SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

VISCARIELLO v MACKS

[2014] SASC 189

Judgment of The Honourable Chief Justice Kourakis

9 December 2014

CORPORATIONS - VOLUNTARY ADMINISTRATION - ADMINISTRATOR - FUNCTIONS, POWERS, RIGHTS AND LIABILITIES GENERALLY

CORPORATIONS - MEMBERSHIP, RIGHTS AND REMEDIES - MEMBERS' REMEDIES AND INTERNAL DISPUTES - PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER

CORPORATIONS - MANAGEMENT AND ADMINISTRATION - DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION - FIDUCIARY AND RELATED STATUTORY DUTIES - OF CARE, SKILL AND DILIGENCE

TORTS - NEGLIGENCE - ESSENTIALS OF ACTION FOR NEGLIGENCE - DUTY OF CARE - SPECIAL RELATIONSHIPS AND DUTIES - PROFESSIONAL PERSONS

TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION LEGISLATION - CONSUMER PROTECTION - MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS

The plaintiff is a director, principal shareholder and creditor of two Companies, Bernsteen Pty Ltd and Newmore Pty Ltd (the Companies), which are in liquidation. The defendant was appointed an administrator of the Companies on 5 December 2001. On 21 December 2001 the Companies' creditors voted to wind the Companies up and appoint the defendant as the liquidator. Plaintiff alleged defendant, as administrator of the Companies, wrongfully failed to negotiate and put in place a Deed of Company Arrangement which would have allowed the Companies to continue to trade under a changed ownership structure. Plaintiff

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Plaintiff: JOHN VISCARIELLO Counsel: MR A PHILLIPS WITH MR A FREADMAN - Solicitor: COMMERCIAL AND GENERAL LAW

Defendant: PETER IVAN MACKS Counsel: MR H ABBOT SC WITH MR T COX - Solicitor: LAWSON SMITH LAWYERS

Hearing Date/s: 13/02/2012 to 29/02/2012, 01/03/2012, 06/08/2012, 08/08/2012 to 30/08/2012, 22/11/2012 to 28/11/2012, 03/12/2012, 17/12/2012 to 21/12/2012, 18/02/2013 to 21/02/2013, 25/02/2013 to 26/02/2013

File No/s: SCCIV-06-165

A

claims damages for loss of employment and having to honour personal guarantees he gave to the Companies' creditors.

Held:

1. As between a voluntary administrator on the one hand and the creditors, contributories and directors of the company on the other, an administrator does not engage in trade or commerce in exercising his or her statutory functions, powers and duties under Part 5.3A of the Corporations Act.

2. It is manifestly inconsistent with the statutory regime of the Corporations Act regulating the duties of voluntary administrators to superimpose up on it a common law duty of care owed by the administrator to individual creditors, directors or shareholders to protect them from financial loss by the exercise of reasonable care in discharging his or her statutory powers. That inconsistency is at its greatest when an administrator must form an opinion and frame a recommendation to the creditors, about whether to trade on, enter into a deed of company arrangement, sell the business and/or wind up the company.

3. There was no evidence that the valuations undertaken by the defendant as administrator were inadequate. Nor was evidence adduced as to the values which would have been assigned to the business and stock if other steps had been taken.

4. The winding up of the Companies was inevitable. The proposed Deeds of Company Arrangement were doomed to failure when major secured creditor of the Companies refused to agree to them.

5. The defendant's conduct was not causative of the failure of the companies to enter into the proposed Deeds of Company Arrangement and his decision to recommend that the Companies be wound up was reasonable in the circumstances.

CORPORATIONS - MANAGEMENT AND ADMINISTRATION - DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION - OFFICERS OF INSOLVENT CORPORATIONS - GENERALLY

CORPORATIONS - MANAGEMENT AND ADMINISTRATION - DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION - OFFENCES - CONTRAVENTION OF PROVISIONS OF ACT

CORPORATIONS - WINDING UP - LIQUIDATORS - SUPERVISION OF LIQUIDATORS

CORPORATIONS - WINDING UP - LIQUIDATORS - REMOVAL - IN VOLUNTARY WINDING UP - GROUNDS

CORPORATIONS - WINDING UP - LIQUIDATORS - DUTIES AND LIABILITIES - IN VOLUNTARY WINDING UP

Plaintiff alleged defendant, as liquidator of the Companies, breached his statutory duties by engaging in expensive litigation which was not in the interests of the Companies but benefited him personally.

Held:

1. The Corporations Act does not expressly or by negative implication limit the Court's power under s 31 of the Supreme Court Act to make a declaration of breach of the statutory duties created by the Corporations Act.

2. The defendant breached his statutory duties under the Corporations Act by unreasonably continuing to pursuing litigation for a collateral purpose where it became clear that it would be of no benefit to the Companies and by failing to properly inform the Committee of Inspection of the way in which that litigation was conducted and its cost.

3. The defendant's breach of statutory duties is sufficient to consider his removal as liquidator. Parties to be given opportunity to be heard on that issue in light of findings.

4. Further matters raised by plaintiff are matters properly to be considered by another liquidator, if one is appointed.

Corporations Act 2001 (Cth) s 9, s 126, s 143, s 180, s 181, s 182, s 184, s 236, s 435A, s 435C, s 436A, s 436E, s 437B, s 438A, s 438B, s 439A, s 439C, s 443A, s 443B, s 443E, s 447A, s 447E, s 448B, s 448C, s 449B, s 503, s 536, s 595, s 1282, s 1311, s 1317E, s 1317H, s 1317J, s 1317G and s 1321; *Corporations Regulations 2001* (Cth) reg 5.6.12 and reg 5.6.18; *Fair Trading Act 1987* (SA) s 56; *Supreme Court Act 1935* (SA) s 31; *Federal Court of Australia Act 1976* (Cth) s 21, referred to.
Brovis v Lenleys Pty Ltd & Wily (2003) 45 ACSR 612; *Smarter Way (Aust) Pty Ltd v D'Aloia* (2000) 35 ACSR 595; *Cusson v Signature Resorts Pty Ltd* (2000) 18 ACLC 341; *Re Eisa Ltd* (2000) 34 ACSR 394; *Brian Rochford Ltd v Textile Clothing and Footwear Union of NSW* (1999) 30 ACSR 38; *Supervac Australia Pty Ltd v Australasian Memory Pty Ltd* (unreported) FCA 6 June 2007; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270; *Re Vouras* (2003) 47 ACSR 155; *McVeigh v Linen House Pty Ltd* [2000] 1 VR 31; *Deputy Commission of Taxation v Portinex* (2000) 156 FLR 453; *Hagenvale Pty Ltd v Depela Pty Ltd* (1995) 17 ACSR 139; *Hill v David Hill Electrical Discounts Pty Ltd* (2001) 37 ACSR 617; *Commission for Corporate Affairs v Harvey* [1980] VR 669; *Central Springworks Australia Pty Ltd v McClellan* (2000) 34 ACSR 169; *Commonwealth v Irving* (1996) 65 FCR 291; *Citric Systems Inc v Telesystems Learning Pty Ltd (In Liq)* (1998) 28 ACSR 529; *Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Yates v Whitlam* [1999] NSWSC 976; *NRMA Ltd v Yates* [1999] NSWSC 859; *Cleary v Australian Cooperative Foods (No 2)* [1999] NSWC 991; *Cap Reinsurance Corporation Ltd v Daya* [2008] NSWSC 64; *Rozenblit v Vainer* [2014] VCS 510; *Baxter v Hamilton* [2005] TASSC 64; *Nominees Ltd v McGoldrick* [2014] VSC 152; *Mills v Sheahan* (2007) 99 SASR 357; *Yango Pastoral Co Pty Ltd v First Chicago (Australia) Limited* (1978) 139 CLR 410; *Brownbill v Kenworth Trucks Sales (NSW) Pty Ltd* (1982) 39 ALR 191 ; *Alexander v Rayson* [1936] 1 KB 169; *McCarthy Rose (Milk Vendors) Pty Ltd v Dairy Farmers Coop Milk Co Ltd* (1945) 45 SR(NSW) 266; *Mason v Clarke* [1955] AC 778; *Re Chevron Furnishers Pty Ltd (in Liq)* (1993) 12 ACSR 565; *National Safety Council of Australia* [1990] VR 29; *Deputy Commissioner of Taxation v ACN 080122587 Pty Ltd* [2005] NSWSC 1247; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434; *Naumoski v Parbery* (2002) 171 FLR 332; *Re Edennote Ltd* [1996] 2 BCLC 389; *Yeomans v Walker* (1986) 5 NSWLR 378; *Westpac Banking Corp v Totterdell* (1998) 20 WAR 150; *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [1997] 1 VR 667; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; *Ibeneweka v Egbuna* [1964] 1 WLR 219; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421; *Talylor Holdings Ltd (In Liq) v Bond* (1993) 59 SASR 432; *Law Society (NSW) v Weaver* [1974] 1 NSWLR 271; *Hall v Poolman* (2009) 75 NSWLR 99; *Kennards Hire Pty Ltd v RMGA Pty Ltd* [2010] NSWSC 1387; *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494, considered.

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CIVIL

KOURAKIS CJ

Part I

1 Since May 1993 the plaintiff, Mr John Viscariello (Mr Viscariello), has been a director and principal shareholder of Bernsteen Pty Ltd (Bernsteen) and Newmore Pty Ltd (Newmore). I will refer to Bernsteen and Newmore together as "the Companies". Bernsteen was incorporated on 3 June 1988 and Newmore on 30 June 1992. Both Bernsteen and Newmore are now in liquidation. From 1988 to December 2001, Bernsteen conducted the business of retailing manchester and other products under the trading name "Bedroom Mazurka". It operated 18 retail outlets primarily in the Adelaide metropolitan area but also in regional South Australia, Victoria and the Northern Territory. From 1992, Newmore also operated as a retailer of manchester under the trading name "Faulty Towels and Sheets". Newmore had 15 retail outlets in shopping centres in the Adelaide metropolitan area.

2 The defendant, Mr Peter Ivan Macks (Mr Macks), is a registered liquidator and an official Liquidator pursuant to the provisions of the *Corporations Act 2001* (Cth) (*Corporations Act*). At all relevant times Mr Macks was a principal of the firm PPB.

3 Mr Macks was appointed an administrator of the Companies on 5 December 2001. On 21 December 2001 the Companies' creditors voted to wind each company up and to appoint Mr Macks as the liquidator of the Companies.

4 Mr Macks engaged the firm Minter Ellison to perform work in relation to the administration and subsequent liquidation of the Companies.

5 Mr Viscariello brings this action against Mr Macks claiming damages for what he alleges was Mr Macks' wrongful conduct as voluntary administrator and then liquidator of the Companies, and seeking orders removing Mr Macks as the Companies' liquidator.

6 Mr Viscariello's claim against Mr Macks as administrator is, in essence, that he wrongfully failed to negotiate and put in place a Deed of Company Arrangement which would have allowed the Companies to continue to trade

under a changed ownership structure. Mr Viscariello contends that but for Mr Macks' failure he would have remained in employment as a manager of the Companies and that he would not have been called on to honour guarantees he had given to the Companies' creditors.

7 Mr Viscariello's claims against Mr Macks as a liquidator are, in essence, that he sold the Companies' assets too cheaply and that he breached his statutory duties by engaging in expensive litigation which was not in the interests of the Companies but benefitted him personally. The litigation comprised proceedings against Ms Hamilton-Smith, the romantic partner of Mr Viscariello, for stock she had purchased from Bernsteen. The debt was for $28,000 but Mr Macks spent in the order of $400,000 pursuing it. Mr Viscariello also claims that Mr Macks sacrificed some of the Companies' assets.

8 Mr Viscariello graduated in law in December 2001. He commenced practice in Adelaide. He had previously worked in the building industry.

9 Mr Viscariello's standing to prosecute some of the claim in this action and his entitlement to damages for any wrongful conduct is a major issue in these proceedings. So too is the question of whether Mr Macks' conduct of the liquidation has deprived Mr Viscariello of a distribution of any part of the Companies' assets which he would otherwise have received. Over and above his interest as a director and shareholder, Mr Viscariello relies on his status as creditor of the Companies and as a secured creditor of Newmore.

10 Mr Viscariello took a 15 per cent interest in the Companies in 1993. He testified that shortly after he became a director he personally borrowed money from the Commonwealth Bank which he then on-lent to the Companies.

11 Mr Viscariello claims that he entered into a loan agreement with Bernsteen in 1993 (the Bernsteen loan agreement) and that during November and December 1993 he advanced $270,000 to Bernsteen pursuant to the loan agreement. I will refer to the monies so advanced as "the Bernsteen advances". Mr Viscariello claimed that he entered into a loan agreement with Newmore in November 1993 ("the Newmore loan agreement") and that $60,000 was advanced to Newmore pursuant to the loan agreement. I will refer to those advances as "the Newmore advances". The advances to both Companies were secured by a charge over the assets of Newmore (the Newmore charge).

12 Within two years of Mr Viscariello acquiring his interest in the Companies, Bernsteen and Newmore experienced financial difficulties and were placed in administration in 1995. In the course of that administration each company entered into a deed of company arrangement (respectively referred to as the Bernsteen and Newmore 1995 DOCA). Mr Macks was the administrator of each of the Companies. The Bernsteen and Newmore 1995 DOCAs bound Mr Macks, Mr Viscariello and the former principals of the Companies, Mr and Mrs Stupos. The Bernsteen and Newmore DOCAs were completed on 28 July 1998.

13 Bernsteen traded at a loss of about $400,000 in the first part of its administration from 1 November 1995 to 30 June 1996. It made a profit of approximately $150,000 in the following financial year. Newmore also traded at a loss of about $160,000.00 in the period to 30 June 1996 and returned to a profit of approximately $188,000 in the following financial year.

14 The Companies came out of the 1995 administration in July 1998 carrying forward substantial losses in the order of about $3.5 million.

15 The Bernsteen 1995 DOCA provided that Mr Viscariello would be paid substantial remuneration as that company's manager. The Newmore 1995 DOCA made similar provision for the employment of Mr Viscariello. Mr Viscariello claims that his entitlements under the Bernsteen and Newmore DOCAs are cumulative. He asserts that he was not paid the remuneration to which he was entitled under those provisions between October 1995 and December 2001 and that the Companies were therefore indebted to him to the extent of that under payment at the time of their liquidation. Mr Viscariello claims that if Mr Macks had put in place a Deed of Company arrangement that his entitlements as an employee would have been paid to him by the proposed purchaser of the businesses.

16 Mr Viscariello and Mr Macks continued to meet from time to time after the 1995 administrations had come to an end. Mr Viscariello testified that in casual conversations with Mr Macks, Mr Macks told him that the National Australia Bank ("NAB") was unhappy with the way in which Mr Macks had conducted the 1995 administrations of Bernsteen and Newmore. According to Mr Viscariello, Mr Macks said that NAB officers had informed him that NAB and other banks would not appoint Mr Macks as a liquidator, an administrator or a receiver because of the way in which he had conducted the administration. Mr Viscariello did not testify that Mr Macks had raised his loss of work as a complaint against him or that Mr Macks blamed him in any way for his predicament. According to Mr Viscariello, the loss of work was nonetheless a recurring theme of the conversations with Mr Macks. Mr Macks testified that he had not been boycotted by NAB or any other bank and denied that he ever made such an allegation to Mr Viscariello.

17 Associated Retailers Limited (ARL) is a wholesaler of manchester and other goods. ARL supplied products to Bernsteen and Newmore from 1995. The Chief Executive Officer of ARL was at all relevant times Mr Yeomans. Mr Viscariello described the business relationship with ARL as one in which ARL imported stock from overseas to supply to the Companies which would "share the import margin" with ARL. ARL supplied something in the order of 25 to 30 per cent of the Companies' product. ARL supplied most of the stock on credit terms which included a clause that property did not pass until payment. It also supplied some stock on consignment. The stock supplied on credit was accounted for as an asset but with a corresponding liability for its cost. Stock on

consignment was only brought into account on sale. ARL held a first registered mortgage debenture over Bernsteen as security for credit advanced to Bernsteen and Newmore and a second registered mortgage debenture, ranking below a charge held by the Commonwealth Bank of Australia (CBA), over Newmore securing those advances. The CBA charge was given on 14 February 1994 and the ARL charge on 29 November 1996. I will refer to the debentures as the "ARL security". It was a term of the ARL security that the Companies could not borrow against their stock without ARL's consent. Mr Viscariello and ARL entered into a Deed of Priority on which, subject to certain specified conditions, gave ARL priority over Mr Viscariello's earlier charge.

18 In August 2001, Mr Viscariello explored with ARL a plan to franchise the Bernsteen and Newmore stores.

19 On 6 September 2001, ARL agreed with Bernsteen that:

- a separate consignment account would be opened;
- the stock would remain the property of ARL;
- fortnightly reports as to sales were to be provided, accompanied by a cheque for the amount of the sales; and
- at no time would the pool of consignment stock exceed $57,443.30.

20 ARL's exposure to Bernsteen had grown from $116,694.22 in January 2001 to $445,393.01 by December 2001. In 2001 ARL entered into an arrangement with Mr Viscariello for two repayments of $40,000 to be made on 20 and 27 August 2001, followed by a further three payments of the same amount on 3, 10 and 17 September 2001.

21 Mr Luigi Viscariello is the father of Mr Viscariello. On 27 August 2001, Luigi Viscariello advanced $88,000 to the Companies and made a further advance of $70,000 on 5 September 2001, allegedly to meet wage commitments. Mr Macks' investigations showed that the money was used to pay other operating costs and not wages.

22 Mr Viscariello explained that from about July 2000 the Companies experienced trading and financial difficulties even though their annual turnover was in the order of $8 million.

The Companies' financial position in 2001

23 The following information about the financial solvency of the Companies is obtained from reports prepared by Mr Macks for the purposes of an action to recover preference payments from the Commissioner of Taxation. I find that for the purpose of giving an overview of the Companies' financial position, it is generally reliable.

24 At the time of appointment as administrator in 2001, Bernsteen employed 30 sales staff and five administrative staff. The monthly wages bill was $110,000, with an associated income tax (PAYG) liability of $20,200, and an employer's superannuation contribution of $8,000.

25 On Mr Macks' appointment as administrator, Bernsteen had failed to remit $345,000 to Federal Commissioner of Taxation on account of its PAYG obligations. In addition, Goods and Services Tax (GST) and Superannuation Surcharge payments were overdue. Bernsteen's total liability to the Commissioner was in the order of $370,000. Bernsteen's monthly rent bill was $55,000. At the time it went into administration, Bernsteen's rental arrears were in the order of $157,000. On 1 November 2001, the landlord of a Bernsteen store in the Westfield Shopping Centre, Marion, distrained goods on account of unpaid rent in the sum of $32,463.17. On 2 November 2001, the landlord of a Bernsteen store in Westfield Shopping Centre, Tea Tree Plaza, distrained goods on account of unpaid rent in the sum of $41,078.94.

26 Bernsteen's net profit before income tax for the year ending 30 June 1999 was $131,820 but in the financial year ending 30 June 2000, it suffered a loss of $16,271. A trial balance by Bernsteen's accountants for the year 30 June 2001 showed a loss of $622,215. Removing the depreciation expense of $139,980 left a trading loss in the order of $500,000. A trial balance prepared by Mr Macks' office showed a cash loss of $463,084 for the five months to the end of November 2001. Bernsteen experienced a substantial fall in sales from $7,330,907 in the year ending June 2000 to $6,128,493 for the year ending June 2001. Its sales in the months of September and October 2001 preceding the commencement of the administration were substantially down on the sales for September and October 2000.

27 Bernsteen's financial statements for the year ending 30 June 2000 claimed an inventory of $1,828,423, property, plant and equipment of about $700,000 and intangible assets of $343,010. In the same year, the current liabilities of $1,961,302 exceeded the current assets by around $61,000.

28 On 10 December 2001 the Companies filed returns as to their affairs in accordance with Form 507 of the *Corporations Act*. Mr Viscariello gave evidence that the returns were prepared by the Companies' external accountants and the Companies' accounts staff. I will refer to them as the Bernsteen and Newmore RATA.

29 The Bernsteen RATA showed total assets of $1,350,004 with an estimated realisable value $1,088,285 as at 5 December 2001. At that time, Bernsteen's inventory was estimated to be $766,638. Of that, inventory goods to the value of $257,179 were realised during the period of trading conducted by Mr Macks as administrator. Plant and equipment was valued at $469,529 by Mr Viscariello with an estimated realisable value $200,000. Mr Macks obtained $25,094 for that plant in the course of the liquidation. The current ratio for Bernsteen, being

the ratio of its current assets to current liabilities, was 0.97 in 2000, down from 1.02 in the year 1999. The quick ratio, which is the ratio of the current cash or cash equivalent assets to current liabilities was 0.03 for the year 2000, down from 0.07 for the year 1999.

30 The Bernsteen RATA estimated employee claims in the sum of $154,000 but they were in fact closer to $233,000. The Bernsteen RATA listed unsecured creditors in the sum of $2,254,806, but the claims of unsecured creditors in the liquidation amounted to $2,985,950. Taxation liabilities were estimated by Mr Viscariello's accounts staff to be $234,691 but were in fact in the order of $482,922 in the liquidation. The Bernsteen RATA mentioned secured creditors in the sum of $597,014 but in the liquidation the total claimed was $861,660. As at the date of Mr Macks' appointment as liquidator, of the total trading liability of $2,794,000, $317,921.33 was current and $1,093,337.82 was overdue by more than 180 days.

31 As of 5 December 2001 Bernsteen's net liabilities were recorded as $1.9m. The claims of creditors amounted to $2.8m. Forty per cent of that debt was six months or more overdue and a further 20 per cent of the debt was between four and six months overdue.

32 Newmore's typical monthly wages bill before in 2001 was $75,400 with PAYG deductions of $13,000 and superannuation payments of an additional $5,700. Newmore fell behind in its remittances of taxation deductions and superannuation payments to the Federal Commissioner of Taxation. At the time it entered into administration, the outstanding remittances were $103,000. Newmore was not separately assessed for GST. Total liabilities to the Commissioner were in the order of $129,000.

33 Newmore's monthly rent bill was $44,000. At the time of Mr Macks' appointment arrears of rent were about $120,000. On 1 November 2001, the landlord of Newmore's store in the Westfield Shopping Centre, Arndale distrained goods for unpaid rent of $13,784.49. On 2 November the landlord of Newmore's store at Tea Tree Plaza distrained against its goods on account of unpaid rent of $15,064.

34 In the year ending 30 June 1999, after deduction for the costs of goods sold from sales of $4,213,761, Newmore's total revenue was $1,925,794. Employment costs were $883,000 and costs of premises $480,000. Together with other costs, including depreciation, the total operating expenses were $1,746,923 resulting in a small profit of $178,871. In the year ending 30 June 2000, total revenue was $2,170,090 (from sales of $4,861,003 after deducting costs of goods sold of $2,722,166). Total operating costs were $2,403,896 of which employment costs were $1,040,040. Costs of premises were $648,790, and depreciation $112,834. The net loss before income tax was $223,806.

35 A trial a balance for the year ending June 2001 showed total income of $1,807,275 derived largely from sales in the amount of $3,784,652 with costs of goods sold at $1,993,801. Employment costs were $1,142,024 and premises costs $670,178. Total operating costs (including a significant advertising expense) were $2,579,224 resulting in a net loss before income tax of $771,949. The loss was due in large part to a drop in sales in the order of 20 per cent.

36 A trial balance profit and loss for the five months to end of November 2001 showed sales of $890,661 with the costs of goods sold at $462,252. Together with some other income the total revenue for that period was $430,856. Employment costs were $372,732 and premises costs $223,790. Advertising costs were much reduced from the preceding financial year. Total operating expenses were $751,855. The net loss was $320,999. Newmore's net liabilities as at 5 December 2001 were $1.1m. At that date the claims of creditors amounted to $1.4m, about a third of which was six months or more overdue.

37 Mr Macks estimated current assets for the year ending 30 June 2000 based on the balance sheets prepared by the company and the Newmore RATA. The value of the inventory of goods was estimated to be $1,338,941 as at 30 June 2000. Receivables were $187,139. Non-current assets including property, plant and equipment was estimated to be $400,000 and intangible assets of $3,321. Current liabilities, included a bank overdraft of $169,965 and trade creditors of $1,073,598. Other creditors including accruals and unsecured loans were put at $103,560. Together with other miscellaneous liabilities, the total current liabilities were $1,473,774. The current ratio for Newmore was 1.04, a reduction from 1.44 in 1999. The quick ratio was 0.15, a reduction from 0.65 in 1999.

38 The Newmore RATA indicated sundry debtors of $181,557 and an inventory of $318,846. Plant and equipment was valued at $263,329. Total assets were shown to be $795,915 at book value. The RATA estimated a full realisable value for the assets, other than for plant and equipment, of $130,000. In fact, they proved to have no value in the course of the liquidation. Newmore's inventory was run down during the administration. The balance of the stock remaining after that period of trading was sold by the liquidator for $130,335.

39 The Newmore RATA listed employee claims at $58,310 but they actually amounted to $93,051 in the liquidation. Secured creditors were listed at $144,858 and unsecured creditors at $1,540,031. There was a shortfall on the face of the Newmore RATA of assets over liabilities in the sum of $1,108,990.

40 In the winding up of Newmore, trade creditors in the sum of $1,444,156 were admitted. Of that amount, $246,983 was current and $472,338 had been outstanding for 180 days or more.

41 As I earlier recorded, ARL commenced to provide goods to the Companies on consignment from about October/November 2001 because the Companies were trading outside of the ordinary terms of credit allowed by ARL.

A rescuer is found

42 During 2001, if not before, Mr Viscariello became concerned about the Companies' solvency. As a result, Mr Viscariello entered into discussions with Mr Fred Bart (Mr Bart), a businessman and entrepreneur who operated from offices situated in Sydney, New South Wales. Mr Viscariello testified that he had first met Mr Bart during the 1995 company administrations. At that time, Mr Bart had expressed interest in purchasing the business of the Companies. Mr Viscariello testified that Mr Bart had told him that he had a business importing manchester and that:

> his family had been in the manchester, or as they call it, the rag trade, for many years and he was interested in acquiring some sort of interest in the business so he could get distribution for his products.

No arrangements were made with Mr Bart with respect to the 1995 administrations.

43 Late in 2001, Mr Viscariello contacted Mr Macks to discuss making arrangements to address the financial difficulties faced by the Companies. Mr Viscariello, accompanied by Mr Bart, met with Mr Macks on 27 November 2001. I will refer to that meeting in more detail below but for now it suffices to say that Mr Viscariello and Mr Bart outlined a proposed deed of company arrangement to Mr Macks. That outline was reduced to writing in a document entitled "Heads of Agreement" which was sent to Mr Macks later on that day. I will refer to the proposal and its subsequent refinements as the proposed Bart DOCA. I set out the document sent to Mr Macks below:

> **Proposal for Heads of Agreement**
>
> JV means Mr John Viscariello the sole director and secretary of Bernsteen & Newmore Diveni means a company owned and controlled by Fred Bart
>
> 1. Diveni to payout Commonwealth Bank Facilities provided for Newmore Pty Ltd which includes a $50,000 overdraft facility and contingent liabilities in the form of Bank Guarantee's for store rents.
>
>   → Diveni to acquire the Banks security over Newmore.
>
> 2. JV and his family trust to sell to FB his shares in Bernsteen & Newmore for a dollar.
>
> 3. JV's family trust Palm Hills to sell to FB the Bedroom Mazurka and Inside Home trade marks for a dollar.
>
> 4. JV to sell to FB his security over Newmore for a dollar.
>
> 5. JV to sell any loan monies he has in Bernsteen & Newmore for a dollar.
>
> 6. Diveni agrees to purchase from ARL its security over Bernsteen & Newmore for the consideration of $400,000 subject to the following:

→ An assignment of ARL's entire debt and charge over Bernsteen & Newmore.

→ That the net stock (net stock meaning all stock free of any retention of title, distraint of rent or any other unspecified claims or encumbrances) being not less than $1,050,000. In the event that the next stock figure is less than $1,050,000 a pro rata consideration shall be paid, provided however that the net stock figure shall not fall below $850,000.00.

7. Employee liabilities for Bernsteen & Newmore shall not exceed:

→ For Bernsteen $227,000

→ For Newmore $112,000 which sum excludes entitle due to the director.

Signed ……. Dated 27 Nov 2001 For Bernsteen & Newmore

Signed ……. Dated 27 Nov 2001 For Diveni.

44 Mr Viscariello explained that the term concerning the minimum stock levels arose out of Mr Bart's demand that the stores have enough stock to continue to trade successfully. Mr Viscariello also testified that Mr Bart wanted him to continue to manage the Companies if he took them over under the proposed Bart DOCA. He explained that the purpose of the proposed Bart DOCA was to effect a quick sale of the business to Bart. I accept that that was his and Mr Bart's joint intention.

45 A brief chronology of the salient events in the administration of the Companies and leading to their winding up is as follows:

- 5/12/2001 – Mr Viscariello resolved as the sole director of Bernsteen and Newmore respectively that each of the companies was insolvent or likely to become insolvent.
- 5/12/2001 – Mr Viscariello appointed Mr Macks as administrator of both.
- 17/12/2001 – The first meeting of the creditors of each of the companies.
- 19/12/2001 – Mr Macks reported to the creditors of Bernsteen and Newmore pursuant to s 439A of the *Corporations Act*. Mr Macks reported that Mr Viscariello had "very little defence" to an action for insolvent trading for the period from at least March 2001.
- 21/12/2001 – The creditors of Bernsteen and Newmore voted to wind the company up.

A summary of Mr Viscariello's claims

46 Paragraphs [22], [23], [28], [29], [40] and [79] of the Statement of Claim allege that Mr Macks engaged in misleading or deceptive conduct in the course of trade or commerce in connection with his appointment as the administrator of

the Companies contrary to what was then s 56 of the *Fair Trading Act*, or under the equivalent provisions of the *Trade Practices Act*.

47 Mr Viscariello alleges that at a meeting on 27 November 2001 Mr Macks told him and Mr Bart that if he were appointed as voluntary administrator of Bernsteen and Newmore he would recommend to the Companies' creditors that they accept a deed of company arrangement incorporating the terms of heads of agreement reached between Mr Viscariello and Mr Bart and would take the necessary legal steps to effectuate the proposed Bart DOCA before Christmas. Mr Viscariello pleads that Mr Macks also agreed not to charge professional fees for work done prior to his formal appointment as voluntary administrator and that he would write off any outstanding debts owed by the Companies to him in relation to the earlier 1995 administrations. Mr Viscariello contends that those representations were false and, insofar as they related to future matters, that Mr Macks did not have reasonable grounds to make them.

48 Mr Viscariello alleges that the following misleading and deceptive conduct of Mr Macks was causative of the Companies' liquidation:

- The delivery of the Bart offer to ARL on the pretence that all of its terms were proposed by Mr Bart.

- Misleading the Court, whether by instruction to his lawyers or through his lawyers as agent, to obtain a preponement of the second meeting of creditors without informing the Court of material changes to the circumstances deposed to in an affidavit filed in support of the application.

- Misleading the creditors of the Companies, in the course of the second meeting of creditors in which they resolved to wind the Companies up, by saying that Mr Bart had withdrawn his offer, or that there was no proposal to put to the meeting, when the truth was that ARL was denying support because the terms of the offer drafted by Mr Macks had the effect of denuding the Bart offer of any benefit to ARL in order to protect Mr Macks' financial position.

- Misleading the second meeting of creditors held on 21 December 2001 by saying that there was no option but to put the Companies into liquidation when it would have been reasonable to adjourn the meeting.

- Misleading the second meeting of creditors by failing to inform the meeting of the reasons for ARL refusing to accept the offer.

49 Finally, Mr Viscariello alleges that Mr Macks' negligent conduct of the administration led to the liquidation of the Companies. That conduct was:

- failing to properly negotiate the proposed Bart DOCA;

- failing to adequately advertise or otherwise procure other purchase of the business;

- failing to continue to trade after the rejection of the Bart DOCA.

50 Before turning to the evidence bearing on those claims, it is convenient to address the question of law whether an administrator acts in trade or commerce in discharging his or her duties. To that end it is first necessary to consider the statutory scheme for the voluntary administration of corporations.

Voluntary administration – the statutory scheme

51 I will refer to the provisions of the *Corporations Act* extant between 5 and 21 December 2001 (incorporating amendments up to Act No. 119 of 2001).

52 Part 5.3A of the *Corporations Act* establishes a regime for the voluntary administration of a corporation. Section 435A of the *Corporations Act* states that the object of Part 5.3A is to maximise the chances of the company, or its business, continuing in existence, and if that object is not possible to provide a better return to the company's creditors and members than would result from an immediate winding up of the company.

53 Part 5.3A is calculated to provide an expeditious and inexpensive response to corporate insolvency. The office charged with responsibility to achieve those ends is that of a voluntary administrator. The independence, impartiality, skill and diligence of the voluntary administrator is the "very marrow" of Part 5.3A.[1] A company may appoint an administrator if its board resolves that in its opinion the company "is insolvent, or is likely to become insolvent at some future time" and that an administrator should be appointed.[2] A voluntary administrator must be a registered liquidator.[3] Section 1282 of the *Corporations Act* provides a regulatory regime for the registration of liquidators and in particular prescribes minimum tertiary qualifications, a level of experience and competence and that the person is "a fit and proper person to be registered as a liquidator".

54 It is an offence for a person to give or promise any valuable consideration to a member or creditor of a company in order to obtain an appointment as a voluntary administrator.[4] The voluntary administrator must prefer the interests of the creditors and members of the corporation over the interests of the appointor and must not give a contrary appearance.[5] A creditor of the company for an amount exceeding $5,000 commits an offence by taking an appointment as the voluntary administrator unless he or she first obtains the permission of the Court[6]

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1 *Brovis v Lenleys Pty Ltd & Wily* (2003) 45 ACSR 612 at [133].
2 Section 436A *Corporations Act.*
3 Section 448B *Corporations Act.*
4 Section 595(1)(b) and s 1311 and schedule 3 item 143 *Corporations Act.*
5 *Smarter Way (Aust) Pty Ltd v D'Aloia* (2000) 35 ACSR 595 at 601.
6 Section 448C, s 1311, schedule 3 item 126 *Corporations Act*.

but the appointment itself is not thereby invalidated.[7] Leave may be given *nunc pro tunc*.[8]

55 The voluntary administrator must convene a first meeting of creditors within five days of his or her appointment.[9] The creditors may remove the voluntary administrator at the first meeting and appoint another but the power to do so does not subsist beyond that first meeting[10] unless with the approval of the court given pursuant to s 449B of the *Corporations Act*.

56 At the first meeting of creditors the creditors must determine whether to appoint a committee and its members.[11] The function of the committee is to consult with the voluntary administrator about the course of the administration and to receive and consider his or her reports.[12] The committee does not have a power of direction.[13] The voluntary administrator must convene a second meeting of creditors within 28 days from the beginning of the day of the administration.[14] That period may be extended pursuant to s 439A(6) of the *Corporations Act*. The power to extend is exercisable only on an application made during the convening period.[15] The discretion to grant an extension of time in which to hold the second meeting of creditors is to be exercised in light of the objects of the *Corporations Act*.[16] The meeting convened in that period must be held within five business days after the end of the convening period.[17] In the case of Bernsteen and Newmore the period of voluntary administration commenced on 5 December 2001. Accordingly, the first meeting of creditors had to be held by 10 December 2001 and the second meeting of creditors had to be convened between 2 and 6 January 2002.[18]

57 A voluntary administrator cannot hold the second meeting of creditors before the end of the convening period[19] unless the court makes an order for preponement of the meeting pursuant to s 447A of the *Corporations Act*.[20] Section 447A gives the court a general power to modify the application of part 5.3A in relation to a particular company:

General power to make orders

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7 *Cusson v Signature Resorts Pty Ltd* (2000) 18 ACLC 341.
8 Section 448C(1) *Corporations Act*.
9 Section 436E(1) and (2) *Corporations Act.*
10 Section 436E *Corporations Act*.
11 Section 436(1) *Corporations Act.*
12 Section 436F *Corporations Act.*
13 *Re Eisa Ltd; Application of Love* (2000) 34 ACSR 394.
14 Section 439A(5)(a) *Corporations Act.*
15 Section 439A(6) *Corporations Act.*
16 *Brian Rochford Ltd v Textile Clothing and Footwear Union of NSW* (1999) 30 ACSR 38.
17 Section 439A(2) *Corporations Act.*
18 Section 439A *Corporations Act*.
19 *Supervac Australia Pty Ltd v Australasian Memory Pty Ltd* (unreported) FCA 6 June 2007: Whitlam J.
20 *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270.

(1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.

(2) For example, if the Court is satisfied that the administration of a company should end:

(a) because the company is solvent; or

(b) because provisions of this Part are being abused; or

(c) for some other reason;

the Court may order under subsection (1) that the administration is to end.

(3) An order may be made subject to conditions.

(4) An order may be made on the application of:

(a) the company; or

(b) a creditor of the company; or

(c) in the case of a company under administration – the administrator of the company; or

(d) in the case of a company that has executed a deed of company arrangement – the deed's administrator; or

(e) ASIC; or

(f) any other interested person.

58 In *Australian Memory Pty Ltd v Brien,* the High Court explained:[21]

It is important to notice that the orders that may be made under s 447A(1) are described as orders about how Pt 5.3A is to operate "*in relation to a particular company*". The power is not cast in terms of a power to make orders to cure defects or to remedy the consequences of some departure from the scheme set out in the other provisions of Pt 5.3A. Its operation is not confined to such cases. Nor is there anything on the face of s 447A(1) that suggests that it should be read down. In particular, the words of the provision are wide enough to confer power to make orders which will have effect in the future but which are occasioned by something that has been done (or not done) under the other provisions of Pt 5.3A before application is made under s 447A(1). As was said in the judgment of the Court in *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc*:

> It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.

Cogent reasons must be advanced, then, if the power given by the general words of s 447A(1) is to be read down.

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[21] *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at [17]-[18], [24].

> Section 447A(1) speaks of orders about how "this Part" is to operate. The reference to "this Part" cannot be read as referring only to the Part as a whole. That is, it cannot be read as referring, in some global way, to the total operation or effect of the Part. In its context, the reference to "this Part" is to be understood as a reference to each of the provisions in it, for it is the provisions of the Part which give it the operation which an order under s 447A(1) may affect. And although the examples given in s 447A(2) cannot be taken as exhaustive of the scope, or as controlling the meaning, of s 447A(1), it is clear from those examples that they assume that orders under s 447A(1) may alter the operation of other provisions of the Part. That is, the orders contemplated in the examples go beyond a curial determination of what is the effect of existing provisions of the Part on a particular company in the circumstances that may be established in a proceeding; the orders contemplated are orders that alter how the Part *is to* operate in relation to a particular company, not how the Part *does* operate in relation to that company.
>
> …
>
> Whatever may be said of the relationship between s 1322 and the provisions of Pt 5.3A generally, or of the relationship between s 1322 and s 447A in particular, s 447A is not properly described as a general power standing apart from the scheme found in Pt 5.3A. Section 447A is an integral part of the legislative scheme provided for by Pt 5.3A. In its terms, it enables the making of orders which alter the way in which "this Part is to operate in relation to a particular company". That is, it permits the making of orders which would alter how s 439A is to apply. It is not right to seek to characterise s 447A as some general source of power to which resort cannot be had because to do so would "circumvent" the statutory limitations upon the exercise of the power that is given by s 439A(6) to extend the convening period. So to characterise s 447A is to give to all of the other provisions of Pt 5.3A a fixed and unchanging operation in relation to all Companies. Yet the evident legislative intention of s 447A is to permit alterations to the way in which Pt 5.3A is to operate.

59 The second meeting of creditors is convened by written notice given to as many of the company's creditors as is reasonably practicable[22] and causing a notice of the meeting to be published in a national newspaper or in a daily newspaper that circulates generally in each State or Territory in which the company operates at least five business days before the meeting.[23]

60 The notice given to the creditors must be accompanied by a report prepared in accordance with s 439A (a "s 439A report") which provides:

> (4) The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:
>
> (a) a report by the administrator about the company's business, property, affairs and financial circumstances; and
>
> (b) a statement setting out the administrator's opinion about each of the following matters:
>
> (i) whether it would be in the creditors' interests for the company to execute a deed of company arrangement;

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[22] Section 439A(3)(a) *Corporations Act.*
[23] Section 439A(3) *Corporations Act.*

(ii) whether it would be in the creditors' interests for the administration to end;

(iii) whether it would be in the creditors' interests for the company to be wound up;

and his or her reasons for those opinions; and

(c) if a deed of company arrangement is proposed—a statement setting out details of the proposed deed.

61 A s 439A report can only be sent when the second meeting of creditors is convened.[24] Notice may be given by prepaid post or fax.[25] The notice is given when it is put in the post.[26] In the ordinary course a voluntary administration will result either in the execution of a DOCA or in a resolution by the creditors that the administration should end or, alternatively, that the company be wound up.[27]

62 The second meeting of creditors may be adjourned by the chairperson with the consent of the meeting and it must be adjourned if the meeting so directs.[28] A meeting must not be adjourned for more than 60 days. A voluntary administrator is an officer of the company[29] and as such owes the company's statutory duties.[30] The voluntary administrator acts as the agent of the company.[31] The powers of the voluntary administrator are set out in s 437A of the *Corporations Act* which provides:

Role of administrator

(1) While a company is under administration, the administrator:

(a) has control of the company's business, property and affairs; and

(b) may carry on that business and manage that property and those affairs; and

(c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and

(d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.

(2) Nothing in subsection (1) limits the generality of anything else in it.

63 Section 438A of the *Corporations Act* obliges the administrator to investigate the company's affairs and form an opinion about whether the interests

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[24] *Re Vouras* (2003) 47 ACSR 155 at 174, [104]; [2003] NSWSC 702.
[25] Regulation 5.6.12 (2)(b)(c) *Corporations Regulations 2001*.
[26] *Re Vouras* (2003) 47 ACSR 155 at [46].
[27] Section 435C *Corporations Act.*
[28] Regulation 5.6.18(1)(a)(b) *Corporations Regulations.*
[29] Section 9 *Corporations Act*.
[30] Sections 180, 181, 182 and 184 *Corporations Act.*
[31] Section 437B *Corporations Act.*

of the company's creditors are best served by executing a Deed of Company Arrangement, ending the administration, or winding up the company. The voluntary administrator must form that opinion as soon as practicable after the administration of the company begins. To that end s 438B requires the directors to fully cooperate with the administrator in providing the company's records.

64 It is the creditors of the company in meeting which determine the ultimate outcome of a voluntary administration but it is the duty of the voluntary administrator to provide the information and recommendations upon which they can make an informed decision.[32]

65 The short time constraints imposed by the *Corporations Act* render the voluntary administrator's task a delicate one.[33]

66 In the essay "Key Developments in Corporate Law and Trusts Law" published in Honour of Professor Harold Ford[34] the policy balance is described as follows:

> The courts have endeavoured to balance the legislative intention that the investigation is to be a swift and practical one[35] against the need for the administrator to present reliable information to creditors on the key issues.[36] The leading judgment is by Cohen J in *Hagenvale Pty Ltd v Depela Pty Ltd*. His Honour said:[37]
>
> > The intention was, as has been indicated in several cases, to provide a more expeditious and less expensive way of assisting those creditors and members than under the greater formality of a winding up or the entry into a scheme of arrangement. One result, however, is that an administrator, constrained as he or she is by the time limits imposed under the Part, cannot carry out a detailed investigation of a company in the same way as can a liquidator, and accordingly the administrator's actions must be looked at in the light of that more restricted range of activities which are available to him. A further result, when dealing with a deed of company arrangement under Part 5.3A, is that the amount of detailed information which would be given to creditors in a scheme of arrangement under s 411 of the Corporations Law is not available, again because of time restrictions and the need to have material sent to the creditors quickly.
>
> The balance between speed and accuracy is obviously a delicate one.[38] The administrator must not accept the company's information uncritically without exercising judgment, and may be required to make further investigations where the available information is clearly inadequate on a critical issue, but frequently it is enough for the administrator simply to make a preliminary assessment and refer the matter to the creditors for a decision.

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32 *Brian Rochford Ltd v Textile Clothing and Footwear Union of NSW* (1999) 30 ACSR 38 at 44; *McVeigh v Linen House Pty Ltd* [2000] 1 VR 31 at 45-46.

33 *Deputy Commission of Taxation v Portinex* (2000) 156 FLR 453 at [126]-[128].

34 Edited by Ian Ramsay.

35 *Deputy Commissioner of Taxation v Pddam Pty Ltd* (1996) 19 ACSR 498 at 510.

36 *McVeigh v Linen House* [2000] 1 VR 31; *Deputy Commissioner of Taxation v Portinex* (2000) 156 FLR 453 at 481; H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (looseleaf), para [26,190].

37 (1995) 17 ACSR 139 at 145-6.

38 *Deputy Commissioner of Taxation v Portinex* (2000) 156 FLR 453.

> Compare, for the application of these propositions, the facts and findings in the *Portinex* and *Cresvale Far East* cases which are cited in this chapter.

67 A voluntary administrator may be a fiduciary in his or her relationship to the company, its contributories and creditors.[39] Irrespective of the nature of the relationship under the general law the statutory duties must prevail. The relationship of a liquidator as an agent of the company puts him or her in a position of trust with respect to the property of the company but he is not a trustee stricto sensu.[40] The voluntary administrator is in a similar position.

68 However, as a general proposition, the administrator's duty is owed to the company in administration. The duty may extend to the creditors generally because of the company's insolvency but it is doubtful that a duty is owed to individual creditors.

69 A voluntary administrator who breaches his or her fiduciary or statutory duties can be removed pursuant to s 449B of the *Corporations Act* if it is in the interests of the creditors to do so. The voluntary administrator can be removed in circumstances in which there is a reasonable apprehension of a lack of independence.[41] The circumstance that the voluntary administrator has acted in a professional capacity for the company is not sufficient to create an actual bias or perception of bias.[42] Of course a conflict will arise if the voluntary administrator would in the ordinary course be required to consider, and if necessary, take some action with respect to work or advice that he or she has given to the company.[43]

70 A voluntary administrator is liable for all debts incurred in the administration, including rent after the first seven days[44] but the voluntary administrator is entitled to an indemnity from the property of the company for debts incurred and for his or her remuneration.[45] The voluntary administrator's indemnity takes priority over all the company's unsecured debts and debts secured by a floating charge.[46]

71 It is by reference to the above statutory context that the questions as to the nature of an administrator's conduct and the duties he or she owes must be determined.

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39 *Hill v David Hill Electrical Discounts Pty Ltd* (2001) 37 ACSR 617 at 621; *Wood v Laser Holdings Ltd* (1996) 19 ACSR 245 at 266.
40 *Commission for Corporate Affairs v Harvey* [1980] VR 669 at 691.
41 *Central Springworks Australia Pty Ltd v McClellan* (2000) 34 ACSR 169.
42 *Commonwealth v Irving* (1996) 65 FCR 291 at 296.
43 *Citric Systems Inc v Telesystems Learning Pty Ltd (In Liq)* (1998) 28 ACSR 529.
44 Section 443A *Corporations Act.*
45 Section 443B *Corporations Act.*
46 Section 443E(1) *Corporations Act*.

Does an administrator engage in trade or commerce?

72 I first deal with the question of whether, in discharging his or her statutory responsibilities pursuant to Part 5.3A, an administrator acts in trade or commerce for the purpose of s 56 of the *Fair Trading Act 1987* (SA).

73 At the relevant time s 56(1) of the *Fair Trading Act* provided as follows:

> 56 Misleading or Deceptive Conduct
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

74 The term "trade or commerce" was not defined by the Act.

75 The authorities dealing with the conduct of directors provide some guidance on this question.

76 In a joint judgment in *Concrete Constructions (NSW) Pty Ltd v Nelson*,[47] Mason, Deane, Dawson and Gaudron JJ considered that, having regard to its location in Part V of the *Trade Practices Act* entitled "Consumer Protection", it was "plain that s 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business". Their Honours observed:[48]

> Put differently, the section was not intended to impose, by a side-wind, an overlay of Commonwealth law upon every field of legislative control into which a corporation might stray for the purposes of, or in connection with, carrying on its trading or commercial activities.

77 Their Honours then said:[49]

> What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct 'in trade or commerce' may be less clear and may require the identification of what imports a trading or commercial character to an activity which is not, without more, of that character.

78 In *Yates v Whitlam*[50] Windeyer J held that directors did not engage in trade or commerce by publishing advertisements seeking support for their re-election. On the other hand in *NRMA Ltd v Yates*[51] Santow J held that a director who

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47 (1990) 169 CLR 594.
48 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at [8].
49 *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at [8].
50 [1999] NSWSC 976.
51 [1999] NSWSC 859.

published an advertisement complaining of "great waste and mismanagement" by the board of a company and promoting a campaign for the election of like-minded directors had engaged in trade or commerce. Santow J so found because the purpose of their conduct was to avoid further waste and mismanagement and thereby to influence the future trade or commerce of the company by changing its corporate governance.

79 In *Cleary v Australian Cooperative Foods (No 2)*[52] Austin J rationalised the decisions in *Whitlam* and *NRMA Ltd* by characterising the conduct in the former case as a bland advertisement for election without reference to the future commercial conduct of the board whilst the conduct in the latter case sought to influence the NRMA's future commercial conduct. With respect, I find it difficult to see how conduct of the same legal, and business, kind, the election by shareholders of directors, can fall within or outside the scope of trade or commerce depending on the policy platform of the candidates. In *Cleary* Austin J held that a director's conduct in distributing a proposal for a corporate merger which would lead to the listing of the corporation was conduct in trade or commerce.

80 It seems to me that there is a distinction between conduct by which one person seeks to influence the commercial conduct of another and the commercial conduct itself. A person who by commentary, advice or criticism seeks to influence commercial conduct does not necessarily engage in the trade or commerce which is the object of the commentary. The election of directors is a matter of the internal governance of corporations. The election itself is not an aspect of, or even incidental to, trade or commerce in a market even though the election of one candidate over another is always likely to affect how the corporation itself engages in trade or commerce. On the other hand, steps taken to secure a corporate merger or the public listing of a company may well be trade or commerce in an equities market.

81 The distinction between commercial conduct and an act or series of acts antecedent to that conduct was highlighted in *New Cap Reinsurance Corporation Ltd v Daya.*[53] In that case, the plaintiffs, a company and its liquidator, sought leave to file a cross claim against the defendants, the former directors of the company, alleging amongst other things that one or more of the directors had made misleading and deceptive representations at a board meeting in contravention of the then s 52 of the *Trade Practices Act*. In holding that that part of the cross claim disclosed no viable cause of action on the ground that conduct complained of was not in trade or commerce, Barrett J observed:[54]

> It must be inferred that what each of them said and did on that occasion was said and done by him as an officer of NCRA for the purpose of promoting discussion of, and

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52 [1999] NSWC 991.

53 [2008] NSWSC 64.

54 *Cap Reinsurance Corporation Ltd v Daya* [2008] NSWSC 64 at [50]. See also *Rozenblit v Vainer* [2014] VCS 510 at [63].

> facilitating a decision on, the proposal that NCRA commit itself to the US$30 million debt transaction. The discussion and decision were antecedent to NCRA's actually entering into the relevant contract with the debt provider. The making of that contract would readily be characterised as an act in trade or commerce. It entailed dealings of a financial kind between NCRA and another corporation. The antecedent corporate decision of NCRA, however, stands in a different light, as do all the steps making up the process by which the matter progressed from idea to proposal to resolution within the board of directors of NCRA, including steps entailing expressions of opinion and the communication of advice or information or recommendations among members of NCRA's board and NCRA's assisting employees. The decision-making process and the steps within in it were internal to NCRA and did not themselves take place "in" trade or commerce. They were anterior to and preparatory for an act or series of acts "in" trade or commerce.

82 The relationship between a voluntary administrator, the company, its contributories and creditors is purely a statutory construct. There is no room for commercial exchange and compromise on the part of a voluntary administrator who is bound by his or her statutory duties, and such further obligations as may be imposed by the general law.

83 I hold that a voluntary administrator does not engage in trade or commerce in discharging those statutory duties.[55] The relationship between the voluntary administrator after his or her appointment on the one hand, and the company, its contributories and creditors on the other, is not one in which there is any commercial exchange or trade. Of course the voluntary administrator may in the course of exercising his or her statutory duties dispose of the assets of the company in the course of trade or commerce. The prosecution, and compromise, of a chose in action of the company under administration may also involve conduct in trade or commerce. However, the relationship between an administrator on the one hand, and the creditors, contributories and directors of the company on the other, in exercising his or her statutory functions, powers and duties under Part 5.3A does not constitute conduct in trade or commerce.

84 On the other hand, a registered liquidator who, by reason of that office, may be appointed as a voluntary administrator of a particular company, is in the business of providing services of the kind provided by liquidators and administrators to insolvent Companies. For that reason, insofar as a registered liquidator, who makes himself or herself available to act as voluntary administrator and or liquidator, competes for that work he or she engages in trade or commerce. If a registered liquidator were to make a false and misleading statement in the promotion of his or her services or in the negotiation of the terms on which he or she will consent to be appointed, he or she would do so in trade or commerce.

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[55] Cf: *Baxter v Hamilton* [2005] TASSC 64 at [64]-[67].

The Administrator's duties

85 I next deal with the question of the duties of the administrator to individual creditors or to the directors and shareholders of the company under his or her administration.

86 The role of an administrator is to execute the statutory scheme for the administration of corporations in accordance with part 5.3A of the *Corporations Act* . To that end, whilst the company is under administration the administrator has control of the company's business, property and affairs. The administrator is entitled to the assistance of the directors of the company and to the company's books.[56] The administrator is in turn under a statutory duty to provide reports and accounts with respect to his or her administration. Importantly, the administrator is charged with the responsibility of investigating the company's business affairs and financial circumstances in order to decide whether the company should enter into a deed of company arrangement, the administration should be terminated or the company would up. The administrator is obliged to convene a meeting of creditors which may be adjourned from time to time and to report to that meeting on the opinion the administrator has formed.[57] It is then for the creditors of the company to ultimately decide the course to be taken.[58]

87 The recommendation as to where the company's interests best lie requires a sophisticated and complex business judgment to be made. The future of a financially distressed company depends on many varied contingencies. It is not susceptible to objective, and scientifically certain, analysis. The decisions are necessarily based to a material extent on an intuitive assessment which must be made quickly.

88 Moreover, different creditors may have different views about where their respective interests lie. There may be significant differences between the views of secured creditors and unsecured creditors. As between unsecured creditors the interests of a supplier of goods may differ from those of an employee. The statutory requirement that the voluntary administrator form a single view as to the best interests of the company necessarily requires that he or she weigh the competing interests and identify a course which optimises the overall outcome.

89 The voluntary administrator is subject to statutory duties to exercise care and diligence,[59] to act in good faith[60] and to not improperly use his or her position[61] in the course of his or her administration. A breach of those statutory

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56 Sections 438B and 438C *Corporations Act.*
57 Section 439A *Corporations Act.*
58 Section 439C *Corporations Act.*
59 Section 180 *Corporations Act.*
60 Section 181 *Corporations Act.*
61 Section 182 *Corporations Act.*

provisions can result in a compensatory order in favour of the corporation but not individual creditors.[62]

90 The *Corporations Act* provides a regime for the supervision of administrators. It provides statutory remedies for the failure of a voluntary administrator to perform his or her duties. The administrator is subject to the supervision of this Court[63] and in particular may be removed on the application of ASIC or a creditor.[64]

91 In *Mills v Sheahan*[65] the trial Judge held that a liquidator was not subject to a duty of care to third persons and dismissed a Statement of Claim which was premised on the existence of the duty. On appeal the majority, Sulan and Layton JJ set aside the Judge's order on the basis that the existence of the duty was arguable. Their Honours left open the question of whether a liquidator owed a duty of care to a guarantor of a company debt to take reasonable steps to sell company assets at their proper value. Debelle J went further and held that the liquidator was, in law, under such a duty.

92 Debelle J considered the principles relevant to the existence of the duty as follows:[66]

> **Vulnerability**
>
> The vulnerability of the plaintiff is an important requirement … The plaintiffs were not able to protect themselves from the economic consequences of the sale by Sheahan of those assets. Their liability to indemnify was entirely dependent upon what Sheahan obtained for those assets. They were vulnerable in the sense that they had no ability to ensure that Sheahan would take care to secure the best price reasonably obtainable in all the circumstances.
>
> **Proximity**
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> The doctrine of proximity no longer governs the law of negligence in this country … Nevertheless, it is necessary to determine whether there is a sufficiently close relationship to give rise to a duty of care for breach of which a pure economic loss might be recovered …
>
> Apart from the fact that Sheahan has, for the purposes of this application, admitted that the loss was reasonably foreseeable, there was a real proximity between Sheahan and the plaintiffs since Sheahan knew that the amount recovered from the sale of the assets would directly affect the amount payable by the plaintiffs. To the extent that proximity is relevant, there was a sufficient proximity or a sufficiently close relationship to entitle the plaintiffs to recover their reasonably foreseeable economic loss, that is to say, to establish a duty of care to ensure that the defendant did not cause economic loss to the plaintiff.
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> **Indeterminacy of Liability**

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62 Section 1317H *Corporations Act.*
63 Section 447E *Corporations Act.*
64 Section 449B *Corporations Act.*
65 (2007) 99 SASC 357: see also *Perpetual Nominees Ltd v McGoldrick* [2014] VSC 152.
66 *Mills v Sheahan* (2007) 99 SASR 357 at [23]-[32].

A factor which may militate against imposing a duty to take reasonable care to protect another from economic loss is that the law is concerned to avoid what Chief Judge Cardozo called the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" …

It is not the size or number of claims that is decisive in determining whether potential liability is so indeterminate that no duty of care is owed. Liability is indeterminate only when it cannot be realistically calculated. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable "in an indeterminate amount for an indeterminate time to an indeterminate class".

In the present case there is no prospect of an indeterminate liability. The liability is confined to the plaintiffs as the persons liable to indemnify RFPL. It is to be contrasted with the wider liability which a liquidator has in any event to creditors and shareholders of a company, especially in the case of a large publicly listed corporation. The potential liability is limited to the amount of the shortfall to the three plaintiffs in circumstances where Sheahan was fully aware of their liability to indemnify.

Individual Autonomy

In a competitive world where one person's economic gain is commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another's personal property, may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage … McHugh J has described this as individual autonomy …

The question of individual autonomy is not relevant in this case because a liquidator or a trustee in bankruptcy, when exercising the power to realise assets, is subject in each case to a duty to creditors to exercise reasonable care and diligence. The liquidator or trustee in bankruptcy has clear obligations when realising assets and those obligations are not inconsistent with a duty to a person liable to indemnify. This is an instance where there is a coincidence of the interests of creditors and the interests of the person liable to indemnify: *Hill v Van Erp* at 167 per Brennan CJ and at 187 per Dawson J. Expressed another way, the duties are entirely compatible.

Inconsistent Duties

Another relevant factor is whether the imposition of a duty of care would be compatible with other duties which the defendant owed: *Sullivan v Moody* at [55]. As already noted, the duty to take care to secure a fair price is entirely consistent with the duties of a liquidator and of a trustee in bankruptcy when realising assets. The duties are entirely compatible. The duty which the plaintiffs seek to enforce is a duty to secure the best price reasonably obtainable in the circumstances for the assets which have been sold. If the liquidator or trustee in bankruptcy has discharged that duty, there is no impairment to the rights of creditors.

A related issue to the last is whether to impose the duty for which the plaintiffs contend would be inconsistent with existing principles of law or equity or with the scheme of the *Corporations Act* or *Bankruptcy Act*: *Sullivan v Moody* at [30]; *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317 at [28]; *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 at [78]. For the reasons just expressed, it is not inconsistent with the duties owed by a liquidator to creditors and shareholders or by a trustee in bankruptcy to creditors and the bankrupt. There is a coincidence of the interests

of the creditors and of the interests of the person liable to indemnify: *Hill v Van Erp* (supra). It does not cut across any aspect of the scheme of either the *Corporations Act* or the *Bankruptcy Act*. Expressed another way, the duties are entirely compatible.

93 Sulan J, with whom Layton J agreed, expressed the following view regarding the conflict of duties:[67]

Conflict of duties

Central to the plaintiffs' claim is an assertion that the defendant liquidator sold assets of RFPL at significantly less than their real value. It was submitted by the defendant before this Court that the imposition of a duty on a liquidator would be inconsistent with the other duties which a liquidator owes: principally, those to the company and to the creditors.

The plaintiffs in this case are not in the position of an ordinary creditor. Their financial liability has arisen from a Federal Court judgment, in which it was determined that the plaintiffs were required to indemnify the Companies as a consequence of the plaintiffs' breach of fiduciary duty.

It has been suggested that a liquidator's duty to creditors is a duty to the group, rather than to each creditor individually. Whether an individual in the position of the plaintiffs can recover is a novel question.

In my view, the fact that there are other parties to whom a liquidator owes a duty is not determinative of whether a duty exists towards the plaintiffs in the present case. As was stated in *Sullivan*:

circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to the plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable... But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists.

In the present case, the plaintiffs contended that there was no conflict between the duty that they claimed was owed to them by the liquidator, and the duties owed by the liquidator to the company and to the creditors. If it is found that the true value of the assets was less than the price at which the liquidator sold the assets, then it may well be that there is no conflict between the duties. However, that is a matter to be explored at trial.

Again, it should be observed that a conflict of duties may preclude the existence of a duty to a person in the position of the plaintiffs in the circumstances of a particular case. However, the existence of a conflict of duties, and the consequences of such a conflict, are matters to be explored at trial. The possibility of there being a conflict of duties should not, by itself, preclude the plaintiffs from bringing a claim.

There are numerous authorities that articulate the way in which a liquidator should reconcile conflicting duties. Further, the *Corporations Act* stipulates the order in which creditors can recover from the assets of a company, thus mitigating the possibility that a liquidator would be unable to reconcile duties. In my view, whether a duty can co-exist

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67 *Mills v Sheahan* (2007) 99 SASR 357 at [112]-[127].

> with the already onerous duties relating to creditors is a question which should arise following the determination of the facts at trial. It is not question to be dismissed on the pleadings.

94 I respectfully adopt the analysis of Debelle J on the question of the existence of a common law duty of care owed by the administrator to the company in administration to manage its business affairs, including the sale of all or some of its assets, compromising claims for and against it, and the negotiation of a DOCA. The interests of the company, its creditors and shareholders, are at one in maximising the return to the company from its commercial dealings with unrelated parties. However, the imposition of a duty to individual creditors in making decisions as to the re-arrangement of the company's finances, the proportionate payment of debt in accordance with a DOCA or whether the Company should go into liquidation would compromise the statutory scheme to which I have referred. In my view, this factor alone decisively tells against the imposition of a duty to individual creditors with respect to that part of an administrator's responsibilities.

95 It is manifestly inconsistent with the statutory regime of the *Corporations Act* regulating the duties of voluntary administrators to superimpose up on it a common law duty of care owed by the administrator to individual creditors, directors or shareholders to protect them from financial loss by the exercise of reasonable care in discharging his or her statutory powers relating to the continued existence of the Company. That inconsistency is at its greatest when an administrator must form an opinion and frame a recommendation to the creditors, about whether to trade on, enter into a deed of company arrangement, sell the business and/or wind up the company.

96 I would distinguish the exercise of those statutory powers from the business management of the company in administration. The administrator must exercise the skills and care of a competent business manager in negotiating commercial arrangements with third parties who may wish to purchase, in whole or in part, the business and stock of the Companies.

97 Similar skills must be exercised in negotiating a deed of company arrangement with the parties to such an agreement. Just as in the management of the business and its assets, the administrator is under a duty to properly safeguard the assets, so too with respect to a deed of company arrangement. There is no conflict of interest, nor any inconsistency with statutory duties and powers, in the imposition of an obligation to diligently seek expressions of interest from persons who may wish to either purchase the assets of the company or enter into a deed of company arrangement and to then manage negotiations with them. The offers so solicited will then be the subject of advice to, and final resolution by, the creditors. There is no duty of care owed in the formulation of that advice for the reasons I have already given. However, it is in the interests of all creditors that those matters are competently handled. Moreover, it is consistent with the administrator's statutory duties to act diligently and reasonably in that respect.

98 In this case, for example, advice given by Mr Macks as to whether the company should enter into a deed of company arrangement, or continue to trade or be wound up, if there be no resolution to enter into a deed of company arrangement, is one for which a voluntary administrator carries no common law duty of care. Indeed, a voluntary administrator is liable for the debts he or she incurs in the performance or exercise of his or her functions and powers as administrator for services rendered, goods bought, property hired and money borrowed.[68] The administrator is also liable in some circumstances with respect to, or under, pre-existing agreements for the use or occupation of property entered into by the company before the administration.[69] In some circumstances the administrator is liable for certain taxation liabilities.[70] The administrator is therefore in a position of conflict. The mechanism for the resolution of those conflicts is provided by the supervisory regime of the *Corporations Act.* It would be inconsistent with the *Corporations Act* and that scheme to impose a common law duty on the administrator to take reasonable care not to adversely affect what are the competing interests of shareholders and creditors which he or she must balance one against the other.

99 In addition, the administrator owes a fiduciary duty to the company in the management of its property and business.[71] The administrator is also under a fiduciary duty to disclose all material information to the creditors.[72]

100 According to Mr Viscariello, in mid 2001 Mr Bart asked Mr Viscariello to provide financial information to Mr Bart's chief financial officer. Mr Viscariello provided the information requested. Mr Viscariello also had discussions with Mr Yeomans about ARL acquiring an interest in the Companies or their businesses.

101 Mr Viscariello entered into some discussions and correspondence with Mr Bart and Mr Yeomans in which he attempted to facilitate an agreement whereby Mr Bart would pay an amount in satisfaction of the Companies' indebtedness to ARL and take over the business of the Companies. No agreement was reached because Mr Bart was not prepared to offer the amount of $400,000 sought by ARL.

102 Mr Viscariello spoke over the telephone with Mr Macks in November 2001 about placing the Companies in administration. Mr Viscariello testified that he and Mr Bart met Mr Macks in his office on 27 November 2001. It is common ground that Mr Viscariello and Mr Bart outlined to Mr Macks a proposal whereby Mr Bart would acquire the shares of the Companies. Mr Macks' notes record, and I find, that Mr Bart referred to the collateral benefit of that form of

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68 Section 443A *Corporations Act.*
69 Section 443B *Corporations Act.*
70 Section 443A *Corporations Act.*
71 *Wood v Laser Holdings* (1996) 19 ACSR 245 at 246; *Hill v David Hill Electrical Discounts Pty Ltd* 37 ACSR 617 at 621.
72 *Brian Rochford Ltd v Textile Clothing and Footwear Union of NSW* (1999) 30 ACSR 389 at 440.

acquisition of utilising the Companies' true losses. The debts to the Commonwealth Bank of Australia and ARL were discussed. Questions were raised as to the timing of a stocktake, and ARL's retention of title claims.

103 As I have already mentioned, Mr Viscariello sent Mr Macks a written outline of the proposed Bart DOCA after their 27 November meeting.

104 Mr Viscariello testified that thereafter information about the value of the stock held in the Companies' stores was sent to Mr Bart by the Companies' employees.

105 Mr Viscariello alleges that Mr Macks made certain representations to him and Mr Bart in that meeting to the effect that if he were appointed as administrator, he would cause the company to enter into a deed of company arrangement reflecting the terms of the proposed Bart DOCA. According to Mr Viscariello, Mr Macks told him that:

- Bart should not pay out the debt due to the Commonwealth Bank of Australia (CBA) prior to the appointment of a voluntary administrator but that the payment should be made pursuant to the terms of the proposed DOCA;

- he would not render an account for work up to the date of his appointment which would be greater than $5,000 and that he would write off all outstanding debts owed by the company to him with respect to the 1995 administration of the company;

- it would not be necessary to advertise the sale of the Companies or their businesses;

- he would recommend the acceptance of the Bart DOCA and would successfully apply to the Court to abridge the time for the convening of a second meeting of creditors to execute the Bart DOCA within about ten days from the date of his appointment and that he could do so without advertising any of the company's assets for sales.

106 I deal with each of the alleged misrepresentations in turn.

107 Mr Viscariello testified that he and Mr Bart had discussed Mr Bart discharging the debt owed to the CBA before the appointment of an administrator. To that end, on 30 November 2001 Mr Viscariello contacted the CBA to make arrangements to release the security it held over Newmore. However, according to Mr Viscariello, Mr Macks advised them that the payment should be made after his appointment as administrator and as part of a deed of company arrangement. As at November 2001 that debt was $81,916.00.

108 Mr Bart testified in evidence-in-chief that he and Mr Viscariello had discussed paying out the CBA before the appointment of the administrator because Mr Bart would then have a right to appoint a receiver. Mr Bart's evidence in cross-examination on this topic is less clear. Mr Bart seemed to accept that he remained open to making the payments contemplated by the proposed Bart DOCA in the course of voluntary administration but it is not clear whether Mr Bart was referring to the proposed payments for the Companies' stock or the payment to the CBA.

109 Mr Macks agreed that Mr Viscariello had suggested that Mr Bart might pay out the CBA liability before the Companies entered into the proposed Bart DOCA but testified that he had suggested that they obtain advice before doing so. I am unable to choose between the detail of these competing accounts. I am satisfied only that as a result of the meeting with Mr Macks, Mr Viscariello and Mr Bart decided not to pay out the bank liability before the Companies went into administration.

110 Even on the allegation made by Mr Viscariello, it is to be observed that the representation was not one of fact as to a future matter.[73] The conduct, properly construed, was a statement of advice or opinion. No evidence has been led that the advice was bad, that Mr Macks did not have reasonable grounds for expressing the opinion or that he did not use a reasonable degree of professional skill and care in giving the opinion.[74]

111 For all of the above reasons, I am not satisfied that there was anything misleading, negligent or improper in anything said by Mr Macks on the payment of the CBA debt. Nor am I satisfied that, had the conduct been misleading or deceptive, the decision not to pay out the liability resulted in any loss.

112 I next deal with the claim that Mr Macks promised to forgive some outstanding PPB fees. I will also deal with a related claim made by Mr Viscariello's that Mr Macks was disqualified pursuant to s 448C(1)(b) of the *Corporations Act* from accepting appointments as voluntary administrator of the Companies because Mr Macks was owed $5,000 for work done for them in the 1995 administration and a further sum of $5,000 for work done in November 2001.

113 Mr Viscariello gave no evidence of any such promise. In any event, I accept Mr Macks' evidence that he was owed no more than the sum of $2,831.38 for work done in the 1995 administration. I am further satisfied that that amount was written off on 31 May 2000. It follows that I also reject the claim that Mr Macks offered to forgive that debt in the meeting of 27 November 2001.

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[73] *ACCC v Dukemaster Pty Ltd* [2009] FCA 682.
[74] *Heydon v NRMA Ltd* [2000] NSWCA 374.

114 I also reject the contention that PPB had outstanding fees for work done between 27 November 2001 and 5 December 2001. There is no timesheet recording any such work. Work which Mr Macks chose to perform in anticipation of an appointment was not chargeable in the circumstances of this case. Minter Ellison performed some limited work in anticipation of Mr Macks' appointment as an administrator. For example, they drew up a deed of indemnity. However, that is work performed for Mr Macks as part of his anticipatory preparation. In any event, it is inconsequential.

115 In any event, even though a breach of s 448C(1)(b) of the *Corporations Act* creates an offence, its breach does not invalidate the appointment of an administrator. A voluntary administrator who accepts an appointment in breach of s 448C of the *Corporations Act* may be removed pursuant to s 449B of the *Corporations Act* but it cannot have been intended that his or her acts in the intervening period would be invalidated.

116 I would also hold that Mr Viscariello is estopped from challenging the appointment on this ground because of his part in procuring Mr Macks to act as administrator of the Companies and because of his failure to challenge Mr Macks' appointment.

117 If I had found otherwise, I would in any event have exercised the discretion to make an order pursuant to s 447A of the *Corporations Act* to validate his appointment.[75] I would make such an order because the evidence shows that the existence of any debt relating to the 1995 administration had no part in the appointment of Mr Macks' voluntary administrator. Mr Viscariello appointed Mr Macks because of his belief that he would achieve an outcome favourable to him. The length of time between the incurring of the debt and the administration shows that Mr Macks had not given its collection any active consideration. He had not taken any steps to enforce it.

118 I am not satisfied that at the 27 November meeting Mr Macks represented to Mr Viscariello and Mr Bart that he would not need to advertise any of the assets of the Companies for sale. No evidence was led by Mr Viscariello that Mr Macks made such a representation. To the contrary, Mr Macks proceed to advertise the sale of the Companies on 7 December and 8 December 2001.

119 Mr Viscariello pleaded that after his appointment as administrator, Mr Macks admitted to him that he took the appointment as the Companies' voluntary administrator as an opportunity to "payback" Mr Viscariello because banks had withheld work from him because of his conduct of the voluntary administrations of the Companies in 1995. However, Mr Viscariello gave no such evidence. Indeed, Mr Viscariello testified that he and Mr Macks had enjoyed a good relationship between the conclusion of the earlier voluntary administration and his appointment as voluntary administrator in 2001.

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[75] *Deputy Commissioner of Taxation v ACN 080122587 Pty Ltd* [2005] NSWSC 1247.

Mr Viscariello testified only that at some time between 1995 and the Year 2000 Mr Macks told him:

> That as a consequence of what had happened with - or his conduct in taking the NAB, I guess, to the Federal Court and getting the orders that we did, the NAB was quite dissatisfied with that and that he wasn't getting appointments from the Bank and from other banks.

120 Mr Macks denied the conversation and explained that he had only lost a small amount of work from the National Australia Bank. I accept Mr Macks' evidence and his evidence that he disclosed the matter in the meeting of the creditors of Bernsteen on 14 December 1995. I also accept Mr Macks' testimony that he had not been black-banned by other banks.

121 I do so because even though opposing parties in liquidation may fall out temporarily or even permanently it is improbable that the NAB's antipathy to Mr Macks would have spread to other banks. It is also improbable that Mr Macks would have exaggerated the adverse effects of acting for Mr Viscariello in that way because to do so would undermine his professional position. In any event, I reject as implausible the suggestion that Mr Macks was motivated to do harm to Mr Viscariello because of the sequelae of acting as the Companies' administrator in 1995. The ongoing friendship with Mr Viscariello in the intervening period tells against any such motive.

122 I find it unlikely that Mr Macks would have given an unqualified assurance that he would support the proposed Bart DOCA in breach of his duty to investigate the financial circumstances of the Companies and provide opinions to creditors. As it transpired, neither Mr Bart nor Mr Viscariello testified that Mr Macks expressly undertook to recommend the adoption of the Bart DOCA. Rather, they testified in more broad terms that they had an understanding that the DOCA which they proposed was viewed favourably by Mr Macks.

123 Mr Bart was asked whether, in the meeting of 27 November, Mr Macks had indicated that he would support the proposed Bart DOCA. Mr Bart answered:

> I can't recollect exactly but I would imagine that John Mr Viscariello would not have appointed Mr Macks unless he got a basic assurance that he would support the deed.

124 Mr Macks gave the following account of the meeting:

> Q Could you tell his Honour as best you can what was said by the people there and in what order, how the meeting went.
>
> A I don't recall it being a lengthy meeting but I recall there were a couple of issues that I thought arose at the meeting. The meeting commenced by Mr Viscariello taking me through the proposal for the heads of agreement. I don't recall Mr Bart saying a lot about that other than agreeing with what was said. I do then recall an issue arose, there was commentary by Mr Viscariello in relation to payout of some securities, CBFC, and I expressed some concern because I think the comment was that he was planning to pay out the CBFC prior to the administration. And I said

> words to the effect that "I think we should get some advice in relation to that", and then I believe Mr Bart said "Perhaps it should be done within the deed" - don't think he used the word "perhaps". He quickly reacted because he could see that I was concerned about - …

125 I find that in the course of the meeting of 27 November there was discussion in general terms about the course that the voluntary administration might take if the proposed Bart DOCA were accepted by the creditors. The paucity of evidence on the discussion makes it difficult to make detailed findings about that conversation. I am satisfied that by words and conduct Mr Macks gave Mr Bart and Mr Viscariello an indication that he would give favourable consideration to recommending the proposed Bart DOCA. However, I reject Mr Viscariello's claim that Mr Macks represented that he would definitely recommend the proposed Bart DOCA to the creditors and that Mr Macks expected that they would accept it. Mr Macks could not have known at that time the true state of affairs of the company nor the attitudes of creditors. It is inherently improbable that he would have made the unqualified representations pleaded by Mr Viscariello.

126 I acknowledge that in a circular to staff dated 5 December 2001, Mr Macks sought to reassure the Companies' staff by referring to the proposed sale of the business to a third party who, even though undisclosed in the memorandum, was Mr Bart, in positive terms. However, it is one thing for Mr Macks to have an initial tentative favourable view of the proposed Bart DOCA. It is a different thing altogether to have irrevocably committed himself to it.

127 Mr Macks' statements to the first meeting of creditors on the issue of the proposed Bart DOCA were appropriately qualified.

128 If the pleaded representations were made and an agreement or understanding reached to that effect, Mr Macks would have breached s 595 of the *Corporations Act* and both Mr Bart and Mr Viscariello would have procured him to do so.

129 Section 595 of the *Corporations Act* provides:

> **595 Inducement to be appointed liquidator etc. of company**
>
> (1) A person must not give, or agree or offer to give, to another person any valuable consideration with a view to securing the first-mentioned person's own appointment or nomination, or to securing or preventing the appointment or nomination of a third person, as:
>
> (a) a liquidator or provisional liquidator of a company; or
>
> (b) an administrator of a company; or
>
> (c) an administrator of a deed of company arrangement executed, or to be executed, by a company; or

(d) a receiver, or a receiver and manager, of property of a company; or

(e) a trustee or other person to administer a compromise or arrangement made between a company and any other person or persons.

(2) An offence based on subsection (1) is an offence of strict liability.

130 It would be contrary to the public interest to allow Mr Viscariello to recover damages for a misrepresentation which arises out of a failure to give effect to an unlawful arrangement.[76] With respect to the false and misleading conduct alleged against Mr Macks in respect of the 27 November meeting with Mr Viscariello and Mr Bart, I reject Mr Viscariello's evidence that Mr Macks gave an assurance that he would ensure that the Companies would enter into the Bart DOCA.

131 Mr Viscariello had further telephone discussions with Mr Macks about the documents in the days following the 27 November meeting.

132 Mr Macks wrote to Mr Viscariello formally advising him of his appointment as administrator and its statutory consequences on 6 December 2001. He enclosed the notices of appointment dated 5 December 2001 of himself as administrator for Bernsteen and Newmore.

133 On 6 December 2001 Mr Kennedy, a solicitor acting for ARL, spoke to Mr Clifton, an officer of PPB and stressed that ARL sought payment of their debt of $400,000 and a payment of between $130,000 to $140,000 for its consignment stock.

134 The first meeting of creditors of Bernsteen was held on 11 December 2001. The minutes of the meeting filed with ASIC by Mr Macks record that Mr Macks disclosed his previous appointment as administrator of both Companies in 1995 and informed the meeting that "he has had minimal ongoing involvement with the director of the Companies, Mr John Viscariello". Mr Macks disclosed that he had a lunch with Mr Viscariello after the Bernsteen and Newmore 1995 DOCAs were finalised and subsequently at a Bank SA function. Mr Macks also informed the creditors that he had been contacted by Mr Viscariello about one week before his appointment as administrator. On the basis of the minutes, Mr Macks' general evidence as to the process by which the minutes were made and his testimony about that meeting, I find that he made the disclosures recorded.

135 The meeting was advised of the proposed Bart DOCA. Mr Macks advised the meeting "that the proposal was dependent on the level of stock at the stores and it was crucial that the sale proceed quickly since the stock is presently at minimum levels and that every day of trading will significant [sic] reduce the expected outcome of the proposed purchase".

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[76] *Yango Pastoral Co Pty Ltd v First Chicago (Australia) Limited* (1978) 139 CLR 410; *Brownbill v Kenworth Trucks Sales (NSW) Pty Ltd* (1982) 39 ALR 191; *Alexander v Rayson* [1936] 1 KB 169; *McCarthy Rose (Milk Vendors) Pty Ltd v Dairy Farmers Coop Milk Co Ltd* (1945) 45 SR(NSW) 266; *Mason v Clarke* [1955] AC 778.

136 With respect to Newmore, Mr Macks advised that the stock was worth approximately $1.5m. Mr Macks confirmed that secured creditors were approximately $208,000 and unsecured creditors $2.2m. Mr Macks informed the meeting that for both Companies combined, 25 retention of title claims had been noted. He estimated stock at $1.5m. Employee entitlements were approximately $150,000 for Bernsteen and $60,000 for Newmore. The meeting was told by Mr Mansueto, a partner of the firm Minter Ellison, that a court order might be obtained to hold the second creditors' meeting on 21 December 2001 in order to adopt the proposed Bart DOCA.

137 Mr Macks disclosed that he was in negotiations with the landlords and that securing their support was "imperative". Mr Macks informed the meeting that the Commonwealth Bank was a secured creditor for a total debt of $44,000. Mr Macks was asked whether he would investigate whether the company had traded whilst insolvent and about the 1995 DOCAs. A committee of creditors was selected comprising Mark Roberts, Tony Colyer, Michael Wild, Graham Young, Sam McCarthy and David Moyle. The minutes of the meeting of Bernsteen record Mr Viscariello's presence as a creditor and director of a company.

138 Mr Viscariello testified about a subsequent conversation with Mr Macks in mid December. The conversation is important only insofar as it bears on the credit of Mr Viscariello and Mr Macks. Mr Viscariello gave evidence that Mr Macks told him that he was not comfortable with the proposed Bart DOCA and that he would not recommend it to the creditors. Mr Viscariello related the conversation in these terms:

> He said that he had made enquiries with his sister firm in Sydney, PPB, about Mr Bart and he said to the effect that there was no way he was going to allow a wealthy Jew to get his hands on $3 million in tax losses.

139 Mr Viscariello testified that he responded in these terms:

> Well I said to him that "this was all agreed prior to your appointment", that we were going to do the Bart deal – that was the whole reason I came to him and that was the whole reason why we'd prepared the heads of agreement and that's why I proceeded on that basis.

140 Mr Viscariello went on to explain what he meant by "the whole reason" and the "basis" in these terms:

> What I had understood from Mr Macks was that the deal or the voluntary administration could happen very, very quickly. Mr Bart was keen that the deal be done very quickly so that he could take advantage of the Christmas trading – Christmas and post Christmas because that is the best time of year for sales. He had stock available in his warehouses in the other States, so he was ready to push the button to go. So there was discussion about bringing the second meeting of creditors forward to enable that to occur.

141 Mr Viscariello testified that after Mr Macks' comment:

> … it got a bit heated because I proceeded on the basis that that was the arrangement that we had agreed prior to his appointment. I felt that that arrangement was the best for the company – all employees would keep their jobs, the landlords would keep the tenant.

142 Only when he was pressed about his response to the reference to Mr Bart's Jewish background did Mr Viscariello testify that he had told Mr Macks that it was an inappropriate reason to refuse the proposed Bart DOCA.

143 Mr Macks was asked in evidence-in-chief about the comment he allegedly made concerning Mr Bart's Jewish background:

> Q At any time after that meeting, at any time after it, did you say anything to Mr Viscariello to the effect, or in these words, that Mr Bart was a wealthy Jew and you didn't want to see a wealthy Jew get his hands on $2 million worth of tax losses.
>
> A No, I didn't, and I never would.
>
> HIS HONOUR
>
> Q Did you have any belief as to whether or not Mr Bart was Jewish or not.
>
> A No, I didn't.
>
> Q And the person you spoke to in Sydney didn't describe Mr Bart in that way.
>
> A No. The other piece of information that came in at that time was that he was very successful in the rag trade. I don't know if that's being a Jew, but that's the full extent of it.
>
> Q Someone in Sydney told you that.
>
> A Yes, and the rag trade basically means the manchester trade, so he had similar businesses as I subsequently came to understand it.
>
> Q Who was it.
>
> A Max Prentice.
>
> Q Mr Prentice.
>
> A Yes.
>
> Q When Mr Prentice said to you "Look, he's a wealthy businessman in New South Wales who is involved in the rag trade", did it occur to you that he might be Jewish.
>
> A No.

144 I find that in a conversation with Mr Viscariello in December 2001 Mr Macks did make a derogatory reference to Mr Bart's Jewish background. I think it improbable that Mr Viscariello would fabricate that account. I was favourably impressed by Mr Viscariello's demeanour and fluency of account in giving evidence of that conversation. On the other hand Mr Macks appeared to

be quite uncomfortable when denying the allegation. Moreover, Mr Macks' testimony that he made enquiries about Mr Bart supports Mr Viscariello's testimony that Mr Macks told him that he had spoken to his counterparts in Sydney. It is improbable that Mr Viscariello remembered, what would be an otherwise unremarkable comment about making enquiries about Mr Bart, and then decided to falsely embellish it with the alleged reference to Mr Bart's ethnic and religious background. I also find it surprising that Mr Macks denied making an association in his own mind between Mr Bart's involvement in the manchester and clothing industries and the possibility that he was Jewish. The coincidence between Mr Macks' disclosure of a fact, peculiarly known to him, that when he was told that Mr Bart was a trader of manchester, the industry was described as the "rag trade" and the alleged reference to Mr Bart's Jewish background, is not without significance.

145 On the other hand, I do not accept that Mr Macks proffered Mr Bart's Jewish background as a reason for not recommending the Bart DOCA. It is not possible to make any firm finding as to precisely how Mr Mack's derogatory reference to Mr Bart being Jewish came about. However, Mr Viscariello's evasive evidence about just how he responded to it suggests that Mr Macks did not advance it as a reason for rejecting the proposed Bart DOCA and that Mr Viscariello was not particularly offended by it. If Mr Macks had linked Mr Bart's Jewish background to rejection of the proposed Bart DOCA, Mr Viscariello is likely to have protested strongly and to have retained a clear recollection of doing so. I think it is more likely that a conversation in which Mr Bart's Jewish background was mentioned occurred when discussing the negotiations over the Bart DOCA, probably in connection with the hope that Mr Bart might increase his offer, having regard to the taxation advantages to him of his proposed DOCA.

146 The testimony with respect to this issue diminished the credibility of both Mr Viscariello and Mr Macks in my mind but has no direct bearing on the ultimate resolution of the issues between them.

147 The minutes of the meeting show that when a member of the committee of creditors questioned Mr Macks about the decision to place the Companies in liquidation at the second meeting of creditors on 21 December 2001, he replied that:

> there was no alternative but for the Companies to go into liquidation. The deal with Mr F Bart had fallen through and Associated Retailers Limited (ARL) were not in a commercial position to support the offer. Mr Macks advised that a number of creditors were willing to place some money on the table to improve the offer but that ARL had made a commercial decision to reject it.

148 Paradoxically Mr Viscariello also relies on Mr Macks' alleged commitment to have the proposed Bart DOCA approved to challenge the validity of his appointment on the ground that he was not independent. Mr Viscariello pleads

that Mr Macks did not have the necessary independence to accept his appointment as a voluntary administrator because of the meetings he had with Mr Viscariello preceding his appointment and because he commenced to investigate the affairs of the company before his appointment. Mr Viscariello also pleads that Mr Macks was disqualified because he had indicated that he would support the proposed Bart DOCA even before his appointment.

149 I find that Mr Macks' discussion with Mr Bart and Mr Viscariello and his investigations into the affairs of the company did not in any way compromise his independence. I find that Mr Macks did not commit himself to any particular course of conduct in the meeting of 27 November. The preliminary investigations into the affairs of the company were properly made for the purpose of determining whether he would accept an appointment as a voluntary administrator. These matters are not such as to raise any concern that Mr Macks "could not fairly and impartially carry out his duties"[77] nor are they matters which detract from the appearance of independence.[78]

Failure to obtain independent valuation of the business or the assets of the company

150 Mr Viscariello did not pursue this allegation in his closing submissions. Rather, his case became focussed on the failure of Mr Macks as administrator to secure the proposed Bart DOCA. Be that as it may, Mr Viscariello did not adduce any evidence to show that the valuations undertaken by Mr Macks as an administrator were inadequate. Nor was evidence adduced as to the values which would have been assigned to the business and stock if other steps had been taken. The evidence showed that Mr Macks obtained a written valuation from Mason Gray Strange of the plant and equipment and also obtained oral advice from Mason Gray Strange concerning the value of the stock. Mason Gray Strange also advised that it was not commercial for Mr Macks to remove fixtures and fittings from the store. The advice of Mason Gray Strange was not contradicted by any evidence adduced by Mr Viscariello. Nor did Mr Viscariello's counsel put to Mr Macks any particular further steps that he ought to have taken.

151 Mr Macks caused advertisements to be published both in South Australia and nationally for the sale of the business in whole or in part. No person other than Mr Bart was prepared to negotiate for the purchase of the business of the Companies as a going concern. Accordingly, no valuation of the businesses on that basis was required.

152 The stock was ultimately sold, following arm's length negotiations, to Le Cornu and Ms Hamilton-Smith. There is no evidence that it was sold at an undervalue.

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[77] *Re Chevron Furnishers Pty Ltd (in Liq); Queensland Amalgamated Industries Pty Ltd v Harris* (1993) 12 ACSR 565.

[78] *Re National Safety Council of Australia* [1990] VR 29.

153 Finally Mr Viscariello did not prove that an increase in the sale of the Companies' assets would have benefitted him personally through a distribution to him as an unsecured or secured creditor.

154 That part of Mr Viscariello's Statement of Claim has not been made out. Mr Viscariello has failed to establish those claims.

Failed negotiation of the proposed Bart DOCA

155 It is now convenient to deal with Mr Viscariello's claims against Mr Macks founded on the allegation that he intentionally, recklessly or negligently conducted the administration in a way which resulted in the failure of the proposed Bart DOCA liquidation of the Companies causing losses to them and to him as a shareholder, creditor and employee. Mr Macks has not suffered material forensic prejudice in defending the claim. The claim, in its current form, evolved in the course of the trial. I am satisfied that it arises out of the same factual matrix as Mr Viscariello's other pleaded claims.

156 On 6 December 2001, a solicitor acting for ARL informed Mr Clifton, an employee of PPB, that ARL were insistent on receiving an amount of $400,000 for their stock subject to ROT and their outstanding debt, and a further $130,000 to $140,000 for the stock on consignment. In addition there was an amount of stock ordered by the Companies in ARL warehouses which was valued at $400,000.

157 A note made by Mr Clifton of a conversation with ARL's solicitor, Mr Kennedy, dated 10 December 2001 records Mr Clifton being told that there was a heated exchange between Mr Yeomans and Mr Bart when Mr Bart complained that of the stock in the Companies' stores, about $150,000 in value was on consignment from ARL.

158 The minutes of the first meeting of Bernsteen creditors held on 11 December 2001 record that Mr Macks advised the creditors that if Mr Bart's proposal were accepted it would be necessary to bring forward the second meeting of creditors and to hold it before Christmas so that there were adequate stock levels in the stores to meet Mr Bart's conditions and that Mr Bart's proposal was dependent on the Companies not going into liquidation so that he could take advantage of the tax losses. Mr Macks questioned Mr Yeomans about ARL's retention of title claim on the company's stock. Mr Yeomans replied that he would supply the information to Mr Macks in due course. Mr Macks informed the committee that he was concerned about the daily cash flow position and accruing a rental liability by maintaining the leases on the stores.

159 Handwritten notes made by officers of PPB of the creditors meeting of 11 December 2001 record that Mr Yeomans claimed that Mr Bart was desperate for the tax losses associated with the company. The notes record that Mr Clifton told the meeting that the Companies could not afford to trade for another week.

Mr Macks suggested there were two options. The first was to sell the businesses to Mr Bart or another party and the second to continue to trade with costs running at $50,000 to $100,000 per week. Mr Macks foreshadowed an application to abridge the time for the second meeting of creditors. Mr Macks raised the possibility of negotiating a higher payment from Mr Bart, but also referred to the likelihood that ARL may have to "absorb some of the pain". The notes also record that Mr Roberts, an employee of the Companies who was a stock buyer, estimated the value of consignment stock at $65,000 for Bernsteen and $27,000 for Newmore.

160 I find that the minutes and notes fairly record the discussion at the meeting. No reason existed at the time they were prepared not to make a proper record of proceedings. I find that at the meeting Mr Macks was preparing the groundwork, and considering the parameters, for negotiations between the two major parties to the proposed Bart DOCA, Mr Bart and ARL. I find that Mr Macks hoped that Mr Bart and ARL would agree on a mutually acceptable arrangement.

161 Mr Macks spoke to Mr Yeomans in a conference call later that afternoon. It is clear from the notes of that conversation that Mr Yeomans was taking a hard stand, insisting on payment in full and threatening that if anything less was paid he would remove the computers from all of the stores. Mr Yeomans also enquired about the extent of any guarantees that Mr Viscariello may have given to the Companies. He suggested that an insolvent trading claim might be brought against Mr Viscariello.

162 A PPB file note dated 11 December 2001 records that Mr Bart told Mr Clifton of PPB in a telephone conversation words to the effect that he was prepared to make a token payment of $10,000 for unsecured creditors. Mr Bart is also recorded as claiming that he had enough to push through the proposed Bart DOCA and that he was not prepared to increase his offer if the employee entitlements were shown to be less than he had been told.

163 I accept that the note made by Mr Clifton of that conversation accurately and fairly reflects what was discussed even though Mr Clifton himself had no recollection of the conversation beyond that which was recorded in the notes. On 12 December 2001 Mr Clifton sent Mr Bart a facsimile informing him that staff entitlements, which he had agreed to take on under the terms of the proposed Bart DOCA, had been overestimated.

164 At a meeting of the committee of creditors on 12 December 2001 Mr Clifton told the committee that Mr Bart was not prepared to change his offer other than to consider offering $10,000 to the unsecured creditors as a token. Mr Clifton informed the meeting that the Companies could only trade until the end of the week.

165 Mr Yeomans suggested that $178,000 should satisfy unsecured creditors. Mr Clifton informed the meeting that Mr Bart might consider offering $10,000

for unsecured creditors but Mr Macks suggested that unsecured creditors would require no less than a ten per cent return on their debt. There was discussion of the effect of the employee entitlements being less than the estimate provided to Mr Bart. Mr Yeomans claimed that stock valued more than $500,000 was either in the possession of the Companies but subject to retention of title claims or ordered by the Companies but still in the possession ARL awaiting delivery to the Companies. Mr Macks told the committee that he and ARL were awaiting an offer from Mr Bart on the ARL stock.

166 Mr Viscariello testified that at the committee meeting on 12 December 2001, Mr Macks raised store closures. Mr Viscariello gave evidence that he told the meeting that every time a store closed, it affected the Companies' reputation. Mr Viscariello testified that he told Mr Macks that he should purchased more stock to keep the business "ticking over" instead of just selling existing stock and banking the proceeds. He explained that the Companies' stores worked on an "80/20 rule" which meant that 80% of the sales came from 20% of the stock but that the other 80% was required to fill the store. Mr Viscariello agreed that in the two weeks prior to the voluntary administration ARL had delivered stock on consignment.

167 Mr Macks gave the following evidence about the discussion concerning restocking of the stores.

> The subject was raised for two reasons: number 1, in the first voluntary administration of Mazurka Mr Viscariello was quite active in terms of giving me his intellectual capacity and analysing the profitability and viability of each of the stores. And as you move forward the model that you come out with may benefit from closures which you can achieve during the VA process, reduce your costs, etc. So that was certainly on my mind. Also on my mind was obviously the depletion of the stock and the ongoing costs, so if there was anything we can do – because clearly not all the stores were profitable; clearly a number of them were unprofitable – so we should quite correctly analyse those to see whether or not we could shapeshift.

168 On the question of raising funds to make further purchases, Mr Macks said that he recalled enquiring of both ARL and Mr Viscariello as to whether they would provide further funds. He continued:

> It was 'No' from ARL. They were awaiting the finalisation proposal and discussions with Bart in relation to stock that was ready. In relation to Mr Viscariello, the answer was 'No' with an explanation that he had previously asked his father for money and he wasn't prepared to do that again.

169 Mr Viscariello testified that he had urged that more stock be purchased but denied that he was asked to contribute to the purchase of stock and that he had refused to do so. I find that Mr Viscariello was asked to contribute money to purchase more stock and declined to do so. It must have been plain that the proceeds of sale during the administration were likely to be committed to the payment of trading expenses such as wages, rent and other operating expenses.

Mr Macks was never likely to expose himself personally to those expenses by purchasing more stock. Mr Viscariello's account is inherently improbable.

170 On 14 December 2001 Mr Macks gave notice to the creditors that he was likely to apply to the Court to abridge the time for the holding of the second meeting of creditors to the afternoon of Friday, 21 December 2001.

171 Mr Macks warned creditors that it was "imperative that any sale proceed as quickly as possible" because he could not continue to trade the business through to the statutorily scheduled second meeting of creditors. I find that that was Mr Macks' genuine view and that Mr Viscariello knew that to be the case.

172 I find that the minutes correctly record that Mr Macks informed the committee of creditors on 17 December 2001 that:

- he was still working through the significant ROT claims of the suppliers;
- if Mr Bart's proposal was not accepted that the Companies would most probably go into liquidation;
- $10,000 was insufficient for unsecured creditors but that there would be no funds available to them on a liquidation;
- the proposal could only be voted on at the second meeting of creditors.

173 There were expressions of support for the proposed Bart DOCA because despite the poor returns to creditors, it would allow for the continued employment of the Companies' workers. Mr Yeomans appears to have kept his views to himself enquiring only as to the position of the Commissioner of Taxation on the issue. The committee of creditors unanimously supported the application to bring forward the second meeting of creditors.

174 On 17 December 2001, Mr Macks wrote to Mr Yeomans informing him that the only offer he had received was the proposed Bart DOCA. Mr Macks informed Mr Yeomans that in his estimation the Bart DOCA would benefit ARL in that it would receive something like $60,000 but that if the Companies went into liquidation ARL would not receive any return. I set out the letter in full:

> Dear Sir
>
> As you are aware I have been actively advertising the business of Bernsteen Pty Ltd and Newmore Pty Ltd for sale as a going concern. The only offer I have received for the business is from Mr Fred Bart. Attached, as Appendix 1 is a summary of the estimated position if the offer of Mr Bart is accepted. I have estimated that ARL will receive in the order of $60,000 from this offer. Attached, as Appendix 2 is a summary of the estimated position if the companies should go into liquidation. I have estimated that if the companies should lapse into liquidation there will be no return to ARL. It is possible that I may recover preferences if the companies lapse into liquidation however, these will be for the benefit of all creditors not ARL in respect of its secured claim.

> The major benefit for ARL from the Bart offer is as a result of Mr Bart assuming the liabilities for employee entitlements. In a liquidation scenario, these liabilities rank ahead of the secured creditor and are increased by redundancy and payments in lieu of notice.
>
> In addition, I understand that Mr Bart is prepared to offer you cost plus 5% for the additional stock that you are holding in your warehouse on terms of 60 days.
>
> Would you please advise whether you are prepared to accept the offer of Mr Bart. As you are aware, I have scheduled a committee meeting for 12.30 today.
>
> In light of the options available unless the secured creditor and other creditors are prepared to accept the Bart offer in the absence of any offers I must consider closing down the operations forthwith.
>
> Would you please call me to discuss these matters.
>
> (signed) PI MACKS – ADMINISTRATOR

175 Mr Macks testified that in the four or five days before the second meeting of creditors, he discussed the proposed Bart DOCA with Mr Bart and Mr Viscariello, with increasing frequency and intensity. Often the discussions took place very late at night. They concerned the ever changing position of the Companies and, in particular, the difficulty the decreasing stock levels posed in meeting Mr Bart's requirement that there be $1,050,000 of stock in the store.

176 Mr Macks gave evidence that Mr Bart appeared to be reluctant to put anything on paper. As a result Mr Macks eventually took on the task of drawing up a revised Bart DOCA on the evening of 18 December 2001. Mr Macks testified that he suspected that he had left messages for Mr Bart during the day on the 18th and that Mr Bart contacted him later at night. By about midnight, a revised proposal had been typed (the revised Bart DOCA). The revised Bart DOCA provided as follows:

> 1. Mr F Bart or Diveni Pty Ltd to repay the Commonwealth Bank their liability in respect of their security over the assets of Newmore Pty Ltd, which we understand to be in the order of $86,000 in return for the assignment of their debt and the transfer of their fixed and floating security. This amount is to be paid to the Minter Ellison trust account and disbursed to the Commonwealth Bank;
>
> 2. Mr F Bart or Diveni Pty Ltd to arrange with the Commonwealth Bank to assume the existing leases that exist between the companies and the Commonwealth Bank and CBFC leasing. These are as follows:
>
> ➢
>
> 3. Mr John Viscariello or entities under his control to sell to Mr F Bart or Diveni Pty Ltd the "Bedroom Mazurka" and "Inside Home" trademarks for $1 each;
>
> 4. Mr John Viscariello to sell to Mr F Bart or Diveni Pty Ltd his fixed and floating charge over Newmore Pty Ltd for $1;

5. Mr F Bart or Diveni Pty Ltd to pay the company the sum of $250,000 in return for the assignment by Associated Retailers Limited ("*ARL*") of its fixed and floating charge over Bernsteen Pty Ltd and Newmore Pty Ltd, subject to the following:

   - An assignment of ARL's debt in both companies;

   - That the new stock free of any encumbrances not being less than $1,050,000. In the event that the stock is less than $1,050,000 a pro rata consideration shall be paid provided however that the net stock figure shall not fall below $850,000; and

   - The payment shall be pro-rated between Bernsteen Pty Ltd and Newmore Pty Ltd based on the value of stock purchased as determined by the records of the companies.

6. The amount determined in the above paragraph is to be calculated on the basis of the gross amount of stock available including any potential ROT claims as calculated from information extracted from records of the companies;

7. The Administrator is to use his best endeavours to assist Mr F Bart or Diveni Pty Ltd in securing the transfer of licence for the right to use the name "Faulty Towels and Sheets".

8. The amount of $20,000 is to be paid to the Administrator for the benefit of unsecured creditors. This amount is to be pro-rated between Bernsteen Pty Ltd and Newmore Pty Ltd on the basis of the value of unsecured creditors in both companies.

9. All funds payable in respect of the Commonwealth Bank payment, the ARL payment and for contribution to unsecured creditors are to be paid immediately into the Minter Ellison trust account;

10. All amounts payable pursuant to paragraphs 5 & 8, received by the Administrator is to be disbursed in the following order:

    (a) In payment of the Voluntary Administrator's and Deed Administrator's fees and expenses;

    (b) In payment of any valid retention of title claims against the Administrator of both companies;

    (c) In payment to employees of both companies for their existing employee entitlements for unpaid wages, annual leave and long service leave; and

    (d) An amount of $20,000 is to be made available to unsecured creditors.

11. In respect of the additional stock currently in the possession of ARL, Mr F Bart or Diveni to pay ARL cost plus 5% for this stock on payment terms of 60 days from statement as the stock is ordered.

12. ARL to waive all rights in respect of the consignment stock currently held by Bernsteen Pty Ltd and Newmore Pty Ltd and the Administrator is not to account to ARL for consignment stock sold during the Administration.

13. Mr John Viscariello confirms that there is no liability of either company to Hindmarsh Financial Services who are reported as a secured creditor according to ASIC records;

14. Mr F Bart accepts as final and binding the value of stock as reflected in the company's records as ascertained by the Administrator as at the date of execution of this agreement;

15. All of the Faulty Towels and Sheets stores other than Mile End are to be closed.

16. Peter Ivan Macks is to be the Deed Administrator of both companies.

17. Settlement is to occur on 21 December 2001, immediately after the meeting of creditors, provided that the creditors accept the proposal.

177 The revised Bart DOCA was generated in the PPB office electronic document system and carried the identifier TC138. A document so numbered retains its original designation even though amended from time to time. TC are the initials of the PPB officer Mr Clifton.

178 Mr Macks gave evidence about the process involved in the drawing of the revised Bart DOCA. Even though he had no actual recollection of typing the revised Bart DOCA, Mr Macks testified that he would have typed in amendments to the proposed Bart DOCA as he was having the conversations with Mr Bart rather than make handwritten notes. No handwritten notes of the conversations with Mr Bart were discovered. Mr Bart testified that he would have left the drawing up of the revised Bart DOCA to Mr Macks because he did not have any secretarial support. It is that process which generated the document TC138.

179 Mr Macks was asked whether he discussed the ROT stock in his conversations with Mr Bart. Mr Macks answered:

> My recollection is that he was more concerned specifically about the level of stock and if that therefore required retention of title to be available so be it. I just don't now recall any specific talk about that. His main thrust was that he had done a deal and in his mind that meant that the stock level was to be a million dollars and he wanted that stock level at one million dollars.

180 Mr Macks testified that told Mr Bart that the level of stock he required might be achieved if ROT stock were included and that led to the significance of ARL's involvement because they were the major supplier of consignment stock.

181 Mr Macks continued:

> Yes the terms ROT, Retention of Title, and consignment were being used interchangeably and really because they were dealt with really by the same party. It was ARL who had both consignments stock and the retention of title stock and it mattered not to Mr Bart who was the owner of that, merely that the stock level was one million dollars.

182 Mr Macks gave evidence that he could not recall any discussion which linked the reduction in the amount Mr Bart was prepared to pay from $400,000 to

$250,000 to the quantity of retention of title stock. Mr Macks' view at the time was that the lower offer of $250,000 was made because Mr Bart was putting commercial pressure on others to accept the proposal. Nonetheless Mr Macks accepted at least as a theoretical proposition that the inclusion of retention of title might be an explanation.

183 As to the change in clause 5 which resulted in the payment to the Companies rather than to ARL, Mr Macks testified:

> The source of that was the discussion I had with Mr Bart and I had mentioned in evidence that it was his suggestion that it go to the company, that it was prompted by, I believe, my rhetoric, in terms of trying to extract a deal, a proposal out of him and then he moved to making the statement "you want the money to go through the company" and I took that mean and there wasn't a long discussion, he is very familiar with administration and dealing with administrators so he understood the logic of that, that is what he was putting to me.

184 Mr Macks acknowledged that it was his preference that the money be paid to the Companies so that it would be subject to priorities like those applicable under the *Corporations Act*, including the payment of administrators' fees. Mr Macks testified that he did not recall discussing with Mr Bart his fees as administrator.

185 As to the change in terminology from "retention of title" to "free of any encumbrances" in clause 5, Mr Macks explained that it:

> … resulted from the discussion with Mr Bart, the term "net free of any encumbrances" reflected discussions that I clearly had with him where I indicated that there was retention of title and consignment and he was very much insisting that the stock figure be a million free of any issues.

186 Mr Macks also testified that on the third subpoint in paragraph 5 that payments made be "pro-rated" between Bernsteen and Newmore was probably an error.

187 As to clause 6 of the revised Bart DOCA, Mr Macks said:

> I don't have a memory of whether he or I were raising that. Now to me it seems to be almost a mechanical consequence of a point in five where it says "net stock clear".

188 Mr Macks also testified that clause 6 of the revised Bart DOCA was inserted:

> In an effort to expand on a deal with the term that I thought he included which was "net stock free of any encumbrances".

189 On the issue of unsecured creditors dealt with clause 8, Mr Macks testified:

> I raised with him the issue that I thought it was inadequate that there was no funds going to the unsecured creditors and my recollection is that he then agreed to include an amount of $20,000, I think, for the unsecured creditors.

190 Mr Macks could not recall Mr Bart offering $20,000 before the night of 18 December.

191 Mr Macks accepted that the concept underlying clause 10 was his idea. He regarded it as a mechanical clause, which accorded with the statutory provisions as to priority of payments in an administration.

192 Mr Macks' recollection was that clause 11 had been first suggested by Mr Bart. Mr Macks testified that an amendment to that clause made in handwriting on one version of document TC138 to add the words "as the stock is ordered" was his and resulted from some dialogue from himself and Mr Bart.

193 Mr Macks gave evidence that clause 12 was initiated by Mr Bart. Mr Macks linked it to the falling stock levels. Mr Macks could not recall why clause 12 dealt specifically with consignment stock and not ROT stock. Mr Macks testified that he could not recall the genesis of the second clause of paragraph 12 which reads "the administrator is not to account to ARL for consignment stocks sold during the administration". Indeed, Mr Macks testified that he didn't believe it came from him although he qualified that answer by saying it was many years ago.

194 Mr Macks acknowledged that the clause was of no benefit to Mr Bart and protected only the administrator. That may not strictly be so in that the consignment stock may have been transferred to Diveni. Mr Macks also agreed that clause 12 added a further cost to ARL. Mr Macks agreed that instead of going to ARL the monies it had secured, or was otherwise entitled to by reason of stock being on consignment, would flow through the administration and be disbursed in accordance with the statutory priorities.

195 According to Mr Macks, clause 14 suited both Mr Bart and Mr Macks. Mr Bart was anxious to have some certainty as to the final stock figure and its value and Mr Macks wanted a simple mechanism for determining value. There was also a handwritten addition to this clause on an earlier version of document TC138 which was later incorporated into the typed version. The amendment added the words "as reflected in the company's records".

196 Mr Macks did not have any particular recollection of faxing the documents as they were amended. Mr Macks testified that the letters were sent to Mr Yeomans and Mr Bart in the final form of the revised DOCA at about the same time soon after the handwritten amendments to clauses 11 and 14 were typed in.

197 The facsimile cover sheets and the evidence of Mr Macks suggest the following sequence in the provision of the revised Bart DOCA:

Date	Time	Document No.	Delivery
18 December 2001	Late at night	138	Macks faxes revised Bart DOCA (document TC138 in original form)
18-19 December 2001	11.59	141	Macks faxes Bart two pages containing typed amendments to clauses 11 and 14 of the revised Bart DOCA (Document TC138)
18-19 December 2001	Close to midnight	140	Revised DOCA (Document TC138) faxed to Yeomans
19 December 2001	00.57		Bart faxes signed revised Bart DOCA to Mr Macks

198 When he gave his evidence Mr Clifton was shown the revised Bart DOCA. He testified that he had seen the document recently but that he did not remember much about it. He could not recall if he had any hand in the drafting of the document. He could not recall how the identifier of the document came to bear his initials. He had no recollection of the facsimile cover sheet by which it was sent to Mr Bart which also bore his initials.

199 When Mr Clifton was asked whether he had any memory of Mr Bart putting a proposal in terms different from the original Bart DOCA, he replied:

> My only really clear memory leading up to that meeting was, it was either – I don't remember the day, it was on a Wednesday night or a Thursday night. Mr Macks and I were in the office late, calling Mr Bart, and we were trying to get him back to the table. Essentially we had lost him at that stage … we were trying to get him to re-negotiate. I think he had withdrawn completely, and the idea of the phone call was to try and get him, you know, to come back and put a new offer to us … only that it was late, I think it was about 10 or 11 at night, and I think we had Mr Viscariello on the other line and we were sort of jumping in between the two trying to get Mr Bart to come back to the table essentially, which didn't happen.

200 The 19th of December 2001 was a Wednesday. Mr Clifton could not say whether the discussion with Mr Bart which he related were before or after the day on which the revised Bart DOCA was drawn. However, although not certain, Mr Clifton testified that his recollection was that it was the night before the second meeting of creditors meeting which took place on Friday 21 December 2001.

201 Mr Clifton then gave the following evidence:

> Q Mr Clifton, let's just assume that that is the case, that what it appears to be is what it is, that it is a signed offer by Mr Bart that came in after midnight on 19 December.
>
> A Yes.

> Q And you've testified that, as best as you can remember, on the night before the creditors meeting of the 21st you and Mr Macks were on the phone to Mr Bart trying to get him to come back to the table.
>
> A Yes.
>
> Q Do you recall how it was or what it was that first informed you that Mr Bart had withdrawn the offer or had left the negotiating table to use a more neutral expression.
>
> A I just don't remember how that came to be. I remember we had that – that was the issue with ARL. We never got any agreement from ARL.
>
> Q That's one thing, but you have no recollection of what it was that transpired before that signed letter arrived shortly after midnight on the 19th.
>
> A No.
>
> Q And you and Mr Macks having to be on the phone to Mr Bart on the 21st – or the night of the 20th.
>
> A On the night of the 20th I think. I said I think it was the 20th but I can't be certain. I just remember that – from my memory was that there was no offer, that's how I remember it.

202 Mr Bart gave evidence that he agreed to vary the proposed Bart DOCA over the course of several telephone conversations with Mr Macks on the night of 18th December. He recalled that agreement was reached at about 11 o'clock that night.

203 When Mr Bart was asked how he came to offer the reduced payment to secure the stock free from ARL's claims he replied:

> A I don't recall exactly but it would have been – we would have had a good look at the stock that was left over, it certainly would have been depleted, we would have looked at the price that Bedroom Mazurka were paying for that stock and found it was somewhat inflated, plus we had to pay extra amounts to the Commonwealth Bank and others and we then thought it was reasonable given the value of the stock to reduce the figure down to that level.

204 Mr Bart could not think of any reason why he would have preferred to pay the Companies rather than ARL direct. He said that from his point of view "I was paying X dollars, I couldn't care less who got it".

205 Mr Bart gave evidence that "as to what was going to get paid and how it was going to be paid, I didn't make changes. There was no benefit, no advantage to me to make those changes, that's why I didn't do it".

206 Mr Bart was asked:

> Q The agreement of 19 December varies the provisions for the Heads of Agreement of 27 November in a way which seems to take into account an issue which has

arisen about retention of title claims and consignment. Which might have affected the capacity to give you $1,050,000 worth of goods owned outright.

A No, I don't believe it did. As I see it now, in retrospect, it appears to be changes that Mr Macks has made to make his position better because, from my point of view, I am handing over the same – I have changed the monetary amount from 400 to 250 plus the increases in the Commonwealth Bank debt so, from my point of view, I am paying X dollars, the formula is still there to retain X dollars with the stock, so I don't care where the money goes. So those changes certainly weren't made by me because it didn't benefit me in the offer. In fact, if anything, it is only going to detract from my offer.

Q When Mr Bart was again asked about a connection between the $150,000 in ROT claims and his reduction from $400,000 to $250,000 he said:

A I can't recall that that was the case. My thought, as I said to you earlier, there would have been a significant amount of stock sold between when the administrator was appointed and the time when they were trying to wrap it up; there was X number of weeks trade, all of that stock, or the majority of that stock was – ARL was the biggest creditor at the time – would have been ARL's stock of which the administrator would have been liable to repay them back in money.

207 When referred to clause 6, Mr Bart testified that it was inserted by Mr Macks and he could not recall its purpose. He could not recall any association between clauses 5 and 6 and the reduced payment saying:

A That's what I just can't recall. I know the amendments were made by Macks because I really didn't care as long as I got hold of the business.

208 Mr Bart testified that he did not ask for the insertion of clause 10 which set out the priorities for distribution of the sums of $250,000 and $20,000 which Mr Bart's company, Diveni, was to pay pursuant to clauses 5 and 8 of the revised Bart DOCA.

209 Mr Bart could not recall the negotiation which led to clause 11 but he acknowledged that it must have resulted from negotiations concerning the purchase by him of ARL stock which had been packaged under the Bedroom Mazurka brand. Mr Bart could not recall the anticipated cost of that stock but "imagined" that it was "a couple of hundred thousand dollars".

210 Mr Bart testified that after he had signed the revised DOCA he thought that he had "satisfied all the requirements for the administrator to support the Deed" and that he had had no communications with Mr Macks thereafter. Mr Bart had no recollection of Mr Viscariello contacting him after he had signed the revised DOCA.

211 Mr Bart explained that his offer of $400,000 for the Companies' stock was affordable only if he purchased the business as a going concern. He testified that without an operating business he would not have paid as much for the stock. Mr

Bart could not recall becoming upset when told that there was some $150,000 in consignment stock.

212 Mr Bart did not have any recollection of a conversation with Mr Macks on 17 December in which Mr Macks expressed concern about the failure of the proposed Bart DOCA to offer anything to the unsecured creditors. It was put to Mr Bart that on 11 December 2001 in a conversation with Mr Clifton he had agreed to offer a token amount of $10,000. Mr Bart did not recall that conversation but, relying on the contents of the revised Bart DOCA, confirmed that he had eventually offered $20,000.

213 As to clause 10, Mr Bart testified:

> Clearly those four (a), (b), (c) and (d) I didn't put in there. I wouldn't have thought of it. The only benefit of those four changes could only be to one party.

Mr Macks' counsel put to Mr Bart that it was in fact his proposal. Mr Bart denied that it was.

214 Mr Bart acknowledged that even if the creditors voted in favour of his proposed DOCA, ARL could, in effect, have vetoed the proposal by insisting on the enforcement of its security through a receiver or otherwise. He acknowledged that ARL could decide to enforce its security.

215 Mr Bart agreed that clause 12 entitled him to consignment stock on the shelf but claimed that he did not ask that that clause be inserted because "it only relates to the period whilst the administrator's in there and the administrator was liable for the consignment for that period".

216 Mr Bart testified that after he signed the revised Bart DOCA and sent it back no one asked him to increase his offer. Mr Bart took the view that ARL would support the DOCA because it was a better outcome than putting the company into liquidation. He testified he had no conversations with ARL. Mr Bart was asked whether he had any reason to withdraw the offer before it was put to the creditors if he had been informed that ARL would not accept it. He answered "zero". Mr Bart later continued:

> As I said before, it was up to Macks to make a decision to put the offer. It was up to him if there was a split between the dollar value and the numbers for it to be put to the meeting. He would have then had to make a choice and make a decision and then ARL would have had to take the next step. It's one thing to call somebody's bluff and say "I'm not accepting". It's another thing to call it after the event and look at the ramifications.

217 Mr Bart's strategy in this regard was consistent with the provisions of the *Corporations Act.*

218 Under s 444D(1) of the *Corporations Act* a DOCA binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed. A secured creditor who votes for a resolution that a company execute a

DOCA is bound by the terms of the DOCA and can only realise or otherwise deal with the security interest insofar as the deed provides. Under s 444E, a person bound by the deed cannot bring proceedings against the company except with the leave of the court. Section 444D(1) does not otherwise prevent secured creditor from realising or otherwise dealing with the security interest except so far as a Court orders pursuant to s 444F(2) of the *Corporations Act.*[79]

219 Section 444F of the *Corporations Act* gives the Court, upon application by an administrator, power to limit the rights of secured creditors. It relevantly provides as follows:

> **444F Court may limit rights of secured creditor or owner or lessor**
>
> (1) This section applies where:
>
> (a) it is proposed that a company execute a deed of company arrangement; or
>
> (b) a company has executed such a deed.
>
> (2) Subject to subsection 441A(3), the Court may order a secured creditor of the company not to realise or otherwise deal with the security, except as permitted by the order.
>
> (3) The Court may only make an order under subsection (2) if satisfied that:
>
> (a) for the creditor to realise or otherwise deal with the security would have a material adverse effect on achieving the purposes of the deed; and
>
> (b) having regard to:
>
> (i) the terms of the deed; and
>
> (ii) the terms of the order; and
>
> (iii) any other relevant matter;
>
> the creditor's interests will be adequately protected.
>
> …
>
> (6) An order under this section may be made subject to conditions.
>
> (7) An order under this section may only be made on the application of:
>
> (a) if paragraph (1)(a) applies—the administrator of the company; or
>
> (b) if paragraph (1)(b) applies—the deed's administrator.

220 In *Hamilton and Fiorentino as Administrators of Kisoro Pty Ltd v National Australia Bank Ltd,*[80] Lehane J considered that the s 444F(2) was directed

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[79] Section 444D(2)(b) *Corporations Act*.
[80] (1996) 66 FCR 12.

towards the exercise of proprietary and contractual rights and powers that the secured creditor has under its security. In other words:[81]

> … where the provisions speak of realising or otherwise dealing with a secured creditor's security, they are referring to steps that the creditor may take without assistance from the Court. If a secured creditor requires the assistance of the Court in order to enforce its rights in relation to the property in which it has an interest - for example, if an order for sale is required (no sale out of Court being possible) or the appointment of a receiver is sought (no such appointment out of Court being possible) - then, it follows, leave will be required in accordance with para444E(3)(c): although the question does not arise in this case, no doubt leave would more readily be granted in such a case than where, for instance, a secured creditor seeks leave to apply for an order for winding up, or to sue on a personal covenant. See also *Brash Holdings Ltd v Katile Pty Ltd* (1994) 13 ACSR 504 at 513, 514; *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* (1996) 135 ALR 280 at 289, 290.

221 As to the approach to be adopted in deciding whether to make an order under s 444F(2), Lehane J observed,[82]

> Making allowances for differences between circumstances and statutory regimes, and bearing in mind particularly that under the English provisions with which the case was concerned the application was one by a lessor of goods for leave to exercise its self help contractual remedies rather than one seeking an order prohibiting a secured creditor from doing so, the following passage from the judgment of the Court of Appeal in *Atlantic Computer Systems (*at 501) is, I think, indicative of the correct approach under the Corporations Law:
>
> > (2) The prohibition [on the exercise of contractual rights] is intended to assist the company, under the management of the administrator, to achieve the purposes for which the administration order was made. If granting leave to a lessor of land or the hirer of goods (a "lessor") to exercise his proprietary rights and repossess his land or goods is unlikely to impede the achievement of that purpose, leave should normally be given.
> >
> > (3) In other cases where a lessor seeks possession the court has to carry out a balancing exercise, balancing the legitimate interests of the lessor and the legitimate interests of the other creditors of the Company (see Peter Gibson J in *Royal Trust Bank v Buchler* [1989] BCLC 130 at 135). The metaphor employed here, for want of a better, is that of scales and weights ... It must be kept in mind that the exercise ... is not a mechanical one; each case calls for an exercise in judicial judgment, in which the court seeks to give effect to the purpose of the statutory provisions, having regard to the parties' interests and all the circumstances of the case. As already noted, the purpose of the prohibition is to enable or assist the company to achieve the object for which the administration order was made. The purpose of the power to give leave is to enable the court to relax the prohibition where it would be inequitable for the prohibition to apply.

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[81] *Hamilton and Fiorentino as Administrators of Kisoro Pty Ltd v National Australia Bank Ltd* (1996) 66 FCR 12 at 31.

[82] *Hamilton and Fiorentino as Administrators of Kisoro Pty Ltd v National Australia Bank Ltd* (1996) 66 FCR 12 at 33.

> (4) In carrying out the balancing exercise great importance, or weight is normally to be given to the proprietary interests of the lessor. Sir Nicolas Browne-Wilkinson V-C observed in *Bristol Airport plc v Powdrill* [1990] 2 All ER 493 at 507, [1990] Ch 744 at 767 that, so far as possible, the administration procedure should not be used to prejudice those who were secured creditors when the administration order was made in lieu of a winding-up order. ... The underlying principle here is that an administration for the benefit of unsecured creditors should not be conducted at the expense of those who have proprietary rights which they are seeking to exercise, save to the extent that this may be unavoidable and even then this will usually be acceptable only to a strictly limited extent.

222 Mr Bart agreed that he spoke to Mr Viscariello from time to time after the meeting with Mr Macks but could not recall any particular conversation. However, Mr Bart testified that he had made a separate side agreement with Mr Viscariello to pay him the same salary he had been drawing as manager of the Companies.

223 I reject Mr Macks' evidence that he did not actively promote the insertion of clause 12. That clause clearly advantaged him as administrator. It removed the possibility that ARL might call on him to account for the proceeds of the consignment stock. Those proceeds were not the property of the Companies but would have been held on trust for ARL. The clause also made it easier to meet the minimum stock requirements in clause 5. I have no hesitation in accepting the tenor of Mr Bart's evidence that he would have had no reason to suggest an alteration which would protect the interests of Mr Macks.

224 Despite the inability of both Mr Macks and Mr Bart to recall the precise reasons for the reduction in Mr Bart's offer from $400,000 to $250,000, I find that it was related to the falling stock levels in the store and to the level of consignment stock. Mr Bart's reported angry reaction to the discovery that a substantial amount of stock was on consignment and the reduction of a similar order in his offer was not purely coincidental. I do not accept Mr Mack's evidence that Mr Bart was simply playing "hard ball". It is unlikely that, having made his assessment that there was value to him in the offer of $400,000, Mr Bart would have cut his offer so substantially at a time when it was facing difficulties both because of ARL's intransigence and Mr Macks' concerns about unsecured creditors. On the other hand I am not satisfied by Mr Bart's evidence that the $20,000 offered to unsecured creditors, and the poorer quality of the remaining stock, adequately explains the reduction.

225 Even though under both the first proposed Bart DOCA, and the revised Bart DOCA, Mr Bart was to take all stock in the stores free from ROT claims and encumbrances, the minimum levels stipulated in the first Bart DOCA were to be met from unencumbered stock only. Under the first proposed Bart DOCA, Mr Bart would, in addition, have taken any ROT stock, over and above the minimum specified levels, free of that encumbrance. In short, under the revised Bart DOCA, there was likely to be much less stock on the shelves than Mr Bart

had anticipated. The reduction in the amount offered reflects the fact that much less stock was available in the stores. Mr Bart's concern about the large amount of consignment stock is likely to be connected to the reduction in price.

226 Finally, I observe that the requirement that the payment be made to the Companies and not directly to ARL meant both that ARL would have to wait longer for its money and that, in the hands of the administrator, it would be subject to the priorities in clause 10, which, as I have observed, mirrored the statutory priorities. However, I reject Mr Viscariello's criticism of Mr Macks for doing so. In my view, he acted reasonably in seeking the additional protection which payment of the money to the Companies gave him.[83]

227 On 18 December 2001 Mr Macks sent Mr Yeomans the revised Bart DOCA. He warned Mr Yeomans that he was "unable to manoeuvre Mr Bart on this offer and the alternative which I will address tomorrow in the event that this offer is not accepted is to close the business asap". ARL rejected the offer.

228 The application for the proponent of the second meeting of creditors was heard in the Supreme Court on Wednesday 19 December 2001. Mr Macks did not attend. Mr Macks could not recall receiving a rejection of the proposal from Mr Yeomans before the application was heard. During the day however, he heard from others in the office that Mr Yeomans had indicated that the offer was not acceptable to ARL.

229 Mr Viscariello strongly criticised Mr Macks for pursuing the proponent application despite knowing that ARL had rejected the revised Bart DOCA. I reject those criticisms. Even though the application was made in the hope that ARL and Mr Bart would reach an agreement that would allow the proposed Bart DOCA or at least the revised Bart DOCA to be accepted, there was no alternative but to proceed with the preponed meeting. It might still have been the case that when faced with the stark and imminent choice between the Bart DOCA and the liquidation that Mr Bart and Mr Yeomans would have reached agreement. In any event, even if agreement was not reached it was plain that the Companies could not continue to trade over the Christmas period. Mr Macks was justified to take the position that continuing to trade the Companies over Christmas would expose him to an unwarranted risk of personal liability. In any event, it was open to the creditors to adjourn the meeting if they saw fit.

230 In this respect I record that Mr Viscariello has failed to satisfy me that the Master of this Court who had the application was misled. There is just no evidence as to what the Master was told. Moreover, I repeat that the proponement was justified by the difficult trading predicament in which Mr Macks found himself.

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[83] Cf sections 442C, 443A, 443D, 437B.

231 At 9.30 am on 19 December 2001, Mr Macks sent a facsimile to Mr Yeomans asking him to urgently provide details of the ROT clause on which ARL relied and asking for the names of suppliers with whom ARL had arrangements to supply stock to the Companies. I reject Mr Viscariello's contention that Mr Macks was in any way involved in a scheme to scuttle the revised Bart DOCA by inflating ARL's ROT claims. That speculative theory is inconsistent with Mr Macks' letters to ARL encouraging Mr Yeomans to support the proposed Bart DOCA.

232 During the day of the 19th of December Mr Macks and his employees prepared the s 439A report that was to be provided to the second meeting of creditors. Mr Macks reported as follows.

> Immediately prior to the completion of this report we were advised that conditions necessary for the proposal could not be met and as a consequence the proposal is no longer available. Accordingly, and we are presently aware there are no proposal available for decisions at the meeting.

233 After setting out the revised Bart DOCA. Mr Macks commented:

> There is currently no deed of company arrangement to be considered. The proposal put forward by the director and a third party required the consent of ARL. This was not received.

The report then set out Mr Macks' opinion that "it would not be in the interest of the company's creditors for the administration to be terminated without the company being wound up" because "there is no proposal to be considered and consequently the creditors are best protected by voting for the company to be placed in liquidation".

234 Mr Macks explained that if ARL had accepted the revised Bart DOCA, his report would have dealt in greater detail with the consequences of the deed, and in particular, the distribution of funds paid into the company both from sale proceeds during the administration and from Diveni. Mr Macks would also have instructed solicitors to prepare the necessary documentation. Mr Macks testified that even if ARL had not rejected the proposal he would have advised the second meeting of creditors that there was little in it for the unsecured creditors and he had concerns about the sufficiency of the amount offered in comparison to that which may be available in liquidation.

235 On 20 December 2001, Mr Macks prepared a facsimile to be sent to Mr Yeomans in an apparent effort to persuade him to agree to the proposed Bart DOCA. However, the facsimile was not sent until 8.30 am on the 21st of December, the day fixed for the second meeting of creditors. Mr Macks could not recall any explanation for the delay. It may, however, have been that Mr Macks did not expect anyone to be in ARL's offices at that late hour. Mr Macks wrote as follows:

Dear Sir

I refer to our recent discussions concerning the sale of Bernsteen Pty Ltd and Newmore Pty Ltd as a going concern and your rejection of the "Bart" proposal.

From our discussions I understand that the primary reasons for the rejection of the Bart offer were:

- No return pursuant to your security over the companies;
- The offer in connection with the "other stock" currently located in your warehouse; and
- The stock over which you have recently claimed that you have a ROT clause against the companies, details of which I am still to receive from you or your solicitor. The causes me [sic] the gravest of concerns since it consequently changes the dynamics of any likely proposal previously discussed.

In connection with these matters I comment as follows:

- Whilst it is unfortunate that Mr F Bart has seen it appropriate to reduce his offer in recent times, inevitably that's life, as you and I are aware Mr F Bart has not, despite all of our requests reconsidered or varied his position.
- It remains likely, as I previously advised you that in a liquidation scenario ARL will receive no monies from the realisation of the assets of both companies as all available funds will be absorbed in employee entitlements and the costs of realisation associated with this difficult and complex matter.

I understand that whilst you were holding out for Mr F Bart is confirm [sic] his offer in respect of the stock at $400,000, he never varied from his stated position and asserts that he has not been able to reach agreement with you in respect of your warehouse stock which it was required to be part of the deal.

The Bart offer in respect of the "other stock" is we understand comparable with estimates of the realisable value of this stock, but that terms in respect of the sale of this stock were not acceptable.

- With respect to your ROT claim, I have again raised this matter with the Director who has advised me that he was not aware of a retention of title claim by you. At the first meeting of creditors you raised the prospect that your claim as admitted by me was incorrect. I sent correspondence to you dated 14 December 2001 in which I requested details and notification of any retention of title claim. At the meeting of the committee of creditors held on 17 December 2001 you first informed me that you had and would rely upon a retention of title clause and I requested details. A copy of a further request for information in this regard was sent to your office on 18 December 2001. I still await a response to my request, but acknowledge that your solicitor has informed me that he was organising the material. I now understand that you will bring this material with you tomorrow. I have at all times been acting unaware of any claim that ARL claimed retention of title over stock delivered. I advise that as at the date of my appointment there was $100,214 of stock supplied by you through ARL, Legend, Sleep Master and Vita Pacific. In addition there was a further $66,385 of stock on hand of Hyde Park and Textile Creations. However, I advise that Bernsteen and Newmore purchased stock directly from these two suppliers as well as through ARL. Most

> of this stock I am informed was not supplied by ARL. Therefore if it is the case that ARL's retention of title clause is valid, as you assert the total potential ROT claim is in the order of $100,000, however if as Liquidator I validly dispute your entitlement to rely upon this clause then potential realisation from this source will be zero. In recent times I have now become aware that it is asserted by the Director that he was encouraged to continue to trade the business in the expectation of ongoing support from ARL and that the supply of stock on a consignment basis was evidence of this support, in addition this involved amending in recent times your security, improving your position as a time when the company was clearly insolvent, these matters by necessity will be fully investigated by a Liquidator
>
> In summary it would appear that you are putting a great deal of weight on the basis of full realisation of your recently asserted retention of title stock and on your consignment stock of $96,000.
>
> I remain available should you wish to discuss this matter prior to the creditors meeting tomorrow.

236 Importantly, the letter does not say that Mr Bart had withdrawn his offer and is premised on it remaining open. Mr Macks testified that he wrote the letter to encourage ARL to enter into the proposed Bart DOCA or at least to clarify their thinking. I accept that that was his purpose. Mr Clifton could not remember the negotiations referred to in the letter.

237 Mr Macks gave evidence that he made two further attempts to negotiate agreement on the proposed Bart DOCA even after ARL had rejected it. Mr Macks testified:

> There was a meeting or a discussion with Tim Clifton and myself and Mr Bart and I believe it took place on the 20th, the evening of the 20th, and that led to subsequent discussions with Mr Viscariello and, if I've got the time frame right, the meeting progressed for quite some time with interchange of phone calls going backwards and forwards between myself and Mr Bart and Mr Viscariello and myself.

According to Mr Macks the telephone conversation occurred from a room in his offices in Mr Clifton's presence. They occurred late, probably 8 or 9 o'clock.

238 Mr Macks described the conversation with Mr Bart as follows.

> And with the conversation with Mr Bart, during that conversation, my memory is he said "I'm out" and that led to a discussion with Mr Viscariello so that he would be kept informed, and I think that that discussion then concluded with Mr Viscariello and Mr Bart, and I have a recollection, and I hope I'm getting my evenings right, but I then went home and I rang Mr Viscariello from home and that was quite late, and I say that because I remember, if I've got the right time meeting, in our house in the hills, you can only get reception in a certain area so I was standing outside in the telephone spot ringing Mr Viscariello and we just had a further discussion in relation to the difficulties that was occurring and there were certain things said with Mr Viscariello after relaying that meeting and I recall two things from the meeting – from the discussion with John Viscariello. Number one, he said to me "Peter no one could do anything else, you can't

> do anything more" and after that, I remember he was quite emotive and that was it. After that, we – I think we had the meeting of creditors the next day and prior to that meeting.

239 When asked to elaborate on Mr Bart's statement that he was "out" Mr Macks testified:

> My recollection was he was just getting tired of the process because we were trying to get him to confirm certain things, and that's just my recollection he just became tired of it all and said "I'm out". I do recall also – sorry, I just remembered – that he expressed a great deal of sympathy for the situation that I was in and that took me a bit by surprise and that's it.

240 Mr Macks continued:

> To get him to confirm what his situation was if ARL weren't supportive. So if they weren't going to basically provide security, if they weren't going to provide the additional warehousing stock and if they weren't going to deal in relation to inclusion of a consignment. I think that's the context around it.
>
> ...
>
> I told him that they were not prepared to accept it and I could not work out, at that time earlier, why Bart and ARL weren't communicating together because that's essentially what I was trying to get them to do, to come up with the terms and proposals and then we would have something to work with. So I don't know if that helps?
>
> ...
>
> I told him that my understanding was that ARL were not supportive of the proposal so what would that mean to his proposal and what was he prepared to do in terms of amending the proposal because I saw that as a pre-condition and a necessary element of what he had in mind.

241 Mr Clifton gave evidence that he saw Mr Macks and Mr Mansueto in a meeting room at the offices of PPB on the day of the second meeting of creditors:

> Okay. I walked past Mr Macks' office and he was in there with Ray Mansuetto [sic] and someone else, I don't recall, the door was shut but I was aware he was calling Mr Bart again that morning before the meeting.

242 Mr Clifton testified that his belief that Mr Macks was calling Mr Bart was based on information from Mr Macks. I do not accord his evidence as to whom Mr Macks was speaking much weight despite its admission into evidence because of its hearsay basis.

243 Mr Viscariello testified that he spoke to Mr Bart in mid-December and was told by Mr Bart that he was negotiating the terms of the proposed Bart DOCA with Mr Macks. According to Mr Viscariello, Mr Bart informed him that ARL wanted him to purchase the stock that ARL had in their warehouse in addition to the other terms of the proposed Bart DOCA. Mr Viscariello also recalled Mr Bart saying that he would "chip in another $20,000 for the unsecured creditors".

Mr Viscariello understood that the $20,000 was in addition to the $400,000 already committed in the proposed Bart DOCA.

244 Mr Viscariello testified that he did not have a recollection of Mr Macks speaking to him about a revised Bart DOCA. Mr Viscariello agreed that he had a number of telephone conversations with Mr Macks about the time but could not recall a specific conversation on the evening of 19 December. Mr Viscariello denied that Mr Macks explained to him the revised Bart DOCA in detail. He denied that Mr Macks told him on 19 December that ARL had not consented to the revised Bart DOCA. Mr Viscariello agreed that he may have spoken to Mr Macks on the 20th but insisted that Mr Macks did not recite the terms of the revised Bart DOCA.

245 Mr Viscariello denied that he and Mr Macks had agreed that Mr Macks would phone Mr Bart in an attempt to persuade him to make a more generous offer. Mr Viscariello denied that Mr Macks called him back a little bit later to tell him that Mr Bart would not raise his offer and denied that he became emotional. After a short adjournment, Mr Macks' counsel later put the following sequence of events to Mr Viscariello:

- Either on 19th or 20th Mr Macks rang Mr Viscariello late at night to report that Mr Bart had put his second proposal, and that ARL had rejected it;

- Mr Viscariello and Mr Macks then discussed whether Mr Macks should ring Mr Bart and it was decided that Mr Macks would phone Mr Bart to inform him of ARL's rejection;

- Mr Macks called back a little later to tell Mr Viscariello about the conversation with Mr Bart and in that telephone call told Mr Viscariello that when informed of ARL's rejection, Mr Bart had responded that he was out;

- That Mr Viscariello then responded to Mr Macks "Well I don't know Peter, we have done all we can. I don't know what else we could have done".

246 There is a subtle difference in the propositions put by Mr Macks' counsel in cross-examination before and after the break. Before the break, it was put that Mr Macks called Mr Bart in the hope of persuading him to increase his offer. In the second, it was simply to tell him of ARL's rejection. In any event, Mr Viscariello denied each of those propositions.

247 Mr Viscariello gave evidence that the last occasion he spoke to Mr Bart before the second creditors' meeting was on 19 or 20 December. Mr Viscariello said there were two conversations, one in which Mr Bart said that he would put in a further $20,000 for unsecured creditors and a later conversation in which he

told him that he had signed the revised Bart DOCA and that as far as he was concerned, the deal had been done.

248 Mr Viscariello claimed that he became aware of the reduction in Mr Bart's monetary offer from $400,000 to $250,000 only after the 21st of December 2001 and during the course of these proceedings. Mr Viscariello denied that Mr Bart had told him that he had offered $150,000 less when he told him that he thought the deal was done. He denied that he had learnt of the reduced offer from Mr Roberts.

249 Mr Viscariello denied that he knew of ARL's rejection before the meeting. He agreed, however, that Mr Roberts told him that ARL had rejected the offer. Viscariello testified that he responded that as far as he knew, that was not the case, and that he thought the deal had been accepted.

250 Mr Viscariello did not offer a satisfactory explanation for why he did not telephone Mr Bart or Mr Macks after the conversation with Mr Roberts. I accept Mr Macks' submission that it is implausible that Mr Viscariello adopted such a supine position on hearing news of that worrying kind from Mr Roberts. Mr Viscariello testified that he assumed that the information provided by Mr Roberts was generated by panic and unsubstantiated rumours. When Mr Viscariello was pressed as to why he remained confident in his belief that the revised Bart DOCA had been accepted even after the information from Mr Roberts, he responded:

> Well my view was this: it was up to the creditors to vote whether the proposal would be accepted.

251 The proposed Bart DOCA was very important to Mr Viscariello. I find his evidence that he remained confident in the face of the bad news from Mr Roberts implausible.

252 Before the second meeting of creditors, Mr Macks decided that the PPB boardroom would not be large enough. The meeting was moved to the Pilgrim Centre. The Pilgrim Centre was next door to the PPB office. A notice was put on the PPB offices in Flinders Street advising of the changed venue. The receptionist was advised to redirect people who attended for the Companies' meetings.

253 To the extent that the change of venue of the second meeting of creditors resulted in a defect or irregularity of notice, I would make an order pursuant to s 447A to cure that defect. Further, Mr Viscariello has not demonstrated that the change of venue caused a substantial injustice such that the business conducted at the meeting is invalid.[84]

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[84] Section 1322(2) *Corporations Act*; *SGIC Insurance Ltd v Insurance Australia Ltd* (2004) 51 ACSR 593.

254 Mr Macks testified that he was late for the meeting because he had asked his solicitor, Mr Mansueto and Mr Tony Colyer, a creditor of the Companies to attend his office. There they spoke to Mr Bart on a speakerphone. Mr Macks testified that he tried to get Mr Bart to "resurrect his offer". According to Mr Macks, Mr Colyer was quite animated. According to Mr Macks, Mr Colyer said in the course of the conversation to Mr Bart "Fred, if it helps I'll throw in $50,000 of my own money to go to the creditors". Mr Macks testified that Mr Bart rebuffed their entreaties and reaffirmed that he was out.

255 The minutes of the second meeting of creditors held on 21 December record the following as to the discussion of the Bart offer:

> The Chairman confirmed that there was no proposal for the sale of the business.
>
> The Chairman discussed in general his report to creditors and outlined the proposal and the circumstances surrounding its failure.
>
> Ms T Hamilton-Smith asked why did Associated Retailers Limited reject the proposal even though they have the infrastructure to support the stores.
>
> Mr G Yeomans responded and advised that he was not in a position to answer her question.
>
> The Chairman advised that Associated Retailers Limited was a buying group and were not in a position as retailers.
>
> Mr J Viscariello advised that the sale of the business has been negotiated for a long time however has never been accepted.
>
> The Chairman advised that he was unable to comment on the sale prior to his appointment.
>
> Mr J Viscariello advised that a proposal was negotiated with Mr F Bart for the sale of the business prior to the appointment of the Administrator.
>
> The Chairman advised that the proposal had been withdrawn and negotiations were made to resurrect the proposal. The Chairman outlined the proposal put forward by Mr F Bart and advised the following:
>
> - $400,000 for the sale of the stock but it was based on a value of $1,050,000
> - The Commonwealth Bank would be paid in full
> - Employee entitlements transferred
> - The trademarks and business names transferred
> - And that there would be a minimal amount to the unsecured creditors.
>
> The Chairman advised as a consequence of failed sale proposal there was no option but for the company to go into Liquidation. He advised that if this was the outcome of today's meeting the stores will be closed on 22 December 2001 close of business. The Chairman advised that a circular will be immediately distributed after this meeting to advise all stores and employees of the closure and their termination of employment.

> The Chairman advised that the stock of the stores will collected from each store and will be auctioned at a later date, however issues such as retention of title and the consignment stock will need to be considered on a case by case basis.
>
> Mr J Viscariello asked why the deal did not succeed and who did not accept the terms of the proposal. The Chairman advised that Associated Retailers Limited was not in a commercial position to accept the proposal. Mr J Viscariello advised that as a consequence of the deal being rejected 80 employees will be unemployed.
>
> The Chairman confirmed again that there was no proposal. The Chairman asked Mr J Viscariello if he had any further questions or comments. Mr J Viscariello declined and advised that he did not.

256 Mr Clifton gave the following account of an exchange between Mr Viscariello and Mr Yeomans concerning responsibility for the failure of the proposed Bart DOCA:

> ... Mr Viscariello stood up and sort of, and I am paraphrasing here, he sort of blamed ARL for the demise of the business saying it's their fault and the employees are going to lose their jobs because of ARL. And I only remember this because he was sitting next to me and he jumped up and he was really indignant and he was waving around in his hand the fax that I sent him and he sort of saying "excuse me Mr Chairman" you know, whatever the number was, I can't remember, 10 c in the dollar or whatever it was. He was very agitated about that … He was sort of complaining about the return, saying effectively "why should I accept such a low return". I think was the thrust of his argument.

257 Mr Viscariello denied that he asked who had not accepted the proposal. He claimed that he did not because Mr Macks opened the meeting by saying that the Bart offer had been withdrawn. Mr Viscariello could not recall whether or not Mr Macks outlined the terms of the revised Bart DOCA at the meeting. Mr Viscariello denied that he said at the meeting that the sale had been negotiated for a long time. Mr Viscariello testified that he asked that the meeting be adjourned to allow more time to negotiate the deal. According to Mr Viscariello, he informed the meeting that he knew that the offer had been on the table for a significant period of time and that it was news to him that it had been withdrawn. Mr Viscariello maintained that he did not know that the offer had been withdrawn.

258 The initial reference in the minutes that Mr Macks said that there was no proposal for the sale of the business is ambiguous as to whether Mr Bart had withdrawn the offer or ARL had rejected it. The recorded responses of both Mr Yeomans and Mr Macks to Ms Hamilton-Smith's question suggest that the persons present understood the reason given by Mr Macks for the failure of the proposed Bart DOCA to be ARL's rejection.

259 It is likely that Mr Macks' advice that the Bart proposal had been withdrawn and that negotiations were made to resurrect it was a reference to the revised Bart DOCA which Mr Macks was contrasting with the initially proposed

Bart DOCA to which Mr Viscariello had just referred, and which had been negotiated prior to the appointment of Mr Macks as administrator.

260 Mr Macks' decision to set out the revised Bart DOCA also suggests that it had not been withdrawn. Mr Macks referred to the failure of sale and not the withdrawal of those proposed terms. Finally, Mr Macks' response to Mr Viscariello as to why the deal did not succeed also suggests that the revised Bart DOCA had not been withdrawn. When Mr Viscariello specifically asked as to who had not accepted the terms of the proposal, Mr Macks attributed the non-acceptance to ARL although he justified that by reference to its commercial position.

261 To my mind, it is significant that Mr Macks never wrote to Mr Bart asking him to reinstate his offer but did write to ARL asking that it accept the revised Bart DOCA.

262 I do not accept Mr Macks' account that he had a further conversation with Mr Bart. Despite Mr Bart's poor recollection, which is very understandable given the time that has passed, I was impressed by his testimony that his involvement ended after he had returned the signed revised DOCA. I also accept his evidence that he had no reason to withdraw the offer. It was in Mr Bart's commercial interests, and suited his business style, to force the issue to a vote. Plainly, his strategy was to have the DOCA voted on in order to put pressure on ARL by reason of the other creditors' acceptance of the revised Bart DOCA. Importantly, the topics which Mr Macks claimed were discussed in that telephone conversation are matters which are more likely to have been discussed on 18 December during the process of revising the proposed DOCA. Mr Clifton's account is also probably referrable to the events of 18 December. Mr Macks' inability to provide any context around the bold statement "I'm out" does not give me confidence in his recollection. The documentary evidence, including the minuted discussion at the second meeting of creditors and the letter to ARL sent on 21 December, suggest that Mr Bart's offer was still on the table.

263 On the other hand, I accept that Mr Macks had a conversation with Mr Viscariello. However, the context of, and reason for, that discussion was ARL's rejection of the offer. That fits with the comments of Mr Viscariello and Ms Hamilton-Smith at the meeting of creditors on 21 December.

264 I reject Mr Macks' evidence of the telephone conversation with Mr Bart just before the second meeting of creditors. Again, Mr Bart had no reason to withdraw the offer. The account of the conversation is more consistent with an attempt to have Mr Bart increase his offer and may have been referrable to something which occurred on the 18th of December. Moreover, the failure to call Mr Colyer is telling given the expressive language attributed to Mr Colyer. Indeed Mr Macks said that an expletive which he did not repeat was also used. It would be surprising if Mr Colyer did not have a recollection of that conversation. The failure to call Mr Colyer is all the more telling given Mr Clifton's failure to

recall the late night phone call which is when Mr Macks testified that Mr Clifton was present. Instead Mr Clifton recalled only seeing Mr Macks in conversation on 21 December.

265 I find that Mr Macks decided not to support the revised Bart DOCA at the second meeting of creditors because of ARL's rejection. He must have realised that it was impracticable without ARL's support. In the circumstances, and given the company's precarious financial position, he made a decision not to force ARL to an election as to what it would do by recommending the revised Bart DOCA. For that reason, he spoke in general terms of there being no proposal, but it was not the case that Mr Bart had withdrawn his offer. Mr Macks' testimony that he had contacted Mr Bart on the night of the 19th or 20th and again on the 21st is a reconstruction, perhaps genuine, of events probably based on the reference to "resurrection" of the Bart proposal in the minutes. It follows that I also reject Mr Viscariello's testimony that Mr Macks expressly told the meeting that Mr Bart had withdrawn the revised Bart DOCA. I suspect that that testimony, which is inconsistent with his minuted statements, is somewhat opportunistic.

Failure to continue trading after rejection of Bart DOCA

266 I turn next to Mr Viscariello's claim that Mr Macks should have recommended that the Companies continue to trade under administration beyond 21 December 2001.

267 Mr Viscariello pleads that in abridging the time for the second meeting of creditors Mr Macks did not allow sufficient time:

- for the investigation of the company's affairs;
- for the negotiation of an agreement of a DOCA;
- for the investigation and negotiation of other potential courses of action; or
- for creditors to review Mr Mack's s 439A report.

268 For that claim he relied heavily on the expert evidence of Mr Stirling Horne. Mr Horne's report of 27 January 2010 was received into evidence.

269 In that report Mr Horne expressed the following opinions:

(1) That it was only appropriate for Mr Macks to seek a preponement of the second meeting of creditors from January 2002 to 21 December 2001 if there was an extant proposal for a deed of company arrangement on which an early decision was required.

(2) In the absence of a proposal to enter into a deed of company arrangement, it was open to Mr Macks to continue to trade the

business for the purpose, at least, of conducting a closing down sale and to leave open a possible sale of the business.

(3) The December 2001 and January 2002 period was conducive to successful trading.

(4) Mr Horne accepted that the final form of the proposed Bart DOCA was to be $86,000. Nonetheless, Mr Horne made the point that it would have yielded a better result than where matters ended.

(5) Mr Macks had embarked on a highly risky path, which ultimately failed, in preponing the second meeting of creditors and recommending that the company be placed in liquidation.

(6) The meeting should have been adjourned to January 2002 so that a more informative and comprehensive report might have been prepared.

(7) There was no urgency as of 19 December 2001 to call a meeting.

(8) Mr Macks overlooked the objectives of the voluntary administration process of the *Corporations Act 2001* by not adjourning the second meeting to allow time to prepare a supplementary report, allow the creditors more time to consider the situation, provide an estimated return to unsecured creditors, enable further dialogue with Mr Viscariello and give time to others to formulate another DOCA proposal.

270 Mr Horne made the recommendations and gave those opinions even though he acknowledged that continuing to trade under administration was "not without risk" because:

- The businesses were making loss.
- The administrator's fees were likely to increase significantly.
- There were no assets available to support the process and to cover the administrator's exposure.
- Stock was the only realisable asset and it had limited and doubtful value in a closing down sale.
- The advertising program which was conducted in early December 2001 was unsuccessful.
- No new expressions of interest had been received in the period to 19 December 2001.

271 Mr Horne quantified the losses generated by the failure to secure the proposed Bart DOCA as follows:

- An amount of $640,028 which both Bernsteen and Newmore owed Mr Viscariello for unpaid wages, car allowance, annual leave,

superannuation and accrued long service leave for the period between October 1995 and December 2001 would have been paid by Mr Bart as an outstanding employee entitlement.

- An amount of $89,791 paid by Mr Viscariello to the CBA in September 2002 in respect of guarantees executed by him to support money advanced by the CBA to Newmore which Mr Bart would have paid under the terms of the proposed Bart DOCA.

- An amount of $53,996 paid to CBFC in September 2002 on his guarantees of leases entered into by both Bernsteen and Newmore which leases were to be assigned to Mr Bart. Mr Viscariello had lost that amount plus interest.

- An amount of $45,000 paid to ARL in two instalments, $30,000 on 22 December 2003 and $15,000 on 17 December 2004, in respect of guarantees of the sale price of goods supplied to Bernsteen and Newmore. The proposed Bart DOCA would have discharged the ARL debt.

- Legal fees of $85,000 in disputing the claim by ARL against him on the guarantees. Mr Viscariello had lost those amounts plus interest.

- $20,000 paid the Australian Taxation Office in June 2007 to discharge his liability as the companies' director. The Bart DOCA proposal involved payment of the companies' tax liability. Mr Viscariello expended $240,000 in respect of legal proceedings associated with resolving that claim. Mr Viscariello had lost that amount plus interest.

272 In his evidence-in-chief Mr Horne was asked what other options Mr Macks might have considered had the second meeting of creditors been adjourned. Mr Horne replied:

> The Administrator could have considered whether he could market the business again, to see whether there was any other people interested in the business, and he certainly considered having a – going forward on that for a short period of time, and I consider that the asset coverage he had at that stage should have allowed him to do that without having any significant concerns about his ability to meet his liabilities as they fell due.

273 However, Mr Horne accepted that he did "not have sufficient information relating to operating costs of the businesses at the time, including store rentals and overheads, employee wages and on costs to form an opinion on the benefit of [continuing to trade]". Moreover Mr Horne also acknowledged that as events transpired the liquidator was able to sell all of the stock in one lot at lower costs than would have been involved in a closing down sale.

274 The caveats on Mr Horne's opinion deny it any significant weight. The accounts of the administration show, and the contemporaneous observations

made by Mr Macks and his staff at the creditors meetings confirm, that substantial losses would probably have been incurred if the trading continued beyond 21 December.

275 Mr Horne had prepared his report on the premise that there were 17 operating Bedroom Mazurka stores and 7 Faulty Towels stores. When asked whether the fact that 12 stores had closed primarily because of action taken by the landlord's altered his opinion, Mr Horne replied that it would have made no difference. In my view the closure of the stores is a significant indication of the precarious trading and financial position in which Mr Macks found himself.

276 In cross-examination Mr Horne disclosed that he was not given any of the financial statements of the Companies for the years preceding their administration.

277 In the course of his evidence Mr Horne did acknowledge the risks faced by Mr Macks. When Mr Horne was asked to elaborate on an observation in his report that there was some risk in trading-on, because of the lack of available assets, he replied:

> As I understand it, the only assets the administrator had to protect himself in relation to expense and what he was taking on was the stock and the fixtures and fittings and plant and equipment in the shops and head office, that was the total asset. So, you know, I mean there's no hard assets there, there is no property, no assets of the nature that he could rely on getting full value for. Stock is always a very problematic type of item to deal with and fixtures and fittings in shops, unless you can sell the shops as a going concern, they have no value. The administrator would be well aware of those issues at the time.

278 Mr Horne explained that his understanding of the term "operating on a cash neutral basis" meant that the cash coming in was the equivalent to all of the expenses of running a business. He would not use the term to cover the administrator's own expenses or his legal expenses. He described it as an accrual based assessment of the financial position of a company. He opined that the cost of future electricity bills would be anticipated in making a determination of whether the business was being operated on a cash neutral basis. However, "operating on a cash neutral basis" is not the same concept as trading at a profit because stock might be discounted below cost to obtain the cash needed to cover the operating expenses with the result that no profit is made when the costs of goods is taken into account.

279 When pressed about how he was in a position to express the opinion that Mr Macks could have continued to trade the businesses when he was not aware of the actual trading and operating expense figures, Mr Horne answered:

> I was trying to take a balanced view about what position the administrator might find himself in but I felt – I mean myself, I would have been extremely worried about the set of events that led up to that meeting on 21st. I made an application – the administrator made an application to the court to have a proponent [sic] of the second meeting

> narrowed down dramatically. … I would have thought the administrator at that particular stage when after going to the court to get a proponent [sic] on the basis – one of the main basis I saw was to try to see whether the creditors were going to accept the deed of company arrangements. Now I have no difficulty with that proponent [sic] on that basis of the deed of company arranged proposals. However, once the proposal is off the table, I believe it was necessary for the administrator to look at all other alternatives. Now, I am not aware of how much effort went in to sell the business but if I was in the administrator's shoes and I knew that I had a person who was willing to make an offer to put forward a deed of company arrangement proposal, I would be concentrating on trying to achieve that outcome and I would not be so concerned whether there might have been other people interested in the business or not at that stage. My focus would have been Bart. So once that is off the table, I then have to reconsider my position and I would be concerned that I would have to demonstrate to the creditors that I have done the best in trying to achieve the best outcome. I would also be concerned about the director because he is at this stage obviously thinking that there is going to be a deed of company arrangement and so I would have been making some effort, at least some effort, to establish whether, in fact that there was any chance of selling the business as a going concern because I would have been concerned about my circumstances, that after the Bart offer disappeared I would be concerned about whether I have done enough to sort of get a return back to creditors as best they can.

280 Mr Horne agreed that an administrator's decision on whether or not to trade on would depend on his or her assessment of all of the sales and costs data to which Mr Horne had earlier referred.

281 On close analysis, Mr Horne's opinion was no more than that every alternative option should carefully be explored because of the serious consequences of placing a company in liquidation. His opinion simply did not have the evidential foundation to speak to the soundness of Mr Macks' decision to recommend that the Companies be placed in liquidation.

282 Mr Horne went on to explain that his concern arose from the fact that the preponement application was sought for one reason, the approval of the proposed Bart DOCA, but resulted in a meeting which recommend that the company be placed in liquidation. He explained that he would have concentrated his efforts in securing agreement to the proposed Bart DOCA.

283 In the course of Mr Horne's evidence, it became apparent that his opinion was based on an assumption, which the evidence before me does not make out. He assumed that there was sufficient asset backing to cover the costs which would be incurred in the course of the administration and in particular the cost of replenishing the stock. It can be accepted, as Mr Horne opined, that the best outcome for the creditors was to sell the stores and the businesses as a going concern. However, Mr Horne assumed that a purchaser who would pay a reasonable price, or at least a price similar to that offered by Mr Bart would be found. Neither of those assumptions are made out on the evidence before me.

284 Mr Macks did not have any source of funds to replenish the stock. Here it must be remembered that most of the sales came from just 20 per cent of the stock which would therefore have been rapidly depleted as the trading continued

over the Christmas period and would have required replacement. Secondly the advertising campaign in December elicited few offers. Mr Macks had no evidence and no reason to believe that any better result would be achieved by advertising again in the New Year.

285 Inherent in Mr Horne's testimony is an assumption that Mr Macks had not tested the market well enough. That assumption is not made good by the evidence. Indeed, it was put to Mr Horne that given the failure of the 2001 advertising campaign to elicit any offer other than Mr Bart's, Mr Macks would have been entitled to think that the prospects of selling the businesses as a going concern were very poor. Mr Horne, in effect, agreed.

286 Mr Horne's evidence continued:

> Q So your answer to his Honour about the need for good reason to recommend liquidation on 21 December amounts to an assumption on your part of a number of things, one of which is that there was some prospect of selling these businesses as going concerns as at that date.
>
> A Yes.
>
> Q What basis do you there was think that there was any such possibility.
>
> A I have worked on the assumption that the administrator's efforts were concentrated very early on to complete a sale to Bart, so I am raising the possibility that maybe all other possibilities weren't considered as far as the sale of the business. I recognise that there is an inherent risk about going to another advertising program to sell the business, but I would have liked to have been in the position where I could say quite clearly that I explored every option available and wasn't able to complete a sale, so therefore the company must go into liquidation.

287 Mr Horne's opinion was based to a large extent on a view that the steps he had recommended were a necessary protection for an administrator from criticisms which might be made by directors, shareholders or creditors. However, it is only valid criticism which an administrator need fear. The determinant of an administrator's conduct must be his or her professional judgment as to the best interests of the company and he or she must not be deflected from acting on that judgment by fear of criticism.

288 Mr Horne was asked whether he would criticise Mr Macks if it were the case that Mr Macks formed the view that the risks of continuing to trade were too high compared to the possible benefits of doing so and replied that he would not.

289 When Mr Horne was asked how finance to replenish stock might be sourced, he said:

> A I come back to an earlier comment. I believe that cash could be generated out of reduction of that level of stock being carried. That might have meant certain shops had to be closed but you could get the cash flow out of reducing the amount of costs.

290 Even though closing stores might marginally reduce costs, it cannot be assumed that the same levels of sales would be achieved by moving the stock to a smaller number of stores. Mr Viscariello did not adduce any evidence that Mr Horne's suggested plan would have worked in the climate in which the businesses found themselves in December 2001. Certainly it has not been established that Mr Macks was unreasonable in reaching the view that it could not. Indeed Mr Horne was asked:

> Q If it were the case that Mr Macks formed the view that there wasn't sufficient cash in the business to purchase further replacement stocks, you wouldn't quibble with that, would you, you wouldn't have enough information.
>
> A No all of those things I agree all of those things are problematic and whether they could be dealt with or not, just depended on the numbers. I didn't have the numbers. I've just made some assumptions.

291 Mr Macks had approached all of the landlords as to whether they would allow any rent free period during his administration or allow a rent free period to a purchaser. He had received negative responses. Mr Horne presumed that that would have been the position.

292 Mr Horne made some rough calculations on what might have been the proceeds of a closing down sale in the course of cross-examination and suggested that an administrator might have taken the view that despite the risk an attempt to trade on for a short period of time was warranted. However, that evidence was clearly speculation because when asked whether to give that opinion definitely he would need to have stood in Mr Macks' shoes at the time to assess the risks he replied "absolutely, there is no doubt".

293 In cross-examination, Mr Horne was asked to assume that even though Bernsteen had $167,000 in cash as at 21 December and Newmore $47,000 the trading operations during the course of the administration had resulted in a $132,000 deficiency of the sale proceeds over costs. It was put to him that the cash balance in the bank was positive because not all of the expenses had been paid. It was then put to Mr Horne that any reasonable administrator facing that position on 21 December would stop trading the businesses. Mr Horne answered:

> Certainly no argument about that. I am not persuaded by the loss, I am persuaded by what is the available assets to cover the risk. What is the risk and what are the available assets? That would be the two issues I would be weighing up.

294 Mr Horne agreed that in considering that question an assessment would have to be made of the prospects of selling the businesses as a going concern.

295 Mr Horne testified that he had experience of obtaining better results in selling stock in a closing down sale than by making a bulk sale to another retailer. However he agreed that obtaining 60 or 70 cents in the dollar is a good result.

296 Mr Horne also failed to take into account ARL's position which had a floating charge over the stock and was entitled to the proceeds of other stock which had been provided on consignment or subject to a retention of title clause.

297 Finally Mr Horne was asked:

> Q The short of it is you don't have information to draw an opinion Mr Macks made the wrong decision.
>
> A No, quite right. I just put forward a view.
>
> Q You certainly don't have enough information to say that the decision he made to recommend liquidation was not within the reasonable parameters of what an administrator in his position could have done.
>
> A I just can't say either way.

298 Mr Viscariello has not satisfied me that Mr Macks' judgment to stop trading and to recommend the liquidation of the Companies was not in the best interests of the Companies, negligent or in any way in breach of his statutory duties.

Conclusion on claims against Mr Macks as an administrator

299 Even though I have rejected Mr Macks' evidence that Mr Bart had withdrawn his offer, I find that the winding up of the Companies was inevitable. The proposed and revised Bart DOCAs were doomed to failure when ARL refused to agree to them. On ARL's rejection of the proposed and then revised Bart DOCA, it is unlikely that the creditors would have voted in favour of it. Even if they had voted in favour of it, ARL was always likely to be given permission to enforce its security. The revised Bart DOCA required it to sacrifice far too much. It was entitled to rely on its security.

300 I am also satisfied that ARL would have rejected the proposed Bart DOCA even before its revision. Even though I have found that, against Mr Macks' evidence, he was largely responsible for the inclusion of several clauses which protected his interests, in my view it was reasonable for him to do so. It was reasonable for him to protect his personal position as against ARL on entry into the proposed Bart DOCA. Mr Macks would have been entitled to similar protections in the course of the administration and in a winding up. In any event, I am satisfied on the evidence of Mr Yeoman's statements at meetings that the changes made in that respect were not causative of ARL's rejection of the revised Bart DOCA. ARL rejected both the initial proposed DOCA and the revised Bart DOCA simply because the payments to it required it to make too great a sacrifice of its secured debt.

301 It has not been shown that Mr Macks' addition or amendment of the clauses of the revised Bart DOCA caused ARL to oppose the proposal. There is therefore no "loss of chance" to assess.

302 Section 447E provides:

> **447E Supervision of administrator of company or deed**
>
> (1) Where the Court is satisfied that the administrator of a company under administration, or of a deed of company arrangement:
>
> (a) has managed, or is managing, the company's business, property or affairs in a way that is prejudicial to the interests of some or all of the company's creditors or members; or
>
> (b) has done an act, or made an omission, or proposes to do an act, or to make an omission, that is or would be prejudicial to such interests;
>
> the Court may make such order as it thinks just.
>
> (2) Where the Court is satisfied that:
>
> (a) a company is under administration but:
>
> (i) there is a vacancy in the office of administrator of the company; or
>
> (ii) no administrator of the company is acting; or
>
> (b) a deed of company arrangement has not yet terminated but:
>
> (i) there is a vacancy in the office of administrator of the deed; or
>
> (ii) no administrator of the deed is acting;
>
> the Court may make such order as it thinks just.
>
> (3) An order may only be made on the application of ASIC or of a creditor or member of the company.

303 In *Honest Remark Pty Ltd v Allstate Explorations NL and Ors* Brereton J explained the scope of the section in these terms:[85]

> Honest Remark submits that s 447E has wide operation, for which it cites *Kirwan v Cresvale Far East Ltd (in liq)* (2002) 44 ACSR 21; [2002] NSWCA 395, in which the Court of Appeal upheld Austin J (*Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd (No 2)* (2001) 39 ACSR 622; [22001] NSWSC 791 (*Cresvale Far East*)) in utilising s 477E to make orders disentitling an administrator to an indemnity from assets of the company for costs associated with the proceedings (to which indemnity the administrator was otherwise entitled). Young CJ in Eq observed that orders for costs were supportable under s 447E and added (at [442]) that it was a general section, empowering the court to supervise administrators and having its equivalent, although not an exact equivalent, so far as liquidators are concerned, in s 536. I accept, as Mr Lindsay submits, that the equivalence is far from exact, because the grounds for relief are somewhat broader (compare s 536(1)(a), which has as a precondition that a liquidator be not "faithfully performing" a function), and the relief is not limited to an inquiry, but extends to any

[85] (2006) 234 ALR 765 at [78].

order "the court thinks just" – although on an inquiry under s 536, the powers of the court are very wide.

304 If an application had been made pursuant to s 447E of the *Corporations Act* at the time the Court would not have had any reason to exercise its power to make any order preventing the winding up of the Company or to interfere or change Mr Macks' assessment that the Company should not trade over the Christmas period. Nor is the Court likely to have reviewed, or in any way interfered with, Mr Macks' assessment and decision not to support the revised Bart DOCA. Those decisions fell within Mr Macks' special expertise and knowledge of the Companies' position.

305 Section 447E of the *Corporations Act* is not a statutory charter for the Court to undertake for itself the management of a company in administration.[86]

306 I would construe s 447E of the *Corporations Act* as empowering a Court to make an order, including a compensatory order, after the administration has ended. It is a remedial provision. It would largely defeat its purpose to limit it temporally to the often short period of time over which an administration is conducted. However, there is little reason to make an order under s 447E of the *Corporations Act* so long after the event when the liquidation of the Companies is almost complete. Moreover, for the reasons given, the impugned conduct of Mr Macks has not prejudiced the interests of the Companies or its creditors and Mr Viscariello has not proved any loss

Part II

307 In this part I deal with Mr Viscariello's claims concerning Mr Macks' conduct of the liquidations. Those claims primarily focus on litigation brought against Ms Hamilton-Smith.

A simple debt recovery

308 Ms Hamilton-Smith was employed by Bernsteen and Newmore in 2001. A purported letter of appointment dated 27 August 2001 engages Ms Hamilton-Smith to provide consulting services to Bernsteen. The letter is on a letterhead styled "Bedroom Mazurka" and endorsed with Bernsteen's registered corporate details. Ms Hamilton-Smith's position is described in the letter as a "Retail Manager". The hours of work are stipulated to be "generally 30 hours per week Monday – Thursday" at a weekly remuneration of $800 inclusive of annual leave, long service leave and sick pay. In addition to the weekly remuneration, Bernsteen's letter offers to "reimburse [Ms Hamilton-Smith] for [her] mobile phone account" and "the running and maintenance costs for [her] motor vehicle".

309 A paragraph of the letter headed "Terms of Employment" provides:

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[86] *Re Pan Pharmaceuticals Limited; Selim v McGrath* 47 ACSR 139 at [50]-[51] per Allsop J.

> Employment will be for a fixed term of one year at which time your services will be automatically terminated unless we enter into a new agreement. Our offer of engagement is based on your entering into our standard Employment Agreement."

310 Another document entitled "Employment Agreement" dated 3 September 2001 purports to set out the terms of Ms Hamilton-Smith's engagement by Bernsteen. It specifies a commencement date of 3 September 2001 with a three month probationary period. The position is said to be covered by the Retail Industry (SA) Award and Ms Hamilton-Smith's remuneration is described as wages. Ms Hamilton-Smith and Mr Viscariello purportedly subscribed to the Agreement on 3 September 2001 and their signatures are witnessed by an employee of the Companies, Mr Roberts.

311 The evidence also shows that on 15 October 2001 Mr Viscariello instructed another Bernsteen employee, Ms Stokes, to provide an additional weekly manager's allowance to Ms Hamilton-Smith from that date.

312 At the time the Companies were placed in administration, Mr Viscariello was in a romantic relationship with Ms Hamilton-Smith. A copy of Ms Hamilton-Smith's letter of engagement was brought to Mr Macks' attention in the course of the liquidation because Ms Hamilton-Smith made a claim with respect to her telephone account. Mr Macks noticed that the letter was on Bedroom Mazurka letterhead which had only been created after the date on which the agreement was purportedly made.

313 After the Companies were placed in liquidation, Mr Macks proceeded to make arrangements for the sale of their stock. Much of the stock was sold to the large South Australian furniture retailer Le Cornu. However, on 15 January 2002 Bernsteen and Ms Hamilton-Smith entered into an agreement for the sale of certain stock and shop fit-outs from the Parabanks Shopping Centre (the Parabanks agreement). The Parabanks agreement took the form of a letter of offer from Ms Hamilton-Smith which Mr Macks accepted by subscribing thereto. The Parabanks agreement fixed a price for the stock at 70 cents in the dollar of the value of the stock set out in a schedule to the letter. The total price was calculated to amount to $21,700. Stock subject to a retention of title claim was excluded. The letter records Ms Hamilton-Smith's agreement to pay for the stock she sold on a weekly basis in arrears on the Monday following the end of each trading week. She undertook to pay the full amount of the stock purchased at the expiration of three months. The Parabanks agreement was conditioned on Ms Hamilton-Smith taking possession of the store on 17 January 2002 pursuant to an agreement with the landlord of the Parabanks Store.

314 Pursuant to the Parabanks agreement, Bernsteen retained title in the stock until such time as Ms Hamilton-Smith paid for it. Clause 10 of the Parabanks agreement provided that if Ms Hamilton-Smith should default in making any of the weekly payments within two days of the due date "then the whole of the balance payable for the stock would become immediately due and payable, and

interest will accrue on the unpaid balance at the rate of 7 per cent per annum until payment in full has been made".

315 Notwithstanding the doubts Mr Macks harboured about the authenticity of Ms Hamilton-Smith's employment agreement, Clause 11 of the agreement provided that upon execution the liquidator would pay Ms Hamilton-Smith the amount of $890.50 for her mobile telephone account in accordance with the letter of engagement. A handwritten proviso to that clause reads "if the payment of stock is not honoured at the end of three months the amount of $890.50 will be added to the final sum payable as described in point 10". That clause reflected a compromise reached between Mr Macks and Ms Hamilton-Smith on her entitlements to telephone expenses. It is not clear why Ms Hamilton-Smith was given any preference in this respect, particularly in light of the doubts about the date of execution of her employment agreement.

316 A similar agreement was entered into with respect to the Castle Plaza store on 16 January 2002. I will refer to the agreements jointly as the Bernsteen stock agreements.

317 Ms Hamilton-Smith's offers were discussed at a meeting of the Committee of Inspection (the Committee) for each of the Companies. Mr Macks described them as "commercially realistic". Mr Macks supported making the Bernsteen stock agreements, explaining that after five weeks of operation, Ms Hamilton-Smith would have paid the amount which could reasonably have been expected to be realised if the stock had gone to auction. Mr Macks advised the Committee that Ms Hamilton-Smith would "probably" be using the Bedroom Mazurka trading name.

318 Ms Hamilton-Smith made instalment payments pursuant to the Bernsteen stock agreements on 18 February 2002, 25 February 2002, 4 March 2002, 11 March 2002, 2 April 2002, 17 April 2002 and 23 April 2002.

319 By the time of the next meeting of the Committee held on 26 February 2002, relations between Mr Viscariello and Mr Macks had deteriorated. Mr Macks informed the Committee that he was concerned about Mr Viscariello's conduct over the preceding "couple of weeks". He invited members to view notes he had made about the alleged conduct but the contents of the notes were not recorded in the minutes. In evidence it appeared that Mr Macks had suggested that Mr Viscariello might have been involved in the theft of stock from the Companies' stores. Mr Macks was asked what he hoped to achieve by informing the Committee of his concerns that Mr Viscariello might have been involved in thefts from the stores. Mr Macks responded:

> Nothing other than disclosing to the committee that I had a concern. It's just a disclosure matter – I didn't hope anything would come out of it. Maybe just to inform the committee that this was now another matter that we had to address and we were concerned that that would result in some further action both with the police, or at least with an insurance claim or something of that nature, something else we had to deal with.

320 Mr Macks was asked whether he had said anything about the theft being an "inside job". He answered:

> Not that I can recall. I may have had, as was my usual practice, the notes that were referred to, and that certainly made mention of the fact that the security codes were activated by someone knowing the codes and it also made mention, if my memory is correct, of the fact that the stock was selectively – it was purposely selected. So someone basically knew what they were looking for. So I wouldn't have done anything other than read out what was in the notes, I think, from memory.

321 On 17 April 2002 Mr Viscariello wrote to Mr Macks complaining that LeCornu was advertising the sale of the large amount of stock which it had purchased from the Companies using the "Bedroom Mazurka" trading name. Mr Viscariello complained that LeCornu was providing carry bags marked with the Bernsteen livery. On 19 April 2002 Minter Ellison responded to Mr Viscariello, on behalf of Mr Macks, asserting that Mr Macks had "made it clear to LeCornu on several occasions that the Bedroom Mazurka name or any other trademark operated by Bernsteen could not be used by LeCornu". The letter also asserted that Mr Macks had not knowingly sold or allowed LeCornu to remove any carry bags labelled with that trademark name.

322 On 26 May 2002 Mr Macks requested a Lands Titles Office search on Ms Hamilton-Smith. Mr Macks thereafter collected documents which he thought might be helpful in any future enforcement of a judgment debt against Ms Hamilton-Smith. Mr Macks testified that he made a note of his decision to start collecting that material and to remind himself to talk to the Committee about what he described as a "simple debt recovery" from Ms Hamilton-Smith. He noted that Ms Hamilton-Smith had had the benefit of the proceeds of the sale of the stock she had purchased from the liquidator and that she had received a salary of $80,000 from her employment at Bedroom Mazurka. I will return to that note in greater detail below. For now it suffices to foretell that the proceedings brought against Ms Hamilton-Smith were far from simple and did not recover more than a token contribution to the legal costs incurred by the Companies in those proceedings. Mr Viscariello alleges that Mr Macks breached various of his duties as a liquidator in pursuing that litigation. A detailed history of the course of those proceedings and the ongoing winding up of the affairs of the company is necessary to understand the nature of Mr Viscariello's complaints.

323 At a meeting of the Committee on 27 June 2002, Mr Macks informed it that he was reviewing whether an insolvent trading claim should be pursued against Mr Viscariello. Mr Mansueto from Minter Ellison explained that Mr Viscariello was engaging in "paper warfare" with Mr Macks and that if he were to respond to the letters in detail the limited funds of the Companies would soon be expended. I draw attention to this early reference to the proposed insolvent trading action. It was regularly referred to thereafter by Mr Macks. The early and repeated references to the proposed insolvent trading action contradict Mr Viscariello's submission that the action was only brought in retaliation for

Mr Viscariello's giving notice of, and bringing, this action. The correspondence was made available to the members of the Committee. Mr Mansueto's warning was never heeded.

324 A report provided to the Committee informed it that Bernsteen and Newmore stock was sold to LeCornu for $266,801 and $116,631 respectively. The stock sold to Ms Hamilton-Smith was put at $34,505. The ROT claims that stock was put at $85,000 and $17,500 respectively. Consignment stock was recorded as $65,581 and $26,837 respectively.

325 Mr Clifton informed the Committee that there were outstanding retention of title claims to be settled with ARL with respect to the sales of the Companies' stock after the commencement of the administration. Mr Clifton stated that the proceeds of stock subject to those claims sold by Bernsteen and Newmore were $5,706.97 and $1,491.28 respectively and that the Companies' retention of title liabilities were $10,088.89 and $5,003.36 respectively. Accordingly ARL's total claim with respect to Bernsteen was $15,795.86 and Newmore $6,494.54. I am unable to reconcile those amounts with the amounts in the report.

326 Mr Clifton also advised the Committee that Ms Hamilton-Smith owed $28,000 pursuant to the stock agreements.

The litigation commences

327 On 30 May 2002 Ms Hamilton-Smith wrote to Mr McCulloch, another PPB employee, referring to her telephone conversation of earlier that week. Ms Hamilton-Smith claimed that the use of Bedroom Mazurka and Inside Home trademarks by LeCornu had caused her loss and damage in the sale of the goods she had purchased from the Companies. She informed Mr McCulloch that she had closed the Castle Plaza store as a result of those losses. Ms Hamilton-Smith purported to confirm a compromise that she and Mr McCulloch had reached in the earlier telephone conversation that she would make weekly payments until the debt has been repaid. A sum of $450 was enclosed with the letter.

328 Bernsteen denied the asserted compromise by letter dated 17 July 2002. Minter Ellison responded to Ms Hamilton-Smith's trademark allegations on 25 July 2002. On 6 August 2002 Bernsteen brought an action against Ms Hamilton-Smith in the Adelaide Magistrates Court claiming $28,000 plus interest and costs. I will refer to those proceedings as the Bernsteen action. Ms Hamilton-Smith filed a defence and counter-claim on 27 August 2002. On 17 September 2002 Bernsteen offered to consent to judgment in the sum of $20,000, inclusive of interest plus costs. During the latter part of 2002, Ms Hamilton-Smith successfully obtained extensions of time in which to make discovery and obtained permission to amend her defence and counterclaim.

329 On 2 September 2002 ARL filed a Statement of Claim in the Supreme Court of Victoria making a claim against Mr Viscariello as guarantor of the Companies' debts in the amount of $902,000.

330 On 21 January 2003 Mr Macks informed the annual meeting of the creditors of Bernsteen, that he was preparing a "section 533" report which would detail a proposed insolvent trading action against Mr Viscariello. Mr Macks also informed the meeting of the progress of the claim against Ms Hamilton-Smith. Mr Macks told the meeting that the principal sources of funds for the liquidation which he had identified were an insolvent trading claim against Mr Viscariello and the recovery of preference payments. He advised that employee entitlements had been paid through the Government Employee Entitlement and Redundancy Scheme (GEERS). Mr Macks advised that the ARL debt had been paid "subject to ROT" claims. The payments to which Mr Macks referred were made in December 2002.

331 When questioned about the source of funds for his remuneration, Mr Macks replied "that he will not get paid for this period if there are no funds" and that "the remuneration for the liquidator is dependent on any successful litigation undertaken by him". In the course of the meeting there were several exchanges between Mr Macks and Mr Viscariello. Mr Viscariello asked if there was any arrangement between the liquidator and his solicitors Minter Ellison for the payment of fees. Mr Macks responded that there was. The meeting fixed the liquidator's remuneration for the period 25 June 2002 to 17 December 2002 at $53,649.

332 In the minutes of annual meeting of creditors of Newmore, there is an elaboration of the exchange between Mr Viscariello and Mr Macks about his arrangements with Minter Ellison. Mr Viscariello is recorded as asking Mr Macks to advise of the nature of the arrangement. Mr Macks responded "that he was not able to advise or elaborate on the matter, especially to the Director of the Company". In what was both a Delphic and portentous utterance, Mr Viscariello asked Mr Macks if he was paying the solicitors personally. Mr Macks responded that he was not.

333 A number of interlocutory applications associated with Ms Hamilton-Smith's counterclaim against Bernsteen were heard in the Magistrates Court and the Supreme Court in the first quarter of 2003.

334 On 3 March 2003 Mr Viscariello filed a defence to the ARL claim in the Supreme Court of Victoria. Mr Viscariello pleaded that ARL had failed to mitigate its loss by refusing to support the proposed Bart DOCA.

335 On 23 April 2003 Ms Hamilton-Smith's defence and counterclaim were struck out for failure to comply with orders for discovery but were eventually reinstated on 5 December 2003.

The Hamilton-Smith dossier – exhibit 279

336 I earlier referred to Mr Macks' decision to collect material which might assist in the enforcement of the judgment he anticipated obtaining against Ms Hamilton-Smith. To that end, Mr Macks' caused various ASIC "Property Assist" and Land Titles Office searches to be made.

337 It is necessary to say a little more about those searches. Mr Macks' evidence-in-chief was that he opened a file for the express purposes of monitoring the assets of Ms Hamilton-Smith so as to inform the course he would take in recovery of the debt she owed on the Bernsteen stock agreements. Of particular interest to him were land holdings associated with a property development undertaken by Ms Hamilton-Smith and Mr Viscariello through the corporate vehicle J & L Developments Pty Ltd.

338 The file commences with the document to which I earlier referred. It appears on its face to be a typed memorandum from Mr Macks to Mr Clifton dated 26 May 2002. The subject matter of the memorandum is described as "Mazurka". I reproduce the memorandum below:

A

From: Peter Macks

To: Tim Clifton

Date: 26 May 2002

Subject: Mazurka

Just a few quick thoughts,

THS:

Please arrange for girls, P MC to do up to date LTO search think she owns land in hills.

Note: we need to talk to committee re recovery of debt, she;

Had benefit of stock sales, still has stock

Earn't approx $80,000 last year from employment Mazurka

Not aware of any reason we should not seek to recover – simple debt recovery

I will refer to the memorandum as the covering note.

339 Over time the following documentary material was collected by Mr Macks:

- ASIC searches of the company J & L Developments dated 10 March 2003 and 16 May 2003;

- Property Assist and Land Titles searches of land at Birch Road, Stirling owned by J & L Developments dated May 2003;

- a Property Assist search of land associated with the Birch Road development dated 1 August 2004;

- a site plan for the construction of a home on the Birch Road land;

- a Property Assist search dated September 2003 with respect to a proposed development described as "DCDB Matt:D62143/A19";

- a copy dated September 2003 of a transfer of land at 11 Monks Avenue, Littlehampton from Donald Robert Osborne to Tanya Hamilton-Smith (then known as Osborne) in consideration of an order of the Family Court of Australia made on 21 August 2001. A copy printed on 24 November 2003 of a mortgage dated 11 October 2002 on that home in the name of Tanya Hamilton-Smith.

- a Property Assist historical search with respect to property at CT5897/893, formerly 5336/710;

- a copy of Certificate of Title 5897/894 and a PropertyAssist search dated 5 November 2003 of the same land;

- a copy of a memorandum of transfer of the land described in CT Volume 5874 Folio 276 from Wryxon Pty Ltd to Ms Hamilton-Smith for a consideration of $110,000 and a Property Assist search of the same land dated November 2003;

- a copy of a memorandum of transfer of land dated June 1984 comprised in Certificate of Title Volume 4136 Folio 245 from Chella Pty Ltd and Mary Catherine Kennedy to Mr Viscariello for the sum of $280,000;

- a Property Assist search of CT5292/73 dated August 2003;

- an ASIC search dated November 2003 of the company Sutherton Pty Ltd with which Mr Viscariello had a connection;

- a personal extract relating to John Mr Viscariello dated 28 August 2003;

- a search dated August 2003 of the company Dalport Holdings Pty Ltd of which Tanya Ann Osborne (aka Hamilton-Smith) was a current director;

- a search dated August 2003 of the company KOC Pty Ltd of which Ms Hamilton-Smith was a director;

- an historical personal search dated August 2003 relating to Ms Tanya Hamilton-Smith;

- an historical company extract obtained in November 2003 of the company Hahndorf Gourmet Foods Pty Ltd of which Ms Hamilton-Smith was a director;

- a circular dated 9 March 2000 to the creditors of Hahndorf Gourmet Foods Pty Ltd notifying them of the appointment of John Irving as a liquidator, a summary of affairs of Hahndorf Gourmet Foods dated 2 July 2001 and the final report to creditors and members in the liquidation of Hahndorf Gourmet Foods Pty Ltd dated April 2001;

- an historical extract of Hahndorf Smallgoods Pty Ltd of which Ms Hamilton-Smith was a director dated August 2003 and a report to the creditors of that company after it had been placed into liquidation dated 17 September 2001;

- a Property Assist search relating to Ms Hamilton-Smith made on 5 February 2010;

- a printout of an email dated 16 November 2005 prepared by a partner at PPB, Mr Magers, recording information he had obtained over the phone from a Ms Mandy Forrest, who claimed to be a former friend of Ms Tanya Hamilton-Smith and Mr Viscariello. Ms Forrest claimed *inter alia* that:

    - Ms Hamilton-Smith had $500,000 in a safety deposit box and a bank account in Melbourne;

    - Mr Viscariello receives $10,000 per month in rental payments from a property he owns in Flinders Street;

    - Bedroom Mazurka stock was removed by Ms Hamilton-Smith and her mother from country stores prior to the administrator completing his stocktake;

    - Ms Forrest is owed approximately $130,000 by Ms Hamilton-Smith, Mr Viscariello and the company Cosmetico.

340 Some of the other documentary material collected by Mr Macks requires more detailed description. There is a facsimile letter from solicitors, Mead Robson Steele, to Mr Macks dated 28 June 2004. The letter refers to a telephone conversation with Mr Macks on Friday 25 June concerning Ms Hamilton-Smith.

Mead Robson Steele informs Mr Macks that they are acting "for numerous Companies who have initiated proceedings against [Ms Hamilton-Smith] as a consequence of unpaid debts".

341 Mead Robson Steele also disclosed to Mr Macks information obtained from a client who assisted Ms Hamilton-Smith to obtain finance for the purchase of a Toyota Land Cruiser. The information from their client was that in support of that application for finance, Ms Hamilton-Smith had provided a group certificate for the period ending 30 June 2001 which recorded that for that period she had received gross wages of $87,692 from Bernsteen. Mead Robson Steele asked Mr Macks to confirm that Ms Hamilton-Smith had in fact been paid that sum. A copy of Mead Robson Steele's letter is endorsed with the initials of various members of PPB indicating their receipt of a copy of the letter. Mead Robson Steele annexed to the letter a copy of the group certificate which Ms Hamilton-Smith had provided them.

342 Thereafter, Mead Robson Steele kept Minter Ellison informed of the proceedings which they had brought against Ms Hamilton-Smith on behalf of their clients. In particular an affidavit of a solicitor Ms Monksfield sworn 30 July 2004 was supplied to Minter Ellison early in August 2004. Mr Macks testified that on receiving that information, he wrote another email to Mr Clifton dated 3 August 2004 which I set out below:

To : Tim Clifton

From : P Macks

Date: 3 August 2004

Re: Mazurka

Got around to reading email Natasha re Monksfield (3 Aug 2004)

Attachement makes interesting reading re THS involvement in this land development ?

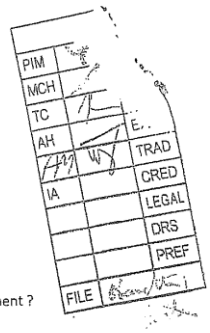
Implications for us:

-minters to continue watching brief – great information

-obvious assets (and could be significant) of THS she may be trying to distance

-commercially may significantly assist us, consider someone attending Court

-must further justify strategy to recover from THS



343 I will refer to it as the Monksfield memorandum.

The ASIC enquiry and the dossier

344 The documents to which I referred were produced in the course of Mr Macks' evidence in a single folder and were received as Exhibit D374. In answer to a leading question, Mr Macks agreed that "within PPB he had kept a file relating to [his] investigations of Ms Hamilton-Smith finances". I will refer

to the file as the Hamilton-Smith dossier. In the course of his evidence-in-chief, Mr Macks referred to the dossier as a watching brief

345 In the course of his evidence concerning the Hamilton-Smith dossier, Mr Macks gave evidence that the dossier was provided to ASIC as part of an enquiry it had conducted into the liquidation of the Companies. When Mr Macks was asked to explain why an email from Ms Flaherty concerning litigation funding for the insolvent trading claim against Mr Viscariello was located in the Hamilton-Smith dossier, Mr Macks responded that the file:

> … was compiled and assembled for the purposes of determining that information that we would have had available at the time to assist in relation to Tanya Hamilton-Smith to continue or not to continue. That's probably why it is on this file because I think now that this file is the assemblage material that people found from various aspects of the file for the purposes of the ASIC review, that's why it is altogether in one file.

346 Mr Macks was taxed about his explanation for the existence of the dossier and his earlier evidence that the dossier was assembled as a watching brief. Mr Macks explained:

> Perhaps I wasn't sufficiently detailed and didn't pick my words correctly but I am only going by what I can recall for things that happened a number of years ago. There was a watching brief. This is provided to the court as evidence of the watching brief.

347 When it was again put to Mr Macks that his evidence that the material was prepared as a watching brief concerning Hamilton-Smith was wrong, Mr Macks answered:

> No. I think – to my impression you are playing a little bit of sophistry of words. I maintained to the court – I thought I explained to the court there are people within PPB where some are responsible to maintain a watching brief. Also, I assume that for someone at Minters that was a task as well. This was information that we had and we were assembling various files from various areas.

348 Mr Macks explained that he also maintained an insolvent trading file which may have been a subset of the other material.

349 Mr Macks confirmed that the documents in exhibit D374 were first put together in a single folder to be provided to ASIC in response to its request for documents to assist in its enquiry. Mr Macks testified that he:

> … participated in the assemblage of information for ASIC but that task was pretty significant. We would have had anything up to about ten people working on the giving of information to ASIC so I did not do it all myself.

350 Mr Macks testified that an officer of PPB flew to Perth with the folder, exhibit D374, and many other folders of documents, requested by ASIC, in a suitcase because ASIC had requested that the files be delivered to its Perth offices.

351 The ASIC enquiry resulted from a complaint made by Mr Viscariello to ASIC. For the purposes of this judgment it is not necessary to say much more about the genesis and history of that investigation.

352 When counsel for Mr Viscariello called for the originals of exhibit D374, Mr Macks' counsel informed the Court that the originals were with ASIC. Mr Macks informed the Court that they were provided to ASIC in 2009 and that the material sent to ASIC comprised 17 files. The documents were eventually produced in response to a subpoena but they too were copies.

353 The focus of the ASIC enquiry was, or at least came to be, the funding arrangement entered into with Ms George, a topic to which I will return to later in these reasons. In particular, a question arose as to whether approval for that arrangement was required pursuant to s 477 of the *Corporations Act*. The enquiry also dealt with a discrepancy in the minutes as to the attendance of a member of the Committee, Mr Routledge, at its 14 November 2005 meeting. Mr Macks contended that the agreement with Ms George had been approved at that meeting. The minutes had recorded Mr Routledge's attendance at the meeting of one of the Companies but not the other. However, the meetings were always conducted concurrently. Mr Macks postulated in his evidence that Mr Routledge might have arrived late and signed in his attendance on the sheet provided for one of the Companies but not on the other. Mr Routledge's attendance at both meetings was subsequently confirmed by the Committee by resolution in a meeting in 2011.

354 It was the practice of PPB that where a document was produced or received by the company, a grid would be stamped on the document and it would be distributed to officers of the company. Offers who saw the document would place their initials in the grid and forward the document to the next officer.

355 In the course of Mr Macks' cross-examination, Mr Viscariello's counsel, Mr Phillips, asked Mr Macks to look one at a time at a number of PPB documents carrying Mr Clifton's initials and to compare them with what purported to be his initials on the covering memorandum. For example, Mr Macks was asked:

> Q It looks nothing like the one on page 1 of exhibit D374 does it?
>
> A Nor to be helpful to your Honour like a number of the other signatures.

Mr Macks was asked to look at another document and was asked:

> Q Upward inflection, no downward inflection, no curl at the beginning.
>
> A Or there is a curl at the beginning and there –
>
> Q No, look at the curl – have a look at p.1 or the first page of exhibit D374, it's quite a pronounced curl isn't it.

A Yeah, but the one on the screen in front of me looks like a faster curl.

When taken to an example on yet another document, Mr Macks answered:

> Looks completely different to the others again, but there is an upward inflection at the end.

356 When taken to yet another example, Mr Macks replied:

> Yes, Mr Phillips, its different again.

357 In the course of the cross-examination, Mr Phillips put the inference which he suggested might be drawn from the differences in the initials as follows:

> Q The inference to be drawn is that Mr Clifton never saw this document, even though it is addressed to him.
>
> A Look, I can understand how you are trying to draw that inference out but it is just not the case. I mean, I have got no knowledge other than my perception here, sitting here years later, that Mr Clifton and other people would have seen that document. I can also comment if you look at my signature, the number of times we change our signatures, it changes incredibly considerably and I don't even recognise Mr Clifton's signature on that document nor on a number of those other documents.

358 Mr Macks was also taken to comparisons of the initials KB which he explained were the initials of Kerry Billings. He agreed that Ms Billings' initials on the covering note were "completely different from the initials on the other PPB document he was taken to".

359 Mr Macks was also questioned about similarities and dissimilarities between the initials KB on the covering note and other documents in the PPB files. At one point Mr Macks said "I'm just making the observation that I am seeing some similarity. I am not trying to see a similarity but I just see some similarity, that's all". Mr Macks was put through the same exercise with the initials PMB, the initials of the PPB officers Paul McCulloch. Mr Macks agreed that the initials on the covering note looked different to Mr McCulloch's initials on other documents.

360 On Monday 17 December 2012, after the production of the material from ASIC, and close to the conclusion of the evidence, Mr Macks was given leave to give evidence-in-chief about the covering note and Monksfield memorandum. Mr Macks gave evidence that he had reconstructed the documents and by his own hand imitated the initials of PPB employees on those documents.

361 Mr Macks explained how the covering note and the Monksfield memorandum were prepared as follows:

> Yes, they are replicas of the original memorandum. What happened was that in the preparation for the material to go to ASIC, I had realised about the night before that the

> material was due to go, that these memos existed. The reason I didn't realise that before is because I had teams of people going through all the documents, and I was working back late myself about midnight, and it suddenly occurred to me that I should inspect and look at my laptop computer. So I pulled my laptop computer, and I found approximately 35 documents and I meticulously went through to make sure that those documents were within the ASIC bundles. These two documents for whatever reason weren't in the ASIC bundles and I spent a lot of time trying to find them in the files, the originals, and I couldn't find them in the files. So having the documents on my computer, I connected my computer to the printer and I tried to print them out and they wouldn't print out. I believe now that they were corrupt, they were old image files and because of that, I sought about trying to replicate them so I could get them out. What I did is I OCR'd the documents, that's all I could think of doing.
>
> …
>
> Optical Character Recognition, so if you can't print it out I tried to - anyway I OCR'd the documents which meant that then I could cut and paste the text and put it into a new word document which I did. If you do that, there is a paste option that you use, and instead of just pasting it I passed them so that it accepted the format of the word system that was in my laptop. I did that really because it was my laptop and it was there, and in so doing what it actually does, it converts it to the text that's in the template and in the template was Calligra which was a new font, it wasn't the old original font. So then I just – I printed it out and I could not extract the image of the signatures, and the reason is because one you OCR, you just lose the quality of it, it doesn't OCR. So in the memo of 22 May I then handwrote the initials on for each of the people including myself, and I then put the original in - if I just look at this document. I put the original in a bundle of documents to be assembled and go to Perth the next morning for the administration staff. I put a tag on it which said 'Copy for ASIC' and there was a line under that which was something like - and I don't know what the exact words are 'Duplicate' or whatever. It was with a bundle of other documents because the staff were coming in the next day to collate the material, to copy it to go into the various sections, because some of these documents are put in more than one section to the ASIC file. Then as far as I knew, it basically went off to ASIC with that designation tag on it, because I left work about five in the morning and didn't get to work until probably 12 - 1 o'clock and all the documents were bundled up in a suitcase ready to be personally delivered to ASIC the next day. That's it in a nutshell.

362 Mr Macks was then asked how he had reproduced the grid appearing on the 3 August 2004 memorandum. He answered:

> To be truthful your Honour I am trying to search my memory in relation to that. My understanding is that when I could not access the image because it was OCR'd, I can remember opening and closing the computer so many times to see if there was a problem, to see what I could do to image it and either two things happened. I successfully managed to image the grid stamp and just cut and paste onto the document that was there, or alternatively I just affixed the grid stamp and handwrote the signatures on it. I truly don't know, I think looking at the quality of everything, is that it was a cut and paste from the original document because I managed to fix the image up, or I managed sorry, to extract that image.

363 The significance of that answer is that the OCR technology does not recognise anything other than the letters, it would not have produced the lines of the grid in which the partners' initials appear in the memo of 3 August 2004. On Mr Macks' account, the process of replicating the document stored electronically

on his laptop was a long, complex and tedious task. Mr Macks testified that it took him about half an hour to go through the process of reconstructing the document.

364 Mr Macks said that having produced the documents, he put them on the pile of documents which were to be finally collated by his staff before delivery to the Perth offices of ASIC.

365 Mr Macks testified that the particular laptop from which he produced the covering note and the Monksfield memorandum was sold in July 2011 when the firm PPB was dissolved. Mr Macks was unable to say whether the information stored electronically on office laptops was backed up on any other office computer system.

366 Mr Macks was asked:

> Q Did it occur to you to just write a note that there were these covering letters and to explain to ASIC later.
>
> A Yes, what I thought to do was that I was going to merely cross out the dam signatures and put crossings in it but I thought that wasn't, that wasn't an adequate explanation. I thought about writing as note to ASIC. We were under a lot of pressure because we had already got an extension from ASIC, I tried to get further extensions from ASIC, I couldn't get any extensions and I knew everything had to be done by the time the documents were picked up and collated that morning so I knew of no way I could do that.

367 Mr Macks testified that there was no-one else in the office when he produced the documents. The very time constraints and pressure to which Mr Macks referred gives me cause to doubt his evidence that he took the time to undertake the elaborate process of replication which he described.

368 Mr Macks said that he put a post-it note on the covering note after he had finally produced it to explain that it was a reconstruction. Mr Macks gave evidence that he did so because he wanted to make it clear to ASIC that it was a replica. Mr Macks gave evidence that the post-it note read "copy for ASIC" and then below that were the words "duplicate only". Mr Macks speculated that the post-it note was removed when the documents were copied. Mr Macks explained, however, that the note "copy for ASIC" was not meant to be an instruction to staff to make a photocopy of the document but was meant instead to indicate that the document was to be sent to ASIC.

369 Mr Macks was asked:

> Q Did you expect your staff to leave on the document a post-it note which said in part "copy for ASIC".
>
> A Yes, I did. I did.

I reject that answer. It is completely implausible.

370 Mr Macks explained that he still thought there was some point in handwriting the initials himself despite the note on the post-it that the document was a replica because, by going to the trouble to handwrite the initials he was making a truer replica of the image on his computer.

371 Mr Macks was asked why he tried to make the signatures on the covering note look genuine. He replied:

> It was just my intention, as I said, to replicate what I put on the screen. The fact is that they were signed. I honestly thought of putting a dash through the signatures and I thought was inappropriate and then I thought "well, I will just sign it", because that is the replica of what I was seeing on the screen or on the document.

372 Mr Macks was then cross-examined about this evidence-in-chief concerning the covering note as follows:

> Q You will recall that probably for about 40 minutes I took you through various examples of Mr Clifton's initials.
>
> A Yep.
>
> Q Probably 30 such examples. I haven't counted them. On 30 occasions you had the chance to tell the court that this wasn't a true document, didn't you.
>
> A Your Honour, and at that time I was – I was troubled, I was uncertain and I didn't really understand that this is the document that I was having reference to that particular night and that is why, after that, I spoke to a couple of mentors and they said "Are you sure" etc, etc and I said "No, I'm not sure in relation to it", and they said "If you have got a firm recollection of something then be honest in relation to it" and I said "I do not have a recollection in relation to it, I was just concerned in relation to the document".
>
> Q I showed you 30, at least, different examples of signatures that looking nothing like Mr Clifton's signature or note or initials. Do you really want to leave the court with that answer. Do you really want to leave this now with that answer.
>
> A Yes, I do, your Honour, because of after that – can I go on?
>
> HIS HONOUR
>
> Q Mr Macks, as I understood the answer you gave a moment ago, it was that when you were taken through the documents with the different signatures you were uncomfortable but you didn't know – that might not be right. Let me put it more plainly. You didn't know which document it was that you had produced that night.
>
> A Correct.
>
> Q My question is still a little ambiguous, I think. As you had been asked about the signatures, did it come to mind that you actually had produced replicas on the night before the material went to ASIC.
>
> A. No, your Honour, it did not.

Q. So when Mr Phillips took you through the documents with the different signatures, the memory of having produced the replicas did not come to mind.

A. No, your Honour, and I went back to the back of the court and I was looking at some other signatures and I looked at the signatures, and to be perfectly frank and honest, I thought that it looked like Tim's signature.

Q. That might be and let's be clear, I am not asking you whether or not, whilst Mr Phillips was taking you through the signatures, you recalled the two memos in D374 were the replicas. I am just asking you whether any thought came into your head about the fact that you had produced a replica in which you had imitated Mr Clifton's signature.

A. No, your Honour –

Q. That never occurred to you.

A. It truly didn't, your Honour.

XXN

Q. There were I don't know how many times in August and again in November where I repeated the call for these originals. Was not then the opportunity to tell your counsel 'Please tell the court these are not true'.

A. My view, your Honour, was that originals would be produced, ASIC would produce the originals with the note on it. That was my view when I subsequently thought about it then in August.

HIS HONOUR

Q. Tell me about that. How did that happen.

A. Sorry?

Q. When did the memory first come back.

A. In relation to this, I think it was really within the last couple of weeks when I was talking to counsel. I can't remember the date but it was in the last couple of weeks. It wasn't in August, it was in the last couple of weeks when I was talking to counsel in relation to these documents.

Q. What happened in August. Nothing, or did something else happen in August.

A. The only thing that happened in August, because Mr Phillips was asking me again and again about these documents, again I spoke to a couple of my mentors, as you do, and one of my mentors said 'Well, if you are troubled about it why don't you get the documents tested'.

Q. What was it that you had recalled, that's what I'm trying to get at. What was it that came to mind. Mr Phillips is going to ask you about what you said to the mentors but what was the memory or thought that came to mind that caused you to go to him.

A. Nothing. I had a couple of people. It was merely the fact that Mr Phillips was asking questions in relation to the memos and I have a couple of mentors during this whole case that I discuss, you know, what's occurring and - what is occurring in my mind and what's occurring. That was it.

XXN

Q. This is the evidence you just gave in the exchange to his Honour. It is words to the effect 'I thought ASIC would turn up with the originals'. ASIC answered the subpoena at the registry on 24 August 2012. This court finished sitting in your matter, with you still in cross-examination, on 30 August 2012. So you well knew before the long break in this case that ASIC had not produced any originals.

A. No, when I made those comments earlier I wasn't referring to a particular timeframe. All I was referring to was the fact that you had asked for the originals and I thought that ASIC would turn up with the originals.

Q. But they turned up with copies. Everything else – and we still have the subpoenaed documents in court – were the originals. Every other document in that file bar one or two were original documents, not copies. Not replicas. So, you would have known at that time that ASIC had not come good with the originals of these documents.

A. No, I had no idea which documents ASIC had produced originals for and which copies - which documents they had produced copies for. It was just my understanding and I was only hearing things that were here, that you had asked for and that they had produced.

HIS HONOUR

Q. I think what you did say possibly in answer to me was that you thought that the document would come back from ASIC with the Post-it note on it.

A. Yes.

Q. You did say that.

A. I did say that.

Q. And if Mr Phillips is right and they returned documents at the end of August, it must mean that you were thinking about a document with a Post-it note on it sometime before 30 August or at least before anyone told you that ASIC had answered the subpoena.

A. No, I don't - sorry, I don't see that.

Q. What I am getting at is this. If you said to me you thought ASIC were going to produce a document with a Post-it note on it, it means that you were having that thought at some time before you knew that ASIC had actually produced the documents.

A. No, your Honour, that was only recent discussion that I was having that thought. I certainly didn't have that thought before. It was only in recent discussion.

Q. I suppose what I haven't asked you is: when did you first learn that ASIC had produced documents in answer to a subpoena.

A. I'm not quite sure but I thought it was after the completion of the August time.

Q. Can you say how long after.

A. No. Probably I went away and I switched off. Maybe two or three weeks.

373 In the course of his evidence, Mr Macks produced PPB documents which did not bear a stamped grid for the signatures of persons who had sighted it. They were received as exhibit D455. It is noteworthy that in none of those documents were the signatures appended in a grid pattern whereas the covering note is set out in that way.

374 Mr Macks was asked why he did not give evidence of the electronic reconstruction of the documents when he was asked about them in evidence-in-chief and during cross-examination in August 2012. He replied:

A I didn't think there was anything wrong with the memos at that time, I just had no recollection of it. I was a little bit troubled by the questioning in relation to it and because of that I sought some counsel from a couple of mentors that I have, and they said 'Have you got any actual recollection in relation to it?' and I didn't have. So I spoke to them on a number of occasions and I didn't have a positive actual recollection. But I had some recollection that there was some document that was sent to ASIC, I just didn't tag with these documents.

375 Mr Macks disclosed that he had spoken to "mentors" in relation to the August hearing, both during and after the August hearing. Mr Macks swore that when he gave the answers in August he believed them to be true.

376 In answer to my question about the storage of documents on individual laptops and in the office systems at the time, Mr Macks responded:

A Yes, okay. During this whole time, 2002-2004, I travelled extensively. I would be away for one or two days most weeks, and because of that I used a laptop. And I also took the opportunity, because I had some free time, to accumulate documents which I could read and digest and study and understand when I had some free time. So, on my laptop would be - for example there were two things on my laptop in particular that are relevant to that - is the - I've forgotten what it's called now, the - basically these documents, the watching brief. And also in another area there was the Monkhouse material. And as I was travelling away -

Q The what material, sorry.

A The Monkhouse material, you know, we've heard about it. And as I was travelling away what I would do is I would scan documents to take with me - so, when I was away I could actually read them, so they'd somehow relate to that material. The reality is that in those days I had a handheld scanner, it was called a PaperPort, it was quite an inferior scanner - and I used to scan the material to upload into a directory so I could read it all when I was travelling away. Has that answered your Honour's questions or have I forgotten?

Q I take it from that, that it was ad hoc - the scanning of documents and storing them electronically was ad hoc.

A Yes, it was ad hoc, yes.

Q And it wasn't done methodically and kept on any sort of data storage - electronic data storage device -

A No.

Q - other than if you or others did so for the purposes of putting them on their personal computer to take with them on their travels.

A Correct, it wasn't sophisticated in those days, and also because I live out of city and we don't have an Internet connection that's reliable, I use things at home. But this is long before iCloud and all that type of technology that we now use. It was quite primitive really.

Q And what was this document when it was first generated and before the stamp was put on it.

A I think it was a Word document because I think it was generated by me when I was doing one of my travels, really - as a Word document.

Q Not as an email, but a separate Word document.

A Yes, as a separate Word document, which was printed out, delivered to the office when I returned, and then it would go through our systems - and then as I was subsequently going away, for whatever reason, I picked up this and a whole lot of other documents, scanned them in - so I could consider them while I was away.

Q And when you looked at the files or the documents that had been prepared to send to ASIC, other than those two documents, did you notice any other documents that you knew existed that weren't amongst the documents being sent to ASIC that you thought should have been.

A I noticed other documents which weren't in our files, but which weren't relevant to ASIC. ASIC had certain categories. As I said, I identified about 35 documents which I meticulously checked off, and of those 35 there was only these two - but there were other documents on the computer which I did two things - I made sure they weren't relevant for ASIC, but I did go and have a look for a couple and they weren't there, for whatever reason, and I just didn't think any more about that.

377 It seems improbable to me that Mr Macks would scan a memorandum of a purely administrative kind generated by him for the purposes of considering it in his interstate absences. That is particularly so given the rudimentary handheld scanner which the office was using at the time. Indeed, it is inconsistent with the very nature of the "watching brief", which was to collect information for later use should it come to pass that there was a judgment to enforce against Ms Hamilton-Smith, to carry the covering note, or indeed any of the dossier, with him. The possibility of enforcement always remained a distant future hope.

378 Mr Macks was asked about the source of the information on the covering note that Ms Hamilton-Smith was paid an annual salary of $80,000. That amount, of course, is much greater than the remuneration shown on the employment agreement which Mr Macks had sighted. However, significantly, it approximates the allegation made in the material received from Mead Robson Steele, but that information was received years after the covering note was purportedly made. Mr Macks said that he may have obtained that information from a former employee of Bedroom Mazurka whom he knew through a school to which they both sent their children. That person was not called. Earlier in his evidence-in-chief, Mr Macks had attributed the source of the information to Mr McCulloch.

379 Mr Macks also testified that the LTO search referred to in the covering note could not be found but that a disbursement on the Hamilton-Smith file for an LTO search in July had been discovered.

380 Mr Macks' counsel contends that he should be believed that he did not recall at the time that he was being cross-examined about the file notes that the two documents were not originals. Mr Macks' counsel submits that "it is entirely believable given the vast number of boxes of documents spanning 11 years of numerous proceedings". Mr Macks' counsel also submits that it would be "just plain silly" to deliberately fabricate the memoranda given the other volume of material in exhibits D374 and D375. He submits that it was "pointless".

381 Mr Macks' counsel rejects the notion that the inclusion of the figure of $80,000 in the covering note suggests that it was fabricated after the date it bears. Even though no other document has been discovered that records knowledge that Ms Hamilton-Smith earnt $80,000 in 2002, Mr Macks' counsel submits that it is "far more believable and probable that [Mr Macks] was told this information in 2002", whether by an acquaintance who knew Hamilton-Smith (as he claimed in his evidence) or someone else at the company or PPB. Mr Macks' counsel relies on the fact that there were discussions about Ms Hamilton-Smith's employment contract and earnings during early 2002.

382 Mr Viscariello submits that Mr Macks fabricated the covering note and the Monksfield memorandum to, in some unspecified way, protect his position in the ASIC enquiry. Mr Viscariello also submits that Mr Macks deliberately, and knowingly, withheld from the court the true provenance of the covering note and the Monksfield memorandum when he gave his evidence until he thought the better of it after the ASIC file was produced.

383 The allegations are, of course, extremely serious. The innate seriousness of the allegations and the potential consequences of any adverse finding I might make have weighed heavily on me in reaching my conclusion.[87] I have

[87] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

scrutinised and considered the evidence weighing its strengths and weaknesses carefully.[88]

384 The factual issues concerning the covering note and the Monksfield memorandum are by and large collateral credit issues. However, they do bear on, and arise out of, the facts in issue concerning Mr Macks' motivation in pursuing the Bernsteen action to exceptional lengths and in indemnifying Ms George. Both because Mr Macks' credit is critical to the resolution of a number of the issues in this case, and to the question of his motives in pursuing Ms Hamilton-Smith in particular, I find it necessary to deal with the issue.

385 I reject as implausible Mr Macks' evidence that he placed the ambiguous, if not cryptic, post-it note on the documents. Mr Macks acknowledged that the covering note was left with a pile of documents next to a photocopier and that he had instructed his staff to photocopy the documents that were to be sent to ASIC. If there was a post-it note bearing the instruction "copy to ASIC" on the covering note, Mr Macks must have realised that it would be photocopied. The implausibility of Mr Macks' account appears from the following testimony:

> A. No, the instructions were verbal because we were doing it every night. If we needed to copy, collate or do anything to the documents they were put in a certain spot for people that were assisting the compilation for that when they came in as the next shift the next day.
>
> Q. Where was the spot.
>
> A. The spot was near the photocopier. There were tables assembled around the photocopier.
>
> Q. So, what, you just plonked it on any one of the tables.
>
> A. No, there was a specific spot where a pile was put for work to be done on those documents when people came in.
>
> Q. Looking at copies of the ASIC subpoena documents, you photocopied every single document that went to ASIC, didn't you.
>
> A. I didn't. I didn't but other people did, yes.
>
> Q. So if there was a document that had a sticker on it your photocopier would have the image of that sticker on it, would it not. When I say "sticker" I mean Post-it note.
>
> A. No, think that's the point. I think the sticker was removed when the documents were copied. That's what I had said.
>
> Q. It was the fault of a member of staff. Now, surely somebody would tell me what the note on the Post-it sticker said.

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[88] *Australian Competition and Consumer Commission v Construction Forestry Mining and Energy Union* [2008] FCA 678 at [31].

A. On the top of it said "Copy for ASIC" and there was another line below that which said something about "duplicate only" or something, something and I don't remember what that said.

Q. So the person who prepared the index then would have had that note available to them when they entered it in the index.

A. No, not if the document had been copied and put in. Because the index was prepared from the documents that were ready and assembled for ASIC in the folders.

Q. Did you expect your staff to leave on the document a Post-it note which said in part "Copy for ASIC".

A. Yes, I did. I did.

386 If the covering note had been produced when, and for the purpose, Mr Macks claimed, it is implausible that the only copy of it available to Mr Macks was the one in electronic form on his personal laptop. On his account, the purpose of the note was to give a direction to employees to collect and keep track of documents which might assist in the enforcement of any judgment obtained against Ms Hamilton-Smith, yet there was no hard copy of the document in the office files of those persons who were charged with that responsibility. It is difficult to understand why Mr Macks would have scanned an administrative note of that kind into his laptop and more difficult again to understand how the scanned form of the document became the only one he could locate. If the covering note was on his laptop, it is difficult to see why Mr Macks thought it so important enough to go to so much trouble to reconstruct it. I would have thought that if it were to be brought to ASIC's attention at all, a note informing ASIC of its existence in electronic form would suffice. If that were not thought sufficient, the bare print using OCR technology would have satisfied most people. Mr Macks' imitation of the signatures of other PPB officers suggests to me that the document was fabricated and not merely replicated.

387 Mr Macks' testimony that he went to so much trouble to reconstruct the note contains an implicit admission that he perceived that it would, in some way, be helpful in the enquiry being conducted by ASIC. ASIC was investigating a complaint from Mr Viscariello. Mr Macks may have had reason to think that Mr Viscariello's complaint included the extraordinary lengths and expense which Mr Macks had gone to in the protracted pursuit of Ms Hamilton-Smith. It is likely that Mr Macks hoped that the covering note would show that, at all times, he had proper regard to the prospects of recovery as he spent more and more of the Companies' money pursuing Ms Hamilton-Smith. It would have given the impression that the file, in which it was presented as the first document, had been dedicated to that purpose. Indeed, that was the impression Mr Macks sought to give in evidence before me when he was first taken to Exhibit D374. In truth, as Mr Macks eventually conceded the documents in Exhibit D374 were only assembled into a single file, from a number of sources, for the first time in response to the ASIC enquiry.

388 I also doubt Mr Macks' evidence as to the source of the information about Ms Hamilton-Smith's remuneration recorded on the covering note. It is yet another surprising circumstance that the cryptic source of that information gave a remuneration figure which was so close to that alleged years later in the correspondence from Mead Robson Steele.

389 Before finally making my finding on the replication/fabrication issues, it is necessary to consider the second submission because its resolution bears on the first. I reject Mr Macks' evidence that at no point in Mr Phillips' cross-examination did he recall the lengths he had gone to to produce the covering note. I do not believe Mr Macks' convoluted evidence about the way in which the memory of the exacting task of replication of the covering note slowly dawned on him during a break in the trial proceeding, when he had an opportunity to discuss his testimony with his "mentors". ASIC enquiries are not a common occurrence. The production of the memorandum took special effort on Mr Macks' part. It was an unusual task. I find, based on Mr Macks' own evidence about the production of the covering note, and the fact that it had occurred just three years before he gave his evidence, that Mr Macks, if not from the start, certainly before Mr Phillips had finished his lengthy, repetitive and pointed cross-examination, comparing the initials on the covering note with initials on other documents, had recalled that he had copied the initials of the other PPB employees on to the grid on the covering note.

390 Mr Macks' delay in admitting to his fabrication of the covering note adds further support to the inference that it was not replicated for the innocent reasons he eventually gave. If it were always the case that Mr Macks' only concern was to give ASIC a replica as close to the original as it could be, he is more likely to have volunteered that explanation very soon after he had recalled, which as I have just found, was during Mr Phillips' cross-examination, the lengths to which he went to create the covering note.

391 I find that Mr Macks created the covering note with the intention of passing it off as the original document, or a true photocopy of, the original.

The Bernsteen Action – a mire of delay and cost

392 On 25 August 2003 Ms Heidi George obtained judgment against Ms Hamilton-Smith in the Adelaide Magistrates Court. It was this debt which, two years later, became the centre piece of a strategy devised by Mr Macks and his legal advisors to have Ms Hamilton-Smith declared bankrupt and thereby escape the mire in which the Bernsteen proceeding had become stuck. I will return to outline in more detail the litigation involving Ms George but for now it suffices to say that the attempt to outflank Ms Hamilton-Smith became itself bogged down in a similar quagmire.

393 As I previously foreshadowed, on 5 December 2003 Ms Hamilton-Smith's counterclaim against Bernsteen was reinstated in the Adelaide Magistrates Court.

394 On 18 December 2003 Mr Macks sought orders in the Supreme Court dispensing with the requirement to hold an annual meeting of creditors. In support of that application he deposed that the only outstanding matter in the winding up was a proposed insolvent trading action against Mr Viscariello. Mr Macks deposed that he had not yet taken steps to commence that proposed action because of an action taken by ARL against Mr Viscariello which, if successful, was expected to result in Mr Viscariello's bankruptcy. The Bernsteen action, which was to be the primary focus of the liquidation for the next four years, was not mentioned.

395 In December 2003 ARL compromised its claim against Mr Viscariello of $1 million for a payment of $45,000. The compromise of a relatively simple, but large, guarantee claim for an amount which probably did not cover the costs of the action after just one year stands in stark contrast to the course which Bernsteen's litigation with Ms Hamilton-Smith over an amount of $28,000 took thereafter.

396 In January 2004 Ms George made various unsuccessful attempts to enforce her judgment debt against Ms Hamilton-Smith.

397 On 25 March 2004 in the Bernsteen action Mr Hiskey SM ordered that Ms Hamilton-Smith pay Bernsteen 80 per cent of Bernsteen's costs to be taxed on a party/party basis on 90 per cent of the Supreme Court scale in her action against Bernsteen, relating to the striking out and reinstatement of her pleadings. Bernsteen submitted a short form bill of costs pursuant to that order in the sum of approximately $17,500 plus GST. Ms Hamilton-Smith appealed that costs order to a single Judge of the Supreme Court, but that appeal was dismissed, with costs, resulting in a further short form bill of costs in the sum of $14,000.

398 Ms Hamilton-Smith then unsuccessfully sought permission to appeal from the Judge. She renewed her application for permission in the Full Court which also refused it on 26 May 2004. The Full Court observed, in the course of dismissing the application for permission, that "the defendant, or those advising her, are of a litigious disposition arguing every point at every stage of the process". That observation was proven right when Ms Hamilton-Smith brought an ultimately unsuccessful application for special leave to the High Court. The warning bell sounded by the Full Court was not heard.

399 Not surprisingly given that litigation history, on 9 June 2004 Ms Riach, a partner at Minter Ellison, sent an email to Mr Macks questioning the commerciality of the Bernsteen action:

> As discussed with you and Peter, the commerciality of the proceedings has always been concerning. If the security application is decided in our favour, Mr Sallis has advised that he has instructions to appeal.
>
> As you know the counterclaim would have remained for determination even if we elected to opt out of the proceedings. However, the undertaking given in the defendant's

> submission do not pursue the counterclaim if security is ordered and not provided raises for the first time some hope that a discontinuance could be negotiated.
>
> It may be however that you consider it important to pursue the claim to indicate the company's rights, particularly when a broken contract was made through you as a liquidator. This issue could be raised with the committee or the main creditor's privately for their views.

400 On 4 August 2004, Minter Ellison informed Mr Macks that in a hearing of an action in the District Court to which Ms Hamilton-Smith was a party, her counsel had submitted that she had a 50 per cent interest in the company J & L Developments Pty Ltd which held assets of $1 million. Given the subject matter of that hearing, there was little reason to accord that claim much credence.

401 On 27 August 2004 Mr Hiskey SM ordered that Bernsteen provide security for costs and that Ms Hamilton-Smith pay the costs of an unsuccessful interlocutory application she had made. Bernsteen provided security in the amount of $6,000.

402 On 24 December 2004, a letter of demand and Notice of Action (the Notice) was sent to the partners of PPB by McNamara of the law firm McNamara Business & Property Law (McNamaras) on behalf of Mr Viscariello in compliance with r 6A of the Rules of this Court. The Notice was the precursor to these proceedings. The letter claimed that when approached about acting as administrator for Bernsteen and Newmore, Mr Macks represented that:

- he would recommend to the Companies' creditors that the Companies enter into the deed of company arrangement proposed by Mr Viscariello;
- he would apply to the Court to abridge the time for convening the second meeting of creditors so that each of the Companies could execute a Deed of Company Arrangement within about ten days from his appointment;
- there was no need to advertise the assets of the Companies for sale;
- Mr Bart should not pay the debt to the Commonwealth Bank prior to the appointment of the voluntary administrator.

403 The Notice claimed that Mr Viscariello appointed Mr Macks relying on those representations but that on his appointment Mr Macks did not act as he had represented that he would.

404 The Notice also claimed that Mr Macks:

- lacked independence and was not able to adequately and properly discharge his duties as an administrator or as a liquidator;
- failed to perform adequately his duties as an administrator;

- did not give creditors adequate notice of the proposed abridgement of time for the second meeting of creditors;

- failed to adequately investigate, and report to creditors on, the proposed Bart DOCA;

- failed to carry out adequate investigations into affairs of the company and properly inform the creditors;

- failed to discharge his duty in relation to obtaining the best return to the creditors.

405 The Notice formulated Mr Viscariello's losses at $1 million comprising the payments he made pursuant to his guarantees of the Companies' indebtedness to ARL and others, his loss of entitlement to wages and other benefits, and for his loss of reputation.

406 On 18 January 2005 Minter Ellison requested access to ARL's records relating to Bernsteen relying on s 530B of the *Corporations Act*. Minter Ellison warned ARL that it would seek orders under s 596B of the *Corporations Act* if ARL did not comply. That application was filed on 31 January 2005.

407 In January 2005, the trial of the Bernsteen action proceeded over four days in the Magistrates Court. It was then adjourned to 6 June 2005. In a letter to Mr Macks on 8 February 2005 Ms Riach informed Mr Macks of the progress of the trial and again:

- questioned the commerciality of the Bernsteen action;

- informed Mr Macks that Ms Hamilton-Smith's counsel had made an offer which would compromise the proceedings with both parties bearing their own costs;

- recorded that the offer of $20,000 made by Mr Macks to settle in September 2002 was a reasonable one and that Bernsteen should succeed in its claim at least to that extent and would obtain further costs orders;

- advised Mr Macks that Mr Viscariello intended to use the action to support his claims against PPB and that, accordingly, Mr Macks might be able to claim some of the costs of continuing the litigation on his professional indemnity insurance policy on the basis that the information elicited from cross-examination of Mr Viscariello could be useful in the defence of that claim.

- recommended that Mr Macks contact his indemnity insurer.

408 On 28 February 2005, Minter Ellison requested information from ARL's solicitors to prepare insolvency reports on Bernsteen and Newmore for the purpose of considering insolvent trading claims against Mr Viscariello.

409 On 2 March 2005 Mr Macks reported to a meeting of the Committee on the recoveries of preference payments made by the Companies and the proposed insolvent trading action. He informed the Committee that a successful result on the insolvent trading action was the only means by which a return to creditors could be obtained. Mr Macks also reported on other litigation including the Bernsteen action.

410 On 4 March 2005 Mr Macks received a payment on account of his fees in the Newmore liquidation for the last time.

411 By letter dated 1 April 2005, Minter Ellison, on behalf of Mr Macks, responded to the Notice denying the allegations. Minter Ellison asserted that the proposed Bart DOCA could not be accepted because of ARL's refusal to consent to it. The letter also alleged that Mr Viscariello's claim was brought for an ulterior purpose relating to on-going litigation involving Mr Viscariello's father, and to the Bernsteen action. Minter Ellison also alleged that it was an attempt to obstruct the foreshadowed insolvent trading claim against Mr Viscariello.

412 On 5 April 2005 Mr McNamara wrote to Minter Ellison on behalf of Ms Hamilton-Smith offering a compromise of the Bernsteen action in which both parties discontinued their actions, waived existing cost orders and bore their own costs.

413 On 6 April 2005 Minter Ellison responded by offering to compromise the action on payment by Ms Hamilton-Smith of the sum of $20,000 in accordance with Bernsteen's earlier filed offer. The letter acknowledged that "the proceedings are uncommercial to pursue" but continued:

> … our client offered to accept the sum of $20,000 in full and final satisfaction of all outstanding matters.
>
> Your client rejected that offer.
>
> Our clients' instructions are to reinstate his offer of $20,000 in full and final satisfaction of all outstanding matters for a period of 14 days from today to allow your client further time to consider the offer and consult your costs counsel.
>
> We are also instructed that our client is prepared to agree to a commercial settlement of either of the substantive action and costs claims independently.
>
> In respect of the costs orders in its favour of Mr Hiskey dated 25 March 2005, and Anderson J, our client is prepared to accept the sum of $20,000 in full and final satisfaction of the amounts claimed in the Bills of Costs. If your client is agreeable, she may accept this offer and still proceed with the trial.

> Our clients' offer is based upon an offer of $9,000 in respect of the Supreme Court Bill of Costs and $11,000 in respect of the Magistrates Court Bill of Costs. Our instructions are to put these offers to you separately that is we confirm that the offer of $9,000 in respect of the Supreme Court Bill, and the offer of $11,000 in respect of the Magistrates Court Bill, are capable of being accepted independently.
>
> …
>
> In respect of the substantive action, our client is prepared to agree to the parties each discontinuing the claim and the counterclaim on the basis that they bear their own costs. If your client is agreeable, she may accept this offer and still proceed for the taxation of the Bills of Costs.

414 Ms Hamilton-Smith did not accept that offer.

415 On 8 April 2005 the trial date of 6 June 2005 for the resumption of the trial of the Bernsteen action was vacated and the trial was listed for 10 October 2005. On 12 August 2005 that trial date was again vacated and the trial relisted for January 2006.

416 On 12 April 2005 Bernsteen served a bankruptcy notice on Ms Hamilton-Smith on the basis of the unpaid interim allocators. The time allowed for compliance with the notice was 3 May 2005.

417 Ms Hamilton-Smith applied to set aside the Bernsteen bankruptcy notice on 4 May 2005.

418 On 27 May Mr McNamara, acting for Ms Hamilton-Smith, wrote to Minter Ellison referring to a conversation between Ms Hamilton-Smith's and Bernsteen's counsel on the occasion of the dismissal by the Full Court of Ms Hamilton-Smith's application for permission to appeal the costs order in the Magistrates Court in the Bernsteen action. In that conversation counsel had canvassed the possibility of settlement. Mr McNamara offered to settle the Bernsteen action on the basis that Ms Hamilton-Smith pay the sum of $10,000 in instalments with the first instalment of $2,000 being paid on execution of a deed of settlement and $1,000 paid monthly thereafter. The letter warned that if settlement was not reached a notice of appeal would be filed in the High Court against the costs orders and that the bankruptcy action would be defended on various grounds. The letter also warned that if Ms Hamilton-Smith failed on the substantive hearing in the Magistrates Court, she intended to appeal that judgment. That letter, together with the extraordinary course which the Bernsteen action had already taken, could have left no doubt in the mind of Mr Macks and his solicitors that the prosecution of the Bernsteen action would be expensive and protracted.

419 Nonetheless, on 31 May 2005 Minter Ellison informed McNamara's that Bernsteen rejected Ms Hamilton-Smith's offer and that it "is not interested in any settlement discussions which involve payments by your client in instalments". The letter referred to the fact that Bernsteen had incurred a further $5,000 costs

on the Full Court application and accordingly offered to accept the sum of $25,000 in full and final settlement of all outstanding issues.

420 On 6 June 2005 McNamara replied to Minter Ellison's letter informing them that Ms Hamilton-Smith was not able to make the payment in one lump sum and resubmitted her previous offer.

421 On 27 June 2005 Mr McNamara reput the offer to compromise for $10,000 on behalf of Ms Hamilton-Smith but on this occasion offered payment within three months.

422 As at 1 June 2005 $104,964.00 in legal fees had been incurred by Mr Macks in the Bernsteen action even after significant discounting by Minter Ellison and counsel of their charges.

423 I am unable to say why the matter did not settle given the apparent interest in compromise shown by the exchange of correspondence in the first half of 2005. The parties were not far apart and the proceedings were plainly uncommercial in the sense that the costs of proceedings were bound to be massively disproportionate to the difference between the offers. I conclude that both parties still saw some collateral benefits in maintaining the litigation, despite that disproportion, which held them back from further compromising their respective positions.

The Heidi George strategy

424 On 7 June 2005 Minter Ellison wrote to Ms George informing her that they acted for a creditor pursuing a debt against Ms Hamilton-Smith. The letter sought Ms George's cooperation in the provision of information that might assist Minter Ellison with the bankruptcy petition.

425 Ms Riach gave the following evidence of how Minter Ellison identified Ms George as a person to whom Ms Hamilton-Smith was indebted:

> A Tyneil [Flaherty] was aware that our commercial litigation team had litigation against Hamilton-Smith and she had a number of court actions on foot and she did a search of the court register to see what litigation Hamilton-Smith was involved in because we were concerned about costs orders that had been made in Peter's favour and had not been paid by her, so she wanted to ascertain what other action she was involved in and she ascertained that Ms George had an outstanding judgment debt in her favour that had been the subject of an unsuccessful appeal and Tyneil then wrote to Ms George advising her that we were pursuing or instructed to pursue a bankruptcy action and could she contact us with some further information.

426 The letter to which Ms Riach referred was dated 7 June 2005 and read as follows:

> We act for a creditor pursuing a debt against Ms Tanya Hamilton-Smith.

> Our client is attempting to bankrupt Ms Hamilton-Smith and we understand that you have a judgment entered in your favour against her. Accordingly we would be grateful for any information that you could provide us to assist with our client's bankruptcy petition.
>
> Please contact the writer on …. as soon as possible to discuss.

427 Ms Riach explained that the purpose of the letter was to ascertain whether Ms George intended to bankrupt Ms Hamilton-Smith. At that time the Bernsteen bankruptcy notice had been challenged by Ms Hamilton-Smith and was soon thereafter set aside in August 2005. Ms Riach explained how she thought Ms George might assist in the successful resolution of the Bernsteen action as follows:

> Q I am still not sure what the importance was of identifying other judgment creditors.
>
> A That Ms Hamilton-Smith was in fact insolvent but was continuing to pursue litigation and wouldn't then be able to pay the original claim of Bernsteen.
>
> Q And how would discovering other judgment creditors help you with that.
>
> A That they may be taking their own bankruptcy action, and that we could then support or they could be substituted to our action if there was a problem with our notice.
>
> …
>
> A Well it's the usual practice that when you file a creditor's petition that other creditors often support the petition to give it added weight.
>
> Q So Ms Flaherty was looking through to try and find another judgment creditor who might be prepared to come along and support the bankruptcy petition of Bernsteen.
>
> A Either support or be taking their own bankruptcy action.
>
> Q Is that something that is done every time Minters takes bankruptcy proceedings, they look around for supporting creditors; is it often, is it sometimes
>
> A On occasion but it's not the usual course.

428 Ms Riach was asked whether she had reached a view about Ms Hamilton-Smith's capacity to pay her debts at about the time Ms George was contacted. Ms Riach answered:

> A We had reached a view at that point that we had serious concerns as to whether she could repay her debts and I am not sure on the timing but I know that the representation had been made by Mr Viscariello at some point that she didn't have the capacity to pay.

429 On 14 June 2005 a solicitor at Minter Ellison spoke with Mr Macks by telephone. Mr Macks was told that Minter Ellison had contacted Ms George who was a judgment debtor in the sum of $5,000 which had not been satisfied. The solicitor proposed that Mr Macks indemnify Ms George for the costs and

disbursements of bringing a bankruptcy petition against Ms Hamilton-Smith. It was suggested that the indemnity be for an amount of $2,000. Mr Macks was advised that it was in both his own and Minter Ellison's interests, in terms of time and costs, to enter into an arrangement with Ms George in the hope of avoiding a trial in the Bernsteen action. Mr Macks agreed saying that it was an "excellent suggestion". He told Minter Ellison that he was happy to pay $1,000 towards that strategy. That arrangement, by which Mr Macks indemnified Minter Ellison, stood in contrast with the arrangement as to the litigation arising out of the liquidation. In the other litigation Mr Macks and Minter Ellison had agreed to distribute equally between themselves such of the proceeds of the actions which were available to pay their fees. Moreover, the proceeds of any one action was to be available to pay the fees charged on other litigation. It is for that reason that Minter Ellison observed that the indemnity also served its interests. In short, Minter Ellison did not expect that the Bernsteen action would produce any useful return.

430 Ms Riach was asked why a different funding arrangement, one in which Mr Macks was made liable to pay the fees irrespective of any recovery, was agreed with respect to the George proceedings. Ms Riach answered:

> A I am not sure why, I don't have a specific recollection as to why that was separated out. But, effectively, we were being asked to undertake further work and my understanding, although my specific recollection is that Ray would have required that if Peter was indemnifying ie for a columnist we would be able to charge for that work.

431 Ms Riach testified that in the conduct of the George matter, she was assisted by Tyneil Flaherty, who was a junior solicitor in the firm. Ms Riach gave evidence that either she or Ms Flaherty drew the retainer letter dated 28 June 2005 which was sent to Ms George. Ms Riach confirmed that she had spoken separately to both Ms George and Mr Macks and had obtained their agreement to the arrangement before the letter was sent.

432 I accept the account of Ms Riach as to how Ms George was identified as a creditor and as to the reasons for approaching her.

433 On 24 June 2005 a bankruptcy notice with respect to the debt owed to Ms Heidi George was issued against Ms Hamilton-Smith.

434 On 28 June 2005 Minter Ellison wrote to Ms George setting out the terms and conditions of their retainer. The scope of the retainer was said to be "to enforce Mt Barker Magistrates Court judgment … against Ms Hamilton-Smith and in particular to prepare and attend to Federal Magistrates Court proceedings to enable a sequestration order to be made against Ms Tanya Hamilton-Smith". Ms George was told that legal fees were estimated to be in the order of $2,000. Under paragraph 5 which was headed "indemnity for legal fees", the letter stated:

> We confirm that Mr Peter Macks of PPB will fund the bankruptcy proceedings to the value of $2,000. As previously discussed, should funds become available in the bankrupt estate of Ms Tanya Hamilton-Smith, or should your debt be paid by Ms Tanya Hamilton-Smith, Mr Peter Mr Macks will be repaid the funds made available for your legal costs in the matter to the value of $1,000.

435 Ms George countersigned the letter on 4 July 2005.

436 Mr Macks was advised of the terms of Minter Ellison's retainer by Ms George by letter dated 1 July 2005. Minter Ellison advised Mr Macks in that same letter to reject Ms Hamilton-Smith's offer of 27 June 2005 to compromise the Bernsteen action for an amount of $10,000 payable over a period of three months.

437 On 1 July 2005 Ms Hamilton-Smith was served with the Heidi George bankruptcy notice.

438 When Ms George was asked in cross-examination by Mr Macks' counsel whether she instructed Minter Ellison to issue the bankruptcy proceedings she replied that she had. Ms George was then asked whether that was a specific instruction or just part of the general instruction to do whatever was necessary. Ms George answered:

> I can't recall the conversation to be specific enough to say that I gave specific instructions for that.

439 Ms Riach gave evidence that there was no agreement as to the payment of Ms George's fees other than that recorded in paragraph 5 of that letter. Ms Riach confirmed that the letter from Ms Flaherty to Mr Macks accurately records the agreement made at that time. Ms Riach testified that there were ongoing discussions about the costs of the matter but no other written agreement was drawn. Ms George also testified that the only written arrangement she entered into was the one contained in the letter of 28 June 2005.

440 On 21 July 2005 Ms Hamilton-Smith filed an application to set aside the Heidi George bankruptcy notice on the grounds that there was no proper basis to issue the Bankruptcy Notice and that the judgment on which the Bankruptcy Notice had been founded had been satisfied in full. Importantly, the application also included a ground that the Bankruptcy Notice was an abuse of process, vexatious and given for an ulterior purpose. Ms Hamilton-Smith asserted in an affidavit filed in support of her application that the judgment debt had been satisfied by an arrangement made in September 2003 whereby Ms George received manchester to the value of $6,000. Ms Hamilton-Smith also asserted that she had strong reason to believe that Ms George's legal costs and expenses were being paid by Mr Macks. She deposed:

> I remain extremely concerned about the adverse findings made by the Courts against Mr Macks in the substantial actions referred to in Mr McNamara's affidavit and about the similar type of tactics being employed by Mr Macks behind the scene in relation to the

> respondent's bankruptcy notice for the benefit of the respondent, Bernsteen Pty Ltd (In Liquidation) in action number ADG 94 of 2005".

441 Ms Riach testified that when the George bankruptcy notice was challenged, she spoke to Mr Macks and Ms George about the continuation of the proceedings. Ms George instructed her to continue the bankruptcy proceedings if Mr Macks was prepared to fund it. Mr Macks advised Minter Ellison that he was.

442 Ms George gave evidence that she came to understand as a result of conversations with her solicitors, of which she had no detailed recollection, that the indemnity had been extended beyond the initial offer of $2,000. She testified that those conversations may have been in connection with an account that was sent to her address for legal fees by mistake. The amount of the bill surprised Ms George even though she could not remember the exact amount. I infer from her surprise that the bill was in excess of $2,000.

443 Although Mr Macks' obligation to fund the proceeding then became open-ended, Ms Riach was not clear about the terms on which the arrangement was extended and in particular as to the contribution Ms George might have to make.

444 Ms Riach testified:

> A I think the position was that she was only obliged to repay $1,000 and my hesitation is to do with when there was the eventual settlement and Heidi wished to repay more than that because of how much Peter had required. No, that's right –
>
> …
>
> We only agreed that both parties wished to continue and we didn't alter the terms other than obviously the amount would increase.

445 The failure to fix on other terms when Mr Macks agreed to continue to pay Ms George's costs beyond the $2,000 limit was problematic. In particular, it left uncertain the circumstances, if any, in which Mr Macks could stop funding the proceedings and the extent to which Ms George would be covered for any costs orders made against her as the proceedings became protracted. On its face there was an agreement to continue to indemnify Ms George for as long as she wished to continue. It certainly was not terminable at will. That would have left Ms George in an impossible position. At the very least, Mr Macks would be required to give reasonable notice of an intention to withdraw his indemnity.

446 Mr Macks testified that he did not believe that he was or would be liable for any adverse costs orders made in the George matter. He explained:

> It wasn't something that was raised. It was not something that was raised in the initial discussion and I would have thought if that would have been you know an issue, it's something that would have been raised quite comprehensively, but it wasn't.

However, Mr Macks went on to say that he would have felt himself morally bound to pay any such costs order.

447 Ms Riach testified that the degree to which Mr Macks and Ms George were kept informed of the proceedings varied. Mr Macks was kept more informed because he was an experienced litigator and Ms George less informed because she was a lay person. Ms Riach accepted that the degree to which a solicitor should keep a client informed was governed both by the client's request and the solicitor's assessment of what was necessary to obtain properly informed instructions. Ms Riach testified that it was Ms Flaherty who made the day to day decisions on the nature and extent of the reports given to Mr Macks and Ms George.

448 Ms Riach testified that the accounts were not sent to Ms George and that there was no mechanism in place to keep her informed of the level of costs that were being expended. Ms Riach testified that Ms George was never informed of the costs of the proceedings in her presence. Ms Riach also gave evidence that Minter Ellison's position was that the documents informing Mr Macks about the progress of the proceedings were not documents over which Ms George had any power or control. Those procedures and arrangements left Ms George unaware of the accounts for which she remained primarily responsible. She was never in a position to assess the level of risk in that exposure nor was she able to make an assessment of her potential liability for costs if her proceedings were to fail.

449 Ms George testified that she believed she was giving instructions and that Mr Macks was not giving instructions because:

> My understanding and my regular communication with my solicitor at Minter Ellison was that she always sought my instructions. I don't have any, any reason to think otherwise.

450 Of course Ms George's perception of the degree to which her instructions controlled the proceedings depended on the extent of the information she was given about them and about the nature and extent of Mr Macks' instructions. She was told very little of that. Ms George testified that she had many "face to face conferences" with solicitors at Minter Ellison but she explained that those conferences mainly concerned giving instructions for, and the swearing of, affidavits and conferences to prepare her to give evidence.

451 When Ms George was asked what instructions she gave about the filing of the creditor's petition, she answered:

> My instructions were always in regards to regaining the debt owed to me and to take necessary steps to do that.

452 Ms George testified that she understood that Mr Macks was funding her creditor's petition because they shared a "common interest".

453 Ms George was asked:

> Q I will just ask you about your state of mind. If you carried on with the bankruptcy proceedings and you didn't accept her cheque, what were you hoping to achieve in terms of your relations with Hamilton-Smith.
>
> A I was hoping to have the debt paid and to cease all further action against me.

454 I accept Ms George's evidence as far as it goes. I accept that Ms George did give instructions to prosecute the bankruptcy proceedings against Ms Hamilton-Smith. She was undoubtedly aggrieved by Ms Hamilton-Smith's failure to pay her debt. I have not heard from Ms Hamilton-Smith but on the evidence before me I am satisfied that she had not paid the debt in cash or by goods in kind. However, I find that Ms George did not give instructions, or at least that she was not provided with the advice necessary to give informed instructions, on the disclosure of the funding arrangements with Mr Macks. In order to properly give instructions on the prosecution of the bankruptcy proceeding, it was necessary that Ms George be in a position to give instructions on the question of discovery.

455 The first return date on the George bankruptcy proceedings was 1 August 2005. The matter was adjourned to enable Ms Hamilton-Smith to put further affidavit before the Court. Ms Hamilton-Smith filed a further affidavit on 11 August 2005.

456 On 16 August 2005 Ms George filed a responding affidavit in the Federal Magistrates Court. Ms George denied that the debt had been satisfied by the provision of manchester.

457 Ms Riach swore an affidavit in response to Ms Hamilton-Smith's application to set aside the Heidi George bankruptcy notice in which she deposed as follows:

> 2.3 That Judgment has not been set aside, nor stayed, nor are proceedings on foot to set aside the Judgment;
>
> 2.4 The Judgment has not been satisfied in full, or at all – the Respondent in her supporting affidavit sworn 29 June 2005 confirms that the Judgment Debt remains outstanding and disputes that she received goods from the Applicant in satisfaction of the debt. Indeed, the Respondent has taken steps to enforce the Judgment subsequent to September 2003 when the Applicant alleges to have satisfied the debt;
>
> 2.5 That being the case, there is no basis to suggest that the Bankruptcy Notice is an abuse of process – the other litigation relied upon by the Applicant in her affidavit and the events which have occurred in that litigation have no relevance to the Respondent, nor to the issue of the subject Bankruptcy Notice by the Respondent;
>
> 2.6 The Bankruptcy Notice was issued in accordance with the Act for the purpose of enforcing the Judgment Debt owed by the Applicant to the Respondent;

3 The Application and supporting affidavit filed by the Applicant does not disclose, or does not provide any supporting documentation to evidence any basis to invalidate or set aside the Bankruptcy Notice.

4 The Application should therefore be dismissed immediately with costs.

458 Ms Riach was questioned about paragraph [2.5] of her affidavit and her statement that the other litigation mentioned by Ms Hamilton-Smith had "no relevance to the Respondent, nor to the issue of the subject Bankruptcy Notice by the Respondent". Ms Riach responded:

A I think I am referring to the litigation that Macks was involved in, not concerning Bernsteen but the other litigation that was referred to in Ms Hamilton-Smith's affidavit.

Q So, you are not responding to the allegation that Mr Macks stands behind Ms George in a funding arrangement.

A I think I am referring to the other litigation she cited.

HIS HONOUR

Q Which litigation was that?

MR ABBOTT: ADG 94 of 05 was the application to set aside the Bernsteen bankruptcy notice.

MR PHILLIPS: I thank my learned friend.

XN

Q In relation to that given that the other litigation referred to in the affidavit as we read before the affidavit of Ms Hamilton-Smith was to the Bernsteen bankruptcy notice –

A Sorry I have to look at Ms Hamilton-Smith's affidavit again.

Q Yes, that was –

HIS HONOUR:

XN

Q And 12 through 15 of the relevant paragraphs.

A I would have to see Mr McNamara's affidavit but my recollection is that there may have been reference to other litigation which Mr Macks had been involved in outside of Bernsteen.

Q McNamara's affidavit.

A It says there "adverse findings made by the court against Mr Macks in substantial actions referred to in McNamara's affidavit". From memory there was an affidavit

> from McNamara that referred to adverse findings against Mr Macks in unrelated litigation.

459 When Ms Riach was recalled to give evidence she testified that the litigation which she had in mind when denying in her affidavit any connection between the Heidi George bankruptcy notice and Mr Macks, was litigation in the liquidation by Mr Macks of the Emmanuel group of Companies which had been mentioned in Mr McNamara's affidavit.

460 Ms Riach was asked about a letter of 26 July 2005 to McNamara in which she had written:

> The suggestion that the bankruptcy notice has been issued for an ulterior motive and that it is an abuse of process is absurd.

Ms Riach testified that she understood the alleged ulterior motive to be a vendetta against Mr Viscariello.

461 Ms Riach also gave the following evidence about Ms Hamilton-Smith's allegations in the Heidi George bankruptcy proceedings:

> Q As I say, leaving aside the colourful language, it appeared to me that Ms Hamilton-Smith was essentially saying "Mr Macks has made arrangements to bring this Heidi George petition because he perceived or he was concerned about my challenge to the Bernsteen notice and perceived this would help him".
>
> A Yes, he would have been referring to that. As to whether I would disagree that is an abuse of process though –
>
> Q Leave that aside. Others will have to worry about making submissions on that and I will have to decide it. As I say, just cutting through the substance of the matters, they didn't seem to be that different.
>
> A [Indicates]
>
> Q Perhaps I can ask you this question.
>
> MR PHILLIPS: Could the record show the witness nodded in response to the question.
>
> HIS HONOUR: Only to indicate she understood the proposition, not that she agreed to it.
>
> MR PHILLIPS: I accept that, your Honour.
>
> HIS HONOUR: Do you agree that there was certainly a connection between the initiation of the Heidi George bankruptcy proceedings and Ms Hamilton-Smith's challenge to the Bernsteen bankruptcy notice.
>
> A Yes, it was because the Bernsteen notice had been challenged that was the trigger for embarking on a different strategy to try and bring an end to the litigation by bankrupting Ms Hamilton-Smith.

Q I use the expression 'connection' deliberately to be fairly neutral about it at that stage but one of the connections was then that should the Bernsteen notice be successfully challenged, Ms Hamilton-Smith might still be declared bankrupt on a notice and petition brought by Heidi George.

A Yes.

Q So that was a connection.

A Yes.

Q There was another connection or, if you like, another aspect of that connection which was this, that if the Bernsteen notice failed to result in the bankruptcy of Ms Hamilton-Smith, the Heidi George proceedings might and, as a result, Mr Macks would be spared the costs which he'd agreed to pay Minters for the defence of the Hamilton-Smith counterclaim.

A That's correct. That was the strategy for Mr Macks indemnifying George.

Q And indeed that is the very strategy which you set out in your letter of 10 November 2005, D377, to Mr Macks. Have you got that before you.

A Yes.

Q That is para. 4. That's that strategy that we're referring to.

A Yes.

Q Again it seemed to me that Ms Hamilton-Smith's affidavit was making that very point. Did you not read it in that way. Did it not occur to you that the ulterior purpose to which she was referring was the very strategy noted in para. 4 of the letter of 10 November 2005 or might have been.

A I go back to the point that, in our view it wasn't an abuse.

Q Yes, I can understand that part of the letter which serves to say it is an abuse of process because you might reasonably take that view as a question of law. My question was really directed to the question of ulterior purpose and whether it occurred to you that the ulterior purpose to which Ms Hamilton-Smith was referring was, in effect, that strategy you set out in para. 4.

A I don't have a recollection of turning my mind to that direct question of ulterior purpose.

462 In the letter of 10 November 2005 referred to in that testimony Ms Riach had written to Mr Macks regarding the Heidi George bankruptcy proceedings. Relevantly, it provided as follows:

> It is important to bear in mind the strategic importance of the action being taken by Ms George, as without her pursuing her claim, you would be unable to pursue the bankruptcy proceeding and would be faced with the cost of the trial resuming next year.

463 The burden of Ms Hamilton-Smith's affidavit was that the Heidi George proceedings had been brought at Mr Macks' instigation to support Bernsteen's

claims against her. Mr McNamara cited the Emmanuel litigation in his affidavit as an example of the strategies Mr Macks might engage in as liquidator. Ms Riach's deposition that the other litigation relied upon by Ms Hamilton-Smith "and the events which have occurred in that litigation have no relevance to the …. issue of the bankruptcy notice" on its face refers to the Bernsteen action as well as the Emmanuel litigation because Ms Hamilton-Smith expressly referred to the "similar type of tactics being employed by Mr Macks behind the scenes in relation to the respondent's bankruptcy notice for the benefit of the respondent Bernsteen Pty Ltd (In Liquidation) in action number ADG 94 of 2005". Ms Riach's affidavit was, to that extent, objectively, not completely accurate. I make it clear that I make no finding that Ms Riach intended it to be so.

464 Ms Riach's deposition was incomplete because far from having no relevance to the Bernsteen action, the bringing of the George bankruptcy proceeding was the centrepiece of a strategy to bring an end to those proceedings.

465 I observe that Ms Riach's affidavit was deployed in the George bankruptcy proceedings without giving Ms George comprehensive advice about the connection between her bankruptcy notice and the Bernsteen action and without obtaining her fully informed instructions on whether or not Ms Hamilton-Smith's allegation should be denied in those bald, and as it turns out, less than complete terms.

The warfare continues

466 On 17 August 2005 Ms Hamilton-Smith failed to attend for cross-examination before Registrar Christie in the Federal Magistrates Court. The matter was adjourned to 9 September 2005.

467 On 25 August 2005 Minter Ellison wrote to Mr Macks to inform him about the efforts to bankrupt Ms Hamilton-Smith. The letter referred to the factual dispute between Ms George and Ms Hamilton-Smith as to the satisfaction of the debt. Mr Macks was informed of counsel's view that it was unlikely that Ms Hamilton-Smith would be believed because of the absence of any evidence to corroborate her account. However, Mr Macks was reminded that much depended on how her oral testimony might be assessed. Minter Ellison gave the following advice to Mr Macks about the extent of his liability under the indemnity given to Ms George:

> We refer to your conversation with Ms Riach on 20 June 2005 in relation to your agreement to indemnify Ms George for her costs of pursuing bankruptcy. We note that we estimated the fees of an uncontested Creditor's Petition to be in the amount of $2,000 plus GST at that time. In view of the unexpected opposition to the Bankruptcy Notice, the adjournments to the proceedings, and the affidavit and oral evidence now required to be presented, our work in progress has escalated to $11,000 (excluding GST).

> The hourly rate for Mark Douglas to act as counsel was $280 plus GST (Ms Flaherty's hourly rate is $225 plus GST). We anticipate that half a day will be required to prepare and attend at the examination on 9 September 2005.
>
> Would you please contact us immediately if you do not wish to continue to indemnify Ms Heidi George in relation to the current Bankruptcy Notice against Ms Hamilton-Smith and/or if you would like to further discuss the existing arrangements in place. Please bear in mind that if you do not continue to indemnify Ms Heidi George, she will have no option but to abandon the claim in the proceedings. This in turn could entail an adverse costs order against her, for which she would seek indemnity.

468 The last two sentences of that letter highlight the potential conflict between Mr Macks and Ms George which the failure to agree the terms on which the extension of the indemnity beyond the $2,000.00 limit was given. That is a conflict on which Minter Ellison, as the solicitors acting for both Mr Macks and Ms George should have given advice, and obtained instructions, at the time Mr Macks agreed to the extension.

469 As to the bankruptcy petition brought by Bernsteen Pty Ltd, Minter Ellison advised:

> I confirm that all documentation in relation to this matter was filed with the Federal Court in early July 2005. Ms Flaherty spoke with the Federal Court Registry on 24 August 2005 and ascertained that Registrar Christie is currently considering this matter and will be in a position to hand down her decision shortly. Unfortunately no time frame was provided for her decision.
>
> The earliest decision in either matter can be used to found a petition, with the other debt used as a supporting creditor, which will help give weight to the petition.

470 On 29 August 2005, Mr Macks wrote to Minter Ellison making a payment of $7,152.75 with respect to an action involving Mr Viscariello and his father Mr Luigi Viscariello in the Supreme Court (the Viscariello proceedings). The Viscariello proceedings had been brought in 2003 claiming a trust over, and the repayment of, funds paid to Bernsteen prior to the commencement of the administration on the grounds that the purpose of the trust, the payment of wages, had failed. In 2004 the proceedings were dismissed. Mr Macks confirmed that work undertaken prior to the strike out-summary judgment application brought in that matter was undertaken on a speculative basis. Mr Macks informed Minter Ellison:

> Please note that I now have minimal funds available to meet the cost of your invoices and therefore ask that cost be kept to an absolute minimum and that you advise me in writing prior to any major time being expended on this matter to enable me to comment before any further invoices are raised by you.

471 On 31 August 2005 in Federal Court Registrar Christie set aside the Bankruptcy Notice issued by Bernsteen against Ms Hamilton-Smith on the ground that Ms Hamilton-Smith was pursuing a counter-claim against Bernsteen in the Bernsteen action.

472 On 9 September 2005 Registrar Christie heard Ms Hamilton-Smith's application to set aside the George Bankruptcy Notice.

473 On 15 September 2005 Minter Ellison wrote to Mr Macks informing him of the timetable for the special leave application on Ms Hamilton-Smith's appeal against the costs order relating to the Bernsteen costs. The letter also informed Mr Macks of Registrar Christie's decision. It expressed Minter Ellison's shock and disappointment at the result. Mr Macks was informed that advice was being sought from Senior Counsel. Minter Ellison expressed some confidence that the George bankruptcy notice would not be set aside following Ms Hamilton-Smith's cross-examination on that application.

474 On 22 September 2005 Registrar Christie dismissed Ms Hamilton-Smith's application to set aside the George Bankruptcy Notice. Registrar Christie noted that the abuse of process argument had not been pressed on the application. Registrar Christie's decision dealt with the claim that the judgment debt had been satisfied.

475 On 26 September 2005 a creditor's petition was filed by Ms George.

476 On 10 October 2005 Mr Macks wrote to Minter Ellison referring to their letter of 29 August 2005 and complaining about the escalating costs of the George bankruptcy proceedings:

> I am greatly concerned by the blow out in costs associated with this matter. By letter dated 6 July 2005 you confirm that the Liquidator will indemnify Ms George in respect of your fees and disbursements. Despite your Ms Riach having verbally estimated on 20 June 2005 to me the estimated fees for an uncontested creditor's petition to be around $2,000 plus GST, you now advise by letter dated 25 August 2005 that your fees have escalated to $11,000 plus GST. The limited funds in the liquidator will not allow the existing arrangements to continue. Given this, I would like to immediately discuss with you a future strategy concerning this claim.
>
> Secondly, I remain concerned how McNamara/John Mr Viscariello appears to constantly be outmanoeuvring us with respect to this claim. A clear example of that is how they keep having the matter adjourned (refer hearings on 1 August and 17 August 2005) and thereby delaying this matter which ends up costing me money!

477 Again Mr Macks' letter is an indication of the problematic basis of the extension of his indemnity of Ms George.

478 On 24 October 2005 Judge Burley extended the time for Mr Viscariello to file a proposed fourth party notice against Mr Macks in proceedings between Mr Viscariello and his father on one side and Bernsteen on the other. The proposed fourth party notice raised similar issues to those which were the subject of the Notice. However, Judge Burley's order was appealed, and subsequently set aside, by Doyle CJ on 8 December 2005.

479 On 25 October 2005 Ms Hamilton-Smith filed a claim against Ms George in the Magistrates Court seeking a declaration that the judgment debt owing to Ms George in that court had been paid in kind by the delivery of Manchester (the Hamilton-Smith declaration proceeding). Minter Ellison acted for Ms George in that action. There was no evidence that a discrete retainer for that purpose, or that an additional indemnity by Mr Macks, was expressly agreed. Minter Ellison appear to have acted on an implicit understanding that they were retained under the same terms as were applicable to the George bankruptcy proceedings. However, the proceedings were quite distinct. Moreover, Ms George's exposure in those proceedings to a declaration that Ms Hamilton-Smith was not indebted at all was a direct result of the bringing of the bankruptcy proceedings at Mr Macks' instigation.

480 On 26 October 2005 Mr Macks met with the solicitors from Minter Ellison. The agenda for the meeting included:

- The ATO proceedings. Mr Viscariello was a party to those proceedings by reason of the Australian Taxation Office's claim against him as a Director.
- The insolvent trading claim.
- The Bernsteen action.
- The Viscariello proceedings.
- The Charles Parsons preference proceedings.

481 On 26 October 2005 Minter Ellison wrote to Mr Magers, an in-house solicitor with PPB, about taking steps to secure litigation funding to enable the insolvent trading action to be brought against Mr Viscariello. In the email Minter Ellison stated:

> In view of the latest development in the Supreme Court regarding JV's claim against PM personally, it is even more expedient that funding be secured as soon as possible in order that we can expedite the insolvent trading proceedings in the Supreme Court.

482 When she gave evidence, Ms Riach was questioned about that email. Ms Riach denied that it evidenced any improper purpose and explained that what she proposed was designed to avoid duplication. I accept Ms Riach's evidence on that question. Ms Riach's point was that the issues to be raised in the insolvent trading claim were similar to those raised in the ATO proceedings. I reject Mr Viscariello's contention that it was part of a strategy precipitated by fear of, or anger at, Mr Viscariello's proposed fourth party claim.

483 On 27 October 2005 Mr Magers and Mr Macks met with a liquidator, Mr Coope, about funding for the insolvent trading action on 27 October 2005.

484 In a letter dated 10 October 2005 apparently received by Minter Ellison 27 October 2005, Mr Macks complained about the escalating costs of pursuing Ms Hamilton-Smith. Minter Ellison responded on 10 November 2005 as follows:

- That they shared Mr Macks' concern over the escalating costs noting that "as with most matters involving Ms Hamilton-Smith and Mr Viscariello every point has been taken in the litigation resulting in a blowout of costs".

- Apologising for not better informing Mr Macks of the level of costs.

- Promising to endeavour to report more regularly on the level of fees incurred and referring to "the strategic importance of the action being taken by Miss George as without her pursuing her claim you would be unable to pursue the bankruptcy proceedings and would be faced with the costs of the trial resuming next year".

- Drawing attention to the level of "work in progress" which was in excess of PPB's WIP for the administration noting that "the prospects of recovery are poor". Minter Ellison informed Mr Macks that they had incurred significant costs in the litigation by Bernsteen action which had not been paid and arguing that it was reasonable that Mr Macks continue to indemnify Miss George.

- Offering a reduction in fees for the work done until 25 August 2005 from $11,000 to $8,000 and reducing the claim for work in progress from 25 August 2005 to November 2005 to $4,100.

485 Minter Ellison advised that assuming that Bernsteen's creditor's petition required only a single hearing Minter Ellison's fees would be $1000 including disbursements for counsel's fees.

The 14 November 2005 Committee meeting

486 The minutes of the 14 November 2005 Committee of Inspection meeting show that Ms Higgins from the Australian Taxation Office and Mr Williams from Associated Retailers Limited attended by telephone. Ms Janine Richards, Mr Routledge and Mr Colyer are shown as apologies. Mr Macks attended with Mr Magers. Mr Macks testified that the meeting was held because about six months had passed since the last meeting which had been held on 2 March 2005. Mr Macks explained that he had decided to consult regularly and he thought that six monthly meetings were appropriate. Mr Macks testified that his practice was to bring to the meetings the receipts and payments for the administration. He would also bring correspondence from the solicitors but would not formally table that correspondence because he feared that by doing so he might waive privilege. Mr Macks gave evidence that the creditors attending by telephone only received copies of material if they asked for it.

487 Mr Macks explained that the office printout of the expenses of the administration which he took to the meeting of the Committees of Inspection did not differentiate and identify the preferences recovery and other actions on which the payments were made to Minter Ellison but that he would give the Committee of Inspection such information about the breakdown that might be derived from Minter Ellison's correspondence. The payment summary for Bernsteen taken into the meeting of 14 November 2005 showed receipts of $1,336,040.80 which had remained from 1 March 2005. The payments were also the same.

488 The Form 524 filed by Mr Macks in March 2006 for Bernsteen for the period ending on 21 December 2005 showed:

- secured creditors of $597,000.00 and unsecured creditors of $2,254,806.00;
- that professional fees of $140,382.08 and expenses of $50,035.00 had been paid to Mr Macks;
- total receipts of $1,108,841 with $115,057 received since 21 June 2005;
- total payments of $1,108,540.90 since 21 June 2005 mostly to solicitors;
- balance of money held $7,445.82.

489 The major receipts by Bernsteen were as follows:

Administration receipts	$167,394.37
LeCornu (18/12/2002)	90,909.00
LeCornu (30/4/2002)	163,930.00
DEWSRB	193,434.00
Sale of stock July 2002	17,255.00
Preference recovery WH Lewis & Co July 2003	5,000.00
Preference recovery Rod Groves October 2003	10,000.00
Preference recovery Duke Unley Trust October 2003	5,000.00
Preference recovery received from Minter Ellison 16/7/2004	120,000.00
Preference recovery Sheridan September 2004	85,000.00

490

Payments included:

Minster Ellison for third party creditors 13/10/2004	54,331.00
Mr Macks' remuneration Jan 2002	47,413.00
Mr Macks' remuneration March 2002	24,510.00
Mr Macks' remuneration Oct 2004	20,696.00
Minter Ellison 5 July 2005	2,380.00
Minter Ellison 16 July 2006	120,000.00
Minter Ellison 5 August 2005	818.00

Minter Ellison 10 August 2005	300.00
Minter Ellison 17 August 2005	6,502.00
Minter Ellison 21 October 2005	609.23
TN Cogan 26 September 2005	1,030.00
Mr Livesey 13 October 2005	5,320.00

491 For Newmore the receipts to 1 March 2005 were $502,140.14 and there was no change to that amount for the period to 13 November 2005. The payments for both periods were also the same at $494,229.58.

492 The Form 524 for Newmore filed in March 2006 for the period ending 21 December 2005 showed:

- secured creditors of $342,817 and unsecured creditors of $1,540,031;
- liquidators' remuneration of $139,685.00 and expenses of $21,945.00;
- total receipts of $411,889;
- total payments of $388,666.00;
- balance money held $23,236.73.

Receipts by Newmore included:

Administration receipts	47,301.71
LeCornu - March 2002	45,450.00
LeCornu - April 2002	70,255.00
Australian Weaving Mills preference recovery 30 September 2004	25,000.00
Young and Rubicon preference recovery 29 October 2005	80,000.00
Andrew Carn P/L preference recovery on 27 February 2004	9,250.00
Minter Ellison preference recovery 21 April 2004	2,500.00
Carob Nominees preference recovery 19 May 2004	4,000.00

Newmore payments included:

Mr Macks' remuneration 9 August 2002	15,000.00
Mr Macks' remuneration 9 August 2002	13,825.00
Mr Macks' remuneration 7 July 2004	17,921.00
Minter Ellison 13 October 2004	11,363.00
Minter Ellison 15 December 2004	14,052.00
Minter Ellison 15 December 2004	13,542.64
Minter Ellison 15 December 2004	7,207.00
Mr Macks' remuneration 4 March 2005	36,363.64

493 Mr Macks informed the committee about the state of affairs of the liquidations with respect to:

- Preferences.
- Insolvent trading claim.
- Litigation funding.
- The claim made against him in the Australian Taxation Office proceedings.

494 At the November 2005 Committee of Inspection meeting, Mr Macks reported generally on the preference claims which he had instructed Minter Ellison to pursue. He informed the Committee that he and his staff had undertaken much work on those claims. He told the Committee that there were two outstanding claims, one against the Australian Taxation Office for a sum of $118,000 and one against Charles Parsons & Co P/L for $74,000. On the former claim he reported that the Australian Taxation Office was still deciding whether to admit insolvency and that there was a process of discovery under way. Mr Macks reported that leave had been given to Mr Viscariello to make a fourth party claim against Mr Macks personally in those proceedings and that he intended to appeal that decision. As I earlier observed, that appeal was successful.

495 Mr Macks reported that he had formed the view that Mr Viscariello had been trading the Companies whilst they were insolvent and was investigating bringing an action against Mr Viscariello for so doing. Mr Macks reported that he expected the quantum of that claim to be considerable. He advised the Committee that PPB had undertaken a great deal of work in preparing a report on the insolvency of the company for the purposes of the ATO action. Mr Macks advised that it was unlikely that a dividend would be distributed to unsecured creditors. He sought approval for remuneration in the sum of $58,059.75 plus GST for the period 1 March 2005 to 31 October 2005.

496 Mr Macks' notes for the meeting record the following information about the proceedings against Ms Hamilton-Smith:

- Trial part heard – not resuming until May 2006;
- Status of negotiations – they have offered $10,000 payable by instalments – we have offered $25,000 payable immediately;
- Heidi George bankruptcy notice – creditor's petition has been served.

497 Mr Macks testified that the notes might have been emailed to Committee members. I find that that is improbable having regard to their form and the course of the meeting as recorded in the minutes. I find that the notes were used as an aide-memoir by Mr Macks. I find that they were not sent to members of the Committee in advance of the meeting and were not distributed at the meeting.

498 Mr Macks testified that he also took with him to the meeting the letter from Minter Ellison dated 10 November 2005 which responded to his concerns about the escalating costs of pursuing Ms Hamilton-Smith both through the Bernsteen action and through the indemnity given to Ms George. There is no reference in the minutes of that meeting, or in Mr Mack's notes, to Minter Ellison's advice that its work in progress in the George bankruptcy proceedings had escalated from the estimated $2,000 to $11,000. Nor is there any record that the creditors were told that Minter Ellison's fees in the Bernsteen action in June 2005 were $191,568.

499 Mr Macks testified that he told the 14 November 2005 meeting of the Committee about the costs and other issues which had arisen in the Bernsteen action. Mr Macks testified:

> My recollection, well, firstly, it's a number of years ago but my recollection is that we were discussing why it was taking so long and I explained to them, I had talked to them in relation to what the lawyers were telling me about why it was taking so long, some of the issues that we were being confronted with.

500 Mr Macks testified that he told the 14 November meeting that in excess of $100,000 had been spent in pursuing Ms Hamilton-Smith and that there was no significant reaction to that disclosure. Mr Macks had no recollection of anyone asking why that much money had been spent recovering a debt of $28,000. He did not remember any adverse or negative comment about it. He testified:

> They, again I reiterate, they expressed some concern about the time it was taking, which translated into costs.

501 Mr Macks testified that he told the Committee on 14 November 2005 about the George indemnity arrangement.

502 In the notes, which I have found were an aide-memoir, for the November meeting, there is a reference to the indemnity given to Ms George. Mr Macks testified that the very shorthand reference to the George bankruptcy proceedings in those notes suggested to him that he had informed the Committee members about the indemnity at some earlier time. However, the last meeting of the Committee before the 14 November meeting was in March 2005 and therefore before the arrangement with Ms George had been made. Mr Macks' evidence was that he was "confused" about the reference to the George bankruptcy proceedings in the notes.

503 Mr Macks was asked what he told the Committee about his dispute with Minter Ellison over the escalating costs in the George proceeding which had culminated in Minter Ellison's letter of 10 November 2005. Mr Macks was not fully responsive. He said:

> My normal practice is that I will have – either or have a solicitor at the meeting to relay an update where the position is, in which case I'll take a back seat. If I didn't have a solicitor at the meeting, I would merely tag some elements of this and quote from the

> letter. In addition to that if my memory's correct and I haven't seen the minutes, but Andrew Magers was the person in our office on the file and he was a practising solicitor, so he may have elaborated on certain matters.

504 As can be seen Mr Macks gave very little evidence about the detail of the information he conveyed to the meeting. In answer to a further question Mr Macks replied only that he remembered that there was some discussion "in relation to the time frame that it was taking". Only when Mr Macks' attention was expressly drawn to the discounting of Minter Ellison's fees from $11,000 to $8,000 did he say that he did disclose to the meeting the costs which were incurred in comparison with the estimate which Minter Ellison had given him. Mr Macks continued:

> … and I also recall, because it was an issue with me with Minters, to get them to endeavour to discount the fees because of the length of time and because of the level of the fees.

505 Mr Macks then testified that he did explain to the Committee that the Heidi George proceedings were a vehicle to endeavour to resolve the Bernsteen action. When Mr Macks' counsel drew his attention to the opinion expressed in the Minter Ellison letter that it was reasonable to continue to indemnify Ms George, Mr Macks agreed that he informed the Committee of that view.

506 Mr Macks also agreed, again in answer to a leading question which drew his attention to the Minter Ellison letter, that he told the meeting that there was a pending hearing in the George bankruptcy proceedings and that it was estimated that counsel fees for that attendance would be $500.

507 Mr Macks was asked about the attitude expressed by the creditors at the 14 November 2005 Committee meeting to his decision to indemnify Ms George. He responded:

> They just saw it as a commercial way to go in order that we would achieve a resolution or a commercial settlement in relation to the matter.

508 Mr Macks was asked which members the Committee expressed that view. He replied:

> A Well I'm trying to think. I certainly remember the ATO.
>
> Q Who's the ATO?
>
> A Sorry?
>
> Q Who is the person?
>
> A It might have been at that meeting, Jackie – I can't recall.
>
> Q And who else?

A Tony Colyer was at the meeting, I just remember the people that were most animated, and I'm not quite sure who was at the meeting – who else was at the meeting.

Q So are you saying that Miss Higgins and Mr Colyer were the most animated?

A Yes.

509 Mr Macks was asked about any concerns which he may have conveyed to the meeting about the imminent resumption of the Bernsteen action. He answered:

A As at that time, my concern was that I had a four day trial for a debt of $27,000. I had been cross-examined for two days. I was concerned in relation to the continual rolling forward of the trial, and that had certain cost implications from an administration point of view, and I was just concerned as to [a] whether that trial would actually ever be achieved, and from what I had seen from the previous trial, what would be the true costs of that trial down the track. If it was anticipated to be four days, would it be four days or would it be longer? So my mind was getting concerned in relation to the actual cost if we had to bring it to trial.

510 Mr Macks was pressed to relate more of the conversation between the members of the Committee of Inspection when he explained to them the delay and escalating costs of the proceedings brought against Ms Hamilton-Smith. He answered:

A My recollection is that I was going through the information received from Minters in relation to what they were experiencing in court in relation to the Bernsteen – Tania Hamilton-Smith matter. My memory of it is that Mr Colyer expressed some frustration with the system. My recollection is someone from the ATO, and I thought it was a female's voice, but I just can't remember, was comforted or said something in relation to the experiences that they had had, and then it lead to a discussion in relation to the strategy to continue on, and there was some discussion in relation to the offer that was put previously, and I just recall someone expressing some support for the rationalization of that and that we should proceed on that basis.

511 When Mr Macks was taken to the minutes of the meeting of 14 November 2005 which showed that Mr Colyer was not present, he gave the following evidence:

Q. What do you remember telling them about Heidi George. You go into the meeting.

A. Yep.

Q. What's the first thing that you say about Heidi George and that arrangement.

A. My recollection was that it was introduced to us by the lawyers as a mechanism to limit the costs of going forward so as to avoid that trial which just kept adjourning and adjourning.

Q. You start off by saying 'it was introduced'. That begs the question about what it was, and what did you say to them about what it was that had been recommended. How did you open it up.

A. I opened it up in terms of it being an arrangement whereby the liquidator would fund another party who had an arrangement against Tanya Hamilton-Smith and who was well advanced - I just recall the words 'well advanced' in relation to her position.

Q. The notes which you've told us were circulated simply have a note I think which say 'Heidi George, notice issue served'. Can we just bring up those notes –

A. Yep.

Q. - of the meeting.

MR PHILLIPS: It's the third dash point under 'Hamilton-Smith' or fourth.

HIS HONOUR: I'm not sure whether the petition had been served then, probably had.

HIS HONOUR

Q. That's what went out.

A. Yes.

Q. And that, I understand, is the first anyone on the committee would have heard of the name Heidi George.

A. I don't recall a meeting before. I don't think there was a meeting before.

Q. When you convened the meeting did someone come in and say 'Who's Heidi George?'.

A. No, no, I don't remember anyone.

Q. Did you say something like 'You might be wondering who Heidi George is. This is what it's about'.

A. No, I don't actually remember referring to her by name. It was 'a person'.

XXN

Q. Would you please look at the transcript 1041. Please look at lines 9 through to 23. Got the transcript in front of you.

A. Yes.

Q. Just look at lines 9 through to 23.

A. Sorry, 1041?

Q. 1041, lines 9 through to 23.

A. Yes.

Q. You refer to Mr Colyer as being 'most animated'.

A. Yes.

Q. He wasn't there.

A. Yes, that's why I was just confused in relation to the meeting.

…

XXN

Q. That was your clear recollection at that time, that it was Mr Colyer who was most animated.

A. It's hard to recall which meeting, or which of the meetings he was most animated at. He took an active part in all the meetings that he attended.

512 Mr Macks testified that he remained confident about the George proceedings even though he knew at the time of the November 2005 meeting that Ms Hamilton-Smith was alleging that she had discharged that debt by payment in kind with manchester.

513 Mr Macks was asked whether he was concerned about the cost effectiveness of the proceedings during 2005 and the extent to which he discussed that issue at the November 2005 Committee meeting. He responded:

A. It was a matter that Minters expressed some concern on, but they rationalised that it was reasonable to consider to continue. At 2005 my overall position, if you like, still in relation to the administration was that I believed that the costs that I'd incurred would be recovered and that I would do better than the proposal that I'd put - which I'd rationalised and I thought it was quite reasonable for a settlement out of Tanya Hamilton-Smith, and I believed also that the administration would be in funds because there are a number of matters that Minters were dealing with on a speculative basis, as we were, and I believed that there were some preferences that we were continuing to sue, but ultimately I believed that the only way the creditors would've got paid and would have received a dividend would have been out of an insolvent trading claim. And I believed that cost effectively at that time I thought that either ARL or the ATO would have enabled that matter to be brought to a head without my participation and then I could participate in a commercial result and/or I was starting to apply my mind to whether or not the insolvent trading claim should be pursued because I thought it was quite a reasonable claim, but I didn't know how I could pursue it given the financial situation that we were in and given the resistance that we were getting from Tanya Hamilton-Smith.

Q. The reference to 'other matters being pursued on a speculative basis by you and Minters', did you mean by that, preference claims - which you were pursing on the basis that you and Minters would only get paid if there was a successful recoupment of the preference.

A. Yes, and there was some elements - the Tanya Hamilton-Smith claim was also being sued on a speculative basis by Minters.

Q. That is the Bernsteen, Hamilton-Smith claim.

A. Yes.

Q. So the fact that they'd incurred $100,000 worth of costs isn't something that they were ever paid or going to be paid. Is that right.

A. Unless the funds were successfully paid as a result of a particular action or from the Tanya Hamilton-Smith action or, I presume, out of the results from the other matters that we were taking on.

Q. That is that the arrangement was that they could be paid for their costs in the Hamilton-Smith matter out of moneys recovered on the other preference matters if they were successful on those.

A. And any other actions that we could take.

Q. Was that explained to the committee - that is, that Minters would be recovering their costs for Hamilton-Smith out of other actions that they were running to bring in moneys owed to the liquidation.

A. I believe so.

Q. When was that explained.

A. I don't know that I can recall a specific meeting. I can't recall a specific meeting, but the basis on which Minters were continuing to engage was certainly discussed.

Q. The proposal that had been put to Hamilton-Smith was in the order of paying about $25,000.

A. Yes.

Q. Well none of that would have gone to the creditors, that would have gone to Minters.

A. If it was settled on that basis it presumably would have gone to Minters, yes.

Q. And the only point in pursuing the Hamilton-Smith claim to try and get more than they would have that they'd offered or to try and win the action ultimately would be to win more fees for Minters to bring about a greater recovery of the fees they'd already thrown into this thing.

A. Well I had presumed it was also to bring in funds into the administration because Minters speculative costs would not be paid until there funds put into the administration. The arrangements that we enter into with the lawyers is if it is speculative then there is a sharing of their costs and our costs.

Q. Is there a document which sets out this contingency type arrangement.

A. No. There is often now a document, but there wasn't in those days.

XN

Q. In the event that you had to proceed with the Bernsteen, Hamilton-Smith action as at November '05 - did you think Bernsteen would succeed.

A. I did.

Q. And in the event that Bernsteen succeeded did you have a view as to whether Bernsteen would recover its costs of action against Hamilton-Smith and ... an order for costs.

A. Yes, I had the view that we would recover our costs and our continued costs would be recovered, yes, I did.

HIS HONOUR

Q. Just a minute. You didn't think you'd ever get costs, especially given that these proceedings were in the Magistrates Court on an indemnity basis.

A. The Magistrates Court is a special court. There were some issues and arguments being explored in relation to some costs on a basis - I'm not quite sure if the word 'indemnity' was used, but certainly on a better basis than what would normally be available in the Magistrates Court because of what we were experiencing.

XN

Q. And you gave evidence yesterday about having filed an offer at the outset for $20,000.

A. Yes, the Calderbank, yes, I did.

Q. Did you have a view as to whether, if you succeeded in the claim and therefore beat that offer, you'd get a particular order as to costs, in terms of the level of costs.

A. I don't know that we had detailed discussions but I had a view in relation to level, other than the view was expressed that we thought we would recover our costs or a significant - I won't use the word 'significant' - but some proportion of our costs that was above the magistrates scale because of what was occurring.

HIS HONOUR

Q. As I understand it, no dividend has been paid to any creditor in this liquidation.

A. Yes.

Q. That's right isn't it.

A. Correct.

Q. Are there any, apart from the insolvent - the insolvent claim has been abandoned as well hasn't it.

A. Sheahan & Lock abandoned the claim reasonably recently, yes.

Q. Are there any other claims outstanding to recover amounts.

A. Not now, no.

Q. What's the level of your unpaid fees and Minters unpaid fees in terms of the speculative actions which you have taken. How much - what's your work in progress.

A. My total work in progress that's been approved by the creditors, which is unpaid, I'd say about $1.1 million –

Q. And Minters.

A. - which includes certain elements of this. Minters, I'm guessing here but I think it's about 400,000.

Q. I get the impression that the only purpose in pursuing Hamilton-Smith realistically would have been to ensure a higher level of remuneration to you and Minters.

A. If there were ever funds coming into the administration on that basis, they would substantially come from either cost recovery from Hamilton-Smith and/or from the insolvent trading position. There is no problem with the assertion and my belief is that if as a result of those funds coming in we were to shave our fees, even significantly, or whatever, so that we got a dividend to the creditors, that's something that we do.

Q. But it just doesn't seem to me as if there was any prospect of that. Was there a prospect at some stage.

A. Yes. At that stage we still had on foot the prospects of funds - the significant funds were only ever going to come in from the insolvent trading action.

Q. What logical connection is there between these proceedings and the insolvent trading action.

A. I don't see a connection.

Q. No.

A. No.

Q. Would anything received on the insolvent trading action, would that have gone to pay any of the outstanding fees earnt on that speculative basis.

A. Not without some discussion as to the size of that and who the other stakeholders would be. So the stakeholders would have been Minters, PPB and the various other creditors.

Q. Did anyone in the meeting in - did you say that in November 2005, 'Look, bringing these actions isn't going to realistically, that is the actions against Hamilton-Smith, result in any surplus over the costs of pursuing it for the creditors. We're just doing it to recover as much of our costs thrown away as we can'. Did you tell them that.

A. I told them in this meeting and other meetings and the committee were alive to this strategy, if you like, that the only way that they'd get funds as a dividend would be as a consequence of significant funds coming out of the insolvent trading claim.

514 I was left very unimpressed by Mr Mack's evidence on this topic. I reject his evidence that there was a detailed discussion about the indemnity given to Ms George in the meeting of 14 November 2005. I reject his evidence that the escalating costs of the indemnity incurred were disclosed. A disclosure of the costs of the Bernsteen action and the indemnity in the George proceedings would have revealed that a significant proportion of the preference recoveries was being spent pursuing Ms Hamilton-Smith. If the disclosures were made, there is likely to have been a strong adverse reaction to the disclosure or at least close questioning of Mr Macks on both the fees already incurred and on his estimates of future costs. No such discussion is recorded in the minutes. I do not accept Mr Macks' account because it is implausible and because of his failure to call any member of the Committee to support it.

515 I find that the Committee of Inspection did not approve Mr Macks entering into the George indemnity arrangement.

The parallel strategy

516 At the November meeting the Committee made a recommendation fixing the liquidator's fees for the period 1 March 2005 to 31 October 2005 at $58,059.

517 On 17 November 2005 Ms George applied to strike out the claim made in the Hamilton-Smith declaration proceeding (Action number 9644 of 2005) and it was struck out on 23 November 2005. Ms Hamilton-Smith applied to reinstate it on 29 November 2005.

518 On 22 December 2005 Registrar Christie adjourned Ms George's creditor's petition.

519 On 12 January 2006 Ms O'Connor SM heard argument on Ms Hamilton-Smith's reinstatement application in her declaration proceedings. On 27 January 2006 Ms Hamilton-Smith withdrew her application for a stay and paid money into court. Ms O'Connor SM gave an intimation that she was likely to reinstate Ms Hamilton-Smith's claim.

520 On 3 February 2006 Mr McNamara wrote to Minter Ellison enclosing a trust account cheque in the sum of $4079.80 in accord and satisfaction of the judgment delivered in the original action brought by Ms George against Ms Hamilton-Smith in the Magistrates Court (No 720 of 2002). The payment was made reserving all rights including rights in relation to the Hamilton-Smith proceeding. On 3 February 2006 Minter Ellison responded on behalf of Ms George as follows:

> Accordingly to pay the judgment debt but at the same time reserve your rights to pursue action number 9644 of 2005 is an entirely inconsistent position. Either your client accepts the judgment debt is outstanding and makes payment or she continues to dispute it. In the circumstance we are simply not able to accept funds in satisfaction of a debt which is the subject of ongoing dispute between our respective clients.

> It is absurd to suggest that our client should accept the funds on this basis.
>
> If your client is prepared to discontinue action number 9644 of 2005 and provide the appropriate releases to our client that payment is made in full and final satisfaction of all claims between them, then our instructions are to accept the funds provided payment is also made in respect of the additional amounts owing to our client.
>
> Accordingly we enclose and return your firms trust account cheque in the sum of $4079.80.

521 The letter also advised that interest on the judgment debt of $500.08 was outstanding and that Ms Hamilton-Smith was indebted by way of costs pursuant to the decisions of Registrar Christie and Magistrate O'Connor.

522 On 10 February 2006 McNamara's retendered the cheque.

523 It can be accepted that the tender of the judgment sum was inconsistent with the prosecution of the Hamilton-Smith declaration proceedings. However, the tender of the judgment sum placed Ms George and Mr Macks in a relationship of actual, or at least, potential conflict. Ms George's interest probably lay in acceptance of the sum tendered.

524 Her liability for legal costs under the agreement made with Mr Macks was limited to $1,000. Even if Ms Hamilton-Smith succeeded in obtaining a declaration that she had already paid the debt in kind, it was unlikely that she would ever recover the amount she had tendered. Importantly, Ms George would have the money in hand. On the other hand, acceptance of the sum would have scuttled Mr Macks' strategy to avoid the costs of prosecuting the Bernsteen claim and defending Ms Hamilton-Smith's counterclaim.

525 Ms George had no recollection of sighting the Minter Ellison letter which rejected the offer put in Mr McNamara's letter. Ms George was asked whether she was advised of any offers made by Ms Hamilton-Smith to pay the amount of the judgment debt. Ms George said that she was informed of such an offer in a conversation with a solicitor from Minter Ellison. She said:

> A Yes, again, its five to seven years ago, I don't recall exacting the wording. But were that the offer that was made it would not stop other action against me in the courts and that I would still be liable and party to further actions against me. So it wasn't a decision that was in my best interests to make, to accept that offer.
>
> HIS HONOUR
>
> Q That's something that you were told by lawyers in conversation about that offer.
>
> A Yep.
>
> XN
>
> Q By liable you understand that you were liable to expose you to a costs order.

A And a costs order and a debt.

Q Yes, but a costs order.

A Well, a debt; Ms Hamilton-Smith was stating that I owed her money.

HIS HONOUR

Q Yes but did you understand what that might be for. What were you told that you might owe her money for.

A She – for goods that she said that I had, as well as any costs for her legal costs.

Q You were told that if the offer was accepted you might be liable for her claim for the goods and for her legal costs.

A Depending on the outcome of that action, yes, because that was not going to cease.

Q And the offer, did you understand that that included the payment of some money to you in the interim, in the meantime.

A I'm – what sort of – no, I don't understand that?

Q Did you understand that Ms Hamilton-Smith, through her lawyers, had provided a cheque to Minter Ellison.

A Yes, I did.

Q Were you told what would happen to that cheque if you accepted the offer.

A I don't recall.

Q Were you told that you could take any part of that cheque and keep it, unless and until Ms Hamilton-Smith's action for the goods she said that she had supplied to you were successful.

A I don't recall that, no.

Q Don't recall being –

A I don't recall whether I could take the money or whether it had to stay with Minter Ellison or not, no.

Q You cannot recall when this conversation occurred despite the seven years ago.

A Yeah

Q I don't know that it matters exactly when it was, can you tell me whether at the time that you had that conversation, there's anything you could have done with three or four thousand dollars.

A Of course there could have been, yeah.

Q And if you were told "Well, look, you can have the $3,000 now, but if she is successful you might have to pay it back". Then I imagine that you would have taken some time to think about which course to take.

A Yes.

Q One of the things that might affect that, of course, is whether, if you took the money you would be liable for any costs if she was successful.

A Yes.

Q That would be a very important part.

A Yes.

Q But do you have any recollection at any time of sitting down and grappling with those issues.

A I don't have any, recollection of that, no. I would have certainly considered it, but the fact that it exposed me to further expense would have been a big consideration.

Q If it didn't, if the position was you could take the $3,000 that you would be covered by legal costs. By Mr Macks, and if Ms Hamilton-Smith was successful you would only have to pay back what it was that you had taken, that would again make it – without trying to hypothetically tell me what you would have done – that would have made it more attractive.

A No.

Q Why is that.

A Because I didn't have anything that I had taken and I wouldn't have wanted to pay anything back to her.

Q If you were given the $3,000 and that is as part of the cheque that had been presented, and you could do with that what you want, unless and until she was ever successful, without being liable to costs, would that have made it a more attractive proposition.

A Possibly, and it would still be a consideration that would have continued on and that court action would have continued on, that would have always been a consideration.

Q It would have better to finalise it altogether.

A Yes.

Q But you understood that by it not being finalised the court action was proceeding.

A Yes, yep.

526 In her evidence Ms Riach confirmed that if Ms George had accepted $3,000 would have been disbursed to Ms George and $1,000 to Mr Macks. That would have brought an end to the Heidi George bankruptcy proceedings on the

judgment debt but as Ms Riach pointed out not to the underlying action by Ms Hamilton-Smith for a declaration in the Magistrates Court. Ms Riach confirmed that on one view Mr Macks was stuck with defending that action because of the agreement he had reached with Ms George. Ms Riach was asked:

> Q … Did it occur to you at the time that you received this letter, that Minters were now in a position of conflict.
>
> A Yes.

527 Ms Riach did not have any recollection of giving advice to Mr Macks after the cheques were tendered about the propriety of him, as a liquidator, continuing to fund the George proceedings.

528 Ms Riach explained that because the offer did not include a settlement of the Magistrates Court application, if Ms Hamilton-Smith won the declaration she thought Ms George would have to repay the money.

529 Ms Riach said of the offer:

> I think that letter explains our position at the time and that it was effectively akin to putting money in trust pending the outcome of litigation.

530 As to the position of conflict, Ms Riach answered:

> A We were alert to the possibility of a conflict, but in our view their interests weren't diverged or separate on this point.
>
> HIS HONOUR
>
> Q Who's 'we'.
>
> A I am talking about Minter Ellison, the lawyers who were involved in the action.
>
> Q Who were they that formed that view.
>
> A Myself, Tyneil and possibly counsel.
>
> Q Which counsel.
>
> A I am not sure at that time whether it was Mr Douglas acting, who was internal counsel.
>
> Q And there was a discussion, was there in which that view was formed.
>
> A I do not recall specifically, but I expect we would have discussed the issue arising out of the tender.
>
> Q Did anyone suggest in that meeting that Ms George be spoken to.
>
> A I don't recall, but I would be very surprised if Tyneil didn't speak to her and take specific instructions on the issue.

> Q Did it occur to you that Ms George might be very happy to have the use of $3,000 whilst these proceedings were litigated and that if Mr Macks and Minters weren't able to successfully defend the proceedings, repay down the track, whatever it was that she might have to repay. Did anyone ask her 'Did you have some wish that you could put $3,000 towards today'.
>
> QUESTION OBJECTED TO
>
> Q Did it occur to you that Ms George might prefer to have the money tendered in hand and to run the risk of having to repay it should the defence of the Hamilton-Smith proceedings fail.
>
> A It did occur to us what needed to be balanced against her involvement in future litigation in terms of continuing to defend the action in court.

531 The above passages yet again highlights the potential for conflict between the interests of Ms George and Mr Macks because of the failure to make the terms of the extended retainer clear. It is not to the point that Ms George ultimately gave instructions which were consistent with how Mr Macks wished to conduct her litigation. Ms George was concerned about her possible exposure to costs. On one view of the implied terms of the arrangement, Mr Macks was liable to indemnify her for those costs. Clear advice on that issue may have caused Ms George to give different instructions.

532 The hearing of Ms Hamilton-Smith's application for special leave to appeal against the Full Court judgment on the costs of the interlocutory skirmishing in the Bernsteen action which had been listed for 10 February 2006 was adjourned.

533 As stated earlier, Mr Viscariello filed the statement of claim in this action against Mr Macks on 13 February 2006.

534 On 15 February 2006 Minter Ellison wrote to Mr Macks reporting on the exchange of letters with Mr Viscariello. The letter advised that Ms George was not required to accept payment from Ms Hamilton-Smith once an act of bankruptcy had been committed. They anticipated that the tender of the cheque would not be a good defence to the prosecution of the bankruptcy petitions and the application for a sequestration order. Instructions were sought to substitute Bernsteen as the petitioning creditor should it be necessary to do so. Minter Ellison also advised Mr Macks that Ms George had indicated that if the debt was to be paid she would provide all of the funds to Mr Macks. Mr Macks replied by email instructing Minter Ellison to substitute Bernsteen if necessary.

535 A file note of the PPB on 15 February 2006 records an expectation that the monies recovered on the George matter would go to PPB and that Ms George "is fully aware of this".

536 On 16 February 2006 Ms Hamilton-Smith filed an affidavit in the Federal Magistrates Court in opposition to Ms Geoge's creditor's petition. Ms Hamilton-Smith deposed to giving her solicitors instructions to withdraw the stay

application on the Heidi George judgment debt in the sum of $4079 and to tender payment. The money which had been paid into court was returned to Miss George's solicitors and forwarded to Minter Ellison.

537 In her affidavit of 16 February 2006, Ms Hamilton-Smith also deposed as follows:

> In relation to paragraph 6.2 of the said affidavit of Miss Flaherty sworn on 17 June 2005 she deposes, I say and it is fact that days after Miss George was contacted by Miss Flaherty on 14 June 2005 Miss George engaged Miss Flaherty to act for her and immediately thereafter I was served with a bankruptcy notice by the applicant Miss George. I say that Miss George's bankruptcy notice was strategically timed so that it could be used against me to support Bernsteen's opposition to have its bankruptcy notice set aside.
>
> I have b (sic) advised by mutual acquaintance I have with Miss George (who wishes to remain anonymous for fear of retribution by Miss George's partner and/or Mr Macks) of the following which I verily believe to be true and correct:
>
> 16.1 that following Miss Flaherty's approach to Miss George, Miss George and Mr Peter Ivan Mr Macks the liquidator of Bernsteen (of which Miss Flaherty is its solicitor) entered into negotiations which resulted in an agreement/arrangement/understanding between them which includes the following terms:
>
> 16.1.1 that Mr Macks pay to Miss George the amount of her alleged debt against me in the sum of $4079.89 (which debt is the subject matter of her bankruptcy notice against me) in exchange for Miss George's cooperation;
>
> 16.1.1.1 in denying that there had been accord and satisfaction of the judgment debt by me in December 2003 as I have always maintained;
>
> 16.1.1.2 in that Mr Macks would give Minter Ellison all instructions in relation to the claim as alleged by Miss George and will control all the proceedings;
>
> 16.1.1.3 as required by Mr Macks in pursuing the debt against me using Miss George as a "front" as and when required including executing any and all documents and deposing to such affidavits as required by Mr Macks and/or Minter Ellison to advance his claim (through Bernsteen against me);
>
> 16.1.1.4 to the extent that Mr Macks would pay all of the costs and disbursements of any and all actions against me and that Mr Macks would receive the benefit of any orders and/or judgments that may be made against me;
>
> 16.1.1.5 that the agreement/arrangement/understanding be kept strictly confidential and is not to be disclosed to any third party in particular including this or any court.

> 17 I say that this agreement/arrangement/understanding as between Mr Macks, Miss George and Miss Riach and Miss Flaherty of Minter Ellison Lawyers as deposed to in paragraph 16 herein is a relevant factor in these proceedings, full disclosure of which I say must be made to this court. I say that this agreement/arrangement/understanding together with the fact that the Applicant refuses to accept payment of the judgment debt is but further evidence which supports the fact that Mr Macks has and continues to pursue these claims for an improper purpose to prevent me from exercising my legal rights to defend myself and pursue my claim against Bernsteen in Magistrates Court action 10039 of 2002. Mr Macks is able to pursue his claim against me under the protection of a company, Bernsteen that is insolvent and without any funds to meet any judgment that may be made against it.

538 On 28 February 2006 Registrar Christie adjourned Ms George's creditor's position to 5 June 2006.

539 On 1 March 2006 Ms Flaherty from Minter Ellison sent an email to Mr Livesey QC informing him of the decision made by Registrar Christie on 28 February 2006 to adjourn the creditor's petition in the George bankruptcy proceeding to 5 June 2006 to allow the Bernsteen action to proceed to trial in the Magistrates Court. Ms Flaherty expressed some concern that the effect would be to allow the trial in the Bernsteen action to proceed over an estimated 13 days, and by implication, the Hamilton-Smith declaration proceedings in the Adelaide Magistrates Court may also need to be defended. Ms Flaherty sought a conference so that the responsible partners at Minter Ellison and Mr Macks could discuss with Mr Livesey QC the options of an appeal or review. Ms Flaherty also informed Mr Livesey QC that Mr Macks was concerned about the level of costs.

540 On the same day Minter Ellison wrote to Mr Magers at PPB reminding him that, in accordance with an agreement reached in June 2005, there was an outstanding account of $6,263.95 in the Viscariello proceedings and another account of $13,936.55 outstanding on the professional indemnity claim. Minter Ellison also advised that close to $4,000 was due to counsel on the Viscariello proceedings and the professional indemnity claim. Finally, the letter reminded Mr Magers that $24,200 was payable to counsel in the Bernsteen action.

541 On 7 March 2006 Minter Ellison formally reported to Mr Macks about the state of the proceedings arising out of the attempts to bankrupt Ms Hamilton-Smith. With respect to the Bernsteen action in the Adelaide Magistrates Court, Minter Ellison estimated that fees in excess of $75,000 would be incurred if that trial were to proceed. On the Hamilton-Smith declaration proceedings in the Magistrates Court, Minter Ellison correctly anticipated that it was likely that Ms O'Connor SM would reinstate Ms Hamilton-Smith's claims which had been dismissed due to the non-attendance by Mr Viscariello. Ms O'Connor SM made that order on 23 March 2006 and the trial was listed for 13 June 2006. Ms O'Connor SM made an order for costs in favour of Ms George but declined to order that the matter was fit for counsel. The agreement between Mr Macks

and Ms George did not on its terms extend to the Hamilton-Smith declaration proceedings. This lacuna in the agreement was yet another source of possible conflict between them. Minter Ellison reported that the George bankruptcy proceedings in the Federal Magistrates Court had been adjourned to 5 June 2006. Minter Ellison reported that the outstanding fees in those proceedings were $38,835.80 and that the work in progress had increased to $40,738 plus GST. Minter Ellison reported that the review of Registrar Christie's decision to adjourn the petition was listed before Federal Magistrate Raphael on 11 April 2006.

542 On 22 March 2006, Mr Magers wrote to Ms Flaherty instructing her to engage Mr Livesey QC on the review application in the George bankruptcy proceedings. Ms Flaherty was instructed to engage another junior counsel in the Bernsteen action on an application to obtain better particulars of Ms Hamilton-Smith's action, and to do whatever was necessary to enable an appeal to be brought from Ms O'Connor SM's anticipated decision to reinstate the Hamilton-Smith counterclaim against Bernsteen.

543 In a letter dated 5 April 2006, Minter Ellison urged Mr Macks to concentrate on the review of Registrar Christie's decision to adjourn the George bankruptcy proceedings in the hope that a sequestration order might be made notwithstanding the trials pending in the Magistrates Court. Not surprisingly, Minter Ellison advised that if that failed Mr Macks should attempt to extricate himself from the expensive morass in which he found himself. Minter Ellison wrote:

> "Having discussed the matter with Mr Mansueto, we are strongly of the view that your strategy in the matter should be to concentrate all efforts and resources on the review hearing. If a sequestration order is not made at that time, then we consider that you should immediately attempt to negotiate a resolution of all matters with Ms Hamilton-Smith, on the basis that the parties including Ms George, walk away with no order as to costs and both parties' entitlement to costs be forgone.
>
> Whilst we had attempted to utilise the George debt to overcome the problem of the ongoing litigation between you and Ms Hamilton-Smith, that debt has its own difficulties and is no longer an appropriate vehicle to pursue. It is most unfortunate that we have had a number of decisions turn against us in the matter. That is a risk of litigation. If our final attempt to bankrupt Ms Hamilton-Smith is not successful, then we feel it is time to withdraw and focus your efforts on other claims in the administration, such as Mr Viscariello's. Clearly there is no commercial benefit in pursuing the matter beyond the review when you are faced with two Magistrates Court trials in May and June 2006." (underlining added)

544 Minter Ellison also informed Mr Macks that Ms George had offered to pay over to him all of the proceeds of any recovery from Ms Hamilton-Smith. Despite Minter Ellison's advice not to accept that sum and to only accept the contribution of $1,000, Mr Macks, through Mr Magers, accepted Ms George's offer.

545 On 11 April 2006, the application to review Registrar Christie's decision to adjourn the Heidi George bankruptcy petition proceeded before Raphael FM. On 21 April 2006, Raphael FM dismissed the application for review.

546 Magistrate Raphael referred to Ms Hamilton-Smith's concern that a sequestration order made with respect to a small debt, payment of which had been tendered, would "strangle" her more valuable litigation by way of counterclaim Ms Hamilton-Smith had brought against Bernsteen. Magistrate Raphael found that that ground was not in itself a sufficient reason not to make a sequestration order.[89] Magistrate Raphael went on to hold that the Bernsteen action, not being a proceeding against the petitioning creditor, namely Ms George, did not constitute sufficient cause not to make a sequestration order. He referred to the decision in *Ling v Enrobook Pty Ltd*[90] in which the Full Court of the Federal Court, after referring to and citing from *Cain v Whyte*, held:[91]

> A review of the authorities discloses that in certain circumstances, but not in all circumstances, the fact that the debtor has pending before a court a legitimate claim to funds sufficient to satisfy the petitioning creditor's debt will amount to "other sufficient cause" not to make a sequestration order (*Re Yeatman; Ex parte Yeatman* (1880) 16 Ch D 283; *Maddestra v Penfolds Wines Pty Ltd* (1993) 44 FCR 303; *Re James; Ex parte Carter Holt Harvey Roofing (Australia) Pty Ltd (No 2)* (1994) 51 FCR 14; *Ling v Commonwealth*). The circumstance that the legitimate claim of the debtor is one against the judgment creditor is likely to be a significant circumstance for the purposes of s 52(2)(b).
>
> …
>
> The above authorities do not, in our view, support the appellant's contention that the courts recognise a public interest in allowing a debtor to prosecute litigation commenced by the debtor. The public interest recognised by such authorities is that which, in broad terms, is reflected also in s 40(1)(g) of the Act; that is, that a sequestration order ought only to be made on the basis of an indebtedness which is not counterbalanced by a claim by the debtor against the petitioning creditor. Such authorities provide no comfort to a debtor who asserts a claim, not against his or her creditor, but against a third party.

547 Nonetheless Magistrate Raphael concluded that the imminent trial of the Bernsteen action was sufficient reason to adjourn the George bankruptcy proceeding. In reporting the decision to Mr Macks on the same day, Minter Ellison wrote:

> "In the circumstances, it may be prudent to revisit our advice in relation to settling these matters."

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89 His Honour referred to *Cain v Whyte* (1933) 48 CLR 639 in which the High Court held that where proof of the preconditions for an order for sequestration had been made out, the debtor had to show "some cause overriding the interests of the public in the stopping unremunerative trading and the rights of individual creditors who are unable to get their debts paid to them as they become due".

90 (1997) 143 ALR 396.

91 *Ling v Enrobook Pty Ltd* (1997) 143 ALR 396 at 400-401.

548 During April 2006, Mr Macks instructed Minter Ellison to make enquiries of various liquidators to see if they would act as trustee of Ms Hamilton-Smith's bankrupt estate. Enquiries were also made of liquidators to act as a special purpose liquidator to pursue an insolvent trading claim against Mr Viscariello.

549 Notes of internal discussions within Minter Ellison following the decision of Magistrate Raphael show that the partners of Minter Ellison had decided to "have a frank discussion" with Mr Macks about settling the Hamilton-Smith matters because "both Minters and PPB need to cut their losses". The notes record that the solicitors with conduct of the matters decided that Mr Macks must be told "that we cannot run it on spec as there is no prospect of recovery".

550 A letter seeking a meeting was sent to Mr Macks on 27 April 2006. Mr Macks was advised to "immediately recommence negotiations with Ms Hamilton-Smith with a view to agreeing to discontinue all litigation on the basis all parties bear their own costs". With respect to the Bernsteen action and the attempt to bankrupt Ms Hamilton-Smith on the basis of the Bernsteen costs allocaturs, Mr Macks was told that an amount in excess of $27,000 had been expended on counsel fees, that there was in excess of $150,000 in work in progress and $142,509.97 in outstanding invoices. Total fees of $334,000.81 had been incurred. With respect to the George bankruptcy proceeding in which Minter Ellison was not acting speculatively, the fees were recorded as follows:

Counsel fees	$ 6,864.00
WIP	$55,760.50
Unbilled disbursements	$ 1,615.49
Outstanding invoices	$ 9,097.80
Total	$64,249.97

551 The legal costs incurred in the Bernsteen actions and both the Bernsteen and George bankruptcy proceedings were therefore close to $400,000.

552 The letter noted that the Bernsteen action did not have sufficient prospects of success for Minter Ellison to act on a speculative basis. After also noting that no monies had been paid on account of Minter Ellison's fees in the George bankruptcy proceedings, Mr Macks was advised:

> "Whilst this firm highly values its relationship with PPB, in the circumstances of this case, the executive of Minter Ellison has indicated that it is not prepared to continue to fund the matter, and in particular, the Bernsteen trial and the George trial. Mr Nigel McBride has made it very clear to us that we are not to act any further unless our costs are met. The point has been reached where we can no longer act on these matters on a speculative basis."

Minter Ellison estimated that, if the matters were to proceed further, fees and costs in the order of $120,000 would be incurred.

553 At that point the state of the proceedings were as follows:

1. Ms Hamilton-Smith's counterclaim in the Bernsteen action in the Magistrates Court was listed to recommence on 16 May 2006 for 13 days. A claim of $14,000 in legal costs had been made against Bernsteen on an unsuccessful interlocutory application for further particulars of Ms Hamilton-Smith's counterclaim.

2. Ms Hamilton-Smith's application to set aside the George bankruptcy notice had been dismissed by Registrar Christie but the matter adjourned even though she was satisfied that the debt had not been satisfied to allow the trial in the Bernsteen action to take place on 16 May 2006 and that adjournment had been confirmed on appeal by Magistrate Raphael. Costs were reserved.

3. An application by Ms George to strike out Ms Hamilton-Smith's claim in the Hamilton-Smith declaration proceeding in the Magistrates Court as an abuse of process, given Registrar Christie's decision, had been dismissed by Ms O'Connor SM. Ms Hamilton-Smith's claim was listed for a two day trial commencing on 13 June 2006.

The letter of 27 April 2006 went on to advise Mr Macks about the options available to him in these terms:

> "The two options available to you are to:
>
> 1. Settle all matters involving Ms Hamilton-Smith, Bernsteen, and Ms George; or
>
> 2. continue to aggressively pursue all litigation at the likely costs set out above.
>
> Although there will be no benefit to creditors in continuing to pursue the litigation, and indeed you may be required to fund the litigation from your own funds given the lack of funds in the administration, we accept that this is a commercial decision for you to make. We understand that you may wish to proceed due to matters of principle.
>
> Should you wish to continue the litigation, our suggested approach, subject to counsel's views, is to consent to Ms Hamilton-Smith's application to vacate the Bernsteen trial date which will not be heard by Magistrate Fahey until 8 May 2006. The George trial should be pursued as soon as possible as if the Magistrate finds the debt owed to Ms George is outstanding, you will then be in a position to move forward with the bankruptcy proceedings in the Federal Magistrates Court.
>
> If you wish to take this option, then we seek your commitment to meet the outstanding costs of the George matter (actions 4, 5 and 7) and the estimate of costs given above for the ongoing work required.
>
> The alternative is to explore settlement. To initiate discussions, we would contact Mr McNamara and raise the possibility of payment of the George monies (approximately $4,500 which were tendered to us on a conditional basis) in return for the discontinuance of all matters, with the parties to bear their own costs. Any settlement must settle all matters between Ms Hamilton-Smith, Bernsteen and Ms George."

554 The observation reiterated in that letter that there was no benefit to the creditors in pursuing the litigation is, of course, very significant. Ms Riach testified that in "matters of principle" was a reference to Mr Macks' strong view that the contract which he had made as a liquidator with Ms Hamilton-Smith should be strictly enforced.

555 Ms Riach testified that she never gave Mr Macks advice that he would be in breach of his duty as liquidator if he continued the claim against Ms Hamilton-Smith. Neither she, nor anyone else, at Minter Ellison considered that there was anything improper about the arrangement with Ms George. Ms Riach testified that Mr Livesey QC was satisfied that it was not an issue.

556 Standing back to review the position as at April 2006, the course which Mr Macks had taken in pursuit of Ms Hamilton-Smith left only one view open: it was disastrous. More had been spent on the collateral George bankruptcy proceedings than the debt he was seeking to recover. Moreover, any costs orders made in his favour were unlikely to compensate for much more than one half of the legal fees he had incurred and actual recovery even of that amount would be difficult. The fees charged by PPB in the Bernsteen action to June 2005 were $136,338 and the fees of Minter Ellison were $191,568.00. Prosecution of the actions against Ms Hamilton-Smith for the purpose of recovering a debt of just $28,000 was manifestly unreasonable, indeed irrational unless they served a useful collateral purpose.

557 The issues raised by Minter Ellison's letter of 27 April 2006 were discussed in a conference held at the chambers of Mr Livesey QC on 28 April 2006. Attending that conference with Mr Livesey QC were Mr Macks, Natasha Riach and Miss Flaherty.

558 Typed minutes of the meeting prepared by Ms Riach of Minter Ellison and sent to Mr Macks on 1 May 2006 were received into evidence. On the oral testimony of the meeting which I heard, and the fact that Mr Macks did not take issue with the notes in any material way at the time, I am satisfied that those notes fairly record what was said.

559 The notes record that Mr Macks expressed concern about Minter Ellison's letter of 27 April 2006 and that he expressed the view that Minter Ellison "is no longer supporting him as liquidator of the company". Mr Macks is recorded as saying:

> Other law firms support all the way to the conclusion of a speculative matter and not "abandon ship" when things get difficult …
>
> The number one rule is to protect the insolvency practitioner at all costs "whereas Minter Ellison was "letting him down by taking the attitude that they no long act on spec"".

560 I find that the remark attributed to Mr Macks was made by him and that it gives an important insight into a substantial motive behind the instructions given

by Mr Macks before and after that meeting. In short, Mr Macks was motivated by a perception that he was personally under threat and a view that attack was the best form of defence.

561 The minutes record Ms Riach as advising Mr Macks that in her view the litigation was at a "cross road". She assured Mr Macks that Minter Ellison would provide ongoing support to negotiate a final settlement but that if Mr Macks "was intent on pursuing it to conclusion by litigating everything then given the costs of the Bernsteen trial and High Court appeal, Minter Ellison could no longer fund that work".

562 The notes record that Ms Riach informed Mr Macks that Minter Ellison had funded the matter to the extent of some $300,000 in legal fees and that they expected future costs to be in the order of $120,000 if the litigation was fully defended. Mr Macks was told that "there is a time when the commerciality of continuing to act needs to be reassessed, particularly as no return is expected from the litigation".

563 A strategy to proceed with the trial of the Bernsteen action in May 2006, at least to a stage where it became plain that Ms Hamilton-Smith had no evidence to support her claims was considered. It was thought that Registrar Christie would proceed to make a sequestration order if the hopelessness of Ms Hamilton-Smith's counterclaim became manifest in those proceedings.

564 Ms Riach's notes record a decision not to undertake any preparation for the trial of the Bernsteen action before the interlocutory hearing before Magistrate Fahey on 8 May 2006. Mr Livesey QC agreed to speak to the junior counsel briefed to appear on that trial to ensure that he was comfortable with being allowed just one week to prepare for it after the interlocutory hearing.

565 Mr Macks is recorded as observing that "the main game is the John Viscariello litigation". That observation too is consistent with what I find was a substantial actuating purpose behind the strategies adopted by Mr Macks. The notes record that Mr Macks felt that if the Bernsteen action and George bankruptcy proceedings were settled, it would give Mr Viscariello "more determination to go forward with all of his actions against Peter and PPB."

566 In his evidence Mr Macks' primary objection to the notes made by Ms Riach was that they emphasised his interests in defending the professional indemnity claim over his preparedness to settle. He explained:

> Well the point that I particularly made, wherever it is, it talks about the main game, I thought – I can't find it but it's there somewhere. I thought and I said to Andrew Magers, that that's taken out of context and has got to be read within the context of what was said at the meeting and also in light of the summary which clearly outlines the fact that I am basically prepared to settle, whereas the main game comment gave weight to an argument that I wasn't prepared to settle and that was not the case. I can't find the paragraph but it's in there somewhere.

567 The distinction made by Mr Macks is a subtle one. Moreover, in my view, Mr Macks' concern is one made in retrospect and through the prism of the issues raised in this litigation. I do not doubt the accuracy of the notes in this respect. The discussion in the meeting, the decisions actually made, and the course of the proceedings, brought against Ms Hamilton-Smith show that in deciding whether, and on what terms, he should compromise the proceeding against Ms Hamilton-Smith, Mr Macks kept a keen eye on the collateral consequences any course might have on the actions he anticipated that Mr Viscariello would bring against him.

568 In the discussion concerning the Hamilton-Smith declaration proceedings, which was listed for trial on 13 June 2006, the meeting resolved to have Miss Flaherty consider the claims of impropriety made by Ms Hamilton-Smith arising out of the indemnity. It was noted that after the impropriety issue had been considered, consideration would be given to informing Ms Hamilton-Smith of the arrangements in place to indemnify Ms George for her costs.

569 Mr Macks testified before me that at the time of the April 2006 meeting he believed that the documents relating to the George indemnity arrangement were privileged because of his discussions with his legal advisors. When asked why he claimed privilege over documents recording his funding arrangement with Ms George, Mr Macks responded:

> Only because I think at the time I was of the view that there was nothing improper in relation to the funding arrangement, and that's what was said to me and I considered that if that material, it might be of a, what you might view a commercially sensitive matter – if that came out it would just put a new element and new dimension to it which I commercially considered to be unnecessary.
>
> …
>
> Well I thought it would lead to whole series of questions in relation to both the funding, the limitation of the funding you know rather than just a straight quick George trial, two day trial.

570 Mr Macks testified that it was not until December 2006 that he received formal advice that there was no impropriety associated with the George funding arrangement.

571 On the question of settling the proceeding brought against Ms Hamilton-Smith, Ms Riach's typed notes record that Mr Macks informed the meeting that if he could "shut down" all of the Hamilton-Smith litigation he would be happy to do so. Mr Macks acknowledged that it was unlikely that Mr Viscariello would settle all matters because the Australian Taxation Office was pursuing its indemnity against him and because of the prospect of a special purpose liquidator being appointed to prosecute an insolvent trading claim. The notes record Mr Macks' calling for a "parallel strategy" which involved the appointment of a special purpose liquidator, continuing to defer the Hamilton-Smith declaration

proceedings and holding the status quo in the Bernsteen action until Registrar Christie was forced to make a decision in the bankruptcy proceedings. The minutes record Mr Macks informing the meeting that he was "happy to resolve" the Bernsteen action and the George bankruptcy proceedings on a commercial basis but that he did "not want to be seen to be weakening on these claims as he considers this will made [sic] John Mr Viscariello will put more effort into pursuing his claims against PPB and Peter".

572 In his evidence, Mr Macks explained the parallel strategy referred to in the notes of the meeting in this way:

> The parallel strategy, I thought I'd mentioned before an earlier cross-examination was merely number 1, me continuing my role as liquidator and dealing with those aspects of it; and number 2, dealing with aspects of the Tanya Hamilton-Smith, the George matter, so that the costs could be minimised, reduced or objectivity brought to bear. That was what was occurring during this period in 2006, if I remember correctly.

573 Mr Macks explained the reference in the notes of the Bar Chambers meeting to him not wanting to give the appearance of "weakening" in this way:

> Yes I thought from the company's point of view if we were seen to be weakening then we'd either achieve a lesser settlement or we'd incur further costs for one reason or another; so our costs structure would go up.

574 However, I reject Mr Macks' evidence that his comment about weakening was a reference to the position of the Companies. Their position was already hopeless. There was no prospect that they would benefit from the litigation. Their interests lay in abandoning the proceedings, even with each party bearing its own costs. I find that a settlement on those terms was always likely to find favour with Ms Hamilton-Smith.

575 Mr Macks denied that his interests in defending Mr Viscariello's claims against him were inconsistent with the interests of the Companies. He testified:

> Because at that time and much subsequently I always formed the view that there was no substance to the claim. So my concern in relation of claim was merely that it would bog the liquidation down, it would continue the liquidation. The liquidation would incur costs. It would be unable to resolve and the creditor base including the liquidator's fees would just go on and on and on. That was my only view in relation to it.

576 Mr Macks testified that the excess on his professional indemnity insurance policy was $50,000. He testified that pursuant to the terms of the policies, the allegations made by Mr Viscariello were treated as two claims and that he had therefore paid an excess amount of $50,000 on each of the claims. Mr Macks testified that he believed that he could properly recover the costs he had incurred in defending the action against him from any funds in the Companies' liquidation. Mr Macks testified that he had received counsel's opinion in another matter that if there was no substance in the allegations made against a liquidator in the conduct of a winding up that the liquidator was entitled to recover the costs

of defending the claim in the liquidation. Mr Macks testified that the excess on his insurance policy was paid out of funds in the Bernsteen liquidation. The effect of that payment was, of course, that there was $50,000 less from which Mr Macks could recover his fees in the liquidations.

577 Mr Livesey QC described the parallel strategy referred to in the minutes in these terms:

> And so rather than accept that, what he has described as a parallel strategy, as I recollect it, was to spend as little as possible on the Bernsteen and Hamilton-Smith matters. I don't remember Mr Macks saying anything about a parallel strategy linking the special purpose liquidator together with the Bernsteen and George matters. My recollection was that Mr Macks was concerned to pursue the insolvent trading claim because as he described it, it had merit and stood a prospect of making a very significant return for creditors, and the reference – what I remember Mr Macks saying is that a special purpose liquidator would be an issue put before the committee of inspection, so that there would no longer be arguments against Mr Macks personally, in other words to remove Mr Macks from any consideration of pursuing that claim on behalf of the companies.

578 By the time of the April 2006 meeting, it was improbable in the extreme that the creditors of the Companies stood to gain any benefit from the continuation of the proceedings against Ms Hamilton-Smith or the proposed insolvent trading action against Mr Viscariello. Mr Macks' fees, including possibly the excess he had paid on the insurance claims, took priority over any distribution to creditors. So too did the substantial legal fees of Minter Ellison. Despite the priority enjoyed by Minter Ellison, its objective appraisal was that there was no benefit in proceeding. Plainly there was no reasonable basis on which to expect any cost effective recovery from Ms Hamilton-Smith or Mr Viscariello.

Denials of Mr Macks' interest in the George proceedings

579 On 8 May 2006 Mr Fahey SM vacated the trial date in the Bernsteen action and adjourned the applications for particulars to 16 May 2006. Expert reports were provided by Ms Hamilton-Smith on that same morning. Mr Fahey extended the time for Ms Hamilton-Smith to serve expert reports. The resumed hearing was listed for 4 December 2006. Costs thrown away were ordered against Ms Hamilton-Smith.

580 On 25 May 2006 Mr Macks wrote to Mr Mansueto referring to the meeting at Bar Chambers and the correspondence which preceded it. Mr Macks again complained about Minter Ellison's decision not to continue to act in the Hamilton-Smith matters on a speculative basis. Mr Macks hinted at a complaint to the Legal Practitioners Conduct Board:

> I was not able to locate any correspondence on our files from you that outlined the precise terms of running these matters on a speculative basis. In the absence of any correspondence I have had regard to the rules of Professional Conduct in Practice ("Conduct Rules") adopted by the Law Society of South Australia. In particular I draw your attention to section 6 of the Conduct Rules relating to termination of engagement.

Mr Macks then set out section 6 of the Law Society Conduct Rules which provided that in the absence of an agreement or discharge by the client, a practitioner could not terminate an engagement other than for just cause and on reasonable notice of the client. Mr Macks asserted that Minter Ellison did not have just cause. Mr Macks continued:

> There were numerous times in the past years where the progress of this matter was discussed and future actions were determined. It is not appropriate, having made decisions previously which were based on Minter's ongoing support, that you now unilaterally choose to select the abandoned action.

581 Mr Macks' letter concluded:

> This letter has been discussed and is supported by all Partners in the firm. As discussed with you on many occasions, both our firms are in this for the long haul.

582 There were meetings of the Committees of Inspection for Bernsteen and Newmore on 29 May 2006. The minutes of the Bernsteen meeting record that Mr Colyer and Mr Williams from Associated Retailers Limited were present by telephone. Miss Higgins attended in person. Mr Macks was present with Mr Magers. The minutes record discussion about the insolvent trading claim. The minutes do not record any detail of the discussion with respect to the Bernsteen action or the George bankruptcy proceedings.

583 Mr Macks gave evidence that the minutes were merely a summary of what took place and that they were not prepared or initiated by him. He emphasised that there were many documents taken into the meetings, including letters from lawyers. He described the minutes as "very, very brief".

584 Nonetheless, I find it surprising, given the position in which Mr Macks and the Companies found themselves and the discussion in the meeting of 27 April 2006 that the minutes do not deal in greater detail with the Bernsteen action and the George bankruptcy proceedings. It confirms my view that Mr Macks communicated very little about the course of the litigation to the Committee.

585 When Mr Macks was asked about the reaction of members of the Committee at the May 2006 meeting when the costs had escalated even more. He answered:

> No, I'm just trying to remember, I just can't picture that particular meeting if it was in May 2006, that's all. It's just too long – I just can't – cant picture Mr Colyer saying anything in relation to this particular letter, that's all, it just goes back too far.

586 Mr Macks testified that he told the Committee that Minter Ellison's legal advice would inform his decisions but that ultimately he would have to navigate his way out in some commercial way. He could not recall whether or not he referred to the advice of Mr Livesey QC.

587 Mr Macks gave the following evidence about the Committee's knowledge of the arrangements which he had made with Minter Ellison for the payment of legal costs:

> A The discussion that I can recall was that they were aware that it was speculative and that they were aware that our fees were speculative and I did express the view, and I don't know if it's at that meeting or other meetings, I expressed the view that all of those amounts if you like, were purely contingent and they would have to be looked at if and when we got to the stage of there being any dividend prospects coming out for the creditors. And by that what I mean is that it has been my habit and experience that the building up of WIP is rather academic, rather you get to a stage, if you actually got a realisation, you look at where that realisation will go to and when you might have to go back and reflect on that level of WIP and it might have to be written down because it's just a pen entry.
>
> Q Yes, I think that you explained that that was your approach to me before. But at the meeting in May 2006, no one commented along the lines "well, for us to see anything from the insolvent trading action we are going to have to get over $400,000 or so on these Hamilton-Smith proceedings before we start to see it". Was anything asked like that which then lead to the explanation which you've just given me.
>
> A The commentary, the dialogue with the Committee that I can recall was more so focused on the side of the insolvent trading action and my memory was it was $2,000,000 plus or something of that nature and I seem to recall that that was considered to be such a sufficiently large figure that these issues weren't terribly relevant within that context.

588 Mr Macks' answers also lead me to conclude that the Committee of Inspection was not told about the extent of the expenditure on pursuing Ms George. If that information was fully disclosed, there was bound to be a reaction. I am fortified in drawing that inference by Mr Macks' failure to call any member of the Committee to support his evidence that he made comprehensive disclosures to them.

589 I reject Mr Macks' evidence that he disclosed the extent of the legal fees incurred in the Bernsteen action and the George bankruptcy proceeding to the May 2006 meeting of the Committee. I find that Mr Macks did not disclose the substance of the discussion and decisions made in the 27 April meeting.

590 The Committee of each of the Companies resolved that Mr Macks be authorised to apply to the Supreme Court of South Australia for orders appointing Mr Ian Lock and Mr John Sheahan of Sheahan Lock Partners as independent, joint and several, special purpose liquidators for the purpose of investigating and prosecuting any insolvent trading claims.

591 On 29 May 2006, Ms O'Connor SM dismissed Ms Hamilton-Smith's application to amend her claim in the declaration proceedings to plead the indemnity arrangement between Mr Macks and Ms George.

592 On 13 June 2006 the Hamilton-Smith declaration proceedings in the Magistrates Court were dismissed after an extraordinary series of events in which Ms Hamilton-Smith arrived late, engaged in a loud exchange with Magistrate O'Connor and eventually stormed out of the courtroom. Ms Hamilton-Smith was ordered to pay costs on a solicitor-client basis.

593 On 9 June 2006 Ms Hamilton-Smith filed an affidavit of Mr Gawronski in opposition of the sequestration order sought by Ms George. Mr Gawronski deposed to his conversations with Ms George about the arrangements she had made with Mr Macks. Mr Gawronski deposed in paragraphs 13.1 and 13.2 that in a conversation with Ms George in January or February 2006, she had told him that:

> 13.1 A liquidator, Mr Macks, was out to "get" Ms Hamilton-Smith because of a dispute he had with Mr Viscariello.
>
> 13.2 That she had been contacted by Mr Macks' lawyer and asked for assistance as a result of which she entered into arrangement in which Mr Macks paid Ms George $4,000 in exchange for her cooperation in denying that Ms Hamilton-Smith had paid the judgment debt with the supply of manchester.

594 Mr Gawronski went on to allege that Ms George had informed him that Mr Macks had promised to pay all of the associated legal fees so that he could pursue the debt against Ms Hamilton-Smith using Ms George as a front for Mr Macks' action.

595 On 19 June 2006 Ms George filed an affidavit of debt in support of the bankruptcy petition against Ms Hamilton-Smith stating that the whole of the judgment debt remained due and payable and that it had not been satisfied by the acceptance of goods in kind. Ms George also referred to the affidavit of Mr Gawronski and denied "the depositions therein contained". The affidavit was prepared by Mr Flaherty.

596 I accept that the affidavit of Ms George was not misleading and that the natural meaning of her denial of "the depositions" is that she denied the conversations to which Mr Gawronski had deposed. However, the Gawronski affidavit was evidential material which raised as an issue whether or not the petition was an abuse of process by reason of a funding arrangement between Mr Macks and Ms George. I find that Mr Macks was reluctant to disclose the arrangement because he, correctly, foresaw that it would complicate proceedings. The escalating costs of the proceeding by this time were having substantial adverse consequences on Mr Macks' personal financial position. Mr Macks' worry that the proceeding would become more complex arose, in part, out of a concern for his own interest. The Minter Ellison letters to which I have referred and the Form 524 documents lodged for the Companies for the calendar year 2006 show that preference recoveries which might otherwise have been available to pay Mr Macks' fees were being spent on legal disbursements in the Bernsteen

action and in the George proceedings. That position would have been exacerbated if the proceedings were taken down yet another complex foray.

597 Mr Livesey QC gave evidence about his part in framing the way in which Mr Macks responded to allegations concerning the arrangement he had made with Ms George. He testified that he reviewed Ms George's affidavit of 19 June 2006 which denied the Gawronski allegations. He took the view that the statements attributed to Ms George by Gawronski were fabricated and that Ms George's affidavit simply denied the fact and content of the alleged conversations. Mr Livesey QC formed the view that there was no impropriety in the funding agreement such as would prevent him from acting for Ms George. Mr Livesey QC proceeded on the basis that the agreement between Ms George and Mr Macks was confidential and that he needed instructions from Mr Macks before he could disclose it. He confirmed that in the April 2006 conference at Bar Chambers he requested that legal research be undertaken on the issues. He also raised the issue of the relevance of the arrangement with Ms George. Mr Livesey QC testified that it was not until December 2006 that he expressly advised on the propriety of the arrangement.

598 Ms George's bankruptcy petition came on for hearing before Registrar Christie. Registrar Christie refused Ms Hamilton-Smith's application for discovery of documents evidencing the arrangement between Ms George and Mr Macks. Registrar Christie received the Gawronski affidavit but excluded subparagraphs 13.1 to 13.5. Registrar Christie's reasons for making the sequestration order included the dismissal of the Hamilton-Smith declaration proceedings in the Magistrates Court. Registrar Christie also decided that the Bernsteen proceedings were not in themselves a sufficient basis not to make the sequestration order because they did not involve the petitioning creditor. Being satisfied that the Heidi George debt remained outstanding, Registrar Christie made the sequestration order and awarded costs to Ms George.

599 On 23 June 2006 Ms Hamilton-Smith applied for a review of Registrar Christie's decision making the sequestration order. The review was heard by Magistrate Raphael on 5 July 2006.

600 On 7 July 2006 Mr Fahey SM stayed the costs order in the sum of $12,000 made by Magistrate Hiskey on 25 March 2004 in the Bernsteen action.

601 Ms Hamilton-Smith's application for permission to appeal the decision of Ms O'Connor SM dismissing the declaration proceedings came on in this Court on 7 July 2006. The application was dismissed as incompetent because Magistrate O'Connor's order was not interlocutory. Ms Hamilton-Smith's application for extension of time within which to appeal against the final judgment was refused.

602 On the same day Mr Macks swore an affidavit in support of the appointment of Sheahan Lock as special purpose liquidator.

603 On 18 July 2006 Ms Hamilton-Smith appealed to the Supreme Court against the judgment of Ms O'Connor SM dismissing her claim against Ms Heidi George.

604 Magistrate Raphael delivered his judgment on 19 July 2006. He ruled that paragraph [13] of Mr Gawronski's affidavit was inadmissible by reason of the form in which Mr Gawronski had deposed to the conversation. Magistrate Raphael found no reason to dismiss Ms George's petition and confirmed the sequestration order. Ms Hamilton-Smith's counsel immediately informed Magistrate Raphael that his decision would be appealed and a stay of the order was granted on condition that Ms Hamilton-Smith file a statement of affairs to the trustee by 2 August 2006.

605 Ms Flaherty sent a prematurely celebratory email to Mr Magers of PPB on the same day:

> I think that champaign (sic) is now warranted!

606 On 1 August 2006 Mr Mansueto sent a letter to Mr Macks which set out the state of the various matters as of the date of his letter as follows:

- Minter Ellison had performed work on a speculative basis in the Bernsteen action costed at $321,913.69 (exclusive of GST). Payment was not sought for that amount at that stage but Mr Mansueto continued "this will be reviewed if and when other recoveries are made in the administration". Of that total, $19,000 was charged for work undertaken since the meeting with Mr Livesey on 28 April 2006.

- Disbursements in the sum of $1,677.46 had been incurred in the Bernsteen matter and payment was sought for those amounts.

- Minter Ellison's fees in the George matter were $108,119 (exclusive of GST) and payment was required for that amount. Mr Mansueto indicated that Minter Ellison were prepared to consider discounting their invoice and to make a repayment arrangement.

- Further disbursements had been incurred in the George matter in the sum of $790 and payment was required.

- There were outstanding accounts for counsel fees in the sum of $31,707.50.

607 Mr Mansueto then responded to Mr Macks' letter of 25 May 2006. He wrote:

> We have never sought to terminate our engagement as suggested in your letter and we have continued to support you in each of the court actions which has now led to an excellent outcome.

> I regret that you felt Minter Ellison proposed to abandon you or act in an unprofessional manner. You may recall that it was only after proceedings had been issued against Ms Hamilton-Smith that we were informed that you did not have sufficient funds in the administration to meet payment of expenses. We agreed at that time to continue that aspect of the matter on a speculative basis. However, speculative matters are always selected on the basis that we consider there to be a reasonable and obtainable cost effective outcome and that our rights reserved as to whether we continue to act on a speculative basis depending upon the progression of the action.
>
> Further we always require that reasonable disbursement has been met.

608 Mr Macks was advised that an application by the Australian Taxation Office to set aside a consent judgment recovering a preference payment had been dismissed in the Supreme Court. Mr Mansueto explained that Mr Macks was therefore free to use the remainder of the judgment sum in order to pay the outstanding accounts of counsel.

609 In early August 2006 Ms Hamilton-Smith appealed against Federal Magistrate Raphael's decision to confirm the sequestration order made on Ms George's bankruptcy petition.

610 On 16 August 2006 in the Federal Court, Messers Locke and Sheahan were appointed special purpose liquidators of Bernsteen and Newmore to investigate the insolvent trading claims.

611 The letter from Minter Ellison dated 1 August 2006 was discussed in an internal PPB memorandum dated 21 August 2006. The memorandum concluded that the following options were available to Mr Macks:

> 1. Pay amounts requested by Minters;
>
> 2. Lodge complaint with Law Society of SA but query commercial benefit of doing so and harm to relationship with Minters;
>
> 3. Negotiate a discounted payment plan which incorporates the following "sweeteners" (PPB to assist Minters in retaining insurance work from Allianz re PI claims);
>
> 4. Agree for Minters to write off WIP on basis that PPB guarantee Minters get instructed on a set number of new matters.

612 On 21 August 2006 Minter Ellison wrote to Mr Macks concerning the professional indemnity claims. The letter reported that a sum of $20,821.84 had been paid by Mr Macks' professional indemnity insurer for the costs he had incurred with Minter Ellison over and above the $50,000 excess in defending the claim brought by Mr Viscariello. The cheque was forwarded to Mr Macks together with a trust account statement. However Mr Macks was told that some fees of Minter Ellison and counsel remained outstanding. The letter also reported that the recovery of costs against Mr Viscariello and Mr Luigi Viscariello had resulted in an agreement that they would pay about $50,000 by 18 August 2006.

Minter Ellison reported that of that amount they would reimburse Mr Macks a sum of about $18,000 which he had paid on account of counsel fees in the matter but that they would retain an amount of some $30,000 on rendering invoices for work in progress for which Minter Ellison had not been paid. Mr Viscariello and his father eventually made that payment and it was dealt with in the way proposed.

613 By letter dated 30 August 2006 Minter Ellison proposed that the reimbursement due to Mr Macks for his payment of counsel fees on the professional indemnity matter be paid to Minter Ellison against their work in progress in the George bankruptcy proceedings. On 31 August 2006 Minter Ellison issued a tax invoice for fees in the sum of $30,700 plus GST for work between 6 April 2005 and 19 June 2006.

614 On 1 September 2006 Ms Riach and Mr Mansueto met with Mr Macks to discuss the issue.

615 The agenda for the meeting between Minter Ellison and Mr Macks on 1 September 2006 was follows:

- Strategy for ongoing work on George and Hamilton-Smith litigation;
- Draft letter to Allianz re PI claim;
- Recovery of recent costs orders; Minters have recently taken $44,081;
- Bernsteen WIP as at 31.08.2006 $485,000 plus GST;
- Bernsteen funds available $1,600.

616 On 4 September 2006 Mr Macks wrote to Minter Ellison confirming that they had reached the following agreement:

- Minter Ellison would agree to cap its fees at $100,000 with respect to Heidi George and Hamilton-Smith litigation and continue to act on a speculative basis until resolution of the matter.
- Minter Ellison would retain from recoveries made on certain cost orders the sum of $20,308 and apply that sum to the agreed lump sum fee of $100,000 on the George matter.
- Mr Macks would raise a bill for his work in respect of Newmore and then apply those funds to meet the outstanding barristers' fees and Minter Ellison's fees in the sum of $30,000.
- The costs order against the Australian Taxation Office in respect of the liquidators fees incurred in preparation of the insolvency report (estimated to be in the order of $50,000) be paid to Minter Ellison.

- Mr Macks would meet the fees of counsel in the hearing before Gray J in the Supreme Court and before Besanko J in the Federal Court.

- Monthly meetings would be held to provide Mr Macks with an update of the costs associated with the various Hamilton-Smith matters.

617 Mr Macks concluded:

> As you are aware, I remain concerned as to the level of fees incurred on this matter and I maintain a different view concerning the events detailed in your letter of 1 August 2006. I note also that a number of comments contained in that correspondence from you which are not correct and/or are misleading, however whilst I reserve my rights in respect of such issues, little is served by detailed examination of such issues at this time.

618 On 5 September Mr Mansueto informed Mr Macks by letter that he should make arrangements to pay legal fees incurred in the George bankruptcy proceedings after 1 September 2006.

619 On 6 September 2006 Mr Macks replied complaining that:

> At our meeting on 1 September 2006 it was our clear understanding that Minter Ellison would agree to cap its fees at $100,000 with respect to the Heidi George and Hamilton-Smith litigation and agrees to keep acting for the liquidator on a speculative basis in this matter until the resolution of the matter. As you are aware there are no funds in the administration and the $100,000 has been in part raised by this practice paying your firm directly.
>
> Your letter now states that separate arrangements will need to be made for payment by PPB of work from 1 September 2006. This is quite contrary to the spirit of our discussions and recollection.
>
> Your urgent comments with respect to this are appreciated as I do not wish to incur any further costs until this fundamental issue is resolved.

620 Minter Ellison responded on 11 September 2006. Mr Mansueto claimed that he had a different recollection of the meeting of 1 September 2006. Mr Mansueto referred to Mr Macks' decision to prosecute the George bankruptcy proceeding "for strategic purposes" and said that for that reason Mr Macks had "agreed to indemnify Miss George for the costs she would incur". Mr Mansueto claimed that Minter Ellison had reduced their fees from $115,000 to $100,000 for work done to 1 September 2006. Mr Mansueto contended that there was no agreement that further work would not be charged in the ordinary way and described Minter Ellison's approach as a reasonable compromise in respect of past costs. He asked Mr Macks to keep in mind that Minter Ellison were likely to write off approximately $600,000 in fees before the matters were completed. The letter then estimated the future costs which would be incurred which included solicitors' fees of $11,500 and counsel fees of $7,500 on the Supreme Court appeal and fees of $7,000 and counsel fees of $7,500 on the Federal Court appeal. By letter dated 18 September 2006, Mr Macks took issue with Mr Mansueto's letter of 11 September 2006.

621 On 12 September 2006 the appeal brought by Ms Hamilton-Smith against the dismissal of the Hamilton-Smith declaration proceedings in the Magistrates Court came on before Gray J in the Supreme Court. The hearing did not conclude on that day and it was adjourned first to 19 September 2006 and then again to 16 October 2006.

622 In the hearing which proceeded before Gray J on 12 September 2006, Ms Hamilton-Smith relied on that part of Mr Gawronski's affidavit in which he had deposed that Ms George had confided in him that Mr Macks had paid her the amount of $4,000 which she claimed from Ms Hamilton-Smith. Ms Hamilton-Smith contended that Ms George's debt had in effect been discharged by the arrangement that she had made with Mr Macks. Ms Hamilton-Smith argued that on that ground she was entitled to a declaration that the judgment debt had been satisfied and that Ms George was not entitled to enforce the debt. Anticiapting a hearsay objection to Mr Gawronski's affidavit on that question Ms Hamilton-Smith's counsel sought an order for discovery so that any documentation of that payment held by Mr Macks might be produced. Ms Hamilton-Smith's counsel submitted:

> We say that what in effect has occurred here is at best an assignment and if there is an amount of money owing, it's an amount of money owing to the liquidator. The liquidator's not showing his hand as it were and the relevance of the pleading is that it gives a greater justification to our claim for return of the money that was subject of the transaction to satisfy the debt in the first place because at the moment there's been two payments to the defendant we say. (1) is by way of the goods that were passed over and (2), is that she's been compensated by the liquidator and must give the goods back.

623 In the course of the submissions Gray J described Ms Hamilton-Smith's allegations as one of a conspiracy between Mr Macks and Ms George. Later in the submissions the following exchange occurred between the bench and Mr Livesey QC:

> HIS HONOUR Does Mr Macks have an interest in this matter of any sort?
>
> MR LIVESEY On my instructions he has no interest in the debt which is the subject of the action and on my instructions he's never paid the debt.
>
> HIS HONOUR Does he have any interest in this action at all?
>
> MR LIVESEY Not on my instructions, no.
>
> HIS HONOUR Was there a time when he had any interest in the action?
>
> MR LIVESEY Not on my instructions. My instructions are that, in short, Ms George has never met Mr Macks, the agreement which has been alleged is denied, and there is no payment of the debt such as has been alleged …

624 Mr Livesey QC was called by Mr Macks in these proceedings and gave the following evidence about that exchange:

Q. ….. What do the words 'Any sort' usually mean.

A. Your Honour, in endeavouring to answer the judge's question I had in mind the Gawronski allegations, which included not just the Manchester payment but the payment by Mr Macks of the amount of money that went to Ms George, and what I was doing in the course of this passage is addressing what had occurred before Magistrate O'Connor, and when the judge asked me this question I took the words 'An interest' to be an interest of the usual sort, a legal or equitable interest, and that's what I was endeavouring to answer. As I answered that -

HIS HONOUR

Q. It seemed to me that the word 'Debt' was quite deliberate - 'No interest in this debt'.

A. That's right, your Honour.

Q. And so what you intended to convey to his Honour is that there was no legal or equitable interest in the chose in action with Ms George.

A. That's what I was endeavouring to do, your Honour. I have had a number of matters before his Honour Gray J and when he used the word 'Interest' I immediately assumed he meant it in a commercial sense, a legal sense.

Q. Now, if Ms George had said to Mr Macks through Minter Ellison or through another officer of PPB that she was happy for all the proceeds of the debt to go to the liquidator, that might constitute an interest in the debt, mightn't it.

A. I accept that.

Q. But you told me before lunch you had no idea that there had been any - if such conversation, if there had, had been –

A. That's correct.

Q. To make it clearer, if there had been such a conversation, you certainly didn't know.

A. I didn't your Honour.

Q. Right, so that's how you understood his Honour's first question.

A. Yes, your Honour.

XXN

Q. That's the first question 'Does Mr Macks have an interest in this matter of any sort' and then you give an answer.

A. Yes.

Q. And you've explained that to his Honour as your perception that his Honour uses the word 'Interest' in the sense of a legal or equitable one.

A. Yes.

Q. Then the question is asked again 'Does he have any interest in this action at all'. Quite plainly his Honour is not satisfied with the answer you've given because he's thinking - he wouldn't be asking the question again –

HIS HONOUR: We don't have to put words in –

MR PHILLIPS: All right –

HIS HONOUR: Just a minute. The relevant question I would have thought is how did Mr Livesey understand that question.

MR PHILLIPS: All right.

XXN

Q. Looking at that, Mr Livesey, given that he's asked you the question a second time, how did you understand the second question.

A. As I stood there on my feet and I was being asked that question, I was aware of course that I had tied the word 'Interest' to the debt, and his Honour was asking me about any interest in the action. I still thought in terms of a legal or equitable interest and I could not think of a legal or equitable interest in the subject matter of the action that Mr Macks had.

HIS HONOUR

Q. Well, what was the action.

A. Well, your Honour, I'd assumed - sorry, I withdraw that - again I have asked for the pleadings, but I haven't seen the pleadings. But my recollection is that what was being alleged by Ms George at this time was the Manchester payment –

Q. By Ms Hamilton-Smith you mean.

A. I apologise, that's so. But what happened was that there was a fresh Magistrates Court proceeding commenced by Ms Hamilton-Smith against Ms George in which, at the very least, the Manchester payment was being re-agitated and, as I recollect it, there was a prayer for a declaration that the payment had been made and therefore that the debt was not owed, and it was in that context that I understood the action.

Q. Well, yes, yes. You see, if you want to be particularly legal, technically legal about these things, the action here in question, or the action in question before Gray J, wasn't the chose in action for the debt, it was actually an action for a declaration in which, strictly, Mr Macks could have no interest in the sense that you were earlier discussing.

A. Your Honour, I accept that. I simply wasn't thinking to that level of detail at that moment.

Q. Mr Livesey, the way in which Ms George's affidavit was framed in answer to Mr Gawronski's affidavit –

A. Yes.

Q. - the particular submission you made to Magistrate Raphael concerning Mr Macks not actually having met Ms George, and now these answers, when taken together, might support an inference that you were making submissions in accordance with a strategy which was not to disclose the George funding arrangement unless it had to be disclosed. What do you say about any suggestion that that inference should be drawn.

A. Your Honour, I would respectfully urge that not to be drawn. That was certainly not my advice and it was not my instruction, and all I was endeavouring to do at those hearings was to address the court in relation to the allegations that Mr Gawronski was making, in a situation where I had personal misgivings about whether any of it was true and where I was also making submissions at various times that - I can't remember if it was Mr Sallis or - one of the counsel acting – could cross-examine Ms George about these matters or Mr Gawronski could be presented for cross-examination. The subtlety that has been put on some of these words - and I don't mean to be at all critical - but the subtlety that has been put on some of these words now is not something that I was thinking at the time, and what I'm about to say is not meant as an excuse or to be critical but a lot of this was happening on the run in a situation where I was getting briefs a day or two before. It was not the sort of case where there were lengthy strategy meetings in which things were being mapped out weeks and months in advance. I've been involved in cases where that has happened. It was very different to that.

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Q. Mr Livesey, three occasions: three occasions where your answers in relation to the question of - first answer in relation to Registrar Christie 'I didn't have instructions to reveal the arrangement' because you understood it to be a confidential arrangement. Second, 15 days later, you haven't sought to get any instructions and your response to similar sorts of question though less pointedly than those put by his Honour Gray J have been the same now 'I was focused on the Gawronski affidavit'. Now, again, this is the third time, and your answer is just the same. Mr Livesey I put it to you that that just can't be right. I put it to you Mr Livesey that the only reasonable inference that can be drawn from all of this is that you, for one reason or another, were unwilling to tell any of those courts about the funding of Ms George by Mr Macks.

A. It wasn't a question of whether I was personally unwilling to do that. I had no instructions to reveal the agreement which I assumed to be confidential and I was focused on the Gawronski allegations. That's what my focus was on.

HIS HONOUR

Q. Just to be clear though, those instructions were not positively to do whatever you can not to disclose it, it's just that you hadn't yet been given instructions to disclose it.

A. Not at all, your Honour.

Q. And that's the distinction that you mean to convey.

A. I do, your Honour. I had raised that topic in April. It had not come back to me for advice. When these issues cropped up I assumed that I did not have instructions to reveal it. When the issue came up in December and there was a decision to be

made about what to do next I gave similar advice to what I'd given back in April, which is that it would be better to disclose the issue and remove it.

Q. There doesn't seem to be a lot of difference now in what you've just explained on reflection. You just took the default position that, in the absence of any specific instructions, it wasn't to be disclosed, so when an occasion came for you to deal with a topic which was close to the existence of the agreement or not, you answered as best you can without contravening - without, in a sense, disclosing that which was confidential and which you had not been instructed to disclose.

A. Your Honour, I assumed that a disclosure without instructions might have all sorts of consequences. I didn't know what they were. But I accept what your Honour says.

Q. And as you read the situation, I think strictly it was the case there had not yet on any of these occasions been an order requiring disclosure of that material.

A. Not at all. That was one of the –

Q. And that was exactly what was fought over in the Magistrates Court.

A. That's right. That was one of the issues that was being agitated that, in the Magistrates Court there was no pleading which raised - I could be wrong, I haven't seen the pleading for some years - but my recollection is there was no pleading that raised this issue and so no discovery obligation had arisen and, in the Federal Magistrates Court, the requests for discovery had been rejected by the registrar and then by the magistrate very much for discretionary reasons your Honour. In the Federal Magistrates Court there is a provision in the Act which creates at least a hurdle as to whether discovery is ever to be given. So that was the issue that was being debated at that time. It was not a question of - I probably don't need to say it - but it was not a question of discovery being a default obligation and something done about that, not at all."

625 In cross-examination Mr Macks testified that after he was shown the transcript of those submissions, he enquired of Mr Livesey QC whether there was any reason for concern over Mr Livesey QC's responses. Mr Macks testified that Mr Livesey QC had advised him that the submission made to Gray J about his involvement in the George matter was correct. Mr Livesey QC had assured him that there was nothing "improper" or "incorrect" about his submissions. Mr Macks explained that he was anxious to obtain that assurance because of his previous experiences in litigation:

> I specifically asked the question because I had been involved in matters before where counsel have made admissions from the Bar table and has cost me a lot of money to rectify that, and I was concerned to know whether or not I should immediately go to court and correct something that was incorrect. So I was assured by counsel that nothing was incorrect so I took it no further.

626 On 20 September 2006 Ms Flaherty wrote to Mr Macks that:

> It would appear that Justice Gray has taken a keen interest in Ms Hamilton-Smith's allegations against you …

627 On 21 September 2006 Mr Livesey QC rendered an invoice to Minter Ellison for his fees in preparing for, and attending on, the hearing before Justice Gray, and for "considering issues concerning champerty maintenance and abuse".

628 Mr Livesey QC impressed me as a truthful witness who actively sought to assist the Court when giving his evidence. I accept the evidence of Mr Livesey QC about his understanding of the questions asked by Gray J and as to what he intended to convey by his responses. However, objectively viewed, when Gray J enquired as to Mr Macks' interest in "this action", His Honour was referring to the appeal before him and the Magistrates Court proceeding from which the appeal was brought. As responses to a query about those actions, Mr Livesey QC's answers were not complete in four respects. First, Mr Macks had an interest in both the proceeding and the debt because, although unbeknown to Mr Livesey QC, Ms George had agreed to assign, and Mr Macks had accepted, any recovery from Ms Hamilton-Smith to Mr Macks in exchange for his agreement to continue prosecuting the action even though the costs had escalated well beyond the initial estimate and the limit on the written indemnity. Secondly, Mr Macks had an interest in the appeal and the proceedings because he had indemnified Ms George for her costs and was probably liable to indemnify her for any adverse costs order made in the Magistrates Court or the Supreme Court proceedings. Mr Macks' indemnity from the Companies was unlikely to result in the reimbursement of those costs because it was already unlikely that his fees as liquidator would be paid. Mr Macks had, in effect, funded the proceedings by not drawing the fees to which he might otherwise have been entitled so that legal disbursements might be paid. Mr Macks therefore had a personal interest in the proceedings as a litigation funder. Minter Ellison had also given notice that they might seek to recover their fees in the Bernsteen action from future recoveries, thereby reducing the funds available to pay Mr Macks' fees. Thirdly, Mr Macks had an indirect interest in the actions because he hoped to secure a forensic advantage in the Bernsteen proceedings by bankrupting Ms Hamilton-Smith. Fourthly, as the minutes of the 27 April 2006 meeting show, Mr Macks had an eye on the way in which the prosecution of the George bankruptcy proceedings might influence the course Mr Viscariello's anticipated action against him might take. All of these matters affected Mr Macks' financial interests.

629 Ms Riach gave evidence that it was likely that the research into the criticism of Mr Macks' arrangement with Ms George was conducted shortly after the meeting at Bar Chambers on 28 April 2006 and well before September 2006. Ms Riach testified that nothing Mr Macks said at that meeting gave her reason to think that he was motivated by an improper purpose in his prosecution of Ms Hamilton-Smith and in particular that it was his purpose to get at Mr Viscariello's assets or to put pressure on him, through the pursuit of Ms Hamilton-Smith. If any such purpose had become apparent, she would have cautioned Mr Macks against that course.

630 Ms Riach testified that it was her view that the arrangement with Ms George was privileged. Ms Riach testified that it was Ms Flaherty who, in December 2006, made the decision, on advice given by Mr Livesey QC, to disclose the George indemnity arrangement after Besanko J remitted the matter to Federal Magistrate Raphael on the issue of an abuse of process. I explain below in more detail the effect of the decision of Besanko J.

631 The root cause of the problematic nature of Mr Livesey QC's submission denying that Mr Macks had an interest in the Hamilton-Smith declaration proceeding was the failure of Mr Macks and his legal advisors to make a timely decision about whether to disclose the George funding arrangement. A private litigant might take a tactical approach not to disclose an agreement of that kind unless and until the issue squarely arises on a pleading or in some other way, as a forensic issue. A private litigant might decide not to make the disclosure fearing that disclosure might delay, cause unnecessary expense or even possibly lead to the dismissal of his or her action. A private litigant may also choose to maintain privilege over the document so disclosed unless that privilege is impliedly waived by the course of the proceeding. However, Mr Macks carried a special responsibility as a liquidator. By his appointment he, and save for minor exceptions, no other person, was entitled to bring proceedings on behalf of the Companies. He was also an officer of the Court subject to the supervision of both the Federal Court and this Court in his conduct of the liquidations. He carried the obligations of a model litigant. A considered decision about disclosure should have been made in a timely manner when Ms Hamilton-Smith first raised Mr Macks' possible involvement in the George proceeding by filing her initial affidavit in 21 July 2005 and Mr Gawronski's affidavit of 9 June 2006. The belief of Mr Macks and his legal advisors in Ms George over Mr Gawronski as to the occurrence of the conversation as well founded as it was, did not remove as an issue the legal consequences of the arrangements made between Mr Macks and Ms George. The issue raised was, with respect to both the George bankruptcy proceedings and the defence of the Hamilton-Smith declaration proceedings, whether the arrangements rendered the prosecution and defence of those proceedings respectively an abuse of process. The written, oral and implied agreements between Mr Macks and Ms George were directly relevant to the issue so raised and their existence, at least, should have been disclosed. I find that the lateness of the appreciation by Mr Macks and his advisors, precipitated as it was by the decision of Besanko J, with which I deal below, was in no small part due to Mr Macks' anxiety to minimise his personal exposure to the costs of the actions he was prosecuting.

The denouement

632 The hearing before Gray J was adjourned to 16 October 2006 to enable the determination of the appeal against the sequestration order which was to be heard by Besanko J.

633 On 22 September 2006 Minter Ellison again wrote to Mr Macks about payment of their accounts for the litigation arising out of the Bernsteen and Newmore liquidations. Mr Mansueto again explained that he had intended to offer only a discount on the then outstanding fees in the George matter from $115,000 to $100,000 plus GST and that further work would be charged. Mr Mansueto explained the difficult position he was in with his partners for having had to write off so much of the firm's work in progress on the Bernsteen matters:

> Peter I can't emphasise enough how much I value our relationship, and we will continue to do work for which there is no expectation of payment, so that it isn't spec work as such, in order to look after your interests. However, the Board has made it clear to me that we have to charge for some of the work, being the Heidi George work, and the best that I can do is give you more discounts when I come to invoice that work."

634 Again, I draw attention to the assessment of Mr Mansueto that he had no expectation of payment of Minter Ellison's fees in the Bernsteen action and his distinction between "spec work" and work which protects Mr Macks' interests. It must, therefore, have been all the more obvious to Mr Macks that the Companies had no prospect at all of benefitting from the litigation.

635 Mr Mansueto then referred to the action brought by Bernsteen against Charles Parsons to recover a preference payment. The trial of that action was listed for hearing on 16 October 2006. Mr Mansueto suggested that the proceeds of the Charles Parsons preference claim, which were anticipated to be $35,000, should be allocated first as to $6,000 for the work in progress of Minter Ellison in that action, and that the balance then be divided between Minter Ellison and Mr Macks, with Mr Macks' share then applied to the fees charged in the George bankruptcy proceedings. Mr Mansueto's suggestion highlights the extent to which Mr Macks' personal financial interests had become enmeshed in the prosecution of Ms Hamilton-Smith. Mr Mansueto claimed that he "couldn't be any fairer than that". Mr Mansueto confirmed that there was a balance of $35,836.80 owing by Mr Macks on the George bankruptcy proceeding, even after applying those costs an amount of $20,308.60 being Mr Macks' share of certain other costs recoveries. Mr Mansueto reminded Mr Macks that he had agreed to make immediate payment of the accounts rendered in the George matter.

636 Mr Macks response further evidences the problematic nature of his involvement in the proceedings. Mr Macks insisted on his recollection that fees for work done both before and after 1 September 2006 were to be capped at $100,000. Mr Macks agreed to the retention by Minter Ellison of the sum of $20,308 from the other costs recoveries in reduction of the amount of $100,000 owing on the George matter but he rejected Minter Ellison's suggestion on the disbursement of the proceeds of the Charles Parsons preference action matter. Instead, he directed Mr Mansueto to deduct from the proceeds of settlement of that action only the fees incurred in that matter and to remit the remainder to him.

He proposed that he would raise a bill for his work in the Newmore liquidation and pay those funds to meet the outstanding barristers' fees and pay Minter Ellison the sum of $30,000. Mr Macks also proposed that Minter Ellison retain the costs ordered against the ATO for preparation by PPB of the insolvency report, which he estimated to be in the order of $50,000, on account of its fees. In exchange for those concessions Mr Macks asked again that Minter Ellison cap its fees in the George matter up to 1 September 2006 at $100,000 and that thereafter all fees be capped at a rate agreed between them.

637 Mr Mansueto replied on 29 September 2006 proposing lump sum fees for the completion of appeals before Gray J in the Supreme Court and Besanko J in the Federal Court in the sum of $23,000.00. As to remitting the balance of the proceeds of the Charles Parsons action after deduction of fees, Mr Mansueto wrote:

> Peter, I do not understand why you would request that I remit the full Charles Parsons recovery to you after payment of our WIP on that matter. As was the case with the ATOs recoveries, we apportioned those amounts equally. We can agree to split the balance and retain your share in trust and applied against the $23,000 capped work on the George matter.

638 On 29 September 2006 Ms Flaherty emailed Mr Magers at PPB conveying Mr Livesey QC's view that a copy of the transcript of the hearing before Gray J should be obtained to show that Gray J was not inclined to determine the factual dispute over the Gawronski allegations ahead of the Federal Court hearing before Besanko J. Mr Magers instructed Ms Flaherty to request a copy of the transcript.

639 The appeal against Federal Magistrate Raphael's judgment on the George bankruptcy petition was heard before Besanko J on 9 October 2006.

640 On 16 October 2006 when the appeal against the dismissal of the Hamilton-Smith declaration proceedings came back on before Gray J, it was further adjourned for mention to 31 October 2006 to await the decision of Besanko J.

641 On 17 October 2006 Mr McNamara wrote to Minter Ellison enclosing a trust account cheque in the sum of $4,970 being the balance payable on the interim allocators made in the Supreme Court on 4 April 2005 and 26 October 2005 on the Bernsteen action. That sum represented the difference between the sum of those allocators and an amount of $6,221.78 which had been taxed in favour of Ms Hamilton-Smith in the Federal Magistrates Court proceedings. Mr McNamara alleged that with the tender of that amount, Ms Hamilton-Smith had "no outstanding debt" to Bernsteen.

642 The cheque was rejected by letter from Minter Ellison to McNamaras on 17 October 2006 on the ground that it was a payment made in breach of Ms Hamilton-Smith's undertaking given to the Federal Court not to dispose of assets other than in the usual course of living.

643 On 24 October 2006 Mr Mansueto wrote to Mr Macks setting out Minter Ellison's work in progress, outstanding invoices, written off invoices and the total of those amounts for each of the ongoing files:

> I refer to our recent discussions and take this opportunity to provide a report of our current work in progress for each of the matters in which we have been acting. The schedule below includes all work undertaken to date, as well as invoices previously issued and written off for internal accounting purposes, but excludes disbursements.

Matter No.	**Matter name**	**Work in progress**	**Outstanding invoices**	**Pre-July 2004 invoices written off for internal accounting purposes**	**Total**
29913/14	General File/ Hamilton-Smith	150,019.02	0.00	145,209.97	295,228.99
29913/33	ATO Preference – Bernsteen	16,852.00	0.00	15,743.96	32,595.96
29913/40	ATO Preference – Newmore	1,232.00	0.00	5,646.88	6,878.88
29913/39	Newmore Pty Ltd (In Liquidation)	0.00	0.00	14,356.58	14,356.58
29913/35	Charles Parsons Preference Claim	1,250.00	6,871.43	17,633.71	25,755.14
29913/42	Carrab Nominees Pty Ltd	0.00	0.00	6,348.21	6,348.21
29913/43	AWM Preference Claim	306.00	0.00	8,544.70	8,850.70
29913/44	AEZ International Pty Ltd	0.00	0.00	6,011.36	6,011.36
29913/41	Luigi Viscariello	0.00	0.00	33,090.99	33,090.99
29913/58	Hamilton Smith Bankruptcy	2,232.00	0.00	0.00	2,232.00
58549/1	Heidi George Bankruptcy	64,650.50	35,836.80	0.00	100,487.30
29913/54	Professional Indemnity Claim	4,355.00	25,032.30	0.00	29,387.30
29913/52	Associated Retailers Ltd	20,461.00	0.00	0.00	20,461.00
29913/46	Viscariello Supreme Court Action	35.00	1,533.40	0.00	1,568.40

Matter No.	Matter name	Work in progress	Outstanding invoices	Pre-July 2004 invoices written off for internal accounting purposes	Total
29913/128	ALF – John Viscariello	15,921.00	0.00	0.00	15,921.00
TOTAL		**277,313.52**	**69,273.93**	**254,590.36**	**599,173.81**

As you know, we have only invoiced work where there has been an agreement between us to bill that work. Accordingly, each of the invoices set out in the "Outstanding Invoices" column require payment to be made as soon as possible. Please forward payment for invoices on matters 58549/1, 29913/46 and 29913/54 as soon as possible. We can then process reimbursement from the insurer.

Agreement Reached as to Outstanding Work in Progress on the George/Hamilton-Smith Matter

We confirm the agreement reached on the George/Hamilton-Smith matter, namely:

- The $115,847 in work in progress up to 31 August 2006 will be limited to $100,000, plus GST and third party disbursements, with the balance written off by Minter Ellison.

- Whilst there was a misunderstanding as to our offer in this regard, we have since reached agreement on this point on the basis that Minter Ellison will also cap costs from 1 September 2006 at $23,000 plus GST and third party disbursements in respect of the appeals before Gray J and Besanko J, subject to the conditions set out in our letter dated 29 September 2006.

- An invoice for approximately $30,000 plus GST and third party disbursements would be paid immediately, being the amount of $35,836.80 in the "Outstanding Invoices" column above. Please forward payment.

- The balance of $49,691.40 from the capped $100,000 amount will be paid by PPB from your share of future recoveries, including the amount to be recovered from the ATO for your reports on insolvency, to be invoiced as and when recoveries are made.

644 As to the Charles Parsons matter, Mr Mansueto wrote:

We are still to reach agreement as to the $35,000 settlement sum received from Charles Parsons. We have proposed to apportion the amount equally after payment of our costs to that matter. You have sought the balance to be paid to you so that you can apply it to the capped amount of $23,000 on the George matter, despite that matter being excluded from the speculative arrangements and the recovery performing the last of the speculative recoveries.

645 Mr Mansueto's letter exposes an unsatisfactory aspect of the general arrangement between Mr Macks and Minter Ellison on recovery matters and a particular problem with the special arrangement made for the payment of their

fees in the George bankruptcy proceedings. As to the former, the loose arrangement meant that the net proceeds of the successful Charles Parsons recovery were to be applied to pay the costs of the commercially unrealistic Bernsteen action. As to the latter, Mr Macks was insisting that instead of Minter Ellison having the proceeds of that arrangement applied to the "speculative" Bernsteen action, he should enjoy the net proceeds to meet his liability to pay the costs of the equally unmeritorious George bankruptcy proceedings.

646 On the professional indemnity matter, Mr Mansueto reported that the insurer's solicitors had sought a handover of the file and requested Mr Macks' urgent instructions as to whether he wished the insurer to retain Minter Ellison.

647 On 25 October 2006 Minter Ellison delivered an interim tax invoice on the Bernsteen bankruptcy matter for $2,455.20 including GST for work between 30 March 2006 and 23 October 2006 and an interim tax invoice in the Bernsteen action generally for $8,173.37 including GST, for work between 3 September 2004 and 17 September 2004. An interim tax invoice in the George bankruptcy proceedings for $23,000 plus GST was delivered for work between 1 September 2006 and 24 October 2006. That invoice included an entry for 18 September 2006 charging for an email sent by Ms Flaherty to Mr Livesey of counsel concerning maintenance and champetry.

648 According to the Form 524 filed in October 2006 a payment of $35,800 was made to Minter Ellison by Newmore on account of fees. That amount is referable to an account sent by Minter Ellison in the George bankruptcy proceedings. It appears, therefore, that Mr Macks did not draw on his fees to pay that account. The payment was later reversed after the ASIC enquiry by Mr Macks paying the sum of $35,836.80 to Bernsteen and Bernsteen paying the amount of $36,836.80 to Newmore.

649 On 26 October 2006 Mr Mansueto wrote to Mr Macks referring to a meeting held on 24 October 2006. Mr Mansueto recorded that in accordance with an agreement reached at that meeting he was enclosing a trust account cheque in the sum of $17,500 representing Mr Macks' half share of the settlement funds recovered from Charles Parsons. Mr Mansueto advised that as to Minter Ellison's half share, $6,871.43 was applied against their fees in the Charles Parsons matter, the sum of $2,455.20 in the "Hamilton-Smith bankruptcy spec matter" and $8,173.37 in the "Bernsteen and Newmore PL matter" which related to the Bernsteen action. Mr Mansueto also enclosed an account for $23,000 with respect to the George bankruptcy proceedings which Mr Macks intended to use the Charles Parsons' recovery to pay. In this way, the benefit of the Charles Parsons preference recovery, after the costs of that action were deducted, was dissipated in the costs of pursuing Ms Hamilton-Smith.

650 On 17 November 2006 Registrar Christie made an order that Mr Viscariello attend for examination on the examinable affairs of Bernsteen and Newmore.

651 On 21 November 2006 Besanko J set aside the decision of Raphael FM, on the grounds that he had wrongly rejected the Gawronski affidavit because of the form in which Gawronski had deposed to his conversation with Ms George. Besanko J held that paragraph [13] of the Gawronski affidavit should have been received because the rule that evidence of conversation be given in direct speech was a rule of practice not of law.

652 Besanko J held further that the Registrar's earlier finding on the question of accord and satisfaction against Ms Hamilton-Smith on the application to set aside the bankruptcy notice, did not give rise to an issue estoppel. The Court had a discretion as to whether to allow the matter to be raised again. [92] However, Besanko J held that Magistrate Raphael had not erred in failing to investigate that question again.

653 On the question of improper purpose, Besanko J relied on *Rozenbes v Kronhill*.[93] In *Rozenbes* the High Court considered a series of extortion cases in which a bankruptcy petition was used in an effort to recover more than the outstanding debt or to obtain an advantage over other creditors. Besanko J concluded:

> I have reached the conclusion that the Federal Magistrate erred in rejecting the tender of paras 13.1 to 13.5 inclusive of Mr Gawronski's affidavit on the ground upon which he relied. If findings are ultimately made in accordance with the evidence in those paragraphs, a finding of an improper purpose may be appropriate and an order made that the petition be dismissed. The appeal must be allowed and the sequestration order made by the Federal Magistrate must be set aside.

654 On 21 November 2006 Ms Flaherty wrote to Mr Macks advising that Besanko J had allowed the appeal. Ms Flaherty informed Mr Macks that Besanko J had adjourned the hearing for further submissions on the ancillary orders which should be made on the questions of:

- whether the order made by Registrar Christie should also be set aside; and

- whether the matter should be remitted to the Federal Magistrates Court; and if so whether it should be remitted to the Registrar or to a Federal Magistrate.

655 Ms Flaherty informed Mr Macks that it would be necessary to attend the further hearing before Besanko J on 24 November 2006 and the hearing before Gray J in the Supreme Court on 30 November 2006.

656 In his reply on 23 November Mr Macks, who was at that time interstate, indicated his displeasure with the result. He complained that advice was not

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[92] Relying on *Makhoul v Barnes* (1995) 60 FCR 572.
[93] (1956) 95 CLR 407.

given, and that instructions were not taken, on the questions asked in anticipation of an adverse result on the appeal. He emphasised that he had no time to deal with the matter immediately. Mr Macks continued:

> This remains a strategic matter and my initial view was that this decision significantly undermines early strategies and THUS solicitors and counsel should revisit strategies – merely embarking along the lines suggested as merely shallow reaction enforces the client to incur costs without due and adequate regard to the implications of the issues.
>
> …
>
> It remains all about strategy.

657 The matter before Besanko J was adjourned to 27 November 2006 and then further adjourned to 29 November 2006 for further submissions. Final orders were made by Besanko J on 29 November 2006 remitting the matter to the Federal Magistrates Court. The Federal Court orders were limited to a remitter on the question of improper purpose only. The sequestration order was stayed but not set aside. There was no order as to the costs of the appeal.

658 On 29 November 2006 Ms Hamilton-Smith's trustee in bankruptcy, Mr Scott, wrote to Mr Fahey SM at the Adelaide Magistrates Court advising that he was not in a position to make an election as to whether to continue the bankrupt's claim.

659 On 1 December 2006 Ms Flaherty wrote to Mr Macks advising that she had received correspondence from the Magistrates Court informing her that the Bernsteen trial which had been listed to commence on 4 December 2006 would be adjourned because the sequestration order which had stayed the proceedings had not been set aside pending the remittal ordered by Besanko J. However, on 4 December 2006 Mr Sallis for Ms Hamilton-Smith submitted before Mr Fahey SM that Ms Hamilton-Smith could continue her action and her counterclaim against Bernsteen because of the stay on the sequestration order. The matter was stood over to 5 December for further argument on whether the stay of the sequestration order allowed the trial to proceed in the Magistrates Court.

660 On 8 December 2006 Mr Fahey SM found that the action had vested in the trustee and the Bernsteen trial was adjourned to 14 May 2007 for mention.

661 Minter Ellison had liaised with Federal Magistrate Raphael in advance of the hearings on the final orders by Besanko J to ascertain his availability. They were told that he could hear evidence on the afternoon of 11 December 2006. That listing did not eventuate. On that day Magistrate Raphael made an order for discovery on the abuse issue and listed the re-hearing of the matter for 30 January 2007.

662 On 8 December 2006 Mr Hiskey SM adjourned the trial of the Bernsteen action for mention only on 14 May 2007.

663 On 8 December 2006 Minter Ellison wrote to Mr Macks summarising the state of the litigation as follows:

- Gray J had adjourned Ms Hamilton-Smith's appeal in the George matter pending the determination of the remitted matter.

- The hearing before Besanko J on the consequential orders was heard on 24, 27 and 29 November. An undertaking was given that Ms Hamilton-Smith would not dispose of any assets other than in the usual course of business. The undertaking was filed and served.

- The cost of work undertaken since 21 November 2006 was $16,731, but that Minter Ellison offered to reduce that to $10,000 plus GST.

- Consideration would have to be given as to which of the documents in Ms George's possession were relevant to the allegations raised in the Gawronski affidavit.

- Enquiries should be made as to Mr Gawronski's credit.

- Half a day had been set aside for the argument before Magistrate Raphael but that preparation was also required and that Mr Livesey had suggested allowing two and a half days for the matter.

- The Bernsteen action had been adjourned from 5 December 2006 for further argument on 8 December 2006. On that day Mr Fahey had held that the action against Ms George had vested in the trustee despite the stay of the sequestration order.

- On 11 December 2006 Mr Raphael FM made orders that Ms George make discovery and produce all documents relevant to the allegations raised in the Gawronski affidavit.

664 A note of a meeting held on 11 December 2006 made by Mr Magers records that PPB were advised that there was nothing improper in the arrangement with Ms George and that counsel's advice was to disclose the documentation of that arrangement.

665 Minter Ellison asserted in a letter to Mr McNamara on 12 December 2006:

> Until such time as Mr Gawronski's allegations form part of the evidence before the Court, our client has no requirement to discover documents relevant to the allegations, nor are those documents relevant to the determination required by the Court on the remitter.

666 The letter continued that notwithstanding that objection, in the interests of avoiding further delay, Ms George was prepared to discover the following documents in her possession relevant to the improper issue:

- the letter from Minter Ellison from Heidi George dated 7 June 2005;
- the costs agreement between Minter Ellison and Heidi George dated 28 June 2005; and
- two invoices rendered to Heidi George dated 5 September 2006 and 25 October 2006.

Minter Ellison then continued:

> We draw your attention to the costs agreement which provides for an indemnity granted by Mr Macks to our client in respect of the bankruptcy proceedings.
>
> The cost agreement is the only arrangement that has been made with respect to our client's costs of prosecuting her rights against your client. … We confirm that there are no other documents in our client's possession that are relevant to the allegations.

667 I make the following observations about the discovery made by Minter Ellison. First, leaving aside the question of privilege, the correspondence between Minter Ellison and Mr Macks concerning his responsibility to pay legal costs far in excess of those amounts, and well beyond the limit on his indemnity recorded in the discovered agreement, were relevant documents. Secondly, it was factually wrong to assert that the costs agreement with Ms George was the only arrangement that had been made with respect to the costs of prosecuting Ms George's rights against Ms Hamilton-Smith. Minter Ellison had made very detailed and extensive arrangements with Mr Macks for that very purpose. At least, as a matter of legal form, those arrangements were made for the benefit of Ms George who would otherwise have been expected to pay Minter Ellison's fees. The reality was that Minter Ellison knew they would never be able to recover their fees from Ms George and the arrangements were pursued to protect Minter Ellison's financial interests. It was for that reason that Ms George was not fully informed about the arrangements. Nonetheless, the documents recording the arrangements made on her behalf with respect to the costs of her proceedings were documents within her possession whatever the privileged status of the documents might have been. Thirdly, there were documents showing that the costs agreement with Ms George had been superseded by Ms George's offer, which had been accepted by Mr Macks, to pay all of any amount recovered to Mr Macks.

668 On the premise that the documents were privileged, I observed that it was at least arguable that Ms Riach's sworn denial that there was any connection between the George bankruptcy proceeding and the Bernsteen action impliedly waived that privilege.

669 The letter was for all of the above reasons not as informative as it should have been. It is likely that the reticence to disclose the extent of the costs liability incurred by Mr Macks through the undisclosed arrangements contributed to the decision not to make fuller disclosure.

670 On 15 December 2006, Mr Viscariello was examined before Registrar Christie on the application of the special purpose liquidator.

671 On 22 December 2006, Minter Ellison filed an affidavit of Ms George in the Federal Magistrates Court. Ms George deposed that she had met Mr Gawronski through her friendship with Ms Hamilton-Smith but had not seen him for at least six years. She denied the conversation alleged by Mr Gawronski to have taken place at a child care centre and his more general allegation that she spoke to him two or three times a year. Ms George affirmed the truth of the matters deposed to in her affidavit when she gave evidence before me. I accept Ms George's evidence on her dealings with Mr Gawronski. Ms George then deposed as follows:

> 21. Mr Gawronski alleges that I told him that Mr Peter Mr Macks was out to get the applicant because Mr Viscariello and Mr Macks were having a large dispute and Mr Macks wanted to use the applicant to "get at" Mr Viscariello. I have never met with or spoken to Mr Peter Macks, or any other employee of PPB, and I am not aware of any dispute between Mr Macks and Mr Viscariello or any reason why Mr Macks would want to "get at" Mr Viscariello.
>
> 22. Mr Gawronski alleges that I told that him that I did a deal with Mr Macks, whereby Mr Macks paid me $4,000 in exchange for my cooperation. There is no such deal with Mr Macks, I have never received any payment from Mr Macks or anyone else in respect of the judgment debt which remains due and payable at the time of swearing this affidavit.
>
> 23. I have never met with Mr Peter Macks or any other employee of PPB, nor have I ever corresponded with Mr Peter Macks or any other employee of PPB.
>
> 24. I am aware however that Minter Ellison also acts for Mr Macks.

Ms George then set out her previous attempts to enforce the judgment debt and before continuing:

> 30. In June 2005 I received a letter from Minter Ellison asking me whether I had any information in relation to the applicant as one of their clients was trying to recover some unpaid money from her through bankruptcy proceedings. Now shown to me and annexed hereto and marked "HG2" is a true copy of the letter that I received.
>
> 31. I contacted Minter Ellison and advised them that I also had a judgment debt that I had been trying to enforce against the applicant but had not to date been successful. As a result of the conversation I instructed Minter Ellison to act for me in pursuing the debt owed by the applicant to me.
>
> 32. The terms upon which Minter Ellison would act was on the basis that their client, Mr Macks, would indemnify me in respect of my costs. Minter Ellison's

> engagement was recorded by a costs agreement entered into between Minter Ellison and myself, a true copy of which is now shown to me and annexed hereto and marked "HG3".
>
> 33. The only arrangement in place is the said cost agreement between myself and my solicitor, Minter Ellison wherein Mr Macks has agreed to indemnify my legal costs. I have not received any payment from Mr Macks or anyone else (including the applicant) in satisfaction of my judgment debt, or my "*cooperation*".
>
> 34. I do not have an improper purpose in issuing a bankruptcy notice against the applicant or in filing the creditor's petition against her. The purpose of commencing these proceedings was to get paid, as I have tried a number of different ways through the warrants to get paid before they did not result in me receiving the judgment debt. …
>
> 36. Following the filing of that Adelaide Magistrates Court claim, the applicant sent a cheque for the original judgment debt to my lawyer (on two occasions) to settle the bankruptcy proceedings that I had issued against her. I decided not to accept the payment from the applicant because I understood that this would not have resolved the Adelaide Magistrates Court action against me. I was still going to be sued by the Applicant in the Magistrates Court regardless of whether I accepted the cheque or not.
>
> 37. I also understand that if another of the applicant's creditors bankrupted her at a time in the future, it would be likely that I would have to repay the settlement money to a trustee in bankruptcy. I could see no benefit to me in accepting payment from the Applicant on those terms.

672 The disclosure of the arrangement with Mr Macks in Ms George's affidavit is incomplete in that it does not refer to the subsequent arrangements between Minter Ellison and Mr Macks whereby the monetary limit on the arrangement was removed and the arrangement extended to the Hamilton-Smith declaration proceeding. The first sentence of paragraph [33] is to that extent incomplete. Nor did Ms George disclose her offer to hand over all of the proceeds of the proceedings to Mr Macks. Minter Ellison were aware that Mr Macks had accepted that offer. Moreover, Ms George's assertion that she gave instructions to reject the payment tendered, for the reasons to which she deposed, failed to account for the fact that she was in any event prepared to assign the proceeds to Mr Macks in exchange for the money he had spent funding the prosecution of her bankruptcy notice and petition. There was, in the circumstances, a material non-disclosure of matters which were relevant to the improper purpose contention.

673 I also observe here that insofar as the subsequent communications with Mr Macks concerning the arrangements to pay Ms George might otherwise have been privileged, the disclosure of the initial written agreement, coupled with the assertion that there were no other documents other than those disclosed, had the effect of waiving that privilege.

674 On 29 December 2006 Ms Hamilton-Smith appealed the decision of Mr Fahey SM to adjourn the trial of the Bernsteen action in order to await an election by the trustee should the stay of the sequestration order be lifted.

675 On 12 January 2007 Ms George made further formal discovery in the bankruptcy proceedings which included:

- The letter from Minter Ellison to Ms George on 7 June 2005.
- The costs agreement between Ms George and Minter Ellison dated 28 June 2005.
- Tax invoices dated 5 September 2006 and 25 October 2006 with the amounts charged redacted.
- File notes dated 14 June 2005 of a telephone conversation between Ms George and Minter Ellison.
- File note of a telephone conversation between Ms George and Minter Ellison dated 15 June 2005.
- Facsimile from Mrs George to Minter Ellison dated 15 June 2005.
- File note of a telephone conversation between Ms George and Minter Ellison dated 22 June 2005.
- File note of a telephone conversation between Ms George and Minter Ellison dated 4 July 2005.
- File note of a telephone conversation between Ms George and Minter Ellison dated 18 May 2006.

676 Legal professional privilege was claimed over:

- Documents recording confidential communication made for the dominant purpose of obtaining or giving legal advice to Ms George or obtaining or providing legal services to Ms George.
- Documents obtained, prepared and created for those purposes.
- Documents recording settlement negotiations.

677 Ms Hamilton-Smith filed an application in the Federal Magistrates Court for further and better discovery. Minter Ellison advised Mr Macks to oppose the application. The application was heard by Magistrate Raphael FM who made orders for limited discovery inter alia that:

- The unmasked copies of the documents described as interim invoices for 5 September and 25 October 2006 be produced.
- The schedule of attendances referred to in the interim invoice be produced.

Suing for peace

678 The trial of matters remitted by Besanko Jwas listed to resume on 13 March 2007. The parties engaged in some settlement discussions after the orders were made. Mr Macks spoke with Ms Riach about how settlement discussions might proceed. He informed Ms Riach that he would like to speak directly with Mr Viscariello. It was also resolved that Mr Macks' counsel, Mr McNamara QC, would approach counsel for Mr Viscariello, Mr Bigmore QC, to discuss a possible settlement.

679 Correspondence ensued between Minter Ellison and McNamaras during February 2007.

680 On 12 February 2007 Ms Riach sent an email to Mr Macks:

- Estimating the legal fees already incurred and future cost liabilities.
- Confirming his instructions to agree to adjourn Ms Hamilton-Smith's appeal against Mr Fahey SM's decision and noting that it had been listed for directions before Sulan J on 20 February 2007.
- Reporting on the appearance before Gray J on 7 February 2007 on the resumption of Ms Hamilton-Smith's appeal in the Hamilton-Smith declaration proceedings.
- Reporting that Ms Hamilton-Smith had filed an affidavit asserting that Minter Ellison had mislead Gray J on the topic of the indemnity.
- Informing Mr Macks that the Federal Magistrates Court matter was listed for four and a half days which would involve counsel fees of some $26,000 including preparation and dealing with interlocutory issues.

681 On 12 February 2007 Minter Ellison prepared and provided to Mr Macks a document listing the substantive claims and associated costs claims outstanding against Ms Hamilton-Smith for the purposes of considering a settlement with Ms Hamilton-Smith and Mr Viscariello. The claims arising out of the George bankruptcy proceedings were:

- The judgment debt to Ms George in the sum of $4,079.80 plus interest in excess of $1,000.
- Costs orders estimated to total $45,000 in prosecuting the George bankruptcy proceedings.
- Costs order made in the Magistrates Court against Hamilton-Smith in the Heidi George matters of about $25,000.

- The competing claims in the Bernsteen proceedings were Bernsteen's claim for goods sold in the sum of $27,733.29 plus interest of $4,622.

- Ms Hamilton-Smith's counter-claim in the sum of $106,000.

- Costs awards in favour of Bernsteen that were estimated to be $47,000.

- An estimated costs order against Ms Hamilton-Smith in the sum of $155,000 if the Bernsteen proceedings were decided adversely to her.

682 After taking into account miscellaneous other costs orders, Minter Ellison formulated Bernsteen's claim at a total of $158,952.31 and estimated Ms Hamilton-Smith's counter claim at $112,286.54.

683 On 7 February 2007 Minter Ellison wrote to Mr McNamara offering to withdraw Ms George's creditor's petition if Ms Hamilton-Smith paid the judgment sum plus interests and discontinued the Hamilton-Smith declaration proceedings in the Magistrates Court, with the greater part of the costs payable to Ms George. On 12 February 2007 Mr McNamara rejected that offer and offered to settle the matter by payment of the sum of $4,079 plus interest to Ms George.

684 On 14 February 2007 Ms Hamilton-Smith issued a subpoena against Mr Macks seeking the production of voluminous documents. On the same date, Minter Ellison wrote to McNamaras rejecting the settlement offer made by Ms Hamilton-Smith.

685 On 21 February 2007 Mr Macks applied to the Federal Magistrates Court to set aside the subpoena. Submissions on that application were made on 22 February 2007.

686 Some preliminary settlement discussions were held on 30 January 2007 after which steps were taken to arrange a mediation. There was a dispute as to whether the mediation should relate only to the Heidi George matter or should include the Bernsteen matter. On 22 February 2007 Minter Ellison wrote to the Federal Magistrates Court requesting the Registrar to preside over a mediation of the George proceeding and to allow Bernsteen to be a party to the mediation. On 23 February 2007 a position paper for that mediation was provided.

687 A mediation was held on 26 February 2007. On 26 February 2007 the mediation concluded successfully and the parties, including Bernsteen, signed a Deed of Settlement. Ms Hamilton-Smith agreed to pay $8,000 to Bernsteen and $6,000 to Ms George. Ms George testified that as part of the final settlement of all the proceedings with Ms Hamilton-Smith, despite her earlier offer, she received $4,000 plus interest from which she paid Mr Macks $1,000. The parties agreed to discontinue all other actions with mutual releases, save for Mr Viscariello's professional indemnity claim against Mr Macks which was excluded from the settlement.

688 On 5 March 2007 Bernsteen discontinued its claim and Ms Hamilton-Smith discontinued her counter-claim in the Magistrates Court.

689 On 4 December 2007 Sheahan Lock filed an insolvent trading claim against Mr Viscariello in the Federal Court. An affidavit was filed in those proceedings stating that ARL had a fixed and floating charge over the assets of the company which was of no value. On 24 November 2009 Sheahan Lock discontinued the insolvent trading proceedings. On 18 December 2009 Sheahan Lock advised Mr Macks of the discontinuance of the proceedings. They reported that on the basis of their investigations, they were satisfied that Mr Viscariello had contravened the insolvent trading provisions of the Act. The letter complained that Mr Viscariello had "generally abused the court process and successfully managed to frustrate the proper conduct of their investigation". They reported that "in the absence of funds to investigate the claim they determined that there was a diminishing likely benefit to the company". Sheahan Lock incurred $326,000 in costs.

690 On 21 December 2009 ASIC examined Mr Macks pursuant to section 19 of the *Corporations Act*. In 2011 and 2012 Mr Macks convened meetings of the Committee of Inspection to report on the finalisation of the liquidation. I refer to those meetings in more detail below. I referred to the circumstances of that enquiry in Part I of these reasons.

691 On 25 May 2010 Mr Macks was examined for a second time by ASIC.

Legal costs arrangements revisited

692 The last two options discussed in the PPB memorandum of 21 August 2006 as to how Minter Ellison's insistence on payment of its fees could be met, expose the dangers inherent in loose retainers of the kind entered into between Minter Ellison and Mr Macks. They suggest that Minter Ellison be offered collateral benefits for discontinuing their fees through future engagement on other matters which Mr Macks would facilitate. The danger in a discounting arrangement of that nature is that the terms on which Minter Ellison are engaged on the other matters might not be as commercial as they might otherwise have been but for the deal.

693 The legal fees of $104,964.20 charged in the Bernsteen action in the period before 1 June 2005 include disbursements payable to counsel and others. Both Minter Ellison and counsel discounted their fees by $145,000 and $6,500 respectively.

694 For the period after 1 June 2005 Minter Ellison charged and received $54,268.41. The remainder, $79,809.50, of the legal costs are disbursements, primarily for counsel fees.

695 In the George bankruptcy proceedings, $125,919.28 was paid in fees to Minter Ellison, about $50,000 paid to counsel, and close to $4,000 paid to another firm of solicitors.

696 To understand how the position could have been reached that in the order of thirteen times the value of the claim was paid in legal fees even before the completion of the Bernsteen trial, it is necessary to set out some more evidence concerning the retainer arrangements made between Mr Macks and Minter Ellison for the conduct of litigation arising out of the liquidation.

697 In summary, Minter Ellison and Mr Macks agreed that Minter Ellison would accept Mr Macks' instructions on preference recovery actions, and in pursuing the debt owed by Ms Hamilton-Smith, on the basis that their fees in each of the actions would be paid from the pooled proceeds of all of those actions. Mr Macks testified that Minter Ellison's retainer to act in all of the legal proceedings arising out of the liquidation was not reduced to writing. He explained that at that time retainers between liquidators and their solicitors were generally not reduced to writing. They now are.

698 Mr Macks had used Minter Ellison many times before. He testified that the fees were charged at a high but not at a speculative rate, in the sense that the rate did not take into account any risk that Minter Ellison might not recover their fees. However, Mr Macks disclosed that his arrangement with Minter Ellison included a term that if the proceeds of the actions were not sufficient to meet the fees of both the solicitors and the liquidators chargeable to those actions then "there would be discussions in relation to how the proceeds would be allocated between or split between PPB and Minters".

699 When asked to explain the significance of an observation made in a letter from Minter Ellison to Mr Macks, Ms Riach replied:

> A I guess I can explain it by when there is an insolvency administration often they are unfunded and there's insufficient funds there, so part of the retainer between the insolvency practitioner and the law firm is to more often spec the recovery work and usually you keep track of what each firm's work in progress is to then apportion what recoveries are made. So sometimes it is done on a 50/50 basis, sometimes it's done on a pro rata basis.

700 Ms Riach was then asked:

> Q Is the idea that you will generally apportion the recoveries 50-50 but that requires, so there is no argument about things, that the WIP is roughly equivalent and, if it is not, then there might be a need to sought out some different –
>
> A My practice is to always agree at the start of the matter whether it's a 50/50 or pro rata and document it, but this was Ray's administration, I understand it was a loose arrangement.

701 Mr Macks agreed that, in effect, that term was no more than an agreement to negotiate in good faith about how the funds recovered would be divided between them in the event of a shortfall.

702 When questioned about correspondence between himself and Mr Mansueto, which gave the appearance that he and Mr Mansueto were squabbling over the proceeds of the liquidation, Mr Macks responded:

> I don't agree because there's no determination or characterisation or discussion in relation to the resource. It's just a discussion in relation to what normally happens in liquidations, a pro rata sharing on a speculative basis of various matters.

703 Mr Macks gave evidence that arrangements of this kind were common in liquidations whereby sharing the proceeds with solicitors was determined after recovery:

> The profession was not in the habit of receiving from the lawyers details as we now do in relation to the manner in which they charge and the rate at which they charge and I suspect that this was a matter that went back prior to that time. Now we do receive contractual arrangements between the lawyers and the insolvency profession. We would inherently rely upon the fact that we have ongoing dialogue with Minters and the experience that we've had then – at that time we would have had with them in terms of their charge levels and their level of service etc, which would now be contained within those particular documents, if that's any help.

704 Mr Macks was questioned about a letter he received from Minter Ellison dated 6 July 2005. In that letter Mr Mansueto had written:

> In view of the level of work which has been undertaken and for which payment has not been received, and is unlikely to be recovered, it was appropriate that we review our arrangements for the ongoing work which is required.
>
> …
>
> As to the other [than the George proceedings] files we will continue to act on a speculative basis. If and when recoveries are made, for example, from the ATO, Charles Parsons or Ms Hamilton-Smith, then we confirm that agreement will be reached at that time as to the apportionment of those recoveries between PPB and Minter Ellison having regard to each firm's level of work in progress.

705 Mr Macks agreed that the apportionment of the amount recovered would occur after the money had been received and that there was no advance agreement about the proportion in which the proceeds would be shared. Mr Macks was then asked:

> Q … What arrangements are in place for ensuring that you are able to meet your obligation that you obtain services for the purposes of the administration at a proper price and for proper value.
>
> A Mr Phillips, we have had and continue to engage Minters on a number of – a number of administrations and I think that prior to a certain time – and I don't know when that time was – we were not in the habit – the profession was not in the

> habit of receiving from the lawyers details as we now do in relation to the manner in which they charge and the rate at which they charge and I suspect that this was a matter that went back prior to that time. Now we do receive contractual arrangements between the lawyers and the insolvency profession. We would inherently rely upon the fact that we have ongoing dialogue with Minters and the experience that we've had then – at that time we would have had with them in terms of their charge levels and their levels of service etc …, which would now be contained within those particular documents, if that's of any help.
>
> Q Are you able to produce any document of any kind that shows an analysis of Minter Ellison's fees and terms of value relative to outcome on your file.
>
> A There were certainly discussions in relation to that aspect of it in 2006 and –
>
> Q Yes, I know you've said that before.
>
> A - and there were meetings in relation to, as you refer to it, the value of those services.
>
> Q Where is anything in writing.
>
> A I am not aware that there are.

706 Mr Macks went on to describe the arrangement in these terms:

> If the results – in current matters, if the results of those proceedings are insufficient to enable the proper fees of the lawyers and the insolvency practitioner and the dividend to creditors to be paid, there are then discussions with the lawyers in relation to (a) the level of their fees and whether or not they should be discounted together with that of the insolvency practitioner to enable the creditors to get a dividend. If however you are at the stage where the level of fees charged by the lawyers and the insolvency practitioner, irrespective will be insufficient to enable a dividend to creditors at various levels – yes, there are discussions with the lawyers in relation to the rate or distribution of those funds.

707 A summary of legal fees to 3 March 2006, including the professional indemnity matter, showed that a total of $386,246.72 had been paid. Of that $76,344 had been paid to senior counsel, $12,437.25 to junior counsel, $289,779.43 to Minter Ellison and $7,686.04 to a firm of costing solicitors. Of the money paid to senior counsel, $7,480 had been paid by Mr Macks' firm, of the amounts paid to Minter Ellison $30,971.96 had been paid his firm. Of the other counsel $1,605. Mr Macks' firm had paid a total of $40,056.90.

708 I set out below the evidence of Mr Macks about the meeting with Minter Ellison of 1 September to which I earlier referred. It discloses the inevitable consequence of the loose arrangement made with Minter Ellison. Mr Macks prosecuted many proceedings to recover preference payments made to some of the Companies' creditors for the purpose of redistributing the payment to all of their creditors. Even though the preferred creditors had disgorged about $1,000,000, the other creditors did not receive any of the recovered preference payments, leaving their debts outstanding. The amount recovered from the preferred creditors did not cover the professional fees incurred in the recoveries.

As a result, Minter Ellison and Mr Macks were left to negotiate over how such proceeds as there were should be divided. So much appears from the following evidence of Mr Macks:

Q. The next item 'George Hamilton-Smith WIP'.

A. Yes.

Q. Doing the best I can, I believe it says 'PM concern re amount of WIP Minters carry'. Would you cavil with that. 'PM', that's you.

A. Yes, I have troubles with the last word, I don't see 'carry', I just don't understand what it is.

Q. What else might it be in that context.

A. I truly don't know.

Q. I'll be asking the court to infer that it says 'carry'. Then two down, two of those arrow heads down, 'Happy to share risk and rewards - Minters have enjoyed benefits of claim and - moneys' and then there is an abbreviation for 'received', 'by Minters will be more than PBB'.

A. Yes.

Q. 'Liquidator', an abbreviation for liquidator, 'only draws 187 K'.

A. Yes.

Q. Meaning $187,000, and the next item, this is attributed to you, 'Question logic of how Minters can stand to receive so much money when PBB missing' and then I think there is a missing word from the photocopy, one would presume or infer it to be 'out'.

A. Yes.

Q. Can you assist with what the last one says, 'PIM', that's you.

A. Yes.

Q. 'Not charging'.

A. 'Time'. I refer to the fact that I was not charging that time.

Q. Is that, in substance, the sharing arrangement between you and Minter Ellison.

A. Yes, it reflects that.

…

Q. The next line reads, for the benefit of the transcript, the one that his Honour just referred Mr Macks to 'Can't see why spec matter can't go on'.

A. Yes.

Q. Then the next line, again attributed to Mr Mansueto, 'Minters take over matters on spec which never have likelihood of recovery'. That's a fair read of that.

A. Yes, I don't understand the comment, but it seems to be a fair reading.

Q. I'll put it fairly to you, I'll be asking the court to draw an inference that this is an exchange between you and Mr Mansueto about, as between the two of you, who's been drawing the most benefit from the relationship.

A. I don't necessarily agree but I still struggle with Minters taken over matter or spec. I can't see a matter that they have taken over.

Q. It's not so much whether it be true or not, but it's the substance of the conversation. The substance of the conversation is a debate between you and Mr Mansueto about who is enjoying the bigger benefit from the relationship between the two of you.

A. Yes.

HIS HONOUR

Q. You accept that that's what the character of this conversation is.

A. I think this is us, or me arguing points and Ray Mansueto arguing points in relation to, from my point of view, who's benefiting from the fees and the fact that the spec of the arrangement should continue. It's just point scoring.

Q. It, on one view, gives the appearance of two joint venturers squabbling over how the proceeds of a resource should be shared between them.

A. I don't agree because there's no determination or characterisation or discussion in relation to the resource. It's just a discussion in relation to what normally happens in liquidations, a pro rata sharing on a speculative basis of various matters.

Q. The resource being the legal work and insolvency practitioner work that comes out of a liquidation.

A. Yes, but there is no discussion in relation to the nature of that resource, the size of it, the shape of it or anything of that nature.

XXN

Q. Did I just hear you to say that this is a normal relationship between solicitor and liquidator.

A. I said that it is my understanding and my experience that normally when there are speculative arrangements between insolvency practitioners and lawyers that the costs are shared on an equivalent basis, so each party bears the pain, if you like, of what the costs are.

Q. Across the whole of the liquidation.

A. Often across the whole of the liquidation, yes.

HIS HONOUR

Q. It is a bit like an informal funding agreement really with the litigation funder, except that it is the solicitors, in a sense, providing the credit if you like for that to happen.

A. Yes, because an insolvency practitioner is incredibly undercapitalised. As you're going through it's impossible to look at a thing in a point of time. You really do have to look at it at the end and you have to go into it not knowing and not really knowing where is it going, so the equitable at the end of the day is for both a pro rating and also, in my view, an analysis of what benefit all this is going to get for the creditors and, if necessary, writing down fees on some type of pro rating basis or some type of basis.

Q. The special purpose liquidation provides an analogy, not a perfect one because we are here dealing with lawyers not special purpose liquidators, but you started off trying to find finance through Patrick Coope and others.

A. Yes, and others.

Q. And that wasn't obtained.

A. Yes.

Q. But in its place there was an arrangement with Sheahan & Lock.

A. Yes.

Q. To actually carry the costs of doing it themselves.

A. Yes.

Q. On the basis that they would be paid out of the recovery.

A. Yes, that's right.

Q. I think you said there might have been some reflection in their rates which were disclosed to the court on their appointment.

A. Yes.

Q. To take that into account.

A. Yes, because neither practitioner nor lawyer has the capitalisation to run the administrations. Insolvency by their very nature, as one of the judges said, there is not enough money to go round, there is no money there, so we just have to spec it all really on the basis of our experience and our view in relation to the risks.

Q At the very bottom of p.5 that appears to me to read 'Liquidation puts this office under considerable pressure' and that's attributed to you. Did you say something like that.

A. Yes, I presume so, it's recorded there.

709 It is difficult to see any public benefit in the litigation generated by the Companies liquidation. Arguably allowing the creditors to retain the payments

would have had greater public benefit than requiring them to disgorge the preference payments made to them only to meet the legal costs of the liquidator and his solicitors. This very unsatisfactory outcome was plainly foreseeable but neither Mr Macks nor any of Minter Ellison's partners squarely addressed the issue. The cost effectiveness of the individual recovery actions was not given close consideration. Nor was there an overall strategy.

710 As a general level, the utility of arrangements of this kind between liquidators and solicitors to facilitate the proper winding up of Companies can be accepted. However, provisions should be made to ensure that the work done and the fees charged are not disproportionate to the anticipated proceeds of the actions. In the absence of proportionality, a liquidation may generate litigation which is not in the company's interests but serves instead the financial interests of the company's professional advisers. That is contrary to the interest of the company's creditors and the public more generally.

711 Finally on this issue I record my finding that the retainer of Minter Ellison was not a contingency fee arrangement because Minter Ellison were not entitled to any uplift. Nor was it required. The arrangement allowed Minter Ellison to charge a full rate without any significant overall risk because the risk was spread across all of the matters in which they were retained.

The pursuit of Ms Hamilton-Smith was unreasonable and not in the interests of the Companies

712 Liquidators bear a heavy responsibility to ensure proportionality in the conduct of the liquidation. Committees of Inspection of a particular company in liquidation are unlikely to provide a sufficient safeguard from practices that may develop between solicitors and liquidators over a period of time spanning multiple liquidations.

713 It will be remembered that in June 2005 Ms Hamilton-Smith had offered to compromise the Bernsteen proceed by the payment of $10,000 over three months and that in February 2006 she had tendered a cheque in the sum of $4,079.80 to compromise the George proceedings.

714 Mr Macks testified that he rejected the offer of $10,000 in mid-2005 because he considered Ms Hamilton-Smith to be a person of means who should at least pay what the defendant was asking. He relied on the fact that Minter Ellison solicitors were dismissive of the offer. However, it is one thing to feel aggrieved that Ms Hamilton-Smith's offer did not truly reflect the strength of Bernsteen's claim and quite another to rationally evaluate whether anything more might be gained by rejecting the offer and continuing to prosecute the proceedings. It is the latter question that a reasonable self-funded litigant, and a reasonable liquidator, alike must address. Mr Macks either did not do so at the time or was influenced to reject the offer by extraneous considerations.

715 Mr Macks' decision was either irrational, or at least unreasonable, or his continued commitment served a collateral purpose. As I earlier observed, the collateral purpose was implementing an offensive strategy to counter perceived threats from Mr Viscariello.

716 Nor was the question addressed properly when the strategy of indemnifying the George bankruptcy proceedings was first discussed. Mr Macks testified that he received advice from Mr Mansueto that it was a cost effective solution but again Mr Macks did not squarely addressed the question whether, having regard to solicitor-client costs, there would be any better recovery against Ms Hamilton-Smith by adopting that strategy. I observe here that Minter Ellison did make that assessment. They reasonably concluded that further expenditure of their resources on the George bankruptcy proceeding on a speculative basis was not warranted. The position of Minter Ellison stands as a model of the position a reaonsable self-funded litigant would take. Mr Macks, however, seems to have fallen for the "sunk cost fallacy". He appears to justify increased investment based on the cumulative prior investment despite evidence showing that future costs outweigh future benefits.

717 Mr Macks, and his counsel, relied heavily on what they described as "important matters of principle" as a justification for his expenditure of substantial resources in chasing Ms Hamilton-Smith. Mr Macks gave the following evidence-in-chief on the topic after he was taken to the Minter Ellison letter of 27 April 2006:

> Q They say we accept that this is a commercial decision for you to make. We understand that you may wish to proceed due to matters of principle. Did you discuss with Minters what those matters of principle might be.
>
> A Yes.
>
> Q What were they.
>
> A Well, number 1 it was claimed by a liquidator for a deal done on a liquidator. Number 2 –
>
> Q Just pausing there, what was the significance of that.
>
> A To me –
>
> Q In terms of principle
>
> A To me it is an issue of principle, it's a black and white issue. On a deal done with the liquidator and the liquidator should pursue the deal.
>
> HIS HONOUR:
>
> Q That should be the case with all contracts. Why – are you suggesting that the contract of the liquidator in that sense is different in terms of making commercial decisions to pursue it or making decisions to pursue it.

A No. Well, I think my view remains that it was a deal that was done with an officer of the courts so it should have been honoured. I thought it elevated it to a new level rather than just a pure contract between normal parties.

Q Was it just that it was a contract with you.

A No, it's not just an issue with me, but in this particular matter it was an issue with the committee, so that the liquidator hears from, and gets advice from, the committee. Admittedly he is not obligated to follow it but it was a deal that was done between the liquidator, the committee and Tanya Hamilton-Smith and it was done with the committee endeavouring to assist her because of the circumstances that she was in. So the view expressed to me strongly by the committee was that we should pursue the debt.

Q That was your view though.

A That remained my view too, yes.

Q Because it was done in a sense to help her out, that made it all the more terrible that she wasn't honouring the agreement.

A Yes.

718 The proferred explanation for pursuing the Bernsteen debt is not objectively reasonable. If litigation to recover a debt on a contract made with a company in liquidation cannot be conducted cost effectively, there is simply no reason why the company in liquidation and the creditors, should sustain further losses in the pursuit of that debt "as a matter of principle". Taking an uncommercial approach to litigation is difficult enough to justify as a general proposition. It is all the more difficult to justify in the case of a company in liquidation. The money was not Mr Mack's to spend. The litigation costs would have been borne by all creditors if the insolvent trading action against Mr Viscariello had recovered any of the Companies' losses. It is no answer to that fact to accept as a matter of faith Mr Macks' assertion that he and, or, Minter Ellison would have reduced their fees to allow creditors a reasonable proportion of any recovery against Mr Viscariello. He was not engaged in a joint venture with the creditors to share the spoils of an insolvent trading action with them.

719 On a subjective level, I find it inherently improbable that Mr Macks devoted the time and resources he did to this matter because of the importance he attached to the office of liquidator alone. Moreover Mr Macks' evidence that the Committee strongly supported the action lacked weight because it was vague and lacking in particularisation. The evidence does not show that Mr Macks sought the advice of the Committee at significant stages of the litigation. Nor does the evidence show that Mr Macks disclosed the cost arrangements which he had entered into with Minter Ellison and the amount of costs that had been incurred from time to time.

720 Mr Macks' failure to call any member of the Committee reinforces my scepticism of his evidence on this issue. I reject Mr Macks' testimony that he

pursued Ms Hamilton-Smith as a matter of principle because of the special nature of his office.

721 Mr Macks testified that Minter Ellison did not at any stage advise him that he was in breach of his duties as liquidator in prosecuting Bernsteen's claim against Hamilton-Smith and in giving Ms George an indemnity. I accept that evidence. However, the relevant question is whether Mr Macks made his decisions to pursue Ms Hamilton-Smith diligently, reasonably and in good faith. Moreover given the arrangements between Mr Macks and Minter Ellison for the pursuit of preference claims on a speculative basis, I am not inclined to give much weight to Minter Ellison's failure to so advise Mr Macks. I acknowledge that Minter Ellison's advice to adopt the George strategy impliedly accepts that the arrangement was both a lawful and proper one to make for a liquidator, but the question was never explicitly addressed by advice from Minter Ellison.

722 Mr Macks testified that he thought it was in the best interests of Bernsteen to indemnify Ms George. It was his view that he had appropriate information on which to make the decision. Mr Macks was asked whether he considered that he had adequate information to support the decision to prosecute the action against Ms Hamilton-Smith having regard to the prospects of recovery. Mr Macks answered:

> I believe that I did have adequate information at that time and I had a watching brief, so I continued to acquire information, yes.

723 I give my reasons below for concluding that the Hamilton-Smith dossier was not, viewed objectively, a sound basis on which to expect any significant recovery from Ms Hamilton-Smith. I also reject Mr Macks' testimony that he believed the dossier gave sufficient cause to expect a significant recovery. The assessment in the correspondence from Minter Ellison was obviously right. Mr Macks could not have believed otherwise.

724 Mr Macks denied that there was any connection between him receiving the rule 6A Notice and his decision to instruct Minter Ellison to initiate the Bernsteen bankruptcy proceedings against Ms Hamilton-Smith. Mr Macks also denied that the maintenance of the George proceedings was in any way connected with Mr Viscariello's proposed claim against him. Mr Macks testified:

> Yes, there was no connection at the end of the day. The fact of the matter is that I had continued and I continued to do my job as best I could as a robust liquidator. So it is referred to subsequently as parallel strategies, I think that's right / that was on front. On the side was merely the fact that we were continuing to prosecute the Tanya Hamilton-Smith, George matter and there was no tie up or linkage between the two except the concern that we had that we were under attack on various fronts and the costs were going up on various fronts and our perception was that that was because Mr Viscariello took the view that he wanted the liquidation shut down.

725 I do not accept that explanation.

726 It is appropriate at this point to consider who benefitted from the Bernsteen action. I set out below a "Universal Distributing Summary" prepared by Mr Macks. The table shows that the cost of pursuing Ms Hamilton-Smith exceeded the return from stock which was covered by the ARL security or was consignment stock:

Client: BERNSTEEN & NEWMORE

Matter: Universal Distributing Summary for Floating Charge Assets

PPB ADVISORY

Floating Charge Asset Realisations	Note	Bernsteen $	Newmore $	TOTAL $
Stock Realisations		257,179	130,335	387,514
Cash		10,562	12,530	23,092
Total Floating Charge Assets Realised		267,741	142,865	410,606
Costs of Protecting, Preserving and Realising				
Trading				
Trading Loss (excluding PPB and Legal Fees)	1	67,572	52,667	120,239
Trading PPB Fees	2	4,231	18,031	22,261
Tanya Hamilton-Smith to June 2005				
PPB Fees	2	36,338		36,338
Minters Fees	3	191,568		191,568
Stock Realisations / ROT				
PPB Fees	2	52,454	16,791	69,245
Luigi Viscariello Actions				
PPB Fees	2, 4	14,499	6,214	20,713
Minters Fees	3, 4	26,289	11,267	37,555
ARL Dealings				
PPB Fees	2	3,696	2,453	6,149
Minters Fees	3, 5	25,652	10,994	36,646
Total Costs of Protecting, Preserving & Realising		422,298	118,416	540,714
Net Position		**-154,557**	**24,448**	**-130,108**

Note:
1. These figures have been taken from the attached Statement of Position
2. Refer to attached worksheets re PPB fee allocation
3. Refer to attached worksheet re Minter Ellison fee allocation
4. This has been apportioned on the basis of employee numbers (70% for BERNS and 30% for NEWMO)
5. This is apportioned based on the number of stores (70% BERNS and 30% NEWMO)

There have been no allowance in the above for PPB fees other than where specifically identified (and included in the above categories).

There is a very significant amount of further PPB fees that would be claimable, being in the nature of that which must be necessarily incurred but not specifically relating to the realisation of floating charge assets, such as the costs of preparing for, attending and documenting meetings or preparing and distributing reports during which there were discussions regarding floating charge assets and their realisation. To include these additional substantial costs would require a complete and time-consuming consideration of all of PPB's general work during the administration and liquidation periods from December 2001 to August 2005.

727 That summary was subsequently amended. The amended table also shows that the costs of pursuing Ms Hamilton-Smith exceeded the proceeds which had been recovered from secured stock. The effect is that the costs became a burden on the unsecured creditor who would not have benefitted even if the litigation had been cost effective. I set out the tables below:

Client: BERNSTEEN & NEWMORE

Matter: Summary of Expenses for Protecting, Preserving and Realising Floating Charge Assets

Floating Charge Asset Realisations	**Note**	**Bernsteen $**	**Newmore $**	**TOTAL $**
Stock Realisations		265,180	130,335	395,515
Cash		10,562	12,530	23,092
Total Floating Charge Assets Realised		275,742	142,865	418,607
Costs of Protecting, Preserving and Realising				
Trading				
Trading Loss (excluding PPB and Legal Fees)	1	67,572	52,667	120,239
Trading PPB Fees	6	4,231	0	4,231
Tanya Hamilton-Smith to June 2005				
[redacted] Fees	2	32,967		32,967
Minters Fees	3	191,568		191,568
Stock Realisations / ROT				
PPB Fees	2	53,002	15,341	68,342
Luigi Viscariello Actions				
PPB Fees	2, 4	14,730	6,313	21,043
Minters Fees	3, 4	22,321	9,566	31,888
ARL Dealings				
PPB Fees	2	4,300	3,028	7,327
Total Costs of Protecting, Preserving & Realising		390,691	86,915	477,606
Net Position		**-114,949**	**55,950**	**-58,999**
PPR PPB		109,229	24,682	129,680
	Fixed	23,869	5,476	
		85,361	19,205	
Minters		213,890	9,566	223,456

Note:
1. These figures have been taken from the attached Statement of Position
2. Refer to attached worksheets re PPB fee allocation.
3. Refer to attached worksheet re Minter Ellison fee allocation
4. This has been apportioned on the basis of employee numbers (70% for BERNS and 30% for NEWMO)
5. This is apportioned based on the number of stores (70% BERNS and 30% NEWMO)
6. For Bernsteen, refer to attached worksheets re PPB fee allocation, for Newmore, assume nil for the sake of this exercise. There have been no allowance in the above for PPB fees other than where specifically identified (and included in the above categories).

There is a very significant amount of further PPB fees that would be claimable, being in the nature of that which must be necessarily incurred but not specifically relating to the realisation of floating charge assets, such as the costs of preparing for, attending and documenting meetings or preparing and distributing reports during which there were discussions regarding floating charge assets and their realisation. To include these additional substantial costs would require a complete and time-consuming consideration of all of PPB's general work during the administration and liquidation periods from December 2001 to August 2005.

728

Statement of Position by Company		Matter: 165 of 2006	
		Bernsteen	**Newmore**
		$	$
Fixed Charge Assets		23,869	5,476
Less:			
Universal Distributer's claim by VA/Liq	B	-23,869	-5,476
Available from Fixed Charge Assets		0	0
Floating Charge Assets		275,742	142,865
Less:			
VA Trading results		-67,572	-52,667
PPB Fees	B	-85,361	-19,205
Legal Fees	C	-213,890	-9,566
Available from Floating charge Assets before employee priorities			
Priority claims		-91,081	61,426
loyee Priorities (Geers)		-193,434	-60,787
Available after priority employee claims		-284,516	639
Shortfall on fixed charge		0	0
Net position	A	-284,516	639
Uncharged Assets:			
Preference Recoveries/GST refunds/Interest etc		825,257	235,222
Less:			
PPB fees (UNPAID) (excluding fees for work spent on JV action,THS/HG proceedings post 1 June 2005 and ASIC's review)	D	-450,735	-201,692
Special Purpose Liquidator fees (UNPAID)		-345,653	-13,617
Liquidation costs (excluding legal)		-63,881	-17,357
Legal fees paid		-476,374	-150,588
Add back THS/HG fees post 1 June 2005		259,971	
		-251,415	-148,032
less (A)		-284,516	639
Net Position		-535,931	-147,393

B: The total of these two amounts is $117,774 being the total PPB fees analysed as Protecting preserving and realising assets.
C: This is the total Minters fees identified as protecting and preserving and realising assets
D: This is the residual PPB fees not accounted for as protecting preserving and realising

Client: Bernsteen & Newmore	BERNS 1 NEWMO1 Matter: 165 of 2006	PPB Advisory

	Note	Bernsteen	Newmore
		$	$
Fixed Charge Assets	1	-	-
Floating Charge Assets		267,742	142,865
Results from Voluntary Administration		-132,038	-101,414
Liquidation Receipts		**833,257**	**235,222**
Liquidation legal fees excluding legal fees spent on Hamilton-Smith/George Proceedings)		**-361,165**	**-160,155**
PPB fees (excluding fees for work spent on JV action,Hamilton-Smith/George proceedings and ASIC's review)		-552,984	-184,524
Liquidation - other payments		-63,881	-17,357
Special Purpose Liquidator fees		-345,653	-13,617
Total (Adjusted) amount available for Distribution		**-$354,722**	**-$98,981**

Notes:

1 Value of minor fixed charge assets absorbed by PPB costs

FileName: SOP

Bernsteen & Newmore		BERNS 1 NEWMO1 Matter: 165 of 2006					PPB Advisory
	NOTE	File TAB Ref:	Bernsteen		File TAB Ref:	Newmore		Comments
			$	$		$	$	
Fixed Charge Assets								
Owned Assets:								
Plant & Equipment & Furniture		2	18,851			0		From Receipts and payments worksheets
Motor Vehicles			0			0		
Intellectual/Intangible			0			0		
Shares		2	5,018		4	5,476		From Receipts and payments worksheets
Leased Assets								
Motor Vehicles	1							No reported net equity from lessor
less Payout								
Equity in leased assets			0			0		
Fixed charge assets before deductibles				23,869			5,476	
Less Liquidator/Administrator Fees & Costs (Protect, preserve & Realise)	2	2	-23,869	-23,869		-5,476		Costs associated will be at least this value.
Available from Fixed Charge Assets				0		0	0	
Floating Charge Assets (Circulating Assets)								
Cash at Bank and on hand		1	10,562		3	12,530		From Receipts and payments worksheets
Stock		2	257,179		4	130,335		See *. This includes a tfr from Berns to Newmo of $50,000
Total Floating Charge Assets		3		267,742			142,865	
Voluntary Administration:								
VA TRADING		1	161,446		3	36,302		See respective sheet attached
VA TRADING (during liquidation period)		2	-229,019		4	-88,969		See respective sheet attached
Total VA Trading Results				-67,572			-52,667	
VA STATUTORY		1	-252			0		See respective sheet attached
VA STATUTORY (during liquidation period)		2	-35,928		4	-5,961		See respective sheet attached
PPB VA Fees (paid during liquidation period)		2	-28,286		4	-42,787		See respective sheet attached
Total VA Statutory results				-64,465			-48,747	
Total VA Results				-132,038			-101,414	
Results from floating charge assets and VA Transactions				135,704			41,450	
Liquidation:								
LIQ - Receipts		2	833,257		4	235,222		See **
LIQ - PPB FEES		2	-88,227		4	-91,422		
LIQ - Payments		2	-63,881		4	-17,357		
LIQ - LEGAL		2	-690,264		4	-160,155		
Less: Paid legal fees re THS	3	7	329,099		7	0	0	
Total adjusted liquidation results				319,984			-33,711	
Total available after adjusted liquidation Costs				455,688			7,739	
PPB Approved Fees (unpaid) up to 31/7/2011		5	-1,033,177		5	-119,877		Per Summary of PPB Fees allocation worksheet attached
Less: PPB Time re JV action (Lawson Smith)	4	5	270,499		5	22,145		Per Summary of PPB Fees allocation worksheet attached
PPB Time re ASIC (JV)		5	234,979		5	4,427		Per Summary of PPB Fees allocation worksheet attached
PPB Time THS actions		5	54,602		5	202		Per Summary of PPB Fees allocation worksheet attached
PPT Time Heidi George		5	8,342		5	0		Per Summary of PPB Fees allocation worksheet attached
Adjusted PPB unpaid and approved WIP				-464,757			-93,103	
Sheahan Lock: Special Purpose Liquidator's WIP		***		-345,653			-13,617	NB: Basic allocation only. Amounts obtained from COI minutes dated 30/01/2012
Adjusted Available after write back of THS Legal Fees and PPB fee adjustments				-$354,722		See Note 8	-98,981	

* Bernsteen's substantial receipts were received 18/2/02=$50k, 30/4/02=$180k, 23/7/02=$19k

** Bernsteen substantial rcoveries were received 6/7/04=$120k, 6/9/04=$80k, 17/32/06=$104,12/09/07=$181k

*** As advised by Sheahan Lock Partners

**** The figures reflect all THS and HG costs.

Notes to SOP

Client: Bernsteen & Newmore	**BERNS1 / NEWMO1**
Matter: 165 of 2006	

Heading	Explanation
VA TRADING	Receipts and payments during the VA period but specifically excluding PPB Fees paid and receipts and payments that are statutory in nature.
VA TRADING (during liquidation period)	Receipts and payments during the liquidation period that relate to the trading during the voluntary administration, but specifically excluding any PPB Fees applicable to the voluntary administration period and receipts and payments that are statutory in nature.
VA STATUTORY	All receipts and payments paid during the voluntary administration period that are statutory in nature, but specifically excluding any PPB Fees paid.
VA STATUTORY (during liquidation period)	All receipts and payments paid during the liquidation period that relate to the voluntary administraion period and are statutory in nature, but specifically excluding any PPB Fees paid.
PPB VA Fees (paid during liquidation period)	All PPB fees paid in the liquidation period that relate to work performed during the liquidation period. For clarity, there were no PPB fees paid during the voluntary administration period and hence no separate disclosure of this.
LIQ - Receipts	**All receipts during the liquidation except for receipts from Geers to the extent they are paid to employees (Trust relationship between Geers and the employees)**
LIQ - PPB FEES	All PPB Fees paid during the liquidation period that relate to the liquidation period.
LIQ - Payments	**All payments during the liquidation except for payments to employees from Geers provided funds (Trust relationship between Geers and the employees).**
LIQ - LEGAL	**All legal fees paid during the liquidation period.**

Notes to SOP

Note 1: Leased Assets
The CBA took possession of their security and realised it. Thewre was a shortfall on the realisation but we have not formally been advised of that shortfall. The CBA will rank as an unsecured creditor for the value of the shortfall.

Note 2: Liquidator/Administrator Fees and Costs in Protecting, preservings and Realising
In accordance with the principles established in "Universal Distributing Company Ltd (In Lquidation HCA 1933 48 CLR, costs in protecting, preserving and realising the fixed charge assets have a priority against the funds realised. It is obvious these costs exceed the samll realisations for each entity.)

Note 3: Paid Legal Fees re THS
We have reviewed all legal invoices in our possession and where those invoices refer to either THS or HG we have adjusted for those amounts so they are excluded from the costs.

Note 4: PPB Time re JV action (Lawson Smith)
We have identified from our WIP printouts that time spent on dealing with John Viscareillo's claim against P Macks. This tiume has been adjusted against PPB approved fees.

Note 5: PPB Time re JV action (Lawson Smith) Future
We have identified all future fees as approved by the COI. While not all thios time will be in respect of John Viscariello's action, we have conservatively adjusted the full amount.

Note 6: PPB Time THS actions
We have identified all PPB time identified in dealing with matters relating to both Tania Hamilton-Smith AND Heidi George since 1 July 2005 to 31 July 2011 (no time charged after that date, so tecnically up to date).

Note 7: PPB time re ASIC Review (JV Complaint)
We have again conservatively adjusted PPB time by identifying all time entries in dealing with the ASIC review

Note 8: Importantly, the deficiency in Newmore will be significantly higher once a proper allocation is made of PPB and Sheahan Lock time.

729 Mr Macks gave the following evidence on that question:

Q Can I just ask you about this: the action that Bernsteen took against Hamilton-Smith was with respect to non-payment for goods over which there was a charge or retention of title.

A Yes.

Q So assuming Hamilton-Smith had paid the amount owing, that would have been paid to ARL.

A Yes, in accordance with the flow – through, yes.

Q So the actual judgment sum on the claim was something that could only benefit ARL.

A Yes, subject to the costs and subject to any benefit that that may give to other creditors as a consequence of the absorption of those costs from those proceeds.

Q I am not sure what you mean by that. Perhaps I can ask you to look at MFID385 and 384. Starting with MFID385, as I understand that document, it shows that as of June 2005, $130,000 more had been spent collecting the secured creditors assets than had been realised.

A Sorry where do you get the $135,000 from?

Q The "Total" column

A Sorry

Q It's 130 for Total.

A Mr Abbott for both companies?

HIS HONOUR:

Q Yes, for both companies.

A Which is that – the total of the $36,000 and the $69,000.

Q Where are you getting the $36,000 and $69,000.

A I'm trying to get your $130,000.

Q It's on the document itself $130,108, bottom right hand corner.

A Yes.

Q Does that mean the $130,000 more than the realised assets had been spent bringing them in.

A Yes, I think – in my view, if I look at it this way, if ARL would have appointed a receiver and they had gone about it in the way in which I had gone about it, the receiver would have asked to be paid $130,000 out of the indemnity that he would have had.

Q But does it mean that you, as the liquidator, had spent $130,000 more in bringing in the secured creditors assets than they realised.

A Yes, I think it does.

Q A large part of that, or more than that, there's money that has been spent on the Tanya Hamilton-Smith proceedings – this is about 227.

A Yes, it must be the amount that was spent, the 191 plus the 36.

Q And those amounts for example from Minter Ellison were in fact paid, $191,000.

A Yes.

Q And were the $36,000 paid in fact or was that just charged.

A I am not quite sure if it was paid or charged without having a look at it.

Q But in any event doesn't it mean that out of moneys recovered on things like preference payments, if there had been a net surplus being distributed to all of the creditors, including the unsecured creditors, out of that money, moneys have been paid to fund an action that could have only benefitted ARL.

A But the proceeds from that action would have gone to ARL, the only benefit to the creditors would have been in the reduction of the costs.

Q Which costs.

A The only benefit –

Q Would it be the reduction of costs that were spent on those proceedings which they had no real reason to fund anyway but had paid for.

A Yes, I think so.

Q Do I take it from that answer that you probably didn't explain that to any unsecured creditor at the time.

A Not that I can recall.

730 Mr Macks testified that he did not understand Minter Ellison's advice recommending that he indemnify Ms George in bringing bankruptcy proceedings against Ms Hamilton-Smith to be limited to the initial amount of $2,000. Mr Macks testified that he believed that the strategy would be successful. He believed that Ms Hamilton-Smith's trustee in bankruptcy would analyse her counterclaim and decide whether it had merit. Mr Macks testified that his view was that the counterclaim had "no legs" and that he hoped the trustee would take the same view.

731 Mr Macks agreed that if Ms Hamilton-Smith became bankrupt, her trustee could assume the role of appointor (consistent with a practice among insolvency practitioners to do so upon the making of a sequestration order). Mr Macks testified that he was told there was nothing improper about the arrangement with Ms George. He believed that the cost of successfully bringing the Heidi George bankruptcy proceedings to an end would be about $2,000. He testified that he was extremely concerned when costs reached the $11,000 mark.

732 Mr Macks gave the following evidence about the progress of the bankruptcy proceedings brought by Ms George:

> A I insisted on being kept informed after a period when the costs accelerated beyond, if I can recall correctly, the $11,000. I was extremely concerned and I raised it with Minters when they put in what I consider to be a statement that this initiative would cost $2,000 and suddenly it was $11,000 and then it crept up and we had further discussions in relation to what would now be necessary for the work to be done and I wanted to be kept informed of those costs.
>
> Q Up until now your counsel now you in your evidence have tried to make quite a point of this; Ms Hamilton-Smith is vigorously defending the Bernsteen debt claim, surely you would have expected her to, and vigorously defended the Bernsteen bankruptcy notice.
>
> A To be honest I did not, and I presume therefore that Minters did not, because if they did they would have commented to me in relation to a range of costs. It was conveyed to me that it was a debt that was due knowing that they would take a bankruptcy application in relation to it and the costs would be $2,000.

733 Mr Macks then agreed that at the time he was pursuing Ms Hamilton-Smith, his belief was that she was contesting the claim not because of any genuine belief that she had a good defence but simply because she did not want to pay the debt and did not want to be bankrupted. Mr Macks was asked why he thought that Ms Hamilton-Smith would not take the same approach to the Ms George proceedings. He answered:

> A I honestly didn't think it really, it wasn't conveyed that way with the lawyers, it was just –
>
> Q This is really a more a matter of psychology.
>
> A Probably.
>
> Q Psychology and plain old human greed.
>
> A Yes.

734 For the reasons given below, I find that Mr Macks acted unreasonably and was influenced by the extraneous consideration of his own personal interests in defending the professional indemnity claim which Mr Viscariello had foreshadowed, and later brought, against him in making his decision to pursue Ms Hamilton-Smith after June 2005..

735 There can be no criticism of the initial decision to bring proceedings against Ms Hamilton-Smith for her failure to honour the terms on which she purchased the manchester. However, by June 2005 the fees incurred by Bernsteen in the pursuit of Ms Hamilton-Smith had come to total $191,500.68. Mr Macks' fees, in pursuing Ms Hamilton-Smith, were $36,338. Those fees had, to a large extent, been incurred on interlocutory applications. Those applications were caused by Ms Hamilton-Smith's combative litigation strategies. Her strategy was to defend

the Bernsteen action in a way which delayed the proceedings and maximised the cost and expense to Mr Macks. Moreover, by June 2005 Ms Hamilton-Smith had brought a counterclaim against Bernsteen, a step which was also calculated to protract and increase the expense of the proceedings.

736 Moreover, it must have been clear to Mr Macks that even if Ms Hamilton-Smith had assets, which might justify pursuing her for the debt and associated costs, recovery of those assets would in turn also be a protracted and expensive affair. It must also have been obvious that the solicitor-client expense of the pursuit of Ms Hamilton-Smith meant that it was very likely that even if the debt and associated costs were recovered, more than the value of the debt would be lost in those costs. At least by June 2005 it was no longer open to Mr Macks to believe that the Bernsteen action was a simple debt recovery. Mr Macks' belief that Ms Hamilton-Smith's defence was unmeritorious was well founded. However, that belief is not a sufficient answer to the criticism of his decision to pursue her. A completely unmeritorious defence might nonetheless frustrate any recovery because the proceedings to recover the debt are not cost effective.

737 The material in the Hamilton-Smith dossier to which I earlier referred, referred to the Bernsteen stock which Ms Hamilton-Smith had purchased. There was also an allegation that in the previous financial year she had received a salary of $88,000. However, there was no material giving any reason to think that those funds had been maintained and secured by Mr Hamilton-Smith rather than spent.

738 The material also showed that:

- Ms Hamilton-Smith was the owner of land in the Adelaide Hills and a director of J & L Developments Pty Ltd (J & L Developments);
- J & L Developments held a substantial holding of land in Stirling which was mortgaged;
- Ms Hamilton-Smith transferred other land in Littlehampton to J & L Developments on 8 July 2003 for $1.35m but that land was subject to a number of trust arrangements;
- Ms Hamilton-Smith was the owner of land at Monks Avenue, Littlehampton, following the settlement of property consequent upon divorce proceedings which was transferred to J & L Developments on 29 July 2004;
- Ms Hamilton-Smith's creditors were claiming that the land transfer of 29 July 2004 was made in an attempt to defraud creditors;

- On 4 August 2004 Ms Hamilton-Smith's counsel made a submission in the District Court that she held 50 per cent of the interest in J & L Developments;

- The Littlehampton land was subdivided and allotments were being sold off the plan from May 2002;

- Ms Hamilton-Smith was a director and shareholder of other Companies, including Southern Pty Ltd, KOC Pty Ltd, Daleport Holdings Pty Ltd, Hahndorf Gourmet Foods Pty Ltd (HGF) and Hahndorf Smallgoods Pty Ltd;

- The business of the Hahndorf Smallgoods was sold for $200,000 in February 2001;

- In July 2007 Ms Hamilton-Smith and her then husband Don Osborne sold the intellectual property relating to HGF to another company HGPL for $250,000;

- Ms Hamilton-Smith was rumoured to have $500,000 in cash in a safety deposit box;

- Ms Hamilton-Smith was rumoured to have a bank account in Melbourne under the name Tanya Viscariello;

- Ms Hamilton-Smith was thought to own land at 42A Morella Grove Bridgewater and 9 Myrtle Road Hawthorndene.

739 In all, the material showed no more than that Ms Hamilton-Smith might have assets held in a trust against which any Bernsteen debt and costs award obtained in the Bernsteen action could be enforced. However, the allegations that Ms Hamilton-Smith had liquid assets were hearsay and of little value. Moreover the ease with which money could be moved made recovery unlikely. The trust arrangements over the real property in the Adelaide Hills would necessarily complicate any attempted recovery. It was also plain, on the material Mr Macks had, that there were likely to be competing claims by other creditors.

740 Mr Macks testified that on the basis of the information in the files which I have summarised, he believed that:

- at the very least Ms Hamilton-Smith's related entities held substantial property assets even though he was not in a position to determine ultimate ownership;

- Ms Hamilton-Smith would settle the proceedings for $25,000 and that she had the resources to make that payment;

- Ms Hamilton-Smith had a 50 per cent interest in J & L Developments which held significant assets.

741 Mr Macks testified that he had no recollection of seeing the trust deeds associated with Littlehampton and J & L Developments but recalled that others had and that they had been discussed. Mr Macks did not satisfy himself that the trust arrangements would not impede recovery of any judgment. Mr Macks' suspicion that Ms Hamilton-Smith was reluctant to put on a statement as to her financial position because she had assets to hide was justified but it was no more than a suspicion. However, that suspicion gave no reason to think those assets would be located and cost-effectively recovered.

742 Mr Macks testified that he was fortified in his assessment because Ms Hamilton-Smith found money from time to time to satisfy court orders when absolutely necessary. That was not a sound basis to form an opinion that her assets would be located following a bankruptcy. Ms Hamilton-Smith was tendering payment as and when required as part of her litigation strategy.

743 Mr Macks' belief that Ms Hamilton-Smith and the entities involved in her business dealings were assiduously avoiding the appointment of a trustee in bankruptcy who would investigate their financial affairs may have been well founded. However, that fact could give him no confidence that he would be able to effect a substantial recovery before or after bankrupting Ms Hamilton-Smith.

744 The material about Ms Hamilton-Smith's assets collected in the Hamilton-Smith dossier does not constitute a serious or reliable assessment of the likelihood and extent of any recovery against her. The material is no more than the collection of miscellaneous items of information that had come to hand from time to time with a view to returning to investigate it if the need were ever to arise in the future. The fact that information was gathered about Ms Hamilton-Smith and that the material collected in the files gave only peripheral attention to the assets of Mr Viscariello himself is not to my mind significant. It was apparent to Mr Macks that there was a personal and financial connection between Mr Viscariello and Ms Hamilton-Smith and that their affairs were closely intertwined. Mr Macks himself recognised that there was unlikely to be full recovery as Bernsteen's debts moved above $200,000.

745 It is significant that Minter Ellison decided not to act "on spec" in the George bankruptcy proceedings and repeatedly expressed the view that the litigation did not have sufficient prospects of a successful recovery. It matters little that Minter Ellison sent those letters because of the concerns of the senior management of Minter Ellison that the firm was unlikely to recover fees for the work it had performed. Their concerns reflect an objective assessment of the position. Mr Macks may have hoped for a miracle but I do not accept that he believed anything different.

746 It is not to the point that Mr Viscariello's affairs could be separately examined in the liquidation and by pursuing the insolvent trading claim. Investigating the interconnected financial affairs of both Mr Viscariello and Ms Hamilton-Smith through examinations of Ms Hamilton-Smith and Mr Viscariello was likely to be more productive.

747 I find that Mr Macks had four substantial and actuating collateral purposes in pursuing Ms Hamilton-Smith after 1 June 2005. First, he was irritated by Mr Viscariello's behaviour generally and, in particular, in committee meetings after the liquidation. Secondly, he bore ill will towards Mr Viscariello for his part in assisting Ms Hamilton-Smith to defend the proceeding brought against her in a way which had caused Mr Macks to suffer financial loss because the costs of the litigation reduced the funds available to pay his fees. Thirdly, he hoped to delay and possibly deter Mr Viscariello in bringing a professional indemnity claim against him. Fourthly, he hoped that pursuing Ms Hamilton-Smith might facilitate the prosecution and enforcement of the insolvent trading claim against Mr Viscariello.

748 I am not inclined to give Mr Macks' commercial judgment as an experienced liquidator great weight on the question of the assessment of the cost effectiveness of the pursuit of Ms Hamilton-Smith. The cost effectiveness of proceedings is a matter which lawyers are well placed to judge and assess. True it is that the likely result of untangling complex transactions designed to avoid creditors is a matter in which liquidators have special expertise. However, Mr Macks never purported to undertake a serious assessment of that. Indeed, he simply did not have the material on which to make such an assessment.

749 Mr Macks, at all times, had a material interest in the George litigation because he was liable to Minter Ellison for the costs of the proceedings in circumstances in which it was unlikely that he would have recourse to funds in the liquidation to meet that liability. For the same reason I am not satisfied that Mr Macks' testimony that he acted in good faith and for the Companies' purpose.

750 I find that the maintenance of the Bernsteen action and the George bankruptcy proceedings of June 2005 were unreasonable. I am not satisfied that Mr Macks acted bona fide in the interests of the Companies in that period because his personal interests had become a substantial and actuating reason for maintaining proceedings that were so obviously not in the interests of the Companies.

751 It follows that Mr Macks breached the duty imposed on him by ss 180 and 181 of the *Corporations Act* in prosecuting the Bernsteen action and the George bankruptcy proceeding after June 2005.

Validity of arrangements indemnifying Ms George

752 Mr Viscariello claims that Mr Macks had no power to enter into the arrangements to indemnify Ms George at all or, in the alternative, to enter into the arrangements which he did without obtaining the approval of the Court, the Committee of Inspection or a resolution of the creditors pursuant to s 477(2B) of the *Corporations Act*.

753 Section 477 of the *Corporation Acts 2001* (Cth) provides:

> Powers of liquidator
>
> (1) Subject to this section, a liquidator of a company may:
>
> (a) carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business; and
>
> (b) subject to the provisions of section 556, pay any class of creditors in full; and
>
> (c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging that they have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or whereby the company may be rendered liable; and
>
> (d) compromise any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the property or the winding up of the company, on such terms as are agreed, and take any security for the discharge of, and give a complete discharge in respect of, any such call, debt, liability or claim.
>
> (2) Subject to this section, a liquidator of a company may:
>
> (a) bring or defend any legal proceeding in the name and on behalf of the company; and
>
> (b) appoint a solicitor to assist him or her in his or her duties; and
>
> (c) sell or otherwise dispose of, in any manner, all or any part of the property of the company; and

(ca) exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) in relation to calls on contributories; and

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary a seal of the company; and

(e) subject to the Bankruptcy Act 1966, prove in the bankruptcy of any contributory or debtor of the company or under any deed executed under that Act; and

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company; and

(g) obtain credit, whether on the security of the property of the company or otherwise; and

(h) take out letters of administration of the estate of a deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor, or his or her estate, that cannot be conveniently done in the name of the company; and

(k) appoint an agent to do any business that the liquidator is unable to do, or that it is unreasonable to expect the liquidator to do, in person; and

(m) do all such other things as are necessary for winding up the affairs of the company and distributing its property.

(2A) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than:

(a) if an amount greater than $20,000 is prescribed--the prescribed amount; or

(b) otherwise--$20,000.

(2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or a an agreement under which a security interest arises or is created) if:

(a) without limiting paragraph (b), the term of the agreement may end; or

(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;

more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.

(3) A liquidator of a company is entitled to inspect at any reasonable time any books of the company and a person who refuses or fails to allow the liquidator to inspect such books at such a time is guilty of an offence.

(4) If:

(a) a company is being wound up under a creditors' voluntary winding up; and

(b) the meeting of creditors has not been held under section 497;

the liquidator of the company must not exercise a power conferred by paragraph (1)(b) or (c) or (2)(m), except with the leave of the Court.

(5) For the purpose of enabling the liquidator to take out letters of administration or recover money as mentioned in paragraph (2)(h), the money due is taken to be due to the liquidator.

(6) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and any creditor or contributory, or ASIC, may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

(7) This section does not apply to calls on shares in a no liability company.

754 Mr Macks relies on the power given by s 477(2)(m) as a statutory authorisation of his arrangement with Ms George. The scope of the power conferred by that subparagraph is delineated both by its text and context. As to its text, it is only those acts which are "necessary" for winding up the affairs of the company which are authorised. It can be accepted that the power extends beyond those acts which, if not performed, will prevent the winding up of the company proceeding any further. The word "necessary" is not so narrow as to include only those acts which the liquidator has no alternative but to take. However, the section does not extend so far as authorising any act which the liquidator considers to be expedient or which might, in some way, facilitate the winding up. The particular aspect of a winding up with which we are here concerned is the recovery of debts due to the company. Liquidators are conferred specific powers in that respect by s 477(1)(d) and s 477(d)(a) and (e) of the *Corporations Act*. Section 477(2)(h) extends those powers in a very

particular way by authorising the liquidator to apply for letters of administration or do any other "necessary" act which cannot be taken by the company itself, perhaps because of its corporate identity. That power is limited to entering into a legal relationship with a debtor, or his or her estate, in order to do what is necessary to collect the debt.

755 It is necessary to read all of the subparagraphs of s 477(2) of the *Corporations Act* together. Subparagraph (m) must not be given a meaning which renders the other powers otiose.[94]

756 In my view, the actions authorised by s 477(2)(m) should be limited by analogy to the conduct expressly mentioned in preceding subparagraphs. A close connection between the act of the liquidator and the recovery of the debt is required.

757 The power conferred on liquidators by s 477(2)(m) of the *Corporations Act* was considered by the New South Wales Supreme Court in *McGrath v HIH Insurance Ltd*.[95] In that case, the liquidators of 41 companies associated with HIH Insurance Ltd sought the Court's approval to engage in a litigation strategy whereby certain companies in the group would provide financial assistance to other companies in the group to pursue causes of action which may have yielded substantial awards of damages. In the event of successful actions or compromise of the actions, the companies which provided the funding would be repaid and receive a premium calculated by reference to the net proceeds. As a necessary condition to the granting of approval, Barrett J considered whether the liquidators had power to enter into the arrangement. His Honour observed:[96]

> There is next the question of the powers of the funding companies. In a direct and immediate sense, each funding company will simply lend money or grant accommodation in return for the promise of repayment with interest and premium if success is achieved by the assisted claimant company, such promise being supported by the security given by that claimant company. A liquidator is not given by the Corporations Act any explicit power to lend. The head of power said to be applicable for that purpose here is that conferred by s 477(2)(m), being the power to:
>
> > "do all such other things as are necessary for winding up the affairs of the company and distributing its property."
>
> It can be said at once that this head of power would not support the provision of litigation funding by a liquidator to some entirely unrelated litigant, purely for the sake of the returns (or prospects of returns) that might be generated by the transaction itself. Such a transaction would be in no sense "necessary for winding up the affairs of the company and distributing its property". The present case is, however, distinguishable from that hypothetical case. Each funding company is, as I have said, a creditor of the claimant company to which it is proposed that it give financial assistance.

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94 *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] 249 CLR 1.
95 [2010] NSWSC 404.
96 *McGrath v HIH Insurance Ltd* [2010] NSWSC 404 at [18]-[22].

> Case law shows that the word "necessary" in s 477(2)(m) is not synonymous with "essential" or "indispensable". The provision is accordingly not confined to matters without which the winding up of affairs and distribution of property cannot occur. The test is, rather, one of what "may be thought expedient with reference to the assets of the company": *Re Cambrian Mining Co* (1882) 48 LT 114 per Kay J. Counsel referred me to the decision of Fullagar J in *Re Bairnsdale Food Products Ltd* [1948] VLR 264 as providing an example of the scope of the section. That case concerned a company which had a right of first refusal in respect of land occupied by it as lessee. After commencement of the winding up, the lessor offered the company the opportunity to purchase. On the evidence, it would have been advantageous to the winding up for the liquidator to buy the land and re-sell it, thus realising the value of the right of first refusal. It was held that the purchase was justified as an incident of the subsequent sale and was therefore comprehended by the power to sell. There was subsidiary reliance upon the equivalent of s 477(2)(m).
>
> I accept that s 477(2)(m) enables a liquidator to do anything expedient with reference to, or conducive to, the beneficial pursuit towards completion of the winding up of affairs and distribution of property. The question is whether commitment of funds by a particular funding company to the pursuit of a claim by a particular assisted claimant company of which it is a creditor is expedient with reference to, or conducive to, those matters in relation to that funding company.

758 In declining to grant approval for the funding arrangement, Barrett J considered that he was not satisfied that the arrangement was within the power conferred by s 477(2)(m):[97]

> On the material before me, I do not see how I can safely conclude that it will be expedient with reference to, or conducive to, beneficial progress towards completion of the winding up of the affairs of any funding company and the distribution of its property for that funding company to provide financial assistance to the particular claimant company. A funding company could and, in the ordinary course, would deploy surplus funds in the normal types of investment entailing minimal risk: see s 543. For it to depart from that ordinary and expected course and to deploy its surplus funds in some other way would call for some analysis of pros and cons undertaken exclusively from the viewpoint of the funding company itself and having regard solely to its separate interests. That is what seems to me to be lacking here. It has not been suggested or shown that there has been any independent assessment, from the unilateral perspective of each funding company, of where the commercial and financial interests of that funding company lie, so far as the proposals are concerned. It is all very well to say, in the abstract, that by financially supporting the pursuit of particular litigation by a claimant company, a funding company may enhance its prospects of greater returns in its capacity as a creditor of the claimant company, in addition to recouping its funding outlay, plus interest and premium on a secured basis. That is no doubt supportable as a theoretical proposition. Also supportable in an abstract or theoretical sense is the proposition that the funding company faces the prospect of losing its total outlay without any return whatsoever. Before the court could conclude that the matter was within s 477(2)(m), it would have to see that there was some good and solid reason for concluding that the processes of winding up and distribution referred to in that provision would be enhanced by the particular outlay of funds envisaged in the particular circumstances prevailing, with the enhancement being demonstrable by comparison with the situation that would prevail if surplus funds were deployed in the ordinary way pursuant to s 543. The enhancement would have to be

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[97] *McGrath v HIH Insurance Ltd* [2010] NSWSC 404 at [25]-[27].

> demonstrated by some informed and independent assessment of the separate and selfish interests of the funding company alone.
>
> In the *Bairnsdale Food* case, Fullagar J emphasised that the existence of power must be distinguished from the propriety of its exercise. I do not lose sight of that distinction here. The point is that, when the question is whether a particular step is "necessary for" – in the s 477(2)(m) sense of "expedient with reference to" or "conducive to" – the progress and completion of the winding up process, the consequences or likely consequences of the step must be known (or, at least, reliably predicted, on the basis of known facts and informed assessment of their significance) as an essential ingredient of the formation of the opinion relevant to the existence of the power, quite separately from the wisdom of its exercise.
>
> Lest it be thought that there is undue concentration here on the question whether the proposed actions of the liquidators of the funding companies are within s 477(2)(m), it should be emphasised that, in entertaining a s 477(2B) application, the court necessarily has before it the question whether it should perfect the power of the liquidator. Each of the specific heads of power in s 477(2) is governed by the opening words of s 477(2) "Subject to this section, a liquidator of a company may ...". I would repeat here what I said in relation to the interaction between ss 477(2) and 477(2B) in *Re HIH Insurance Ltd* [2004] NSWSC 5 at paragraph [12]:
>
> > Each of s 477(1) and 477(2) begins with the words 'Subject to this section', so that a power conferred by one of those provisions (including the power to compromise debts and claims conferred by s 477(1)(d)) simply does not arise, in a case dealt with by s 477(2A) or s 477(2B), unless court approval is given.

759 In *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher*,[98] a case which also concerned a liquidator's power to enter into a litigation funding arrangement, the Full Federal Court observed:[99]

> Section 477(2)(m) would not support the provision of litigation funding by a liquidator to an entirely unrelated litigant, simply on the prospect of obtaining the return that might be generated by the arrangements. Such arrangements would not, without something more, be necessary for the winding up of the affairs of the company and distributing its property. There would need to be something over and above the possibility of a commercial return from arrangements such as are proposed. For example, where the funding company is a creditor of the accommodated company, the possibility of augmenting the distribution from the accommodated company to the funder might well make it expedient for the liquidator of the funding company to enter into a funding arrangement. Further, if the funding company were also a prospective claimant, such that claims by the funding company and the accommodated company would be heard together, it might be expedient, for the purposes of winding up the affairs of the funding company and distributing its property, for funding to be made available to the other company (see *Re McGrath and Another (in their capacity as liquidators of HIH Insurance Ltd and Others)* (2010) 266 ALR 642 at Appendix 1, [18]-[21]).

760 In this case it was not necessary to fund the George bankruptcy proceedings in order to wind up the affairs of Bernsteen. Bernsteen was in a position to bring bankruptcy proceedings against Mr Hamilton-Smith because of the costs orders

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98 (2011) 281 ALR 38.

99 *Credit Corporation (Australia) II Pty Ltd v Fletcher* (2011) 281 ALR 38 at [44].

made in its favour. The initial apprehension that the George bankruptcy proceedings would proceed more expeditiously was soon shown to be misconceived. Even if entering into the limited arrangement with Ms George might be regarded as a "necessary" step given the way in which the Bernsteen notice was defended, there was no necessity, from Bernsteen's perspective, to proceed with it after it became bogged down. The prosecution of the George bankruptcy proceeding thereafter was not reasonably proportionate to the purpose of the power which is to wind up the affairs of the company. Moreover, as I have already found, some of the actuating reasons for proceeding were extraneous to that end.

761 Ultimately, it is unnecessary to resolve this question. As Barrett J observed, agreements which might fall within s 477(2)(m) but which allow obligations to be discharged by performance more than three months after the agreement was made require the approval of the Court or the Committee of Inspection. The George agreement was plainly such an agreement. Whatever Mr Macks may have hoped about the speed with which a sequestration order might be secured, the arrangement contemplated performance beyond a three month horizon. Minter Ellison were retained to act on the George bankruptcy proceedings without any temporal limitation. It was in the nature of those proceedings that Minter Ellison might discharge their obligations over a period longer than three months. I have already found that the agreement was not terminable at will. Even if it were, the relevant question would have been whether the agreement, if not terminated, fell within the terms of s 477(2B) of the *Corporations Act.* It is to the question of approval that I now turn.

Retrospective approval to enter into the George indemnity

762 On 29 August 2011 a notice was given calling a meeting of the Committee of Inspection for Bernsteen for 8 September 2011 was given. The agenda included a resolution that the Committee approve the funding of the George proceedings pursuant to s 477(2B) in accordance with the finding of ASIC.

763 On 30 August 2011 Mr Macks provided a written report to the Committee summarising the Hamilton-Smith and Heidi George proceedings and attaching the Sheahan Lock letter.

764 On 8 September 2011 the Bernsteen Committee purported to approve the funding of the Heidi George proceedings. The motion was seconded by Mr Colyer. For reasons which are not material, on 22 September 2011 and on 30 January 2012, the Committee of Bernsteen again purported to approve the funding of the Heidi George proceedings pursuant to s 477(2B).

765 Mr Macks testified that the Committee meetings in September 2011 were called principally to obtain approval pursuant to s 477(2B) for the arrangements made with Minter Ellison for the payment of the costs of the George proceedings. Mr Macks explained that neither the solicitors, nor counsel, who

were involved in the Heidi George proceedings ever advised him that it was necessary to obtain approval for the arrangement in order to comply with s 477(2B). Mr Macks' evidence was confirmed by Ms Riach. Ms Riach testified that she had never acted for a liquidator who had sought leave pursuant to s 477(2B) of the *Corporations Act* with respect to a litigation retainer. She was aware of the decision in New South Wales in *Hutchinson*[100] in association with litigation funding arrangements to that effect. Ms Riach's view was that no writing was required because the retainer was not a contingency fee arrangement.

766 Mr Macks testified that the s 477(2B) issue was first raised in the ASIC examination.

767 Mr Macks was cross-examined about the November 2005 meeting of the Committee of Inspection by reference to the paragraphs of his defence which denied Mr Viscariello's allegations that the Heidi George arrangement was entered into without any of the appropriate approvals required by s 477(2B) of the Act. Mr Macks gave evidence that he believed that he did have approval pursuant to s 477(2B) of the Act and that he had obtained that approval "at two levels". He continued:

> I can't remember the date, in maybe November 2005 in which the issue was raised and discussed but the resolution was not put to the committee in the form technically required by s 477 and there was subsequent meetings with the committee in about, I think, November 2011 and then maybe in January 2012 where it was raised and discussed.

I earlier found that no resolution approving the arrangement was made at the November 2005 meeting.

768 Mr Macks then referred to an application for the approval of this Court made in 2012 and continued:

> A Yeah, as I said, I believe it is my understanding that I had the support of the committee, it was not a resolution that was put in the exact terms required by s 477. But I did put that resolution to the committee later on, as required by the section, in November and then again in January 2012.
>
> HIS HONOUR
>
> Q Mr Macks, I can't recall the minutes from November 2005, but is there a resolution that gives approval for the agreement that of Ms George, but not in the precise terms the section requires, or is there is a reference only to discussion but no resolution. What was the –
>
> A Yeah, in the early committee meeting, which my memory is it's about November 2005, there is discussion, but there is no resolution in the format required.
>
> Q That's what I seem to remember, you were suggesting there was a resolution that wasn't in the right form, but the point is, you discussed it.

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[100] *Hutchinson v Hillcrest Litigation Services Limited* [2010] NSWSC 934.

A Yep.

Q You might have, from your recollection, have been given consent in the course of that discussion but there was no minuted resolution to that effect, is that what you're saying.

A That is correct, yes.

769 Mr Macks' evidence was that he finally obtained consent in the form required by s 477(2B) of the *Corporations Act* from two meetings of the committee of inspection held in September 2011 and January 2012. For the purposes of those meetings Mr Macks prepared a report entitled "liquidator's report to the committee of inspection – dated 30 August 2011".

770 The report included the following table and annexure:

2. Financial position at time of commencement of Liquidation

In December 2001, a report as to the Group's affairs was produced, which listed the assets and liabilities as at the commencement of the voluntary administration. I outline a summarised version of this report below.

Table 1. Summary of Director's ERV and Liquidator's ERV by Entity

	Bernsteen Director's ERV $	Newmore Director's ERV $	Bernsteen Liquidator's ERV $	Newmore Liquidator's ERV $
ASSETS				
Cash[1]	31,032	2,100		
Debtors[2]	73,397	21,672		
Debtors[3]		159,885		
Stock[4]	766,638	318,846	570,000	230,000
Plant & Equipment[5]	200,000	130,000		
Investments[6]	8,302	8,302		
	1,1079,369	640,805	570,000	230,000
Leased Assets	37,000	35,000		
Tania Hamilton-Smith[7]			35,000	
LeCornu Stock (estimated)[8]			365,000	115,000
Total Assets	1,116,369	675,805	300,000	115,000
Less				
ROT Stock			80,000	17,000
Total est Asset Values			220,000	98,000
AMOUNTS OWING TO SECURED CREDITORS				
ARL[9]	208,273	144,858	860,000	200,000
Financed computer equipment		22,057		
AMOUNTS OWING TO PRIORITY CREDITORS				
Employees[10]	154,050	58,310	245,000	110,000
Superannuation			32,000	18,600
SUB TOTAL	390,407	225,225	1,137,000	328,600
AVAIL (SHORTFALL TO UNSECURED CREDITORS	725,962	450,580	(917,000)	(230,600)
UNSECURED CREDITORS				
Trading[11]	2,254,806	1,540,031	2,345,000	928,000
Statutory[12]	234,691		556,000	172,000
*Surplus/ (Shortfall) of assets to liabilities before costs of Administration	(1,763,535)	(1,089,451)	(3,805,000)	(1,330,000)
Administrator's cost of Administration (as approved at creditors' meeting during the Voluntary Administration)[13]	50,000	30,000	50,000	30,000

A copy of the receipts and payments in respect of the administrations to date will also be tabled at the meeting.

Attachment 4

Notes on Table 1

Note 1. These specific amounts have not been included for the sake of brevity as these do not add materially to the overall analysis

Note 2. The plant and equipment largely comprised shop fit out, which in circumstances where the stock assets were being removed for sale to LeCornu would not and did not have significant residual value refer note 1 above.

Creditors and those creditors present on the committee may recall that prior to closure of the business with effect from late December 2001, we had discussed with a number of parties their interest (if any) in the business following advertising the business for sale and had spent considerable effort in endeavouring to have an offer for the business which may have then been available through a Deed of Company Arrangement. That proposal was no longer available and in any event not capable of acceptance. I note also that the proposal did not offer anything other than a minimal dividend to unsecured creditors and required the first ranking secured creditor to take a significant discount in respect of their debt also.

Note 3. An amount of stock approximately $34,000 was sold to Tanya Hamilton Smith on repayment terms approximately $7,000 was paid off that debt no further amounts were paid nor collected. This is referred subsequently in this report.

Note 4. The remaining stock was sold to Le Cornu for approximately the above amounts. Certain stock was subsequently returned where it was determined that title to that stock remained with the original supplier.

Note 5. Based on Proofs of Debts submitted by Associated Retailers Ltd (ARL)

Newmore contains ARL POD in amount of $196,020.6 dated 10 December 2001- made up of:

- Normal trading account $162, 057
- Loan account – loan in Joint names of Bernsteen and Newmore – refer POD Bernsteen for outstanding amounts
- Consignment Account $33,963

Total $196,020

Bernsteen contains a formal claim by ARL lodged in the Bernsteen administration,

- Normal trading account $686,918.79
- Loan account (loan joint names of Bernsteen & Newmore) $99,202.96
- Consignment account $115,538.96

Total $861,660.71

Note 6. Employee entitlements. The Liquidator has now had access to claims lodge by employees

Note 7. This information is purely based on proofs of debts and claims sent to the Liquidator no resources have been applied to considering those claims further given that the administration is without funds and substantial costs have already been incurred to date

Note 8. Significant further Liquidators costs were subsequently approved by creditors at subsequent meetings. In Summary (approximate figures, excluding GST)

	Bernsteen	Newmore
Fees Approved	$540,000	$211,000
Fees Drawn	$128,000	$91,000

Significant legal fees were incurred and paid.	Bernsteen	Newmore
	$658,000	$164,000

Note 9. In addition to the above stock which had been distrained prior to the appointment of the Administrator was held by Mason Gray Strange comprising

Bernsteen	$135,000
Newmore	$64,000
Total	$199,000

No material nor substantial benefit was received in respect of this stock.

Note 10. Consignment Stock comprised an amount of $65,000 (Bernsteen) and $27,000 (Newmore) and was dealt with subsequently as the first ranking secured creditor asserted that that stock belonged to them. As it was subsequently determined to provide this stock to the first ranking secured creditor the amount claimed by the First ranking secured creditor would have been reduced accordingly.

771 In the report Mr Macks referred to the liquidation as being in a state of "near completion" with the following outcomes:

- Some funds (and equivalent in stock) were paid to the first ranking secured creditor;

- The employees were partially paid pursuant to the GEERS Scheme;
- Some payments were made to liquidators and to external lawyers (although a significant amount of professional fees remain unpaid to both);
- No funds were paid to unsecured creditors.

772 Mr Macks continued:

> While I am unable to currently finalise the liquidation due to the matters detailed in this report, I have sought to limit any impost on the committee and to facilitate my retirement as a liquidator as soon as possible.

773 Mr Macks commented generally on Mr Viscariello's involvement in a number of proceedings relating to the Companies in these terms:

> The manner in which he has chosen to pursue and defend these proceedings has operated to frustrate the timely resolution of the liquidation.

774 Mr Macks then reported on the particular proceedings in which he had been engaged. Mr Macks referred to the Viscariello proceedings and reported that he had discovered that the funds were paid by Mr Luigi Viscariello but were used by the Companies to pay secured creditors. He reported that the Viscariello proceedings were defended and resolved in the liquidator's favour in 2004.

775 As to the Hamilton-Smith proceedings, Mr Macks reported:

> By 2005 the costs and delays involved in the recovery proceedings left the prospects of successfully recovering both the original THS debt, and the litigation costs incurred remote. In April 2005, after discussions with the committee and with Minter Ellison, the liquidator determined that recovery would be better sought via the issuing of a bankruptcy notice.
>
> The resulting bankruptcy proceedings were commenced in the Federal Magistrates Court in May 2005. The recovery proceedings also became tangled in interlocutory applications and counterclaims. THS's conduct of the litigation resulted in excessive delays for the resolution of the proceedings which were not able to be finalised until 2007.
>
> In June 2005 the liquidator obtained legal advice from Minter Ellison that a more efficient usage of the remaining Bernsteen assets would be to financially support a bankruptcy application by a third party, Heidi George, who had already obtained a judgment debt against THS in the Mount Baker Magistrates Court (George proceedings).
>
> It was felt that obtaining the appointment of a Trustee in Bankruptcy would help fully introduce an objective party to examine THS's financial affairs and determine if matters such as the counterclaim against Bernsteen, and other appeals being pursued by THS at that time, should probably be continued. In this respect the funding of the George Proceedings was aimed at finalising the claim against THS in the quickest and most cost effective manner possible.

> In early July 2005, an agreement was reached between the Liquidator, Minter Ellison and Ms George whereby:
>
> - Minter Ellison would issue a bankruptcy petition against THS in the Federal Magistrates Court, on Ms George's behalf; and
>
> - the Liquidator would indemnify Ms George against Minter Ellison's costs, on the basis that Ms George agree to pay $1,000 out of any payment received from THS.
>
> The George proceedings were filed in the Federal Magistrates Court on 26 September 2005. Ms Hamilton-Smith followed a similarly obstructive approach to that outlined above and the costs in dealing with the array of counterclaims and interlocutory applications greatly exceeded the estimates originally provided by Minter Ellison. Despite the Liquidator's confidence about the merits of Bernsteen's claim, it became apparent that the costs being incurred were no longer able to justify continuing to prosecute the proceedings.
>
> The George proceedings are eventually referred to a court appointed mediator in February 2007 and orders were made for THS to pay the liquidator in an amount of $8000 on the basis that each party otherwise walk away from the proceedings bearing their own costs. Ms George also recovered an amount in respect of her judgment debt, part of which was paid to the Liquidator in respect of the indemnity provided.
>
> The funding of the George proceedings occurred pursuant to an agreement which extended over a period well in excess of three months. Pursuant to s 477(2B) of the *Corporations Act 2001* (Cth) (the Act), such an agreement requires the approval of the court, the committee of inspection or a resolution of creditors.
>
> As a consequence of the file review outlined below, ASIC has requested, and I have agreed to seek retrospective approval from the committee in relation to the decision to fund the George proceedings. The following motion regarding the George proceedings will be sought at the committee meeting.
>
> 1 That pursuant to s 477(2B) of the *Corporations Act 2001* (Cth), Bernsteen's funding of Heidi George's legal expenses in the George proceedings be approved.

776 I observe that Mr Macks' report fails to quantify the extraordinary costs of the proceedings. Nor do the above paragraphs suggest that the indemnity of Ms George had been approved at the November 2005 meeting of the Committee nor does the report refer to the extension of the indemnity beyond $2,000 and to the Hamilton-Smith declaration proceedings.

777 Mr Macks reported on the proposed insolvent trading action against Mr Viscariello as follows:

> … the investigations conducted by the [Special Purpose Liquidator (SPL)] supported the view that the company had traded whilst insolvent and that Mr John Viscariello had breached the relevant sections of the Act.

> The SPL has finalised its role, not having been able to pursue the claim against Mr Viscariello in the Federal Court successfully. This was largely due to the vexatious and obstructive manner in which the former Director conducted his defence of those proceedings. I refer to the contents of the SPL's formal report, annexed hereto as attachment 1. Despite the funding limitations which restricted their conduct of the proceedings, the SPL remains confident as to the prospects of obtaining a judgment against John Mr Viscariello should the claim have been able to continue.

778 The letter from Sheahan Locke Partners which was annexed to the report stated in part as follows:

> During the course of our conduct of examinations in subsequent proceedings, the Director brought numerous interlocutory applications and, in our view, generally abused the court process and successfully managed to frustrate the proper conduct of our investigations and subsequent claim. As you are aware, we were without funds in the conduct of our investigations and subsequent claim, and, after personally incurring costs of 10s of thousands of dollars we ultimately determined that, in view of our outstanding time costs and the legal costs incurred by us, there was a diminishing likely benefit to the company even if the claim were to be successful.
>
> Accordingly, on 18 November 2009 following a formal mediation, the proceedings, action number SAD174 of 2007 were discontinued by mutual consent, with each party bearing their own costs. Our primary reason for agreeing to such a basis of settlement, that's our primary reasons for agreeing to such a basis of settlement where the ongoing costs, the prospect of having to go through the various appeals process once judgment was obtained at first instance, and our concerns about the ultimate recoverability in any judgment sum in the event that the matter was pursued to its final conclusion (probably by way of bankruptcy of the Director). We remain very confident, throughout, of the prospects of ultimately obtaining a judgment in our favour if we had continued with the claim.

779 Mr Macks reported that he had recovered preference payments of approximately $534,000 for Bernsteen and $200,000 for Newmore. Mr Macks reported that the funds so recovered had been used during the course of the liquidation to partially satisfy his fees as liquidator and the fees of lawyers engaged by him. The report did not expressly inform the Committee of the extent to which preference recoveries had funded the Bernsteen action and the George proceedings.

780 Mr Macks proposed approval of remuneration for the liquidator in the Bernsteen liquidation as follows:

- for the period fees from 1 August 2011 to finalisation in the amount of $226,000 plus GST;
- for the period 25 May 2006 to 31 July 2011 in the sum of $536,417.45 plus GST:
- for the period 1 March 2005 to 31 October 2005 in the amount of $58,059.75 plus GST.

Mr Macks also proposed that his fees in the Newmore liquidation be approved;

- for the period 25 May 2006 to 31 July 2011 in the sum of $42,246;
- for the period from 1 August 2011 to finalisation in the sum of $69,000.

781 Mr Macks' report also set out the fees which had been previously approved in the winding up as follows:

Date	**Amount (excl GST)**
21/12/2001	$47,413.40
17/01/2002	$24,510.10
26/02/2002	$56,579.00
27/06/2002	$52,058.14
21/01/2003	$53,649.90
02/03/2005	$223,241.00
14/11/2005	$58,059.75
29/05/2006	$24,835.25
Total	**$540,346.54**

782 A resolution was also passed confirming Mr Routledge's attendance at the Committee meeting of 14 November 2005.

783 Mr Macks testified that for the purposes of the September 2011 meeting he assembled relevant documents in the form of "a raft of the Bernsteen and Newmore folders and files" to make available for the Committee of Inspection. Mr Macks testified that there was discussion about whether it was appropriate for Newmore to pay some of the legal fees involved in the Bernsteen action. He explained that even though the Bernsteen action concerned the sale of its manchester to Ms Hamilton-Smith, he thought that Ms Hamilton-Smith's counterclaim in some way implicated Newmore so as to justify a part payment of the fees by Newmore.

784 Mr Macks agreed in cross-examination that ASIC had raised the question of s 477(2B) approval for the George bankruptcy proceedings by no later than 25 May 2010. Mr Macks was asked why he had delayed for up to 18 months before calling the meeting of the Committee for September 2011. Mr Macks

replied that he had many matters to attend to generally in his practice and with respect to the Companies' liquidation. In particular he wished to update the form 524 statements for which he required trust account statements from Minter Ellison. Mr Macks was pressed about the absence of any reference in his report to the quantum of fees incurred in the Bernsteen action and in the George bankruptcy proceedings. Mr Macks responded:

> It was in the information that was provided to the committee that was available at that and the subsequent meetings … By that I mean that assembled for the benefit of the committee we had a number of files that were ready for the committee if they had enquired and there was some discussion, if I can recall it, in relation to the availability of those files and information, and if I can recall it correctly too, I thought that there were receipts and payments, printouts as well for the committee.

785 When pressed again about the papers that were available at the 2011 meeting, Mr Macks said that he could not recall what the supporting papers were. He agreed that there was no record of which documents were tabled. The meeting in September 2011 was held in the PPB boardroom and commenced at 4.30pm and closed at 5.30pm. Mr Macks said that the documents were in lever arch folders on the floor next to the window of the office.

786 When Mr Macks was pressed again as to why his report did not clearly quantify the legal costs incurred in pursuing Ms Hamilton-Smith, Mr Macks answered that he had discussed the content of the report with a number of people, including his solicitor Mr Lipman, a PPB employee Mr Naudi and Mr Riach.

787 I reject Mr Macks' evidence about his disclosures to the Committee meeting in September 2011. I found his testimony to be evasive and unconvincing. I find that Mr Macks did not disclose to the Committee the quantum of the fees he had incurred in pursuing Ms Hamilton-Smith and in the George bankruptcy proceedings in particular. I draw that inference from the absence of any reference to the quantum of the fees in the report to, or the minutes of, the meeting of the Committee. Again, if Mr Macks had disclosed the quantum of the costs, I would have expected some robust questioning, if not criticism from members of the Committee, of the course he had adopted which would have appeared in the minutes. My adverse view of Mr Macks' testimony is confirmed by Mr Macks' failure to call any Committee members as witnesses.

788 On the question of the lack of full disclosure, the Committee should also mention the way in which the Form 524 documents recorded receipts and payments related to the legal actions taken by Mr Macks.

789 Mr Macks prepared the Form 524 documents for both companies which were sent to ASIC. As part of ASIC's inquiry, errors were discovered in the way that Mr Macks reported on the payment of legal fees to Minter Ellison and the receipt of proceeds of legal actions. As a result, Mr Macks subsequently filed amended Form 524 documents. A comparison of the original and amended Form 524 documents shows the inscrutable nature of the accounting method employed

by Mr Macks. Instead of reporting the total amount received from a particular legal action and then reporting the total amount to paid to Minter Ellison, in fees, Mr Macks only recorded the payments made to Minter Ellison for legal expenses after deducting the proceeds of the legal action that had already been applied to Minter Ellison's fees under the cost sharing agreement. Accordingly, the actual cost of legal fees and the corresponding benefit to the companies was not transparently reported, nor was it ascertainable, from the documents. The following comparison of the original and amended Form 524 documents filed for Bernsteen for the period 21 June 2006 to 20 December 2006 highlight the issue.

790 The original Form 524 for that period records a total receipt from payments of $10,187.62. That total is comprised of four GST refund payments from the ATO and one interest payment from the CBA. No other receipts are recorded. The total payments made by Bernsteen for that period are recorded in the original document as $22,657.88. That total includes three payments to Minter Ellison of $388.52 on 26 June 2006, $6,273.66 on 5 July 2006 and $8,000 on 5 December 2006.

791 In the amended Form 524 the total receipt of payments is $85,091.60. The difference in the amount of money received in the original and the amended Form 524, being $74,903.98, is attributable to the recording in the amended Form of a further three receipts described as "receipts in relation to legal matters". Those receipts are; $20,821.84 from Alliance Insurance, $29,500 from Luigi Viscariello and $8,050.76 from John Viscariello. The total payments made by Bernsteen for that period are recorded as $97,561.86. In the case of the amended Form 524, the three payments made to Minter Ellison are $388.52 on 26 June 2006, $6,273.66 on 5 July 2006 and $54,082.14 on 5 December 2006.

792 It is apparent that the difference in the payment made to Minter Ellison on 5 December 2006 recorded as $8,000 in the original Form 524 and $54,082.14 in the amended version is explicable on the basis that the funds received by Bernsteen from legal actions were applied to, and deduced from, Minter Ellison's fees in respect to those actions.

793 I find that the resolutions of the Committee to approve the arrangement to indemnify Ms George were not valid or effective because of the material non-disclosure of the extent and nature of the indemnity.

794 By application dated 23 April 2012, Mr Macks sought, *inter alia*, a declaration pursuant to s 1322(4) of the *Corporations Act* that:[101]

> The Bernsteen Committee's approval of the funding of the George Proceedings, as reflected in the minutes of the Committee Meetings on 8 and 21 September 2011, was valid for the purposes of section 477(2B) of the Act so as to authorise the Plaintiff's entry into the funding arrangements for, and the subsequent funding of, the George Proceedings on Bernsteen's behalf.

[101] SCCIV-12-543

795 Mr Viscariello sought permission to intervene in the action and an order that the application be consolidated with the present action.

796 The application came before a Master of this Court on 4 May 2012 who directed that the matter be referred to me. On 4 June 2012 I ordered that the application be held over until the conclusion of these proceedings.

797 Mr Macks also sought approval of this Court for the George indemnity pursuant to s 477(2B) of the *Corporations* Act. The purpose of s 477(2B) of the *Corporations Act* was discussed by Austin J in *Corporate Affairs Commission v ASC Timber Pty Ltd*.[102]

> Section 477 took its present form upon the enactment of the Company Law Reform Act 1992 (Cth), which introduced major reforms to the insolvency provisions as a result of recommendations in the Harmer Report (The Law Reform Commission — Australia, General Insolvency Inquiry, Report No 45, 1988). The thrust of the reform was to remove various restrictions which previously required a trustee in bankruptcy or a liquidator of an insolvent company to seek approval either from the creditors or a court. For example, in an involuntary winding up a liquidator was required to have approval to carry on the business of the company after four weeks from the winding up order (Companies Code, ss 377(1)(a), 377(3); see Harmer Report, Vol 1, para 607). However, the at 117Commission acknowledged that "it may be appropriate to restrict some powers, the unfettered exercise of which may not be conducive to an expeditious and beneficial administration, in particular, the power to carry on business and the power to enter into long term commitments such as the mortgaging or leasing of property of the insolvent" (report, Vol 1, para 608). The explanatory memorandum to the Company Law Review Bill 1992 (para 766) confirmed that the intention was to implement the Harmer Report's recommendation, and stated
>
> > The term "long-term commitment" as such has not been used, but the concept is described as any agreement on the company's behalf the term of which may be greater than three months, or any agreement where the obligation to the party may be discharged by performance more than three months after the date of the agreement.
>
> It appears, therefore, that the purpose of s 477(2B) is, in the Harmer Report's words, to restrict the unfettered exercise of powers which may not be conducive to an expeditious and beneficial administration. That suggests that the role of the court, the committee of inspection or the creditors (as the case may be) is to review the liquidator's proposal by reference to those criteria. The role of the approving body, at any rate where that body is a court, is to grant or deny approval to the liquidator's proposal rather than to develop some alternative proposal which might seem to be preferable.
>
> The history of and analogous to s 477(2B) were considered by Young J in *Re G A Listing & Maintenance Pty Ltd* (1994) 15 ACSR 308 see also *Re Feastys Family Restaurants Pty Ltd (in liq)* (1996) 14 ACLC 1058 *Re Moage Ltd (in liq)* (1997) 77 FCR 81 ; 25 ACSR 53; *Re Aslor Pty Ltd (in liq)* (1997) 24 ACSR 612 ; 15 ACLC 1412. Young J said (at 310):
>
> > The whole purpose of liquidation is, to borrow a metaphor used by Sir Laurence Street some years ago, to lead the horse back into the stable. The activities of the

[102] (1988) 29 ACSR 109 at 109-110.

> liquidator must always be directed towards reducing the company's assets to cash or divisible property, paying the debts and distributing any surplus to the members. Any activity which marks a substantial deviation from the activity of "leading the horse back to the stable" is, generally speaking, outside the power of the liquidator. However, human activity is so diverse that there will be situations where the liquidator cannot lead the horse back to the stable by the direct route. He may have to pause along the way because the path is blocked by some litigation or other impediment.

Applying these observations to s 477(2B), his Honour continued (at 311):

> If the court can see that the transaction that is to enure past three months is really for the proper realisation of the assets of the company or to assist its winding up, then leave should be granted. In view of the general attitude in the Harmer Report that, subject to particular fetters spelt out in the legislation, liquidators should be given fairly free reign to conduct the winding up. The court's duty is to see that despite the prolongation of the leading the horse home process, the transaction is in the interests of the company, the creditors and the community.

798 In *McGrath*, Barrett J considered the proper approach that the court is to take in deciding whether to grant approval under s 477(2B). His Honor said:[103]

> This brings me to the approach. The aim of the provision is clearly enough, to ensure that the court exercises some oversight of a liquidator's actions and, in effect, confers or completes the necessary power only where it sees that a case for exercise of the power in the particular circumstances has been sufficiently shown. The court's assessment must be made in the light of the purposes for which liquidators' powers exist. One over-riding purpose is to serve "the interests of those concerned in the winding up – here the creditors" (*Re Spedley Securities Ltd* (1992) 9 ACSR 83 per Giles J); the other is to do whatever needs to be done "for the proper realisation of the assets of the company" or to assist its winding up (*Re GA Listing & Maintenance Pty Ltd* (1994) 15 ACSR 308 per Young J). The court generally does not concern itself with the commercial desirability of the transaction. As Giles J said in the *Spedley Securities* case (above) at pp.85-6:
>
> > … the court pays regard to the commercial judgment of the liquidator. That is not to say that it rubber stamps whatever is put forward by the liquidator but, as is made clear in *Re Mineral Securities (Australia) Ltd* [1973] 2 NSWLR 207 at 231–2, the court is necessarily confined in attempting to second guess a liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct.
>
> Although this was said in relation to s 477(2A), I consider the statement to be equally applicable to s 477(2B), even though that section focuses particular attention on the need to ensure that contractual provisions as to timing do not cut across the general expectation that winding up will proceed in as expeditious a fashion as circumstances allow: *Re GA Listings & Maintenance Pty Ltd* (above); *Re CIC Insurance Ltd* (2001) 38 ACSR 181.

799 In the exercise of my discretion, I decline to give retrospective approval to the arrangement for several reasons.

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[103] *McGrath v HIH Insurance Ltd* [2010] NSWSC 404.

800 First, Mr Macks should have fully disclosed the arrangement to the Committee of Inspection. His failure to do so at the time, and in 2011, are good reasons not now to give curial approval to it. Secondly, it was very obviously not in the best interest of the Companies to enter into the arrangements. I repeat in this respect my reasons for finding that Mr Macks breached his duty in entering into the agreement and taking other steps to pursue Ms Hamilton-Smith. Thirdly, the arrangement is of doubtful validity for the reasons I have given above.

801 Mr Viscariello also contends that the general retainer of Minter Ellison breached s 477(2B) and should not be approved. The reasons I have given in declining to approve the George arrangement lend some support to that contention but it is unnecessary to decide the issue at least for now.

Declarations of breach

802 Mr Viscariello seeks declarations that Mr Macks breached ss 180-182 of the *Corporations Act*. Section 180 of the *Corporations Act* provides:

> **180 Care and diligence—civil obligation only**
>
> *Care and diligence—directors and other officers*
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
>
> Note: This subsection is a civil penalty provision (see section 1317E).
>
> *Business judgment rule*
>
> (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

> Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.
>
> (3) In this section:
>
> ***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

803 I observe that the primary subsection of s 180 of the *Corporations Act* is subsection (1) which imposes the duty of care and diligence. The business judgment rule enacted by subsection (2) deems that duty to have been discharged if all of the circumstances it prescribes are established.

804 In *Yeomans v Walker*[104] Hodgson J explained the general approach taken by supervising courts to the statutory duties imposed on liquidators as follows:

> In my view, the general approach of the Court in a case like this is that it should not interfere with a decision made by a liquidator unless either there is fraud, or it can be said that the discretion has not been exercised bona fide, or it can be said that the liquidator has acted in a way in which no reasonable liquidator could have acted … it may be that if a liquidator does take into account entirely irrelevant considerations, then it would be appropriate to intervene, but, in my view, that is not the case here.

805 There is great reluctance on the part of courts to interfere in commercial decisions.[105] There is an analogy between the business judgments of directors[106] and the discretionary decisions of liquidators involving business judgments.[107]

806 I accept that judgments about the liquidator's conduct must be made in the context of the circumstances as they existed at the time, without the benefit of hindsight, and with the distinction between negligence and mistakes of error of judgment firmly in mind.[108]

807 Sections 181 and 182 of the *Corporations Act* impose duties on officers of corporations to act honestly as follows:

> **181 Good faith—civil obligations**
>
> *Good faith—directors and other officers*
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
>
> (a) in good faith in the best interests of the corporation; and

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[104] (1986) 5 NSWLR 378 at 383.
[105] *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434.
[106] *Westpac Banking Corp v Totterdell* (1998) 20 WAR 150.
[107] *UG SA Pty Ltd (In Liq) v Ultratune Australia Pty Ltd* [1997] 1 VR 667.
[108] *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1; [2009] NSWSC 1229 at [7242] per Austin J.

(b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

182 Use of position—civil obligations

Use of position—directors, other officers and employees

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

808 Section 1317E provides that subsections 180(1), 181(1) and (2), s 182(1) and (2) are civil penalty provisions and, by reference to s 1317D of the *Corporations Act*, they are corporation scheme civil penalty provisions.

809 Section 1317G provides that if a s 1317E declaration has been made, a court may order the person subject to that declaration to pay the Commonwealth a pecuniary penalty.

810 However, s 1317J of the *Corporations Act* limits the persons who can apply for a declaration of contravention of the provisions of the *Corporations Act* to ASIC and the company. It relevantly provides:

Who may apply for a declaration or order

Application by ASIC

(1) ASIC may apply for a declaration of contravention, a pecuniary penalty order or a compensation order.

Application by corporation

> (2) The corporation, or the responsible entity for the registered scheme, may apply for a compensation order.
>
> …
>
> (4) No person may apply for a declaration of contravention, a pecuniary penalty order or a compensation order unless permitted by this section.

811 Section 1317K imposes a time limit of six years.

812 It can be accepted that the *Corporations Act* enacts a scheme which, by and large, precludes any person other than the company or ASIC bringing or enforcing pecuniary claims against corporations. However, it does not follow that a declaration cannot be made, at the suit of a person with a legal interest in the proper management of a corporation, against a company officer, liquidator or administrator who has breached one or more of his or her statutory duties. Many circumstances can be postulated in which there may be good reason to make, and much utility in, a declaration of that kind. The declaration may inform the members' decisions in exercising their control over the corporation's officers. It may prompt ASIC to exercise its powers. It may guide the officer's management of the company.

813 The statutory source of this Court's general jurisdiction to grant declaratory relief is to be found in s 31 of the *Supreme Court Act 1935* (SA) which is as follows:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court shall have power to make binding declarations of right whether any consequential relief is or could be claimed or not.

814 In *JN Taylor Holdings Ltd (In Liq) v Bond*,[109] King CJ, with whom Prior and Perry JJ agreed, held that the jurisdiction to grant declaratory relief "is very wide and that judicial pronouncements appearing to restrict the circumstances in which such relief will be granted relate to the sound exercise of the discretion rather than to jurisdiction." It is not necessary that the plaintiff have a cause of action against the defendant. The Chief Justice further observed:[110]

> I can find no warrant for the imposition by the courts of a self-denying restriction on their jurisdiction to grant declaratory relief. In my opinion there is no jurisdictional limit. The court's power to grant such relief is "only limited by its own discretion" (*Hanson v Radcliffe* (supra) at 507), and the boundaries of judicial power: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 . The settled practice of the courts may indicate the manner in which the discretion will be exercised in given circumstances. In *Rediffusion (Hong Kong) Ltd v Attorney-General (Hong Kong*) (supra) the Privy Council made that point (at 1155):

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[109] (1993) 59 SASR 432 at 435. See also for example, *Ibeneweka v Egbuna* [1964] 1 WLR 219 at 225; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 438.

[110] *Taylor Holdings Ltd (In Liq) v Bond* (1993) 59 SASR 432 at 436.

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, ie, to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.
>
> The proposition that there is no limit to the jurisdiction of the court to grant declaratory relief would be an incomplete and misleading statement of the true position unless there be added the further proposition that there are circumstances which are so contra-indicative to the exercise of the discretion in favour of the grant of declaratory relief that the existence of those circumstances would lead almost inevitably to the exercise of the discretion against the making of a declaration.

815 The authors of *Equity Doctrine & Remedies*[111] submit that the court's jurisdiction to make declarations is limited only when a statute expressly, or by necessary implication, ousts the court's jurisdiction. The following cases are illustrative of the way in which courts have marked out the jurisdictional limits of the remedy.

816 In *Forster v Jododex*,[112] the High Court rejected an argument that the Equity Court of NSW had no jurisdiction to grant a declaration that an exploration license granted under the *Mining Act 1906* (NSW), had been validly renewed. Gibbs J explained:[113]

> With all respect, I find it difficult to see any reason why the Court should have lacked jurisdiction to declare that Jododex held the right which it claimed, namely the right of the holder of an exploration license validly renewed. There is no provision in the Act that gives to any other tribunal exclusive jurisdiction to decide the question whether a person is the holder of a valid exploration license, or that otherwise withdraws the determination of that question from the jurisdiction of the Supreme Court.
>
> …There is nothing in the provisions considered in those cases that indicates a clear intention to exclude the power of the court to make a declaratory order. The Act does not provide a specific remedy to which the holder of an exploration license who seeks to establish the rights which it gives him is bound to resort.

817 In that case, Walsh J considered that existence of a special tribunal created by the Act with the power to determine such disputes was a factor to which a court should have regard in determining whether or not to grant declaratory relief. His Honour observed:[114]

> In my opinion, when a special tribunal is appointed by a statute to deal with matters arising under its provisions and to determine disputes concerning the granting of rights or privileges which are dependent entirely upon the statute, then as a general rule and in the

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[111] R Meagher, D Heydon and M Leeming (2002) 4th Edition, [19-105].
[112] (1972) 127 CLR 421.
[113] *Forster v Jododex* (1972) 127 CLR 421 at 436.
[114] *Forster v Jododex* (1972) 127 CLR 421 at 427.

> absence of some special reason for intervention, the special procedures laid down by the statute should be allowed to take their course and should not be displaced by the making of declaratory orders concerning the respective rights of the parties under the statute. In other words, I think that it will ordinarily be a wise exercise by the Supreme Court of the discretion which it has under s. 10 of the Equity Act to decline to undertake the tasks which have been committed by the Parliament to a specialized tribunal. Whilst I agree with Gibbs J. that s. 10 ought not to be construed as if it contained words excepting from its operation cases arising under the Act, I think that the procedure set out in the Act itself should be regarded as the normal procedure for dealing with such cases.

818 In *Law Society (NSW) v Weaver*,[115] the plaintiff sought an order declaring whether or not the defendant had been guilty of professional misconduct in the profession of a solicitor. The defendant argued that the Court had no jurisdiction to entertain the summons on the grounds that he had been dealt with by the Statutory Committee established under Pt. X of the *Legal Practitioners Act 1898* (NSW) and there has been a decision made in his favour in respect of the question of professional misconduct. Section 79, which was contained in Pt. X of the Act, provided that "Nothing in this Act contained shall prejudice, diminish, or affect the jurisdiction, powers and authorities which are exercisable by the Court over solicitors." The Court held:[116]

> It is a principle of statutory construction that a superior court of law will not be deprived of jurisdiction except by express words or necessary implication. The provision of another tribunal would not of itself ordinarily be sufficient to do so.
>
> In this case, however, the matter is put beyond doubt by s. 79. Its terms are wide and explicit. It plainly means that the legislature was not substituting a tribunal with appropriate appellate rights. That, by its very terms, it denies. Assuming that the events and conduct now relied upon to constitute professional misconduct pre-dated the hearing and finding of the Statutory Commit tee, or indeed, is the same conduct as relied upon before the Statutory Committee, we are of opinion that this Court has jurisdiction to entertain the summons now before it. Whether an answer is available in the nature of issue estoppel or res judicata is another question.

819 In this case it is also necessary to take into account that the *Corporations Act*, as a Commonwealth statute, may affect the operation of the Supreme Court by operation of s 109 of the Constitution. In this respect, I observe that the Federal Court of Australia has conferred on it a wide power in civil proceedings in relation to a matter within its original jurisdiction to make binding declarations of right whether or not any consequential relief is or could be claimed.[117]

820 In *FAI General Insurance Co Ltd v RAIA Insurance Brokers Ltd*,[118] the applicant sought declaratory relief and damages founded on an action for breach of the then s 52 of the *Trade Practices Act 1974* (Cth). It was common ground that that the applicant was unable to seek declaratory relief under s 163A of the *Trade Practices Act*. The respondent contended that s 163A provided the only

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[115] [1974] 1 NSWLR 271.
[116] *Law Society (NSW) v Weaver* [1974] 1 NSWLR 271 at 272.
[117] Section 21 *Federal Court of Australia Act 1976.*
[118] (1992) 108 ALR 479.

basis for the granting of declaratory relief in proceedings brought in relation to a matter arising under the *Trade Practices Act.* Forster J rejected the respondent's submission and held that there was power to make a declaration under s 21 of the *Federal Court Act*. His Honour observed:[119]

> Section 163 a of the Act does not, I am satisfied, provide a charter for the granting of declarations in the same way as s 80 does for the granting of injunctions. The section operates only in a fairly narrow field and "was not intended to apply to civil litigation under the Consumer Protection Provisions" of the Act (per Toohey J in *Polgardy* at FLR 244 ; ALR 395). Having regard to the underlying policy of consumer 108 ALR 479 at 508protection, in Pt V of the Act it would, in my view, be inconceivable that s 163 a was intended to provide the only basis for the making of declaratory orders in matters under the Act.

821 Similarly in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*,[120] Sheppard J observed:

> The provisions of s 163A need to be considered but I do not read them as providing exhaustively for the circumstances in which the court may make a declaration at the suit of "a person". The provisions of s 21 of the Federal Court Act are too clear.
>
> …
>
> Nevertheless, it would seem to me to be taking a most restrictive step to limit the circumstances in which declarations may be made by the court to the circumstances provided for in s 163A when the court has conferred upon it the extensive powers provided for in both ss 21 and 23. I do not think that a power such as is conferred by these sections should be narrowly construed or denied simply because there is in an Act which confers jurisdiction on the court a specific power, for example, to give declaratory relief in some specific circumstances. Declarations of right are an important part of a court's armoury of remedies and the power to make them ought not be cut down except where the language which Parliament has used is abundantly clear.

822 The *Corporations Act* does not expressly or by negative implication limit the Court's power to grant declarations. The declarations made pursuant to s 1317E have particular statutory consequences. That section and the associated provisions do not evince any intention to limit the powers of State or Federal superior courts to grant declarations.

823 Where jurisdiction to grant declaratory relief exists, the principles which guide the exercise of the discretion are well established. The factors were summarised King CJ in *JN Taylor Holdings*:[121]

> A declaration will not be made except in matters "which have a real legal context, and to the determination of which the Court's procedure is apt": *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation* (supra) per Hutley JA at 61. There must be some person who has a true interest in opposing the declaration. The question raised must not be purely theoretical. There must not only be a party with a true interest in opposing the

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[119] *FAI General Insurance Co Ltd v RAIA Insurance Brokers Ltd* (1992) 108 ALR 479 at 508-9.
[120] (1993) 41 FCR 89 at 98-100.
[121] *Taylor Holdings Ltd (In Liq) v Bond* (1993) 59 SASR 432 at 436.

> declaration, but the plaintiff must have a real interest in having the question determined: *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, per Lord Dunedin at 448. That interest may exist although the apprehended impact on the plaintiff may be no more than a future possibility: *Hordern-Richmond Ltd v Duncan* [1947] 1 KB 545. If, however, the determination of the question could not affect the plaintiff's legal rights or commercial or personal interests now or in the future, that is to say would "produce no foreseeable consequences for the parties" (*Gardner v Dairy Industry Authority* (1977) 52 ALJR 180 at 188, per Mason J), see generally *Ainsworth v Criminal Justice Commission* (supra) at 581-582, the declaration would almost certainly be refused.

824 Mr Viscariello has a legal interest in the management of the corporation.

825 As I found earlier in these reasons, Mr Macks breached the statutory duties imposed on him by ss 180, 181 and 182 of the *Corporations Act* as a liquidator in pursuing Ms Hamilton-Smith. As to s 181 of the *Corporations* Act, Mr Macks acted unreasonably for the reasons I have given. As to s 181 of the *Corporations* Act, the litigation after June 2005 was not in the best interests of the Companies and not conducted for a proper purpose because Mr Macks' predominant purpose was to protect his personal position. AS to s 182 of the *Corporations* Act, Mr Macks engaged in the litigation to gain an advantage for himself to the detriment of the Companies.

826 I would exercise my general discretion pursuant to s 31 of the *Supreme Court Act* to make the declaration because:

- the breach is egregious; and
- in the circumstances of this case it is a necessary step in determining whether or not to remove Mr Macks as liquidator of the Companies.

Statutory relief not available to Mr Viscariello

827 Mr Viscariello founds his claim for relief against Mr Macks for his conduct of the administration and subsequent liquidation on several provisions of the *Corporations Act* and at common law which I find below are not available to him.

828 Mr Viscariello claims compensation on behalf of the Companies pursuant to s 1317H of the *Corporations Act*. That section provides:

> **Compensation orders--corporation/scheme civil penalty provisions**
>
> Compensation for damage suffered
>
> (1) A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:
>
> (a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and

(b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

829 However, s 1317J of the *Corporations Act* provides that only ASIC, or the corporation which suffered the loss, may make an application pursuant to s 1317H of the *Corporations Act*. It follows that Mr Viscariello has no entitlement to bring the application on behalf of Bernsteen pursuant to s 1317H of the *Corporations Act.*

830 Mr Viscariello also claims damages for Mr Macks' breach of a common law duty he owed to Bernsteen. However, the right to bring a common law derivative action is abolished by s 236(3) of the *Corporations Act*. Section 236(1) of the *Corporations Act* conditions the right of a member, or former member, or officer or former officer of a company to bring an action on that person obtaining permission pursuant to s 237 of the Act. Permission has not been granted. Moreover, I would hold that s 237 of the *Corporations* Act does not apply to a company in liquidation. In this respect, I would follow *Chahwan v Euphoria Pty Ltd.*[122] The statutory scheme for the supervision of liquidators denies any purpose to a reading of s 237 of the *Corporations Act* which would include insolvent companies.

831 It follows that Mr Viscariello cannot claim damages on Bernsteen's behalf for breach of a common law duty of care owed to it.

832 Mr Viscariello also seeks relief against Mr Macks for his conduct as administrator and liquidator of the Companies pursuant to s 1321 of the *Corporations Act 2001*. That section provides:

Appeals from decisions of receivers, liquidators etc.

(1) A person aggrieved by any act, omission or decision of:

(a) a person administering a compromise, arrangement or scheme referred to in Part 5.1; or

(b) a receiver, or a receiver and manager, of property of a corporation; or

(c) an administrator of a company; or

(ca) an administrator of a deed of company arrangement executed by a company; or

(d) a liquidator or provisional liquidator of a company;

[122] (2008) 66 ACSR 661.

> may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.
>
> (2) Paragraph (1)(b) does not apply to a corporation that is an Aboriginal and Torres Strait Islander corporation.
>
> Note: Similar provision is made in relation to Aboriginal and Torres Strait Islander corporations under section 576-10 of the Corporations (Aboriginal and Torres Strait Islander) Act 2006.

833 Mr Macks submits that Mr Viscariello has no standing to bring an appeal pursuant to s 1321 of the *Corporations Act*. I reject that submission.

834 In *Northborne Developments Pty Ltd v Reiby Chambers Pty Ltd*[123] McClellan J (as he was then) held that to be a person aggrieved within the meaning of that term in s 1321 of the *Corporations Act* a person must have suffered a legal grievance, in the sense that a legal right or interest has been affected by the impugned conduct. In that case his Honour held that a company which had lost a commercial opportunity to negotiate a contract for the purchase of the assets of the company under liquidation is not a person so aggrieved. I would follow the decision in *Northborne Developments*. Third parties do not have a right, or legally binding expectation, to have their contractual offers accepted by liquidators or administrators. The law does not recognise a general right, universally held by all persons, to be afforded commercial opportunities. A commercial opportunity is not in itself a legal right or interest even though it may be recognised as a head of damage when a legal interest is breached. Nor is it a privilege in the sense of a legal power recognised in law.

835 However, the interests of members and creditors of a corporation stand on a very different footing. The creditors have an interest in the proper winding up of the company. It is an interest in the due performance by liquidators and administrators of their duties under the *Corporations Act* because their conduct may affect, in a practical legal sense, the rights of the creditors to share in the distribution in any surplus.[124]

836 In *Naumoski v Parbery*[125] Young CJ in Equity held that a plaintiff who claimed to hold 99 per cent of the shares in a company, of which he had been a director and creditor, had standing to bring an appeal and was a person aggrieved. Young CJ observed that in *Re Edennote Ltd*[126] the English Court of Appeal said that the words "person aggrieved" should be read as shorthand for "any creditor, debtor or other person aggrieved".

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[123] (1989) 19 NSWLR 434.
[124] Cf: *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494.
[125] (2002) 171 FLR 332.
[126] [1996] 2 BCLC 389 at 393.

837 Mr Viscariello is a person aggrieved in that he has a legal interest in the proper administration and liquidation of Bernsteen as a director, shareholder and creditor. The conduct of the administrator and liquidator of the Companies is likely to affect the distribution of the available asset pool to creditors and shareholders and may increase the extent of the personal liability of the company's directors.

838 However, Mr Viscariello faces other obstacles in claiming relief pursuant to s 1321 of the *Corporations* Act. The Corporations Rules 2003 provide that appeals to this Court pursuant to s 1321 of the *Corporations Act* must be filed within 21 days of the decision appealed against.[127] Section 1321 is one of several provisions of Part 9.5 of the *Corporations Act* which confer powers on the Court to supervise the winding up of Companies and to give directions with respect to that winding up. It is for that reason that the Corporations Rules 2003 have prescribed a relatively short time within which to bring an appeal. The administration of the Companies came to an end on 21 December 2001. The George and Bernsteen proceedings and related litigation was resolved in February 2007. There is no utility in bringing a belated appeal pursuant to s 1321 of the Act against the decisions made by Mr Macks in the course of the administration and liquidation. I would not allow an extension of time in which to appeal.

Removal of a director

839 The Court is empowered by s 503 of the *Corporations Act* to, on cause shown, remove the liquidator and appoint another liquidator:

> **503 Removal of liquidator**
>
> The Court may, on cause shown, remove a liquidator and appoint another liquidator.

840 Mr Viscariello has standing to bring an application pursuant to s 503 of the *Corporations Act* because he is a person who may be beneficially or adversely affected by the final winding up of the Companies. He is a creditor of both Companies and a secured creditor of Newmore for the reasons I give below.[128] The steps which another liquidator might take to recover fees and costs wrongfully incurred in the conduct of the liquidation by Mr Macks may benefit Mr Viscariello.

841 In exercising the discretion a court must consider the matters which have been done and remain to be done in the liquidation.[129] The ultimate question is whether it is to "the general advantage of the persons interested in the winding up

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[127] Rule 14.1, Corporations Rules 2003

[128] *Re Creight Pty Ltd (In Liq)*; *Re Stafford Services Pty Ltd (In Liq)*; *Handberg and Another v Cont and Others* 56 ACSR 334 at [3].

[129] *Domino Hire Pty Ltd v Pioneer Park Pty Ltd (In Liq)* (2003) 21 ACLC 1330; [2003] NSWSC 496 at [22].

to remove the liquidator".[130] There is good reason to remove a liquidator when it is shown that it is for the better conduct of the litigation and the general advantage of those interested in the assets of the company that the liquidator be removed.[131] The creditors should be put on notice.[132] The Court must not allow itself to become an instrument of those who wish to disrupt the liquidation for their own purposes.[133]

842 In *AMP Music Box Enterprise Ltd v Hoffman*[134] Neuberger J (as his Lordship then was) said of the equivalent power in the *Insolvency Act 1986* (UK):

> It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. So to hold would encourage applications under s 108(2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that have could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds. It would mean that any liquidator who was appointed, in circumstances where there was support for another possible liquidator, would spend much of his time looking over his shoulder, and there would be a risk of the court being flooded with applications of this sort.
>
> Further the Court has to bear in mind that in almost in any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of cost and in terms of delay.

843 In opposition to the application Mr Macks submits that nothing remains to be done in the liquidation which has been on foot for over 12 years. The proceedings against Mr Macks are the only outstanding matters. No other creditor wishes to intervene or to be heard. Mr Macks argues that removal would have no material benefit. Mr Macks submits that the question must be one of future benefit and not past conduct of the liquidator.[135]

844 My conclusion that Mr Macks has breached his statutory duties in the pursuit of Ms Hamilton-Smith after June 2005 is a reason, whether or not it is ultimately sufficient, to consider his removal as liquidator. In this particular matter, that breach is compounded by Mr Macks' failure to properly inform the Committee of the way in which that litigation was conducted and its cost. It may

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[130] *Re Adam Eyton Ltd; Ex Parte Charlesworth* (1887) 36 Ch D 299.
[131] *City and Suburban Pty Ltd v Smith (As Liquidator of Compac (Aust) Pty Ltd) (In Liq))* (1998) 28 ACSR 328 at 336.
[132] *Re Biposo Pty Ltd* (1995) 120 FLR 399.
[133] *Domino Hire Pty Ltd v Pioneer Park Pty Ltd (In Liq)* (2003) 21 ACLC 1330; [2003] NSWSC 496 at [22].
[134] [2003] 1 VCLC 319 at [27]-[28].
[135] *Ultratune Australia Pty Ltd v McCann* (1999) 30 ACSR 651 at [128], [131].

also be that in the light of these findings, Mr Macks does not wish to continue as liquidator.

845 The breach was committed, in large part, because Mr Macks' independence had been compromised by the ill will he bore Mr Viscariello and his concern over the financial and reputational losses caused and threatened by Mr Viscariello's conduct. That perceived and actual loss of independence demands substantial weight.

846 I acknowledge even if all of the fees paid to Mr Macks and Minter Ellison were to be recouped, it is unlikely that any secured or unsecured creditor would receive any benefits. Earlier in this judgment, I reproduced summaries of the proceeds received from the sale of the Companies' secured assets and the costs of those realisations. They show that there is unlikely to be a surplus available to secured creditors.

847 Moreover, before any distribution could be made to secured creditors if there were found to be a net surplus priority creditors would need to be paid.[136] In this case the GEERS would take the place of the employees whose entitlements it paid.[137]

848 Notwithstanding the improbability based on that schedule of there being any money due to Mr Viscariello as a secured creditor, it may be appropriate that the calculations supporting that schedule be examined by another liquidator. In particular, a surplus may be found to exist in the Newmore liquidation.

849 There is also, I acknowledge, very little prospect that there will be any net amount available to the creditors, secured or unsecured ,after payment of the fees to which Mr Macks is entitled and the priority creditors. However, the only material available in these proceedings on which any assessment of that could be made are materials and assessments provided by Mr Macks. That is an additional reason for considering the removal of Mr Macks despite the low likelihood of any return to creditors and Mr Viscariello in particular.

850 I will give the parties an opportunity to make submissions on the question of Mr Macks' removal and his replacement by another liquidator in the light of these reasons. I will also hear the parties on directions which should be given for the notification of creditors and other persons who may have a proper interest in the question.

Section 536 Enquiry

851 By interlocutory application dated 7 October 2009 Mr Viscariello sought an enquiry under s 536 of the *Corporations Act*. On 8 March 2012 he filed a second interlocutory application. On that application Mr Viscariello sought an enquiry

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[136] *Cook v Italiano* (2010) 190 FCR 474 at 491.
[137] Section 561 *Corporations Act*.

in relation to the nature of the terms and conditions of the retainer of Minter Ellison by Mr Macks and into the conduct by Mr Macks and Minter Ellison of the Heidi George proceedings and *Bernsteen v Hamilton-Smith* proceedings. In particular the application sought an enquiry into whether Mr Macks should be required to reimburse the Companies for his fees related to the prosecution of those actions and whether he should be removed as a liquidator by reason of his conduct of that litigation.

852 Section 536 of the Act provides:

> **536 Supervision of liquidators**
>
> (1A) In this section:
>
> ***liquidator*** includes a provisional liquidator.
>
> (1) Where:
>
> (a) it appears to the Court or to ASIC that a liquidator has not faithfully performed or is not faithfully performing his or her duties or has not observed or is not observing:
>
> (i) a requirement of the Court; or
>
> (ii) a requirement of this Act, of the regulations or of the rules; or
>
> (b) a complaint is made to the Court or to ASIC by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties;
>
> the Court or ASIC, as the case may be, may inquire into the matter and, where the Court or ASIC so inquires, the Court may take such action as it thinks fit.
>
> (2) ASIC may report to the Court any matter that in its opinion is a misfeasance, neglect or omission on the part of the liquidator and the Court may order the liquidator to make good any loss that the estate of the company has sustained thereby and may make such other order or orders as it thinks fit.
>
> (3) The Court may at any time require a liquidator to answer any inquiry in relation to the winding up and may examine the liquidator or any other person on oath concerning the winding up and may direct an investigation to be made of the books of the liquidator.

853 In *Hall v Poolman*,[138] the New South Wales Court of Appeal explained the operation of s 536 as follows:

> However, Young J did not say that there must be a case of failure faithfully to perform duties or observe requirements proven to a prima facie evidentiary standard. That is plain from *Burns Philp Investments Pty Ltd v Dickens (No 2)* (1993) 31 NSWLR 280 at 287, where his Honour accepted a submission to the effect that the barrier over which the plaintiffs would have to pass to have an inquiry mounted was not a very high one, and

[138] (2009) 75 NSWLR 99 at [57]-[68].

that "all that was necessary for his clients to show was that there was a prima facie case that something needed to be investigated".

The Full Court of the Federal Court dealt with a similar submission in *Lesliev Hennessy* [2001] FCA 371 at [6]. In a joint judgment, on appeal from Drummond J in *Leslie v Hennessy* [2000] FCA 1532, Ryan J, Dowsett J and Hely J said:

> [6] … [W]e believe that both Young J [in the *Burns Philp Investments (No 2)* case] and Drummond J were describing something less formal than a prima facie case according to some evidential burden of proof. Their Honours both meant only that an applicant must show a sufficient basis for making an order, that there is something which requires inquiry. The Court then has a discretion which it must exercise. Many factors will be relevant to that exercise. They include the strength and nature of the allegations, any answers offered by the liquidator, other available remedies, the stage to which the liquidation has progressed, the likely amounts of money involved, the availability of funds to pay for any inquiry, the likely benefit to be derived from it and the legitimate 'interest' of the applicant in the outcome. (Emphasis added)

See also *Magarditch v Australia and New Zealand Banking Group Ltd* (1999) 30 ACSR 26517 ACLC 424 at 445, per Einfeld J; *Re Fox Home Loans Pty Ltd (In Liq)* [2005] NSWSC 1050 at [8], per Barrett J; *Vink v Tuckwell* (2008) 216 FLR 30966 ACSR 30 at 42 [76]–[77], per Robson J; application for leave to appeal dismissed: *Vink v Tuckwell* (2008) 68ACSR 265.

We agree with these observations, subject to a qualification that we take to be implied in their Honours' remarks, namely that the "sufficient basis" for making the order must relate to the matters concerning faithful performance of duties or observance of requirements that are stated in subs (1)(a). Of course, the list of relevant factors set out in this passage does not purport to be comprehensive.

In *Re Timberland Ltd (In Liq); Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 683, Marks J expressed concern that if subs (1)(a) were construed to mean that the court only had jurisdiction if the matters stated in the subparagraph were first shown to exist, such a construction would "produce the curious result that the subject of the inquiry would be something that has happened rather than whether and to what extent it has happened". The answer to that conundrum is that under subs (1)(a) the court is empowered to inquire as to whether and to what extent something has happened or is happening of the kind described in the subparagraph, provided only that there is a sufficient basis for ordering an inquiry in the sense articulated by the Full Federal Court in *Leslie v Hennessy*.

The court's supervisory role over the conduct of liquidators

The powers conferred by s 536 have a common element, namely that they are powers of a regulatory nature concerned with the supervision of liquidators of all kinds. The court has a long-established role in the supervision of court- appointed liquidators, and s 536 confers a statutory supervisory jurisdiction in respect of liquidators of all kinds.

In a compulsory winding up by the court, the liquidator's office stems from the appointment by the court. The winding up is conducted by the court and the decisions the liquidator makes from time to time are in effect made under the authority of the court by the liquidator as an officer of the court: *Re Timberland Ltd (In Liq); Commissioner for*

Corporate Affairs v Harvey (at 696), per Marks J. On the other hand, voluntary winding up is a statutory process and the liquidator is not an officer of the court carrying out tasks on the court's behalf: *Clutha Ltd (In Liq) v Millar (No 5)* (2002) 43 ACSR 295 at 298 [13]–[18]; (2003) 21 ACLC 1 at 4 [13] –[18], per Austin J; *Australian Security Estates Pty Ltd v Bluecrest Holdings Pty Ltd (In Liq)* (2002) 169 FLR111 at 125 [60], per Bergin J. The distinction is reflected in r 42.3(2)(g) of the *Uniform Civil Procedure Rules*, which permits the court to make an order for costs in the exercise of its supervisory jurisdiction over its own officers, including court-appointed liquidators but not liquidators appointed in a voluntary winding up.

The liquidators in the present case hold office under a deemed creditors' voluntary winding up, consequent upon termination of the administration of the companies per s 446A. They are not liquidators in a compulsory winding up. They are therefore not officers of the court. Nevertheless they are subject to the applicable provisions of the *Corporations Act* (Cth), which include not only the statutory duties of officers of corporations (liquidators of all kinds being within the definition of "officer" in s 9; also s 179(2)), but also statutory provisions of a supervisory kind where those provisions extend to liquidators generally. Importantly, s 536 is one of those provisions.

…

It is pertinent to recognise that the powers conferred by s 536(1) are vested in both the court and the regulator, and therefore that the court is performing a regulatory role, in the sense that its function under s 536, like the function of ASIC under the section, is supervisory. Although the power conferred by s 536(3) is conferred on the court alone, it is of the same supervisory nature. As predecessors to s 536(1) said expressly, the court is to "take cognizance of the conduct of liquidators": *Companies Act 1896* (Vic), s 146; *Companies Act 1936*, s 235; *Companies Act 1961*, s 278; see *O'Toole v Mitcham* (1977) 2ACLR 471 at 473, per Young CJ (Gillard J and McGarvie J agreeing); nothing in the explanatory memorandum to the *Companies Bill 1981* suggests that the change of wording introduced in the *Companies Code* was intended to alter the court's role.

The court's supervisory role is recognised in the frequently cited observations of McLelland J in *Northbourne Developments* (at 438), where his Honour said of the predecessor to s 536 that it "is concerned with aspects of the conduct of liquidators which are liable to attract sanctions or control for what might broadly be described as disciplinary reasons." For subsequent applications of this approach, see, for example, *Re Glowbind Pty Ltd (In Liq); Takchi v Parbery* (at 217 [21]; 465 [21]), per Burchett AJ; *Australian Securities and Investments Commission v Forestview Nominees Pty Ltd (Receivers and Managers Appointed)* (2006) 236 ALR 65224ACLC 1567 at 1570 [15]; *Leslie v Hennessy* (at 656 [4]); *Australian Securities and Investments Commission v Edge* (2007) 211 FLR 137 at 152 [48], per Dodds-Streeton J; *Vink v Tuckwell*, per Robson J.

The characterisation of the basis for intervention as "disciplinary reasons" is, as McLelland J said, "broadly" apt. Particularly with respect to the unfettered power in s 536(3), it is not appropriate to limit the power to a concept of impropriety. It extends at least to the full range of "duties" referred to in s 536(1)(a). Questions of skill and diligence, as well as questions of improper conduct or improper purpose, can give rise to "disciplinary reasons" in the sense that McLelland J was applying the concept (see, for example, the duties in ss 180, 181, 182 and 183 of the *Corporations Act* (Cth)).

854 The applicant for an enquiry carries the onus of showing that there exists "a well based suspicion indicating the need for further investigation, with suspicion

connoting a positive feeling of actual apprehension or mistrust, as distinct from mere wondering".[139]

855 Where such a suspicion exists, the Court will, in deciding whether or not to exercise its discretion, consider the appropriateness of ordering an enquiry. The relevant circumstances include whether or not:

- an enquiry is likely to be in the broader public interest or merely represents the furtherance of private claims;
- an enquiry is likely to accord with the supervisory and disciplinary purposes of s 536;
- an enquiry is likely to be of some practical benefit;
- there are alternative remedies.[140]

856 I have already indicated that I will hear the parties on whether or not Mr Macks should be removed as liquidator. I will also adjourn any further considerations of the application for an enquiry.

Mr Viscariello, a creditor, secured or otherwise?

857 Subject to any report which may be received from another liquidator if Mr Macks is replaced, it is as I have observed unlikely that there will be funds available to distribute to creditors. Nonetheless it is appropriate that I make findings as to the indebtedness of the Companies to Mr Viscariello. I deal first with the question whether Mr Viscariello is owed any amount on account of wages.

858 I am not prepared to find on the basis of the bare existence of an employment agreement that Mr Viscariello was employed by Bernsteen. The fact that he was the director and principal shareholder of the Companies, substantially discounts the weight that would otherwise be given to the existence of the employment agreements of that kind. Whether or not the profits of a company are distributed to its principals by way of dividend or remuneration may vary depending on the benefits which each might derive and on how transactions are structured.

859 Documentation sent by Ms Tanya Hamilton-Smith to PPB in the course, or leading up to the administration, listed Mr Viscariello as an employee only of Newmore. Other Newmore records show that Mr Viscariello was an employee of Newmore but Bernsteen's employment records do not. Newmore's records show that Mr Viscariello was paid $2,302.43 per fortnight. The Newmore

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[139] *Kennards Hire Pty Ltd v RNGA Ltd* [2010] NSWSC 1387 at [36]-[37].

[140] *Re Bauhaus Pyrmont Pty Ltd (In Liq)* [2006] NSWSC 742 at [4]; *BL&GY International Co Ltd v Hypec Electronics Pty Ltd* (2010) 79 ACSR 558 at [41]; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434 at 439; *Leslie v Hennessy* [2001] FCA 371 at [6].

RATA shows Mr Viscariello was owed $21,630 for annual leave and $6,112 for long service leave when the Company went into liquidation. The Bernsteen RATA does not show Mr Viscariello as an employee.

860 Importantly, the Deed of Settlement entered into between Mr Viscariello and ARL, in ARL's action against him on his guarantee of the debts of Newmore, includes a declaration by Mr Viscariello that an attached summary of his financial affairs is true and correct. It shows that his salary from Newmore in the 2001 financial year was $28,871. No salary from Bernsteen is shown.

861 On 21 January 2003 a solicitor, Mr Gretsas, lodged two proofs of debt in the Newmore liquidation for a "Mr Viscariello". The first asserted a debt of $6,000 for "advances to the Company". There is very little explanatory evidence about that proof of debt. It is possible that it was lodged for Mr Luigi Viscariello.

862 The second was a formal proof of debt for amounts of $147,829.00, $21,630.18 and $6,111.70 totalling $175,570.88. The sum of $147,829 replicates a figure declared in the Newmore RATA as an unsecured loan made by Mr Viscariello. Mr Viscariello agreed in his evidence that that was so. However, the 2000 audited financial statements of Newmore show a loan owed by Newmore to Mr Viscariello of only $7,818.62.

863 Mr Viscariello testified that the employment records did not show the full extent of his salary because he treated his unpaid wages as an advance back to the Companies thereby increasing his loan account.

864 Mr Viscariello said that if he did not take a wage "it went through as an advance".

865 He continued:

> I was entitled to, under the DOCAs, to a certain amount of payments and entitlements. In order to assist the companies during that period and following, I didn't take those entitlements, so they were treated as an advance to the companies just foregoing my entitlements … well if I don't receive it, it's an obligation which the Company has to me which I don't then receive. It's like giving me the money and then sending it back as a loan.

866 I find that Mr Viscariello's only employment entitlements are the amounts recorded in the Newmore RATA. I do not accept Mr Viscariello's evidence that he was employed by Bernsteen and Newmore at the rates of remuneration shown in the employment agreements. I reject his claim that he was entitled to that remuneration from each of the Companies.

867 I turn next to Mr Viscariello's claim that there remained an outstanding balance on loans he had made to the Companies.

868 Mr Viscariello claims, and Mr Macks admits, that Newmore accepted a loan from Mr Viscariello pursuant to a loan agreement in 1993 and that Newmore granted Mr Viscariello a deed of debenture to secure that loan.

869 Viscariello and Bernsteen entered into a loan agreement on 1 November 1993. On the same day a similar agreement was reached between Viscariello and Newmore. The agreements govern such sums as the lender agrees to make available. Interest is set at a rate of 15 per cent per annum.

870 Mr Macks admits that Viscariello made advances to Bernsteen in the sum of $270,000 and to Newmore in the sum of $60,000. Mr Macks also admits that Newmore entered into a deed of debenture in favour of Mr Viscariello on 1 November 1993 (the Newmore debenture). The Newmore debenture secured advances to Newmore and Bernsteen. Mr Macks admits that the Newmore debenture was registered. Mr Macks contends, however, that Mr Viscariello has failed to prove that the Companies were still indebted to him as at 5 December 2001. For that reason the historical records evidencing the loan must be examined.

871 The 1995 Bernsteen DOCA records an outstanding loan to Mr Viscariello in the sum of $180,000. I accept that Mr Viscariello never disputed that recital at the time of the 1995 Bernsteen DOCA was made. Mr Viscariello claims that the external financier referred to in the 1995 Bernsteen DOCA was the Commonwealth Bank of Australia (the CBA). The 1995 Newmore DOCA records a loan in the sum of $39,328 made by Mr Viscariello to Newmore and secured by a charge. I accept that Mr Viscariello never claimed at the time of the 1995 Newmore DOCA that that figure was incorrect.

872 However, Mr Viscariello testified that the total amount outstanding at the time of the 1995 Newmore and Bernsteen DOCAs was $330,000. Mr Viscariello relied on the 1993 financial statements prepared by the Newmore's accountants which showed a loan of $329,000. I do not accord those financial statements much weight because Mr Viscariello was the principal of Newmore and had a personal interest in the accounting for the loan.

873 Mr Viscariello was a signatory to both the Newmore and Bernsteen 1995 DOCAs. When he gave his evidence, Mr Viscariello initially agreed that they recorded the debts owed to him by the Companies in 1995 even though he qualified his statement by saying that the information was provided by his accountants. He initially agreed that the Bernsteen loan stood at $180,000. However, when taken in the course of his evidence to the loan shown in the 1995 Newmore DOCA, he did not accept that it correctly recorded Newmore's indebtedness. Mr Viscariello testified that his recollection was that a total of $330,000 was owed by the Companies at the time.

874 I find on the basis of the recitals in the 1995 DOCAs of the Companies that as of 31 October 1995 Bernsteen was indebted to Mr Viscariello in the sum of $180,000 and Newmore was indebted in the sum of $39,328.

875 Bernsteen's balance sheet for the financial year ending 30 June 1996 shows an indebtedness to Mr Viscariello of $368,392.22. I place no reliance on that balance sheet because of the absence of any satisfactory explanation from Mr Viscariello as to why the loan might have so dramatically increased in that year. I have earlier recorded my finding that Mr Viscariello was not receiving the remuneration from the Companies which he claimed.

876 A financial report prepared by Mr Macks as administrator of the 1995 DOCA records that the level of indebtedness reduced under his administration from $180,000 to $153,000.18. However, financial statements prepared by Bernsteen's accountants for the period 1 November 1995 to 31 October 1997 record a secured loan account in favour of Mr Viscariello in the sum of $427,319.96. Again, I reject that figure because of the absence of any explanation as to the increase in the loan over and above the 1995 Bernsteen DOCA figure, and the 1996 financial statement. The financial statement prepared for Bernsteen by its accountants for the financial year ending 2000 show the director's loan outstanding at the end of the 1999 financial year in the sum of $200,000. Although the financial statement describes the loan as secured, Mr Viscariello did not hold any security over Bernsteen's assets with respect to that loan. It was secured only by the registered Newmore debenture. Again, there is no explanation for the increase in the amount over and above $180,000. The financial statement prepared by the company's accountants for the year ending 30 June 2000 shows the director's loans to be $150,000. I reject Mr Viscariello's explanation that despite the financial statements recording Bernsteen's indebtedness as $150,000, the loans to both Companies were still in the order of $330,000. In particular, I reject his contention that the inter-company loan between Bernsteen and Newmore includes, in part, an indebtedness to him.

877 The Bernsteen RATA did not show any debt owed to Mr Viscariello. However, on 21 January 2003 Mr Viscariello lodged a proof of debt through his solicitor in the sum of $300,000. He described the debt as "advances to co". He made the following remark in support of the claim "details contained in co accounts and records." Mr Macks, as chairman of the meeting of creditors on 21 January 2003, disputed the proof of debt but admitted the plaintiff as a creditor for voting purposes in an amount of $175,000. Mr Viscariello never appealed against that decision nor did he assert any security.

878 In a statutory declaration made by Mr Viscariello at the time that he entered into a Deed of Settlement with ARL over ARL's claim against him for his guarantee of the credit ARL extended to Bernsteen, he declared that he was owed the sum of $142,773 by Bernsteen as at 30 June 2001.

879 Mr Viscariello did not call any of the Companies' accountants. The reasons for, and the way in which any variation in the loan account was affected, was peculiarly within Mr Viscariello's knowledge.

880 Financial statements prepared at the direction of Mr Macks during his administration of 1995 Newmore DOCA record the outstanding shareholder loan to Mr Viscariello in the sum of $39,328.

881 A balance sheet prepared by the Companies' accountants as at 31 October 1997 show a secured shareholder loan in the sum of $64,797.38. Mr Viscariello did not give any evidence as to how or why the loan had increased. In audited financial statements prepared by Newmore by its accountants for the year ending 30 June 2000 there is also a column setting out the balance sheet for the financial year ending 1999. That column records the item "shareholder's loan – J Viscariello" at $4,723. The 30 June 2000 report itself shows the shareholder loan at $7,818.62.

882 I reject Mr Viscariello's evidence that in some way the inter-company loan from Bernsteen to Newmore represents an advance made by him either to Bernsteen or Newmore.

883 In the Newmore RATA Mr Viscariello claimed that he was owed $147,829 by Newmore. Mr Viscariello through his solicitor submitted a formal proof of debt for Newmore on 21 January 2003. I earlier referred to the second proof of debt filed in the Newmore liquidation claiming a total of $175,570.88 as "advances to Co". That total comprised advances of $147,829, $21,630.18 and $6,111.70. The form elaborated on the debt stating "Details previously provided and are contained in the Co's records and accounts". The breakdown of the advances match claims made by Mr Viscariello in the Newmore RATA. The proof of debt claims:

Advances to Co

$ 147,829.00

$ 21,630.18

$ 6,111.70

$ 175,570.88

884 The first line matches the secured debt claimed in the Newmore RATA. The second line matches Mr Viscariello's annual leave entitlement as claimed in the Newmore RATA. The third line appears to match Mr Viscariello's long service leave claim in the Newmore RATA.

885 Nonetheless, Mr Viscariello has not given a satisfactory explanation for the increase in the amount outstanding after June 2001. I find that the indebtness of

Newmore is no more than $7,818.62 which is the amount recorded in the financial statement for the year ending 30 June 2000.

886 The next issue is whether Mr Viscariello was a secured creditor. Mr Macks accepts that Mr Viscariello did have a floating charge over the assets of Newmore. He contends, however, that Mr Viscariello surrendered that charge by lodging proofs of debt as an unsecured creditor.

887 As a secured creditor, Mr Viscariello was entitled to:

- prove the whole amount of the secured debt and thereby surrender his security;
- estimate the value of the security and approve the balance; or
- to rely on the security only.

It is only if Mr Viscariello has unequivocally made an election in terms of the first alternative does he surrender his security.[141]

888 Mr Viscariello did not expressly state that he was a secured creditor in his proof of debt and purported to prove for what he alleged to be the whole of his debt. In my view, the mere failure of Mr Viscariello to expressly assert his security and the mere lodgement of the proof of debt, in circumstances in which the administrator was aware of the existence of the security, did not result in the surrender of that security.

889 Even though Mr Viscariello voted in a show of hands at meetings of creditors, he never voted in a formal poll on the basis of his proof of debt. His participation in the meeting is, therefore, not inconsistent with the maintenance of his secured interest.

890 Mr Viscariello also claims to be a secured creditor by reason of rights of subrogation over a charge by the CBA over the assets of Newmore. In 2002 the CBA held a charge over the assets of Newmore (the CBA Newmore charge). It is accepted by Mr Macks that Mr Viscariello made a payment to the CBA discharging Newmore's indebtedness and securing the release of the charge. The amount paid was $97,886.07. Mr Viscariello sought permission to amend his claim, close to the conclusion of the trial in February 2013, to plead that by that payment he was subrogated to the CBA security. Mr Viscariello pleads that he holds rights of subrogation through the CBA Newmore charge because he made that payment pursuant to a guarantee he had given to the CBA, or alternatively, pursuant to an all moneys mortgage he gave in favour of the Commonwealth Trading Bank of Australia.

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[141] *Surfers Paradise Investments Pty Ltd (In Liq) v Davoren Nominees Pty Ltd* [2003] QCA 458 at [5]-[7] per Williams JA, at [30]-[34] per Dutney J; *Kelso v McCulloch* 24 October 1994 NSWSC Young J; *17th Canute Pty Ltd v Bradley Air Conditioning Pty Ltd (In Liq)* [1987] 1 QdR 111.

891 The guarantee is not in evidence. It is, therefore, not possible to say whether or not the terms of the guarantee denied Mr Viscariello any rights of subrogation with respect to the security held by the CBA for the debts he had guaranteed.[142]

892 The mortgage relied on by Mr Viscariello is in evidence but it is a mortgage to the Commonwealth Trading Bank. The evidence does not establish that the Commonwealth Trading Bank of Australia is the same entity as the Commonwealth Bank of Australia.

893 Internal bank correspondence of the CBA shows that on 4 December 2001 the Bank agreed to discharge Mr Viscariello's guarantee and "the Bank's equitable mortgage" on payment of the sum of $97,886.07. The equitable mortgage must mean the CBA Newmore charge. There is no reference to the payment being required under the mortgage to the Commonwealth Trading Bank. On 21 November 2002 the CBA advised Mr Viscariello that it had applied his payment to certain loan accounts. The letter does not refer to the payment being made pursuant to the Commonwealth Trading Bank mortgage.

894 The CBA Newmore charge was deregistered on 13 November 2002. On deregistration the Newmore charge ceased to have any priority over any other charge such as that of ARL[143] by reason of that registration. However, the CBA Newmore charge predates the ARL charge and would enjoy priority for that reason.

895 Mr Macks contends that if Mr Viscariello were subrogated to the CBA Newmore charge and, despite its deregistration in November 2002, it had statutory priority over ARL's charge, an issue arises as to whether, by reason of the Deed of Priority entered into between ARL and Mr Viscariello in 2001, Mr Viscariello would be estopped from evading the effect of that Deed by subrogation to a prior security. Mr Macks contends that the resolution of such an issue would require interpretation of the Deed, consideration of extrinsic evidence and an analysis of the circumstances surrounding its execution. No such evidence has been led. I doubt the premise of Mr Macks' contention in this respect. It is not obvious to me why the Deed of Priority should be thought to speak at all to rights held through another charge which enjoyed priority and has, in effect, been "purchased" by Mr Viscariello.

896 The very late notice of the proposed amendment left very little time to properly conduct investigations and examine records concerning the discharge of the CBA security and the basis on which it was paid. The guarantee has not been found. Mr Macks contends that Mr Viscaeriello should not be given lead to plead his subrogation to the CBA security because there is doubtful utility in giving leave to make the amendment. First, it remains unknown whether, and to

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[142] *Austin and Another v Royal and Another* (1998) NSW Com R 655-683 – BC 980177.
[143] Sections 280 and 281 *Corporations Act* (incorporating amendments up to Act No 29 of 2002).

what extent, there will be funds in the company on which the security can be enforced after proper allowance for the liquidator's fees and costs. Moreover, ARL would have to be given an opportunity to be heard. However, the effect of refusing leave might be to allow Mr Viscariello to press his claim on another liquidator. I will reserve my decision on this issue further until the resolution of the question of the appointment of another liquidator. If another liquidator is appointed, this matter may then properly be investigated and the liquidator can consider and determine Mr Viscariello's claims in this respect and, if necessary, any dispute over those claims can be brought before this Court.

Addendum – the production of privileged documents

897 It is apparent from the narrative given in my reasons, and in particular from the references to correspondence between Minter Ellison and Mr Macks and their discussions in meetings that communications which would otherwise attract legal professional privilege have been produced in the course of the trial. I made an order in the course of the trial that certain evidentiary material that would otherwise have been subject to legal professional privilege should be disclosed. Much of the material to which I have referred was provided to me for the purposes of deciding whether or not there were reasonable grounds to suspect that the communications evidenced by that material was made for a purpose which precluded Mr Macks and Ms George from claiming privilege over it. I was satisfied that there were reasonable grounds to conclude that certain communications disclosed in that material were made for the purpose of maintaining proceedings which were an abuse of process. I formed the view that there were reasonable grounds to suspect that Mr Macks was prosecuting Ms Hamilton-Smith for the purpose of facilitating his proposed insolvency action against Mr Viscariello or for other collateral purposes. I formed that view primarily on the basis of the massive disproportion between the costs of the litigation and the poor prospects of any recovery.

898 I acknowledge that, at least until the matter was resolved, Mr Macks and Ms George intended to prosecute the matters to judgment if at all possible.[144] However, I was, and am, satisfied that that purpose had become insignificant to Mr Macks from mid 2005. There was by that time no prospect of any net return to the Companies after the payment of the legal costs of continuing the proceedings.

899 It appeared to me then, and is now my view, that the continuation of the proceedings could only be explained by Mr Macks' concern for his own personal financial and reputational interests. I have found in these reasons that was in fact the case.

900 From at least mid 2005 when Mr Macks gave instructions on the conduct of the proceedings he gave active consideration to the protection of his personal

[144] *Williams v Spautz* (1992) 174 CLR 509.

interests as he saw them. Notwithstanding Mr Macks' general intention to prosecute the proceedings through to successful judgments in his favour if he could, the lack of any prospect of obtaining any reasonable return, coupled with the personal interests he sought to protect, constituted the proceedings an abuse of process.

901 I acknowledge that Mr Macks' position as litigation funder did not in itself constitute the proceeding an abuse of process.[145] I also acknowledge that a funder can control litigation without it being an abuse.[146] Moreover, it is not an abuse to seek the bankruptcy of an opponent in litigation, especially when the opponent is insolvent and the defence unmeritorious. Finally, I acknowledge that a debt may be purchased in order to procure a sequestration order with a view to proving debts of the purchaser in the winding up or bankruptcy[147] unless the applicant seeks to extort more than is due.[148]

902 However in this case the proceedings were, to the knowledge of Mr Macks and his advisers, prosecuted when there was no prospect of a real recovery and for the purposes, at least in part, of protecting Mr Macks from litigation, threatened and then brought, by Mr Viscariello. The disconnection between the legitimate purpose of the litigation and Mr Macks' personal purposes, and the way in which it was funded, were calculated to corrupt the proceedings.

903 In the peculiar circumstances of this case, the proceedings were an abuse of process.

904 I also record that after the close of submissions in this matter, the plaintiff plaintiff filed two volumes of further submissions. The defendant then filed submissions in response contending that the plaintiff had gone beyond any permission given and taking issue with the submissions made. In particular, the defendant responded that the plaintiff was by and large putting a different case. The plaintiff responded to those submissions on 13 May 2013. The defendant made submissions in reply to the plaintiff's submissions of 28 June 2013 in July 2013. I indicate that I have had regard to all the submissions provided to me.

905 Finally I indicate that I would give permission to the plaintiff to make the amendments in his proposed fourth amended Statement of Claim which relate to the findings I have made. I am satisfied that the issues relating to those findings were fully joined in the course of the hearing and that the defendant has not suffered any prejudice by the evolving nature of the plaintiff's case.

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[145] *Campbell Cash & Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [84]-[89].
[146] *Volpes v Permanent Custodian Pty Ltd* [2005] NSWSC 827.
[147] *McIntosh v Shashova* (1931) 46 CLR 499 at 505.
[148] *Rozenbes v Kronhill* (1956) 95 CLR 407.