SUPREME COURT OF QUEENSLAND

CITATION: *Parbery & Ors v QNI Metals Pty Ltd & Ors* [2020] QSC 143

PARTIES:

STEPHEN JAMES PARBERY IN HIS CAPACITY AS LIQUIDATOR OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
(first plaintiff)

QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
(second plaintiff)

JOHN RICHARD PARK, KELLY-ANNE LAVINA TRENFIELD & QUENTIN JAMES OLDE AS LIQUIDATORS OF QUEENSLAND NICKEL PTY LTD (IN LIQ) ACN 009 842 068
(third plaintiffs)

v

QNI METALS PTY LTD ACN 066 656 175
(first defendant)

QNI RESOURCES PTY LTD ACN 054 117 921
(second defendant)

QUEENSLAND NICKEL SALES PTY LTD ACN 009 872 566
(third defendant)

CLIVE FREDERICK PALMER
(fourth defendant)

CLIVE THEODORE MENSINK
(fifth defendant)

IAN MAURICE FERGUSON
(sixth defendant)

MINERALOGY PTY LTD ACN 010 582 680
(seventh defendant)

PALMER LEISURE AUSTRALIA PTY LTD ACN 152 386 617
(eighth defendant)

PALMER LEISURE COOLUM PTY LTD ACN 146 828 122
(ninth defendant)

FAIRWAY COAL PTY LTD ACN 127 220 642
(tenth defendant)

CART PROVIDER PTY LTD ACN 119 455 837

(eleventh defendant)

COEUR DE LION INVESTMENTS PTY LTD ACN 006 334 872
(twelfth defendant)

COEUR DE LION HOLDINGS PTY LTD ACN 003 209 934
(thirteenth defendant)

CLOSERIDGE PTY LTD ACN 010 560 157
(fourteenth defendant)

WARATAH COAL PTY LTD ACN 114 165 669
(fifteenth defendant)

CHINA FIRST PTY LTD ACN 135 588 411
(sixteenth defendant)

COLD MOUNTAIN STUD PTY LTD ACN 119 455 248
(seventeenth defendant)

EVGENIA BEDNOVA
(eighteenth defendant)

ALEXANDER GUEORGUIEV SOKOLOV
(nineteenth defendant)

ZHENGHONG ZHANG
(twentieth defendant)

SCI LE COEUR DE L'OCEAN
(twenty-first defendant)

DOMENIC MARTINO
(twenty-second defendant)

FILE NO:	BS6593 of 2017
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	3 June 2020
DELIVERED AT:	Brisbane
HEARING DATES:	16-17, 22-26, 30-31 July, 2, 5, 8, 19-21, 23, 27-28 August, 2-3, 30 September, 1-2, 4, 16-17 October 2019
JUDGE:	Mullins J
ORDERS:	**1. The plaintiffs' claims against the seventh defendant are dismissed.** **2. It is declared that the fixed and floating charge executed by the second plaintiff in favour of the sixteenth defendant on 13 January 2016 (the China**

First charge) is voidable under s 588FE of the Corporations Act 2001 (the Act).

3. **Pursuant to s 588FF of the Act it is declared that the China First charge is void ab initio against the second plaintiff.**
4. **The question of what, if any, relief should be ordered in respect of the finding that the share subscription argument between the second plaintiff and the sixteenth defendant executed on 13 January 2016 is an uncommercial transaction within the meaning of s 588FE of the Act is adjourned to a date to be fixed.**
5. **It is declared that the fixed and floating charge executed by the second plaintiff in favour of the fifteenth defendant on 13 January 2016 (the Waratah Coal charge) is voidable under s 588FE of the Act.**
6. **Pursuant to s 588FF of the Act, it is declared that the Waratah Coal charge is void ab initio against the second plaintiff.**
7. **It is declared that the security deed executed by the fifteenth defendant, the second plaintiff and the first and second defendants on 13 January 2016 (the security deed) pursuant to which the fifteenth defendant agreed to make its mining tenements EPC 1040 and EPC 1079 available as security for credit or facilities provided by creditors of the second plaintiff and the first and second defendants is voidable under s 588FE of the Act.**
8. **Pursuant to s 588FF of the Act, it is declared that the security deed is void ab initio against the second plaintiff.**
9. **The application for the declarations in paragraphs 522(b) and (c) of the third further amended consolidated statement of claim is refused.**
10. **The question of any further orders ancillary to the preceding orders or to give further effect to, or as a consequence of, these reasons and the question of costs of the proceeding are adjourned to a date to be fixed.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS CONSTITUTED INTER VIVOS – CONTRACTS AND COVENANTS – where two companies which owned a nickel refinery entered into a joint venture agreement for the operation of the refinery – where the joint venturers appointed a manager to conduct the operations of the refinery – where the manager was a company wholly owned by the joint venturers and a party to the joint venture agreement – where the powers and responsibilities of the manager were extensively set out in the joint venture agreement – where a clause of the joint venture agreement specified that it should not be construed as constituting an association, corporation,

trust, mining partnership or any other kind of partnership – whether the parties to the joint venture agreement manifested an intention to create an express trust of the joint venture property with the manager as the trustee and the joint venturers as beneficiaries

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – PARTIES – GENERAL PRINCIPLES – where two companies which owned a nickel refinery entered into a joint venture agreement for the operation of the refinery – where the joint venturers appointed a manager which was a subsidiary of both joint venturers to conduct the operations of the refinery as their agent – where the manager conducted bank accounts in its name for the purpose of the joint venture – where a related company to the joint venturers borrowed funds that were paid by the manager from the joint venture accounts – where under the joint venture agreement the funds in the accounts belonged to the joint venturers – whether the joint venturers or the manager was the lender to the related company

CORPORATIONS – WINDING UP – WINDING UP IN INSOLVENCY – WHAT CONSTITUTES INSOLVENCY – GENERALLY – EVIDENCE OF INSOLVENCY – where the company was the operator of a nickel refinery conducted as a joint venture by two related companies – where the falling nickel price meant the costs of production exceeded the revenue from sales of product – where the company was predicting a substantial cash shortfall for about nine months – where the company was unsuccessful in securing financial assistance from government, creditors and financiers – where no related party committed funds or realistic financial support – where debts to a major creditor were overdue, but the creditor had allowed a few weeks for payment of the debt and gave notice of its intention to suspend its services if payment were not made – whether the company was insolvent before the time nominated by the major creditor for suspension of services

CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – PREFERENCES AND VOIDABLE TRANSACTIONS – UNCOMMERCIAL TRANSACTIONS – where the company was on the verge of entering into voluntary administration – where the company entered into an agreement to purchase two billion shares for $135 million in a related private company that had rights under a mining right agreement to develop a coal mine where the project was in the pre-development stage – where the payment for the shares was deferred and secured by a fixed

and floating charge – where there was independent expert evidence that at the time the transactions were entered into the project had a nil valuation – where the company also entered into a security deed with another related company that agreed to allow its mining exploration permits to be used as security for credit or facilities provided by creditors to the company – where the company entered into a fixed and floating charge to secure the prospective amount of security to be provided by the company holding the exploration permits – whether the transactions were uncommercial

CORPORATIONS – RECEIVERS, CONTROLLERS AND MANAGERS – DUTIES AND LIABILITIES – DUTIES – GENERALLY – where the appointed controller purported to act in that capacity – where order declaring appointment as a controller invalid was made by consent of the relevant parties – where controller gave an undertaking to the court not to further act under the appointment – where plaintiffs seek a declaration that the controller's actions breached duties of good faith and not to act so as to sacrifice the interests of the company – whether the definition of "controller" under the *Corporations Act* 2001 (Cth) extended to include those acting as controllers while invalidly appointed – whether there was utility in making the declaration sought by the plaintiffs

Corporations Act 2001 (Cth), s 95A, s 418, s 419, s 588FB, s 588FC, s 588FE, s 588FF, s 588FG, s 588FJ

In re Canadian Land Reclaiming and Colonizing Company (1880) 14 Ch D 660, considered
Chan & Ors v First Strategic Development Corporation Limited (in liq) & Anor [2015] QCA 28, considered
Corporate Affairs Commission v Drysdale (1978) 141 CLR 236; [1978] HCA 52, considered
Corumo Holding Pty Ltd v C Itoh Ltd (1991) 24 NSWLR 370, cited
Croton v The Queen (1967) 117 CLR 326; [1967] HCA 48, cited
Featherstone v Ashala Model Agency Pty Ltd (in liq) [2018] 3 Qd R 147; [2017] QCA 260, cited
Gibson v Barton (1875) LR 10 QBD 329, considered
In re Goldburg (No 2) [1912] 1 KB 606, cited
Hall v Poolman (2007) 65 ASCR 123; [2007] NSWSC 1330, considered
Herdegen v Federal Commissioner of Taxation (1988) 84 ALR 271; [1988] FCA 419, considered
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, cited
Hussain v CSR Building Products Ltd (2016) 246 FCR 62; [2016] FCA 392, cited
Jessup v Queensland Housing Commission [2002] 2 Qd R

270; [2001] QCA 312, considered
Korda v Australian Executor Trustee (SA) Limited (2015) 255 CLR 62; [2015] HCA 6, considered
Lee Kong v Pilkington (Australia) Ltd (1997) 25 ACSR 103, cited
Lewis v Doran (2004) 50 ACSR 175; [2004] NSWSC 608, considered
Lewis v Doran (2005) 54 ACSR 410; [2005] NSWCA 243, considered
Montgomerie v United Kingdom Mutual Steam Ship Association Limited [1891] 1 QB 370, cited
Parbery v QNI Metals Pty Ltd [2019] QSC 207, related
QNI Resources Pty Ltd v Queensland Nickel Pty Ltd (in liq) [2017] QCA 167, considered
Queensland Nickel Pty Ltd (in liq) v Martino [2017] QSC 95, related
Queensland Nickel Pty Ltd (in liq) v Queensland Nickel Sales Pty Ltd [2018] 3 Qd R 133; [2017] QSC 305, cited
Sandell v Porter (1966) 115 CLR 666; [1966] HCA 28, considered
Sino Iron Pty Ltd v Palmer (No 3) [2015] 2 Qd R 574; [2015] QSC 94, considered
Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation (2001) 53 NSWLR 213; [2001] NSWSC 621, considered
Tosich Construction Pty Ltd (in liq) v Tosich (1997) 78 FCR 363, cited
United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1; [1985] HCA 49, cited
Walker v Wimborne (1976) 137 CLR 1; [1976] HCA 7, cited
Williams v Peters [2010] 1 Qd R 475; [2009] QCA 180, considered

COUNSEL: G J Gibson QC, S L Doyle QC, T Sullivan QC, J P Moore QC, C G Curtis, M J Doyle and N J Derrington for the second and third plaintiffs
C Ward SC, M Karam (on 22-24 July 2019) and T March for the first, second, seventh, fifteenth and sixteenth defendants
K S Byrne (to 30 July 2019) and E L Robinson (from 31 July 2019) for the twenty-second defendant

SOLICITORS: HWL Ebsworth Lawyers for the second and third plaintiffs
Jonathan Shaw for the first, second, seventh, fifteenth and sixteenth defendants
Robinson Nielsen Legal for the twenty-second defendant

[1] The third plaintiffs are the general purpose liquidators (GPLs) of the second plaintiff Queensland Nickel Pty Ltd (in liquidation) (QNI). The first plaintiff who was the special purpose liquidator (SPL) of QNI was also a party to this proceeding, but settled the claims

he was pursuing on behalf of QNI with the defendants. That resulted in orders made on 5 August 2019 that had the effect of leaving the second and third plaintiffs and the first, second, seventh, fifteenth, sixteenth and twenty-second defendants as the active parties in the proceeding. The twenty-second defendant is Mr Martino. I will refer to the other active defendants as the corporate defendants.

[2] The final versions of the pleadings on which the trial was ultimately conducted were the third further amended consolidated statement of claim filed on 21 August 2019 (with one additional amendment that paragraph 181 was struck out), the defence filed on 28 August 2019 and the second further amended reply filed on 1 October 2019.

[3] The first defendant QNI Metals Pty Ltd (Metals) and the second defendant QNI Resources Pty Ltd (Resources) are joint venture companies which own the Yabulu nickel refinery and conduct the Queensland Nickel Joint Venture pursuant to a joint venture agreement under the deed dated 17 September 1992 (the JVA) (exhibit HAL.001.001.0547). QNI was also a party to the JVA and the general manager of the joint venture pursuant to the JVA and an administration agreement dated 17 September 1992 (HWL.004.001.0094). Metals owns 20 per cent of the shares in QNI and Resources owns 80 per cent of the shares in QNI. The shares in each of Metals and Resources are held by Nickel Consolidated Pty Ltd (49 per cent), Nickel Processing Pty Ltd (49 per cent) and Nickel House Pty Ltd (2 per cent). Each of those companies in turn is owned by the fourth defendant Mr Palmer. Mr Palmer purchased the joint venture companies in July 2009.

[4] On 18 January 2016 QNI entered voluntary administration due to insolvency. The third plaintiffs, together with Mr Stefan Dopking, were appointed as administrators and then on 22 April 2016 as the general purpose liquidators (GPLs). (Mr Stefan Dopking resigned as liquidator on 28 July 2017. Reference to the GPLs in these reasons in relation to events prior to that date includes Mr Dopking.)

[5] QNI continued to operate as general manager until 11 March 2016, after it was notified on 7 March 2016 by letter dated 6 March 2016 that Metals and Resources had on 3 March 2016 appointed a replacement manager, Queensland Nickel Sales Pty Ltd (QN Sales) (at Transcript 6-83).

[6] When the trial commenced there were a large number of unsecured creditors of QNI listed in schedule E to the statement of claim. At the outset, the purpose of this proceeding by the plaintiffs was to recover funds which they alleged were owed by, or recoverable from, the defendants, in order to pay the creditors of QNI. As most of the schedule E creditors were paid, as a result of the settlement reached with the SPL, the remaining defendants sought a stay of the proceeding, as they argued that the purpose of the second and third plaintiffs' continuing with the proceeding was for the purpose of recovering the GPLs' costs of the proceeding and the funding premium payable under the litigation funding agreement the GPLs entered into with Vannin Capital Operations Limited, and not for the benefit of creditors. The application for a stay was refused: *Parbery v QNI Metals Pty Ltd* [2019] QSC 207.

[7] The claims pursued by the second and third plaintiffs are those set out in parts NA, U and W of the statement of claim.

[8] Part NA deals with the claims against the seventh defendant Mineralogy Pty Ltd. From about 8 October 2009, the shares in Mineralogy were held by Mr Palmer (as to 0.42 per cent), River Crescent Pty Ltd (being wholly owned by Mr Palmer) as to 98.77 per cent, and Closeridge Pty Ltd (being substantially owned by Mr Palmer) as to 0.81 per cent.

[9] Part U sets out the claims against the fifteenth and sixteenth defendants (Waratah Coal Pty Ltd and China First Pty Ltd) arising from transactions that took place on 13 January 2016, including the entry by QNI into a deed of charge in favour of China First (China First charge) that was registered on 14 January 2016. Waratah Coal has Mineralogy as its ultimate holding company. Prior to the issue of shares in China First to QNI on 13 January 2016, China First was a wholly owned subsidiary of Waratah Coal.

[10] Part W concerns the plaintiffs' claims in respect of the transactions involving accountant Mr Martino who was appointed on 4 May 2017 by China First as the agent of QNI pursuant to the China First charge.

[11] There are some critical issues to be decided that will affect whether the plaintiffs can establish their claims. They include:

(a) the nature of the relationship between QNI and the joint venture companies, ie. whether the funds in QNI's bank accounts that were used in the operation of the refinery were held by QNI on an express trust for the benefit of Metals and Resources, as contended by the plaintiffs, or as the agent only of Metals and Resources under the JVA, so that QNI held the funds as a bare trustee, as contended by the corporate defendants;

(b) whether payments made from QNI's bank accounts to or at the request, or on behalf, of Mineralogy were loans by QNI to Mineralogy;

(c) whether QNI was insolvent on 13 January 2016;

(d) whether the China First and Waratah Coal transactions were uncommercial transactions.

The nature of QNI's relationship with Metals and Resources under the JVA

[12] The JVA is the replacement agreement for the former joint venture agreement that was under the deed dated 14 December 1988 identified in recital A to the JVA. When the JVA commenced, the joint venturers were Resources and Nickel Resources North Queensland Pty Limited for and on behalf of NRNQ a limited partnership (NRNQ). Apart from QNI, another company Ore Purchase and Shipping Pty Limited (OPS) was also a party to the JVA and had the role of ore purchase and shipping manager. The term "Manager" is used in the JVA to refer to either of QNI and OPS and their respective successors. It was apparent from the lack of reference to OPS as ore purchase and shipping manager in this proceeding that OPS was not performing that role and that QNI was doing so (and that is consistent with clause 5.2(d) of the JVA).

[13] The purposes of the joint venture are set out in clause 2.1. They include mining, developing and otherwise exploiting the joint venture area (as defined in the JVA) so as to produce lateritic ore, transporting such ore to, and processing such ore at the Yabulu treatment facility to produce nickel oxide and nickel and cobalt sulphide products for delivery to, or as directed by, each of the joint venturers, purchasing ore from third parties, processing ore supplied by or on behalf of the joint venturers at the treatment facilities to produce products for delivery to, or as directed by, each of the joint venturers (provided such supply of ore is in proportion to the respective participating interests of the joint venturers) and exercising the rights, titles, interests, claims and benefits comprised in the joint venture property (as defined in the JVA). Clause 2.2 specifies that the purposes are to be carried out by the joint venturers in conformity with the *Queensland Nickel Agreement Act* 1970 (Qld) (the Agreement Act) and the agreement that was entered into by the State of Queensland dated 17 December 1970 (as amended from time to time) with MEQ Nickel Pty Ltd and Greenvale Queensland Nickel Inc.

[14] Clause 3.1 of the JVA relevantly provides:

> "All the Joint Venture Property shall at all times be made available for the purpose and duration of the Joint Venture and during such duration shall not be used for any other purpose. All the Joint Venture Property and, subject to Clause 3.3, all estate and interest in Products produced at the Treatment Facilities shall be beneficially owned by the Joint Venturers as tenants in common, and all liabilities of the Joint Venture shall be severally borne by such Joint Venturers, in the following percentages (such percentages being the parties' respective Participating interests as at the Effective Date):
>
> | Joint Venturer | Participating Interest |
> |---|---|
> | QNR | 80% |
> | NRNQ | 20%" |

[15] Metals acquired NRNQ's interest in the joint venture on 31 January 1995 (exhibit FTI.002.011.3508).

[16] The term "Joint Venture" is defined in clause 1.1 of the JVA to mean "the unincorporated joint venture constituted by the Former Joint Venture Agreement and confirmed and continued pursuant to this Deed". A comprehensive definition of "Joint Venture Property" is set out in clause 1.1 of the JVA. It includes specified mining leases and other rights and titles pursuant to the Agreement Act or the *Mineral Resources Act* 1989 (Qld), specified land, Yabulu treatment facilities, all technology and know-how developed or to be developed on behalf of the joint venture and all other rights, titles, interests or property of whatsoever kind held, constructed or acquired for the purpose of the joint venture.

[17] The definition of "Products" and "Subject Products" in clause 1.1 of the JVA are respectively:

> " 'Products' means the nickel oxide and nickel and cobalt sulphide products (whether mixed or separated) produced or to be produced at the Treatment

> Facilities and any other products which may be produced from time to time at the Treatment Facilities;."
>
> …
>
> " 'Subject Products' means in relation to a Joint Venturer:
>
> (a) all that Joint Venturer's right, title and interest, both present and future, as tenant in common in Products produced at the Treatment Facilities and not yet received in kind by any Joint Venturer; and
>
> (b) all that Joint Venturer's right, title and interest, both present and future, in Products produced at the Treatment Facilities and received in kind by that Joint Venturer;"

[18] Clause 3.2 of the JVA deals with the holding of titles to the joint venture property in the manager's name as the nominee for both joint venturers:

> "For purposes of convenience, title to any of the Joint Venture Property may be held at the request of the Joint Venturers solely in the name of either of the Managers as nominee for both Joint Venturers in proportion to their respective Participating Interests; provided, however, that all Real Property Titles and Mining Titles shall be held in the names of both Joint Venturers in accordance with their Participating interests. If at any time any of the Joint Venture Property is not vested at law in the names of the Joint Venturers in proportion to their Participating Interests, the Joint Venturer or Joint Venturers in who names such Joint Venture Property is vested shall hold such Joint Venturer Property for the use and benefit of the Joint Venturers in proportion to their Participating Interests and, if requested to do so by the Manager or the other Joint Venturer (as the case may be), but at the expense of the Joint Venture, shall take all such steps as may be necessary to vest the Joint Venture Property in question in the names of the Joint Venturers in proportion to their Participating Interests."

[19] The plaintiffs place significance on the reference in clause 3.1 of the JVA to the joint venture property being "beneficially owned" by the joint venturers as tenants in common as an acknowledgment that some of the joint venture property may be legally owned by another party (which was then contemplated by clause 3.2). It is equally arguable that the same reference in clause 3.1 is also consistent with an express trust not being created, as there is no reference in clauses 3.1 and 3.2 of the JVA to a trust being created by the joint venturers in respect of the joint venture property and clause 3.2, in fact, contemplates that one joint venturer may hold the legal title of some joint venture property for the benefit of all joint venturers. The provision that all liabilities of the joint venture will be "severally borne by such Joint Venturers" in proportion to their respective participating interests is inconsistent with the notion of a trustee holding the legal title to the property.

[20] Clause 3.3 of the JVA provides that "[e]ach of the Joint Venturers shall have the right to, and shall, receive in kind its Subject Products on production thereof at the Treatment Facilities and separately disposed of or market such share". Each joint venturer is then made solely responsible for the payment of any royalties on account of the marketing or disposal of its subject products.

[21] Clause 4 of the JVA sets out detailed provisions concerning the establishment, powers, membership and operation of the Joint Venture Owners Committee (JVOC) (made up of representatives of the joint venturers) which has the responsibility and authority for the conduct of the joint venture, including determining general policy and strategic matters for the joint venture. Clause 4.10 specifies the matters on which neither the JVOC nor the managers have power to make any decision about and, where a decision is required on those matters, it requires the approval of each joint venturer.

[22] The appointment of QNI as the general manager of the joint venture was confirmed in clause 5.1(a).

[23] Clause 5.2 sets out the responsibilities of the general manager in extensive detail. Clause 5.2(a) provides:

> "The General Manager shall, subject to the directions of the JVOC, be in charge of and responsible for:
>
> (i) the overall management, operation and administration of the Joint Venture;
>
> (ii) managing the funds of the Joint Venture;
>
> (iii) maintaining the accounting records of the Joint Venture and, to the extent set out herein, the Joint Venturers;
>
> (iv) in conjunction with the Ore Purchase and Shipping Manager, co-ordinating the supply of ore for the Joint Venture;
>
> (v) conducting planning, engineering feasibility and project evaluation and managing design and construction for the Joint Venture and its Development Programmes;
>
> (vi) medium and long term planning for the Joint Venture; and
>
> (vii) the management and control of the Joint Venture Property and all operations hereunder as agent for, and for the account of, the Joint Venturers.
>
> In the exercise of such rights and duties the General Manager shall act subject to and consistently with the provisions of this Deed. The General Manager shall be subject to the supervision of the Joint Venturers acting through the JVOC and shall carry out all directions and decisions of the JVOC. Subject to the provisions set out herein, the General Manager shall use its best endeavours to produce Products at the lowest possible unit cost and to keep working capital at the lowest possible level consistent with prudent management.
>
> The General Manager shall also have such other duties and responsibilities as are set out in Clause 5.2(b) and (c), as well as the obligation to perform the 'Management Services' as described in the Administration Agreement."

[24] The detailed activities required of the general manager to be undertaken either itself or through independent contractors in connection with the operation of the joint venture are specified in clause 5.2(b). One of the activities under clause 5.2(b)(xiii) is the proper

disbursing of all funds provided by the joint venturers to carry out the operation of the joint venture, including the paying of all sums payable by the general manager with respect to its acquisition of all services and supplies, materials, equipment and other property necessary or appropriate in connection with the operation of the joint venture. Clause 5.2(b)(xvi) contemplates that the general manager will, at the request of a joint venturer, pay on behalf of that joint venturer any costs or expenses payable by that joint venturer in relation to the joint venture.

[25] Under clause 5.2(b)(xvii), the general manager must undertake:

> "the preparation and maintenance, in accordance with accounting principles generally accepted in Australia, of complete books and accounting records describing each Joint Venturer's financial involvement in the Joint Venture.
>
> …
>
> Such books and records shall be prepared so as to enable each Joint Venturer to meet its reporting, accounting, statutory and taxation requirements."

[26] Under clause 5.2(c) of the JVA, the general manager is required to act as the agent of the joint venturers in the purchase and shipping of nickel ore from overseas sources for processing at the Yabulu refinery. Under clause 5.2(g) of the JVA, it is specified that the duties and responsibilities of the general manager shall not include any activities relating to the sale or marketing of any Products.

[27] Under clause 5.3(a) of the JVA, the general manager is required to furnish to each joint venturer within 14 days at the end of each month a reasonably detailed financial and performance report concerning activities undertaken pursuant to the JVA and the administration agreement since the previous report. The requirements for the report are then set out:

> "The report shall summarise Joint Venture operations during such month and shall include an unaudited statement reflecting in reasonable detail, but in summary form, all charges and credits incurred or accrued to the Joint Venture and showing the financial position of each Joint Venturer (with respect to its involvement in the Joint Venture), as well as a comparison thereof with the relevant programmes, budgets, estimates and schedules adopted by the JVOC."

[28] Paragraphs (h) to (j) of clause 5.3 of the JVA deal with the obligations of the general manager to keep the books, accounts and records of the operations and business of the joint venture and to arrange the audits of the accounts of the joint venture:

> "(h) A Manager shall maintain, in accordance with accounting principles generally accepted in Australia, consistently applied, complete books, accounts and records of and relating to the operations and business of the Joint Venture (including all costs incurred pursuant to this Deed) and the Joint Venture Property. A Manager shall provide to each Joint Venturer from time to time such information from such books, accounts and records as the Joint Venturer reasonably requires in

order to enable it to carry out the procedures, and file and otherwise distribute the information, as is necessary to meet the reporting, accounting and taxation requirements imposed on the Joint Venturer concerned. Each Joint Venturer shall have the right, at all reasonable times and after giving reasonable notice to the Manager, to inspect such books, accounts and records and all or any of the Joint Venture Property.

(i) The General Manager shall keep such other records and accounts in respect of the Joint Venture as any Joint Venturer may be reasonably require.

(j) The General Manager shall cause annual audits of the Joint Venture accounts to be carried out, at the cost of the Joint Venture, by the General Manager's auditor. If by reason of a particular Joint Venturer having a financial year which is different from that covered by the annual audit of the Joint Venture accounts, it is necessary for a supplementary audit of the Joint Venture accounts to be conducted, the General Manager shall cause the General Manager's auditor to carry out such supplementary audit at the cost of the Joint Venture. Copies of such audits shall be furnished by the General Manager to each of the Joint Venturers within 45 days of the end of the relevant financial year."

[29] Clause 5.5(b) of the JVA prohibits the general manager from carrying on, or being interested in, any other business or activity or other operation. Clause 5.5(i) precludes the general manager from mortgaging, pledging, charging, encumbering or creating any lien over or trust in respect of the Joint Venture Property (except for liens arising in the normal and ordinary course of business).

[30] Clause 5.6 of the JVA deals with the replacement of the general manager.

[31] Under clause 6.1 of the JVA, the general manager is responsible for the preparation of all financial reports and budgets relating to the joint venture.

[32] Clause 6.2 then sets out in detail the requirement imposed on the general manager to submit to the JVOC annually for review and approval as provided in clause 4.1 a proposed financial plan for the operations of the joint venture for the next cost year. Clause 6.2 also requires the general manager to prepare and submit to the joint venturers for their approval a new business plan for the forthcoming five year period. Clause 6.3 then imposes on the general manager an obligation to submit to the JVOC a proposed budget for development capital expenditures for any development programme approved by the JVOC pursuant to clause 4.1.

[33] Pursuant to clause 6.4(a) of the JVA, a manager which is entitled to make calls on the joint venturers for funds to meet joint venture expenses (being all costs, liabilities and expenses of the joint venture properly incurred including funds to meet financial plans approved under clause 6.2 and approved development budgets) which includes the general manager is referred to as the "Calling Manager". The timing of calls is dealt with in Clauses 6.4(b) to (e). Clause 6.4(f) of the JVA provides:

> "The Calling Manager shall deposit Called Sums and other moneys received from or for the account of the Joint Venturers in a working capital bank account and shall not deposit any other moneys in such account. Such account shall be in the name of the Calling Manager but the moneys standing to the credit of the account shall belong to the Joint Venturers in proportion to the amounts respectively paid to such account by or on behalf of them and the Calling Manager shall keep sufficient records as will enable the respective entitlements of the Joint Venturers to such moneys (and to any interest or income accrued on those moneys) from time to time to be determined. Payments shall be made from such account to meet Joint Venture Expenses payable or accrued or to become payable or to be accrued in respect of the Joint Venturer concerned. Moneys standing to the credit of the account may be invested by the Calling Manager in a prudent manner for a term not exceeding one week (in the case of moneys paid pursuant to a weekly call and any interest thereon) or one month (in the case of moneys paid pursuant to a monthly call and any interest thereon). All bank interest and other income derived from the investment of the moneys paid by or attributable to a Joint Venturer shall be for the account of that Joint Venturer. Such moneys, bank interest and other income shall be applied promptly to meet Joint Venture Expenses to the intent that calls made under paragraphs (b) or (d) of this Clause 6.4 be reduced to the maximum extent possible."

[34] It is of note, where clause 6.4(f) applies to the moneys standing to the credit of a bank account conducted by the general manager for the joint venture, it expressly provides those moneys "shall belong to the Joint Venturers in proportion to the amounts respectively paid to such account by or on behalf of them" and refers to the manager keeping sufficient records "as will enable the respective entitlements of the Joint Venturers to such moneys". This is consistent with the moneys in the account belonging to the joint venturers rather than an expression of intention to create a trust in respect of the moneys. Under clause 6.4(g), a manager may make a call for funds other than in accordance with the timing schemes set out in clauses 6.4(b) and (d), provided the manager has the consent of each of the joint venturers.

[35] Under clause 6.5 of the JVA, the calling manager is given express authority to make unbudgeted operating expenditures on behalf of the joint venture in respect of rail freight charges, the purchase of imported ore for processing and the purchase of fuel oil (where the purchase of fuel oil remains subject to the requirement under clause 4.10(j) for the approval of each joint venturer to decisions specified in that paragraph). Those expenditures are for items that are critical to the operation of the refinery.

[36] Clause 13 of the JVA provides:

> "The full extent of the joint venture between the Joint Venturers is set forth in this Deed and such other agreements relating to the Joint Venture as are executed and, where applicable, delivered on the date hereof or on the Effective Date. Nothing in this Deed shall be construed to constitute a Joint Venturer an agent or representative of the other Joint Venturer, and no Joint Venturer shall have any authority to act for or to assume any obligation, liability, indebtedness or responsibility on behalf of the other Joint Venturer

except as set forth in this Deed. The rights, duties, obligations and liabilities of the Joint Venturers arising out of this Deed shall be several in proportion to their respective Participating Interests and not joint or collective, it being the expressed purpose and intention of the Joint Venturers that their ownership of their respective interests shall be as tenants in common and that this Deed shall not be construed as constituting an association, corporation, trust, mining partnership or any other kind of partnership."

[37] The original parties to the administration agreement were Resources, NRNQ and QNI. QNI is referred to as QNPL in the administration agreement. Clause 5 of the administration agreement requires the administration agreement to be construed subject to the terms and conditions of the JVA and, if there is any inconsistency between them, the JVA prevails to the extent of the inconsistency. Consistent with clause 13 of the JVA, recital A noted that the joint venturers under the JVA "have associated themselves in an unincorporated joint venture for the purpose of (inter alia) mining lateritic ore and processing such ore at the Treatment Facilities to produce Products for sale by each of them". The expression "Management Services" is defined in clause 1.1 of the administration agreement to mean the management services described in clause 3.

[38] Clause 3.1 and 3.2 of the administration agreement provide:

"3.1 QNPL is hereby severally appointed by the Joint Venturers to perform the Management Services for and on behalf of the Joint Venturers in relation to the participation and involvement of each of the Joint Venturers in the Joint Venture.

3.2 The Management Services which QNPL shall perform on behalf of the Joint Venturers are as follows:

(a) The management of all debtors of the Joint Venturers in relation to the sale of their Subject Products, including the:

(i) collection by payment to the credit of such bank account of the relevant Joint Venturer as that Joint Venturer may direct;

(ii) satisfaction; or

(iii) discounting,

of those debts.

(b) The promotion of nickel and cobalt products in world markets on behalf of the Joint Venturers, including participation in the Nickel Development Institute and other similar bodies.

(c) The preparation of annual consolidated profit and loss and cashflow budgets for each Joint Venturer which shall include estimates of the following items:

(a) the costs and expenses payable by the Joint Venturer to Queensland Nickel Sales Pty. Ltd. ('QNS') acting in the capacity as the Sales Agent of the Joint Venturer;

(b) the costs and expenses payable by the Joint Venturer to QNPL:

(i) acting in its capacity as General Manager of the Joint Venture; and

(ii) pursuant to this Agreement;

(c) the costs and expenses payable by the Joint Venturer to OPS acting in its capacity as Ore Purchase and Shipping Manager of the Joint Venture;

(d) the capital expenditure and other Joint Venture expenses payable by the Joint Venturer;

(e) charges and/or interest payable in respect of any financing for the Joint Venturer's involvement in the Joint Venture, and drawdowns to be made by the Joint Venturer in relation to any such financing; and

(f) the proceeds of the sale of the Joint Venturer's Subject Products.

(d) In conjunction with QNS, the negotiation in consultation with and on behalf of the Joint Venturers of Sales Contracts for each Joint Venturer's Subject Products.

(e) The provision of treasury, tax planning and risk management advice and functions in connection with each Joint Venturer's involvement in the Joint Venture."

[39] Clause 4.2 of the administration agreement reinforces the restriction set out in clause 5.5(b) of the JVA and provides:

> "Other than the performance of its role as the General Manager of the Joint Venture and the provision of Management Services as contemplated by this Agreement, QNPL shall not directly or indirectly carry on or be interested in any other business or activity or other operation."

[40] Neither the JVA nor the administration agreement provides for QNI to be paid for its services as general manager. That is not surprising, as from the commencement of the appointment of QNI as general manager under the JVA, it was wholly owned by the relevant joint venture companies, according to their respective interests in the joint venture (exhibit QNK.025.001.1042).

[41] The Yabulu refinery was operated by QNI by sourcing ore from overseas third parties to be used at the refinery. The ore was unloaded at QNI's material handling facility at the Port of Townsville and then delivered by rail to the refinery. The joint venture also sourced ore from its own mine in central Queensland. The domestic ore and coal were also transported by rail to the refinery. The ore was processed at the refinery where nickel was separated from cobalt and nickel products and cobalt produced by the refinery were transported by rail to Townsville or Brisbane for export. QNI operated the bank accounts in its name into which it deposited the revenues generated by the refinery business and met the liabilities

incurred in operating the refinery business from the revenues deposited into its bank accounts. During the period from the acquisition of the refinery by the Palmer interests until 18 January 2016, it was common ground that QNI did not receive any income for the services it provided as general manager to the joint venture (at Transcript 8-34 and 18-15).

[42] The parties make very different submissions about the effect of the JVA (and the administration agreement) on the nature of the relationship between QNI on the one hand and Metals and Resources on the other. The issue arises in an unusual way of pleading, as a result of the settlement with the SPL. It was the SPL, and not the GPLs, who had originally alleged in the statement of claim that from the creation of the joint venture QNI by acting as the general manager of the joint venture for the benefit of the joint venturers acted as trustee of the joint venture property for the purpose of carrying on the joint venture with the joint venturers as the beneficiaries. It was alleged the trust was an express trust that was manifested by express terms of the JVA and the conduct of the joint venturers that was particularised. Those allegations that were in part K of the statement of claim were not part of the GPLs' claims made under part NA of the statement of claim and ultimately did not form part of the GPLs' claims made in the statement of claim. The corporate defendants plead in their defence that QNI managed and controlled the joint venture property and all operations under the JVA as agent for, and for the account of, the joint venturers and that the JVA did not create, and was not to be construed as creating, a trust. That gave the GPLs the opportunity to reinstate in the reply the allegations that had originally been made in part K of the statement of claim.

[43] The corporate defendants submit that on a proper construction of the JVA the Products that were produced were not joint venture property, but were owned separately by Resources and Metals, all funds from the sale of the Products were the property of Resources and Metals individually and QNI received such funds as agents for and on behalf of Resources and Metals, and otherwise all the property of, and held, constructed or acquired in respect of or for the purposes of the joint venture was owned by Resources and Metals as joint venturers as tenants in common in accordance with their respective percentage interests in the joint venture. The corporate defendants also submit that QNI, on the proper construction of the JVA, was, subject to the directions of the JVOC, responsible for the management and control of joint venture property as manager of the joint venture, and QNI was, as agent of Metals and Resources, required to act subject to the supervision, directions and decisions of Metals and/or Resources as principals in respect of funds received from the sale of Subject Products.

[44] There are two aspects to the plaintiffs' trust claim. The first is based on a construction of the JVA. The second aspect of the plaintiffs' trust claim is also based on the construction of the JVA, but seeks to rely on the conduct of the joint venturers both before and after NRNQ ceased to be a joint venturer in the requests made of QNI to hold assets, incur liabilities and enter contracts on behalf of the joint venturers. The plaintiffs clarified in their oral closing submissions (at Transcript 26-62) that the second aspect of their trust claim did not depart from their contention that the trust was created under the JVA, but relied on the conduct of the joint venture over time as augmenting the trust property.

[45] The question of construction has to be determined by reference to the JVA itself and the same conclusion on construction must apply in respect of the operation of the joint venture under the JVA before or after the involvement of the Palmer interests.

[46] A joint venture is not a term with a defined meaning and the observation of Mason, Brennan and Deane JJ in *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 10 remains applicable:

> "The term 'joint venture' is not a technical one with a settled common law meaning. As a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill."

[47] Those members of the court then went on to observe at 10 that a joint venture will often be a partnership, but the term of joint venture is apposite "to refer to a joint undertaking or activity carried out through a medium other than a partnership: such as a company, a trust, an agency or joint ownership". It is a matter of construing the terms of a written joint venture agreement to determine the intention of the parties as to whether they intended their relationship to be one of the recognised legal relationships that may be used for the purpose of a joint venture.

[48] The plaintiffs' submissions endeavoured to deal with the fact that many of the provisions of the JVA are directed at the general manager being the agent of the joint venturers by submitting that the JVA and the administration agreement provided for a framework for the joint venture that was not tied to one particular legal concept, but instead provides different legal relationships to be used for different purposes. The plaintiffs seek to construe the JVA as creating a trust in respect of the joint venture property held in the name of QNI on behalf of the joint venturers and agency with respect to QNI's ability to manage the affairs of the joint venture. The plaintiffs recognise that the words "on trust" are not used in the JVA in relation to the joint venture property held in the name of QNI, but rely on construing the JVA, having regard to its text, context and purpose, to reveal the parties' intention to create a trust of the joint venture property. In this regard, the plaintiffs rely on the approach to the analysis of a commercial document to reveal whether or not a trust was intended by the parties undertaken by Jackson J in *Sino Iron Pty Ltd v Palmer (No 3)* [2015] 2 Qd R 574. In particular, the plaintiffs rely on the statement at [86] where Jackson J expressed the view that "the failure to expressly provide that there is a trust is the occasion for ascertaining whether an intention to create a trust is to be inferred, not a reason, per se, to reject the inference".

[49] The High Court reviewed the essential requirements for an express trust in *Korda v Australian Executor Trustee (SA) Limited* (2015) 255 CLR 62. That case was concerned with documents that set up a pine plantation investment scheme where funds had been raised from investors called covenantholders. The respondent was the trustee for the covenantholders under a trust deed between it and the company that carried on the business of managing the pine plantation investment scheme on land owned or leased by it (the manager). There was another deed, referred to as the tripartite deed between the respondent, the manager and the company that did the felling, milling and selling of the trees (the miller). Under the tripartite deed, the miller was to pay the balance of the proceeds of the sale of the timber (after deducting certain amounts) to the manager and the manager was then obliged to pay those proceeds (after deducting all expenses incurred by it) to the respondent for distribution amongst the covenantholders under the trust deed. The manager sold the land on which it had operated the plantations and the manager and

the miller sold the trees under a tree sale agreement for an amount that was payable to the miller. The respondent sought declarations that the proceeds of the tree and land sales were held by the manager and the miller subject to an express trust in favour of the covenantholders. All members of the court in *Korda* found the documents constituting the investment scheme, considered separately or together, did not indicate an intention that either the manager or the miller were to hold the timber and land sale proceeds on trust for the covenantholders.

[50] French CJ at [5] approved the observation in the 7th edition of *Jacobs' Law of Trusts in Australia* (with is now found in the 8th edition at paragraph 3-06):

> "The author of the trust has meant to create a trust, and has used language which explicitly or impliedly expresses that intention, either orally or in writing. The fact that a trust was intended may even be deduced from the conduct of the parties concerned but if there is any uncertainty as to intention, there will be no trust." (*footnote omitted*)

French CJ at [7] noted that there are "three certainties necessary to an express trust" which are certainty of intention, certainty of subject matter and certainty of object (ie. beneficiaries) and that in the case of a written text an express trust depends upon the construction of the written instrument.

[51] Gageler J observed at [109]:

> "… where parties to a contract have refrained from contractual use of the terminology of trust, an intention to create a trust will be imputed to them only if, and to the extent that, a trust is the legal mechanism which is appropriate to give legal effect to the relationship, between the parties or between a party and a third party, as established or acknowledged by the express or implied terms of the contract." (*footnote omitted*)

[52] In considering the textual considerations from the terms of the documents themselves, Keane J identified at [225] that a significant textual consideration was that no provision in any of the relevant documents required either the manager or the miller to create and maintain an account separate from its general funds to safeguard the timber proceeds from the vicissitudes of their business. Keane J found the approach to the construction of a funding agreement in *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270 of assistance in relation to the significance of the obligation to keep accounting records to determine an entitlement (at [227]) and the omission of the reference to the imposition of a trust amongst other detailed obligations (at [228]).

[53] In *Jessup*, the Queensland Housing Commission (QHC) had made grants to an association pursuant to a detailed funding agreement for the purposes of assisting eligible persons in obtaining advice and services for home maintenance and repairs. The issue was whether the association was trustee for QHC of the money standing to the credit of the nominated account into which the funds had been paid. The funds were received from QHC to pay the wages of the association's employees and other administrative expenses in carrying out the purposes for which the grants were made. The association also paid into the nominated account funds from another entity for a different granting program. It was held by McPherson JA (with whom Davies JA and Philippides J agreed) at [9] that the extensive

obligations in the funding agreement (some of which were characteristic of obligations imposed on trustees) "tell against rather than in favour of the existence of a trust", as if QHC had intended to create a trust, it could have said so, instead of descending to the detail it did in the agreement. It was held at [12] that, even though there was an obligation under the funding agreement to pay the funds into a nominated account, the fact there was not an obligation to keep the grant funds separate and not to mix them with money from other sources (which would be expected if there were a trust) was a strong indication that no trust was intended. It was also held at [12] that the requirement for an accounting system that identified the QHC funding was inconsistent with the funds being held on trust.

[54] Other cases such as *Jessup*, *Korda* and *Sino Iron* are useful for illustrating the process of construction of an agreement in order to discern whether the contracting parties intended to create a trust. Statements in those cases about the significance or otherwise of a particular obligation or the failure to refer to the term "trust" must be considered in the context of the particular case, including the relationship between the parties and the purpose and the terms of the relevant agreement. What is called for in the case of the JVA is to construe the entire document in the circumstances in which, and the purpose for which, the agreement was entered into.

[55] The JVA is a carefully drafted commercial document that was intended to regulate all aspects of the relationships between the joint venture companies and the managers. It is a telling, but not necessarily decisive, consideration that, as explained in *Jessup* at [8], in a lengthy and detailed agreement, there is no express reference whatsoever to the creation of a trust of the joint venture property with the general manager as the trustee and the joint venture companies as the beneficiaries. In fact, the express provision dealing with the responsibility of the general manager for the joint venture property in clause 5.2(a)(vii) requires the manager to be in charge of, and responsible for, the management and control of the joint venture property as agent for the joint venturers. The express provision in the JVA that deals with the relationship of parties is clause 13 and it is concerned with the relationship between the joint venturers. The joint venture is the undertaking of the joint venturers. They are the primary parties. It is noteworthy that clause 13 expressly states that "this Deed shall not be construed as constituting an association, corporation, trust, mining partnership or any other kind of partnership". The joint venturers were expressly avoiding the legal relationships specified in clause 13 that are commonly used to conduct a joint venture.

[56] Apart from regulating the relationship between the joint venturers, the JVA sets out the means by which the joint venturers as the primary parties propose to conduct their undertaking. The joint venturers have provided for managers to operate their business and manage the joint venture property for that purpose. Clause 13 of the JVA is inconsistent with the proposition that the JVA created a trust of the joint venture property where the legal title was vested in QNI of which the general manager was the trustee and the joint venturers were the beneficiaries. That is confirmed by appointment of the managers under clause 5.1 as managers and that under clause 5.2 the general manager is subject to the supervision of the joint venturers acting through the JVOC. The JVA does not contemplate that the general manager will be dealing with trust funds in managing the operations of the joint venture, but is responsible for disbursing the funds provided by the joint venturers in meeting the expenses of conducting the business of the joint venture. The nature of the role of the general manager as an agent of the joint venturers, rather than

as the trustee of a trust, is also confirmed by the express appointment under clause 5.2(c) of the JVA in respect of the purchase and shipping of nickel ore from overseas sources. In the context of the structure for operating the joint venture under the JVA, the prohibition on the general manager depositing any other moneys to the bank accounts into which the general manager pays the moneys received from or for the account of the joint venturers does not have the significance that the plaintiffs assert. That is because the general manager which is wholly owned by the joint venturers is prohibited otherwise from carrying on any other business or activity. In addition, clause 6.4(f) of the JVA facilitates the ascertainment of the funds belonging to each of the joint venturers in respect of the bank accounts operated by the general manager. The administration agreement is subsidiary to the JVA, but is consistent with no express trust being created under the JVA in respect of the joint venture property.

[57] Although not repeated in the closing submissions, the plaintiffs did plead in paragraph 31D(a)(viii) of the reply as a fact relevant to manifesting the intention to create an express trust that there is no term of the JVA that excluded a trust relationship existing between QNI as trustee and the joint venturers as beneficiaries, because the express provisions against creating a trust, including clauses 5.5(i), 12.1(a) and (c), 12.3 and 13, were not directed to that particular trust relationship. That approach misses the point that the purpose of construing the JVA is to ascertain if there was an intention to create an express trust. It is not established by listing provisions of the JVA and submitting that they do not preclude the ascertainment of an intention to create an express trust.

[58] It defies the clear language and purpose of the JVA and the structure and mode of operation of the joint venture under the JVA to strain to find that the JVA created the express trust of the joint venture property asserted by the plaintiffs. On the basis of the terms of the JVA, QNI was the general manager of the joint venture and its relationship with Resources and Metals and the conduct of the business of the refinery was a contractual relationship of agency. That is not to say the relationship did not have fiduciary aspects by virtue of the nature of the obligations imposed on QNI under the JVA as the agent of the joint venturers, but those fiduciary obligations do not alter the nature of the relationship created under the JVA from an agency to a trust relationship: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68, 96, 141.

[59] In carrying out its duties and responsibilities under the JVA, QNI contracted with third parties and incurred liabilities. The fact that QNI may have made the contract with a third party in its own name (as it was entitled to do under the JVA) may have affected the liability and rights of QNI under the contract to the third party, but could not alter the relationship between QNI and the joint venturers under the JVA as a result.

[60] The proposition that the liability and rights of QNI under a contract with a third party depended on the terms of the contract with the third party is illustrated by a decision that arose out of QNI's liquidation: *Queensland Nickel Pty Ltd (in liq) v Queensland Nickel Sales Pty Ltd* [2018] 3 Qd R 133. Glencore had entered into a contract with QNI, Metals and Resources for the purchase of nickel product from the refinery. After QN Sales replaced QNI as the general manager, Glencore paid the money into court that it owed for nickel product. The question was whether it should be paid to QNI or to QN Sales. The contract recited that QNI was the agent of Resources and Metals, but designated QNI as the seller of the nickel product. Bond J at [31] applied the principle that, even where a

contracting party is identified as having a role as agent of other contracting parties, the question of the rights and liabilities of the contracting parties between themselves is to be determined by the application of principles of construction to the relevant contract. That resulted in the conclusion at [47] that QNI had the legal right to recover from Glencore the amounts owing by it under the contract.

The basis on which QNI held the funds of the joint venture in its bank accounts

[61] Mr Wolfe was employed in various roles within the finance department of QNI for 26 years from 1989 until 11 March 2016. He had worked at the refinery since graduating with his Commerce degree in 1989 and held various accountant roles, before becoming senior management accountant, senior business analyst, group leader Business Analysis and Manager Finance. From July 2009 to March 2013, he was employed by QNI in various roles including Manager Finance and Finance Director. In these roles, he had oversight of payments and receipts, management of QN Group bank accounts and assisted with the preparation of audited financial statements of the QN Group. From March 2013 to 11 March 2016, Mr Wolfe was employed as the Chief Financial Officer of the QN Group. Both as Finance Director and Chief Financial Officer, Mr Wolfe had oversight of the corporate governance of the QN Group which included an average of 360,000 financial transactions per annum (or approximately 30,000 transactions per month).

[62] Apart from the relationship between QNI and each of Resources and Metals that is regulated by the terms of the JVA, it is necessary to have regard to how the joint venture operated. I have been greatly assisted by the evidence of Mr Daren Wolfe. Mr Wolfe is now a management consultant. He consults for entities controlled by Mr Palmer, but he also consults for other entities. The plaintiffs endeavoured to attack his credit during the cross-examination, but were unsuccessful in showing that his evidence generally should not be accepted. Notwithstanding Mr Wolfe's continuing relationship with Mr Palmer and that he had been an employee of QNI when Mr Palmer was its ultimate owner, his evidence was given in the context of his in-depth knowledge of the operations of the QN Group of companies comprising Resources, Metals, QNI and QN Sales (both before and after the QN Group was acquired by Mr Palmer) and his professional experience in accounting and finance and was consistent with the documents generated over many years in respect of the operations of the joint venture and the refinery.

[63] PricewaterhouseCoopers (PWC) were the tax accountants for the QN Group and Ernst & Young (EY) were the auditors from July 2009.

[64] Mr Wolfe explained the setup of the finance and accounting team based at the refinery as follows. Prior to January 2016, the finance department comprised 16.5 full time equivalent finance and accounting staff. QNI employed Mr Michael Fitzsimmons in the role of financial controller to facilitate preparation of the annual financial statements, including coordination of the audit process. In his role as CFO, Mr Wolfe would review the financial accounts of each company prior to their execution by the directors of the company and participated in audit review meetings with EY in relation to preparation and audit of accounts across the QN Group. QNI employed Mrs Alexandra Carlyle in the role of tax adviser to facilitate preparation of the annual income tax returns for Resources and Metals and managed all indirect taxation matters. Mrs Carlyle would liaise directly with PWC

and the Australian Taxation Office on tax matters and reported directly to Mr Wolfe in his role as CFO.

[65] Although Mr Wolfe was familiar with the mechanism under clause 6.4 of the JVA for QNI to make calls on the joint venturers, he was able to say (at paragraph 22 of exhibit QNM.002.018.0001/exhibit 59) that he was not aware of any calls being made under the JVA by QNI during the Palmer controlled period for funds from Resources or Metals. (That was confirmed by the SPL in paragraph 64 of his third affidavit (exhibit SUP.015.006.5679) who reviewed the hard copy books of QNI and did not identify any call notices issued by QNI to the joint venture companies before it entered administration.) Mr Wolfe described the practice during that period at paragraph 24 of his same affidavit, as QNI receiving the proceeds of sale of Products for and on behalf of the joint venture partners. Mr Wolfe in paragraph 20 of his affidavit (exhibit 63) pointed out that during the period from 1 August 2009 until 18 January 2016 more than 99 per cent of funds in the bank accounts of QNI were derived from the sale of the Joint Venture Products, with the remaining funds derived from receipts for bank interest, rent, disposal of surplus joint venture equipment and sale of by-products generated through joint venture operations.

[66] It was common ground that during the Palmer controlled period, QNI sold the products from the refinery and deposited the proceeds into its bank accounts, rather than each of Resources and Metals being responsible for the sale of its respective share of the products, as was anticipated by the JVA. That explains why QNI did not need to make calls on the joint venturers, as the funds from the sale of the products deposited to the bank accounts were available to QNI in meeting the expenses of the joint venture. Funds from the sale of Products fall within the description in clause 6.4(f) of the JVA of other moneys received from or on account of the joint venturers which were able to be deposited by QNI in the bank accounts it operated for the joint venture.

[67] Mr Wolfe accepted that the employees, including him, were employed by QNI which made QNI liable to pay the employees' salary and entitlements, but he explained (at Transcript 20-46) that from a financial accounting perspective all the liabilities of the joint venture rested with the joint venture partners.

[68] Mr Wolfe explained (at paragraph 14 of exhibit 36) that SAP was the enterprise system where transactions of the QN Group were recorded, that supported the preparation of monthly management reports for the QN Group and the audit of accounts. Ms Packer who is a chartered accountant employed by FTI Consulting as a managing director and who works with the GPLs became familiar with the books and records of QNI relating to the refinery during the administration and then liquidation of QNI. Although Ms Packer's affidavit (exhibit SUP.015.011.0001) referred to QNI using the SAP system as its electronic financial record-keeping system, she conceded that the 5710 company code used in the SAP system referred to the QN Group and the company code was in the name of QNI, because it owned the SAP licence (at Transcript 8-21). This was confirmed by exhibit QNM.007.001.0002 which was a document used to train finance staff at QNI that showed that the 5710 code was "Queensland Nickel P/ L (main entity - for refinery operations) For entries shared exactly 80/20 between the JV owners". Ms Packer agreed (at Transcript 8-21) that 5710QNPL was the profit centre in the SAP system for all transactions of the refinery. It is consistent with QNI's obligations under clause 5.3(h) of the JVA that it maintained books, accounts and records relating to the operations and

business of the joint venture and the joint venture property. The recording of the entries for the profit centre 5710QNPL is therefore not evidence that an asset or liability was that of QNI, rather than being an asset or liability of the joint venturers.

[69] Mr Wolfe explained (at Transcript 20-44) that the month end accounting process included a specific task called profit centre balancing that was one of the steps undertaken in the monthly account preparation process to ensure that reports for each legal entity were correct. There was a procedure document for profit centre balancing after other reports had been run (exhibit 37). The instructions showed what adjustments had to be made, so that a transaction was attributed to the correct profit centre and for the correct amount. There was a profit centre for Resources that had the code "5710QNIR" and a profit centre for Metals with the code "5710QNIM". There was an instruction for what to do "If 5710QNIR has purchased something that was unique to it and not to be shared 80/20 with 5710QNIM" and an example was given as to the type of entries that needed to be raised as a result. There was also the possibility of use being made of a blank profit centre or a default profit centre that was given the code 5999ZZZZ (at Transcript 8-27).

[70] The plaintiffs in their written closing submissions on the topic "QNI was recorded in the SAP System as the Party with the Entitlement to Recover" endeavour to make a number of points by reference to records in the SAP system to discredit Mr Wolfe's evidence on how the SAP System recorded transactions and the process of the monthly reconciliation and profit centre balancing. The plaintiffs did not cross-examine Mr Wolfe on some of the records relied on in these submissions, namely the instructions for reconciliation to produce the trial balance for the 2012 financial year and the instructions for the loan receivable balances with the external partner of the Styx Basin Joint Venture. The submissions are therefore unhelpful without the substance of them being tested by being put to Mr Wolfe and, in any case, do not attempt to address Mr Wolfe's actual evidence as to what QNPL stood for in the SAP system and the process of monthly reconciliations and profit centre balancing.

[71] Mr Wolfe was cross-examined (at Transcript 21-38 and 21-39) on why QNPL was used for convenience in the SAP system instead of Resources and Metals. Mr Wolfe responded that there was a limitation in the SAP system as to the number of characters allowed in a general ledger account description and so for convenience QNPL was used. When Mr Wolfe was then asked was he saying that there was not space to write QNR and QNM instead of QNPL, he responded:

> "I'm suggesting that to be properly correct, you'd therefore have to [write] QN R80 per cent, QN M20 per cent. QNPL, in the way that the accounting team treated those entries, was split 80 per cent/20 per cent to the joint venture partners. That's the understanding."

[72] Without further testing that proposition, the plaintiffs' closing submissions submit that Mr Wolfe was "clearly mistaken" in saying the loan account could not correctly describe Resources and Metals, as if "QNPL" had been replaced with "QNR-80% & QNM-20%", the full loan account name for the loan with Mineralogy would have had 43 characters and there were other accounts in the SAP system that had up to 55 characters.

[73] First, if the plaintiffs wished to make such a submission by reference to the numbers of characters used in naming accounts in the SAP system, Mr Wolfe should have been cross-examined about it. Second, the submission is made on the basis that the plaintiffs interpreted Mr Wolfe's answer as relating only to the length of the account name for the loan with Mineralogy. It is not apparent that Mr Wolfe was giving his answer on that limited basis, when there were many loan accounts that would have been affected by substituting a reference to both Resources and Metals and their respective interests for QNPL. The plaintiffs needed to explore this topic further with Mr Wolfe, before they could submit that his evidence was "clearly mistaken".

[74] Mr Wolfe exhibited to his affidavit affirmed on 21 August 2017 (exhibit QNM.002.009.0001/exhibit 58) the audited accounts for each of Resources and Metals for the financial years ended 2011 to 2015 and the consolidated accounts for the QN Group for the financial years ended 2011 to 2015. Mr Wolfe also at paragraph 24 of that affidavit exhibited a table as exhibit DW-03 (exhibit QNM.002.009.0594) that analysed the consolidated accounts and showed that the beneficial ownership of all assets of the joint venture was disclosed in the accounts of Metals and Resources and that QNI had no net assets.

[75] As Metals and Resources were private companies and the directors were of the opinion that there were unlikely to be users who existed who were unable to command the preparation of reports to satisfy their information needs, the annual financial reports prepared by PWC in the relevant years were Special Purpose Financial Reports for distribution to the members of the companies. A statement to that effect is included in each of the Special Purpose Financial Reports in paragraph (b) of note 1. See p .9486 of exhibit QNK.002.008.9477 as an example.

[76] At the end of each financial year and at other times during the year, Mr Wolfe and members of his team would confer with PWC and EY in respect of transactions and the accounting treatment for transactions. One topic for discussion was the forgiveness of loans between the companies under Mr Palmer's common ownership.

[77] At paragraphs 15 and 16 of exhibit 36, Mr Wolfe explained that in preparing the Special Purpose Financial Reports (for Resources and Metals), a number of different reports were generated in SAP and exported to Microsoft Excel to analyse the underlying transactional data prior to consolidation and incorporation in the annual financial statements. That meant the annual financial statements were prepared outside the SAP system, using templates created in Microsoft Word and later Microsoft Excel.

[78] Mr Sorensen who is an accountant and at the relevant time was a tax partner at PWC had been the principal tax adviser for Mr Palmer since 2007 and advised Mr Palmer about the acquisition of the QN group. By letter dated 9 August 2017 (exhibit QNM.002.008.0076), Mr Sorensen summarised for Mr Palmer the tax implications relating to deeds of debt forgiveness entered into by Resources and Metals and the associated section 245-90 agreements under the *Income Tax Assessment Act* 1997 (Cth) (ITAA). Mr Sorensen was subpoenaed to give evidence in this proceeding by the corporate defendants. He confirmed (at Transcript 18-18) that the advice he gave in the letter dated 9 August 2017 was correct at the time it was given and remained correct.

[79] Mr Sorensen explained in that letter the provisions of the ITAA that made it lawful for Resources and Metals to have been a party to various deeds of debt forgiveness during the years ended 30 June 2013 and 30 June 2015 for which section 245-90 agreements had been completed. For the years ended 30 June 2010 to 30 June 2015 inclusive, both Resources and Metals were in a non-taxable position and had substantial carried forward losses, but had a nil franking account balance for those years. All the deeds of debt forgiveness entered into by Resources and Metals were with entities under common ownership throughout the period from the time the respective debt was incurred until it was forgiven. Mr Sorensen explained that companies under common ownership may enter into an agreement under which the commonly owned creditor company may forgo an entitlement it would otherwise have to a capital loss, as a result of forgiving the debt or a deduction in the forgiveness year for a bad debt. The creditor's capital loss or deduction is reduced by the amount forgone and a corresponding amount is deducted from the debtor company's net forgiven amount. The tax impact of the commercial debt forgiveness between the commonly owned companies is disregarded. In the letter, Mr Sorensen did a calculation of the gross dividends required to be paid by Resources and Metals to provide funds to the other Palmer controlled companies equivalent to the aggregate net forgiven amount or to provide for on payment from those companies as dividends to Mr Palmer as the sole shareholder. The equivalent amount of dividends would have required a minimum grossing up of 30 per cent of the amount of the debt forgiven.

[80] Mr Sorensen's evidence in chief (at Transcript 18-13 to 18-18) can otherwise be summarised as follows. All the assets were held by the joint venturers Resources and Metals. Mr Sorensen had also acted for the QN Group from around 1995 up to 2001 and the position had been the same that all assets were treated as being owned by the joint venturers. In the period 2010 to 2015, all income received by the joint venture was accounted for as being the income of Resources (as to 80 per cent) and Metals (as to 20 per cent). No tax returns were filed in that period by QNI, because it was the joint venture operator, was acting merely as the nominee or agent of the joint venture and did not derive any assessable income. That was also consistent with what occurred in the previous period for which Mr Sorensen had acted for the QN Group. As Resources and Metals were generating profits, loans that had been made throughout the year by Metals and Resources to other areas of the Palmer group would be the subject of deeds of forgiveness entered into by Metals and Resources. That was treated as a means for the profits to be distributed to other Palmer entities. A section 245-90 agreement would be entered into by each of Resources and Metals with the relevant Palmer company which had the effect that the debt forgiveness between commonly owned companies could be documented in the deed of forgiveness and ignored for tax purposes. Each section 245-90 agreement was in common form and was a notice required by taxation law that had to be completed by the time the tax return was due to be lodged. An example is exhibit QNM.005.001.0743. That agreement was signed by Mr Palmer as the public officer of Resources and the public officer of Mineralogy, dated 14 April 2014 and is headed "Section 245-90 Agreement between companies under common ownership for creditor to forgo capital loss". The operative part of the agreement provides:

> "QNI Resources Pty Ltd and Mineralogy Pty Ltd, being under common ownership throughout the period from the time that the relevant debts were incurred until the time that the debts were forgiven, agree that QNI Resources Pty Ltd will forgo so much of the capital loss under Division 104 that would have arisen for the 2013 year of income in respect of the

> forgiveness of the debts due by Mineralogy Pty Ltd to QNI Resources Pty Ltd and which does not exceed the provisional net forgiven amounts and as stated below:
>
> Amount of capital loss forgone: $10,162,497
> $38,400,000
> $48,562,497"

[81] Mr Sorensen explained that the forgiveness of debts was not shown in the tax returns filed on behalf of Metals and Resources as the debt forgiveness was credited directly to an equity account for each company called the reorganisation reserve. There was no requirement to make any adjustment in the tax return for any debt forgiveness amount, because the debt forgiveness was not reflected in the profit and loss of Metals or Resources. The section 245-90 agreements were retained with the tax returns. Mr Sorensen identified the reorganisation reserve at note 24 of the Special Purpose Finance Report for the year ended 30 June 2015 for Resources (exhibit QNK.002.008.9477).

[82] During cross-examination, Mr Sorensen confirmed (at Transcript 18-21) that where the section 245-90 agreement was entered into, the debt forgiveness was dollar for dollar which meant that each dollar that was received under the loan could be effectively kept, whereas if a dividend was paid, it would have to be grossed up by a minimum of 30 per cent and potentially 49 per cent to cover all income tax liabilities, because Resources and Metals could not pay any franked dividends. Mr Sorensen explained (at Transcript 18-22) that when the Palmer interests acquired Resources and Metals, those companies had an existing cost base for the assets that advantaged them and, further, it was sensible for the owner of a private company group for loans to be made, rather than dividends paid, and doing so was within the law.

[83] Mr Sorensen was shown the loan agreement dated 29 June 2011 between QNI and Mineralogy (exhibit QNK.014.001.0223) whereby QNI as lender promised to provide a loan of up to A$10m to Mineralogy as the borrower and said that he had not seen that document before (at Transcript 18-26). That would only be relevant, if it were an operative loan agreement.

[84] Mr Sorensen was cross-examined on the manner in which he and his team provided tax advice to the Palmer controlled companies. He was asked to look at one document on QN Group structural changes (exhibit QNK.013.022.1479) that appeared to have been prepared by the QN Group that included comments in respect of issues raised by PWC (exhibit QNK.013.022.1478). It was not a document that had been prepared by Mr Sorensen, but he accepted the proposition that was put to him (at Transcript 18-37) that PWC would receive instructions from the client, assume the instructions were correct and then provide advice based on those instructions. Mr Sorensen was then cross-examined on a bundle of documents that included deeds of debt forgiveness for the purpose of division 245 of the ITAA and settlement notices requiring completion of other transactions dated variously in July 2012 and a written sale agreement between Mr Palmer and QNI for a Cessna aircraft dated 6 July 2012 (exhibit QNM.001.002.6400) that was forwarded from one of Mr Sorensen's team on 28 October 2013 (exhibit QNM.001.002.6399) to Ms Carlyle on whether he would investigate whether each of the documents were actually executed on the date the document was dated. In respect of the sale of the Cessna, Mr Sorensen responded

(at Transcript 18-38) that he did query that with Mr Palmer who asserted that was correct and Mr Sorensen confirmed with the auditors they were happy with the transactions as documented.

[85] Ultimately the plaintiffs made a submission that the tax advice given by PWC did not assist Mineralogy in proving that it was Resources and Metals, rather than QNI which made loans to Mineralogy. On the basis of very limited cross-examination of Mr Sorensen, the submission was made that "it is obvious that PwC was not bringing a particularly critical eye to its instructions". Mr Sorensen had been the tax adviser of Mr Palmer since 2007 and had the long term knowledge of the conduct of the joint venture both before and after it was acquired by the Palmer interests. The treatment of the operation of the refinery for the purposes of income tax that was reflected in the Special Purpose Financial Reports for Resources and Metals reflected the ongoing conduct of the refinery pursuant to the JVA which made financial sense due to the advantageous cost base for the assets of Resources and Metals on the acquisition by the Palmer interests. The plaintiffs are making their submissions on the basis of starting from a position that transactions were "suspicious" and purporting to judge in this proceeding the conduct of PWC as tax advisers from that starting position. Mr Sorensen explained his role as a tax adviser in raising queries with his client and the plaintiffs have not shown by reference to any expert or other evidence that was other than the orthodox approach for a professional and experienced tax adviser. After all, the Special Purpose Financial Reports of Metals and Resources were audited and their tax returns were lodged accordingly and it was the responsibility of Metals and Resources for those documents to reflect their interests in, and the income from, the joint venture.

[86] The plaintiffs submit that it was fiction that QNI held no assets or liabilities in any financial year. They pointed to the employment of the staff by QNI and the legal obligations that were imposed on QNI as a result. Even though the transaction is impugned, the plaintiffs rely on the acquisition by QNI of the shares in China First in its own right and that it was subject to the liability claimed against it by China First of $135m which Mr Mensink included in his report as to the affairs of QNI (exhibit FTI.001.001.0027), but in which Mr Mensink also asserted QNI owned no assets. (This report as to the affairs of QNI was admitted as prima facie evidence of the matters stated in it.) The plaintiffs also submit that QNI asserted title to assets, granted security over assets that it held (such as the assets listed as owned by QNI recorded in the search of the Personal Property and Securities Register which is exhibit QNM.002.034.0060) and sued other parties to contracts in its own name. It should be noted, however, that with respect to liabilities that QNI incurred as the general manager under the JVA (including the employment of staff), it was entitled to recover those liabilities from the joint venturers as the principals and that it was entitled to hold assets that were joint venture property in its own name for convenience pursuant to clause 3.2 of the JVA.

[87] The plaintiffs submit that Mr Sorensen's evidence showed his understanding of the joint venture that he reflected in the annual accounts and tax returns prepared by him for Resources and Metals and that his understanding did not reflect how the joint venture operated after the acquisition of the QN group by the Palmer interests. The main difference in how the joint venture operated after July 2009 is that QNI sold the Products on behalf of the joint venturers and banked the proceeds to the accounts operated by QNI for the joint venture. That was not a difference that changed the fundamental nature of the

joint venture that the business and the joint venture property belonged to the joint venturers and not QNI which operated the business and managed the joint venture property for the benefit of the joint venturers. It was apparent from Mr Wolfe's evidence that his detailed and close working knowledge of the operation of the joint venture was consistent with the treatment that Mr Sorensen applied in the preparation of the Special Purpose Financial Reports for Resources and Metals. I reject the plaintiffs' submission that somehow Mr Sorensen's professional view of the operation of the joint venture was divorced from the reality of the operation.

[88] The corporate defendants accept that each bank account in QNI's name that was operated by QNI for the purpose of the joint venture meant that QNI owned the chose in action against the bank represented by the funds in the account, in order to be able to claim the funds against the bank. See *Croton v The Queen* (1967) 117 CLR 326, 330. The corporate defendants submit, however, that the funds were at all times the property of Metals and Resources pursuant to the JVA and the fact they were held for convenience in the bank account in the name of QNI, as agent of each of the joint venturers, did not convert the funds to the property of QNI, but created a bare trust for the benefit of Metals and Resources which ended when the funds were disbursed from the account at the direction of Metals and Resources or in accordance with the authority conferred on QNI under the JVA for dealing with the liabilities of the joint venture.

[89] The corporate defendants rely on what they assert was the interpretation of the expression "Joint Venture Property" by Gotterson JA (with whom Douglas and Applegarth JJ agreed) in *QNI Resources Pty Ltd v Queensland Nickel Pty Ltd (in liq)* [2017] QCA 167 at [9]:

> "The expression 'Joint Venture Property' is comprehensively defined in clause 1.1 of the JVA to include relevant real property and mining titles, relevant technology and know-how and 'all other rights, titles, interests, claims and benefits held or acquired from time to time, directly or indirectly, for the purposes of the Joint Venture'. Products produced at the nickel refinery were the property of the Joint Venturers according to their respective shares. They are not Joint Venture Property." (*footnote omitted*)

[90] That decision was an appeal against the primary judge's refusal to grant leave to proceed to Resources, Metals and Sales against QNI in administration and the GPLs in respect of their claim that the property held by the plaintiffs for the joint venture be delivered to Sales or the joint venture companies. It can be noted, however, that Gotterson JA was not interpreting the JVA to resolve an issue between the parties, but was merely summarising facts described in [7] of the judgment as uncontroversial by reference to the content of the relevant clauses of the JVA.

[91] The corporate defendants submit that it follows from the distinction in the JVA between "Joint Venture Property" and "estate and interests in Products produced" that the proceeds of the sale of the Products do not form Joint Venture Property, but such proceeds comprise part of the "estate and interests in Products produced".

[92] This submission does not sit well with the fact that the proceeds from the sale of products were deposited by QNI in its bank accounts and then used for the purpose of the joint venture. As the proceeds were paid into the bank accounts in lieu of the system of calls

provided for in clause 6.4(a) of the JVA, the entitlement to the funds in the bank account is determined by applying clause 6.4(f) of the JVA rather than reliance on the exclusion of Products from the definition of Joint Venture Property.

[93] The plaintiffs submit that the obligations on QNI in relation to the funds in its bank accounts precluded the characterisation that it was holding the funds on a bare trust. Gummow J interpreted the expression "bare trustee" in s 5(5) of the *Taxation (Unpaid Company Tax*) *Assessment Act* 1982 (Cth) (the Recoupment Act) in *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271. Gummow J recorded the history of the use of the expression "bare trustee" at 281 and then set out its modern usage:

> "Today the usually accepted meaning of 'bare' trust is a trust under which the trustee or trustees hold property without any interest therein, other than that existing by reason of the office and the legal title as trustee, and without any duty or further duty to perform, except to convey it upon demand to the beneficiary or beneficiaries or as directed by them, for example, on sale to a third party."

Gummow J at 182 construed "bare trustee" in the Recoupment Act as being used in the sense of the modern usage. That discussion was considered in *Corumo Holding Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370, 398 where the expression "bare trustee" for the purpose of a provision of the *Companies (New South Wales) Code* that disregarded the relevant interest in a share if it were held by a trustee who was a bare trustee was construed. It was held to mean no more than "a nominee or cypher, in a commonsense commercial view" that would apply to a person who, in a practical sense, had no say in the utilisation of the powers attaching to the shares. See also the commentary in paragraph 3-15 in *Jacobs' Law of Trusts in Australia*, 8th ed (2016).

[94] As between the bank and QNI, QNI was the legal owner of the funds in the relevant bank account, but on a bare trust for Resources and Metals to which the funds belonged. As between QNI and Resources and Metals, QNI had no role to perform as bare trustee, as any action it took in relation to the funds in the bank account was pursuant to the JVA – either to pay joint venture expenses or to disburse the funds to Resources and Metals, as directed by them. I therefore accept as accurate the corporate defendants' analysis that the bare trust was collapsed when QNI disbursed the funds from its bank accounts whether it was for the purpose of making payments on account of the joint venture or for distributing to Metals and Resources at their request their respective shares of the funds to which they were entitled.

Claim against Mineralogy

[95] The plaintiffs are now seeking to recover from Mineralogy a net amount of $102,884,346.26. This net sum comprises various payments made by QNI to Mineralogy totalling $35,285,474.44, amounts paid by QNI totalling $2,458,217.94 in professional legal fees and disbursements incurred by Mineralogy in litigation conducted by it, and payments totalling $79,983,837.52 made to Mr Palmer or third parties recorded in the books and records of QNI as debts owing by Mineralogy, less repayments made by Mineralogy that total $14,883,183.64. The corporate defendants do not dispute that these

payments were recorded in the account referred to as the Mineralogy Loan Account in the SAP system.

[96] The plaintiffs allege that by loan agreement dated 21 June 2011 between QNI and Mineralogy (exhibit QNK.014.001.0223), QNI promised to lend up to $10m to Mineralogy and Mineralogy promised to repay the loan plus any outstanding interest upon written demand by QNI. In the alternative, the plaintiffs allege that from 7 March 2011 onwards there was an agreement between Mineralogy and QNI that amounts paid to QNI at the direction of Mr Palmer and Mr Mensink and recorded in the Mineralogy loan account in QNI's SAP system would be recoverable as loan amounts. In the alternative, QNI seeks to recover some of the moneys as either moneys lent or moneys paid.

[97] The corporate defendants say that no funds were advanced by QNI under the June 2011 loan agreement or any alternative loan agreement alleged by the plaintiffs, as the loans were not made by QNI to Mineralogy, but from the funds of Metals and Resources and at their direction and rely on a number of written agreements that were entered into in respect of each financial year from the year ended 30 June 2012 to the year ended 30 June 2015 whereby Resources forgave Mineralogy loans made by Resources and whereby Metals forgave Mineralogy loans made by Metals.

[98] A critical issue to be resolved is whether the recording of a loan by QNI to Mineralogy in the SAP system reflected a transaction that accorded with that description or whether that was a convenient way of recording loans that were in fact made by Metals and Resources, rather than QNI, to Mineralogy. The plaintiffs' claims cannot succeed unless they show that it was QNI that lent or paid the money to Mineralogy and not Metals and Resources.

[99] Ms Packer set out at paragraph 21 of her affidavit (exhibit SUP.015.011.0001) the findings of the investigations of the GPLs that were reported to creditors in April 2016. They were as follows. From early 2011 onwards, there was a practice of QNI transferring money from bank accounts held by QNI either directly to Mineralogy or other parties or by QNI paying an expense or liability of Mineralogy or other parties and those amounts being credited to loan account ledgers in the SAP system. Interest accrued on the loan account as recorded in the SAP system on a monthly basis for each month during June 2011 to May 2013, but that was reversed for the Mineralogy loan account in full on 5 July 2013 and thereafter no further interest was recorded. There were also records of repayments made in respect of the loan account ledgers, where QNI received an amount of cash and the loan balance was credited and there were also small credit amounts from other sources relating to payments, such as refunds from suppliers. Sometime after 30 June in each year, an entry was created which purported to "forgive" the loan balance, by posting a credit journal entry to the Mineralogy loan account which adjusted the loan account balance. The claim made in part NA of the statement of claim summarised the net amount of the payments to or on behalf of Mineralogy or recorded as debts owing by Mineralogy.

[100] In the SAP system, the account number for Mineralogy was 5000038 and the general ledger account number for the loan to Mineralogy was 127600 (exhibit QNK.023.001.0591). Mr Fitzsimmons reported to Mr Wolfe by email on 25 February 2011 that he had created a new general ledger account for the Mineralogy loan account with the number 127600 "for urgent bills which we need to pay on behalf of Mineralogy

P/L which we will claim back on them in the future" (exhibit QNK.027.013.8372). The email then dealt with the forms that were required and the process of approval.

[101] Mr Wolfe stated at paragraph 25(b) of his affidavit affirmed on 20 April 2017 (exhibit QNM.002.029.0005):

> "The general ledger account 127600 labelled 'CARecv Loan-QNPL>Min' is a short form description for the balance sheet account classification Current Assets Loans Receivable from Mineralogy to QN Group. Accounting conventions and practice for the QN Group ensured that any such asset accounts were allocated to the JV partners, [Resources] and [Metals], in accordance with their ownership interests (80%/20% respectively)."

[102] At paragraphs 19 to 26 of his affidavit (exhibit 36), Mr Wolfe explained the process that he undertook to obtain from the SAP system for the financial years 2011 to 2015 the transactions for the identified related party loan accounts and the process that he underwent in order to eliminate transactions that collectively added to zero and then to relate the remaining data to the claims in the statement of claim. Mr Wolfe then analysed the related party loan transactions and produced the pivot table analysis that is set out at DW-53 to exhibit 36. He explained (at paragraph 27 of exhibit 36) that a pivot table is a feature of Excel and is a table of statistics that summarises more extensive data and (at paragraph 31 of exhibit 36) that the analysis had been undertaken "in 100% joint venture terms, i.e. at the QN Group level".

[103] In paragraphs 44 and following of exhibit 36, Mr Wolfe showed how the debt forgiveness in the audited financial statements for Resources and Metals for each of the relevant financial years can be reconciled with the related party receivables and payables in the same statements. The pivot table analysis undertaken by Mr Wolfe in relation to Mineralogy demonstrated that at 30 June 2015 there was alignment between the loan amounts entered in the SAP system and the annual financial accounts, as adjusted by the relevant loan forgiveness that occurred, and at 30 June 2015 the balance of the Mineralogy loan account in the SAP system was zero. Ms Packer was cross-examined on this analysis and did not dispute the conclusion that Mr Wolfe reached that the loan balance in the Mineralogy account was zero, as a result of how the transactions, including debt forgiveness, had been recorded in the annual financial statements (at Transcript 7-79), but asserted that was not reflected in the SAP system with a zero balance in the Mineralogy loan account at 30 June 2015 (at Transcript 8-15).

[104] Consistent with the primacy given by Ms Packer during the course of her cross-examination to the entries in the SAP system, the plaintiffs submitted that Mr Wolfe's pivot table analysis did not assist the defendants or the resolution of the issues in the proceeding, because the SAP system showed that the loan to Mineralogy was from QNI and those who were tasked with recording the transactions in the nature of the loans in the SAP system treated the loans as being between QNI and the respective related parties of Mr Palmer. Similarly, the plaintiffs also made a submission based on what they described as the "failure" on the part of the defendants to call any of the authors of the loan account entries in the SAP system and that should give rise to an inference that nothing they could have said would have assisted. The plaintiffs' submissions assume that an entry in the

SAP system characterised the transaction for all times, as between QNI and the other party to the transaction. That would be surprising, when 30,000 transactions were being processed each month. It is also an assumption that is unwarranted in the light of Mr Wolfe's evidence about reconciliation of entries in the SAP system at each month's end and the shorthand way that the company code 5710QNPL was used to refer to the interest of the joint venture companies split 80/20. The authors of the loan account entries were not necessary witnesses and no inference is justified as submitted by the plaintiffs.

[105] The plaintiffs sought to discredit Mr Wolfe, as a result of his different treatment of certain transactions in two affidavits. Mr Wolfe had affirmed an affidavit in Supreme Court proceeding BS3202 of 2017 on 20 April 2017 which was exhibited as DW-38 to his affidavit affirmed in this proceeding on 6 March 2019 (exhibit QNM.002.029.0001/exhibit 62). At paragraph 26 of the affidavit affirmed on 20 April 2017 Mr Wolfe was addressing what he described as omissions from a table of repayments made to QNI by Mineralogy in the statement of claim in that earlier proceeding. Three payments were identified as:

A$10m paid by Mineralogy on 4 October 2013
A$5m paid by Mineralogy on 28 October 2013
A$7.5m paid by Mineralogy on 3 December 2013

[106] Mr Wolfe exhibited to the affidavit affirmed on 20 April 2017 as DW-09 the Real Time Gross Settlement request forms authorising the transfer of funds from Mineralogy's bank account to QNI's bank account (exhibit QNM.002.029.0922).

[107] Mr Wolfe in his affidavit affirmed on 28 June 2019 (exhibit 36) dealt with the general ledger account 127640 in the SAP system that was named "CARecv Loan-QN & CFP" which he said at paragraph 68 reflected a loan balance payable to Mr Palmer, as at 30 June 2013, of $3,196. He then listed in paragraph 69 five payments totalling $33,855,101.76 made by Mr Palmer to QNI between 7 June 2013 and 3 December 2013 which included the three payments made on 4 and 28 October and 3 December 2013 that Mr Wolfe had previously attributed to Mineralogy.

[108] When this discrepancy between how Mr Wolfe dealt with those three payments in his 2019 affidavit and how he dealt with them in his 2017 affidavit was pointed out in cross-examination, Mr Wolfe accepted there was a discrepancy and explained (at Transcript 21-45) that he assisted Artemis Insolvency (of which Mr Dinoris was the principal) in providing information to them to prepare their report for this proceeding. As the material included in the 2019 affidavit included additional analysis, Mr Wolfe believed that it was Mr Palmer who should be given the credit for those three payments, rather than Mineralogy. Ms Packer at paragraph 29 of her affidavit (exhibit SUP.015.028.1013) had noted that the entry for those three payments were reversed within the books and records of QNI on 1 March 2014 with the payments then being recorded for the benefit of Mr Palmer which accorded with the view expressed by Mr Wolfe in his 2019 affidavit. When cross-examined as to why he had not corrected the discrepancy himself, Mr Wolfe explained that he was not aware that was required. Mr Wolfe is not a party to the proceeding. Even though he has provided assistance to the corporate defendants in the preparation for the trial of this proceeding, there was no obligation on Mr Wolfe to draw attention to the discrepancy in how he dealt with those three payments in the two affidavits. He was entitled to assume that the lawyers for the parties would see that for themselves, as the

plaintiffs' lawyers did. It is not a matter which, in my view, is adverse to Mr Wolfe's credit.

[109] The corporate defendants also rely on exhibit QNM.001.002.6691 which is the Special Purpose Financial Report for the year ended 30 June 2013 of Mineralogy as showing that the loan was between the joint venturers and Mineralogy as it recorded the following notes to the financial statements:

> "In July 2012, QNI Resources Pty Ltd and QNI Metals Pty Ltd (entities under the control of Professor Clive Palmer) forgave loans payable by the Company of $12,703,121."
>
> …
>
> "In June 2013, QNI Resources Pty Ltd, QNI Metals Pty Ltd and Palmer Leisure Australia Pty Ltd (entities under the control of Professor Clive Palmer) forgave loans payable by the Company of $59,607,292."

[110] The plaintiffs rely on a document executed on 30 October 2014 entitled "Acknowledgement of loan repayments" to which QNI, Mr Palmer and Mineralogy were parties (exhibit FTI.009.001.1534). It documented a round robin in respect of a payment of $20m and was signed by Mr Mensink on behalf of QNI and Mineralogy and Mr Palmer for himself. The acknowledgement provided:

> "It acknowledged that, on 30 June 2014, Queensland Nickel Pty Ltd repaid A$20,000,000 of the loan owing by it to Clive Frederick Palmer. It is acknowledged that prior to this repayment Queensland Nickel Pty Ltd owed Clive Frederick Palmer a loan of A$20,048,101.76, and after this repayment Queensland Nickel Pty Ltd owed Clive Frederick Palmer a loan of A$48,101.76 as at the end of 30 June 2014.
>
> It acknowledged that, on 30 June 2014, Clive Frederick Palmer directed Queensland Nickel Pty Ltd to make the above payment of A$20,000,000 to Mineralogy Pty Ltd on his behalf. It is acknowledged that this payment of A$20,000,000 was made on 30 June 2014 to Mineralogy Pty Ltd in partial repayment of the loan owing by Clive Frederick Palmer to Mineralogy Pty Ltd. It is acknowledged that prior to this repayment Clive Frederick Palmer owed Mineralogy Pty Ltd a loan of A$44,158,637.86, and after this repayment Clive Frederick Palmer owed Mineralogy Pty Ltd a loan of A$24,158,637.86.
>
> It acknowledged that, on 30 June 2014, Mineralogy Pty Ltd directed Queensland Nickel Pty Ltd to apply this payment of A$20,000,000 in partial repayment of the loan owing by Mineralogy Pty Ltd to Queensland Nickel Pty Ltd, and that this payment was so applied. It is acknowledged that prior to this repayment Mineralogy Pty Ltd owed Queensland Nickel Pty Ltd a loan of A$28,558,272.91, and after this repayment Mineralogy Pty Ltd owed Queensland Nickel Pty Ltd a loan of A$8,558,272.91 as at the end of 30 June 2014."

[111] The plaintiffs relied on this acknowledgement of loan repayments to indicate an acceptance by QNI and Mineralogy that the parties to a loan agreement were QNI and Mineralogy.

Mr Wolfe accepted (at Transcript 21-40) that the document purported to record an agreement between QNI, Mr Palmer and Mineralogy in that the last sentence referred to the general ledger account in the SAP system for the loan recorded as QNI to Mineralogy, but explained that the debt was owed to Resources and Metals, as QNI "was essentially the agent of Resources and Metals". The corporate defendants therefore submit that the acknowledgement was neutral, as it said nothing about the capacity in which QNI was a party to the transactions. This acknowledgement appears to relate to a letter of advice dated 30 October 2014 given by Mr Negus of PWC (who worked with Mr Sorensen) to Mineralogy (exhibit QNM.001.002.3732) about transactions that would reduce deemed dividends under Division 7A of the ITAA assessable to Mr Palmer in respect of loans for the year ended 30 June 2014. In fact, that letter did refer to the loan of $20,048,101.76 owed to Mr Palmer by QNI on behalf of Resources (80 per cent) and Metals (20 per cent) which is consistent with Mr Wolfe's evidence. Mr Sorensen was noted in that letter as a point of reference and was cross-examined on the letter (at Transcript 18-25), but not cross-examined on the acknowledgement of loan repayments. Particularly in the light of the content of the related letter of advice of 30 October 2014, I consider that the acknowledgment was concerned with Mr Palmer's position and not with addressing the issue of the capacity in which QNI was dealing with Mineralogy in respect of the loan of funds.

[112] The plaintiffs submit the objective circumstances of the payment of money by QNI to Mineralogy support the proposition that QNI was a party to the loan contract. Apart from relying on how the loan amounts were recorded in the SAP system as a loan by QNI to Mineralogy, the plaintiffs rely on the recording in the Mineralogy loan accounts of the same payment as a loan to Mineralogy from QNI (see exhibit QNK.020.001.0322 as an example). The plaintiffs emphasise there is no transactional document recording the making of loans by Resources and Minerals to Mineralogy.

[113] The corporate defendants' position is that, when the Special Purpose Financial Reports of Metals and Resources are considered with the SAP records and the subsequent treatment of the forgiveness of the loaned amounts in both the Special Purpose Financial Reports and the SAP records, the primary account material is probative of loans between Metals and Mineralogy and between Resources and Mineralogy.

[114] The plaintiffs at first made submissions on the basis of an incorrect assumption about what the Special Purpose Financial Reports for Resources recorded in relation to controlled entities. Submissions were made on the basis that QNI was a controlled entity of Resources and the assets and liabilities recorded under the heading "Company" and the heading "Consolidated" were the consolidated assets and liabilities held by Resources as well as QNI in respect of Resources' interest in the joint venture: see paragraphs 195 and 196 of the plaintiffs' closing submissions. The plaintiff then made submissions on the basis that, if QNI was not a controlled entity of Resources, the interest of Resources in 80 per cent of the joint venture was included in the "Company" column on the financial statements, whether or not the asset or liability was in the name of Resources or QNI.

[115] Using the Special Purpose Financial Report for the year ended 30 June 2015 for Resources (exhibit QNK.002.008.9477) as the example, note 1 explains what the report covers:

> "This financial report covers both QNI Resources Pty Ltd as an individual entity ("Company") and the consolidated entity comprising the Company and its controlled entities ("consolidated entity" or "Group"). The separate financial statements of QNI Resources Pty Ltd include its 80% interest in the Queensland Nickel Joint Venture and its 64% interest in the Styx Basin Joint Venture."

[116] Paragraph (b) of note 1 then explains the principles of consolidation, being that the consolidated financial statements incorporate the assets and liabilities of all subsidiaries controlled by Resources as at 30 June 2015 and refers to note 25 for details of the entities that form the Resources group. Note 25 then lists each of the controlled entities and the extent of the interest of Resources in each controlled entity. There are four companies listed which are each 100 per cent owned by Resources. They are QN South Africa Pty Ltd, Queensland Nickel Mining Pty Ltd, Palmer Aviation Pty Ltd and Asia Pacific Shipping Enterprises Pte Ltd. QNI was therefore not an entity that was treated as a subsidiary of Resources for the purpose of this report.

[117] The plaintiffs took some comfort from what they described as a concession made by Mr Wolfe (at Transcript 21-41) that in the 2015 Special Purpose Financial Report for Resources the reference to loans to related companies in the company column could reflect either a loan made from Resources or 80 per cent of a loan made by QNI. That evidence was given by Mr Wolfe in the context of his evidence that 80 per cent of the loan made by QNI was on behalf of Resources.

[118] What this Special Purpose Financial Report showed on its face consistent with Mr Wolfe's evidence and with Mr Sorensen's evidence is that the relevant loans to Mineralogy were made respectively by Resources and Metals and not by QNI.

[119] As Mr Sorensen's firm prepared the Special Purpose Financial Reports which were duly audited, I accept his evidence in respect of what those reports show which accords with the content of the report themselves.

[120] Chartered Accountant, Mr John Williams, was engaged by the SPL to prepare a report that identified the accounting policies adopted by the QN Group in the annual financial statements and to express an opinion on how the statements would be presented for QNI under four different scenarios. Mr Williams' report dated 10 April 2019 is exhibited to his affidavit (exhibit SUP.015.034.4393). Mr Sorensen was not cross-examined on the opinions expressed by Mr Williams. It was much more helpful hearing from the accountant responsible for the preparation of the QN Group's financial statements then receiving the conclusions of Mr Williams which were theoretical in the sense that they did not relate to the questions in issue between the plaintiffs and the relevant defendants in this proceeding. These observations are not intended to reflect adversely in any way on Mr Williams who did what he was instructed to do. The plaintiffs rely on Mr Williams' report as consistent with the assertion in their closing written submissions that the fact that loans were recorded as receivable from related parties in the Special Purpose Financial Reports for Metals says nothing about whether those loans were receivable by QNI, or Metals and Resources. That assertion is not borne out by Mr Williams' report which was directed at different questions, but the assertion is inconsistent with Mr Sorensen's evidence.

[121] Implicit in the plaintiffs' submissions is the assertion that Mineralogy believed it was dealing with QNI. It was, on a practical level, as the bank accounts for the joint venture were in QNI's name. It cannot be ignored that Mineralogy, Metals and Resources had the same ultimate owner of Mr Palmer. Even without Mr Palmer giving evidence in this proceeding, it is a reasonable inference to draw that Mineralogy knew that Metals and Resources were the owners of the joint venture property and that QNI was the operator of the joint venture business on their behalf. It is apparent from the description of the transactions that are subject to the plaintiffs' claims against Mineralogy that the funds paid to Mineralogy from QNI's accounts were not for the purpose of the joint venture business. It was a means of disbursing the funds of Metals and Resources to a company with the same ultimate owner which was done by way of loan, as the loan forgiveness provisions of the ITAA that applied to related companies enabled the profits of Metals and Resources to be distributed to Mineralogy in a tax effective way. The loan of funds to Mineralogy by Metals and Resources was a means of disbursement by QNI to Metals and Resources of their entitlement to the funds in the bank accounts operated by QNI for them and were disbursed by being paid to Mineralogy at their request.

[122] On the basis of Mr Wolfe's evidence and Mr Sorensen's evidence together with the Special Purpose Financial Reports for Resources and Metals for the years ended 30 June 2011 to 30 June 2015, the plaintiffs cannot succeed in their claims against Mineralogy. I am satisfied that loan account 127600 in the SAP system recorded the loan from the joint venture companies to Mineralogy that was managed by QNI and payments made by QNI from its bank accounts to, for or at the request of Mineralogy and recorded in that loan account were, in fact, disbursement of the funds of Resources and Metals and the funds lent by Resources (as to 80 per cent) and Metals (as to 20 per cent) to Mineralogy and not QNI. It follows the plaintiffs' claims against Mineralogy whether claimed as a debt, moneys lent or moneys paid must be dismissed.

The test for insolvency

[123] Section 95A(1) of the *Corporations Act* 2001 (Cth) (the Act) provides:

> "A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable."

[124] The classic statement of what amounts to insolvency is found in the judgment of Barwick CJ in *Sandell v Porter* (1966) 115 CLR 666 at 670-671:

> "Insolvency is expressed in s. 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time – relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency. Whether that state of his affairs has arrived is a

> question for the Court and not one as to which expert evidence may be given in terms though no doubt experts may speak as to the likelihood of any of the debtor's assets or capacities yielding sufficient time to meet the debts as they fall due."

[125] It should be noted that the authorities prior to the enactment of s 95A of the Act were concerned with a definition of insolvency that included the words "from his own moneys" and that is no longer part of the test. This has not had a major effect on the question of insolvency, as was explained by Giles JA (with whom Hodgson and McColl JJA agreed) in *Lewis v Doran* (2005) 54 ACSR 410 at [109]-[110]:

> "**[109]** Particularly when the limiting words are no longer part of the test, there is no compelling reason to exclude from consideration funds which can be gained from borrowings secured on assets of third parties, or even unsecured borrowings. If the company can borrow without security, it will have funds to pay its debts as they fall due and will be solvent, provided of course that the borrowing is on deferred payment terms or otherwise such that the lender itself is not a creditor whose debt can not be repaid as and when it becomes due and payable. It comes down to a question of fact, in which the key concept is *ability* to pay the company's debts as and when they become due and payable.
>
> **[110]** Even before the wording of s 95A, in *Re RHD Power Services Pty Ltd* (1991) 3 ACSR 261; 9 ACLC 27 McPherson SPJ was prepared to pay regard to ability to borrow without security. Kearney J in *Re Adnot Pty Ltd* (1982) 7 ACLR 212; 1 ACLC 307 took into account that the company 'instead of having to resort to some outside lender, is in the fortunate position of having its fellow member of the group of companies to which it belongs, available in effect as banker to provide funds required to meet any shortfall': at ACLR 217; ACLC 311; the shortfall was until completion and sale of a shopping centre. In *Re a Company* [1986] BCLC 261 Nourse J declined to find that a company was unable to pay its debts as they fell due although it was being 'propped up by loans made to it by associated companies and possibly by others': at 262; his Lordship noted at 263 that he had evidence from a director to the effect that there was no question of the loans being withdrawn, the loans not being repayable for some 18 months."

[126] Giles JA in *Lewis v Doran* at [103] also made observations about what debts should be taken into account when the issue of insolvency has to be determined:

> "Solvency or insolvency is a state on which directors and others act in current conduct, for example if the issue is trading while insolvent. Section 95A speaks of objective ability to pay debts as and when they become due and payable, but ability must be determined in the circumstances as they were known or ought to have been known at the relevant time, without intrusion of hindsight. There must of course be 'consideration ... given to the immediate future' (*Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1528; 14 ALR 51 at 54–5 per Griffith CJ), and how far into the future will depend on the circumstances including the nature of the company's business and, if it is known, of the future liabilities."

[127] The question of the "degree of assuredness" that is required of financial support from a third party to enable a company to pay its debts was considered in *Chan & Ors v First Strategic Development Corporation Limited (in liq) & Anor* [2015] QCA 28. Morrison JA (with whom Gotterson JA and Boddice J agreed) referred with approval to the observations of the primary judge set out at [42] and then stated in [43]:

> "They reflect the need, in cases where the financial support is from a source which cannot be compelled by legal arrangement, for there to be a degree of assuredness that the financial support will be forthcoming and at such a level that one could say the company was **able** to pay its debts as and when they fall due, rather than being **possibly able** to do so. Just as a conclusion that the relevant financial support does not have to be absolutely certain in order to be sufficient to meet the test in *Lewis v Doran*, *Scholz* and *International Cat*, equally the financial support does not have to be absolutely uncertain in order to be insufficient to qualify. Between the two extremes the factual circumstances of each case will provide a variety of points at which one might conclude that the financial support was of such a degree of commitment that it was likely to continue, and with the result that the company was able to pay its debts, and therefore that it has sufficient financial support to draw the conclusion of solvency."

[128] The New South Wales Court of Appeal in *Lewis v Doran* dismissed the appeal from the decision of Palmer J in *Lewis v Doran* (2004) 50 ACSR 175. Palmer J had observed at [106] in relation to the test of insolvency:

> "I think that I must approach the application of s 95A CA with two considerations in mind. First, the words of s 95A must be construed as they stand, without addition or subtraction. Second, the law both before and after the enactment of s 95A is unequivocally and emphatically clear that insolvency is, first and last, a question of fact: … to be ascertained from a consideration of the company's financial position taken as a whole. In considering the company's financial position as a whole, the Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable: *Southern Cross Interiors Pty Ltd (in liq) v DCT* (2001) 53 NSWLR 213 at 224 (citations of authority omitted); 188 ALR 114; 164 FLR 430; 39 ACSR 305 at 316."

[129] *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213 is another decision of Palmer J in which his Honour helpfully set out at [54] a series of propositions that were drawn from the authorities. Propositions (iii), (iv) and (v) are relevant:

> "(iii) in assessing whether a company's position as a whole reveals surmountable temporary illiquidity or insurmountable endemic illiquidity resulting in insolvency, it is proper to have regard to the commercial reality that, in normal circumstances, creditors will not always insist on payment strictly in accordance with their terms of trade but that does not result in the company thereby having a cash or

credit resource which can be taken into account in determining solvency …;

(iv) the commercial reality that creditors will normally allow some latitude in time for payment of their debts does not, in itself, warrant a conclusion that the debts are not payable at the times contractually stipulated and have become debts payable only upon demand …;

(v) in assessing solvency, the Court acts upon the basis that a contract debt is payable at the time stipulated for payment in the contract unless there is evidence, proving to the Court's satisfaction, that:

• there has been an express or implied agreement between the company and the creditor for an extension of the time stipulated for payment; or

• there is a course of conduct between the company and the creditor sufficient to give rise to an estoppel preventing the creditor from relying upon the stipulated time for payment; or

• there has been a well established and recognised course of conduct in the industry in which the company operates, or as between the company and its creditors as a body, whereby debts are payable at a time other than that stipulated in the creditors' terms of trade or are payable only on demand …;"

[130] Palmer J cited a number of authorities for proposition (iv) set out above in *Southern Cross Interiors*, including the decision of the Full Court of the Supreme Court of Western Australia in *Lee Kong v Pilkington (Australia) Ltd* (1997) 25 ACSR 103. Owen J (with whom Franklyn and Murray JJ agreed) held at 112 that, in the context of whether a company was trading whilst insolvent, whether or not a debt is due is to be determined by reference to the legally binding agreement between the parties and any reluctance by creditors to enforce legal rights was not relevant. That authority and others to similar effect were applied by Edelman J in *Hussain v CSR Building Products Ltd* (2016) 246 FCR 62 at [63]-[65].

[131] Palmer J had occasion in *Hall v Poolman* (2007) 65 ACSR 123 to consider what would accord with commercial reality as the delay creditors would be prepared to accept before payment of their debts, while the debtor company sold assets. Palmer J stated at [187]:

"An asset cannot be taken into account in assessing solvency at a particular time without reference to the time it would realistically take to effect realisation and produce cash. It is no indication of solvency — indeed, it is the opposite — to point to property as available to meet debts falling due next month when, even with the utmost expedition, that property cannot be turned into cash for 6 months. Realisable property can only be taken into account in assessing solvency 'if that property is in such a position as to title and otherwise that it could be realised in time to meet the indebtedness as the claims mature'*: Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1543; 14 ALR 51 at 80; see, for example, *Crema (Vic) Pty Ltd v Land Mark Property Developments (Vic) Pty Ltd* (2006) 58 ACSR 631 ; [2006] VSC

> 338 at [141]–[144] per Dodds-Streeton J and *Noxequin Pty Ltd v DCT* [2007] NSWSC 87 at [14] and [15] per Barrett J."

[132] Palmer J then stated at [267]:

> "Where a company has assets which, if realised, will pay outstanding debts and will enable debts incurred during the period of realisation to be paid as they fall due, the critical question for solvency is: how soon will the proceeds of realisation be available: see the authorities cited at [187] above. Bearing in mind the commercial reality that creditors will usually prefer to wait a reasonable time to have their debts paid in full rather than insist on putting the company into insolvency if it fails to pay strictly on time, I think it can be said, as a very broad general rule, that a director would be justified in 'expecting solvency' if an asset could be realised to pay accrued and future creditors in full within about 90 days."

QNI's activities between mid-September 2015 and 18 January 2016

[133] The following summary of QNI's activities is drawn largely from the documents relied on by the parties for the purpose of the proceeding supplemented by the evidence of witnesses who have knowledge of the relevant events, meetings or correspondence, including the affidavits and evidence of Ms Trenfield, Mr Park, Mr Wright, Mr Prescott, Mr Wolfe and Mr Harris. The corporate defendants did not rely on any affidavits sworn by either Mr Palmer or Mr Mensink in the proceeding for the purpose of the resolution of the issues that remained to be decided in the proceeding after the settlement with the SPL. Where I refer to actions taken or statements made by either Mr Palmer or Mr Mensink, I have relied either on the documentary evidence or the evidence of the witnesses who were able to give evidence of those actions or statements.

[134] The short term outlook on nickel price forecasts was revised downward for the period September 2015 to June 2016 by Wood Mackenzie in its report issued at the end of August 2015 (exhibit QRM.001.001.0373). Wood Mackenzie is an analytics business that produced a monthly report on the global nickel outlook. QNI took its key nickel price forecasts from the reports prepared by Wood Mackenzie which it cross checked with other public forecasts and then input the figure for the nickel price forecast into its spreadsheet model for cash flow projections. The key drivers for the profitability of the refinery were the nickel price and the exchange rate between the Australian dollar and the US dollar.

[135] In mid-September 2015, QNI made approaches or presentations to various financiers that were unsuccessful. These included Deutsche Bank, BNP Paribas, Credit Suisse, Societe Generale, Sumitomo Mitsui Banking Corporation and Bank of Tokyo-Mitsubishi. The presentation showed that the nickel price was then at a six year low and set out the Wood Mackenzie prediction for an upturn in world nickel prices that would not happen until May 2016. QNI was seeking an overdraft facility for nine months from October 2015 to sustain QNI through the low point in the nickel price cycle (exhibit FTI.007.001.0928). QNI made a powerpoint presentation to the Commonwealth Bank and approached Westpac and Suncorp for financial facilities around September 2015, but was unsuccessful in obtaining the requested facilities.

[136] QNI also made a powerpoint presentation to the NAB on 16 September 2015. QNI's operational bank accounts were then held with NAB. Mr Wolfe had suggested to the NAB that an option for a short term facility for $10m would be to use QNI's motor vehicle fleet as collateral, as it comprised 94 vehicles with a value in excess of $15m. QNI was advised by Mr MacGinley, the Director-Natural Resources of NAB, that the credit area of NAB would not favour providing overdraft facilities to fund losses at QNI until the nickel price recovered (exhibit FTI.002.013.8988). Mr MacGinley suggested that an option to get around the uncertainty of the nickel price would be for Mr Palmer to provide "some form of liquid collateral that can be used to clear the debt on the overdraft facility in the future if prices don't recover for any reason". From Ms Trenfield's familiarity with QNI's books and records, she conceded (at Transcript 7-24) (what otherwise reflects the documentary evidence) that the NAB would have been prepared to make a loan to QNI, if a Queensland Government guarantee were available.

[137] QNI approached the Queensland Government for assistance in early October 2015. Mr Palmer and Mr Wolfe together with the Queensland Government Under Treasurer met with executives from NAB on 8 October 2015. The NAB officers advised that it was the policy of NAB not to lend in the natural resources sector at the current time. The then Treasurer sent a letter dated 11 October 2015 to Mr Mensink, as the managing director of QNI (exhibit FTI.007.001.0393), noting that QNI would need to demonstrate the ability to continue to operate in light of the preliminary analysis of QNI's finances that showed QNI's average monthly income was around $45m and its monthly outgoings were around $49m.

[138] Mr Wright (who was then Aurizon's general manager for Queensland for Diversified Bulk Freight-Commercial and Marketing) by telephone and Mr Moutafis (who was then Aurizon's Vice President, Commercial and Marketing) in person met with Mr Palmer, Mr Mensink and Mr Wolfe on behalf of QNI on 12 October 2015 at QNI's request in connection with QNI's delay in making payments then due to Aurizon. Mr Moutafis was Mr Wright's direct manager and had overall responsibility for commercial and marketing of Aurizon's national freight operations (paragraph 55 of exhibit 55). Either Aurizon or its subsidiaries under the then existing agreements with QNI transported nickel ore by rail from the Port of Townsville to the refinery (the Import TSA) and from Glen Geddes to the refinery (the Domestic TSA) and, after the refining process, transported nickel and cobalt to the Port of Brisbane (the Metal TSA). There was also an agreement to transport thermal coal from the Collinsville coal mine to the refinery (the Coal TSA). QNI was the party to these agreements with Aurizon. It is not in contention that Aurizon was entitled to take action against QNI to recover payments due under these agreements.

[139] Mr Wright's recollection of the conversation at that meeting (set out at paragraphs 56 and 58 to 61 of exhibit 55) included the following. Mr Palmer said there was currently a poor nickel price that was anticipated to turn around in May 2016 and that QNI was not, and would not be, able to meet its payment obligations to Aurizon until May 2016. Mr Palmer advised that QNI had been unsuccessful in its attempts to obtain funding assistance from banks and he did not believe there would be any Government assistance forthcoming. Mr Palmer requested that Aurizon consider providing QNI with a $25m line of credit and there was a need to consider a payment plan with Aurizon. Mr Moutafis conveyed that Aurizon would not provide any funding, but may be able to consider options for a payment plan. Mr Moutafis also conveyed that the "debt couldn't increase". They discussed security

options and Mr Moutafis requested a formal letter from QNI providing details of proposed securities and a detailed payment plan. The overdue amount owing to Aurizon at the time of this meeting was about $10m (exhibit 17).

[140] It was ascertained from Mr Wright (at Transcript 11-30) that he did not know where Mr Moutafis was and I infer that by the time of the trial Mr Moutafis was no longer an employee of Aurizon. The corporate defendants sought an inference from the fact that Mr Moutafis did not attend to give evidence that there was no evidence that Mr Moutafis could give that would assist the plaintiffs' case. Mr Moutafis was an employee of Aurizon when negotiating in relation to QNI's debt and that relationship provides no basis for drawing any inference from the fact that Mr Moutafis was not called by the plaintiffs to give evidence in the proceeding.

[141] Mr Wolfe sent a memorandum to Mr McInerney of NAB on 15 October 2015 (exhibit FTI.007.001.2564), noting the outcome of the meeting on 8 October 2015 and describing the policy of NAB in not providing financial accommodation to QNI in the short term at commercial interest rates for $30m with QNI providing NAB with security over $1.9 billion worth of assets as "unconscionable". Another slide presentation prepared by QNI specifically for NAB dated 15 October 2015 (exhibit FTI.007.001.2589) was enclosed with this memorandum. It specifically sought an overdraft facility for $30m for 12 months from October 2015.

[142] Mr Schweizer who was the managing director, corporate finance, of FTI Consulting and Mr McIntosh also of FTI Consulting were involved in sourcing short term funding for the QN Group in October 2015. By email dated 16 October 2015, Mr Schweizer reported to Mr Wolfe on potential funding to the extent of $32.8m (exhibit QNK.006.008.4386). On 18 October 2015, Mr Wolfe instructed Mr Schweizer and Mr McIntosh to discontinue any further work on this potential QNI facility (exhibit FTI.002.002.0806).

[143] Mineralogy had brought a proceeding in the Supreme Court of Western Australia to recover royalties which it claimed to be owed pursuant to Mining Rights and Site Lease Agreements (MRSLAs) with Sino Iron Pty Ltd and Korean Steel Pty Ltd (of which CITIC Ltd was the parent company) (the CITIC parties). Mr Wolfe affirmed an affidavit on 23 October 2015 (exhibit QNK.013.047.9274) for the purpose of Mineralogy's application for a mandatory interlocutory injunction against the CITIC parties seeking payment of royalties. Mr Wolfe was cross-examined on this affidavit (at Transcript 20-74), although it is not apparent that it was actually filed in the Western Australian proceeding. It remained a statement of Mr Wolfe's views as at 23 October 2015. Mr Wolfe deposed in paragraph 86 of that affidavit to his belief that, in the absence of funding from Mineralogy, the refinery would close. In dealing with the impact of the CITIC parties failing to pay royalties, he explained at paragraph 91 of the affidavit that it had been the practice for Mineralogy to lend money to QNI for the purpose of working capital.

[144] On 29 October 2015 Mr Palmer and Mr Wolfe met with representatives of international mining and metallurgical company Eramet SA in Paris with a proposal for Eramet SA to acquire QNI (exhibit QRM.001.001.0484). On 6 November 2015 a representative of Eramet SA advised Mr Wolfe by email that Eramet SA had decided not to start any discussions in respect of the QNI proposal (exhibit QRM.001.001.0662).

[145] Some insight into Aurizon's strategy for dealing with QNI's request for Aurizon to agree to a payment plan is gained from Aurizon's internal memorandum dated 2 November 2015 (exhibit 17) that was prepared by Mr Wright and directed to Mr Moutafis and Mr Collins. Mr Collins was the Vice President of Finance and Group Treasurer. The proposed payment plan was endorsed by Mr Collins and Mr Moutafis (at Transcript 15-11). The memorandum included a summary of the presentation made by Mr Palmer at the meeting on 12 October 2015. It recorded that "Market Intel have provided insight into the forecast consensus price for nickel which is consistent with that outlined by Mr Palmer, and suggests a nickel price uplift in April 2016". The memorandum shows that although Aurizon may have been insistent on payment of its outstanding accounts, there were good reasons for Aurizon to be generous to QNI in respect of a payment plan, so that Aurizon could obtain an extension of its current agreements with QNI that were due to expire in the next 12 months. As Mr Wright acknowledged (at Transcript 11-43 and 11-49), QNI's business was "very important to Aurizon's bulk haulage division" and Aurizon wanted the refinery to continue to operate. Although the memorandum had provided for the payment plan to be proposed by Aurizon to QNI on 6 November 2015, that did not happen. The internal approvals to the proposal in exhibit 17 were not completed until 9 November 2015 (at Transcript 11-45). It was not until 20 November 2015 that Aurizon made a proposal to QNI.

[146] Mr Palmer provided QNI with US$1.86m on 13 November 2015 to assist in the operations of the refinery.

[147] Mr Wolfe affirmed another affidavit on 17 November 2015 in the Western Australian proceeding for the purpose of obtaining the mandatory interlocutory injunction against the CITIC parties which was filed and relied on in the proceeding. It has been tendered twice in this proceeding and is exhibit FTI.002.003.1085 and exhibit QNK.013.048.2015. I infer from the fact that it was referred to in [39] of the relevant judgment (exhibit 39) that it was relied on by Mineralogy in the proceeding in lieu of the earlier affidavit affirmed by Mr Wolfe on 23 October 2015. Mr Wolfe stated at paragraph 34 of the later affidavit that Mineralogy's source of income consisted almost exclusively of royalties payable pursuant to the MRSLAs. Amongst the reasons advanced by Mr Wolfe for Mineralogy's requirements for funds was that, due to the current nickel price being lower than QNI's cost of production, QNI could only sustain itself by external cash injections and that Mineralogy was not in a position to make any further cash injections (as it was asserted it had in the past), unless it received the royalty payments from the CITIC parties. Exhibit DBW12 to that affidavit was a graph that showed for the period from 7 December 2015 to 7 June 2016, QNI would experience a negative cash flow position. Mr Wolfe expressed the opinion in paragraph 76 of this affidavit that, in the absence of funding from Mineralogy, the refinery would need to close down. On the basis of the QNI cash flow analysis set out in exhibit DBW12 to the affidavit, Mr Wolfe then expressed the opinion in paragraph 80 of the affidavit that a cash injection of $28m (being $25m shortfall as set out in the QNI forecast plus an allowance of $3m for production outages) would have the effect that the figures would increase to the point that QNI would remain cash flow positive throughout the period of cash flow difficulty. Mr Wolfe set out at paragraphs 88 to 90 of the affidavit details of the lack of success he had encountered on behalf of QNI in approaching banks in September and October 2015 to borrow funds to provide working capital for QNI.

[148] Mr Mensink as the sole director and secretary of both QNI and Mineralogy affirmed an affidavit on 17 November 2015 in the same proceeding (exhibit QNK.013.048.2324) in which he confirmed the contents of Mr Wolfe's affidavit affirmed on 17 November 2015 as true and stated (referring to QNI as QN):

> "11. I have taken advice from QN executives in relation to the cash flow forecasts and based on those forecasts and the current position of QN, I have formed the view as a director of QN, that unless QN receives $28 million by 4th December 2015. I will terminate all employees of QN.
>
> 12. I have been fully apprised on the discussions between Daren Wolfe and the financiers and others referred to in his affidavit and have formed the view that all reasonable enquiries have been made and that no other funding options are available for QN at this time.
>
> 13. I have formed the opinion that if QN receives $28 million, it will be able to continue to trade profitability during the period of the cash shortfall which is forecast to occur and will be a sustainable business as it has been for the last 30 years based on the current outlook.
>
> 14. The figure of $28 million is comprised of $25 million being the cash shortfall observed in the Graph (at DBW-12 of the Wolfe Affidavit) and an allowance of $3million being the estimated cost of any potential production outage that may occurring during the relevant period where the shortfall is observed.
>
> 15. As a director of Mineralogy, if this honourable court orders Sino Iron Pty Ltd and Korean Steel Pty Ltd to pay to Mineralogy the sum of $28 million to be issued for QN, I will cause Mineralogy to apply the monies to advance a loan to QN of $28 million on an interest free basis and will not seek repayment of funds until QN is in a positon to make repayment without affecting ongoing operations."

[149] Mr Mensink affirmed a supplementary affidavit on 19 November 2015 that was filed in the Western Australian proceeding (exhibit QNK.013.048.2295) in which he stated that, in addition to what he had said in paragraph 11 of his affidavit affirmed on 17 November 2015, if QNI did not receive $28m by 4 December 2015, he would place QNI into administration. Even though Mr Mensink did not give evidence in this proceeding, the two affidavits he affirmed on 17 and 19 November 2015 for the purpose of the Western Australian proceeding were admitted into evidence for all purposes, including the truth of their contents.

[150] Aurizon sent a letter to QNI on 20 November 2015 setting out its position (exhibit QNK.013.055.5632). Despite the fact that Aurizon had been giving serious consideration to the request made of it at the meeting on 12 October 2015 at least for a payment plan, its response to that request was the letter of 20 November 2015. Aurizon was prepared to offer a degree of short term support by way of a more lenient payment plan than was currently agreed in the relevant agreements for the current overdue amounts of $12,575,948.74. The proposal was specified as being conditional upon the terms set out in section 3 of the letter being met by QNI in full, as well as a return to full payment compliance as per the agreements for all future invoices presented. The proposed payment

plan was for six instalments each of approximately $2.6m payable in each month between November 2015 and April 2016. The letter required the first payment to be paid in full on or before 27 November 2015 and acceptance of the proposed plan was required by 5pm on 25 November 2015. The proposed payment plan was also conditional on QNI agreeing to additional conditions that were in the nature of extensions of existing agreements, a new 10 year rail haulage agreement for coal transport, and exclusive dealings and haulage of all domestic nickel ore from the QNI mines operated at or near the Brolga Mine for three years from 22 January 2016. The proposed payment plan was not accepted by QNI by the date specified by Aurizon.

[151] By letter dated 26 November 2015 (exhibit QNK.011.028.6067), Mr Wolfe responded to Aurizon's letter dated 20 November 2015, advising that Mr Mensink was travelling overseas and that the earliest at which the letter could be brought to his attention was 30 November 2015. Mr Wolfe noted that the time period specified in the letter of 20 November 2015 was unrealistic and the best that Mr Wolfe could do was to prepare a paper for the board to consider on 1 December 2015. On 27 November 2015 Aurizon issued default notices to QNI for non-payment of its invoices. The notice in respect of the Import TSA was for a total amount of $7,829,166.29 of which $5,919,586.14 was then overdue and $1,909,580.15 was due on 13 December 2015 (exhibit QNK.010.002.5230). The notice in respect of the Domestic TSA (exhibit QNK.010.002.5228) was for a total amount of $4,094,865.51 of which $3,825,938.77 was then overdue and $268,926.74 was due on 10 December 2015. The default notices required immediate payment of the amounts outstanding which totalled $9,745,524.91 (which does not include the respective amounts for the payments due on 10 and 13 December 2015). Aurizon reserved its rights under the relevant agreements and drew attention to its rights to suspend transfer of product by notice, where failure to meet payment obligations persisted for 28 days from the date of the default notices. The default notices made it clear that the amount then outstanding of $9,745,524.91 was overdue and the fact that QNI had 28 days from the date of the default notices before Aurizon might exercise its right to suspend operations did not change the characterisation of the amounts as overdue payments.

[152] The judgment was delivered in *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 8]* [2015] WASC 473 on 7 December 2015 (exhibit 39) in which Mineralogy's application for the interlocutory injunction was refused. (That decision was overturned on appeal on 27 June 2016 and the application remitted for hearing before another judge: *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105. Mineralogy then succeeded in its application on the remitted hearing on 13 December 2016: *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 13]* [2016] WASC 403).

[153] Another meeting was convened on 8 December 2015 between representatives of Aurizon (Mr Moutafis, Mr Wright and Mr Prescott) and Mr Palmer, Mr Mensink and Mr Wolfe (on behalf of QNI). Mr Prescott held the position with Aurizon of "Manager Above Rail Finance". (The above rail business refers to the part of Aurizon's business that owns the rolling stock and moves product from origin to destination.) Although Mr Prescott in his affidavit (exhibit SUP.015.008.0001) had omitted to record that Mr Wright attended the meeting, I was satisfied otherwise by Mr Prescott's evidence that he had a reliable recollection of the discussion at the meeting. In fact, Mr Wright's evidence of the discussions at this meeting was consistent with Mr Prescott's recollection (at paragraphs 67 to 70 of exhibit 55). According to Mr Prescott, Mr Palmer did most of the talking at the

meeting on behalf of QNI and proposed a payment arrangement for the payment of Aurizon's outstanding invoices, so that there would be relief from payment obligations until May 2016. Mr Prescott recalled that Mr Moutafis on behalf of Aurizon made it clear in relation to securities being provided that they would have to have a value that could be readily ascertained, come from an entity external to QNI and be capable of being liquidated at a time of Aurizon's choosing. I accept Mr Prescott's view as to what was conveyed by the representatives of Aurizon in that discussion with the meeting concluding with Aurizon being prepared to consider a proposal from QNI involving security, but with no agreement by Aurizon at that stage to any plan for deferred payments.

[154] Mr Wolfe on behalf of QNI sent a letter dated 8 December 2015 to Mr Moutafis (exhibit QNK.013.055.5624) in which he acknowledged the meeting that had taken place on that date and confirmed the QNI was proposing to enter into a payment plan for bulk haulage of imported nickel ore, domestic nickel ore and coal which would result in the payments falling due on 16 May 2016 and attached a payment plan. The letter advised that QNI would pay interest in accordance with the existing agreements and also proposed to provide Aurizon with security in the form of the first charge over selected assets of QNI that were set out in another attachment in the letter. Mr Wolfe on behalf of QNI sent a further letter on 8 December 2015 to Mr Moutafis (exhibit QNK.013.055.5631) in which he set out the different stages of QNI's expected liability to Aurizon and confirmed that QNI would have a cash shortfall of up to $9m between 23 December 2015 and 19 January 2016. Mr Wolfe suggested if that amount were provided by Aurizon during that period, QNI's peak liability to Aurizon would still only be $24.5m which was less than the total amount of $29m that it would reach in early May 2016 and would reduce back to $20.4m before the end of January 2016. Mr Wolfe therefore advised that QNI would be agreeable, in those circumstances, to accept the additional contract extensions referred to in Aurizon's letter dated 20 November 2015. The letter then advised that, as at 30 June 2015, QNI's net assets were valued at $1.95 billion and proposed that QNI could provide security over land in central Queensland and coal assets valued at $60m that were separate from the refinery.

[155] Mr Mensink on behalf of QNI in the letter dated 9 December 2015 to Mr Moutafis (exhibit QNK.013.055.5628) then purported to set out the terms of an agreement that had been reached at the meeting on 8 December 2015. The terms included postponement of the dates for payment until 16 May 2016 of all current invoices and those issued for services carried out up to 31 March 2016, the extension of the agreements with Aurizon previously proposed by Aurizon, a loan by Aurizon of the amount of $9m on 22 December 2015 repayable 45 days from the date of the advance, and QNI to provide a first charge and mortgage over the Mamelon property, the Styx coal tenements and any other form of security agreed between the parties. It is apparent from Mr Wright's evidence that no such agreement had been reached at the meeting.

[156] Consistent with that view, Mr Moutafis responded by letter dated 10 December 2015 to QNI (exhibit QNK.013.055.5619) treating the letter from QNI as an offer and rejecting the offer on the basis that the security proposed was not adequate. The letter stated that in order to consider any deferral of payments "the proposed security must be provided by entities external to the QNPL group of companies, unencumbered and capable of liquidation by Aurizon at a time of its choosing and at least equivalent in value to the amounts overdue and proposed to be deferred by QNPL". The letter noted that Aurizon maintained its demand for the outstanding amounts totalling $15,801,840.03 with current

overdue amounts comprising $12,575,948.74. Apart from the amounts previously demanded in respect of the Import TSA and Domestic TSA, this letter also claimed outstanding amounts in respect of the Coal TSA and the Metal TSA.

[157] By letter dated 11 December 2015 (exhibit FTI.002.013.8974), Mr Mensink on behalf of QNI withdrew the offer to Aurizon contained in the letter of 9 December 2015 and noted there was no rational basis for Aurizon to disregard the $1.95 billion of unencumbered assets of QNI and asserted that to do so was "unconscionable conduct". He also foreshadowed that he would "have to take the appropriate action", but did not provide details.

[158] In early December 2015 QNI had granted KPMG access on behalf of Queensland Treasury to undertake an independent financial assessment into QNI. KPMG made the draft report dated 8 December 2015 (exhibit FTI.007.001.0363) available to Mr Wolfe to check for factual accuracy (exhibit FTI.007.001.2839). The report predicted that, based on QNI's assumptions on its costs and future world nickel prices, the business would return to profitability in the future. One of the cost savings forecast to take effect in the then current financial year was to switch from active maintenance at the refinery to reactive maintenance, but that carried with it the risk of production downtime resulting in the decreased production capacity. As a result of receiving the report, the Queensland Treasurer advised Mr Mensink by letter sent on 11 December 2015 (exhibit QNK.011.027.5246) that it was the Government's view that QNI and its shareholders should take direct responsibility for resolving QNI's financial issues and ensuring the future of the refinery. Mr Mensink on behalf of QNI replied to that letter on 13 December 2015 (exhibit FTI.001.005.0477) affirming the request of QNI that the Government provide a guarantee in the sum of $30m to enable QNI to obtain a bank loan for that amount.

[159] On 14 December 2015 QNI sent a presentation (exhibit QRM.001.001.0218) to Efic (which provided finance for Australian exporters) in which it noted:

> "Banks are not prepared to loan money to resources companies in Queensland or to consider significant asset base as security for short term overdraft facility
>
> Without short term support, the refinery will be forced to close."

[160] Email exchanges between Mr Moutafis and Mr Wolfe on 15 December 2015 showed that Mr Moutafis was keen to evaluate potential security that QNI may have available. By letter dated 15 December 2015 (exhibit QNK.013.055.5618), Mr Mensink on behalf of QNI indicated to Mr Moutafis that QNI was prepared to offer security detailed in that letter in return for Aurizon agreeing to QNI deferring payments for current outstanding amounts and future amounts yet to be invoiced until 30 May 2016. The security that was offered was a charge over the mining tenements for the Galilee Coal Project as set out in the Galilee Coal Project Overview (exhibit QNK.011.027.6130) provided to Aurizon earlier on 15 December 2015. The letter set out QNI's proposal for what Aurizon would be entitled to do, if QNI did not make payment by 30 May 2016. An extension of 21 days was also sought to the date for complying with the default notices dated 27 November 2015.

[161] Mr Moutafis responded to QNI's offer set out in the letter dated 15 December 2015 by a letter dated 16 December 2015 that was not sent until 17 December 2015 (exhibit QNK.011.027.6514). The response sought clarification of the security that was proposed in respect of the Galilee Coal Project. It specified that Aurizon would not accept security which would only entitle it to an equity stake in the Galilee Coal Project without rights to liquidate the underlying coal tenement in the event of default. The letter repeated the requirements previously stipulated by Aurizon (including that in the event of default the underlying asset can be readily liquidated) in relation to the nature of the security and that Aurizon would not consider an extension to any right available under the transportation agreements and any further relief to QNI, until security satisfactory to Aurizon was provided in respect to QNI's payment obligations.

[162] Mr Wolfe had sent to Mr Mensink by email on 17 December 2015 (exhibit QNK.011.027.6619) a draft of a security agreement between QNI and Waratah Coal (exhibit QNK.011.027.6620) that referred to the request by Aurizon that QNI arrange for a security to secure future payments by QNI to Aurizon and Waratah Coal had agreed to provide the tenement as security for the consideration of US$100m payable on or before 31 December 2016 or such time as agreed in writing between the parties, provided that if a termination event occurred, the consideration would become immediately due and payable by QNI to Waratah Coal. The definition of termination event had been left blank in the document.

[163] A further letter was sent by Mr Mensink on behalf of QNI on 17 December 2015 (exhibit QNK.013.055.5617) that asserted that Aurizon had by its conduct since 12 October acquiesced to QNI's proposed payment plan for payments up until 30 April 2016. The letter foreshadowed that QNI was now seeking to extend that proposal until 30 May 2016. Another letter sent by Mr Mensink on the same date (exhibit QNK.013.055.5616) advised Mr Moutafis that QNI had obtained consent of Waratah Coal to provide its main coal deposit contained on mining tenement EPC 1040 for the purpose of a charge in favour of Aurizon. It was asserted that its value was in excess of any likely obligation to Aurizon, it could be easily sold and was unencumbered. Mr Prescott conceded in cross-examination (at Transcript 15-24) that it was a good faith attempt by QNI to address the security issues raised by Mr Moutafis previously.

[164] On 17 December 2015 Mr Wolfe emailed a letter to the Commonwealth Minister for Industry, Innovation and Science (exhibit QNK.011.027.6900) seeking a loan guarantee to assist QNI's short term cash flow difficulties.

[165] On 18 December 2015 Mr Ferguson who was the Managing director, Operations, Refinery and Port of QNI sent an email (exhibit GMK.011.027.7430) to Mr Palmer and Mr Mensink with a list of the last 200 employees plus a further 50 employees should they "decide to remove people from the 200 list". The email noted that "Finance/Payroll" had not been included in compiling the calculations and leave accruals had been included based on the last pay period earlier that week.

[166] Aurizon's response by letter of 18 December 2015 (exhibit QNK.013.055.5614) to QNI's letters of 15 and 17 December 2015 was to reject the claim that Aurizon had acquiesced to QNI's proposed payment plan and to confirm that Aurizon had not agreed to a repayment plan with QNI and that the amounts due and owing as set out in the default notice dated 27

November 2015 remained due and owing, but to facilitate continuing discussions Aurizon was prepared to extend the time for compliance with the notice until 18 January 2016. The letter noted there would be no further extensions. The letter also advised that if the amounts due and owing were not paid on or before 18 January 2016, Aurizon reserved all its rights under the agreements, including the right to suspend transport of product. Aurizon also rejected the security offered to be provided by Waratah Coal on the basis that EPC 1040 was due to expire on 21 June 2016 and was subject to a caveat in favour of China First which would prevent the registration of any further interests over EPC 1040 without its consent. The letter confirmed that security must be proposed by entities external to the QN Group to allow Aurizon to consider further any deferral of payments.

[167] On an unspecified date in December 2015, Mr Harris on behalf of Waratah Coal commissioned BDO Corporate Finance (Qld) Ltd to calculate the value of the coal in EPC 1040 and EPC 1079, based on the implied resources and reserve multiples observed for the most recent comparable transactions (paragraph 21 of exhibit 52).

[168] On 21 December 2015 Mr Ferguson sent an email to Mr Mensink and Mr Wolfe (exhibit QNK.011.027.8183) with two options for reducing the numbers of employees at the refinery. He estimated the redundancy payout for each of the options and the impact on the future production and maintenance of the refinery.

[169] QNI informed Mr Moutafis by letter dated 22 December 2015 (exhibit QNK.013.055.5613) that Mr Mensink had already had discussions with Waratah Coal personnel who assured him that, when they returned to work at the end of the first week in January 2016, they would take immediate steps to remove China First's caveat and would address the expiry issue with the Department of Natural Resources and Mines, when staff were back at work around 11 January 2016. Mr Prescott accepted in cross-examination (at Transcript 15-25) that the steps Mr Mensink was taking in relation to security from Waratah Coal was "a good-faith attempt" to address Mr Moutafis' security concerns. The letter also acknowledged that Aurizon had extended the payment deadline until 18 January 2016 and advised that QNI accepted that Aurizon had made such extension.

[170] Mr Ferguson sent an email to Mr Palmer, Mr Mensink and Mr Wolfe on 23 December 2015 (exhibit QNK.011.027.8740) with further options for reducing employees. One proposal was for reduction of employees by 198 and the other was for a reduction of 244 employees. Mr Ferguson provided details for each scenario of the redundancy payout and the risks for the operation of the refinery. On 24 December 2015 Mr Ferguson emailed the same recipients (exhibit QNK.011.027.9075) with a proposal for removing 265 employees with a redundancy cost of approximately $15.9m.

[171] Aurizon gave QNI a notice of failure to pay dated 4 January 2016 in respect of the amounts overdue for payment to Aurizon under the Coal TSA as at 20 November 2015 (exhibit QNK.013.048.7827). The total amount demanded in that notice was $3,592,854.77. That amount for the Coal TSA had been included in Aurizon's letter of demand dated 10 December 2015.

[172] Ms Trenfield was advised by Mr Park on 4 January 2016 there was the potential for an administration appointment of the Queensland Nickel Group (at Transcript 6-63) and commenced background investigation into the operations (at Transcript 7-15).

[173] Mr Moutafis responded to QNI's letters dated 22 December 2015 and 4 January 2016 by letter dated 6 January 2016 (exhibit QNK.011.028.0371). Aurizon rejected the security suggested by Waratah Coal, despite the suggestion that the caveat lodged by China First would be removed and Waratah Coal would lodge a Mineral Development Licence. It was expressly stated that Aurizon was not interested in having the payment of the moneys currently due and owing to it being tied to the potential sale of assets to a third party. The offer was repeated that to allow Aurizon to consider further any deferral of payments, QNI "should focus on proposing unencumbered security by entities external to the QNPL group of companies". The letter specified that "Unencumbered means security not restricted by registrations or agreements that prevent dealing with the asset" and that acceptable security was preferably real property. QNI was invited to put a proposal that met Aurizon's criteria by no later than 12 January 2016 to allow Aurizon sufficient time to consider it before 18 January 2016. Aurizon confirmed that if the amounts that were due and owing pursuant to the 27 November 2015 default notices were not paid on or before 18 January 2016, Aurizon reserved all its rights under the agreements, including but not limited to the suspension of rail haulage in the week commencing 18 January 2016 and the right to take further action available to it without further reference to QNI.

[174] Mr Ferguson sent an email to Mr Wolfe on 6 January 2016 (exhibit QNK.013.048.8130) attaching a spreadsheet with the final numbers and names of employees on the reduction list. The email noted that would result in a monthly reduction in expenses of $1,938,302. Mr Ferguson also forwarded the email to Mr Mensink on the same date (exhibit QNK.011.028.0418).

[175] The renewal application for EPC 1040 was lodged by Waratah Coal on 6 January 2016.

[176] By letter dated 6 January 2016 (exhibit QNK.011.030.5023), Mr Mensink advised Mr Moutafis that EPC 1040 had no restrictions by any agreements and was fully unencumbered and that Waratah Coal was not part of the QN group.

[177] Mr Vickers sent to Mr Mensink on 8 January 2016 an engagement letter from which it appeared that PWC was engaged to provide QNI with advice during the week commencing 11 January 2016 on general restructuring matters, possible restructuring options and stakeholder management (which was particularised as meeting with Aurizon to negotiate a "standstill agreement") (exhibit PWC.001.001.0183).

[178] By letter dated 8 January 2016 (exhibit QNK.013.055.5602), Mr Mensink advised Mr Moutafis that PWC was looking at restructuring options for QNI and requested a meeting. By a further letter dated 8 January 2016 (exhibit QNK.013.055.5605), Mr Mensink confirmed that it remained QNI's position that Aurizon acquiesce to the payment plan, as asserted in QNI's letter dated 17 December 2015 and QNI reserved its rights.

[179] The letters dated 8 January 2016 from BDO Corporate Finance (Qld) Ltd (exhibits QNK.017.002.0914 and QNK.017.002.0920) were received by Waratah Coal on that date.

[180] On 8 January 2016 a meeting was held on the Gold Coast attended by Mr Palmer, Mr Mensink, Mr Wolfe, Mr Sorensen and Mr Vickers at which the various possibilities of an administrator, receiver, and liquidator for QNI were discussed. Mr Wolfe recorded in his diary notes (exhibit WOL.001.001.0420) for 8 January 2016 at 5pm (at p .0472) that there was to be a charge over the assets of Resources, Metals and QNI to secure payments payable to Waratah Coal by QNI in respect of an agreement (to be) dated 10 January 2016 and that he had to email details of the companies to Mr Ellis at Nyst Legal. Mr Wolfe explained in his evidence (at Transcript 21-31) that his understanding was that it would be the assets of Resources and Metals that were charged, as QNI had no assets and he was recording the concept that Mr Mensink and Mr Palmer were discussing at that time.

[181] Mr Wolfe had also made notes of a meeting on 9 January 2016 (at p .0473) that he observed that he was to prepare three sets of minutes for Resources, Metals and QNI that dealt with the resolution for each of those companies to enter into agreements with Waratah Coal. He recorded that he and Mr Mensink were present. He recorded that the Aurizon letters seeking security were tabled and that it was important to maintain the Aurizon contracts and that representatives of Waratah Coal agreed to make the China First Coal Project tenements available as security. At that stage the proposal was for QNI to pay $150m by 31 December 2017 to obtain security outside the QNI group to ensure cash flow for QNI. Mr Wolfe noted that Mr Mensink tabled the James King report and BDO letters supporting the value of the property and the project.

[182] There had also been another accounting firm, apart from FTI Consulting, engaged to undertake due diligence in relation to a possible administration of QNI. Mr Wolfe, Mr Palmer and Mr Mensink had a meeting with two representatives of Hall Chadwick on 9 January 2016.

[183] There was a meeting at Mr Mensink's home on 10 January 2016 attended by Mr Palmer, Mr Mensink, Mr Wolfe, Mr McIntosh, Mr Schweizer and Mr Park in relation to a potential administration of QNI. At that stage Mr Palmer proposed that administrators be appointed to QNI, Metals and Resources (at Transcript 8-59). On 10 January 2016 at 10.30am, Mr Wolfe emailed Mr Schweizer requesting him to email a draft director's resolution and notice of appointment in relation to the appointment of Mr McIntosh and Mr Park as administrators (exhibit QNI.006.004.9641).

[184] Mr Schweizer, Mr Dopking, Mr Bantock and Ms Trenfield commenced their due diligence investigations at the refinery on 11 January 2016 (paragraph 20 of exhibit 61).

[185] On 11 January 2016 QNI received a letter from the Commonwealth Minister for Industry, Innovation and Science (exhibit FTI.002.013.8357) declining to provide assistance.

[186] Mr Park joined the due diligence team in Townsville on 12 January 2016.

[187] A meeting was held on 12 January 2016 at PWC's office that was attended by Mr Prescott and Mr Moutafis with Mr Vickers at which they discussed possible security that might be acceptable to Aurizon.

[188] By email dated 12 January 2016 (exhibit QNK.011.028.1939), Mr Vickers reported to Mr Mensink and Mr Wolfe on the feedback that he had from potential debt providers and on his meeting with Aurizon held earlier on that day. That email was admitted as original evidence only and not for the truth of its contents. In relation to the meeting with Mr Moutafis and Mr Prescott, Mr Vickers' email reported that he advised them that PWC was trying to achieve a capital raising and that was "well received". He reported that Aurizon required the security outside of QNI that must be "an asset of worth and not be complicated to realise in any way" and the external security was sought in relation to the past debt and future debt. Mr Prescott's evidence of this meeting does not support the optimism expressed in Mr Vickers' email for Aurizon's view of a proposed capital raising. According to paragraph 19 of Mr Prescott's affidavit, the meeting was only about 20 minutes and "it involved Derrick Vickers trying to discuss possible security that might be acceptable to Aurizon, and nothing was expressed at the meeting which altered Aurizon's position". Despite what Mr Vickers' email reported of the meeting, Mr Prescott was not aware that Mr Vickers asserted he had located a number of financiers who may have been able to fund the operations of QNI (at Transcript 15-28). There is no suggestion in Mr Vickers' email that he had, in fact, disclosed to Mr Prescott and Mr Moutafis that he had found interested financiers for QNI. There is no reason not to accept Mr Prescott's recollection of the discussion with Mr Vickers at this meeting. There was no evidence of Mr Vickers' taking his inquiries of financiers any further after 12 January 2016. A cryptic email from Mr Wolfe to Mr Vickers on 14 January 2016 merely enquired whether there had been any feedback from the parties that he had contacted since Tuesday afternoon which could have been a reference to Aurizon or to the financiers (exhibit QNK.011.028.2666).

[189] By letter dated 13 January 2016 (exhibit QNK.013.055.5604), Aurizon gave QNI notice that it required payment by 18 January 2016 of the amounts due to it set out in the default notices dated 27 November 2015. If the amounts were not paid, Aurizon proposed notifying QNI on 19 January 2016 that it would suspend transfers of the product under the TSAs.

[190] The Waratah Coal and China First transactions were entered into on 13 January 2016. Mr Wolfe was present at the offices of Nyst Legal with Mr and Mrs Palmer and Mr Mensink, when the documents for the transactions were executed. It is apparent that when these transactions were entered into on 13 January 2016, no formal decision had been made by the sole director of QNI to appoint administrators. The documents were signed, however, at a time when QNI had engaged two firms of accountants to undertake due diligence in respect of the possible administration of QNI and five accountants from FTI Consulting had undertaken due diligence on 11 and 12 January 2016 and were due to report to QNI on 13 January 2016. I deal in detail with the nature of these transactions in the section of these reasons that is concerned with part U of the statement of claim. The appropriate inference to draw in the circumstances from the timing of the transactions in relation to QNI's activities since September 2015 is that they were entered into when QNI was on the verge of entering administration.

[191] A further meeting was held later on 13 January 2016 attended by Mr Palmer, Mr Mensink, Mr Wolfe, Mr McIntosh, Mr Schweizer and Mr Park. The representatives of FTI Consulting reported on their due diligence findings (at Transcript 8-60). Mr Palmer advised the representatives of FTI Consulting of the Waratah Coal and China First

transactions (at Transcript 8-60). Because concern was expressed by Mr Palmer that, if administrators were appointed to Metals and Resources, an event of default would be triggered under the agreement to supply gas to QNI, Mr Palmer conveyed his view that administrators should be appointed only to QNI (at Transcript 8-60 and 21-12). Mr Wolfe was cross-examined (at Transcript 21-6) on whether it was confirmed at that meeting that QNI would be placed into voluntary administration. Mr Wolfe responded that Mr McIntosh and Mr Park advised Mr Mensink and Mr Palmer that they thought administration was the best course of action and they believed they would be able to trade the operation through the voluntary administration. Mr Wolfe had formed the view following that meeting that the likelihood was that QNI would enter administration, but he could not speak for Mr Mensink who was the person in the position to make the decision about whether QNI should enter administration. Mr Wolfe was cross-examined extensively on an email exchange that he had with Mr McIntosh and Mr Schweizer on 15 January 2016 (exhibit QNI.006.004.9641) in which reference was made by Mr Wolfe that "we are prepared to continue on the original lines as discussed on Wednesday at the Gold Coast" which was referring to the meeting of 13 January 2016. Mr McIntosh's email in reply included the following statement:

> "When Clive P decided to keep the jv partners out of va to protect the gas contract and only put QN in, this added a large level of complexity to the project."

[192] That email was admitted into evidence as an original document and not for the truth of the assertions made by Mr McIntosh. Mr McIntosh was not called as a witness and the statement made by him in that email is not proof of the truth of its contents. There is no doubt there was an expectation on those who were at the meeting on 13 January 2016 that it was likely that QNI would enter administration, but the email chain of 15 January 2016 is not proof that the decision had been made by Mr Mensink as the sole director on 13 January 2016. Mr Wolfe recalled (at Transcript 21-13) that at the meeting on 13 January 2016 the discussion was that it was likely that QNI and Palmer Aviation Pty Ltd would enter voluntary administration and that Mr Palmer said words to the effect that QNI would go into voluntary administration. Mr Wolfe's comments (at Transcript 21-12) on the statement made by Mr McIntosh in the email of 15 January 2016 gives some context to his evidence about the meeting. Mr Wolfe said:

> "My recollection of the meeting was that Mr Palmer, as he often does in conversations, tended to lead the conversation. … But that doesn't suggest to me, necessarily, that Mr Palmer made the decision."

[193] On 14 January 2016, Mr Wolfe emailed the Waratah Coal and China First documents that were executed on 13 January 2016 to Mr Schweizer. The charges over the assets of QNI, Metals and Resources in favour of Waratah Coal and China First were recorded in the Personal Property and Securities Register on 14 January 2016. Mr Wolfe also sent an email on that date to Mr Moutafis (exhibit QNK.011.028.2685) in which he referred to the deadline of 18 January 2016 that Aurizon had imposed to reach resolution with QNI and inquired about the availability of Mr Moutafis and Mr Wright to meet on 18 January 2016.

[194] The GPLs required securities from Metals and Resources, if they were not to be put into administration, as they would not have otherwise have access to the assets of those

companies for the purpose of the administration, and also for the additional reason that Waratah Coal and China First had obtained charges over the assets of QNI.

[195] On 15 January 2016, QNI made 217 employees redundant and, as a result, became liable for a payment to those employees of $16.9m. According to Mr Wolfe (at Transcript 21-16), QNI did not have the cash to meet that liability when it was due the following week.

[196] The consents of Mr Park, Mr Dopking, Ms Trenfield and Mr Olde to act as administrators of QNI were received by Mr Mensink and Mr Wolfe by email on 16 January 2016.

[197] Because Resources and Metals were not going to enter voluntary administration and Mr Park was aware of the documents that comprised the China First and Waratah Coal transactions, the GPLs considered it prudent to obtain security and execute a priority deed with Waratah Coal, China First, Metals, Resources and QNI (paragraph 10 of exhibit SUP.015.009.0001). Mr Park explained further (at Transcript 8-61) that this was done to ensure security for the expenses, liabilities and costs of administering QNI for which the GPLs would be personally liable, in circumstances where there was a charge over all the assets of QNI.

[198] On 18 January 2016 the GPLs obtained a general security agreement from Metals and Resources) supported by a deed of guarantee and indemnity from Metals and Resources and executed a priority deed with Waratah Coal, China First, Metals, Resources and QNI (exhibit QNK.013.056.1750) which gave priority to the securities of the GPLs over the charge in favour of Waratah Coal and the China First charge. At the same time, two deeds of power of attorney and undertaking in favour of the GPLs to give the GPLs access to the assets of Metals and Resources were executed by Metals and Resources respectively (exhibits QNK.013.056.1517 and QNK.013.056.1529). The GPLs had not at that stage investigated, and did not accept, the validity of the Waratah Coal and China First charges (paragraph 12 of exhibit SUP.015.009.0001).

[199] Mr Mensink as the sole director of QNI appointed the GPLs pursuant to a resolution that he made on 18 January 2016 at 4.45am that he was of the opinion that QNI was insolvent or was likely to become insolvent at some future time and that an administrator should be appointed.

[200] Proofs of debt as at 3 March 2016 were lodged by Metals and Resources with the administrators respectively for $61,608,314 and $246,433,255 on the basis there was no approved budget for the 2016 financial year as required by the JVA and Metals and Resources were seeking reimbursement for the amount spent by QNI between 1 July 2015 and 3 March 2016.

[201] Mr Mensink completed a report as to affairs in respect of QNI dated 24 March 2016 (exhibit FTI.001.001.0027) that showed, as at 18 January 2016, that the amount owing for employee entitlements was $30,291,768, the amount owing to partly secured creditor Vale New Caledonia was $7,178,713 and the amount owing to unsecured creditors was $53,920,066. There was a priority debt shown as owed to China First pursuant to a share subscription agreement for $135m. There was also listed a disputed amount claimed by an unsecured creditor of $6,819,580. There were no assets listed as belonging to QNI. Mr

Mensink completed a questionnaire for the GPLs that is included in the same exhibit. The report was signed by Mr Mensink on 25 March 2016. In answer to the question "When did you first realise that the company might have to go into Administration?", Mr Mensink inserted the date 3 January 2016. In response to the next question "What caused you to realise this? What did you do as a result?", Mr Mensink answered "Forecast Cashflow Position" and "Commenced Discussions with FTI Consulting".

Expert evidence on whether QNI was insolvent on 13 January 2016

[202] Expert evidence was given by the SPL and Mr Gothard on behalf of the plaintiffs and by Ms McCallum on behalf of the corporate defendants. They are all chartered accountants and registered liquidators. Mr Gothard was the managing partner of Ferrier Hodgson in Sydney when the SPL joined that firm from PPB Advisory in July 2018. As managing partner, Mr Gothard was closely involved in the discussions with the SPL that resulted in his joining Ferrier Hodgson. Mr Gothard benefited personally therefore from the fees the SPL generated as SPL, after he joined Ferrier Hodgson.

[203] The SPL explained (at Transcript 23-17) that in the normal course he would have prepared an insolvency report, but there was such a vast amount of information to deal with, that it was decided after obtaining legal advice to have another accountant prepare the expert report. The SPL acknowledged that neither he nor Mr Gothard were independent of each other.

[204] Mr Gothard's report on the solvency of QNI was dated 5 November 2018 (exhibit SUP.015.005.4756). Mr Gothard had also prepared a further report dated 29 March 2019 (exhibit SUP.015.034.4311) (the reply report). In view of the narrowing of the issue in the proceeding to whether or not QNI was insolvent from and including 13 January 2016, Mr Gothard confirmed (at Transcript 22-7) that he held the opinion that QNI was insolvent as at 13 January 2016. Ms McCallum's report dated 24 September 2019 (exhibit 42) did not dissuade him from his opinion that QNI was insolvent as at that date.

[205] At paragraph 2.2.1 of the report, Mr Gothard expressed the opinion that QNI was insolvent on 9 October 2015 and at all times thereafter. This report had been prepared, when the date from which the plaintiffs alleged insolvency in the statement of claim was 9 October 2015. During cross-examination (at Transcript 22-21), Mr Gothard denied receiving a letter of instructions and resisted accepting that he had been advised of that date and asserted he had arrived at the date independently. That resulted in a call by the corporate defendants for production of the earlier drafts of Mr Gothard's report. When earlier drafts were produced, it appeared from the first draft (exhibit 44) that the instruction given to Mr Gothard in a letter of instructions was to prepare an expert report setting out, amongst other matters, whether QNI was insolvent as at 9 October 2015 and at all times thereafter. As it turned out, the affidavits of Ms Tatasciore (exhibits 65 and 66) established that a first draft of an insolvency report for the SPL had, in fact, been prepared by another partner of PPB Advisory, Mr Pascoe, and that no letter of instructions had been sent by the SPL's solicitors to either Mr Pascoe or Mr Gothard. Mr Pascoe could not continue as an expert, because of potential conflict of interest issues, when PPB Advisory merged with PWC in July 2018 and Mr Pascoe became a partner of PWC.

[206] The corporate defendants analysed the Pascoe draft and the first draft report prepared by Mr Gothard and established there was an identity of phrasing and words between about half of the first draft of the Gothard report and the Pascoe draft. When Mr Gothard was recalled and further cross-examined on the Pascoe draft, he conceded (at Transcript 25-5) that he would have seen the Pascoe draft before he prepared the first draft, but did not think he and his staff copied from the Pascoe report necessarily. He also had to concede (at Transcript 25-12) that his answer that he had arrived at the date of insolvency for QNI of 9 October 2015 independently was incorrect and that he had been asked to look at the date of 9 October 2015 for the purpose of his report.

[207] The corporate defendants submit that Mr Gothard was deliberately deceptive in the responses he originally provided in his sworn evidence that he had not been instructed to express an opinion in relation to insolvency as at 9 October 2015 and for that reason and his closeness to the SPL, his opinions should be approached with caution.

[208] It was apparent from Mr Gothard's evidence and his reports that the reports were prepared with the assistance of other staff of Ferrier Hodgson, but he expressly acknowledged at paragraph 1.4.2 that the conclusions expressed in the report were his own. It was not surprising assistance was required, given the magnitude of the task that was undertaken. In fact, Ms McCallum disclosed in her report the identity of the colleagues who assisted her and similarly at paragraph 8.4.1 stated that she had reviewed the work of her colleagues to the extent she considered necessary to form her opinions, but the opinions expressed in the report were her own. What was disappointing about Mr Gothard's evidence was that he was so insistent on his selection of the date of 9 October 2015 as the date that he had decided was the relevant date for the start of QNI's insolvency, when it was obviously a date to which his attention had been originally directed, whether by the SPL (because of its significance in the statement of claim) or as a result of taking over the Pascoe draft for the purpose of the preparation of his report. For whatever reason in connection with the preparation for giving evidence in the trial that Mr Gothard did not re-visit how he was originally instructed, I am not prepared to find that Mr Gothard was deliberately deceptive in the responses he provided in his sworn evidence, before the Pascoe draft was produced. Mr Gothard's experience as an insolvency practitioner for over 30 years is such that his opinions deserve serious consideration, notwithstanding the disappointing aspect that I have referred to in relation to this evidence. I accept the SPL's evidence that it is not unusual for an insolvency accountant to give an expert opinion on insolvency in relation to an administration with which that accountant is associated and that lack of independence of Mr Gothard by virtue of benefiting from the fees generated by the SPL does not necessarily undermine Mr Gothard's professional opinions.

[209] Mr Gothard set out at paragraph 4.3 of the report, the assumptions that he made for the purpose of the report, based on his review of the books and other documents to which he had access at the time of preparing the report. These included the following. No separate financial accounts were prepared for QNI, but the monthly reports, weekly cash flow data and audited accounts were prepared for the QN Group. All bank accounts relating to the joint venture were in the name of QNI and QNI was entitled to be indemnified by the joint venturers for the costs, liabilities and expenses of the joint venture. No calls were made on the joint venturers between 31 July 2009 and 18 January 2016. The QN Group maximised its cash flows from operations over the course of the financial year ending 30 June 2016 (FY16) which included minimising the amount of working capital deployed in the business

that was consistent with the weekly cash flow data which contained projections that anticipated a cash flow deficiency may arise and commentary from management outlining steps it undertook to maximise cash flow projections, including deferring payment to QNI's creditors beyond their due dates, running down inventory levels, reducing maintenance expenditure, ceasing non-core activities and deferring capital expenditure.

[210] Mr Gothard noted at paragraph 4.5.1 of the report that he assumed the financial information in the QN Group monthly reports, weekly cash flow data and audited accounts which he used to assess the solvency of QNI was materially accurate. Mr Gothard set out at paragraph 4.5.2 of the report that, based on the assumptions in paragraph 4.3 of the report, it was appropriate to regard information prepared for the QN Group as recording the accounting position of QNI.

[211] In section 5 of the report Mr Gothard undertook a profit and loss analysis. He summarised his key findings in paragraph 5.2.1 as:

> "(a) QNI incurred EBITDA losses from FY12 onwards totalling $306.9m;
>
> (b) Deteriorating nickel prices negatively impacted QNI's profitability;
>
> (c) QNI's cost of production exceeded the realised nickel price from February 2015 onwards;
>
> (d) In HY16, actual monthly trading results were consistently below forecast and $106.0m below budget; and
>
> (e) As at 31 December 2015, QNI was forecasting total FY16 EBITDA losses to be $59.1m."

[212] To illustrate the significant impact of the price of nickel on QNI's profitability at paragraph 5.4 of the report, Mr Gothard included figure 2 that graphed the realised nickel price with the costs of production for QNI between July 2010 and January 2016. The information for the graph was based on QNI's monthly reports. Mr Gothard noted at paragraph 5.4.4 that from February 2015 QNI's unit cost of production exceeded the realised nickel price.

[213] Mr Gothard did a cash flow analysis in section 6 of the report. He set out in table 5 the statement of cash flows for FY11 to FY15 that was taken from the audited accounts for those periods. It showed a dramatic reduction in cash from the end of FY11 of $163,728m to $8,631m at the end of FY15. Mr Gothard noted at paragraph 6.3.3 that in the three years to 30 June 2015, QNI generated no net cumulative cash flow from operations, but during this period QNI also made payments for property, plant and equipment and loans to related parties. Mr Gothard did note at paragraph 6.3.5(c) of the report that there were several term deposits held by QNI amounting to $14.1m as at 30 September 2015, but as each term deposit was held as security or guarantee of the performance for a supplier, it was not considered as cash available to QNI to meet trading liabilities. In paragraph 6.4 of the report, Mr Gothard had regard to QNI's cash flow forecasts, including the daily cash flow projections (that were prepared weekly), to consider QNI's ability to continue to meet its debts as they fell due. At paragraph 6.4.8 of the report, Mr Gothard referred to the update of the cash flow forecast for the week ending 11 September 2015 that was prepared by QNI on 15 September 2015 that forecast negative cash balances of up to $19.9m. Mr Gothard set out in figure 5 of the report QNI's FY16 cash flow forecasts prepared at

various dates between August 2015 and December 2015. Mr Gothard set out his conclusion on the cash flow analysis at paragraph 6.5 of the report which included at paragraph 6.5.4 that from at least 15 September 2015 it was known by QNI that there were forecast cash deficiencies from October 2015 to May 2016.

[214] The corporate defendants were critical of Mr Gothard for failing to see that he had made an error in adjusting QNI's 9 October 2015 forecast of monthly available cash balances set out in figure 3 of the reply report. Despite conceding in cross-examination (at Transcript 22-36) that QNI's records showed that, as at 9 October 2015, QNI had a cash balance of $3.943m, figure 3 in the reply report adjusts the 9 October 2015 forecast for the exclusion of the $25m facility proposed to be obtained by QNI, but was not obtained. It was simplistic on Mr Gothard's part to adjust QNI's 9 October 2015 forecast by a gross amount of $25m, without having regard to the actual cash balance as at 9 October 2015 and the adjustments that had to be made to the proposed payments, if the $25m facility were not obtained, that had also been included in the cash forecast. The corporate defendants therefore submit that not being prepared to make the appropriate concession reflected very poorly on Mr Gothard. Mr Gothard could have been more forthcoming in acknowledging this error, but it remains relevant that QNI was seeking a facility of $25m in October 2015 to address the anticipated cash deficiency (that was, in fact, realised) and that requirement was confirmed by the affidavits of Mr Mensink and Mr Wolfe affirmed on 17 November 2015 for the Western Australian proceeding. Mr Gothard's error in how he charted the 9 October 2015 forecast of available cash balances (excluding the facility of $25m) did not affect the opinions that he otherwise expressed in paragraph 3.3.10 of the reply report or undermine the cash flow analysis that he did in section 6 of the report.

[215] The corporate defendants also rely on deficiencies in figure 5 in Mr Gothard's report to submit that no reliance can be placed on Mr Gothard's analysis of cash flow. Mr Gothard stated in the report at 6.4.10(c) that by 25 December 2015 QNI was forecasting a cash deficiency from February 2016 onwards. The daily cash forecast showed, however, that the forecast for 1 February 2016 was a surplus of $5.3m, there was not a forecast deficit until 16 February 2016 and then only of $6m and the forecast deficit of $20m did not occur until 29 February 2016. Mr Gothard conceded (at Transcript 22-41) his error in showing the $20m deficit in figure 5 as at 1 February 2016 rather than 29 February 2016. Again, this was an error, but one that had to be considered in conjunction with the other comments of Mr Gothard's report in paragraph 6.4.10 in relation to figure 5 that were not in error. They were that from the update of the cash flow forecast by Mr Wolfe from 11 September 2015, QNI was forecasting cash deficiencies from October 2015 to May 2016 after revising the forecast nickel prices significantly downwards in the weekly cash flow data and that between 11 September and 27 November 2015, the weekly cash flow data showed that QNI was deferring and stopping payments of creditors due to insufficient cash reserves.

[216] Mr Gothard did a balance sheet analysis at section 7 of his report. QNI had revalued its property, plant and equipment upward by $1.582.8m in FY15. Mr Gothard dealt with the effect of that revaluation in paragraph 7.4.2 of the report and noted at paragraph 7.4.3 that the basis for the change was an internal valuation prepared by QNI. The key findings made by Mr Gothard on his analysis of the balance sheet, excluding the effect of the asset revaluation in FY15, during the period FY11 to HY16 (half year ended 31 December 2015) are set out in paragraph 7.2.1 of the report. They can be summarised as declining

net asset position, declining working capital, declining cash and QNI's quick ratio was below 1.00 from FY13 onwards. Mr Gothard explained the quick asset ratio in paragraph 7.5.1(b) of the report as liquid assets divided by current liabilities in which liquid assets are assets that can be converted into cash quickly in the normal course of business. He further stated that a quick asset ratio of less than 1 is an indicator that a company is experiencing financial difficulties.

[217] Mr Gothard analysed other financial resources available to QNI in section 8 of the report. He noted at paragraph 8.2.6 Mr Palmer's position that he would not make his own assets available to QNI, after meeting with the Prime Minister on 9 October 2015 and, in view of that, notwithstanding Mr Palmer's funding of part of QNI's payroll on 13 November 2015, proceeded on the basis that QNI could not place reliance on Mr Palmer to provide any funding to meet its liabilities as they fell due. Mr Gothard considered (at paragraphs 8.2.3 to 8.2.5) that the related entities controlled or owned by Mr Palmer outside the QN Group were not a source of funding, by 14 October 2015 no facility or other financial accommodation was offered or made available to QNI by any Australian or international banks, and that the discussions with the State and Federal governments were not far enough progressed to give reasonable prospects of funding from those sources. Mr Gothard therefore expressed the opinion in paragraph 8.4.1 of the report that he did not consider the refinery could be realised within a timeframe to meet QNI's immediate funding requirement of the cash deficiencies forecast from October 2015 onwards. In paragraph 8.4 of the report, Mr Gothard dealt in detail with each of the categories of assets for the purpose of considering whether the assets were a source of funding for QNI to meet its liabilities. Apart from the surplus equipment comprising of dump trucks, tippers and trailers with a book value of $4.3m that was identified by QNI in October 2015 in respect of which submissions were received from auction houses or a date of sale starting from mid-January 2016, no other realisable assets or other source of funds were identified by Mr Gothard. Subsequent to the appointment of the GPLs, the surplus equipment was realised at auction for a net amount of $3.3m.

[218] Mr Gothard had regard to other indicators of insolvency in section 9 of the report, including the aged trade creditor analysis, overdue Commonwealth and State taxes and the action taken by QNI to defer creditors. Mr Gothard was not challenged on his aged trade creditor analysis set out at paragraph 9.3 of the report which highlighted QNI's strategy of deferring creditors. He had inferred from QNI's accounts payable ledgers that the ordinary payment terms for most trade creditors were 30 days. He then tabulated the total of the invoices at various dates from April 2015 onwards that were not paid within 31 days from date of invoice. It is apparent from table 13 that the aging of the invoices deteriorated from 9 October 2015 onwards. The invoices outside of ordinary payment terms as at 25 September 2015 amounted to $5.4m. From 30 October 2015 onwards the quantum of the invoices outside ordinary payment terms at the dates selected by Mr Gothard was mostly three times that amount.

[219] There were differences between Mr Gothard and Ms McCallum as to whether or not, as at 13 January 2016, there were, in fact overdue Commonwealth and State taxes. Based on the ATO's proof of debt as at 31 October 2018, Mr Gothard worked on the basis there was an outstanding debt of $1,791,055.05 in respect of the running balance account for PAYG and similar taxes and there was outstanding superannuation guarantee totalling $612,137.67 for the period 1 July to 31 December 2015. Mr Gothard conceded (at Transcript 22-50) that

the superannuation guarantee charge amount was not payable until 28 January 2016. Ultimately, it appeared that Mr Gothard and Ms McCallum were in agreement on the quantum of PAYG that was outstanding in January 2016 which was a figure in the vicinity of $1.7m. The difference between them was when the amount was payable. It may be, as Ms McCallum asserted in paragraph 5.8.17 of her report, that the outstanding PAYG was not due and payable as at 13 January 2016, but later in that month, as a result of the assessment by the ATO, because QNI did not lodge its monthly PAYG return for the month of November 2015. If it had lodged its return on time, the debt would have been payable in December 2015. I consider that deferring the accrual of this debt by failing to lodge a return is a relevant matter to take into account in assessing solvency as at 13 January 2016. Similarly, the obligation to pay the superannuation guarantee charge of $612,137.67 on 28 January 2016 arose only because QNI failed earlier to comply with its statutory obligation to have paid its employees' superannuation obligations (at Transcript 22-48). I consider that failure is also a relevant matter to take into account in assessing solvency as at 13 January 2016.

[220] Mr Gothard dealt with deferral of creditors at paragraph 9.6 of his report. He reviewed the deferred payments workbooks in QNI's weekly cash flow data and prepared a summary of the trade creditors that were due or overdue at each relevant date and which were deferred for payment to a future date by reference to the deferred payments workbooks. Mr Gothard set out the results of his analysis in table 16 that showed a dramatic increase from 11 September 2015 onwards in the deferral of trade creditors.

[221] There were a number of affidavits of the SPL that were tendered into evidence. Relevantly his third affidavit (exhibit SUP.015.006.5679) was prepared after he had the opportunity to view Mr Gothard's report and at paragraph 114 he agreed with Mr Gothard's conclusions set out at paragraphs 11.1 to 11.3.2 including that QNI remained insolvent at all times after 9 October 2015. At paragraph 123, the SPL stated that he had reviewed Mr Gothard's report and agreed with Mr Gothard's conclusions set out in paragrpahs 5.4, 6.4 and 6.5 of the report on the impact of the decline in nickel prices on QNI's cash flow and profitability.

[222] The SPL's seventh affidavit (exhibit SUP.015.034.6950) was sworn in response to the report prepared by Mr Dinoris. The SPL used the opportunity of responding to that report to undertake further analysis (with the assistance of his staff) of the records of QNI. He summarised his opinion in paragraph 67 of that affidavit that the following indicators of insolvency were present in June 2015 and continued from July 2015 to December 2015:

(a) the costs of production of nickel exceeding the realised price of nickel;

(b) the quick asset ratio being below 1;

(c) declining revenues (which correlated with the declining nickel prices during this time);

(d) declining working capital;

(e) declining cash at bank; and

(f) continued net profit after tax losses.

[223] Ms McCallum's report also assessed the solvency of QNI, Metals and Resources (to which she referred as the QN Group) as a whole, as that allowed her to assess the solvency of QNI, either as an agent for the joint venturers or on the basis that QNI had an effective right of indemnity from the joint venturers.

[224] Ms McCallum concluded that at all times to 13 January 2016 the QN Group had a surplus of net assets and was able to pay all creditors, given a reasonable time frame and, on the premise that QNI had a right of indemnity from Resources and Metals, there were sufficient assets owned by Resources and Metals at 13 January 2016 to enable payment of all debts that were due and payable on that date.

[225] Ms McCallum set out a table in paragraph 2.2.1 of her report to show that as at 13 January 2016 the QN Group has sufficient working capital to pay all creditors that were due and payable at that time. On the basis that cash only was taken into account, Ms McCallum showed that there was cash of $5,810,349 as at 13 January 2016, there were no payroll liabilities and the only creditors due were for the total amount of $1,536,831, leaving a surplus of cash of $4,273,518.

[226] At section 5.4 of her report, Ms McCallum set out her observations from the financial statements and other documents. She did a comparative analysis of trading figures from the management accounts for the period 1 July 2012 to 31 December 2015. Ms McCallum noted at paragraph 5.4.7 that the trading losses during the half year ended 31 December 2015 were mainly funded by decrease in stock and fixed assets. In table 26 of her report, Ms McCallum summarised her assessment of working capital as at 13 January 2016. She reviewed the sundry receivables list, as at 31 December 2015, and noted that most of them were received by 13 January 2016. She was therefore of the opinion that sundry receivables would be realisable in the short term. She also considered that finished goods were realisable in the short term, due to the contractual arrangements with Glencore for the purchase of stock.

[227] For the purpose of his seventh affidavit, the SPL had his staff review the monthly reports of QNI from July 2014 to December 2015 to calculate the quick asset ratio which is an indicative measure of a company's ability to meet its short term financial commitments from available assets. A quick asset ratio of less than one may indicate that a company cannot meet its short term financial commitments from its available assets. The graphical representation of the quick asset ratio at paragraph 51 of the affidavit shows that QNI's quick asset ratio was below 1 during the entire period between July 2014 and December 2015. That suggested to the SPL that QNI was experiencing financial difficulty for the whole of this period. The SPL used cash, trade debtors and sundry receivables as the quick assets of QNI for this calculation. He conceded (at Transcript 23-49) that it was worth taking into account the inventory of finished product that was the subject of immediate sale to Glencore in calculating the quick asset ratio. It should be noted that, even though Ms McCallum did include finished goods in her adjusted quick ratio for each of the months from July to December 2015, it still resulted in a quick ratio of less than 1 for each month.

[228] Because Ms McCallum was doing the calculations on the assumption that QN Group was a going concern, she did not treat the employee provisions and accruals as payable as at 13 January 2016. Ms McCallum's conclusion at paragraph 5.6.52 was that the short term

asset position at 13 January 2016 was positive, in that QN Group had sufficient cash or cash equivalents at that date to meet liabilities due and payable at that date.

[229] Ms McCallum was only engaged to do the report on 26 July 2019, when the trial of this proceeding was underway, and was briefed by Mr Wolfe and employees of QNI to familiarise herself with the operation of QNI and the relevant financial documents and books and records of the QN Group. Because of the time constraint in preparing her report, Ms McCallum accepted at face value entries in the SAP system without making further inquiries. This was particularly relevant in relation to the opinions Ms McCallum expressed in section 5.7 of her report in respect of deferral of trade creditors.

[230] Ms McCallum explained in paragraphs 5.7.16 to paragraph 5.7.26 of her report the reconciliation that she undertook of trade creditors for the purpose of working out the trade creditors' debts due as at 13 January 2016. She used schedule E that was included in Mr Livingstone's affidavit (exhibit 51), the proofs of debt as described in that affidavit of Mr Livingstone, and other claims detailed in Ms Trenfield's affidavit sworn on 15 August 2019, in addition to the aged creditors listing in the SAP report from the QN Group prepared as at 16 January 2016 (exhibit QNM.001.004.1147). Ms McCallum also had regard to Mr Wolfe's annotations of the schedule E creditors that he had undertaken in August 2017 and which were included as appendix 5.7C to Ms McCallum's report. If a debt was not shown in both schedule E and the proofs of debt, Ms McCallum did not include it in her analysis.

[231] Before the SPL settled his claims in this proceeding, schedule E to the statement of claim listed the unpaid liabilities alleged to be owing by QNI to third party creditors arising out of acting as manager for the joint venture. Mr Livingstone is a registered liquidator who worked with the SPL on the special purpose liquidation. Mr Livingstone's affidavit (exhibit 51) provided information in relation to the claims of third party creditors. The content of schedule E (with adjustments identified in that affidavit) was set out in paragraph 26 of that affidavit. Mr Livingstone's further affidavit (exhibit 25) updated some of the information about the claims of the third party creditors.

[232] Ms McCallum conceded (at Transcript 24-8) that her analysis of trade creditors would not have covered creditors who may have been paid before 18 January 2016, creditors who were owed money, but paid after 18 January 2016 by the GPLs, creditors whose claims may have been small and did not warrant lodgement of a proof of debt and at least one creditor, AGL, which had the benefit of a guarantee in place and may have claimed against that guarantee. Ms McCallum explained (at Transcript 24-8) that she compared the totals of the creditors' database with the proofs of debt for the period up to 18 January 2016 and the difference was $1.5m which, in her opinion, was probably not material.

[233] One of the categories of creditors who were paid after 18 January 2016 by the GPLs who would otherwise withhold supply (which Mr Park described as "ransom creditors") were paid about $6.5m by the GPLs (at Transcript 8-77). This information had been available to Ms McCallum in the Report by Administrators dated 11 April 2016 (exhibit HWL.004.003.0105). It showed at paragraph 4.3.6 that a critical New Caledonian supplier of ore required the GPLs to satisfy pre-appointment debts of approximately US$2.8m and to pay for future supply in advance of loading and at paragraph 4.3.8 that, in addition to payment of the debts owing to the New Caledonian supplier, the GPLs were required to

pay over A$2.5m towards pre-appointment liabilities owed to other critical suppliers to the refinery to ensure continued supply.

[234] The GPLs caused QNI to pay another significant debt whilst in voluntary administration for fuel excise. The ATO's running account for excise duty showed a balance as at 13 January 2016 of $2,155,640.21. As it was not shown on the Australian Taxation Office's proof of debt, Ms McCallum did not include fuel excise as one of the debts as at 13 January 2016, when it should have been included for at least the amount paid by the GPLs. Annexure 2 to the Report by Administrators shows that the amount paid by the administrators for fuel excise was $1,946,297.

[235] One of the debts in schedule E was for $1,563,272.75 owed to Daiichi Chuo Kisen Kaisha. The amount in schedule E is the Australian dollar equivalent for the amount in US dollars that was claimed by Daiichi. Daiichi provided freight services to QNI in respect of its nickel ore cargo. Ms McCallum included the claim for Daiichi in table 29 as one that was the subject of negotiations with QNI. Ms McCallum exhibited to her report as appendix 3.6K a letter from Daiichi dated 17 November 2015 seeking payment of the outstanding amount of US$844,266.13 for freight with demurrage relating to 17 shipments where the invoices were due on various dates between January and November 2015. The balance of the amount claimed in Daiichi's proof of debt was for an invoice dated 3 December 2015 due on 10 December 2015 in the sum of US$284,573.17 for a shipment that was cancelled on 27 October 2015 (exhibit PPB.001.001.5338). This is a creditor for which an entry in the Yabulu forecast Jan FY16 spreadsheet (exhibit QNK.013.048.9852) was made to defer the payments to Daiichi to January 2016, but the supporting documents do not reveal a justifiable basis for doing so.

[236] Ms McCallum's list of the deferred creditors are listed in table 34 of the report. Aurizon's debt is included in this list. Sums totalling $1.1m (in round terms) owed to Mount Isa Mines were shown in the SAP system as not being due before 19 January 2016. That is irreconcilable with the invoices for the components of the total amounts with due dates ranging from 28 November to 23 December 2015. The SAP system showed two invoices from Civil Haulage & Mining Pty Ltd totalling $219,409 as due in late January 2016, but the invoices showed payment was due in November 2015 (exhibit PPB.001.001.5297).

[237] Even though Mr Wolfe was not cross-examined on the provenance of the deferred dates for payment shown in the aged creditors' listing as at 16 January 2016 (exhibit QNM.001.004.1147), it is apparent that some of the entries may have represented wishful thinking on the part of the QN Group rather than an accurate statement of an agreed deferral date for payment. The prime example is that the Aurizon debt was shown as not being due until May 2016 and, on any view, there was never any basis to support that being the case. The log of changes for the Excel spreadsheet Yabulu forecast Jan FY16 (exhibit QNK.013.048.9852) shows that Charmain Crouch (who was the Finance Director of QNI) on 14 December 2015 updated the due date for the Aurizon payments "to defer until mid May". The corporate defendants assert that the deferral dates in the SAP system are records of QNI and, as such, are prima facie admissible for the truth of their contents. The contrary evidence that shows the deferral dates for payment of debts did not accord with the due date for payment under the relevant agreement with the creditor displaces the prima facie effect of the recording of the deferral date in the SAP system.

[238] Another example is the royalty agreement debt to Metallica Minerals that was shown in the SAP system as having been deferred until 15 January 2016. The statutory demand for payment of the debt that was dated 13 January 2016 (exhibit FTI.018.001.0067) showed that the payment had been due on 22 October 2015. Ms McCallum exhibits as appendix 3.6N to her report emails from the director of Metallica Minerals sent in November and December 2015 showing some willingness to negotiate on the payment, if a part payment were made (which was not done). Even though Metallica Minerals showed some reluctance to take immediate action to enforce the debt and did not issue the statutory demand until 13 January 2016, consistent with authorities such as *Lee Kong* at 112, the debt should have been shown as due, when it was legally due under the royalty agreement.

[239] In the circumstances of this matter, Ms McCallum's approach to identifying the creditors' debts due on 13 January 2016 did result in a significant understatement of the debts. Taking into account in round terms the amount of the ransom creditors of $6.5m, fuel excise of $2m, and the debts of Daiichi ($1.5m), Mt Isa Mines ($1.1m), Civil Haulage & Mining Pty Ltd ($209,409) and Metallica Mines ($220,000), there was another $11.5m in trade creditors that should have been recorded by Ms McCallum as due on 13 January 2016. When the debt to Aurizon of $15.8m is also considered, even on the basis of the figures used by Ms McCallum in table 26 of her report, QNI could not pay its debts as they fell due as at 13 January 2016.

[240] Ms McCallum conceded in cross-examination (at Transcript 24-14) that it was "more than likely" that QNI was insolvent on 18 January 2016, but did not agree that QNI was insolvent as at 13 January 2016. Ms McCallum explained that, in her opinion, the difference between the dates was that the Aurizon debt became due on 18 January 2016, no external finance had been obtained by that date, and no cash was put in by related parties by that date.

[241] Ms McCallum dealt with the willingness and ability of Mr Palmer and his related entities to support the QNI Group at paragraphs 5.14.12 to 5.14.36 of the report. Ms McCallum considered at paragraph 5.14.14 that the China First and Waratah Coal transactions (that took place on 13 January 2016) put the QN Group "potentially in a more favourable position to attract finance from external parties". Ms McCallum interpreted the various comments made by Mr Palmer that were referred to in her report as showing that he was "willing to allow his personal assets to be used as security against which finance could be raised". Ms McCallum therefore concluded at paragraphs 5.14.35 and 5.14.36 that the QN Group had the financial support of related parties, being companies and the ultimate shareholder Mr Palmer and that availability of related party support "would be relevant to the question of solvency after 13 January 2016".

[242] Even though the offer from Chifley Securities dated 7 March 2016 (exhibit QNM.002.033.1054) was received after QNI was in administration, Ms McCallum referred to that offer at paragraph 5.15.33 of her report as evidence showing that, as at 13 January 2016, the QN Group still had not exhausted all avenues for raising the required finance through external providers. Ms McCallum observed that opportunity for external financing given by the China First and Waratah Coal transactions were then diminished by the priority deed given to the GPLs by 18 January 2016. Even so, Ms McCallum concluded at paragraph 5.15.35 that:

> "QN Group was not dependent on the financial support of external financiers at 13 January 2016, and the absence of any such support on 13 January 2016 does not affect my opinion on the solvency of QN Group at that date."

I infer that Ms McCallum expressed the conclusions that she did at paragraphs 5.14.35, 5.14.36 and 5.15.35 on the basis that there remained a possibility of assistance from either related parties or external financiers after 13 January 2016, but that possibility was exhausted by 18 January 2016.

[243] I deal with the opportunity for external financing given by the China First and Waratah Coal transactions in the section of this judgment that deals with part U of the statement of claim. I note that Ms McCallum's reference to those transactions and related party support was not relevant to her conclusion of solvency as at 13 January 2016.

Was QNI insolvent on 13 January 2016?

[244] Even though the expert evidence dealt directly with the question of whether QNI was insolvent on 13 January 2016, it is an issue of fact for me to decide. I have been assisted by the expert evidence in considering the significance of the manner in which QNI was conducting the refinery business and undertaking transactions in the period from September 2015 leading up to the appointment of the GPLs as voluntary administrators on 18 January 2016. QNI made no secret of the fact from September 2015 that the forecast fall in the nickel price was going to have an adverse effect on its liquidity. It took a number of steps to seek financial assistance from government, creditors and financiers, but also took steps to reduce its expenditure by changing from active to reactive maintenance at the refinery, looking at redundancies of employees and providing information through Mr Mensink and Mr Wolfe to support Mineralogy's quest for payment of royalties in the Western Australian proceeding that would have enabled Mineralogy to provide funds by way of loan to QNI.

[245] QNI as the agent for the joint venturers was entitled to pay for the expenses of the joint venture out of the bank accounts operated by QNI for the purpose of the joint venture. QNI was entitled under clause 6.4(g) of the JVA to call for funds from Resources and Metals to meet the liabilities it incurred for the joint venture, if the funds available in QNI's bank accounts were not sufficient to meet the liabilities. Even if the third parties contracting with QNI were aware that QNI was conducting the operations of the refinery on behalf of Resources and Metals, those third parties were entitled to hold QNI liable under the contracts entered into by QNI with the third parties, if that was the effect of the contracts: *Montgomerie v United Kingdom Mutual Steam Ship Association Limited* [1891] 1 QB 370, 371. By way of example, the Aurizon agreements were with QNI and Aurizon was pursuing QNI, as the party liable to pay the debts that were overdue under those agreements that were the subject of the notices of default issued on 27 November 2015.

[246] The primary reason for Ms McCallum's conclusion as to QNI's solvency on 13 January 2016 was that the Aurizon debt was not due until 18 January 2016. The reality for QNI was that Aurizon had deferred taking action in relation to the debt until 18 January 2016, but most of the debt was overdue by 27 November 2015 and the debt of $15.8m was well

overdue as at 13 January 2016. Applying the authority of *Lee Kong* at 112, the Aurizon debt was a debt the payment of which had to be considered by QNI in determining its solvency on that date. To the extent that Aurizon's letter of 18 December 2015 (exhibit QNK.013.055.5614) advised QNI of what would happen if the outstanding payments were not made by 18 January 2016, the letter did not change the fact that payments were overdue, but it merely gave QNI the benefit of time until 18 January 2016 before Aurizon would take action to exercise its rights under the relevant agreements. The same comment applies to Aurizon's letter dated 6 January 2016 (exhibit QNK.011.028.0371) in which Aurizon was giving QNI an opportunity to put forward a security proposal suitable to Aurizon that would allow Aurizon to consider further any deferral of payments under the agreements, but Aurizon confirmed in the same letter that the amounts due and owing under the default notices remained due and owing and that if they were not paid on or before 18 January 2016, Aurizon reserved all its rights under the agreements either to suspend rail haulage or to take further action available to it without reference to QNI. In any case, it was conceded appropriately in submissions on behalf of the corporate defendants (at Transcript 27-47) that debts due five days ahead could be taken into account as relevantly due in the immediate future, when determining solvency at a particular date.

[247] Despite Ms McCallum's lack of reliance on the Chifley Securities' letter (exhibit QNM.002.033.1054) for her opinion on insolvency, the corporate defendants asserted (at Transcript 27-47) that the offer was demonstrative of the fact that it could not be said, as at 13 January 2016, there was no realistic prospect of funding. There was no evidence given by any officer on behalf of Chifley Securities. The letter of offer itself was admitted only as an original document and not for the truth of its contents. It was an indicative offer only and made to Queensland Metals Pty Ltd and not QNI. Ms McCallum assumed that Queensland Metals Pty Ltd was a reference to Metals, but that is not apparent from the face of the document. It is not apparent over which assets that any loan would have been secured. Even assuming that the offer was to Metals, the Chifley Securities' letter is not probative of the availability of a loan to Resources and/or Metals in March 2016 from which an inference could be drawn that such a loan was able to be procured between 13 and 18 January 2016.

[248] The documentary evidence and the evidence from Mr Wolfe and Mr Park shows that Mr Palmer was closely involved in the discussions with FTI Consulting and others about the options open to QNI in early January 2016. As at 13 January 2016, QNI did not have the liquidity or access to funds (whether through Metals and Resources or otherwise) to pay the Aurizon debt on 18 January 2016. Metals and Resources as the owners of the refinery and associated joint venture property were asset rich, but there were no plans for realisation of assets prior to 13 January 2016 that would meet the ongoing cash shortfalls in January 2016 and going forward to at least May 2016. I find that Metals and Resources did not have the capacity to address the cash flow shortages that QNI was experiencing as at 13 January 2016. It is axiomatic that if Metals and Resources had that capacity, they would have addressed the liquidity problems of QNI. The fact that Mr Palmer did not pay, or would not procure any finance or loans for QNI to pay, the debts that were outstanding and either had fallen or were falling due as at 13 January 2016 means Mr Palmer and his related entities were not a source of support that precluded QNI's insolvency on and from 13 January 2016. The question of insolvency is being determined as at 13 January 2016 before QNI entered into the China First and Waratah Coal transactions, but when the arrangements were in place for QNI (together with Resources and Metals) to enter into those transactions. Even though Ms McCallum did not rely on

the potential financial support from China First and Waratah Coal in determining solvency as at 13 January 2013, the corporate defendants assert that the potentiality of funding as a result of the transactions with China First and Waratah Coal that were in the process of being finalised has to be taken into account in assessing the solvency of QNI as at 13 January 2016. For the reasons that I have set out in the section of the judgment dealing with the China First and Waratah Coal transactions, there is a lack of evidence of any plans by QNI as at 13 January 2016 to pursue finance on the basis of the China First and Waratah Coal transactions, instead of entering voluntary administration. The potentiality of finance from the China First and Waratah Coal transactions is therefore not a matter that saves QNI from being found to be insolvent as at 13 January 2016.

[249] The issue of QNI's solvency as at 13 January 2016 was significantly affected by the deterioration in the nickel price during 2015 that was forecast to continue until mid 2016. That external factor was combined with the decline over a number of years in QNI's net asset position (when the effect of the asset valuation as at 30 June 2015 that was an extraordinary item is excluded), the decline in working capital, the decline in cash, consistent trading losses and the pattern of deferral of payment of trade creditors outside the usual terms that was discernible from September 2015 onwards. When that trading history was coupled with no anticipated improvement in the nickel price for some months and the lack of access to sufficient credit or realistic financial support, I conclude that as a matter of fact and commercial reality QNI was insolvent from and including 13 January 2016.

China First and Waratah Coal transactions

[250] Waratah Coal is the holder of two exploration permits EPC 1040 and EPC 1079 within the Galilee Basin. All the shares in Waratah Coal were purchased on or about 26 May 2009 by Mineralogy. Waratah Coal entered into an agreement dated 8 July 2009 with China First entitled "Mining Right Agreement" (exhibit QNK.017.011.0353) that provided for Waratah Coal to sublease to China First the part of the mining leases it expected to obtain as a result of holding the two exploration permits. That was described in the agreement as the mine area designated in the plan marked "A" in annexure 1 to the agreement. The project to be developed under the sublease was called the China First Coal Project.

[251] The parties to the mining right agreement acknowledged in clause 2.1 that the China First Coal Project was dependent upon Waratah Coal applying for and obtaining mining leases within the mine area. Clause 3.2 provided for the sublease to confer on China First the right to establish a mine within the mine area for mining coal, to conduct the mining operations to take a quantity of coal up to the annual extraction limit in any operating year, and to provide processing facilities. Clause 3.4 provided that, subject to any earlier termination of China First's mining right under the agreement, China First's mining right would continue in force until such time as China First had taken its total extraction limit (as defined by the agreement) from the mine area. Clause 6.1 conferred the ownership of all coal taken by China First pursuant to the exercise of the mining right under the agreement on China First. Clause 7.1 then provided for the payment by China First to Waratah Coal of a royalty in respect of that coal at the rate specified in the schedule. Clause 8.1 provided for China First to pay on behalf of Waratah Coal and itself all State Government royalty in respect of coal allocated to and mined by China First from the mine area. Clause 27 provided for early termination of the mining right. Under clause 27.3

Waratah Coal had the right to give notice of intention to terminate the mining right, if within five years after the date of the agreement, China First had not prepared a development plan and submitted it to Waratah Coal and the relevant government authorities for approval (as required). Under clause 27.4, Waratah Coal had the right to give notice of its intention to terminate the mining right, if within seven years after the date of the agreement, China First had not commenced development operations within the mine area following its approval as a mine participant.

[252] A consent caveat was lodged by China First in reliance on the mining right agreement that was registered on EPC 1040 and EPC 1079 on 10 March 2011. The application for a Mineral Development Licence was lodged on 23 May 2011 that was within the areas of EPC 1040 and EPC 1079 and MDL 455 was granted on 16 January 2012. The application for the mining lease was lodged on 30 May 2011 (exhibit QNK.025.001.1010). During 2013, Waratah Coal received EIS approvals for the project from both the Queensland and Commonwealth Governments for mine and rail. By 8 July 2014, China First had not prepared or submitted a development plan to Waratah Coal, as required under the mining right agreement (at Transcript 17-32). Waratah Coal submitted a draft Environmental Management Plan for the project during March 2015 to the Department of Environment Heritage and Protection. That Department assessed the Environmental Management Plan and in December 2015 issued Waratah Coal with a draft Environmental Authority for the project (paragraphs 10 and 11 of exhibit QNM.005.001.0905). These were steps required to further the application for the mining lease. The mining lease had still not been granted, when Mr Harris gave evidence at the trial of this proceeding (at Transcript 17-30).

[253] Independent consultant Mr James F King prepared a report in January 2016 (exhibit QNK.017.002.0892) on the costs of production and financial viability of the China First Coal Project. This report was in the possession of Waratah Coal. The report relied on the technical details of the project set out in reports prepared by Worley Parsons (WP concept study) in April 2009 and data provided by Waratah Coal and was by way of an update of a report prepared by James F King on 27 November 2011. Mr King described the project as designed to extract 1.4 billion tonnes of raw coal to produce about 40 million tonnes per year of saleable processed thermal coal over an operation period of 25 years of commercial-scale production. The report estimated the total capital cost for the whole project as A$8.04billion at the base date of 1 January 2010 and phased according to the schedule for the project and adjusted for inflation during construction and total costs are then divided up between the capital cost of the mine and other assets of China First of A$3.83billion and the balance being the capital cost for rail and port. (Mr King was not called by the corporate defendants to give evidence in this proceeding and therefore his report was in evidence as an original document, but not as expert evidence.)

[254] On 8 January 2016 Waratah Coal received two letters from Mr Birkett, a director of BDO Corporate Finance (Qld) Ltd, setting out indicative values for the China First assets. One letter (which the parties referred to as the reserves letter) (exhibit QNK.017.002.0914) gave an indicative value of $198.2m, based on using one reserve multiple (that was implied from the purchase by Adani Group of Linc Energy Ltd's interest under the royalty deed for the Carmichael mine) applied to a probable reserve of 1,105million tonnes. The other letter (which the parties referred to as the resources letter) (exhibit QNK.017.002.0920) gave a range of indicative values (based on resource multiples) between $51.6m to $246.8m using a range of resource multiples in respect of the total JORC resource of 3,684

million tonnes (where JORC is a reference to the Joint Ore Reserves Committee of The Australasian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and Minerals Council of Australia). Both letters were expressly stated not to be valuations (as limited information had been used for the calculations) and were expressed to be limited in the purposes for which they could be used. Each letter noted that a valuation would require further work to be completed and may result in results materially different from those set out in the letter.

[255] Mr Harris who is the manager of Waratah Coal and was formerly its managing director in his affidavit filed on 22 September 2017 (exhibit QNK.025.001.1072) endeavoured to rely on the two BDO letters for the purpose of giving a value to China First's interest in the China First Coal Project. Mr Harris stated at paragraph 28 of his affidavit:

> "The combined calculated indicative range of **$51.6 million to $246.8 million** for resources and indicative value of **$198.2 million** for reserves needs to be considered together, when calculating indicative China First values. So the total Value of the Tenements and/or reserves and resources using the minimum for the resource calculation and the indicative value for China First reserves calculation was **$51.6 million plus $198.2 million totalling** $ **249.8 million**."

[256] The logic of this calculation done by Mr Harris was in question, when he acknowledged (at Transcript 17-38) that, according to the JORC Code, "an ore reserve is the economically mineable part of a measure and/or indicated mineral resource".

[257] Mr Harris endeavoured to explain in paragraph 30 of his affidavit the rationale for the Waratah Coal and China First transactions:

> "In early January 2016 Waratah was considering providing the tenements as security for borrowing by QN. If Waratah provided security of its tenements Waratah risk $249.8 million dollars of its assets based on the conclusions reached by BDO. Waratah was considering doing this and that is why I sought the opinion of BDO. If Waratah provided the tenements for QN to use as security for borrowings, then QN would be obliged to pay $135 Million dollar as a fee to Waratah when QN could afford to do so. This matter did not proceed, however it was proposed instead of Waratah receiving the $135 million dollars, Waratah's then wholly owned subsidiary China First would issue shares to QN as a subscription and not the fee that was being considered as a payment to Waratah. In this way Waratah would make the tenements available to lenders as security and QN would be the owners of shares they could use as security as well for no additional payment than if they paid the fee to Waratah."

[258] The proposal that Waratah Coal may make the tenements available for security for QNI for a fee is confirmed by the draft security agreement between QNI and Waratah Coal (exhibit QNK.011.027.6620) pursuant to which it was proposed that QNI would pay a fee of US$100m for Waratah Coal to provide security for Aurizon to secure payments by QNI. When Mr Harris was cross-examined (at Transcript 17-42) on the arrangement that shares would be issued in China First to QNI for the sum of $135m and Waratah Coal would then

make its tenements available as security for lenders to QNI, Mr Harris responded "Well, that's the agreement that Clive Palmer had made".

[259] Mr Harris also exhibited to his affidavit (exhibit QNK.025.001.1072) an agreement and various letters dated between 22 July 2009 and 29 October 2010 relating to Chinese State-owned enterprises' involvement in the China First Coal Project. He also exhibited letters dated 31 May 2011 and 21 October 2011 from the Export-Import Bank of China (exhibit QNM.002.017.0084). The first letter gave in principle approval to fund 85 per cent of the construction contract for the China First Coal Project. That letter of intent specified that it was valid until 21 October 2011. The second letter in the exhibit extended the expiry date of the letter of intent to 21 April 2012. Mr Harris did not suggest that anything had happened to further that funding approval after the expiry of the letter of intent on the extended date.

[260] Mr Harris had also been a director of China First from 9 December 2011 to 12 January 2016. He described it "effectively a dormant company" from post 2012 to the present time (at Transcript 17-27).

[261] On 12 January 2016 Mr Palmer and the other two then current directors (Mr Zou and Mr Harris) resigned as directors of China First and Mr Palmer's wife, Mrs Anna Palmer, was appointed sole director and held that position on 13 January 2016. Mrs Palmer was also the sole director of Waratah Coal as at 13 January 2016, as the other directors of Waratah Coal had resigned. They were Mr Mensink who resigned as a director on 8 January 2016, Ms Emily Palmer who is Mr Palmer's daughter and was appointed a director on 9 January 2016 and resigned on 10 January 2016, and Mr Michael Palmer who resigned as a director on 10 January 2016.

[262] Two sets of transactions were entered into on 13 January 2016. The China First transaction involves a share subscription agreement (exhibit QNK.006.004.9819) and the China First charge (exhibit QNK.006.004.9838). QNI, Metals and Resources entered into the share subscription agreement with China First whereby QNI "on its behalf as part of the Queensland Nickel Joint Venture" agreed to subscribe for two billion shares (mistakenly referred to in the agreement as two million shares) in China First for $135m and Metals and Resources were jointly and severally liable with QNI for the payment of the subscription share price. The subscription share price was payable in one instalment of $67.5m on or before 31 December 2017 and a second instalment of the same amount payable on or before 31 December 2018. QNI acknowledged in clause 4.4(c) of the share subscription agreement that an investment in China First "is speculative and involves risk" and that QNI has considered such risk in deciding to acquire the shares. Under the China First charge, each of QNI, Resources and Metals is a chargor and each chargor charges its interest in all its property with repayment of the secured money. Under clause 8.1 and the definitions of "Secured Money" and "Obligations" of the China First charge, the secured money of $135m would become immediately payable at China First's option if an "Insolvency Event", as defined, occurred. The appointment of a voluntary administrator was within the definition of "Insolvency Event".

[263] Under the second clause 6.14 of the share subscription agreement, each of QNI, Metals and Resources agreed to execute a charge in favour of China First securing their payment obligations under the share subscription agreement. On the same date each of those

companies executed the China First charge for the amounts due and owing under the share subscription agreement to a maximum prospective liability of $135m together with interest and costs. The ASIC search of China First (exhibit QNM.002.041.0314) shows that two billion shares were issued to QNI and are beneficially held by QNI.

[264] Mr Harris purported to express an opinion about the benefits of the China First transaction to QNI in paragraphs 34 and 35 of his affidavit (exhibit QNK.025.001.1072). Mr Harris asserted in paragraph 34 that all the benefits of the China First transaction had "gone only one way", as the movement of assets and benefits was to QNI and there was no payment or movement of assets to any party away from QNI. Mr Harris asserted in paragraph 35 that the payment of $135m by QNI for shares in China First was "advantageous" for QNI, as it provided security "for no extra costs". Consistent with the explanation Mr Harris gave in paragraph 30 of his affidavit set out above, I infer that he was referring to the preparedness of Waratah Coal to provide the tenements as security in favour of creditors of QNI, when QNI was only agreeing to pay for its shares in China First and not paying any additional fee to Waratah Coal.

[265] The Waratah Coal transaction involves a security deed, a fixed and floating charge and a release agreement. The parties to the security deed (exhibit QNK.006.004.9942) were Waratah Coal and QNI, Metals and Resources (which were defined and referred to in the security deed collectively and jointly and severally as the QN Group). Under clause 1.1, Waratah agreed that it would make the two exploration permits available as security or part security for credit or facilities provided by creditors of the QN Group (approved by Waratah Coal under clause 1.2). Under clause 3.1, the QN Group companies agreed to provide a fixed and floating charge in favour of Waratah Coal over each of their assets and undertakings. A fixed and floating charge was entered into by QNI, Metals and Resources in favour of Waratah Coal (exhibit QNK.013.056.1639) (the Waratah Coal charge) for amounts for which Waratah Coal may become liable under the security deed with the maximum prospective liability specified as US$100m together with interest and costs.

[266] The parties to the release agreement were QNI, Metals and Resources (defined as QN Parties) and Waratah Coal (exhibit QNK.006.004.9831). The recitals refer to the request to QNI from Aurizon that QNI arrange for a security to secure payments by QNI to Aurizon "and or the QN Parties or any other party", the request made to QNI "during discussions with Banks for credit" to have property available outside QN Group to lend against, and the agreement by Waratah Coal under the security deed to provide the tenements to any party nominated in writing by QNI or any of the QN parties to Waratah Coal as security for any borrowings or transaction. The term "Release" is defined in clause 1 of the agreement to mean all loan forgiveness by QNI and/or any of the QN Parties to the Palmer Parties or any of them up to the date of execution of the agreement. The expression "Palmer Parties" is defined in the agreement as "all companies or entities ultimately owned by Clive F Palmer now or in the past and Clive F Palmer and Related Parties". The term "Deed" is defined to mean the security deed. Clause 2.1 provides that "The Consideration for Waratah entering into the Deed is the … Release". Clause 5 contains an acknowledgement by QNI that damages are not a sufficient remedy for any breach of the release agreement and Waratah Coal is entitled to specific performance or injunction relief as the remedy for any breach or threatened breach by QNI, in addition to any other remedies available at law. There is an indemnity given in clause 6 of the release agreement from each of QNI, Resources and Metals in favour of Waratah Coal and the

Palmer Parties against all claims, proceedings expenses, costs, damages, losses and other liabilities of any kind incurred in connection with any breach by any of QNI, Metals or Resources (or any act or omission of any of their employees, agents or advisors) of the release agreement.

[267] The corporate defendants concede that the release agreement is not well drafted, but submitted that it should be construed on the basis that its context and purpose is to record the consideration for Waratah Coal entering into the security deed. The only provision of the release agreement that seems to have any work to do is clause 2.1. There is no evidence that any loan forgiveness was made by QNI or Metals or Resources in conjunction with the release agreement. Although clause 2.1 purports to state that the consideration for Waratah Coal entering into the security deed is the "Release", the terms of the release refer only to past consideration and therefore the "Release" did not provide good consideration for the release agreement. As the security deed was executed as a deed and, according to terms, intended to be a deed, the security deed was an operative document without the release agreement. As past consideration is no consideration, the release agreement is not a valid contract and therefore incapable of being enforced as a contract.

[268] The relevant defendants admit the transactions entered into on 13 January 2016. The plaintiffs submit that each of the transactions comprising the China First transaction, either alone or in combination, constituted a transaction of QNI that was voidable under the Act as an uncommercial transaction. The plaintiffs also submit that the transactions entered into by QNI that comprise the Waratah Coal transaction either alone or in combination constitute a transaction that is voidable under the Act as an uncommercial transaction. The defendants dispute that the transactions are voidable.

[269] The documents that comprise the China First transaction are linked to each other. The documents that comprise the Waratah Coal transaction can be seen to be interlinked with each other. Although Mr Harris' evidence provides a reason for linking the China First transaction and the Waratah Coal transaction, there is no interlinking between the China First transaction and the Waratah Coal transaction by reference to the content of the documents themselves.

[270] On 5 July 2016 QNI and the GPLs commenced the proceeding in this court in which they claimed to set aside the China First and Waratah Coal transactions and which is now incorporated into this proceeding.

Would a reasonable person in QNI's circumstances have entered into the China First and Waratah Coal transactions?

[271] The plaintiffs seek a declaration that the Waratah Coal and China First transactions are voidable under s 588FE of the Act. The plaintiffs rely on the transactions falling within s 588FE(2) and s 588FE(3) of the Act. The question to be determined is whether the transaction was uncommercial which is defined in s 588FB(1) of the Act:

> "A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

(a) the benefits (if any) to the company of entering into the transaction; and

(b) the detriment to the company of entering into the transaction; and

(c) the respective benefits to other parties to the transaction of entering into it; and

(d) any other relevant matter."

[272] Giles JA (with whom the other members of the Court of Appeal agreed) in *Lewis v Doran* discussed the meaning of an uncommercial transaction at [136]:

> "Transactions at an undervalue were no doubt the primary target of the provisions, but the description of an uncommercial transaction in s 588FB(1) was not limited to such transactions. The description directed primary attention to a balancing of benefit and detriment, only in the broadest sense involving undervalue. A transaction could conceivably be one a reasonable person in the company's circumstances would not have entered into although for full value; or it could be one a reasonable person in the company's circumstances would have entered into although at an undervalue, for example a forced sale to overcome temporary illiquidity. For s 588FB(1), in addition to regard to benefits and detriments to the company, regard was to be had to the benefits to the other parties to the transaction. It appears to have been contemplated that a transaction detrimental to the company but beneficial to other parties to the transaction might not unreasonably be entered into. If, for example, there were no creditors and no prospect of creditors, it may be that the controller of the company could reasonably sacrifice its interests to the interests of other parties to the transaction."

[273] The Full Court of the Federal Court observed in *Tosich Construction Pty Ltd (in liq) v Tosich* (1997) 78 FCR 363, 367:

> "What the Court must do is consider each of the matters to which reference is made in s 588FB(1) and, having regard to them, reach a conclusion as to whether a reasonable person in the company's circumstances would not have entered into the transaction. The company's circumstances must include the state of its knowledge, that is, of the knowledge of those who were relevantly its directing mind. Only if the Court can conclude that a reasonable person in the company's circumstances would not have entered into the transaction does the section make that transaction uncommercial."

See also *Featherstone v Ashala Model Agency Pty Ltd (in liq)* [2018] 3 Qd R 147 at [118]-[122]. The question of whether a transaction is uncommercial is therefore largely an objective test, as it is considered from the perspective of a reasonable person in the company's circumstances and with the state of knowledge of the directing mind of the company at the time of the transaction.

[274] On the basis that most cases show that s 588FB of the Act is engaged when the relevant company enters a transaction at an undervalue, the corporate defendants endeavoured to show that the China First and Waratah Coal transactions were not at an undervalue. As

Giles JA explained in *Lewis v Doran* at [136] the description of an uncommercial transaction in s 588FB(1) is not limited to transactions at an undervalue, even if such transactions were the primary target of the provision. It may be a relevant consideration in some instances that the companies involved in the impugned transactions are related companies. If the transaction is entered into by the company when its financial position has deteriorated so that it is on the verge of insolvency, if not insolvent, at the time of the transaction, the relevance of the companies being related companies may be diminished or eliminated, as the directors of the company must then be mindful of the interests of any unsecured creditors: *Walker v Wimborne* (1976) 137 CLR 1, 7.

[275] With a view to proving that no reasonable person in QNI's circumstances would have entered into the China First and Waratah Coal transactions, the plaintiffs relied on an independent expert analysis of the China First Coal Project (exhibit 6) prepared by professional mining engineer Mr Marston of Golder Associates Pty Ltd in conjunction with geologist Mr Radonich and mining engineer Mr Hamilton who are other employees of Golder and contractors Mr Mathewson (who is an engineer engaged in coal preparation and minerals processing) and Mr Barton (who is a consulting mining engineer) engaged by Golder. Mr Marston conceded (at Transcript 3-27) that the Golder report took approximately nine months to prepare, as it was a document review and then an opinion on the documents reviewed which involved technical work in reviewing the inputs to the James F King model.

[276] Mr Marston provided an opinion on the market value of EPC 1040 and EPC 1079 and on the market value of the China First Coal Project as at 13 January 2016, having regard to publicly available information and the documentation contained in a "data room" on a USB that was made available to Mr Marston by the GPLs to whom the USB had been provided by Mr Harris on 14 March 2016 (exhibit QNK.017.002.0003). The data room included the 2016 King report and the WP concept study. For the purpose of doing the report, the experts applied the principles of the 2015 edition of the *Australasian Code for Public Reporting of Technical Assessments and Valuation of Mineral Assets* (VALMIN Code) (exhibit 4). Mr Marston acknowledged (at Transcript 3-35) that the Golder report was not a VALMIN public report, but emphasised (at Transcript 4-32) that the Golder report was an independent expert report which reviewed the materials provided and applied VALMIN principles. Mr Marston also acknowledged (at Transcript 3-84) that the 2015 edition of the VALMIN Code did not become binding until 1 July 2016, but explained that it was known to the members of the Australasian Institute of Mining and Metallurgy before it was first published on 13 January 2016 and before it became binding and it was best practice to apply its standards for the valuation as at 13 January 2016. I accept Mr Marston's reasons for applying the 2015 edition of the VALMIN Code, as there was no evidence to contradict his evidence of the availability of its standards before 13 January 2016 and I otherwise found Mr Marston's expertise in the valuation of coal projects to be apparent from the detailed content of exhibit 6 and the professional and rational manner in which he defended his opinions during cross-examination. In any case, Mr Marston explained (at Transcript 4-39) that generally the basic principles for the approach to market value in the 2005 VALMIN Code were the same as for the 2015 VALMIN Code.

[277] Under the VALMIN Code:

> "Market Value is the estimated amount (or the cash equivalent of some other consideration) for which the Mineral Asset should exchange on the

> date of Valuation between a willing buyer and a willing seller in an arm's length transaction after appropriate marketing where the parties had each acted knowledgeably, prudently and without compulsion."

Mr Marston set out at paragraph 38 of the report the three acceptable valuation approaches to determine the basis of value under the VALMIN Code (market-based, income-based and cost-based) and at paragraph 39 of the report the table in the VALMIN Code that assists in selecting the appropriate valuation approach by the project development stage.

[278] Mr Marston explained in section 3.4 of exhibit 6 the methodology that was used to provide the opinions expressed in the report. Mr Marston relied on the subsidiary reports included in exhibit 6 prepared by his associates and incorporated their opinions in reaching his conclusions. Mr Marston has nearly 40 years of experience in the mining and energy industries and has worked for coal companies, investors and financial institutions on projects worldwide and his expertise includes coal mine planning, coal pricing, mining feasibility and reserve and valuation studies. He explained at paragraph 34 of the report that the model developed by Mr Barton used the coal price forecasts that were developed by Mr Marston based on export thermal coal market and price forecasts that he generated in 2015 as part of his advisory and consulting work.

[279] Mr Marston expressed the opinion the market value of the exploration permits as at 13 January 2016 was at most $1 based on an analysis of contemporaneous transactions for non-producing coal properties (section 3.5.2 of exhibit 6), as Mr Marston was unable to find information on contemporaneous sales of other exploration permits in the Galilee Basin. At paragraph 56 of the report, Mr Marston described the actual contemporaneous transactions of non-operating coal resources as at the valuation date to be "purely speculative". He noted that in December 2015 Anglo American sold its 83.33 per cent interest in the closed Dartbrook mine to Australian Pacific coal for $25m in cash plus a future royalty payment, but the sale was not completed with the price being paid until May 2017. Dartbrook had 2.5 billion tonnes of mineral resources. That resulted in a multiple of $0.012 per tonne, but as at the valuation date the price had not been paid, so Mr Marston considered that this multiple was not valid. It was indicative of what a seller would accept for a fully equipped export thermal coal mine with established infrastructure as at the valuation date. Another transaction relied on by Mr Marston at paragraph 57 of his report was the purchase in August 2015 by Stanmore Coal of the "mothballed" Isaac Plains Mine in the Bowen Basin for $1 from Sumitomo Corp and Vale. Mr Marston was cross-examined (at Transcript 4-18) on the fact that at paragraph 58 of the report, he used a sale that was announced on 4 July 2016 as one of the contemporaneous transactions. It was of a non-operating coal mine at Blair Athol for $1 with an undertaking by the vendor to pay $80m for the mine's rehabilitation liability (exhibit QNK.033.001.0437), with the purchaser's announced intention of continuing the rehabilitation of the mined areas, while trying to bring the mine back into operation. He explained that there was a "lead up" to such a transaction and it would have been known by the market at the valuation date of 13 January 2016, but conceded that he did not know the quantity of coal that was still there to mine. At paragraph 60 of the report, Mr Marston noted that buyers for the non-operating properties were "junior mining companies offering very little to no value and purchasing these properties on a purely speculative basis".

[280] Mr Marston was of the opinion that, using a cost-based approach, as at 13 January 2016, the exploration permits had no value, because of depreciation and obsolescence factors associated with depressed thermal coal market prices and demand outlook and any market participants would have been interested in the exploration permits solely on a speculative basis (section 3.5.1 of exhibit 6). Mr Marston also expressed the opinion that the China First Coal Project as described in the WP concept study was a pre-development stage project under VALMIN principles and had no market value as at 13 January 2016, because the project was not economic (section 3.5.3 of exhibit 6). He could not find any contemporaneous market transactions (for prospective or pre-development stage mega-thermal coal projects) that were comparable to use a market-based approach (at Transcript 4-32). Mr Marston emphasised in section 3.5.3.1 of the report that the export thermal coal market outlook had changed significantly for the worse from the 2009 date of the WP concept study to 13 January 2016. At the latter date there was a long term supply surplus in export thermal coal markets and the projected coal prices had the effect of reducing returns on the China First Coal Project to nil. Mr Marston set out in table 7 of the report three coal price escalation forecasts for the China First Coal Project that had the price around US$50 per tonne in 2016. There had been a five year decline in the price of coal from January 2011 to January 2016 (at Transcript 4-40). It followed that Mr Marston's opinion was that, assuming QNI's shares in China First reflected only the market value of the China First Coal Project, the shares had no market value as at 13 January 2016.

[281] Mr Marston was cross-examined (at Transcript 3-37) on the fact that his report was based on the technical details in the WP concept study which was finalised in April 2009 and that was used by James F King in his reports. Mr Marston conceded (at Transcript 3-38) that the proposal in the WP concept study may not be the best way to develop the tenements, but that was the proposal in the data room that he was asked to review. (I note that was theoretically the information that Waratah Coal and China First could make available to QNI, when QNI was making its decision to acquire the shares in China First for $135m and considering whether that would be an asset attractive to potential financiers.)

[282] Mr Marston conceded (at Transcript 3-43) that the accuracy level of his report was whatever the accuracy level was of the WP concept study and noted that WP put a 25 per cent contingency on its numbers. Mr Marston explained that the accuracy levels relate to costs, but there can be more certainty with revenues. Mr Marston accepted (at Transcript 3-43) that the costs could be 50 per cent lower or higher and that the purpose of a concept study was to decide whether to do further work in the field and go forward to do a pre-feasibility study. He conceded (at Transcript 3-43) that the Golder report was neither a pre-feasibility study that would be required to be in the range of 25 to 35 per cent accuracy nor a bankable feasibility for banking finance which would be required to be in the range of 10 to 15 per cent accuracy.

[283] Mr Marston was cross-examined (at Transcript 3-51) on the framework agreement that China First had entered into on 22 July 2009 with Metallurgical Corporation of China Ltd (MCC) (exhibit QNM.002.017.0022) in relation to the proposal that MCC be the main contractor for the China First Coal Project and to sell the coal for the project and the related documents China First had entered into with other Chinese government entities. Mr Marston accepted that the tenements were not worthless in 2010, when those agreements had been entered into, but he observed (at Transcript 3-60) that circumstances changed between 2010 and 2016. In 2010 the price of coal "was the best time there's ever

been in the coal market". He stated (at Transcript 3-62) that the coal prices were not there to support a major investment in 2016 in a developing coal project. Mr Marston was cross-examined (at Transcript 3-59) on whether he had taken into account the interest of Chinese State-owned enterprises in securing a long term supply of coal. Mr Marston explained (at Transcript 4-16) that State-owned enterprises that are not driven by profit are not market participants and are not taken into account in the market-value approach under the VALMIN Code. Mr Marston did not accept (at Transcript 4-49) that it was reasonable that an investor in January 2016 would acquire the China First Coal Project to sell it onto the Chinese government regardless of market conditions. No evidence was adduced to make good this proposition that was put to Mr Marston who kept returning to the fundamental matter on which the report was based (and supported by evidence) that, as at the valuation date, the market for coal was depressed.

[284] Mr Marston did not investigate the Adani transaction for the Carmichael mine which is also in the Galilee Basin. The transaction took place in July 2010 was almost six years prior to 13 January 2016 and that at the time the Newcastle thermal coal price was US$102, whereas in January 2016 it was US$60 (at Transcript 4-29). Mr Marston had explained that the Newcastle thermal coal price was a benchmark that he used for predicting what would be the coal price from the China First Coal Project. He explained at paragraph 82 of exhibit 6 that the China First Coal Project prices would be lower than the Newcastle export thermal coal prices to account for the China First Coal Project's coal's lower average specific energy content and higher total moisture content.

[285] One of the documents in the data room that was assessed by Mr Radonich for his report on the resources and reserves used as inputs for the BDO letters and the King model (appendix A in exhibit 6) was the Xenith Consulting Pty Ltd report dated July 2010 that was an in situ coal resource estimate for the China First Coal Project (described as the South Alpha Project) (exhibit QNK.017.002.0072). Because the coal valuation was being done as at 13 January 2016, Mr Radonich applied the principles of the VALMIN Code and the JORC Code (2012 edition). Mr Radonich explained (at Transcript 4-60) that although he had access to the Xenith report, he did not have access to the underlying data that was the basis for the conclusions in the report. Although he assessed the report by reference to the 2012 edition of the JORC Code, he conceded (at Transcript 4-62) that the Xenith report was prepared at the time the JORC Code (2004 edition) was applicable.

[286] The Xenith report at table 7-1 concluded that there was 1,975m tonnes of measured resource, 569m tonnes of indicated resource and 1,140m tonnes of inferred resource (as those terms were defined in the 2004 JORC Code), making total resources of 3,684m tonnes. Although Mr Radonich did not have sufficient information to reach conclusions about the extent of the resource in accordance with the 2012 JORC Code, he explained (at Transcript 4-69) that he could not agree or disagree with the conclusions of the Xenith report. He acknowledged at paragraph 221 of exhibit 6 that it appeared at least some part of the deposit had been explored and sampled to a level sufficient to report coal quantities and quality to, at least, an indicated resource level of confidence. Mr Marston conceded in cross-examination (at Transcript 3-62) that a commercial person in the mining industry would believe there were over three billion tonnes of coal in the ground, but explained that under the 2012 JORC Code there would have to be a reclassification of the old measured, indicated and inferred resources and, in order to calculate reserves, a pre-feasibility study would now be required. If that were done in January 2016 "it would come out worthless".

[287] Mr Radonich also prepared an expert report on the costs of obtaining a mining lease over an area within the exploration permits (appendix B in exhibit 6). He set out the process for obtaining a mining lease and estimated that the environmental studies, exploration drilling, laboratory analytical, associated field work and technical mining studies required to get the China First Coal Project to a level suitable to obtain a mining lease would cost somewhere in the order of $22.4m. Mr Mathewson's part of the report (appendix C in exhibit 6) was directed at the costs of construction and commissioning processing facilities and processing coal to produce saleable export grade coal. As the WP concept study proposed both underground and open cut mining, Mr Hamilton's expert report (appendix D in exhibit 6) was directed at the costs of establishing an underground mine and one of Mr Barton's reports (appendix E in exhibit 6) was directed at the costs of establishing an open cut mine. Mr Barton did a further report (appendix F in exhibit 6) in which he compared the inputs to the King model with the results and recommendations of the review within exhibit 6 of the mining plans and coal handling and processing plant designs and concluded at paragraph 489 of exhibit 6 that the inputs to the King model were fatally flawed in several respects and that the King model and its resulting valuation estimates were neither adequate nor appropriate as a basis for valuing the China First Coal Project.

[288] Mr Marston comprehensively sets out the deficiencies in the BDO letters as assessments of the market value of the China First Project for the exploration permits, as at 13 January 2016, at section 3.7.1 of exhibit 6. Apart from pointing out (correctly) that the BDO letters themselves acknowledge their inherent limitations as valuations, Mr Marston relies on the review undertaken by Mr Radonich of the 2010 Xenith report, as it is apparent that the measurements of reserves and resources used in the BDO letters were those set out in the 2010 Xenith report. On that basis and relying on Mr Radonich's explanation of the application of the JORC Code to the measurement of reserves, Mr Marston noted at paragraph 103 of the report, in relation to the reserves letter, there were no reserves in the China First Coal Project reportable according to the JORC Code.

[289] In relation to the resources letter, Mr Marston noted that BDO relied on two transactions that took place well before the valuation date: the Adani purchase of the Carmichael mine announced in August 2010 and the Cockatoo coal transaction announced on 18 October 2013. In relation to the former, Mr Marston did not investigate the purchase of the Carmichael mine as a comparable transaction, because it was almost six years prior to the valuation date (at Transcript 3-65). In relation to the latter, Mr Marston disputed that it was a comparable transaction for the reasons he set out in paragraph 107 of the report that it appeared to be an allocation of a portion of the purchase price that Cockatoo Coal paid in its acquisition of Blackwood which controlled a significant coal project in pre-development near the Rolleston Mine in the Bowen Basin, as well as coal interests in the Surat Basin, and there was no information provided on the basis of the value shown for the transaction. The average multiple (enterprise value/resources) for these two transactions was $0.067 per tonne. The BDO resources letter did note that the prevailing Newcastle free on board coal price was approximately US$96 per tonne at the time of the Adani transaction and approximately US$85 per tonne at the time of the Cockatoo Coal transaction, whereas the Newcastle free on board coal price as at 8 January 2016 was approximately US$56 per tonne. This letter then expressly cautioned that, in view of the transactions occurring at a time when the conditions for coal explorers were more favourable than they were at the date of the letter, "the enterprise value to resource multiples outlined above may be considered by the market to represent an upper limit for the value of the China First Assets". Mr Marston noted at paragraph 111 of the report that,

despite that caution, BDO did not factor its multiples for the significant lower prices as at the valuation date compared to the transaction dates. That is a significant criticism, when the disparity in coal prices between the valuation date and each transaction date respectively is considered. Mr Marston noted at paragraph 112 of the report that, in fact, for lower quality Galilee Basin coals such as those anticipated from the China First Coal Project, by January 2016 prices had dropped significantly lower to US$40 per tonne to US$45 per tonne based on figure 5 of the report (but I note the forecasts at table 7 of the report). Whichever of the January 2016 prices are used for the Galilee Basin coals, the point was well made by Mr Marston that the BDO resources letter did not refer to the lower price for Galilee Basin coals when compared with Newcastle thermal coal. Mr Marston concluded at paragraph 116 of the report that the BDO letters did not provide an adequate or appropriate basis for assessing the market value of the China First Coal Project or the exploration permits as at the valuation date.

[290] Mr Marston and the other experts whose reports were incorporated into exhibit 6 were cross-examined extensively, but the corporate defendants did not adduce engineering or technical evidence that controverted the opinions expressed in exhibit 6, as clarified in the course of the cross-examination of Mr Marston and the other experts. It may sound extreme that the Golder report results in a market value of $1 for the exploration permits and a nil valuation of the China First Coal Project as at 13 January 2016, but the analysis undertaken in that report to support these conclusions is highly persuasive. The methodology undertaken by Mr Marston and the other experts is helpful for assessing what the market value of the China First Coal Project would have been to an independent purchaser as at the valuation date. As Mr Marston acknowledged (at Transcript 4-14), he could not rule out that the project may have attracted speculative investment as at 13 January 2016, but that does not mean that the market value was other than what exhibit 6 indicates as at that date.

[291] The corporate defendants urge the court not to apply "hindsight reasoning" to the transactions to assess the commerciality and, in that regard, it is submitted the court should not speculate that transactions were entered into in anticipation of QNI entering into administration. Even without any speculation as to the purpose of the transactions, the timing of the transactions when QNI was exploring the option of administration after flagging the intention in connection with the Western Australian proceeding to enter into administration, if a loan were not forthcoming from Mineralogy (and none had been forthcoming as at 13 January 2016), and Mr Mensink had realised from the forecast cashflow position on 3 January 2016 that QNI might have to go into administration, cannot be ignored and must be a relevant matter for the purpose of s 588FB(1)(d) of the Act. I therefore do not consider it is "hindsight reasoning" to treat the timing of the transactions in relation to the appointment of administrators anticipated by QNI on the date of the transactions as a relevant matter.

[292] The defendants submit the China First transactions were commercially beneficial to QNI in providing access to significant resources of value against which borrowing could occur, but for which the payment obligations were deferred. The defendants point out that, objectively, according to the report prepared by KPMG that was provided to QNI (exhibit FTI.007.001.0363) in early December 2015 sufficient profit and cash was forecast to meet the first instalment of the subscription share price due in 31 December 2017. It was therefore a relevant consideration that QNI was anticipated to be able to meet the payment

obligations through revenue generated in the business. What a reasonable person in QNI's circumstances would be considering as at 13 January 2016 would be whether that was an appropriate investment at a time when QNI was about to enter into administration and whether that purchase price was value for the investment, even if QNI's liquidity was likely to have improved by December 2017.

[293] The defendants rely on the fact that the total subscription share price of $135m was based on the estimate of value undertaken by BDO of the China First assets on 8 January 2016. The corporate defendants submit that I should infer that the share subscription price of $135m was calculated by reference to the indicative values identified in the BDO letters and reflected the proportion of the number of shares QNI received in China First to the total issued shares of China First (which was twenty-forty sevenths). The calculation that was done to arrive at the total share subscription price of $135m is not immediately apparent from the figures in the BDO letters. There is a suggested method of calculation set out in paragraph 388(b) of the defence that is based on an incorrect proportion of the shares in China First issued to QNI. That method did not accord with the evidence given by Mr Harris and no other witness was called by the defendants to explain any calculation that may have been done.

[294] I infer from the date of the BDO letters that they were available to Waratah Coal and China First for the purpose of fixing the price of the China First shares issued to QNI. What is relevant is the state of knowledge of QNI about the value of the China First Coal Project. There is direct evidence that the BDO letters were provided to QNI at the time, or soon after, they were received by Waratah Coal in the notes Mr Wolfe made at the meeting on 9 January 2016 (exhibit WOL.001.001.0420 at p .0473) to prepare resolutions for Resources, Metals and QNI to enter into agreements with Waratah Coal at which he noted that Mr Mensink tabled the James King report and the BDO letters. The sole director of QNI, Mr Mensink, remained a director of Waratah Coal until 8 January 2016 and was secretary of Waratah Coal until 10 January 2016. Mr Mensink was therefore aware of the content of the BDO letters before 13 January 2016.

[295] Apart from the BDO letters, the corporate defendants rely on opinions that had been expressed by external financial institutions in May 2011 as to the value of the China First Coal Project. These May 2011 valuation opinions were in the data room (exhibits WTC.001.001.0810, QNK.017.002.0590, QNK.017.002.0667 and QNK.017.002.0740). It should be noted, however, that the documents containing those opinions were admitted into evidence as original documents, but not for the truth of their contents. It appears they were prepared for the proposed float of a company Resourcehouse Limited (at Transcript 17-34) and it is apparent that float did not proceed, as the shares that Resourcehouse Limited had held in China First were transferred to Mineralogy (exhibit QNM.002.041.0314). In addition, they made assumptions about the coal price that did not reflect the coal price of about US$50 per tonne in January 2016 for coal of the quality anticipated from the China First Coal Project. For example, the UBS report was on the basis of a real long term coal price of US$80.80 per tonne and the Bank of China report was on the basis of a coal price of US$87 per tonne in the 2015 financial year (which was stated in the report to be the anticipated commencement date of commercial production of the China First Coal Project), adjusted by an inflation rate of 2.4 per cent in the following years.

[296] On the basis that Mr Mensink was a director of Resourcehouse Limited when those valuation opinions were published in May 2011, the corporate defendants submit that Mr Mensink would have been aware of the opinions at the time QNI entered into the China First and Waratah Coal transactions. It is not open to infer that a reasonable person in QNI's circumstances would have been influenced by those May 2011 valuation opinions, when considering the China First and Waratah Coal transactions on 13 January 2016. Even if a reasonable person in QNI's circumstances as at 13 January 2016 were aware of the May 2011 valuation opinions, the reasonable person would have also considered the current coal price (that was markedly different to that which was the basis for the opinions expressed in May 2011) and that the China First Coal Project had still not commenced. No evidence was adduced in the proceeding that would support an inference that Chinese State-owned entities were interested in January 2016 in investing in the China First Coal Project.

[297] The defendants assert that it is apparent from clause 2.1 of the share subscription agreement that QNI agreed to subscribe for the shares on its behalf as part of the joint venture which meant it entered into the agreement as agent under the JVA. The defendants also submit that it was apparent from recital A of the Waratah Coal security deed which recorded that Metals, Resources and QNI were parties to a joint venture under the JVA that the parties to the security deed were acknowledging that QNI entered into the security deed as agent for and on behalf of Metals and Resources, even though that was not expressly stated in the security deed. The defendants also note that, as the Waratah Coal charge should be construed in conjunction with the security deed as a composite transaction, it follows that QNI entered into the Waratah Coal charge as agent for and on behalf of Metals and Resources, despite that not being expressly stated in the Waratah Coal charge. In addition, the defendants note that pursuant to clause 2.1(2) of the Waratah Coal charge, it was given by each of the parties comprising the chargor relevantly as beneficial owner of all of the secured property held by the chargor beneficially and as QNI did not hold property beneficially, the secured property for QNI was minimal.

[298] There is an inconsistency between the corporate defendants' submission (at [370] of their closing submissions) that QNI obtained shares with a substantial value (where it did not previously hold assets of value, as a result of the issue of shares to QNI in its own name beneficially (as recorded by China First) under the share subscription agreement and the submission otherwise made by the corporate defendants (at [351] of their closing submissions) that QNI acted as agent for Resources and Metals in acquiring the shares and Resources and Metals held ultimate responsibility for the payment of the shares. It is not necessary to resolve the issue whether or not the shares in China First were issued to QNI as agent for Resources and Metals, because as at the date of the China First and Waratah Coal transactions, Resources and Metals were experiencing the same liquidity crisis that affected QNI's position. Even though Resources and Metals charged their property with the payment of the sum of $135m, what is relevant is that on 13 January 2016 QNI assumed the liability to pay $135m for the China First shares.

[299] The defendants also submit the Waratah Coal transactions were commercially beneficial to QNI in that they provided access to significant resources of value against which borrowing could occur, they did not impose any immediate payment obligations on QNI and QNI obtained a commercial opportunity to borrow up to US$100m using assets of Waratah Coal. The defendants submit that the China First and Waratah Coal transactions were

designed to assist QNI to obtain access to property outside the QN Group which could be provided as security to a creditor or creditors to advance funds, so as to keep QNI out of administration.

[300] The corporate defendants also assert that the China First and the Waratah Coal transactions could have enabled QNI to satisfy the requirements of Aurizon which would then have allowed Mr Vickers to pursue the financiers identified in his email dated 12 January 2016 sent to Mr Mensink and Mr Wolfe (exhibit QNK.011.028.1939), if QNI had remained out of voluntary administration. It is therefore submitted that the potential of QNI to obtain finance on the basis of holding shares in China First and the availability of the Waratah Coal tenements as security to support borrowing by QNI formed a legitimate basis for concluding a reasonable person in the position of QNI would have entered into the China First and Waratah Coal transactions. This submission overlooks the clear rejection by Aurizon in its correspondence (exhibit QNK.011.028.0371) of the Waratah Coal exploration permits as security for the debt owed by QNI. It also overlooks the fact that the shares issued to QNI in China First did not satisfy another criterion of Aurizon that the security be provided by entities external to the QN group. It also overlooks the lack of evidence of any plans by QNI as at 13 January 2016 to pursue finance secured by its shares in China First or security provided by Waratah Coal, instead of entering voluntary administration. The evidence does not support a finding that QNI entered the China First and Waratah Coal transactions on the basis they correlated with the advice of Mr Vickers and were steps taken in implementing his advice.

[301] The plaintiffs point out there was no benefit to QNI in acquiring the shares, as they were a minority interest in China First and China First's only asset was a right to develop a mining project, but the rights were defeasible by Waratah Coal, as China First had not prepared the development plan and submitted it to Waratah Coal and the relevant Government authorities for approval by 8 July 2014 as required by the mining right agreement. The plaintiffs submit that objectively, there was only value in the shares, if the underlying project were developed. That would take many years and require considerable funding and there was no evidence that QNI, as at 13 January 2016, had any knowledge, or assurance from China First, that would or could be done. There was no evidence that QNI had taken independent advice in respect of the acquisition of the shares.

[302] The plaintiffs also submit there was no value to QNI in obtaining the shares, because it had no prospect of selling them or using them as security for the purposes of obtaining a loan, because they were the subject of the China First charge. The shares did not fit the criteria that Aurizon proposed for security to support postponement of the payment of the debts that were unpaid by QNI, particularly the requirement that, in the event of default, the underlying asset could be readily liquidated (exhibit QNK.011.027.6514). The plaintiffs also made the point that there was obvious detriment to QNI in the terms on which it agreed to pay the sum of $135m for the shares, because as soon as it entered into administration, that sum became immediately payable at China First's option. The plaintiffs also rely on the fact that there was an obvious detriment to the unsecured creditors of QNI, as the China First charge purported to give China First security for the payment of $135m that would become immediately payable at its election upon QNI entering into voluntary administration and thereby deferring the unsecured creditors. For there to be any benefit in Waratah Coal making its tenements available as security for QNI, the plaintiffs point out there needed to be a financier who would accept that security and do

so within the short timeframe before Aurizon proposed to suspend services from 18 January 2016. No evidence was adduced of a financier willing to take that security in such a short timeframe. Even if it were accepted that a speculator might place value on the tenements, there was no evidence adduced that a financier would be prepared to do so.

[303] The imminence of the suspension of the rail services from 18 January 2016 would have been a consideration for a reasonable person in QNI's circumstances in considering whether or not to embark on the set of transactions that resulted in QNI having shares in a private company available to offer as security to its creditors, but for which it was then liable to pay $135m (on a deferred basis). It may not have been possible for QNI to obtain a comprehensive report on the value of the China First Coal Project between the time Aurizon issued the default notices on 27 November 2015 and 13 January 2016, but a reasonable person in QNI's circumstances would have recognised the BDO letters were not intended to be, and did not amount to, valuations to support the making of a substantial investment in shares in China First. In fact, a reasonable person in QNI's circumstances would not commit to a payment of $135m for shares in China First on the basis of the extremely qualified BDO letters. The facts that China First was a dormant company, its rights under the mining right agreement were defeasible at Waratah Coal's election, the project was still in its pre-development phase and thermal coal prices were depressed as at 13 January 2016 would be matters a reasonable person in QNI's circumstances would have taken into account in considering the risks of investing in China First for a substantial price (even though the payment was deferred, if QNI did not go into administration). The question posed by Mr Doyle of Queen's Counsel on behalf of the plaintiffs (at Transcript 27-16) is apt: Would a reasonable company in the position of QNI, that was on the verge of voluntary administration, contract to buy $135m worth of shares in a related company? A reasonable person in QNI's circumstances with the state of knowledge that QNI's director had of QNI's circumstances would not have entered into the China First transaction.

[304] It is not as straightforward to determine the position in relation to the Waratah Coal transaction. It is admitted on the pleadings that no assets of Waratah Coal were made the subject of any security interest in relation to any provision of lending or other credit in favour of QNI, the terms of the security deed do not oblige QNI to make any payments to Waratah Coal and the Waratah Coal charge does not secure any liability of QNI to Waratah Coal. That means that QNI could request Waratah Coal to release the Waratah Coal charge. It is still relevant to consider, though, whether the transactions comprising the Waratah Coal transaction were uncommercial from QNI's perspective at the time they were entered into. In relation to the release agreement, it is a relevant matter that QNI, whilst in the throes of preparing for entry into voluntary administration, enters into an agreement which, on its face, appears to be for bolstering any loan forgiveness that had been made in the past by QNI, Resources and Metals to the Palmer Parties (as defined). In fact, in this proceeding the corporate defendants plead inaccurately in paragraph 178 of the defence as to the effect of the release agreement that by written agreement dated 13 January 2016 that loans between Resources and Metals and Mineralogy up to that date were forgiven. In view of my conclusion, however, that the release agreement was not a valid contract in the absence of good consideration, it does not constitute a transaction within the meaning of the definition in s 9(1) of the Act and therefore is not amenable to relief on the basis of being uncommercial.

[305] The asserted benefit that QNI obtained from Waratah Coal making the mining tenements available for security against which QNI could borrow was illusory, because as at the date the transaction was entered into under the security deed, it was already known that Aurizon was proposing to suspend rail services from 18 January 2016 and there is no evidence from which an inference can be drawn that QNI reasonably believed that it could obtain finance using that security by 18 January 2016. The Waratah Coal charge was intended to secure the amount of any finance that was obtained by QNI on the basis of the mining tenements. It is curious that without embarking on steps to procure any such finance, QNI entered into the security deed and the Waratah Coal charge. Because QNI was on the verge of entering into voluntary administration, there was no benefit to QNI's unsecured creditors in QNI giving Waratah Coal the benefit of the Waratah Coal charge which would have potentially enabled Waratah Coal to exercise the rights as chargee, if any amount at all was secured by the Waratah Coal charge (such as the costs of preparing the document). It may be arguable that Waratah Coal obtained no greater benefit under the Waratah coal charge than that to which in the normal course it would be entitled by virtue of making the mining tenements available as security for QNI, but that is far outweighed in the circumstances by the timing of the transactions.

[306] Applying an objective test from the perspective of QNI's circumstances, I conclude that a reasonable person in QNI's circumstances with its state of knowledge of the imminent entry of QNI into administration would not have entered into the Waratah Coal charge and security deed.

[307] The corporate defendants pleaded a defence under s 588FG of the Act that would preclude the court making orders under s 588FF(1) of the Act. Section 588FG(2) provides:

> "A court is not to make under section 588F an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:
>
> (a) the person became a party to the transaction in good faith; and
>
> (b) at the time when the person became such a party:
>
> (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
>
> (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
>
> (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction."

[308] The defence under s 588FG(2) required China First and Waratah Coal respectively to prove that each became a party to the transactions to which each company were parties in good faith and, as at 13 January 2016, each of China First and Waratah Coal had no reasonable grounds for suspecting that QNI was insolvent at that time and a reasonable person in the circumstances of each of China First and Waratah Coal would have had no such grounds for so suspecting. These were not matters on which any person with relevant

knowledge gave evidence that would assist China First and Waratah Coal in discharging the onus each bears respectively in relation to the defence. See *Williams v Peters* [2010] 1 Qd R 475 at [55]-[57].

[309] The corporate defendants did not make any written or oral closing submissions on the application of s 588FG(2). There was no formal abandonment of the defence, but the failure to make any submissions was implicit acknowledgement, and I find, that China First and Waratah Coal could not discharge the onus each bore in relation to the defence.

[310] In the statement of claim, the plaintiffs sought to have all agreements entered into by QNI as part of the China First transaction declared void ab initio. In the written closing submissions, however, the plaintiffs did not seek that relief in respect of the share subscription agreement on the basis that, as a consequence of the settlement with the SPL, China First had released the claims it had against QNI. The plaintiff submitted this extended to QNI's obligation to pay the subscription fee due under the share subscription agreement. The submissions on the effect of the settlement with the SPL on QNI's liability under the share subscription agreement are found at paragraphs 881 to 883 of the plaintiffs' written closing submissions. This was not a matter that was referred to in oral submissions by either the plaintiffs or the corporate defendants. In fact, all that was referred to by senior counsel for the plaintiffs in the oral closing submissions was that the plaintiffs set out the relief sought in respect of the uncommercial transactions in that section of their written submissions (at Transcript 27-22) and the fact that the plaintiffs were no longer seeking an order to set aside the share subscription agreement was not highlighted.

[311] The plaintiffs did seek in paragraph 884(b) of their written closing submissions an order that China First not seek to recover any payments from QNI under the share subscription agreement (as reflecting the settlement with the SPL), but that order is not based on the claims of the plaintiffs in this proceeding. I therefore do not consider I could make such an order without at least hearing from China First.

[312] I have difficulty with the fact that the matters in paragraphs 881 to 883 were not addressed in oral submissions, as if the share subscription agreement is not set aside, that leaves QNI with the two billion shares in China First for which the plaintiffs now assert QNI has been released from its obligation to pay. This can be contrasted with the case the plaintiffs pursued in the proceeding (until the closing submissions) that the share subscription agreement was an uncommercial transaction and should be set aside as being void ab initio. If the share subscription agreement were set aside, it would have the result that there would be no obligation on QNI to pay for the shares in China First, but the shares issued to QNI would have to be relinquished. I therefore propose not to make any orders at this stage in relation to the share subscription agreement, but will reserve the question of what orders are appropriate until after these reasons are published, in order to give both parties the opportunity to make further submissions on the appropriate relief in view of my conclusion it was an uncommercial transaction.

[313] In view of the findings that I have made that the China First charge, the Waratah Coal charge and the security deed are uncommercial transactions, each is voidable under either or both of s 588FE(2) and (3) of the Act. It is appropriate that declarations be made that each of the transactions is voidable. It is therefore necessary to consider what orders are appropriate to be made pursuant to s 588FF(1) of the Act. China First and Waratah Coal

have been on notice from the statement of claim that the plaintiffs claim orders that each of the transactions be declared void ab initio. Because of the timing of the transactions when it was inevitable QNI would enter into voluntary administration, I am satisfied that it is appropriate to make the orders sought by the plaintiffs in relation to these transactions.

[314] It is therefore not necessary to consider the plaintiffs' alternative claim under s 588FJ of the Act, but for completeness sake I will do so. That provision provides that a circulating security interest created within six months of the relation back date is void, except so far as an exception applies. That means the China First charge and the Waratah Coal charge are void under this provision, unless one of the exceptions in s 588FJ(2) applies. The corporate defendants plead that by virtue of the exceptions in paragraphs (a) and (d) of s 588FJ(2), both the Waratah Coal charge and the China First charge are not void. In addition, the defendants plead that, by virtue of s 588FJ(2)(c), the China First charge is not void against the liquidators of QNI, because it secures the amount of QNI's obligations pursuant to the share subscription agreement which were obligations undertaken at, or about the time of entry, into the China First charge for the benefit of QNI.

[315] On its terms, the exception in paragraph (a) does not apply to either charge, as neither China First nor Waratah Coal paid an advance to the company that was secured by the relevant charge. Paragraph (d) provides an exception where the charge secures an amount payable for property supplied to the company. That exception does not apply to the Waratah Coal charge but prima facie applies to the China First charge which secured the amount payable by QNI for the shares in China First issued to QNI under the share subscription agreement. Section 588FJ(5) states that paragraph (d) does not apply in relation to an amount payable for property in so far as the amount exceeds the market value of the property, when supplied to the company. In view of Mr Marston's opinion that at the date of the transaction the China First Coal Project had no market value and that was the only asset of China First, it means that the exception in paragraph (d) does not apply to the total amount for the purchase price of the shares secured the China First charge. China First also sought to rely on the exception in paragraph (c), but that does not, on its terms, apply to the China First charge. Paragraph (c) applies to the extent the charge secures "the amount of a liability under a guarantee or other obligation undertaken at or after that time on behalf of, or for the benefit of, the company". QNI's obligation to pay China First for the shares is not an obligation that is "on behalf of, or for the benefit of" QNI. That means that both the China First charge and the Waratah Coal charge were also void under s 588FJ(2) of the Act.

Martino transactions

[316] The conclusion that the China First charge was voidable and should be declared void ab initio against the second plaintiff means, on any view, Mr Martino had no authority whatsoever to act in the manner in which he did, upon being appointed pursuant to the China First charge. It is therefore not strictly necessary to deal with the claims in part W of the statement of claim, but as Mr Martino participated in the trial as a party to the end of the trial, I will address the submissions made by the parties in respect of the issues that remained outstanding between the plaintiffs and Mr Martino during the trial of the proceeding.

[317] Apart from the proceeding to set aside the China First and Waratah Coal transactions, QNI had commenced another proceeding in this court against Mineralogy seeking to recover about $105m from Mineralogy (which is also now incorporated into this proceeding).

[318] The transactions involving Mr Martino took place in early May 2017. On 3 May 2017 Mr Palmer on behalf of China First signed a deed appointing Mr Martino as the agent of QNI pursuant to the China First charge. Mr Martino accepted the appointment on 3 May 2017. Then on the same day Mr Martino on behalf of QNI entered into a deed dated 3 May 2017 with China First whereby, in consideration of the releases provided for in clause 11 of the deed, China First agreed to reduce the debt owed by QNI from $135m to $125m. Clause 11 provided:

> "Upon this deed being duly executed by each of the required signatories and upon receipt by CF of notice that the proceeding has been formally discontinued, withdrawn or dismissed, QN and CF mutually release and discharge each other from all claims, actions, suits, causes of action, demands, complaints, damages and costs which each may have had, have now or may have in the future, concerning the proceeding and the carriage of the proceedings, but for the execution of this deed. Furthermore, the consideration of the matters set out herein QN releases all directors and related parties as defined under the *Corporation Act 2001* (of CF) from all claims, actions, suits, causes of action, demands, complaints, damages and costs that have accrued to the date hereof."

[319] Although recital A to the deed referred to QNI's proceeding against Mineralogy, Mineralogy was not a party to the deed.

[320] On 4 May 2017 a substitute deed was prepared for signature by Mr Martino where Mineralogy was now also a party to the settlement deed, and clause 9 of the deed referred specifically to the agreement by QNI to discontinue the proceeding against Mineralogy and not make future claims against Mineralogy which have been the subject of the proceeding. Clause 11 was also amended so that the mutual releases involved QNI, China First and Mineralogy and QNI specifically released all directors and related parties of Mineralogy and China First as defined under the Act (of China First) from all claims, actions, suits, causes of action, demands, complaints, damages and costs that had accrued to the date of the deed.

[321] Mr Martino signed a notice of party acting in person on behalf of QNI and a notice of discontinuance in respect of QNI's proceeding against Mineralogy on 8 May 2017. The notice of discontinuance was signed on behalf of Mineralogy on 9 May 2017. Both documents were filed in the court on 9 May 2017. The GPLs on behalf of QNI immediately applied for an interim injunction restraining Mr Martino and China First from taking any steps pursuant to his appointment on 3 May 2017 as the controller of QNI or the China First charge. The interim injunction was granted by Bond J and an interlocutory injunction was granted first until 25 May 2017 and then until the trial or earlier order: *Queensland Nickel Pty Ltd (in liq) v Martino* [2017] QSC 95.

[322] The claims against Mr Martino were incorporated into this proceeding.

[323] Mr Martino was an active defendant in the proceeding and represented throughout the trial. When Mr Robinson of counsel was invited to open the case for Mr Martino on 21 August 2019, he indicated that Mr Martino would abide the court's decision in respect of the validity of his appointment as the controller of QNI.

[324] On 27 August 2019, the corporate defendants abandoned the defence based on the Mineralogy settlement deed which Mr Martino had entered into on 4 May 2017 and no longer sought to rely on evidence from Mr Martino (at Transcript 18-40). Mr Martino remained a defendant in the proceeding and continued to appear by counsel and solicitors.

[325] By letter dated 10 October 2019 from Mr Martino's solicitors to the plaintiffs' solicitors (exhibit 67), Mr Martino has unconditionally and permanently undertaken not to act further on his appointment, or purported appointment, as controller of QNI. That undertaking reflected the terms of the interlocutory injunction made by Bond J on 18 May 2017. The letter stated:

> "Our client hereby permanently undertakes not to – whether by his servants, agents or otherwise – take any step pursuant to his appointment or purported appointment on or about 3 May 2017 as agent and controller to property of Queensland Nickel Pty Ltd (in liquidation) (**QNI**) including (without limitation):
>
> 1. Filing any documents in court proceedings on behalf of QNI;
> 2. Purporting to dispose of or otherwise deal with any property of, or held in the name of, QNI; and
> 3. Executing or entering into any deed, agreement or other instrument purporting to bind QNI."

[326] Mr Martino's position changed in respect of the validity of his appointment by the time his written closing submissions were provided to the other parties. In the written submissions on his behalf, the position was advanced that, as Mr Martino was not a registered liquidator and his appointment was effectively as a receiver, his appointment was invalid, as pursuant to s 418(1)(d) of the Act a person who is not a registered liquidator is not qualified to be appointed as receiver of property of a corporation. Although the plaintiffs did not accede to that submission and asserted other reasons for the invalidity of Mr Martino's appointment, the plaintiffs' position was that, as long as a declaration was made about the invalidity of Mr Martino's appointment, the basis on which it was made did not need to be determined.

[327] During closing submissions on 17 October 2019, Mr Martino gave an undertaking to the court in the terms which had been proposed in the letter dated 10 October 2019. The plaintiffs did not oppose that aspect of their relief being dealt with by Mr Martino's undertaking to the court. In addition, an order was made with the concurrence of the parties in another proceeding in this court involving the plaintiffs, Mr Martino and China First (BS4902 of 2017) that disposed of a notice that Mr Martino had purported to issue to the GPLs under s 430 of the Act on 3 May 2017. A declaration was also made in that proceeding in terms that the purported appointment of Mr Martino as controller of QNI was invalid and of no effect. Costs were reserved.

[328] The issue that remains in relation to Mr Martino is whether, in light of the declaration made by consent that his appointment as controller of QNI was invalid and of no effect and his undertaking given to the court on 17 October 2019, any further relief that was sought by the plaintiffs against Mr Martino in paragraphs 522(b) and (c) of the statement of claim should be ordered.

[329] The relief sought in paragraph 522(b) was a declaration that the Mineralogy settlement deed and the two notices signed and filed by Mr Martino in proceeding BS3202 of 2017 were not legally effective to bind QNI or to discontinue the proceeding. There is no utility in making the declaration that is sought in paragraph 522(b) of the statement of claim after the corporate defendants abandoned reliance on the Mineralogy settlement deed and the undertakings given by Mr Martino to the court. The determination of this proceeding will bring to an end the interlocutory injunction ordered by Bond J on 18 May 2017 which in the meantime had restrained any action on the settlement deed and notices signed by Mr Martino. The making of the declaration that those documents were ineffective has been overtaken by the making of the declaration that Mr Martino was invalidly appointed. The application for the declaration in paragraph 522(b) of the statement of claim is therefore refused.

[330] The plaintiffs pressed for a declaration in terms of that sought in paragraph 522(c) of the statement of claim that Mr Martino's conduct in purporting to bind QNI to the deed of settlement entered into between QNI, China First and Mineralogy dated 4 May 2017 and the two notices given to the court in proceeding number BS3202 of 2017 amounted to a breach of Mr Martino's obligation to act in good faith for the purpose of obtaining repayment of an amount owing to China First and not to act so as to sacrifice the interests of QNI. The plaintiffs submitted there was utility in making the declaration sought in paragraph 522(c), as it may have relevance on the question of costs. The corporate defendants did not make submissions on the substantive issue raised by the declaration, but submitted that the declaratory relief sought by the plaintiffs was of no utility. Mr Martino asserts there is no utility in making the declaration sought in paragraph 522(c), as no party is relying on the Mineralogy settlement deed or the notice of discontinuance. Mr Martino did, however, also submit against the making of the declaration sought in paragraph 522(c) on the basis that he did not owe the obligations imposed upon a controller, if he were not validly appointed as a controller.

[331] The issue the plaintiffs seek to have determined between them and Mr Martino in respect of the declaratory relief sought in paragraph 522(c) is therefore whether, even though it is now common ground that Mr Martino was not validly appointed, he owed the duties alleged by the plaintiffs on the basis he purported to assume the position of a controller of QNI.

[332] First, it should be noted that the declaration sought in paragraph 522(c) was by way of further or alternative relief.

[333] Second, the plaintiffs relied on three authorities which dealt with whether persons who were not validly appointed as directors (or like officers) owed the duties that a validly appointed director (or like officer) owed.

[334] *Gibson v Barton* (1875) LR 10 QBD 329 concerned circumstances that would now be considered quite unusual. The appellant Mr Gibson was the secretary of Steam Stoker Company Ltd. An information was brought against him by the respondent who was a member of the company that Mr Gibson as the manager had not forwarded to the registrar of joint stock companies a copy of the list of persons who, at the 14th day after the holding of the ordinary general meeting of the company, were members of the company as required by s 26(1) of the relevant legislation. Section 27 of the legislation made it an offence for every director and manager of the company who knowingly and wilfully authorised or permitted default in complying with s 26(1). The respondent gave evidence that he knew of the appellant as the manager of the company. No person had been appointed by the board of directors of the company as manager or managing director. The default was alleged to have occurred in respect of the general meeting of the shareholders due to be held in 1873 which was not held. The court by a majority (Blackburn and Lush JJ) found there was evidence that the appellant was permitted by the board of directors to be the manager of the company, as if he had been legally appointed. He was therefore described by Blackburn J at 338 as a "manager de son tort". It was held at 340 that the appellant wilfully and knowingly permitted default in not causing the company to call a meeting in 1873 which was the condition precedent to sending in the list of shareholders, so that he knowingly and wilfully permitted the default of the company in not sending in the list and was liable to the penalty for not doing so.

[335] In *In re Canadian Land Reclaiming and Colonizing Company* (1880) 14 Ch D 660 two persons were not validly appointed as directors as they did not hold the requisite shares for eligibility for appointment as a director. They acted as directors. The company was wound up and the liquidator sought damages from each of them for misfeasance equivalent to the value of the shares required for appointment as a director. The liquidator was successful at first instance, but unsuccessful on the appeal on the basis there was no misfeasance. The liquidator had proceeded against the appellants on the basis of the statutory provision that permitted the liquidator to recover from a director or any officer of the company any moneys of the company or damages for misfeasance or breach of trust in relation to the company. For the purpose of the appeal, it was noted at 670 that the following admission and submission was made:

> "It was admitted by the Appellants that these persons, as *de facto* directors, would be liable for any act of commission or any omission on their part in the same manner and to the same extent as if they had been *de jure* as well as *de facto* directors. They were, so to say, directors *de son tort*, and liable in that character, but not otherwise, and you must shew something that they did which resulted in loss to the company, and for which, if they had been duly appointed directors of the company, the company would have been entitled to a remedy against them."

[336] The admission was consistent with the provision of the relevant legislation that "all appointments of directors shall be deemed to be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications" and one of the articles of association of the company to similar effect that all acts done by any person acting as a director shall be valid, as if every such person had been duly appointed and was qualified to be a director. It was not shown that the de facto directors had done anything wrong in the course of acting as directors that caused loss to the company.

[337] In *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236, Mr Drysdale was appointed to fill the casual vacancy on the board of a company. The company's articles of association provided that a director appointed to fill a casual vacancy should hold office only until the next following annual general meeting and should then be eligible for re-election. Mr Drysdale was not re-elected and therefore ceased to hold office, but he continued to attend meetings of the board, to vote on resolutions and to participate in the management of the company as a director. He was later charged with failing to act honestly in the discharge of the duties of his office as a director and failing to use reasonable diligence in the discharge of the duties of that office in the period that post-dated the annual general meeting at which he was not re-elected and ended with his resignation as a director. He was convicted of both charges, but on a case stated to the New South Wales Court of Criminal Appeal, it was determined that he was not a director within the meaning of s 124 of the *Companies Act* 1961 (NSW). The High Court reversed that decision.

[338] Even though Mr Drysdale's case was not one of invalid appointment (as he continued acting as a director after his valid appointment was terminated), the court relied on authorities including *Gibson* and *Canadian Land Reclaiming* to hold that s 124 of the NSW Act applied to a de facto director. Mason J (which whom Gibbs J agreed) held at 243 that a de facto who holds over after his appointment as a director has terminated accords with the assumptions that s 124(1) makes, as he continues to occupy the office of director (although without lawful authority) and discharges the duties attached to that office. Murphy J agreed at 245 that a director may occupy an office, although wrongfully. Aickin J (with whom Gibbs J also agreed) observed at 252 in relation to *Gibson* that:

> "Although that case deals only with 'managers' which is not an office recognized by the Act as a necessary part of the internal government of a company, as the office of director, it is clear that the majority thought that the reasoning applied to de facto directors."

Aickin J then analysed the decision in *Canadian Land Reclaiming* and noted at 253:

> "That case cannot be regarded as a direct decision concerning the liability under a misfeasance summons of a de facto director, although the members of the Court appeared to agree with the concession made by counsel for the appellants."

Aickin J concluded at 255-256 that these and like authorities meant that it was too late to say that the word "director" in the relevant statutory provisions was confined to directors properly so called and duly appointed to such office.

[339] In contrast to the authorities that treat a de facto director as a director, an invalidly appointed receiver was treated as a trespasser: *In re Goldburg (No 2)* [1912] 1 KB 606, 611. That distinction is reflected by the current definitions in the Act respectively for "director" and "controller". The definition of "director" in s 9 of the Act expressly extends to a person who is not validly appointed as a director who acts in the position of a director or the directors of the company are accustomed to act in accordance with that person's instructions or wishes. No such extended definition applies to "controller" which is consistent with express provision being made in s 419(3) of the Act for dealing with the liability of a controller who was not properly appointed. The scheme for regulation of the

conduct of controllers under the Act is arguably different to the scheme for the regulation of the conduct of directors (or like officers) of corporations.

[340] Where there is no real utility between the parties in making the declaration that is sought in paragraph 522(c), because of the undertaking given by Mr Martino to the court on the last day of the trial and the order to which he consented about the invalidity of his appointment, it is not necessary, and I am therefore not inclined, to decide the substantive issue pursued by the plaintiffs of whether Mr Martino was subject to the obligations that would have applied, if he were validly appointed, to the acts he purported to perform as controller of QNI. This is particularly so, when the authorities relied on by the plaintiff for imposing the obligation are not necessarily definitive of the issue. The question of costs of the proceeding as between the plaintiffs and Mr Martino is not going to be determined by whether or not a declaration is made that has no utility, as a result of the late concessions made by Mr Martino in relation to the invalidity of his appointment and the undertakings given by him to the court. The application for the declaration in paragraph 522(c) of the statement of claim is therefore refused.

Orders

[341] There are some orders that can be made on the publication of these reasons, as a result of the conclusions that I have reached in the course of these reasons. The dealings that were the subject of these proceedings were complex and it may be that the parties consider that further orders ancillary to those made or to give effect to, or as a consequence of, these reasons should be made. No doubt the parties will wish to make written submissions on the question of the costs of the proceeding and other outstanding related questions of costs, such as the costs reserved in respect of proceeding BS4902 of 2017. I therefore propose to make an order adjourning those questions to a date to be fixed. That course will accommodate the parties agreeing on a timetable for further submissions on the terms of any additional orders and costs and any further hearing that may be necessary to dispose of those questions. The orders that I will make in the meantime are set out at the commencement of these reasons.