

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2019 0016

QUEENSLAND PHOSPHATE PTY LTD
(ACN 609 384 894)

First applicant

PARADISE PHOSPHATE LIMITED
(ACN 154 180 882)

Second applicant

v

MARK ANTHONY KORDA AND CRAIG
PETER SHEPARD AS JOINT AND SEVERAL
LIQUIDATORS OF LEGEND INTERNATIONAL
HOLDINGS INC (IN LIQUIDATION) (ARBN
120 855 352)

First respondent

LEGEND INTERNATIONAL HOLDINGS INC
(IN LIQUIDATION) (ARBN 120 855 352) [No 2]

Second respondent

<u>JUDGES:</u>	KYROU, McLEISH and NIALL JJA
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	31 July 2019
<u>DATE OF JUDGMENT:</u>	30 September 2019
<u>MEDIUM NEUTRAL CITATION:</u>	[2019] VSCA 215
<u>JUDGMENT APPEALED FROM:</u>	[2018] VSC 789 (Randall AsJ)

INSOLVENCY – Dormant mining company with insufficient cash to meet liabilities – Ownership of valuable mining tenements through subsidiary – Whether tenements realisable within reasonable period to enable payment of debts – Whether company able to pay all its debts as and when they became due and payable – Whether fact that tenements necessary for company’s ongoing business precluded them from being treated as realisable assets – *Jingellic Minerals NL v Beach Petroleum NL* (1991) 56 SASR 532 considered – *Rees v Bank of New South Wales* (1964) 111 CLR 210, *Re Timbatec Pty Ltd* (1974) 24 FLR 30, *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 18 ACLC 343 applied – *Re Adnot Pty Ltd* (1982) 7 ACLR 212, *Re Newark Pty Ltd (in liq)* [1993] 1 Qd R 409 distinguished – *Corporations Act 2001* (Cth) ss 95A, 459A, 585.

INSOLVENCY – Whether subsidiary insolvent – Whether subsidiary should be wound up on the just and equitable ground – *Corporations Act 2001* (Cth) ss 459A, 461(1)(k).

CORPORATIONS – Uncommercial transaction – Company gave security to lender over all its shares in subsidiary which owned valuable mining tenement pursuant to bond deed and general security deed – Company received \$400,000 pursuant to bond deed – Onerous provisions including

events of default and consequences of default – Whether reasonable person in company’s circumstances would not have entered into transaction – *Corporations Act 2001* (Cth) ss 588FB, 588FC, 588FE, 588FF.

PRACTICE AND PROCEDURE – New ground sought to be argued on appeal which had been abandoned at trial – Leave to rely on new ground refused.

APPEARANCES:

Counsel

Solicitors

For the Applicants

Mr J Evans QC
with Mr D Ratnam

Coleman Greig Lawyers

For the Respondents

Dr C G Button QC
with Ms R Zambelli

Arnold Bloch Leibler

TABLE OF CONTENTS

Introduction and summary	1
Facts	10
<i>Business activities of Legend and Paradise</i>	10
<i>IFFCO dispute</i>	10
<i>Communications leading up to the execution of the deeds</i>	11
<i>Terms of the deeds</i>	17
<i>Enforcement of award and appointment of receiver and manager of Paradise</i>	20
<i>Winding up of Legend and commencement of proceeding</i>	21
Trial Division proceeding	21
Issues raised on appeal	25
Issue 1: Insolvency of Legend and Paradise	26
<i>Legislation</i>	26
.....	
<i>Principles</i>	26
<i>Associate judge's findings</i>	29
<i>Grounds of appeal</i>	36
.....	
<i>Parties' submissions</i>	36
<i>Decision</i>	39
Issue 2: Void transactions	46
<i>Legislation</i>	46
.....	
<i>Principles</i>	49
<i>Associate judge's findings</i>	52
<i>Grounds of appeal</i>	57
.....	
<i>Parties' submissions</i>	58
<i>Decision</i>	71
Issue 3: Applicability of just and equitable ground to Paradise	82
<i>Legislation and principles</i>	82
.....	
<i>Associate judge's findings</i>	83
<i>Grounds of appeal</i>	87
.....	
<i>Parties' submissions</i>	87
<i>Decision</i>	89
Issue 4: Form of relief	90
Conclusion	95

Introduction and summary

1 This is an application for leave to appeal against an order made by an associate judge
in the Trial Division.¹ The associate judge held that a bond deed and a general security deed
(‘deeds’) entered into on 25 November 2015 between Legend International Holdings Inc
(‘Legend’), Paradise Phosphate Ltd (‘Paradise’) and Queensland Phosphate Pty Ltd
(‘Queensland Phosphate’) were void. The associate judge also decided that Paradise was
insolvent and ordered that it be wound up.

2 Legend is a company incorporated in the US State of Delaware on 1 May 2001 and
registered with the Australian Securities and Investments Commission (‘ASIC’) under pt 5.7
of the *Corporations Act 2001* (Cth). As appears from [23] below, it went into liquidation on
2 June 2016.

3 Paradise is an unlisted public company incorporated in Australia on 9 November
2011. At all relevant times, Legend owned 100 per cent of the shares in Paradise.

4 Queensland Phosphate is a company incorporated in Australia on 19 November 2015.

5 During the period from about August 2008 until 25 November 2015, the directors of
Legend included Joseph Gutnick (‘Mr Gutnick’) and three non-executive directors, David
Tyrwhitt, Allan Trench and Henry Herzog. Upon execution of the deeds on 25 November
2015, Mr Tyrwhitt and Mr Trench ceased to be directors and Mordechai Gutnick, Sholom
Feldman and Pnina Feldman were appointed as directors. Ms Feldman is Mr Gutnick’s sister.
Mr Feldman is Ms Feldman’s son and Mr Gutnick’s nephew. Mordechai Gutnick is Mr
Gutnick’s son. On 23 March 2016, Mordechai Gutnick ceased his directorship. Ms Feldman
resigned as a director on 20 April 2016 and Mr Feldman resigned on 22 April 2016. On
8 July 2016, Mr Gutnick became bankrupt and resigned as a director. During this time,

¹ *Re Legend International Holdings Inc (in liq)* [2018] VSC 789 (‘Reasons’).

Legend's company secretary and chief financial officer was Peter Lee.

6 From at least January 2014 until 25 November 2015, Paradise's directors were Mr Gutnick, Mr Lee and Mr Tyrwhitt. From 25 November 2015, Paradise's directors were Mr Gutnick, Mordechai Gutnick, Mr Feldman and Ms Feldman. Mordechai Gutnick resigned as a director on 23 March 2016 and Mr Gutnick resigned on 8 July 2016.

7 At all relevant times the directors of Queensland Phosphate were Mr Feldman and Ms Feldman. Queensland Phosphate has 10,825 ordinary shares on issue, 10,000 of which are beneficially owned by the Feldman family. The remaining 825 shares were issued to external investors known as the Courtney House Capital Trading Group, for a consideration of \$650,000. David Sipina was a member of that Group.

8 Up until 2012, Legend's main business was the development of a project for mining, beneficiation and processing of phosphate assets — primarily comprised of mining tenements — near Mt Isa in north-west Queensland. The main tenements were known as the 'Paradise North Project' and the 'Paradise South Project'. In February 2012, Legend transferred the mining tenements to Paradise in return for Paradise issuing 100,000,000 of its shares to Legend. The transfer formed part of a restructure of Legend's assets for the purpose of conducting an initial public offering ('IPO') of Paradise on the Australian Stock Exchange, which subsequently failed. Paradise's main assets are the mining tenements.

9 On 14 July 2008, Indian Farmers Fertiliser Cooperative Ltd ('IFFCO') entered into a share options agreement with Legend whereby IFFCO acquired an option to purchase shares in Legend. Pursuant to that agreement, IFFCO purchased 20,000,000 shares in Legend for US\$40,400,000. IFFCO later purchased a further 14,300,464 shares in Legend in an open market transaction. Also on 14 July 2008, Mr Gutnick entered into a shareholders agreement with IFFCO to regulate their relationship as shareholders in Legend. By an affiliate deed of adherence, IFFCO's subsidiary, Kisan International Trading FZE ('Kisan'), agreed to be bound by the terms of the shareholders agreement. As discussed in more detail at [35] below, a dispute between the parties was arbitrated in Singapore. On 7 May 2015, the arbitral tribunal made an award in accordance with which Legend was ordered to pay US\$17,741,693

(AU\$22,435,612.72) plus legal costs to IFFCO and Kisan, and Mr Gutnick was ordered to pay them US\$28,050,000 plus interest and legal costs ('award').

10 For convenience, unless otherwise indicated, all further references to IFFCO are to IFFCO and Kisan and the amounts payable by Legend to those companies under the award will be referred to as the 'IFFCO debt'.

11 On 15 October 2015, IFFCO filed an application in the Supreme Court of Victoria to enforce the award as a judgment of that Court pursuant to s 8(2) of the *International Arbitration Act 1974* (Cth) ('IFFCO award registration proceeding'). The proceeding was heard on 19 November 2015. Judgment was reserved.

12 On 25 November 2015, Legend and Paradise entered into the bond deed² and general security deed, referred to at [1] above, with Queensland Phosphate. The deeds are discussed in detail at [60]–[62] below. At this stage, it suffices to refer to the following features of the deeds:

- (a) The bond deed provided for Queensland Phosphate to subscribe for up to 2,500 convertible bonds with a face value of \$1,000 to be issued by Legend in a series of tranches. If Queensland Phosphate subscribed for all the bonds and converted them to shares, it would have a 53 per cent controlling interest in Legend.
- (b) Under clause 3.3(b) of the bond deed, Queensland Phosphate was not required to take up the bonds if there was an event of default.
- (c) Under cl 15.1, the specified 'Events of Default' included the following:
 - (d) a final judgment or judgments of an Australian or USA court or courts of competent jurisdiction for the payment of money aggregating in excess of \$1,000,000 ... are rendered against [Legend] or any Subsidiary and not stayed pending appeal within 21 days after entry thereof.
 - ...
 - (k) there is any change to the composition of the board of either Legend or Paradise ... without the consent of [Queensland Phosphate].
- (d) Clause 2(a) of pt 1, sch 1 of the bond deed set out a warranty of solvency on the part of Legend in the following terms:

² The full title of the bond deed is 'Convertible Bond and Subscription Deed'.

[Legend] is solvent and will not become insolvent by entering into and performing its obligations under [the deeds].

- (e) Under cl 9.2 of the bond deed (read with cl 1.1), the interest payable on the bonds increased from 10 to 50 per cent per annum on default of any payment.
- (f) Clause 12.2(d) (read with cl 1.1) of the bond deed obliged Legend to pay an ‘event of default fee’ of 50 per cent of the amounts advanced if it was required to redeem the bonds upon the occurrence of an event of default.
- (g) Clause 16.3(g) of the bond deed prohibited Legend from procuring any further financing whilst a bond remained outstanding, without the prior written consent of Queensland Phosphate.
- (h) Under cl 23.1, Paradise guaranteed Legend’s obligations under the bond deed.
- (i) Under the general security deed, Legend and Paradise granted security over all of their assets to secure their obligations under the bond deed.

13 For convenience, we will refer to the above provisions of the bond deed as follows: cl 15.1(d) as the ‘final judgment event of default’; cl 2(a) of pt 1, sch 1 as the ‘warranty of solvency’; cl 9.2 as the ‘50 per cent default interest rate’; cl 12.2(d) as the ‘50 per cent event of default fee’; and cl 16.3(g) as the ‘prohibition on further borrowing’.

14 On 20 November 2015, prior to entering into the deeds, Queensland Phosphate, Mr Feldman, Ms Feldman and Zalg Exploration Pty Ltd (‘Zalg’) as trustee of the Zalg Exploration Trust entered into a shareholders deed (‘Zalg shareholders deed’) which provided as follows:

The Feldmans and [Queensland Phosphate] give Zalg or its nominee, as facilitator of the Convertible Bond Deed, the option to buy up to half of the Convertible Notes (or Shares if the Convertible Note has been converted into Shares) held by [Queensland Phosphate] under the Convertible Bond Deed from [Queensland Phosphate] anytime in the period of 18 months from the date of this Deed, at a price of \$1000 per Convertible Note (or the equivalent of \$0.005 per Share if the Convertible Note has been converted into Shares).

15 Mr Gutnick was a director of Zalg until 18 November 2015. From 18 November 2015 onwards, Mordechai Gutnick was a director of Zalg. The shares in Zalg are beneficially owned by the Gutnick family.

16 The option for Zalg to take up to half the notes issued to Queensland Phosphate (or

shares, if already converted) translated to an option to purchase up to approximately 26 per cent of Legend's shares for \$1,250,000.

17 Amounts totalling \$400,000 were provided pursuant to the bond deed as follows:
\$100,000 from Queensland Bauxite Ltd ('Queensland Bauxite') on 10 November 2015;
\$100,000 from Queensland Phosphate on 25 November 2015; and \$200,000 from Queensland
Phosphate on 26 November 2015. Queensland Bauxite is a listed public company
incorporated in Australia whose directors are Mr Feldman and Ms Feldman.

18 On 21 December 2015, Croft J delivered judgment in the IFFCO award registration
proceeding. He determined that the award be enforced in the same manner as a judgment of
the Supreme Court.

19 On 18 February 2016, IFFCO served a statutory demand on Legend for payment of
the IFFCO debt. The time for compliance expired on 10 March 2016.

20 On 11 March 2016, Queensland Phosphate appointed Christopher Palmer as receiver
of Legend's shares in Paradise pursuant to the general security deed. Mr Palmer was also
appointed receiver and manager of Paradise.

21 On 11 April 2016, IFFCO filed a winding up application in respect of Legend.

22 On the day that Mr Feldman resigned as a director of Legend — 22 April 2016 — Mr
Palmer, in his capacity as receiver of Legend's shares in Paradise, caused Legend to enter
into a share sale agreement with Queensland Phosphate and Paradise. Under that agreement,
all of Legend's shares in Paradise were sold to Queensland Phosphate for a consideration of
\$1, which was subject to adjustment based on a future valuation ('\$1 share sale agreement').
That agreement provided that the sale of the shares would not proceed if Queensland
Phosphate did not pay the valuation amount within 60 days after the date of the valuation. On
26 April 2016, a share transfer was executed to give effect to the \$1 share sale agreement.
This is being held in escrow by Mr Palmer's solicitors pending the outcome of the current
proceeding. Mr Palmer ceased acting as receiver and manager of Paradise and receiver of
Legend's shares in Paradise on 22 December 2016.

23 On 2 June 2016, Randall AsJ ordered that Legend be wound up in insolvency and that Mark Korda and Craig Shepard be appointed as joint and several liquidators of Legend ('liquidators').³

24 By way of two originating processes dated 7 November 2016 (as amended on 20 November 2017) and 15 December 2017 respectively, the respondents sought orders which included that Paradise be wound up and that the deeds and the \$1 share sale agreement be declared void. The proceeding was heard by Randall AsJ on 5, 6, 7 and 9 March 2018.⁴

25 On 14 December 2018, the associate judge delivered judgment. Relevantly, the judgment sets out his reasons for the following conclusions:

- (a) Legend was insolvent at the time that the deeds were entered into. If necessary, the associate judge would have also determined that Legend became insolvent by virtue of entry into the deeds. In reaching that conclusion, he relevantly made the following findings:
 - (i) Legend was not able to pay its debts as and when they fell due.
 - (ii) Legend had no cash flow in November 2015.
 - (iii) Legend did not have a realisable asset.
 - (iv) The IFFCO debt was due and payable by Legend prior to the order of Croft J for the enforcement of the award as a judgment of the Supreme Court.
- (b) The deeds were voidable transactions.
- (c) The good faith defence in s 588FG(2) of the *Corporations Act* was not available to Queensland Phosphate.
- (d) The \$1 share sale agreement was void.
- (e) Mr Palmer's appointment as receiver of Legend's shares in Paradise and receiver and manager of Paradise was invalid.
- (f) Paradise should be wound up in insolvency pursuant to s 459A of the *Corporations Act*.

³ *Indian Farmers Fertiliser Cooperative Ltd v Legend International Holdings Inc* (2016) 52 VR 1.

⁴ The trial was delayed due to a dispute about whether the proceeding had been settled. On 1 May 2017, Judd J decided that the proceeding had not been settled. An appeal against that decision was dismissed by this Court on 26 September 2017: *Queensland Phosphate Pty Ltd v Korda* [2017] VSCA 269.

(g) If it had been necessary for him to do so, he would have decided that Paradise should be wound up on the just and equitable ground in s 461(1)(k) of the *Corporations Act*.

26 As appears from [30] below, the applicants seek to impugn conclusions (a)(i) and (iii), (b), (f) and (g) above.

27 The associate judge's judgment was subsequently given effect in an order he made on 1 February 2019 ('associate judge's order'). That order was in the following terms:

- 1 Pursuant to s 558FF(1)(h) of the [*Corporations Act*], each of the Bond Deed and the General Security Deed are void and unenforceable as at the time they were entered into.
- 2 The Share Sale Agreement dated 22 April 2016 between [Legend] and [Queensland Phosphate] is void and unenforceable.
- 3 Upon the expiry of the undertakings referred to in 'Other Matters', Christopher Palmer shall cause to be delivered the share transfer certificate, which purports to transfer [Legend's] shareholding in [Paradise] to [Queensland Phosphate], to the [respondents] for destruction.
- 4 Pursuant to section 588FF(1)(g) of the [*Corporations Act*], [Queensland Phosphate] is entitled to prove in the winding up of [Legend] as an ordinary unsecured creditor for an amount equal to:
 - (a) moneys paid by it to [Legend] under or in connection with the terms of the Bond Deed; and
 - (b) interest in respect of any amount paid under (a) of this paragraph, at the rate prescribed by the *Penalty Interest Rates Act 1983* (Vic) from the date that any stay of these orders expires.
- 5 [Paradise] be wound up in insolvency under section 459A of the [*Corporations Act*] and Messrs Mark Anthony Korda and Craig Peter Shepard jointly and severally are appointed liquidators of [Paradise] for the purposes of the winding up.
- 6 The requirement to file the requisite notices of application for winding up [Paradise] with ASIC are dispensed with.
- 7 [Legend's] costs of the application for winding up [Paradise] are costs in the winding up.
- 8 Otherwise, [the applicants] pay [the respondents'] costs of the proceedings, including reserved costs, on a standard basis.
- 9 From the date of entry of these orders, such orders be stayed for a period of 14 days to permit [the applicants] to lodge any appeal of these orders.

28 The associate judge's order declared that:

- 1 The [bond deed] and the [general security deed] ... are:

- (a) uncommercial transactions within the meaning of s 588FB of the *Corporations Act* ... ;
- (b) insolvent transactions within the meaning of s 588FC of the [*Corporations Act*]; and
- (c) voidable transactions within the meaning of s 588FE(2) and (3) of the [*Corporations Act*].

2 The appointment of Mr Palmer on 11 March 2016:

- (a) as receiver of [Legend's] shares in [Paradise] was invalid; and
- (b) as the receiver and manager of [Paradise] was invalid.

29 The associate judge's order also continued the undertakings of Mr Feldman, Ms Feldman, Mr Palmer and Queensland Phosphate — originally given by consent on 11 November 2016 — not to encumber or otherwise deal with the shares in Paradise or the assets of Paradise, or allow the amendment of Paradise's share register, pending the outcome of the proceeding.⁵ Those undertakings, which remain in place, may be briefly summarised as follows:

- (a) The Feldmans undertook not to cause Paradise to deal with, or assist Mr Palmer in dealing with, any asset of Paradise or to exercise their powers as directors of Paradise to amend Paradise's share register.
- (b) Mr Palmer undertook not to deal with the shares in Paradise.
- (c) Queensland Phosphate undertook not to: deal with the interest that it holds in the shares or assets of Paradise; cause Mr Palmer to deal with the shares in or assets of Paradise; cause Mr Palmer to deal with any interest that Legend has in any asset of Paradise, other than in the ordinary course of Paradise's business.

30 Initially, the applicants sought leave to appeal against the associate judge's order on 12 grounds. At the hearing of the application for leave to appeal, they abandoned grounds 2, 5, 7 and 10 and sought leave to add a thirteenth ground. The extant grounds and proposed ground 13 are set out in full later in these reasons. In summary, they seek to impugn the following aspects of the associate judge's decision:

- (a) grounds 6 and 8 contend that the associate judge erred in concluding that Legend and

⁵ An application by the applicants to vary or discharge the undertakings was dismissed by the associate judge on 24 April 2017.

- Paradise were insolvent at the time they entered into the deeds on 25 November 2015;
- (b) grounds 1, 3, 4 and 9 contend that the associate judge erred in concluding that the deeds constitute a void transaction;
 - (c) grounds 11 and 12 contend that the associate judge erred in concluding that Paradise should be wound up on the just and equitable ground in s 461(1)(k) of the *Corporations Act*; and
 - (d) proposed ground 13 contends that the associate judge's discretion miscarried in relation to the relief he granted to the respondents consequent upon his finding that the deeds constituted a voidable transaction. The ground asserts that instead of depriving Queensland Phosphate of its security in its entirety, the associate judge should have preserved the security in respect of the amounts owing under the bond deed or alternatively the advances totalling \$400,000 that were made to Legend.

31 The respondents opposed the applicants' application for leave to add proposed ground 13.

32 For the reasons that follow, the application for leave to appeal will be granted in respect of grounds 1 and 6 only, but the appeal will be dismissed.

Facts

Business activities of Legend and Paradise

33 As stated at [8] above, Legend's main business was the development of the tenements. It was engaged in the exploration stage in relation to the tenements since August 2006 and reached the development stage in February 2011. It became dormant following the failed IPO in 2012.

34 As at November 2015, Legend and Paradise did not engage in any income producing activities and did not have an ongoing source of revenue.

IFFCO dispute

35 As we have stated at [9] above, a dispute arose between IFFCO on the one hand, and Legend and Mr Gutnick on the other, in relation to the share options agreement and the shareholders agreement referred to in that paragraph. The dispute was referred to arbitration in Singapore on 18 January and 25 March 2013. On 7 May 2015, the arbitral tribunal made the award referred to at [9] above in favour of IFFCO. It found that IFFCO was entitled to rescind the two agreements on the basis that it was induced to purchase the shares in Legend by fraudulent misrepresentation.

36 As we have already noted at [9] above, under the award, Legend was ordered to pay US\$17,741,693 (AU\$22,435,612.72) plus costs to IFFCO, and Mr Gutnick was separately ordered to pay US\$28,050,000 plus interest and costs to IFFCO. The award did not expressly require IFFCO to return the share certificates upon receipt of the amounts awarded.

37 On 22 June 2015, the High Court of Singapore granted IFFCO leave to enforce the award in the same manner as a judgment of that Court. Judgment was entered as against Mr Gutnick on 9 July 2015 and as against Legend on 2 September 2015.

38 As we have stated at [11] above, on 15 October 2015, IFFCO commenced the IFFCO award registration proceeding in the Supreme Court. Legend and Mr Gutnick opposed the proceeding on the ground of public policy. They contended that the arbitral tribunal's failure to order IFFCO to return the share certificates upon receipt of the amounts awarded vitiated the award because it involved double recovery.

39 On 19 November 2015, — the same day that Queensland Phosphate was incorporated — the IFFCO award registration proceeding was heard before Croft J, who reserved his decision.

Communications leading up to the execution of the deeds

40 On 26 October 2015, — 11 days after the commencement of the IFFCO award registration proceeding — Legend obtained legal advice from Herbert Smith Freehills in relation to a proposed convertible note issue under which Legend would grant security over its shareholding in Paradise to a convertible note holder. The convertible note issue

eventually evolved into the bond deed. The advice relevantly stated:

To the extent that Australian law may intersect, the granting of the security could be subject to challenge if Legend or Paradise is insolvent, or could become insolvent in the next 6 months — in which case the granting of the security may be challenged and undone as an uncommercial transaction.

41 On 30 October 2015, Mr Gutnick circulated a draft agreement titled ‘Convertible Note Agreement’ to Mr Feldman. This draft agreement provided for an unspecified noteholder’s subscription of 1 million notes in Legend at \$1 per note and set out a boilerplate events of default clause. Clause 7.1 provided for staged security to be given over Legend’s shares in Paradise, namely:

- (a) security over 25 per cent of the shares on payment of \$250,000 on 2 November 2015;
- (b) security over 35 per cent of the shares on payment of \$350,000 on 2 December 2015;
- and
- (c) security over 40 per cent of the shares on payment of \$400,000 on 31 December 2015.

42 Later on the same day, Mr Gutnick circulated to Mr Feldman a second version of the convertible note agreement, cl 7 of which provided for security in the form of a charge over the assets of Legend. The events of default clause was boilerplate. The subscription amount was increased from \$1,000,000 to \$5,000,000 of which \$1,000,000 was payable on the signing of the agreement, \$1,000,000 on 2 December 2015, \$2,000,000 on 31 December 2015 and \$1,000,000 on 1 February 2016.

43 On 4 November 2015, Mr Feldman emailed a draft term sheet relating to the convertible note agreement to Mr Gutnick. The draft term sheet provided for a subscription of an unspecified number of convertible bonds for an amount of \$2,500,000 secured by first ranking security over Legend and over its shares in Paradise. It was initially contemplated that the transaction with Legend and Paradise would be entered into by Queensland Bauxite. The draft term sheet provided that the purpose of the funding was for Legend to defend the ‘current court action’ — that is, the IFFCO award registration proceeding — and that any excess funds would be used for general working capital purposes. The draft term sheet also provided for events of default, the first of which was as follows:

- (1) any finding by a court of law against [Legend] that causes a judgment of

more than \$1M to be entered against [Legend].

44 On 5 November 2015, Mr Feldman provided a new version of the draft term sheet to Mr Gutnick with minor changes. In that version, a clause provided that the lender at its option could require Legend to redeem any or all of the convertible bonds, at any time after an event of default occurs, at a price representing 150 per cent of the funds advanced. Such redemption would result in further accruing penalties at a rate of 50 per cent per annum until repaid.

45 Also on 5 November 2015, Mr Gutnick provided Mr Feldman's version of the draft term sheet to Mr Lee, who amended and annotated it with comments which he passed on to Mr Gutnick. Mr Lee's amendments included the insertion of the words 'other than any actions by IFFCO and/or Kisan' in brackets at the end of the first event of default set out at [43] above. In relation to the 50 per cent interest rate in the clause referred to at [44] above, Mr Lee commented: 'Is this legal given recent legal decisions in regard to penalties'. That same day, Mr Gutnick forwarded to Mr Feldman the term sheet with Mr Lee's amendments and comments.

46 On 6 November 2015, Mr Gutnick emailed Mr Feldman stating: 'We need to move on Legend ASAP because we need the funds and don't want to go elsewhere. Try your best'.

47 Also on 6 November 2015, Mr Feldman emailed Mr Gutnick attaching a further revised term sheet. In this version, Mr Feldman rejected the change made by Mr Lee carving out the IFFCO award registration proceeding from the first event of default. The effect of Mr Feldman's version was to ensure that there would be an event of default if IFFCO was successful in that proceeding.

48 On 9 November 2015, Mr Lee made the following comment to Mr Gutnick in relation to the term sheet:

As previously advised, this term sheet will be released to the [US Securities and Exchange Commission] as part of a Form 8-K filing in the USA. From a view point, it might be better to delete the reference to defending the court case and simply say working capital.

Mr Gutnick passed this on to Mr Feldman.

49 On 10 November 2015, an initial tranche of \$100,000 was provided by Queensland Bauxite to Legend despite the fact that the term sheet had not yet been executed.

50 On 13 November 2015, Mr Feldman emailed a draft bond deed to Mr Gutnick. On 16 November 2015, Mr Feldman emailed a draft security deed to Mr Gutnick under cover of an email which relevantly stated:

I need to check on how we secure a US company, so I included Paradise in the deed. Paradise is probably the most important one to protect in this transaction to ensure no one can get first preference so we can protect the asset.

51 On 19 November 2015, the term sheet relating to the bond deed was executed by Mr Feldman and Ms Feldman on behalf of Queensland Phosphate and by Mr Gutnick and Mr Lee on behalf of Legend. As stated at [11] and [39] above, that same day Croft J heard the IFFCO award registration proceeding. It was also the day that Queensland Phosphate was incorporated. It was named as the lender in the term sheet in the place of Queensland Bauxite.

52 That same day, Mr Gutnick emailed Mr Feldman a copy of Legend's and Paradise's balance sheets as at 30 September 2015. The balance sheets suggested that both companies were insolvent at the time. In particular, as at 30 September 2015:

- (a) Legend's balance sheet indicated that it had current liabilities of AU\$27,161,061 and current assets of AU\$663,028; and
- (b) Paradise's balance sheet indicated that it had current liabilities of AU\$2,458,358 and current assets of AU\$2,537.

53 Also on 19 November 2015, Legend received legal advice from US lawyers which relevantly stated:

At a conversion rate of A\$0.005, it appears that the Bonds are convertible into 500,000,000 shares (excluding shares issuable upon conversion of interest payments). This would represent more than 53% of the issued and outstanding shares of Legend following conversion, which would substantially dilute existing stockholders. With this level of dilution (and considering the 50% penalty interest rate), the Board needs to be satisfied, after making a reasonable inquiry, that there isn't an alternative source of financing that would be available to the Company on more favorable terms. Also, I understand that Pnina Feldman is [Mr Gutnick's] sister so the existence of this family relationship will impose a heightened level of scrutiny on the reasonableness of the Board's actions.

54 On 20 November 2015, Mr Feldman received an email from Mr Sipina of the Courtenay House Capital Trading Group enquiring about the impact of the IFFCO award registration proceeding on Legend's assets. Mr Feldman replied:

This is his [Mr Gutnick's] main fight he is fighting at the moment. He is confident he will win it, but if he doesn't then we are doing what we can through this structure to protect the asset and its value. This is precisely the point of his doing this deal, to ensure that all value is not lost to the company if he loses the battle ... We as third parties will develop and control the asset for the foreseeable future, ensuring maximum value possible will be retained by the company if they lose this case ...

55 On 22 November 2015, Mr Feldman sent an email to Mr Gutnick stating:

I made quite a number of additions to the documents, particularly surrounding Paradise as the guarantor to the deal, in case anything happens to Legend, we want to make sure that Paradise is secure and we will have the right to step in and protect the assets from any other creditor or receiver, so I put in quite a bit of wording that I feel would be necessary in such a scenario. Let's all hope that scenario does not happen, but these documents should at least protect us as much as possible from that scenario.

56 On 23 November 2015, Mr Lee on behalf of Legend deleted Legend's warranty as to solvency in his marked up copy of the draft bond deed and sent the amended draft to Mr Feldman (copied to Mr Gutnick).

57 Also on 23 November 2015, a number of emails were exchanged between Mr Feldman and Mr Gutnick. The following relevant exchanges occurred:

(a) At 3:14 pm, Mr Feldman sent an email to Mr Gutnick stating:

The main issue is obviously on the warranty of solvency. If the company cannot say that it is solvent then how is it able to legally do this deal. The whole basis of doing any business is that the Company thinks that its asset is worth more than its liabilities, and has the current support of its creditors to wait until the company has funds to be paid, or else the company is not legally able to trade. We then can't take security over the asset if there is a reasonable suspicion that the company is insolvent. It is my view that the assets are worth more than the liabilities, and worth more than the funds being advanced as well, which is why we are looking to save the asset, but my understanding is that we need the directors to be able to say that is the case in their view in order to be able to legally take security.

(b) At 3:20 pm, Mr Gutnick replied to Mr Feldman's email stating '[t]he problem is only the IFFCO debt'. A short time later at 3:24 pm, Mr Gutnick sent a follow up email stating '[w]e can [give the warranty as to solvency] if you insist'.

(c) At 3:28 pm, Mr Feldman responded to Mr Gutnick's email of 3:20 pm stating:

[i] You are still arguing that [the IFFCO debt] is not payable.

- [ii] Even if it gets enforced as payable, you still have reasonable grounds to believe that the asset is worth more than the \$12M and can at that point be put up to tender to pay the debt. Until that is publicly tested, it is only a matter of reasonable belief.
- [iii] You clearly are not of the belief that the company is currently insolvent, or else you wouldn't be able to do this transaction. In order for the security to be valid, the company needs to say that to be the case. If that warranty is deleted from the deed, it effectively invalidates the deed in my understanding?
- (d) At 3:37 pm, Mr Feldman responded to Mr Gutnick's email of 3:24 pm stating 'ok. I think it is important to ensure the validity of the security as much as possible'.

58 On 24 November 2015, Mr Feldman emailed a presentation to Mr Sipina. The first page of the presentation relevantly stated:

- Legend is currently under serious litigation by IFFCO
- Legend has a world class phosphate project 100% owned and unencumbered
...
- Queensland Phosphate to lend \$2.5M to Legend and will take first ranking security on the asset
- Control of the project to go to Queensland Phosphate from the outset in order to realise the value of the project in the short term, thereby giving significant value to Queensland Phosphate and the potential for Legend to refinance its potential liabilities to IFFCO
- ...
- With valuations of between approximately \$200M and \$4Bn on the project, depending on the options and level of development or a combination of them, Queensland Phosphate's current value would be \$50M-\$1Bn.

Terms of the deeds

59 As stated at [1] above, on 25 November 2015, Legend and Paradise entered into the deeds with Queensland Phosphate.

60 The relevant terms of the bond deed were as follows:

- (a) Clause 2.1 (read with cls 1.1 and 2.2) provided for Legend to issue to Queensland Phosphate up to 2,500 convertible bonds with a face value of \$1,000.
- (b) Under cl 3.2, Legend was required to ensure that, prior to settlement, it and Paradise had no more than three directors, two of whom had to be Mordechai Gutnick (as joint chief executive officer) and Mr Gutnick and that, upon settlement, three additional

- directors to be nominated by Queensland Phosphate were appointed, two of whom had to be Mr Feldman (as joint chief executive officer) and Ms Feldman.
- (c) Clause 3.3 provided the following timetable for the issue of bonds: 200 bonds on completion; 200 bonds on 15 December 2015; 100 bonds on 28 February 2016, 31 March 2016, 30 April 2016, 31 May 2016, 30 June 2016 and 31 July 2016 respectively, following which it was optional for Queensland Phosphate to take up any further bonds issued up to a maximum of 1,500 additional bonds.
 - (d) Under cl 3.3(b) Queensland Phosphate was not required to take up any further bonds if there was an event of default.
 - (e) Clause 2(a) of pt 1, sch 1 set out the warranty of solvency referred to at [12(d)] above.
 - (f) Under cl 6, Legend undertook to apply the proceeds of the bond issue for its 'general working capital purposes'.
 - (g) Clause 9.2 (read with cl 1.1) contained the 50 per cent default interest rate referred to at [12(e)] above.
 - (h) Under cl 10.1, the bonds were convertible at the option of Queensland Phosphate.
 - (i) Under cl 12.2, on default, Legend was obliged to redeem the bonds at the election of Queensland Phosphate, on three days' notice.
 - (j) Clause 12.2(d) (read with cl 1.1) contained the 50 per cent event of default fee referred to at [12(f)] above;
 - (k) Clause 15.1 set out events of default, including the final judgment event of default referred to at [12(c)] above;
 - (l) Under cl 16.2, Legend gave various undertakings, including that it would not, and would not permit its subsidiaries, to dispose of or encumber their 'Material Assets' without the consent of Queensland Phosphate.
 - (m) Clause 16.3(g) set out the prohibition on further borrowing referred to at [12(g)] above.
 - (n) Under cl 28.1, Paradise, as guarantor, was required to pay interest at the default rate of 50 per cent per annum on amounts due and payable under the bond deed.

61 Under cl 2.1 of the general security deed, Legend and Paradise (as guarantor of Legend's obligations) granted Queensland Phosphate security over all of their assets to secure

their obligations under the bond deed. Clauses 10.1 to 10.6 conferred enforcement powers on Queensland Phosphate, including the power to appoint a receiver upon an event of default.

62 The effect of the final judgment event of default was that registration of the award as a judgment of the Supreme Court would give rise to significant adverse consequences for Legend and Paradise, including the following:

- (a) Queensland Phosphate would not be required to advance any further funds to Legend;
- (b) Queensland Phosphate could require Legend to redeem the bonds on three days' notice;
- (c) Legend would be required to pay a 50 per cent event of default fee and default interest of 50 per cent per annum on amounts already advanced and those obligations would be guaranteed by Paradise; and
- (d) Queensland Phosphate would be able to appoint a receiver over the assets of Legend and Paradise.

63 Prior to executing the deeds, Mr Lee emailed a written resolution to Legend's non-executive directors, Mr Tyrwhitt, Mr Trench and Mr Herzog, for their signature. The resolution authorised Legend to enter into the transaction as described in the resolution and authorised Mr Gutnick and Mr Lee to sign the deeds on behalf of Legend and Paradise. However, the summary of the bond deed included in the resolution failed to identify key provisions of the bond deed, including: the specified events of default; Queensland Phosphate's right of redemption on an event of default; the 50 per cent event of default fee; the 50 per cent default interest rate; the warranty of solvency; and the prohibition on further borrowing.

64 On the day the deeds were executed: Mr Feldman, Ms Feldman and Mordechai Gutnick were appointed as directors of Legend and Paradise; Mr Tyrwhitt and Mr Trench resigned as directors of Legend; and Mr Lee and Mr Tyrwhitt resigned as directors of Paradise. Mr Herzog remained the sole non-executive director of Legend. As a result of these changes, the Gutnick and the Feldman families had equal representation on the boards of Legend and Paradise. Mordechai Gutnick and Mr Feldman were appointed joint chief executive officers of Legend and Paradise.

65 The payments totalling \$400,000 that were made to Legend under the bond deed
between 10 November 2015 and 26 November 2015 are set out at [17] above.

66 On 26 November 2015, Legend notified the US Securities and Exchange Commission
of the transactions with Queensland Phosphate.

67 On 1 December 2015, Mr Feldman sent the following email to Mr Lee:

Can you please arrange for the original signed documents to be sent to me via
registered overnight express so we can attend to stamping and registering.

This is time sensitive particularly as a decision may be forthcoming in the courts
immediately.

Enforcement of award and appointment of receiver and manager of Paradise

68 As stated at [18] above, on 21 December 2015, Croft J delivered judgment in which
he determined that the award be enforced against Legend in the same manner as a judgment
of the Supreme Court. He held that the award did not involve double recovery because
rescission of the two agreements entailed ‘the avoidance of the transactions from the
beginning and the restoration of the parties to their previous positions’.⁶ On 22 December
2015, he made an order to this effect but granted a stay until 5 February 2016.

69 Legend and Mr Gutnick applied to this Court for leave to appeal against Croft J’s
decision. On 9 February 2016, the Court refused leave to appeal.⁷ The Court granted a stay
until 12 February 2016. Legend and Mr Gutnick applied for special leave to appeal to the
High Court but subsequently discontinued their application.

70 The expiration of the stays in relation to Croft J’s order of 22 December 2015
triggered the final judgment event of default under the bond deed.

71 As stated at [19] above, on 18 February 2016, following the expiration of the stay,
IFFCO served a statutory demand on Legend for payment of the IFFCO debt. The time for
compliance expired on 10 March 2016.

⁶ *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 299 [98].

⁷ *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732.

72 As stated at [20] above, on 11 March 2016, Queensland Phosphate appointed Mr Palmer as receiver of Legend’s shares in Paradise pursuant to the general security deed. Mr Palmer was also appointed as receiver and manager of Paradise.

Winding up of Legend and commencement of proceeding

73 As stated at [21] above, on 11 April 2016, IFFCO filed a winding up application in respect of Legend.

74 As stated at [22] above, on 22 April 2016, Legend entered into the \$1 share sale agreement with Paradise and Queensland Phosphate. On that day, prior to the execution of that agreement, Mr Feldman resigned as a director of Legend. In his covering email to Mr Gutnick attaching his letter of resignation, Mr Feldman stated: ‘Due to potential conflicts of interest I can no longer remain on the board of Legend ...’.

75 On 8 May 2016, Legend filed a bankruptcy proceeding under ch 11 of the *Bankruptcy Code* (US) in the United States Bankruptcy Court for the District of Delaware. The proceeding was dismissed on 25 July 2016.

76 IFFCO’s application to wind up Legend was heard on 27 and 30 May 2016. As stated at [23] above, on 2 June 2016, the associate judge made an order that Legend be wound up in insolvency and that the liquidators be appointed as liquidators of Legend. The order was affirmed by this Court on 30 June 2016.⁸

77 On 30 May 2016, Mr Palmer obtained a valuation report from John Dunlop which set out a ‘preferred valuation’ of the tenements in the amount of \$3,200,000.

Trial Division proceeding

78 As stated at [24] above, the respondents commenced the current proceeding in the Trial Division in November 2016 and the proceeding was heard by the associate judge on 5, 6, 7 and 9 March 2018.

⁸ *Legend International Holdings Inc v Indian Farmers Fertiliser Cooperative Ltd* (2016) 52 VR 40.

79 The key evidence comprised documents tendered by the parties, six affidavits sworn by one of the liquidators of Legend (Mr Shepard) on behalf of the respondents and two affidavits affirmed by Mr Feldman on behalf of the applicants. One of the documents tendered by the respondents was an expert valuation report dated 14 February 2017 prepared by Snowden Mining Industry Consultants in relation to the tenements ('Snowden report'). Both Mr Shepard and Mr Feldman were cross-examined.

80 The associate judge did not make any adverse credit findings against Mr Shepard or Mr Feldman. In respect of Mr Feldman, the associate judge said that he had no reason to doubt his honesty as a witness.⁹

81 Relevantly, in his first affidavit of 4 November 2016, Mr Shepard stated that 'an ordered sale process' to realise the tenements 'would take three to six months to complete'.

82 Mr Feldman gave evidence on a range of issues, including: his extensive experience in the mining industry; sources of funding for mining projects; tensions in the relationship between the Gutnick and Feldman families; the role of Bob Katter MP in introducing him to the business opportunity involving the tenements; his communications with Mr Gutnick leading up to the execution of the deeds; his intentions regarding the strategy Legend should pursue once he became a director following the execution of the deeds; the value of the tenements; and the timeframes for developing mining assets.

83 In relation to the funding of mining projects, Mr Feldman stated that, in his experience, the only methods by which a company that owns a mining tenement can raise capital are: to offer equity in the mining project; to offer shares in the company; or to take a loan and offer its assets as security.

84 In relation to his intentions regarding the strategy Legend should pursue once he became a director following the execution of the deeds, the following exchanges in cross-examination by counsel for the respondents encapsulate Mr Feldman's evidence:

DR BUTTON: But coming back to my question, the effect of the deal that you were proposing to Mr Gutnick was that for putting in 2.5 million, if you decided to

⁹ Reasons [288].

convert?---Yes.

If you put it all in and if you decided to convert, you'd get 53 per cent of the equity for an investment of 2.5 million?---Correct. But that was — all the equity obviously, is subject to all the debts of the company.

Now it was your view, was it not, that Mr Gutnick was giving away a chunk of equity by agreeing to that deal?---Every deal that I try and do, I try and ensure there's a win win for all parties.

That's not my question. My question is- - - ?---So the answer to that is a chunk of equity. A chunk of equity is my, and my investors win side of the deal. The win side for Gutnick was obviously the continuation of Legend and the ability to pay its creditors.

...

HIS HONOUR: What creditors?---The creditors of Legend.

What were you going to give him 13 million? Or 25 million?---To see what happens if the company continues to operate, no. And the \$2.5m was enough to keep the company alive and operating subject to now to get in the big funding enough to be able to develop the project. And if he was going to lose the battle in the Victorian Supreme Court against IFFCO, and if I was going to be creating value and investing in the project, what that would achieve is within what I believed at that time, within a short period of time, I'd be able to create that value and whenever IFFCO would then put in their demand legally in Australia, if that would be the eventuated — the eventuating position, then we would be able to pay that out.

...

DR BUTTON: ... Do you also say that was part of a responsible strategy with the interests of Legend's creditors in mind?---Yes. And the reason being that if we are able to create in that short period of time before they can enforce their debt enough value in the project, um, Legend would still have enough money to pay Kisan and IFFCO in full.¹⁰

85 Mr Feldman also gave the following evidence in cross-examination regarding the risk that Croft J may decide to register the award and the timing of any such decision:

DR BUTTON: ... But you were aware that a judgment could be handed down any day?---Yes.

You really had no control over that?---Correct.

...

And you were alert to the possibility that there was a very real prospect that the decision that was coming down would be in favour of enforcement?---I saw that as a possibility and I couldn't — I didn't feel I could risk my investors' funds on that basis.¹¹

¹⁰ Transcript of Proceedings (7 March 2018) 277–8, 322–3.

¹¹ Transcript of Proceedings (7 March 2018) 305, 313.

86 Mr Feldman gave evidence about the approaches he made to potential investors between February 2016 and January 2017. He said that some investors were ‘pretty keen to get involved ... but people are afraid of litigation’.¹²

87 In relation to the value of the tenements, Mr Feldman said that, as at November 2015, he believed the tenements were worth ‘perhaps ... in the tens, if not more, millions of dollars’.¹³ He also stated that in the period leading up to the execution of the \$1 share sale agreement on 22 April 2016, he believed that ‘a likely valuation or possible valuation’ of the tenements was between \$10,000,000 and \$20,000,000.¹⁴

88 In relation to the timeframe for developing the tenements, Mr Feldman agreed that substantial capital was required before phosphate could be extracted and sold. He agreed that approximately \$30,000,000 was required to develop the Paradise North Project. He said that if funding were in place, the Paradise North Project could be put into production in ‘maybe as quick as six months’ whereas the Paradise South Project ‘would need a few years of development’.¹⁵

89 In relation to a possible sale of the tenements, Mr Feldman said that it was his impression that the realisation of the tenements ‘would take time’.¹⁶ He did not give evidence that a sale of the tenements was contemplated, that any potential purchaser had been identified or as to the expected timeframe for receipt of funds following a sale.

90 The Snowden report valued the tenements as at 30 November 2016 as follows: the ‘technical value’ was in the range of \$16,500,000–\$42,500,000, with a preferred technical value of \$29,500,000; and the ‘fair market value’ was in the range of \$17,000,000–\$25,000,000. The report described the technical value as ‘a de-facto valuation of the technical work completed by Legend to date’.

¹² Transcript of Proceedings (7 March 2018) 379.

¹³ Transcript of Proceedings (7 March 2018) 267.

¹⁴ Transcript of Proceedings (7 March 2018) 351.

¹⁵ Transcript of Proceedings (7 March 2018) 265.

¹⁶ Transcript of Proceedings (7 March 2018) 306.

91 As we have stated at [27]–[28] above, the associate judge ordered that Paradise be wound up in insolvency and declared that the bond deed, the general security deed and the \$1 share sale agreement were void.

92 The associate judge granted a 14 day stay of execution in respect of his order dated 1 February 2019 to permit the applicants to seek leave to appeal, which they duly did. That stay remains in place as a result of further orders made by the associate judge and this Court.¹⁷ The undertakings set out at [29] above also remain in place.

Issues raised on appeal

93 In their application for leave to appeal, the applicants sought orders that: the appeal be allowed; the associate judge’s order of 1 February 2019 be set aside; the undertakings noted in that order be dissolved; and the respondents pay the applicants’ costs in the Trial Division and appeal proceeding.

94 We have summarised the grounds of appeal at [30] above. We will discuss the issues they raise in the following order: first, whether Legend and Paradise were insolvent when they entered into the deeds on 25 November 2015; secondly, whether the deeds were voidable transactions; and thirdly, whether the associate judge erred in concluding that Paradise should be wound up on the just and equitable ground. We will then discuss the issue raised by proposed ground 13, namely, the appropriateness of the form of relief granted to the respondents by the associate judge. The legislation, legal principles, associate judge’s findings and reasons, grounds of appeal and our reasons will be set out under the issues to which they relate.

Issue 1: Insolvency of Legend and Paradise

Legislation

95 Section 95A of the *Corporations Act* stipulates when a company will be considered to

¹⁷ See *Queensland Phosphate Pty Ltd v Korda* [2019] VSCA 119.

be insolvent. It provides:

95A Solvency and insolvency

- (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
- (2) A person who is not solvent is insolvent.

96 It will be recalled that Legend is a company registered under pt 5.7 of the *Corporations Act*. Section 585 of the *Corporations Act* is a deeming insolvency provision applicable to pt 5.7 bodies. The only part of that section which is presently relevant is sub-para (d) which provides as follows:

585 Insolvency of Part 5.7 body

For the purposes of this Part, a Part 5.7 body is taken to be unable to pay its debts if:

...

- (d) it is ... proved to the satisfaction of the Court that the Part 5.7 body is unable to pay its debts.

Principles

97 The applicable test as to insolvency was stated by Barwick CJ (with whom McTiernan and Windeyer JJ agreed) in *Sandell v Porter* as follows:

Insolvency is ... an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realisation by sale or by mortgage or pledge of his assets within a relatively short time — relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.¹⁸

98 The above test has been applied by this Court.¹⁹ It has been said that s 95A of the *Corporations Act* adopts a cash flow test of insolvency which focusses on the liquidity and viability of the business.²⁰ The test focusses upon whether a company is 'able' to pay its

¹⁸ (1966) 115 CLR 666, 670 ('*Sandell*').

¹⁹ *Jetaway Logistics Pty Ltd v Deputy Commissioner of Taxation* (2009) 26 VR 657, 659–60 [12]–[13] ('*Jetaway*').

debts rather than whether it is ‘willing and able’ to do so.²¹

99 Whether a company is insolvent for the purposes of s 95A of the *Corporations Act* is a ‘question of fact to be ascertained from a consideration of the company’s financial position taken as a whole’.²² In considering the company’s financial position as a whole, the court must have regard to commercial realities, which will be relevant in considering the resources available to the company to meet its liabilities as and when they fall due.²³ Commercial realities include the nature of the company’s business, the character of the debt and all of the circumstances present at the relevant time.²⁴

100 Commercial realities will also be relevant to consideration of whether the company can realise funds from its assets in order to pay its debts as and when they fall due and the time in which those assets can be realised. Whether an asset is realisable requires consideration of the timeframe in which the asset can be realised and produce cash.²⁵ There is a temporal limit on whether an asset can be considered realisable²⁶ which has been described as the realisation of assets ‘within a relatively short time’,²⁷ ‘within a reasonable time’,²⁸ ‘relatively quickly’,²⁹ and ‘in time to meet the indebtedness as the claims mature’.³⁰

101 In determining whether an asset is realisable, the nature of the business and the asset, in particular whether the asset is necessary for the continuation of the business, is a relevant consideration. An asset will not be realisable where it is necessary to the conduct of the

²⁰ *Crema Pty Ltd v Land Mark Property Developments Pty Ltd* (2006) 58 ACSR 631, 652 [141].

²¹ *Re Sarina; Ex parte Wollondilly Shire Council* (1980) 32 ALR 596, 599.

²² *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* (2001) 53 NSWLR 213, 224 [54] (‘*Southern Cross*’) quoted in *Wimpole Properties Pty Ltd v Beloti Pty Ltd [No 3]* [2012] VSC 219 [40] (‘*Wimpole*’).

²³ *Southern Cross* (2001) 53 NSWLR 213, 224–5 [54]; *Lewis v Doran* (2004) 208 ALR 385, 408 [106]; *Evans & Tate Premium Wines Pty Ltd v Australian Beverage Distributors Pty Ltd* [2005] NSWSC 186 [11]; *Jetaway* (2009) 26 VR 657, 660 [13].

²⁴ *Jetaway* (2009) 26 VR 657, 660 [14]–[15].

²⁵ *Southern Cross* (2001) 53 NSWLR 213, 224 [54]; *Hall v Poolman* (2007) 215 FLR 243, 285 [187] (‘*Hall*’).

²⁶ *McLellan v Carroll* (2009) 76 ACSR 67, 89 [107].

²⁷ *Sandell* (1966) 115 CLR 666, 670.

²⁸ *Re Pacific Projects Pty Ltd (in liq)* [1990] 2 Qd R 541, 547.

²⁹ *Taylor v Australia & New Zealand Banking Group Ltd* (1988) 13 ACLR 780, 784.

³⁰ *Hall* (2007) 215 FLR 243, 285 [187] quoting *Bank of Australasia v Hall* (1907) 4 CLR 1514, 1543.

business or where its sale, other than in the ordinary course of business, would deprive the company of any future as a going concern ('essential business asset principle').³¹ This principle is discussed in detail below.

102 Other considerations that are relevant to whether an asset is realisable include whether realisation of the asset was contemplated; whether the asset was in a position such that it could be realised; and whether any steps were taken towards realising the asset.

103 Where the sale of the asset was not reasonably contemplated or not contemplated at all, this may go against a suggestion that the asset is realisable.³²

104 How saleable an asset is may also be a relevant consideration in determining whether it is realisable. Evidence of the existence of a prospective buyer — or buyers — or of a recent sale of similar assets may point towards the asset being realisable.³³ By contrast, where there has been difficulty selling the asset previously, this will indicate that it may not be realisable within the relevant timeframe.³⁴

105 The test of insolvency in s 95A of the *Corporations Act* is to be applied 'without intrusion of hindsight'.³⁵ Therefore, consideration of events in relation to an asset subsequent to the date at which it is relevant to determine insolvency may be of limited utility.

Associate judge's findings

106 In determining whether Legend was insolvent within the meaning of s 95A of the *Corporations Act* as at the time of entering into the deeds on 25 November 2015, the

³¹ *Re Timbatec Pty Ltd* (1974) 24 FLR 30, 36–7 ('*Timbatec*'); *Rees v Bank of New South Wales* (1964) 111 CLR 210, 218 ('*Rees*'); *Switz Pty Ltd v Glowbind Pty Ltd* (2000) 18 ACLC 343, 347–8 [39]–[40] ('*Switz*'). See also *Hall* (2007) 215 FLR 243, 286–7 [189]–[195]. Cf *Re Adnot Pty Ltd* (1982) 7 ACLR 212, 217 ('*Adnot*'); *Jingellic Minerals NL v Beach Petroleum NL* (1991) 56 SASR 532, 550–1 ('*Jingellic*'); *Re Newark Pty Ltd (in liq)* [1993] 1 Qd R 409, 415–6 ('*Newark*').

³² *Wimpole* [2012] VSC 219 [116]; *Treloar Constructions Pty Ltd v McMillan* (2017) 318 FLR 58, 86 [144].

³³ *Adnot* (1982) 7 ACLR 212, 214; *Jingellic* (1991) 56 SASR 532, 550–1; *Newark* [1993] 1 Qd R 409, 415–6.

³⁴ *Re Ashington Bayswater Pty Ltd (in liq)* [2013] NSWSC 1008 [16], [34]–[35] ('*Re Ashington*').

³⁵ *Lewis (as liquidator of Doran Constructions Pty Ltd (in liq)) v Doran* (2005) 219 ALR 555, 578 [103] ('*Lewis*').

associate judge considered Legend's cash flow, liabilities and assets.

107 In relation to Legend's cash flow, the associate judge had regard to Legend's 2013 annual report, which stated that as 'an exploration stage company until February 2011 and a development stage company since then', Legend has 'not had an ongoing source of revenue'. The annual report referred to a report of Legend's independent registered public accounting firm for the years ended 31 December 2012 and 2013 which noted that Legend had not yet commenced revenue producing operations and questioned Legend's ability to 'continue as a going concern'.

108 The associate judge noted that by 2015 Legend was not trading. He stated that on 5 August 2015, an email was sent from a debt recovery agency to Legend attaching a statement of claim for \$3,163. He said that the sum appeared to be associated with levies which had been accumulating since November 2014 and that the correspondence suggested that Legend offered part payment on the same day. He also referred to correspondence regarding overdue rent payments by Legend in relation to the tenements and stated that Legend's 30 September 2015 balance sheet showed cash of \$1,028.

109 As to Legend's liabilities, the associate judge concluded that for the purposes of s 95A of the *Corporations Act*, the IFFCO debt was due and payable by Legend from at least 7 May 2015 — that is, prior to registration of the award in Victoria — and was therefore relevant to the issue of Legend's solvency.³⁶

110 The associate judge stated that the list of Legend's aged creditors dated 16 December 2015 identified a total of \$868,504 owing for over 120 days, \$14,363 over 90 days and \$10,109 over 30 days. He also considered Legend's report as to affairs ('RATA') submitted in accordance with s 475 of the *Corporations Act* signed by Mr Gutnick and dated 2 June 2016. The RATA identified a liability to IFFCO of \$25,027,207 and a further \$1,271,813 owing to creditors, although approximately \$255,637 of that sum was said not to be owing.

111 The associate judge gave consideration to Legend's 30 September 2015 balance sheet,

³⁶ Reasons [145], [152]–[153].

which listed assets of \$4,457,960 of which \$3,027,741 was stated to be a non-current asset itemised as ‘development expenditure’. It was unclear to the associate judge whether the development expenditure and certain loans identified as assets in the RATA and materials filed in the ch 11 US bankruptcy proceeding — which were in addition to loans to Paradise discussed at [112] below — could be called upon.

112 The associate judge also gave consideration to intercompany loans between Legend and Paradise. He noted that the balance sheet of Legend did not list the shareholding in Paradise as a non-current asset nor did it identify, as assets, the loans from Legend to Paradise which were listed in Paradise’s 30 September 2015 balance sheet, the RATA and materials filed in the ch 11 US bankruptcy proceeding. The associate judge stated that the applicants had conceded that the intercompany loans Legend had made to Paradise totalled approximately \$18,053,443.³⁷

113 Having regard to Legend’s assets, the associate judge noted that the parties agreed that the chief asset of Legend was its shareholding in Paradise and the underlying value of the tenements held by Paradise.³⁸

114 The associate judge considered that the value of the tenements was somewhat uncertain and that this resulted in uncertainty as to the value of Legend’s shares in Paradise.³⁹ A number of valuations of the tenements were tendered in evidence, in which the value of the tenements ranged from \$3,200,000 to \$29,000,000. He stated that it may not be possible to determine, on balance, the likely value of the tenements.⁴⁰ He considered that the most reliable valuation was that set out in the Snowden report, however that report was prepared 12 months after the deeds were entered into. He said that, given the ‘technical nature’ of the technical value in the Snowden report, it did not appear appropriate.⁴¹

115 Separately, the associate judge considered whether the tenements constituted a

³⁷ Reasons [66]–[67].

³⁸ Reasons [86].

³⁹ Reasons [68].

⁴⁰ Reasons [69].

⁴¹ Reasons [68]. See [90] above.

realisable asset. In doing so, he considered a number of relevant factors including: Legend's business circumstances; the nature and size of the debts; the nature of the asset; whether it was in a realisable form; the timeframe required to realise the asset; whether realisation of the asset was open and contemplated in the circumstances; potential purchasers of the asset; and what actually happened to the asset.

116 Having weighed up the above factors, the associate judge concluded that the tenements should not be considered a realisable asset for the purposes of the assessment of insolvency under s 95A of the *Corporations Act*.⁴² This was said to be so for the following reasons:

- (a) On the evidence, the tenements would take three to six months to realise. Realisation within three months may be reasonable, however six months is beyond the temporal limit within which an asset can be considered realisable within a 'relatively short' time. The circumstances were tending towards IFFCO having to wait for Legend to pay them 'in due course', which is contrary to authority. To allow realisation after six months begins to undermine the cash flow test which forms the basis of s 95A.
- (b) As to the essential business asset principle, if Legend were to realise the tenements it would be selling its main asset which is necessary for the continuation of its business. Although this principle has been applied in the context of property development, which is in some ways similar to mining development projects, the present case was distinguishable from cases where the key asset was held to be realisable. The cases that the associate judge distinguished — which we discuss in detail below — were *Re Adnot Pty Ltd*,⁴³ *Re Newark Pty Ltd (in liq)*,⁴⁴ and *Jingellic Minerals NL v Beach Petroleum NL*.⁴⁵
- (c) No buyers were identified and the saleability of the tenements was uncertain.⁴⁶
- (d) Even if the tenements were realised, Paradise was wound up and Legend called on the

⁴² Reasons [123].

⁴³ (1982) 7 ACLR 212.

⁴⁴ [1993] 1 Qd R 409.

⁴⁵ (1991) 56 SASR 532.

⁴⁶ In an un-numbered paragraph on page 58 of his reasons, the associate judge stated that there was no history regarding previous attempts to sell the tenements and no evidence of potential purchasers.

loan of \$18,053,443 owed by Paradise, this would not be enough to pay the IFFCO debt.

- (e) The sale of the tenements did not appear to be genuinely considered. The bulk of the evidence pointed towards taking the tenements out of IFFCO's reach.

117 The associate judge held that even if the tenements were considered realisable prior to entering into the deeds, upon entry into the deeds viewing the tenements as realisable was commercially unrealistic.⁴⁷ He considered this to be so for the following reasons: in order to sell the tenements, the loan from Queensland Phosphate needed to be discharged or Queensland Phosphate otherwise needed to agree to the sale; at the time Legend appeared to have no other source of funds, making it unclear how it could have discharged the loan; it was unrealistic to suggest that Mr Feldman would have agreed to realise the value of the tenements to repay Queensland Phosphate, when his focus was on protecting the tenements from IFFCO; and Mr Feldman was developing the project with the intention of extracting it from Legend and investing through Queensland Phosphate, rather than to keep Legend afloat. The associate judge rejected Mr Feldman's suggestion that he could have spent 'a couple of months' developing the project and following that, Mr Gutnick may have been able to obtain funds elsewhere to pay out the bonds.⁴⁸

118 The associate judge considered the commercial realities of Legend's position. These may be summarised as follows:

- (a) Legend had been in difficult financial circumstances since at least 2012, prior to incurring the IFFCO debt.
- (b) The strategy of incorporating and publicly listing an Australian company — Paradise — had not progressed the development of the tenements. Paradise was consuming significant funds and required further substantial investment to reach the production stage.
- (c) Legend sold a significant asset, its interest in another company, in order to repay a

⁴⁷ Reasons [124], [127].

⁴⁸ Reasons [127]. Mr Feldman's evidence on this point was as follows: 'But if I would have spent a couple of months developing the project and if, brought in some other investors by then, it could very well be that [Mr Gutnick would] be able to get [funds] elsewhere'.

creditor after the proposed IPO in 2012 did not progress.

- (d) Paradise and Legend had little cash.
- (e) The aged creditors list suggested that perhaps as early as August 2015, Legend had particular difficulty paying its smaller debts as they fell due.
- (f) Legend and Paradise were not voluntarily wound up, even after the IFFCO debt became payable.
- (g) Once the IFFCO debt was announced to the market, securing financing or ongoing funding would have been difficult.
- (h) Legend sought to raise funds to defend enforcement of the IFFCO debt.
- (i) The underlying value of the tenements was not a realisable asset. The reasons for this finding are discussed in detail at [115]–[116] above.
- (j) Without realisation of the tenements, the IFFCO debt could not be paid at the time the deeds were entered into.⁴⁹

119 The associate judge distinguished the circumstances set out above to those in *International Cat Manufacturing Pty Ltd (in liq) v Roderick*,⁵⁰ — a case upon which the applicants had relied — in which reliable financial support was being provided to the company enabling it to cover its trade creditors until it was able to derive income from the sale of the boats it was building.⁵¹ The associate judge found that the funds from Queensland Bauxite and Queensland Phosphate appeared aimed, at least in part, at resisting the enforcement of the IFFCO debt. He said that the provision of financial support while a company attempts to eliminate enforcement of a debt is distinct from support to pay trade creditors until income is produced or an asset is realised.⁵²

120 The associate judge ultimately concluded that Legend was insolvent as at 25 November 2015 and by virtue of entering into the deeds:

Legend had an ‘endemic shortage of working capital’, compounded by a significant debt. When the Bond Deed and General Security Deed were entered into, Legend was not suffering from a ‘temporary lack of liquidity’. That is, realisation of the

⁴⁹ Reasons [71].

⁵⁰ [2013] QSC 91.

⁵¹ Reasons [72].

⁵² Reasons [72].

tenements would not have allowed Legend to weather a temporary period of illiquidity prior to becoming income producing or establishing substantial ongoing financial support, it would have led to the cessation of Legend's primary business purpose. Even if, prior to entry into the Bond Deed and the General Security Deed the tenements were realisable, upon entry into those documents it was not commercially realistic to suggest that Mr Feldman would have consented to sale of the tenements to repay the IFFCO debt.

...

For the reasons previously set out, I determine that Legend was insolvent on 25 November 2015. Further, if it were necessary I would also determine that Legend became insolvent by virtue of entry into the Bond Deed and the General Security Deed.

Without detracting from the consideration previously set out, I base that determination upon the following summary of conclusions namely:

- (i) The IFFCO arbitral award constituted a debt for the purposes of s 95A even though Croft J's judgment enforcing the same pursuant to s 8(2) of the *International Arbitration Act* was not pronounced until December 2015.
- (ii) Legend could not pay its debts as and when they fell due.
- (iii) Legend had no cash flow in November 2015.
- (iv) Although the [30 September 2015] Balance Sheet relied upon by Mr Gutnick and Mr Feldman as referred to in the Bond Deed and General Security Deed was unreliable in that it understated the assets, there was sufficient evidence to determine the liabilities of Legend elsewhere. To the extent that the assets were of value or of substantial value was irrelevant in that I have determined that the same were not realisable.
- (v) The assets of Legend being the shareholding in Paradise and the underlying value of the mining tenements held by Paradise were not a readily realisable asset. Accordingly, I have disregarded the value of the assets in consideration of whether there were funds available to Legend on 25 November 2015. Further, upon entry into the Bond Deed and the General Security Deed, the ability to realise the assets was even more hampered or improbable.
- (vi) If it were necessary, I would be entitled to draw a *Jones v Dunkel* inference as Mr Lee did not give evidence with respect to the question of solvency. On that note, neither did Mr Gutnick provide any evidence with respect to the question of solvency.⁵³

Grounds of appeal

121 Grounds 6 and 8 seek to challenge the associate judge's finding that Legend and Paradise⁵⁴ were insolvent as at 25 November 2015. Those grounds are in the following terms:

⁵³ Reasons [73], [164]–[165].

⁵⁴ The finding regarding Paradise is dealt with at [155] below.

6 The learned trial Associate Justice failed to take into account the principles enunciated in *International Cat Manufacturing Pty Ltd (in Liq) v Rodrick; Re Swan Services Pty Ltd (in Liq); Re Ashington Bayswater Pty Ltd (in Liq)* and *The Bell Group Ltd (in Liq) v Westpac Banking Corp (No 9)* by not properly taking into account the commercial realities of the business of [Paradise] and Legend and the abilities of those companies to convert assets to cash within a reasonable period of time.

...

8 The learned trial Associate Justice failed to accept the valuation evidence proffered by the Respondent[s] (at trial), namely the expert report of John Snowden (Snowden Valuation) which valued [Paradise's] mining tenements in the range of \$17–25 million and furthermore wrongly concluded and failed to give reasons why it was not appropriate for the Applicants to accept the upper figure of the technical range of the Snowden Valuation (\$29 million).

Parties' submissions

122 The applicants submitted that, contrary to the associate judge's decision, the tenements were a realisable asset. They argued that the associate judge had no regard to the commercial realities of the mining industry, uncontradicted evidence of which was given by Mr Feldman. According to the applicants, it is a relevant commercial reality that a tenement has the ability to generate income when it reaches the development stage and becomes a sustainable project. The applicants contended that having regard to the commercial realities, the associate judge wrongly concluded that the period in which the tenements could be realised — being three to six months — was not 'relatively short' or 'reasonable'. They also contended that, ultimately what is a reasonable period is a matter of impression in individual cases. In the present case, so it was said, a period of three to six months was a reasonable period and the associate judge erred in finding otherwise.

123 In their oral submissions, the applicants conceded that the IFFCO debt was due and payable and that it had the effect of rendering Legend insolvent unless the tenements were treated as assets that were realisable within a reasonable period.

124 In relation to the essential business asset principle, the applicants submitted that it is implicit from *Jingellic*⁵⁵ that this principle is confined to the balance sheet test of solvency and has no application to the cash flow test of solvency which the associate judge applied.

⁵⁵ (1991) 56 SASR 532.

The applicants argued that this principle is not relevant in circumstances, such as in the present case, where the assets of the company exceed its liabilities and that the associate judge erred in this regard.

125 The applicants further submitted that the associate judge did not give proper consideration to Legend’s ability to obtain finance through the three methods of capital raising about which Mr Feldman gave evidence.⁵⁶

126 According to the applicants, the associate judge erred in not accepting the Snowden valuation, which attributed significant value to the tenements. They argued that the associate judge failed to provide reasons for rejecting the applicants’ reliance on the ‘technical range’ in the Snowden valuation, which had a preferred figure of \$29,500,000, and that there was no evidence to support that rejection.

127 In their written case, the respondents submitted that the associate judge gave proper consideration to the relevant principles and evidence regarding whether the tenements were a realisable asset, including the evidence of Mr Feldman. As to the associate judge’s alleged failure to take into account the commercial realities of the mining industry, they argued that the relevant commercial realities (other than the fact that the tenements only generate money when in production) have not been identified by the applicants nor have the applicants explained how having regard to them would reveal error in the associate judge’s approach. They contended that the associate judge did have regard to the nature of the tenements and the likely timeframe for realisation, along with many other factors. According to the respondents, as very substantial funding was required to bring the tenements into production, income producing capacity was in no way imminent and development potential is not tantamount to solvency.

128 The respondents submitted that the applicants wrongly asserted that the associate judge rejected the Snowden valuation. They argued that the associate judge simply noted its limitations, as well as the existence of other evidence concerning the potential value of the tenements. Regarding the associate judge’s statement that the technical value ‘does not

⁵⁶ See [83] above.

appear appropriate', the respondents contended that at trial the applicants invited the associate judge to prefer the technical value over the fair market value and this was rejected. They further argued that in the light of the associate judge's findings that the tenements were not capable of realisation within a reasonable period, their value was irrelevant and therefore ground 8 cannot affect the outcome of the current application.

129 In their oral submissions, the respondents contended that it was open to the associate judge to form the view, as a matter of impression, that a period of three to six months was not a reasonable period within which the assets could be realised. They relied on the observations of the High Court in *Fox v Percy*⁵⁷ as to the impression of a case that a trial judge is able to ascertain through hearing from witnesses, of which an appellate court does not have the benefit.

130 The respondents noted that the principles relating to realisable assets focus on the period within which assets can be converted to cash to pay debts rather than the period within which they can be sold. They emphasised that, although Mr Shepard gave evidence that the tenements could be sold within three to six months, there was no evidence as to when payment would be received.

131 The respondents also submitted that the principles relating to realisable assets are not confined to a consideration of the period within which assets are capable of being sold and converted to cash, but also take into account other matters such as whether the relevant company contemplated a sale and whether there were any prospective purchasers. They contended that, in the present case, there was no evidence that Legend was prepared to sell the tenements or that there was any interest from any prospective purchasers. According to the respondents, it was also relevant that the applicants did not challenge the associate judge's finding that there had been no intention on the part of Legend to sell the assets.

132 The respondents disagreed with the applicants' contention that in applying the cash flow test of insolvency, it was erroneous for the associate judge to rely on the essential business asset principle. They observed that the cases to which the applicants referred,

⁵⁷ (2003) 214 CLR 118, 125–6 [23].

including *Jingellic*, applied the cash flow test of insolvency. They also submitted that, in any event, the associate judge found that the tenements were not realisable on a number of bases, not only on the ground that they were core assets.

Decision

133 In our opinion, the associate judge was correct in concluding that the tenements were not realisable assets that could be realised within a reasonable time to enable Legend to pay its debts as and when they fell due.

134 It will be recalled from [81] and [89] above that Mr Shepard expressed the opinion that the tenements could be sold within three to six months whereas Mr Feldman stated that a sale ‘would take time’. However, for the purpose of determining whether a company is able to pay its debts as and when they fall due by realising assets, the relevant period is when funds from the sale of an asset become available to meet the debts, not the period within which the asset might be sold. In the case of real estate and other high value assets, there may be a significant delay between the execution of a contract of sale and the receipt of the proceeds of sale. In the present case, there was no evidence before the associate judge which would have enabled him to determine that a sale of the tenements would result in Legend receiving the proceeds of sale within a reasonable period.

135 In any event, even if the tenements could be realised within a reasonable period, the associate judge was right to decide that, as they were necessary for the continuation of Legend’s business, they did not constitute realisable assets for the purpose of determining Legend’s solvency.

136 The essential business asset principle is clearly established by the cases to which the associate judge referred, namely *Rees v Bank of New South Wales*,⁵⁸ *Re Timbatec Pty Ltd*,⁵⁹ and *Switz Pty Ltd v Glowbind Pty Ltd*.⁶⁰

⁵⁸ (1964) 111 CLR 210.

⁵⁹ (1974) 24 FLR 30.

⁶⁰ (2000) 18 ACLC 343.

137 In *Rees*, the liquidator of a retail company trading in foodstuffs sought a declaration that certain payments made to the respondent bank were voidable preferential payments. The bank argued that it did not have reason to believe that the company was insolvent because the value of its trading stock exceeded its debts. Barwick CJ stated that the extent to which realisable assets ‘will prevent a conclusion of insolvency will depend on a number of surrounding circumstances, one of which must be the nature of the assets and ... the nature of [the] business’.⁶¹ He held that in the company’s circumstances, the stock was not within the category of realisable assets.⁶² He stated:

Here the company’s business was the sale of foodstuffs through a number of retail outlets. The asset whose value was said to negative a conclusion of insolvency, or at any rate to obviate the suspicion of it, was its trading stock of foodstuffs. In the ordinary course of the company’s business this asset was not available to be realised except by means of retail sales through its various shops. ... [N]o proposal to realise surplus stock by some bulk disposal for cash was in contemplation. The bank was not contemplating that the company intended to liquidate its business but to carry it on. Indeed the bank with a degree of sympathy was assisting the company to carry on the business. The stock in trade was clearly not an asset which was available to be realised to meet current debts except in the ordinary course of the company’s business, a course which had proved itself inadequate.⁶³

138 *Timbatec* concerned alleged preferential payments made by a timber company and the solvency of that company at the time the payments were made. It was argued that had it been necessary, the company could have remained solvent by obtaining additional cash resources through realising plant or stock. On the issue of realising the company’s plant or stock Bowen CJ in *Eq* stated:

One of the difficulties of realising assets is that it may involve the company in terminating that particular part of its business and may even, in some circumstances, involve it in breach of contract. The same applies to the sale of stock, which is on hand to be devoted to the performance of works in progress. It may be possible to realise cash from selling it, but this may involve throwing away the contracts or works in progress, and in some circumstances may involve liability for damages for breach of contract. The same applies to office furniture and equipment. This may be sold to realise cash. But it is difficult to visualise a continuing business without tables and chairs on which to conduct its administrative side. In other words, the test as regards ready realisation of cash resources has regard, as I understand it, to the debtor who is conducting a business, and is applying his cash resources, and selling or mortgaging assets readily available to inflate these resources, while continuing his business. I do not take it to apply to a situation where the business is brought to a full stop, and either sale or mortgage can produce cash resources if it breaks up its

⁶¹ *Rees* (1964) 111 CLR 210, 218.

⁶² *Rees* (1964) 111 CLR 210, 219.

⁶³ *Rees* (1964) 111 CLR 210, 218.

business.⁶⁴

139 Ultimately, Bowen CJ in Eq held that the company was not in a position of temporary liquidity that could be overcome by realising plant or stock, while it continued its business.⁶⁵ It therefore followed that the company was insolvent at the time that most of the relevant payments were made.

140 In *Switz*, a property development company sought to establish that it was not insolvent on the basis that its current assets, if realised, exceeded its liabilities. Its principal asset was a property it was developing. Hodgson CJ in Eq stated that ‘[a]lthough s 95A does set a cash flow test, it is conceivable that solvency might be inferred from such a preponderance of current assets over current liabilities’.⁶⁶ In relation to the realisation of the property, he followed *Rees* and *Timbatec* and held that the property could not be considered realisable as ‘the immediate sale of the property would be akin to the realisation of stock-in-trade otherwise than in the ordinary course of business’.⁶⁷

141 In addition, there was no evidence before the Court in *Switz* as to when the property could be sold and when the proceeds of sale could be expected. Hodgson CJ in Eq found that the sale of the property was not in fact intended, rather it was contemplated that it would be developed and units from the completed development sold, which would take much longer than three months.⁶⁸ Accordingly, it was held that there was not a ‘mere temporary lack of liquidity’⁶⁹ and that the company was insolvent.

142 We reject the applicants’ submission that *Jingellic* supports the proposition that, under the cash flow test of solvency — as distinct from the balance sheet test — an asset which is necessary for the continuation of a company’s business may constitute a realisable asset.

143 In *Jingellic*, a dispute arose out of an agreement between the respondent, Beach

⁶⁴ *Timbatec* (1974) 24 FLR 30, 36–7.

⁶⁵ *Timbatec* (1974) 24 FLR 30, 37.

⁶⁶ *Switz* (2000) 18 ACLC 343, 347 [37].

⁶⁷ *Switz* (2000) 18 ACLC 343, 348 [39].

⁶⁸ *Switz* (2000) 18 ACLC 343, 348 [39].

⁶⁹ *Switz* (2000) 18 ACLC 343, 348 [40].

Petroleum NL ('Beach'), and other companies including the appellant, Jingellic Minerals NL ('Jingellic'), to finance the purchase of an interest in a US oil field by Beach. Several months after the agreement was entered into, Jingellic gave notice of demand under the *Corporations Act* claiming payment of \$5,398,166.60 from Beach under the agreement. Beach and Jingellic subsequently entered into a heads of agreement, under which Beach made some repayments to Jingellic. Beach later gave notice to Jingellic that it was unable to make a payment that was about to fall due. At that stage the debt owing to Jingellic was \$5,078,017.05. Jingellic then issued a summons to wind up Beach. The trial judge held that Beach was insolvent.

144 On appeal, Matheson J (with whom Mohr and Mullighan JJ agreed) found that Beach was not insolvent. Relevantly, he concluded that Beach had three primary assets that were readily saleable and their realisation could be used to pay its debts if need be.⁷⁰ The assets consisted of interests in an oil exploration and production area, an oil field and an exploration permit. These assets were valued at between \$6,000,000 and \$7,000,000, approximately \$15,000,000 and \$1,500,000, respectively.

145 Contrary to the applicants' submission, there was no indication, implicit or otherwise, from the Court in *Jingellic* that the essential business asset principle is confined to the balance sheet test and has no application to the cash flow test. In any event, in that case Beach owned multiple assets and could have paid its debts by selling one or more of them while retaining the balance for its ongoing business. In these circumstances, it is not surprising that there was no discussion in that case about whether any of the assets were required for the continuation of Beach's business or whether they were not realisable on that basis.

146 The other cases referred to which have held that an asset is realisable notwithstanding that it is a core asset of a company's business, do not assist the applicants. Those cases are *Adnot*⁷¹ and *Newark*.⁷²

⁷⁰ *Jingellic* (1991) 56 SASR 532, 550–1.

⁷¹ (1982) 7 ACLR 212.

⁷² [1993] 1 Qd R 409.

147 In *Adnot* a builder brought a creditor’s petition to wind up a company and appoint a provisional liquidator on the grounds of insolvency on the basis of moneys owing under a building contract. The company existed solely as a vehicle to implement a venture involving the construction and sale of a shopping centre. The only significant asset of the company was the shopping centre. It had been constructed and was occupied. Negotiations for the sale of the shopping centre between the company and a prospective purchaser were on foot.⁷³

148 Kearney J stated that the circumstances of the company were unusual as it was ‘not trading in the sense of turning over stock and thereby generating income’.⁷⁴ He relevantly held that in the light of the likely amount that could be realised by the sale of the shopping centre, it ought not be said that the company was insolvent.⁷⁵ On the independent valuation evidence before the Court, the property had significant value which was more than sufficient to meet the company’s liabilities. This was in addition to evidence that any interim funding shortfall could be met by providing security for further advances by way of mortgage or through group company loans.

149 In our opinion, the associate judge correctly distinguished the facts of the present case from those in *Adnot*.⁷⁶ The circumstances in *Adnot* were unusual as the company was established for the purpose of developing and selling its key asset, the shopping centre, and that purpose was close to being achieved. In the present case, Legend held the tenements through Paradise for the purpose of generating income through development — which was far from imminent and required substantial capital — rather than sale.

150 *Newark* concerned a liquidator’s appeal relating to an application for recovery of certain payments made by a tile company as void unfair preferences. The only issue on appeal was whether the company was insolvent at the time that the relevant payments were made. The company had made a decision to sell a major asset, a building, and to utilise the proceeds of sale to enhance its trading capital. There was evidence that the value of the

⁷³ *Adnot* (1982) 7 ACLR 212, 214.

⁷⁴ *Adnot* (1982) 7 ACLR 212, 216.

⁷⁵ *Adnot* (1982) 7 ACLR 212, 217.

⁷⁶ Reasons [107], [123].

building exceeded the company's debts and that two prospective buyers were interested in purchasing it.

151 Thomas J (with whom Derrington and Moynihan JJ agreed) held that in the circumstances the company was close to insolvency but that the realisation of the building — which it was in the process of selling — would restore a proper balance to its trading liquidity.⁷⁷ He said that the prospects of successful realisation of the building 'were sufficiently good and immediate to allow the view to be taken that it was at the material time realisable within a relatively short time' and that the realisation of the building 'was capable of sustaining the company's trading situation'.⁷⁸

152 We agree with the associate judge that the present circumstances are distinguishable from those in *Newark*. In that case the sale of the building was capable of discharging the company's debts within a relatively short period which would enable it to continue its tiling business. In contrast, the tenements in the present case could not be sold within a relatively short period and their sale would bring to an end Legend's business.

153 It follows that ground 6 is not made out. The associate judge considered all the cases to which that ground refers and properly applied the principles set out in them. He also expressly took into account the commercial realities of Legend's position. He correctly held that Legend was insolvent as at 25 November 2015.

154 Ground 8 is also not made out. Although the associate judge raised issues about the weight to be given to the Snowden valuation in the light of the fact that it was prepared a year after the execution of the deeds, he did not in terms reject any of Snowden's valuation figures. Ultimately, he concluded that it was not necessary to determine the value of the tenements, because irrespective of their value, they were not a realisable asset. As we have upheld this conclusion, even if ground 8 had been made out, it would not entitle the applicants to any relief.

155 Our conclusion that the associate judge correctly found that Legend was insolvent at

⁷⁷ *Newark* [1993] 1 Qd R 409, 416.

⁷⁸ *Newark* [1993] 1 Qd R 409, 416.

the time the deeds were executed also applies to Paradise. That is because neither company was able to pay its debts from its cash resources and their common underlying asset — the tenements — was not a realisable asset.

156 Although the applicants did not accept the correctness of the associate judge's secondary conclusion that Legend's entry into the deeds resulted in its insolvency, they did not make detailed submissions on this issue. In the light of our conclusion that Legend was insolvent when it executed the deeds, it is not necessary for us to separately consider that issue.

Issue 2: Void transactions

Legislation

157 Section 588FB of the *Corporations Act* outlines when a transaction entered into by a company will be considered uncommercial. It relevantly provides as follows:

588FB Uncommercial transactions

- (1) A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
 - (a) the benefits (if any) to the company of entering into the transaction; and
 - (b) the detriment to the company of entering into the transaction; and
 - (c) the respective benefits to other parties to the transaction of entering into it; and
 - (d) any other relevant matter.

158 Section 588FC of the *Corporations Act* stipulates when a transaction will be considered to be an insolvent transaction. It relevantly provides as follows:

588FC Insolvent transactions

A transaction of a company is an insolvent transaction of the company if, and only if, it is an ... uncommercial transaction of the company, and:

- (a) any of the following happens at a time when the company is insolvent:

- (i) the transaction is entered into; or
 - (ii) an act is done, or an omission is made, for the purpose of giving effect to the transaction; or
- (b) the company becomes insolvent because of, or because of matters including:
- (i) entering into the transaction; or
 - (ii) a person doing an act, or making an omission, for the purpose of giving effect to the transaction.

159 Section 588FE of the *Corporations Act* outlines a number of circumstances when a transaction will be considered to be voidable. It relevantly provides as follows:

588FE Voidable transactions

- (1) If a company is being wound up:
- (a) a transaction of the company may be voidable because of any one or more of subsections (2) to (6) if the transaction was entered into on or after 23 June 1993; and
- ...
- (2) The transaction is voidable if:
- (a) it is an insolvent transaction of the company; and
 - (b) it was entered into, or an act was done for the purpose of giving effect to it:
 - (i) during the 6 months ending on the relation-back day; or
 - (ii) after that day but on or before the day when the winding up began.
- ...
- (3) The transaction is voidable if:
- (a) it is an insolvent transaction, and also an uncommercial transaction, of the company; and
 - (b) it was entered into, or an act was done for the purpose of giving effect to it, during the 2 years ending on the relation-back day.
- ...
- (5) The transaction is voidable if:
- (a) it is an insolvent transaction of the company; and
 - (b) the company became a party to the transaction for the

purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company; and

- (c) the transaction was entered into, or an act done was for the purpose of giving effect to the transaction, during the 10 years ending on the relation-back day.

...

160 Under s 588FF the court has the power to make orders about voidable transactions, including as follows:

588FF Courts may make orders about voidable transactions

- (1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:

...

- (e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;

...

- (g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;

- (h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;

- (i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time;

...

161 'Transaction' is broadly defined in s 9 of the *Corporations Act* to include, without limitation: a conveyance, transfer or other disposition of property; the granting of a security interest; the giving of a guarantee or making a payment; incurring an obligation; and accepting a loan. The definition also captures a transaction that has been completed, given effect to or terminated.

162 ‘Relation-back day’ is the date from which a transaction may be considered void. The relevant relation-back day is determined in accordance with s 91 of the *Corporations Act*. Generally, the relation-back day will correspond with the date that the application for winding up was filed.

163 Section 588FG(2) of the *Corporations Act* precludes the making of an order under s 588FF if certain criteria are met. This is known as the ‘good faith defence’. We will not set out s 588FG(2) or the principles relating to it, as the applicants abandoned their challenge to the associate judge’s finding that the good faith defence was not available to Queensland Phosphate.

Principles

164 The principles applicable to determining whether a transaction is uncommercial according to the test in s 588FB of the *Corporations Act* may be summarised as follows:

- (a) Under s 588FB, an objective standard is to be applied.⁷⁹
- (b) The four criteria set out in s 588FB(1) are to be considered by reference to the company’s circumstances, which must include the state of knowledge of those who were the directing mind of the company, such as its directors.⁸⁰
- (c) For a transaction to be uncommercial it must result in ‘the recipient receiving a gift or obtaining a bargain of such magnitude that it [cannot] be explained by normal commercial practice’ or where ‘the consideration ... lacks a “commercial quality”’.⁸¹
- (d) Courts have adopted a purposive approach in interpreting s 588FB by having regard to the objects and purpose of the provision. The purpose of s 588FB is to prevent a depletion of the assets of a company which is being wound up by voiding transactions at an undervalue entered into within a specified time period prior to the

⁷⁹ *Capital Finance Australia Ltd v Tolcher* (2007) 164 FCR 83, 109 [129] (*‘Capital Finance’*) citing *Lewis* (2005) 219 ALR 555, 589 [156] and *Tosich Construction Pty Ltd (in liq) v Tosich* (1997) 78 FCR 363, 366–7 (*‘Tosich’*).

⁸⁰ *Capital Finance* (2007) 164 FCR 83, 109 [129] citing *Tosich* (1997) 78 FCR 363, 367.

⁸¹ *Capital Finance* (2007) 164 FCR 83, 109 [129] citing *Peter Pan Management Pty Ltd (in liq) v Capital Finance Corporation (Australia) Pty Ltd* (2001) 19 ACLC 1392, 1400–1 [43], *Lewis v Cook* (2000) 18 ACLC 490, 496–7 [45]–[46], *Demondrille Nominees Pty Ltd v Shirlaw* (1997) 25 ACSR 535, 548 (*‘Demondrille’*) and Explanatory Memorandum, *Corporate Law Reform Bill 1992* (Cth) [1044].

commencement of the winding up.⁸² Although s 588FB has been said to focus on transactions entered into at an ‘undervalue’, uncommercial transactions are not limited to such transactions.⁸³

- (e) It must positively appear that a reasonable person in the position of the company would not have entered into the transaction.⁸⁴
- (f) It has been recognised that the court must view the transaction prospectively ‘according to the circumstances at the time, including proper perception of the future, but without the influence of hindsight’.⁸⁵
- (g) Consideration of ‘detriment’ in s 588FB is not limited to monetary detriment, but encapsulates the broader concept of commercial detriment.⁸⁶
- (h) The court will have regard to the totality of the business relationship of the parties.⁸⁷ The court will also consider whether there is a relationship between the parties to the transaction that may require greater scrutiny.⁸⁸ This may include consideration of any personal relationship between the individuals involved in the transaction.⁸⁹

165 By virtue of s 588FC of the *Corporations Act*, where a transaction is found to be an uncommercial transaction, it may also be considered to be an insolvent transaction where:

- (a) at a time when the company is insolvent, the transaction is entered into or an act is done or an omission is made for the purpose of giving effect to the transaction; or
- (b) the company becomes insolvent because of entering into the transaction or because of a person doing an act or omission for the purpose of giving effect to the transaction.

166 As set out at [159]–[160] above, uncommercial and insolvent transactions may be

⁸² *Demondrille* (1997) 25 ACSR 535, 548; *Shot One Pty Ltd (in liq) v Day* [2017] VSC 741 [215] (‘*Shot One*’).

⁸³ *Lewis* (2005) 219 ALR 555, 585 [136]; *Campbell Street Theatre Pty Ltd (rec and mgr apptd) (in liq) v Commercial Mortgage Trade Pty Ltd* [2012] NSWSC 669 [15]–[16]; *640 Elizabeth Street Pty Ltd (in liq) v Maxcon Pty Ltd* [2015] VSC 22 [35].

⁸⁴ *Lewis* (2005) 219 ALR 555, 589 [157] quoted in *Shot One* [2017] VSC 741 [215].

⁸⁵ *Lewis* (2005) 219 ALR 555, 590 [159]; *Shot One* [2017] VSC 741 [215].

⁸⁶ *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47, 63 [115]–[117]; *Shot One* [2017] VSC 741 [221].

⁸⁷ *Cussen v Sultan* (2009) 74 ACSR 496, 503 [23].

⁸⁸ *Shot One* [2017] VSC 741 [219].

⁸⁹ *McDonald v Hanselmann* (1998) 144 FLR 463, 469–70; *Shot One* [2017] VSC 741 [219]–[220].

voidable under s 588FE of the *Corporations Act*, enabling the court to make orders in relation to those transactions under s 588FF, including an order declaring void an agreement forming part of the transaction.

Associate judge's findings

167 The associate judge gave consideration to Legend's circumstances as at the date of entry into the deeds on 25 November 2015. Those circumstances included — as he had already found — that Legend was insolvent at the time of entry into the deeds, or in any event, that it became insolvent by reason of entry into the deeds. In addition, IFFCO had applied to the Supreme Court for orders to enforce the award. The associate judge stated that, as no attempt had been made to challenge the award or to set aside the registration of the award in Singapore, even if IFFCO had been unsuccessful in its application to enforce the award in Victoria, a substantial debt would still have been due and payable.⁹⁰

168 The associate judge set out the circumstances and correspondence leading up to the execution of the deeds, including discussion of and amendments to their terms. In addition to referring to some of the correspondence and circumstances set out at [40]–[58] above, the associate judge noted that the final versions of the deeds were altogether different to the original drafts. He stated that the following differences between the original drafts of the bond deed (which are summarised at [41]–[42] above) and the final version (which is summarised at [60] above) were of note:

- (a) The inclusion of the 50 per cent default interest rate.
- (b) The inclusion of the 50 per cent event of default fee.
- (c) The principal sum was increased from \$1,000,000 to \$2,500,000.
- (d) The redemption price upon an event of default was to be:
 - (i) the face value of the bond (or part of that value to the extent that the bond has not been converted in full); plus

⁹⁰ Reasons [217].

- (ii) the accrued and unpaid interest from time to time payable by Legend in respect to the bond under the deed; less
 - (iii) any earlier repayment applied against the bond.
- (e) At completion, Legend must issue to Queensland Phosphate 200 bonds on the terms and conditions of the deed, and then a further 100 bonds for each \$100,000 advanced by Queensland Phosphate to Legend as per the timetable set out at [60(c)] above, up to a maximum of 2,500 bonds.
- (f) Under cl 3.3, payment of any tranche of funds was subject to no event of default occurring.
- (g) The final judgment event of default set out at [12(c)] above was added.
- (h) Under cl 6, Legend undertook to Queensland Phosphate that the funds would be applied to Legend's general working capital purposes.
- (i) The warranty of solvency set out at [12(d)] above was added.
- (j) Undertakings were added prohibiting Legend from dealing with its assets or procuring further borrowings without the consent of Queensland Phosphate.

169 The associate judge stated that the 'genesis of the [deeds] and the motivation for inclusion of the draconian terms can ... be distilled from contemporaneous correspondence'.⁹¹

170 The associate judge observed that the applicants did not call Mr Gutnick to give evidence in opposition to the respondents' contention that the deeds were void or to challenge their evidence, which he would have expected given that Mr Gutnick was the directing mind of Legend.⁹²

171 The associate judge ultimately determined that he was satisfied on an application of the *Briginshaw v Briginshaw*⁹³ test, that the deeds were entered into with an intention to defeat, delay or hinder creditors, in particular IFFCO.⁹⁴

172 The associate judge gave consideration to each of the factors set out in s 588FB(1) of

⁹¹ Reasons [245].

⁹² Reasons [261]–[262], [265].

⁹³ (1938) 60 CLR 336 ('*Briginshaw*').

⁹⁴ Reasons [218], [262].

the *Corporations Act*.

173 Regarding the benefit that Legend stood to gain from entering into the deeds, the associate judge considered ‘all the prevailing circumstances ... “from the point of view of the company”’.⁹⁵ He said that the primary purpose of the \$400,000 advance was to meet the costs of resisting the registration of the award in Victoria. He noted that there was no proceeding instituted to seek to set aside the award in Singapore and without doing so, Legend was at all relevant times insolvent. He stated that accordingly, Legend’s unsecured creditors were ignored.

174 Further, he found that the primary object of resisting registration of the award in Victoria was to delay the consequences of the registration.⁹⁶ Such delay did not have regard to unsecured creditors, did not permit appropriate funding to be sourced to develop the tenements in a timely manner and could not result in any tangible gain. He considered that, on the evidence, the capital costs to develop the tenements were far greater than the \$400,000 advance by Queensland Phosphate and the maximum amount payable under the deeds. It was ultimately concluded that there was no tangible or commercial benefit to Legend in entering into the deeds and securing the \$400,000 advance from Queensland Phosphate.⁹⁷

175 The associate judge held that in the circumstances, by entering into the deeds, Legend had suffered a detriment. He said that the event of default clause inserted into the bond deed was ‘the telling factor’ as it ‘went beyond the usual boilerplate provisions to include “a final judgment ... for the payment [of money] aggregating in excess of [A]\$1,000,000”’.⁹⁸ In circumstances where the award was not being challenged, he said it was inevitable to conclude that the event of default clause made the triggering of the security ‘almost inevitable’.⁹⁹ He went on to state that the terms of the deeds meant that ‘Legend’s assets ... were placed beyond the reach of the unsecured creditors with Legend being left with no

⁹⁵ Reasons [266]–[267] (citations omitted).

⁹⁶ Reasons [268].

⁹⁷ Reasons [269].

⁹⁸ Reasons [272].

⁹⁹ Reasons [274].

ability whatsoever to remedy any default by being able to raise funds elsewhere'.¹⁰⁰

176 The associate judge rejected the applicants' contention that the test for the purposes of s 588FB of the *Corporations Act* is whether secured creditors were worse off. Rather, he stated that s 588FB requires the court to determine 'whether a "reasonable person" in Legend's circumstances would have entered into the transaction having regard to the matters set out in ... s 588FB(1)'.¹⁰¹ He concluded that 'the putting beyond reach of an asset of the value of perhaps, \$20 million in return for an advance of \$400,000 was not a transaction which [it] could be expected that a reasonable person in Legend's circumstances would have entered into'.¹⁰²

177 Conversely, the associate judge found that Queensland Phosphate, the Feldman family and Mr Gutnick, stood to benefit from entering into the deeds. The following benefits were identified:

- (a) In return for the advance of \$200,000, Queensland Phosphate gained control of Legend and Paradise's assets by appointing Mr Palmer as receiver over Legend's shares in Paradise and then instigating him, or at least concurring with him, to sell those shares to Queensland Phosphate for a nominal amount, subject to adjustment. The associate judge commented that he had 'no confidence that the resulting adjustment would have been appropriate'.¹⁰³
- (b) Queensland Phosphate and the Feldmans obtained the benefit under the bond deed and the Zalg shareholders deed of being able to exercise joint control of the Legend and Paradise boards.¹⁰⁴
- (c) The event of default converted the advance of \$400,000 into a liability of Legend of approximately \$1,000,000 in less than six months.¹⁰⁵
- (d) Under the Zalg shareholders deed, Zalg obtained the benefit of the option to take up

¹⁰⁰ Reasons [274].

¹⁰¹ Reasons [277].

¹⁰² Reasons [276]. Cf [229] below in relation to the phrase 'beyond reach'.

¹⁰³ Reasons [281].

¹⁰⁴ Reasons [282].

¹⁰⁵ Reasons [283].

half of the notes, or shares if the notes had already been converted, issued to Queensland Phosphate. This translated to a purchase of 26 per cent of Legend's shares for \$1,250,000 and in effect 'warehoused' those shares for the benefit of Zalg.¹⁰⁶

178 Other matters that the associate judge considered relevant were the timing of the implementation of the transactions and the relationship between the parties. He stated that the timing of the transactions relative to the hearing of the IFFCO award registration proceeding, the failure to contemplate an alternative source of funding and Mr Feldman's acquiescence to Zalg being given the option to take up the notes or purchase shares, indicated that the transaction was not an arm's length transaction that a reasonable person would have entered into.¹⁰⁷

179 Having regard to the factors in s 588FG, as set out above, the associate judge held that a reasonable person in Legend's position would not have entered into the deeds for the following reasons:

- (a) The detriment to Legend disproportionately outweighed any benefit it might have attained. In essence, even disregarding all other circumstances, the transaction led to Legend effectively providing millions of dollars of assets (of whatever value that could be ascribed or attributed) for the minor consideration of \$400,000;
- (b) The transaction could not be considered an 'arm's length' transaction in the normal sense. Putting aside the familial relationships, the transactions were designed, with the addition of the shareholder's agreement, for Mr Gutnick to obtain or retain a benefit through Zalg without accounting to Legend's creditors;
- (c) The transaction included default provisions which might be considered a penalty;
- (d) The transaction was designed to precipitate an almost instant default;
- (e) In the Event of Default, Legend was commercially incapable of remedying the same even though a relatively minor ... advance had been made to it;
- (f) Legend negotiated the terms of the transaction in circumstances where it had been dormant for years, the arbitral award had been made in early 2015 and seemingly, the only new factor was the filing of the Australian enforcement proceeding. It is inescapable that the only purpose for entering into the transaction was to defeat creditors and, in particular, IFFCO and Kisan;

¹⁰⁶ Reasons [284]. In para 251 of his reasons, the associate judge stated that, although he need not make any determination that the assets in Legend were being 'warehoused' for Mr Gutnick, that possibility could not be discounted.

¹⁰⁷ Reasons [286].

- (g) There was a conscious determination to change the use to which the funds were to be put to disguise the purpose of the advance; and
- (h) There was a conscious determination to include a warranty of solvency in circumstances where the Chief Financial Officer (Mr Lee) and Mr Gutnick initially did not support such a warranty.¹⁰⁸

180 For the reasons set out above, the associate judge held that the deeds were void as uncommercial, insolvent and voidable transactions.

181 As we have already stated at [163] above, the applicants have abandoned their challenge to the associate judge's finding that the good faith defence was not available to Queensland Phosphate. Accordingly, we will not summarise the associate judge's reasons for that finding.

182 Finally, the associate judge decided that the \$1 share sale agreement, which Mr Palmer caused Legend to enter into with Queensland Phosphate, was void and unenforceable and that the appointment of Mr Palmer as receiver of Legend's shares in Paradise and as receiver and manager of Paradise was invalid. As these findings are not the subject of any ground of appeal, we will not summarise the associate judge's reasons for them.

Grounds of appeal

183 Grounds 1, 3, 4 and 9 allege that the associate judge erred in finding that the deeds should be declared void as uncommercial, insolvent and voidable transactions. Those grounds are in the following terms:

1 The learned trial Associate Justice on insufficient evidence concluded against the weight of the evidence that the entry into the Bond Deed and the General Security Deed were not reasonable transactions that a reasonable person would have entered into.

...

3 The learned trial Associate Justice wrongly concluded that Mr Gutnick stood to benefit at the expense of creditors via a shareholders deed executed between himself, Mordechai Gutnick, Zalg ..., [Queensland Phosphate], [Mr] Feldman and [Ms] Feldman in upholding the Bond Deed and General Security Deed.

¹⁰⁸ Reasons [287].

4 The learned trial Associate Justice concluded on insufficient or lack of evidence that the Bond Deed and the General Security Deed were entered into with an intention to defeat, delay or hinder creditors in applying the *Briginshaw* test by failing to call Mr Gutnick and in doing so was against the weight of the evidence.

...

9 The learned trial Associate Justice on insufficient or no evidence concluded that Mr Gutnick and Mr Feldman acted in a common enterprise to protect the assets from enforcement by IFFCO and as such was against the weight of the evidence.

Parties' submissions

184 The applicants submitted that on the evidence before him, the associate judge ought to have found that entry into the deeds did not constitute an uncommercial transaction within the meaning of s 588FB of the *Corporations Act*.

185 The applicants argued that the objective evidence relevant to whether a reasonable person in Legend's circumstances would have entered into the deeds established the following:

- (a) The deeds were commercial documents. Mr Shepard conceded that the bond deed was 'vanilla' and 'common or garden' and there was no evidence adduced to contradict this. No independent expert evidence was led by the respondents before the associate judge as to whether the transaction was uncommercial. The associate judge failed to recognise that the security extended to what would be in essence a facility worth \$2,500,000, not \$400,000. The prohibition on further borrowing did not suggest that it was designed to restrict Legend from obtaining finance, rather it permitted Queensland Phosphate a first right or option to loan further funds. It was the intention of Legend to source further funding for its benefit.
- (b) There was nothing uncommercial about the right conferred on Queensland Phosphate to appoint a receiver over Legend's shares in Paradise upon default by Legend. The receiver sold Legend's shares in Paradise to Queensland Phosphate for fair market value because the sale price of \$1 was subject to an independent valuation adjustment, and the sale did not extinguish Paradise's liability of \$18,053,443 to Legend. Further, a valuation of the tenements that was lower than the \$18,053,443 owed by Paradise to

- Legend would not be detrimental to creditors, because Paradise would still be indebted to Legend. However, a sale of the tenements at a value less than that amount would be to the detriment of Legend's creditors, because the debt to Legend would not be satisfied by that amount.
- (c) Mr Gutnick did not want to go elsewhere for funding because he had a reasonable commercial offer from Queensland Phosphate. Further, Mr Gutnick did not have much credibility in the financial community at the time and Legend did not have any other potential lenders willing to lend to it.
 - (d) The funds advanced by Queensland Phosphate were provided with the prospect of further funds being advanced.
 - (e) Entry into the deeds permitted Mr Feldman to sit as a director of Legend. Mr Feldman had expressed a desire to develop the tenements, which would have benefitted creditors. In addition, obtaining the directorship of Mr Feldman and his experience in capital raising was a benefit to Legend.
 - (f) There was no cogent evidence that indicated a manifested intention by either Mr Gutnick or Mr Feldman to design the transaction so that it precipitated an almost instant default by Legend.
 - (g) The associate judge's finding that Legend was commercially incapable of remedying the event of default failed to take into account the commercial realities of the mining industry and capital raising options.
 - (h) The email exchanges that the associate judge relied upon in concluding that Mr Lee and Mr Gutnick did not support giving a warranty as to Legend's solvency did not disclose an express intention by them not to support such a warranty.

186 The applicants submitted that the associate judge erred in concluding that the Zalg shareholders deed was detrimental to Legend's creditors because it effectively warehoused Legend's shares for the benefit of Zalg. They argued that the associate judge failed to consider the provisions of that deed which benefitted creditors, namely, the requirement for the parties to promote the business and interests of Legend and their stated objective of maximising the value and growth of the business. According to the applicants, the Zalg shareholders deed only gave Mr Gutnick the option to purchase shares in Legend and did not

affect the value of the assets that were available to pay creditors or alter the creditors' right to be paid ahead of shareholders.

187 The applicants submitted that the associate judge erred in finding that the deeds had been entered into with the intention to defeat, delay or hinder creditors, in particular IFFCO. They relied on the following matters in support of that submission:

- (a) The associate judge's finding was not supported by evidence. On the contrary, there was overwhelming objective evidence which contradicted this finding. Accordingly, it was not open to the associate judge to conclude that the transaction was uncommercial and that the *Briginshaw* standard had been met.
- (b) Although the financial position of Legend as at November 2015 was such that its directors had to have regard not only to the interests of shareholders but also creditors generally, the deeds did not have the effect of placing the tenements beyond the reach of creditors. Rather, they enabled Queensland Phosphate to appoint a receiver to control those assets instead of the assets being controlled by a liquidator in the event of enforcement of the award by IFFCO. The assets were available for the benefit of creditors and shareholders irrespective of whether they were controlled by a receiver or a liquidator. As receivers and liquidators have 'practically identical duties' in relation to the realisation of assets, IFFCO was not being denied any of the usual rights of an unsecured creditor in a winding up.
- (c) The associate judge's finding was also erroneous as the subjective intention of Mr Feldman and Mr Gutnick was not a relevant part of the inquiry as to whether the transaction was uncommercial.
- (d) The associate judge failed to engage in an analysis of what was meant by the phrase 'delay, defeat or hinder creditors' and in the circumstances there was no basis to conclude that the deeds were entered into in order to delay, defeat or hinder creditors.¹⁰⁹

188 The applicants argued that as there was no evidence to suggest that Mr Gutnick would or could give evidence for the applicants, no negative inferences should have been drawn by their failure to call him as a witness. According to the applicants, the liquidators were in a

¹⁰⁹ The applicants relied on *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278.

better position to adduce evidence from Mr Gutnick given their statutory powers to compel directors to provide information as to the financial position of a company.

189 The applicants submitted that the associate judge erred in concluding that the correspondence between Mr Gutnick and Mr Feldman revealed that they had acted in a common enterprise to protect Legend's assets from enforcement of the award by IFFCO. They relied on the following matters:

- (a) Mr Feldman's evidence, including his discussions with Mr Gutnick, was not challenged and no adverse credit finding was made against him.
- (b) Mr Feldman did not seek out a business opportunity from Mr Gutnick. He was introduced to the business opportunity by Bob Katter MP.
- (c) Mr Feldman gave evidence as to his belief regarding the value of the tenements, his desire to develop the tenements to pay IFFCO if the award was registered in Victoria and the ability for Legend to pay its debts through financing. Mr Feldman had a genuine belief that Legend's assets were worth more than its liabilities and he represented that belief to third parties.
- (d) Mr Feldman relied on a representation Mr Gutnick had made to him that on the basis of advice provided by Bret Walker SC, Mr Gutnick had a belief that the award would not be registered in Australia and the IFFCO debt would not be payable.
- (e) The associate judge failed to recognise that Mr Feldman procured real investors to fund the advances Queensland Phosphate made to Legend under the bond deed and that it was necessary to obtain security for the advances.
- (f) The intention of the parties was to develop the tenements to increase their value in order to pay IFFCO and without Queensland Phosphate, Legend could not develop the tenements.

190 The applicants further submitted that the communications between Mr Feldman and Mr Gutnick prior to the execution of the deeds were not inconsistent with Mr Feldman's evidence. Reference to 'we will have the right to step in and protect the assets' was said to be in the context of ensuring that there was a valid security if there was an event of default, and references to 'we' were said to be to Mr Feldman and Queensland Phosphate, not to him and

Mr Gutnick. It followed, so it was said, that the associate judge erred in construing the communications as involving some sort of conspiracy by Mr Feldman and Mr Gutnick to place the tenements beyond the reach of IFFCO and other creditors. According to the applicants, the correct inference that should be drawn from the communications was that Mr Feldman, in negotiating the deeds, was ensuring that Queensland Phosphate and its investors, would have the benefit of a valid security.

191 In their oral submissions, the applicants characterised the deeds as, in substance, a secured litigation funding arrangement to enable Legend to resist the IFFCO award registration proceeding. They argued that in circumstances where a company is facing a significant claim by a creditor, such arrangements are common and ordinary. According to the applicants, although the bond deed stated that the purpose of the funding was ‘general working capital purposes’, its primary purpose was to meet legal expenses associated with the IFFCO award registration proceeding and this was evidenced by the context of the transaction and the original purpose for which the funding was sought.

192 The applicants conceded that the funding provided in accordance with the bond deed would not result in a permanent bar to the registration of the award but only delay its inevitable registration and thus IFFCO’s ability to enforce it against Legend’s Australian assets. This was said to be because if the error upon which Legend relied to resist registration of the award — that is, the absence of an express obligation on IFFCO to return the share certificates upon receipt of the amounts awarded, which constituted double recovery and was contrary to public policy —was upheld, the award would be capable of rectification by the arbitral tribunal.

193 The applicants also conceded that the 50 per cent event of default fee constituted a penalty. In the light of this concession, they contended that the event of default fee does not constitute part of the transaction and should not be taken into account for the purpose of determining whether the transaction was uncommercial.

194 Notwithstanding the above concessions, the applicants argued that, in the prevailing circumstances as at November 2015, the deeds were not uncommercial transactions from

Legend's perspective. In essence, the applicants submitted that Legend had two options. The first option was not to resist the registration of the award, which would inevitably result in its registration and commencement of winding up proceedings by IFFCO to enforce the award. The second option was to resist the registration of the award in order to 'buy enough time' to enable Legend to either sell the tenements or undertake a capital raising for the purpose of developing the tenements and paying the IFFCO debt.

195 According to the applicants, the first option was not in the interests of Legend's shareholders because it would result in the liquidation of the company. In relation to the second option, it was said that it was not desirable for the tenements to be sold, as Mr Feldman considered that they would have more value if developed. The applicants argued that delaying the registration of the award in order to obtain funding to develop the tenements was in the interests of Legend's shareholders and was considered to be a positive benefit to Legend because it would avoid liquidation and give the company an opportunity to retain the value of the tenements. This was said to be so notwithstanding the onerous provisions of the deeds because, on the evidence before the associate judge, no other funding on any other terms was available to Legend.

196 The applicants contended that, as the associate judge accepted that Mr Feldman was an honest witness and his evidence about his ability to raise capital on behalf of Legend was not contradicted, the associate judge should have accepted it or should have given reasons for rejecting it. The applicants submitted that Mr Feldman's evidence about his intention to raise capital on behalf of Legend following the execution of the deeds could be imputed to Legend because Mr Feldman would be able to carry out his intention once he became a director of Legend upon execution of the deeds.

197 The applicants submitted that, despite the familial relationships, there was nothing to suggest that entering into the deeds was anything but a commercial transaction. They also submitted that Mr Feldman's evidence supported the proposition that there was no association which would give rise to a conclusion or support an inference that the transaction was not arm's length.

198 The applicants acknowledged that grounds 3, 4 and 9 are effectively subsidiary to
ground 1.

199 In their written case, the respondents submitted that none of the matters upon which
the applicants relied have any merit and they do not, individually or collectively, support a
conclusion that the associate judge erred in finding that a reasonable person in Legend's
position would not have entered into the deeds. They argued that the associate judge's
conclusion that the deeds were uncommercial was amply justified.

200 Addressing each of the points raised by the applicants in their written case, the
respondents submitted as follows:

- (a) The applicants' contention that Mr Shepard allegedly conceded that the deeds were
'vanilla' and 'common or garden type' is misconceived as the paragraph of the
associate judge's reasons cited records a submission made by the applicants. Contrary
to the applicants' contentions: no submission was made before the associate judge that
expert evidence was required on the commerciality of the transaction or that the Court
could not determine the issue without expert evidence; the associate judge was aware
of and had regard to the features of the bond deed; the associate judge correctly
rejected the suggestion that Legend was in a position to raise further funds; it was
never put before the associate judge that the requirement for Queensland Phosphate to
consent to Legend obtaining further finance was merely to give it a first right of
refusal and such a construction was against the evidence; and the applicants' reliance
on a footnote to Legend's December 2012 annual report to support their contention
that Legend intended to raise further finance was misplaced because any intention
Legend had to raise finance had not come to fruition and could not have been pursued
in the light of the restrictions in the deeds.
- (b) The applicants' argument that the transaction was not uncommercial by virtue of
Queensland Phosphate's rights of enforcement as a secured lender did not address the
statutory inquiry into uncommerciality and ignored the basis for the associate judge's
conclusion that the transaction was uncommercial. Further, the applicants sought to
rely on prejudice to creditors as the relevant test, which the associate judge rightly

- rejected.
- (c) The applicants' submission that Mr Gutnick did not want to go elsewhere for funding because he had a reasonable commercial offer from Queensland Phosphate assumed a causal connection which was not the subject of evidence as Mr Gutnick was not called to give evidence. The applicants' submission also ignored the following issues: Legend was insolvent and should not have been borrowing at all; only a limited sum was raised which would not have advanced the development of the tenements; the deeds were on punitive terms; and the transaction was structured to put the assets of Legend beyond the reach of IFFCO.
 - (d) The applicants' contention that there was the prospect of further funds being advanced and that Mr Feldman expressed the desire to develop the tenements was self-serving and relied on evidence of Mr Feldman which the associate judge rejected. The finding of the associate judge was amply supported by documentary records of the communications between Mr Feldman and Mr Gutnick.
 - (e) The applicants' submissions regarding Mr Gutnick and Mr Feldman's intention and the commercial realities of the transaction mischaracterised the facts, overlooked relevant facts and confused matters that might be relevant to good faith inquiries with the inquiry concerning Legend's actions and purpose.
 - (f) The deeds themselves were in evidence and their punitive characteristics were manifest on the face of the bond deed. Relevant characteristics included the immediate redemption upon an event of default, the 50 per cent event of default fee, the 50 per cent default interest rate and the prohibition on further funding.

201 The respondents contended that the applicants' submissions under ground 3 proceeded from a misstatement of para 265 of the associate judge's reasons which explained why it was not incumbent on the respondents to adduce evidence from Mr Gutnick, not that there was a benefit to Mr Gutnick at the expense of creditors. According to the respondents, regardless of this, the associate judge's finding that Mr Gutnick had an interest in upholding the deeds was well founded and none of the matters raised by the applicants disturbed his conclusion that, in applying the test under s 588FB(1)(c) of the *Corporations Act*, there were benefits to other persons.

202 As to the benefits to others, the respondents submitted that the associate judge did not make a finding that the Zalg shareholders deed in fact ‘warehoused’ Legend’s shares nor did he make a finding that the deed was detrimental to creditors, which in any event is not the relevant test. Further, they contended that the benefit to others under the deed was one of many reasons that the associate judge gave for his conclusion that a reasonable person in Legend’s position would not have entered into the deeds.

203 The respondents argued that the associate judge’s statements as to why he would have expected to hear from Mr Gutnick if there were reasons why the Court ought not make the orders sought by the respondents, and his reasons as to why it was not incumbent on the respondents to call Mr Gutnick, were unexceptional and did not advance the applicants’ case. They submitted that in the light of the concessions made by senior counsel for the applicants at trial — who did not appear on the appeal — including that it was ‘unheard of’ for liquidators to call a director and that there was nothing in the *Jones v Dunkel*¹¹⁰ point on either side — it was not open for them to advance the submission that the liquidator was in a better position to call Mr Gutnick to give evidence.

204 The respondents also submitted that the associate judge’s finding that there was an intention to defeat creditors was open on the evidence and, in any event, the authorities considered by the associate judge make it clear that an intention to defeat or hinder creditors is not the only way that a finding of uncommerciality might be reached.

205 The respondents submitted that ground 9 has no merit. They contended that none of the matters relied upon demonstrate error in the associate judge’s conclusions, as they do not address the fundamental features of the transaction, the circumstances in which it occurred or the interactions between Mr Feldman and Mr Gutnick.

206 In their oral submissions, the respondents contended that the deeds contained onerous provisions which were not in the interests of shareholders or creditors of Legend. The respondents highlighted the following features of the transaction:

- (a) In return for a loan of \$400,000, Queensland Phosphate obtained control over

¹¹⁰ (1959) 101 CLR 298.

Legend's board of directors and security over all of its assets.

- (b) In the light of the IFFCO award registration proceeding, the final judgment event of default exposed Legend to a default which would trigger the 50 per cent default interest rate and 50 per cent event of default fee, as well as the power to appoint a receiver.
- (c) As the associate judge found, the effect of the penalty provisions in the bond deed had the effect of converting advances totalling \$400,000 into a liability of Legend of approximately \$1,000,000 in less than six months.
- (d) The prohibition on further borrowing meant that Legend could not discharge its indebtedness to Queensland Phosphate.
- (e) The debt incurred to Queensland Phosphate increased the indebtedness of the company.
- (f) At the time of entering into the deeds, Legend had an obligation to have regard to the interests of creditors and entering into the deeds, which had the effect of tying up the assets of the company, could not have been in the interests of creditors. In addition, the fact that the debt to Queensland Phosphate was secured prejudiced unsecured creditors by altering the priorities for the payment of debts.
- (g) In relation to the purpose for which the funds were used, the respondents submitted that there was no evidence that the advances were actually spent on legal fees.

207 The respondents submitted that in determining whether the deeds constituted an uncommercial transaction, all of their features, including the 50 per cent default interest rate and the 50 per cent event of default fee, had to be considered and that these could not be 'washed away', as the applicants argued, notwithstanding that they had conceded that the event of default fee constituted a penalty.

208 The respondents submitted that there was no evidence about the length of any delay that Legend could secure by resisting the registration of the award or that Legend could successfully undertake a capital raising during that period. They also submitted that there was no evidence that Legend intended to undertake a capital raising and that Mr Feldman's evidence about what he intended to do could not be attributed to Legend in the period leading

up to the execution of the deeds, prior to him becoming a director of Legend.

209 According to the respondents, the Court should view with caution the applicants' submission that delaying the registration of the IFFCO award was necessary to buy time to allow Legend to raise capital, when the award could potentially have been enforced through other means. They referred to service of a demand under s 585 of the *Corporations Act* or commencement of enforcement action under the *Foreign Judgments Act 1991* (Cth).

210 As to the applicants' contention, as outlined at [194] above, that entering into the deeds was the better of two options, the respondents argued that this was irrelevant as the appropriate inquiry was not whether there was a more favourable deal to be done, but rather whether the transaction should have been entered into at all, which the respondents argued it should not have been.

211 The respondents submitted that the communications between Mr Feldman and Mr Gutnick should be read according to their terms without regard to Mr Feldman's evidence about what was intended by those communications. According to them, the communications indicated that the purpose of the deeds was to place the tenements beyond the reach of creditors, particularly IFFCO.

212 The respondents submitted that, even though the Zalg shareholders deed was separate to the bond deed and the general security deed, it was a 'private side deal' that could be taken into account as part of the context in which the latter deeds were executed. According to the respondents, the Zalg shareholders deed provided a benefit to Mr Gutnick's family because it enabled Zalg to acquire 26 per cent of the shareholding in Legend. As such, when considered in accordance with the statutory criteria under s 588FB(1), it provided a strong indication as to why a reasonable person in Legend's position would not have entered into the transaction and also showed that the transaction was not at arm's length.

213 The respondents took issue with the applicants' submission that the deeds did not prejudice the position of creditors in relation to the tenements because they remained assets of Legend and continued to be available to creditors, notwithstanding the fact that they could be controlled by a receiver appointed by Queensland Phosphate rather than a liquidator.

According to the respondents, although receivers and liquidators have similar legal duties, receivers have particular regard to the interests of the secured creditor who appointed them and are unlikely to challenge the agreements under which their appointment was made. On the other hand, a liquidator was said to have equal regard to all creditors.

214 Further, so the respondents submitted, the relevant test as to whether a transaction is uncommercial is not whether creditors, including IFFCO, were worse off and the associate judge rightly rejected this contention made by the applicants. However, the respondents argued that the positions of IFFCO and other creditors could be taken into account in accordance with the criteria in s 588FB(1). They contended that in that context, it could not be suggested that creditors were not worse off, as by executing the deeds Legend incurred further debt on a secured basis in circumstances where it may not be capable of discharging it.

215 The respondents emphasised that the test of uncommerciality is objective. They contended that in the light of the features of the deeds which were prejudicial to the interests of shareholders and creditors, no reasonable person in Legend's position would have entered into them.

Decision

216 In our opinion, the associate judge was correct to find that the deeds constituted an uncommercial transaction within the meaning of s 588FB(1) of the *Corporations Act*. A reasonable person in Legend's circumstances would not have entered into the transaction embodied by the deeds having regard to the four criteria set out in that section.

217 The first criterion is the benefits, if any, to Legend of entering into the deeds. As articulated in the applicants' oral submissions, the alleged benefit to Legend was to fund the defence of the IFFCO award registration proceeding in order to 'buy enough time' to enable Legend to raise capital to pay debts and develop the tenements.

218 There are a number of difficulties with this proposition.

219 First, when the deeds were executed on 25 November 2015, the hearing of the IFFCO award registration proceeding had already concluded and Croft J had reserved his decision. Even if the deeds are considered in the context of the term sheet that preceded them, the term sheet was executed on the same day as the hearing of the IFFCO award registration proceeding — 19 November 2015 — so it is unclear how it was necessary for the funding arrangements to be put in place in order to secure legal representation for that hearing. It must also be borne in mind that Legend obtained \$100,000 from a different company, Queensland Bauxite, on 10 November 2015, well before the term sheet was signed and Queensland Phosphate was incorporated on 19 November 2015.

220 Secondly, under the timetable for the issue of bonds in cl 3.3 of the bond deed,¹¹¹ Legend was entitled to receive only \$400,000 prior to 28 February 2016. As events transpired, the advances did not exceed that amount. Further, apart from a general statement by Mr Feldman that ‘[p]art of the funds advanced by [Queensland Phosphate] ... was for the purpose of paying Paradise’s liabilities’, there was no evidence as to how the amount of \$400,000 was applied. It is not known what part, if any, of this funding was used for legal expenses relating to the IFFCO award registration proceeding.

221 Thirdly, senior counsel for the applicants frankly conceded in response to questions from the Bench that Legend could not have known on 19 November 2015 the extent of any delay between the hearing of the IFFCO award registration proceeding and delivery of judgment in that proceeding. Accordingly, Legend could not have known whether it would have sufficient time to undertake a capital raising. We note that in his email to Mr Lee dated 1 December 2015, Mr Feldman stated that a decision by Croft J ‘may be forthcoming ... immediately’¹¹² and that in his evidence he acknowledged that judgment could be handed down ‘any day’.¹¹³

222 Fourthly, senior counsel for the applicants also frankly conceded in response to questions from the Bench that investors do not like uncertainty and that they would be

¹¹¹ See [60(c)] above.

¹¹² See [67] above.

¹¹³ See [85] above.

reluctant to invest in Legend during the time that judgment was reserved because it could not be known whether the award would be registered. Senior counsel also conceded that no capital raising would be successful in the event that the award was registered and that there was a risk that might be the outcome of the IFFCO award registration proceeding. This was so despite the hearsay evidence of Mr Feldman that Mr Gutnick had informed him that, based on advice from Bret Walker SC, he believed there was ‘a very good chance’ of the award not being registered.¹¹⁴ The associate judge correctly gave little weight to this evidence.¹¹⁵

223 The concessions made by senior counsel for the applicants were sensible and appropriate. The reality of the situation was that while the risk of the award being registered remained, it was highly unlikely that any capital raising would be successful. That was so despite Mr Feldman’s experience in capital raising.

224 In his evidence, Mr Feldman did not in terms say that he would be able to raise funds from investors in the limited window of time between the execution of the deeds on 25 November 2015 and the making of an order by the Supreme Court enabling the award to be enforced as a judgment of that Court. Although Mr Feldman said that he believed that he would be able to ‘get in the big funding ... to develop the project ... within a short period of time’,¹¹⁶ that evidence cannot be reconciled with his acknowledgement that judgment ‘could be handed down any day’, that he could not risk his investors’ funds if a judgment in favour of enforcement of the award were handed down and that investors ‘are afraid of litigation’.¹¹⁷

225 In our opinion, the general and aspirational nature of Mr Feldman’s evidence did not provide a sound basis for a finding that there was any real prospect of Legend being able to use the funding it received from Queensland Phosphate to raise sufficient capital which would enable it to develop the tenements and pay the IFFCO debt once it became registered. The fact that the associate judge said that he had no reason to doubt Mr Feldman’s honesty as a witness did not mean that he was bound to accept Mr Feldman’s evidence. Further, even

¹¹⁴ Transcript of Proceedings (7 March 2018) 283.

¹¹⁵ Reasons [266].

¹¹⁶ See [84] above.

¹¹⁷ See [85]–[86] above.

though the respondents did not call any evidence to contradict Mr Feldman's evidence, he was extensively cross-examined about the purpose of the deeds and whether their execution would place Legend in a position of being able to pay the IFFCO debt.

226 Fifthly, there was no objective evidence that Legend's purpose in entering into the deeds was to 'buy enough time' to enable Legend to raise capital to pay debts and develop the tenements. The contemporaneous documents do not refer to such a purpose. The draft term sheet originally referred to the purpose of the funding as defending the 'current court action',¹¹⁸ however the final wording in the bond deed was 'general working capital purposes'. There was no reference to capital raising or the payment of creditors.

227 Mr Feldman gave evidence that he intended to engage in capital raising, however his intentions cannot be attributed to Legend in the period leading up to the execution of the deeds because he did not become a director of Legend until after the deeds were executed. Mr Gutnick could have given evidence about Legend's intentions, but the applicants did not call him.

228 The only reliable evidence of Legend's purpose in entering into the deeds were the contemporaneous documents leading up to the execution of the deeds, particularly the emails passing between Mr Gutnick and Mr Feldman.¹¹⁹ We agree with the respondents' submission that the emails speak for themselves and no assistance can be gained from Mr Feldman's evidence about what was meant by them. Although the respondents bore the onus of establishing that the deeds constituted an uncommercial transaction, the associate judge did not need evidence from them in order to draw inferences from: the contemporaneous documents; the terms of the deeds and their legal effect; and the evidence as a whole.

229 The emails refer to the purpose of the deeds as being protection of the assets and their value. However, the clear inference that arises from the context of the communications is that the purpose was to ensure that the assets were controlled by a receiver appointed by Queensland Phosphate and placed beyond the reach of a liquidator appointed as a result of a

¹¹⁸ See [43] above.

¹¹⁹ See [41]–[58] above.

successful winding up application by IFFCO. Critical to the achievement of this purpose was the final judgment event of default which had the effect of enabling Queensland Phosphate to appoint a receiver in the event that the award was registered, well before any application by IFFCO to wind up Legend could be heard or determined.

230 We reject the applicants' submission that the deeds cannot constitute an uncommercial transaction because the only other option available to Legend would have resulted in its winding up. The mere fact that a transaction averts a winding up does not mean that any draconian terms it contained and any prejudice to shareholders and general creditors that it entailed are to be disregarded in determining whether it is uncommercial. Rather, the transaction must be viewed as a whole in applying the criteria in s 588FB(1) of the *Corporations Act*. If a winding up is in fact the only alternative to an uncommercial transaction when a company is insolvent, then winding up is the appropriate course.

231 It follows from the above analysis that in the circumstances that existed as at 25 November 2015, there was no tangible benefit to be gained by Legend from entering into the deeds. That would have remained our conclusion even if the entire facility of \$2,500,000 had been advanced rather than the sum of \$400,000 that was actually advanced. Having regard to the fact that Legend's debts and capital requirements for developing the tenements greatly exceeded \$2,500,000, as well as the difficulties in raising capital to which we have referred, additional funds of \$2,100,000 would not have made a material difference.

232 The second criterion in s 588FB(1) of the *Corporations Act* is the detriment to Legend of entering into the deeds.

233 In contrast to the absence of any tangible benefits to Legend of entering into the deeds, the detriments were significant and immediate.

234 First, Legend incurred a debt of \$400,000 which it did not have the cash flow to meet and which it did not have the ability to refinance without Queensland Phosphate's consent.

235 Secondly, there was an immediate change in the composition of Legend's board. By advancing a mere \$200,000 as at 25 November 2015, Queensland Phosphate acquired

representation on the boards of Legend and Paradise that equalled the representation of the Gutnick family, and also equal management control of those companies.¹²⁰ Accordingly, Queensland Phosphate gained significant sway over the tenements.

236 Thirdly, by agreeing to the final judgment event of default while Croft J's decision on registration of the award was reserved, Legend assumed a significant risk that an event of default would occur in a matter of weeks which would have the following detrimental consequences:

- (a) Queensland Phosphate would not be obliged to make any more advances;
- (b) Queensland Phosphate could oblige Legend to redeem the bonds on three days' notice, by paying the amounts advanced, whereas Legend did not have the financial capacity to redeem the bonds;
- (c) the interest rate payable under the bond deed would increase from 10 per cent per annum to 50 per cent per annum;
- (d) the amount of \$400,000 that was advanced would become a liability of \$600,000 due to the 50 per cent event of default fee; and
- (e) Queensland Phosphate would be able to appoint a receiver over Legend's shares in Paradise and over Paradise and thus control the tenements.

237 The effect of the three factors discussed at [234]–[236] above was that a modest advance of \$400,000, which provided no tangible benefit to Legend, resulted in serious and disproportionate adverse changes in:

- (a) Legend's debt profile, where previously its assets were unencumbered, now they were the subject of Queensland Phosphate's security;
- (b) Legend's governance, due to Queensland Phosphate acquiring equal representation on Legend's board;
- (c) Legend's ability to deal with its material assets without Queensland Phosphate's consent;¹²¹
- (d) Legend's ability to borrow, due to the prohibition on further borrowing; and

¹²⁰ See [64] above.

¹²¹ See [60(1)] above.

(e) Legend's risk profile, due to the matters set out at [236] above.

238 Further, when an event of default materialised by the registration of the award — which was inevitable¹²² — Legend was locked into the Queensland Phosphate debt and was no longer able to control its business or assets.

239 We reject the applicants' submission that provisions in the bond deed that constitute penalties can be disregarded on the basis that they do not form part of the legally enforceable transaction. In applying the criteria in s 588FB(1) of the *Corporations Act*, the provisions of the impugned agreement must be considered as a whole. It would undermine the purpose of the legislative scheme if provisions in an agreement which are so draconian that the law will not enforce them — and whose inclusion in the agreement would have resulted in a reasonable person in the company's circumstances not entering into the agreement — were ignored in order to arrive at a conclusion that a reasonable person would have entered into the agreement.

240 Fourthly, the shareholders of Legend were worse off because a new secured debt was incurred by Legend which had priority over the shareholders' interest in the company notwithstanding that it did not confer any tangible benefit on the company.

241 Fifthly, it was common ground that, in view of Legend's financial position as at November 2015, the directors were required to have regard not only to the interests of shareholders but also creditors. In our opinion, the deeds were detrimental to the interests of creditors generally because they enabled the debt of a new secured creditor to have priority over their debts even though the new debt conferred no tangible benefit on the company. Also, the new secured creditor, by advancing the modest amount of \$400,000, was placed in the position of being able to assume control of the tenements through the appointment of a receiver upon an event of default. The unsecured creditors were in a worse position as a result of a receiver, rather than a liquidator, controlling the tenements because a liquidator would act in the interests of all creditors equally whereas a receiver owed duties to the secured creditor who appointed the receiver. Further, a liquidator would ordinarily examine

¹²² See [192] above.

the validity of material agreements recently entered into by the company whereas a receiver was less likely to investigate the validity of any agreement under which the receiver was appointed.

242 In some cases, the shareholders and general creditors of a company may be better off if a receiver and manager rather than a liquidator is appointed to control the company. That is because a receiver and manager may, by continuing to carry on the company's business, enable it to pay its debts and continue as a going concern, whereas a liquidator's focus will be to sell the company's assets and wind up the company. Such an advantage did not apply in the present case, as Legend and Paradise did not have any income that could fund the payment of debts and enable their business to continue. The only viable course available to either a receiver and manager or a liquidator to enable creditors to be paid was to sell the assets of the companies.

243 In the light of the above analysis of the first and second criteria in s 588FB(1) of the *Corporations Act*, we reject the applicants' submission that the deeds, in substance, constituted a secured litigation funding arrangement or that they were standard-form documents. Both their terms and their overall effect were highly detrimental to Legend. We are able to reach that conclusion by an objective consideration of the deeds in the circumstances existing as at 25 November 2015, irrespective of the subjective views of Mr Feldman and Mr Shepard on the commerciality of the transaction. Expert evidence on the issue of uncommerciality was not required.

244 The third criterion in s 588FB(1) of the *Corporations Act* is the benefits to other parties to the transaction of entering into it.

245 The detriments to Legend that we have identified above constituted benefits to Queensland Phosphate of entering into the deeds. As those detriments to Legend were significant and immediate, the corresponding benefits to Queensland Phosphate were significant and immediate.¹²³ In essence, Queensland Phosphate obtained a bargain of such magnitude that it lacked a commercial quality and could not be explained by normal

¹²³ See in particular [235]–[238], [240] above.

commercial practice.¹²⁴

246 The final criterion in s 588FB(1) of the *Corporations Act* is ‘any other relevant matter’.

247 We agree with the respondents’ submission that, although the Zalg shareholders deed was separate from the bond deed and the general security deed, it constitutes a relevant matter. This is because it formed part of the overall dealings between the Gutnick and Feldman families in relation to the execution of the deeds and shows that the Gutnick family stood to gain from the overall transaction.

248 In our opinion, the \$1 share sale agreement — under which the receiver appointed by Queensland Phosphate sold Legend’s shares in Paradise to Queensland Phosphate for \$1 subject to adjustment following a valuation — is also a relevant matter. Although this agreement was not part of the transaction involving the execution of the deeds, it demonstrates that, by entering into the deeds, Legend exposed itself to the risk of a default which would result in it being controlled by a receiver appointed by Queensland Phosphate. This in turn created a risk that such a receiver may enter into a transaction with Queensland Phosphate which was not at arm’s length and not in the interests of other shareholders or creditors in general.

249 In our opinion, in the face of the above significant and immediate detriments to Legend and benefits to Queensland Phosphate from entering into the deeds — which wholly outweighed any potential benefits to Legend — no reasonable person in Legend’s circumstances would have entered into the deeds.

250 As Paradise was in a similar position to Legend in relation to the deeds, no reasonable person in Paradise’s circumstances would have entered into the deeds.

251 It follows that the deeds were uncommercial transactions within the meaning of s 588FB(1) of the *Corporations Act*.

¹²⁴ See [164(c)] above.

252 As we have found that the associate judge was correct in finding that Legend was
insolvent as at 25 November 2015,¹²⁵ the deeds were insolvent transactions within the
meaning of s 588FC of the *Corporations Act*.

253 The applicants did not contend that if the deeds were uncommercial transactions and
insolvent transactions, there was any basis for them not also being voidable transactions
under s 588FE of the *Corporations Act*.

254 It follows that the associate judge correctly found that the deeds were voidable
transactions.

255 It also follows that ground 1 is not made out.

256 As acknowledged by the applicants, grounds 3, 4 and 9 were effectively subsidiary to
ground 1. Accordingly, we can deal with them briefly.

257 The applicants' submissions in support of ground 9 were principally directed to the
good faith defence which they have abandoned. To the extent that the submissions extended
beyond that defence, we reject them.

258 We agree with the respondents' contention that the associate judge's statement at
para 198 of his reasons — that the correspondence between Mr Gutnick and Mr Feldman
reveals a common enterprise to protect the assets from enforcement by IFFCO — records a
submission made by the respondents rather than a conclusion of the associate judge. In any
event, we have concluded from the objective evidence that the purpose of the deeds was to
ensure that Legend's assets were controlled by a receiver appointed by Queensland Phosphate
and placed beyond the reach of a liquidator appointed as a result of a successful winding up
application by IFFCO. Whether Mr Gutnick and Mr Feldman had a particular common
subjective intention is not determinative, as the test in s 588FB of the *Corporations Act* is
objective. It follows that even if ground 9 is made out, the correctness of the associate
judge's conclusion that the deeds constituted an uncommercial transaction would not be
undermined.

¹²⁵ See [153] above.

259 Ground 3 does not assist the applicants. That is because the Zalg shareholders deed does not form part of the transaction which is sought to be impugned as an uncommercial transaction. Only the bond deed and the general security deed form part of that transaction and the Zalg shareholders deed, while part of the context, played only a limited role in the associate judge’s reasoning. It follows that even if the associate judge wrongly concluded that Mr Gutnick stood to benefit under the Zalg shareholders deed at the expense of creditors, that would not affect the correctness of his finding that the bond deed and the general security deed constituted an uncommercial transaction.

260 Ground 4 also does not assist the applicants. That is because a transaction can be uncommercial based on the criteria in s 588FB of the *Corporations Act* even if it is not entered into with an intention to defeat, hinder or delay creditors. Thus, even if the associate judge erred in relation to the intended effect of the deeds on creditors, that would not affect the correctness of his finding that the deeds constituted an uncommercial transaction. We note that the associate judge’s declaration that the transaction was voidable was made under s 588FE(2) and (3) of the *Corporations Act* and not under s 588FE(5), which refers to a transaction being entered into for the purpose of ‘defeating, delaying or interfering with’ the rights of creditors on a winding up. We also note that, in considering the detriment to Legend in entering the deeds, we concluded at [241] above that the deeds were detrimental to the interests of creditors.

Issue 3: Applicability of just and equitable ground to Paradise

Legislation and principles

261 The legislation and principles relevant to determining whether Paradise was insolvent under s 95A of the *Corporations Act* at the time of the hearing before the associate judge are set out at [95]–[105] above. In addition, ss 459A and 461(1)(k) of the *Corporations Act* are relevant to the associate judge’s order that Paradise be wound up. Those provisions relevantly provide as follows:

459A Order that insolvent company be wound up in insolvency

On an application under section 459P, the Court may order that an insolvent company be wound up in insolvency.

...

461 General grounds on which company may be wound up by Court

(1) The Court may order the winding up of a company if:

...

(k) the Court is of opinion that it is just and equitable that the company be wound up.

...

262 Under s 459P(1)(b) of the *Corporations Act*, a creditor may apply for an order under s 459A. Under s 462(2)(b), a creditor may apply for an order under s 461.

263 Three ‘general fundamental principles’ relevant to winding up a company on the just and equitable ground in s 461(1)(k) of the *Corporations Act* were identified by Warren J in *Australian Securities and Investments Commission v ABC Fund Managers* as follows:

There are general fundamental principles applied by the courts with respect to a winding-up application on the just and equitable ground. First, there needs to be a lack of confidence in the conduct and management of the affairs of the company ... Second, in these types of circumstances it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a reluctance on the part of the courts to wind up a solvent company.¹²⁶

264 In relation to the first principle, it has been said that the lack of confidence relates to the directors’ conduct in regard to the company’s business.¹²⁷ A lack of confidence may arise where “‘after examining the entire conduct of the affairs of the company” the court cannot have confidence in “the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company””.¹²⁸

265 Regarding the second principle, the public interest can take several forms and can include where ‘a company has not carried on its business candidly and in a straightforward manner with the public’.¹²⁹

¹²⁶ (2001) 39 ACSR 443, 469–70 [119] (*ABC Fund Managers*) (citations omitted). See also *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504, 531–3 (*AS Nominees*).

¹²⁷ *ASIC v Planet Platinum Ltd* [2015] VSC 682 [18] (citations omitted).

¹²⁸ *ASIC v Activesuper Pty Ltd [No 2]* (2013) 93 ACSR 189, 195 [21] (*Activesuper*) quoting *Galanopoulos v Moustafa* [2010] VSC 380 [32]. See also *AS Nominees Ltd* (1995) 62 FCR 504, 532–3; *ASIC v International Unity Insurance Pty Ltd* (2004) 22 ACLC 1416, 1428–9 [135]–[139].

266 As to the third principle, although courts will be reluctant to wind up a solvent company and will require a strong case for doing so, solvency is not a bar to winding up on the just and equitable ground.¹³⁰

Associate judge's findings

267 The associate judge found that Paradise was insolvent pursuant to s 95A of the *Corporations Act* and that it should be wound up in insolvency pursuant to s 459A.¹³¹

268 The associate judge observed that Legend, as an unsecured creditor of Paradise, had standing to apply to wind up Paradise in insolvency under s 459P(1)(b) of the *Corporations Act*.¹³²

269 In determining that Paradise was insolvent, the associate judge gave consideration to Paradise's balance sheets, which he noted 'can provide context for the application of the cash flow test'.¹³³ He stated that Paradise's 30 September 2015 balance sheet showed net liabilities of \$15,342,915, which included a current liability to Legend for \$2,143,443 and a non-current liability to Legend for \$15,910,000. Paradise's 31 December 2015 balance sheet showed net liabilities of \$15,399,530.40, which included two current liabilities to Legend for \$781,986.92 and \$1,407,996.77 and a non-current liability of \$15,910,000.¹³⁴

270 The associate judge noted that the RATA up to 10 May 2016 as to the affairs of Paradise prepared by Mr Palmer showed that the total moneys owed by Paradise to Legend were \$18,109,803.78.¹³⁵ He observed that Paradise had other creditors, but that Legend's percentage of the total debt owed was approximately 98.2 per cent.¹³⁶ According to the

¹²⁹ *Activesuper* (2013) 93 ACSR 189, 195 [23].

¹³⁰ *ABC Fund Managers* (2001) 39 ACSR 443, 470 [124]; *ASIC v Kingsley Brown Properties Pty Ltd* [2005] VSC 506 [96]; *Activesuper* (2013) 93 ACSR 189, 195 [24].

¹³¹ Reasons [321], [338].

¹³² Reasons [323].

¹³³ Reasons [324] quoting *Re Ashington* [2013] NSWSC 1008 [3].

¹³⁴ Reasons [325].

¹³⁵ Cf [112] above.

¹³⁶ Reasons [327].

associate judge, the evidence showed that the amounts owed to Legend by Paradise related to loans made by Legend to Paradise or costs incurred by Legend on behalf of Paradise which Legend on-charged to Paradise.¹³⁷ The associate judge noted that on 22 June 2016 the liquidators requested that Paradise pay the debt of \$18,109,803.78 it owed to Legend and that Paradise had failed to make the payment.¹³⁸

271 The associate judge rejected the applicants' argument that if it were not for the undertakings given by Paradise to the Court,¹³⁹ it could have borrowed moneys — in the form of a \$1,000,000 loan from Queensland Bauxite — to meet its immediate liabilities. He said:

There is no indication that the \$1 million loan to Paradise by [Queensland Bauxite] would have been directed toward repaying Paradise's debt to Legend. Even if this was the case, a sum of \$1 million is merely the tip of the iceberg when one considers the full debt of \$18,109,803.78 that Paradise owes to Legend. In any event, a detailed consideration of whether [Queensland Bauxite's] loan to Paradise would have been sufficient for Paradise to discharge its debt to Legend is purely hypothetical and not necessary as [Queensland Phosphate and Paradise's] application to vary the undertakings was dismissed on 24 April 2017.¹⁴⁰

272 The associate judge also rejected the applicants' contention that if the underlying value of the mining tenements is taken into account, Paradise would be able to satisfy its debt to Legend. He found that having regard to Paradise's commercial realities, the evidence suggested that it may not be possible to realise the value of the tenements within a realistic time period.¹⁴¹ This was in the light of evidence of the significant expenditure that would be required to bring the tenements into production,¹⁴² the fact that Paradise was a 'dormant entity',¹⁴³ and if the tenements were to be sold, the sale process would take three to six months.¹⁴⁴

273 The associate judge concluded as follows:

¹³⁷ Reasons [326].

¹³⁸ Reasons [328].

¹³⁹ See [29] above.

¹⁴⁰ Reasons [333].

¹⁴¹ Reasons [335].

¹⁴² Reasons [335].

¹⁴³ Reasons [336].

¹⁴⁴ Reasons [337].

I determine that Paradise is insolvent for the purposes of s 95A of [the *Corporations Act*]. Paradise's financial position has moved beyond temporary illiquidity; it is now in a state where it is unable to generate enough revenue to discharge its debts as and when they fall due and payable. Accordingly, Paradise should be wound up in insolvency pursuant to s 459A of [the *Corporations Act*].¹⁴⁵

274 Regarding the respondents' argument in the alternative — that Paradise be wound up on the just and equitable ground in s 461(1)(k) of the *Corporations Act* — the associate judge was satisfied that the conduct of Mr Gutnick and Mr Feldman and their conflicts of interest justified the winding up of Paradise on that ground.¹⁴⁶

275 The associate judge found that as an unsecured creditor of Paradise, Legend had standing under s 462(2)(b) of the *Corporations Act* to bring an application for Paradise to be wound up under s 461(1)(k).¹⁴⁷

276 The associate judge had regard to the three principles identified by Warren J in *ABC Fund Managers*, as set out at [263] above. In relation to the first principle, the associate judge considered that: the deeds were entered into in an attempt to frustrate Legend's creditors; at the time that the deeds were entered into, Mr Gutnick was a director of Legend and Paradise, which pointed to a potential conflict of interest; Mr Feldman and Ms Feldman have been directors of Queensland Phosphate from 19 November 2015 and of Paradise from 25 November 2015; Mr Feldman and Ms Feldman were directors of Legend from 25 November 2015 until 22 April 2016 and 20 April 2016, respectively, which pointed to a conflict of interest; there did not appear to be any indication that Mr Gutnick and the Feldmans were able to separate their duties to each company and act in the best interests of each respective company.¹⁴⁸ For these reasons, the associate judge held as follows:

This gives rise to a distinct lack of confidence in the ability of the directors to conduct and manage the affairs of each company with clarity and honesty. It follows that the first principle is satisfied.¹⁴⁹

277 As to the second principle, namely the public interest, the associate judge stated that it

¹⁴⁵ Reasons [338].

¹⁴⁶ Reasons [321].

¹⁴⁷ Reasons [341].

¹⁴⁸ Reasons [345].

¹⁴⁹ Reasons [345].

did not appear that Mr Gutnick and the Feldmans had been able to conduct the affairs of Legend and Paradise in a transparent and candid manner by virtue of their conflicts of interest given that they serve, or had served, as directors ‘on both sides of the transaction’.¹⁵⁰

278 In relation to the third principle — that the court will be reluctant to wind up a solvent company on the just and equitable ground — the associate judge relied on his finding that Paradise was insolvent.

279 The associate judge ultimately concluded as follows:

I have determined that Paradise be wound up in insolvency. If it had been necessary, I would have considered it appropriate to wind up Paradise on the just and equitable ground in any event.¹⁵¹

Grounds of appeal

280 Grounds 6, 8, 11 and 12 of the applicants’ written case deal with whether the associate judge erred in finding that Paradise was insolvent and should be wound up. Grounds 6 and 8 are set out at [121] above. Grounds 11 and 12 are in the following terms:

11 The learned trial Associate Justice erred in concluding on the just and equitable ground pursuant to section 461(1)(k) of the [*Corporations Act*] that Mr Gutnick, Mr Feldman, and Ms Feldman were unable to separate their duties to each respective company and act in the best interests of each respective company which gave rise to a distinct lack of confidence in the ability of the directors to conduct and manage the affairs of each company with clarity and honesty.

12 The learned trial Associate Justice erred in concluding on the just and equitable ground pursuant to section 461(1)(k) of the [*Corporations Act*] that Mr Gutnick, Mr Feldman and Ms Feldman were conflicted and as a result were unable to conduct the affairs of Legend and Paradise in a transparent and candid manner.

Parties’ submissions

281 The parties’ submissions under grounds 6 and 8 are set out at [122]–[132] above. These submissions are relevant to the insolvency of both Legend and Paradise.

282 Under grounds 11 and 12, the applicants submitted that the associate judge concluded

¹⁵⁰ Reasons [346].

¹⁵¹ Reasons [348].

against the weight of the evidence, namely the matters relied upon in grounds 1 and 9 set out above, that a conflict of interest arose on the part of Mr Gutnick and the Feldmans and that they were unable to conduct the affairs of Legend in a transparent and candid manner. They argued that he did not give adequate reasons to justify such a finding and that it conflicted with his finding that Mr Feldman was a credible witness.

283 In oral submissions, senior counsel for the applicants sought to impugn the winding up order made by the associate judge on the ground of insolvency in respect of Paradise. The winding up order relating to Paradise was said to be challenged fundamentally on the same basis as that in relation to Legend, that is that the tenements owned by Paradise could be realised in order to discharge the IFFCO debt.

284 The associate judge's alternative finding that Paradise should be wound up on just and equitable grounds was not addressed by the applicants in oral submissions. However, the applicants did not abandon their written submissions relating to grounds 11 and 12.

285 The respondents submitted that there was no error in the associate judge's findings concerning Mr Gutnick and Mr Feldman's conflicts of interest and the conduct of the Feldmans in relation to the affairs of Legend and Paradise. They argued that even without regard to the whole of the evidence concerning the conduct of Mr Feldman, the associate judge's finding could be supported by the conduct of the Feldmans in arranging to have Queensland Phosphate acquire Legend's shares in Paradise for \$1, subject to an adjustment mechanism. That was said to be because they were directors of Legend until very shortly before the acquisition and the vast majority of the shares in Queensland Phosphate were held by a Feldman family trust.

286 The respondents contended that the Feldmans have a continuing conflict between their interests as directors and indirect beneficial owners of Queensland Phosphate, and their role as directors of Paradise. According to the respondents, the fact that the associate judge saw no reason to question Mr Feldman's honesty as a witness does not mean that he did not have a conflict of interest.

287 The respondents also relied on the fact that, in addition to his finding that Legend was

insolvent at the time that it entered into the deeds, the associate judge found, in the alternative, that it became insolvent by virtue of entering into the deeds. They argued that the applicants' contentions relating to Legend and Paradise's solvency based on realisable assets do not undermine the associate judge's alternate finding and therefore there is no basis to disturb the order that Paradise be wound up in insolvency.

Decision

288 At [153] above, we concluded that the associate judge correctly found that Paradise was insolvent as at 25 November 2015. The applicants did not submit that Paradise's financial position improved between that date and the date of the associate judge's judgment on 14 December 2018. Accordingly, the associate judge was correct to order that Paradise be wound up in insolvency.

289 As the associate judge's order for the winding up of Paradise was appropriate under the insolvency ground in s 459A of the *Corporations Act*, that order cannot be disturbed even if the associate judge erred in concluding that the just and equitable ground was made out. This is particularly so as the winding up order was made solely by reference to the insolvency ground. The associate judge's conclusion that it was appropriate to wind up Paradise under the just and equitable ground was prefaced by his remark that he would have reached that conclusion if it had been necessary for him to do so.¹⁵²

290 It follows that it is not necessary for us to express a view on whether the associate judge correctly applied the just and equitable ground. Had it been necessary for us to do so, we would have accepted the respondents' submissions in support of the associate judge's decision.

291 In particular, after Legend and Paradise defaulted under the deeds and Queensland Phosphate appointed a receiver and manager over Paradise, there was a conflict between the interests of Mr Feldman and Ms Feldman as directors and indirect beneficial owners of Queensland Phosphate, and their role as directors of Paradise. It was in Queensland

¹⁵² See [279] above.

Phosphate's interest to ensure that the receiver and manager managed the company in a manner that maximised the financial return to it, whereas it was in Paradise's interest for the company to be managed in a manner that retained as much value as possible for its shareholders and general creditors, including by challenging the penalty provisions in the deeds.

Issue 4: Form of relief

292 As we have stated at [30] above, the applicants sought leave to rely on additional ground 13. That ground is in the following terms:

Having declared that the Bond Deed and the General Security Deed were voidable transactions, the learned Associate Justice erred in failing to apply his discretion in giving recognition to [Queensland Phosphate's] advancement of \$400,000 and [Queensland Phosphate's] entitlement to be secured for at least that limited amount, such that the correct exercise of his discretion would have resulted in orders that the General Security Deed was varied by the deletion of the powers contained in clauses 10.1 to 10.6, but preserving the charge created by Legend and Paradise over their assets. The applicant will seek to contend that [Queensland Phosphate] having advanced the sum of \$400,000 to Legend, relying upon the validity of the Bond Deed and the General Security Deed, it should not have been deprived of the benefit of its security interest in respect of those amounts, notwithstanding the finding by the learned Associate Justice that the Bond Deed and the General Security Deed were voidable transactions. [Queensland Phosphate] will seek to contend that the learned Associate Justice wrongly concluded that the advances of the \$400,000 provided no tangible or commercial benefit to Legend, and that thus the exercise of his discretion in avoiding the Bond Deed and the General Security Deed in their entirety miscarried.

293 The applicants sought the following relief in the event that the Court granted them leave to rely upon ground 13 and upheld that ground:

- (3A) Further, an order that the General Security Deed be varied by the deletion, *ab initio*, of clauses 10.1 to 10.6.
- (3B) Further or in the alternative to 3A above, declare that the amount secured by [Queensland Phosphate's] charge over Legend's and Paradise's assets under the Bond Deed exclude any amounts payable under clause 12.2(d), and any amount payable by reference to the Bond Default Interest Rate be limited to the amount payable as if the reference were to the Bond Interest Rate.

294 It will be recalled from [60]–[61] above that cls 10.1 to 10.6 of the general security deed conferred enforcement powers on Queensland Phosphate, including the power to appoint a receiver upon an event of default, and that cl 12.2(d) contained the 50 per cent event of default fee. Under the bond deed, the 'Bond Interest Rate' was 10 per cent per annum

whereas the ‘Bond Default Interest Rate’ was 50 per cent per annum.

295 The applicants submitted that, even if this Court agreed with the associate judge’s ultimate conclusion that the deeds constituted an uncommercial transaction, it could itself exercise the discretion in relation to the form of relief to be granted under s 588FF of the *Corporations Act* if it did not agree with the associate judge’s process of reasoning in reaching that conclusion. They argued that if the Court rejects ground 1 but upholds grounds 3, 4 or 9, the Court could re-exercise the discretion and grant a different form of relief.

296 According to the applicants, a finding that the deeds constituted an uncommercial transaction did not necessitate that they be declared void in their entirety. Rather, so it was said, the Court could declare as void those features of the deeds that were uncommercial — such as the 50 per cent default interest rate, the 50 per cent event of default fee and the provisions empowering Queensland Phosphate to enforce its security — while preserving the security in place for the actual amount of \$400,000 advanced to Legend. That was said to be a benefit conferred on Legend, which should be recognised by the Court in the relief granted under s 588FF (presumably by exercising the power of variation under s 588FF(1)(i)).

297 The applicants argued that in so far as any provisions of the deeds constituted penalties, they were unenforceable and therefore could be disregarded for the purposes of determining the appropriate relief to be granted under s 588FF of the *Corporations Act*.

298 The applicants submitted that the issue of relief is a matter purely of law as it flows from the findings made by the associate judge and is not a matter in respect of which any additional evidence could potentially have been called at trial. Therefore, so it was said, the issue could be dealt with by this Court as a new ground.

299 The respondents relied on six reasons in support of their submission that the applicants should not be given leave to add ground 13.

300 First, at trial, the applicants relied on a similar contention in their written closing submissions, namely: ‘In the event that the [deeds] are held to be voidable [Queensland

Phosphate's] entitlements under the [deeds] should retain their secured status'. However, senior counsel who then appeared for the applicants abandoned the contention in oral submissions. Senior counsel stated the following:

I accept that if Your Honour sets aside the transactions it will be very difficult for me to persuade you to nevertheless allow our funds to be other than unsecured or to give us some seniority in terms of priority, your Honour. ... I'm not going to seek to persuade you of that, Your Honour.¹⁵³

301 According to the respondents, as this contention was abandoned at trial, the applicants should not be permitted to rely upon it on appeal.

302 Secondly, *Whisprun Pty Ltd v Dixon*¹⁵⁴ and other authorities make it clear that even where there is no question of further evidence, it may not be in the interests of justice to permit a party to raise an argument on appeal where it was not relied upon at trial. The respondents submitted that the onus is on the applicants to satisfy the Court that there are exceptional circumstances and to show that the point they seek to raise on appeal could not have been met at trial. In addition, so it was said, running an argument on appeal that was not run at trial is contrary to the objects of the *Civil Procedure Act 2010*. The overarching purpose in s 7 of that Act is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

303 Thirdly, as the applicants abandoned the contention that the deeds should not be declared void in their entirety at trial, the respondents did not make any submissions in relation to it and the associate judge did not deal with it in his reasons. It followed that the applicants could not identify any error on the part of the associate judge that would enable this Court to exercise the discretion for itself. The respondents relied on *Macedonian Orthodox Community Church St Petka Inc v Petar*¹⁵⁵ in support of this proposition.

304 Fourthly, the respondents would be prejudiced if the applicants were permitted to raise the contention on appeal. This was said to be because, had the contention been pursued at trial, the respondents would have conducted the case differently. The respondents

¹⁵³ Transcript of Proceedings (9 March 2018) 441.

¹⁵⁴ (2003) 200 ALR 447, 460–1 [50]–[51] (*Whisprun*).

¹⁵⁵ (2008) 237 CLR 66, 106 [120]–[122].

submitted that the contention may have affected the manner in which Mr Feldman was cross-examined and may have resulted in the calling of additional evidence, such as evidence about the law on enforceability of judgments in the United States where Legend was incorporated. The respondents further submitted that they would have also given consideration to whether the deeds could function with the removal of the impugned clauses.

305 Fifthly, the respondents relied on the fact that during the interlocutory stages of the application for leave to appeal, the Court had informed the applicants of the need for them to identify in their written case the contentions they proposed to pursue on the appeal and gave them ample opportunities to amend their written case. The respondents emphasised that, despite these opportunities, the applicants had not raised the contention embodied in ground 13 until two days prior to the hearing of the application for leave to appeal and did not provide any written submissions in support of ground 13.

306 Sixthly, in relation to the substance of the contention, the respondents argued that removing the clauses that provide for the enforcement of the security from the general security deed would not cure the uncommercial nature of the transaction. That was said to be because there are other enforcement mechanisms that Queensland Phosphate could have relied upon, including commencing proceedings for an order for sale or for a court-appointed receiver, or seizure and disposal of assets under pt 4.3 of the *Personal Property Securities Act 2009* (Cth).

307 In our opinion, the applicants should not be given leave to add ground 13. This is because, as the applicants raised and then abandoned the contention embodied in that ground at trial, it would not be in the interests of justice to permit them to raise the contention on appeal. There is a strong public interest, which is reflected in the authorities¹⁵⁶ as well as the overarching purpose in the *Civil Procedure Act*, for there to be finality in litigation in the sense that parties should not be permitted to pursue on appeal a case that was different to the case they ran at trial. That is particularly so where, as in the present case, a party turned its

¹⁵⁶ See, eg, *Water Board v Moustakas* (1988) 180 CLR 491, 496–7; *Whisprun* (2003) 200 ALR 447, 460–1 [50]–[51]; *Metcalf v Commonwealth of Australia* (2008) Aust Torts Reports 81–934, 61–249 [36]; *McMahon v National Foods Milk Ltd* (2009) 25 VR 251, 268–9 [25]; *Wallis Nominees (Computing) Pty Ltd v Pickett* (2013) 45 VR 657, 672–3 [74]–[77], 674 [84], 679 [109] (‘*Wallis*’).

mind to an issue and made a considered decision not to pursue it at trial.¹⁵⁷ The applicants should be bound by the manner in which they conducted the proceeding at trial.

308 The above conclusion is sufficient to dispose of the applicants' application for leave to rely on ground 13. However, we would add that we are not persuaded that it would be appropriate for this Court to exercise the discretion in s 588FF(1)(i) of the *Corporations Act* if, notwithstanding that we agreed with the associate judge's conclusion that the deeds constituted an uncommercial transaction, we disagreed with his finding, in arriving at that conclusion, that the advances totalling \$400,000 provided no tangible benefit to Legend.

309 In accordance with s 588FB of the *Corporations Act*, a transaction is uncommercial if, having regard to the four specified criteria, it would be expected that a reasonable person in the company's circumstances would not have entered into it. In the present case, we have upheld not only the associate judge's conclusion that the deeds constitute an uncommercial transaction but also his reasoning in the application of the four criteria. In particular, we have agreed with the associate judge's conclusion that the deeds did not provide any tangible benefit to Legend.¹⁵⁸ There was also no tangible benefit to Paradise. In those circumstances, it would not be appropriate for this Court to make different orders under s 588FF which have the effect of partially preserving the validity of the deeds. That is so even if the associate judge made erroneous findings on any matters that were not material to the application of the four criteria. It follows that even if there were some substance to the applicants' contentions under grounds 3, 4 and 9 — which are ancillary to ground 1 which we have rejected — that would not warrant this Court disturbing the associate judge's orders under s 588FF.

310 In view of the above conclusions, it is not necessary for us to consider the other submissions made by the parties in relation to proposed ground 13.

Conclusion

311 As grounds of appeal 1 and 6 were arguable, we will grant leave to appeal in respect

¹⁵⁷ *Wallis* (2013) 45 VR 657, 674 [84], 679 [109].

¹⁵⁸ See [174] above.

of them but refuse leave in respect of the other grounds. For the reasons set out above, we will dismiss the appeal.
