SUPREME COURT OF QUEENSLAND

CITATION:	*Allways Resources Holdings Pty Ltd & Anor v Samgris Resources Pty Ltd & Anor* [2017] QSC 74
PARTIES:	**ALLWAYS RESOURCES HOLDINGS PTY LTD** ACN 154 218 256 (first plaintiff) **MCKAY BROOKE RESOURCES LIMITED** (second plaintiff) **v** **SAMGRIS RESOURCES PTY LTD** ACN 147 457 181 (first defendant) **ASIA PACIFIC JOINT MINING PTY LTD** ACN 156 619 484 (second defendant)
FILE NO/S:	SC No 11618 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	8 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	1 – 2, 5 – 8, 15 September 2016
JUDGE:	Bond J
ORDERS:	**The orders of the Court are that:** **1. The first defendant be wound up.** **2. Mr W.J. Harris and Mr A.N. Connolly be appointed as liquidators of the first defendant, jointly and severally.** **3. The orders made in (1) and (2) be stayed until 4:00pm on 15 May 2017.** **4. The parties have liberty to apply to vary the length of the stay ordered in (3).**
CATCHWORDS:	CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – OTHER CASES – where the company was said to be in the nature of a "quasi-partnership" – whether the company should be wound up on the just and equitable ground CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – CONDUCT OF DIRECTORS – OTHER CASES – whether the directors have acted in the

affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members – whether the company should be wound up

CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – CONDUCT OF DIRECTORS – OPPRESSIVE, UNFAIRLY PREJUDICIAL OR UNFAIRLY DISCRIMINATORY CONDUCT – whether the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, the plaintiffs or in a manner that is contrary to the interests of the members as a whole – whether an act or omission by or on behalf of the company was oppressive or unfairly prejudicial to, or unfairly discriminatory against, the plaintiffs or was contrary to the interests of the members as a whole – whether the company should be wound up

CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – WHAT CONSTITUTES – GENERALLY – whether the affairs of the company were being conducted in a manner which was oppressive to, unfairly prejudicial to, or unfairly discriminatory against, the plaintiffs – whether the affairs of the company were being conducted in a manner which was contrary to the interests of the members as a whole

CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT – RELIEF – whether an order should be made requiring the second defendant to purchase the plaintiffs' shares – whether the company should be wound up

Corporations Act 2001 (Cth), s 232, s 233, s 461, s 467

Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd (2008) 66 ACSR 325
Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3) [2015] NSWSC 1639
Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304
Campbell v Backoffice Investments Pty Ltd [2008] NSWCA 95
Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450
Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd (1977) 13 ALR 561
Dodrill v The Irish Restaurant & Bar Co Pty Ltd & Ors [2009] QSC 317
Doughty v Abboud [2010] NSWSC 721
Ebrahimi v Westbourne Galleries Ltd [1973] AC 360
Exton v Extons Pty Ltd [2017] VSC 14

Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (1998) 28 ACSR 688
Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672
Goozee v Graphic World Group Holdings Pty Ltd (2002) 42 ACSR 534
Gregor v British-Israel World Federation (NSW) (2002) 41 ACSR 641
Hillam v Ample Source International Ltd (No 2) (2012) 202 FCR 336
HNA Irish Nominee Ltd v Kinghorn (No 2) [2012] FCA 228
Ian Allan Byrne v A J Byrne Pty Limited [2012] NSWSC 667
International Hospitality Concepts v National Marketing Concepts (No 2) (1994) 13 ACSR 369
Jankar v Dellmain [2009] NSWSC 766
John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd (1991) 6 ACSR 63
Joint v Stephens [2008] VSCA 210
Jones v Dunkel (1959) 101 CLR 298
Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd [2008] NSWSC 144
Loch v John Blackwood Ltd [1924] AC 783
MMAL Rentals Pty Ltd v Bruning (2004) 63 NSWLR 167
Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692
Nassar v Innovative Precasters Group Pty Ltd (2009) 71 ACSR 343
O'Neill v Phillips [1999] 1 WLR 1092
Pearl Link International Ltd v Recruit Co Ltd [2005] HKCFI 366
Re Amazon Pest Control Pty Ltd [2012] NSWSC 1568
Re Bluechip Development Corporation (Cairns) Pty Ltd [2011] QSC 368
Re Dalkeith Investments Pty Ltd (1984) 9 ACLR 247
Re Day (2017) 91 ALJR 262
Re London School of Electronics Ltd [1986] Ch D 211
Re Spargos Mining NL (1990) 3 WAR 166
Re Tivoli Freeholds Ltd [1972] VR 445
Re William Brooks & Co Ltd [1962] NSWR 142
Registrar of Titles (WA) v Franzon (1975) 132 CLR 611
Ruut v Head (1996) 20 ACSR 160
Thomas v Mackay Investments Pty Ltd (1996) 22 ACSR 294
Tomanovic v Argyle HQ Pty Ltd [2010] NSWSC 152
Tomanovic v Global Mortgage Equity Corporation Pty Ltd (2011) 288 ALR 310
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1
Wayde v New South Wales Rugby League Ltd (1985) 180 CLR 459

Justice Barrett, *Robson's Annotated Corporations Legislation* (Looseleaf service, Thomson Reuters)

COUNSEL:	K E Downes QC, with R Schulte, for the plaintiffs No appearance for the first defendant S Couper QC, with J Baartz, for the second defendant
SOLICITORS:	Holding Redlich for the plaintiffs No appearance for the first defendant Corrs Chambers Westgarth for the second defendant

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Introduction

[1] The two protagonists in this proceeding are –

(a) the first and second plaintiffs,[1] Allways Resources Holdings Pty Ltd (**ARH**) and McKay Brooke Resources Limited (**MBR**), which are the minority shareholders of the first defendant, Samgris Resources Pty Ltd (**Samgris**); and

(b) the second defendant (**APJM**), which is the majority shareholder of Samgris.

[2] Although it is a party to the proceeding, Samgris has not itself taken an active part in it.

[3] The principal relief sought by the minority shareholders is an order that Samgris be wound up pursuant to either ss 233 or 461 of the *Corporations Act* 2001 (Cth). Alternatively, they seek orders pursuant to s 233 that APJM purchase their Samgris shares at a price to be determined by the Court on a date to be fixed after the culmination of a further judicial process. They submit that if the alternative relief were to be granted the Court should formulate an order which would keep open the option of making a winding up order if APJM failed to effect a purchase of their shares in Samgris at the ordered value.[2]

[4] As to s 233, the minority shareholders contend that –

(a) the affairs of Samgris were being conducted in a manner which was oppressive to, unfairly prejudicial to, or unfairly discriminatory against, the plaintiffs within the meaning of s 232(e); and

(b) further or alternatively, the affairs of Samgris were being conducted in a manner which was contrary to the interests of the members as a whole within the meaning of s 232(d).

[5] As to s 461, the minority shareholders rely, first, on the just and equitable ground pursuant to s 461(1)(k) and, second, on those subparagraphs of ss 461(1)(e), 461(1)(f) and 461(1)(g) which use similar language to ss 232(d) and (e). In the latter regard, they contend –

(a) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members (s 461(1)(e));

(b) the affairs of the company were being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole (s 461(1)(f));

(c) an act or omission by or on behalf of the company was oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was contrary to the interests of the members as a whole (s 461(1)(g)).

[6] These contentions are said to be justified by an evaluation of events which occurred over a 4½ year period in the life of Samgris, commencing on about 20 April 2012 when the plaintiffs and second defendant became the shareholders of Samgris. The minority shareholders say that from that time until the time this proceeding started in December 2014, APJM caused the business and operations of Samgris to be managed as if APJM was the sole shareholder or, at the least, in a manner that failed to pay any real regard to the views and concerns of the directors appointed to Samgris by the minority shareholders. Further, they say that the position became worse once this proceeding started. The position has been

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1 The two minority shareholders have the same representation and have acted in concert throughout this proceeding. No relevant distinction needs to be drawn between them.

2 Cf *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 288 ALR 310 per Young JA at [337] (with whom Campbell JA at [313] and Macfarlan JA at [314] agreed) where the Court concluded in relation to a buy-out order as oppression relief that the orders should reserve liberty to apply in relation to the valuation process and generally, should the valuation process be unduly delayed or prove to be impracticable.

reached, they say, in which there has been an irretrievable breakdown in the relationship between APJM and the minority shareholders such that the minority shareholders can have no trust and confidence in the proper management of Samgris in the future.

[7] The structure of this judgment will be as follows:

(a) First, I will identify the relevant principles of the substantive law.

(b) Second, I will express my findings as to the relevant facts.

(c) Third, I will express my evaluation of the significance of the relevant events in terms of the issues made relevant by the substantive law.

(d) Finally, I will consider the question of the relief which is called for by the evaluations which I have made.

The substantive law

Winding up under the just and equitable ground

[8] Section 461(k) is, relevantly, in these terms:

> **Part 5.4A—Winding up by the Court on other grounds**
>
> **461 General grounds on which company may be wound up by Court**
>
> (1) The Court may order the winding up of a company if:
>
> …
>
> (k) the Court is of opinion that it is just and equitable that the company be wound up.

[9] In the present proceeding, the minority shareholders suggest that winding up under the just and equitable ground is justified because –

(a) Samgris was a company formed on the basis of mutual trust, confidence and cooperation between its corporate shareholders and the individuals who represented those corporate members; and

(b) the relationship of mutual trust, confidence and cooperation has irretrievably broken down.

[10] For present purposes, the following summary of general principle may be made.

[11] **First**, Lord Wilberforce observed in *Ebrahimi v Westbourne Galleries Ltd*[3] that in most companies and in most contexts, the rights, expectations and obligations *inter se* of the people standing behind a company are sufficiently and exhaustively stated in the relevant companies legislation[4] and in the company's constitution. In such cases, the association between those people is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively stated in the legislation and in the constitution.[5] That a minority shareholder does not trust or have confidence in a majority shareholder may, and often will, be a matter of irrelevance to the question of the continuation of such a company.[6]

[12] **Second**, Lord Wilberforce explained that the "just and equitable" ground enables the court to subject the exercise of legal rights so stated to equitable considerations, namely considerations of a personal character arising between one individual and another, which

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[3] [1973] AC 360 at 379.

[4] Here, the *Corporations Act* 2001 (Cth).

[5] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 per Lord Wilberforce at 379.

[6] If such a company is to be wound up on the just and equitable ground, some other justification may have to be found. In this regard, see the discussion of the broad categories into which the cases fall in *Gregor v British-Israel World Federation* (NSW) (2002) 41 ACSR 641 at [136], citing *International Hospitality Concepts v National Marketing Concepts (No 2)* (1994) 13 ACSR 369 per Young J at 371.

may make it unjust, or inequitable, to insist on legal rights so stated, or to exercise them in a particular way.[7] I observe:

(a) Given the language used by Lord Wilberforce (i.e. referring to (1) considerations of a "personal" character arising between "one individual and another" and (2) to an association formed or continued on the basis of a "personal" relationship), a question arises whether the requisite relationship can exist unless all parties concerned are natural persons.

(b) I note that in *Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd* [2008] NSWSC 144, Brereton J proceeded on the basis that the requisite relationship could exist between a natural person and her corporate joint venture partner, who, together, became associated as shareholders. Further, the law can undoubtedly recognize the existence of a fiduciary relationship between corporate persons: *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

(c) No argument that the requisite relationship could only exist between natural persons was advanced by APJM in this case, and, in any event, taking such approach would seem to me to be too restrictive an approach to take to Lord Wilberforce's judgement and,[8] more importantly, the language of s 461(k). Accordingly, I conclude that it is not essential to the operation of the approach described by his Lordship that all parties concerned must be natural persons.

[13] **Third**, it is well recognized that one category of case in which legal rights may be regarded as subject to the superimposition of equitable considerations, is the category described by Lord Wilberforce[9] as involving companies characterized by one, or probably more, of the following elements:

(a) an association formed or continued on the basis of a personal relationship, involving mutual confidence;

(b) an agreement, or understanding, that all or particular shareholders shall participate in the conduct of the business;

(c) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

[14] **Fourth**, it is often said of such companies that they are in the nature of a "quasi-partnership", but in some cases that terminology might be misleading and it may be more accurate to say that the company is "a majority controlled business requiring mutual cooperation and a level of trust". [10] For companies which fall into the category described by Lord Wilberforce, winding up is regarded as the characteristic remedy where the working relationship predicated on mutual cooperation, trust and confidence has irretrievably broken down.[11] To put it another way, for companies of this type, it would be unjust or inequitable for the majority to continue to exercise their legal rights to control the business once the working relationship predicated on mutual cooperation, trust and confidence has irretrievably broken down.

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[7] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 per Lord Wilberforce at 379.
[8] *Pearl Link International Ltd v Recruit Co Ltd* [2005] HKCFI 366.
[9] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379.
[10] See *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343 per Barrett J at [77] citing *MMAL Rentals Pty Ltd v Bruning* (2004) 63 NSWLR 167 per Spigelman CJ at [71]. See also *Ian Allan Byrne v A J Byrne Pty Limited* [2012] NSWSC 667 per Black J at [76].
[11] *Doughty v Abboud* [2010] NSWSC 721 per Barrett J at [225]; *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325 per Dodds-Streeton JA at [119].

[15] **Fifth,** the circumstances in which legal rights will be subject to the superimposition of equitable considerations cannot and should not be exhaustively defined. The presence of the elements identified by Lord Wilberforce does not mean that the court will necessarily draw the inference that there were superimposed equitable considerations on the company law rights and duties.[12] On the other hand, the categories of case in which a winding up order can be made on the just and equitable ground are not closed.[13] The question of whether equitable considerations should be superimposed is a question of fact, which will depend on the circumstances of the particular case.[14]

[16] **Sixth**, the making of a winding up order on the just and equitable ground involves the exercise of a judicial discretion. It would be wrong to regard an order for the winding up of a solvent company as a "last resort". Although some cases have used that language,[15] such an absolute statement seeks to impose a limitation on the discretion which is not justified by the wording of the statute: see generally the discussion in *Hillam v Ample Source International Ltd (No 2)* (2012) 202 FCR 336 per Emmett, Jacobson and Buchanan JJ at [8], [67] to [74], and see also the discussion of s 467(4) below. The better approach is that suggested in *Hillam* at [70], namely to regard it to be an extreme step to wind up a solvent company and to bear that consideration in mind when considering whether the remedy is appropriate on the facts of the particular case. It may also be relevant to consider –

(a) whether the commercially sensible operations of the company in accordance with the incorporators' expectations has been frustrated;[16]

(b) whether continuation of the company would be a futility;[17]

(c) whether any loss of confidence is justified;[18] and

(d) whether the claimant is the person who is responsible for the breakdown of the relationship.[19]

[17] **Seventh**, grounds for winding up on the just and equitable ground under s 461(1)(k) may be established, and a winding up order made, in circumstances which do not amount to oppression under s 232.[20] But where the facts of the particular case reveal that some remedy other than winding up is available (whether because oppression is established and other

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[12] *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 at 707.

[13] See also *Thomas v Mackay Investments Pty Ltd* (1996) 22 ACSR 294 at 300 per Owen J; *Doughty v Abboud* [2010] NSWSC 721 per Barrett J at [219].

[14] *Re Tivoli Freeholds Ltd* [1972] VR 445 per Menhennitt J at 468.

[15] See, eg, *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 13 ALR 561; *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247 at 252.

[16] *Tomanovic v Argyle HQ Pty Ltd* [2010] NSWSC 152 at [49]-[51]. On appeal, the Court specifically noted that neither party challenged the trial judge's summary of the applicable principles: *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 288 ALR 310 at [140]. See also *Re Amazon Pest Control Pty Ltd* [2012] NSWSC 1568 per Black J at [19].

[17] *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325 at [119]. This was quoted with approval in *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343 at [322] and *Jankar v Dellmain* [2009] NSWSC 766 at [81]-[85].

[18] *Loch v John Blackwood Ltd* [1924] AC 783 at 788; *Re Bluechip Development Corporation (Cairns) Pty Ltd* [2011] QSC 368 per Peter Lyons J at [215].

[19] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 per Lord Cross at 387; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 per Spigelman CJ at [90]; *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343 at [96]; *Re Amazon Pest Control Pty Ltd* [2012] NSWSC 1568 per Black J at [22]. In *Ruut v Head* (1996) 20 ACSR 160 at 162 it was noted that this is not an absolute bar to relief, but one of a number of factors to be taken into account.

[20] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672; *Nassar v Innovative Precasters Group Pty Ltd* (2009) 71 ACSR 343; *Doughty v Abboud* [2010] NSWSC 721 per Barrett J at [227]; R*e Amazon Pest Control Pty Ltd* [2012] NSWSC 1568 per Black J at [19].

remedies under s 233 are open, or for any other reason), it is necessary to consider the matters made relevant by s 467(4). As to this:

(a) Section 467(4) provides:

> Where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the Court, if it is of the opinion that:
>
> (a) the applicants are entitled to relief either by winding up the company or by some other means; and
>
> (b) in the absence of any other remedy it would be just and equitable that the company should be wound up;
>
> must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(b) Where it applies, s 467(4) imposes a duty on the Court to make a winding up order unless the Court forms the positive opinions that –

(i) some other remedy[21] is available to the applicants; and

(ii) the applicants are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

(c) No implication that winding up is a last resort arises from s 467(4), or should be made in those terms: see *Re Bluechip Development Corporation (Cairns) Pty Ltd* [2011] QSC 368 per Peter Lyons J at [216]. Where s 467(4) applies, the Court is required to consider whether or not the opinions specified should be formed. If applicants are seeking to have a solvent company wound up instead of pursuing another available remedy, the fact that it is an extreme step to wind up a solvent company would be relevant to (but not necessarily determinative of) the question whether the Court should form the opinion that the applicants were acting unreasonably in pursuing that step instead of the other available remedy.

(d) By way of example, in *Re Amazon Pest Control Pty Ltd*[22] Black J specifically recognized the Courts' reluctance to wind up a solvent company, expressly bore in mind that it was an extreme step to make such an order, but nevertheless could not form the opinion that the applicant for the order was acting unreasonably in pursuing it. Black J made the order to wind up, although the order was stayed for a short period to permit the parties to explore the possibility of reaching another solution.

Relief for oppressive conduct of a company's affairs

[18] Sections 232 and 233 are in these terms:

> **Part 2F.1—Oppressive conduct of affairs**
>
> **232 Grounds for Court order**
>
> The Court may make an order under section 233 if:
>
> (a) the conduct of a company's affairs; or
>
> (b) an actual or proposed act or omission by or on behalf of a company; or
>
> (c) a resolution, or a proposed resolution, of members or a class of members of company;
>
> is either:

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[21] The expression "some other remedy" in s 467(4) of the Act has been construed very broadly to include not only legal remedies but alternative courses of action otherwise open to the parties, including commercial remedies such as an offer to purchase the applicant's shares: see *Exton v Extons Pty Ltd* [2017] VSC 14 per Sifris J at [84] to [86].
[22] [2012] NSWSC 1568 per Black J at [26] – [32].

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

233 Orders the Court can make

(1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

(a) that the company be wound up;

(b) that the company's existing constitution be modified or repealed;

(c) regulating the conduct of the company's affairs in the future;

(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

(e) for the purchase of shares with an appropriate reduction of the company's share capital;

(f) for the company to institute, prosecute, defend or discontinue specified proceedings;

(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

(h) appointing a receiver or a receiver and manager of any or all of the company's property;

(i) restraining a person from engaging in specified conduct or from doing a specified act;

(j) requiring a person to do a specified act.

Order that the company be wound up

(2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:

(a) as if the order were made under section 461; and

(b) with such changes as are necessary.

(3) …

[19] For present purposes, the following summary of general principle may be made.

[20] **First**, the language and history of these sections indicate that they are to be read broadly.[23] The imposition of judge-made limitations on their scope is to be approached with caution.[24]

[21] **Second**, the phrase "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members" is to be regarded as a compound expression,[25] which calls for a single overall judgment about the conduct of the affairs of the company in relation to a person.[26]

[22] **Third**, the different aspects of the compound expression are concerned with the essential criterion of "commercial unfairness".[27] The test is whether, objectively in the eyes of a reasonable commercial bystander, there has been unfairness, namely, conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision

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[23] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [72], per French CJ; at [176] per Gummow, Hayne, Heydon and Kiefel JJ.

[24] *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at [72], per French CJ; at [178] per Gummow, Hayne, Heydon and Kiefel JJ.

[25] *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 288 ALR 310 at [140]; *HNA Irish Nominee Ltd v Kinghorn (No 2)* [2012] FCA 228 at [506]; *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 per Young J at 704; *Joint v Stephens* [2008] VSCA 210 at [134].

[26] *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 per Spigelman CJ at [6].

[27] *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 per Brennan J at 472; *Joint v Stephens* [2008] VSCA 210 at [134]; *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 per Young J at 704.

fair.[28] Fairness is not the same as legality. Conduct which is legal because, for example, it involves an exercise of power consistently with the company's constitution, may still be oppressive.[29] In *Re Spargos Mining NL* (1990) 3 WAR 166 at 189, Murray J held:

> … it is certainly clear that the opinion required of the court is that objectively viewed, the conduct of those in control of the company is in all the circumstances to be regarded as unfair to a particular member, a group of members, perhaps a minority group, or the members as a whole and I conclude that that unfairness may lie in the harm suffered as a result of the conduct of management, the prejudice caused, the lack of reasonable commercial justification for the course taken, or simply in the decision making processes within the company.

[23] **Fourth**, the task of deciding whether there has been commercial unfairness is to be undertaken in the context of the particular relationship which is in issue.[30] It will not infrequently involve a balancing exercise between competing considerations.[31] There is no fixed rule that an applicant must have clean hands, but the conduct of an applicant may be relevant, for example, because it may either render the conduct on the other side not unfair[32] or may affect the relief which the court thinks fit to grant.[33]

[24] **Fifth**, authority suggests that the better view is that s 232(d) is separate and distinct from s 232(e).[34] Conduct may be 'contrary to the interests of members as a whole' without necessarily involving commercial unfairness. The task of deciding whether there has been such conduct involves an objective assessment of whether the conduct adheres to accepted standards of corporate behaviour or is in accordance with how reasonable directors would act in attending to the affairs of the company.[35]

[25] **Sixth**, in selecting the nature of the remedy concerned when a finding of oppression has been made, the discretion should be exercised with a view to ending the oppression.[36] If there was no continuing oppression when a case came to trial, the weight of authority presently supports the view that the Court would retain power to make the orders for which s 233 provides; the fact that claimed relief was founded on conduct which was no longer continuing would be regarded as relevant but not necessarily determinative of the exercise of the discretion.[37]

[26] **Seventh**, for reasons expressed earlier in relation to winding up on the just and equitable ground, it would be wrong to approach the exercise of the discretion concerning remedy by regarding winding up a solvent company as a "last resort". Rather, that it is an extreme step

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[28] *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 per Brennan J at 472; *Joint v Stephens* [2008] VSCA 210 per Nettle, Ashley and Neave JJA at [133] – [135]; and *Hillam v Ample Source International Ltd (No 2)* (2012) 202 FCR 336 at [4].

[29] *Dodrill v The Irish Restaurant & Bar Co Pty Ltd & Ors* [2009] QSC 317 per Daubney J at [21]

[30] *O'Neill v Phillips* [1999] 1 WLR 1092 per Lord Hoffmann at 1098; *Joint v Stephens* [2008] VSCA 210 at [134], [136]; *Hillam v Ample Source International Ltd (No 2)* (2012) 202 FCR 336 at [4].

[31] *Re London School of Electronics Ltd* [1986] Ch D 211 per Nourse LJ at 222; *Joint v Stephens* [2008] VSCA 210 at [136].

[32] Thus, it might be relevant to take into account that a minority shareholder has baited a majority shareholder to act in an oppressive manner (*Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688 at 741) or conduct said to be oppressive may have been undertaken with the acquiescence or consent of the applicant (*John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd* (1991) 6 ACSR 63 per Young J at 66).

[33] *Joint v Stephens* [2008] VSCA 210 at [134].

[34] See the review of the authorities reaching that conclusion in *Exton v Extons Pty Ltd* [2017] VSC 14 per Sifris J at [35] – [39].

[35] *Goozee v Graphic World Group Holdings Pty Ltd* (2002) 42 ACSR 534 at [42] – [44]; *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 at [84], both cited with approval by Sifris J in *Exton v Extons Pty Ltd* [2017] VSC 14 per Sifris J at [36].

[36] *Campbell v Backoffice Investments Pty Ltd* [2008] NSWCA 95 per Giles JA at [122].

[37] See the review of the authorities reaching that conclusion in *Exton v Extons Pty Ltd* [2017] VSC 14 per Sifris J at [27] – [34]. Note, however, that in *Campbell v Backoffice Investments Pty Ltd,* the judgment of the plurality (Gummow, Hayne, Heydon and Kiefel JJ) expressed the view that that "may very well" be the case, but concluded that the point did not need to be decided: see (2009) 238 CLR 304 at [182].

to wind up a solvent company is a consideration which must be borne in mind when considering whether the remedy is appropriate on the facts of the particular case. Where some remedy other than winding up is available, it is necessary to consider the matters made relevant by s 467(4).

Other bases for winding up under s 461

[27] Section 461(1)(e), (f) and (g) are, relevantly, in these terms:

> **Part 5.4A—Winding up by the Court on other grounds**
>
> **461 General grounds on which company may be wound up by Court**
>
> (1) The Court may order the winding up of a company if:
>
> …
>
> (e) directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members; or
>
> (f) affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole; or
>
> (g) an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or

[28] These grounds share some similarities with the grounds contained in s 232 for the making of an order (including a winding up order) under s 233. There are also differences.

[29] The first part of s 461(1)(e) is narrower than s 232(d), which encompasses not only directors acting in their own interests, but extends to any instance of directors acting *contrary* to the interests of the members. The second part of s 461(1)(e), acting in a manner that appears to be unfair or unjust to other members, does not appear in s 232, although it seems likely that conduct encompassed by s 232 would be regarded as unfair or unjust. It has been judicially noted that s 461(1)(e) adds nothing to s 461(1)(k).[38]

[30] On the other hand, the language used in ss 461(1)(f) and (g) mirrors the language used in ss 232(d) and (e). It is a settled canon of statutory interpretation that where the same words appear multiple times in a single piece of legislation, they should ordinarily be given the same meaning. In *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618, Mason J (as he then was) spoke of the "sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise".[39] Given that a winding up order is an available remedy under both sets of provisions, ss 461(1)(f) and (g) do not appear to contemplate any avenues of relief beyond those available in s 232. Indeed, one commentator has noted that "it is difficult to see how s 461(1)(f), 461(g) [sic] add anything to s 232".[40]

The facts

Preliminary observations

[31] The documentary evidence in this case was contained in a 16-volume trial bundle and 14 additional volumes containing other exhibits. Many of the exhibits (including some affidavits) appeared both in the Chinese language and in English translation. I received 4

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[38] See *Re William Brooks & Co Ltd* [1962] NSWR 142 per Hardie J. His Honour was there dealing with a cognate provision.
[39] See also *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 per Hodges J at 452.
[40] Justice Barrett, *Robson's Annotated Corporations Legislation* (Looseleaf service, Thomson Reuters) at [461.80].

sets of written submissions from the parties, containing a total of 582 pages. Affidavit evidence was received from 19 witnesses (often in multiple affidavits, including affidavits which directly responded to statements in other affidavits). The oral evidence was received from 12 witnesses over 6 days. Of those witnesses, 6 required interpreters because they were either unable to speak and write English or insufficiently confident of their ability to do so.

[32] It does not seem to me to be either necessary or appropriate to resolve every factual contest which can be identified as arising out of the evidence before me. I will focus principally on the factual contests and related evidence which were addressed in the written submissions, and then only on those which are necessary for the determination of the issues and relevant remedy, if any, to which the plaintiffs are entitled.

[33] As much as possible, the factual findings will be made in the course of a chronological analysis, using as the principal reference points:

(a) the events leading up to the establishment on 20 April 2012 of the association between the current shareholders of Samgris; and

(b) the 7 board meetings which took place over about 4 years of Samgris' operations, namely –

(i) the first board meeting, which took place on 18 May 2012 in Xi'an, China.

(ii) the second board meeting, which took place on 17 March 2013 in Brisbane.

(iii) the third board meeting, which took place on 6 December 2013 in Xi'an, China.

(iv) the fourth board meeting, which took place on 22 April 2014 in Brisbane.

(v) the fifth board meeting, which took place on 30 March 2015 by video link between Brisbane and Xi'an.

(vi) the sixth board meeting, which took place on 10 November 2015 by video link between Brisbane and Xi'an.

(vii) the seventh board meeting, which took place on 31 May 2016 by video link between Brisbane and Xi'an.

[34] On occasion it will be necessary to interpose a consideration of issues which cannot be conveniently analysed in this way because they require a consideration of facts which span a broader time frame.

Events leading to the establishment of the association between the members of Samgris

Introduction

[35] Dr Wanfu Huang had undergraduate and post-graduate degrees in Science from the China University of Geosciences in Wuhan in the People's Republic of China and a doctorate in Geology from James Cook University in Queensland. He registered Samgris in November 2010 for the purpose of conducting the business of coal exploration in Queensland. In the period from 19 November 2010 until 19 April 2012, Dr Huang was Samgris' sole director and shareholder.

[36] Shaanxi Coal and Chemical Industry Group Co Ltd (**Shaanxi Coal**) and Shaanxi Coal Geology Group Co Ltd (**Shaanxi Geology**) (together the **Shaanxi Parties**) are entities owned by the People's Republic of China. Shaanxi Coal is a very large coal mining company. To give an idea of its size: in 2015 its total sales measured in excess of ¥190 billion (over $30 billion[41]) and it had approximately 180,000 employees. Shaanxi Geology

[41] The precise exchange rate is not relevant. This calculation uses the 6:1 ratio referred to in Exhibit 2: Huang (1) at [70].

is a coal exploration company. It is responsible for all of the coal exploration work in the Shaanxi Province, and for 178 billion tonnes of coal reserves within the Province.

[37] At a time when it was solely under the control of Dr Huang, Samgris developed a plan to conduct lawful exploration and development of resources within its exploration rights in Queensland "through the introduction of partners", and to establish a large scale coal production supply base in Queensland. To this end, Samgris entered into a suite of agreements in 2011 and 2012 with the Shaanxi Parties. Mr Shijie Song, who was the Head of the Strategic Planning Committee of Shaanxi Coal, and had acted as a director, supervisor and senior officer of more than ten companies within its group, was the principal negotiator on behalf of Shaanxi Coal for the initial agreement.[42] As will appear, broadly speaking, Dr Huang's side of the deal was to contribute the relevant coal exploration tenements held by corporations he controlled, and the Shaanxi Parties' side of the deal was the contribution of funds.

[38] One of the questions which must be determined in this proceeding is whether –

(a) (as APJM contends) the association between the present members of Samgris is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively stated in the Act and in the constitution of Samgris; or

(b) (as the minority shareholders contend) the association between the present members of Samgris bears the character (sometimes referred to as quasi-partnership) which would warrant subjecting to equitable considerations the legal rights which otherwise govern their association.

[39] In order to answer this question it is necessary to examine the way in which the association between the present members of Samgris became established. That requires an examination of the fact and terms of the instruments which gave rise to the association, namely:

(a) the "Cooperation Framework Agreement" dated 9 March 2011 which was entered into between on Samgris (at a time when Dr Huang was its sole director and shareholder), and the Shaanxi Parties;

(b) the "Investment Agreement" dated 15 October 2011 which was entered into between Samgris (still at a time when Dr Huang was its sole director and shareholder), Dr Huang personally and also the Shaanxi parties;

(c) three instruments entered into on 20 April 2012, which was effectively the settlement date of the transaction contemplated by the Investment Agreement, namely:

(i) the "Amendment Agreement" dated 20 April 2012 between Samgris, Dr Huang personally and also the Shaanxi parties by which they varied and supplemented the Investment Agreement;

(ii) the Constitution which Samgris adopted on 20 April 2012; and

(iii) the "Side Agreement" dated 20 April 2012 between Samgris, Dr Huang personally, the minority shareholders, APJM, and also the Shaanxi parties.

The Cooperation Framework Agreement dated 9 March 2011

[40] The Cooperation Framework Agreement was executed in a Chinese language form entitled "Australia SAMGRIS Coal Resources Exploration and Development Cooperation Framework Agreement". A certified translation was in evidence before me. I make the following observations as to the relevant provisions of the Cooperation Framework Agreement.

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[42] Exhibit 13: Song (1) at [15].

[41] The first part of the Cooperation Framework Agreement was essentially the recitals. Recital 1 stated (inter alia) that the development plan of Samgris was to conduct lawful exploration and development of resources within its exploration rights "through the introduction of partners", and to establish a large scale coal production supply base in Queensland. Recitals 2 and 3 described Shaanxi Geology and Shaanxi Coal respectively and Recital 4 stated that Shaanxi Coal and Shaanxi Geology planned to establish a new entity (referred to as "The Joint Entity") and cooperate with Samgris on the coal resources exploration and development in its area. (The "Joint Entity" which the Shaanxi Parties eventually established was APJM and, when summarizing the terms of the Cooperation Framework Agreement, it is convenient to refer to the Joint Entity as APJM, even though APJM did not yet exist.)

[42] From the recitals it appeared that the intention involved the "partners", namely Samgris, on the one hand and the Shaanxi Parties (via APJM which they would establish) on the other hand, cooperating for coal resources exploration and development in the exploration rights held by Samgris.

[43] The operative part of the Cooperation Framework Agreement was then introduced with these words "On the basis of equality and consent, through negotiation, the three parties reached the below agreement".

[44] The intention of the Cooperation Framework Agreement was set out in clause 6, which contemplated a further contract would be entered into in the future, but at the same time that there would be a continued role for the Cooperation Framework Agreement:

> 6.1. This agreement forms the basic framework of cooperation by the 3 parties and is the foundation of the cooperation between the 3 parties. Within this framework, the three parties will undertake further negotiations regarding the details of the cooperation in accordance with practical needs and form and sign a formal cooperation contract.
>
> 6.2. Issues not exhaustively covered will be prescribed in the formal contract.
>
> 6.3 …

[45] By clause 1 "Company Overview Objectives", Samgris was identified as a private proprietary company conducting coal exploration and development in Australia which held or was applying for 16 coal exploration tenements. Various characteristics of the tenements were then recorded, namely the type of coal concerned, the estimated resource quantity and whether they were approved or awaiting approval.

[46] By clause 2 the parties recorded the "Method of Cooperation". The clause made clear these matters:

(a) The Shaanxi Parties would establish APJM and contribute certain resources to it.

(b) There would be a restructure of Samgris, which would result in the shares of Samgris being held by APJM as to 60% and the original shareholders of Samgris as to 40%. (Although the plural was used in the instrument, in fact there was only one shareholder of Samgris at the time, namely Dr Huang.) That would happen by APJM acquiring shares from the original shareholders and also from a fresh issue of shares.

(c) For its part, APJM would pay $11 million to the original shareholders of Samgris and also contribute $55 million capital to Samgris in the form of cash by way of a number of instalments. For their part, the original shareholders of Samgris would contribute capital in the form of the coal exploration tenements.

(d) There would be a final transaction price, the calculation of which depended in certain respects on a quantitative assessment of the coal resource as proved by exploration.

(e) Clause 2 also set out agreement as to some aspects of the governance of Samgris, consequent upon the contemplated restructure. Clause 2.3.4 provided:

> 2.3.4. Governance Structure
>
> SAMGRIS will establish a Board of Directors and a Supervising Committee. The Board of Directors will consist of 5 members, among which The Joint Entity will elect 3 directors. The Supervising Committee will consist of 3 members, among which The Joint Entity will elect 2 supervisors. The Chairman of the Board of Directors will be chosen from the directors elected by The Joint Entity, the Chairman of the Supervising Committee will be chosen from the supervisor elected by SAMGRIS's original shareholders.
>
> Company management will consist of the Chief Executive Officer (CEO), the Chief Operating Officer (COO), the Chief Finance Officer (CFO) and deputy Chief Executive Officer. Among them CEO will be recommended by The Joint Entity, COO will be recommended by SAMGRIS's original shareholders (underlined in original), CFO will be recommended by The Joint Entity, and other management level personnel are to be appointed by the Board of Directors (underlined in wavy lines in original).
>
> Rights, responsibilities and procedural rules of the board of directors, the Supervising Committee and the CEO will be determined upon negotiation amongst the cooperating parties and clarified in the constitution of the restructured company.

[47] By clause 3, Samgris (i.e. prior to its restructure) was to assist in obtaining investment access approval from relevant Australian government departments (failing which approval the agreement was to terminate). Samgris was obliged not to undertake commercial negotiation concerning the coal exploration tenements with other "partners". In the meantime, a bank account jointly managed by Samgris and the Shaanxi Parties was to be established; each was to deposit monies into the account and provisions were set out governing how monies might be spent from that account.

[48] By clause 9, the parties agreed that the contract would be governed by the law of the People's Republic of China, and set out an arbitration agreement committing disputes to the China International Economic and Trade Arbitration Commission (**CIETAC**).

The Investment Agreement dated 15 October 2011

[49] The "Investment Agreement" dated 15 October 2011 was entered into between Samgris (still at a time when Dr Huang was its sole director and shareholder), Dr Huang personally and also the Shaanxi parties. It was written and executed in both the English and Chinese languages.

[50] The Investment Agreement was the formal cooperation contract which had been contemplated by clause 6 of the Cooperation Framework Agreement. As the following observations demonstrate, the shape of the transaction was a fleshed out version of the transaction contemplated by the Cooperation Framework Agreement:

(a) The recitals to the Investment Agreement acknowledged that the Shaanxi Parties and Samgris had signed the Cooperation Framework Agreement.

(b) The recitals acknowledged that the Shaanxi Parties would establish an acquisition vehicle, referred to as "the Purchaser". (The "Purchaser" which the Shaanxi Parties eventually established was APJM and, when summarizing the terms of the Investment Agreement, it is convenient to refer to the Purchaser as APJM, even though APJM did not yet exist.)

(c) The recitals acknowledged that the contemplated restructure of Samgris would still result in the shares of Samgris being held by APJM as to 60% and the original shareholders of Samgris as to 40%. That would happen by APJM –

(i) purchasing 200,000 shares from Dr Huang for an "Acquisition Price" of $11 million; and

(ii) subscribing for a fresh issue of 1,000,000 shares in Samgris for a "Subscription Price" of $55,000,000.

(d) APJM would pay the $11 million Acquisition Price to Dr Huang at the "Closing". It would pay the $55 million Subscription Price to Samgris in installments of $22 million, $22 million and $11 million. The first instalment would be paid on the Closing. The second instalment would be paid (subject to satisfaction of certain conditions) within 12 months after Closing and the third instalment (again subject to satisfaction of certain conditions) would be paid within a further 12 months.

[51] The Investment Agreement added two new ingredients.

[52] First, the express contemplation that at the Closing, Dr Huang's 800,000 shares in Samgris would be transferred to two entities, of which he directly owned a more than 50% equity interest and over which he had full control. This was referred to as the "Redistribution at the Closing". These were the two entities which became the minority shareholders.

[53] Second, by clause 6.2, an express restriction on transfer was created, to be applicable after the Closing which –

(a) constrained both Dr Huang and APJM from transferring or charging any of the shares in Samgris which they beneficially held without the other's prior consent in writing; and

(b) constrained Dr Huang to maintain over 50% equity interest in and full control over each of the entities which acquired his shares through the "Redistribution at the Closing".

[54] Notably, the connection between the amount which would be paid by the Shaanxi Parties (via APJM) and the quantitative assessment of the coal resource contained in the existing exploration tenements as ultimately proved by exploration, which had been previously stated in clause 2 of the Cooperation Framework Agreement, was also fleshed out in the Investment Agreement. A schedule to the Investment Agreement listed the 4 exploration permits for coal (or EPC's) which had been granted; the 7 for which application had been made; and identified relevant variables, including the type of coal expected to be found, the anticipated coal reserve, and its estimated value. Clause 2.3 of the Investment Agreement revealed that the $66 million (the addition of the Acquisition Price to the Subscription Price, referred to as the "Initial Consideration") could be adjusted up or down leading to a further payment by APJM to Samgris or vice versa depending on what was found. It also contemplated an adjustment being made in the event that there was eventually a "supermajority"[43] board decision to cease activities in relation to any of the tenements. The clause provided:

2.3 <u>Price/Adjustment</u>

(a) The Initial Consideration shall be adjusted following the Closings as follows:

(i) if the Geological Resources Amount[44] is less than 90% of the Basic Resource Amount[45] for any of the exploration permits for coal set forth in the schedule headed by "EPCs", by deducting the amount calculated based on the formula below, subject to a maximum deduction of 70% of the Benchmark Price[46] of that permit:

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[43] "Supermajority" was a term which was ultimately defined in clause 19.4 of the Constitution as over two thirds of the votes cast by all directors present at a duly convened board meeting.

[44] This was a term defined as "the geological coal reserve portion exceeding the finally-verified resourcing ranking of 333 as determined in accordance with the *Coal and Peat Geological Exploration Guidelines (DZ/T 0215-2002)* published by the PRC Land and Resources Ministry in 2002".

[45] This was a term defined as "the anticipated coal reserve for each of the exploration permits under the column, "Anticipated Coal Reserve" in the schedule headed by "EPCs".

[46] This was a term defined as "the estimate value for each of the exploration permits as set forth under the column, "Estimate Value" in the schedule headed by "EPCs".

- the Benchmark Price for that permit *(90% of the Basic Resource Amount – Geological Resources Amount)/ the Basic Resource Amount.

(ii) if the Geological Resources Amount is more than 120% of the Basic Resource Amount for any of the exploration permits for coal set forth in the schedule headed by "EPCs", by adding the amount calculated based on the formula below, subject to a maximum addition of 20% of the Benchmark Price of that permit:

- the Benchmark Price for that permit * (Geological Resources Amount-120% of the Basic Resource Amount)/ the Basic Resource Amount.

(b) If as a result of such adjustment:

(i) the amount of the Initial Consideration is increased, the Purchaser shall pay to Samgris in cash a sum equal to that increase without any change to the Purchaser's shareholding in Samgris; or

(ii) the amount of the Initial Consideration is decreased, Samgris shall return to the Purchaser in cash a sum equal to that decrease without any change to the Purchaser's shareholding in Samgris, or

(c) Any such payment or transfer shall be made within five (5) Business Days following the day on which the Geological Resources Amount for any of the exploration permits for coal set forth in the schedule headed by "EPCs" has been finally determined by a third party selected by the Minerals Resources Reserve Appraisal Centre of the PRC Ministry of Land and Resources authorized by the board of Samgris.

(d) If subject to a supermajority board approval of Samgris (a supermajority board approval will be further specified in Samgris's articles of association), Samgris finally determines to not pursue any mine activities for any reasons in relation to any of exploration permits for coal set forth in the schedule headed by "EPCs", Samgris shall return to the Purchaser in cash a sum equal to the Benchmark Price for that permit multiplying its relevant Discounted Ratio minus the cost and expenses arising from the exploration activities in the area covered by that permit without any change to the Purchaser's shareholding in Samgris.

[55] The Investment Agreement also contained terms regarding the composition of the board of directors of Samgris (**the Board**). Clause 6.1(b) provided that initially the Board would consist of five directors and the quorum should consist of three directors (at least including one appointed by Dr Huang and one appointed by APJM). Clause 6.1(c) provided that APJM could designate three directors and the remaining shareholders of Samgris could designate two directors. Unless all directors agreed otherwise, each director had to receive at least 30 days notice in advance of any board meeting: clause 6.1(g). Clause 6.1(i) provided that:

> The board shall have authority with respect to all aspects of the operation of Samgris but the detailed requirements of the board approval will be further specified in Samgris's [Constitution].

[56] By clauses 13.8 and 13.9, the parties again agreed that the contract would be governed by the law of the People's Republic of China, and again set out an arbitration agreement committing disputes to CIETAC.

[57] I observe parenthetically:

(a) The obligation to pay the second payment of $22 million and the conditions relevant thereto were set out in clauses 2.5 and 9.1. The obligation to pay the third payment of $11 million and the conditions relevant thereto were set out in clauses 2.6 and 10.1.

(b) It eventually transpired that neither the second nor the third payment was made within the timeframe contemplated by the Investment Agreement and there is a dispute between the minority shareholders and APJM as to whether the $33 million is payable by APJM to Samgris.

(c) The question of the merits or otherwise of that dispute is not before me. I have been told that that question is the subject of arbitration proceedings under the arbitration agreement.

(d) However, as will appear, the way in which the dispute arose, and the way in which parties conducted themselves in relation thereto, is part of the evidence before me and sheds light on the findings I should make in relation to the issues which are before me.

[58] By clause 13.11, the parties set out an entire agreement clause in terms which acknowledged that anything specified in the Cooperation Framework Agreement, but which had not been mentioned in the Investment Agreement, would continue to be valid in accordance with the terms and conditions of the Cooperation Framework Agreement. The clause provided (emphasis in original):

> This Agreement (including the documents referred to herein) constitutes the entire agreement among the Parties and supersedes any prior understandings, agreements, or representations by or among the Parties, written or oral, to the extent they have related in any way to the subject matter hereof unless anything specified in **CFA has not been mentioned in this Agreement and such specification in CFA should continue to be valid in accordance with the terms and conditions of the CFA.**

The events which occurred on the Closing on 20 April 2012

[59] Prior to 20 April 2012, the Shaanxi Parties had established APJM and Dr Huang had brought about a restructure of Samgris, such that the shares which had been solely held by him had become held by he and his two entities ARH and MBR.

[60] It was common ground that on or about 20 April 2012:

(a) the parties to the Investment Agreement entered into an "Amendment Agreement" which varied and supplemented the Investment Agreement;

(b) the Closing took place such that –

(i) APJM paid $11 million to Dr Huang and $22 million to Samgris;

(ii) APJM became the owner of 60% of the issued shares in Samgris, leaving ARH and MBR each holding 20%;

(c) Samgris adopted a formal written Constitution; and

(d) the parties to the Investment Agreement, together with all the shareholders in Samgris entered into the "Side Agreement".

The Amendment Agreement dated 20 April 2012

[61] The Amendment Agreement was dated 20 April 2012 and was written and executed in both English and Chinese languages. The Amendment Agreement varied and supplemented the Investment Agreement in certain respects.

[62] Three matters should be noted.

[63] First, it recorded the parties' agreement that the Closing would occur at 10am on 20 April 2012.

[64] Second, the parties recorded the fact that the "Redistribution at the Closing" had occurred before the Closing by way of a restructure and thus, at the Closing, the Acquisition Shares (200,000 shares) would be transferred to APJM by Dr Huang, and his two entities ARH and MBR as follows:

(a) Dr Huang would transfer his ownership of 18,000 fully paid and issued shares in Samgris to APJM for a consideration of $990,000 such that after the Closing, Dr Huang would not hold any shares in Samgris;

(b) ARH would transfer 91,000 fully paid and issued shares in Samgris to APJM for a consideration of $5,005,000 such that after the Closing, it would only directly hold 400,000 fully paid and issue shares in Samgris; and

(c) MBR would transfer 91,000 fully paid and issued shares in Samgris to APJM for a consideration of $5,005,000 such that after the Closing, it would only directly hold 400,000 fully paid and issued shares in Samgris.

[65] Third, as to the relationship between Dr Huang and the two entities ARH and MBR:

(a) ARH was incorporated in Australia on 11 November 2011 and is a company registered with the Australian Securities and Investments Commission. Since 11 November 2011, Dr Huang has been its sole director. He holds over 67% of its shares.

(b) MBR was incorporated on 30 March 2007 in the British Virgin Islands. Dr Huang is the sole director. He holds about 51% to 52% of its shares, with the remainder being held by 3 other shareholders.[47]

The Constitution adopted 20 April 2012

[66] The Constitution recorded that it was adopted on 20 April 2012. It stated (by clause 4.1) that as at the time it was adopted, the members of the company were ARH, MBR and APJM. Accordingly, logically, it is to be regarded as having been adopted after the Closing had occurred.

[67] It is also notable that, by a number of its clauses and definitions, it revealed an intention that it be construed as against the background of Australian Corporations law.[48] Although executed in a version which expressed both English and Chinese, clause 3.2(f) provided than in the event of inconsistency the English language version would prevail.

[68] The Constitution contained the following relevant provisions:

7 Restriction on sale or transfer

7.1 Shares in Samgris

(a) Any member of the Company shall not, directly or indirectly (through the transfer of Shares it holds, or controls it holds), male or solicit any sale or transfer of, or create, incur or assume any Encumbrance with respect to, any Share beneficially owned by it or them, in whole or in part without the other members' prior consent in writing.

(b) No transfer of Shares shall be effective if a purpose or effect of such transfer shall have been to circumvent this section 7(a). Any attempt to make any sale of, or create, incur or assume any Encumbrance with respect to any Shares of the Company other than in compliance with this rule 7(a) shall be null and void and of no force and effect and in that case:

(i) the purported transferee shall have no rights or privileges in or with respect to Samgris; and

(ii) Samgris shall not give any effect in Samgris's book records to such attempted sale or Encumbrance.

7.2 Shares in ARH and MBR

(a) Notwithstanding the foregoing, Dr. Huang Wanfu is obligated to keep maintaining an over 50% equity interest in and have control of each of ARH and MBR.

(b) If Dr Huang Wanfu's equity interest in any of ARH or MBR (as the case maybe) is below or equal to 50% of that entity or Dr. Huang Wanfu no longer has control of either of ARH or MBR (as the case maybe), that member of the Company shall have no rights or privileges in or with respect to Samgris, and its Shares in Samgris will be transferred to APJM automatically free of charge and Encumbrance and the directors of the Company must register such automatic transfer of Shares in the Company, provided, *however*, that APJM is obligated to acquire the Shares in Samgris held by each of ARH and MBR at a fair market value and each of ARH and MBR is also obligated to sell all its owned Shares to APJM at a fair market value if Dr. Huang dies or becomes mentally incapable or totally and permanently disabled.

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[47] Transcript, pp 1-89 and 2-12.

[48] See, for example, clauses 2.2, 3.1 and 3.2.

….

14 Appointment and removal of directors

14.1 Number of directors

The Board must consist of five (5) directors.

At least one director must reside ordinarily in Australia.

14.2 Members to appoint directors

APJM shall be entitled to appoint three (3) directors by giving notice in writing to the Company. ARH and MBR shall be entitled to appoint two (2) directors by giving notice in writing to the Company. The appointment is effective from the date of the notice or a later date specified in the notice.

14.3 Confirmation of appointment

If a person is appointed as a director of the Company by a member or members jointly pursuant to this Constitution, the Company must confirm the appointment by resolution as soon as practicable but in any event within two months after the appointment is made.

14.4 Director may resign by giving written notice to the Company (Replaceable Rule 203A)

A director of the Company may resign as a director by giving a written notice of resignation to the Company at its registered office.

14.5 Removal by Shareholders

A member may at any time remove a director appointed by it under rule 14.2 from office by giving notice in writing to the Company.

….

16 Senior Managing

The board of directors of the Company should decide the management structure of the Company. The day-to-day operation and management of the Company should be under the leadership of the general manager, who should be nominated by APJM. The general manager should report directly to the board of directors of the Company. All other senior officers should report directly to the general manager.

17 Powers of directors

17.1 Management of business (Replaceable Rule 198A(1))

The board of directors of the Company shall have all the authority conferred by law in the conduct of the business of the Company and granted by the members' meeting and shall have the responsibility for making general policy decisions concerning the management of the business and affairs of the Company. The business of the Company is to be managed by or under the direction of the board of directors of the Company.

…

18 Remuneration of directors

18.1 Determined by resolution (Replaceable Rule 202A(1))

The directors of the Company are to be paid the remuneration that the Company determines by resolution.

18.2 Traveling and other expenses (Replaceable Rule 202A(2))

The company may also pay the directors' travelling and other expenses that they properly incur:

(a) in attending directors' meetings or any meetings of committees of directors;

(b) in attending any general meetings of the Company; and

(c) in connection with the Company's business.

19 Directors' meetings

19.1 Calling directors' meetings (Replaceable Rule 248C)

A directors' meeting may be called by a director by giving not less than twenty-one (21) days prior notice in writing individually to every other director, unless all directors agree in writing for a short period of notice in relation to that meeting.

19.2 Chairing directors' meetings (Replaceable Rule 248E)

(a) The directors may elect a director to chair their meetings. The directors may determine the period for which the director is to be the chairman.

(b) The directors may elect a director present to chair a meeting, or part of it, if:

(i) a director has not already been elected to chair the meeting; or

(ii) a previously elected chairman is not available or declines to act, for the meeting or the part of the meeting.

19.3 Quorum at directors' meetings

The quorum for a directors' meeting is three (3) directors (one of them must be a director designated by ARH and MBR) and the quorum must be present at all times during the meeting.

19.4 Passing of directors' resolutions (Replaceable Rule 248G)

(a) A resolution of the directors must be passed by a simple majority (over 50%) of the votes cast by all directors present at a duly convened board meeting, except that each of the following shall be passed by a super majority vote (over two thirds (2/3)) of the votes cast by all directors present at a duly convened board meeting):

(i) the Company issues or agrees to issue new Shares or instrument convertible to Shares;

(ii) the Company obtains external funding or financing;

(iii) the Company grants any security on its assets;

(iv) the Company amends any rules of this Constitution;

(v) the Company acquires or disposes assets over ten million Australian dollars;

(vi) the Company disposes or surrenders a tenement;

(vii) the Company enters into an off-take agreement;

(A) other than at arm's length; or

(B) not in usual commercial terms (including a sale price which is at a materially lower than market price); or

(C) with an associate of a member; and

(viii) approval of an exploration work program and budget.

(b) The chairman has no casting vote.

(c) In addition to the above-mentioned, all members and directors of the Company hereby agree and undertake that Australia Shaanxi Mining Pty Ltd. (with the ACN number of 151 573 983 and registered address of Indooroopilly QLD 4068) will be granted a priority to provide the service to the geographic exploration work of the Company.

19.5 Directors' meetings by teleconference

At any time not less than two (2) Business Days prior to a directors' meeting, a director may by notifying the director who calls that directors' meeting require to attend that directors' meeting by teleconference. In that case, the director who calls that directors' meeting shall make all reasonable arrangements to enable the notifying director to attend that directors' meeting over phone.

20 Circulating resolutions

20.1 Resolutions (Replaceable Rule 248A(1))

The directors of the Company may pass a resolution without a directors' meeting being held if all the directors entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document.

20.2 Copies (Replaceable Rule 248A(2))

Separate copies of a document may be used for signing by directors if the wording of the resolution and statement is identical in each copy.

20.3 When the resolution is passed (Replaceable Rule 248A(3))

The resolution is passed when the last director signs.

….

26 Notices

26.1 General

Any notice, statement or other communication under the Constitution must be in writing in both English and Chinese.

26.2 How to give a communication

In addition to any other way allowed by the Corporations Act, a notice or other communication may be given by being:

(a) personally delivered;

(b) left at the person's current address as recorded in the Register of Members;

(c) sent to the person's address as recorded in the Register of Members by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or

(d) sent by fax to the person's current fax number for notices.

26.3 Notice to joint members (Replaceable Rule 249J(2))

Notice to joint members must be given to the joint member named first in the register of members.

26.4 When notice by post or fax is given (Replaceable Rule 249J(4))

A notice of meeting sent to a member by post is taken to be given three (3) days after it is posted (and fourteen (14) days if posted to an overseas address). A notice of meeting sent to a member by fax, or other electronic means as that member elected and notified to the Company, is taken to be given to that member on the next business day after it is validly sent.

The Side Agreement dated 20 April 2012

[69] The Side Agreement was dated 20 April 2012 and was also written and executed in both English and Chinese.

[70] Although it bore the same date as the Amendment Agreement, the terms of the Side Agreement recite the fact that the "Redistribution at the Closing" and the Closing had already occurred. It refers to the Constitution of Samgris. Accordingly it is to be regarded as an agreement entered into after all the foregoing events had been finalized and the Constitution had been adopted.

[71] As mentioned, the parties to the Side Agreement were the parties to the Investment Agreement together with all of the shareholders of Samgris. The effect of the Side Agreement was –

(a) to record the agreement of the three shareholders:

> … to hold their shares in Samgris and only deal with their shares in Samgris in accordance with the Investment Agreement as amended by the Amendment Agreement and the constitution of Samgris, provided, ***however***, that in the event of any conflict between the terms and provisions of the Investment Agreement as amended by the Amendment Agreement) and the constitution of Samgris, the terms and provisions of the Investment Agreement as amended by the Amendment Agreement) shall prevail.

(b) to record the agreement of all parties that Samgris would be operated and managed in the same way and subject to a similar precedence agreement;

(c) to record the agreement of Dr Huang's two companies, namely the two minority shareholders, that–

(i) they assumed joint and several liability with Dr Huang for his obligations under the Investment Agreement as amended by the Amendment Agreement; and

(ii) they, jointly and severally with Dr Huang, would indemnify and hold harmless Samgris, APJM, and the Shaanxi Parties from losses caused by breach by Dr

Huang or Samgris of the Investment Agreement or the Amendment Agreement or certain other things.

Conclusion concerning the nature of the association between the members of Samgris

[72] The question at hand is whether the association between the members of Samgris was –

(a) (as APJM contends) entirely commercial such that they may be safely left to their legal rights; or

(b) (as the minority shareholders contend) such as would attract the superimposition of equitable considerations in the manner explained by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*.

[73] It will be recalled that Lord Wilberforce identified three considerations which might support the latter conclusion:

(a) an association formed or continued on the basis of a personal relationship, involving mutual confidence;

(b) an agreement, or understanding, that all or particular shareholders shall participate in the conduct of the business; and

(c) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

[74] Each of Lord Wilberforce's considerations is present in this case.

[75] The association between the members of Samgris which was brought into being on 20 April 2012 was formed on the basis of the pre-existing relationship between –

(a) on the one hand, Dr Huang; and

(b) on the other hand, the Shaanxi Parties,

which involved mutual cooperation and a level of trust between them.

[76] It is not clear on the evidence when that relationship was first formed. However, it must have been in existence by the time of entry into the Cooperation Framework Agreement in March 2011, notwithstanding that Dr Huang was not a party to it. I infer that that was so because, at the time that agreement was entered into, Dr Huang was the sole member and director of Samgris and the end goal was that he and an entity which the Shaanxi Parties would set up would be the members of Samgris, and Samgris would be administered via the involvement of both as set out in clause 2.3.4. Although the Cooperation Framework Agreement referred to the Shaanxi Parties as co-operating with Samgris, in substance and given the end goal, the necessary co-operation was with Dr Huang.

[77] The relationship was formalized when in October 2011 the Investment Agreement amended and supplemented the Cooperation Framework Agreement and Dr Huang became a party to the Investment Agreement. The end goal became one in which Dr Huang and the Shaanxi Parties would bring about an association as members of Samgris between corporations over which they, respectively, had control, in circumstances in which they agreed that the corporations would be locked into that association by restrictions on transfer. Samgris would be administered via the involvement of those corporations as set out in clause 6.1 of the Investment Agreement. Although by the Investment Agreement the direct relationship between Dr Huang and the Shaanxi Parties would continue only until the Closing, Dr Huang agreed that he would maintain majority equity in and control over the corporations which would become the members of Samgris after the "Redistribution at the Closing".

[78] The relationship and its importance continued after the contemplated Closing occurred on 20 April 2012. By that time, the members of Samgris had become ARH and MBR (as minority shareholders) and APJM (as majority shareholder) and the Constitution had been adopted in a form which restricted all members from transferring or encumbering shares without the consent of other members (clause 7.1), and which obliged Dr Huang to maintain his majority equity in and control over ARH and MBR (clause 7.2). And, by the Side Agreement, all parties (namely Samgris, its 3 members, Dr Huang and the Shaanxi Parties) agreed that Samgris would be operated and managed in accordance with the Investment Agreement as amended by the Amendment Agreement and the Constitution. In this way the direct relationship between Dr Huang and the Shaanxi Parties continued.

[79] By the time of the Closing and bearing in mind the Side Agreement, the substance of the matter was that there were still essentially two sides, namely –

(a) Dr Huang and the 2 minority shareholders; and

(b) the Shaanxi Parties and APJM,

which were involved in a continuing relationship the purpose of which was to enable Samgris to conduct the exploitation of coal exploration tenements. Restrictions on transfer applied to both sides. For present purposes the significance of this is that Dr Huang and the 2 minority shareholders were locked into the relationship by the operation of the restrictions on transfer and related terms. There was express agreement that both sides would participate in the conduct of the business via the medium of the provisions regarding nomination of directors, the constitution of the quorum for directors' meetings, and the need for supermajority votes for particular types of decisions.

[80] The conclusion that the association between the members of Samgris was formed and continued on a basis of mutual confidence and a level of trust between those two sides is justified by –

(a) First, the observations I have made concerning the relationship between Dr Huang and the Shaanxi Parties which brought about the association between the corporations who became the members of Samgris;

(b) Second, the terms of the Cooperation Framework Agreement;

(c) Third, the fact that by clause 13.11 of the Investment Agreement, the parties evidently contemplated that matters may have been specified in the Cooperation Framework Agreement which should be regarded as having continued significance to the relationship; and

(d) Fourth, a particular aspect of the supermajority requirement expressed in the Constitution.

[81] As to the second point just mentioned, the particular aspects of the Cooperation Framework Agreement which were relevant were these:

(a) The long title of the agreement;

(b) The statement in Recital 1 that Samgris had sought the introduction of "partners";

(c) The statement in Recital 4 that the Shaanxi Parties planned "to jointly establish a new entity … and cooperate with SAMGRIS on the coal resources exploration development in its area";

(d) The statement that the operative terms of the agreement had been reached "on the basis of equality and consent, through negotiation";

(e) The statement in clause 3 which constrained Samgris (i.e. prior to its restructure) from entering into commercial negotiation concerning the coal exploration tenements with other "partners", which was consistent with (b) above and with the Shaanxi Parties as being described as partners;

(f) The statement in clause 6.1 that "This agreement forms the basic framework of cooperation by the 3 parties and is the foundation of the cooperation between the 3 parties";

(g) The statement in clause 9.2 that "In the event that the parties to this agreement encounters [sic] disputes regarding interpretation and fulfilment of the relevant clauses of this agreement, solution should be reached through friendly negotiations."

(h) The other terms which evidenced at least the need for mutual cooperation and trust in the period leading up to the Closing, e.g.-

(i) Clause 2.3.4 provided for the governance structure and included the statement:

> Rights, responsibilities and procedural rules of the board of directors, the Supervising Committee and the CEO will be determined upon negotiation amongst the cooperating parties and clarified in the constitution of the restructured company.

(ii) Clause 3.1 contemplated cooperation and obliged Samgris (i.e. the company prior to its restructure) to assist the joint entity to be established by Shaanxi Coal and Shaanxi Geology to obtain investment access approval from relevant Australian government departments (failing which the agreement was to terminate).

(iii) Clause 6.1 provided the sentence already quoted and continued:

> …Within this framework, the three parties will undertake further negotiations regarding the details of the cooperation in accordance with practical needs and form and sign a formal cooperation contract.

[82] As to the fourth point:

(a) A supermajority required over 2/3 of the votes cast by directors present at a duly convened meeting.

(b) If all 5 board members were present and voting, the 3 directors nominated by APJM could not outvote the 2 directors nominated by the minority shareholders on a supermajority issue.

(c) One of the decisions which required a supermajority was "approval of an exploration work program and budget".

(d) Given the centrality to the whole venture of the coal exploration work, this evidenced the underlying assumption of mutual cooperation and trust. If that did not exist, it is difficult to see how an exploration work program or budget would ever get approved and the exploration work done.

[83] For the foregoing reasons, I find that the nature of the association between the members of Samgris was such that it was to be regarded as falling within the category of cases to which Lord Wilberforce referred. There was an underlying assumption to the instruments which expressed the parties' legal rights *inter se* and that was the continuity of a working relationship between the two sides which involved the mutual cooperation and level of trust of which the cases speak.

[84] Whether one refers to Samgris as a "quasi-partnership" or "a majority controlled business requiring mutual cooperation and a level of trust" between the majority and the minority, I find it to be the type of company for which winding up is regarded as the characteristic

remedy where the working relationship[49] predicated on mutual cooperation, trust and confidence has irretrievably broken down.

Relevant actors after the restructure of Samgris

The natural persons representing the minority shareholders

[85] The association between Dr Huang and the two minority shareholders ARH and MBR has already been described. He was the sole director of each and had a majority equity position in each.

[86] After the Closing, two minority shareholders had the ability to nominate two directors of Samgris. Dr Huang was so nominated and, accordingly, continued as a director of Samgris at all relevant times.

[87] Mr Michael Howard was an experienced and qualified mining engineer. He ran a mining consultancy business. He had a prior working association with Dr Huang and Dr Huang approached him to become a director of Samgris. He was appointed as such, at the nomination of the minority shareholders, on about 14 September 2012. Mr Howard did not speak Chinese.

[88] Dr Huang and Mr Howard were the principal witnesses called by the minority shareholders to establish their case.

The natural persons representing APJM

[89] The association between the Shaanxi Parties and the majority shareholder APJM has already been described.

[90] APJM was incorporated in Australia on 2 April 2012 and its board of directors was constituted as follows:

(a) For the period from 2 April 2012 to 18 May 2012:

(i) Mr Shijie Song. As I have already mentioned, he was the Head of the Strategic Planning Committee of Shaanxi Coal (and remained so for the period of his involvement with Samgris), had acted as a director, supervisor and senior officer of more than ten companies within its group and had been the principal negotiator for Shaanxi Coal of the Cooperation Framework Agreement. He was the Chair of APJM until he was replaced in that position by Mr Laixin Li on 30 December 2015.[50] As will appear, APJM nominated him to the board of Samgris and he became the first Chairman of the Board of Samgris (**Chair**).

(ii) Mr Yuping Zhang. As will appear, he was appointed as the first CEO of Samgris, nominated by APJM.

(iii) Mr (Xin) Wang. As will appear APJM nominated him to the board of Samgris.

(iv) Mr Qinke Feng.

(v) Mr (Chen) Wang.[51]

(b) For the period from 18 May 2012 to 30 December 2013;

(i) Mr Shijie Song;

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[49] The working relationship concerned is the relationship between the 2 minority shareholders and APJM, as evidenced by the relationship between the persons who they appointed to conduct the relationship from time to time.

[50] Exhibit 13: Song (1) at [10].

[51] Tab 12 of Volume 1 of Exhibit 1 records Mr (Chen) Wang separately to Mr (Xin) Wang and I have assumed, despite the similarity of names, that they are in fact different persons. That they were different persons is also consistent with [63](a) of the Defence and [30](c) of the Reply.

(ii) Mr (Xin) Wang;

(iii) Mr Qinke Feng; and

(iv) Mr Hui Xie. As will appear APJM nominated him to the board of Samgris.

(v) Mr (Chen) Wang.

(c) For the period from 30 December 2013 to 30 December 2015:

(i) Mr Shijie Song;

(ii) Mr (Xin) Wang;

(iii) Mr Qinke Feng; and

(iv) Mr Hui Xie; and

(v) Mr (Chen) Wang.

(d) For the period from 30 December 2015 to date:

(i) Mr Laixin Li. He was the Executive Director and Secretary of the CPC Committee of Shaanxi Coalbed Methane Development Company, which undertook the coal seam gas exploration activities for Shaanxi Coal. He replaced Mr Song as Chair of APJM. As will appear, APJM nominated him to the Board of Samgris from 30 August 2013 and he became the second Chairman, replacing Mr Song.

(ii) Mr (Xin) Wang;

(iii) Mr Qinke Feng;

(iv) Mr Hui Xie; and

(v) Mr (Chen) Wang.

[91] From 18 May 2012 to 30 December 2015, Ms Wu was the company secretary of APJM.

The board and executive management of Samgris

[92] The three directors of Samgris nominated by APJM, were as follows:

(a) For the period from 20 April 2012 to 30 August 2013:

(i) Mr Song (who was also appointed as Chair);

(ii) Mr Xie; and

(iii) Mr (Xin) Wang.

(b) after 30 August 2013:

(i) Mr Li, who replaced Mr Song as director and Chair;

(ii) Mr Xie; and

(iii) Mr (Xin) Wang.

[93] APJM called the two chairs as witnesses, but not the other two directors.

[94] For most of the relevant period (namely from 18 May 2012 to 31 May 2016) Ms Wu was also the company secretary of Samgris. She was not called by APJM.

[95] As to the executive management and staff of Samgris:

(a) On 18 May 2012, Mr Yuping Zhang was appointed as CEO of Samgris, having been nominated by APJM. In that role, he was also General Manager within the meaning of clause 16 of the Constitution. The terms CEO and General Manager should be

regarded as interchangeable in this context. Mr Yuping Zhang was replaced in those roles on 22 April 2014 by Mr Mu, who remains in those roles.

(b) On 1 September 2012, Mr Li Bao Zhu was appointed the deputy CEO of Samgris.

(c) On 18 May 2012, Ms Dong was appointed as CFO of Samgris, having been nominated by APJM. Ms Dong remains in that role.[52] She is also the Senior Business Manager employed in the Finance Department of Shaanxi Coal.

(d) Ms Lingling Zhang was an employee of Samgris who became the in-house accountant, was involved in setting up Samgris' accounting system, assisting in drafting the accounting policy and reimbursement policy, checking contracts, paying invoices payable by Samgris, and was responsible for the process of employee reimbursement.[53]

[96] Mr Yuping Zhang, Mr Mu, Ms Dong and Ms Lingling Zhang were all called by APJM. Mr Li Bao Zhu was not.

The first board meeting - 18 May 2012

[97] In March 2011 and by clause 2.3.4 of the Cooperative Framework Agreement it had been specified that:

(a) There would be a 5 member board and a 3 member Supervising Committee.

(b) APJM would be able to nominate the majority of members of each. It could choose the chair of the Board, but the minority shareholders could choose the chair of the Supervising Committee.

(c) Executive management would comprise a CEO, a COO, a CFO and other management level personnel.

(d) APJM could pick the CEO and the CFO, but the minority shareholders could pick the COO.

(e) The other management level personnel were to be appointed by the Board.

(f) Otherwise, the allocation of responsibilities as between the Board, the contemplated Supervising Committee and the CEO was left for negotiation between the cooperating parties and clarification in the eventual Constitution.

[98] In October 2011 and by the Investment Agreement no further specific provision was made concerning those matters, save for the general statement in clause 6.1(i) that "The board shall have authority with respect to all aspects of the operation of Samgris but the detailed requirements of the board approval will be further specified in Samgris's [Constitution]." In light of the fact that by clause 13.11 the parties had specifically agreed that anything specified in the Cooperative Framework Agreement and not mentioned in the Investment Agreement would continue to be valid in accordance with the Cooperative Framework Agreement, the agreement as to the matters referred to in [97](a) to [97](e) above continued to be binding.

[99] On 20 April 2012, the Constitution of Samgris was adopted. The following observations may be made about the effect of clauses 16 and 17.1 and the supermajority provisions of clause 19.4:

(a) The Board had the authority to conduct the business of Samgris. The business was to be managed by or under the direction of the Board.

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[52] See [27] of the Statement of Claim which was admitted by [9](a) of the Defence.

[53] Exhibit 16: Lingling Zhang (1) at [13] – [14].

(b) The Board had the sole responsibility for –

(i) deciding the management structure of Samgris;

(ii) making general policy decisions concerning the management of the business and affairs of Samgris; and

(iii) the decisions identified as requiring a supermajority, including approving an exploration work program and budget.

(c) APJM had to nominate a CEO. No provision was made concerning the responsibility for approving the terms and conditions on which the CEO was engaged, but I think the proper construction of the Constitution was that it must have been contemplated that that subject was a decision for the Board.

(d) The Constitution provided that the day-to-day operation and management of Samgris was to be done "under the leadership of [the CEO]", on a direct report to the Board. I think it was unlikely that the proper construction of the Constitution (construed by itself) was that the CEO was thereby authorized to make any decision which could be characterized as "day-to-day operation and management of Samgris" without seeking board authority. Rather it must have been contemplated that the question of conferring (and then setting the precise limits of) the CEO's delegated authority was a matter for the Board to decide once the CEO was appointed.

(e) There would be other senior officers, who would report to the CEO. No provision was made for their appointment. Obviously the Board had authority to make those choices and to make all related decisions. The Board also had authority to allow those decisions to be made by the CEO. Again, I think that it must have been contemplated that question of setting of the precise limits of the CEO's delegated authority was a matter for Board to decide once the CEO was appointed.

[100] On 20 April 2012, by the Side Agreement, the parties agreed on a conflict provision which stated that "in the event of any conflict between the terms and provisions of the Investment Agreement (as amended) and the Constitution, the terms of the Investment Agreement (as amended) shall prevail". Bearing in mind the observations I have made at [97] and [98] above, there was an agreement, which would prevail over the Constitution, that management level personnel would be appointed by the Board. The Side Agreement operated to make that agreement binding on the members of Samgris, Samgris, Dr Huang, and the Shaanxi Parties.

[101] On 18 May 2012, about one month after the Closing, the board of directors held its first board meeting in Xi'an, China.[54]

[102] The directors who attended this meeting were Mr Song, Mr Xie, Mr (Xin) Wang and Dr Huang. Mr Howard was not yet a director, so he was not present. There were others present, including Mr Zhang (who was to become the CEO), Ms Wu (who was to become company secretary), Ms Dong (who was to become CFO) and Mr Cheng, a lawyer representing APJM.[55]

[103] At the first meeting, it was unanimously resolved, inter alia, that:[56]

(a) The Board considered and approved the motion to elect the first directors and the first Chair, namely Mr Song, Mr Xie and Mr (Xin) Wang (as nominated by APJM) and Dr

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[54] This is common ground: see [30] of the Statement of Claim which was admitted by [12](a) of the Defence.

[55] Evidence of Mr Song: Transcript, pp 4-40 line 29 to 4-41 line 18.

[56] The minutes of the first board meeting appear in tab 23 of Volume 1 of Exhibit 1, and the resolutions passed by the Board at the meeting appear in tab 22 of Volume 1 of Exhibit 1.

Huang and Mr Howard (as nominated by the plaintiffs) as directors, and Mr Song as Chair (as nominated by APJM);

(b) The Board considered and approved the motion to nominate and appoint Mr Zhang as CEO (on the nomination of APJM) for a period of 3 years;

(c) The Board considered and approved the motion to establish the "department setting" of Samgris,[57] namely that three departments be set up temporarily, being General Office, Project Department and Finance Department, with 2 positions in the General Office, 3-6 positions in the Project Department, and 2 positions in the Finance Department;

(d) The Board considered and approved the motion to nominate and appoint the senior management members of Samgris, namely Ms Dong be appointed as CFO (on the nomination of APJM) and Ms Wu be appointed as company secretary (on the nomination of APJM).

(e) The Board considered and approved the motion to rent office place and purchase business vehicles, in these terms (emphasis added):

> According to the current department setting and the development of the company, a proper office place in Brisbane and business vehicles are needed. **And the [CEO] will be responsible for the specific issues regarding this.**

(f) The Board considered and approved the motion to establish the governance and management system of the company in these terms (emphasis added):

> The governance and management system of the company should be accomplished as soon as the company starts to operate officially. **The [CEO] will be responsible for the specific issues regarding this, and one copy should be submitted to the Board for record**.

[104] With two exceptions, there does not seem to be any step taken at this meeting which was inconsistent with the way the view I have taken of the proper construction of the Constitution and of the other contractual obligations of the parties *inter se*. The exceptions are that there was no supervising committee created, and that there was no COO appointed. The evidence did not explain why that did not occur and no complaint is made about it.

[105] Obviously enough, and consistently with the observations I have made, the fifth resolution delegated particular authority to the CEO in relation to the topic of arranging for premises and vehicles. The only other specific delegation given to the CEO was that which was the subject of the sixth resolution.

[106] The minutes[58] (and Mr Song's oral evidence) reveal that as Chair Mr Song did flag other issues which would have to be addressed in the future, including –

(a) working out the annual plan and working scheme (which was a reference to the exploration work program);[59]

(b) establishing financial regulations (which was a reference to rules concerning financial management of Samgris, including how its money would be spent);[60]

(c) formulating the system of salary and benefit packages.

[107] At this time, all of these matters were matters for decision by the Board. No board decision had yet been made on them. They were, however, obviously important matters on which decisions needed to be made by the Board promptly. As will appear, what in fact happened

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[57] This seems to be a decision on the management structure as contemplated by the Constitution.
[58] Tab 23 of Volume 1 of Exhibit 1, p 4.
[59] Transcript, p 4-41 lines 43 to 47; p 4-42 line 1; p 4-55 lines 40 to 45.
[60] Transcript, p 4-42 lines 3 to 19.

was that important decisions started to get made and implemented either by Mr Song as Chair or Mr Zhang as CEO, without having first obtained the authority to do so from the Board. There was ample opportunity for this to occur: Mr Song deposed to the fact that his practice was to convene a teleconference with the management of Samgris each Monday morning "in my capacity as a director of Samgris, and director and Chairman of APJM so that I could be kept up to date on company matters."[61] This behavior was at the root of the eventual breakdown in the relationship between the two sides. As will appear, it was evident in a meeting which took place on 31 August 2012, in Samgris' conduct (by Mr Song as Chair) in making important appointments, both shortly before and after that meeting, a similar meeting in January 2013, and in APJM's own view that it had in fact taken over the management of Samgris at the Closing. I infer that this conduct was in fact authorized by APJM.[62] It was not authorized by the minority shareholders.

Events between the first and second board meetings

[108] An attempt was made to convene the second board meeting in Xi'an, China on 20 August 2012, but it was cancelled on 17 August 2012 due to the unavailability of Mr Song. Dr Huang and Mr Howard nevertheless travelled to Xi'an.[63] On 21 August 2012, the directors (other than Mr Song) met in Xi'an, in a meeting which I infer must have been informal.[64] Dr Huang deposed to having raised concerns with the APJM-nominated directors about the operation of Samgris, particularly in relation to it being operated as if it was a wholly owned subsidiary of APJM and without having regard to the views of the plaintiffs' nominated directors.[65] Dr Huang was reassured that this concern would be addressed.[66]

Meeting of Samgris in China on 31 August 2012

[109] It is common ground that a meeting was held on 31 August 2012 in Shaanxi, China[67] which was hosted by Mr Song and attended by ten people including Ms Dong.[68] It is also common ground that other than Mr Song, no director of Samgris was notified of the meeting and none attended.[69] The attendees comprised:

(a) Mr Song and two of the four other directors of APJM, namely –

  (i) Mr (Chen) Wang;

  (ii) Mr Qinke Feng;

(b) In relation to the management of Samgris:

  (i) the CEO, Mr Zhang;

  (ii) the CFO, Ms Dong;

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[61] Exhibit 13: Song (1) at [90].

[62] The approach I have taken in this judgment to the question whether I should draw inferences is that described by Gordon J in *Re Day* (2017) 91 ALJR 262 at [18]

[63] Exhibit 2: Huang (1) at [42] to [44].

[64] Exhibit 2: Huang (1) at [45].

[65] Exhibit 2: Huang (1) at [46].

[66] Exhibit 2: Huang (1) at [46].

[67] See [38] of the Statement of Claim which was admitted by [18](a) of the Defence.

[68] See [39] of the Statement of Claim which was admitted by [18](b) of the Defence. The meeting was attended by, amongst others, Mr Song (the Samgris Chair), Mr Zhang (the Samgris CEO), Mr Li Bao Zhu (the proposed deputy CEO of Samgris), Ms Dong (the CFO of Samgris), Ms Lingling Zhang (the proposed accountant to be employed by Samgris) and Ms Wu (the company secretary of Samgris): see Exhibit 2: Huang (2) at [68] and [69]. See also the minutes of the meeting at tab 47 of Volume 2 of Exhibit 1.

[69] Paragraph 40 SOC admitted by paragraph 19(b) Defence. Dr Huang was not notified of the meeting until after it had taken place: paragraph 41 SOC admitted by paragraph 19(b) Defence.

(iii) the company secretary, Ms Wu;

(c) Persons who subsequently became part of the management of Samgris:

(i) Mr Li Bao Zhu, who became the Deputy CEO;

(ii) Ms Lingling Zhang, who became the accountant;

(d) Two Shaanxi Coal employees.[70]

[110] The minutes of that meeting[71] reveal the following.

[111] First, the minutes were headed "SAMGRIS Resources Pty Ltd" and recorded that "On the afternoon of 31 August 2012, the chairman of the board, [Mr Song] hosted the Samgris Resources Pty Ltd business meeting at the Shaanxi Hotel".

[112] Second, the minutes record instructions being given to Samgris management and decisions being made on behalf of Samgris, in terms which reveal no contemplation that it would be necessary to obtain the approval of the Board prior to their implementation. Thus:

(a) The meeting instructed management to "clarify the business scope of [Samgris] as soon as possible".

(b) The meeting "clarified" the company structure and staffing of Samgris. The structure was set out in a diagram which identified authority as flowing down through the following tiers:

(i) The Chair (but not, notably, the Board);[72]

(ii) The CEO;

(iii) The COO, Deputy CEO and CFO; and

(iv) The General Office (noted as comprising 2 people), the Project Department (noted as comprising 4 people), and the Financial Assets Department (noted as comprising 1 person).

(c) The minutes recorded Samgris management as having submitted a 2012 annual exploration plan and the meeting giving its agreement in principle to that plan.

(d) The meeting clarified for Samgris management what the focus of that year's work would be.

[113] Third, the minutes did record some instructions being given to Samgris management and decisions being made on behalf of Samgris, but in terms which did reveal a contemplation that the Board should be approached for approval. Thus:

(a) As to remuneration:

(i) Decisions were made about the components of remuneration of the Chair, the CEO, and COO, Deputy CEO and CFO, although it was acknowledged that bonuses required consideration or resolution by the Board.

(ii) Managers were given authority to determine the remuneration of non-senior management personnel "in accordance with the actual local level in Australia".

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[70] Exhibit 2: Huang (2) at [69].

[71] Contained in tab 47 of Volume 2 of Exhibit 1.

[72] It is telling that the structure did not include a place for the Board. Particularly is that so in light of the fact that the insertion of the Chair in lieu of the Board at the top of the structure represented a change from a draft structure which the CEO (Mr Zhang) had earlier circulated to the Board, including Mr Song, on 22 June 2012: see tab 25 of Volume 1 of Exhibit 1.

(iii) Samgris management was directed to formulate a remuneration scheme and submit it to the Board for consideration.

(b) Mr Li Bao Zhu was nominated for the role of Deputy CEO with his nomination to be submitted to the Board for approval.

[114] Mr Song sought to characterize the meeting as a meeting of APJM not of Samgris,[73] the purpose of which was to formulate recommendations that APJM, as the majority shareholder in Samgris, wished to make for Samgris' operations. I reject his characterization of the meeting. It flies in the face of the form and wording of the minutes and, it must be noted, of the subsequent email from Ms Wu (who attended the meeting) by which on 20 September 2012 the minutes were subsequently provided to the Samgris directors and which described the minutes as "the formal document of the meeting minutes of Samgris Resources Pty Ltd on August 31st, 2012".[74] To my mind, Mr Song's evidence in this regard sounded adversely to his credit.

[115] I have no doubt that the meeting should at least be characterized as a meeting in which Mr Song as chair of both APJM and Samgris (and with the blessing of APJM, as evidenced by the presence of a majority of its directors) purported to exercise authority over Samgris' management. Essentially it was an exercise of the authority of the chair of both Samgris and APJM (backed up by other representatives of APJM), consistent with the authority accorded to the Chair in the company structure "clarified" for Samgris' management at the meeting. The problem with all of this was that the Board had not given Mr Song that authority and, in particular, the directors nominated by the minority shareholders were excluded from the process of considering whether the Chair should have it. It was precisely the sort of thing about which Mr Huang had raised concerns only a few weeks earlier: see [108] above.

[116] Similar exemplars of the exercise of authority by the Chair were to be found shortly before and shortly after this meeting in the manner in which Mr Song caused Samgris to enter into contracts of employment with Mr Zhang (as CEO), Ms Wu, Mr Li Bao Zhu (as Deputy CEO) and Ms Lingling Zhang (as accountant). I make the following observations:

(a) On 18 August 2012, Mr Song sent a letter of offer and employment contract to Mr Zhang.[75] He did this without having informed the Board of the terms of the proposed offer and contract, and without having obtained the Board's express approval of those terms.[76] Whilst the Board had resolved at the first board meeting to appoint Mr Zhang as CEO, the terms upon which he was to be employed in that role had not been considered. Nor had the nature and extent of his delegated authority.

(b) Notwithstanding the fact that the meeting of 31 August 2012 had specifically noted that the nomination of Mr Li Bao Zhu for the role of Deputy CEO was to be submitted to the Board for approval, in fact Mr Song issued a letter of offer and employment contract[77] to Mr Li Bao Zhu for the role of "Deputy CEO", the very next day on 1 September 2012 and without any approval having been sought and obtained.[78] The offer was accepted on the same day.

(c) Although of lesser significance, the letter of offer and employment contract made to Ms Wu for the position of Chief Information Officer and accepted by her on 8 August

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[73] Exhibit 13: Song (1) at [86].

[74] Tab 58 of Volume 2 of Exhibit 1.

[75] That this was done is common ground: see [26A] of the Statement of Claim which was admitted by [8A](a) of the Defence.

[76] See [26A] of the Statement of Claim and [8A](b) of the Defence.

[77] See tab 50 of Volume 2 of Exhibit 1.

[78] This is common ground: see [46] of the Statement of Claim which was admitted by [23] of the Defence.

2012 was similarly unauthorized.[79] Similarly, Mr Song's issue of a letter of offer to Ms Lingling Zhang on 4 September 2012, which was then revised by Mr Zhang on 9 October 2012 and accepted by Ms Lingling Zhang on the same day.[80]

[117] It is common ground that Dr Huang was not, prior to 1 September 2012:

(a) informed of APJM's proposal for the company structure of Samgris;

(b) given an opportunity to have any input into APJM's decision to propose that company structure;

(c) informed of the nomination of Mr Li Bao Zhu as Deputy CEO or given an opportunity to have any input as to whether he was an appropriate person to be appointed; or

(d) informed that Mr Song was going to offer Mr Li Bao Zhu the position of Deputy CEO or the terms on which that offer would be made, including his salary.[81]

[118] Dr Huang did not learn of the 31 August 2012 meeting until he received the 20 September 2012 email which provided him with a copy of the minutes. On 21 September 2012 he complained to Mr Song that the matters discussed during the meeting should have been the responsibility of the Board.[82] On the same day, he also emailed all board members and the company secretary making a similar point and requesting that the next board meeting be held as soon as possible.[83]

[119] The essence of the minority shareholders' complaint on this issue is that Dr Huang and Mr Howard were excluded from a meeting[84] during which important matters concerning the management of Samgris were discussed and important decisions were made. The complaint was entirely justified. Dr Huang expressed this quite powerfully in his oral evidence before me during cross-examination[85]:

> MR COUPER: You would expect the next step would then be [indistinct] a discussion about those matters with members of the board. Is that what you say?---My concern re – with this board – with this meeting, when I received the email from the company secretary [indistinct] the minute – I immediately talk to Mr Song. Remember, we tried to have a board meeting on 21st. It was planned. We book the flight. We went to Xi'an. Everybody's there. Mr Song not attended the meeting, cancelled the meeting, and after the week, he has all this minute sent to us and then started trying to implement [indistinct] so [indistinct] was my concern. I'm not worry about the major shareholder, they could have a view.
>
> So you say now that your concern was the timing of the meeting. Is that your - - -?---Not the timing of the meeting. How they conduct was wrong.
>
> So I'm not following you. You've got no objection to the fact that the major shareholders' representatives met and discussed the affairs of Samgris. Is that right?---No. No. The – it's – sorry, your Honour. Here, my objection to this meeting – the meeting minutes was – look, major shareholder – if they're APJM, they have their own meeting. That's fine. Now, they – they can have proposal sent to the – sent to the Samgris board, have recommendation. You can discussion. There's no – nothing wrong with that, but they cannot – the – this is not a major shareholders meeting. This is Samgris meeting. The – the meeting – because the –the chairman and the CFO – CO – the – the CEO, they making the minutes, making decision, making appointment, and they send the minutes to – to every director of Samgris.

[120] APJM sought to defuse these concerns by pointing to the fact that some of the subject matters which were dealt with at the 31 August 2012 meeting were in fact subsequently dealt with at board level. That is not an adequate response for at least these reasons:

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[79] Tab 35 of Volume 2 of Exhibit 1.

[80] See Exhibit 2: Huang (2) at [83] to [94].

[81] See [47] of the Statement of Claim and [24] of the Defence.

[82] See Exhibit 2: Huang (1) at [53] and [54] and Huang (2) at [80] to [82].

[83] Tab 60 of Volume 2 of Exhibit 1.

[84] The meeting held in China on 31 August 2012.

[85] Transcript, p 1-106 lines 4 to 34.

(a) First, insofar as the meeting reflects a course condoned by APJM, that was contrary to what I have concluded was the proper construction of the legal obligations which lay between the parties. Moreover, it tended to be destructive of the mutual trust and confidence which I have concluded was an important feature of the association between the members of Samgris.

(b) Second, as will appear, the company structure which had been "clarified" in August 2012 for Samgris management – notably in a way which had authority flowing down from the Chair not the Board – was not dealt with at the next board meeting. A structure which would have correctly placed the Board not the Chair at the top was an agenda item as at 16 October 2012,[86] but by the time of the second board meeting on 17 March 2013, the agenda item had been removed. As will appear, Board Operation Rules were eventually adopted at the third board meeting in December 2013, in a form which specifically acknowledged that the Chair would only have the authority specifically given by the Board, but that adoption did not seem to have any effect.

(c) Third, by the time of Dr Huang's complaint, all of the appointments, including their terms and conditions were *faits accomplis*.

[121] So far as the last point, in particular, is concerned, in cross-examination it was pointed out to Dr Huang that, the nomination of Mr Li Bao Zhu as Deputy CEO was submitted to the Board for approval at the second board meeting. As will appear, the second board meeting did not take place until 17 March 2013. This was more than six months after Mr Song had issued a letter of offer of employment and employment contract to Mr Li Bao Zhu on 1 September 2012 and Mr Li Bao Zhu was working in Australia by November 2012. Dr Huang gave the following evidence in cross-examination:

> MR COUPER: Page 19. We were looking at item 7, Dr Huang: *The meeting nominates Bao Zhu Li to be appointed as the deputy CEO of Samgris Resources and submits to the board of directors for approval.*
>
> Did you have a complaint about the idea that that appointment should be submitted to the board of directors for approval?---Your Honour, the complaint or the – my disagreement with this one is not what you say. It's what you did. Okay. Even though the – on this minute they say that Mr Li be appointed as deputy CEO [indistinct] board approval, but they already – in the 1st of September they already offer him a contract. He – the second meeting is on March 2013. He already – in November he already in Australia. So, you know, how this is what they say is what they did. That's contradictory to themself. That's what my complaint.
>
> Well, let us deal with an aspect of that. We'll come back to some other things. At the board meeting in March – so when was the next board meeting after this, March two thousand - - -?---17 March 2013.
>
> All right. '13. There was a resolution proposed that Mr Li be appointed deputy CEO of Samgris; is that right?---Correct.
>
> All right. Your complaint, as I understand it, now is that you and Mr Howard didn't get a proper chance to say no because he had an employment contract; is that right? Is that your complaint?---During that – if – already in my exhibit in the second board meeting – the audio recording can't say – we complain about his appointment is not about – not only about the procedure because he should have [indistinct] to approval, then give him a contract and then he started work. He already in Australia. That's first thing. Second thing, we were – actually during the meeting we said Mr Li is not qualified. Is not a qualified guy can do the job. We already have a CEO here is incompetent. They trying to put another guy – this in my record. Already said that. They got another guy. He cannot speak English at all. He hasn't got Australia regulations or safety guard, all of this stuff. They're trying to put him into to look after safety issue – drilling issue. He hasn't got experience. That's my complaint, so two side.
>
> …[87]

[86] See tab 69 of Volume 2 of Exhibit 1 at pp 296, 299 and 300.
[87] Transcript page 1-107 at line 6ff.

Dr Huang's concerns as at October 2012

[122] Dr Huang travelled to Xi'an between 21 and 25 October 2012 to discuss his concerns about management issues (and other matters) with Mr Song. He arranged for Australian lawyers to give a presentation explaining the duties and obligations of directors of an Australian-registered company. He deposed to the continuation of the concerns which he expressed at the meeting in China on 21 September 2016.[88] I accept his evidence in this regard. His identification of what he was concerned about is supported by the matters referred to above and also by the terms of the email which he sent to the directors on 18 October 2012.[89]

Delayed response to Dr Huang's request for holding of second board meeting

[123] As has been mentioned, the second board meeting had been scheduled to take place on 20 August 2012, but this did not occur. Mr Song's evidence was that he decided to cancel the meeting after discussion with Mr Xie and Mr (Xin) Wang and that they decided together.[90] He sought to explain that he could not communicate with the Australian directors because of language, but that was not a persuasive explanation because he accepted that Dr Huang spoke Chinese and he could speak with him.[91] Mr Song agreed that Dr Huang wanted to have a board meeting as soon as possible and from August to December 2012 asked for a board meeting.[92] Nevertheless, this did not happen until March 2013.

[124] On 16 October 2012, a number of resolutions to be considered by the Board at the second board meeting were distributed to the directors.[93] Mr Song's evidence is that these proposed resolutions came from Mr Zhang.[94] They included:

(a) nomination of Mr Li Bao Zhu as the "Director of Business Operations of the Company", assisting the work of the General Manager;

(b) review of a proposed remuneration system (being the draft Remuneration Plan prepared following the 31 August 2012 meeting described above);

(c) review of the stage-one exploration plan and budget;

(d) review of the report on the 2013 financial budget;

(e) review of a proposed organisational chart which was said to set out the organisation structure of the company.[95]

[125] The following day, 17 October 2012, Mr Xie emailed comments regarding these resolutions to Ms Wu.[96] He commented generally that the proposed resolutions were lacking in detail. As regards the company's corporate structure, Mr Xie stated that description of job duties for the positions should be provided.

[126] On 18 October 2012, Dr Huang sent an email to Ms Wu regarding his proposals for the second board meeting.[97] Dr Huang stated (emphasis added):

> … **I wish to remind all directors:**

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[88] Exhibit 2: Huang (1) at [56] to [58].

[89] Tab 74 of Volume 2 of Exhibit 1 quoted post at [126].

[90] Transcript, p 4-65 lines 5-16.

[91] Transcript, p 4-65 line 16 et seq.

[92] Transcript, p 4-88 lines 23-38.

[93] Tab 69 of Volume 2 of Exhibit 1.

[94] Exhibit 13: Song (1) at [154].

[95] This chart was the chart referred to at [120](b) above.

[96] Tab 71 of Volume 2 of Exhibit 1; Exhibit 2: Huang (2) at [96].

[97] Tab 74 of Volume 2 of Exhibit 1; Exhibit 2: Huang (2) at [97].

> **1. The management of the company must be transparent and professionalized, and an accountability system should be implemented. The positions allocated must have clear responsibilities and rights.** Therefore, the supervisors' job descriptions under the company framework should be presented by the Board of Directors.
>
> 2. The company's recent major conflicts and communication issues concentrate upon the financial area. The Board must rethink whether the structure of management is set up properly, how to strengthen the cooperation and communication of all the parties, and what to do to implement a reasonable, legal, convenient and transparent financial management system.
>
> **Here once again I would like to request the Board to decide upon an accountability system for the management at the next board meeting and to examine and approve the company's financial management system**.

[127] Mr Song was informed of the comments from Mr Xie and Dr Huang.[98] He responded in an email to the company secretary Ms Wu in these terms (emphasis added):[99]

> Each director has proposed valuable comments and suggestions regarding the topics of the board meeting. According to these comments and suggestions, I think we need to do well in the following aspects:
>
> Continue to improve the content of the proposal and the suggestions expressed by the directors shall be fully expressed in the motion.
>
> … **Organizational structure and the description of staff positions shall be in accordance with the spirit of the meeting held at Zhangba Hotel last time and shall be improved after full communication with managers**. In terms of performance appraisal, instruct managers to make comment as soon as possible.
>
> You shall communicate fully with Director [Dr Huang] about the accountability suggestion and come up with an operational proposal. The proposal shall be circulated to all directors for discussion. Instruct managers to come up with solutions as soon as possible in terms of the improvement of financial systems. The solutions need to be determined at the board meeting.
>
> …
>
> We need to communicate fully in order to establish a regulator communication mechanism between the Board of Directors and managers.
>
> Please communicate with Manager Zhang fully for other issues that have not been mentioned.
>
> Please forward the letter and this email together to the directors and managers. At the same time, please talk with them one by one.

[128] These comments were forwarded to the other directors (but not Mr Howard).[100] The reference to the meeting held "at Zhangba Hotel" was a reference to the meeting on 31 August 2012 discussed at [109] to [115] above.[101] It follows that the Chair had effectively reiterated to all the directors that the organizational structure was to accord with that which he had clarified to Samgris management at that time, namely which depicted authority flowing down from the Chair. Of course that was the very meeting about which justified complaint had been made by Dr Huang.

[129] On 19 October 2012, Dr Huang sent an email to Mr Song, Mr Xie, Mr (Xin) Wang and Ms Wu stating that he hoped the next board meeting could be scheduled for 29 October 2012 in Xi'an. The second board meeting did not proceed on 29 October 2012 as Dr Huang had hoped. He was advised by email from Ms Wu on 22 October 2012 that the management of Samgris needed more time to prepare for the meeting and that the Chair (Mr Song) had decided to postpone it.[102]

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[98] Tab 76 of Volume 2 of Exhibit 1; Exhibit 2: Huang (2) at [98].

[99] Tab 78 of Volume 2 of Exhibit 1; Exhibit 2: Huang (2) at [99].

[100] Tab 80 of Volume 2 of Exhibit 1.

[101] Transcript, p 7-15 lines 23 to 27.

[102] Tab 84 of Volume 2 of Exhibit 1.

[130] As noted above, Dr Huang was in Xi'an between 21 and 25 October 2012 to discuss his concerns about management issues (and other matters) with Mr Song.[103] Dr Huang met with Mr Song, Mr (Chen) Wang and Ms Dong. Mr Song suggested,[104] that in this meeting Dr Huang expressed support for each of the resolutions for the second board meeting which had been distributed. However I do not consider his version of the conversation to be reliable. I accept Dr Huang's version, namely that he communicated (consistently with his state of mind at the time) that:

(a) Samgris had to be managed according to Australian corporate law;

(b) each of the directors of the Board had legal obligations to look after all of the shareholders;

(c) the Board had to set up a clear strategic plan for the management team to implement but the Board does not interfere with daily management;

(d) Samgris needed to hold regular board meetings to improve communications.[105]

[131] On 6 November 2012, Ms Wu distributed to the directors (other than Mr Howard)[106] seven proposed resolutions for a board meeting.[107] I observe:

(a) The proposed resolutions included the subject matter of the proposed resolutions which had been distributed on 16 October 2012, but with more detail, and a new proposal to establish the financial management system of Samgris.

(b) The proposed resolution in respect of the remuneration system included a copy of the draft Remuneration Plan as it existed at that time. The proposed resolutions also included a 2012 phase 1 exploration plan and budget for Samgris, and a proposal to approve a management structure, the latter, properly (and unlike the structure dealt with at the meeting of 31 August 2012) containing a diagram depicting authority flowing down from the Board to the CEO.

[132] Both the resolution for the 2012 phase 1 exploration plan and budget and the management structure were subsequently removed from the agenda for the meeting when a revised notice of meeting was later distributed in February 2013 prior to the meeting (as mentioned at [148] below). When asked why the proposal to approve a management structure was later removed from the agenda for the meeting, Mr Song responded:

> … it probably is because when we were asking the directors to make comments, there have been a lot of disputes around this issue. That's why didn't submit this to the board of directors, but I cannot remember the specific reasons.[108]

[133] I did not find his response to be persuasive.

[134] On 18 November 2012, Dr Huang provided comments on the proposed resolutions which had been distributed on 6 November, by way of marked-up resolutions.[109] Among other things, he wrote (emphasis added):

> **According to the *Australian Company Law* and the requirements of joint investment agreement, directors from SAMGRIS Resources Pty Ltd resume basic responsibilities** as bellow [sic]:

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[103] Exhibit 2: Huang (1) at [57] and [58].

[104] Exhibit 13: Song (1) at [123] and [126].

[105] Exhibit 2: Huang (2) at [105].

[106] The email stated: "… *because the Samgris 2013 budget is being prepared by our finance department in English, I have not been able to send these resolutions to Michael Howard. Once the finance department has submitted their English budget, I will send that along with the resolutions to Michael Howard."*

[107] Tab 89 of Volume 3 of Exhibit 1.

[108] Transcript, p 5-19 lines 4-7.

[109] Tab 95 of Volume 3 of Exhibit 1.

Ensure the development strategies, policies and schemes;
Organize professional managerial team;
Reply and review managerial group's advises;
Effectively supervise the work process of the managerial group.

To effectively and truly complete the tasks from board of directors, directors need a reasonable and lawful communicative platform so as to fully exercise their professional expertise and help the company develop in an effective and stable course.

Therefore, propose regular board meetings: once a quarter and twice a year and they will be held in Australia.

Send this proposal to board of directors and please review and discuss about this proposal.

The Fundamental Principles of Framework for Organizing Managerial Team

1. **Shareholders decide the structure of board of directors and all directors serve Samgris;**
2. **On the premise of goals and budgets decided by board of directors, managerial team will implement;**
3. Board of directors will access managerial team per annum, dynamic management decided by communication exchanged between secretary from board of directors and managerial team.
4. Specific shareholders could initially nominate the positions for managerial team but all positions depend on their competence.
5. Those who have relevant competence in specific areas must take corresponding positions, and all positions for management need to be appointed to people with full-time work.

[135] On 23 November 2012, Ms Wu emailed the directors (other than Mr Howard) and noted that only Dr Huang had commented on the proposed resolutions, and enquired as to whether others had any suggestions or comments including on Dr Huang's comments.[110]

Meeting of Samgris in China on 4 January 2013

[136] Against that background, it is telling that on 4 January 2013, there was essentially a repetition of the conduct which had taken place on 31 August 2012 as discussed at [109] to [115] above. Of course this was also consistent with the Chair's statement in October 2012: see [127] to [128] above.

[137] It is common ground[111] that on 4 January 2013, a meeting was held in Shaanxi, China, hosted by Mr Song.[112] It is also common ground that no director of Samgris, other than Mr Song, was notified of or attended the meeting.[113]

[138] The attendees comprised:

(a) Mr Song and one of the other directors of APJM, namely Mr (Chen) Wang;

(b) In relation to the management of Samgris:

(i) The CEO, Mr Zhang;

(ii) The Deputy CEO, Mr Li Bao Zhu;

(iii) The CFO, Ms Dong; and

(c) One other person, Wen Fan, described as the "Xi'An Representatives' Office employee" who acted as the minute taker.

[139] The minutes of that meeting[114] reveal the following.

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[110] Tab 97 of Volume 3 of Exhibit 1.

[111] See [88] and [89] of the Statement of Claim which were admitted by [62] of the Defence.

[112] Mr Song identifies each of the attendees in Exhibit 13: Song (1) at [133].

[113] See [88] – [92] of the Statement of Claim and [62] – [64] of the Defence.

[114] Tab 111 of Volume 3 of Exhibit 1.

[140] First, the minutes were headed "Samgris Resources Pty Ltd" and recorded that "On 4 January 2013, [Mr Song], the chairman of the board of directors, hosted the special subjects meeting in the meeting room of the Samgris Resources Pty Ltd …. Xi'An Representatives Office". Each page of the minutes had Samgris' name and logo recorded on it.

[141] Second, Mr (Chen) Wang was recorded as being a director of [Samgris'] parent company and attending the meeting 'in a non-voting capacity'. In the context of the observations I have already made concerning the 31 August 2012 meeting, again I infer that APJM condoned the course taken by Mr Song.

[142] Third, the minutes record instructions being given to Samgris' management and decisions being made on behalf of Samgris, in terms which reveal no contemplation that it would be necessary to obtain the approval of the Board prior to implementation. Thus:

(a) The CEO and deputy CEO reported on work done in the previous period and the CFO reported on the company's financial position.

(b) The meeting "made arrangements" for the next steps to be done by Samgris in relation to the selection of future exploration areas, the selection of exploration teams, the use of external agencies, costs control, possible capital raising, and communication issues.

[143] Fourth, the last point mentioned is of particular importance, because it is apparent that the meeting continued to recognize a *de facto* exercise of authority by the Chair consistent with that which had been "clarified" at the 31 August 2012 meeting and re-confirmed by the Chair's statement in October 2012, referred to at [127] to [128] above. Thus the minutes record as follows (emphasis added):

> **6) Regarding communication issues**
>
> The company needs to establish effective communication mechanisms to ensure the company advance along the right path. Therefore, **the below system will be implemented from 2013**:
>
> I. **Routine meetings. Routine meetings will be hosted by the chairman of the board. It can be held in person or via telephone/video link. Routine meetings will decide and strategize on important issues such as selection of exploration areas, exploration plans, hiring and firing of important personnel, serious accidents, important financial expenses, etc... In principle the routine meeting should be held monthly but can also be held impromptu if important issues or issues requiring urgent solutions are encountered. In the event important matters are to be decided, directors of the board and shareholder representatives shall be invited to attend.**
>
> II. Management weekly written report. The report shall include previous week's work summary, next week's work plans, issues requiring solutions, resources required to resolve matters, etc...
>
> Ill. Routine reporting to directors and shareholder representatives. Management shall report in writing to directors and shareholder representatives every month regarding the progress of each matter.
>
> Matters regarding communications shall be organised by the company's board secretary. As the primary responsible person, the board secretary is responsible for meeting recording, document transfers and communication coordination. Company management should cooperate with and provide necessary conditions for the board secretary's work; the board secretary should actively participate in the company's daily operating activities.

[144] As with the meeting of 31 August 2012, I have no doubt that the meeting should be at least be characterized as a meeting in which Mr Song as Chair of Samgris (and with the blessing of APJM, as evidenced by the presence of Mr (Chen) Wang) purported to exercise authority over Samgris' management. Again, it was an exercise of authority by the chair of both Samgris and APJM (backed up by another representative of the majority shareholder, notwithstanding his "non-voting" status), consistent with the authority accorded to the Chair in the company structure "clarified" for Samgris' management at the 31 August 2012 meeting. And, again, the problem was that the Board had not given Mr Song that authority and, in particular, the directors nominated by the minority shareholders were excluded from the process. And, further, it had occurred in the face of active complaints by Dr Huang.

[145] The minority shareholders complain that the minutes reveal that they were excluded from another occasion where important matters concerning the management of the business and affairs of Samgris were discussed and important decisions were made. I agree. The matters which were the subject of the minutes were plainly matters which should have been dealt with at board level, *a fortiori* given the fact of the earlier meeting of 31 August 2012, the concerns which it had engendered and the matters which Dr Huang had raised thereafter. I reach the same conclusion in relation to this meeting that I did in relation to the 31 August 2012 meeting, namely that the conduct of the meeting was contrary to what I have concluded was the proper construction of the legal obligations which lay between the parties and was contrary to, and tended to be destructive of, the mutual trust and confidence which I have concluded was an important feature of the association between the members of Samgris.

[146] APJM sought to characterize the meeting merely as a meeting of APJM, the purpose of which was to raise matters to be discussed during a meeting with the Samgris board. I reject that characterization as inconsistent with the form and terms of the minutes. It is also inconsistent with the description which Ms Wu used when, on 21 January 2013, she circulated the minutes. She described them as "the thematic office meeting minutes of Samgris Resources Pty Ltd".[115] Mr Song's oral evidence conceded that the meeting was an "administrative and business meeting" of Samgris, notwithstanding his affidavit evidence to the contrary.

[147] For completeness I note that the plaintiffs invite me to find that an office of Samgris was established in Xi'an, China without consultation with or the approval of the Samgris board. As to this:

(a) Dr Huang reviewed the minutes of the 4 January 2013 meeting and interpreted them as referring to a Samgris office having been established in Xi'an. He visited the offices in Xi'an in April 2013 and says that he saw the Samgris logo affixed to the wall behind the receptionist. He questioned Mr Song about this and Mr Song did not respond.[116]

(b) The budget presented at the second board meeting included the amount of $400,000 for 'Board and Xi'an office expenses'[117] but the Board decided not to vote on matters relating to the establishment of an office in Xi'an at the second board meeting.[118]

(c) Mr Song denies that conversation, says there was no logo on the wall and says that no such office was set up. The room was only a room in Shaanxi Coal's premises. He says the proposal for setting up an office was not implemented.[119]

(d) Ultimately the lack of detail on the question has the result that I am not persuaded to make the finding sought.

Some but not all issues brought to the second board meeting

[148] On 26 February 2013. Ms Wu circulated a notice that the second board meeting would take place on 15 March 2013.[120] The topics listed were:

(a) Proposal 1: To purchase D&O insurance for Samgris;

(b) Proposal 2: To nominate Deputy General Manager of Samgris;

(c) Proposal 3: The remuneration system and evaluation plan of Samgris;

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[115] Tab 114 of Volume 3 of Exhibit 1.
[116] Exhibit 2: Huang (2) at [130] to [133].
[117] Exhibit 2: Huang (2) at [132](a).
[118] Tab 144 of Volume 5 of Exhibit 1.
[119] Exhibit 13: Song (1) at [140] to [147].
[120] Tab 119 of Volume 3 of Exhibit 1.

(d) Proposal 4: 2012 Annual Report of Samgris;

(e) Proposal 5: (Phase two) Exploration plan and budget of Samgris;

(f) Proposal 6: 2012 Annual Financial Report of Samgris;

(g) Proposal 7: 2013 Annual Financial Budget of Samgris;

(h) Proposal 8: The financial management system of Samgris; and

(i) Proposal 9: Key points of Entrustment Agreement between Samgris and Australia Shaanxi Mining Pty Ltd (**ASM**).

[149] However, the topics listed for discussion did not include the earlier proposed resolution to approve a management structure or the 2012 phase 1 exploration plan and budget.

[150] This evidently caused Dr Huang immediate concern because the following morning, on 27 February 2013, he sent an email to Ms Wu and to the other Samgris directors[121] which, for her information, and without any further comment or elaboration, provided as follows:

> **Shareholder Disputes: cases for legal resolutions**
>
> some circumstances, the relationship between shareholders can break down so severely that mediation or negotiation will not solve the underlying dispute. In those cases, shareholders may need to approach the Federal Court of Australia or the Supreme Court of Queensland for relief.
>
> Generally speaking, you can approach the Court for relief if you are a shareholder of a company and:
>
> 1. the conduct of the company's affairs; or,
> 2. an actual or proposed act or omission by or on behalf of the company; or,
> 3. a resolution, or a proposed resolution, of shareholders or a class of shareholders of the company;
>
> is either contrary to the interests of the shareholders as a whole ***or*** oppressive to, unfairly prejudicial to, or unfairly discriminatory against a shareholder or shareholders.
>
> Applications of this nature are usually commenced in the context of shareholder disputes in order to protect minority shareholder rights.
>
> The section that relates to these sorts of proceedings (which are usually referred to as oppression or shareholder oppression proceedings) is wide in nature and applies to many different factual scenarios. It is impossible to give a comprehensive description of all situations where a shareholder might have a right to go to Court but a review of the most common cases shows that the most common grounds are as follows:
>
> 1. oppressive boardroom tactics where majority shareholders employ their majority to constantly deprive the minority shareholders of their right to participate in board meetings;
> 2. conduct by directors or shareholders that excludes a shareholder from management of the company;
> 3. directors preferring the interests of the shareholder who nominated them to the board over other shareholders;
> 4. excessive payments made to directors;
> 5. issuing of shares to decrease minority shareholding;
> 6. breach of directors duties or breach of fiduciary duties where directors act in their own interests or in the interests of other parties to the detriment of the company or the minority shareholders;
> 7. inadequate payment of dividends;
> 8. improper appropriation of business opportunities;
> 9. misappropriation of company funds;
> 10. refusal to grant access to information or books and records;
> 11. inability to sell shares in a private company.

[121] Tab 121 of Volume 3 of Exhibit 1.

> The oppression remedy is a very powerful tool afforded to minority shareholders. It allows shareholders to control and the Court to resolve abuses of power by majority shareholders and management.

[151] In my view any reasonable director who received such an email, especially in the context of the various complaints which had already been conveyed, would have regarded the email as a further complaint and an indication that the complaining party regarded the conduct complained of to be serious, and, potentially, justifying a remedy for oppression. Ms Wu orally translated the English language document for the Chair, Mr Song, and his reply was conveyed in an email Ms Wu sent to Dr Huang later that day. Mr Song did not attempt to engage at all. He suggested that Chinese shareholders and directors were not familiar with Australian law, but actively seek advice from professional advisers. Otherwise he simply suggested to Dr Huang that he "feel free to advise if you disagree upon the time, topics or other aspects of board meeting".[122] Bearing in mind Mr Song's conduct in the two meetings of 31 August 2012 and 4 January 2013, the response was high-handed to say the least.

[152] Dr Huang continued to express concerns about the choices which were made in relation to the issues to be brought to the meeting. Thus:

(a) On 28 February 2013, Ms Wu distributed nine proposals for the second board meeting.[123] They included some of the same proposals earlier distributed and some new ones. But the comments which Dr Huang had made on the earlier distributed resolutions were not reflected in these resolutions.

(b) On 12 March 2013, Dr Huang questioned Ms Wu by email on that topic: "I noticed that my earlier responding to the proposals are not included in this "NEW" circulation, why? And who made the call? please advise asap".[124]

(c) Ms Wu responded that this was the decision of the Chair, Mr Song, and "If you have different opinions on the motions or schedules of the meeting, please raise yours according to the company regulations and the agreement of joint venture".[125]

(d) On 16 March 2013, Dr Huang gave notice of three further draft resolutions for consideration at the second board meeting:[126]

(i) Proposal 10: To nominate a COO of Samgris;

(ii) Proposal 11: Independently reviewing of the management structure and performance of Samgris;

(iii) Proposal 12: Periodic Board Meetings of Samgris, which proposed that the Board should establish an effective communication platform (to utilise the specialist knowledge of each of the directors to put the company on the right track), and have periodic board meetings every three months, and at least two of those meetings should be in Australia.

[153] The other minority shareholder appointed director also raised some concerns. Thus:

(a) On 4 March 2013, Mr Howard sent an email to Ms Wu in which he set out comments regarding the proposed resolutions.[127] Mr Song received these comments on 6 March 2013[128] and he understood that Mr Howard wanted to update the Samgris organisational chart and have it signed off by the Board.[129]

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[122] Tab 122 of Volume 3 of Exhibit 1.
[123] Tab 124 of Volume 4 of Exhibit 1
[124] Tab 131 of Volume 4 of Exhibit 1.
[125] Tab 132 of Volume 4 of Exhibit 1.
[126] Tab 140 of Volume 4 of Exhibit 1; Exhibit 2: Huang (2) at [141].
[127] Tab 128 of Volume 4 of Exhibit 1.
[128] Tab 129 of Volume 4 of Exhibit 1.

(b) In his email, Mr Howard also asked for an explanation of the difference between performance-based pay and bonuses, but this was never answered, including at the second board meeting. Mr Howard also asked the contracts signed by directors be circulated to the other directors. This was not discussed either.

(c) On 12 March 2013, Mr Howard prepared a document for inclusion in the board papers setting out his comments on the various proposals which had been distributed for the meeting.[130] As a general comment Mr Howard noted that "We do need to update the Samgris Organisational Chart and have it signed off by the board". In relation to Proposal 2 (to nominate a Deputy CEO), Mr Howard commented that the "Samgris organisational structure should be revised" and that a "position description should be developed". In relation to Proposal 3 (remuneration plan), Mr Howard commented (inter alia) that the performance payment must be based on defined KPIs which need to be discussed and agreed before the commencement of the evaluation period. He also proposed a quarterly board meeting alternating between Brisbane and Xi'an.

[154] On 12 March 2013, Ms Wu distributed an amended Proposal 3 regarding the remuneration plan.[131] The amendment deleted a proposal that all directors receive remuneration and instead proposed only the Chair receive the remuneration. As will appear, the remuneration policy was not approved at the second board meeting, but payments (including payments to the Chair) kept getting paid: see the discussion at [288] – [304] below.

[155] An agenda for the second board meeting was distributed on 13 March 2013.[132] The agenda listed only the nine topics which had previously been notified. The same day the directors were notified that the meeting would be delayed until 17 March 2013.[133]

<u>The second board meeting - 17 March 2013</u>

[156] The attendees at the meeting were:

(a) (of the directors of Samgris, nominated by APJM) Mr Song and Mr Xie (both of whom were also directors of APJM). Mr (Xin) Wang did not attend and had given Mr Song his proxy.[134]

(b) (of the directors of Samgris, nominated by the minority shareholders) both Dr Huang and Mr Howard.

(c) (from the management of Samgris) the CEO, Mr Zhang; the Deputy CEO, Mr Li Bao Zhu; the accountant, Ms Lingling Zhang; the company secretary, Ms Wu; and two others, Mr White (the exploration manager) and Ms Han.

(d) Mr Cheng (the lawyer representing APJM);

(e) Ms Lai, a lawyer representing Samgris; and

(f) Mr Qinke Feng and Mr Peter Skerman.

[157] The meeting was conducted in the Chinese language and Mr Howard had an interpreter.

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[129] Transcript, p 5-21 lines 43 to 47.

[130] Tab 133 of Volume 4 of Exhibit 1.

[131] Tab 130 of Volume 4 of Exhibit 1. This is the version which appears in tab 7A of Volume 1 of Exhibit 1.

[132] Tab 136 of Volume 4 of Exhibit 1; Exhibit 2: Huang (2) at [139].

[133] Tab 137 of Volume 4 of Exhibit 1; Exhibit 2: Huang (2) at [140](a).

[134] See p 1022/926 of the transcript in tab 143 of Volume 5 of Exhibit 1.

[158] The outcome of the second board meeting so far as the agenda items were concerned was as follows:[135]

(a) Proposal 1: To purchase D&O insurance for Samgris – resolution passed unanimously;

(b) Proposal 2: To nominate Deputy General Manager of Samgris - resolution passed (3 affirmative votes, 2 negative votes);

(c) Proposal 3: The remuneration system and evaluation plan of Samgris – resolution not adopted (1 affirmative vote, 2 negative votes, 2 abstentions);

(d) Proposal 4: Adoption of 2012 Annual Report of Samgris – resolution passed unanimously;

(e) Proposal 5: Adoption of 2013 (Phase two) Exploration plan and budget of Samgris – resolution passed unanimously;

(f) Proposal 6: Adoption of 2012 Annual Financial Report of Samgris – resolution passed unanimously;

(g) Proposal 7: Adoption 2013 Annual Financial Budget of Samgris – resolution passed with modification of part of the contents (3 affirmative votes, 2 negative votes);

(h) Proposal 8: Adoption of the financial management system of Samgris – resolution passed (3 affirmative votes, 2 negative votes);

(i) Proposal 9: Adoption of Key points of Entrustment Agreement between Samgris and ASM – not adopted (3 affirmative votes, 2 abstentions).

[159] Under "other issues discussed", the minutes record the following about the three additional proposals notified by Dr Huang:

(a) Proposal 10: To nominate a Chief Operating Officer of Samgris Resources Pty Ltd. On this the minutes read:

> During the meeting, Director Wanfu HUANG proposed to nominate a COO for Samgris Resources Pty Ltd. Considering that this proposal was not on the agenda of the meeting, other directors agreed to discuss and vote on this proposal during the next directors' meeting.

(b) Proposal 11: Independently reviewing over the performance of Management Team at Samgris Resources. The minutes do not record any outcome in respect of this proposal.

(c) Proposal 12: Periodic Board Meetings of Samgris Pty Ltd, which proposed that the Board should establish an effective communication platform (to utilise the specialist knowledge of each of the directors to put the company on the right track), and have periodic board meetings every three months, and at least two of those meetings should be in Australia. As to this issue, the minutes record:

> There will be two regular directors' meetings within each year, one in Xi'an and one in Brisbane. If necessary, interim directors' meeting can be called in accordance with the Constitution of Samgris Resources Pty Ltd.

[160] Under "other issues discussed", the minutes also recorded that preliminary agreement had been reached that directors would be paid a directors' fee of $20,000 per year and that no other payment would be paid to a director unless special advisory services were provided by the director to the company. Further, during the second board meeting, Mr Song as Chair stated that he and Ms Dong would not be paid by the company.[136] Mr Howard's consultancy

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[135] The meeting was recorded and an English translation appears in tab 143 of Volume 5 of Exhibit 1. The minutes of the meeting appear in tab 144 of Volume 5 of Exhibit 1.

[136] Tab 143 of Volume 5 of Exhibit 1 at p 1043/947.

agreement was drawn to the Board's attention during the meeting[137] (and Mr Howard had also mentioned his "Services Agreement" in the comments he distributed to the other directors prior to the second board meeting on 12 March 2013).[138] The agreement was entered into originally to provide assistance to Samgris' CEO.

[161] Some other matters should be noted.

[162] First, Dr Huang's concerns which had been raised previously about the organizational structure of the company were raised again in the context of the discussion which addressed the second proposed resolution, namely the nomination of a Deputy CEO. As to this:

(a) The transcript reveals (and I accept the truth of) Dr Huang's frustration with the way in which the Board had been operating. For example, he expressed the view that "our board just exists in name only" and he commented that there was a lack of communication.[139] He also queried the need for him to attend such a meeting, noting that the directors appointed by the majority shareholders could outvote him on all issues.[140]

(b) Although it would be to overstate the position to say that any substantive discussion on this question was precluded by actions of the Chair, it is fair to say that by the Chair's own intervention[141] and by his permission of the intervention of APJM's lawyer in the discussion, he did take steps to close the discussion down. The intervention of APJM's lawyer was significant because it sought to postpone any discussion of the Chair's lines of authority and obligation. He said (emphasis added):[142]

> Please allow me to say something. Huang's idea is the same as Shaanxi's: to make our company succeed. Let me say something as an outsider. **It's no doubt Samgris is Shaanxi Coal and Chemical's subsidiary since Shaanxi Coal and Chemical owns 60% of its shares. You can also confirm this with Australia's law. Of course, it's a subsidiary and also an independent company, not a branch of Shaanxi Coal and Chemical. Those things are in a a really large context…too abstract... we can discuss after today's meeting. Discuss the chairman's lines of authority and obligation. No problem!** Now we dig into those specific things of all proposals…I think the differences in culture between the east and west lead to those disagreements. **Your thought is to set down the organizational structure, clarify who is the CEO, the CFO, it's the west's ideology, which means a general picture goes before actions. This is different from China's traditions. In China, we do things step by step, add a position really quick once its needed, and then improve things later.** I think those two are two kinds of thinking patterns. Both sides all know we shall adjust the management structure…Shaanxi Coal and Chemical proposed the vice general manager position, I am not sure if it's also the decision of company's management level.. There is no need to spend too much time on abstract things…at a meeting like today's, time is really precious. We can discuss that after this meeting. I don't think we can solve any problems through verbal confrontations. Money is good for everyone … no need to disagree over each other … it won't solve problems. We can talk about things objectively, for example whether Li Baozhu is competent for the position of vice general manager. Then nominate. If we agree that he is not qualified then it's over. It is helpful to solve problems by this way. **We can leave those abstract topics later…we have those three storms you mentioned, like the joint-venture agreement, Articles of Association…It is quite clear in the Articles of Association that the structure of company shall be settled by the board meeting. We can discuss it later, over meals…but this**

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[137] Tab 143 of Volume 5 of Exhibit 1 at p 1088/992. Mr Song accepted that, at the second board meeting, Mr Howard discussed that he had been retained as a consultant by Samgris: Transcript, p 4-63 lines 20-28.

[138] Tab 133 of Volume 4 of Exhibit 1, final page.

[139] See p 1033/937 of the transcript in tab 143 of Volume 5 of Exhibit 1. See also p 1048/952: *"... the board is not playing its role. As I said earlier, the board only exists in name since we don't communicate with each other"* and *"what we are doing is wasting everyone's time and cannot solve any problems"*.

[140] See p 1038/942 of the transcript in tab 143 of Volume 5 of Exhibit 1.

[141] See p 1030/934 of the transcript in tab 143 of Volume 5 of Exhibit 1.

[142] See pp 1033/937 and 1034/938 of the transcript in tab 143 of Volume 5 of Exhibit 1.

> **time, let us talk about those proposals, clear things up. For Huang, your thoughts are really comprehensive. Again, it's not necessary to spend too much time talking over those large context**s.

(c) No resolution of the issue was achieved at the meeting.

[163] Second, Dr Huang expressed concerns as to the competence of Samgris' CEO[143] and the company's management.[144] That was the foundation for his proposal for an independent review of the performance of the management team.[145] On this topic, the following very brief exchange occurred at the very end of the meeting:[146]

> Huang: "The last question. Our finance and management are being audited every year, and our directors are hoping a third party audit. So we could hire a third party company to evaluation our management or board of directors' ability, even a Chinese company."
>
> Song: "How about this? I'm not familiar with Australian rules, but in China the last chapter of an audit report is the management evaluation. I have a draft of our audit report, but I don't know if there's any chapters like that. If no such chapter, we should make some suggestions."
>
> Xie: "Dr. Huang, your idea is good, but you underestimate the ability of our board of directors. If board of directors doesn't evaluate the management team appropriately, how could the team focus on the planned index with heart and soul?"
>
> Huang: "Aren't we doing pretty good? The Chairman said that wise see wisdom. Mr. Cheng said why I always do something in opposition. The reason is I'm more familiar with this company than you all together."
>
> Cheng: "There are right solutions for every problem. I think you have darkened the problem by doing this. I believe your idea and intention were good, wanted to solve the problem. But it takes time when you try to solve one."

[164] Third, Dr Huang deposed that after the board meeting had officially ended but before everyone had left the room:

(a) Mr Song said to him words to the effect "why did you veto all my proposed resolutions?"; and

(b) (in front of Mr Xie) "we are not afraid to fight against you and will kill this company as this will only cost us 200 million RMB" (this being equivalent to about AUD $33 million).[147]

[165] Mr Song's affidavit, although affirmed after Dr Huang's affidavits which recorded that conversation, did not dispute that he made the first of those statements but denied making the second statement.[148] During cross-examination, Mr Song said he could not recall making the first statement. He repeated his denial that he had ever said anything like the second statement.

[166] The minority shareholders contended that I should accept Dr Huang's evidence over that of Mr Song in this regard. As to this:

(a) I find that there was a discussion after the board meeting had officially ended but before everyone had left the room. No witness denies this and, given the context, it seems likely that it would have happened.

(b) I accept the first part of Dr Huang's evidence. Mr Song did not deny this. Mr Xie was not called by APJM and I infer that his evidence would not assist APJM.

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[143] See p 1036/940 of the transcript in tab 143 of Volume 5 of Exhibit 1.
[144] See p 1048/952 of the transcript in tab 143 of Volume 5 of Exhibit 1.
[145] See [50](c) of the Statement of Claim which was admitted by [27](b) of the Defence.
[146] See pp 1098/1002 and 1099/1003 of the transcript in tab 143 of Volume 5 of Exhibit 1.
[147] Exhibit 2: Huang (1) at [70] and Huang (2) at [155].
[148] Exhibit 13: Song (1) at [227] .

(c) As to the second part of Dr Huang's evidence:

(i) I infer that Mr Xie's evidence would not assist APJM (although I do not go further to infer that it would support the plaintiffs as that would be to misapply the rule in *Jones v Dunkel* (1959) 101 CLR 298).

(ii) That leaves me with a direct conflict between Dr Huang and Mr Song.

(iii) For Mr Song the involvement in the affairs of Samgris was simply involvement in the management of a one of over 400 foreign companies for which his group was responsible.[149] Dr Huang, on the other hand, was understandably far more focused on the particular circumstances of this company. I am inclined to view the evidence of Dr Huang as more reliable in relation to this conflict. I am not persuaded by Mr Song's denial.

(iv) I accept the second part of Dr Huang's evidence.

[167] Having made that finding, I should indicate the significance which I attribute to it. I am not inclined to regard the statement as proof of the truth of its contents. Rather I regard it as an intemperate remark by the Chair at the end of a long board meeting in which, in some respects, the exercise of power which the Chair had (with the consent of APJM) assumed to himself had been thwarted. The statement reflected a consciousness of the actual power imbalance which existed as between APJM and Dr Huang's interests and the continued deterioration in the working relationship and any confidence between the two sides.

Events between the second and third board meetings

[168] The concerns which the minority shareholder appointed directors evinced at the second board meeting as to the way in which Samgris was being run were not allayed at that meeting. Over the following months they continued to be expressed.

[169] On 26 March 2013, Mr Howard sent an email to Mr Song, Dr Huang, Mr Xie and Mr (Xin) Wang, copied to Dr Huang (at another email address) and Ms Wu, which contained a Chinese translation of an English email which he had sent on 19 March, two days after the second board meeting. The email stated (emphasis added):[150]

> Dear Fellow Directors of Samgris Resources
>
> **I write this email from a point of view of a major concern and disappointment I have about the functionality and effectiveness of the Samgris Board of Directors which will reflect in the ultimate success of the company as a coal explorer and developer of coal resources**.
>
> Samgris is an Australian registered proprietary company and as such the running of the Samgris is under the Corporations Act and ASIC (Australian Securities and Investment Commission) requirements and guidelines.
>
> **Samgris is not a subsidiary of anyone shareholder and at all times the board is required to act in the best interests of all shareholders.**
>
> **The way the board meeting was conducted on Sunday 17th March in Brisbane did not reflect this requirement and some business was conducted in an inappropriate manner.**
>
> It should be noted that this was only the 2nd board meeting in 11 months (the 1st being held in April 2012!!). This should not be the case, especially when a company is establishing itself. Good and open communication is critical to success.
>
> Many of the issues that were 'discussed' and resulted in, at times, lengthy verbal interchanges, could have been avoided to a large extent by good and timely communication between Samgris management and the board; 'board' in this context means the duly constituted board consisting of 5 members of which each

[149] Transcript, p 5-17.
[150] Tab 146 of Volume 5 of Exhibit 1.

member is equal. **The appointed chairman of the board is primarily in place to coordinate the activities of the board.**

Please note that since I joined the board, there has been little or no communication through the chairman to me as a board member despite numerous attempts to set dates for a board. This I have found frustrating as well as disappointing in attempting to carry out my duties as a board member.

Direction for the running of the company has not come from the board and to be kind, it has been 'ad hoc'. This situation I believe has produced a lot of the issues (eg. the contract with ASM, a related entity, should have been reviewed by the board) that are currently challenging Samgris and have the potential to impact on the exploration effort and ultimately success, which will come from direction from the board and commitment from the employees both in the field and the office.

I believe it is all our intention that Samgris is a successful coal exploration company and the goal of developing coal mines in the future. Samgris has a good portfolio of exploration tenements which if managed in a proper manner.

In order to move forward, I believe Samgris needs to adopt a new approach:

- **Improve communications between all board members and management;**
- **The board hold regular board meetings to improve the functionality of the board and the effectiveness of management in undertaking the requirements of the board;**
- At all times, good governance is required by all board members; this should be monitored and advised by the company secretary;
- Ensure that the board meetings are effective and constructive; recognising that there are 3 levels of discussion –
    - Management,
    - Board, and
    - Shareholder.

  All 3 have different requirements and who, how and what is discussed.
- Each meeting is minuted and the minutes are distributed to each board member for comment and are generally Agenda Item 1 on the agenda for the next meeting.
- **I do believe that the company would benefit from the appointment of an 'independent' CEO whose job would be to implement the instructions of the board and report back to the board.**

In order to move forward in an effective and efficient way –

- We need urgently review the proposed budget as per the concerns expressed at the meeting and approve it now with a circular resolution between board members; this will give confidence to management that they can continue to implement the 2013 exploration program,
- As a board, provide direction to management with timely reviews of the exploration program and other matters that may arise from time to time,
- **Review the organisation structure of Samgris,**
- **Implement a performance review of Samgris,**
- **Reconsider how often the board meets, and**
- Monthly Business and Operations reports from management.

I hope all Samgris directors find this email constructive on how & what Samgris needs to move forward. This should be our prime concern.

I look forward to your comments and constructive dialogue going forward.

[170] Extraordinarily, there was never any response to Mr Howard's letter.[151]

Dispute concerning the $22 million installment

[171] In the meantime, almost 12 months had elapsed since the Closing provided for by the Investment Agreement as amended. By letter dated 5 April 2013, Dr Huang on behalf of the the minority shareholders wrote to the directors of APJM, asking that APJM make the second ($22 million) payment within the time limit provided for in the agreement.[152] APJM responded by email from Mr Song[153] on 18 April 2013 (writing as chair of APJM, and copying other Samgris directors) rejecting the suggestion that the amount should be paid.

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[151] See [51]-[52] of the Statement of Claim which were admitted by [29]-[30] of the Defence.

[152] Tab 151 of Volume 5 of Exhibit 1.

[153] Exhibit 13: Song (1) at [250] and exhibit SS-38.

The letter was sent to Dr Huang and also to the minority shareholders. I make the following observations.

[172] First, the body of the letter said that APJM had found that Dr Huang and the minority shareholders had not fulfilled their parts of the bargain, and that prevented the fulfilment of the conditions for the making of the payment. Details were said to be set out in an attachment.

[173] Second, the attachment explicitly stated that (emphasis added)–

> **On completing the transaction in April 2012, [APJM] took over the management of Samgris Resources Pty Ltd.**, and discovered at least the following breaches of [the Investment Agreement, the Amendment Agreement and the Side Agreement] on the part of [Dr Huang and the minority shareholders] …

[174] Third, it seems to me that the emphasised observation represents what must be taken to be the subjective view of APJM as to what had happened on the Closing. I also think it correctly characterized the way in which actual authority was being exercised by APJM over the management of Samgris, exemplars of which were the two meetings of 31 August 2012 and 4 January 2013.

[175] Fourth, although the exchange of correspondence demonstrates the existence of a dispute between the two sides as to whether the monies were owing, it will be recalled that if the monies the subject of the second payment were due and payable, they would have been payable by APJM to Samgris. So in reality, the dispute was that Dr Huang and the minority shareholders had contended that APJM owed Samgris $22 million and APJM rejected that contention. The letter amounted to Mr Song as chair of APJM writing a letter in which he took a position on why APJM did not in fact owe $22 million to Samgris, a company of which he was also chair. He deposed to having made inquiries of APJM's legal advisers, Mr Feng, and Samgris management before writing the letter.[154] The structural conflict involved in the putative creditor (APJM) also managing the putative debtor (Samgris) does not seem to have been remarked upon by anyone. It may, however, be part of the explanation for the later conduct of the APJM appointed directors of Samgris –

(a) at the fourth board meeting on 22 April 2014 in not even voting on a proposal put by Dr Huang that Samgris should make a call on APJM for the monies which Dr Huang contended were owed by APJM to Samgris as part of the subscription price for shares: see [217] below; and

(b) the conduct which occurred in late 2014/early 2015 in relation to the way in which a decision was eventually made (without any involvement of the minority shareholders or their nominated directors) that Samgris should effectively write off the debt: see [241] – [278] and following below.

[176] Finally, the basis for APJM's contention that the $22 million was not due was elaborated upon in the attachment to the letter. The attachment contended that in breach of contract various fees had not been paid on the coal exploration tenements, there had been undisclosed third party rights which affected the utility of the coal exploration tenements, and there were various other breaches of contractual warranties and representations. The attachment contended that Dr Huang and the minority shareholders were obliged to compensate APJM and the Shaanxi Parties in an amount not less than ¥50 million (which was a sum of the order of $8 million). Whether there is any merit in these contentions concerning breach (or any merit in the subsequent refutations of them by Dr Huang[155] and whether monies are in fact owing by one side to the other pursuant to the relevant agreements (or consequent upon breach of them) are not questions which are before me. I was told that those questions were

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[154] Exhibit 13: Song (1) at [249].

[155] As to which see, for example, tabs 160 and 166 in Volume 5 of Exhibit 1.

to be resolved by arbitral proceedings in China. There was no evidence before me as to the identity of the parties to the arbitral proceedings.

[177] The following day, 19 April 2013,[156] Dr Huang on behalf of the minority shareholders called for a general meeting of Samgris to discuss the following proposals:

(a) "The establishment of company management, and specification of management institution, responsibilities and rights";

(b) "Explicit provision of the constitution of the board of directors, responsibilities of directors and the basic function of the board of directors";

(c) "If no consensus can be achieved among directors, under the precondition that Samgris is effectively managed and developed, shareholders should be equipped with a legal procedure and scheme to dissolve Samgris",

and an attachment to the letter revealed that topics for discussion would include shareholder confidence in the current board of Samgris, voting on the responsibility and supervisory scheme of the board, and amendment to certain sections of the Investment Agreement and the Constitution.

[178] On 29 April 2013, Dr Huang sent a letter on behalf of ARH to the Chairmen of Shaanxi Coal and Shaanxi Geology (and others) which stated (emphasis added):[157]

Report on the Current Status of Samgris Resources Pty Ltd

Based on the principles of truthfulness and reliableness, professionalism and cooperation, the Australian shareholder of the Samgris Resources Pty Ltd wished to build up the Samgris company as a sample Sino-foreign joint venture among Chinese mining companies, which expand abroad, with the help of the prospecting technique of [Shaanxi Geology] and the mining experience of [Shaanxi Coal]. **However, in the view of the cooperation with the company during more than one year, the Australian shareholder reckons that due to the completely arbitrary management mode of the major shareholders in the joint venture, there are contradictions on values, company management ideas and the protection of small shareholders' benefits and rights between the Chinese and Australian shareholders, leading to an unclear prospect on the company's development.** The major facts supporting the argument are as follows:

1. [Dr Huang referred to the allegations of breach made in the letter of 19 April 2013, his "explanation against them" and subsequent communications on the merits of the allegations.]

2. **Over the past year, due to the bad management of the Samgris Resources Pty Ltd, there were many breaches and illegal actions in it (include but not limited to)**:

a) **The board of directors is a nominal board and could not convene board meetings and fulfil the functions according to the company constitution**; aimed at addressing problems in the company administration, personnel and financial rules and regulations, the directors from the Australian side have provided many good suggestions in accordance with local legislation and regulations, but they were rejected by the Chinese side (which is a breach of the Corporation Act 2001 on the rights and obligations of the board and directors)

b) Delegated, appointed and employed unqualified managers and employees, which was not in accordance with relevant Australian regulations, and did not accept the suggestions given by directors from the Australian side (which is a breach of the Australian Corporations Act 2001/immigration law)

c) **Performed "taking completely control of the company"** and rejected Australian shareholder's suggestions on the company management; the internal management does not follow administrative principles, leading to a huge waste of resources; the company management had no ability to effectively and honorably understand and obey local legislation and regulations, which had a very adverse effect on the company's image and development.

[156] See tab 158 in Volume 5 of Exhibit 1.
[157] Tab 165 of Volume 5 of Exhibit 1.

d) The company staff mechanically applied financial management and accounting system, which had breached the Australian financial behaviors and standards, and relevant departments had worried about these problems. (This is a breach of Australian accounting and taxation regulations)

e) The decisions on the company operation were made at random and the personal will overrode the benefits of the whole company. (That seriously impairs the Australian shareholder's benefits)

3. Based on the facts above, the Australian shareholder and its representatives deem that although we are the biggest single shareholder and we have sophisticated experience of local mining and relevant registration and regulations, the Chinese shareholders and their representatives accredited here ignored the benefits of the whole company and did not obey the company constitution and the local Corporation Acts, resulting in the operation and development of the company straying from the right path, which is far away from our expectations. **Hence, the Australian shareholder doubts if both sides have the base to cooperate.**

The Australian shareholder makes a special claim to the shareholders of [APJM], which are [the Shaanxi Parties]:

a) [Dr Huang requested withdrawal of the allegations of breach, apology, and the making the second payment and] restructure the board, and amend Section 16 of the company constitution (designation of top executives), returning the right of nominating the company general manager to the Australian shareholder; and/or

b) Amend Section 6.2 (transfer of stock rights) of the investment agreement and Section 7 of the company constitution (limit on selling stock rights), and approve that the Australian shareholder has the right of selling its 40% share to any third party, and the current Australian shareholder withdraws from the joint venture; and/or

c) The Australian shareholder applies for the dissolution of the Samgris Resources Pty Ltd through legal procedures.

Furthermore in accordance with the Section 249D and 249F of the Corporations Act 2001, the Australian shareholder has formally made a proposal towards the board of the Samgris Resources Pty Ltd to convene a general shareholder meeting at once.

The leaders from the Chinese side need to observe these problems which the Samgris Resources Pty Ltd faces all-sidely, and via consultation, endeavour to make an all sides accepted plan to solve these problems.[158]

The first general meeting – 14 June 2013

[179] In June 2013, Dr Huang distributed different versions of proposed resolutions apparently for discussion at the upcoming general meeting of Samgris.[159] One such proposal was that –

Background

The reflection on JVCompany's share position

• A consortium with technical, financial capacity and knowledge base

• Trust and cooperative manners of each parties with transparent communication

• Professional behavior and law/regulation bind good citizen

• Each parties share common value and works for each other

Having tried to build up a proper management structure from the Board to department level, observed JV parties' operation style, there is lack of trust, transparent free flow communication, false claims against each other over the last 14 months. In order to materialize the value of the investment of the parties, it would be beneficeous for one of the parties to take over the JV company altogether. Thus, here we propose to amend Item 6.2 of the Investment Agreement.

"The Parties hereby agree and covenant that after the first year of operation of the JV company, the Seller/Purchaser can sell their shares to any third party as long as it informs other parties in writing 20 days before a sale can be finalized."

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[158] Tab 165 of Volume 5 of Exhibit 1; Exhibit 2: Huang (1) at [83].
[159] Tab 171 of Volume 5 of Exhibit 1; Exhibit 2: Huang (1) at [93] – [94].

[180] On 14 June 2013, the general meeting of Samgris took place in Xi'an. Mr Song had APJM's proxy. Dr Huang and Mr Howard each had a proxy from the minority shareholders. The other directors of Samgris and of APJM were also present. Representatives of Samgris management were also present. The minutes of the meeting[160] reveal the following topics were discussed but no consensus reached and no resolution actually voted on:

(a) The CEO gave a management report to the meeting. He reported that all operations for 2013 were on track but identified problems because the current market for coal was down and some difficulties had been experienced in relation to some of the coal exploration tenements, including access issues due to land holder and environmental factors, adverse geographic factors, and overlapping tenements. Based on those issues the management team proposed:

(i) tenements with adverse geographic issues be abandoned or divested;

(ii) EPC 2193 should be abandoned because of difficulties caused by an overlapping tenement;

(iii) seismic work or drilling to be undertaken to confirm the extent of potential resources available;

(iv) management should select tenements which have the potential for future development and undertake preliminary work for future mine development;

(b) Mr Feng for APJM made a statement supporting the solutions proposed by management and calling on Dr Huang to comply with the covenants expressed in the Investment Agreement so that the agreement could be satisfied.

(c) Dr Huang spoke against the proposal to abandon or divest any tenements contending that there was insufficient information and that management should find better solutions rather than just giving up.

(d) Mr Song also proposed that Dr Huang should comply with his obligations as set forth in the Investment agreement, consistently with what he had previously written in his letter of 18 April 2013, referred to at [171] – [176] above. Dr Huang's response was also consistent with the position for which he had previously contended.

[181] Although not recorded in the minutes, it is common ground that at this meeting, Dr Huang on behalf of the minority shareholders put a proposal to Mr Song on behalf of APJM that the minority shareholders be allowed to sell their shares in Samgris and exit as shareholders,[161] and that this proposed was rejected.[162] The way that occurred was elaborated upon in the affidavit evidence. Dr Huang deposed that, at the general meeting, Mr Song stated that he would never agree to the plaintiffs selling their equity in Samgris, and that Mr Song gave no reason for rejecting the proposal.[163] Mr Song did not deny this.[164] He simply said he did not recall it happening and relied on the absence of reference to it in the minutes. I accept the plaintiffs' submission that Dr Huang's evidence should be accepted.

[182] The discussion of matters at the general meeting on 14 June 2013 did not resolve the conflict which had been evident since September 2012.

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[160] Tab 172 of Volume 6 of Exhibit 1.

[161] See [111] – [112] of the Statement of Claim which were admitted by [82] – [83] of the Defence.

[162] See [113] of the Statement of Claim which was admitted by [84] of the Defence.

[163] Exhibit 2: Huang (1) at [96](b)-(c).

[164] Exhibit 13: Song (1) at [253] et seq.

[183] On 1 July 2013 Dr Huang on behalf of the minority shareholders wrote to the other directors, CEO and company secretary of Samgris reiterating a request earlier made for relevant financial records, reports and budget plans for the minority shareholders directors and auditing team to examine.[165] By separate letter on the same day[166] to Mr Song as chair of APJM, the other two Samgris directors appointed by APJM, the company secretary of Samgris and the other director of APJM, Dr Huang requested confirmation whether –

(a) APJM wanted to continue carrying on the Investment Agreement to complete the second closing; and

(b) the accusations and request for compensation sent on 18 April 2013 were still the position of APJM.

[184] Dr Song's response was passed on to Dr Huang by email from Ms Wu by email on 4 July 2013.[167] Dr Song on behalf of APJM wrote that APJM would comply with the Investment Agreement, but maintained APJM's position that the conditions under which the second payment was required had not been satisfied at least because:

(a) certain fees had not been paid in respect of coal exploration tenements; and

(b) there were unsolved problems in relation to some exploration sites including but not limited to land, tax exemption and environmental appraisal.

[185] On 4 July 2013, Mr Howard distributed a further letter to the other directors.[168] His covering email referred to his "serious concerns on how Samgris is being managed and operated" at all levels in the company – shareholders, board of directors and management. Mr Howard expressly stated that his "concerns are of a serious nature from both governance and operational perspectives and need to be resolved urgently". The covering letter stated (inter alia):

> Fellow Directors
>
> I believe I am duty bound to communicate to all of my fellow Samgris directors of some major concerns on how Samgris Resources Pty Ltd (Samgris) is being managed as an Australian company including the role and obligations of the directors under the Australian Corporations legislation, not being seriously taken into account.
>
> …
>
> Some of the major issues as I see them are:
>
> - The currently [sic] board is totally dysfunctional in its operation and how it operates; there is a complete lack of recognition of how a company is managed in Australia; in particular, the separation of the roles and functions of the shareholders, the board and the management;
> - The meetings that I have attended were embarrassing to be part of due to their general lack of structure and minimal discussion of any resolutions. In many cases the meetings were attended for their entirety, by many people irrelevant to and/or unsuitable for many for the issues/resolutions on the agenda.
> - …
> - The level of reporting to the Board is totally inadequate ….
> - There appears to be an unwillingness by some directors to commit to a timetable for board meetings based on standard practice; any suggestion of this has been rejected by the Chairman.

[165] Tab 175 in Volume 6 of Exhibit 1.
[166] Tab 175 in Volume 6 of Exhibit 1.
[167] Tab 177 in Volume 6 of Exhibit 1.
[168] Tab 178 of Volume 6 of Exhibit 1.

- The concept of corporate governance and the associated responsibilities does not seem to be of any importance to some of the board members despite their clearly defined duties and responsibilities under Australian Corporation legislation. This should be of concern to all the directors.
- Senior management appears to deem it only necessary to report to the Chairman of the Board, not recognising the fact that the CEO reports to the Board and that the directors are required to look after all shareholders interests.
- Changes are made to the agreed exploration program and budget without reference to the board. These changes are implemented without reference to the board.

The above are some of the issues I have with the directing and management of Samgris. I believe the board needs to resolve the issues and my concerns which should be the concern of all five directors of Samgris…

…"

[186] There was no response to this letter.[169]

[187] On 12 July 2013, Dr Huang engaged Grant Thornton on behalf of ARH to carry out a review of the financial management of Samgris.[170] This review involved Mr Chris Watson of Grant Thornton attending the offices of Samgris and taking copies of financial records, including expense claim forms with supporting receipts and tax invoices, and cash advance forms.[171] The results of that review informed the minority shareholders' complaints in connection with improper payments in connection with this proceeding. The improper payments are addressed at [289] – [314] below.

[188] On 31 July 2013, Dr Huang sent a letter dated 30 July 2013 on behalf of the minority shareholders to Mr Song (as Chair of Samgris), copied to the other directors of Samgris and Ms Wu.[172] This letter identified areas of concern he held in relation to the management of Samgris and stated, inter alia, that:

(a) Dr Huang had recently raised a number of concerns with Mr Song, and other members of the Samgris board, regarding significant management issues that were affecting Samgris, but he had not received a satisfactory response and none of the issues raised had been properly addressed;

(b) many of the issues related to appointments to the Board and employment of executive staff made by or at the direction of APJM, without reference to the rights or interests of the minority shareholders who are entitled to participate in the management of the company through its appointed directors;

(c) some of the concerns were, in summary, that the company's management staff report only to APJM's board representatives and did not provide the same information to the minority shareholder's Board representatives;

(d) the members of the Board did not communicate properly, or at all, regarding significant and important decisions for the company;

(e) the fact that Samgris had not taken steps to ensure that APJM paid the second payment under the Investment Agreement was an example of the issues damaging Samgris.

[189] Again, there was no response to this letter.[173]

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[169] See [36] of the Statement of Claim which was admitted by [14] of the Defence.

[170] Exhibit 2: Huang (1) at [106].

[171] Exhibit 2: Huang (2) at [327].

[172] Tab 189 of Volume 7 of Exhibit 1.

[173] Exhibit 2: Huang (1) at [103].

[190] On 5 August 2013, Dr Huang sent a letter on behalf of the First Plaintiff to the Chairmen of Shaanxi Coal and Shaanxi Geology.[174] This letter:

(a) reiterated complaints similar to those which had been made in other letters to Mr Song;

(b) stated (emphasis added):

> The Australian shareholders had held high hopes for [the Shaanxi Parties'] technology as well as your party's corporation management and operation abilities and had agreed to let go and let your party form and appoint Samgris' management team…
>
> Due to the differences in experience, ability and vision among members of the management team, conflicts and issues continuously appeared in the course of company management and operations…
>
> …
>
> Since the Xi'An geneal meeting of shareholders, I have twice sent letters of Samgris's board of directors inquiring opinions and solution proposals regarding the relevant issues, for which I have yet to receive any solutions or response. Until this day, your party still insist on your accusations toward the Australian shareholders, refuse to carry out the second settlement in accordance with the investement agreement and have not offered any legal explanations. **These actions have not only damaged trust betwteen the two parties and the foundation of the cooperation**, it has also damaged [the Shaanxi Parties'] commercial goodwill reputation.
>
> …
>
> **The Australian shareholders are deeply concerned about the future of Samgris and are attempting to find a plan to resolve the issues reasonably and lawfully. The Australian shareholders believe the success of a company depends on its leadership team. If Samgris cannot form a board of directors that embodies mutual respect, fair cooperation and strategic visions**, it will not have the ability to assemble a management team that features extensive management experience, specialty competence and professional ethics, then **it will be impossible to manage Samgris effectively as a joint venture to strengthen and expand the company and achieve winning results for each shareholding parties**.
>
> The Australian shareholders perceive Samgris to be a joint venture with significant potentials. To manage this enterprise fairly and effective **was going to be a test to the abilities, characters and responsibilities of each shareholding parties.**
>
> Accordingly, the Australian shareholders again earnestly request [the Shaanxi Parties] to re-appoint its representatives on the company's board of directors and restructure the board and additionally to have the new board of directors appoint an independent company CEO and CFO to operate and manage Samgris.

(c) concluded with a request for a definitive response by 22 August 2013.

[191] Once again, there was no response to this letter.[175]

[192] In August 2013, Mr Li replaced Mr Song as director and Chair of Samgris. Mr Li said he was asked to take the position by senior management of Shaanxi Coal and considered that taking on the role was "part of [his] work duties as a [Shaanxi Coal] employee".[176] No submission has been made before me that the change of Chair had anything to do with an attempt by the Shaanxi Parties to respond to the problems which had been identified by Dr Huang. Mr Song said it was because his scope of responsibilities as an employee of Shaanxi Coal had changed. He was the head of Shaanxi Coal's strategic planning department and responsibility for managing overseas business operations had shifted to another Shaanxi Coal department. But he also noted that all of Shaanxi Coal's exploration business operations had shifted to become subject of what I infer is a related Shaanxi Coal company, namely Shaanxi Coalbed Methane Development Company, of which Mr Li was the leader.

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[174] Tab 192 of Volume 7 of Exhibit 1; Exhibit 2: Huang (1) at [104].

[175] Exhibit 2: Huang (1) at [105].

[176] Exhibit 20: Li (1) at [13].

[193] Whatever may have been the cause of Mr Song's departure and Mr Li's arrival, some small improvement in relations seems to have occurred, not least because Dr Huang and the new Chair Mr Li met in Brisbane on 26 November 2013 and were at least able to reach a "preliminary consensus" as follows:[177]

1. The principals of 2014 and future exploration plans
    - The whole exploration scheme and hole arrangements must be result-oriented.
    - Hole drilling can be postponed for deeply buried resources (greater than 500 metres).
    - Exploration of shallowly buried resources should be put into the first priority. In principal, coking coal and coal for injection into blast furnace should be explored first.
    - EPC2221 and EPC2193: Related work should be conducted towards applying for MDL and the application should be started.
    - EPC1799: Resources integration should be conducted for the shallow buried block in the north. After integration the application for MDL should be started.
    - Encourage the geological clarifications and conduct regular analysis meetings of experts.
2. The company's strategic plan for the coal resources of Queensland's three basins:
    - Sturat Basin: The coal type is thermal coal. There are plenty of existing coal bed methane materials, so no further explorations are needed. Mining right should be maintained and application for MDL should be started.
    - Bowen Basin: The coal type is mainly coking coal and coal for injection into blast furnace. Endeavour to find mature blocks or seek joint stock partnership for the project.
    - Galilee Basin: The coal type is high quality steam coal. Actively search for shallowly buried resources to the north of the company's mining right 1799 block. Work with the mining right holding of the north block to integrate resources and then apply for MDL.
3. The company should strengthen capital and cost control, and establish the Capital Budget Management System. The company should apply to the Board for capital budget each month. Any extra-budgetary expenses over AU$20,000 must be examined and approved by the Chairman.
4. In principal, there should be at least one board meeting each year. The Board can convene a meeting each quarter as required. Specific date and place will be decided separately.

[194] The new chair called an extraordinary Board Meeting for 6 December 2013 by a notice sent on 5 December 2013.[178]

[195] Later that day by email to Ms Wu, Mr Xie and Mr (Xin) Wang, copied to Mr Li, Dr Huang raised no difficulty with having the extraordinary meeting but sought to raise two additional items to be added to the agenda namely:

1. All parties of the partner companies comply with the relevant provisions of the original *Tripartite Investment Agreement*: to complete the second settlement immediately and the Asia-Pacific United Mining Company to withdraw the lawsuit against ARH and MBR;
2. The change to the management level of the partner companies: to hire a general manager who has sufficient qualifications and experience; to discuss the deputy general manager; to appoint a Chief Operating Officer and straighten out the financial management.

<u>The third board meeting - 6 December 2013</u>

[196] The third meeting of the board of directors was held on 6 December 2013 in Xi'an, China. This was the first board meeting attended by Mr Li as the new Chair. Mr Howard did not attend but the other three directors (Mr Xie, Mr (Xin) Wang and Dr Huang) did.[179]

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[177] The minutes of that meeting appear at tab 226 of Volume 7 of Exhibit 1.
[178] Tab 228 of Volume 7 of Exhibit 1.
[179] Exhibit 2: Huang (2) at [191]; Exhibit 20: Li (1) at [43].

[197] At the meeting, the directors approved[180] three documents:

(a) the Board Operation Rules;

(b) the Capital Control Rules; and

(c) the Samgris Guidelines in 2014.

[198] The Board Operation Rules[181] sought to clarify the duties and responsibilities of the board and to standardize its work procedures. They provided, inter alia:

(a) By clause 1:

> To clarify the duties and responsibilities of the Board, to standardize the work procedures of the Board, and to ensure the Board exercised its power legally, the Board Operation Rules are formulated in accordance with "Corporations Act", "Constitution of Samgris Resources Pty Ltd" and other relevant regulations.

(b) By clause 11:

> …The Board of the Company shall have all authority conferred by law in the conduct of the business of the Company and granted by the members' meeting and shall have the responsibility for making general policy decisions concerning the management of the business and affairs of the Company. The business of the Company is to be managed by or under the direction of the Board of the Company.

(c) By clause 12:

> The Board of the Company should decide the management structure of the company. The senior management (general manager/CEO, vice general manager, COO and CFO) should be appointed or removed by the Board. The general manager/CEO should be appointed by APJM, and report directly to the Board. The day-to-day operation and management of the Company should be under the leadership of the general manager/CEO, and all other senior officers (vice general manager, COO and CFO) should report directly to the general manager/CEO.

(d) By clause 13:

> The decision-making processes:
>
> (1) Business Planning Process: The Board assigns the GM/CEO of the Company to organize relevant personnel to develop short, medium and long term development plans as well as the annual work plans, then these plans should be submitted to the Board for approval, after the Board approves these plans, the GM/CEO should organize the management team to implement these plans; If necessary, certain important business plans should be submitted to the members of the Company for approval.
>
> (2) Investment Decision-Making Process: The Board assigns the GM/CEO of the company to organize relevant personnel to develop annual investment plans as well as proposals of major investment projects, then these plans and proposals should be submitted to the Board for approval, after the Board approves these plans and proposals, the GM/CEO should organise the management team to implement these plans and proposals; If necessary, certain important investment plans and proposals should be submitted to the members of the Company for approval.
>
> (3) Annual Financial Budget and Annual Financial Report: The Board assigns the GM/CEO of the Company to organize relevant personnel to develop annual financial budget and annual financial report, then submit them to the Board for approval, after the Board approves the annual financial budget and annual financial report the GM/CEO should organise the management team to implement them; If necessary certain important financial-related matters should be submitted to the members of the Company for approval.
>
> (4) Basic Management Systems: The Board assigns the GM/CEO of the Company to organize relevant personnel to develop basic management systems (including the rules of GM decision-making procedure, personnel management system, remuneration system, financial management system, safety system, contract management system and etc.), then these basic management systems

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[180] The minutes of the third board meeting appear in tab 235A of Volume 8 of Exhibit 1.

[181] Board Operation Rules appear in tab 7B of Volume 1 of Exhibit 1 and tab 235 of Volume 8 of Exhibit 1.

should be submitted to the Board for approval, after the Board approves these systems, the GM/CEO should organize the management team to implement them.

(e) By clause 14:

> The Board of the company must select one direct as the chairman to chair the board meetings, and the chairman should also be responsible to organise the day-to-day operation of the Board. The Board may, as required, authorize the chairman of the Board to exercise part of the powers of the Board during the period when the Board meeting is not in session, and in this case, the limits of the powers should be specified by the Board. All matters related to the Company's major interests should be decided by the Board of directors.

(f) By clause 16:

> There are two types of board meeting: regular board meeting and interim board meeting. And there should be at least two regular board meetings within each year, one in Xi'An and one in Brisbane. Interim board meeting can be called under special circumstances.

(g) By clause 24, that for a quorum to exist for a board meeting, at least one director designated by the minority shareholders must be present.

[199] The Capital Control Rules[182] covered these topics: budget preparation and reporting, approval authority on funds, and implementation and supervision. The rules covered the reports to be prepared by the Finance Department, and certain reporting requirements.

[200] The Samgris Guidelines in 2014:[183]

(a) identified the approach which would be taken to exploration in 2014 in relation to specific nominated tenements;

(b) set out some strategic planning goals;

(c) stated that Samgris should strengthen capital supervision and cost control by implementing the Capital Control Rules, including that the "management team must submit monthly budget to the Board and must get approval of Chairman of the Board on non-budgeted spending in large value";

(d) stated that Samgris would take steps to prepare for making an IPO to raise funds and list on the stock market.

[201] The meeting appeared to be conducted without controversy and the adoption of the three instruments to which I have referred was regarded as a positive step. The first three points were consistent with the outcome of the meeting between Mr Li and Dr Huang in Australia referred to at [193] above. There was also some discussion addressed to the dispute concerning the Investment Agreement and the making of the second payment.

[202] I do observe, however, that –

(a) The three instruments concerned seemed to fit the description of the documents referred to in the first board meeting in May 2012 and the subject of the resolution quoted at [103](f) above, but which were to be accomplished, "as soon as possible".

(b) The delay was of the order of 19 months as at the third board meeting. But as is evident even in the terms of the clause 13 of the Board Operation Rules, some of the documents still had not been prepared. There is no evidence before me that documents meeting the description of "Basic Management Systems" described in clause 13(4) were ever put before the Board for approval.

(c) Clause 14 of the Board Operation Rules contemplated the possibility that the Board might authorize the Chair to exercise part of the powers of the board during the period

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[182] Capital Control Rules appear in tab 235 of Volume 8 of Exhibit 1.
[183] Capital Control Rules appear in tab 235 of Volume 8 of Exhibit 1.

the board was not sitting, but within limits specified by the board. Notably this represented the adoption of an authority structure inconsistent with that which had been "clarified" in the 31 August 2012 meeting, in that the Chair could only exercise the Board's power if authorized by it to do so, and then only within the limits specified. There is no evidence before me that the Board ever exercised the power so to authorize the Chair.

(d) I have earlier discussed the language which the Constitution used to describe the role of the CEO: see [99](d) above. I concluded that the language used in the Constitution did not delegate to the CEO authority to decide everyting which might be characterized as "day to day operation and management". The adoption of the Board Operation Rules did not change this position. The Board had express authority to conduct the business of Samgris. The business was to be managed by or under the direction of the Board. The day-to-day operation and management of Samgris was to be done "under the leadership of [the CEO]", on a direct report to the Board. But, as was the case with the similar language used in the Constitution, stating that day-to-day operation and management is under someone's leadership when that person has to report to the Board is not the same as conferring authority on that person to make those decisions without recourse to the Board. If that were so, the rules would have used the language of "authority" as they had with the Board itself.

[203] Prospects of increased harmony consequent upon this meeting proved short-lived. Within weeks of the meeting an important decision concerning Samgris' exploration activities was again apparently made by discussion between the CEO and the Chair, without any involvement of Dr Huang or Mr Howard, whose subsequent complaints were treated with disdain.

[204] Mr Matt White had been employed as Samgris' Exploration Manager. In mid-January 2014 the Samgris CEO determined that Mr White's contract of employment would not be renewed and, accordingly, would terminate on 31 January 2014. He made that decision without any consultation with the Board (or at least with Dr Huang and Mr Howard). Mr Howard sent a letter to the directors which once translated was forwarded to them by Ms Wu on 23 January 2014[184] in these terms:

> Yesterday I received a copy of a letter (attached) from Mr Zhang Yuiping, CEO of Samgris. The letter was addressed to Matt White, the Samgris Exploration Manager advising him that his employment contract with Samgris which finished on the 31 January 2014 will not be renewed. This decision taken by Mr Zhang is very difficult to understand as Mr Zhang has acknowledged that Matt White achieved his KPIs at an average of 98%.
>
> Whilst I recognise the appointment of the Exploration Manager is within the rights of the CEO, it concerns me greatly, not only how the advice was given but also the timing of the termination. On both accounts, it was conducted very badly. This action now I believe puts the operation and assets of Samgris at risk and as directors of an Australian registered company, it should concern all directors from both an investment viewpoint and a legal viewpoint; as directors, we are ultimately responsible to ensure the company is managed correctly. What has happened in the last week should concern us all.
>
> In summary, the way I see the situation now facing Samgris is:
>
> - Mr Zhang will not be the Samgris CEO from February 2014.
> - The termination date of the Exploration Manager Matt White puts Samgris and its directors in a very difficult position as there will be no senior officer to take responsibility. Under these circumstances, the management of the company would normally be taken over by the Chairman of the Board until a new CEO is appointed. This may not be practical in this case.
> - A new CEO will be appointed. On this matter, I strongly urge the Board to consider appointing an independent CEO who has the skills, qualifications and experience to guide Samgris through its

[184] Tab 257 of Volume 9 of Exhibit 1.

next phase as a company. Unfortunately Mr Zhang has been proven not to have the required skills to manage and lead Samgris;

- An appointment of a new CEO could take 2 to 3 months;
- Samgris needs a person in place who knows the business of Samgris and what is required to be done to ensure its assets and operations are maintained in good order until a new CEO is appointed.
- The recent board meeting in Xi'an which unfortunately I did not attend, passed 3 Resolutions which require the board and Samgris management to implement.

Based on the above, what I propose is:

- Matt White's termination stands as outlined in the letter dated 16th January, 2014;
- Matt White is appointed from 1 February, 2014 on a short term 3 month contract to ensure continuity of the exploration and administrative functions until a new CEO is appointed. In the interim period, Matt can report to Mr Li or another director as decided by the Board:
- A search commences immediately for an independent CEO with the skills, qualifications and experience that is required for Samgris and a new CEO is appointed as soon as possible;
- After the appointment of the new CEO, the new CEO can review the Samgris Organisation Structure and make recommendations to the Board; this will include the appointment of a permanent Exploration Manager.

Fellow Directors, I make this proposal in good faith to the Board for discussion and resolution because we as directors must ensure that we fulfil all our obligations to all the Samgris shareholders to try and ensure Samgris is a success.

[205] Mr Howard's suggestions were given short shrift by the Chair, Mr Li. His response was circulated on 23 January 2014[185] in these terms:

Today is "Small New Year's Day" according to the traditional Chinese lunar calendar and I already received the letter from Mr Howard. I would like to thank him for his concern and support to Samgris. Especially, I would like to thank Matt White for what he has done for Samgris.

In my opinion, Mr Zhang is still the CEO of Samgris, the shareholders, the board, and the management team should respect each other, so that we can drive the company towards a healthy development. As an old Chinese saying goes, try to avoid self-inflicted setbacks. We can always hire Matt again if needed in the future.

[206] A few days later Dr Huang sent an email on 24 January 2014,[186] which provided:

I also received the letter and proposal from Michael.

I have been travelling the whole time this month, and only talked with Chairman Li once on phone, so I don't really know what's going on in Samgris right now

From the management point of view, the current management team had the obligation to maintain the assets of Samgris (tenements) in good order, no matter what kind of personal reasons the management staff have, relevant work arrangement should be done properly. Because the CEO is away from office (on holiday or any other reason), he should give notice to the Board about this absence and his arrangements.

From the responsibility point of view, the Board members have the legal obligation to work for all the shareholders. As a director, Michael has his reason to send all the other directors such letter and proposals. Personally, I totally agree with his comments and suggestions.

I don't feel like talking too much about the issues regarding out current CEO anymore, but I think Geology and APJM should be responsible for this. Practically, to manage an Australian registered company with the Chinese management style will cause all sorts of issues and trouble. But based on what have been happening during the past whole year, I have to admit that I don't have the ability to convince you all about this…

[207] During cross-examination Mr Li said that he raised Mr Howard's concerns with the CEO (who was in China at that time), and the CEO told him that Mr Sercombe was going to be

[185] Tab 258 of Volume 9 of Exhibit 1.
[186] Tab 261 of Volume 9 of Exhibit 1.

taking over the role of Exploration Manager from February 2014 when the contract of Mr Matthew White ended.[187] However Mr Li did not tell either Mr Howard or Dr Huang.

[208] Indeed Mr Howard (who had not been told about the arrangements for Mr Sercombe and who had been given the peremptory response quoted at [205] above) regarded Mr Li's response as unsatisfactory and on 26 January 2014 his response was circulated to all the directors:[188]

> Today I received from Mr Li a reply to my email I sent to all Samgris directors regarding my concerns about how Samgris is currently being managed. In my email to all directors, I also put a proposal to the Board that would allow Samgris to operate properly in the absence of a CEO who is currently in China and an Exploration Manager who has not had his employment contract renewed by the CEO.
>
> My proposal would have kept Samgris operating by continuing the exploration program and ensuring its assets were kept in good order. As directors, collectively we are all legally and morally responsible for:
>
> 1. the efficient management of the company,
> 2. to ensure that all shareholders are treated equally, and
> 3. that the board makes decisions collectively for the best outcome for the company and not based on personal interests and allegiances.
>
> As a consequence of Mr Li's dismissive reply to my proposal and seemingly lack of concern for the issues I have raised with the directors, I formally advise you that until the directors are able to act in the best interests of the company and all of its shareholders and in a manner consistent with Australian corporate practice, that I cannot take any responsibility for any decisions or actions that may cause harm to the company and/or damage to the assets as a consequence of lack of action. I will continue do my best to carry out my functions and duties as a director but point out that this will be difficult.
>
> To take this action disappoints me greatly as I have put a lot of effort in trying to make Samgris a good Australian based exploration company and manager across the cultural boundaries. Unfortunately the Chinese style of management currently in place and the existing shareholder structure at Samgris, is in conflict with the style required.
>
> Mr Li quoted a Chinese saying – " … try to avoid self-inflicted setbacks". This is exactly what I was trying to do by putting my proposal to the board.

[209] On any view that response raised matters which should have been regarded by any reasonable director (let alone the Chair) as raising matters which required a careful and immediate response. Especially would that have been so when a moment's thought would have revealed that Mr Howard's concerns could have been at least partially alleviated by telling him that arrangements had already been put in place to engage Mr Sercombe as Exploration Manager. Mr Li was cross-examined about that response, agreed that it seemed to raise an important subject matter regarding how the directors would be able to operate, but nevertheless was not able to remember whether or not he sent a response to Mr Howard on that subject. It seems to me that his inability to recall on that aspect sounds adversely to the view I should form as to his reliability as a witness.

[210] More significantly, however, it seems to me that the whole incident was emblematic of the larger problem, namely the fact that day to day management issues were dealt with between the Chair and management, without adequate involvement of the other directors (in particular the directors nominated by the minority shareholders).

<u>The fourth board meeting and second general meeting - 22 April 2014</u>

[211] Certainly Dr Huang and Mr Howard seemed to continue to have the concerns previously expressed by them on behalf of the minority shareholders. On 15 March 2014, the minority shareholders requested that a general meeting and board meeting occur on 20 April 2014.[189]

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[187] Transcript, pp 6-31 to 6-32.
[188] Tab 264 of Volume 9 of Exhibit 1.
[189] Tab 268 of Volume 9 of Exhibit 1; Exhibit 2: Huang (1) at [112]; Exhibit 20: Li (1) at [71].

The date of 20 April 2014 was the date for the "Third Closing" pursuant to the Investment Agreement. Their letter to the Samgris Chair was in these terms:

> Based on the coordination problem between the corporation management and shareholders which resulted in the abnormal operation of the company, we put a proposal package on solving the problem to your company in July 2013 as follows:
>
> 1. Restructuring the board of directors;
> 2. Change senior managers
> 3. Complete the second settlement and delivery
>
> After the restructuring of the board in September 2013, you had a personal Australian 'fact-finding trip' and subsequently we joined a board discussion in Xian; and all sides had a straightforward and objective discussion on the basic direction of the Samgris company and made related promises. It was believed on our part that the company would develop along the right lines from then on.
>
> However, the problem we discussed above was not solved and even worsened:
>
> 1. The new general manager has not been designated, who should be nominated by shareholders and then examined and designated by the board. Because the new general manager has not been designated, there was a delay in normal company operation, leading to unfinished projects, budgets, personnel arrangement, etc. in 2014.
> 2. In accordance with the investment agreement by all sides of the Samgris Resources Pty Ltd, the second settlement and delivery has been overdue for nearly 11 months, so how did the company management contact and discuss with the shareholders of [APJM]? It is [APJM] responsibilities and obligations of [APJM] to inform all sides about its suggestions and decision.
> 3. In accordance with the investment agreement by all sides of the Samgris Resources Pty Ltd, the date of the third settlement and delivery is near at hand, so how did the company management make the arrangement with the shareholders of [APJM] about this settlement and delivery?

[212] At the same date the minority shareholders sent a letter to Mr Song as chair of APJM and Mr Li as chair of Samgris and the other directors of Samgris, which contended essentially that both the second and third payments were due under the Investment Agreement. A response was sent by letter dated 18 March 2014 acknowledging the letter and communicating that APJM was currently examining whether the conditions had been met regarding the second and third payment specified in the investment agreement. The letter stated "As long as the conditions are met, we also eagerly wish to finalise the remaining two payments as soon as possible".[190]

[213] On 16 April 2014, the minority shareholders proposed a resolution that Samgris make a call on APJM to pay the monies unpaid on the shares they held.[191] Their proposal that a call should be made on APJM was founded on the proposition that the second and third payments under the Investment Agreement were owing by APJM to Samgris as part of the subscription for the shares held by APJM and Samgris was entitled to call for payment.

[214] On 17 April 2014, a notice of directors' meeting was issued for a meeting to be held on 22 April 2014.[192] The agenda items for the meeting were identified as:

(a) discuss and vote on proposed resolution 1 (a resolution to appoint Mr Wei Mu as the new CEO of Samgris, to replace Mr Zhang);

(b) discuss and vote on proposed resolution 2 (the resolution that a call should be made on APJM); and

(c) discuss and come up with a solution of the senior management's bonus for year 2013.

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[190] Tab 272 of Volume 9 of Exhibit 1.

[191] Tabs 274 and 275 of Volume 9 of Exhibit 1; Exhibit 2: Huang (1) at [115].

[192] Tab 277 of Volume 9 of Exhibit 1; Exhibit 2: Huang (1) at [116].

[215] A notice of general meeting was distributed the same day.[193] The only agenda item for the General Meeting was identified as a report by Mr Zhang (as CEO) to the shareholders on the Annual Report of 2013, Work Plan of 2014, Financial Reports of 2013 and Budget Report of 2014.

[216] Both the fourth meeting of the board, and the general meeting, occurred on 22 April 2014 in Brisbane.[194]

[217] At the fourth board meeting on 22 April 2014, the directors voted unanimously to appoint Mr Mu as the new CEO of Samgris.[195] Dr Huang proposed the resolution to make a call on shares held by APJM. But the minutes record that "most" of the directors "suggested" that the board of Samgris could "make a suggestion to [APJM] to suggest them paying any money unpaid on the shares", but there was no need to pass such a resolution and no vote was taken on the resolution. In light of the behavior of Dr Huang and Mr Howard both before and after this meeting, I infer that the "most" to which the minutes refer was in fact the APJM appointed directors and that it was an exercise of power by them which made the determination recorded in the minutes. I am not prepared to accept Mr Li's evidence[196] that Dr Huang acquiesced in that course.

[218] At the second general meeting on 22 April 2014, the 2013 Financial Report (**2013 Financial Report**) was presented.[197] That report included the financial statements of Samgris for the year ended 31 December 2013 (**2013 Financial Statements**).[198] Mr Li gave evidence that he read the Financial Report for the year ended 31 December 2013 before the meeting and voted in favour of adopting it.[199] In a passage in cross-examination[200] which sounded adversely to his credit, he contended that he could not say that he was "happy" with the content of the document he signed because he had just started working at the company. That was incorrect, he had been a director since August the previous year. I found his testimony to be evasive. He later said he could not recall signing the 2013 Financial Statements.[201] I felt his evidence was driven by a subjective view that he wanted to distance himself from the accounts.

[219] It is notable that:

(a) The 2013 Financial Report was prepared by Ms Dong.[202] Hanrick Curran were the auditors for the 2013 Financial Statements and Ms Dong and Lingling Zhang provided information to them.[203]

(b) The 2013 Financial Report specifically dealt with the assets status of Samgris and stated:

> the other receivables is $33.61 million. It mainly includes investment receivable 33 million from APJM.

(c) The 2013 Financial Statements set out a "Statement of Financial Position" as at 31 December 2013.

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[193] Tab 276 of Volume 9 of Exhibit 1; Exhibit 2: Huang (2) at [199].

[194] Exhibit 2: Huang (1) at [117].

[195] Tab 279 of Volume 10 of Exhibit 1.

[196] Exhibit 20: Li (1) at [100] – [103].

[197] Ms Dong confirmed this: see Transcript, p 5-53 lines 37 to 42.

[198] Tab 248 of Volume 8 of Exhibit 1.

[199] Transcript, pp 6-16 lines 19 to 24 and 6-17 lines 37 to 41.

[200] Transcript, p 6-16 line 25 to p 6-17 line 40.

[201] Transcript, p 6-18.

[202] Transcript, p 5-50 line 35 to p 5-51 line 3.

[203] Transcript, p 5-52 lines 1 to 14.

(d) In the section of the "Statement of Financial Position" headed "Current Assets", there was an entry for "other current asset" of $33,120,876 with a reference to note 5. Note 5 identified "Other Financial Assets" and included under "current asset" an entry for "capital contribution receivable from related party - $33,000,000."

(e) In the section of the "Statement of Financial Position" headed "Equity", the issued capital was stated to be an amount of $56,000,982 with a reference to note 12. Note 12 recorded all shares in APJM as being fully paid. APJM owed the sum of $33 million to Samgris, in respect of shares which had previously been only partly paid. The amount was said to be "due to be received" and as being a "present obligation" of APJM as at 31 December 2013, but nevertheless "confirmed as payable within the 2015 financial year". Note 12 was in the following terms:

		2013	2012
		$	$
12	**Issued Capital**		
	Shares at the beginning of the reporting period	**54,728,759**	1,000,000
	Shares issued (Fully paid)	-	22,000,982
	Shares issued (Partly paid)	-	33,000,000
	Less: Present value discount	-	(1,272,223)
	Add: Present value reversal	**1,272,223**	-
	Total	**56,000,982**	54,728,759

(a) Ordinary shares

	2013	2012
	No.	No.
At the beginning of the reporting period	**2,000,000**	-
Ordinary Shares Partly paid	-	2,000,000
At the end of the reporting period	**2,000,000**	2,000,000

The holders of ordinary shares are entitled to participate in dividends and the proceeds on winding up of the Company. On a show of hands at meetings of the Company, each holder of ordinary shares has one vote in person or by proxy, and upon a poll each share is entitled to one vote.

As at 20 April 2012, the company issued 1,000,000 partly paid shares, of which $2.20 per share was paid with a further $3.30 per share outstanding. The outstanding amount is due to be received. As the outstanding amount is contractually committed the discounted unpaid share capital has been recognised as a current other receivable (Note 5).

In 2012, the 1,000,000 partly paid shares amount of $33,000,000 was to be paid in 2 instalments (ie 20 April 2013 and 20 April 2014). A present value calculation on the $33,000,000 was calculated giving a result of $31,727,777. The difference of $1,272,223 was a present value discount, of which $668,239 has been recognised as other revenue and the remaining amount has been adjusted against the related party loan balance. In 2013 year, the 2 instalments were unpaid at 31 December 2013 giving rise to a present obligation of $33,000,000 at 31 December 2013. These amounts have been confirmed as payable within the 2015 financial year. Accordingly, a present value reversal of $1,272,223 was done and $668,239 recognised as an expense in the Statement of Profit or Loss and Other Comprehensive Income with the remaining amount of $603,984 adjusted against the loan balance bringing it to a total of $33,000,000.

[220] I observe that the evidence did not explain how or by whom the $33 million receivable had been "confirmed as payable within the 2015 financial year".

Events between the fourth and fifth board meetings

[221] Shortly after the fourth board meeting, on 27 April 2014, Mr Howard was moved to write again identifying his serous concerns as to the conduct of APJM nominees on the Samgris board.[204] Amongst other things, Mr Howard again expressed his concerns on the direction that the conduct of the AJPM nominees to the Board, suggested there was a blurring between the role of shareholders and the role of Board members and that every time there was a discussion the two roles seem to merge as one with the result that objective discussion was lost, and suggested that the directors nominated by APJM were acting in the interests of APJM and not Samgris. Apparently as an exemplar of the last proposition Mr Howard stated:

> APJM has obligations under the Investment Agreement. One of these is payment of the Second Payment upon pre-conditions being met. The second payment was due in April 2013 and APJM have repeatedly said that the pre-conditions have not been met. Up to this point, despite asking for the proof that the pre-conditions have not been met, no proof or evidence has been forthcoming to substantiate this claim. In the last three meetings I have attended this has been the case. I understand that also there have been numerous other discussions on the same issue that I have not been involved in. I believe that APJM is in breach of the Investment Agreement and action should be taken by Samgris to resolve the issue.

[222] The letter went on to urge Chairman Li to provide leadership to settle the issue.

[223] Mr Li responded by email of 27 April 2014 thanking Mr Howard for suggestions and indicating that he would take them into consideration seriously.

[224] Over the course of the next 12 months or so leading up to the next board meeting in March 2015, events evidencing in greater or lesser ways the continued deterioration in the relationship between the two sides occurred in a number of areas.

[225] It is appropriate to consider the following areas:

(a) the way in which important Samgris staff appointments occurred, including those which affected mining exploration activities, without Board involvement;

(b) the way in which a de facto decision to cease or to reduce mining activities was made;

(c) the commencement of the present litigation in December 2014;

(d) the way in which decisions were made (without any involvement of the minority shareholders or their nominated directors) in relation to the accounting treatment of the $33 million debt, which was said to be owed by APJM under the Investment Agreement.

[226] I will deal with each of these under separate subheadings.

Staff appointments made without board involvement

[227] At [116] above, I indicated why I regarded the manner in which in 2012 Mr Song had caused Samgris to enter into contracts of employment of Mr Zhang (as CEO), Ms Wu, Mr Li Bao Zhu (as Deputy CEO) and Ms Lingling Zhang (as accountant) as exemplars of an exercise of authority by the Chair which was not authorized by the Samgris Board. Similar issues arose in 2014 concerning other staff appointments.

[228] Of course, by 2014 the Board Operation Rules had been adopted. I have already explained at [202] above, that –

(a) clause 14 of the Board Operation Rules contemplated the possibility that the Board might authorize the Chair to exercise part of the powers of the Board during the period

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[204] Tab 288 of Volume 10 of Exhibit 1.

the Board was not sitting, but within limits specified by the Board, but that there is no evidence before me that this happened; and

(b) the nature and limits of any delegated authority of the CEO concerning staff appointments were not clarified by the Board Operation Rules.

[229] I have already adverted (see [204] to [210] above) to the decisions made in early 2014 in relation the non-renewal of Dr White's contract and the appointment of Mr Sercombe as exploration manager. These decisions were decisions made without first obtaining the approval of the Samgris Board and in the absence of appropriate delegations of authority.

[230] The Chair seemed to regard it as within his authority to appoint the new CEO. On 22 April 2014 Mr Li sent a letter of offer and employment contract to Mr Mu as the appointed CEO[205] without having informed or obtained the approval of the Samgris board as to the terms of those documents.[206] Further, on or about 1 September 2014, Mr Li issued a letter to Mr Mu which set out an increase in his remuneration.[207] Mr Mu signed this letter on 3 September 2014.[208] Again, the letter had been sent by Mr Li without having informed the Board or obtained its approval.[209] I agree with the plaintiffs' complaint that, absent the express delegation of authority, these decisions were for the Board and not the Chair.

[231] On a less significant level, on 28 November 2014, the employment of Mr Skerman, who had been employed as a full time Land Access Officer, was terminated and Samgris entered into a consultancy services agreement with him on 13 January 2015,[210] also without Board approval.

[232] By themselves, these decisions were not of huge moment. They were, however, indicative of the way in which authority was exercised within Samgris. They evidence the continuation of the practice adopted in 2012 that day to day management issues were dealt with between the Samgris Chair and Samgris management, without adequate involvement of the other directors (and in particular the directors nominated by the minority shareholders). This conduct was also entirely consistent with the internal view of APJM (evidenced in the events discussed at [171] - [176] above) that "on completing the transaction in April 2012, [APJM] took over the management of Samgris Resources Pty Ltd".

De facto cessation or reduction of mining activities

[233] Clause 19.4 of the Constitution provided, amongst other things, that the approval of an exploration work program and budget was one of the types of decision which could only be made by a supermajority vote of over two thirds of the votes cast by all directors present at a duly convened Board meeting. In my view, the corollary of that obligation is that amendment of an already approved exploration work program required the same majority. Setting and changing the exploration work progam and budget were plainly not things which could be done by decisions as between Samgris management and the Samgris Chair, without the involvement of the Board.

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[205] APJM admits that on or about 22 April 2014, Mr Li, on behalf of Samgris, sent a letter of offer and employment contract to Mr Mu: see [11A](a) of the Defence. The letter of offer and employment contract are at tab 281 of Volume 10 of Exhibit 1.

[206] Exhibit 2: Huang (2) at [129].

[207] See tab 342 of Volume 10 of Exhibit 1.

[208] See tab 342 of Volume 10 of Exhibit 1.

[209] Exhibit 2: Huang (2) at [129]. That is deemed to be admitted on APJMs' pleading because it does not traverse that allegation: see [29B] of the Statement of Claim and [11B] of the Defence.

[210] See [98], [98A] and [98B] of the Statement of Claim which were admitted by [69], [69A](a) and [69B](a) of the Defence.

[234] There is some controversy between the parties in relation to some of the facts, but at least these points are clear:

(a) In November 2013 Dr Huang and Mr Song had reached a consensus as set out at [193].

1. The principals of 2014 and future exploration plans

- The whole exploration scheme and hole arrangements must be result-oriented.
- Hole drilling can be postponed for deeply buried resources (greater than 500 metres)
- Exploration of shallowly buried resources should be put into the first priority. In principal, coking coal and coal for injection into blast furnace should be explored first.
- EPC2221 and EPC2193: Related work should be conducted towards applying for MDL and the application should be started.
- EPC1799: Resources integration should be conducted for the shallow buried block in the north. After integration the application for MDL should be started.
- Encourage the geological clarifications and conduct regular analysis meetings of experts.

2. The company's strategic plan for the coal resources of Queensland's three basins:

- Sturat Basin: The coal type is thermal coal. There are plenty of existing coal bed methane materials, so no further explorations are needed. Mining right should be maintained and application for MDL should be started.
- Bowen Basin: The coal type is mainly coking coal and coal for injection into blast furnace. Endeavour to find mature blocks or seek joint stock partnership for the project.
- Galilee Basin: The coal type is high quality steam coal. Actively search for shallowly buried resources to the north of the company's mining right 1799 block. Work with the mining right holding of the north block to integrate resources and then apply for MDL.

(b) The Samgris Guidelines in 2014, which were approved unanimously at the third board meeting in December 2013, were entirely consistent with that consensus.

(c) At the second general meeting held on 22 April 2014, amongst other things, the Samgris Financial Budget Report for the year ending 31 December 2014 was tabled. The Samgris Financial Budget Report for the year ending 31 December 2014 provided an exploration budget of $4.956 million.[211] It provided that the plan was to drill 13 holes in 2014 ($2.28 million), conduct 10km of seismic surveying ($150,000), land access ($195,000), tenement administration ($140,000), desktop studies ($230,000) and summary reports ($220,000).[212] $1 million was allocated for the acquisition of new tenements.[213] Of the 13 holes for drilling, five were budgeted for EPC1799, five for EPC2114, and one each for EPC2060, EPC1744 and EPC1999.[214]

(d) Yet within a few months, Samgris' CEO had made a decision to recommend a change to that plan. APJM accepts[215] that Mr Mu met with Mr Li and Mr Xie in Xi'an in mid July 2014. Mr Mu informed them of his proposal to temporarily defer mining exploration activities on the existing tenements and to use those funds to acquire better tenements. Mr Li and Mr Xie agreed that Mr Mu's suggestion made sense.[216]

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[211] Tab 568 of Volume 16 of Exhibit 1 at pp 746 – 747.
[212] Tab 568 of Volume 16 of Exhibit 1 at pp 746 – 747.
[213] Tab 568 of Volume 16 of Exhibit 1 at p 747.
[214] Tab 273 of Volume 9 of Exhibit 1 at p 138.
[215] Second Defendant's written submissions at [296].
[216] Exhibit 22: Mu (1) at [103] – [105].

(e) On 25 September 2014, an "Eight Months (Jan-Aug) Report – August 2014" was prepared by Mr Mu and circulated to the Samgris Board.[217] The covering email sought comments within 10 days. Mr Mu deposed that no comments were received. Neither Dr Huang nor Mr Howard suggested that they made any complaints. As part of that report, the "Australian Industry Update" identified that only Samgris was conducting its field work and other exploration companies had pulled off their spending in the field, and field work had generally been postponed by EPC holders in the Galilee Basin.[218] On that basis, Samgris management recommended carrying out tenement maintenance and no field work for the rest of 2014.[219] Mr Howard accepted in cross-examination that the Eight Months Report contained recommendations by management to the board.[220]

(f) The papers for the fifth board meeting on 30 March 2015 included the 2014 CEO's Annual Report.[221] As will appear, resolution 1 at the meeting was the adoption of the 2014 CEO's Annual Report and the resolution passed unanimously. The exploration approach foreshadowed by Mr Mu in his dealings with the directors in 2014 was recorded in his annual report. The report included as appendices a paper entitled "justification for 2015 exploration budget', which was similarly consistent. Neither of the plaintiffs' directors criticised that exploration approach.

[235] Dr Huang says that in June 2014, Dr Huang met with Mr Mu (CEO of Samgris) at the Brisbane Polo Club. Mr Mu informed Dr Huang that:

(a) no further drilling would be carried out by Samgris once the proposed drilling at tenement EPC2114 was completed at the end of June 2014;

(b) he was looking for merger and acquisition opportunities.[222]

[236] It is not disputed that Dr Huang and Mr Mu met at the Brisbane Polo Club at this time,[223] nor is it contentious that Mr Mu told Dr Huang that he was looking for merger and acquisition opportunities.[224] The dispute lies in whether Mr Mu informed Dr Huang that no further drilling would be carried out by Samgris once the proposed drilling tenement EPC2114 was completed at the end of June 2014. Mr Mu informed Dr Huang that he intended making a recommendation to the Board of Samgris that having regard to the downturn in the mining industry, the Board should give consideration to temporarily suspending exploration activities pending a change in market conditions.[225]

[237] Given that that is in fact what he did, and without any objection by either Dr Huang or Mr Howard, Mr Mu's version seems more likely.

[238] The change to the exploration plan should not have been, but seems to have been, implemented before a formal resolution obtained by supermajority. Mr Mu raised that with the Chair, but he was told that "Samgris will hold a board meeting to confirm the change to the 2014 exploration plan that you propose".[226] The way in which this occurred is, then, another exemplar of the inappropriate exercise of authority as between Samgris Management and the Samgris Chair. Its significance is not diminished by the fact that almost 6 months

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[217] Tab 541 of Volume 16 of Exhibit 1 at pp 301 – 304.
[218] Tab 541 of Volume 16 of Exhibit 1 at pp 301 – 303.
[219] Tab 541 of Volume 16 of Exhibit 1 at p 303.
[220] Transcript, p 3-41 lines 1 to 28.
[221] Tab 409 of Volume 12 of Exhibit 1 at pp 1756 – 1759.
[222] Exhibit 2: Huang (1) at [152].
[223] Exhibit 22: Mu (1) at [95].
[224] See [95](b) of the Statement of Claim which was admitted by [67](b) of the Defence.
[225] Exhibit 22: Mu (1) at [95] to [110].
[226] Exhibit 22: Mu (1) at [138].

after the change was proposed by management and implemented contrary to authority, the change was approved at the next Board meeting.

Litigation commences in December 2014

[239] The minority shareholders commenced this proceeding by filing an originating application together with supporting affidavits on 4 December 2014. It had, however, been foreshadowed by a solicitors' letter on behalf of the minority shareholders in September 2014. As originally framed, and amongst other things, the minority shareholders sought –

(a) orders that the majority shareholder buy out the minority shareholders or *vice versa*; or

(b) an order that the company be wound up under the just and equitable ground.

[240] Amongst the supporting affidavits was an affidavit from Dr Huang in which he raised many of the matters on which I have already remarked.

Accounting treatment of the alleged $33 million APJM debt

[241] It will be recalled that –

(a) Consequent upon the restructure of Samgris on the Closing on 20 April 2012, Samgris issued 1,000,000 partly paid shares to APJM, and APJM agreed to pay a $55 million subscription price to Samgris in installments of $22 million, $22 million and $11 million. The first instalment was paid on the Closing. The second instalment was to be paid (subject to the satisfaction of certain conditions) within 12 months after Closing (i.e. by 20 April 2013) and the third instalment (again subject to satisfaction of certain conditions) would be paid within a further 12 months (i.e. by 20 April 2014).

(b) By the end of April 2013, all the directors and members of Samgris knew there was a dispute concerning whether or not APJM was obliged to pay the second installment of $22 million of the subscription price, and knew that APJM had contended it was not liable to make the payment based on the contentions advanced in Mr Song's letter of 18 April 2013 and its attachment: see the events in April 2013 discussed at [171] to [178] above.

(c) By the end of April 2014 (and at all times thereafter), all the directors and members of Samgris knew that there was still some form of dispute concerning the outstanding $33 million: see the events of April 2014 discussed at [211] to [223] above. True it was that the 2013 Financial Statements approved at the meeting on 22 April 2014 recognised in its financial accounts that its assets included a receivable from APJM in the sum of $33 million which would be paid in the 2015 financial year. But Mr Howard found the discussion of the resolution put by the minority shareholders at the same meeting so unsatisfactory as to form the views that the directors nominated by APJM were acting in the interests of APJM and not Samgris, that APJM was in breach of the Investment Agreement by not paying the amounts, and action should be taken by Samgris to resolve the issues. So plainly enough, and despite the fact that no formal demand had been made of APJM, Samgris knew that APJM contended that the amounts were not due.

[242] The $33 million was treated very differently in the 2014 Financial Statements as compared to the 2013 Financial Statements. The nature of the different treatment, and the circumstances in which it has occurred, are best explained, first, by identifying the different treatment, and, second, by examining the manner by which that different treatment occurred.

[243] The following table addresses the first task and contains my observations concerning the differences.

Item	2013 Financial Report and audited accounts dated March 2014	2014 Financial Report and audited accounts dated March 2015	My observation
1	The 2013 Financial Report was prepared by Ms Dong. Hanrick Curran were the auditors for the 2013 Financial Statements and Ms Dong and Ms Lingling Zhang provided information to them.	The 2014 Financial Report was prepared by Ms Dong. PricewaterhouseCoopers (**PwC**) were the auditors for the 2014 Financial Statements and Ms Dong and Ms Lingling Zhang provided information to them.	
2	The 2013 Financial Report specifically dealt with the assets status of Samgris and stated: the other receivables is $33.61 million. It mainly includes investment receivable 33 million from APJM.	The 2014 Financial Report specifically dealt with the assets status of Samgris. No mention was made in the assets section of the investment receivable $33 million from APJM which had been noted in the previous year. The explanation appeared in a later section of the report entitled "Significant changes in 2014" and which provided (emphasis added): **At 31 December 2014, the company has resolved to reduce the Company's paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM**. Both instalments (totalling $33,000,000) are overdue and there is significant uncertainty as to whether they will be received. **The delay in receipt of the last 2 instalments is attributable to variances in tenements and coal resources as provided by the previous holder (seller) and the facts after exploration.**	The proposition that the company had resolved to reduce Samgris' paid share capital was false. There had been no meeting of either members of Samgris or of its board at which such a resolution was put let alone approved. In light of the directors' report signed by the chair, Mr Li, I infer that this statement was made with Mr Li's authority.
3	The 2013 Financial Statements contained a directors' report by the chair Mr Li.	The 2014 Financial Statements contained a directors' report by the chair Mr Li dated 28 February 2015, stated to be made in accordance with a resolution of directors. Relevantly it stated (emphasis added): Significant changes in the state of affairs As at 20 April 2012, the Company issued 1,000,000 partly paid shares to [APJM] of which $2.20 per share was paid with a further $3.30 per share outstanding. The outstanding amount was due to be received in two instalments, being 12 calendar months following the first payment and 12 calendar months following the second payment.	Mr Li's statement that the directors' report was made in accordance with a resolution of directors was false, at least insofar as it suggested a valid resolution of directors. Neither Dr Huang nor Mr Howard had participated in any such resolution. They had not been consulted in any way concerning the changes to the reporting of the $33,000,000 APJM debt. Mr Li's statement that it was in accordance with a resolution of directors to state there was significant uncertainty concerning the receipt of the payments and that the delay was in fact attributable to the causes

Item	2013 Financial Report and audited accounts dated March 2014	2014 Financial Report and audited accounts dated March 2015	My observation
		However, both instalments (totalling $33,000,000) are overdue and there is significant uncertainty as to whether they will be received. **The delay in receipt of the last 2 instalments is attributable to variances in tenements coal resources as provided by the previous holder (seller) and the facts after exploration. As at 31 December 2014, the directors have resolved to reduce the Company's partly paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM.**	identified was false. There had been no meeting of the board at which such a resolution was put let alone approved. Mr Li's statement that the directors had resolved to reduce the Company's partly paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM, was false. There had been no meeting of the Board at which such a resolution was put let alone approved. Because it would beggar belief to conclude that Mr Li behaved in this way without the authority and consent of APJM, I conclude that this statement occurred with the authority and consent of APJM.
4	The 2013 Financial Statements set out a "Statement of Financial Position" as at 31 December 2013 and contained a directors declaration with provision for signing by the chair, Mr Li.	The 2014 Financial Statements set out a Balance Sheet as at 31 December 2014 and contained a directors declaration signed by the chair, Mr Li dated 28 February 2015.	The directors' declaration by the Chair Mr Li, was false. There had been no resolution of the directors declaring that the financial statements and notes presented fairly the company's financial position as at 31 December 2014. Neither Dr Huang nor Mr Howard had participated in any such resolution. They had not been consulted in any way concerning the changes to the reporting of the $33,000,000 APJM debt.
5	In the section of the Statement of Financial Position headed "Current Assets", there was an entry for "other current asset" of $33,120,876 with a reference to note 5. Note 5 identified "Other Financial Assets" and included under "current asset" an entry for "capital contribution receivable from related party - $33,000,000."	The section of the Balance Sheet headed "Current Assets", recorded figures reduced by $33,000,000 and cross-referred to note 5. Note 5 identified the reduction to $0 of the "capital contribution receivable from related party" which had been recorded at $33,000,000 in the previous year and contained a cross-reference to note 12 discussed below.	
6	In the section of the Statement of Financial Position headed Equity, the issued capital was stated to be	In the section of the Balance Sheet mistakenly headed "Equipment" instead of "Equity", the issued capital was stated to be an amount of	The statement in note 12 concerning the instalments being overdue was accurate.

Item	2013 Financial Report and audited accounts dated March 2014	2014 Financial Report and audited accounts dated March 2015	My observation
	an amount of $56,000,982 with a reference to note 12. Note 12 recorded all shares in APJM as being fully paid. APJM owed the sum of $33 million to Samgris, in respect of shares which had previously been only partly paid. The amount was said to be "due to be received" and as being a "present obligation" of APJM as at 31 December 2013, but nevertheless "confirmed as payable within the 2015 financial year".	$23,000,962, reflecting a $33,000,000 reduction from the previous year with a reference to note 12. That was consistent with Note 12 recorded (emphasis added): "As at 20 April 2012, the Company issued 1,000,000 partly paid shares to [APJM] of which $2.20 per share was paid with a further $3.30 per share outstanding. The outstanding amount was due to be received in two instalments, being 12 calendar months following the first payment and 12 calendar months following the second payment. **However, both instalments (totalling $33,000,000) are overdue and there is significant uncertainty as to whether they will be received. As at 31 December 2014, the directors have resolved to reduce the Company's partly paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM**. Note 13 recorded: (b) $33 million receivable from [APJM] As at 31 December 2014 [Samgris] has a contingent asset in respect to a $33,000,000 receivable which arises from a legal obligation under the Investment Agreement that is in dispute between the Company's shareholders. If negotiations are successful, [Samgris] may receive a further $33,000,000 in cash funding that will increase the contributed equity of the company by the same amount.	Samgris knew that APJM rejected the proposition that the monies were due to be paid. Even the minority directors knew this (although they did not accept it was correct). Whether it was accurate to say that there was "significant uncertainty" as to whether they would be received, would depend on whether there had ever been an objective assessment from Samgris' (and not APJM's) point of view as to whether Samgris could or should take steps to compel APJM to pay. There is no evidence that such an objective assessment was ever made. If such an assessment had been made, I would have expected APJM to have been able to adduce evidence of that assessment via, at least, Mr Li and/or Mr Mu. As I have stated above, the statement that the directors had resolved to reduce Samgris' partly paid share capital in the manner recorded in note 12 was false. The statement in note 13 concerning the receivable seems unobjectionable.

[244] As CFO of Samgris, Ms Dong was responsible for ensuring the audit was carried out.[227] Ms Dong was in China during this period, as was the Chair, Mr Li.[228] Ms Lingling Zhang assisted Ms Dong with this process by collating relevant documents required by PwC and by directly liaising with PwC on issues in connection with the audit.[229] Ms Lingling Zhang was based in Brisbane. So was the CEO, Mr Mu.

[227] Exhibit 14: Dong (1) at [111].

[228] Exhibit 20: Li (1) at [32]; Exhibit 14: Dong (1) at [39].

[229] Exhibit 14: Dong (1) at [112].

[245] In or around December 2014 Ms Dong gave Ms Lingling Zhang instructions to commence collating financial information for provision to PwC so that they could commence their audit of the 2014 financial accounts of Samgris.

[246] Instructions were given to the auditors via the CEO, Mr Mu, and Ms Dong. I infer that this important conduct by Samgris' management would have been done with the authority of the Chair in the same manner as had been done on other occasions in the past.

[247] On 13 January 2015, Amanda Bacon of PwC sent an email to Ms Lingling Zhang which referred to a phone call that morning between them and which attached a list outlining "key discussion points".[230] The first listed matter was "Confirmation of $33m related party receivable from APJM".[231] As to this matter, the list recorded that Ms Lingling Zhang would "discuss with CEO" and revert to PwC. I note that given the size of the receivable and the treatment of it in the previous accounts, it is hardly surprising that PwC would seek to have confirmation concerning the receivable.

[248] Later that day, Ms Lingling Zhang responded, inter alia:

> about the 33 million, is that OK if the directors report states that "they are negotiating with APJM, so they prefer the share structure will stay the same".[232]

[249] The following day, 14 January 2015, PwC emailed Ms Lingling Zhang, copying Mr Mu and others, as follows:[233]

> ….
>
> The significant issues we need to resolve for our audit are outlined in order of highest to lowest priority as follows:
>
> 1) Confirmation & recovery of $33m receivable
>
> Thanks for your note and I understand your wish to recognise the $33 million and keep the share structure the same.
>
> However, I will need you to provide me with more compelling evidence that Samgris will received the full $33 million from APJM. The fact that Samgris is negotiating with APJM on this matter raises concerns from my point of view that Samgris may not receive the entire amount. The investment agreement required the shareholders of APJM to make a 2nd payment of $22 million 12 months after the date of the agreement (I think this was March 2012) with a third payment of $11 million 12 months after the date of the 2nd payment Both of these payments are overdue.
>
> From memory, and please correct me if I am wrong, but APJM is reliant on its shareholders to contribute the $33 million to the company so that it can pass these funds down to Samgris. Therefore to be comfortable that this will happen I would like some assurances to be provided to us by the shareholders of APJM that they will pay the money, in addition to the receivable confirmation to be provided by the directors of APJM as I have already requested.
>
> The key questions that I will need to be answered are:
>
> 1) What is the status of negotiations, and what are the key issues being discussed between Samgris and APJM?
>
> 2) Are the Director's of APJM happy to provide us with a confirmation of the loan payable to Samgris for $33m?
>
> 3) Can the shareholder's of APJM provide us with a letter confirming that they will contribute the full $33 million to APJM which will be used to settle the debt with Samgris?
>
> If we cannot resolve these questions, there are two options that you may like to consider, option 1 is our most preferred option:

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[230] Exhibit 16: Lingling Zhang (1) at exhibit LZ-11 at p 65.

[231] Exhibit 16: Lingling Zhang (1) at exhibit LZ-11 at p 67.

[232] Exhibit 16: Lingling Zhang (1) at exhibit LZ-11 at p 65.

[233] Exhibit 14: Dong (1) at [114] – [115]; Exhibit 16: Lingling Zhang (1) at exhibit LZ-11 at pp 62-63.

1) We raise a provision for doubtful debt against the $33 million receivable, to reduce the amount receivable down to the amount that will be recovered. This would be expensed through the income statement as a bad debt expense. Our audit report will remain unqualified, provided we can see evidence that Samgris will have sufficient cash to remain a going concern for at least 12 months from the date of our audit report (through to 28 February 2016), Please refer to our point on going concern below.

2) If you do not wish to write-down the receivable as proposed in the above option 1 our audit report would include a qualification that the financial report is presented fairly, except for the fact that we have been unable to obtain sufficient audit evidence to confirm the recoverability of the $33m receivable. I don't think this qualification would create a problem for the auditor of APJM because when it consolidates Samgris the receivable will be eliminated against the payable in APJM. We would need to raise this with them as early as possible so that they can plan their audit response accordingly.

Hopefully we will be able to resolve this matter quickly, however I wanted to give you a full picture as to what the effects on the financial report and audit report would be if we cannot resolve this by the 31 January audit report deadline.

…

[250] Again, once Samgris management had referred to negotiations as to the receivable, it is hardly surprising that PwC would seek to have answered the "key questions" identified in the email.

[251] On 14 January 2015 (the same day as PwC's email), Ms Lingling Zhang sent PwC an email which attached a draft copy of a document titled "Special purpose financial report For the Year Ended 31 December 2014", which Ms Lingling Zhang had prepared.[234] The draft report recorded a "Capital contribution receivable from related party" of $33 million,[235] which was the bulk of the recorded current assets.[236]

[252] On 15 January 2015, Ms Lingling Zhang sent a copy of PwC's 14 January 2015 email to Ms Dong .[237] Further, in response to an email in quiry from PwC, Ms Lingling Zhang told PwC that she had talked to "the Chairman" about the subject matter of the enquiry and hoped he would send a response to PwC.[238] Whilst it is not clear what the particular subject matter of the enquiry was, the email confirmed what I would otherwise infer, namely that Samgris staff were keeping the Chair Mr Li informed. Sometime in the next few days, Ms Lingling Zhang also discussed that email with Mr Mu, as a result of which on 19 January 2015, Ms Lingling Zhang's emailed Ms Dong and advised her that Mr Mu preferred the second approach and said he did not want to adjust the $33 million. Ms Lingling Zhang asked Ms Dong to advise if she had any issues with this.[239]

[253] On 20 January 2015, Samgris management circulated drafts of the 2014 Financial Report and attached financial statements.[240] It is notable that the drafts were consistent with the 2013 Financial Report in that they recorded the $33,000,000 as a current asset and the total issued capital in the same way as in the 2013 Financial Report. Those drafts were circulated to all of the directors including Dr Huang and Mr Howard.

[254] On 21 January 2015, Ms Lingling Zhang sent another email to Ms Dong which forwarded her email of 19 January 2015 and stated to the effect: "In that case, I will directly tell Price Waterhouse to use the 2nd proposal".

[255] Later on 21 January 2015, Ms Dong emailed her reply as follows:[241]

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[234] Tab 386 of Volume 11 of Exhibit 1; Exhibit 16: Lingling Zhang (1) at [47] – [48].

[235] Tab 386 of Volume 11 of Exhibit 1 at p 55.

[236] Tab 386 of Volume 11 of Exhibit 1 at p 50.

[237] Exhibit 14: Dong (1) at [114] – [115].

[238] Exhibit 17.

[239] Exhibit 14: Dong (1) at [116]; Exhibit 16: Lingling Zhang (1) at [53].

[240] Tab 388 of Volume 11 of Exhibit 1.

[241] She has translated it to English at Exhibit 14: Dong (1) at [117].

> Dear Mr Mu and Lingling,
>
> Apologies for the late reply.
>
> First of all, the first approach is no longer feasible, as it will have adverse effect on the company which is currently involved in court proceedings.
>
> I would suggest we adopt the third option. If the third option does not work, then we adopt the second option. The consequences of the second option will be that the auditor will most likely issue a qualified audit report, or even an audit report with a negative opinion.
>
> The third option is described as follows:
>
> The 2014 financial statements of Samgris will neither recognise the $33 million receivable from APJM, nor will it recognise the registered capital of $33m resulting from it. The effect of this is that there will be simultaneous reduction of $33 million in assets and owner's equity.
>
> With regards to the receivable from APJM, please ask the auditor to have the item included as a contingent item and disclosed in the audit report.
>
> Meanwhile, it is suggested that the auditor should adjust the 2013 figures, ie the "figures at the beginning of the year" in the audit report in accordance with the same approach. That is to say, the figures at the beginning of the year would not recognise this $33 million. The figures at the beginning of the year and the figures at the end of the year in the financial statements should be based on the same approach.
>
> In this way, the risks associated with the audit report figures can be eliminated, at the same time disclosure is given in the Notes to the audit report. Both the auditor's requirements in respect of the audit risk are met, and an unqualified audit report can be issue which will meet the current interest of the company.[242]

[256] The "court proceedings" to which Ms Dong referred was the proceeding commenced by the minority shareholders to which I have referred at [239] above.[243] In both this document and in her oral evidence before me, Ms Dong attributed the change in the approach taken in relation to the $33 million receivable to the fact of that proceeding having commenced.[244] Neither she nor the Chair gave evidence identifying the decision-making process within Samgris which led to her expression of view in this email. It is very unlikely that the CFO would form the view which she there expressed without having discussed the matter with those people in China who were accustomed to giving directions to the CFO. I infer that this must have been Mr Li and Mr Mu, the Chair and the CEO. My inference is consistent with their subsequent conduct in relation to the accounts. The "third option" mentioned in Ms Dong's email was not one which had been proposed by PwC. It was proposed by Ms Dong.

[257] By email on 22 January 2015 (I infer at a time when Ms Dong's "third option" had not been communicated to PwC), PwC emailed Ms Lingling Zhang to suggest that they did not propose to adjust the balance for the $33 million receivable in the accounts, but because they were not able to obtain sufficient evidence that the full amount would be recovered, they proposed to qualify their audit report by reference to that fact.[245] By 4 February 2015 that position changed and Ms Lingling Zhang emailed Ms Dong stating that she had "discussed with PwC" and that they "agreed to adopt the third option suggested by you".[246] The basis on which PwC agreed to the "third option" is addressed below. As is apparent from the table at [243] above, it was the "third option" which was implemented.

[258] In February 2015, the following documents relating to the 2014 year were finalised:

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[242] Exhibit 14: Dong (1) at [117].

[243] Transcript, p 5-67.

[244] Transcript, p 5-65.

[245] Tab 390 of Volume 12 of Exhibit 1.

[246] Exhibit 14: Dong (1) at [118]; Exhibit 16: Lingling Zhang (1) at [60] – [61].

(a) 2014 Financial Report;[247]

(b) 2014 Annual Report;[248] and

(c) 2014 Financial Statements.[249] (These formed part of the 2014 Annual Report.)

[259] On 16 February 2015, PwC provided to Ms Lingling Zhang (amongst other documents), the 2014 Financial Report and directors report (to be signed by Mr Li) and a management representation letter to be signed by Mr Mu.[250] PwC requested that both documents be signed on the same day, but as appears from the next two paragraphs, that did not happen.

[260] On 28 February 2015, Mr Li signed the 2014 Annual Report and the associated directors' declaration.[251] These documents contained the statements identified at items 2 – 6 of the table at [243] above (including the false statements there identified).

[261] On 2 March 2015, Mr Mu sent PwC a management representation letter which stated as follows (emphasis added):[252]

> 1. I, Mr Wei Mu, Chief Executive Officer, **confirm to the best of my knowledge and belief, and having made appropriate enquiries of other directors' and officials of the company**, the following representations given to you in connection with your audit of the company's financial statements for the financial year ended 31 December 2014 (balance date).
>
> 2 . I acknowledge the directors' and management's responsibility for ensuring:
>
> (a) the accuracy of the financial records and the financial statements prepared from them;
>
> (b) that the financial statements of the company are drawn up:
>
> to present fairly the financial position of the company as at balance date and the results of its operations and its cash flows for the financial year on that date.
>
> …
>
> 25. As at 31 December 2014 I have assessed the recoverability of the $33,000,000 receivable from [APJM] and concluded that this balance will be written-off on the basis that there is insufficient evidence to prove that the balance will be recovered, either partially or in full. **This decision has been made based on consultation with other directors of Samgris Resources Pty Ltd and I confirm that all directors' are in agreement with this accounting treatment.** An additional disclosure has been included in the financial report which identifies a contingent asset in respect of this receivable because of the legal right that has been created in the Investment Agreement. This asset will be reassessed in future reporting periods and the balance re-instated when sufficient appropriate evidence becomes available regarding the recoverability of this asset.
>
> …

[262] What is to be made of the various false statements concerning there having been directors' resolutions effectively signing off on the accounting treatment of the $33,000,000 receivable from APJM in the 2014 Financial Report, as recorded in items 2 – 4 of the table at [243] above and in the management representation letter?

[263] Ms Dong suggested that she mistakenly misconstrued the references in the documents.[253] But I am not prepared to accept this evidence. Mr Li, who does not read English, suggests he signed the English documents after receiving a verbal assurance from Ms Dong that it was in order to sign them. I would not accept that faint *non est factum* proposition from Mr

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[247] The financial report of Samgris for the year ending 31 December 2014: Tab 409 of Volume 12 of Exhibit 1 at p 1760.

[248] The annual report of Samgris for the year ending 31 December 2014: Tab 409 of Volume 12 of Exhibit 1 at p 1766.

[249] The financial statements of Samgris for the year ended 31 December 2014 (which formed part of the 2014 Annual Report): Tab 409 of Volume 12 of Exhibit 1 at p 1770ff.

[250] Tab 398 of Volume 12 of Exhibit 1.

[251] Tab 409 of Volume 12 of Exhibit at p 1769.

[252] Exhibit 3.

[253] Exhibit 14: Dong (1) at [123]-[124].

Li without detailed evidence from both he and Ms Dong as to their involvement (or lack of involvement) in the decision making processes in relation to the "third option" and its reflection in the written materials which Mr Li was asked to sign. That sort of discussion was absent in their affidavits. I do not accept that he did not by his signature intend to acknowledge the truth of what he signed and declared, in the usual way. The notion that the litany of falsehoods derives solely from Ms Dong's unauthorized mistakes does not make any sense, in light of –

(a) Ms Lingling Zhang's email of 15 January 2015 which confirmed that Samgris management had consulted the Chairman at least once;

(b) the subsequent conduct by Mr Li, both in signing what he signed in February and (as will appear) in continuing to support the accounts in an unaltered state at the fifth board meeting despite having been in receipt of complaints from Dr Huang and Mr Howard; and

(c) Mr Mu's evidence (referred to below) that he consulted directors.

[264] Nor is it consonant with other behavior in which Samgris management took instruction from the Samgris Chair on important matters.

[265] Ms Dong prepared[254] the part of the 2014 Financial Report which contained the statements which I have quoted at item 2 of the table at [243] above. She was cross-examined as to the sources of her information for the statements. She was pretty sure it was a meeting between all of the directors, and that it was before the report was prepared.[255] She was vague and uncertain about the other attendees and she could not even say whether the meeting was in Australia or China.[256] None of this evidence was in her affidavit, as one would expect had it been true. I do not accept her evidence that there was any meeting attended by all the directors. Nevertheless it is plainly true that she considered the statements in the documents to be correct, had checked them twice and had asked Mr Li to sign them.[257] At the board meeting in March 2015 she revealed she was sensitive to the fact that the treatment of the issue was affected by the fact of the legal proceeding which the minority shareholders had commenced.[258] I think the likely explanation for her conduct was that when she expressed the instruction recorded in her email of 21 January 2015, that was because the solution was something which had been approved in China by people more senior than her. And when she later gave the documents to Mr Li to sign that was because she already knew that the accounting treatment was one which was satisfactory to him. It may even have been that she was present at a meeting of some Samgris directors which she felt justified the statements in the documents. Of course in light of the fact that the "third option" was suggested as an option for the first time in Ms Dong's 21 January 2015 email, such a meeting could not have taken place at 31 December 2014.

[266] So far as Mr Mu is concerned, he did not speak or read English, but he acknowledged that before he signed the management representation letter someone must have explained it to him.[259] Moreover, he prepared the CEO's annual report to which Ms Dong's financial report was an appendix and that document made specific reference to there being a resolution by the Company to reduce the capital and to make a corresponding adjustment to the APJM receivable. I conclude that Mr Mu must have known of the contents of the financial report and of the representation letter. I think it is likely that Mr Mu did in fact make the enquiries

[254] Transcript, p 5-55 lines 28 to 30.
[255] Transcript, pp 5-60 and 5-63.
[256] Transcript, pp 5-61 and 5-62.
[257] Transcript, pp 5-68 and 5-69.
[258] See below at [284].
[259] Transcript, p 6-76.

of "other directors" that he regarded to be appropriate. Given that his enquiries of directors did not extend to Dr Huang and Mr Howard,[260] they must have included Mr Li and probably the other APJM-appointed directors. I infer that Mr Mu would have been prepard to sign the management representation letter because he knew that the accounting treatment of the APJM receivable was satisfactory to Mr Li and the other APJM-appointed directors.

[267] So far as Mr Li is concerned, I think it is likely that he did know of and approve the course identified in the documents, as his signature of the documents would suggest.[261] He would have approved this course because it suited APJM, particularly in light of the court proceedings which the minority shareholders had commenced. It beggars belief to conclude that this occurred without the approval of APJM. I am supported in that view by the fact that at the fifth board meeting in March 2015 the other APJM-nominated directors approved the approach and, accordingly, it must be accepted that APJM approved because Mr Xie and Mr (Xin) Wang were also directors of APJM and also because of the other material to which I have referred in this judgment which evidences the proposition that APJM had taken over the management of Samgris as at the date of the Closing in April 2012. I note also that at the board meeting in March 2015 Mr Li too revealed he was sensitive to the fact that the treatment of the issue was affected by the fact of the legal proceeding which the minority shareholders had commenced.[262]

[268] The management representation letter appears to have been prepared by PwC.[263] It set out matters which PwC needed to be assured of in order to sign off on the documents. During the evidence of Mr Weeden, I raised with him the question of what would have happened had he not been given the management representation letter containing [25] (quoted at [261] above):

> And what, if any, significance to the question whether you have an unqualified signoff, are the representations in 25, about decisions made by directors and all directors being in agreement?---If I reflect back on it, it would be if they had not wanted to sign that representation, I would have had to have thought carefully around what the appropriate response would be. I still would not have accepted a balance sheet with that $33 million asset recognised as an asset of the company that was recoverable.[264]

[269] I accept this evidence.

[270] I accept the submission by the minority shareholders that, at least insofar as it dealt with the $33 million APJM receivable, the 2014 Annual Report and Financial Report and audit report obtained from PwC were based on false statements to PwC and false premises.

[271] Dr Huang and Mr Howard did not learn of the purported directors' resolution, or the change to the manner in which the company's financial statements treated the $33 million and the purported reduction in share capital, until they received an email on 12 March 2015 from

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[260] At least Mr Howard and Dr Huang had not been asked about the matter: see evidence of Mr Howard at Transcript, p 3-16 lines 22 to 25. APJM's counsel stated in opening that the "minority directors [being a reference to Mr Howard and Dr Huang] didn't get the representation letter": Transcript, p 3-69 line 8. Mr Mu seemed to acknowledge this: Transcript, p 6-76 lines 20 to 25.

[261] Senior Counsel for APJM contended in oral argument that it was illegitimate to enquire into whether or not Mr Li or other directors had any involvement in the treatment of the accounts before their preparation. I reject that submission. Mr Li's own evidence permits my inquiry into the quality of his apparent consent by signature of the English documents. And, more generally, inquiry into how it was that the false statements found their way into the accounts was plainly relevant in the trial as pleaded and in light of the evidence which was permitted to be adduced on this topic.

[262] See below at [284].

[263] Tab 398 of Volume 12 of Exhibit 1.

[264] Transcript, p 2-7 lines 16 to 21.

Ms Wu which attached copies of (inter alia) the 2014 Annual Report and 2014 Financial Report.[265]

[272] After receiving the 2014 Financial Report and 2014 Annual Report, and discovering the above matters, Mr Howard and Dr Huang liaised with one another regarding the preparation of a letter to the directors of Samgris.[266] Mr Howard sent a letter to Mr Li, Mr Xie, Mr (Xin) Wang and Ms Wu by email on 18 March 2015[267] which stated, inter alia (emphasis added):

> We refer to:
>
> 1. The Notice of Board Meeting dated 5 March 2015 (received on 5 March 2015); and
> 2. Appendices A to D referred to in the Notice of Board Meeting (received 12 March 2015).
>
> We have concerns about the proposed resolutions. Our concerns are outlined below.
>
> **Reduction of partly paid share capital**
>
> There are numerous references in the Appendices to a resolution made by Samgris dated 31 December 2014 whereby Samgris is said to have resolved to reduce its *"partly paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM"*.
>
> Those references can be found in the following documents: …
>
> **No such resolution has been passed either by Samgris or its directors regarding a reduction of partly paid share capital on 31 December 2014**.
>
> Please advise urgently how and when it was resolved that there be a reduction in share capital and why we received no notice of this proposed resolution. Please also advise if any directors' meetings or shareholders' meetings have occurred without notification being given to us, when those meetings occurred and what was purportedly resolved at these meetings.
>
> Samgris is not permitted to reduce the share capital of APJM without complying with Part 2J.1 under Chapter 2J of the Corporations Act ….

[273] The letter then explained the requirements of s 256B of the *Corporations Act* and stated that in the circumstances no reduction of the share capital was permitted under that legislation. The letter continued by identifying numerous factual inaccuracies in the financial documents as follows (emphasis added):

> **Factual inaccuracies in financial documents**
>
> **As there has been no valid reduction in the partly paid share capital of APJM, there are numerous inaccuracies in the financial material which is proposed to be tabled at the next board meeting later this month.**
>
> The Notice of Board Meeting is said to have been called to discuss a number of topics, including to discuss and vote on "The Financial Report of Samgris Resources Pty Ltd for the year ended December 31 2014" and "the Financial Budget of Samgris Resources Pty Ltd for the year ending December 31, 2015" (Appendix B and Appendix C).
>
> There are factual inaccuracies in these financial documents which arise as a result of Samgris' attempt to reduce its partly paid capital which need to be corrected.
>
> For example:
>
> 1. The Financial Report states (at page 5) that **"At 31 December 2014, the company has resolved to reduce the Company's partly paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM." This has not occurred and this is a misleading statement/misrepresentation about the affairs of Samgris**.
> 2. Further, the Annual report for the year ended 31 December 2014 includes:

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[265] Exhibit 2: Huang (2) at [277]. The email of 12 March 2015 and attachments are at tab 409 of volume 12 of Exhibit 1.

[266] Exhibit 2: Huang (2) at [283].

[267] Tab 414 of Volume 12 of Exhibit 1; Exhibit 2: Huang (2) at [284].

(a) A statement (at page 1) which says "**At 31 December 2014, the directors have resolved to reduce the Company's partly paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM**".

(b) The Balance Sheet (at page 4) reflects a reduction in issued capital from 56,000,982 to 23,000,982 (a reduction of 33,000,000).

(c) The corresponding note to the Balance Sheet (note 12, on page 12) shows a reduction in issued capital by 33,000,000 shares and repeats the statement that "At 31 December 2014, the company has resolved to reduce the Company's partly paid share capital to reflect only contributed amounts received to date, with a corresponding adjustment to the receivable from APJM".

(d) The Statement of Changes in Equity (at page 5) reflects a reduction in issued capital from 56,000,982 to 23,000,982.

(e) Note 5 to the Financial Statements show a reduction in "capital contribution receivable from related party" from $33,000,000 in 2013 to $0 in 2014.

(f) The Directors' Declaration on page 14 states that the directors of Samgris declare that the financial statements and notes "presents fairly the company's financial position as at 31 December 2014..."

(g) The Declaration also states that it is made in accordance with a resolution of the directors. This is a false representation which leads to the impression that as at 28 February 2015 (the date the Annual Report was signed) that the directors agreed to the content and statements in the financial information which is simply not true.

For the reasons set out above, the financial statements are inaccurate and are not in a form which presently can be voted on by the directors.

[274] The letter then demanded that:

(a) all financial accounts and documents in the name of Samgris be immediately rectified to reinstate the liability owed by APJM to Samgris for the balance of the unpaid shares (in the sum of $33 million); and

(b) all company documents be revised to remove all references to the purported resolution made by the directors/Samgris on 31 December 2014 as the resolution was never made.

[275] The letter concluded with a request that its contents be considered and responded to prior to the board meeting so that the board meeting could have a meaningful discussion.

[276] Two days after Mr Howard's letter was distributed, on 20 March 2015, Dr Huang sent an email to Ms Wu attaching two proposed resolutions for the board meeting, seeking an independent review of the performance of the Management Team at Samgris and the Financial Management at Samgris.[268]

[277] There was no response from any of the other Samgris directors to the letter of 18 March, or to Dr Huang's proposed resolutions, prior to the fifth board meeting. On 23 March 2015, Ms Wu informed Dr Huang that she had not received any feedback from the other directors on his proposals.[269] Two days later, on 25 March 2015, Ms Wu sent an email to Dr Huang attaching an agenda for the fifth board meeting.[270] The same day Dr Huang sent an email to Ms Wu enquiring as to whether the other directors had provided any feedback on the 18 March 2015 letter.[271] He received a response, the next day, advising that she had not received any feedback in response to the letter of 18 March 2015.[272] The same day Dr Huang also received an email from Ms Wu, inquiring if any other director had any feedback on the

[268] Tab 415 of Volume 12 of Exhibit 1; Exhibit 2: Huang (2) at [285].

[269] Exhibit 2: Huang (2) at [287].

[270] Exhibit 2: Huang (2) at [288].

[271] Exhibit 2: Huang (2) at [289].

[272] Exhibit 2: Huang (2) at [290].

18 March 2015 letter and on Dr Huang's proposals.[273] There was no evidence of any comment from any other director prior to the meeting.

[278] In my view the contents of the letter called for a response. Any reasonable director would have appreciated that. The matters raised were serious and any reasonable enquiry would have realized that they raised matters about the accounts and associated documents which needed to be corrected.

The fifth board meeting – 30 March 2015

[279] The fifth meeting of the board of directors was held on 30 March 2015 by video link between Brisbane and Xi'an.[274] It was attended by the five directors of Samgris and also Mr Mu, Ms Dong, Ms Wu and Ms Jie Han. Only Dr Huang and Mr Howard were present in Brisbane.[275] A partial transcript and the minutes of the meeting were in evidence before me.[276]

[280] At the fifth board meeting, the following resolutions were discussed and voted upon by the directors:

(a) A resolution to adopt the 2014 CEO's Annual Report (**Resolution 1**);

(b) A resolution to adopt the Financial Report of Samgris for the year ending 31 December 2014 (**Resolution 2**);

(c) A resolution to adopt the financial budget report of Samgris for the year ending 31 December 2015 (**Resolution 3**);

(d) A resolution to adopt the Samgris HR and Remuneration Policy (**Resolution 4**);

(e) A resolution to conduct an independent review of the performance of the management team of Samgris as proposed by Dr Huang (**Resolution 5**); and

(f) A resolution to conduct an independent review of the performance of financial management of Samgris as proposed by Dr Huang (**Resolution 6**).[277]

[281] The resolutions were voted on as follows:

(a) Resolution 1: unanimously adopted;

(b) Resolution 2: adopted (Mr Laixin Li, Mr Xie and Mr (Xin) Wang voted in favour, Mr Howard and Dr Huang voted against this resolution);

(c) Resolution 3: not adopted (this resolution required a two-thirds majority, and Mr Laixin Li, Mr Xie and Mr (Xin) Wang voted in favour, and Mr Howard and Dr Huang voted against this resolution);

(d) Resolution 4: adopted (Mr Laixin Li, Mr Xie and Mr (Xin) Wang voted in favour, Mr Howard and Dr Huang voted against this resolution);

(e) Resolution 5: not adopted (Mr Howard and Dr Huang voted in favour, Mr Laixin Li, Mr Xie and Mr (Xin) Wang voted against this resolution);

(f) Resolution 6: not adopted (Mr Howard and Dr Huang voted in favour, Mr Laixin Li, Mr Xie and Mr (Xin) Wang voted against this resolution).[278]

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[273] Exhibit 2: Huang (2) at [291].

[274] See [33A] of the Statement of Claim which was admitted by [12] of the Defence.

[275] Exhibit 2: Huang (4) at [28].

[276] Tab 430 of Volume 13 of Exhibit 1.

[277] Exhibit 2: Huang (2) at [294].

[278] Exhibit 2: Huang (2) at [296].

Adopting the 2014 Financial Report

[282] During the fifth board meeting, Dr Huang referred to the written comments which he and Mr Howard had made and the Chair confirmed that they had been received. The position which he and Mr Howard separately communicated to the meeting was consistent with the terms of their previous letter. Notably:

(a) The minutes do not reveal either the Chair or Mr Xie commented on the matters raised by Dr Huang and Mr Howard at the meeting or in their letter. In light of the false statements in the Chair's reports which by then had been exposed, this was extraordinary.

(b) The minutes reveal that Ms Dong was asked to speak to the meeting by Dr Huang and she supported the accounts, contending that they had been the subject of advice from PwC and also legal advice. She said that the reason the audit report did not go through the Board was because it was during an adjournment of the board meeting and there were disputes and lawsuits between company shareholders.

(c) The minutes reveal Mr (Xin) Wang also noted that the accounting treatment of the $33 million was affected by the "unique circumstance" that there was a dispute and lawsuit between the Samgris shareholders.

[283] Ms Dong said in cross-examination that the "legal advice" to which she referred during the fifth board meeting was oral advice which Ms Lingling Zhang had obtained from a lawyer.[279] She could not identify the lawyer.[280] She did not subsequently provide any legal advice to Dr Huang because, she said, it was not written.[281] No summary of the legal advice was given to Dr Huang after the fifth board meeting. Ms Lingling Zhang did not give evidence of being given any legal advice or what it was. No other evidence exists regarding the legal advice. On the other hand, later, on 8 July 2015, Ms Wu suggested that the accounting and legal advice to which Ms Dong had referred at the board meeting was the advice which had been obtained from PwC.[282] I think that Ms Wu's proposition is far more likely. I do not regard Ms Dong's suggestion that there was actual legal advice to be reliable and I do not accept that Samgris obtained legal advice to justify the accounting treatment in the 2014 Financial Reports.

[284] Mr Li, Mr Xie and Mr (Xin) Wang voted to adopt the 2014 Financial Report and it was thereby passed. They did so in the full knowledge of the many indisputably valid criticisms of it by the two minority directors. At least Ms Dong and Mr (Xin) Wang had explicitly acknowledged that the approach taken to the accounting treatment was informed by the fact of the legal proceeding having been commenced by the minority shareholders. Mr Li personally had been prepared to make a false statement in the directors' report.

[285] No reasonable director would have voted to adopt the 2014 Financial Report given the matters which had been identified by Dr Huang and Mr Howard. The conduct of the three APJM-nominated directors in doing so and in failing to address the errors was conduct which was contrary to the interests of the company as a whole. The whole process by which the accounting treatment of the $33 million receivable was changed in the 2014 year from how it appeared in the previous year was commercially unfair.

[286] That is not to say, of course, that the 2014 Financial Report should have continued to record the $33 million receivable in the same way as had the 2013 Financial Report. PwC was plainly right to question the recoverability of the debt and, in consequence, whether it should

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[279] Transcript, p 5-71 line 30ff.
[280] Transcript, p 5-71 lines 39 to 40.
[281] Transcript, page 5-72 lines 9-13.
[282] Tab 465 of Volume 14 of Exhibit 1.

continue to be reported in the way it had been in the previous year. It was appropriate to make some disclosure to the fact of APJM's attitude to the debt and their rejection of liability in respect of it. What that reference would have been is unclear, because false information was provided to PwC. The vice in the whole episode is that as PwC was provided with relevantly false information, it was not given an opportunity to exercise a proper judgment.

[287] I received conflicting expert option evidence as to whether the accounting treatment of the $33 million receivable was appropriate and in accordance with reasonable accounting standards and practices and, if it was not, what should have been done.[283] This diversion into technical accounting expertise was a red herring. What was important to the relief sought in this proceeding was what actually happened and in particular, how Samgris' management and the Samgris Chair went about providing information to PwC and then how Samgris' management and the APJM nominated directors dealt with the issues pointed out to them by Dr Huang and Mr Howard.

Adopting the Samgris HR and Remuneration Plan

[288] The history of events leading up to the majority approval of the remuneration plan at the fifth board meeting on 30 March 2015 commences much earlier, at the meeting on 31 August 2012. It shows Mr Zhang as CEO and then Mr Mu as his replacement, over time authorising numerous payments to officers and employees of Samgris (including themselves and the Chair) in purported application of a remuneration plan even though they knew that the Board had rejected the draft plan and no replacement plan had been approved. This continued over a lengthy period of time. Mr Song as Chair, and his replacement, Mr Li, condoned this conduct.

[289] This history goes beyond merely evidencing the continuation of the practice adopted at the 31 August 2012 meeting that management decisions were made between the Samgris Chair and Samgris management, without adequate involvement of the other directors (and in particular the directors nominated by the minority shareholders), although it does evidence that. It evidences such decisions being made in disobedience to a Board decision. Like other conduct which I have analysed in these reasons, this conduct was also entirely consistent with the internal view of APJM (evidenced in the events discussed at [171] - [176] above) that "on completing the transaction in April 2012, [APJM] took over the management of Samgris Resources Pty Ltd".

[290] I turn briefly to describe the events which justify that conclusion.

[291] At the meeting of 31 August 2012, the Samgris Chair directed Samgris management to formulate a remuneration scheme and submit to the board for consideration: see [113] above.

[292] A draft remuneration plan was subject of a formal resolution before the Board at the second board meeting on 17 March 2013 and the resolution failed: see [158] above. This was known to the then CEO, Mr Zhang, and, of course, to Mr Song as Chairman because they were present at the meeting.

[293] Mr Zhang deposed:

(a) at paragraph 232:

> Despite the Remuneration Plan not receiving formal approval at the board meeting of Samgris on 17 March 2013, I continued to apply the plan in matters connected with Samgris' remuneration, because the Samgris business was operating, and a policy was required.

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[283] For the plaintiffs, Mr Anthony Samuel (Exhibit 7) and for the defendants, Mr Peter Haley (Exhibit 11). A joint expert report was also prepared and provided (Exhibit 7).

(b) at paragraph 245, after explaining that he authorised what he described as performance payments totalling nearly $140,000 in November 2013 – including to himself:

> … these payments were part of our executive remuneration permitted by the Remuneration Plan, which entitled each senior executive to a payment of 30% of their base salary. I had authority to make these payments.[284]

[294] Whatever it was that informed Mr Zhang's view that he had authority to make the payments, it was not authority from the Board which had, to his knowledge, rejected the remuneration plan.

[295] The Samgris Chair seemed to have the same view that it was of no moment that the Board had considered and rejected the draft remuneration plan. Mr Song deposed as follows:

> 238 The directors could not reach agreement on resolution 3 at the second board meeting, concerning the proposed remuneration plan.
>
> 239 There was further discussion about the application of the policy after the board meeting.
>
> 240 I told the other directors present words to the effect that:
>
> "The management of Samgris should continue to apply the draft remuneration policy tabled at the meeting, but the policy should be adjusted as necessary until it is able to be formally approved by the board."

[296] If he said those words, he did not say them in the presence of Dr Huang[285] and it would not have mattered if he said them in the presence of Mr Howard because Mr Song only spoke Chinese and Mr Howard only spoke English. But whether or not he said them is irrelevant in the face of the Board's rejection of the plan. If there was a need for an interim arrangement – and one could well imagine that there might be – then the only proper course would have been to formulate some satisfactory interim plan and have that voted on by the Board. I think it is unlikely that Mr Song's recollection is reliable as to saying those words, because it would be surprising that he would expect acquiescence from the other directors in the rejected plan operating in its entirety as the interim plan.

[297] I do conclude, however, that both Mr Song as Chair and Mr Zhang as CEO behaved as if the Board had in fact authorized the application of the rejected draft as the approved interim plan.

[298] As I have already discussed, Mr Mu replaced Mr Zhang as CEO on 22 April 2014. As Mr Zhang had done, Mr Mu continued to purport to apply the unapproved Remuneration Plan, including by causing payments to be made to himself.[286] His evidence includes the following:

> 46 I applied the draft remuneration policy until the Samgris HR and Remuneration Policy …was subsequently approved at the fifth board meeting of Samgris on 30 April 2015.
>
> …
>
> 54 One of my responsibilities as CEO of Samgris is recruiting and managing staff and authorising payments to staff.
>
> 55 Samgris' draft remuneration policy for senior management consisted of three components:
>
> (a) base salary;
>
> (b) performance related pay (30% of base salary); and
>
> (c) bonus.
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> 56 I authorised a payment of $10,000 per month to Mr Li in each month following my appointment as Samgris CEO in April 2014, until December 2014. These payments were made in accordance with

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[284] The memorandum signed by Mr Zhang is Tab 219 of Volume 7 of Exhibit 1. It refers to the payment of bonuses.
[285] Exhibit 2: Huang (3) at [17].
[286] Tab 377 of Volume 11 of Exhibit 1. The payments are called 'bonus amount'.

the draft remuneration policy, which provided that the Samgris Chairman was entitled to a payment of $10,000 per month plus a 30% performance payment at the end of each year.

57 The performance payment is a Chinese concept. The performance payment is paid to senior management provided that the company has been operating in a normal way, with no significant safety incidents. It is customarily paid at the end of the year.

58 As CEO of Samgris, I considered that it was my responsibility to authorise the payment of the performance payment element of the relevant employee's salary at the end of each year.

59 Bonus payments to senior management, as distinct from the performance payments, must be awarded by the board of directors of Samgris.

60 On or about 30 November 2014 I caused Samgris to make the following payments:

(a) $34,000.00 to myself;

(b) $46,000.00 to Mr Li;

(c) $30,666.67 to Ms Zhang; and

(d) $27,633.33 to Ms Wu.

61 These payments **(November Payments)** consisted of the November 2014 salary for those persons, plus their 30% performance payment which I decided should be paid in full. These amounts are gross amounts, that is, the gross salary performance payment before the company made deductions for tax. This means that the actual amount received by each employee was less than the above amounts.

62 Ms Zhang, the Samgris Cashier, is responsible for ensuring that the appropriate deductions are made from staff salaries for tax.

63 Mr Li, Ms Wu and myself are senior managers of Samgris, and as such qualify for payment of the performance payment of 30% of base salary.

64 Ms Zhang is not part of Samgris' senior management, but her contract of employment separately provided for the making of a performance payment each year of 30% of base salary.

…

66 Whilst I considered that it was within my authority as CEO to authorise the payments of performance related pay, I informed Mr Li of my intention to authorise each of these payments before making them.

67 Mr Li agreed that the payments were in order.

…

71 I had followed the draft remuneration policy when authorising the payments and I also knew that the performance payments had been made to the Samgris employees at the end of the previous year (2013).

[299] On 3 December 2014, Dr Huang complained about the November payments in an email to Mr Mu. He contended that such payments amounted to serious misconduct because they occurred without proper approvals by the Board. Dr Huang did not get a response until a meeting between Mr Mu and Dr Huang and Mr Howard on 13 January 2015. Dr Huang's evidence of the meeting is as follows:

I recall that the following words were stated between Mr Mu and I (in Chinese) during the meeting:

(a) I stated: *"I emailed to you for information about the November Payments more than a month ago, and I haven't received any information from you. What's really going on, what's the story?*

(b) Mr Mu did not respond.

(c) I stated: "*Have you got authorisation to pay for that?"*

(d) Mr Mu stated: *"Yes, I made the payment with instruction from above."*

(e) I stated: *"Who? Where is the instruction, show me?"*

(f) Mr Mu did not respond.

(g) I stated: *"As a CEO of the Samgris, you have the responsibility to stick to the financial management rules, you cannot pay yourself without board approval."*

(h) Mr Mu did not respond.[287]

[300] I think it is very likely that Mr Mu did in fact make the payment with instruction from above. It is likely that the then Samgris Chair, Mr Li, shared the previous Chair's attitude to the remuneration. I infer from the fact that Mr Li personally received payments in purported application of the draft Remuneration Plan that he probably had authorized Mr Mu to make the payments.

[301] To add insult to injury, the draft Remuneration Plan was in fact not actually followed according to its terms. The performance payments for Mr Li and others were not authorized by the plan, at least as implemented. As appears from the emphasized parts of the following quote from the draft plan,[288] the payment of "performance pay" turned on evaluation results where, for payment made to the CEO, Deputy CEO, the CFO and the Company Secretary, the evaluation was to be made by the Board:

> 1. The basic principle of the remuneration system is localization, considering differences of scale and business type in the same industries.
>
> 2. **Executive remuneration is composed of 3 parts: base salary, performance-related pay and bonus**. The base of basic salary is AU$10,000. All of principals, including Chairman and General Manager, the ratio is 1; all of deputies, including COO, Deputy General Manager, CFO and Company Secretary, the ratio is 0.8. **The base of performance-related pay is 30% of base salary**. **Bonuses are decided by the board of directors, according to business circumstance**.
>
> The remunerations of non-executives are decided by managers, based on Australian local standard.
>
> 3. No matter whether be an executive or not, the actual payment of remunerations should be related to actual work time in Australia. Except defined returning vacation, employees' salary should be related to actual work time in Australia.
>
> 4. The company is supposed to pay allowance to part-time duty personnel on the basis of actual working hours and workload in Australia. The company would not pay further salaries to these personnel.
>
> 5. The Company adopts time rate wage system to outside consultants and short term employed technical staff. Specific benchmark is provided in the contract.
>
> 6. Salary payment program: Administration Office summary and check a report of all staff's attendance for last month during the first week every month, which will be the base of salary; Administration Office figures out the actual payment salary, and reports to CEO; after its confirmation, salary payment files are delivered to financial department. Other approval procedures comply with relative financial system.
>
> ...
>
> **Evaluation principles**
>
> **Basic principle: all of departments and staff are supposed to go through Evaluation, the Evaluation of a department is a prerequisite and necessary condition of personnel Evaluation, done once a year; Evaluation results are related to performance-related pay for the senior management and salary floating for the other staff.**
>
> **Evaluation method and indexes**
>
> **The method of Evaluation: Senior Management (General Manager, Deputy General Manager, Chief Financial Officer and Company Secretary) should be evaluated by the Board**; Evaluation of all the other employees should be organized by the Administration Office.
>
> **The target Evaluation indicates are determined by the Board of Director and the management team at the beginning of the Evaluation.**
>
> The senior management is evaluated in accordance with the listed items in the following tables [which essentially listed a number of KPI's].

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[287] Exhibit 2: Huang (2) at [259].

[288] Tab 7A of Volume 1 of Exhibit 1.

…

[302] The problem was the Board of Samgris did not carry out any such evaluations and it did not otherwise authorise performance related pay (or, for that matter, bonuses).[289] Thus, whether the payments made by Mr Zhang and Mr Mu were bonuses or performance-related pay, it was contrary to the draft Remuneration Plan for them to be paid without the involvement and approval of the Board.

[303] It is appropriate to make some observations concerning the $10,000 monthly payments to the Chair, Mr Li:

(a) The Constitution expressly provided that the Board must approve the remuneration of the directors: see clause 18. There is no evidence of any resolution of the Company to pay Mr Li the amount of $10,000 per month.

(b) At the second board meeting, the directors agreed unanimously (but informally) that each director would be paid only $20,000 per year unless special advisory services were provided by the director to the company.[290] No special advisory services were provided by Mr Li. It was common ground that Samgris had no contract with Mr Li.[291] The $10,000 monthly payments were not justifiable by reference to any contractual term.

(c) At the second board meeting, the former Chair (Mr Song) had stated that he would not be paid by the company.[292]

(d) The payments were provided for in the draft Remuneration Plan, but that was not approved. And whether, if it had been approved, it would actually have authorized the payments is debatable in light of the express statement that actual payments should be related to work time in Australia and Mr Li's evidence was that he resided in China and came to Australia about 4 times a year for about 2 weeks each time.[293]

[304] That payments were ultimately placed on a regular footing by the approval of a remuneration plan at the fifth board meeting does not defuse the conclusions which I have expressed at [288] to [289] above.

Events between the fifth and sixth board meetings

2015 decisions concerning irregular payments to Mr Zhang

[305] By a written declaration to Samgris dated 26 March 2015,[294] the former CEO, Mr Zhang, effectively accepted that during the previous 3 years when Mr Zhang had been CEO, he had inappropriately authorized his own reimbursement for a series of small payments which he had made to purchase gifts for various persons. That acceptance derived from an internal audit carried out at Samgris, which Mr Li deposed to having commissioned because of new anti-corruption rules made in China in 2012 and 2013.[295]

[306] The total of the expenditures over the years concerned was $25,499.21. In light of Mr Zhang's declaration, and the fact that APJM does not seek to justify the payments, it is not necessary to examine the nature of the payments further.

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[289] See Mr Song's evidence at Transcript, pp 4-48 and 4-49; Exhibit 2: Huang (2) at [180] and [185]. There is no evidence of any decision by the Board to pay performance related pay.

[290] Tab 144 of Volume 5 of Exhibit 1 at p 164; see also tab 143 of Volume 5 of Exhibit 1 at pp 1088/992 – 1089/993. See also Exhibit 2: Huang (2) at [173]; evidence of Mr Song at Transcript, p 4-62 line 30 to p 4-63 line 8.

[291] See [68] of the Statement of Claim and [44] of the Defence.

[292] Tab 133 of Volume 4 of Exhibit 1 at p 1043/947.

[293] Transcript, p 6-10 lines 20 to 24. Compare the pay advices at Tab 266 of Volume 9 of Exhibit 1.

[294] Tab 426 of Volume 13 of Exhibit 1; Exhibit 2: Huang (2) at [317].

[295] Exhibit 20: Li (1) at [259] – [273].

[307] Despite the fact that remuneration for CEOs (including the topic of a retrospective increase in base salary to Mr Zhang) was the subject of discussion at the fifth board meeting on 30 March 2015, the Chair made no mention of Mr Zhang's declaration (about which he already knew)[296] that he should reimburse Samgris some $25,499.21. A reasonable director would not have behaved in that way.

[308] Instead, at a meeting on 14 April 2015 between the Samgris Chair, the Samgris CEO and Ms Dong (about which at least Dr Huang and Mr Howard were not informed), a decision was made that the way in which Mr Zhang could reimburse Samgris was by setting-off of the amount concerned against the bonus which Mr Zhang would be paid.[297]

[309] On 10 September 2015 the plaintiffs' solicitors received a letter from APJM's solicitors which stated, amongst other things, that APJM had had arranged for, and confirmed, the reimbursement to Samgris of all moneys spent by Samgris in connection with certain identified expenditures.[298] Subsequent comparison with Mr Zhang's declaration reveals that the letter encompassed all the expenditures which had been the subject of his declaration.

[310] Dr Huang did not become of aware of Mr Zhang's declaration of 26 March 2015, or the meeting of 11 April 2015, until many months later on 22 September 2015 when, with Mr Howard, he attended a meeting with Mr Mu, Ms Wu, and Ms Lingling Zhang.[299] He asked what happened with the reimbursement of monies as referred to in the APJM solicitors' letter. He was given the declaration and the minutes of the meeting held on 11 April 2015 and told that the reimbursement had occurred by the deduction from a bonus payment to Mr Zhang.[300] At the meeting Dr Huang asked why the matter had not been reported to the directors, but received no answer. Later that afternoon, Dr Huang emailed the meeting participants complaining that the company was being run "as [the CEO] liked" and referring to the making of unauthorized payments and the insufficiency of information being presented to the Board.[301]

[311] Notably the giving of a bonus was still a matter for the Board under the remuneration plan adopted only weeks earlier.[302] There is no evidence that the Board ever approved the making of a bonus payment to Mr Zhang against which the $25,499.21 could be set off. It may be that the reference to the monies being deducted from a bonus payment was a reference to the retrospective increase to CEO gross salary which was discussed at the fifth board meeting on 30 March 2015. The minutes of that meeting record the directors as having agreed to make such a payment. As will appear, the minority directors correctly dispute the accuracy of the minutes in this regard.

[312] The significance of these events for the present proceeding is:

(a) the fact that the Samgris Chair made no timely disclosure to Dr Huang and Mr Howard and no explanation why that occurred; and

(b) the fact that reimbursement was effected either by means of deduction from –

(i) a bonus payment that had not been resolved by the Board; or

(ii) a retrospective increase to Mr Zhang's gross salary, which increase was either not authorized at all, or was authorized absent knowledge that the beneficiary of

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[296] He had been handed the declaration at the date it was made: Exhibit 20: Li (1) at [268] – [269].

[297] Tab 438 of Volume 13 of Exhibit 1; Exhibit 2: Huang (2) at [318].

[298] Tab 478 of Volume 14 of Exhibit 1; Exhibit 2: Huang (2) at [335].

[299] Tab 481 of Volume 14 of Exhibit 1; Exhibit 2: Huang (2) at [320].

[300] See Dr Huang's notes which appear at Tab 481 of Volume 14 of Exhibit 1. Dr Huang prepared this typed note after the meeting: see Exhibit 2: Huang (2) at [320].

[301] Tab 482 of Volume 14 of Exhibit 1.

[302] See tab 409 of Volume 12 of Exhibit 1.

the largesse had only 4 days earlier confessed to making improper payments to himself during the period of his stewardship.

[313] Both these considerations evidence the same decision-making process and exercise of authority which I have previously criticized.

[314] The plaintiffs submitted that I should find as a fact that the internal audit was in fact caused by the commencement in December 2014 of the present proceeding. They submitted that I should reject Mr Li's evidence to the contrary. I am unpersuaded by that submission: there was no evidence establishing that causal link other than the fact that the alleged result occurred after the alleged cause.

Continued complaints by directors appointed by minority shareholders

[315] After the fifth board meeting, Ms Wu had distributed draft minutes of the meeting which recorded that a majority of the directors had agreed that the CEO's annual gross salary should be AUD $260,000 in 2013 and AUD $220,000 in 2014 (being an increase from the previous base amount of $120,000 plus employer superannuation contributions and annual leave loading), but that the management team should submit a salary survey report. Mr Howard, whose evidence I accept, deposed that there was no vote taken or resolution at the meeting on that topic.[303] I find the minutes were in error.

[316] Mr Howard notified Ms Wu that he could not recall this being voted on at the meeting.[304] Dr Huang also sent an email which challenged the accuracy of the minutes.[305] These comments appear to have been passed on to Mr Li.[306] The solicitors for the plaintiffs formally complained about the accuracy of the minutes on 8 May 2015.[307]

[317] On 19 May 2015, Mr Howard emailed the directors and Ms Wu about a lack of response to his comments on the minutes of the fifth board meeting or receipt of the final minutes inclusive of his comments.[308] Mr Howard sent another email on 22 July 2015 to Ms Wu as well as Mr Mu and Ms Han identifying which of his comments relating to the minutes of the fifth board meeting had not been included.[309] Ms Wu responded on 3 August 2015, advising that the Chair considered the minutes did accurately record the details of the meeting and that if Mr Howard wished he could raise his objections and have them noted in the minutes of the next board meeting.[310]

[318] On 11 September 2015, Ms Wu sent an email to the Samgris directors which stated that by direction of the Chair, the next board meeting of Samgris would be held on 15 October 2015 and requested that the directors provide proposed resolutions.[311]

[319] On 23 September 2015, the day after the meeting referred to at [310], Dr Huang and Mr Howard responded to the invitation. Mr Howard proposed (inter alia) that at the next board meeting there be (1) a restructure of Samgris to reflect the reality that the Chair ran the business and the CEO was redundant, and (2) a vote of no confidence in the Samgris financial group.[312] Dr Huang proposed three resolutions, namely that there be independent

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[303] Exhibit 6: Howard (2) at [102].
[304] Tab 447 of Volume 13 of Exhibit 1 at p 255.
[305] Tab 451 of Volume 14 of Exhibit 1.
[306] Tab 460 of Volume 14 of Exhibit 1
[307] Tab 452 of Volume 14 of Exhibit 1; Exhibit 2: Huang (2) at [306].
[308] Tab 457 of Volume 14 of Exhibit 1.
[309] Tab 470 of Volume 14 of Exhibit 1 (starting halfway down the page).
[310] Tab 470 of Volume 14 of Exhibit 1.
[311] This is common ground: see [103AF] of the Statement of Claim which was admitted by [74AF] of the Defence.
[312] Tab 485 of Volume 14 of Exhibit 1; Exhibit 6: Howard (2) at [117].

reviews of (1) the performance of the financial management at Samgris, (2) the capacity of the management team at Samgris, and (3) the business strategy of Samgris.[313]

[320] Ultimately, the first of those resolutions was not placed on the agenda because the Chair formed the view that the resolution would require changes to the Constitution and the Investment Agreement. No complaint is advanced in relation to that judgment.

[321] On 30 September 2015, Dr Huang sent to all of the directors his comments on resolutions which had been proposed by Mr Li.[314] As to this:

(a) The three proposed resolutions were:

(i) A resolution appointing an independent auditor to inspect and report on Samgris' compliance with its Australian taxation obligations;

(ii) To independently evaluate the economic values of the 11 EPCs owned by Samgris, so that EPCs having no economic value for future development would be returned to Dr Huang according to the Investment Agreement;

(iii) To confirm the salary survey results for the CEO position for 2013 and 2014.

(b) In his covering email Dr Huang stated that it would be "another waste of time meeting unless all of directors openly put forward their thoughts and have discussions on the basis of merits". In respect of proposed resolution 3, Dr Huang commented (inter alia) that "It has been my argument that the appointments of a CEO must be based on a contract approved by the board, and the CEO must be paid according to the contract: In our case, a proper contract of the CEO (Mr Zhang) was never presented to the board". He further stated:

> I have some grave concern with the argument to re-write Mr Zhang's contract at this stage. It is open knowledge that he misused company fund for his personal benefits; he mismanaged and caused financial loss of the company, and he lost board's confidence in him, which led to his replacement in early 2014…

<u>The sixth board meeting - 10 November 2015</u>

[322] The sixth board meeting was postponed twice and ultimately held on 10 November 2015.[315] It was attended by all of the directors as well as others including Mr Mu and Ms Wu.[316] It took place by video link between Brisbane and Xi'an.[317] Only Dr Huang and Mr Howard were present in Brisbane.[318] It was recorded and a copy of the English translation of the transcript and of the minutes of the meeting were in evidence.[319]

[323] The agenda provided for the consideration of the following 11 resolutions:[320]

(a) Proposed Resolution 1: Nine Months Summary Report of 2015;

(b) Proposed Resolution 2: To independently evaluate the economic values of the 11 EPCs owned by Samgris Resources Pty Ltd;

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[313] This is common ground: see [103AH] of the Statement of Claim which was admitted by [74AH] of the Defence. The email is tab 484 of Volume 14 of Exhibit 1.

[314] This common ground: see [103AI] of the Statement of Claim, which was admitted by [74AI] of the Defence. See tab 487 of Volume 14 of Exhibit 1.

[315] This is common ground: see [33B] of the Statement of Claim which was admitted by [12](a) of the Defence.

[316] This is common ground: see [103AN] which was admitted by [74AM] of the Defence. The others were Jianqiang Qin and Jie Han.

[317] This is common ground: see [33B] of the Statement of Claim which was admitted by [12](a) of the Defence.

[318] Exhibit 2: Huang (4) at [28].

[319] Tabs 504 and 505 of Volume 15 of Exhibit 1.

[320] Tab 496 of Volume 14 of Exhibit 1.

(c) Proposed Resolution 3: Confirming the salary survey results of CEO of Samgris Resources Pty Ltd for year 2013 and 2014;

(d) Proposed Resolution 4: Appointing an independent auditor to inspect and report on Samgris' compliance with its Australian taxation obligations;

(e) Proposed Resolution 5: Independently reviewing over the performance of Financial Management at Samgris Resources Pty Ltd;

(f) Proposed Resolution 6: Independently reviewing over the capacity of Management team at Samgris Resources Pty Ltd;

(g) Proposed Resolution 7: Request for an independent review of the Business strategy of Samgris Resources Pty Ltd;

(h) Proposed Resolution 8: Engage an external independent Australian audit group to review the payments to the Chairman of Samgris Resources Pty Ltd;

(i) Proposed Resolution 9: Voting on the Minutes of the 30th March 2015 Board Meeting of Samgris Resources Pty Ltd;

(j) Proposed Resolution 10: the Board endorse a vote of no confidence in the financial department of Samgris Resources Pty Ltd; and

(k) Proposed Resolution 11: Independently reviewing the current HR system of Samgris Resources Pty Ltd.

[324] This meeting was the most explicitly antagonistic board meeting thus far. It confirmed the breakdown of any mutual co-operation and trust between the directors. APJM suggested I should conclude that Dr Huang and Mr Howard were taking positions which were seeking to serve their interests in the litigation which had been on foot for some months, and that the attitude of the other directors, particularly the Chair, is explicable on the basis that the other directors could legitimately have formed that view. Although I accept that the existence of the litigation would inevitably have contributed to tensions, I do not accept APJM's argument.

[325] Mr Howard made a number of statements towards the start of the meeting, including the following:

(a) The Chair asked Mr Howard to explain the resolutions which he had put to the Board. Obviously, the Chair thought that Mr Howard was not acting as his own man because before Mr Howard could do so, the Chair queried whether Mr Howard had written the resolutions by himself. Mr Howard confirmed that he had.

(b) Mr Howard explained, in support of his proposed resolutions, that he was "very concerned about the management and governance at Samgris".[321] He said:

> Over the past two years, I think I've attended these board meetings in good faith, and all I've seen is that the suggestions I put forward are rarely discussed or put in place in the minutes of the meetings. For Example, for the fifth board meeting, I think I proposed sixteen amendments to the draft and three or four were accepted. I asked for the reasons why the others not accepted? No reply. I believe that Samgris is at the cross road now, at a decision point, where unless we can come to some reasonable understanding of each other's positions and some reasonable understanding for Samgris to go forward, I do not see a very good future.[322]

(c) Mr Howard explained that he found it very worrying that changes to the CEO's salary could be made without the Board's approval.[323] He also stated it was worrying that

[321] Tab 504 of Volume 15 of Exhibit 1 at p 869/782.
[322] Tab 504 of Volume 15 of Exhibit 1 at p 869/782.
[323] Tab 504 of Volume 15 of Exhibit 1 at p 870/783.

there was no discussion of the changes[324] and said he did not recall that the Board agreed with the new CEO salary.[325]

(d) Mr Howard explained that he proposed a vote of no confidence in the financial department of Samgris for a number of reasons.[326] He proposed that a number of resolutions be joined together to have a review done of the Samgris financial management as a whole, by an independent auditor other than the current auditor of Samgris.[327] He stated, as regards his proposed vote of no confidence:

> …I propose this resolution because I do not believe that the Samgris financial department are acting competently to provide the board of directors and the senior management with the information they require.[328]

(e) Mr Howard referred to illegal payments and stated that "we still haven't received (despite many requests) the accounting and legal opinions on the recapitalization from PwC".[329]

(f) Mr Howard stated that the board should set the strategy going forward and then put an organisation structure in place that can carry out and meet the Board's strategy.[330] He commented that over the last three years since Samgris had started, "we have not been able to move from a state-owned enterprise's view point to, what I believe, Australian corporations acquired enterprise".[331]

(g) Mr Howard said he was disturbed that the Chair approved meeting minutes without consultation with the other board members and he commented that some content of the minutes was not consistent with the actual content of the meeting.[332] He further stated that, although he had tracked the changes so everyone could see them, and followed up to find out the status of his proposed changes, he had not received replies from the other directors.[333] Mr Howard commended that it was "a function of the poor relationship between the directors" that they could not have a good discussion on what was included, and what was not included, in the minutes.[334]

(h) Mr Howard stated that he did not have a good understanding of the reasons behind the payments to the Chair.[335]

[326] I observe that many of Mr Howard's statements reflect concerns which, consistent with the findings I have already made, were entirely justified.

[327] After statements by Mr Xie and Mr Hang, Mr Li then spoke and he suggested getting started on voting.[336] Dr Huang then spoke. He complained about a lack of response from other directors to his opinions and suggestions.[337] He stated:

> Mr Li just mentioned that the management team is very professional to serve all shareholders in accordance with the company's regulations and investment agreements, and they have not done any illegal things, right? I want to tell Mr Li that this is not the truth. This is just not true, and I did not say this without evidence. At

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[324] Tab 504 of Volume 15 of Exhibit 1 at p 870/783.
[325] Tab 504 of Volume 15 of Exhibit 1 at p 871/784.
[326] Tab 504 of Volume 15 of Exhibit 1 at p 871/784.
[327] Tab 504 of Volume 15 of Exhibit 1 at pp 871/784, 872/785 and 877/790.
[328] Tab 504 of Volume 15 of Exhibit 1 at p 876/789.
[329] Tab 504 of Volume 15 of Exhibit 1 at p 877/790.
[330] Tab 504 of Volume 15 of Exhibit 1 at p 873/786.
[331] Tab 504 of Volume 15 of Exhibit 1 at p 874/787.
[332] Tab 504 of Volume 15 of Exhibit 1 at pp 874/787 and 875/788.
[333] Tab 504 of Volume 15 of Exhibit 1 at p 875/788.
[334] Tab 504 of Volume 15 of Exhibit 1 at p 876/789.
[335] Tab 504 of Volume 15 of Exhibit 1 at p 878/791.
[336] Tab 504 of Volume 15 of Exhibit 1 at p 881/794.
[337] Tab 504 of Volume 15 of Exhibit 1 at p 882/795.

the last board meeting, regarding the management and governance of this company, I proposed to independently assess its financial situation. Everyone considered it as a good idea, but not the right timing. But as the board of directors of this company, I am very surprised that, at the board meeting, our chairman or relevant personnel or the CEO, did not disclose certain matters, materials and information to other directors while they are aware of those matters, materials and information. Let me give you an example. On March 26, according to this material, we have reached an agreement with Mr Yuping Zhang, former CEO. According to Mr Yuping Zhang's written materials, he admitted that, within these years, more than twenty-five thousand Australian dollars including the money he claimed, reimbursed and others, is improper. He is willing to take responsibility for this. As a former CEO, it is a major dereliction of duty. Although you can choose not to tell other directors, I do not understand why, Mr Li. OK, this happened in March, according to the record you gave me, he already singed [sic] this on March 26. On April 14, the chairman, CEO Mr Wei Mu and Dong Lin signed a summary of financial work, which concerns a decision on how to deal with his so-called improper claim and improper reimbursement. It is until October, September or October, when it was sent to me. In September, Mr Yuping Zhang has already received the so-called back pay. After all those things have been settled, I later asked about those matters, it is until then, the CEO told us that, there is a such record and an agreement with Mr Yuping Zhang. …

[328] This statement was obviously a reference to the way in which the improper payments, which had been acknowledged by Mr Zhang, were dealt with. I have dealt with this at [305] to [313] above. Dr Huang's evident anger with the fact that Mr Zhang's statement was not mentioned at the last board meeting, despite the fact that it was known to the Chair, and his concerns that the Chair and management could in September 2015 make the decision to deal with the issue by set off against a retrospective increase to Mr Zhang's salary which had not even yet been voted on at Board level, were both understandable and entirely justified.

[329] After some further statements, the following exchange occurred:

Mr Li: Does it have anything to do with this meeting?

Dr Huang: It is greatly relevant. Let me just speak for another few minutes. Let me explain to you this matter in a clear order. So under such situation, you give me first…

Mr Li: Now, you do not need to say this matter at this meeting, but you are still saying these things…

Dr Huang: No, no, regarding your proposal and the CEO, I want to explain to you clearly the causes and effects, why I do not think the…

Mr Li This has nothing to do with this meeting.

Dr Huang: Why does it have nothing to do with this meeting, Mr Li.

Mr Li: Does it have anything to do with this meeting.

Dr Huang: Yes. Because you can not say…

Mr Li: What you said is not the matters mentioned at this meeting.

Dr Huang: You just mentioned the proposal and CEO's salary of this company. Now, I am explaining to you in a logic way. What is your motivation and purpose of increasing CEO, Mr Yuping Zhang's salary in 2013? That is a problem. Because we…

Mr Li: The question is ridiculous. You should have a look at our salary package. According to it, salary package includes the basic salary and performance pay, bonus is decided by the board of directors. The issue of CEO's salary was already raised in last April. Why did we do market research report? At the board meeting held in September, you said Mike will not participate. So we wait until April this year when we confirmed that the CEO's salary is 260,000 dollars in 2013…

Dr Huang: Mr Li…

Mr Li: You propose to make market research reports, and we provided reports to you, what else do you want?

Dr Huang: Mr Li, Mr Chairman, I think it is not a quite normal procedure. First, we can not participate in the board meeting last September, which is not the excuse for adjourning the meeting. Because at anytime, according to our regulations, say if…

Mr Li: Not participating in the board meeting is a reason.

Dr Huang: NONONONO

Mr Li: Ridiculous words.

Dr Huang: Mr Li, could you let me finish my speech?

Mr Li: No, do not make more speech.

Dr Huang: Why I can not speak?

Mr Li: It has nothing to do with this meeting. You can talk, I am saying what you are talking about has nothing to do with this meeting…

Dr Huang: How do you judge whether my speech is relevant to this meeting or not?

Mr Li: What you are saying now is irrelevant to this meeting…

Dr Huang: You have no right to say that your speech has nothing do to with the board of directors. You are very ridiculous. I am the same position with you. As a chairman, you only have the right to host a meeting, but you do not have the power to stop others speaking!

Mr Li: I did not stop you speaking, I am saying you need to say something relevant to this meeting…

Dr Huang: I have not finished my speech yet. My speech is certainly relevant to this meeting. I just said you have no reason to say okay about those matters. Why did I pay Yuping Zhang? I can tell you that, on 8th August 2013, we paid Mr Yuping Xhang according to our employment contract, about which Mr Wang and Mr Xie should clearly know. Regarding the salary and wages, I said many times in Xi'an that, localization, localization. Mr Xie, Mr Wang and Mr Song told me that we should consider the situation of state-owned enterprises and the situation of other companies in Australia. Mr Xie and Mr Wang said we can not be fully localized, didn't they? Therefore, under such situation, you signed this contract with Mr Xie, signed the contract with Mr Yuping Zhang. So, you insisted to increase the salary…

Dr Li: Considering the achievements and revenue of this company, there is no problem of raising salary. Isn't you on law case? If you want to say more, please say it in court.

Dr Huang: Then you say…

Mr Li: There is no necessary to talk about it here.

Dr Huang: Then we cannot continue this meeting. I have no right? I have no right to express my…

Mr Li: You have the right, but do not say anything irrelevant to the meeting.

Dr Huang: Why do you think it is irrelevant? You just said, at the last meeting, the increase of the CEO's salary was approved, didn't you? I say it is not approved, why? Because we need you to…

Mr Li: It is very clear in the minutes of the meeting…

Dr Huang: I already told you that the minutes of the meeting was not approved by other directors. You can not say that, you followed requirements, signed on the minutes of the meeting and approved it, right? You should not enforce China's management systems on me. We've told you that, your minutes of the meeting is not completely accurate…[338]

[330] The Chair's expressed judgment as to the irrelevance of Dr Huang's complaints about the Mr Zhang payment issue and its relationship to making a retrospective increase to Mr Zhang's salary was indefensible. The proposed third resolution was that the salary survey results for the CEO position for 2013 and 2014 be confirmed. The board papers for the meeting[339] made plain that the purpose of the confirmation was that based on salary survey results the retrospective increase in salaries said to have been agreed during the fifth board meeting "should be confirmed formally by the board". I have earlier found that there was in fact no agreement reached at the fifth board meeting. But even if there had been, Dr Huang's comments were relevant to that resolution.

[331] Later in the meeting:

Dr Huang: Mr Li, if you think what I said should be solved through legal measures, the law will certainly deal with it. But I want to tell you that, from last year until now, why have you not listened to other's opnions? You are running this company as if it is your own company, right? Questions raised by all parties should be discussed on the table. I just spoke out my different opinions towards Mr Yuping Zhang and previous CEO's salary in a justifiable way. This matter cannot be discussed in other places, why? I just said,

[338] Tab 504 of Volume 15 of Exhibit 1 at pp 883/796 – 887/801.
[339] See tab 496 of Volume 14 of Exhibit 1 at p 2523.

since you have reached a written agreement with the former CEO, why did you not give notice to other directors? This is the first point. Second, why do you notify other directors you paid all his salary?

Mr Li: You can say those words in court. It is meaningless to say this here.

Dr Huang: Don't those questions concern the board of directors?

Dr Li: Do not say those things here.

Dr Huang: Aren't we having a board meeting? Doesn't it concern the board of directors? Didn't you ask directors to discuss and vote on the proposals?

…[340]

[332] After some further exchanges, Dr Huang left the meeting after stating that he had not been allowed to talk and would just leave. Dr Mr Howard left the room with him.[341]

[333] Mr Howard referred to the conduct of the sixth board meeting in his email of 16 November 2015 which he asked Ms Wu to translate and send to all directors of Samgris (and which was so sent the next day):[342]

> It is a sad reflection that I again have to write again the manner in which the Samgris BOD meetings are conducted. My concerns were again realised at the 6th Samgris BOD meeting held on 10th November. However, I do not need to do this to ensure my concerns are recorded and hopefully are shared with senior management within the parent companies. This appears the only way that common sense can eventually prevail.
>
> These BOD meetings, combined with unilateral decisions made by the chairman and implemented by the CEO, many of which I believe are outside their powers. I have been recording my concerns since early 2013 when it became obvious that there was a big difference in understanding of how Samgris should be run as an Australian company and the roles and responsibilities of directors and Samgris senior management.
>
> It is obvious that the Samgris BOD continues to have 2 very different cultures in place – the Chinese based directors act very much in the mould of a traditional SOE. This prevails because the major changes that China has made in the last couple of decades towards becoming truly international. This change appears to have stalled with some parts of the Shaanzi based SOE's, including the Shaanxi Coal Geology Group and the Shaanxi Coal and Chemicals group; in Samgris's case, the Chairman is unwilling to allow discussion on what are from my perspective, very serious issues.
>
> Finally, for the record, I find it very offensive that the chairman would even think that I do not act as my own person and as a representative for all shareholders. I can only assume that he finds my positions on certain issues intimidating and not inline with his thinking; hence, my thoughts are generally dismissed. I have always taken a stand which I believe has been in the interest of all the Samgris shareholders as a group and to provide good governance for Samgris. In most cases my emails at the time expressing my concerns were ignored.

[334] There was no response to this email. Mr Li said he "cannot recall" whether he responded[343] but there is no evidence of a response. I do not accept his evidence concerning his absence of recollection. He must have known full well, that, consistent with his earlier pattern of failing to respond to such complaints, that he made no response.

The seventh board meeting - 31 May 2016

[335] The seventh meeting of the board of directors of Samgris took place on 31 May 2016 by video link between Brisbane and Xi'an.[344] This meeting was attended by Mr Li, Mr Duan (as alternative director for Mr Xie), Mr (Xin) Wang, Dr Huang, Mr Howard, Mr Mu, Ms Fang and Ms Jie Han.[345] Only Dr Huang and Mr Howard were present in Brisbane.[346] The

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[340] Tab 504 of Volume 15 of Exhibit 1 at p 890/803.
[341] Exhibit 2: Huang (2) at [359].
[342] Tab 506 of Volume 15 of Exhibit 1; Exhibit 6: Howard (2) at [128].
[343] Transcript, p 6-53 lines 9 to 22.
[344] This is common ground: see [33C] of the Statement of Claim which was admitted by [12](a) of the Defence.
[345] This is common ground: see [103CA] which was admitted by [74CA] of the Defence.
[346] Exhibit 2: Huang (4) at [28].

meeting was recorded and an English transcript of part of the meeting and draft minutes were in evidence before me.[347]

[336] The following is common ground:[348]

(a) One of the resolutions proposed at the meeting was to adopt a budget for 2016 (**Proposed Resolution 2**).[349]

(b) The proposed budget included payment of "directors [sic] fee (including 2014 and 2015 backpay, and 2016)" in the amount of $532,000, but did not contain any detail of the breakdown of how the $532,000 had been calculated or the basis upon which it was payable.

(c) Dr Huang stated at the meeting that he did not know the breakdown of the directors' fee amount and requested that he be given that breakdown at the meeting.

(d) Dr Huang was told by Ms Dong that she would provide him with that information after the meeting.

(e) The exploration budget for 2016 needed to be passed to enable Samgris to proceed with the proposed coal exploration in 2016.

(f) Dr Huang requested that Proposed Resolution 2 be split into two resolutions so that the directors could vote in favour of the proposed exploration budget but against the proposed management budget.

(g) This request was refused.

[337] The breakdown of the directors' fee amount of $532,000 was not provided during the meeting. However, the calculation did become clear in subsequent communications as follows between Ms Lingling Zhang and Dr Huang.[350]

[338] It suffices to say that the failure to split the resolutions, when that was obviously the sensible course, and the failure to give the breakdown of the directors' fee at the meeting, are further evidence of the breakdown communication between the directors. Further evidence is contained in an intemperate exchange between Mr Li and Dr Huang at the end of the meeting the details of which are unnecessary to record.

Events after the seventh board meeting.

[339] The trial in this proceeding took place in September 2016.

[340] There was a minor controversy which took place in the months prior to the trial which the plaintiffs sought to characterize as further demonstration of the lack of trust between the parties and the breakdown in their relationship.

[341] Samgris, by its CEO Mr Mu, sought and obtained legal advice from APJM's Australian lawyers on the question whether Samgris should permit Dr Huang to obtain access to certain financial documents of Samgris. Dr Huang had sought access to documents because he had identified that some documents suggested that Samgris had paid out of its funds certain expenses of APJM's Chinese lawyer, in connection with his visit to Australia for a mediation in April 2016.[351] The documents were relevant to this proceeding, but, in any event, documents to which, as a director, Dr Huang was entitled. Mr Mu initially prevented Dr

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[347] Tabs 559 and 562 of Volume 16 of Exhibit 1.
[348] See [103CA] – [103CH] of the Statement of Claim and [74CA] – [74CH] of the Defence.
[349] Resolution 2 related to both a management budget (which included the directors' fees) and an exploration budget: Exhibit 2: Huang (4) at [33].
[350] See her emails of 24 June 2016 (tab 519 of Volume 15 of Exhibit 1); his email of 4 July 2016 (tab 521 of Volume 15 of Exhibit 1) and her email of 5 July 2016 (tab 522 of Volume 15 of Exhibit 1).
[351] Exhibit 2: Huang (4) at [50] – [59].

Huang obtaining acess but relented after obtaining advice from APJM's Australian lawyers.[352]

[342] Samgris, by Mr Mu, should not have placed any obstacle in the way of Dr Huang, and if it were concerned as to its legal obligations, certainly should not have consulted APJM's lawyers on the question.

[343] I do not regard this incident of having any great moment in relation to the issues in this proceeding.

Other issues: the regularity of board meetings

[344] There were only seven meetings of the Samgris board in the period since the company was restructured on 20 April 2012: see [33](b) above.

[345] That outcome was inconsistent with the preliminary agreement reached at the second board meeting in 17 March 2013 that that there would be two regular board meetings within each year, one in Xi'an and one in Brisbane and that, if necessary, interim directors' meetings could be called in accordance with the Constitution of Samgris: see [159](c) above.

[346] It is also inconsistent with the statement in clause 16 of the Board Operations Rules, which were adopted at the third board meeting on 6 December 2013, that there be *"at least two"* board meetings each year, one in Xi'an and one in Brisbane: see [198](f) above.

[347] The plaintiffs identify the infrequency of board meetings as further evidence of the matters about which they complaint. They suggest that the lack of regular board meetings was one aspect of the ongoing failure of APJM and Samgris to allow Dr Huang and Mr Howard to participate in the management of the business of Samgris.

[348] Certainly it is true that Dr Huang and Mr Howard complained about the lack of regular board meetings and their impact on the operations of Samgris.[353] But, on the other hand, they did not, as they could have, implement the specific mechanisms set out in the Constitution and the Board Operation Rules to call board meetings of their own motion to address any infrequency concerns. Clause 19.1 of the Constitution permitted any director to convene a board meeting at any time. Clause 16 of the Board Operation Rules referred to interim board meetings. Both Mr Howard and Dr Huang admitted in cross-examination that they were aware of the power for a director to convene a board meeting but that they never sought to do so.[354]

[349] I am not prepared to identify any particular responsibility for the actual frequency of the board meetings. I have had regard to, but do not summarise here, the plaintiffs' submissions[355] which sought to attribute blame for particular timing of or postponement of particular board meetings. I do not think there is a sound factual foundation before me which permits the attribution of fault one way or the other. I am not prepared to infer that the frequency, *per se*, was the problem in the way APJM (and the board members it nominated) exercised power in the context of Samgris' operations.

Other issues: alleged incompetence of Mr Zhang

[350] The plaintiffs allege that the directors of Samgris who were appointed by APJM allowed Mr Zhang to remain in the position of CEO in circumstances where he was incompetent to perform that role.

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[352] Exhibit 2: Huang (5) at [29] – [51].
[353] See, for example, tab 146 of Volume 5 of Exhibit 1; Tab 178 of Volume 6 of Exhibit 1. See also [36] of the Statement of Claim which was admitted by [14] of the Defence.
[354] Transcript, p 2-60 lines 34 to 46; p 2-61 lines 1 to 8; p 3-36 lines 13 to 30.
[355] Plaintiffs' submissions at [489] to [498].

[351] It was certainly true that Dr Huang had from the outset and from time to time during the conduct of the operations of Samgris expressed views ranging from reservations concerning Mr Zhang's capacity to perform the role of CEO[356] to outright condemnation of the competence of Mr Zhang as CEO.[357] However, at the first board meeting Dr Huang voted in favour of Mr Zhang's appointment. Indeed, on the face of it Mr Zhang did have relevant and appropriate experience, including substantial experience in management roles in respect of coal exploration and a working knowledge of Australian Corporations Law and Queensland mining legislation and regulations.[358]

[352] I note that Dr Huang subsequently stated that he voted in favour of the appointment of Mr Zhang, despite his concerns about Mr Zhang's suitability, because he did not think he had any real choice in the matter and Mr Zhang would be appointed regardless of how he voted. However, by the time he made that statement, much water had passed under the bridge and I do not accept it as a reliable statement concerning Dr Huang's reasons for so voting at the time. I do, however, accept that Dr Huang had the subjective view of Mr Zhang which he expressed.

[353] In their written submissions, the plaintiffs point to a number of steps not taken in the executive management of Samgris, which, they contend, evidence the incompetence of Mr Zhang.[359] But if this case was a serious negligence case in which I was invited to make a finding as to the incompetence of a CEO, I would have evidence which focused with particularity on discrete events and their causes and which permitted me to form a view on the question of whether Mr Zhang's conduct was or was not consistent with the conduct of a reasonably competent person standing in his shoes. I do not have such evidence or indeed such a rigorous analysis of the issue of Mr Zhang's alleged incompetence.

[354] What I do have is evidence which points to matters which occurred in the executive management of Samgris which the plaintiffs characterize as less than satisfactory, and I am then invited to draw an inference that the explanation for that must be the incompetence of Mr Zhang as CEO. Amongst other things, the plaintiffs' written submissions referred to –

(a) the timing of the development by Samgris management, under the direction of Mr Zhang, of certain important policy documents such as organization structure and remuneration plans;

(b) the fact that in August 2012 Mr Zhang said that he needed assistance in his role as CEO[360] and, it may be that that was why Mr Howard was, for a period, given a consultancy by Samgris;[361]

(c) the fact that Mr Li Bao Zhu was hired to become Deputy CEO of Samgris in September 2012,[362] which may also have been to assist Mr Zhang.[363]

(d) the fact that Mr Zhang applied the draft remuneration plan despite the fact that it had been rejected by the Board,

but none of these (or indeed the miscellany of other things referred to in the submissions) were matters to which it could be appropriate, in effect, to apply the doctrine of *res ipsa*

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[356] Exhibit 2: Huang (2) at [9] – [12]. Dr Huang had known Mr Zhang for about eight years: Huang (1) at [30], [32] (other than the words in brackets which were not pressed); Huang (2) at [13] – [15].

[357] See tab 143 of Volume 5 of Exhibit 1 at pp 1038/942; 1066/970 – 1067/971; 1075/979.

[358] Exhibit 19: Yuping Zhang (1) at [21] – [56].

[359] Plaintiffs' written submissions at [231] – [272].

[360] See [15](c)(i) of the Reply.

[361] Exhibit 6: Howard (2) at [12]. See also the consultancy agreement at tab 43 of Volume 2 of Exhibit 1.

[362] See above at [116].

[363] Tab 143 of Volume 5 of Exhibit 1 at pp 1028/932 – 1029/933; Mr Song was the person speaking: Transcript, p 5-23 line 40 to 48 to p 5-24 lines 1 to 14.

loquitur. They are not an adequate evidentiary basis for the conclusion about Mr Zhang's incompetence which I am invited to draw.

[355] The plaintiffs invite me to conclude that Mr Zhang's continuation in the role of CEO was contrary to the interests of Samgris and to its shareholders as a whole, that it caused real financial detriment to Samgris, that he should have been replaced but was not, and that was all the fault of APJM and the directors which it appointed to the Board. I do not accept the premise that the plaintiffs have proved the incompetence of Mr Zhang, so I will not make that finding.

Evaluation

Is it just and equitable that Samgris be wound up?

[356] I have explained at [72] to [84] above my reasons for concluding that the nature of the association between the members of Samgris was such that it was appropriate to regard it as a "quasi-partnership", or "a majority controlled business requiring mutual cooperation and a level of trust" between APJM and the two minority shareholders. I found that Samgris was the type of company for which winding up is regarded as the characteristic remedy where the working relationship predicated on mutual cooperation, trust and confidence has irretrievably broken down.

[357] APJM contended that the minority shareholders had mischaracterized the nature of the relationship between the incorporators of Samgris. APJM submitted that the better view was that the relationship was entirely commercial and was completely spelt out in the Cooperation Framework Agreement, the Investment Agreement and the Side Agreement. I have explained earlier in these reasons why I rejected this view by reference to an analysis of what had occurred between the parties up to and including the Closing on 20 April 2012.

[358] APJM submitted that the fact that the parties did not regard the company as bearing the character to which I have referred was demonstrated by the letter from Dr Huang to the Shaanxi Parties dated 5 August 2013 to which I have referred at [190] above. That proposition is misconceived. As the quote I have set out at [190] demonstrates, Dr Huang's conduct in writing to the Shaanxi Parties was entirely consistent with a view of the centrality of the need for mutual trust and co-operation. The letter revealed his attempt to explain the damage which had been done, and to suggest that proper attention to that relationship would give him some redress for the complaints to which the letter was addressed.

[359] The factual examination carried out in the previous section of these reasons leaves no room for any doubt that the working relationship between the 2 minority shareholders and APJM has irretrievably broken down. APJM's principal response was to meet this argument at the antecedent point of whether the relationship was one which should be subject to equitable considerations for the reasons identified by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*. It did formally submit that the relationship had not irretrievably broken down, but I think the evidence against that proposition is overwhelming. I do not think that the responsibility for the breakdown in the relationship can be attributed to the minority shareholders. Samgris is not functioning, and cannot reasonably be expected in the future to, in the way intended at the time of Closing. There is no real prospect that the directors nominated by the two sides can work together sensibly to reach the necessary agreement to be able to conduct the company's business in the future.

[360] In the circumstances of this case, in the absence of any other remedy, it would be just and equitable that Samgris should be wound up.

Have the affairs of Samgris been conducted in a way which is commercially unfair to the minority shareholders?

[361] I have earlier explained (see paragraphs [21] – [23] above), that the phrase "oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members" is to be regarded as a compound expression which calls for a single overall objective judgment by the Court about the conduct of the affairs of the company in relation to a person. In this case, at issue is the the conduct of the affairs of Samgris in relation to the minority shareholders. The test is whether, objectively in the eyes of a reasonable commercial bystander, there has been conduct that is so unfair that reasonable directors who consider the matter would not have thought it fair.

[362] In this case it seems to me that that conclusion is justified. Unfairness, as Murray J observed in *Re Spargos Mining NL* (1990) 3 WAR 166 at 189 (quoted at [22] above) can lie in the decision-making processes within the company. I think there was fundamental unfairness in the decision-making processes within Samgris.

[363] In this case, I have explained that from the time of the 31 August 2012 meeting, important decisions started to get made and implemented as between the Samgris Chair and Samgris management, without having first obtained the authority so to do from the Board. This behavior was at the root of the breakdown in the relationship between the two sides. This conduct was evidenced by -

(a) the 31 August 2012 meeting: see [109] – [121] above;

(b) Samgris' conduct (by Mr Song as Chair) in making important staff appointments, both shortly before and after that meeting and at later occasions: see [116] above;

(c) the 4 January 2013 meeting: see [136] – [147] above;

(d) APJM's own view expressed in its letter of 18 April 2013, that it had in fact taken over the management of Samgris at the Closing: see [173] above;

(e) the staff appointments made without board involvement in 2014 and 2015: see [227] – [232] above;

(f) the de facto cessation or reduction of mining activities without board approval: see [233] – [238] above;

(g) the way in which the accounting treatment of the APJM $33 million dollar receivable for the year ended 31 December 2014 occurred: see [241] – [278] above;

(h) the manner of implementation of the draft remuneration plan despite its rejection: see [288] – [304] above; and

(i) the manner in which decisions were made concerning the irregular payments which had been made to Mr Zhang see [289] – [314] above; and

(j) the inadequacy of response to complaints advanced by Dr Huang and Mr Howard, to which I have referred throughout the chronological analaysis.

[364] Some of this conduct could have been authorized if, at a properly constituted board meeting, the Samgris board –

(a) had authorized that sort of conduct by the Chair;

(b) had identified that the delegated authority of the CEO extended to making particular types of decision without recourse to the Board (or with recourse only to the Chair).

[365] As to the former, clause 14 of the Board Operation Rules adopted in December 2013, contemplated that the Board could authorize the Chair "to exercise part of the powers of the

Board during the period when the Board meeting is not in session" but also specifically contemplated that "in this case the limits of the powers should be specified by the Board." However, the Board never authorized the Chair to exercise any part of its powers.

[366] As to the latter, under both the Constitution and in the Board Operation Rules, the Board had the authority to conduct the business of Samgris. The business was to be managed by or under the direction of the Board. The day-to-day operation and management of Samgris was to be done "under the leadership of [the CEO]", on a direct report to the Board. But as I have said I would not construe the relevant clauses as bringing about the result that the CEO was thereby authorized to make any decision which could be characterized as "day-to-day operation and management of Samgris" without seeking Board authority. Both the Constitution and the Board Operation Rules contemplated that the question of the conferring of (and the setting of the precise limits of) the CEO's delegated authority was a matter for the Board. The Board never exercised that power.

[367] Absent proper delegations, the process whereby important decisions were made and implemented as between the Samgris Chair and Samgris management, without having first obtained the authority so to do from the Board and without the involvement of the directors appointed by the minority shareholders, was so unfair that reasonable directors who considered it would have reached that conclusion. I note and agree with the observations by Young J in *John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'asia) Pty Ltd* (1991) 6 ACSR 63 at 71–72:

> It is essential in company law that all persons who are entitled to participate in meetings are able to participate in them to the extent which the law allows. There must be proper notices of meetings; there must be proper time for discussion at meetings; everybody's views must be respected before the vote is taken, on which the majority will succeed, if they wish, but only after they have listened. Where the rights of the minority are affected by persistent conduct at the board, so that they are not able fully to participate in meetings, then there is, in my view actual oppression and, in my view, there is actual oppression on the sum total of the events in this case.

[368] These were not mere matters of form. Compliance with agreed processes was not excused by virtue of the fact that the some of the decisions made by this process could be characterized as unexceptionable. And whilst acquiescence is relevant in evaluating the significance of such conduct, the fact is that Dr Huang and Mr Howard complained about exclusion virtually from the outset. That APJM was treating Samgris as its wholly-owned subsidiary of which APJM had the management was a constant (and, to my mind, valid) theme to their complaints. The vice in what occurred was the exclusion of the minority shareholders (by the exclusion of Dr Huang and Mr Howard) from the appropriate decision making processes and the exercise of decision making power, in the way described in the meetings of 31 August 2012 and 4 January 2013.

[369] The unfairness constituted by the exclusion from the agreed manner by which the minority shareholders would participate in management decisions was the most significant and ongoing oppressive conduct which occurred. The same conduct was also unfair, viewed from the perspective of departure from the underlying assumption on which the legal rights were entered into, which I have discussed in the previous section of these reasons.

[370] There were some other matters which may be characterized as commercially unfair, viewed as discrete topics. I refer in particular to –

(a) the way in which the accounting treatment of the APJM $33 million dollar reeivable for the year ended 31 December 2014 occurred: see [241] – [278] above;

(b) the manner of implementation of the draft remuneration plan despite its rejection: see [288] – [304] above;

(c) the manner in which decisions were made concerning the irregular payments which had been made to Mr Zhang see [289] – [314] above; and

(d) the continued inadequacy of response to complaints advanced by Dr Huang and Mr Howard.

[371] My opinion is that the plaintiffs have established that they are entitled to a remedy under s 232(d). It is a remedy which should provide them redress for the cumulative commercially unfair effect of the considerations to which I have referred, but principally for the fact that -

(a) Samgris has not been managed so as to accord to its minority shareholders the degree of participation in management to which they were entitled under its Constitution and Board Operation Rules.

(b) Samgris has not been managed so as to accord to its minority shareholders the degree of participation in management which, in light of the assumption which underlay the formation of the relationship between its members, was just and equitable. The mutual trust and co-operation between the groups of its members has completely broken down.

(c) There is no reason to believe that either of those two considerations will change and the minority shareholders are subject to restraint on their ability to exit the company, which APJM has indicated that they will insist upon.

[372] They are entitled to relief either by winding up of the Company or by other means.

Has there been conduct 'contrary to the interests of members as a whole'?

[373] I have earlier explained (see [24] above), that the better view is that s 232(d) is separate and distinct from s 232(e). Conduct may be 'contrary to the interests of members as a whole' without necessarily involving commercial unfairness. The task of deciding whether there has been such conduct involves an objective assessment of whether the conduct adheres to accepted standards of corporate behaviour or is in accordance with how reasonable directors would act in attending to the affairs of the company.

[374] It does not seem to me that the application of this test reaches any different outcome to that arrived at in relation to commercial unfairness.

Relief

[375] Section 467(4) provides:

> Where the application is made by members as contributories on the ground that it is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the Court, if it is of the opinion that:
>
> (a) the applicants are entitled to relief either by winding up the company or by some other means; and
>
> (b) in the absence of any other remedy it would be just and equitable that the company should be wound up;
>
> must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

[376] This case involves an application which meets the description in the chapeau to the section. The findings I have made in these reasons mean that I have formed the opinions referred to in subparagraphs (a) and (b). The result is that I must make a winding up order unless I form the positive opinions that –

(a) some other remedy is available to the applicants; and

(b) the applicants are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

[377] Some other remedy is available to the plaintiffs. They and APJM both accept that the remedy of ordering APJM to purchase the minority shareholders is available.[364] For their part, the plaintiffs' primary position is that a winding up order should be made. APJM submit that if, contrary to their principal case, I was minded to grant the plaintiffs a remedy, there is no justification in making a winding up order in preference to a share buy-out order. The only available buy-out order was one where APJM bought out the minority shareholders. Dr Huang's evidence that the minority shareholders could not afford to buy-out APJM was not disputed. APJM submits that I should form the view that the minority shareholders have not discharged their onus to persuade me that share purchase was not a reasonable and viable option.

[378] Neither side was able to draw my attention to any authority on the question whether the proper construction of s 467(4) is that if applicants have persuaded the court to form the two opinions in (a) and (b), with the result that the Court is obliged to make a winding up order unless it forms the opinion referred to in the final paragraph, there is then an onus on the applicants to prove that the Court should not form that opinion. APJM suggests that there is such an onus. However, the language of the section does not support that view. It seems to me that the substance of the matter is that the last paragraph after the word "unless" identifies an exception to a general rule which exception would apply by reason of additional or special matters, and accordingly the burden of proof would be on the party seeking to rely on the existence of those special or additional matters: cf *Vines v Djordjevitch* (1955) 91 CLR 512 at 519.

[379] Putting aside the question of onus, the issue is whether I should form the opinion that the the applicants are acting unreasonably in seeking to have the company wound up instead of pursuing the other available remedy.

[380] In this case there is no suggestion that Samgris is not solvent. Its draft financial accounts for the year ended 31 December 2015[365] strongly suggest the contrary because they record net assets of in excess of $18 million before having any regard to the disputed $33 million receivable from APJM. I accept, therefore, that in forming the opinion and in exercising the discretion I have as to remedy based on the findings I have made, I should regard it to be an extreme step to wind up a solvent company.

[381] I balance that consideration against the following.

[382] First, the operations of Samgris are relatively confined. Nothing of significance has happened in its operations for some little time. The persons affected by it being wound up will principally be Dr Huang, the minority shareholders and APJM.

[383] Second, no offer is on the table. Rather the share buy-out option would involve my ordering APJM to purchase the plaintiffs' Samgris shares at a price to be determined by the Court on a date to be fixed after the culmination of a further judicial process. The requisite further litigation would carry with it the virtual inevitability of time, cost and further uncertainty. In this regard, I make the following observations:

(a) APJM submitted that it was not legitimate for the plaintiffs to point to such considerations as justifying a submission that they would not be unreasonable in pursuing the remedy of winding up instead of the remedy of share-buy out by APJM.

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[364] APJM also submit that I could conclude it was appropriate to make an order for compensation for financial loss suffered by the plaintiffs under s 233. Whilst that remedy might be regarded as responsive to complaints concerning the implementation of the draft remuneratin plan and other inappropriate payments (and reference to the evidence was identified at Transcript, pp 8-3 and 8-4), it is not responsive to the principal matters which I have found to be oppressive, so I do not consider it further.

[365] Exhibit 20: Li (2) at exhibit LL-76.

(b) However, I reject that contention. Similar considerations were considered relevant in *Hillam*.[366]

(c) I have no evidence from either side addressing the extent of time and cost which would be involved, but it would inevitably be considerable. I observe:

(i) There would be have to be valuation evidence necessarily adduced from each side, aimed at working out the value to be attributed to the plaintiffs' 40% shareholding.

(ii) That would require consideration of the true net asset position of Samgris.

(iii) There are 3 principal assets: cash, the EPCs and the the chose in action against APJM for the disputed $33 million receivable.

(iv) The potential for dispute in the approach to be taken to the valuation of the latter two assets would be high. The valuation of the chose in action would be particularly complex.

(d) Further, I have no evidence as to the financial position of APJM. The facts that APJM is owned by the Shaanxi Parties and they are companies of significant substance does not mean that APJM should be so regarded. Accordingly, there is uncertainty whether APJM would be able to comply with any buy-out ordered by the Court and at least the possibility that a buy-out order might still end up with a winding up of Samgris.

[384] Third, winding up would introduce a third party (namely the liquidators) who could bring an objective mind to the realization of the assets and liabilities of Samgris, including Samgris' chose in action against APJM for the recovery of the $33 million receivable. The liquidators could form a view whether there was merit in the pursuit of APJM for the monies. True it is the liquidators would have to form a view about value in order to make the decisions involved in performing their duty. There would be at least a possibility that Samgris might become involved in further litigation. But it would not necessarily involve any direct incurrence of costs by the plaintiffs.

[385] When one considers the competing merits of the two options, I do not form the opinion that the plaintiffs are acting unreasonably in preferring the winding up option over the buy-out option. It seems to be to be entirely reasonable to choose to avoid the practical certainty of being directly subjected to the time, cost and uncertainty involved with further litigation concerning the value of any buy-out offer and the potential uncertain consequences of obtaining a buy-out order.

[386] If, as I think is the better view, the onus was on APJM to persuade me to form the opinion that the plaintiff would be acting unreasonably by pursuing the winding up remedy, APJM has failed to to persuade me of that. If I am wrong in that, and the onus was on the plaintiffs to persuade me that I should not form that opinion, they have done so.

[387] Accordingly, the appropriate relief in this case is an order that Samgris be wound up and Mr W.J. Harris and Mr A.N. Connolly be appointed as liquidators of Samgris. I propose, however, to take the approach referred to by Black J in *Re Amazon Pest Control Pty Ltd* at [33] to [36] and to stay the order to give the parties a chance to resolve their differences in a manner which might avoid the liquidation. I will stay the order for 7 days, but preserve the capacity to alter the length of the stay, should that prove necessary.

[388] I make the following orders:

1. The first defendant be wound up.

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[366] *Hillam v Ample Source International Ltd (No 2)* (2012) 202 FCR 336 at [80] to [82]

2. Mr W.J. Harris and Mr A.N. Connolly be appointed as liquidators of the first defendant, jointly and severally.

3. The orders made in (1) and (2) be stayed until 4:00pm on 15 May 2017.

4. The parties have liberty to apply to vary the length of the stay ordered in (3).

[389] I will hear the parties as to costs.