FEDERAL COURT OF AUSTRALIA

Sev.en Gamma a.s. v IG Power (Callide) Pty Ltd (Administrators Appointed) [2024] FCA 30

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| File number: |  |
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| Judgment of: | **DERRINGTON J** |
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| Date of judgment: | 29 January 2024 |
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| Catchwords: | **CORPORATIONS** – company in administration – whether leave to commence proceedings should be granted *nunc pro tunc* under s 440D(1)(b) of the *Corporations Act 2001* (Cth) – where proceedings are not brought to assert an antecedent right against the company or the property – where proceedings are for specific relief that does not target or diminish the company’s assets – leave granted**CORPORATIONS** – standing under s 447A(4) of the *Corporations Act* *2001* (Cth) – whether plaintiff is an “other interested person” under s 447A(4)(f) – where plaintiff holds economic interest in company derived from sequential shareholdings – where plaintiff also holds economic interest as a creditor of one of its subsidiaries which is a substantial creditor of the company – each interest sufficient to accord plaintiff standing**CORPORATIONS** – application for appointment of special purpose administrators under s 447A(1) of the *Corporations Act* *2001* (Cth) – where company has potential valuable claims which do not appear to have been adequately investigated – whether special purpose administrators should be appointed to conduct investigations into those claims – whether appointment of special purpose administrators is appropriate – where company has been in administration for ten months – where company’s potential claims are at risk of being undervalued or lost – where claims are significant to determination to be made by the creditors – special purpose administrators appointed |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth)*Competition and Consumer Act 2010* (Cth)*Corporations Act 2001* (Cth)*Evidence Act 1995* (Cth)*Insolvency Practice Rules (Corporations) 2016* (Cth) |
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| Cases cited: | *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement) (No 4)* [2019] FCA 1846*Adelaide Brighton Cement Ltd v Concrete Supply Pty Ltd (subject to deed of company arrangement)* (2018) 124 ACSR 389*Allatech Pty Ltd v Construction Management Group Pty Ltd* (2002) 41 ACSR 587*Apollo Shower Screens Pty Ltd v Building & Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561*Attard v James Legal Pty Ltd* (2010) 80 ACSR 585*Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1*Australian Securities and Investments Commission v Marco (No 5)* [2020] FCA 1512*BE Australia WD Pty Ltd v Sutton* (2011) 82 NSWLR 336*Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969*Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612*Britax Childcare Pty Ltd v Infa Products Pty Ltd* (2016) 115 ACSR 322*Clean Energy Regulator v E Connect Solar & Electrical Pty Ltd* [2023] FCA 1082*Commonwealth of Australia (Department of Education, Skills and Employment) v Phoenix Institute of Australia Pty Ltd (in liq)* [2020] FCA 937*Easey v Grosvenor Constructions (NSW) Pty Ltd* (2005) 54 ACSR 820*GDK Projects Pty Ltd, in the matter of Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541*Habrok (Dalgaranga) Pty Ltd v Gascoyne Resources Ltd* (2020) 149 ACSR 1*Hill v Esplanade Wollongong Pty Ltd ACN 141 133 708 (subject to a deed of company arrangement)* [2018] NSWSC 478*Hopkins v AECOM Australia Pty Ltd* (2012) 91 ACSR 391*In the matter of ACN 004 410 883 Ltd (formerly Arrium Limited) (in liq)* [2023] NSWSC 461*J F Keir Pty Ltd v Priority Management Systems Pty Ltd (admin apptd)* [2007] NSWSC 748*Jahani, in the matter of Northern Energy Corporation Ltd (Administrators Appointed) (No 2)* [2019] FCA 382*Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 285 ALR 207*Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126*Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd (No 2)* (2011) 82 ACSR 300*Medtel Pty Ltd v Courtney* (2003) 130 FCR 182*Meehan v Stockmans Australian Cafe (Holdings) Pty Ltd* (1996) 22 ACSR 123*Mehan v Arrium Ltd (Formerly Onesteel Ltd)* [2016] NSWSC 1680*Melhelm Pty Ltd v Boka Beverages Pty Ltd* *(in liq)* (2019) 138 ACSR 95*MXJ v Company X (admin apptd)* [2023] VSC 42*Northwalker Realty Pty Ltd v TFM Chatswood Land Pty Ltd* [2022] NSWSC 1407*Public Trustee (Qld) v Octaviar Ltd* [2009] QSC 202*Pybar Mining Services Pty Ltd v Challenger Gold Operations Pty Ltd* [2018] SASC 156*Re Diamond Press Australia Pty Ltd* [2001] NSWSC 313*Re Nillumbik Community Church Incorporated (In Administration)* [2010] VSC 136*Re Senvion GmbH (No 2)* (2019) 140 ACSR 20*Re Windows on the World Steel Windows Pty Ltd (In Administration)* [2020] VSC 880*Rialto Sports Pty Limited v Cancer Care Associates Pty Limited; CCA Estates Pty Limited; Davjul Holdings Pty Limited; Armmam Pty Limited (No 2)* [2023] NSWCA 246*Sanders v Probuild Constructions (Aust) Pty Ltd* [2023] WASC 317*Sev.en Gamma a.s v IG Energy Holdings (Australia) Pty Ltd* [2023] NSWSC 1032*Shangri-La Construction Pty Ltd v GVE Hampton Pty Ltd (in liq)* (2021) 152 ACSR 19*Sparks (Administrator), in the matter of IG Energy Holdings (Australia) Pty Ltd (Administrators Appointed)* [2023] FCA 403*Sparks, in the matter of IG Energy Holdings (Australia) Pty Ltd (No 3)* [2023] FCA 1002*Sparks, in the matter of IG Energy Holdings (Australia) Pty Ltd* [2023] FCA 538*Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344*Toll Holdings Ltd v Stewart* (2016) 338 ALR 602*Tucker as joint and several administrator of Allegiance Mining Pty Ltd (Recs and Mgrs Apptd) (Subject to Deed of Company Arrangement) v Su* [2022] WASC 178*Vautin v BY Winddown, Inc (formerly Bertram Yachts) (No 4)* (2018) 362 ALR 702*Viterra Malt Pty Ltd v Cargill Australia Ltd* [2023] VSCA 157*Zervas v Burkitt* [2019] NSWCA 112 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Date of hearing: | 22 – 23 January 2024  |
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| Counsel for the Plaintiff: | Mr C Withers SC with Mr M Gvozdenovic |
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| Solicitor for the Plaintiff: | Quinn Emanuel Urquhart & Sullivan |
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| Counsel for the Defendants: | Mr SK Dharmananda SC with Mr CEA Hibbard |
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| Solicitor for the Defendants: | Gilbert + Tobin |

ORDERS

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|  | QUD 541 of 2023 |
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| BETWEEN: | SEV.EN GAMMA A.S.Plaintiff |
| AND: | IG POWER (CALLIDE) LTD (ADMINISTRATORS APPOINTED) ACN 082 413 885First DefendantRICHARD J HUGHES IN HIS CAPACITY AS JOINT AND SEVERAL ADMINISTRATOR OF IG POWER (CALLIDE) PTY LTD (ADMINISTRATORS APPOINTED) ACN 082 413 885Second DefendantGRANT D SPARKS IN HIS CAPACITY AS JOINT AND SEVERAL ADMINISTRATOR OF IG POWER (CALLIDE) PTY LTD (ADMINISTRATORS APPOINTED) ACN 082 413 885Third Defendant |

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| order made by: | DERRINGTON J |
| DATE OF ORDER: | 29 January 2024 |

THE COURT ORDERS THAT:

1. Pursuant to s 440D(1)(b) of the *Corporations Act 2001* (Cth) (the Act), the plaintiff be granted leave, *nunc pro tunc*, to begin these proceedings.

2. Pursuant to s 447A of the Act, John Richard Park and Benjamin Peter Campbell of FTI Consulting be appointed as additional administrators of the first defendant (the Special Purpose Administrators).

3. Pursuant to s 447A of the Act, the Special Purpose Administrators appointed under Order 2 be empowered to carry out the functions specified in Annexure A to these Orders.

4. The Special Purpose Administrators be entitled to exercise, solely for the purposes of carrying out the functions specified in Annexure A to these Orders, all the powers conferred on an administrator by s 437A and Div 8 of Pt 5.3A of the Act.

5. Pursuant to s 447A of the Act, the second and third defendants (in their capacity as primary administrators of the first defendant):

(a) subject to these Orders, must refrain from exercising any of the powers of the Special Purpose Administrators specified in Annexure A to these Orders, except with the prior written consent of the Special Purpose Administrators or by leave of the Court; and

(b) must use their reasonable endeavours to assist the Special Purpose Administrators to exercise the powers given to them by Order 4, including by providing documents or information previously prepared or obtained by them in investigating or pursing any claim in relation to the matters set out in Annexure A to these Orders.

6. Pursuant to s 447A of the Act, ss 443D – 443F of the Act do not apply in the appointment of the Special Purpose Administrators and the Special Purpose Administrators:

(a) are not entitled to be indemnified out of the first defendant’s property; and

(b) do not have a lien over the first defendant’s property.

7. The Special Purpose Administrators and the parties have leave to apply to the Court for any further or other order or other relief to which they might be entitled arising from the reasons for judgment delivered herewith.

8. Despite the content of Annexure A to these Orders:

(a) nothing therein prevents the second and third defendants from making an application to the Court to extend the period for convening the second meeting of the creditors of the first defendant; and

(b) the Special Purpose Administrators must give to the second and third defendants:

(i) copies of any reports that they produce in relation to any investigations undertaken in relation to the matters referred to in Annexure A;

(ii) written advice as to the progress of any investigations being undertaken as is reasonable requested by the second and third defendants.

9. The parties are to be heard on the question of costs.

10. The parties have liberty to apply.

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

**Annexure A**

1. Conduct investigations into the cause or causes of the two catastrophic incidents at the Callide C power station, specifically, the explosion of the unit C4 turbine on 25 May 2021 and the partial collapse of the unit C3 cooling tower on or around 31 October 2022 (the **Incidents**), and any claims available to the first defendant against any party arising out of, relating to or in any way connected with the Incidents.

2. Prepare, make an application for, and conduct with the assistance of legal representatives of their choosing, such examinations under ss 596A and 596B of the Act and obtain such orders for production pursuant to s 579(9) of the Act as are necessary or desirable for the purposes of the investigations referred to herein.

3. Engage a suitably qualified technical expert or experts to assess the cause or causes of the Incidents to the extent that it is necessary or desirable to do so for the purposes of the investigations referred to herein.

4. Give consideration to the claims available to the first defendant or its administrators in relation to the Incidents arising from the investigations and examinations referred to in this Annexure, and from examination of the books and records of the first defendant, including obtaining and considering legal advice in respect of any such claims.

5. Commence and prosecute any legal proceedings in the name of the first defendant or as administrator of the first defendant arising from the investigations and examinations referred to herein, and from the examination of the books and records of the first defendant.

6. Commence and/or defend any legal proceedings in the name of the first defendant or as administrator of the first defendant that concern a third party seeking to acquire IGPC’s Interest in the joint venture, as that term is defined in the Joint Venture Agreement dated 11 May 1998.

7. Take possession of such books and records of the first defendant as the Special Purpose Administrators deem necessary for the purpose of the investigations and examinations referred to herein, subject to the proviso that the Special Purpose Administrators will provide the second and third defendants all reasonable access to those books and records and the second and third defendants are permitted to make such copies of them as they see fit.

8. Undertake such further or other matters in relation to the administration and affairs of the first defendant as the Court considers appropriate and so orders. This includes, for the avoidance of doubt, making an application to extend the administration of the first defendant.

9. Make an application pursuant to ss 442A and/or 447A of the Act, and/or s 90-15 of Sch 2 to the Act, that they be justified in executing, on their own behalf as Special Purpose Administrators and on behalf of the first defendant, a funding and indemnity deed.

REASONS FOR JUDGMENT

DERRINGTON J:

## Introduction

1 The Callide Power Station, located at Biloela, is one of Queensland’s major power stations. It is a coal-powered electricity generator comprised of two power plants, Callide B and Callide C, each of which has two generating units. At Callide C, those units are referred to as units C3 and C4. On 25 May 2021, the turbine of unit C4 suffered a kinetic disintegration that resulted in an explosion. Following that, unit C4 went offline and ceased exporting power to the grid. It has remained offline since. About 18 months later, on 31 October 2022, part of the unit C3 cooling tower suffered a significant structural failure. As a result, it went offline as well. It also has not yet resumed electricity production.

2 Callide C is operated by an unincorporated joint venture between the first defendant, IG Power (Callide) Ltd (IGPC), and Callide Energy Pty Ltd (CEPL). CEPL is wholly owned by CS Energy Limited (CSEL), which is ultimately owned by the Queensland Government. Pursuant to a Joint Venture Agreement dated 11 May 1998 (as amended over time), IGPC and CEPL each had a 50% interest in the business operations. Needless to say, the cessation of the two power units has caused substantial loss to both.

3 The plaintiff, Sev.en Gamma a.s. (which, for convenience, will be referred to as Sev.en), has an economic interest in IGPC, albeit one derived from sequential shareholdings through a number of companies. Broadly speaking, it has a 25% economic interest in IGPC. It also has an economic interest as a creditor of one of its subsidiaries which is, in turn, a substantial creditor of IGPC. There was no dispute between the parties that Sev.en held these interests, though a question was raised as to whether they were sufficient to accord Sev.en standing to make the present application.

4 By this application, Sev.en seeks the appointment of special purpose administrators pursuant to s 447A of the *Corporations Act 2001* (Cth) (the Act) to conduct investigations into the failures at the Callide C plant. At the epicentre of Sev.en’s application is the somewhat unsurprising proposition that, in the ordinary course of events, one would not have expected the catastrophic failures of units C3 and C4 to have occurred but for some negligent or inappropriate maintenance or operational control. Relevantly, at the material times, CSEL was contracted as the “Operator” of Callide C. By its contract, referred to as the “Operation and Maintenance Agreement”, it had responsibility for the operation, maintenance and repair of the Callide C units. Its obligations under its contract of engagement were what one might expect for such an important piece of infrastructure. There is a not unreasonable inference that CSEL, as the entity having the management and control of the units, may have breached its contractual obligations or common law duties, and those breaches may have been, in some way, causative of the two units going offline.

5 It must be stressed that it is far from certain that CSEL bears any responsibility for the damage to the units, or the loss of generation and any subsequent economic loss suffered by the joint venture participants. That is a matter to be determined, if at all, in the future. Nevertheless, for present purposes, it is possible to draw an inference that failures of the kind that ultimately took place are unlikely to have occurred, in the ordinary course, to power generating units that were properly maintained and operated.

6 Sev.en is naturally interested in ascertaining whether IGPC is entitled to recover damages from CSEL in respect of the losses that have occurred consequent upon the failures of units C3 and C4.

7 Whether such claims exist is particularly important, as IGPC has now been placed into administration and any such claims will add to its value should the company, its business or its assets be sold pursuant to a deed of company arrangement (DOCA). More significantly, CEPL has sought to enforce its right under the Joint Venture Agreement to acquire ICPC’s interest. Again, the value of any claim against CSEL will or may be relevant to the price at which IGPC’s interest is transferred.

8 Necessarily, ascertaining whether such claims exist will involve identifying the cause of the incidents that occurred in relation to units C3 and C4 and determining whether any party, such as CSEL, has any legal liability for their occurrence. Further, the valuation of any such claims necessitates some investigation into the possibility of recovery and any impediments thereto.

9 Sev.en alleges that IGPC’s administrators have failed to perform their statutory obligations to investigate the cause of the two catastrophic failures and the existence of any claims against CSEL. In particular, it is concerned that those administrators have been funded by CEPL whose parent company, CSEL, is obviously the potential defendant for any claim.

10 Sev.en also asserts that the consequences of the administrators’ failure to investigate to date are compounded by CEPL’s assertion of its claimed right to acquire compulsorily IGPC’s “Interest” in the joint venture. On 30 May 2023 or 1 June 2023, CEPL gave notice that it was exercising its right to acquire that Interest. Upon receipt of that notice, the administrators of IGPC engaged valuers to undertake a valuation. The value that they derive is to be used as the price in the compulsory acquisition process, which is now drawing to completion, and Sev.en is concerned both that the administrators have capitulated to CEPL’s assertion of a right to acquire IGPC’s interest and that the administrators’ failure to investigate IGPC’s claims against CSEL will result in IGPC’s Interest being transferred at an undervalue.

11 The administrators have indicated that they expect to conclude their investigation into any potential claims available to IGPC by the time that they issue their statutory report to creditors, which is intended to be released on 23 February 2024. It was submitted by Sev.en that this was a startling revelation, given that the administrators have failed to use their statutory powers to investigate the causes of the catastrophic incidents and thus to identify and assess the value of any potential claims that IGPC may have.

12 It is in these circumstances that Sev.en seeks the appointment of special purpose administrators who are to be tasked with investigating the causes of the failures of units C3 and C4, as well as any claims that IGPC may have arising out of or relating to those incidents. By this relief, it seeks to remedy what it says was the current administrators’ failure to perform their duties.

13 The matter was brought before the Court on an urgent basis, and it was necessary for it to be determined with some haste:  evidently, if it was found to be appropriate to appoint special purpose administrators, then any delay in doing so would tend to imperil the assets of IGPC and, necessarily, its creditors. The production of these reasons has been expedited and, accordingly, they are issued subject to correction and revision.

## Leave to proceed

14 Sev.en requires leave to proceed pursuant to s 440D(1)(b) of the Act. As it has already commenced the action, that leave must be granted, if at all, *nunc pro tunc*.

15 Ultimately, there is no basis upon which to refuse the application for leave. The present action is brought to correct what is seen to be some delinquency in the administrators’ conduct. It is not brought to assert an antecedent right against the company or its property, which would hinder the due process of administration, involve the administrators in complex litigation, or amount to an attempt to circumvent the administration process.

16 Where circumstances exist that demonstrate that the administrators, who are tasked with performing the duties imposed by Pt 5.3A of the Act, are failing to meet the required standards, it is for the benefit of all creditors that an application be made to ensure that the statutory process is fulfilled. This is such a case and, as the discussion that follows shows, the application is well founded. Further, the action is for specific relief, which does not involve the targeting or diminution of IGPC’s assets.

17 It follows that the present application is an archetypical instance in which leave to proceed should be granted.

18 At the hearing, counsel for the defendants placed reliance on the recent decision of Gleeson JA in *Rialto Sports Pty Limited v Cancer Care Associates Pty Limited; CCA Estates Pty Limited; Davjul Holdings Pty Limited; Armmam Pty Limited (No 2)* [2023] NSWCA 246 [18] – [24] (*Rialto Sports*). There, his Honour noted (at [18]) that there are “two general themes” underlying the need for leave under s 440D of the Act. First, the undesirability of an administrator being distracted from his or her statutory duties and being required to incur the expense associated with litigation. Secondly, the undesirability of permitting one creditor to advance his or her own interests in respect of some disputed matter at the expense of, or at least ahead of, the interests of creditors more generally; that includes to prevent the creation of preferences and interference in the disposition of the property of the company whilst under administration.

19 Drawing upon this first theme, the defendants submitted that the Court should remain cautious when exercising the discretion under s 440D(1)(b), so as to avoid creating a distraction for the administrators in the performance of their statutory obligations: *Zervas v Burkitt* [2019] NSWCA 112 [16]. Whilst that general proposition can be accepted, it is more relevantly applied to claims that are made against the company under administration in respect of antecedent rights and liabilities. It does not apply with anywhere near the same force where the question is one concerning the conduct of the administration itself.

20 In relation to the second theme, counsel for the defendants submitted that, by this application, Sev.en, which is not even a creditor, seeks to impose its own particular point of view as to how the administration should be conducted. He suggested that, in their report to creditors, the administrators will address matters of relevance so that they may decide whether any available proposal is one that they view as sensible and appropriate for the resolution of the administration. There are difficulties with this proposition. First, the suggestion that the administrators will adequately address all matters of relevance in their report to creditors, which must be taken to include IGPC’s potential causes of action, is difficult to accept. As the ensuing reasons reveal, the administrators provided scant evidence to the Court concerning the work that they have undertaken or the views they have formed in relation to IGPC’s causes of action. Whilst the general proposition offered by Gleeson JA is no doubt correct, it is, again, not so relevant in this case. By seeking the appointment of the special purpose administrators, Sev.en does not attempt to advance its own interests at the expense of IGPC’s creditors, or impose its own particular view as to how the administration should be conducted. As these reasons reveal, Sev.en’s concerns about the adequacy of the administrators’ investigations are valid. In addition, the proposed investigations will come at no cost to the company or its creditors, and IGPC’s creditors stand to benefit from an adequate investigation into the failures that occurred and a valuation of the company’s potential causes of action.

21 The defendants submitted that, in approaching the exercise of the power under s 440D(1)(b), the Court should consider the factors identified by Tobias JA (with whom Beazley and Giles JJA agreed on this point) in *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585 at 614 [146] – [147] (*Attard*). The factors identified in the first of those paragraphs were drawn expressly from the judgment of Rein AJ in *J F Keir Pty Ltd v Priority Management Systems Pty Ltd (admin apptd)* [2007] NSWSC 748 (*J F Keir*) at [8]. However, Tobias JA specifically recognised that the factors were “to be taken into account in respect of an application for leave under s 444E(3)” — that is, a different “leave to proceed” provision of the Act.

22 Section 444E(3) is analogous to ss 471B and 500(2) of the Act, and essentially the same principles apply to all three provisions: see *Clean Energy Regulator v E Connect Solar & Electrical Pty Ltd* [2023] FCA 1082 [8] – [9]. However, the provision the subject of present concern, s 440D(1)(b), has received different treatment. In *Meehan v Stockmans Australian Cafe (Holdings) Pty Ltd* (1996) 22 ACSR 123, Lehane J stated as follows (at 125) in dealing with s 444E(3):

So far as counsel and I have been able to discover, there is no reported authority as to the principles to be applied on an application for leave under subs 444E(3). Counsel proceeded on the basis that the principles applicable are those which the court applies when considering a similar application in a winding up by the court, under s 471B. No doubt deeds of company arrangement may take many forms, and different considerations may apply in other cases, but in this case (and I shall return to the general effect of the present deed) I think the basis on which counsel proceeded was right. Particularly I do not think that the very strict approach which may be apt where an administrator has been appointed under Div 2 of Pt 5.3A, having regard to the interim character of such an appointment (*Foxcraft v Ink Group Pty Ltd* (1994) 15 ACSR 203), is appropriate here.

23 His Honour’s judgment has been cited in subsequent cases as authority for the proposition that the test to be applied in determining applications for leave to proceed against a company in administration under s 440D is more stringent than the test to be applied in the context of an application under s 444E: see, eg, *Easey v Grosvenor Constructions (NSW) Pty Ltd* (2005) 54 ACSR 820, 821 [4]; *Mehan v Arrium Ltd (Formerly Onesteel Ltd)* [2016] NSWSC 1680 [11]; *Adelaide Brighton Cement Ltd v Concrete Supply Pty Ltd (subject to deed of company arrangement)* (2018) 124 ACSR 389, 396 [22]; *Hill v Esplanade Wollongong Pty Ltd ACN 141 133 708 (subject to a deed of company arrangement)* [2018] NSWSC 478 [19]; *Sanders v Probuild Constructions (Aust) Pty Ltd* [2023] WASC 317 [21] – [28].

24 Nevertheless, the list of factors set out in *Attard* has been applied from time to time in the context of applications under s 440D(1)(b): see, eg, *Hopkins v AECOM Australia Pty Ltd* (2012) 91 ACSR 391, 396 [20]; *Toll Holdings Ltd v Stewart* (2016) 338 ALR 602, 615 [55]; *Pybar Mining Services Pty Ltd v Challenger Gold Operations Pty Ltd* [2018] SASC 156 [16]; *Re Senvion GmbH (No 2)* (2019) 140 ACSR 20, 33 [48]; *Australian Securities and Investments Commission v Marco (No 5)* [2020] FCA 1512 [20]; *Northwalker Realty Pty Ltd v TFM Chatswood Land Pty Ltd* [2022] NSWSC 1407 [8]. In light of the authorities set out above, the correctness of that approach is perhaps arguable, as is the correctness of the statement in the headnote to *Attard* (as reported in the Australian Corporations & Securities Reports) that “[t]he factors to be considered in an application for leave to continue proceedings against a company in administration are summarised in *J F Keir Pty Ltd v Priority Management Systems Pty Ltd (admin apptd)* [2007] NSWSC 748 at [8]: at [146], [147]”. In this respect, it is important to have regard to what was said by way of background at 596 – 597 [62] of Tobias JA’s judgment, as follows:

The Orlando proceedings were listed for hearing in the District Court for 4 days commencing 26 November 2001. Mr Jacobs was briefed to appear instructed by Ms Cunningham. The proceedings did not conclude in the 4 days allocated and were adjourned to 21 January 2002. *Her Honour noted (at [51]) that according to Mr Attard’s evidence, he drew attention to the fact that CMG was subject to the deed and that, by reason of s 440D of the Corporations Act, proceedings could not be commenced or continued against CMG without the leave of the Supreme Court or without the written consent of Mr Hillig, the administrator under the deed. In fact, s 444E(3) applied, as CMG was then subject to the deed.* Section 440D(1) had applied from the commencement of CMG’s administration until the entry into the deed, and referred to the administrator’s written consent or the leave of the court. Section 444E(3) referred only to the leave by the court. This prompted Mr Jacobs to notify the District Court judge who then adjourned the hearing, apparently indefinitely.

(Emphasis added).

25 The apparent effect of this passage is that the provision properly to be applied in the case was s 444E(3), and this would explain the later reference to the factors summarised by Rein AJ in *J F Keir*. Although Tobias JA subsequently remarked (at 600 – 601 [83]) that an erroneous reference to s 440D rather than s 444E in the reasons of the primary judge did not matter because “their effect was relevantly the same”, it should not be thought that his Honour intended by these passing words to equate the principles relevant to an application under the former provision to those relevant to an application under the latter.

26 Ultimately, it is unnecessary for present purposes to draw any final conclusion as to the appropriateness of having resort to the factors listed in *Attard* to an application for leave under s 440D(1)(b). As explained below, those factors are met in this case. If a more stringent test is to be applied — and it is arguable whether or not it ought to be: see, generally, *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 285 ALR 207, 214 – 215 [33] – [39] — then I find that it, too, is met. The present circumstances justify displacement of the stay for which s 440D(1) provides by default.

27 The first of the factors identified in *Attard* is whether the claim has a solid foundation and gives rise to a serious dispute. Here, as the reasons that follow demonstrate, there is a solid claim — indeed, it is one on which Sev.en should succeed.

28 The second factor is whether the administrator “would be unreasonably distracted from his or her statutory duties and be obliged unnecessarily to incur substantial legal costs”. The present application is confined both in terms of its scope and its length. The administrators were entitled to file a submitting appearance to it, had they been so minded. Given that the application appears to originate from disputation between two joint venturers and their associated companies, the administrators could well have left it to those parties to engage in the relevant contest. In any event, the result of the application is that it affords the administrators relief in relation to the performance of their statutory duties: the special purpose administrators will undertake a separate and distinct part of the administration at no cost to the administration generally.

29 The third factor referred to in *Attard* is “whether the company is insured against the liability that is the subject of the proceedings”. This factor emphasises that the requirements under consideration are usually directed to claims that are made against the company in relation to its pre-administration obligations, rather than claims that are directed to the administration itself.

30 The fifth factor (the fourth not being relevant) is whether the applicant will suffer any disadvantage if leave is not given. That would most certainly be the case here, where Sev.en is likely to face adverse financial consequences if IGPC’s potential claims are not adequately investigated. Coincidently, IGPC is likely to benefit from the relief that Sev.en seeks, as it will receive some certainty as to the identity and value of its assets.

31 The sixth factor is “whether there are good reasons for allowing a creditor to depart from the general intention of Pt 5.3A, which is that a creditor ought not be able to take action against the company in such circumstances”. This factor emphasises that the concerns about the grant of leave to proceed are generally directed to the bringing of proceedings by those with antecedent claims against the company, originating prior to the administration. That is not the case here.

32 The factors identified in *Attard* confirm that leave ought to be granted.

33 The defendants suggested that there was “substantial and unexplained” delay on the part of Sev.en in commencing these proceedings, which in their submission must tell against the grant of leave. As the reasons below reveal, however, there was no relevant delay on the part of Sev.en in making this application that ought properly to impact upon the grant of leave.

34 Accordingly, an order should be made granting leave *nunc pro tunc* for Sev.en to bring the current proceedings.

## Relief sought

35 By its originating process, Sev.en seeks the appointment of special purpose administrators to conduct investigations into the causes of the two catastrophic failures at the Callide C power plant. Those investigations include: making an application for public examinations as necessary, engaging suitably qualified technical experts, considering the claims available to IGPC, and commencing and prosecuting any proceedings. Sev.en undertakes to fund that process in the event that its application is successful. Other orders are sought which are intended to create a regime in which the special purpose administrators might carry out their activities unhindered by the current administrators.

## The evidence and factual background

36 Sev.en relied upon five affidavits, being the affidavits of: Petr Šlechta affirmed 28 November 2023 (First Šlechta Affidavit); Elan David Sasson affirmed 29 November 2023 (Sasson Affidavit); John Richard Park affirmed 29 November 2023 (Park Affidavit); Nicholas Jacob Lennings affirmed 8 December 2023 (Lennings Affidavit); and Petr Šlechta affirmed 9 January 2024 (Second Šlechta Affidavit).

37 At the hearing, the defendants relied upon four affidavits, being the affidavits of: Megan Bridget Lowe affirmed 2 January 2024 (Second Lowe Affidavit); Grant Dene Sparks affirmed 8 December 2023 (First Sparks Affidavit); Grant Dene Sparks affirmed 2 January 2024 (Third Sparks Affidavit); and Grant Dene Sparks affirmed 17 January 2024 (Fourth Sparks Affidavit).

38 Whilst, to a large extent, the factual background was not in dispute, it is appropriate to set it out in some detail. The following facts are taken substantially from the “amended agreed factual background” prepared by Sev.en. Although the defendants initially complained that this factual background had improperly been characterised as having been “agreed”, they did not ultimately dispute that the facts were correct at least for the purposes of this application (save for certain specific points, which have been incorporated into the below reproduction of those facts).

### Sev.en’s relationship with IGPC and Callide C

39 As mentioned above, Sev.en’s interest in IGPC is indirect. There exists an intermediate holding structure, within which it is the ultimate shareholder. In summary, that structure is as follows:

(a) Sev.en holds a 50% interest in InterGen N.V. (IGNV), a company incorporated in the Netherlands. The other 50% shareholder of IGNV is Huaneng-Yudean NV (HY), also incorporated in the Netherlands;

(b) HY is 60% owned and controlled by China Huaneng Group Co Ltd (CHG), a State-owned electricity company based in the People’s Republic of China. HY’s minority non-controlling interest of 40% is owned by Guangdong Energy Group Co Ltd, which itself is co-owned by CHG;

(c) IGNV (through a series of intermediate holding companies including Emberock Australian Holdings (UK) Limited, which was at the time of the administrators’ appointment named InterGen Australian Holdings (UK) Limited) holds a 50% interest in OzGen (UK) Limited (OzGen) with the other 50% held by Union Star Development Limited, being a wholly owned subsidiary of CHG;

(d) OzGen owns Genuity Pty Ltd (Genuity), which is the Australian parent of IG Energy Holdings (Australia) Pty Ltd (IEHA), IG Power Holdings Limited (IGPH), IG Power Marketing Limited (IGPM) and IGPC. All those subsidiaries of Genuity are in administration under the control of Mr Sparks and Mr Hughes of Deloitte Financial Advisory Pty Ltd;

(e) through the intermediate holding structure described above, Sev.en has a 25% economic interest in IEHA which owns 100% of the shares in IGPH, and IGPH owns 100% of the shares in IGPC, which has a 50% interest in Callide C through the joint venture; and

(f) from this, it can be discerned that Sev.en has a 25% economic interest in IGPC, and an effective 12.5% interest in the joint venture.

40 Sev.en is also a major creditor of IEHA. On about 25 April 2022, those parties entered into a Credit Agreement pursuant to which the former advanced to the latter a line of credit of up to EUR 25 million in order to allow the latter to lend funds to IGPC for financing certain margins on Callide C hedging contracts. The credit limit was subsequently increased to EUR 75 million.

41 The evidence indicated that, as at 31 March 2023, the total amount payable under the Credit Agreement was $88,428,433 (approximately EUR 54.4 million), with the result that Sev.en remains a creditor of IEHA in at least that amount. IEHA on-lent to IGPC the funds that it received, and the evidence suggests that none has been repaid to date.

### The Callide Power Project contractual framework

42 The contractual framework that supports the operations of Callide C can be summarised as follows:

(a) Callide C is owned and operated by an unincorporated joint venture between CEPL and IGPC. The parties’ rights and obligations are set out in the Joint Venture Agreement;

(b) pursuant to the parties’ agreement, Callide Power Management Pty Ltd (CPM) was appointed as the “Manager” of Callide C. Each of IGPC and CEPL own 50% of the shares of CPM;

(c) the Operation and Maintenance Agreement was entered into by CPM, as agent for the joint venture participants, and it engaged CSEL, as Operator, to operate and maintain Callide C;

(d) the services that were to be provided by CSEL under the Operation and Maintenance Agreement, as set out in its Schedule 3, included:

(i) operating, maintaining, and repairing the Facility in accordance with the standards and requirements of the Operation and Maintenance Agreement;

(ii) providing the skills and resources necessary for the provision of the Services;

(iii) optimising the effective life of the Facility;

(iv) undertaking reviews of and (where appropriate) updating the methods of operation and maintenance employed having regard to world best practice;

(v) performing routine maintenance and testing of plant and equipment;

(vi) maintaining operating and maintenance records for plant and equipment;

(vii) reporting on the performance of the Facility and providing forward projections on operations and maintenance;

(viii) maintaining sufficient personnel, expertise, and resources and using best endeavours to maximise returns to the Station Owner;

(e) pursuant to a Station Services Agreement, CPM (as agent for the joint venture participants) also engaged CSEL to provide certain station services required for the operation of Callide C.

### The catastrophic failures at Callide C and its present lack of generation capacity

43 On 25 May 2021, the unit C4 turbine suffered a kinetic disintegration which resulted in an explosion at the power station. As a result, C4 went offline and ceased exporting power to the grid, with the consequence that power generation from Callide C was reduced to approximately 400 MW. C4 has been offline ever since, such that it is now nearly three years since it was properly operational. It is not expected to return to unrestricted operations until at least July 2024.

44 On or about 31 October 2022, part of the unit C3 cooling tower suffered a significant structural failure, as a result of which the Callide Power Station lost connectivity to the electrical grid and unit C3 went offline. Unit C3 has been offline since 31 October 2022, and is not expected to return to unrestricted operations until at least February 2024.

45 The cost of restoring units C3 and C4 to full capacity is estimated to be in the vicinity of $390 million, with one of the major contributing factors being that the cooling towers for both units C3 and C4 had to be demolished.

46 There did not appear to be any real doubt that returning units C3 and C4 to service is important to the Queensland electricity market, given Callide’s historical contribution to the overall electricity supply.

47 It was also not doubted that returning both units to service is important to IGPC, which has been unable to generate any income, given that its only source of revenue was the electricity generated from Callide C.

48 On 18 October 2023, the Australian Energy Regulator (AER) announced that CSEL had operated the Callide Power Station without the required regulatory approval at the time the failure of unit C4 occurred and issued CSEL with a $67,800 fine for the breach.

### The report of Dr Brady

49 In June 2021, CSEL commissioned a forensic engineer, Dr Sean Brady, to conduct an investigation into the causes of the unit C4 failure. Despite the passage of more than 30 months, no report by Dr Brady has been published by CSEL, and Sev.en has not been provided with any information about the progress of the report, nor any interim drafts.

50 In the course of the hearing, it became apparent that the stage of review reached by Dr Brady is presently unclear. It may be that he has finalised his report and delivered it to CSEL, or he may still be in the course of completing it. The fact that the administrators were not in a position to give any clear evidence about that matter suggests that they have no real control over its production and no direct knowledge of how it might be produced, or what it might say.

### IGPC’s rights in relation to Callide C

#### JVA Sale Process

51 Under the Joint Venture Agreement between IGPC and CEPL, a participant becomes a “Defaulting Participant” if, *inter alia*, it becomes insolvent: cl 7.2(a).

52 IGPC became a Defaulting Participant on 8 April 2023 for the purposes of cl 7.2(a) — that date being 14 days after it appointed Mr Hughes and Mr Sparks as administrators.

53 Upon IGPC becoming a Defaulting Participant, CEPL (as a “Non-Defaulting Participant”):

(a) had exclusive power to make decisions at meetings of the Management Committee; and

(b) immediately had a right (though not the obligation) to compulsorily acquire IGPC’s “Interest” following service of a “Notice of Election”: cl 7.8. This was referred to by the parties as the “JVA Sale Process” or “NOE Process”.

54 On 30 May 2023 or 1 June 2023, CEPL gave notice to IGPC that it was exercising its rights to acquire IGPC’s Interest in the Callide Power Project pursuant to the JVA Sale Process.

55 Upon the giving of that Notice, the procedure contained in cls 7.8 – 7.19 of the Joint Venture Agreement was enlivened, pursuant to which the acquisition of IGPC’s Interest must be completed within 180 days following the Notice, or such further time as is reasonably allowed by CEPL: cl 7.9.

56 The purchase price payable by CEPL is the amount equal to the lesser of the “Book Value” (as calculated in accordance with cl 7.14) and the “Fair Value” (as calculated in accordance with cl 7.13) less all “Valuation Costs”, with that assessment to be completed within 60 days: cls 7.8(a), (f), (g); 7.9; 7.12(b); 7.13; 7.14.

57 The administrators have engaged expert valuers and auditors to calculate the above values. The auditor firm, RSM, is to perform certain calculations in relation to the Book Value and Fair Value.

58 The difference between the Book Value and Fair Value could be significant. The administrators’ submissions to the valuers (appointed under the Joint Venture Agreement) demonstrate the potential for a substantial difference in those values of IGPC’s Interest. [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted] [Redacted]

59 Once the Book Value and Fair Value figures are determined, the “Sale Price” will be generated (being the lesser of the two values): cl 7.12(c). Thereafter, IGPC and CEPL must move promptly to complete the sale: cl 7.9.

60 The valuations under the JVA Sale Process are due on 25 January 2024, though CEPL has extended that date to 8 February 2024 to allow it to obtain the necessary approvals, authorisations, and consents. It can be assumed that the JVA Sale Process will complete between 25 January 2024 and 8 February 2024.

#### The NBIO Process

61 The process referred to in these proceedings as the “NBIO Process” involves the administrators seeking non-binding indicative offers (NBIOs) for the restructure or recapitalisation of each of the companies in the IG Group (being IGPC, IEHA, IGPH and IGPM).

62 In general terms the following matters are important to note:

(a) CEPL’s intention is to advance the JVA Sale Process while, contemporaneously, considering the NBIO Process;

(b) the latter process may be implemented through a DOCA, but the options are not limited to such an arrangement;

(c) the deadline for submission of any NBIOs was 14 December 2023;

(d) the administrators received three proposals, each of which was requested by the proponent to be kept confidential;

(e) on 22 December 2023, the administrators notified the proponents of the three NBIOs that they intended to extend the timeframe for the process to enable negotiations to take place with them from 14 December 2023 to 24 January 2024, with exclusive negotiations with the preferred bidder to continue thereafter;

(f) after that date, the administrators may proceed by DOCA, or may proceed in some other way; and

(g) the NBIO Process plainly includes the benefit of any claims that IGPC may have, with offerors to indicate what they think the claims are worth. This was made clear in the administrators’ letter of 27 October 2023, which indicated that any offer should include the value assigned to any claims of IGPC arising from the failures of units C3 and C4.

63 This process has also caused Sev.en some concern, as it is apparent that the administrators have not investigated, for themselves, what those claims are worth.

64 At present, the negotiations under the NBIO Process appear to be ongoing. In relation to the proposals received, the administrators expressed the view that, if the conditions precedent to them were satisfied, and they were accepted at the second meeting of creditors, at least two of them would result in the creditors of IGPC being paid in full.

### Steps taken by the administrators in the administration

65 On 24 March 2023, being the date that the administrators were appointed to IGPC, Mr Sparks and Mr Hughes were also appointed as the administrators of three related companies: IEHA, IGPH and IGPM.

66 The administrators have been in office for about 10 months. The specific steps that they have taken since their appointment (which were summarised in the Third Sparks Affidavit) include the following:

(a) on 5 April 2023, they held the first meeting of creditors of each of the companies under their control;

(b) on 11 April 2023, Sev.en entered into a Deed of Cooperation with the administrators under which the latter agreed to cause IGPC to progress the rebuild of Callide C as expeditiously as reasonably practicable. Under the Deed, they have obligations to (*inter alia*) provide Sev.en with any information or documents relating to the administrations which it reasonably requests;

(c) on 21 April 2023, they filed an originating process in this Court seeking orders pursuant to ss 439A(6) and 447A(1) of the Act that the period within which they must convene the second meeting of creditors under s 439A be extended to 1 September 2023. The Court made the orders sought on 28 April 2023 (*Sparks (Administrator), in the matter of IG Energy Holdings (Australia) Pty Ltd (Administrators Appointed)* [2023] FCA 403);

(d) on 22 May 2023, the administrators filed a further interlocutory process seeking directions under ss 443A and 447A of the Act that they would be justified and acting reasonably in entering into, and limiting their liability in respect of, the proposed funding arrangements and other contracts relating to the rebuilding of Callide C. The Court made the orders sought on 25 May 2023 (*Sparks, in the matter of IG Energy Holdings (Australia) Pty Ltd* [2023] FCA 538). In an affidavit of Mr Hughes on which the administrators relied, it was deposed, *inter alia*, that they and CEPL had discussed an alternative solution to the funding term sheet, which included CEPL issuing a letter of comfort. Sev.en has not seen the terms of the letter of comfort in relation to the rebuilding of Callide C;

(e) on 8 August 2023, they filed a further interlocutory process seeking, *inter alia*, orders to further extend the period within which they must convene the second meeting of creditors until 1 March 2024; judicial advice that they were justified and acting reasonably in entering into, and causing IGPC to enter into, a remittance deed; and orders pursuant to s 447A(1) of the Act limiting any liability incurred with respect to their obligations arising out of the remittance deed. The Court made the orders sought on 11 August 2023 (*Sparks, in the matter of IG Energy Holdings (Australia) Pty Ltd (No 3)* [2023] FCA 1002); and

(f) they accepted a settlement offer from IGPC’s insurers for $102.34 million as a final payment (in addition to $2.5 million that had already been paid) in full and final satisfaction of all relevant claims covered by the particular policy.

67 The defendants also drew attention to several other steps taken by the administrators, which were expressed in more general terms. Those are:

(a) progressing the “Staged Return to Service”, being the rebuild works to units C3 and C4, which are to occur in order to enable operations of the Callide C Power Station to resume. This involves the demolition and rebuild of the power station;

(b) defending proceedings commenced by Sev.en in relation to the Credit Agreement between it and IEHA;

(c) cooperating with the investigations of the AER;

(d) investigating, considering and taking advice on the company’s significant contractual obligations (under the Joint Venture Agreement), liaising with the company’s shareholders and joint venture partner in relation to the JVA Sale Process and identifying and engaging experts to conduct the relevant valuations;

(e) conducting the NBIO Process; and

(f) managing “complex arrangements” associated with the sale of electricity, such as IGPM’s hedging arrangements.

68 Mr Sparks also deposed that he and Mr Hughes have reviewed the books and records of IGPC and identified multiple reports (many of which were treated as confidential) that have been generated by experts engaged by stakeholders in the Callide Power Project. It is not possible to set out the contents of those reports, or the conclusions that might be drawn from them, in circumstances where the administrators gave no detailed evidence on the matter.

69 Further, Mr Sparks deposed to certain “investigations” conducted by him and Mr Hughes. Amongst other things, that included “participat[ing] in multiple discussions with” certain staff members of Genuity in relation to the incidents at Callide C and undertaking tasks in connection with the insurance proceedings, such as quantifying business interruption losses and property damage suffered as a result of the incidents.

70 Despite these apparent investigations, there was no dispute that the administrators have not commissioned any independent parties to conduct investigations into the failures of either units C3 or C4. There was no explanation proffered by the administrators as to how they might form a view regarding IGPC’s potential causes of action without any information surrounding the causes of the failures. Remarkably, counsel for the defendants was unable to reveal, when asked, whether the administrators had even formed a view at this late stage of the administration about the cause of the incidents.

71 On 1 September 2023, Sev.en, through its solicitors, wrote to CEPL’s solicitors, expressing its belief that the damage to units C3 and C4 was caused or contributed to by CSEL’s breaches of the Operation and Management Agreement and its failure to properly operate and maintain Callide C. Sev.en requested an undertaking from CEPL that it would not seek to complete the JVA Sale Process without first providing it with at least 10 clear business days’ prior notice.

72 On or around 7 September 2023, Sev.en put forward a DOCA to the administrators of IEHA. Apparently, it was not accepted.

73 On 14 September 2023, CEPL’s solicitors stated that it would not give the undertaking sought by Sev.en on 1 September 2023.

74 On 29 September 2023, Sev.en’s solicitors wrote to the administrators’ solicitors, expressing Sev.en’s concern over their apparent lack of investigation into both the causes of the two catastrophic incidents and the causes of action that IGPC may have against CSEL. The letter stated, in part, that:

… in circumstances where the breaches of CEPL’s parent company likely caused the failures at the Power Station which resulted in the administration of [IGPC], it would plainly be unconscionable for CEPL to take advantage of those breaches in order to acquire [IGPC]’s interest in the JV pursuant to the JVA Sale Process. However, instead of investigating whether [IGPC] may have claims against CEPL for unconscionable conduct, the Administrators are actively pursuing the JVA Sale Process and are even collaborating with CEPL to amend the terms of the JVA so that the JVA Sale Process can proceed more efficiently.

75 On 18 October 2023, the administrators’ solicitors sent a letter to Sev.en’s solicitors stating, *inter alia*, that:

(a) the review by Dr Brady was ongoing and the administrators had no detail as to when that report would be delivered;

(b) the administrators were receiving legal advice in relation to potential claims arising from the failures of units C3 and C4 which is (or, would be, when provided) confidential and privileged;

(c) the administrators had no intention, without the benefit of further investigations, advice, and information, of releasing CEPL or CSEL from any claims that may exist as a result of the incidents. Specifically, it was stated that:

We confirm that the Administrators have no intention, without the benefit of further investigations, advice and information, of releasing [CEPL] or CSEL from any claims that may exist as a result of the incidents. The Administrators are aware that such claims will have a bearing on both the value of CEPL’s claim against [IGPC] and the value of the assets of [IGPC].

76 Again, it is worthy of observation that the administrators appeared to place substantial weight on the report of Dr Brady — an expert who had been engaged by the entity most likely to carry responsibility for the damage to units C3 and C4.

77 On 27 October 2023, the administrators wrote to Sev.en, inviting it to submit an offer (an NBIO) for the restructure or recapitalisation of each company in the IG Group, which may be in the form of a DOCA. The process required Sev.en to submit its NBIO by 14 December 2023. The administrators expressly told bidders that the “Offer Value” should provide details:

… of the value assigned to any claims of IGPC arising from the incidents at the Callide C Power Station and extensive damage to the Unit C4 and Unit C3 in May 2021 and October 2022 respectively, including any material assumptions made in relation to same.

78 On 2 November 2023, Sev.en’s solicitors wrote to the solicitors for the administrators, stating, among other things, that:

(a) the administrators had only described the work they had done at a very high level, leaving one to infer that they had not progressed (or not materially progressed) the investigation of the two incidents; and

(b) Sev.en had given instructions to commence proceedings seeking orders for the appointment of a special purpose administrator.

79 On 8 November 2023, the administrators, by their solicitors, responded to the letter of 2 November 2023.

80 On 9 November 2023, CEPL advised the administrators that it will exercise its compulsory acquisition right if the administrators put forward a NBIO proposal that is not acceptable to CSEL and CEPL. Further, if the administrators put forward a NBIO proposal that includes the acquisition of IGPC’s interest in the joint venture, CEPL will require the administrators to first make an offer to it on the same terms to purchase the interest under cl 9A of the Joint Venture Agreement.

81 In Sev.en’s view, this correspondence suggests that CEPL intends to acquire IGPC’s interest either through: (i) making its own NBIO offer; (ii) exercising its compulsory acquisition right; or (iii) exercising its first right of refusal under the Joint Venture Agreement.

82 On 30 November 2023, the defendants’ solicitors received an email from Sev.en’s solicitors which attached unsealed copies of the originating process and Sev.en’s evidence.

83 On 5 December 2023, Sev.en’s solicitors wrote to the defendants’ solicitors, confirming that the proceedings had been listed for hearing on 11 December 2023 and requesting confirmation as to whether the administrators consented to the appointment of the special purpose administrators on the terms set out in the originating process and to the interlocutory orders sought. Sev.en sought an urgent and expedited hearing of its application.

84 On 6 December 2023, the defendants’ solicitors wrote to the solicitors for Sev.en, stating that:

(a) they opposed the orders sought in the proceedings;

(b) they were prepared:

… to provide an undertaking substantially in the form of paragraph 5 [of the originating process] until no earlier than 15 January 2024 and thereafter on five business days’ notice

(c) the final formal proposal by any preferred bidder under the JVA Sale Process was due by 15 January 2024 (though it was later extended), and the convening period of IGPC was extended to 1 March 2024.

85 On that same date, Sev.en, by its solicitors, rejected the defendants’ proposed undertaking and proposed an undertaking in the terms set out in paragraph 5 of the originating process, subject to the following amendment (with emphasis added):

The first, second and third defendants undertake that they will not grant any releases to any party in connection with, **or sell, assign or otherwise dispose of**, any claims or potential claims arising out of, relating to or in any way connected with the Incidents (as defined in Item 1 of Annexure A to the originating process) until the determination of the relief sought in the originating process.

86 Later that same date, the defendants’ solicitors wrote to Sev.en’s solicitors, stating that the defendants rejected Sev.en’s proposed amendments to the undertaking, and that any interlocutory order should be conditional upon Sev.en giving the “usual undertaking as to damages”.

87 At a case management hearing on 11 December 2023, the Court made timetabling orders for the final hearing to be heard on 22 and 23 January 2024.

88 On 14 December 2023, the administrators provided a copy of IGPC’s Valuation Submissions for the JVA Sale Process to Sev.en to allow it an opportunity to provide any feedback.

89 On 18 December 2023, the administrators’ solicitors wrote to the solicitors for CEPL and CSEL. They noted that “it is apparent from the NBIOs received by the Administrators … that it will inevitably be necessary to seek an extension of the convening period in the administration of the Company”, and that “a short extension of the convening period will facilitate the progression of the DOCA proposals received and may obviate the need for an expedited hearing of the SPA Application in January”. For these reasons, the administrators sought agreement from CEPL and CSEL that “they will not take any further steps in the NOE process for the duration of the proposed extension of the convening period (or at least for a period which is substantially coextensive with the proposed extension)”.

90 On 19 December 2023, the solicitors for CEPL and CSEL replied to the above letter, rejecting the administrators’ requests. Specifically, CEPL and CSEL considered that:

(a) the matters set out in the above letter did not provide any (or any sufficient) basis for the contention that it would inevitably be necessary to seek an extension of the convening period;

(b) they are not necessary parties to the present proceedings; and

(c) any extension would cause significant prejudice to them, including because:

(i) CEPL has ongoing obligations pursuant to the NOE Process including the provision of information, and participating in the “Q&A process” with the independent experts engaged by CEPL and IGPC in accordance with the Joint Venture Agreement; and

(ii) the extension would also extend the timeframe for which CEPL is required to pay, pursuant to cl 7.11(a) of the Joint Venture Agreement, all of the called sums becoming due and payable by IGPC. An extension of that timeframe is likely to increase the amounts payable by CEPL “by tens of millions of dollars”.

## Sev.en’s standing under s 447A(4) of the Act

91 It was not doubted that Sev.en has an economic interest in the outcome of IGPC’s administration. That interest derives from Sev.en’s shareholding in companies with an interest in IGPC, and because it is a creditor of IEHA, which is a major creditor of IGPC. On the basis of those interests, Sev.en claimed that it fell within the expression “any other interested person”, as used in s 447A(4)(f), which provides that such a person may apply for orders under s 447A(1). The defendants, however, submitted that Sev.en’s interests were insufficient to make it an interested person for those purposes.

92 The expression “interested person” is not defined and must take its meaning from the context in which it is used. That said, there is nothing in the legislation that suggests that the expression should be given any limited or restricted meaning. So much was recognised by Austin J in *Allatech Pty Ltd v Construction Management Group Pty Ltd* (2002) 41 ACSR 587 (*Allatech*). There, Allatech Pty Ltd had brought proceedings under Pt 5.3A (specifically, s 445D) seeking an order terminating a DOCA. Its standing to do so was challenged. Relevantly, standing under s 445D was conferred in materially identical terms to s 447A(4). In these circumstances, Austin J held (at 591 [18]) that the words “other interested person” are “words of wide scope”, and that the legislature intended to give standing to apply for relief to a broad class of applicants. His Honour then observed (at 591 – 592 [20] – [21]):

In my view, the words “other interested person” in s 445D(2) are intended to encompass applicants whose material rights or economic interests are or may be affected by the operation or effect of the deed of company arrangement which they seek to challenge, at least where the effect is substantial. …

An applicant whose substantial economic interests are at stake would be a person whose “interests are affected” … It is enough to say that when material legal rights or pecuniary or other economic interests of the applicant are or may be substantially affected by the matter in issue, the applicant is an “other interested person”, however much further those words may extend, …

93 There is a close relationship between ss 445D and 447A, and no reason presents itself as to why Austin J’s reasoning in respect of the former provision does not apply equally to the latter. In *Re Nillumbik Community Church Incorporated (In Administration)* [2010] VSC 136 (*Re Nillumbik*), Davies J cited Austin J’s observations with approval in the context of the application of s 447A. Her Honour observed (at [30]) that “the expression ‘interested person’ is of wide scope and should be construed liberally in the context of s 447A”. See also *Habrok (Dalgaranga) Pty Ltd v Gascoyne Resources Ltd* (2020) 149 ACSR 1, where Beach J said (at 53 [401], 54 [403]):

But in any event, Habrok has standing to bring the application as “any other interested person” pursuant to s 445D(2)(c). The expression “any other interested person” is to be interpreted broadly. And the test is that laid down by Austin J in *Allatech*, namely, whether the person’s material rights or economic interests are or may be affected by the operation or effect of the deed of company arrangement that they seek to challenge. …

Further, for similar reasons, Habrok has standing as “any other interested person” under s 447A(4)(f) and as “a person with a financial interest in the external administration of the company” under s 90-20 of the Insolvency Practice Schedule.

94 The decision in *Re Nillumbik* has been applied or cited with approval in a number of decisions, including: *MXJ v Company X (admin apptd)* [2023] VSC 42, where it was said (at [40]) that a company director was an “interested person”; *Re Windows on the World Steel Windows Pty Ltd (In Administration)* [2020] VSC 880 [36], where it was accepted that any unitholder of a trust of which the company in administration was trustee was an “interested person” for the purpose of the section; and *In the matter of ACN 004 410 883 Ltd (formerly Arrium Limited) (in liq)* [2023] NSWSC 461, where Black J left open the possibility (at [210]) that an “interested person” might be wide enough to include the credit insurer of trade creditors of the company in administration.

95 There is much force in the view that the concept of an “interested person” under s 447A should be accorded a wide application and extend to persons whose economic interests are substantially affected, rather than being limited to those whose legal rights are directly affected. When a company is placed into administration, it is not only creditors or shareholders whose interests are affected. Whilst the denial or alteration of the rights of such persons is no doubt immediate and direct, the detrimental impact on those entities can often have a consequential effect on the economic interests of others. That is especially so when the insolvency of one entity becomes a contagion which spreads to immediate creditors and possibly beyond, thereby financially preventing those immediately affected from taking any action. It may be left to those who are more indirectly affected to seek to remediate any infelicities in the application or use of Pt 5.3A. Similarly, it may be that the entities directly affected by an administration will not take action under s 447A because of their association with interested parties or the administrators. The present case is, perhaps, an exemplar. The main creditors are generally associated with CSEL or the administrators and, as such, are not interested in bringing an application such as the present. The wide wording of s 447A(4) suggests that the legislature recognised that, in the world of commerce, where an almost infinite variety of circumstances might exist, no significant limitation should be imposed on the class of persons who might make an application for relief.

96 On behalf of the defendants, detailed reference was made to the decision in *Tucker as joint and several administrator of Allegiance Mining Pty Ltd (Recs and Mgrs Apptd) (Subject to Deed of Company Arrangement) v Su* [2022] WASC 178 (*Tucker v Su*). There, an application was made by the deed administrators of a company, Allegiance Mining Pty Ltd (Allegiance), that they have leave to transfer all of the existing shares in Allegiance to a company referred to as Mallee Resources Limited, which was a condition of a DOCA entered into by Allegiance. Mr Su relevantly sought to be joined as an “interested person” pursuant to s 444GA(2)(c) of the Act, but his joinder was opposed. He was the holder of approximately 13% of the shares in Dundas Mining Pty Ltd (in liquidation) (Dundas), which was the holding company of Allegiance. He was also a related party creditor of Dundas in an amount of $200,000. In essence, Mr Su sought to prevent the DOCA’s terms and conditions being carried out because he believed that alternative proposals were available to Allegiance and the members of Dundas would be better off under those proposals than they would be under the existing DOCA.

97 In his reasons refusing to grant Mr Su leave to intervene, Sanderson M identified (at [21]) that the parties had agreed that “subject to modification to reflect the difference in subject matter, *Allatech* elucidates the proper interpretation of the descriptor ‘any other interested person’”. The “modification” in question is that concerned with the subject matter of the section giving rise to the Court’s exercise of power in respect of which the person is seeking to be a party. For instance, the class of “interested persons” for a section concerned with the setting aside of a DOCA might properly be narrower than the class of persons interested in preventing a DOCA from being entered into. Although Sanderson M ostensibly agreed with the observations of Austin J in *Allatech*, he sought to narrow the scope of the concept of an “interested person” by the observation (at [27]) that:

The better view may be that the reference to ‘substantially’ refers to materially or significantly impact. In other words, as the interested parties in this case would have it, there must be a direct rather than reflective impact on the party seeking to be joined. …

98 A “reflective” loss is, apparently, a loss sustained by reason of another person sustaining a loss from a wrong — in contrast to a loss that is sustained from wrongful conduct directly. Master Sanderson said (at [29]) that:

… With respect, I think that is a proper formulation of the position Mr Su finds himself in. Hartree submits Mr Su’s situation, so far as his shareholding in Dundas is concerned, is analogous to one of reflective loss. The reflective loss principle precludes a shareholder from independently seeking to recover loss in an action against a wrongdoer where the claimed loss derives from, and is not independent of, loss suffered by the company which the company itself could recoup in a separate action against the wrongdoer: see *Minerology Pty Ltd v Sino Iron Pty Ltd [No 2]* [2021] WASCA 105 [260] - [261].

99 In the result, Sanderson M held (at [39]) that Mr Su’s interest was indirect or reflective, with the consequence that he had no standing for the purpose of the application.

100 It is not irrelevant to note that Sanderson M made reference to the decision of the Queensland Supreme Court in *Public Trustee (Qld) v Octaviar Ltd* [2009] QSC 202 (*Octaviar*), where the following was observed by McMurdo J (at [8]):

It is not disputed that the Public Trustee is a creditor of OL. Accordingly, he has standing to apply for the termination of its deed. The Public Trustee claims to be a creditor of OA. The administrators disagree. But they, and all other parties here, apparently accept that the Public Trustee has standing to apply for the termination of the deed for OA on the basis that he is an “interested person” within the meaning of s 445D(2)(c). As will appear, the interest of the Public Trustee as a substantial creditor of OL makes him an interested person because of the potential impact of the DOCA for OA upon the amount of funds to be distributed to creditors of OL.

101 There, it was accepted that a creditor (the Public Trustee) of a company (OL) was an “interested person” in the setting aside of a DOCA entered into by another company (OA) on the basis that OL would receive an amount from the DOCA entered into by OA. In other words, it was accepted that a creditor of a creditor of a company under a DOCA was an “interested person” when it was asked whether or not the DOCA ought to be set aside. It is, with respect, difficult to see how that scenario can be any different, in the present context, to the example of reflective loss sustained by a shareholder consequent upon a loss to a company. It is also difficult to see how that position is different to that of Mr Su. Moreover, the observations of McMurdo J are consistent with the approach in *Allatech*.

102 As the submissions of Sev.en identified, *Tucker v Su* has been neither followed nor cited subsequently. No other court has sought to limit the entitlement to seek relief under s 447A to those whose financial and legal interests are directly affected. With respect, there is no compelling basis upon which to read the expression as involving any analogy to the right to bring a cause of action for loss sustained by a company, in accordance with the reasons of Sanderson M. In keeping with the modern approach to statutory construction, it is inappropriate to impose any judicial exegesis upon the wide words that the legislature has used. In the present context, to do so would be inconsistent with the effect of Austin J’s decision in *Allatech*.

103 Ultimately, due respect should be accorded to the observations of Austin J and his Honour’s purposive construction of the statutory language, which concluded that a sufficient impact on economic rights was enough to demonstrate standing, in apparent contrast to a direct impact on legal rights. There is no warrant for reading down the observations of Austin J or for reading into s 447A (or any cognate provision) any word or words of limitation.

104 The decision in *Tucker v Su* would have the Court read s 447A(4)(f) as if it said “any other *directly* interested person”. It is a significant step to read words into a statutory provision that have the effect of limiting its obvious operation. Here, the application of Sanderson M’s approach would effect a substantial limitation on the class of persons who might apply under s 447A for relief in relation to an administration. With respect, no principled basis for doing so was identified in *Tucker v Su*,and it is difficult to ascertain why the legislature would have intended that a person whose economic interests were significantly and substantially affected by an abuse of the Pt 5.3A process should be denied a remedy under the section, merely because their immediate legal interests or rights were unaffected. Instead, the legislature should be seen as having intended to provide protection from the abuse of Pt 5.3A. Given the wide range of persons who might be impacted by an administration, there is no reason to limit the class of persons who might seek relief.

105 The defendants submitted that to construe liberally the scope of s 447A(4) would be to open the floodgates and allow every single intermediate company in a corporate group to make an application. However, no legitimate reason was advanced as to why the scope of the section should *not* extend that far — albeit that is not to say that it necessarily does. In any event, it is likely that it will be those entities that are most directly affected by an administration, and that are financially capable, that will seek relief when it is available. Entities whose interests are derivative upon those more immediately affected, meanwhile, will likely stand back and obtain the benefit of any successful action. It is unreasonable to assume that all entities that might have suffered loss from the same original source will reflexively each apply for relief.

106 At the hearing, both parties referred to the New South Wales Court of Appeal’s decision in *BE Australia WD Pty Ltd v Sutton* (2011) 82 NSWLR 336. In that case, the Court had cause to consider Austin J’s decision in *Allatech*. Justice of Appeal Campbell (with whom McColl JA agreed) stated (at 376 [168]) that:

In my view, *Allatech* and *Commonwealth v Rocklea Spinning Mills* were correctly decided so far as who is an “interested person” within s 445D(2) is concerned. Some statements in them need modification to be applied to the present case. That is because in the context of s 445D(2) an “interested person” is a person who has an interest in whether the court makes an order terminating a DOCA. By contrast, in the context of s 447A an “interested person” is a person interested in whether the court makes the order that is sought under s 447A.

107 Relevantly, the defendants relied on Campbell JA’s reference to a passage from *Allatech* in which Austin J quoted the following statement made by Davies J in the context of ss 27 and 30 of the *Administrative Appeals Tribunal Act 1975* (Cth), which permits a person whose “interests are affected” by a decision to seek review of that decision:

… a person seeking joinder must be able to identify a relevant interest which is his. In other contexts, dicta in cases have used the adjectives ‘real’, ‘genuine’ and ‘direct’ to describe the relationship required between the decision and the interest. Sections 27(1) and 30(1) do not make use of adjectives but they do require that the applicant demonstrates genuine affection of an interest which attaches to him.

108 They suggested that this passage “identif[ies] some adjectival assistance to qualify the nature of the interest that would satisfy the issue of standing” for the purposes of s 447A(4). They also submitted that both Campbell JA and Austin J recognised that there is an “additional ingredient” that needs to be demonstrated in order to establish that a plaintiff is an “interested person”. With respect, these submissions are not quite accurate. For the reasons expressed above, there is no principled basis for reading adjectives into the provision that have the effect of qualifying the nature of the interest required. As to their Honours’ observations regarding the need for an “additional ingredient”, each observed that, where the plaintiff is a creditor, there must be something beyond the “bare claim” of being a creditor before it can be sensibly said that the plaintiff is an interested person. It can be accepted that the words “other interested person” in s 447A(4) are unlikely to be intended to encompass any possible entity with an interest in the orders sought, however remote that interest may be. The assessment of whether a plaintiff is an “interested person” must be made in the circumstances of each case.

109 As a matter of both principle and authority, the expression “interested person” in s 447A(4) is to be read in much the same manner as the cognate expression in s 445D(2). It is intended to encompass entities whose “material rights or economic interests are or may be affected”.

110 Here, the administration substantially affects Sev.en’s economic interests — specifically, in its capacity as, effectively, the sole creditor of IEHA, which is in turn a substantial creditor of IGPC. Sev.en therefore falls within the scope of the expression “any other interested person” for the purpose of s 447A. It has standing to make the present application. That conclusion follows from the position accepted by McMurdo J in *Octaviar* and the principles referred to by Austin J in *Allatech*. It was submitted by the defendants that the debt owed to IEHA was controlled by Mr Sparks and Mr Hughes as administrators, and that this negated Sev.en’s interest. However, it was not explained how that was so or why their control of IEHA’s indebtedness was relevant to Sev.en’s economic interest. That is important here, where Sev.en is the only real creditor of IEHA, and that company’s administrators should act in a manner that enhances Sev.en’s chances of being paid.

111 It is also quite possible that Sev.en has standing arising from its 25% economic interest in IGPC. Although that interest arises by a somewhat unusual corporate structure, and it is derived through shareholdings in nine companies, the evidence of the shareholdings does at least show it to exist. As the holder of such an interest, Sev.en may be detrimentally affected by the conduct of IGPC’s current administrators if the company’s entitlement to recover from CSEL is not appropriately explored and/or valued, or is otherwise diminished by a release of any claims. It is not irrelevant to note that the administrators have previously dealt with Sev.en on the basis that it held a major “interest” in IGPC’s administration. They entered into a Deed of Cooperation with Sev.en for the purpose of sharing information or documents relating to the administration that might be relevant to Sev.en and might keep it informed of the rebuilding of the C3 and C4 units. It is unusual that the administrators would deal with Sev.en in that way, apparently on the basis that it had a substantive interest in units C3 and C4, and then purport to deny that interest for the purposes of this application.

112 The defendants submitted that Sev.en’s position as an “indirect shareholder” was not sufficient to establish it as a person whose material or economic interests were affected. That proposition was advanced on the basis that it was unknown whether the interest of IEHA in IGPC was diminished by the financial position of the companies between IEHA and Sev.en. It was suggested that the financial circumstances of the intermediate companies might be such that not all, or perhaps not any, of the economic benefit of IEHA’s shareholding would pass to Sev.en. The difficulty here is that there was no evidence of the financial standing of the intermediate entities and, as was submitted on behalf of Sev.en, this had not been raised as an issue in the proceedings. That latter proposition is correct. Moreover, Sev.en had sought to establish its standing, in part, by reliance on a sequence of shareholdings and adduced evidence of that. In the absence of any challenge to the financial standing of those companies, it is not open to the defendants to raise the issue during addresses. In the absence of evidence to the contrary, it is open to conclude that Sev.en derived an economic interest in IGPC via the sequential shareholdings.

113 The defendants’ submissions on this point are further undermined by the evidence adduced by the administrators themselves. An exhibit to the Fourth Sparks Affidavit is an email of 8 March 2023 sent on behalf of IGPC’s directors to persons who were apparently interested in that company. It concerned the growing problems with the cashflow of the company consequent upon the failures of units C3 and C4. Notably, the recipients of the letter included three persons at Sev.en: A Němcová, A Svoboda and P Šlechta. The terms of the letter indicate that it was mostly directed to the “ultimate owners of the Callide project”, which were referred to as the “shareholders”, though that latter term was not referring to the actual shareholders of IGPC but, *inter alia*, Sev.en. An important issue raised in the letter was the question of whether an offer from an insurer of unit C4 should be accepted. In that discussion, reference was made to Sev.en’s position in relation to the offer which indicated that, as a matter of commercial reality, it had substantial influence on IGPC. The letter also identified that Sev.en was influential in relation to the financing that IGPC might pursue, and that it had relevant control over the identity of the company’s directors. This provides some evidence that Sev.en’s economic interest in IGPC was not seriously diluted by the financial position of the intermediate companies. In such circumstances, it is unrealistic to suggest that Sev.en does not have a direct and significant economic interest in IGPC, through the sequential shareholdings, that is sufficient to give it standing in the present action.

114 It was further submitted that Sev.en’s interest would have been insufficient to qualify it to bring a derivative action in the name of IGPC or to seek relief under s 90-15 of the *Insolvency Practice Schedule (Corporations)* (being Sch 2 to the Act) (IPS), though the relevance of that point is unclear where no such application is made.

115 It follows that the defendants’ challenge to Sev.en’s standing fails. That company’s legal and economic interests have been detrimentally affected by the administration and are further imperilled by the apparent future conduct of the administrators. It therefore has a substantial interest in ensuring that IGPC’s potential claims against CSEL are appropriately investigated, preserved and pursued.

## Alleged delay on the part of Sev.en

116 The defendants submitted that Sev.en’s delay in bringing the application, which was said to be substantial and unexplained, should tell against the grant of leave and (if leave was granted) the application to appoint special purpose administrators. The alleged delay was said to be apparent from the fact that the incidents involving units C3 and C4 occurred on 25 May 2021 and 31 October 2022 respectively, that the administrators were not appointed until 24 March 2023, and that a further eight months passed before this application was made. It was suggested that Sev.en ought to have taken steps earlier to pursue its interest in and concerns with the investigation of the incidents, given that it had access to “key documents” regarding those incidents, and had previously threatened to remove the administrators for a perceived lack of independence. It was also said that Sev.en has not explained its failure to make this application earlier in circumstances where it would now interfere with the NBIO Process or the JVA Sale Process.

117 The defendants’ submissions lack merit. The concern of Sev.en is the administrators’ continued failure to perform their statutory duty. At all times, the administrators’ duty to investigate remained extant, and it was for them to perform it. It was not Sev.en’s obligation to supervise them or to oversee all that they did. Additionally, the administrators’ non-fulfilment of their duty has led to some urgency, given that the NBIO Process and the JVA Sale Process are both approaching completion. The import of conducting the appropriate investigations was to identify whether IGPC has a cause or causes of action in relation to the failures of units C3 and C4 and, if so, what may be the value of any such claims. These matters are critical to any disposition of IGPC’s assets, business, or interest in the joint venture. It is the administrators’ determination to progress with the disposition of IGPC’s assets without appropriately undertaking the investigations that has necessitated the making of the application.

118 Sev.en rightly submitted that it was reasonable for it to assume that, from the date of their appointment, the administrators were appropriately investigating the causes of the two failures and whether IGPC may have claims against third parties arising out of those incidents. After CEPL gave notice to IGPC in May 2023 that it was exercising its rights to acquire IGPC’s interest under the JVA Sale Process, Sev.en’s concerns about IGPC losing the value of any potential claims were apparently allayed by the administrators in various pieces of correspondence between September and October 2023. It was not until the materials relating to the administrators’ proposed application for remuneration in October 2023 became available to Sev.en, and subsequent correspondence with the administrators indicated the possible undervaluing or lack of investigation into IGPC’s claims, that the necessity to make the present application arose.

119 Counsel for the defendants took issue with Sev.en’s assertion that it assumed that the administrators were undertaking appropriate investigations, given that Sev.en took a “rather aggressive position” against the administrators shortly after they were appointed.

120 The defendants were correct to observe that the relationship between Sev.en and the administrators was fractious from time to time, and it is apparent that Sev.en lacked confidence in them. For example, on 1 April 2023, Sev.en wrote to the administrators stating that it intended to apply to have them removed from their office “for perceived or actual lack of independence”.

121 Further, after the appointment of the administrators to IEHA, Sev.en sought orders compelling IEHA to execute a general security deed that it was, allegedly, contractually obliged to execute: *Sev.en Gamma a.s v IG Energy Holdings (Australia) Pty Ltd* [2023] NSWSC 1032. Justice Ball refused the application, holding (at [27] – [30]) that the deed would not benefit the creditors or the company as a whole. The effect of the deed would have been for Sev.en to be converted from an unsecured creditor to a secured creditor. The defendants sought to rely on Ball J’s observations in that application as somehow supporting their position with respect to delay. However, a distinct application by Sev.en in relation to a different company in administration does not have any bearing upon the present application.

122 Further, as mentioned above, even if Sev.en did have doubts about the administrators early into their appointment, it was for the administrators to perform their duty, and the urgency of the present application only heightened as the administration progressed. Sev.en was not obliged to make a pre-emptive application on the assumption that the administrators would not fulfil their duty to investigate. Had any such application been made, it would surely have been met with the defence that it was premature.

123 There is nothing to suggest that Sev.en did not act promptly once it became aware that there was a need to make the present application. Even if Sev.en might have brought this application earlier, the administrators cannot now rely on that delay to avoid the consequences of their own failures.

124 The defendants also suggested that a range of other steps might have been taken by Sev.en to ensure the preservation of IGPC’s potential causes of action. However, the reference to those matters is an attempted distraction from the real issue, which is the administrators’ own failure to fulfil their statutory duties.

125 There was no relevant delay by Sev.en in making this application. It follows that it is not a relevant consideration in relation to the grant of leave to proceed, or the exercise of the discretion to appoint the special purpose administrators.

## The appointment of special purpose administrators

126 The power of the Court under s 447A(1) to make such orders as it thinks appropriate about how Pt 5.3A is to operate in relation to a particular company is broad. It is remedial, and is to be applied to the unlimited circumstances that might arise in relation to companies and administrations.

127 It was not doubted that the power is sufficient to permit a Court to appoint a special purpose administrator: *Jahani, in the matter of Northern Energy Corporation Ltd (Administrators Appointed) (No 2)* [2019] FCA 382 [28] (*Jahani*). In that case, Farrell J held that the Court had power to make such an order under either s 447A or s 95-15 of the IPS. Her Honour went on to observe as follows (at [29]):

Without in any way seeking to be restrictive, the Court accepts that special purpose administrators may be appointed in circumstances similar to those which Courts have found sufficient to justify the appointment of special purpose liquidators. Examples of those circumstances are set out in Gleeson J’s reasons in *Deputy Commissioner of Taxation, in the matter of ACN 154 520 199 Pty Ltd (in liq) v ACN 154 520 199 (in liq)* [2017] FCA 444 at [64]-[85] and they include:

(1) Where there are matters that require investigation with a view to possible recovery for the benefit of creditors.

(2) Where the current administrators have insufficient funds and insufficient prospects of obtaining funds to pursue an investigation.

(3) Where a creditor is prepared to fund an investigation and recovery action, but only on condition that another administrator is appointed.

(4) Where such appointment would be beneficial in the administration (or subsequent winding up) to the creditors as a whole.

128 The matters identified by Gleeson J, as set out by Farrell J above, are relevant considerations which may or may not apply on a particular occasion. When they do apply, the weight attributed to them will vary as that occasion requires. However, they do not impose any limit on the matters that might be taken into account, nor should they be taken to establish any fixed regime in which the power to appoint a special purpose administrator should be exercised. In general, they are matters that courts might regularly consider when reaching a state of satisfaction that it is appropriate to make the relevant order in the light of the particular circumstances of the case. Within those circumstances, the advancing of the interests of creditors and members in one way or another is a not insignificant underpinning consideration.

129 The defendants sought to distinguish *Jahani* from the circumstances of this case. However, the differences to which they pointed were immaterial. Here, Sev.en is effectively a substantive creditor of IGPC and the application that it makes will most likely inure for the benefit of all creditors. Though the time suggested for the extension of the administration for the purpose of allowing the special purpose administrators to make inquiries is longer in the present case than it was in *Jahani*, the underlying circumstances are different. Here, there is only scant evidence as to the extent of the work undertaken by the current administrators, such that it is not known from what foundation the special purpose administrators will have to start. Had the current administrators wished to limit the scope of the appointment, they ought to have been rather more open about the nature and extent of the investigative work that they have performed to date. Further, the purpose of the appointment is to investigate a not insignificant matter, which has a degree of complexity. It is not, as it was in *Jahani*, the mere examination of a transaction.

### Matters requiring investigation

130 Central to Sev.en’s application for the appointment of special purpose administrators is the proposition that such an appointment is required so that there can be a proper investigation into, and preservation and/or valuation of, any claims that IGPC may have against CSEL. The appointment is also required so that proper consideration can be devoted to whether there are good defences to CEPL’s claimed right to a transfer of IGPC’s interest in the joint venture. The claims against CSEL are essential to the value of IGPC’s interest in the joint venture and the price for which that interest might be acquired under the JVA Sale Process, or the price that might be offered under the NBIO Process.

131 On the available evidence, it is sufficiently apparent that the administrators, who have in part been funded by CSEL, have failed to make any substantial assessment of any claim that IGPC might have against CSEL in relation to the latter’s possible failure to meet its contractual or tortious obligations in relation to the maintenance of units C3 and C4. The evidence shows, further, that they have not adequately considered what defences they may have to CEPL’s attempt to acquire compulsorily IGPC’s joint venture interest. There is some vague evidence that the administrators have turned their minds to those issues, but nothing to show that they have seriously pursued them. The lack of action by the administrators has been left unexplained. Of greater concern is the fact that the administrators have no plan in place to do anything to further any such investigations. Their present intention appears to be to wait and see if any further information comes to light that might assist them to form a view, which they might then insert into their report to creditors.

### The scope of the administrators’ investigations

132 Despite the obvious importance of determining the cause of, and responsibility for, the failures of units C3 and C4, the administrators have not undertaken any appropriate investigations. The evidence in their affidavits tends to obfuscate rather than clarify what work they have performed in this respect. Overall, their approach in this hearing was to dissemble rather than be open and straightforward about the state of any investigations and the state of their knowledge.

#### The engagement of an expert to assess and report

133 It is concerning that the administrators have not engaged their own suitably qualified technical expert to assess and report on the causes of the two failures and to identify what conduct or omissions may have been responsible for the circumstances in which the failures occurred. There is no suggestion that they were unable to finance the production of such a report or that there was no person suitably qualified, and neither suggestion would have been tenable. As indicated, in the circumstances of IGPC’s administration, it is obviously in the interests of IGPC and its creditors and members to know what caused units C3 and C4 to go offline and who was responsible. The omission to engage an appropriate expert to report on these matters indicates a lack of attention to the requirements of the administration.

134 That failure has the result that the administrators have no expectation of receiving any further information prior to the time of the second meeting of creditors or, more importantly, the time of the attempt by CEPL to require a transfer of IGPC’s interest under the joint venture. They have no ability to inform the valuers engaged for that process of the worth of claims that might exist, and that should be taken into account.

#### What steps have the administrators taken?

135 The dissembling nature of the administrators’ evidence in relation to the steps that they have taken to ascertain the causes of the failures of units C3 and C4 renders it difficult to discern the real or effective nature of their investigations.

136 In the Third Sparks Affidavit, Mr Sparks claimed that the administrators had investigated IGPC’s affairs but that they were concerned to reveal too much information for confidentiality reasons. That explanation for the absence of any satisfactory evidence is insufficient. There are myriad ways in which evidence can be adduced in court without unnecessary publication, and it is axiomatic that the administrators and their legal representatives would have known that. The explanation in that respect lacks substance. The Court must proceed on the basis of the evidence produced and, if the administrators choose not to adduce evidence that might rebut an otherwise necessary inference, they have to bear the consequences of any adverse finding.

137 In his affidavit, Mr Sparks asserted that the administrators had reviewed the books and records of IGPC and identified reports that had been generated by experts engaged by stakeholders in the Callide Power Project in relation to the failure of unit C4. Thereafter, a number of reports were referred to, though the oblique references to their contents do not suggest that they informed the administrators of the causes of the failures of units C3 and C4. Whilst some of the reports referred to might touch upon the causes of the failures, many were initiated by CSEL, and the administrators claimed that they are now privileged by reason of common interest privilege. Some reports were also said to have been acquired by the compulsory production processes in the course of litigation and, therefore, could not be disclosed. Others were simply claimed to be “confidential”, though what that means in the current circumstances is unclear.

138 Mr Sparks further stated that he and Mr Hughes have undertaken reviews and held multiple discussions with several persons about the background of the incidents and technical issues relating to them.

139 From the foregoing, Mr Sparks claimed that the administrators have considered the legal position of IGPC in relation to the incidents and its position under the Joint Venture Agreement. They have also considered and advanced claims against insurers, which process has involved their undertaking an assessment of the losses that have been sustained and the cost of rebuilding units C3 and C4.

140 In circumstances where Mr Sparks gave evidence that he has considered a number of reports that are (in his apparent view) relevant to the failures of units C3 and C4, it is strange that he omitted from his evidence any opinion that he or Mr Hughes formed as to the causes of those failures. He did not say that any opinion has been formed, or that there is insufficient evidence on which to base a conclusion. He did not even venture to opine as to what further information might be required, if any. He made no statement whatsoever as to the sufficiency of the available information. These omissions were sought to be excused by the claim that the investigations are ongoing.

141 That claim is insufficient. It suggests that the administrators anticipated further investigations that were incomplete. However, it has subsequently become clear that there were no anticipated further investigations, and the administrators have no plan to undertake further investigations. Rather, all that was meant was that further reports from other sources may be received and considered by the administrators prior to the preparation of their second report to creditors. In other words, the administrators have had no plan in place to acquire information that they considered necessary to formulate appropriate opinions for the purposes of the report to creditors.

142 That is obviously inadequate. It is made more so by their uncritical reliance on reports produced by CSEL. That company, more than any other entity, is likely to have some responsibility for the failures at units C3 and C4. It had the contractual obligation to manage, maintain and operate the power units and, in the ordinary course, it is unlikely that such catastrophic failures would have occurred without some wrongful act or omission on its part. That is not to make a finding that it is culpable or liable, of course. It is merely to point out that there is a significant possibility that it might subsequently be found to be, in the circumstances as they are presently known. That being so, it is passing strange that the administrators would seek to rely upon reports produced on its behalf for the purpose of determining whether it failed to meet its contractual obligations or is otherwise liable to IGPC.

143 In that latter respect, it can be observed that the report of Dr Brady, in particular, was referred to repeatedly in the evidence. The administrators appeared to rely upon that report as the solution to their omission to make their own investigations. As mentioned, Dr Brady was engaged by CSEL in June 2021 to investigate the incident involving the failure of unit C4. The terms of reference given to Dr Brady have not been produced, and they have not been described in even the most general sense. It does not seem likely that the administrators have seen them or know their contents.

144 Despite two and a half years having passed since it was commissioned, no report from Dr Brady has been seen by the administrators. A statement in a media release of CSEL on 25 May 2023 indicated that the independent investigation by Dr Brady into the failure of unit C4 was entering its final stages. Yet, still, it has not been produced. It is not known whether the report has been given to CSEL or whether it remains incomplete. The administrators had no evidence about that. On 18 October 2023, their solicitors informed the solicitors acting for Sev.en in a letter that they had no detail as to when the report would be delivered. In particular, the letter provided:

1. The independent review by Sean Brady to which you refer is ongoing and the Administrators currently have no detail as to when that report will be delivered. We understand that the Callide Power Project itself (through the manager) has also engaged a separate expert for the purposes of a separate individual review. The Administrators investigations as to the scope and adequacy of the investigations are continuing.

145 The impression that one might gather from this passage is that the administrators were not actually pursing any investigations themselves, but instead were merely considering the scope and adequacy of investigations conducted by others.

146 A consideration of the scope and adequacy of the investigations being carried out by others could only prove relevant if the administrators were to receive some conclusions or results from those investigations. Here, it appears that the administrators merely have a hope that Dr Brady’s report might be produced in time for them to consider it before forming an opinion about the causes of the unit C4 incident, and the potential causes of action that might flow from it. That said, they have no right or entitlement to see the report. It is being prepared for CSEL, which commissioned it and, presumably, paid for it. On that basis, the administrators’ hope is effectively that CSEL will gratuitously provide to them a report that it has commissioned about the incident, in circumstances where there is a likelihood that CSEL will bear some responsibility for it. If that is indeed their position, it is not one that reasonably competent administrators who are seeking to comply with their obligations would adopt.

147 The administrators also relied upon an investigation being conducted by the AER into the incident in relation to unit C4 and the potential liability of CEPL, IGPC and Callide Power Trading Pty Ltd (a company that is apparently a registered participant and intermediary under the National Electricity Law for the Callide Power Project). They have been required to cooperate with that investigation and have sought legal advice about it. However, investigations into whether certain entities met statutory requirements may not necessarily be concerned with the causes or consequences of the failure to meet them. In this case, the AER’s investigation may not entail any detailed consideration of the circumstances leading to the failure of unit C4, but rather may be limited to whether certain standards were met.

148 In his evidence, Mr Sparks again observed that the AER’s investigation into the unit C4 failure is ongoing. By that, he seemed to suggest that the final report may be of use to the administrators. If that is true, it is again a mere hope — not a realistic expectation. The administrators have no right to be briefed on the results of the AER’s investigation, and it may be that they never will be. It is not immediately apparent why the administrators believe that the AER’s investigation will assist them to understand the causes of the failure of unit C4. There is also not a scintilla of evidence that the report will be available to them within any suitable timeframe.

149 It should be remarked that, in the Third Sparks Affidavit, there exists a not insubstantial amount of material about the investigations of others, including the AER. Much of it is irrelevant. It has the appearance of having been included merely to “pad” the affidavit with material that ostensibly identifies some investigative work on the part of the administrators. However, as the suggestion that the material served only that purpose was not put squarely to them, I refrain from making any finding about it.

150 Whatever steps might be said to have been taken by the administrators to ascertain the causes of the failures of units C3 and C4, they have been inadequate. The administrators have failed to initiate investigations that they would be able to control, regulate and rely upon. Instead, they have conditioned their ability to understand the causes of the failures and the responsibility for them on the work of others. It is only a possibility that this work will even be provided to them. To exacerbate their failure to perform their statutory function, they have put themselves in a position whereby they might have to rely upon a report produced for CSEL, specifically — an entity that has an obvious interest in deflecting blame away from it.

151 In around October 2023, the administrators gave notice of their intention to apply for approval of their remuneration for the period between March and July 2023, as well as prospective remuneration from 1 August 2023. They filed material in support of that application. As was submitted on behalf of Sev.en, the material fails to disclose any work undertaken in the investigation of the causes of the failures of units C3 and C4. A cryptic reference is made, in respect of the work intended to be performed in the period from 1 August 2023 to the end of October 2023, to “undertaking investigations”. However, on the evidence, that apparently does not refer to investigations in relation to the causes of the failures of the units. This supports the conclusion referred to above that little or no relevant investigation has been undertaken and, indeed, the administrators do not intend to conduct any such investigation.

152 It should also be observed, for what it is worth, that much of the consideration in the material seems to have related to the failure of unit C4 and very little has concerned the failure of unit C3.

153 If the administrators have in fact undertaken sufficient investigations into the failures of units C3 and C4, then they must necessarily have the means and ability to establish as much. However, evidence of those matters is lacking. As was said by Branson J in *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182, s 140 of the *Evidence Act 1995* (Cth), relating to the standard of proof in civil proceedings, incorporates “the common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and in the power of the other to contradict”: see also *Apollo Shower Screens Pty Ltd v Building & Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561, 565; *Blatch v Archer* (1774) 1 Cowp 63, 65; 98 ER 969, 970; *Vautin v BY Winddown, Inc (formerly Bertram Yachts) (No 4)* (2018) 362 ALR 702, 743 [193]. Here, the scant and obscure evidence adduced by the administrators is indicative of their inability to establish that they have undertaken appropriate investigations.

154 *Prima facie*, therefore, the work undertaken by the administrators to ascertain the vital information concerning the causes of, and responsibility for, the incidents in question has fallen below the standards required. Those matters are critical to the interests of IGPC and the interests of its creditors in relation to both the potential sale of IGPC or its assets under a DOCA, or the compulsory acquisition by CEPL. The inadequacy of the investigations is compounded by the administrators’ (related) failure to form any view whatsoever about the cause of, and responsibility for, the incidents. Their unrealistic hope that some other information may happen to come their way before knowledge of the true value of IPGC becomes pivotal also demonstrates conduct falling well short of the standards ordinarily to be expected of administrators.

#### Legal advice

155 In the Fourth Sparks Affidavit, Mr Sparks asserted that a barrister “was indeed briefed to provide the Administrators with advice in relation to potential claims arising out of the Callide C Incidents, the contents of which is subject to legal professional privilege”. The defendants’ written submissions stated, relatedly, that:

The Administrators sought and considered legal advice, including advice from [a barrister] in relation to potential claims arising out of the Callide C Incidents. While the exact parameters of the advice sought and obtained are privileged, the fact that advice has been sought is not.

156 There is nothing in the affidavit of Mr Sparks that indicates that he has obtained advice from the counsel concerned, or that he had considered it. Even if it is assumed that advice has been obtained and considered, a question arises as to its value in the present context, where there is no disclosed report as to how the incidents involving units C3 and C4 occurred. One might expect that the advice is about the liability of various parties (including CSEL) generally but, absent knowledge of the causes of the failures, it is difficult to see how the advice would assist the administrators in providing any information to creditors about the available causes of action or their value.

157 It is relevant to note that the administrators have failed to express any opinion as to the existence or otherwise of any causes of action that IGPC might have. All that has been said is that, based on their experience in assessing the value of contingent claims, there are several issues and risks that may reduce the value of any *choses-in-action*. That statement is, with respect, somewhat meaningless. The omission to mention that it was based on the legal advice received (if that was in fact the case) is unusual.

158 In any event, in circumstances where the administrators are not sufficiently informed about the incidents to know how they occurred, there seems to be little value in whatever legal advice might have been obtained.

#### Were the administrators required to carry out the investigations?

159 Part of an administrator’s role is to prepare a report to creditors in accordance with s 439A of the Act, and r 75-225 of the *Insolvency Practice Rules (Corporations) 2016* (Cth) (IPR), about the company’s business, property, affairs and financial circumstances, which provides appropriate information on which the creditors can act when exercising their vote at the second meeting. Usually, the report will include commentary and observations about the potential causes of action that the company under administration might have, and their potential value. Some investigation by the administrators is necessary in order to facilitate the inclusion of those matters. Here, the evidence sufficiently demonstrates that the required investigations have not been performed.

160 Nevertheless, a central tenet of the defendants’ submissions was that administrators are not required to undertake the same type of investigations as are required of liquidators. They claimed that Sev.en sought to impose upon them too high a standard of investigation, and that the substance of the application was to appoint quasi-liquidators who might undertake the more in-depth investigation.

161 That submission should be rejected. The requisite level of investigation will necessarily vary with the circumstances of each case — including the time in which the administrators must undertake it. Here, the administrators have held their office for more than 10 months and there is nothing to suggest that an adequate investigation could not have been done in that time.

162 It was not doubted that administrators have a duty to undertake investigations and make inquiries where the circumstances call for them, keeping in mind the need for efficacy in the process. In *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement) (No 4)* [2019] FCA 1846, Besanko J identified the need to satisfy the balance between speed and accuracy where he said (at [1206]):

Nevertheless, there is a duty on an administrator to make inquiries where the circumstances call for such inquiries. The “delicate balance” between speed and accuracy was discussed by Austin J in *Portinex* (at [125]–[127]). The passage is lengthy, but, with respect, it is helpful to set it out in full:

125 If an insolvent company is to be saved and restored to health, the commercial reality is that decisions about its future must be taken speedily after its insolvency has been identified. Additionally, speed is required because rights of enforcement against the company are suspended during the period of administration, and it would be unfair to extend the period of suspension for longer than is absolutely necessary. Therefore Part 5.3A sets a very short timetable for the creditors’ decision about the future of the company. It is an unfortunate but unavoidable consequence of the scheme established by Part 5.3A that the creditors must make their decision on the basis of information that is likely to be imperfect …

126 The balance between speed and accuracy is a delicate one. An administrator who accepts the company’s information uncritically and without exercising judgment, cutting corners to complete the administration and receive his fee, will be treated harshly by the Court, since the whole scheme of Part 5.3A depends on the independence, competence, professionalism and hard work of the insolvency practitioners who accept appointments as voluntary administrators.

127 The distinction between an adequate preliminary investigation, leading to the conclusion that there are grounds for suspecting insolvent trading and unfair preferences but going no further, and an inadequate preliminary investigation which fails to assemble available information with respect to insolvent trading and unfair preferences, is a matter of degree. If the administrator has conducted an adequate preliminary investigation in accordance with the principles in the *Hagenvale* case, his obligation is to bring the results of the investigation to creditors so that they can decide what is to be done next. If the administrator’s preliminary investigation has been adequate, he is entitled to decline to embark upon further substantial investigations unless funds are made available to cover his fees and expenses of doing so.

163 However, as his Honour also noted, that does not mean that an administrator is entitled to neglect the undertaking of an appropriate investigation into the company’s affairs. At [1207], he said:

The duty of an administrator to carry out proper inquiries was, with respect, forcefully articulated by Gillard J in *Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126 at [75]–[79]. The passage is lengthy, but again, with respect, it is helpful to set it out in full:

75 The extent of the investigation is in the end a matter for the administrator. Hence the importance of his impartiality, independence and requirement to act carefully in the interests of the creditors.

76 Whilst there are strict time limits and the administration is intended to proceed speedily there is no excuse for failing to carry out a full and proper investigation. What is a full and proper investigation will depend on all the circumstances but matters of concern to creditors are preferences, possible directors’ breach of duty, possibility of recovering compensation from directors who conduct the company’s business knowing it is insolvent, and recovery of compensation from de facto directors. Another matter of importance is the recovery of any of the corporation’s property which has been unlawfully transferred.

77 In my opinion it is no excuse to limit a full and careful investigation by reference to the time limits set out in the Law. Time limits require expedition, and a full investigation may require further resources being used and if necessary the second meeting be adjourned or an application for extension of time be made. Further resources would include the employment of enough personnel to adequately perform the task. The fact that the second meeting can be adjourned from time to time supports the view that the administrator should not refuse to investigate fully a matter because of time constraints. In the end result the creditors must know. They are entitled to a thorough investigation. They rely on the administrator performing his task. Failure to properly investigate puts at risk the whole object of Pt5.3A which ultimately leaves the decision to the creditors making an informed decision. If the administrator is unable to make a proper investigation in respect of matters of importance to the creditors’ decision he should tell them. He should alert them that there are matters relevant to their interests which should be further investigated. Much can be gained by shareholders, directors and others from a deed of company arrangement “wiping the debts” and putting beyond the reach of the law the delinquencies of directors and others involved with the company’s business. It behoves an administrator to properly fulfil his duty.

78 There are dicta in the cases suggesting that the time limits imposed for the convening of the second meeting can affect the amount of information that should be provided to the creditors. An administrator should not take those observations as being an excuse for failing to properly, adequately and carefully investigate matters which are material to the decision of the creditors or failing to inform the creditors on material matters.

79 The administrator has extensive powers and it is no excuse not to fully, carefully and adequately investigate a matter which would bear on the decision of the creditors. There is a tendency to assume that if any money is available to a creditor pursuant to a deed of company arrangement which is in excess of any amount that would be recovered on a liquidation, that is a proper basis for opining the view that company arrangement is the best alternative. Therefore there is no necessity to concern the creditors about other issues. The argument is the bottom line is money, and irrespective of how much, a receipt of something is better than nothing. But there are other factors which may influence creditors. They should have the benefit of a proper investigation.

164 The observations of Gillard J in *Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126 at [77] – [79] are particularly relevant to the present case. Any investigations must be proper, adequate and careful, such that the creditors can be appropriately informed. That is especially so in this case, where the time for the convening of the second meeting of creditors has been extended previously, allowing more than sufficient opportunity for a thorough investigation to take place. This is not a case where it can be said that only abbreviated inquiries could have been undertaken because of the limited time available. Here, the difficulty is that the required investigations have not occurred at all, and the administrators have not acted in a manner that is likely to furnish the creditors with sufficient information from which they may decide how to exercise their vote.

165 At the hearing, counsel for the defendants emphasised that an administration is intended to be swift and practical, and that the Court should be slow to impugn the business and commercial judgements of the administrators. The defendants relied upon a line of cases, including *Britax Childcare Pty Ltd v Infa Products Pty Ltd* (2016) 115 ACSR 322, *Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd (No 2)* (2011) 82 ACSR 300, *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612 and *Strawbridge, in the matter of Virgin Australia Holdings Ltd (administrators appointed) (No 8)* [2020] FCA 1344. Those decisions broadly establish that an administrator’s investigation is necessarily a preliminary investigation, which is carried out in accordance with the short timeframes imposed by Pt 5.3A of the Act. In that context, the Court must not assess the steps taken by administrator in an overly critical light.

166 None of the propositions drawn from that line of cases is in any doubt. Nor is any of the propositions in conflict with the position stated above. As Besanko J and Gillard J made clear in the passages extracted above, the requirements under Pt 5.3A are also flexible and take into account the myriad circumstances in which companies may find themselves. Any investigations expected of an administrator must be within what is practical and proportional in the circumstances. Here, however, the administrators have determined on two occasions to seek an extension of the convening period. The claims that IGPC may have are expected to carry a not insignificant value, and are properly regarded as being significant to the creditors’ decision as to what to do with the company. The period of time that the administrators have had is more than sufficient to accommodate the calibre of investigation that the circumstances of this case warranted, as has been identified above. Unfortunately, for whatever reason, the necessary investigation simply does not appear to have been conducted.

167 In this case, the essential issues as to the cause of the failures of units C3 and C4 and the responsibility for them are critical to the determination to be made by IGPC’s creditors. Even if the time for the conducting of investigations had been more limited, the administrators’ omission to act with reasonable haste to ascertain appropriate answers should not be allowed now to “prejudice sensible and constructive actions directed towards maximising the return for creditors and any return for shareholders”: *Re Diamond Press Australia Pty Ltd* [2001] NSWSC 313 [10]. The creditors are entitled to that critical information before deciding whether to vote in favour of a DOCA or to cause IGPC to be wound up. The appointment of special purpose administrators with appropriate powers would allow that to occur.

168 The defendants submitted that there was no basis for the suggestion that they would not call the attention of the creditors to the potential claims that IGPC might have in relation to the failures of units C3 and C4 in their report to creditors. That, however, avoids the real point: that is, without the results of a proper investigation and analysis of the potential claims, the creditors will have no real understanding of their value. The present circumstances are far removed from those prevailing in many cases, where the potential claims are relatively small compared to the anticipated value of the company. Here, the value of the claims may well be in the tens or hundreds of millions of dollars and form a substantial portion of IGPC’s value.

169 The authorities referred to above merely serve to emphasise that the administrators in this case have fallen well short of the standard ordinarily to be met in the performance of their statutory duties. That has put IGPC and its creditors in a difficult position in relation to the sale or disposition of the business or its assets. The appointment of the special purpose administrators has the potential to alleviate, or remedy, that detriment.

#### Delay

170 Again, it is worthy of remark that the administrators have not explained the unfortunate delay in their investigation into the potential claims against CSEL. The absence of an explanation when one is called for is, necessarily, a significant matter to be taken into account. It becomes more relevant in circumstances where the administration is progressing toward a conclusion or, alternatively, toward the forced acquisition of IGPC’s joint venture interest. The administrators’ delay in this case is especially regrettable, as it risks a situation in which IGPC might be deprived of valuable *choses-in-action* without appropriate compensation. Their omission to explain that delay is even more concerning, and indicates a failure to appreciate one of the most fundamental aspects of their obligations.

171 The concern raised by the above matters is compounded by the administrators’ opposition to the appointment of the special purpose administrators. In circumstances where, for whatever reason, there has been inadequate investigation into IGPC’s claims, it seems counterintuitive that the existing administrators would oppose the appointment of persons who are able to consider those claims specifically, and who are independently funded to do so. There was no sufficient explanation as to why the administrators opposed the proposed appointment.

172 Sev.en relied on the further proposition that the administrators have accepted funding from CSEL and/or CEPL but have not disclosed the terms and conditions on which it was provided. That is a not unimportant point, as it may be that a term of the funding provided by CEPL was that the administrators were not to investigate any potential claims against CEPL or CSEL. If that were the case, it would explain the absence of any real investigation in that respect. Whilst the administrators took objection to the raising of this inference, they were best positioned to dispel it and yet they chose not to give evidence about it. That is entirely a matter for them. However, having received funding from the subsidiary of an obvious target of litigation, it seems to be incumbent on them to explain the inference that arises.

173 By itself, the administrators’ failure to investigate the potential claims against CSEL and/or CEPL, despite having had sufficient time to do so, supports the granting of the relief sought by Sev.en, if that could be achieved without detriment to IGPC. If the current administrators are left to pursue whatever investigations they may currently be pursuing, then there is a serious risk that an extremely valuable claim that IGPC may well have against CEPL and/or CSEL may be lost or diminished in value.

174 It can be accepted that the administrators have attended to most of the usual tasks required in an administration. Those tasks were identified broadly in the affidavits and submissions filed in these proceedings. However, the question in the present case is not what general matters have been attended to, but rather what has been done to ascertain the cause of and responsibility for the failures of units C3 and C4. It is not expected that the administrators will necessarily undertake the inquiries themselves. The appropriate step here would have been for the administrators to engage an expert to make inquiries and to provide the expert with the information and material relevant to that process. This should not have involved a great deal of time and effort by the administrators or their staff.

### Financial support for the special purpose administrators

175 Other factors relevant to the appointment of special purpose administrators, as referred to by Farrell J in *Jahani*, include whether the existing administrators have insufficient funds and insufficient prospects of obtaining funds to pursue an investigation and, conversely, whether a creditor is prepared to fund an investigation and recovery action, but only on the condition that another administrator is appointed.

176 In the present case, the first of these factors is irrelevant. While the administrators are possessed of sufficient funds to undertake the required investigations, they have not indicated any intention to expedite any investigation and, unfortunately, it must be concluded that they are, seemingly, not prepared to do what is required.

177 On the other hand, there is no risk that IGPC will be burdened with additional costs or that the appointment of special purpose administrators will negatively impact its creditors: see *Shangri-La Construction Pty Ltd v GVE Hampton Pty Ltd (in liq)* (2021) 152 ACSR 19, 34 [87]. Sev.en is prepared to fund the investigation and any recovery action on the condition that the special purpose administrators are appointed. It has produced a funding agreement, which it is prepared to enter with the special purpose administrators as is appropriate. It shows that the special purpose administrators’ costs will be met by Sev.en so as to avoid any duplication of costs with the administrators. The funding will be available for the remuneration of the special purpose administrators and for their legal expenses. If the initial limit of funds is reached, a request can be made for additional funding and the parties will consult in good faith, and the same applies in relation to subsequent limits. The actual amounts that will be payable have been redacted, but there is nothing sinister in that. That is necessarily confidential information. It can be assumed that the amounts will be adequate, given Sev.en’s commercial interest in the matter. The special purpose administrators’ obligation to repay Sev.en is limited to the recoveries received by IGPC in connection with the investigation, subsequent proceedings, or any appeal.

178 An important aspect of the funding arrangement offered is that the special purpose administrators will be unrestrained in the use of the funds, save that they are to be used generally for the purposes for which they are advanced. A further aspect is that, if the special purpose administrators consider that it is appropriate to commence proceedings, the parties will consult with a view to funding that litigation. That may be somewhat optimistic, given that the time remaining in the administration may be limited.

179 In the course of the hearing, some aspects of the funding agreement were rightly criticised by the defendants and Sev.en agreed not to pursue them.

180 For the purposes of this application, it is sufficient to conclude that, if the special purpose administrators make an application in relation to entry into a funding agreement, then there exists a likelihood that Sev.en will propose an agreement that is acceptable to the Court. Although the final terms cannot now be known, there is enough material before the Court to conclude that there is a satisfactory assurance that the appointment of special purpose administrators will not financially burden IGPC or otherwise diminish the funds available to the current administrators. In this way, the appointment will neither adversely affect the current administration nor diminish whatever funds may be available to the company’s creditors.

181 In his first affidavit, Mr Šlechta indicated that Sev.en had lost faith in the current administrators, with the consequence that it was only prepared to fund alternative and independent administrators. For the reasons that have been referred to above, Sev.en’s position is understandable and should be accepted. The evidence in these proceedings objectively justifies Sev.en’s position that, even if it funded the current administrators, it is unlikely that the required investigations would be carried out.

### Whether the appointment will benefit the administration and creditors as a whole

182 A further relevant factor is that the appointment of the special purpose administrators will likely benefit the administration and the company’s creditors as a whole. At the very least, the appointment will allow for a fulsome and appropriate investigation of IGPC’s available *choses-in-action* against CEPL or CSEL arising from the failures of units C3 and C4. It is also likely that it will enable a proper valuation of those claims, which is relevant to any sale of IGPC’s interest in the joint venture or of its interests pursuant to a DOCA. The investigations come at no cost to the company or its creditors. Further, if proceedings are brought by IGPC following the special purpose administrators’ investigations, IGPC’s creditors stand to benefit from any amounts recovered.

183 The appointment of special purpose administrators will also permit the current administrators to focus on other areas of the administration, allowing for those matters to be attended to with greater timeliness and efficiency. In this respect, it is noted that the orders that are sought expressly separate the powers granted to the special purpose administrators from those of the existing administrators. Such an order allows for clarity in the performance of the duties of the two sets of administrators and, to some extent, avoids disagreement as to their respective responsibilities. Such orders are common in circumstances akin to the present: see, for example, the orders made in *GDK Projects Pty Ltd, in the matter of Umberto Pty Ltd (in liq) v Umberto Pty Ltd (in liq)* [2018] FCA 541and *Commonwealth of Australia (Department of Education, Skills and Employment) v Phoenix Institute of Australia Pty Ltd (in liq)* [2020] FCA 937. Even though both cases concerned the appointment of special purpose liquidators, the pragmatic considerations contained in them are applicable to the present case.

184 Such orders are unlikely to cause any difficulty for the present administrators. Certainly, the administrators have not adduced any evidence to the contrary, nor have they expressed any opinion to that effect. Pursuant to the orders sought, the special purpose administrators are to have exclusive power with respect to several identified matters. The orders have sufficient clarity to allow reasonable people, acting honestly, to ascertain that which is within their scope and that which is not. If the unfortunate circumstance arises where the administrators and the special purpose administrators are in disagreement, then either party may make an appropriate application to the Court.

185 There is one matter that requires some more specific treatment, and that is the entitlement to make an application to the Court for an extension of the convening period for the second meeting of creditors. That power should be held by each set of administrators independently. It is likely that such an application will be required, and there is no reason why it should not be made as soon as one set of administrators is satisfied that it is necessary.

186 It cannot be doubted that, in order to benefit the creditors as a whole, any relevant report prepared by the special purpose administrators should be made available to the existing administrators prior to the second creditors’ meeting. That would enable the existing administrators to consider it and advise the creditors about its findings. It will also enable them to identify to the creditors the impact that any such report has on their own views. A similar approach was taken by Farrell J in *Jahani* at [71].

187 The defendants submitted that the appointment of special purpose administrators would “create significant uncertainty in relation to the finalisation of the administration of IGPC and the timing of any payment of creditors” and would extend beyond current expectations the time required to conclude the administration. Even if this is accepted, the compromise is that the creditors will acquire substantially more useful information with the result that they will be better informed as to the manner in which they might exercise their vote at the second meeting. Additionally, the exposure of the true value of the claims available to IGPC is likely to force any DOCA proponents to offer greater consideration, as some of the uncertainty around the value of IGPC’s assets will be removed.

188 It was also said that the appointment of the special purpose administrators will add costs to the administration, in that an application for an extension of the convening period will be required and resources will have to be applied to accommodate the requirements of the new administrators. Whilst it is likely that those costs may be incurred, in the absence of any sufficient information about the costs of the administration to date, it is difficult to ascertain the relative burden that they would impose. In the present context, where the administrators have received in excess of $100 million on one of their insurance claims, it is unlikely that the costs referred to will be significant. Moreover, it might be pointed out that this is an unusual complaint for the current administrators to make in circumstances where it has been their failures that have created the need for the appointments.

### The possible release or transfer of IGPC’s claims

189 A further issue that arose was whether any of IGPC’s potential claims against CSEL or CEPL could be acquired by the latter pursuant to the compulsory acquisition process, if that course is pursued. In that regard, the question is whether any such claims are part of IGPC’s interest in the joint venture. There are arguments both ways, and that is best exemplified by the current administrators having expressed both opinions in recent times. In his initial affidavit, Mr Sparks expressed the conclusion that any claim IGPC had against CSEL was joint venture property, which would pass to CEPL if the transfer under the Joint Venture Agreement occurred. Conversely, at around the same time, the administrators, in their submissions to the valuers for the purposes of the transfer of the joint venture interest, expressed the opposite opinion — that is, that the claims that IGPC might have against CSEL did not form part of IGPC’s interest under the Joint Venture Agreement. Inconsistently with that position, in the course of the hearing, counsel for the defendants submitted that some causes of action might be transferred whilst others might not be. This point is somewhat significant in circumstances where the administrators have made submissions to the valuer, which could have the result that IGPC’s valuable causes of action might be lost for no consideration. The administrators have failed to explain their inconsistent positions, notwithstanding the serious consequences that may result.

190 In its written submissions, Sev.en advanced the position that any such claims would remain the property of IGPC. Whether that is correct in relation to each of the possible contractual, tortious or statutory claims need not be decided on this application. However, there are some strong arguments in support of the proposition that some of the statutory causes of action will not be transferred.

191 Sev.en submitted that, assuming IGPC had claims against CSEL that were not transferrable under the Joint Venture Agreement, there was a risk that they would be extinguished as a result of either the JVA Sale Process, or through a DOCA or other process in the administration. It further submitted in relation to the former process that CSEL has asked the administrators to waive any claim by IGPC in relation to Callide C (which would include claims against CSEL and CEPL) and that the administrators have not ruled out granting such releases. For the latter proposition, Sev.en relied upon a letter of 18 October 2023 sent to its solicitors from the administrators’ solicitors, wherein it was stated that:

We confirm that the Administrators have no intention, without the benefit of further investigations, advice and information, of releasing Callide Energy Pty Ltd (CEPL) or CSEL from any claims that may exist as a result of the incidents. The Administrators are aware that such claims will have a bearing on both the value of CEPL’s claim against the Company and the value of the assets of the Company.

192 Whilst that statement might suggest that the administrators could, on some occasion in the future, release or waive the claims, it does not suggest that they will release them prematurely or without adequate compensation being paid. Rather, it suggests that the administrators were at that time awaiting the results of investigations and advice before consideration of such matters could occur. Whilst this tends to diminish the suggestion that IGPC’s causes of action might readily be lost or devalued, it also emphasises that, as of 18 October 2023, the urgency in obtaining advice as to the causes of and responsibility for the catastrophic failures in units C3 and C4 was patent. This urgency did not seem to motivate the administrators at the time. Again, this reveals the adoption of an approach on the part of the administrators that supports the appointment of special purpose administrators.

### Injunctive relief against the current administrators in relation to IGPC’s causes of action

193 Although the issue as to the injunctive relief sought by Sev.en does not bear on the question as to whether the special purpose administrators should be appointed, it is conveniently dealt with at this juncture. By its proposed orders, Sev.en sought the imposition of a restraint on the administrators to prevent them from releasing any of IGPC’s claims in relation to the failures of units C3 and C4. That relief was sought in the originating process as interlocutory relief and, whilst no application to amend was made, the defendants did not appear to object to it being sought as final relief.

194 Nevertheless, such relief should not be granted. It is not needed, as there appears to be no risk that the administrators will release any of IGPC’s claims without sufficient reason. Any attempt to do so could be enjoined in the future. It may be that, if CEPL seeks to enforce the compulsory acquisition of IGPC’s joint venture interest, a number of causes of action might be transferred. That, however, would be a consequence of the operation of the parties’ agreement, rather than any independent action by the administrators. Presently, there is no articulated claim that might be relied upon to prevent CEPL from enforcing its rights. That is not to say that such a claim does not exist, and counsel for Sev.en identified some causes of action that might, with a bit of work and elaboration, be called in aid to justify injunctive relief.

195 The defendants pointed out the absence of any undertaking as to damages by Sev.en. However, that is not a relevant consideration where the injunctive relief sought is final.

196 For the foregoing reasons, the injunctive relief should be refused.

### The potential claims that IGPC may have against CEPL or CSEL

197 As mentioned, and as was observed in *Melhelm Pty Ltd v Boka Beverages Pty Ltd* *(in liq)* (2019) 138 ACSR 95 at 105[59], it is neither necessary nor appropriate for this Court to make findings in relation to the potential claims that a company in administration may have against third parties. Nevertheless, Sev.en made substantial submissions as to the nature of the possible causes of action and, to some extent, their strength. It did so in an apparent effort to support the making of the orders sought.

198 Despite Sev.en’s desire to secure some findings as to the potential causes of action, little should be said other than that the evidence establishes that there is a degree of likelihood that a number of causes of action may exist, even if their merits are unable to be ascertained at this point. Necessarily, those causes of action arise from the failures of units C3 and C4 at a time when CSEL was responsible for their maintenance and operation, and the not unreasonable *prima facie* inference that the failures would not have occurred in the absence of some neglect or default on its part. It must be stressed that it may well be that the failures occurred in the absence of any act or omission by CSEL, or it may well have conclusive defences to any claim that might be made. Indeed, those defences may arise from the Operation and Management Agreement itself, and the terms therein limiting its liability. Whether those clauses are sufficient to exclude claims made under the *Australian Consumer Law* (being Sch 2 to the *Competition and Consumer Act 2010* (Cth)), however,is a question that will need to be determined: see *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2023] VSCA 157 [450], [712].

199 It was also submitted that IGPC may have a claim for unconscionability, which might prevent CEPL from exercising its rights of compulsory acquisition under the Joint Venture Agreement. It was said that, if the wrongful conduct of the parent company caused damage to IGPC which, in turn, triggered the compulsory acquisition clause, those circumstances may prevent its enforcement. At first blush, such a claim under s 21 of the *Australian Consumer Law* might seem to have no more than moderate chances of success. However, a consideration of the several reasons for judgment in the High Court’s decision in *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 reminds one that the section is extremely wide and may require only a departure from acceptable commercial behaviour. Necessarily, whether that has occurred in this case is dependent upon the particular circumstances. An initial hurdle for Sev.en is that it was CSEL that allegedly caused IGPC’s loss, not CEPL (which is the joint venture partner seeking to enforce the agreement). Nevertheless, a quick perusal of the documents relating to the parties’ interactions suggests the possibility that the operation of units C3 and C4 occurred via groups of economic interests, rather than through the operation of individual companies. If that were the case, and it is far from clear, then it might follow that any wrong committed by CSEL that caused IGPC’s insolvency could bar CEPL’s reliance on the strict terms of the Joint Venture Agreement.

200 Whether a claim based on s 21 of the *Australian Consumer Law* can be advanced is far from certain. However, it is also far from improbable — at least, as the facts are currently known.

201 Overall, the evidence supports the conclusion that there may well be several claims that IGPC might pursue, which might serve to protect its interest in ensuring that:

(a) its assets, including its causes of action, are correctly valued;

(b) its interest in the joint venture is not improperly appropriated; and

(c) if its interest in the joint venture *is* taken, it receives the value to which it is entitled.

### The absence of any evidence of urgency under the JVA Sale Process

202 A further issue in these proceedings concerned the exigencies of the circumstances of CEPL’s enforcement of its rights under the Joint Venture Agreement. It was common ground that CEPL has sought to enforce a transfer of IGPC’s interest in the joint venture and that the agreed process of valuing IGPC’s interest has begun. It was suggested that this created an urgency relevant to the exercise of the Court’s discretion. Whilst that should be accepted, each party asserted that this supported their position. For the defendants, it was submitted that, as the acquisition under the Joint Venture Agreement is likely to conclude in the near future, there is insufficient time for special purpose administrators adequately to investigate and consider whether any claims exist and, if so, what they are worth. Though there is some force in this, it is, as Sev.en submitted, ameliorated because it was the administrators’ failure to perform their duty which has caused the problem in the first place. In any event, though the time to investigate may be short, if, as the administrators say, they have numerous reports that have accumulated over time, that should work to hasten the special purpose administrators’ assessment.

203 Conversely, the current administrators have not adequately, or at all, sought to ascertain what claims IGPC may have against CSEL or what relief might obtain in relation to CEPL’s attempt to enforce the transfer under the Joint Venture Agreement. They are seemingly prepared to capitulate to CEPL’s demands, despite the absence of any sufficient consideration of the relevant issues. In this context, whilst it may be that the timeframe for achieving an outcome is limited, there exists a possibility that some claims can be ascertained and used to preserve IGPC’s position. Even if the possibility was not significant, some substantial benefit could still be achieved if claims were identified and valued.

204 Further, the attitude of the current administrators discloses that they are not prepared to pursue any relief in relation to CEPL’s asserted claim to IGPC’s joint venture interest. It was on this basis that Sev.en sought orders that the special purpose administrators have wide powers to commence and prosecute proceedings arising from their investigation. It also sought orders that the special purpose administrators have power to defend any legal proceedings in which any third party seeks to acquire IGPC’s interest in the joint venture. Whilst, initially, such orders might seem excessive, the administrators’ conduct in this case has, on the basis of the material presently before the Court, left IGPC in a very difficult position. It is potentially exposed to significant loss. Whilst these conclusions arise on limited material before the Court, the current administrators did have the opportunity to provide a fulsome explanation for their actions. As has been described above, they chose not to do so.

205 In any event, in the circumstances of urgency and risk of loss created by the current administrators, it is appropriate that the special purpose administrators have sufficient power to protect the assets of IGPC as best as they now might be able to.

206 Another issue arising from the exigencies of the particular circumstances is that, whilst the transfer of IGPC’s interest remains outstanding, CEPL is required to meet IGPC’s unpaid called sums under the Joint Venture Agreement. However, to the extent that it is so required, it is entitled to recoup any amount paid from IGPC and no doubt that will result in a reduction in the sale price of any transfer of the joint venture interest. In any event, once the transfer occurs, CEPL will be required to pay 100% of the called sums, with the result that any delay does not truly impact it.

### Other factors

207 There was a suggestion, albeit unsupported by evidence, that the appointment of the nominated special purpose administrators funded by Sev.en will give rise to a difficulty of impartiality. However, there is no reason to believe that is so. First, there is nothing in the conduct of the proposed administrators to suggest that they would not be impartial and fair in dealing with the creditors of the company. The indemnification by Sev.en is important because it protects the assets of IGPC generally and that has been recognised as an important consideration. The mere fact that the special purpose administrators are to be paid by Sev.en for their work does not call their impartiality into question. There is a need for them to be paid and, where a creditor is prepared to make finance available for the benefit of all creditors, no immediate conflict of interest arises. If it were to transpire that their conduct was genuinely called into question, the fact that Sev.en was paying them might be relevant. Presently, no such issue arises.

208 It was alleged that the appointment of special purpose administrators to investigate possible claims against CEPL and CSEL was prejudicial to them. Though it is true that these two companies are the likely targets of investigation, and in that sense the appointment is detrimental to them, that is only in their capacity as potential wrongdoers and not in their capacity as creditors of IGPC. That is no basis for rejecting the application.

209 Sev.en has expressed confidence in the proposed special purpose administrators. That is appropriate, and no evidence has been adduced to query whether that confidence is well founded. Both of the proposed administrators, Mr Park and Mr Campbell, are well known to the Court as respected and experienced insolvency practitioners.

210 The appointment of the special purpose administrators will probably necessitate an extension of the convening period for the holding of the second meeting of creditors or its adjournment. That is unfortunate, but it is a consequence of the current administrators having failed, over an extended period of time, to acquire sufficient information as to the failures of units C3 and C4 which is crucial to the creditors’ decision at the second meeting.

211 Necessarily, the extension of the administration should not be indefinite. However, the present difficulty is that the current administrators have chosen not to provide the Court with any clear picture of the extent of their investigations to date, and it is not known what work may be available to the special purpose administrators to build upon. It is, therefore, preferable not to set limitations on them. Rather, they and the current administrators can make appropriate applications to the Court as the circumstances require. At each application for an extension, the Court can consider whether further time should be allowed.

212 It was submitted that the appointment will not impact the JVA Sale Process because there is agreement that IGPC’s claims do not form part of the interest transferred under that process. It is, with respect, not entirely clear that the potential claims do not form part of that interest. As mentioned, the administrators have adopted differing positions on this topic.

#### Impact on the NBIO Process

213 Whilst there is a risk that the appointment of the special purpose administrators will delay the NBIO Process or the JVA Sale Process, that concern is offset by the likely benefits of a proper investigation into the failures of units C3 and C4. It is also not immediately clear that the NBIO Process will be delayed. The speed at which it progresses is a matter determined by reference to the contractual rights contained in the Joint Venture Agreement and whatever rights, if any, IGPC might have to restrain their enforcement. The powers granted to the special purpose administrators are apt to enable them to deal with any relevant litigious issue which arises.

#### The position of creditors

214 It is relevant that there is no support for the making of the orders from the creditors of IGPC. CSEL, which is the largest creditor, opposes the making of the orders, though that is understandable given that it is the obvious target of the investigations that are proposed to be undertaken. IGPC’s second largest creditor, IEHA, also appears to oppose the orders, but it is under the control of the administrators and its opposition does not carry much weight. Sev.en is the major creditor of IEHA, and it obviously supports the application. It was not explained why the administrators in their capacity as the controllers of IEHA opposed the application when Sev.en was its proponent.

215 The defendants submitted that a risk associated with the appointment of special purpose administrators was that offers made under the NBIO Process which were currently available, and which would enable the creditors to be fully paid, may be lost. It was not explained why parties who were prepared to make significant payments to acquire the assets or business of IGPC would not be prepared to maintain their offer in the future in circumstances where they have greater certainty as to the causes of action that they might acquire. Underlying the administrators’ submission in this respect is the suggestion that the investigations are likely to yield information that will alter IGPC’s value or, at least, the perception of its value. If that were so, one would have thought that they would have expressly identified it, even if it be in a confidential affidavit. In any event, as the circumstances are, it is unlikely that any sale will eventuate via the NBIO Process. CEPL has insisted on exercising its rights to compulsorily acquire IGPC’s interest and, absent a change of heart on its part, the acquisition is likely to proceed — subject to any action by IGPC to restrain it.

#### The terms of the appointment

216 The defendants raised an objection to the terms of the appointment, being that the proposed funding deed not only permits but requires the special purpose administrators to “consult in good faith concerning the availability and commencement of any Recovery Proceeding” with Sev.en (see cl 5.1(a)) and to provide it with regular reports (see cl 7.4). This creates a situation in which Sev.en will receive information gathered in the administration of IGPC to which it would otherwise have no entitlement, as it is not a creditor of IGPC.

217 It was not explained why, given its obvious economic interest in the administration and the outcome of the investigation, and its preparedness to financially support any future litigation, Sev.en ought not to have access to the results. Necessarily, the administrators will have access to the report and will be able to disclose its contents as they see fit. The pursuit of any recovery action is likely to be in the interests of all creditors, and this complaint has no relevance to the Court’s exercise of power.

218 The defendants’ complaint that some delay will arise and extra expense will be incurred when the special purpose administrators seek approval of a funding agreement is unmeritorious. Even if there is such a delay and expense, it will be minimal in the scheme of this matter. It will likely be greatly outweighed by the benefits possibly to be derived from the appointment of the special purpose administrators.

#### The practical difficulties

219 The defendants submitted that the Court should decline to make the orders sought because of several practical difficulties arising from them. Before considering them, it ought to be made clear that there is no doubt that this application has been made in the late stages of the administration, with the inevitable result that there will be some practical limitations to the appointment of special purpose administrators. However, this application has been brought in an to attempt to mitigate the potential losses that might occur for IGPC and its creditors because of the failure by the current administrators to undertake any investigations into the causes of the failures at the Callide C plant. Many of the alleged practical concerns have been dealt with or are covered by earlier findings and conclusions. Of the remainder, whilst some of them might superficially raise some concern, on closer inspection any real hindrance is chimerical.

220 The defendants submitted that it would be possible that the special purpose administrators might be converted to special purpose liquidators, which would generate difficulties. However, whether that occurs is a matter for IGPC’s creditors and, in the present circumstances, it is something that is unlikely to occur.

221 The defendants rightly complained of the restriction contained in one of the orders proposed by Sev.en, to the effect that the administrators would not have access to reports prepared by the special purpose administrators. Such a restriction would prevent the administrators from discharging their obligations under r 75-225(3)(a) of the IPR to report to creditors in relation to the causes of action or to make any relevant recommendations. This has been referred to above and resolved by the making of orders that the special purpose administrators provide copies of all reports of their investigations to the current administrators.

222 A third practical difficulty was said to be that there is no indication of when or how an application for an extension of the convening period would be made. It was said that this stands in contrast to the position in *Jahani*, where the application for an extension was properly made at the same time as the application for the appointment of the special purpose administrators and their work was to coincide with the duration of the administration. That, with respect, is overcome by the grant of power to both sets of administrators to make the relevant application or applications. Undoubtedly, each set of administrators will be proper parties to any such application and may make such submissions as they see fit. As professional persons, it might be accepted that reasonable attitudes and stances will be adopted for the purpose of ensuring that the objective of providing appropriate advice to the creditors is achieved.

223 It was submitted that the special purpose administrators would require the approval of the creditors for the bringing of any claim and, because the power of the creditors is controlled by CEPL or the administrators, that approval will not be granted. However, an administrator’s capacity to bring proceedings is not so constrained and s 442A of the Act specifically grants power to bring any proceedings. There is nothing in that purported concern.

## Conclusions

224 The foregoing discussion leads inevitably to the conclusion that the special purpose administrators should be appointed for the purposes of investigating the claims that IGPC might have against CEPL and CSEL. The failure of the current administrators to investigate such claims adequately, notwithstanding the fact that they might add substantially to IGPC’s value, is central to that conclusion.

225 The orders that should be made are somewhat different to those originally sought by Sev.en, but not substantially so.

226 The appropriate orders are those accompanying these reasons.

## Costs

227 The parties will be heard on the question of costs.

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| I certify that the preceding two hundred and twenty-seven (227) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 29 January 2024