SUPREME COURT OF QUEENSLAND

CITATION:	*Re Bluechip Development Corporation (Cairns) Pty Ltd* [2011] QSC 368
PARTIES:	**PROMOSEVEN PTY LTD** ACN 102 606 324 (applicant) **v** **BLUECHIP DEVELOPMENT CORPORATION (CAIRNS) PTY LTD** ACN 117 021 566 (respondent)
FILE NO:	SC No 1882 of 2011
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATES:	12, 18, 24 May 2011; 15, 20, 21, 22, 23, 24, 29 June 2011; 11, 25, 29 July 2011; 8, 10 August 2011; 5 September 2011
JUDGE:	Peter Lyons J
ORDERS:	**1. Bluechip Development Corporation (Cairns) Pty Ltd ACN 117 021 566 be wound up;** **2. Bradley Vincent Hellen and Nigel Robert Markey be appointed jointly and severally as Liquidators to wind up the affairs of the company;** **3. It is declared that anything that is required or authorised by the *Corporations Act* 2001 (Cth) to be done by the Liquidator is to be done by all or any one or more of the persons appointed;** **4. The costs of and incidental to this application be taxed and paid by Prime Project Development (Cairns) Pty Ltd ACN 109 685 332.**
CATCHWORDS:	CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY COURT – PROCEDURE – LEAVE OF COURT TO APPLY FOR WINDING UP – where a shareholder applied to have a company wound up on the ground of insolvency – where leave to bring the application was required under s 459P of the *Corporations Act* 2001 (Cth) – whether leave should be granted *nunc pro tunc* CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – WHAT CONSTITUTES INSOLVENCY – EVIDENCE OF INSOLVENCY – whether the company was

insolvent

CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY COURT – ORDERS – DISMISSAL, STAY OR OTHER RESTRAINT OF PROCEEDINGS – ABUSE OF PROCESS – where a representative of a bank learned of the application within three days of service of the application to wind up on the company – whether the application for a winding up order on the ground of insolvency should be dismissed

CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY COURT – ORDERS – GENERALLY – whether a winding up order on the ground of insolvency should be refused on discretionary grounds

CORPORATIONS – WINDING UP – APPLICATIONS FOR WINDING UP BY COURT – PROCEDURE – AMENDMENT OF APPLICATION – where the shareholder made an interlocutory application for leave to amend the application to wind up the company to include the just and equitable ground – whether leave should be granted to amend the application

CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – GENERALLY – whether the company should be wound up on the just and equitable ground

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where an interlocutory application for an adjournment made by a secured creditor on the basis that it should be given time to make an affirmative case for the solvency of the company was dismissed – where the secured creditor gave notice to the Attorneys-General under s 78B of the *Judiciary Act* 1903 (Cth) – whether the Court had refused to exercise, or had exceeded, the jurisdiction conferred by Chapter III of the *Commonwealth Constitution* – whether the Court had jurisdiction to continue the hearing – whether the proceedings should be transferred to another jurisdiction

Corporations Act 2001 (Cth), s 95A, s 459P, s 465A, s 467(4)
Judiciary Act 1903 (Cth), s 78B
Uniform Civil Procedure Rules 1999 (Qld), Schedule 1A, r 5.3, r 5.6

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, applied
Australian Securities and Investments Commission v Plymin & Ors (2003) 46 ACSR 126; [2003] VSC 123, applied
Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd (2007) 69 NSWLR 374; [2007] NSWCA 57, considered
Bingham v Iona Corporation Pty Ltd (1995) 16 ACSR 436;

[1995] FCA 1195, considered
Emanuele v Australian Securities Commission (1997) 188 CLR 114; [1997] HCA 20, cited
Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation [1978] VR 83; [1978] VicRp 9, considered
In Re A Company [1983] 1 WLR 927, cited
Joint v Stephens (No 2) [2008] VSC 69, cited
Lewis v Doran (2004) 208 ALR 385; [2004] NSWSC 608, cited
Loch v John Blackwood Ld [1924] AC 783, cited
Melbase Corporation Pty Ltd v Segenhoe Ltd (1995) 17 ACSR 187; [1995] FCA 1225, cited
Mincom Pty Ltd v Murphy [1983] 1 Qd R 297, cited
Re Dalkeith Investments Pty Ltd (1984) 9 ACLR 247, cited
Re Dikwa Holdings Pty Ltd v Oakbury Pty Ltd (1992) 36 FCR 274; [1992] FCA 225, cited
Re Testro Brothers Consolidated Ltd [1965] VR 18; [1965] VicRp 4, cited
Sandell v Porter (1966) 115 CLR 666; [1966] HCA 28, cited
Short v Crawley (No 30) [2007] NSWSC 1322, not followed

COUNSEL:

P Hastie, with J Payne, for the applicant (P Hastie on 12 May 2011; P Freeburn SC, with J Payne, on 18, 24 May 2011; J Payne on 29 June 2011)

No appearance for the respondent

Dr R O'Hair for the secured creditor Prime Project Development (Cairns) Pty Ltd (W Sofronoff QC SG, with Dr O'Hair, on 12, 18, 24 May 2011; S Farrugia (*sol*) Hemming + Hart on 29 June 2011, 25 July 2011)

K Cameron (*sol*) for the Deputy Commissioner of Taxation on 12, 18, 24 May 2011, by leave of the court on 23 June 2011 (A Scott (*sol*) on 24 May 2011, 15 June 2011)

D Pratt for Messrs Gates, Matthews and Torto, creditors seeking to intervene, appearing by leave of the court on 20 June 2011

SOLICITORS:

Synkronos Legal for the applicant

No appearance for the respondent

Hemming + Hart Lawyers for the secured creditor Prime Project Development (Cairns) Pty Ltd

Australian Taxation Office for the Deputy Commissioner of Taxation

[1] **PETER LYONS J:** Promoseven Pty Ltd (*Promoseven*) and Prime Project Development (Cairns) Pty Ltd (*Prime*) are the only shareholders in Bluechip Development Corporation (Cairns) Pty Ltd (*Bluechip*). Promoseven has made applications, the aim of which is to have Bluechip wound up. They are opposed by Prime on a number of grounds.

Relevant persons and entities

[2] Promoseven and Prime each hold 100 fully paid ordinary class shares in Bluechip. Mr Sidney Knell is a director of Bluechip. Mr Stephen Burt is its other director. Bluechip is the vehicle by which a development known as Cairns Central, located in Cairns, has been carried out.

[3] Mr Burt is an architect by profession. He is a director of Promoseven. The other director of Promoseven is Mr Akram Miknas, a resident of Bahrain. Mr Burt described himself as Mr Miknas' "local representative in Australia".

[4] Mr Knell is the director of Prime. Other entities and persons associated with Mr Knell are of some relevance to these proceedings. Mr Knell is the managing director of Prime Project Development Pty Ltd (*PPD*). Mr Knell is (or was) a director of Prime Property Investment Pty Ltd (*PPI*). It is apparent that Mr Knell has a substantial degree of control of PPD and PPI. Mr Knell is the sole director of Cairns Central Plaza Pty Ltd (*CCP*), and he and his wife, Alison Knell, are the shareholders of Endeavour ACT Pty Ltd (*Endeavour*) which is itself the only shareholder in the company which owns the shares in CCP. Mr Knell is the sole director of Endeavour. In the evidence, reference was made to other companies associated with Mr Knell, and apparently under his control. They include a company referred to as "PPI Victoria" or "PPI Vic" (*PPI Vic*); and another referred to as "Prime Residential Management" (*PRM*). All of these companies and others are sometimes referred to as "the Prime Group".

[5] Ms Knell is also the director of a company, Refund Property Fees Pty Ltd (*Refund*). Refund has commenced proceedings against Prime, Bluechip and Promoseven in the Australian Capital Territory (ACT).

[6] Mr I J Ericson carries on business as Flea's Concreting, and provided services for the project. In some of the material, Mr Ericson is referred to as "Flea". There have been disputes between Mr Ericson and Bluechip.

Background

[7] Bluechip was formed in November 2005 to undertake the Cairns Central development. Cairns Central is the subject of Community Title Schemes. The building comprises commercial premises, retail business premises and serviced apartments. To carry out the development, Prime and Promoseven entered into a document described as a Joint Venture Agreement (*JVA*) dated 16 November 2005.

[8] Under the JVA, some of the funding for the project was to be provided by the parties. However the major source of finance for the project was the HSBC Bank (*HSBC*), which provided funds totalling (at least) $18 million. To secure this funding, a first mortgage over the land was given to HSBC.

[9] Bluechip entered into an agreement, called the Development Management Agreement, and dated 16 November 2005, with PPD. Under this agreement, PPD was appointed the development manager for the project.

[10] PPI was appointed as the sales agent to sell the apartments and commercial properties in Cairns Central. Most of these have been sold.

[11] At some point, HSBC entered into what were described as side agreements with subcontractors for the development project, to enable it to be completed. Under these agreements, HSBC accepted liability to make payments to the subcontractors. It entered into a side agreement with Mr Ericson.

[12] Mr Knell sent a letter to Mr Miknas dated 16 February 2007. The subject of the letter was what was described as the Cairns Mezzanine Funds. The letter gave notice of the requirement for funds totalling $2,250,000, in stages, up to about 1 June 2007. The letter made it plain that at that time, Prime was not in a position to contribute funds, but expected to be able to do so after 1 August 2007. The letter also proposed interest either at 15 per cent on monthly rests, or at 18 per cent "at the end" (presumably, of each year). The letter suggested a loan agreement, to be supported by a second ranking mortgage, capable of registration, to be held in escrow. A unit trust was also proposed. Mr Burt, who was provided with a copy of the letter, sent it to Mr Miknas, who replied to him expressing a preference for "the simplest process, i.e. a second ranking mortgage", and instructed that it proceed.

[13] On 20 February 2007, Mr Gates, who worked as a consultant with the Prime Group, sent an email to Mr Burt, attaching mortgage documents and a loan agreement for the advance of funds from Promoseven to Bluechip. Mr Burt forwarded these to Mr Miknas. Signed copies of these documents have not been located. However, the evidence of Mr Burt, supported by bank records, is that Promoseven advanced substantial amounts of money to Bluechip from 15 March 2007. Mr Burt also gave evidence that the mortgage documents and loan agreement were signed on that date.

[14] Funds for the project were provided by both parties to the JVA. This is apparent in particular from the evidence of Mr Paul Morris, a solicitor to whom Mr Knell and Mr Burt gave instructions on or about 21 January 2009. At that time, they told him that Promoseven had already advanced around $5 million, and that "one of Mr Knell's company (*sic*)" (presumably Prime) had advanced between $1.5 million and $2 million. This was said to be "pursuant to an existing loan arrangement" or "existing loan agreement". They instructed him to prepare a mortgage to rank second to that granted to HSBC, to secure moneys advanced under the existing loan agreement, as well as future variations to it, and further loan agreements.

[15] Bluechip then granted a mortgage dated 23 January 2009, to both Prime and Promoseven. It was registered on 29 January 2009. The mortgage provided security for funds advanced under any agreement between Bluechip on the one hand, and Prime and Promoseven on the other.

[16] A loan agreement, made between Bluechip and Promoseven (*Promoseven 2009 loan agreement*), and another loan agreement, between Bluechip and Prime (*Prime 2009 loan agreement*), were in evidence. Although each is dated 22 January 2009, the evidence shows these documents (or loan agreements between these parties) were signed in April 2009. The loan agreements were prepared as a result of instructions which Mr Knell gave to Mr Gates, the business development manager for the company providing administration services to the Prime Group.

[17] Each of the Promoseven 2009 loan agreement and the Prime 2009 loan agreement promised the provision to Bluechip of financial accommodation, referred to as a facility. The facility limit in the case of Promoseven was $10 million, and in the case of Prime was $5 million. Otherwise, the two loan agreements were generally

identical. There is, however, one significant difference between them. In each case, the agreement commences with a section headed "Details", listing some matters of significance to the loan agreement. One of the entries related to the maturity date. In Prime's case, that entry was "Subject to clause 5.2, the first anniversary of the granting of Strata Titles over the lots in the Land, replacing the current titles in the Land". Clause 5.2 then provided for an extension of the maturity date by agreement of the parties.

[18] In the case of Promoseven, the maturity date entry stated "Subject to clause 5.2, the first anniversary of the drawdown of the Facility". Clause 5.2 then provided, under a heading identical to that in the Prime 2009 loan agreement, as follows:

> "The Maturity Date for the Facility stated in the Details is replaced with 'The tenth anniversary of the date of this agreement'."

[19] There was no explanation in the evidence for the substantial difference in the maturity date under the Prime 2009 loan agreement and the Promoseven 2009 loan agreement. Mr Burt gave evidence that he signed loan agreements in April 2009, but does not accept that the documents in evidence (exhibited to affidavits of Mr Knell) are the loan agreements which he then signed.

[20] In early 2009, PNP Realty Pty Ltd (*PNP Realty*) (a company with no presently relevant connection to any party) commenced proceedings against Bluechip in the Supreme Court of the Australian Capital Territory (*ACT*). Loan agreements between Bluechip, Prime and Promoseven were prepared against the background of these proceedings. Mr Burt and Mr Knell gave evidence in these proceedings, discussed later in these reasons. The proceedings commenced by PNP Realty were ultimately settled.

[21] In 2008 and 2009, proceedings were commenced in this Court between Mr Ericson and Bluechip. In 2009, Bluechip commenced proceedings in the Federal Magistrates Court against Mr Ericson. Arbitration between Bluechip and Mr Ericson resulted in a Deed of Release dated 11 February 2010. The Deed recited the side agreement (referred to as a Side Deed) with HSBC, and provided that, on compliance with the Deed, Mr Ericson would make no further claims against HSBC. The Deed also included an immediate release of any claim Mr Ericson might have against HSBC. One of the terms was that Bluechip and Shae Investments Pty Ltd (*Shae Investments*) were to enter into a contract for the sale by Bluechip of Lot 11 in Cairns Central, the purchase price to be $200,000; with a deposit of $125,000 deemed to have been paid. The settlement date under the contract was to be no later than 28 February 2011; and on settlement, the buyer was to lease the lot to Bluechip for a term of five years at a nominated rental, Mr Knell to guarantee personally the performance of Bluechip's obligations under the lease. The terms of settlement further provided that the contract for the sale of Lot 11 would automatically terminate and Bluechip would refund $125,000 to Ms Tracy Ericson if the contract did not settle by 28 February 2011. The evidence shows that there has been no settlement of a sale of Lot 11 to Shae Investments.

[22] Mr Knell gave evidence that Mr Burt has told him that subsequently, Mr Burt negotiated with Mr Ericson for a release in favour of HSBC on the basis that the yearly rental of Lot 11 would be increased to $35,000; and that Mr Ericson has demanded the increase in rental; and accordingly, Bluechip did not enter into the

contract for the sale of Lot 11 to Shae Investments. He also gave evidence that neither Mr Ericson nor Ms Ericson have demanded payment of the sum of $125,000. However, he gave evidence that at a Board meeting of Bluechip on about 22 September 2010, it was resolved that, should the contract for the sale of Lot 11 not settle by 28 February 2011, the contract would automatically terminate; and that Bluechip would pay the sum of $125,000 in accordance with the terms of settlement.

[23] Lot 505 is the manager's unit for the Cairns Central Plaza Apartments Community Title Scheme (*CTS*), being part of the Cairns Central development. By a contract dated 20 May 2009 entitled "Management Rights Procurement Agreement", Bluechip sold to CCP the management rights associated with the Apartments CTS and the Commercial CTS for the sum of $1,100,000. At about the same time, Bluechip entered into a contract to sell Lot 505 to CCP for the sum of $371,109. The management rights include rights relating to the letting of apartments. Mr Burt gave evidence, not denied by Mr Knell, that CCP continues to keep all revenue derived from the management rights.

[24] Mr Burt also gave evidence that CCP has not paid the purchase price for the management rights. On 23 July 2010, Mr Andrew Courtice, a solicitor acting on behalf of Promoseven, sent an email to Mr Knell stating that the management rights (and Lot 505) needed to be paid for by CCP; and that payment should occur by 31 August 2010. On 24 August 2010, Mr Knell sent an email to Mr Burt, with a copy to Mr Courtice. It included, with reference to the request to settle by 31 August 2010, the statement "we are under no positive obligation to settle by that date (if at all)". The email rejected a proposal that a solicitor be appointed to act for Bluechip to recover the outstanding amounts, "in isolation of the wider issues".

[25] Mr Burt gave evidence that, in a discussion relating to non-payment by CCP, Mr Knell said that Bluechip owed considerable sums of money to his companies, and that "he was entitled to set those sums against the sale price" of Lot 505. Mr Knell gave evidence that "the management rights have been paid for". However, the evidence shows that this is a reference to a reduction of the amount owing to Prime, rather than to a payment of the sum of $1,100,000 by CCP to Bluechip.

[26] The 2009 contract for the purchase of Lot 505 has not settled. Mr Knell has deposed that Bluechip and CCP have entered into a contract dated 21 April 2011 for the sale of Lot 505 to CCP, again for the sum of $371,109. He has also sworn that the contract would settle within 90 days (that is, by 20 July 2011). He gave evidence that attempts were being made to complete this contract during the hearing.

[27] On 18 August 2010, Refund commenced two proceedings in the Supreme Court of the ACT. Although Refund is not a party to the JVA, it would appear that the relief sought includes declarations as to the proper interpretation of the JVA, and a determination of amounts owing between Prime, Bluechip and Promoseven. Mr Knell gave evidence to the effect that, on about 10 August 2010, Prime assigned to Refund, the debt owed to it by Bluechip. An application to strike out Refund's proceedings has been heard, apparently in April 2011, at which time judgment was reserved. Mr Knell has exhibited a letter dated 21 April 2011 to Mr John Gallop, notifying of his appointment as an arbitrator pursuant to an arbitration agreement of 13 September 2010, for the determination of the amounts owed to Prime, PPD and

PPI by Bluechip, the parties to the arbitration agreement apparently being Bluechip, Prime, PPD and Refund (it is not suggested that Promoseven is a party to the arbitration agreement).

[28] It is clear that Bluechip has outstanding Goods and Service Tax (*GST*) liabilities in respect of the sale of units in Cairns Central. An audit has been conducted of its affairs by the Australian Taxation Office (*ATO*). In response to a request from the ATO, on 16 February 2011 Mr Knell wrote a letter on behalf of Bluechip (*February ATO letter*) enclosing information relating to Bluechip's financial position, identifying reasons why sales of units were unlikely to occur, and estimating Bluechip's GST liability at "around $400,000".

[29] When the applications initially came on for hearing, and on subsequent days, the Deputy Commissioner of Taxation (*DCT*) appeared as a supporting creditor. However, on 16 June 2011, the DCT gave notice of an intention to withdraw. An affidavit had been filed on behalf of the DCT on 2 June 2011, the deponent being Mr Giovanni Costa, a taxation officer employed in the ATO. Promoseven relied on Mr Costa's affidavit. He deposed that on 31 May 2011, the GST liability of Bluechip was $867,244.66 (including interest). It is apparent from the Running Balance Account exhibited to his affidavit, that the tax component of the liability was $715,385. The cross-examination of Mr Costa did not challenge his evidence as to the amount of the tax liability. Mr Knell in cross-examination, accepted that, as at 23 June 2011, the amount owing to the ATO was as shown in the Running Balance Account, perhaps with some additional interest. However, he gave evidence that on 8 June 2011, ATO officers attended Bluechip's office to conduct the ATO's final audit review, at which Mr Knell expressed the view that the final debt would be between $500,000 and $600,000. He was thanked for his co-operation, and informed that it would be recommended that penalties not be sought, and that a final report should be available by mid July.

[30] Mr Knell has deposed to a contract dated 21 April 2011 for the sale by Bluechip to Property Acquisitions Australia P N Ltd as trustee for the PAA Unit Trust (*PAA*) of two lots in Cairns Central. The lots were identified in Mr Knell's affidavit as Lot A and Lot ii, though in the contract they were described as Lots 1 and 8. The purchase price was $1,055,000. The contract identified the current use of the lots as "Medical Tenancies", and the title encumbrances as leases for 10 years, the lessee being Naidoo Medical Pty Ltd. Settlement date was 90 days after contract. There is no evidence that the contract has settled.

[31] By 2010, the Cairns Central development was completed and the residential units (other than Lot 505) were sold. There remain unsold some 15 commercial and retail lots, including Lots 1 and 8. It is apparent from the evidence that in recent times, sales have been made difficult by the general economic circumstances.

[32] The evidence indicates that Prime and Promoseven have also been involved in a development project at Robina.

The proceedings

[33] On 7 March 2011, Promoseven filed an application to wind up Bluechip in insolvency. The application sought such leave as may be necessary under the *Corporations Act* 2001 (Cth) (*Corporations Act*) to enable it to bring the

application. The application and supporting material were served on Bluechip by express post on 7 March 2011. Notice of the application was published in *The Australian* newspaper on 17 March 2011. Promoseven has also given notice that it applies for leave to wind up Bluechip on the just and equitable ground.

[34] The proceedings came on for hearing on 12 May 2011 in the applications list, after having been adjourned from 4 May 2011. They could not be disposed of then, and were adjourned until 18 May, when some evidence was heard. The matter came on again for hearing on 24 May; and was set down for further hearing on 20 June, for three days. On 15 June 2011, an application was made on behalf of Prime for the adjournment of the scheduled resumption of the hearing, which was refused. The hearing continued for five days commencing on 20 June. At the end of that period, a timetable was set for the delivery of submissions. At a mention on 29 June, I was formally advised that Prime had caused notices to be given under s 78B of the *Judiciary Act* 1903 (Cth) (*Judiciary Act*). On 29 July 2011, it became apparent that none of the Attorneys-General wished to intervene. On 10 August 2011, Prime applied to re-open its case, but that application was refused. Some further references were sought from Prime, and provided on 2 December 2011.

Contentions

[35] Prime submitted that it had been refused permission to run an affirmative case to establish that Bluechip was solvent, as a result of which "there was an excess of jurisdiction", and accordingly, there was no jurisdiction to continue further with the proceedings. Prime relied on its notice under s 78B of the *Judiciary Act* for the further articulation of the grounds on which it relied for this submission.

[36] In its final written submissions, Prime relied on earlier written submissions of 24 May 2011. In its earlier submissions, Prime submitted that the proceedings should be transferred to the Supreme Court of the ACT, on the grounds that the bringing of the present proceedings in Queensland was "forum shopping"; and because there had been earlier proceedings in the Supreme Court of the ACT relating to Bluechip's insolvency (the proceedings brought by PNP Realty). Moreover there were other proceedings involving Bluechip (the proceedings instituted by Refund) in that court.

[37] Prime submitted that the application to wind up Bluechip should be dismissed on the grounds of abuse of process, since a representative of the National Australia Bank (*NAB*) learned of the application within three days of the service of that application on Bluechip.

[38] In so far as Promoseven brought its application for the winding up of Bluechip in insolvency on the basis that it was a contributory, it required leave to do so under s 459P of the *Corporations Act*. In so far as it contended it was a creditor, Prime submitted that Promoseven's debt was a contingent or prospective debt, and accordingly leave was required to make its winding up application.

[39] Prime submitted that leave should not be granted *nunc pro tunc* under s 459P of the *Corporations Act*.

[40] Prime opposed a grant of leave under s 459P on a number of grounds. The principal grounds might be summarised as follows:

(a) There was no *prima facie* evidence of insolvency;
(b) The winding up would trigger default provisions of the Promoseven 2009 loan agreement, with the result that the rights of unsecured creditors would be defeated. Associated with this was a submission that the winding up would secure to Promoseven a benefit which was not proper, namely the advancement of its interest over the unsecured creditors;
(c) Promoseven had remedies of a proprietary nature available to it, superior to those which would be available to a liquidator;
(d) Other dispute resolution mechanisms were available, and in particular, those in the JVA;
(e) The debt on which Promoseven relied was subject to the winding up provisions of the JVA; and was thus "no more than a part of an accounting" which was to take place on the winding up of the joint venture;
(f) The relationship between Promoseven and Prime was a partnership. It would be inappropriate to wind up Bluechip without winding up the partnership;
(g) As Bluechip was no longer trading, the refusal of leave to wind it up in insolvency would constitute no risk to the public;
(h) Promoseven's conduct sounded against the grant of leave. In particular, its director, Mr Burt failed to inform the court of a number of things, namely, that Promoseven's debt was the subject of the Promoseven 2009 loan agreement; that the debt was not due for repayment until 2017, unless the winding up order was made; that the debt was secured; and that Mr Burt had, in the ACT winding up proceedings, sworn that Promoseven would not enforce its debt to the detriment of unsecured creditors, but he no longer maintains that position.

[41] Prime contended that Promoseven had not established that Bluechip was insolvent. Prime also submitted that the application to wind up Bluechip in insolvency should be refused on discretionary grounds.

[42] Prime's submissions in opposition to the application to amend the winding up application to introduce the just and equitable ground, and its submission in opposition to an order based on that ground, are interrelated. They are summarised later in these reasons. Its submissions on these issues also included a broad reference to its submissions in opposition to Prime's application for leave to wind up Bluechip in insolvency, and to the winding up application itself.

[43] Promoseven submitted that the constitutional grounds relied upon by Prime had not been made out.

[44] It also submitted that Bluechip's insolvency has been demonstrated. It relied on that, in support of its application for leave under s 459P. It submitted that it was not in the public interest for an insolvent company to continue to trade; or for a contributory to be locked into an insolvent company. It generally contested the grounds relied upon by Prime for the refusal of leave.

[45] Promoseven submitted that the grant of leave under s 459P was a procedural matter, and not one of jurisdiction; and accordingly, leave could, and should, be granted *nunc pro tunc*.

[46] It further submitted that as it was in the interest of the creditors, and in the interest of equity between creditors, for Bluechip as an insolvent company to be wound up, such an order should only be refused on discretionary grounds in special circumstances; and none had been shown.

[47] In addition, Promoseven submitted that there was a serious and operative state of mistrust and disharmony between the directors; and referred to a number of transactions relating to Bluechip and companies associated with Mr Knell. It submitted that leave should be granted to amend the application, to include the just and equitable ground.

[48] In view of the contentions of the parties, it is appropriate to determine in due course the question of solvency. However, it seems appropriate that questions relating to the continuation of these proceedings in this Court should be dealt with in advance of other questions, namely: the grant of leave under s 459P; whether Bluechip is insolvent; if so, whether a winding up order should be refused on discretionary grounds; whether leave should be granted to amend the application; and if so, whether Bluechip should be wound up on the just and equitable ground.

Jurisdiction of this Court to continue the hearing

[49] Prime's submissions regarding the failure by this Court to exercise jurisdiction are to be gleaned from the notice given under s 78B of the *Judiciary Act*. Because that notice identifies issues in the form of questions, some reframing of it is necessary to understand Prime's contentions. Reference to a number of key contentions will be sufficient for the determination of this ground.

[50] One of the bases of Prime's adjournment application made on 15 June 2011 was that it would not have time to obtain a report from an insolvency expert for the hearing scheduled for 20 June 2011. One matter taken into account when refusing the application was that Prime could succeed on the basis that Promoseven failed to prove that Bluechip is insolvent; and that it was not necessary to Prime's success that it positively establish the solvency of Bluechip. Prime submitted that it was required to confine its case to challenging Promoseven's case that Bluechip was insolvent, and its case was limited to challenging that case. Prime's submissions also referred to a motion for limited disclosure having been denied; that cross-examination of Mr Burt had been truncated by the Court; that an adjournment application to permit the restoration of accounts was overruled; and that the Court decided against making an order for pleadings. It submitted that the Court had a duty under Chapter III of the *Commonwealth Constitution* to exercise its jurisdiction; and that duty required the Court to hear the affirmative case which Prime wished to present, and precluded the Court from limiting Prime to a challenge of the affirmative case of insolvency sought to be established by Promoseven. At least by implication, it contended that the rulings referred to in its submissions had these effects, and resulted in an excess of jurisdiction, thereby depriving the Court of jurisdiction to proceed further. It submitted that, to the extent that r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*) supported those rulings, it was invalid as conflicting with Chapter III; and accordingly should be read down.

[51] In my view, the exercise of judicial power extends to regulating the conduct of litigation, and includes the power to make orders which have the effect of placing limitations on the way in which a party conducts its case. So much may be deduced

from the decision in *Aon Risk Services Australia Ltd v Australian National University* (*Aon*).[1] The existence of such a jurisdiction plainly includes the jurisdiction to make a decision which, on appeal, might be shown to be wrong. However, in the present case, the submissions made on behalf of Prime have not sought to controvert the rulings referred to; rather, they simply assert that the effect of these decisions amounts to a breach of a duty to exercise jurisdiction, with the consequences identified earlier. In my view, the decisions to which Prime makes reference are themselves an exercise of judicial power. While a party has a right to invoke the Court's jurisdiction, and, no doubt, to contest the making of orders sought by a party who has invoked that jurisdiction, parties do not have an unlimited right to raise any arguable case at any point in the proceedings.[2] Decisions regulating the extent to which a party might do so, or which may have the practical effect that a party is unable to advance a particular case, are not, for that reason alone, beyond the scope of judicial power. They do not have the consequence that the Court is deprived of jurisdiction to continue further with the hearing.

[52] In any event, Prime's submissions do not reflect accurately the effect of the course of proceedings. No order was made requiring Prime to confine its case to challenging Promoseven's case that Bluechip was insolvent, or limiting its case to challenging that case. Even by 15 June 2011, more than three months after the commencement of the proceedings, Prime had not commissioned an expert to prepare a report on Bluechip's solvency, with the inevitable consequence that it did not then know what such a report would show. The true effect of the refusal of the adjournment was that Prime would not have further time to determine whether it would be in a position to advance a positive case that Bluechip was solvent.

[53] Dr O'Hair, who appeared for Prime, was invited to identify the occasions on which Prime had applied for and been refused limited disclosure. He referred to an occasion on 21 June 2011, when I indicated that I was not at that stage of the proceeding prepared to make an order for general disclosure on the just and equitable ground; and another occasion on the same day when he tendered a request made by an email and facsimile transmission dated 20 June 2011 (Exhibit 7). This was refused, having regard to the width of the request, and the stage in the proceedings at which it was made. No, more specific, application was made subsequently. There was an occasion, referred to below, when arrangements were made for Dr O'Hair to have the opportunity to inspect documents relied on by Mr Ham, an accountant called on behalf of Promoseven, save for some MYOB records.

[54] Although a limitation was placed on the time allowed for the cross-examination of Mr Burt, the limitation was foreshadowed, and the time allowed was, nevertheless, substantial, approximating the maximum time indicated as likely to be required by the cross-examiner.

[55] In the s 78B notice it was said that Promoseven's case depended in part on its books of account, produced from electronic records that had been wiped, and it was said that an application by Prime that the proceedings be adjourned to permit the restoration of the accounts was overruled. These matters require some fuller explanation.

---

1 (2009) 239 CLR 175.

2 *Aon* at [96]-[98].

[56] Mr Ham, an accountant, gave evidence in Promoseven's case as to Bluechip's insolvency. His affidavit, sworn on 4 May 2011 and read at the hearing on 12 May 2011, included, as Exhibit JJH3, Mr Ham's analysis of transactions between Bluechip and Promoseven, and his calculations of interest in respect of some moneys advanced. In the course of objections heard on 20 June 2011, it became apparent that this document was not easy to read. As a result, a larger format version of the document, with numbered lines as a means of reference, was prepared, and became Exhibit 10. The information recorded in Exhibit 10 is the same as had appeared in Exhibit JJH3. Prior to the commencement of the cross-examination of Mr Ham by Dr O'Hair, an inquiry was made about the source materials relied upon for these documents. To the extent they showed interest amounts, that was a matter of calculation only. Mr Ham explained the source of other information in Exhibit 10. He said that he had been provided with Bluechip's records in electronic form, using the Quickbooks system. He had compared those with Promoseven's electronic accounting records, produced using the MYOB system. A limited number of entries (Exhibit 10 would suggest there were ten such entries) were found in the MYOB records, but not in the Quickbooks records. An arrangement was made that, during the luncheon adjournment on 22 June 2011, and before the cross-examination of Mr Ham, Dr O'Hair would be given access to the Quickbooks records and the documents which had been given to Mr Ham by representatives of Bluechip, and which he had relied upon to produce Exhibit JJH3. However, Mr Ham gave evidence that the MYOB system automatically purges the records he had relied upon to produce the exhibit, and that to reconstruct it would take some days. He also said that in respect of the transactions not found both in the MYOB records and the Quickbooks records, the original source documents were available. Nevertheless, Dr O'Hair made an application for an adjournment to enable a reconstruction of the MYOB records in a form which would show the basis in Promoseven's records for the material which appeared in the exhibit. The decision on the application for the adjournment required a weighing up of the potential benefit to Prime of the adjournment, against the fact that the information on which the exhibit was based was, on Mr Ham's evidence, found in Bluechip's Quickbooks records, or in source documents which had come from Bluechip, and which would be made available to Dr O'Hair; in the light of the disruption to the hearing which would be occasioned by the adjournment.

[57] The delivery of pleadings was discussed late in the afternoon of 22 June 2011, but no application was made for a direction that they be delivered.

[58] In my view, the submissions made on behalf of Prime in support of its constitutional grounds should not be accepted. I am not prepared to terminate these proceedings on the basis that to continue with them would be beyond the jurisdiction of the Court.

Transfer to the Supreme Court of the ACT

[59] Prime's submissions on this question appeared in its written submissions of 12 May 2011, and its written submissions of 24 May 2011. These in turn were relied on in its written submissions subsequent to the hearing.

[60] No formal application was made for a transfer of proceedings to the ACT. Nor did Prime seek an early determination of the question of an appropriate forum for these proceedings, notwithstanding their now lengthy history.

[61] The winding up application brought by PNP Realty Pty Ltd in the ACT Supreme Court was resolved by consent. The actions commenced by Refund involve entities which are not parties to the present proceedings. Obviously, the questions raised by the present proceedings are in many respects different from those to be considered in the actions by Refund.

[62] Prime has not made any submissions about the source of power, or the principles to be applied, in relation to a transfer these proceedings to the ACT. In particular, it does not assert that the ACT Supreme Court alone has jurisdiction to deal with these proceedings; nor does it make any reference to the presence or absence of any territorial connection between these proceedings, and this Court's jurisdiction. There are in fact strong territorial connections between the facts relevant to Promoseven's applications, and this Court's territorial jurisdiction.

[63] Prime submitted that the fact that evidence, including oral evidence, given in the ACT Supreme Court is in issue in these proceedings, was a matter supporting the transfer. I have not detected any controversy about the evidence given in proceedings in that Court. In any event, it is highly likely that, were these proceedings to be transferred, a judge dealing with them in the ACT Supreme Court would be acting on the same materials as have been placed before me.

[64] Assuming that Prime's submissions may be treated as an application for an order for the transfer of these proceedings to the ACT Supreme Court, I would not be prepared to make such an order.

Premature publication of the winding up application

[65] Section 465A of the *Corporations Act* requires a person who applies to wind up a company (including, relevantly in insolvency or on the just and equitable ground) to advertise the application as prescribed by the rules. Rule 5.6 of Schedule 1A of the *UCPR*[3] provides that notice of the application must be published at least three days after the application is served on the company, and at least seven days before the date fixed for the hearing of the application.

[66] Mr Knell gave evidence that at approximately 4pm on 10 March 2011 he spoke with a manager at the NAB who said he had just received the application and the supporting affidavit of Mr Burt, and further said to Mr Knell, "… you are in a lot of trouble". Mr Knell suggested that the documents had been sent to the bank manager to affect adversely his relationship with the manager, and the NAB.

[67] Mr Burt was cross-examined about this matter. He had instructed solicitors to provide these documents to the NAB. He said that Promoseven had dealings with the NAB in relation to another project with Mr Knell, relating to the Robina development; and that his lawyers (likely to be a reference to lawyers retained on behalf of Promoseven) advised that the NAB should be notified of the application.

[68] Dr O'Hair submitted that the consequence of this conduct was that the proceedings should be dismissed. He submitted that the matter was governed by the decision in *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd*[4]

---

3 This being the relevant rule: see the definition of "rules" in s 9 of the *Corporations Act*, and r 5.1 of schedule 1A of the *UCPR*.

4 (2007) 69 NSWLR 374.

(*Australian Beverage Distributors*); and that the present proceedings "fall fair square within the terms of that judgment".

[69] For Promoseven, it was submitted that there was no evidence of harm to Bluechip, or, for that matter, Prime; that the facts in the present case were significantly different from those in *Australian Beverage Distributors*; and that because Bluechip was insolvent, it could not have successfully applied for an injunction to protect its trading reputation or commercial credit.[5]

[70] The submissions make it necessary to pay some attention to the decision in *Australian Beverage Distributors*. In that case, winding up applications brought by Australian Beverage Distributors against two companies (*Evans & Tate* and *Evans & Tate Premium Wines*) were summarily dismissed. The dismissal was upheld on only one ground, relating to the giving of public notice of the winding up applications, by means of a press release, on the day they were filed (which was inevitably less than three days after service of the applications on the companies).

[71] The decision of the court was given by Beazley JA. Her Honour held that the rule requiring the publication of notice of the application at least three days after service on the respondent was "an implied restraint on publication in a statutory context which provides a specific regime for the publication of a winding-up application".[6] The trial judge had found that the publication was "deliberate and calculated to cause harm" to the companies.[7] Beazley JA upheld the summary dismissal of the applications on the basis that the early publication must have caused harm to the companies (her Honour referred to the "overwhelming objective effect of the press release").[8] Her Honour considered that the harm caused by the press release was a sufficient basis "for the Court to exercise its discretion to dismiss the application for breach of the publication rule."[9] Her Honour also observed that the press release "could only have been intended to cause harm".[10]

[72] Elsewhere, her Honour had described the effect of the rule as being "to prohibit publication, other than in accordance" with it.[11] It is clear, from the authorities cited by her Honour, that the existence of the restraint or prohibition, and the power of the court to dismiss a winding up application of which notice is given prior to the time prescribed by the rule, are well established. However, one might question whether a breach of a restraint or prohibition implied into a rule, for which no consequence is expressly provided, should always or usually prevent the exercise of rights and the granting of remedies expressly conferred by the Act, where the granting of the remedies may in many cases be in the public interest.

[73] Beazley JA referred to *Re Signland Ltd*[12] as identifying the purposes of the restraint. One is to enable the company to discharge the debt relied upon by the applicant, before publication. An alternative purpose is to enable the company, if it wishes to

---

5 By reference to *General Welding and Construction Co (Qld) Pty Ltd v International Rigging (Aust) Pty Ltd* [1983] 2 Qd R 568 at 570 per McPherson J.

6 See *Australian Beverage Distributors* at [108].

7 Ibid at [98].

8 Ibid at [122].

9 Ibid.

10 Ibid.

11 Ibid at [102].

12 [1982] 2 All ER 609; see *Australian Beverage Distributors* at [106].

dispute the debt, to apply to the Court to restrain advertisement. Her Honour also referred to *Paterson v Hampton Interiors* (*Paterson*)[13] where Needham J, to somewhat similar effect, said that the purpose of the rule is to give the company an opportunity to apply for an injunction to restrain advertising the application, which is justified by the damage which might accrue to the company as a result of the advertising of the application. His Honour also said that service of the application after advertising would constitute an abuse of process, having regard to the purpose of the rule.

[74] Beazley JA clearly identified the power to dismiss the application as discretionary. That is confirmed by her Honour's citation of cases where a winding up application had not been dismissed, notwithstanding premature notice of it.[14] However, some of the authorities[15] show a strong disposition in favour of dismissal of a winding up application where there has been a breach of the implied restraint.

[75] In *Dikwa*, Wilcox J had regard to the purpose of the publication rule, and the consequences of early publication. His Honour was prepared to excuse early publication of a winding up application, in breach of the rule, in a case where the early publication caused no prejudice to the company.[16]

[76] In view of the submission that the "present proceedings fall fair square within" *Australian Beverage Distributors*, some further features of that case should be noted. The publication was a press release, made subsequent to an interview by a journalist of a Mr Brooks, the in-house legal counsel for Australian Beverage Distributors. The press release was sent to the journalist, and to other journalists who had contacted Mr Brooks, and who were from the major newspapers. The opening paragraphs of the press release recited the issue of the winding up applications, and that that action was a response to the failure of one of the companies to pay costs in previous proceedings. The press release continued with contentions that the companies were insolvent, stating matters said to justify that conclusion. The concluding paragraph, which was of particular importance, expressed the opinion that the shares in the companies were worthless, as evidenced by the financial accounts; and encouraged creditors to support the winding up applications.

[77] In dealing with the question whether the press release justified the summary dismissal of the winding up applications, her Honour noted that there was "nothing untoward in the first and second paragraphs of the press release, (and) its sting was in the last paragraph".[17]

[78] There was no evidence that Bluechip suffered harm as a result of the provision of the application and Mr Burt's affidavit to NAB by 10 March 2011. This is not a case of extensive publication of the application. Moreover, it is not possible to infer that it led the NAB or its manager to come to an adverse view of the financial position of Bluechip. As the submissions of Mr Hastie, who appeared for

---

13 (1989) 7 ACLC 904 at 905-906.

14 *DR Electrical and Engineering Pty Ltd, Re* (1989) 15 ACLR 700; 7 ACLC 1058; *Jazzamint Pty Ltd, Re* (1990) 8 ACLC 763; *Melcann Ltd v Marmlon Holdings Pty Ltd* (1991) 4 ACSR 736; 9 ACLC 678; *Re Dikwa Holdings Pty Ltd v Oakbury Pty Ltd* (1992) 36 FCR 274 (*Dikwa*).

15 See *Paterson* and *Re a company No 001127 of 1992* (1992) 10 ACLC 3,035.

16 *Dikwa* at 278.

17 See *Australian Beverage Distributors* at [121]; see also [58], [64]-[65].

Promoseven, point out, the ATO had issued a garnishee notice dated 11 January 2011 to the NAB, requiring the payment of money held on behalf of Bluechip in respect of its debt to the ATO, then identified as being $888,268.11. It is clear that between that date and 10 March 2011, Bluechip remained indebted to the ATO for a substantial amount. There was no evidence to suggest that the garnishee notice had been withdrawn in this period.

[79] Moreover, there has been no evidence to suggest that Bluechip could have, prior to the giving of the application and affidavit to the NAB, paid its debt to Promoseven. Nor has there been any suggestion that it intended to apply for an injunction to restrain the advertising of the winding up applications.

[80] Taking these circumstances into account, I am not prepared to exercise a discretion to dismiss the winding up applications by reason of the fact that notice of it was given, before the expiry of a period fixed by rule 5.6. I have reached this conclusion without reliance on a finding that Bluechip is insolvent, but such a finding would provide further support for it.

[81] Moreover, I note that Prime did not press for summary dismissal of the proceedings on this ground. As a result, there has been a hearing which has extended over eight days, with some additional shorter hearings. In principle, it would seem to me that this consideration would be relevant to the exercise of discretion. Since it was not referred to on behalf of Promoseven, I have not relied on it in reaching my conclusion.

Promoseven's debt

[82] There is no doubt that Promoseven has advanced substantial sums to Bluechip, which have not been repaid. For example, the balance sheet, being part of the financial statements for Bluechip as at 31 January 2011 (*January 2011 financial statements*) which accompanied the February ATO letter, records the debt to Promoseven as being $7,958,327.86. For present purposes, it is its characterisation, rather than the precise amount, which needs to be considered, to determine whether Promoseven needs leave for its application.

[83] The JVA included provisions relating to the funding of the project. Bluechip was not a party to the JVA. Absent some evidence establishing a novation with Bluechip, or which might have the consequence that Bluechip is bound by the provisions of the JVA by virtue of s 55 of the *Property Law Act* 1974 (Qld), it seems to me the JVA is at best of background relevance to the determination of the nature of Bluechip's debt to Promoseven.

[84] Mention has been made previously of Mr Burt's evidence relating to the signing of a mortgage and loan agreement in March 2007. I am prepared to accept this evidence. However, it is clear that in April 2009, further loan agreements were signed.

[85] With respect to the Promoseven 2009 loan agreement and the Prime 2009 loan agreement, Mr Burt noted the absence of his initials from each page of the body of the documents. Mr Burt gave evidence that at the time of the signing of the loan agreements in April 2009, he believed that, except for the loan amounts and the name of the lender, the agreements were identical. He also gave evidence that prior

to the signing of the agreements, Mr Knell had said that the parties (Prime and Promoseven) "should be on the same terms of repayment and security and so on". That evidence was not challenged. Indeed, Mr Knell gave evidence that in late November or early December 2008, he met with Mr Burt and discussed the loans made by Prime and Promoseven to Bluechip. In the course of the discussion, with reference to Prime and Promoseven, he said, "… we should be on the same terms of repayment and security and so on". In one of his affidavits, Mr Knell also said that the Prime 2009 loan agreement was "almost a mirror" of the Promoseven 2009 loan agreement.

[86] Mr Knell gave evidence that in mid to late April 2009, he and Mr Burt agreed that the moneys lent by Prime and Promoseven to Bluechip would not be repaid until unsecured creditors had been paid; and that they would, in respect of moneys owing to those two companies, "do the adjustments at the end of the Project". This was close to the time when the loan agreements were executed.

[87] A letter dated 16 April 2009 was sent to Mr Burt, which referred to loan agreements prepared in the last twenty four hours, for production at an oral examination to take place that day. It recorded that Promoseven had not had the time to examine them fully, and that they were subject to further negotiation. Mr Knell gave evidence that Mr Burt said he had read the agreements and was happy to sign them, which he did.

[88] On 29 April 2009, Mr Burt swore an affidavit in the PNP Realty proceedings stating that the balance of Promoseven's loan to Bluechip currently stood at $8,607,599.08, and that the loan was pursuant to a loan agreement (dated 22 January 2009), and was secured by the mortgage executed on 23 January 2009. He then swore, "Promoseven has no intention to call in any of the loan funds, unless (Bluechip) was placed in liquidation", making reference to Promoseven's "overall responsibility to the Project".

[89] Subsequently, in the same proceedings, Mr Burt swore an affidavit on 19 June 2009, in which he said, "I have previously indicated that Promoseven is not intending to draw funds from the company so as to defeat the claims of unsecured creditors."

[90] In a further affidavit of 27 August 2009, Mr Burt swore, "Promoseven has no intention to call in any of the loan funds, unless … [Bluechip] was placed in liquidation … While Promoseven is entitled to repayment of the funds, it has an overall responsibility to the Project."

[91] On 9 September 2009, Mr Burt swore another affidavit in the PNP Realty proceedings. The affidavit identified an exhibited balance sheet as providing a true and fair view of the financial position of Bluechip. The loan from Promoseven was recorded in the balance sheet as a long term liability, as was a loan described as "S Knell Loan Account", but in fact being a debt owed to Prime. A note to the balance sheet stated that the directors of Bluechip represented that its shareholders "will not call on these funds in the 'normal course of events' in preference to meeting unsecured company obligations to sub contractors/ATO", the note including a reference to affidavits of Mr Burt and Mr Knell filed in the PNP proceedings.

[92] Mr Burt was cross-examined in the PNP Realty proceedings. In response to a question as to the accruing of interest on the money owed by Bluechip to Promoseven, he is recorded as saying "… we're certainly not going to be calling

that money in until such time as the funds are available in the company to be able to pay out the – Mr Nell (*sic*) and ourselves, so. To some extent, although it may sound flippant, but it doesn't really matter what the amount is at the moment because it's not come due, so."

[93] Mr Burt's recollection was that he read one of the loan agreements, and had a quick glance at the other, before signing both in April 2009; and that he did not appreciate until 4 May 2011 that, under the Promoseven 2009 loan agreement (on the assumption that that is the document which he signed), the loan was not repayable by Bluechip to Promoseven until the 10th anniversary of the loan agreement.

[94] Beyond Mr Burt's reservations, there are some curious features of the Promoseven 2009 loan agreement. Although Promoseven had by early 2009 advanced most of the funds, the general tenor of the document is prospective. Moreover, it provides for interest, though it appears to be common ground that interest was not payable on some moneys advanced by Promoseven to Bluechip. Nevertheless, it was the intention of the parties in 2009 to enter into a document regulating their obligations in relation to moneys advanced by Promoseven to Bluechip. The stated purpose of the document was to "capture and formalise all loan funds by Members to the Borrower."

[95] Mr Burt's evidence in the PNP Realty proceedings is consistent with earlier discussions about the proposed loan agreements. It is not consistent with the term relating to repayment in the Promoseven 2009 loan agreement.

[96] Notwithstanding Mr Burt's reservations and the other matters just mentioned, in the absence of the identification of any other loan agreement then entered into, I accept that the 2009 Promoseven loan agreement was signed by the parties to it in April 2009.

[97] In my view, it is highly unlikely that Mr Burt, in the PNP Realty proceedings, would have given evidence in the form recorded earlier, had he then appreciated that the loan agreement between Bluechip and Promoseven made Bluechip's debt repayable in 10 years' time. Moreover, there was no sensible reason for deferring Bluechip's obligation to repay Promoseven for 10 years. There was nothing in the way Mr Burt gave evidence to lead me to doubt his evidence to the effect that, when he signed the loan agreements, he did not appreciate that Bluechip was not to repay Promoseven for 10 years. I accordingly accept his evidence on this point.

[98] Subject to the default provisions, the effect of the 2009 Promoseven loan agreement is that moneys advanced by Promoseven to Bluechip are not repayable until 2019. It is conceivable that, in appropriate proceedings, the loan agreement might be varied, with the consequence that Bluechip's debt to Promoseven becomes immediately repayable. However, there are no such proceedings on foot. The position is not materially affected by this consideration, because the consequence would simply be that Promoseven might be regarded as a contingent creditor.

[99] The submissions made on behalf of Promoseven, however, relied upon the default provisions of the 2009 Promoseven loan agreement. These submissions referred to Bluechip's insolvency in this context. They also referred to the conduct identified earlier in these reasons relating to the signing of the 2009 Promoseven loan agreement. However, the effect of cl 12.2 of the 2009 Promoseven loan agreement

is that, if an event of default occurs, then Promoseven may declare that the debt is payable on demand, or immediately due. Promoseven did not submit that it had made either declaration.

[100] I am not satisfied that Bluechip's debt is immediately payable. It seems to me that Promoseven is a prospective creditor, though it might also be said to be a contingent creditor. In either case, it requires leave to bring the winding up application. It will therefore be necessary to consider whether leave should be granted.

Leave *nunc pro tunc*?

[101] Prime submitted leave should not be granted *nunc pro tunc* to bring the winding up application. It submitted that it would not be proper to grant such leave. It also submitted that the application for leave should not have been dealt with concurrently with the winding up application. It submitted that it objected to this course, but Promoseven chose to proceed notwithstanding that objection. For the relevance of these matters, it relied on the judgment in *Re Testro Brothers Consolidated Ltd* (*Testro Brothers*).[18] It submitted that rule 5.3 of Schedule 1A of the *UCPR* (*rule 5.3*) (which permits the making of an application for leave to make a winding up application at the same time that the application for winding up is made) cannot override the requirement for leave found in the *Corporations Act*, which is a Commonwealth Statute. It also submitted that the course of these proceedings has been prejudicial to Prime, depriving it of the opportunity to present an affirmative case that Bluechip is solvent. It also submitted that an effect of the grant of leave would be that a relation back period dating from 7 March 2011 would catch payments made to the ATO in the preceding six months, making them voidable preferences.

[102] For Promoseven, it was submitted that the requirement for leave is procedural, and does not affect the validity of the winding up application. It relied on the decision in *Emanuele v Australian Securities Commission* (*Emanuele*).[19] It submitted that rule 5.3 authorised the course which it took. This rule was introduced subsequent to the decision in *Emanuele*.

[103] *Emanuele* established that a failure to obtain leave before the making up of a winding up application, and indeed before the making of a winding up order, is a procedural defect which may be subsequently cured.

[104] Obviously, there is a discretion to grant leave *nunc pro tunc*.

[105] In *Testro Brothers*, Sholl J relied upon the lateness of the objection as a reason why leave should be granted *nunc pro tunc*[20] (though it does not follow that an early objection will inevitably be successful).

[106] Prime's submissions did not identify when it first opposed the course taken of determining the application for leave, at the same time as the winding up application. Its submissions of 12 May and 26 May 2011 did not oppose this course. On 24 May, it became apparent that Prime's Counsel had expected the hearing on that date to deal only with the interlocutory issues, but Counsel for

---

18 [1965] VR 18, particularly at 35.

19 (1997) 188 CLR 114.

20 [1965] VR 18 at 35.

Promoseven understood that the hearing would deal with both the interlocutory applications and the application for final relief. Directions were then made to have the interlocutory applications and the winding up application heard at the same time. No objection was made at that time to this course; nor was it submitted that this was not a case where leave should be granted *nunc pro tunc*; rather, it seemed to be accepted at that point that, if the grounds for a grant of leave were made out, that leave could be granted *nunc pro tunc*.

[107] I do not accept that the fact that Prime has not called expert witnesses to support its contention that Bluechip is solvent is a consequence of the decisions made about the conduct of the hearing. I have previously referred to the fact that even by 15 June 2011, it had not instructed an expert to prepare a report dealing with the question of Bluechip's solvency.

[108] In my view, rule 5.3 does not seek to alter the requirement for leave found in s 459P of the *Corporations Act*. It expressly recognises the existence of that requirement; but reflects the effect of the decision in *Emanuele*. It simply deals with matters of procedure, authorising the filing of an application for leave at the same time as the filing of an application for winding up; and the hearing of both applications at the same time.

[109] The submissions made on behalf of Prime did not point to any evidence of payments made to the ATO in the six month period prior to the filing of the winding up application on 7 March 2011. Initially, the ATO supported the winding up application. At no time has it sought to submit that leave should not be granted *nunc pro tunc*.

[110] Save in respect to calling an expert witness, Prime has not sought to demonstrate how it has been prejudiced because the question of leave was not determined earlier, or before the application was made. Given the time that Prime has had to prepare its case, it is not clear that more time would have resulted in any real benefit to it. In any event, the purpose of the leave requirement is not to give an opponent more time to prepare its substantive case.

[111] In the circumstances, if I am otherwise satisfied that Promoseven has established that it should be granted leave to apply to wind up Bluechip, I would not be prepared to refuse that leave, on the basis that the order would have to be made *nunc pro tunc*. I turn then to a consideration of matters which Prime relies on, in opposition to a grant of leave to make the application.

Would winding up advance Promoseven's interests ahead of other creditors?

[112] Prime submitted that the effect of winding up Bluechip would be to advance the interests of Promoseven ahead of the unsecured creditors, because the winding up would be an event of default under the 2009 Promoseven loan agreement. Prime's submissions do not explain, by reference to the loan agreement, how this might be so. An event of default under clause 12.1 of the loan agreement is that Bluechip becomes insolvent. That term is defined in the loan agreement in a way which makes it applicable to an entity which is insolvent, by the test found in the *Corporations Act*. The loan agreement also defines the term by reference to a "person" who is in liquidation or wound up. If Bluechip is insolvent, then the making of a winding up order does not give to Promoseven a right under the loan

agreement, which was not available to it before the order. In any event, the occurrence of an event of default does not itself have any effect on Bluechip's obligations under the loan agreement. As discussed earlier, it is only if Promoseven were to act under clause 12.2 that that would occur.

[113] Nor has it been demonstrated that even if such action were taken, the position of the unsecured creditors is worsened. As will become apparent, the only likely source of funds for the payment of most of the unsecured debts is the sale of the remaining units. They are subject to the mortgage in favour of Promoseven and Prime. It has not been explained how, in a winding up where the debt to Promoseven is payable some years in the future, the unsecured creditors would be likely to receive substantial repayment of their debts, unless Promoseven surrendered its rights under the mortgage.

[114] In the course of submitting that Promoseven should be refused leave to apply for the winding up of Bluechip, Prime's Counsel recognised that Mr Burt had given evidence on two occasions that he and Mr Miknas intended that the unsecured creditors be paid ahead of Promoseven, notwithstanding that it has the benefit of a mortgage over the unsold units. He did not submit that Mr Burt's evidence should be rejected. In any event, I would be prepared to accept it. It is therefore difficult to see how the consideration relied upon by Prime is of any practical significance.

[115] In the circumstances, it seems to me that this consideration does not provide a ground of any weight for refusing leave.

Alternative remedies available to Promoseven

[116] In this context, Prime relied upon the fact that Promoseven has the benefit of the mortgage over the units. It also relied upon the dispute resolution provisions of the JVA. Reliance was also placed on the winding up provisions of the JVA, it being submitted that Promoseven's debt is in truth no more than a part of an accounting on determination of what amounts to an incorporated partnership. The submissions made on behalf of Prime also referred to Promoseven's right to give a direction under s 293 of the *Corporations Act*, resulting in the production of an audited financial report. No authorities were cited on behalf of Prime as to the relevance of these matters to the grant of leave.

[117] For Promoseven it was submitted that it is not in the public interest for an insolvent company to continue to trade; or for a contributory to be locked into an insolvent company; and that the dispute resolution provisions of the JVA make no provision for a winding up of Bluechip. The first two of those considerations were regarded as relevant in *Melbase Corporation Pty Ltd v Segenhoe Ltd* (*Melbase*).[21] Further, it was submitted that the appointment of an expert would be futile, given that Bluechip is insolvent.

[118] In *Bingham v Iona Corporation Pty Ltd* (*Bingham*),[22] Lindgren J, when considering an application for leave to apply to wind up a company in insolvency, referred to the Australian Law Reform Commission's *Discussion Paper 32*,[23] which stated that the reason for the requirement for leave, in the case for an application for winding up in

---

21 (1995) 17 ACSR 187 at 201.

22 (1995) 16 ACSR 436.

23 *General Insolvency Inquiry*, (August 1987).

insolvency made by a member or director, was to prevent mischievous and possibly harmful applications.[24] His Honour also noted that insolvent trading by a company is a serious matter, particularly for its directors.[25] Since, in the present case, the question of leave is being considered at the same time as the final determination of the application to wind up the company, it seems to me that the significant consequences of the making of an application are not as important as in a case where the question of leave is being dealt with prior to the commencement of the application to wind up the company.

[119] In *Bingham*, His Honour also observed:[26]

> "While the case does have the flavour of a falling out between 'partners', in my opinion this does not, without more, exclude the possibility that leave should be granted to a director to apply to have the company wound up in insolvency. A person must be concerned if a company of which he or she is a director is prima facie insolvent and is continuing to trade: see ss 588G-588U of the (*Corporations Law*). Indeed, a difference of views as to whether a company is solvent and should continue to trade is apt to be a source of partnership-type disputation in a closely held proprietary company."

[120] While the present application is made by a contributory, his Honour's observations seem to me, with respect, to be of some relevance. Assuming insolvency, the mere fact that the relationship between the contributories is, or has some of the characteristics of, a partnership, does not seem to me to be a significant consideration adverse to the grant of leave. The concern about a contributory remaining locked into an insolvent company, referred to in *Melbase*,[27] seems to me to be relevant in such a case.

[121] In *Fortuna Holdings Pty Ltd v Deputy Commissioner of Taxation* (*Fortuna Holdings*),[28] McGarvie J identified what he referred to as two branches of the principle that a court could, in the exercise of its discretion, grant an interlocutory injunction restraining the presentation of the winding up application. The first branch applied where the application had no chance of success. The second branch related to the availability of a more appropriate alternative remedy. Thus, his Honour said:[29]

> "The second branch applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success."

[122] His Honour later said:[30]

> "The second branch applies to cases where there is a more suitable alternative means of resolving the dispute involved in a disputed

---

24 *Bingham* at 437.
25 Ibid at 439.
26 Ibid at 440.
27 See also *Leveraged Capital Pty Ltd v Modena Imports Pty Ltd* [2009] NSWSC 509 at [25].
28 [1978] VR 83.
29 Ibid at 92.
30 Ibid at 93-94.

> claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the Court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time."

[123] His Honour's approach was applied in *Mincom Pty Ltd v Murphy*,[31] a case where a shareholder, dissatisfied with a proposed restructure of the company, and no longer wishing to remain a shareholder, threatened to commence winding up proceedings, unless his shares were purchased at a high price. An order was then made restraining the shareholder from doing so, it being contemplated that the shareholder should first exhaust the procedures providing for the sale of shares set out in the articles of association of the company; and further, that the shareholder should exhaust the remedy found in s 320 of the *Companies (Queensland) Code* (other than winding up).

[124] In *Australian Beverage Distributors*, the two branches identified in *Fortuna Holdings* were again adopted. However, the availability of other remedies was not considered sufficient to warrant a finding that the bringing of winding up applications by creditors was an abuse of process. Beazley JA said:[32]

> "[71] It seems to me therefore that the relevant matters for his Honour's consideration were these: Australian Beverage Distributors had standing to bring the proceedings based on the costs order; there were District Court proceedings on foot in respect of a different debt; and there was Mr James' belief that the Evans & Tate companies were hopelessly insolvent. A question might properly be asked whether a person with an entitlement to bring an application to wind up should be required to desist from doing so, or be at risk of a finding of abuse of process, where there are other disputed claims between the parties. Thus if it be assumed for the purposes of the argument that the Evans & Tate companies are insolvent, then, if that approach is taken, Australian Beverage Distributors would be required to prosecute the District Court proceedings, and incur costs in doing so, that may never be recovered by reason of the insolvency. Is it therefore an abuse of process for it to rely upon its admitted status as creditor, otherwise prove insolvency and lodge a proof of debt in respect of the disputed claim?
>
> [72] The answer to that question would depend, at the least, upon the extent of insolvency. If proof of insolvency depended upon the disputed claim, then I am of the opinion that a court could exercise

---

31 [1983] 1 Qd R 297.

32 At [71]-[72].

> its discretion to stay or dismiss the winding-up application so as to allow the dispute in the other proceedings to be determined. If, however, the company was insolvent without taking the disputed debt into account, then the court would almost certainly be required to allow the winding-up application to proceed."

[125] It will be apparent that her Honour considered that it was not inevitable that a winding up application was an abuse of process where there was a dispute between the applicant and the company, even about a debt, and there was some other mechanism for resolving it.

[126] The availability of an alternative remedy, as can be seen from the authorities, has been raised, not in the context of opposition to an application for leave to bring a winding up application, but in an attack on a winding up application. Nevertheless, it seems to me the authorities provide some assistance in identifying considerations relevant to a grant of leave. If I am not satisfied that Bluechip is insolvent, then there is no point in granting leave. If, on the other-hand, I am satisfied that Bluechip is insolvent, then it seems to me that one matter of particular relevance for the grant of leave will have been established. Further, the fact that Promoseven would remain a shareholder locked into an insolvent company seems to me to be a relevant consideration. The significance of the availability of an alternative remedy should, at least in the present case, be determined with these considerations in mind.

[127] The obtaining of an audited report under s 293 of the *Corporations Act* would not, it seems to me, do much to relieve Promoseven of its difficulty.

[128] The dispute resolution provisions of the JVA come into effect when the Steering Committee is unable to reach a valid resolution of a matter in dispute which has been referred to it, after having considered and voted upon it at least twice at separate and duly convened Steering Committee meetings. A notice may then be given, resulting in a referral to the Dispute Resolution Committee. That may in turn lead to referral to an expert for determination. Each Dispute Resolution Committee would consist of a representative of Promoseven and a representative of Prime.

[129] The process was described, in my view fairly, as "long winded", in the submissions on behalf of Promoseven. In view of the level of dispute, there is no reason for confidence that this process would result in agreement between the parties. As the submissions for Promoseven point out, in any event, the procedure makes no provision for the winding up of Bluechip, and the appropriate forum for determining whether Bluechip should be wound up in insolvency is the Court.

[130] Prime's submissions do not seek to demonstrate how the dissolution provisions of the JVA might apply in the present case. The application of these provisions may well be contentious. Moreover, they require the taking of accounts, the realisation of assets, the discharge of liabilities, and the distribution of any surplus. That could be a lengthy process. While it was being carried out, on the assumption that Bluechip is insolvent, it would continue in existence.

[131] No authority has been identified to support the proposition that the fact that a contributory or a contingent creditor is secured provides a basis for refusing it leave to apply for the winding up of a company on the ground of insolvency. The fact that the existence of a security does not make it necessary under s 459P to apply for

leave is, in my view, a strong indicator that the existence of the security is irrelevant to the grant of leave. Nor did Prime's submissions indicate why the existence of the security is a reason to refuse leave.

[132] In my view, therefore, these considerations would not warrant a refusal of leave, if Bluechip is insolvent.

Mr Burt's conduct

[133] Prime submitted that there are a number of reasons relating to Mr Burt's conduct, by reference to which leave should be refused. One was that in the ACT winding up proceedings, Mr Burt had sworn that Promoseven would not enforce its debt to the detriment of unsecured creditors; but that he no longer maintained that position.

[134] In my view, the factual basis for that submission is not correct. As I understood Mr Burt's evidence, Promoseven does not intend to require payment of its loan, until the unsecured creditors have been paid. Indeed, Prime's submissions elsewhere recognised this.[33] Mr Burt's evidence, which I accept, is that Promoseven intends to see that those creditors are paid (no doubt out of the assets of Bluechip).

[135] Prime's submissions criticise Mr Burt for failing to inform the Court of the Promoseven 2009 loan agreement, and the fact that pursuant to it, repayment of the loan is not due until 2019. It is clear that Mr Burt considers he was misled about the Promoseven 2009 loan agreement, that he has reservations about whether it is the document he executed, and that he does not accept that Promoseven is (or, perhaps, after litigation will be) bound by the repayment date identified in it. These considerations may well explain why the agreement was not referred to in his first affidavit. In any event they seem to me to be relevant in considering what weight, if any, is to be attributed to the fact that he did not do so.

[136] Although Prime's submissions relied upon the fact that Mr Burt did not, in his initial affidavit, state that the debt to Promoseven is secured, the submissions do not seek to identify the significance of this omission on the application for leave.

[137] Although Mr Burt could have been more forthcoming about some of these matters, his conduct is not such as to have the effect that the winding up application is an abuse of process. Nor, in my view, does it weigh significantly against a grant of leave.

Conclusions on leave under s 459P of the *Corporations Act*

[138] Prime has identified a number of matters, some of which might be regarded as weighing against the grant of leave to Promoseven to bring a winding up application under s 459P. Some of these matters have some relationship to the purpose for which the leave requirement was introduced into winding up legislation in Australian, others less so. Taken together, it seems to me that they would not warrant a refusal of leave, if Bluechip is in fact insolvent; in which case I would be prepared to grant leave under s 459P. Before considering whether Bluechip is insolvent, it is necessary to refer specifically to a number of its debts; and to make reference to some potential sources of funds.

---

[33] See paragraph 24 of its submissions received 28 June 2011, and the transcript references there identified.

Bluechip's debt to the ATO

[139] Mr Costa gave evidence that as at 31 May 2011, Bluechip was indebted to the ATO in an amount of $867,244.66 (including interest), the tax component of which was $715,385. Reference has been made earlier to the fact that an audit was carried out in relation to Bluechip's tax liability. In cross-examination, Mr Costa accepted that the result of an audit may be that the amount payable might go up or down. No evidence, however, has been given of the outcome of the audit. Had the audit been concluded prior to judgment, it might have been expected that an application would have been made by Prime to re-open its case, at least if the extent of the liability were reduced. Although Prime made an application to re-open, it was not on the basis that the audit had been concluded with a reduction in Bluechip's liability to the ATO.

[140] In addition, the effect of Mr Knell's evidence, previously referred to, was that at the final audit review, he expressed the view that the debt to the ATO would be between $500,000 and $600,000; and that the review concluded somewhat amicably. In my view, this does not demonstrate any alteration of the amount of indebtedness identified by Mr Costa.

[141] There is strong corroboration for the existence of the debt, and some corroboration of its amount. In his letter of 16 February 2011 to the ATO, Mr Knell wrote that Bluechip's GST liabilities "may be as high as $900,000"; but suggested that the effect of input credits might reduce the liability to "around $400,000".

[142] Mr Knell swore an affidavit dated 21 April 2011, to which he exhibited a balance sheet of the same date. It recorded a liability for tax in the sum of $443,037.09. However, in cross-examination, Mr Knell accepted that as at 23 June 2011, the amount owing to the ATO was the amount deposed to by Mr Costa, "with probably some interest added".

[143] I am therefore satisfied that, as at 23 June 2011, Bluechip was indebted to the ATO in the sum of $867,224.66, with, probably, a relatively small amount of interest.

Bluechip's debt to Ericson

[144] It was submitted for Prime that the position in respect of this debt "is utterly unclear"; and whether it is presently due is "utterly uncertain".

[145] On the evidence presented at the hearing, it is clear that the effect of the deed of settlement was that, as from 28 February 2011, the sum of $125,000 became payable to Ms Tracy Ericson. There has been no evidence to suggest a variation of the deed, or that some arrangement has been made about deferred payment. Nor was it suggested that the obligation was unenforceable. The debt was recognised in the Board resolution of 22 September 2010. Further, the liability is expressly recognised in the Aging Summary which was attached to the April 2011 balance sheet, and which provided details of the current liabilities identified in the balance sheet (the creditor being referred to as "Flea's Concreting)".

[146] It seems to me that this is not a case where there are established arrangements which would be recognised as forming part of the commercial or trading reality, by reference to which the question of company's insolvency is to be determined.[34]

[147] In my view, the sum of $125,000 is an amount current due and payable, to be taken into account in determining Bluechip's solvency.

Debt to Promoseven

[148] Mr Ham, as stated earlier, prepared a document reconciling the records of Bluechip and Promoseven in relation to advances by Promoseven to Bluechip. In doing so, he categorised moneys provided by Promoseven as either non-interest bearing funding; or mezzanine funding, which was interest bearing. Non-interest bearing funding included the initial advance provided under the JVA, and some small miscellaneous items. The total amount described as non-interest bearing funding was $1,270,679.84.

[149] In respect of amounts which Mr Ham categorised as mezzanine funding, Mr Ham calculated interest at 15 per cent. Payments made by Bluechip to Promoseven were treated as reducing the amount advanced by way of mezzanine funding, and interest. The total amount of mezzanine funding was $6,831,610; the payments from Bluechip to Promoseven totalled $633,600; and the calculated interest was $2,920,006.77. On Mr Ham's calculations, therefore, Bluechip is indebted to Promoseven in an amount of $10,388,696.61.

[150] There is scope for debate about Mr Ham's calculation of interest. The JVA makes provision for the payment of interest only when one of the shareholders of Bluechip makes an advance in circumstances identified in clause 7.5 of the JVA, and the other shareholder does not do so. On the other hand, Mr Knell's letter of 16 February 2007 envisaged the payment of interest on all mezzanine funds; and the subsequent loan agreement made provision for interest (at 15 per cent, payable monthly). The 2009 Promoseven loan agreement (which may be thought to have been intended to apply to all funds advanced) provides for interest, at different rates for different periods of time.

[151] Mr Ham's calculations include transactions recorded in Promoseven's records, but not in Bluechip's. The net total of those transactions is $198,689.84.

[152] In view of my earlier conclusions about the nature of Bluechip's debt to Promoseven, I do not propose to make a precise determination of the amount owed by Bluechip to Promoseven. However, some observations can be made.

[153] It is clear that the initial loan of $1,260,000 was made, and remains unpaid. Of the total sum of $6,831,610 which Mr Ham describes as mezzanine funding, $6,630,000 is recognised in the books of Bluechip. It may be accepted, therefore that mezzanine funding in at least that amount has been provided by Promoseven. The funds returned by Bluechip to Promoseven, recorded in Bluechip's records, total $620,000. Bluechip's records also recognise an interest liability in the sum of $597,231.33. These figures indicate that Bluechip's liability to Promoseven is in

---

[34] Compare *Re Newark Pty Ltd (in liq)* [1993] 1 Qd R 409 at 413-415; *Melbase Corporation Pty Ltd v Segenhoe Ltd* (1995) 17 ACSR 187; *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213.

excess of $7,800,000. Mr Ham states that the records of Bluechip show that it is indebted to Promoseven in an amount of $7,958,327.86. That is the amount of the liability shown in the January 2011 balance sheet. In the April 2011 balance sheet, the debt to Promoseven is said to amount to $9,305,615.40. The evidence, in my view, supports a finding that Bluechip is indebted to Promoseven in a sum exceeding $7,800,000.

Bluechip's liabilities to Prime-related entities

[154] The January 2011 balance sheet records these as amounting to $2,811,014.03. The April balance sheet records these as amounting to $3,710,701.23. In each balance sheet, these amounts are classified as long term liabilities. However, the April 2011 balance sheet also includes, as current liabilities, entries for what are described as "Prime Group Loan Accounts", totalling $565,721.21. Moreover, in addition to the increase in the total long term liabilities to Prime-related entities there are some rather large differences between amounts owed to individual entities, shown in the two balance sheets. The differences were not explained in evidence.

[155] Mr Knell gave evidence, the effect of which was that moneys owing to him and his related companies would not be demanded while unsecured creditors were unpaid. The submissions made on behalf of Promoseven, however, pointed out that the fact that Mr Knell had given similar evidence in the ACT proceedings had not prevented him from claiming a set off to pay for the management rights for Cairns Central. Moreover, the inclusion for the first time of debts totalling more than $560,000 in the current liabilities in the April 2011 balance sheet does not sit particularly comfortably with Mr Knell's evidence. He did not explain how his evidence might be reconciled with his affidavit in the Refund proceedings, indicating that these debts have been assigned to Refund, to enable his wife to commence a business.

[156] While the material indicates that Bluechip has a substantial debt arising, at least initially, out of advances from Prime, I have not found it possible to determine its amount; or the entity or entities entitled to claim it. I do not consider it necessary to make such determinations.

Bluechip's other debts

[157] The following debts appear in the April 2011 Aging Summary. There is no reason to think that they were not payable at that date.

Body Corporate Services Pty Ltd	$70,472.14
Cairns Regional Council	9,829.44
Office of State Revenue	4,670.99
QLEAVE	44,667.00

[158] It should be observed that Bluechip continues to incur debts for rates, land tax, electricity and body corporate levies. However, a summary dated 23 June 2011 (Exhibit 17) indicates that the debt to the Council was paid. The remaining debts are again referred to later in these reasons.

[159] On 20 June 2011, affidavits were filed by leave by persons claiming to be creditors of Bluechip. Mr Anthony Torto swore that he provided services to Bluechip. At the time when he was engaged, which would appear to have been after February

2010, Mr Knell told him that Bluechip "was experiencing cash flow issues" and asked if he would be prepared to accept deferred payment of his remuneration. He agreed to that on the basis of an increase of his hourly rate. He swore that he is currently owed $17,952 by Bluechip; and he has not made a demand for payment, because he was prepared to wait until the sale of units in Cairns Central.

[160] Mr John Gates swore that, prior to August 2009, Mr Burt had promised that either Promoseven or Bluechip would pay him a bonus of $10,000 for work he had done in respect of the joint venture. On that basis, he swore that he was a creditor of the company, the bonus not having been paid.

[161] Mr Bradley Matthews swore that he was the resident manager of the Cairns Central Plaza Apartment Hotel; but that he has also provided additional services to Bluechip. Some of this work related to remedying defects left by the contractors, once they left the site. He swore that Mr Knell told him at the time he did this work that "money was tight" but Mr Knell promised that when the hotel was up and running, and "he had his cash flow", bonuses would be paid. No amount is specified for these bonuses.

[162] The deponents were not cross-examined. On Mr Torto's evidence, it would appear that there is an additional debt of $17,952 which remains unpaid. There may be a debate about whether Bluechip owes money to Mr Gates, but if it does, the amount is $10,000.

[163] It is now necessary to discuss Bluechip's assets and financial resources.

Lot 505 – manager's unit

[164] Mention has been made previously of the fact that on two occasions CCP has entered into a contract to purchase lot 505, in each case for the sum of $371,109. The evidence did not explain why the first contract was not completed; nor why the second contract was entered into. Mr Knell gave evidence that $370,000 had been transferred to the trust account of Hemming and Hart Lawyers, to provide settlement funds for this unit, and he produced a record of the transfer. He also said that attempts were being made to settle the contract on the day he gave that evidence (23 June 2011). However, notwithstanding the continuation of the hearing on 24 June, no attempt was made to prove then that the contract had settled, or that settlement was imminent. Although an application was made by Prime on 10 August 2011 to re-open its case, that application did not relate to completion of the sale of Lot 505.

Lots 1 and 8

[165] Mr Knell gave evidence that Bluechip entered into a contract dated 21 April 2011 with PAA for the sale of lots 1 and 8 for the sum of $1,055,000.[35] A copy of the contract was exhibited to his affidavit. Settlement date was stated to be 90 days after contract.

[166] PAA was incorporated on 15 April 2011. Its sole director, secretary and shareholder is a Mr David Foxwell. Mr Foxwell's address given in the ASIC

---

35 The sum of $1,065,000 is stated in Mr Knell's affidavit sworn 21 April 2011; however, the sale price on the contract is $1,055,000.

returns for PAA is next door to one of Mr Knell's addresses. Mr Knell said that Mr Foxwell manages "a loose group of investors and friends … on my behalf". Mr Foxwell raises money for some of Mr Knell's projects by putting together a syndicate of investors, apparently from that "loose group". In relation to one of Mr Knell's projects, in Gladstone, Mr Foxwell was a creditor of a company which was subject to a deed of company arrangement.

[167] When asked in the course of cross-examination whether the contract with Mr Foxwell was a contract at arms length, Mr Knell gave an answer which might be thought to be somewhat equivocal. Further, having denied that there were any side agreements or side arrangements with Mr Foxwell, Mr Knell appeared to accept that his wife was prepared to provide a guarantee in respect of an indicative offer of a loan to PAA; although an alternative view of his evidence is that Ms Knell was herself attempting to borrow money to lend to Mr Foxwell so that PAA could complete the contract. Mr Knell also admitted his involvement in attempting to find finance for PAA.

[168] The evidence did not extend to a firm commitment by a financier to provide funds to PAA for the purchase of Lots 1 and 8. There was no evidence about PAA's capacity to complete the contract. Notwithstanding that the settlement date has now long past, there has been no attempt to prove that settlement occurred, or if it has not, that PAA is ready and willing to complete the contract.

Loan funds

[169] On 16 May 2011, Mr Knell wrote to HSBC asking either for a release of the first mortgage, or for additional finance. HSBC replied on 20 May 2011. The reply stated that the mortgage would be released once HSBC was satisfied that claims associated with Mr Ericson had been satisfied in full, and that there were no other liabilities or contingent liabilities in respect of the project to which HSBC might be subject. The letter also stated that HSBC would not provide Bluechip with further financing.

[170] Exhibited to an affidavit of Mr Knell is a letter from PPI, signed by Mr Knell, to Bluechip, dated 29 April 2011, containing an offer of a loan of $150,000. The loan records an agreement to repay PPI from the sale proceeds of Lots 1, 8 and 505, after all unsecured creditors had been paid in full (save for any unsecured debt to any related entity of Mr Knell). No date for repayment is specified, though the loan is described as a "short term loan".

[171] On 23 June 2011, Mr Knell gave evidence that the money had not been advanced to Bluechip. In cross-examination, Mr Hambleton, the insolvency practitioner called on behalf of Prime, stated that he would consider the loan agreement as "disputed", and would not include the benefit of it in the current assets of the company. The final submissions on behalf of Prime do not rely on this document as relevant to Bluechip's solvency.

Bluechip's other receivable amounts

[172] The April 2011 balance sheet shows these to total $120,012.84.

[173] Of this amount, $69,869.73 is recorded as owing by F3 Design & Architecture. The amount is a claim for damages, it being alleged that F3 failed to include disabled facilities in the development, and the cost of subsequently providing them is the amount claimed. That cost was incurred no later than June 2009, and a letter of demand was sent shortly afterwards. There was no suggestion that any formal action has been taken to recover this amount. It seems unlikely to result in the receipt by Bluechip of any funds in the near future.

[174] The remaining items are amounts said to be payable by tenants of Cairns Central. One is outstanding for more than 60 days, and the others for more than 90 days. Mr Knell indicated that each of these tenants is experiencing financial difficulty from which they need some time to recover. There is no reason to think that any of these amounts will be paid in the near future.

Other assets of Bluechip

[175] The April 2011 balance sheet records the amounts credited to bank accounts and cash as totalling $22,000.86.

[176] The fixed assets are, primarily the unsold units in Cairns Central, and an entry entitled "Furniture Package". The management rights were also included in the total current assets.

[177] Valuations were placed before the Court recording the values of Lots 1 and 8 at 15 April 2011 as $840,000 and $220,000 respectively.

[178] When Mr Knell wrote to the ATO on 16 February 2011, he included a list of unsold assets, ascribing a market value to the units. Promoseven submitted that the total of these values was $10,703,781 (not including Lot 505); though this is not easily reconciled with the list, and may be less than the total. However, the letter indicated that the amounts ascribed to these units were in fact the prices sought for the units, a fact confirmed by Mr Knell in his oral evidence. The prices for Lots 1 and 8 totalled $1,228,966, substantially above their values at April 2011.

[179] The balance sheet for January 2011 attributes a total of $8,299,991.66 to fixed assets, being the unsold units including Lot 505. It makes no reference to the furniture package. Mr Knell said in oral evidence that the values attributed to the units in the April 2011 balance sheet was based on their cost.

[180] In addition, it is apparent from Mr Knell's letter to the ATO of 16 February 2011, and his evidence, that the sale of the units is difficult in the current market, though he expressed some optimism about the state of the latter in Cairns in mid 2011.

Principles for determining insolvency

[181] Under s 459A of the *Corporations Act*, the Court may order that an insolvent company be wound up in insolvency. Section 95A has the effect that a company is solvent if, and only if, it is able to pay all its debts, as and when they become due and payable; and otherwise it is insolvent.

[182] The test has been described as a "cash flow test". Insolvency is a question of fact, to be ascertained from a consideration of the company's financial position taken as a

whole.[36] In determining whether a company is able to pay its debts, regard is to be had not only to money actually held by the company, but also any moneys of which it "can obtain immediate command by sale or pledge" of its assets;[37] or moneys which it can "procure by realisation by sale or by mortgage or pledge of (its) assets within a relatively short time – relative to the nature and amount of the debts, including the nature of the business, of the debtor".[38] A company is not to be found insolvent "simply from evidence of a temporary lack of liquidity".[39] Commercial realities are relevant in identifying the resources available to the company to meet its liabilities as they fall due, including whether resources other than cash are realisable by sale or borrowing on security, and when such realisations might be achieved.[40] The conclusion of insolvency ought to be clear from a consideration of the company's financial position in its entirety.[41] Whether a company is insolvent is a question for the court, and is not to be determined by an expert.[42] Because the cash flow test is to be used to determine insolvency, the question is not decided by a comparison of assets and liabilities. Indeed, "a company may be at the same time insolvent and wealthy."[43]

[183] A number of matters have been identified as being indicators of insolvency. It seems to me that it is doubtful that the establishment of one or more of these indicators would be sufficient to reach a conclusion that a company is insolvent; but that their presence at least provides support for that conclusion, when it is otherwise open on the evidence. The following are of some relevance in the present case:[44] continuing losses; overdue Commonwealth and State taxes; poor relationship with present Bank, including inability to borrow further funds; and no access to alternative finance.

Is Bluechip insolvent?

[184] In my view, Bluechip's debts which are due and payable include the following:

ATO (as at 31 May 2011)	$867,224.66
Office of State Revenue (as at 23 June 2011, overdue more than 90 days)	4,670.99
Body Corporate Services Pty Ltd (as at 23 June 2011, amounts overdue for varying periods, some more than 90 days)	87,919.90
QLEAVE (as at 23 June 2011, overdue more than 90 days)	44,667.00
Ericson	125,000.00
Total	$1,129,482.55

36 *Lewis v Doran* (2004) 208 ALR 385 at [106]; *Southern Cross Interiors Pty Ltd (in liq) v DCT* (2001) 53 NSWLR 213 at 224.

37 *Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1528, cited in *Australian Securities and Investments Commission v Plymin & Ors* (2003) 46 ACSR 126.

38 *Sandell v Porter* (1966) 115 CLR 666 at 670-671.

39 Ibid.

40 *Southern Cross Interiors Pty Ltd (in liq) v DCT* (2001) 53 NSWLR 213 at 224.

41 *Sandell v Porter* (1966) 115 CLR 666 at 670.

42 Ibid.

43 *Re Tweed Garages Ltd* [1962] Ch 406 at 410.

44 Taken from the list in *Australian Securities and Investments Commission v Plymin & Ors* (2003) 46 ACSR 126 at [386].

[185] The total of these debts, and the period of time for which some moneys have been outstanding, are both matters which speak rather strongly of insolvency.

[186] In addition, the affidavits of Mr Torto and Mr Gates indicate that Bluechip may have further debts totalling $27,952; and an unspecified sum may perhaps be payable to Mr Matthews. These affidavits provide support for the view that for some time Bluechip has been experiencing financial difficulty, though I do not take the debts which the deponents claim into account in determining whether Bluechip is unable to pay its debts as they fall due. The fact that the deponents consider it not to be in their interests that Bluechip be wound up suggests that, to the extent they are owed money, they are prepared to give it time to pay these debts.

[187] In contrast, Bluechip's cash resources are meagre.

[188] In determining whether Bluechip is insolvent, I would not give any weight to the prospect that it would obtain cash from the sale of units in the relatively near future. In particular, I give no weight to the contracts for the sale of Lots 1, 8 and 505. No attempt has been made to establish that these contracts were completed on their due dates; nor that it is likely that they will be completed in the near future. I have already referred in some detail to the circumstances of these contracts, which raise real doubts about whether they are genuine transactions. Moreover, I consider that the evidence of Mr Knell should generally be treated with some care.

[189] I would add that Mr Knell's dealings with the management rights for Cairns Central raise a real question whether the settlement of Lot 505 would result in a transfer of cash to Bluechip. However, I have reached my conclusion about the relevance of this contract, without reliance on that fact.

[190] Beyond that, it is clear that the units in Cairns Central are not property which is easily sold. The purchase prices are not insignificant. Market circumstances do not make sales of these units particularly easy. The fact that current tenants require financial accommodation, and the fact that in the past, Mr Knell or one of his companies has had to provide a rental guarantee for one of the commercial units, only emphasise the difficulty in selling these units.

[191] Nor do I give any weight to the proposed advance of $150,000, the subject of the letter from PPI to Bluechip dated 29 April 2011. I come to that view by reason of the time which has elapsed, without the funds being advanced; and note that it is consistent with the evidence of Mr Hambleton.

[192] There is no prospect that funds of any significance will be recovered from debtors in the near future.

[193] Accordingly, I am satisfied that Bluechip is insolvent. My conclusion is confirmed by the fact that some of the debts are for moneys due to the Commonwealth and the State; and by Bluechip's poor relationship with HSBC, which has refused further finance. There has been no suggestion that alternative finance is available (apart from the letter from PPI, referred to a little earlier).

[194] Financial statements for Bluechip have been placed in evidence. To the extent they indicate that Bluechip is in financial difficulty, it might be thought that they carry some significant weight, because they were produced by Mr Knell, and are likely to

have been prepared by people associated with the Prime Group. The profit and loss statements from 2008 onwards, record losses. However, the accounting approach adopted in them is not entirely clear, and accordingly I give them little weight, even as supportive of the conclusion of insolvency.

[195] There is, however, additional evidence which supports that conclusion. Mr Ham gave evidence that on 20 January 2011, at Bluechip's offices at Newstead in Brisbane, Mr Knell told him that Bluechip should be placed in voluntary administration, and asked Mr Ham to recommend a liquidator or administrator, which Mr Ham did. I accept this evidence.

[196] On 24 January 2011 Mr Miknas wrote by email to Mr Knell in relation to Bluechip's tax liability. In his reply, Mr Knell referred to the "many outstanding invoices of mine (not paid)". He also wrote, "What we are going to have to do is put the company into Voluntary Administration"; and later, "*Every day I curse the fact that I got involved in the Cairns market*". In my view, these statements point strongly to Bluechip's insolvency.

[197] In his letter of 16 February 2011 to the ATO, Mr Knell expressed the view that the likelihood of sales at that time was very limited. He then proposed, until further units were sold, to pay "around $4,500 a month" in respect of a debt which the letter acknowledges to be at least $400,000. Again, in my view, this evidence supports insolvency. Although the letter was written in February 2011, there is no reason from the evidence to think that Bluechip's position has materially improved since then.

[198] Mr Hambleton identified a number of reasons for concluding that he was not satisfied that Bluechip is insolvent. In part, he relied on the contract for the sale of Lots 1, 8 and 505. He considered that the cash at bank was sufficient to retire immediate creditors. He referred to the fact that the ATO was conducting an audit (which might affect the amount owing), and in this context relied on sales of units by Bluechip. He referred to the fact that no attempt had been made to recover the Ericson debt. He relied on the loan facility offered by PPI. He considered there was no evidence of a poor relationship with Bluechip's bank, nor a lack of access to alternative finance. These are matters which have been dealt with earlier in these reasons. My conclusions about them differ from those of Mr Hambleton. Accordingly, in the circumstances of this case, I do not find his opinion to be of assistance.

[199] Prime submitted that it is necessary to prove insolvency with precision, relying on *Sandell v Porter*.[45] In my view, that submission does not accurately state the law. What is required, by reference to s 95A of the *Corporations Act,* is a determination as to whether a corporation is able to pay debts as and when they become due and payable. That involves the consideration of a capacity, or more accurately, incapacity, in this case, financial. The determination of the precise extent of a company's financial incapacity is not required by the legislation. While *Sandell v Porter* provides support for the proposition that insolvency should be clearly established, that is a different question. In my view, insolvency is clearly established in the present case.

---

45 (1966) 115 CLR 666.

[200] I should add that I consider that this is not a case of a temporary lack of liquidity.

Exercise of discretions relating to wind up in insolvency

[201] By reference to *Re Presha Engineering (Aust) Pty Ltd*,[46] Prime submitted that there is a discretion to delay an order for the winding up of an insolvent company; and that discretion should be exercised in the present case, to permit the sale of units. It relied upon the fact that both Prime and Promoseven have indicated that they would not seek to recover the moneys owed to them (or in Prime's case, associated entities) until unsecured creditors are paid. In those circumstances, it was submitted that the Court should consider the position of the other creditors; the secured creditors having ample means to protect themselves, and the effect of the JVA being that these were to be paid before the relative positions of Prime and Promoseven were to be determined.

[202] For Promoseven, it was submitted, by reference to *ACP Syme Magazines Pty Ltd v TRI Automotive Components Pty Ltd*,[47] that where a company is insolvent, then as a matter of general application, and apart from any special circumstances to the contrary, it should be wound up. It was submitted that there were no relevant special circumstances.

[203] Mr Gates and Mr Matthews expressed the view that it is not in their interests for Bluechip to be wound up. Mr Torto expressed concern that he would not be paid, if Bluechip were wound up. However, the second mortgage over the remaining units has the consequence that these people are unlikely to be paid whatever money is owing to them, unless Promoseven and Prime are prepared to forego their rights under the mortgage, even if Bluechip is not wound up. Moreover, the size of their debts, when considered in the context of other moneys owed by Bluechip, would indicate that their views should not be accorded great weight.

[204] Although Bluechip is not, in the ordinary sense, carrying on business, nevertheless it does continue to incur debts. Subject to what I have said about Messrs Torto, Gates and Matthews, none of the creditors whose debts I have identified as being presently due and payable has expressed the view that Bluechip should not be wound up. It is difficult to see how any of these creditors would be advantaged by the exercise of the discretion for which Prime has contended.

[205] Moreover, the general policy considerations referred to earlier, namely that it is not in the public interest for an insolvent company to continue to trade, or for a contributory to be locked into an insolvent company, seem to me to be relevant in this context. Accordingly, I am not prepared to refuse to make an order for the winding up of Bluechip, by reference to discretionary considerations.

[206] My conclusion that Bluechip is insolvent has the consequence that leave may be granted to Promoseven to make its application. Since I am not prepared to refuse an order to wind up Bluechip in insolvency on discretionary grounds, the grant of such leave would not be futile. The matters advanced by Prime in opposition to a grant of leave under s 459P(2) are not such as to lead me to refuse to grant that leave, it having been established that Bluechip is insolvent. As indicated earlier, I am prepared to grant that leave *nunc pro tunc*.

---

46 (1983) 1 ACLC 675.

47 (1997) 74 FCR 372 at 381.

[207] It follows that I am prepared to order that Promoseven have leave to apply for the winding up of Bluechip in insolvency; and to order that Bluechip be wound up in insolvency.

[208] I turn to a consideration of matters relating to the just and equitable ground.

Submissions on the application to wind up Bluechip on the just and equitable ground

[209] The submissions made on behalf of Promoseven relied upon a number of factual matters in support of this application. Mr Hastie referred to the circumstances surrounding the signing of the loan agreements in 2009, and in particular to the provisions of the Promoseven 2009 loan agreement relating to the repayment date. In addition, Mr Hastie submitted that it is relevant that Mr Knell maintains that the arrangements reflected in the loan agreements were fair, and that the loan agreements were virtually a mirror of each other.

[210] Promoseven's submissions also referred to the dealings with the management rights. They referred to Mr Knell's role in the commencement of proceedings against Bluechip by Refund. Reliance was placed on evidence of Mr Ham, to the effect that a bulk sum had been appropriated from Bluechip in respect of rental guarantees; that proceeds from the sales of units had been retained by PPI; and that substantial moneys had been transferred from Bluechip to PPI Vic, without supporting invoices.

[211] It was submitted, on the basis of Mr Burt's evidence, that the relationship between Prime and Promoseven had broken down. It was also submitted that Mr Knell's evidence, and in particular his evasiveness when questioned about transactions involving Bluechip, demonstrated that he was untrustworthy.

[212] Prime submitted that the manner in which these proceedings have been conducted have made it more difficult to determine whether the just and equitable ground is made out. It submitted that the evidence of Mr Hambleton showed that no significance should be attached to the state of Bluechip's financial records. Prime submitted that no weight should be attributed to Mr Ham's evidence that Mr Knell expressed a desire to destroy Bluechip's books and records. It submitted that, the project approaching its end, little remained for the board of Bluechip to do. What work remains has principally been assigned to Mr Knell under the JVA. It was submitted that Mr Knell had made no effort to hide accounts from Mr Burt. It was submitted the state of animosity between them was not such as to preclude all reasonable hope of reconciliation.

[213] Prime referred to the dispute resolution provisions of the JVA, which it submitted ought to be implemented. Alternatively it submitted that effect should be given to the provisions of clause 17 of the JVA, dealing with default by one of the parties. It submitted that if there is a deadlock, that was because Mr Burt had withdrawn from the company. It also submitted that the exercise of powers by Mr Knell conferred on him by the JVA does not provide a basis for winding up Bluechip on the just and equitable ground. Finally, it relied on s 467(4) of the *Corporations Act*.

Just and equitable ground – relevant principles

[214] Under s 467(4) of the *Corporations Act*, where a shareholder has brought a winding up application on the ground that it is just and equitable that the company should be wound up, and the court is of the opinion that the applicant is entitled to relief, and in the absence of any other remedy that it would be just and equitable that the company be wound up, then the court is required to make a winding up order, unless it is also of the opinion that some other remedy is available to the applicant, and that the applicant is acting unreasonably in seeking to have a company wound up instead of pursuing another remedy.

[215] The ground for relief under s 467(4) is quite broadly expressed. The authorities indicate that there are general classes of cases in which a winding up order will be made on this ground. One is where the company is substantially a domestic company, in the nature of a partnership, whose members are unable to cooperate in the conduct of its affairs. Another is where the control or management of the company's affairs is characterised by fraud, misconduct, or oppression.[48] However, the identified classes are not exhaustive.[49] Where a company is small, and it gives effect to an association between its members formed or continued on the basis of a personal relationship involving mutual confidence, or an agreement or understanding that all or some of them will participate in the conduct of the business, then relief may be granted where a serious and operative state of mistrust and disharmony has arisen between them.[50] In *Loch v John Blackwood Ld*[51] it was said that there must be a justifiable lack of confidence in the conduct and management of the company's affairs for the ground to be made out. However a winding up order on the just and equitable ground may be refused where the applicant is solely responsible for disrupting the friendly relationship which may be expected to prevail between the members of such a company, or a deadlock has been caused by the applicant's own misconduct.[52]

[216] In *Re Dalkeith Investments Pty Ltd*[53] it was said that the effect of an earlier provision similar to s 467(4) of the *Corporations Act* was that winding up "is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate".[54] In *Short v Crawley (No 30)* (*Short*)[55] with respect to this statement, it was said, "Presumably, if some other less drastic form of relief is available and appropriate, it can then be seen that the applicant for winding up is acting unreasonably in seeking such an order, even if such an applicant has cogent reasons to advance in support of the application."[56] This passage was relied upon in the submissions of Dr O'Hair. Section 467(4) identifies two matters that, taken together, would justify not making a winding up order, namely, that some other remedy is available to the applicant, and that the applicant is acting unreasonably in seeking to have a company wound up instead of

---

48 See Legal Online, *McPherson's Law of Company Liquidation*, 'The just and equitable ground' at [4.225].

49 *Re Tivoli Freeholds Ltd* [1972] VR 445 at 468.

50 *McMillan v Toledo Enterprises International Pty Ltd & Ors* (1995) 18 ACSR 603 at 618-619.

51 [1924] AC 783 at 789.

52 Note 48 at [4.305], citing *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 384, 387.

53 (1984) 9 ACLR 247.

54 Ibid at 252.

55 [2007] NSWSC 1322.

56 Ibid at [1222].

pursuing another remedy. The passage from *Short*, in my respectful opinion, gives no weight to the reference to an applicant acting unreasonably.

[217] The English equivalent to s 467(4) was considered by Vinelott J in *In Re A Company*.[57] His Lordship identified that the expression "some other statutory remedy" was not limited to statutory remedies under a different section; but also said that the provision contemplated "a situation in which the continuance of the company would be unjust to the petitioner and where that injustice cannot be remedied by any step reasonably open to the petitioner." His Lordship observed that if an offer was made to a petitioner to purchase his shares, the question would be whether he was acting unreasonably in rejecting it.[58]

[218] The approach of Vinelott J was applied by Robson J in *Joint v Stephens (No 2)*.[59] However , his Honour said:[60]

> "In the typical case of a quasi partnership where the court finds that the partners have fallen out and one partner is excluded from the operation of the partnership or that the partners can no longer get along together, the court usually finds it is just and equitable to wind the company up … It is obvious why that is so. The winding up of the quasi partnership will enable the respective partners to terminate their relationship and to receive the capital they have in the partnership."

[219] In that case, the liabilities of the company under consideration exceeded its assets, and its shares were worthless. His Honour considered that it would not be unjust to the applicant to allow the company to continue in existence, and that the applicant was acting unreasonably in seeking to have the company wound up where there was no practical or material benefit to him and where he would suffer no injustice in the company remaining in existence.[61]

[220] While, therefore, there is considerable reluctance to order a winding up, it is necessary to consider the other remedies (including non-statutory remedies) available to the applicant; and whether or not it is reasonable for an applicant to take advantage of them.

Just and equitable ground – consideration

[221] There was evidence from Mr Burt about the state of the relationship between him and Mr Knell. Mr Burt said that they no longer had a relationship; that Mr Knell had not been truthful; and that he had not disclosed matters relating to Bluechip to Mr Burt, giving as an example the February ATO letter. He also said in cross-examination that he and Mr Knell had not been able to agree to anything regarding the company.

[222] I accept Mr Burt's evidence that he has lost trust in Mr Knell, to a serious extent. I also consider that loss to be justifiable.

---

57 [1983] 1 WLR 927.
58 Ibid at 933.
59 [2008] VSC 69.
60 Ibid at [36]-[37].
61 See ibid at [36] and [42].

[223] In my view, the loan agreements presented to Mr Burt in April 2009 had great potential to mislead. They disguised the very significant differences between the dates for repayment by Bluechip of its debts to Prime and to Promoseven. In the case of the debt to Promoseven, the identification of the date for repayment required a careful reading of the document. Mr Hastie submitted that Mr Knell admitted that he did not advise Mr Burt of the differences between the two agreements. In fact, when asked about this, Mr Knell stated that he had no recollection "either way". While that is not itself an admission, consistent with my earlier acceptance of Mr Burt's evidence, I find that Mr Knell did not draw Mr Burt's attention to the deferral of the date for the repayment of the debt to Promoseven by Bluechip; nor to the difference in repayment dates in the two documents. Moreover, the loan agreements were presented to Mr Burt against the background of discussions to the effect that the agreements should be on the same terms. In my view, such conduct is likely to be productive of a great degree of mistrust.

[224] The dealings with the management rights have been referred to earlier in these reasons. It should be noted that Mr Knell has had control of the management of Bluechip. It is clear that he was responsible for the reduction of the debt owed to Prime (ignoring, for the moment, any potential interest of Refund in that debt), on the basis that the management rights had been transferred to CCP. This occurred without the agreement of Promoseven, who in fact required payment of the purchase price to Bluechip.

[225] Mr Knell's conduct in relation to the sale of the management rights to CCP is likely to be productive of deep mistrust. The effect of his conduct was (or would appear to have been) that a valuable asset passed from Bluechip to a company associated with Mr Knell; but that, notwithstanding its financial difficulties, Bluechip's cash position was not improved. Moreover, income received in respect of the management rights has been retained in the Prime Group.

[226] Mr Knell justified the transfer by a reduction in the debt owed by Bluechip to one of his companies. As the shareholders had previously agreed that their debts would not be repaid until the debts of unsecured creditors had been met, this provided further reason for distrust. The evidence shows that the failure by CCP to pay for the managements rights, and to complete the 2009 contract for Lot 505, contributed to ill feeling between the parties.

[227] I take a similar view of Mr Knell's role in relation to the proceedings commenced by Refund, and Bluechip's submission (through Mr Knell) as to the relief sought. Mr Knell was questioned about his role in the commencement of proceedings against Bluechip by Refund. He initially indicated that he was responsible for the issue of those proceedings; but then retracted, and said that Refund was responsible for that. When asked whether he was the active person on behalf of Refund, his answer was evasive. In any event, he provided an affidavit in support of those proceedings. Further, without reference to Mr Burt, on behalf of Bluechip he purported to submit to the relief claimed by Refund. Mr Knell does not appear to have been acting in the interest of Bluechip, nor to have been giving any recognition to the potential interests of Promoseven, in providing support for these proceedings.

[228] In an affidavit filed in the Refund proceedings Mr Knell said that the assignment had occurred, so that his wife could have money to commence a business, and in his oral evidence in the present proceedings gave as the reason for the assignment the

fact that his wife "owes money for her family" and "she's sick of it". This explanation does not sit comfortably with his evidence in relation to the non-enforcement of the debt owed to Prime, and the earlier agreement between Mr Knell and Mr Burt about the enforcement of that agreement.

[229] Mr Ham produced a summary, based on the Quickbooks data files for Bluechip, provided to him by Mr Knell, of the entries posted to loan accounts for entities associated with Mr Knell. That became Exhibit 11. It revealed several matters relied upon by Promoseven in relation to its application to wind up Bluechip on the just and equitable ground.

[230] On Mr Ham's evidence, Bluechip's financial records show that it made payments to PPI Vic totalling $1,547,355.40, apparently for goods or services provided by it. However, the records also show that for this amount, invoices totalling only $401,105.33 were received from PPI Vic. Promoseven's submissions relied on the absence of justification for a substantial amount credited to PPI Vic in support of its application on the just and equitable ground.

[231] In other circumstances, the absence of invoices for payments made to PPI Vic might perhaps not be a particular cause for concern. However, against the background of the conduct of Mr Knell which has just been discussed, it seems to me that the absence of invoices for payments totalling a large sum of money is likely to contribute to a deep sense of suspicion about Mr Knell's conduct.

[232] Mr Ham referred to a journal entry dated 30 June 2010, crediting the sum of $533,000 to PRM. This was identified as an amount for rental guarantees, "as per feasibility". That description appears to be a reference to the Feasibility and Project Budget, which formed schedule 2 to the JVA. It included, apparently as an item of anticipated expenditure, an amount for rental guarantees, the provision in the budget being $546,000. The effect of Mr Knell's evidence was that, when the project commenced, it was anticipated that to sell some of the residential units, rental guarantees would be required; that the guarantees would be provided by one of Mr Knell's companies; that they were provided (as well as for a commercial unit); and that money was paid pursuant to the guarantees, the amount being substantially above the budgeted provision. He also gave evidence that the journal entry was intended to reflect the budget provision, though the amount is lower than in the budget.

[233] Mr Ham's work identified a journal entry dated 30 December 2010, debiting PRM's loan account in the sum of $143,280.42, as rent received for unsold units. The entry indicates that this amount was paid to PRM by way of rent for units owned by Bluechip in Cairns Central; and that the money was retained by PRM.

[234] In my view, the budget indicated that Bluechip would pay a substantial amount to reimburse an entity associated with Mr Knell for the provision of rental guarantees. There was no challenge to Mr Knell's evidence that these were given, and payments made in respect of them. Market circumstances in recent years make it likely that this occurred. Mr Burt's evidence of the arrangements relating to the rental guarantees was generally consistent with that of Mr Knell. In the circumstances, and notwithstanding my general reservations about Mr Knell's evidence, I accept that one of his companies has provided rental guarantees to purchasers of units in Cairns Central, and that payments have been made pursuant to those guarantees.

No evidence has been led to demonstrate the amount paid. I am reluctant to make a positive finding about the amount. For present purposes, and without making a positive finding, I am prepared to proceed on the basis that the amount paid pursuant to the rental guarantees may well have been at least $533,000.

[235] In those circumstances, and in the absence of any suggestion that cash was paid to PRM to reimburse it for the provision of rental guarantees, I see nothing untoward in the creation of a loan account in favour of PRM, and crediting the sum of $533,000 to that account. Nor do I see anything untoward in the reduction of the balance of the account, by reason of rents received and retained by PRM. In cash terms, the effect of these transactions is that Bluechip has paid out a relatively small proportion of the amount budgeted for rental guarantees; and it has done so from rent received for units in its ownership.

[236] There are a number of other entries recording that PPI retained money received on settlement of the sales of units in Cairns Central. The journal entries for these sums record them as reducing the amount owed by Bluechip to PPI. There are two other entries, similarly reducing Bluechip's indebtedness to PPI, which include a reference to the same HSBC loan account. There are also two entries, treated similarly, the description of which includes a reference to a banking error, as well as a reference to the same HSBC loan account. The total of the amounts in these entries, on Mr Ham's calculation, is $223,332, the entries being identified as a group relating to settlements on unit sales.

[237] Mr Knell, in his evidence, stated that the moneys retained from the sales were commission fees. He did not explain, however, how the payment of commission to PPI would reduce the indebtedness on the loan account.

[238] It may be that these retentions are legally justifiable. They would not sit comfortably with the agreement made in 2009 about the repayment of unsecured creditors before payments were made to the shareholders and related entities. The treatment of these actions in Bluechip's accounts also seems to me to be curious. Because there is some uncertainty about whether these retentions were justified as between the shareholders, I do not propose to rely on them in relation to the just and equitable ground.

[239] Promoseven's submissions refer to a meeting on 22 September 2010 between Mr Burt, Mr Knell, Mr Courtice and Mr David Martell (a company director, who describes himself as the senior commercial consultant for all of Mr Knell's companies). On Mr Burt's evidence, he and Mr Courtice took Mr Knell to task for refusing to provide answers to questions previously asked by Mr Ham. These questions were, why Mr Knell had moved the registered office of Bluechip (and Bluechip Robina, a company associated with the Robina development) to Canberra; and why he had transferred funds out of Bluechip without Mr Burt's knowledge. Mr Knell became extremely agitated and abusive, with the result that Mr Courtice and Mr Burt left the office.

[240] Mr Martell gave a somewhat different version of this meeting. He said that the questioning directed to Mr Knell related to the rationale behind Promoseven entering into the Robina joint venture; and when the same question had been asked a number of times in an increasingly aggressive manner, Mr Knell then became

abusive. Mr Courtice responded in a more aggressive fashion, and then left the meeting. Mr Martell was not cross-examined.

[241] Mr Knell also gave evidence of a meeting, apparently that of 22 September 2010. His evidence bears some similarity to that of Mr Martell, and includes an acceptance of the fact that he used offensive language.

[242] It seems to me that the evidence relating to this meeting demonstrates a significant degree of hostility between those associated with Promoseven and those associated with Prime, particularly Mr Knell. It is difficult to identify from the evidence, the extent to which this related to the Robina development, and the extent to which it related to the Cairns development. I do not propose to rely on it in relation to the just and equitable ground.

[243] It seems to me unnecessary to comment on the unreliability of Mr Knell's evidence in these proceedings, as a justification for the breakdown in the relationship between Promoseven and Prime. His evidence having been given at a later time, it is difficult to see how it could be said to provide justification for an earlier loss of trust by Mr Burt in Mr Knell.

[244] I turn then to the matters raised on behalf of Prime. Notwithstanding the fact that additional documents might have been obtained on disclosure, and that other people might conceivably have given evidence in the case, I am satisfied the evidence is sufficient for the findings I have made.

[245] I have previously discussed the dispute resolution mechanism in the JVA. It does not seem to me to provide an alternative remedy for the matters about which Promoseven now complains.

[246] The provisions of clause 17 of the JVA have been summarised earlier. The submission made on behalf of Prime did not attempt to deal with the effects of the provisions of this clause. To implement it would require the appointment of an expert, to consider whether Prime has frustrated the orderly management and development of the project. There is scope for debate about the extent to which the matters of which Promoseven complains would satisfy that description. The clause then makes provision for an opportunity to remedy default, which may itself well be productive of further dispute. The ultimate outcome of action taken under the clause would appear to be that Promoseven might be entitled to purchase Prime's share in the joint venture. It seems to me that an attempt to implement the clause may well be productive of further disputes between the parties, and in any event is not an apt means to address all of Promoseven's concerns. I therefore do not consider it a suitable alternative remedy to winding up.

[247] It will be apparent that I do not accept that there remains any prospect of reconciliation and cooperation between the parties. In my view, the remaining matters referred to in Prime's submissions provide no basis for refusing to make a winding up order on the just and equitable ground.

[248] In essence, Mr Burt has lost confidence in Mr Knell. Bluechip's remaining business is to sell the unsold units; to pay unsecured creditors; to repay (if it is able) its debts to Promoseven and Prime; and, if there is any surplus, to distribute it. By far the largest creditor is Promoseven. Since it, through Mr Burt, has lost confidence in Mr

Knell, it is difficult to see how any remedy other than winding up would appropriately address its concerns.

[249] The basis on which Prime opposed the grant of leave to Promoseven to amend its application to include this ground was that the ground would not succeed. Since I have come to a different conclusion, there is no reason to refuse Promoseven leave to amend its application to include this ground.

[250] On the amendment of the application, I would have been prepared to order that Bluechip be wound up on this ground, had I not earlier concluded that it should be wound up in insolvency.

Conclusion

[251] I am prepared to grant leave *nunc pro tunc* to Promoseven to bring its application to wind up Bluechip. Having concluded that Bluechip is insolvent, I would make an order that it be wound up in insolvency. I would grant leave to Promoseven to amend its application to seek the winding up of Bluechip on the just and equitable ground. Had I not earlier determined that it should be wound up in insolvency, I would have been prepared to order that it be wound up, on the just and equitable ground.