# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Coldham-Fussell & Ors v Commissioner of Taxation* [2011] QCA 45 |
| PARTIES: | **NORMAN COLDHAM-FUSSELL**<br>(appellant)<br>**PETER BLIZZARD**<br>(appellant)<br>**EDWARD EUGENE FALK**<br>(appellant)<br>**v**<br>**COMMISSIONER OF TAXATION**<br>(respondent) |
| FILE NO/S: | Appeal No 8888 of 2010<br>SC No 3969 of 2006 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 18 March 2011 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 February 2011 |
| JUDGES: | Chief Justice, Margaret McMurdo P and White JA<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Allow the appeal with costs**<br>**2. Set aside orders 2, 3, 5 and 6 of the orders made on 26 July 2010**<br>**3. Otherwise, the costs of the application below are reserved.** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the appellants were directors of a company that became insolvent and third parties to litigation brought by the liquidators against the Commissioner of Taxation – where the trial judge granted summary judgment against the appellants – where r 292 *Uniform Civil Procedure Rules* 1999 (Qld) applied – whether the appellants had no real prospect of defending the respondent's claim – whether there was a need for a trial of the claim |

*Companies (South Australia) Code*, s 556(1)
*Corporations Act* 2001 (Cth), s 95A, s 588FA, s 588FC, s 588FE, s 588FF, s 588FGA, s 588FGB(2), s 588FGB(3), s 588FGB(4)
*Federal Court of Australia Act* 1976 (Cth), s 31A
*Income Tax Assessment Act* 1936 (Cth), s 222AOE
*Taxation Administration Act* 1953 (Cth), Sub-Division 16-B of Part 2-5 in Schedule 1
*Uniform Civil Procedure Rules* 1999 (Qld), r 292, r 293

*Agar v Hyde* (2000) 201 CLR 552; (2000) 173 ALR 665; [2000] HCA 41, cited
*Australian Securities and Investments Commission v Plymin (No 1)* (2003) 46 ASCR 126; [2003] VSC 123, cited
*Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; (2006) 227 ALR 425; [2006] HCA 27, cited
*Bernstrom v National Australia Bank Ltd* [2003] 1 Qd R 469; [2002] QCA 231, cited
*Carrier Air Conditioning Pty Ltd v Kurda and Ors* (1993) 11 ACSR 247, cited
*Deputy-Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232; [2005] QCA 227, cited
*Gray v Morris* [2004] 2 Qd R 118; [2004] QCA 005, cited
*Jessup v Lawyers Private Mortgages Pty Ltd* [2006] QSC 003, cited
*Jessup v Lawyers Private Mortgages Ltd & Ors* [2006] QCA 432, cited
*Powell v Fryer* (2001) 159 FLR 433; (2001) 37 ASCR 589; [2001] SASC 59, cited
*Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)* [2003] 1 Qd R 259; [2002] QCA 224, cited
*Sandell v Porter* (1966) 115 CLR 666; [1966] HCA 28, cited
*Sims v The Deputy Comissioner of Taxation* (2007) 69 ATR 186; [2007] NSWSC 998, cited
*Spencer v The Commonwealth* (2010) 241 CLR 118; (2010) 269 ALR 233; [2010] HCA 28, considered
*Swain v Hillman* [2001] 1 ALL ER 91, cited
*Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1; [2001] 2 All ER 513; [2001] UKHL 16, cited

COUNSEL: D J S Jackson QC, with M R Bland, for the appellants
R M Derrington SC, with C J Conway, for the respondent

SOLICITORS: Clarke Kann Lawyers for the appellants
ATO Legal Services Branch for the respondent

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of White JA. I agree with the orders proposed by her Honour, and with her reasons.

[2] **MARGARET McMURDO P**: This appeal should be allowed for the reasons given by White JA. I agree with the orders her Honour proposes.

[3] **WHITE JA**: On 26 July 2010 orders were made in the Trial Division pursuant to s 588FF of the *Corporations Act* 2001 (Cth), that the defendant ("the Commissioner") pay to Allens Services Limited (in liquidation) $2,304,310.53 plus interest of $867,545.94.

[4] The learned primary judge made further orders that the appellants, Mr Coldham-Fussell as first third party and Mr Blizzard as second third party, pay to the Commissioner $2,304,310.53 plus interest of $867,545.94 and Mr Falk, as fourth third party pay $1,765,044.74 plus interest of $669,859.13. There were ancillary orders about costs.

[5] The liquidators of Allens Services Limited ("the Company") were the applicants below for summary judgment against the Commissioner. The Commissioner had joined the former directors as third parties seeking orders pursuant to s 588FGA that they indemnify him in respect of any orders made. The directors had been given leave to defend the liquidators' claim against the Commissioner. The Commissioner also brought an application for summary judgment against the first, second and fourth third parties returnable on the same day as the liquidator's application.

[6] On 9 March 2010 on the hearing of the two summary judgment applications the Commissioner consented to summary judgment being entered against him in the sum of $763,384.18 plus interest in the amount of $20,000 being the amount claimed by the liquidators for which the Commissioner did not seek indemnity from the appellants. The amount for which indemnity was sought comprised payments applied to Pay-As-You-Go withholding liabilities of the Company under Sub-Division 16-B of Part 2-5 in Schedule 1 of the *Taxation Administration Act* 1953 (Cth).

[7] The liquidators (who are not parties to this appeal) were appointed voluntary administrators of the Company on 13 May 2003. On 4 July 2003 the creditors resolved that the Company be wound up and the administrators were appointed as its liquidators. In their Solvency Report dated 24 December 2009 the liquidators expressed the opinion that the Company was insolvent from November 2002 on both a balance sheet and cash flow basis. In proceedings commenced on 12 May 2006 the liquidators sought to recover payments made by the Company to the Commissioner on the basis that they were voidable preferential payments. On 5 December 2008 the Commissioner joined five former directors of the Company as third parties seeking indemnity pursuant to s 588FGA of the *Corporations Act* 2001 (Cth). By orders made on 30 September 2009 the third parties were given leave to defend the liquidators' claim and directions were given for disclosure and the filing and serving of experts' reports.

[8] The Commissioner discontinued his claims against the third and fifth third parties in February 2010. By an application filed by the remaining third parties they sought leave to issue fourth party notices against those former directors. That application was dismissed on 9 March 2010.

[9] The third parties had not filed a defence to the liquidators'/Commissioner's claims but opposed it in affidavits and by submissions. As summarised by the learned primary judge, while the third parties did not take any issue about the Company making the payments to the Commissioner, their preferential effect or being voidable if the Company was insolvent when they were made, they disputed the

allegation that the Company was insolvent at the relevant times when the payments were made. They relied upon the defences to proceedings brought under s 588FGA and s 588FGB of the *Corporations Act* that at the time the several payments were made they had reasonable grounds to expect, and did expect, that the Company was solvent and would remain solvent even if it made the payment.[1] They further relied upon the defence in s 588FGB(4) that they believed, and reasonably so, that they were provided with adequate information about solvency from the chief executive officer and the chief financial officer of the Company.

[10] On 9 July 2010 her Honour published her reasons for concluding that she was satisfied that the third parties had "no real prospect of defending" the Commissioner's claim against them and "there [was] no need for a trial of it".[2] She ordered that the Commissioner should have summary judgment seeking draft orders and submissions as to interest and costs. The orders were pronounced on 26 July 2010.

**Relevant legislative provisions**

[11] By s 588FE of the *Corporations Act* if a company is being wound up a transaction of the company is voidable if it is an insolvent transaction of the company and was entered into during the six months ending on the relation-back day.[3] It was uncontentious that the relation-back day for the Company was 13 May 2003 so that the six months commenced on 14 November 2002. By s 588FC a transaction of a company is an insolvent transaction if it is an unfair preference given by the company and the company was insolvent at the time of the transaction. A transaction will be an unfair preference if the transaction results in the creditor receiving more than the creditor would receive if the transaction were set aside and the creditor were to prove in the winding-up.[4] A company is solvent if the company is able to pay all the company's debts as and when they become due and payable and a company that is not solvent is insolvent.[5]

[12] A company's liquidator may apply to the court for an order that if a particular transaction is voidable because of s 588FE, a person be directed to pay the company an amount equal to some or all of the money that the company has paid under the transaction.[6]

[13] By s 588FGA if the court makes an order under s 588FF against the Commissioner because of the payment of an amount in respect of a liability under a provision of Sub-division 16-B in Schedule 1 to the *Taxation Administration Act* 1953, each person who was a director of the company when the payment was made is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order. The amount payable is a debt due to the Commonwealth and payable to the Commissioner and may be recovered in a court of competent jurisdiction by the Commissioner suing in his official name. The court may, in the proceeding in which the order was made against the Commissioner, order a person to pay to the Commissioner an amount payable by the person.[7]

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1 s 588FGB(3).
2 Reasons [71].
3 s 588FA.
4 s 588FA.
5 s 95A.
6 s 588FF.
7 s 588FGA(1), (2), (3) and (4).

[14] The *Corporations Act* provides a director, from whom the Commissioner seeks to be indemnified, with defences to the claim. By s 588FGB(3) and (4):

> "(3) It is a defence if it is proved that, at the payment time, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it made the payment.
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> (4) Without limiting the generality of subsection (3), it is a defence if it is proved that, at the payment time, the person:
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> (a) had reasonable grounds to believe, and did believe:
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> (i) that a competent and reliable person (***the other person***) was responsible for providing to the first-mentioned person adequate information about whether the company was solvent; and
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> (ii) that the other person was fulfilling that responsibility; and
>
> (b) expected, on the basis of information provided to the first-mentioned person by the other person, that the company was solvent at that time and would remain solvent even if it made the payment."

The time when the relevant payment was made is called "the payment time".[8]

**Allens Services Limited**

[15] In 1991 John and Lorna Allen trading as Evanbank Plant Hire Pty Ltd established a business operating out of Mackay providing hire equipment to mines, quarries and civil contractors in central Queensland. The business expanded into the Northern Territory and New South Wales. In 1993 the business commenced heavy haulage operations under the trading name of Delemar Heavy Haulage. Between 1994 and 1998 hire and haulage branches were established in Darwin, Mt Isa, Townsville and Kalgoorlie. In 1998 Evanbank Plant Hire formed Pinman Pty Ltd to acquire Enzed Hydraulic Hose and Fittings Services franchises in Queensland and Western Australia, including the distributorship for MIM Holdings, a large Australian mining and mineral processing company.

[16] On 20 March 2000 Allens Services Limited was incorporated as a public unlisted company limited by shares. Mr and Mrs Allen carried out a major restructuring of the various businesses under their control with Allen's Services Limited acquiring and assuming various business assets and liabilities from related companies. At about the same time Business Management Limited ("BML")[9] and Quadrant Capital Fund ("Quadrant") provided $10 million of capital to the Company through convertible notes. In July 2002 the Company acquired the business assets of two companies which specialised in plant hire, earth works and haulage operations.

[17] In 2002 the Company experienced declining sales and a resulting tightness of liquidity. To improve its financial position a restructure was undertaken in the period leading into the relation-back six months commencing in mid-November 2002. As mentioned, the liquidators have deposed that the Company was, in their

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8 s 588FGB(2).

9 Of which company Mr Blizzard, the second third party, was a director.

opinion, insolvent on both a balance sheet and cash flow basis from November 2002. The appellants in extensive affidavits each swear that they had reasonable grounds to expect, and did expect, that the Company was solvent and would remain so if payments were made to the Australian Taxation Office in the relation-back period[10] and that they relied upon information provided to the Board by the chief executive officer, Mr John Attwell and the chief financial officer, Mr Graeme MacKenzie, about the Company's solvency.

[18] The first relevant payment for which the Commissioner sought indemnity pursuant to s 588FGA(2) was made on 6 December 2002 and the final payment was made on 12 May 2003. Just under $1 million was paid to the Commissioner and allocated against Pay-As-You-Go liabilities by 27 December 2002.

**Preliminary observation**

[19] Although the affidavits of the appellants cover the whole relation-back period from November 2002 to the appointment of the administrators in mid May 2003 (or 11 March 2003 for Mr Falk) as did the written outlines, the focus of the oral submissions was upon the period to the end of January 2003. Although no concession was made by Mr Jackson QC for the appellants, the real prospect of defending the Commissioner's claim for indemnity more compellingly related to the payments amounting to approximately $1 million made in this period. Although no Notice of Contention was filed by the Commissioner nor any other indication given prior to the hearing of the appeal that he would do so, Mr Derrington SC for the Commissioner submitted that this court could, consistently with the provisions of rule 292 of the *Uniform Civil Procedure Rules*, uphold the judgment below for part of the claim relating to the payments made after the end of January 2003. That outcome was firmly opposed, and rightly so, on the basis that the proceedings had been conducted below and on appeal on a whole of claim basis. These reasons will focus particularly on the earlier period in the relation-back period whilst making some reference to the solvency of the Company and the appellants' responses up to 13 May 2003.

**The directors**

[20] The three directors, the subject of the summary judgment orders, each had considerable experience as company directors across a range of relevant areas. Mr Edward Falk was a non-executive director of the Company from 18 April 2000 until his resignation on 11 March 2003. He has had a long experience as a company director including as chairman of manufacturing, mining, civil engineering, earth moving equipment hire, equity finance and business loans companies. He has been chairman, for example, of the Victorian Brown Coal Council, Coal Corporation of Victoria, 3i Australia Ltd, Allpower Industries Ltd, La Trobe Research and Technology Centre and Australian World Trade Centre. He has been a non-executive director of Phosphate Mining Co Ltd, BLE Capital Ltd, Barlow Marine Ltd and MacMahon Holdings Ltd (between 1986 and 1999). His other appointments have included as national consultant between 1986 and 1996 to Mitsui Australia Ltd, and an Australian government delegate in 1980 to the European

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10 The three directors depose to a period from 21 November 2002 to 11 March 2003. Mr Falk resigned on 11 March 2003 and it would seem that that date has erroneously intruded into Mr Coldham-Fussell's and Mr Blizzard's affidavits as they depose to their belief generally up to the date of administration. Nothing turns on this.

Management Forum at Davos. He has been a president of the Melbourne Chamber of Commerce and a member of a number of relevant professional institutes such as Fellow of the Institute of Chartered Accountants in Australia and Fellow of the Institute of Chartered Secretaries & Administrators. Between April 1960 and the end of December 1980 he carried on professional practice as a chartered accountant. His contribution to the community and his profession have been recognised by the award of a number of honours.

[21] Mr Norman Coldham-Fussell was chairman and non-executive director of the Company from 18 April 2000 until the appointment of the administrators on 13 May 2003. Between 1970 and 1980 he was, at various times, general manager, secretary, director, managing director, and chief executive officer of companies associated with Thiess Holdings Limited. Between 1980 and 1995 he was a director of Mt Isa Mines Limited as well as of a number of companies associated with MIM Holdings Ltd. He has been chairman of the Queensland Industry Development Corporation, Flight Centre Ltd, Mesa Minerals Ltd and Kolar Gold plc. He has been a director of Namoi Cotton Co-operative Ltd and a director and chairman of Anaconda Nickel Ltd. He has been a director of a number of well known companies such as Teck Corporation, Cominco Ltd, Asarco Inc., Pioneer Sugar Mills Ltd, Geominerals Ltd as the alternating chairman, and a number of German companies. His formal qualifications include an associate in accountancy from the University of Queensland, a registered tax agent, a Fellow of the Institute of Certified Practising Accountants, Fellow of the Australian Institute of Company Directors, Fellow of the Chartered Institute of Secretaries, Fellow of the Australasian Institute of Mining and Metallurgy, Fellow of the Taxation Institute of Australia and Fellow of the Australian Institute of Management. His service to the community has been recognised by several awards.

[22] Mr Peter Blizzard was a non-executive director of the Company from 18 April 2000 until the appointment of the administrators. He has been a director of numerous companies including Business Management Ltd between 1998 and 2010, Ironstone Group Pty Ltd for five years, Harris Scarfe Australia Ltd between June 2002 and April 2007, Fineline Timbers Pty Limited, Grafton Sawmills Pty Limited, Kopps Investments Pty Ltd, Brothers Neilsen Pty Ltd and Onerail Global Holdings Ltd.

**Review of the Company's financial position from mid-2002**

[23] The Company incurred a net loss before tax for the year ending 30 June 2002 of $7.3 million. The audited profit and loss statements showed a decrease of $6.9 million in relation to the value of plant and equipment as a result of the Company identifying equipment "no longer expected to provide opportunities for growth".[11] Those financial statements were not signed, however, until 24 December 2002.

[24] A restructure plan was prepared by Mr John Attwell, chief executive officer, and Mr Graeme MacKenzie, who was soon to be appointed chief financial officer and company secretary.[12] The plan submitted to the Board was "a package to resolve the cash flow position of the company".[13] To that end it was proposed to reduce the

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11 AR 119; para 5.40.1 of the Solvency Report of the liquidators.

12 Appointed 3 October 2002, AR 541.

13 AR 476.

fleet on the east coast and concentrate on the major centres of the group business in central and north Queensland and Western Australia, and improve the margin on Evanbank Plant Hire. As at 16 September the current liabilities were $6 million. The components of the plan comprised closing down the southern region; selling the Sunstate Cement contract; selling all under-utilised old plant; obtaining a loan of $2 million from the present investors; cutting staff; preparing a business plan to obtain a two month moratorium on payments and rewrite the contracts; senior executives to take a 10 per cent pay cut; reducing the Board to three external and two internal directors; closing HR as a separate position and investigating selling a house in Mackay. The net assets were identified as approximately $25 million. As at 30 September 2002 long outstanding liabilities were $4.968 million. A schedule of plant to be sold at auction was calculated to bring in $3.25 million.

[25] At the Board meeting of 23 September 2002 eight components of the restructure plan were approved in principle and three were held over for further discussion. On 10 October 2002 the directors, including Mr Attwell, Mr MacKenzie and the outgoing company secretary, Mr Frederiks, had a wide ranging discussion in which the Board challenged some of the assumptions upon which the restructure was based. The appellants were concerned that the restructure did not go far enough and had no margin for error. Issues such as the Australian Taxation Office debt, which was approximately $1.5 million, and the financiers' loans' interest of approximately $560,000 were discussed. Management emphasised that the restructure was a whole package. The Minutes record:

> "Directors reviewed the revenue production report for September 2002 and the nine month budget to 30/6/03. Directors noted that the September revenue at $4.28m was 85% of budget and affirmed the need for a full review of the business model and re-structure.
>
> A discussion ensued on the actions that needed to be taken to ensure that the Company achieved a profit of 300k per month – equivalent to a cash flow surplus of $100k per month. Directors unanimously agreed that the bigger picture needed to be looked at to determine what extra disposals and cost cuts were needed to achieve this outcome. Directors further agreed that they could not accept the re-structure budget which contemplated a $200k cash flow deficit per month and RESOLVED that management should present a new budget that generated a positive cash flow. Failure to do so would mean that the accounts would not get audit clearance."[14]

[26] The appellants resolved that management should prepare a new restructure plan which would, immediately, enable the Company to generate a positive cash flow. The Minutes record:

> "Directors individually each expressed their views on the solvency of the company and were satisfied that the Company could pay its debts as and when they fell due."[15]

The Minutes also record that management advised that the estimated provision for diminution in asset values would be $3.52 million being the difference between the written down value of the assets proposed to be sold at auction of $10.28 million

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14 AR 537.

15 AR 537.

and net sale proceeds estimated to be $6.76 million. The meeting resolved to seek the agreement of two financiers, BML and Quadrant, to accrue outstanding interest.

[27] On 23 October 2002 Mr Attwell circulated a restructure document to the Board updating progress on the 11 strategies. It showed a re-worked budget to establish a positive cash flow and a positive balance sheet. On the basis of the assumptions made the restructure budget showed net profit before tax for the nine months to June 2003:

- October 2002 at $364,740
- November 2002 at $525,092
- December 2002 at $45,969
- January 2003 at ($41,185)
- February 2003 at $384,032
- March 2003 at $406,218
- April 2003 at $356,331
- May 2003 at $407,234
- June 2003 at $236,692.[16]

Of these re-worked figures Mr Falk, Mr Coldham-Fussell and Mr Blizzard depose that they demonstrated to them that there was a predicted gross profit of approximately $2 million from October 2002 to June 2003 with only January 2003 predicting a loss; and that the balance sheet showed the assets of the Company far outweighing its liabilities with a total equity of about $30 million. Because of these positive indicators in the re-written restructure plan those directors were confident that the Company would pay its debts as and when they fell due.[17] In fact, as reported at the 21 November 2002 Board meeting, there was a loss of $360,000 for October 2002 compared with the projected profit of $364,740.

[28] After the receipt of a s 222AOE *Income Tax Assessment Act* 1936 (Cth) notice from the Australian Taxation Office on 1 November 2002 the Company entered into a payment agreement to pay some $1.105 million outstanding by 18 December 2002. The first payment of $200,000 was made on 8 November.

[29] Mr Attwell circulated two memoranda to the Board dated 14 November 2002 and two dated 15 November. He noted that all the strategies were in place and the Company was awaiting the auction results; the Company was struggling to maintain an arrangement whereby payments to financiers were only one month overdue, although the Company had avoided any repossession action. CAT Finance had advised that they required the full proceeds of sale of plant in reduction of their liability which would take $850,000 out of the net proceeds. Surplus funds of $4.5 million were expected to be generated while the current liabilities were $4.9 million. In his second memo of 14 November, Mr Attwell noted that GE Commercial were willing to monitor arrangements and expressed willingness to continue consideration of a further equipment finance facility. The limit on the debt factoring agreement with Scottish Pacific Business Finance ("Scottish Pacific") was increased from $6 million to $8 million.

[30] Mr Falk, Mr Coldham-Fussell and Mr Blizzard comment in their affidavits that those two memos demonstrated that the surplus payments from the auction of the

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16 AR 546.

17 AR 326; 489; and 675.

Company's unused and obsolete equipment would mean that liabilities would decrease to $468,000 and, with the increase in the debtors' finance facility the current liabilities would be extinguished.[18] Those figures persuaded the directors that the Company was solvent and could pay its debts as and when they fell due.

[31] On the following day Mr Attwell reported that:

> "Cash flow is extremely tight with many suppliers stopping credit and threatening legal action and several Statutory Demands and Summons received."[19]

These demands amounted to over $75,000 but he reported that it had been possible to satisfy most by payment or agreed terms. He identified that a major impediment to improving cash flow sourced from Scottish Pacific was the level of debtors classified as "unacceptable". Mr Attwell noted the increased stock-pile on the Croesus contract at Kalgoorlie for which he hoped to negotiate a different system of invoicing which would inject a further $900,000 to the Company. The ongoing litigation with the Abigroup was settled with the Company to receive $277,000 on 4 December.

[32] The Minutes of the Board meeting of 21 November 2002 reveal that the National Australia Bank had informed management

> "that the overdraft will now be restricted to payroll transactions only. All other payments will only be transacted if cleared funds are available in the account."[20]

Reference was made to a dispute with Hitachi with the value of the claims quantified at approximately $1 million. The settlement with the Abigroup was formally noted, as was the increase of $2 million in the debtor facility with Scottish Pacific. The financial results for the four months to October 2002 showed a profit of $378,097 after accounting for restructuring costs provided for in the June accounts. The result for October was a loss of $360,811. These results were reviewed and discussed at length by the directors. There were significant variances in certain expense items which could not be satisfactorily explained by management. The restructure plan was discussed. It was agreed that the $200,000 scheduled payment to the Australian Taxation Office "must" be paid by 1 December and that the proceeds from the Abigroup settlement would be applied against this payment.

[33] Mr Blizzard is recorded as requiring management to provide a "clear statement" of all outstanding creditors and statutory obligations and a schedule supporting the distribution of auction proceeds to clear the Company's obligations. The directors agreed to hold a special meeting on 5 December 2002 to review the year to date results, to consider the 30 June 2002 accounts and finalise the reports and to consider cash flow forecasts to 30 June 2003 "and its relationship to the solvency of the Company".[21] Mr Falk, Mr Coldham-Fussell and Mr Blizzard sought the special meeting, they each depose, so as to be better informed of the Company's actual financial results to date and its cash flow forecasts.[22]

[34] The liquidators comment in their report that it was likely that the accounts for July and December 2002 were not accurate for reasons relating to the treatment of

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18 AR 327; 490; and 676.
19 AR 562.
20 AR 565.
21 AR 567.
22 AR 329; 492; and 678.

certain items by management. They also contend that, overall, but particularly by virtue of the overstated value of the plant and equipment, the accounts may not have correctly reflected the true financial position of the Company. The liquidators made adjustments to reflect their assessment of the carrying value of plant and equipment of $30-$40 million and so arrived at a negative net asset position from November.[23] The appellants make two submissions about this. The analysis on a summary judgment application of the solvency of the Company should not rely on reconstituted figures, and there was no evidentiary basis to support a wide ranging reduction in the value of the plant and equipment based solely on the lower than expected return for some plant and equipment at auction.

[35] Mr Falk, Mr Coldham-Fussell and Mr Blizzard each depose that at the end of November 2002 they reasonably believed the Company was solvent because:

- there was an expectation of receiving $277,000 from the Abigroup settlement;
- there were claims of approximately $1 million from Hitachi;
- there was an increase in the Scottish Pacific facility by $2 million;
- the reported year to date profit was positive, that is, $378,097 after including October's loss;
- there were debtors of $1.456 million;
- there was an extra $900,000 from Croesus;
- there were balance sheet assets for November 2002 of $25.4 million;
- $4.4 million was expected from the auction proceeds and
- $300,000 was expected from the sale of a Darwin property.

[36] The auction of the plant and equipment, in respect of which so many hopes had been held by management and the directors, produced proceeds after the discharge of the finance debts and costs of only $1.48 million. This result was formally notified to the Board in a memo from Mr MacKenzie dated 23 January 2003. As at 30 November 2002 the net profit before tax for November 2002 was a loss of $234,800 compared to the restructure budget of a projected $525,092 profit. There was thus a shortfall on the projected profitability under the restructure budget of $759,892.

[37] By email dated 2 December 2002 sent to the other directors and management Mr Falk, writing in response to Mr MacKenzie's final draft accounts which had been adjusted to take account of the results of the auction, said:

> "Graham [sic] thanks for the accounts. In my opinion we are going to need more than forward estimates of cash flow. Neil Summerson, Peter Blizzard and I have previously emailed and asked John Attwell to provide financial results to 31 October, statements from him on solvency, etc. When we get all of this info then we may be able to judge the solvency and on going viability of the business."[24]

[38] A special Board meeting was held on 5 December 2002. Management tabled the profit and loss accounts for the four months to 31 October 2002 and the October balance sheet together with the projected cash flow to 30 June 2003. The analysis showed an "accumulative positive cash flow" of $351,658 to 30 June 2003. The major assumptions underpinning that cashflow were:

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23 Insolvency Report s 5.2 and 5.3; AR 109 – 111.

24 AR 442.

- the Croesus stock-pile generating $600,000 in chargeable revenue by 31 December 2002;
- the auction would generate $1.9 million;
- debtors collection to occur within 30-45 days;
- financiers agree to re-write contracts to cover $841,000 in arrears;
- BML and Quadrant agree to defer interest payments to 30 June 2003;
- budget profit results including the WA Division were achieved;
- no contingency in the cash flow;
- the increased Scottish Pacific facility was activated; and
- assumptions noted in the cash flow statement.

The Minutes reveal that the cash flow was discussed at length and presented an optimistic view. The result relied heavily on all assumptions being achieved.[25]

[39] The Minutes also record:

> "Mr E Falk expressed concern as to the solvency of the company and he as a director was not prepared to sign the annual accounts or a solvency statement. Should the remaining directors disagree with his views then he was willing to resign as a director to allow the remaining directors to sign the accounts."[26]

Mr Falk explained in his affidavit:

> "I expressed my concern as to the solvency of the Company because the financial documents prepared and tabled by Attwell and MacKenzie at the meeting relied heavily on many assumptions, the assumptions being those recorded in the minutes of the meeting. Before I accepted the financial documents and signed off on the solvency of the Company I wanted to know if the Company would achieve the projected accumulative positive cash flow of $351,658 to 30 June 2003, in light of the conflicting records and information being provided by Attwell and MacKenzie to the directors at this meeting, and previous meetings, and the mistakes being made in relation to the preparation of the financial accounts."[27]

[40] The Minutes record that it was agreed that the cash flows were too vulnerable as presented and a cash injection was necessary for solvency and an ability to carry on business. A capital injection of $1 million from shareholders/investors (BML/Quadrant and Mr and Mrs Allen) was necessary to make the cash flow "robust". Further discussion suggested that the figure should be $1.5 million. Mr MacKenzie advised the Board that after reviewing the financial results to October 2002 the July result was overstated by $230,000 and that "…may result in a further write off." The meeting was adjourned without resolutions until the resumed meeting on 24 December 2002.

[41] Mr Coldham-Fussell deposes that despite Mr Falk expressing his concern at the meeting as to the solvency of the Company he thought it was solvent because the accounts showed an accumulative cash flow despite Mr MacKenzie overstating the results for July. Further the Company had assets equivalent to approximately

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25 AR 571.
26 AR 571.
27 AR 331.

$25 million which would be liquidated if required, and $1.5 million was to be injected by BML and the Allens in December 2002/January 2003.[28] Mr Blizzard was similarly reassured despite Mr Falk's concerns.[29]

[42] On 12 December 2002 a group of three payments were made to the Australian Taxation Office amounting to approximately $680,000.

[43] By letter dated 19 December 2002 BML agreed to provide a convertible note facility to the Company as part of a total financing package of $1.5 million, $750,000 to be provided by way of a convertible note and the balance $750,000 to be provided by the Allen family. In addition to the provision of funds by the Allen family, the injection was subject to Quadrant's outstanding interest of approximately $200,000 being deferred until conversion or repayment of the convertible note with interest to be charged but payment deferred until July 2003. This Quadrant agreed to do on 23 December.

[44] On 23 December 2002 Mr Coldham-Fussell emailed Mr Attwell and the other directors referring to a note from Mr MacKenzie in which he had written, "I cannot see how we can meet our immediate creditor commitments". Mr Coldham-Fussell sought comment and supporting information "as a matter of urgency"[30] and a report on the shortfall "apparently" coming from the auction sale, the debtors' financing facility draw down and the renegotiation of finance creditors. He concluded:

> "You will appreciate that with the meeting of the Board of December 5 standing adjourned, it is necessary that we come to a conclusion at an early date, preferably today, so that the accounts can be dealt with and that meeting progressed to a finality."[31]

According to the Solvency Report at that time the Company had $1.9 million worth of creditors exceeding 120 days.

[45] The Minutes of the continuation of the 5 December 2002 Board meeting held on 24 December 2002 noted advice from management that as at 28 November $6.6 million was owing to creditors with $2.5 million greater than 90 days; as at 20 December the total owing was $7.3 million with $1.4 million greater than 90 days and $2.3 million greater than 120 days; as at 23 December the total owing was $6.4 million with $1.2 million greater than 90 days and $1.9 million greater than 120 days. Those amounts did not take into account common debtor/creditor off-sets totalling $770,000. Management advised of other liabilities including a commitment of $1.8 million to purchase prime movers and trailers due for completion in February and a truck valued at $350,000 was on order and finance had been arranged. There was some question over the Hitachi equipment as Sogelease had refused to roll-over finance when the residual payments fell due on 22 November. Two small payments of $21,495 each were payable by 6 January 2003 and negotiations were underway to finance the Hitachi equipment which required $596,000 in funding. Management advised the Board that, although the claim against Hitachi was quantified at $1 million, "due to a lack of adequate documentation" a provable claim would only be $200-$300,000. Management tabled a list of proposed arrangements for deferment of loan repayments for each financier. The directors reviewed the list in order to form a view as to what level of support would be provided by the financiers.

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28 AR 494.
29 AR 681.
30 AR 579.
31 AR 579.

[46] The capital injection of $1 million by BML and the Allen family was noted.

[47] Mr MacKenzie reported that the profit result for the five months to November 2002 was $143,300 while the November result was a loss of $234,800 after writing back $230,000 for transactions in July which were incorrect. The November result was a small loss of $4,800. Mr MacKenzie reported that the Company was starting to see the benefit of tighter cost control in repairs and maintenance. Costs and depreciation for the auction equipment were being applied against the provisions raised in the June 2002 accounts. Management tabled the 12 month cash flow to December 2003 referring to the earlier assumptions. The following appears in the Minutes:

> "The directors having reviewed and considered the Financial Statements of the Company together with the Representation and Management letters and the twelve month cash flow to December 03 RESOLVED as follows
>
> - That they believed the Company was a going concern and had the ability to pay its debts as and when they fell due;
> - That the Financial Statements be hereby approved, and the Chairman of the Company be authorised to sign on behalf of the Board the Directors' Report and the Directors' Declaration;
> - That they expect the Company to generate sufficient profits in the future."[32]

Mr MacKenzie, as company secretary, was instructed to lodge the annual accounts and returns.

[48] By letter dated 24 December 2002 to the Board, Mr Attwell confirmed that the financial report was "free of material misstatements, including omissions"; there were no non-current assets stated in excess of their recoverable amount; and future revenues expected to be derived supported the respective carrying values. After vouching various obligatory matters Mr Attwell concluded that on a going concern assumption he was satisfied that the Company could meet its obligations for the 12 months from the date of signing the financial report. He confirmed that the following representations had been made to the Board:

> - "I believe the cash flow forecasts and underlying assumptions prepared on 2 December 2002 to be reasonable and achievable. We note that the cash flow forecasts have been prepared for the period to December 2003.
> - Additional capital of $1,500,000 is to be injected by the shareholders and certain note holders in December 2002 and January 2003.
> - Confirmation has been received from BML and Quadrant that interest will be deferred until 30 June 2003.
> - Based on sales achieved at auction, and sale of the remaining items we expect to receive net auction proceeds of at least $1,645,000.
> - The Australian Taxation Office has issued a letter dated 19 December 2002 agreeing to our repayment schedule."[33]

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32 AR 582.

33 AR 592.

A letter in the same terms was provided to the Company's auditors, Ernst & Young[34] and signed by the Chairman and Mr Attwell.

[49] Because of the matters mentioned in the letters, Mr Falk, Mr Coldham-Fussell and Mr Blizzard depose that they each believed that the Company was solvent.[35]

[50] A third payment was made to the Australian Taxation Office on 27 December 2002 in the sum of $90,000.

[51] The actual net profit before tax to 31 December 2002 was a loss of $415,100 compared to the restructure budget of $45,969 profit. This was a shortfall on the profitability under the restructure budget of $461,069. This loss was reported to the Board on 23 January 2003 by Mr MacKenzie. He explained the loss compared to the restructure forecast as attributable to the timing of expenses and accruals "flow[ing] through the books inconsistently".[36] He conceded that he had contributed to the problem by his calculation of monthly payroll figures. He forecast trading losses at $250,000 per month unless sales were to rise in the coming months. He foreshadowed further losses. He noted that the auction results had been finalised. The funds paid to the Company were $1,488,982.86. Those funds were disposed in tax payments of $705,845.98, other creditors $431,493.75, stamp duty of $86,488.98, wages of $120,003 and servicing loans $145,150.95. Mr MacKenzie noted that due to cash flow pressures GST funds had not been preserved and were owing to the Australian Taxation Office. He further noted, more positively, that the Scottish Pacific facility was "fully operational" and had been a major contributing factor to managing day to day cash flows, however the Company had been unable to utilise this facility fully because some debtors were not being funded, there were lower sales in December and January and difficulties "arranging cheque swaps with creditors who owe [the Company] money".[37] The Croesus stock-pile issue was estimated at December to be worth $745,236.44 but was still unresolved.

[52] On 23 January Mr MacKenzie reported to the Board that the Company had received a number of summonses since November. These had been paid prior to the final date to avoid further action. Of the six outstanding, the largest was by Hitachi for $183,670.01. He noted that management had agreed to pay Hitachi $50,000 per week to avoid further action. Winding-up proceedings due to commence on 13 January had thus been delayed. Hitachi declined to discuss a set-off of $437,000 owing to the Company until its payment was paid. Mr MacKenzie opined that the Company had received many final letters of demand from credit agencies and creditors' solicitors which would eventuate in more summonses being received. The amounts per creditor were small and could be managed, but, he noted, several large creditors were on payment plans, where, if the Company failed to meet the payment date, a summons would be issued. Major creditors such as Caltex who were owed in excess of $200,000 had not issued proceedings.

[53] On 23 January 2003 members of the Allen family met with a representative of MacMahon Holdings Ltd who had expressed interest in investing in the Company by merger or takeover.[38] There was a fresh proposal from Quadrant to invest

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34 AR 586.
35 AR 337; 500; and 686.
36 AR 594.
37 AR 595.
38 AR 501.

a further $2.5 million in the Company and the Allens and BML $250,000 each. The Company's financiers had agreed to defer interest and lease payments for two months which was estimated variously to provide $1.4 million to $2 million in cash flow.

[54] Mr Falk deposes that he considered Mr MacKenzie's memos in conjunction with the potential investment by MacMahon Holdings Ltd, the expected injection of $2.5 million capital by Quadrant and the $500,000 from the Allens and BML as well as the deferral of payments by the creditors and believed that with that support the Company was solvent.[39] For similar reasons Mr Coldham-Fussell believed that the Company was solvent.[40]

[55] A Board meeting was held on 24 January 2003. Mr Falk is minuted as expressing concern that directors' fees had not been paid and should, as preferred creditors, be paid. Management were asked to pay immediately. Mr Falk explains[41] that he was referring to directors who had resigned in October 2002 to help reduce costs to the Company and should have been paid their directors' fees. Mr Allen had retained the service of a business broker to source potential buyers for the Company and initial discussions had commenced with MacMahons Holdings. The poor performance of UPH was noted with some action to follow. Mr MacKenzie presented the financial results showing a loss of $272,150 for the six months to December 2002. The Chairman advised that through the representations of Mr Allen all finance companies had agreed to a two month deferral on payments with a consequent cash flow of $1.4 million.

[56] An email dated 28 January 2003 was sent by Mr MacKenzie to John Kouvelis, Trevor Moir and James Baird, apparently Sydney-based business associates. The appellants did not see this email until after the commencement of these proceedings and dispute its contents in several respects. It is included in the liquidators' material (as is reference to an email dated 16 October 2002 to Mr MacKenzie's daughters to the effect that the Company was then insolvent to which reference will be made below). Mr MacKenzie notes that things were difficult in Mackay; that he had made a bad decision (presumably to go there for work); the Company was trading with major losses and had a difficult cash flow situation; "Government taxes, directors fees, superannuation and statutory charges" had not been paid for many months, "[n]ot to mention trade creditors and secured financiers, who all hound us daily for payment"[42], adding:

> "I met with the board in Brisbane last week and advised them that the company was insolvent with many legal actions against the company about to commence. With all these problems the board sacked the CEO at the Christmas board meeting. The major shareholder who is also a senior manager with the group has gone into deep depression and can't get out of bed. He has lost several million dollars of his investment."[43]

[57] Each of Mr Falk, Mr Coldham-Fussell and Mr Blizzard point out[44] that, as company secretary, Mr MacKenzie was responsible for preparing the Minutes of Board

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39 AR 339.
40 AR 502.
41 AR 339.
42 AR 602.
43 AR 602.
44 AR 341; 503; and 689 - 690.

meetings. The contents of the email set out above are not reflected in the Minutes as having been reported as concerns to the Board. Further, the accounts prepared by him were positive.

[58] The balance sheet for January 2003 showed a surplus of assets over liabilities of $24,263,734.11.

[59] On 17 February 2003 the directors received a memo from Mr MacKenzie concerning the cash flow position of the Company. It had reached a critical point where it was "increasingly difficult" to meet creditors' demands; the overdue creditors who required immediate payment amounted to $4.847 million as at 31 January 2003; Queensland Payroll Tax Office "may" agree to a one year payment program; a financier was considering financing the trailers in Western Australia and if those initiatives proved successful creditors requiring immediate payment would fall to $3.97 million; the total funds available from debtors' collections and sales as at 6 February was $2.489 million; and the cash shortfall was still $1.48 million. That figure was dependent on the speedy resolution of the Croesus stock-pile and debtors' collections and understated the true cash position. Creditors were calling in payment on November accounts, in some cases for full settlement. January sales were down to $3.24 million against the budget estimate of $3.67 million. If that trend continued the cash position would deteriorate further. The Company was attempting to meet its commitments by a payment program but this did not satisfy all creditors' demands. He estimated the Company was spending $870,000 a week for which sales of $1.025 million were required. The budget projections ranged from $4.4 million to $4.6 million per month. Of the $1.5 million available from the noteholders only $750,000 would be paid to creditors which would have little impact. Mr MacKenzie advised that the Company would not survive without further financial support. The sale of the Company was the best option.

[60] Mr Falk, Mr Coldham-Fussell and Mr Blizzard each contacted Mr MacKenzie for a full set of accounts, which they had earlier requested, to make an informed decision.[45]

[61] The net profit before tax to 31 January 2003 was a loss of $861,300 compared to a projected net loss in the restructure budget of $41,185. Mr MacKenzie reported these figures to the Board in a memo dated 23 February 2003. The balance sheet for January 2003 showed a surplus of assets over liabilities of $24,263,734.11. In addition to notifying the Board of the much larger loss than the restructure budget had forecast, Mr MacKenzie noted that the drop in sales was largely attributable to poor performance in Western Australia in part due to the Company's inability to pay Caltex for fuel. A number of creditors were refusing to supply goods or only giving limited supply until their accounts were fully paid. Pressure was being felt in meeting the weekly payroll and tax of approximately $115,000 and $180,000. Mr MacKenzie explained that more than half the January loss resulted from the writing-off of a costing error. He added:

> "Over the past several months a number of accounting issues have impacted the result and distorted the proper timing of profit reporting. This may have caused confusion in the board's mind and has left me with some doubt as to what trends are emerging in the numbers. The accounting issues I refer to include, the [A]ugust

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45 AR 342; 505; and 691.

> accounting adjustment, the restructuring cost writebacks, timing of R&M recognition and some accounting errors."[46]

Sales in the coming months would fall short of previous projections and a $500,000 reduction in sales "is completely realistic". He concluded:

> "Under these assumptions, March through to May will be cash flow negative with March peaking at $1.5m. Obviously this is not possible and creditors will not get paid. This position is not sustainable as creditors continue to take legal action to collect outstanding debt. To my mind the company is insolvent and cannot continue without a sale to McMahons."[47]

[62] The Board met the next day on 24 February 2003. Mr MacKenzie formally reported the loss for January due to low January sales which was largely attributable to poor performance in Western Australia. This was heavily impacted by lack of parts and fuel. Many suppliers in Western Australia were owed money in excess of $100,000 and trading accounts had been put on stop credit. The Minutes record that the trading performance of UPH was discussed at length "and the directors insisted that management instigate initiatives to correct the poor trading performance". Mr MacKenzie explained the almost $500,000 accounting error which he had mentioned in his memo the previous day. He presented the February to December 2003 cash flow. The Minutes record the following points:

- Significant monies were still outstanding from the Croesus contract.
- King Solomon's Mine was in administration and the Company was owed approximately $1 million.
- The security deposit of $757,000 to Sogelease was unacceptable and should be renegotiated.

The directors identified certain areas and omissions in the cash flow predictions making them inaccurate. Mr MacKenzie was asked to represent the cash flow to the Board. The meeting was adjourned.

[63] After receiving Mr Mackenzie's memo of 23 February 2003, Mr Coldham-Fussell and Mr Blizzard, also a director of BML, discussed a proposal by Quadrant to inject a further $2.5 million capital into the Company. If that eventuated (and the indication was promising) Mr and Mrs Allen and BML would each inject a further amount of $250,000 into the Company.

[64] On 26 February 2003 Mr MacKenzie emailed the Board that he had not yet completed the new cash flow as there were some outstanding matters. He provided the new figures on 7 March 2003.

[65] Mr Falk, Mr Coldham-Fussell and Mr Blizzard depose that at the time they were awaiting Mr MacKenzie's complete set of figures, MacMahons was considering a merger or takeover of the Company; the injection of $3 million in new capital was under consideration by Quadrant, BML and the Allen family; the balance sheet for February 2003 had net assets of $23.2 million; the benefits of interest deferred by BML and Quadrant was still being achieved in the amount of $562,377 which, together with the deferral of interest and lease charges by the financiers, was

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46 AR 609-10.

47 AR 610.

approximately $1.4 million. For those reasons each deposes that the Company was solvent. The directors believed that the Company could pay any creditors and the injection of funds would extinguish the loss in January, "…it being subject to revision by MacKenzie due to the errors".[48]

[66] Mr MacKenzie emailed a revised cash flow for March, reviewed by Mr Attwell to the Board. Outstanding creditors had not been reduced significantly and, as at 1 March, $2.845 million was still owed to creditors from November and prior. Many creditors were taking legal action with some summonses exceeding $100,000. The figures produced showed projected negative cash flows for the balance of the financial year and thereafter positive cash flows from July through to November 2003. The sales in January and February had been well below original targets. Since the cash flow for the following nine months was positive, that there was to be a cash injection into the Company and the value of the Company's assets still exceeded debt, Mr Falk, Mr Coldham-Fussell and Mr Blizzard each depose to their belief in the solvency of the Company.[49]

[67] Mr Mackenzie reported to the Board on 11 March 2003:

> "In recent months I am sure, through my reporting to you as a board I have caused some confusion and doubt in your mind as to the financial position of the company. And as recently as the last board meeting I made errors in the cash flow which frustrated the board. "[50]

Notwithstanding some more positive cash flow monthly predictions from March to June, Mr Mackenzie was not confident that increased sales would occur and operational cash flow would thereby be negative. He noted that the major hurdle for the Company was to overcome the disparity between debtors and creditors. Excluding outstanding commitments to the Australian Tax Office and convertible note interest, creditors in all other categories totalled $6.79 million as at 28 February. Debtors were $8.36 million, of which $4.1 million was funded and the money spent. The difference, he noted, of $4.26 million consisted of unfunded debtors, late February sales funded in March and the 15 per cent balance of cash outstanding when debtor receipts were paid. The net funds collected from debtors after allowing for King Solomon's Mine was only $3.26 million. There was an urgent need for cash to satisfy creditors dating back to November 2002.

[68] Mr Coldham-Fussell requested revised cash flows so that he could form his own opinion about the views expressed in Mr MacKenzie's memo. He noted that there was still under active consideration the injection of $3 million capital which had been delayed because the revised accounts had not been provided to Quadrant and the Company retained unused and obsolete assets which would bring in $620,000.

[69] Mr MacKenzie resigned from the Company on 11 March and Mrs Allen assumed the role of preparing, tabling and reporting on the financial records of the Company.

[70] On 11 March 2003 Mr Falk retired as a director for health reasons and because he had almost reached the Company's retirement age. In his letter to the Chairman he said:

> "On my return from overseas to the October 2002 board meeting I was greatly surprised with the seriousness of the company's situation being presented to us by the Chief Executive, particularly as

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48 AR 507.

49 AR 345; 508; and 694.

50 AR 623.

> prior to my departure we had been provided with budgets, which even after the directors' request for review, were re-presented showing good profits and cash flows for the next two years. At this meeting I agreed to continue and assist the restructure of the company which is now nearing completion with a good candidate identified for CEO. The cash flow statements just to hand for the next eight months show a positive situation and Macmahon Holdings Ltd appear interested in acquiring [the Company]."[51]

[71] At the Board meeting of 18 March 2003 the Minutes record that Mr MacKenzie's memoranda of 7 and 11 March were discussed. The new cash and profit forecast for the 12 months reviewed by Mr Atwell, Mr and Mrs Allen and Mr MacKenzie and others, showed a cash flow forecast with positive results over that 12 month period and the profit and loss forecast showed the ability to achieve positive net profit after tax. The Board resolved that those projections be adopted as the Company's operating plan for the coming 12 months subject to regular review. The Board was seeking a new chief executive officer and company secretary. On a review of current litigation management was assured that all outstanding matters would be settled before court. All liabilities to the Australian Taxation Office were up to date. Business brokers were continuing to represent the Company and associated interests in discussion with MacMahons.

[72] Mr Coldham-Fussell and Mr Blizzard depose that given the injection of a further $1.5 million of capital and the targets set to reduce overheads, costs savings, the deferral of interest, the payment of all Australian Tax Office liabilities and agreement to the other tax amounts, the Company was projected to have a positive cash flow and achieve a positive net profit after tax. There was some possibility of a further injection of capital up to $1 million. They each believed that the Company was solvent.

[73] The Board met on 17 April 2003. Mr Ashley Fraser was appointed chief executive officer of the Company approved by BML and Quadrant. The Minutes record that the Chairman confirmed his earlier advice to Board members that MacMahons had advised through the brokers that they had no interest in proceeding with an offer to acquire the Company as they were unable to make adequate arrangements with their bankers or financiers. The brokers were noted as being keen to renew a search for potential acquirers but no further action would be taken at that stage. Mr Fraser tabled a report relating to the Company's cash flow. He expressed an opinion to the Board "being a view formed in the main by instinct and general business perceptions due to lack of time to analyse the business" that the current situation could be traded out and to achieve this he outlined a number of initiatives. The Board endorsed these initiatives subject to Quadrant and BML approval. The profit and loss statement showed a loss of $536,000 for February and $681,000 for March. Directors expressed concern at the level of sales revenue which was well down from levels forecasted. There was discussion about a further injection of capital. BML might inject a further $250,000 if the Allen family matched that contribution but Mrs Allen doubted that the family could raise any more money. It appears that some legal actions had settled.

[74] The Board met again on 28 April 2003. The Minutes were prepared by the Chairman. The cash flow was reported on for the next seven days by management

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[51] AR 453.

and on the longer term cash forecast. There was to be a further auction of equipment on 3 May which was subject to the consent of the noteholders. The Minutes note that further detailed information was required in respect of projected revenue and expenses for the current and next financial year for which a meeting would be held in May. An email dated 29 April 2003 from Mr Fraser to the Chairman with an updated cash flow model showed the cumulative cash balance as decreasing to approximately negative $2 million in June 2003.

[75] Mr Coldham-Fussell and Mr Blizzard depose that the possibility of the further injection of capital which had been foreshadowed would extinguish the negative cash flow and they were still confident that the Company was solvent and could trade out of its position and could better its financial position in the future. Mr Blizzard was confident that Quadrant would provide further funds to ensure that the Company "did not fold".[52] To that end Quadrant commissioned Deloitte Touche Tohmatsu to provide a report on the financial position of the Company. The report was pessimistic and Quadrant decided not to invest. As a consequence, neither BML nor the Allen family would inject further capital. Without those funds, as the directors conceded, the Company could not continue to incur decreasing sales and negative cash flow and on 13 May 2003 the directors resolved to appoint administrators to the Company.

[76] Each appellant deposes:

> "I formed this belief [as to solvency] from financial information and records provided to me by employees of the Company, from my knowledge of the affairs of the Company, and the financial resources available to the Company.
>
> I had reasonable grounds to rely upon, and did rely upon Attwell and MacKenzie to be competent, reliable and able to prepare and provide me with accurate and timely information pertaining to the affairs and solvency of the Company during the relevant period.
>
> I believed and relied upon Attwell and MacKenzie to maintain proper accounting and reporting systems, proper books and records and to provide regular monthly operational reports and financial statements regarding the Company's financial circumstances.
>
> The board relied upon Attwell and MacKenzie to provide proper information. Whilst errors were made from time to time, I had no reason to doubt either of their ability."[53]

[77] The appellants refer to the extensive and relevant experience and qualifications of Mr Attwell and Mr MacKenzie upon whom they relied for the provision of timely and accurate information. They each depose to careful scrutiny of all the financial reports prepared and tabled by Messrs Attwell and MacKenzie for error and/or miscalculation. They believed that the restructure plan would result in cost cuts and savings which, together with the other financial resources which were available or potentially available as discussed above, meant that the Company was solvent during the relevant periods. Mr Coldham-Fussell and Mr Blizzard additionally join issue with a number of conclusions in the liquidator's report.[54] They were not required for cross-examination.

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52 AR 516.

53 AR 347; 517; and 704.

54 See, for Mr Coldham-Fussell AR 525-529, and for Mr Blizzard AR 712-717.

**The decision below**

[78] After setting out uncontentious matters the learned primary judge identified the issues for determination as:

> "(a) on the plaintiffs' summary judgment application against the defendant – the company's actual insolvency when the payments were made; and
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> (b) on the defendant's summary judgment against the first, second and fourth third parties – the third parties' expectation that the company was solvent when the payments were made and that it would remain so."

[79] Her Honour referred to Barwick CJ's well known dictum in *Sandell v Porter*[55] on the meaning of insolvency and summarised the Company's financial position by reference to the Board Minutes and the various memoranda from management.[56] Her Honour referred to aspects of the Solvency Report to indicate the Company's insolvency at relevant times and specific challenges to those conclusions by Mr Coldham-Fussell. She noted his contention that the value of a company's plant and equipment as a going concern is significantly greater than in liquidation; that, contrary to the liquidators conclusion that the Company should have reviewed the carrying value of its plant and equipment in November 2002 in light of the auction results, that had occurred in the 30 June 2002 annual accounts signed off on 24 December 2002; and his contention that the solvency tests for equipment hire companies were best determined by an examination of a company's total net asset worth and coverage of trade creditors by trade debtors, business value and financing and funding resources available to the company. Her Honour noted Mr Coldham-Fussell's assertion that in the seven months from July 2002 to 31 January 2003 the Company's earnings/profits before interest and tax were in surplus. Her Honour countered by noting, however, that once large finance and convertible interest for the seven months to January 2003 were taken into account the result was a loss of over $1 million. Her Honour noted his assertion that the liquidator had failed to account for the funds received from the auction of plant in November 2002; and that he referred to successful negotiations with financiers who had agreed to defer interest payments to allow the company to rearrange its fundings.

[80] The learned primary judge took into account the submissions by the Commissioner on the issue of solvency and the indicia advanced by Mandie J in *ASIC v Plymin*.[57] These her Honour set out with relevant comment.[58] Her Honour concluded that on the objective facts the appellants had no real prospect of defending the liquidators' claim against the Commissioner "on the only ground which is in issue - the actual insolvency of the company when the various payments were made".[59] She noted that the Commissioner had consented to judgment and that there was no need for a trial of the liquidators' claim against the Commissioner. Her Honour gave judgment for the liquidators against the Commissioner for $2,304,310.53 plus interest. The appellants do not challenge that finding about actual insolvency.

[81] The learned primary judge then considered the Commissioner's claim against the appellants and their defences under s 588FGB. Her Honour referred to the

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55 (1966) 115 CLR 666.
56 Reasons [21] – [47].
57 (2003) 46 ACSR 126.
58 At Reasons [54].
59 At Reasons [55].

observations of Debelle J on the duties of a director in *Carrier Air Conditioning Pty Ltd v Kurda*[60] concerning s 556(1) of the *Companies (SA) Code*, not relevantly different from the provisions under consideration. Some of the strictures made by his Honour against directors relying on "indulgences" to the company might not now be expressed as severely. In *Sims v Deputy Commissioner of Taxation*[61] Hammerschlag J commented, relying upon *Powell v Fryer*,[62] that "[i]t is legitimate [on the question of solvency] to take into account indulgences extended to a company by its creditors as to trading terms."[63] *Carrier Air Conditioning* was an appeal after a trial.

[82] The learned primary judge referred to *Sims* in support of the following propositions:[64]

> "'Reasonable grounds' to expect requires more than a mere hope or possibility: *Tourprint International Pty Ltd (in liq) v Bott*.
>
> The test requires the director subjectively to have that expectation and for the expectation to be reasonably based.
>
> The director's conduct is to be judged not only on what he knew but on what he ought to have known: *Deputy Commissioner of Taxation v Saunig*".[65]

[83] While noting the appellants' sworn belief that the Company was relevantly solvent the learned primary judge emphasised that in order to have a defence, that expectation must be reasonably based. Her Honour concluded:

> "The objective evidence points overwhelmingly to the absence of reasonable grounds for such an expectation. The third parties were at all times aware of the company's financial circumstances. Their reliance on the forecasts and proposed capital injections to ground an expectation that the company was solvent and would remain so was not reasonably based…"[66]

Her Honour's reasons for that conclusion were:

> "(a) The forecasts were based on assumptions that the directors considered to be 'optimistic'. They did not accept the restructure budget presented to the board meeting on 10 October 2002, which contemplated a cash flow deficit, and directed management to present a new budget that generated a positive cash flow. The forecasts were for monthly profits, but the company made monthly losses from October 2002. By the time the first preference payment was made in December 2002, actual sales and cash flow were well short of the forecasts – an objective indicator that the forecasts were unreliable.
>
> (b) The auction of surplus plant in November 2002, before the first of the preference payments, was expected to provide

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60 (1993) 11 ACSR 247.
61 [2007] NSWSC 998.
62 (2001) 37 ACSR 589.
63 At [157].
64 Reasons [60].
65 The knowledge in *Saunig* was the liability to pay income tax.
66 Reasons at [64].

> a return of $4.5 million, which would have been insufficient to pay out all existing creditors. In fact it produced a return of only $1.48 million. This was an objective indicator that the forecasts were unreliable, that the company was unable to pay its debts and that its assets were significantly overvalued in its balance sheet – in other words, that the company was both cash flow and balance sheet insolvent.
>
> (c) That the company needed to rely on noteholders and creditors to defer collection of their debts in order to continue trading was another objective indicator that it was unable to pay its debts when they were due, and was therefore insolvent.
>
> (d) The company increased its factoring facility with SPBF from $6 million to $8 million, but access to this amount was dependent on a sufficient number of qualifying debtors at any point in time. There were no profits to sustain repayments of the increasing debt. In those circumstances the increase to the factoring facility (which was insufficient to pay creditors) was another objective indicator that the company was insolvent.
>
> (e) MacMahon retracted its interest in purchasing the business as a going concern, and Quadrant refused to provide further capital after receiving independent advice – further objective indicators that the company was insolvent."[67]

[84] The appellants contend that the learned primary judge erred in assessing the defences without differentiating the times of the several payments to the Australian Taxation Office by taking into account later occurring facts that could not have been known to the appellants at the time of the earlier payments. It is uncontentious between the parties that the time to determine the question of the solvency of the Company for each unfair preference payment is at the time each payment was made. There is, with respect, an appearance in her Honour's reasons of "rolling up" events that occurred across the whole period of the payments. For example, it was not until the Board meeting of 17 April 2003 that it was formally notified that MacMahons were no longer interested in acquiring the Company. Brokers were still negotiating as reported at 18 March 2003 Board meeting.

[85] As has been discussed above, on 10 October 2002 the directors had considered that the proposed restructure plan was inadequate and directed management to prepare a plan which would achieve a cash flow surplus of $100,000 per month. Mr Attwell's memo to the Board of 23 October 2002 forecast a gross profit for each month from October 2002 to June 2003 with the expectation that January would return a small loss. The balance sheet for November 2002 showed a surplus of assets over liabilities in excess of $25 million. The disappointing auction results were not known and there was no reason to suppose that the assets had been overvalued. In fact, the Company made provision in December 2002 for the diminution in value in those assets in its 30 June 2002 annual accounts which were signed off on 24 December 2002. Mr Coldham-Fussell contends that "[t]his illustrates that the new asset position as at December 2002 was significantly better than as represented by the Liquidator in his report".[68] Further, he contests the

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67 Reasons at [64].

68 AR 525.

liquidator's statement that the Company had a poor liquidity demonstrated by the negative current net asset position:

> "The Liquidator either does not understand, or omits to accurately present, that equipment hire companies such as this, should not use the current asset ratio test as a basis for determining liquidity for the reason that their prime stock in trade is their equipment, which is also their largest expense item. Companies' such as Allens are required to record the hire purchase and finance costs for the next twelve months for their equipment in the current liabilities, whereas its current assets in the balance sheet only include the historical balances of assets. The solvency test for equipment hire companies is best determined by an examination of a company's total net asset worth and coverage of trade creditors by trade debtors, business value, and financing and funding resources available to the company. The Company was well positioned in all of these areas."[69]

[86] As at the end of November the estimates of the proceeds of the auction of plant and equipment was $4.5 million and there was an extra $2 million from Scottish Pacific. The memos of 15 November 2002 discussed the renegotiation of the stockpile at the Croesus Mine which would entitle the Company to up to $900,000. The claim against Abigroup had been settled with the Company to receive $277,000. There was also the unresolved claim against Hitachi of $1 million. The qualification about the documentation for a claim of that magnitude had not been revealed to the Board. Finally, the financial statements showed a profit for the year to date of $378,097 after accounting for restructuring costs. The appellants are critical of the primary judge's failure to put these facts in the balance when she reached her conclusion that the evidence pointed overwhelmingly to the absence of reasonable grounds.

[87] The liquidators respond by pointing out that the directors had rejected management's restructure plan on 10 October 2002 because it showed a negative cash flow and directed a plan to be brought back showing a positive cash flow. They submit that this not only demonstrates that the directors were not relying on management to provide them with information about the solvency of the Company but were, in fact, ignoring that advice. Management's restructure plan indicated to them that the Company was not able to pay its debts as they fell due. The liquidators contend that whether a company's liquidity is better reflected in a comparison of current assets to current liabilities rather than a balance sheet test which includes assets which are not readily realisable is not to the point. This is because, notwithstanding the optimism of the positive factors mentioned by the directors, they were told of statutory demands, that suppliers were stopping credit and threatening legal action; that the company was unable to draw on the existing factoring facility due to its high level of bad debtors so the extra $2 million would make no difference (the directors were not actually informed until 23 January 2003); there was no basis for any expectation that the customers of the Croesus stockpile would agree to change the contract; nor was there any prospect that funds could be recovered quickly from litigation against Hitachi. It might be thought that these differences would more appropriately be resolved at a trial than on documents and submissions.

[88] The appellants also point to other factors in December 2002 which pointed to a real prospect of a finding that there were reasonable grounds for an expectation of

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69 AR 525-526.

solvency. The projected cash flow to 30 June 2003 tabled at the Board meeting on 5 December 2002 showed an accumulated positive cash flow of $351,658. As noted in the Minutes the directors thought this was "optimistic" because it depended on a number of assumptions being fulfilled, so in order to make the cash flow robust they considered that a capital injection was necessary. The liquidators point to Mr Falk's concern about the solvency of the Company recorded in the Minutes of the meeting of 5 December 2002 but that overlooks Mr Falk's explanation that the agreement to inject $1.5 million into the Company by BML and Mr and Mrs Allen overcame his concerns.

[89] The learned primary judge noted that at the Board meeting on 24 December 2002 Mr Attwell informed the Board that the Company had total debts due of $6.4 million with $1.2 million owing for greater than 90 days and $ 1.9 million owing for greater than 120 days and that the Company had made a loss for November 2002. Her Honour concluded:

> "It ought to have been obvious to the directors that the proposed capital injections by the Allen Family and BML of $1.5 million would be inadequate to enable the company to pay its aged creditors, let alone ongoing costs."[70]

Her Honour referred to the much reduced actual surplus from selling the plant and equipment and concluded:

> "… it ought to have been clear to the directors at that time that the company's plant and equipment assets were grossly overstated, and that the company was insolvent on a balance sheet test as well as a cash flow test."[71]

[90] The appellants contend that the learned primary judge erred in concluding that the appellants' reliance on the forecasts and proposed capital injections to found an expectation that the Company was solvent and would remain so was not reasonably based; and that she erred in finding that it ought to have been obvious that the proposed capital injections would be inadequate to enable the Company to pay its aged creditors and ongoing costs. They argue that at the 21 November 2002 meeting, although a loss of $360,811 was reported for October, the Company had actually made a profit for the year to date of $378,097. Similarly at the 24 December meeting the loss of $234,800 which was reported for November 2002 was adjusted because there were incorrect transactions in July and the loss was only $4,800 and there was still a profit for the year to date of $143,300.

[91] The appellants contend that her Honour's conclusion that the assets were overvalued on its balance sheet was unwarranted and speculative because there was no evidence of what value was attributed to any particular items, or that the auction results were reflective of all the plant and equipment. The liquidators criticise the appellants for not reviewing all the assets of the Company and the balance sheet after the auction but, as Mr Jackson submitted, this is the language of a finding of fact after exploration at a trial.

[92] The appellants contend that the learned primary judge erred in finding that the approval of increased factoring credit limits with Scottish Pacific was no basis for expecting the Company was solvent since access to the extra amount was dependent on a sufficient number of qualifying debtors. The liquidators contend that the Board

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70 Reasons at [67].

71 Reasons at [67].

was well aware of the problem with unacceptable debtors by 15 November 2002. Nevertheless the appellants depose to being heartened by Mr MacKenzie's report that the Scottish Pacific facility had been a major factor contributing to day to day cash flow noting that it had not been fully drawn.

[93] The learned primary judge found[72] that on the basis of the information supplied by Mr Attwell and Mr MacKenzie the appellants could not have expected that the Company was solvent and they did not, in any event, rely on information provided by them or any other competent and reliable person. On the first limb of s 588FGB(4) her Honour identified a number of factors which she concluded demonstrated that before the first payment was made to the Australian Taxation Office the appellants could not have held an expectation that the Company was solvent because Mr Attwell had provided the Board with information to the opposite effect, namely:

> "• The company was struggling to maintain financier contracts at 'only one month overdue';
> • The sale of assets in November 2002 … was short of the amount required to pay outstanding current liabilities of the company;
> • Many suppliers of the company were stopping credit and threatening legal action;
> • Several statutory demands and summons had been received and the company had not been able to satisfy all of the demands through payment or agreed terms;
> • Cash flow was 'extremely tight';
> • The company was not able to access additional funding [through Scottish Pacific] … due to their high number of unacceptable debtors;
> • NAB had restricted the company's use of their overdraft facility to payroll transactions only;
> • The company had been approved for an increased factoring facility with [Scottish Pacific];
> • The company's accounts showed significant reductions in revenue from Townsville Heavy Haulage and UPH, the latter due to a lack of cash to support the operations, and overall showed a loss for October 2002."[73]

[94] The learned primary judge concluded that the information Mr MacKenzie provided to the appellants between 5 December and 11 March 2003 made it clear that the Company was unable to pay its debts as and when they fell due. Her Honour identified the following matters which led to that conclusion:

> "• The company's results for July 2002 appeared to be overstated by $230,000.00;
> • The company made a loss again in December 2002 and would make a loss of $250,000.00 per month unless sales rose in coming months;
> • [Mr MacKenzie] had located a negative balance in the costings account in the amount of $492,000.00, which would result in further losses;

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72 Reasons at [65].

73 Reasons at [66].

- The auctions of plant in November 2002 had produced surplus funds of only $1.488 million;
- The company was unable to draw down the full factoring facility …;
- Cash flow would be impacted by King Solomon's Mine going into administration with a debt to the company of $981,985.82;
- Sales were expected to be significantly below budget for January 2003;
- Weekly payroll was not paid when due on 4 February 2003 but the company was expecting to pay it on 5 February 2003;
- Cash flow had reached a critical point with January sales $30,000.00 below budget;
- The amount of cash injection from noteholders would not be enough to impact on creditors;
- [Mr MacKenzie] was of the view that the company would not survive without further financial support, and should be sold;
- The company made a loss in January of $861,300.00 as sales of $3.06 million were well below projected sales of $3.71 million;
- WA performance was significantly adversely affected by the company's inability to source fuel or parts due to the suppliers putting it on stop credit …;
- The company required sales of $4.4 million to $4.6 million per month … to break even. In the year to January 2003 it made sales of only $27.6 million and so made a loss of $1.8 million;
- … sales would be $500,000 per month short of projections, resulting in negative cash flow… from March 2003 to May 2003, peaking at $1.5 million;
- In his view the company was insolvent;
- The company had made continual losses since July 2002 and he considered the losses would continue."[74]

[95] Mr Jackson submitted, it seems correctly, that these factors which led to her Honour's conclusion of clear insolvency were all raised with the Board after 24 January 2003. The first item was reported at the meeting of 5 December but the balance appear to be from the end of January. One other factual concern was identified by the appellants. Her Honour referred to evidence in the Solvency Report that Mr MacKenzie informed the Board that the Company was insolvent.[75] At para 6.1.14 the following appears:

> "On 16 October 2002, Mr Graham [sic] McKenzie [sic] emailed his daughters where he stated that 'I told the Coy Sec that I have already informed Attwell that the company is insolvent and that he disagrees with me. MY staff and I continue to be badgered by creditors and financiers so not much gets done in the day'."

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74 Reasons at [68], fn 55.

75 AR 123.

There is no evidence that Mr MacKenzie expressed this opinion so firmly about solvency to the Board at any time prior to the end of February 2003. Mr Derrington submitted that the learned primary judge was referring only to the period after 5 December. Her Honour has, by referring to it, presumably, taken that piece of information into account as reflecting a view conveyed to the Board at the time it was written.

[96] The learned primary judge concluded that the objective evidence demonstrated that the appellants did not rely on Mr Attwell's or Mr MacKenzie's information about the solvency of the Company. They rejected it when they disagreed with it. The appellants depose that they did rely upon the expertise of Mr Attwell and Mr MacKenzie; that they found aspects of the restructure unacceptable and required a positive cash flow, they contend, is no more than diligent oversight by directors who sought management co-operation in more stringent cost cutting and economies. Their evidence does suggest, or, at least, opens for argument that they did rely upon the chief financial officer and the chief executive officer to provide them with reworked figures and summaries of how the businesses were operating around Australia in order to probe the issues that concerned them.

**Summary judgment**

[97] Rule 292 of the *Uniform Civil Procedure Rules* provides:

> "(1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
>
> (2) If the court is satisfied that –
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

Rule 293 provides in similar terms for a defendant to seek summary judgment against a plaintiff.

[98] The key expressions are "no real prospect" in respect of the defence of a claim and "there is no need for a trial of the claim". Other expressions have been proffered in an attempt to describe the task of the court in language which is thought to be of more assistance. Rule 292 is expressed in clear and plain language. It requires no judicial gloss to understand its meaning. What those phrases mean is best understood, in the time honoured way, on a case by case basis, informed by judgment about the relevant legal principles. In *Deputy Commissioner of Taxation v Salcedo*[76] the President described the rule as "clear and unambiguous language".[77] Justice Williams quoted with approval observations of Lord Woolf MR in *Swain v Hillman*[78] considering the English Rule 24.2 upon which Rule 292 was based:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or … they direct the court to the need to see whether there is a 'realistic' as opposed to 'fanciful' prospect of success."

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76 [2005] 2 Qd R 232; [2005] QCA 227.

77 At [2]. See also Williams JA at [11] – [17] and Atkinson J at [47].

78 [2001] 1 All ER 91 at 92.

[99] That approach was approved by the House of Lords in *Three Rivers District Council v Bank of England (No 3)*[79] where Lord Hobhouse observed:[80]

> "[t]he criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality."

Lord Hope said:[81]

> "The simpler the case the easier it is likely to be [to]… resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, … that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

[100] This court has endorsed the approach in *Swain v Hillman* on a number of occasions, for example *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)*[82], *Bernstrom v National Australia Bank Limited*[83] and Philip McMurdo J with whom McPherson JA agreed, in *Gray v Morris*[84]. But, as Chesterman J, as his Honour then was, noted in *Jessup v Lawyers Private Mortgages Pty Ltd*:[85]

> "The difficulty with the approach taken in *Salcedo* is that it begs the question of what is meant by the words 'no real prospect of success'… [and] while eschewing the need to put a gloss upon the wording of the rule in order to arrive at their 'plain and unambiguous meaning' two of the judgments felt obliged to explain that a real prospect of success was to be understood as being different from a fanciful prospect of success."

Nothing contrary to those views was expressed by this court in dismissing the appeal, Keane JA with whom MacKenzie and Jones JJ agreed, merely observing that his Honour had concluded that there was "no arguable case."[86] And Hayne, Crennan, Kiefel and Bell JJ in *Spencer v The Commonwealth*[87] deprecated any attempt to use synonyms when discussing the Federal Court summary judgment provisions:

> "No paraphrase of the expression can be adopted as a sufficient explanation of its operation, let alone definition of its content… The judicial creation of a lexicon of words or phrases intended to capture the operation of a particular statutory phrase… is to be avoided."[88]

[101] All of the Queensland decisions mentioned above[89] note that rule 292 must be applied in the context of the overriding purpose of the UCPR to "facilitate the just and expeditious resolution" of the matter in dispute.[90]

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79 [2003] 2 AC 1.
80 At [158]; 282.
81 At [95]; 261.
82 [2003] 1 Qd R 259.
83 [2003] 1 Qd R 469.
84 [2004] 2 Qd R 118 at 133.
85 [2006] QSC 003 at [18].
86 [2006] QCA 432 at [13].
87 (2010) 269 ALR 233; [2010] HCA 28.
88 At [58].
89 At [100].
90 *Uniform Civil Procedure Rules* 1999 (Qld), r 5.

[102] Recently, in *Spencer*, the High Court considered the operation of s 31A of the *Federal Court of Australia Act*. That provision is differently worded to rule 292 and permits summary judgment if the court is satisfied that the opposite party "has no reasonable prospect of successfully defending the proceeding".[91] By s 31A(3) a defence "need not be hopeless" or "bound to fail" for it to have no reasonable prospect of success. Lord Hope's caution about the deployment of summary judgment proceedings in "more complex cases" involving the resolution of issues of law and fact or of mixed law and fact was endorsed by French CJ and Gummow J in *Spencer*[92]. Their Honours noted that:[93]

> "[t]he exercise of powers to summarily terminate proceedings must always be attended with caution".

Justices Hayne, Crennan, Kiefel and Bell noted the important difference in the expression in the English rule, "no real prospect" (as in rule 292) and "no reasonable prospect" in s 31A. "The two phrases", their Honours said, "convey very different meanings".[94] Furthermore, the negative admonition in subsection (3), (not present in rule 292 or the English rule), operated to give further meaning to "reasonable". For that reason the further elucidation in *Spencer* of s 31A will not particularly assist in identifying the approach to rule 292. However, their Honours' acceptance "that the power to dismiss an action summarily is not to be exercised lightly"[95] is applicable to any phrase which broadly has as its purpose the test for summary dismissal of a claim or defence. Their Honours referred to *Agar v Hyde*[96] and the statement by Gaudron, McHugh, Gummow and Hayne JJ:[97]

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."

That statement was endorsed by Gleeson CJ, Gummow, Hayne and Crennan JJ in *Batistatos v Roads and Traffic Authority (NSW)*[98] and by French CJ and Gummow J in *Spencer*.[99]

[103] The learned primary judge did not analyse rule 292 (perhaps mindful of the warnings against elucidation); her conclusion was that the appellants had no real prospect of defending the Commissioner's claim against them and there was no need for a trial of it. The liquidators make something of the fact that these proceedings were on the Commercial List, that disclosure had been completed and that there was "no possibility" that any further evidence might become available to the appellants were there to be a trial. That it was on the Commercial List is not

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91 The proceedings for summary judgment in *Spencer* were brought by the Commonwealth as defendant but no different approach is required for a plaintiff seeking summary judgment from a defendant under the Federal Court rules.

92 At [26]; 243.

93 At [24]; 242.

94 At [51]; 248.

95 At [60]; 251.

96 (2000) 201 CLR 552; [2000] HCA 41.

97 At [57].

98 (2006) 226 CLR 256, at [46]; [2006] HCA 27.

99 At [24].

a relevant consideration and there is no suggestion that her Honour thought it was. That disclosure had occurred was a factor to consider. It was a bold submission that no further evidence might emerge in a trial.

**Conclusion**

[104] The business of the Company was geographically extensive, the material on the hearing was voluminous, the financial considerations complex and the Minutes upon which much depended were necessarily truncated versions of what occurred at meetings. There were differences between the liquidators and the appellants about the treatment of assets which remained differences but which appear to have been resolved in favour of the liquidators. The appellants are persons of considerable experience with appropriate qualifications for whom the orders are grave and who, it would appear on the documentary material, attempted to attend to their duties as directors. They have deposed to their belief and expectation and why they held those beliefs and expectations about solvency in considerable detail and at each relevant stage of the relation-back period. They are not irrational. They may have been in error but, if that be the conclusion, it should be reached in the ordinary way after testing those beliefs and expectations in a trial.

[105] In my respectful view, her Honour gave too little weight to the sworn opinions of the appellants and the real differences between them and the liquidators about the prospects for the Company. The signs of insolvency are usually easily seen in retrospect but that is not the test. It is at the time when the impugned payments were made and there is well founded concern that her Honour erred in not sufficiently compartmentalising the early periods from later information. It may well be the case that the later transactions are more vulnerable to challenge but in my view it could not be concluded that the appellants have no real prospect of successfully defending the claim particularly in respect of the payments made to the end of January 2003 and the way the proceedings were conducted below and on appeal does not suggest that judgment for part of the claim is appropriate.

[106] I would make the following orders:

1. Allow the appeal with costs

2. Set aside orders 2, 3, 5 and 6 of the orders made on 26 July 2010;

3. Otherwise, the costs of the application below are reserved.