SUPREME COURT OF QUEENSLAND

CITATION:	*Thorne Developments Pty Ltd v Laird* [2022] QSC 085
PARTIES:	**THORNE DEVELOPMENTS PTY LTD** (Plaintiff) **v** **GRAHAM DAVID LAIRD AS TRUSTEE FOR THE LAIRD FAMILY TRUST** **(First Defendant)** **and** **RICK WILLIAMSON INVESTMENTS PTY LTD** **ACN 120 400 446** **(Second Defendant)** **and** **GRAHAM DAVID LAIRD** **(Third Defendant)** **and** **RICHARD JOHN WILLIAMSON** (Fourth Defendant)
FILE NO/S:	BS3570 of 2014
DIVISION:	Trial
PROCEEDING:	Trial of separate questions
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	16 June 2022
DELIVERED AT:	Brisbane
HEARING DATE:	3- 5 May 2022
JUDGE:	Bradley J
ORDER:	**THE ORDER OF THE COURT IS THAT:**

1. Pursuant to s 601AH(3)(c) of the *Corporations Act 2001* (Cth) (the "Act"), the following things done during the period from 4 December 2011 to 4 September 2013 are validated:

(a) The plaintiff making the share sale agreement with the first, second, third and fourth defendants and Brett John Thorne dated 28 February 2012 (the "SSA");

(b) The plaintiff receiving $95,000 paid to the trust account of Reardon & Associates solicitors on or about 12 December 2011, for or on behalf of the plaintiff or at its direction;

(c) The plaintiff receiving $300,000 paid to trust account of Reardon & Associates solicitors on or about 28 February 2012, for or on behalf of the plaintiff or at its direction;

(d) The plaintiff taking steps to perform its obligations under clause 4.2 and clause 5.1(a)(iii) of the SSA on or about 28 February 2012, including:

(i) executing a transfer of one ordinary share in Transparent Enterprises Pty Ltd ACN 123 992 325 ("TEPL") from the plaintiff to the first and second defendants;

(ii) executing a transfer of one class B share in TEPL from the plaintiff to the first and second defendants; and

(iii) delivering these executed transfers and the related share certificates to the first and second defendants;

(e) The first and second defendants taking the steps to perform their obligations under clause 4.3(a) and clause 4.3(b) of the SSA on or about 28 February 2012;

(f) The entry in the register of members of TEPL recording the first and second defendants as the joint holders of one ordinary share and one class B share in TEPL, which shares were formerly held by the plaintiff, on or about 28 February 2012; and

(g) The plaintiff making the loan agreement with the first and second defendants on or about 28 February 2012.

2. Pursuant to s 601AH(3)(d) of the Act:

(a) The receipt of payments validated by paragraphs 1(b) and (c) of this Order are deemed to be receipts of payments pursuant to the SSA made by the first and second defendants as the Buyers to the plaintiff as the Seller;

(b) The steps validated by paragraph 1(d) of this Order are deemed to be acts of performance by the plaintiff as the Seller pursuant to the SSA; and

(c) The steps validated by paragraph 1(e) of this Order are deemed to be acts of performance by the first and second defendants as the Buyers

pursuant to the SSA.

3. **Within seven days the parties are to file written submissions if they contend any order should be made as to the costs of and incidental to the separate hearing directed by Davis J on 18 October 2021.**

CATCHWORDS: CORPORATIONS - FORMATION - REGISTRATION OR INCORPORATION - DEREGISTRATION - VALIDATING ORDERS - where the plaintiff is an Australian proprietary company limited by shares - - where the plaintiff was deregistered by ASIC on 4 December 2011 and reinstated by ASIC on 4 September 2013 - where the plaintiff seeks orders under s 601AH of the *Corporations Act 2001 (Cth)* validating certain things done in the deregistration period - whether the Court should make orders validating some of the acts done during the deregistration period and to make associated deeming orders confirming the nature and effect of those acts.

Corporations Act 2001 (Cth), s 601AH, s 601AH(3)(c), s 601AH(3)(d), s 601AH(5), s 169, s 1072E(9)

Bell Group v ASIC (2018) 258 ALR 624, cited.
Hillam v Ample Source International Ltd (No 2) (2012) FCR 336, cited.
Hounslow Badminton Association v Registrar of Companies [2013] EWHC 2961, cited.
Joddrell v Peaktone Ltd [2013] 1 WLR 784, followed.
Re Greenzan Pty Ltd (In liq) [2017] NSWSC 489, cited.
Re Lindsay Bowman Ltd [1969] 1 WLR 1443, followed.
Re Piccoli Tesori Pty Ltd; *Ex parte Bertuol* (2006) 151 FCR 109, cited.
Tyman's Ltd v Craven [1952] 2 QB 100, followed.

COUNSEL: The plaintiff did not engage counsel, but by leave appeared by P O Land, a director
M T de Waard of Counsel for the defendants

SOLICITORS: The plaintiff did not engage solicitors
Macrossan & Amiet for the defendants

[1] The plaintiff Thorne Developments Pty Ltd seeks orders validating certain things done in the period between 4 December 2011, when the Australian Securities and Investments Commission (**ASIC**) deregistered the plaintiff, and 4 September 2013, when ASIC reinstated it. On 18 October 2021, Davis J directed that this part of the relief sought in the proceeding be the subject of a separate hearing and decision.

[2] The hearing took place over three days from 3 to 5 May 2022.

[3] The plaintiff did not retain counsel or solicitors to represent it at the hearing. It sought leave to be represented by Peter Otley Land, a director. The defendants did not oppose leave. The court granted leave for Mr Land to represent the plaintiff at the hearing. The defendants were represented by Mr de Waard of Counsel, instructed by Macrossan & Amiet solicitors.

Reinstatement and validating orders

[4] The plaintiff is an Australian proprietary company limited by shares. It was incorporated on 17 June 2004 and registered under the *Corporations Act 2001* (Cth) (the **Act**). The legislative scheme for deregistration, reinstatement, validating and other orders about such companies is found in Part 5A.1 of the Act.

[5] The plaintiff seeks orders under s 601AH:

> "**601AH Reinstatement**
>
> *Reinstatement by ASIC*
>
> (1) ASIC may reinstate the registration of a company if ASIC is satisfied that the company should not have been deregistered.
>
> (1A) ASIC may reinstate the registration of a company deregistered under subsection 601AB(1B) if:
>
> (a) ASIC receives an application in relation to the reinstatement of the company's registration; and
>
> (b) the levy imposed on the company by the *ASIC Supervisory Cost Recovery Levy Act 2017* is paid in full; and
>
> (c) the amount of any late payment penalty payable in relation to the levy is paid in full; and
>
> (d) the amount of any shortfall penalty payable in relation to the levy is paid in full.
>
> *Reinstatement by Court*
>
> (2) The Court may make an order that ASIC reinstate the registration of a company if:
>
> (a) an application for reinstatement is made to the Court by:
>
> (i) a person aggrieved by the deregistration; or
>
> (ii) a former liquidator of the company; and
>
> (b) the Court is satisfied that it is just that the company's registration be reinstated.
>
> (3) If:
>
> (a) ASIC reinstates the registration of a company under subsection (1) or (1A); or
>
> (b) the Court makes an order under subsection (2);

the Court may:

(c) validate anything done during the period:

(i) beginning when the company was deregistered; and

(ii) ending when the company's registration was reinstated; and

(d) make any other order it considers appropriate.

Note: For example, the Court may direct ASIC to transfer to another person property vested in ASIC under subsection 601AD(2).

ASIC to give notice of reinstatement

(4) ASIC must give notice of a reinstatement in the *Gazette*.

(4A) If an application was made to ASIC for the reinstatement of a company's registration, ASIC must give notice of the reinstatement to the applicant.

Effect of reinstatement

(5) If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC revests in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim.

(6) Subsection 601AH(5) does not affect the cancellation of an Australian financial services licence held by the company if the cancellation occurs because the company was deregistered."

Consequences of reinstatement

[6] ASIC reinstated the plaintiff more than eight and a half years ago. No reinstatement order is required under s 601AH(2). However, the consequences of the reinstatement, set out in s 601AH(5), are relevant to the orders now sought.

[7] The first relevant consequence is that the plaintiff is taken to have continued in existence as if it had not been deregistered.

[8] A second consequence concerns the plaintiff's property. On deregistration, any property the plaintiff held as trustee vested in the Commonwealth and any property the plaintiff otherwise held vested in ASIC. On reinstatement, any property of the plaintiff that was still vested in the Commonwealth or ASIC revested in the plaintiff. If any of that property was subject to a security or other interest or claim, it vested subject to that interest or claim.

[9] The third usual consequence of reinstatement is that any person who was a director of the plaintiff immediately before deregistration becomes a director again from the time when ASIC reinstates the plaintiff. This did not occur in the present instance.

[10] From its incorporation until its deregistration, the sole director of the plaintiff was Brett John Thorne. On 26 March 2012, while the plaintiff was deregistered, Mr Thorne became a bankrupt. On 16 August 2013, with the approval of ASIC, Mr Thorne's trustee in bankruptcy, Daniel Peter Juratowitch, (who in that capacity held the only issued share in the plaintiff) appointed himself as the sole director of the plaintiff. So, Mr Juratowitch became a director on the plaintiff's reinstatement by ASIC. Mr Juratowitch removed Mr Thorne as a director, and appointed Antonia Marie Weis as another director. He then resigned his own position as director.

[11] At the present time there are two directors. Patrick Norman Casey has been a director and the secretary of the plaintiff since 18 February 2014. Mr Casey gave evidence at the hearing. Mr Land has been a director since 1 July 2020. He represented the plaintiff at this hearing, by leave.

Court's powers to validate

[12] The court may validate anything done during the period between deregistration and reinstatement of a company's registration under s 601AH(3)(c).[1] The court may also make any other order the court considers appropriate under s 601AH(3)(d). It has been said that the primary purpose of a validating or other order is "treating a company upon reinstatement as though it had continued in existence since the date of deregistration."[2] These powers enable the court to bring the things that were done during the unregistered period into alignment with the statutory effect of reinstatement under s 601AH(5).

[13] The power to make validating or other orders is a discretionary power, to be exercised according to the justice of the case.[3] It is a very wide power.[4] It has been found to permit an order to be made with significant retrospective consequences, not merely consequences incidental to the reinstatement.[5] It has been used to make orders modifying the ordinary effect of reinstatement.[6]

[14] The court may consider the circumstances in which a company came to be deregistered, whether good use could be made of a validating or other order, and whether any person is likely to be prejudiced - as the court would do if ordering reinstatement of a company.[7]

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1 Paragraph 601AH(3)(a) was inserted in the Act with effect from 1 July 2012 to extend the court's power to make a validating order to a case in which ASIC had reinstated the registration of a company.

2 *The Bell Group Limited v ASIC* (2018) 358 ALR 624 [136] (McKerracher J).

3 (2018) 358 ALR 624 [110] (McKerracher J).

4 *Pagnon v Workcover Queensland* (2001) 2 Qd R 492, 499 [15] (McPherson JA).

5 (2018) 358 ALR 624, [137].

6 *In the matter of ACN063346708* (2018) NSWSC 1709, [51] (Rees J).

7 See: *Australian Competition and Consumer Commission v Australian Securities and Investments Commission* (2000) 174 ALR 688, [27] (Austin J), citing *Re Kilkenny Engineering Pty Ltd (in liq) Re Kilkenny Engineering Pty Ltd (in liq)* (1976) 13 SASR 258; *Drysdale v Australian Securities Commission* (1992) 8 ACSR 563; and *Steelmaster Pty Ltd (in liq) v McCann* (1992) 6 ACSR 494.

[15] An important consideration is whether any unfair prejudice would be done to any other person by making any validating or other order sought by an applicant.

[16] Unfair prejudice is a concept familiar in oppression claims and the just and equitable winding up of companies.[8] As in an oppression proceeding, it requires an objective consideration of the conduct of the individual parties, in the context of their particular relationship, including the extent to which one party's behaviour may have influenced the conduct of any other from time to time.[9]

The relevant dealings and the other interested parties

[17] The plaintiff seeks validation orders concerning dealings between it and the persons who are the defendants in the proceeding, about shares in another company Transparent Enterprises Pty Ltd (**TEPL**).

[18] At the time of its deregistration on 4 December 2011, the plaintiff was the owner of two shares in TEPL.[10] One was an ordinary share, entitling the plaintiff to dividends, and the other was a class B share, with specific rights.

[19] The first defendant Graham David Laird held two shares in TEPL: one ordinary share and one class A share. Mr Laird held these two shares in TEPL in his personal capacity. They were not trust property.

[20] The plaintiff had held its two shares and Mr Laird had held his two shares since TEPL was incorporated and registered under the Act on 16 February 2007.

[21] TEPL held shares in several other companies: Iradex Pty Ltd, Showbar 140 Pty Ltd, Showbar Properties Pty Ltd, Showbar 303 Pty Ltd and Showbar Australia Pty Ltd (collectively the **Showbar Group companies**).[11]

[22] TEPL held two-thirds of the issued shares in each of the Showbar Group companies. The second defendant Rick Williamson Investments Pty Ltd (**RWI**) held the remaining one-third of the shares in each of the Showbar Group companies. The fourth defendant Richard John Williamson is the sole director of RWI.

[23] The Showbar Group companies conducted adult entertainment businesses, or managed those businesses, or held properties where those businesses were conducted. These included businesses at Wilkies Tavern in Mackay. The Showbar Group companies paid dividends to TEPL and RWI.

[24] In 2011 and 2012, Mr Laird and Mr Williamson held interests in other entities that were involved, or planning to be involved, in adult entertainment businesses at the

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8 Act, s 232(e).

9 *Hillam v Ample Source International Ltd (No 2)* (2012) FCR 336, 337 [4] (Emmett, Jacobson and Buchanan JJ), citing *Joint v Stephens* (2008) 26 ACLC 1,467, [134], [136] (Nettle, Ashley and Neave JA).

10 This was a finding fact sought by the defendants at the hearing and accepted by the plaintiff.

11 On 9 December 2020, Showbar Properties Pty Ltd was deregistered. On 24 January 2021, Showbar 303 Pty Ltd and Showbar Australia Pty Ltd were deregistered.

Exchange Hotel in Townsville and the Grosvenor Hotel in Brisbane. TEPL held no interest in those Townsville and Brisbane businesses.[12]

[25] At all material times, TEPL has operated as a holding company for interests in the Showbar Group companies. It received dividends from those entities and, in turn, paid dividends to its shareholders. Over the nine financial years for which financial statements were tendered, TEPL paid a total of $1,702,000 in fully franked dividends to its ordinary shareholders.

Financial Year	Dividends paid	Dividend per ordinary share
2011-2012	$90,000.00	$45,000.00
2012-2013	$152,000.00	$76,000.00
2013-2014	$180,000.00	$90,000.00
2014-2015	$200,000.00	$100,000.00
2015-2016	$210,000.00	$105,000.00
2016-2017	$240,000.00	$120,000.00
2017-2018	$230,000.00	$115,000.00
2018-2019	$260,000.00	$130,000.00
2019-2020	$140,000.00	$70,000.00
2011-2020	**$1,702,000.00**	**$851,000.00**

[26] There is no evidence that TEPL conducted any business other than as an investor in the Showbar Group companies.

[27] TEPL is not a party to the proceeding. Through its directors, Mr Laird and Mr Williamson, TEPL is aware of the proceeding.

The 28 February 2012 transaction

[28] On 28 February 2012, the plaintiff, Mr Laird, RWI, Mr Williamson and Mr Thorne executed a document entitled "Share Sale Agreement" (**SSA**). The same day, the plaintiff, Mr Laird and RWI executed a second document entitled Loan Agreement (**LA**). For the purposes of this decision, the relevant parties' objective intentions set out in the SSA and LA, and the effect of the terms and conditions of each of those two agreements, are clear. No party raised any issue about the proper construction of any of the provisions relied upon for this hearing.

Share Sale Agreement

[29] The SSA was prepared by Macrossan & Amiet Solicitors, acting for Mr Laird, RWI and Mr Williamson.

[30] Mr Thorne signed the SSA attesting that the plaintiff executed it in accordance with s 127(1) of the Act by his authority as its sole director. Mr Laird signed as trustee for the Laird Family Trust (**LFT**).[13] Mr Williamson signed attesting that RWI executed it in accordance with s 127(1) of the Act by his authority as its sole director. Each of Mr Laird and Mr Williamson signed as guarantors. Mr Thorne also signed as an individual restrained by a clause in the SSA.

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12 Some of the Showbar Group companies recorded in their financial statements loans to the entities involved in the Townsville and Brisbane businesses.

13 In this proceeding, Mr Laird is named in that capacity as the third defendant.

[31] Graham Ross Mazlin witnessed the signatures of Mr Laird, Mr Williamson, and Mr Thorne.

[32] In the recitals to the SSA, the parties stated that the plaintiff (as the Seller) was "a registered holder and beneficial owner" of two shares in TEPL, that the plaintiff had agreed to sell, and that Mr Laird and RWI (jointly as the Buyers) had agreed to buy those shares on the terms of the SSA.[14] The parties identified the two shares in a schedule to the SSA as one class B share and one ordinary share. The consideration for the class B share was $1.00. For the ordinary share it was $1,871,774.00.

[33] By the SSA, the parties agreed that, at completion, the Seller would give the Buyers duly executed transfers of the shares in favour of the Buyers (or as they may direct), and the share certificates for the shares. The Seller was to provide a written resignation of Mr Thorne[15] from the board of TEPL. The Seller was also to provide a certified copy of a resolution of the TEPL directors signed by Mr Thorne, resolving that the transfer of the shares be entered in the company register and that Mr Thorne's resignation be accepted with effect from completion.

[34] The parties also agreed that, at completion, the Buyers were to give the Seller, amongst other things, a certified copy of a resolution of the TEPL directors signed by Mr Laird and Mr Williamson, resolving that the transfer of the shares be entered in the company register and that Mr Thorne's resignation be accepted with effect from completion.

[35] By the SSA, the parties agreed that on completion the Buyers would procure:

> "to be paid as follows:
>
> (i) $95,000 paid into the Trust Account of Reardon & Associates on 12th December, 2011;
>
> (ii) $300,000.00 to be paid to [the plaintiff] upon the Completion Date;
>
> (iii) $1,476,775 to be paid in accordance with the Loan Agreement between the Seller and the Buyers".

[36] These amounts, in total, made up the $1,871,775.00 consideration for the sale and purchase of the two shares in TEPL.

[37] The date for completion was 28 February 2012.

[38] In the SSA, the parties defined "Guarantor" as Mr Laird and Mr Williamson. As the Guarantor, they unconditionally and irrevocably guaranteed the obligations of the Buyers to pay any sums of money payable by the Buyers under the SSA or to perform any other obligations under the SSA. They indemnified the Seller against any loss or liability the Seller incurs arising from or connected with the failure of

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14 In the SSA, the parties defined "Buyers" as Mr Laird as Trustee of the LFT and RWI. Mr Laird gave evidence that he was a joint Buyer of the two shares in his capacity as trustee of the LFT.

15 In the drafting of the SSA, Mr Thorne and Mr Williamson, as individuals, were not distinguished from the plaintiff and RWI, of which respectively they had been appointed sole directors. The construction of the SSA noted in this paragraph and the next was adopted and not in dispute at the hearing.

the Buyers to perform their obligations under the SSA. They charged their real and personal estates with payment of all sums that may become payable by the Guarantor.[16]

[39] In the SSA, the plaintiff and Mr Thorne undertook to the Buyers that for three years after completion: they would not be engaged or involved (on their own behalf or as agents, assignees, representatives or directors of any company) in any business or activity that provides adult entertainment in Brisbane, Mackay or Townsville; they would not use a logo, symbol, trade mark or business name like one of the Showbar Group companies in those places; and, in a three year restraint period, they would not approach existing employees, contractors or sub-contractors of the Showbar Group companies,[17] or any person employed or contracted by them.

Loan Agreement

[40] The parties to the LA are the plaintiff (as the Lender), and Mr Laird and RWI (as the Borrower). Mr Thorne signed the LA attesting that the plaintiff executed it in accordance with s 127(1) of the Act by his authority as its sole director. Mr Laird signed as trustee for the LFT. Mr Williamson signed attesting that RWI executed it in accordance with s 127(1) of the Act by his authority as its sole director.

[41] Mr Mazlin witnessed the signature of Mr Laird.

[42] In the LA, the parties recited that the Lender had advanced a sum of money. The parties described the sum in this way:

> "The amount of the loan is $1,476,775.00 plus all reasonable costs incurred by the Lender in relation to the Loan and this Loan Agreement."

[43] The amount of the Loan was expressly related to the balance of the purchase price for the ordinary share and the class B share in TEPL.[18]

[44] In the LA, the parties provided for the Borrower to repay the Loan by two instalments: $540,888 on or before 31 March 2012; and $935,887 on or before 31 August 2012.

[45] The rate of interest was nil (or 0%),

> "Provided that if the Loan is not repaid on or before the Expiry Date then interest shall accrue on monthly rests at a rate of twelve percent (12%) per annum."

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16 There were additional terms: making the guarantee a principal obligation; allowing the Seller to enforce it without first being required to exhaust any remedy against the Buyers; making it a continuing guarantee and indemnity for the whole of the Buyers' obligations under the SSA, irrevocable and remaining in full force and effect until discharged.

17 Again, at the hearing I construed the SSA provision to this effect. No contrary construction was proposed by any party.

18 In the LA, the parties attributed the loan amount as $1,476,774 relating to the sale by the Lender to the Borrower of one ordinary share in TEPL, and $1 as relating to the sale by the Lender to the Borrower of one Class B share in TEPL. For the purposes of this decision, I accept the submission put by the plaintiff that in the LA the reference to one ordinary share in the plaintiff was intended as a reference to one ordinary share in TEPL. It is the obvious intention from an ordinary reading of the LA and the contemporaneous SSA.

[46] The Expiry Date was 31 August 2012.

[47] The security for the Loan included a registered mortgage over Lots 2 and 4 on SP 180674. Mr Laird held the fee simple in this land.

Guarantee and Indemnity

[48] Another document was put into evidence. It is a Guarantee and Indemnity made between the plaintiff (as the Lender), Mr Laird and Mr Williamson (as the Guarantors) and Mr Laird, as trustee of the LFT, and RWI (jointly as the Borrower). It is also dated 28 February 2012.

[49] Mr Mazlin witnessed the signatures of Mr Laird and Mr Williamson on this document. He signed a "Witness Declaration", which included confirmation of the following:

> "I have explained to the Guarantor GRAHAM DAVID LAIRD and RICHARD JOHN WILLIAMSON that this Guarantee means that they accept responsibility to pay THORNE DEVELOPMENTS PTY LTD (ACN:109 570 194) THE SUM OF $1,476,775.00
>
> …
>
> The Guarantor GRAHAM DAVID LAIRD and RICHARD JOHN WILLIAMSON have confirmed to me that they understands [sic] this Guarantee and accept this responsibility."

Completion

[50] On 28 February 2012, completion of the SSA occurred. The transfers, share certificates, resignation, and signed directors' resolutions were exchanged.

[51] On 28 February 2012, TEPL lodged forms with ASIC recording a change in the ownership of the two shares sold by the plaintiff. The forms stated that the plaintiff no longer owned any shares in TEPL, and that the shares formerly owned by the plaintiff were now jointly owned by Mr Laird and RWI. TEPL also lodged a form recording the resignation of Mr Thorne as a director of TEPL and the appointment of Mr Williamson as a director. Mr Laird, who continued to be a director of TEPL, was appointed secretary. He signed these forms. The company register of TEPL was updated to record that Mr Laird and RWI jointly held the class B share and the ordinary share formerly owned by the plaintiff.

[52] Mr Laird gave evidence at the hearing. I accept his evidence that at the material times Mr Mazlin's accounting practice, The Leader Group, was responsible for keeping TEPL's books and records, and that the many forms and documents he signed for TEPL were prepared by The Leader Group and signed by him on his assumption that they were correct. This includes the forms he signed on 28 February 2012. Mr Laird said he would not have known whether the documents he signed were correct or not. He did not hold or maintain TEPL's books and accounts. The Leader Group performed that role. Its office was the registered office of TEPL. Mr Laird said he "left that up to the professionals." Mr Laird's recollection was that: Mr Mazlin and the solicitors prepared these forms; Mr Mazlin

came to the Grosvenor Hotel in Brisbane with the forms; and there Mr Laird signed them in Mr Mazlin's presence.

[53] Mr Williamson also gave evidence. His understanding of the transaction was highly simplified. He understood, "I bought one share off Brett [Thorne]."[19] As a newly appointed director of TEPL, he signed the minutes recording directors' resolutions. He did not sign any of the ASIC forms.

Mr Mazlin, the CBRE valuation report and the purchase price

[54] Mr Mazlin gave evidence at the hearing. For the most part, his evidence was not challenged. He qualified as a chartered accountant in 1978. He is now retired. He was the principal of The Leader Group in Cannonvale. In that capacity, from about December 2009, he acted as accountant for TEPL and "other associated Showbar entities." On 4 November 2011, TEPL made The Leader Group office its registered office.

[55] Mr Mazlin and his firm never undertook any work for Mr Thorne or his entities. He and the firm did work for TEPL and the Showbar Group companies, including for some of the period when the plaintiff held shares in TEPL.

[56] Mr Mazlin calculated the $1,871,775 purchase price for the plaintiff's TEPL shares, which the parties adopted in the SSA. He identified a balance sheet recording his calculation. I this calculation, he relied on a valuation report on the freehold of Wilkies Hotel, owned by one of the Showbar Group companies, and the businesses operated there by other Showbar Group companies.

[57] The valuation report was prepared for the National Australia Bank (**NAB**) by CBRE (C) Pty Ltd trading as CBRE Hotels (**CBRE**). It is dated 1 December 2011. CBRE prepared it pursuant to written instructions from the NAB, subject to a Commercial Valuation Service and Panel Agreement between CBRE and the NAB.[20]

[58] In it, CBRE valued the freehold and business on a going concern basis at $8.6 million for first mortgage security purposes. CBRE apportioned $4 million to the freehold interest. CBRE's $4.6 million value of the business was based on annual maintainable earnings of $1,590.395.

[59] In his calculation, Mr Mazlin added to the CBRE valuation the value of other property of the Showbar Group companies that was not the subject of the CBRE report. He deducted liabilities of the Showbar Group companies. He also deducted amounts for loans from Showbar Group companies to the businesses being developed by Mr Laird and Mr Williamson in Townsville and Brisbane. The value of other property and the liabilities were extracted from the books and accounts of TEPL and the Showbar Group companies, which Mr Mazlin's firm maintained. With this information, Mr Mazlin calculated a total value of the Showbar Group businesses. He divided this figure by three to calculate the value of the one-third interest in the Showbar Group held by the plaintiff in the form of its shares in TEPL.

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19 In fact, the SSA provided that Mr Laird and RWI jointly bought two shares from the plaintiff.

20 The valuation report was expressly for the use only of the NAB. CBRE accepted no responsibility to any third party who might use or rely on it in whole or in part.

[60] Mr Mazlin gave evidence that, for the purpose of his calculation, he perused the CBRE report. He must have done so to identify the other property of the Showbar Group companies that was not the subject of the CBRE report. He said he did not form any opinion about the CBRE report at that time. He said it was not necessary for him to do so, as he had been instructed to adopt the valuation in the CBRE report for the purpose of making his calculation. He identified this instruction as coming from Mr Laird, Mr Williamson and Mr Thorne at a meeting he attended with them at the Grosvenor Hotel, Brisbane on 21 February 2012.[21]

[61] Mr Mazlin made a typed file note of the meeting, dated 21 February 2012, and a handwritten note of the details of a share sale agreement to be prepared. As long ago as 30 October 2012, Mr Mazlin had provided a version of this evidence in a letter to the defendants' solicitors:

> "1. The deal involving the sale of Thorne Developments Pty Ltd's shares in Transparent Enterprises Pty Ltd was negotiated orally with the assistance of the writer. The parties involved were Graham Laird, Rick Williamson, Jas Robson and Brett Thorne.
>
> 2. At a meeting of the parties held at the Grosvenor Hotel on Tuesday 21 February 2012, the writer was instructed by Laird, Williamson and Thorne to get Macrossan and Amiet to draw up the necessary share sale documentation for the sale of Thorne's shares in Transparent Enterprises Pty Ltd – refer **attached** file note.
>
> 3. The sale price agreed between the parties in (2) above was based on the **attached** spreadsheet and financial statements as prepared by Leader Group Accountants.
>
> 4. The price was calculated on an 'arm's length' basis using an independent valuation for the Showbar property and business (attached) with adjustments in respect of assets and liabilities in the respective financial statements for all of the entities.
>
> 5. No other correspondence, emails or telephone calls took place between the parties – the writer was in control of all negotiations which were conducted orally as stated previously.
>
> 6. The documentation for the sale was subsequently signed off on 28 February 2012 at a meeting between all parties at the Grosvenor Hotel in Brisbane. …"

[62] Mr Mazlin was called by the defendants. These parts of his evidence were not challenged by any party.

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[21] Mr Mazlin recalled Jasmine Robson also being present when this instruction was given. No party called Mr Thorne or Ms Robson to give evidence at the hearing. Nor did any party dispute Mr Mazlin's account of the meeting.

Events after 28 February 2012

[63] Since 28 February 2012, TEPL, its directors Mr Laird and Mr Williamson, and RWI have all acted on the basis that Mr Laird and RWI are jointly the owner of the one ordinary share and the class B share in TEPL formerly owned by the plaintiff.

[64] TEPL, through Mr Laird, has reported to ASIC that TEPL's shares are held in that way.

[65] The Leader Group has prepared profit and loss statements and balance sheets for TEPL recording the amount of profits available to pay dividends. Over the nine financial years ending 30 June 2012 to 30 June 2020, Mr Laird and Mr Williamson (as directors) and Mr Laird and RWI (as members) have by resolutions caused TEPL to pay a total of $1.702 million in fully franked dividends.[22] One half of this amount has been paid at the direction of Mr Laird and Mr Williamson in the form of credits to loan accounts in their names or the names of their associates. These dividend payments were in respect of the one ordinary TEPL share jointly held by Mr Laird and RWI, transferred to them by the plaintiff on 28 February 2012.

Knowledge that the plaintiff was deregistered

[66] It is common ground that, in the period leading up to the execution of the agreements on 28 February 2012, none of the individual parties (who were also the controlling minds of the corporate parties) to the SSA and the LA was aware that ASIC had administratively deregistered the plaintiff on 4 December 2011.

[67] It seems all parties proceeded on the common assumption that the plaintiff was registered and that Mr Thorne, as the sole director of the plaintiff, was entitled to execute the SSA and the LA on behalf of the plaintiff and that he was otherwise able to take steps to carry those agreements into effect.

[68] Mr Laird learned about the deregistration of the plaintiff from Mr Mazlin. He thought this may have been in late March 2012, but he was not "totally sure." Mr Thorne became bankrupt on 26 March 2012. Mr Mazlin may have made enquiries at about that time and may have advised Mr Laird. Mr Mazlin gave no evidence about this, and he was not questioned about it.

[69] Mr Laird's recollection was that he and Mr Williamson were ready to pay the first instalment of $540,888 to the plaintiff under the LA, but they were stopped from doing so by a freezing order. He associated this with his first knowledge of the deregistration of the plaintiff. The first instalment was due by 31 March 2012. A freezing order directed to Mr Laird and Mr Williamson was made by this court in Mackay on 30 April 2012. An earlier freezing order is also in evidence. It was made by the court in Mackay on 29 March 2012, but it is directed to a Kym Madigan.

[70] To the extent it has any relevance to this decision, from the evidence of Mr Laird and the contemporaneous documents relating to the first instalment payment and the

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22 The TEPL Profit & Loss Appropriation Statement for the year ended 30 June 2011 recorded an operating profit after income tax of $442,535.10. While this amount was available for appropriation, it was retained as profit at the end of the financial year. It formed the whole of TEPL's retained profits in the financial statements for the year ended 3- June 2012.

freezing orders, I infer that by about 31 March 2012 Mr Laird knew that the plaintiff had been deregistered. I infer that, through Mr Laird, Mr Williamson and, through him, RWI knew of the deregistration by about the same time.

Mortgage granted by Mr Laird as trustee for the LFT

[71] In March 2012, a mortgage was registered over Lots 2 and 4 on SP 180674. It was executed by Mr Laird as trustee for the LFT (as Mortgagor) in favour of the plaintiff (as Mortgagee) securing a debt pursuant to the LA. It created an interest in the Lots. A release of the mortgage over Lot 4 was registered on 23 May 2012 and a release over Lot 2 was registered on 9 July 2012. On registration of the releases, the interest created by the registration of the mortgage was extinguished. Each of the Lots was then sold by Mr Laird.

[72] In the circumstances, an order validating the mortgage would be of little utility. Although the plaintiff formally sought such an order, at the hearing, the plaintiff did not press this part of its claim for relief.

The status of the agreements

[73] At the hearing, Mr de Waard for the defendants clarified that, despite their pleading, the defendants did not deny that the SSA and the LA were signed or that the associated things were done by the defendants in relation to the transaction and its completion. Mr de Waard explained that the defendants contended that the agreements and the other things done "are of no legal effect absent validation in this proceeding." On their behalf, he submitted that the SSA and the LA "are nullities and are void" and "can only be given any legal effect if validated."

[74] The defendants offered no explanation for why they would not be bound by the promises they made in the SSA and LA, by reason of having received the consideration in the form of the TEPL shares and the loan for the balance of the purchase price, save for the fact that the plaintiff was deregistered at the time of the transaction. Nor was any clear explanation given for how the statutory provision in s 601AH(5) of the Act - that the plaintiff is "taken to have continued in existence as if it had not been deregistered" - did not negative the contention that its deregistration prevented the plaintiff executing the agreements.

[75] Provisions analogous to s 601AH of the Act may be found as far back as the *Companies Act 1880* (UK). Provisions with similar wording were enacted in the successive *Companies Acts* for England and Wales.

[76] In *Tyman's Ltd v Craven*,[23] the Court of Appeal considered an analogous provision in the *Companies Act 1946* (UK), which provided that the effect of an order restoring a "struck off" company to the register was that on restoration "the company shall be deemed to have continued in existence as if its name had not been struck off." [24] The company in question had applied for a new lease after it had been struck off the register. It had been restored to the register by a subsequent order. The landlord contended that the earlier application was a nullity because the company was not in existence when it was made. The Court held that the effect of

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23 [1952] 2 QB 100.

24 s 353(6).

the order restoring the company's registration was to validate retrospectively all acts done in the name or on behalf of the company during the period between its dissolution and its restoration. Sir Raymond Evershed MR explained that once the company was restored to the register:

> "it was no longer open to the respondent to allege the non-existence of the company on the preceding July 23; for, by the terms of the subsection, the company had then to be deemed to have continued in existence as if its name had never in fact been struck off the register."[25]

[77] The Master of the Rolls described the provision for the court to make a validating or ancillary order as:

> "a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the "as-you-were position" which, according to the ordinary sense of those general words, is prima facie their consequence."[26]

[78] Hodson LJ was of the same opinion:

> "I think the words of section 353(6) are clearly designed to produce an "as you were" position, and think that the latter part of the subsection is complementary and intended to provide for cases where provision is necessary in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost. An example of this would be a case where a company had lost an opportunity of obtaining a concession or renewing a lease during the interval between its dissolution and an order under the subsection. A provision in the order could deal with such a case. That the last four lines of the subsection do not cut down the retroactive effect of that which precedes them is, to my mind, indicated by the introductory words "and the court may by the order." The directions and provisions to be made by the order would naturally be supposed to make good what had previously been stated, namely, that the company should be deemed to have continued in existence as if the name had not been struck off."[27]

[79] In *Re Lindsay Bowman Ltd*[28], Megarry J expressed, *obiter dictum*, the same view of the deeming provision and its effect on a contract executed by a director, purportedly on behalf of a company, at a time when the company's name had been removed from the register:

> "such a deeming carries with it all the consequences that flow from it. If I may borrow the classic sentence that Lord Asquith of Bishopstone uttered, in an entirely different context, in *East End Dwellings Co. Ltd. v. Finsbury Borough Council* [1952] A.C. 109, 132:

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25 At 113.
26 At 111.
27 126.
28 [1969] 1 WLR 1443, 1446A-1447A.

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.
>
> …
>
> The statutory fiction that results from an order under the subsection is that the company continued in existence throughout; and this, with all that flows from it, is the necessary consequence of the order. One of the consequences is that any liabilities properly incurred by a director in the name of the company would be liabilities of the company and not of the director."

[80] In *Joddrell v Peaktone Ltd*,[29] the plaintiff sued the defendant company, not knowing it had been struck off the register. After the defendant was restored to the register,[30] it applied to have the claim against it struck out on the basis that it was a nullity because the defendant did not exist when the claim was filed and served. The Court of Appeal rejected this argument, applying the previous jurisprudence relating to the deeming provision, including *Tyman's v Craven*.

[81] These decisions for England and Wales construed the analogous deeming provision as validating acts performed by a company when technically it did not exist and when those purporting to act for or on behalf of the company lacked authority to do so. The effect of restoration was to hold a disgruntled third party to their bargain, in the sense of being kept to a state of affairs consistent with what happened during a time when the parties did not know of the striking off and assumed that the company was capable of operating normally. The deeming provision prevented a third party from taking advantage of the removal of a company from the register by disavowing the commitment it had made to the company in that period. The restoration rendered a contract what it had purported to be, namely a contract with the company.

[82] As McKerracher J observed in *Bell Group v ASIC*,[31] Australian cases have followed the English authorities, holding the fundamental objective of the provision is to clarify "an obscure position" following restoration to the register and to "give back to the company an opportunity which it might otherwise have lost."[32]

[83] In *Hounslow Badminton Association v Registrar of Companies*,[33] Vos J (as the Master of the Rolls then was) following a review of the authorities, concluded that:

> "When a decision is taken either by the Registrar or by the court, in my judgment it matters not which, to restore the company to the [register], the authorities make clear that the effect of sections 1028(1) and 1032(1) is very extensive indeed. Everything that would

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29 [2013] 1 WLR 784, 797-798 [42]- [46] (Munby LJ; Lewison and Etherton LJJ agreeing).

30 Under the analogous provision in s 1032 of the *Companies Act 2006* (Eng & W).

31 (2018) 358 ALR 624, 655 [113]-[114].

32 The words quoted by his Honour are from the reasons of Hodson LJ in *Tyman's Ltd v Craven* [1952] 2 QB 100, 126.

33 [2013] EWHC 2961 (Ch).

> have happened, had the company continued in existence, is effectively deemed to have happened."[34]

[84] As Lee J concluded in *Re Piccoli Tesori Pty Ltd*:[35]

> "The terms of s 601AH(5) are consistent with a statutory form of a 'nunc pro tunc' order. That is to say the Act contemplates that an order under s 601AH(2) will have a retrospective effect that makes good the deregistered company's standing to make the application [for its own reinstatement]."[36]

[85] The "statutory fiction" - deeming something to be a fact - applies, if necessary, contrary to actual fact.[37]

[86] It is possible that all or some of the things done, including the promises the defendants made in the SSA and LA, are legally effective and may be enforced by the plaintiff following its reinstatement. However, the defendants have quite a different opinion. All parties assert, that validating orders would remove any uncertainty.

[87] All parties accept that the validation of the things done to effect the change of share ownership in TEPL would regularise the position as it affects the plaintiff, Mr Laird, Mr Williamson, and RWI. It would put these matters in the position as if the plaintiff had remained registered between 4 December 2011 and 4 September 2013, to the extent (if any) that the reinstatement of the plaintiff has not already brought about that result.

The defendants' grounds for opposing validation and other orders

[88] The defendants oppose the validation of the things done, including the SSA and LA, by orders under s 601AH(3)(c), and the making of any other orders under s 601AH(3)(d). Over the long life of this proceeding, the defendants have advanced many grounds for their opposition. By the conclusion of the hearing, those grounds had contracted to eight.[38] It is convenient to group them under four common topics and deal with each topic in turn, before considering them all in the context of other matters relevant to the exercise of the discretionary power.

The attitude of the defendants – no longer wishing to be bound

[89] The first group of grounds of opposition are in paragraphs 43(b)(i)(A) and (C) and (vi) of the defence, namely that:

> "(i) the making of validating orders would cause unfair prejudice to the Defendants and is unjust because:

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34 [43].
35 (2006) 151 FCR 109.
36 At 111-112 [19].
37 See, e.g., *Coates v Commissioner for Railways* (1960) 78 WN NSW 377.
38 The defendants did not press their ground in [43](B)(xiii) of the defence that "certain matters sought to be validated … are incapable as a matter of law of being validated". Nor did they press the ground in [43](b)(xiv) alleging the company executed the SSA and LA "knowingly and in contravention of warranties" in the SSA that it constituted a valid and binding obligation on the plaintiff.

(A) the Defendants do not seek validation; …

(C) the Defendants ought not be compelled into agreements to which they do not wish to enter or be bound by;

… [and]

(vi) section 601AH(3)(c) of the [Act] was intended to regularise conduct, not compel parties into agreements they do not seek to be bound by."

[90] These and other parts of the defendant's pleading were the subject of exchanges during the hearing. As noted above, the defendants did not deny that they executed and signed the SSA and LA and the associated documents required for completion of the sale and purchase of the TEPL shares. Their apparent denials were to be read as limited to a denial that the things they did (including the execution and signing of the agreements) bound them in any way. The above extract of the defendants' defence must be read in the same way.

[91] The attitude of responding parties affected by proposed orders is relevant to whether orders should be made. It is clear the defendants do not seek validation and do not wish to be bound by the Agreements. It is less clear how their attitude means they would suffer unfair prejudice or that it would be unjust to order validation.

[92] In their written submissions, the defendants say:

> "While it is not in dispute, the Defendants were prepared to proceed on the terms set out in February 2012, there is no good reason why the Defendants ought not be able to change their mind based on what they now know."

[93] The courts are not accustomed to allowing a party to avoid its contractual obligations on the basis that it has had a change of mind.

[94] I reject the defendants' submission that "the authorities which deal with validation deal only with circumstances where both parties wish for the validation to occur." Neither the authorities[39] nor the provisions of the Act are to that effect.

[95] On 28 February 2012, the relevant defendants voluntarily executed and signed the SSA and LA. A validating order would not compel any of the defendants into any agreement they did not want to enter.

[96] The defendants took steps to carry into effect the terms of the agreements, including changing the TEPL register, and lodging relevant forms with ASIC. Between 28 February 2012 and the hearing, they continued to act as if the SSA was legally effective, resolving to pay dividends in accordance with the altered share register, and directing how those dividends were to be applied. They accepted the plaintiff's "vendor finance" for part of the purchase price. They took steps to make the first repayment instalment. Only a freezing order prevented them from doing so.

[97] The defendants have not made the payments required by the LA, since the freezing order was lifted, but that is not a matter the subject of this decision.

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[39] See, e.g., *The Bell Group Limited* (2018) 358 ALR 624; *Pagnon* (2001) 2 Qd R 492.

[98] I am not persuaded that the changed attitude of the defendants means that any order validating their voluntary entry into the agreements with the plaintiff would cause them unfair prejudice or be unjust. Nor am I persuaded orders validating the steps the plaintiff and the defendants took to carry into effect the agreements would have such a result.

The purchase price in the SSA – change in value

[99] The second group of grounds of opposition are in paragraphs 43(b)(i)(B) and (D) of the defence, namely that:

> "(i) the making of validating orders would cause unfair prejudice to the Defendants and is unjust because:
>
> (B) the valuation on which the price in the Share Sale Agreement was set is now known by the Defendants to be inaccurate; …
>
> (D) the shares are no longer of the same value as their original price;"

[100] The defendants rely on an expert opinion by David James Williams, a chartered accountant of Nexia Brisbane Forensics Pty Ltd. Mr Williams set his opinion out in a report dated 3 March 2019. The subject of his opinion is a valuation, based on fair market value, of a 50% interest in TEPL as at 30 June 2018.

[101] Mr Williams undertook his valuation by these steps.

(a) He assessed the estimated future maintainable earnings before interest and tax (**EBIT**) of Showbar 140 Pty Ltd and Iradex Pty Ltd (as a single consolidated entity) based on their trading results for the year ended 30 June 2018. He concluded the estimated future maintainable earnings EBIT was $163,000 per annum.

(b) He applied a multiple of 3 to the $163,000 future maintainable EBIT, arriving at a value of $489,000.

(c) He valued the net tangible operating assets (**NTOA**) of the two entities as at 30 June 2018 at $190,596.

(d) Deducting this figure for NTOA from the $489,000 future maintainable EBIT value, he calculated the value of the business goodwill as $298,404.

(e) Mr Williams then assessed the value of the operating business as a going concern, considering all assets and liabilities. He assessed that value as $100,673, and adopted $100,700 as the value as at 30 June 2018.

(f) As TEPL owned a two-third interest in Showbar 140 Pty Ltd and Iradex Pty Ltd, Mr Williams included TEPL's interest in the consolidated entity at a value of $67,133 as at 30 June 2018.

(g) He considered the assets and liabilities in TEPL balance sheet. He assessed the loans made by TEPL to its directors and the plaintiff to have no value. He adopted a provision for income tax liability of $15,871 in the balance sheet for the year ended 30 June 2018.

(h) To calculate the value of TEPL, he deducted the income tax provision from the value of TEPL's interest in the Showbar 140 and Iradex (as a consolidated entity). In this way he arrived at $51,267.

(i) Mr Williams valued a 50% interest in TEPL at half of the $51,267, giving a valuation of $25,633.

[102] Mr Land for the plaintiff objected to the court receiving Mr Williams' report on the basis that it was not relevant. According to Mr de Waard, the relevance of the report was that it supported a submission the defendants wished to advance on this ground. The submission was that between the date of the SSA (28 February 2012) and the date the subject of Mr Williams' valuation (30 June 2018) there had been a dramatic decrease in the value of the TEPL shares.

[103] I allowed the report to be tendered on this limited basis.

[104] The report has no relevance to the value of the shares at the date of the transaction. Mr Williams did not use any financial or trading information that related to the 2011-2012 financial year or any earlier period. His review started with data from 1 July 2014 onwards and ultimately was confined to data for the 30 June 2018 financial year. Under brief cross-examination, Mr Williams said he had never seen the CBRE valuation report, or the spreadsheet Mr Mazlin used to calculate the purchase price for the TEPL shares included in the SSA.

[105] Mr Williams offered no opinion on the present value of the TEPL shares.

[106] In closing written submissions, the defendants relied on Mr Williams' report to explain why "it is no wonder the Defendants no longer wish to be bound" by the agreements. For the reasons set out at [91] to [94] above, I do not consider the change of attitude by the defendants to be a sound basis for finding unfair prejudice or other injustice. To the extent that Mr William's report provides some explanation for the defendants' change of heart, it does not render it unfair to unjust to make validating and associated orders.

[107] Mr Williams' report identified a decline in the value of the TEPL shares by 30 June 2018. He considered the trading results for the years ended 30 June 2015 to 30 June 2017 as well as 30 June 2018. He elected to adopt only the year ended 30 June 2018 for his valuation. Mr Williams explained that, while the gross profit percentage had remained relatively consistent over the 2015-2018 period (82%-84%), the level of income had trended down since the 2016 financial year.

Consolidated[40]	**30/06/2015**	**30/06/2016**	**30/06/2017**	**30/06/2018**
Income	$2,482,298	$1,774,495	$1,710,588	$1,753,329
Gross profit	$2,092,246	$1,469,207	$1,424,958	$1,437,888

[108] Mr Williams reported that this trend was attributed to the impact of the downturn in the mining industry in the Mackay Region. There is no evidence that in February 2012 any of the parties had any knowledge of a coming economic decline of the Mackay Region from 2016 onwards.

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40 Showbar 140 Pty Ltd and Iradex Pty Ltd.

[109] The financial statements provided to Mr Williams (and tendered in court) show the decline in sales for the main operating entity (Showbar 140 Pty Ltd) started in the 2013 financial year. The sales were at a much higher level in the 2011 and 2012 financial years.

Showbar 140 Pty Ltd - Sales ($million)

2011	2012	2013	2014	2015
$4.553	$5.091	$4.083	$3.040	$2.412

2016	2017	2018	2019[41]	2020
$1.729	$1.697	$1.743	$1.811	$1.340

[110] Mr Mazlin gave evidence that, in December 2015, the NAB informed him, Mr Laird, and Mr Williamson that "it no longer wished to provide financial accommodation to the Showbar companies because of the nature of the business conducted." The Showbar Group companies were unable "to obtain replacement finance." The NAB was the mortgagee of the real property in Mackay held by the Showbar Group. Mr Mazlin said the NAB required the sale of those properties. The Wilkies Hotel, which CBRE had valued at $4 million in December 2011, was sold for $800,000.

[111] There is no evidence that, in February 2012, any of the parties had any knowledge that the NAB would change its view in December 2015, leading to the sale of Wilkies Hotel. In late 2011 and early 2012, Mr Laird, Mr Williamson and Mr Thorne were actively seeking additional funding from the bank. That was the purpose for which the NAB obtained the CBRE report. None of the witnesses said they had concerns at that time that the NAB would no longer provide financial accommodation.

[112] Mr Mazlin said the subsequent sale of the Wilkies Hotel freehold caused him to think the CBRE valuation was inaccurate, leading to an overstatement of the value of the TEPL shares in the spreadsheet he had prepared. The defendants sought, in closing submissions, to rely on Mr Mazlin's opinion to undermine the CBRE report. This was not appropriate on three counts.

[113] *First*, no party sought to prove or rely on the CBRE valuation as evidence of the true value of Wilkies Hotel or the Showbar Group companies' business there. *Second*, Mr Mazlin expressly disclaimed undertaking any valuation of the shares, the hotel or the business as at December 2011 or February 2012. His retrospective view of the CBRE report provides no independent basis for a finding about the value of those assets at the earlier time. *Third*, Mr Williams, who could have offered an admissible opinion on the value of the shares at the earlier time, was not asked to do so and was not provided with a copy of the CBRE report or Mr Mazlin's spread sheet. The only evidence of value in February 2012 is the amount the defendants were prepared to pay, and the plaintiff was prepared to accept, for the transfer of the TEPL shares.

[114] There was no evidence that Mr Laird or Mr Williamson or their entities were in a position of any disadvantage or otherwise required the protection of the court in

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41 This sales figure is based on a revised figure in the 2020 financial statements.

February 2012 or afterwards. They were, in Mr Mazlin's words, "good at running their businesses but on a technical level most of the work is left to their professional advisors." At the time of the transaction, they had such advisers. Their solicitors drew the SSA. Their chartered accountant, Mr Mazlin, calculated the purchase price in accordance with their instructions, and he explained to them the loan and guarantee obligations they were undertaking.

[115] The dramatic reduction in sales, income and gross profit for the Showbar Group companies' business, over the six years following the 28 February 2012 transaction, provides no basis for a finding that validation or other orders would cause unfair prejudice to the defendants or otherwise be unjust.

The passing of time

[116] The third ground of opposition is in paragraph 43(b)(i)(E) of the defence, namely that:

> "(i) the making of validating orders would cause unfair prejudice to the Defendants and is unjust because:
>
> (E) a significant amount of time has now passed;"

[117] No specific submissions were addressed to this ground. It may be dealt with briefly.

[118] It is true that a significant period has passed since the parties entered into the agreements. However, most of that period has passed since the plaintiff brought its application for relief.

[119] On 4 September 2013, ASIC reinstated the plaintiff. It did so on an application by Mr Juratowitch, as trustee in bankruptcy of Mr Thorne's estate. On 8 November 2013, the plaintiff commenced this proceeding seeking validating orders. No submission was put that the plaintiff should have commenced the proceeding sooner.

[120] For more than eight years, the defendants have been on notice that the plaintiff was seeking validation and ancillary orders. The defendants have persistently resisted that relief, adding and deleting grounds of opposition from time to time. No submission was put that the plaintiff had delayed the progress of the proceeding.

[121] The individuals involved in the transaction on the part of the defendants were able to give evidence at the hearing and the relevant documents from February 2012 appear to have been retained.

[122] In the circumstances, the amount of time now passed since the transaction is unfortunate. Of itself, it has not been shown to have caused unfair prejudice to the defendants or made the grant of relief unjust.

Whether the plaintiff held the TEPL shares as trustee of the TFT3

[123] The defendants' fourth group of grounds of opposition to validating and ancillary orders is pleaded in paragraphs 43(b)(i)(F) and (xv) of the defence, namely that:

> "(i) the making of validating orders would cause unfair prejudice to the Defendants and is unjust because:

(F) by reason of the matters pleaded in paragraphs 26, 64, 65 and 70 herein, the Plaintiff is not the beneficial owner of the shares and the beneficial owner of the shares has an alternative remedy available to her, namely declaratory relief and account of any benefit received [and] …

(xv) of the matters pleaded in paragraphs 26, 64, 65 and 70 herein."

[124] In paragraphs 26, 64, 65 and 70 of the defence, the defendants plead:

"26. Further and in the alternative, if as is denied the Share Sale Agreement and the Loan Agreement alleged in the SOC to have been made, were enforceable against the Defendants at the time they were entered into, the Plaintiff has no standing or entitlement to bring the claim brought in this proceeding and is not entitled to the relief it seeks because:

(a) Insofar as the Plaintiff held shares in [TEPL] and entered into the alleged Share Sale Agreement and the Loan Agreement, it did so in its capacity as the sole trustee of the Thorne Family Trust No. 3 (the "**Trust**"); and

(b) insofar as any claims arose or presently arise of the kind sought to be brought by the Plaintiff in this proceeding those claims constitute a right or chose in action which divested form the Plaintiff on and from 22 August 2012 and it has no present entitlement to enforce them."

"64. By application brought in this proceeding by the Plaintiff and heard and determined by this court by orders made 11 June 2015 and which established an estoppel against the Plaintiff, this Court determined:

(a) that Thorne became bankrupt on 26 March 2012;

(b) that on 22 August 2012 Thorne, pursuant to a power granted under the Trust Deed for the Thorne Family Trust No.3, validly appointed Suzanne Maree Thorne and Mr Craig Thorne to be vested in all of the property of the Trust in those trustees; and

(c) that Mr Craig Thorne relinquished his office as trustee leaving Mrs Suzanne Thorne, at all material times from and since 22 August 2012, as the trustee of the Thorne Family Trust No.3."

"65. In the premises the person vested with the chose in action constituted by the claims which the Plaintiff purports to make in this proceeding except for that under the Corporations Act is Suzanne Thorne, not the Plaintiff."

> "70. In relation to the claims for specific performance and damages in lieu thereof in the prayer for relief of the SOC, the Defendants:
>
> (a) object in point of law because the SOC contains no allegations of material fact alleged to give rise to or support the granting of any such relief;
>
> (b) contend otherwise that the Plaintiff ought be refused that relief on a discretionary basis having regard to its conduct in relation to the circumstances of the entry into the alleged Share Sale and Loan Agreements and since;
>
> (c) contend otherwise that the Plaintiff ought be refused that relief on the grounds of laches and unclean hands;
>
> (d) contend otherwise that the Plaintiff ought be refused that relief on the grounds that the shares have a limited value significantly less than $1,871,775 and if the shares were hitherto be ordered to be transferred in accordance with the alleged Share Sale and Loan Agreements, the Plaintiff would benefit from its own wrongdoing to the detriment of the Defendants; and
>
> (e) contend that no damages are pleaded as having been suffered, not have any been suffered."

[125] According to the defendants:

(a) The TEPL shares were trust property held by the plaintiff as trustee for the Thorne Family Trust No 3 (**TFT3**).

(b) On the plaintiff's deregistration, the shares vested in the Commonwealth as trustee.

(c) On 22 August 2012, Mr Thorne exercised the power of appointment under the TFT3 trust deed to appoint his wife Ms Suzanne Thorne and his brother Craig Thorne as new trustees of the TFT3 and the shares were thereby vested in the new trustees.

(d) When the plaintiff was reinstated, the Commonwealth no longer held the shares, because they were vested in the new trustees, and so the shares did not revest in the plaintiff as trust property.

(e) Craig Thorne subsequently disclaimed or resigned as trustee of the TFT3, leaving Ms Thorne as the sole trustee.

Standing

[126] A trustee who enters a contract for the benefit of the trust estate, and not on its own behalf, is a party to the contract. The trustee makes itself personally liable to sue and be sued on the contract, though the trustee would usually have a right of indemnity out of the trust fund.

[127] Neither side contends that the TEPL shares revested in the plaintiff when it was reinstated on 4 September 2013. The plaintiff says the shares had been sold to Mr Laird and RWI on 28 February 2012 by the SSA. The defendants say the shares were not sold and, after vesting in the Commonwealth, vested in Ms Thorne on 22 August 2012, when Mr Thorne appointed her as a new trustee.[42]

[128] Whether the plaintiff held the TEPL shares beneficially or as trustee of the TFT3 on 28 February 2012, the plaintiff may seek validation and other orders about things done by it and its counterparties on that date. Subject to discretionary considerations, the court may make such orders. The capacity in which the plaintiff held the shares is not essential to its claim for relief under s 601AH(3)(c) or (d) of the Act.

[129] The defendants' allegation that the plaintiff has no standing to seek orders under s 601AH(3)(c) or (d) and no entitlement to seek relief is simply wrong.

Onus of proof

[130] The plaintiff is the party seeking relief from the court. It must prove any facts necessary for it to succeed. For the plaintiff to obtain the relief it seeks,[43] it is not necessary that the plaintiff establish the true basis on which it held the TEPL shares.

[131] In its reply, the plaintiff denies it held the shares as trustee of the TFT3. In the alternative, it pleads that if it held the shares in that capacity, then it remains a trustee of the TFT3 together with any other person who has become a trustee and has not relinquished that position.

[132] In written submissions, the defendants assert that the plaintiff bears the onus of proving it owned the TEPL shares beneficially. This contention seems to arise from the defendants' allegation in its defence that the plaintiff held the shares as trustee for the TFT3, which the plaintiff denied in its reply.

[133] The defendants are the proponents of the proposition that the court should decline to grant relief because the plaintiff held the TEPL shares on trust for the TFT3. This further and alternative plea by the defendants is not a denial of an essential element of the plaintiff's cause of action.

[134] In their closing submissions, the defendants seemed to assert that as a former trustee, who agreed to part with trust property for valuable consideration, the plaintiff would be unable to enforce the SSA or LA against the relevant defendants and could not obtain validating or other orders under the Act for that purpose. As noted above, this is simply wrong.[44] In any event, the defendants contend that, if it

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42 Mr Thorne's brother Craig Thorne, who was also appointed as a new trustee of the TFT3, later resigned as trustee.

43 At least the relief in the form of the validation of the SSA and LA, the receipt of part payment for the TEPL shares and the steps it took to comply with the two agreements.

44 If Mr Laird and RWI had returned the TEPL shares to the trustee of the TFT3 (whoever that may be) and the trustee had accepted the shares and agreed to discharge any obligations arising from the SSA and the LA, then the defendants may have had a defence based on that conduct. Nothing of that kind has occurred. I will deal below with an undertaking proffered by the defendants on the second day of the hearing.

is established that the plaintiff held the shares as trust property for the TFT3, then it would constitute a good defence to avoid the plaintiff obtaining relief.

[135] In the circumstances, the defendants bear the onus of proving the TEPL shares were held on trust for the TFT3 at the time the plaintiff was deregistered.

Evidence for the defendants

[136] The defendants called no witness who could give evidence that the plaintiff held the shares for the TFT3. Hearsay evidence to that effect was the subject of objection. It was not pressed by the defendants, or not relied on as evidence of the truth of its contents, or excluded by objections being upheld.

[137] The steps constituting the TFT3 were taken nearly three years before TEPL was incorporated and the TEPL shares allotted to the plaintiff. The defendants advanced no case that the plaintiff held the TEPL shares on a resulting trust or a constructive trust. The defendants did not tender any declaration of trust by the plaintiff in respect of the TEPL shares. They asked the court to draw an inference that the shares were trust property from other documents put into evidence at the hearing.

The TFT3 documents

[138] The TFT3 was created by a deed executed on 21 June 2004. In the deed, the settlor set out the objects of the trust as classes of individuals and set out the limitations of the trust in full. It is an express, private and executed trust. The subject matter of the TFT3 is a trust fund of $10 settled on the plaintiff as trustee.

[139] The TFT3 is a discretionary trust. The entitlement of beneficiaries to income from or the corpus of the trust fund is not immediately ascertainable. The discretionary beneficiaries are the usually large class of relatives of Mr Thorne and his wife Ms Thorne, any trustee of a trust benefiting any of the beneficiaries, any corporation in which any beneficiary holds a share, other legal entities in which an interest is held by any beneficiary, any religious, charitable or educational institution, and any other person or class of person the trustee of the TFT3 determines. The settlor, his children (while under 18 years), and any other person the trustee of the TFT3 determines are excluded from being beneficiaries. The residuary beneficiaries are Mr Thorne and Ms Thorne.

[140] The deed provides for the trust fund to include "all money and property paid or transferred to and accepted by the Trustee as additions to the Trust Fund." It authorised the trustee to take up an allotment of shares in an Australian company or purchase such shares. Nothing in the deed would prevent the plaintiff from taking up TEPL shares or acquiring them as trustee of the TFT3.

[141] The deed provides a process for a corporate trustee (such as the plaintiff) to resolve by its director(s) to receive or accept property as additions to the trust fund. No such resolutions are in evidence.

Register of members

[142] The TEPL register of members was included in exhibit 1. It is a register kept under Chapter 2C of the Act.

[143] The register shows an asterisk next to the one ordinary share and another next to the one class B share acquired by the plaintiff on 16 February 2007. This designates each as "Shares held non-beneficially. See Section 169 Corporations Act." No such designation accompanies the entry in the same part of the register for "Balance Shares Held" by the plaintiff as one ordinary and one class B share.

[144] The acquisition entry shows that when the plaintiff acquired the shares they were "held non-beneficially". This is a matter the register of TEPL had to indicate, pursuant to s 169(5A) of the Act. In the absence of evidence to the contrary, these entries in the TEPL register about non-beneficial ownership of shares[45] are proof of the matters they show.[46] For the purposes of a register kept under Chapter 2C of the Act, shares are held by a person non-beneficially if they are held as trustee, nominee or on account of another person.

[145] By s 1072E(9) of the Act:

> "Shares in a corporation registered in a register and held by a trustee in respect of a particular trust may, with the consent of the corporation, be marked in the register in such a way as to identify them as being held in respect of the trust."

[146] No such mark identifying a particular trust is found in the TEPL register. Otherwise,[47] "no notice of a trust, whether express, implied or constructive, must be entered on a register kept in this jurisdiction or be receivable by ASIC."

[147] In the absence of evidence to the contrary, the entry in the TEPL register is evidence that the plaintiff was not the beneficial owner of the shares. Subject to considering any contrary evidence, this is a basis from which the court could infer the TEPL shares were held by the plaintiff as trustee for the TFT3.

[148] The lack of an asterisk accompanying the "Balance Shares Held" by the plaintiff, being the same ordinary share and class B share acquired by the plaintiff, may be proof that, following acquisition on a non-beneficial basis, the plaintiff then held the shares beneficially – again in the absence of evidence to the contrary. Alternatively, the presence or absence of an asterisk might be a typographical error or oversight.

Other documents

[149] Exhibit 1 contained several other documents described as part of the "Transparent Enterprises Pty Ltd Company Register – disclosed 10-11-2016." These included "Agreement/Consent of Member to take Shares" forms executed for and on behalf of the plaintiff by Mr Thorne as its sole director on 16 February 2007. They also included copies of TEPL share certificates numbers 3 and 4, respectively, certifying that the plaintiff was the holder of one ordinary share and one class B share. Each of these is dated 16 February 2007, and signed by Mr Laird and Mr Thorne, as

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45 Act, s 168(1)(a). A company is required to indicate in the register any shares that a member does not hold beneficially. See: Act, s 169(5A).

46 Act, s 176.

47 By ss 1072E(2) to (7) of the Act, provision is made for the recording in a register of a trustee, executor or administrator of a deceased estate, an administrator appointed to the estate of a person incapable of managing their affairs, and the Official Trustee in Bankruptcy in whom a share is vested.

directors of TEPL. These documents contain no statement to the effect the shares are being received or held non-beneficially or on trust for the TFT3 or any other trust.

Mr Casey

[150] Mr Casey was the only witness called in the plaintiff's case. After he became a director of the plaintiff in 2014, he went to some lengths to familiarise himself with the books and records of the plaintiff and its business activities. He found no declaration of trust in respect of the TEPL shares. Nor did Mr Casey find any determination of the plaintiff to such effect.

[151] Mr de Waard, quite properly, put this part of the defence to Mr Casey in cross-examination. He secured neither an admission nor any evidence that the TEPL shares were held on trust for the TFT3.

[152] According to Mr Casey, the plaintiff conducted business on its own account as a property developer, probably before 2006. He also found some bank account records from 2005 and 2006 with a small balance, about $8.00. He found no later bank account records.

[153] Mr Casey was an intelligent and considered witness. He listened carefully to each question and answered it as succinctly as he could. He resisted loose language. He corrected erroneous or imprecise statements in questions. He asserted no personal knowledge of what occurred with respect to the plaintiff before he was appointed as a director. I accept him as a credible witness and am content to rely on his evidence.

Mr Johnson

[154] Brett Anthony Johnson was called by the defendants. He is a member of the firm Wallace & Wallace, based in Mackay. He has been a solicitor since 1988.

[155] Mr Johnson gave evidence about a copy of a letter he wrote on 27 February 2007 to accounting firm Connole Carlisle about the incorporation of TEPL. He said he had "little independent recollection of the particular transaction." He inferred from the letter that he had been instructed to incorporate TEPL. That is an appropriate inference to draw. At about that time, it was common for him in his practice to receive and act on such instructions. He interpreted the reference in the letter to a "trust not being disclosed" as a reference to "the name of the trust not being disclosed on the ASIC records." According to Mr Johnson:

> "The purpose of sending the letter was to ensure that the client and the client's accountant knew the name of the trust their shares were held on trust for even though the name of the trust was not disclosed on the ASIC records. The reason the letter was sent to the Accountants, Connole Carlisle was that those accountants were to hold the Company Register for [TEPL]."

[156] In the letter, Mr Johnson did not identify his client or the source of his instructions. However, in a concluding paragraph he directed the accountants to contact Mr Laird for any further information.

[157] This evidence from Mr Johnson did not rise to the level at which it was opened, namely, that "he took instructions from the then director of the plaintiff Mr Thorne and assisted with and took instructions in relation to setting up of [TEPL]."

[158] Mr Johnson is an experienced solicitor. Most of his evidence was in the form of an affidavit. It was clear and carefully worded. From the fact that he did not give the evidence opened, I infer that he formed the view that he could not give such evidence.

[159] Mr Johnson's evidence does not support an inference that Mr Thorne was the person who gave Mr Johnson instructions about the capacity in which the plaintiff held the shares in TEPL. His evidence could support an inference that Mr Laird was the source of Mr Johnson's instructions, and that Mr Laird was the source of the information communicated to the accountant in the letter. This would be consistent with the evidence that, in February 2012, after Mr Mazlin's firm had taken over keeping the TEPL company register, Mr Laird was the person to whom the accountants looked to confirm the correctness of TEPL information and the person they asked to sign ASIC forms on behalf of TEPL. No alternative inference was pressed.

[160] A copy of the ASIC form 201 application for registration as an Australian company was tendered at the hearing as part of exhibit 1. It was signed on 16 February 2007 by Company Dynamics Pty Ltd as the applicant. It directs any query about the form to Compulodge as the ASIC registered agent. The form records that the plaintiff did not beneficially hold the two shares in TEPL. This is consistent with the entry in the register of members. The Current & Historical Company Extract for TEPL, obtained from ASIC on 2012, records that the ordinary share and the class B share formerly owned by the plaintiff were not beneficially held by it. According to the extract, this information was obtained from the ASIC form 201C lodged by Company Dynamics on 16 February 2007. So, there had been no change to that information in any subsequent filing with ASIC.

[161] Exhibit 1 also includes a power of attorney, executed for and on behalf of Company Dynamics Pty Ltd, by its sole director and secretary, appointing Mr Johnson as its attorney. The express purpose of the instrument was for Mr Johnson:

> "To obtain and hold the necessary signed consents and agreements from the officeholders and members under the [Act] for the purposes of registration of [TEPL]."

[162] These documents lead back to Mr Johnson. From him, they do not lead to Mr Thorne or, through him, to the plaintiff. They further diminish the scope for drawing the inference the defendants urged upon the court in their closing submissions.

Mr Mazlin

[163] The defendants led relied on an affidavit made by Mr Mazlin on 14 December 2021. It included several statements by others about the TFT3 question and exhibited a diagram. This evidence was the subject of a hearsay objection by the plaintiff. The defendants asked that it be admitted, not as to the truth of the contents of the

statements or the diagram, but only as to the fact that the statements were made or the diagram provided. In short, in this part of his evidence Mr Mazlin deposed that:

(a) When he "took over as the accountant for the various companies",[48] Mr Thorne told him that "the shares held by [the plaintiff] were held as trustee for [TFT3];

(b) Mr Thorne provided him with a diagram that stated the plaintiff held its shares in TEPL as trustee for the TFT3; and

(c) In the negotiations between Mr Thorne, Mr Laird, Mr Williamson and Ms Robson in relation to the SSA, "Mr Thorne always stated that his shares (or more accurately the shares held by [the plaintiff]) were held by the [TFT3]."

[164] Mr Mazlin became the accountant for TEPL and the Showbar Group companies in December 2009. He was not any more specific about the date Mr Thorne gave him the diagram, but in the context of his evidence it was likely about that same time. The negotiations seem to have started in December 2011 and ended on 21 February 2012. It is odd that the instruments prepared to record the parties' agreement and effect the transaction are contrary to what Mr Mazlin recalls Mr Thorne "always stated" in the preceding negotiations. More so because to a significant degree Mr Mazlin was the conduit between the parties and the defendants' solicitors who prepared the SSA.

TEPL Annual Company Statement (17 February 2012)

[165] Originally, Connole Carlisle kept the books and records of TEPL, as Mr Johnson's letter of 27 February 2007 indicates. Since December 2009, Mr Mazlin's accounting practice, The Leader Group, has kept TEPL's books and records.

[166] On about 16 February 2012, The Leader Group produced a document titled "Annual Company Statement." The document looks quite like an extract of particulars produced by ASIC. However, Mr Mazlin gave evidence, which was not challenged, that the document was produced from the database maintained by The Leader Group. I accept this evidence. I infer that the information in the statement was taken from the register of members kept by The Leader Group at that time, on behalf of TEPL.

[167] The Annual Company Statement recorded that the plaintiff beneficially owned the Class B share and the one ordinary share in TEPL. Mr Laird, as a director of TEPL, signed the Annual Company Statement to certify that the information in it was true and correct.

[168] This was about five days before 21 February 2012, when Mr Laird, Mr Williamson and Mr Thorne met with Mr Mazlin to agree on their instructions about the transaction and the documents to effect and record it. It was about 12 days before the parties signed the SSA and LA, and completed the SSA by exchanging the share transfers, share certificates and associated documents.

[169] The Annual Company Statement, prepared by Mr Mazlin's firm from the TEPL records it held, and confirmed by Mr Laird, is an important piece of evidence. It

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48 In the context of his affidavit, this is a reference to TEPL and the Showbar Group companies.

records that, contrary to what appears in the original entry in the TEPL register of members, by the time of the transaction the plaintiff was the beneficial owner of the two shares in TEPL.

The parties' position at the time of the transaction

[170] Mr Mazlin took notes from the 21 February 2012 meeting. In these, he recorded the instructions of Mr Laird, Mr Williamson, and Mr Thorne for the transaction documents.

[171] The SSA was drawn by the defendants' solicitors. It includes a recital by the parties that the plaintiff (as Seller) "is the registered holder and beneficial owner" of the one ordinary and one Class B share. There is no reference to the plaintiff holding the TEPL shares as trustee for the TFT3. The share transfers were prepared and executed on the same basis. Although the transaction documents refer to Mr Laird acquiring his joint interest in the TEPL shares as trustee for the LFT, there is no reference to TFT3 at all.

[172] On 28 February 2012, the parties signed the SSA and LA and completed the transaction. Mr Laird and Mr Williamson, as the directors (and, in the case of Mr Laird, as the secretary) of TEPL acted to carry the SSA into effect by recording Mr Laird and RWI as the holders of the shares formerly held by the plaintiff. On 28 February 2012, official notices to this effect, signed by Mr Laird, were lodged with ASIC. These recorded that the plaintiff beneficially held the ordinary share and the class B share it transferred to Mr Laird and RWI.

[173] This is also evidence contrary to what appears in the original 2007 entry in the TEPL register of members.

The defendants' conduct since 28 February 2012

[174] Since 28 February 2012, Mr Laird and Mr Williamson have remained the only directors of TEPL and Mr Laird has remained the secretary of TEPL. In the subsequent documents lodged with ASIC, TEPL has continued to record that Mr Laird and RWI hold the shares formerly held by the plaintiff.

[175] Since 28 February 2012, Mr Laird and Mr Williamson, as directors, and Mr Laird and RWI, as members, have resolved that TEPL pay dividends from its profits to Mr Laird and RWI as the holders of the shares formerly held by the plaintiff. These were not minor resolutions. The dividends per ordinary share paid by TEPL for the financial years ended 30 June 2012 to 2020 total $851,000.00.

[176] The defendants submit that the SSA should not be validated because they say, in truth, Mr Laird and RWI never owned and do not own the shares formerly held by the plaintiff. The effect of this submission, if accepted, would be an admission that, consistently since 28 February 2012, Mr Laird has authorised false entries in the books of TEPL, signed and authorised the lodging of forms to record these false entries in ASIC's publicly available records, and Mr Laird and RWI have taken the benefit of dividends to which they were not entitled and for which they ought to have accounted to the true legal owner or the true beneficial owners of the shares.

[177] The sincerity of the defendants' submission may be gauged by the observation that, in the past decade, Mr Laird and Mr Williamson have never acted to correct the records of TEPL to record Ms Thorne as the legal owner of the shares, and Mr Laird and RWI have never acted to account to her (or to the persons they submit are the true beneficial owners of the shares) for the dividends paid to Mr Laird and RWI, or at their direction.

The absence of Mr Thorne

[178] No party called Mr Thorne to give evidence. For the plaintiff and for the defendants it was respectively contended that the court should draw an inference of the kind drawn in *Jones v Dunkel*[49] against the opposing parties or party.

[179] So far as the evidence reveals, Mr Thorne has not had any connection to any of the parties since his bankruptcy in March 2012. Since he was released from bankruptcy, it does not appear Mr Thorne has had any relationship with the plaintiff, its directors, or its shareholder. For the defendants, an intended effect of the transaction was to remove Mr Thorne from any association with them and the regulated businesses with which they were associated.[50] There is no evidence of any subsequent connection between Mr Thorne and any of the defendants.

[180] There is no evidence that Mr Thorne played any role in the keeping of TEPL's company records or that he signed any documents relating to the shares in TEPL other than those tendered at the hearing. There is no reason to suspect that, after becoming a bankrupt, Mr Thorne retained any records of the plaintiff. Anything Mr Thorne might say about the meeting on 21 February 2012 with Mr Laird, Mr Williamson and Mr Mazlin, or the meeting on 28 February 2012 at which the SSA and LA were signed and the SSA completed, would merely be cumulative to the evidence given by Mr Laird, Mr Williamson, and Mr Mazlin.

[181] In the circumstances, from Mr Thorne's absence from the witness list, I draw no inference about the extent which his evidence would have assisted either the plaintiff or the defendants.

An alleged concession by the plaintiff

[182] For completeness, I do not accept the defendants' submission that paragraph [9] of the plaintiff's statement of claim "seems to concede that TFT3 had some power or control" over TEPL. The submission mischaracterises a plea based on the commonly accept fact that the OLGR had advised it would not renew existing permits or issue new permits if Mr Thorne remained a director of TEPL.

Consideration of the defendants' fourth ground of opposition

[183] There is no direct testamentary or documentary evidence that the plaintiff held the TEPL shares on trust for the TFT3. Other documents, in particular the TEPL register of members, would support a finding that, when first acquired, the plaintiff

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49 (1959) 101 CLR 298.

50 Evidence was given that the reason Mr Laird and Mr Williamson (through RWI) sought to acquire the TEPL shares from the plaintiff was that the Office of the Liquor and Gaming Regulation (**OLGR**) had informed them that it regarded Mr Thorne as not a fit and proper person to be associated with the holder of an adult entertainment permit or a liquor licence.

held the shares on trust for or on behalf of another person or entity (or more than one). The documents from about the time of the transaction, including the Annual Company Statement and the SSA are evidence contrary to earlier entry in the TEPL register of members and the application for registration form.

[184] This ground of opposition is directly contrary to the position the defendants took, with the assistance of their accountant and lawyers, at the time of the transaction.

[185] The defendants' submission is also at odds with their conduct between 28 February 2012 and the hearing. In the intervening period, they have acted in a way that is inconsistent with the shares being held by the plaintiff on trust for the TFT3 and passing to Ms Thorne as a new trustee of the TFT3. They have received the benefits flowing from share ownership. They have not done so accidentally or inadvertently. They have done so deliberately and consciously. Each year, Mr Laird and Mr Williamson, as directors, and Mr Laird and RWI, as members, resolved to pay dividends as if the relevant defendants held the shares. Mr Laird and RWI directed how those dividends were to be paid.

[186] I raised this circumstance with Mr de Waard on the first day of the hearing, during his opening of the defendants' case. On the second day, Mr de Waard tendered an undertaking by the defendants that:

> "in the event that the Court finds (as the Defendants contend) that the true owner of the Shares in issue is Suzanne Thorne as Trustee of the [TFT3] and declines to validate the [SSA] on that basis [then the defendants would] correct [the share register for TEPL] to reflect ownership of the Shares by Suzanne Thorne as Trustee of the [TFT3] [and]
>
> Take all steps necessary to update the ASIC records … to give effect to the true ownership of the Shares."

[187] I enquired specifically whether the defendants would account to Ms Thorne for the fully franked dividends TEPL had paid to or at the direction of Mr Laird and RWI. Mr de Waard explained that the defendants thought Ms Thorne should seek her own remedy in that respect.

[188] The defendants did undertake that (if the court found as the defendants now contend) they would not rely on a defence under the *Limitation of Actions Act 1974* (Qld) "or equitable equivalent such as laches" in relation to any proceeding commenced by Ms Thorne as trustee of the TFT3 "for an account with respect to the Shares."

[189] If Ms Thorne has such a right or remedy, she has had it since about 22 August 2012, the date of the deed of appointment. The evidence before the court is that Ms Thorne has been aware of this possible right since at least 9 September 2013. She has not advanced it as a party to the proceeding.[51] Nor is there any evidence she has

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[51] Exhibit 1 included written submissions by Mrs Thorne, as "a non-party" that seek an adjournment of a hearing if this proceeding in the Supreme Court of New South Wales with a view to Mrs Thorn being joined in the proceeding "as a plaintiff". If the submissions were given to the Court, it was likely between 8 November 2013, when the proceeding commenced, and 28 March 2014, when it was transferred to this court.

sought to enforce it outside this proceeding in recent years.[52] There is no indication that Ms Thorne would do so now or that she has the resources to do so.

[190] If Ms Thorne, as trustee of the TFT3, is the legal owner of the TEPL shares, as the defendants now submit, and if declining the relief sought by the plaintiff would leave her with a legal title (and the trust beneficiaries with a beneficial interest) in the TEPL shares, as the defendants also submit, then Ms Thorne would hold shares that, according to the defendants, dramatically decreased in value by 30 June 2018. In February 2012, Mr Laird and RWI agreed to pay $1,871,775 for the shares. According to Mr Williams, the value had fallen to $25,633 by 30 June 2018.

[191] It would seem contrary to the interests of the beneficiaries of the TFT3 to deprive them of the consideration the defendants had agreed to pay for the shares and, instead, leave them with a claim to property now said to be of greatly reduced value. On the defendants' case, Ms Thorne would have to pursue Mr Laird and RWI to account for dividends paid in the intervening years. There is no evidence before the court of the ability of Mr Laird and RWI to satisfy any account that might be ordered. Nor was there a concession that they would not defend to such a suit.

[192] The apparent detriment it could cause any persons with a beneficial interest in the TFT3 is a circumstance tending against adopting the course the defendants propose. So also is the absence before the court of the person alleged to be the new trustee. No case was advanced that the sale by the plaintiff of the TEPL shares to Mr Laird and RWI was a breach of trust.[53]

[193] The provisions in Part 5A.1 of the Act assume an existing legal system within which and by means of which they operate. If the TEPL shares were held on trust at the time the plaintiff agreed to sell them, then the plaintiff would have fiduciary obligations with respect to the consideration paid and payable for the shares. Orders validating the transaction instruments would not alter that situation.

[194] It is difficult to avoid the conclusion that in February 2012 the defendants adopted the position that the plaintiff could transfer to them the beneficial interest in the TEPL shares because that position favoured them, by allowing them to control the Showbar Group companies and pay dividends at their direction for their benefit. Now the defendants have reversed their position, again to favour themselves, to avoid the prospect of having to pay for the TEPL shares they acquired back in 2012.

[195] In all the circumstances, I am not persuaded that this ground of opposition establishes any unfair prejudice to the defendants or would make any validating or other order unjust.

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52 Seven years ago, Ms Thorne successfully resisted an application by the plaintiff in separate proceedings for declarations about the invalidity of the deed of appointment: *Thorne Developments Pty Ltd v Thorne* [2015] QSC 156.

53 Of course, a claim to redress a breach of trust cannot be brought by a person who is not a successor trustee or a co-trustee, or a beneficiary, or a person standing in their shoes, such as their personal representative or trustee in bankruptcy. See: *Occidental Life Insurance Co of Australia Ltd v Bank of Melbourne* (1991) 7 ANZ Ins Cas 61-201 at 78,320.

Another question about Ms Thorne's position

[196] The parties made submissions at and shortly after the hearing about whether Mr Thorne's power to appoint a new trustee under the TFT3 trust deed was property that vested in Mr Juratowitch, as his trustee in bankruptcy, on 26 March 2012. If it did, Mr Thorne's purported exercise of the power of appointment on 22 August 2012 would not have been effective to appoint Ms Thorne and Craig Thorne as new trustees of the TFT3.[54]

[197] Although competing submissions were made, it is not necessary to resolve this issue. It is sufficient to note that validating and other orders could make such doubts irrelevant, without adversely affecting the rights any beneficiary may have.

Consideration of whether to make validating or other orders.

[198] In addition to the above consideration of the defendants' individual ground of opposition, considering them all collectively, I am not persuaded that the making of validating or other orders would cause unfair prejudice to the defendants or otherwise be unjust.

[199] The other matters relevant to an exercise of discretion under s 601AD(3)(c) and (d) of the Act are as follows.

[200] The deregistration of the plaintiff came about administratively and not because of insolvency or any identified misconduct of the plaintiff. On application, ASIC reinstated the plaintiff.

[201] Each of the defendants signed each of the SSA and LA voluntarily, acting in his or its own interest, and with access to professional accounting and legal advisers. They participated in making the agreements to the same extent as the plaintiff and Mr Thorne. None could have made either agreement without the cooperation and consent of the other parties.

[202] Mr Laird and Mr Williamson identified in their evidence the importance of the agreements to them and their interests in the Showbar Group companies. In their different ways, Mr Laird and Mr Williamson understood the general effect of the transaction. Each understood that (through their respective business structures) they would jointly acquire Mr Thorne's interest in the Showbar Group companies (held through the plaintiff) in order to address concerns raised by the OLGR about whether Mr Thorne was a fit and proper person to hold an interest in any entity with a liquor licence or an adult entertainment permit.

[203] The defendants obtained the immediate benefit they sought from the SSA, as if the transaction was valid and effective in law to remove from TEPL and the Showbar Group companies and their licensed and permitted businesses of any interest associated with Mr Thorne.

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[54] This issue does not appear to have been raised or considered in *Thorne Developments Pty Ltd v Thorne* [2015] QSC 156 or *Thorne Developments Pty Ltd v Thorne & Anor* [2016] QCA 63, which were decisions in another proceeding between different parties.

[204] The defendants then participated in implementing the SSA to its full extent, as if it were a legally binding agreement. If the plaintiff had remained registered at that time, there would be no issue about the defendants' respective obligations.

[205] Despite earlier allegations, the defendants made no case that their entry into the agreements was the result of any fraud, mistake, or misrepresentation.

[206] The defendants took steps to perform their obligations under the LA for a period after they became aware that the plaintiff had been deregistered, as if it were a legally binding agreement. These steps continued until a freezing order prevented them from doing more. Their knowledge that the plaintiff had been deregistered did not cause the defendants to rescind or terminate the SSA or the LA or, for a time, to avoid their continuing obligations.

[207] The defendants continued to take the benefits arising from the SSA for a period of more than ten years, as if the things done were valid and effective in law.

[208] The validation of the SSA, the LA, and the steps taken by the plaintiff and the defendants to perform their respective obligations, would remove the apparent uncertainty as to their effect and the lawfulness of the transactions the parties to each instrument purported to effect.[55]

[209] Some validating and other orders would remove the doubt about whether the present legal and beneficial ownership of the TEPL shares and the position as to ownership which all the parties have treated as true since the SSA was executed until the defendants most recent change of position.

[210] An order validating the SSA and LA would allow the plaintiff to enforce the promises of Mr Laird, RWI and Mr Williamson about the payment of the balance of the purchase price of the shares.

[211] Validating and other orders would not adversely affect the position of any person with a beneficial interest in the TFT3, insofar as any property of that trust might be affected by the orders.

[212] The transfer of the plaintiff's shares in TEPL and the resignation of Mr Thorne as a director of TEPL were related to concerns expressed by the OLGR about Mr Thorne's association with the conduct of regulated businesses by the Showbar Group companies. The validation of the transfer would remove any uncertainty about the end of this association between Mr Thorne and those businesses. It would confirm that the concern of the public regulator had been addressed.

Conclusion

[213] In the circumstances, I am satisfied that it is appropriate to make orders validating some of the acts done during the deregistration period, to the extent that it is necessary to do so for those acts to have legal effect, and that it is appropriate to make associated deeming orders confirming the nature and effect of those acts. This will restore the parties to the position that would have prevailed had the

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55 This is somewhat analogous to the basis for reinstatement identified by Gleeson JA in *Re Greenzan Pty Ltd (In liq)* [2017] NSWSC 489 at [9].

plaintiff not been deregistered, which is consistent with the primary purpose of such orders.

[214] To this end:

(a) The plaintiff's act in making the SSA and the LA should be validated;

(b) The plaintiff's receipt of $95,000 paid to the trust account of Reardon & Associates solicitors on or about 12 December 2011 and the plaintiff's receipt of $300,000 paid to the same trust account on or about 28 February 2012 for the benefit of the plaintiff (or at its direction) should be validated and deemed to be receipts of payments pursuant to the SSA made by the defendants as Buyers to the plaintiff as the Seller;

(c) The plaintiff taking steps to perform obligations under clause 4.2 and clause 5.1(a)(iii) of the SSA, on or about 28 February 2012, including executing a transfer of one ordinary share and a transfer of one class B share in TEPL from the plaintiff to Mr Laird and RWI, and delivering the executed transfers and the related share certificates to Mr Laird and RWI should be validated and should also be deemed to be acts of performance by the plaintiff as the Seller pursuant to the SSA;

(d) Mr Laird as trustee for the LFT and RWI taking steps to perform obligations under clause 4.3(a) and clause 4.3(b) of the SSA, on or about 28 February 2012, should be validated and should also be deemed to be acts of performance by them as the Buyers pursuant to the SSA; and

(e) The entry in the register of members of TEPL recording Mr Laird as trustee for the LFT and RWI as the joint holders of one ordinary share and one class B share in TEPL, which were formerly held by the plaintiff, on or about 28 February 2012, should be validated.

[215] The plaintiff does not press for an order about the mortgage granted by Mr Laird on 28 February 2012: see [72] above.

[216] The plaintiff seeks two further orders. One would validate the "payment of all dividends" by TEPL since 28 February 2012 to RWI and to Mr Laird as trustee for the LFT as joint holders of the shares formerly held by the plaintiff. The other would validate the "receipt of all taxation imputation credits attached or accruing to" those dividends.

[217] The power of the court to make a validating order under s 601AH(3)(c) is limited to the subject matter of "anything done" during the period between deregistration and reinstatement of the plaintiff. The payment of dividends and the receipt of associated imputation credits after 4 September 2013 appears to be outside the scope of the power.

[218] The court could make an order about that subject matter pursuant to s 601AH(3)(d) if it were appropriate.

[219] I am not persuaded that it would be appropriate to validate or otherwise sanction the payment of dividends and the receipt of associated franking credits before or after the reinstatement of the plaintiff. There are two reasons.

[220] Firstly, there is no apparent advantage to the plaintiff of an order validating the payment and receipt of the franked dividends by Mr Laird and RWI. The only persons who could benefit from such validating orders would be the defendants who resolved that TEPL should pay the fully franked dividends and who directed how they were to be paid. The defendants do not seek validating orders.

[221] Secondly, none of the financial statements for TEPL or any of the Showbar Group companies has been audited. The financial statements show that substantial dividends continued to be paid from retained earnings well after the sales, income and profits began their steep decline. No evidence was led as to the reliability of the financial statements or the lawfulness of dividend payments or the allocation of franking credits. To the extent that the payment and receipt of any of the franked dividends might be subject to any regulatory or other review or reassessment, it would not be appropriate for the court to make an order validating the payments and receipts.

[222] In the circumstances, I decline to make orders about the TEPL dividends and franking credits.

Costs

[223] The plaintiff has obtained most of the relief it sought at the hearing. In the absence of any competing consideration, costs of the hearing should follow the event. I will allow the parties seven days to file any written submissions on costs.