SUPREME COURT OF QUEENSLAND

CITATION:	*International Cat Manufacturing (in liq) & Anor v Rodrick & Ors* [2013] QCA 372
PARTIES:	**INTERNATIONAL CAT MANUFACTURING PTY LTD (in liquidation)** ACN 099 908 942 (first appellant) **DAVID HAMBLETON & ROBERT MURPHY AS LIQUIDATORS OF INTERNATIONAL CAT MANUFACTURING PTY LTD (in liquidation)** (second appellant) **v** **RAYMOND JOHN RODRICK** (first respondent) **NU-LOG PTY LTD** ACN 001 420 515 (second respondent) **SUSAN RUTH CARTER** **JASON WALTER BETTLES** (third respondents)
FILE NO/S:	Appeal No 4074 of 2013 SC No 9739 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13 September 2013
JUDGES:	Holmes, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CORPORATIONS – CHARGES, DEBENTURES AND OTHER BORROWINGS – VALIDITY – OTHER CASES – where the appellants were the plaintiffs in proceedings against (relevantly) the first and second respondent – where the proceedings sought relief arising out of the insolvency of the first appellant in relation to the granting of a charge by the first appellant to the second respondent – where the appellant contends that the Company was insolvent at the time it

granted the charge, on 25 November 2003, to the second respondent and therefore the charge should be set aside as void under s 267 of the *Corporations Act* 2001 – where there was evidence of an arrangement between the first appellant and the first and second respondents for the latter to finance the former in exchange for the charge – where the learned primary judge concluded that the arrangement was such that it would cover all debts as and when they fell due – whether the learned primary judge erred in finding that the arrangement was sufficiently certain to result in a finding of solvency – whether the learned primary judge erred in finding that, having regard to the terms of the arrangement, the first appellant was solvent as at 25 November 2003 and the charge was valid

Corporations Act 2001 (Cth), s 267, s 588FE
Trade Practices Act 1974 (Cth), s 52

Australian Securities and Investments Commission v Edwards (2005) 220 ALR 148; (2005) 54 ACSR 583; [2005] NSWSC 831, cited
Coates Hire Operations Pty Ltd v D-Link Homes Pty Ltd [2011] NSWSC 1279, considered
Crema (Vic) Pty Ltd v Land Mark Property Developments (Vic) Pty Ltd (2006) 58 ACSR 631; [2006] VSC 338, cited
In re A Company (No 006794 of 1983) [1986] BCLC 261, considered
International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors [2013] QSC 91, upheld
Lewis v Doran (2004) 208 ALR 38; [2004] NSWSC 608, considered
Lewis (as liquidator of Doran Constructions Pty Ltd (in liq) & Anor v Doran & Ors (2005) 219 ALR 555; [2005] NSWCA 243, considered
Mulherin v Bank of Western Australia Ltd; McCann & Ors v Bank of Western Australia Ltd [2006] QCA 175, considered
Owenlaw Mortgage Managers Ltd v Shepparton Retail Investments Pty Ltd [2011] VSC 544, cited
Re Kerisbeck Pty Ltd (1992) 10 ACLC 619, considered
Re Newark Pty Ltd (in liq) [1993] 1 Qd R 409, cited
Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation (2001) 53 NSWLR 213; [2001] NSWSC 621, cited
Williams (as liquidator of Scholz Motor Group P/L (in liq)) v Scholz & Anor [2008] QCA 94, considered

COUNSEL: S M Anderson SC, with M T de Waard, for the first and second appellants
S C Russell (*sol*) for the first and second respondents
C D Coulsen for the third respondents

SOLICITORS: McKays Solicitors for the first and second appellants
Russells for the first and second respondents
QBM Lawyers for the third respondents

[1] **HOLMES JA:** I agree with the reasons of Morrison JA and the order he proposes.

[2] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** The appellants were the plaintiffs in proceedings against (relevantly) Raymond John Rodrick ("Rodrick") and Nu-Log Pty Ltd ("Nu-Log"). The proceedings sought relief arising out of the insolvency of International Cat Manufacturing Pty Ltd ("ICM"). The relief concerned the granting of a charge by ICM to Nu-Log, securing both present and future debts. That charge was granted on 25 November 2003.

[4] In essence the main contention was that the company was insolvent at the time it granted the charge and therefore the charge should be set aside as void under s 267 of the *Corporations Act* 2001 (Cth). Associated relief concerned whether the granting of the charge was an unreasonable director-related transaction or an uncommercial transaction because a director of Nu-Log was also a director of ICM. There were related questions including whether the transfer of a vessel, the subject of the charge, was a voidable transaction, an insolvent transaction, or an uncommercial transaction. There were various derivative forms of relief which were all dependent upon a finding of insolvency, including whether the transfer of the vessel was a breach of director's fiduciary or statutory duties.

Essential background

[5] ICM was a manufacturer of sailing catamarans. It was incorporated in March 2002, and traded on the Gold Coast. Its then directors were Ms Sarah Morrin and her husband, Mr Justin Coghlan.

[6] Prior to ICM's incorporation Ms Morrin and Mr Coghlan conducted a business of boat manufacture through TIY Manufacturing Pty Ltd ("TIY"). That business commenced in 1999, went into voluntary administration in April 2003, and was wound up in May 2003. By August 2002, the C35 business had passed from TIY to ICM.

[7] TIY's business entailed the construction of catamarans, one model of which was called the C 35. In February 2002, Mr Rodrick met Ms Morrin and Mr Coghlan through the TIY business. TIY was then building a C35 catamaran, which was given the number C3502.[1] Mr Rodrick was a potential customer for a catamaran. Through his company, Nu-Log, he contracted with TIY for the construction of a C35 catamaran. That was to be on the basis of a "hull and deck" package, which meant that TIY supplied a constructed hull and deck, leaving it to Nu-Log to complete the fitting out of the vessel with rigging, sails, furniture and so forth. Mr Rodrick planned to perform a deal of that work himself, and moved to the Gold Coast to do so.

[8] In August 2002, the construction of Mr Rodrick's catamaran, C3503, was well advanced. At that point Ms Morrin asked him to agree to its sale, instead, to another customer. Mr Rodrick agreed to this. The agreement provided for Nu-Log to be credited with a deposit of $25,000 towards the construction of another C35 catamaran.

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1 It was the second C35 to be built, hence C3502. The sequential numbering will be seen across succeeding catamarans.

[9] In about October 2002 work began on the catamaran which became C3504, and which was then being built for Nu-Log.

[10] However, in July 2003, it was also sold to another customer, with Nu-Log's agreement. At the same time ICM began work on a catamaran which became C3505. It was completed in March 2004 and registered by ICM in Nu-Log's name.

[11] By early 2003, Mr Rodrick was spending much of each working day at ICM's factory. He was interested in the construction of the catamaran intended for Nu-Log, but was also taking a broader interest in the activities at the ICM factory, and the conduct of its business.

[12] Further, by early 2003, Mr Rodrick and Nu-Log were lending money to ICM, which ICM needed for its day to day operations, including employing several people and renting premises. However, ICM's income only came from the sale of completed boats and by November 2003 it had only sold two catamarans.[2]

[13] By November 2003 ICM needed the financial support from Nu-Log and Mr Rodrick, and without it would have been insolvent.[3]

[14] Further, by November 2003, ICM's only customer was Nu-Log. ICM had just commenced the construction of another catamaran, which became C3506, but no deposit was paid for that vessel until January 2004. Mr Rodrick offered that Nu-Log would lend further money to ICM, but only upon condition that ICM grant Nu-Log a charge to secure both present and future debts. Ms Morrin agreed, and the charge was granted on 25 November 2003.

[15] After that Nu-Log made further advances and also received substantial repayments, the most significant of which was when C3505 was transferred to Nu-Log, and an amount for that vessel was set off against ICM's debt to Nu-Log.

[16] After November 2003, Mr Rodrick continued to work at ICM's factory, even after he took possession of C3505 in March 2004. He contended that his entitlement to wages was, by agreement with Ms Morrin, postponed. Further, although he did not formally become a shareholder, Mr Rodrick considered he had an interest in ICM's business, and acted accordingly towards Ms Morrin, Mr Coghlan and ICM's employees.

[17] Eventually Mr Rodrick and Ms Morrin had a falling out. Mr Rodrick was dissatisfied with the way in which Ms Morrin was conducting ICM's business, and there was a dispute between Ms Morrin and himself as to whether ICM still owed money to Nu-Log. As a consequence Nu-Log appointed receivers to ICM, pursuant to the charge, on 5 August 2005.[4]

[18] On 18 August 2005, Mr Hambleton and Mr Murphy were appointed as voluntary administrators of ICM, and on 14 September 2005 they became its liquidators.

Synopsis of claims at the trial

[19] The liquidators of ICM made three complaints against Mr Rodrick and Nu-Log. First, they impugned the charge given on 25 November 2003 on the basis that it was

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2 They were C3503 and C3504.

3 *International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors* [2013] QSC 91 ("Reasons") at [5].

4 The receivers were the third defendants in the proceedings before the learned primary judge.

a voidable transaction under s 588FE of the *Corporations Act* 2001 (Cth), and also that the charge was void under s 267 of that Act.

[20] Secondly, the liquidators contended that Mr Rodrick's participation in the affairs of ICM was so extensive that by November 2003 (and thereafter) he was a de facto director. Whilst that had potential consequences in terms of the validity of the charge,[5] it also provided a basis for the contention that Mr Rodrick had engaged in insolvent trading and breached his directors' duties to ICM. The contention was that ICM was insolvent by the time the charge was granted, and it remained insolvent thereafter. As a consequence the liquidators claimed that all payments made by ICM to Nu-Log between January 2004 and June 2005 were preferential payments because the charge was invalid.

[21] Thirdly, there was a dispute as to the true ownership of C3505. The contention was that there was no contract for the sale of the vessel and that it was taken in March 2004 only as a form of enforcement of Nu-Log's charge. On the basis that the charge was invalid, the contention was that Nu-Log had no entitlement to C3505, and it should be re-transferred to ICM.

Proceedings before the primary judge

[22] The trial occupied 11 days. Proceedings were perhaps a little slower than they could have been because Mr Rodrick and Nu-Log did not have legal representation, and Mr Rodrick was permitted to conduct Nu-Log's defence as well as his own.

[23] Having considered the evidence as to the state of the relevant accounts between Mr Rodrick, Nu-Log and ICM,[6] the learned primary judge turned to the consideration of whether ICM was insolvent as at November 2003.[7] On this question the plaintiffs bore the onus of proof. His Honour's consideration of this question required detailed examination of documentary and oral evidence, to some aspects of which I will return to shortly. Mr Rodrick challenged a substantial number of matters, including the accuracy of the liquidators' reconstructed balance sheets, the liquidators' calculation of profits (or losses), and whether and what unpaid creditors' accounts were due and owing from time to time.

[24] As his Honour found, at all relevant times ICM's largest creditor was, by far, Nu-Log. Because of that his Honour stated:

> "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 insolvency at any relevant time."[8]

[25] His Honour also held that consideration of the question of insolvency could not properly occur by treating the Nu-Log/Rodrick interests as being in all respects completely external to ICM. Thus his Honour said:

> "But it would be quite artificial to consider this question of insolvency as if the Nu-Log/Rodrick interests were in all respects

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5 The contention that the charge was an unreasonable director-related transaction or uncommercial transaction.

6 See Reasons at [17] to [30].

7 Reasons at [31] to [113].

8 Reasons at [36].

> 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."[9]

There was no challenge on the appeal in respect of the findings mentioned above.

[26] Part of ICM's case at the trial was that Nu-Log, by Mr Rodrick, had contravened s 52 of the *Trade Practices Act* 1974 (Cth), by representing to Ms Morrin 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 …".[10]

[27] The plaintiffs' contention was that in reliance upon those (and other) representations, ICM continued to trade, and incurred further liabilities to creditors which remained unpaid when ICM went into liquidation. As the learned primary judge observed, that pleaded case directly raised the question: What was the parties' understanding about the ongoing provision of Mr Rodrick's finance?[11] His Honour observed that even though the s 52 claim had been abandoned by the end of the trial,

> "… 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."[12]

There was no challenge to his Honour's finding in that respect.

[28] His Honour's conclusions on the documentary evidence were expressed in these terms:[14]

> "[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

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9 Reasons at [37].

10 Reasons at [38], referring to the Plaintiffs' Further Amended Statement of Claim, filed 9 June 2011, para 25(b)(ii) and (iii).

11 Reasons at [39].

12 Reasons at [38].

13 Which findings are not the subject of challenge on this appeal.

14 Reasons at [65]-[66].

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

[29] His Honour then turned to the question of liquidity. In this respect his Honour's consideration occurred in the context of ICM's only source of finance, namely the Nu-Log/Rodrick interests:[15]

> "The company earned income only from the sale of boats. As at the date of the charge, that required the completion of 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 or 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."

There was no challenge to that finding on the appeal.

[30] In this context his Honour examined the evidence concerning the arrangements between Mr Rodrick and Nu-Log, on the one hand, and Ms Morrin for ICM, on the other, in relation to funding ICM's business operations. I shall return to this aspect in more detail shortly. For the moment it suffices to note the following steps in his Honour's analysis:

(a) Ms Morrin's evidence was examined: this referred to a meeting with Mr Rodrick where the future of ICM was debated, Ms Morrin threatening to put it into external administration unless someone could give it a large cash injection; Mr Rodrick overruled her saying that he would go to the bank and get a loan to fund the completion of the boat,[16] ensure that ICM could pay all future debts that it incurred, and ensure that ICM's creditors would be paid;

(b) Ms Morrin's evidence was that Mr Rodrick seemed confident he could obtain the loan and inject funds into ICM such that it would be able to pay all of its creditors and continue to trade; as a consequence she agreed to let Mr Rodrick try and raise that funding;

(c) his Honour referred to the fact that the liquidators' analysis of insolvency did not have regard "to the understanding between the

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15 Reasons at [67].

16 The C3505.

company and Mr Rodrick and Nu-Log, as proved by that evidence of Ms Morrin";[17]

(d) his Honour accepted that ICM was unable to raise further equity capital; but in respect of trade creditors, he did not accept that there was a substantial body of creditors unpaid outside the trading terms; this was a consequence of an analysis of the position of each trade creditor;

(e) his Honour referred to the liquidators' criticism of the state of ICM's accounts, and the apparent inability of ICM to produce timely and accurate financial information; however he continued: "But again the question is one to be answered in the circumstances of the assured finance from the Rodrick interests";[18]

(f) his Honour referred to the fact that ICM was unable to make forecasts as to its likely working capital requirements whilst it completed the construction of C3505 and C3506; however he continued: "But that does not mean that the company was unable to reliably budget towards the completion of [C3506], given the assurance of such finance from the Nu-Log/Rodrick interests during that period as was necessary".[19]

[31] His Honour then went on to analyse the profit and loss position as revealed in the liquidators' reports and the adjusted profit figures for the period between October 2003 and June 2005. He concluded that there was:

> "… 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 …".[20]

[32] His Honour then examined the question of whether the evidence supported a finding that in November 2003 ICM had a contract for the sale of C3505. I do not need to trouble with the detail of this analysis, because there was no challenge to his conclusions on this issue.[21] As at the date of the charge there was no concluded contract between ICM and Nu-Log for the sale of C3505. However, his Honour pointed out that that finding did not mean that ICM had no likely buyer for the C3505. Mr Rodrick's interest had not declined and his Honour inferred that Mr Rodrick expected it would become his boat (or that of Nu-Log) save for the prospect that it might be sold to someone else ahead of its completion. That led to his Honour's conclusion:

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17 Reasons at [70].
18 Reasons at [75].
19 Reasons at [76].
20 Reasons at [85].
21 Reasons at [98].

> "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." [22]

There was no challenge to that finding on the appeal.

[33] Having set out some of the relevant legal principles on the question of solvency,[23] his Honour expressed his conclusions in the following way:[24]

> "[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.
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> [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.
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> [111] At one point in his evidence, Mr Rodrick admitted that the Nu-Log loan was repayable on demand.[25] But the question is not whether the company was legally 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".
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> [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

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22 Reasons at [99].
23 Reasons at [104]-[108].
24 Reasons at [109]-[113].
25 T8-32, l 45; AR 622.

> went down'.[26] But that was not to say the company, in his then view inevitably would become insolvent. And clearly Ms Morrin did not think so.
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> [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."

Issues on the appeal

[34] The notice of appeal contained 12 grounds. At the commencement of the appeal grounds 6 and 12 were abandoned. The appellants reformulated the others into three principal grounds, namely:[27]

(a) grounds 3, 7, 9 and 10: the learned primary judge erred in finding that ICM was solvent as at 25 November 2003 (the date of the charge);

(b) grounds 2, 4 and 5: the primary judge erred in finding that Mr Rodrick would provide financial support to ICM, such that it could meet its current and future debts; and

(c) ground 11: the primary judge erred in not finding that Mr Rodrick and Nu-Log had received unfair preferences or benefits of uncommercial transactions, within the meaning of the *Corporations Act*.

[35] It was made clear that contentions about the ownership of the C3505 were no longer pressed,[28] nor was the contention that the vessel was taken by means of enforcing the charge.[29] The appellant having limited the appeal to the one substantive point, namely the question of solvency, the appellant merely contended that if it succeeded on that point there would be a "cascading effect"[30] in terms of relief, in respect of which this Court would be in as good a position as the trial judge to determine the final relief.

Solvency and the finance arrangement

[36] The appeal was conducted on the basis that the issue of solvency turned on the learned primary judge's finding that the arrangement between Mr Rodrick and Ms Morrin was sufficient to ensure a source of finance such that ICM was able to pay its current and future debts, as and when they fell due. On that basis it is appropriate to focus on the findings that his Honour made in respect of that arrangement and whether the attack upon those findings is justified.

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26 See Reasons at [68].

27 Transcript of *International Cat Manufacturing Pty Ltd & Anor v Rodrick & Ors* (Court of Appeal, Appeal No 4074 of 2013, 13 September 2013) ("Appeal Transcript") at 1-2 to 1-3.

28 Appeal Transcript 1-46.

29 Appeal Transcript 1-47.

30 Appeal Transcript 1-46. The transcript records "cascading affect" instead of "effect"; this is a transcription error.

[37] The appellant's contention was that the learned primary judge was wrong to place reliance upon the relationship or arrangement between the Nu-Log/Rodrick interests and ICM for the following reasons:

(a) whilst it was correct to find that his Honour needed to be satisfied that the Nu-Log/Rodrick interests would provide whatever finance was required to meet ICM's lack of liquidity, no findings were made as to what those requirements were;

(b) there was no evidence, nor findings, as to the true nature of the understanding, for what period of time it was to last, what it was to cover or what its terms were;

(c) there was no evidence or findings as to whether the Nu-Log/Rodrick interests had the resources to back any promise of financial support;

(d) in order to be sufficient as an arrangement to satisfy solvency issues, the decision of this Court in *Williams v Scholz*[31] establishes that there must be evidence that the funder was capable of, and willing to, furnish the funds from its own resources; it was submitted that *Scholz* established that there had to be a commitment which had substance, namely one which demonstrated a willingness to provide secure financial arrangements going forward, and that anything short of that was insufficient;

(e) the evidence showed that the debts owed to the ATO and for superannuation were not met, but increased with time;

(f) all that the evidence revealed was Mr Rodrick expressing a preparedness to provide future funds, but repayable on demand, in which event it was merely the substitution of one debt for another and therefore not sufficient to show solvency;

(g) even if the primary judge found that there was some form of assurance by Mr Rodrick, and accepted by Ms Morrin, that would not be enough in the absence of findings that there was, in fact, the ability to meet the debts.

[38] His Honour's findings as to the nature and extent of the arrangements between Mr Rodrick and Ms Morrin have to be seen in the context of unchallenged findings about the antecedent relationship. The relevant ones are set out below.

[39] By early 2003, Mr Rodrick was spending much of his time at ICM's factory, taking a broader interest in ICM's business than the mere construction of the catamaran that was to be owned by Nu-Log. By early 2003, Mr Rodrick and Nu-Log were lending ICM the money it needed for its day to day operations. Part of that financial support was provided by permitting ICM to use Mr Rodrick's credit cards to pay its debts.

[40] In addition to the use of the credit cards Mr Rodrick made payments to, or for the benefit of, ICM from a cheque account of Nu-Log, and he drew upon his own

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[31] *Williams (as liquidator of Scholz Motor Group P/L (in liq)) v Scholz & Anor* [2008] QCA 94 ("*Williams v Scholz*").

facility with the St George Bank. By these various means finance was provided by the Nu-Log/Rodrick interests to ICM in the tens of thousands of dollars each month.

[41] The first repayment to Nu-Log was not until October 2003, in the sum of $99,000. This was repaid against amounts which had been drawn from St George Bank. The repayment was only able to be made from the proceeds of sale of C3504.

[42] The position was 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."[32]

[43] By 2003 Mr Rodrick saw himself not simply as a customer or creditor, but also as an investor in ICM, with a direct interest in developing the business to the end that it would derive profits and develop a capital value, which would be enjoyed by his interests.[33] ICM was a relatively small enterprise in which a director would be more likely to be involved in management and other tasks that would not be undertaken by a director of a large public company. There was a contract for Mr Rodrick's (or Nu-Log's) acquisition of furniture moulds, the use of which was licensed to ICM.

[44] Mr Rodrick believed, at least from August 2002, that he had the prospect of sharing in the financial success of ICM, and the ultimate disposition of its business.[34] The level of his involvement extended to discussions between the two sides as to Nu-Log becoming a 50 per cent shareholder in ICM. His Honour accepted that 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, the capacity in which he was content to be seen by persons outside the company."[35]

[45] Mr Rodrick's involvement was sufficient for his Honour to find:

> "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."[36]

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32 Reasons at [24].
33 Reasons at [37].
34 Reasons at [163].
35 Reasons at [163].
36 Reasons at [164].

[46] Those findings were not challenged on the appeal.

[47] The learned primary judge then examined the evidence of other employees and managers at ICM, as to the nature and extent of Mr Rodrick's participation. His conclusion was expressed in this way:

> "… 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."[37]

[48] His Honour referred to the fact that the plaintiff's pleaded case (albeit in respect of the *Trade Practices Act* claim which was later abandoned) was that Mr Rodrick had represented 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 …".[38] His Honour identified that one question to be considered was whether "the Rodrick interests were likely to continue to provide whatever finance was required to meet the company's lack of liquidity".[39]

[49] It is in that context that his Honour then examined the evidence of Ms Morrin and Mr Rodrick in relation to the arrangement. That evidence was a combination of what had been said by way of affidavit, and oral evidence during the trial.

[50] As for Ms Morrin, the text of the essential parts of her affidavit evidence was set out in para [68] of the Reasons. This concerned the meeting where it was agreed that further finance would be provided in exchange for a charge given by ICM. Ms Morrin was concerned about ICM incurring debts without the ability to pay for them, and saw that in the absence of someone providing a large cash injection there would be no choice but to close ICM down. According to Ms Morrin, Mr Rodrick said that ICM was not to be shut down, that he had a number of potential customers lined up, he had too much money invested in ICM to let it go down, and he wanted to get his money back before it went down. Ms Morrin said she was overruled by Mr Rodrick on the question of closing ICM down. The critical paragraphs are as follows:

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37 Reasons at [189].

38 Reasons at [38].

39 Reasons at [39].

> "114. In order for ICM to pay its creditors and continue trading, Rodrick said that he would:
>
> 141.1 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;
>
> 141.2 ensure that ICM could pay all future debts it incurred; and
>
> 141.3 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.
>
> …
>
> 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."[40]

[51] As was pointed out by the learned primary judge, that evidence was tendered by the plaintiffs.

[52] Mr Rodrick's evidence challenged only part of the evidence recorded above by Ms Morrin. Specifically he denied ever stating the matters in paragraphs 114.2 and 114.3 quoted above. He also denied "Morrin's account of the circumstances surrounding the Deed of Charge".[41]

[53] However, Mr Rodrick's affidavit evidence did not dispute the antecedent financial relationship. Thus, he accepted that from February or March 2003 he agreed (via Nu-Log) to pay the employees each week.[42] He also deposed that around February/March 2003 a verbal agreement was reached that Nu-Log would become a 50 per cent shareholder in ICM, and that Nu-Log would loan monies to ICM to continue building "our vessel C3504, and to complete C3503".[43] He also deposed to the use of their credit cards in order to fund ICM's purchases. The February/March agreement was "only intended to be a short term funding agreement".[44]

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40 Reasons at [68], quoting from Affidavit of Ms Morris, sworn 17 November 2011.
41 Affidavit of Mr Rodrick, sworn 15 March 2012, paras 172 and 173; AR 3808-3809.
42 Affidavit of Mr Rodrick, sworn 15 March 2012, para 28; AR 3742.
43 Affidavit of Mr Rodrick, sworn 15 March 2012, para 30 (a) and (b); AR 3743.
44 Affidavit of Mr Rodrick, sworn 15 March 2012, para 30 (g); AR 3744 and 3746.

[54] As to the circumstances surrounding the grant of the charge, even though Mr Rodrick denied Ms Morrin's account, his own evidence was fairly sparse in terms of detail. At paragraphs 56 and 57 of his affidavit[45] he said simply this:

> "56. From well before November, Morrin began pressing me to loan further funds to ICM to start the following vessel (C3506). Morrin offered me a Charge over ICM as security.
>
> 57. On or about 25 November 2003, Morrin and I (being ICM and Nu-Log) agreed that I would further fund ICM in return for a Deed of Charge over ICM.
>
> (a) The purpose was to build the vessel C3506 in parallel with my vessel C3505 while Morrin & Coghlan procured a customer for C3506.
>
> (b) On about 25 November 2003, construction of C3506 commenced.
>
> (c) When C3506 was sold by ICM, a significant part of our loan would be repaid by ICM."

[55] Whilst it is true to say that at some other places in his affidavit material[46] Mr Rodrick referred to matters concerning the meeting in October/November 2003 when Ms Morrin wanted to close ICM down, or the giving of the charge, in none of those cases was anything substantive said to challenge Ms Morrin's account. Thus, at least as far as the affidavit material went, there was little direct challenge to Ms Morrin's account, except for the denial that he made any statement going as far as to say that he would ensure that ICM could pay all future debts as ICM incurred them, or would ensure that ICM's creditors would be paid. However, there was no specific denial of the opening words of para 114 of Ms Morrin's affidavit, namely:

> "In order for ICM to pay its creditors and to continue trading, Rodrick said that he would … 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."[47]

[56] The meeting at which it was alleged that the arrangement had been made was one at which Ms Morrin's partner, Mr Coghlan, was present. His affidavit[48] deposed to that meeting and the fact that Ms Morrin had made it clear that she would close ICM down if a capital injection could not be arranged. He also attributed to Mr Rodrick a statement that the Rodrick interests could borrow money to finance completion of the boat that was being constructed. His affidavit went on:

> "98. My collection [sic] of the terms of the proposal that was agreed in my presence was that Rodrick and Liz[49] would inject the money into ICM and that the demonstration boat would be an asset of ICM it could sell. ICM would get to

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45 AR 3750.
46 AR 3785-3786.
47 AR 6172.
48 Affidavit of Mr Coghlan, sworn 17 November 2011; AR 2074.
49 A reference to Mr Rodrick's wife.

> use it at boat shows and for test sales. I do not recall any discussion of exactly how much money would be put in by Rodrick and Liz, but I believe that it was going to basically cover the cost to put the current boat in the water.
>
> 99. Rodrick stated that he would continue to supplemented [sic] ICM's cash flow to ensure that ICM's creditors were all paid. Further, Rodrick stated that he believed that ICM had a huge future and did not want it to see it shut down."[50]

The oral evidence as to the arrangement

[57] It was a feature of the oral evidence of Ms Morrin and Mr Coghlan, that in cross-examination they were not challenged substantively as to the evidence in relation to the arrangement. That is not a surprising thing given that it was hardly in Mr Rodrick's interests to have a finding that ICM was insolvent at the date the charge was given.

[58] Ms Morrin did not elaborate on her affidavit evidence when she gave evidence-in-chief. In cross-examination she was questioned about when Mr Rodrick commenced to provide finance to ICM. She said that Mr Rodrick "started to put money in pretty much straight away. That's why we wanted to have this partnership because you had the cash flow."[51] She went on:

> "… you need to keep the thing turning over and you were sort of providing that in five and $10,000 lots to make sure that the boys were paid, whatever they needed to be paid that week and we could buy those basic materials to keep it moving while we waited for that customer …"[52]

[59] When questioned about whether there was a customer, and whether Mr Rodrick was the customer, Ms Morrin drew the distinction between an ordinary customer who would not be told all of the various details as to the construction of the catamarans, and what Mr Rodrick was told. She continued:

> "I told you all of that stuff because you were there for the long haul. You were there to make this, build this thing up so you could sell your moulds and we would sell the business at the end and make money off it and along the way we would build a boat at some point, but you were not a customer at that point. You were working with me to improve this business, to give it a shot, to give this business a chance because we both believed this was a really good boat and a good product and we could make something of this. We could sell a lot of these."[53]

[60] In response to that evidence Mr Rodrick said "I absolutely agree with you."[54]

[61] Mr Rodrick then questioned Ms Morrin about the difference between the period before the charge and after the charge. Her answer was:

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50 AR 2084.
51 T 3-75; AR 244.
52 T 3-76; AR 245.
53 T 3-76; AR 245.
54 T 3-76, l 28; AR 245.

> "Well, the difference was you went and got from the bank a large sum of money so we could – rather than you worrying about borrowing 5,000 from your mum or whether you were going to put it on a credit card, suddenly we were going to have this nice big chunk of money to actually do something. So rather than just, okay, what do we need this week to get to the next point? What do we need to get to the next point where we wait for a customer, the idea was suddenly there would be a cash flow and that was kind of – we would build this boat as a demonstrator. We'll have a boat as a demonstrator. That's a manufacturer's dream to have a demonstrator because that means you can take customers out whenever you want to and show them the very best version of what you can build … So we could actually get the boys working to their optimum which was always your thing and my thing, make sure those boys are working to their optimum and not just kicking dust around the factory while we wait for a customer. So that was the big difference. The big difference was rather than small amounts of money being drip-fed in suddenly there would be a good chunk of money, together we could build a deck, really get things rolling, we could buy in bulk, we could make that difference."[55]

[62] Mr Rodrick returned to questions concerning the circumstances surrounding the charge. Ms Morrin had referred to the fact that at the time they had no customers and that creditors were making phone calls seeking payment. The following exchange occurred:

> "So, do you want to change that evidence or-----?-- No.
>
> ----- do you want to leave it there? So, you don't say that the charge was taken out because it was going to be the fact that we were going to produce two vessels side by side, one being two months behind the other so that – because the vessel takes four months, doesn't it? – Between four and six months, yep.
>
> Yeah. It was taking four when we got at that point?-- It would be nice.
>
> So in order to build the vessel when we didn't have an order?-- Yep.
>
> The previous way we worked I had security to buy the vessel. I know that's in argument, but that's what I believed. What did you believe?-- I believed you were injecting money so that we had rolling capital to keep building boats and we didn't have to stop.
>
> Right, and you believed I gave that to International CAT without security?-- Yes. At the start." [56]

[63] The topic then turned to the repayment of $99,000 in October 2003. That repayment occurred because C3504 was sold. As to that episode the following exchange occurred:

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55 T 3-76 to 3-77; AR 245-246.

56 T 5-30; AR 374.

> "So, then those funds that he put in -----?-- Yep.
>
> -----that had been expended was supposed to come back; correct?-- I think we made a big payment back because you'd been rolling capital the way the whole way through so I think whatever we could afford to give back we gave back at that stage. It's happy." [57]

[64] The repayment was referred to again shortly thereafter in the context of questions about which creditors were ringing seeking payment and Ms Morrin's considerations of putting an administrator into ICM. This exchange then occurred:

> "Okay, and – but you just paid me back 99,000, so-----?-- Yes. You'd asked for that.
>
> So wouldn't – wouldn't you expect -----?-- But you would be putting that back in. That's like paying back an overdraft because you were there to cash flow everything, so that's just like you paying your overdraft down so you can draw on it again." [58]

[65] Mr Rodrick returned again to the discussions leading to the charge and asked Ms Morrin if she agreed that "we needed to put more funds into the company to build a second boat in parallel if we didn't have a purchaser".[59] Ms Morrin's response was:

> "Well, you were cash flowing at that stage, so the idea was keep boats on the floor because the minute we stop we'll never get to six in a year."

There then followed this exchange:

> "So, how was I doing cash flow when I didn't have access to the books and records?-- Why do you need access to the books and records if you're doing cash flow? You were providing the cash flow.
>
> Well, isn't – isn't the definition -----?-- So you were providing the capital might be a better way to say it. You were providing the money.
>
> Okay, but cash flow is how much cash you actually physically need, is it not?-- Sorry. I just – I apologise. What I meant was you were providing the funds that were paying the bills to keep the thing running." [60]

[66] Mr Rodrick also referred to a cash flow analysis which had been produced at about the time of the discussion in respect of the charge. Mr Rodrick himself had produced a document showing various expenses on production as well as sales of one vessel and resultant profit or loss.[61] Mr Rodrick put a question to Ms Morrin referring to that document in these terms:

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57 T 5-32; AR 376.
58 T 5-36; AR 380.
59 T 5-51; AR 395.
60 T 5-51 to 5-52; AR 395-396.
61 The document was part of Exhibit DH12 to the Affidavit of Mr Hambleton, sworn 21 November 2011; AR 1037.

> "When we sat down at the house to talk about whether I would continue to fund the company and I produced that from that basis."[62]

[67] What is noteworthy about the statement is the acknowledgment that Mr Rodrick (or his interests) had been funding the company, and the question was whether he would "continue to fund the company".

[68] Mr Rodrick challenged some part of the account of the meeting, principally that it occurred at Ms Morrin's house.[63] He asked questions about Ms Morrin's version, namely that the charge had to be signed because Mr Rodrick needed to get it back to the bank in order to release money the following Monday. The following question and answer then occurred:

> "And wouldn't that be a little unusual that I'd need to go to the bank when I've got $99,000 back less than three weeks earlier?-- That is what you were doing. You sought advice of a broker. This was our big break. This is you going away to get a big – like I said the other day, a big lump of money so that we can properly fund the production of – of a demonstration model and a boat behind it so that we're always rolling. This is very different at this point."[64]

[69] Mr Rodrick's challenge at that point was that Ms Morrin and her partner had "conspired together to put this evidence together".[65]

Mr Rodrick's evidence

[70] On a number of occasions Mr Rodrick agreed, under cross-examination, to questions revealing the extent of his financing of ICM.

[71] Thus, one question was: "Now, you must have known when you lent money to the company, the company obviously needed your money for its ongoing business?"[66] At another point:[67] "You were the only source of income, only source of finance that you understood ICM had?"; and "So it must have been evident to you then that the company was solely trading on borrowed funds?" In the same sequence of questions: "You knew, though, that the money that you were paying was critical to the ongoing success of the business, though, you knew that, surely".

[72] Mr Rodrick was questioned as to whether there were any arrangements for the finance to be for a fixed term.[68] The answer from Mr Rodrick was "no" and then when asked whether it was "simply repayable when you made demand for it", his answer was:

> "It was repayable when they sold the vessel. It was supposed to come back to us, and, indeed, when we allowed 04 to be sold, around about June July of 2003, and we'd take – the vessel was 3505, which was then commenced that day, the – we were then to be paid back some – some of the funds, and, indeed, in October 2004 approximately $99,000 was paid back to us."

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62 T 5-53; AR 397.
63 Mr Rodrick's contention was that he had ceased going to her house in July 2003.
64 T 5-55; AR 399.
65 T 5-55, l 27; AR 399.
66 T 7-89; AR 585.
67 T 8-22; AR 612.
68 T 8-22, l 3; AR 612.

Next he was asked:

> "Now, but you were always in a position, surely, that if you – if you required the money you could make demand for it; you'd agree about that, wouldn't you, and then that would be Morrin and Coghlan's problem?"

To which he replied:

> "The only – the only reason I'd make demands for it was if – if the company wasn't trading successfully and at all times they told me it was and at all times I believed it was. …"

[73] On two occasions Mr Rodrick agreed with the proposition that it was his money which was keeping the company afloat.[69]

[74] On the question of whether he had the capacity to make a demand for the money which he had lent, at any time, Mr Rodrick's response was:

> "If the company was not performing, I suppose I did. I never considered it because I never considered the company was not performing and, indeed, I believed the company was very profitable, save for Morrin's misappropriation."[70]

[75] One of the appellants' contentions was that Mr Rodrick only financed ICM to a limited extent and purpose, namely completion his own catamaran. Thus, it was contended that the finance the subject of the charge was not of a character that would mean the company was solvent. However, Mr Rodrick accepted that ICM needed his money for its ongoing operations, not only to build his own boat but to build other boats. That change occurred when the charge was taken out. In that context Mr Rodrick accepted the description of him as a "financier" of ICM.[71] Further, Mr Rodrick explained that part of the reason why he agreed that he or one of his interests would become a 50 per cent shareholder in ICM was connected with the possibility of further funding. As well, he agreed that he had an interest in ICM beyond simply his boat, saying: "We had a dual interest in it – in, one, of course, getting our boat, two, yes, we wanted to get – we wanted to see that we got a return out of our funds."[72]

[76] Mr Rodrick also accepted that in his position as a financier of ICM he had contributed a substantial amount over and above that which was utilised for his catamaran.[73] In that context, his advances in credit card drawings were providing cash flow for ICM.[74]

[77] It was also the case that Mr Rodrick described himself as a part owner in ICM, a description which he considered correct because he considered himself to be a part owner.[75]

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69 T 8-29, l 48 and T 8-32, l 40; AR 619 and AR 622.
70 T 8-32; AR 622.
71 AR 585, 587 and 646.
72 AR 588.
73 T9-41; AR 672 and 678.
74 T 9-35, l 41; AR 672.
75 AR 668.

[78] As to the duration of financing, Mr Rodrick said that ICM was not in trouble during his involvement with it and that he did not call in his loan because he expected ICM would require funds in its early days. He went on:

> "I was quite happy to lend them money to get established and I believe I have clearly established that on the 25th of November 2003 when my charge was taken out that that company was actually solvent if you take my loan as being noncurrent … Very clearly solvent."[76]

[79] Mr Rodrick also said that he continued to advance money to ICM for a couple of years on the basis of what Ms Morrin had said, namely that ICM was going to pay the money back, and she demonstrated how that could be done within a reasonable amount of time.[77]

[80] The rationale surrounding the granting of the charge was explained by Mr Rodrick in this way:

> "… that was the whole purpose of the charge, was to get into building two vessels in parallel even if they didn't have a purchaser on the basis that that's how you build the business and somewhere along the line a customer will come along and then you'll have – and then you've halved your overheads between two boats. And that was what Morrin put to me and put to me as a charge, and I accepted that fact as that was a reasonable assumption, and indeed that's what happened, and it did work." [78]

Findings by the learned primary judge

[81] The learned primary judge referred to Ms Morrin's evidence concerning the arrangement in November 2003, setting out the essential parts of her affidavit.[79] He summarised her evidence as being that with Mr Rodrick's finance ICM "was able to stay in business and be in a position to pay its debts as they fell due".[80] His Honour then referred to the fact that the further finance, on Ms Morrin's evidence, was needed until ICM could pay Nu-Log, which would occur when sales came through. Whilst finalisation of sales was uncertain, his Honour found that upon Ms Morrin's evidence "no deadline was imposed for the achievement of these sales".[81] His Honour also seems to have accepted that Mr Rodrick represented that "he would put in sufficient capital to ensure that all ICM's current and further creditors would be paid …". That wording is taken directly from paragraph 119 of Ms Morrin's affidavit.[82]

[82] The learned primary judge referred to the fact that there were differences between the respective accounts of Ms Morrin and Mr Rodrick, but observed that Mr Rodrick's evidence was "not inconsistent with the essence of her evidence".[83]

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76 T 9-36, ll 37-51; AR 673.
77 AR 678-679.
78 AR 683-684.
79 Reasons at [68].
80 Reasons at [69].
81 Reasons at [69].
82 See Affidavit of Ms Morrin, sworn 21 November 2011; AR 2041.
83 Reasons at [71].

By this his Honour referred to paragraph 136 of Mr Rodrick's affidavit.[84] In that affidavit, Mr Rodrick essentially said that the arrangement was based upon the fact that whilst C3506 did not then have a customer, Ms Morrin was adamant that one could be produced before the vessel was completed; and upon a customer being obtained for C3506 the loans would be repaid to Nu-Log.

[83] It is evident that his Honour accepted Ms Morrin's evidence and, where it differed from Mr Rodrick's, preferred her evidence to that of Mr Rodrick. That is particularly so where it concerns the evidence about the extent of the finance. Ms Morrin had deposed[85] that the finance would be such as to ensure that ICM could pay all its future debts as they were incurred, and ensure that creditors were paid. Those two paragraphs were formally denied by Mr Rodrick, though that denial had to be seen in light of what he then said in paragraph 136 of the same affidavit that contained the denial.[86]

[84] Based on that evidence his Honour held that there was an assurance of finance from the Nu-Log/Rodrick interests during the period that it might take to complete C3506. That is, extending to such finance as was necessary to complete the vessel.[87]

[85] As to the amount to be secured by the charge, the learned primary judge held that the $500,000 was fixed by reference to an estimate of the likely upper limit of the debt required during the period that ICM would continue construction of C3505 as well as C3506.[88] That finding was not challenged on appeal.

[86] The critical findings by the learned primary judge appear in paragraphs [110] and [111] of the Reasons as follows:

> "[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 an investor. There was therefore a reliable source of funds to pay the company's debts as they fell due.
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> [111] At one point in his evidence, Mr Rodrick admitted that the Nu-Log loan was repayable on demand.[89] But the question

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84 See Affidavit of Mr Rodrick, sworn 15 March 2012; AR 3802.

85 See paragraphs 114.2 and 114.3 of her affidavit, sworn 17 November 2011, quoted in the Reasons at paragraph 68.

86 The denial is in para 172 at AR 3808 and para 136 is at AR 3802. That affidavit was sworn 15 March 2012.

87 Reasons at [76].

88 Reasons at [103].

89 T 8-32, l 45.

> is not whether the company was legally 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'."

Relevance of the unpaid tax and superannuation debts

[87] As to the ATO debt the evidence shows that as at 25 November 2003 that stood at $23,958.63.[90] That then increased monthly, predominantly on the basis of self assessments as to liability for income tax or GST, so that by the end of March 2004 it stood at $50,301.71.[91] By the end of June 2004 it had increased to $65,758.39.[92] Increases continued to be the result of self assessment for liability to income tax or GST, and general interest charges imposed by the ATO. There is no suggestion in the evidence of the ATO pressing for payment though and liability for tax arises upon an assessment being issued.

[88] As to the superannuation which was owing, the evidence reveals that it was part only of the superannuation that was not paid. As at 30 June 2003, the unpaid superannuation was $14,512.86. By the end of June 2004 that had risen to $26,261.64.[93] By June 2005 there had been a minor increase in the amount outstanding, to $26,826.66. Soon thereafter receivers were appointed under the charge. As can be seen from the proofs lodged with the liquidators[94] the actual amount of superannuation outstanding been 25 November 2003 and 30 June 2005 was $13,578.59. In the context of ICM's business, that is a relatively minor amount.

[89] There was no suggestion in the evidence that Mr Rodrick had any involvement in the day to day affairs of deciding who got paid. Indeed, one of his complaints in his evidence was that Ms Morrin had not given him full access to the books and records. Ms Morrin was not challenged as to why the ATO debt remained unpaid, or why superannuation went partly unpaid. In the circumstances there is no evidence which would warrant the conclusion that it was an inability to meet those debts, as opposed to a choice made by her. The latter may be the more likely given that the levels of cash at bank often exceeded, or were a substantial percentage of the amount owed in tax.[95] Given the level of commitment exhibited by Mr Rodrick, in terms of his half interest in the company and his determination to succeed, there is reason to think that if Ms Morrin had raised the matters of the outstanding liabilities to the ATO and superannuation, Mr Rodrick would have made arrangements to meet them.

[90] That would certainly accord with the evidence of Mr Rodrick, as to whether tax and superannuation were included in his financing. His evidence[96] was that he agreed in

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90 Annexure "D" to Mr Hambleton's Final Solvency Report, dated 21 November 2011; AR 1198. See AR 6121 where it is noted that the figure should be $23,958.63 not $24, 165.76.

91 AR 1199 (Annexure "D" to Mr Hambleton's Final Solvency Report); also AR 1610 (Annexure "N" to Mr Hambleton's Final Solvency Report).

92 AR 1200; also AR 1610.

93 AR 1456 (Annexure "K" to Mr Hambleton's Final Solvency Report).

94 AR 1453 (Annexure "J" to Mr Hambleton's Final Solvency Report).

95 AR 4527 (October 2003); AR 4529 (November 2003); AR 4541 (May 2004); AR 4543 (June 2004); AR 4547 (August 2004); AR 4550 (October 2004); and AR 4568 (May 2005).

96 See paragraph 28 of his affidavit, sworn 15 March 2012, at AR 3742.

early 2003 to pay for workers, and deposited $5,000 per week into ICM's account which he understood covered employees' superannuation and tax. He said that it was only after liquidation he discovered those two debts had not been paid to the relevant authorities.[97] Given that Mr Rodrick believed that he was already financing ICM in regards to superannuation and tax, it is difficult to see how one could conclude that the arrangement to provide finance in November 2003 excluded those components, or that his willingness and capacity to fund the company would have excluded those components. Indeed, his evidence was that he continued to pay the company the money that should have covered tax and superannuation, but that money was misappropriated by Ms Morrin.[98]

[91] Ms Morrin disputed the suggestion that the regular payments of $5,000 had been structured so as to include tax and superannuation.[99] However, the payments were regularly made in five or ten thousand dollar lots and Ms Morrin said that they were made "to make sure that the boys were paid, whatever they needed to be paid that week …".[100]

[92] Whilst there was a difference in the evidence between Mr Rodrick and Ms Morrin about whether the periodic sums were structured in such a way as to include the tax and superannuation component, that is a different question from the one surrounding the arrangements to finance in exchange for the charge. As to that there was an adequate foundation for his Honour's finding expressed in paragraph [110], that the arrangement meant ICM could raise "whatever cash it required over this period", and that Nu-Log would "make up the shortfall in the company's working capital".

[93] His Honour's conclusion was that the arrangement was such that it would cover all debts as and when they fell due. In my respectful opinion that finding was open to his Honour and cannot be demonstrated to be in error. That being so, the fact that the ATO and superannuation debts went unpaid does not mean that the arrangement was inadequate to support a finding of solvency. It simply means that in the implementation of the arrangement those debts went unpaid either by choice or neglect. Certainly from Mr Rodrick's point of view the arrangement was intended to cover such debts and it was only upon liquidation that he discovered that Ms Morris had "misappropriated" those monies.

Discussion

[94] The evidence referred above in paragraphs [50] to [80] provided a solid foundation for the learned primary judge to make findings in relation to the financial arrangements made in November 2003. Specifically, that evidence supported findings which meet the major criticisms advanced by the appellant, as to the nature of the arrangement, the extent of the finance offered, the duration, and the certainty of the financing source.

[95] Both Ms Morrin and Mr Rodrick said that the financing was to last at least until the sale of C3506. At the time of the arrangements ICM did not have a customer for C3506, and C3505 was only half completed. Thus, there was a clear basis to accept that there was some definition to the duration of the finance.

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97 See also his evidence at AR 669; T9-32 ll 25-40.

98 AR 703; T 9-66 l 27.

99 Affidavit, paragraph 13 at AR 2058; AR 376; T5-32 ll 7-25.

100 AR 245; T-3-76 l 3.

[96] As to the extent of the finance, his Honour held, correctly in my respectful opinion, that it was to be sufficient to cover all debts during the period until the sale of C3506. That finding is quite consistent with the evidence of Mr Rodrick referred to above. With the exception of the unpaid debt to the Australian Taxation Office, and superannuation, it is also consistent with what actually occurred in the months that followed. Finance was provided and ICM was, as Mr Rodrick deposed, profitable over that period.[101] There was nothing in Mr Rodrick's evidence, nor indeed that of Ms Morrin, which referred to some limit on the finance, or exception by way of debts to be paid. That the ATO debt, or superannuation, remained unpaid, and even increased, does not enable an inference to be drawn that the agreement to provide finance did not extend to these debts. Rather, it simply means that the recipient of the finance, ICM or Ms Morrin, did not actually pay them.

[97] The debt created by the finance arrangement was not one where repayment was likely to be demanded ahead of the sale of C3506. Mr Rodrick's evidence was that he was of the view that ICM was profitable, and he continued to be of that view for a substantial time after the charge was granted. He was quite clear that he would not have made an immediate demand for repayment, even if that was legally possible. It is not surprising that he said so, given that he regarded himself as a half owner of the business, and wanted to participate in the growth of the business into the future. Thus, though the learned primary judge did not make a finding in express terms that Mr Rodrick would not have demanded repayment, nonetheless his reference to the "assured finance from the Rodrick interests",[102] and the "assurance of such finance from the Nu-Log/Rodrick interests",[103] show that his Honour was proceeding on the basis that repayment was not likely to be demanded ahead of the completion of C3506. Indeed, his Honour stated that ICM was capable of raising funds from Nu-Log "because Mr Rodrick was willing and able to provide them, for reasons which would hold good, at least for the 'immediate future'".[104] In my respectful opinion, that finding is to the same effect, namely that although the debt might have been repayable on demand, demand was not likely to have been made.

[98] Further, it is evident from the fact that finance was provided, as the liquidator's report revealed, that the Nu-Log/Rodrick interests had the capacity to make the finance available. In this respect the appellants' contentions only pointed to the unpaid ATO and superannuation debts as being evidence that that capacity may not have existed. In my opinion that conclusion does not follow. Mr Rodrick thought that he was providing enough finance to cover all debts, and he understood from Ms Morrin that all debts were covered. The fact that Ms Morrin did not pay the ATO and superannuation debts does not lead to the conclusion that there was any lack of capacity to do so on the part of the Nu-Log/Rodrick interests, nor any lack of willingness to do so.

[99] Mr Rodrick's history of interest in ICM, his willingness to provide funding to it from as early as February or March 2003, his desire to become a part owner, and his firm view that it was a profitable business, all provide a solid foundation for concluding that he was committed to the continuation of financial support. On his own evidence, at the time of the charge, he was convinced the company was

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101 See his Honour's findings at [79]-[85] of the reasons.

102 Reasons at [75].

103 Reasons at [76].

104 Reasons at [111].

profitable, and that it continued to be profitable thereafter. Further, his evidence contained repeated references to the fact that he saw ICM as a new company starting up, operated by relatively young and inexperienced directors who needed assistance, and having a product (the C35 catamaran) which was very desirable. None of that suggests that the Nu-Log/Rodrick interests were otherwise than committed financiers once the decision had been made to give finance in exchange for the charge.

[100] In *Lewis v Doran*[105] Palmer J had this to say as to the assessment of a corporation's solvency or insolvency:

> "In my opinion, s 95A requires the Court to decide whether the company is able, as at the alleged date of insolvency, to pay all its debts as they become payable by reference to the commercial realities. If the Court is satisfied that as a matter of commercial reality the company has a resource available to pay all its debts as they become payable then it will not matter that the resource is an unsecured borrowing or a voluntary extension of credit by another party."[106]

[101] That decision was upheld on appeal[107] where the Court of Appeal[108] had this to say:

> "[109] Particularly when the limiting words are no longer part of the test,[109] there is no compelling reason to exclude from consideration funds which can be gained from borrowings secured on assets of third parties, or even unsecured borrowings. If the company can borrow without security, it will have funds to pay its debts as they fall due and will be solvent, provided of course that the borrowing is on deferred payment terms or otherwise such that the lender itself is not a creditor whose debt can not be repaid as and when it becomes due and payable. It comes down to a question of fact, in which the key concept is ability to pay the company's debts as and when they become due and payable.
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> [110] Even before the wording of s 95A, in *re RHD Power Services Pty Ltd* (1991) 9 ACLC 27 McPherson SPJ was prepared to pay regard to ability to borrow without security. Kearney J in *re Adnot Pty Ltd* (1982) 1 ACLC 307 took into account that the company "instead of having to resort to some outside lender, is in the fortunate position of having its fellow member of the group of companies to which it belongs, available in effect as banker to provide funds required to meet any shortfall" (at 311; the

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105 *Lewis & Anor v Doran & Ors* [2004] NSWSC 608.

106 *Lewis v Doran* [2004] NSWSC 608 at [116].

107 *Lewis (as liquidator of Doran Constructions Pty Ltd (in liq) & Anor v Doran & Ors* [2005] NSWCA 243; see also *Crema Pty Ltd v Land Mark Property Developments Pty Ltd* (2006) 58 ACSR 631, at [141]-[145]; *Owenlaw Mortgage Managers Ltd v Shepparton Retail Investments Pty Ltd* [2011] VSC 544, at [30]..

108 Composed of Giles, Hodgson and McColl JJA.

109 This was a reference to the change in wording of the *Corporations Act* so that the test of insolvency was no longer related to the ability of the corporation to pay "from its own moneys".

> shortfall was until completion and sale of a shopping centre). In *re a Company* (1986) BCLC 261 Nourse J declined to find that a company was unable to pay its debts as they fell due although it was being "propped up by loans made to it by associated companies and possibly by others" (at 262; his Lordship noted at 263 that he had evidence from a director to the effect that there was no question of the loans being withdrawn, the loans not being repayable for some eighteen months)."

[102] In *Mulherin v Bank of Western Australia Ltd; McCann & Ors v Bank of Western Australia Ltd*[110] the court held that whether a company has the ability to pay debts as and when they become due and payable, or lacks that ability, is to be determined by considering its financial position as a whole, with reference not merely to its strict legal rights and obligations under agreements with creditors and debtors, but by taking into account "commercial realities".[111] The court[112] went on to say:

> "[114] The availability of unsecured borrowings is also relevant where, for example, they are capable of providing temporary liquidity pending the realisation of assets or the obtaining of secured loans.
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> [115] There is some authority for the proposition that unsecured loans by directors cannot be taken into account.[113] But where it can be shown that directors are likely to continue to support the company, whether by unsecured loans or otherwise, there is no reason in principle why such support should be regarded as irrelevant. The likely existence of continued support of directors and/or shareholders may be a significant consideration in assessing the solvency of a development project vehicle such as UTC. Its only capacity to pay its debts on or before the conclusion of the development was dependent on the sale of the developed real property for a price higher than the outgoings of the development. In such circumstances, there will tend to be an expectation, once the development is embarked upon financed by loans secured and otherwise, that as long as loan conditions are observed the loans will be extended until the conclusion of the project through sale of the developed lots. That assumes, of course, that lenders continue to have a reasonable expectation that the borrower will have a continued ability to perform its obligations under its loan agreements. And the continued existence of confidence on the part of lenders will depend largely on their assessment of whether the development is likely to result in a net profit or loss."

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

111 Referring to *Re Newark Pty Ltd (in liq)* [1993] 1 Qd R 409 at 413-4; *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213 at 224.

112 Muir J, with whom McMurdo P agreed.

113 *Re Mike Electric (Aust) Pty Ltd (in liq)* (1983) 1 ACLC 758; *Re RHD Power Services Pty Ltd (in liq)* (1990) 3 ACSR 261 cf. *Re Kerisbeck Pty Ltd* (1992) 10 ACLC 619.

[103] In *Williams v Scholz*[114] the statement in *Lewis v Doran*, namely that "the key concept is ability to pay the company's debts as and when they fall due"[115] was accepted.[116] The Court of Appeal went on to state:

> "[109] It is well established that in considering a company's financial position as a whole, reference may be had, not merely to strict legal rights and obligations under agreements with creditors and debtors, but to "commercial realities". A significant consideration on any such determination is often the ability of the Company to borrow on the security of its own assets and the willingness of its secured creditors to continue lending despite temporary financial difficulties.
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> [110] Unsecured borrowings are also relevant, provided they do not give rise to obligations which the company is unable to meet.[117] Where the Court has the benefit of assessing insolvency with the advantage of hindsight, as is the case here, it will tend to be in a better position to evaluate the true bearing of unsecured borrowings on the Company's ability to meet its financial obligations.[118] There is some authority for the proposition that unsecured loans by directors cannot be taken into account. There should, however, be no objection in principle to regarding such financial support as relevant where the evidence establishes that the directors are likely to continue. Loans by related corporations have been regarded as relevant to the determination of solvency. And there is no reason in principle why a loan from directors should be treated any differently to loans from companies controlled by directors. The most important consideration is the degree of commitment to the continuation of financial support."[119]

[104] The appellant sought to utilise the decision in *Scholz*, to contend that in a case such as this there must be evidence that the funders were able and willing to provide sufficient funds from their own resources, to enable ICM to discharge its debts. *Scholz* is not authority for that proposition. In that case there was no financial arrangement in place. Absent such an arrangement the contention was that consideration should have been given "to the prospect of the Sholzes providing long term loans to the company (or share capital) in lieu of bank debt". There was no evidence at all that the Scholzs' were able or willing to provide sufficient funds and the only evidence given was of a hearsay nature, where one witness spoke only of the "possibility" that the Scholzs could have borrowed and on-lent. In those circumstances it is not surprising to find a conclusion that in the absence of such evidence solvency could not be established on that ground, but the decision extends no further on that point.

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114 *Williams v Scholz* [2008] QCA 94.
115 Emphasis in the original.
116 *Williams v Scholz* [2008] QCA 94 at [40].
117 *Lewis v Doran* (2005) 219 ALR 555 at 579.
118 See *Lewis v Doran* (2004) 208 ALR 395 at 408-409.
119 Some internal references omitted.

[105] The loans provided by the Nu-Log/Rodrick interests were secured by the charge, but were loans from, effectively, a director[120] or related company.[121] As *Scholz* shows,[122] regard can be had to such financial support where the evidence establishes that the directors are likely to continue it. That is the case here. There was ample foundation for his Honour's finding that finance was assured in the sense that it was provided at least until the sale of C3506. Mr Rodrick's own evidence that he regarded ICM as being profitable and conducting a worthwhile business in which he was part owner, provide ample support for a conclusion that Mr Rodrick was likely to continue the financial support.

[106] Similarly, if one has regard to the statement in *Scholz*[123] that "the most important consideration is the degree of commitment to the continuation of financial support", the same conclusion as to assured finance can be drawn. Mr Rodrick was a committed financial supporter.

[107] If one has regard to the "commercial realities", the findings open to his Honour were all one way. Mr Rodrick had committed himself to financing ICM to one degree or other from as early as February or March 2003. His belief in the quality of the product ICM produced, and its likely success, led him not only to provide finance to it but to commit as a part owner of the company. Further, his own catamaran, C3505, was partly under construction at the time when he had to consider whether he could continue financing in exchange for the charge. On his own evidence he was a willing and committed financier. The commercial realities are that the provision of that finance meant that as at the date of the charge ICM was able to pay its debts as and when they fell payable.

[108] In my respectful opinion, the fact that the loans may have been technically repayable on demand, does not avoid the commercial reality that Mr Rodrick had no intention of making a demand earlier than the sale of C3506. Thus, the incurring of the loan debt by ICM did not give rise to the substitution of one debt for another, as the appellant contends. It did give rise to an obligation which ICM was likely to meet on the sale of C3506.

[109] In that respect this case is similar to that considered in *Re Kerisbeck Pty Ltd*[124] where Harper J refused to make a finding of insolvency where there was a debt repayable on demand to a director, but the director gave evidence, which was accepted, that he did not intend to demand repayment of the debt in the immediate future. Similarly, in *re a Company*[125] Norse J declined to find insolvency where the company was propped up by loans made by associated companies, but there was evidence from a director to the effect that there was no question of the loans being withdrawn, and they were not repayable for some 18 months.

[110] Both of those decisions were referred to with apparent approval in *Lewis v Doran*[126] where the court said:[127]

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120 The primary judge found that during this period Mr Rodrick was a de facto director: Reasons [189]-[190]. That finding was not challenged.

121 Since Mr Rodrick was a de facto director, Nu-Log was a related company.

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

123 At [110].

124 *Re Kerisbeck Pty Ltd* (1992) 10 ACLC 619.

125 *Re A Company* [1986] BCLC 261.

126 *Lewis v Doran* [2005] NSWCA 243 at [110] and [112].

127 At [113].

> "In the present case, there was ample support for Palmer J's regard to availability of funds from other companies in the group, relevantly Holdings, additional to the $1.189 million balance of Holdings' debt and Dyspan's $1.21 million, sufficient to establish Constructions' ability to pay its debts as and when they fell due. Importantly, I do not think it was suggested that the funds made available, apparently repayable on demand, were to be regarded as immediately repayable so that Holdings itself was a creditor whose debt could not be repaid as and when it was due and payable."

[111] To the same effect is the decision in *Coates Hire Operations Pty Ltd v D-Link Homes Pty Ltd*.[128] There the company owed a debt by way of a loan advanced to it by Hoang. The debt was treated by the company as a loan payable on demand, but no demand had been made, and none was contemplated. Justice White found that if a demand was made the company would not be able to pay it, but Hoang had no intention of making that demand. His Honour referred to the decision of Barrett J in *ASIC v Edwards*[129] in which the well-known statement was made that replacing one debt with another by way of loan funds payable on demand was to substitute one form of immediate or near immediate obligation for another. Justice White went on:

> "[76] I do not understand his Honour to be saying that it is always necessary to treat a loan payable on demand as a debt that is due or near due and to be taken into account on a determination of solvency. It depends on whether the court is satisfied that demand will not be made within the reasonably immediate future.
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> [77] I accept Mr Hoang's evidence that he has no present intention of requiring the company to repay what he calls the loans amounting to $458,621.
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> …
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> [79] As a matter of "*commercial reality*" it makes no difference whether the debt owed by the company to Mr Hoang is payable on demand or without demand. Section 95A has been construed as if it provided that a company is solvent if it is able to pay all its debts as and when they become due and payable as a matter of commercial reality.
>
> [80] Although the defendant has not established that the debt owed to Mr Hoang is only payable on demand, as a matter of "*commercial reality*" the position is the same as if the debt were payable only on demand. Applying s 95A in the sense referred to above, the defendant is solvent."

[112] In my respectful opinion the learned primary judge's conclusion that as at 25 November 2003 (the date on which the charge was given) ICM was solvent, was plainly correct.

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128 *Coates Hire Operations Pty Ltd v D-Link Homes Pty Ltd* [2011] NSWSC 1279.

129 *ASIC v Edwards* [2005] NSWSC 831; (2005) 54 ACSR 583.

Other grounds dependent on a finding of insolvency

[113] In light of the conclusion above, it is unnecessary to deal with the other grounds of appeal.

Disposition

[114] I would dismiss the appeal, with costs.