

## Business as Mutual: Floating Charges No Obstacle to Mutual Set-Off Agreements

### IN SHORT

**The Situation:** Section 553C of the Corporations Act 2001 (WA) ("Act") provides that if a creditor and a company in liquidation have mutual dealings, the creditor must offset any sum the creditor owes to the company in liquidation against debt owed by the company.

**The Question:** Does the existence of a third party security interest over circulating assets (floating charge) which are intended to be set off against other debts prevent the dealings from being "mutual"?

**Looking Ahead:** Registered security holders over circulating assets of an insolvent company may, via statutory set off, have a diminished asset pool from which to recover their security's value. Seeking charges over fixed assets could better preserve this value.

In the recent decision of *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in Liquidation) (Receivers and Managers Appointed)* [2018] WASCA 163, the Western Australian Court of Appeal has provided some clarity in relation to the law of set-off. The Court of Appeal held that debts could still be "mutual" for the purposes of statutory set-off even when a debt was subject to a security interest, provided the security allowed for the debtor to use the assets for its own benefit in the course of business.

### Background

In 2012, Hamersley Iron Pty Ltd ("Hamersley") and Forge Group Power Pty Ltd ("Forge") entered into two EPC contracts ("contracts").

In 2013, Forge entered into a General Security Agreement ("GSA") with ANZ Fiduciary Services Pty Ltd ("ANZ"), granting ANZ a registered charge over Forge's contractual rights under the contracts.

In February 2014, Forge went into voluntary administration and then into liquidation. ANZ appointed receivers and Hamersley terminated the contracts. Both Hamersley and Forge had claims against each other. Hamersley's counterclaims in connection with the contracts far exceeded monies owed to Forge. As such, Hamersley sought to pursue available set-off rights under statute, contract and in equity.

### First Instance Decision

At first instance, Tottle J of the Supreme Court of Western Australia determined that; (i), Hamersley was not entitled to set off its claims in contract or equity against Forge as s. 553C of the act applied exclusively once a company entered into liquidation and (ii), the statutory set-off under s 553C of the act did not apply because the attachment of a Personal



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Property Securities Act 2009 (Cth) ("PPSA") security interest to Forge's claims stopped the dealings from being "mutual".

### Issues for Determination on Appeal

The main issue on appeal was whether Hamersley and Forge's claims were "genuinely mutual as a matter of substance" for the purposes of statutory set-off notwithstanding the bank's security interest.

allowed for the debtor to use the assets for its own benefit in the course of business.



The relevant question was whether the benefit or burden of the claims arising from Hamersley and Forge's dealings lay "in the same interest". To determine this question, the Court of Appeal considered the question of the assessing mutuality to be whether the secured party retains the right to use the secured assets for its own benefit.

### The Appeal Decision

The Court of Appeal held the following:

- (i), As at the commencement of the winding up of Forge in insolvency, the relevant dealings between Hamersley and Forge under the contracts were "mutual dealings" able to be set off for the purposes of s. 553C of the act because Forge retained the right to use the amounts paid by Hamersley to Forge under the Contracts for Forge's own benefit. The balance is to be admissible to proof against Forge.
- (ii), Section 553C of the act operates to the exclusion of any contractual or equitable set-off rights which Hamersley had prior to the commencement of the winding up of Forge.

The Western Australian Court of Appeal has confirmed the availability of statutory set-off in circumstances where there is a registered security interest granted over circulating assets provided the party granting the interest retains the right to use the assets of the subject of the security interest for its own benefit. On the other hand, in the case of a security over non-circulating assets (fixed charge) there is no mutuality and statutory set-off is unavailable.

### THREE KEY TAKEAWAYS

1. A debt can still be "mutual" for the purposes of s. 553C of the act notwithstanding the existence of a registered security interest over circulating assets (floating charge).
2. A debt will not be "mutual" for the purposes of s. 553C of the act in the event that there is a registered security interest over non-circulating assets (fixed charge).
3. The operation of s. 553C of the act excludes other rights of set-off under the contract and in equity.



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