IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2016 04516
S CI 2017 05129

IN THE MATTER of Legend International Holdings Inc (In Liq)

MARK ANTHONY KORDA AND CRAIG PETER SHEPARD AS JOINT AND SEVERAL LIQUIDATORS OF LEGEND INTERNATIONAL HOLDINGS INC (IN LIQUIDATION) (ARBN 120 855 352)	First Plaintiff
LEGEND INTERNATIONAL HOLDINGS INC (IN LIQUIDATION) (ARBN 120 855 352)	Second Plaintiff
v	
QUEENSLAND PHOSPHATE PTY LTD (ACN 609 384 894)	First Defendant
PARADISE PHOSPHATE LIMITED (ACN 154 180 882)	Second Defendant

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JUDGE:	Randall AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	5 March 2018, 6 March 2018, 7 March 2018 and 9 March 2018
DATE OF JUDGMENT:	14 December 2018
CASE MAY BE CITED AS:	*Re Legend International Holdings Inc (in liq)*
MEDIUM NEUTRAL CITATION:	[2018] VSC 789

CORPORATIONS – *Corporations Act* (Cth) 2001 – Second plaintiff's (Legend) entry into a Bond Deed and General Security Deed after the commencement by substantial creditors of a proceeding in the Supreme Court of Victoria for orders to enforce a Singapore arbitral award which the High Court of Singapore granted leave to enforce in the same manner as the judgment of that Court – Whether an uncommercial transaction – Section 588FB – Whether an insolvent transaction – Section 588FC – Whether a voidable transaction – Section 588FE(2)&(3) – Whether void as at the time when the Bond Deed and General Security Deed were made – Section 588FF(1)(h).

CORPORATIONS – Whether the appointment of receiver of Legend's shareholding is valid – Whether the appointment of a receiver or manager of Legend's subsidiary is valid.

CORPORATIONS – Whether Share Sale Agreement entered into by receiver consequent upon default under the Bond Deed and General Security Deed was an 'act done for the purposes of giving

effect to the transaction'? – Alternatively whether the Share Sale Agreement is void or unenforceable in any event.

CORPORATIONS – Was the good faith defence available? – Section 588FG(2).

INSOLVENCY – Was Legend insolvent at the time of entry into the Bond Deed and the General Security Deed or did it become insolvent by reason of such entry? – Section 95A – Section 585 with respect to a Part 5.7 body.

CORPORATIONS – Should a foreign debt be considered a 'debt' for the purposes of assessing insolvency prior to an order being made under s 8(2) of the *International Arbitration Act 1974 (Cth)* enforcing the Singaporean arbitral award in Australia.

CORPORATIONS – *Corporations Act (Cth) 2001* – Winding up in insolvency or on just and equitable grounds – Section 459A – s 461(k).

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Dr C G Button with Ms R T Zambelli	Arnold Bloch Leibler
For the Defendants	Mr L Glick QC with Mr D K Ratnam	Harwood Andrews, Sladen Legal and Adley Burstyner

TABLE OF CONTENTS

HIS HONOUR:

1 By originating process filed on 7 November 2016 (amended on 20 November 2017) and 15 December 2017, the first plaintiffs ('the Liquidators') and the second plaintiff ('Legend') seek orders that:

(a) the second defendant ('Paradise') be wound up in insolvency pursuant to s 459A of the *Corporations Act 2001* (Cth) ('*the Act*') or, alternatively, that Paradise be wound up on the just and equitable ground pursuant to s 461(1)(k) of *the Act*;

(b) pursuant to s 472(2) of *the Act* that the Liquidators be appointed as provisional liquidators of Paradise pending the outcome of the application for relief sought in paras 1 or 2 of the 20 November 2017 amended originating process. The plaintiffs did not prosecute this relief.

(c) the Convertible Bond and Share Subscription Agreement ('Bond Deed') and the General Security Deed ('General Security Deed') entered into by Legend, the first defendant ('QPPL') and Paradise on 25 November 2015 are:

(i) uncommercial transactions within the meaning of s 588FB of *the Act*;

(ii) insolvent transactions within the meaning of s 588FC of *the Act*;

(iii) voidable transactions within the meaning of ss 588FE(2) and 588FE(3) of *the Act*; and

(iv) void as at the time when the Bond Deed and General Security Deed were made pursuant to s 588FF(1)(h) of *the Act*.

(d) alternatively, pursuant to s 588FF(1)(e) of *the Act* that any security interest given by Legend under or in connection with the General Security Deed is wholly discharged. The plaintiffs did not prosecute this relief.

(e) QPPL is entitled to prove in the winding up of Legend as an ordinary unsecured creditor for an amount equal to monies paid to Legend under or in connection with the terms of the Bond Deed, and for monies expended during the appointment of Mr

Christopher Palmer as the receiver and manager of Paradise in preservation of the assets of Paradise plus interest;

(f) the Share Sale Agreement dated 22April 2016 ('Share Sale Agreement') between Legend, QPPL and Paradise is void or unenforceable; and

(g) the appointment of Mr Palmer as the receiver of Legend's shares in Paradise and the receiver and manager of Paradise is invalid.

Determination

2 For the reasons set out herein I determine that the following relief ought to be granted to the plaintiffs in the following terms:

(a) Each of the Bond Deed and the General Security Deed are:

(v) uncommercial transactions;

(vi) insolvent transactions; and

(vii) void from the date of entry into the same, being 25 November 2015.

(b) The appointment of Mr Palmer as the receiver of Legend's shares in Paradise and as receiver and manager of Paradise is invalid.

(c) The Share Sale Agreement is void and unenforceable.

(d) That Paradise ought to be wound up in insolvency.

Parties

Legend

3 Legend was incorporated in the State of Delaware, United States of America ('US'). Legend was also registered with the Australian Securities and Investments Commission ('ASIC') as a pt 5.7 body. On 2 June 2016, I ordered that Legend be wound up in insolvency and appointed the Liquidators as liquidators of Legend.

4 The directors from about August 2008 to 25 November 2015 were, in addition to others,

Joseph Gutnick ('Mr Gutnick'), David Tyrwhitt ('Mr Tyrwhitt'), Allan Trench ('Mr Trench') and Henry Herzog ('Mr Herzog'). The latter three directors were non-executive directors. Mr Gutnick ceased his directorship on 8 July 2016. During this time Legend's company secretary and chief financial officer was Peter Lee ('Mr Lee').

Paradise

5 Paradise is an unlisted public company incorporated in Australia. From at least January 2014 to 25 November 2015, Paradise's directors were Mr Gutnick, Mr Lee and Mr Tyrwhitt. From 25 November 2015, Paradise's directors were Mr Gutnick, Mordechai Gutnick, Sholom Feldman ('Mr Feldman') and Pnina Feldman ('Ms Feldman'). Mr Gutnick ceased his directorship on 8 July 2016. Mordechai Gutnick, Mr Gutnick's son, ceased his directorship on 23 March 2016. Mr Feldman and Ms Feldman replaced Mr Lee and Mr Tyrwhitt. Ms Feldman is Mr Gutnick's sister, Mr Feldman is Ms Feldman's son and Mr Gutnick's nephew.

QPPL

6 QPPL was incorporated on 19 November 2015. QPPL's directors are Mr Feldman and Ms Feldman. QPPL has 10,825 ordinary shares on issue and paid up capital of $796,499.99. 10,000 of those ordinary shares are owned by Menachem Mendel Pty Ltd as trustee for the Mendel Trust, whose beneficiaries include Rabbi Pinchus Feldman, Ms Feldman and any of their issue.

7 In making a pitch to the Minerals and Metals Group ('MMG') in relation to its Century Mine (which was part of the 'Karumba' option), Mr Feldman confirmed that QPPL was held by a trustee company for the Feldman family and associated charities.

Background

8 On 14 July 2008:

(a) Indian Farmers Fertiliser Cooperative Ltd ('IFFCO') entered into a Share Options Agreement with Legend whereby IFFCO acquired the option to purchase shares in Legend;

(b) IFFCO and Mr Gutnick entered into a Shareholders Agreement in order to regulate

their relationship as shareholders in Legend; and

(c) by an Affiliate Deed of Adherence, Kisan International Trading FZE ('Kisan'), a subsidiary of IFFCO, agreed to be bound by the terms of the Shareholders Agreement.

9 Pursuant to the terms of those agreements, IFFCO and Kisan purchased 20 million shares in Legend for a total of US$40.4 million. IFFCO later purchased a further 14,364 million shares in Legend in an open market transaction.

10 Those parties later fell into dispute and on 18 January, and 25 March 2013, the dispute was arbitrated in Singapore.

11 On 7 May 2015, the arbitral tribunal delivered its award in Singapore, finding against Legend and Mr Gutnick. Legend was ordered to pay US$12.35 million (plus costs and interests of 5.33 per cent per annum from 7 August 2008 until the date of the award) to IFFCO and Kisan. The interest accrued to 7 May 2015 amounted to US$5,391,693.00. As at 7 May 2015, the total debt owed by Legend was US$17,741,693.00 (A$22,435,612.72) together with legal costs. The arbitral award also required Mr Gutnick to separately pay US$28.05 million plus interest and legal costs.

12 On 22 June 2015, the High Court of Singapore granted IFFCO and Kisan leave to enforce the award in the same manner as a judgment of that Court. Judgment was entered and the award was enforced in Singapore as against Mr Gutnick on 9 July 2015 and as against Legend, on 2 September 2015.

13 On 8 October 2015, IFFCO and Kisan applied to this Court for orders to enforce the Singapore award. The application was heard on 19 November 2015. On the same day, QPPL was incorporated in Australia.

14 Until 2012, Legend's main business was the development of mining, beneficiation and processing of phosphate assets near Mt Isa in Northwest Queensland. Those phosphate assets comprised of mining tenements. In February 2012, those phosphate assets were transferred to Paradise, Legend's wholly owned subsidiary at the time, in return for Paradise issuing 100 million of its shares to Legend. The transfer formed part of a restructure of Legend's assets

for the purpose of conducting an Initial Public Offering ('IPO') of Paradise on the Australian Stock Exchange (which subsequently failed).

15 On 25 November 2015, Legend and Paradise entered into the Bond Deed and the General Security Deed with QPPL.

16 The Bond Deed provided for QPPL to subscribe for up to 2,500 convertible bonds with a face value of $1,000 dollars immediately or over time.

17 On 26 November 2015, Legend filed forms with the US Securities and Exchange Commission ('SEC'), notifying the entering into of the transactions with QPPL.

18 On 21 December 2015, Croft J delivered judgment enforcing the arbitral award against Legend. On 22 December 2015, Croft J granted an interim stay of execution until 5 February 2016.

19 On 5 February 2016, there was a hearing before the Court of Appeal with respect to Croft J's decision. On 9 February 2016, the Court of Appeal delivered judgment dismissing the appeal and granted an interim stay of execution until 12 February 2016.

20 On 18 February 2016, after the expiration of the stay, IFFCO and Kisan served a statutory demand on Legend.

21 On 8 March 2016, Legend applied to the High Court of Australia for special leave to appeal, which was subsequently withdrawn.

22 On 10 March 2016, the time for compliance with the statutory demand expired.

23 On 11 March 2016, QPPL appointed a receiver of Legend's shares in Paradise and receiver and manager of Paradise.

24 On 11 April 2016, IFFCO and Kisan filed the winding up application of Legend. The first return date was listed for 11 May 2016.

25 On 22 April 2016, the receiver to Legend and Paradise, transferred the Paradise shares to QPPL. By that date, $400,000 may have been advanced to Legend/Paradise on behalf of

QPPL.

26 On 8 May 2016, Legend filed US *Bankruptcy Code* ch 11 proceedings.

27 On 10 May 2016, being the date before the return date of the wind up application, Mr Lee, as authorised representative of Legend, filed an originating process seeking recognition of the US proceeding. That originating process was subsequently amended to insert Legend as the applicant as it was still in possession of the Legend assets pursuant to the provisions of ch 11.

28 On 17 May 2016, there was a status conference before the Honourable Brandan L Shannon, US Bankruptcy Judge. That conference was adjourned to ascertain the outcome of the winding up application.

29 The application to wind up Legend was heard on 27 and 30 May 2016. On 2 June 2016, Legend was wound up in insolvency.

30 The plaintiffs' opening submissions conveniently sets out the background leading up to the implementation of the Bond Deed and General Security Deed. The general substance of the chronology was not in dispute. Accordingly, I will adopt the same:

> 15. On 26 October 2015, Legend, through Mr Lee, obtained legal advice in relation to a proposed convertible note issue under which Legend would grant security over its shareholding in Paradise to a convertible note holder. The advice noted, among other things:
>
> To the extent that Australian law may intersect, the granting of the security could be subject to challenge if Legend or Paradise is insolvent, or could become insolvent in the next 6 months – in which case the granting of the security may be challenged and undone as an uncommercial transaction.
>
> 16. Between 30 October 2015 and 24 November 2015, Mr Gutnick and Mr Feldman exchanged a number of emails, most of which attached versions of draft agreements and term sheets that related to the proposed convertible note issue.
>
> 17. On 30 October 2015, Mr Gutnick circulated a draft agreement entitled 'Convertible Note Agreement' to Mr Feldman. This draft agreement provided for an unspecified noteholder's subscription of 1 million notes in Legend at $1 per note. The proposed security under that agreement was a staged provision of security over Legend's shares in Paradise, namely:
>
> (a) security over 25% of the shares on payment of $250,000 on 2 November 2015;
>
> (b) security over 35% of the shares on payment of $350,000 on 2 December 2015; and

(c) security over 40% of the shares on payment of $400,000 on 31 December 2015.

18. On 4 November 2015, Mr Feldman emailed a draft term sheet to Mr Gutnick. The draft term sheet provided for a subscription of an unspecified number of convertible bonds for an amount of $2.5 million secured by first ranking security over Legend. It was initially contemplated that the transaction with Legend and Paradise would be entered into by Queensland Bauxite Limited, a public company of which Mr Feldman and Ms Feldman are directors. The draft terms sheet provided that the purpose of the funding was for Legend to defend the 'current court action' (ie IFFCO and Kisan's enforcement action).

19. The draft term sheet also provided for the following event to constitute an event of default:

(1) Any finding by a court of law against the Company that causes a judgment of more than $1M to be entered against the company.[1]

20. On 6 November 2015, Mr Gutnick emailed Mr Feldman stating:

> We need to move on Legend ASAP because we need the funds and don't want to go elsewhere. Try your best.[2]

21. In the period 4 November 2015 to 20 November 2015, several versions of the draft term sheet were exchanged in emails between Mr Feldman and Mr Gutnick.

22. On 5 November 2015, Mr Gutnick provided Mr Feldman's version of the terms sheet to Mr Lee. Mr Lee marked it up. Mr Lee's amendments included the insertion of a carve out from the event of default by including the words 'other than any actions by IFFCO and/or Kisan' in brackets after the first event of default set out in paragraph 0 above.[3] Clearly, Mr Lee's amendment was designed to exclude the anticipated enforcement of the Singaporean arbitral award from triggering an event of default, as it was well known to all concerned that:

(a) judgment had in fact already been entered against Legend in the Singaporean High Court; and

(b) IFFCO and Kisan had already commenced their action in the Supreme Court of Victoria.

23. On 5 November 2016, Mr Gutnick forwarded Mr Lee's markup of the term sheet to Mr Feldman.

24. The following day, on 6 November 2016 at 4:54 pm, Mr Feldman emailed Mr Gutnick attaching a further revised term sheet. In this version, Mr Feldman rejected the change (made by Mr Lee and forwarded by Mr Gutnick) carving out the IFFCO/Kisan action (which was then on foot) from the event of default. The effect of Mr Feldman's amendment was to ensure that there would be an event of default if IFFCO and Kisan were successful in their application to register the arbitral award in Australia. This amendment remained in the binding term sheet, which was eventually executed on or about 19 November 2015.

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1 Email from Sholom Feldman to Joseph Gutnick, Court Book 2, 0650.
2 Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 0669.
3 Email from Sholom Feldman to Joseph Gutnick, Court Book 2, 0665.

25. … on 10 November 2015, an initial tranche of $100,000 was provided by Mr Feldman (from Queensland Bauxite Ltd) to Legend, despite the fact that the term sheet had not yet been executed.

26. On 12 November 2015, Craig Michael ('Mr Michael') (Legend's Executive General Manager) sent Mr Feldman two financial models for Paradise's phosphate assets. The first model was expressed to be 'a simplistic financial model (no inflation, based on current rock price and forex with no forecast assumptions) for the MMG option of shipping rock through their infrastructure to the Port of Karumba'.[4] This model produced a pre-tax net present value ('NPV') of Paradise's phosphate assets of $566 million. The second model was expressed by [Mr] Michael to be a 'much more complex and detailed financial model for the Townsville option. This model was built by KPMG and I have updated it to reflect current prices and forex rates'.[5] This model produced a post-tax net present value of Paradise's phosphate assets of $174.3 million.

27. The two options referred to, 'Karumba' and 'Townsville' were transport options then under consideration, the details of which are set out in a presentation which Mr Gutnick provided to Mr Feldman on 2 November 2015.

28. On 16 November 2016, Mr Feldman emailed a draft security deed to Mr Gutnick under the cover of an email which relevantly stated:

> I need to check on how we secure a US company, so I included Paradise in the deed. Paradise is probably the most important one to protect in this transaction to ensure no one can get first preference so we can protect the asset.[6]

29. On 19 November 2015, IFFCO and Kisan's application to enforce the arbitral award against Legend in Australia was heard by the Honourable Justice Croft in the Supreme Court of Victoria. Justice Croft reserved his decision.

…

31. On 19 November 2015, Mr Gutnick emailed Mr Feldman a copy of Legend's and Paradise's balance sheets as at 30 September 2015. Both balance sheets strongly suggested that both companies were insolvent at the time. In particular:

    (a) Legend's balance sheet indicated that it had current liabilities of AUD$27,161,061.00 and current assets of AUD$663,028.00 as at 30 September 2015; and

    (b) Paradise's balance sheet indicated that it had current liabilities of AUD$2,458,358.00 and current assets of AUD$2,537.00 as at 30 September 2015.

32. As at November 2015, the phosphate tenements were not in, and were not close to being in, production.

33. On the same day (19 November 2015), the binding term sheet was executed by Mr Feldman and Ms Feldman on behalf of QPPL and Mr Gutnick and Mr Lee on behalf of Legend.

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4 Email from Craig Michael to Sholom Feldman, Court Book 3, 0787.

5 Ibid.

6 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 0892.

34. On 19 November 2015, Legend also received legal advice from US lawyers by email, which relevantly stated (emphasis added):

> At a conversion rate of A$0.005, it appears that the Bonds are convertible into 500,000,000 shares (excluding shares issuable upon conversion of interest payments). This would represent more than 53% of the issued and outstanding shares of Legend following conversion, which would substantially dilute existing stockholders. With this level of dilution (and considering the 50% penalty interest rate), the Board needs to be satisfied, after making a reasonable inquiry, that there isn't an alternative source of financing that would be available to the Company on more favourable terms. Also, I understand that Pnina Feldman is Joseph's sister so the existence of this family relationship will impose a heightened level of scrutiny on the reasonableness of the Board's actions.

35. On 20 November 2015, Mr Feldman received an email from David Sipina of Courtenay House Capital Trading Group, enquiring about the impact of IFFCO and Kisan's application to enforce the arbitral award against Legend and Mr Gutnick. Mr Feldman replied:

> > This is his [Mr Gutnick's] main fight he is fighting at the moment. He is confident he will win it, but if he doesn't then we are doing what we can through this structure to protect the asset and its value. This is precisely the point of his doing this deal, to ensure that all value is not lost to the company if he loses the battle … We as third parties will develop and control the asset for the foreseeable future, ensuring maximum value possible will be retained by the company if they lose this case …

36. On or about 20 November 2015, Mr Gutnick and his son, Mordechai Gutnick, Zalg Exploration Pty Ltd as trustee for the Zalg Exploration Trust ('Zalg'), QPPL, Mr Feldman and Ms Feldman entered into a Shareholders Deed under which the parties agreed that:

> The Feldmans and QPPL give Zalg or its nominee, as facilitator of the Convertible Bond Deed, the option to buy up to half of the Convertible Notes (or Shares if the Convertible Note has been converted into Shares) held by QPPL under the Convertible Bond Deed from QPPL anytime in the period of 18 months from the date of this Deed, at a price of $1000 per Convertible Note (or the equivalent of $0.005 per Share if the Convertible Note has been converted into Shares).

37. The effect of this option was to give Zalg or its nominee… a right to purchase up to approximately 26 per cent of Legend's shares for $1.25 million in circumstances where Mr Gutnick and his son, Mordechai Gutnick, were directors of Zalg and the shares in Zalg are beneficially owned as to one third each by Mr Gutnick, his wife, Stera Gutnick and their son Modechai Gutnick. Legend did not disclose the existence of this agreement to the US market in its Current Report Form 8-K lodged with the SEC on 26 November 2016.

38. On 22 November 2015, Mr Feldman emailed Mr Gutnick stating :

> > I made quite a number of additions to the documents, particularly surrounding Paradise as the guarantor to the deal, in case anything happens to Legend, we want to make sure that Paradise is secure and we will have the right to step in and protect the assets from any other creditor or receiver, so I put in quite a bit of wording that I feel would be necessary in such a scenario. Let's all hope that scenario does not happen, but these documents should at least protect us as much as

possible from that scenario.

39. The next day, on 23 November 2015… [an] email exchange ensued between Mr Feldman and Mr Gutnick:

(a) at 3:14 pm, Mr Feldman stated :

> The main issue is obviously on the warranty of solvency. If the company cannot say that it is solvent then how is it able to legally do this deal. The whole basis of doing any business is that the Company thinks that it's [sic] asset is worth more than its liabilities, and has the current support of its creditors to wait until the company has funds to be paid, or else the company is not legally able to trade. We then can't take security over the asset if there is a reasonable suspicion that the company is insolvent. It is my view that the assets are worth more than the liabilities, and worth more than the funds being advanced as well, which is why we are looking to save the asset, but my understanding is that we need the directors to be able to say that is the case in their view in order to be able to legally take security.

(b) at 3:20 pm, Mr Gutnick replied: "The problem is only the IFFCO debt";

(c) at 3:24 pm, Mr Gutnick followed up his previous email: "We can do it if you insist" [ie give the warranty as to solvency];

(d) at 3:28 pm, Mr Feldman responded to Mr Gutnick's email of 3:20 pm stating:

> a) you are still arguing that it [the IFFCO/Kisan debt] is not payable
>
> b) even if it gets enforced as payable, you still have reasonable grounds to believe that the asset is worth more than the $12M and can at that point be put up to tender to pay the debt. Until that is publicly tested, it is only a matter of reasonable belief.
>
> c) You clearly are not of the belief that the company is currently insolvent, or else you wouldn't be able to do this transaction. In order for the security to be valid, the company needs to say that to be the case. If that warranty is deleted from the deed, it effectively invalidates the deed in my understanding?

(e) at 3.37 pm, Mr Feldman responded to Mr Gutnick's email of 3:24 pm about the warranty as to solvency stating :

> ok. I think it is important to ensure the validity of the security as much as possible.

40. That email was triggered by Mr Lee having deleted the warranty of solvency in a draft of the Bond Deed, sent to Mr Feldman, and copied to Mr Gutnick.

41. On 24 November 2015, Mr Feldman emailed Mr Sipina attaching a presentation. The first page of the presentation stated, among other things (emphasis added):

> Legend is currently under serious litigation by IFFCO

> Legend has a world class phosphate project 100% owned and unencumbered
>
> …
>
> Queensland Phosphate to lend $2.5M to Legend and will take first ranking security on the asset …
>
> With valuations of between approximately $200M and $4Bn on the project, depending on the options and level of development or a combination of them, Queensland Phosphate current value would be $50M-$1Bn …

42. QPPL was newly incorporated and there is no suggestion it held or was intended to hold any asset other than its interest in Paradise. It appears that Mr Feldman considered that the Paradise phosphate project was worth somewhere between $200 million–$4 billion, making the acquisition of such a substantial part of Legend for a maximum of advance of $2.5 million of great benefit to QPPL.

43. On 25 November 2015, as envisaged by the binding term sheet executed on 19 November 2015, Legend entered into the Bond Deed and the General Security Deed with QPPL and Paradise. Under the Bond Deed:

    (a) Legend was to issue to QPPL up to 2,500 convertible bonds with a face value of $1,000;

    (b) there was a timetable for the issue of Bonds to QPPL ($200,000 for 200 Bonds on Completion, $200,000 for 200 Bonds on 15 December 2015, $100,000 for 100 Bonds on 28 February 2016 with further obligations to take Bonds up to a total of $1 million, following which it was optional for QPPL to take any further Bonds);[7]

    (c) QPPL was not required to take any tranche of the $1 million worth of Bonds if there was an Event of Default;[8]

    (d) Legend was entitled to use the proceeds of the bond issue for its 'general working capital purposes';[9]

    (e) Legend gave the warranties set out in part 1 of schedule 1, which included a warranty that Legend was solvent and would not become insolvent by entering into and performing its obligations under the Bond Deed and the General Security Deed;[10]

    (f) the Bonds were transferable without Legend's consent being required;[11]

    (g) interest was to be paid on the Bonds at 10 per cent or a default rate of 50 per cent per annum;[12]

    (h) the Bonds were convertible at the option of the Bondholder at any

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7 Convertible Bond and Subscription Deed and General Security Deed between QPPL, Legend and Paradise, 25 November 2015, cl 3.3, Court Book 3, 1194-5.

8 Ibid cl 3.3(b).

9 Ibid cl.

10 Ibid cl 7.1(a); 2(a) in pt 1 of sch 1, Court Book 3, 1225.

11 Ibid cl 8.2, Court Book 3, 1197.

12 Ibid cl 9.2.

time;[13]

(i) there was an immediate redemption obligation on default (at the election of the Bondholder);[14]

(j) an 'Event of Default Fee'[15] … comprising a 50 per cent penalty on any amounts advanced was payable if an event of default occurred;[16]

(k) the specified Events of Default … included:[17]

(i) any change to the composition of the board of Legend or Paradise without the consent of the Bondholder (at sub-cl (k)); and

(ii) 'a final judgment or judgments of an Australian or USA court or courts of competent jurisdiction for the payment of money aggregating in excess of $1,000,000 … are rendered against the Corporation or any Subsidiary and not stayed pending appeal within 21 days after entry thereof' (at subclause(d)).

(l) the guarantor (Paradise) was additionally to pay interest at the Default Rate (50 per cent) on amounts due and payable under the Bond Deed, which interest accrued daily and was capitalised monthly;[18]

(m) Legend gave various negative covenants, including that it would not (and would not permit its subsidiaries to) further encumber their Material Assets without the consent of the 'Consenting Party' (effectively QPPL);[19] and

(n) Legend also undertook not to procure any other financing without the consent of the 'Consenting Party' (effectively QPPL).[20]

44. By clause 2.1… of the General Security Deed, Legend and Paradise granted security over all of their assets to secure their obligations under the Bond Deed, including the payment obligations on an event of default.

45. Prior to execution, Mr Lee emailed 'a resolution in writing for signature' to Legend's non-executive directors, Mr Tyrwhitt, Mr Trench and Mr Herzog. The resolution authorised Legend to:

> Enter into the transaction as described in this resolution in Writing and authorize Joseph Gutnick and Peter Lee to sign the Bond Deed and Security Deed on behalf of [Legend] and [Paradise].

46. However, the summary of the Bond Deed provided in the Resolution failed to identify a number of critical provisions in the Bond Deed, including:

(a) the event of default in clause 15.1…,[21] which was effective on a final judgment for the payment of an amount over AUD$1 million being

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13 Ibid cl 10.1.
14 Ibid cl 12.2.
15 Ibid cl 1.1.
16 Ibid cls 12.2(d), 15.
17 Ibid cl 15.1.
18 Ibid cl 28.1.
19 Ibid cl 16.2.
20 Ibid cl 16.3(g).
21 Ibid Court Book 3, 1206.

entered in a court of Australia or the US;

(b) the warranty as to solvency in clause 2(a) in part 1 of schedule 1;[22]

(c) the undertakings in clause 16.3…,[23] including the undertaking not to procure any other financing whilst a bond remains outstanding without QPPL's written consent;

(d) QPPL bondholders' right of redemption on an event of default under cl 12.2(a);[24] and

(e) the Event of Default Fee, comprising 50 per cent of any amounts advanced under the Bond Deed, immediately payable to the Bondholder where it exercises a redemption right under clause 12.1(a)…[25]

47. There is no evidence that the approval of Legend's other directors was sought before Mr Gutnick committed Legend to the binding terms sheet on 19 November 2015.

Issues for determination

31 The issues for determination are as follows:

(viii) Was Legend insolvent as at 25 November 2015?

(ix) Ought the Bond Deed and the General Security Deed be declared void as voidable and insolvent transactions?

(x) In making the determination referred to in sub-para ii, is the 'good faith' defence available?

(xi) Was the Share Sale Agreement void or unenforceable? Was Mr Palmer's appointment invalid?

(xii) Ought Paradise be wound up?

32 The defendants strenuously argued that Legend was not insolvent. Accordingly, it is appropriate to deal with that issue first and in isolation.

I. Was Legend insolvent?

33 In determining this issue five questions are germane:

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22 Ibid 1225.
23 Ibid 1207.
24 Ibid 1203.
25 Ibid cls 12.2(d), 1.1.

(a) Was Legend able to pay its debts as and when they were due?

(b) Should I accept the Balance Sheet as evidence of Legend's financial position?

(c) Did Legend have a realisable asset?

(d) Can the IFFCO debt be considered prior to its Australian registration?

(e) Should a *Jones v Dunkel* inference be drawn regarding the defendants failure to call Mr Lee?

34 Section 95A of *the Act* provides as follows:

> **95A Solvency and insolvency**
>
> (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
>
> (2) A person who is not solvent is insolvent.
>
> …

35 Section 585 of *the Act* contains additional insolvency deeming provisions applicable to pt 5.7 bodies. Section 585 relevantly provides:

> **585 Insolvency of Part 5.7 body**
>
> For the purposes of this Part, a Part 5.7 body is taken to be unable to pay its debts if:
>
> (a) a creditor, by assignment or otherwise, to whom the Part 5.7 body is indebted in a sum exceeding the statutory minimum then due has served on the Part 5.7 body, by leaving at its principal place of business in this jurisdiction or by delivering to the secretary or a director or senior manager of the Part 5.7 body or by otherwise serving in such manner as the Court approves or directs, a demand, signed by or on behalf of the creditor, requiring the body to pay the sum so due and the body has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the satisfaction of the creditor; or
>
> (b) an action or other proceeding has been instituted against any member for any debt or demand due or claimed to be due from the Part 5.7 body or from the member as such and, notice in writing of the institution of the action or proceeding having been served on the body by leaving it at its principal place of business in this jurisdiction or by delivering it to the secretary or a director or senior manager of the Part 5.7 body or by otherwise serving it in such manner as the Court approves or directs, the Part 5.7 body has not, within 10 days after service of the notice, paid, secured or compounded for the debt or demand or procured the action or proceeding to be stayed or indemnified the defendant to his, her or its reasonable satisfaction

against the action or proceeding and against all costs, damages and expenses to be incurred by him, her or it by reason of the action or proceeding; or

(c) execution or other process issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor against the Part 5.7 body or a member of the Part 5.7 body as such, or a person authorised to be sued as nominal defendant on behalf of the Part 5.7 body, is returned unsatisfied; or

(d) it is otherwise proved to the satisfaction of the Court that the Part 5.7 body is unable to pay its debts

…

36 Clearly, s 585(a) and (c) are not applicable. I doubt that the enforcement proceeding in the Singapore High Court is the type of proceeding contemplated by s 585(b). Accordingly, I utilise s 588(d) for the purposes of considering if Legend as a pt 5.7 body, insolvent.

Plaintiff's Submissions

37 The plaintiffs asserted that as identified in *Brooks v Heritage Hotel Adelaide Pty Ltd*[26] and *Crema (Vic) Pty Ltd v Land Mark Property Developments (Vic) Pty Ltd*,[27] s 95A adopts a cash flow approach. In the latter case, for example, which was an appeal from a decision of an Associate Justice to wind up the appellant upon a s 459P application, Dodds-Streeton J (as her Honour was then) determined:

> Section 95A of the Act enshrines the cash flow test of insolvency which, in contrast to a balance sheet test, focuses on liquidity and the viability of the business. While an excess of assets over liabilities will satisfy a balance sheet test, if the assets are not readily realisable so as to permit the payment of all debts as they fall due, the company will not be solvent. Conversely, it may be able to pay its debts as they fall due, despite a deficiency of assets.
>
> Section 95A evolved from the test of insolvency classically enunciated by Barwick CJ in *Sandell v Porter*, where his Honour stated:
>
> > Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time — relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirely and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.[28]

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26 (1996) 20 ACSR 61, 64 ('*Brooks v Heritage*').

27 (2006) 58 ACSR 631, 652 ('*Crema*').

38 In *Brooks v Heritage*, after stating that the definition of insolvency adopts a 'cash flow test', Olsson J reasoned:

> In reviewing the evidentiary material it is important to keep in mind what was said by McGarvie J in *Taylor v Australian and New Zealand Banking Group Ltd* … The issue of insolvency is a question of fact, which falls to be decided as a matter of commercial reality in the light of all the circumstances or, as Gummow J expressed it in *New World*, a situation must be viewed as it would be by someone operating in a practical business environment. Moreover, it is not to be forgotten that the statutory focus is on solvency and not liquidity ... So it is that it is appropriate to consider the terms of credit or financial support available to the respondent with which to defray debts owed to creditors ... The question is not to be answered merely by looking at the financial statements, although these are, of course, not irrelevant.[29]

39 In applying s 95A, regard is to be had to the commercial realities and the ability of the company to meet its liabilities:

> [I]nsolvency is a question of fact
>
> > to be ascertained from a consideration of the company's financial position taken as a whole. In considering the company's financial position as a whole, the Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable.[30]

40 A distinction was said to be drawn between circumstances involving a 'temporary lack of liquidity'[31] and those involving an 'endemic shortage of working capital',[32] the latter in which insolvency is found. In *Hall v Poolman*, Palmer J said:

> The law recognises that there is sometimes no clear dividing line between solvency and insolvency from the perspective of the directors of a trading company which is in difficulties. There is a difference between temporary illiquidity and 'an endemic shortage of working capital whereby liquidity can only restored [sic] by a successful outcome of business ventures in which the existing working capital has been deployed': *Hymix Concrete Pty Ltd v Garritty* ... The first is an embarrassment, the second is a disaster. It is easy enough to tell the difference in hindsight, when the company has either weathered the storm or foundered with all hands; sometimes it is not so easy when the company is still contending with the waves. Lack of liquidity is not conclusive of insolvency, neither is availability of assets conclusive of solvency: *Expo International Pty Ltd (in liq) v Chant* ...

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28 Ibid (citations omitted).

29 *Brooks v Heritage* (1996) 20 ACSR 61, 64 (citations omitted).

30 *Lewis (as liquidator of Doran Constructions Pty Ltd) v Doran* (2005) 219 ALR 555, 576 *('Lewis v Doran')*, quoting *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213, 224 ('*Southern Cross*'); see also *Wimpole Properties Pty Ltd v Beloti Pty Ltd (No 3)* [2012] VSC 219, [40].

31 *Sandell v Porter* (1966) 115 CLR 666, 670.

32 *Hall v Poolman* (2007) 215 FLR 243, 305, quoting *Hymix Concrete Pty Ltd v Garritty* (1977) 2 ACLR 559, 566. An appeal was upheld on a separate issue in *Hall v Poolman* (2009) 75 NSWLR 99; see also *McLellan v Carroll* (2009) 76 ACSR 67.

> Where a company has assets which, if realised, will pay outstanding debts and will enable debts incurred during the period of realisation to be paid as they fall due, the critical question for solvency is: how soon will the proceeds of realisation be available … Bearing in mind the commercial reality that creditors will usually prefer to wait a reasonable time to have their debts paid in full rather than insist on putting the company into insolvency if it fails to pay strictly on time, I think it can be said, as a very broad general rule, that a director would be justified in 'expecting solvency' if an asset could be realised to pay accrued and future creditors in full within about 90 days.[33]

41 In *Hall v Poolman*, while certain property and stock could potentially have been sold to assist cash flow, 'realisations from those sources would not be sufficient to enable Wines and Vineyards to pay all existing creditors and to pay future trading debts as and when they fell due for payment'.[34]

42 The plaintiffs acknowledged that the nature of a company's assets and its ability to convert those assets into cash in a relatively short time, is a relevant consideration in determining whether the company can meet its debts when they fall due.[35] On this point reliance was placed upon *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd*,[36] an application brought under s 459P. There, Weinberg J (as his Honour was then) stated as a relevant principle:

> There is a distinction between solvency and a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company's assets, and its ability to convert those assets into cash within a relatively short time, at least to the extent of meeting all its debts as and when they fall due, must be considered in determining solvency ... [37]

Defendants' Submissions

43 The defendants emphasise that the issue of solvency is not solely determined by the cash flow test. Rather, all of the circumstances need to be considered, including the ability of the debtor to realise funds from its balance sheet assets, how long it would take to realise such funds and on what terms. Here, reliance is placed upon *International Cat Manufacturing Pty Ltd (in liq) v Rodrick*,[38] *Re Swan Services Pty Ltd (in liq)*,[39] *Re Ashington Bayswater Pty Ltd (in liq)*[40]

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33 *Hall v Poolman* (2007) 215 FLR 243, 305 (citations omitted).

34 Ibid 313.

35 Mark Anthony Korda, Craig Peter Shepard and Legend International Holdings Inc, 'Plaintiffs' Closing Submissions', Submission in *Re Legend International Holdings Inc (in liq)*, S CI 2016 04516, S CI 2017 05129, 8 March 2018, [39] ('*Plaintiffs' Closing Submissions*').

36 [1999] FCA 728 ('*Ace Contractors*').

37 Ibid [44] (citations omitted).

38 [2013] QSC 91 ('*International Cat*'); affirmed on appeal *International Cat Manufacturing (in liq) v Rodrick* (2013) 97 ACSR 200 ('*International Cat Appeal*').

and *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)*.[41]

44 In *Swan Services*, in the context of an insolvent trading claim, Black J repeated the summary of the principles of insolvency that his Honour had stated in *Re Ashington*:

> [Section 95A] adopts a 'cashflow test' of insolvency which turns upon the income sources available to the Company and the expenditure obligations that it has to meet, rather than a balance sheet test which focuses on the value of the Company's assets and liabilities reflected in its books, although a balance sheet test can provide context for the application of the cashflow test ...
>
> Whether the Company was able to pay its debts as and when they fall due and payable is a question of fact to be determined objectively and without hindsight in all the circumstances, including the nature of its assets and business, and the court will have regard to commercial realities in that regard ... In *Playspace Playground Pty Ltd v Osborn* [2009] FCA 1486 at [40], [43]; Reeves J observed that a determination of solvency is not based on a simple analysis of a company's current assets and liabilities or liquidity at a particular point in time and must involve a consideration of its financial position in its entirety, including matters such as expected profits and other sources of income and funding. ….[42]

45 In the circumstances of *Swan Services*, while reference was generally made to the realisable value of immediately available assets,[43] such assets were not considered in detail. *Re Ashington* involved claims of unfair preferences and uncommercial transactions by a company that operated as a commercial property developer. Evidence was accepted that the only way the company could meet its liabilities, where rental income was insufficient and other funds could not be sourced, was through the sale of properties, which the creditors would have to wait for. Additionally, the company had encountered difficulties in selling properties to members of the public previously. In the circumstances, generating revenue from selling properties was not considered sufficient for the company to meet its debts as and when they fell due.[44]

46 *International Cat* involved a company that ran a boat construction business. The company's liquidator brought a claim asserting that a charge made in favour of another company, Nu-Log, was a voidable transaction. During periods of boat construction the company was short

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39 [2016] NSWSC 1724, [138] ('*Swan Services*').
40 [2013] NSWSC 1008, [3]–[4] ('*Re Ashington*').
41 (2008) 39 WAR 1, 142.
42 *Swan Services* [2016] NSWSC 1724, [138], quoting *Re Ashington* [2013] NSWSC 1008, [3]–[4] (citations omitted).
43 *Swan Services* [2016] NSWSC 1724, [142].
44 *Re Ashington* [2013] NSWSC 1008, [39].

of working capital, and both Nu-log and Nu-log's director provided finance. This included the director of Nu-log allowing the company to use his credit cards.

47 Nu-log also contracted to buy a boat from the company, although on two occasions, by agreement the boat was sold to another party. The director of Nu-log spent much time at the company's factory and took an interest in the conduct of the company's business. At a time when Nu-log was the company's only customer, and the company had also begun construction on a fourth boat, funds were needed to maintain day to day operations. Nu-log agreed to provide further finance, but only on the condition that Nu-log be granted a charge to secure present and future debts. There was evidence that at that time the company was balance sheet 'insolvent', it had debts to Nu-Log and Nu-log's director, debts to the Australian Taxation Office ('ATO') and for superannuation. Of the liabilities, however, only the tax and superannuation debts as well as trade creditors of about $6,000 were due.

48 At first instance, McMurdo J determined that the company was solvent at the relevant time. In summarising the law his Honour stated:

> A company's ability to pay its debts is not assessed by reference only to its cash or current assets at the relevant date. In *Bell Group Ltd (in liq) v Westpac Banking Corporation*, Owen J said that in this context:
>
> > It is legitimate to take into account funds the company can, on a real and reasoned view, realise by the sale of assets, borrowing against the security of its assets, or by other reasonable means.
>
> Therefore the Court must have regard to 'commercial realities', particularly when considering 'what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable'.[45]

49 Given that Nu-log was the company's biggest creditor, the key issues were the relationship between Nu-log and the company, the company's trading prospects, and whether the director's interests 'were likely to continue to provide whatever finance was required to meet the company's lack of liquidity'.[46] In his Honour's view, the solvency of the company was to be determined by the ability of the company to pay its debts as and when they fell due ahead of the completion of the boats.[47] In the circumstances, the granting of the charge allowed the

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45 *International Cat* [2013] QSC 91, [106], quoting *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1, 145; *Southern Cross (*2001) 53 NSWLR 213, 224.

46 *International Cat* [2013] QSC 91, [39].

company to secure whatever funds that it needed and it had an almost certain buyer for the third boat (Nu-log). The evidence also supported the conclusion that although Nu-log purchased the third boat, Nu-log's director was willing to have the boat used as a demonstration model.

50 The decision was upheld upon appeal.[48] The Court of Appeal specifically noted that the financing provided by Nu-log was to last at least until the fourth boat was sold.[49] Repayment of the debt to Nu-log was not likely to be demanded ahead of such sale.[50] Further, although the ATO and superannuation debts were due and payable, the company had the capacity to pay these, even if it opted not to.[51]

Applicable law

51 The applicable test as to insolvency under s 95A is that propounded in *Sandell v Porter*.[52] The approach was summarised by the Court of Appeal in *Jetaway Logistics Pty Ltd v Deputy Commissioner of Taxation*[53] as follows:

> Ordinarily the mere inability to pay a particular debt when it falls due does not demonstrate insolvency. It may simply reveal a temporary lack of liquidity. The classic statement is that of Barwick CJ in *Sandell v Porter*:
>
> > Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time – relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.
>
> This statement has been accepted as applicable in the current statutory environment. In *Evans & Tate Premium Wines Pty Ltd v Australian Beverage Distributors Pty Ltd*, Palmer J emphasised the importance of considering 'commercial realities', as follows:
>
> > The law is clear that solvency is, first and last, a question of fact to be

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47 Ibid [109].
48 *International Cat Appeal* (2013) 97 ACSR 200.
49 Ibid 220.
50 Ibid 221.
51 Ibid 219.
52 (1966) 115 CLR 666.
53 (2009) 76 ACSR 404 ('*Jetaway Logistics*').

> ascertained from a consideration of the company's financial position taken as a whole. In considering the company's position, the Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are available by sale or borrowing upon security, and when such realisations are achievable.
>
> The statement that a company is insolvent is usually conclusionary in nature. Unlike, for example, the fact of incorporation, solvency or insolvency is rarely a matter of straightforward proof. Rather, there must be an examination of the financial condition of the company, typically by reviewing its dealings over a period of time; the identification of the symptoms (if any) of insolvency; and the making of a 'diagnosis' as to the ability of the company to pay its debts as they fall due.
>
> The conclusion is one to be drawn in all of the circumstances present at the time, as known to the creditor. This might include the nature of the debtor's business and, perhaps, its cyclical nature. It might also include the character of the debt.[54]

(a) Was Legend able to pay its debts as when they were due?

Evidence of Legend's financial state in November 2015

Cash flow

52 In the Annual Report of 2013, Legend stated:

> As an exploration stage company until February 2011 and a development stage company since then, we have not had an ongoing source of revenue. Our revenue stream is normally from ad-hoc tenement disposals, interest received on cash in bank and applicable receivables.[55]

53 It further stated:

> We have historically funded our operations through fund raisings noted below.
>
> As of December 31, 2013, the Company has A$2,000 (US$2,000).[56]
>
> …
>
> The report of our independent registered public accounting firm on our consolidated financial statements … for the years ended December 31, 2013 and 2012, includes a paragraph questioning our ability to continue as a going concern. This paragraph indicates that we have not yet commenced revenue producing operations, have incurred net losses from inception, and have an accumulated (deficit) of A$171,921,000 which conditions raise substantial doubt about our ability to continue as a going concern.
>
> As future exploration and development activities will require additional financing, the Company is pursuing various strategies to accomplish this including obtaining third

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54 Ibid 406–7 [12]–[15], quoting *Sandell v Porter* (1966) 115 CLR 666, 670; *Evans & Tate Premium Wines Pty Ltd v Australian Beverage Distributors Pty Ltd* [2005] NSWSC 186, [11]. See also *Rexel Electrical Supplies Pty Ltd v Morton (as liquidator of South East Queensland Machinery Manufacturing and Distribution (Mining No 1) (in liq))* (2015) 110 ACSR 341.

55 Extract from Annual Report of Legend filed with SEC, Court Book 2, 0405.

56 Ibid 0408.

> parties to take an ownership interest in or to provide financing for the anticipated development activities related to the phosphate project, as well as capital raising through share issuances and sale of assets.[57]

54 The consolidated cash flow in the 2013 Annual Report demonstrated a net decrease in cash of $1.06 million, such that Legend had $2,000 cash remaining. By 2015 Legend was not trading.

55 On 5 August 2015 an email was sent from a debt recovery agency to Legend on behalf of a body corporate attaching a statement of claim for $3,163. The sum appears to be associated with levies accumulating from November 2014. The correspondence suggests that Legend offered part payment on the same day.

56 In October 2015 David Tyrwhitt also emailed invoicing his director's fees for the previous quarter.

57 The Balance Sheet of 30 September 2015 ('the Balance Sheet') showed cash of $1,028.

58 In an email to Gutnick on 7 October 2015 Craig Michael stated:

> This is the second letter regarding rents for all of the Kind Eagle phosphate tenements … They have given us until 1 November to pay. I am not sure what action they will take after this as we haven't been in this position yet with Queensland tenements. This letter does say 'to avoid the possibility of the tenure or authority being cancelled, we ask you to please give this matter your immediate attention…:. We may be lucky and get one more letter after this one stating that cancellation will take place unless payment is made by a certain date however they may just proceed to cancellation after 1 Nov given that this is their second letter.[58]

59 The funds provided under the binding terms sheet, Bond Deed and General Security Deed appear to have been paid in three transactions — $100,000 from Queensland Bauxite Limited ('QBL') on 10 November 2015, $100,000 from QPPL on 25 November 2015 and a further $200,000 from QPPL on 26 November 2015. The draft of the binding terms sheet suggests that the funds were primarily intended to be used to continue to challenge the IFFCO debt, albeit this was later amended to be used for 'general working capital purposes'. There is also, however, the email of Mr Lee dated 16 December 2015 which listed how the $200,000 would be used for a number of payments, including rent, tenements, legal and audit fees.

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57 Ibid 0409-0410.

58 Bundle of creditor correspondence from KPR, Craig Michael and David Tyrwhitt, Court Book 6, 2327.

Liabilities

60 The IFFCO debt is identified in the Balance Sheet as $25,203,309. 'Accounts payable' identifies a sum of $1,916,320. While according to an email of Mr Lee it appears that this sum includes $700,000 of costs that had been incurred but not invoiced, it may be that the sum would still be considered a debt or perhaps a contingent debt for the purposes of s 95A.

61 The list of aged creditors dated 16 December 2015 identifies a total of $868,504 owing for over 120 days, $14,363 over 90 days and $10,109 over 30 days. Of the liabilities owing for over 120 days, the creditors include the following:

- Judicial Holdings Pty Ltd ($161,700)
- Northern Land Council ($87.161.94)
- Richards Layton & Finger ($62,247)
- David S Tyrwhitt ($122,100)
- Body Corporate Services, Enterprise Park Mt Isa ($593.20)[59]

62 The Report as to Affairs ('RATA') signed by Mr Gutnick date 2 June 2016 identified a liability to IFFCO of $25,027.207 and a further $1,271,813 owing to creditors (albeit approximately $255,637 of that sum is said not to be owing). Listed among the creditors owed are:

- Judicial Holdings Pty Ltd ($161,700)
- Northern Land Council ($87.161.94)
- Richards Layton & Finger ($62,247.73)
- David S Tyrwhitt ($135,372)
- Body Corporate Services, Enterprise Park Mt Isa ($2037.05)

63 The balance listed against a further three creditors remained the same between the Balance Sheet and RATA, however the liability was disputed in the RATA.

64 The funds owing to some creditors reduced between the Balance Sheet and the RATA in July 2016, including to Mt Isa City Council and the Queensland Government.

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[59] Email from Joseph Gutnick to Sholom, Court Book 4, 1291.

65 Broadly, the documents filed by Mr Gutnick in the ch 11 proceedings appear to list the same creditors.

Assets

66 The Balance Sheet of Legend does not set out the shareholding in Paradise as a non-current asset. Nor does it identify as asset loans to Paradise, which are listed in Paradise's Balance sheet of 30 September 2015 as $15,910,000 and $2,143,443 (current liability), the RATA of Legend in June 2016 as $18,219,519, the ch 11 documents as US$18,109,803. When the figure from the Paradise Balance Sheet was raised during the hearing, the following exchange took place:

> DR BUTTON: I've clarified with my friend that he said to Your Honour that his instructions did not permit him to say the intercompany balance was wrong, so on the basis of that concession I will not press the question.
>
> HIS HONOUR: Yes. I've taken the record of the intercompany balances until somebody points out differently that it stands.[60]

67 As such, the concession appears to be that the intercompany loan was approximately $18,053,443.

68 Further, as already noted, the value of the tenements is somewhat uncertain, also leading to uncertainty surrounding the value of the shares:

- according to Mr Feldman, the 'book entry' when they were transferred to Paradise in 2012 was $2.7 million;[61]
- the Balance Sheet of Paradise dated 30 September 2015 listed total assets of $3,068,733, primarily comprised of 'capitalised development expenditure';
- Mr Feldman gave evidence that he thought the value of the tenements was $10–20 million leading up to the Share Sale Agreement;
- the Dunlop valuation was $3.2 million;
- the Snowden valuation was $17–25 million;
- Mr Gutnick signed off on a realisable value of $10 million on the shares in Paradise in the June 2016 RATA, however this may indicate a tenement value of approximately $28 million;

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60 Transcript, 242.

61 Email from John Dunlop to Sholom Feldman, Court Book 4, 1638.

- the defendants accepted as applicable the upper figure of the technical range of the Snowden valuation ($29 million).[62] Given its technical nature, however, this does not appear appropriate.

69 It may not be possible to determine, on balance, what the likely value of the tenements was. The most reliable figure appears to be that of Snowden, however the date of the valuation appears to be twelve months after November 2015. The tenement value would also be subject to the other trade creditors of Paradise ($314,915 according to the Balance Sheet of 30 September 2015, $329,513 according to the Receiver's RATA of Paradise).

70 Looking beyond the shares or underlying value of the tenements, the Balance Sheet lists assets of $4,457,960, $3,027,741 of which is a non-current asset 'development expenditure'. It is unclear if this would be considered a realisable asset, and as discussed earlier, this aspect of the Balance Sheet (ie the assets), should perhaps be given little weight. The RATA and ch 11 material identifies certain loans (in addition to those to Paradise) as assets — Merlin Diamonds Ltd ('MED') ($436,644) and AXIS Consultants Pty Ltd ('AXIS Consultants') ($3,527,086). It is unclear if these could have been called upon, however, the fact that Mr Gutnick did not realise in the context of the aged creditors list and need for funds to defend the IFFCO debt, suggests that they could not do so.

Consideration

71 The commercial realities were:

- Legend was in difficult financial circumstances prior to the IFFCO debt. The independent accounting reviews attached to its annual reports questioned its ability to continue as a going concern. Significant funds had been invested without the project progressing to the production stage.
- The strategy of incorporating an Australian company and publicly listing had not progressed the project. Paradise was then consuming significant funds, and required further substantial investment to reach production.
- Both Paradise and Legend had little cash.
- While it would perhaps not be uncommon for a mining development company to go through periods of limited cash flow, Legend appears to have had difficulties since at

62 Transcript, 401.

least 2012. Further, simply maintaining the tenements costs money.

- As Mr Feldman put it, in the industry:

> ... the mining business is a very high risk, high reward business. So, you enter into - that's why companies are created and people invest in specific companies. If it works, you progress it. If it doesn't work, you close it down.[63]

- Legend had already sold a significant asset (interest in MED) to repay Acorn Capital ('Acorn') after the IPO did not progress.
- In addition to having difficulties with cash flow on account of lack of investment, the IFFCO arbitral decision was then determined against Legend. The sum attributed to the debt in September 2015 by Legend was $25,203,309. This is broadly consistent with the $22,435,612 plus costs awarded plus interest, and the figures in the RATA.
- Legend and Paradise were not voluntarily wound up, even after the IFFCO debt became payable.
- Once the debt was announced to the market, securing financing or ongoing funding would have become difficult.
- The aged creditors list suggests that perhaps as early as August, Legend had particular difficulty paying its smaller debts as they fell due.
- Legend then sought to raise funds to defend the IFFCO enforcement.
- The underlying value of the tenements was not a 'realisable asset':
    - The period identified, three to six months, is not 'relatively short' or reasonable.
    - The asset was the chief asset of the business, necessary for its ongoing survival.
    - There was no evidence of potential buyers and/or the phosphate project was far from completion, such that realisation of the chief asset was not justified in the circumstances if the business was to continue/succeed.
    - Upon entry into the General Security Deed, Legend and Paradise were both limited in their ability to raise finance based upon the tenements or realise the value of the tenements.
- Without realisation of the tenements, the IFFCO debt could not be paid at the time the Bond Deed and General Security Deed were entered into.

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63 Transcript, 343.

72 The circumstances are distinct from *International Cat*. There, although in the context of the business periods of limited cash flow and high costs were to be expected (between boat sales), financial support was being provided by a director (de facto) and his company, that was able to cover the trade creditors until the next boat was sold, which was likely to occur. Similarly, in *Sandell v Porter*, a building partnership that had difficulties paying sub-contractors until payments for the built properties were received, the company received funding to provide support in the interim between paying the sub-contractors and being paid for the built property. Here, there was no external support to cover the IFFCO debt and the aged trade creditors, and there was not a point in the near future in which Legend would be likely to produce income or secure ongoing substantial investment until it did. The funds from QBL and QPPL appeared aimed, at least in part, to defend the enforcement of the IFFCO debt. The provision of financial support while a company attempts to eliminate enforcement of a debt is distinct from support covering trade creditors until income is produced or an asset is realised.

73 Legend had an 'endemic shortage of working capital', compounded by a significant debt. When the Bond Deed and General Security Deed were entered into, Legend was not suffering from a 'temporary lack of liquidity'. That is, realisation of the tenements would not have allowed Legend to weather a temporary period of illiquidity prior to becoming income-producing or establishing substantial ongoing financial support, it would have led to the cessation of Legend's primary business purpose. Even if, prior to entry into the Bond Deed and the General Security Deed the tenements were realisable, upon entry into those documents it was not commercially realistic to suggest that Mr Feldman would have consented to sale of the tenements to repay the IFFCO debt.

(b) Should the Balance Sheet be accepted as evidence of Legend's financial position?

74 The plaintiffs submit that Legend's books and records are prima facie evidence of Legend's insolvency, pursuant to s 1305 of *the Act*.[64] It is contended that, there is no evidence that would displace that standing, and Legend's liabilities are established by the Balance Sheet.[65] On the issue regarding the accuracy of the Balance Sheet, the plaintiffs submit that although

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64 *Plaintiffs' Closing Submissions* [45].

65 Legend's Balance Sheet, Court Book 3, 0989.

the shares in Paradise are absent as an asset, the accuracy of the liabilities should not be doubted.[66]

75 The plaintiffs also rely upon *Switz Pty Ltd v Glowbind Pty Ltd*[67] in support of the proposition that 'the primary source of the information on the solvency of the company must be the company itself'.[68] There, in the context of s 459S(2) Spigelman CJ stated:

> The process of proving solvency is not some kind of forensic game. Solvency is a matter peculiarly within the knowledge of the company. The primary source of information on the solvency of the company must be the company itself.[69]

76 Additionally, as the Balance Sheet was also put in evidence by the defendants through affidavits of Mr Feldman, the plaintiffs suggested that it was 'somewhat rich' for the defendants to be 'resiling from them now'.[70]

77 The defendants contend that the Balance Sheet should be given no weight as its author is unknown,[71] there is no reference to Legend's main asset,[72] and it refers to a $25 million IFFCO liability without explanation.[73] Further, Mr Shepard agreed that on its face, the Balance Sheet was not drafted in accordance with generally accepted accounting principles,[74] and that I should not give weight to them 'as a balance sheet prepared in accordance with accepted accounting principles'.[75] The loan that is reflected in the Balance Sheet of Paradise is also not documented as a non-current asset.[76]

78 It is asserted that the plaintiffs' submissions regarding s 1305 of *the Act* 'camouflages the issue and the difficulty' with that section.[77] As stated in *Whitton v Regis Towers Real Estate Pty Ltd (in administration)* and quoted by Sloss J in *Shot One Pty Ltd (in liq) v Day*:

> Section 1305 of the *Corporations Act* does not elevate the entry to prima facie evidence that any such transaction (or series of transactions) exists. It can be no more

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66 *Plaintiffs' Closing Submissions* [47].
67 (2000) 48 NSWLR 661.
68 *Plaintiffs' Closing Submissions* [40].
69 *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661, 674.
70 Transcript of Proceedings, *Re Legend International Holdings Inc (in liq)* (Supreme Court of Victoria, S CI 2016 04516, S CI 2017 05129, Associate Justice Randall, 9 March 2018) 454 ('Transcript').
71 Ibid 176.
72 Ibid.
73 Ibid 176–7.
74 Ibid 181.
75 Ibid 183.
76 Ibid.
77 Ibid 388.

than prima facie evidence that an unknown person formed an opinion on an undisclosed basis that, in the absence of any directly recordable transaction nevertheless, as a balancing entry, such a figure should appear in the accounts. Mr Harris took the matter no further and, indeed, eroded any weight the entry may have had.[78]

Applicable law

79 Section 1305 of *the Act* provides:

> **1305 Admissibility of books in evidence**
>
> (1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.
>
> (2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).

80 In *Shot One*, Sloss J considered the application of s 1305 in the context of a submission that, as discussed by Austin J in *ASIC v Rich*,[79] 'while the books are treated as prima facie evidence of the matters stated in them, the weight to be attached to that evidence is a matter which is to be measured in accordance with the common sense of the tribunal'.[80] In the circumstances before Sloss J, it was asserted that, inter alia, if there was a prima facie presumption of the existence of a loan then this was rebutted by the unreliability of the general ledgers and the effective reconstruction of the financial records. In reviewing relevant authorities Sloss J discussed *ASIC v Rich* as follows:

> More recently, in *ASIC v Rich*, Austin J said:
>
> > [397] Section 1305(1) does not make the company's books conclusive evidence of the matters they contain, in the sense of requiring the tribunal of fact to make a finding in terms of the content of the books in the absence of proof to the contrary by the opposing party. The books are prima facie evidence of the matters stated in them, but the weight of that evidence is to be measured in accordance with the common sense of the tribunal of fact…
> >
> > [398] In my view it would be open to the tribunal of fact to find that the prima facie evidence constituted by the company's books is outweighed by other evidence (including evidence adduced by the proponent of the books, even if the opponent does not give evidence about them); or by some quality or characteristic of the books themselves, even if there is no other evidence. In particular, if a book has the appearance of a draft or (being electronic) has a file title indicating that it is a draft, that alone may be sufficient (all other things being equal) for the tribunal of fact to reject the book as evidence of the matter stated in it, notwithstanding that the book is prima facie evidence

78 (2007) 161 FCR 20, [59], quoted in *Shot One Pty Ltd (in liq) v Day* [2017] VSC 741 ('*Shot One*').
79 (2009) 236 FLR 1, [397].
80 *Shot One* [2017] VSC 741, [238], citing *ASIC v Rich* (2009) 236 FLR 1, [397] (Austin J).

> of that matter; a fortiori if, in addition to having the appearance of a draft, the book contains inconsistencies or ambiguities or the matter otherwise demands explanation.

Austin J then referred to the purpose of s 1305(1) as outlined in the explanatory memorandum to the Companies Bill 1981, which introduced the provision, and said:

> [400] Therefore s 1305(1) allows a company's books to be introduced in evidence as they are, without any 'authenticating' evidence by any witness, and allows the books to be relied upon to prove transactions recorded in them. But it does not elevate the matters contained in the books to a plane of probative value that requires the court to disregard the context in which the matters relied on appear in the tendered document. If, for example, there is some doubt as to whether a particular transaction is "recorded' in a book because of some uncertainty about the status of the document or ambiguity about what it contains, s 1305(1) does not overcome the problem.[81]

81 Her Honour, following the approach of Austin J, determined that while the ledger and financial accounts were 'generally to be treated as prima facie evidence of the matters stated in them',[82] the loan account entries could not be relied upon as proving either the loan transactions purportedly recorded or the quantum of alleged indebtedness. When viewed in the context of the body of evidence before the Court, her Honour could not be satisfied that the records were probative evidence that could be relied upon to prove indebtedness. As such, 'the prima facie evidence constituted by the company's books is rebutted or "outweighed" (to adopt Austin J's language) by that other evidence'.[83]

Consideration

82 In accordance with *Shot One*, prima facie the Balance Sheet is evidence of the matters contained within it. It must be viewed, however, within the context of the evidence as a whole, and its prima facie value may be outweighed by other evidence.

83 The following evidence negates the reliability of the Balance Sheet:

(xiii) During cross examination, Mr Shepard admitted that he did not know how the document came into existence;[84]

(xiv) The emails of Mr Lee suggest that the document may require some reconstruction. In response to queries from Mr Feldman, Mr Lee stated:

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81 *Shot One* [2017] VSC 741, [241]–[242], quoting *ASIC v Rich* (2009) 236 FLR 1, [397]-[398], [400] (Austin J).
82 *Shot One* [2017] VSC 741, [244].
83 Ibid.
84 Transcript, 176.

1. The first point is that the balance sheet given to Sholom is at 30 September 2015 and the creditors list given today is as of todays [sic] date – some 2 ½ months later.

2. Creditors have been paid since 30 September and minimal creditors incurred since 30 September.

3. There are accruals in the 30 September balance sheet of costs that have been incurred but we do not have invoices for ($700,000) covering Singapore costs, audit fees not yet received, directors superannuation, etc. They are not on today's [sic] creditors list as we still do not have invoices.[85]

(xv) The Balance Sheet does not identify as a non-current asset the shares in Paradise, or the loan to Paradise that is on Paradise's Balance Sheet.

(xvi) Mr Shepard agreed with the claim of counsel for the defendants that the Balance Sheet was not prepared in accordance with the generally accepted accounting principles. That is, on its face, the Balance Sheet was not something that would be 'acceptable in the market'.[86] Further, Mr Shepard agreed that the Balance Sheet was not something that could be given weight in accordance with accepted accounting principles.[87]

84 The following evidence supports the proposition that the Balance Sheet can be relied upon:

(xvii) The fact that Mr Lee was able to provide certain explanations as to the figures in the Balance Sheet, perhaps suggests that he relied upon it and was involved in its creation.[88]

(xviii) It was the Balance Sheet provided by Mr Gutnick to Mr Feldman during negotiations, and which Mr Feldman referenced and queried after the Bond Deed and General Security Deed were entered into.

(xix) The Legend shareholder's deed, entered into around the time that the terms sheet was executed and the Balance Sheet emailed to Mr Feldman, stated in cl 10.6 that '[a] summary of the balance sheet of Legend is provided in sch 3 and warranted by Joseph Gutnick to the Feldmans as to the accuracy of the balance

85 Email from Peter Lee to Joseph Gutnick sent on 16 December 2015, Court Book 4, 1298.
86 Transcript, 181.
87 Ibid 183.
88 Email from Peter Lee to Joseph Gutnick sent on 16 December 2015, Court Book 4, 1298.

sheet'.[89] In oral evidence Mr Feldman accepted that the Balance Sheet was the summary referred to, stating 'I believe it was'.[90]

(xx) At least in relation to the Paradise Balance Sheet, Mr Lee stated in an email to Korda Mentha of 10 November 2016 that it was straight off the accounting system and should be viewed as an internal document only and would never be used for an assessment of whether a loan was current or non-current.[91] In the same email Mr Lee stated:

> From a Legend point of view, as all the inter-company loans eliminated on consolidation, the dissection of whether they were in the classic accounting system balance sheet as current or non-current was irrelevant.[92]

(xxi) An explanation for some of the missing assets and lack of satisfaction of Australian standards is that it was compiled with a view of American reporting obligations (albeit the figures appear to be in Australian dollars).

(xxii) The cash figure of $1,028 is consistent with evidence that Legend had minimal cash reserves/income.

(xxiii) The figure identified as 'Liability IFFCO' ($25,203,309) is broadly consistent with other evidence as to the debt. The actual amount owing on the arbitral award of 7 May 2015 was $22,435,612 plus costs; and the RATA dated 2 June 2016 and signed by Mr Gutnick (on 2 July 2016) identified the debt as $25,027,207.

85 Overall:

(a) uncertainty surrounds the description of non-current assets in the Balance Sheet. Some of the discrepancy in the Balance Sheet may be explained by differing accounting standards in the US.

(b) the 'accounts payable' includes accruals for work done that has not yet been invoiced.

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89 Shareholder's Deed, Court Book 3, 1051.
90 Transcript, 359.
91 Ibid 454; Email from Mr Lee to Natalie Chin sent on 19 January 2017, Court Book 5, 2191.
92 Email from Mr Lee to Natalie Chin sent on 19 January 2017, Court Book 5, 2191.

(c) the identification of the IFFCO debt appears broadly consistent with the other evidence.

It is not necessary for me to dismiss the reliability of the Balance Sheet entirely, particularly regarding the liabilities, as these are consistent with other evidence. However, the Balance Sheet should be given little to no weight regarding the non-current assets.

(c) Did Legend have a realisable asset?

86 The parties agree that the chief asset of Legend was its shareholding in Paradise, and the underlying value of the mining tenements held by Paradise.

How could Legend realise the value of the tenements?

87 Mr Shepard agreed that the directors of Legend could have looked to realise the underlying value of the tenements, just as he could realise the asset if the Bond Deed and General Security Deed are set aside.

88 The parties did not discuss in detail how the realisation would have occurred in practice. Based on my examination of the evidence, theoretically three options exist:

(xxiv) Paradise selling the tenements, being voluntarily liquidated, and the funds being distributed to the creditors and then Legend as the sole shareholder.

(xxv) Paradise selling the tenements and repaying the earlier loans from Legend, as well as creating new loans to Legend if the sum realised was greater than the earlier loans from Legend. Presumably this would not be feasible as Paradise would be at risk of insolvency and an unfair preference.

(xxvi) Legend selling the shares that it owns in Paradise (ie the shares being realised rather than selling the tenements). This, however, would be influenced by the liability of Paradise to Legend. That is, the share price would be less than the value of tenements on account of Paradise's liabilities. As such, if a sale of shares was to occur, Legend would perhaps have to look for a party capable of bringing in external funding to repay the loans it made to Paradise.

Submissions

89 The plaintiffs submitted that in accordance with the cash flow test and s 95A, Legend was unable to meet its debts as and when they fell due, regardless of what the tenements were worth. Further, given the evidence of Mr Shepard that it would take a period of three to six months to sell the tenements,[93] no proceeds of sale would be imminent in a reasonable timeframe.[94]

90 Mr Shepard gave evidence that in the event that the Bond Deed and General Security Deed were set aside he would seek to sell the 'underlying assets' through a market process that would take 'three to six months'.[95] Mr Shepard also agreed that the directors of Legend could have pursued the same process in a similar timeframe but they chose not to.[96]

91 Conversely, the defendants submitted that three to six months, as identified by Mr Shepard, was a reasonable timeframe.[97] The question of determining reasonableness was said to be 'fact dependant on the nature of the underlying asset'.[98] As to prospective buyers, in the words of counsel for the defendants:

> Yes, probably a buyer; an overseas buyer and that might take six months to get the price or it might be the next day. Or it might be IFFCO who wants to buy them. Who knows?[99]

92 Each of Mr Shepard and Mr Glick, in his submissions did not address the issue of when funds may have been available consequent upon any hypothetical sale.

Applicable Law

93 In determining whether a corporation is insolvent for the purposes of s 95A, regard is had to 'commercial realities'.[100] This encompasses consideration of whether the corporation can realise funds from its assets in order to pay its debts as and when they become due and payable.[101] That is:

> …if that property is in such a position as to title and otherwise that it could be

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93 Transcript, 172.
94 *Plaintiffs' Closing Submissions* [26].
95 Transcript, 172, 396.
96 Ibid 173.
97 Ibid 402.
98 Ibid 398.
99 Ibid 396.
100 *Lewis v Doran* (2005) 219 ALR 555, 576, quoting *Southern Cross* (2001) 53 NSWLR 213, 224.
101 *Southern Cross* (2001) 53 NSWLR 213, 224.

> realized in time to meet the indebtedness as the claims mature, with money thus belonging to the debtor, he cannot be said to be unable to pay his debts as they become due from his own moneys. In other words, if the debtor can, by sale or mortgage of property which he owns at the time of the assignment, change the form of the property into cash wholly or partly but sufficient for the purpose of paying his debts as they become due, that requirement of the section is satisfied.[102]

94 A key consideration in determining whether an asset is realisable is the time within which funds would be made available. That is, there is a temporal limit on whether an asset can be considered realisable.[103] Although resources other than cash may be considered on the question of solvency, creditors are not required to accept that, although the debtor is asset rich, it will pay them in due course when assets are realised. As Young J stated in *Kekatos v Holmark Construction Co Pty Ltd*,[104] 'it is not sufficient that the debtor given time to realize its assets would be able to pay 100 cents in the dollar.'[105]

95 Consequently, the time in which realisations are achievable is a relevant consideration.[106] In this regard reference has been made to realisation of assets occurring within a 'relatively short time',[107] 'reasonable time',[108] 'relatively quickly'[109] and 'as claims mature'.[110] The Queensland Court of Appeal has stated the 'degree of immediacy has always been incapable of precise definition and has been subject to varying emphasis'.[111]

96 In *Sandell v Porter*, Barwick CJ phrased the temporal limit as follows:

> …the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time - relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor.[112]

97 These statements echoed those that his Honour had made earlier in *Rees v Bank of New South*

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102 *Bank of Australasia v Hall* (1907) 4 CLR 1514, 1543.
103 *McLellan v Carroll* (2009) 76 ACSR 67; *Sandell v Porter* (1966) 115 CLR 666; *ASIC v Plymin* (2003) 174 FLR 124.
104 [1995] NSWSC 2771 (24 November 1995).
105 Ibid 5, citing *Re Attiwill* (1932) 5 ABC 54; see also *Re Tweed Garages Ltd* [1962] Ch 406, 410: 'A company may be at the same time insolvent and wealthy'.
106 *Southern Cross* (2001) 53 NSWLR 213, 224.
107 *Sandell v Porter* (1966) 115 CLR 666; *Jingellic Minerals NL v Beach Petroleum NL* (1991) 6 ACSR 313 ('*Jingellic*').
108 *Re Pacific Projects Pty Ltd (in liq)* [1990] 2 Qd R 541, 547.
109 *Taylor v Australia & New Zealand Banking Group Ltd* (1988) 13 ACLR 780, 784 ('*Taylor v ANZ*').
110 *Expo International Pty Ltd (in liq) v Chant* [1979] 2 NSWLR 820, 838 ('*Expo v Chant*'); *Hall v Poolman* (2007) 215 FLR 243, 285.
111 *Taylor v Carroll* (1991) 6 ACSR 255, 261.
112 *Sandell v Porter* (1966) 115 CLR 666, 670 [15].

Wales:

> It is quite true that a trader, to remain solvent, does not need to have ready cash by him to cover his commitments as they fall for payment, and that in determining whether he can pay his debts as they become due regard must be had to his realizable assets. The extent to which their existence will prevent a conclusion of insolvency will depend on a number of surrounding circumstances, one of which must be the nature of the assets and in the case of a trader, the nature of his business.[113]

98 Drawing upon the comments of Isaacs J in *Bank of Australasia v Hall*,[114] in an often cited statement Palmer J addressed the issue as follows in *Hall v Poolman*:

> [a]n asset cannot be taken into account in assessing solvency at a particular time without reference to the time it would realistically take to effect realisation and produce cash. It is no indication of solvency – indeed, it is the opposite – to point to property as available to meet debts falling due next month when, even with the utmost expedition, that property cannot be turned into cash for six months. Realisable property can only be taken into account in assessing solvency *'if that property is in such a position as to title and otherwise that it could be realised in time to meet the indebtedness as the* claims mature'.[115]

99 There, although a company was selling certain bulk wine assets and retaining others, it was considered unable to pay its debts as they fell due.[116] The comments of Palmer J suggest that his Honour viewed five months as too long, and he expressly referenced a period of '90 days'.[117]

100 In *Re Northridge Properties Ltd*,[118] Richardson J reasoned that 'there must be a substantial element of immediacy in the ability to provide cash from non-cash assets', noting that 'if convertibility extends beyond two or three weeks, a businessman is likely to be faced with another set of debts fall due from a previous month's operations'.[119] In the circumstances of the case, properties owned by a company in the business of property development, were not considered realisable within a relatively short time.

101 In *Jingellic*, within the context of an application for winding up, a realisable asset was recognised. There, a company purchased an interest in an oil field in the US, paid in part with funds from a syndicated cash advance facility agreement ('SCAF') involving Jingellic

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113 *Rees v Bank of New South Wales* (1964) 111 CLR 210, 218 ('*Rees v Bank of NSW*').
114 (1907) 4 CLR 1514, 1543.
115 *Hall v Poolman* (2007) 215 FLR 243, 285 (emphasis in original).
116 Ibid 286–7, 290.
117 See [40].
118 (Unreported, High Court of New Zealand, Richardson J, 13 December 1977) [27].
119 Ibid.

Minerals NL and others. On the basis of the SCAF, Jingellic later demanded payment of funds from the company, plus interest. A heads of agreement for payment was entered into, however, after making three payments the company gave notice that it was unable to make the fourth. Jingellic then filed a summons in the Supreme Court of South Australia to wind up the company. At first instance Zelling AJ determined that there was not a bona fide dispute and that the company was insolvent. These findings were overturned upon appeal.

102 On the issue of insolvency, the Court of Appeal (Matheson J, Mohr and Mullighan JJ agreeing) determined that funds were available through a bank loan to pay the debt in question, a sum of approximately $5.08 million. Although the bank required security, such security would be able to be provided as in paying out the debt to Jingellic, Jingellic's security would be released. Additionally, the company had three primary assets — an interest in an oil exploration in Queensland ($6–7 million), an interest in the oil field in the US ($15 million) and an interest in a Timor Sea exploration permit ($1.5 million). Based upon documentary and oral evidence, the assets were considered saleable and the Queensland interest, for example, typically would take 'a few months' to sell.[120] In this regard the Court of Appeal determined that the company had readily saleable assets that could be used to pay debts if need be.

103 Ultimately, whether the time period required to realise the asset is reasonable depends upon the circumstances of the case,[121] and the Court should remain cognisant that the focus remains upon the text of s 95A. On this point Bryson AJ has reasoned:

> My primary concern is to give effect to s 95A in accordance with its terms, which clearly relate to ability to pay by the due date, not to the ability to cope with the debtor's commercial situation in such a way as to extricate himself from difficulty. The concept of surmountable temporary illiquidity referred to in Palmer J's third proposition is frequently raised and from time to time relied upon judicially to support a finding against insolvency. I regard it as important to approach questions of illiquidity, whether temporary or endemic, in a way which does not depart from the terms of s 95A(1) and its reference to ability to pay all debts as and when they become due and payable; ability to raise money from assets and pay a debt before the creditor's patience is exhausted is not enough, in my opinion.
>
> There have frequently been references to observations of Barwick CJ in *Rees v Bank of New South Wales* (1964) 111 CLR 210 at 218 and in *Sandell v Porter* (1966) 115 CLR 666 at 670–671. Barwick CJ spoke in relation to s 95 which referred to a debtor

120 *Jingellic* (1991) 6 ACSR 313, 329–30.
121 *Hall v Poolman* (2007) 215 FLR 243; *Rees v Bank of NSW* (1964) 111 CLR 210.

> as being "unable to pay his debts as they become due from his own money"; there are no words corresponding to "from his own money" in s 95A. For an exposition of s 95 it was, of course, important to say as Barwick CJ said in *Rees* at 218:
>
> > It is quite true that a trader, to remain solvent, does not need to have ready cash by him to cover his commitments as they fall for payment, and that in determining whether he can pay his debts as they become due regard must be had to his realisable assets.
>
> In neither of these cases did Barwick CJ, to my reading, say to the effect that a process of realising assets, however readily realisable, could extend the time when debts become due to which s 95 refers.[122]

104 In a number of cases assets have not been considered realisable where those assets are necessary for the continuation of the business. In *Re Timbatec Pty Ltd*,[123] where declarations were sought as to the invalidity of a transaction, it was submitted that although a company was only paying a proportionate amount of its debts during the relevant period, 'had it been absolutely necessary to do so it could have provided additional cash resources by selling plant or stock'.[124] On this point Bowen CJ, after acknowledging the test from *Sandell v Porter*, stated:

> One of the difficulties of realizing assets is that it may involve the company in terminating that particular part of the business and may even, in some circumstances, involve it in a breach of contract. The same applies to the sale of stock, which is on hand to be devoted to the performance of works in progress, and in some circumstances may involve liability for damages for breach of contract. The same applies to office furniture and equipment. This may be sold to realize cash. But it is difficult to visualise a continuing business without tables and chairs on which to conduct its administrative side. In other words, the test as regards ready realization of cash resources has regard, as I understand it, to the debtor who is conducting a business, and is applying his cash resources, and selling or mortgaging assets readily available to inflate these resources, while continuing his business. I do not take it to apply to a situation where the business is brought to a full stop, and either sale or mortgage can produce cash resources if it breaks up its business. This is implicit in Barwick CJ's reference to 'temporary lack of liquidity'. He is not referring to a terminal lack of liquidity. It is also, I think, apparent from the judgments in *Rees v Bank of New South Wales*. Barwick CJ emphasised that stock-in-trade in that case was clearly not an asset which was available to be realized to meet current debts except in the ordinary course of the company's business, a course which had proved itself inadequate.[125]

105 *Rees v Bank of NSW*, to which Bowen CJ referred, was a case in which it was alleged that a retail trading company gave an unfair preference to a bank. There, all of the takings of the company were placed in an overdraft account provided by the bank, and a sum was regularly

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122 *JTS Property & Investments No 1 Pty Ltd (in liq) v Sadri* [2010] NSWSC 1384, [48].
123 (1974) 24 FLR 30 ('*Timbatec*').
124 Ibid 36.
125 Ibid 36–7.

applied to permanently reduce the overdraft. On the issue of whether the bank had reason to suspect that the company was insolvent, Barwick CJ stated:

> It is quite true that a trader, to remain solvent, does not need to have ready cash by him to cover commitments as they fall for payment, and that in determining whether he can pay his debts as they become due regard must be had to his realizable assets. The extent to which their existence will prevent a conclusion of insolvency will depend on a number of surrounding circumstances, one of which must be the nature of his business. The asset whose value was said to negative a conclusion of insolvency, or at any rate obviate the suspicion of it, was its trading stock of foodstuffs. In the ordinary course of the company's business this asset was not available to be realized except by means of retail sales through its various shops … the bank was not contemplating that the company intended to liquidate its business but to carry it on. Indeed the bank with a degree of sympathy was assisting the company to carry on the business. The stock in the trade was clearly not an asset which was available to be realized to meet current debts except in the ordinary course of the company's business, a course which had proved itself inadequate. In this connexion, the test applied by Lindley L.J. in *Ex parte Russell; Re Butterworth* (1882) 19 Ch D 588, in determining whether a voluntary settlement by a trader was made at a time when he was able to pay his debts without the aid of the settled property, namely, that the trader should be able to pay his debts in the way he is proposing to pay them, i.e. in the ordinary course of his business, if he is intending to continue it, is instructive.[126]

106 *Timbatec* was followed in *Switz Pty Ltd v Glowbind Pty Ltd*.[127] That case involved an application under s 459P regarding a company in the business of property development. On the issue of solvency as defined in s 95A, the company submitted that it could rely upon the realisation of funds from its principal asset, the property that was to be the subject of development.[128] On this point Hodgson CJ accepted the submissions of the plaintiff, finding that even if the property:

> …were put on the market immediately, there is no evidence as to when it could be sold and when the proceeds of sale could be expected; and I could not use judicial notice to come to a conclusion that the proceeds of sale could be received any earlier than about three months from now. Furthermore, as submitted by [counsel for the plaintiff], this is not in fact intended, and would be inconsistent with the course actually being undertaken of developing the site and selling units from the completed development. Plainly, that process will take much longer than three months: again there is no evidence, but I could not take judicial notice that the proceeds of that process would be available any earlier than about one year from now. Again, as submitted by [counsel for the plaintiff], the immediate sale of the property would be akin to the realisation of stock-in-trade otherwise than in the ordinary course of business, as discussed in the cases of Russell, Timbatec and Reese.
>
> In my opinion, that situation cannot be regarded as a mere temporary lack of liquidity.[129]

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126 *Rees v Bank of NSW* (1964) 111 CLR 210, 218.

127 [2000] NSWSC 222.

128 Ibid [22].

129 Ibid [39], [40], citing *Ex parte Russell* (1882) 19 Ch D 588, 601; *Timbatec* (1974) 24 FLR 30, 36–7; *Rees v Bank of NSW* (1964) 111 CLR 210, 218.

107 At times, however, courts have concluded that assets key to the conduct of the business were readily realisable. In *Re Adnot Pty Ltd*[130] for example, a company the subject of a winding up petition was found to be solvent on the basis of sale or the intended sale of a shopping centre and certain sources of funds in the interim. The main purpose of the company's venture was to construct the shopping centre, and it was not 'trading in the sense of turning over stock'. There was evidence that any shortfall in capital could be covered by further mortgage on the property and funds from a related company, and although further construction was required to avoid a forced sale, the property had significant value. It is apparent that in the circumstances, while the asset was key to the purpose of the company, that purpose was almost achieved and there were adequate funds in the interim to avoid insolvency.

108 *Taylor v Carroll*[131] was a case involving a claim of unfair preferences against a company that traded as a tile merchant. A key issue was whether it was correct to consider sale of the company's building as an asset realisable in a relatively short time. Thomas J (with whom Derrington and Moynihan JJ agreed) noted that this came down to 'question of fact involving questions of circumstance and degree'.[132] In the circumstances at hand, a decision had been made to sell the property and use the money to enhance the trading capital of the company, and there was evidence that prior to entering receivership the property had been advertised and there were two prospective purchasers. The company could also borrow upon its own security. As such, the picture was said to be one of 'a company close to insolvency but with sufficient assets to remain solvent, currently involved in the process of selling a major asset the realisation of which would restore a proper balance to its trading liquidity'.[133]

109 Arguably, *Jingellic* also provides an example of circumstances in which a key asset of a company was considered to be realisable, albeit in the context of a summons for winding up. There, the company was presumably in the business of oil exploration and production. The Supreme Court of South Australia accepted a submission by the company that it could have drawn upon funds from sale of its three major assets, which were interests in oil fields. Evidence of valuations and potential buyers was before the court, and in the context of a

130 (1982) 7 ACLR 212.
131 (1991) 6 ACSR 255.
132 Ibid 260.
133 Ibid 262.

liability of approximately $5 million disputed on the grounds of fraud, the total value of the assets was around $27.5 million.

110 Second, perhaps overlapping with the temporal limit, courts have considered how 'saleable' the property is, in the sense of whether there are prospective buyers and previous attempts to sell the asset. In *Re Ashington* (unfair preferences and uncommercial transaction) it was noted that the company had had difficulty selling the properties previously, in *Taylor v Carroll* (unfair preference) there were two prospective buyers, in *Re Northridge Properties Ltd* (unfair preference) there were difficulties selling the properties previously, in *Re Adnot Pty Ltd* (winding up) there was an identified buyer, and in *Jingellic* (winding up) there had been recent sale interests of other companies.

111 It is of note that courts have discussed any steps that the party has taken, or lack thereof, toward realising the asset. In *Re Northridge Properties Ltd*, for example, after referring to *Sandell v Porter* and *Rees v Bank of NSW*, Richardson J reasoned:

> It seems to me to follow, and as a prudent commercial consideration, that the possibility of converting a non-cash asset into a cash asset should not be taken into account for the purpose of assessing solvency unless realisation of the asset in that way was in contemplation by the debtor at the time.[134]

112 His Honour later went on to note that the test of insolvency is an objective one, such that presumably the reference to 'in contemplation by the debtor' would rely upon objective evidence. In the circumstances, even though a director of the company had stressed the need to sell properties, they were not considered to be convertible to cash in a relatively short time.

113 Similar views as to the intention of the company were expressed in *Taylor v ANZ*, albeit the approach in that case as to unsecured loans has since shifted. There, in relation to submissions that a company could have continued to trade rather than winding up its financial affairs, McGarvie J stated:

> In my opinion the answer to this is that there is no suggestion in the evidence that this company ever intended to trade on after the sale of its business and in fact it did not. I am satisfied that it never intended to do so. It would hardly be an application of commercial reality in deciding whether a company was unable to pay its debts as they became due, to have regard, not to the course the company intended to follow but to some other course which it never intended to follow and never followed.[135]

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134 (Unreported, High Court of New Zealand, Richardson J, 13 December 1977) [28].

114 In *Treloar Constructions Pty Ltd v McMillan*,[136] a claim pursuant to s 588G, the Court of Appeal of New South Wales also discussed evidence surrounding the proposed realisation of an asset. On the question of insolvency, an issue that arose on appeal were comments of the trial judge that an expert report failed to take into account the ability of the corporate group to sell a certain franchise. In response to this, the Court of Appeal stated:

> [T]here was no evidence that the sale of the franchise was ever actually contemplated. More importantly, Volkswagen Finance held security over the whole franchise business for its provision of floor plan finance. As events transpired, the receivers appointed by Volkswagen eventually sold the franchise in circumstances leaving no surplus for the McMillan Group. These factors tend against any suggestion that the Volkswagen franchise was as a matter of commercial reality, a realisable asset available to McMillan Prestige.[137]

115 Again, in *Wimpole Properties Pty Ltd v Beloti Pty Ltd (No 3)*, an application for winding up, there was no 'credible plan or reasonable prospect for asset sales'.[138]

116 In relation to evidence surrounding the possible sale of an asset, in *Hall v Poolman*, a distinction was drawn between an unwillingness to pay a creditor, and a commercial decision not to realise an asset. The notion of unwillingness relates to a recalcitrant debtor, as discussed by the full Federal Court in *Sarina v Council of the Shire of Wollondilly*:

> If a debtor is able to pay his debts but is recalcitrant, his creditors may resort to the remedies otherwise afforded by the law such as execution against his property and garnishee proceedings. The words "able to pay his debts" in s. 52 (2) of the Act do not mean "willing and able" to do so.[139]

117 That is, the focus is on the ability of a debtor to pay debts rather than any unwillingness. In *Hall v Poolman*, in response to the submission that a company had bulk wine assets such that it was solvent, Palmer J said:

> Mr Irving submits that Vineyards could have sold additional bulk wine so as to receive a total of $5M in cash in rolling amounts by 4 August 2003 … The ability of Vineyards to sell bulk wine generating that amount by August 2003 is disputed but Mr Irving's submissions are, in any event, hypotheses which are based on reports of experts obtained after the collapse of the Group.
>
> The reason that all the bulk wine was not sold to pay outstanding trade debts during the Period was given by Mr Martini, whose frank and helpful evidence I accept …

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135 *Taylor v ANZ* (1988) 13 ACLR 780, 16.
136 (2017) 318 FLR 58 ('*Treloar Constructions*').
137 Ibid 86.
138 [2012] VSC 219, [116].
139 (1980) 32 ALR 596, 599 ('*Sarina*').

> What Mr Martini was saying, in effect, was that the other asset resources which might have been available to produce cash were not so assured or readily realisable as the bulk wine: if all of the bulk wine was sold and the proceeds exhausted in payment to creditors before the companies had successfully resolved their dispute with the ATO and thereby regained their ability to refinance and raise further cash, then the companies would have had nothing at all left with which to pay creditors ... if the companies had sold all the bulk wine to pay outstanding debts, they would have run out of cash more quickly. They were therefore selling as much as was needed to pay 'essential creditors' and deferring payment to other creditors more and more.
>
> *This strategy did not demonstrate unwillingness to use an asset to pay creditors, in the sense discussed in Re Sarina: rather, it demonstrated an inability to pay creditors if the companies were to avoid 'burning all their bridges behind them'* by exhausting their most readily available resource when the ability to realise other resources was so uncertain.
>
> …
>
> Mr Martini gave a second reason for not selling all bulk wine as soon as possible. Mr Irving wished to avoid selling large quantities of bulk wine quickly, resulting in sales at below book value…
>
> In any event, Mr Hall, the Liquidator, *had doubts about whether a quick sale of virtually all of the bulk wine stocks was commercially realistic if the companies were to have any future as a going concern* … It seems to me that these considerations also could lie behind the Directors' decision not to sell all bulk wine within the Period. Doing so could have spelt the end of the companies.[140]

118 A similar point was discussed in *Smith v Boné*,[141] where the submission that the company was 'unwilling' rather than 'unable' to pay a certain debt was rejected in part because the director said it was 'a question of trying to pay everybody as much as possible from the funds that [were] available'.[142]

119 In *Hall v Poolman*, Palmer J expressly considered the context of a holding company and a subsidiary, and the ability of assets of the subsidiary to assist the holding company as follows:

> It is trite that the test of solvency of a company under CA s.95A is, first and last, a question of fact and that the Court approaches that question as a matter of commercial reality. If one member of a group of companies has, as a matter of commercial reality, ready recourse to the assets of another member of the group for payment of the first company's debts as they fall due, and that recourse will not result in the insolvency of the second company or in merely delaying the insolvency of the first, then the Court may have regard to that fact in assessing whether the first company is able to pay its debts as they fall due: *Lewis v Doran* (2004) 50 ACSR 175 at [116].
>
> It is beyond question in the present case that whatever cash and asset resources were available to Wines were regarded by the Boards of Wines and Vineyards as available

140 *Hall v Poolman* (2007) 215 FLR 243, 286–7 [189]–[195] (emphasis added).
141 [2015] FCA 319.
142 Ibid [342].

> to Vineyards for the payment of its debts, and vice versa. Even Mr Irving, in his submissions, takes the same approach. In Exhibit 2D1, which are hypothetical worked examples put forward by Mr Irving in an endeavour to show that Wines and Vineyards had sufficient asset resources to meet their respective liabilities as they fell due, assets such as the Quandong property, bulk wine sales and debt finance are treated as producing cash for both companies, regardless of which company actually owned the particular asset.
>
> If commercial reality requires the Court, in assessing the solvency of company A in a group, to have regard to the assets of assets in company B in the group, commercial reality will also require the Court to look at the liabilities of company B. Company B's liabilities may be such that it cannot use its assets to assist company A without becoming insolvent itself. In such a case, company B's assets cannot be regarded as available to pay company A's debts: the law does not condone robbing Peter to pay Paul.[143]

120 Courts have had regard to what happened to the asset in the circumstances. That is, in *Treloar Constructions*,[144] *McLellan v Carroll*,[145] and *Taylor v ANZ*,[146] for example, reference was made to whether sale of the asset eventuated and for what price. While this accords with the comments of Palmer J in *Lewis v Doran* as to assessing insolvency retrospectively,[147] in the appeal of that case Giles JA stated:

> Section 95A speaks of objective ability to pay debts as and when they become due and payable, but ability must be determined in the circumstances as they were known or ought to have been known at the relevant time, *without intrusion of hindsight.* There must of course be 'consideration … given to the immediate future' … , and how far into the future will depend on the circumstances including the nature of the company's business and, if it is known, of the future liabilities. Unexpected later discovery of a liability, or later quantification of a liability at an unexpected level, may be excluded from consideration if the liability was properly unknown or seen in lesser amount at the relevant time.[148]

121 As such, it appears that whether consideration can be afforded to how the property in question was dealt with in the circumstances may be limited.

122 It is clear that the analysis as to whether an asset was realisable at the relevant time turns upon the financial position of the company as a whole and the commercial realities at hand. It is not a 'mechanical'[149] process, limited to the identification of an asset that hypothetically could have been sold within a defined time. Rather, consideration encompasses the financial

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143 *Hall v Poolman* (2007) 215 FLR 243, [64]–[66].
144 (2017) 318 FLR 58, 86 [144].
145 (2009) 76 ACSR 67, 95 [132].
146 (1988) 13 ACLR 780, 786.
147 *Lewis v Doran* (2004) 50 ACSR 175, 198–9 [107]–[113]. See also the comments of White J in *New Cap Reinsurance Corp Ltd (in liq) v Grant* [2008] NSWSC 1015, [47]–[52] ('*New Cap*').
148 *Lewis v Doran* (2005) 219 ALR 555, 578 [103].
149 *Eykamp v Deputy Commissioner of Taxation* [2010] FCA 797, [5].

position of the company, including the nature and size of the debts, the nature of the asset in question, particularly whether it is key to ongoing business or income producing, the timeframe in which the asset may be realised, whether realisation was contemplated in the commercial context, whether the asset was in a position as to 'title and otherwise' that it could have be realised, and in a limited sense, what then occurred in relation to that asset as events unfolded.

Consideration

The following factors are relevant in resolving the issue of whether the tenements were realisable (through Legend's shareholding in Paradise):

The business and circumstances of Legend

(xxvii) Legend was incorporated in 2001 in Delaware. In 2004, Legend's plan of operations was to engage in mineral exploration activities, and it acquired diamond exploration tenements. In 2004 Legend entered into an agreement with AXIS Consultants to provide geological, management and administration services.[150] In 2007 Legend acquired phosphate tenements and commenced exploratory activities on them. According to Snowden Mining Industry Consultants, 'Legend's original concept (circa 2008) was to mine and beneficiate rock phosphate at the Paradise Project Site'.[151] In 2009 Legend acquired a controlling interest in MED. The company's 2013 Annual Report, states that between July 2006 and December 2013, Legend spent $171,082,000 on exploration and pre-development activities.[152]

(xxviii) In the ch 11 document signed by Mr Gutnick, the description of the debtor's business is 'Development of Phosphate Operation'.[153]

(xxix) Legend identified that a dedicated Australian company wholly focused on phosphate was best placed to bring the project into production.[154] In 2012 Legend restructured and transferred all of its phosphate assets to Paradise as a

150 Annual Report of Legend filed with the SEC, Court Book 2, 0410.31.
151 Valuation from Snowden Mining Industry Consultants, Court Book 5, 2308.18 ('Snowden Report').
152 Annual Report of Legend filed with the SEC, Court Book 2, 0410.30.
153 Official Form 201: Voluntary Petition for Non-Individuals Filing for Bankruptcy, Court Book 4, 1464.
154 Annual Report of Legend filed with the SEC, Court Book 2, 0410.30.

wholly owned subsidiary. Funding was through a $10 million convertible note facility into Paradise through Acorn, which was intended to convert into equity in the subsidiary upon a successful IPO. An IPO did not progress and in early in 2013 Legend undertook capital raising ($7.5 million) and sold its interest in MED ($12,740,000) to repay the convertible note facility.[155] Paradise ultimately paid out Acorn $16.929 million, with funds loaned from Legend.

(xxx) Paradise's independent audit of December 2012 notes that Paradise had incurred a loss of $14,037,575, had a net cash outflow of $5,306,666 and negative working capital of $15,973,568. The ability of Paradise to continue as a going concern was said to rely on the support of Legend, or to raise further capital. Additionally, the report noted a $1.356 million loan to Legend associated with pre-transaction costs, and repayments to Acorn of $16.9 million with funds provided by Legend.[156]

(xxxi) In both the 2012 and 2013 reports of independent registered public accountants, questions were raised about Legend's ability to continue as a going concern.[157] The independent registered public accounting reports note that Legend's assets described as 'mineral rights' went from $15.49 million in 2011, to $14.1 million in 2012, to nil in 2013.

(xxxii) In 2013, Legend's strategy was primarily focused on the commencement of mining, beneficiation and processing of its 100 per cent owned (via Paradise) phosphate mineralisation. It had a 'phased implementation plan to become a leading supplier of phosphate fertilisers'.[158]

(xxxiii) Paradise then remained dormant and Legend's cash flow remained limited.

(xxxiv) Mr Feldman described the industry as follows:

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155 Ibid 0410.31.
156 Bundle of Audited Financial Accounts for Paradise, Court Book 1, 0305.
157 Annual Report of Legend filed with the SEC, Court Book 2, 0410.37.
158 Ibid 0410.7.

> Yes?---And you know, the mining business is a very high risk, high reward business. So, you enter into - that's why companies are created and people invest in specific companies. If it works, you progress it. If it doesn't work, you close it down.[159]

(xxxv) It perhaps would not be unusual in the industry for companies to go through periods of illiquidity, in the first stages of attempting to generate investment and get the mine to production (i.e. similar to the periods between boat sales in *International Cat*).

(xxxvi) The arbitral award went against Legend on 7 May 2015. In such a context, Mr Feldman described Legend's circumstances as follows:

> On the equity side at the time Legend was worth on the stock market a couple of million dollars. It was worthless at the time because it had the IFFCO debt against it out in the marketplace. So, clearly the market did not value Legend after the debt at very much at all. He could not therefore raise funds from the market…[160]

(xxxvii) Substantial capital was required to bring the Paradise Project to the stage of producing and selling phosphate.[161] A presentation sent from Mr Michael of AXIS Consultants to Mr Gutnick and forwarded to Mr Feldman in early November 2015, suggested that for the Paradise North Project, US$23.8–64 million investment was required for the project to reach production, and for Paradise South, US$204–343 million.[162] Mr Gutnick suggested that it would take Paradise two to three years to reach production and Mr Michael's presentation suggested 18 months to two years, although Mr Feldman gave evidence that it may be as quick as six months once the funding was in place.[163]

The nature and the size of the debts

(i) The IFFCO debt was of a significant size and became due and payable at least from six months prior to November 2015. In accordance with the arbitral award on 7 May 2015, it was US$12.35 million plus interest from 7 August

159 Transcript, 343.
160 Ibid 276–7.
161 Ibid 264.
162 Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 0599, 0604.
163 Transcript, 264–5.

2008, and costs. This gave rise to a total debt of $22,435,612 plus costs. It is identified in the other evidence as follows:

- Balance Sheet (30 September 2015): $25,203,309.
- Mr Gutnick signed RATA (2 June 2016): $25,027,207.
- Mr Gutnick filing in ch 11 (8 May 2016): US$12,350,000.[164]
- Mr Gutnick filing in Delaware (23 May 2016): US$12,350,000.[165]

(ii) Other liabilities existed, as evidenced by: the list of aged creditors from 16 December 2015, including those over 120 days; the email of Mr Lee regarding a specific creditor stating that 'if we are lucky' we may get another letter of warning; the threatened claim in Queensland by the body corporate.

The nature of the asset

(i) Generally, the assets of Legend appear to be comprised primarily of the shares in Paradise (although these are subject to Paradise's liabilities), the loan to Paradise, and perhaps $3.2—3.7 million of additional assets. The latter is identified as follows:

- Balance Sheet of 30 September 2015: $663,028 current, $3.79 million non-current, including 'development expenditure'. Of note, the same figure is listed on Paradise's Balance Sheet as 'capitalised development expenditure'.
- Mr Gutnick filing in Delaware (23 May 2016): other assets (US$3,251,703), including loans to MED and AXIS Consultants.
- RATA signed by Mr Gutnick (2 June 2016): the loans to MED and AXIS Consultants were noted as $436,644 and $3,527,086 respectively.

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164 Official Form 201: Voluntary Petition for Non-Individuals Filing for Bankruptcy, Court Book 4, 1472.

165 Official Form 206Sum: Summary of Assets and Liabilities for Non-Individuals in Chapter 11 Proceeding, Court Book 5, 1727.

(ii) The tenements (held through Paradise) formed the basis of Legend's business model/purpose.

(iii) The value of the tenements in November 2015 is uncertain. The plaintiffs' expert identified a Fair Market Value range of $17 million and $25 million.[166] However, it appears that the effective date of that valuation was said to be 30 November 2016, and the report observes that the fair market valuation is 'time and circumstance specific'.[167] In this regard, the rock phosphate price showed small variations between 2015 and 2016.

(iv) Although the defendants sought to question and undermine the market value identified in the Snowden Report,[168] in my opinion, they had an evidentiary onus in this regard.[169] The factors that counsel for the defendant pointed to, such as the qualifications of Mr Peters, do not appear sufficient,[170] as explanations were provided in the report as to the VALMIN Code, technical value versus market value, etc.

(v) Other values identified in the evidence:

- The Dunlop valuation of 30 May 2016 of Paradise's mineral tenements, identifying a preferred market value of $3.2 million.[171] Mr Dunlop, however, was only provided with limited documents when drafting his report.[172] In an email of 22 May 2016, Mr Feldman also appeared to emphasise the negative aspects of the tenements.[173]

- In the RATA of Legend signed by Mr Gutnick (2 June 2016), the asset, 'Paradise Phosphate Ltd', was listed as having a netbook value of $83,722,002 and a realisable value of $10,000,000.[174]

166 Snowden Report, 2308.5.
167 Ibid 2308.35.
168 Transcript, 401.
169 See discussion in *Treloar Constructions* (2017) 318 FLR 58, 86 [141]–[144].
170 See plaintiffs' submissions at Transcript, 457.
171 Expert Valuation Report Prepared by John Dunlop, Court Book 5, 1901.
172 As identified in the report, the 2012 Prospectus lodged with ASIC and a feasibility study from 2011. In contrast, Mr Peters appeared to have 32 documents available to him.
173 Email from John Dunlop to Sholom Feldman, Court Book 4, 1638.

Further, the same RATA identifies assets in the form of loans, to MED ($436,644), AXIS Consultants ($3,527,086) and Paradise ($18,219,519), with a realisable value of $22,183,249. This suggests that Mr Gutnick perhaps considered the shares being worth $10,000,000 and the tenements being worth around $28,219,519. That is, the biggest liability of Paradise was the loan from Legend, the chief asset was the tenements, if the shares were viewed as being worth $10,000,000 realisable, then perhaps the tenements were viewed as: the loan plus the realised value on the shares (ie share value = assets – liabilities, therefore, assets = share value + liabilities).

- Mr Feldman gave evidence that he believed the value of the undeveloped tenements in November 2015 to have been in the range of 'tens of millions',[175] and similarly in April 2016.[176] He conceded, however, that leading up to the Share Sale Agreement the value was from $10–20 million:

> You've accepted that if the valuation was too high, you wanted an exit route. I'm trying to put the figure on what you thought would be too high? And I'm suggesting to you that it was put- you put it at 20 million? Do you agree with that or not?-- I agree that may have been a price that we may not have wanted to pay –
>
> ….
>
> do you accept that in this period leading up to the share sale agreement, your personal view was that the tenements would be worth $10m - $20m for a cash sale?---I believe that was a likely valuation or possible valuation.[177]

(vi) The Balance Sheet of Paradise dated 30 September 2015 listed total assets of $3,068,733, primarily comprised of 'capitalised development expenditure'.

Whether the asset was in a realisable form

(i) There is no suggestion in the evidence or submissions that prior to entry into

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174 Report as to Affairs of Legend, Court Book 5, 1978.
175 Transcript, 267.
176 Ibid 268.
177 Ibid 349, 400.

the Bond Deed and General Security Deed the tenements were subject to restrictions/other interests such as a mortgage or charge. While Acorn initially had security over the tenements, the Acorn loan was repaid in 2013.

(ii) After entry, cl 3 of the General Security Deed restricted the ability of the Grantor to deal in certain ways with the 'Collateral', without the prior written consent of QPPL. 'Collateral' is defined as the 'property subject to the security interest'. Clause 2.1 granted a security interest over the grantor's assets, all Specifically Identified Property, and anything which the Grantor had the right to grant a security interest over. 'Restricted asset' includes 'any legal or equitable interest … in any… mining tenement'. Clause 3.3 allows the Grantor to dispose of or deal with 'any Collateral which is not a Restricted Asset'. Under cl 5.1 as to representations and warranties, sub-cl (f) refers to sch 3 detailing all Collateral with a combined value of over $50,000 in relation to which the security interest may be perfected by control other than Marketable Securities issued by the Grantor. Schedule 3 lists the entire share capital of Paradise and Exploration and Mining Tenement Holdings in Queensland. 'The Grantor' as a party is defined as the parties listed in sch 1 of the deed, which lists Legend and Paradise. As such, it appears that upon entry into the General Security Deed certain restrictions applied to both Legend and Paradise in dealing with the tenements.

The timeframe to realise the asset

(i) The evidence is that of Mr Shepherd (three to six months), and a comment of Mr Feldman that he was aware that realisation 'would take some time'.[178]

Whether realisation of the asset was contemplated/open in the commercial context

(i) In November 2015, Legend had failed to secure the level of investment necessary to develop the Paradise Project and Mr Gutnick stated '[w]e need to move on Legend ASAP because we need the funds and don't want to go elsewhere'.[179] During cross examination, Mr Feldman agreed with counsel for

178 Transcript, 306.
179 Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 0669.

the plaintiff's proposition that Legend's state of desperation would have been reaffirmed by Mr Gutnick wanting the first $100,000 even before the term sheet had been signed.[180]

(ii) Mr Feldman described the position of Legend as follows:

> On the equity side at the time Legend was worth on the stock market a couple of million dollars. It was worthless at the time because it had the IFFCO debt against it out in the marketplace. So, clearly the market did not value Legend after the debt at very much at all. He could not therefore raise funds from the market.[181]

(iii) The amendment to the draft terms sheet sent between Mr Lee and Mr Gutnick stated the application of funds as:

> The proceeds from the subscription of the Convertible Bonds will be used by the issuer for defending the current court action against Legend and any excess funds towards general working capital purposes.[182]

This was later amended at Mr Lee's suggestion,[183] however the draft suggests that the primary role of the additional finance was to provide finance to cover legal costs associated with challenging the debt. The picture is one of a company with limited cash flow seeking to get rid of its biggest debt, while at the same time having some difficulty in paying small creditors.

(iv) Mr Feldman suggested that Mr Gutnick was contemplating realisation of the assets if the arbitral award was successfully registered, also indicating that Mr Gutnick did not believe the debt was payable until registration. The email of Mr Feldman dated 23 November 2015 suggested that if the IFFCO debt was 'enforced as payable … at that point [the asset] be put up to tender to pay the debt'.[184] The evidence surrounding Mr Lee and Mr Gutnick removing the solvency warranty from the draft Bond Deed and General Security Deed, and Mr Gutnick's email stating 'the problem is only the IFFCO debt',[185] suggests however, that Mr Gutnick was at least concerned as to the impact of the debt on solvency.

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180 Transcript, 298.
181 Ibid 276–7.
182 Email from Joseph Gutnick to Sholom Feldman, Court Book 3, 0671.
183 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 0765.
184 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1163.
185 Email from Joseph Gutnick to Sholom Feldman, Court Book 3, 1161.

(v) In closing submissions, Mr Glick stated that realising the asset was not contemplated in November 2015 because 'the debts weren't current'.[186]

(vi) The existence of the Legend Shareholders Deed, and the option for Zalg Exploration Pty Ltd ('Zalg') to purchase some of the convertible notes or shares in Legend from QPPL at a later date, goes against the suggestion that Mr Gutnick ever seriously contemplated realising the tenements.

(vii) Ultimately, if the value of the tenements had been realised then this would have been selling the key asset of Legend, fundamental to its business, such that its ability to continue and generate any income in the future would be significantly compromised. Unless Mr Gutnick was looking to wind up/shelve Legend, this would not appear to be a commercially feasible option. In this sense it may be that Mr Gutnick was not simply 'unwilling' to pay the debt in the *Sarina* meaning, particularly in the context of the aged creditors list suggesting that other debts were going unpaid.

History of potential sale of the asset or possible purchasers

(i) There is no history regarding previous attempts to sell the asset. The only previous transfer of note is the transfer from Legend to Paradise, according to Mr Feldman as a 'book transfer' for $2.7 million.[187] More broadly, it is clear that the project itself failed to stimulate any meaningful investment.

(ii) There is no evidence of potential purchasers or how saleable the asset was at the relevant time. There is no evidence, for example, that QPPL ever offered to buy the tenements, rather than potentially obtaining an interest through the Convertible Bond and General Security Deed.

What actually happened to the asset perhaps can reaffirm other factors

(i) In the event, the shares in Paradise were sold to QPPL for $1 subject to the valuation of Dunlop. The letter of Marcel Equity identifies that nothing was considered payable beyond this figure. This is consistent with the valuation of

186 Transcript, 403.
187 Email from Sholom Feldman to John Dunlop, Court Book 4, 1531.

Dunlop ($3.2 million) and liabilities of Paradise (to Legend alone, $18,053,443),[188] rendering the shares effectively worthless.

123 Overall, on the following factors, I conclude that the tenements should not be considered a realisable asset for the purposes of the assessment of solvency under s 95A:

- The relevant timeframe has been described as 'relatively short', such that the indebtedness can be met 'as the claims mature'. In *Jingellic*, three months has fallen within the phrase 'relatively short'. Again, in *Hall v Poolman*, Palmer J discussed generally how 90 days may be considered appropriate but five months would not. Here, while three months may be reasonable, six months does not appear consistent with meeting claims 'as they mature' and 'relatively short'. Rather, the circumstances are tending toward IFFCO having to wait for the debtor to pay them in 'due course', which is contrary to authority. To allow realisation after six months begins to undermine the cash flow test said to form the basis of s 95A. Further, Palmer J also discussed the rationale behind the realisation — creditors may prefer to wait for realisation rather than forcing the company into insolvency, here, where the realisation of the asset in question effectively would lead to the failure of both Paradise and Legend the difference between the two options appears negligible.
- If Legend were to realise the mining tenement it would have been selling its chief asset and the basis for its existence. That asset was necessary to the continuation of the business. As Bowen CJ said in *Timbatec:*

> One of the difficulties of realizing assets is that it may involve the company in terminating that particular part of the business … the test as regards ready realization of cash resources has regard … to the debtor who is conducting a business, and is applying his cash resources, and selling and mortgaging assets readily available to inflate these resources, while continuing his business. I do not take it to apply to a situation where the business is brought to a full stop.[189]

- This approach has been applied in the context of property development,[190] which in some ways bears similarities with mining development projects (ie limited cash flow and ongoing investment required in order to eventually realise a profit). The current circumstances are distinguishable from cases where a key asset has been considered realisable:
  - In *Re Adnot,* a winding up application in the context of a

188 See Statement of Financial Position for Paradise Phosphate Ltd, Court Book 2, 0481.
189 *Timbatec* (1974) 24 FLR 30, 36–7.
190 *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 48 NSWLR 661.

property development, it was noted that the company was not 'trading in the sense of turning over stock', and the chief asset was considered to be realisable as the purpose of the company (the development) was almost achieved. Here, Paradise was at least 18 months to two years of production and this required substantial investment.

– In *Taylor v Carroll*, a decision had been made to sell the property and there were two potential buyers, such that the company could restore proper balance to its liquidity.

– In *Jingellic*, a winding up application, the size of the debt was approximately $5 million, there was evidence that the assets were saleable, the company's three assets were worth approximately $6–7 million, $15 million and $1.5 million respectively, such that the realisation would not end the business.

- There were no other buyers identified in the circumstances. That is, other than the market value assessments, it is uncertain how saleable the asset was in the circumstances.
- Following the approach of Palmer J in *Hall v Poolman*, it may be that if the assets of Paradise were realised and Paradise was wound up, it is a case of 'robbing Peter to pay Paul'. While Legend was owed a substantial sum by Paradise, and may have simply called on the loan, that sum was not enough to pay the IFFCO debt.
- As a commercial reality, the sale of the asset did not appear to be genuinely considered. Mr Feldman did suggest that sale of the asset was a possibility if the Supreme Court defence failed; however, this appears inconsistent with the bulk of evidence pointing toward taking the asset out of IFFCO and Kissan's reach.

Were the assets readily realisable after entering into the Bond Deed?

124 Even if, contrary to the above discussion, the tenements could have been considered realisable, prior to entry into General Security Deed, upon entry into that deed by both Paradise and Legend, viewing the tenements as realisable, in the sense that they were 'in a position as to title and otherwise' to be sold, appears commercially unrealistic.

125 As noted above, the terms of the General Security Deed appeared to limit Paradise from dealing with the tenements without the consent of QPPL. That is, without consent the mining tenements themselves could not be sold, and Legend could not deal with the shares in

Paradise.

126 To a certain extent, Mr Feldman acknowledged that there were limitations on the ability to raise capital:

(a) Mr Feldman appears to acknowledge that the default hindered at least Paradise's ability to raise further capital from QPPL.[191]

(b) Mr Feldman admitted that to fund repayment back to QPL upon default, Legend would have to get the agreement of QPPL. On this point Mr Feldman said that he would act reasonably:

> And Mr Gutnick didn't, I suggest, tell you anything that would lead you to believe that Legend would be able to fund such a purchase back?---I didn't need Gutnick's, um, opinion on that. My opinion was that they could and that's why they lent the money... They had plenty of assets to back it.
>
> They couldn't do it without your agreement, though, could they, as the deal was ultimately signed?---Yeah, but I would act reasonably, and that's my - that is my obligation as you mentioned before, as a direct, and I'm very familiar with them.
>
> …
>
> When acting for Legend or when acting for QPL?---For both, and that's my fiduciary duties.
>
> Right. So you'd reconcile that conflict somehow?---If there was a reasonable way, then of course QPL would act reasonably as any normal business transaction or any lender would do.[192]

As to whether Mr Gutnick could actually find the funds, Mr Feldman appeared to suggest that it turned on Mr Gutnick's ability to secure investment:

> But your assumption in going into this deal, was that if there was an event of default Legend would not be in a position to pay out the bonds?
>
> ---Well, Gutnick always had it - the directors of Legend always had available to them to immediately seek funds elsewhere to pay out our security. So, if they would have paid it out in full, we wouldn't have been able to stop them from doing that.
>
> HIS HONOUR: Hang on. You already knew that he couldn't get it elsewhere?---You don't know what's going to be in the future, though. At that time I knew.
>
> Yes?---But if I would have spent a couple of months developing the project

191 Affidavit of Sholom Dovber Feldman, affirmed 17 January 2016, [68] ('First Feldman affidavit').
192 Transcript, 285–6.

> and if, brought in some other investors by then, it could very well be that he'd be able to get it elsewhere.[193]

(c) He then gave evidence that once the QPPL debt was repaid, Legend could then raise capital:

> But they would need QPPL's agreement in order to raise funds, in order to pay out QPPL?---Not necessarily, no. I don't believe that is how it operates. I'd have to look again. But I believe that if they would have, like any other security, I believe the security would have operated, but had they paid out our demand in full and not left any, then they could have done so. Like any secured creditor.
>
> So you're saying that you were not mindful at this time that the terms of the bond deed explicitly prohibited Legend from raising further finance without QPPL's agreement? ---While the money is outstanding. So, if they still owe us money, we don't let them go and raise money elsewhere without paying us out. But if they would raise enough money to pay out our security, then they can do whatever they like.[194]

127 The suggestion that Legend could have realised the asset (the tenements) to pay the IFFCO debt after entering the General Security Deed appears commercially unrealistic as:

(a) in order to be able to deal with the asset, the QPPL loan needed to be discharged, or QPPL needed to agree to the sale of the tenements;

(b) at the time Legend appeared to have no other source of funds, so it is unclear how it could have discharged the loan. This is further compounded by the rate at which interest and penalties accrued upon default;

(c) given the focus of Mr Feldman on 'protecting the asset' from IFFCO/Kissan, and his business model, it is commercially unrealistic to suggest that he would have agreed to realisation of the value of the tenements by Legend in order to repay the QPPL loan rather than acquiring control of the tenements through the Share Sale Agreement; and

(d) Mr Feldman suggested that 'I could have spent a couple of months developing the project' and that afterwards Mr Gutnick may have been able to get funds elsewhere and pay out the bonds.[195] I reject that proposition. My impression from the evidence is that he was developing the project with the intention of extracting it from Legend

193 Ibid 307.
194 Ibid 308.
195 Ibid 307.

and investing through QPPL, not to keep Legend afloat. Additionally, in other evidence he was quite frank about Legend's inability to raise finance.

(d) Can the IFFCO debt be considered prior to its Australian registration?

128 The plaintiffs submitted that the debt was due to IFFCO regardless of the enforcement proceedings.[196] The distinction between enforcement proceedings and proceedings under pt 5.7B of *the Act* was emphasised, and it was asserted that the IFFCO debt was based upon a foreign judgment and it did not preclude it from being a relevant debt.[197] Here, reliance was placed upon *Standard Commodities Pty Ltd v Société Socinter Department Centragel*[198] and *RDCW Diamonds Pty Ltd v Da Gloria*,[199] and the language of pt 5.7 of *the Act*.

129 *Standard Commodities* involved an application to set aside a statutory demand under s 459G of *the Act* brought upon multiple grounds, including one relating to deficiencies in the affidavit of service, and another based upon the fact that the demand did not relate to a debt payable in Australia. Barrett J determined that the demand should be set aside based upon the deficiencies in the affidavit, however on the foreign debt issue his Honour asserted that '[n]othing in Pt 5.4 of the Act confines the operation of that part to debts payable in Australia'.[200]

130 *RDCW* was a case in which the applicant sought to enforce a judgment debt that it had been awarded in a South African court. As South Africa was not a participating state for the purposes of the *Foreign Judgments Act 1991* (Cth) ('*Foreign Judgments Act*'), the applicant was seeking enforcement under the common law. Instead of commencing a new suit, the applicant chose to bring an action for a liquidated sum relying upon the foreign judgment. On the evidence, the applicant was entitled to judgment on summons, and there was no material to suggest that the default judgment did not create a due and payable debt.[201]

131 As to pt 5.7 of *the Act*, the plaintiffs emphasised that s 585(c) lists an unsatisfied execution or process of a judgment or order obtained in a foreign court as a circumstance in which a pt 5.7

196 Ibid 48.
197 Ibid 450.
198 (2005) 54 ACSR 489 ('*Standard Commodities*').
199 [2006] NSWSC 450 ('*RDCW*').
200 *Standard Commodities* (2005) 54 ACSR 489, 494 [17].
201 *RDCW* [2006] NSWSC 450, [33].

body will be taken to be unable to pay its debts.

132 The plaintiffs also submitted that in accordance with *Duncan v Commissioner of Taxation*,[202] 'the solvency of companies is assessed with something of a forward looking view as to what's coming'.[203] In that case, Young J cited with approval, the approach of Sundberg J in *Tru Floor Service Pty Ltd v Jenkins (No 2)*,[204] that 'it must also be borne in mind that the plain words of s 95A ("as and when they become due") require anticipated debts to be taken, to some extent, into account in determining insolvency'.[205]

133 In oral submissions, the defendants asserted that the IFFCO debt was not a debt for the purposes of s 95A as prior to registration it was not enforceable. Reliance was placed upon *Quarter Enterprises Pty Ltd v Allardyce Lumber Co Ltd*[206] and analogies with foreign tax debts and statute-barred debts, which are unenforceable. The submissions were consistent with the evidence of Mr Feldman:

> 'Joseph Gutnick presented - represented to me that the award in Singapore was unfair, illegal, would never have stood up in Australia. That was what he represented to me. And therefore it would never be payable in Australia. If they trialled their action in Australia, they would never win that. And therefore, he dismissed the validity of that debt. And I took that on face value and I said, "Let's see what the courts actually decide in Australia about that'.[207]
>
> …
>
> Yes, but you're talking there about enforcement?---I'm talking about whether it was - whether that would be a debt that would be recognised in Australia under Australian law.[208]

134 In *Quarter Enterprises*, the applicant sought to have a statutory demand set aside under s 459G. The statutory demand was for a sum owing under a judgment of the High Court of the Solomon Islands that had been registered in the Supreme Court of New South Wales under the *Foreign Judgments Act*. An application had been brought to set aside that registration, which was heard but yet to be handed down. A further application had been brought to reopen that case, and the parties sought to adjourn the s 459G proceeding. White J refused

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202 (2006) 58 ACSR 555.
203 Transcript, 452.
204 (2006) 232 ALR 532, 543–4 [44] ('*Tru Floor*').
205 *Duncan v Commissioner of Taxation* (2006) 58 ACSR 555, 565.
206 [2011] NSWSC 1031 ('*Quarter Enterprises*').
207 Transcript, 279.
208 Transcript, 302.

the adjournment. Instead, his Honour viewed the circumstances as similar to cases where a statutory demand is served based upon a judgement debt and there was a pending appeal. In such cases, the debt was viewed as existing by reason of the judgment, whether the judgment was entered in error or not. His Honour reasoned that where there were arguable issues to set the registration aside, the Court's discretion to set aside the statutory demand may be enlivened.

135 In the circumstances, White J determined that the matter was complex and there were arguable issues for setting aside the registration of the judgment, including claims that the judgment in the Solomon Island was obtained by fraud. On the condition that the plaintiff paid money into Court within 28 days, the statutory demand was to be set aside. It was envisaged that if the registration of the judgement was set aside in the interim, that would provide a basis for the statutory demand to also be set aside. His Honour noted the issue of whether an unregistered foreign judgment could form the basis of a statutory demand, citing the comments of Barrett J in *Standard Commodities*, before commenting:

> However, depending on the grounds upon which registration of the judgment was set aside, there could be a real question whether or not there was a debt a court of this country should recognise as being due and payable.[209]

136 Beyond reliance on *Quarter Enterprises*, the defendants submitted that the current circumstances were relevantly analogous to statute-barred debts and foreign tax debts, both of which are considered unenforceable debts. Here, although the foreign debt was said to be a 'debt', it was unenforceable prior to registration such that it could not be considered a debt for the purposes of insolvency.[210] No authorities were cited for these analogies.

Applicable Law

137 Determining whether the IFFCO debt falls within the meaning of 'debt' for the purposes of s 95A is resolved by reference to the text, context and purpose of the section.[211] Section 95A provides:

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209 *Quarter Enterprises* [2011] NSWSC 1031, [24].

210 Transcript, 406–8.

211 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381; *KR v BR* [2018] VSCA 159, [51] (22 June 2018).

(1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.

(2) A person who is not solvent is insolvent

138 The word 'debt' is not specifically defined in *the Act*, and its natural and ordinary meaning has been stated as a 'liability or obligation to pay or render something'.[212] The term is to be applied in a 'practical and common sense fashion', consistent with its context and statutory purpose.[213] While these principles are derived from cases considering insolvent trading[214] and statutory demands,[215] there is nothing to suggest that 'debts' as used in s 95A should be read as anything other than its ordinary meaning.

139 Further, s 95A defines when a person is solvent or insolvent. It is contained within div 7 of pt 1.2 of *the Act*, the latter of which is titled 'Interpretation'. The provision is to guide the interpretation of 'insolvent', as that word is used in s 588FC:

588FC Insolvent transactions

A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:

(a) any of the following happens at a time when the company is insolvent:

(i) the transaction is entered into; or

(ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or

(b) the company becomes insolvent because of, or because of matters including:

(i) entering into the transaction; or

(ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

140 Section 588FC, to be read with s 588FE, falls within pt 5.7B, the scope and purposes of which have been described as including 'the avoidance of transactions by which an insolvent

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212 *Hawkins v Bank of China* (1992) 26 NSWLR 562, 572; *Treloar Constructions* (2017) 318 FLR 58, 67–8 [43]–[46]; *Meales Concrete Pumping Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2015] VSC 594, [32] ('*Meales*').

213 *Hawkins v Bank of China* (1992) 26 NSWLR 562, 572. See also *Highup Pty Ltd v Gubas* (2014) 102 ACSR 467, 478 [68] ('*Highup*'); *Pearce v Gulmohar Pty Ltd* [2017] FCA 660, [197].

214 *Hawkins v Bank of China* (1992) 26 NSWLR 562, 572. See also *Edwards v ASIC* (2009) 76 ACSR 369.

215 *Commonwealth Bank of Australia v Garuda Aviation Pty Ltd* (2013) 93 ACSR 168; *Meales* [2015] VSC 594.

company has disposed of property in circumstances that are regarded by the legislature as unfair to the general body of unsecured creditors.'[216] That is, preventing the depletion of assets of a company that is being wound up, by transactions at an 'undervalue', entered into within a certain time of winding up.[217] Such purposes would not be promoted if a narrow view of 'debts' was adopted in s 95A.[218]

141 The phrase 'as and when they become due' in s 95A is forward looking:

> In considering a company's ability to pay debts 'as they become due', it is appropriate to consider the immediate future, precisely how far into the future being a matter that depends on circumstances including the nature of the company's business and, if known, the future liabilities … So, for example, 'if it appears that the debtor will not be able to pay a debt which will certainly become due in, say, a month…by reason of an obligation already existing, and which may before that day exhaust all his available resources, how can it be said that he is able to pay his debts 'as they become due,' out of his own moneys?: *Bank of Australasia v Hall* ...[219]

142 As White J discussed in *New Cap*,[220] s 95A encompasses contingent debts:

> As s 95A refers to a person's inability to pay *all* the person's debts, there is no reason to exclude contingent or prospective debts. A contingent debt exists if there is an existing obligation out of which a liability on the part of the debtor to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen (*Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 at 459). A prospective debt is one not immediately payable but which will certainly become due in the future on a date which is presently determined or which will be determined by reference to future events (*Edwards v Attorney General* [2004] NSWCA 272; (2004) 60 NSWLR 667 at 679, [59]).[221]

143 It is unclear where the reference to 'anticipated debts' by Sundberg J in *Tru Floor*, cited with approval in *Duncan v Commissioner of Taxation*, falls within this rubric. His Honour based the reference upon the words 'as and when they become' in s 95A, without specific reference to authority. It would appear, however, on the natural meaning of the words 'anticipated debts' may be viewed as something akin to 'prospective debts' rather than 'contingent debts'.

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216 *Fortress Credit v Fletcher* (2015) 254 CLR 489, 505 [24].

217 See *Demondrille* (1997) 25 ACSR 535, 548; LexisNexis, H A J Ford, I M Ramsay and R P Austin, *Ford, Austin and Ramsay's Principles of Corporations Law*, [22.220] ('Ford, Austin and Ramsay').

218 As to reading the words of a definition into a substantive enactment to promote the purpose of that enactment, see *Kelly v R (*2004) 218 CLR 216, 253 [103]; LexisNexis, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (2014, 8th ed) [6.58].

219 *Smith v Boné* [2015] FCA 319 [27]; *Lewis v Doran* [2005] NSWCA 243, [103]. See also *Pearce v Gulmohar Pty Ltd* [2017] FCA 660, [152]; *Expo v Chant* [1979] 2 NSWLR 820, 838; *Taylor v ANZ* (1988) 13 ACLR 780, 787 ('intention for the future').

220 [2008] NSWSC 1015.

221 Ibid [75]; see also *Expo v Chant* [1979] 2 NSWLR 820.

144 In order for a debt to be recognised as contingent, an existing obligation must be identified that is capable of 'maturing' into a liability. Examples include the existing obligation of a guarantor that, depending upon the acts of the debtor,[222] may mature into a liability, or an obligation to pay costs[223] or for works on a quantum meruit basis,[224] the exact liability for which matures at a later date.

Consideration

145 In accordance with the ordinary and natural meaning of 'debt', the IFFCO debt falls within the scope of s 95A. It is an obligation of Legend to pay IFFCO. Further, as the plaintiffs submit, s 585 as to the insolvency of a pt 5.7 body contemplates executions or processes issued on judgments in foreign courts as being relevant. Part 5.7 'has effect *in addition to, and not in derogation of* ... any provisions contained in' *the Act*, and a liquidator may 'exercise any powers or do any act in the case of pt 5.7 bodies that might be exercised or done by him, her or it in the winding up on companies'.[225] While this proceeding is not an application under pt 5.7, it would perhaps be incongruous for executions on foreign judgment to be contemplated in the insolvency of a pt 5.7 body, yet pt 5.7B not encompassing foreign debts.

146 The defendants submitted that on the issue of insolvency, a foreign debt should be viewed similarly as statute-barred debts, which can exist as debts without being enforceable.[226] Specific policy considerations underpin the limitations legislation,[227] and on account of the particular text that such legislation adopts, although the remedy to claim on the debt is lost, the debt itself is not extinguished.[228] Here, the defendants have not identified any relevant policy considerations underpinning *the Act* and the construction of s 95A sought is inconsistent with the natural and ordinary meaning of the provision's text.

147 Generally, foreign tax debts are not debts that are provable in winding up as they are

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222 *Hawkins v Bank of China* (1992) 26 NSWLR 562, 572.

223 *McDonald v Deputy Commissioner of Taxation* (2005) 23 ACLC 324; *Community Development Pty Ltd v Engwirda* (1969) 120 CLR 455.

224 *Edwards v ASIC* (2009) 76 ACSR 369.

225 *The Act* s 582 (emphasis added).

226 *Hall v Hall* [2018] VSC 131; *Motor Terms Co Pty Ltd v Liberty Insurance Ltd* (1967) 116 CLR 117.

227 *Brisbane South Regional Authority v Taylor* (1996) 1286 CLR 541, 555.

228 *Australia and New Zealand Banking Group v Douglas Morris Investments Pty Ltd* [1992] 1 Qd R 478, 492–3, quoted in *Hall v Hall* [2018] VSC 131, [41]; *NetGlory Pty Ltd v Caratti* [2013] WASC 364, [296].

unenforceable.[229] The unenforceable character of the debt is founded upon the notion that courts cannot be used to collect taxes of foreign states for the benefit of the sovereigns of those states,[230] albeit the principle may have been modified somewhat by a number of treaties.[231] There is no suggestion that any similar policy considerations are relevant in the current circumstances, particularly as *the Act* provides mechanisms for the winding up of pt 5.7 bodies in Australian courts and pt 5.7 contemplates foreign judgments.

148 Moreover, foreign tax debts aside, foreign debts are enforceable in Australia through a number of mechanisms. Where a foreign judgment has been entered, both the *Foreign Judgments Act* and the common law provide such avenues. In this case, the plaintiff pursued enforcement of the foreign arbitral award through the *International Arbitration Act 1974* (Cth) ('*International Arbitration Act*'). While in *Quarter Enterprises* White J questioned whether a foreign judgment debt not yet registered under the *Foreign Judgments Act* could form the basis of a statutory demand, those comments were made in the context of allegations of fraud surrounding the foreign judgment. Fraud is also a consideration under the common law test for enforcement of foreign judgment debts, and the registration of foreign awards.[232] There is no suggestion of fraud surrounding the arbitral award in the current circumstances.

149 At least on the question of when a debt becomes due, and as the plaintiffs submitted more generally, there is a distinction between when a debt is 'due and payable' for the purposes of insolvency, and enforcement mechanisms. In *Hussain v CSR Building Products Ltd*,[233] Edelman J (as his Honour was then) summarised: 'it does not matter even if it is unlikely that a creditor will enforce its debt because the statutory test is whether the debt is due and payable'.[234]

150 The issue of an unenforceable debt was considered in *FAI Traders Insurance Co v Ferrara*.[235] There, the *Workers' Compensation Act 1926* (NSW) ('*Workers' Compensation Act*')

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229 *Re Oygevault International BV (in liq)* (1994) 14 ACSR 245.
230 *Government of India v Taylor* [1955] AC 491.
231 *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324, [25]–[27].
232 *International Arbitration Act* s 8(7A).
233 [2016] FCA 392 ('*Hussain v CSR*'); *Standard Chartered Bank of Australia Ltd v Antico (Nos 1 & 2)* (1995) 38 NSWLR 290, 331.
234 *Hussain v CSR* [2016] FCA 392, [63].
235 (1996) 41 NSWLR 91 ('*FAI Traders*').

provided that where an employer failed to pay certain premiums within one month of a notice to pay, the premium was recoverable with interest as a debt in a court of competent jurisdiction. An employer was wound up, and an insurer sought to recover substantial unpaid premiums from the directors personally under the insolvent trading provision of the *Companies (New South Wales) Code*. At first instance, the trial judge determined that the premiums never became payable, as notice had not been given in accordance with the *Workers' Compensation Act*, such that the sum did not fall within the scope of the insolvent trading claim. Upon appeal, Handley JA noted that an action for the unpaid premium under the *Workers' Compensation Act* prior to the one month notice period would fail, and that action could not be pursued after winding up of the employer. As such, the issue was 'whether a debt due, but not recoverable from the company' could be considered in relation to the phrase 'incurs a debt' in the context of insolvent trading. His Honour found in favour of the insurer:

> Legal proceedings against the company will be stayed by, or may be stayed as a result of, orders for winding up … It cannot be supposed that such procedural barriers to legal proceedings against a company would defeat the operation of the section, and [counsel] for the respondents did not contend otherwise. His submission was that procedural barriers to the recovery of the debt arising outside the Code were in a different position …
>
> This submission finds no direct support in the language of s 556 and there is no reason why a court should construe it as having that effect. The section ought to apply for debts for goods, services or loans incurred shortly before the winding up even if those debts had not been recoverable before the order was made.[236]

151 In addition to the text of the applicable provision of the *Companies (New South Wales) Code*, relevant to his Honour's finding were that the section extended to guarantees and other contingent debts, and that the condition precedent in the *Workers' Compensation Act* ceased to be directly relevant because the proceedings could no longer be commenced.[237] According to Ford, Austin and Ramsay, at least in the context of s 588G and the incurring of debts, the case supports the proposition 'that the fact a debt is not enforceable against the company does not prevent directors being liable'.[238] While the case is not directly applicable, turning upon a procedural issue in the context of winding up and an insolvent trading provision, it

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236 Ibid 96–7.
237 Ibid 97.
238 Ford, Austin and Ramsay [20.090.3].

underscores the point that the focus of consideration is upon the text of the relevant section.

152 Here, Legend had an obligation to pay IFFCO from at least 7 May 2015. That obligation was legally enforceable in Australia, and readily falls into the natural and ordinary meaning of 'debts' in s 95A. There is no reason to view the debt as akin to a foreign tax debt or a statute barred debt.

153 For completeness it is noted that even if, as the defendants contend and contrary to the analysis above, the IFFCO liability existed but was somehow not yet a debt for the purposes of s 95A, it would be considered a contingent debt. According to this alternative analysis, Legend was under an existing obligation to pay a liquidated sum. It was possible for that obligation to 'mature' into a debt for the purposes of s 95A upon registration through the *International Arbitration Act*.

(e) Should a *Jones v Dunkel* inference be drawn regarding Mr Lee's failure to give evidence?

154 On the issue of the liabilities as identified in the Balance Sheet, the plaintiffs assert that as the defendants failed to call Mr Lee, they must suffer the inference that his evidence would not have supported their submissions. Specifically:

> The Defendants have not put forward any evidence contradicting the statement of liabilities in Legend's balance sheet. This was despite having served an affidavit from the CFO, Peter Lee, the very man who would be expected to be able to tell the Court if Legend's liabilities were overstated in any way, or if Legend had any special arrangements with its creditors. Despite counsel for the Defendants having, in seeking to issue a late subpoena, described Mr Lee as a 'very important witness', they did not proceed to call him and must suffer the inference that his evidence would not have supported any submission they now make seeking to cast doubt on Legend's insolvency.[239]

Applicable Law

155 In *ASIC v Hellicar*,[240] the High Court reviewed the facts from *Jones v Dunkel* before determining that the principles that the case reflects were not applicable in the circumstances:

> Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly had been led. Principles governing the onus and standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken into account in determining whether a party has proved its case to the requisite standard. But both the

239 *Plaintiffs' Closing Submissions* [48].
240 (2012) 247 CLR 345.

circumstances in which that may be done and the way in which absence of evidence may be taken to account are confined by known and accepted principles which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence tendered by ASIC.

…

This Court's decision in *Jones v Dunkel* is a particular and vivid example of the principles that govern how the demonstration that other evidence could have been called, but was not, may be used … the Court held 'that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn where a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.'

…

This was not a case where ASIC's case depended on inference, let alone on "uncertain inferences", or where there was a question about whether "limited material is an appropriate basis on which to reach a reasonable decision". It was not a case where "the missing witness would be expected to be called by one party rather than the other" or where it was known that "his evidence would elucidate a particular matter" (emphasis added).[241]

156 Cited in supported of the last statement was *Payne v Parker*.[242] In that case Glass JA set out the following propositions:

(1) The rule is a principle of the law of evidence whereby a particular form of reasoning is authorized.

(2) The reasoning which is permissible involves the treatment of a failure to adduce evidence as a reason for increasing the weight of the proofs of the opposite party or reducing the weight of the proofs of the party in default: … The principle may be invoked for a deficiency in the evidence either of a party bearing the legal onus of proving an issue, or of a party bearing the evidentiary burden only … If the failure is of the latter kind, the direct evidence of the party with the onus of proof can be more readily accepted, and inferences in his favour may be more confidently drawn: *Jones v. Dunkel* …

…

(6) Whether the principle can or should be applied depends upon whether the conditions for its operation exist. These conditions are three in number: (a) the missing witness would be expected to be called by one party rather than the other, (b) his evidence would elucidate a particular matter, (c) his absence is unexplained.

(7) The first condition is also described as existing where it would be natural for one party to produce the witness … or the witness would be expected to be available to one party rather than the other … or where the circumstances excuse one party from calling the witness, but require the other party to call him … , or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him … or where the witness'

241 Ibid 412–13, 446.

242 (1976) 1 NSWLR 191, 200–2.

> knowledge may be regarded as the knowledge of one party rather than the other … or where his absence should be regarded as adverse to the case of one party rather than the other … It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary … If the witness is equally available to both parties, for example, a police officer, the condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so … Evidence capable of satisfying this condition has been held to exist in relation to a party's foreman … his safety officer … his accountant … his treating doctor …
>
> (8) According to Wigmore, par. 285, the second condition is fulfilled where the party or his opponent claims that the facts would thereby be elucidated. Under other formulations, the condition is made out when the witness is presumably able to put a true complexion on the facts … might have proved the contrary … would have a close knowledge of the facts … or where it appears that he had knowledge … I would think it insufficient to meet the requirements of principle that one party merely claims that the missing witness has knowledge, or that, upon the evidence, he may have knowledge. Unless, upon the evidence, the tribunal of fact is entitled to conclude that he probably would have knowledge, there would seem to be no basis for any adverse deduction from the failure to call him.
>
> (9) The third condition is satisfied if no explanation is offered for the absence of the witness, or the tribunal thinks that the explanation given is unsatisfactory. The explanation tendered may be that the witness is ill, overseas, dead or refuses to waive his privilege.

157 In *ASIC v Geary*,[243] the Court of Appeal stated that the trial judge had set out the law regarding *Jones v Dunkel* in unimpeachable terms. The trial judge referred to a number of cases, including *ASIC v Hellicar*, and the following comments of the Court of Appeal in *Chong v CC Containers Pty Ltd*:

> The rule does not enable the absence of a witness to make up any deficiency of evidence. It will not support an adverse inference unless the evidence otherwise provides a basis on which that unfavourable inference can be drawn. But where evidence has been left uncontradicted, any inference favourable to a party for which there was ground in the evidence might be more confidently drawn when a person, presumably able to put the true complexion on the facts relied on as the ground for the inference, has not been called as a witness and the evidence provides no sufficient explanation of his or her absence. The reasoning involves the treatment of the failure to adduce evidence as a reason for increasing the weight of the proofs of the opposite party or reducing the weight of the proofs of the party in default.[244]

158 The rule in *Jones v Dunkel* has been considered specifically in the context of liquidators. In *Skouloudis v Planet Enterprizes Pty Ltd*[245] for example, regarding an appeal from an unsuccessful insolvent transaction claim the sole issue in which was whether the transaction

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243 (2018) 126 ACSR 310.

244 Ibid [233], citing *Chong v CC Containers Pty Ltd* (2015) 49 VR 402, 463.

245 [2003] NSWCA 31 (‘*Skouloudis*’).

was uncommercial, Hodgson JA stated:

> There are difficulties facing a liquidator without funds and having no cooperation from the liquidated company's directors and virtually no company records. In applications such as this, a liquidator can in those circumstances rely on *Jones v Dunkel* (1959) 101 CLR 298, but nevertheless must produce some evidence from which inferences can be drawn. The case presented by the liquidator in these proceedings, it seems to me, did not provide even the limited evidence needed to base the drawing of inferences.[246]

159 These comments were cited by Gzell J in *Ziade Investments v Welcome Homes Real Estate Pty Ltd*[247] in the context of criticisms of the liquidator's report to creditors. Upon appeal, Hodgson JA referred to his earlier comments and explained:

> Of course, the extent to which *Jones v. Dunkel* can be relied on in cases brought by liquidators depends on precisely what is in issue and the position of the party against whom the case is brought. In *Skouloudis*, the asset in question was a business, and the purchaser of the business was a company associated with the wife of the principal of the company in liquidation. So on a question concerning the value of the business at the time of the disposition, the respondent to the liquidator's application was in a position to lead evidence on that issue.
>
> In the present case, the respondents were the father and mother of the principal of the company in liquidation and companies associated with them, and the father had become extensively involved in the affairs of the company at the time of the transaction; and also, it was not submitted that the son was estranged from his parents at the time of the hearing. In those circumstances, on the issue of insolvency, there was room for the application of *Jones v. Dunkel* in this case.[248]

160 The comments emphasise that while liquidators may be confronted with certain difficulties as to evidence, the principles as to the appropriate application of *Jones v Dunkel* remain. In *Ziade Investments* and *Skouloudis*, although the inference was discussed, it was not relied upon. Similarly in *Re Lawrence Waterhouse Pty Ltd (in liq); Shaw v Minsden Pty Ltd*,[249] Ward J discussed the principle, without applying it, in the context of lack of evidence from a company accountant:

> What was missing, by way of explanation of the manner in which Lawrence Waterhouse had accounted for intercompany or group expenses, was anything from the accountant himself to explain what he had done or why it had been done in that fashion.
>
> That gives rise to the question whether a *Jones v Dunkel* (1959) 101 CLR 298 inference should be drawn against the defendants in relation to the unexplained failure to call evidence from Mr Smith in relation to the manner in which the accounts

246 Ibid [25].
247 (2006) 57 ACSR 693 ('*Ziade Investments*').
248 *Welcome Homes Real Estate Pty Ltd v Ziade Investments Pty Ltd* [2007] NSWCA 167, [64], [65].
249 [2011] NSWSC 964.

> were prepared. Such an inference could only be drawn if there is a matter which calls for explanation by the defendants. The rule in such a case would permit evidence in relation to that matter to be given greater weight, and an inference or inferences to be more readily drawn, when the party who might have called evidence to the contrary has chosen not to do so. (In *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389 Handley JA and Beazley JA said; "... The rule typically applies to strengthen or weaken an inference otherwise available on the evidence for the benefit of the party not in default." (my emphasis).)[250]

161 In contrast, in *Noxequin Pty Ltd v Deputy Commissioner of Taxation*,[251] Barrett J inferred that the evidence that potentially would have been given by a sole director of a company, who was a party to the proceeding and person best placed to provide reliable information as to certain discrepancies associated with the company ledgers, would not have helped the director's case. In *Ashala Model Agency Pty Ltd (in liq) v Featherstone*,[252] Jackson J determined that the first condition of *Payne v Parker* was not satisfied in relation to a liquidator calling a former director and employee of the company.

Consideration

162 In my opinion, the defendants have not explained the absence of Mr Lee. Additionally, it would appear that Mr Lee is well-placed to elucidate the facts as to the Balance Sheet. That is, he would probably have knowledge to put a true complexion on the facts. The evidence demonstrates that when Mr Feldman queried the Balance Sheet, it was Mr Lee who provided a number of explanations.

163 Mr Lee would be expected to be called by the defendants. Mr Lee was the Chief Financial Officer and Secretary at the relevant times and was involved in reviewing the draft documents. There is evidence that he sought to delete the warranty as to solvency from the draft Bond Deed and General Security Deed.[253] If the defendants sought to put evidence before the Court refuting that Legend was insolvent, I would have expected to hear from Mr Lee. I have taken that his seeking to remove the warranty of solevency is telling. Further this is not a case where there are any deficiences in the plaintiff's proofs. Accordingly, I conclude that in the absence of evidence from Mr Lee, there is sufficient reason (if it were at all necessary but which I find not to be the case) to reduce 'weight of the proofs of the party in

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250 Ibid [256], [257].
251 [2007] NSWSC 87, [24], [25].
252 [2016] QSC 121, [112]–[116] ('*Ashala*'). An appeal by the defendant was dismissed, see *Featherstone v Ashala Model Agency Pty Ltd (in liq)* [2017] QCA 260.
253 Draft Convertible Note and Share Subscription Agreement and General Security Deed, Court Book 3, 1159.44.

default' as referred to by Glass JA in *Payne v Parker*.[254]

Conclusion

164 For the reasons previously set out, I determine that Legend was insolvent on 25 November 2015. Further, if it were necessary I would also determine that Legend became insolvent by virtue of entry into of the Bond Deed and the General Security Deed.

165 Without detracting from the consideration previously set out, I base that determination upon the following summary of conclusions namely:

(ii) The IFFCO arbitral award constituted a debt for the purposes of s 95A even though Croft J's judgment enforcing the same pursuant to s 8(2) of the *International Arbitration Act* was not pronounced until December 2015.

(iii) Legend could not pay its debts as and when they fell due.

(iv) Legend had no cash flow in November 2015.

(v) Although the Balance Sheet relied upon by Mr Gutnick and Mr Feldman as referred to in the Bond Deed and General Security Deed was unreliable in that it understated the assets, there was sufficient evidence to determine the liabilities of Legend elsewhere. To the extent that the assets were of value or of substantial value was irrelevant in that I have determined that the same were not realisable.

(vi) The assets of Legend being the shareholding in Paradise and the underlying value of the mining tenements held by Paradise were not a readily realisable asset. Accordingly, I have disregarded the value of the assets in consideration of whether there were funds available to Legend on 25 November 2015. Further, upon entry into the Bond Deed and the General Security Deed, the ability to realise the assets was even more hampered or improbable.

(vii) If it were necessary, I would be entitled to draw a *Jones v Dunkel* inference as

254 (1976) 1 NSWLR 191, 200.

Mr Lee did not give evidence with respect to the question of solvency. On that note, neither did Mr Gutnick provide any evidence with respect to the question of solvency.

II. Ought the Bond Deed and General Security Deed be declared void as voidable and insolvent transactions?

III. In making the above determination, is the 'good faith' defence available?

166 The following provisions are germane:

> **588FB Uncommercial transactions**
>
> (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
>
> (a) the benefits (if any) to the company of entering into the transaction; and
>
> (b) the detriment to the company of entering into the transaction; and
>
> (c) the respective benefits to other parties to the transaction of entering into it; and
>
> (d) any other relevant matter.
>
> (2) A transaction may be an uncommercial transaction of a company because of subsection (1):
>
> (a) whether or not a creditor of the company is a party to the transaction; and
>
> (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.
>
> …
>
> **588FC Insolvent transactions**
>
> A transaction of a company is an insolvent transaction of the company if, and only if, it is an unfair preference given by the company, or an uncommercial transaction of the company, and:
>
> (a) any of the following happens at a time when the company is insolvent:
>
> (i) the transaction is entered into; or
>
> (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or
>
> (b) the company becomes insolvent because of, or because of matters including:

(i) entering into the transaction; or

(ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

…

588FE Voidable transactions

(1) If a company is being wound up:

(a) a transaction of the company may be voidable because of any one or more of subsections (2) to (6) if the transaction was entered into on or after 23 June 1993; and

(b) a transaction of the company may be voidable because of subsection (6A) if the transaction was entered into on or after the commencement of the *Corporations Amendment (Repayment of Directors' Bonuses) Act 2003*.

(2) The transaction is voidable if:

(a) it is an insolvent transaction of the company; and

(b) it was entered into, or an act was done for the purpose of giving effect to it:

(i) during the 6 months ending on the relation-back day; or

(ii) after that day but on or before the day when the winding up began.

…

(3) The transaction is voidable if:

(a) it is an insolvent transaction, and also an uncommercial transaction, of the company; and

(b) it was entered into, or an act was done for the purpose of giving effect to it, during the 2 years ending on the relation-back day.

(5) The transaction is voidable if:

(a) it is an insolvent transaction of the company; and

(b) the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and

(c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

(6) The transaction is voidable if it is an unfair loan to the company made at any time on or before the day when the winding up began.

…

(7) A reference in this section to doing an act includes a reference to making an omission.

…

588FF Courts may make orders about voidable transactions

(1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:

…

(h) An order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;

Section 9 of the Act defines 'transaction' as follows:

"Transaction", in Part 5.7B, in relation to a body corporate or Part 5.7 body, means a transaction to which the body is a party, for example (but without limitation):

(a) a conveyance, transfer or other disposition by the body of property of the body; and

(b) a security interest granted by the body and its property (including a security interest in the body's PPSA retention of title property); and

…

(e) an obligation incurred by the body; and

…

(g) a loan to the body;

and includes such a transaction that has been completed or given effect to, or that has terminated.

167 Section 588FG (2) provides as follows:

Transaction not voidable as against certain persons

…

(2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:

(a) the person became a party to the transaction in good faith; and

(b) at the time when the person became such a party:

(i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and

(ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and

(c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.

Plaintiff's submissions

168 The plaintiffs submit that the Bond Deed and the General Security Deed were uncommercial transactions pursuante to s 588FB(1) of *the Act*.

Benefit to Legend

169 The benefit to Legend in entering into the Bond Deed and the General Security Deed comprise the initial $200,000 capital injection and the potential for a further $800,000 dollars in tranches in the period to 31 July 2016. The availability of the further $800,000 was dependent upon the absence of any default in the meantime. Further, there was potential for a further $1.5 million funding at the discretion of QPPL.

170 The plaintiffs concede that there was some benefit bestowed upon Legend upon the sum of $400,000 being advanced. However, that benefit 'went no further than permitting it to fund its ambitious (and not surprisingly unsuccessful) attempt to resist the registration of Arbitral Award as a judgment of the Australian courts and perhaps — although the evidence is not clear — discharge some urgent creditors.'[255]

171 The plaintiffs argue that neither the $400,000 advanced under the Bond Deed, nor the maximum available of $2.5 million would ever have been sufficient to discharge Legend's liabilities or convert Paradise's mining tenements into income producing assets. In a presentation forwarded by Mr Gutnick to Mr Feldman in early November 2015, the capital costs to develop Paradise North and South on the 'Townsville' option totalled US$366.8 million or US$274 million using the 'Karumba' option (with US$64 million required for Paradise North alone).[256]

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255 Mark Anthony Korda, Craig Peter Shepard and Legend International Holdings Inc, 'Plaintiffs' Submissions', Submission in *Re Legend International Holdings Inc (in liq)*, S CI 2016 04516, S CI 2017 05129, 26 February 2018, [124] ('*Plaintiffs' Submissions of 26 February 2018*').

256 Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 0599–600.

Detriment to Legend

172 'Detriment' has been interpreted as referring to commercial detriment rather than measured solely in monetary terms.[257]

173 The detriments incurred by Legend by entering into the Bond Deed and the General Security Deed (by which time action to enforce the arbitral award in Australia had already commenced) far outweighed any benefits. Legend:

(a) agreed that the entry of 'a final judgment or judgments of an Australian or a USA court or courts of competent jurisdiction for the payment of money aggregating in excess of [A]$1,000,000' would constitute an event of default;[258]

(b) granted QPPL an immediate redemption of bonds upon an event of default;[259]

(c) agreed to the payment of an 'Event of Default Fee' comprising a 50 per cent penalty on any amounts advanced if an event of default occurred and interest at the default rate of 50 per cent;[260]

(d) agreed not to procure 'any other financing' without the prior written consent of QPPL;[261] and

(e) granted security over all of its assets to secure its obligations under the bond deed, including the payment obligations on an event of default.[262]

174 Entry into the transaction comprising the Bond Deed and the General Security Deed put Legend in a position where, for very limited financial benefit, Legend gave complete security over its assets and undertook commitments that it could not reasonably expect to meet. Even if it had not lost the Australian court litigation the phosphate assets were not generating income and Legend had undertaken not to raise further finance without QPPL's consent.

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257 *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109, [117].

258 Convertible Bond and Subscription Deed and General Security Deed between QPPL, Legend and Paradise, cl 15.1(d), Court Book 3, 1206.

259 Ibid cl 12.2.

260 Ibid cl 1.1, 12.2(d), 15.

261 Ibid cl 16.3(g).

262 Ibid cl 2.1.

Benefits to other parties

175 While Legend stood little to gain from the Bond Deed and General Security Deed, QPPL and the Feldman family stood to gain much.

176 In an email to Mr Sipina on 20 November 2015, Mr Feldman described the benefit he saw from QPPL in the following terms:

> He [Mr Gutnick] is giving away a chunk of the equity as a result [of the structure being put in place to "protect the asset"] but it's a necessary insurance policy for his company. We as third parties will develop and control the asset for the foreseeable future … and in the meantime we have taken a significant chunk of equity in a world class project.[263]

177 Of the options open to it, QPPL elected to appoint a receiver to Legend's shares in Paradise. QPPL (and the Feldmans) obtained the additional benefit under the Bond Deed (and the related Shareholders Deed) in relation to joint control of the board of Legend and Paradise.[264]

178 Given what transpired in the Australian registration proceedings, the main beneficiary of the transaction comprising the Bond Deed and the General Security Deed was QPPL. QPPL was incorporated on the first day of the trial before Croft J. The directors of QPPL were the sister and nephew of Mr Gutnick. The primary shareholder is a family trust of which Mr Gutnick's sister and nephew are direct beneficiaries.

179 Another beneficiary of the transaction was Mr Gutnick and his family through the Zalg Exploration Trust, the trustee of which was at all relevant times Zalg. The Shareholders Deed gave the option to Zalg to take up half the notes issued to QPPL (or shares, if already converted) and so as to purchase up to approximately 26 per cent of Legend's share for $1.25 million, and do so in circumstances where Mr Gutnick and Mordechai Gutnick were directors and shareholders of Zalg (along with Mrs Gutnick, who was also a shareholder) and Mr Gutnick and his children were beneficiaries of the Zalg Exploration Trust.[265]

180 Further, given the circumstances of the default, the transaction conferred no material benefit on Paradise even though one of the recitals to the Bond Deed provided for the transaction for

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263 Email from Sholom Feldman to David Sipina, Court Book 3, 1057.

264 Shareholders Deed between Zalg Exploration Pty Ltd, Pnina and Sholom Feldman and QPPL, Court Book 3, 1041; Convertible Bond and Subscription Deed and General Security Deed between QPPL, Legend and Paradise, Court Book 3, 1194.

265 Deed of Settlement: The Zalg Exploration Trust, Court Book 1, 0122.1.

the purpose of developing Paradise assets:

> There will be a commercial benefit flowing to Paradise.[266]

Other Relevant Matters

181 Where the transaction in question involves a related party — either in the corporate sense or individuals related by blood or law — it will be scrutinised more closely. The transaction is less likely to be excused for some other commercial factor.[267] Mr Gutnick and his immediate family have a personal interest in the transaction through Zalg, as did Mr Feldman and Mrs Feldman through QPPL.

182 No attempt was made to obtain finance from any source other than the Feldmans.[268] That failure was despite legal advice being received which included:

> the board needs to be satisfied, after making a reasonable enquiry that there isn't an alternative source of financing that would be available to the Company on more favourable terms.[269]

183 The transaction constituted by entry into the Bond Deed and the General Security Deed was a stratagem to defeat IFFCO and Kisan.

184 While there is no requirement in an action to set aside a s 588FB uncommercial transaction, to establish dishonesty, or any intent to defraud creditors, the Liquidators contend that a transaction entered to defeat, delay, or hinder the rights of creditors is necessarily uncommercial and not a transaction, which applying the objective test of s 588FB, it may be expected that the company would enter into.[270]

The defendants submissions

185 In determining whether a reasonable person 'in the company's circumstances' would have entered into the impugned transaction, the Court's focus is required to be on Legend and not QPPL. Even if it is assumed QPPL was motivated by greed and opportunism (which Mr

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266 Convertible Bond and Subscription Deed and General Security Deed between QPPL, Legend and Paradise, Court Book 3, 1184.

267 *McDonald v Hanselmann* (1998) 28 ACSR 49, 56 (Young J); *Welcome Homes Real Estate Pty Ltd v Ziade Investments Pty Ltd (in liq)* [2007] NSWCA 167, [52]–[57] (Hodgson JA, Spigelman CJ and Santow JA agreeing).

268 Email from Joseph Gutnick to Sholom Feldman, Court Book 3, 0670.

269 Email from Joseph Gutnick to Sholom Feldman, Court Book 3, 0982.

270 *The Act*, s 588FE(5)(b).

Glick obviously did not concede), that does not bear on whether 'in the circumstances' it was uncommercial for Legend to enter into the Bond Deed and the General Security Deed.

186 Although the defendants conceded that an examination of the contractual obligations embodied in the relevant documents might be inherently so oppressive that no reasonable company would subject itself to those terms given its circumstances, the defendants submitted that that was not the case with respect to the relevant documents. Further, the Liquidator made no such criticism. The Liquidator conceded that the convertible bond was 'vanilla' and 'common or garden' type.[271]

187 Further, the defendants submitted that:

(a) the Liquidator appeared to be more concerned about the giving of security over the whole of the undertaking of Legend by means of taking security over the shares of Legend in Paradise, rather than the actual terms of the Bond Deed;

(b) it is not relevant to determine whether the appointed receiver did or did not comply with legal obligations;

(c) the Liquidator's complaint was really that the security given was disproportionate to the loan of $400,000 advanced; and

(d) it's commercially unrealistic to expect a lender to seek security over only a fraction of the available security.

188 There was no relevant detriment to the body of creditors generally, or to IFFCO in particular, whether it is a receiver that extracts the value out of the asset or a liquidator that extracts the value out of the assets to pay the creditors. It was submitted that the case was really about whether it is the receiver appointed by QPPL or a liquidator appointed by IFFCO who conducts and controlls the method of extracting the value out of the Paradise tenements.

> Any innuendo or suggestion that the assets were able to be "stripped out" by reason of any relevant contractual documents is unfounded.[272]

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271 Transcript, 210.

272 Queensland Phosphate Pty Ltd and Paradise Phosphate Ltd, 'Defendants' Closing Submissions', Submission in *Re Legend International Holdings Inc (in liq)*, S CI 2016 04516, S CI 2017 05129, 4 ('*Defendants' Closing Submissions*').

189 The focus should have been on Mr Gutnick's state of mind rather than Mr Feldman's. Mr Feldman's motives were irrelevant.[273]

190 This was not a cosy family deal, given particularly the state of the relationship between Mr Feldman and Mr Gutnick.

191 It was not to the point that $30 million or some other large amount was required to put the tenements in a position where they would start to generate income. The funding procured was used to pay 'immediate and pressing creditors'.

192 As to the plaintiffs' contention that the transactions were designed to defeat Legend's creditors, the defendant submitted:

(a) it is Mr Gutnick's conduct which ought to have been examined but Mr Gutnick's motives were not elicited;

(b) Mr Feldman's conduct is irrelevant;

(c) The email exchanges between Mr Gutnick and Mr Feldman are insufficient (especially on the *Briginshaw* basis) to establish by means of such circumstantial evidence, any alleged intention on the part of Mr Gutnick to defeat creditors.

(d) in any event, the transaction did not in fact defeat creditors and there was no material difference to the position of the creditor by reason of the entry into those transactions.

Good faith

Defendants submissions

193 Mr Feldman and QPPL relied upon the good faith defence set out in s 588FG(2). The defendants contend that Mr Feldman had legitimately procured the advancement of $400,000 from independent investors. Furthermore, Mr Gutnick had received advice from Mr Bret Walker SC that Mr Walker believed that Legend had 'a very good chance of winning'.[274]

194 Accordingly, Mr Feldman and QPPL satisfied the criteria set out in s 588FG(2), namely:

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273 See *Shot One* [2017] VSC 741, [357].

274 Transcript, 283.

(a) he entered into the transaction in good faith;

(b) he entered into the transaction on reliance of Mr Walker's advice;

(c) he had no reasonable grounds for suspecting the company (Legend) was insolvent at the time or would become insolvent, and otherwise in the circumstances had no such grounds for so suspecting;

(d) In procuring the $400,000, Mr Feldman provided valuable consideration

The plaintiffs response to the Good faith defence

195 The plaintiffs submit that the 'good faith' requirement of the defence will be negated if a creditor knew, believed or suspected that the debtor was insolvent or that the payment would give the creditor a preference over other creditors. In *Queensland Bacon Pty Ltd v Rees*,[275] Barwick CJ said:

> The existence of knowledge or suspicion of insolvency negatives good faith: and the knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities is knowledge of insolvency. …

196 At the time of entry into the Bond Deed and the General Security Deed, Mr Feldman:

(a) was aware of the contents of Legend's Q3 Balance Sheet and had verified as a Schedule to the Shareholder's deed;

(b) believed that he was Mr Gutnick's last chance as no one else would lend to Mr Gutnick (as director of Legend);

(c) was aware that Mr Gutnick wanted to raise money to fight IFFCO's enforcement action to prevent IFFCO from enforcing against the assets of Legend;[276] and

(d) knew that Legend would not be able to pay out the Bonds if (as he conceded was a real possibility) IFFCO won its enforcement action and there was an event of default without raising further funds.[277] The entry into the transaction prevented Legend and Paradise from raising any further funds without the permission of QPPL.

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275 (1966) 115 CLR 266, 287.
276 Email from Sholom Feldman to Joseph Gutnick, Court Book 2, 0648.
277 Transcript, 283.

197 The conclusion that the transaction was not entered into in good faith was not negated by Mr Feldman's evidence to the effect that, from his perspective, it was merely a commercial deal which he was entering into at the behalf of investors (although really for the overwhelming benefit of the family through the Mendel Trust). As Mr Feldman put it in his email to Mr David Spina, he knew that the transaction was Mr Gutnick's 'insurance policy' against IFFCO succeeding in its enforcement actions.[278]

198 Taken as a whole, the collection of correspondence between Mr Gutnick and Mr Feldman reveals a common enterprise to protect the assets from enforcement by IFFCO. The convergence of Mr Gutnick's and Mr Feldman's purpose is evident in the chain of correspondence as a whole. On 16 November 2016, Mr Feldman emailed a draft security deed to Mr Gutnick under cover of an email which relevantly stated:

> I need to check on how we secure a US company, so I included Paradise in the deed. Paradise is probably the most important one to protect in this transaction to ensure no one can first preference so we can protect the asset.[279]

Suspicion of insolvency

199 QPPL has not discharged its onus of satisfying the Court that it had no reasonable grounds for suspecting Legend's insolvency, whether actual or as a result of entering into the transaction (s 588FG(2)(b)(ii)).

200 The test is 'no reasonable grounds' for suspecting insolvency. The reasonable person limb of the defence is such that QPPL cannot satisfy the Court that a reasonable person in QPPL's position would not have had reasonable grounds for suspecting insolvency. The reasonable person in QPPL's position would not consider Legend to be solvent just because it owned Paradise. The reasonable person would not take the view that providing enough funding to fight enforcement proceedings and for little else was sufficient. The reasonable person would recognise that Legend had a large number of unpaid creditors and was unable to pay them as and when the liabilities fell due. It is insufficient to rely upon hope or even a confident intention of obtaining further finance to exploit the tenements.

201 The reasonable person is assumed to have the knowledge of an 'average business person'.[280]

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278 Email from Sholom Feldman to David Sipina, Court Book 3, 1057; Transcript, 281.
279 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 0892.

In all the circumstances, a reasonable person in QPPL's circumstances would have suspected insolvency.

Applicable Law

202 Section 588FB is an objective test and it is imperative to have regard to the company's circumstances.[281] Furthermore, the courts have endorsed a purposive approach in interpreting the provision. In *Demondrille Nominees Pty Ltd v Shirlaw*,[282] the Full Court of the Federal Court referring to the object and purpose of ss 588FB and 588FC said:

> These provisions are clearly the current attempt by the legislature to balance the interests of the unsecured creditors of a company being wound up and those who would otherwise would be the beneficiaries of pre-winding up transactions entered into by the company: cf para 1034 of the explanatory memorandum which accompanied the *Corporate Law Reform Bill* 1992.
>
> …
>
> The purpose or object of the provisions with which we are concerned is to prevent a depletion of the assets of a company which is being wound up by, relevantly, "transactions at an under-value" entered into within a specified limited time prior to the commencement of the winding up: see explanatory memorandum, para 1014. To construe the expression "uncommercial transaction" to catch the agreement in the way in which we have done promotes the purpose or objects of the provisions to which we have referred.[283]

203 Gordon J (as her Honour then was), in *Capital Finance Australia Ltd v Tolcher*,[284] summarised the relevant principles of uncommercial transaction. Her Honour said:

> In seeking to address the third of the requirements [of s 588FB][32] the principles to be applied may be summarised as follows:
>
> (1) as the express words of s 588FB make clear, it is an objective standard to determine if a transaction is uncommercial: see also *Lewis (as liquidator of Doran Constructions Pty Ltd (in liq)) v Doran* (2005) 219 ALR 555; 54 ACSR 410; [2005] NSWCA 243 at [156] and *Tosich Construction Pty Ltd (in liq) v Tosich* (1997) 78 FCR 363 at 366–7;
>
> (2) four criteria are to be considered — the benefits enjoyed by the company (s 588FB(1)(a)), the detriment to the company (s 588FB(1)(b)), the respective benefits others received (s 588FB(1)(c)) and any other relevant matters (s 588FB(1)(d));
>
> (3) The objective criteria are not considered in some vacuum but by reference to "the company's circumstances" which must include the state of knowledge of those who were the directing mind of the company, such as its controlling

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280 *Cussen v Commissioner of Taxation* (2003) 47 ACSR 107, 64.
281 See *Capital Finance Australia Ltd v Tolcher* (2007) 64 ACSR 705, [129] ('*Tolcher*').
282 (1997) 25 ACSR 535 ('*Demondrille*').
283 Ibid 548.
284 *Tolcher* 64 ACSR 705.

director or directors: (*Tosich Construction* at 367); and

(4) for a transaction to be "uncommercial" it must result in "the recipient receiving a gift or obtaining a bargain of such magnitude that it [cannot] be explained by normal commercial practice" or where "the consideration … lacks a 'commercial quality'": see *Peter Pan Management Pty Ltd v Capital Finance Corp (Aust) Pty Ltd* (2001) 19 ACLC 1392 ; [2001] VSC 227 at [43]; *Lewis v Cook* (2000) 18 ACLC 490 ; [2000] NSWSC 191 at [45]–[46] and *Demondrille Nominees Pty Ltd v Shirlaw* (1997) 25 ACSR 535 at 548 and the explanatory memorandum, *Corporate Law Reform Bill* 1992, para [1044].[33]

204 In *640 Elizabeth Street Pty Ltd (in liq) v Maxcon Pty Ltd*,[285] Sifris J noted that 'whilst transactions at an undervalue may be a focus of s 588FB, transactions caught by s 588FB are not limited to such transactions.'[286] The notions of 'benefit' and 'detriment' are inherent to the analysis and characterisation of any uncommercial transaction. This is because s 588FB(1)directs attention to a balancing of benefit and detriment. In *Lewis v Doran*, Giles JA said:

> Transactions at an undervalue were no doubt the primary target of the provisions, but the description of an uncommercial transaction in s 588FB(1) was not limited to such transactions. The description directed primary attention to a balancing of benefit and detriment, only in the broadest sense involving undervalue. A transaction could conceivably be one a reasonable person in the company's circumstances would not have entered into although for full value; or it could be one a reasonable person in the company's circumstances would have entered into although at an undervalue, for example a forced sale to overcome temporary illiquidity. For s 588FB(1), in addition to regard to benefits and detriments to the company, regard was to be had to the benefits to the other parties to the transaction. It appears to have been contemplated that a transaction detrimental to the company but beneficial to other parties to the transaction might not unreasonably be entered into. If, for example, there were no creditors and no prospect of creditors, it may be that the controller of the company could reasonably sacrifice its interests to the interests of other parties to the transaction.[287]

205 In *Campbell Street Theatre Pty Ltd v Commercial Mortgage Trade Pty Ltd*,[288] Black J said:

> A transaction is an uncommercial transaction if it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to the benefit or detriment to the company in entering the transaction, the benefit to other parties to the transaction and any other relevant matter: *Corporations Act* s 588FB(1). In *Demondrille Nominees Pty Ltd v Shirlaw* [1997] FCA 1220; (1997) 25 ACSR 535 at 548; 15 ACLC 1716, Foster, Lindgren and Madgwick JJ observed that ss 588FB and 588FE of the then *Corporations Law* sought to balance the interests of the unsecured creditors of a company being wound up and those who would otherwise be the beneficiaries of pre-winding up transactions entered into by the company and their purpose was:

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285 [2015] VSC 22.
286 Ibid 35.
287 [2005] NSWCA 243, 136.
288 [2012] NSWSC 669 ('*Campbell Street Theatre*').

> To prevent a depletion of the assets of a company which is being wound up by, relevantly, "transactions at an under-value" entered into within a specified limited time prior to the commencement of the winding up: see explanatory memorandum, para 1014.
>
> Their Honours also observed, by reference to the explanatory memorandum, that a transaction is uncommercial, for the purposes of s 588FB, where there is a bargain "of such magnitude that it could not be explained by normal commercial practice: *Demondrille Nominees Pty Ltd v Shirlaw* at ACSR 548; see also *McDonald v Hanselmann* [1998] NSWSC 171; (1998) 28 ACSR 49 at 53.
>
> The purpose of the section includes preventing companies disposing of their assets or other resources through transactions that result in the recipient receiving a gift or obtaining a bargain of such commercial magnitude that it could not be explained by normal commercial practice: *Skouloudis Group Pty Ltd (in liq) v Planet Enterprizes Pty Ltd* [2002] NSWSC 239; (2002) 41 ACSR 369 at [14]- [15]. In *Lewis (as liq of Doran Constructions Pty Ltd (in liq)) v Doran* [2005] NSWCA 243; (2005) 219 ALR 555; 54 ACSR 410 at [136], where Giles JA observed that the description of an "uncommercial transaction" in s 588FB(1) is "directed primary attention to a balancing of benefit and detriment, only in the broadest sense involving undervalue. Whether a reasonable person in the company's circumstances would not have entered into the transaction is determined by an objective inquiry, by reference to the factors specified in s 588FB(1): *Tosich Construction Pty Ltd (in liq) v Tosich* above at FCR 367; *Old Kiama Wharf Company (in liq) v Betohuwisa Investments Pty Ltd* [2011] NSWSC 823; (2011) 85 ACSR 87 at [35]. The possibility that this section may apply to an agreement under which excessive service fees were paid has been recognised in the academic literature: see A Keay, "Liquidators' Avoidance of Uncommercial Transactions" (1996) 70 ALJ 390 at 393.[289]

206 The interests of a company's unsecured creditors are integral in determining whether a transaction is a benefit or detriment. In *Demondrille*, the Full Court held in respect of the foregoing by an insolvent company of $120,000 regarding the sale of one of its properties:

> … Although there may have been a benefit to Valdivia or to Mr or Mrs Veraar or to both of them in having done so, there was no benefit to [the company] or, indirectly, **to its unsecured creditors**, in its having done so. …[290]

207 Furthermore, a transaction which reduces a company's debts may be deemed as an uncommercial transaction if it negatively affects the interests of other creditors. In *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* Young JA said:

> The primary judge held at [222] that Buzzle (as distinct from its creditors) suffered no detriment from the relevant transaction.
>
> With respect this cannot be correct. It is true, as the primary judge stated, that in making the payments Buzzle reduced its debts to the resellers. However, that was not the whole picture. Buzzle had limited resources and to deprive itself of liquidity before it legally had to do so, where it had other pressing creditors and a need to expend moneys on its computer accounting system amounted to a detriment.

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289 Ibid 15-16.

290 (1997) 25 ACSR 535, 548 (emphasis added).

"Detriment" in the section is not limited to a detriment that can necessarily be measured in money terms. The word refers to commercial detriment.[291]

208 *Re Employ (No 96) Pty Ltd (in liq)*,[292] Black J said:

> I am conscious that, in *Lewis (as liq of Doran Constructions Pty Ltd* (in liq)) v *Doran* [2005] NSWCA 243; (2005) 219 ALR 555; 54 ACSR 410 at [136], Giles JA (with whom Hodgson and McColl JJA agreed) observed that the description of an "uncommercial transaction" in s 588FB(1) directed primary attention to a balancing of benefit and detriment and only in the broadest sense involved undervalue and (at [154]) that a Court should be slow to pronounce upon the commercial justification of particular executive decisions. That observation appears to be directed particularly to the context where no straightforward comparison of the value of an asset and the consideration received can be undertaken. On the other hand, in *Capital Finance v Tolcher* above at [73], Lindgren J quoted Professor Andrew Keay's observations as to the importance of undervalue in determining whether a transaction is an uncommercial transaction for the purposes of s 588FB in his article "Liquidators' Avoidance of Uncommercial Transactions" (1996) 70 ALJ 390 at 397, as follows:
>
> > "While not dealing exclusively with undervalue, undervalue is at the heart of the section [s 588FB], that is, if the company received less than what is reasonable from the transaction the liquidator may attack it. It is likely that in many cases Courts will be pre-occupied with comparing the value of what the company received in exchange for what it gave or vice a versa."
>
> That passage was in turn cited by Nicholas J in *Cussen v Sultan* above at [19]. In *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109; (2011) 82 ACSR 703 at [82], Young JA also recognised the relevance of the consideration received by the company in a transaction, albeit also observing that an assessment of the adequacy of consideration for the purposes of this section does did not require "exact equivalence" but only a fair equivalence between what is given and what is received.
>
> The matters to which the Court is to have regard in determining whether a transaction is an uncommercial transaction, in the requisite sense that a reasonable person in the company's circumstances would not have entered into the transaction, are specified in sub-paragraphs 588FB(1)(a)-(d) as any benefits to the company of entering into the transaction; the detriment to the company of entering into the transaction; the respective benefits to other parties to the transaction of entering into it; and any other relevant matter. In the present case, Employ 96 received the benefit of obtaining professional services from DVT. On the other hand, it suffered the detriment of obtaining those services at double the usual rate that would be charged by DVT for the provision of those services. For the reasons set out below, in my view, the relevant circumstances were not of such a character that an agreement to pay double rates could be explained by normal commercial practice.[293]

209 In *Welcome Homes Real Estate Pty Ltd v Ziade Investments Pty Ltd (in liq)*,[294] Gzell J said:

> In my opinion also, Mr. Segal in his submissions stated the test too highly, as requiring that the transaction be so unreasonable that no reasonable person would enter into it. The statutory language is that "it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction".

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291 [2011] NSWCA 109, [115]-[117].
292 [2013] NSWSC 61 ('*Re Employ*').
293 Ibid 62-3.
294 (2007) NSWCA 167.

> The word "may" is weaker than "must" or even "would"; and in my opinion one reason why something "may be expected" is that it is what normally happens. That is, it is not essential that it would always or necessarily happen. For that reason, what is normal commercial practice, while not decisive, is relevant to the question.[295]

210 In *Tosich Construction Pty Ltd (in liq) v Tosich*,[296] Burchett, Foster and North JJ held:

> What the Court must do is consider each of the matters to which reference is made in s 588FB(1) and, having regard to them, reach a conclusion as to whether a reasonable person in the company's circumstances would not have entered into the transaction.[297]

211 In *Shot One*, Sloss J set out the principles summarised by Gordon J in *Capital Finance Australia Ltd and v Tolcher* and continued:

> In addition to these principles, courts have recognised that:
>
> (1) Section 588FB must be construed in a manner that would promote the purpose of the underlying law. The purpose or object of s 588FB is to prevent a depletion of the assets of a company which is being wound up by, relevantly, avoiding 'transactions at an under-value' entered into within a specified time period prior to the commencement of winding up.
>
> (2) The court must view the transaction prospectively 'according to the circumstances at the time, including proper perception of the future, but without the influence of hindsight'.
>
> (3) The matter must be looked at from the point of view of the company, and it must 'positively appear' that the reasonable person in the position of the company would not have entered into the transaction. Accordingly, the liquidator bears the onus of demonstrating that a transaction is uncommercial.
>
> Although, as noted above, the legislation does not refer to the 'value' of the transaction, courts have nevertheless emphasised that the purpose of s 588FB is to avoid transactions at an 'undervalue' where assets are effectively disposed of at below market value. For example, in *Demondrille Nominees v Shirlaw*, the Full Court of the Federal Court considered whether a contract to sell a property for $180,000, but to forego receipt of $120,000 of the purchase price, was an uncommercial transaction for the purposes of s 588FB. In finding that the transaction was relevantly an 'uncommercial transaction', the Full Court noted that:
>
> > The purpose or object of the provisions with which we are concerned is to prevent a depletion of the assets of a company which is being wound up by, relevantly, "transactions at an under-value" entered into within a specified limited time prior to the commencement of the winding up (see Explanatory Memorandum, par 1014). To construe the expression "uncommercial transaction" to catch the Agreement in the way in which we have done promotes the purpose or objects of the provisions to which we have referred.
>
> Although the Full Court's comments in *Demondrille* have been cited with approval on many occasions, some intermediate courts have moved away from assessing transactions by reference to their 'value'. In *Lewis (as liquidator of Doran Constructions Pty Ltd (in Liq)) v Doran*, for example, the New South Wales Court of

295 Ibid [54].
296 (1997) 78 FCR 363.
297 Ibid 367.

Appeal considered an application by a liquidator to set aside a series of resolutions that operated to restructure debt obligations between related companies. After considering the comments of the Full Court in *Demondrille*, Giles JA observed that the statutory test under s 588FB was not solely targeted towards undervalued transactions, with other considerations shaping the commercial context for the transaction. His Honour said:

> Transactions at an undervalue were no doubt the primary target of the provisions, but the description of an uncommercial transaction in s 588FB(1) was not limited to such transactions. The description directed primary attention to a balance of benefit and detriment, only in the broadest sense involving undervalue. A transaction could conceivably be one that a reasonable person would not have entered into although for full value; or it could be one that a reasonable party would have entered into although at an undervalue, for example, a forced sale to overcome temporary illiquidity.

The recent observations of Sofronoff P in *Featherstone v Ashala Model Agency Pty Ltd* (in liq)[286] reinforce the notion that the legislation does not define uncommercial transaction by reference to the presence or absence of valuable consideration.

Apart from the value of the transaction in question, other factors that the courts have had regard to include whether there is a relationship between the parties to the transaction that might require it to be subjected to greater scrutiny. For example, in *McDonald v Hanselmann*, the Supreme Court of New South Wales considered an application by a liquidator to set aside an agreement purporting to sell, to the son of a director of the company, the company's equipment, the ability to deal with existing clients, and the goodwill of the business. Young J noted that the equipment in question was specialised equipment which was used in a specialised business, and that the company had to vacate the site where it was located and did not appear to have the wherewithal to lease a suitable alternative site. The purchaser was the son of the controller of the company at the relevant time, and he did have a business in which most of the equipment could be used, and he was familiar with it having worked in his father's business. The controller of company 'knew that his son was interested and that his son was willing to take virtually the whole of the plant and equipment for his new business.' Young J referred to the fact that the transaction involved related parties and observed that s 588FB(1):

> …indicates that I am to take into account not only the position of the company, but also the significant matter of the relationship of the purchaser to the people who control the company. Where, it would seem to me, the purchaser is a related entity in the corporate sense, or a relation by blood or by law in the individual sense, then the court should be inclined to look at the transaction far more closely and be less inclined to excuse a sale at an undervalue because of some commercial factor.

Young J held that the transaction was uncommercial and liable to be set aside under s 588FB of the Corporations Act. His Honour said he could not see 'any sufficient reason why the company would sell the property to a relative of the controller for an undervalue of 21 per cent rather than sell it by auction or in some other way', noting that no other avenues appeared to have been explored. But in reaching the conclusion that the transaction was uncommercial, his Honour also gave consideration to the issue of whether the discrepancy could be accounted for by reason of a 'special value [of the transaction] to the company which would affect its worth to the company'. He said that 'it was clear that the company needed to clear the equipment and the company needed ready money' and observed that '[t]hese would be factors which could induce a reasonable person in the position of the company to let the property go for less than its proper value.'

> Against this background, it seems clear that while the 'value' of a transaction will often be an important consideration in assessing whether it is 'uncommercial' for the purposes of s 588FB, it is not decisive. Rather, in determining whether a transaction is 'uncommercial' for the purposes of s 588FB, the court must consider all of the benefits and detriments bearing on a party's decision to enter into a transaction, including benefits and detriments that cannot be measured in monetary terms. The commerciality or otherwise of the transaction is to be assessed upon an objective view, having regard to the company's circumstances and not just the subject matter of the transaction. Furthermore, a transaction will be an uncommercial one only where a reasonable person in the company's circumstances would not have entered into it.[298]

Consideration

212 I have concluded that Legend was insolvent at the time of entry into the Bond Deed and the General Security Deed. In any event it became insolvent by reason of entry into the same.

213 Further, it almost goes without saying that the entry into the Bond Deed and General Security Deed was a 'transaction' within the meaning of s 9 of *the Act*. Legend was a party to both the Bond Deed and the General Security Deed. Those deeds granted a loan to Legend in return for Legend undertaking obligations and giving security over Legend's assets.

214 That leaves consideration as to whether entry into the Bond Deed and General Security Deed constituted an uncommercial transaction and whether the good faith defence is available.

215 On 25 November 2015, being the date of entry into the Bond Deed and the General Security Deed, Legend's circumstances were as set out in the following paragraphs.

216 Legend was insolvent. IFFCO and Kisan had applied to this Court for orders to enforce the Singapore awards.

217 Even if IFFCO and Kisan had been unsuccessful in the registration of the Singapore judgment in the Supreme Court of Victoria, there was still a substantial debt which was due and payable. No application had been made within respect to the underlying debt. That is, there had been no attempt to review the Singapore arbitral award nor to set aside the Singapore court registrations of that award.

218 There was overt conduct engaged in by Legend to defeat, delay or hinder creditors and, in particular, IFFCO and Kisan.

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298 *Shot One* [2017] VSC 741, [215]-[221].

219 By at least 30 October 2015, Legend went about producing a Convertible Note Agreement which evolved into the Bond Deed. However, the idea, if not the document drafting seems to have germinated prior to 26 October 2015. On 26 October 2015, Herbert Smith Freehills responded to Mr Lee of Legend with respect to the 'Legend Convertible Note issue and granting of security'. In part that email transmission set out:

> Note however:
>
> 1) the arising security interest must be promptly registered under the PPSA to be enforceable.
>
> 2) to the extent that Australian law may intersect, the granting of the security could be subject to challenge if Legend or Paradise is insolvent, or could become insolvent in the next six months – in which case the granting of the security may be challenged and undone as an uncommercial transaction.[299]

220 On 30 October 2015, the initial draft Convertible Note Agreement was provided by Mr Gutnick to Mr Feldman. It appears that Mr Lee had previously provided Mr Gutnick with that draft agreement. Clause 7.1 with respect to security was in the form of a ladder provision. It provided for Legend to provide security in the form of charge over the shareholding of Legend and Paradise as follows:

(a) 25 per cent interest in Paradise upon the payment of the first amount referred to in sch 7;

(b) 35 per cent interest in Paradise shares upon payment of the second amount referred to in sch 7; and

(c) 40 per cent interest in Paradise upon payment of the third amount referred to in sch 7. Schedule 7 provided for payments of $250,000 on 2 November 2015, $350,000 on 2 December 2015 and $400,000 on 31 December 2015.

221 Clause 12.1 dealt with 'major events of default' by Legend. Those provisions were boilerplate.

222 The second version of the draft Convertible Note Agreement was circulated by Mr Gutnick to Mr Feldman later on the same date. The security revision in cl 7 was altered to:

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299 Email from Michael Ziegelaar to Peter Lee, Court Book 1, 0483.

> The company will provide security in the form of a charge over the assets of the company.[300]

223 Again, the major events of default by Legend referred to in cl 13.1 were boilerplate.

224 The subscription amount in cl 4.1 was increased from $1 million to $5 million and payable as set out in sch 7. Schedule 7 provided for payments of $1 million on the signing of the agreement, $1 million on 2 December 2015, $2 million on 31 December 2015 and $1 million on 1 February 2016.

225 The Bond Deed and General Security Deed was executed on 25 November 2015. The final version was altogether different from the original drafts. Differences of note are:

- The inclusion of default interest rate at 50 per cent per annum;
- The inclusion of an event of default penalty uplift of 50 per cent of the amounts already advanced under this deed;
- The principal sum was increased to $2,500,000;
- The redemption price was to be:

  > (a) the Face Value of the Bond (or part thereof to the extent that the bond has not been converted in full); plus
  >
  > (b) the accrued and unpaid interest from time to time payable by the Corporation in respect to the Bond under this deed; less
  >
  > (c) any earlier repayment under cl 12.1 applied against the Bond.

- At Completion, the Corporation must issue to the Bondholder 200 bonds (Initial Bonds) on the terms and conditions of this Deed, and then a further 100 bonds for each $100,000 advanced by QPPL to the corporation as per the timetable set out in cl 3.3 up to a maximum of 2,500bonds.
- The principle sum was to be paid by [QPPL] to the corporation in tranches in accordance with the following timetable:

  > (1) on or prior to the completion date, and at the same time as the delivery of the Initial Bonds, the Bondholder must pay,

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300 Ibid 0514.

or cause to be paid to the Corporation $200,000 dollars in Immediately Available Funds;

(2) $200,000 on 15 December 2015 to purchase a further 200 bonds;

(3) $100,00 on 28 February 2016 to purchase a further 100 bonds; and

(4) Provision for further payments up to an entire $2.5 million dollars for facility to purchase all 2,500 Convertible Bonds.

226 The payments referred to in cl 3.3 were subject to:

> The payment of any tranche subject to no default occurring on this Deed or Event of Default occurring in the corporation.

227 Clause 6 added in a use for the proceeds as follows:

> The Corporation undertakes to the Bondholder that the Principal Amount will be applied to the general working capital purposes of the Corporation.

228 Clause 7 added in various warranties referred to pt 1 of sch 1. Those sch 1 warranties included:

> (2)(a) The Corporation is solvent and will not become insolvent by entering into and performing its obligations under this Deed and the Security.

229 The boilerplate events of default were added too. Most poignantly, under cl 15.1 a specific event of default included:

> (d) A final judgment or judgment of an Australia or USA court or courts with competent jurisdiction for the payment of money aggregating in excess of $1 million dollars (or its equivalent in the relevant currency of payment) are rendered against the corporation or any subsidiary and not stayed pending appeal within 21 days after entry thereof;

230 Notwithstanding the judgment already entered in the High Court of Singapore, the construction of such clause is prospective in nature and accordingly, there was no need to mention the Singapore court registration of the arbitral award to constitute an event of default.

231 Clause 16.2 contained negative undertakings to prohibit (without the prior written consent) dealing with Legend's assets 'including by way of creation of an Encumbrance or Standard

Guarantee or indemnity over such asset other than on the terms approved by the Consenting Party'.[301]

232 Clause 16.3 set out further undertakings (without the prior written consent) requiring Legend not to procure any other financing into the Corporation. The security became a total security over Legend's assets including the phosphate properties.[302]

233 A separate security document was entered into being the General Security Deed.

234 The genesis of the provisions of the Bond Deed and General Security Deed can be distilled from term sheets which were circulated commencing on 4 November 2015. The first term sheet[303] was circulated by Mr Feldman. It relevantly contained the following:

> Application of funds.
>
> > The proceeds from the subscription of the Convertible Bonds will be used by the issuer for defending the court action against Legend and any excess funds towards general working capital purposes (including if required by the issuer, its costs of undertaking the transactions contemplated in the term sheets set out in Annexure 1).
>
> Director options.
>
> > The issuer will grant a 100,000,000 performance options to the Board of Directors ('Options'), each to subscribe for 1 fully paid ordinary share in the issuer at the option exercise price up until the date that is three years from the completion date. $50 million options will be offered to the incoming directors and $50 million to Joseph Gutnick and Mordi Gutnick.
>
> Security.
>
> > 1st ranking secured senior debt over the issuer to be granted to the lender on the settlement date, and over its shares in Paradise phosphate.
>
> Events of default
>
> > Customary events of default for a transaction of this nature including but not limited:
> >
> > (1) Any finding by a court of law against the Company that causes a judgment of more than $1 million be entered against the Company;
> >
> > …

235 It was contemplated in the term sheet circulated by Mr Feldman on 4 November 2015 that the

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301 Convertible Bond and Subscription Deed and General Security Deed between QPPL, Legend and Paradise, Court Book 3, cl 16.2(a), 1207.

302 Ibid cl 23.5.

303 Email from Sholom Feldman to Joseph Gutnick, Court Book 2, 0648.

issuer would be QBL.

236 A shareholder's agreement was annexed to the term sheet. It relevantly included the following:

> …
>
> (2) Following the first $200,000 being provided as per Tranche one and two above, the sapphires to be provided to Sholom Feldman as per his email to JG on 22nd October 2015.
>
> (3) Both Joseph Gutnick and Pnina Feldman agreed to only approve board resolutions that they both approve.
>
> …
>
> (4) Mordi Gutnick, as facilitator of the deal, to have the right to share in the half of the Convertible Note throughout the time it outstanding from the Lender, at an effective 1c per share.
>
> …

237 A further version of the term sheet was provided by Mr Feldman to Mr Gutnick on 5 November 2015. Minor charges were attended to including changing QBL to the lender and maintaining Legend as the issuer.

238 The provisions with respect to redemption upon an event of default were as follows:

> The lender at its election can require the issuer to redeem any or all of the Convertible Bonds at any time after an Event of Default occurs at a price representing 150% of the funds advanced and further accruing penalties at an accrued rate of 50% per annum until repaid.

239 Mr Gutnick replied on 5 November 2015 with his comments with respect to the term sheet. Relevant comments with respect to:

- Security:

  > This means holders holds 100% security for a loan of $200,000

- With respect to the redemption upon event of default:

  > Is this legal given recent legal decisions in regard to penalties?

- With respect to events of default, Mr Gutnick added a caveat as follows:

  > Customary events of default for a transaction of this nature including but not limited to:
  >
  > (1) Any finding by a court of law against the company that causes a judgement of more than $1 million dollars to be entered against the

company (Other than any actions by IFFCO and/or Kisan);

240 Mr Lee also considered the term sheet and forwarded his comments to Mr Gutnick on 6 November 2015. Mr Gutnick transmitted those comments to Mr Feldman on the same day.

241 Mr Feldman provided a further marked up copy on 6 November 2015 to Mr Gutnick. The major alterations were with respect to the security to be provided and the events of default. Mr Feldman deleted the provison with respect to the million dollar judgment being entered against the company by deleting the words '(other than any actions by IFFCO and/or Kisan)'.

242 Over the ensuing days, Mr Gutnick, Mr Feldman and Mr Lee made various comments in relation to the binding term sheet. On 9 November 2015, Mr Lee made comments including:

> Application of funds.
>
> Comment [A2]: As previously advised, this term sheet will be released to the SCC as part of a Form 8–K filing in the USA. From a point of view, it might be better to delete the reference to defending the court case and simply say working capital.

243 A version of the term sheet provided by Mr Feldman to Mr Gutnick on 9 November 2015 included further provisions in relation to the shareholders agreement being the annexure. Those provisions provided for an acknowledgement that Mr Gutnick owns and/or controls 70 million shares in Legend and each of JG and the Feldmans would only vote shares as agreed with each other. At cl 5, the following was included:

> A summary of the balance sheet of Legend to be provided and warranted by JG to the Feldmans as to the accuracy of the balance sheet. Joseph Gutnick warrants to the Feldmans that other than the liabilities as detailed on the balance sheet, there are no further liabilities not disclosed to the lender by the directors, or any material agreements not disclosed to the directors including any other Shareholder Agreement that has not been disclosed.[304]

244 It was not until 19 November 2015, being the day QPPL was incorporated that QPPL was nominated as the lender in the term sheet.

245 The genesis of the Bond Deed and the General Security Deed and the motivation for inclusion of the draconian terms can also be distilled from contemporaneous correspondence.

246 On 6 November 2015, Mr Gutnick emailed Mr Feldman stating:

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304 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 0782.

> We need to move on Legend ASAP because we need the funds and don't want to go elsewhere. Try your best.[305]

247 On 16 November 2016, Mr Feldman emailed Mr Gutnick which relevantly set out:

> I need to check on how we secure a US company, so I included Paradise in the deed. Paradise is probably the most important one to protect in this transaction to ensure no one can get first preference so we can protect the asset.[306]

248 On 19 November 2015, Legend received legal advice from its US lawyers which relevantly stated:

> …
>
> This would represent more than 53% of the issued and outstanding shares of Legend following conversion, which would substantially dilute existing stockholders. With this level of dilution (and considering the 50% penalty interest rate), the Board needs to be satisfied, after making a reasonable inquiry, that there isn't an alternative source of financing that would be available to the Company on more favourable terms. Also, I understand that Pnina Feldman is Joseph's sister so the existence of this family relationship will impose a heightened level of scrutiny on the reasonableness of the Board's actions.[307]

249 On 20 November 2015, Mr Feldman received an email from David Sipina of Courtenay House Capital Trading Group, enquiring about the impact of IFFCO and Kisan's application to enforce the arbitral award against Legend and Mr Gutnick. Mr Feldman replied relevantly:

> This is his [Mr Gutnick's] main fight he is fighting at the moment. He is confident he will win it, but if he doesn't then we are doing what we can through this structure to protect the asset and its value. This is precisely the point of his doing this deal, to ensure that all value is not lost to the company if he loses the battle … We as third parties will develop and control the asset for the foreseeable future, ensuring maximum value possible will be retained by the company if they lose this case …[308]

250 Notwithstanding the statement in the last transmission to Mr Sipina, on or about 20 November 2015, Mr Gutnick and his son, Mordechai Gutnick, Zalg as trustee for the Zalg Exploration Trust, QPPL, Mr Feldman and Ms Feldman entered into a Shareholders Deed under which the parties agreed that:

> The Feldmans and QPPL give Zalg or its nominee, as facilitator of the Convertible Bond Deed, the option to buy up to half of the Convertible Notes (or Shares if the Convertible Note has been converted into Shares) held by QPPL under the Convertible Bond Deed from QPPL anytime in the period of 18 months from the date of this Deed, at a price of $1000 per Convertible Note (or the equivalent of $0.005 per

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305 Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 0669.
306 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 0892.
307 Email from Brian Brodrick to Peter Lee, Court Book 3, 0982.
308 Email from Sholom Feldman to David Sipina, Court Book 3, 1057.

Share if the Convertible Note has been converted into Shares).[309]

251 Although I do not need to make any determination about the issue, the determination that ultimately the assets in Legend were being 'warehoused' for Mr Gutnick cannot be discounted. This transaction has none of the elements of an arm's length transaction. On one hand, Mr Feldman had referred to 'control' by third parties. On the other, he entered into the Shareholder Agreement to maintain Mr Gutnick's interest or the ability of Mr Gutnick to maintain his interest. The last statement in the response to Mr Spina is almost reflective of what was intended by Legend 'ensuring maximum value possible…by the company if they [Legend] lose this case.'

252 On 22 November 2015, Mr Feldman emailed Mr Gutnick stating:

> I made quite a number of additions to the documents, particularly surrounding Paradise as the guarantor to the deal, in case anything happens to Legend, we want to make sure that Paradise is secure and we will have the right to step in and protect the assets from any other creditor or receiver, so I put in quite a bit of wording that I feel would be necessary in such a scenario. Let's all hope that scenario does not happen, but these documents should at least protect us as much as possible from that scenario.[310]

253 On 23 November 2015, Mr Lee deleted the warranty as to solvency in his marked up copy of the draft Bond Deed.

254 On 23 November 2015 Mr Feldman emailed Mr Gutnick as follows:

> The main issue is obviously on the warranty of solvency. If the company cannot say that it is solvent then how is it able to legally do this deal. The whole basis of doing any business is that the Company thinks that it's [sic] asset is worth more than its liabilities, and has the current support of its creditors to wait until the company has funds to be paid, or else the company is not legally able to trade. We then can't take security over the asset if there is a reasonable suspicion that the company is insolvent. It is my view that the assets are worth more than the liabilities, and worth more than the funds being advanced as well, which is why we are looking to save the asset, but my understanding is that we need the directors to be able to say that is the case in their view in order to be able to legally take security.[311]

255 Mr Gutnick replied 'The problem is only the IFFCO debt'.[312]

256 Mr Gutnick followed up with 'We can do it if you insist'.[313] The only natural inference from

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309 1047.
310 Shareholders Deed between Zalg Exploration Pty Ltd and Pnina and Sholom Feldman, and QPPL, Court Book 3, 1060.
311 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1160.
312 Email from Joseph Gutnick to Sholom Feldman, Court Book 3, 1161.
313 Email from Joseph Gutnick to Sholom Feldman, Court Book 3, 1162.

that statement is that the warrant of solvency would be given, notwithstanding that it would be contrary to the exsistence of Legend's indebtness to IFFCO and Kissan.

257 Mr Feldman responded as follows:

> a) you are still arguing that [the IFFCO/Kisan debt] is not payable.
>
> b) even if it gets enforced as payable, you still have reasonable grounds to believe that the asset is worth more than the $12M and can at that point be put up to tender to pay the debt. Until that is publicly tested, it is only a matter of reasonable belief.
>
> c) You clearly are not of the belief that the company is currently insolvent, or else you wouldn't be able to do this transaction. In order for the security to be valid, the company needs to say that to be the case. If that warranty is deleted from the deed, it effectively invalidates the deed in my understanding?[314]

258 Mr Feldman further responded to Mr Gutnick [about the warranty as to solvency]:

> ok. I think it is important to ensure the validity of the security as much as possible.[315]

259 Further, on 24 November 2015 it is patently obvious that Mr Feldman considered that the Paradise phosphate project were worth somewhere between $200 million and $4 billion dollars.[316]

260 The haste in compiling and executing all the documents in an attempt to thwart IFFCO and Kissan's application to the Victorian Supreme Court was further illustrated by an email transmission from Mr Feldman to Mr Lee dated 1 December 2015. It relevantly provided:

> Can you please arrange for the original signed documents to be sent to me via registered overnight post so we can attend to stamping and registering?
>
> This is time sensitive particularly as a decision may be forthcoming in the courts immediately.[317]

261 Surprisingly, the defendants did not call Mr Gutnick to give evidence. Mr Gutnick, given his position at Legend and as distilled from the email transmissions passing between Mr Gutnick, Mr Lee and Mr Feldman was obviously the directing mind of Legend. I would have expected him to have given evidence on behalf of the defendants to support the Bond Deed andthe General Security Deed and the attendant agreements if there were any grounds to resist the

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314 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1163.
315 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1164.
316 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1171.
317 Email from Sholom Feldman to Peter Lee, Court Book 3, 1284.

relief sought by the plaintiffs. In *McCormack v Federal Commissioner of Taxation*,[318] the question was whether the taxpayer had discharged the onus of proof that she had not bought property for the purposes of resale at a profit for the purposes of s 26(a) of the *Income Tax Assessment Act* 1936 (Cth). Gibbs J said:

> In a case arising under s 26 (a) the taxpayer is usually the person best able to give evidence as to the purpose for which the property in question was bought. Although evidence given by a taxpayer as to the purpose with which he acquired property must, for obvious reasons, "be tested most closely, and received with the greatest caution", that it would be wrong for a judge to regard the evidence of a taxpayer as prima facie unacceptable. The taxpayer's evidence must of course be considered on its merits, in the light of the circumstances of the case, without any prepossession, favourable or unfavourable. If the taxpayer gives evidence that the property in question was not acquired by him for the purpose of profit-making by sale, and that evidence is accepted, he of course succeeds. In some cases the taxpayer may establish that the case does not fall within s 26 (a), even though he does not give evidence or does give evidence but is disbelieved … And the fact that the taxpayer was disbelieved could, in appropriate circumstances, itself give rise to an inference adverse to the taxpayer's case … Nevertheless, if the proper inference to be drawn from the evidence is that the taxpayer bought the property for a purpose other than that of profit-making by sale, the appeal will succeed.[319]

262 I determine that the Bond Deed and the General Security Deed were entered into with an intention to defeat, delay or hinder creditors. Given that the plaintiffs' affidavits which were to be relied upon at the hearing as evidence in chief clearly set out material as to why the Bond Deed and the General Security Deed were each void, I expected Mr Gutnick to depose to matters to form the basis of reasons why the Court ought not make an order. I comfortably make that determination relying upon application of the *Briginshaw* test.

263 In *Shot One*, Sloss J referred to *Re Day* where Gordon J explained:

> when conducting the process of fact finding, a court or tribunal, after careful weighing of testimony and close examination of the facts:
>
> … must feel an actual persuasion of the occurrence or existence of a fact before it can be found. Where direct proof is not available and satisfaction of the civil standard depends on inference, "there must be something more than mere conjecture, guesswork or surmise" - there must be more than "conflicting inferences of equal degrees of probability so that the choice between them is [a] mere matter of conjecture". An inference will be no more than conjecture unless some fact is found which positively suggests, or provides a reason in the circumstances particular to the case, that a specific event happened or a specific state of affairs existed.[320]

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318 (1979) 143 CLR 284.

319 Ibid 301.

320 [2017] VSC 741, [257], citing *Re Day* (2017) 91 ALJR 262, [18].

264 In *Ashala*, Jackson J said:

> Clearly enough, an intention to defeat, delay or hinder creditors is a serious allegation that will attract the Briginshaw approach. So much was accepted in The Trustee of the *Property of Cummins v Cummins*.[321]
>
> In dealing with an inference for a finding of fact, *Holloway v McFeeters*[322] is a leading case. The plurality judgment said:
>
> > "Inferences from actual facts that are proved are just as much part of the evidence as those facts themselves. In a civil cause, you need only circumstances raising a more probable inference in favour of what is alleged … where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture … All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood".[323]

265 I accept that the Liquidators had not examined Mr Gutnick and hence there was no transcript of the examination to be produced. I also accept that it was not incumbent on the plaintiffs to have called Mr Gutnick, given Mr Gutnick's interest in upholding the Bond Deed and the General Security Deed as he stood to benefit via Zalg, it is hardly suprsing that the plaintiffs did not seek to adduce any evidence from him. In any event, it is highly unsual for any liquidator to seek to rely upon a directors evidence. By virtue of the very nature of the winding up regime, the liquidator and a director are rarely viewed as being 'in the same camp'.

The s 588FB(1) factors

Benefit to Legend

266 Whilst it is recognised that the consideration of a $400,000 advance was not 'nominal' or 'trivial', when considering whether a transaction is for the benefit or to the detriment of Legend, all the prevailing circumstances must be considered. The primary purpose of the $400,000 advance was to meet the costs of resisting the registration of the Singapore arbitral award. Notwithstanding the contention that Mr Feldman had advice from Mr Bret Walker

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321 (2006) 227 CLR 278, 292 [34].
322 (1956) 94 CLR 470.
323 Ibid 480–1; *Ashala* [2016] QSC 121, [172], [173].

SC that the prospects of resisting registration were strong, that contention is of little value as Mr Feldman conceded that there was no written advice provided and that his understanding was based upon what Mr Gutnick had told him. Mr Feldman did not have a conversation with Mr Walker about the prospects. The briefing notes to elicit the advice were not adduced into evidence by the defendants. I further note that as with most of the transactions between Legend and QPPL it is difficult to distil whether Mr Feldman was acting for and on behalf of Legend or for and on behalf of QPPL or even QBL or Mr Gutnick.

267 Notwithstanding my observation about Mr Feldman's role, my primary focus is to look at the transactions and the circumstances 'from the point of view of the company'.[324] In any event, although the Australian registration was resistedwhat is telling is that there was no proceeding instituted to seek to set aside the arbitral award nor the Singaporean or High Court judgment. Without the arbitral award being set aside, Legend was at all relevant times insolvent. Accordingly, the interests of Legend's unsecured creditors were necessarily relevant.[325] Those interests were entirely ignored.

268 The primary object of resisting the Australian registration was to delay any consequences of that registration of the award. Such delay did not have regard to the interests of unsecured creditors and, in particular, IFFCO and Kisan, nor did the delay permit appropriate funding to be sourced to develop the tenements in a timely manner. In the presentation forwarded by Mr Gutnick to Mr Feldman on 2 November 2015, the capital costs to develop Paradise North and South on the 'Townsville' option totalled US$366.8 million (with US$23.8 million required for Paradise North alone) or US$274 million using the 'Karumba' option (with US$64 million required for Paradise North alone).

269 Although the $400,000 or even the maximum of $2.5 million payable under the Bond Deed (without default) may have delayed further creditor action, nothing tangible was gained or could be gained by the resistance to the registration of the Arbitral Award. Clearly there was no tangible or commercial benefit to Legend in securing the advance by QPPL.

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324 See *Shot One* [2017] VSC 741, [215]–[221].

325 See *640 Elizabeth Street Pty Ltd (in liq) v Maxcon Pty Ltd* [2015] VSC 222, [37] (Sifris J); *Walker v Wimborne* (1976) 137 CLR 1, 7; *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722.

Detriment to Legend

270 Legend granted security over all its assets and, in particular, the Paradise shares to secure its obligations under the Bond Deed. Although the Liquidator conceded that the security document itself was 'vanilla', the circumstances of entry into the same must be considered.

271 Legend granted QPPL an immediate redemption of bonds upon an Event of Default. Legend agreed to the payment of an 'Event of Default Fee' comprising a 50 per cent penalty on any amounts advanced if an Event of Default occurred and the Default Interest Rate of 50 per cent. Legend agreed not to procure 'any other financing' without the prior written consent of QPPL.

272 Critically, the evolution or genesis of the 'Event of Default' was the telling factor. That Event of Default went beyond the usual boilerplate provisions to include 'a final judgment or judgments of an Australian or USA court or courts of competent jurisdiction for the payment aggregating in excess of [A]$1,000,000.'[326]

273 That clause was inserted in circumstances where the efficacy of the arbitral award and the registration as a judgement in the Singapore court was not being attacked. The Australian registration proceedings were only opposed on the grounds of natural justice and public policy.

274 In circumstances where the underlying arbitral award was not being attacked it is inevitable to conclude that the 'Event of Default' clause was tailored in such a way that the triggering of the security was almost inevitable. Legend's assets, by entry into the Bond Deed and the General Security Deed on the terms contained therein, were placed beyond the reach of the unsecured creditors with Legend being left with no ability whatsoever to remedy any default by being able to raise funds elsewhere.

275 This occurred in a setting where it had been estimated that Legend's assets by virtue of its shareholding in Paradise translated as accepted by Mr Feldman on 24 November 2015 to be worth somewhere between $200 million and $4 billion. Giles JA said in *Lewis v Doran*:[327]

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326 Convertible Bond and Subscription Deed and General Security Deed between QPPL, Legend and Paradise, cl 15.1(d), Court Book 3, 1206.

327 *Lewis v Doran* [2005] NSWCA 243, [136].

> Transactions at an undervalue were no doubt the primary target of the provisions, but the description of an uncommercial transaction in s 588FB(1) was not limited to such transactions. The description directed primary attention to a balancing of benefit and detriment, only in the broadest sense involving undervalue.

276 If Mr Feldman's evidence to the effect that, on behalf of QPPL, he was unwilling to pay more than $20 million for the Paradie shares, the putting beyond reach of an asset of the value of perhaps, $20 million in return for an advance of $400,000 was not a transaction which could be expected that a reasonable person in Legend's circumstances would have entered into.

277 The defendants propounded that the test for the purposes of s 588FB is whether or not the unsecured creditors were worse off. That contention ought to be rejected. The section requires the Court to determine whether 'a reasonable person' in Legend's circumstances would have entered into the transaction having regard to the matters set out in the s 588FB(1). It is clear from authorities that:

(a) the test is objective;

(b) a transaction entered into with the purpose of hindering, delaying or depriving creditors will constitute an uncommercial transaction;

(c) a transaction can be uncommercial even if it is not, as the case is here, at an 'undervalue';

(d) in assessing the transaction, the totality of the relationship between the parties is to be considered.

278 In *Cussen v Sultan*,[328] Nicholas J said:

> Accordingly, the court will look at the totality of the business relationship between the parties, and to what the parties under their relationship intended to effect, and how their intention was effected, in part or in whole, by the impugned transaction.

279 Further, the test propounded by the defendants illustrates the extent of the detriment suffered by Legend in entry into the Bond Deed and the General Security Deed. On any view, an asset valued at considerably more than the $400,000 or even the potential $2.5 million was 'locked away' out of reach of unsecured creditors even if an 'Event of Default' had not

328 (2009) 74 ACSR 496, [23].

occurred.

Benefits to other parties

280 While upon my analysis Legend stood to gain nothing tangible from entry into the Bond Deed and the General Security Deed, the converse can be said about QPPL, the Feldman family and Mr Gutnick through the Zalg Exploration Trust.

281 QPPL obtained control of Legend's and Paradise's assets in return for the advance of $200,000. That control was affected by appointing a receiver to Legend's shares in Paradise and then instigating the receiver to sell or, at the very least, concurring with the receiver selling them to QPPL for a nominal amount payable immediately and subject to a subsequent formulaic adjustment. Given the history of this matter, I have no confidence that the resulting adjustment would have been appropriate.

282 QPPL and the Feldmans also obtained the benefit under the Bond Deed and the related Shareholders Deed of being able to exercise joint control of Legend and Paradise boards.

283 The Event of Default converted the advance of $400,000 into a liability of Legend of approximately $1 million in less than six months.

284 By virtue of the Shareholders Deed accompanying the Bond Deed, Zalg was given the option to take up half the notes issued to QPPL (or shares, if already converted). This translated to a purchase of 26 per cent of Legend's shares for $1.25 million. In effect, 26 per cent of Legend's shares were being warehoused for the benefit of Zalg.

Other relevant matters

285 The timing of the implementation of the transactions and the relationship between the parties is germane.

286 Notwithstanding Mr Feldman's unchallenged evidence that there was tension between himself and Mr Gutnick at all relevant times, the emails passing between each do not bear that out. Further, the timing of the entry into the transactions and Mr Feldman's compliance in incorporating QPPL (rather than using QBL), just before entry into the transactions at a time when the application had already been made to Croft J and a decision was 'imminent', clearly

separate the transactions from one which might be considered by 'a reasonable person' as an arm's length third party transaction. Further, despite the advice from the US lawyers that the board needed to be satisfied ('after making a reasonable enquiry' that there is not an alternative source of financing that would be available to the company on more favourable terms) nothing was contemplated or explored. Again, that is corroborative of the intention to put the assets out of the reach of creditors. Again, the acquiescence by Mr Feldman to Zalg's opportunity to purchase the shares or take up the notes illustrates that this was not a third party arm's length transaction.

Conclusion

287 Accordingly, I conclude that 'a reasonable person' in the position of Legend would not have entered into the Bond Deed or the General Security Deed. I come to this conclusion on the following basis:

(a) The detriment to Legend disproportionately outweighed any benefit it might have attained. In essence, even disregarding all other circumstances, the transaction led to Legend effectively providing millions of dollars of assets (of whatever value that could be ascribed or attributed) for the minor consideration of $400,000;

(b) The transaction could not be considered an 'arm's length' transaction in the normal sense. Putting aside the familial relationships, the transactions were designed, with the addition of the shareholder's agreement, for Mr Gutnick to obtain or retain a benefit through Zalg without accounting to Legend's creditors;

(c) The transaction included default provisions which might be considered a penalty;

(d) The transaction was designed to precipitate an almost instant default;

(e) In the Event of Default, Legend was commercially incapable of remedying the same even though a relatively minor amount advance had been made to it;

(f) Legend negotiated the terms of the transaction in circumstances where it had been domant for years, the arbitral award had been made in early 2015 and seemingly, the only new factor was the filing of the Australian enforcement proceeding. It is

inescapable that the only purpose for entering into the transaction was to defeat creditors and, in particular, IFFCO and Kisan;

(g) There was a conscious determination to change the use to which the funds were to be put to disguise the purpose of the advance; and

(h) There was a conscious determination to include a warranty of solvency in circumstances where the Chief Financial Officer (Mr Lee) and Mr Gutnick initially did not support such a warranty.

The good faith defence

288 From the outset, I observed that I had no reason to question Mr Feldman's honesty as a witness however, that observation does not translate into QPPL being able to take advantage of the good faith defence set out in s 588FG(2). To establish the good faith defence, QPPL was required to establish:

(a) it entered into the Bond Deed and the General Security Deed in good faith; and

(b) it had no reasonable grounds for suspecting Legend was insolvent at the time of entry into of the Bond Deed or the General Security Deed, or would become insolvent because of entering into the Transaction; and

(c) a reasonable person in QPPL's circumstances would have no such grounds; and

(d) it provided valuable consideration or changed position in reliance on the transaction.

(e) The 'and' in s 588FG(2) is conjunctive. QPPL bears the onus of satisfying each limb of the defence.

289 In *Cussen v Sultan*,[329] Nicholas J said:

> The defendant must establish a positive. The plaintiff is not required to prove the absence of good faith. The term 'good faith' is to be given its natural meaning, namely to act with propriety and honesty… The concept of 'good faith' encompasses notions of honesty of purpose, motive, or intention which actuated the defendant to become a party to the impugned transaction… The inquiry, accordingly, is directed to the party's state of mind, with regard to his knowledge and belief about the nature of the transaction at the relevant time.

329 (2009) 74 ACSR 496, [33]–[34].

290 Even if I were to accept that QPPL acted in good faith by applying the subjective test, in *Queensland Bacon Pty Ltd v Rees*,[330] Barwick CJ said:

> The existence of knowledge or suspicion of insolvency negatives good faith: and the knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities is knowledge of insolvency.

291 Firstly, it is difficult to reconcile the concept of subjective 'good faith' with Mr Feldman's conduct. Objectively, Mr Feldman's fingerprints were all over the transaction. He actively participated in drafting the Bond Deed and the accompanying Term Sheet together with the Shareholders Agreement. Normally I would expect a third party lender to present an agreement on terms acceptable to it rather than embarking upon an agreement by consensus. Although irrelevant to the subjective test with respect to 'good faith', the objective criteria are telling when it comes to an assessment of whether Mr Feldman (and thus QPPL) had actual knowledge or suspicion of insolvency.

292 I determine that from his participation in the genesis of the Bond Deed and the General Security Deed, that Mr Feldman had actual knowledge of Legend's insolvency. I will not repeat the matters relied upon save to note from what I've set out in para 156, it is patently clear that Mr Feldman had that knowledge. Further, it is patently obvious that Mr Feldman had the requisite suspicion of insolvency. The criteria upon which Mr Feldman had a reasonable suspicion of insolvency is as follows:

(a) Mr Feldman's fingerprints were all over the drafting of the relevant documents;

(b) Mr Feldman had received on 19 November 2015 balance sheets for Paradise and Legend. At that time, he knew that Legend had ready cash of $1,028 as at 30 September 2015. He knew the position had not improved since that date. He knew that apart from the IFFCO debt, Legend owed money to the extent of $1.9 million odd dollars with respect to other accounts payable;[331]

(c) Mr Feldman accepted that he was, in effect, a lender of last resort;

(d) Mr Feldman concurred in the redrafting of the ‘purpose’ clause but knew that the

330 (1966) 115 CLR 266, 287.
331 Transcript, 298.

funds advanced would be used in the main, to pay legal costs and would not discharge the liability to all other creditors;

(e) Mr Feldman knew that the market place would not support Legend once the IFFCO liability was announced;

(f) He understood that Legend was so desperate that Mr Gutnick wanted the first $100,00 tranche from QPPL even before the term sheet had been signed;[332]

(g) From the 22 November 2015 email transmission from Mr Feldman to Mr Gutnick, I can only conclude that Mr Feldman knew that Legend could not meet the IFFCO and Kisan liability;[333]

(h) Mr Feldman knew that Mr Lee sought to excise the warranty of solvency from the transactional documents;

(i) Mr Feldman knew that on 23 November 2015, Mr Gutnick was reluctant to provide the warranty of solvency 'the problem is only the IFFCO debt'.

(j) Mr Feldman knew that the phosphate tenements had not been developed;

(k) Mr Feldman knew that the phosphate tenements were the only asset of Legend held by Paradise; and

(l) Mr Feldman knew that significant sums were required to be expended for the projects to reach production and that Mr Gutnick had suggested it would take Paradise two to three years to reach production. Even though Mr Feldman's evidence was that it might have been as quick as six months but once funding was in place, there was no prospect of generating income in the foreseeable future.[334]

293 In *Dean-Willcocks v Commissioner of Taxation*,[335] Barrett J said:

> As Bryson J pointed out in *Mann v Sangria Pty Ltd* [2001] NSWSC 172; … at [46], the first of these inquiries is concerned with the existence of reasonable grounds for

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332 Ibid.
333 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1060.
334 Transcript, 171; Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 0599 and 0604.
335 [2008] NSWSC 1113, [10]–[14], [16].

> the formation of the relevant suspicion by the Commissioner, while the second is concerned with the existence of reasonable grounds for the formation of the relevant suspicion by a reasonable person in the Commissioner's circumstances. I do not think it is all that helpful to attempt to characterise one inquiry as "subjective" and the other as "objective". One should merely approach the two inquiries according to the terms in which they have been expressed by the legislature. I would, however, respectfully endorse Bryson J's observation (at [46]) that:
>
> "it would be seldom that the two tests would produce different results, although it is conceivable that a person might be afflicted by some personal difficulty in forming a suspicion."
>
> His Honour thus accommodates the possibility that the actual frame of mind of the particular person may be affected by factors to which the mind of the hypothetical "reasonable person" would be impervious, even though each formed a judgment on "reasonable grounds". And the "reasonable person" to whom regard is to be had is, as the Court of Appeal confirmed in Cussen as Liquidator of *Akai Pty Ltd v Commissioner of Taxation* [2004] NSWCA 382; … at [31], a "reasonable business person".
>
> The relevant concept of "suspecting" - or "suspicion" - is that referred to by Kitto J in *Queensland Bacon Pty Ltd v Rees* [1966] HCA 21l (1966) 115 CLR 266. It is more than idle wondering. It is a positive feeling of actual apprehension or mistrust without sufficient evidence.
>
> It is important to emphasise that the relevant suspicion is one of actual and existing insolvency, as distinct from impending or potential insolvency. That, as the Full Court of the Supreme Court of South Australia pointed out in *Sheahan v Fabienne Pty Ltd* [1999] SASC 335 … , is something that was made clear in *Queensland Bacon Pty Ltd v Rees* (above).
>
> The last matter to be mentioned before I turn to the specifics of this case concerns the process of ascertaining the state of suspicion (or otherwise) with which an official such as the Commissioner of Taxation must be fixed.
>
> …
>
> It is, as I have said, necessary for the Commissioner to prove the two negative propositions in paragraph (b) of s 588FG(2). That task arises, however, in a context where the liquidators point to various factors which they say must have engendered relevant suspicion on the part of the Commissioner and the hypothetical "reasonable business person".

294 From what I have set out in paragraph 293, I have concluded that Mr Feldman had actual knowledge of insolvency of Legend as at 25 November 2015. However, and in any event, the criteria set out satisfies the objective test as referred to Barrett J in *Dean-Willcocks v Commissioner of Taxation* and are such that the 'reasonable person' in Mr Feldman's position would have formed the relevant suspicion that Legend was insolvent.

295 In those circumstances, Mr Feldman's evidence that he believed that the value of the tenements was such that Legend was solvent (or that he had no suspicion that it was

insolvent) does not discharge the onus upon QPPL.

IV. Was the Share Sale Agreement void or unenforceable? Was Mr Palmer's appointment invalid?

296 The Share Sale Agreement was entered into on 22 April 2016. The purchase price was $1, subject to adjustment upon valuation.

297 The evidence suggests that the focus of Mr Feldman from the start of his involvement was the primary asset of Legend; control of the tenements, rather than providing finance to Legend per se. This is demonstrated by:

(a) Commencing October 2015 to December 2016, Mr Feldman had discussions with Mr Katter regarding development of the project.[336]

(b) At a meeting of 3 November 2015, Mr Feldman and Mr Gutnick discussed how to secure Paradise so that the value of the tenements would be protected as far as possible and would not be made available to Legend's unsecured creditors.[337]

(c) The email of Mr Feldman to Mr Sipina of 20 November 2015:

> 'we are doing what we can through this structure to protect the asset and its value. This is precisely the point of his doing this deal, to ensure that all value is not lost to the company if he loses the battle … [W]e as third parties will develop and control the asset for the foreseeable future, ensuring maximum value possible will be retained by the company if they lose this case'.[338]

(d) The email of Mr Feldman to Mr Gutnick of 22 November at 5.55pm stating '… we want to make sure that Paradise is secure and we will have the right to step in and protect the assets from any other creditor or receiver'.[339] Mr Feldman stated that the reference to 'we' was to him and his investors — 'we have to make sure that we're fully secured and there's no way out'.[340]

(e) The email of 23 November 2015 to Mr Gutnick stating '[w]e then can't take security over the asset … [I]t is my view that the assets are worth more than the liabilities, and

336 First Feldman affidavit, [23], [28].
337 Transcript, 271.
338 Email from Sholom Feldman to David Sipina, Court Book 3, 1057.
339 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1060.
340 Transcript, 293.

worth more than the funds being advanced as well, which is why we are looking to save the asset …'.[341]

(f) Similarly, regarding the amount of equity that would be obtained in Legend and the proposition of Mr Gutnick as to security over a sliding percentage of the shares in Paradise:

> One of the fundamental terms that I gave to Joseph Gutnick was that any deal that I do with him, I need to have a way to control … Otherwise I wouldn't do the deal.[342]
>
> Well, if the loan's repaid, what control do you want?---No conversion of the shares into Legend and then I would make sure that the development and the company continues to be operated under my control.
>
> So, it was already contemplated that you'd take control of the tenements?---Of Legend. So, I did - the conversion - the convertible note in its essence, has twice parts of it. It can either be converted into equity or if it doesn't get converted into equity, it gets converted - you can just take the security obviously and be able to sell the security.
>
> Deal with the security?---Deal with the security. So, that's the protected downside. On the equity side at the time Legend was worth on the stock market a couple of million dollars. It was worthless at the time because it had the IFFCO debt against it out in the marketplace. So, clearly the market did not value Legend after the debt at very much at all. He could not therefore raise funds from the market and if I was going to come in and resuscitate the company, I was going to make sure that it's - I bring in independent third party investors, which I was doing, using my reputation and my abilities. I wasn't going to do that and put it under his control.[343]
>
> ….
>
> To give a security of half a project or a minimum amount of a nature such as this I would find very difficult to realise. Whereas if you take control of a whole security, you're able to realise it. And therefore him part security is just uncommercial and ridiculous.[344]

(g) The presentation forwarded by Mr Feldman to Mr Sipina on 24 November 2015, stating 'Legend has a world class phosphate project 100% owned and unencumbered … Queensland Phosphate to lend $2.5M to Legend and will take first ranking security on the asset … with valuations of between $200 M and $4Bn on the project…'.

(h) Mr Feldman's evidence in his first affidavit at para 62: 'The Courtney House

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341 Email from Sholom Feldman to Joseph Gutnick, Court Book 3, 1160.
342 Transcript, 276.
343 Ibid 276–7.
344 Ibid 282.

investors were not secured over any asset of Legend or Paradise. Instead QPPL obtained security over the advance of the funds from the Courtney House Investors by the terms of the GSD. QPPL's entry into the GSD provided the shareholders in QPPL security over the assets of Legend and Paradise … QPPL had a right to convert its loan into a majority equity position in Legend, which would have the potential to translate into significant value in QPPL and potential capital gains for the investors of QPPL.

(i) An email of Mr Feldman to Mr Spinia on 14 December 2015, in response to a query over the impact of court action: 'this is the reason we (QPL) are taking first-ranking security over the assets … if for some reason we haven't been able to secure the finance for the payout, and the project is not yet developed, then we will sell the project and get our costs and investment back plus 10%, so the downside is strongly protected … the downside is protected as strongly as we have been able to protect by structuring the QPL investment into Legend initially by way of secured loan'.

298 After Croft J's orders were handed down on 22 December 2015 (the event of default), Feldman acted to protect Legend's chief asset:

(a) In an email to Bailey on 7 March 2016 he stated '[t]he Australian Asset is the 100% shareholding in Paradise Phosphate Ltd. We can also go after Paradise's assets individually, being the mining leases and appoint receivers to them. That may make it one step more complicated for any unsecured creditor of Legend to access the assets'.

(b) After QPPL appointed the receiver (Mr Palmer) on 11 March 2016, and Bailey sought instructions from Mr Feldman as to the next steps to take, Mr Feldman replied on 15 March 2016 stating: '[n]othing yet at this point until we see what response if any we get from the Indians'.

(c) The appointment of the receiver was over the shares in Paradise, rather than receiver and manager of Legend, appeared aimed at obtaining control of the chief asset:

> You hadn't appointed Mr Palmer receiver and manager of Legend, you just appointed him receiver of Legend's shares in Paradise?---Okay, yeah, but at that time, we were considering how we could ensure that we protect the

value.[345]

…

So at this point, it was, um - you know, we were looking to see how can we retain value.[346]

(d) Mr Feldman accepted that in acting as appointer QPPL was seeking to make it more complicated for IFFCO and Kisan to access the assets:

> Yeah, the day before they told us that they want the asset, so, um, we [QPPL] felt we had to do something before they did. …. And this is what we wanted to effect to make sure the proper value was given to Legend for the assets and not stopped and taken by them in liquidation.[347]
>
> …
>
> Not to hold - not to hold them back from enforcement, but to hold their, um, any attempts they might get to get their hands on the asset which is different to being able to recover their debt. So we - we felt that while we were still operating the project, we were negotiating with MMG at the time to secure the, ah, pipeline infrastructure next door, and we were very close to concluding those - those negotiations with MMG. Um, should those negotiations have concluded in that short period of time which we believed it could have, um, then the assets would have been worth much, much more than even the 10 millions of dollars, so we didn't want a situation where that would be lost to Legend, its creditor or to QPL to be able to recover.[348]

(e) Mr Feldman gave evidence that Mr Gutnick called him up 'screaming and shouting' after the appointment of the receiver, and that he told Mr Gutnick that 'we have to do what we can to protect the asset'.[349]

(f) In an email to Mr Gutnick of 22 March 2016 Mr Feldman stated: '[t]he receiver is very comfortable that the Indians won't be able to touch the assets without our approval … They now will find it very hard if not impossible to try to access the assets …'. In oral evidence Feldman agreed with the proposition that the appointment of a receiver was to ensure that proper value was achieved for the phosphate assets.[350] That is, as a director of Legend the aim was to create enough value in the project, prior to enforcement of the debt, such that Legend would have enough money to pay the IFFCO debt in full.[351]

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345 Ibid 325.
346 Ibid 326.
347 Ibid 322.
348 Ibid 323.
349 Ibid 321.
350 Ibid 322.

(g) Email from Mr Feldman to Mr Gutnick, dated 14 April 2016 stated '[w]e are doing what we can to protect the assets under the security..'. When questioned about this email Feldman said:

> When you said to Mr Gutnick that for the receiver to consider anything it needed a valuation, were you referring there to the receiver considering some action which would take the assets - protect the assets from enforcement by IFFCO and Kisan?---No, to in fact enable QPL to perfect its security. … And by perfecting your security you meant doing something that would mean the assets could not be accessed by IFFCO and Kisan to QPL's creditors?---Well, it - yeah, the - if - um, IFFCO had no right to the assets. They had right to Legend and to a loan to Legend, and obviously our - and, you know, as - as being a director of Legend, my responsibility was to try to do what I can, ah, to ensure value in Legend, so we can pay IFFCO as and when it's due…
>
> But with your QPL hat on, you wanted the assets taken out from under Legend, so that - - - ?---At - at - at that - - -
>
> - - - a liquidator could not access them?---At that point in - at that point in time, um, QPL and Legend's interests aligned. At that point in time. …. I - I wanted it so we would have control, because we had the right to do so under our security, and I wanted to ensure that we would be able to enforce our security.[352]

(h) In an email of 19 April 2016 Rostron Carlyle lawyers let Mr Bailey know that '[Feldman] has suggested that QPPL seek to acquire Legend's shareholding in Paradise'.[353]

(i) When questioned as to whether the Share Sale Agreement was prompted by the fact that IFFCO had filed the winding up application on 11 April Mr Feldman said:

> By that time we did see IFFCO as a competing to try and control the assets, so we obviously were trying to figure out how we ensure to protect our security. So, that would have been the method that we would have come up with to do that.[354]

(j) Mr Feldman accepted that the reason that $1 subject to adjustment was adopted in the Share Sale Agreement was because it meant that the sale could be pushed through quickly –'[s]o we could protect our security, yes'.[355]

(k) In relation to correspondence from Ashurst, Mr Feldman stated in an email to Mr

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351 Ibid.
352 Ibid 332.
353 Email from Clayton Hellen to Liam Bailey, Court Book 4, 1348.
354 Transcript, 341.
355 Ibid.

Bailey of 6 May 2016 regarding a letter from: '[w]e were right in doing the transfer of shares prior to receiving this'.

(l) On the 26 May 2016 Mr Feldman also stated in an email to Mr Bailey regarding the ch 11 proceedings: '… they are making the noise they need to make. This is their only real asset but the valuation undertaking undermines the heart of both their case and the case of the Indians'.

(m) In relation to other correspondence:

> It seems reading this correspondence that you saw IFFCO as really your competition or your opponent in a tussle for the assets?---They - that's - that's correct, because that's how they put it to us. And we - we had approached them for a couple of months saying we would like to work together to create this value, um, and their response to us was you're in competition with us for these assets.[356]

299 Mr Feldman also continued to look for investment in the project:

(a) In an email to Mr Sipina of 17 May 2016 he stated: 'we are offering a 12% equity position for $30M or a 25% equity position for $70M';

(b) In this regard Mr Feldman appeared to accept that he and his family were getting a 'free carry':

> Now, your business planning in setting up this structure was basically for your family to get a free carry. So you get the investors to put in all the 2.5 million, and they only get for that 20 per cent of QPPL, and your family basically keeps the other 80 per cent?---That's what I - that's what I do for a living, is develop projects, yes.[357]

300 Such evidence suggests that the purpose of the Share Sale Agreement was to take the valuable assets out of Legend and out of the reach of Legend's creditors.

301 At times Mr Feldman focused upon repayment of the loan rather than maximising the value of the asset:

(a) Email from Mr Feldman to McInnes of Rostron Carlyle Lawyers of 12 April 2016; '[t]he matters I would also like advice on is the advantage of perhaps transferring the

356 Ibid 337.
357 Ibid 357.

shares in PPPL [sic] to QPL prior to any potential liquidation, making it potentially more secure to ensure repayment of the secured creditor'.

(b) Mr Feldman stated in his first affidavit: QPPL agreed as part of the advance of any funds from Courtney House Trading's investors to offer them a shareholding in QPPL. Further those investors were offered the comfort that their funds were secured by QPPL entering into a security arrangement to cover advances by QPPLY.[358] Further, the loan facility was referred to as an example of Paradise raising capital.[359]

(c) On the issue of whether a 50 per cent uplift on default and 50 per cent interest were both reasonable:

> Yeah, absolutely. They're very commercial, um, you put - you put money in from independent investors. You have to return that money to investors with a return, and there's got to be, um, there's got to be a return for the business. And with the quantity of money and quantum of money that was put it, it was very commercial. Must other deals have within it broker fees, facility fees and all of those types of fees which was not put into this. So under the circumstances this was a very commercial deal.[360]

Similarly:

> I don't recall the exact mechanisms because generally speaking when we've entered default, we would just go after the cash and not the shares. So, I don't think I would have been thinking at the time of an event of default and then taking more shares. So, I don't think I would have been thinking at the time of an event default and then taking more shares when a company's defaulted.[361]
>
> …
>
> Your expectation was that if there was a default you would enforce not redeem?---Enforce, correct… And you were aware, were you not, that if there was an event of default, Legend would not be in a position to redeem the bonds on three days' notice because it didn't have the cash?---Yeah, that was - yes. But when it becomes payable then we can enforce it and try and get the cash from the assets.[362]

(d) On the advice sought regarding the ability to transfer the shares in Paradise to QPPL:

> So when you sought this advice, what you were asking advice on is the advantage of perhaps transferring the shares in PPL to QPL prior to any potential liquidation? ---Yes.

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358 First Feldman affidavit, [40].
359 Ibid [52].
360 Transcript, 286.
361 Ibid 305.
362 Ibid 306.

> Making it potentially more secure to ensure repayment of the secured creditor?---Correct.
>
> So you're seeking advice there on the advantages, in effect, to QPPL of transferring the shares prior to liquidation? ---To ensure that we get repaid, yes.[363]

302 Overall, the evidence suggests that Mr Feldman was interested in securing the chief asset of Legend in order to:

- secure investment and maximise its value, leading to a return on the investment and the QPPL debt to be paid; or
- sell the asset and cover repayment of the funds advanced.

303 In relation both of these reasons he admitted to acting such that the assets were out of reach of IFFCO/Kissan (see 119(g), 119(d), 119(f) and 118(b), above) and that conclusion is also supported by the surrounding evidence (see eg 119(a), 119(f), 118(d), 118(e) above).

304 As such, the purpose of the Share Sale Agreement appears to have been to take the valuable assets out of Legend and away from IFFCO/Kissan. I cannot identify any other purpose on the facts.

Was entering into the Share Sale Agreement an 'act done for the purposes of giving effect to the transaction'?

305 At its highest, the plaintiffs' submission is that 'entry into the share sale agreement was an act giving effect to the substratum of the transaction'. That is, the transaction was intended as an insurance policy to put the assets of Legend out of IFFCO's reach, and the Share Sale Agreement was an act giving effect to that.[364]

306 There is limited case law on the phrase 'act done for the purposes of giving effect to the transaction' in s 588FC(b)(ii).

307 In *Demondrille*[365] the relevant transaction was an agreement for the sale of a unit. Cornelis was a company in property development and entered into a contract of sale with a purchaser, Demondrille. Although the contract stated that a deposit of $120,000 had been paid, the sum in fact was not paid on account of a debt owing to Demondrille from a company related to

363 Ibid 327.
364 Ibid 457.
365 (1997) 25 ACSR 535.

Cornelis. Later, when Cornelis was insolvent, Cornelis and Demondrille entered into a deed rescinding the contract of sale on payment of $120,000 from Cornelis to Demondrille. The Full Federal Court determined that the contract of sale was an uncommercial transaction, and that entering into the deed of rescission was an act for the purpose of giving effect to the transaction. On the second point the Full Court reasoned:

> Prior to the making of the agreement, Demondrille had no relevant rights against Cornelis. By the agreement, it acquired contractual rights and became subject to contractual obligations. Relevantly, it acquired the right, upon payment of $60,000, after 12 December 1994 to receive a transfer of the title to Unit 3 and to be credited with having paid a total purchase price of $180,000. That right subsisted at the time when the deed was entered into. Demondrille's right, upon paying $60,000, to be treated as having actually paid $180,000 when it had not in fact done so, was a valuable right. …
>
> Demondrille's right to be treated as having paid $120,000 which it had not in fact paid explains the deed and makes commercial sense of it. We think that for the purpose of subs 588FB(2), the acts of Cornelis and Demondrille in entering into the deed in fact 'gave effect', within the meaning of s 558FC, to the 'transaction' constituted by the agreement, because it gave effect to the 'credit' in favour of Demondrille which the agreement created.
>
> ….
>
> It was argued that because the deed provided for the rescission, or undoing, of the agreement, it could not be said to "give effect to" it … The deed here set out to secure for Demondrille the payment of $120,000 to which it became entitled by virtue of the agreement and not otherwise. To the parties this was clearly the most commercially important effect of the agreement. It is true that the deed did not give effect to the entirety of the earlier transaction, but we do not think that this matters: it gave effect to a substantial part of it and the "uncommercial" part at that, namely, the agreement to transfer property at an undervalue of $120,000 to the detriment of Cornelis and to the benefit of Demondrille. It is with the giving of effect to an uncommercial transaction that the statutory provisions are concerned.[366]

308 Further, 'the purpose of' does not mean 'the sole or dominant' purpose.

309 In *Lewis v Doran*, in the context of a resolution of a board of directors, followed by journal entries, Giles JA stated as follows:

> I consider it sufficient that posting the journal entries was doing what had been agreed should be done, maybe sufficient even if the resolution(s) had not stipulated the method of payment. Attaching legal significance, in the present context, to an act done for the purpose of giving effect to a transaction seems to have been intended to catch an agreement entry into which was an uncommercial transaction if the company was insolvent when the agreement **was performed**. This is consonant with the view taken in the Full Federal Court in *Demondrille Nominees Pty Ltd v Shirlaw* …[367]

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366 25 ACSR 535, 549.

367 *Lewis v Doran* [2005] NSWCA 243, [124] (emphasis added).

310 *Lewis v Doran* was applied in the *International Cat* at first instance. There, the plaintiff company claimed that the charge over the boat was the relevant transaction, and consequent payments to pay-off the loan secured by the charge were 'acts done for the purpose of giving effect to the charge'.[368] McMurdo J referred to *Lewis v Doran* and *Demondrille,* noting that the phrase had been given a broad scope in those cases. Applying the reasoning of Giles GA in *Lewis v Doran*, McMurdo J stated:

> Therefore the payment must have had a purpose of giving effect to the creation of the charge. None of these payments was made in order that the creation of the charge would have its legal effect. Rather each payment was made simply for the purpose of reducing the debt to Nu-Log. By contrast, the registration of a charge could be considered an act done for the purpose of making effective the creation of the charge.[369]

311 In *Cashflow Finance Pty Ltd (in liq) v Westpac Banking Corp*,[370] certain payments were held to 'give effect' to unfair preference transactions.[371]

312 Ford's Principles of Corporations law provides the following example of when the subsection may apply:

- When the company is solvent a circulating security interest was given, the company becomes insolvent when the secured party causes the security interest to crystallise.[372]

Consideration

313 In the current circumstances, upon initial consideration the entry into the Share Sale Agreement perhaps would not be regarded as an act to 'give effect' to the Bond Deed and General Security Deed. The phrase is 'for the purpose of giving effect to the transaction'. In *Demodrille*, this was interpreted to mean 'for the purpose of giving effect to the uncommercial transaction', where the first transaction gave a right to the defendant that the second transaction gave effect to.

314 It may be that in the current circumstances, the broad approach adopted in *Demondrille* could be followed:

- The Bond Deed and General Security Deed created a right in QPPL to security, in

368 See *International Cat* [2013] QSC 91, [115].
369 Ibid [118] (emphasis in original).
370 [1999] NSWSC 671.
371 Ibid [562], [563]; see also *Neman v Coropean Pty Ltd* [2002] WASC 79.
372 Ford, Austin and Ramsay [27.340.18].

circumstances where an event of default may have occurred in the near future.

- The right created in the General Security Deed was the most commercially significant part of the transaction, and was not of value without further steps.
- The Share Sale Agreement 'gave effect' to the General Security Deed, including the 'uncommercial part' of the General Security Deed, in the sense that Feldman at least was seeking to take the assets out of the reach of IFFCO/Kissan.
- The Share Sale Agreement only made commercial sense insofar as it 'gave effect' to the General Security Deed.

315 Further, in *Lewis v Doran* reference was to acts when the uncommercial agreement was performed. On a broad approach it may be that the Share Sale Agreement was an act of controlling an asset of Paradise, which could be considered performance of the rights under the General Security Deed.

316 In any event, the Share Sale Agreement is void and unenforceable by reason of its substratum falling away. The Bond Deed and General Security Deed which authorised the sale of the shares are void. The power to sell no longer exists. Further, Mr Palmer's appointment must also be considered invalid. In *Jenner v Selmoore Pty Ltd*[373] Ryan J considered the validity of the appointment of a receiver under a debenture mortgage. Ryan J had held that the insufficient time had been afforded to meet a demand and thus the right to appoint had not crystallised. Ryan J said:

> Mr Jenner was appointment under the debenture mortagage. The fact that the appointment was liable to, and was actually, set aside does not mean that he was to be equated with a person who continued to act as a receiver after the invalidity of his appointment had been established, or otherwise, in a way which made him analogous to an executor in *de son tort*.[374]

317 Ryan J cited *Velcrete Pty Ltd v Melsom*[375] that:

> An invalidly appointed receiver, in so far as he has possession, is not entitled to such possession and is in law a trespasser. That being so, the invalidly appointed receiver cannot take advantage of his unlawful possession by retaining assets pending a valid appointment.

318 It follows that as Mr Palmer was not validly appointed, given that I have found that the Bond

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373 (1997) 23 ACSR 552.
374 Ibid 561.
375 (1995) 13 ACLC 799.

Deed and General Security Deed are void, his imprimatur to deal with the shares no longer existed.

V. Is Paradise insolvent or should the company be wound up on just and equitable grounds?

319 The plaintiffs contend that Paradise is insolvent pursuant to s 95A of *the Act* as it was unable to pay its debts as and when they fell due and payable.[376] The plaintiffs further argue that s 95A mandates a cash flow approach to determining solvency.[377] As a result, they seek orders that Paradise be wound up in insolvency pursuant to s 459A of *the Act* or, alternatively, on the just and equitable ground pursuant to s 461(1)(k).[378]

320 In opposition to that, the defendants argue that Paradise is not insolvent on a cash flow test.[379] The defendants rely on evidence that funds were available to expend by or sourced from QBL. Moreover, they contend that if the underlying value of the phosphate tenement is taken into account, the debt of Paradise to Legend could be satisfied.[380]

321 I determine that Paradise is an insolvent company pursuant to s 95A of *the Act*. Furthermore, the conduct and conflict of interest of Mr Gutnick and Mr Feldman is such that it satisfies an application to wind up Paradise on the just and equitable ground.

Winding up in insolvency

322 Section 459A of *the Act* provides as follows:

> **459A Order that insolvent company be wound up in insolvency**
>
> On an application under section 459P, the Court may order that an insolvent company be wound up in insolvency.
>
> …

323 Legend has standing to apply pursuant to s 459P(1)(b), which allows a creditor to apply to the Court for a company to be wound up in insolvency. According to Paradise's RATA prepared by Mr Palmer, Legend is an unsecured creditor of Paradise.

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376 *Plaintiffs' Closing Submissions* [71].
377 *Plaintiffs' Submissions of 26 February 2018* [158].
378 Ibid [1(b)].
379 *Defendants' Closing Submissions* 2.
380 Ibid.

324 The approach for determining the solvency of a company is relatively settled, although 'a balance sheet test can provide context for the application of the cash flow test.'[381]

325 The Balance Sheet of Paradise dated 30 September 2015 shows net liabilities in the sum of $15,342,915.00. This includes a current liability to Legend for an amount of $2,143,443.00 and a non-current liability to Legend for an amount of $15,910,000.00. The Balance Sheet of Paradise dated 31 December 2015 shows net liabilities in the sum of $15,399,530.40, which includes two current liabilities to Legend for an amount of $781,986.92 (account number 65301.290.000) and $1,407,996.77 (account number 70201.209.000) and a non-current liability for an amount of $15,910,000.00 (account number 70200.290.000).

326 In an email to Ms Chin on 10 November 2016, Mr Lee provided an explanation of the abovementioned liabilities. The current liability of $781,986.92 (account number 65301.290.000) is a running account for funding or other costs incurred by Legend on behalf of Paradise.[382] The current liability of $1,407,996.77 (account number 70201.209.000) is the billing from AXIS Consultants to Legend with respect to Paradise, which Legend then on-charged to Paradise.[383] Furthermore, the non-current liability to Legend for an amount of $15,910,000.00 (account number 70200.290.000) relates to loans from Legend for payments to Acorn.[384]

327 Significantly, the moneys owed to Legend by Paradise is evident in the RATA up to 10 May 2016 prepared by Mr Palmer.[385] The RATA shows that the total moneys owed by Paradise to Legend up until this date amounted to $18,109,803.78. The RATA reveals that Paradise owed money to other creditors, although Legend's percentage of the total debt owed by Paradise to its creditors was approximately 98.2%.

328 On 22 June 2016, the Liquidators sent an email to Paradise requesting payment of the debt for the amount of $18,109,803.78.[386] However, Paradise did not respond to this email nor has

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381 *Re Ashington* [2013] NSWSC 1008, [3] (citations omitted).
382 Email from Peter Lee to Natalie Chin, Court Book 5.
383 Ibid.
384 Email from Peter Lee to Natalie Chin, Court Book 5, 2191.
385 Report as to affairs of Paradise, Court Book 4. .
386 Affidavit of Craig Peter Shepard in Support of Application for Winding Up in Insolvency, affirmed 4 Novmber 2016, [7(b)], [10] ('First Shepard affidavit'); Letter from KordaMentha to Paradise, Court Book 5 , 1994

Paradise repaid the debt owed by it to Legend.

329 A clear distinction needs to be drawn between 'temporary illiquidity' and 'an endemic shortage of working capital whereby liquidity can only restored by [sic] a successful outcome of business ventures in which the existing working capital has been deployed'.[387] Whereas the former is an 'embarrassment', the latter is a 'disaster'.[388] The evidence presented does not demonstrate that Paradise's financial position is merely one of 'temporary illiquidity'; rather, the balance sheet and the RATA indicate that Paradise has accrued significant debt and has been unable to discharge this debt.

330 I further note that Paradise's debt is not exclusively owed to Legend. Exhibits B and C to Mr Roberts' affidavit, which appears to be the most recent known statement of Paradise's financial position, show respectively that Paradise owes $403,165.50 to 'non-receivership creditors' and $241,890 to Judd Commercial Lawyers ('JCL') for legal fees.[389] The list of 'non-receivership creditors' in Mr Roberts' affidavit includes, among others, various Queensland Government departments and Mt Isa City Council. Similarly, the list of unsecured creditors in Paradise's RATA includes, among others, Legend, Mt Isa City Council, the ATO, ASIC and various Queensland Government departments. Notwithstanding, the debt owed by Paradise to Legend represents approximately 98.2% of its overall debt.

331 Within the Balance Sheet of Legend, the defendants did not contest the efficacy of Paradise's financial document.

332 During cross examination, Mr Feldman stated that if not for the undertakings given by Paradise to the Court, the company could have immediately borrowed moneys to discharge its debts other than those owed to Legend.[390] Moreover, Mr Feldman also stated that if Paradise was unable to borrow those moneys, it would be unable to meet its immediate liabilities.[391] Mr Feldman was referring to the application by the defendants to release

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387 *Hall v Poolman* (2007) 215 FLR 243, [266], quoting *Hymix Concrete Pty Ltd v Garritty* (1977) 138 CLR 647.
388 *Hall v Poolman* (2007) 215 FLR 243, [266].
389 Roberts' Affidavit [10], Exhibits B and C.
390 Transcript, 366–7.
391 Ibid 367.

himself and Ms Feldman from the undertakings given to the Court so as to allow Paradise to borrow a secured loan of $1 million from QBL for the purposes of discharging its debt of $403,165.50 to 'non-receivership creditors', $241,890 to JCL for legal fees and for payment of Paradise's ongoing expenses as and when they arise. [392]

333 There is no indication that the $1 million loan to Paradise by QBL would have been directed toward repaying Paradise's debt to Legend. Even if this was the case, a sum of $1 million is merely the tip of the iceberg when one considers the full debt of $18,109,803.78 that Paradise owes to Legend. In any event, a detailed consideration of whether QBL's loan to Paradise would have been sufficient for Paradise to discharge its debt to Legend is purely hypothetical and not necessary as the defendants' application to vary the undertakings was dismissed on 24 April 2017.[393]

334 The defendants contend that if the underlying value of the mining tenements is taken into account, this would result in a position where Paradise could satisfy its debt to Legend.[394] However, the underlying value of the mining tenements can only be considered pertinent to Paradise's ability to repay Legend if Paradise is able to convert those tenements into cash within a realistic timeframe. I have dealth with and determined this issue at paragraphs [40]-[42] of this judgment.

335 In considering the commercial reality within which Paradise operates, the evidence suggests that it may not be possible to realise Paradise's mining tenements into cash within a realistic time period. Legend's annual report of 31 December 2013 states that the Paradise North Project 'has an estimate of capital expenditure of approximately A$26.4 million',[395] while the Paradise South Project also has 'significant capital requirements'.[396] This is supported by the presentation on Legend which indicates that the Paradise North Project would take between US$23.8-64 million of capital expenditure to bring into production and the Paradise South Project would take US$204-343 million of capital expenditure to bring into production.[397]

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392 Affidavit of Christiaan Roberts in support of application for variation of undertakings, Court Book 5, 2312.42 [10]; Email exchange between Arnold Bloch Leibler and Judd Commercial Lawyers, Court Book 5, 2312.41.

393 Order of the Honourable Associate Justice Randall, Court Book 5.

394 *Defendants' Closing Submissions* [2].

395 Extract from Annual Report of Legend filed with the SEC, Court Book 1, 388.

396 Ibid 387.

397 Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 580, 599, 604.

336 These problems are compounded by the fact, admitted by Mr Feldman, that Paradise is a dormant entity. During cross examination, Mr Feldman stated that Paradise became dormant in the sense of not actively progressing the tenements 'years ago'.[398] Mr Shepard depose in his affidavit that Paradise is an 'illiquid, dormant entity'.[399] Furthermore, Mr Shepard depose that the mining assets 'were not yet at the stage of, or close to, production and significant additional capital expenditure was required to bring them to production'.[400] Indeed, the timeline for the Paradise North Project, as shown in the presentation, is approximately 21 months (including shipment period).[401]

337 Mr Shepard also states in his affidavit that Paradise's mining tenements 'cannot be readily realised to meet its liabilities as they fall due and payable, but would require an ordered sale process which, based on my experience, I estimate would take three to six months to complete'. [402] However, even if an expeditious sale process of the mining tenements is taken into account, it is important to take into account the consequences of the delay in the production of the tenements as highlighted by Marcel Equity, the corporate advisors of QPPL, in their email to Arnold Bloch Leibler. Marcel Equity estimated a cost of $300,000 per month to 'adequately manage' the phosphate project.[403] Marcel Equity also expressed their concern that the longer the mining tenements remain undeveloped, the more the value of Paradise and the phosphate project is liable to diminish.[404]

338 I determine that Paradise is insolvent for the purposes of s 95A of *the Act*. Paradise's financial position has moved beyond temporary illiquidity; it is now in a state where it is unable to generate enough revenue to discharge its debts as and when they fall due and payable. Accordingly, Paradise should be wound up in insolvency pursuant to s 459A of *the Act.*

Winding up on the just and equitable ground

339 In the alternative, the plaintiffs submit that Paradise should be wound up on the just and equitable ground pursuant to s 461(1)(k).. It is their contention that Mr Feldman and Ms

398 Transcript, 354.
399 First Shepard affidavit, [29].
400 Affidavit of Craig Peter Shepard, affirmed 4 November 2016, [50] ('Supporting affidavit').
401 Email from Joseph Gutnick to Sholom Feldman, Court Book 2, 580, 600.
402 First Shepard affidavit, [29].
403 Letter from Marcel Equity to Arnold Bloch Leibler, Court Book 5, 2026, 2031.
404 Ibid 2032.

Feldman are under a conflict of interest as they are directors of both Paradise and QPPL and have not been able to separate their roles in order to act in the best interests of each company. As a result, the plaintiffs argue that the Court can have no confidence in the management of the company and Paradise ought to be wound up pursuant to s 461(1)(k), as this would benefit all of Paradise's unsecured creditors.[405] The defendants counter-argue that there is no basis in evidence for Paradise to be wound up on the just and equitable ground.[406]

340 Section 461(1)(k) of *the Act* provides as follows:

> **461 General grounds on which company may be wound up by Court**
>
> (1) The Court may order the winding up of a company if:
>
> …
>
> (k) the Court is of opinion that it is just and equitable that the company be wound up.
>
> …

341 Legend has standing to apply pursuant to s 462(2)(b) of *the Act*, which allows a creditor to apply to the Court for a company to be wound up on a ground provided for by s 461. According to Paradise's RATA prepared by Mr Palmer, Legend is an unsecured creditor of Paradise.

342 In *ASIC v ActiveSuper Pty Ltd* (No 2),[407] Gordon J summarised the relevant legal principles when winding up a company pursuant to s 461(1)(k) of *the Act*. From the outset, her Honour observed that '[t]he classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and each application will depend upon the circumstances of the particular case'.[408] Her Honour also noted that '[i]t has long been established that a company may be wound up where there is "a justifiable lack of confidence in the conduct and management of the company's affairs"',[409] before reiterating the 'general fundamental principles' enunciated by Warren J (as her Honour then was) in *ASIC v ABC Fund Managers*.[410]

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405 *Plaintiffs' Closing Submissions* [79].
406 *Defendants' Closing Submissions* [2].
407 [2013] FCA 234.
408 Ibid [19], citing *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 374, 376–9; *ASIC v Kingsley Brown Properties Pty Ltd* [2005] VSC 506, [95]–[97]; *Nilant v RL & KW Nominees Pty Ltd* [2007] WASC 105, [117].
409 Ibid [20], quoting *Loch v John Blackwood Ltd* [1924] AC 783, 788.
410 (2001) 39 ACSR 443.

343 Warren J identified three 'general fundamental principles' to be applied by courts in relation to applications for winding up a company on the just and equitable ground:

> First, there needs to be a lack of confidence in the conduct and management of the affairs of the company. Second, in these types of circumstances it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a reluctance on the part of the courts to wind up a solvent company.[411]

344 In relation to the first of these principles, it is 'a foundation for applications for winding up on the just and equitable ground' and '[i]t relates to the directors' conduct in regard to the company's business'.[412] Specifically:

> a lack of confidence may arise where, 'after examining the entire conduct of the affairs of the company' the Court cannot have confidence in 'the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company'.[413]

345 In this matter, Legend entered into the Bond Deed and General Security Deed with Paradise and QPPL on 25 November 2015. As established previously, this was done in an attempt to frustrate Legend's creditors. Additionally, at the time the agreement was entered into, Mr Gutnick was a director of Legend from 17 November 2004 to 8 July 2016 and director of Paradise from 9 November 2011 to 8 July 2016, which points to a potential conflict of interest for Mr Gutnick. Similarly, Mr Feldman and Ms Feldman are the current directors of QPPL starting from 19 November 2015 and the current directors of Paradise starting from 25 November 2015. Mr Feldman was also a director of Legend from 25 November 2015 to 22 April 2016 and Ms Feldman was a director of Legend from 25 November 2015 to 20 April 2016, which again would point to a conflict of interest for the directors. There does not appear to be any indication that Mr Gutnick, Mr Feldman and Ms Feldman were able to separate their duties to each respective company and act in the best interests of each respective company. This gives rise to a distinct lack of confidence in the ability of the directors to conduct and manage the affairs of each company with clarity and honesty. It follows that the first principle is satisfied.

346 As to the second of these principles – a demonstrated risk to the public interest that warrants

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411 Ibid [119] (citations omitted).
412 *ASIC v Planet Platinum Ltd* [2015] VSC 682, [18].
413 [2013] FCA 234, [21], quoting *Galanopoulos v Moustafa* [2010] VSC 380, [32].

protection – this may take various forms, for example where a company has not carried on its business candidly and in a straightforward manner with the public or where it might be justified so as to prevent repeated breaches of the law.[414] As previously established, it does not appear that Mr Gutnick and Mr Feldman (as well as Ms Feldman) have been able to conduct the affairs of Legend and Paradise in a transparent and candid manner given that there is a conflict of interest for these individuals as they serve, or have served, as directors on both sides of the transaction.

347 As to the third principle, Mandie J in *ASIC v Kingsley Brown Properties*[415] clarified that 'a stronger case might be required where the company was prosperous, or at least solvent, and/or where there was an established business being carried on'.[416] As previously discussed, Paradise has been a dormant entity for some years and has no present source of income. Given that it has accrued substantial debt and has been unable to discharge this debt as and when they fell due and payable, Paradise is an insolvent company. As a result, there is nothing to suggest that Paradise is at this present time an active and prosperous company. It follows that the third principle is satisfied.

348 I have determined that Paradise be wound up in insolvency. If it had been necessary, I would have considered it appropriate to wind up Paradise on the just and equitable ground in any event.

349 I require the parties to provide orders which reflect these reasons. I also need assistance in identifying a consent to act as liquidators. In the absence of any debate about the form of order or if any consequential orders are required, I propose to make orders in the following terms:

(a) The Court declares that the Convertible Bond and Share Subscription Agreement and the General Security Deed each dated 25 November 2015 are:

(viii) Uncommercial transactions within the meaning of s 588FB of the

414 [2013] FCA 234, [23], quoting *ASIC v International Unity Insurance Pty Ltd* (2004) 22 ACLC 1416, [135]–[139]; *ASIC v Kingsley Brown Properties Pty Ltd* [2005] VSC 506, [96].

415 [2005] VSC 506.

416 Ibid [96].

Corporations Act (Cth) (2001) (*'the Act*');

(ix) Insolvent transactions within the meaning of s 588FC of *the Act*; and

(x) Voidable transactions within the meaning of s 588FE(2) and (3) of *the Act*.

(b) The Court orders:

(i) Pursuant to s 588FF(1)(h) of *the Act*, each of the Convertible Bond and Share Subscription Agreement and the General Security Deed are void as from 25 November 2015;

(ii) The Share Sale Agreement dated 22 April 2016 between the second plaintiff and the first defendant is void and unenforceable;

(iii) The appointment of Mr Palmer as receiver of the second plaintiff's shares in the second defendant is invalid;

(iv) The appointment of Mr Palmer as the receiver and manager of the second defendant is invalid;

(v) The second defendant be wound up in insolvency under the provisions of *the Act*;

(vi) Mark Anthony Korda and Craig Peter Shepard jointly and severally are appointed liquidators for the purposes of the winding up;

(vii) The requirement to file the requisite notices of application for winding up with ASIC are dispensed with; and

(viii) The plaintiffs costs of the application for winding up are costs in the winding up.

(ix) Otherwise, the defendants pay the plaintiffs' costs of the proceeding, including reserved costs, on a standard basis.