SUPREME COURT OF QUEENSLAND

CITATION:	*First Strategic Development Corporation Limited (in liq) and Anor v Chan and Ors* [2014] QSC 60
PARTIES:	**FIRST STRATEGIC DEVELOPMENT CORPORATION LIMITED (IN LIQUIDATION)** (First Plaintiff) and **JONATHAN PAUL MCLEOD AS LIQUIDATOR OF FIRST STRATEGIC DEVELOPMENT CORPORATION LIMITED (IN LIQUIDATION)** (Second Plaintiff) v **SING CHUK CHARLES CHAN** (First Defendant) and **WAI LAP VICTOR CHAN** (Second Defendant) and **WAI TAK KWOK** (Third Defendant)
FILE NO/S:	BS 7838 of 2012
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2013 – 25 October 2013 Further submissions 1 and 5 November 2013
JUDGE:	Philip McMurdo J
ORDER:	**The first and third defendants are ordered to pay to the first plaintiff, pursuant to s 588M(2) of the *Corporations Act*, the sum of $1,349,131.03. The second defendant is ordered to pay to the first plaintiff, pursuant to s 588M(2), the sum of $1,322,867.35.**
CATCHWORDS:	CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – WHAT CONSTITUTES INSOLVENCY –

where the liquidator made claims to recover losses from insolvent trading by the company's directors – whether debts were incurred by the company whilst insolvent.

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – WHAT CONSTITUTES INSOLVENCY – where the liquidator made claims to recover losses from insolvent trading by the company's directors – whether the prospect of funding from a director was sufficient to enable the company to pay its debts.

Corporations Act 2001 (Cth), s 95A, s 286(1), s 588E(4), s 588H(2), s 588H(4), s 588M(2)

Deputy Commissioner of Taxation v Clark (2003) 57 NSWLR 113
International Cat Manufacturing Pty Ltd (in liquidation) & Anor v Rodrick & Ors (2013) 97 ACSR 200
Lewis v Doran & Ors (2004) 184 FLR 454; (2005) 219 ALR 555
Mulherin v Bank of Western Australia Ltd; McCann & Ors v Bank of Western Australia Ltd [2006] QCA 175
Shephard v Australia & New Zealand Banking Group Ltd (1996) 41 NSWLR 431
Williams v Scholz [2008] QCA 94

COUNSEL: MD Martin QC for the plaintiff

PA Looney QC with NM Cooke for the first and second defendant

C Jennings for the third defendant

SOLICITORS: Shand Taylor Lawyers for the plaintiff

Herbert Geer for the first and second defendant

Russells for the third defendant

[1] The first plaintiff, which I will call the company, was wound up on 17 November 2010. The second plaintiff is the company's liquidator. Each of the defendants was a director of the company. The first defendant was a director at all relevant times until 5 October 2010. The second defendant was a director at all relevant times from 5 March 2010. The third defendant was a director at all relevant times.

[2] At least by when it was wound up, the company was insolvent, having no assets but liabilities in excess of $1 million. The principal claim is by the liquidator against each of the directors for compensation for losses from the company's alleged insolvent trading. The debts which were incurred but unpaid and which are the subject of this claim total $1,032,483.80. For the most part there is no dispute as to the existence of those debts or the respective dates upon which they were incurred.

[3] Each defendant denies that the company was insolvent when the debts were incurred. At no time did the company have any assets or any apparent source of credit except for the first defendant, who did finance the payment of some creditors

to the order of about $80,000. The defendants' case is that until 6 August 2010, the first defendant expressed and demonstrated a preparedness to finance the company's only activity, being the exploration of certain mining tenements in Western Australia over which the company held an option to purchase. It was a condition of that option that the company expend $2.5 million in the exploration of the tenements. The defendants' case is that until 6 August 2010, which they say was after the last of the relevant debts was incurred, the first defendant was willing and able to provide whatever funds the company required either to fulfil that condition or otherwise, ahead of its exercise of the option to purchase. The first defendant's ability to provide such funds was not contested at the trial. As I will discuss, it is the nature and extent of his willingness to do so which is critical to the question of the solvency.

[4] The first defendant is the second defendant's father. They were jointly represented in these proceedings. The second defendant argues also that if the company was insolvent, at each relevant time he had reasonable grounds to expect, and did expect, that the company was solvent and would remain solvent on the incurring of that debt.[1]

[5] The third defendant also argues that defence. And he has an alternative argument, which is that for good reason, he did not take part in the management of the company at relevant times.[2] The effect of his case is that by about May 2010, he and his co-directors had agreed that he should not participate in the company's affairs and that subsequently he remained a director in name only.

[6] The company also seeks to recover effectively the same amount as compensation for a breach of duty by each of the defendants, as a director of the company. To the extent that there was a common understanding between the directors that the first defendant would provide any necessary support for the company pending the exercise of its option, that was not the subject of any formal agreement with or enforceable obligation upon the first defendant. It is said that each of the directors was in breach of his duty to the company by allowing it to incur the subject debts, absent some enforceable obligation by the first defendant to cause those debts to be paid. Each of the defendants disputes that case by saying that the likelihood that the first defendant would pay whatever amount was required was sufficiently reliable for the company's purposes.

The company's history

[7] Macarthur Minerals Limited ("MMS") is an Australian company registered on the Toronto Stock Exchange. Mr Alan Phillips was and is a director of MMS and its chief executive officer. Mr Phillips lives in Brisbane.

[8] From at least 2007, MMS was seeking to attract co-investors to develop an iron ore project in Western Australia called the Lake Giles Project. This brought about an association between the third defendant and MMS. He is an Australian citizen who, after meeting Mr Phillips, introduced to MMS potential investors from China and Hong Kong. One of those investors was the first defendant, a resident of Hong Kong, whom he had known for about 16 years. He also introduced to MMS a company called China Minmetals Ltd, a state owned company incorporated in

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1 *Corporations Act 2001* (Cth), s 588H(2).

2 *Corporations Act 2001* (Cth), s 588H(4).

China, which became a shareholder of MMS. One of the third defendant's roles was to act as an intermediary between MMS and this company, in the negotiation of long term off-take agreements for the project and also to assist in capital raising by MMS.

[9] In September 2009, the first and third defendants visited the Lake Giles Project in the company of Alan Phillips and his son, Joe Phillips. On this occasion, they discussed the possible exploration of tenements which were adjacent to those held by MMS. These tenements were held by a Mr Dalla-Costa.

[10] Mr Dalla-Costa was minded to sell his tenements. He was willing to grant an option to purchase them at a price to be calculated by reference to their mineral resources. But the tenements were then unexplored and the extent of their resources was unknown. Mr Dalla-Costa proposed that the grantee of the option to purchase would be required to explore the tenements so that the price, upon exercise of the option, could be ascertained by the results of that exploration. More specifically, he proposed that the grantee of the option be required to spend $2.5 million in exploring the tenements as a condition of the exercise of the option.

[11] Mr Dalla-Costa's tenements, being alongside those of MMS, were understandably attractive to MMS. But at that time it did not have sufficient funds of its own to explore them. Therefore, MMS proposed to the first and third defendants that, in effect, they should be granted the option to purchase the tenements and that they should fund the exploration. But this was to be to the ultimate end of the tenements being onsold by them to MMS, at a substantial profit to them and in consideration for the issue of MMS shares to them.

[12] In September 2009, Joe Phillips emailed the third defendant to summarise the relevant discussions to that point, the subject matter of which went beyond Mr Dalla-Costa's tenements. Mr Phillips recorded that a "Newco" was to hold an option over the tenements for 12 months, requiring the expenditure of $2.5 million by it in the exploration and the production of an independent resource report, a process which, he said, should take about six months. He wrote that "the investor" would "supply the A$2.5 million" and would have initially 40 per cent of the equity in "Newco" and a further 40 per cent upon exercise of the option of purchase.

[13] There were further discussions and emails before another email from Joe Phillips to the third defendant on 28 October 2009, which the third defendant then forwarded to the first defendant. Mr Phillips there set out a proposal having several elements. The first was the grant of an option by Mr Dalla-Costa to the company, it having been identified by them as the appropriate vehicle to take the option and pursue the exploration of the tenement. The company was then a shell, the directors and shareholders of which were Alan Phillips and a Mr Taplin. Ninety per cent of the shares were to be transferred to the first and third defendants who were also to be its directors.

[14] A further element was that MMS would manage the exploration project. A third element was that MMS would also hold a call option, for the purchase of the tenements within 60 days of the exercise of the company's option granted by Mr Dalla-Costa. The email set out the respective prices to be paid to Mr Dalla-Costa and in turn to the company, which would result in a large profit for the

company. Upon the exercise of its call option, MMS could pay for the tenements "in the form of equity".

[15] In that same email, Mr Phillips explained how the various elements "fitted together". He said that assuming that in 18 months time, MMS was trading at a certain price and then had a certain number of shares on issue, these transactions would result in the company acquiring some 36.6 per cent of the then shares in MMS. In round terms, the price to be paid to Mr Dalla-Costa would be of the order of $40 million and the price to be paid by MMS to the company would be of the order of $60 million, to be provided by the issue of shares in MMS. The transaction was presented as very beneficial to the company and thereby to the first and third defendants. But on the face of this email, the company would have to find its own funds for the acquisition of the tenements, because its onsale would be for equity and not for cash. The email did not refer to the funding of the company's acquisition.

[16] Importantly, this and other documents demonstrate that the company's exploration and acquisition of the Dalla-Costa tenements was intended to be for the ultimate benefit of MMS, in that there was no proposal either for the development by the company (or anyone behind it) of the tenements or for the sale by the company of the tenements to anyone other than MMS.

[17] The discussions progressed to the point of an agreement that the company should be wholly owned by the first and third defendants. They became its only directors until they were joined on the board by the second defendant on 5 March 2010.

[18] On 28 November 2009, Joe Phillips emailed the third defendant to further explain the proposed exploration and acquisition of the Dalla-Costa tenements, to the ultimate end that they should be owned by MMS which would paid for it by the issue of shares to the company resulting in more than 70 per cent of MMS being held by what Mr Phillips described as "our group". His email was forwarded to the first defendant.

[19] Mr Dalla-Costa granted the call option to the company by an option agreement dated 3 December 2009. The option, which was granted in consideration of the payment of the fee of $1.00, was to purchase the tenements for a price which was calculated by reference to the outcome of the exploration program, but capped at A$40 million. The company agreed to act with all reasonable expedition in order to satisfy the conditions of the exercise of the option, one of which was that the company was to expend $2.5 million "on exploration of the Tenements of which at least 85% must be expended on geological investigation of the definition of a Resource on the Tenements in accordance with" a certain plan of exploration as set out in the agreement. The option was exercisable no later than 12 months from the date of the agreement. Upon its exercise, the company would be able to extend the date for completion to a period of 90 days, albeit with the payment of interest. The option agreement was signed by the first and third defendants on behalf of the company.

[20] On 4 December 2009, Joe Phillips emailed the third defendant, attaching a budget for the exploration. He wrote: "Currently I have been funding the program. David [Chan] will need to establish banking facilities and have funds transferred into the account to meet the attached expenditure commitments". He also wrote that MMS

would submit a management contract "to support the delivery of this geological program".

[21] A few days later, Joe Phillips emailed the third defendant and another, saying:

> "Macarthur Minerals is the manager of the exploration tasks and will in effect redirecting [sic] invoices to [the company] for the geological tasks performed. [The company] does not have a credit history, so it will be MMS that is ultimately will [sic] have to vouch for [the company]. It is important that you have funds at hand to meet these exploration commitments. [The company] then can pay the contractors directly post MMS approval that the work was completed and to the standard contracted."

That email was forwarded by the third defendant to the first defendant.

[22] Although the third defendant became nearly a half owner in the company, there is no indication that he intended to provide any of the $2.5 million which was required to be spent on exploration or any other funds which the company would need for this project or for any other purpose. The defendants' cases are that this burden was left entirely to the first defendant, who was thought by the third defendant to be a wealthy and trustworthy man. They had worked together for several years and he understood the first defendant to be a prominent entrepreneur and businessman in Hong Kong who was well able to afford the required expenditure of $2.5 million.

[23] Some work was done on the Dalla-Costa tenements in December 2009 and January 2010. On 20 January, Joe Phillips emailed some invoices to the company requesting their payment. The invoices totalled about $16,000 and they were paid promptly. No further payment was made on behalf of the company until four payments, totalling approximately $21,000, in early March 2010. By this stage, not everything was progressing as some may have expected. On 25 February 2010, Alan Phillips wrote to the second and third defendants, referring to the fact that drafts of an option agreement between the company and MMS and a management agreement between them had been sent to those defendants by MMS for their review in late January. The board of MMS had resolved to execute these documents, but the company had no responded to the drafts. Further, it seems that the exploration work had not progressed.

[24] On 28 March 2010, Joe Phillips emailed the first defendant to make a number of complaints. The first was that despite his request, he had not received a direction that MMS should undertake the next round of exploration on the Dalla-Costa tenement. The second was that he did not have a completed management agreement. On 29 March, the first defendant replied saying that these matters had been overlooked and instructing MMS to "catch it up immediately".

[25] By this stage, there was discord between the third defendant and Alan and Joe Phillips. MMS was considering a private placement of shares which, the third defendant was complaining, would dilute the interests of existing shareholders. (On one view of the correspondence, they included the first defendant.) In late March and early April 2010, Norton Rose, on the third defendant's instructions, wrote several letters to MMS to complain about the proposed placement and to refer to other differences which had arisen between the board of MMS and what was

described as the group of "Hong Kong shareholders", which included the third defendant and on one view, also the first defendant.

[26] At least from those letters being sent, the relationship between Alan Phillips and the third defendant broke down. The evidence of Alan Phillips was that he was then not prepared to have further dealings with the third defendant because (through Norton Rose) he had threatened proceedings against MMS.

[27] In April or May 2010, Alan Phillips told the first defendant that he would not do business with the third defendant. He insisted that the third defendant be removed as a director and cease to be a shareholder of the company. That stance was reflected in an insistence by MMS that what was still a draft of a management agreement between MMS and the company, be made conditional on MMS being satisfied that it was the first defendant who owned all of the capital of the company.

[28] At this stage little appears to have happened in the exploration of the tenements. Of the few payments which were made in April and May 2010, most of them seem to relate to legal and administrative matters. I infer that this was because MMS was unprepared to engage contractors for the exploration work in the particular circumstance that it did not have a concluded management agreement.

[29] In May 2010, the third defendant executed a power of attorney, appointing Mr Terry Au Yeung "to represent me and sign documents on my behalf in all corporate matters, including but not limited to the transfer of shares or change of shareholding structure, relating to me … being a member of [the company]". Mr Au Yeung was then employed by the first defendant or one of his companies. On 11 May 2010, the first defendant emailed Alan Phillips telling him that he was in "effective control" of the company. On the same day, Mr Au Yeung gave some instructions for the third defendant's shares to be transferred to the first defendant. Documents to effect that transfer were prepared and signed by Mr Au Yeung as the third defendant's attorney. They were also signed by the first defendant. But it appears that the transfer was not registered. The third defendant remained a shareholder. He also remained a director of the company. The explanation for that may be indicated by an email from Mr Au Yeung to the first defendant on 31 May 2010, where he referred to the need for an Australian resident director.[3] The first and second defendants lived in Hong Kong. The third defendant lived in Australia.

[30] A management agreement was signed by MMS and the company and dated 26 May 2010. However, it had a so-called commencement date of 3 December 2009. It was signed for the company by the first defendant. By cl 3.1.(a) it was conditional upon the project manager (MMS) being satisfied that the first defendant was or was entitled to all of the share capital in the company. The agreement was terminable by the company on 180 days notice. The project was the exploration of minerals within the Dalla-Costa tenements. MMS was authorised to make expenditure in accordance with an approved program and budget. MMS was to be paid a fee, to "accrue on a daily basis", payable in "equal monthly instalments". The amount of the fee was "15 per cent of the Project Budget …, which fee forms part of the Project Budget". The term "Project Budget" was defined to be the amount of $2.5 million (plus GST) or such other amount as might be agreed from time to time. Of course, that project budget corresponded with the amount which was required to be

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3 *Corporations Act*, s 201A(1).

spent under the agreement with Mr Dalla-Costa. The apparent intention was that the cost of exploration was to remain $2.5 million but inclusive of this project management fee.

[31] The option agreement, whereby MMS was to be granted an option to purchase the tenements from the company remained a draft. There had been several drafts. None was ever signed.

[32] The signing of the project management agreement appears to have prompted some activity in the exploration of the tenements. On 4 June 2010, the company made four payments to a consultant providing environmental services, totalling a little under $10,000. On 9 June 2010, Orbit Drilling Pty Ltd provided a quotation for the necessary drilling program, in which there was no all-up price. Its work was to be done at certain rates. Orbit Drilling was to be paid 14 days from its invoice which would be provided on a fortnightly basis. A deposit of $20,000 was to be paid on acceptance of the quotation. The first defendant signed to accept the quotation and that deposit was paid on 9 June 2010.

[33] Orbit Drilling is the largest of the unpaid creditors, being owed $448,178.43. It is common ground on the pleadings that this debt was incurred on 9 June 2010, upon the acceptance of its quotation. But the drilling work did not commence immediately. On 1 July 2010, Joe Phillips emailed the first and second defendants asking for confirmation that the drill program should commence, the rig having just arrived on the site. Mr Au Yeung gave that confirmation on the following day.

[34] On 8 July 2010, the first defendant emailed Alan Phillips saying that he would be in Brisbane shortly and wished to discuss with him the "317 MMS contract" and the "317 extension with the original mill operator" for the purpose of providing some assurance to the first defendant for him to "move forward". That first contract was an apparent reference to the draft call option to be granted to MMS by the company. The second reference was to a proposed extension of the time for the company to exercise its own call option.

[35] There followed email exchanges between representatives of MMS and the company. There was also correspondence within those on the company's side of the transaction, in which Mr Au Yeung explained that there was a "cash flow consideration" which would result from the interval of time between the required payment to Mr Dalla-Costa and the receipt of payment from MMS. Mr Au Yeung wrote to the second defendant on 7 July 2010 that he had discussed this issue with the first defendant a couple of weeks earlier and had the understanding that "neither [the company] nor MMS have the cash to complete the transaction". Therefore, the first defendant had to negotiate with Mr Dalla-Costa as well as with MMS. Consequently, in late July 2010 there was a visit to the site of the tenements by the first and second defendants and Mr Au Yeung, who were there introduced to Mr Dalla-Costa by Alan Phillips. Also present was a Mr Betts, who represented a company which was proposing to make a takeover offer for MMS. There were discussions about whether Mr Dalla-Costa would extend the option period but no concluded agreement for an extension appears to have been made.

[36] By early August the company was being pressured to pay some creditors. On 6 August 2010, the first defendant sent this email to Alan Phillips:

> "… I feel uncomfortable with the immediate prospect of the Lake Giles E317 exploration program. I have to request you to suspend the exploration with immediate effect until further notice and until the concerns below are resolved.
>
> I have a few concerns. We have secured the buy option from the tenement owner but we cannot secure the sell option to MMS. This does not make commercial sense for me to proceed further. Given the uncertainty of the dispute regarding [the third defendant] vs MMS, I feel very unsecure [sic] to move forward.
>
> I understand [the company] is responsible for the exploration cost and other expenses accrued so far. Please send me the most up to date account upon suspension. [The company] shall settle the account in due course …"

[37] On 16 August 2010, Alan Phillips replied that as a result of his email of 6 August, MMS as the project manager had suspended all geological activity on the tenements. He said that he would compile a list of outstanding accounts for the company.

[38] On 19 August 2010, Alan Phillips sent such a list to the first defendant. The total amount owing was said to be $856,365.19 which included two invoices which had by then been received from Orbit Drilling, totalling nearly $350,000. It also included two invoices, each dated 10 August 2010, which MMS had issued and which totalled about $365,000.

[39] None of those accounts was paid, contrary to the first defendant's assurance in his email of 6 August. Instead, on 27 August 2010, the first defendant emailed Alan Phillips in these terms:

> "Given the missing link of a firm commitment from MMS … on buying the tenement … from [the company] if [the company] is to take up the option of buying the tenement from the tenement owner [the company] will not be able to raise funds for this project. Please be advised that [the company] had to face the reality of cancelling and terminating this project.
>
> MMS as a manager to the exploration project should also immediately convey the same message to all parties concerned by this decision.
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> Shareholders of [the company] are considering disposing the company [sic] as an option to draw a conclusion to this project. Please let me know if any potential buyer is interested in taking up this offer before [the company's] deciding on other options."

[40] On 17 November 2010, at a meeting of creditors of the company, there was a resolution for the company to be wound up and for certain persons to be appointed liquidators. A notification of that resolution, to be presented to the Australian Securities and Investments Commission, was signed by the second and third defendants as directors. The liquidators so appointed had prepared a report to creditors dated 19 November 2010 in which they wrote that the company had assets of but $269.54, against liabilities (all of which were unsecured creditors) of

$1,894,405.98. Within those creditors were some which, it is now accepted, were entities associated with one or more of the defendants and which falsely claimed to be owed money by the company. That list of creditors also included each defendant, who lodged a proof of debt claiming a director's fee. The total claimed by the directors and their associates was an amount of $982,667 being, unsurprisingly, about 51 per cent of the total creditors.

[41] None of the claims by the directors or their associates was genuine. Each was made in an attempt to have the defendants control the outcome of the meeting for the purpose of having their selected candidates appointed as liquidators. About those facts there was no real contest at this trial.

[42] The respective claims for a director's fee, by the first, second and third defendants, were for $172,667, $116,667 and $160,000. The defendants made these claims, prompted by a suggestion by Mr Au Yeung, in an email to at least the first and second defendants of 10 October 2010, that "in order to increase the number of 'friendly' creditors … each of the directors should file in a large bill for [a] director's fee for financial year 2009-2010 and up to Sept 2010". He there suggested that the amount should be "about 80% of MMS's current director fee rate". And he suggested certain further claims which could be made by "friendly" creditors.

[43] The third defendant signed a letter addressed to the company, which was backdated to 25 September 2010, in which he requested the company to "kindly arrange the transfer of A$160,000 … being the director fee of [the company] during the period from 25 September 2009 to 24 September 2010 …". He also caused to be made two further claims upon the company, on behalf of other entities, claiming so-called management and referral fees totalling A$250,000.

[44] As part of this attempt to control the meeting of directors, there were also purported contracts signed in Hong Kong between the company and entities associated with one or more of the directors, which purported to record agency agreements which had commenced in September and October 2009.

[45] It is unnecessary to discuss further the details of this attempt to obtain control of the meeting. It could not be doubted that each of the defendants was a participant and made claims for debts which he knew were false. The evidence of these matters is clearly relevant to each defendant's credibility. It is also said to be relevant to the question of whether the third defendant believed that he had remained a director after April/May 2010, because he claimed payment for acting as a director up to late September 2010. Further, he gave evidence at an examination by the liquidator as follows:

> "Right. So you claim that you acted as a director up to and including the 24th of September 2010?-- Yes.
>
> But I thought you told us earlier that from about March of 2010 you didn't have much to do with the company. Is that right?-- Yes.
>
> All right. Well, how is that you claim director's fees up to the 24th of September 2010?-- But I still stay as a registered director and I have - have the obligation to know about the company operation and Mr Charles Chan and Au-Yeung from time to time ask for my opinion."

[46] This scheme to control a meeting of creditors was in response to demands for payment being made by MMS and Orbit Drilling with the likely result of the company being ordered to be wound up. The documents show that the three defendants wanted to have certain liquidators appointed, by a meeting of creditors, who were individuals whom they expected would be friendly to their interests. Those liquidators were appointed at the meeting. But MMS and Orbit Drilling successfully applied to this court to have them removed and the present liquidator was then appointed.

The debts incurred

[47] I set out from the Statement of Claim the liquidator's list of debts incurred by the company whilst insolvent:

"

Name of creditor	**Amount**	**Date incurred**
Strategic Capital Services Pty Ltd	$36.90	20.01.10
Macarthur Minerals Limited	$457,437.31	03.12.09-30.06.10
Resource Potentials Pty Ltd	$43,818.28	16.03.10-02.06.10
APS Geological Services Pty Ltd	$37,260.00	June 2010
McKenna Pty Ltd	$9,267.50	04.07.10-12.07.10
Unlimited Business Strategies Pty Ltd	$2,650.00	31.07.10
CSA Global Pty Ltd	$20,062.56	31.01.10
Treston & Co	$3,236.20	23.10.10
Alan Phillips	$1,782.42	14.06.10
Chambers & Co	$8,754.20	07.10.10
Orbit Drilling	$448,178.43	09.06.10
TOTAL	$1,032,483.80"	

[48] The first and second defendants dispute the debt of MMS, to the extent of $120,833.33. They dispute the debt of Unlimited Business Strategies Pty Ltd. They also dispute the dates upon which the debts to Treston & Co and Chambers & Co were said to have been incurred, saying that each was incurred on or before 6 August 2010.

[49] The third defendant makes the same challenge to the MMS debt. And he disputes the claims by Alan Phillips and Strategic Capital Services Pty Ltd.

[50] I go first to the MMS debt. On 10 August 2010, MMS issued two invoices to the company, in amounts of $254,375 and $76,521.50. Included within those invoices were claims for reimbursement for moneys which had been paid to third parties for work on the tenements. There were also management fees claimed, which across these two invoices totalled $250,000 plus GST.

[51] The disputed component of MMS's claim is for what its proof of debt described as follows:

> "Aug-Nov 2010 Project management fees pursuant to the agreement dated 26 May 2010 … which was terminated by [the company] on 180 days notice on 27 August 2010."

[52] The defendants dispute this component upon the argument that it is a claim for damages for breach of contract and not a debt which was incurred by the company.[4] The liquidator's response is that this was a debt incurred, in that the management agreement was not terminated with immediate effect from August 2010: rather, it came to an end only at a point which was 180 days from the email from the first respondent to Mr Phillips of 27 August 2010 during which time the monthly management fee continued to accrue as due and payable.

[53] I have referred to the relevant provisions of the management agreement, whereby MMS was to be paid a fee quantified at 15 per cent of a budget of $2.5 million. The respective submissions would appear to accept that MMS was not limited to a fee calculated upon the basis of what was actually spent in the exploration of the tenements. There is no dispute as to that part of MMS's claim which is for management fees totalling $250,000 to August 2010, when plainly that sum is well in excess of 15 per cent of what had been spent or incurred in the exploration of the tenements.

[54] Although signed in May 2010, the management agreement was for a term of 12 months commencing 3 December 2009. The contract provided for the payment of but one management fee, albeit by equal monthly instalments. That fee was $375,000 plus GST.

[55] By 27 August 2010, nearly nine months of the agreed period of 12 months of the management agreement had expired. The company was able to terminate the agreement only with effect from 180 days after its notice of termination. Therefore as at 27 August 2010, it was unable to terminate the agreement earlier than 3 December 2010. The evidence does not support a finding that MMS accepted the company's wrongful termination of the agreement, by itself terminating the agreement in response to the first defendant's email of 27 August 2010. I did not understand the defendants to argue for such a finding. Therefore, the management agreement remained in place. No work was done by MMS pursuant to it. But whilst the agreement was still in place, MMS's entitlement to the balance of the fee continued to accrue month by month. Therefore, this disputed component of the MMS claim is for a debt or part of a debt incurred by the company, rather than being a claim for damages. The last of the monthly instalments of the fee was due for payment on 3 November 2010, which was prior to the appointment of the first liquidators.

[56] There is no issue raised as to whether this component of the MMS claim was a debt *incurred* after 6 August 2010, when the defendants accept that the company was insolvent. It is the liquidator's case that any part of the MMS debt was incurred no later than June 2010.

[57] This component of the MMS debt is in an amount which is slightly less than the sum which could have been claimed, which is the balance of the management fee being $125,000 plus GST. But that does not matter for present purposes. I conclude that the defendants' argument about the MMS debt should be rejected.

[58] Unlimited Business Strategies Pty Ltd is a company associated with Joe Phillips. The first and second defendants say that there is no debt which is established by the evidence to support its claim, which is to be reimbursed for payments of $2,650

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4 *Shephard v Australia & New Zealand Banking Group Ltd* (1996) 41 NSWLR 431 at 434, 445.

made to McMahon Mining Title Services Pty Ltd (McMahon), an apparently unassociated company. McMahon billed these amounts by invoices addressed to Unlimited Business Strategies in September 2010. The evidence is scant on this question. But earlier invoices from McMahon were paid by the company and I infer that the subject invoices were also for services provided in relation to the subject tenements. I accept that these debts were incurred by the company. Although the invoices are dated in September 2010, the liquidator has pleaded that they were incurred on 31 July 2010 and it must be accepted (in the defendants' favour) that they were then incurred.

[59] The next disputed item is a debt to Treston & Co of $3,236. They were accountants and the fees were for "audit work carried out at the request of the company for the 2008 and 2009 financial years". Their invoice is dated 23 October 2010. The liquidator says that the debt was then incurred. The first and second defendants say that in the absence of evidence as to when the work was performed, the possibility that it was carried out prior to 6 August 2010 cannot be excluded. On the evidence, it is just as likely that the debt was incurred prior to 6 August 2010 than after that date. Therefore, this debt should be regarded as incurred prior to that date.

[60] Chambers & Company is a firm of lawyers who rendered a bill for $8,754.20 which was dated 7 October 2010. The work was described as advice in connection with the option agreement with Mr Dalla-Costa, the draft option agreement between the company and MMS and the project management agreement. Plainly, at least much of this work was done prior to 6 August 2010. It is unlikely that any of it was done after that date. I accept that this debt should be treated as having been incurred prior to 6 August 2010.

[61] What remains are challenges by the third defendant to amounts of $1,782.42 and $36.90. The first is the amount claimed by Alan Phillips for reimbursement of the cost of airline tickets which were purchased for the first and second defendants and Mr Au Yeung. The second is for the cost of a courier for documents sent to the second defendant. The sender of those documents was recorded as Joe Phillips although at the company's address. On its face it seems to be a debt incurred by the company. The air tickets related to the trip to Western Australia in July 2010. It is clear enough that this trip was for the purposes of the company's business. But I am persuaded that this was a company expense, which made the company indebted to Mr Phillips when he paid it.

[62] The outcome is that the various challenges to the debts, as the liquidator says were incurred, succeed only to the extent that the debts of Treston & Co and Chambers & Co should be treated as incurred prior to 6 August 2010.

Insolvency

[63] 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".

[64] Section 588E(4) provides for a presumption of insolvency throughout a period in which a company has failed to keep financial records as required by s 286(1). That requirement 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

wrote a "solvency report" which is in evidence. He there wrote that he had seen no financial statements of the company for any period from December 2009 and that whilst he had seen some "raw form" source documentation, this was inadequate for the company to be able to produce true and fair financial statements. In his view, the company had not complied with s 286. That evidence is unchallenged. Accordingly, the company is presumed to have been insolvent pursuant to s 588E(4). But the liquidator has assumed the burden of proving insolvency and the outcome does not turn upon this presumption.

[65] At no time did the company have any assets. Nor had it arranged any line of credit or other financial support from a party with whom it was at arms length. It had no contractual entitlement to receive any funds at all, from which it could have paid the debts which it was incurring. Its prospects of paying its debts depended entirely upon the means and preparedness of someone who stood to benefit from the company's operations. According to the evidence, the only possibility was the first defendant. There is no suggestion that the third defendant, who on the face of things was a half owner in the company, was prepared to fund any part of its operations during any relevant time.

[66] The plaintiffs concede that the first defendant had the means to fund the company's payment of the subject debts and any other debts, to the order of the amount of $2.5 million which had to be spent under the option agreement with Mr Dalla-Costa. But they dispute that there was a sufficient likelihood that the first defendant would meet the company's debts such that the company was thereby able to pay its debts as they fell due.

[67] It is well established that s 95A requires the court to have regard to "commercial reality" in assessing whether, as at the relevant date, a company is able to pay its debts as they become payable.[5] In this context, a company's position must be considered by reference to not only its legal rights and obligations but also other circumstances such as the relative likelihood that it will have funds available to it from sources with which it has no formalised agreement or understanding.[6] And there is no objection in principle to a consideration of the prospect of loans from related corporations or directors.[7] A recent example of the relevance of finance being provided by a director or related entity, such as to make a company solvent, is *International Cat Manufacturing Pty Ltd (in liquidation) & Anor v Rodrick & Ors*,[8] where Morrison JA (with whom Holmes and Gotterson JJA agreed) said that "regard can be had to such financial support where the evidence establishes that the directors are likely to continue it".[9]

[68] In *Williams v Scholz,*[10] Muir JA said that in this context "the most important consideration is the degree of commitment to the continuation of financial support",[11] a statement which was endorsed by Morrison JA in *International Cat Manufacturing*.[12]

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5 *Lewis v Doran & Ors* (2004) 184 FLR 454 at 481and on appeal (2005) 219 ALR 555.

6 *Mulherin v Bank of Western Australia Ltd; McCann & Ors v Bank of Western Australia Ltd* [2006] QCA 175.

7 *Williams v Scholz* [2008] QCA 94 at [110].

8 (2013) 97 ACSR 200.

9 (2013) 97 ACSR 200 at 224.

10 [2008] QCA 94.

11 [2008] QCA 94 at [110].

12 (2013) 97 ACSR 200 at 224.

[69] In *Lewis v Doran*,[13] Giles JA (with whom Hodgson and McColl JJA agreed) emphasised that "the key concept is *ability* to pay the company's debts as and when they fall due".[14] That emphasis on "ability" is important here. The prospects of obtaining necessary funds from a party, which is not obliged to provide them, must be such as to give the company something more than a chance of paying its debts: the prospects must be sufficient to make the company able to do so. That does not mean that the provision of the funds must be free of any uncertainty or contingency. But there must be a sufficient likelihood for the company, and those directing it, to be able to rely upon the availability of those funds when incurring the relevant debts.

[70] It must be accepted that the first defendant had some inclination to provide funds for the company, because (it appears to be common ground) such debts as the company did pay within the relevant period were paid from funds which he caused to be provided for that purpose. But in the context of the company's required expenditure over a 12 month period, these payments were comparatively small. No more than about $80,000 was paid in total by the company prior to 6 August 2010. There was no apparent system for the timely provision of funds to facilitate payments by the company.

[71] To the extent that the first defendant was minded to fund the company's operations, this was because of his interest in a prospective transaction or transactions which went beyond the exploration and acquisition of the tenements of Mr Dalla-Costa. The evidence reveals for no possibility that the company intended itself to develop the tenements, with or without a joint venturer. Rather, the intention from the outset was for the tenements to be on-sold to MMS (or a related company) in consideration for shares in MMS. A possible variant was that the shares in the company would be sold to MMS after the company's acquisition of the tenements, but that difference does not affect what was the essence of the prospective investment which had attracted the participation of the first defendant.

[72] The first defendant was interested in becoming a major shareholder in MMS. The company's proposed acquisition of the Dalla-Costa tenements was a means by which that could be achieved and in a way which would effectively discount the cost of acquiring those shares in MMS, because as the overall scheme was explained to the defendants in late 2009, there was a large profit which would be derived upon the company's resale of the tenements. The potential for that profit and an ongoing participation as a substantial shareholder of MMS in its Lake Giles project was sufficiently attractive to the first defendant for him to transact as he did in 2009 and to cause some funds to be provided for the payment of the company's debts. But the first defendant's preparedness to fund the company was qualified by the prospect that, for one or more reasons, the on-sale to MMS and the consequential acquisition of a substantial shareholding in MMS would not eventuate.

[73] The company and MMS reached an advanced state of negotiations of a proposed agreement between them for the on sale of the Dalla-Costa tenements. But their proposed agreement was one whereby the company would grant to MMS a call option, rather than an agreement which would oblige MMS to acquire the tenements

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13 (2005) 219 ALR 555.

14 (2005) 219 ALR 555 at 579.

(or the shares in the company). The absence of any concluded agreement between the company and MMS and the limited value (to the company) of that agreement being for a call option in favour of MMS, provided substantial reasons to doubt whether the proposed investment in MMS would proceed.

[74] There were many other contingencies or uncertainties which might affect the proposed transfer to MMS, one of which was about what might be the level of the MMS share price at the time of that transfer. In effect, the company was to be paid $60 million by the issue of shares, but obviously the number of shares which it would acquire in MMS would depend upon the then share price. There was a risk that if the share price was too low, the number of shares which would have to be issued to the company would result in its holding more than 50 per cent of MMS, which would be problematical given the requirements of the MMS constitution in that event for the approval of a general meeting of shareholders.[15] Another uncertainty was about what might be the number of issued shares in MMS, prior to the share issue to the company in exchange for the Dalla-Costa tenements, because that might also have affected the percentage of the shareholding in MMS which would be acquired by the company.

[75] And the future of MMS was itself dependent upon very many things, not the least of which was its prospects of securing sufficient capital or finance for the development of the Lake Giles project. Those prospects would be affected by, for example, its chances of securing an appropriate off-take agreement.

[76] The prospects of the company and those who stood behind it to ultimately share in a profitable investment in MMS were also dependent upon Mr Phillips and other directors of MMS being minded to attract them, rather than some other entity or group, as the major shareholder in MMS. I am mindful of the risks of hindsight. But the fragility of the relationship between the controllers of MMS, in particular Mr Phillips, and the potential investors in MMS which included the first and third defendants, was demonstrated by the series of events by which that relationship broke down over a period of about four months in 2010. That began with the complaints made by the third defendant, through his lawyers, that the board of MMS was in the process of diluting the stakes of the third defendant and associates in MMS. The "commercial reality" was that the company and the first defendant had no protection against the possibility that the board of MMS would choose to deal instead with other parties to become the major shareholders of MMS.

[77] Another uncertainty was the not unimportant issue of the company having to fund not only the exploration of the tenements, but also the acquisition of the tenements (at a cost of about $40 million) ahead of receiving the consideration for the on-sale of those tenements to MMS and where that consideration was to be provided by equity and not by cash. It is one thing to say that the first defendant was able to fund the expenditure which was required under the option agreement with Mr Dalla-Costa. It is another to say that the funding of the acquisition of his tenements would present no difficulty. This was the difficulty explained by Mr Au Yeung in July 2010 in the emails to which I have referred above at [35].

[78] Therefore there were many circumstances which must have made the first defendant, at any point, reluctant to contribute anything to the exploration of these

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15 As referred to in, for example, an email from Mr Phillips to the third defendant of 3 November 2009.

tenements and otherwise to the expenses of the company, to any extent beyond that which was required to be paid immediately in order to avoid the collapse of the entire proposal at that point. His "degree of commitment" was thereby low. It was dependent upon so many contingencies that, had there been an independent board of directors, they could not have considered the first defendant to be a reliable source of funds.

[79] The reliability or otherwise of the first defendant is also indicated by the way in which he ultimately showed no sense of responsibility for the payment of debts which he had caused the company to incur. In his letter of 6 August 2010, he asked for the outstanding accounts so that he could have them paid. But none of them was paid. He sought to explain this in his evidence by saying that he felt that he had been "cheated". But that allegation, whatever its content, was apparently directed to the controllers of MMS and not to any other creditor.

[80] In my conclusion the degree of preparedness of the first defendant to pay the debts of the company as they fell due, was not such as to provide a sufficiently reliable source of funds by which the company became *able* to pay its debts as they fell due. The company was insolvent at all material times and each of the subject debts was incurred when the company was insolvent.

[81] In reaching this conclusion I have not overlooked the evidence of the first defendant. I have to say that none of the defendants impressed as a credible witness, having regard to their conduct in falsifying the affairs of the company in an attempt to control the winding up of the company in a way which would avoid proceedings such as the present one. And statements by the first defendant now as to his preparedness to fund the company's activity have to be assessed against what he did or did not do. As I have mentioned, he gave no credible explanation for not paying the debts which had been incurred to August 2010. And the ability or otherwise of the company to pay its debts must be assessed by looking at, from the company's perspective at the time it incurred a debt, the reliability of the first defendant as a source of funds, which is an assessment undertaken more accurately by reference to the surrounding facts and circumstances which I have discussed than by the first defendant's evidence of what was in his mind.

Grounds for suspecting insolvency

[82] The next question is whether, in terms of s 588G(1)(c), there were reasonable grounds for suspecting that the company was insolvent at the time that each debt was incurred. In my conclusion, there were grounds. The company had no assets or external line of credit. Its only prospect of paying any of its debts was from voluntary contributions by the first defendant. The circumstances, as discussed above, which made that an insufficiently reliable source of funds were or should have been apparent to each of the directors. The relevant circumstances were always apparent, even before April/May 2010 after which the third defendant is said to have been less involved. A reasonable person in the second defendant's position would have been aware of those circumstances, and thereby the company's insolvency, from the time at which he became a director. I infer that he was so aware. There were ample grounds for a suspicion of insolvency, as the defendants were or should have been aware.

[83] It follows that by failing to prevent the company from incurring these debts, each director contravened s 588G(2), subject to any defence under s 588H.

Section 588H(2)

[84] Each of the second and third defendants argues, in terms of s 588H(2), that he had reasonable grounds to expect, and did expect, that the company was solvent at the time that each debt was incurred and would remain solvent if it incurred that debt and any other debts that it incurred at that time. No particular basis for this being a defence of the second defendant is indicated by the evidence or the submissions on his behalf. It may be accepted that the second defendant was not privy to everything within his father's mind. But the circumstances which made his father's support of the company insufficiently reliable were or should have been known to the second defendant. He had no reasonable grounds to expect that the company was solvent.

[85] For the third defendant, particular reliance is placed upon his evidence of his understanding of the first defendant's wealth. It is submitted that there was no rational basis for the third defendant to believe that a man of the first defendant's wealth and business acumen would not continue to fund the company. That submission cannot be accepted. There was every reason for the first defendant not to fund the company whilst there were so many uncertainties about whether that funding would yield any return. The risk that debts would be incurred which would not ultimately be paid by the first defendant was substantial for the reasons which I have discussed and which the third defendant should have appreciated. The third defendant fails to establish a defence under s 588H(2).

Section 588H(4)

[86] The third defendant also relies upon s 588H(4) which provides that:

> "If the person was a director of the company at the time when the debt was incurred, it is a defence if it is proved that, because of illness or for some other good reason, he or she did not take part at that time in the management of the company."

[87] The third defendant argues, in terms of s 588H(4), that for good reason he did not take part in the management of the company, at least from early May 2010.

[88] He says that he was effectively ousted from the company's affairs from that date, because of the insistence of Alan Phillips that he be disassociated with the company if MMS was to proceed with the broader transaction which the parties had proposed. I do not understand the third defendant to say that he did cease to be a director. Rather, his case is that he then *believed* that he had ceased to be a director and that consistently with that belief, he did not involve himself in the management of the company. So he says that he had good reasons not to be involved in the company's management, from his belief that he was no longer a director and from his acceptance of the demands by MMS that he should be not associated with the company.

[89] As earlier discussed, in May 2010 the third defendant executed a power of attorney which was in wide terms, empowering Mr Au Yeung to sign any document on his behalf "in all corporate matters". The third defendant says that he signed that document on the understanding that the first defendant's staff would complete the

"paperwork" for his resignation as a director as well as for a transfer of his shares. His evidence here was that he then understood that he had ceased to be a director of the company.

[90] However, on about 19 May 2010, a document in the form of a resignation of a director was sent to the third defendant. That appears from an email from Michelle Lagana, who according to the third defendant was the company's secretary, to a person called Yafi Yan but which was copied to the third defendant. The email attached a form of resignation for the third defendant's signature. Emails of 24 May 2010[16] record that the third defendant had not signed the form of resignation as a director. His evidence here was not to the effect that he did sign and return that document. Rather, it was to the effect that he believed that by the power of attorney which he had signed, others had done whatever was required to remove him as a director. The fact that he did not sign the form of resignation as a director and return it detracts from his evidence that he believed that he had ceased to be a director.

[91] Other evidence further detracts from the third defendant's evidence on that point. He lodged a proof of debt in the winding up of the company claiming a director's fee for a period expiring on 24 October 2010. And at the liquidator's public examination, the third defendant said that he was aware of his obligations as a director and continued to discharge them for the entire period for which he had claimed a director's fee. His evidence at the examination was:

> "That I still stay as a registered director and I have - had the obligation to know about the company operation. And [the first defendant] and Au Yeung from time to time asked for my opinion."

Yet at this trial he said that he then believed that he had ceased to be a director but that he continued to be involved in the company's affairs "as a consultant".

[92] The third defendant wrote a letter to the then liquidator of the company dated 4 January 2011 which set out the services which he said he had provided to the company in his capacity as a director. In his cross-examination here, he agreed that the letter accurately described what he had done. The letter made no reference to his ceasing to be a director or ceasing to act as a director at any time.

[93] I am not persuaded that the third defendant then believed that he had ceased to be a director. He made no claim to having such a belief, until it was made by him in the present proceedings.

[94] Did the third defendant continue to take part in the management of the company? The company did not keep proper records and there were no formal meetings of directors. It is for the third defendant to prove that he ceased to take part in the management of the company. Unless his evidence is accepted, there is really no evidence which could prove that fact. I am not persuaded to accept his evidence. It is inconsistent with his conduct in claiming a director's fee. It is also inconsistent with his evidence at the public examination and with what he wrote to the then liquidator in early 2011.

[95] Had I been persuaded that he did cease to be involved in the management of the company, it would have been necessary for the third defendant to prove that this

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16 Admitted in evidence by consent at pp 1673-1674 of the Agreed Trial Bundle.

was for a "good reason". Absent a belief, and a reasonable belief, that he had ceased to be a director, there could have been no good reason. I am unpersuaded that he held such a belief. And that could not have been a reasonable belief in the absence of evidence from him that he signed and returned the form of resignation as a director. Whilst he remained a director, he was obliged to act as such and to discharge the various duties of a director. One aspect of a director's duty of care and diligence is the core, irreducible requirement of participation in the management of the company: *Deputy Commissioner of Taxation v Clark*.[17] His failure to be involved in the management of the company, as the third defendant would have it was the case here, could not have been for a "good reason", within s 588H(4), especially where the company had incurred debts whilst insolvent and was likely to continue to do so. The third defendant has not established a defence under s 588H(4).

Conclusions

[96] It follows that each of the defendants must compensate for the company's insolvent trading. Pursuant to s 588M(2), the liquidator should recover from each of the first and third defendants, as a debt due to the company, the sum which is claimed. But as against the second defendant, the amount should be limited to the debts incurred after 5 March 2010, which is the date upon which he became a director. The debts of Strategic Capital Services Pty Ltd and CSA Global Pty Ltd were incurred prior to that date. Although no submission was made for the second defendant to the effect that the amount recoverable against him should be different from that recoverable against the first defendant, it would be inconsistent with what is common ground on the pleadings, to include those debts in the amount of the judgment against the second defendant.

[97] The MMS debt was pleaded as having been incurred "03.12.09 - 30.06.10". Was any of that debt incurred prior to 5 March 2010? The second defendant did not argue that it was and any such argument would have encountered the difficulty that the project management agreement was not signed until May 2010. It did entitle MMS to be paid for its services from December 2009. But it does not follow that any part of the MMS debt was incurred prior to the date upon which the relevant agreement with MMS was concluded.

[98] The amount which the liquidator should recover against the second defendant is therefore $1,032,483.80 less the two debts which I have mentioned, being an amount of $1,012,384.34.

[99] The outcome on the liquidator's claims for insolvent trading means that it is unnecessary to consider the alternative claims for breach of duty. In essence, the company claimed that the defendant's breached their duties as directors by permitting the company to incur these debts without an enforceable agreement between the company and the first defendant whereby the first defendant would provide the necessary funds. Because I have held that the directors must pay compensation in the amounts of the unpaid debts, there is no further loss from any such breaches of duty. On the insolvent trading claim, there will be orders, under s 588M(2), for the recovery of amounts as debts due to the company. The claim for breaches of debts was made against the possibility that the insolvent trading claim

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17 (2003) 57 NSWLR 113.

would fail. But had I held that the company was solvent at the times when these debts were incurred, there would have been no apparent basis for concluding that the directors were in breach of their duties by allowing those debts to be incurred. In that event, I would have concluded that the first defendant was a sufficiently reliable source of funds.

[100] Finally, there was a claim by the company that there was an enforceable agreement made between the company and the first defendant, for him to pay the company's debts. That argument was ultimately abandoned.[18]

Orders

[101] Interest should be awarded on the judgment amounts from the date of winding up, 17 November 2010 to the date of this judgment. Interest will therefore be allowed which, using the rates upon default judgments[19] adds $316,647.23 to the judgments against the first and third defendants and $310,483.01 to the judgment against the second defendant.

[102] The first and third defendants will be ordered to pay to the first plaintiff, pursuant to s 588M(2) of the *Corporations Act*, the sum of $1,349,131.03. The second defendant will be ordered to pay to the first plaintiff, pursuant to s 588M(2), the sum of $1,322,867.35.

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18 Transcript 7-39.

19 Under Practice Direction No 7 of 2013.