SUPREME COURT OF QUEENSLAND

CITATION:	*International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors* [2013] QSC 91
PARTIES:	**INTERNATIONAL CAT MANUFACTURING PTY LTD (IN LIQUIDATION) ACN 099 908 942** (First Plaintiff) and **DAVID HAMBLETON AND ROBERT MURPHY AS LIQUIDATORS OF INTERNATIONAL CAT MANUFACTURING PTY LTD (IN LIQUIDATION) ACN 099 908 942** (Second Plaintiffs) v **RAYMOND JOHN RODRICK** (First Defendant) and **NU-LOG PTY LTD ACN 001 420 515** (Second Defendant) and **SUSAN RUTH CARTER AND JASON WALTER BETTLES** (Third Defendants)
FILE NO/S:	BS9739 of 2006
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	9 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	27, 28, 29, 30 and 31 August 2012, 25, 26 and 28 September 2012, 25 and 26 October 2012 and 14 November 2012.
JUDGE:	Philip McMurdo J
ORDER:	**The plaintiffs' claims are dismissed.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – WHAT CONSTITUTES INSOLVENCY – where company was balance sheet insolvent – where company granted a charge on understanding that chargee

would make up shortfall in company's working capital – where debt owed to chargee was significant proportion of company's overall liabilities – where director of chargee was investor in company and had interest in survival of business – whether company insolvent

CORPORATIONS – CHARGES, DEBENTURES AND OTHER BORROWINGS – VALIDITY – where company granted a charge on understanding that chargee would make up shortfall in company's working capital – where debt owed to chargee was significant proportion of company's overall liabilities – where director of chargee was investor in company and had interest in survival of business – whether granting of charge an insolvent transaction because company insolvent when charge given – whether granting of charge an insolvent transaction because it caused company to become insolvent – whether granting of charge an act done for purpose of giving effect to the transaction

CORPORATIONS – CHARGES, DEBENTURES AND OTHER BORROWINGS – VALIDITY – where company granted charge to another company of which one of its directors was also a director – where company granted a charge on understanding that chargee would make up shortfall in company's working capital – where debt owed to chargee was significant proportion of company's overall liabilities – where director of chargee was investor in company and had interest in survival of business – whether granting of charge was unreasonable director-related transaction or uncommercial transaction – whether chargee was a close associate of director of company – whether reasonable person in company's circumstances would have granted the charge

CORPORATIONS – CHARGES, DEBENTURES AND OTHER BORROWINGS – VALIDITY – where company granted charge to another company of which one of its directors was also a director – whether charge void under s 267 Corporations Act – whether chargee is relevant person – whether chargee took a step in the enforcement of the charge by taking boat which was property of the company – whether taking of boat was done for purposes of enforcing the charge or as purchase of boat

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – where company granted charge to another company of which one of its directors was also a director – where boat transferred from company to the chargee – whether taking of boat was done for purposes of enforcing the charge or as purchase of boat – whether transfer of boat a voidable transaction – whether transfer of boat an insolvent transaction because company insolvent when boat transferred – whether transfer of boat an insolvent transaction because it

caused company to become insolvent – whether transfer of boat an uncommercial transaction because reasonable person in company's circumstances would not have entered into the transaction – whether transfer an unreasonable director-related transaction

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – OFFICERS OF CORPORATION – DIRECTOR – WHO IS A DIRECTOR – where first defendant not registered as a director – whether first defendant acted in the position of a director

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – DUTY TO PREVENT INSOLVENT TRADING – where company granted a charge on understanding that chargee would make up shortfall in company's working capital – where debt owed to chargee was significant proportion of company's overall liabilities – where director of chargee was investor in company and had interest in survival of business – whether company insolvent at time debts were incurred by company – whether company presumed to be insolvent in 12 months prior to its winding up

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – where company granted charge to another company of which one of its directors was also a director – where company granted a charge on understanding that chargee would make up shortfall in company's working capital – where debt owed to chargee was significant proportion of company's overall liabilities – where director of chargee was investor in company and had interest in survival of business – where director of chargee appointed receivers and managers of the company – where boat transferred from company to the chargee – whether creation of charge was in breach of director's fiduciary and/or statutory duties – whether company was insolvent when debts were incurred by the company – whether transfer of boat was a breach of director's fiduciary and/or statutory duties

Corporations Act 2001 (Cth), ss 9, 95A, 181, 182, 183, 267, 588E, 588FB, 588FC, 588FDA, 588FE, 588G, 588M.
Uniform Civil Procedure Rules 1999, r 165(2)

Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd [1999] FCA 728, considered
Australian Securities and Investments Commission v Edwards (2005) 220 ALR 175; [2005] NSWSC 831, considered
Australian Securities and Investment Commission v Plymin (2003) 175 FLR 124; [2003] VSC 123, applied

Bank of Australasia v Hall (1907) 4 CLR 1514. considered
Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd (2010) 238 FLR 384; [2010] NSWSC 233, considered
Demondrille Nominees Pty Ltd v Shirlaw and Anor (1997) 25 ACSR 535, considered
Emanuel Management Pty Ltd v Foster's Brewing Group Ltd (2003) 178 FLR 1 [2003] QSC 205, cited
Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; [2012] FCAFC 6, applied
International Cat Manufacturing Pty Ltd & Anor v Rodrick & Ors [2010] QSC 30, cited
Lewis v Doran (2004) 184 FLR 454 at 479; [2004] NSWSC 608, cited
Lewis v Doran (2005) 219 ALR 555 at 578; [2005] NSWCA 243, considered
Re Newark Pty Ltd (in liq) [1993] 1 Qd R 406, cited
Sandell v Porter (1966) 115 CLR 666, considered
Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation (2001) 53 NSWLR 213, applied
The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 6) [2006] WASC 54, cited
The Bell Group Ltd (in liq) and Ors v Westpac Banking Corporation and Ors (No 9) (2008) 39 WAR 1 at 141; [2008] WASC 239, applied

COUNSEL: P Davis SC, with M de Waard for the plaintiffs
The first defendant appeared on his own behalf.
The first defendant appeared on behalf of the second defendant.
No appearance for the third defendant.

SOLICITORS: McKays Solicitors for the plaintiffs.
The first defendant appeared on his own behalf.
The first defendant appeared on behalf of the second defendant.
No appearance for the third defendant.

Introduction

[1] The first plaintiff, which I will call the company, built boats. They were sailing catamarans, hence its name. It was incorporated in March 2002 and immediately commenced trading on the Gold Coast. Its then directors were Ms Sarah Morrin and her husband, Mr Justin Coghlan. The shareholders are not disclosed by the ASIC records but it seems that they were one or both of the directors.

[2] This was not the first company through which Ms Morrin and Mr Coghlan had built boats. From 1999, they conducted a business through a company called TIY Manufacturing Pty Ltd ("TIY").[1] It built, or offered to build, several models of catamaran, one of which was called the C35. It was through the TIY business that Ms Morrin and Mr Coghlan met the second defendant, Mr Rodrick, in February 2002. TIY was then building a C35 which was given the number C3502 (TIY had

[1] Originally called Tasman International Yachts Pty Ltd.

built one C35 before this one). Mr Raymond Rodrick was a potential customer and liked what he saw. Through his company, the first defendant ("Nu-Log"), he contracted with TIY for the construction of a C35. This was a "hull and deck" package, meaning that TIY was to supply a constructed hull and deck leaving it to Nu-Log to fit the vessel with rigging and sails, furniture, electrical wiring, plumbing and other items. Mr Rodrick planned to perform at least most of this work himself and he moved to the Gold Coast to do so.

[3] In August 2002, when the construction of the hull and deck of Mr Rodrick's catamaran was well advanced, Ms Morrin asked him to agree to its sale instead to another customer, a Mr Stuart Rumble. Mr Rodrick agreed. I will return to the terms of that agreement but it provided for Nu-Log to be credited with a deposit of $25,000 towards the construction of another C35. The boat sold to Mr Rumble was numbered C3503. By this time, the C35 business had passed from TIY to the company, so that this agreement in August 2002 was made between it and Nu-Log. It appears that the TIY business had proved unsuccessful by this stage. It went under voluntary administration in April 2003 and was wound up a month later.

[4] In about October 2002, work began on the boat which became C3504 and which was then being built for Nu-Log. But it too went to another customer (a Mr Lynch), with Nu-Log's agreement in July 2003. At the same time the company began work upon the boat which became C3505. It was completed in March 2004 and then registered by the company in Nu-Log's name.

[5] By early 2003, Mr Rodrick was spending much of the working day at the company's factory. He was interested, of course, in the construction of whatever at the time was to be Nu-Log's boat. But he was taking a broader interest in the activities at the factory and in the conduct of the company's business. He and Nu-Log were also lending money to the company which it needed for its day to day operations. It employed several people and rented premises but its income came only from the sale of completed boats and by November 2003 it had sold only two of them.[2] The company needed this financial support from Nu-Log and Mr Rodrick. At least without it, it was insolvent.

[6] In November 2003, the company's only customer was Nu-Log. It had just commenced the construction of another boat, which became the C3506, but no deposit was paid by a customer for that boat until January 2004. Mr Rodrick offered to Ms Morrin to have Nu-Log lend further money to the company, but only upon the condition that the company granted to Nu-Log a charge to secure both present and future debts. She agreed and that charge was granted on 25 November 2003 ("the charge").

[7] Subsequently, Nu-Log made further advances and also received substantial repayments, most importantly from an amount for the C3505 being set off against the company's debt to Nu-Log when the boat was transferred to it. As I will discuss, the amount which should have been set off has been controversial.

[8] From November 2003, Mr Rodrick continued to work at the factory, even after he took possession of C3505. He claims that he was entitled to wages but, that by an agreement with Ms Morrin, the payment of his wages was postponed. And although he did not become a shareholder, he considered that he had an interest in

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2 The C3503 and C3504.

the business and acted accordingly towards Ms Morrin, Mr Coghlan and the company's employees.

[9] Eventually he and Ms Morrin fell out. He said that he was dissatisfied with the way in which she was having the company conduct its business and with the fact, as he asserted and (by mid-2005) she denied, that the company still owed money to Nu-Log. This culminated in Nu-Log's appointment of receivers to the company pursuant to the charge, on 5 August 2005. The receivers are the third defendants.

[10] On 18 August 2005, the second plaintiffs were appointed as voluntary administrators of the company and on 14 September 2005 they became its liquidators.

[11] By these proceedings the company and the liquidators make essentially three complaints against Mr Rodrick and Nu-Log. The first concerns the charge, which the liquidators impugn upon several bases. They say that it is a voidable transaction under s 588FE of the *Corporations Act 2001* (Cth) ("the Act"). They also claim that the charge has always been void by reason of s 267 of the Act.

[12] Secondly, the liquidators claim that Mr Rodrick's participation in the affairs of the company was so extensive that by November 2003 and thereafter until the appointment of the receivers, he was a de facto director.[3] That has potential consequences for the validity of the charge. But it is also the basis for other claims made against Mr Rodrick, namely that he engaged in insolvent trading and breached duties which, as a director, he owed to the company. The liquidators say the company was insolvent by the time the charge was granted and remained so. The liquidators also claim that all payments made by the company to Nu-Log from January 2004 to June 2005, which are said to total $835,183.26, were preferential payments because the charge was invalid.

[13] Thirdly, there is a contest as to the ownership of the C3505. The liquidators say that there was no contract for a sale by the company to Nu-Log of this boat and that it was taken in March 2004 only upon the basis of Nu-Log's charge. Given the alleged invalidity of the charge, Nu-Log had no entitlement to it and it should be ordered to re-transfer the boat to the company.

[14] As against the receivers, the plaintiffs claim that their appointment had no effect, because of what the plaintiffs say about the validity of the charge. They seek an order that the receivers pay to the company any amounts received by them.

[15] The receivers said that they did not wish to participate in the litigation of these questions, including the validity of their own appointment. They were not represented at the trial.

[16] Well before the trial, Nu-Log and Mr Rodrick ceased to have legal representation. Mr Rodrick was permitted to conduct Nu-Log's defence.

The defendants' loans

[17] It is convenient to go first to the evidence of the state of the relevant accounts between Nu-Log, Mr Rodrick and the company. This is complicated by the

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[3] s 9 of the Act.

imperfect state of the company's accounting records. They were kept upon a MYOB system for which there were many mistaken entries. But allowing for those errors which have been identified by the liquidators, still they provide a basis for assessing the state of relevant accounts between the company, Nu-Log and Mr Rodrick at relevant times.

[18] Unfortunately, the evidence of Mr Rodrick does not assist much on this subject. If he kept accurate records of how much was lent and repaid, he did not produce them at the trial. In July 2005, he prepared a spreadsheet, which purported to set out the state of the account between the company and Nu-Log from August 2002 through June 2005. In his evidence, Mr Rodrick did not claim that this document was in all respects accurate, saying that it was prepared in haste and from incomplete information. It showed a balance owing to Nu-Log as at June 2005 of $392,053.64 and as at November 2003, a balance of $402,316. According to the Further Amended Defence of Nu-Log and Mr Rodrick (prepared by his then lawyers), the debt as at the date of the charge (25 November 2003) was $376,579.56 and as at 5 August 2005, $407,348.33.

[19] The defendants' pleading thereby alleged higher amounts owed to Nu-Log and Mr Rodrick than the liquidators had adopted in their initial insolvency report. In their ultimate solvency report, the liquidators became content to admit the amounts pleaded by the defendants. Nevertheless, the evidence of the timing and extent of finance provided by the defendants at various times must still be considered.

[20] In early 2003, Mr Rodrick began to finance the company in several ways. He made payments to, or for the benefit of, the company from a cheque account of Nu-Log. He drew upon his facility with St George Bank. And he permitted the company to use several credit cards in his name or that of Nu-Log. He says that the credit cards provided only short term finance, because the company would make payments to the credit card company which reduced the balances to enable further funds to be drawn by the company upon those cards. But neither the company's accounts nor Mr Rodrick's spreadsheet of July 2005 indicate that these credit card debts were always repaid within a month or so. Be that as it may, it is clear enough that from the beginning of 2003, the Nu-Log/Rodrick interests were providing finance to the company by one or more of these means, in most months, to the order of some tens of thousands of dollars.

[21] Again according to that 2005 spreadsheet, the first repayment to Nu-Log was not made until October 2003, when $99,000 was repaid against amounts which had been drawn from the St George Bank. The company's accounts record that this was effected by six distinct payments commencing on 2 October and ending on 16 October. The company was able to make these payments from the proceeds of sale of the C3504.

[22] Both the company's accounts and Mr Rodrick's spreadsheet included amounts for interest, accruing 10 per cent per annum, which I infer had been agreed. Mr Rodrick's spreadsheet also included two items, accruing month by month, which were not recorded in the company's accounts. The first was a purported licence fee, as a charge for the company's use of furniture moulds which had been acquired by Nu-Log from the company as part of the agreement between them about C3503, to which I will return. The other component is what was described in Mr Rodrick's spreadsheet as "Nu-Log Salary", consistently with Mr Rodrick's case that it was

agreed that he or Nu-Log would receive something equivalent to wages for the services which he was providing, but to be accrued rather than paid immediately. A monthly amount of $4,250 was shown for this component in his spreadsheet.

[23] The relevant accounts of the company are exhibited to an affidavit of one of the liquidators, Mr Hambleton.[4] As at 25 November 2003, they showed debts these amounts and descriptions owing by the company:

Loan R&E Rodrick - S/G Loan	$247,024
Loan Nu-Log (R Rodrick Amex)	$20,010
Loan Nu-Log - W/pac Visa	$13,405
Loan R Rodrick W/pac V	($2,890)
Nu-Log St G 055224482	$2,011[5]
Total	$279,560

This total was the amount initially allowed by the liquidators.[6] But as mentioned already, they saw fit to increase this in their ultimate solvency report, to the amount pleaded by the defendants. The explanation for at least much of the difference might lie in the allowance made by the defendants for the licence fee and for the so-called wages.

[24] In any case, certain things are clear. The first is that by November 2003, the finance from the Nu-Log/Rodrick interests was providing at times most if not all of the company's working capital. Its income had come only from the sales of the C3503, which was finished in May 2003, and the C3504, which was not finished until in or near November 2003.

[25] After the charge was granted (in November 2003), the defendants continued to provide finance. But although some finance was provided after March 2004, when the C3505 was delivered and transferred to Nu-Log, it was relatively little. In particular, there was no finance, other than by the permitted use of the credit cards, after March 2004 (except by two payments totalling less than $500). And in many months there was, in net terms, a reduction in one or more of the credit card accounts. According to the company's accounts, the various balances as at 30 June 2004 were as follows:

Loan R&E Rodrick - S/G Loan	$37,068
Loan Nu-Log (R Rodrick Amex)	$537
Loan Nu-Log - W/pac Visa	$19,137
Loan R Rodrick W/pac V	$1,455
Nu-Log st. G 055224482	$2,011
Total	$60,208

This position, more specifically that for the loan named "Loan R&E Rodrick – S/G Loan", had resulted from a reduction in the company's debt in an amount of $488,771 on 1 March 2004 against the description "Blue Magic - sale". This was a reference to the transfer to Nu-Log of the C3505 (which was named "Blue Magic").

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4 Ex DH22 to the affidavit of Mr Hambleton, Court document 216.

5 Not shown within this exhibit but otherwise appearing in the company's accounts as within Annexure M to the liquidator's Final Solvency Report which is Ex DH17 to the affidavit of Mr Hambleton, Court document 215.

6 Allowing for some amounts not expressed in whole dollars, their figure was $279,561.10.

The defendants say that the amount which should have been allowed in reduction of the debt was $350,000. That amount, it seems, was never entered in the company's accounts. It also appears that the entry of $488,771 was reversed at some point, because the opening balance for the next financial year for that particular account was not $37,068 but $525,839.

[26] Again according to the company's accounts, the balances as at 30 June 2005 were as follows:

Loan R&E Rodrick - S/G Loan	$488,230
Loan Nu-Log (R Rodrick Amex	($27,832)
Loan Nu-Log - W/pac Visa	$42,267
Loan R Rodrick W/pac V	($62,440)
Nu-Log st. G 055224482	$2,011
Total	$442,236

Therefore, had the amount originally credited upon the transfer of the C3505 not been reversed, in net terms Mr Rodrick's interests would have owed money to the company. Even at Mr Rodrick's figure of $350,000 for the C3505, then with the consequent reduction in interest, the company's debts to the Rodrick interests would have been less than $50,000. It is not so surprising then that in July 2005, Ms Morrin presented Mr Rodrick with a spreadsheet which represented that the Rodrick interests owed the company, as at 30 June 2005, about $32,000. In that document, she reduced the debt on account of Nu-Log's acquisition of the C3505 by an amount of $498,528. (This was the amount for which, apparently, Nu-Log had offered the C3505 for sale at the Sydney Boat Show in mid 2004.)

[27] Ms Morrin was called in the plaintiffs' case. According to her evidence, there was no sale of C3505 to Nu-Log; rather it simply took the boat under the charge to effectively recover some of the secured debt. But she was not asked about the company's accounts insofar as they had recorded, at one stage, that reduction in the Nu-Log debt for the transfer of the boat.

[28] It is apparent that the liquidators have made only limited attempts to assess the true state of the accounts between the company and the Nu-Log/Rodrick interests or, more particularly, the amount which at various times was secured by the charge. In particular, they have not made their own assessment of what was the proper amount for the reduction of the debt for the sale of the C3505. And some of the credit cards used by the company were not in the name of Nu-Log but in the name or names of the Rodricks, so that it is far from clear that they would be relevant in determining the amount secured by the charge.

[29] It is relevant to consider the complete history of Mr Rodrick's financing of the company because it is alleged that the company was insolvent throughout the period from November 2003 until August 2005 and, as I will discuss, it is the availability of finance from the Rodrick interests which was critical to the company's ability (or otherwise) to pay its debts as they fell due. The liquidators have pointed to several errors in the company's accounts and are critical of their reliability. But there has been no specific challenge to the reliability of the accounts in recording the financing by the Rodrick interests. These MYOB records would seem to represent the best evidence of the position between the company and Rodrick interests throughout that period.

[30] Some other observations should be made at this point. Even allowing only $350,000 for the boat transferred to Nu-Log, the secured debt was substantially reduced by 30 June 2004. Putting on one side Mr Rodrick's claims that a licence fee and his unpaid salary were accruing and secured by the charge, the secured debt was then further reduced within the year to 30 June 2005. Indeed upon Mr Rodrick's own calculation within his July 2005 spreadsheet, in the period from April 2004 through June 2005, the repayments by the company exceeded further drawings upon the Rodrick finance by about $62,000. These are indications of a decreasing dependency upon the Rodrick finances.

November 2003: insolvency?

[31] I go then to the question of whether the company was solvent as at the date of the charge, 25 November 2003. The plaintiffs must prove its insolvency. They have sought to discharge that burden by an analysis by Mr Hambleton, ultimately within what he described as his final insolvency report. But before going to that and other evidence, something should be said about the state of the pleadings in respect of this issue.

[32] In paragraph 16 of the Further Amended Statement of Claim it was alleged that the company was insolvent from 25 November 2003 until 5 August 2005. The Defence pleaded a non-admission of that allegation, upon the basis that having made reasonable enquiries, Nu-Log and Mr Rodrick remained uncertain about its truth. That meant that by r 165(2) of the *Uniform Civil Procedure Rules*, these defendants were not to be able to give or call evidence in relation to that question. But clearly Mr Rodrick did intend to contest this allegation by evidence, including his own evidence as to the company's trading prospects, as he did within affidavits which he served before the trial. The non-admission of insolvency, coupled with the professed ignorance of the truth of the allegation, could well be explained (although not excused) as an attempt to distance Mr Rodrick from the company and its business, in the context of the plaintiffs' case that he had been so closely involved as to be a de facto director.

[33] The state of the pleadings on this point became controversial when Mr Rodrick was cross-examining Mr Hambleton on the first day of the trial. Mr Hambleton was challenged upon a number of items within the balance sheet which he had constructed to show the company's position as at the date of the charge. None of these points had been pleaded. Mr Rodrick also suggested to Mr Hambleton that the Nu-Log/Rodrick debts should have been put on one side in Mr Hambleton's analysis, because they were not going to be demanded from the company until it was able to repay them. Counsel for the plaintiffs complained that this point, in particular, had not been pleaded.

[34] On the following day, the defendants sought leave to amend their Defence, in order to plead that there was an enforceable agreement between the company and the Nu-Log/Rodrick interests that the debts would not be demanded until they could be repaid. That leave was opposed and I refused it. Consequently the relevant part of the Defence remained as a mere non-admission.

[35] At the end of the trial, counsel for the plaintiffs submitted that this non-admission had not been explained as required by r 166(4), with the consequence that there was a deemed admission of insolvency by the operation of r 166(5). However, the issue

of insolvency occupied much of the trial and it would be fanciful to suppose that the plaintiffs conducted their case in the belief that this allegation did not have to be proved by evidence. Their case contained substantial evidence going to the question and Mr Hambleton, as well as Ms Morrin, were extensively cross-examined on matters relevant to it. Mr Rodrick's evidence contained evidence relevant to this issue including statements of his belief that the company was solvent. Having regard to the course of this trial, it became too late for the plaintiffs to claim the benefit of an implied admission.

[36] In his ultimate argument, Mr Rodrick made extensive submissions on the issue of insolvency. He challenged the accuracy of the liquidator's reconstructed balance sheets. He challenged the liquidator's calculation of profits (or losses) over the relevant period. Mr Hambleton was challenged in cross-examination on at least most of these points. He maintained his opinion as to insolvency, although he was unable to claim the accuracy of his report in several respects, such as the existence or otherwise of debts which, within his reconstructed balance sheets, he had represented as owing. But he said that these were in such small amounts that they made no difference to his opinion. In that he was correct. At all times the company's largest creditor was, by far, Nu-Log (with or without the other Rodrick interests). Ultimately therefore, it is the relationship between the Nu-Log/Rodrick interests and the company in relation to that indebtedness, as well as the company's trading prospects, which are determinative of its solvency at any relevant time.

[37] This is not to say that consideration should be given to the case which the defendants unsuccessfully sought to plead, which was an alleged *agreement* that they could not demand their debts until the company could repay them. But it would be quite artificial to consider this question of insolvency as if the Nu-Log/Rodrick interests were in all respects completely external to the company and, being interested only as creditors, likely to demand repayment at any time. By the date of the charge and thereafter, Mr Rodrick saw himself not simply as a customer or a creditor, but also as an investor with a direct interest in developing the business to the end that it would derive profits and develop a capital value which in part would be enjoyed by him or Nu-Log. That role, as an investor in the company's business, is an important element of the plaintiffs' case that Mr Rodrick became a de facto director, because it helps to explain what the plaintiffs say was such an extensive participation in the affairs of the company.

[38] Further, the understanding between the company and the Nu-Log/Rodrick interests about their ongoing financial support was a matter raised directly in the plaintiffs' evidence, particularly in the first of Ms Morrin's affidavits. It was also part of the plaintiffs' pleaded case, although not specifically upon the subject of insolvency but as part of the company's case that the defendants had engaged in misleading conduct. The company pleaded that Nu-Log, by Mr Rodrick, contravened s 52 of the *Trade Practices Act 1974* (Cth) by representations to Ms Morrin in 2002 and 2003 that "he had significant financial capital and would use these funds to jointly run and grow the Business Operations to their mutual benefit" and that "he would provide sufficient financial backing to allow the Company to keep building in the event that the Company was without a customer for any significant period of time …".[7] The plaintiffs allege that in reliance upon those and other representations, the company continued to trade, incurring further liabilities to creditors which were

[7] Further Amended Statement of Claim, para 25(b)(ii), (iii).

unpaid at the commencement of the winding up and otherwise suffering loss. Therefore the plaintiffs' pleaded case directly raised the question of what was the understanding of the parties about the ongoing provision of the defendants' finance. At the end of the trial, this s 52 claim was abandoned. But the plaintiffs must be taken to have conducted their case upon the basis that the arrangement or understanding for the ongoing provision of finance by the defendants would be explored. In any event, this subject was always a proper matter for the liquidators' consideration, in their assessment of whether as a matter of commercial reality, the company would be able to meet any short-term deficiency in working capital by again calling upon the resources of the defendants.

[39] When refusing leave to amend the Defence in that respect, I referred to one element of prejudice to the plaintiffs which, with a full exploration of the facts by the end of the trial, has been shown to be non-existent. I said that if the amendment had been allowed, the liquidators would be put to the task of investigating the core business of the company to ascertain when, by reference to an agreement to provide finance for as long as was necessary, the company would have been able to repay the defendants. But that task, it seems, had already been undertaken by the liquidators (although not entirely accurately). In Mr Hambleton's affidavit evidence, there was an assessment of the profitability of the business and of its prospects of trading its way out of what was said to have been its liquidity shortage throughout this period. Again, this is not to say that consideration should be given now to the case which the defendants were not permitted to plead, specifically that there was an enforceable agreement by which the defendants were precluded from requiring repayment until the company was able to repay. What must be considered is a different question, which is whether, at a relevant point in time, the Rodrick interests were likely to continue to provide whatever finance was required to meet the company's lack of liquidity.

The balance sheet

[40] The starting point is Mr Hambleton's balance sheet for the company as at 25 November 2003, from which he concludes that liabilities exceeded assets by $460,983.28.

[41] He reached that point by this course. According to the company's MYOB records, the deficiency in assets was $313,719.02. This came from total assets of $88,923.63, including current assets of $86,759.40, put against the total liabilities of $402,642.65, which included the Nu-Log/Rodrick debts of $279,560. The current assets included a debt said to be owing to the company by TIY in the sum of $62,931.89. As Mr Hambleton said, given the apparent weakness in the position of TIY, having been wound up in May 2003, this should have been written off as a bad debt. In this and certain other respects, Mr Hambleton saw fit to adjust the balance sheet. One important adjustment was to increase the debt to Nu-Log/Rodrick interests to $376,579.56, as had been asserted by Mr Rodrick. The outcome is a calculated excess of liabilities over assets of $460,983.28. Even excluding the Nu-Log/Rodrick debt, upon Mr Hambleton's analysis the company was still "balance sheet" insolvent.

[42] The defendants challenged several components of this calculation. That largely involved a challenge to the list of trade creditors. In his ultimate analysis, Mr Hambleton included only 12 creditors which were said to be owed, in total,

$27,183.49 as at the date of the charge. Mr Hambleton said that these challenges were insignificant because of the small amounts involved. Nevertheless it is relevant to consider them because of the defendants' argument that their financial assistance had permitted creditors to be paid their debts as they fell due and that this was to continue to be the case.

[43] The first of those creditors is said to have been Alfab (Aust) Pty Ltd in the sum of $4,394.20. Mr Rodrick's evidence is that this was part of an amount to be paid for windows and doors which were built into the C3504 and that they were not delivered until sometime in about March/April 2004. A deposit of $3,000 had been paid by the company and the balance of $4,394.20 was to be paid only on delivery.

[44] The next is AMI Sales in an amount of $137.98. Mr Rodrick says that this amount had been paid by the relevant date and he refers to a purchase order numbered 549 which apparently supports that contention.

[45] An amount of $604.01 is said to have been owed to ATL Composites Pty Ltd. Mr Rodrick refers to two orders placed by the company with this supplier: one in November 2002 and the apparently relevant order, which was numbered 1258, for $604.01. It was entered in the MYOB records as an order made on "1/05/2003", which Mr Rodrick says was an error because it should have been entered as "1/3/05", that is to say on 1 March 2005. This order, as Mr Rodrick points out, has been marked as "prepaid" and its number 1258 is to be compared with purchase order 1254 (with another supplier) which was dated "1/03/2005", which strongly suggests that 1258 was an order placed in March 2005. Mr Rodrick's explanation is persuasive.

[46] Next is Barlow Distributors (Aust) Pty Ltd in an amount of $3,296.70. Mr Rodrick's evidence is that this was a "cash before delivery" account and that these purchase orders were placed well in advance of the delivery time. That is supported by the first of the purchase orders, which was dated 9 September 2003, carrying the notation that some of the goods were due for delivery in November 2003 and the balance in January 2004. The purchase order is marked "COD". Mr Rodrick's evidence is persuasive on this point.

[47] An amount of $7,400 was recorded as owing to Ensign Ship Brokers. A "recipient created tax invoice", dated 28 October 2003, records this as the commission on the sale of the C3503 to Mr and Mrs Rumble. The commission was $9,000 plus $900 GST. The same document records a payment of $2,500, leaving a balance due of $7,400. Mr Rodrick also refers to a tax invoice from Ensign Ship Brokers for that sum of $9,900, dated 30 September 2002 and describing the bill as for the commission on the sale of the boat to Mr Rumble. This invoice was addressed to TIY. There is an accounting statement sent by Ensign Ship Brokers to the company dated 1 October 2003, claiming this amount of $7,400 as outstanding for more than 90 days. But this does not mean that the amount was a debt owing by the company, as distinct from TIY. The debt appears to have been one owing by TIY and not the company, as Mr Rodrick has explained. There is no evidence showing how the company became bound to pay TIY's debt.

[48] The next is an amount of $4,473.90, said to have been owed to Fibre Glass International. Mr Rodrick says that this was a "cash before delivery" account and that nothing was owed at the relevant date. He identifies a "recipient created

adjustment note" in the MYOB system, which shows a purchase order numbered 531 which was delivered and "prepaid" on 24 November 2003. The amount was $5,927.85 inclusive of GST. This document is not easy to reconcile with the documents upon which Mr Hambleton relied. In one of those documents, described as "payables reconciliation", a number of transactions is listed, one of which was given that number 531 and dated 24 November 2003, and for which the amount shown was $4,050.99. This makes up most of Mr Hambleton's claimed amount of $4,473.90. Despite the difference between $4,050.99 and $5,927.85 (in the document to which Mr Rodrick refers) it appears that whatever was the true amount of the purchase order numbered 531, that amount was prepaid and there was nothing owing for it as at 25 November 2003. In Mr Hambleton's "payables reconciliation", there is an item of $530.48 said to have been incurred on 19 November 2003. If this amount was outstanding at the date of the charge, it had been owing for less than one week. Mr Hambleton's calculation also brings into account an amount of $127.94, said to have been incurred on 28 August 2003. However, in another of the documents to which he refers, that amount is shown as paid on the same date.[8] From that page it appears to have been the GST component of a purchase under order number 407. That would leave an amount of $8.25 shown as incurred on 2 December 2002. The same payables reconciliation shows a payment of $243.76 on 4 December 2002. Perhaps $8.25 was, at the time, overlooked by both the company and this creditor but that seems to be unlikely. Overall I am unpersuaded by the liquidators' case in respect of this creditor. It is more probable that for this creditor either nothing was owed or at least nothing was overdue as at the date of the charge.

[49] Next there is an amount of $540.38 said to have been owed to Gold Coast Cranes Pty Ltd. According to Mr Hambleton's documents this debt arose only five days prior to the date of the charge and was paid on 2 December 2003. It was by no means overdue.

[50] An amount of $220 was owed to a creditor called Rletshie Thomas. Again this was due but not overdue. It became due on 20 November 2003 and was paid seven days later.

[51] The next creditor is Southern Stainless Pty Ltd in the sum of $5,545. The documents upon which Mr Hambleton relies show this as the total of several invoices from 25 August 2003 to 19 November 2003. The first of them, in an amount of $3,036, was paid, as was another $2,674.19, on 16 January 2004 and the balance on 2 March 2004. The other invoices, apart from the last of them which was dated 19 November 2003 in the sum of $123, were also paid on 16 January 2004. That last invoice was paid on 26 February 2004. Mr Rodrick ultimately submitted that this was a "forward order" for which the relevant item or items were delivered to the C3504 in the last week of October 2003. If that was so, then the liquidators are correct to say that the company was late in its payment. For this creditor, I am satisfied that the company's debt was overdue on the date of the charge save for that last invoice of $123. However, the amounts were paid not long after the date of the charge.

[52] The next creditor is said to have been the University of Southern Queensland in an amount of $506. This was due from 19 June 2003 and was paid on 29 October

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8 Ex DH17 to the affidavit of Mr Hambleton, Court document 214, page 386.

2004. Mr Rodrick's evidence is that he believes that it was paid by one of the company's suppliers, Synthetic Resins, and that it was that supplier's responsibility rather than it being a debt owing by the company. The company's records had not recorded that payment, but it was confirmed by the University in a letter to the liquidators. That is consistent with Mr Rodrick's belief that the payment was made by another party. If so, that indicates that it was considered by that party to be its responsibility. I am not satisfied that this was a debt owing by the company.

[53] Another creditor is said to have been Viking Office Products in the sum of $52.98. The tax invoice from this supplier is dated 27 May 2003. Mr Rodrick suggests that it was paid on 20 August 2003 by a cheque numbered 138 in the sum of $55.43. The tax invoice from the supplier shows that figure as the total inclusive of GST. I accept Mr Rodrick's suggestion. The debt was not owing in November 2003.

[54] The remaining creditor is WorkCover Queensland. According to a statement from WorkCover dated 1 December 2003, which set out the activity on the company's account back to April 2003, there was at that date only $12.54 owing. This is the amount claimed by the liquidators. It was a late payment charge which was imposed on 31 August 2003. It is clear enough that it was simply overlooked.

[55] In summary then the position in relation to these trade creditors is as follows. Of the trade creditors set out in Mr Hambleton's final report, only the amounts due to Gold Coast Cranes ($540.38), Rletshie Thomas ($220), Southern Stainless Pty Ltd ($5,545) and WorkCover Queensland ($12.54) were owing as at 25 November 2003. Of them, the overdue amounts were $5,422 for Southern Stainless Pty Ltd and the WorkCover debt. This position is consistent with Mr Rodrick's evidence that usually the company did not purchase from its suppliers on credit and therefore had little or no trade creditors.

[56] I go then to the other creditors as at the date of the charge. First there was outstanding rent of $11,668. However, the landlord and the company had agreed that this amount would be paid over 23 months from October 2003, by equal monthly instalments of $507.30 to be added to what was otherwise the monthly rental. This sum of $11,668 had accrued due in a period from June to November 2002, during the occupancy of these premises by TIY. The company took over this monthly tenancy in about April 2003. Subsequently it agreed to pay the arrears by those monthly payments. It appears that it did so. All of this appears from the evidence of a director of the landlord company, Mrs Storey. Therefore it may be accepted that at least $11,000 was owing of that $11,668 as at the date of the charge.[9] However, it was not then due.

[57] The position was different with respect to tax and superannuation. The company had not paid any of the required contributions for its employees. Mr Hambleton showed an amount of $27,195.91 as due for superannuation. Mr Rodrick used information as provided by Ms Morrin to Mr Hambleton, from which he calculated $25,657.07 for this debt. The difference is immaterial.

[58] The company was also in arrears with the Australian Tax Office, apparently for unremitted group tax. Mr Hambleton said that the amount owing as at the date of the charge was $24,165.76. Mr Rodrick submitted that it was $23,958.63 because a component of interest had not then accrued. Mr Rodrick is correct in that respect.

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[9] The October payment having been made.

But again the difference is immaterial. The sum then owing was made up of amounts which accrued due in September, October and November 2003 together with some interest charges. Clearly, at least most of this amount was overdue by the date of the charge.

[59] Next there was a loan said to have been made by "J Saunders" of $30,000 plus accrued interest of $3,000. The MYOB accounts record payments by a John Saunders to the company in December 2002 and January 2003. No payment was made in reduction of this debt, apart from a payment of $7,000 in about April 2005. Mr Saunders was Ms Morrin's stepfather. According to Mr Rodrick's evidence, when in early 2003 Nu-Log began to lend money to the company, he and Ms Morrin agreed that this loan from Mr Saunders would not be repaid until all of the Rodrick/Nu-Log loans had been repaid. That evidence was not specifically challenged.[10] From this Mr Rodrick suggests that the loan was not due for payment as at the date of the charge. The plaintiffs have not proved otherwise. I accept that the debt was owing but not then payable.

[60] Mr Hambleton's balance sheet as at the date of the charge is challenged in several more respects. He says that the assets should have included an amount for the work in progress represented by the then partially completed C3505. It appears that the vessel was half built at this stage. Mr Hambleton declined to include anything for it, because of a dispute as to its then ownership. But if it was owned even then by Nu-Log, that was because the relevant agreement between the parties was in relevantly the same terms as the agreement between the company and Nu-Log of 29 August 2002 for what became the C3504. By cl 11 of that document, all property in the boat during its construction was to be that of Nu-Log, but the company was to have a lien over the boat to the extent of any outstanding instalments. The partially completed C3505 may not have been the company's property in the sense that it could have sold the boat to someone else. But it is difficult to see that the boat was not then an asset of the company. The company's position then was that by completing the construction of the boat, it would be in a position where it would be paid or credited with the full price (whatever that was).

[61] Mr Rodrick says that Mr Hambleton failed to include an asset which was money held in the trust account of a legal firm, Porter Davies, in an amount of or about $11,000. He says that this deposit was made from money paid by Mr Rumble for the C3503 in July 2002. That appears to be correct. But the point is of little importance because the circumstances under which the money was deposited, and the availability of that money to meet liabilities of the company, cannot be determined here.

[62] Mr Rodrick complains that Mr Hambleton did not include, as assets, materials which were in the company's factory for the purposes of the construction of the C3506. He says that they were worth about $20,000. I am persuaded to accept his contention.

[63] At one point in Mr Rodrick's submissions, he seemed to suggest that there was another asset, in the form of moulds used for the construction of a boat called the

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[10] It is contained with para 30(h) of Mr Rodrick's affidavit which, Court document 245 . In Ms Morrin's affidavit in response, Court document 287, there is a denial of para 30 as "an accurate version of events". But this hardly deals with the evidence specifically relating to the Saunders loan.

Tasman/Elite 40. Mr Rodrick has not demonstrated that these were then the property of the company rather than of TIY.

[64] Lastly, there is a collection of items shown in the MYOB records in relation to payments by the company to credit card accounts in the names of one or both of Mr Morrin and Mr Coghlan. The MYOB records indicated that, in net terms, they had been paid $52,063.16. Mr Hambleton saw fit to remove these items from the balance sheet, upon the basis that they were records of amounts paid to reimburse these individuals for payments on their credit cards for expenses of the company. If that is correct, then Mr Hambleton's adjustment was properly made. Mr Rodrick argues that these payments were effectively loans to Ms Morrin and Mr Coghlan and should therefore appear in the balance sheet as assets of the company. I am unable to resolve that question from the evidence. It would require an enquiry as to the use of the relevant credit cards and the extent of the correspondence between the company's payments and the amounts charged to the cards.

[65] The net result is that the company was "balance sheet" insolvent as at the date of the charge, even allowing a substantial sum such as $175,000 (as Mr Rodrick suggests) for the partially constructed C3505. It had less than $15,000 in cash and perhaps as much as $20,000 worth of materials for the C3506 as well as inventory (according to the MYOB records) of about $8,000. On any view of the amount owing to the Nu-Log/Rodrick interests, when debt is added to the debts to the ATO and for superannuation as well as the loan from Mr Saunders, its liabilities well exceeded its assets.

[66] Of its liabilities, only the tax and superannuation debts as well as trade creditors of about $6,000[11] were due. The company had insufficient cash to pay even those debts.

Liquidity

[67] The company earned income only from the sale of boats. As at the date of the charge, that required the completion at least of the C3505 and the expenditure of more money to do so. Absent the provision of further finance to the company, either by Mr Rodrick and his interests or from another financier, it is plain that the company would have been unable to pay its debts as they fell due. There is no suggestion by the defendants that there was any prospect of obtaining finance from a bank or other financial institution. The company's only prospect of being able to pay its debts as were due and owing was to obtain further credit from the Nu-Log/Rodrick interests.

[68] This predicament was described by Ms Morrin in her first affidavit as follows. In or about October 2003, the company was experiencing serious cash flow difficulties. There was an incomplete boat (the C3505), which had been commenced not for Nu-Log but for a customer called Ted Wrigg, who had paid a deposit of $10,000 but subsequently cancelled his order. Ms Morrin described the position as follows:

> "106. The result was that ICM [the company] had put a lot of money into the incomplete boat and was left in a difficult position. ICM had no funds and just an asset but no customer to sell it to."[12]

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11 See above at [55].

12 Affidavit of Ms Morrin, Court document 223.

She described a meeting attended by Mr and Mrs Rodrick, Mr Coghlan and her. Her evidence about the discussion and the outcome of the meeting was as follows:

> "108. I advised those present at the meeting that I felt that we needed to find someone who was willing to give ICM large cash injection or we had no choice but to close ICM down and appoint controllers. I was concerned about ICM incurring further debt without the ability to pay for it. This was particularly concerning for me as we had no imminent sales. At this stage, I believe that ICM was not able to pay its existing debts and that the most appropriate thing to do was place it into external administration. I communicated this to Rodrick at this meeting. ICM certainly had no capacity to pay any future or ongoing liabilities that would be incurred, such as wages, PAYG taxation instalments, superannuation etc unless Rodrick was willing to invest further funds.
>
> 109. Rodrick responded by saying to me words to the effect that:
>
> 109.1 we were not shutting the business down as ICM had a future;
>
> 109.2 he had a number of potential customers lined up for early the next year;
>
> 109.3 if those customers came on next year, then everything would be ok;
>
> 109.4 he had too much money invested in ICM at that stage to let it go down without him getting anything back;
>
> 109.5 he wanted to get his money back before it went down.
>
> 110. At the time, money was owing on both of his credit cards and he wanted the balances on them paid. We all knew that the only way that was going to happen was if ICM continued to trade.
>
> …
>
> 113. I was very firmly stating at that time that I wanted to close ICM (by which I meant to place it into external administration) but I was overruled by Rodrick.
>
> 114. In order for ICM to pay its creditors and continue trading, Rodrick said that he would:
>
> 114.1 go to the bank and get a loan to fund the completion of the boat that was sitting on the floor that had just lost its customer;

114.2 ensure that ICM could pay all future debts it incurred; and

114.3 ensure that ICM's creditors would be paid.

115. Rodrick seemed very confident that he could obtain a loan and inject funds into ICM such that it would be able to pay all of its creditors and continue to trade. I agreed to let Rodrick try and raise that funding.

…

119. Rodrick's representations that he would put in sufficient capital to ensure that all ICM's current and future creditors would be paid was the reason why I agreed to allow ICM to continue to trade. Otherwise, ICM would have ceased trading and I would have sought advice from an insolvency specialist to review what options were available.

120. Rodrick's proposal was beneficial to ICM as it gave it the ability to pay its debts, build another boat and hopefully complete the future potential sales that Coghlan was working on for January and February 2004.

121. If those sales came through, then we would be able to start trading normally from that point forward and ICM would have been able to repay Rodrick in full when the time came to do so.

122. The whole deal was good for ICM because it would give it access to essential funds and it could continue to operate and pay its creditors. Further, ICM would have a demonstration boat that Coghlan could use to sell boats. It was a huge advantage from a sales point of view.

123. If Rodrick had not come up with his offer I would have shut ICM down and appointed controllers to the company. ICM would not have incurred any further debts."[13]

[69] This evidence was tendered by the plaintiffs. It may have been directed more to the plaintiffs' allegation of misleading and deceptive conduct. But it is highly relevant to the question of insolvency. In essence, Ms Morrin's evidence here is that the company was insolvent in October 2003 but that with the finance which Mr Rodrick said that he would provide, the company was able to stay in business and be in a position to pay its debts as they fell due. The further finance was needed until the company could repay Nu-Log, which it could if and when sales "came through." Of course that was uncertain. But Ms Morrin felt sufficiently confident to decide that the company should continue trading. Upon her evidence no deadline was imposed for the achievement of these sales. Mr Rodrick represented that "he would put in sufficient capital to ensure that all ICM's current and further creditors would be paid … ."

13 Affidavit of Ms Morrin, Court document 223.

[70] Mr Hambleton analysed the company's insolvency by reference to the various indicators considered in *Australian Securities and Investment Commission v Plymin*.[14] But the fundamental difficulty with his analysis is that he failed to have regard to the understanding between the company and Mr Rodrick and Nu-Log, as proved by that evidence of Ms Morrin.

[71] Although there are differences between the respective versions of Ms Morrin and Mr Rodrick, Mr Rodrick's evidence is not inconsistent with the essence of her evidence. He says that at this time, it was discussed that the additional funding to come through Nu-Log would permit the company to build another vessel (C3506) at the same time as C3505, whilst it looked for a customer for C3506. He says that in a discussion with Ms Morrin in November 2003, she said that when C3506 was sold, the loans from Nu-Log would be repaid and that Ms Morrin was adamant that a customer could be found for that boat before it was completed.[15]

[72] As to those indicators, the company had made losses in its short life to November 2003. Its liquidity ratio had fallen below 1, in that its current assets were exceeded by its current liabilities. There were overdue Commonwealth taxes. It had no relationship with its bank by which it could have borrowed funds.

[73] As to access to alternative finance, Mr Hambleton wrote that taking into consideration the Nu-Log interests, the company was not in a position to raise finance from a non-bank lender. But that overlooks the position of Nu-Log itself as the alternative financier.

[74] I accept that the company was then unable to raise further equity capital. Suppliers were regularly insisting upon cash on delivery although, it seems, not through the cancellation of previous credit arrangements. Having regard to my analysis above about trade creditors, I do not accept that there was a substantial body of creditors which was unpaid outside trading terms.

[75] The last of the indicators used in *Plymin* was an "inability to produce timely and accurate financial information to display the company's trading performance and financial position, and make reliable forecasts." Mr Hambleton says that there was such an inability here. He is critical of the state of the company's accounts. There is much force in that criticism. In turn, the poor state of these accounts provides a good basis for his opinion that there was an apparent inability to produce timely and accurate financial information. But again the question is one to be answered in the circumstance of the assured finance from the Rodrick interests.

[76] I do not think that the company was unable to make forecasts as to its likely working capital requirements whilst it completed the construction of the C3505 and C3506. As I will discuss, it did have a buyer for the C3505, which was Nu-Log. There was an uncertainty in forecasting the revenue from the C3506, ahead of finding a buyer for it. But that does not mean that the company was unable to reliably budget towards the completion of that boat, given the assurance of such finance from the Nu-Log/Rodrick interests during that period as was necessary.

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14 (2003) 175 FLR 124 at 213-14; [2003] VSC 123 at [386].

15 Affidavit of Mr Rodrick, Court document 245, para 136.

[77] Of the other indicators used in *Plymin*, Mr Hambleton was unable to make any significant comment. But from the indicators which I have discussed, he concluded that the company was probably insolvent as at 25 November 2003.

[78] He then went on to discuss the company's solvency or otherwise in the period from October 2003 to 5 August 2005. In doing so he referred to what he described as a "cumulative loss" over that period. However, the documents which he attached to his report in that respect far from indicate such a loss. At this point, it is relevant to refer to them for what they indicate about the company's performance in the period to 30 June 2004, by which time the C3505 had been transferred to Nu-Log and a buyer had been found for the C3506. Although the solvency or otherwise of the company as at the date of the charge must be considered by reference to the facts and circumstances which then existed, the income and expenditure of the company in the seven months or so which followed the date of the charge can be seen as the occurrence of what had been likely at the date of the charge. No party suggests that the circumstances of the company underwent some major change, for better or for worse, within this period.

[79] Within annexure M to the final report of Mr Hambleton are profit and loss statements produced from the company's MYOB accounts for the periods October 2003 through June 2004 and July 2004 through June 2005. For the former period, the profit and loss statement shows a net profit of $178,280.37, and an operating profit of $181,336.37. The total income is shown as $1,195,601.01 and the costs of sale were $743,786.18. The total expenses were $270,478.46. Of the income, $444,337.27 was attributed to the C3505.[16] But there was also $428,462.86 for the sale of the C3506, almost all of which was received in June 2004. There were also payments totalling $128,764.17 received in March, May and June 2004 for another vessel, which was the C3507. The other income was for the C3503 and C3504 although only $5,280.89 of this figure was received after November 2003.

[80] I accept that the MYOB records were not entirely accurate. Mr Hambleton saw fit to make extensive adjustments to the monthly balance sheets and profit and loss statements.[17] However, his adjusted accounts are not completely persuasive. In particular, the change to the company's balance sheets between two dates does not correspond with his adjusted profit or loss for the period between those dates. In his final solvency report, Mr Hambleton wrote that "the company made a accumulative loss over the period 31 October 2003 - 5 August 2005." The "unadjusted" figures, ie those from the MYOB system, are to the end of June 2005 and I will discuss Mr Hambleton's adjusted accounts for that same period.

[81] Mr Hambleton's adjusted balance sheets show a net asset deficiency at the end of each month commencing with October 2003 through June 2005. The amounts include the following end of month balances:

October 03	$512,239.18
November 03	$578,368.05

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16 Incorrectly showing the buyer as Ted Wrigg rather than Nu-Log Pty Ltd. That figure of $444,337.27 shown as income from the C3505 was apparently net of GST. Adding GST, the amount would be $488,771 which is the amount by which the company's debt to Nu-Log was reduced in its accounts: see above at [25].

17 Contained in Annexures L & M of Ex DH17 to the affidavit of Mr Hambleton, Court document 215.

June 04	$541,617.27
June 05	$571,651.45.

[82] His adjusted profit figures for each month during this period were as follows:

October 03	-$7,280.33
November 03	-$52,447.87
December 03	-$45,746.19
January 04	-$92,319.64
February 04	-$106,956.00
March 04	$209,703.59
April 04	-$117,836.94
May 04	-$107,848.84
June 04	$314,702.68
July 04	-$36,456.47
August 04	$25,251.63
September 04	$194,069.63
October 04	-$159,752.94
November 04	-$40,776.44
December 04	-$51,466.98
January 05	$15,447.12
February 05	-$3,744.94
March 05	$66,157.72
April 05	$12,942.65
May 05	$72,628.01
June 05	$52,182.33
Total	$140,451.78.

[83] It can also be seen that from the end of November 2003 (the charge being granted on 25 November 2003) to the end of June 2005, the company derived profits, according to Mr Hambleton's adjustments, of $200,179.98. And for the year to 30 June 2005 it derived profits, upon his adjusted figures, of $146,481.32.

[84] Mr Hambleton allowed $350,000 as the reduction in the Nu-Log debt for the transfer of the C3505. Obviously his adjusted profit for March 2004 would have been higher if he thought that the company was entitled to be credited with more than $350,000, a subject which is discussed below.

[85] Therefore, there is in some of Mr Hambleton's analysis some substantial support for Mr Rodrick's testimony that the company was indeed profitable. Ms Morrin did not say otherwise. In her first affidavit, she said that it was in December 2004 that "the financials were getting tight again." This may have been true, given that by December 2004, Mr Rodrick and his company were providing effectively no further finance, as I have already discussed.[18] In the three months to 31 December 2004, according to Mr Hambleton's adjusted profit figures, the company made accumulated losses of more than $250,000. But then its profits for the six months to 30 June 2005 improved.

[86] The explanation for this disparity between Mr Hambleton's adjusted profit figures and his adjusted balance sheets does not clearly appear. But at least one likely explanation is that Mr Hambleton adjusted the balance sheet for the liabilities to the Nu-Log/Roderick interests according to what his report described as "information provided by Nu-Log Pty Ltd",[19] but there have been no corresponding adjustments made to the profits. I am not suggesting that Mr Hambleton could have made the same adjustments to the profits, because he had no information upon which he could have commensurately increased particular expenses or decreased the company's income. Indeed the absence of such a basis to alter the profit figures indicates the unreliability of acting on Mr Rodrick's say so about the amount of Nu-Log's debt, where Mr Rodrick is likely to have seen it as in Nu-Log's interest to err on the side of claiming a higher amount. In acting upon the say so of Mr Rodrick about the size of Nu-Log's debt, rather than making his own assessment about the state of the account between the Nu-Log interests and the company, the liquidator has produced adjusted accounts within his annexures L and M to his final solvency report which are internally inconsistent.

A contract for the C3505?

[87] At this point it is convenient to consider what was the agreement or understanding between the parties about C3505 as at the date of the charge.

[88] There was no contract, at least in writing, for Nu-Log to acquire the C3505. Upon the plaintiffs' case, relying on Ms Morrin's evidence, there was no contract at all. Upon the defendants' case, it was an oral contract in substitution for and upon the same terms as that for the C3504, which had replaced the contract between Nu-Log and the company for the C3503.

[89] As I have outlined earlier, the first boat which was to be built for Nu-Log was the C3503. Nu-Log's contract for that boat was made with TIY. It was for a hull and deck package. In August 2002, in order to let the C3503 be purchased by Mr Rumble, Nu-Log agreed to replace that contract with one for the construction by the company of another boat. Mr Rodrick for Nu-Log and Ms Morrin for the company signed a one page document, dated 29 August 2002, in respect of the C3503. Clause 1 of the this document provided that Nu-Log would sell "its Tasman

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18 See above at [25]-[29].

19 Ex DH17 to the affidavit of Mr Hambleton, Court document 214, page 202.

C35 (hull #3503) to ICM for the sum of $125,000." It provided that this sale would not include the engines or certain electronics, the ownership of which would be retained by Nu-Log. Clause 2 provided that $100,000 of that consideration would be provided by the supply by the company to Nu-Log of a set of furniture moulds for the C35 model. It detailed the moulds to be supplied over "a 12 month period." It was further agreed that Nu-Log would "enter into a lease agreement with International Cat Manufacturing for the use of the moulds it has purchased." Clause 4 provided that the balance of $25,000 would be paid by Nu-Log being credited with that amount as a deposit "on the boat now being purchased by Nu-Log from ICM, hull #3504."

[90] On the same day, a written contract was made between the company and Nu-Log for the construction of what was to become the C3504. It stipulated a purchase price of $185,000 including GST. It provided for a series of progress payments and recorded that a $25,000 deposit had been paid. Possession was to be given to Nu-Log upon the payment of the final instalment but, as already noted, cl 11 provided that at all times during construction, the boat as constructed and all materials intended for use in its construction should be the property of Nu-Log which was to have a lien to the extent of any instalments owing. There was a detailed specification of what was to be built. It was a "hull and deck" package, as had been agreed for the C3503.

[91] According to Mr Rodrick's evidence there was some variation to this contract (for the construction of the C3504) in about February/March 2003, when Nu-Log and Mr Rodrick began to fund the company's operations. He says that it was then agreed that his work for the company would be rewarded with a "wage" to be paid to Nu-Log and to accrue in the company's accounts until "after all our other loans had been repaid." Nu-Log would be paid a monthly licence fee of $550, again to accrue upon the same terms. He says that it was also agreed that the C3504 would be "completed for us at cost by [the company]" and "extras would be at cost." Mr Rodrick's evidence was that he told Ms Morrin that if the company could find a buyer for the C3504, he "may consider permitting [the company] to re-sell a vessel on the same basis as we had permitted C3503 to be sold." In her second affidavit Ms Morrin disputed all of that evidence.

[92] In about July 2003, a buyer was found by Ms Morrin and Mr Coghlan for the C3504, being Mr Lynch. He made an initial payment of $11,000 on 25 July 2003. But this time, there were no documents which recorded Nu-Log's agreement to give up its interest in the boat which was under construction. Mr Rodrick contends that because of earlier discussions about the prospect of a buyer for this boat, the parties must be taken to have agreed to the substitution of another boat, more particularly the C3505, for the boat that was going to Mr Lynch. The plaintiffs say that there was no such agreement for the C3505.

[93] Clearly there was some agreement by which Nu-Log gave up its interest in the C3504. But beyond that, it is difficult to identify what the agreement was. For example, Mr Rodrick does not demonstrate how much had been paid by Nu-Log and appropriated towards the purchase price for the C3504 and nor does he say that there was a certain amount which the parties agreed would be credited against the price of the C3505. Moreover, the C3505 as constructed became a more elaborate and expensive product than the boat specified within the contract for the construction for Nu-Log of the C3504. That appears from a comparison between

the specification within the contract of 29 August 2002 and a document described as "production specifications" within the annexures to the letter from Ms Morrin to Nu-Log of 26 July 2005. Clearly then the price for the C3505 would be different from what had been originally agreed to be the price for the C3504. But the new price, or the basis for ultimately fixing that price, was not the subject of any written agreement and it is difficult to glean from Mr Rodrick's evidence that anything was said by which it was orally agreed, at least with sufficient certainty.

[94] This indicates that although Nu-Log agreed to give up its contract for and its interest in the boat that went to Mr Lynch, at the same time it did not contract with the company for the construction of the C3505. That is also indicated by the evidence about Mr Wrigg. Ms Morrin's evidence that Mr Wrigg agreed to buy a boat to be constructed is supported by entries in the company's accounts. In particular, there is a transaction described as "initial deposit", being a payment to the company of $10,000 on 5 August 2003. And there was a document signed by Mr Wrigg, and witnessed by Mr Rodrick, recording the payment of his deposit. So at about the same time that Mr Lynch contracted for the acquisition of the C3504, Mr Wrigg was found for the next boat to be built, and I infer that it was partly for that reason that Mr Rodrick did not insist upon a new contract for the C3505, as he had done in August 2002 for the C3504. I think that the absence of a contract for the C3505 might also have a further explanation, which is that by this stage, Mr Rodrick was regarding himself as effectively one of the proprietors of this business rather than dealing with it on an entirely arms length basis.

[95] The construction of the C3505 apparently began in about August 2003. Mr Rodrick's evidence is that "at one stage, Morrin & Coghlan thought they had a customer that may want to buy C3505, providing we agreed again. However, this customer did not eventuate."[20] This is an apparent reference to Mr Wrigg.

[96] Mr Rodrick says that in about October 2003, the company repaid $99,000 "off our loan account" as "part of the proceeds from us selling our vessel C3504 back to ICM."[21] But again, the parties had not adverted to what amount or amounts (if any) had been paid by Nu-Log towards the C3504 and which could be credited against Nu-Log's purchase of the C3505. This is a further indication of the absence of a concluded contract between them for the C3505, as at October 2003.

[97] There is some common ground between the respective versions of Ms Morrin and Mr Rodrick about Nu-Log's providing further finance to fund the completion of the construction of the C3505 and the construction of the C3506. But Mr Rodrick says that this was in the context of an existing contract under which Nu-Log was to take the C3505. Ms Morrin says that the intention was to have the C3505 remain in the company's ownership, even after it had been completed, so that it could be used by the company as a "demonstration boat" and the company "would be able to take it to the boats shows to potential purchasers, be able to sell it quickly to a customer and then put the money into [the company] as we built a new demonstration boat."[22] She says that this idea of a demonstrator came from Mr Rodrick.

[98] In my conclusion, as at the date of the charge there was no concluded contract between the company and Nu-Log for the C3505. However the company's position

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20 Affidavit of Mr Rodrick, Court document 245, para 52.

21 Affidavit of Mr Rodrick, Court document 245, para 54.

22 Affidavit of Ms Morrin, Court document 223, para 118.

was not as if it had had no likely buyer for that boat. Mr Rodrick had not indicated any declining interest in acquiring a C35. On the contrary he was at the factory daily and paying very close attention to the construction of the C3505. I infer that he expected that it would become his boat (or that of Nu-Log), save for the prospect that it would be sold to someone else ahead of its completion. I do not accept that it was the common intention of the company and Nu-Log that the C3505 would be built but then retained by the company as a demonstrator. As at November 2003, the company needed to sell the C3505 (to Nu-Log if not another buyer) and the C3506 in order to have sufficient working capital to build further boats without the need for ongoing support from Nu-Log.

[99] Therefore in assessing the solvency of the company as at the date of the charge, it should be accepted that it was effectively certain that the company would have a buyer for the C3505. Absent another buyer, that would be Nu-Log and the price would reduce the company's debt to it. I accept that Mr Rodrick did intend to allow the C3505, once owned by Nu-Log, to be used as a demonstrator (if it was not sold to someone else), because he was interested in the development of the company's business beyond the construction of his boat. But that was not inconsistent with a mutual understanding Nu-Log (absent another buyer) would take the boat upon its completion.

[100] Mr Rodrick argues that at all times during its construction, the C3505 belonged to Nu-Log. The basis for that is his argument that upon the agreed termination of the contract for the C3504, the parties made a contract for the C3505 upon identical terms, at least insofar as the ownership of the boat pending its completion was concerned. But because I conclude that the parties did not then make a contract for the C3505, the basis for Mr Rodrick's argument as to ownership is not established. This means that the partially completed C3505, as at the date of the charge, was the property of the company. A further indication of the parties' understanding as to ownership of the partially completed boat is said to be the fact that it was not until the boat was delivered to Nu-Log in March 2004 that Mr Rodrick saw fit to insure it. That is some indication, although it is of relatively little weight, at least because there is no evidence that Mr Rodrick had insured what had been for a time his partially completed C3504.

[101] Absent a contract for this boat, was there in November 2003 an understanding about its price in the event that it was transferred to Nu-Log? There is no contemporaneous documentary evidence on this point. In March 2004, Mr Rodrick had the boat insured for the sum of $350,000. That may or may not indicate his view of its then value. But it is not evidence of what (if anything) he discussed with Ms Morrin about the price prior to the creation of the charge.

[102] Absent any evidence on the point, I am unable to infer that there was some discussion, until at least near the point of completion of the boat, about a particular price. I infer that it was understood that the price would be based upon what had been agreed for the C3504, but increased according to the costs of adding the extras within this boat. It is probable that the parties did not then fix a certain price in 2003, because at that stage of the boat's construction, those costs were not fully known.

[103] Ms Morrin said that she and Mr Rodrick discussed the value of the boat when negotiating the terms of the charge. She says that the matter arose in this way.

Mr Rodrick had to negotiate a loan from his bank from which he could draw funds in order to continue to finance the company's operations. He told her that the bank required this charge to be given by the company. She noticed that the amount proposed to be secured was $720,000 which, she told Mr Rodrick, was too high because the company did not owe "anywhere near that amount of money". She said that because "the charge could only cover the value of the boat", and "the boat would only be worth about $500,000", she persuaded Mr Rodrick that the charge should be limited to $500,000. I accept that there were negotiations as to the amount to be secured by the charge. I am not persuaded that the common understanding was that the C3505 would be worth $500,000 or that the charge would cover only the value of "the boat", namely the C3505. After all, the proposal was for the company to continue the construction of that boat as well as the construction of C3506. It is more likely that the amount secured by the charge was fixed by reference to an estimate of the likely upper limit of the debt.

Solvency: relevant principles

[104] By s 95A(2) of the *Corporations Act*, a person who is not solvent is insolvent. Section 95A(1) provides that a person is solvent "if, and only if, the person is able to pay all the person's debts, as and when they become due and payable." The question of solvency is one of fact. It requires a consideration of the particular facts and circumstances of the company at the relevant time, undertaken of course with the guidance of the authorities. It is not a question to be answered by reference only to the company's balance sheet, although the balance sheet has some relevance.[23]

[105] Section 588E(4) provides for a presumption of insolvency throughout a period in which a company has failed to keep financial records for that period as required by s 286(1). The requirement there is to keep financial records that correctly record and explain the company's transactions and financial position and performance and which would enable true and fair financial statements to be prepared and audited. The liquidator is critical of the standard of the financial records. But there is no allegation that s 286(1) was breached and that a presumption of insolvency arises under s 588E(4) and I was not asked to make a finding to that effect.

[106] A company's ability to pay its debts is not assessed by reference only to its cash or current assets at the relevant date. In *Bell Group Ltd (in liq) v Westpac Banking Corporation*, Owen J said that in this context:

> "It is legitimate to take into account funds the company can, on a real and reasoned view, realise by sale of assets, borrowing against the security of its assets, or by other reasonable means."[24]

Therefore the Court must have regard to "commercial realities", particularly when considering "what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable."[25]

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23 *The Bell Group Ltd (in liq) and Ors v Westpac Banking Corporation and Ors (No 9)* (2008) 39 WAR 1 at 141; [2008] WASC 239 at [1073]; *Australian Securities and Investments Commission v Edwards* (2005) 220 ALR 175; [2005] NSWSC 831 at [96]; *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] FCA 728 at [44].

24 *The Bell Group Ltd (in liq) and Ors v Westpac Banking Corporation and Ors (No 9)* (2008) 39 WAR 1 at 145; [2008] WASC 239 at [1090].

25 *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213 at 224 per Palmer J; see also *Australian Securities and Investments Commission v Plymin* (2003) 175

[107] An assessment of solvency as at a certain date does not involve a determination of whether the company could, by the end of that day, pay the debts which were then due and payable. Rather, an assessment of solvency as at a certain date, requires a consideration of the company's prospects of paying debts which are due and payable within a period which commences on that date. In *Bank of Australasia v Hall*, Griffith CJ said that in this context:

> "The words 'as they become due' require … that some consideration shall be given to the immediate future; and if it appears that the debtor will not be able to pay a debt which will certainly become due in say, a month … by reason of an obligation already existing … how can it be said that he is able to pay his debts 'as they become due' …?"[26]

Citing that passage in *Lewis v Doran*, Giles JA (with whom Hodgson and McColl JJA agreed) said:

> "There must of course be 'consideration … given to the immediate future' … and how far into the future will depend on the circumstances including the nature of the company's business and, if it is known, of the future liabilities."[27]

In *Sandell v Porter*, Barwick CJ described the length of this period as follows:

> "Insolvency is expressed … as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realisation by sale or by mortgage or by pledge of his assets within a relatively short time - relative to the nature and amount of the debts and to the circumstances, including the nature of the business of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity."[28]

The words "from his own money" have no equivalent in the current provision, s 95A. But this passage has been applied many times in cases under the present statute and the distinction between insolvency and "a temporary lack of liquidity" is well established. In *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*, White J made this observation:

> "When, in *Sandell*, Barwick CJ said that a conclusion of insolvency should not be drawn simply from evidence of a temporary lack of liquidity, he went on to say that it was the debtor's inability, utilising such cash resources as he has or can command through the use of his assets to meet his debts 'as they fall due' which indicates insolvency. One might think that a temporary lack of liquidity denotes a

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FLR 124; [2003] VSC 123; *Emanuel Management Pty Ltd v Foster's Brewing Group Ltd* (2003) 178 FLR 1 [2003] QSC 205; *Lewis v Doran* (2004) 184 FLR 454 at 479; [2004] NSWSC 608 at [106]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 6)* [2006] WASC 54 at [101]-[107]; *The Bell Group (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1 at 145; [2008] WASC 239 at [1090].

26 (1907) 4 CLR 1514 at 1528.

27 (2005) 219 ALR 555 at 578; [2005] NSWCA 243 at [103].

28 (1966) 115 CLR 666 at 670.

> temporary inability to pay debts as they fall due. Such a temporary inability would not be inconsistent with the company's being able to pay 'all' its debts as they became due and payable. However in assessing a company's solvency one has regard not only to the company's cash resources, but to the cash which it can raise including from the sale or charging of its assets. If a company has the ability to raise cash to pay its debts as they become due and payable, for example, by raising an overdraft on security of its assets, it is not insolvent merely because at the time particular debts have become due and payable it has not made or completed arrangements to do so. It is in this way that one can say that temporary illiquidity is not the same as insolvency, even though because of a company's temporary illiquidity, it is not, in one sense, able to pay all its debts as they become due and payable. The question is whether it would be able to pay all its debts as they became due and payable by appropriately deploying its assets or taking other steps open to it."[29]

[108] In some cases, a company might be able to pay debts due and payable by borrowing to do so, but lack the capacity to repay that borrowing. In such a case, the availability of immediate credit would not make the company able to pay its debts as they fell due.[30]

Solvency with Nu-Log's finance

[109] In applying these authorities to the present case, what was the "immediate future" as at the date of the charge? As was said in *Sandell*, the nature of the business is relevant here. The company derived its income not by daily, weekly or monthly sales, but by the sale of boats which took some months to construct. It was incurring the cost of the construction of the C3505 and was about to commence the C3506. In my view, this meant that the company's solvency or otherwise at the date of the charge was to be determined according to its capacity to pay its debts as they fell due ahead of the completion of those boats.

[110] By granting the charge the company had the means to raise whatever cash it required over this period. The common understanding upon which the charge was given was that Nu-Log would make up the shortfall in the company's working capital. Before taking the charge Nu-Log first arranged the necessary line of credit with its own bank and so became able to provide that finance to the company. And Nu-Log and Mr Rodrick had every reason to provide the required finance. There was their interest in the completion of a C35 boat which would become their own. There was also their interest in the survival and prosperity of a business in which Mr Rodrick had come to consider himself as an investor. There was therefore a reliable source of funds to pay the company's debts as they fell due.

[111] At one point in his evidence, Mr Rodrick admitted that the Nu-Log loan was repayable on demand.[31] But the question is not whether the company was legally

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29 (2010) 238 FLR 384 at 427-8; [2010] NSWSC 233 at [202]. In Queensland see, for example, *Re Newark Pty Ltd (in liq)* [1993] 1 Qd R 409 at 413 per Thomas J (with whom Derrington & Moynihan JJ agreed).

30 See the example given by Owen J in *Bell Group* (2008) 39 WAR 1 at 145-6; [2008] WASC 239 at [1091].

31 T8-32, l 45.

entitled to the provision of further credit. It is whether it was capable of paying its debts, for which its capacity to raise necessary funds from Nu-Log must be considered. It was capable of raising those funds because Mr Rodrick was willing and able to provide them, for reasons which would hold good, at least for the "immediate future".

[112] There is the evidence by Ms Morrin that Mr Rodrick said at the time that he "wanted to get his money back before ICM went down".[32] But that was not to say the company, in his then view inevitably would become insolvent. And clearly Ms Morrin did not think so.

[113] Ms Morrin says that she kept the business going in November 2003 because of this understanding about the ongoing provision of whatever was the necessary finance, if the company granted the charge. Her opinion was that with this assistance from Nu-Log, the company could trade as a solvent company. That opinion is not now demonstrated to have been misplaced. In my conclusion, the company was solvent when the charge was granted.

Challenges to the charge

[114] The granting of the charge was a transaction within the meaning of that term in s 9 of the *Corporations Act*. It is alleged that it was a voidable transaction upon several grounds. One ground is that it was an insolvent transaction because it was either an unfair preference given by the company or an uncommercial transaction of the company and that one of the conditions prescribed by s 588FC(a) and (b) was satisfied. In particular, it is said that the company was insolvent when the transaction was entered into or alternatively that it caused the company to become insolvent. I have concluded that the company was not then insolvent. It also follows from my reasons that the granting of the charge did not cause the company to become insolvent. Rather the company was solvent because it was able to charge its assets to obtain whatever was required for it to pay its debts as they fell due.

[115] Section 588FC also provides that the transaction is an insolvent transaction (if an unfair preference or an uncommercial transaction) and "an act is done … for the purpose of giving effect to the transaction … ."[33] The plaintiffs plead that each of the payments made by the company to Nu-Log, after the granting of the charge, was an act which was done for the purpose of giving effect to the charge.[34] The proposition here appears to be that if a charge is granted at the time that a company is solvent, it will be an insolvent transaction if a payment is made of any part of the secured debt at a time by which the company has become insolvent. By their written submissions, counsel for the plaintiffs appear to have abandoned that part of the pleaded case, by conceding that these payments (as well as the transfer of the C3505), "if done pursuant to a valid charge, are not voidable transactions." But in case the plaintiffs did not intend to abandon this point, I should set out my conclusions about it.

[116] The point requires an identification of the relevant transaction and the distinct act (or omission) which has the requisite purpose. In the present case, it is said that the

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32 See above at [68].

33 s 588FC(a)(ii) of the Act.

34 Para 9(a) of the Further Amended Statement of Claim.

transaction was the creation of the charge.[35] The charge was created on the date when the deed of charge was executed and delivered by the company. Each of the payments which is relied upon is said to have been made "for the purpose of giving effect to" the creation of the charge.

[117] There have been few judgments which have discussed what is meant by "the purpose of giving effect to the transaction," but in two cases, it has been given a broad scope. In *Demondrille Nominees Pty Ltd v Shirlaw and Anor*, the Full Federal Court held that the purpose need not be the sole or dominant purpose.[36] And in *Lewis v Doran*, Giles JA said:

> "Attaching legal significance, in the present context, to an act done for the purpose of giving effect to a transaction seems to have been intended to catch an agreement entry into which was an uncommercial transaction if the company was insolvent when the agreement was performed."[37]

[118] Therefore the payment must have had a purpose of giving effect to the *creation* of the charge. None of these payments was made in order that the creation of the charge would have its legal effect. Rather each payment was made simply for the purpose of reducing the debt to Nu-Log. By contrast, the registration of a charge could be considered an act done for the purpose of making effective the creation of the charge. At least for this reason, I would not have accepted this part of the plaintiffs' pleaded case.

[119] Accordingly, the creation of the charge was not a transaction which was an insolvent transaction as defined in s 588FC, at least because the company was not insolvent when the charge was created or when an act was done for the purpose of giving effect to that transaction. Accordingly, the creation of the charge is not voidable under s 588FE(3).

[120] The plaintiffs argue that s 588FE(4) applies. It provides that:

> "The transaction is voidable if:
>
> (a) it is an insolvent transaction of the company; and
> (b) a related entity of the company is a party to it; and
> (c) it was entered into, or an act was done for the purpose of giving effect to it, during the 4 years ending on the relation-back day."

Nu-Log is said to have been "a related entity" of the company, because Mr Rodrick was a director of Nu-Log and also, it is alleged, a director of the company. The term "related entity" is relevantly defined in s 9 as follows:

> "*related entity*, in relation to a body corporate, means any of the following:
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> …

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35 Section 9 of the Act provides, as an example of a "transaction,": "(b) a charge created by the body … ."

36 (1997) 25 ACSR 535 at 549 per Foster, Lindgren and Madgwick JJ.

37 (2005) 219 ALR 555 at 582; [2005] NSWCA 243 at [124].

(k) a body corporate one of whose directors is also a director of the first-mentioned body …"

But again, the creation of the charge was not an insolvent transaction of the company. Therefore the transaction is not voidable under s 588FE(4).

[121] Next the plaintiffs rely upon s 588FE(6A) which provides as follows:

"The transaction is voidable if:

(a) it is an unreasonable director-related transaction of the company; and
(b) it was entered into, or an act was done for the purposes of giving effect to it:
(i) during the 4 years ending on the relation-back day; or
(ii) after that day but on or before the day when the winding up began."

The term "unreasonable director-related transaction" is defined by s 588FDA(1) as follows:

"A transaction of a company is an *unreasonable director-related transaction* of the company if, and only if:

(a) the transaction is:

…

(ii) a conveyance, transfer or other disposition by the company of property of the company; … and

(b) the … disposition … is, or is to be, made to:

(i) a director of the company; or
(ii) a close associate of a director of the company; or
(iii) a person on behalf of, or for the benefit of, a person mentioned in subparagraph (i) or (ii); and

(c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

(i) the benefits (if any) to the company of entering into the transaction; and
(ii) the detriment to the company of entering into the transaction; and
(iii) the respective benefits to other parties to the transaction of entering into it; and
(iv) any other relevant matter …"

If the transaction is a payment, disposition of property of the company or the issue of securities by the company and it is entered into for the purpose of meeting an obligation the company has incurred, the test in s 588FDA(1)(c) is to be applied taking into account the circumstances existing at the time when the transaction was

entered into, rather than those which existed at the time when the obligation was incurred.[38] It follows that it is the circumstances of 25 November 2003 which must be considered.

[122] Here the disposition of the company's property was by a charge granted not to Mr Rodrick, but to Nu-Log. The plaintiffs plead that Nu-Log was a "close associate" of Mr Rodrick. But s 9 defines that term as follows:

> "*close associate* of a director means:
>
> (a) a relative … of the director; or
> (b) a relative of a spouse … of the director."

The term "relative" is defined by s 9 as follows:

> "*relative*, in relation to a person, means the spouse, parent or remoter lineal ancestor, child or remoter issue, or brother or sister of the person."

Therefore Nu-Log was not a close associate of Mr Rodrick in the required sense. At least for this reason, this was not an unreasonable director-related transaction within s 588FDA.

[123] Further, I would not be persuaded that the transaction would satisfy the requirement in s 588FDA(1)(c). The benefit to the company of creating the charge was that it obtained the ongoing provision of finance to enable it to trade as a solvent company pending the receipt of the proceeds of the next couple of boats. Ms Morrin clearly thought that this was beneficial. The alternative was to have the company cease trading as insolvent. In a sense the transaction was a detriment to the company, because its property became encumbered. But the charge did not impede the conduct of the company's business or diminish its future profitability. Rather it enabled the company to continue its business, a course which, assessed against the circumstances existing at the time, was not futile or detrimental. Nu-Log received a substantial benefit, in that a large and unsecured debt then owing to it became secured. But the immediate benefit was not commensurate with the amount of that debt, because the company's balance sheet showed that the debt well exceeded whatever was the value of the company's then assets. Ms Morrin's preparedness to enter into the transaction was not unreasonable. And it must be kept in mind that it was her decision, on behalf of the company, to grant the charge. For that further reason, s 588FDA does not apply.

[124] For the same reasons, in my view this was not an uncommercial transaction, as defined in s 588FB.

[125] The plaintiffs further claim that the charge is taken to have always been void pursuant to the former s 267 of the Act. This provision was within Chapter 2K, which was repealed effective 30 January 2012. However, the provisions of Chapter 2K have a continuing application: s 152 of the Act.

[126] Section 267 relevantly provided as follows:

> "(1) Where:

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[38] s 588FDA(2) of the Act.

(a) a company creates a charge on property of the company in favour of a person who is, or in favour of persons at least one of whom is, a relevant person in relation to the charge; and

(b) within 6 months after the creation of the charge, the chargee purports to take a step in the enforcement of the charge without the Court having, under subsection (3), given leave for the charge to be enforced;

the charge, and any powers purported to be conferred by an instrument creating or evidencing the charge, are, and are taken always to have been, void.

(2) Without limiting the generality of subsection (1), a person who:

…

(b) whether directly or by an agent, enters into possession or assumes control of property of a company for the purposes of enforcing a charge created by the company;

is taken, for the purposes of subsection (1), to take a step in the enforcement of the charge.

…

(7) In this definition:

chargee, in relation to a charge, means:

(a) in any case - the holder, or all or any of the holders, of the charge; or

(b) in the case of a charge that is an agreement to give or execute a charge in favour of a person or persons, whether upon demand or otherwise - that person, or all or any of those persons.

officer, in relation to a company, includes, in the case of a registered foreign company, a local agent of the foreign company.

…

relevant person, in relation to a charge created by a company, means:

(a) a person who is at the time when the charge is created, or who has been at any time during the period of 6 months ending at that time, an officer of the company; or

> (b) a person associated, in relation to the creation of the charge, with a person of a kind referred to in paragraph (a)."

[127] The plaintiffs' case is that Mr Rodrick was a "relevant person" because when the charge was created, he was an officer of the company by being a director. It is said that Nu-Log is a person associated with Mr Rodrick, thereby being within paragraph (b) of the definition of "relevant person". The question of whether Nu-Log was associated, in relation to the creation of the charge, with Mr Rodrick is governed by sections 10 and 15 (and possibly s 11) of the Act. For present purposes it may be accepted that Nu-Log was a relevant person for the purposes of s 267.

[128] The question then is whether Nu-Log purported to take a step in the enforcement of the charge within six months of its creation. The plaintiffs' case is that the charge was enforced by Nu-Log's taking possession of the C3505 and crediting its value against the loan account. Those events certainly took place within six months from the creation of the charge. But as I discuss below in relation to the ownership of the C3505, Mr Rodrick did not take possession of the boat for the purposes of enforcing Nu-Log's charge. Rather, he did so on behalf of Nu-Log as the purchaser of the boat. The purchase price was set off against the debt owed to Nu-Log and at least at the time of this transfer, an amount was credited against the Nu-Log debt in the company's accounts. But this was not by way of a purported enforcement of the charge, on the findings which are set out below.

[129] Therefore, s 267 does not apply.

[130] In summary, each of the plaintiffs' arguments for challenging the validity of the charge fails.

Payments made to Nu-Log

[131] The plaintiffs allege that payments made by the company to Nu-Log, after the creation of the charge, were voidable transactions. But as already noted, they concede that if the payments were made pursuant to a valid charge, they were not voidable. It follows that this part of the claim also fails.

Ownership of the C3505

[132] I have found that the boat remained in the ownership of the company until March 2004. It was then transferred to Nu-Log. At the same time it left the company's factory and went into Nu-Log/Mr Rodrick's possession, after which it was moored at Southport where Mr and Mrs Rodrick lived on it.

[133] The plaintiffs' case about this boat has been put very broadly and involves several strands, not all of which are consistent. For example, by paragraph 10 of the Further Amended Statement of Claim, they allege that in March 2004, at the request of Mr Rodrick, the company transferred ownership in the boat to Nu-Log. But in the plaintiffs' ultimate written submissions,[39] it seems to be argued that the boat has never been the property of Nu-Log.

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[39] Paras 194 to 201.

[134] The submissions suggest an inconsistency between two documents, being a so-called bill of sale and a certificate under the *Gas Act 1965* (Qld). That latter document was not made or signed by any of the parties. It was a certificate of due installation of relevant fittings to the boat, signed by some person outside of the company who conducted the required inspection, who completed the certificate by inserting, against the word "owner", the words "International Cat". This is not probative of the question of whether Nu-Log became the owner. On the other hand, the bill of sale is clearly relevant, and in my view it is clear proof of the transfer. It is signed by Ms Morrin as director of the company. Mr Rodrick contends that it supports his case, which I have already rejected, that the boat was owned by Nu-Log from the commencement of its construction. He points to the words in this document which record that the boat was "built for Nu-Log … ." Those words do not mean that Nu-Log had always been the owner. Indeed this document itself indicates otherwise. It records a *sale* of the boat to, and the payment of the purchase price by, Nu-Log.

[135] The plaintiffs were correct in pleading that it was in March 2004 that Nu-Log became the owner. But their pleaded case is that this was not by a sale of the boat, but by way of an enforcement by Nu-Log of the charge. This is based upon Ms Morrin's evidence that when Mr Rodrick/Nu-Log took possession of the boat in March 2004, she and Mr Rodrick discussed the matter and he said "he would take it under the charge and credit it against the debt owed to him by ICM."[40] She says that it was her "understanding, based on what Rodrick said to me at the time, … that he was entitled to take it as it was secured by the charge … ."[41]

[136] I have rejected Mr Rodrick's case that there was a contract for the construction of this boat and on the same terms, relevantly, as those between the company and Nu-Log for the C3504. But it does not follow that I should accept Ms Morrin's evidence on this subject.

[137] It is not unlikely that Mr Rodrick did say something about the charge when arranging for the ownership of the boat to be transferred. But if he did so, that need not have been inconsistent with a *sale* of the boat, rather than a purported seizure of the vessel under the charge. There is no evidence of any default, or any allegation of a default, under the charge as at that time. No demand had been made by Nu-Log for repayment. Moreover, it is not said that the charge entitled Nu-Log, as the chargee, to have the legal title to any of the charged property transferred to it upon the occurrence of an event of default. So any such reference by Mr Rodrick to the boat being taken "under the charge" could well have been his saying, in effect, that the price of the boat would be paid by setting it off against the secured debt, rather than Nu-Log paying the price by transferring further funds to the company.

[138] It is said that the spreadsheet prepared by Mr Rodrick in July 2005 constitutes an admission by him and Nu-Log that Nu-Log took possession of the boat "as part of the enforcement of the rights of [Nu-Log] pursuant to the fixed and floating charge." That cannot be accepted. The document does not show the legal basis of the transaction. Rather, it shows, or represents, that there was a reduction in the secured debt as the consideration for the transfer.

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40 Affidavit of Ms Morrin, Court document 223, para 141.

41 Affidavit of Ms Morrin, Court document 223, para 142.

[139] The bill of sale, by its reference to the boat being "built for Nu-Log" supports the conclusion that although the ownership remained with the company during the boat's construction, it was a boat which was intended by the company to be transferred to Nu-Log, at least absent the intervention of another buyer.

[140] The plaintiffs place some reliance upon a document which, it is alleged, was handed to prospective buyers at the Sydney boat show in 2004. It showed a price for a "standard Tasman C35" of $359,000 plus GST. It also showed a number of extras totalling a further $104,208. There was another line in this document showing a discount for "boat show & demo" of $10,000. The all-up price was $453,208, which with GST was $498,528. As already noted, in 2005 Ms Morrin used this figure as the deduction from Nu-Log's debt in the calculation of the debt which she put to Mr Rodrick. The plaintiffs say that this document supports the case that the C3505 remained effectively the company's property and was being used as a demonstrator. In his evidence, Mr Rodrick denied seeing the document, described in the plaintiffs' argument as a "sale brochure", and asserted that it was a fabrication by Ms Morrin and Mr Coghlan to "set us up."[42] I do not accept Mr Rodrick's evidence about this document. On its face, it seems to promote the sale of the C3505 at a boat show, but for Nu-Log. The document was headed:

> "TASMAN C35 - Nu-Log Pty Ltd (Nu-log) Blue Magic
>
> …
>
> *Proudly Built under licence by INTERNATIONAL CAT MANUFACTURING P/L*."

The document also referred to an email address and a website which, according to Mr Rodrick's affidavit evidence, was the company's website and used in its advertising throughout 2003-2005. But if this was a brochure advertising the C3505 for sale by the company, why would Nu-Log have been so prominently specified in the document? Most probably this was because it was Nu-Log which was offering the boat for sale. The reference to the company's email address and website are explicable because Mr Rodrick was spending so much time at the company's premises and was still heavily involved in the management of its business. I see no reason for Ms Morrin and Mr Coghlan to "fabricate" the document, as Mr Rodrick claims. With Nu-Log as the registered owner and in possession of the boat, they could not have disposed of it without Nu-Log's authority. Nor is it likely that they fabricated the document for the purposes of this case; had that been their intention, it could not have been in these terms.

[141] Therefore the document evidences the fact that the C3505 was used as a demonstrator, a fact which could hardly be doubted because Mr Rodrick sailed the boat to Sydney to display it at the Sydney Boat Show in 2004. But it does not assist the plaintiffs to prove that the ownership in the boat was never transferred to Nu-Log. In my view, it indicates the contrary.

[142] I find, therefore, that the boat was transferred pursuant to a sale by the company to Nu-Log, upon an agreement in about March 2004 that the price would be paid by a reduction in the company's debt to Nu-Log.

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42 T 9-59, l 18.

[143] The plaintiffs plead that the transfer of the boat was a transaction which occurred when the company was insolvent or alternatively that it caused the company to become insolvent. As to whether it was then insolvent, there is no basis for concluding that although it was solvent in late November 2003, it had become insolvent by late March 2004. There is no evidence that, in the meantime, the company's position took some particular turn for the worse. Rather by March 2004, it had secured a buyer for the C3506 and another for what became the C3507. Nor is it demonstrated that the transaction itself made the company insolvent. As to that, the price at which the boat was sold is not plain from the evidence. Ms Morrin's evidence does not assist in this respect. She did not say, for example, that she and Mr Rodrick agreed that a certain amount would be deducted from the Nu-Log debt. And Mr Rodrick's claim that the price was $350,000 is not persuasive, coming as it does as part of his contention, which I have rejected, that there was a contract for the sale of this boat made at the time at which the C3504 went to another buyer. In my view, the most reliable indication is in the record which was made at the time within the company's accounts. This was an amount, inclusive of GST, of $488,770. This demonstrates that someone turned his or her mind to what should be the deduction from the Nu-Log debt. Ms Morrin maintained the MYOB accounts. As already discussed, at some point that entry was reversed. No amount, such as $350,000, was substituted for it. The reason for that change to the accounts is not explained by the evidence. But there is no suggestion that there was some subsequent transaction whereby the property in the boat was transferred back to the company.

[144] The sales brochure, used at the Sydney Boat Show, does not provide any evidence which is probative of the agreed price. It is evidence of the price at which Nu-Log was prepared to sell the boat. What remains then as the only evidence of the price is the contemporaneous entry in the company's accounts. More probably than not, that amount was entered because it had been agreed.

[145] In these circumstances, it cannot be accepted, as the liquidators allege, that this was an uncommercial transaction within the meaning of s 588FB. The benefit to the company was that its debt to Nu-Log was reduced by an amount which was not an inadequate price. There is no valuation evidence of the boat. But there is no suggestion that a price of that order, or even of $350,000, would be less than that which could be obtained then from another buyer. The so-called sales brochure suggests that the price entered in the accounts was, in substance, no less than the amount which subsequently was thought by those who prepared the sales brochure to be an appropriate asking price for this boat.

[146] Because the debt was a secured debt, this transaction did not involve an unfair preference within s 588FA.

[147] It is also alleged that the transfer of the boat was an unreasonable director-related transaction within s 588FDA. That allegation fails for two reasons. The first is that just as this was not an uncommercial transaction, it was not a transaction which would satisfy s 588FDA(1)(c). It is not to be expected that a reasonable person in the company's circumstances would not have entered into the transaction. Secondly, it was a disposition of property in favour of Nu-Log, which was not a party within s 588FDA(1)(b).[43]

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[43] See above at [122], in relation to the granting of the charge.

[148] Therefore the transfer of the boat was not a voidable transaction.

Claims against Mr Rodrick as a director

[149] The plaintiffs allege that by the date of creation of the charge and thereafter until the receivership, he was a director of the company in that, although not validly appointed as a director, he acted in the position of a director. That allegation was strongly resisted by the defendants and the issue occupied much of the trial.

[150] Upon the premise that he was a director, the plaintiffs claim that between the creation of the charge and the receivership, he failed to prevent the company from incurring debts and thereby contravened s 588G(2) because he was aware that there were grounds for suspicion that the company was not solvent or a reasonable person in his position would have been so aware. The liquidators seek to recover from him, as a debt due to the company, an amount equal to the loss or damage said to have been suffered by unsecured creditors whose debts were incurred during this period but which remain unpaid.[44]

[151] Again upon the premise that he was a director, it is alleged that he is obliged to compensate the company for what are said to have been breaches of his statutory and fiduciary duties. The alleged breaches of his statutory duties are largely the same as the alleged breaches of fiduciary duties. They focus upon the creation of the charge, allowing the company "to continue to accrue creditors, whilst completing the [C3505]" for his or Nu-Log's benefit, allowing the company to continue to trade and incur debts, the transfer of the C3505 to Nu-Log and its appointment of receivers.

[152] For reasons which appear below, I have concluded that these insolvent trading and breaches of duty claims must fail, even accepting that Mr Rodrick was a director throughout this period. But I am persuaded that at least until shortly before the appointment of the receivers, he was a de facto director and in case that finding becomes relevant, it is necessary to set out my reasons for it.

Was Mr Rodrick a director?

[153] Section 9 defines the term "director" as follows:

> "*director* of a company or other body means:
>
> (a) a person who:
>
> (i) is appointed to the position of a director; or
> (ii) is appointed to the position of an alternate director and is acting in that capacity;
>
> regardless of the name that is given to their position; and
>
> (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
>
> (i) they act in the position of a director; or

[44] s 588M of the Act.

> (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.
>
> Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body."

[154] The plaintiffs focus their case upon the proposition that Mr Rodrick was not validly appointed but acted in the position of a director. To the extent that they pursued an alternative argument that Ms Morrin, as the director of the company, was accustomed to act in accordance with Mr Rodrick's instructions or wishes, I would not be persuaded by it. Ms Morrin sometimes acted according to what she, or perhaps what she and Mr Coghlan, had decided and without reference to Mr Rodrick. Examples are the appointment of selling agents and the selling of a boat on so-called "vendor finance" under contracts which she made with the company in early 2005.

[155] The question is then whether Mr Rodrick acted in the position of a director, in the relevant sense. I discussed some of the relevant authorities upon this question when dismissing Mr Rodrick's summary judgment application.[45] The leading authority is now last year's decision of the Full Court of the Federal Court in *Grimaldi v Chameleon Mining NL (No 2).*[46] The Court (Finn, Stone and Perram JJ) set out a number of propositions, derived from the wording of the definition and from Australian case law, on what is meant by "act(s) in the position of a director."[47] It is unnecessary for that summary to be repeated in full here but there are some matters which are of particular relevance.

[156] The first is that "whether [the roles and functions performed] suffice in the circumstances to constitute the person a director for the Act's purposes will often be a question of degree having regard to 'the nature of the functions or powers which are exercised and the extent of their exercise.'"[48]

[157] Next the question is one of substance and not simply of how the person has been nominated in, or by, the company.[49]

[158] Care should be taken with the employment of a principle that to be a de facto director "one must be shown to have assumed or performed functions which only a *de jure* director or board can properly perform." This shorthand description has the capacity to mislead by suggesting that the duties or functions that can only properly be performed by *de jure* directors, or which are their sole responsibility, are capable of a priori enumeration.[50]

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45 *International Cat Manufacturing Pty Ltd & Anor v Rodrick & Ors* [2010] QSC 30 at [24]-[25].

46 (2012) 200 FCR 296; [2012] FCAFC 6.

47 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 321-6; [2012] FCAFC6 at [64] to [76].

48 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 322; [2012] FCAFC6 at [66].

49 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 322; [2012] FCAFC6 at [68].

50 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 323; [2012] FCAFC6 at [70].

[159] The requirement that a person make, or participate in making decisions that affect the whole, or a substantial part, of the business of the corporation does not mean that that person does so as one in "ultimate control."[51]

[160] That a company has an active director apart from the alleged de facto director does not preclude a finding that the person in question was a director.[52]

[161] And "perceptions of those dealing with the company that the person was a director can themselves be of some contextual evidentiary significance", particularly where those perceptions were "independently formed, reasonable in the circumstances and support the appearance that the person was acting 'under colour of office.'"[53]

[162] Something should be said about the relevant circumstances of this company. On any view it was a relatively small enterprise in which the director or directors would be more likely to be involved in management and other tasks which would not be undertaken by a director of a large public company. In such a case, the distinction between the director or directors and management will not be so marked. A second and related point is that in a company such as this, it would not be surprising for the directors to conduct the business in a less formal and structured fashion, without formal meetings or records of resolutions. Therefore the absence of such matters need not be significant. Thirdly, the plaintiffs' case is not disproved by the fact that, on some occasions, Ms Morrin acted without reference to Mr Rodrick, in taking actions which would be expected to require a decision of the directors. Examples are the appointment of selling agents in early 2005 and the appointment of new accountants at about the same time. Rather this could indicate that a director was simply, although wrongly, excluding the other director from his proper role, an event which is not unknown between validly appointed directors. Fourthly, if Mr Rodrick resisted the suggestion of Ms Morrin that he should become a director (as she related), that is not inconsistent with the notion that he did act in the position of a director. It might well indicate that he simply wished to avoid a formal appointment for whatever reason, such as a fear of legal responsibility for the fate of the company.

[163] Another important circumstance is that Mr Rodrick came to see himself as an investor in the company's business. There was a contract for his acquisition of furniture moulds (or their acquisition by Nu-Log), the use of which was licensed to the company. I am satisfied that he believed that, at least once this had been agreed (as it was in August 2002), he saw the prospect of sharing in the financial success of the company and the ultimate disposition of its business. Then Mr Rodrick's evidence was that in around February/March 2003, he and Ms Morrin agreed that Nu-Log would become a 50 per cent shareholder in the company and indeed she gave him a copy of a signed share transfer which he only later discovered had not been registered. Some of that was disputed by Ms Morrin and Mr Coghlan. But in her first affidavit she did say that there were discussions about Mr Rodrick taking a 50 per cent interest in the company and some documents were prepared to effect that transfer but they were "never finalised or signed." She said that she was "not sure why, it was just a matter that seemed to fade into the background as Rodrick took an increasingly more active [role] in ICM."[54] She also said that "a share

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51 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 324; [2012] FCAFC6 at [73].

52 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 325; [2012] FCAFC6 at [74].

53 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at 325; [2012] FCAFC6 at [75].

54 Affidavit of Ms Morrin, Court document 223, para 59.

transfer document was drawn up at one stage, but it was never formally signed up," for a reason which she cannot recall.[55] So even on Ms Morrin's evidence, there was an understanding that Mr Rodrick or Nu-Log would become a half owner in the company, although that was never formalised. The point at which this agreement was reached, according to Mr Rodrick, coincides with the beginning of his substantial financial contributions to the company. I accept Mr Rodrick's evidence about this agreement, save that I am not persuaded that, more probably than not, a share transfer was actually signed. But the point is that Mr Rodrick came to see himself as one of the owners of the company, a capacity in which he was content to be seen by persons outside the company. As effectively a half owner, it is very likely that he regarded himself as being just as involved in the control of the company as Ms Morrin was involved. That is reflected in the mutual understanding that he would be paid wages, not immediately but to be accrued, at a rate of half of the combined wages for Ms Morrin and Mr Coghlan.[56]

[164] It was this involvement as an investor which made Mr Rodrick see fit to provide such substantial unsecured funding to the company even prior to the creation of the charge. He said that he and Mrs Rodrick wished to help Ms Morrin and her husband. But the provision of this finance was not done simply out of kindness; it was a considered business decision by someone who had come to think of himself as a co-owner of the company.

[165] I go then to some of the more important indicia of Mr Rodrick's acting in the position of a director.

[166] The position in mid-2003 is indicated by three documents, each dated 16 June 2003, containing a "to do list" for, respectively, Ms Morrin, Mr Coghlan and Mr Rodrick. These three documents give the strong impression of the three being together in charge of the company.

[167] At about the same time (20 June 2003), Mr Rodrick signed a trust account authority on behalf of the company, directed to its lawyers. He signed over his own handwritten description of his position as "production manager." At certain stages in his cross-examination, he disputed that he was a production manager. But he also claimed that being a production manager did not make him a director. In my conclusion, the term production manager was not inappropriate, given his extensive involvement in the production of all boats through the company's factory, not limited to the boat being built for him. That is not to say that his participation was limited to the production of boats.

[168] He admitted to being authorised to operate the company's bank account. In a small business such as this, that was significant and consistent with his participation as an investor.

[169] Although Mr Rodrick was not actively involved in negotiating particular sales, he did not leave the matter of pricing entirely to Ms Morrin. For example, in March 2005, he sent to Ms Morrin an email saying that "we have to increase the price now - cannot take any more sales at old price."[57]

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55 Affidavit of Mr Rodrick, Court document 245, para 84.

56 Affidavit of Mr Rodrick, Court document 245, para 30(e).

57 Ex DH12 to the Affidavit of Mr Hambleton, Court document 213, page 78.

[170] In cross-examination, he was asked about a proposal of Ms Morrin and Mr Coghlan that the company operate a charter boat. His evidence was that they decided that they were "going ahead with it" and that "I thought, 'hang on a minute, we're not going ahead with it. I haven't discussed it with my wife. I haven't thought anything about it.'"[58] His evidence continued "it was not building charter boats as such, and I just didn't want anything to do with it at that point in time and I wasn't happy that it had been taken as 'oh, okay, we're doing this. Well, no, we weren't doing it.'"[59]

[171] Ms Morrin worked from the house occupied by her and Mr Coghlan. Mr Rodrick went to the house on most days and Ms Morrin says it was to perform work in a managerial capacity. Mr Rodrick's explanation, which I do not accept, was that he was there only to work on his own personal bank loan applications.[60] Mr Rodrick says that he attended the house from February 2003 until about July 2003. He did obtain a loan in November 2003 but it seems fanciful to suggest that he was there, every day and for months on end, to have the use of a computer in order to work upon an application for a loan. As an investor, he had every reason to visit the home office regularly to check on the progress of the company and in particular its requirements for cash.

[172] Ms Morrin and Mr Coghlan each gave evidence to the effect that Mr Rodrick was very extensively involved in many aspects of the business, including directing staff, preparing cash flows, calculating costings, dealing with suppliers and generally running the company. I would not be persuaded by their evidence alone. There is a high level of antagonism between them and Mr Rodrick. They gave the impression that they hold him to be ultimately responsible for the company's demise, by appointing receivers for no good cause when the business was fundamentally profitable. There was also a tendency for them to want to shift all responsibility to Mr Rodrick for the company's demise in order to put their own contributions to that outcome in a lesser light. Nevertheless, there is substantial support for their evidence from some other witnesses.

[173] Mr David Smith was the head boat builder at the factory from August 2002. He described an extensive involvement of Mr Rodrick, such as being present at the factory on a daily basis and giving orders to other workers about how to do their jobs. He said that on a number of occasions Mr Rodrick told him that he was a part owner of the company. All day-to-day supply orders were authorised by Mr Rodrick, he said, and Mr Rodrick oversaw management of the staff who took most of their direction from him. Mr Smith says that on his observations, at least from the start of 2003, Mr Rodrick was "more involved in the running of ICM than Morris or Coghlan."[61] Mr Rodrick argues that Mr Smith was inclined to support Ms Morrin and Mr Coghlan, having worked for them in this company and subsequently in the company through which they conducted a boat building business after the appointment of the receivers. Mr Rodrick rightly points out that Mr Smith did acknowledge that Ms Morrin continued to place orders with suppliers. Nevertheless, I am not persuaded to reject all of Mr Smith's evidence and it substantially supports the case that Mr Rodrick was present in the factory on a daily basis directing staff and acting as an owner. I had the impression that Mr Smith was

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58 T 9-75, ll 1-4.

59 T 9-75, ll 15-18.

60 T 8-28, ll 28-35.

61 Affidavit of Mr Smith, Court document 220, para 41.

resentful towards Mr Rodrick, but probably because Mr Rodrick did exert his authority at the factory.

[174] Mr Kerry Hennessy was another boat builder employed by the company and by the subsequent business of Ms Morrin and Mr Coghlan. In his affidavit, he said that the running of the business was overseen by Morrin, Coghlan and Rodrick, with Coghlan's involvement becoming less and Rodrick's involvement increasing significantly from about the beginning 2003. He said that Mr Rodrick was the "dominant force in the management of the business from at least the start of 2003 until it ceased to trade."[62] He recalled a meeting at which Ms Morrin and Mr Coghlan informed all staff that Mr Rodrick was "a silent partner in the business of ICM."[63] Mr Rodrick disputes that particular evidence but it is inherently likely, because that was effectively what Mr Rodrick had become. Again, there is some force in Mr Rodrick's criticism of Mr Hennessy's evidence, as being partial to the Morrin/Coghlan argument. Nevertheless, it cannot be entirely disregarded.

[175] Mr Christopher Hutchings was the managing director of Oceanic Yacht Design, which performed design and survey approval services for the company. His evidence was that from his conversations with Mr Rodrick, he believed that Mr Rodrick was the person in the factory who was responsible for the management of the construction of the boats. It was Mr Rodrick who verbally engaged his firm's services on a number of occasions and approved quotes for that work. He was in all respects an independent witness and I accept his evidence.

[176] Mr Alan Carwardine worked for a firm which manufactured masts and rigging and which was a supplier to the company. He said that it was Mr Rodrick with whom he dealt primarily, in his dealings with the company from about October 2003 until about July 2005. He regularly dealt with Mr Rodrick in relation to orders and the progress of construction of boats but sometimes in relation to the payment of accounts. He recalled Mr Rodrick saying often words to the effect that Mr Rodrick could bring about a change within the company and "create a real success story."[64] It was his impression that Mr Rodrick "was at least as much involved in the day-to-day running of ICM as Morrin."[65] He observed Mr Rodrick running the factory and giving directions to the staff. Again, he was an independent witness and I accept his evidence.

[177] There was evidence from Ms Valda Martin that Mr Rodrick told her that he was a director of the company and was upset because he was being excluded from directors' meetings. Ms Martin is married to Mr Neil Hollier and is involved with a business called Bosun's Locker. They were purchasers of the C3509. Mr Rodrick submitted that I should reject her evidence because she was partial to the Morrin/Coghlan side of the argument. But as his submissions also assert, they provided funds to the next venture of Morrin and Coghlan and ultimately lost their money, which hardly suggests a reason for her to be inclined to the Morrin/Coghlan side. However, Ms Martin and Mr Hollier were in dispute with the receivers appointed by Nu-Log and this affects the weight of her evidence. Ultimately, Mr Rodrick accepted her version of this conversation with him, except that the word

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62 Affidavit of Mr Hennessy, Court document 218, para 8.

63 Affidavit of Mr Hennessy, Court document 218, para 14.

64 Affidavit of Mr Carwardine, Court document 225, para 17.

65 Affidavit of Mr Carwardine, Court document 225, para 19.

"director," he said, had not been used. I am not persuaded that he did use that word, although I would accept that Ms Martin now believes that he did so.

[178] Mr Raymond Harris worked for another supplier to the company. His employer manufactured diesel engines. He visited the factory on three or four occasions where he saw Mr Rodrick apparently in charge, giving orders and directions to employees. He recalls Mr Rodrick always talking in optimistic terms about the future of the company and how he (Mr Rodrick) "was actively making ICM a success story." This evidence was apparently credible.

[179] Against this evidence, Mr Rodrick called several witnesses. Mr John Hutton was a former employee at the factory. He gave quite a different account of Mr Rodrick's involvement, saying that he worked only sporadically and on some days was not seen at all. He said that he was answerable to Ms Morrin but not to Mr Rodrick. But he did say that Mr Rodrick occasionally spoke to suppliers and sales representatives who came to the factory as well as to potential customers. He said that only Ms Morrin ordered any materials or anything else needed for construction. But in cross-examination, the weight of his evidence was diminished by his saying that Mr Rodrick worked at the other end of the factory and that, in effect, he was too busy with his own work to see what Mr Rodrick was doing. It was further diminished by Mr Hutton saying that he had not seen Mr Rodrick do a number of things at the factory which Mr Rodrick admitted he had done.

[180] Mrs Rodrick gave evidence which disputed the version of Ms Martin. Ms Martin denied that Mrs Rodrick was at the meeting in question. Again, Ms Martin could be innocently mistaken about that detail. Mrs Rodrick denied that she did help with the company's accounts, although she says that in early 2003 this had been suggested. She did not see Mr Rodrick using the MYOB system or entering any information within it. Of course, she is not an independent witness. But I accept that Mr Rodrick did not do any of the accounting work.

[181] Mr Mark Mackman conducted a business from premises next door to the company's factory. He had some idea of what was happening in the factory from which he offered some evidence about Mr Rodrick's participation. In evidence in chief, he was asked by Mr Rodrick "what did you see me doing in the factory?", to which he answered "as far as I know, you were wiring and looking after the electronics on the boats."[66] He said that he did not see Mr Rodrick "directing any of the staff."[67] In cross-examination he said that he often had some interaction with the people working at the factory, as they sat together having lunch outside, from which he said that "we knew what was going on [at the factory]."[68] But he conceded that Mr Rodrick could have been giving instructions without his being aware of it.[69] There is no reason not to accept his evidence, as far as it goes, given his limited personal experience inside the company's factory.

[182] Mr Jeffrey Johns is an electrical engineer working in the marine industry. He provided consulting services to TIY and the company, in the course of which he met Mr Rodrick as well as dealing with Ms Morrin and Mr Coghlan. He says that Mr Coghlan "made it quite clear to me that Rodrick was only an investor, and that

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66 T 9-83, ll 39-41.
67 T 9-83, l 43.
68 T 9-83, ll 25-6.
69 T 9-87, ll 21-4.

Rodrick was not involved in any significant decision making."[70] Mr Johns also began to supply components to the company which again took him to the factory. The only person with whom he dealt in relation to financial matters was Ms Morrin. He saw Mr Rodrick doing electrical work on the boats. He never saw Mr Rodrick giving directions to any of the workers but saw Mr Smith doing so. At no time did Mr Rodrick tell him, or imply, that he was a director or a senior manager of the company and "in fact he denied he was a director."[71] In re-examination, he said that he was at the factory about twice every three weeks, for an hour or two at a time. His evidence certainly supports Mr Rodrick's case. However, he said he did not see Mr Rodrick doing the tasks which, in the terms in which Mr Rodrick cross-examined witnesses for the plaintiffs, Mr Rodrick accepted were tasks which he had performed. (I refer to these below.) Mr Johns was, in my view, an honest witness and not completely unreliable. However, he did not work for the company or at the factory, save for his visits there when he is likely to have been thinking of things other than the present question.

[183] The defendants led evidence from Mr Stuart Rumble who, through his company, purchased the C3503 in about August 2002. He took delivery of his boat in May 2003 and only after some dispute with the company as to making progress payments ahead of its completion. As part of his agreement with the company, his boat was to be displayed at the Sanctuary Boat Show in May 2003 and the Sydney Boat Show in July/August 2003. Mr Rodrick accompanied him in sailing the boat to and from the Sydney Boat Show. He also allowed the company to use his boat to show prospective customers and to use it for tests sails, which were organised by Mr Coghlan. He said that in about March/April 2003 he asked Mr Rodrick if he was a director, to which Mr Rodrick stated very clearly that he was not. Mr Rodrick later told him that in 2003 he had started to lend money to the company and had become a part owner. Mr Rumble said that he closely followed the construction of his boat until it was launched and this took him to the factory several times. He said that Ms Morrin and Mr Coghlan appeared to be in complete control of the company, answering to no-one. At no time did he see Mr Rodrick giving instructions at the factory. He recalled Mr Rodrick's only involvement being in the performance of electrical work as well as having sailing experience. Mr Rumble was clearly antagonistic towards Ms Morrin and Mr Coghlan, although perhaps with good cause. The weight of his evidence is thereby affected. He recalled Mr Rodrick being present at a meeting to resolve his dispute with the company, in which he said that Mr Rodrick acted as a mediator, resulting in a compromise by which the boat was completed. In cross-examination, he said that it was at the mediation that he asked Mr Rodrick whether he was a director "because in all - honestly, I thought he was."[72] At that time, he suspected that Mr Rodrick may have been "the new owner" of the business. Mr Rumble was able to speak only of the events and circumstances up to about the middle of 2003. It is likely that Mr Rodrick's involvement evolved over time and that when Mr Rumble was first dealing with the company in 2002 and early 2003, Mr Rodrick's role was less extensive. The fact that Mr Rumble had the impression that Mr Rodrick was the new owner of the business and saw fit to ask him whether he was a director, strongly suggests that Mr Rodrick was doing more than electrical wiring work.

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70 Affidavit of Mr Johns, Court document 243, para 18.

71 Affidavit of Mr Johns, Court document 243, para 49.

72 T 9-113, ll 16-17.

[184] Mr Michael Church, through his company, purchased the C3507 in the first half of 2004. That contract was negotiated with Mr Coghlan and/or Ms Morrin. During the construction of the boat, he visited the factory a few times. In about mid-2005, Mr Coghlan participated in a business conducted by Mrs Church, but that relationship soon broke down. His affidavit evidence followed something of a pattern for the witnesses called by the defendants on this question. He said that Ms Morrin and Mr Coghlan appeared to be in complete control of the company, answering to no-one and he did not see Mr Rodrick giving any instructions at the factory. His observation was that Mr Rodrick's only involvement was in doing the electrical wiring. In cross-examination, it was put to him that he had "no idea at all what Mr Rodrick's involvement may have been in the management [of the company]," which he appeared to accept.[73] He claimed that when he went to the factory to see how the construction of his boat was progressing, he "never saw [Mr Rodrick] at the factory."[74] His evidence cannot be entirely accepted. He was clearly antagonistic towards Ms Morrin and Mr Coghlan and sympathetic to Mr Rodrick's position. As an outsider visiting the factory only now and then, and concerned with questions other than the management and control of the company's business, his evidence of his impression of Mr Rodrick's participation is of limited value.

[185] Ms Janice Reeves performed receptionist and clerical duties for TIY and then for the company. She said that Mr Rodrick went to the business premises of TIY and then the company on most days, at first to assist with the production of what was to be his boat and subsequently "because he had put money into the company."[75] Ms Reeves did some work in maintaining the MYOB records. She said that Mr Rodrick did not assist with any bookkeeping while she was employed at the company and neither Mr Rodrick nor Mrs Rodrick made any entries into the accounts. Ms Morrin did so, however. She says that Mr Rodrick did not direct any of the workers at the factory, but Ms Morrin did this on a regular basis. Ms Morrin and Mr Coghlan did the "hiring and firing of the workers" and Mr Rodrick played no part in this respect. Ms Reeves left the company in about September 2003.[76] She thought that Mr Rodrick was an investor but that he never appeared to be a director. Again, her affidavit followed the pattern for several witnesses, in saying that Ms Morrin and Mr Coghlan appeared to be in complete control of the company and answering to no-one, and that Mr Rodrick's only involvement was in performing the electrical wiring. In that last respect, it is difficult to see what Ms Reeves thought was Mr Rodrick's role during the months in which he worked each day from an office in Ms Morrin's house. It seems clear that Mr Rodrick was doing more than electrical wiring work. Overall her evidence has limited weight, particularly because she left the company in September 2003.

[186] Mr Leigh McLean was a worker at the factory. He described the process for the ordering of materials, as one by which orders had to go through Mr Smith who would probably go then to Ms Morrin.[77] He said that Mr Rodrick did not direct workers in the factory. He did not see Mr Rodrick performing many of the activities which, according to Mr Rodrick's cross-examination of witnesses in the plaintiffs' case, were part of his role. Mr McLean was not an unimpressive witness.

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73 T 10-38, ll 32-4.
74 T 10-38, ll 47-8.
75 Affidavit of Ms Reeves, Court document 239, para 10.
76 Affidavit of Ms Reeves, Court document 239, para 20.
77 T 10-11, ll 45-8.

But his evidence is of limited value in that it goes only to the practices on the factory floor.

[187] In the final submissions for the plaintiffs, counsel handed up a document described as a schedule of admissions, containing transcript references to what Mr Rodrick said about his participation when cross-examining witnesses for the plaintiffs. It is unnecessary here to discuss each of those references but it is clear that Mr Rodrick cross-examined upon factual premises which were inconsistent with the notion that he had only been performing electrical wiring work.

[188] As can be seen, the evidence is not all one way. But clearly Mr Rodrick was not simply performing electrical work. He was involved in many tasks, including dealing with suppliers and promoting the company at boat shows.

[189] The nature and extent of his participation is most reliably indicated by these circumstances. He considered himself to be an investor and effectively a half owner of the company. He was providing its working capital and monitoring its application closely; in other words, he was not simply writing a cheque each month or so without knowing how it was spent. He was at the factory or the Morrin home office upon effectively a full time basis. He was accruing a wage at the same rate as Ms Morrin and Mr Coghlan. But he was not under the direction of either of them. They were not able to direct what he could or could not do for the company. He became authorised to operate its bank account, consistently with the circumstance that he financially controlled the business by controlling its only line of credit. And he was an experienced businessman who believed that he could contribute not only finance but also business acumen to the company, particularly in the circumstance where he considered Ms Morrin and Mr Coghlan to be inexperienced. I accept that he chose not to become a duly appointed director. But there may have been many reasons for that and it is not irreconcilable with his wanting to be effectively one of the controllers of the company. Having provided so much money for the business and considering himself to be a part owner, it was almost inevitable that he would assume a role which corresponded with that of a director.

[190] There was no resistance by Ms Morrin or Mr Coghlan to this participation by Mr Rodrick, until 2005. One circumstance which indicates the true extent of his participation was that until then, they did not attempt to conduct the business by excluding him. They were content for him to have this extensive role, because he was providing the necessary finance. But in 2005 they began to exclude him by, for example, denying him access to the accounts. It is difficult to put a precise date upon this development in their relationship. As I have said, their acting without reference to him was not necessarily inconsistent with his being a de facto director. But I am left with the impression that by the date of the appointment of the receivers, his participation had so diminished with the deterioration in their relationship, such that he may have ceased to be a de facto director.

Insolvent trading claim

[191] Section 588G relevantly provides:

> "(1) This section applies if:
>
> (a) a person is a director of a company at the time when the company incurs a debt; and

(b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or by incurring at that time debts including that debt; and

(c) at that time, there are reasonable grounds for suspecting that the company is insolvent, or would so become insolvent, as the case may be; and

(d) that time is at or after the commencement of this Act.

…

(2) By failing to prevent the company from incurring the debt, the person contravenes this section if:

(a) the person is aware at that time that there are such grounds for so suspecting; or

(b) a reasonable person in a like position in a company in the company's circumstances would be so aware."

[192] The liquidators' case is put in this way. The company was insolvent throughout the period from 25 November 2003 until 5 August 2005, during which certain debts were incurred totalling $371,007.56. Throughout that period, Mr Rodrick was bound to prevent the incurring of those debts (presumably by causing the company to discontinue its trading). Had he disclosed that obligation, these debts would not have been incurred. Those creditors have suffered loss or damage to the extent of $371,007.56 and s 588M permits the liquidators to recover from Mr Rodrick, as a debt due to the company, that amount.[78]

[193] Therefore, in the way in which the liquidators have put their case, it depends upon the proof of insolvency throughout that period. I have found otherwise. I have concluded that the company was solvent when it created the charge and remained so in March 2004 when it transferred the boat to Nu-Log. The liquidators have not sought to establish the various dates upon which individual debts were incurred within this period from 25 November 2003 until the receivership. Perhaps they could have done so by reference to the very extensive evidence of the MYOB records. However, they did not attempt to do so and sought no finding of that kind. But as it happens, that exercise would have been futile, absent the proof of some alternative case that the company was insolvent, at least from a certain date after 25 November 2003.

[194] The liquidators did not seek to establish an alternative case based upon a presumption under s 588E(3) which provides:

"(3) If:

(a) the company has been wound up; and

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78 s 588M(2).

> (b) it is proved … that the company was insolvent at a particular time during the 12 months ending on the relation-back day;
>
> it must be presumed that the company was insolvent throughout the period beginning at that time and ending on that day."

It is common ground that the relation back day here was 18 August 2005, being the date of the appointment of the present liquidators as voluntary administrators. There was no attempt to prove, as an alternative case, that the company was insolvent at a particular time after 18 August 2004.

[195] As I have noted, Ms Morrin's evidence was that by late December 2004, "the financials were getting tight again" and "Rodrick started raising issues about how much money was owing."[79] At about the same time, she engaged new accountants for the company and said that "the trigger for getting the accountants was Roderick saying that he wanted his money. Prior to Roderick demanding his money, it had always been a pretty loose situation."[80] As I have also discussed, the company made profits in all but one of the six months to 30 June 2005. So Ms Morrin's evidence, if accepted, would not prove that the company was insolvent as at, say, the end of December 2004.

[196] Again according to Ms Morrin, in early 2005 the company "seemed to be travelling alright … as it had commenced building boat number 10 and boat number 11 had been sold."[81] She was then of the view that although the company had substantial debts, "these were able to be paid and … the prospects for the company were looking the best they had since late 2002/early 2003."[82] At about this time the company negotiated an extension for the payment of its tax debts.[83] Further, the company entered into an agency agreement, appointing the business of Ms Martin and Mr Hollier, called Bosun's Locker, as its agent to sell catamarans. As already noted, that firm or its principals were also the purchasers of a boat (the C3509) and Ms Morrin said that this sale relieved "the financial pressure" on the company.[84] These agreements with Bosun's Locker were the subject of strong complaint made by Mr Rodrick, who was not consulted by Ms Morrin and Mr Coghlan before they were concluded by Ms Morrin on the company's behalf. But the point of all of this is that Ms Morrin, acting independently of Mr Rodrick and, it may be accepted, only in the company's interests, judged that the company was well able to continue trading from this time and with improved prospects but without the continuing support of Mr Rodrick and Nu-Log. Therefore there would be no basis, upon the liquidator's case, for a finding that the company, whilst solvent in early 2004, had become insolvent by the end of December in that year.

[197] Ms Morrin also gave evidence that not long after the C3505 had been completed and delivered to Nu-Log, Mr Rodrick "started to ask me for all of the rest of the money that he had put into ICM" and that she responded by saying that it "was too

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79 Affidavit of Ms Morin, Court document 223, para 159.
80 Affidavit of Ms Morin, Court document 223, para 161.
81 Affidavit of Ms Morin, Court document 223, para 173.
82 Affidavit of Ms Morin, Court document 223, para 174.
83 Affidavit of Ms Morin, Court document 223, para 175.
84 Affidavit of Ms Morin, Court document 223, para 167.

early to be paying his debt given his agreement to support ICM going forward."[85] As I see her evidence, Mr Rodrick seemed to accept that response and it was not until late December 2004 that he was "demanding his money."[86]

[198] The outcome is that the liquidators have failed to prove that certain debts were incurred at a time at which the company was insolvent. Therefore the insolvent trading claim must be dismissed.

Breaches of duty

[199] The plaintiffs allege that Mr Rodrick, as a director, or "at the least as senior officer of the Company engaged in the management and affairs of the Company," owed fiduciary duties to act in the interests of the company rather than his own interests, or those of an entity of which he was a director or had an interest, and to avoid potential conflicts between the company's interest, and those interests. The alleged breaches of fiduciary duty are pleaded as follows:

> "33. In breach of his Fiduciary Duties the First Defendant:
>
> (a) failed to take steps to protect the First Plaintiff's position;
>
> (b) used his position to cause the Fixed and Floating Charge to be entered into by the First Plaintiff with a related entity of the First Defendant, namely the Second Defendant;
>
> (c) used his position to secure an advantage over other creditors and the shareholders in relation to their investment, namely the Unsecured Loan and all monies advanced after this time, into the Company;
>
> (d) used his position to secure an advantage over other creditors and the shareholders by allowing the Company to continue to accrue creditors, whilst completing the boat 'Blue Magic' for the benefit of the First and/or Second Defendant;
>
> (e) allowed the Company to continue to trade and increase its indebtedness in circumstances where a reasonable person would not have done so;
>
> (f) transferred, or accepted the transfer, of the Boat on behalf of the Second Defendant from the Plaintiff;
>
> (g) appointed the Third Defendant as the Receivers and Managers of the Company."[87]

[200] It is alleged that in consequence of those breaches, the company suffered loss and damage, including but not limited to the incurring of debts in the total sum of

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85 Affidavit of Ms Morin, Court document 223, paras 154 and 155.

86 Affidavit of Ms Morin, Court document 223, para 161.

87 Further Amended Statement of Claim.

$371,007.56 (as claimed by the liquidators for insolvent trading), the loss to the company of the C3505 and the interest paid by the company to Nu-Log.

[201] In essence the complaints seem to be about the creation of the charge, the transfer of the C3505, the continued trading of the company whilst insolvent and the appointment of receivers and managers.

[202] I have discussed the relative benefits and detriments to the company and Nu-Log from the creation of the charge, in concluding that it may be expected that a reasonable person in the company's circumstances could have entered into that transaction.[88] For substantially the same reasons, the negotiation of the charge did not involve a breach of fiduciary duty by Mr Rodrick. Moreover, that is not shown to have caused a loss to the company. It permitted the company to continue to trade after November 2003, and from then until 30 June 2005 it derived substantial profits.[89]

[203] I have also discussed the commerciality of the transaction for the transfer of the C3505.[90] For the same reasons, this transaction did not involve a breach of fiduciary duty. Nor is it demonstrated that it caused loss to the company. In particular, it is not demonstrated that it resulted in a reduction of the debt to Nu-Log which was less than the value of the boat.

[204] The allegation of a breach of fiduciary duty by allowing the company to continue to trade fails for substantially the same reason as the insolvent trading claim fails. It is dependent upon the proof of insolvency from 25 November 2003 onwards.

[205] The pleading does not reveal the basis upon which it is alleged that the appointment of receivers and managers involved a breach of fiduciary duty by Mr Rodrick. Perhaps it is dependent upon the alleged invalidity of the charge. Otherwise, there is no apparent basis for this allegation. It is not said, for example, that Mr Rodrick should have allowed the company to continue to trade, for that would be inconsistent with the liquidators' case that the company had long been insolvent and should have ceased trading. Nor is it said that by August 2005, Nu-Log was not entitled to demand payment of whatever was its debt. Further, as I have discussed above, it would appear that Mr Rodrick had ceased to be a de facto director by this stage, being effectively excluded from participation in the company's business.[91]

[206] As to the alleged damage by the amount of interest paid by the company under the charge, the company relies upon Mr Rodrick's spreadsheet submitted in 2005, showing a total of $66,540.85 as debited to the company in the months from November 2003 through June 2005. How much of this was *paid* is a different question. That amount does not appear from Mr Rodrick's spreadsheet. In any event, the amount of interest obviously is dependent upon the amount of the outstanding debt from time to time, which in turn depends upon the amount for which the company was entitled to be credited upon the sale of the C3505 and Mr Rodrick's spreadsheet allows for $350,000 in that respect.

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88 See above at [123].
89 See above at [82]-[83].
90 See above at [145]-[147].
91 See above at [190].

[207] It follows that the claims against Mr Rodrick for breach of fiduciary duty, and the consequential claims against Nu-Log based upon his alleged breaches of duty, must fail.

Breaches of statutory and other duties

[208] Paragraph 36 of the Statement of Claim alleges that Mr Rodrick, by virtue of his position as a director or as a senior officer of the company, owed duties in identical terms to the fiduciary duties which he is said to have owed. It is further alleged that he owed duties under sections 181, 182(1)(a) and (b) and 183(1)(a) and (b) of the *Corporations Act*, each of which he breached.

[209] The alleged breaches of these duties are pleaded in paragraph 43 in identical terms to the allegations of breaches of his fiduciary duties, together with a further complaint that he:

> "(h) exposed the Company to a liability for a contravention of the [*Trade Practices Act*], as pleaded herein."

In that last respect, the Statement of Claim does not allege that the plaintiff company contravened or became liable for a contravention of the *Trade Practices Act 1974* (Cth). It does plead that the plaintiff suffered loss and damage by the contravention by Nu-Log of that Act, but this part of the plaintiffs' case was abandoned at the trial. Perhaps the pleader had in mind that the company had contravened s 52 by incurring debts and misrepresenting its ability to pay them. If so, then that case also would depend upon the alleged insolvency of the company throughout this period. At least for that reason, this particular allegation must fail. Otherwise, the allegations of breaches of these duties fail for the same reasons as the alleged breaches of fiduciary duty.

[210] The quantum claimed under this heading, for compensation pursuant to s 1317H of the *Corporations Act*, is said to "depend upon at what point in time the duties were breached." In some written submissions provided at the commencement of the trial,[92] reference was made to the crediting of $350,000 for the C3505, the sum of $371,007.56 as claimed for insolvent trading and the fact that the company made payments "pursuant to the charge during the period between 25 November 2003 and 28 June 2005" of $835,183.26. However, Mr Hambleton said that some of the amounts which he had pleaded were incorrectly included as payments.[93] Those amounts incorrectly included total $4,679.96. Otherwise the alleged payments seem to be evidenced by the company's general ledger and, should it matter, I would accept that these payments were made to Nu-Log.

Conclusion

[211] Each of the causes of action pursued against the first and second defendants is not established. The plaintiffs' claims against them will be dismissed.

[212] The claims against the third defendants, the receivers and managers, were dependent upon the challenge to the validity of the charge. Therefore the claims against the third defendants will be dismissed.

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92 Plaintiffs' supplementary written opening submissions, para 66.

93 Affidavit of Mr Hambleton, Court document 213, paras 49-50.

[213] I will hear the parties as to any consequential orders and as to costs.