FEDERAL COURT OF AUSTRALIA

Clifton (Liquidator) v Kerry J Investment Pty Ltd trading as Clenergy [2020] FCAFC 5

|  |  |
| --- | --- |
| Appeal from: | *Clifton v Kerry J Investment Pty Ltd trading as Clenergy* [2017] FCA 1379 |
|  |  |
| File numbers: | SAD 341 of 2017SAD 342 of 2017SAD 343 of 2017 |
|  |  |
| Judges: | **BESANKO, MARKOVIC AND BANKS-SMITH JJ** |
|  |  |
| Date of judgment: | 7 February 2020 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** - discovery - where adequacy of discovery questioned after trial of preliminary issue and prior to hearing of appeals - whether liquidators of company complied with discovery orders - where liquidators sourced documents by obtaining hard copy documents, electronic images from certain servers and computers and by obtaining production orders - where hard copy documents of company disorganised - whether reasonable searches undertaken - whether electronic search terms for image searching sufficiently broad - where no interrogation of electronic records in cloud storage - where amount or nature of material in cloud storage unknown - whether technical difficulties a reason not to interrogate material - discovery inadequate**PRACTICE AND PROCEDURE** - discovery - meaning of “reasonable search” for the purposes of r 20.14 of *Federal Court Rules 2011* (Cth) - whether requirement of reasonable search applies to non-standard discovery under r 20.15 - whether requirement of r 20.14 that documents be “directly relevant” applies to non-standard discovery under r 20.15 unless excluded on application**PRACTICE AND PROCEDURE** - relief - where parties who failed to comply with discovery in first instance proceedings are appellants - consequences of such failure on an appeal and cross appeal - where extent and effect of inadequate discovery on matters before primary judge unknown - where failure to comply with discovery orders is ongoing - effect of ongoing failure to make proper discovery - s 28 of *Federal Court of Australia Act 1976* (Cth) - assessment of what will serve interests of justice - whether appeals should be dismissed where but for the question of discovery there may have been merit in grounds - whether remittal should be ordered - whether terms of remittal should be limited**CORPORATIONS** - winding up - where unfair preference claims brought by liquidators against creditors under s 588FF of *Corporations Act 2001* (Cth) - whether the company was insolvent when payments made - where primary judge made findings as to date of insolvency - s 95A of *Corporations Act 2001* (Cth) and“forward looking test” of insolvency - whether forecast as to future cash flow ought to have been taken into account**CORPORATIONS** - winding up - security - whether renewable energy certificates (RECs) were an asset of the company able to be realised to meet debts in the ordinary course of business - where sale other than in the ordinary course of the company's ordinary business restricted by terms of loan facility and security in favour of bank by way of fixed and floating charge - whether scale of proposed sale of RECs such that outside the ordinary course of business - whether consent of bank to sale of RECs could be inferred**CORPORATIONS** - winding up - tax - liability of company to Commissioner of Taxation - whether established that payment arrangement was in place under s 255-15 of Schedule 1 to *Taxation Administration Act 1953* (Cth) - meaning of “due and payable” where used in s 255‑15 of Schedule 1 - statutory construction - whether open to treat tax obligation as deferred for reasons of “commercial reality”**CONTRACT** - construction and interpretation - subordination deed - consideration of loan agreement in construing subordination deed - whether subordination deed abandoned - whether subordination continued such that liability under loan agreement not due and payable |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 9, 95A, 459G, 513B, 513C, 588, 588E, 588FF*Federal Court of Australia Act 1976* (Cth) ss 23, 25, 27, 28, 37M*Renewable Energy (Electricity) Act 2000* (Cth) s 26*Taxation Administration Act 1953* (Cth) ss 8AAZL, 255‑10, 255-15, 255-20, 269-15, Schedule 1*Federal Court Rules 2011* (Cth) rr 1.33, 5.04, 5.23, 20.14, 20.15, 20.16, 20.17, 30.01, 36.17, 36.74 |
|  |  |
| Cases cited: | *BB Retail Capital Pty Ltd v Alexandria Landfill Pty Ltd* [2015] NSWCA 319*Boensch v Pascoe* [2019] HCA 49*Brookfield v Yevad Products Pty Ltd* [2002] FCA 1376*Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164*Clone Pty Ltd v Players Pty Ltd (In liq) (Receivers and Managers Appointed)* [2018] HCA 12; (2018) 264 CLR 165*Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134*Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1*Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; (2008) 237 CLR 473*Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640*Emanuel Management Pty Ltd v Foster’s Brewing Group Ltd* [2003] QSC 205*Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International B.V. (No 4)* [2017] FCA 1345*Fire Nymph Products Pty Ltd v Heating Centre Pty Ltd* (1988) 14 NSWLR 460*Fire Nymph Products Pty Ltd v Heating Centre Pty Ltd (in liq)* (1992) 7 ACSR 365*Fitzgerald v Masters* (1956) 95 CLR 420*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118*Hall v Poolman* [2007] NSWSC 1330*Hussain v CSR Building Products Ltd* [2016] FCA 392; (2016) 246 FCR 62*JR Consulting & Drafting Pty Ltd v Cummings* [2016] FCAFC 20; (2016) 329 ALR 625*Lewis v Doran* [2004] NSWSC 608; (2004) 208 ALR 385*Lewis v Doran* [2005] NSWCA 243; (2005) 219 ALR 555*Mango Boulevard Pty Ltd v Spencer* [2008] QCA 274*McDonald v McDonald* (1965) 113 CLR 529*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104*Mulley v Manifold* (1959) 103 CLR 341*Neutral Bay Pty Ltd v Deputy Commissioner of Taxation* [2007] QCA 312*Noza Holdings Pty Limited v Commissioner of Taxation* [2010] FCA 990*Pearce v Gulmohar Pty Ltd* [2017] FCA 660*Porter v Sundance Resources Ltd [No 2]* [2015] WASC 493*Rees v Bank of New South Wales* (1964) 111 CLR 210*Reynolds Bros (Motors) Pty Ltd v Esanda Ltd* (1983) 8 ACLR 422; (1983) 1 ACLC 1333*Ryder v Frohlich* [2004] NSWCA 472*Smith v Boné* [2015] FCA 319*Stoljic v Deputy Commissioner of Taxation* [2018] FCA 483*Stone v Melrose Cranes & Rigging Pty Ltd, in the matter of Cardinal Project Services Pty Ltd (in liq) (No 2)* [2018] FCA 530*Treloar Constructions Pty Ltd v McMillan* [2017] NSWCA 72*Yates v Australian* *Competition and Consumer Commission* [2006] FCA 1058 |
|  |  |
| Date of hearing: | 6-7 August 2018, 7-8 February 2019 and 15 March 2019 |
|  |  |
| Registry: | South Australia |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 688 |
|  |  |
| Counsel for Solar Shop: | Mr B Roberts SC with Mr S Evans |
|  |  |
| Solicitor for Solar Shop: | O’Loughlins Lawyers |
|  |  |
| Counsel for Kerry J Investments Pty Ltd trading as Clenergy: | Mr P Ehrlich QC |
|  |  |
| Solicitor for Kerry J Investments Pty Ltd trading as Clenergy: | Barrett Walker Lawyers |
|  |  |
| Counsel for Wuxi Suntech Power Co. Limited: | Mr S Hay |
|  |  |
| Solicitor for Wuxi Suntech Power Co. Limited: | Holding Redlich |
|  |  |
| Counsel for SMA Solar Technology A.G: | Mr C N Bova with Mr J S Burnett |
|  |  |
| Solicitor for SMA Solar Technology A.G: | Corrs Chambers Westgarth |
|  |  |

|  |  |
| --- | --- |
| **Table of Corrections** |  |
|  |  |
| 15 September 2020 | In paragraph 172, “rr 20.15(1) and (2)” has been replaced with “rr 20.14(1) and (2)”. |

ORDERS

|  |  |
| --- | --- |
|  | SAD 341 of 2017 |
|   |
| BETWEEN: | TIMOTHY JAMES CLIFTON AND MARK CHRISTOPHER HALL IN THEIR CAPACITY AS LIQUIDATORS OF SOLAR SHOP AUSTRALIA PTY LTD (IN LIQ) (ACN 092 562 877)Appellant |
| AND: | KERRYJ INVESTMENT PTY LTD TRADING AS CLENERGY (ACN 108 633 227)Respondent |

|  |  |
| --- | --- |
| JUDGES: | BESANKO, MARKOVIC AND BANKS-SMITH JJ |
| DATE OF ORDER: | 7 February 2020 |

THE COURT ORDERS THAT:

1. Leave be granted to the respondent/cross appellant to file a further amended notice of cross appeal in the form annexed to its second further amended interlocutory application filed on 5 November 2018 (**Interlocutory Application**) and marked C.

2. Save to the extent provided by these Orders, the Interlocutory Application be otherwise dismissed.

3. The appeal be dismissed.

4. The respondent’s notice of contention filed on 18 July 2018 be dismissed.

5. The cross appeal be allowed:

(a) Order 1 made in proceeding SAD 261 of 2014 on 24 November 2017 be set aside; and

(b) proceeding SAD 261 of 2014 be remitted to the primary judge or another judge of the Court for determination of the following question:

Was Solar Shop Australia Pty Ltd (in liquidation) insolvent within the meaning of s 95A of the *Corporations Act 2001* (Cth) on 31 July 2011?

6. The appellant/cross respondent’s notice of contention filed on 18 July 2018 be dismissed.

7. The respondent/cross appellant file and serve its submissions, not exceeding five pages in length, on the question of the costs of proceeding SAD 261 of 2014, the appeal, the Interlocutory Application and cross appeal within 14 days of the date of these Orders.

8. The appellants/cross respondents file and serve their submissions, not exceeding five pages in length, on the question of the costs of proceeding SAD 261 of 2014, the appeal, the Interlocutory Application and cross appeal within 28 days of the date of these Orders.

9. The question of costs of proceeding SAD 261 of 2014, the appeal, the Interlocutory Application and cross appeal be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

|  |  |
| --- | --- |
|  | SAD 342 of 2017 |
|  |
| BETWEEN: | **TIMOTHY JAMES CLIFTON AND MARK CHRISTOPHER HALL IN THEIR CAPACITY AS LIQUIDATORS OF SOLAR SHOP AUSTRALIA PTY LTD (IN LIQ) (ACN 092 562 877)**Appellant |
| AND: | **WUXI SUNTECH POWER CO. LIMITED, (PEOPLE**’**S REPUBLIC OF CHINA) LICENSE NUMBER 320000400001498**Respondent |

|  |  |
| --- | --- |
| JUDGE: | BESANKO, MARKOVIC AND BANKS-SMITH JJ |
| DATE OF ORDER: | 7 February 2020 |

THE COURT ORDERS THAT:

1. Leave be granted to the respondent/cross appellant to file a further amended notice of cross appeal in the form annexed to its further amended interlocutory application filed on 5 November 2018 (**Interlocutory Application**) and marked C.

2. Save to the extent provided by these Orders, the Interlocutory Application be otherwise dismissed.

3. The appeal be dismissed.

4. The respondent’s notice of contention filed on 19 July 2018 be dismissed.

5. The cross appeal be allowed:

(a) Order 1 made in proceeding SAD 275 of 2014 on 24 November 2017 be set aside; and

(b) proceeding SAD 275 of 2014 be remitted to the primary judge or another judge of the Court for determination of the following question:

Was Solar Shop Australia Pty Ltd (in liquidation) insolvent within the meaning of s 95A of the *Corporations Act 2001* (Cth) on 31 July 2011?

6. The appellant/cross respondent’s notice of contention filed on 18 July 2018 be dismissed.

7. The respondent/cross appellant file and serve its submissions, not exceeding five pages in length, on the question of the costs of proceeding SAD 275 of 2014, the appeal, the Interlocutory Application and cross appeal within 14 days of the date of these Orders.

8. The appellants/cross respondents file and serve their submissions, not exceeding five pages in length, on the question of the costs of proceeding SAD 275 of 2014, the appeal, the Interlocutory Application and cross appeal within 28 days of the date of these Orders.

9. The question of costs of proceeding SAD 275 of 2014, the appeal, the Interlocutory Application and cross appeal be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

|  |  |
| --- | --- |
|  | SAD 343 of 2017 |
|  |
| BETWEEN: | **TIMOTHY JAMES CLIFTON AND MARK CHRISTOPHER HALL IN THEIR CAPACITY AS LIQUIDATORS OF SOLAR SHOP AUSTRALIA PTY LTD (IN LIQ) (ACN 092 562 877)**Appellant |
| AND: | **SMA SOLAR TECHNOLOGY A.G. (JOINT STOCK COMPANY) (GERMANY) REGISTRATION NUMBER HRB 3972**Respondent |

|  |  |
| --- | --- |
| JUDGE: | BESANKO, MARKOVIC AND BANKS-SMITH JJ |
| DATE OF ORDER: | 7 February 2020 |

THE COURT ORDERS THAT:

1. Leave be granted to the respondent/cross appellant to file a further amended notice of cross appeal in the form annexed to its further amended interlocutory application filed on 5 November 2018 (**Interlocutory Application**) and marked C.

2. Save to the extent provided by these Orders, the Interlocutory Application be otherwise dismissed.

3. The appeal be dismissed.

4. The respondent’s notice of contention filed on 19 July 2018 be dismissed.

5. The cross appeal be allowed:

(a) Order 1 made in proceeding SAD 276 of 2014 on 24 November 2017 be set aside; and

(b) proceeding SAD 276 of 2014 be remitted to the primary judge or another judge of the Court for determination of the following question:

Was Solar Shop Australia Pty Ltd (in liquidation) insolvent within the meaning of s 95A of the *Corporations Act 2001* (Cth) on 31 July 2011?

6. The appellant/cross respondent’s notice of contention filed on 18 July 2018 be dismissed.

7. The respondent/cross appellant file and serve its submissions, not exceeding five pages in length, on the question of the costs of proceeding SAD 276 of 2014, the appeal, the Interlocutory Application and cross appeal within 14 days of the date of these Orders.

8. The appellants/cross respondents file and serve their submissions, not exceeding five pages in length, on the question of the costs of proceeding SAD 276 of 2014, the appeal, the Interlocutory Application and cross appeal within 28 days of the date of these Orders.

9. The question of costs of proceeding SAD 276 of 2014, the appeal, the Interlocutory Application and cross appeal be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**TABLE OF CONTENTS**

|  |  |
| --- | --- |
| BACKGROUND | [4] |
| Solar Shop and its business | [5] |
| Solar Shop’s arrangements with its financiers | [9] |
| Renewable energy certificates | [16] |
| Westpac reviews | [21] |
| The appointment of voluntary administrators and of the Liquidators | [28] |
| THE FIRST INSTANCE PROCEEDINGS | [29] |
| The primary judge’s decision | [33] |
| The Solarise Loan | [36] |
| Solar Shop’s liability to the ATO | [43] |
| Overview of the Liquidators’ claims of insolvency | [45] |
| 31 January 2011 | [49] |
| 30 April 2011 | [54] |
| 22 May 2011 and 31 May 2011 | [60] |
| Solar Shop’s solvency as at 31 July 2011 | [72] |
| THE APPEALS AND THE DISCOVERY ISSUE | [77] |
| Procedural history | [77] |
| The discovery issue | [88] |
| Discovery in the First Instance Proceedings | [91] |
| Sources of documents | [98] |
| Hard Copy Documents | [104] |
| Electronic documents | [115] |
| Third party documents | [119] |
| Review of discovery since the commencement of the hearing of the appeal | [128] |
| Analysis and ground 1A of the cross appeals | [132] |
| The effect of the Liquidators’ ongoing failure to make proper discovery | [190] |
| THE LIQUIDATORS’ GROUNDS OF APPEAL | [211] |
| Ground 1 | [212] |
| Analysis | [214] |
| Conclusion | [235] |
| Ground 2 | [236] |
| Analysis | [309] |
| The Construction Issue | [309] |
| The Abandonment Issue | [323] |
| The Approval Issue | [333] |
| Conclusion | [336] |
| Ground 3 | [337] |
| The Charge Issue | [366] |
| The Market Issue | [381] |
| The No Difference Issue | [389] |
| The Number of RECs Issue | [390] |
| Conclusion | [392] |
| Ground 4 | [393] |
| Analysis | [412] |
| Conclusion | [423] |
| Ground 5 of the appeals and grounds 1 and 2 of the cross appeals | [424] |
| The Confined Dates Issue before the primary judge | [432] |
| Analysis of Confined Dates Issue | [437] |
| Conclusion on grounds 1 and 2 of cross appeals | [455] |
| The 30 June 2011 Issue | [456] |
| Consideration of the 30 June 2011 Issue | [459] |
| Conclusion on ground 5 of the appeal | [471] |
| CROSS APPEALS | [472] |
| Grounds 3, 4 and 5 of the cross appeals | [474] |
| When was debt due to the Commissioner of Taxation (ATO) | [477] |
| The primary judge’s reasons | [479] |
| Was the payment plan within s 255-15 of Schedule 1 | [498] |
| Meaning of “due and payable” for s 225-15 | [504] |
| Any other basis to treat liability as deferred | [516] |
| Conclusion as to purported deferral | [533] |
| The Wuxi debt | [542] |
| The Kerry J debt | [552] |
| The Bosch debt | [557] |
| Access to cash and cash equivalents | [564] |
| Access to inventory | [576] |
| Primary judge’s reasons for 31 May 2011 assessment | [579] |
| Summary of submissions | [583] |
| Consideration | [585] |
| Conclusion | [611] |
| Value of the RECs receivables | [618] |
| Inference that trade creditors outside terms | [626] |
| Exclusion of potential funding from Harbert | [631] |
| Reliance on correspondence with Bosch, SMA and Mitsui | [644] |
| Use of Mr Morris’ cash flow | [648] |
| Use of the Lombe Reports | [649] |
| Reference to the May Cash Flow | [650] |
| Reference to the 17 August 2011 correspondence | [655] |
| Conclusion on grounds 3, 4 and 5 of the cross appeals | [661] |
| Overall conclusion on cross appeals | [662] |
| RESPONDENTS’ NOTICES OF CONTENTION | [663] |
| Other items said to be available/excluded as at 30 April 2011 | [668] |
| Access to cash and cash equivalents/trade and other receivables | [668] |
| Access to RECs receivables | [672] |
| Access to inventory | [673] |
| Access to other current assets | [674] |
| Exclusion of tax liabilities | [675] |
| Other items said to be available/excluded as at 22 May 2011 | [676] |
| Cash and cash equivalents/trade and other receivables | [676] |
| Access to RECs receivables | [679] |
| Other current assets | [680] |
| Reduction of Wuxi liability | [681] |
| Conclusion on Respondents’ notices of contention | [682] |
| THE LIQUIDATORS’ NOTICE OF CONTENTION | [687] |
| DISPOSITION | [687] |

REASONS FOR JUDGMENT

THE COURT:

1 There are three appeals before the Court brought by Timothy James Clifton and Mark Christopher Hall in their capacities as joint and several liquidators (**Liquidators**) of Solar Shop Australia Pty Limited (in liquidation) (**Solar Shop**). The Liquidators challenge findings made by the primary judge in response to a separate question about the date on which Solar Shop became insolvent within the meaning of s 95A of the *Corporations Act 2001* (Cth) (**Corporations Act**): *Clifton v Kerry J Investment Pty Ltd trading as Clenergy* [2017] FCA 1379.

2 The respondents to the appeals are respectively Kerry J Investment Pty Limited trading as Clenergy (**Kerry J**), Wuxi Suntech Power Co Limited (**Wuxi**) and SMA Solar Technology A.G. (**SMA**) (collectively **Respondents**). Each of Kerry J, Wuxi and SMA has filed a cross appeal and a notice of contention in the appeal against it. The Liquidators have filed notices of contention in the cross appeals. Whilst the Respondents were separately represented and filed separate written submissions, in effect the Respondents each adopted the submissions of SMA (or, as to the issue of inventory, Kerry J). Therefore, when we refer to the submissions of the Respondents it is on the basis that those submissions are made jointly. On occasion for clarity we refer to the submissions of an individual Respondent but regardless those submissions are taken to have been made by the Respondents jointly.

3 The hearing of the appeals spanned some five days and assumed a level of complexity because it became apparent that two documents had not been discovered to all of the Respondents. The effect of this revelation, and the relief sought as a consequence, is further described below. Before turning to it and to the substantive issues raised by the appeals and cross appeals, it is convenient to set out the background facts.

# BACKGROUND

4 The following background facts, which we understand not to be in dispute, are taken substantially from the primary judge's reasons.

## Solar Shop and its business

5 Solar Shop was incorporated on 20 April 2000. It carried on business as a supplier and installer of solar energy systems and, until 2009, solar water heating systems.

6 Solar Shop had three wholly owned subsidiaries: Solar Hut Pty Limited (**Solar Hut**) which engaged in online sales under the name “SunSavers”; Solar Financial Solutions Pty Limited which offered finance to purchasers under the name “Sunworks”; and SA Commercial Solar Pty Limited which promoted large-scale solar systems for commercial applications under the name “CommSolar”. Solar Shop also held a 50% interest in Sunray Tracker Pty Limited and a 40% interest in Metropolitan Metering Assets Pty Limited.

7 The shareholders in Solar Shop and their respective holdings changed over time such that:

(1) from April 2003 until about 12 February 2007 Adrian and Tanya Ferraretto were its sole shareholders holding shares in their own capacity and as trustees for the A and T Ferraretto Family Trust;

(2) on or about 12 February 2007 Solarise Pty Ltd (**Solarise**), a company associated with Mr Russell Mourney, acquired a substantial holding in Solar Shop and members of Solar Shop’s management also acquired shares;

(3) on 6 May 2009 HMC Australian Private Equity Fund 1 GP, LP (**HAPE 1**), a private equity fund managed by Harbert Management Corporation (**Harbert**), acquired shares in Solar Shop for a consideration of $7 million by acquiring shares from the Ferrarettos,Solarise in its capacity as trustee for the Mourney Family Trust and Mr Stone and Ms Morris in their capacity as trustees of the Morristone Family Trust; and

(4) in October 2010 Solar Shop bought back shares associated with the Ferrarettos for $10 million and the Ferrarettos sold shares to HAPE 1, its CEO, Anthony Thornton, and Solar Shop Australia Management Team Pty Ltd (**SSAMT**).

8 As at 19 October 2010 Solar Shop’s shareholders comprised:

(1) HAPE 1 which held 36,152 shares or 50.2%;

(2) Mr and Mrs Ferraretto who held 20,849 shares or 28.9%;

(3) Mr Thornton who held 11,112 shares or 15.4%;

(4) James Leggett who held 2,292 shares or 3.2%; and

(5) SSAMT which held 1,637 shares or 2.3%.

## Solar Shop’s arrangements with its financiers

9 Westpac Banking Corporation (**Westpac**) was Solar Shop’s banker. On 19 October 2010 Solar Shop entered into a facility agreement with Westpac (**2010 Facility Agreement**) which superseded a business finance agreement that it had entered into with Westpac in 2009 dated 4 May 2009 (**May** **2009 Business Finance Agreement**).

10 Pursuant to the 2010 Facility Agreement Westpac agreed to make six different facilities available to Solar Shop, each referred to as “tranches”. Relevantly:

(1) tranche A comprised an overdraft with a decreasing limit: $3.5 million until 30 October 2010, $2.5 million in the period from 31 October to 29 November 2010 and $1.0 million from 30 November 2010; and

(2) tranche F was a bill acceptance discount facility with a limit of $10 million. Its principal purpose was to fund Solar Shop’s share buy-back from the Ferrarettos.

11 Clause 8.2 of the 2010 Facility Agreement required Solar Shop to make quarterly repayments of principal of $500,000 each, commencing on 31 December 2010 and ending on 30 June 2012, and to repay the balance of tranche F (and the balance owing under any other tranches) on or before the termination date, 19 October 2012.

12 Pursuant to a loan agreement dated 6 May 2009 between Solarise, Mr Mourney, Solar Shop and HAPE 1 (**Solarise Loan Agreement**), Solarise provided unsecured vendor finance for the shares it sold to Solar Shop (**Solarise Loan**). Relevantly in that agreement:

(1) clause 1.1 included the following definitions:

Bank means Westpac Banking Corporation (ABN 33 007 457 141)

Bank Debt means all the money and amounts (in any currency) that [Solar Shop] is or may become liable at any time (presently, prospectively or contingently, whether alone or not and in any capacity) to pay to, or for the account of, the Bank pursuant to the terms of the Bank Finance Documents.

Buy-Back Date means the date on which the Share Buy-Back Agreement completes and the Buy-Back becomes effective.

Permitted Payment means:

(a) any payment that the Bank has consented to in writing; or

(b) any payment permitted under clause 6.4.

Repayment Date means in respect of any amount of the Principle Sum that is not a Notified Claim Amount or Respective Proportion Amount that earliest of:

…

(b) the second anniversary of the Buy-Back Date; and

…

Solarise Debt means all money and amounts that [Solar Shop] is or may become liable at any time (presently, prospectively or contingently, whether alone or not and in any capacity) to pay to or for the account of Solarise in accordance with the terms of this agreement.

Subordination Period means the period from the date of this document until the second anniversary of the Buy-Back Date.

(2) clause 4.1 required Solar Shop to repay the principal sum, $5,178,682.13, to Solarise on “the Repayment Date”, 22 May 2011;

(3) clause 5 provided that interest accrues daily on the Principal Sum (as defined) plus any capitalised interest from time to time at the interest rate calculated in accordance with the specified formula; and

(4) clause 6 provided that:

6.1 Solarise Debt subordinated

Solarise acknowledges and agrees that the Solarise Debt and all related rights, claims and payments are subordinated and postponed to, and rank in priority after, the Bank Debt and all related rights, claims and payments, on the terms of this agreement. [Solar Shop’s] obligations and liabilities in respect of the Solarise Debt are conditional (only to the extent set out in this agreement) on the Subordination Period ending.

6.2 Solarise Debt not payable

Despite any agreement to the contrary, during the Subordination Period none of the Solarise Debt is payable or repayable except for the purpose of a Permitted Payment.

6.3 Continuing subordination

The Subordination applies to the present and future balances of the Bank Debt and Solarise Debt. Solarise agrees and acknowledges that the Subordination is irrevocable and a continuing subordination until the Subordination Period ends, and is not discharged by any payment, settlement of account, an Insolvency Event or anything else.

6.4 Permitted Payment

If at any time all of the following conditions are satisfied:

(a) no Bank Debt is due and unpaid;

(b) no Subordination Default subsists;

(c) neither [Solar Shop] nor Solarise is in breach of the provisions of this agreement; and

(d) no Insolvency Event had occurred in respect of [Solar Shop]or Solarise,

[Solar Shop] will pay, repay, satisfy or discharge, and Solarise may receive and retain payment of, the following amounts due at that time in respect of the Solarise Debt:

(a) accrued interest in accordance with the terms of this agreement; and

(b) payments of the Principal Sum in accordance with the terms of this agreement; and

(c) amounts notified by the Bank to [Solar Shop] in writing as being permitted under this clause.

13 On 20 May 2009 Westpac, Solarise and Solar Shop entered into a deed of subordination (**Subordination Deed**) which relevantly included:

(1) at clause 1 that:

“Business Finance Agreement” means the Business Finance Agreement dated 4 May 2008 between Westpac and the Borrower “Debts” means the Westpac Debt and the Solarise Debt;

“Debts” means the Westpac Debt and the Solarise Debt;

…

“Permitted Payments” has the meaning stipulated in clause 8;

…

“Solarise Debt” means the aggregate of all monies, debt and liabilities owing from time to time now or in the future on any account or remaining unpaid by [Solar Shop] to Solarise pursuant to the Loan Agreement”

“Subordination Default” means any one or more of:

(a) the occurrence of a “Default Event” as defined in the Business Finance Agreement;

(b) [Solar Shop’s] failure to pay any Westpac Debt or Solarise Debt when due or within any applicable grace period;

(c) the Westpac Debt or Solarise Debt becoming due and payable before its due date other than at [Solar Shop’s] option.

“Westpac Debt” means the aggregate of all of the amounts owing from time to time on any account by [Solar Shop] to Westpac pursuant to the Business Finance Agreement, or pursuant to the Westpac Securities, whether actual or contingent, present or future including, without limitation, all of the facilities under the Business Finance Agreement;

“Westpac Securities” means those securities listed as security the facilities provided by Westpac to [Solar Shop] under the Business Finance Agreement;

(2) at clause 4 titled “Subordination” that:

4.1 The Lenders and [Solar Shop] agree that the Solarise Debt is subordinated to the Westpac Debt.

4.2 Until:

4.2.1 the Westpac Debt has been paid or satisfied in full; or

4.2.2 the Solarise Debt is repaid with the written consent of Westpac, payment by [Solar Shop] to Solarise of the Solarise Debt or any part of it is postponed, despite any other arrangement to the contrary, except for the Permitted Payments and subject to this Deed.

(3) at clause 5 that Solar Shop agrees with each of Solarise and Westpac that it may not, without Westpac’s prior written consent and for so long as any of the Westpac Debt (adopting the definition from the Subordination Deed) remains outstanding, among other things, make any payment in satisfaction of the Solarise Debt other than the Permitted Payments; and

(4) at clause 6 that Solarise agrees with Solar Shop and Westpac that, so long as any of the Westpac Debt remains outstanding, Solarise must not, without Westpac’s prior written consent or otherwise as permitted by the Subordination Deed, among other things, receive any payment or thing of value in satisfaction of any part of the Solarise Debt other than the Permitted Payments or demand, sue for or take any other action to cause or enforce payment of any of the Solarise Debt except the Permitted Payments.

14 Clause 8 of the Subordination Deed titled “Permitted Payments” was central to the issue raised both before the primary judge and on appeal about the time at which the Solarise Loan fell due for repayment. It relevantly provided:

8.1 If, at any time, all of the following conditions are satisfied:

8.1.1 no Westpac Debt is due and unpaid; and

8.1.2 no default under the Business Finance Agreement subsists; and

8.1.3 neither Solarise or [Solar Shop] are in breach of the provisions of this Deed; and

8.1.4 no Insolvency Event has occurred in respect of Solarise or [Solar Shop]; and

8.1.5 no Subordination Default subsists,

then [Solar Shop] may pay, repay, satisfy or discharge Solarise, and Solarise may receive and retain payment of the amounts contemplated in the Amortisation Schedule in the manner and at the times contemplated by the Amortisation Schedule (“Permitted Payments”).

8.2 To avoid doubt:

…

8.2.2 If [Solar Shop] does not make a capital payment (“Unpaid Capital Payment”) on the date which that capital payment is permitted to be made in accordance with the Amortisation Schedule (“Relevant Capital Payment Date”), [Solar Shop] may make the Unpaid Capital Payment at any time following the Unpaid Capital Payment Date, provided:

(a) the conditions set out in this clause 8 are satisfied; and

(b) [Solar Shop] notifies Westpac in writing within 2 business days of the date when the Unpaid Capital Payment is actually made.

8.3 Notwithstanding anything else in this Deed or the Loan Agreement, any payments by [Solar Shop] in connection with the Solarise Debt (whether to Solarise, Harbert or anyone else) which are not Permitted Payments must not be made without Westpac’s prior written consent (which will not be unreasonably withheld or delayed).

15 The Amortisation Schedule referred to in cl 8 provided:



Note: The interest payments set out in the table above have been calculated on the basis that capital payments will be made on the Dates of Payment. [Solar Shop] may, but is not obliged to, make the capital payments on the Dates of Payment. If [Solar Shop] does not make any capital payments, or makes reduced capital payments, the interest payable on each Date of Payment will increase accordingly.

In addition, if the amount of the interest payments are increased from time to time, as a result of the [non] payment of capital, the total amount payable by [Solar Shop]to Solarise will increase over the term of the Loan such that the total amount permitted to be paid on 20 May 2011, when taken together with the total permitted payments on each of the other Dates of Payment, will need to increase to allow [Solar Shop] to make a payment to Solarise of the total amount of capital due and payable under the Loan Agreement together with all interest accrued in accordance with the terms of the Loan Agreement, provided that the total capital payable will not exceed $5,178,682.13.

## Renewable energy certificates

16 Renewable energy certificates (**RECs**) assumed some importance both in the proceedings before the primary judge and on appeal. They are a form of incentive under a scheme established by the *Renewable Energy (Electricity) Act 2000* (Cth) (**Renewable Energy Act**). From about January 2011 the RECs which were at issue in the proceedings became known as “small scale technology certificates”, but Solar Shop continued to refer to them as RECs.

17 Relevantly s 26 of the Renewable Energy Act provides that: a REC is not valid until it has been registered; when the Regulator has been notified that a REC has been created, it must determine whether the REC is eligible for registration; and if the Regulator determines that a certificate is eligible for registration, it must create an entry for the certificate in the relevant register and record the person who created the REC as its owner.

18 Customers purchasing a solar system from Solar Shop were entitled to RECs upon installation of the system based on the power generation capacity of the system installed. That is, the higher the capacity the greater the entitlement. Once generated, RECs could be sold to a clearing house established under the Renewable Energy Act or privately to a purchaser for a negotiated price.

19 Solar Shop agreed with its customers at point of sale to purchase their RECs in exchange for a reduction in the purchase price of the system. Solar Shop would later sell the RECs so acquired, endeavouring to do so at a profit. However, there was a risk that the clearing house or market price would decline in the period between Solar Shop’s entry into the consumer contract with its customer and the time, usually several months later after installation was complete, when the consumer became entitled to the RECs and could assign them to Solar Shop.

20 The effect of the RECs scheme was that Solar Shop had two income streams: the amounts paid by consumers for the solar systems they purchased and the amounts derived from the sale of RECs.

## Westpac reviews

21 On 9 December 2010 Solar Shop informed Westpac that its operating profit had declined significantly and that, as at 31 December 2010, it was likely to be in breach of covenants in the 2010 Facility Agreement. This position was confirmed by letter dated 15 February 2011 when Solar Shop informed Westpac that it was in breach of three of the four financial covenants in cl 12.12 of the 2010 Facility Agreement.

22 On 12 January 2011 Westpac appointed John Hart of Ferrier Hodgson to undertake an independent review of Solar Shop’s financial performance and status. The purpose of the review was to enable Westpac to obtain a better understanding of Solar Shop and to consider:

(1) Solar Shop’s:

(a) immediate and medium term cash flow requirements;

(b) ability to continue to trade and to meet its obligations;

(c) current available strategies to assist with a turnaround in profitability and cash flow; and

(2) the alternatives available to Westpac in the event that it needed to realise its security.

23 On 28 February 2011 Ferrier Hodgson reported to Westpac (**First Ferrier Hodgson Report**). In its executive summary Ferrier Hodgson reported, among other things, that:

(1) between July 2010 and 31 December 2010 Solar Shop’s growth had slowed and it had incurred an operating loss after tax of $1 million;

(2) Solar Shop recognised revenue on completion of installations rather than on receipt of a confirmed order with deposit paid;

(3) as at 31 December 2010 Solar Shop had a backlog of over 3,600 installations which represented future revenue of over $70 million;

(4) in the six months to 31 December 2010 installations had averaged 676 per month against orders received of 879 per month. Had installations kept pace with the rate of sales, revenue may have been approximately $20 million higher and a net profit after tax of approximately $3 million achieved compared with the loss of $1 million;

(5) evidence of mismanagement or fraud had begun to emerge in Sunsavers;

(6) an internal review of Sunsavers completed by Solar Shop in February 2011 indicated that estimated EBITDA had been overstated by approximately $3.2 million;

(7) the decline in net profit before tax was mainly due to:

(a) the decline in revenue and gross margin percentage for Sunsavers;

(b) reduced gross margin percentage for Solar Shop offsetting revenue growth;

(c) increased costs in anticipation of growth not covered by growth in gross margins; and

(8) as at 31 December 2010 Solar Shop had cash on hand of approximately $5.5 million. The cash position improved in the six months from 1 July 2010 to 31 December 2010 as a result of liquidation of RECs, the deferment of approximately $3.2 million in creditor payments through arrangements with three major suppliers and the Australian Taxation Office (**ATO**), reduction in accounts receivable and reduction in solar rebates receivable.

24 The First Ferrier Hodgson Report contained a number of recommendations including that Westpac:

(1) “give strong consideration to continuing to support” Solar Shop, at least in the short term including by providing additional guarantee and forex requirements sought by Solar Shop, subject to Solar Shop achieving satisfactory performance criteria based on its forecast;

(2) give consideration to continuing to reserve its rights in respect of the existing breaches of covenants;

(3) monitor Solar Shop’s performance on a monthly basis, including achievement of its required rate of installations;

(4) notify Solar Shop that it should not make any repayment of the Solarise Loan without Westpac’s approval;

(5) assess Solar Shop’s financial position as at 30 April 2011, including assessment of the then current order backlog and forecasts for the balance of 2011;

(6) subject to Solar Shop’s financial performance, give consideration to the extent to which it may permit a part payment of the Solarise Loan; and

(7) make any repayment of the Solarise Loan subject to a reduction in Westpac’s own debt to at least $3 million to improve Westpac’s security position.

25 On 28 April 2011 Solar Shop informed Westpac that it was “not in compliance” with the same three financial covenants in cl 21.2 of the 2010 Facility Agreement as had been notified in December 2010 and February 2011. On 27 May 2011 Westpac wrote to Solar Shop confirming the breaches of covenants, reserving its rights to take action in relation to those breaches, noting that it did not waive the “events of default” and that as a result of those breaches all facilities provided by Westpac to Solar Shop “are on demand”.

26 On 19 July 2011 Ferrier Hodgson provided Westpac with a second independent business review of the Solar Shop group performance in the period from 1 January 2011 to 30 June 2011 (**Second Ferrier Hodgson Report**). In that report Ferrier Hodgson:

(1) noted a number of issues about the group’s performance including that revenues were down by $13 million, EBITDA was $7 million below the revised budget, there were continued below budget performances as installation targets were not met for a variety of reasons and RECs were being sold at a price less than had been paid for them; and

(2) made recommendations including that, subject to compliance with certain conditions including that Harbert and/or other shareholders immediately inject $5 million into the business and that there be deferral of the current repayment proposal of the Solarise Loan, Westpac “may consider granting the request to 12 month deferral of debt amortisation” but that it should not “increase the overdraft facility from $1.0m to $3.0m, the deferral of vendor loan payments will alleviate the requirement for this funding”.

27 Westpac did not agree to increase the overdraft limit nor did it agree to waive payment of the amortisation payments of $500,000 per quarter in relation to the tranche F facility (see [10] above).

## The appointment of voluntary administrators and of the Liquidators

28 On 21 October 2011 the directors of Solar Shop appointed voluntary administrators. On 25 November 2011 a meeting of creditors resolved that Solar Shop should be wound up and the Liquidators were appointed as joint and several liquidators.

# THE FIRST INSTANCE PROCEEDINGS

29 The Respondents were each suppliers to Solar Shop. The Liquidators commenced proceedings against each of those entities seeking to recover amounts for unfair preferences pursuant to s 588FF of the Corporations Act as follows:

 in proceeding SAD261/2014 against Kerry J (**Kerry J Proceeding**) the sum of $417,075.26 or, in the alternative, the sum of $327,449.46;

 in proceeding SAD275/2015 against Wuxi (**Wuxi Proceeding**) the sum of US$1,814,066.80; and

 in proceeding SAD276/2014 against SMA (**SMA Proceeding**) the sum of €2,445,850.21 or, in the alternative, €1,800,797.89,

(collectively, **First Instance Proceedings**).

30 By reason of the definitions in ss 9, 513B and 513C of the Corporations Act, the relation back day for Solar Shop is 21 October 2011 and the relation back period is 22 April 2011 to 21 October 2011. The payments received by each of Kerry J, Wuxi and SMA in that period which were the subject of the First Instance Proceedings are:



The Liquidators contended that Solar Shop was insolvent at the time it made each of these payments and the Respondents disputed that was so.

31 On 25 May 2016 orders were made in each of the First Instance Proceedings pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) (**Rules**) that a separate question be heard and determined which was in the following terms: “did [Solar Shop] become insolvent within the meaning of s 95A of the Corporations Act and, if so, when?”. The Court also ordered that the hearing of the separate question in each of the First Instance Proceedings was to take place concurrently.

32 On 24 November 2017 the primary judge delivered judgment on the separate question. His Honour found that the Liquidators had not proved that Solar Shop was insolvent as at 31 January 2011, 30 April 2011 and 31 May 2011 and determined the separate question in each of the First Instance Proceedings by holding that Solar Shop had become insolvent by 31 July 2011: reasons at [366]‑[367]. It is from those findings that the appeals and cross appeals that are now before the Court are brought.

## The primary judge’s decision

33 Before the primary judge, the Liquidators sought a finding that Solar Shop was insolvent by not later than either 31 January 2011; in the alternative, 30 April 2011; or, further in the alternative, 22 May 2011. The primary judge noted that SMA and Kerry J contended for different dates: SMA contended that Solar Shop had not become insolvent until 29 July 2011 and possibly not until 4 August 2011 and Kerry J submitted that it had not become insolvent until 9‑16 August 2011. The primary judge expressed the view that, because of the terms of the separate question, the Court was not confined to any of those dates and did not accept the Respondents’ submission that the Liquidators were confined to the three dates they had nominated: at [6].

34 The evidence before the primary judge was entirely documentary. The Liquidators, Kerry J and SMA each obtained reports from forensic accountants. Relevantly, the Liquidators obtained four reports from Brian Morris and SMA obtained two reports from David Lombe, one dated 4 December 2015 (**First** **Lombe Report**) and the second dated 9 September 2016 (**Second Lombe Report**). However, the parties agreed that, instead of the Court dealing with the numerous objections that were made to the forensic accountants’ reports, they would have the “status of an aide to the submissions of the party retaining them” which, his Honour observed, is contemplated by r 5.04(3) item 19 of the Rules and is consistent with the approach adopted by Gordon J in *Noza Holdings Pty Limited v Commissioner of Taxation* [2010] FCA 990: at [7].

35 Having observed that the Liquidators bore the onus of establishing Solar Shop’s insolvency, the primary judge considered each of the matters relied on by the Liquidators to establish Solar Shop’s insolvency as at the dates for which they contended.

### The Solarise Loan

36 The first matter that the primary judge considered was the Solarise Loan because, central to the Liquidators’ case, was their contention that the Solarise Loan became due and payable on 22 May 2011 and that Solar Shop did not have the resources, nor any plan, at any time during 2011 to repay that loan when it did so. It was common ground that the question of whether the Solarise Loan became due and payable on 22 May 2011 turned principally on whether it remained subordinated after that date to the Westpac Debt. At [83] of the reasons, his Honour noted that that question gave rise to the following issues:

(a) did the Subordination Deed operate to make the Solarise Loan subordinate to the Westpac Debt only to 22 May 2011?

(b) alternatively, did Westpac agree in May 2011 to [Solar Shop] executing an agreement with Solarise which rendered the whole of the Solarise Debt then due and payable on demand?

(c) alternatively, did the Subordination Deed, by reason of the principles of abandonment, cease to be “valid and efficacious” as and from the time of the tripartite negotiations involving Westpac, Solarise and [Solar Shop] in October 2010 in relation to the negotiation of the new facility agreement?

(d) alternatively, did an indemnity obligation in an agreement made between [Solar Shop] and Solarise in May 2011 give rise to a new debt which was immediately due and payable on [Solar Shop's] failure to pay the Solarise Debt on 22 May 2011?

37 In relation to the first issue, the primary judge found that the Subordination Deed did not operate to make the Solarise Loan subordinate to the Westpac Debt only until 22 May 2011. His Honour held that, while Solar Shop had been authorised to make the Permitted Payments which would have had the effect of repayment of the Solarise Loan by 22 May 2011, it was not required to do so. The parties thus contemplated that the Solarise Debt may continue past 22 May 2011. The primary judge found that, as Solar Shop did not make the Permitted Payments to Solarise before 22 May 2011, it could only make a payment after that date with Westpac’s prior written consent, which could not be unreasonably withheld. Accordingly the primary judge concluded that this basis for the claim that the Solarise Loan was due and payable on 22 May 2011 failed: at [96]‑[97].

38 In relation to the second issue, the primary judge found that cl 8.3 of the Subordination Deed did not have the effect of an agreement by Westpac to Solar Shop entering into a fresh agreement with Solarise which, in turn, had the effect of making the Solarise Debt due and payable on demand: at [110]‑[113].

39 In relation to the third issue, the primary judge rejected the Liquidators’ contention that Solar Shop, Westpac and Solarise were, from the time of entry into the 2010 Facility Agreement, proceeding on the basis that the Subordination Deed was no longer operative and had been abandoned: at [128]‑[133].

40 The fourth issue concerned the effect of cl 9 of an agreement referred to by the primary judge as the **2011 Solarise Agreement** which was the subject of an email dated 19 May 2011 from Mr Mourney to Mr Thornton and Jeremy Steele, a director of Solar Shop appointed as a representative of Harbert. Mr Mourney’s email attached the 2011 Solarise Agreement and noted that he had it “drafted as discussed to allow us to continue past 22 May if required”. Clause 9 of the 2011 Solarise Agreement was titled “Indemnity” and provided:

[Solar Shop] must indemnify Solarise against all claims and all losses, costs, liabilities and expenses incurred by Solarise, arising wholly or in part from an act or omission of [Solar Shop] or its employees, agents or contractors in relation to this agreement.

41 The primary judge rejected the Liquidators’ submissions that cl 9 of the 2011 Solarise Agreement created an obligation, distinct and separate from Solar Shop’s debt obligation, which was not subject to the Subordination Deed and that as soon as Solar Shop failed to pay the Solarise Debt, after demand was made for it on 27 May 2011, Solar Shop’s liability under the indemnity in cl 9 crystallised. The primary judge referred to his earlier finding that the Subordination Deed continued in force and that Solarise remained bound by cl 6 of that deed from receiving any payment in satisfaction of its debt, taking any action to recover its debt or receiving any money from Solar Shop directly or indirectly. Thus, even if cl 9 of the 2011 Solarise Agreement gave rise to a separate obligation, it could not have been enforced by Solarise: at [135]‑[136].

42 The primary judge concluded that Solar Shop’s liability to Solarise remained subordinated to the amounts owing to Westpac and, that being so, the Solarise Loan did not become due and payable while the indebtedness to Westpac remained outstanding. For that reason the Solarise Debt could not be taken into account at any of the alternate dates of insolvency for which the Liquidators contended: at [136].

### Solar Shop’s liability to the ATO

43 The primary judge then turned to consider Solar Shop’s liability to the ATO, which the Liquidators contended was another matter which resulted in a finding of insolvency at each of the alternate dates propounded by them.

44 Having considered the evidence, the primary judge found that it was apparent that Solar Shop was unable to meet its taxation obligations, it did not make payment arrangements with the ATO until the amounts owing were overdue and, when it did make such arrangements, it often defaulted: at [154]. The primary judge was satisfied that the Liquidators’ inclusion of Solar Shop’s liability to the ATO at each of the alternative dates at which they contended Solar Shop was insolvent was appropriate: at [170].

### Overview of the Liquidators’ claims of insolvency

45 Before the primary judge, the Liquidators sought to prove Solar Shop’s insolvency as at each of the dates on which they contended that it was insolvent by reference to the debt position at a succession of month ends. For that purpose the Liquidators relied on an “aide memoire”, marked as exhibit P4, which analysed Solar Shop’s debt position at month end for each month in the period January to August 2011 (**Aide Memoire**). The Aide Memoire included for each month the aggregate of Solar Shop’s overdraft balance, the amounts said to be due to its 14 principal trade creditors, the debt to the ATO and, for the period 31 May to 31 August 2011, the amount of the Solarise Debt said to be due and payable.

46 At [173]‑[176] of the reasons, the primary judge made the following observations about the Aide Memoire:

Although [Solar Shop] had hundreds of trade creditors, the Aide Memoire records [Solar Shop’s] indebtedness to only 14. The Liquidators selected these creditors as a matter of convenience because they considered [Solar Shop’s] own Aged Creditor Reports in respect of all the creditors to be unreliable.

The Liquidators relied on the figures in the column headed “Adjusted Overdraft Account Less Stated Debts” as indicating the debts due and payable at the various month ends which [Solar Shop] was unable to pay.

The Respondents challenged the accuracy of a number of the figures in the Aide Memoire and pointed to other features not taken into account by the Liquidators. I will refer to them below. The Respondents accepted, however, the accuracy of the figures in the column headed “Overdraft Account (Actual)”. Those figures are derived from the Westpac account statements.

In these reasons, I will adopt the framework set out in the Liquidators’ Aide Memoire. It will be necessary in addition to have regard to the circumstances more generally concerning [Solar Shop’s] debts and the resources available to it, especially given that the Liquidators did not provide a cash flow analysis for [Solar Shop] for any of the three dates by which they contended that it was insolvent.

47 The Aide Memoire provided:



48 The primary judge considered Solar Shop’s solvency as at the three dates on which the Liquidators contended it was insolvent, 31 January 2011, 30 April 2011 and 22 May 2011, and found that the Liquidators had failed to establish that it was insolvent at any of those dates.

#### 31 January 2011

49 The primary judge noted at [177] that as at 31 January 2011 the Liquidators relied on the following indicia of insolvency:

(a) [Solar Shop] was in breach of its banking facilities, rendering its bank debt of approximately $17 million payable on demand;

(b) more than $1.2 million of amounts due to the 14 significant trade creditors were outside terms and accordingly overdue (in addition to those which were current and not overdue);

(c) [Solar Shop] owed $2,784,112.47 to the ATO and was unable to pay that amount without a payment plan;

(d) the combined effect of overdue creditors and the outstanding debt to the ATO was that [Solar Shop] owed $3,854,907.68 which was outside terms, and $2,854,907.68 in excess of its overdraft limit;

(e) [Solar Shop] had sustained a trading loss of $1.946 million in January 2011 (although the evidence to which the Liquidators pointed to support this proposition was [Solar Shop’s] trading performance for the first seven months of the 2011 financial year);

(f) the forecast profits from one arm of the business (Sunsavers) were overstated;

(g) by 31 January 2011, it was apparent that [Solar Shop] had no resources available to meet the repayment of the Solarise Loan of over $5.2 million which was to fall due on 22 May 2011;

(h) by 31 January 2011, [Solar Shop’s] shortage of working capital was endemic and thereafter it was outside terms in paying its creditors and in paying the debt to the ATO.

50 The primary judge made the following findings:

(1) while Solar Shop was in breach of covenants in the 2010 Facility Agreement it continued to have access to the facilities provided by Westpac; the monies advanced pursuant to the 2010 Facility Agreement had not been declared due and payable by Westpac; and, while the breach of covenants put Solar Shop in a vulnerable position, that was not a significant indicia of insolvency: at [188];

(2) as at 31 January 2011 amounts were overdue to seven of the 14 trade creditors included in the Aide Memoire. The Respondents accepted that amounts were due to each of these creditors but disputed that the amounts were outside trading terms in relation to five of them, namely Optimum Media Direction Pty Limited (**Optimum**), Fasteners Australia Pty Limited (**Fasteners**), BlueScope Distribution Pty Limited (**BlueScope**), Lawrence & Hanson Group Pty Ltd (**L&H**) and Matrin Australia Pty Limited (**Matrin**). The primary judge undertook the task of identifying the terms of trade between Solar Shop and each of those five trade creditors in order to establish whether the amounts shown as owing to each of them in the Aide Memoire as at 31 January 2011 were in fact due. His Honour found that:

(a) the Liquidators had not proved Solar Shop’s trading terms with Optimum such that a finding could not be made that Solar Shop was outside agreed payment terms in relation to the amount of $86,922.50 due to Optimum as at 31 January 2011 or at either of the alternative dates for which the Liquidators contended: at [194];

(b) Solar Shop was outside the agreed payment terms in respect of the amount of $130,000 due to Fasteners as at 31 January 2011: at [200];

(c) BlueScope had reached some agreement with Solar Shop which was reflected in Solar Shop’s pattern of payment to it such that his Honour was not willing to find that Solar Shop was outside the agreed trading terms in relation to the amount of $292,000 due to BlueScope as at 31 January 2011 or the amounts due as at any of the alternative dates relied on by the Liquidators: at [206];

(d) Solar Shop was outside the agreed payment terms in relation to the amount of $141,976.67 due to L&H as at 31 January 2011: at [211]; and

(e) there was an implied agreement between Solar Shop and Matrin for extensions of time within which Solar Shop was to pay Matrin’s accounts. Thus his Honour was not satisfied that the amount of $35,860 was due and payable to Matrin: at [217];

(3) in relation to the January 2011 trading loss of $1.946 million, the primary judge was of the opinion that the fact that a loss is incurred in one month is not of itself a strong indicator of insolvency. After making a number of observations about trading in January, his Honour noted that the same profit and loss statement on which the Liquidators relied to support the trading loss also showed that Solar Shop’s net profit after tax for the 12 month period ending in January 2011 was $538,000. The primary judge concluded that he did not regard the trading loss for January 2011 as a significant factor: at [220]‑[223];

(4) the primary judge accepted that the apparent fraud in the Sunsavers business had a significant impact on Solar Shop at a time when it was experiencing other cash flow difficulties but noted that the Liquidators did not suggest that its effect required an adjustment to the figures in the Aide Memoire at any of the dates upon which they relied. His Honour observed that, instead, it helped to explain the financial position of Solar Shop at the various dates under review: at [229]; and

(5) given the earlier finding that the Solarise Loan was not due and payable on 22 May 2011, the position in relation to it as at 31 January 2011 did not have to be considered.

51 Having regard to those findings the primary judge found that the amount for “Adjusted Overdraft Less Stated Debts” to be included in the Aide Memoire as at 31 January 2011 should be $2,899,344.94.

52 The primary judge then turned to consider whether Solar Shop was insolvent as at 31 January 2011. At [237] his Honour accepted that in determining that question it was appropriate to have regard to all of the resources available to a company by which it could meet its debts and said:

Even if it could be said that the whole of the trade receivables and REC receivables were not immediately available to [Solar Shop] to meet its debts, it seems probable that a sufficient amount could have been realised within a relatively short time so that [Solar Shop] could meet the due debts of $2.9 million. Some of the cash and cash equivalents could also have been used for that purpose.

53 The primary judge was not therefore satisfied that the Liquidators had shown that Solar Shop was insolvent as at 31 January 2011.

#### 30 April 2011

54 In relation to 30 April 2011 the primary judge noted at [242] that, in addition to those matters relied on by the Liquidators as at 31 January 2011 to prove insolvency, they relied on:

(a) by 30 April 2011, [Solar Shop’s] debt of $2.444 million to another supplier, Bosch Solar Energy AG (Bosch), had become overdue and was never brought back within terms;

(b) the adjusted overdraft account less stated debts figure in the Aide Memoire was now $5,471,520.66; and

(c) the spot price for RECs had fallen from approximately $38 to $25 during the first two weeks of April, with the effect that [Solar Shop’s] assets had declined materially, as had its proceeds from ongoing trading.

55 In relation to the amount due to Bosch Solar Energy AG (**Bosch**), the primary judge was satisfied that Bosch’s terms required payment of a 10% deposit and payment in full of the balance within 60 days of shipment. The primary judge found that there was an uncertainty about the dates of shipment from which the 60 days commenced to run which “precluded satisfaction that the Bosch debt on which the Liquidators relied was due and payable as at 30 April 2011, although it was probable that it had become due by at least 16 May 2011”. Thus the primary judge did not consider that the Bosch debt should be taken into account in determining Solar Shop’s solvency as at 30 April 2011: at [249]‑[252].

56 The primary judge considered the amount owing to the 14 trade creditors recorded in the Aide Memoire as at 30 April 2011 and noted that the Respondents disputed that the amounts shown as owing to Optimum, Fasteners, BlueScope, L&H and Matrin were due and payable as at that date. For the reasons already given in relation to 31 January 2011 his Honour was not satisfied that the amounts of $467,000, $476,000 and $229,000 were due and payable to Optimum, BlueScope and Matrin respectively. However his Honour was satisfied that the amounts of $105,000 and $276,000 were due and payable to Fasteners and L&H. Accordingly his Honour found that the trade creditors figure for 30 April 2011 in the Aide Memoire should be $2,825,155.59. The primary judge also found that the amount drawn on the overdraft should be excluded because it was not due and payable as at 30 April 2011. Thus the figure for the “Adjusted Overdraft Account Less Stated Debts” included in the Aide Memoire should be $3,787,848.01 or $3.8 million in round figures: at [257]‑[259].

57 The primary judge then turned to consider whether Solar Shop had resources available to it as at 30 April 2011 to meet debts of $3.8 million. His Honour considered cash at bank, cash equivalents, trade receivables and RECs receivables, the latter of which assumed some importance to the determination of the issue.

58 In relation to the RECs receivables at [262]-[264] his Honour said:

[Solar Shop’s] balance sheet in its management accounts showed that the RECs receivable amounted to $6.369 million. It appears that this figure was based on an average price for RECs of $36 whereas at the end of April, the spot price was $26. This suggests that the value of the RECs at the end of April 2011 was not $6.369 million but $4.6 million. It also meant that [Solar Shop] could dispose of the RECs only by incurring a loss.

It is convenient to record here that the spot price of RECs continued to decline reaching a low of $19.75 on 21 June 2011 and did not return to $26 until 8 August 2011.

I will refer in relation to later months to some matters bearing upon the extent to which the RECs were readily saleable. For the present, it is sufficient to note that sale of the RECs held at 30 April 2011 would have been more than sufficient to meet the debts which were due and payable at that date.

59 The primary judge concluded that when account was taken of the trade receivables, RECs receivables and some of the cash resources, it could not be concluded that the Liquidators had proved that Solar Shop was insolvent as at 30 April 2011.

#### 22 May 2011 and 31 May 2011

60 The final date relied on by the Liquidators was 22 May 2011, a date which was selected because that was when, on the Liquidators’ case, the Solarise Debt became due and payable.

61 The primary judge noted that he had found that the Solarise Debt did not become due and payable on 22 May 2011, because it remained subordinated to the Westpac Debt, and that the Liquidators had not provided any other analysis of the position as at 22 May 2011 that would warrant a finding that Solar Shop was otherwise insolvent as at that date. That being so, the primary judge considered the position as at 31 May 2011, for which there was some financial evidence and thus some analysis was possible.

62 The primary judge commenced his analysis of the position as at 31 May 2011 with the amounts said to be overdue as at that date to the 14 trade creditors in the Aide Memoire and which were recorded at [271] as follows:

Optimum Media (rounded) $467,000.00

Fasteners (rounded) $108,000.00

Wuxi (rounded) $1,199,000.00

BlueScope (rounded) $495,000.00

IPD Group (rounded) $263,000.00

L&H (rounded) $250,000.00

Matrin $68,875.84

Enerdrive $180,180.00

Clenergy $181,484.09

Bosch $2,444,155.59

**Total** **$5,656,695.22**

63 For the reasons already given the primary judge excluded Optimum, BlueScope and Matrin from the analysis but retained Fasteners and L&H. His Honour had already accepted that the Bosch debt was due and payable as at 22 May 2011 and thus also found that it was due and payable as at 31 May 2011.

64 That left for consideration the debts said to be due to Wuxi, IPD Group Limited (**IPD Group**), Enerdrive Pty Ltd (**Enerdrive**) and Kerry J. His Honour concluded that Solar Shop’s debt to Wuxi was due and payable on or about 26 May 2011 and that the debts due to Wuxi, Enerdrive and Kerry J were properly included in the Aide Memoire, but found that the debt due to IPD Group should be excluded.

65 As it is an issue that assumed some importance on the cross appeals, it is useful to provide some further detail of the primary judge’s findings in relation to the debt due to Wuxi. The primary judge noted that Wuxi’s trading terms were “100% T/T net 90 days from B/L date” which he understood to mean that payment was required in full within 90 days of the bill of lading date. His Honour observed that Wuxi’s invoices did not include a bill of lading date but did include an “ETD” or “estimated time of departure” date and that Solar Shop had been generally compliant with Wuxi’s terms of trade in late 2010 and early 2011: at [273]‑[275].

66 The Liquidators relied on an invoice issued on 23 February 2011 for US$1,244,880 which was due and payable on or about 26 May 2011 and which was paid by Solar Shop in two equal instalments on 17 and 24 June 2011 respectively.

67 Before the primary judge SMA submitted that the payment of $1,199,000 should not be regarded as outside terms as at 31 May 2011 because Solar Shop had a payment arrangement in place with Wuxi which was evident from an email exchange between Mr Thornton and Wuxi in December 2010. However, the primary judge found that the payment plan referred to by Mr Thornton in his email was not proved in evidence. At [279]‑[280] his Honour said:

I accept that this exchange evidences Wuxi’s agreement to a payment plan in respect of an amount then due to it (and probably explains the late payment of the debt due in January to which I referred earlier). However, I do not consider that the exchange can reasonably be understood as evidencing an agreed departure from Wuxi’s terms of trade in respect of its subsequent supplies. Mr Thornton’s reference to “near term” cash restraints suggests that he was seeking only some short term relaxation of Wuxi’s terms of trade, as do the reasons he gave for the request. I also note in this respect that [Solar Shop] did not conduct itself as though it had a payment plan: on the contrary, it complied with Wuxi’s usual terms of trade.

It is also pertinent to record that on 1 June 2011, Mr Thornton proposed to Wuxi that it accept the transfer of RECs “over the next 45 days at a risk adjusted discount cash flow” in exchange for a payment plan. Wuxi responded by asking for the proposed payment schedule. That exchange is inconsistent with there having been an existing payment plan. There is no evidence that [Solar Shop] and Wuxi later agreed upon a payment plan, and I reject the submission of counsel for SMA to the contrary. The best I think that can be said is that given the history, [Solar Shop] may have had some prospect of negotiating a payment plan with Wuxi, but that does not alter the circumstance that its debt to Wuxi was due and payable by on or about 26 May 2011.

68 The primary judge found that, upon excluding the amounts due to Optimum, BlueScope, Matrin and IPD, the Solarise Debt and the amount that Solar Shop had drawn down on the overdraft, the figure for the “Adjusted Overdraft Account Less Stated Debts” should be $5,887,223.63 or in round terms $5.9 million: at [293]‑[294].

69 The primary judge then considered whether Solar Shop had sufficient resources available as at 31 May 2011 to meet the debts which were due and payable. His Honour noted that the RECs, which were valued in the balance sheet at $12.704 million based on an average cost of about $36.00 per REC where the average spot price as at 31 May 2011 was $25.15, could be sold but that Solar Shop would have experienced difficulty in doing so quickly. Based on Solar Shop’s sales of RECs during 2011 his Honour concluded that the RECs were liquid to an extent but that there were limitations on its ability to sell them quickly: at [307]‑[310].

70 The primary judge found that as at 31 May 2011 Solar Shop had approximately $1.7 million in cash together with whatever amount could be realised from trade and other receivables and the RECs receivables to meet debts then due and payable of $5.9 million. His Honour noted that the question was not just whether Solar Shop was able to pay its debts but whether, ignoring temporary illiquidity, it was able to do so when they were due and payable. His Honour said that, while it can be accepted that there may be a distinction between a failure to pay debts when due and an inability to pay them, in this case, subject to one qualification, the distinction was not real. His Honour found that the effect of the evidence was that Solar Shop “was willing to pay its debts if only it could”. His Honour addressed the “qualification” at [314] as follows:

It is evident that [Solar Shop] was reluctant to sell the RECs when that would mean that it would incur a loss. That is understandable. I take into account therefore that its omission to sell all available RECs by 31 May should not be regarded as an inability to sell them, even if there were some limitations on their liquidity.

71 The primary judge concluded that, even taking into account the limitations on the saleability of RECs, they were sufficient to meet the debts due and payable at 31 May 2011 and that, while it was understandable Solar Shop was reluctant to sell them, the RECs were an asset which could be sold to meet its debts. Accordingly the primary judge held that the Liquidators had not proved that Solar Shop was insolvent as at 31 May 2011.

### Solar Shop’s solvency as at 31 July 2011

72 Having considered and rejected each of the alternatives put by the Liquidators as dates on which Solar Shop was insolvent, the primary judge considered whether Solar Shop was insolvent as at 31 July 2011. This date was selected because of SMA’s contention by reference to the “report of Mr Lombe”, that Solar Shop had become insolvent by 29 July 2011 or 4 August 2011.

73 The primary judge undertook his analysis as at 31 July 2011 by reference to the Aide Memoire. His Honour excluded the debts owing to Optimum and IPD Group, the overdrawn balance on the overdraft and the Solarise account and found that the figure in the column headed “Adjusted Overdraft Account Less Stated Debts” should be $8,364,620.20 or $8.365 million (rounded).

74 In relation to the assets available as recorded in Solar Shop’s management accounts to meet that debt, the primary judge excluded the cash and cash equivalents and reduced the RECs receivables figure to $6.47 million. The price used for RECs in the balance sheet was not clear. However, his Honour assumed that it was based on an average price of $36.00 when the spot price of RECs as at 31 July 2011 was $23.00. He made a reduction to reflect that fact.

75 The primary judge noted that the adjusted RECs receivable figure and RECs receivable CBA figure (“CBA” being a reference to the Commonwealth Bank of Australia) exceeded the “Adjusted Overdraft Account Less Stated Debts”. His Honour observed that this might suggest that Solar Shop was solvent because it could have recourse to the RECs to meet the debts which were then due and payable. However, his Honour considered that other factors should be taken into account including:

(1) the limitations on the liquidity of RECs;

(2) that the management accounts for the month of July 2011 reported trade creditors totalling $20.17 million, which exceeded the total owing by the 14 trade creditors included in the Aide Memoire. His Honour found that it was realistic to infer that several of those trade creditors were outside terms;

(3) Solar Shop’s own cash flow forecast for the period 27 May 2011 to 12 August 2011 which confirmed that its cash flow problems were becoming more evident. That said the primary judge noted that he understood that the position as at 31 July 2011 was not as severe as the cash flow analysis predicted because Solar Shop had in fact sold 374,300 RECs between 26 May 2011 and 31 July 2011 and held a significant number of RECs, but there still remained a substantial cash flow deficiency as at 29 July 2011;

(4) Harbert’s pursuit of possible further investment during July and August 2011 never came to fruition. Relevantly, the primary judge found that during June and July 2011 Solar Shop had the prospect of additional funding from Harbert and Harbert was willing to participate in arrangements for further funding. However, by 31 July 2011, Harbert’s own conditions had not been satisfied. The primary judge concluded that as at 31 July 2011 funding from Harbert was not sufficiently certain such that it could be a resource to be considered in relation to Solar Shop’s solvency;

(5) on 16 June 2011 Solar Shop made a number of requests of Westpac which only acceded to one of those requests, namely an increase in its forex facility to $10 million. Westpac was prepared to continue its facility pending receipt of the Second Independent Business Review but was otherwise not prepared to provide additional facilities other than in limited ways;

(6) in the Second Ferrier Hodgson Report Ferrier Hodgson recommended that Westpac’s continued support should be subject to Harbert or other shareholders immediately injecting $5 million into the business. In addition in the First Lombe Report, Mr Lombe noted that the solvency and future trading of Solar Shop was contingent on it obtaining a cash injection of $5 million from Harbert and Westpac’s continued support and that the absence of either would be fatal to Solar Shop’s solvency; and

(7) by 31 July 2011 Solar Shop was being harried by other of its creditors.

76 The primary judge thus concluded that Solar Shop was insolvent as at 31 July 2011.

# THE APPEALS AND THE DISCOVERY ISSUE

## Procedural history

77 The appeals were initially set down for hearing for two days commencing on 6 August 2018.

78 On the first morning of the hearing SMA foreshadowed an application to adduce fresh evidence on appeal. That application concerned one document being the first two pages of an email chain included at tab 83 of part C of the appeal book and which was an email dated 10 June 2011 from Jenny Lu at Wuxi to Mr Thornton (**10 June Email**). The balance of the email chain which was included at tab 83 of part C of the appeal book commenced at page 3 (**Tab 83 Document**).

79 As the Liquidators did not consent to the inclusion of the 10 June Email in the appeal book, later that day SMA filed an interlocutory application in the appeal against it (**SMA Appeal**) seeking an order that at the hearing of the SMA Appeal the Court receive the 10 June Email into evidence. SMA also filed an affidavit in support sworn on 6 August 2018 by David Anthony Gordon, a solicitor in the employ of SMA’s solicitors with responsibility for the day to day conduct of the matter on behalf of SMA. Mr Gordon’s evidence included that the 10 June Email was not in evidence in the First Instance Proceedings, was not discovered in the SMA Proceeding and was not known to SMA until after 6.00 pm on 3 August 2018, the last business day before the commencement of the appeals on 6 August 2018. Mr Gordon also gave evidence about the relevance of the 10 June Email to the issues in the SMA Appeal including his opinion of the effect that the 10 June Email would have had on the findings made by the primary judge had it been available to and tendered by SMA in the SMA Proceeding.

80 On 7 August 2018 the Liquidators filed and served in each of the appeals an affidavit sworn on that day by Justin David Courtney, a consultant to the Liquidators’ solicitors with the primary conduct of the appeals on behalf of the Liquidators (**First Courtney Affidavit**). In that affidavit Mr Courtney explained, among other things, that:

(1) the Tab 83 Document had been discovered in the SMA Proceeding;

(2) it was only in the course of the hearing on the preceding day that it had come to his attention that SMA had not had discovery of the whole of the Tab 83 Document and was seeking to adduce the 10 June Email as fresh evidence on appeal;

(3) nearly two years later he could not specifically recall why he did not include within the tender bundle for trial or make discovery in the SMA Proceeding of the whole of the Tab 83 Document including the 10 June Email;

(4) having reviewed the discovery made in the Wuxi Proceeding, the whole of the Tab 83 Document, i.e. including the 10 June Email, was discovered in that proceeding; and

(5) in the time available he had sought out and identified a bundle of emails which were exhibited as “JDC2” to the First Courtney Affidavit and which touched on the topic the subject of the Tab 83 Document and 10 June Email but he was unable to ascertain whether that bundle of emails represented all of the documents on that topic.

81 On 7 August 2018 the appeals were adjourned part heard and orders made for the Respondents to put on any applications they wished as a result of the issues raised by the First Courtney Affidavit.

82 On 20 August 2018 SMA filed an amended interlocutory application in the SMA Appeal and Kerry J and Wuxi each filed an interlocutory application in the appeals to which they were respondents. In those applications the Respondents each relevantly sought orders that the Liquidators provide further and better discovery in accordance with orders made in the First Instance Proceedings (see [91]-[94] below) and that at the hearing of the appeals and the cross appeals the Court receive further evidence including the 10 June Email and a second email dated 27 July 2011 from Stephanie Wu to Carey Peck which was included in JDC2 to the First Courtney Affidavit (**27 July Email**). The Respondents each filed an affidavit in support of their respective interlocutory applications.

83 On 23 August 2018 the Liquidators filed an affidavit sworn by Mr Courtney on that date in each of the appeals (**Second Courtney Affidavit**).

84 On 24 August 2018 the appeals were listed before the Court. Orders were made requiring the Respondents to file and serve any further affidavits and any draft amended interlocutory applications and for the Liquidators to file and serve any further affidavits.

85 Each of the Respondents and the Liquidators filed and served further affidavits. At that point the Respondents each proposed and sought leave, which was subsequently granted, to file amended interlocutory applications. Relevantly, by way of their respective amended interlocutory applications in each of the appeals the Respondents now seek orders that:

(1) pursuant to s 25(2B)(bb) and/or s 28 of the *Federal Court of Australia Act 1976* (Cth)(**Federal Court Act**) and/or r 36.74(a) of the Rules the appeal and cross appeal be dismissed;

(2) pursuant to s 23 and/or s 28 of the Federal Court Act and/or r 1.33 and/or r 5.23 of the Rules the First Instance Proceedings be dismissed;

(3) in the alternative to orders dismissing the appeals and cross appeals, pursuant to s 27 of the Federal Court Act, at the hearing of the appeals and/or cross appeals, the Court receive the 10 June Email and the 27 July Email; and

(4) in the alternative to orders dismissing the appeals and cross appeals and in the event that the cross appeals are not dismissed, the Respondents each be granted leave to file a further amended notice of cross appeal.

86 The draft further amended notices of cross appeal which each of the Respondents seeks leave to file relevantly:

(1) include in each case as ground 1A that the Liquidators failed to comply with the orders for discovery made in the First Instance Proceedings; and

(2) seek the following additional relief:

1A. Paragraph 1 of the orders made by the Court on 24 November 2017 be set aside and the proceeding be remitted to the primary judge for determination of the following questions, following the provision of further and better discovery by the Appellants:

a. whether an amount of $4,849,577.59 was due and payable by the Company to Wuxi Suntech as at 31 July 2011;

b. whether an amount of $2,444,155.59 was due and payable by the Company to Bosch as at 31 July 2011;

c. whether any of the Company’s inventory was available to pay debts that were due and payable;

d. such other questions as permitted by the primary judge on application by the Respondent; and

e. in light of the answer to the questions in a to d above, and otherwise in accordance with the findings made by the primary judge in the judgment delivered on 24 November 2017, whether the Appellants have proved that the Company was insolvent as at 31 July 2011.

1B. The additional evidence on the remitted hearing be limited to:

a. the evidence before the primary judge; and

b. any additional documents discovered to the Respondent by the Appellants since the conclusion of the hearing before the primary judge.

(underlining omitted.)

87 On 7 February 2019 the part heard appeals, cross appeals and each Respondent’s respective amended interlocutory application in which the orders described in [85] above are sought (collectively **Interlocutory Applications**) were listed before the Court for hearing.

## The discovery issue

88 The Interlocutory Applications and the Respondents’ draft further amended notices of cross appeal raise the issue of whether the discovery given by the Liquidators in the First Instance Proceedings was adequate and, if not, the consequence of any such inadequacy. In order to consider those issues it is first necessary to set out the Liquidators’ evidence on the process followed by them in providing discovery in the First Instance Proceedings. That evidence is comprised in the First Courtney Affidavit, the Second Courtney Affidavit and a further affidavit sworn by Mr Courtney on 5 October 2018 (**Third Courtney Affidavit**).

89 The Respondents raised a number of objections to the Second Courtney Affidavit and the Third Courtney Affidavit but subsequently withdrew their objection to [4] of the Second Courtney Affidavit and indicated that they were content for the Court to deal with the balance of their objections, which they characterised as objections to opinion evidence given by Mr Courtney, as a matter of weight.

90 Before setting out the available evidence about the discovery process and the effect of that evidence we make a general observation about the evidence relied on by the Liquidators. Once the issue of adequacy of discovery had been raised by the Respondents, the Liquidators bore the onus of establishing the steps they took to comply with the Court’s orders for discovery and satisfying the Court that they were, in the circumstances, adequate. The information relevant to that inquiry was solely within their knowledge. But, despite the attempts by the Liquidators to provide a complete picture of the steps they took in complying with the orders for discovery, they have not succeeded in that task. The Liquidators rely on the three affidavits sworn by Mr Courtney. However, notwithstanding Mr Courtney’s attempts to provide an explanation of the steps undertaken, his evidence provides an incomplete picture. Mr Courtney does not provide a full explanation of why the Liquidators proceeded as they did in relation to their treatment of some categories of documents nor does he explain why the Liquidators did not disclose to the Respondents at the time of giving discovery the sources and extent of the documents that were reviewed. Those matters are addressed below.

### Discovery in the First Instance Proceedings

91 Orders for discovery were made in each of the First Instance Proceedings.

92 In the Kerry J Proceeding on 20 November 2014, the Court ordered that mutual discovery be made between the parties by 20 March 2015 and on 28 October 2015 the Court ordered the parties to file and serve supplementary disclosure lists on or before 16 November 2015.

93 In the SMA Proceeding on 21 September 2015, the Court ordered the Liquidators to provide discovery to SMA in the following categories:

1 Communications between Harbert Management Corporation (Harbert) and/or HMC Australian Private Equity Fund 1 GP, LP (HMC), and/or any entity or person associated with or acting on behalf of Harbert or HMC, and the Company between 1 June 2011 and 30 September 2011.

2 Communications between Westpac Banking Corporation (including any subsidiaries or related entities of Westpac Banking Corporation) or any person acting on its behalf and the Company and/or any persons acting on its behalf between 1 June 2011 and 30 September 2011.

3 All documents referring or relating to the possible provision of money to the Company via debt or equity created, sent or received between 1 June 2011 and 30 September 2011.

4 Communications, other than invoices and purchase orders, with suppliers to, and any other creditors of the Company between 1 June 2011 and 30 September 2011.

5 Internal communications between officers, Directors, staff or employees of the Company referring or relating to the financial position and/or insolvency and/or related issues of the Company between 1 June 2011 and 30 September 2011.

6 Minutes of, or papers for, any board meetings held by the Company between 1 June 2011 and 30 September 2011.

7 Communications, including any retainer agreements. discussion and options papers and/or advices, between the Company or any person acting on its behalf and 333 Capital Pty Ltd (trading as 333 and/or 333 Group) or any person acting on its behalf between 1 June 2011 and 30 September 2011.

8 Communications including any retainer agreements, discussion and options papers and/or advices, between the Company or any person acting on its behalf and any solicitors providing advice in relation to the financial position and/or insolvency and/or related issues, between 1 June 2011 and 30 September 2011.

94 On 12 February 2016 the Court made an order in the Wuxi Proceeding for the parties to provide “standard discovery” by 18 March 2016.

95 The Liquidators served lists of documents:

(1) in the Kerry J Proceeding on 6 May 2015, 20 November 2015 and 1 August 2016;

(2) in the SMA Proceeding on 26 October 2015; and

(3) in the Wuxi Proceeding on 18 April 2016.

96 When the tender bundle for the First Instance Proceedings was finalised the Liquidators served a supplementary list of documents in each of the First Instance Proceedings containing the documents in the tender bundle (**Supplementary List of Documents**).

97 The list of documents filed in the SMA Proceeding on 26 October 2015 and the Supplementary List of Documents filed in the SMA Proceeding on 1 August 2016 were in evidence before us. Each of those lists includes an affidavit sworn by Mr Clifton, one of the Liquidators, in identical terms save for the date on which the affidavit was sworn. In those affidavits Mr Clifton relevantly deposes that:

…

2. The [Liquidators] have made reasonable enquiries as to the existence and location of the documents specified in the order.

3. To the best of my knowledge, information and belief, there are no documents specified in the order that are or have been in the [Liquidator’s] control, other than the documents specified in this list of documents.

4. The documents set out in part 1 are in the [Liquidator’s] control and we do not claim privilege from production for any of these documents.

5. The documents set out in part 2 are in the [Liquidator’s] control but we claim privilege from production of each of these documents on the grounds set out in part 2.

6. The documents set out in part 3 have been but are no longer in the [Liquidator’s] control. Details of when each document was last in the [Liquidator’s] control and what became of it are set out in part 3.

#### Sources of documents

98 There are three sources of documents held by the Liquidators:

(1) hard copy documents contained within boxes that were gathered by the Liquidators and their staff from a variety of Solar Shop’s offices around Australia (**Hard Copy** **Documents**);

(2) electronic images of Solar Shop’s file server and computers used by its key staff provided by Ferrier Hodgson, the receivers and managers of Solar Shop, which included emails stored on those devices; and

(3) production made by third parties in answer to a number of document production orders made by this Court under Pt 5.9 of the Corporations Act (**Production Documents**).

99 In relation to those categories of documents Mr Courtney said that:

(1) the Hard Copy Documents are and were at the time of making discovery in a poor condition both because of deterioration of paper and files and because they were not indexed or organised in any logical way;

(2) the electronic images of Solar Shop’s servers were not readily readable without the assistance of an IT company, Stopline, which used a software package known as “Encase”; and

(3) the Liquidators have never had access to Solar Shop’s complete email records which were stored in the cloud.

100 In light of the matters set out in the preceding paragraph the Liquidators do not consider that they had, or have, a complete copy of Solar Shop’s books and records, and those which they do have are not easily reviewable.

101 In seeking to comply with the Liquidators’ discovery obligations in the First Instance Proceedings, solicitors at O’Loughlins and Kains Lawyers, the firm at which Mr Courtney was previously employed, undertook a review under Mr Courtney’s supervision of the three sources of documents held by the Liquidators: the Hard Copy Documents, the electronic documents and the Production Documents.

102 Mr Courtney said that the review of documents was not limited to the six month relation back period before the winding up of Solar Shop began. The Liquidators were originally contending for a finding that Solar Shop was insolvent on and from October 2010 and, on that basis, the review of documents was completed with the understanding that documents from that earlier period could be directly relevant.

103 The Hard Copy Documents together with the Production Documents comprised the complete source of historical physical documents held by the Liquidators in connection with the First Instance Proceedings. According to Mr Courtney those documents were reviewed several times for relevance to the First Instance Proceedings as described below.

#### Hard Copy Documents

104 The Hard Copy Documents comprised 194 boxes of documents received by the Liquidators from various offices of Solar Shop around the country. According to information provided to Mr Courtney by Mr Clifton, gathering the Hard Copy Documents was a significant and difficult exercise; those documents were located in approximately eight sites around Australia; notwithstanding that, all physical files of which the Liquidators were aware were retrieved; when the boxes arrived there was no semblance of order to them so that significant work had to be undertaken in order to catalogue and organise the documents; and, despite the work undertaken, the documents are not well organised, are in far from perfect condition and many of the documents have deteriorated making their review difficult.

105 The Liquidators retained two law firms for different categories of proceedings brought by them and Solar Shop: O’Loughlins Lawyers and Lynch Meyer Lawyers. Lynch Meyer conducted the initial review of the Hard Copy Documents to identify relevant documents, not only for the purposes of the proceedings in which they were retained, but also for other proceedings including the First Instance Proceedings.

106 According to Mr Courtney, because of the nature of the proceedings in which each firm was retained, there was a crossover of issues, most relevantly on the topic of Solar Shop’s solvency. For that reason Mr Courtney said that it was considered advisable for there not to be duplication of work reviewing documents.

107 Lynch Meyer conducted its review of the Hard Copy Documents on the basis of a document titled “Protocol for Discovery” (**Discovery Protocol**) which relevantly included:

**Scope:-**

The purpose of this protocol for discovery is to assist in identifying relevant documents for discovery in the following proceedings:-

…

* Timothy James Clifton and Mark Christopher Hall, As Joint and Several Liquidators of Solar Shop Australia Pty Ltd (In Liquidation) ACN 092 562 877 v Kerry J investment Pty Ltd trading as Clenergy ACN 108 633 227 (Action SAD261/2014) (“**Clenergy Proceedings**”)

…

* Timothy James Clifton and Mark Christopher Hall, As Joint and Several Liquidators of Solar Shop Australia Pty Ltd (In Liquidation) ACN 092 562 877 v SMA Solar Technology A.G. (Joint Stock Company) (Germany) Registration Number HRB 3972 (Action SAD 276/2014) (“**SMA Germany Proceedings**”);

…

* Timothy James Clifton and Mark Christopher Hall, As Joint and Several Liquidators of Solar Shop Australia Pty Ltd (In Liquidation) ACN 092 562 877 v Wuxi Suntech Power Co. Limited, (People’s Republic of China) License Number 320000400001498 (Action SAD 275/2014) (“**Suntech Proceedings**”);

…

This protocol is limited to the Solar Shop documents that are in archive boxes in the possession of the Liquidator of which there are approximately 200.

A party’s obligations for discovery are dealt with under Rules 20.11 to 20.25 of the Federal Court Rules 2011. In identifying the discoverable documents, rules 20.14(1) and (2) are particularly relevant. These state:

…

108 The Discovery Protocol included a more detailed description of each of the First Instance Proceedings. Relevantly, at the time neither SMA nor Wuxi had filed a defence and for the purposes of the discovery exercise assumptions were made about the nature of the defences that might be filed which, on their face, envisaged that most aspects of the claims would be in issue.

109 The review undertaken by Lynch Meyer generated a subset of documents comprising 10 lever arch folders (**Lynch Meyer Review Documents**). The Lynch Meyer Review Documents were used in the Liquidators’ examinations and a copy of them was provided to Mr Courtney who used them as part of the tender bundle in the First Instance Proceedings.

110 In making initial discovery in the First Instance Proceedings, Mr Courtney primarily had regard to the Lynch Meyer Review Documents and his own review of the Hard Copy Documents undertaken with the assistance of solicitors subject to his supervision.

111 Shortly before the hearing of the First Instance Proceedings counsel appearing for the Liquidators decided that they should create the Aide Memoire for use at trial. In order to do so the largest 14 trade creditors were to be identified and analysed on a 14 month basis; strict proof of the trading terms and other arrangements between Solar Shop and each of those 14 trade creditors was required; insofar as there were trading terms or materials relating to such terms they would need to be added to the tender bundle, with a supplementary tender bundle prepared for that purpose; and, to the extent necessary, there would need to be review of the discovery already undertaken to ensure that all documents to be included in the supplementary tender bundle were discovered.

112 As a result of the decision to prepare the Aide Memoire Mr Courtney, Ellen McGettigan, a solicitor who was subject to Mr Courtney’s supervision, and Anna Agostino, a senior manager employed by the Liquidators, undertook a further review of the Hard Copy Documents. According to Mr Courtney, he and Ms Agostino looked for documents concerning the 14 trade creditors the subject of the Aide Memoire, including invoices and remittance advices, and undertook what he described as a comprehensive review exercise in relation to those creditors.

113 Following that review another folder of documents was produced relating to the 14 trade creditors the subject of the Aide Memoire which was tendered at trial. Although not expressly stated by Mr Courtney, we would infer that the documents comprised in this folder, collated in order to assist the Liquidators in proving their case, were not included in the Supplementary List of Documents or, it seems, in any of the lists of the documents served earlier in the First Instance Proceedings.

114 Thus by the time of the hearing of the First Instance Proceedings the Liquidators had undertaken three reviews of the Hard Copy Documents: the Lynch Meyer review undertaken by reference to the Discovery Protocol; Mr Courtney’s review for the purpose of providing initial discovery; and Mr Courtney and Ms Agostino’s review for the purpose of compiling the Aide Memoire.

#### Electronic documents

115 During the First Instance Proceedings Mr Courtney was informed by the Liquidators that there were practical difficulties associated with searching the electronic documents held by the Liquidators and limits on the availability of records in that:

(1) Solar Shop did not operate an email server but rather stored its emails in the cloud;

(2) a complete forensic image of all Solar Shop’s file servers was not available and not held by the Liquidators;

(3) the Liquidators had received 13 images of various parts of Solar Shop’s file servers from Ferrier Hodgson;

(4) the Liquidators received images taken by Ferrier Hodgson of certain computers of the following Solar Shop staff:

(a) Chris Stewart;

(b) Daniel Edgecombe;

(c) Jim Leggett;

(d) Kent Sharp;

(e) Kevin Whelan;

(f) Mark Walker;

(g) Michael Dillon;

(h) Pip Marsden; and

(i) Tony Thornton;

(5) the images referred to in the preceding sub paragraph did not include some of Solar Shop’s primary decision makers, namely Messrs Steele and Anderson; and

(6) those images were not readable on their own. Thus the Liquidators retained a third party information technology service provider, Stopline.

116 Stopline was instructed by the Liquidators to conduct word searches of the electronic images of Solar Shop’s server that would flag documents that might be relevant to Solar Shop’s insolvency including, but not limited to, any payment arrangements that had been entered into with trade creditors. The time period searched was the six month period prior to the Liquidators’ appointment in October 2011. An email from Simon Miller, director of Clifton Hall, to Andrew McLeish of Stopline dated 17 December 2013 provides:

Anna and I have worked through the list of payees and based on the payments made over the 6 months before our appointment, identified all those parties who we’d be interested in finding more information on.

We’ve also identified a number of other keywords that may flag any documents, portions of emails etc that would be of interest.

117 The list of payees and terms included in Mr Miller’s email was:

**Payees**

333 Consulting

AS Electrical

BHP Billiton Nickel West Pty Ltd

Clenergy Australia

Schnieder Electric (Australia) Pty Ltd (Clipsal)

Ecocreative Pty Ltd

Eltech Industries

Enerdrive Pty Ltd

Erico Lightning Technologies

Executive Lifestyle Pty Ltd

GS & L McArdle Pty Ltd

Lawrence & Hanson Pty Ltd

lnnodev Pty Ltd

IPD Group Limited

Louvretec Adelaide

Mark Yates Electrical

Matrin Australia

Mitsui & Co (Australia) Limited

OMD

Optimum Media Direction Pty Ltd

Rainey Electrical Services Pty Ltd

SMA Australia

SMA GBMH

Bluescope Distribution Pty Ltd

TH Brown Furniture Pty Ltd

Solarise Pty Ltd

Solar Frontier

**Terms**

Difficulty

Cash flow

Payment arrangement

Demand

Overdue

Stop credit

Stop supply

Stop work

Distress

Debt Collector

Solicitor

118 Mr Courtney was informed by Mr Miller, who at the time had the primary responsibility for dealing with Stopline and the electronic documents, that:

(1) the images of the computers referred to at [115(4)] above contained a copy of all of the data on each individual computer. However, the information contained in those images was largely unusable because it contained “significant unallocated clusters of data”. Mr Courtney sought to explain this concept as follows:

(a) when a computer file is deleted by a user it is not deleted from the computer’s hard drive at that time, but space on the hard drive which the file occupies is identified as being free for new data to override it when a new file is saved;

(b) in technical language, reference to the deleted document is removed from the “file allocation table” which contains a list of all of the files saved onto a computer and their specific location on the hard drive. By deleting a file from the computer, the computer is only removing the reference to the file in the file allocation table so that, although the hard drive space where the file is saved is not overwritten, the computer loses the ability to identify where that file is and the computer’s operating system records the space on the hard drive as being available for a new document;

(c) because file sizes differ, when a new file is saved it very likely will not match the file size of the previous saved documents on the hard drive and thus a new file is likely to partially overwrite old files on a hard drive; and

(d) consequently an image of a computer contains a significant amount of old and partially overwritten files, which are not properly readable; and

(2) searching the computer images, even with Stopline’s assistance, was difficult because the images could not be accessed and searched by standard computer applications; as search terms were searching within the entire computer images, which included the unallocated clusters of data, most of the search terms would return thousands of hits, largely from partially overwritten and deleted files; often the system would crash and become inoperable due to the number of hits for a search term; and searches would return multiple copies of the same document.

#### Third party documents

119 In order to supplement Solar Shop’s books and records the Liquidators sought the issue of production orders in this Court against the following third parties, including 12 of the 14 trade creditors referred to in the Aide Memoire:

 Ecocreative Pty Limited;

 Hydrogate Pty Limited;

 Innodev Pty Limited;

 AJ Stock;

 Matrin;

 APC Storage Solutions Pty Limited;

 First Solar (Australia) Pty Limited;

 IPD Group;

 Schneider Electric (Australia) Pty Limited;

 SMA Australia Pty Limited;

 Solar Choice Pty Limited;

 Suntech Power Australia Pty Limited;

 Vanguard Logistics Services (Aust) Pty Limited;

 Bluescope;

 Kerry J;

 L&H;

 Mitsui & Co (Australia) Limited;

 Robert Bosch (Australia) Pty Limited;

 Toll IPEC Pty Limited;

 Enerdrive;

 Trebor Pty Limited;

 SMA;

 Solar Frontier K.K.; and

 Wuxi.

120 Following the issue of the production orders to the parties referred to in the preceding paragraph there was a series of hearings and documents were produced.

121 Mr Courtney said that because of doubts about the adequacy of the documentation held by the Liquidators and the difficulties with searching the electronic documents, Solar Shop’s directors were examined in this Court and production orders were also obtained against the following parties:

 Mr Thornton;

 Westpac;

 333 Group Pty Limited (formerly known as 333 Consulting Pty Limited);

 Brendan John Anderson;

 Mr Ferraretto;

 Andrew George Forman;

 Harbert Australian Private Equity Fund I, L.P;

 KPMG;

 Jeremy Edward Steele;

 PricewaterhouseCoopers; and

 PwC Securities Limited.

122 Lynch Meyer, who conducted the Liquidators’ examinations, provided O’Loughlins with copies of the production made pursuant to the production orders on USBs throughout 2015 and 2016. O’Loughlins reviewed that material for the purpose of giving discovery in the First Instance Proceedings. Those documents were reviewed again after the initial hearing of the appeal proceedings.

123 In addition, subpoenas to produce documents were issued to Westpac and Messrs Steele and Mr Thornton at the request of Solarise’s solicitors in proceeding SAD263/2014, between the Liquidators as plaintiffs and Solarise as defendant.

124 According to Mr Courtney production orders were sought against the Harbert entities because it was apparent that senior people in Solar Shop were emailing each other from a Harbert server and not from Solar Shop’s server.

125 By letter dated 3 November 2011 from the Liquidators to the ATO the Liquidators sought “access to and copy of” the following documents in relation to Solar Shop:

1. All original/s, final/s, draft/s whether executed, signed, unsigned or otherwise of documents, books, correspondence, memorandum, notes (including case notes and call logs), minutes, records (including all copies, reproductions, and duplicates of such documents and information recorded on a computer tape and computer disk) received by the Commissioner of Taxation for the Commonwealth of Australia (“COT”), any Regional Commission of Taxation for the Commonwealth of Australia (“ROT”) and/or the Australia Taxation Office (“ATO”) from the Company, its directors Jeremy Steele, Brendan Anderson, Anthony Thornton (“the directors”), its secretary Michael Dillon and/or any officer of the Company, employee, agent, servant and/or entity engaged by or on behalf of any officer of the Company “for the period 7 September 2008 to 7 September 2011”.

2. All original(s), final(s), draft(s) whether executed, signed, unsigned or otherwise of documents, books, correspondence, memorandum, notes (including case notes and call logs), minutes, records (including all copies, reproductions, and duplicates of such documents and information recorded on a computer tape and computer disk) from the COT, ROT and/or ATO to the Company, its directors and/or any officer of the Company, employee, agent, servant and/or entity engaged by or on behalf of the Company regarding outstanding tax and/or superannuation contributions of the Company “for the period 7 September 2008 to 7 September 2011”.

3. All original(s), final(s), draft(s) whether executed, signed, unsigned or otherwise of documents, books, correspondence, memorandum, notes (including case notes and call logs), minutes, records (including all copies, reproductions, and duplicates of such documents and information recorded on a computer tape and computer disk) in regard to any conference, discussions, interviews, meetings held with the directors concerning and/or relating in any way whatsoever with the Company “for the period 7 September 2008 to 7 September 2011”.

126 Mr Courtney said that solicitors under his supervision reviewed the production by the ATO for the purposes of discovery in the First Instance Proceedings and that a significant number of those documents were included in the tender bundle relied on by the Liquidators in the First Instance Proceedings.

127 The Liquidators commenced 13 proceedings, including the First Instance Proceedings, against various parties in this Court. Of those proceedings, orders for standard discovery pursuant to r 20.14 of the Rules were made and discovery given by the following defendants in the proceeding relevantly commenced against them:

(1) Bluescope;

(2) Innodev Pty Limited;

(3) Kerry J;

(4) Lawrence & Hanson Group Pty Ltd;

(5) SMA Australia Pty Limited;

(6) Solarise; and

(7) Wuxi.

#### Review of discovery since the commencement of the hearing of the appeal

128 Following the initial two days of hearing of the appeals on 6 and 7 August 2018, Mr Courtney caused a review to be undertaken of the adequacy of the discovery made in each of the First Instance Proceedings. That review involved considering the documents held by the Liquidators including the Production Documents but did not include the electronic documents. We understand this to mean that the further review undertaken was of the Hard Copy Documents and the Production Documents only. According to Mr Courtney the review focussed on identifying documents:

(1) recording or referring to payment plans with creditors on the basis that such documents would be directly relevant and therefore discoverable in the Kerry J Proceeding and the Wuxi Proceeding under the standard discovery orders made in those proceedings; and

(2) recording communications between Solar Shop and its creditors in the date range 1 June 2011 to 30 September 2011 as required by category 4 of the orders for discovery made in the SMA Proceeding.

129 As a result of that review Mr Courtney identified:

(1) in relation to the 14 trade creditors in the Aide Memoire:

(a) nine additional documents which, in his opinion, were directly relevant to the issue of solvency and should have been discovered in each of the First Instance Proceedings;

(b) 1003 further documents which he describes as “not directly relevant to the issue of solvency and therefore did not need to be discovered in the [Kerry J Proceeding] or the [Wuxi Proceeding] but did need to be discovered in the [SMA Proceeding]”; and

(2) in relation to other creditors, 46 further documents and one additional document referring to a payment plan which fell within the order for discovery made in the SMA Proceeding.

130 In relation to the further identification of documents Mr Courtney said that it was now apparent to him that there were nine instances where “directly relevant documents were overlooked by inadvertence” and that there was “a misapprehension” about the scope of the discovery required in the SMA Proceeding “such that documents which were not directly relevant but nevertheless fell within the category of creditor communications within the relevant period were inadvertently not discovered”.

131 As a result of Mr Courtney’s further review the Liquidators have discovered the nine additional documents, referred to at [129(1)(a)] above, in each of the First Instance Proceedings and the further 1050 documents, referred to at [129(1)(b)] and [129(2)] above (**Additional SMA Discovery**), in the SMA Proceeding.

### Analysis and ground 1A of the cross appeals

132 The first issue that arises is procedural in nature. That is, whether the Respondents can seek their proposed relief in relation to the alleged failure in discovery by way of the Interlocutory Applications or whether they are confined to seeking such relief via their cross appeals. That issue appeared to resolve itself in the course of argument such that the Respondents accept that the relief they seek in relation to the alleged inadequacy in discovery is a matter arising in the cross appeals rather than relief that can be sought by way of interlocutory application.

133 The reasons for this can be shortly stated. The basis of the applications to dismiss the appeals and the First Instance Proceedings concerns the Liquidators’ conduct in the First Instance Proceedings and not on appeal. The Respondents in effect seek substantive relief in the exercise of the Court’s appellate jurisdiction rather than relief capable of determination by an interlocutory application. In that regard we accept the Liquidators’ submission that s 25(2B)(bb) of the Federal Court Act and r 36.17 of the Rules are inapposite heads of power to invoke to dismiss the appeals on the grounds alleged by the Respondents as they deal with the procedural aspects of, and the conduct of parties in, an appeal: see for example *Yates v Australian* *Competition and Consumer Commission* [2006] FCA 1058.

134 The orders which can be made by the Court in the exercise of its appellate jurisdiction are set out in s 28 of the Federal Court Act and include orders varying the judgment appealed from or setting it aside, in whole or in part, and remitting the proceeding to the court from which the appeal was brought for further hearing and determination, subject to such directions as the Court thinks fit. To the extent such relief is sought by the Respondents arising out of the discovery issue in their Interlocutory Applications and in their amended cross appeals (see [86(2)] above) it can be granted by the Court in the exercise of its appellate jurisdiction pursuant to s 28 of the Federal Court Act by making the orders sought in the cross appeals.

135 It is then necessary to consider whether the discovery given by the Liquidators was inadequate. It is clear that it was. Indeed, the Liquidators concede as much. But, the extent to which that is so and the consequences that flow from the inadequacy are in issue between the parties.

136 Orders for standard discovery were made in the Kerry J Proceeding and the Wuxi Proceeding and for non-standard discovery in the SMA Proceeding. Rules 20.14 and 20.15 of the Rules, which apply respectively to standard and non-standard discovery, provide:

**20.14 Standard discovery**

(1) If the Court orders a party to give standard discovery, the party must give discovery of documents:

(a) that are directly relevant to the issues raised by the pleadings or in the affidavits; and

(b) of which, after a reasonable search, the party is aware; and

(c) that are, or have been, in the party’s control.

(2) For paragraph (1)(a), the documents must meet at least one of the following criteria:

(a) the documents are those on which the party intends to rely;

(b) the documents adversely affect the party’s own case;

(c) the documents support another party’s case;

(d) the documents adversely affect another party’s case.

(3) For paragraph (1)(b), in making a reasonable search, a party may take into account the following:

(a) the nature and complexity of the proceeding;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document likely to be found;

(e) any other relevant matter.

(4) In this rule, a reference to an affidavit is a reference to:

(a) an affidavit accompanying an originating application; and

(b) an affidavit in response to the affidavit accompanying the originating application.

**20.15 Non‑standard and more extensive discovery**

(1) A party seeking an order for discovery (other than standard discovery) must identify the following:

(a) any criteria mentioned in rules 20.14(1) and (2) that should not apply;

(b) any other criteria that should apply;

(c) whether the party seeks the use of categories of documents in the list of documents;

(d) whether discovery should be given in an electronic format;

(e) whether discovery should be given in accordance with a discovery plan.

(2) An application by a party under subrule (1) must be accompanied by the following:

(a) if categories of documents are sought - a list of the proposed categories; and

(b) if discovery is sought by an electronic format - the proposed format; and

(c) if a discovery plan is sought to be used - a draft of the discovery plan.

(3) An application by a party seeking more extensive discovery than is required under rule 20.14 must be accompanied by an affidavit stating why the order should be made.

(4) For this Division:

***category of documents*** includes documents, or a bundle of documents, of the same or a similar type of character.

(notes omitted; original emphasis.)

137 The importance of parties providing proper discovery in accordance with orders made by the Court is well recognised in the authorities. In *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164 (***Brookfield***)Lander J referred to the origins of discovery and at [366]‑[368] explained that:

The process enables the parties to obtain documents from their opponents which support their own case, and which destroy their opponents’ case. It enables the parties to assess their own prospects of success before trial and to ensure that they are not ambushed at trial. Interrogatories also form part of this process and are designed to identify the opposing parties’ oral evidence.

Sir John Donaldson MR said in *Davies v Eli Lilly & Co* [1987] 1 All ER 801 at 804:

‘Let me emphasise that the plaintiffs’ right to discovery of all relevant documents, saving all just exceptions, is not in issue. The right is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted “cards face up on the table”. Some people from other lands regard this as incomprehensible. “Why”, they ask, “should I be expected to provide my opponent with the means of defeating me?” The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.’

The integrity of the discovery process must be maintained. The discovery process in many ways depends upon the honesty of the parties and their legal advisers.

138 At [392]-[394] his Honour said:

… A trial has not been regularly conducted where a party to the litigation has not discovered documents which are relevant to the issues in the trial. That party has not complied with its obligations in the interlocutory processes and by failing to make full discovery that party has withheld evidence from its opponent.

Moreover, another aspect of the administration of justice must be considered. Because it serves the administration of justice, it is also in the public interest that the integrity of the courts’ processes are preserved.

For the reasons already given the discovery process is very important in ensuring that the parties are accorded a fair trial. Litigants will lose confidence in the courts’ processes and decisions if they think that a party might avoid giving proper discovery and not be later held to account.

139 The Liquidators concede that the discovery in the First Instance Proceedings was inadequate because there was a failure to make discovery as set out in the First Courtney Affidavit and the Second Courtney Affidavit. However, they contend that their failure has been remedied by the discovery of the additional documents referred to at [129] above. Those documents were identified as a result of a further review of the Hard Copy Documents and the Production Documents.

140 The Liquidators submit that what they described as the “non-relevant documents” produced to SMA as a result of their further review, that is the Additional SMA Discovery, were strictly not discoverable under the orders for discovery made in the SMA Proceeding. Rather, the Additional SMA Discovery was made out of an abundance of caution. In that regard the Liquidators submit that:

(1) paragraph 2 of the orders for discovery made in the SMA Proceeding required the Liquidators to make discovery in certain categories. That order was made without opposition from the Liquidators and, although not expressed to be the case, must have been made under r 20.15 of the Rules;

(2) an order under r 20.15 does not dispense with the direct relevance test in rr 20.14(1)(a) and (2) of the Rules unless it so provides. The onus of demonstrating why the direct relevance test should be dispensed with is on the party seeking the non-standard discovery order;

(3) where, as here, there was no supporting affidavit relied on by SMA at the time of making the application for discovery by categories setting out whether any of the criteria in rr 20.14(1) and (2) should not apply and no mention, either at the hearing or in any correspondence, of a dispensation from the direct relevance test the order should not be read as implicitly dispensing with the r 20.14 tests; and

(4) such a result is consonant with the purpose of the 2011 discovery regime which provides that no discovery is to be made unless an order so provides and which is reflective of the overarching purpose in s 37M of the Federal Court Act.

141 If the Liquidators are correct in their analysis then, on their case, their discovery was inadequate:

(1) in each of the First Instance Proceedings by reason of:

(a) the failure to produce the nine additional documents referred to at [129(1)(a)] above, which have since been discovered; and

(b) although not entirely clear, the additional documents annexed to the First Courtney Affidavit as JDC2; and

(2) in addition in the SMA Proceeding and Kerry J Proceeding, by reason of the failure to produce the 10 June Email and the 27 July Email.

142 The Liquidators submit that the failure to comply with the discovery orders was thus *de minimis*, inadvertent and did not affect the result such that the relief sought by the Respondents to dismiss the appeals and the First Instance Proceedings would not be granted.

143 In light of these submissions, it is necessary to determine the extent of the non‑compliance with the discovery orders made in the First Instance Proceedings. As we have already observed, the evidence plainly establishes that the Liquidators’ discovery was inadequate and the Liquidators concede as much in relation to the documents referred to at [129] above. However, contrary to the Liquidators’ submissions, we do not think that the failure to comply with the Court’s discovery orders was minimal. On the state of the evidence, it is difficult to know the extent and effect of the failure to comply with the Court’s orders. That is particularly so because of the Liquidators’ treatment of the electronic material.

144 The Liquidators had three repositories of documents: the Hard Copy Documents; the Production Documents; and the electronic images of Solar Shop’s file server and computers used by its key staff. The Respondents allege that there were deficiencies in the Liquidators’ treatment and review of each of these categories of documents in providing discovery. We turn to consider whether that is so.

145 It is convenient to start with the electronic documents as that is where the Liquidators’ failure to comply with their discovery obligations is most stark. The evidence discloses that the Liquidators did not have and have never had access to Solar Shop’s complete email records which were stored in the cloud. That is, for one source of documents the Liquidators candidly inform this Court and the Respondents, for the first time at this late stage in the proceedings, that they have never accessed and thus searched all of the available electronic material. They have also informed the Court and the Respondents, again for the first time since commencement of the proceedings, that the electronic material that was in the Liquidators’ possession was difficult to review and that the review that was undertaken was limited.

146 The Liquidators submit that their approach to the electronic documents was justified for a number of reasons.

147 First, they submit that having regard to the extensive direct evidence about dealings between creditors there was no reason to think that the email cloud database would have contained any additional information directly relevant to the issue of solvency. That is mere conjecture on the part of the Liquidators. There is no evidence to that effect. No attempt has been made to interrogate the cloud or to ascertain the amount or nature of the material that is stored there and the ability to access it. The question of whether there is, or indeed might be, any additional information relevant to the question of Solar Shop’s solvency stored in the cloud remains unanswered.

148 The Liquidators also say that, given that Solar Shop maintained eight sites around Australia, had a salary bill which exceeded $1 million per month and dealt with a wide array of creditors, it may readily be inferred that Solar Shop’s email records, insofar as they bear upon interactions with creditors, would have been enormous. Again there was no evidence called by the Liquidators to demonstrate whether that was so. On the state of the evidence, we would not draw such an inference. Even if it was, that fact of itself is not a sufficient reason to take no steps in relation to that material.

149 Finally, in this vein, the Liquidators contend that, in the context of the wide ranging production orders that were sought against Solar Shop’s principal trade creditors, the postulated searches of the electronic material in the cloud are not “reasonable searches” for the purposes of r 20.14 of the Rules. They said that it was for the Respondents to demonstrate, among other things, that they did not undertake reasonable searches for the purposes of r 20.14 having regard to subr (3).

150 In the absence of any evidence about the nature of the material stored in the cloud and the ability to access it, the Liquidators cannot sustain a submission that, because of the production orders, a search of the cloud was not a “reasonable search” for the purposes of the Rules. Nor can it be the case that it is for the Respondents to establish that, in the absence of searching the documents stored in the cloud, the Liquidators did not comply with r 20.14 by undertaking reasonable searches.

151 The Respondents were unaware, until this issue arose on appeal, of the steps undertaken by the Liquidators to comply with their discovery obligations, that documents were stored in the cloud and that no steps had been taken to access or search those documents. The issue of the adequacy of the Liquidators’ discovery has been raised by the Respondents because they became aware, in the case of SMA and Kerry J, that two relevant documents had not been discovered to those Respondents. That being so, as we have already observed at [90] above, it is for the Liquidators to satisfy the Court that they have complied with their obligations including that they have made a reasonable search of the documents in their control. So much can be gleaned from the nature of the discovery obligation in r 20.14(1) which places the onus on the party who is required to give the discovery to undertake a reasonable search to identify the documents to be discovered. In making a reasonable search, a party may take into account the matters set out in r 20.14(3). Further, r 20.16 of the Rules provides that a party gives discovery by serving on each other party to the proceeding a list of documents prepared in accordance with r 20.17 and which specifies any category of documents for which a search was not made and why. That is presumably so that the other party or parties are aware of the extent of the searches made by a party in complying with r 20.14 and can, if a certain category has not been searched, take steps to challenge the reasonableness of the searches undertaken.

152 It is convenient at this point to say something about the affidavits of discovery sworn by Mr Clifton which formed part of the list of documents filed by the Liquidators in the SMA Proceeding and the Supplementary List of Documents. The Liquidators submit, in response to the Respondents’ criticisms of their discovery process, that it was not for them to justify the process they undertook and to explain why the Respondents’ solicitors’ opinion about how that process ought to have been carried out is wrong. They contend that that is the very evidentiary process which is discouraged by the rule that an affidavit verifying discovery is generally considered to be conclusive. The Liquidators relied on *Brookfield v Yevad Products Pty Ltd* [2002] FCA 1376, which concerned an application to set aside a judgment on the basis of incomplete discovery, where at [21] Mansfield J said:

The purpose of verification of a list of documents by affidavit is to ensure that the Court receives from the discovery party a reliable list of the documents in its possession custody or power. The verified list of documents is provided as if in answer to an imaginary interrogatory, and developed in the Courts of Chancery as a means of securing disclosure of potentially relevant documents without the physical intervention of the Court or of a third party to search for them. The responsibility of providing a reliable list of documents is a heavy one. The corollary of the Court’s acceptance of a verified list of documents is its willingness to accept the parties’ own statement as to the documents in its possession custody or power. Thus, a verified list of documents is generally conclusive of its contents. The Court is concerned to prevent a contest between two competing oaths that only a trial could resolve. See generally Bray, *The Principles and Practice of Discovery*, 1885, pp 127, 155, 220-223; Cairns, *Australian Civil Procedure*, Law Book Co. 5ed 2002, p 289. Although that position has been relaxed to some extent, the principle that a verified list of documents is generally conclusive of its contents has not been abolished. The Court will only order a further affidavit or permit cross-examination of a deponent of an affidavit verifying a list of documents in limited circumstances. An early expression of those exceptions can be found in *Jones v Monte Video Gas Co* (1880) 5 QBD 556 at 558 per Brett LJ:

“*either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production. It cannot be shown by a contentious affidavit that the affidavit of documents is insufficient.*”

See also *Mulley v Manifold* (1959) 103 CLR 341; *Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359 per Giles J; *Auspine Ltd v HS Lawrence & Sons Pty Ltd* [1999] FCA 1749 per O’Loughlin J; *Finance Sector Union of Australia v Commonwealth Bank of Australia Limited* [2000] FCA 1389.

153 In *Mulley v Manifold* (1959) 103 CLR 341, which involved an application for further discovery under the Rules of the High Court, at 343 Menzies J held that it cannot be shown by a contentious affidavit that the discovery made is insufficient. His Honour continued:

Before 1912, it was thought that the insufficiency had to appear from the pleadings, the affidavit of documents itself or the documents therein referred to. However, in *British Association of Glass Bottle Manufacturers Ltd v Nettlefold* [1912] 1 KB 369; [1912] AC 709, it was established that the insufficiency might appear not only from the documents but also from any other source that constituted an admission of the existence of a discoverable document. Furthermore, it is not necessary to infer the existence of a particular document; it is sufficient if it appears that a party has excluded documents under a misconception of the case. Beyond this, the affidavit of discovery is conclusive.

154 The affidavits sworn by Mr Clifton were conclusive for the purposes of the First Instance Proceedings subject to establishing an insufficiency in them. That did not happen in the course of the First Instance Proceedings. But that position has changed. The insufficiency of those affidavits has been demonstrated first, as a result of the revelation that the 10 June Email and the 27 July Email had not been discovered in the SMA Proceeding and Kerry J Proceeding; and subsequently, as a result of the Liquidators’ own evidence relied on in the appeals.

155 Putting that issue to one side, contrary to the Liquidators’ submissions, their evidence does not provide a sufficient basis for the Court to conclude that they undertook a reasonable search of the documents in their control. There was no evidence before us as to whether the Liquidators in providing discovery had regard to the factors in r 20.14(3) of the Rules in coming to the view that they had, by proceeding in the manner described by Mr Courtney, undertaken a “reasonable search”. The Court was, in effect, asked to infer that the Liquidators had turned their mind to those factors in adopting the third party production as a work around for the difficulties encountered with the electronic material. We are unable to draw such an inference.

156 The Liquidators failed in the course of the First Instance Proceedings to undertake any search or interrogation of the documents stored in the cloud. There is no evidence to establish the number of documents involved, the ease and cost of retrieving the documents, the significance of any document that might be located there or whether the material that would be available and relevant to the issues in the First Instance Proceedings from that source was or might be available from other sources. These are all matters to which the Liquidators were required to turn their minds in determining whether they had undertaken a reasonable search at the time they provided discovery.

157 Nor did the Liquidators take any steps to bring to the attention of the Court or the Respondents the existence of the cloud as a repository of material that they did not intend to search in discharging their discovery obligations; to explain at the time why that was so; to explain how, in the absence of searching the cloud for relevant material, they would otherwise meet their discovery obligations. That is illustrated by the two lists of documents in evidence before us (see [97] above) in which the Liquidators did not make any disclosure as required by r 20.16 of the Rules in relation to the electronic documents (or any other category of documents). At the time of service of the lists of documents, the Respondents, or at least SMA, could not know whether there were any categories of documents in relation to which a search was not undertaken and, if that was the case, why that was so.

158 Secondly, the Liquidators submit that the evidence was that they did not have control over all of Solar Shop’s electronic documents and that they did not have a forensic image of Solar Shop’s file servers but only had available an image of 13 computers used by a number of Solar Shop’s employees. The evidence of these matters rises no higher than an assertion that that is so. It is not explained why the Liquidators did not hold or have access to a forensic image of all of Solar Shop’s file servers. But, even accepting that to be the case, the searches undertaken of the images of the 13 computers to which the Liquidators had access suffered from inadequacies.

159 The images were searched using the key word searches set out at [117] above. According to Mark Anthony Wilks, the solicitor for SMA, those key words omitted a number of key creditors, such as the ATO, Wuxi or Suntech and Bosch, and Solar Shop’s financiers, Westpac and Harbert. They also excluded search terms relevant to the orders for discovery made in the SMA Proceeding such as agreement, credit, credit terms, arrangement, payment plan or extension.

160 The Liquidators object to Mr Wilks’ evidence about, among other things, the deficiency of the search terms on the basis that it is irrelevant and comprises submissions.

161 Mr Wilks is a solicitor with over 20 years’ experience who principally practises in the areas of commercial litigation and insolvency and who has supervised and advised on discovery exercises. The adequacy of the Liquidators’ discovery is in issue on the appeals thus making Mr Wilks’ evidence relevant. Mr Wilks’ experience, combined with the fact that he acted for SMA in the SMA Proceeding, means that he is aware of the issues that arose in that proceeding and provides his opinion on the adequacy of the search terms. We note that no objection is taken to Mr Wilks’ evidence on the basis that it is opinion evidence and that if Mr Wilks is relied on as an expert he has not complied with the Court’s *Expert Evidence Practice Note (GPN-EXPT)* in that he has not referred to and agreed to be bound by the *Expert Witness Code of Conduct*.

162 Mr Wilks evidence is not irrelevant. But, in any event, this is not a matter on which we would necessarily require evidence. It is clear, even without the assistance of Mr Wilks’ evidence, that, to the extent a search was undertaken by the Liquidators of the electronic images in their possession, the search terms used made those searches inadequate given the matters in issue in the First Instance Proceedings and having regard to the way in which the Liquidators chose to run their case by reference to the 14 principal trade creditors. That there may be relevant documents which have not been discovered as a result of the Liquidators’ approach can be illustrated by one example identified by SMA. Bosch was one of the 14 trade creditors named in the Aide Memoire. An issue in the First Instance Proceedings was whether by, 30 April 2011, Solar Shop’s debt to Bosch of $2.444 million was overdue and was thereafter never brought back within terms. The primary judge rejected the Respondents’ contention that a payment plan was in place: reasons at [255]-[256]. No electronic searches were conducted using the search term “Bosch” and Bosch was not the subject of any order for production. However, a letter dated 27 June 2011 from Bosch to Solar Shop was included in the Additional SMA Discovery. Among other things, that letter refers to amounts due to Solar Shop in May 2011 as well as other earlier correspondence between Bosch and Solar Shop which, according to SMA, appears not to have been discovered. As SMA submits, such documents seem to exist, but were not and have not been discovered. Further, as Kerry J submits the time period searched, being the six months prior to the Liquidators’ appointment on 6 October 2011, was also inadequate. The Liquidators sought findings that Solar Shop was insolvent by certain dates including by no later than 31 January 2011 or in the alternative 30 April 2011. The former date was more than six months prior to the Liquidators’ appointment and the latter was barely six months prior to their appointment.

163 The timing of the search in December 2013, well prior to the making of the discovery orders in any of the First Instance Proceedings and presumably before the issues between the parties had been defined by the pleadings, is also an issue. No further search has been undertaken of that material since that time nor, on Mr Courtney’s evidence, has there been any further review of the output of that search.

164 Thirdly, the Liquidators submit that the computer images they held were practically unreadable and unsearchable and that there was no evidence on which to conclude or infer that searches of the 13 images would have yielded usable results and any additional documents that were relevant to the issue of Solar Shop’s solvency. Mr Courtney provided some evidence on information and belief as to the difficulties with searching this material but his evidence was not that the material could not be searched. Indeed it clearly appears that it was searched. That there were technical difficulties or limitations was not a reason for the Liquidators not to interrogate the material.

165 Of course, if the difficulties were such that they affected the ability to adequately search the material it was open to the Liquidators to raise the issues with the Respondents at the time of providing discovery and to come to some accommodation or, failing that, to approach the Court for appropriate relief. Neither of those courses was taken.

166 Fourthly, the Liquidators submit that the material stored in the cloud was a replication of at least the material on the computer images of the nine employees received by them from Ferrier Hodgson (see [115(4)]) above. They further submit that searching the computers of the likely relevant staff is not an unusual approach to the discovery undertaken in this and other courts. It is not at all clear from the Liquidators’ evidence that the images of the nine employee computers replicated the material that would be stored in the cloud in relation to those computers. But, even if we were to accept that to be the case, it does not explain what other material was stored in the cloud nor excuse the Liquidators from searching that material or at the very least bringing its existence and the issues that might arise from searching it to the attention of the Court and the Respondents. We accept the Liquidators’ contention that searching the images of particular computers might be a satisfactory way of meeting discovery obligations in this and other courts. But whether that is so will depend on the particular circumstances of the case and on the party obliged to provide the discovery bringing all material that bears upon the question of the extent of the searches to be undertaken to the attention of the court and the other parties to the proceeding at the time of and as part of the discovery process.

167 Fifthly, contrary to the Liquidators’ submission, the issuing of production orders to third parties is not a proxy for the Liquidators complying with their discovery obligations by undertaking searches of the documents in *their* control. Documents produced by third parties can only disclose the interaction between that party and Solar Shop and will not fill the void in relation to Solar Shop’s internal dealings and its own documents on particular issues. Once again, to the extent that the Liquidators sought to fill any perceived gap in the discovery process by third party production because they would not or could not access other sources of documents clearly in their control, it was incumbent on them to raise the issues and their proposed approach with the Respondents or the Court. They did not.

168 That leaves the Hard Copy Documents. A number of searches have been undertaken of those documents and further discovery has been given in each of the First Instance Proceedings since the question of the adequacy of the discovery provided was raised in the appeals. The further searches undertaken focussed, in relation to the SMA Proceeding, on documents in category 4 of the orders for discovery made in that proceeding (see [93] above) and in relation to the Kerry J Proceeding and the Wuxi Proceeding on documents recording or referring to payment plans with creditors. That approach was understandable given the way in which the applications for further discovery and associated orders developed and the issues between the parties in the appeals. However, it leaves open the possibility that discovery remains deficient in relation to other issues in the proceedings and/or categories of discovery as ordered in the SMA Proceeding.

169 Insofar as a further review has been undertaken by the Liquidators of the Hard Copy Documents it is now clear that the 10 June Email and the 27 July Email were not discovered in the Kerry J Proceeding and the SMA Proceeding and that other material was not discovered in each of the First Instance Proceedings. That of itself, as the Liquidators have conceded, tells of a failure by the Liquidators to give proper discovery.

170 The question of the nature of the orders for discovery made in the SMA Proceeding and whether the order for non-standard discovery incorporated the requirements in r 20.14 of the Rules was in issue between the Liquidators and SMA. As set out at [140] above, the Liquidators suggested that the extent of their failure to provide discovery of the Hard Copy Documents in the SMA Proceeding, in so far as a further review was undertaken of that material, was not as extreme as it might seem because, based on their interpretation of the Rules, the Additional SMA Discovery was not required and only provided out of an abundance of caution.

171 Rule 20.15 of the Rules applies to non-standard discovery and thus to the order for discovery made in the SMA Proceeding. That order required the Liquidators to make discovery of the categories of documents set out in schedule A (see list at [93] above).

172 In making an application for non-standard discovery pursuant to r 20.15 of the Rules there is a positive obligation imposed on the applicant for discovery to identify a number of things including any criteria in rr 20.14(1) and (2) that should not apply. It follows that, on a proper construction of r 20.15, where an order for non-standard discovery is made the requirements of r 20.14 will continue to apply unless an application is made to have them excluded. The requirements of r 20.14 include that the documents are “directly relevant” to the issues raised in the proceeding.

173 That this is the effect of the combined operation of the Rules is not surprising. Rule 20.14 gives guidance to parties as to how to proceed with discovery. There is a logic to the parameters it sets continuing to apply to non-standard discovery. That is particularly so in relation to an order for non-standard discovery by way of discovery in categories. It could not be the intent of such an order that the discovery to be provided would have a wider ambit than standard discovery in the same proceeding. The intent of discovery by categories is, in the usual case, to refine and narrow the range of discovery. To remove the requirement of direct relevance to the issues as a matter of course would be contrary to that intention. There is no doubt for that reason that r 20.15 is framed as it is, putting the onus on the applicant for non-standard discovery to make a case as to why aspects of r 20.14(1) and (2) should not apply.

174 The discovery order made in the SMA Proceeding does not in its terms exclude the operation of r 20.14 of the Rules. Nor is there any evidence that SMA made any such application at the time of seeking the order. The only evidence SMA points to is Mr Courtney’s evidence at [2] of the Second Courtney Affidavit that the discovery in the SMA Proceeding had a “wider scope”. We would not infer, based on that evidence alone, that the order made excluded the operation of r 20.14(1)(a). No such inference is available and, in our opinion, the contrary is the case.

175 However, it does not follow that the Additional SMA Discovery was not required. SMA disputes the contention that none of those documents are directly relevant to the issues and points to a number of them, by way of example, that it says are relevant. That is not a dispute that we need to presently resolve given our finding that, in any event, the Liquidators failed to give proper discovery, that failure was not *de minimis* and it has not been remedied.

176 Having found that the Liquidators failed to give proper discovery in the First Instance Proceedings, we turn to consider the consequences, if any, of that failure. The starting point is the decision in *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 (***Quade***). In that case the respondents brought proceedings in this Court against the appellant (that is, the Bank) for breach of s 52 of the *Trade Practices Act 1974* (Cth), breach of the *Contracts Review Act* *1980* (NSW) and in negligence after sustaining losses because of unfavourable exchange rate fluctuations on a Swiss franc loan. At first instance the trial judge dismissed the proceedings. On appeal, a Full Court of this Court upheld the appeal and ordered that there be a new trial. The ground on which the appeal to the Full Court succeeded was that, after the primary judge had given judgment the appellant disclosed, for reasons that were not explained, that it had failed to comply with a pre-trial discovery order and had not discovered a considerable number of relevant documents in its possession.

177 On appeal, the question before the High Court for determination was “what is the appropriate approach (or ‘test’) to be adopted by an appellate court for determining whether a new trial should be ordered when documents which should have been discovered were not discovered by the successful party”. At 141 the Court noted that earlier decisions had established that where all that was involved was the discovery of fresh evidence by the unsuccessful party, the reconciliation of the demands of justice and the policy that there be an end to litigation at least prima facie meant that a successful party should only be deprived of a verdict in its favour if the unsuccessful party persuades the court that there was no lack of reasonable diligence on its part and that it is reasonably clear that the fresh evidence would have produced an opposite result. However, at 142 the Court observed that the position was different in a case such as the one before it where the unavailability of the evidence at the trial resulted from a failure by the successful party to comply with an order for discovery of relevant documents in its possession or control. The Court continued:

The application to that category of case of the general rule that a new trial should only be ordered on the ground of fresh evidence if it is “almost certain” or “reasonably clear” that the opposite result would have been produced if the evidence had been available at the first trial would, particularly where the failure was deliberate or remains unexplained, serve neither the demands of justice in the individual case nor the public interest in the administration of justice generally. In so far as the demands of justice in the individual case are concerned, it would cast upon the innocent party an unfairly onerous burden of demonstrating to virtual certainty what would have happened in the hypothetical situation which would have existed but for the other party’s misconduct. In so far as the public interest in the administration of justice generally is concerned, it would be likely to ensure to the successful party the spoils of his own default and thereby encourage, rather than to penalize, failure to comply with pre-trial orders and procedural requirements.

It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court’s assessment of what will best serve the interests of justice, “either particularly in relation to the parties or generally in relation to the administration of justice”. In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party, any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the order had been complied with and the non‑disclosed material had been made available. While it is not necessary that the appellate court be persuaded in such a case that it is “almost certain” or “reasonably clear” that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so.

178 The Liquidators rely on two further decisions which do not take the principles set out in *Quade* any further. The first is *Clone Pty Ltd v Players Pty Ltd (In liq) (Receivers and Managers Appointed)* [2018] HCA 12; (2018) 264 CLR 165 (***Clone***) which concerned the equitable power of a court to set aside its own perfected judgment. There the primary judge set aside a perfected judgment based on misconduct not amounting to fraud. An appeal from that order to the Full Court of the Supreme Court of South Australia was dismissed by majority. The issue before the High Court was whether in the exercise of the Court’s general power to set aside a perfected judgment there must be conduct amounting to fraud. The High Court said that was so.

179 In considering that issue the Court referred to the two ways recognised historically by the Court of Chancery in which decrees could be set aside, a bill of review and an original bill, and noted that the distinction between each of those bills is now recognised, on the one hand, in the power of an appellate court to set aside a lower court judgment and order a new trial and, on the other, in the power of a court, by original action, to set aside a judgment based on fraud. It is not necessary to set out the Court’s analysis of the replacement of the bill of review with the appellate procedure. Relevantly at [50] in considering the power of an appellate court to order a new trial in two identified categories, namely where there had been an error of law or where fresh evidence had been discovered by the unsuccessful party, the Court said:

In *Commonwealth Bank of Australia v Quade*, this Court considered whether the general requirements that attached to the second category also applied to instances in the first category where the error of law arose from an allegation of malpractice. In that case the successful party had, by misconduct, failed to comply with an order for discovery before judgment. The Full Court of the Federal Court held that the result of the trial might have been different if discovery had been provided. The appeal was allowed and a new trial was ordered. This Court dismissed the further appeal, explaining that in relation to errors of law as well as instances of surprise, malpractice, or fraud it was not necessary to conclude that the result would have been different. The power to order a new trial in all these cases depended upon the appellate court’s assessment, in all the circumstances, of the interests of justice.

(footnotes omitted.)

180 The second decision on which the Liquidators rely is *McDonald v McDonald* (1965) 113 CLR 529. That case concerned an action for damages for defamation in which the defendant relied on evidence of a witness, Mr Moloney. In an application for a new trial to the Full Court of the Supreme Court of Queensland, the plaintiff alleged that Mr Moloney did not in fact witness the events he swore he witnessed and that the defendant, Mr Moloney and another witness called on behalf of the defendant, Mr Cedric Moloney, conspired together to present the false evidence. The appeal was allowed and the Full Court ordered a new trial. The defendant sought special leave to appeal contending that the judgment of the Full Court was wrong because it was founded on fraud which was not established. Special leave was granted and the appeal allowed. At 532‑533 Barwick CJ said:

The discovery subsequent to verdict of admissible credible evidence, which could not have been sooner discovered by the exercise of reasonable diligence in the circumstances, and which is of such probative value and significance that, taken with the evidence already given at the trial, it will in all probability be decisive of the issues between the parties in a sense opposite to that of the verdict, is a ground for the granting of a new trial. If the Court, is satisfied that the fresh evidence fulfils these requirements, it will generally conclude that, therefore, the interests of justice demand that the issues be tried afresh.

But if the fresh evidence does not satisfy all these requirements so that a new trial could not be ordered on the basis of the discovery of the fresh evidence, but does tend to establish that the verdict was obtained by fraud or by surprise or that there has been subornation of witnesses, the Court may grant a new trial upon a motion therefor, though a separate proceeding is clearly the preferable course, if the Court itself, on a trial of such issues, finds the fact of the fraud, the surprise or the subornation of witnesses, as the case may be, to be proved to its reasonable satisfaction: see *Hip Foong Hong v h. Neotia & Co*; *Jonesco v Bears* …. Whether or not the Court does so must finally depend on the Court’s view as to whether or not the interests of justice, either particularly in relation to the parties or generally in relation to the administration of justice, require such a course. So much, I think, is definitely established by the authorities to which I have referred.

181 In *Quade* the High Court declined to set out any general rule to determine when a new trial might be ordered where there was misconduct on the part of the successful party as a result of which relevant evidence in that party’s possession remained undisclosed until after judgment. Rather the Court said that in such a case the answer to that question depends upon an assessment of what will best serve the interests of justice either particularly in relation to the parties or more generally having regard to the administration of justice. The Court also observed that in determining whether the matter should be tried afresh, it is necessary to consider a variety of possibly competing factors, including:

(1) the degree of culpability of the successful party;

(2) any lack of diligence on the part of the unsuccessful party; and

(3) the extent of any likelihood that the result would have been different if the order had been complied with and the non-disclosed material had been made available. In relation to this requirement there must at least be a real possibility that that is so.

182 Here it is the Liquidators who seek to have the orders of the primary judge set aside. They are not the party affected by the failure to provide proper discovery but are in fact the party who defaulted in their obligations, a default which is not *de minimis* as the Liquidators contend and which is continuing. Nor did the Liquidators identify their default. Rather it was the Respondents who, by raising a query, became aware of the potential issue. It was only after an exchange of evidence that the extent of the issue became apparent. Notwithstanding their default and the current status of the discovery provided by them, the Liquidators ask that this Court make orders on the basis of the material that was before the primary judge supplemented only by some limited further documents that have now been disclosed.

183 The Liquidators made a number of submissions as to why what they termed as *Quade* style relief should not be granted. Those submissions included why, in their opinion, there was not a real possibility that:

(1) the 10 June Email and the 27 July Email, which were not discovered in the SMA Proceeding and the Kerry J Proceeding, would have made a difference to the outcome in those proceedings; and

(2) the documents identified by SMA from the Additional SMA Discovery would have made a difference to the outcome of the First Instance Proceedings.

184 We do not propose to address those submissions at the level of detail at which they were put. That is because, unlike the circumstances that faced the Court in *Quade*, this is not a case where the successful party at trial, having become aware of a failure in the discovery that was made, then remedied that default so that the unsuccessful party had in its possession those documents that were not available at trial. In those circumstances an assessment can be made by reference to that material as to whether there was a real possibility of a different outcome at trial had those documents been available.

185 The Liquidators’ failure to comply with the Court’s orders for discovery is not confined to those documents they have now identified and made available as a result of their additional searches undertaken since this issue was raised but extends beyond those documents. Repositories of material were not searched or not sufficiently searched at the time that the Liquidators gave discovery and that remains the case. That is, there has been and is an ongoing failure to comply with the orders for discovery made in the First Instance Proceedings. In those circumstances the question of whether there is a real possibility that there would have been a different outcome had the Liquidators complied with their discovery obligations cannot be answered by considering only those documents recently identified by the Liquidators.

186 The Liquidators submit that the Respondents’ allegation that they have been deprived of relevant evidence which they cannot identify by reason of the failure in discovery needs to rise beyond mere conjecture and that the Respondents need to identify that the failure in discovery is likely to have deprived them of relevant evidence such that the verdict is unsafe and should be set aside. The failure in the Liquidators’ discovery has been established. That failure is such that it is not possible for the Respondents to identify the further material and to put to the Court why in their opinion there is a real possibility that that material could have made a difference to the outcome before the primary judge and for the Court to assess whether that is so.

187 In the circumstances of this case the Respondents could not be expected to identify that the failure in discovery is *likely* to have deprived them of *relevant* evidence. To impose that onus as urged by the Liquidators is simply unrealistic. In the absence of knowing what is in the repository of material, which has not been searched or adequately searched or, in the case of the material stored in the cloud, interrogated in any way, the Respondents and the Court could not possibly know if it is likely to include relevant evidence.

188 Once the issue of adequacy of discovery had been raised, in order to put the parties in a position where the question of whether there was a real possibility that any additional material that had not been discovered in the First Instance Proceedings could have made a difference could be addressed, the Liquidators were required to satisfy the Court that any failure in discovery had been remedied and that all discoverable material had been identified and made available to the Respondents. The parties and the Court would then be armed with the material to consider that factor. But that is not what has happened. The Liquidators have not satisfied us that they complied with the orders for discovery made in the First Instance Proceedings. Indeed we have come to the contrary conclusion.

189 As things presently stand there has been and is an ongoing failure in discovery. Ground 1A of the cross appeals has been made out. In the circumstances of this case whether any additional material, if available, would have made a difference to the outcome is not the issue. As set out at [137] above litigation is “designed to do real justice between opposing parties”, an objective which cannot be achieved if the court does not have all relevant information: see *Brookfield* at [367].

## The effect of the Liquidators’ ongoing failure to make proper discovery

190 Before addressing what we consider to be the appropriate disposition of the appeals and cross appeals, we address one aspect of potential relief raised by the Respondents. The Respondents suggested the First Instance Proceedings should be dismissed, but they were unable to take the Court to any case in which a failure to give proper discovery at trial resulted in an order dismissing the proceeding. SMA referred to several cases in its submission where the effect of a failure to provide discovery was considered but placed emphasis on the decisions in *Mango Boulevard Pty Ltd v Spencer* [2008] QCA 274 (***Mango Boulevard***) and *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International B.V. (No 4)* [2017] FCA 1345 (***Federal Treasury Enterprise***).

191 *Mango Boulevard* concerned an appeal from, among others, an order that the appellant’s defence and counterclaim be struck out with no leave to re-plead. The facts are not straightforward. Relevantly, at first instance there had been a complete failure on the part of the first and second defendants to give discovery. After numerous defaults, on 3 April 2007 a guillotine order was made requiring each of those defendants to serve lists of documents by 27 April 2007 and failing which, upon the plaintiff’s solicitor filing an affidavit deposing to that failure, specified paragraphs of the defence and all of the counterclaim would be struck out and there would be judgment for the plaintiff against the first and second defendants on the counterclaim. The first and second defendants did not comply with the 3 April 2007 order. Thus all but 20 paragraphs of the defence and the counterclaim were struck out and the plaintiff (**Mango**) obtained judgment on the counterclaim. The appellant applied to be substituted as a party for the first defendant, who had become a bankrupt. It was agreed that the appellant should be joined as a party, that it should file its defence and counterclaim in the form in which it had been delivered and that Mango should proceed with an application to have those proceedings struck out and for summary judgment on the counterclaim. On that application, which resulted in the orders the subject of the appeal, Mango relevantly sought to retain the benefit of the 3 April order and a further order made on 4 October 2007 and relied on abuse of process.

192 The appellant contended on appeal that the primary judge’s finding of abuse of process based on unfairness to Mango and on “adverse reflection upon the administration of justice” was limited to the question of insolvency of the two defendants and that it was thus inappropriate for it not to be permitted to advance defences and claims which were not related to the insolvency question. The appeal was dismissed but in considering the primary judge’s finding about the deficiencies in disclosure at [23] Muir JA (with whom Mackenzie AJA and Douglas J agreed) said:

A party’s failure to comply with its obligations under the *Uniform Civil Procedure Rules*, including those relating to disclosure, may constitute an abuse of process even if the failure directly affects only some of the pleaded issues. An object of the rules is to ensure that all the pleaded issues between the parties to a proceeding are tried fairly. That is also the parties’ entitlement. A party cannot be permitted to gain a forensic advantage by wilfully, recklessly or negligently failing to give proper disclosure on an issue of substance. Here, the failure to disclose went to an issue central to the Mango’s case and also to one of the defences pleaded by Spencer, Perovich and the appellant.

193 In *Federal Treasury Enterprise* Perram J ordered a stay because of a failure to give discovery. The only remaining aspect of the proceeding was a cross claim brought by two Russian entities. In short, an order for discovery had been made in 2013. While there was no complaint about the applicant’s compliance with those orders there was an issue with the efforts to have the Russian Federation, a non-party which stood behind the applicants and had been invited to give discovery in the categories as ordered, to do so. Insofar as efforts to obtain documents from the Russian Federation was concerned, his Honour found that there had been a failure to produce documents which fell within the discovery categories; the inquiries that had been made to find the documents were insufficient; and no proper explanation had been provided as to how the task was being approached: at [60]. At [61]-[62] Perram J said:

The question then is whether this Court should permit the cross-claimants to pursue proceedings in this Court whilst the sovereign State standing behind them makes little effort to ensure that the proceedings are fairly conducted by providing relevant documents in its possession. There is no doubt that a jurisdiction to stay proceedings in such circumstances exists although it lies at the extreme end of the sanctions which might be imposed: *Aetna Pacific Securities Ltd v Hong Kong Bank of Australia Ltd* (Unreported, Supreme Court of New South Wales, Giles J, 29 April 1993) at 14. It is, in my opinion, an aspect of the Court’s jurisdiction to prevent its own processes from being abused. Nor, for the reasons given by Edmonds J in *SPI Spirits (No 2)* do I doubt that a stay may be granted in the current circumstances even where a Sabre order is involved.

If this was an ordinary case, I would not have had any hesitation in ordering the proceedings to be stayed until the non-complying party gave proper discovery. To permit the cross-claim to be pursued whilst this unfair posture continued would be unjust. Indeed, the pursuit of the cross-claim would, in that circumstance, be an abuse of process. I accept, therefore, that the Court has the jurisdiction to stay the cross-claim and that, ordinarily, the current circumstances would be such that that power should be exercised.

194 After considering the added complexity occasioned by the fact that the entity standing behind the cross claimants is a foreign state, Perram J concluded that, as the invitation to provide discovery had already been sent but not responded to, he would stay the cross claim until further order as his Honour “could see no other way of ensuring that these proceedings are conducted fairly”.

195 Neither *Mango Boulevard* nor *Federal Treasury Enterprise* had analogous facts to this case and in neither was the first instance proceeding dismissed by order of an appellate court because of the failure to provide discovery. We are not prepared to dismiss the First Instance Proceedings.

196 We turn then to consider what will best serve the interests of justice in this case having regard to its facts which are unique and different to those which were presented to the Court in *Quade* and the other cases to which we were taken.

197 The problem confronting this Court is the appropriate disposition of the appeals and cross appeals in circumstances in which it has been revealed only on the appeals that the Liquidators have not made proper discovery and their failure to do so is ongoing.

198 Had a failure to make proper discovery emerged during the course of the First Instance Proceedings, the Court may have stayed the proceedings until proper discovery was made. Alternatively, the Court may have permanently stayed them if the Court reached the view that the Liquidators had had a sufficient opportunity to make discovery and that the continuation of the proceedings was, in the circumstances, an abuse of process.

199 Had a failure to make proper discovery emerged after trial and before the appeals and cross appeals were heard, but the failure had then been remedied, the Court’s approach would need to take into account the difference between the appeals on the one hand, and the cross appeals on the other. Had the issue arisen during the application for leave to appeal, there may have been good reason to refuse leave to a party who had been and continues to be in breach of its discovery obligations. The scenario before us is different.

200 We have in this case an answer to a separate question as to the date of insolvency in preference claims. The party in default of its discovery obligations appeals against the failure of the primary judge to find earlier dates of insolvency. The innocent parties resists those appeals. The innocent parties bring their own appeals against the primary judge’s finding of the date of insolvency.

201 Had there been a failure to make proper discovery which had since been remedied, the Court may well have approached the appeals of the defaulting party by having regard to a number of considerations, including the nature of the default, the reasons for it and the nature and effect of the documents now discovered in order to determine where the balance of the interests of justice lies. The cross appeals on the other hand would be capable of a *Quade* type of analysis of determining whether the recently discovered documents could have made a difference to the result. It is not necessary for present purposes to focus on the precise nature of the requirement of a different result.

202 What then is the appropriate course in this case, where even now, the Liquidators have not complied with their discovery obligations?

203 We consider that unless this Court is satisfied that there is no realistic possibility of there being documents which might be deployed by the innocent parties to meet the defaulting party’s claims, the defaulting party’s claims (i.e. the appeals) should not be considered by this Court because to do so would be to consider them on a hypothetical and potentially false basis. It is tempting to think that most, if not all, of the relevant documents have been produced. We give the following example. We address below what we call the Charge issue. As we explain (at [366]‑[380] below), the Liquidators appear to be right about the issue at least up to the point of the question of whether it is likely that Westpac would have consented to a sale of the RECs holding. We know the Liquidators sought production of documents from Westpac, among others (see [121] above), and we know that they have made extensive discovery. It is tempting to conclude that the possibility of identifying on discovery further documents relevant to this issue is so remote that it can be ignored. However, it is not for this Court to in effect “take a chance” on this issue. It was for the Liquidators to establish the absence of the realistic possibility we have described and they have failed to do that.

204 We then turn to the appropriate orders with respect to the appeals. In our view and for the reasons already given, the appeals cannot be allowed for the purposes of substituting different (and earlier) dates. Nor can they be allowed for the purposes of a remitter (subject to proper discovery now being given) as to the earlier dates of alleged insolvency for that would be to reward the defaulting party for its default. In other circumstances one approach might be for this Court to give the defaulting party a further short period to comply with its discovery obligations. However, in this case that time has well and truly passed.

205 In the somewhat unique circumstances of these appeals, we consider that the appropriate order under s 28 of the Federal Court Actis that they be dismissed.

206 We are of the opinion that the Liquidators’ failure to make proper discovery and their ongoing failure to do so means that the primary judge’s determination of the separate question should be set aside and the separate question remitted to him or another judge but on the basis that it will not be open to the Court to find a date before 31 July 2011. The Respondents who were otherwise successful should not be put to the expense of having to re-litigate all issues and the Liquidators who were the defaulting party should not be given a second chance to establish insolvency at an earlier date. On the remitter, the primary judge would have all the Court’s existing powers to deal with the Liquidators’ failure to make proper discovery.

207 As is apparent from the wording of ground 1A of the relief sought in the cross appeals, the Respondents ask this Court to limit the remitter in various ways should the Court find that a remitter was appropriate. Other than excluding any date earlier than 31 July 2011, we do not consider that any of the proposed limitations are appropriate. We consider that once the Court decides (as it has) that the matter should be remitted, then it should be on the basis that the judge is able to reach the correct result and not on the potentially artificial basis of limitations imposed by this Court.

208 In case we are wrong, the Court proposes to consider the merits of the appeals. We do that on the basis of the evidence before the primary judge. We have considered carefully whether we should embark on this exercise. On balance we have decided that we should because of the unique nature of the circumstances before the Court and in case we are wrong: *Boensch v Pascoe* [2019] HCA 49 at [8] (Kiefel CJ, Gageler and Keane JJ).

209 What then is to be done with the cross appeals (leaving aside ground 1A)? The situation that the parties now find themselves in is not occasioned by any fault on the part of the Respondents. If their cross appeals have merit then they should be entitled to succeed. However, having considered the merits of the cross appeals on the evidence before the primary judge, we do not consider that they should be allowed. Whilst an appeal or cross appeal might be dismissed on a basis other than the merits, we do not consider that, in the ordinary case at least, an appeal or cross appeal should be allowed other than on the merits. We do not need to address the Court’s power to proceed in that way. We note the Respondents’ submission that there is power to do that in s 23 of the Federal Court Act and in the Rules. In our opinion, the exercise of such a power, assuming it to exist, is not warranted. The prejudice to the Respondents to date can be remedied by appropriate orders as to costs.

210 We will now turn to address the grounds of the appeals and cross appeals (and, briefly, the notices of contention). However, it must be borne steadily in mind that throughout our analysis and conclusions we are proceeding on the basis of the evidence before the primary judge and without regard to the ramifications of the inadequate discovery subsequently disclosed.

# THE LIQUIDATORS’ GROUNDS OF APPEAL

211 The Liquidators raise five grounds of appeal in their notices of appeal which are relevantly the same in each of the appeals. In summary the Liquidators contend on appeal that Solar Shop was insolvent for the purpose of s 95A(2) of the Corporations Act by 30 April 2011 or, alternatively, by 22 or 31 May 2011 or by 30 June 2011 and that the primary judge erred in not finding that was the case. The grounds are, as the Liquidators submit, somewhat inter related. We address each ground in turn below.

## Ground 1

212 The Liquidators allege that the primary judge erred in law, or alternatively mixed fact and law, in failing to apply the “forward looking” test of insolvency and in failing to find that Solar Shop was insolvent by no later than 31 May 2011 because:

(1) his Honour failed to take into account in the determination of the question of solvency of Solar Shop as at 31 May 2011 the then current forecast inability of Solar Shop to pay its debts each week on and from 3 June 2011 to 29 July 2011 in the Solar Shop cash flow analysis considered by the board on 30 May 2011 (**May Cash Flow**), which was accepted to be reliable by the primary judge, and the fact that in the May Cash Flow Solar Shop was forecasting a deficiency of $1.2 million by the week ending 3 June 2011 increasing to $7.419 million by the week ending 29 July 2011, in each case even after the sale of its entire RECs holdings; and

(2) in the First Lombe Report Mr Lombe opined that Solar Shop’s solvency from 31 May 2011 was conditional on the availability of the Harbert recapitalisation, which is referred to and rejected by the primary judge, and a $2 million overdraft extension from Westpac, which the primary judge found to have been unavailable.

213 At the heart of the Liquidators’ argument is the contention that the primary judge did not have to wait until the cash deficiency forecast in the May Cash Flow was borne out at the end of July 2011 before relying on it, as his Honour did in making the finding that Solar Shop was insolvent as at 31 July 2011. Rather, they say that the primary judge could have relied on the May Cash Flow to find that Solar Shop was insolvent as at 31 May 2011. The Liquidators contend that his Honour should have found that the May Cash Flow established as at the end of May 2011 that the cash and liquid assets available to Solar Shop were insufficient to cover both the debts that were due and payable and that were to become due and payable in the future. That being so, the Liquidators said that the primary judge erred by not applying a forward looking test for insolvency which required consideration of debts that were not immediately payable but which were payable in the foreseeable future and which Solar Shop did not have the ability to pay.

### Analysis

214 The test for solvency is set out in s 95A of the Corporations Act which relevantly provides that a person is solvent if and only if the person is able to pay all of their debts as and when they fall due.

215 In *Lewis v Doran* [2004] NSWSC 608; (2004) 208 ALR 385 (***Lewis v Doran***) at [106]‑[109] and [112]‑[113] Palmer J explained the application of the test in the following way:

I think that I must approach the application of s 95A of the CA with two considerations in mind. First, the words of s 95A must be construed as they stand, without addition or subtraction. Second, the law both before and after the enactment of s 95A is unequivocally and emphatically clear that insolvency is, first and last, a question of fact “to be ascertained from a consideration of the company’s financial position taken as a whole. In considering the company’s financial position as a whole, the Court must have regard to commercial realities. Commercial realities will be relevant in considering what resources are available to the company to meet its liabilities as they fall due, whether resources other than cash are realisable by sale or borrowing upon security, and when such realisations are achievable”: *Southern Cross Interiors Pty Ltd (in liq) v DCT* (2001) 53 NSWLR 213 at 224 (citations of authority omitted); 188 ALR 114; 164 FLR 430; 39 ACSR 305 at 316. Those propositions have been approved in *Australian Securities and Investments Commission v Plymin (No 1)*, above*, Emanuel Management Pty Ltd v Foster’s Brewing Group Ltd* (2003) 178 FLR 1; *Iso Lilodw’ Aliphumeleli Pty Ltd (in liq) v Cmr of Taxation* (2002) 42 ACSR 561; 50ATR 391; *White Constructions (ACT) Pty Ltd (in liq) v White* (2004) 49 ACSR 220 and *Keith Smith East West Transport Pty Ltd (in liq) v Australian Taxation Offıce* (2002) 42 ACSR 501.

The question of a company’s solvency may arise retrospectively or prospectively. The question arises retrospectively where, for example, a liquidator is seeking to recover an unfair preference or to set aside an insolvent transaction so that the issue is solvency as at a date prior to the winding up. The question may arise prospectively where a company is sought to be wound up in insolvency and the company’s ability to pay its debts must be determined not only by reference to debts payable as at the date of trial but also by reference to its ability to pay debts which will fall for payment some time in the near future.

Where the question is retrospective insolvency, the court has the inestimable benefit of the wisdom of hindsight. One can see the whole picture, both before, as at and after the alleged date of insolvency. The court will be able to see whether as at the alleged date of insolvency the company was, or was not, actually paying all of its debts as they fell due and whether it did, or did not, actually pay all those debts which, although not due as at the alleged date of insolvency, nevertheless became due at a time which, as a matter of commercial reality and common sense, had to be considered as at the date of insolvency. By reference to what actually happened, rather than to conflicting experts’ opinions as to the implications of balance sheets, the court’s task in assessing insolvency as at the alleged date should not be very difficult.

Where the question is prospective insolvency, however, the court’s task is more difficult simply because foresight, rather than hindsight, is called into play. One can appreciate the court’s reluctance to conclude that a company will be able to pay those debts which must be taken into account as a matter of commercial reality as at the relevant date only because it claims to have access to funds which a third party is said to be willing to lend without security.

…

So, where retrospective insolvency is in issue, the court can take into account that as at and after the alleged date of insolvency the company actually paid all its debts as they fell due because a third party made funds available to it without security. The court can look at the arrangements which were actually made rather than artificially excluding them from consideration because the arrangements did not fall within the definition of payments from the debtor’s “own monies”. To look at what actually happened avoids the possibility that the court is forced to conclude that, as a matter of law, a company could not pay all its relevant debts when, as a matter of fact, the company clearly did pay those debts.

On the other hand, where prospective insolvency is in issue the court, as a general rule, would be sceptical of an assertion that a third party is willing to advance funds unsecured on such terms as would not, in any event, bring about insolvency. Such willingness on the part of a third party would have to be cogently demonstrated, if not as a matter of legal obligation, then as a matter of commercial reality.

216 On appeal in *Lewis v Doran* [2005] NSWCA 243; (2005) 219 ALR 555 at [103] Giles JA (with whom Hodgson and McColl JJA agreed) relevantly said:

… Section 95A speaks of objective ability to pay debts as and when they become due and payable, but ability must be determined in the circumstances as they were known or ought to have been known at the relevant time, without intrusion of hindsight. There must of course be “consideration ... given to the immediate future” (*Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1528; 14 ALR 51 at 54‑5 per Griffith CJ), and how far into the future will depend on the circumstances including the nature of the company’s business and, if it is known, of the future liabilities. Unexpected later discovery of a liability, or later quantification of a liability at an unexpected level, may be excluded from consideration if the liability was properly unknown or seen in lesser amount at the relevant time. …

217 The primary judge extracted a part of the May Cash Flow at [330] in the context of his findings that Solar Shop was insolvent as at 31 July 2011. At [331]-[332] his Honour then said:

The “cash gap” which the Board noted on 30 May was the negative figure of $7.419 million at 29 July 2011. The analysis projected that, by 29 July 2011, [Solar Shop] would have a total of 397,991 RECs with a value of $25. In fact, the spot price for RECs at 31 July was $23 meaning that the cash which could be realised from that number of RECs at 31 July 2011 was $9.153 million.

It was not suggested that [Solar Shop’s] cash flow analysis was unsound. On my understanding, the position at 31 July was not as severe as the cash flow analysis predicted because, putting to one side the RECs transferred to Solarise in reduction of its debt, SSA had in fact sold 374,300 RECs in the period from 26 May to 31 July 2011 and still held a substantial number of RECs, as the figure in the balance sheet indicates. Even so, there remained a substantial cash flow deficiency as at 29 July 2011. In short, the cash flow analysis is evidence of [Solar Shop’s] developing cash shortfall, even taking account of the prospect of sales of RECs.

218 The minutes of the meeting of the Solar Shop board on 30 May 2011, referred to by the primary judge, recorded that:

The Board discussed potential financing options to bridge the projected cash gap of $7-8m in late July. Adrian Ferraretto had pledged to buy 80,000 RECS for ~$2.8m (plus GST). The balance of the funding requirement is likely to be needed from (1) selling RECS in the spot market (at current $25 spot price, this would raise ~$3.4m net of the RECS sold to Adrian); (2) entering into some sort of Repo program; (3) temporary funding from Westpac; and/or (4) injecting new equity from Harbert and other shareholder.

219 The Solar Shop board acknowledged a “projected cash gap of $7-8 million in late July” which, it can be inferred, was based on the projected cash shortfall of $7.419 million as at 29 July 2011 included in the May Cash Flow. However, as at 30 May 2011 that was no more than a projection. It could not be a basis for establishing that Solar Shop was insolvent as at 30 May 2011. That this is so is demonstrated by a number of matters:

(1) a document titled “Investment committee update-Solar Shop cash situation-31 May 2011” (**May Investment Committee Update**), which was prepared to “provide an update on Solar Shop’s cash situation post the receipt at the May 2011 Board meeting this week of updated earnings and cash flow forecasts for the consolidated business”, includes the May Cash Flow under the heading “Weekly Cashflow Forecast to mid August 2011”. The May Cash Flow is said to show a “$7.4m cash hole in the last week of July assuming that the company’s entire RECS holding is sold in the spot market (at the current spot market price of $25)” and it is noted that there are no other cash preserving or cost cutting initiatives “included in it”. The cash receipts included in the May Cash Flow are also “based on booked installs”. In other words, the May Cash Flow is modelled on certain assumptions which may or may not have come to pass;

(2) that the May Cash Flow was no more than a forecast is evident from a comparison of its contents to what in fact occurred. For example, it assumed that in each week in the period it covered, 27 May 2011 to 12 August 2011, cash receipts from customers would be $2.75 million. However, the “SSA Group: May summary & analysis” shows that the total revenue for May 2011 was $20.899 million and a Solar Shop trading update for June 2011 results shows actual total revenue of $20.899 million and $20.153 million for May and June 2011 respectively. Thus for June 2011 the actual revenue exceeded the total revenue for that month included in the May Cash Flow by approximately $9 million;

(3) additional sales of units by Solar Shop as evidenced by the actual revenue achieved would also mean that Solar Shop acquired additional RECs; and

(4) given its nature as a document which sought to predict the future the May Cash Flow does not take account of actual transactions that took place after it was prepared, for example the sale of RECs to the CBA on 30 June 2011 from which it realised $3.645 million: reasons at [315].

220 The May Cash Flow and the conclusion which the Liquidators urge should have been drawn from it also need to be considered in the context of a number of other matters which are relevant to the question of Solar Shop’s solvency as at 31 May 2011.

221 First, the primary judge found that the Solarise Debt was not due and payable as at 22 May 2011. The Liquidators challenge that finding in ground 2 of their notices of appeal which we address below at [236]-[336].

222 Secondly, the Liquidators would need to establish that RECs sales ought not to have been taken into account in assessing the assets available to Solar Shop to meet its debts as at 30 May 2011. The ability of Solar Shop to sell its RECs as part of the assessment of Solar Shop’s solvency at certain dates is the subject of appeal ground 3 which we address below at [337]-[392]. However, it seems that RECs had been sold in May 2011 and the primary judge found that Solar Shop’s omission to sell all available RECs as at 31 May 2011 “should not be regarded as an inability to sell them”: reasons at [314].

223 Thirdly, contrary to the Liquidators’ submission, Solar Shop’s ability to pay its debts as and when they fell due as at the end of May 2011 was not wholly dependent on the temporary funding from Westpac and an equity raising from Harbert. Solar Shop’s revenue could be improved in other ways which were referred to in the May Investment Committee Update such as the closure of part of the business thus reducing expenditure, the centralisation of operations, head count reduction in some teams, potential sale of part of the business as well as by an increase in revenue and sale of inventory.

224 The primary judge did not err by failing to apply the forward looking test of insolvency having regard to the May Cash Flow as alleged. As is apparent, it was no more than a forecast. In circumstances where there was available evidence of what actually happened the primary judge was able to assess the question of whether Solar Shop met the test in s 95A of the Corporations Act by reference to that evidence, having regard to the whole picture both before, as at and after the alleged date of insolvency: *Lewis v Doran* at [108].

225 The other factor which the Liquidators contend affected the primary judge’s finding that Solar Shop was not insolvent as at 31 May 2011 relies on [4.15] of the First Lombe Report which appeared in that part of the report headed “[Solar Shop’s] solvency - support of Westpac and Harbert” and provides:

4.15 Therefore it is apparent that the solvency and future trading of SSA was contingent on SSA obtaining both Harbert’s $5.0m cash injection in July 2011 and Westpac’s ongoing financial support. The absence of one would be fatal to the solvency of SSA.

226 SMA submit that before the primary judge the Liquidators confined themselves to three dates on which they said that Solar Shop was insolvent, the last of which was 22 May 2011. SMA sought to meet each of those dates by contending that the Liquidators had failed to discharge their onus of establishing Solar Shop’s insolvency at each of the nominated dates and relied on the First Lombe Report and the Second Lombe Report (**Lombe Reports**) as submissions in response to the Liquidators’ expert reports, which were also relied on as a submission. However, SMA said that it was not a part of its case that Solar Shop was insolvent as at 31 July 2011. Whether that is so is an issue that also arises on ground 2 of the cross appeals and is addressed at [446]-[454] below.

227 In so far as this aspect of the first ground of appeal is concerned, in our opinion, it is not the case that the primary judge erred in failing to apply the forward looking test of insolvency and in failing to find that Solar Shop was insolvent as at 31 May 2011 because of his Honour’s later reliance on the First Lombe Report.

228 Paragraph 4.15 of the First Lombe Report needs to be read in context. Relevantly, the First Lombe Report also included:

1.9 It is my opinion [Solar Shop] was solvent up to 29 July 2011 and possibly as at 3 August 2011. My opinion is in part based on the commitment of Harbert to contribute $5.0m cash by 29 July 2011 to assist [Solar Shop’s] working capital requirements to pay its creditors.

1.10 It is possible that [Solar Shop] may have still been solvent after 29 July 2011 due to the extensive negotiations conducted between Harbert and Westpac regarding [Solar Shop’s] restructure plan. However, it is evident that by 18 August 2011 that [Solar Shop’s] restructure plan was no longer viable and therefore [Solar Shop] would in all likelihood be insolvent by this date.

…

4.4 It is apparent that [Solar Shop’s] solvency comes into question from approximately May 2011. At this point, [Solar Shop] was in breach of its loan financial covenants and subject to a standstill arrangement with Westpac. However, the correspondence between Westpac and [Solar Shop] from May 2011 indicated that Westpac was supportive of [Solar Shop], as it requested [Solar Shop] submit a plan on how it would rectify its financial covenant breaches. Westpac also continued to provide [Solar Shop] use of its existing facilities and even allowed [Solar Shop] to make principal repayments to Solarise, a debt which was subordinated to Westpac’s debt. In June 2011, Westpac asked [Solar Shop] to submit its FY12 Budget and a formal request on what assistance [Solar Shop] was seeking so that Westpac could assess the provision of its facilities for [Solar Shop] going forward. In my opinion, this indicates Westpac’s ongoing commitment and support of [Solar Shop].

…

4.12 In my opinion, [Solar Shop] had Westpac’s ongoing support during June 2011 and it would be reasonable for [Solar Shop] to continue to trade with this financial support until the outcome of the Second Ferrier Hodgson Report was communicated to [Solar Shop], including Westpac’s decision regarding its provision of ongoing facilities to [Solar Shop].

…

4.16 On 2 August 2011, Harbert and [Solar Shop] were still confident that [Solar Shop] could meet its FY12 Budget and therefore it appeared that Harbert was still committed to providing the $5.0m working capital injection.

229 In the Second Lombe Report, which is to be read with the First Lombe Report, Mr Lombe concluded that Solar Shop was “solvent between 1 October 2010 and 29 July 2011 … and possibly as late as 4 August 2011”.

230 The Liquidators submit that the primary judge relied upon the opinion at [4.15] of the First Lombe Report advanced by way of submission and that Mr Lombe proceeded on the premise that Solar Shop was solvent until 29 July 2011 because that was the point at which it became apparent that the Harbert funding would not proceed. The Liquidators further submit that, having rejected the Respondents’ case that the Harbert funding ought to have been considered as available to Solar Shop until such time as it became apparent that the funding would not proceed, the finding at [356] militated in favour of an insolvency finding at the end of May 2011.

231 Commencing at [333] of his Honour’s reasons, in considering Solar Shop’s solvency as at 31 July 2011, the primary judge referred to the potential funding options which the board of Solar Shop considered were available as at 30 May 2011, including further funding by Harbert. His Honour then reviewed the evidence of Harbert’s consideration of providing a capital injection or further funding. His Honour concluded that during June and July 2011 Solar Shop had the prospect of additional funding from Harbert and that Harbert was willing to be a participant in arrangements for additional funding. That is, the primary judge found that in June and July 2011 there was the possibility of additional funding. It was not until 31 July 2011 that the primary judge found, in contrast to the preceding period, that the prospect of funding was not sufficiently certain that it could be considered as a resource to be taken into account.

232 It was in the context of the primary judge’s consideration of the question of solvency as at 31 July 2011 and in light of the finding that further funding by Harbert was not a commercial reality as at that date that the primary judge rejected the Respondents’ contention that the additional funding from Harbert could be considered as an available resource to Solar Shop and thus indicative of solvency until it became apparent that Harbert would not make the additional investment. At [356] the primary judge said:

Mr Lombe noted in his first report prepared at the request of SMA that the solvency and future trading of [Solar Shop] was contingent on [Solar Shop] containing the cash injection of $5 million from Harbert in July and on Westpac’s ongoing financial support. He also noted that the absence of either would be fatal to the solvency of [Solar Shop]. I agree with that assessment. [Solar Shop] did not have the cash injection from Harbert at 31 July 2011 and, as indicated, the prospect of its receipt was a highly contingent. Westpac had not indicated its willingness to increase its facilities in the way Harbert had sought.

233 This finding did not militate in favour of a finding that Solar Shop was insolvent as at 31 May 2011. It was a finding made in the context of the primary judge’s consideration of the position as at 31 July 2011 and followed from his Honour’s earlier findings as to the change in the availability of the Harbert funding as at that date.

234 There was no error in the primary judge’s approach and no warrant for the primary judge to consider or rely on [4.15] of the First Lombe Report to make a finding that Solar Shop was insolvent as at 31 May 2011. His Honour did not err in failing to apply a forward looking test of insolvency as at 31 May 2011 in circumstances where, as we have already observed, he had available to him evidence of what actually occurred and could make findings based on that evidence, as his Honour did.

### Conclusion

235 We reiterate what we have said earlier and in particular at [210]. On that basis we would have found that ground 1 in the notices of appeal is not made out.

## Ground 2

236 The Liquidators allege that the primary judge erred in law and in fact in finding that the debt owed to Solarise by Solar Shop was not due and payable as and from 22 May 2011, but instead was subordinated to the debt due to Westpac by Solar Shop. The Liquidators contend that the primary judge ought to have found that Solar Shop was insolvent on and from 30 April 2011, or alternatively, 22 May 2011. The significance of the latter date is obvious. The link between the former date and the Solarise Debt becoming due and payable on 22 May 2011 is based on the Liquidators’ argument concerning the application of a “forward looking” test of insolvency, although that argument is not raised in this particular context in the notice of appeal.

237 The Liquidators’ first allegation relates to the construction of the Solarise Loan Agreement and the Subordination Deed.

238 First, the Liquidators allege that on the proper construction of the Solarise Loan Agreement and the Subordination Deed when read together, the obligations of the parties under the Subordination Deed were to, and did, come to an end as at 22 May 2011 in the event that, as at that date, each of the five conditions identified in cl 8.1 of the Subordination Deed were met, and Solar Shop was thereby permitted (by the Subordination Deed) and required (by the Solarise Loan Agreement) to pay the Solarise Debt to Solarise. Further and in the alternative, they allege that on and from 22 May 2011, “Subordination Default” as defined for the purpose of cl 8.1.5 of the Subordination Deed was not to include a failure by Solar Shop to make payment of the balance of the Solarise Debt after that date.

239 The Liquidators allege that the primary judge should have construed the Subordination Deed and the Solarise Loan Agreement together to come to the aforesaid conclusions in that:

(1) by the terms of each of the Solarise Loan Agreement and Schedule 1 to the Subordination Deed, the whole of the Solarise Debt was permitted and required to be repaid by 22 May 2011;

(2) the only occasion on the facts for the subordination springing into effect after 22 May 2011 was the failure of Solar Shop to pay Solarise the Solarise Debt when it was due, and permitted to be paid, on 22 May 2011; and

(3) it is an uncommercial construction of the combined effect of the Solarise Loan Agreement and the Subordination Deed that Solar Shop could and must pay the Solarise Debt on 22 May 2011, but if it did not do so that very day, then Solar Shop would achieve a deferral of its liability to pay for an indeterminate period merely by its own default in making that payment when due.

240 Further, or in the alternative, the Liquidators allege that the primary judge ought to have found that there had been an abandonment of the Subordination Deed on and from the entry into the 2010 Facility Agreement between Westpac and Solar Shop on 19 October 2010. They allege that, objectively viewed, Westpac, Solar Shop and Solarise by their conduct manifested an intention that the Subordination Deed would not continue to have application after the entry into the 2010 Facility Agreement in substitution for the May 2009 Business Finance Agreement, the effect of which was that the pre-existing debt owed by Solar Shop to Westpac was to be increased by $10 million. They allege that Westpac, Solar Shop and Solarise negotiated as to the continued applicability of the Subordination Deed to the 2010 Facility Agreement and by their dealings, each manifested an intention that:

(1) the continued operation of the Subordination Deed was dependent upon agreement as between them for a variation to extend the operation of the subordination to the new, increased facility; and

(2) the waiver of the condition of the 2010 Facility Agreement that a new subordination arrangement be agreed with Solarise manifested the intention of each of Westpac, Solar Shop and Solarise that thereafter the Subordination Deed was at an end.

241 The Liquidators allege that it was the common and objectively manifested understanding, reflected in Westpac’s correspondence in response to a request for permission to enter into an agreement containing the terms, that the Subordination Deed ceased to have effect following the entry into the 2010 Facility Agreement. They allege that the interest payments conformed to a proposed loan agreement, and were not an objective manifestation that the parties considered that the Subordination Deed remained operative.

242 In ground 3 of their notices of contention, the Respondents allege the following with respect to the primary judge’s finding that the Subordination Deed had not been abandoned:

(1) the primary judge should have found that the Liquidators did not prove that the employees of Westpac, on whose conduct they relied to establish the abandonment or abrogation of the Subordination Deed, had the necessary authority;

(2) the primary judge should have also found that the Subordination Deed could only be abandoned or abrogated by written deed of all parties and no such deed was entered into (cll 13 and  18); and

(3) in the alternative to (2), the inclusion of those clauses (cll 13 and 18) in the Subordination Deed was an additional basis for concluding that there had been no abandonment or abrogation.

243 Finally, the Liquidators allege that further and alternatively, the primary judge ought to have found that the Westpac correspondence in response to a request for permission to enter into the 2011 Solarise Agreement containing the certain terms constituted Westpac’s consent to the payment by Solar Shop of the Solarise Debt upon demand. The 2011 Solarise Agreement was a proposed agreement between Solarise, Solar Shop, Mr Mourney and Harbert to cover the position after 22 May 2011. Westpac was not a proposed party. The primary judge said that it was not clear whether the 2011 Solarise Agreement was executed by all parties. His Honour did find that it was executed by at least Solar Shop and Harbert.

244 In summary, the notices of appeal raise three issues under Ground 2. They are as follows:

(1) the construction issue, namely, whether the subordination came to an end on and after 22 May 2011;

(2) the abandonment issue, namely, whether the Subordination Deed was abandoned in or about October 2010; and

(3) the approval issue, namely, whether in or about May 2011 and acting under cl 8.3 of the Subordination Deed, Westpac approved Solar Shop’s repayment of the Solarise Debt.

245 We turn now to the reasons of the primary judge. We have already briefly outlined those reasons (at [36]-[42] above). It is now necessary to examine those reasons in greater detail.

246 With respect to the construction issue, the primary judge considered whether the Subordination Deed operated to make the Solarise Loan subordinate to the Westpac Debt only to 22 May 2011.

247 The primary judge noted the link between the Solarise Loan Agreement and the Subordination Deed. The Solarise Loan Agreement provided the subject matter for the Subordination Deed. Furthermore, by cl 15 of the Subordination Deed, Westpac acknowledged that it had received unexecuted copies of the Solarise Loan Agreement and the Share Buy-Back Agreement, and by cl 16 both parties acknowledged that the Subordination Deed would prevail in the event that there was any inconsistency between the Subordination Deed and the Solarise Loan Agreement. The primary judge considered that there was, therefore, an extent to which the Solarise Loan Agreement and the Subordination Deed can be read together. However, the primary judge did not consider that there was any basis for concluding that the Subordination Deed incorporated the two year Subordination Period contained in the Solarise Loan Agreement. In fact, there were a number of matters which indicated that the subordination, which is the subject of the Subordination Deed, was more extensive than (and inconsistent with) that contained in the Solarise Loan Agreement.

248 The matters upon which the primary judge relied are as follows. First, the Subordination Deed made it clear in cl 4.2 that the debt under the Solarise Loan Agreement was subordinated to the Westpac Debt until the Westpac Debt had been paid or satisfied in full, or the debt under the Solarise Loan Agreement was repaid with the written consent of Westpac. The primary judge noted that cll 5,  6 and  7 expanded the subordination by excluding payment to, recovery by or assignment of the debt under the Solarise Loan Agreement by Solarise, “so long as any of the Westpac Debt remains outstanding”.

249 Secondly, the primary judge expressed the view that the Amortisation Schedule to the Subordination Deed did not, by the provision for Permitted Payments, alter that position. Clause 8.1 of the Subordination Deed authorised, but did not require, Solar Shop to make the Permitted Payments. Clause 8.2.2 makes it clear that Solar Shop may not make a capital payment on the date specified and provides that it may make such a payment at any time following the unpaid capital payment date subject to conditions. The primary judge considered that, in light of the permissive “may” in cll 8.1 and 8.2.2, the apparently imperative “will” in the notes to the Amortisation Schedule did not have that quality. The primary judge said that it was not to be expected that an obligation of this kind would be imposed by a note to the schedule setting out Permitted Payments. Furthermore, the first note in the Amortisation Schedule states that Solar Shop may, but is not obliged to, make capital payments on the dates of payment.

250 Thirdly, the primary judge said that it was not readily to be supposed that when Westpac was negotiating the May 2009 Business Finance Agreement, it sought subordination for a two year period only. His Honour considered that it was more realistic to suppose that Westpac sought to have the subordination continue until its debt had been paid, save and except that Permitted Payments could be made at times when the conditions in cl 8.1 were satisfied. Westpac was not a party to the Solarise Loan Agreement and it never signified its agreement to the two year Subordination Period referred to in that agreement. That arrangement was one made between Solar Shop, Solarise, Mr Mourney and Harbert only. The primary judge considered that the express mention of the two year Subordination Period in the Solarise Loan Agreement, and the absence of any reference to such a limitation period in the Subordination Deed, suggested that the parties to the latter were deliberately departing from such a limitation.

251 Finally, the primary judge said that the inconsistency clause in the Subordination Deed was significant. The inconsistency clause was cl 16. It provided that, to the extent of any inconsistency between the Subordination Deed and the Solarise Loan Agreement, the Subordination Deed shall prevail. His Honour considered that there was an inconsistency between the indefinite period of subordination contemplated by cll 5, 6 and 7 of the Subordination Deed, on the one hand, and the two year Subordination Period contemplated by the Solarise Loan Agreement, on the other. In those circumstances, the Subordination Deed prevailed.

252 The primary judge concluded that, whilst Solar Shop was authorised to make the Permitted Payments which would have had the effect of the loan being repaid by 22 May 2011, it was not required to do so. It followed that the parties contemplated that the Solarise Debt may continue past 22 May 2011. The primary judge held that as Solar Shop did not make the Permitted Payments to Solarise before 22 May 2011, it could thereafter make a payment only with Westpac’s prior written consent. That consent could not, by reason of cl 8.3 of the Subordination Deed, be unreasonably withheld or delayed.

253 In the circumstances, the primary judge concluded that this basis (i.e. that the Solarise Loan was subordinated to the Westpac Debt only to 22 May 2011) for the claim that the Solarise Loan was due and payable on 22 May 2011 failed.

254 With respect to the abandonment issue, the primary judge noted that the Liquidators submitted that each of Westpac, Solar Shop and Solarise from the time of entry into the 2010 Facility Agreement, proceeded on the basis that the Subordination Deed was no longer operative. The Liquidators relied upon events within Westpac in 2010 and July 2011, and upon a course of dealings between Westpac, Solar Shop and Solarise from May 2011 onwards.

255 Before the primary judge, the Liquidators relied on an unsigned internal Westpac memorandum dated 15 October 2010 in which the authors, identified only as “Relationship Manager”, “Analyst” and “Portfolio Manager”, sought approval for amendment to the conditions to the then proposed Facility Agreement on the basis that the Solarise Loan will no longer be subordinated to Westpac. The primary judge set out a passage from the memorandum. He noted that the memorandum included an extract from Westpac’s legal department which indicated a belief that the Subordination Deed referred only to amounts owing under the May 2009 Business Finance Agreement and would not extend to amounts advanced under the 2010 Facility Agreement. The extract from the legal advice also set out three options which his Honour set out in his reasons.

256 The primary judge noted that there was no evidence that a copy of the internal memorandum was ever provided to Solar Shop or Solarise and considered that it was unlikely that that would have occurred. Nor was there any evidence before the Court of a response from Westpac management to the recommendation, let alone an indication, that management accepted the premise to the recommendation, that is to say, that the Solarise Loan would not be subordinated to advances under the 2010 Facility Agreement.

257 The primary judge noted that the Liquidators relied on the fact that a condition precedent to the tranche F advance was that the terms of the Subordination Deed (or the amendments required to it) be satisfactory to Westpac, both in form and in substance. They submitted that as there had been no amendment to the Subordination Deed and no new deed, Westpac must, at least impliedly, have waived compliance with this condition and that this was consistent with acceptance of the “do nothing” recommendation in the memorandum dated 15 October 2010. The Liquidators also relied on the fact that Westpac had not challenged Mr Mourney’s assertion when, on 26 July 2011, Mr Steele informed Mr Tanner that Mr Mourney considered that the Subordination Deed was no longer applicable. The primary judge inferred that this was because Mr Tanner had called for and reviewed the internal memorandum of 15 October 2010.

258 The primary judge noted that the Liquidators also relied on a course of dealings in 2011 to demonstrate that Solarise, Solar Shop and Westpac regarded the Subordination Deed as no longer operative. We will not at this stage set out the seven matters identified by the Liquidators.

259 The Liquidators put to the primary judge that, in these circumstances, it should be inferred that Westpac, Solarise and Solar Shop had manifested a common intention no longer to be bound by the Subordination Deed.

260 The primary judge said that the subjective intention or understanding of the unidentified authors within Westpac of the memorandum dated 15 October 2010 was not relevant. The matter was to be assessed objectively and there was no express evidence that the views of the authors were ever adopted by Westpac management, let alone communicated to Solar Shop or Solarise.

261 The primary judge said that no inference of a mutual intention that the Subordination Deed should no longer be operative should be drawn. Even if Westpac had that understanding, the corresponding understanding could not be attributed to either Solar Shop or Solarise. The primary judge noted that all that the unidentified authors reported was that Solarise was not prepared to sign any further documents which may weaken its position and that it was resistant to revisiting the Subordination Deed “to capture the whole of the new facility arrangements” or to amending it “to capture those facilities which were under the [2009 May Business Finance Agreement] but not the new facilities”.

262 The primary judge accepted that it can be inferred that Westpac waived the requirement for any amendment to the Subordination Deed. However, that circumstance did not suggest in an objective way a common contemplation that the Subordination Deed in its unamended form should cease to be operative. The primary judge considered that the evidence that the parties conducted themselves on that basis was at best slight, and, to the contrary, there was some objective evidence that Solar Shop at least continued to regard the Subordination Deed as being applicable. The primary judge noted that Solar Shop made payments of interest to Solarise on 13 January 2011, 14 April 2011 and 20 May 2011 and that these dates were at intervals and very close to the dates specified in the Amortisation Schedule in the Subordination Deed. This suggested, according to the primary judge, that Solar Shop regarded the Subordination Deed as being in operation. The primary judge said that it was also significant that after 22 May 2011, Solar Shop sought Westpac’s consent to it making payments to Solarise. The primary judge said that that seemed to be consistent with an understanding on its part that the Subordination Deed continued to be applicable, although his Honour accepted that that conduct may also be attributable to Solar Shop’s understanding of its obligations under the 2010 Facility Agreement.

263 The primary judge concluded that there was no evidence of a “long-continued ignoring of the contract on both sides”. Rather, the primary judge noted that the evidence was more consistent with a view at least by Solar Shop, and probably Solarise and Westpac, that the Subordination Deed continued to be applicable to the extent to which it was capable of doing so.

264 With respect to the approval issue, the primary judge noted that cl 3 of the 2011 Solarise Agreement was in the following terms:

[3] Acknowledgement of liability for Debt

[3.1] Solar Shop acknowledges and agrees that pursuant to the Loan Agreement, on and from 22 May 2011 Solar Shop is liable to pay Solarise on demand the whole of the principal sum of A$5,178,682.13 (Debt), together with interest accrued to 22 May 2011 pursuant to the Loan Agreement of A$43,132.04, on 22 May 2011.

[3.2] Nothing in this agreement shall be taken to limit or postpone Solar Shop’s liability or Solarise’s rights pursuant to the Loan Agreement as acknowledged and agreed by the preceding subclause.

265 Mr Tanner at Westpac was provided with a copy of the 2011 Solarise Agreement on 20 May 2011 and asked by Mr Thornton to “advise if you/Westpac have any issues and are happy to support”.

266 Mr Tanner’s response on 23 May 2011 to that request was as follows:

I confirm that Westpac is not a party to the attached proposed Agreement.

Whether Solar Shop decides to enter into this Agreement with Solarise Pty Ltd and Russell Mourney is a matter for the directors of Solar Shop who must consider the ability of Solar Shop to comply with any obligations under the Agreement.

As you are aware, Solar Shop’s facilities with Westpac are currently under review and we reiterate that all requirements under [the] current Facility Agreement dated 19 October 2010 must continue to be met during this period of review.

267 The primary judge rejected a submission by the Liquidators that Mr Tanner’s email of 23 May 2011 constituted, for the purposes of cl 8.3 of the Subordination Deed, a consent by Westpac to Solar Shop entering into the 2011 Solarise Agreement, including its agreement to the terms providing for repayment of the Solarise Loan on and from 22 May 2011 upon demand.

268 First, the primary judge said that the consent to which cl 8.3 refers relates to payments by Solar Shop in connection with the Solarise Debt, not consent to Solar Shop entering into an agreement containing a term that the Solarise Loan will be repayable on demand. Secondly, the primary judge did not consider that Mr Tanner’s response could be regarded as a “consent” of the requisite kind. The email from Mr Thornton to Mr Tanner of 20 May 2011 had not in terms sought Westpac’s consent and Mr Tanner did not frame his response in such terms. Instead, he pointed out that the decision whether to enter into the agreement had to be made by Solar Shop itself. The primary judge considered that, in context, Mr Tanner appeared to have been declining to proffer advice to Solar Shop about the appropriateness of the 2011 Solarise Agreement. Finally, the primary judge said that there was nothing in the circumstances objectively considered which indicated that Mr Tanner was intending, by his response, to alter Westpac’s position under the Subordination Deed. The primary judge concluded that Westpac had not given a relevant consent pursuant to cl 8.3 of the Subordination Deed.

269 We turn now to outline briefly the submissions of the parties on the appeals.

270 With respect to the construction issue, the Liquidators submit that the primary judge should have found that on the true construction of the Solarise Loan Agreement and the Subordination Deed, when read together, the subordination regime came to an end on 22 May 2011 because, as at that date, the five conditions in cl 8.1 of the Subordination Deed were satisfied, thereby permitting (in the case of the Subordination Deed) and requiring (in the case of the Solarise Loan Agreement) Solar Shop to pay the Solarise Loan, in turn, extinguishing the subject matter of the subordination.

271 The Liquidators submit that irrespective of whether the subordination regime continued, Solar Shop had the ability to make the “Permitted Payments”, which meant that it could (in the case of the Subordination Deed) and must (in the case of the Solarise Loan Agreement) repay the entirety of the Solarise Loan on 22 May 2011, and cl 8.2.2 of the Subordination Agreement permitted Solar Shop to repay the entirety of the Solarise Loan after 22 May 2011, even if Solar Shop defaulted in repayment of that sum on 22 May 2011.

272 The Liquidators submit that it follows from these propositions that the primary judge erred in not finding that the repayment of the balance of the Solarise Loan became due and payable on 22 May 2011. In particular, the primary judge erred in finding that: (1) Solar Shop was authorised, but not required, to pay the Solarise Loan on 22 May 2011; and (2) thereafter only permitted to make the payment of the Solarise Loan with Westpac’s consent.

273 The Liquidators refer to cl 8 of the Subordination Deed which provides that Solar Shop could make payments to Solarise in reduction of the Solarise Loan, namely, the Permitted Payments. The making of such payments, which would have resulted in the Solarise Loan being completely repaid by 22 May 2011, were conditional upon the five matters referred to in cl 8.1 being satisfied. Each of those matters were, in fact, satisfied. In particular, there was no subsisting “Subordination Default”. With respect to para (b) of the definition of “Subordination Default” (that is, “(b) the Borrower’s failure to pay any Westpac Debt or Solarise Loan when due or within any applicable grace period”), there was no payment default under the Westpac Debt, leaving only a failure to pay any Solarise Debt when due as “the possible trigger for subordination springing into existence as a block to making a permitted payment”. The primary judge made no finding of any “Subordination Default”, nor that any of the conditions in cl 8.1 of the Subordination Deed (which precluded the making of the Permitted Payments) had occurred.

274 As the primary judge found, Solar Shop was authorised under the Subordination Deed to make payment of the entire Solarise Loan balance by 22 May 2011. However, the primary judge went on to hold that because Solar Shop did not make the Permitted Payments before 22 May 2011, it could thereafter make a repayment only with Westpac’s prior written consent.

275 The Liquidators submit that this finding was the product of two related errors by the primary judge.

276 First, the finding that Solar Shop was authorised, but not required, to make the Permitted Payments misapprehends the interrelationship between the Solarise Loan Agreement and the Subordination Deed. The Solarise Loan Agreement required Solar Shop to repay the Solarise Loan on the repayment date of 22 May 2011. The Liquidators submit that the very nature of a subordination arrangement is that the senior debtholder will limit or constrain the repayment of the junior debtholder. The obligation otherwise to repay the junior debtholder is not found in the instrument of subordination, but in the terms of the junior debt itself which in this case is the Solarise Loan Agreement. Once it is accepted that the Subordination Deed authorises Solar Shop to repay the entirety of the Solarise Loan, there was no need for it to “require” Solar Shop to pay the entirety of the Solarise Loan.

277 Secondly, and relatedly, having found that Solar Shop was authorised to pay the entirety of the Solarise Loan on 20 May 2011, cl 8.2.2 of the Subordination Deed then permitted that payment to be made at any time after it had been a Permitted Payment, provided that the conditions set out in cl 8 were satisfied. The primary judge addressed this clause in terms that were like the approach already identified, namely to address whether the obligation to make the catch up payment was mandatory or permissive. By 22 May 2011, cl 4.1 of the Solarise Loan Agreement required the repayment of the Solarise Loan. There is no finding by the primary judge that the conditions in cl 8.2.2 were not satisfied. Notwithstanding that, there remains a need to construe para (a) of cl 8.2.2, namely, the proviso that the conditions in cl 8 are satisfied. That is a reference to the conditions in cll 8.1 to 8.1.5 respectively. The Liquidators submit that cl 8.3, which speaks of obtaining Westpac’s written consent, is not such a condition, because it only operates on its own terms where the relevant payment is not a Permitted Payment: by contrast the essence of cl 8.1 and the catch up payments under cl 8.2.2 is that these are Permitted Payments, not otherwise requiring Westpac’s consent.

278 The Liquidators submit that it remained then for the Court to be satisfied that there was no “Subordination Default” occasioned by the failure to repay the Solarise Loan on 22 May 2011 (notwithstanding that there is no finding that there was such a default). The Liquidators submit that, in accordance with the strict language of cl 8.1.5, a failure to pay any Solarise Debt when due constitutes a “Subordination Default”. The Liquidators submit that this strict construction is irreconcilable with cl 8.2.2 because, notwithstanding that a catch up payment is permitted under cl 8.2.2, the proviso in para (a) of cl 8.2.2 could never be satisfied if the failure to make a Permitted Payment on time thereafter precluded the satisfaction of the condition in cl 8.1.5. The Liquidators submit that the very occasion for the making of the catch up payment under cl 8.2.2, namely, a failure to make a Permitted Payment on time would thus preclude the clause from having any operation. The Liquidators submit that the only workable construction so as to give cl 8.2.2 any field of operation, is to give primacy to the specific language of cl 8.2.2 and to permit a catch up payment where the conditions of cl 8.1 are satisfied other than the need for the catch up payment itself. The Liquidators submit that this avoids the commercial absurdity that the Solarise Loan was repayable on 22 May 2011 and permitted to be repaid by that date under the Subordination Deed, but (immediately) thereafter only capable of being enforced by Solarise should Westpac consent.

279 The Liquidators submit that the Solarise Loan balance was repayable on 22 May 2011 under the Solarise Loan Agreement, and not precluded under the Subordination Deed and that remained the position after 22 May 2011.

280 The Liquidators submit that if this finding is made, Solar Shop had insufficient means to repay the Solarise Loan as at 22 May 2011 and it was insolvent by that date. Furthermore, such a finding would sustain a finding of insolvency as at 30 April 2011 because of the requirement to adopt a forward looking test.

281 With respect to the construction issue, the Respondents submit that the Liquidators do not expressly challenge any of the reasons given by the primary judge for coming to the conclusion that as Solar Shop did not make the Permitted Payments to Solarise before 22 May 2011, it could thereafter make a repayment only with Westpac’s prior written consent. The Respondents submit that the Liquidators now challenge the primary judge’s conclusion on a different basis to that which they had advanced at trial without ever confronting the primary judge’s clear reasons.

282 The Respondents submit that the Liquidators appear to identify two errors in the primary judge’s reasoning. The Respondents say the first error alleged appears to be that the primary judge found that the Subordination Deed authorised, but did not require, Solar Shop to make the Permitted Payments and that the primary judge somehow misunderstood or misapprehended the relationship between the Solarise Loan Agreement and the Subordination Deed. The Respondents submit that this first alleged error is wholly misconceived. They submit that it relies on a sentence in the primary judge’s reasons taken out of context and does not attempt to grapple with any of the reasons given by his Honour.

283 The Respondents submit that the Liquidators’ reliance on the primary judge’s statement that the parties contemplated that the Solarise Debt may continue past 22 May 2011 was directed to answering the issue the primary judge identified of whether the Subordination Deed operated to make the Solarise Loan subordinate to the Westpac Debt only to 22 May 2011. They submit that the primary judge’s observations at [96] (set out below at [314]) are directed to answering the question of whether the Subordination Deed incorporated the two year Subordination Period contained in the Solarise Loan Agreement. The Respondents submit that the primary judge answered that issue correctly by deciding that the Subordination Deed continued to make the Solarise Loan subordinate to the Westpac Debt beyond 22 May 2011 in circumstances where the Permitted Payments were not made to Solarise before 22 May 2011. They submit that the primary judge’s conclusion that while Solar Shop had been authorised to make the Permitted Payments which would have had the effect of repayment of the Solarise Loan by 22 May 2011, it was not required to do so, supported the conclusion that the parties contemplated that the Solarise Loan was not repaid in full by 22 May 2011. That conclusion was supported by the matters which indicate that the subordination for which the Subordination Deed provided was more extensive than (and inconsistent with) that contained in the Solarise Loan Agreement.

284 The Respondents submit that there was no error by the primary judge. The statement by the primary judge that while Solar Shop had been authorised to make the Permitted Payments which would have the effect of repayment of the Solarise Loan by 22 May 2011 it was not required to do so, was directed to whether the Subordination Deed prohibited the repayment of the Solarise Loan (or any amounts outstanding) after 22 May 2011 absent Westpac’s prior written consent under cl 8.3.

285 The second alleged error of the primary judge that the Respondents say is alleged by the Liquidators was in not concluding that, having found that Solar Shop was authorised to repay the Solarise Loan on 20 May 2011, cl 8.2.2 of the Subordination Deed permitted Solar Shop to repay the Solarise Loan at any time after 22 May 2011, provided that the conditions set out in cl 8.1 of the Subordination Deed were satisfied. The Respondents submit that the primary judge did not make this error for the following six reasons.

286 First, the Respondents submit that the argument depends on the repayment of the Solarise Loan after 22 May 2011 being a Permitted Payment as defined in cl 8.1 of the Subordination Deed. They submit that any payments made to Solarise after 20 May 2011 in repayment of the Solarise Loan are clearly not Permitted Payments and therefore require, as the primary judge found, Westpac’s prior consent under cl 8.3.

287 Secondly, they say the argument ignores cl 4.2 of the Subordination Deed which, as the primary judge found, stipulated that except for Permitted Payments, and subject to the Deed, the subordination continued until the Westpac Debt had been paid in full, or until the Solarise Debt had, with Westpac’s written consent, been repaid in full. Again, given the repayment of the Solarise Loan after 20 May 2011 was not a Permitted Payment, it required Westpac’s prior written consent under cl 8.3.

288 Thirdly, it ignores cll 5, 6 and 7 of the Subordination Deed. For example, by cl 5 of the Subordination Deed, Solar Shop agreed, among other things, that without the prior written consent of Westpac and “for as long as any of the Westpac Debt remains outstanding”, it would not make any payment in or towards the satisfaction or discharge of the Solarise Debt, other than the Permitted Payments.

289 Fourthly, there is no warrant to read, as the Liquidators do, the reference to the conditions set out in cl 8.2.2(a) as a reference to the conditions contained in cl 8.1 only. Clause 8 plainly includes cl 8.3 which requires Westpac’s prior written consent for any payments to be made by Solar Shop “in connection with the Solarise Debt … which are not Permitted Payments”.

290 Fifthly, the Respondents submit that the purpose of cl 8.2.2 is to permit catch up payments to be made on or before 20 May 2011. It is consistent with Westpac’s commercial interests. Subject to the conditions in cl 8.1 of the Subordination Deed being satisfied, Westpac permitted Solar Shop to repay the Solarise Loan (and make interest payments) within two years. In the event that the Solarise Loan was not repaid within two years, Westpac reserved to itself an opportunity to consider, in light of the financial position that the company was then in, whether to permit the repayment. The Respondents submit that this is hardly “commercial absurdity”.

291 Sixthly, and in any event, the Respondents say that the Liquidators have not proved that each of the conditions in cll 8.1.1 to 8.1.5 were satisfied as at 22 May 2011. Clause 8.1.5 was not satisfied because, on the Liquidators’ own case, there was a failure to pay the Solarise Debt and, therefore, a failure to satisfy cl 8.1.5 of the Subordination Deed. The Liquidators contend that cl 8.1.5 of the Subordination Deed should somehow be read down because the strict language of cl 8.1.5 is irreconcilable with cl 8.2.2. The Respondents submit that that is not the case and that the language of cl 8.1.5 is wholly consistent with the primary judge’s finding that the Solarise Loan could only be repaid after 22 May 2011 with the written consent of Westpac under cl 8.3. As to the Liquidators’ submission that the primary judge made no findings of any “Subordination Default” or that any of the conditions in cll 8.1.1 to 8.1.4 of the Subordination Deed which precluded the making of a Permitted Payment had not been satisfied, the Respondents submit that the reason the primary judge made no such finding is because he was not asked to and he did not need to. They submit that this is because the contentions now advanced by the Liquidators were not made to the primary judge.

292 Finally, the Respondents submit that even if the primary judge’s finding is overturned and the Solarise Loan was due and payable on 22 May 2011, the Liquidators have not discharged their onus to establish that Solar Shop was unable to meet such a liability.

293 With respect to the abandonment issue, the Liquidators submit that the Subordination Deed had been the subject of mutual abandonment between Westpac, Solarise and Solar Shop in October 2010 and prior to entry into the 2010 Facility Agreement. They pointed to the following matters as relevant to the context in which the issue of abandonment should be determined. In May 2009, Solar Shop undertook a share buy-back, acquiring the totality of the shares then held by Solarise. The payment of the proceeds of that sale were deferred and the monies were to be repaid under the terms of the Solarise Loan Agreement and regulated by the Subordination Deed. At the time Solar Shop undertook the share buy-back and entered into the Solarise Loan Agreement and the Subordination Deed, Westpac and Solar Shop were parties to the May 2009 Business Finance Agreement. Under the May 2009 Business Finance Agreement, Solar Shop’s principal banking facility was an overdraft facility of $3 million. By the Subordination Deed, Solarise agreed to subordinate the repayment of the Solarise Loan to the interests of Westpac, which, at that time, reflected that overdraft, a $100,000 credit card account, a $300,000 equipment loan and three banker’s undertakings (letters of credit) of about $4.3 million. In October 2010, a time at which Solarise and its principal, Mr Mourney, no longer had an interest in Solar Shop, the company undertook a further buy-back of the Ferraretto’s shares requiring further borrowings from Westpac of $10 million. The further borrowings undertaken by Solar Shop to fund the 2010 buy-back were reflected in the 2010 Facility Agreement which, according to the Liquidators, restated and replaced the earlier Facility Agreements.

294 The Liquidators submit that shortly before the 2010 Facility Agreement was entered into, Westpac through Solar Shop sought that Solarise enter into new subordination arrangements given that the facility arrangements were being substantially modified, including by the advance of a new $10 million bill facility. Westpac had assessed that it needed to get an amendment to this Subordination Deed for it to be valid given the change in facilities. The Liquidators refer to the Westpac memorandum dated 15 October 2010. The authors of the memorandum refer to Westpac’s legal advice and statements therein that the options of having the Subordination Deed revisited to capture the whole of the new facility arrangements, or amending it to capture those facilities which were under the May 2009 Business Finance Agreement, but not the new facilities being contemplated now, had been met with strong customer resistance on the basis that it would most likely delay the process substantially and, in any event, Solarise may simply refuse to deal with the matter at all. The authors acknowledge that by not getting an updated Subordination Deed, which it appeared Westpac could not get anyway, Westpac was essentially accepting that the Solarise Loan of $5 million “will no longer be subordinated formally to us”. In the memorandum, the authors seek credit approval for the following:

(i) Amendment or approval conditions as vendor Loan no longer to be subordinate to Westpac.

295 Credit approval was given as is evident from the fact that the new loans contemplated by the 2010 Facility Agreement as settled on 19 October 2010, that is to say, four days after the memorandum. The primary judge inferred that Westpac must have waived the requirement for any amendment to the Subordination Deed. This, the Liquidators submit, reveals an inconsistency in the primary judge’s finding. The primary judge found that there was no evidence of a response from Westpac management to the recommendation, “let alone that it accepted the premise to the recommendation, that the Solarise Loan would not be subordinated to advances under the 2010 Facility Agreement” (at [122]) and that there was no express evidence that the views of the authors of the memorandum were ever adopted by Westpac management (at [128]). The Liquidators submit that it is a compelling inference that that waiver flowed directly out of the explicit application to credit for a waiver of the approval conditions to reflect that the Solarise Loan was no longer to be subordinated. The Liquidators further submit that the primary judge erred in deciding that the internal Westpac memorandum was only evidence of Westpac’s subjective view of the need for further subordination and not of that which is expressly recorded, namely tripartite negotiations between the parties to the Subordination Deed “which were premised on the assumption that the then extant subordination regime would be at an end if the new facility agreement was entered into if no agreement for variation was reached”.

296 The Liquidators submit that the Court should find the following:

(1) Westpac, Solar Shop and Solarise negotiated in October 2010 in a tripartite fashion, for the entry into a fresh Subordination Deed or amendments to the Deed;

(2) the occasion for these negotiations was an acceptance that the Subordination Deed would be invalid unless amended, given the increase of $10 million in the Westpac facilities;

(3) Solar Shop and Solarise were not prepared to agree to vary the subordination arrangements such that they would apply to the increased facilities; and

(4) Westpac acceded to the position of Solar Shop and Solarise, accepting that the Solarise Loan will no longer be subordinated following the entry into the revised Westpac facilities in October 2010.

297 The Liquidators further submit that the subsequent conduct of each of Westpac, Solar Shop and Solarise through 2011 reflects an inferred agreement that the subordination of the Solarise Loan was at an end. In this context, the Liquidators referred to the following:

(1) on 4 March 2011, Westpac wrote to Solar Shop advising it that its continued financial support was contingent on Solar Shop renegotiating the Solarise Loan. The Liquidators submit that this would be “entirely unnecessary” if the Solarise Loan was subordinated;

(2) during April and May 2011, Solar Shop engaged in discussions with Solarise about extending the time for repayment of the Solarise Loan. Solarise was pressing for repayment on or shortly after 22 May 2011 without regard to any restrictions on repayment through subordination;

(3) Westpac did not indicate any objection to Solar Shop to the 2011 Solarise Agreement which contained an acknowledgement of the Solarise Debt as being payable on demand;

(4) throughout May 2011 and thereafter, Westpac was corresponding with Solar Shop in respect of the Solarise Loan in a context where it was accepted that Solarise wanted and was entitled to repayment of the Solarise Loan after 22 May 2011 without any reference to subordination;

(5) on 20 May 2011, an internal Westpac Credit Approval Summary recorded under the heading “Background” the result of meetings between Westpac and Solar Shop in terms that reflected a mutual understanding that the Solarise Loan was not subordinated. The summary recorded the bank asking Solar Shop to advise how it would negotiate a deferment of the vendor loan repayment due in late May;

(6) on 26 July 2011, Solar Shop updated Westpac concerning Solarise’s position in terms that made it explicit that Solarise felt free to enforce the Solarise Loan Agreement unconstrained by the Subordination Deed which was not thereafter challenged by Westpac; and

(7) the primary judge’s inference that Westpac’s decision not to challenge Mr Mourney’s contentions because the officer called for and reviewed the 15 October 2010 memorandum does not detract from, but militates in favour of, conduct that evinces an inferred agreement that the subordination of the Solarise Loan was at an end.

298 The Liquidators submit with respect to conduct potentially consistent with the continuation of the Subordination Deed that the primary judge erred in concluding that the interest payments identified suggested that Solar Shop considered the Subordination Deed was still operative when, in fact, those payments were required on those dates under cl 5.3(c) of the Solarise Loan Agreement and insofar as the primary judge held that the seeking of Westpac’s consent to payments to Solarise after 22 May 2011 was consistent with the understanding that the Subordination Deed remained on foot, that was to overlook the discussions between Westpac and Solar Shop on or around 20 May 2011.

299 The Respondents submit that the Liquidators have not even sought to prove the authority of the Westpac employees on whose conduct they rely to abandon or abrogate the Subordination Deed. They submit that this is fatal to the Liquidators’ contention given the power to enter into the Subordination Deed on behalf of Westpac was granted to its attorney and there is no evidence that any of the Westpac employees had such authority to agree to discharge the Subordination Deed. The Respondents further submit that the abandonment of the Subordination Deed is contrary to the Deed itself and, in particular, cl 13 which provides that the Deed and all rights of the lenders and all obligations and duties of the borrower continue in full force and effect until payment in full of the debts despite any action which a lender or the borrower may take or refrain from taking. In addition, the Subordination Deed provides that it can only be amended by written deed of all parties. The Respondents submit that a finding of abandonment should not be inferred. The most that can be inferred is that the parties were prepared to move forward on the basis of their existing arrangements. The Subordination Deed and the Solarise Loan Agreement continued to operate on their terms and continued to permit the payment by Solar Shop to Solarise of capital and interest payments.

300 With respect to the abandonment issue, the Respondents addressed each of the seven matters raised by the Liquidators. First, they point out that it is clearly not the case that the renegotiation of the Solarise Loan would have been entirely unnecessary if the loan was subordinated. After 22 May 2011, Westpac could not unreasonably withhold or delay its consent to any proposed repayment of the Solarise Loan. As such, it was in Westpac’s commercial interest to require Solar Shop and Solarise to enter into a negotiated payment schedule over a period of time.

301 Secondly, the fact that Solarise was pressing Solar Shop for repayment of the Solarise Loan on or shortly after 22 May 2011 goes nowhere. Again, despite Solarise’s position, Westpac’s consent was required for Solar Shop to make any such repayment.

302 Thirdly, the Respondents rely on the primary judge’s finding that Mr Tanner’s response cannot be regarded as a consent of the requisite kind.

303 Fourthly, the Respondents do not accept the characterisation of the communications in May 2011. They submit that, in any event, it is difficult to see the relevance of these communications in May 2011 to the contention that the Subordination Deed was abandoned in October 2010, particularly in light of the matters referred to above.

304 Fifthly, the Respondents submit that the file note does not reflect a mutual understanding that the Solarise Loan was not subordinated. The fact that Westpac asked Solar Shop to negotiate a deferment of the loan repayment was in its commercial interest given it could not otherwise reasonably withhold or delay its consent to the repayment of the Solarise Loan.

305 Sixthly, the legal opinion and correspondence with Westpac were not in evidence and Mr Mourney was not called as a witness in the proceedings. The Respondents submit that it is therefore difficult to see how the submission that Westpac did not challenge the fact that Solarise felt free to enforce the Solarise Loan Agreement unconstrained by the Subordination Deed could be given any weight at all and highlights the problem of seeking to prove an inferred agreement in this way.

306 Seventhly, the Respondents submit that the inference does not militate in favour of an inferred agreement.

307 Finally, with respect to the approval issue, the Liquidators submit that Mr Tanner’s response to Solar Shop’s email dated 19 May 2011 was written consent by Westpac to repayment of the Solarise Loan for the purpose of cl 8.3 of the Subordination Deed. That is particularly so when Mr Tanner’s response dated 23 May 2011 is considered in the context of the discussions between Westpac and Solar Shop on or around 20 May 2011.

308 The Respondents submit that the primary judge’s finding is correct. They submit that there is no rational basis to suggest that Mr Tanner had the requisite authority to give such consent. They submit that, in any event, it is difficult to see where the contention goes in circumstances where the proposed 2011 Solarise Agreement was not executed by Solar Shop and Solarise. As we have said, the primary judge found that it was unclear whether the agreement was executed by all parties. It was executed by Solar Shop and Harbert.

### Analysis

#### The Construction Issue

309 The Solarise Loan Agreement and the Subordination Deed are commercial contracts or agreements and are to be construed in accordance with what are now well-established principles. In *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 (***Electricity Generation Corporation v Woodside Energy***), French CJ, Hayne, Crennan and Kiefel JJ said (at [35]):

Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating”. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption “that the parties … intended to produce a commercial result”. A commercial contract is to be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”.

(see also the discussion in *JR Consulting & Drafting Pty Ltd v Cummings* [2016] FCAFC 20; (2016) 329 ALR 625 at [51]‑[52]).

310 The last sentence in the passage from *Electricity Generation* *Corporation* *v Woodside Energy* is of particular relevance in this case because of the Liquidators’ submission that the construction adopted by the primary judge was an uncommercial construction. We did not understand the Liquidators to contend that the construction adopted by the primary judge was not one open on a literal construction of the Subordination Deed. Their argument was that it was an uncommercial result and one the parties could not have intended.

311 The proper construction of the Subordination Deed may be assisted by an examination of the Solarise Loan Agreement (*Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at [46] per French CJ, Nettle and Gordon JJ). The general proposition of law that the construction of one agreement may be assisted by an examination of another agreement clearly applies here where the contract or agreement to be construed - the Subordination Deed - places a particular character on a debt created and dealt with by another instrument, the Solarise Loan Agreement, and the later agreement in time refers extensively to the earlier agreement in time. Having said that, it must be borne in mind that the beneficiary of the subordination, Westpac, was not a party to the Solarise Loan Agreement, and the Subordination Deed expressly provided, in cl 16, that in the case of any inconsistency between the Subordination Deed and the Solarise Loan Agreement, the Subordination Deed prevailed.

312 The essential question is whether the subordination came to an end on 20 May 2011 and thereafter such that the debt became due and payable as between Lender (Solarise) and Borrower (Solar Shop) on 22 May 2011 without regard to the fact that the debt had previously been subordinated to the Westpac Debt.

313 We deal with one matter at the outset. As we have said, the Liquidators submit that the primary judge erred in treating as decisive the issue of whether the Subordination Deed required, as distinct from permitted, the repayment of the Solarise Loan. His Honour held that the Subordination Deed did not require the repayment of the Solarise Loan. The Liquidators submit that to look for a requirement for repayment in the instrument of subordination is an error. The instrument creating the debt (i.e. the Solarise Loan Agreement) creates the obligation or requirement to repay the loan and it is sufficient if the instrument of subordination (i.e. the Subordination Deed) permits or allows repayment either as an exception to the subordination, or because the period of subordination has come to an end. The Liquidators submit that this error infected the whole of the primary judge’s reasoning on this issue.

314 It is true that, in the course of his reasons, the primary judge said (at [96]):

I conclude that, while [Solar Shop] had been authorised to make the Permitted Payments which would have had the effect of repayment of the Solarise Loan by 22 May 2011, it was not required to do so. The parties contemplated therefore that the Solarise Debt may continue past 22 May 2011. As [Solar Shop] did not make the Permitted Payments to Solarise before 22 May 2011, it could thereafter make a repayment only with Westpac’s prior written consent. That consent could not be unreasonably withheld or delayed (cl 8.3).

315 Having regard to the earlier reasons his Honour gave where he spoke of Permitted Payments being authorised, but not required (see, for example, at [92]), this might be construed as a statement that his Honour considered it necessary for the Subordination Deed to contain an obligation to repay by 22 May 2011 before the Liquidators’ construction could be adopted as distinct from (assuming it was established) being a highly material matter supporting the conclusion that the subordination came to an end after two years. In any event, this Court can determine the issue of construction, and a number of the matters identified by the primary judge support the conclusion we have reached as to the proper construction of the Subordination Deed.

316 As we have said, the Solarise Loan Agreement required repayment of the Solarise Loan by 22 May 2011. The subordination to the Westpac Debt to that date is provided for in cl 6 and the notion of Permitted Payments in respect of the Solarise Debt is dealt with in cl 6.4.

317 Putting the matter somewhat generally at this stage, the structure of the Subordination Deed is that the Solarise Debt is subordinated to the Westpac Debt and there is to be no payment by Solar Shop of the Solarise Debt until the Westpac Debt has been paid or satisfied in full. This subordination of the Solarise Debt is without limit as to time, subject to the provision for Permitted Payments by Solar Shop or the payment by Solar Shop of the Solarise Debt with the written consent of Westpac. The Permitted Payment structure is an exception or qualification to the subordination whereby the senior debtholder allows the repayment of parts of the junior debtholder’s debt over certain intervals of time, but so that the whole of the junior debtholder’s debt may be repaid at the expiration of a defined period. The essence of the Liquidators’ submission is that the permission to make the Permitted Payments and to make catch up payments as provided for in cl 8.2.2 of the Subordination Deed mean that the subordination came to an end on or about 20 May 2011. On or after that date, Solar Shop was permitted to make payment of the full amount of the Solarise Debt even though the Westpac Debt had not been paid or satisfied in full and even though it did not have the prior written consent of Westpac under cl 8.3 of the Subordination Deed.

318 Clauses 8.1, 8.2 and 8.3 are set out above (at [14]).

319 As we have said, the Liquidators submit that, to the extent that the Respondents submit that cl 8.3 is a “condition” within the reference to “conditions”, that submission should be rejected. They submit that the reference to conditions in cl 8.2.2(a) is a reference to, and only a reference to, the conditions identified in cl 8.1. We think that that is probably correct. Whilst it is true that in another context the provision in cl 8.3 might be characterised as a condition, in the context of cl 8 as a whole, we consider that the “conditions” to which cl 8.2.2(a) refers are the five conditions in cl 8.1.

320 As we have also said, the Liquidators submit that on 20 May 2011 Solar Shop could have repaid the full amount of the Solarise Debt, it was not caught by the subordination and it would be paradoxical and an uncommercial result of not paying two days later if the subordination meant that, whilst the Westpac Debt remained unpaid, the Solarise Debt could not be paid. As we understand it, there was no dispute that on or about 22 May 2011, the conditions in subcll 8.1.1, 8.1.2, 8.1.3 and 8.1.4 were satisfied. The contentious subclause was 8.1.5 which refers to no “Subordination Default” subsisting. The definition of “Subordination Default” is set out above. The relevant paragraph is para (b) and the circumstance of a failure to pay the Solarise Debt when due which, in this case, was on 22 May 2011. The Liquidators submit (as we understand it) that it would be an odd and uncommercial result if the effect of the clause is that Solar Shop is not permitted to pay the Solarise Debt because it has failed to pay it and it is a literal reading of the clauses which produces an uncommercial result.

321 We acknowledge the uncertainties caused by the way in which the various clauses have been drafted. However, we are of the view that the natural and ordinary meaning of cll 8.2.2(a), 8.1.5 and para (b) of the definition of the term “Subordination Default” is that a failure to pay the Solarise Debt on 22 May 2011 meant that cl 8.2.2 was not engaged because the condition in cl 8.1.5 was not satisfied. We do not consider that this produces such an uncommercial result that we should depart from the natural and ordinary meaning of the words in the Subordination Deed, particularly when regard is had to the following:

(1) the Subordination Deed otherwise provides for a subordination which is unlimited in time. We have already referred to the main subordination clause, cl 4. Clauses 5, 6 and 7 all make it clear that the subordination continues until the Westpac Debt is satisfied in full;

(2) this is in a context in which all parties to the Subordination Deed are taken to be aware of the period of the Solarise Loan Agreement (as to Westpac see cl 15.2);

(3) the Subordination Deed prevails over the Solarise Loan Agreement in the case of any inconsistency; and

(4) it was always open to Solar Shop to seek Westpac’s prior written consent under cl 8.3 and such consent was not to be unreasonably withheld or delayed.

322 Although our reasons differ in some respects from those of the primary judge, we agree with his Honour that the Liquidators’ construction arguments must be rejected.

#### The Abandonment Issue

323 It is not suggested by the Liquidators that the primary judge misdirected himself as to the relevant legal principles. The Liquidators’ contention is that the primary judge erred in the inferences he drew or failed to draw.

324 In *Fitzgerald v Masters* (1956) 95 CLR 420, Dixon CJ and Fullagar J said (at 423):

There can be no doubt that, where what has been called an ‘inordinate’ length of time has been allowed to elapse, during which neither party has attempted to perform, or called upon the other to perform, a contract made between them, it may be inferred that the contract has been abandoned. … What is really inferred in such a case is that the contract has been discharged by agreement, each party being entitled to assume from a long‑continued ignoring of the contract on both sides that (in the words of Rowlatt J), ‘the matter is off altogether’.

(Citations omitted.)

325 There is also, with respect, a useful summary of the relevant principles in the following passage in the reasons for judgment of Kenneth Martin J in *Porter v Sundance Resources Ltd [No 2]* [2015] WASC 493 at [166], (a passage cited by the primary judge) which is as follows:

(a) the conduct of parties may amount to a mutual abandonment of their contract;

(b) a contract on foot may be discharged by the inferred later agreement of the parties, such later agreement being inferred from their conduct;

(c) discharge of a contract by abandonment is rare;

(d) the abandonment may be either of unperformed obligations or of future performance and existing rights;

(e) the key question is whether the parties have objectively manifested an implied intention to extinguish their contract;

(f) abandonment requires that the inference is clear;

(g) the subjective intention of the parties is not relevant;

(h) the implied intentions may be manifested through silence and delay;

(i) parties may be estopped from denying that a contract has been abandoned. Silence and delay may be relevant in showing such an estoppel.

 (Citations omitted.)

326 Finally, in *Ryder v Frohlich* [2004] NSWCA 472, McColl JA said (at [135]‑[137]):

Where it is plain from the conduct of parties to a contract that neither intends that the contract should be further performed the parties will be regarded as having so conducted themselves as to abandon or abrogate the contract …

Whether there is abandonment or abrogation of a contract is a matter of fact to be inferred from an objective assessment of the conduct of the parties ...

The underlying premise of the abandonment cases is that a period of time elapses during which neither party to the contract manifests any intention to perform the contract, leading to the inference that the contract has been abandoned. It is clear that the question whether an ‘inordinate length of time has been allowed to elapse’ is relative. In *DTR Nominees Pty Limited v Mona Homes Pty Limited* the High Court was prepared to infer abandonment after a period of less than five months had elapsed during which neither party took any steps to perform the contract. In *Fitzgerald v Masters* it was held that a contract for the sale of land had not been abandoned even though proceedings for its specific performance were not commenced until 26 years after its execution.

(Citations omitted.)

327 We consider that the primary judge was correct to view the issue as involving a question of whether, on an objective assessment, it should be inferred that there was a later agreement by the parties to abandon or abrogate the Subordination Deed.

328 The primary judge was correct to hold that the subjective intention or understanding of the unidentified authors within Westpac of the memorandum dated 15 October 2010 is not relevant and that the matter is to be assessed objectively. Furthermore, as the primary judge pointed out, the understanding of the unidentified authors went no further than an understanding that Solarise was not prepared to sign “any *further* documents which it perceives may weaken its position further (i.e. with [Solar Shop] taking a further $10 m of debt at this time)” (emphasis added) and that Solarise was resistant to revisiting the Subordination Deed “to capture the whole of the new facility arrangements” or to amending it “to capture those facilities which were under the [May 2009 Business Finance Agreement], but not new facilities being contemplated now”.

329 The primary judge said that there was no evidence of the response of Westpac management to the “do nothing” recommendation of the unidentified authors and that Westpac management accepted the premise in the recommendation to “do nothing” that the Solarise Loan would not be subordinated to advances under the 2010 Facility Agreement. Those conclusions are correct. It is also correct to say that there is no evidence that the memorandum was provided to Solar Shop or Solarise and, given its nature, that was unlikely to have occurred. It is true that a condition precedent to the tranche F advance under the 2010 Facility Agreement was that the terms of the Subordination Deed be satisfactory to Westpac, both in form and in substance, that there was no amendment to the Subordination Deed and that a new deed was not executed and that, as the primary judge said, it is to be inferred that Westpac must have waived any requirement for any amendment to the Subordination Deed. We agree that the waiver of the requirement does not, assessing the matter objectively, mean that the inference should be drawn that there was a common contemplation on the part of the parties that the Subordination Deed had ceased to be operative.

330 The primary judge described the evidence that thereafter (i.e. after October 2010) the parties conducted themselves on the basis that the Subordination Deed had ceased to be operative to be, at best, slight. We agree with his Honour’s characterisation of the evidence. His Honour noted evidence which pointed in the other direction, namely, the payment of interest to Solarise on 13 January 2011, 14 April 2011 and 20 May 2011, these being at the intervals, and very close to the dates, specified in the Amortisation Schedule in the Subordination Deed. The primary judge was correct to conclude that this suggested that Solar Shop considered the Subordination Deed as being in operation.

331 The primary judge also referred to the fact that after 22 May 2011, Solar Shop sought Westpac’s consent to it making payments to Solarise and that this was consistent with Solar Shop’s understanding that the Subordination Deed continued in operation, although, as his Honour noted, the conduct by Solar Shop may also be attributable to Solar Shop’s understanding of its obligations under the 2010 Facility Agreement.

332 Our review of the evidence leads us to a similar conclusion to that of the primary judge, namely, that it is more consistent with the view that at least Solar Shop, and probably Solarise and Westpac, considered that the Subordination Deed continued in operation to the extent to which it was capable of doing so, as against a conclusion that the Subordination Deed had been abandoned or abrogated by the parties.

#### The Approval Issue

333 Clause 8.3 of the Subordination Deed is set out above (at [14]). It enables Westpac to give its prior written consent to payments in connection with the Solarise Debt.

334 The 2011 Solarise Agreement contains an acknowledgement of Solar Shop’s liability to pay Solarise the Solarise Debt on and from 22 May 2011. The agreement was sent to Mr Tanner at Westpac and he was asked to “advise if you/Westpac have any issues and are happy to support”. Mr Tanner’s response of 23 May 2011 is set out above (at [266]).

335 The primary judge’s reasons for concluding that Westpac had not given a relevant consent pursuant to cl 8.3 of the Subordination Deed are set out above (at [268]). We consider his Honour’s reasons to be correct and nothing said on the appeal causes us to doubt their correctness.

### Conclusion

336 We reiterate what we have said earlier and in particular at [210]. On that basis we would have rejected ground 2 in the notices of appeal.

## Ground 3

337 In their notices of appeal, the Liquidators allege that the primary judge erred in mixed fact and law in assessing Solar Shop’s solvency at each relevant date on the premise that Solar Shop was able to sell its RECs holdings, or a substantial portion thereof, so as to pay its overdue debts. The Liquidators allege that the primary judge ought instead to have found that:

(1) Solar Shop was prevented by the Westpac facility arrangements and charge from selling its RECs other than in the ordinary course of its ordinary business such that the sale of all of its stockpiled RECs would have breached the covenant in the Westpac facility arrangements and charge, and any such sale of secured assets outside of the ordinary course of Solar Shop’s ordinary business, would not have generated cash that was available to pay Solar Shop’s unsecured creditors as distinct from Westpac;

(2) Solar Shop’s May Cash Flow, accepted to be reliable by the primary judge, demonstrated that the sale of the entire RECs holding of Solar Shop would be insufficient to bring overdue trade creditors back into terms; and

(3) in any event, the RECs market was subject to an oversupply such that Solar Shop could not have sold, or alternatively, it was not established that Solar Shop could have sold, a substantial portion of its RECs holding at the prevailing market price.

338 Counsel for the Liquidators sought to raise some other issues concerning the RECs in the course of written and oral submissions to this Court and we will identify these issues in due course.

339 In the circumstances, the Liquidators contend that Solar Shop was insolvent on and from 30 April 2011, or alternatively, 22 May 2011.

340 We turn to address the reasons of the primary judge. We have already briefly outlined those reasons (at [54]-[71]). It is now necessary to examine those reasons in greater detail.

341 Solar Shop’s management accounts showed that as at 30 April 2011 the company had a RECs holding worth $6.369 million, and as at 31 May 2011, $12.704 million. If these dollar amounts are converted to numbers of RECs, the numbers are approximately 177,000 and 353,000 respectively. Because of a falling price in the market, his Honour reduced the dollar amounts for the purposes of his calculations to $4.6 million and $8.875 million respectively. It is fair to say that his Honour took these into account as the major realisable assets of Solar Shop to meet its liabilities.

342 The primary judge did not address the submission that a sale of all or a large number of RECs was precluded by Westpac’s charge and the provisions of the 2010 Facility Agreement.

343 In the context of considering whether Solar Shop was insolvent as at 30 April 2011, the primary judge found that the sale of the RECs held as at that date would have been more than sufficient to meet the debts which were due and payable at that date.

344 In the context of considering Solar Shop’s insolvency as at 31 May 2011, the primary judge noted that Solar Shop was reluctant to sell the RECs when that would mean that it would incur a loss. The primary judge said that that was understandable. The primary judge took into account that it followed that its omission to sell all available RECs by 31 May 2011 should not be regarded as an inability to sell them, even if there were some limitations on their liquidity. The primary judge noted that, despite the limitations on the saleability of the RECs, Solar Shop was able to make a sale to the Ferrarettos on 6 June 2011, thereby realising $2.8 million, and a sale to the CBA on 30 June 2011, thereby realising $3.645 million. The primary judge noted that Solar Shop’s other sales of RECs in June 2011 were modest, being 20,000 on 16 June and 4,300 on 20 June. The primary judge concluded that, even taking into account the limitations on the saleability of the RECs, they were sufficient to meet the debts due and payable at 31 May 2011. His Honour considered that it was understandable that Solar Shop was reluctant to sell the RECs earlier, but they remained an asset which could be sold to meet Solar Shop’s debts. In the circumstances, the primary judge did not consider that the Liquidators had proved that Solar Shop was insolvent at 31 May 2011.

345 Before the primary judge, the Liquidators submitted that Solar Shop’s May Cash Flow, which was accepted as reliable by the primary judge, demonstrated that a sale of the entire RECs holding would be insufficient to bring overdue trade creditors back to terms. The primary judge set out an extract of the May Cash Flow as follows:

|  |
| --- |
| **Week Ending** |
| **$’000** | **3-Jun-11** | **17-Jun-11** | **3-July-11** | **15-Jul-11** | **29-Jul-11** | **12-Aug-11** | **Total** |
| **Cash Receipts** |  |  |  |  |  |  |  |
| Received from Customers | 2,750 | 2,750 | 2,750 | 2,750 | 2,750 | 2,750 | **16,500** |
| Contracted REC Sales | - | 814 | - | 827 | - | - | **1,641** |
| RECs sold to Adrian Ferraretto | - | - | - | - | - | - | **-** |
| SFS Drawdowns | - | 500 | - | - | - | - | **500** |
| ***Total*** | **2,750** | **4,064** | **2,750** | **3,577** | **2,750** | **2,750** | **18,641** |
| **Cash Outgoings** |  |  |  |  |  |  |  |
| Suppliers – Panels + Inventory | (4,569) | (5,271) | (1,391) | (2,768) | (3,790) | (732) | **(18,521)** |
| Wages/Other Employee | (313) | (170) | (300) | (272) | (170) | (240) | **(1,465)** |
| ATO – Tax Instalments | - | - | - | - | - | - | **-** |
| Suppliers – Others | (1,823) | (467) | (2,010) | (445) | (1,230) | (489) | **(6,464)** |
| ***Total*** | **(6,705)** | **(5,908)** | **(3,701)** | **(3,485)** | **(5,190)** | **(1,461)** | **(26,450)** |
| **Net Weekly Cash In/Out** | **(3,955)** | **(1,844)** | **(951)** | **92** | **(2,440)** | **1,289** | **(1,809)** |
| **Cash Position (excluding RECS Sales)** |  |  |  |  |  |  |  |
| Cash at start of week | (1,023) | (4,215) | (9,523) | (11,117) | (14,929) | (16,710) |  |
| Net weekly Cash In/Out | (3,955) | (1,844) | (951) | 92 | (2,440) | 1,289 |  |
| **Cash at end of week** | **(4,978)** | **(6,059)** | **(10,474)** | **(11,025)** | **(17,369)** | **(15,421)** |  |
| **Additional Cashflows from REC Spot Sales** |  |  |  |  |  |  |  |
| RECS on hand (not contracted to sell) | 150,950 | 113,428 | 205,995 | 296,341 | 397,991 | 464,987 |  |
| RECS Spot Price | $25.00 | $25.00 | $25.00 | $25.00 | $25.00 | $25.00 |  |
| Cash Value of RECS (‘000) | 3,774 | 2,836 | 5,150 | 7,409 | 9,950 | 11,625 |  |
| **Adjusted Cash at end of week** | **(1,204)** | **(3,223)** | **(5,324)** | **(3,616)** | **(7,419)** | **(3,796)** |  |
| *(Assumes Additional RECS sold in Spot market)* |  |  |  |  |  |  |

346 The findings which the primary judge made about the market for RECs were as follows.

347 In the context of considering Solar Shop's solvency as at 31 May 2011, the primary judge found that the RECs could be sold, but that it was apparent that Solar Shop would have experienced difficulties in doing so quickly. His Honour said that that was evident from the analysis which Solar Shop had itself carried out in mid-May 2011. As to the option of selling RECs in the spot market, the author of the analysis noted doubts as to whether there was sufficient liquidity in the RECs market to enable a sale to be made.

348 The primary judge considered that some conclusions as to the liquidity of the RECs could be drawn from the record of Solar Shop’s sales of them during 2011. The first sale of RECs by Solar Shop in that year occurred on 31 March 2011. During April 2011, Solar Shop made eight separate sales, all privately negotiated. This was at a time when the spot price of RECs was declining significantly. During May 2011, Solar Shop made three separate sales and, on 31 May, transferred 12,987 RECs to Solarise in reduction of its debt. On 6 June 2011, Solar Shop transferred 78,560 RECs to the Ferrarettos thereby raising $2.8 million. The primary judge noted that they were a related party, being Solar Shop’s second largest shareholder, and the sales were on advantageous terms to Solar Shop, perhaps because the Ferrarettos were seeking by this means to provide some support to Solar Shop. Thereafter, Solar Shop made only three further sales of RECs in June 2011.

349 The largest of these sales had already been referred to and was a sale to the CBA of 180,000 RECs on 30 June 2011. However, the primary judge noted that this sale was part of a Put and Call arrangement for the sale of 480,000 RECs at a rate of $20.25 which was to be effected over a three month period, with the consequence, as the primary judge understood it, that Solar Shop was not to receive payment in full immediately. The primary judge said that, furthermore, Solar Shop could be required to buy‑back the RECs at the sale price plus 10% and this could have resulted in Solar Shop incurring a further loss.

350 The primary judge noted that the sale of the RECs in April, May and June 2011 occurred at a time when Solar Shop had a need for cash and was looking to raise it by the sales. However, the overarching problem for Solar Shop was that there was an oversupply of RECs in the market. The fact that Solar Shop was willing to sell such a large quantity of RECs to the CBA at a significant loss was, according to his Honour, some measure of its financial difficulty at that time. His Honour considered that the sales history supported the view that RECs were liquid to an extent, but that there were limitations on Solar Shop’s ability to sell them quickly. A further indication that this was so was contained in an email from Solar Shop’s CEO, Mr Thornton, sent on 1 June 2011. Mr Thornton proposed that Solar Shop transfer RECs to Wuxi “in exchange for supplier payments at a discounted cash flow”. He explained it to Wuxi as follows:

The high volume of systems being put in by June 30 especially in NSW was going to generate STC’s at an astronomical rate especially given the rather low liability that had been set. Obviously, this reality is come to fruition as the market has become flooded at the moment and liquidity has correspondingly dropped.

351 The primary judge noted that the position as at 31 May 2011 seems to have been that Solar Shop had approximately $1.7 million in cash, being the monies held in its account and the balance of the available overdraft, together with whatever amounts could be realised from the trade and other receivables, and the RECs receivables with which to meet debts which were then due and payable amounting to $5.9 million. The primary judge considered that the overall effect of the evidence was that Solar Shop was willing to pay its debts if only it could. The primary judge added a qualification relating to Solar Shop’s RECs holding to the effect that Solar Shop was reluctant to sell the RECs when that would mean that it would incur a loss.

352 We turn now to the submissions of the parties.

353 The Liquidators submit that in considering Solar Shop’s insolvency on 30 April 2011 and 31 May 2011, the primary judge wrongly took into account Solar Shop’s RECs holding as an asset which could be realised to repay debt.

354 The Liquidators submit that a sale of RECs in the quantity and in the time required to bring creditors back to terms was prevented by Westpac’s charge. The charge is dated 30 March 2008 and is a fixed and floating charge over the assets of Solar Shop. The Liquidators submit that Solar Shop’s RECs could not be realised as a block, outside of the ordinary course of Solar Shop’s ordinary business without crystallising Westpac’s charge. The Liquidators submit that they raised this issue before the primary judge, but that he did not consider it. They refer to cl 2.3(a)(xii) of the charge as providing for a fixed charge over “other assets that are not acquired for disposal in the ordinary course of the Mortgagor’s business”. Section C2 of the Memorandum of Common Provisions (see further below) to the charge provides that Solar Shop will not “… sell or otherwise dispose of any Property or any interest in it (except sale of Property subject to a floating charge, in the ordinary course of business)” and that Solar Shop will comply with each Lender Arrangement. “Lender Arrangement” is defined widely to include loan agreements between Solar Shop and Westpac.

355 The Liquidators also point to cl 12.3 of the 2010 Facility Agreement which prevents the disposal of assets other than a “Permitted Disposal”. A Permitted Disposal is defined to include, inter alia, “a disposal of assets in the ordinary course of an Obligor’s ordinary business on arms length commercial terms”. The Liquidators submit that the scope of the phrase “the ordinary course of the mortgagor’s ordinary business” is narrower than “ordinary course of business”. It does not include something unusual or exceptional, but only something ordinarily done in the course of the particular business of the company. The Liquidators submit that, while the sale of RECs by Solar Shop was part of its ordinary business, a fire sale of the whole (or substantially the whole) of Solar Shop’s RECs as a means of paying unsecured creditors, thus placing its principal circulating asset beyond the reach of Westpac, was not.

356 The Liquidators submit that Solar Shop knew that Westpac’s consent to sell large blocks of RECs was required, demonstrating that both legally and practically there could not and would not have been a large scale sale of RECs with the proceeds passing to unsecured creditors to the detriment of Westpac. The Liquidators refer to an email from Mr Steele to other Harbert personnel dated 29 June 2011 wherein he discusses a potential sale of RECs and says “Westpac will need to agree to this, we have already flagged to them we were pursuing this. Given we are tight with cash, and it doesn’t affect their security position, we believe they should agree”. Furthermore, in the context of a payment to Solarise of RECs to reduce the balance of the Solarise Loan, Solar Shop sought Westpac’s consent. In the email to Westpac seeking consent and speaking of the sale of RECs which were secured by Westpac’s fixed charge, Mr Steele said “[w]hile this is a dilution of Westpac’s security position, it is small in the context of the total RECs held by the business”.

357 The Liquidators submit that the primary judge erred in not finding that a sale of Solar Shop’s RECs holding was not feasible given the oversupply and illiquidity in the market. The Liquidators rely on the following matters. First, they submit that despite the dire financial position in which Solar Shop found itself, it did not sell its RECs holding to bring creditors back to terms. In those circumstances, a compelling inference arises that its failure to do so means that it was incapable of doing so. Secondly, in an email from Solar Shop’s CEO dated 1 June 2011, there is a statement to the effect that the “market has become flooded at the moment and liquidity has dropped correspondingly”. Thirdly, the sale of RECs that Solar Shop was able to effect was done on disadvantageous terms thereby demonstrating a lack of a market for the asset. The Liquidators submit that an example is the sale of RECs to the Commonwealth Bank of Australia on 30 June 2011. Fourthly, Solar Shop’s ability to sell RECs was largely limited to the spot market. Apart from a proposed sale of RECs to a former director which did not proceed, the minutes of the board meeting held on 30 May 2011 record that the “balance of the funding requirement is likely to be needed from (1) selling RECS in the spot market”. Fifthly, in the minutes of the board meeting held on 22 June 2011, there is a reference to uncertainty in the RECs market and the collapse in the RECs spot market. Sixthly, in a memo for HAPE Investors dated 17 June 2011, there is a statement that there is no certainty that there will be sufficient liquidity in the RECs market to absorb these sales.

358 The Liquidators put two further arguments in relation to the RECs. First, they submit that in relation to Solar Shop’s solvency as at 31 May 2011, the primary judge wrongly took into account RECs on hand that had earlier been contracted and were not available for subsequent sale. The Liquidators submit that the May Cash Flow demonstrates that the RECs on hand and not contracted to sell at the end of May comprised 150,950 RECs. The May Cash Flow shows that as at 3 June 2011, and in relation to additional cash flows from RECs spot sales, the RECs on hand (not contracted to sell) totalled 150,950. The RECs spot price was $25 and, therefore, the cash value of RECs was $3,774,000. Secondly, the Liquidators submit that the May Cash Flow demonstrates that a sale of the entire RECs holding, even were that possible, would have been insufficient to bring creditors back into terms.

359 The Respondents submit that the onus is not on them to establish that RECs were an available asset to meet Solar Shop’s debts. They submit that the onus was on the Liquidators to establish that those assets were not available and that the Liquidators have failed to discharge that onus.

360 The Respondents submit that the Liquidators draw a distinction which has no foundation in the facts of the case or in the nature of Solar Shop’s business. The distinction is between the sale of RECs as part of the ordinary course of the business of Solar Shop and a fire sale of the whole, or substantially the whole, of Solar Shop’s RECs. The Respondents submit this distinction is not valid. Customers of Solar Shop transferred RECs to Solar Shop as part of the consideration for the installation of solar systems. Solar Shop’s holding of RECs was not static, but in the absence of sales of RECs, would continue to grow on systems being installed. It was common ground before the primary judge that Solar Shop made sales of RECs in the ordinary course of business throughout 2010 and early 2011. Solar Shop’s business plans involved holding RECs where there was an opportunity to make a profit, but otherwise selling the RECs to meet daily cash needs. The Respondents submit that the sale of RECs in any volume would clearly have been in the ordinary course of Solar Shop’s business.

361 The Respondents submit that the subjective view of Solar Shop that it was prudent to seek Westpac’s consent to any large RECs transaction says nothing about whether such consent was a contractual requirement. The Respondents further submit that even if Westpac’s consent was required, it was for the Liquidators to prove that Westpac did not or would not have consented and the Liquidators did not and could not discharge that onus. The evidence was clear that Westpac either did consent to such sales, acquiesced in such sales, or would have consented to such sales. Westpac was aware that the sale of RECs was part of Solar Shop’s business and that RECs sales were occurring to meet Solar Shop’s cash needs. When asked to consent to sales, Westpac consented. Westpac provided a significant level of support to Solar Shop throughout the period the Liquidators contend Solar Shop was insolvent.

362 With respect to the alleged illiquidity in the market, the Respondents first rely on the finding of the primary judge that Solar Shop’s omission to sell all available RECs by 31 May 2011 should not be regarded as an inability to sell, even if there was some limitations on their liquidity. The Respondents submit that a number of other points made by the Liquidators are based on subjective statements by officers of Solar Shop about the liquidity of the RECs market. Such statements are irrelevant and say nothing about the price and volume of RECs transactions that would have been possible. Further, despite those observations, it is clear that a number of transactions in fact took place during the period. The statements were, at most, a reflection that Solar Shop could not sell RECs at a price it wanted to achieve so as to make a profit or not incur a loss, rather than any indication that no sales at all were possible.

363 The Respondents submit that the fact that Solar Shop sold RECs on disadvantageous terms did not demonstrate a lack of market or that transactions would not have been possible.

364 As to the submission that Solar Shop was limited to sales of RECs on the spot market, the Respondents submit that the submission seems irrelevant and lacks a factual foundation where sales of RECs were, in fact, negotiated outside of the spot market. The Respondents address the Liquidators’ submission that the RECs available as at 31 May 2011 were limited to the amount of the RECs sales included in the May Cash Flow for the week of 3 June 2011. They submit that the figure of 150,950 RECs was a forecast figure only. Where the performance of the business in May exceeded forecast, this would result in a greater number of RECs becoming available given that RECs were acquired by Solar Shop as part of the consideration for installing solar systems for customers. Furthermore, the May forecast assumed that all RECs available in previous weeks had been sold in that week. If that did not in fact occur, the RECs available at the end of the month would necessarily be greater than 150,950. Once these factors are taken into account, it is evident that the figure recorded in Solar Shop’s May 2011 management accounts is much more likely to have reflected the actual RECs held by Solar Shop than a forecast figure.

365 Drawing the threads together, it seems to us that ground 3 raises the following issues:

(1) the Charge issue, namely, whether the Westpac securities prevented the sale of the RECs holding or a substantial part thereof without Westpac’s consent;

(2) the Market issue, namely, whether the market was such that Solar Shop could not have sold its RECs holding or a substantial part thereof;

(3) the No Difference issue (if we may call it that), namely, that insolvency was established at least as at 31 May 2011 even if the RECs holding or a substantial part thereof could be sold as is clear from the May Cash Flow; and

(4) the Number of RECs issue, namely, a claim by the Liquidators that the primary judge substantially overestimated the number of RECs available to Solar Shop for sale.

### The Charge Issue

366 Westpac held a fixed and floating charge over the assets of Solar Shop dated 30 March 2008. The charge provided that it was a fixed charge as regards all present and future:

(xii) other assets that are not acquired for disposal in the ordinary course of the Mortgagor’s business

(Cl 2.3(a)(xii)).

367 The Memorandum of Common Provisions General Conditions Booklet provides that the Chargor promises at all times not to “sell or otherwise dispose of any Property or any interest in it (except sale of Property subject to a floating charge, in the ordinary course of [the Chargor’s] business)” (at part C2 under the heading “No dealings”), unless Westpac first gives its consent. It further provides that the Chargor promises to comply with every lender arrangement.

368 Having regard to the closing written submissions of the parties before the primary judge, it appears that the Respondents relied on the RECs holding as a realisable asset. In response, the Liquidators submitted that the RECs holding was the subject of Westpac’s charge and could not be realised as a block, thus outside of the ordinary course of business, without crystallising Westpac’s charge. The Liquidators submitted that recourse to this asset to generate cash for ordinary trading operations would therefore require Westpac’s consent, which was neither sought nor obtained. The reference in the footnote in the Liquidators’ submissions is to the original 30 March 2008 charge and cl 2.3(a)(xii).

369 On the appeal, the Liquidators also made reference to the terms and conditions of the 2010 Facility Agreement and, in particular, cl 12.3 which provided that no Obligor, which includes Solar Shop, will sell, transfer, license, lease out or otherwise dispose of its assets or agree to do so, other than a Permitted Disposal. Permitted Disposal is defined in cl 1.1 as:

(a) a disposal of assets (other than a disposal listed in paragraphs (b) and (c) below) provided that the total aggregate value of assets disposed of does not exceed $500,000 in any Financial Year;

(b) a disposal to another Obligor;

(c) a disposal of assets in the ordinary course of an Obligor’s ordinary business on arms length commercial terms; and

(d) any other disposal with the prior written consent of the Financier.

The relevant paragraphs for present purposes are paras (c) and (d).

370 The Liquidators pointed to the fact that Solar Shop was prohibited from disposing of assets not only other than in the ordinary course of business, but “in the ordinary course of [Solar Shop’s] ordinary business”. This, the Liquidators submitted, created a higher hurdle for the Respondents to show that the RECs holding could be disposed of without Westpac’s consent. In order to support their argument, the Liquidators relied (as they had before the primary judge) on the fact that Solar Shop itself had acknowledged the need to obtain Westpac’s consent in relation to two transactions. There does not appear to be any dispute that, in the context of a payment to Solarise of RECs to reduce the Solarise Loan, Solar Shop sought the consent of Westpac. In the email to Westpac seeking consent the Solar Shop representative said:

While this is a dilution of Westpac’s security position, it is small in the context of the total RECs held by the business.

371 Nor does it appear to be in dispute that in an email from a representative of Solar Shop to other Harbert personnel dated 29 June 2011 the representative discussed potential RECs and stated:

Westpac will need to agree to this, we have already flagged to them we are pursuing this. Given we are tight with cash, and it doesn’t affect their security position, we believe they should agree.

372 The Court was referred to authorities which supported the proposition that the phrase “ordinary course of a mortgagor’s ordinary business” had a more restricted meaning than that of the phrase, “ordinary course of business”. In *Reynolds Bros (Motors) Pty Ltd v Esanda Ltd* (1983) 8 ACLR 422; (1983) 1 ACLC 1333, the New South Wales Court of Appeal considered the meaning of the expression “ordinary course of business”. Mahoney JA said that “ordinary” was not to be confined to what is in fact ordinarily done in the course of the particular business of the company and that transactions will be within the meaning of ordinary course of business though they be in relation to the company, exceptional or unprecedented.

373 In *Fire Nymph Products Pty Ltd v Heating Centre Pty Ltd* (1988) 14 NSWLR 460 (***Fire Nymph***), Rogers CJ of Comm D considered the meaning of the phrase “in the ordinary course of its ordinary business”. His Honour said at 464:

Obviously, the requirement that the transaction be part of the mortgagor’s “ordinary business” was intended to add something more to the customary phrase employed in floating charges requiring transactions to be “in the ordinary course of business” …

Quite obviously, in the floating charge here in question, it was sought to overcome the limited meaning of the phrase “ordinary course of business”, explained by Mahoney JA, by requiring that, as well, the transaction should not be unusual or exceptional but be something ordinarily done in the course of the particular business of the company.

This decision was affirmed on appeal: *Fire Nymph Products Pty Ltd v Heating Centre Pty Ltd (in liq)* (1992) 7 ACSR 365.

374 In *BB Retail Capital Pty Ltd v Alexandria Landfill Pty Ltd* [2015] NSWCA 319, Bathurst CJ (with whom the other members of the Court agreed) referred to the remarks of Rogers CJ of Comm D in *Fire Nymph* without disagreement and noted that the judgment had been affirmed on appeal (at [102]-[103]).

375 The key submission made by the Liquidators is that, whilst the sale of RECs by Solar Shop was part of its ordinary business, a fire sale of the whole (or substantially the whole) of Solar Shop’s RECs holding as a means of repaying unsecured creditors, thus placing its principal circulating asset beyond the reach of Westpac, was not. The Respondents submit that the subjective view of Solar Shop that it was prudent to seek Westpac’s consent to any large RECs transaction said nothing about whether such consent was a contractual requirement. The Respondents submit that there can be no distinction between the sale of RECs as part of the ordinary course of the business of Solar Shop and a fire sale “of the whole or substantially the whole of Solar Shop’s RECs holding”. It is true that it was part of Solar Shop’s business to receive RECs as part of the consideration for the installation of solar systems, that Solar Shop sold RECs from time to time, and that its plans included selling RECs to make a profit or to otherwise meet daily cash needs. Those propositions led the Respondents to submit that the sale of RECs in any volume would clearly have been in the ordinary course of Solar Shop’s business.

376 An alternative submission made by the Respondents was that if Westpac’s consent was required, the onus was on the Liquidators to prove that Westpac did not or would not have consented. In the alternative, the Respondents submit that the evidence established that Westpac would have consented to such sales. The evidence was that when asked to consent, Westpac did so and that Westpac provided major support to Solar Shop at times that the Liquidators said that Solar Shop was insolvent. The Liquidators point out (correctly) that the question of the consent of Westpac never arose “because the transaction involving RECs was hypothetical in circumstances where the company did not seek to realise its entire RECs holding”. The Liquidators contend that if the Respondents sought to argue that Westpac would have consented, then an evidential onus fell upon them to prove that fact.

377 We agree that the fact that Solar Shop sought Westpac’s consent to any large RECs transaction is not decisive. The issue is to be determined by reference to the terms of the Westpac securities and the facts and circumstances assessed objectively.

378 The sale of some RECs was undoubtedly in the ordinary course of Solar Shop’s ordinary business. However, we cannot think that the sale of Solar Shop’s entire RECs holding within a short period to pay unsecured creditors would be in the ordinary course of Solar Shop’s ordinary business. Such a transaction would be unusual or exceptional within the authorities.

379 On the face of it, such a sale would operate to the substantial detriment of Westpac and, in those circumstances, the Respondents bore an evidential onus (at least) to show that Westpac would have or may well have consented. None of the matters the Respondents raised as showing Westpac’s intention to support Solar Shop meets that onus.

380 The importance of the ability of Solar Shop to realise its RECs holding as at 30 April 2011, and, in particular as at 31 May 2011, was such that an inability to realise a substantial part of the RECs holding means (absent any counter-balancing item upheld on the notices of contention) it would appear that Solar Shop was insolvent as at those dates. As we confirm below, we have found that no such counter-balancing item has been established.

### The Market Issue

381 Assuming contrary to the previous conclusion that Solar Shop was free to sell its RECs holding the Liquidators’ submission that the primary judge should have found that Solar Shop was not able to sell RECs in the quantities required in order to bring creditors back to terms must be rejected. The matters, or nearly all of the matters, upon which the Liquidators rely were considered by the primary judge and we see no error in his Honour’s reasons.

382 First, the Liquidators submit that despite the dire financial position of Solar Shop as revealed by the “cash hole” shown in the May Cash Flow, Solar Shop did not sell its RECs holding to bring creditors back to terms. The Liquidators submit that a compelling inference arises that Solar Shop’s failure to do so means that it was incapable of doing so. They submit that there is no evidence that Solar Shop deliberately refrained from selling RECs in circumstances where it had an option to do so. This matter was considered by the primary judge in his reasons. His Honour considered that, subject to a qualification involving the RECs, Solar Shop was not a company which was cynically exploiting the willingness of some creditors to allow some flexibility in their payment terms and that the overall effect of the evidence was that Solar Shop was willing to pay its debts if only it could. However, the Solar Shop RECs holding was a qualification. The primary judge found that Solar Shop was reluctant to sell the RECs when that would mean that it would incur a loss and that that position was understandable. His Honour expressly found that Solar Shop’s omission to sell all available RECs by 31 May 2011 should not be regarded as an inability to sell them, even if there were some limitations on their liquidity.

383 Secondly, the Liquidators relied on an email from a representative of Solar Shop which stated with respect to the RECs that “the market had become flooded at the moment and liquidity had correspondingly dropped”. This email was specifically addressed by his Honour (see [310]).

384 Thirdly, the Liquidators submit that the sales of RECs that Solar Shop was able to achieve were on disadvantageous terms which demonstrated the lack of a market for the asset. The Liquidators referred to the Put and Call arrangement with the Commonwealth Bank of Australia. The primary judge was aware of the transaction and he was aware that the transaction could have resulted in Solar Shop incurring a further loss.

385 Fourthly, the Liquidators relied on the fact that Solar Shop’s ability to sell RECs was largely limited to the spot market. They refer to the minutes of the meeting of the board of directors on 30 May 2011. As far as we can see, these matters were considered by the primary judge (see [333]).

386 Fifthly, the Liquidators relied on the minutes of the 22 June 2011 meeting of the board of directors which refers to uncertainty in the RECs market and the collapse in the RECs spot market. The primary judge was aware of these matters.

387 Finally, the Liquidators referred to the memorandum for HAPE investors dated 17 June 2011 wherein the following is said:

There is no certainty that there will be sufficient liquidity in the RECs market to absorb these RECs sales.

388 We appreciate that this Court is in as good a position as the primary judge to draw inferences and that this Court must conduct a real review (*Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [25] per Gleeson CJ, Gummow and Kirby JJ)). No error has been shown and we agree with the conclusions reached by the primary judge.

### The No Difference Issue

389 The Liquidators submit that the May Cash Flow demonstrates that the sale of Solar Shop’s entire RECs holding, even if that were possible, would have been insufficient to bring creditors back to terms. This submission was pitched at a general level and the identity of the particular assets to be sold by Solar Sop (i.e. the RECs holding) was not critical to the submission. We have already considered this submission and rejected it in the context of our consideration of ground 1.

### The Number of RECs Issue

390 In relation to this issue the Liquidators submit that, even if Solar Shop was free to sell all or a substantial part of its RECs holding, the primary judge erred in his calculation of the RECs available. His Honour proceeded on the basis of the management accounts which suggested 177,000 RECs were available for sale as at 30 April 2011 and 353,000 RECs were available for sale as at 31 May 2011. An immediate point made by the Liquidators is that it is difficult to see how there could be 353,000 RECs available for sale as at 31 May 2011 and, according to the May Cash Flow (see [344]-[345] above), only 150,950 RECs were available for sale as at 3 June 2011. More generally however, the Liquidators submit that the primary judge’s approach ignored two matters: (1) some of the RECs were already under contract and were not available for sale; and (2) under the relevant legislative scheme - the Renewable EnergyAct - there was a time lapse, or at least there could be, between the creation of a certificate and its registration such that it could not be assumed that all certificates could be sold in the short term. The Court was taken to various Solar Shop documents showing RECs under contract and to the relevant legislative scheme and, in particular, s 26.

391 As far as we can see, these points were not raised before the primary judge and they are not clearly articulated in the notices of appeal. Leaving aside the more general problem that even now the Liquidators have not complied with their continuing obligation to make discovery, they could have been informed by evidence and, in those circumstances, we would not allow them to be raised (*Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at 7‑8).

### Conclusion

392 We reiterate what we have said earlier and in particular at [210]. On that basis we would have found that ground 3 in the notice of appeal succeeds in that the Westpac security documents prevented the sale of the RECs holding, or a substantial part thereof, and in those circumstances (absent a counter-balancing item being upheld on the notice of contention) that would appear to lead to the conclusion that Solar Shop was insolvent as at 30 April 2011 and as at 31 May 2011.

## Ground 4

393 The Liquidators allege that the primary judge erred in mixed fact and law in his analysis of the overdue debts and the assets which might be realised to pay them as at 30 April 2011 and 31 May 2011, and erred in his analysis of solvency as at those dates in four material respects.

394 First, the Liquidators allege that the primary judge erred by excluding the overdue debts of Optimum, $467,000 as at 30 April 2011 and $467,000 as at 22 May and 31 May 2011, and BlueScope, $476,000 as at 30 April 2011 and $495,000 as at 22 May and 31 May 2011.

395 Secondly, the Liquidators allege that the primary judge erred by not including consideration of the fact that the Solarise Loan was due to be repaid in the immediate future on 22 May 2011. We have already dealt with this submission at [236]-[336] above and rejected it (ground 2).

396 Thirdly, the Liquidators allege that the primary judge erred by finding that Solar Shop’s RECs holding, valued at $4.6 million as at 30 April 2011 and $8.875 million as at 31 May 2011, could be sold and was therefore sufficient to meet the debts then due and payable. We have already dealt with this submission at [337]-[392] above (ground 3).

397 Fourthly, the Liquidators allege that the primary judge erred by finding as at 30 April 2011 that some of the accounts receivable and cash assets identified in Solar Shop’s balance sheet could have been used to pay overdue debts, which was a finding in contradistinction to the primary judge’s findings at later times.

398 Finally, the Liquidators allege that the primary judge erred by failing as at 31 May 2011 to have regard or sufficient regard to the May Cash Flow which identified a cash deficiency of $1.204 million as at 3 June 2011 and $7.149 million as at 29 July 2011 even after the sale of Solar Shop’s entire RECs holdings. We have already dealt with this submission at [212]-[235] above (ground 1).

399 We turn to consider the primary judge’s reasons as to the first and fourth matters.

400 With respect to the first matter, namely, the debts due to Optimum and BlueScope by Solar Shop, the primary judge found that the pattern of Solar Shop’s payments to Optimum suggested that the contractual terms between Solar Shop and Optimum may not have required payment on the issue of an invoice, but instead payment within 31 to 60 days. The primary judge noted that there was no evidence that Optimum challenged Solar Shop’s pattern of payment, or that it had asserted that Solar Shop was non-compliant with agreed payment terms. In those circumstances, the primary judge considered that the Liquidators had not proved the trading terms between Solar Shop and Optimum and that therefore he could not make a finding that Solar Shop was outside agreed payment terms in relation to amounts owed by it to Optimum at either 30 April 2011 or 31 May 2011.

401 With respect to the alleged overdue debt by Solar Shop to BlueScope, the primary judge said, based on the history of payment for the months of January to May 2011, that the consistency of payment being made within about 60 days raised the possibility that BlueScope had a different arrangement with Solar Shop from that which was indicated on the monthly statements issued by BlueScope to Solar Shop. The primary judge said that there was some evidence that BlueScope regarded the pattern of payment by Solar Shop as within agreed terms. The primary judge noted that BlueScope confirmed that Solar Shop was compliant with its trading terms in a response it gave on 28 March 2011 to a request from another company for a credit reference with respect to Solar Shop. The primary judge inferred from the statements that BlueScope had reached “some agreement” with Solar Shop which was reflected in Solar Shop’s pattern of payment to it. In those circumstances, the primary judge was not prepared to find that Solar Shop was outside the agreed payment terms in relation to monies owed to BlueScope.

402 With respect to the fourth matter, namely, the accounts receivable and cash assets, the Liquidators submit that the primary judge erred in finding that some of the accounts receivable and cash assets could have been used to pay overdue debts. In this context, we note that the Respondents claim in ground 2(a) of their notice of contention that the primary judge should have included additional assets as being available to meet Solar Shop’s liabilities, including cash and cash equivalents, and trade and other receivables.

403 The primary judge noted that as at 30 April 2011, the trade receivables or amounts payable by Solar Shop’s customers comprised $3.586 million. His Honour noted Solar Shop’s liquidity difficulties and he concluded that it was to be expected that it had been seeking payment by its customers as promptly as possible. His Honour referred to some evidence bearing on that conclusion. His Honour also concluded that it did not seem reasonable to infer that Solar Shop would have been able to achieve payment by its customers any more quickly than it was, in fact, achieving and he noted that there was no suggestion that a factoring arrangement was possible. In any event, his Honour observed that such an arrangement would probably have contravened the Facility Agreement with Westpac. After making those observations and conclusions, his Honour said that it was nevertheless reasonable to assume that some of the trade receivables were available to meet the debts then due and payable.

404 The primary judge said that he was not willing to accept that the whole of Solar Shop’s cash at bank and overdraft balance was available to meet overdue debts as at 30 April 2011. His Honour said that if they were, then Solar Shop would have been deprived of that resource in continuing business. His Honour noted that there was some evidence that its employment expenses alone exceeded $1 million each month. His Honour noted that Solar Shop did not have alternative sources of funding so that if it used its available cash to meet the debts due and payable on 30 April 2011, it would have become insolvent in any event. In all those circumstances, his Honour reached the conclusion that it was not realistic to assume that anything more than a modest proportion of the cash and remaining overdraft was available to meet outstanding debts.

405 With respect to the position as at 31 May 2011, the primary judge noted that the cash and cash equivalents amount was comprised almost wholly of cash held by Solar Shop at its bank and that the balance of the overdraft available as at that date was only approximately $281,000. The primary judge noted that in considering Solar Shop’s debtors position as at 30 April 2011, he had referred to the difficulties associated with regarding significant amounts of the trade and other receivables, as being readily available to meet Solar Shop’s debts which were then due and payable. His Honour considered that that conclusion was confirmed with an important Solar Shop document, being the May Investment Committee Update. His Honour considered that the figure as at 31 May 2011 could be taken to have reflected management’s best efforts to secure payment from its debtors and to monetise inventory. A little later, his Honour said that for reasons given earlier, the cash and undrawn overdraft should not be taken into account because if Solar Shop had used these funds to pay its outstanding debts, then it would have become immediately insolvent in any event.

406 With respect to Solar Shop’s solvency as at 31 July 2011, the primary judge said that for reasons given earlier, he would again exclude the cash and cash equivalents (and inventories) from consideration as a resource which was available to Solar Shop to meet the debts then due and payable.

407 We turn now to address the submissions made by the parties.

408 With respect to the overdue debt owed by Solar Shop to Optimum, the Liquidators submit that the primary judge erred in finding that the terms of trade between the two companies were not proven, and that the primary judge erred in relying on the pattern of payments by Solar Shop to Optimum. As to the latter proposition, the Liquidators submit that the fact that a debtor pays late is not, of itself, sufficient evidence to conclude that the creditor has agreed to a variation in its terms of trade so as to permit extended payment terms.

409 With respect to the overdue debt owed by Solar Shop to BlueScope, the Liquidators submit that the written statement of the trading terms should, absent evidence of an enforceable variation or estoppel, be held by the primary judge to be the contractual arrangement. The Liquidators submit that there was no proper basis to depart from that which was recorded in writing and there was no evidence of any communication between Solar Shop and BlueScope with respect to any variation. Solar Shop did not object to the trading terms on statements sent to it after the credit reference relied on by the primary judge.

410 With respect to the accounts receivable and cash assets, the Liquidators made no separate submission in support of this ground. The explanation for this appears at [67]‑[68] of their written submissions on the appeals and is that these matters either were not taken into account, or were taken into account only to a very limited extent, and that it was Solar Shop’s RECs holding which formed the basis, or major basis, for the primary judge’s conclusion. As we have said, the Liquidators challenge his Honour’s conclusions with respect to the RECs holding.

411 In response to the Liquidators’ submissions with respect to the overdue debts due by Solar Shop to Optimum and BlueScope respectively, the Respondents submit that the primary judge was correct for the reasons he gave.

### Analysis

412 With respect to the Liquidators’ submissions concerning Solar Shop’s debt to Optimum, it is true that the primary judge found that the Liquidators had not proved Solar Shop’s trading terms with Optimum. However, it is necessary to consider that finding in the context of the whole of his Honour’s reasoning on the topic.

413 The evidence before the primary judge were the statements issued by Optimum to Solar Shop at the end of the month and these showed that nearly all of the invoices were issued at the end of the month and that the invoice date and the due date were the same. His Honour noted that he did not have direct evidence of the terms of supply between Optimum and Solar Shop. We take his Honour to mean by that that there was no evidence of the terms of supply by Optimum to Solar Shop other than what could be inferred from the end of month statements and the course of dealings which actually took place between the parties. It is possible to infer from the end of month statements that the terms of payment were, in effect, cash on delivery, but in our opinion, one would consider whatever other evidence was available before inferring such an arrangement.

414 His Honour considered the evidence of the periods over which Solar Shop actually paid accounts from Optimum between December 2010 and April 2011. He found that Solar Shop was paying Optimum’s accounts between 31 and 60 days after their issue. That finding is not challenged. It is inconsistent with a cash on delivery arrangement. His Honour found, with respect, correctly, that it was not a case of established trading terms with occasional late payments, but a case in which the Liquidators had not proved the trading terms between Optimum and Solar Shop. The challenge to his Honour’s conclusions with respect to the Optimum debt is rejected.

415 With respect to the Liquidators’ submissions concerning Solar Shop’s debt to BlueScope, his Honour found that whilst BlueScope’s end of month statements indicated that invoices were to be paid within 30 days from the end of the month in which they were issued, that did not reflect Solar Shop’s payment practice with respect to BlueScope’s accounts. His Honour summarised that payment practice as described by Mr Morris, a forensic accountant, as follows (at [203]):

(a) January 2011 on 1 April 2011, being 60 days from the end of month and 32 days outside the stated trading terms;

(b) February 2011 on 29 April 2011, almost 60 days from the end of month and almost 30 days outside the stated trading terms;

(c) March 2011 on 31 May 2011, being 61 days from the end of month and 31 days outside the stated trading terms;

(d) April 2011 on 30 June 2011, being 61 days from end of month and 31 days outside the stated trading terms.

416 That evidence suggested the possibility of a different payment arrangement from that indicated by the end of month statements. Absent other evidence, that might remain no more than a possibility. However, there was other evidence of a significant nature and that was BlueScope’s response on 28 March 2011 to a request from another company for a credit reference with respect to Solar Shop in which BlueScope indicated that Solar Shop was paying BlueScope according to terms.

417 We agree with the primary judge that that leads to an inference that BlueScope had reached some agreement which was reflected in Solar Shop’s pattern of payment to it and, in the circumstances, it was appropriate to decline to find that Solar Shop was outside agreed payment terms in relation to the relevant amounts. The challenge to his Honour’s conclusions with respect to the BlueScope debt is rejected.

418 With respect to the primary judge’s findings in relation to accounts receivable and cash assets in Solar Shop’s balance sheet, the thrust of the Liquidators’ submission is that the primary judge found that they should not be taken into account as realisable assets of Solar Shop and that his Honour then erred by taking them into account to some extent. This ground did not receive a great deal of attention in the Liquidators’ submissions. As we have said, this may have been because the Liquidators wished to emphasise the importance of the RECs in the primary judge’s conclusions. At all events, this challenge must fail.

419 In considering Solar Shop’s solvency as at 30 April 2011, the primary judge, for reasons he gave and which it is unnecessary to outline at this point, said that, in terms of available realisable assets to pay debts, it was reasonable to assume that some of the trade receivables were available to meet debts then due and payable and a modest proportion of the cash and remaining overdraft was available to meet the outstanding debts.

420 In considering Solar Shop’s solvency as at 31 May 2011, the primary judge had additional evidence that Solar Shop was doing everything it could to realise trade receivables and he did not take them into account in assessing Solar Shop’s solvency as at that date. That does not mean that his Honour’s earlier conclusion is wrong or, even if it is, that it was material to his conclusion that the Liquidators had not established that Solar Shop was insolvent as at 30 April 2011. We think that the RECs holding was the major consideration in that conclusion.

421 As far as cash and unused overdraft ($281,000 rounded) is concerned, it is true the primary judge said “[f]or the reasons given earlier” these assets should not be taken into account. The amount of the unused overdraft is not a substantial amount. We do not think that the apparent inconsistency is material. It suggests that the amount for cash and unused overdraft that the primary judge took into account for 30 April 2011 was modest indeed and that if his Honour’s other conclusions for 30 April 2011 are sustained, any error on the part of the primary judge is not material.

422 It is apparent from his Honour's reasons that by the time of the assessments as at 31 May 2011 and 31 July 2011 there were significant employee and operational commitments and a concession by Solar Shop (on 19 July 2011) that cash was constrained and it was trying to keep cash in the bank. These matters are addressed more fully for the purpose of ground 5(a)(vi) of the cross appeals. Again, the findings that militate against access to cash and cash equivalents and trade receivables as at 30 May 2011 and 31 July 201 do not mean that his Honour’s findings as at 30 April 2011 were wrong.

### Conclusion

423 We reiterate what we have said earlier and in particular at [210]. On that basis we would have found that ground 4 in the notices of appeal is not made out.

## Ground 5 of the appeals and grounds 1 and 2 of the cross appeals

424 By ground 5 of their notices of appeal the Liquidators allege that the primary judge erred in not considering solvency as at 30 June 2011 in the context of his Honour’s finding that the appellants were not confined to the nominated dates of insolvency of 31 January 2011, 30 April 2011 and 22 May 2011.

425 It is to be recalled that the primary judge determined the separate question in each of the First Instance Proceedings by holding that Solar Shop had become insolvent by a later date than those nominated by the Liquidators, that later date being 31 July 2011.

426 For convenience, we again note that the separate question before the primary judge was in the following terms: “did [Solar Shop] become insolvent within the meaning of s 95A of the Corporations Act and, if so, when?”. It did not prescribe any particular date for the assessment of insolvency.

427 The issue of identification of the date of insolvency is also raised by grounds 1 and 2 of the cross appeals of the Respondents.

428 By ground 1 of their cross appeals the Respondents contend that it was not open to the primary judge to assess insolvency on any date other than 31 January 2011, 30 April 2011 and 22 May 2011. Accordingly, it is contended, his Honour ought not to have addressed the position as at 31 July 2011 or as at any other date. We will refer to this as the Confined Dates Issue.

429 By ground 2 of their cross appeals the Respondents argue that the primary judge erred in finding that SMA had contended that Solar Shop had become insolvent by 29 July 2011. Implicit in this ground is the contention that no party pursued a finding of insolvency as at 31 July 2011 and the primary judge erred in considering the position at that date.

430 We add that in its amended notice of cross appeal, Kerry J claims by ground 2 that the error comprised a finding that Clenergy (Kerry J) had contended that Solar Shop had become insolvent by 29 July 2011. We assume the reference to Clenergy rather than SMA is an error: this follows from the cross reference in Kerry J’s ground 2 to [317] of the primary judge’s reasons (where his Honour expressly refers to the contention being that of SMA by reference to the report of Mr Lombe), and also from the fact that in Kerry J’s proposed further amended notice of cross appeal it has deleted the reference to Clenergy and substituted a reference to SMA. We have proceeded on that basis.

431 It is convenient to deal with ground 5 of the appeals and grounds 1 and 2 of the cross appeals together, starting with the grounds of the cross appeals.

### The Confined Dates Issue before the primary judge

432 It is not surprising that the Liquidators pursued a finding in the proceedings that the date of insolvency was as early in time as properly could be established. Although initially they sought a finding that Solar Shop was insolvent as at 20 October 2010, by their closing submissions the earliest date pursued was “not later than 31 January 2011”. The Liquidators then pressed in the alternative for findings of insolvency “to the extent required, at all times thereafter”. They maintained a case that Solar Shop was insolvent at the time of each of the 18 payments listed in the primary judge’s reasons (see above at [30]), and so being during the period 13 May 2011 to 19 August 2011.

433 They then submitted that there were “true alternative” dates to 31 January 2011 for a finding that Solar Shop was insolvent, those dates being “by the end of 30 April 2011” or “by no later than 22 May 2011”. Their submissions focussed on the position on each of those three dates.

434 SMA in its written closing submissions filed in the First Instance Proceedings proceeded on the basis that the Liquidators had confined their case to a finding of insolvency on one of those three identified dates and no other, reciting a number of times that the conclusion that the Liquidators asked the Court to reach was that Solar Shop was insolvent on 31 January 2011, 30 April 2011 and 22 May 2011. SMA then addressed the question of Solar Shop’s solvency on each of those three dates.

435 The Liquidators confronted SMA’s apprehension of a limitation in their case in their written reply submissions, stating that the Liquidators’ case was not confined to a finding of insolvency on one of those three dates but remained a case that Solar Shop was insolvent at the time of each of the impugned payments.

436 The primary judge (at [6]) rejected the Respondents’ submission that the Liquidators were confined to a determination as at one of 31 January, 30 April and 22 May 2011. His Honour said that:

(1) although the Liquidators indicated in opening that they sought a finding that Solar Shop had been insolvent from 20 October 2010, in their final submissions they sought instead a finding that Solar Shop was insolvent by not later than 31 January 2011; in the alternative, by not later than 30 April 2011; and, in the further alternative, by not later than 22 May 2011;

(2) SMA contended that Solar Shop had not become insolvent until 29 July 2011 and possibly not until 4 August 2011;

(3) Kerry J submitted that it had not become insolvent until 9-16 August 2011; and

(4) by reason of the terms of the separate question, the Court is not confined to any of these dates.

### Analysis of Confined Dates Issue

437 In our view, the rejection of the Confined Dates limitation was justified having regard to the manner in which the question for determination was expressed.

438 Further, we do not consider that the Liquidators made any concession to the contrary.

439 The Respondents contend in the appeals that the Liquidators had run a case that was limited to the three identified dates and that they sought to rely only on the presumption as to insolvency under s 588E of the Corporations Act for any later period (in context a reference to s 588E(3) of the Corporations Act). Therefore, the Respondents submit, if insolvency was not established on one of those three dates, then no presumption of insolvency would operate for the period from that date.

440 In support of their submission the Respondents rely on a statement in the introductory part of the Liquidators’ closing submissions at first instance (para 5) to the effect that the Liquidators seek a finding that Solar Shop was insolvent by not later than 31 January 2011, and that “to the extent that any of the [Respondents] then seek to rebut the presumption of insolvency, the [Liquidators] press for findings of insolvency, to the extent required, at all times thereafter”. However, to suggest that the introductory submission operates to bar any finding as to insolvency on a later date if the Respondents did not seek to rebut the presumption as to insolvency artificially confines and misrepresents the manner in which the case was run and presented by the Liquidators. For a start, it is apparent that despite the reference in para 5 of the submissions to only 31 January 2011, the Liquidators in fact sought findings as to insolvency after that date. Moreover, as already noted, the Liquidators in their reply submissions expressly clarified that their case remained that Solar Shop was insolvent at the time of each of the impugned payments, a case consistent with the manner in which the question before the primary judge was framed.

441 Further, during oral closing submissions the primary judge asked senior counsel for the Liquidators what course the Court should follow if it was against the Liquidators as to Solar Shop being insolvent as at May 2011. In his response senior counsel expressly referred to what was said by Mr Lombe in the First Lombe Report to the effect that Solar Shop was insolvent absent the Harbert recapitalisation and submitted that even if that cash hole was not apparent as at May 2011 “at the very least, it makes for that insolvency once the cash hole was not filled”. Senior counsel continued, submitting that the Court would then not ignore what happened after 22 May 2011 in respect of indebtedness. This submission in our view discloses and anticipates that it was open to the Court to find insolvency at a later date and when, relevantly, Harbert’s unwillingness to fill the cash hole and provide financial support became apparent. It indicates that the Liquidators did not simply rely upon any presumption that might arise under s 588(3) of the Corporations Act for the period after 22 May 2011 but rather submitted that the Court should continue to assess Solar Shop’s solvency after that date.

442 In our view, the case as run and disclosed by the Liquidators was that if insolvency was challenged or not established as at 31 January 2011 or as at one of the identified dates then it remained a question for the Court to ascertain when it was insolvent. How the primary judge was to proceed in such a scenario depended upon the extent to which there was sufficient clarity of the financial position at any later particular date, having regard to the submissions before his Honour.

443 The primary judge’s rejection of the Respondents’ contention on the Confined Dates Issue is also supported by the materials that were before his Honour that addressed the position of solvency post May 2011.

444 For example, the Aide Memoire upon which the Liquidators relied analysed Solar Shop’s debt position at month end for each month in the period January 2011 to August 2011.

445 Further, the Second Lombe Report, which was to be read with the First Lombe Report, was also before the Court by way of submission, and those reports explained Mr Lombe’s reasons for considering that Solar Shop was solvent until 29 July 2011 (being the point at which it became apparent that the Harbert funding would not proceed) or possibly as late as 4 August 2011.

446 As is apparent from ground 2 of their cross appeals, any reliance by the primary judge on the Lombe Reports is challenged by the Respondents. The Respondents take issue with the statement at [6] in the primary judge’s reasons that “SMA contended that SMA had not become insolvent until 29 July 2011 and possibly not until 4 August 2011”. SMA submits on the appeal that it did not rely upon the Lombe Reports and did not make any admission or contend for a date of insolvency from 29 July 2011 as alleged.

447 It is useful to include the written closing submission made by SMA at first instance as to the use of the Lombe Reports:

261. Mr Lombe’s Report was prepared in response to Mr Morris’ fourth report dated 15 July 2016, which is scarcely referred to in the Plaintiffs’ Closing Submissions. Further Mr Morris expressed the opinion that the Company was insolvent from 19 October 2010. Given the Plaintiffs have abandoned that date, both the report of Mr Morris and Mr Lombe (which are to be treated by the Court as submission only) are not addressed to the issue that the Court is now being asked by the Plaintiffs to determine; which is whether the Company was insolvent on 31 January 2011, 30 April 2011 or 22 May 2011.

262. In these circumstances the Defendant does not propose to respond to the discussion of Mr Lombe’s report contained in the Plaintiffs’ Closing Submissions. Nor does the Defendant propose to address Mr Morris’ report.

448 It may be accepted that SMA did not contend by the time it closed its case that any dates other than 3 January 2011, 30 April 2011 or 22 May 2011 were relevant to the task to be undertaken by the Court. His Honour’s rejection of the Respondents’ submission that the Liquidators were confined to those dates confirms his understanding of the Respondents’ position.

449 However, the Liquidators in their written reply submissions before the primary judge pointed out that although they had abandoned an argument based upon insolvency as at 31 October 2010, the Lombe Reports were not irrelevant to the determination of solvency for the period of 31 January 2011 onwards and that Mr Lombe would concede insolvency subject to the support of Harbert and Westpac.

450 In our view the contention as to the latest date of solvency had been made by Mr Lombe in the Second Lombe Report (obtained at SMA’s request) and, having rejected the Respondents’ Confined Dates submission, it was open to the primary judge to have regard to the Lombe Reports as submission and on the basis already discussed (see [34] above). If SMA wished to challenge that part of the opinion of Mr Lombe, or put forward an alternative submission in the event the reports were considered relevant, or disabuse his Honour of any notion that the reports could be relied upon for any reason, SMA should have made that position clear before the primary judge.

451 That SMA made a forensic decision to decline to address the opinion in the Lombe Reports as to the date of solvency before the primary judge, and rather to assert that the reports were irrelevant, did not limit the Liquidators’ or the Court’s reliance on the reports. The prospect that the Court would consider the reports relevant and useful remained and, as it turned out, eventuated.

452 Contrary to the Respondents’ submission before us, we do not consider it was clear before the primary judge that SMA “abandoned” the Lombe Reports. SMA denied their relevance. We note that the Liquidators suggested in their reply closing submissions at first instance that the primary judge could infer that SMA no longer relied upon the Lombe Reports, but the primary judge was not obliged to draw such an inference and clearly declined to do so in circumstances where he did not accept the Respondents’ relevance submission, based as it was on a narrow view of the role of the Morris report and Lombe Reports.

453 The primary judge’s finding as to insolvency at the later date of 31 July 2011 was not dependent upon any admission or contention from SMA but rather followed his Honour’s consideration of relevant information before the Court, including the submissions by way of the Lombe Reports.

454 Accordingly, we do not consider there was error on the part of the primary judge in having regard to the Lombe Reports. Nor do we consider there was error on the part of the primary judge in determining that it was open to him to consider the solvency of Solar Shop as at 31 July 2011.

### Conclusion on grounds 1 and 2 of cross appeals

455 We reiterate what we have said earlier and in particular at [210]. On that basis we would have dismissed grounds 1 and 2 of the Respondents’ cross appeals.

### The 30 June 2011 Issue

456 The rejection of the Respondents’ Confined Dates submission directs attention to whether the primary judge was then obliged to consider the solvency of Solar Shop at 30 June 2011, as alleged by ground 5 of the Liquidators’ notice of appeal.

457 The primary judge recorded (at [317] of the reasons) that “[n]o party contended for a finding of insolvency as at 30 June 2011 so that the position at that date need not be considered”.

458 The Liquidators submit that the primary judge erred in not testing insolvency as at 30 June 2011. By way of alternate relief, the Liquidators seek an order that the question before the primary judge be answered by finding that Solar Shop had become insolvent within the meaning of s 95A of the Corporations Act at that date.

### Consideration of the 30 June 2011 Issue

459 We have already accepted that the Liquidators’ case was not one confined to the identified dates, and that it was open to the primary judge to consider other dates during the period of the impugned payments, a period that self‑evidently includes 30 June 2011. However, in contrast to the position at 31 July 2011, as to which there were detailed submissions to assist the Court by way of the Lombe Reports, there was no submission before the primary judge that explained why the date of 30 June 2011 should be addressed.

460 It was not for the primary judge to consider each and every date during the relevant period absent some assistance from the parties, particularly having regard to the density of the factual matters before the Court.

461 Nor was the task of assessment at that date straightforward, having regard to the matters the subject of this appeal. That is apparent from the Liquidators’ analysis provided to this Court by way of written submissions, which was not provided to the primary judge.

462 In those submissions the Liquidators submit that the Aide Memoire recorded by the primary judge included a reference to the debt position of Solar Shop at 30 June 2011 and submit that the primary judge had before him information from which to assess the position of trade creditors and any changes to the column headed “Adjusted Overdraft Account Less Stated Debt”.

463 The Liquidators note that the Aide Memoire relevantly lists trade creditors as at 30 June 2011 in the sum of some $8.636 million and an Adjusted Overdraft Account Less Stated Debt of $15.669 million.

464 The Liquidators submit that the trade creditors sum should be reduced to $7.528 million, that sum comprising the debts of Fasteners - $148,000; Wuxi - $4.796 million; Kerry J - $140,000; and Bosch - $2.444 million.

465 The Liquidators submit that the Adjusted Overdraft Account Less Stated Debt should be reduced to $9.135 million, taking into account the exclusion of the Solarise Debt on the basis it is subordinated.

466 The Liquidators then submit that there were insufficient assets to bring the trade creditors back to terms, and that the market value of RECs conceivably available to sell to reduce the overdue debt of $9.135 million was $5.631 million, leaving a shortfall of some $3.5 million. That shortfall might be reduced subject to the availability of some part of cash and the undrawn overdraft but, according to the Liquidators, there would still have been a significant shortfall.

467 It is immediately apparent that any assessment of solvency as at 30 June 2011 is dependent on various findings of fact and law that are the subject of this appeal. For example, the financial analysis depends on the position assessed with respect to ground 4 of the appeal (whether the primary judge ought to have included or excluded the BlueScope Steel and Optimum debts and the status of the Solarise Debt); grounds 1 and 2 of the Respondents’ notices of contention (whether the debt due to the ATO was due and payable); and ground 5 of the cross appeal as to a range of debts said to be due (including the Wuxi debt) and assets said to be available to meet such debts (including inventory).

468 The Respondents argued that, consistent with their submission on the Confined Dates Issue, there was no basis for an assessment to be conducted by the primary judge as at 30 June 2011, but in any event challenged the Liquidators’ analysis of the position at that date, relying on the issues as to liabilities and available assets that are addressed elsewhere in the appeals and cross appeals, and on the basis such issues are equally relevant to an assessment of solvency as to 30 June 2011.

469 Having regard to the complexity of those matters and the potential changes in position from month to month, in our view no error on the part of the primary judge is disclosed by the absence of any assessment of the position as at 30 June 2011 in circumstances where no party provided assistance or made submissions directed to the position as at that date or distinguished it from any of the other dates during the relevant period as a date requiring particular attention. That it was open to the primary judge to consider solvency at that date did not compel his Honour to do so.

470 We add that in order for this Court to make a finding as to insolvency as at 30 June 2011 (as sought by the Liquidators by way of alternative relief), it would be necessary to assess the evidence and make findings having regard to other findings in these reasons. The relevance of the discovery issues to such a task is apparent.

### Conclusion on ground 5 of the appeal

471 We reiterate what we have said earlier and in particular at [210]. On that basis we would have found that ground 5 in the notices of appeal is not made out.

# CROSS APPEALS

472 Ground 1A of the cross appeals (introduced by the further amended notices of cross appeal) has been addressed above (at [132]-[189]).

473 Grounds 1 and 2 of the cross appeals have been addressed with ground 5 of the appeals.

## Grounds 3, 4 and 5 of the cross appeals

474 Grounds 3, 4 and 5 of the cross appeals may be dealt with together. Grounds 3 and 4 make the general allegations that:

(1) the primary judge erred in finding that the matters identified in [317] to [364] of the reasons were sufficient to discharge the Liquidators’ onus of proving that Solar Shop was insolvent as at 31 July 2011; and

(2) the primary judge should have found that the Liquidators had not discharged their onus of proving that Solar Shop was insolvent as at 31 July 2011.

475 Whilst expressed as being a further alternative ground of the cross appeals, ground 5 in effect lists and describes the alleged errors made by the primary judge in finding (at [365]) that Solar Shop was insolvent as at 31 July 2011, and can properly be regarded as encompassing the matters raised generally by grounds 3 and 4. To the extent onus issues were raised, they are addressed in the context of the particular items where relevant.

476 Ground 5 alleges that the primary judge erred in finding that Solar Shop was insolvent as at 31 July 2011 (at reasons [365]), and in the course of making that finding erred:

(a) in his analysis of the overdue debts of Solar Shop and the assets which might be realised to pay them as at 31 July 2011 (at [318]‑[324]), namely:

(i) by including an amount of $365,887.02 as due and payable to the Commissioner of Taxation (at [318]);

(ii) [deleted by amendment];

(iii) by including an amount of $4,849,577.59 as due and payable to Wuxi (at [318]);

(iv) by including an amount of $379,000 as due and payable to Kerry J (at [318]);

(v) by including an amount of $2,444,155.59 as due and payable to Bosch (at [318]);

(vi) by excluding as an asset an amount of $984,000 comprising cash and cash equivalents (at [322]);

(vii) by excluding as an asset an amount of $20,666,000 comprising inventories (at [322]);

(viii) by reducing the value of Solar Shop’s RECs receivables by $3,661,000 (at [323]);

(ix) by inferring that several of the trade creditors of Solar Shop (other than the 14 selected by the Liquidators for analysis) were outside terms (at [327]);

(b) by excluding as a resource available to Solar Shop additional funding from Harbert (at [349]);

(c) by taking into account correspondence with Bosch, SMA and Mitsui as being supportive of a finding of insolvency (at [357]);

(d) by taking into account the cash flow analysis prepared by Mr Morris (at [360]);

(e) by taking into account that Mr Lombe considered that Solar Shop was insolvent by 29 July 2011 (at [361]);

(f) by taking into account Solar Shop’s cash flow analysis prepared on 30 May 2011 in determining the position of the company as at 31 July 2011 (at [362]); and

(g) by taking into account correspondence sent 17 August 2011 in determining the position of Solar Shop as at 31 July 2011 (at [364]).

### When was debt due to the Commissioner of Taxation (ATO)

477 At each of the relevant dates of 30 April 2011, 30 May 2011 and 31 July 2011, the assessment of solvency took into account a month-end liability included in the Aide Memoire and said to be the respective sums of $962,692.42, $1,511,403.95 and $365,887.02 due to the ATO (more properly due to the Commissioner of Taxation but referred to generally by the parties as a debt to the ATO).

478 The quantum of the sums set out in the Aide Memoire was not relevantly in issue. The Respondents accepted that the “integrated client account” in evidence before the primary judge recorded Solar Shop’s liability to the Commissioner of Taxation at the end of each day. However, the Respondents did not accept that such amounts reflected the actual payment obligation of Solar Shop to the ATO. The basis for the Respondents’ qualification was its argument that there was a payment arrangement in place at all relevant times such that the debts were not relevantly due and payable. The primary judge found that although the ATO and Solar Shop had entered into payment arrangements, that course did not deny the status of the identified debts as due and payable to the ATO.

#### The primary judge’s reasons

479 The primary judge first dealt with factual matters relating to the manner in which the debts were recorded and Solar Shop’s communications with the ATO.

480 His Honour described (at [140]) the manner in which liabilities for GST (payable monthly), PAYG and FBT instalments (payable quarterly) and PAYG withheld from employees’ salaries and wages (payable monthly and later fortnightly) were recorded in an integrated running balance account maintained by the ATO; that a liability is not recorded in the account until it is due and payable; and that if taxation liabilities are being met in the ordinary course, the balance of the account will generally be zero.

481 His Honour then recorded that Solar Shop did not meet its taxation liabilities between 31 October 2010 and 30 September 2011, and referred to the rounded balances of the account for those months (at [141]). To the extent payments were made, some were made late. For example, as summarised at [143]:

(1) the amounts due for payment in the months of November 2010 through to February 2011 were paid between 52 and 112 days after the due date;

(2) the amounts due for payment in March and April 2011 were paid on time;

(3) the amounts due for payment in May, June and July 2011 were paid between 16 and 31 days late;

(4) the amounts due for payment in August 2011 (which were significantly less than the amounts due in earlier months) were paid on time; and

(5) the amounts due for payment in September 2011 were never paid.

482 The primary judge then addressed communications between representatives of Solar Shop and the ATO between November 2010 and January 2011 (at [145]). His Honour recited extracts from ATO file notes which refer to Solar Shop’s explanations for being unable to pay liabilities in full, Solar Shop’s agreement to make payment proposals and that the ATO gave “legal warnings”.

483 Relevantly, his Honour referred to a file note of a conversation on 13 January 2011 between Michael Dillon of Solar Shop during which Solar Shop suggested a payment proposal.

484 His Honour then referred (at [146]) to a letter of 14 January 2011. It is headed “Payment Arrangement Integrated Client Account”. By that letter, the ATO agreed to “accept an arrangement for payment by instalments”. The letter implicitly refers to the proposal of the preceding day. By the letter the ATO agreed to payment of the sum of $2,824,447.40 by 10 instalments, each on a specified date. The following were conditions of acceptance:

(1) payments must be made as detailed in the schedule (outlined in the letter);

(2) all future lodgement obligations must be met by the due dates; and

(3) all future payment obligations must be made by the due dates.

485 Although not set out in the reasons of the primary judge, it is useful to also note the following terms of the 14 January 2011 letter:

Failure to meet all these conditions [of acceptance] may result in the commencement of legal action without further notice.

If you have difficulties in meeting these conditions, please contact us immediately.

Should any tax credits arise during the life of this arrangement they may be credited against this debt.

The arrangement we have agreed to is conditional upon the information you have provided being accurate. Should this not be the case, or should your circumstances change, the arrangement may be varied or terminated. If the arrangement is terminated, the remainder of your debt, together with any accrued general interest charge (GIC), will become payable immediately.

If we agreed to amend the standard GIC terms outlined below, these amended terms will apply to this arrangement. You were advised of these terms at the time of accepting this arrangement.

Although your account is under an arrangement, GIC for late payment is continuing to accrue. Notification of the amount of GIC accruing may, from time to time, issue while this arrangement is in place. This arrangement provides for payment of an estimated GIC amount which is included in the payment schedule. Any variation to the payment dates or a variation in the rate of GIC will affect the final GIC amount payable. You may also receive another GIC notice at the end of the arrangement period.

GIC is calculated daily on a compounding basis and is currently imposed at a rate of 12.02% per annum on any outstanding amounts. The GIC rate is reviewed every quarter. Amounts of GIC are tax deductable in the year in which they are incurred.

486 The primary judge said that Solar Shop complied with the first three payments under the arrangement but did not comply with it thereafter.

487 The primary judge then referred to three further letters by which the ATO accepted payment arrangements, it being apparent that each was preceded by a phone call. The letters were dated 12 February 2011, 8 March 2011 and 30 June 2011 and set out different instalment dates and amounts but were otherwise on the same terms as the letter of 14 January 2011.

488 The primary judge said that as to each arrangement apart from that of 30 June 2011 there was non‑compliance (at [150]‑[152]) and concluded (at [154]) that it was apparent that Solar Shop was unable to comply with its taxation obligations, that it did not make payment arrangements with the ATO until the amounts owing were overdue, and that when it did make payment arrangements, it often defaulted, sometimes almost immediately. Mr Dillon repeatedly attributed Solar Shop’s inability to meet its taxation liabilities to “cash flow difficulties”. The ATO gave multiple “legal warnings” to Solar Shop.

489 The primary judge then considered the Liquidators’ submission based on the effect of entry into a payment arrangement, an argument based on s 255‑15 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TA Act**).

490 We note that s 255‑15 falls within Subdivision 255‑B of the TA Act which is headed “Commissioner’s power to vary payment time”. For convenience we include the three sections contained in that part:

**255‑10** To defer the payment time

*Deferrals for particular taxpayers*

(1) The Commissioner may, having regard to the circumstances of your particular case, defer the time at which an amount of a \*tax‑related liability is, or would become, due and payable by you (whether or not the liability has already arisen). If the Commissioner does so, that time is varied accordingly.

Note: General interest charge or any other relevant penalty, if applicable for any unpaid amount of the liability, will begin to accrue from the time as varied. See, for example, paragraph 5‑15(a) of the *Income Tax Assessment Act 1997*.

(2) The Commissioner must do so by written notice given to you.

*Deferrals for classes of taxpayers*

(2A) The Commissioner, having regard to the circumstances of the case, may, by notice published on the Australian Taxation Office website, defer the time at which amounts of a \*tax‑related liabilities are, or would become, due and payable by a class of taxpayers (whether or not the liabilities have already arisen).

(2B) If the Commissioner does so, that time is varied accordingly.

Note: General interest charge and any other relevant penalties, if applicable for any unpaid amounts of the liabilities, will begin to accrue from the time as varied. See, for example, paragraph 5‑15(a) of the *Income Tax Assessment Act 1997*.

(2C) A notice published under subsection (2A) is not a legislative instrument.

*Deferral does not affect time for giving form*

(3) A deferral under this section does not defer the time for giving an approved form to the Commissioner.

Note: Section 388‑55 allows the Commissioner to defer the time for giving an approved form.

**255‑15** To permit payments by instalments

(1) The Commissioner may, having regard to the circumstances of your particular case, permit you to pay an amount of a \*tax‑related liability by instalments under an \*arrangement between you and the Commissioner (whether or not the liability has already arisen).

(2) The \*arrangement does not vary the time at which the amount is due and payable.

Note: Despite an arrangement under this section, any general interest charge or other relevant penalty, if applicable for any unpaid amount of the liability, begins to accrue when the liability is due and payable under the relevant taxation law, or at that time as varied under section 255‑10 or 255‑20.

**255‑20** To bring forward the payment time in certain cases

(1) If the Commissioner reasonably believes that you may leave Australia before the time at which an amount of a \*tax‑related liability becomes due and payable by you, the Commissioner may bring that time forward. If the Commissioner does so, that time is varied accordingly.

Note: General interest charge or any other relevant penalty, if applicable for any unpaid amount of the liability, will begin to accrue from the time as varied. See, for example, paragraph 5‑15(a) of the *Income Tax Assessment Act 1997*.

(2) The Commissioner must do so by written notice given to you.

491 As is common in Commonwealth legislation, the asterisk denotes a defined term. Relevantly, “tax related liability” is defined in s 255‑1(1) to be a “pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable)”. “Arrangement” includes any agreement or understanding, whether express or implied and whether or not intended to be enforceable by legal proceedings (by reference to s 3AA(2) of the TA Act which adopts for the purpose of the TA Act the definition of “arrangement” in s 995‑1 of the *Income Tax Assessment Act 1997* (Cth)).

492 The primary judge noted in particular the contrast between s 255‑15(2), which provides that a payment arrangement does not vary the time at which an amount is due and payable, and s 255‑10, which authorises the Commissioner to defer the time at which an amount will become due and payable.

493 His Honour then considered the relevant authorities, being *Hall v Poolman* [2007] NSWSC 1330 and *Smith v Boné* [2015] FCA 319, both of which support findings that a payment arrangement with the ATO does not cause a debt which was due and payable to cease to be due and payable, and that such a debt is not contingent but remains presently payable.

494 The primary judge rejected the Respondents’ argument to the effect that it was not established that any arrangement made was made under s 255‑15 of Schedule 1 to the TA Act (at [162]). His Honour accepted that it may be that the Commissioner has an independent power to contract with respect to payments by instalments but considered that all the indicia in this case were that the payment arrangements were made pursuant to s 255‑15. In particular, his Honour referred to:

(1) the recording of the arrangements in a letter that accepted a proposal from Solar Shop, rather than by any formal contract that may have indicated an exercise of an independent contracting power;

(2) the standard form nature of the ATO letters;

(3) the fact that the letters were apparently issued by officers exercising delegated powers; and

(4) the absence of any tailoring of the letters to address any particular circumstances of Solar Shop.

495 The primary judge also noted that any consideration of the nature of the power being exercised must be undertaken in the context that s 255‑15 provides for an express power. Therefore, an inference that it was that express power being exercised can readily be drawn.

496 The primary judge considered and rejected the balance of the Respondents’ submissions: his Honour rejected an argument based on the Respondents’ interpretation of the decision of Edelman J in *Hussain v CSR Building Products Ltd* [2016] FCA 392; (2016) 246 FCR 62 (***Hussain***); did not accept that “due and payable” under s 255‑15 should be read narrowly to achieve only a purpose of protecting an entitlement to interest; and did not accept that it was “commercially unreal” to take into account a liability for the purpose of assessing insolvency where there is a formal arrangement for payment in place.

497 The Respondents agitated the same submissions on their cross appeal and we now turn to address them in more detail.

#### Was the payment plan within s 255-15 of Schedule 1

498 The Respondents contend that the primary judge erred in inferring that the arrangements made with Solar Shop were made under s 255‑15 and not under an independent contractual power. The Respondents contend that the Liquidators were obliged to positively establish that the arrangements were made under that provision and failed to do so.

499 We do not accept that submission. The primary judge was entitled to make findings based on properly drawn inferences and in our view each of the matters to which his Honour had regard were relevant and together were sufficiently persuasive to justify the inference that was drawn. No other evidence positively undermined the basis for the inference.

500 The Respondents in their submissions point to a history of communications between Solar Shop and the ATO about instalment payments. The evidence of such history was clearly considered by his Honour. There were also previous instalment payment arrangements in place at various times. In any event the fact that there was a history of communications does not detract from the compelling evidence that from (relevantly) 14 January 2011, payment arrangements were made and formalised by the terms of the respective letters, letters that each followed a payment proposal made by Solar Shop.

501 Use by the ATO of the word “arrangement” in each of the four letters, the term used in s 255‑15, whilst not of itself decisive, is relevant and consistent with the Liquidators’ submission.

502 Further, the ATO letters each stated that “*[a]lthough your account is under an arrangement, GIC for late payment is continuing to accrue*”. The reference to GIC is a reference to a general interest charge. As is apparent from the note to s 255‑15 inserted in the statute, despite any permission to pay by instalments under a s 255‑15 arrangement, the GIC or any other relevant penalty continues to accrue from the date when the liability is due unless there is a variation under s 255‑10 or s 255‑20. The fact that the letters confirm that GIC continues to accrue despite the instalment arrangement is consistent with the arrangement being one made under s 255‑15. Those words are inconsistent with the position that would apply if, for example, there was a permitted deferment under s 255‑10 (see notes to that provision).

503 In our view the Liquidators therefore established to the standard required that the payment arrangements were made under and governed by s 255‑15 of Schedule 1 of the TA Act.

#### Meaning of “due and payable” for s 225-15

504 As a matter of construction, it is clear in our view that an arrangement made in accordance with s 225‑15 does not vary the time at which a liability to the Commissioner is due and payable. The arguments can be addressed by reference to four matters.

505 First, so much is apparent from the text of s 225‑15(2) itself. By contrast, both s 225‑10 and s 225‑20 grant to the Commissioner the discretion to change the time at which a payment becomes due and payable. Section 225‑10 permits a deferral of that time, whereas s 255‑20 permits the time to be brought forward. Each provision of Subdivision 255B therefore expressly addresses whether or not the Commissioner may vary the date upon which a taxation liability is due and payable.

506 It is therefore apparent that Subdivision 255‑B empowers the Commissioner to vary the times for payment depending on the particular circumstances. For example, it might be that where circumstances beyond the control of a taxpayer prevent payment the Commissioner might consider a deferral is appropriate. It might be that where a company is experiencing cash flow difficulties that prevent it from paying its debts on time the Commissioner might consider instalment payments rather than some other means of revenue collection. There is no reason on the face of the statute that an instalment arrangement should be taken to be a deferral, when it is apparent that the provisions permit different approaches by the Commissioner.

507 Secondly, it is apparent from the text of Subdivision 255-B that deferral of payment is a matter that requires some formality. For example, deferral under s 255‑10(1) must be done by written notice. Deferral under s 255‑10(2A) must be publicised by publication of a notice. In that context some caution would be required before inferring that a deferment has been permitted if any written communication does not clearly disclose a deferral.

508 Thirdly, contrary to the submission of the Respondents, we do not consider that the purpose of s 255‑15 is “to make clear that interest continues to run on an unpaid account”. The Respondents make this submission in support of their argument that “due and payable” in s 255‑15 has a narrow meaning which does not accord with the manner in which that expression is used in assessing insolvency under the Corporations Act.

509 It can be accepted that the note to s 255‑15 clarifies that its operation does not protect against interest accruing, but we do not consider the section is to be construed as having so narrow a purpose.

510 Section 255‑15 falls within Part 4.15 of Schedule 1. Section 250‑25 provides that the object of this Part is to ensure that unpaid amounts of tax-related liabilities and other related amounts are collected or recovered in a timely manner.

511 An arrangement under s 255‑15 of Schedule 1 also has other potential effects. For example, it provides protection against enforcement of directors’ obligations including by penalties under Division 269 of the TA Act: see s 269‑15(3) of the TA Act. It provides some discretion to the Commissioner as to the application of certain types of payments against liabilities despite the otherwise obligatory requirements of s 8AAZLA or s 8AAZLB of the TA Act: see s 8AAZL(3) of the TA Act.

512 Nor does such a narrow purpose sit with the policy published by the Commissioner that sets out its approach in considering and permitting taxpayers’ requests to pay by instalments. That policy includes reference to a large range of information to which the Commissioner may have regard, including the manner in which other creditors are being managed by the taxpayer: see, for example, Thawley J’s summary in *Stoljic v Deputy Commissioner of Taxation* [2018] FCA 483 at [40]‑[44].

513 It is therefore artificial to view s 225‑15 as a provision directed solely at preserving GIC payments.

514 Fourthly, the Respondents’ submission that “due and payable” has a particular meaning under s 255‑15 which is narrower than the usual meaning of those words in the context of the definition of solvency under s 95A of the Corporations Act is not supported. We have already rejected this submission to the extent it relies upon a purpose limited to preserving the GIC charge.

515 The description of debts as “due and payable” is used widely in the TA Act in the context of when a liability to pay tax accrues and when payment of that liability is due. We agree with the primary judge that the term “due and payable” is well known. Section 95A of the Corporations Act provides that “*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*”. Nothing in s 95A of the Corporations Act qualifies the meaning of the term. As is well recognised, part of the exercise required by s 95A in assessing solvency is a consideration of the terms of each relevant debt and whether it is due and payable at the relevant time the subject of consideration. Part of that consideration includes ascertaining and reviewing the contractual terms relevant to any obligation that arises under contract and a consideration of the relevant statutory terms where, as here, an obligation arises under statute. Section 255‑15 clearly informs the question of when a liability is due and payable where there is a payment arrangement, just as s 255‑10 informs the question of when a liability is due and payable where there has been a deferral granted by the Commissioner. There is nothing in that process that requires or suggests that “due and payable” in s 255‑15, or indeed Subdivision 255‑B of the TA Act, has any particular or confined meaning.

#### Any other basis to treat liability as deferred

516 The remaining submission raised by the Respondents is to the effect that even if the tax liability is due and payable on a particular date under s 255‑15(2), it should not be treated as such for the purpose of an assessment of solvency in accordance with s 95A and the cash flow test more generally, and so should not have been included in the Aide Memoire on the relevant respective dates. The basis for such submission rests on a range of matters best described as regard to commercial reality and hardship, and waiver.

517 One can well understand that directors of a company might find it incongruous that having secured an arrangement for payment by instalments they remain obliged to take the full liability into account when considering whether the company is able to pay all of its debts on a particular date. At least in the case of contractual debts some latitude in the time for payment might influence the question of whether a debt is due and payable at a certain time: *Lewis v Doran* at [106]. However, here we are concerned with a debt arising under statute and where the only relevant arrangement as to payment arises in accordance with statutory terms (that is, s 255‑15).

518 At this point it is appropriate to turn to the authorities relied upon by the primary judge.

519 In *Hall v Poolman*, Palmer J considered how a disputed tax debt was to be treated in assessing insolvency where the disputed debt was still subject to review. The Commissioner had issued assessments and the scheme of the tax legislation was such that the issue and service of the notice of assessment creates, upon expiry of the prescribed period for payment, a debt which is immediately due and payable (*Hall v Poolman* at [85]).

520 At [91] his Honour said:

… the decisive answer to the defendants’ appeal to ‘commercial reality’ in their submission that the Commissioner’s debt was not payable during the period is that the tax legislation clearly and unequivocally made that debt payable. If the legislature clearly says that a tax debt is payable at a certain time, neither the Court nor a company director can disregard that statutory imperative by an appeal to commercial reality. Absent an agreement by the commissioner to defer payment, it is not commercial reality to treat a present liability, statutorily imposed, as if it does not exist.

521 Palmer J considered a scenario where a review of an assessment might be ultimately successful, noting that unless and until that possibility occurred, the tax liability remained actual and not contingent (at [94]). His Honour noted that, especially where accounts are to be scrutinised by creditors and possibly the market, it may well be uncomfortable to disclose a present liability which cannot be paid and that it may create an event of default under lines of credit. However, his Honour described the treatment by the company and its auditors of the liability as not presently payable but as possibly payable in the future as inverting the true legal position, something that was not permissible, however convenient it may be. His Honour said that the scheme imposed of making tax debts immediately payable even though still subject to a review process reflects a “deliberate policy of the legislature” (at [96]‑[97]).

522 At [108] Palmer J repeated that a debt that is in law and in fact presently payable must be acknowledged as such in the company’s accounts unless something has been done effectively to defer payment.

523 At [110] Palmer J said:

If the company obtains either an agreed deferment of payment under s 255-10 [of Schedule 1 to the TA Act] or a stay of enforcement proceedings from the Court, obviously a director of the company may take that fact into account as a commercial reality in ascertaining the company’s present and projected cashflow position. But if the company obtains neither a deferment nor a stay, the director must take account of the fact that the debt, as a matter of law and commercial reality, is not a contingent liability and remains presently payable.

524 The primary judge also referred to *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* [2008] HCA 41; (2008) 237 CLR 473 (***Broadbeach***) at [53]‑[57]. This decision provides another example where the taxation legislation might appear to give rise to harsh results in an insolvency context, but can be seen as implementing a policy to protect the interests of the revenue. Despite ongoing challenges by review proceedings to debts that were the subject of statutory demands, the High Court held that such challenges were not grounds upon which the statutory demands could be set aside under s 459G of the Corporations Act. Under the relevant tax legislation the debts were due and payable upon assessment.

525 The High Court in *Broadbeach* noted that the Court of Appeal (published as *Neutral Bay Pty Ltd v Deputy Commissioner of Taxation* [2007] QCA 312) adopted an approach of looking to the reality that the claims remained the subject of review and considered it open to regard the debt as being the subject of genuine dispute. However the High Court referred to the long-standing recognition that although it might be thought to be a hardship that a taxpayer should have to pay the tax assessed when an objection has not been decided, it was not for the courts to narrow the operation of the statute by reference to business convenience or the like (Gummow ACJ, Heydon, Crennan and Kiefel JJ at [44]). It was not persuaded by the Court of Appeal’s reasoning that there was no indication in the legislation to the effect that a challenge to liability was to be ignored for all purposes in all proceedings which arise under other laws (see generally [53]‑[58]). The plurality rejected the idea that the regime was premised on a “fictional state of affairs”, saying that the source of the debt is to be found in the legislation dealing with assessments and that such debts have a special character under legislation - a special character that cannot be sidestepped by an application under s 459G.

526 Therefore, whilst addressing the question in the context of the statutory demand regime, the emphasis of the High Court on the primacy of the legislation that expressly creates a statutory debt and provides for its terms is useful in the resolution of the question before us.

527 In *Smith v Boné*, Gleeson J considered the date of insolvency of a company, Petrolink, that had entered into a series of arrangements by way of instalment payments with the Commissioner of Taxation. Her Honour referred to *Hall v Poolman* and the provisions of s 255‑15 (at [41]‑[42]) and referred during the course of her reasons to Petrolink’s tax debt remaining due and payable despite the payment arrangements that had been entered into (for example, at [166]). It is apparent that her Honour followed *Hall v Poolman*. In doing so her Honour rejected an argument advanced by the defendants to the effect that, had the Commissioner sought to enforce payment of the obligations prior to the conceded date of insolvency, the Commissioner would have been prevented from doing so by operation of an estoppel based upon, it is to be inferred, the instalment arrangements. Her Honour said (at [44]):

… No conduct on the part of the Commissioner could operate as an estoppel against the operation of the Act: *Federal Commissioner of Taxation v Wade* [1951] HCA 66; (1951) 84 CLR 105 at 117 (Kitto J); *Maritime Electric Co Ltd v. General Dairies Ltd* [1937] AC 610. More generally, no estoppel is effective against the operation of a statute: *Oamington Pty Ltd (Receiver & Manager Appointed) v Commissioner of Land Tax* (1997) 98 ATC 5051. See also *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 208ff.

528 The Respondents did not rely in their submissions on the operation of any estoppel. Rather, they asserted that “the preferable way” to view the effect of a s 255‑15 arrangement was that it comprised a waiver on the part of the Commissioner, relying on the judgment of Edelman J in *Hussain*.

529 In *Hussain*, the Court was assessing whether the taxpayer (FPJ Group) was insolvent as at 21 November 2013, being the date on which its PAYG liability was due and payable. On 26 November 2013 FPJ Group entered into a payment arrangement with the ATO. Edelman J stated that the arrangement did not preclude the PAYG debt being due in full on 21 November 2013. That finding was therefore consistent with the position in *Hall v Poolman* and *Smith v Boné*. His Honour also referred to the “ATO Practice Statement Law Administration” which informs taxpayers that, relevantly, an arrangement under s 255‑15 of Schedule 1 does not vary the time at which the amount is due and payable and that GIC begins to accrue from when the tax‑related liability is due and payable. His Honour continued at [119]:

FPJ Group might have had a reasonable expectation that it could reach a payment arrangement with the Australian Taxation Office. This expectation might have been based on the Practice Statement, but was more likely to be based on the conversations that Mr O’Toole had with the tax office. But a reasonable expectation is not a waiver of the obligation to pay the tax debt. Prior to, and on, 21 November 2013, FPJ Group’s tax had been due and payable on 21 November 2013.

530 As the primary judge correctly noted, Edelman J was considering only the proposition that the company may have expected that it could come to an arrangement as to payment with the Commissioner, and in effect was stating that such an expectation, without any agreement confirmed, would not assist the company. Edelman J did not address the effect of an agreement if it was in fact achieved.

531 Bearing in mind the attention that Palmer J paid to the question of a deferment or stay in *Hall v Poolman*, and the consideration of the alternative argument of estoppel in *Smith v Boné*, it would be surprising if Edelman J intended to provide that a waiver might operate by s 255‑15, without addressing those respective reasons. This would be particularly surprising because, as noted by the primary judge, Edelman J was aware of both decisions, having cited them elsewhere in his reasons, albeit in a different context. We do not accept that Edelman J’s statement should be taken as authority for the general proposition that a payment arrangement under s 255‑15 may operate as a waiver of an obligation to pay a tax debt.

532 The Respondents provided no other basis upon which a waiver might operate in the face of the express terms of s 255-15(2) and did not develop the argument beyond a reference to Edelman J’s reasons.

#### Conclusion as to purported deferral

533 In the end we are not persuaded that the primary judge was wrong in the determination of this issue. We also consider *Hall v Poolman* was correctly decided with respect to s 255‑15. We do not consider arguments based on commercial reality or waiver assist the Respondents.

534 We accept, as noted by Palmer J, that the approach in s 255‑15 reflects a deliberate legislative policy that regardless of entry into an arrangement, the debt remains due and payable. This is particularly clear where, in contrast, the surrounding provisions permit deferral of liability (s 255‑10 and s 255‑20).

535 We do not consider the fact that insolvency is to be determined for the purpose of or in accordance with the Corporations Act justifies any different result. Although the Court in both *Hall v Poolman* and *Broadbeach* considered the statutory liability under the tax legislation in the context of different provisions of the Corporations Act, it is relevant that those Corporations Act provisions related to insolvency.

536 Further, in both cases the Court referred to the perception that a result might be harsh in circumstances where there remains a pending review process as to disputed liability. Regardless, the Court found in those cases that potentially deleterious consequences, where there might ultimately be no liability at all, did not justify departure from a strict application of the statutory provisions.

537 We note that in both *Hall v Poolman* and *Broadbeach* the Court considered hardship in the context of a challenge to underlying liability. In this case, liability is accepted (at least for current purposes), and the alleged hardship relates to the consequences on an assessment of solvency where the debts are considered due and payable regardless of the conditional permission granted to pay the liability over time. We do not regard that distinction as justifying any different outcome. Hardship by way of threats to solvency or pressure upon cash flow might arise from treating a liability as due and owing when it might ultimately be found to be not owing (and hardship might arise even where such payment is later reversed), and similarly might arise from treating a debt as immediately due and payable although it might be paid over time.

538 Against the backdrop of our finding that the arrangement was entered into in accordance with s 255‑15 and having regard to the unequivocal nature of the statutorily imposed terms, we do not consider it open to contend that the conduct of the Commissioner in entering into a s 225‑15 arrangement without more comprises a representation that the debt will be treated differently than in accordance with s 255‑15(2) or that he or she will proceed differently in pursuing the debt. No waiver was established and the primary judge did not err in failing to make a finding to the contrary.

539 It follows that we would dismiss ground 5(a)(i) of the Respondents’ cross appeal. The primary judge did not err in taking into account the debt listed in the Aide Memoire as due and payable to the ATO of $365,887.02. It follows that for the same reasons we would also dismiss grounds 1(c) and 2(c) of the Respondents’ notices of contention, as addressed below.

540 The view we have reached does not deny the value to directors or a company of entry into a s 255‑15 arrangement. As already noted, there may be benefits conferred by statute in terms of a director’s personal liability or the application of funds against debts by the Commissioner. The existence of an instalment arrangement might also effect the exercise of the Commissioner’s discretion in deciding whether or not to pursue a winding up application. The directors of a company may also direct or arrange cash flow differently once the reality that the debt remains due and payable is understood.

541 Finally, we note that the Liquidators assert the conditions of the s 255‑15 arrangements were in any event breached, at least insofar as the dates of 30 April 2011 and 22 May 2011 are concerned. We have not had to consider this factual issue in order to determine the particular cross appeals and notices of contention ground.

### The Wuxi debt

542 The primary judge found that a trade debt of $1.199 million due to Wuxi was properly included in the analysis in the Aide Memoire as at 31 May 2011 (at [281]). We have set out above the manner in which the primary judge addressed the Wuxi debt and the contractual arrangements at that date (at [64]-[67] above).

543 The primary judge then accepted the figure of $4,849,577.59 as due and payable to Wuxi as at 31 July 2011.

544 The Respondents contend that having regard to the materials before the primary judge, error is disclosed in that:

(1) there were documents that reflected a “supportive commercial relationship”, being the documents referred to by the primary judge at [277] and [278] of his reasons, and also an internal spreadsheet with a May 2011 footer that referred to there being “no issues” with Wuxi; and

(2) an email of 18 August 2011 from Mr Thornton of Solar Shop to Ms Lu of Wuxi that reads:

As you are aware, Solar Shop has 2 payments due this week totalling approximately $4.5M. I would like to request that Suntech [Wuxi] extend those payment terms by 14 days immediately in order to allow us to continue our process of recapitalisation of the business.

…

545 We concur with his Honour that the documents to which he referred do not rise to evidencing any later agreement as to deferred payment terms. That finding implicitly extends to the position as at 31 July 2011. The internal spreadsheet does not assist. As to the 18 August email, it does not comprise evidence of an agreement effective as at 31 July 2011. There is insufficient information from which to properly infer that in the period prior to 31 July 2011 there was an agreed variation, the terms of such variation and whether Solar Shop had complied with any such variation. It does not evidence a later agreement and no error on the primary judge’s part is disclosed.

546 Having said that, we note that the examination of the contractual terms as between Wuxi and Solar Shop discloses one example of the difficulties created by the deficient discovery.

547 The Respondents refer to the 10 June Email that we have discussed with respect to discovery. The email lists various invoices and provides for a two month extension of payment. The email refers to the invoice for $1.199 million and states that it is due on 1 June 2011. The primary judge relied upon invoices. It is not clear to us that the email reflects a variation of the contractual time for payment or simply an error. Even if we were to take the 10 June Email into account we are not persuaded that the primary judge was wrong in his assessment of the position as at 31 May 2011 (this issue was raised orally as a notice of contention point - see [681] below).

548 However, the 10 June Email takes on more significance with respect to the cross appeal ground, which addresses the position as at 31 July 2011. It sets out a number of other invoices and provides for a two month extension for unpaid invoices. The Respondents contend that this previously undiscovered evidence should be taken into account and this Court should find that $4.7 million should be deducted from the liabilities due at 31 July 2011.

549 In support of this argument the Respondents also rely on a further email that was attached to the First Courtney Affidavit that discloses another email from Wuxi to Solar Shop that apparently was not discovered to SMA and Kerry J prior to the First Instance Proceedings, being the 27 July Email. This email repeats the two month extension for each invoice referred to in the 10 June Email (less the invoice that had been paid) but also includes a total for those invoices, being $4.766 million, and provides that payments are to be made from the period 18 August 2011 to 24 August 2011. On the face of the document none of those invoices were due for payment by 31 July 2011.

550 On the basis of the 10 June Email and the 27 July Email it can be seen that there may well be evidence, previously not disclosed to SMA, Kerry J or the Court, that might be highly relevant to assessing whether terms of payment with Wuxi were varied. However, we do not consider it appropriate to decide the factual issue of whether the emails constitute a variation of terms and the date that debts become due and payable in circumstances where it is apparent, and we have found, that the Liquidators’ discovery has been inadequate.

551 We would be in a position to make that factual finding only if we were satisfied that all relevant evidence was before us. The discovery dispute on this appeal has disclosed that there is known additional evidence. It is not appropriate for us to have regard to only those additional disclosed documents to make a factual finding in circumstance where we cannot be confident that further documents might not be disclosed if proper discovery were undertaken.

### The Kerry J debt

552 The primary judge considered the terms of trade with Kerry J when assessing solvency as at 31 May 2011. His Honour referred to Kerry J’s invoices that recorded that payment terms were “Net 30”. His Honour inferred that meant 30 days from the date of invoice, and noted a pattern of late payment of invoices. His Honour found that it was not open to infer any agreement, tacit or express, entitling Solar Shop to defer payment, and noted that as a party to the litigation, Kerry J was in a position to adduce evidence of any such arrangement and it did not do so (at [290]‑[291]). On that basis the amount of $181,484.09 due to Kerry J as at 31 May 2011 was properly included in the Aide Memoire analysis.

553 For the month ending 31 July 2011 the Aide Memoire included the amount of (rounded) $379,000 due to Kerry J. The primary judge included this figure in the amount of overdue trade creditors at that date and it can be inferred that there was no other evidence that established a deferment arrangement as at that date.

554 The Respondents submit that during the period January 2011 to April 2011 there were times when no amounts were outstanding to Kerry J, that all outstanding amounts were cleared by 9 August 2011, and that it is commercially unreal to have regard to the debt as at 31 July 2011.

555 The Respondents’ submission does not take into account that even if debts were reduced to zero, they were paid late. Nor does it change the fact that, as the Liquidators accurately recorded in their Aide Memoire analysis, as at 31 July 2011 the debt was due and the primary judge was entitled to take that into account. To ignore that debt for reasons of commercial reality would have the countervailing effect of ignoring that resources to meet that debt needed to be taken into account.

556 No error is disclosed in the primary judge’s finding.

### The Bosch debt

557 The primary judge considered the arrangements between Bosch and Solar Shop in some detail (at [244]‑[256]) for the purpose of the 31 May 2011 solvency assessment. Three issues were considered: the terms of trade; whether non-payment should be attributed to a dispute rather than an inability to pay; and whether a payment plan had been negotiated and complied with.

558 The primary judge found that, despite Solar Shop’s board having a subjective view that payment was due by 75 days, the contractual terms construed objectively established that the terms of trade were a 10% deposit and the balance within 60 days of shipment.

559 His Honour found that shipping dates were attended by insufficient certainty to find that the debt was due and payable by 30 April 2011, but that it was likely due by 16 May 2011.

560 His Honour rejected the contention that there was a genuine dispute between the parties as to indebtedness, finding that Solar Shop board documents relied upon by the Respondents indicated that Solar Shop’s customers were resistant to paying the prices for the Bosch modules and so it had decided to discontinue purchasing, did not need to secure ongoing supply and decided to “slow” payments.

561 His Honour also rejected the Respondents’ argument that there was a payment arrangement in place. For this contention, counsel relied on a letter from Bosch of 8 July 2011. By that letter, Bosch asserted that Solar Shop’s account of €1,557,406.92 had been overdue for 53 days (i.e. since 16 May 2011). The letter also referred to demands which Bosch had made for payment of its outstanding accounts by letters dated 31 May and 27 June 2011 and in telephone discussions on 24 and 27 June 2011. It then made an offer to resume possession of certain goods and offered a payment plan in respect of the other goods which it could not retrieve. The payment plan essentially involved monthly payments of €350,000 until the outstanding debt had been repaid in full. The offer was expressed to be open until 13 July 2011 and indicated that, in the event that the offer was not accepted, Bosch would take enforcement action. The letter specified that Solar Shop should indicate its acceptance of the offer by a signed acknowledgment. The evidence did not contain any such signed acknowledgement.

562 The Respondents relied on the fact that two payments in the sum of €350,000 were made by Solar Shop as indicating acceptance of the payment proposal. His Honour did not agree, finding such conduct in the context to be insufficient to establish an agreement. His Honour found that in any event, the debt had become due and payable by 22 May 2011 (prior to the 8 July letter).

563 The Respondents then assert the same argument as to the payment plan on the cross appeal. For the 31 July 2011 assessment the primary judge took into account a liability to Bosch of $2.444 million. The Respondents submit that by 8 July 2011 Solar Shop and Bosch had agreed a payment plan such that there would be payments of €350,000 per month on the 24th of each month until the debt was cleared. They refer to the two payments that they say were made in accordance with that plan, being on 2 August 2011 and 24 August 2011. We agree that there is insufficient evidence from which to infer a contractual deferred payment regime. There was no evidence that the offer was acknowledged as requested. The first payment upon which the Respondents rely was made on 2 August 2011 and so in any event not on a date consistent with the purported plan. Absent evidence that rises to the level of proof of a contractual deferred payment plan, we do not consider error is established on the primary judge’s part in his inclusion of the Bosch debt for the 31 July 2011 assessment.

### Access to cash and cash equivalents

564 We have considered the primary judge’s treatment of cash and cash equivalents as at 30 April 2011 and May 2011 in ground 4 (at [418]-[422] above). It appears that the amount of cash equivalents was negligible and the parties did not suggest that any particular regard should be paid to them.

565 As we have summarised, the primary judge’s reasons record that as at 30 April 2011 there was cash at bank of a little over $800,000 and the balance of a $1 million overdraft which had not been drawn (just under $490,000). His Honour found that it was not realistic to assume that anything more than a modest proportion of the cash and remaining overdraft was available to meet the outstanding debts. In doing so he took into account that employment expenses alone exceeded $1 million per month and that if available cash was used to meet the debts due and payable on 30 April it would have become insolvent in any event. We have rejected the Liquidators’ argument that his Honour erred in taking into account that modest proportion of cash and cash equivalents, an argument that had its basis in an alleged inconsistency with the primary judge’s conclusion as at May 2011 and 31 July 2011. For those dates his Honour concluded that cash and the undrawn overdraft should not be taken into account, noting again that if Solar Shop had used the funds to pay its outstanding debts it would have become immediately insolvent in any event.

566 As we have said, his Honour suggested only a “modest” amount should be taken into account as at April 2011 in any event, and whether it was or was not taken into account would not have made a material difference to the position as at April 2011.

567 The amount of the cash and cash equivalents listed in Solar Shop’s management accounts for 31 May 2011 was $1.421 million, comprised almost wholly of cash. The balance of the overdraft was only $281,000.

568 The amount of the cash and cash equivalents had decreased by 31 July 2011 to $984,000.

569 The Respondents contend on their cross appeals that the primary judge should have found that the $984,000 was available as an asset to meet debts.

570 The Respondents made only very brief submissions on this part of their cross appeal. Those submissions were that Solar Shop’s cash position was dynamic and that it was for the Liquidators to identify some proper reason why the cash should not have been considered as an available asset.

571 The Liquidators rely upon the reasoning of the primary judge as at May 2011: that is, having regard to Solar Shop’s obligations to meet employee entitlements (and, they add, other operational expenses) the cash resources should not be considered a resource available to meet the unpaid debts of Solar Shop.

572 In our view, it was appropriate that the primary judge exclude access to cash as a resource for payment of debts in the July 2011 solvency assessment. We do not accept that the Liquidators failed to meet their onus on this issue. There were company records before the Court which were available to the primary judge, including Solar Shop’s own documents, and it was not suggested there was a restriction on their use. Inferences could be drawn properly from such documents. Solar Shop was continuing to trade and it can properly be inferred that it could not do so if all cash were allocated to outstanding debts (the relevant principles are discussed further in the context of the limits on realisation of inventory below). It had obligations to employees and suppliers and had other operational expenses for as long as it continued to trade.

573 The Liquidators refer to employee expenses of some $1.653 million and operational expenses of some $1.413 million for June 2011 based on a July board pack. Counsel for SMA and the Liquidators referred in the course of their submissions as to RECs to a company-produced “Trading Update - July 2011 results”, apparently provided to Westpac. That document also indicates that there were employee expenses of some $1.644 million and operational expenses of $1.123 million for July 2011. These significant expenses, taken with the apparently declining levels of available cash between May 2011 and July 2011, provide in our view a proper foundation for inferring that Solar Shop was required to maintain access to its cash resources in order to carry on business, including its obligation to meet expenses of that nature. It could not sensibly utilise that cash to meet its outstanding debts.

574 We also note that the company was avoiding depletion of cash. The primary judge recorded, relevant to 31 July 2011, that the board was informed at its meeting on 19 July 2011 (reasons at [357]):

Cash continues to be constrained. We have lots of unhappy suppliers as we are squeezing payments for as long as possible in order to keep some cash in the bank.

575 We do not consider the primary judge erred in excluding cash and cash equivalents as a resource to meet Solar Shop’s then due and payable debts.

### Access to inventory

576 This cross appeal ground relates to the 31 January 2011 assessment. As at 31 July 2011 the Solar Shop management accounts recorded inventory of $20.666 million (reasons at [321]). His Honour excluded this inventory as a realisable asset in his assessment of solvency at that date for the same reasons it was excluded for the purpose of the assessment as at May 2011.

577 As at 31 May 2011 the Solar Shop management accounts recorded inventory of $26.591 million (reasons at [298]). The primary judge did not consider that resource to comprise a realisable asset. The failure to regard the inventory as a realisable asset is the subject of the Respondents’ notices of contention ground 2.

578 For the purpose of the 30 April 2011 assessment, his Honour did not expressly refer to inventory but, having referred to cash and cash equivalents, the trade receivables and the RECs receivables, said that the other assets in Solar Shop’s balance sheet could not reasonably be regarded as readily realisable (at [260]). The failure to have regard to inventory for this reason for the 30 April 2011 assessment is the subject of the Respondents’ notices of contention ground 1.

#### Primary judge’s reasons for 31 May 2011 assessment

579 The primary judge’s reasons with respect to inventory are brief, a result that seems to accord with the relative brevity with which inventory was dealt by the parties before him.

580 At [38] the primary judge noted that the biggest item in Solar Shop’s balance sheet as at 30 June 2011 was the asset of $24.473 million in inventories. His Honour said that “[it] is reasonable to infer (and I do) that this was a relatively illiquid form of asset”.

581 At [299] the primary judge stated:

The Defendants did not submit that the amount of inventories comprised a resource which was readily convertible to cash. It is in any event evident that [Solar Shop’s] management had been working diligently before 31 May to reduce and monetise the inventory where possible.

582 We have already addressed for the purpose of ground 1 of the appeal the principles to be applied in assessing solvency. It is clear from the primary judge’s reasons that for each of the relevant dates he considered in an orthodox manner the assets that might be available to meet then outstanding liabilities and considered whether and when they might be realisable. This is consistent with an application of the cash flow test and its focus on moneys that might be procured by the sale of assets that are readily realisable or realisable in the short term. His Honour cited *Hall v Poolman* as to the importance of an asset being realised within a time frame useful for meeting Solar Shop’s claimed indebtedness (at [305]). It is also clear that his Honour had regard to the necessity for Solar Shop to fund and continue day to day operations (this is apparent from, for example, [236], [266] and [315]).

#### Summary of submissions

583 The Respondents’ submissions on ground 5(a)(vii) of the cross appeal may be distilled as follows:

(1) the prima facie starting position was that inventory was an available resource. It was for the Liquidators to prove that the inventory was not an available resource from which Solar Shop could pay its creditors. They failed to do so and the Respondents did not bear any onus on the issue; and

(2) the primary judge should not have drawn an inference that the inventory was a relatively illiquid form of asset: the only available inference to be drawn from the evidence was that stock was an available resource which could be monetised to pay creditors, even if by fire sale.

584 The Liquidators contend in response that:

(1) they raised before the primary judge the relevance of determining whether there were sufficient liquid resources to bring outstanding debts back to terms and pay all debts as and when they fell due;

(2) there was sufficient evidence before the primary judge to justify the inferences regarding inventory that were drawn; and

(3) the conflicting inference referred to by the Respondents was not an inference that could be drawn to any sufficient degree of probability, having regard to matters including that any fire sale would not comprise a sale in the ordinary course of Solar Shop’s ordinary course of business and would have brought into play the provisions of the Westpac Charge (we note that the Respondents in reply sought to minimise their own reference to a fire sale as “oratorical”, but the submission was made and it was appropriate for the Liquidators to address it).

#### Consideration

585 In having regard to how the onus of proof might be met it is important to bear in mind that the Liquidators have no personal knowledge of events that occurred at the time relating to Solar Shop’s solvency and rather are left to ascertain its position based primarily on its books and records.

586 Whilst the Respondents criticise the Liquidators for failing to call witnesses in order to ascertain information as to the capacity to monetise or realise inventory, the Liquidators were not obliged to do so. It was open to the Liquidators to rely on a documentary case and the inferences that might properly be drawn from such documentary evidence, bearing in mind that the Court also had the benefit of the forensic reports by way of submission.

587 It is also well recognised that inferences might properly be drawn from certain indicia. For example, persistent late payment of debts often gives rise to the inference of insolvency, but the inference may be rebutted if there is evidence showing a reason for late payment, other than incapacity to pay: *Treloar Constructions Pty Ltd v McMillan* [2017] NSWCA 72 at [99]‑[100] (***Treloar Constructions***); *Stone v Melrose Cranes & Rigging Pty Ltd, in the matter of Cardinal Project Services Pty Ltd (in liq) (No 2)* [2018] FCA 530 at [162]; *Emanuel Management Pty Ltd v Foster’s Brewing Group Ltd* [2003] QSC 205 at [92].

588 In *Treloar Constructions* the New South Wales Court of Appeal considered the question of insolvency in the context of an expert report of Mr Palmer who approached the question of insolvency on the basis of the cash flow test. The primary judge considered that Mr Palmer’s report was seriously flawed because some of the assumptions he had made were incorrect and some of the tables and figures upon which he based his analysis were either wrong or unreliable. Treloar was the creditor seeking recovery of payment from Mr McMillan under s 588M(3) of the Corporations Act.

589 Their Honours considered whether there was an evidentiary onus on Mr McMillan to contradict Mr Palmer’s evidence. In relation to that issue their Honours said at [142]‑[143]:

The legal onus to prove insolvency at all times remained upon Treloar. That carried with it the evidentiary onus of proof sufficient to establish insolvency or at least to establish matters from which insolvency could be inferred at each of the relevant dates. We have referred above to the observations of Morrison JA in *Chan* that for financial support from a related financial entity to be relevant there is a need for cogent evidence establishing a degree of commitment from the related entity to the continuance of the financial support for the company whose solvency is in contention.

In this case, whilst there were deficiencies in the material available to Mr Palmer there were undoubted indicators of insolvency. There were a number of features of Mr Palmer’s report, which if not countered by evidence, were relevant to a determination as to whether McMillan Prestige was insolvent at each of the relevant times. To that extent, Mr McMillan bore an evidentiary onus to point to circumstances that would deprive Mr Palmer’s report of that relevance or at least make the matters to which he referred in the report an unsatisfactory basis upon which to determine insolvency.

590 Against that backdrop, there are various points to be addressed.

591 First, the Respondents argue that the primary judge wrongly reversed the onus of proof, reflected by the finding at [299] that they did not submit that the amount of inventories comprised a resource which was readily convertible to cash. However, the statement at [299] is to be viewed in the context of other submissions that were made by the Respondents as to available assets. SMA submitted in its written submissions in the First Instance Proceedings that as at each of January 2011, April 2011 and May 2011 the most liquid assets were the “cash and cash equivalent” and the “trade and other” receivables. His Honour’s statement highlights the contrast in the description of those “most liquid assets” as against other assets.

592 SMA included the inventory figures in its submissions (but without further detail) in the list of assets of Solar Shop at the relevant dates. At most, reference to the capacity to access inventories was subsumed within the Respondents’ general submission to the effect that the assets of Solar Shop were more than sufficient to meet the amounts identified in the Aide Memoire.

593 SMA accepted before us that it did not submit before the primary judge that the inventories were an asset available to meet Solar Shop’s liabilities. The Respondents argued they did not need to meet any onus with respect to the availability of inventory and so were not required to address that issue, and that (through SMA) they had stated before the primary judge that their contention was that the Liquidators had failed to meet their onus. The strategy of declining to comment further on inventory may also have been based on the Respondents’ position that Solar Shop was solvent without any need to have regard to inventory.

594 Rather than reversing the onus, it seems to us that the primary judge correctly looked to the factual matters from which he could draw inferences as to the status of inventory in circumstances where the Liquidators asserted that the inventory was not readily realisable and where the Respondents chose not to meet any evidential onus to counter the Liquidators’ position.

595 Secondly, it is appropriate then to consider the evidence to which the primary judge made express reference. His Honour referred (at [49]‑[51]) to the Second Ferrier Hodgson Report that identified that there were “further inventory management issues”; that there should an independent verification of current inventories; that an immediate injection of $5 million into the business was required; and that there was a key risk to the budget where there was a short term cash flow strategy heavily reliant on “a rundown of inventories” and sales and margin targets being met. One might have expected that if funding of $5 million was immediately required and inventory valued at many millions was readily realisable then the report would have said so.

596 As to the statement at [299] that Solar Shop management had been working diligently before 31 May to reduce and monetise inventory, that statement has its source in a document before the primary judge that was expressly referred to by the Respondents, being the May Investment Committee Update which stated that:

In FY11 YTD, and in particular over the last 60 days, management have done everything possible to improve the company’s cash position - including significantly reducing debtors days, monetising and reducing inventory, and stretching out creditor payments where possible. ...

597 His Honour refers to that document again (at [302]) and states that the figure at 31 May can be taken to have reflected management’s best efforts to secure payment from its debtors and to monetise inventory.

598 In our view, the course of drawing an inference based on the May Investment Committee Update was rationally available. The inference drawn was reasonable and sufficiently definite. If the task of monetising inventory was already underway by May 2011, then it was not resulting in realisations anywhere near the value of those assets recorded in the accounts. That task was apparently being carried out to the best of management’s ability, which suggests any market had been properly identified and steps had been taken to sell at least some part of it, bearing in mind that some would be required assuming Solar Shop intended to continue to trade. Presumably, had it been readily able to realise more inventory without jeopardising its continued trading or finance arrangements, then it would have done so. It can properly be inferred that the inventory was not readily realisable in amounts or for prices that would permit Solar Shop to pay its outstanding debts. The Respondents did not meet the evidential onus of rebutting the inference that could properly be drawn from that update.

599 Thirdly, SMA submitted before the primary judge that “there are ways to monetise this inventory, none of which has been taken into account”. The Respondents submit that the only inference to be drawn was that the inventory could be monetised to pay creditors, including by fire sale. Despite these submissions, the Respondents did not expand upon how the inventory might properly be monetised. To draw any such inference the Court would need to have regard to recognised limitations on any sale of inventory, including the need to retain inventory in order to continue trading and the terms of Solar Shop’s facilities with Westpac.

600 It is established that an excess of inventory over debts does not of itself deny an inference of insolvency. In *Rees v Bank of New South Wales* (1964) 111 CLR 210, Barwick CJ considered the extent to which trading stock could be taken into account for insolvency purposes. His Honour said at 218:

It is quite true that a trader, to remain solvent, does not need to have ready cash by him to cover his commitments as they fall for payment, and that in determining whether he can pay his debts as they become due regard must be had to his realizable assets. The extent to which their existence 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 in the case of a trader, the nature of his business. 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 realized except by means of retail sales through its various shops. It is possible, of course, in a business such as that of the company for excess stocks to be realized otherwise than through the channels of the company’s retail business: but … no proposal to realize 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. … The stock in trade was clearly not an asset which was available to be realized to meet current debts except in the ordinary course of the company’s business …

601 We note also the useful comments of Rangiah J in *Pearce v Gulmohar Pty Ltd* [2017] FCA 660 at [154], [265] and [266].

602 In this case, efforts to monetise had already been implemented by management doing “everything possible”. The evidence did not reveal whether it was usual for Solar Shop to retain excess inventory in case of additional orders or how much. It was not apparent from the evidence how much remaining inventory was surplus and could be readily sold. The evidence did not reveal whether Solar Shop might sell a block of surplus inventory and that such a sale might still fall within its ordinary course of business, or what proportion of inventory would comprise a block of such scale that its sale would fall outside the ordinary course of its ordinary business, requiring consideration of the position of Westpac as the secured creditor.

603 The Liquidators addressed the fire sale submission by noting that a sale of inventory other than in the ordinary course of Solar Shop’s ordinary business was precluded by cl 12.3 of the 2010 Facility Agreement.

604 We have already addressed the competing arguments as to the operation of cl 12.3 of the 2010 Facility Agreement for the purpose of ground 3 of the appeals and it is not necessary to address those arguments again in detail. It is sufficient in considering the nature of any inference that the Respondents assert may have been drawn about the capacity to sell inventory to note that:

(1) we do not accept that it should be inferred that the sale of inventory in any volume would clearly have been in the ordinary course of Solar Shop’s business;

(2) whilst we have already noted that it is unclear what block of inventory might have sensibly been sold within the ordinary course of business, the sale of a quantity of inventory in a short time frame sufficient to pay all unsecured creditors would not on its face appear to be in the ordinary course of Solar Shop’s business and would appear to be an unusual transaction;

(3) it is not to the point that the Liquidators did not point to the absence of consent on Westpac’s part to the sale of volumes of inventory that were not being used by way of usual installations - the question of consent never arose as the scenario was hypothetical;

(4) if the Respondents wished to assert that such a sale could have been pursued with the consent of Westpac, they assumed some evidential basis;

(5) although it might be inferred that Westpac did not oppose the sales of inventory that had been achieved by management’s best efforts and as referred to in the May Investment Committee Update, it could not safely be inferred that Westpac would consent to a sale of a large block of inventory;

(6) Kerry J’s argument that the inventory should be taken into account in assessing solvency because it was open to Solar Shop to sell its assets despite Westpac’s contractual rights ignores the ramifications for Solar Shop of a breach of the 2010 Facility Agreement. A sale in breach of the disposal undertaking had the potential, amongst other things, to crystallise enforcement of the Westpac charge, having regard to cl 14.1 (default) and cl 14.2 (consequences of default include the right to declare all money payable and enforce securities) of the 2010 Facility Agreement;

(7) Kerry J’s argument that a sale of inventory by Solar Shop to its online subsidiary Solar Hut for on-sale would not have offended the provision of the 2010 Facility Agreement can be given no real weight in circumstances where there is no disclosed plan by Solar Shop to transfer any block of inventory in that manner. Such a proposal appears speculative and it is by no means clear that the subsidiary would have been in a position to realise such inventory by way of a fire sale and not be in breach of its own facilities; and

(8) while the Respondents complain about the Liquidators raising the issue of the Westpac facility and charge in relation to inventory on the appeal, the issue fairly arises in response to the Respondents’ submission that the inventory could have been monetised even if by fire sale. The legal issue that arises is not new, having been addressed by the parties with respect to RECs.

605 Taking all of those matters into account, we would not have considered it appropriate to draw an inference that there should be an allowance for the realisation of inventory. Such an inference would have been based on speculation. It does not provide a basis for undermining the inference that was drawn by the primary judge.

606 Fourthly, there was other evidence before the primary judge that was consistent with the inference that the inventory was not readily realisable. For example, as already noted, the May Investment Committee Update listed a number of initiatives to reduce the cash deficiency, but those initiatives did not include inventory; in its June 2011 board pack Solar Shop referred to having identified excess stock in the business “which is deadweight which has inflated the stocks while never turning over”; a 17 August 2011 email (which included Solar Shop’s directors) stated that “there are no quick inventory wins, even the easier wins will take 2‑4 weeks to realise”.

607 Fifthly, the Respondents submit that it was inappropriate for the primary judge to accord weight to the statement in the May Investment Committee Update because the statement “is simply someone’s opinion in an investment committee report”. However, the document formed part of the evidence before the primary judge. It was tendered without restriction and therefore for all purposes, it was a document that recorded information from Solar Shop management and it was relied upon by the Respondents in their own submissions. For example, paras 157 and 177 of SMA’s closing submissions filed 15 December 2016 recite amongst others things the precise paragraph of the update in question. The May Investment Committee Update reflected management’s view and the Respondents did not inform the primary judge of why it should or should not be relied upon. In those circumstances there was no error in the primary judge relying on the content of the May Investment Committee Update.

608 Sixthly, we do not consider the result is different for the three identified dates. The key evidence is the May Investment Committee Update. It refers to the financial year 2011 but in particular the preceding 60 day period (and so includes April 2011) in terms of attempts to realise inventory. It is proximate to both the April 2011 and May 2011 dates. There is no reason to view the position differently for those dates.

609 The May Investment Committee Update remains persuasive as the basis for an inference as to whether inventory was realisable to meet Solar Shop’s debts as at 31 July 2011. Again, it is proximate and suggested that the best efforts to monetise inventory had already been undertaken.

610 The parties relied upon the same submissions as to inventory for the three relevant dates, save that the Respondents relied upon an additional factual matter for the assessment as at 31 July 2011. That matter was a fraud that had been discovered in the Sunsavers division that included the loss of inventory recorded at $79,859. It was submitted that this indicated there was a separate market for sale of inventory, as otherwise it would not have been stolen. Without more, that does not comprise a sound foundation for an inference as to a ready market for large quantities of relevant inventory. It is unclear how the alleged perpetrator, who was said to be closely involved in the industry and had knowledge of the installation of panels and converters, intended to dispose of the inventory, what would be involved in such disposal and whether it had been sold to rivals. The fraud does not shed sufficient doubt on the basis on which the primary judge drew the relevant inference as at May 2011.

#### Conclusion

611 We do not consider that error has been shown on the part of the primary judge in his treatment of inventory for the purpose of the 31 July 2011 solvency assessment, taking into account the evidence that was before his Honour. Nor do we consider his Honour erred in his treatment of inventory on the earlier dates of 30 April 2011 and 31 May 2011.

612 We interpose to note that, further to the Wuxi example referred to above at [546]-[551], the inventory issue discloses another example of the difficulties that arise from the inadequate discovery.

613 In the evidence relied upon in its interlocutory application, SMA identified some documents which had not been discovered in the First Instance Proceedings but which are relevant to the issue of the potential to monetise inventories.

614 For example, amongst the documents that comprise exhibits to the Second Courtney Affidavit is an email exchange of 6 and 7 September 2011 with the creditor, Fasteners, which refers to credit being provided for the return of stock. Within the bundle of documents that comprise exhibits to the affidavit of Mark Wilks filed on behalf of SMA on 21 September 2018 are the following documents which were contained within a bundle of 1,050 documents on a USB that was provided to SMA’s solicitors on 5 September 2018:

(1) an email exchange between Solar Shop and Michael Burns of Matrin on 31 August 2011 and 7 September 2011 referring to stock being redrawn by Matrin “to free up our outstanding balance with Matrin on overstocked loans” and stating:

Because of the change in our supply chain and the respective drop in eastern state sales we are in need to reduce our inventory and BOS holdings. I have been contacting all of our major suppliers to go through this same process as to help us through this current situation.

Please can you provide your thoughts on the following list of goods and crediting the invoice amount shown …;

(2) a further email exchange between Solar Shop and Matrin between 31 August 2011 and 7 September 2011 which indicates that Solar Shop was seeking to have Matrin withdraw stock accorded a value of some $130,220; and.

(3) two spreadsheets headed April 2011 to August 2011 which appear to have been produced by Matrin and which refer to Solar Shop stock being transferred to consignment stock.

615 The Respondents submit that such documents would have strengthened the Respondents’ case to the effect that the Liquidators did not prove that inventory could not be monetised. The documents, the Respondents submit, would suggest to the contrary that inventory could have been monetised in some way. They also submit that the documents suggest that, contrary to the primary judge’s finding, inventory had not been monetised to the extent possible as at each of the dates considered by the primary judge.

616 In response, the Liquidators submit that such documents would have made no difference to the outcome, having regard to the late date of the communications and the fact that receivers were appointed on 7 September 2011.

617 We have already found that there has been and is an ongoing failure to comply with the orders for discovery made in the First Instance Proceedings. In those circumstances the question of whether there is a real possibility that there would have been a different outcome as to treatment of inventory as a realisable asset had the Liquidators complied with their discovery obligations cannot be answered by considering only those documents identified by the Liquidators in the interlocutory application process.

### Value of the RECs receivables

618 The Respondents assert that the primary judge should have considered the full value of the RECs receivables listed on Solar Shop’s balance sheet as being available to it at 31 July 2011, rather than a reduced value.

619 This issue falls away in light in light of our determination of ground 3 of the appeals. It was not suggested that there was evidence relating to Westpac approval for realisation of RECs that might distinguish the position at 31 July 2011 as against at 30 April 2011 and 31 May 2011.

620 Regardless, we will address the argument.

621 The primary judge referred to the RECs assets recorded in Solar Shop’s management accounts as being available to meet debts. Those accounts included “RECs receivables CBA” of $3.645 million and “RECs receivables” of $10.131 million. His Honour noted that the price used for the RECs in the balance sheets is not clear but assumed it was based on an average of $36 whereas the spot price of RECs as at 31 July 2011 was $23. His Honour therefore reduced the RECs receivables figure to $6.47 million, leaving an aggregate total of $10.117 million.

622 The Respondents say that the reduction in the value of RECs had already been taken into account in Solar Shop’s accounts and it was impermissible to further reduce their value. First, they refer to a set of draft accounts for June 2011 that refer to RECs receivables of $10.137 million, and say that was not reduced by being marked to market. In summary, a “marked to market” reduction reflects a reduction from the cost price paid by Solar Shop to the prevailing spot price if sold. They then refer to Solar Shop’s final accounts for June 2011 and say that those accounts include a figure for July 2011 of $10.131 million and a draft figure for the end of the financial year of $6.21 million, the latter being a figure that they contend was reduced.

623 The Respondents refer to the following documents:

(1) on 26 July 2011 Solar Shop produced the Trading Update - June 2011 Results. The balance sheet includes as at June 2011 draft RECs receivables of $10.137 million. However, in the profit and loss statement there is an adjustment by way of reduction of $7 million with a note. The note to the profit and loss statement states:

The P&L provided shows an estimated mark to market RECs and Inventory adjustment, the final amount is yet to be confirmed.

(2) the July 2011 board pack includes in its profit and loss statement an adjustment of a $7 million reduction and a note that:

RECs Mark to Market estimated at $7 m final amt to be determined

(3) the Second Ferrier Hodgson Report of 19 July 2011 noted that adjustments would be required to management accounts for the financial year 2011 because “The group’s practice is to mark to market at 30 June each year following audit review”; and

(4) the Trading Update - July 2011 results refer to an actual figure of RECs receivables for July 2011 of $10.131 million, refer to a draft figure of $6.212 million for the 2011 financial year and refer by way of note to a large estimated write down in RECs for financial year 2011 “currently estimated at $6.8m”.

624 Whilst we agree with the primary judge that the position is not clear, we consider the documents provide sufficient support for the inference to be properly drawn that the RECs receivable figure of $10.131 million was the figure before any reduction by way of being marked to market. We say this because: it is apparent that nothing more than an estimate had been provided in terms of a reduction at the time the accounts were prepared and which was prior to any audit; it is reasonable to assume the actual figure listed for July 2011 in the July results is therefore exactly that - the actual cost price without deduction by way of estimate; and the notes consistently refer to the need to take into account a negative adjustment for marking the RECs to market.

625 Accordingly, we do not consider error has been established in the primary judge reasons to reduce the value of the potential RECs resource value from $10.131 million to $6.47 million.

### Inference that trade creditors outside terms

626 The primary judge noted the extent of debts due to trade creditors as reported in Solar Shop’s management accounts, a figure of some $20.17 million, which was substantially more than the total for the 14 trade creditors that had been selected by the Liquidators for the purpose of the analysis reflected in the Aide Memoire. His Honour considered it realistic to infer that several of those trade creditors were also outside terms, and relied upon a statement made to the Solar Shop board on 19 July 2011 which provided some confirmation of this. That statement has already been referred to by us. It is the statement that:

Cash continues to be constrained. We have lots of unhappy suppliers as we are squeezing payments for as long as possible in order to keep some cash in the bank.

627 The Respondents contend that the Liquidators made no reference to trade creditors other than the selected 14 and so it was unfair and prejudicial to the Respondents for the primary judge to then make a finding about those creditors.

628 Whilst the Aide Memoire analysis may have focussed on the 14 identified creditors, the accounts that were before the Court routinely disclosed the sums of all trade creditors, and the primary judge was not obliged to ignore the fact that there were other creditors. The Respondents relied on the same accounts in asserting the value of assets to which Solar Shop might have had regard to pay its debts as and when they fell due.

629 But more to the point, the primary judge’s inference was limited, referring to the prospect that only “several” other trade creditors may have been outside terms, and his view was supported by Solar Shop’s own statement about squeezed suppliers to which we have referred. Bearing in mind the nature of the inference drawn and its context, we do not consider the primary judge erred in his conclusion.

630 In any event, even if the primary judge erred in drawing such an inference, we do not consider it to be material to the outcome when viewed in the context of the 31 July 2011 solvency assessment as a whole. The primary judge appears to have referred to the position of other trade creditors by way of a check as to whether there were matters that might otherwise contradict his findings, rather than as any part of his cash flow analysis.

### Exclusion of potential funding from Harbert

631 The Respondents contend that the primary judge wrongly excluded funding from Harbert as being a resource available to Solar Shop as at 31 July 2011 because that funding was sufficiently certain to be considered an available resource and because the fundraising failed only later and due to the identification of an additional “cash deficit” in August 2011. They contend that deficit was not something known as at 31 July 2011 and that at that time all indications were that the Harbert funding would be available and significant steps were taken to advance that process during June and July 2011.

632 The submissions from the parties with respect to this aspect of the cross appeal were somewhat cursory.

633 Therefore, it is necessary to set out in some detail the primary judge’s reasons, which in our view indicate that the matter was given close consideration and his Honour’s findings were supported by the evidence.

634 The primary judge commenced by referring to the Solar Shop board meeting of 30 May 2011 at which the board had discussed potential financing options, including raising capital through Harbert. As we have noted, Mr Steele was the representative of Harbert on the Solar Shop board. The Investment Committee had significant information before it by way of the May Investment Committee Update, including the cash flow forecast that had been presented to Solar Shop’s board on 30 May 2011.

635 The primary judge recorded that on 17 June 2011 Harbert prepared a memorandum to its investors in which it referred to Solar Shop’s need for additional funding and indicated that it was committed to supporting the business. Harbert indicated that it was prepared to underwrite an investment shortfall but required a commitment to funding by 30 June. The memorandum stated that further support from Harbert was subject to “stabilising the relationship with Westpac and Solarise” to ensure the business has sufficient time to track through current issues.

636 The primary judge referred to the indication on 20 June 2011 that the Investment Committee was considering investing a further $5.05 million. These additional investments were contingent on satisfaction of a number of conditions including a successful capital raising among Harbert’s investors; Westpac’s agreement to increase the overdraft; the sale of RECs to another entity; and the finalisation of a further investment by Mr Ferraretto. In the end, however, none of those conditions were satisfied (although a sale of some RECs was achieved with the Commonwealth Bank of Australia).

637 On 29 June 2011 Harbert prepared another memorandum for its investors and contemplated a rights issue. None of Solar Shop’s existing shareholders agreed to participate by further investment and that position was known by 31 July 2011.

638 On 21 July 2011 Mr Steele of Harbert and Solar Shop wrote to Mr Mourney saying, relevantly, that money for investment in Solar Shop should be available in the next 10 days and that there was a “current cash hole”.

639 The primary judge noted that Harbert’s interest in providing a capital injection was confirmed by the fact that it obtained accounting and legal advice. His Honour also took into account that Harbert continued during July and August to pursue possible further investment but it never eventuated.

640 The primary judge made the following findings (at [346]): (a) during June and July 2011 Solar Shop had the prospect of additional funding from Harbert; (b) Harbert was willing to be a participant in arrangements for additional funding; but (c) by 31 July Harbert’s own conditions were still not satisfied including the raising of funds from its own investors. Therefore, the primary judge concluded that further investment by Harbert at 31 July 2011 was not sufficiently certain as a matter of commercial reality so as to constitute a resource properly to be considered in relation to Solar Shop’s solvency.

641 The primary judge also noted that the uncertainty of the position at 31 July 2011 was confirmed by evidence of events occurring shortly after that date. In particular, it is apparent that Harbert only received subscriptions from its own investors for an amount significantly less than its proposed funding.

642 It is apparent from those reasons that his Honour had regard to the fact that Harbert appeared to be genuine in its attempts to provide a capital injection to Solar Shop but that the conditions attached to the proposals were such that the success could not be considered sufficiently certain. It is also apparent that, contrary to the submission made by the Respondents, it was not the case that there was certainty until “the identification in August of an additional cash deficit”. Rather, taking into account the conditions attached, the evidence to which his Honour referred supported his finding that there were real issues as to the inability to secure member interest as at 31 July 2011 and so it was not sufficiently certain as at 31 July 2011 that Harbert would be in a position to provide the proposed investment in Solar Shop.

643 In our view the primary judge was right to find that, despite Harbert’s best intentions and efforts, there was insufficient certainty as at 31 July 2011 that funding would be available so as to justify treating it as a resource available to Solar Shop.

### Reliance on correspondence with Bosch, SMA and Mitsui

644 The primary judge noted that at 31 July 2011 Solar Shop was being harried by several of its creditors. His Honour referred to the demands by Bosch which have already been addressed in these reasons (at [563]). His Honour also referred to correspondence from SMA in which it stated that it would stop shipment on all orders if it did not receive payment of an overdue invoice the following day. His Honour also referred to correspondence from Mitsui indicating it would require advance payments on certain invoices and that it might delay future shipments due to concerns about Solar Shop’s cash flow.

645 The Respondents submit that the primary judge should not have made such a finding because a company is not insolvent if it chooses not to pay debts in circumstances in which it was otherwise able to do so. This submission was not developed in any way by the Respondents and the Liquidators did not respond to it in their submissions.

646 The Respondents did not point to evidence that Solar Shop was able to, but was choosing not to, pay Bosch, SMA or Mitsui. We have rejected the argument that the evidence supported a finding that there was a payment plan between Solar Shop and Bosch. Otherwise, it is sufficient to say that, even if there was some evidence (not specified on the appeals) that there were arrangements in place with SMA or Mitsui that explained the correspondence to which the primary judge referred, his Honour’s reference to other creditors harrying Solar Shop is supported by and consistent with the statement in Solar Shop’s own document to which we have already referred (part of the July 2011 board pack) that the company had lots of unhappy suppliers who were being squeezed.

647 We reject the Respondents’ argument on this point.

### Use of Mr Morris’ cash flow

648 The Respondents criticise the primary judge’s reference to the Morris report and cash flow analysis on the basis that it was received as submission only. We have dealt with this argument elsewhere and in the context of the Lombe Reports (cross appeals ground 2) and reject it. The Respondents had the opportunity to critique the report before the primary judge and it is apparent that they did so (see [361] of reasons]). The primary judge was entitled to have regard to the report.

### Use of the Lombe Reports

649 The Respondents criticise the primary judge’s reference to the Lombe Reports for the purpose of the July solvency assessment. We have explained why this criticism is unfounded in the context of our reasons dismissing grounds 1 and 2 of the cross appeals.

### Reference to the May Cash Flow

650 The primary judge referred to Solar Shop’s own analysis by way of the May Cash Flow that forecast a cash shortfall of $7.419 million. The May Cash Flow has been discussed for the purpose of grounds 1 and 3 of the appeals.

651 The Respondents’ submission on the cross appeals is that the forecast was merely a forecast and it should not be given significance for the purpose of assessing solvency as at 31 July 2011, particularly as forecasts done on other bases suggested the cash hole might be reduced over time to $4.9 million or $3.7 million. The Respondents refer to the May Investment Committee Update which, after setting out the May Cash Flow, sets out an adjusted cash flow that is premised on conditions such as a delay in payments to suppliers (including payments to Bosch of some $2.0 million) and estimates a cash hole of $4.9 million. It also sets out an adjusted cash flow for a scenario involving the deferral of payments to suppliers including Bosch and a sale of all RECs to an entity known as Diamond Energy, and estimates a cash hole of $3.7 million.

652 The primary judge was clearly aware of the forecast nature of the May Cash Flow. For the 31 July 2011 assessment his Honour was able to view the May Cash Flow and the alternatives cited by the Respondents and have regard to the developments in the intervening months. The sale of all RECs to Diamond Energy did not eventuate. His Honour was not satisfied that the debt to Bosch was deferred. His Honour found that there remained a substantial cash shortfall, even taking account of the sale of RECs (at [332]).

653 In our view, the Respondents’ implicit assumption that the primary judge treated the May Cash Flow as an account reflecting the actual position as at 31 July 2011 is misplaced. His Honour did not treat it as an actual management account rather than a forecast. However, having regard to the assumptions upon which the alternative cash flows were built, we do not consider the primary judge was wrong to have regard to the May Cash Flow. His Honour also found that Mr Morris’ cash flow analysis was generally supportive of the difficult position indicated by Solar Shop’s own analysis in the May Cash Flow.

654 It follows that we reject the Respondents’ submissions with respect to the primary judge’s reference to the May Cash Flow.

### Reference to the 17 August 2011 correspondence

655 We have touched on the 17 August 2011 email in the context of inventory above. The email from Mr Steele is part of a chain of emails with various other people within Harbert. It attached a memorandum of 16 August 2011.

656 In the email, Mr Steele describes Solar Shop’s position as follows:

With the 12 week forecast still showing us about $2.8 m short of cash (assuming the CBA deals are closed out and the $5m from Harbert goes in), this is not a supportable position. Management and Harbert are working on a number of options to rectify this through the 12 week period, but will need the support of suppliers to agree to the plan. If we can’t get their support for this in in the next day or so, then it is our view that the business is not solvent and we couldn’t recommend that Harbert invest the money.

657 The primary judge said that although the email is dated 17 August 2011 it is not realistic to consider that the position which Mr Steele was describing had developed only within the previous few days. The Respondents contend that the primary judge erred in considering that was the case. The Respondents submit that the subject of the email was a cash deficit that was only identified in August 2011 and there is no reason to think that the description also applied to July 2011.

658 Having reviewed the attachment, we note that it refers to a cash sheet received at the end of July. It then refers to an 11 August 2011 cash sheet that indicated a deterioration in Solar Shop’s forecast position. It noted that the previous (July) cash sheet had not been fully updated for changes that were being made to the budget for the financial year 2012. It referred to the provision of an updated cash sheet dated 14 August 2011. It then noted that there would be a deterioration at the end of October for reasons involving a reduction in the number of installations and a reduction in revenue per installation. It is possible that this is the “development” to which the Respondents refer. However, the submissions provided no further assistance and it is not for this Court to speculate as to the intent of the submission made by the Respondents. In a cross appeal where a large number of points have been raised by the Respondents, it was incumbent upon them to provide appropriate detail and assistance to the Court, particularly where the contention is based on factual matters of some detail.

659 The Respondents have not demonstrated error.

660 Furthermore, it is apparent from the extract cited by the primary judge that any error arising from having regard to the email would not be material in circumstances where the email foreshadows the importance of support from both Harbert and suppliers, matters that were clearly live and relevant to the assessment of solvency as at 31 July 2011.

### Conclusion on grounds 3, 4 and 5 of the cross appeals

661 We reiterate what we have said earlier and in particular at [210]. On that basis we would have dismissed grounds 3, 4 and 5 of the cross appeals.

### Overall conclusion on cross appeals

662 We have already explained why we would have dismissed grounds 1 and 2 of the cross appeals, and we have now also explained why we would have dismissed grounds 3, 4 and 5. We would, however, having regard to the discovery issues, allow ground 1A of the cross appeals.

# RESPONDENTS’ NOTICES OF CONTENTION

663 There is significant overlap in the matters raised by the Respondents in their identical notices of contention with the matters already addressed for the purpose of the appeals and cross appeals. Very little was provided by way of submissions addressing the notices of contentions, and in general the contentions are resolved by our earlier findings. Our reasons in this section are therefore brief.

664 Ground 3 of the Respondents’ notices of contention has been summarised and addressed in the reasons above dealing with ground 2 of the appeals and we would have dismissed it for the same reasons. It is therefore only necessary to summarise grounds 1 and 2.

665 The Respondents’ notices of contention address additional assets that it is said the primary judge should have taken into account and a liability to the ATO that it is said should have been excluded at the respective dates of 30 April 2011 and 22 May 2011 (nothing appears to rest on their reference to 22 May 2011 as against the date as at which the substantive May assessment was made, being 31 May 2011). The Respondents allege that if the assets were included and tax liability excluded the finding as to the insolvency of Solar Shop at those dates would have been bolstered.

666 More particularly, ground 1 contends that with respect to the assessment as at 30 April 2011, the primary judge should have included additional assets as being available to meet Solar Shop’s liabilities, being the whole of the company’s cash and cash equivalents, trade and other receivables, RECs receivables, inventories and other current assets. In the alternative it is argued that the primary judge should not have found that the Liquidators proved those assets were unavailable to meet Solar Shop’s liabilities. It is also contended that the primary judge should have excluded the liability to the ATO of $962,692.42 as being a liability that was due and payable on that date.

667 Ground 2 makes the same contentions but regarding the primary judge’s assessment of solvency as at 22 May 2011. The liability to the ATO that it is contended ought to be excluded from the calculations by that date was in the sum of $1,511,403.95.

### Other items said to be available/excluded as at 30 April 2011

#### Access to cash and cash equivalents/trade and other receivables

668 The position as to trade receivables and cash and cash equivalents as at 30 April 2011 has been addressed by our reasons relating to ground 4 of the appeals (see [418]-[422] above) and ground 5(a)(vi) of the cross appeals (see [564]-[567] above).

669 On the basis of those reasons, we do not consider there were grounds for the primary judge to find that any more than a modest proportion of the cash and remaining overdraft was available to meet the outstanding debts then due and payable.

670 His Honour properly had regard to the continued operation of the business of Solar Shop and the need to meet expenses such as the substantial employee expenses. If available cash was used to meet the debts due and payable on 30 April 2011 it would have become insolvent in any event.

671 The Respondents have not identified the “other receivables” or the basis upon which it is said they should have been considered as readily realisable assets.

#### Access to RECs receivables

672 The question of whether Solar Shop could utilise RECs receivables has been addressed by ground 3 of the appeals. The Westpac security documents prevented the sale of the RECs holding, or a substantial part thereof, outside of the ordinary course of business absent consent.

#### Access to inventory

673 The question of access to and realisation of inventory as at 30 April 2011 and 22 May 2011 is addressed with respect to ground 5(a)(vii) of the cross appeals. There it is addressed in the context of a relevant date of 31 July 2011, but the reasons also apply as at 30 April 2011 and 22 May 2011 and the parties did not submit otherwise.

#### Access to other current assets

674 The Respondents do not explain the basis upon which they say other assets should have been taken into account. The assets are not identified and no information is provided as to how they may have been realised. That they may have been available rises to nothing more than speculation in the context of a business that was continuing to trade.

#### Exclusion of tax liabilities

675 The issue as to whether tax liabilities were due and payable (whether at 30 April 2011, 22 May 2011 or 31 July 2011) is addressed in the context of ground 5(a)(i) of the cross appeals. Contrary to the Respondents’ argument, it was not appropriate that those liabilities be excluded as debts due and payable on the given dates for the reasons given above.

### Other items said to be available/excluded as at 22 May 2011

#### Cash and cash equivalents/trade and other receivables

676 The question of whether the primary judge ought to have found that as at 22 May (or 31 May 2011) Solar Shop could have utilised cash resources to meet its unpaid debts has also been dealt with as part of ground 4 of the appeals (see [418]-[422] above) and by ground 5(a)(vi) of the cross appeals (see [564]-[567] above). We rely upon those findings in rejecting that contention.

677 As to trade receivables, the primary judge had additional evidence that by 22 May 2011 Solar Shop was doing everything it could to realise the trade receivables and on that basis his Honour did not take them into account in assessing Solar Shop’s solvency at that date. We repeat our reasons referred to at [420]-[422] above.

678 The Respondents have not identified the “other receivables” or the basis upon which it is said they should have been considered as readily realisable assets.

#### Access to RECs receivables

679 The question of whether Solar Shop could utilise RECs receivables as at 22 May 2011 has been addressed by ground 3 of the appeals.

#### Other current assets

680 Again the Respondents do not explain the basis upon which they say other assets should have been taken into account. The assets are not identified and no information is provided as to how they may have been realised. Again, the Westpac security documents prevented the sale of the RECs holding, or a substantial part thereof, outside of the ordinary course of business absent consent.

#### Reduction of Wuxi liability

681 In oral submissions, counsel for SMA submitted that as a result of the additional discovery the Wuxi level of indebtedness should be reduced and described this as a notice of contention point. However, on the basis that we are determining these questions without regard to the discovery position, the evidence reflects that the Wuxi debt as accounted for was due and payable at 22 May 2011 and was correctly included in the analysis for the Aide Memoire.

### Conclusion on Respondents’ notices of contention

682 We do not consider that the Respondents have demonstrated that the matters contended for are established on the basis of the materials that were before the primary judge and we would have dismissed their notices of contention.

683 We said in our conclusion with respect to ground 3 of the appeals (at [392] above) that ground 3 would have succeeded, as absent a counter-balancing item being upheld on the notices of contention, it would appear that Solar Shop was insolvent as at 30 April 2011 and as at 31 May 2011. As is apparent from our reasons, we are not satisfied that there is any such counter‑balancing item established by the notices of contention.

# THE LIQUIDATORS’ NOTICE OF CONTENTION

684 In a notice of contention in the cross appeals, the Liquidators allege that the primary judge’s finding that Solar Shop was insolvent as at 31 July 2011 can be upheld on grounds other than grounds relied on by him. They allege that his Honour erred in his calculation of the value of RECs available to Solar Shop as at 31 July 2011. The primary judge had aggregated “RECs receivables” (adjusted to $6.47 million) and “RECs receivables CBA” ($3.645 million) and that involved (so the Liquidators contended) double-counting because the RECs transferred to the Commonwealth Bank of Australia (figure were still accounted for in the “RECs receivable” figure. Therefore, on the argument, the true comparison was between adjusted overdraft account less stated debts of $8.365 million and $6.47 million for RECs and not $10.117 million for RECs.

685 For the reasons given with respect to the cross appeals, and leaving aside the discovery issue, we would not have disturbed his Honour's finding as to the assessment that Solar Shop was insolvent as at 31 July 2011. Therefore it is not necessary to consider this ground of contention. In any event, it is not apparent to us that the primary judge was taken to relevant evidence or that the calculations for which the Liquidators contend were properly exposed before his Honour, and therefore it is not surprising that his Honour did not make findings of the nature now pursued by the Liquidators. The identification of the relevant figures and suggested calculations were matters of some complexity when explained before us.

686 It is appropriate that the Liquidators' notice of contention be dismissed.

# DISPOSITION

687 For the reasons given we have concluded that the appeals are to be dismissed, the notices of contention are to be dismissed and the cross appeals are to be allowed on the basis that there is to be a remittal to the primary judge or another judge for determination of the question of Solar Shop's solvency as at 31 July 2011.

688 We will invite submissions from the parties as to costs.

|  |
| --- |
| I certify that the preceding six hundred and eighty-eight (688) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Besanko, Markovic and Banks-Smith. |

Associate:

Dated: 7 February 2020