



## Payments from head contractor may not be preferences

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In July 2017 the Supreme Court of New South Wales handed down the decision in *in the matter of Evolvebuilt Pty Ltd* [2017] NSWSC 901 (“**EB Case**”). It provides a useful guide as to when payments from a head contractor to subcontractors may or may not be considered preference payments according to the *Corporations Act 2001* (Cth) (“**the Act**”).<sup>1</sup>



### What are preference payments?

For a guide on unfair preference claims for creditors, you should read my colleague Alicia Auden’s article here: <http://www.jhklegal.com.au/unfair-preference-claims-in-liquidation-a-basic-guide-for-creditors/>

Section 588FE of the Act says that certain transactions undertaken by a company that subsequently enters liquidation (“**the Company**”) will be considered “voidable” and are liable to be reversed.

Section 588FA of the Act provides liquidators with the right to pursue an action as a “voidable transaction” against an unsecured creditor which has been paid out a Company in preference to other unsecured creditors.

Essentially, the following factors are required:<sup>2</sup>

1. There was a transaction undertaken during the six (6) months prior to the appointment of administrators or liquidators to the Company;
2. The Company was insolvent at the time;<sup>3</sup>

<sup>1</sup> This article cannot be used to replace legal advice. Each voidable transaction case is different, and you should seek legal advice if you think you may require assistance with a voidable transaction case or circumstance.

<sup>2</sup> There are some legislated defences to unfair preference actions, but we note that those are not relevant to *EB* and therefore not set out here.

3. The Company and the unsecured creditor were parties to the transaction; and
4. The transaction results in the unsecured creditor receiving more than it would have received if the transaction were set aside and the unsecured creditor were to prove for the debt in the winding up of the Company.<sup>4</sup>

### The facts in EB Case

Evolvebuilt Contracting Pty Ltd (“**Evolvebuilt**”) was subcontracted by Built NSW Pty Ltd (“**Built**”) as the headcontractor to perform “certain interior work on a project, called the ANZ Project”.<sup>5</sup> Evolvebuilt, in turn, secondarily subcontracted some of that work to the eight defendants in the EB Case<sup>6</sup> (except Kennico Pty Ltd, the eighth defendant)<sup>7</sup>.

The ANZ Project was affected by flooding which resulted in a revised construction program by Built and ultimately, developed into a dispute between Built and Evolvebuilt.

Evolvebuilt became liable to pay the secondary subcontractors but failed to do so. As a result, the secondary subcontractors ceased work at the ANZ Project.

In March 2013, Evolvebuilt asked Built to pay the secondary subcontractors, and the failure by Evolvebuilt to pay the secondary subcontractors was brought to the attention of the CFMEU. Later in the month, Built terminated its subcontract with Evolvebuilt, and wrote to the CFMEU to confirm that payment would be made to the secondary subcontractors (subject to investigations).

Between March and April 2013, Built made the payments to the secondary subcontractors which were then the subject of the preference actions in the EB Case.

On 19 September 2013, Evolvebuilt entered voluntary administration, and later was placed into liquidation.

### The decision in EB

The insolvency of Evolvebuilt at the time of the transactions, that the transactions occurred within 6 months of the date of administration, and that the transactions resulted in the defendants receiving more than if they proved in the winding up of Evolvebuilt were fairly settled.

The major factor concerning defendants 1 – 5 (the 8<sup>th</sup> defendant not being a secondary subcontractor, and therefore relying on separate facts) was the 3<sup>rd</sup> factor listed above; that is: whether Evolvebuilt was a party to the transaction for the purposes of section 588FA of the Act.

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<sup>3</sup> Factors 1 and 2 are set out in section 588FE. Note that factor 2 is more particularly described in section 588FC of the Act.

<sup>4</sup> Factors 3 and 4 are set out in section 588FA.

<sup>5</sup> At [2].

<sup>6</sup> Note that the case did not proceed against the 6<sup>th</sup> and 7<sup>th</sup> defendants, who settled prior to hearing.

<sup>7</sup> This summary will cover the matters raised by the payment to the 1<sup>st</sup> – 7<sup>th</sup> defendants, rather than the matters raised by payment to the 8<sup>th</sup> defendant, which relies on a different defence.

The liquidators submitted that though Built made the impugned payments, those payments were made on behalf of Evolvebuilt. In making this submission, the liquidators referred to cases regularly relied upon in such matters.<sup>8</sup>

In the EB Case, His Honour distinguished the facts from cases such as *Re Emanuel* on the basis that:

1. Evolvebuilt could only request that Built make the payment: there was no contractual or other right to demand the impugned payments be made;
2. There was no evidence that Built owed any monies to Evolvebuilt out of which the payments could have been directed; and
3. There was no property or right to the benefit of which Evolvebuilt was entitled (out of which the impugned payments were made).

That is, even though Built's payments to the secondary subcontractors had the effect of discharging Evolvebuilt's indebtedness to those secondary subcontractors, it does not follow that Evolvebuilt was a party to the transaction for the purposes of section 588FA of the Act.

### Summary

Ultimately, the liquidators failed to establish that the payments to the defendants 1 – 5 were unfair preferences under the Act.

The EB Case provides authority for the position that a payment that is made by a head contractor (or, it follows, other third party), at its discretion and free of any obligation to do so, will not be an unfair preference pursuant to the Act.

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<sup>8</sup> At [22]. Such as: *Re Emanuel (No 14) Pty Ltd* and *Commissioner of Taxation v Kassem and Secatore*.