Blackadder v McQuinn & Ors [2017] NTSC 29

PARTIES:	BLACKADDER, Paul Gordon and MCQUINN, Justin and NTRDS PTY LTD and BLAIR PLEASH AND KATHLEEN VOURIS, VOLUNTARY ADMINISTRATOR OF NTRDS PTY LTD (ADMINISTRATORS APPOINTED)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	61 of 2016 (21632618)
DELIVERED:	13 April 2017
HEARING DATES:	7 April 2017
JUDGMENT OF:	HILEY J

CATCHWORDS:

CORPORATIONS – Voluntary administration – Appointment of administrators - Whether director held a genuine opinion in good faith that

the company was insolvent or likely to become insolvent – whether the belief that the company was insolvent or likely to become insolvent was reasonable in the circumstances – whether the director formed a concluded opinion - whether the appointment of an administrator was in the best interests of the company as a whole.

Corporations Act 2001 (Cth) s 95A, s 436A, s 435A, 439A, 440D, 447C

Briginshaw v Briginshaw [1938] 60 CLR 336; *Deputy Commissioner of Taxation v Portinex Pty Ltd* [2000] NSWSC 557; (2000) 34 ACSR 422; *Downey v Crawford* [2004] FCA 1264; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 NSWLR 6; AC 821; *In the matter of Condor Blanco Mines Ltd* [2016] NSWSC 1196; *In the matter of Condor Blanco Mines Ltd (No 2)* [2016] NSWSC 1304; *In the Matter of Lime Gourmet Pizza Bar (Charlestown) Pty Ltd* [2015] NSWSC 244; *In the matter of Warwick Keneally as Administrator of Australian Blue Mountains International Cultural & Tourist Group Pty Ltd* [2015] NSWSC 937; *Kazar v Duus* (1998) 88 FCR 218; *Mentha v Colorbus Pty Ltd (In Liq)* [2004] VSC 486; (2004) 51 ACSR 677; *Re Wood Parsons Pty Ltd (In Liq)* [2002] NSWSC 1058; (2002) 43 ACSR 257; *Smolarek v McMaster as administrator of Eznut Pty Ltd (No 2)* [2008] WASCA 234; *Wagner v International Health Promotions* (1994) 15 ASCR 419; *Wilson v Manna Hill Mining Company Pty Ltd* [2004] FCA 1663; (2004) 51 ACSR 404, referred to

REPRESENTATION:

Counsel:

Plaintiff:	M Crawley
First Defendant:	P Cozens
Second Defendant:	A Smith
Third Defendant:	A Smith

Solicitors:

Plaintiff:	Paul Maher
First Defendant:	Cozens Johansen
Second Defendant:	HWL Ebsworth
Third Defendant:	HWL Ebsworth

Judgment category classification:	B
Judgment ID Number:	Hil1704
Number of pages:	52

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Blackadder v McQuinn & Ors [2017] NTSC 29
No. 61 of 2016 (21632618)

BETWEEN:

PAUL GORDON BLACKADDER
Plaintiff

AND:

JUSTIN MCQUINN
First Defendant

AND:

NTRDS PTY LTD
Second Defendant

AND:

BLAIR PLEASH AND KATHLEEN VOURIS, VOLUNTARY ADMINISTRATOR OF NTRDS PTY LTD (ADMINISTRATORS APPOINTED)
Third Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 13 April 2017)

Introduction

[1] The Third Defendant (**the Administrators**) have sought a declaration pursuant to s 447C *Corporations Act 2001* (**the Act**) as to whether or

not their appointment as voluntary administrators of the Second Defendant NTRDS Pty Ltd (**the Company**) was valid.[1]

[2] Blair Pleash and Kathleen Vouris were appointed voluntary administrators following a resolution under s 436A of the Act passed on 27 February 2017 by the First Defendant, Justin McQuinn, in his capacity as the sole director of the Company.

[3] Following investigations undertaken by the Administrators during the voluntary administration of the Company, the Administrators formed the view that the Company may have been solvent at the time of their appointment.[2] In addition, by reason of submissions and exchanges with the Court at a hearing before Master Luppino on 28 February 2017 about the purpose for the appointment of the Administrators, including a tacit suggestion the appointment was for an ulterior purpose, the Administrators formed the view that they may not have been validly appointed as voluntary administrators of the Company.

The Role of the Administrators in this proceeding

[4] As counsel for the Administrators stressed, where the validity of the appointment of a voluntary administrator is put in issue, it is not appropriate for the voluntary administrator to simply "retire from the

[1] Interlocutory Process filed 22 March 2017.
[2] Affidavit of Blair Pleash sworn on 22 March 2017 at [97] – [98] (the **First Pleash Affidavit**).

field". The taking of such a course of action has been described as capable of being "a clear breach of duty".[3]

[5] Pursuant to s 447C of the Act:

> (1) If there is doubt, on a specific ground, about whether a purported appointment of a person as administrator of a company, or of a deed of company arrangement, is valid, the person, the company or any of the company's creditors may apply to the Court for an order under subsection (2).
>
> (2) On an application, the Court may make an order declaring whether or not the purported appointment was valid on the ground specified in the application or on some other ground.

[6] Section 447C clearly grants standing to a voluntary administrator to apply for a declaration pursuant to s 447C(2). However, as a fiduciary of the company to which they have been appointed and a person with an interest in the outcome of an application to determine their validity, a voluntary administrator is obliged to avoid a conflict of interest between their personal interests and the interests of the company to which they are purportedly appointed.[4] Accordingly, a voluntary administrator who, having been put on inquiry about the validity of his or her appointment, commences proceedings pursuant to s 447C, may only properly "place relevant evidence before the court, together with

---

[3] *In the matter of Condor Blanco Mines Ltd* [2016] NSWSC 1 (***Condor Blanco Mines***) at 196 [149].
[4] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 NSWLR 68; AC 821.

an analysis of arguments both for and against the proposition that [their] appointment was tainted."[5]

[7] The Administrators and their lawyers conducted this litigation in the manner described above. Accordingly they did not contend for any particular determination by the Court but provided useful assistance to the Court in relation to the law, relevant background history and factual information largely complied by the Administrators since their appointment.

[8] Counsel submitted that, with the above considerations in mind, premised upon, *inter alia*, opinions expressed by the Plaintiff at the hearing of the Proceeding on 28 February 2017, the Administrators came to the view that the Plaintiff was the most appropriate contradictor to the relief sought pursuant to s 447C. Further, the First Defendant, being the person whose decision it was to resolve to appoint the Administrators as voluntary administrators of the Second Defendant is the most likely party to have an interest in upholding the validity of the appointment of the Administrators. Against that factual landscape, the Administrators made the forensic decision to file an Interlocutory Process in the Proceeding seeking, inter alia,

[5] *Condor Blanco Mines* at [154]. See also *In the matter of Condor Blanco Mines Ltd (No 2)* [2016] NSWSC 1304 (***Condor Blanco Mines No 2***) at [8] – [14] and [61].

determination of the validity of their appointment (**the Interlocutory Process**).[6]

Relevant legal principles

[9] Section 435A of the Act sets out the objects of Part 5.3A, the provisions that relate to voluntary administration:

> The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
>
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

[10] The power to appoint an administrator is contained in s 436A(1) of the Act:

> A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that (a) *in the opinion of the directors* voting for the resolution, the company *is insolvent, or is likely to become insolvent* at some future time; and (b) an administrator of the company should be appointed. (emphasis added).

[11] Solvency is defined in s 95A(1) of the Act:

> A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.

[6] Applicant's Outline of Submissions dated 5 April 2017 (**Third Defendant's Submissions**) at [1.11 – 1.12].

[12] The opinion of the director(s) must be "bona fide and genuinely formed".[7] An inability to determine whether a company is insolvent cannot, without more, found an opinion that it is or is likely to be insolvent.[8] The belief that the company was insolvent or likely to become insolvent in the near future, must be "reasonable in the circumstances"[9] and should be formed on reasonable grounds.[10] The Court's finding will depend largely upon whether the directors took "adequate steps to satisfy themselves that the statutory requirements were met".[11] The power to appoint can only be exercised in the best interests of the company as a whole.[12]

[13] In *Smolarek v McMaster as administrator of Eznut Pty Ltd (No 2)*[13] Pullin JA (Wheeler JA and Le Miere AJA agreeing) said, at [55] - [56]:

> The opinion referred to in s 436A must be bona fide and genuinely formed. A concluded opinion, rather than a tentative opinion, is necessary. If a bona fide opinion is genuinely formed as to 'actual' or 'likely' insolvency, that opinion will satisfy the requirements of s 436A. The requisite opinion is that of the directors voting for the resolution, rather than that of its individual members.

---

[7] *Kazar v Duus* (1998) 88 FCR 218 at 231 (***Kazar***). See also *Downey v Crawford* [2004] FCA 1264; 51 ACSR 182, at 208 [147] (***Downey v Crawford***); *McMaster v Eznut Pty Ltd* [2006] WASC 109, and *Smolarek v McMaster as administrator of Eznut Pty Ltd (No 2)* [2008] WASCA 234 (***Smolarek***).
[8] *Kazar* at 231; *Wagner v International Health Promotions* (1994) 15 ACSR 419 at 421; *In the matter of Warwick Keneally as administrator of Australian Blue Mountains International Cultural & Tourist Group Pty Ltd (admin apptd)* [2015] NSWSC 937 at [74] (***Warwick Keneally***).
[9] *Downey v Crawford* at 218 [196].
[10] *In the matter of Lime Gourmet Pizza Bar (Charlestown) Pty Ltd* [2015] NSWSC 244 at [42] (***Lime Gourmet Pizza Bar***)
[11] Ibid; See also *Lime Gourmet Pizza Bar* [2015] NSWSC 244 at [22].
[12] *Condor Blanco Mines* at [113].
[13] [2008] WASCA 234. See also, *Warwick Keneally* [2015] NSWSC 937 at [74] and *Condor Blanco Mines* at [16].

> The ultimate task of the court is to determine, having regard to the actual facts and circumstances, whether on the balance of probabilities the opinion required to be formed by the repository of the power as a condition of its exercise has been formed. Statements as to subjective intention are relevant, but the Court must approach its task of classification of the conduct in question objectively.

[14] The actual state of the financial affairs of a company at the time of the appointment of a voluntary administrator is not determinative of the validity of a resolution passed by a director pursuant to s 436A of the Act. However, evidence of the actual state of the financial affairs of a company at the time of the appointment of a voluntary administrator may ground inferences as to the validity of the opinion of a director expressed in such a resolution.[14]

[15] Per Weinberg J in *Downey v Crawford* at [196]:

> [T]he question is not whether, as at that date, the company was actually insolvent, or likely to be so at some future time. It is rather whether the directors genuinely believed that this was so, and whether that belief was reasonable in the circumstances. That in turn will depend largely upon whether they took adequate steps to satisfy themselves that the statutory requirements were met before resolving to appoint Mr Downey as administrator.

[16] The purpose of a resolution to appoint a voluntary administrator must be ascertained, then characterised as proper or improper. After identifying the actual purpose or purposes of the directors who voted in favour of a resolution to appoint a voluntary administrator, it is relevant to ask what the substantial purpose was and whether the

[14] *Condor Blanco Mines* at [58] and *Downey v Crawford* at 218 [196].

resolution would have been passed were it not for an improper purpose.[15]

[17] A voluntary administrator is not required to "undertake some form of independent verification of the factual basis" on which he or she has been appointed at or before the appointment.[16] At its highest, a voluntary administrator need only satisfy him or herself as to whether "the resolution appointing [them] appeared, on its face, to be valid."[17]

[18] In all but very exceptional cases:

> It may be expected that an administrator will make some inquiry of those by whom he or she is approached with a view to gaining insight into the company's financial position and thereby to subject the expressed opinion of directors to a rough check.[18]

[19] Such a rough check does not extend to an administrator investigating or forming an opinion about whether or not a director's motives or purpose for appointment are proper.[19] Analysis of that kind is a matter for which a voluntary administrator is unlikely to be properly equipped particularly at the time of appointment. Ultimately the Court is in a

---

[15] *Warwick Keneally* at [96].
[16] *Lime Gourmet Pizza Bar* at [72] cited with apparent approval in *Condor Blanco Mines* at [138] – [139].
[17] *Lime Gourmet Pizza Bar* at [72] cited with apparent approval in *Condor Blanco Mines* at [138] – [139].
[18] *Condor Blanco Mines* at [139].
[19] *Condor Blanco Mines* at [140].

much better position to assess and determine these kind of things with the assistance of additional evidence then available to it.[20]

[20] Once appointed, if a voluntary administrator is 'put on inquiry' about the validity of his or her appointment, he or she ought to then take reasonable steps to confirm the validity of their appointment.[21]

Relevant background

[21] Counsel for the Administrators provided a comprehensive summary of the relevant background history of the Company and the matters leading up to the Interlocutory Process.

The Company

[22] The Company was incorporated on 13 July 2012.[22] The Plaintiff and the First Defendant were each issued fifty (50) of the one hundred (100) ordinary shares in the Company.[23] In May 2015, the Company issued 10 "A" class shares to the First Defendant and 10 "B" class

[20] See for example *Condor Blanco Mines* at [141] referring to Austin J's description of "the court's task" in *Cadwallader v Bajco Pty Ltd* [2001] NSWSC 1193; 189 ALR 370 at [224]
[21] *Warwick Keneally* at [44] citing *Deputy Commissioner of Taxation v Portinex Pty Ltd* [2000] NSWSC 557; (2000) 34 ACSR 422 at 423; *Re Wood Parsons Pty Ltd (In Liq)* [2002] NSWSC 1058; (2002) 43 ACSR 257 at [60]; *Wilson v Manna Hill Mining Company Pty Ltd* [2004] FCA 1663; (2004) 51 ACSR 404 at [63]; *Mentha v Colorbus Pty Ltd (In Liq)* [2004] VSC 486; (2004) 51 ACSR 677.
[22] Affidavit of Paul Blackadder sworn 8 July 2016 at [2] and [24]; Annexure "PGB4" and Affidavit of Justin McQuinn sworn on 18 November 2016 at [15] and Ex JM02.
[23] Affidavit of Paul Blackadder sworn 8 July 2016 at [2]; Affidavit of Justin McQuinn sworn on 18 November 2016 at [15] and Ex JM02.

shares to the Plaintiff.[24] The Company commenced trading as Roller Door Services NT on or about 1 September 2012.[25]

[23] Prior to that, another company JCEE Pty Ltd (**JCEE**) had conducted the same business, also trading as Roller Door Services NT, since about 2007.[26] The directors of JCEE were the First Defendant and Mr Craig John Beadman (**Beadman**).[27] The Plaintiff had been the insurance broker for JCEE since about 2007.[28] Simon Coulter of Merit Partners Chartered Accountants (**Merit**) became the accountant for JCEE in about 2010, on the Plaintiff's recommendation.[29]

[24] In 2012, Beadman and the First Defendant agreed to part ways, for Beadman to resign as a director of JCEE and for the First Defendant to purchase Beadman's shareholding in JCEE.[30] In order to fund acquisition of the shares issued by JCEE owned by Beadman, the First Defendant approached, *inter alios*, the Plaintiff to borrow funds.[31]

[25] Since incorporation (in 2012), the Company operated a business of "providing roller door services in and around Darwin…"[32] "… using the same premises, the same plant and equipment and the same stock

---

[24] Affidavit of Paul Blackadder sworn 8 July 2016 at [9].
[25] Affidavit of Justin McQuinn sworn on 18 November 2016 at [16] and [32].
[26] Affidavit of Justin McQuinn sworn on 18 November 2016 at [2] and [7] and ExJM01.
[27] Affidavit of Justin McQuinn sworn on 18 November 2016 at [2] and ExJM01, p. 17.
[28] Affidavit of Justin McQuinn sworn on 18 November 2016 at [3].
[29] Affidavit of Justin McQuinn sworn on 18 November 2016 at [4].
[30] Affidavit of Justin McQuinn sworn on 18 November 2016 at [5].
[31] Affidavit of Justin McQuinn sworn on 18 November 2016 at [9] and Affidavit of Justin McQuinn sworn on 15 March 2017 at [4]*ff*.
[32] Affidavit of Paul Blackadder sworn 8 July 2016 at [4] and Affidavit of Justin McQuinn sworn on 18 November 2016 at [16].

and the same employees as JCEE had been using the day before."[33] The Company's primary source of income is procured through its ongoing relationship with B&D Australia Ltd, which is governed by the B&D Accredited Dealer Agreement.[34]

[26] The First Defendant worked full time in the business of the Company including conducting the day to day management of the business of the Company for which he was remunerated $120,000 per annum.[35] His remuneration was increased to $190,000 per annum in February 2015[36] and has remained at that amount.

[27] The Plaintiff worked part time for a salary of $52,000 per annum, doing administrative and marketing work for the Company.[37] The Plaintiff said that "in September 2015, I ceased my part-time employment with the company, proposed to the first defendant that he buy my shares at valuation, and intended to resign as a director upon sale of my shares."[38]

---

[33] Affidavit of Justin McQuinn sworn on 18 November 2016 at [16].
[34] Expert Valuation Report of Mark Bruce dated 22 February 2017 (**RMP Report**) at p. 4, Third Pleash Affidavit at [11] and Annexure **BP**-33.
[35] Affidavit of Paul Blackadder sworn 8 July 2016 at [5].
[36] Affidavit of Paul Blackadder sworn 8 July 2016 at [8] albeit there appears to be some dispute about how that increase in remuneration came about.
[37] Affidavit of Paul Blackadder sworn 8 July 2016 at [6] and Affidavit of Justin McQuinn sworn on 18 November 2016 at [13]; albeit the First Defendant disclaims any knowledge of the Plaintiff working from home or off premises.
[38] Affidavit of Paul Blackadder sworn 8 July 2016 at [13].

[28] In this proceeding it is an agreed fact that the Plaintiff resigned as a director of the Company in September 2015 and since that time, the First Defendant has been the sole director of the Company.[39]

The Proceeding

[29] The Plaintiff commenced this proceeding naming the First Defendant and the Company as defendants by filing an originating process (**the Originating Process**) on 11 July 2016 (**the Proceeding**). The Originating Process contained prayers for relief that the Company "be wound up" and "Stuart Reid be appointed its liquidator."[40]

[30] On or about 18 November 2016, the First Defendant filed his first substantive affidavit in the Proceeding. Under the heading "NTRDS IS A PROFITABLE COMPANY" Mr McQuinn deposed that:

> [35] In the financial year ending 30 June 2015 as shown in the draft profit and loss statement annexed hereto and marked exJM16 the [C]ompany made a net profit of $173,041 before tax.
>
> [36] In the financial year ending 30 June 2016 as shown in the profit and loss statement annexed hereto and marked exJM17 the company made a net profit of $231,102 before tax.

[31] On 21 November 2016 the First Defendant filed an Interlocutory process, to be mentioned before the Master the following day, seeking orders including:

---

[39] Exhibit P3, points 7 and 8 and see also Transcript of 28 February 2017 at p 28.
[40] Originating Process.

1. That Justin McQuinn or his nominee purchase free from encumbrances the ordinary shares and the B class shares owned by the Plaintiff in NTRDS Pty Ltd (ACN 159586816).

2. That the value of the shares and the date of the valuation be determined by the Court.

3. That the method of the valuation be determined by the Court.

[32] On 22 November 2016, the Court made orders by consent (**the Consent Orders**) including orders that:

1. The First Defendant or his nominee purchase free from encumbrances the ordinary shares and B class shares of the Plaintiff in the Second Defendant.

2. The value of the shares and the date of valuation be determined by the Court.

[33] In addition, the Consent Orders prescribed the time for the parties to file and serve expert reports and lay evidence, and listed the matter for hearing for three days, on 28 February 2017, 1 March 2017 and 3 March 2017. I shall refer to this as **the Valuation Proceeding**.

The Expert Reports

[34] On or about 9 February 2017, Mr Lee Barrett of Bizval on instructions from the First Defendant produced a business valuation for the Company (**the Bizval Report**). The Bizval Report concluded that the fair market value of 100% of the Company was $1,050,000 as at

30 June 2016.[41] However, the Bizval Report also contained the following caveat in respect of that valuation namely that:

> A portion of this valuation is based on assets & liabilities of the company. These values were taken from the company's Balance Sheet as at 30 June 2016. As such, any movements in the company's net asset position should be taken into account in any future transactions or negotiations.[42]

[35] The Plaintiff also procured an expert report valuing the business from a Mr Mark Bruce of RMP Chartered Accountants (the RMP Report). The RMP Report determined the value of the shares of the Plaintiff in the Company as at 23 September 2015 and 11 July 2016.[43] In preparing the RMP Report, Mr Bruce "estimated a provision for income tax arising from operations for the year ended 30 June 2016 …, as best I can with the information provided…" of $73,602.[44] An estimate of taxation liabilities owing by the Company of $81,943 was also included for the financial year ended 30 June 2015.[45] (The Administrators have subsequently taken into account taxation credits and prior payments of PAYG instalments that would be set off against the Company's income tax liability for the period ending 30 June 2015. As a result of this, the liability for that period is only about $2,050).[46]

---

[41] Bizval Report at p 2.
[42] Bizval Report at p 2.
[43] RMP Report at p 1.
[44] RMP Report at pp 4-5 and Appendix to Valuation Report.
[45] RMP Report, Appendix to Valuation Report.
[46] Third Pleash Affidavit at [40(d)].

The Pre-Appointment Communications

[36] Mr Blair Pleash (**Pleash**) was first contacted on the afternoon of Saturday 25 February 2017 by Mr Duncan Bell (**Bell**) by email (**the First Email**) about accepting appointment as a voluntary administrator of the Company.[47] Pleash had no prior dealings with the Company or anyone else involved with the Company.[48]

[37] The subject line of the First Email was "Urgent Assistance re possible Company Administration required on Monday".[49] The main points made by Bell in the First Email were:[50]

(a) He had just had a meeting with a barrister and "his client (NTRDS Pty Ltd)", presumably Mr McQuinn, "the shareholders of which have been embroiled in a dispute, which is set to go to the Supreme Court on Tuesday, for a three-day hearing over the value of the shares."

(b) He was "referred to do a Forensic report on the two valuations …. Both were grossly wrong as they were based on the 2015 and 2016 unreconciled accounts where the tax returns have not been lodged, so the in-house MYOB has not been properly reconciled since 1.07.14 and neither accountant has bothered to look at the year-to-date trading result, which is a loss year to date."

[47] First Pleash Affidavit at [11] and Annexure **BP**-1.
[48] First Pleash Affidavit at [12].
[49] First Pleash Affidavit, Annexure **BP**-1 p 30.
[50] First Pleash Affidavit at [13], Annexure **BP**-1 p 30.

(c) The "NT Construction industry has fallen off a cliff and building approvals are down by 35%"

(d) The valuers "have put a value of $1.2 million on the company, which in my view is worth whatever the net assets are, once accounts have been properly prepared."

(e) The "trial balance on debtors is $100k overstated compared to the Debtors ledger to start with" and

(f) He had told the barrister "to go back to the other side and tell them that they can either take half of the net assets once the accounts are properly prepared, which will be very little, or we will appoint you as the Administrator on Monday".

(g) He was critical of the competence of the two valuers, the barrister and the Company's then solicitor.

[38] Mr Pleash says that a number of these points would raise concerns about the possible insolvency of the company. These included the costs of the imminent litigation between disputing shareholders, the company trading at a loss since July 2016, the state of the construction industry in the Northern Territory and the possible overstatement in relation to collectable debts.[51]

[51] First Pleash Affidavit at [14] – [22].

[39] After receiving the First Email, on the same day, Pleash contacted Bell by telephone and had a short five (5) minute conversation with Bell, the content of which was largely a repetition of parts of the First Email (**the First Telephone Call**).[52]

[40] Later in the afternoon of 25 February 2017, Bell telephoned Pleash again and they had a conversation which lasted for approximately thirty (30) minutes (**the Second Telephone Call**).[53] During the Second Telephone Call, Bell said to Pleash that, *inter alia*, "there has been a trading loss of $40,000 this year", and the Company had "a tax debt of about $150,000 plus interest and penalties", "about $100,000 worth of trade creditors", and "$235,000 cash at bank".[54]

[41] After the Second Telephone Call, Bell sent a series of emails to Pleash which attached various records of the Company and information in respect of the Company (**the Bell Records**).[55] The Bell Records included:

(a) an email from Eddie Lai of De Castro Sullivan Lai, the Company's current accountants, who advised that the "last final set of financial statements prepared and tax return lodged were for the financial year ended 30 June 2014" and "a draft set of financial

[52] First Pleash Affidavit at [24] - [26].
[53] First Pleash Affidavit at [27].
[54] First Pleash Affidavit at [28] – [29] and Annexure **BP**-2 at pp 32-33.
[55] First Pleash Affidavit at [30] – [39] and Annexures **BP**-3 – **BP**-11 at pp. 34-132.

statements for the 2015 financial year was provided to us by Simon Coulter (Merit partners)";[56]

(b) a record of the Income Tax Account for the Company obtained from the Tax Agent Portal which recorded a closing balance of $46,550.10CR;[57]

(c) a record of the Integrated Client Account for the Company obtained from the Tax Agent Portal which recorded a closing balance of $0.00;[58]

(d) a draft asset register for the period 30 June 2015 recording total depreciating assets of the Company (including plant and equipment and motor vehicles) of $132,402.31;[59]

(e) a profit and loss statement for the period 1 July 2016 to 23 February 2017 recording a net loss of $12,809.36;[60]

(f) copies of the Bizval and RMP Reports;[61] and

(g) a copy of the First McQuinn Affidavit.[62]

[42] On Sunday 26 February 2017, Pleash spoke to Bell briefly to arrange a telephone conference with the First Defendant on Monday

[56] First Pleash Affidavit at [30] and Annexure **BP**-3, p 36.
[57] First Pleash Affidavit at [30] and Annexure **BP**-3, p 38.
[58] First Pleash Affidavit at [30] and Annexure **BP**-3, pp 40-53 and in particular p 53.
[59] First Pleash Affidavit at [30] and Annexure **BP**-3, pp 54-56
[60] First Pleash Affidavit at [31] and Annexure **BP**-4, p 58.
[61] First Pleash Affidavit at [32] – [33] and Annexures **BP**-5 and **BP**-6, pp 60 and 62.
[62] First Pleash Affidavit at [37] and Annexure **BP**-9, p 72.

27 February 2017.[63] Draft resolutions and documents appointing Pleash and Vouris as voluntary administrators of the Company were drafted and sent to Bell by email on 27 February 2017 (**the Draft Appointment Documents**).[64]

[43] The first communication between the First Defendant and Pleash occurred during a telephone conference on the morning of 27 February 2017 (**the Fourth Telephone Call**).[65] The wife of the First Defendant and Bell were also present during the Fourth Telephone Call.[66] The Fourth Telephone Call lasted for approximately forty (40) minutes.[67] During that call Pleash advised the First Defendant that "Before you can appoint a voluntary administrator, you must satisfy yourself that the Company is insolvent."[68]

[44] After the Fourth Telephone Call, on 27 February 2017 Pleash received the Draft Appointment Documents executed by the First Defendant as the Company's director appointing Pleash and Ms Vouris as voluntary administrators of the Company (**the Appointment Documents**).[69] The Appointment Documents included:

[63] First Pleash Affidavit at [49] – [50].
[64] First Pleash Affidavit at [51] and Annexure **BP**-14, pp 156 – 161.
[65] First Pleash Affidavit at [52].
[66] First Pleash Affidavit at [52].
[67] First Pleash Affidavit at [53].
[68] First Pleash Affidavit at [56].
[69] First Pleash Affidavit at [60] and Annexure **BP**-15, pp. 163-170.

(a) a statement that "I considered the financial affairs of the Company and considered that if the Company was not already insolvent, it was likely to become insolvent at some future time"

(b) a resolution that "I resolved that the Company was likely to become insolvent at some future time" and

(c) a resolution " that the Company appoint the [Administrators] as joint and several voluntary administrators of the Company."[70]

[45] Following their appointment, the Administrators, by themselves and staff of Hall Chadwick under their supervision, took various steps to investigate the business and property of the Company as well as securing and preserving the assets of the Company.[71] The Administrators engaged the services of HWL Ebsworth[72] who filed a Notice of Change of Solicitors on behalf of the Second Defendant on 27 February 2017.[73]

[46] On 28 February 2017, the Administrators issued a first report to creditors of the Second Defendant.[74] The first meeting of creditors was held on 8 March 2017 (**the First Meeting**).[75] The creditors of the

[70] Affidavit of Justin McQuinn sworn 28 February 2017 at [1] and Annexure JM1.
[71] First Pleash Affidavit at [62].
[72] First Pleash Affidavit at [67] – [69].
[73] Notice of Change of Solicitors dated 27 February 2017.
[74] First Pleash Affidavit at [70] and Annexure **BP-18** at pp 179-194.
[75] First Pleash Affidavit at [71] and Annexure **BP-19** at pp 196 – 203.

Company did not pass a resolution to appoint a Committee of Creditors.[76]

The 28 February 2017 Hearing

[47] At the commencement of the hearing of the Valuation Proceeding on 28 February Mr Cozens appeared on behalf of the First Defendant and applied to have the matter adjourned for four weeks. He advanced a number of reasons for that application.

[48] The first reason was that the Company had been placed into voluntary administration the previous afternoon. Mr Cozens referred to s 440D of the Act and said that this requires the Court to stay the Valuation Proceeding absent the consent of the administrators or leave of the Court, and that the Court should not give such leave. He said that the appointment of the administrator will have a substantial impact on the value of the Company, amongst other things because suppliers might then have the right to terminate their contracts with the Company. Also, he had only taken over as solicitor for the First Defendant at 4.30pm the previous day and had not looked at the Court file or the expert report obtained by the First Defendant's previous solicitors.[77]

[49] Mr Cozens also told the Master that the First Defendant had engaged Mr Duncan Bell, a forensic accountant, a week or so earlier. He said that Mr Bell had raised a number of issues and he expected Mr Bell to

[76] First Please Affidavit at [71] and Annexure **BP-19** at p 201.
[77] Transcript of 28 February 2017 at pp 4-6.

provide an expert report. His final point was that "this entire proceedings is substantially going to be a waste of time", apparently because of the limited assets of the First Defendant and presumably his inability to pay the Plaintiff the value of his shares as assessed by the experts so far.[78]

[50] The Master asked counsel to tell him "on what basis, or why the appointment has been made" and "why has there seemed to be the need to appoint an administrator at this stage?" Mr Cozens said:

> Because we are instructed that revenue has fallen off the cliff because the Darwin retail – sorry, residential building market has fallen off the cliff. Revenue has substantially decreased and our client is about to go insolvent.

The Master said:

> I see. Well, that flies in the face of the contents of the valuations as well. They both painted a rather rosy picture.

Mr Cozens:

> Precisely why it's a relevant factor that needs to be considered in detail and the matter should be adjourned, your Honour.[79]

[51] Mr Crawley, on behalf of the Plaintiff, made a number of submissions, including that earlier that month the Plaintiff sought to reinstate the winding up of the Company but that was vigorously resisted by the First Defendant. The First Defendant would have had the Bizval report

[78] Transcript of 28 February 2017 at pp 7-8.
[79] Transcript of 28 February 2017 at p 12.

of 9 February 2017, which put a very significant value on the shares and the value of the Company itself. The financial information upon which both valuers proceeded was provided by the First Defendant. Within a matter of weeks the First Defendant had resolved that the Company may become insolvent at some point in the future and appointed an administrator, without giving any particular reasons or identifying any relevant changes in his knowledge concerning the Company's financial situation. Counsel submitted that this was simply a ploy on the part of the First Defendant and queried the genuineness of his decision to place the Company into voluntary administration. [80]

[52] On the afternoon of 28 February Mr Crawley outlined the case for the Plaintiff in the Valuation Proceeding and identified the evidence that he would be adducing the following day, in particular from Mr Bruce. The next day, Mr Bruce gave evidence and Mr Crawley tendered materials including a draft financial report for the financial year ending 30 June 2015 and a balance sheet and profit and loss statement for the financial year ending 30 June 2016 extracted from the Company's MYOB records. The Valuation Proceeding was then adjourned to enable the First Defendant to provide further affidavit evidence and to obtain an expert report from Mr Bell to be filed by 12 April 2017.

[80] Transcript of 28 February 2017 at pp 13-17.

Investigations of the Administrators

[53] In order to obtain an accurate understanding of the financial affairs of the Company, *inter alia*, Mr Pleash and Ms Vouris continued the engagement of De Castro Sullivan Lai Chartered Accountants to finalise the accounts for the Company for the financial years ended 30 June 2015 and 2016.[81]

[54] Following the Appointment and by reason of their investigations into the property, business and affairs of the Company, Ms Vouris and Pleash identified that the Company:

(a) as at the date of the Appointment had cash at bank of $261,331.51;[82]

(b) has three (3) secured creditors collectively owed $33,267.41;[83]

(c) as at 27 February 2017 had debtors of $245,988.56[84] of which approximately $25,000 of those debts appeared doubtful;[85]

(d) as at 27 February 2017 had recorded trade creditors of $113,670.89 in its financial records;[86] and

(e) did not appear to have received any solicitors' letters of demand, creditor's statutory demands, court processes (other than in

[81] First Pleash Affidavit at [75].
[82] First Pleash Affidavit at [96.3].
[83] First Pleash Affidavit at [86] - [87] and Annexure **BP**-20, pp 205 – 209.
[84] Third Pleash Affidavit at [32].
[85] First Pleash Affidavit at [96.4].
[86] First Pleash Affidavit at [93] and Annexure **BP**-23.

respect of the Proceeding) or judgments in respect of the Company.[87]

[55] On 22 March 2017, the Administrators received final drafts of the financials and income tax returns for the Company for the periods ended 30 June 2015 and 2016.[88] The final draft financials for the Company for the financial year ended 30 June 2015 recorded an income tax liability of $79,005.30.[89] After allowing for PAYG instalments of $32,557 paid by the Company and the credit of $44,378 on the income tax account for the Company, the balance of tax payable by the Company for the financial year ended 30 June 2015 is $2,050.30.[90] The final draft financials for the Company for the financial year ended 30 June 2016 recorded an income tax liability of $82,040.10.[91] The Company did not pay, and was not required to pay,[92] any PAYG instalments in the financial year ended 30 June 2016.[93]

[56] Unfortunately, the Administrators have had some difficulty recovering all of the Company's books and records from the accountants previously engaged by the Company. Although De Castro Sullivan Lai were first engaged by the First Defendant to act for the Company in about May 2016 records were not obtained from the Company's

[87] First Pleash Affidavit at [94].
[88] Second Pleash Affidavit at [2] and Annexures **BP**-24 – **BP**-31.
[89] Second Pleash Affidavit at [5.2] - [5.4] and [9] and Annexures **BP**-25, p. 6 of 18, **BP**-26, p. 2 and **BP**-27, p 10 of 12.
[90] Second Pleash Affidavit at [5.3] and [9] and Annexure **BP**-26, p 2.
[91] Second Pleash Affidavit at [11.1] – [11.4] and [15] and Annexures **BP**-28, p 3, **BP**-29, p 6 of 18, **BP**-31, p 10 of 12.
[92] Third Pleash Affidavit at [24] and Annexure **BP**-43.
[93] Second Pleash Affidavit at [15].

previous accountants until about September 2016, and are still incomplete.[94]

[57] In his affidavit of 30 March 2017 Mr Pleash provided a number of summaries identifying the financial situation of the Company as at 27 February 2017.

(a) As at that date the Company had net assets of $579,652. It had total assets of $722,192, of which $526,303 were current assets and $195,888 were non-current assets. Total liabilities were $142,540, comprising current liabilities of $119,975 and non-current liabilities of $22,565.[95]

(b) During the period 1 July 2016 to 27 February 2017 the Company received total income of $1,485,497. This resulted in a gross profit of $589,048 before deduction of expenses. Expenses were $604,201 resulting in an operating loss of $15,153. After further minor adjustments the net loss for the period was $14,749.[96]

[58] Mr Pleash made a number of other observations:[97]

(a) The company's annual net profit decreased from $177,382 for FY 14/15 to $103,761 for FY 15/16 and to the loss of $14,749 for the period 1 July 2016 to 27 February 2017.

[94] Third Pleash Affidavit at [12] – [19].
[95] Third Pleash Affidavit at [39].
[96] Third Pleash Affidavit at [39].
[97] Third Pleash Affidavit at [40].

(b) Sales decreased significantly from FY 15/16 to the date of appointment which led to the loss of $14,749.

(c) Total expenses increased significantly from FY 14/15 to FY 15/16, mainly due to an increase in employment expenses, such as wages and salaries of $128,523 and superannuation of $67,364, and also because during FY 15/16 the Company made substantial payments in respect of superannuation guarantee charges incurred for periods prior to 1 July 2016.

(d) The estimated income tax payable by the Company is $2,050.3 for FY 14/15 and $82,040 for FY 15/16.

(e) The Company's current assets decreased from $684,072 as at 30 June 2016 to $526,303 as at 27 February 2017, predominantly due to decreased cash at bank of $122,997, from $384,328.51 to $261,331.51.

(f) According to the Company's management accounts, the Company experienced trading losses during the period ended 27 February 2017. The Company experienced trading losses in July, August, October and November 2016 and profits in September 2016 and from December 2016 to 23 February 2017. However the profits were not sufficient to enable the Company to offset prior losses.

[59] After receiving proofs of debt and other information from unsecured creditors during the voluntary administration Mr Pleash calculated the claims of unsecured creditors, other than the ATO, to be $126,673.78.[98] This amount is very similar to the amount of $113,671 shown on the aged payables report generated through the MYOB file,[99] particularly if the latter did not take into account a claim of $13,607 made by DN Bell & Associates who had only been engaged by the Company within a week or so before the Appointment.

[60] On 22 November 2016 and 12 January 2017 the Company paid a total of $16,500 as a security bond for a new lease that commenced on 14 November 2016.[100] That lease was for an initial term of 12 months and could be renewed by the Company for another five years.[101] It would appear that this amount was included in the expenses for the period 1 July 2016 to 27 February 2017 thus resulting in the loss of $14,749 for that period.

Joinder of the Administrators

[61] The Administrators were joined as the Third Defendant to the proceeding on 24 March 2017.[102] Pursuant to s 439A(6) of the Act the Court extended the convening period for the Company to hold a second meeting of its creditors until seven (7) days after the determination of

[98] Third Pleash Affidavit at [41].
[99] Third Pleash Affidavit at [43].
[100] Third Pleash Affidavit at [10] and Annexure **BP**-32.
[101] Third Pleash Affidavit at [7] and BP.
[102] Order of Grant CJ made 24 March 2017 authenticated on 29 March 2017.

the validity of the appointment of the Administrators.[103] Copies of the orders made on 24 March 2017 and 27 March 2017 and notice of the orders made by the Court on those dates were given to ASIC and all known creditors of the Company.[104]

Hearing 7 April 2017

[62] At the hearing on 7 April 2007 Mr McQuinn was called and was cross-examined by Mr Crawley counsel for the plaintiff. The parties otherwise relied upon affidavit material, primarily affidavits of Blair Pleash affirmed on 22 March[105], 23 March[106] and 30 March 2017[107] and affidavits of Justin McQuinn affirmed on 28 February, 15 March and 3 April 2017. Mr Smith, counsel for the Administrators, also referred to parts of earlier affidavits, namely an affidavit of the Plaintiff Paul Blackadder sworn 8 July 2016, and an affidavit of Justin McQuinn affirmed on 18 November 2016.

Evidence on behalf of the First Defendant

[63] In the longer of his two affidavits of 28 February 2017 Mr McQuinn referred to his lack of understanding about accounting and said that he relied upon others such as Simon Coulter of Merit Partners and Mr Blackadder to do the accounting accurately. He annexed a copy of the Company's bank statements (exJM01), a copy of the Company's tax

[103] Order of Master Luppino made 27 March 2017 authenticated on 29 March 2017
[104] Third Pleash Affidavit at [20] and Annexure **BP-36** at pp. 129-138
[105] Ibid.
[106] Affidavit of Blair Pleash sworn on 23 March 2017 (The **Second Pleash Affidavit)**.
[107] Affidavit of Blair Pleash sworn on 30 March 2017 (The **Third Pleash Affidavit)**.

return for FY 13/14 showing that he received a dividend of $29,228 in that financial year (exJM04), and a copy of a Profit and Loss Statement and a Balance Sheet as at 23 February 2017 (exJM05) extracted from the Company's MYOB records maintained by the Company's book keeper (**the MYOB spreadsheets**).

[64] He said:

> 9. I visit my builders on a regular basis at the least monthly. At present I am told there are no big projects in the pipe line. I am told that the only big project on at the moment is the Palmerston Hospital. There is a small project at Plamerston [sic] and a few houses are being built at Muirhead. I have been told there are only a couple of small land releases coming up. The builders have told me to tighten up and not spend money because this is what they are doing because of the dismal prospects of the next 2 years.
>
> 10. I project that the income of the business for the next two years will be very poor and there will be no chance of maintaining the income of the 2015 and 2016 financial years.
>
> 11. Annexed hereto and marked exJM05 is a copy of the trading profit and loss and the balance sheet for the period 1 July 2016 to 23 February 2017. The income is minus $12,809.36.
>
> 12. The outlook for the company is very poor and the company will not be able to maintain an income of $235,000 per annum for the next two years at the least as suggested by Mr Barrett nor the $281,500 of Mr Bruce.

[65] In paragraph 6 of his affidavit of 3 April 2017 Mr McQuinn set out his reasons for deciding that the Company "was either insolvent or was

likely to become insolvent at some future time"[108] and for appointing an administrator:

> I made the decisions described in paragraph 5 because:
>
> (a) I was aware, though past meetings with Merit Partners and correspondence with my newly appointed accountant that NTRDS financials were not completed for the previous two financial years, being FY2015 and FY2016. I was aware of the following implications from this:
>
> (i) I did not and could not know what the current financial state of NTRDS was now for the previous few years.
>
> (ii) I did not and could not know how much of the money in NTRDS' account belonged to NTRDS. There was an unknown portion owed to creditors and the ATO.
>
> (iii) I did not and could not know how much money NTRDS owed to other people.
>
> (iv) I did not know the book value of NTRDS' assets and stock.
>
> (v) I was aware that there are substantial ATO fines and penalties for such late payments and I presumed that they may apply to NTRDS.
>
> (vi) I also presumed that there was a substantial (unknown) tax debt owed to the ATO.
>
> (b) My accountant advised me that NTRDS was operating at a loss based on cashflows for FY2017.
>
> (c) I was aware based on the general cashflow that trading conditions for FY2017 were significantly worse than previous years.
>
> (d) As the director of a company in the building industry, particularly during my day to day jobs, I was aware that there was a considerable downturn in building industry in Darwin over the last 12 months.

[108] Affidavit of Justin McQuinn sworn on 3 April 2017 at [5].

(e) The workflow of NTRDS appeared slow in the period leading up to the end of February 2017 compared to previous years;

(f) My ex lawyers were informing me that I was more than likely going to end up bankrupt as a result of current legal action. At the time I thought that this would [sic] be occur imminently. I was aware that if I was bankrupt I could not be a director and felt it was another reason to justify the appointment of an administrator.

(g) I was aware of the obligation on directors to not trade whilst insolvent and did not want to be in breach of this obligation.

(h) I had discussed a number of issues Blair Pleash (an administrator) about the process of appointing an administrator.

(i) Ongoing demands, endless worry and every day running of NTRDS at the same time of defending this legal claim has put major stress on me and my ability to work to the highest standards I am used to. I felt confronted with deadlines and legal terms.

(j) Given all of the above, I felt confused and worried about the financial state of NTRDS. I realised that I simply did not know with any certainty whether or not NTRDS was trading insolvent.

(k) Given the negative factors such as poor trading conditions and poor recent trading figures etc as above (together with my state of mind at the time as above, and my awareness of the significant implications of trading whilst insolvent), I considered that it was more likely than not that NTRDS either was, or would soon be insolvent.

(l) Given that above, I determined that the most prudent way forward at the time was to appoint an administrator to NTRDS.

(m) I considered that this decision was in the best interest of NTRDS at the time given all factors that I was aware of at the time.

[66] Mr McQuinn also said during his oral evidence that he became concerned because the Company's shelves were empty of stock. This suggested a downturn in the number of orders for product from builders and the like. He would only order stock (from the Company's suppliers interstate) after receiving an order. Presumably the product would only be on the shelves between the time it was received and the time it was installed or otherwise provided to the purchaser. He did not provide any more detail about how much stock would usually be on the shelves at any given time.

[67] Mr McQuinn referred to the difficulties obtaining draft tax returns and other information from Merit since May 2016 when he engaged De Castro Sullivan Lai as the Company's accountants. He agreed that he made no effort to have De Castro Sullivan Lai or someone else complete that work once De Castro Sullivan Lai had received the necessary information in September 2016. He said that he was "busy running the company" and working long hours.

[68] He corrected a significant error in paragraph 6(b) of his affidavit of 3 April 2017 by stating that it was his bookkeeper, not his accountant, who advised him that "NTRDS was operating at a loss based on cash flows for FY2017." The bookkeeper was employed by a firm which provided bookkeeping services to the Company from time to time. Her functions included her recording the Company's financial information in MYOB. Mr McQuinn had access to the Company's MYOB records

at all stages. The bookkeeper had been doing the Company's bookkeeping since September 2015.

[69] That error was significant because until it was corrected the paragraph conveyed that he had received that advice from his accountant, presumably De Castro Sullivan Lai or from Mr Bell. Nowhere else did Mr McQuinn say that he received or relied upon the advice of an accountant, and no such person provided any evidence of having formed such an opinion or given such advice. It seems, at least from his affidavit evidence, that the only professional advice that he received other than from the bookkeeper, was that he may "end up bankrupt as result of the current legal action", namely the Valuation Proceeding that was to be heard the next day.

[70] During his oral evidence Mr McQuinn was extremely vague about what he had been told during the few days prior to the date of the appointment of the voluntary administrators.

[71] When asked what advice Mr Bell gave him about whether he should or should not put the company into administration he said:

> He obviously brought it to my attention as well that the company was trading at a loss and not aware of financials, incomplete financials. Saying that the company may be insolvent or likely to be insolvent.[109]

[109] Transcript of 7 April 2017 at p 52.

[72] During re-examination Mr Cozens put to him that someone had previously told him that they thought the Company was insolvent or likely to be insolvent, and he replied that it was Mr Bell who told him that.[110]

[73] Mr McQuinn was asked during cross-examination about his discussion with the book keeper when she told him that the Company was operating at a loss. He said that she told him this some time "in mid to late February" after he asked her how the Company was going.[111] When counsel asked him whether he asked the bookkeeper how much the loss was he said that he asked her to send him a spreadsheet. She sent him the MYOB spreadsheets.

[74] Counsel asked Mr McQuinn whether he asked the bookkeeper if she could tell him what the Company owed at or about 27 February 2017. Mr McQuinn said there was an outstanding amount of "100 something thousand dollars". When counsel put to him that the amount owed to the Company as at about 27 February 2017 was something in excess of $240,000 he said he was "not sure of the figure" and proceeded to say that it was "200 and something thousand". He would also have known that there was over $260,000 in the bank.[112] He agreed that the MYOB

[110] Transcript of 7 April 2017 at p 59.
[111] Transcript of 7 April 2017 at pp 29 and 46.
[112] Transcript of 7 April 2017 at pp 35 and 38-9.

spreadsheets showed that the trading loss was $12,809.36, the figure he recorded in paragraph 11 of his affidavit of 28 February 2017.[113]

[75] It seems that Mr McQuinn's main concern in relation to the Company's current financial situation, as expressed in his affidavit of 3 April 2017, was the Company's possible liability to the ATO for the financial years 2014/15 and 2015/16. He said he was also concerned about the Company having to pay fines and penalties due to the fact that returns had not been lodged on time. Although he had previously deposed to the substantial net profits before tax for those years and had not then expressed concerns about a significant tax liability,[114] he did not identify the basis for his concerns about this liability in his affidavit of 3 April 2017. Even if he did read or hear of a possible liability of about $150,000 plus fines and penalties from Mr Bell he provides no information as to how realistic that estimate may have been. Although he may not have known then that the liability for 2014/2015 was only small (approximately $2000) there was no reason for him to suspect that the tax liability would be significantly greater than for the previous years. He should also have been able to ascertain the fact that the Company did have a credit of almost $50,000. In any event, even if the tax liability was in the order of $150,000, this would

[113] Transcript of 7 April 2017 at p 47.
[114] Affidavit of Justin McQuinn sworn on 18 November 2016 at [35] & [36] quoted in [30] above.

not suggest any inability of the Company to pay its debts as and when they fell due.

[76] I reject his evidence that he "did not and could not know how much money NTRD owed to other people". Apart from the uncertainty regarding the Company's liability to the ATO he could easily have found out other important matters concerning the current financial position of the Company, in particular the approximate amounts owing to and by others and the current bank balance, for example by reference to the bookkeeper and if necessary the Company's MYOB records such as the MYOB spreadsheets that his bookkeeper had sent him and he annexed to his affidavit of 28 February 2017. Indeed his bookkeeper had told him about these matters not long before that. Also, he must have known about the Company's continuing expenses of significance such as his salary, rent that he had recently negotiated when obtaining the new lease, and that the Company had just paid the security bond of $16,500. He would also have known that the Company's rental liability had halved, from $10,000 per month to $5000 per month, since November 2016 as a result of the Company moving out of its more expensive premises.[115]

[77] Mr McQuinn was also extremely vague about the expert reports that have been obtained for the purposes of the Valuation Proceeding. Although they focused on the Company's financial situation as at

[115] Transcript of 7 April 2017 at p 50.

earlier dates, including 30 June 2016 and 11 July 2016, they should have removed most if not all of Mr McQuinn's uncertainties in respect of major issues including tax liabilities. He gave varying answers as to whether he had been sent or otherwise seen either or both of the reports, notwithstanding that the Company's solicitor had possession of them and their contents would be of major importance during the imminent hearing of the Valuation Proceeding. He eventually said that he had not read the documents, he did not receive copies of them and that his solicitor did not show them to him. He said that his ex-solicitor just said that he had received a valuation.[116]

[78] I have considerable difficulty accepting his evidence about this, particularly because he appears to have quoted specific figures from each of those reports in paragraph 12 of his affidavit of 28 February 2017. Also, apart from the importance of the information contained in those reports for the Valuation Proceeding, they would have provided more information than what he says he had concerning the financial situation of the Company and enabled him to form a better opinion as to the solvency of the Company. For example the opinion of his own expert, Mr Barrett, that as at 30 June 2016 the Company's assets exceeded its liabilities by about $390,000, should have prompted him to make further enquiries as to why some eight months later the Company might be insolvent.

[116] Transcript of 7 April 2017 at pp 45-6.

[79] Later in his cross-examination Mr McQuinn was asked whether he would have chosen to put the Company into administration if the Valuation Proceeding was not current and if he knew of the level of the Company's "cash at bank, creditors, the debtors and the slight trading loss". He said:

> Well, with the knowledge that I had at the time and all the unknowns and not knowing whether the company was insolvent or likely to become insolvent, I would have put the company into administration in the best interests of the company.[117]

[80] In reply to the next question: "what were the benefits to the company of being put into administration?" he said: "to find out the financial state of the company." He was then asked why he did not instruct his accountants to finalise the accounts and replied that: "I've been trying to for a long time". It was then put to him that he had already agreed that he had made no effort to try and finalise accounts of the Company, and he said: "I guess I was busy running the company."[118]

[81] If that was one of his reasons for placing the Company into administration it was not a proper purpose.[119]

[117] Transcript of 7 April 2017 at p 53.
[118] Transcript of 7 April 2017 at p 53.
[119] Cf *Kazar* at p 234.

Consideration

[82] Counsel for the Administrators made a number of brief and helpful observations, stressing the constraints upon his clients that I have already summarised earlier in these reasons.

[83] Mr McQuinn signed the Appointment Documents in his capacity as the sole director of the Company. The Appointment Documents are a pro-forma document prepared by staff of the Administrators and provided by Mr Pleash to Mr McQuinn. Mr McQuinn signed the Resolution after the discussion with Pleash when the financial affairs of the Company were discussed and Pleash had expressly represented to Mr McQuinn that "Before you can appoint a voluntary administrator, you must satisfy yourself that the Company is insolvent."[120]

[84] Further, in assessing whether the opinion of the First Defendant about the potential future insolvency of the Company was genuinely formed the Court is entitled to take into account the long standing involvement of Mr McQuinn in the business conducted by the Company (which business was previously conducted by JCEE); Mr McQuinn's knowledge of the trading activity of the Company derived from his involvement in the day to day operation of the Company including cash flow and sales activity; information that he obtained from clients including builders with whom the Company regularly dealt about future

[120] First Pleash Affidavit at [56].

building work in the Northern Territory or lack thereof; and reliance by Mr McQuinn upon the advice and opinions given to him by professionals including accountants in respect of the financial affairs of the Company.

[85] In addition, there is evidence, albeit in a conclusory form, from the First Defendant that:

> Given the negative factors such as poor trading conditions and poor recent trading figures etc as above (together with my state of mind at the time as above, and my awareness of the significant implications of trading whilst insolvent), I considered that it was more likely than not that NTRDS was, or would soon be insolvent.[121]

[86] Counsel for the Administrators also pointed out that Court has before it the opinion of Mr Pleash, an experienced insolvency practitioner, that contributors to, and indicia of, insolvency sometimes include acrimonious litigation between stakeholders, unreconciled accounts and non-lodgement of income tax returns, trading losses and a downturn in the construction industry.

First Defendant's knowledge as at 27 February 2017

[87] There is nothing to suggest that, prior to his solicitors receiving Mr Bruce's expert valuation on 22 February and prior to his discussion with the Company's bookkeeper, Mr McQuinn was not still of the opinion that the Company was profitable and solvent, and that there

[121] Affidavit of Justin McQuinn sworn on 3 April 2017 at [6(k)].

was no justification for it being wound up. Nor was there any suggestion, until about the weekend of 25-26 February that the hearing of the Valuation Proceeding should not proceed the following Tuesday 28 February 2017.

[88] It seems that during that weekend Mr McQuinn changed his mind about those matters following discussions with his then lawyers and Mr Bell. Unfortunately little is known about those discussions, partly because of Mr McQuinn's poor memory of them and partly because none of those other people gave evidence.

[89] It appears very likely that Mr McQuinn's change of mind was based upon his discussions with Mr Bell over that weekend. However Mr McQuinn was unable to recollect much of what Mr Bell or his lawyers told him. He did not recall having been shown parts of the expert reports of his own expert Mr Barrett or of the Plaintiff's expert Mr Bruce.

[90] He was not clear about what Mr Bell told him. Nor did he refer to Mr Bell, or any advice that Mr Bell might have given him, when he identified his reasons for making his decision to place the Company into administration in his affidavit of 3 April 2007. He only referred to "my accountant" who was really the Company's part time bookkeeper.

[91] Mr Bell was not called to give evidence as to what advice he gave to Mr McQuinn or the basis for that advice. He is meant to be preparing

an expert report for the Valuation Proceeding, due to be filed 12 April, and should have been very familiar with the Company's financial situation by 7 April. Nor was any evidence led from the bookkeeper, or either of the lawyers who participated in the meetings that weekend. Accordingly Mr Bell could not be asked about the apparent differences between some of the things that he told Mr Pleash during the Second Telephone Call on 25 February, and perhaps Mr McQuinn, and the information that he had, and provided to Mr Pleash soon after that call, for example in relation to the trading loss of $40,000 and the ATO credit of $46,550.10.[122]

[92] At most, all that I can infer is that Mr Bell advised Mr McQuinn to take this step of appointing the Administrators and to do so urgently before the Valuation Proceeding hearing the following Tuesday, and that Mr McQuinn acted on that advice. Without knowing more about the advice and the basis for it, it is rather difficult to know the true state of Mr McQuinn's knowledge and the real reasons for him changing his mind about the Company's solvency so suddenly and putting the Company into administration the day before the hearing.

[93] Otherwise it seems that his only other source of information was his bookkeeper's advice that the Company was operating at a very small loss based on cash flows for that financial year.

[122] See [40] and [41] above.

Submissions and conclusions

[94] In his written submissions Mr Cozens, counsel for the First Defendant, repeated and relied upon the reasons expressed by Mr McQuinn in paragraph 6 of his affidavit of 3 April 2017.

[95] Mr Cozens stressed the fact that Mr McQuinn had limited financial literacy and that he relied on external advisers and others to assist him in managing the financial side of the business. His knowledge of the financial state of the Company was limited to being aware of the bank account balance of the Company from time to time, making payments from that account in the ordinary course of business and reviewing financial statements prepared for the Company from time to time.

[96] Counsel acknowledged that the mere absence of the knowledge of the financial state of the Company is not enough for an appointment to be valid.[123] He submitted however that unlike the situation in *Kazar*, the lack of available financial information was not the only basis upon which Mr McQuinn formed his opinion. He identified other reasons, namely poor trading conditions as compared with previous years, Mr McQuinn's knowledge of the poor state of the industry, the fact that the books showed that the business was operating at a loss, and the potential for significant and unknown level of debts to ATO and others.

[123] Submissions on behalf of the First Defendant [11].

[97] However, I consider it clear that Mr McQuinn did have knowledge of the financial state of the Company sufficient for him to know that the Company was not insolvent and that there was little prospect of the company becoming insolvent in the foreseeable future.

[98] Consistent with what his bookkeeper told him, the MYOB spreadsheets which he annexed to his affidavit of 28 February 2017 showed a very healthy balance, which included cash at hand of almost $240,000 and trade debtors of about $250,000 as against trade creditors of about $85,000. They also showed that the major ongoing expenses were employment expenses of about $360,000, a significant part of which would have been his salary, and rent of $75,264 which I consider included the security deposit of $16,500 paid in November 2016 and January 2017 and was lower since it was halved in November 2016.

[99] Even on his evidence as to what his bookkeeper told him, the Company had significant assets over liabilities: over $260,000 cash at the bank; debtors of approximately $200,000; creditors of approximately $100,000 and a very small operating loss, probably due to the advance payment of the $16,000 bond for the lease.

[100] The operating loss was so small that there could have been no reason for him to assume that it could not be met when necessary out of the considerable amount of cash at the bank or by him taking a temporary and small pay cut.

[101] Mr McQuinn, and Mr Cozens on his behalf, advanced several other reasons for placing the company into administration. The fact that Mr McQuinn was worried about the forthcoming hearing of the Valuation Proceeding which was causing him stress, and that his ex-lawyers told him he might go bankrupt as a result of that legal action,[124] were matters personal to him and had nothing to do with the interests of the Company. In addition to the fact that both of those consequences were directly attributable to his own actions in terminating the winding up by his proposal to purchase the Plaintiff's shares, they were not proper reasons for placing the Company into administration.

[102] Nor do I accept that he genuinely thought that the Company would be trading while insolvent. Although he said in paragraph 6(k) that for the reasons there given he "considered that it was more likely than not that NTRDS either was, or would soon be insolvent" I attach little weight to this assertion. As I have said there was no basis for anyone to conclude that the Company was insolvent, and no proper basis for a conclusion that the Company was likely to become insolvent at some future time, unless some unexpected event occurred such as Mr McQuinn increasing the Company's expenses.

[124] Affidavit of Justin McQuinn sworn on 3 April 2017 at [6(f)] and [6(i)] – [6(k)].

[103] Mr Crawley, counsel for the Plaintiff, listed a number of reasons why Mr McQuinn as the sole director, could not on reasonable grounds have believed the Company was or was likely to become insolvent.

[104] I agree and conclude that Mr McQuinn could not have held such a belief. I say this for a number of reasons:

(a) he was aware from his discussions with the bookkeeper and could readily have seen on the MYOB spreadsheets, that the Company's assets, in particular cash at bank and trade debtors, considerably exceeded its liabilities even if the tax liability was in the order of $150,000 or more;

(b) he had ready access to the MYOB accounts and thus the trading and overall financial position of the Company, which revealed only an approximately 20% drop in both sales and expenses over the previous year (before any seasonal adjustment to allow for the wet season) and a small profit after the abnormal expense for the rental security bond was removed;

(c) the fact that his (or the Company's) bookkeeper had told him that the Company was operating at a small loss based on cash flows for FY2017 was no basis for him to conclude that the Company was insolvent or likely to become insolvent, in the absence of further enquiries by him in relation to that possibility;

(d) he had not instructed the company's accountant to undertake formal reconciliation of the accounts in the 17 months he had sole control of the Company;

(e) the figures mentioned by Mr Bell did not suggest an inability to meet liabilities as and when they fell due;

(f) the Company had not received any demands for payment or other complaints from creditors concerning unpaid or overdue accounts;

(g) as he said in his affidavit of 3 April 2017 he simply did not know with any certainty whether or not the Company was trading insolvent, and in his evidence to the effect that he did not know whether the company was insolvent or likely to become insolvent.[125]

[105] I also agree with Mr Crawley that Mr McQuinn's belief, such as it was, was not bona fide genuinely formed. It was inconsistent with:

(a) his affidavit of November 2016, and his decision at that time to enter a new lease;

(b) his strong opposition in early February 2017 to the company being wound up;

(c) what the financial accounts showed; and

[125] Transcript of 7 April 2017 at p 53, quoted at [79] above.

(d) what he could have easily ascertained by perusing the expert valuation reports and the MYOB spreadsheets, if necessary with the assistance of someone else such as a bookkeeper or accountant.

[106] Mr Crawley also submitted that McQuinn's purpose in resolving to put the Company into administration was a strategic decision relating to his dispute with the other shareholder in the Valuation Proceeding. Had that dispute been resolved, the decision to submit the Company to external administration would not have been made. Counsel said that the advice from Mr Bell to McQuinn's barrister makes that clear. However there is no evidence that this advice was given in the presence of Mr McQuinn, or that he was otherwise given that advice. Nor is there any evidence that he instructed the barrister to act on such advice or that the proposal was ever put to the Plaintiff or his lawyers.

[107] Counsel also submitted that such a precipitate act as placing the Company in administration, without making any effort to first ascertain the true position of the Company, in the presence of substantial cash at bank, valuable debtors and limited creditors, raises a strong inference of an ulterior motive – especially when facing an imminent hearing with his belief that the likely outcome would be a substantial judgment against him and personal bankruptcy. I agree that such an inference is open.

[108] It is clear that Mr McQuinn was concerned about being bankrupted if he is unable to pay the Plaintiff for his shares and that this was one of the reasons for him taking this action when he did.[126] I consider that Mr McQuinn was keen to have the hearing of the Valuation Proceeding adjourned, apparently hoping that he could obtain a more conservative valuation report from Mr Bell and perhaps negotiate a more modest settlement with the Plaintiff. Indeed his understanding was that "if the company was in administration, chances were the hearing would be put off or postponed."[127]

[109] I agree and find that a substantial purpose of the First Defendant when he made the resolutions placing the Company into voluntary administration was to have the Validation Proceedings adjourned in the hope that they would not proceed or otherwise result in him being made bankrupt. This was not a proper purpose.

[110] However I am not satisfied to the requisite standard that the First Defendant had the necessary intent to abuse the process of the Court or to otherwise act in bad faith. Before drawing such a conclusion I consider that I would have to apply a higher than ordinary standard of proof, such as the *Briginshaw* standard.[128]

[126] See Mr Cozens' submissions on 28 February noted at [49] above and paragraph 6(f) of Mr McQuinn's affidavit of 3 April 2017.
[127] Transcript of 7 April 2017 p 54.
[128] *Briginshaw v Briginshaw* [1938] 60 CLR 336 at 361-1.

[111] Rather, I have the impression that Mr McQuinn blindly accepted the advice of Mr Bell without giving any real thought to whether the Company was insolvent or was likely to become insolvent at some future time. He was not able to determine that question. He did not form a concluded opinion.

[112] Moreover, such belief as he did have was not reasonable in the circumstances. He could and should have taken more steps than he did, particularly in relation to ascertaining the Company's likely tax liabilities if that really concerned him, before deciding to place the Company into administration.[129]

[113] It is sufficient to say, for the reasons expressed above, that I do not consider that Mr McQuinn's opinion that the Company was insolvent or likely to become insolvent at some future time was a bona fide opinion genuinely formed.

[114] I consider that Mr McQuinn's actions were not taken in the best interests of the Company as a whole. I do not consider that the appointment can have been thought to attain either of the objectives set out in s 435A of the Act. If, as Mr McQuinn suggested, the Company needed more assistance in relation to getting its accounts into order, that would be done more economically by engaging competent advisors

[129] C.f. *Downey v Crawford* at 196.

rather than incurring the higher costs associated with the voluntary administration.

Orders

[115] I declare that the Appointment of the Third Defendant as voluntary administrators of the Second Defendant was invalid.

[116] I will hear the parties further concerning the other matters raised in the Interlocutory Process filed 22 March 2017.
