SUPREME COURT OF QUEENSLAND

CITATION:	*Sino-Resource Imp & Exp Co Ltd v Oakland Investment Group Ltd* [2018] QSC 98
PARTIES:	**SINO-RESOURCE IMP & EXP CO LTD** (*Applicant*) **v** **OAKLAND INVESTMENT GROUP LIMITED BVI COMPANY 1913227** (*Respondent*)
FILE NO/S:	553 of 2017
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	14 May 2018
DELIVERED AT:	Cairns
HEARING DATES:	20 December 2017, 18 January 2018, 19 January 2018, 9 February 2018
JUDGE:	Henry J
ORDERS:	**1. It is declared that no money is due under and by virtue of a loan agreement between the respondent as lender and The Passage Holdings Pty Ltd ACN 602 422 891 as trustee for the Passage Holdings Unit Trust as borrower dated 22 September 2016, secured by mortgages numbered 717541242 and 717541414.** **2. The respondent's application for security for costs is dismissed.** **3. I will hear the parties as to consequential orders, directions for the future disposition of the application and costs at 9.15 am on 23 May 2018 (out of town parties have leave to appear by audio or video link).**
CATCHWORDS:	MORTGAGES – MORTGAGEES REMEDIES – FORECLOSURE – proof of loan – where the respondent mortgagee has priority over the applicant mortgagee – where the respondent mortgagee seeks to exercise foreclosure and sale rights by reason of default under the mortgage – where the applicant mortgagee alleges no loan was ever made pursuant to the respondent mortgagee's mortgage – whether

such a loan was made – whether the arrangement was a sham.

Uniform Civil Procedure Rules 1999 (Qld)

Jones v Dunkel (1959) 101 CLR 298
McVeigh (trustee of bankrupt estate of Piccolo) v National Australia Bank Ltd (2000) 278 ALR 429
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423
Equuscorp v Glengallan Investments Pty Ltd (2004) 218 CLR 471
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2005) 219 CLR 165
ASIC v Bilkurra Investments Pty Ltd and Ors
Sharrment Pty Ltd v Official Receiver in Bankruptcy (1988) 18 FCR 449
Briginshaw v Briginshaw (1938) 60 CLR 336
Raftland Pty Ltd v Commissioner of Taxation (2008) 238 CLR 516

COUNSEL:	D A Savage QC and L Copley for the applicant K N Wilson QC for the respondent
SOLICITORS:	Connolly Suthers for the applicant Bransgroves Lawyers for the respondent

Introduction

[1] Port Hinchinbrook Resort is a residential and marina development located on the Hinchinbrook Channel near Cardwell.

[2] The development's common areas and unsold residential land ("the estate") were owned by Williams Corporation Pty Ltd. That company went into liquidation in 2013, in the wake of damage done to the estate by Cyclone Yasi in 2011. The liquidator of Williams Corporation Pty Ltd sold the estate to The Passage Holdings Pty Ltd ACN 602 422 891 as trustee for the Passage Unit Trust ("Passage") by a contract dated 13 February 2015[1] which eventually settled about 26 September 2016.

[3] Around the date of settlement, the applicant, Sino-Resource Imp & Exp Co Ltd ("Sino") and the respondent, Oakland Investment Group Limited BVI Company 1913227 ("Oakland") both allegedly lent money to Passage pursuant to loan agreements. Their loans were purportedly secured by mortgages over the estate, with Oakland's mortgage having priority between the two.

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[1] Affidavit of David Haubert court doc 7 [8].

[4] Passage was ordered to be wound up in insolvency on 4 August 2017.[2] Oakland was allegedly "handed possession" of the estate by Passage on the same day,[3] asserting Passage was in default as mortgagor.[4]

[5] A dispute ensued about Oakland's right to possess and sell the estate, resulting in the filing of the present application on 31 October 2017. The application sought various orders. A pivotal issue in the application was whether Passage in truth owed Oakland any money pursuant to the purported loan agreement between them. This resulted in a consent order on 21 November 2017 requiring that issue to be determined first pursuant to r 483 *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR").

[6] The question the order poses for determination is:

> "…[I]s any money due under and by virtue of a Loan Agreement between the Respondent as Lender (Oakland) and The Passage Holdings Pty Ltd ACN 602 422 891 as trustee or [sic – for] the Passage Holdings Unit Trust as Borrower (Passage) dated 22 September 2016 (Loan Agreement), secured by mortgage number 717541242 and mortgage number 717541414 (Mortgages) over the land described in Annexure A as [at] the date of the order made in this proceeding [?]" ("the question")[5]

[7] The debt or liability secured by the terms of the mortgages was:

> "All amounts owed from the Mortgagor to the Mortgagee <u>pursuant to the Loan Agreement</u> dated on or about 22 September 2016". (emphasis added)

[8] Sino's case is the alleged loan debt is a not owed pursuant to the terms of the loan and is a sham in that no loan was actually made. If the alleged loan debt is not owed "pursuant to" the loan agreement it follows it is not secured by the mortgages.

[9] Oakland's case is that Passage was indebted to Mr Perry Cooper and Passage directed Oakland to pay the $4,150,000 being advanced under its loan agreement with Passage to Mr Cooper. Rather than paying the loan amount to Mr Cooper, Oakland allegedly paid it by crediting it against a debt Mr Cooper allegedly owed to Oakland ("the debt cancelling loan"). It contends this was a loan made pursuant to the terms of the loan agreement and thus a debt secured by the mortgages.

[10] Sino, as the applicant, carries the onus of proving the question for determination should be answered favourably to it, that is, that the answer is "no". Its case is necessarily circumstantial, for it was not a party to or privy to Oakland's loan agreement or the making of its debt cancelling loan. Oakland carries no legal onus but on the other hand it was the lender under the loan agreement and the alleged maker of the debt cancelling loan. Oakland was only formed four months before the alleged debt cancelling loan. It has but one director and shareholder, Mr Pawel Gardas. It might be thought it would have been a simple thing for Mr Gardas to give evidence of the making of Oakland's loan pursuant to the loan agreement.

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2 Affidavit of David Haubert court doc 7 [11].
3 Affidavit of David Haubert court doc 7 [45] p 436.
4 Affidavit of Clive Scott court doc 4 pp 9, 10.
5 Court doc 32 [3].

[11] As the dispute emerged, and then at the hearing, it became increasingly apparent that Oakland was only prepared to reveal limited information about the making of its debt cancelling loan. It was an approach exemplified by its incomplete disclosure and its unexplained failure to call Mr Gardas or indeed any properly authorised representative of Oakland at the hearing. As will be seen, such evidence as was adduced in Oakland's case about the debt cancelling loan was unconvincing.

Approach to determination

[12] Determination of the question is conveniently approached through consideration of the following topics:

(1) **The emergence of the dispute**.

(2) **The parties' conduct of the hearing of the question** – the way in which the parties approached the hearing introduces considerations which will inform how the determination of the question ought be considered.

(3) **Background** – the context in which Sino and Oakland came to be involved as purported lenders to Passage by the date of settlement on 26 September 2016.

(4) **The "critical documents" relied on by the respondent** – the real significance of the documents the respondent submits evidence a "well documented and straightforward" loan transaction which, in truth, has neither of those qualities.

(5) **The apparent money trail** – such evidence as there is of the flow of any funds in connection with the debt cancelling loan.

(6) **Determination** – the answering of the question.

The emergence of the dispute

Oakland purports to take possession

[13] On 4 August 2017, when Passage was ordered to be wound up, Michael Brennan and Dennis Offermans were appointed as joint and several liquidators of Passage. Mr Brennan's first report to creditors of 31 August 2017 revealed but did not acknowledge the legitimacy of Oakland's purported act of possession.[6]

[14] The report also opined that Mr Craig Gore, a bankrupt permanently banned from providing financial services,[7] had been acting as an officer of Passage though he had no formal office with it.[8] Mr Gore had played a role in attracting Sino to lend money to

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6 Affidavit of David Haubert court doc 7 p 463 et seq; affidavit of Clive Scott court doc 2 p 22 et seq.
7 Ex 18, 19.
8 Affidavit of David Haubert court doc 7 pp 463, 465.

Passage. He is not the only person to have been influentially involved in Passage's affairs despite holding no office with it. On Oakland's own case both Mr Cooper and a New South Wales solicitor, Mr Daniel Clarke, also fit that description.

[15] Sino questioned Oakland's purported right of possession and there was a newspaper report about the issue. Oakland's director Pawel Gardas emailed Sino's lawyer, Steven Zhen, on 13 October 2017, writing, inter alia:

> "I can also let you know that (as I have already confirmed to the newspaper) Oakland did credit the $4.15m to Mr Cooper's account in accordance with our direction to do so by the company. The term discharge was one used by Mr Cooper and the company in a deed acknowledging receipt of the money signed by the company and Mr Cooper at the time of settlement last year."[9]

[16] On 26 October 2017 Oakland's solicitor gave notice Passage was in default as mortgagor under the mortgages by failing to make interest payments and being wound up, giving 30 days notice that if the default was not remedied the mortgagee may sell the land.[10]

*Oakland's reluctance to substantiate its purported right to possessio*n

[17] The present application was filed on 31 October 2017. On the same date Oakland's solicitor wrote to the liquidator's solicitor complaining that the estate's prospective sale was being hampered as a result of the liquidator's view that Sino did not take possession lawfully and was not entitled to sell the property.[11] The letter also asserted Oakland had no obligation to satisfy the liquidator of its right to sell the estate.

[18] It might be thought curious, if not remarkable, that a party purporting to have the right to possess and sell a property owned by a company in liquidation would be so unwilling to assist the liquidator satisfy himself of the existence of that right. Why not just produce the documentary evidence of how it came by that right? Instead Oakland's solicitor's letter merely described the debt cancelling loan, asserting:

> "The Passage Holdings Pty Ltd ("TPH") agreed by way of deed ("the Deed") with Perry Cooper and D&M Technologies Pty Ltd to pay Mr Perry Cooper the sum of $6.8M. Upon draw down of its loan from Oakland Investment Group Limited ("Oakland"), TPH directed Oakland to pay the sum of $4.15M to Mr Cooper. Mr Cooper has acknowledged the receipt of that sum from Oakland in the Deed. TPH have acknowledged and agreed to the payment to Mr Cooper, and TPH has had the benefit of the reduction in the amount owing to Mr Cooper."[12]

[19] By 2 November 2017 Oakland deigned fit to disclose a couple of documents. On that date Oakland's solicitor wrote to Sino's solicitor asserting, inter alia:

> "10. At the time of the loan, we are instructed that our client was informed:

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9 Affidvait of Clive Scott court doc 4 p 6, Affidavit of David Haubert court doc 7 [61] p 453.
10 Affidavit of Clive Scott court doc 4 pp 9, 10.
11 Affidavit of Clive Scott court doc 4 pp 20, 21.
12 Affidavit of Clive Scott court doc 4 p 20.

a. Mr Perry Cooper … had originally intended to be the shareholder of The Passage Holdings;

b. As a result, he had spent time and money working on the Property with respect to carrying out the development, between The Passage Holdings entering into the contract for sale, and the completion of the purchase.

c. The Passage Unit Trust determined it wanted to acquire the land, and remove Mr Cooper's interest. To do so, by way of Deed of Release (**enclosed**) (the "Deed"), The Passage Holdings as trustee for The Passage Unit Trust agreed to pay Mr Cooper the sum of $6,800,000.

11. Our client was provided with the Deed and a direction to pay (**enclosed**). The Deed includes an acknowledgment by Mr Cooper of receipt of $4,150,000 from Oakland. We are instructed that on that basis, and with the authority of The Passage Holdings, the funds were advanced and paid directly to Mr Cooper. Our client otherwise knew nothing of the amounts owing to Mr Cooper or the work performed by Mr Cooper and relied upon the direction by The Passage Holdings."[13]

[20] The two enclosures produced were incomplete and unconvincing documentary evidence of the alleged loan. Their content, and the absence of any accompanying monetary transaction records from any financial institution, was inherently more likely to excite suspicion than to quell the controversy.[14]

The direction to pay

[21] The direction to pay document disclosed by Oakland's solicitor's letter of 2 November 2017 is an undated, unsigned document with the following typewritten content, seemingly in Word format:

"**Settlement Sheet & Direction to Pay – The Passage Holdings Unit Trust**

Purchase from Williams Corp and Settlement with P Cooper

Balance owing to Perry Cooper by TPH	$ 6,800,000.00
Balance owing for settlement of land	$ 2,455,000.00
Adjustments to Liquidator	$ 207,554.02
Stamp Duty	$ 135,200.00
Transfer Duty	$ 9,250.00
Registration Costs TGLAW	$ 1,091.79
Land Rent	$ 64,489.21
Repay to Sino (Already Advanced)	$ 488,585.27
TPH For Cashflow Needs	$ 788,829.71
Total Due on settlement	**$10,950,000.00**

[13] Affidavit of Clive Scott court doc 4 pp 37, 38.

[14] An additional controversy raised by witness David Haubert about the two documents is that the pdf versions of them were allegedly generated on 1 September 2017, raising the spectre than they were created long after the event to try and quell the controversy. I have upheld an objection relating to that allegation and in the absence of proper admissible evidence on the subject I disregard it.

Funds Available from	
Oakland Investments	$ 4,150,000.00
Sino Resources	$ 4,150,000.00
TPH Investors	$ 2,650,000.00
	$10,950,000.00
Payment Direction to pay (actual board approved)	
Oakland -> P Cooper	$ 4,150,000.00
TPH Investors -> P Cooper	$ 2,650,000.00
Sino -> TG Law	$ 2,807,557.02
Sino -> TG Law	$ 65,028.00
Sino -> The Passage Holdings	$ 788,829.71
Sino -> Sino (repay prior advances)	$ 488,585.27
	$10,950,000.00"[15]

[22] The document bears no indication who gave the direction. In such records of Passage as the liquidator obtained, it is not identifiable as constituting the disbursement authority referred to in the resolution to enter into the transaction involving Oakland.[16] It is valueless evidence, save for demonstrating how insubstantive Oakland's purported attempt at substantiating its position was.

The settlement deed

[23] The settlement deed enclosed with the letter from Oakland's solicitors of 2 November 2017[17] had a typewritten date inserted at its outset, namely 23 September 2016. It too appeared to be in Word format. It was said to be between:

> "The Passage Holdings Pty Ltd ACN 602 422 891 as trustee for The Passage Unit Trust (TPH)
> and
> Perry Cooper (Cooper)
> and
> D&M Technologies Pty Ltd ACN 095 128 966 as trustee for the CLH Trust (D&M)."

[24] Its second page, the purported execution page, contained the signatures of Daniel Clarke on behalf of D&M, Ian Stephens as a director of Passage (described by the abbreviation TPH in the deed), and Mr Cooper. Mr Cooper's signature was endorsed as witnessed by one Pamela Viel.

[25] Passage's director, Mr Stephens, conducted an accountant's firm called GPTAA out of Mr Clarke's law firm, Clamenz Lawyers.[18] Mr Clarke is D&M's director and shareholder.[19] Mr Clarke deposed that D&M became the shareholder in Passage on about 11 March 2016.[20]

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15 Affidavit of Clive Scott court doc 4 p 44,
16 Ex 11 p1026.
17 Affidavits of Clive Scott court doc 4 p 45, David Haubert court doc 7 p 423, Perry Cooper court doc 47 p 30, Daniel Clarke court doc 48 p 46.
18 T2-85 LL11-21.
19 Ex 15 p20.

[26] The settlement deed's content is discussed further below. For the moment it is sufficient to note two features more likely to attract than allay suspicion. Firstly, the deed had not been disclosed to Sino before it lent money to Passage. Secondly, the deed purported to record an agreement whereby the benefit of Oakland's loan would be used to pay Mr Cooper, for reasons only vaguely explained in the deed.

The liquidator's lack of information from Passage

[27] Mr Michael Brennan, the liquidator of Passage, testified documents which became exhibit 11 in the hearing were a selection of documents from his file,[21] which documents had been recovered from the last solicitors who acted for Passage.[22] At the time of his first report to creditors of 31 August 2017 he had not been provided with any evidence of a debt owed by Passage to Oakland.[23]

[28] Mr Brennan confirmed that amongst materials received from Passage's last solicitors was a purported facility agreement between Passage and an entity called Orpheus.[24] Mr Brennan confirmed that subsequent to 31 August 2017 he had recovered a settlement deed between Passage, Perry Cooper and D&M from the last solicitors acting for Passage.[25] Mr Brennan testified this was the only evidence he had come across in connection with any alleged debt by Passage to Mr Cooper.[26] Mr Brennan testified that while he had found amongst some email material a general ledger of a company called The Passage Constructions (it will be recalled the company in liquidation was The Passage Holdings Pty Ltd) he received no general ledgers or books of account from Passage or its former solicitors.[27] He did however locate a document, evidenced in exhibit 11, recovered from an email, which is a ledger named "The Passage Holdings". He has no way of verifying its accuracy or who compiled it.[28]

[29] Mr Brennan testified that despite attempts he had not recovered any documents directly from Passage.[29] He received no co-operation at all from Passage and cannot locate its director, Ian Stephens.[30] He sought information from Passage's accounting firm but received nothing from them.[31] He contacted Daniel Clarke, who he considered to be a shadow director, but Mr Clarke would not speak to him and would only respond by email.[32]

The parties' conduct of the hearing of the question

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20 Affidavit of Daniel Clarke court doc 48 [60].
21 T1-15 L27.
22 T1-16 L25.
23 T1-16 L17.
24 T1-16 L22.
25 T1-16 L40.
26 T1-17 L17.
27 T1-16 L44 – T1-17 L13.
28 T3-3 LL4-29, ex 11 p 396 et seq.
29 T3-3 L4.
30 T3-6 LL15-24.
31 T3-3 L29
32 T3-2 L45, T3-6 LL26-38.

[30] The order requiring the determination of the separate question listed the hearing of the question to occur on 20 and 21 December 2017. The order required, inter alia, the filing and serving of any affidavits to be relied upon and a list of the affidavits to be relied upon on the hearing of the separate question and the service of outlines of argument prior to the hearing. It also ordered that the evidence-in-chief of the parties would be by way of affidavit evidence. The order required the making of disclosure relevant to the separate question by 5 December 2017.[33] It was obvious during the hearing that Oakland had not complied satisfactorily with that order.[34]

[31] There were two significant developments at the outset of day 1 of the listed hearing on 20 December 2017. One was that Sino's counsel provided the court and Oakland's counsel with a lengthy written opening of its case. Its 98 paragraphs contained comprehensive references to evidentiary material. This was in contrast to the outline earlier filed on behalf of Sino, which was only eight paragraphs long. Oakland's counsel sought and was granted an adjournment of the hearing to allow Oakland sufficient time to properly absorb and meet Sino's foreshadowed case. The hearing was accordingly adjourned for continued hearing on 18 January 2018.

[32] The second significant development on day 1 of the listed hearing related to the absence of Oakland's sole director and shareholder Pawel Gardas. Despite having filed an affidavit by Mr Gardas,[35] Oakland informed Sino on the afternoon before the hearing that Mr Gardas would not be called.[36] Oakland's counsel tendered a medical certificate which he said explained why Mr Gardas was not present at court.[37] The certificate, by a medical practitioner in Athens, dated 18 December 2017, certified that Mr Gardas had come to the clinic's surgical emergency unit, on a date not mentioned in the certificate, presenting with pain in the right side of thoracic ribs, having slipped and fallen in France three days earlier. The certificate indicated no injury was detected on a CT scan, that the patient had been recommended two drugs (an anti-inflammatory and a painkiller), a follow-up visit to the clinic in three days and rest for two weeks. The certificate noted the patient would be fit to fly within 14 days after a new clinical evaluation. The certificate did not refer to or consider Mr Gardas' role or capacity as a witness in the present case.

[33] It is noteworthy that on the first day of the hearing, when the certificate was tendered, Oakland's counsel explained he had not considered it would be satisfactory to call Mr Gardas by telephone or video link because of the number of documents to be put.[38] However he also intimated the decision not to call him at the then listed hearing had been made based on the filed outline, as distinct from the much more comprehensive written opening which he acknowledged raised serious allegations about Mr Gardas.[39]

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33 Order of 21 November 2017 court doc 32.

34 Sino's counsel mounted an argument that Oakland had failed to comply with the disclosure requirements of my order (including by not disclosing electronic materials) and UCPR with the consequence that judgment ought be given for Sino. Given my answer to the question for determination is in any event in Sino's favour, it is unnecessary to decide that argument.

35 Affidavit of Pawel Gardas court doc 12.

36 T1-2 L41. This information was advanced by Sino's counsel but not disputed by Oakland's counsel – see T1-11 L35.

37 T1-9 L5; Exhibit 1.

38 T1-12 L11.

39 T1-11 L37.

Significantly, at the resumed hearing in 2018, at which Mr Gardas was not called as a witness, no further medical certificate was produced in respect of Mr Gardas, no application to adduce evidence from him by way of telephone or video link was made and no explanation was given as to why Mr Gardas was not called as a witness.

[34] The witnesses called in Sino's case were Mr Brennan and Mr Haubert, who were required for cross-examination. In addition to the affidavit of Mr Haubert, Sino also relied upon the affidavits of its solicitor, Mr Clive Scott, who was not required for cross-examination.[40] Its list of read materials filed at the outset of day one[41] also listed a variety of miscellaneous documents including subpoenas and some materials produced in response thereto. The materials produced to the Registry in response to subpoenas were not akin to filed documents which could be read and it remained for the applicant to evidence the material, relied upon, which it did by tendering it as exhibits at the hearing.

[35] The respondent read the affidavits of Mr Perry Cooper and Mr Daniel Clarke, who were called for cross-examination, and Ms Pamela Viel, who was not required for cross-examination.[42] Despite having filed affidavits by Mr Gardas and administrative assistant Renee Tucker[43] the respondent did not rely upon them as part of its case, removing any obligation to meet the applicant's requests to produce them for cross-examination. However, the applicant read those affidavits, not to rely upon them as evidence of their content but for limited forensic purposes in support of its submissions.

[36] There were a variety of objections taken to the affidavit evidence. The parties were however desirous of proceeding with the hearing without the preliminary determination of those objections. To avoid cluttering these reasons my rulings in respect of Oakland's objections to Sino's read affidavit content are given in annexure A hereto.

[37] As to Sino's objections to Oakland's read affidavits of Mr Cooper and Mr Clarke I acknowledge there is force to some of them. However, having had regard to the full content of their affidavits I nonetheless by these reasons conclude the question for determination in favour of Sino. In light of that outcome it is unnecessary to determine the objections.

[38] I add that in any event there existed good reason to approach my reasons, as I have, on the basis their affidavits were admissible in full. This is a case in which Sino carries the onus of proving the alleged debt cancelling loan was a sham. To do this it is not enough to merely rely on the failure of Oakland to properly disclose and prove documents purportedly evidencing the making of the loan or its failure to call its principal Mr Gardas. While the rule in *Jones v Dunkel*[44] looms as a problem for Oakland in this case, it does not remove the onus upon Sino to actually prove its case in the positive, by advancing evidence sustaining the circumstantial inference that the debt cancelling loan is a sham, that is, that the loan did not in fact happen. On the one hand this makes

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40 T1-4 L17.
41 Court doc 36.
42 T2-29 LL14-20.
43 Tucker is said to be an employee of a company allegedly engaged by Oakland and Mr Gardas to provide administrative assistance.
44 (1959) 101 CLR 298.

documents of the kind referred to by Mr Cooper and Mr Clarke relevant to proof of the circumstantial inference sought by Sino. On the other hand, as alleged parties to a sham, which involves a subjective intention, it is appropriate Mr Cooper and Mr Clarke be permitted to attempt to point to the documents – even if not their documents – they assert in support of the debt cancelling loan being genuine. The mere acceptance that Mr Cooper and Mr Clarke may permissibly refer to and exhibit documents which should more properly have been produced by Oakland does not involve an acceptance of the genuineness of such documents or the genuineness of the arrangement asserted. It is, rather, a matter to be borne in mind in assessing the weight to be accorded to such documents and the accompanying testimony about them.

[39] At the conclusion of the hearing, in reserving my decision, I gave leave to Oakland to file further submissions on the admissibility of passages in affidavits by the following Thursday. The content of the outline subsequently filed by Oakland went well beyond that grant of leave. It made further submissions on the merits and purported to "maintain" objections which had not been made to the tender of subpoenaed documents. This prompted a predictable spat and eventually a re-convened hearing to regularise the receipt of further written submissions from both sides (a course I found to be the most practicable and less time consuming in the circumstances). The fate of the parties' arguments on the merits is exposed hereunder but I ought rule at the outset on the objection to the subpoenaed documents, exhibits 14, 15, 16 and 17.

[40] Those exhibits were tendered for identification on the first day of the hearing in December. The written opening for Sino made extensive reference to them, making plain their relevance. Oakland well understood the intended reliance upon them. They were tendered and received as exhibits at the hearing. The content of much of exhibits 14, 15 and 16 and a little of exhibit 17 was referred to in Sino's ensuing submissions – largely as it was in the opening – and is relevant.

[41] The time to object to the exhibits was the time of tender. If Oakland wanted to contend the documents had not been properly proved, as it now does, that was the time to do so. Had that occurred and had there been substance to such an objection then Sino would have been in a position to adduce further evidence, for instance from the firms which produced the documents, to properly prove the documents before the close of the evidentiary stage of the hearing. The absence of objection in these circumstances was an act of acquiescence to the admissibility of the documents, though not of course to the weight which the court ought to attach to them. I accordingly over-rule the post hearing objection to those exhibits. To remove doubt, I only have regard to such of the content of those exhibits as was identified as relevant by submissions.

Background

The reeling in of Sino

[42] Sino's principal is a Chinese citizen, Mr Haiming Jiang. He goes by the anglicised name Joe Koman but is not fluent in English. David Haubert acts as his agent in English speaking countries and did so in negotiating Sino's gradual involvement as a prospective investor and ultimately lender in respect of the estate's development.

[43] Mr Haubert deposed that on 7 April 2016 Lewis Cohen, a director of Passage, emailed him a prospectus-like document, described as an "Investment discussion" by Passage, "Represented by its principal Hinchinbrook Development Inc" ("HDI").[45] The document purported to announce an equity investment of $8M in the development of Port Hinchinbrook, to give rise to an ownership proportion of 30 per cent, with the remainder owned by Mr Clarke (10 per cent), Maaca Government Consultancy Group (30 per cent) and Hinchinbrook Development Consultancy Group (30 per cent).[46] Despite on-going occasional further references to HDI during negotiations with Sino, Mr Clarke deposed that a unit and share sale agreement between D&M Technologies, Passage and HDI, executed by him for D&M and Mr Stephens for Passage, did not ultimately proceed.[47]

[44] On 5 July 2016 Mr Gore emailed Mr Haubert, Mr Cohen and Mr Pinto (another director of Passage), an Investor Outline representing that Daniel Clarke and Dev Melon (sic: Menon) of Clamenz Lawyers had, to date, invested $550,000 to $750,000 in the project. The email also represented that "Perry Cooper Orpheus Investments Pte Ltd … atf Orpheus Investment Trust" had to date invested between approximately $2,500,000 and $4,500,000 and "Bought out Craig Gore … in June 2015 for 4M AUD" and had "Agreed to sell development rights to HID development INC for the sum of $6.8M AUD".[48]

[45] As a result of receiving the investor outline on 5 July 2016 Mr Haubert testified he enquired of Mr Gore about the circumstances under which Mr Cooper or Orpheus Investments Pte Ltd ("Orpheus") had bought Mr Gore out for $4,000,000 given he had seen other notations showing only $2,000,000 owing to Mr Cooper.[49]

Orpheus?

[46] Orpheus was incorporated in Singapore 2015. Its sole shareholders are Mr Cooper and Mr Clarke in respective proportions of one-third and two-thirds.[50] Mr Cooper described it in evidence as an investment vehicle.[51] It is discussed further below.

Oakland emerges

[47] Despite receiving such variable and vague representations as the investment discussion and the investor outline, Sino became interested in investing in the estate's development. However, it was unwilling to invest more than 50 per cent of the funds required by Passage,[52] a position effusively acknowledged on 12 July 2016 in an email by Mr Pinto to Mr Haubert, cc'd to Mr Gore and Mr Cohen.[53]

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45 Affidavit of David Haubert court doc 7 [14] pp 1-22.
46 Affidavit of David Haubert court doc 7 p 18.
47 Affidavit of Daniel Clarke court doc 48 [8] pp 1-43
48 Affidavit of David Haubert court doc 7 pp 72, 76, 77.
49 T2-13 L41.
50 Ex15 pp 7,8.
51 T2-49 LL19-38.
52 Affidavit of David Haubert court doc 7 [23].
53 Affidavit of David Haubert court doc 7 p 80.

[48] Mr Haubert explained in cross-examination, of Sino's wish that somebody else contribute 50 per cent, that Sino needed "to see another investor with experience in the Australian market at arms-length, which would corroborate and help justify and support our investment".[54] He acknowledged in cross-examination an understanding that the amounts to be advanced by Sino and whoever the other investor was to be, was for more than merely the purchase of the estate land and was also for development.[55]

[49] As will be seen, Sino's desire to only invest 50 per cent in Passage was met by the device of Oakland miraculously stepping up and supposedly lending 50 per cent without anybody telling Sino that none of Oakland's 50 percent loan would be paid to Passage.

[50] In July 2016, the same month in which Sino was baulking at investing more than 50 per cent, Mr Clarke claims he contacted Mr Gardas about the prospect of Oakland investing. Mr Clarke deposed that in about July 2016 Craig Gore contacted him, explaining that Mr Koman and Mr Haubert (that is, Sino) would only invest half the amount needed. Mr Clarke deposes that, as a result, he contacted Mr Gardas and suggested that one of Mr Gardas' commercial entities may be interested.[56]

[51] Mr Cooper, on the other hand, deposed that in about July 2016 he was told by Craig Gore that he had new partners from China called Joe and Dave – a reference to Sino – prepared to fund the purchase price of HDI, but that Mr Gore wanted Mr Cooper to arrange someone to pay him out.[57] Mr Cooper deposed that he, in turn, spoke to Mr Clarke who said he would speak with Mr Gardas to see if "they" (presumably an entity of Mr Gardas) would fund the money owed to Mr Cooper "in the form of a mortgage on the Hinchinbrook assets".[58]

[52] Mr Cooper deposed Mr Clarke subsequently told him Mr Gardas was interested in funding the money owed if Mr Cooper would reinvest with "their latest project (Hakone as it later become known)" and Mr Cooper agreed.[59] It is not apparent why, if Oakland had money available, it would not simply invest that money directly in the so-called Hakone project rather than lend that money by indirect means to Mr Cooper.

[53] My abiding impression of the evidence of Mr Cooper and Mr Clarke, was that they were not being candid with the court about the true extent of their knowledge of the circumstances of Oakland's conduct in this matter. It appeared they obviously knew more about the relevant events than they were prepared to reveal in their evidence. They did not appear to be reliable witnesses and my review of the documentary detail of the case has confirmed that impression.

[54] On 14 July 2016 Mr Gore emailed Mr Haubert and Mr Cohen, cc'g Mr Pinto, addressing the email to "Dave and Joe" (Mr Haubert and Mr Koman of Sino) and claimed to have received a "confidential written offer" from another investor.[60]

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54 T2-11 L14.
55 T2-11 L27.
56 Affidavit of Daniel Clarke court doc 48 [10-12].
57 Affidavit of Perry Cooper court doc 47 [18].
58 Affidavit of Perry Cooper court doc 47 [22].
59 Affidavit of Perry Cooper court doc 47 [23.
60 Affidavit of David Haubert court doc 7 p 83.

[55] On 31 July 2016 Mr Gore emailed Mr Haubert, Mr Koman, Mr Cohen and Mr Pinto attaching an undated and unsigned letter from Pawel Gardas as director of Oakland Investment Group Ltd offering to loan Passage $4,150,000.[61]

[56] Mr Haubert deposed that in August 2016 Mr Pinto, Mr Cohen and Mr Gore circulated a business plan for Passage which included, under the heading "Use of proceeds and funds for this investment", the words "Pay off Perry AUD $2,000,000".[62] This document was referred to by Mr Haubert in cross-examination when he was challenged as to the source of his belief Mr Cooper had not retained a $4M stake in the project.[63]

The Octal investment agreement

[57] Mr Cooper deposed that in about April 2016 he had told Mr Gardas he was expecting to exit his Hinchinbrook investment later in 2016 and would have about $4,000,000 to invest in projects which Mr Gardas might have in the investment phase.[64] Mr Cooper deposed Mr Gardas then told him of a proposed loan he was looking at and Mr Cooper agreed to invest the money with him in anticipation of receiving the settlement funds.[65] It was not until the following month, on 6 May 2016, that Oakland Investment Group Ltd was incorporated in the British Virgin Islands.[66]

[58] It will be recalled Mr Cooper deposed that after Mr Clarke apparently spoke with Mr Gardas in around July 2016, Mr Clarke told him Mr Gardas was interested in funding the money owed to Cooper by Passage if Mr Cooper would reinvest with Mr Gardas' latest project. Mr Cooper deposed that in August 2016, as the Passage sale negotiations were taking longer than anticipated, he spoke with Mr Clarke and Mr Gardas and it was suggested he borrow money from Oakland, so as to invest in the Hakone project, and when settlement with Passage happened, those funds could be used to refund the loan.[67]

[59] Mr Clarke deposed he suggested to Mr Cooper and Mr Gardas that Oakland lend the money for Mr Cooper's investment in the Hakone project – or Octal Investments Ltd ("Octal"), as Mr Clarke called the relevant investment entity - and be repaid by journal entry when Passage settled.[68]

[60] Mr Cooper deposed that on or around 10 August 2016 he entered into a loan agreement with Oakland, pursuant to which, he asserts, he "borrowed the funds … needed to invest in the Hakone investment with Octal Investments Ltd" ("the Octal investment agreement").[69] Octal had been incorporated, in the British Virgin Islands, on 4 August 2016.[70] Mr Gardas is also its sole director. Mr Cooper deposed, without reference to any documents, that "the investment was made to 60 Hakone Road Pty Ltd and a

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61 Affidavit of David Haubert court doc 7 pp 85, 86.
62 Affidavit of David Haubert court doc 7 p 155.
63 T2-15 L35 – T2-16 L37.
64 Affidavit of Perry Cooper court doc 47 [20].
65 Affidavit of Perry Cooper court doc 47 [21].
66 Affidavit of Clive Scott court doc 4 p 4, affidavit of David Haubert court doc 7 pp 461-462.
67 Affidavit of Perry Cooper court doc 47 [25].
68 Affidavit of Daniel Clarke court doc 48 [24].
69 Affidavit of Perry Cooper court doc 47 [26].
70 Ex15 p 5.

mortgage is held as security in the name of Octal".[71] The Octal investment agreement is considered further below.

Clarke emerges

[61] On 31 August 2016 Daniel Clarke emailed Mr Haubert, apparently communicating with him for the first time. The email identified the documents necessary to implement an arrangement whereby Sino would lend $4,150,000 to Passage to purchase the estate and provide working capital to be secured by a second mortgage and there would be a deed of priority as between the first mortgagee and Sino as the second mortgagee.[72]

[62] Mr Haubert acknowledged in cross-examination that such due diligence as he undertook in relation to Oakland involved communications with Mr Gore and possibly Mr Clarke.[73] He testified that in a conversation with at least one of those men he enquired whether it would be helpful for him to talk directly to Oakland but he was cautioned against doing so on the basis it might jeopardise the deal.[74]

[63] Negotiation of the loan ensued, with Sino apparently being prepared to rank second in priority to the other investor. Sino did however seek further information about holdings in and lenders to Passage.

[64] On 15 September 2016 Daniel Clarke emailed Sino's lawyer, Steven Zhen, cc'g Mr Haubert and Mr Koman, advising that the sole shareholder of Passage was D&M Technologies atf the CLH Trust. In response to Mr Zhen's query, "How much loans or credit kind [Passage] has received to date and the respective lenders' names and their respective credit amount", Mr Clarke responded:

> "There are loans from Oakland for $4.15m and then another loan for the balance of the $6.8m purchase price ($2.65m – which will rank below you). There is also a convertible note for about US$900k from HDI which will also rank below you. Some minor expenses are also outstanding pending settlement of about AUD$250k."[75]

It will be noted that the response made no reference to any loan or credit received by Passage from Mr Cooper.

Last minute jitters

[65] On Thursday 22 September 2016, Mr Clarke emailed Mr Koman about the foreshadowed disbursement of Sino's loan amount in part to "Thompson Geer Brisbane Law Practice Trust Account", with the balance in trust to go to Passage's bank account "on Monday", a reference to Monday 26 September.[76]

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71 Affidavit of Perry Cooper court doc 47 [27].
72 Affidavit of David Haubert court doc 7 [28] p 137.
73 T2-12 LL12-44.
74 T2-12 L32.
75 Affidavit of David Haubert court doc 7 [29] p 139.
76 Affidavit of David Haubert court doc 7 [35] p 146.

[66] With settlement looming in only a few business days Mr Koman emailed Mr Clarke on 22 September, raising questions including the following:

> "We are concerned about all the various parties to the deal and their relationships to each other. It seems that you were able to make decisions on behalf of Oakland by rendering them in very short time. If you may also represent Oakland, it seems the parties connection are very suspicious for us. Please clarify whether you also represent Oakland and please also clarify the history and prior relationships between Oakland and you, Passage or anyone else and you, related to this transaction.
>
> Second, we are concerned for the recent changes in structure. For example, formerly HDI owned Passage, now it does not, there are several directors who recently resigned so only one director remains? This all seems very odd."[77]

[67] On the same date Mr Clarke emailed Mr Koman, cc'g Mr Zhen and Mr Haubert, responding to the questions. He explained he had not acted for Oakland before but had previously acted for Mr Gardas. That explanation lacked candour. As will become apparent, Mr Clarke knew much more than was disclosed by him to Sino about the "history and prior relationships" between himself, Oakland and others related to Oakland's loan transaction.

[68] Of the changes pertaining to directors, Mr Clarke's email explained:

> "Earlier today, Passage had three directors, Lew, Steve and Ian. Lew and Steve agreed to resign today solely because of the time pressures we have. We had been told all week these documents would be signed and completed and we are now at Thursday and don't have time to get documents signed by Lew and Steve. As a result Lew and Steve agreed to resign on the condition that they are re-appointed within two business days of settlement … As you can see from the mortgage documents, the borrower needs to be identified by an Australian lawyer (but the lender does not). We did not have time for Lew or Steve to fly to Australia to be identified so this process was much easier.
>
> Also, about HDI and Passage. HDI never owned the Passage, it had a contractual right to buy Passage (a copy of which I believe you have). When you were looking at coming in, we changed the deal to avoid you have double taxation and to give you the protection of the mortgage until conversion.
>
> As a result of accommodating you into the deal, HDI and its directors consented to cancel the contract to buy the Passage from D&M to let you have the 30% directly in the Passage. The FNQ Trust also decided to come in with you and have a direct interest in the Passage to put you on equal footing."[78]

[69] The email went on to state:

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[77] Affidavit of David Haubert court doc 7 p 141.
[78] Affidavit of David Haubert court doc 7 p 142.

> "That is the relationship between the parties. Oakland's investment has been used to pay out part of Perry's money (to avoid him defaulting on HDI and taking the whole project) as per the agreement between Perry, HID [sic] and the Passage."[79]

That vague reference, to Oakland's investment having "been used" to pay Perry Cooper per the agreement with HID, which Clarke testified did not proceed, appears not to have excited further inquiry.

[70] On the same day Mr Clarke also emailed Mr Zhen, cc'g Mr Koman and Mr Haubert, apparently endeavouring to assuage Sino about the set-up of the CLH Unit Trust.[80] He explained it was a discretionary trust in which there were two unitholders, stating:

> "The first 50% is held by the Clarke Family Trust and the second is held by the Menon Family Trust. These trusts are controlled by and for the benefit of my family and my business partner in law firm's family."

[71] Mr Clarke's reference to Mr Menon as a "business partner" in his law firm was to Dev Menon, who, according to Mr Cooper, has been charged in connection with the Plutus payroll scam.[81] Mr Clarke asserted at the hearing that Mr Menon was only an employee of his firm and is just "styled" as a partner.[82]

Sino's agreements

[72] For the purposes of the present question it is not in issue that, despite its last minute concerns, Sino proceeded to loan money to Passage after entering into a number of documentary agreements on or before the settlement date of 26 September 2016.[83]

[73] The documents are:

(1) an undated loan agreement with Passage by which Sino agreed to loan $4,150,000 to Passage for the purchase of the estate and the costs and expenses associated with the purchase;[84]
(2) a mortgage over the estate securing amounts loaned by Sino to Passage pursuant to the loan agreement;[85]
(3) an undated security deed between Sino and Passage granting Sino security over Passage's personal and other property to secure repayments pursuant, inter alia, to the loan agreement;[86]
(4) an undated deed of priority and subordination between Oakland, Sino and Passage by which it is agreed Passage's debt to Sino is subordinated and postponed to Passage's debt to Oakland which shall take priority as between the two.[87]

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79 Affidavit of David Haubert court doc 7 p 143.
80 Court doc 7 [33] p 145.
81 T2-74 L45.
82 T 2-81 LL30-36.
83 Affidavit of David Haubert court doc 7 [36(b)] p 157; also see for example T2-10 L2.
84 Affidavit of David Haubert court doc 7 [36(a)] pp 158-181.
85 Affidavit of David Haubert court doc 7 [36(b)] pp 182-238.
86 Affidavit of David Haubert court doc 7 [36(c)] pp 239-285.
87 Affidavit of David Haubert court doc 7 [36(d)] pp 286-313.

[74] The documents of much greater interest in the present determination are the documents said to evidence the making of Oakland's loan to Passage, which on any view did not occur as a cash loan to Passage.

[75] Mr Haubert was pressed in cross-examination about the implausibility of him not knowing that Oakland's $4.15M loan had not been advanced as a cash loan to Passage.[88] Mr Haubert acknowledged he was aware that in excess of $250,000 was paid to Oakland by way of interest between October 2016 and May 2017 but had not learned of that until after learning from Mr Gore of the alleged delinquency in interest payments.[89]

[76] Mr Haubert explained he was deprived of access to the books of the company.[90] He began to suspect there had been a less than arms-length transaction when he saw an email by Daniel Clarke of 30 October 2016.[91] That email by Mr Clarke to various recipients, including Mr Haubert, referred to the liquidator losing patience with "us" for being in default under their agreement with the liquidator and went on to say, "Also, we need to make a payment to Orpheus for its interest ($62,250)".[92] This is at odds with Mr Cooper's evidence that it was him, not Orpheus, who lent funds to Passage.

The "critical documents" relied on by Oakland

Oakland's reliance upon "5 critical documents"

[77] Oakland's counsel placed particular emphasis upon five critical documents, which, unless impeached, give rise to what he optimistically submitted was a well-documented and straightforward transaction.[93]

[78] The documents emphasised by Oakland's counsel are:

(1) a loan agreement between Oakland and Passage;
(2) the mortgages in favour of Oakland;
(3) a security deed between Oakland and Passage;
(4) the deed of priority and subordination between Oakland, Sino and Passage (mentioned above);
(5) the settlement deed.

[79] Each of those documents is considered individually hereunder. As will become apparent they do not have the determinative quality imputed to them by Oakland's submissions. True it is they are documents of a kind likely to be in place in the context of the making of a loan as large as $4,150,000. Equally though, they are documents of a kind likely to be in place in the context of delivering a windfall pursuant to a sham loan – there being little point to such a sham without the accompanying instruments allowing the fraudulent to gain by it. Moreover, with the arguable exception of the settlement

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88 T2-17 L20 – T2-22 L38.
89 T2-21 L14 – T2-22 L21.
90 T2-17 L40.
91 T2-21 L42.
92 Affidavit of David Haubert court doc 52 Ex DH01.
93 Respondent's outline of submissions court doc 53 [5-7], T3-16 LL19-32.

deed, none of them actually evidence the making of the alleged debt cancelling loan by Oakland.

Loan agreement between Oakland and Passage

[80] A copy of a loan agreement document by which Oakland agreed to lend Passage the amount of $4,150,000 was exhibited to the affidavits of Mr Haubert and Mr Clarke and contained in the documents produced to the court by the liquidator.[94] It is not clear how Mr Haubert came by his copy of the loan agreement between Oakland and Passage. Mr Clarke deposed it was he who had prepared it, along with the deed of settlement and direction to pay, as well as the security deed, the deed of priority and the mortgage documents.[95]

[81] The loan agreement between Oakland and Passage, which is typewritten, bears near its outset the handwritten date 22 September 2016. Clause 2 of the agreement, read with clause 1, provided that Oakland "has or will" advance a loan of $4.15M to Passage for the purchase of the estate pursuant to a contract for the sale of land dated 18 July 2016 said to have been entered into between Passage and a vendor not defined in the document. Clause 3 of the agreement required Passage to pay Oakland an establishment fee of $135,000 on the date of occurrence of the first draw-down of the loan. Clauses 9 and 10 of the agreement required Passage to provide a registered mortgage over the whole of the property and a security deed dated on or about the date of the agreement as security for due and punctual repayment of the loan facility.

[82] Accepting for present purposes that the loan agreement document was properly executed,[96] it is only evidence of an agreement to loan. It does not prove the loan occurred. Moreover, it says nothing of any arrangement by which the loan money would not in fact be paid to Passage.

The mortgage documents

[83] Mortgages numbered 717541242 and 717541414, are the numbered mortgages named in the question for determination by the court. It is uncontroversial the numbers are identifying numbers of a kind ascribed to mortgages by the Queensland Titles Registry. The question's adoption of mortgages so described, in the context of an order drafted by and made with the consent of the parties suggests the parties are at least at common ground that such mortgages were registered. Consistently with that common ground nothing was made in the course of submissions of some anomalies in the evidencing of those mortgages.

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[94] Affidavit of David Haubert court doc 7 pp 314-336; affidavit of Daniel Clarke court doc 48 pp 61-85; Ex 11 pp 263-285 (there is some variability in the presence of additional pages at the end of these exhibits, likely because copies of the closing pages of a security deed document have been appended in error).

[95] Affidavit of Daniel Clarke court doc 48 [25].

[96] The execution page immediately following the last clause of the agreement contains a signature, purportedly under the hand of Ian Stephens, signing as the sole director of Passage. The provision beneath that for execution by the director of Oakland has not been signed. In Mr Clarke's exhibited copy of the agreement but not Mr Haubert's, there is a following page bearing the same typewritten entries as the previous execution page in which the purported signature of Mr Gardas appears, naming him as "director/secretary". The signatures are undated.

[84] Mortgages meeting the description in the question for determination were exhibited to the affidavit of Mr Gardas filed 3 November 2017, prior to the consent ordering of the question for determination on 21 November 2017.[97] In the end result Mr Gardas' affidavits were not read by Oakland, the party which filed them, and were only read by Sino for confined forensic purposes.[98] However it will not disadvantage the parties to allude to the mortgages exhibited to Mr Gardas' affidavit in explaining the irrelevance of the anomalies to the present question.

[85] Both mortgages originally named the mortgagor in typewritten form as "The Passage Holdings Pty Ltd (ACN 602 422 891) as trustee for the Passage Holdings Unit Trust" which, is the name of the mortgagor as it appears in the question for determination by the court. However, the copies of each mortgage exhibited to Mr Gardas' affidavit contained a line drawn through the words "for the Passage Holdings Unit Trust" substituting the deleted entry with the handwritten words "under instrument 717541218". This had the consequence that the mortgagor was described as "The Passage Holdings Pty Ltd (ACN 602 422 891) as trustee under instrument 717541218".

[86] The mortgagee in both of the mortgages was named as "Oakland Investment Group Limited Company Number 1913227".

[87] The interest identified as being mortgaged in Mortgage Number 717541242 ("the PPL mortgage") was described as "PPL 0/211509" with the lot described as "Lot 54 on SP 115194". The interest described as being mortgaged by Mortgage 717541414 ("the fee simple mortgage") was said to be in "fee simple" and its lots were described in an annexed enlarged panel which listed 27 separate lots, three of which were deleted by lines drawn through them with some initialling against the lines. Each of the mortgage documents exhibited to Mr Gardas' affidavit contained a signature which appeared similar to that appearing against Mr Stephens' name in other documents. The signature appeared in a section for the mortgagor's signature and was accompanied by the handwritten words "The Passage Holdings Pty Ltd ACN 602 422 891" and "sole director/secretary". It was dated 26 September 2016 and witnessed by the signature of a person described as "Daniel Clarke solicitor". In each instance Mr Clarke's signature also appeared with his name against the mortgagee's solicitor's signature section of the form and again the handwritten execution date against it was 26 September 2016.

[88] Both of the mortgage documents exhibited to the affidavit of Mr Gardas bore endorsements at the top, of their numbers and "$175.00 27/09/2016 15:37", consistent with them being officially ascribed to that effect at the date and time endorsed.

[89] Mr Haubert's affidavit exhibits mortgage number 717541414 (the fee simple mortgage), the content of which appeared to be identical to the content of the same mortgage exhibited to the affidavit of Mr Gardas.[99] His affidavit did not exhibit the PPL mortgage. Indeed it seems the only affidavit evidencing the PPL mortgage bearing its endorsed number was Mr Gardas'.

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97 Affidavit of Pawel Gardas court doc 12 [7] p 29 et seq and p 87 et seq.
98 T3-11 L37 – T3-12 L47.
99 Affidavit of David Haubert court doc 7 p 340 et seq.

[90] An apparent copy of the fee simple mortgage, without its endorsed number or other Registry endorsements, was produced by the liquidator.[100] However, that copy did not contain the handwritten amendment to the mortgagor's description or the cross outs of some of the lots listed in the enlarged panel. Moreover, it only contained one execution signature, similar to that of Mr Stephens, witnessed by a solicitor apparently named Joyce Au, likely a solicitor of Mr Clarke's firm. It was clearly different to the execution and witnessing endorsements attributable to Mr Stephens in the fee simple mortgage which was registered.

[91] Copies of both the fee simple and PPL mortgages without their endorsed number or other Registry endorsements are exhibited to the affidavit of Daniel Clarke.[101] However while the mortgage documents annexed to Mr Clarke's affidavit were purportedly executed by the same persons as those exhibited to Mr Gardas' affidavit, the variations in handwriting make it obvious that they were not the same acts of execution. Further, there was no endorsement of the signatures' execution dates. Nor was there the handwritten amendment to the mortgagor's description or the cross outs of some of the lots listed in the enlarged panel. Most curiously of all, the fee simple mortgage exhibited by Mr Clarke was not only differently executed from the Registry endorsed and numbered version, it was also differently executed than the version apparently supplied to the liquidator.

[92] Having acknowledged these anomalies no conclusion need be reached about them, for present purposes. The registry endorsed and numbered version of the fee simple mortgage has in any event been properly proved by its exhibiting to Mr Haubert's affidavit. The fact that what appears to be the only exhibited copy of the registry endorsed and numbered version of the PPL mortgage is exhibited by Mr Gardas, whose affidavit was not read other than for confined other purposes, is not concerning for present purposes, because of the aforementioned common ground of the parties in the framing of the question by reference to the numbered mortgages. That common ground continued throughout with each counsel's submissions ignoring the aforementioned anomalies and proceeding on the basis the PPL mortgage was the mortgage referred to in the order as mortgage number 717541242.

[93] A point of significance, on which the parties diverged, about the content of the mortgages was that in both mortgages the description of the debt or liability secured was:

> "All amounts owed from the Mortgagor to the Mortgagee pursuant to the Loan Agreement dated on or about 22 September 2016".

[94] The reference to the loan agreement dated on or about 22 September 2016 was a reference to the aforementioned loan agreement between Oakland and Passage ("the loan agreement"). This has the consequence that any due money secured by the mortgages – the money with which the question for determination is concerned – must be money owed "pursuant to" the loan agreement.

[95] The purpose of the loan, pursuant to clause 2.2 of the loan agreement, was:

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[100] Ex 11 pp 288 et seq.
[101] Affidavit of Daniel Clarke court doc 48 p 134 et seq and p 191 et seq.

> "**Purpose of loan**
> The borrower agrees and acknowledges that the Lender has advanced the Loan for the purchase of the Property pursuant to the Contract and the costs and expenses associated with the purchase."[102] (emphasis added)

[96] The Contract referred to in clause 2.2 was Passage's contract to buy the estate. The use of the loan to pay out a party to an alleged dispute over entitlements to units, profits or revenue in or owed by a corporate trustee is not a use for the purchase by the corporate trustee of real estate or for the cost and expenses associate with that purchase. If the loan did occur, then far from the alleged loan paying for the purchase of the estate or costs and expenses associated with that purchase, the loan's use, pursuant to the undisclosed deed of release, had the purported effect of encumbering the estate to the lender without the loan having contributed anything to the cost and expense of its purchase.

[97] I do not accept the mere fact the loan was not applied to its purpose as foreshadowed by the loan agreement would have the automatic consequence that it was not secured by the mortgage. The agreement does not expressly bind the borrower to the stated purpose and the mortgage only requires that the amount in question is owed "pursuant" to the agreement.

[98] The proper approach in construing a mortgage is to consider the whole of the arrangement in contemplation between the parties.[103] Here the parties supposedly contemplated an arrangement by which the loan would not be applied for the purpose stated in the loan agreement. Yet if acting legitimately they could easily have stated its correct purpose in the loan agreement. The real relevance of the fact the supposedly intended purpose – a debt cancelling loan – was not mentioned in the loan agreement is that it is a piece of circumstantial evidence tending, in combination with other evidence, to suggest that the arrangement supposedly contemplated by the parties was a sham and did not involve a genuine loan at all. If that is so then plainly no money would be owing pursuant to the loan agreement.

Security deed between Oakland and Passage

[99] Mr Clarke's affidavit also exhibited a copy of a security deed as between Oakland and Passage with a date endorsement and signature executions like those in the loan agreement between Oakland and Passage.[104]

[100] It is of similar effect to the aforementioned security deed as between Sino and Passage. It does not prove that the loan mentioned in the loan agreement between Oakland and Passage actually occurred.

Deed of priority and subordination between Oakland, Sino and Passage

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[102] Affidavit of David Haubert court doc 7 p 320.
[103] *McVeigh (trustee of bankrupt estate of Piccolo) v National Australia Bank Ltd* (2000) 278 ALR 429; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 429.
[104] Affidavit of Daniel Clarke pp 86-133.

[101] The deed of priority and subordination was mentioned above in canvassing the Sino related documents. It need not be dwelt upon further. It is only relevant to the priority of any debt owing pursuant to the loan agreement between Oakland and Passage. It provides no evidence that such a debt is owing pursuant to the loan agreement.

The settlement deed

[102] As earlier mentioned the settlement deed was dated 23 September 2016 and was between Passage, Mr Cooper and D&M.[105]

[103] It is a document of undoubted importance. For the debt cancelling loan to have been a sham, the settlement deed must necessarily have been a sham. Setting aside its provision for discharges and releases, the settlement deed provided:

> "**RECITALS**
>
> A. Cooper has been providing financial accommodation, management services and other goods and services to TPH for the purposes of running the business.
>
> B. TPH and Cooper had an agreement to agree whereby TPH would issue units or pay a profit or revenue share in TPH to Cooper in part consideration for the financial accommodation provided to TPH.
>
> C. TPH and Cooper have not agreed on the number of or amount for the units or profit or revenue share arrangement to be issued or provided by TPH to Cooper and Cooper is owed significant, albeit in part disputed amounts from TPH.
>
> D. TPH is about to settle on the land and new investors are wanting to invest in TPH. TPH requires the dispute with Cooper to be resolved before the new investors will invest.
>
> E. The Parties have agreed to resolve their disputes and the above issues on the terms contained in this Deed.
>
> **OPERATIVE PART**
>
> **Payment to Cooper**
>
> 1. TPH agrees to pay Cooper an amount of $6,800,000.
>
> 2. Cooper acknowledges $4,150,000 has been discharged by Oakland Investment Group Limited on behalf of TPH.
>
> 3. Cooper acknowledges the balance of $2,650,000 has been discharged by HBR MANAGMENT PTY LTD as trustee for the FNQ Trust on behalf of TPH."

[104] The content of this deed, in the context of such evidence as has been adduced, adds to Sino's circumstantial case. It involves the purported settlement of vaguely described disputes, appearing as if from nowhere, on terms which are likely uncommercial.

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[105] Affidavit of Clive Scott court doc 4 p 45; Affidavit of David Haubert court doc 7 p 423; Affidavit of Daniel Clarke court doc 48 p 220.

[105] Mr Cooper, who was on notice of Sino's written opening, testified there were no records of the disputes referred to in the settlement deed.[106] I did not believe him. If the settlement deed contains a genuine settlement I infer there would inevitably exist a paper trail of emails and file notes and probably documentary proposals, corroborating the existence of the arrangement subject to the supposed disputes and the evolution of or negotiations leading to the settlement deed resolving it. Sino's counsel also pressed Mr Cooper about the absence of any record of him paying tax on the settlement amount to which Mr Cooper responded that as a "tax resident of Singapore" he did not believe he had to pay tax in Australia.[107]

[106] The deed does not expressly articulate what the disputes are. By implication from the content of recital C they presumably relate to "the number of or amount for the units or profit or revenue share arrangement" and the "in part disputed amounts" Mr Cooper was said to be owed. However, no information of any substance is included in the deed about the substance of the disputes.

[107] The settlement deed referred to Mr Cooper being owed "significant, albeit in part disputed amounts" from Passage in the "dispute" but Mr Cooper asserted in cross-examination that the dispute actually related to the number of units "we each held".[108] That evidence did not rest comfortably with the terms of the recitals in the settlement deed which spoke of the issuing of units as a prospective future event, not something which had already occurred such that Mr Cooper already held units.

[108] It will be recalled D&M was the owner of Passage. Mr Cooper testified that on his understanding D&M also held all the units that were issued in The Passage Unit Trust and that D&M was itself a trustee company for the CLH Unit Trust.[109] The beneficiaries of the Clarke and Menon family trusts are the beneficiaries of that trust. Mr Cooper appears to have no identifiable interest in any of that structure. According to him, while the units in the trust appeared to be held by D&M in its own right, in fact they were held for him and interests associated with Mr Gore.[110] However, he had no documentary record of the arrangement by which they were held or to be held for him and Mr Gore's interests.[111]

[109] Mr Clarke was cross-examined in connection with the unit and share sale agreement between D&M as trustee for the CLH Trust, Passage and HDI.[112] Mr Clarke acknowledged that, on the face of the agreement, which did not ultimately proceed, the sole unitholder in The Passage Unit Trust was D&M as trustee for the CLH Trust.[113] He acknowledged he was the beneficial owner of the shares in D&M. According to Mr Clarke, the real arrangement was that Mr and or Mrs Gore and Mr Cooper were the owners of the units in The Passage Unit Trust, however Mr Clarke explained this was not the subject of any written record and was an oral agreement only.[114] However, on

[106] T2-70 L38, T2-72 LL7-19.
[107] T2-34 LL20-35.
[108] T2-67 L2.
[109] T2-52 LL2-6.
[110] T2-52 L29.
[111] T2-52 L34.
[112] Affidavit of Daniel Clarke court doc 48 p 1 et seq.
[113] T2-15 L30.
[114] T2-115 L43 – T2-116 L5.

the face of the unit and share sale agreement, it was D&M as trustee for the CLH Trust, not as trustee for Mr Cooper or the Gores, which would sell 90 per cent of the units in The Passage Unit Trust to Hinchinbrook Development Inc for $6.8 million.[115]

[110] According to Mr Clarke, the oral agreement had been struck in about 2015 at a time before Mr Cooper had paid money for the deposit on the property.[116] Mr Clarke explained the agreement reflected arrangements not as they were at the time of the drafting of the agreement, but as they were intended to be as at the completion date for the sale to Passage of the estate at Port Hinchinbrook.[117] Mr Clarke acknowledged he made no entries in The Passage Unit Trust to give effect to any of the arrangements.[118]

[111] Mr Clarke further testified that the agreement in relation to Mr Cooper and the Gores holding units in The Passage Unit Trust was never an agreement whereby they held such units or had an interest in such units and was only an agreement as to what units or profit share or amount they would be entitled to in the future.[119] When pressed in cross-examination about the existence of documentary records such as drafts, correspondence and contemporaneous notes, Mr Clarke was obviously reluctant to commit to specifics.[120]

[112] Mr Clarke had actually been subpoenaed to produce an array of documents but, curiously, declined to comply, asserting it would take 10 to 12 weeks and citing an absence of conduct money.[121] A more remarkable feature of Mr Clarke's behaviour was that having read the applicant's written opening[122] and having elected to provide an affidavit which exhibited some documentary records, he did not, regardless of any subpoena, at least seek out and exhibit to his affidavit, documentary records tending to independently corroborate the transactions being asserted. As already mentioned, I infer there should, if the settlement recorded in the deed is genuine, exist a paper trail of emails and file notes and probably documentary proposals, corroborating the existence of the arrangement subject to the supposed disputes and the evolution of or negotiations leading to the settlement deed resolving it. He well knew his historical role in the matter left him very well placed to quickly identify, seek out and obtain copies of such documents to exhibit to his affidavit (or produce at least in partial compliance with the subpoena). Against this background his failure, and the failure of Mr Cooper, to exhibit such documents to their affidavits or otherwise produce them in their evidence supports the inference such documents do not exist and in turn supports the inference the settlement deed does not contain a genuine settlement.

[113] As to the likely uncommercial terms of the settlement deed, there is some evidence that Mr Cooper funded about $800,000 of payments made to Passage, although that appears to have been via the company Orpheus. The documents exhibited by the liquidator Mr Brennan include an undated but executed "Facility Agreement" between Orpheus and

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115 T2-16 LL27-33.
116 T2-18 L5.
117 T2-120 L3.
118 T2-137 L3.
119 T2-124 LL4-17.
120 T2-126 L20 – T2-127 L25.
121 T2-131 LL1-3.
122 T2-130 L2.

Passage, by which Orpheus committed to lend Passage $100,000 followed by multiple drawdown amounts of $40,000 twice monthly from 1 April 2015 for a year.[123] Clause 2.3 of the Facility Agreement expressly precluded payments to Mr Cooper or Mr Gore. Exhibit 6 at the hearing contains a comparative table drawing together the evidence of the 2015 payments to Passage contemplated under the Orpheus agreement, the 2015 payments to Passage, recorded in its general ledger variously as a loan or advance as from Orpheus,[124] and the 2015 payments made from Mr Cooper's bank accounts to the liquidator or Combined Legal Holdings law trust account for Passage. While the correlation is not complete there is significant correlation between the amounts and approximate dates of the payments made, respectively, a total of $780,000 under the Orpheus agreement, $775,376 in the Passage ledger and $800,420,000 in the Cooper bank statements.

[114] Mr Cooper deposed that the person who executed the Orpheus facility agreement for Orpheus, Mr McManus, was not authorised to do so, and that he considered but decided against using Orpheus as a vehicle to invest in the project.[125] If so, he must have forgotten to tell Mr Clarke who on 30 October 2016, well after the settlement deed's supposed execution, emailed Mr Haubert about the need to pay Orpheus $62,250 interest.[126] The very fact that email was sent by Mr Clarke suggests it is unlikely the settlement deed, to which Mr Clarke was a signator, was in existence prior to the date of settlement.

[115] If Mr Cooper had a change of heart about structuring investment in the project it appears he forgot to tell anyone. The abovementioned correlation is so significant as to compel the inference that at least when the payments were coming from Mr Cooper's bank account they were being made pursuant to the Orpheus facility agreement.

[116] It is noteworthy that there was no reference to Mr Cooper's supposed contributions in the expenses schedule to the unit and share sale agreement. Mr Clarke did not explain that absence, preferring to maintain the line that the fact of Mr Cooper's contributions was addressed by the deed of settlement and release.[127]

[117] According to Mr Cooper, in addition to the payments of approximately $800,000 evidenced by his bank statements, he contributed a further $1.2 million through other companies controlled by him so that his total financial investment in Passage was about $2 million.[128] Ignoring the lack of evidentiary support for that assertion and, for a moment, suspending disbelief that if investments by companies controlled by Mr Clarke were made that would entitle him personally to repayment of those amounts, this still leaves a credulous observer with a gap of $4.8 million in the settlement figure of $6.8 million.

[118] Admittedly the settlement deed did not assert $6.8 million represented a specific debt and rather it was identified as an amount Passage agreed to pay Mr Cooper to resolve

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[123] Ex 11 p 5 et seq.
[124] Ex 11 p 923.
[125] Affidavit of Perry Cooper court doc 47 [93].
[126] Affidavit of David Haubert court doc 52 Ex DH01.
[127] T2-121 L33.
[128] T2-68 LL7-12.

the supposed disputes. It may also be accepted, as Mr Cooper asserted in evidence, that he was entitled to expect a return exceeding what he invested monetarily and which also allowed for his time and effort in contributing to the project.[129] However, I do not believe those factors could conceivably justify an uplift of such enormous dimensions. This was clearly not an objectively commercial settlement. Parties are of course entitled to enter into binding agreements which on objective analysis are uncommercial. The fact that the deed is so obviously uncommercial does not of itself mean the settlement deed is a sham. However, it is a fact which very strongly supports Sino's circumstantial case.

The critical documents do not evidence the fact the loan was actually made

[119] With the arguable exception of the settlement deed, none of the so-called critical documents "evidence" the fact the loan was actually made.

[120] As for the settlement deed, Oakland places emphasis on Mr Cooper's acknowledgement in clause 2 of the deed that $4,150,000 of what he was supposedly owed pursuant to the deed "has been discharged" by Oakland "on behalf of" Passage. This is said to constitute evidence that Oakland did actually make the loan to Passage, in that it paid or credited to Mr Cooper the loan amount on behalf of Passage.

[121] Counsel for Oakland emphasised the High Court's repeated pronouncements, particularly in *Equuscorp v Glengallan Investments Pty Ltd*,[130] as to the binding nature of documents which have been executed.[131] Accepting for the sake of argument that "paid or credited" is what is meant by the term "discharged" in clause 2 of the settlement deed, I do not accept that the deed should be accepted as itself constituting binding evidence that the loan was in fact made. To so construe the deed's effect and status would be to ignore that such a construction would affect the rights of those who were not parties to the deed, particularly Sino.

[122] The various circumstances canvassed above in respect of the settlement deed support the conclusion the deed is a sham, part of an arrangement conjured up to help create a fictional loan to cover up the free acquisition of a valuable secured priority interest. That conclusion is further supported by the other circumstantial evidence to which I now turn.

The apparent money trail

[123] The focus of the question for determination, whether any money is owing under the loan agreement, calls for focus upon the question of whether any money was truly lent in the first place. Oakland's contention is that the loan to Passage was paid on Passage's behalf to Mr Cooper by cancelling a debt Mr Cooper owed Oakland in consequence of Oakland's alleged loan to Mr Cooper pursuant to the Octal investment agreement. The question therefore calls for consideration of the Octal investment agreement and

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[129] T2-68 LL10-20.
[130] (2004) 218 CLR 471.
[131] Also see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2005) 219 CLR 165.

whether what was done pursuant to it gave rise to a genuine debt purportedly later extinguished by the debt cancelling loan.

Octal investment agreement

[124] Copies of the Octal investment agreement, exhibited to the affidavits of Mr Cooper and Mr Clarke, reveal it is styled as an "Investment Agreement" between Mr Cooper, Octal and Oakland ("the Octal investment agreement").[132] The agreement was purportedly dated 10 August 2016, only six days since Octal was incorporated, and purportedly executed by the electronic signatures of Mr Cooper and Mr Gardas. Mr Gardas signed twice: as "Sole Director/Secretary" of Oakland and as "Sole Director/Secretary" of Octal. Mr Gardas had evidently created a company additional to Oakland to be the purported investment vehicle for the Hakone Road development, to which Oakland was supposedly to lend its funds on behalf of Mr Cooper.

[125] If the Octal investment agreement was really executed on 10 August 2016, it suggests incredible prescience on Mr Cooper's part as to the generosity of a settlement with Passage which supposedly did not occur until about a month and a half later on 23 September 2016. In explaining the advance, Mr Cooper unconvincingly testified of what he described as "a fairly straightforward transaction"[133]:

> "[I]n this case, our agreement with – my agreement with Oakland and – the Oakland group was – the Hakone investment was coming up. I had a settlement due from Hinchinbrook. Oakland was, indeed, going to put the mortgage forth, and I have seen from documents they actually had the money ready, but the deal hadn't closed yet. But the Hakone deal was about to close, so if I was going to be an investor, I had to commit at that point in time. So what we agreed to do was – they would lend me the money in advance of the settlement on the Oakland proceeds to TPH, which would come to me through the deed of release, and I would invest in Hakone."[134] (emphasis added)

The fact there was no settlement between Passage and Cooper agreed, let alone due, on the alleged date of signing of the Octal investment agreement casts doubt upon that agreement's authenticity.

[126] Mr Cooper testified he did not see the Octal investment agreement prior to agreeing to its terms by authorising Mr Gardas to append Mr Cooper's electronic signature to it.[135] On his unconvincing testimony would there be no verifiable documentary trail culminating in and thus corroborating the authenticity of the agreement. He testified that he sent almost nothing by email to Oakland[136] consistently with his asserted aim of keeping such transactions "very private".[137] It was also impossible to verify whether the phone call in which he agreed to terms actually occurred because, according to Mr

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[132] Affidavit of Perry Cooper court doc 47 pp 21-29, Affidavit of Daniel Clarke court doc 48 pp 48-56 (pages 57 to 60 of the exhibits to Mr Clarke's affidavit were purportedly annexed as being part of the investment agreement but they are demonstrably not part of it).

[133] T2-46 L26.

[134] T2-46 LL17-25.

[135] T2-40 LL5, 35.

[136] T2-43 L9.

[137] T2-43 L13.

Cooper, he uses a "silent phone for those kind of transactions".[138] By this he explained he meant a phone call placed using the internet via user names, not telephone numbers.[139] He asserted the process of using a telephone call, which he specifically wanted no-one to have a record of, to authorise the placing of his electronic signature upon a document, the contents of which he had never seen, was not unusual.[140] He explained he and Mr Gardas had agreed to terms between each other, referring implicitly to an oral agreement, explaining:

> "Done business with them before. There was a level of trust between Oakland and myself."[141]

[127] That is a surprising level of trust to have built up, given the purported date of the investment agreement of 10 August 2016 is only three months after the apparent incorporation of Oakland.[142] Perhaps Mr Cooper meant there was a level of trust between he and Mr Gardas, as distinct from Oakland, although on his account he had never been to any of Mr Gardas' offices[143] and had only been associated with him since earlier that year.[144]

[128] The document's recitals provided:

> "A Cooper wishes to invest $4,014,314.00 ("Loan Amount") into Octal for the purposes of providing a loan to 60 Hakone Road Holdings Pty Ltd on the terms of this agreement.
>
> B Cooper had expected to be paid an amount of $4,150,000 by way of a settlement of an amount due to him by The Passage Holdings Pty Ltd and use these funds to make investment in Octal, however the settlement of such amount has been delayed and Cooper has requested Oakland advance him the $4,014,314.00 so that he can make the investment in anticipation of that settlement for $4,150,000 occurring shortly, which will allow him to repay the Oakland advance.
>
> C Oakland has also agreed to advance to The Passage Holdings Pty Ltd the $4,150,000 in return for a mortgage of their property and, subject to the terms of this agreement, Cooper agrees to accept this loan to him in full consideration of the $4,150,000 that will be owing to him by Oakland when such settlement occurs, which is expected to happen imminently."[145] (emphasis added)

[129] The relevant operative parts of the agreement, in which "Borrower" is defined to mean Passage, were:

> "**2. The Transaction**
>
> **2.1. Agreement to Lend**

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138 T2-41 L12.
139 T2-42 L46.
140 T2-41 L26, T2-43 L22.
141 T2-40 LL4-9.
142 Affidavit of Pawel Gardas court doc 12 p 85.
143 T2-41 L37.
144 T2-41 L42.
145 Affidavit of Perry Cooper court doc 47 p 22.

Cooper hereby requests that Oakland provide the Loan Amount to him or as directed by him.

2.2 Direction to Fund Loan

Cooper directs that the Loan Amount be paid to Dibbs Barkers Australian Law Practice Trust account to be held in trust for Octal and distributed in accordance with the directions of Octal.

2.3 Obligation and warranty of Octal

Octal warrants that it will use the funds, in part, to obtain a Security Interest over the real property owned by 60 Hakone Road Holdings Pty Ltd and otherwise use the balance of the funds in a prudent and reasonable way, which shall include but not be limited to, using the funds for working capital, investment, loans to related parties of Octal or other third parties.

2.4 Repayment of Loan Amount from Cooper to Oakland

(a) Cooper will repay Oakland the amount of $4,150,000 on or before 31 December 2016, including principal of the Loan Amount and interest of $135,686.00.

(b) Cooper acknowledges that Oakland may offset any amounts owing to Cooper from Oakland against the liability of Cooper to Oakland under this Agreement, with the intention that Oakland will advance to The Passage Holdings Pty Ltd an amount of $4,150,000, to be used to settle its obligation to Cooper. Upon receipt of such funds, Cooper will provide them directly to Oakland (or allow Oakland to offset any such amounts from the amount due to it under this agreement if a direction to pay Cooper directly is received by Borrower [ie Passage]).

2.5 Failure of Borrower to settle

If the Borrower [ie Passage] fails to pay to Cooper the amount of $4,150,000 or Oakland does not otherwise get repaid the $4,150,000 from Cooper (by way of setoff) by 31 December 2016, Cooper shall pay to Oakland on 31 December 2016 an amount of $4,150,000. Failing such payment, Oakland may take from Cooper the interest in Octal and Cooper shall pay to Oakland the amount of $135,686.00.

2.6 Repayment of Loan Amount from Cooper to Octal

In return for making the investment in Octal, Cooper shall be entitled to:

(a) Payment of the first 6 months interest collected by Oakland under the Oakland facility with the Borrower [ie Passage]; and

(b) A lump sum repayment of $5,750,000 on 31 December 2019."[146] (emphasis added)

[130] Clauses 2.2 and 2.6 contemplate the occurrence of events which should be easily confirmed: the payment of the loan amount into the Dibbs Barker trust account and the payment of Passage's first six months interest by Oakland to Cooper.

Payment of the loan amount into the Dibbs Barker trust account

[131] It is apparent from clause 2.2 of the Octal investment agreement that the threshold payment event, providing the premise for Cooper being indebted to Oakland and that debt later supposedly being paid out by Oakland's debt cancelling loan to Passage, is the payment of "the Loan Amount to Dibbs Barkers Australian Law Practice Trust account to be held in trust for Octal". The agreement does not in terms say the loan amount, of $4,014,314, is to be provided by Oakland. However, I find that is an implied term, given it is Oakland who is owed back the loan amount plus interest on it under the agreement, given recital B's reference to "the Oakland advance" and given clause 2.1's request that Oakland provide the loan amount.

[132] The evidence shows an amount matching the loan amount of $4,014,314 was paid to Dibbs Barker. In compliance with a subpoena for production Dibbs Barker Lawyers produced various documents admitted into evidence as exhibits at the hearing.[147] They included a letter of 12 August 2016 from Dibbs Barker to Mr Gardas of Octal indicating he had retained Dibbs Barker to review documents and advise in respect of the purchase of Hakone Lot 60.[148] The Dibbs Barker documents include records of an EFT transfer on 10 August 2016 of the equivalent of the Octal investment agreement loan amount, namely $4,014,314, from Stacks Law Firm ("Stacks") into the Dibbs Barker trust account.[149] The money appears to have been transferred within the Dibbs Barker trust accounts from being held for a client named as Oakland to being held for a client named as Octal on 18 August 2016.[150] This demonstrates the ease with which Mr Gardas could vary the indicia of which of his companies owned or lent the money.

[133] The produced documents show the purchase of Lot 60 Hakone Road by Hakone Road Holdings Pty Ltd, apparently represented by Joyce Au of Clamenz Lawyers, funded by payments from Dibbs Barker's Octal trust account to a total of $2,774,940.75, settled on 19 August 2016.[151] As to the fate of the rest of the $4,014,314, on 19 August 2016 $43,799.25 was paid to Clamenz Lawyers and on 26 August 2016 $1,175,574 was paid to Axion Investments Group Pty Ltd.[152] The latter payment was recorded as "Refund of Trust Monies".[153] This left a balance of $20,000, of which $17,210.29 was paid by to Mr Gardas on 21 February 2017.[154]

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146 Affidavit of Perry Cooper court doc 47 pp 25-26.
147 Ex 16.
148 Ex16 p 7.
149 Ex 16 pp 4, 5.
150 Ex 16 p 14.
151 Ex 16 pp 12, 13, 24, 25.
152 Ex 16 p 25.
153 Ex 16 pp 21, 25.
154 Ex 16 p 26.

[134] Clearly a substantial proportion of the $4,014,314 – the loan amount referred to in the Octal investment agreement – was not expended on the Hakone Road investment. True it is that clause 2.3 gave Octal a broad discretion as to how the loan amount could be used. Nonetheless, a key premise of the arrangement described by Cooper, indeed a recital of the agreement, was that Mr Cooper was to "invest $4,014,314.00 into Octal for the purposes of providing a loan to 60 Hakone Road Holdings Pty Ltd".

[135] Mr Cooper maintained that premise in his affidavit[155] and in cross-examination. Thus, when asked if the money that was advanced to Octal in respect of what was referred to as the Hakone Road transaction was Mr Cooper's money, he responded:

> "It was in anticipation of my money. So, in fact, they advanced the loan in August to settle the Hakone transaction to me in anticipation of Oakland advancing the mortgage proceeds to The Passage Holdings which then, according to the deed of release, would be directed to me. And at that point in time, yes, I would be a direct investor in Hakone."[156]

[136] The fact that only $2,774,940.75 of the supposed loan of $4,014,314.00 was lent to 60 Hakone Road Holdings Pty Ltd joins the list of circumstantial facts supporting the inference that the debt cancelling loan was a sham.

[137] The involvement of Mr Clarke's firm, Clamenz Lawyers, in this transaction highlights the lack of candour by Mr Clarke in his above discussed response to Sino's request of 22 September that he clarify "the history and prior relationships between Oakland and you, Passage or anyone else and you, related to this transaction". By 22 September he well knew of the connection between Oakland's loan transaction with Passage, its investment agreement with Cooper and Octal and Oakland's funding of the Hakone Road transaction – a transaction in which his firm acted. Mr Clarke was vague and unconvincing in cross-examination in downplaying his firm's role in the Hakone Road transaction.[157] He eventually appeared to concede Clamenz Lawyers' client in the Hakone Road mortgage transaction was Octal,[158] which may explain how his firm came to receive $43,799.25 from the Octal funds held by Dibbs Barker. None of this was disclosed to Sino in response to its request to Mr Clarke of 22 September 2016.

[138] Sino's counsel placed particular emphasis on the curious pedigree of the money paid to Dibbs Barker from Stacks. Documents produced on subpoena by Stacks, also admitted into evidence at the hearing, include a trust account statement for Oakland.[159] That statement records the transfer of the $4,014,314 to Dibbs Barker of 10 August 2016. It shows that amount to be debited against a balance that opened with a direct deposit, described as "settlement funds", attributed to Oakland of $5,697,064.44 on 2 August 2016. It also shows a debit against that balance on 9 August 2016 when $1,300,000 was transferred to one Elena Kay.

[139] The Stacks documents show one Daniel Kay, using the email address daniel@metdev.com.au, arranged for the initial $5,697,064.44 deposit to Stacks on 2

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[155] Affidavit of Perry Cooper court doc 47 [26-27].
[156] T2-45 L5.
[157] T2-92 LL22-34.
[158] T2-94 LL16-31.
[159] Ex 14 p 12.

August 2016,[160] advising them Mr Gardas would contact them shortly to provide instructions.[161] Mr Cooper testified Mr Kay was an Oakland representative.[162] Mr Clarke testified that Daniel Kay is a relative of Mr Gardas.[163]

[140] When Mr Kay arranged the initial deposit into Stacks trust account he advised Mr Gardas, by email:

> "I confirm that I have arranged a partial repayment of the money owed from TPC (Vic) Pty Ltd to Oakland (in trust for you, Oakland) into the trust account of Stacks Law".[164]

[141] Stacks' practice manager directed the file relating to that deposit be opened under Oakland's name using the same "contact details as in #9270 – Daniel Kay", with "any reference to TPC" to be removed.[165] TPC (Vic) Pty Ltd ("TPC") was incorporated on 2 February 2016. Its sole shareholder is Metropolis Investment Group Pty Ltd ("Metropolis"), whose shareholders are Castle Hill Investment Group Pty Ltd and Oxley Capital Investments Pty Ltd, whose sole shareholders are, respectively, Daniel Kay and James Aston.[166] Mr Clarke's law firm is the registered office address of Metropolis[167] so, for example, a person telephoning either of those firms would find their call actually going through to the Clamenz Lawyers' receptionist who would take the call and put it through.[168]

[142] The documents show Mr Gardas did contact Stacks, introducing himself as the sole director and shareholder of Oakland, and gave various directions for the transfers of the money. On Friday 5 August 2016 he emailed Stacks requesting:

> "With the funds that you hold on trust for Oakland Investment Group Limited, could you please transfer them over on trust to my other company, Octal Investments Limited ("Octal"). I am the sole shareholder and director of Octal."[169]

The email went on to state Octal was "providing a loan to Elena Kay" and requested Stacks to transfer $1,3000,000 "from the Octal trust" to her bank account. On Monday 8 August Mr Gardas emailed Stacks telling it to disregard his request, not open up a trust account for Octal and leave funds to be disbursed in trust for Oakland.[170] This again highlights the ease with which Mr Gardas could vary the indicia of which of his companies owned the money.

[143] The Stacks documents also included a file note of a telephone call from Daniel Kay on 11 August 2016 in which he requested a trust remittance for the transfer of 10 August

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160 Ex 14 p 12.
161 Ex 14 pp 48, 49.
162 T2-41 L42, T2-43 L37.
163 T2-87 L18.
164 Ex 14 pp 48, 49.
165 Ex 14 p 47.
166 Ex 15.
167 T2-86 L32, T2-87 L1.
168 T2-86 L43.
169 Ex 14 p 51.
170 Ex 14 p 157.

2016 (the transfer of the $4,014,314 to Dibbs Barker) to be emailed "to Joyce at Clamenz Lawyers so they can reconcile their accounts".[171]

[144] The file note reflects enquiries were made within the firm to decide whether it "was okay" to meet Mr Kay's request. The resulting email from Stacks to Clamenz Lawyers, stated:

> "As requested by our client, Daniel Kay, please see the attached payment note for the yesterday's transaction."[172]

Why it was deemed "okay" to meet the request of a "client" to forward information to Clamenz Lawyers about the transfer of trust account funds of another client is unclear. It is presumably connected in some way with Mr Kay having had control of the funds when they entered Stacks trust account from TPC. Certainly Mr Clarke of Clamenz Lawyers knew by 3 August 2016 that those funds were being held in the trust account for Oakland.[173]

[145] TPC, represented by Stacks, had for a time been an intervener in *ASIC v Bilkurra Investments Pty Ltd and Ors.*[174] Beach J was there concerned with winding up proceedings against Bilkurra Investments Pty Ltd (Bilkurra) and Foscari Holdings Pty Ltd (Foscari), the owners of developments lands associated with schemes targeting unsophisticated retail investors. It appears that the sole director of those two failed companies was none other than Passage's director, Mr Ian Stephens.[175] In observations of events echoing in the present case, Beach J found Mr Stephens had "allowed others to exercise the real control of Bilkurra and Foscari".[176] Of TPC he noted it was "a special purpose vehicle … set up for the purpose of acquiring the shares of Bilkurra and Foscari so that they and TPC could complete both developments".[177] His Honour rejected adjourning proceedings to allow a voluntary administrator to be appointed to permit TPC to put a DOCA to creditors that might then save the developments, noting if TPC "were genuine, they could purchase the relevant land directly and deal directly with the optionholders".[178] He also expressed concern at the very high interest rates attaching to the mortgages taken over by TPC, observing:

> "It is not hard to see how in its capacity as mortgagee and with any later potential receivership of the entities, any profit from the developments could be effectively siphoned off through the usurious interest charges to the diminution of any otherwise profit, and in a manner ranking ahead of the optionholders. Those matters have not been explored and I will say nothing further."[179]

[146] Of course, findings in that judgment ought not be and will not be acted upon as evidence here and, to paraphrase Beach J, I will say nothing further either.

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171 Ex 14 p 187.
172 Ex 14 p 177.
173 Affidavit of Daniel Clarke court doc 48 [21].
174 [2016] FCA 371.
175 Ibid [8].
176 Ibid [12].
177 Ibid [51].
178 Ibid 53.
179 Ibid [51], [53].

[147] In any event, it evidently did transpire that there were mortgage defaults and resulting sales of the Bilkurra and Foscari lands. The initial deposit to Stacks from TPC was from the proceeds of those sales.[180] How that deposit constituted a "repayment" of money "owed" from TPC to Oakland", as Mr Kay described it in his email to Mr Gardas, is unknown. Why it was necessary for the money to be parked in and channelled through several solicitor's trust accounts is also unknown. In the end result though the curious pedigree of the funds does not add materially to Sino's strong collection of circumstantial evidence, save for demonstrating the ready availability of the funds to Mr Gardas' companies, making it unlikely he needed Cooper to actually invest.

Payment of Passage's first six months interest by Oakland to Cooper

[148] It will be recalled clause 2.6(a) of the Octal investment agreement entitled Cooper to payment of the first six months interest collected by Oakland from Passage. This element of the agreement is significant because it provides such a readily identifiable means by which Oakland could have demonstrated the debt cancelling loan was not a sham. If such payments were made to Cooper, that fact would tend to confirm the debt cancelling loan was genuine and would be easily evidenced by Oakland.

[149] Mr Cooper acknowledged in cross-examination he understood he was to receive a return under the investment agreement, not from the borrowers in respect of the mortgage over the Hakone land but from Passage.[181] He claimed to have received those interest payments by way of electronic funds transfer – three payments on his account[182] – but when asked where a document was showing that he received those monies into a bank account, he merely explained he had not been asked to produce such a document.[183]

[150] As to where those payments went, he explained:

> "I believe…that money was paid into my holding company, which was STI Global, which was held at the NAB at the time. So some of the payments would have been the STI Global account at the NAB, and that company changed from a public company to a private company called Ion Nexus, and I changed the bank accounts over to Westpac, so it would be a split between NAB and Westpac payments."[184]

[151] He acknowledged that as a director of those companies he was obliged to keep records of the financial transactions and asserted that he did,[185] however, under further questioning he explained he did not retain printed or digital copies of his banking records of those financial transactions.[186] This was another of Mr Cooper's unconvincing attempts to explain the absence of documents which could corroborate him. His evidence of the supposed payments of interest was not credible and I reject it.

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[180] T2-90 L40-T2-91 L24.
[181] T2-47 LL6-16.
[182] T2-47 L43.
[183] T2-47 L27.
[184] T2-47 LL31-36.
[185] T2-47 L39.
[186] T2-48 L2 – T2-49 L11.

[152] Mr Cooper deposed to and gave evidence of having read the written opening of Sino's counsel.[187] That fact assumed significance in that it put Mr Cooper on notice of how easily he could dispense with Sino's concerns were he to produce some financial transaction records from financial institutions in respect of the debt cancelling loan. If the debt cancelling loan was genuine he well knew a simple way of showing it was to produce some evidence that he had received the Passage interest payments. The absence of such evidence is telling.

Determination

[153] Sino accepts it carries the onus of proving that the debt cancelling loan is a sham. As to what is meant by a "sham" the plurality in *Equuscorp* observed:

> ""Sham" is an expression which has a well understood legal meaning. It refers to steps which take the form of a legally effective transaction, but which the parties intend should not have the apparent, or any legal, consequences."[188]

In *Equuscorp* the High Court referred to *Sharrment Pty Ltd v Official Receiver in Bankruptcy.*[189] In *Sharrment*, Lockhart J concluded that the finding of a sham is a strong finding which cannot be made if another inference is at least equally open.[190] As much is unremarkable in that evidence of a sham is of its nature circumstantial, having the inevitable consequence that the inference of a sham must not only be logically and rationally sustainable on the evidence but that the inference of legitimacy must also be excluded as reasonably open. It is a finding akin to fraud and the evidence sustaining and excluding the relevant inferences should be of a force commensurate with the gravity of such a finding.[191]

[154] In *Raftland Pty Ltd v Commissioner of Taxation*[192] Kirby J identified the key requirement of a finding of sham, explaining:

> "The key to a finding of sham is the demonstration, by evidence or available evidence, of a disparity between the transaction evidenced in the documentation (and related conduct of the parties) and the reality disclosed elsewhere in the evidence. Where, for example, the evidence shows a discordance between the party's legal rights or obligations as described in the documents and the actual intentions that those parties are shown to have had as to their legal rights and obligations, a conclusion of sham will be warranted.
>
> The test as to the parties' intentions is subjective. In essence, the parties must have intended to create rights and obligations different to those described in their documents. Such documents must have been intended to mislead third parties in respect of such rights and obligations.[193]

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[187] Affidavit of Perry Cooper court doc 47 [1], T2-45 L31.
[188] Ibid 486.
[189] (1988) 18 FCR 449.
[190] Ibid, 461.
[191] *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[192] (2008) 238 CLR 516.
[193] (2008) 238 CLR 516, 562.

[155] In the case at hand there is a significant body of circumstantial evidence in support of Sino's case. Its most noteworthy features are:

(a) Oakland had money available, yet rather than simply investing that money directly in the Hakone development it purportedly made the odd choice of lending that money by indirect means to Mr Cooper, supposedly for him to invest it in that same development.

(b) In response to Mr Zhen's query of 15 September 2016, "How much loans or credit kind [Passage] has received to date and the respective lenders' names and their respective credit amount", Mr Clarke response made no reference to any loan or credit received by Passage from Mr Cooper.

(c) Mr Clarke knew more relevant information than was disclosed by him in response to Sino's inquiry of 22 September 2016 about the "history and prior relationships" between himself, Oakland and others related to Oakland's loan transaction.

(d) Mr Clarke's email of 30 October 2016, referring to the need to pay Orpheus $62,250 interest, is inconsistent with the settlement deed having existed by then.

(e) The terms of the settlement deed were not disclosed to Sino before it proceeded with its loan to Passage.

(f) The debt cancelling loan is inconsistent with the stated purpose in Oakland's loan agreement with Passage of the loan being for the purchase of the estate and costs and expenses associated with the purchase.

(g) The settlement deed's reference to disputes was vague and uninformative and there is no documentary evidence of them, despite such evidence being likely to exist if the settlement deed was genuine.

(h) There is no documentary evidence of the evolution or negotiation of the settlement described in the settlement deed, despite such evidence being likely to exist if the settlement deed was genuine.

(i) There is no documentary record of any holding or agreement to hold the units, profit or revenue share referred to in recital B of the settlement deed.

(j) Recital A of the settlement deed is untrue, as it was likely not Mr Cooper but companies controlled by him which provided the finances, goods and services referred to.

(k) The agreement in the settlement deed to pay Mr Cooper $6.8 million involves a settlement sum so far exceeding any contribution of Mr Cooper

or his companies that, even allowing for his time and effort and expectation of an investment return, it is obviously uncommercial.

(l) The Octal investment agreement, was allegedly executed on 10 August 2016, in apparently confident anticipation of and reliance on an obviously uncommercially generous settlement agreement with Mr Cooper which was yet to occur.

(m) Only $2,774,940.75 of the supposed loan of $4,014,314.00 pursuant to the Octal investment agreement was lent to 60 Hakone Road Holdings Pty Ltd despite recital A of the agreement announcing that Mr Cooper was to "invest $4,014,314.00 into Octal for the purposes of providing a loan to 60 Hakone Road Holdings Pty Ltd".

(n) Clause 2.6(a) of the Octal investment agreement entitled Mr Cooper to payment of the first six months interest collected by Oakland from Passage, yet there is no documentary or other credible evidence that he was paid such interest.

[156] The circumstantial evidence combines to provide compelling support for the inference that the debt cancelling loan was a sham and exclude the possibility that it was legitimate. It compels the conclusion the subjective intention of those involved must have been to mislead (at least) Sino as to the fact no loan was made so as to safeguard its priority of security over the estate which was acquired without in fact lending the money secured. The evidence demonstrates a disparity between the reality of what occurred and the arrangement contended for pursuant to the settlement deed and the Octal investment agreement. That arrangement and the debt cancelling loan supposedly made pursuant to it was a sham. There was in fact no such loan.

[157] In reaching that conclusion I am fortified by the unexplained absence of evidence from Mr Gardas, the man behind the corporate veil of Oakland. If the debt cancelling loan truly occurred he would be able to give evidence of that fact and produce documents corroborating it. I infer from his absence that, contrary to that expectation, his evidence could not have advanced Oakland's case. This allows me to be additionally confident in drawing the above inferences and concluding there was no loan.

[158] It follows from my conclusion above that the answer to the separate question is "no", that is, no money is due under the loan agreement. I will articulate that conclusion in the form of a declaration.

Security for costs

[159] There was a belated application for security for costs made by the respondent on the eve of the resumed hearing in January. It should have been made much earlier, for instance by the occasion of the adjournment of the hearing in December. I refrained from delaying the listed resumed hearing by determining the application. I will now take the formal step of dismissing that application.

Orders

[160] Consequential orders requiring Oakland to execute a release of the mortgages may be required but I ought hear the parties about such orders, bearing in mind my discrete task was only the determination of the separate question. It will also be necessary to hear the parties as to directions for the future disposition of the application and as to costs.

[161] My orders are:

1. It is declared that no money is due under and by virtue of a loan agreement between the respondent as lender and The Passage Holdings Pty Ltd ACN 602 422 891 as trustee for the Passage Holdings Unit Trust as borrower dated 22 September 2016, secured by mortgages numbered 717541242 and 717541414.

2. The respondent's application for security for costs is dismissed.

3. I will hear the parties as to consequential orders, directions for the future disposition of the application and costs at 9.15 am on 23 May 2018 (out of town parties have leave to appear by audio or video link).

APPENDIX A : RULINGS ON RESPONDENT'S OBJECTIONS TO AFFIDAVITS READ BY APPLICANT

Affidavit of David Gregory Haubert sworn 31 October 2017 (court doc 7)

Paragraph	Part	Objection	Response	Ruling
4, ex p 425	All	Hearsay, inadequate proof of authority in absence of evidence from Koman	Opposed. See affidavit of Mr Koman	Upheld. Mr Haubert's evidence on the point is hearsay as to what his principal, Mr Koman, authorised and an affidavit of Mr Koman was not read in the hearing. This ruling does not of itself detract from the admissibility of evidence by Mr Haubert of relevant communications in which he was a participant.
5	All	Relevance to separate question	Opposed – goes to authority of Mr Haubert	Over-ruled. It is of contextual relevance, explaining Mr Haubert's role. (There was no objection to the second and third sentences as hearsay.)
6	All	Relevance to separate question, hearsay	Opposed – goes to authority of Mr Haubert	Over-ruled. It is of contextual relevance and its hearsay component is cured by the exhibits to the affidavit evidencing that component, both directly and as a matter of inference.
7	All	Relevance to separate question, hearsay	Opposed – goes to authority of Mr Haubert	Over-ruled, as per [6] above.
10	All	Relevance to separate question	Accept	Upheld.
13	All	Relevance to separate question, hearsay	Accept	Upheld.
14, ex pp 1-22	All (if prospectus is relied on for truth of contents – hearsay otherwise relevance)	Hearsay, relevance to separate question	Opposed – document relied upon for non-hearsay purpose	Over-ruled. Not relied upon as evidence of the truth of its content but as evidence of what was or was not disclosed to Sino about Mr Cooper's interest and Passage's indebtedness to him. (In any event it was also made relevant by cross-examination T2-10 LL15-48.)
15	All	Relevance to separate question	Opposed – relevant to evidence given by Mr Cooper	Over-ruled. As per [14] above.
16	All	Relevance to separate question,	Accept on relevance ground	Upheld.

		hearsay		
17; ex pp 41-50, 61-64	All	Relevance to separate question; hearsay	Accept on relevance ground	Upheld.
18; ex pp 36-40	If contents of document relied on for truth of contents – hearsay otherwise relevance	Relevance to separate question, hearsay	Accept on relevance ground	Upheld.
19; ex pp 501-534	If document relied on for truth of contents – hearsay otherwise relevance	Relevance to separate question	Accept on relevance ground	Upheld.
24	Second sentence	Unqualified expert opinion, no factual basis exposed for expression of opinion	Accept on relevance ground	Upheld.
24	Third sentence	Hearsay; unqualified expert opinion, argumentative	Accept on relevance ground	Upheld.
26; ex pp 88-136	All	Relevance to separate question	Accept on relevance ground	Upheld.
27	All	Relevance to separate question, hearsay	Accept on relevance ground	Upheld.
32	First sentence	Argumentative	Accept	Upheld.
32	Second sentence; ex p 31	Hearsay	Opposed – save for the remainder of the paragraph commencing "In that email"	Upheld. Hearsay.
34	All	Relevance to separate question	Opposed as relevant to the separate question	Upheld. Mr Haubert's belief is irrelevant.
40; ex pp	All	Relevance to	Opposed as relevant to	Over-ruled. As per [14] above.

153-157		separate question; hearsay	the separate question	
41	All	Relevance to separate question	Accept on relevance ground	Upheld.
42; and pages of exhibits referred to therein	All	Relevance to separate question; hearsay	Accept on relevance ground	Upheld.
43	All	Relevance to separate question	Accept on relevance ground	Upheld.
47	All	Unqualified expert opinion, no factual basis exposed for expression of opinion		Upheld. No factual basis exposed for the expression of opinion.
48(b)	All	Unqualified expert opinion, no factual basis exposed for expression of opinion; argumentative		Upheld. As per [47] above.
49; ex p 455	All	Relevance to separate question; hearsay	Accept on relevance ground	Upheld.
50, 51 and ex pp 463-498	All	Relevance to separate question	Opposed – relevant to the separate question	Over-ruled. It is of contextual relevance in explaining the emergence of the dispute the subject of the separate question.
52; ex p 436	All	Relevance to separate question	Opposed – relevant to the separate question	Over-ruled. As per [50, 51] above.
57	All	Relevance to separate question	Opposed – relevant to the separate question	Upheld. Mr Haubert's and Sino's belief is irrelevant to the separate question.
58	All	Relevance to separate question	Opposed – relevant to the separate question	Upheld. As per [57] above.

59	3rd and 4th sentences	Speculation, relevance to separate question	Accept on relevance ground	Upheld.
63	All	Argumentative, matter for submission	Accept on relevance ground	Upheld.
66, ex p 449	All	Relevance to separate question	Accept on relevance ground	Upheld.
67; ex p 453	All	Relevance to separate question	Accept on relevance ground	Upheld.
68; ex p 658	All	Relevance to separate question	Accept on relevance ground	Upheld.
69; ex p 432	All	Relevance to separate question; speculation	Accept on relevance ground	Upheld.
70	All	Hearsay; relevance to separate question	Accept on relevance ground	Upheld.
71	All	Relevance to separate question	Accept on relevance ground	Upheld.
72	All	Argumentative	Accept	Upheld.
Pages of exhibits not referred to in affidavit	23-30; 32-35; 51-60; 72; 83-87; 153-157; 425-429; 432-434; 439; 441; 448; 451-452; 455-457; 459-462; 499-500	Relevance to separate question	All accepted save for pages 85, 86, 425, 430, 432 and 448	23-30 : Upheld. 32-35 : Upheld. 51-60 : Upheld. 72 : Over-ruled, referred to in paragraph [20] which was not objected to and admissible as per [14] above. 87-87 : Over-ruled, referred to in paragraph [23], which was not objected to and admissible in explanation of the need for and timing of the emergence of another 50% investor. 153-157 : Over-ruled, per [40] above. 425-429 : Upheld. 432-434 : Upheld. 439 : Upheld. 441 : Upheld. 448 : Over-ruled, relevant to emergence of the dispute the subject of the separate question. 451-452 : Over-ruled, per 448 above. 455-456 : Upheld. 457 : Over-ruled, per 448 above. 459-462 : Over-ruled, incorporation of and holdings in each company is contextually relevant. 499 : Upheld.

Affidavit of Clive Jeremy Hamilton Scott sworn 31 October 2017 (court doc 2)

Paragraph	Part	Objection	Response	Ruling
4; ex CJS02	All	Hearsay; relevance to separate question	Accept on relevance ground	Upheld.
5	Ex CJS03	Hearsay; relevance to separate question	Opposed – relevant	Over-ruled. Relevant in explaining the emergence of the dispute.
6 and ex CJS04	All	Hearsay; relevance to separate question	Accept on relevance ground	Upheld.

Affidavit of Clive Jeremy Hamilton Scott sworn 2 November 2017 (court doc 4)

Paragraph	Part	Objection	Response	Ruling
2; ex CJS01	All	Hearsay; relevance to separate question	Accept on relevance ground	Upheld.
3; ex CJS02	Page 7	Hearsay; relevance to separate question	Accept on relevance ground	Upheld (only as to p 7 of exhibit).
5; ex CJS04	Pages 23-34	Hearsay; relevance to separate question	Accept on relevance ground	Upheld as to pp 23-32 of exhibit. Over-ruled as to pp 33-34 which are relevant as evidence of Oakland's reluctance to disclose information and in explaining the emergence of the dispute the subject of the separate question.
6; ex CJS05	Pages 48-109 (sic)	Relevance to separate question	Accept on relevance ground	Over-ruled (pp 47-50 are actually ex CJS06, not part of CJS05).
7; ex CJS06	All	Relevance to separate question	Accept on relevance ground	Upheld.