SUPREME COURT OF QUEENSLAND

CITATION:	*Manicaros v Commercial Images (Aust) Pty Ltd (in liq)* [2024] QCA 40
PARTIES:	**MICHAELA MANICAROS** (appellant) **v** **COMMERCIAL IMAGES (AUST) PTY LTD** **(in liquidation)** ACN 011 023 617 (respondent)
FILE NO/S:	Appeal No 6955 of 2023 DC No 4568 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane - [2023] QDC 77 (Porter KC DCJ)
DELIVERED ON:	22 March 2024
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2023
JUDGES:	Flanagan JA, Buss AJA and Kelly J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – CONFIRMATION – ACKNOWLEDGMENTS – where the respondent commenced proceedings for recovery of debts owed by the appellant – where the issue was whether the respondent's claim was barred because the respondent had not commenced proceedings within the time limit prescribed by s 10(1)(a) of the *Limitation of Actions Act 1974* (Qld) (the Act) – where the respondent contended the appellant acknowledged the debts after the limitation period had expired and the claim for the debts accrued afresh in accordance with s 35(3) and s 36 of the Act – where the appellant signed company financial accounts recording historical debts – where the appellant referred to the debts in an affidavit filed in alternative proceedings – whether the appellant acknowledged the debts owed to the respondent in accordance with the Act – whether the appeal should be allowed *Corporations Act 2001* (Cth), s 9, s 45A, s 286, s 292, s 295, s 296, s 297 *Limitation Act 1939* (UK), s 23, s 24

Limitation of Actions Act 1974 (Qld), s 10, s 35, s 36
Statute of Frauds Amendment Act 1828 (UK), s 1

Australian Executor Trustees Ltd v Lokit Investments Pty Ltd [2023] VSC 141, cited
Australian Securities and Investments Commission v Healey (2011) 196 FCR 291; [2011] FCA 717, cited
Bucknell v Commercial Banking Co of Sydney Ltd (1937) 58 CLR 155; [1937] HCA 35, cited
Giacci v Giacci Holdings Pty Ltd [2010] WASCA 233, cited
Hepburn v McDonnell (1918) 25 CLR 199; [1918] HCA 43, cited
Hipworth v Mahar (1952) 87 CLR 335; [1952] HCA 43, considered
In re Flynn, (decd) (No 2) [1969] 2 Ch 403, cited
In re Gee & Co (Woolwich) Ltd [1975] Ch 52, cited
Re Compania de Electricidad de la Provincia de Buenos Aires Ltd [1980] Ch 146, cited
The Stage Club Ltd v Millers Hotels Pty Ltd (1981) 150 CLR 535; [1981] HCA 71, cited
VL Finance Pty Ltd v Legudi (2003) 54 ATR 221; [2003] VSC 57, considered

COUNSEL: A J Morris KC, with I A Erskine, for the appellant
C A Wilkins KC for the respondent

SOLICITORS: Cronin Miller Litigation for the appellant
Colin Biggers & Paisley for the respondent

[1] **FLANAGAN JA:** I agree with Buss AJA.

[2] **BUSS AJA:** The appellant appeals from a judgment of Porter KC DCJ entered after the trial of an action in which the respondent as plaintiff claimed $631,276 and interest on that amount from the appellant as defendant.

[3] The amount of $631,276 was the difference between debts totalling $686,797 (the debts) owing by the appellant to the respondent and a debt of $55,521 owing by the respondent to the appellant.

[4] The sole issue at the trial was whether the respondent's claim was barred because the respondent had not commenced the proceedings for recovery of the debts within the time limitation prescribed by s 10(1)(a) of the *Limitation of Actions Act 1974* (Qld) (the Act).

[5] At the trial the respondent accepted that the claim for the debts had accrued more than six years before the proceedings were commenced on 19 December 2018 and therefore the claim was prima facie statute barred. However, the respondent contended that the appellant had acknowledged the debts after the six year limitation period had expired, in accordance with s 35(3) and s 36 of the Act, and consequently the claim for the debts accrued afresh on 11 November 2016 and again on one or more later dates.

[6] The appellant's defence at the trial was that the requirements of s 35(3) and s 36 of the Act in relation to the debts had not been satisfied on any of the dates alleged by the respondent.

[7] The trial judge found that:

(a) On 11 November 2016, the appellant signed financial accounts of the respondent for the year ended 30 June 2016 (the 2016 accounts) as a director of the respondent. By signing the 2016 accounts, the appellant declared the accounts to present fairly the respondent's financial position. The 2016 accounts recorded debts totalling $686,797 owed by the appellant to the respondent as current assets.

(b) On 24 October 2017, the appellant swore an affidavit (the appellant's affidavit) in pending proceedings in the Supreme Court of Queensland (the oppression proceedings) that were commenced on 23 October 2017. The parties to the oppression proceedings were the appellant (as applicant), the respondent (as first respondent) and Stephen Verschoyle (as second respondent). The appellant's affidavit was filed on 24 October 2017 and was served on or about that date. In the oppression proceedings the appellant sought an order that the respondent be wound up on the just and equitable ground (in particular, on the ground of oppression by Mr Verschoyle). The appellant and Mr Verschoyle are siblings. Each held 50 per cent of the respondent's issued shares. At all material times before 13 October 2017, the appellant and Mr Verschoyle were the sole directors of the respondent.

(c) Each of the 2016 accounts and the appellant's affidavit contained an acknowledgment of the debts which satisfied the requirements of s 35(3) and s 36 of the Act.

(d) As a result, the right of action to recover the debts was deemed to have accrued afresh on 11 November 2016 and 24 October 2017 respectively.

(e) In either case, the proceedings were commenced within the six year period prescribed by s 10(1)(a) of the Act and were not statute barred.

[8] His Honour ordered the appellant to pay to the respondent the amount of $765,196.46 (which comprised the amount claimed by the respondent and interest on that amount). His Honour also ordered the appellant to pay the respondent's costs of the proceedings (including reserved costs) to be assessed.

[9] The appellant's grounds of appeal allege in substance that the trial judge erred in finding that the appellant, by signing the 2016 accounts and by swearing, filing and serving the appellant's affidavit, had acknowledged the debts in accordance with s 35(3) and s 36 of the Act.

[10] The respondent submits that the grounds of appeal are without merit.

[11] The respondent has filed a notice of contention in which it asserts that his Honour's decision should be affirmed on grounds additional to those relied upon by his Honour in his reasons for decision. In particular, the respondent asserts that:

(a) The appellant's email sent on 3 July 2017 acknowledged her indebtedness to the respondent, as his Honour found (reasons [192] - [195]), and was an

acknowledgment made to the respondent or its agent, contrary to his Honour's finding (reasons [197] - [199]). (The 3 July 2017 email is referred to in his Honour's reasons and elsewhere in the appeal papers as the 2 July 2017 email but it was in fact sent on 3 July 2017.)

(b) Further or alternatively, the appellant's email sent on 18 August 2017 acknowledged her indebtedness to the respondent, as his Honour found (reasons [202] - [208]), and was an acknowledgment to the respondent or its agent, contrary to his Honour's finding (reasons [209] - [211]).

(c) Further or alternatively, the email sent by the appellant's then solicitor on 4 December 2017 acknowledged the appellant's indebtedness to the respondent, contrary to his Honour's finding (reasons [231]).

(d) Further or alternatively, the appellant or her agent acknowledged the appellant's indebtedness to the respondent by the combined operation of some or all of the following:

(i) the appellant signing, on 11 November 2016, the 2016 accounts (reasons [1], [12] - [27]);

(ii) the appellant sending the email of 3 July 2017 (reasons [37]);

(iii) the appellant sending the email of 18 August 2017 (reasons [42]);

(iv) the appellant serving her affidavit, filed on 24 October 2017, in the oppression proceedings, on the respondent on or about that date (reasons [44] - [46]); and

(v) the appellant's then solicitor sending the email of 4 December 2017 (reasons [49]).

[12] I would dismiss the appeal with costs. My reasons are as follows.

The winding up order in respect of the respondent and the appointment of a liquidator

[13] On 31 October 2017, Boddice J ordered in the oppression proceedings that Darryl Kirk, registered liquidator, be appointed as the provisional liquidator of the respondent until the making of a winding up order or further order. On 15 February 2018, the Supreme Court of Queensland made consent orders for the winding up of the respondent and the appointment of Mr Kirk as liquidator. On 19 December 2018, the respondent, by its liquidator, commenced the primary proceedings.

The background facts and circumstances

[14] The trial judge found that the background facts and circumstances to the litigation were, relevantly, as follows.

[15] The 2016 accounts recorded that during each year between the year ended 30 June 2005 and the year ended 30 June 2009, the respondent made loans to each of the appellant (that is, Ms Manicaros) and Mr Verschoyle. The amounts of those loans were recorded in Note 6 to the 2016 accounts as follows:

Unsecured Loan	Debtor	2016 ($)	2015 ($)
Unsecured loan 2005	S Verschoyle	50,000	50,000
Unsecured loan 2005	M Manicaros	50,000	50,000
Unsecured loan 2006	S Verschoyle	30,000	30,000
Unsecured loan 2006	M Manicaros	30,000	30,000
Unsecured loan 2007	S Verschoyle	70,002	70,002
Unsecured loan 2007	M Manicaros	70,002	70,002
Unsecured loan 2008	S Verschoyle	217,056	217,056
Unsecured loan 2008	M Manicaros	171,119	171,119
Unsecured loan 2009	S Verschoyle	372,391	372,391
Unsecured loan 2009	M Manicaros	365,676	365,676
		$1,426,246	**$1,426,246**

[16] His Honour found that the appellant incurred debts to the respondent as recorded in Note 6 [11].

[17] The trial judge said that the 2016 accounts recorded a debt due from the respondent to the appellant of $55,521 [11]. The respondent did not dispute the existence or amount of that debt. Consequently, the net amount claimed by the respondent from the appellant in the primary proceedings was $631,276.

The 2016 accounts

[18] Crowe Horwath were the accountants for the respondent. Crowe Horwath prepared the 2016 accounts for the respondent as client.

[19] The 2016 accounts included a trading statement and a profit and loss statement. The trading statement showed a gross profit from trading of $1,396,588 in 2015 and $1,247,732 in 2016. The profit and loss statement showed a profit of $58,398 in 2015 and a loss of $19,930 in 2016.

[20] The 2016 accounts included a balance sheet, relevantly, as follows:

COMMERCIAL IMAGES (AUST) PTY LTD
ABN: 53 011 023 617

BALANCE SHEET
AS AT 30 JUNE 2016

	Note	2016 $	2015 $
CURRENT ASSETS			
Commonwealth bank overdraft cheque account		183,976	267,201
GST payable	5	28,882	179
Cash on hand		100	100
Deposit - SEQEB		1,600	1,600
Petty cash		300	300
Trade debtors		183,493	901,637
Unsecured loan	6	1,426,246	1,426,246
Stock on hand - Commercial Images		68,423	69,904
Stock on hand - Metro Living		9,899	12,007
Prepayments		13,710	13,689
		1,916,629	2,692,863
FIXED ASSETS			
Property, plant and equipment	7	322,239	358,505
		322,239	358,505
INTANGIBLE ASSETS			
Goodwill	8	100,000	100,000
		100,000	100,000
TOTAL ASSETS		2,338,868	3,151,368
CURRENT LIABILITIES			
Unsecured loan	9	99,281	107,180
Integrated client account		1,016	2,822
Trade creditors		544,235	1,211,769
Other creditors		110,434	106,511
Accrued Superannuation		31,481	35,464
PAYG withholding		13,188	10,054
Provision for Long Service Leave		81,472	110,702
Provision for Holiday Pay		110,241	79,115
Income in advance		238,863	326,721
		1,230,211	1,990,338
NON-CURRENT LIABILITIES			
Loans from other related entities	10	195,948	199,785
Hire Purchase Liability	11	32,584	49,952
Bank of Queensland loans		142,327	153,565
		370,859	403,302
TOTAL LIABILITIES		1,601,070	2,393,640
NET ASSETS		**737,798**	**757,728**

[21] The 2016 accounts included a reconciliation of the respondent's equity. The total equity as at 30 June 2015 was $757,728 and the total equity as at 30 June 2016 was $737,798.

[22] The Notes to the 2016 accounts were set out on pages 7 and 8. In Note 1 it was stated that the financial statements were "a special purpose report prepared for use by directors and the member [sic]" and that the directors of the respondent had determined that the respondent was not a reporting entity.

[23] Page 13 of the 2016 accounts contained a Directors' Declaration (the 2016 Directors' Declaration), signed by each of the appellant and Mr Verschoyle and hand dated 11 November 2016. Each of them signed adjacent to the typewritten description "Director". The declaration provides:

DIRECTORS' DECLARATION

> The directors have determined that [the respondent] is not a reporting entity and that this special purpose financial report should be prepared in accordance with the accounting policies outlined in Note 1 to the financial statements.
>
> In accordance with a resolution of the directors of [the respondent], the directors of [the respondent] declare that:
>
> 1. the financial statements and notes as set out on pages 2 to 12 present fairly [the respondent's] financial position as at 30 June 2016 and its performance for the year ended on that date in accordance with the accounting policies outlined in Note 1 to the financial statements; and
>
> 2. in the directors' opinion there are reasonable grounds to believe that [the respondent] will be able to pay its debts as and when they become due and payable.

[24] Note 1 was referred to again in the Compilation Report on page 14 of the 2016 accounts as follows:

> COMPILATION REPORT
>
> TO [THE RESPONDENT]
>
> We have compiled the accompanying special purpose financial statements for the year ended 30 June 2016 of [the respondent], as set out on pages 2 to 12. The specific purpose for which the special purpose financial statements have been prepared is set out in Note 1 to the financial statements.
>
> *The Responsibility of Directors*
>
> The directors of [the respondent] are solely responsible for the information contained in the special purpose financial statements and have determined that the basis of accounting used is appropriate to meet their needs and for the purpose that the financial statements were prepared.
>
> *Our Responsibility*
>
> On the basis of information provided by the directors of [the respondent], we have compiled the accompanying special purpose financial statements in accordance with the basis of accounting adopted and APES 315: Compilation of Financial Information.
>
> Our procedures use accounting expertise to collect, classify and summarise the financial information, which the directors provided, in compiling the financial statements. Our procedures do not include verification or validation procedures. No audit or review has been performed and accordingly no assurance is expressed.
>
> The special purpose financial statements were compiled exclusively for the benefit of the directors of [the respondent]. We do not accept responsibility to any other person for the contents of the special purpose financial statements.

[25] Brett Collins, a principal of Crowe Horwath, signed the Compilation Report.

[26] Although there was no direct evidence at the trial about the preparation or use of the 2016 accounts, his Honour found that some inferences could reasonably be drawn, as follows [23] - [26]:

> **First**, by Note 1 and by the 2016 declaration, the 2016 accounts state that [the respondent] was determined by the directors not to be a reporting entity. In my view, considering the character of [the respondent] disclosed by the 2016 accounts, it can be inferred this means that it is not a corporate entity required by the *Corporations Act 2001* (Cth) (**CA**) to prepare financial reports and directors' reports. I explain as follows.
>
> Section 292(2) CA deals with the financial reporting obligations of small proprietary companies. Based on the 2016 accounts, [the respondent] could reasonably be considered by the directors to be such a company: see s. 45A(2) CA. Small proprietary companies are not required to produce financial reports unless they fall into the specific categories in s. 292(2)(a) and (b). There is no suggestion in the evidence that [the respondent] falls into any of those specific categories. The references to not being a reporting entity appear to be linked to the lack of formal application of the Accounting Standards (See *Corporations Act 2001* (Cth) s 296). Those references make sense when considered in the context of s. 292. The CA provides, in my view, extrinsic facts relevant to the objective interpretation of company accounts, at least in relation to statutory provisions of general application.
>
> **Second**, the 2016 declaration states that the 2016 accounts should be prepared in accordance with the accounting policies in Note 1. In my view, the accounting policies objectively discernible in Note 1 [are] as follows:
>
> (a) The accounts are prepared on an accruals basis;
>
> (b) The accounts use historic costs unless otherwise stated; and
>
> (c) No Australian Accounting Standards have been intentionally applied.
>
> **Third**, the Compilation Report states that the 2016 accounts have been prepared for the specific purpose in Note 1. In my view, the purpose objectively discernible in Note 1 is "use by directors and the member" [*sic*: members]. That certainly seems to have been Crowe Horwath's view, given the second underlined statement in the Compilation Report which confirms that the financial statements were produced exclusively for the use of the directors (who in fact are also the members). This language must be considered, however, considering the admission in paragraph 5 of the TFAD that the 2016 accounts were prepared for [the respondent] by Crowe Horwath.

[27] The trial judge was of the opinion that "references to use by the directors and members of [the respondent] in that context objectively refers to use by [the respondent], through its directors and its constituent shareholders" [27].

The directors and shareholders of the respondent fall into dispute

[28] The trial judge made findings and observations in relation to the emergence of the dispute between the appellant and Mr Verschoyle, as the directors and shareholders of the respondent, as follows.

[29] No oral evidence was adduced at the trial. The trial bundle, tendered by consent, included an affidavit of each of the appellant and Mr Verschoyle in the oppression proceedings. Neither the appellant nor Mr Verschoyle was cross examined. However, the contents of the affidavits were largely uncontentious in relation to the issues in the proceedings before his Honour [28].

[30] In his affidavit Mr Verschoyle stated that between March and December 2016 the appellant told him from time to time that she no longer wanted to be involved with the respondent. The appellant's affidavit exhibited correspondence between the parties from about February 2017 which broadly confirmed Mr Verschoyle's statement [29].

[31] Based on correspondence between the parties, between February and about May 2017 there were discussions between the appellant and Mr Verschoyle about the appellant's departure from the respondent and the sale of her shares in the respondent [30].

[32] Between February and about May 2017 there was little mention of the debts owing by the directors to the respondent. However, his Honour noted an email of 3 March 2017 from Mr Verschoyle to the appellant which read, relevantly [31]:

> Obviously the current uncertainly [sic] is personally challenging for us both, however given that we both have requested our accountant to provide information relating to the possibility of forgiving the Directors loans - and the information and a decision on same is imminent - I request that we wait on receipt of advice.
>
> If the suggestion from Brett [Collins] is that there is an option - I require confirmation - and then obviously, our mutual decision on same - with clear and defined outcomes.
>
> Although we both personally stand to save a significant amount of money - quite the windfall - the consequences of a forgiven loan will negatively affect [the respondent's] equity position.

[33] Based on that email, Mr Verschoyle "plainly took the view that the loans were assets of the company able to be enforced, because if that were not the case, their forgiveness could scarcely negatively affect the equity position of the company" [32]. His Honour added that, although the appellant did not respond directly to the email, "it was a consistent theme of the correspondence that the debts had to be dealt with" [32].

[34] On 12 April 2017, a lawyer, Ms Gray, wrote to the appellant enclosing a draft deed of forgiveness for review by the appellant (the draft deed). The letter enclosing the draft deed indicated that Ms Gray was acting for the appellant. The letter and the draft deed were sent to the appellant by email. The email was shared with Crowe Horwath and the appellant and Mr Verschoyle's family, but there was no evidence that the email was copied to or received by Mr Verschoyle. The draft deed was between the respondent and the appellant. The draft deed did not mention

Mr Verschoyle by name and did not include any reference to any debt owing by Mr Verschoyle to the respondent. Nevertheless, the execution block in the draft deed contemplated execution by two directors of the respondent. At that date, the directors comprised the appellant and Mr Verschoyle [33].

[35] The draft deed provided, relevantly [33]:

(a) By the recitals:

1. [The respondent] made a number of Loans to [Ms Manicaros] over time.

2. [Ms Manicaros] may be indebted to [the respondent] for the amount of up to $686,796.87.

3. [The respondent] acknowledges that some of that amount may have already been forgiven.

4. To the extent that [Ms Manicaros] is indebted to [the respondent] for any remainder of the amount, [the respondent] has resolved to forgive the debt on the terms and conditions set out in this Deed.

(b) By the definitions section:

1.1 The meanings of the terms used in this document are set out below.

Term	Meaning
Debt	means any amount of the Loans still owing to [the respondent] by [Ms Manicaros] and not otherwise already forgiven by operation of law or for any other reason including but not limited to any statutory limitation period in respect of the Loans.
Deed	means this document and any subsequent amendment or variation made in accordance with this document from time to time.
Loans	means as the monies loaned to [Ms Manicaros] as set out in Schedule 1.

(c) For a full release of all the Debts as defined; and

(d) By Schedule 1, the debts identified in Note 6 to the 2016 accounts.

[36] His Honour said [34]:

(a) despite the email of 3 March 2017 from Mr Verschoyle to the appellant, there was no evidence that Mr Verschoyle was ever provided with the draft deed; and

(b) there was no evidence that Mr Verschoyle, the appellant or the respondent received advice from Crowe Horwath on forgiving the debts owing by each of Mr Verschoyle and the appellant to the respondent.

[37] On 10 May 2017, Russells (lawyers acting for Mr Verschoyle) sent a proposed heads of agreement to the appellant in connection with the appellant's proposed departure from the respondent and the sale of her shares. The proposed heads of agreement included a term that the agreement was "subject to [the respondent] forgiving the current loans to" the appellant and Mr Verschoyle. However,

agreement could not be reached between the parties and contentious correspondence between them continued [35].

The alleged 3 July 2017 acknowledgment

[38] The trial judge made findings and observations in relation to the alleged 3 July 2017 acknowledgment as follows.

[39] On 2 July 2017 Mr Verschoyle noticed that a withdrawal of $121,923 had been made from the respondent's bank account. He mentioned the withdrawal to the appellant and required the amount to be returned immediately.

[40] On 3 July 2017, the appellant sent this email (the 3 July 2017 email) to Mr Verschoyle [37]:

> Stephen
>
> Withdrawal was partially for TCB share of rent for July, Aug and Sept. Given you have recently withdrawn significant funds for personal "allowances" without discussion, I wanted to ensure monies were available for rent.
>
> The balance of the withdrawal was to normalize the loans we have with the company. You will be aware your loans as of June 30th 2016 were higher than my loans. I have brought us to "even" as of 1st July 2017 but we can determine at a subsequent date whether this amount shall be classified as a loan or applied against any Director's fees and/or other adjustments that may arise during the year.
>
> I am still waiting on clarification from you regarding your distribution of allowances paid in the weekly payroll amounts over the past few weeks.
>
> I note that you continue to deny me access to company records.
>
> Kind Regards
>
> Michaela Manicaros
>
> [underlining added]

[41] The 3 July 2017 email was sent in the context of ongoing contentious correspondence between the appellant and Mr Verschoyle in which each criticised the other's management of the respondent's affairs [38].

The alleged 18 August 2017 acknowledgment

[42] The trial judge made findings and observations in relation to the alleged 18 August 2017 acknowledgment as follows.

[43] In the days preceding 18 August 2017, the appellant and Mr Verschoyle were in dispute concerning the rent payable by the respondent under its lease of premises. The dispute focused on whether the rent had been overpaid or underpaid and whether the appellant had wrongly transferred the respondent's funds to pay the rent.

[44] In the context of that dispute, Mr Verschoyle sent an email to the respondent at 10.20 am on 18 August 2017 as follows:

> Michaela,
>
> I am working on EOY 2017 figures allocations and need below
>
> (a) Your Credit Card Receipts for Last 6 months.
>
> (b) Your position on Forgiveness of Loans
>
> …

[45] At 3.59 pm on 18 August 2017, the appellant responded with this email (the 18 August 2017 email) to Mr Verschoyle [42]:

> Stephen
>
> All my expenditure relates to running of company car and some Telstra invoices. Original Receipts will be submitted on my return
>
> Director's [*sic*] loans remain and at this stage are not forgiven, however seeming actions [*sic*] you took when I made an attempt to equalise the loan positions, you should equalise the loan positions.
>
> Is there any reason why you feel that you should have approximately $64,000 in company loans above what I have in company loans?
>
> You should act to equalise our loan positions. This can be either by increasing my loan position or decreasing yours. Given the concern you seem to convey to me with regards to the company's financial position (especially when it comes to abiding by the lease agreement) you may consider it best for Commercial Images if you inject those additional loan funds you have taken back into the company. If you do not feel at this current time Commercial Images requires these additional funds (to pay items like rent), you should increase my overall loan amount to bring it into line with yours.
>
> Advise your position regarding the loans and your intentions to equalise / normalise the loans between us.
>
> I note you still include the title "Managing Director" in your email signature. Again, you are NOT Managing Director and should cease to hold yourself out as such
>
> You have also not provided TCB Pty Ltd with any correspondence regarding its request for payment of the rent.
>
> I again confirm that as equal Director and Shareholder, I am not in dispute of the terms of the current agreement and therefore it cannot be Commercial Images' position that it disputes the terms of the lease and actual rent owing. Your position in disputing the rent and terms of the lease is a personal position and not the position of the Company. I, as Company Director, have every intention of abiding by the current Lease Agreement we have both signed as Lessee of the premises.
>
> Also, I still await all other outstanding information requests.

> Further to that, you should forward to me with urgency all figures etc on all revenue and expenses currently available to you regarding 2017. Obviously if you require items like petrol receipts by this Tuesday, you would certainly have Sales figures available. I expect that you forward all this information to me if not immediately, then certainly by the 22/8/17
>
> Kind Regards
>
> Michaela Manicaros
>
> [underlining added]

The alleged 4 December 2017 acknowledgment

[46] The trial judge made findings and observations in relation to the alleged 4 December 2017 acknowledgment as follows.

[47] On 25 October 2017, at Mr Verschoyle's instigation, voluntary administrators were appointed to the respondent [47].

[48] On 31 October 2017, Boddice J found that the voluntary administrators had been appointed improperly. His Honour made orders to this effect [47]:

(a) the administration of the respondent was terminated;

(b) Darryl Kirk was appointed as provisional liquidator of the respondent;

(c) the appellant's application to wind up the respondent was to continue as if it had been commenced by claim;

(d) pleadings were to be exchanged in the application to wind up; and

(e) the application to wind up was listed for further review on 4 December 2017.

[49] After Mr Kirk was appointed as provisional liquidator of the respondent, Mr Williams of Kemp Strang, solicitors, acting on instructions from Mr Kirk on behalf of the respondent, wrote to the appellant's solicitor with a view to facilitating the ongoing operation of the respondent. The letter was in these terms [48]:

> Dear Bruce
>
> …
>
> As you are aware:
>
> - the Provisional Liquidator is being asked to sign work orders for the purposes of continuing the business operations of the Company; and
> - the order confirmations arising from those work orders will result in the Company incurring liabilities.
>
> We note that the Provisional Liquidator has previously asked Michaela to pay an amount of $150,000 in reduction of her director loan account for the purposes of providing the Company with working capital to fund its ongoing business operations. That request has not been met by Michaela to date.

> In the circumstances, would you please arrange for Michaela to sign and date the attached Indemnity as a matter of priority and return a copy to us by 1.00pm on Friday 1 December 2017.

[50] On 4 December 2017, the appellant's solicitor responded by email as follows [49]:

> Dear Glen
>
> Further to recent communications we have been instructed to reaffirm our client's position that it is unnecessary for your client to be dealing with the loan accounts at this stage.
>
> Our client says that she is at a disadvantage because of this proposed path and is being forced to bid in order to avoid the unpalatable circumstance of having her estranged brother buy the loan account and then wield same as a sword.
>
> Our client says your client should simply focus on the business sale and leave the loan accounts to be dealt with after should the need arise.
>
> Can you please advise whether the current offer from Stephen includes our client's loan account?

[51] His Honour made these observations in relation to the 4 December 2017 email [50]:

> This email seems to be a non sequitur to the preceding letter from Mr Williams. There is nothing else in the evidence which explains what the recent communications might be that are referred to in that letter. The plaintiff contends that this email comprises a further and final acknowledgement [sic] of the 2016 debts.

The relevant statutory provisions

[52] Section 35(3) of the Act provides:

> Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to the personal estate of a deceased person or to a share or interest therein and the person liable or accountable therefor acknowledges the claim or makes a payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

[53] Section 36 of the Act provides:

> (1) Every acknowledgment referred to in section 35 shall be in writing and signed by the person making the acknowledgment.
>
> (2) Any acknowledgment or payment may be made by the agent of the person by whom it is required to be made under section 35 and shall be made to the person or to an agent of the person whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

The trial judge's identification of the issues arising under the relevant statutory provisions

[54] The trial judge observed that, when s 35(3) and s 36 of the Act were read together, the relevant conditions for the fresh accrual of the respondent's claim to the debts were as follows [56]:

(a) First, the appellant had acknowledged the debts.

(b) Secondly, the acknowledgment was in writing.

(c) Thirdly, the acknowledgment was signed by the appellant or her agent.

(d) Fourthly, the acknowledgment was made to the respondent or its agent.

[55] His Honour said that each of the alleged acknowledgments relied upon by the respondent was in writing. His Honour also said that the appellant accepted at the trial that each of the alleged acknowledgments was signed by her or (in the case of correspondence from her solicitor) her agent. His Honour then said that each of the other conditions was contentious in respect of each of the alleged acknowledgments [57].

The trial judge's findings and conclusion in relation to the appellant's alleged acknowledgment of the debts by signing, on 11 November 2016, the 2016 accounts

[56] The trial judge held that the 2016 accounts contained an admission by the appellant of her liability to the respondent for the debts and therefore an acknowledgment of the debts [132].

[57] His Honour said that the admission of the debts arose objectively from the following features of the 2016 accounts [133]:

> (a) **First**, [the appellant] signs [the 2016 Directors' Declaration] which states that the 2016 accounts present fairly the financial position of [the respondent] as at 30 June 2016. That declaration is in a formal form, objectively communicating that the matters declared are not casually stated but are, rather, the result of careful consideration;
>
> (b) **Second**, the 2016 accounts show that [the appellant] owed [the respondent] five specified debts totalling $686,797. Those liabilities were included in the balance sheet as current assets of [the respondent]. A current asset is defined in AASB 101 at paragraph 66 in this manner ([The] parties accepted I could use that standard to inform my understanding of the expression as a term of art in financial accounting: see TS 2-21.42):
>
> > An entity shall classify an asset as current when:
> >
> > (a) it expects to realise the asset, or intends to sell or consume it, in its normal operating cycle;
> >
> > (b) it holds the asset primarily for the purpose of trading;
> >
> > (c) it expects to realise the asset within twelve months after the reporting period; or

(d) the asset is cash or a cash equivalent (as defined in AASB 107)

unless the asset is restricted from being exchanged or used to settle a liability for at least twelve months after the reporting period.

An entity shall classify all other assets as non-current.

(c) Unsecured loans will ordinarily fall within 66(c) or 66(d). The 2016 accounts are professionally prepared in relation to a company carrying on business. In construing objectively whether the accounts (prepared for a commercial trading corporation) contains an acknowledgment, I consider that matters of commercial accounting can be taken into account. In any event, the ordinary meaning of the expression "current asset" in relation to a loan is broadly consistent with its technical accounting meaning. Both are consistent with identification of a current and enforceable liability (bearing in mind that it is not evident on the face of the accounts that the debts are repayable on demand and therefore prima facie statute barred).

(d) **Third**, without the inclusion of the debts due from [the appellant], [the respondent] would be barely solvent on a balance sheet basis, with net assets of just $51,000. Accordingly, the accounts could not "fairly present the company's financial position" unless [the appellant] was liable to [the respondent] for those debts. [The appellant's] declaration can only be correct if [the appellant] is liable for those debts;

(e) **Fourth**, as both director (privy to the books and records of the company) and as debtor (with knowledge of the circumstances of the advances identified) she was in a unique position to know whether those particular liabilities (being her debts due to the company) were correctly recorded. Her declaration that the accounts fairly represent the financial position of [the respondent] therefore has unique force in relation to these debts as compared to the other assets and liabilities shown. Reading the document objectively, a reader would be justified in assuming the director was affirming her liability for her own disclosed debts; and

(f) **Fifth**, there is nothing in the Notes which suggest otherwise. The fact that the accounts were prepared on an accruals basis has no impact on a liability in debt, especially historic debts. Similarly the warning that the accounts are based on historic costs and do not take into account changing money values has no impact on the liability in debt, which is a monetary asset unaffected by "changing money values".

[58] After explaining why he rejected the appellant's arguments to the effect that the admission of the debts did not arise objectively from the 2016 accounts [134] -

[142], the trial judge said that there was "another compelling reason why the signing of the 2016 [accounts] objectively communicates an admission of the debts due by [the appellant]" [143]. His Honour elaborated [143] - [144]:

> [The appellant] owed duties to [the respondent] both at general law and under the Corporations Act to exercise her powers with reasonable care and skill and in good faith and for the benefit of [the respondent] as a whole. It was her, together with Mr Verschoyle, as directors, who had the power to cause [the respondent] to take steps to recover the debts. Further, as the debtor, she was in the position to know when the debts were incurred and when they would be prima facie statute barred.
>
> There can be little doubt in my view that her duties required her to repay or take steps to recover those debts within the limitation period. Those statutory and common law duties are well known. In my respectful view they provide relevant context to the construction of [the 2016 Directors' Declaration]. In that context, the declaration that the accounts "present fairly the company's financial position" read objectively supports in a compelling manner the conclusion that the director is affirming that the unsecured debts she is shown as owing to [the respondent] are admitted being due and owing. In my view, a director who is shown as owing substantial debts to a company in accounts that director has affirmed as giving an accurate picture of the financial position of the company could not be taken to be doing anything but affirming the existence of those liabilities (absent some special circumstances), especially where those liabilities are of an amount which is fundamental to the financial position of the company which the accounts present.

[59] His Honour then held that the appellant's acknowledgment of the debts in the 2016 accounts was "made to" the respondent as required by s 36(2) of the Act [149].

[60] The trial judge arrived at that conclusion for the following reasons [150] - [155]:

> **First**, I adopt the following submission by Mr Wilkins:
>
> > ...the argument that a company's financial report is not a document prepared for the use or consideration of the company is, with respect, unencumbered by merit. A company is required to keep financial records which correctly record and explain its transactions and its financial position and performance: CA, s.286(1). Here, although, as a small proprietary company, the plaintiff was not obliged to do so, the plaintiff has discharged that obligation by, inter alia, the preparation of a financial report as described in CA, s.295(1). The whole purpose of the statutory obligation in s.286(1) is to prevent an officer of a company "from flying the company blind and upon its crash, and without having any information capable of sustaining the opinion, from then saying that he thought he had more altitude": ***Van Reesema v Flavel*** (1992) 7 ACSR 225 at 229 per King CJ, Bollen and Prior JJ concurring, referring with approval to ***Manning v Cory*** [1974] WAR 60 at 62 per Burt J. A financial report is in every respect a document

> that is prepared for the use and consideration of the company. The fact that a financial report is also prepared for other purposes does not mean that it is not prepared for the purpose of enabling the company, by its officers, to not fly blind.

The 2016 accounts are expressly identified as being accounts of the company and were prepared on instructions of [the respondent]. By declaring to [the respondent] that the 2016 accounts presented fairly [the respondent's] financial position, [the appellant] as a director of [the respondent] was the human agent of [the respondent]. She informed [the respondent] of the matters stated therein for use by [the respondent] in carrying on its affairs. That conclusion is reinforced by having regard to the second declaration, which is also plainly made to and for use by [the respondent] and its board of directors so as to address the risk of impermissible insolvent trading.

Second, the defendant relies on the express words in the 2016 accounts identifying to whom the accounts are addressed (see [120] above). The relevant words are those in the first paragraph of Note 1: "The financial statements are a special purpose report prepared for use by the directors and the member [sic]". (It seems clear the singular was a typographical error, as there were two members, being the two directors). However, in my view, this sentence assists the plaintiff not the defendant. As is observed in *Ford*, *Austin & Ramsay's Principles of Corporations Law* (Robert Austin and Ian M Ramsay, LexisNexis Butterworths, *Ford*, *Austin & Ramsay's Principles of Corporations Law* (online at 9 May 2023) [4.140.6]):

> Although a company is a discrete legal entity separate from its directors and members in the sense of having its own legal rights, privileges, duties and liabilities separate from theirs, it is in other respects not separate. After all, a company cannot act (for example, entering a contract or acquiring or disposing of property) unless its directors (or sometimes its members), or agents whom they appoint, act on behalf of the company. When it is the board of directors that acts on behalf of the company there is a fiction that the company itself is acting, the board of directors being considered an organ of the company rather than merely its agent. In some situations a general meeting of members can also be an organ of the company. When the person acting on behalf of the company is authorised by the board of directors to act for the company, that person does so as an agent of the company.

A financial statement prepared for use by the directors and members is prepared for use by all the natural persons who comprise the company. To suggest that accounts prepared for use by the directors and members are not prepared for the company is meaningless, at least in the context of this case where there is nothing about the accounts which suggest they are prepared for some reason other than ordinary financial record keeping. To adopt the observation of Brennan J in *The Stage Club* (at 577), "*a balance sheet covered by an auditor's report and the directors' report in the usual form is not*

> *addressed, in the first instance, to creditors but to the company in general meeting*." There is nothing which takes the 2016 accounts outside that statement of principle. Indeed the express words support that conclusion.
>
> In my view, the above circumstances sustain the conclusion that the acknowledgment by the director was made to [the respondent] in the ordinary meaning of that phrase because it was included in accounts prepared for [the respondent]. Using the language of *Campania*, it was addressed to [the respondent] and received by it. As to the latter point, the 2016 accounts must have become part of the books and records of [the respondent] and thereby passed into the possession of the liquidator. The reasonable inference, indeed the only rational inference, is that the 2016 accounts were received by [the respondent].
>
> **Third**, I reject the argument that the directors in signing the 2016 accounts were acting as the company (or on its behalf) and therefore cannot as a matter of law be acting also in their personal capacity.

[61] His Honour discussed ***VL Finance Pty Ltd v Legudi***[1] in which Nettle J considered, in the context of the *Limitation of Actions Act 1958* (Vic), whether a company's annual return constituted an acknowledgment of debts owing to the company by its directors [156] - [178]. His Honour focused on two propositions which he said Nettle J advanced at [67] of ***VL Finance***.

[62] Nettle J's first proposition (according to the trial judge) was that "an Annual Return is made by the company, not to the company. It is designed and prepared for the use of others, not the company" [174(a)]. The trial judge said that "just because a financial document might be a document of the company, by its directors, that does not mean that the same document cannot also be objectively identified as a document provided to the company by its officers acting in their individual capacity" [175]. His Honour continued [175]:

> Depending on the form and content of a financial document, it can be both. That that is correct as a matter of principle emerges from ***Compania*** [***Re Compania de Electricidad de la Provincia de Buenos Aires Ltd*** [1980] Ch 146]. Financial accounts of a company certified by its directors can be (and in this case are) made to the company in the sense of being addressed to the company and received by it (***Compania*** first limb). They can at the same time be made to a creditor of the company if provided to the creditor with the authority of the company (***Compania*** second limb).

[63] Nettle J's second proposition (according to the trial judge) was that "an Annual Return [of a company] is not expressive of an intention on the part of the directors to admit debts to the company and have the return produced and used by the company for that purpose" [174(b)]. The trial judge said that this proposition was based on "a misapplication of the principle articulated [by Dixon CJ, Webb and Fullagar JJ] in [***Hipworth v Mahar***[2]]" [177]. His Honour then stated [177]:

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1 ***VL Finance Pty Ltd v Legudi*** [2003] VSC 57; (2003) 54 ATR 221.

2 ***Hipworth v Mahar*** [1952] HCA 43; (1952) 87 CLR 335.

> [Nettle J's] reasons appear to use the language of intention and purpose to inform his approach to whether there is an acknowledgment in the sense of an admission of the debt. That is not what the intention and purpose statement in ***Hipworth*** was concerned with, as I have already explained. Nor for that matter, in my view, was ***Hipworth*** purporting to set out an exclusive test for whether an acknowledgment is made to a creditor which confines and defines the scope of that test.

His Honour concluded that ***VL Finance*** was not applicable in the circumstances of the present case but, if it was, his Honour would not follow it [178].

The trial judge's observation in relation to the other alleged acknowledgments by the appellant of the debts

[64] The trial judge observed that, having regard to his conclusion in relation to the appellant's acknowledgment of the debts by signing, on 11 November 2016, the 2016 accounts, it was strictly unnecessary for him to decide whether the other alleged acknowledgments had been established by the respondent. Nevertheless, his Honour proceeded to analyse the other alleged acknowledgments in case his decision on the 2016 accounts was wrong [180].

The trial judge's findings and conclusions in relation to the appellant's alleged acknowledgment of the debts by sending the 3 July 2017 email

[65] The trial judge made these findings and conclusions in relation to whether the appellant had acknowledged the debts in the 3 July 2017 email:

(a) On an objective reading of the 3 July 2017 email, the appellant distinctly acknowledged the existence of the debts (in the form of loans made to her by the respondent) as at 30 June 2016 [194]. His Honour reasoned [194]:

> The words "normalise the loans we have with the company" in terms [acknowledge the existence of the debts]. Further, it is the existence of those debts, of both her and her brother, which are the foundation for her objective which was to bring them to even. It must be remembered, it is not necessary to extract an implied or express promise to pay the debts to establish acknowledgment, just an acknowledgment of their existence.

(b) It is not necessary that the precise amount of a debt be stated in an acknowledgment "so long as the amount may be established from extrinsic evidence or from documents expressly or impliedly identified in the acknowledgment" [195]. His Honour continued [195]:

> Here the 2016 accounts identify the position as at the date specified in the [3 July 2017 email]. This is particularly compelling given the specific discussion of the difference in the loans and the amount required to equalise the parties' positions are broadly consistent with the figures in the 2016 accounts.

[66] His Honour made these findings and conclusions in relation to whether the acknowledgment of the debts in the 3 July 2017 email was made to the respondent:

(a) The 3 July 2017 email was not addressed to the respondent, "nor delivered to [the respondent] as such". It was addressed to Mr Verschoyle and delivered to him [196].

(b) Although the matter was not free from doubt, his Honour was not satisfied that, on an objective appraisal, the acknowledgment in the 3 July 2017 email was made to Mr Verschoyle as agent for the respondent [196] - [197]. His Honour elaborated [197]:

> [The appellant's] email is …, viewed objectively, addressed to Mr Verschoyle personally and [is] concerned with their respective personal positions vis a vis [the respondent] in relation to loan accounts. It is, from [the appellant's] perspective, a continuation of the personal dispute between them about the affairs of [the respondent].

(c) The 3 July 2017 email was neither addressed to the respondent nor delivered to the respondent by delivery to Mr Verschoyle. His Honour said that "[it] was addressed to Mr Verschoyle personally and delivered to him personally" [198].

(d) The reference to s 286 of the *Corporations Act* did not have "a role to play in this part of [the respondent's] case". His Honour said that "[t]he fact that a document might objectively be a financial record does not mean that the author of it has made an acknowledgment it contains to the company for which the document is objectively a financial record" [199]. In other words, "just because the [3 July 2017 email] could be characterised as a financial record and might indeed have been used by Mr Verschoyle as one on behalf of [the respondent], does not of itself mean that looked at objectively, [the appellant's] acknowledgment was made to [the respondent]" [199].

The trial judge's findings and conclusions in relation to the appellant's alleged acknowledgment of the debts by sending the 18 August 2017 email

[67] The trial judge made these findings and conclusions in relation to whether the appellant had acknowledged the debts in the 18 August 2017 email:

(a) An email from Mr Verschoyle which preceded the 18 August 2017 email enquired about the appellant's position on "Forgiveness of Loans" [202].

(b) The suggestion that a loan must be forgiven is "consistent with the conclusion that such a loan is in existence" [203].

(c) The appellant's response to Mr Verschoyle's email was that "the loans remain and at this stage are not forgiven". That was "a plain admission of the existence of the debts of both directors" and, further, the appellant's response "impliedly asserts that the debts are recoverable absent forgiveness" [203]. That conclusion was reinforced by the balance of the 18 August 2017 email [204]. His Honour elaborated [204] - [205]:

> [The 18 August 2017 email] goes on to reiterate [the appellant's] complaints about unequal loans, plainly referring back to the complaint in the [3 July 2017] email. However she goes on to suggest the loans be equalised by Mr Verschoyle paying back part of his loan. Although this refers to Mr

> Verschoyle's loan not hers, it is consistent with an admission of the debts and indeed an admission they were repayable.
>
> The observations about identification of the loans to which [the appellant] refers in the [3 July 2017] email set out in paragraph [195] above apply equally to the acknowledgment in the [18 August 2017] email. Although the latter does not directly refer to the position as at 30 June 2016, it is plain that that is what [the appellant] is referring to, particularly when regard is had to her reference to Mr Verschoyle having approximately $64,000 more in loans than [the appellant].

I have set out at [65](b) above the trial judge's relevant observations at [195] of his Honour's reasons.

(d) The 18 August 2017 email contained an acknowledgment by the appellant of loans made by the respondent to her as recorded in the 2016 accounts [206].

[68] His Honour made these findings and conclusions in relation to whether the acknowledgment of the debts in the 18 August 2017 email was made to the respondent:

(a) The respondent's contention that the 18 August 2017 acknowledgment was made to the respondent mirrored the contention advanced by the respondent in relation to the 3 July 2017 email [209].

(b) His Honour was not persuaded that the acknowledgment in the 18 August 2017 email was made to the respondent. His Honour said that his observation at [197] of his reasons in relation to the 3 July 2017 email applied equally to the 18 August 2017 email. I have set out at [66](b) above his Honour's observation at [197] of his reasons. His Honour was of the view that "[e]ven more than the [3 July 2017] email, looked at objectively the [18 August 2017] email is addressed to Mr Verschoyle personally and concerned with their respective personal dispute over the affairs of [the respondent]" [210].

(c) Further, his Honour considered that an email exchange about whether loans should be forgiven was not a financial record within s 286 of the *Corporations Act* [211].

The trial judge's findings and conclusions in relation to the appellant's alleged acknowledgment of the debts in her affidavit sworn, filed and served in the oppression proceedings

[69] As I have mentioned, on 24 October 2017 the appellant's affidavit was sworn and filed in the oppression proceedings. The parties to the oppression proceedings were the appellant (as applicant), the respondent (as first respondent) and Mr Verschoyle (as second respondent). The appellant's affidavit was served on or about 24 October 2017. See [7](b) above.

[70] The appellant's affidavit exhibited copies of the 3 July 2017 and the 18 August 2017 emails. The 3 July 2017 and the 18 August 2017 emails and other correspondence was incorporated in para 20 of the appellant's affidavit, which read:

> I have exchanged the following correspondence with [Mr Verschoyle] and others in relation to the operation of [the

> respondent] or alternatively, I have been copied into the following correspondence relating to the operation of [the respondent].

[71] Other paragraphs of relevance in the appellant's affidavit read:

> [23] As noted above, I was removed as a director of [the respondent] on 13 October 2017 without my knowledge.
>
> [24] Following my removal, I received three demands from [the respondent] as follows.
>
> (a) A demand that I immediately repay my director related loans (see pages 184 to 191 of MM1 [sic].
>
> …
>
> [25] I note for much of 2017, [Mr Verschoyle] and myself have been negotiating a possible sale of my interest in the business to him. In this regard, I received a proposed heads of agreement from his solicitors on 10 May 2017 (see pages 118 to 119 of MM1) following earlier discussions in February 2017 (see 65 to 66 of MM1).
>
> [26] I am of the opinion that [Mr Verschoyle] has sent the above demands in order to exert pressure to force me to sell my interest in [the respondent] on terms favourable to [Mr Verschoyle].

[72] The respondent asserted in the primary proceedings that the appellant, by adopting the alleged acknowledgments in the 3 July 2017 and the 18 August 2017 emails in the appellant's affidavit, made a further acknowledgment of the debts. The respondent also asserted in the primary proceedings that the appellant's further acknowledgment was made to the respondent because they were included in the appellant's affidavit that was filed and served in the oppression proceedings to which the respondent was a party.

[73] The trial judge noted that he had already found that each of the 3 July 2017 email and the 18 August 2017 email contained an acknowledgment by the appellant of the debts to the respondent as recorded in the 2016 accounts [213].

[74] His Honour said that the issue in respect of the appellant's affidavit was "whether the inclusion of the two emails in the affidavit leads to the conclusion that the acknowledgments they contain were made to [the respondent] in circumstances where, without such inclusion, [his Honour had] found that they were not made to [the respondent]" [217].

[75] The trial judge recorded the respondent's contention that the 3 July 2017 and the 18 August 2017 emails were exhibited to the appellant's affidavit in these circumstances [225]:

(a) the affidavit was filed and then served on the respondent;

(b) the oppression proceedings involved an application to wind up the respondent in circumstances of alleged oppression;

(c) the appellant expressly swore that demands had been made on her for repayment of the debts and that those demands were an example of oppression; and

(d) the emails were exhibited by her under cover of a statement that the emails were part of the correspondence with Mr Verschoyle and others "in relation to the operation of [the respondent]".

[76] His Honour also recorded the respondent's contention that, in those circumstances, the inclusion of the 3 July 2017 and the 18 August 2017 emails in the appellant's affidavit involved making to the respondent the acknowledgments contained in the emails [226].

[77] The trial judge concluded that the respondent's contention was correct [228]. His Honour said [228]:

> The factors identified by [the respondent] are such as to confirm that the communication of the acknowledgments contained in the [3 July 2017 and 18 August 2017] emails should not be able to be read down to some narrow purpose when they are included in an affidavit relied upon in legal proceedings involving [the respondent]. The characterisation by [the appellant], in fact, takes the matter no further. As she submitted, the correspondence is included to show why [the respondent] should be [wound] up, but one of the reasons advanced in the text of the affidavit is that [the respondent] and Mr Verschoyle are making oppressive demands for payment of [the debts] which are acknowledged in the documents exhibited to the affidavit.

[78] His Honour was therefore of the view that, by including the 3 July 2017 and the 18 August 2017 emails as exhibits to the appellant's affidavit, the appellant's acknowledgments in those emails were made to the respondent on the date the affidavit was filed [229].

The trial judge's findings and conclusions in relation to the appellant's alleged acknowledgment of the debts by her then solicitor sending the email on 4 December 2017

[79] The trial judge made these findings and conclusions in relation to whether the appellant had acknowledged the debts in her solicitor's email of 4 December 2017:

(a) His Honour noted that the only issue in dispute in respect of this alleged acknowledgment was whether the email of 4 December 2017 contained "an admission of the debts" [230].

(b) His Honour was of the view that the email did not contain an admission. His Honour explained that the preceding letter from the provisional liquidator's solicitor called for part repayment of the appellant's loan account and the gravamen of the response in the email of 4 December 2017 was that "the issue of the loan accounts should be dealt with later". That was not an express admission of the debts. Indeed, the terms of the email were "equally consistent with preserving the right to argue against the enforceability of the debts". His Honour considered that the terms of the email, read with the letter to which it was responding, were "too equivocal to amount to an

> acknowledgment of the loans by [the respondent to the appellant] shown in the 2016 accounts" [231].

The trial judge's conclusion on the outcome of the primary proceedings

[80] The trial judge held that the appellant had acknowledged the debts by executing the 2016 accounts on 11 November 2016 and by filing and serving her affidavit in the oppression proceedings on or about 24 October 2017 [232].

[81] His Honour was therefore of the opinion that, pursuant to s 35(3) of the Act, the respondent's right to sue for the debts was deemed to have accrued on 11 November 2016 and again on 24 October 2017. The primary proceedings were commenced on 19 December 2018. The defence that the limitation period had expired before the commencement of the proceedings failed [233].

[82] Accordingly, as the limitation defence was the sole issue in the primary proceedings, his Honour entered judgment for the respondent [234].

The trial judge's alleged errors

[83] The grounds of appeal specified in the appellant's notice of appeal allege, in essence, that the trial judge made errors as follows.

[84] First, his Honour erred in law in concluding that the 2016 accounts contained an acknowledgment by the appellant of the respondent's claim for the debts and that this acknowledgment was made to the respondent.

[85] Secondly, in the alternative, his Honour erred in law in finding that the 2016 accounts on their face comprised an acknowledgment made to the respondent by the appellant (as debtor) of the appellant's debts to the respondent shown in those accounts.

[86] Thirdly, his Honour erred in law in failing to follow and purporting to distinguish the decision in ***VL Finance***.

[87] Fourthly, his Honour erred in law in concluding that either or both of the 3 July 2017 and 18 August 2017 emails contained an acknowledgment by the appellant of the respondent's claim for the debts.

[88] Fifthly, his Honour erred in law in finding that, by including the 3 July 2017 and the 18 August 2017 emails as exhibits to the appellant's affidavit filed on 24 October 2017 and served on or about that date, that fact comprised an acknowledgment made to the respondent by the appellant (as debtor).

The relevant provisions of the Act, the relevant legislative history and the relevant case law

[89] Section 35(3) of the Act provides, relevantly:

> Where a right of action has accrued to recover a debt or other liquidated pecuniary claim … and the person liable or accountable therefor acknowledges the claim or makes a payment in respect

> thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.

[90] Section 36 of the Act provides:

> (1) Every acknowledgment referred to in section 35 shall be in writing and signed by the person making the acknowledgment.
>
> (2) Any acknowledgment or payment may be made by the agent of the person by whom it is required to be made under section 35 and shall be made to the person or to an agent of the person whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[91] Section 35(3) and s 36, read together, operate in relation to a debt as follows. First, a right of action to recover the debt must have accrued. Secondly, the person liable for the debt must acknowledge the claim. Thirdly, the acknowledgment must be in writing and signed by the person making the acknowledgment. Fourthly, an acknowledgment may be made by the agent of the person liable for the debt. Fifthly, the acknowledgment must be made to the person or an agent of the person whose claim is being acknowledged. Sixthly, if an acknowledgment satisfies the prescribed conditions, the right of action to recover the debt is deemed to have accrued on (and not before) the date of the acknowledgment.

[92] The concept of an acknowledgment of a debt in the context of limitation periods was introduced by s 1 of the *Statute of Frauds Amendment Act 1828* (UK) (Lord Tenterden's Act).

[93] Section 1 provided, relevantly:

> in actions of debt or upon the case grounded upon any simple contract no *acknowledgment or promise* by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such *acknowledgment or promise* shall be made or contained by or in some writing to be signed by the party chargeable thereby; (emphasis added)

[94] Lord Tenterden's Act did not make provision for an acknowledgment of a debt to be signed by an agent of the debtor. A provision to that effect was enacted by s 13 of the *Mercantile Law Amendment Act 1856* (UK).

[95] In ***Hepburn v McDonnell***,[3] the appellant, by his solicitor, sent a letter to the respondent stating that the respondent owed the appellant a specified amount, the respondent had made no attempt to reduce her debt, the appellant required repayment of the amount and interest and any reasonable proposal from the respondent would be considered. The respondent then sent a letter to the appellant stating that she had been surprised to receive the solicitor's letter "re my indebtedness to you". The respondent's letter also stated that "I always knew, and had intended to pay you a certain sum, which I knew I was indebted … I am offering you twenty-six pounds per year until the War is over and when my

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3 ***Hepburn v McDonnell*** [1918] HCA 43; (1918) 25 CLR 199.

daughter is of age we can sell some land which I shall advise them to give you a portion … this is the best offer I can offer at present". In an action brought by the appellant against the respondent to recover indebtedness, including the amount specified in the solicitor's letter, the respondent pleaded the limitation statute and the appellant relied upon the respondent's letter as an acknowledgment in writing of the sum specified in the solicitor's letter. The primary judge held that the respondent's letter did not constitute a sufficient acknowledgment. The High Court allowed the appellant's appeal on the basis that the respondent's letter contained an unconditional acknowledgment to the extent of the amount specified in the solicitor's letter; the respondent's letter did not contradict the implied promise to pay arising from that acknowledgment; and consequently there was a sufficient acknowledgment within Lord Tenterden's Act of the appellant's claim to the extent of the specified amount.

[96] In ***Hepburn***, Isaacs J referred with approval to a line of authority which had decided that an unconditional acknowledgment of a debt implied a promise to pay (208 - 209).

[97] Isaacs J made these observations about the distinction between an "unconditional acknowledgment" and a "promise" (210):

> In ***Green v. Humphreys*** (26 Ch. D., at p. 481) Fry L.J. says: - "In my view an acknowledgment is an admission by the writer that there is a debt owing by him ... In order to take the case out of the Statute there must upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt". That admission, as is seen in ***Maniram's Case*** (L.R. 33 Ind. App., 165), need not mention the amount of the debt and need not even be an unconditional admission of a debt, but it must be an admission of a debt conditionally or unconditionally. And it must, of course, be an admission of the debt sued for. And in order to raise the implication of a promise an admission must be made *as* an acknowledgment. That is, it must be so made as to stand on its own footing, and to be made as an admission. It may be preceded or followed by words which prevent the implication of an unconditional promise or even a conditional promise arising. But the presence of those words does not prevent an admission from being an acknowledgment capable in itself - if it were not qualified - of supporting the implication … On the other hand, if words referring to the debt are used, not by way of an admission but as part of the promise, and in order merely to form and explain the promise, the promise must be taken as it is in fact, and there is then no clear admission from which the implication of a different promise can in law arise. (original emphasis)

[98] In ***Bucknell v Commercial Banking Co of Sydney Ltd***,[4] the appellant was overdrawn on his account with the respondent. The respondent sued the appellant to recover the overdrawn amount. The appellant pleaded the limitation statute. The respondent relied upon a letter written by the appellant to the manager of the respondent's head office as an acknowledgment in writing of the overdrawn amount. The trial judge nonsuited the respondent. The Full Court of the Supreme

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4 ***Bucknell v Commercial Banking Co of Sydney Ltd*** [1937] HCA 35; (1937) 58 CLR 155.

Court of New South Wales set aside the nonsuit and ordered a new trial. The High Court gave the appellant leave to appeal from that decision on the condition that, if the High Court dismissed the appeal, judgment should be entered for the respondent for the amount claimed. The High Court (Dixon and McTiernan JJ; Evatt J dissenting) dismissed the appeal.

[99] Dixon J explained the rules of law and construction which govern the revival by acknowledgment of debts against which the limitation period has run or is running (163 - 164):

> An express promise in writing by the debtor to pay revives his liability. But the liability is revived only according to the tenor of the promise. If it is so expressed as to be conditional or subject to limitations, the conditions must be fulfilled before the liability becomes enforceable and the limitations must be observed. The letter upon which [the respondent] depends contains no express promise either conditional or unconditional, restricted or unrestricted. But, although a document relied upon as an acknowledgment contains no express promise, it may effect a revival of the debtor's liability if there is found in it a distinct admission of the debt. The law implies from an acknowledgment of the existence of the liability a promise to discharge it. Words clearly acknowledging that the writer is liable suffice to raise the implication. But although the promise is implied as an artificial legal consequence of the written admission of liability and is not the result of a search after the true meaning disclosed by the writing, yet if the document in which the admission occurs expresses an intention inconsistent with the making of such a promise or an intention consistent only with the making of a qualified promise, the implication will be rebutted or qualified accordingly. Thus, if the context includes a flat refusal to pay, the admission of liability cannot be made the foundation of an implied promise to discharge the debt. If the admission is accompanied by an express promise to which the writer has attached conditions or limitations in point of time or otherwise, an absolute promise cannot be implied from the acknowledgment of liability, because to imply it would involve an inconsistency, and the creditor obtains no more than a conditional or limited revival of the debt. In the same way if the document in which the admission of liability is found contains an expression of some qualification which is inconsistent with an unconditional or unrestricted promise to pay, the promise implied from the acknowledgment of the debt will be qualified by the condition or limitation expressed.

[100] Dixon J said, with reference to the letter allegedly containing the acknowledgment, that the first step in applying the rules of law and construction which govern the revival by acknowledgment of debts was to determine whether the letter contained "a sufficiently clear or distinct acknowledgment of the existence of the liability" (165).

[101] So, an acknowledgment of a debt, for the purposes of s 35(3) and s 36 of the Act and comparable provisions elsewhere, involves an admission of the debt which on a fair appraisal is clear or distinct, having regard to the whole of the relevant text and

the relevant surrounding circumstances. See Hepburn (209 - 211); Bucknell (163 - 165); ***Giacci v Giacci Holdings Pty Ltd***.[5]

[102] In ***Hipworth***, the High Court considered the proper construction and application of s 304 of the *Property Law Act 1928* (Vic). By s 304, time, for the purposes of the limitation period, began to run again from the date of an "acknowledgment … *given* in writing signed by the person by whom [the money] is payable or his agent to the *person entitled thereto or his agent*" (emphasis added) (339).

[103] The relevant facts of ***Hipworth*** were that a debtor (the appellant) signed a proposal for an adjustment of debts and an accompanying comparison statement and transmitted the signed documents to the proper authority under the *Farmers Debts Adjustment Act 1935* (Vic). A creditor (the respondent) was included among the list of creditors and the amount owing to the respondent was specified as a debt. The *Farmers Debts Adjustment Act* required the proper authority to forward a copy of the proposal for adjustment of debts to each creditor. Ultimately, no adjustment of the appellant's debts was made. Later, the respondent brought an action against the appellant for recovery of the debt. The appellant pleaded that the claim was statute barred. The primary judge held that the defence failed. Judgment was entered for the respondent on his claim. The question in the High Court was whether the acknowledgment evidenced by either document or both documents read together, that were signed by the appellant under the *Farmers Debts Adjustment Act*, was an acknowledgment "given to the creditor or his agent" (341).

[104] Dixon CJ, Webb and Fullagar JJ held that "an admission by a bankrupt in his statement of affairs that a debt is owing to a particular creditor must, if there is no sequestration or the bankruptcy is annulled, be regarded as a sufficient acknowledgment "given to" the creditor concerned, and available as such in subsequent proceedings in which the debtor claims that his debt is barred by a statute which makes time run anew from the date of an acknowledgment given by him to the creditor" (344). Their Honours explained that although the admission is not made directly to the creditor, the admission is made "with the intention that it shall be communicated to the creditor and for the purpose of enabling a compromise of rights as between all creditors" (344). Their Honours added that, "[h]aving that intention and that purpose, [the admission] is fairly and properly regarded as a statement made to each and every creditor" (344).

[105] Their Honours held that no distinction could be drawn between an admission made in abortive insolvency or bankruptcy proceedings and an admission in abortive proceedings under the *Farmers Debts Adjustment Act* (344). Their Honours elaborated (344):

> The official who receives the "Proposal for Adjustment" is directed by s. 19 of the Act to communicate it to all the creditors. Admissions contained in the proposal must be regarded as made with the intention that they shall be communicated to the creditors concerned. It seems correct, and in accord with authority, to regard them as acknowledgments given to the creditors.

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5 ***Giacci v Giacci Holdings Pty Ltd*** [2010] WASCA 233 [36] (Newnes JA; Martin CJ agreeing), [60] (Murphy JA; Martin CJ agreeing).

[106] Dixon CJ, Webb and Fullagar JJ distinguished the case before them from the case of a will or of an executor's affidavit for probate on the basis that neither a will nor an executor's affidavit is made "for the purpose, or with the intention, of its being communicated to creditors" (344).

[107] In my opinion, ***Hipworth*** is authority for the proposition that if a debtor clearly or distinctly admits a debt and the admission is not made directly to the creditor, the admission will not be given or made to the creditor, for the purposes of s 304 of the *Property Law Act 1928* (Vic) and comparable provisions elsewhere, unless the admission was made with the intention that it should be communicated to the creditor. The existence of the requisite intention is to be determined objectively from the relevant document or documents, having regard to the whole of the relevant text and the relevant surrounding circumstances. Ordinarily, as a matter of fact, whether the requisite intention exists will be a matter of inference.

[108] Section 23(4) of the *Limitation Act 1939* (UK) superseded s 1 of Lord Tenterden's Act. Section 23(4) provided, relevantly:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim … and the person liable or accountable therefor *acknowledges* the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the *acknowledgment* or the last payment. (emphasis added)

[109] Section 23(4) was identical in substance to s 35(3) of the Act.

[110] Section 24 of the *Limitation Act 1939* (UK) provided:

> (1) Every such *acknowledgment* as aforesaid shall be in writing and signed by the person making the *acknowledgment*.
>
> (2) Any such *acknowledgment* or payment as aforesaid may be made by the agent of the person by whom it is required to be made under the last foregoing section, and shall be made to the person, or to an agent of the person, whose title or claim is being *acknowledged* or, as the case may be, in respect of whose claim the payment is being made. (emphasis added)

[111] Section 24 was identical in substance to s 36 of the Act.

[112] The text of s 23(4) and s 24 of the *Limitation Act 1939* (UK) (and the text of s 35(3) and s 36 of the Act) was different from the text of s 1 of Lord Tenterden's Act in that the *Limitation Act 1939* (UK) (and the Act) referred to an "acknowledgment" whereas Lord Tenterden's Act referred to an "acknowledgment or promise". However, this textual difference did not effect any alteration of substance in that an "acknowledgment", within the statutes, has been construed to imply a promise to pay the debt and to involve an admission that the debt is outstanding and unpaid.

[113] In ***In re Gee & Co (Woolwich) Ltd***,[6] the balance sheet of a company as at 31 December 1965, which was signed by the directors on 24 November 1966 and approved by them at a board meeting on that date, recorded as a liability of the

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6 ***In re Gee & Co (Woolwich) Ltd*** [1975] Ch 52.

company: "Loan account - Estate [of E] deceased £6,857 3s 0d". The balance sheet was also approved at a general meeting of the company on the same day. The principal issue in the proceedings was whether the balance sheet operated as a written acknowledgment, for the purposes of s 23(4) of the *Limitation Act 1939* (UK). It was submitted by the liquidator of the company that the balance sheet was not an effective acknowledgment because the balance sheet did not acknowledge the existence of a debt subsisting when the balance sheet was signed. Brightman J held that a balance sheet of a company, if duly signed by the directors, was capable of being an acknowledgment, within s 23(4), of the state of indebtedness as at the date of the balance sheet and, in an appropriate case, the cause of action will be deemed to have accrued at the date of the balance sheet, that being the date to which the directors' signatures relate (70 - 71).

[114] In ***Re Compania de Electricidad de la Provincia de Buenos Aires Ltd***,[7] Slade J followed Brightman J's reasoning in ***In re Gee***. Slade J observed (193 - 194):

> A company's balance sheet must in my judgment be regarded as implicitly addressed to (among other persons) those creditors whose debts are referred to in it. It follows that in my judgment … an effective "acknowledgment" of a debt must be said to have been "made" by the company to any creditor who can establish by appropriate evidence that (i) he has actually received, from whatever source, a copy of a balance sheet of the company, signed by directors of the company and referring to "sundry creditors"; (ii) he is one of the "sundry creditors" so referred to. In such circumstances the balance sheet of the company would constitute an effective acknowledgment of the relevant debt, not as at the date on which it was actually signed by the directors or received by the creditor, but as at the date of the balance sheet, being the date to which the signature of the directors related; and the cause of action would be deemed to have accrued at that date: see ***In re Gee & Co. (Woolwich) Ltd.*** [1975] Ch. 52, 71, *per* Brightman J.

[115] In ***The Stage Club Ltd v Millers Hotels Pty Ltd***,[8] the respondent sued the appellant for the recovery of $27,236.21 as money lent or paid by the respondent to the appellant. The appellant pleaded that the limitation period in respect of the respondent's claim had expired before the commencement of the proceedings. The respondent relied upon entries in the appellant's 1970 and 1971 balance sheets which showed the respondent as a secured creditor for $27,236.21. The balance sheets had been signed by two directors of the appellant, confirmed by the appellant's auditor and adopted at a general meeting of the appellant. The trial judge gave judgment for the respondent and his decision was upheld by the Court of Appeal of New South Wales. A majority of the High Court (Murphy, Aickin and Wilson JJ; Gibbs CJ and Brennan J dissenting) dismissed the appellant's appeal.

[116] The *Limitation Act 1969* (NSW) was the relevant statute. Section 54(1) provided that "[w]here, after a limitation period fixed by or under this Act for a cause of action commences to run but before the expiration of the limitation period, a person against whom … the cause of action lies confirms the cause of action, the time

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7 ***Re Compania de Electricidad de la Provincia de Buenos Aires Ltd*** [1980] Ch 146.

8 ***The Stage Club Ltd v Millers Hotels Pty Ltd*** [1981] HCA 71; (1981) 150 CLR 535.

during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for an action on the cause of action by a person having the benefit of the confirmation against a person bound by the confirmation". By s 54(2)(a), for the purposes of s 54, "a person confirms a cause of action if, but only if, he … acknowledges, to a person having … the cause of action, the right or title of the person to whom the acknowledgment is made". By s 11(2)(c), "a thing done to or by or suffered by an agent is done to or by or suffered by his principal".

[117] In ***The Stage Club***, Wilson J (with whose reasoning Murphy J expressed his "substantial agreement") referred to ***Hepburn*** and ***Bucknell*** and made these comments about those cases (560 - 561):

> In each case the question was whether a letter written by the debtor to the creditor constituted an acknowledgment under the rules of law and construction associated with the *Statute of James and Lord Tenterden's Act*. In both cases there is the recognition that under the old law the extension of liability resulted from the existence of a new promise to pay the debt which was either explicit or implicit in the admission of the debt: see per Isaacs J. in ***Hepburn*** ((1918) 25 CLR, at pp 207-209); per Dixon J. in ***Bucknell*** ((1937) 58 CLR, at p 163); and cf. ***Spencer v. Hemmerde*** ([1922] 2 AC 507). Both Isaacs J. and Dixon J. make it clear that the precise extent of the acknowledgment will depend on the circumstances, the admission of the debt and the consequent implied promise being capable of qualification or condition. In other words, the "liability is revived only according to the tenor of the promise" (per Dixon J. in ***Bucknell*** ((1937) 58 CLR, at p 163)), thereby allowing considerable flexibility in the application of the doctrine to particular circumstances.

[118] Later in his reasons, Wilson J addressed three propositions on which the appellant's case rested.

[119] The appellant's first proposition was that the balance sheets were not signed by the debtor company or its agent. It was common ground between the parties that if either of the two balance sheets answered the description of an acknowledgment, within s 54, the respondent was entitled to succeed. The appellant relied on s 162(12) of the *Companies Act 1961* (NSW), as it existed before its amendment in 1971, which required that every balance sheet shall be accompanied by a statement signed "on behalf of the directors" by two directors of the company. The appellant argued that the statement was signed, not on behalf of the company, but on behalf of the directors. Wilson J resolved the appellant's first proposition as follows (562):

> [I]n my opinion [s 162(12)] does not deny the collective agency of the board of directors in the management of the company. It merely prescribes the procedure by which the board will discharge its responsibility in relation to the balance sheet, without undermining in any way the character of the document, when signed, as the company's document. I can see no reason in the present case to doubt that the balance sheets were written documents signed by [the appellant's] agent. Such a conclusion is consistent with every one of the balance sheet cases determined in England during the present

> century, for in none of those cases is there any suggestion that the signature of directors does not bind the company save where a particular director is disqualified by interest.
>
> This is not a case where [the respondent] can rely on the signature of the auditor, because there is nothing to show that he has signed otherwise than in his statutory character.

[120] The appellant's second proposition was that, to be an effective confirmation of a debt, the writing must acknowledge that there was a presently subsisting debt at the date on which it was signed. Wilson J resolved the appellant's second proposition as follows (563 - 566):

> A balance sheet is essentially an historical document, recording the financial affairs of the company as at the date which it bears. Section 162(12) of the *Companies Act* requires the balance sheet to be accompanied by a statement affirming that it exhibits a true and fair view of the state of affairs of the company as at the end of the period to which the accounts relate. Unless something is added to that statement to declare the position as it stands at the date when the statement is signed, I am unable to see how the balance sheet can be said to acknowledge a liability existing at the date when the directors sign the statement or at the date when the general meeting adopts it (cf. ***Bertram's Case*** ([1965] A.C., at p. 485)).
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> …
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> It is established that after the enactment of the *Limitation Act* 1939 it was no longer necessary in England to look for a promise to pay: ***Preston and Newsom***, p. 227; and cf. ***In re Compania de Electricidad*** ([1980] 1 Ch., at p. 193). From that time it has been sufficient to inquire whether the document in question constitutes an acknowledgment within the meaning of the Act. The same is true, in my opinion, of the position in New South Wales with the coming into operation of the *Limitation Act* 1969.
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> …
>
> There is no reference in [either the *Limitation Act* 1939 (UK) or the *Limitation Act* 1969 (NSW)] to the date of the signature. In the former Act, the phrase in s. 23(4) is "the date of the acknowledgment"; in the latter, "the date of the confirmation" (s. 54(1)). In my opinion, these phrases are ambiguous. I draw no distinction between them. The phrase can refer to the date on which the acknowledgment or confirmation is made, that is, the date on which the writing is signed. Alternatively, it can refer to the date to which the acknowledgment or confirmation relates, that is, the date as at which the liability is acknowledged to exist. I do not find the question to have been authoritatively answered in any previous case, although the line of cases holding that the entry of a liability in a balance sheet is capable of constituting an acknowledgment is persuasive of a conclusion against [the appellant] because a balance sheet is of its nature an historical document.

> …
>
> I am unable to find any reason, either in principle or relevant authority, or, indeed, in terms of expediency, to favour the view that to be effective a writing must acknowledge a liability which is presently subsisting at the date on which the writing is signed. Having regard to the multiplicity of circumstances that may arise, such a view is arbitrary and unnecessarily restrictive. It would be a rule which performed no useful purpose.
>
> In my opinion, therefore, the Act on its proper construction yields the conclusion that an acknowledgment may refer to a liability which existed on a date prior to the date on which the acknowledgment is signed.

[121] The appellant's third proposition was that there had been no acknowledgment to the creditor or his agent. A Mr Walker was a member and director of the appellant. He was also the chief executive of the respondent. Mr Walker was present at each of the 1970 and 1971 annual general meetings of the appellant where the respective balance sheets were adopted. Mr Walker, and other members of the appellant who were present at each of those annual general meetings, received at the meeting a copy of the balance sheet for the year in question. Wilson J resolved the appellant's third proposition as follows (566):

> [T]his is an area where flexibility in approach is evident: see ***Hipworth v. Mahar*** ((1952) 87 CLR 335), and ***In re Compania de Electricidad*** ([1980] 1 Ch. 146). [The appellant] argues that the balance sheets were given to Mr Walker in his capacity as a member of [the appellant], and not as agent for [the respondent]. In my opinion, it clearly emerges from the cases which I have reviewed that the absence of an intention on the part of the debtor to communicate to the creditor or his agent is immaterial so long as the document is actually delivered to him. In any event, in my opinion there was sufficient evidence before [the trial judge] to support the findings of fact which he made in this regard, and which support the conclusion that the delivery of the balance sheets to Mr. Walker was a communication to [the respondent].

[122] It is apparent that Wilson J (Murphy J agreeing) considered that the absence of an intention by the debtor to communicate an acknowledgment to the creditor is immaterial provided that the document containing the acknowledgment is actually delivered to the creditor (566).

[123] In ***The Stage Club***, Aickin J said that the critical issue was whether s 54 of the *Limitation Act 1969* (NSW) required that a "confirmation" of a cause of action by acknowledgment in writing must refer to, for example, a sum of money owing when the acknowledgment is made, or may refer to a sum of money owing at some earlier date (549). His Honour referred to the judgment of Brightman J in ***In re Gee***, Aickin J then said (552):

(a) the view that "an acknowledgment should relate to the date to which it expressly or impliedly refers would accommodate ordinary trading and personal arrangements and have an operation which would be certain rather

than uncertain", and there was nothing in the *Limitation Act 1969* (NSW) to negative that view; and

(b) he agreed with Brightman J's reasons in ***In re Gee***, and those reasons were equally applicable to the New South Wales statute.

[124] In ***The Stage Club***, Gibbs CJ stated that there was "no doubt that the directors signed the balance sheets in pursuance of their duty as directors, but that [did] not mean that [the directors] did not sign as agents for [the appellant]" (543). His Honour elaborated (543):

> The directors of a company are its agents, and the balance sheet is a statement by the company of the state of its assets and liabilities. The directors who sign a balance sheet do so as agents of the company.

Although his Honour dissented in ***The Stage Club***, his Honour was not in dissent in relation to that statement.

[125] Gibbs CJ noted that it had been held consistently, in a line of English cases, that a balance sheet may constitute a sufficient acknowledgment of debts recorded in it, apart from debts owed to the persons signing the balance sheet (543). His Honour said that, where the claim is for payment of a debt, "an acknowledgment, to be sufficient, must recognize the present existence of the debt" (544). His Honour agreed with Lord Denning MR's statement in ***Good v Parry***[9] that there is no acknowledgment of a debt unless there is "an admission that there is a debt … outstanding and unpaid" (544). His Honour was not in dissent in relation to that issue. See also ***Woodhouse v Woodhouse***.[10]

[126] Gibbs CJ was of the opinion that it was proper to infer, on the facts of the case before him, that the appellant intended that Mr Walker should receive the balance sheets as agent for the respondent as well as in his individual capacity as a shareholder (548). It was therefore unnecessary for his Honour to consider the correctness of the view expressed by Slade J in ***In re Compania de Electricidad*** that the balance sheet of a company must be regarded as implicitly addressed to, amongst others, those creditors whose debts are referred to in the balance sheet (548).

[127] In ***The Stage Club***, Brennan J, who dissented, made these observations about the communication of an acknowledgment to the creditor (579):

> An acknowledgment is "made to" a creditor by his debtor if the debtor adopts some means, direct or indirect, with the intention of communicating the acknowledgment thereby to the particular creditor or to his creditors generally; but it is not sufficient to furnish a document containing the acknowledgment to a third party without intending that that acknowledgment be communicated to the particular creditor or to creditors generally. A public right of access to an acknowledgment lodged with the Corporate Affairs

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9 ***Good v Parry*** [1963] 2 QB 418, 423.

10 ***Woodhouse v Woodhouse*** [2022] NSWSC 204 [173] (Ward CJ in Eq). Her Honour's judgment was reversed by the Court of Appeal of New South Wales, but her Honour's observations concerning the acknowledgment of a debt were not disapproved.

> Commission without more does not give rise to an inference that the debtor intended that acknowledgment to be communicated to any who have or might exercise that right of access. There is no evidence that [the appellant] intended to communicate to [the respondent] an acknowledgment of its liability, either by sending a copy of its balance sheet to Mr. Walker as a member of [the appellant] or by lodging its annual return with the Corporate Affairs Commission.

[128] In ***Good***, Lord Denning said that, as a result of the enactment of the *Limitation Act 1939* (UK), "there is no necessity to look for a promise, express or implied" and "[t]here need only be an acknowledgment of a debt or other liquidated amount" (423). See also ***Surrendra Overseas Ltd v Government of Sri Lanka***.[11]

[129] In ***OLI 1 Pty Ltd (in liq) v OLG 1 Pty Ltd (No 2)***,[12] Chen J accepted that the existence of a loan from the creditor (OLI) to the debtor (OLG) was recorded in OLG's 2016 financial report and that this constituted an acknowledgment within s 54(2)(a) of the *Limitation Act 1969* (NSW). His Honour noted that it had been accepted in ***The Stage Club*** and later Australian cases that an entry in a financial report of a corporation which records the corporation's debt has been recognised as constituting an admission and, therefore, an acknowledgment of indebtedness.

[130] As I have mentioned, in ***The Stage Club*** the respondent relied upon entries in two balance sheets. The parties were agreed that if either of the two balance sheets contained an acknowledgment, within s 54, the respondent was entitled to succeed. The earlier balance sheet was signed by two directors, neither of whom was the person seeking to rely upon the acknowledgment of debt. However, the later balance sheet was signed by two directors, one of whom was the person seeking to rely upon the acknowledgment of debt. Wilson J mentioned that the later balance sheet raised the question of personal disqualification referred to in ***In re Coliseum (Barrow) Ltd***[13] and ***In re Transplanters (Holding Company) Ltd***.[14] His Honour noted that if the respondent had relied solely upon the later balance sheet it would have been necessary to consider whether the signature of the other director (who was not seeking to rely upon the acknowledgment of debt) was sufficient to satisfy the requirement in s 54(4) that the acknowledgment "be signed by the maker" (561 - 562). However, it was unnecessary to decide that point because of the respondent's reliance upon the first balance sheet. See also ***In re Brookers (Australia) Ltd (in liq)***;[15] ***Fischer v Nemeske Pty Ltd***.[16]

[131] The requirement in s 54(2)(a)(i) of the *Limitation Act 1969* (NSW) that an acknowledgment must be made "to a person having … the cause of action" will be satisfied if the acknowledgment is made to a liquidator of the creditor. See ***General Credits Ltd v Wenham***;[17] ***Woo v Woo***;[18] ***OLI 1*** [200].

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11 ***Surrendra Overseas Ltd v Government of Sri Lanka*** [1977] 1 WLR 565, 574 (Kerr J).

12 ***OLI 1 Pty Ltd (in liq) v OLG 1 Pty Ltd (No 2)*** [2022] NSWSC 1199; (2022) 164 ACSR 171 [198].

13 ***In re Coliseum (Barrow) Ltd*** [1930] 2 Ch 44.

14 ***In re Transplanters (Holding Company) Ltd*** [1958] 1 WLR 822.

15 ***In re Brookers (Australia) Ltd (in liq)*** (1986) 41 SASR 380, 385 - 386 (King CJ; Mohr J agreeing), 396 - 397 (Olsson J; Mohr J agreeing).

16 ***Fischer v Nemeske Pty Ltd*** [2015] NSWCA 6 [111] - [113] (Barrett JA; Beazley P & Ward JA agreeing).

17 ***General Credits Ltd v Wenham*** (1989) 18 NSWLR 570, 576 (Meagher JA; Kirby P & Mathews AJA agreeing).

18 ***Woo v Woo*** [2010] NSWSC 1216 [95] (Bryson AJ).

[132] In ***VL Finance***, litigation arose out of loans alleged to have been made by Legudi Freehold Properties Pty Ltd to the defendants. The issues in the litigation were the existence of the loans and whether the loans were statute barred. The defendants denied the existence of the debts. Alternatively, the defendants alleged that if they did incur the debts, the debts were statute barred pursuant to s 5(1)(a) of the *Limitation of Actions Act 1958* (Vic). The plaintiff (VL Finance Pty Ltd), who was the assignee of the debts, contended that the writ of summons claiming the indebtedness was issued within the limitation period. Alternatively, the plaintiff contended that the 1994 Annual Return of Legudi Freehold Properties Pty Ltd, which was signed by one of the defendants in his capacity as a director and lodged with the Australian Securities and Investments Commission, showed current debtors totalling $2,876,883, and that total amount included the indebtedness that was due and payable to the company by the defendant/director who had signed the annual return. Later, Legudi Freehold Properties Pty Ltd went into liquidation. The liquidator purported to assign to the plaintiff the indebtedness of the defendants. The plaintiff gave notice of the assignment to the defendants, demanded payment of the debts and, when the demands were not met, commenced the proceedings.

[133] Section 24(3) of the *Limitation of Actions Act 1958* (Vic) provided, relevantly, that where any right of action has accrued to recover any debt, and the person liable for the debt acknowledges the claim, the right "shall be deemed to have accrued on and not before the date of acknowledgment". Section 25(1) provided, relevantly and in effect, that an acknowledgment for the purposes of s 24(3) must be in writing and must be signed by the person making the acknowledgment. Section 25(2) provided, relevantly and in effect, that an acknowledgment for the purposes of s 24(3) may be made by the agent of the person by whom it is required to be made under s 24(3) and must be made to the person, or to the agent of the person, whose claim is being acknowledged.

[134] Nettle J made these observations in the course of dealing with the plaintiff's contention that the 1994 Annual Return of Legudi Freehold Properties Pty Ltd constituted an acknowledgment which caused time to start running again [60]:

(a) what constitutes an acknowledgment is a question of construction; and

(b) although an acknowledgment must be in writing, must be signed by the debtor or his agent and must be "given to the creditor", the acknowledgment need not specify the amount of the debt precisely (provided that the amount is ascertainable from extrinsic evidence) and an acknowledgment may comprise a number of documents.

[135] His Honour noted that the requirement that an acknowledgment be "given to the creditor" is difficult to define precisely [61]. His Honour elaborated [61] - [62]:

> As the authorities now stand, it [is] no longer necessary that an acknowledgment be sent or delivered to the creditor (***Jones v Bellgrove***, supra; ***Stage Club Ltd v Millers Hotels Pty Ltd*** (1981) 150 CLR 535, 566). But it remains that it must expressly or implicitly be "addressed to the creditor" (***In re Compania de Electridad [sic]*** [1980] 1 Ch 146, 193 - 4; ***Hipworth v Maher*** (1952) 87 CLR 335, 344), and it is here that problems arise. Thus, whereas in England it has been held that a list of a testator's debts in an executor's affidavit for probate is not an acknowledgment given to

> the testator's creditors (because it is not addressed to the creditors) (***In Re Beavan*** [1912] 1 Ch 196, 205; ***Lloyd v Coote*** [1915] 1 KB 242, 246), it has been held in Ireland that an acknowledgment in a will can be treated as an acknowledgment (because it is in substance expressive of the debtor's intention to admit the debt to the creditor) (***Millington v Thompson*** [1852] 3 Ir Ch R 236, 238; ***Howard v Hennessy*** [1947] IR 336, 338). Again, whereas early English authority has it that the recital of a debt in a deed between debtor and creditor is not an acknowledgment of the debt (***Batchelor v Middleton*** (1848) 6 Hare 75; 67 ER 1088; cf ***Howcuff v Bonser*** (1839) 3 Ex 491; 154 ER 939), later English authority is to the effect that facts stated in pleadings and affidavits in previous proceedings between debtor and creditor can constitute an acknowledgment (because, although they are made to the court, they are implicitly addressed to the creditor) (***Flyn v Flyn*** [1969] 2 Ch 403, 411).
>
> More recently, it has been held in England that a withholding tax certificate signed by a debtor is an acknowledgment (because, although its preparation is required by the revenue law, it is prepared for the benefit of the creditor in respect of whom the tax is deducted) (***Dungate v Dungate***, supra); it has been held in Australia that a proposal for the adjustment of debts under a rural reorganisation plan is an acknowledgment of the debts (because, although the proposal is for submission to the registrar of the plan, it is the intent of the plan that the registrar furnish affected creditors with a copy of the proposal) (***Hipworth v Maher***, supra); and it has been held in both England and Australia that a company's balance sheet may constitute an acknowledgment of the company's indebtedness to the creditors shown in the balance sheet (because it must be taken that the balance sheet is prepared for use by creditors) (***Jones v Bellgrove***, supra; ***Stage Club Ltd v Millers Hotels Pty Ltd***, supra). But it has also been held in England that a record in a building society's accounts of the amount of a deposit is not an acknowledgment (because it is not given to the depositor) (***Wilson v Walton*** (1903) 22 TLR 408, 409).

[136] Nettle J noted that the reasoning throughout the cases he had cited at [61] - [62] was "hardly constant" and that some of the earlier decisions "may now be doubted in light of later decisions" [63]. His Honour concluded that the trend of authority appeared to favour "a relaxation of the requirements of an acknowledgment and therefore of treating as acknowledgments an increasing array of documents signed by or on behalf of a debtor" [63]. His Honour then said [63]:

> But while there is now high authority in Australia that a debtor need not intend to communicate an acknowledgment to the creditor or his agent (it is enough that the acknowledgment is actually communicated to the creditor) (***Stage Club Ltd v Millers Hotels Pty Ltd*** at 566), it remains the position in Australia as it is in England that a document does not constitute an acknowledgment unless it is in substance expressive of the debtor's intention to admit the debt and to have the document produced and used for that purpose (***Hipworth v Maher, supra*** at 345; ***Jones v Bellgrove, supra***).

[137] ***Hipworth*** at 345 does not support the proposition advanced by Nettle J towards the end of that passage. Dixon CJ, Webb and Fullagar JJ did not state at 345 that a document does not constitute an acknowledgment unless it is in substance expressive of the debtor's intention to admit the debt and to have the document produced and used for that purpose. However, I consider that ***Hipworth*** is authority for the proposition that if a debtor clearly or distinctly admits a debt and the admission is not made directly to the creditor, the admission will not be given or made to the creditor, for the purposes of s 35(3) and s 36 of the Act and comparable provisions elsewhere, unless the admission was made with the intention that it should be communicated to the creditor. See [107] above.

[138] Nettle J held that an annual return of a company is not capable of constituting an acknowledgment by the directors of the company (including a director who signs the annual return) of debts which the directors (including a director who signs the annual return) owe to the company [67]. His Honour elaborated [67]:

> It may perhaps be an acknowledgment by the company (in the same way that a balance sheet may be an acknowledgment by the company), because it may be supposed that the return is intended for use by the company's creditors. But I do not consider that it is an acknowledgment by the directors, because in my view it cannot be supposed that the return is made out to be used by the directors' creditors. The return is not made to the company. It is made by the company. Nor is the return prepared for the use and consideration of the company. It is designed and prepared for the use of others. Moreover, even if all the directors of the company are under a personal obligation to ensure that the return is made out and filed, I do not consider that the return is expressive of an intention on the part of the directors to admit such of their debts to the company as are shown in the return and to have the return produced by the company and used for that purpose. Therefore, regardless of whether the return comes to the attention of the company, I am unable to see that it is an acknowledgment made to the company.

[139] His Honour therefore decided that the 1994 Annual Return of Legudi Freehold Properties Pty Ltd was not an acknowledgment for the purposes of s 24(3) of the *Limitation of Actions Act 1958* (Vic).

[140] In ***In re Flynn, (decd) (No 2)***,[19] the applicant claimed to be the owner and holder of a promissory note which was given by the deceased, Mr Flynn, in return for a payment to him of US$75,000. The promissory note became due for payment in June 1958. An action was begun in a New York court in October 1958 for recovery of the money. In October 1959 (before judgment was given) Mr Flynn died. In December 1961, formal judgment was entered for the applicant in the New York court against temporary administrators in respect of Mr Flynn's estate. In December 1964, an administration order was made in the High Court in England. Notice was given to the applicant to prove its claim against Mr Flynn's estate. Mr Flynn's personal representatives resisted the claim on the ground that it was statute barred. The applicant contended, relevantly, that Mr Flynn's written pleading in answer to the applicant's claim in the New York action, as signed by Mr Flynn's

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19 ***In re Flynn (decd) (No 2)*** [1969] 2 Ch 403.

attorneys and lodged or delivered by the attorneys in June 1959, constituted sufficient acknowledgment for the purposes of s 23(4) and s 24(2) of the *Limitation Act 1939* (UK).

[141] Buckley J said that, in deciding whether a pleading in fact contains an acknowledgment, it is necessary to read the pleading as a whole and to construe it in accordance with the ordinary rules of construction (411).

[142] His Lordship made these observations about whether a pleading in the nature of confession and avoidance may constitute an acknowledgment (412):

> [I]n my judgment, the authorities … establish the principle that the acknowledgment properly interpreted must be an acknowledgment of liability on the part of the person making the acknowledgment, and not merely an acknowledgment of certain facts which, taken in isolation, would give rise to a liability but which are alleged by the person who is said to have given an acknowledgment not to give rise to a liability by reason of other surrounding circumstances. [The applicant] has contended that where one has a pleading in the nature of confession and avoidance, the confession can be taken as being an acknowledgment for the purposes of the statute, the avoidance being disregarded; but in my judgment that cannot be right. The whole burden of the pleading relied upon in the present case is that the deceased was not liable to [the applicant]. It is true that one finds in the pleading an admission that the deceased gave the promissory note and that no part of the moneys referred to in it have been paid, and I am satisfied also that by implication one must find in the document an indication that [the applicant] advanced 75,000 dollars to the deceased by way of loan. Nevertheless, the whole purpose of the defence is to say that, notwithstanding those circumstances, liability is denied. Although the grounds relied upon for denying liability carried no weight with the New York court, it seems to me impossible in those circumstances to treat that document as being an acknowledgment of the debt. Accordingly, in my opinion, no reliance can be placed upon that answer or upon the confirmatory affidavit which verified it as amounting to an acknowledgment for the purposes of section 23 of the Limitation Act, 1939.

[143] In ***Australian Executor Trustees Ltd v Lokit Investments Pty Ltd***,[20] Lyons J considered the principles to be applied in determining whether a pleading in previous proceedings between debtor and creditor constituted an acknowledgment for the purposes of s 24(3) of the *Limitation of Actions Act 1958* (Vic).

[144] His Honour said, in essence [98]:

(a) the question whether a document constitutes an acknowledgment involves a question of construction with each case turning on its own facts: ***VL Finance*** [60];

(b) facts stated in a pleading in previous proceedings between debtor and creditor can constitute an acknowledgment in that, although a debtor's pleading is

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20 ***Australian Executor Trustees Ltd v Lokit Investments Pty Ltd*** [2023] VSC 141.

"made to the Court", the pleading is implicitly addressed to the creditor: ***VL Finance*** [61]; and

(c) nevertheless, a document (including a pleading in previous proceedings between debtor and creditor) does not constitute an acknowledgment "unless it is in substance expressive of the debtor's intention to admit the debt and to have the document produced and used for that purpose": ***VL Finance*** [63].

See, in relation to his Honour's statement at [144](c) above, based on ***VL Finance*** [63], my observations at [107] and [137] above.

[145] Lyons J made these additional comments [100]:

(a) in considering whether a pleading does in fact contain an acknowledgment, the pleading must be read as a whole and construed in accordance with the ordinary rules of construction to ascertain the meaning of its language: ***In re Flynn*** (411); and

(b) the acknowledgment must be an admission that the debt is currently due or may prospectively be due (for example, due upon demand) when the acknowledgment is made, and not that it was due at some time in the past: ***The Stage Club*** 547 (Gibbs CJ), 573 (Brennan J).

Did the trial judge err in law in concluding that the 2016 accounts contained an acknowledgment by the appellant of the respondent's claim for the debts and that this acknowledgment was made to the respondent?

[146] Crowe Horwath prepared the 2016 accounts. The respondent was Crowe Horwath's client.

[147] The 2016 accounts recorded that during each year between the year ended 30 June 2005 and the year ended 30 June 2009 the respondent made loans to the appellant. The amount of those loans was recorded in Note 6 to the 2016 accounts. The trial judge found that the appellant incurred debts to the respondent as recorded in Note 6.

[148] The total indebtedness due from the appellant to the respondent, as recorded in the 2016 accounts, was $686,797. His Honour found that the 2016 accounts also recorded a debt due from the respondent to the appellant of $55,521. Accordingly, the net amount of the appellant's indebtedness to the respondent was $631,276. That was the amount of the respondent's claim against the appellant in the primary proceedings. The respondent did not dispute that it owed the $55,521 to the appellant.

[149] Note 1 to the 2016 accounts, as set out at [22] above, stated, relevantly, that the financial statements had been prepared "for use by directors and the member [sic]".

[150] The 2016 Directors' Declaration on page 13 of the 2016 accounts was signed by each of the appellant and Mr Verschoyle. Each of them signed adjacent to the typewritten description "Director". The declaration was dated 11 November 2016. In the 2016 Directors' Declaration the appellant and Mr Verschoyle declared, relevantly, that the financial statements and notes presented fairly the respondent's financial position as at 30 June 2016 and its performance for the year ended on that date.

[151] In the Compilation Report on page 14 of the 2016 accounts Mr Collins, a principal of Crowe Horwath, stated, relevantly, that:

(a) Crowe Horwath had compiled the financial statements of the respondent for the year ended 30 June 2016;

(b) the directors of the respondent were solely responsible for the information contained in the financial statements; and

(c) the financial statements had been compiled exclusively for the benefit of the directors of the respondent.

[152] A balance sheet in a corporation's financial statements can constitute an acknowledgment by the corporation of the corporation's debts to the creditors shown in the balance sheet, for the purposes of s 35(3) and s 36 of the Act, at least where:

(a) the balance sheet is signed by the directors; and

(b) the corporation does not owe the debts in issue to the directors who signed the balance sheet.

See ***In re Gee*** (70 - 71); ***In re Compania de Electricidad*** (193 - 194); ***The Stage Club*** (543, 561 - 566).

[153] The directors who sign the balance sheet attach their signatures pursuant to their duty as directors but also as the agents of the corporation. See ***The Stage Club*** (543 - 544, 561 - 562).

[154] The acknowledgment of the debt will be made as at the date of the balance sheet, and not as at the date on which the directors sign the balance sheet, and not as at the date on which the creditor receives a copy of the balance sheet. See ***In re Gee*** (70 - 71); ***In re Compania de Electricidad*** (193 - 194); ***The Stage Club*** (551 - 552, 565 - 566).

[155] The case law in relation to the balance sheet of a corporation has been concerned with debts owing by the corporation and with whether the balance sheet constitutes an acknowledgment by the corporation to creditors, within the applicable limitation statute, of the corporation's debts.

[156] By contrast, the critical question in the present case is whether the appellant, by signing the 2016 Directors' Declaration on page 13 of the 2016 accounts, acknowledged in writing the respondent's claim for the debts, within s 35(3) and s 36 of the Act.

[157] The critical question in the present case is therefore materially different on the facts from the critical question in cases such as ***In re Gee***, ***In re Compania de Electricidad*** and ***The Stage Club***.

[158] Where a person signs an agreement in which a corporation is named as a party and the person's status as a director of the corporation is stated in the agreement next to his or her signature, the person will invariably be held to have signed the agreement in his or her capacity as a director of the corporation for the purpose of binding the

corporation. See ***Trotter v Avonmore Holdings Ltd***.[21] A person may, however, sign an agreement in a dual capacity. Although there is a presumption that, if a person purports to sign on behalf of a corporation, he or she is signing solely in that capacity, the presumption may be displaced by the clear words of the agreement or by extrinsic evidence from which the person's intention, when attaching his or her signature, may be inferred objectively. See ***Young v Schuler***;[22] ***Elpis Maritime Co Ltd v Marti Chartering Co Inc***;[23] ***Doughty Pratt Group Ltd v Perry Castle***;[24] ***Vuletic v Contributory Mortgage Nominees Ltd***.[25]

[159] At the material time, the respondent was a "small proprietary company" as defined in s 45A(2) of the *Corporations Act*. At the material time, the provisions of the *Corporations Act* with respect to annual financial reports and directors' reports were contained in div 1 of pt 2M.3. Division 1 comprised s 292 to s 301. At the material time, s 292(2) of the *Corporations Act* provided that a small proprietary company had to prepare a financial report and a directors' report for each financial year only if at least one of the conditions specified in s 292(2) was satisfied.

[160] At the material time, s 295 of the *Corporations Act* specified the contents of the financial report for a financial year. Section 295(4) provided, relevantly, that the directors' declaration about the financial statements for a financial year and the notes to the financial statements was a declaration by the directors:

(a) whether, in the directors' opinion, there were reasonable grounds to believe that the corporation will be able to pay its debts as and when they become due and payable (para (c)); and

(b) whether, in the directors' opinion, the financial statement and notes are in accordance with the *Corporations Act*, including s 296 (compliance with accounting standards) and s 297 (true and fair view) (para (d)).

[161] At the material time, s 286(1) of the *Corporations Act* provided, relevantly, that every company, including a small proprietary company, must keep written financial records that:

(a) correctly record and explain its transactions and financial position and performance; and

(b) would enable true and fair financial statements to be prepared and audited.

[162] In ***Australian Securities and Investments Commission v Healey***,[26] Middleton J held that the directors have a non-delegable, primary responsibility for a corporation's financial report and the directors' report. Each director must take a diligent interest and have the ability to understand the financial statements and must

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21 ***Trotter v Avonmore Holdings Ltd*** (2005) 8 NZBLC 101,646; [2005] NZCA 192 [28] - [29] (Glazebrook J, delivering the reasons for judgment of the Court of Appeal of New Zealand).

22 ***Young v Schuler*** (1883) 11 QBD 651, 654 - 655 (Brett MR), 655 (Cotton LJ), 655 (Bowen LJ).

23 ***Elpis Maritime Co Ltd v Marti Chartering Co Inc*** [1992] 1 AC 21, 28 31 (Lord Brandon of Oakbrook; Lord Keith of Kinkel, Lord Ackner, Lord Oliver of Aylmerton & Lord Lowry agreeing).

24 ***Doughty Pratt Group Ltd v Perry Castle*** [1995] 2 NZLR 398, 403 - 404 (Hardie Boys J, delivering the reasons for judgment of the Court of Appeal of New Zealand).

25 ***Vuletic v Contributory Mortgage Nominees Ltd*** (2006) 7 NZCPR 552; [2006] NZCA 191 [13] (Chambers J, delivering the reasons for judgment of the Court of Appeal of New Zealand).

26 ***Australian Securities and Investments Commission v Healey*** [2011] FCA 717; (2011) 196 FCR 291 [16] - [22], [124], [132], [139].

inquire about any potential deficiency in the accounts that they observe or should reasonably have observed. Each director is required to have knowledge of conventional accounting practice and the accounting standards relevant to the matter or matters being approved to form the opinion required by s 295(4)(d) of the *Corporations Act*.

[163] At the material time, the respondent was not obliged by s 292(1) of the *Corporations Act* to prepare a financial report and a directors' report for the financial year ended 30 June 2016 because neither of the conditions specified in s 292(2) was satisfied.

[164] Nevertheless, the 2016 accounts were prepared and the 2016 Directors' Declaration on page 13 of the 2016 accounts was signed by each of the appellant and Mr Verschoyle.

[165] As I have mentioned, in the 2016 Directors' Declaration signed by each of the appellant and Mr Verschoyle it was declared that, in accordance with a resolution of the directors of the respondent, the financial statements and notes presented fairly the respondent's financial position as at 30 June 2016 and its performance for the year ended on that date.

[166] I am satisfied that the appellant, by signing the 2016 Directors' Declaration, acknowledged in writing the respondent's claim for the debts, within s 35(3) and s 36 of the Act, in that:

(a) the proper inference in the circumstances is that the appellant intended that the 2016 accounts should be prepared for the respondent and become part of the respondent's "books" (as defined in s 9 of the *Corporations Act*) as its financial statements;

(b) the appellant made a clear or distinct admission that the debts were outstanding and unpaid at the balance date, namely 30 June 2016; and

(c) the proper inference in the circumstances is that the appellant intended to admit the debts and intended that the respondent should rely upon the 2016 accounts for, relevantly, that purpose.

[167] I am of that opinion for the following reasons.

[168] First, by signing the 2016 Directors' Declaration, the appellant declared that the financial statements and notes presented fairly the respondent's financial position at 30 June 2016 and that in the appellant's opinion there were reasonable grounds to believe that the respondent would be able to pay its debts as and when they became due and payable.

[169] Secondly, the current assets of the respondent, as set out in the balance sheet at 30 June 2016, included unsecured loans in the total amount of $1,426,246. Note 6 disclosed that the total amount of the unsecured loans included unsecured loans made by the respondent to the appellant totalling $686,797 (and unsecured loans made by the respondent to Mr Verschoyle totalling $739,449). The net assets of the respondent, as set out in the balance sheet at 30 June 2016, were $737,798.

[170] Thirdly, it is inherent in the appellant's declaration that the financial statements and notes presented fairly the respondent's financial position as at 30 June 2016, that the

appellant must have satisfied herself, in accordance with her general law and statutory duties as a director, that her total indebtedness of $686,797 was outstanding and that she had a liability to the respondent for the $686,797.

[171] Fourthly, it is to be inferred from the appellant's status as a director of the respondent, the obligations of the respondent under s 286(1) of the *Corporations Act*, the terms of the 2016 Directors' Declaration and the appellant having signed the declaration, that the appellant intended that the 2016 accounts should be included in the books of the respondent. The books of a corporation are for its use and consideration.

[172] Fifthly, although the appellant signed the 2016 Directors' Declaration in her capacity as a director of the respondent, the appellant did not merely declare, relevantly, that the respondent's current assets included the debts and that the appellant had a liability to the respondent for the debts. By signing the declaration in the circumstances set out at [168] - [171] above, the appellant also impliedly admitted that at the balance date the debts were outstanding and she had a liability to the respondent for the debts. The appellant did not merely express an opinion in relation to whether she had a liability to the respondent for the debts.

[173] Sixthly, it is to be inferred from the circumstances set out at [168] - [172] above, that the appellant intended to admit her indebtedness to the respondent and intended that the respondent should rely upon the 2016 accounts for that purpose.

[174] Seventhly, it is to be inferred from the circumstances set out at [168] - [172] above, that the appellant signed the 2016 Directors' Declaration both in her personal capacity and for and on behalf of the respondent. See ***The Stage Club*** (543, 562).

[175] My reasons for deciding that the appellant, by signing the declaration, acknowledged in writing the respondent's claim for the debts, within s 35(3) and s 36 of the Act, are not undermined by the fact that:

(a) the 2016 accounts were prepared on an accruals basis (see Note 1); or

(b) no Australian Accounting Standards were "intentionally applied" in preparing the 2016 accounts (see Note 1).

[176] The trial judge did not err in referring at [133] of his reasons to the definition of a "current asset" in para 66 of Australian Accounting Standard 101. At the trial, counsel for the appellant accepted that his Honour was entitled to rely upon para 66 for that purpose. In any event, the definition in para 66 reflects the generally accepted meaning of a "current asset" in the context of a corporation's financial statements. The debts were expressly included in the 2016 accounts as a current asset. The balance sheet did not merely record the debts as historical indebtedness or historical loan accounts.

[177] It is true that in the Compilation Report Mr Collins stated that the 2016 accounts had been "compiled exclusively for the benefit of the directors of [the respondent]" and that Crowe Horwath "[did] not accept responsibility to any other person for the contents of [the 2016 accounts]". Mr Collins' statement related to any acceptance of responsibility by Crowe Horwath for the contents of the 2016 accounts. His attempt to limit responsibility does not preclude the conclusion that the 2016 accounts were prepared for the respondent and became part of the respondent's

books as its financial statements, despite Mr Collins' assertion that the directors of the respondent were the sole beneficiaries of the 2016 accounts.

[178] In my opinion, the trial judge did not err in law in concluding that the 2016 accounts contained an acknowledgment in writing by the appellant of the respondent's claim for the debts.

[179] I turn to consider whether this acknowledgment was made to the respondent.

[180] I am satisfied that it is to be inferred from the circumstances set out at [168] - [174] above, that the appellant intended that her acknowledgment in writing of the respondent's claim for the debts be made to the respondent as an admission of debt.

[181] I am also satisfied that the appellant's acknowledgment was made to the respondent upon the 2016 Directors' Declaration being signed by the appellant and Mr Verschoyle. At that stage the 2016 accounts, including the balance sheet and the declaration, were in the possession of the respondent by its directors and agents, namely the appellant and Mr Verschoyle, and became part of the respondent's books as its financial statements.

[182] In my opinion, the trial judge did not err in law in concluding that the acknowledgment by the appellant of the respondent's claim for the debts was made to the respondent.

Did the trial judge err in law in finding that the 2016 accounts on their face comprised an acknowledgment made to the respondent by the appellant (as debtor) of the appellant's debts to the respondent shown in those accounts?

[183] It is unnecessary to consider this alleged error because I have decided, for the reasons I have already given, that the 2016 accounts contained an acknowledgment by the appellant of the respondent's claim for the debts and that the appellant made the acknowledgment to the respondent.

Did the trial judge err in law in failing to follow and purporting to distinguish the decision in VL Finance?

[184] As I have mentioned, the critical question in the present case was materially different on the facts from the critical question in cases such as ***In re Gee***, ***In re Compania de Electricidad*** and ***The Stage Club***. The principles of law enunciated in those cases were of relevance in deciding whether the 2016 accounts contained an acknowledgment by the appellant of the respondent's claim for the debts and whether this acknowledgment was made to the respondent. However, the balance sheets under consideration in ***In re Gee***, ***In re Compania de Electricidad*** and ***The Stage Club*** concerned indebtedness owing by the company rather than, as in the present case, indebtedness owing to the company.

[185] In ***VL Finance***, the 1994 Annual Return of Legudi Freehold Properties Pty Ltd, which was signed by one of the defendants in his capacity as a director and lodged with the Australian Securities and Investments Commission, showed current debtors totalling $2,876,883. That total amount included the indebtedness that was due and payable *to the company* by the defendant/director who had signed the annual return. Nettle J held that an annual return of a company is not capable of constituting an acknowledgment by the directors of the company (including a director who signs the annual return) of the debts which the directors (including a director who signs

the annual return) owe to the company [67]. His Honour's rationale for that conclusion was as follows [67]:

(a) an annual return of a company is not made out to be used by the directors' creditors;

(b) an annual return of a company is not made to the company but, rather, is made by the company;

(c) an annual return is not prepared for the use or consideration of the company but, rather, is designed and prepared for the use of others;

(d) even if all the directors of a company are under a personal obligation to ensure that an annual return is made out or filed, the annual return is not expressive of an intention on the part of the directors to admit such of their debts to the company as are shown in the annual return or to have the annual return produced by the company and used for that purpose; and

(e) accordingly, regardless of whether the annual return comes to the attention of the company, the annual return is not an acknowledgment made to the company of any debts of the directors that are shown in the annual return.

[186] In 1994, when the later annual return the subject of ***VL Finance*** was lodged, the former s 335 of the *Corporations Law* required every company to lodge an annual return with the Australian Securities and Investments Commission each year. The object of an annual return was to confirm the continued active administration of the company and to provide some basic information about the company. See the former part 3.8 and the former form 316 of the *Corporations Regulations 1990* (Cth). The *Corporations Law* was amended in 1996 to remove a company's obligation to provide fundamental financial data in its annual return, but amendments to the *Corporations Law* made in 1998 required that if a company had not lodged financial statements with the Australian Securities and Investments Commission within the previous 12 months, the directors were obliged to include a solvency statement in the annual return. The *Corporations Legislation Amendment Act 2003* (Cth) abolished annual returns.

[187] In my opinion, ***VL Finance*** is distinguishable from the present case for these reasons. First, as Nettle J noted at [60], the question whether a document or documents constitute an acknowledgment is a question of construction, and the decided cases are of little value as precedents. Secondly, ***VL Finance*** was not a balance sheet case. It was concerned with annual returns. Thirdly, provisions of the *Corporations Act* in relation to financial statements, including the contents of financial statements and the obligations of directors in relation to financial statements (which I have summarised at [159] - [163] above), are materially different from the former provisions of the *Corporations Law* and the *Corporations Regulations*, including the former obligations of directors, in relation to annual returns. Fourthly, an annual return of a company was not prepared for the use or consideration of the company. By contrast, financial statements, including the balance sheet, of a company are made for use and consideration by the company, including use and consideration by the company in relation to the value of its assets (for example, whether unsecured loans made by the company are recoverable) and its financial status generally. Fifthly, there is a line of authority, including the decision of the High Court in ***The Stage Club***, about the relevance and significance

of a balance sheet in the context of an acknowledgment by a corporation of its indebtedness to creditors.

[188] I consider that Nettle J's first proposition at [67] of ***VL Finance*** (that was criticised by the trial judge: see [62] above) in relation to annual returns, namely that an annual return is made by the company, not to the company, and that an annual return is designed and prepared for the use of others, not the company, was correct.

[189] Similarly, I consider that Nettle J's second proposition at [67] of ***VL Finance*** (that was criticised by the trial judge: see [63] above) in relation to annual returns, namely that an annual return is not expressive of an intention on the part of the directors to admit the debts to the company and have the return produced and used by the company for that purpose, was correct.

[190] However, the correctness of Nettle J's first and second propositions in relation to annual returns does not determine the issue in this case as to whether the 2016 accounts contained an acknowledgment by the appellant of the respondent's claim for the debts and, if so, whether the appellant made the acknowledgment to the respondent.

[191] Although the trial judge's criticism of Nettle J's first and second propositions was misplaced, his Honour was correct in concluding that the decision in ***VL Finance*** was distinguishable from the present case.

Did the trial judge err in law in concluding that either or both of the 3 July 2017 and 18 August 2017 emails contained an acknowledgment by the appellant of the respondent's claim for the debts?

[192] The appellant sent the 3 July 2017 email to Mr Verschoyle in response to Mr Verschoyle having mentioned to the appellant on 2 July 2017 that $121,923 had been withdrawn from the respondent's bank account and that he required the amount to be returned immediately.

[193] The 3 July 2017 email reads:

> Stephen
>
> Withdrawal was partially for TCB share of rent for July, Aug and Sept. Given you have recently withdrawn significant funds for personal "allowances" without discussion, I wanted to ensure monies were available for rent.
>
> The balance of the withdrawal was to normalize the loans we have with the company. You will be aware your loans as of June 30th 2016 were higher than my loans. I have brought us to "even" as of 1st July 2017 but we can determine at a subsequent date whether this amount shall be classified as a loan or applied against any Director's fees and/or other adjustments that may arise during the year.
>
> I am still waiting on clarification from you regarding your distribution of allowances paid in the weekly payroll amounts over the past few weeks.
>
> I note that you continue to deny me access to company records.

Kind Regards

Michaela Manicaros

[underlining added]

[194] The trial judge found that the 3 July 2017 email was sent in the context of ongoing contentious correspondence between the appellant and Mr Verschoyle in relation to the management of the respondent's affairs [38].

[195] When the appellant and Mr Verschoyle signed the 2016 Directors' Declaration on 11 November 2016 the balance sheet as at 30 June 2016 disclosed that the appellant's total indebtedness was $686,797 and Mr Verschoyle's total indebtedness was $739,449.

[196] In the 3 July 2017 email:

(a) The appellant referred to "the loans we have with the company" and to "your loans" and "my loans". Those references, read in light of the surrounding circumstances, were to the loans owed by Mr Verschoyle to the respondent and the loans owed by the appellant to the respondent.

(b) The appellant referred to the "balance of the withdrawal" having been made to "normalize" the loans; to Mr Verschoyle's loans "as of June 30th 2016" having been "higher" than the appellant's loans; and to the appellant having "brought us to "even" as of 1st July 2017". Those references, read in light of the surrounding circumstances, were to the appellant's aggregate indebtedness to the respondent and Mr Verschoyle's aggregate indebtedness to the respondent as at 30 June 2016; to Mr Verschoyle's aggregate indebtedness exceeding the appellant's aggregate indebtedness; and to part of the amount withdrawn from the respondent's bank account having been applied to equalise the amount of their aggregate indebtedness.

[197] I am satisfied that, on a fair appraisal of the 3 July 2017 email in the context of the surrounding circumstances (in particular, the 2016 accounts), the appellant, by sending the email, acknowledged in writing the respondent's claim for the debts, within s 35(3) and s 36 of the Act. In particular, it is apparent from those parts of the 3 July 2017 email which I have examined at [196] above, that the appellant admitted that the debts were outstanding and unpaid and that she intended to admit the debts were outstanding and unpaid. The admission was unconditional and unrestricted. The admission was that the debts were presently subsisting. Although the email did not specify the amount of the appellant's aggregate indebtedness to the respondent, the amount of the debts was ascertainable from extrinsic evidence.

[198] In my opinion, the trial judge did not err in law in concluding that the 3 July 2017 email contained an acknowledgment by the appellant of the respondent's claim for the debts.

[199] The appellant sent the 18 August 2017 email to Mr Verschoyle in response to Mr Verschoyle's earlier email of 18 August 2017 which asked the appellant about, relevantly, her "position on Forgiveness of Loans".

[200] The appellant's 18 August 2017 email reads:

Stephen

All my expenditure relates to running of company car and some Telstra invoices. Original Receipts will be submitted on my return

Director's [*sic*] loans remain and at this stage are not forgiven, however seeming actions [sic] you took when I made an attempt to equalise the loan positions, you should equalise the loan positions.

Is there any reason why you feel that you should have approximately $64,000 in company loans above what I have in company loans?

You should act to equalise our loan positions. This can be either by increasing my loan position or decreasing yours. Given the concern you seem to convey to me with regards to the company's financial position (especially when it comes to abiding by the lease agreement) you may consider it best for Commercial Images if you inject those additional loan funds you have taken back into the company. If you do not feel at this current time Commercial Images requires these additional funds (to pay items like rent), you should increase my overall loan amount to bring it into line with yours.

Advise your position regarding the loans and your intentions to equalise / normalise the loans between us.

I note you still include the title "Managing Director" in your email signature. Again, you are NOT Managing Director and should cease to hold yourself out as such

You have also not provided TCB Pty Ltd with any correspondence regarding its request for payment of the rent.

I again confirm that as equal Director and Shareholder, I am not in dispute of the terms of the current agreement and therefore it cannot be Commercial Images' position that it disputes the terms of the lease and actual rent owing. Your position in disputing the rent and terms of the lease is a personal position and not the position of the Company. I, as Company Director, have every intention of abiding by the current Lease Agreement we have both signed as Lessee of the premises.

Also, I still await all other outstanding information requests.

Further to that, you should forward to me with urgency all figures etc on all revenue and expenses currently available to you regarding 2017. Obviously if you require items like petrol receipts by this Tuesday, you would certainly have Sales figures available. I expect that you forward all this information to me if not immediately, then certainly by the 22/8/17

Kind Regards

Michaela Manicaros

[underlining added]

[201] In the 18 August 2017 email:

(a) The appellant stated that the "Director's [sic] loans remain and at this stage are not forgiven". That statement, read in light of the surrounding circumstances (including the 2016 accounts), was to the loans owing by the appellant to the respondent and the loans owing by Mr Verschoyle to the respondent. By asserting that the loans had not been forgiven, the appellant admitted in effect that the loans were subsisting debts.

(b) The appellant stated that she had "made an attempt to equalise the loan positions" and that Mr Verschoyle "should equalise the loan positions". That statement, read in light of the surrounding circumstances (including the 2016 accounts and the appellant's 3 July 2017 email), was to Mr Verschoyle's aggregate indebtedness to the respondent exceeding the appellant's aggregate indebtedness to the respondent; to a previous attempt by the appellant to equalise the amount of their aggregate indebtedness; and to it now being appropriate for Mr Verschoyle to equalise their aggregate indebtedness by reducing his indebtedness to the level of the appellant's aggregate indebtedness.

(c) The appellant enquired whether there was "any reason why [Mr Verschoyle felt] that [he] should have approximately $64,000 in company loans above what [the appellant had] in company loans". By this enquiry the appellant admitted in effect that the loans owing by the appellant to the respondent were subsisting debts and that Mr Verschoyle should justify why his aggregate indebtedness to the respondent exceeded her aggregate indebtedness to the respondent.

(d) The appellant reiterated that Mr Verschoyle "should act to equalise our loan positions" and that this could be achieved "either by increasing [the appellant's] loan position or decreasing [Mr Verschoyle's]". That statement, read in light of the surrounding circumstances (including the 2016 accounts and the appellant's 3 July 2017 email), was to Mr Verschoyle's aggregate indebtedness to the respondent exceeding the appellant's aggregate indebtedness to the respondent; and to it now being appropriate for Mr Verschoyle to take steps to equalise their aggregate indebtedness either by reducing his indebtedness or by agreeing to the respondent making additional loans to the appellant so that the aggregate indebtedness of Mr Verschoyle and the appellant to the respondent was equal.

[202] I am satisfied that, on a fair appraisal of the appellant's 18 August 2017 email in the context of the surrounding circumstances (in particular, the 2016 accounts and the 3 July 2017 email), the appellant, by sending the 18 August 2017 email, acknowledged in writing the respondent's claim for the debts, within s 35(3) and s 36 of the Act. In particular, it is apparent from those parts of the 18 August 2017 email which I have examined at [201] above, that the appellant admitted that the debts were outstanding and unpaid and that she intended to admit the debts were outstanding and unpaid. The admission was unconditional and unrestricted. The admission was that the debts were presently subsisting. Although the email did not specify the amount of the appellant's aggregate indebtedness to the respondent, the amount of the debts was ascertainable from extrinsic evidence.

[203] In my opinion, the trial judge did not err in law in concluding that the appellant's 18 August 2017 email contained an acknowledgment by the appellant of the respondent's claim for the debts.

Did the trial judge err in law in finding that, by including the 3 July 2017 and the 18 August 2017 emails as exhibits to the appellant's affidavit filed on 24 October 2017 and served on or about that date, that fact comprised an acknowledgment made to the respondent by the appellant (as debtor)?

[204] As I have mentioned, I am of the opinion that, on a fair appraisal of:

(a) the 3 July 2017 email in the context of the surrounding circumstances (in particular, the 2016 accounts); and

(b) the 18 August 2017 email in the context of the surrounding circumstances (in particular, the 2016 accounts and the 3 July 2017 email),

the appellant, by sending each of those emails, acknowledged in writing the respondent's claim for the debts, within s 35(3) and s 36 of the Act.

[205] In my opinion, by swearing the appellant's affidavit with the 3 July 2017 and the 18 August 2017 emails exhibited, and then filing the affidavit in the oppression proceedings and serving the affidavit on the respondent as a party to those proceedings, the appellant acknowledged in writing the respondent's claim for the debts, within s 35(3) and s 36 of the Act.

[206] In the affidavit the appellant swore that demands had been made on her for repayment of the debts and that those demands were an example of oppression. The appellant exhibited the emails to her affidavit as part of correspondence she had with Mr Verschoyle and others in relation to the operation of the respondent. In para 24 of her affidavit the appellant said she had received three demands from the respondent including a demand that she repay immediately her "director related loans" (that is, the debts). In para 26 of her affidavit the appellant said she was of the opinion that Mr Verschoyle had sent the demands for the purpose of exerting pressure to force her to sell her interest in the respondent on terms favourable to Mr Verschoyle. The appellant's reference to a demand that she repay immediately her "director related loans" (that is, the debts), having regard to her view that the demand had been made to exert pressure on her to sell her interest in the respondent, indicates an acceptance by the appellant that the debts were outstanding and unpaid. That indication is reinforced by the terms of the 3 July 2017 and the 18 August 2017 emails. The appellant's admission of the debts, in the context of the demand that she repay the debts immediately, was relevant to her case in the oppression proceedings that the respondent's affairs were being conducted in a manner which made it just and equitable that the Supreme Court make an order for the winding up of the respondent. The proper inference from the content of the appellant's affidavit is that the appellant intended to admit the debts were outstanding and unpaid. The affidavit did not merely exhibit documents as proof of demands and not as an acknowledgment of liability. The appellant's admission was unconditional and unrestricted. The admission was that the debts were presently subsisting. Although the affidavit did not specify the amount of the appellant's aggregate indebtedness to the respondent, the amount of the debts was ascertainable from extrinsic evidence.

[207] In my opinion, the trial judge did not err in law in concluding that the appellant's affidavit contained an acknowledgment by the appellant of the respondent's claim for the debts.

[208] It is necessary, in deciding whether the acknowledgment in the appellant's affidavit was made to the respondent, to read the affidavit as a whole and to construe it in accordance with the ordinary rules of construction and having regard to the circumstances in which the affidavit was sworn, filed and served.

[209] As I have mentioned, in ***The Stage Club*** Wilson J (Murphy J agreeing) said that "the absence of an intention on the part of the debtor to communicate to the creditor or his agent is immaterial so long as the document [containing the acknowledgment] is actually delivered to him" (566). Also, as I have mentioned, I consider that ***Hipworth*** is authority for the proposition that if a debtor clearly or distinctly admits a debt and the admission is not made directly to the creditor, the admission will not be given or made to the creditor, for the purposes of s 35(3) and s 36 of the Act and comparable provisions elsewhere, unless the admission was made with the intention that it should be communicated to the creditor. See [107] and [137] above.

[210] In the present case, I am satisfied that by swearing the appellant's affidavit with the 3 July 2017 and the 18 August 2017 emails exhibited, and then filing the affidavit in the oppression proceedings and serving the affidavit on the respondent as a party to those proceedings, the appellant made the admission directly to the respondent. However, I record that, in any event, I am satisfied that it is to be inferred from the circumstances set out at [204], [205] and [206] above, that the appellant intended that her acknowledgment of the respondent's claim for the debts in the appellant's affidavit be communicated to the respondent as an admission of debt.

[211] I am also satisfied that the appellant's acknowledgment was made to the respondent when the appellant's affidavit was served on the respondent.

[212] In my opinion, the trial judge did not err in law in concluding that the appellant's acknowledgment in the appellant's affidavit of the respondent's claim for the debts was made to the respondent.

The notice of contention

[213] It is unnecessary, having regard to my conclusions on the merits of the appeal, to consider the grounds of the notice of contention.

Conclusion

[214] I would dismiss the appeal with costs.

[215] **KELLY J:** I agree with Buss AJA.