FEDERAL COURT OF AUSTRALIA

Robit Nominees Pty Ltd v Oceanlinx Limited (in liq) (Receivers and Managers Appointed), in the matter of Oceanlinx Limited (in liq) (Receivers and Managers Appointed) [2016] FCA 225

File number(s):	NSD 1304 of 2014
Judge(s):	**YATES J**
Date of judgment:	11 March 2016
Catchwords:	**CORPORATIONS** – external administration – supervision of the administrators of a company – whether the administrators have managed the company's business, property or affairs in a way that is prejudicial to the interests of some or all of the company's creditors – sale of company assets **CORPORATIONS** external administration – appeal from a decision of the administrators – decision to sell assets of a company **CORPORATIONS** – duties and powers of officers – duties and powers of administrators – proceedings for breach of duties and powers – standing of creditors to bring proceedings for breach of duties and powers **CORPORATIONS** – external administration – voluntary winding up – application to remove liquidators
Legislation:	*Bankruptcy Act 1966* (Cth) s 178 *Corporations Act 2001* (Cth) ss 127, 128, 129,180, 181, 182, 436A, 436E, 437A, 437B, 439A, 440B, 447E, 503, 588FP, 1321, 1322, Pt 5.3A *Personal Property Securities Act 2009* (Cth)
Cases cited:	*Correa v Whittingham* (2013) 278 FLR 310; [2013] NSWCA 263 *Eden Energy Ltd v Drivetrain US Inc* (2012) 90 ACSR 191; [2012] WASC 192 *Hausmann v Smith* [2006] NSWSC 682 *Honest Remark Pty Ltd v Allstate Explorations NL* (2006) 201 FLR 456; [2006] NSWSC 735 *In re Adam Eyton Limited; Ex parte Charlesworth* (1887) 36 Ch D 299

	In the matter of Joe & Joe Developments Pty Limited (subject to a Deed of Company Arrangement) [2014] NSWSC 1444 *Labocus Precious Metals Pty Ltd v Thomas* [2007] FCA 1154 *Northside Developments Pty Ltd v Registrar General* (1990) 170 CLR 146; [1990] HCA 32 *Oris Funds Management Ltd v National Australia Bank Ltd* [2003] VSC 315 *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404; [1994] HCA 54 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; [1966] HCA 21 *Re Keypak Homecare Ltd* [1987] BCLC 409 *Silver v Dome Resources NL* (2007) 62 ACSR 539; [2007] NSWSC 455 *Soyfer v Earlmaze Pty Ltd* [2000] NSWSC 1068 *Spies v The Queen* (2000) 201 CLR 603; [2000] HCA 43 *Strawbridge and Tracy in their capacity as joint and several administrators, in the matter of Oceanlinx Limited* [2014] FCA 524 *Sunburst Properties Pty Ltd (in liq) v Agwater Pty Ltd* [2005] SASC 335 *Weinstock v Beck* (2013) 251 CLR 396; [2013] HCA 14
Date of hearing:	20, 21, 22, 23 July 2015
Registry:	New South Wales
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National Practice Area:	Commercial and Corporations
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Category:	Catchwords
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Counsel for the Plaintiffs:	Mr S Golledge with Mr J Kohn
Solicitor for the Plaintiffs:	JPM Lawyers
Counsel for the First, Second and Third Defendants:	Mr DR Stack

Solicitor for the First, Second and Third Defendants:	Bridges Lawyers
Counsel for the Fourth and Fifth Defendants:	Mr MJ Dawson
Solicitor for the Fourth and Fifth Defendants:	ERA Legal

ORDERS

NSD 1304 of 2014

IN THE MATTER OF OCEANLINX LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)

BETWEEN:	**ROBIT NOMINEES PTY LTD (and another named in the Schedule)** Plaintiffs
AND:	**OCEANLINX LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) (and others named in the Schedule)** Defendants

JUDGE: **YATES J**

DATE OF ORDER: **11 MARCH 2016**

THE COURT ORDERS THAT:

1. The proceeding be dismissed.
2. In the event that the parties are unable to agree on the question of costs, the first, second and third defendants, and the fourth and fifth defendants, are to file and serve any written submissions they wish to make on that question (in each case, limited to three pages in length) by 4.00 pm on 18 March 2016; the plaintiffs are to file and serve any written submissions in answer (limited to three pages in length for each response) by 4.00 pm on 29 March 2016; and the first, second and third defendants, and the fourth and fifth defendants, are to file any written submissions in reply (in each case, limited to one page in length) by 4.00 pm on 4 April 2016.
3. Subject to further order, the question of costs be determined on the papers.

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

REASONS FOR JUDGMENT

YATES J:

INTRODUCTION

1 The plaintiffs, Robit Nominees Pty Ltd (**Robit**) and Ocean Energy Construction Pty Ltd (**Ocean Energy**), seek orders setting aside a sale of assets by the second and third defendants, Vaughan Neil Strawbridge and Jason Tracy, acting as the joint and several administrators of the first defendant (**the Company**). The plaintiffs rely on s 447E(1) and s 1321(1) of the *Corporations Act 2001* (Cth) (**the Act**). The sale was made to the fifth defendant, Wave Power Renewables Limited (**WPR**), on 25 November 2014.

2 The plaintiffs also claim that Messrs Strawbridge and Tracy (**the administrators**) breached various common law, equitable and statutory duties. The alleged breaches are associated with their conduct in selling the Company's assets to WPR. The plaintiffs claim damages, equitable compensation and statutory compensation for these breaches.

3 Messrs Strawbridge and Tracy are now the liquidators of the Company. The plaintiffs seek their removal as liquidators and the appointment of a new liquidator. The plaintiffs say that it would be in the interests of the plaintiffs and of all unsecured creditors that a new liquidator be appointed to investigate whether claims might be brought by the Company against the administrators for the breaches alleged.

4 Each plaintiff is an unsecured creditor of the Company. Each has lodged a proof of debt in the Company's winding up.

5 The proof of debt lodged by Robit is for $449,017. This includes a debt of $370,000 plus interest arising under a Redeemable Convertible Note Deed entered into between Robit and the Company, apparently on 15 June 2012 (**the Robit Note Deed**): see below at [24]

6 Tibor Nick Vertes is a director of Robit. Mr Vertes has made a number of affidavits which were read as evidence in the plaintiffs' case. Mr Vertes was cross-examined.

7 Mr Strawbridge made an affidavit which was read in his, Mr Tracy's and the Company's case. Mr Strawbridge was cross-examined.

8 The fourth defendant, Wave Energy Resources Pty Ltd (**WER**), and WPR were originally sued on the basis of their alleged knowing involvement in the administrators' alleged breaches of duty. These claims were abandoned shortly before the commencement of the hearing. Nevertheless, WER and WPR remain as parties to the proceeding. In the case of WPR, this is necessary because it is the purchaser under the sale of the relevant assets. WER and WPR did not adduce evidence at the hearing. They did, however, make submissions in respect of their positions in light of the evidence adduced by the other parties.

9 The plaintiffs' case focuses on two main propositions.

10 The first proposition is that, when undertaking the sale of assets, the administrators failed to properly consider the validity of certain secured convertible note deeds and second, third and fourth ranking securities that the Company entered into with various private lenders in the period November 2013 to February 2014 to finance its ongoing activities. This is said to be so, notwithstanding that the administrators had in fact obtained legal advice on that question. The plaintiffs say that the legal advice that was given to the administrators did not have regard to a complaint of Mr Vertes that the loans secured by these transactions were not authorised at a properly convened board meeting. The plaintiffs say that, consequently, the administrators proceeded on a flawed understanding that the security interests that were created were unquestionably valid and assessed the value of various deed of company arrangement (**DOCA**) proposals and various competing proposals for the sale of assets in the same flawed manner. It is important to note that, in this proceeding, the plaintiffs stop short of pleading that the secured loan transactions or the security interests that were thereby created were invalid. They merely raise that possibility.

11 The second proposition is that the administrators succumbed to pressure in making the sale to WPR on 25 November 2014. The consequence, they say, is that an opportunity was lost to enter into a sale with a different purchaser, New Wave Energy Pty Ltd (**New Wave**), that would have provided a greater return to unsecured creditors. New Wave is a company associated with Mr Vertes.

12 By making the sale to WPR in these circumstances, the plaintiffs say the administrators breached their duties. The plaintiffs also say that the administrators acted prejudicially to the

interests of the Company's creditors and that, for this reason, the sale to WPR should be set aside.

BACKGROUND

The Company

13 The Company was registered in New South Wales on 16 January 1997. In the period relevant to this proceeding (15 June 2012 to 25 November 2014), its directors were Ali Mohammad Baghaei Nanehkaran (**Mr Baghaei**), Joaquim Manuel Jordao Servulo Rodrigues, and Mr Vertes. Each remains a director of the Company. Mr Baghaei was the Company's Chief Executive Officer. In this period, Colin Parbery was the secretary of the Company until 10 March 2014. He was also the Company's Chief Financial Officer.

14 The Company was established for the purpose of researching, developing, building and installing machinery that would be capable of harnessing wave energy from the ocean and converting that energy into electricity for industrial and domestic use. The focus of the Company's business was the development and commissioning of wave-powered generators, including a wave energy converter prototype unit (**the prototype unit**) and a wave energy converter unit, referred to in the evidence as the 1MW greenWAVE unit (**the greenWAVE unit** or **the unit**).

15 Development of the greenWAVE unit began in 2012. The development took place at Port MacDonnell in South Australia. Construction of the unit began in August 2013 at a facility called the TechPort Adelaide common user facility. In early February 2014, the unit was completed. In March 2014, the Company undertook to install the unit off the coast of South Australia. In the course of towing the unit to its intended site of operation, a problem developed which required it to be towed to shallow waters off the coast of Carrickalinga, South Australia, where the unit is now stranded.

16 This event precipitated the Company's financial collapse and it being placed in external administration and, subsequently, liquidation. For completeness, I record that the prototype unit is also stranded off the coast at Port Kembla in New South Wales. As events have transpired, both the South Australian Government and the New South Wales Government have salvage claims against the Company.

17 On 5 March 2014, the directors of the Company resolved to appoint an administrator of the Company under s 436A of the Act. On 21 March 2014, David Ross and Brent Kijurina of

Hall Chadwick Chartered Accountants were appointed as joint and several administrators. Shortly after this appointment, Rahul Goyal and Cassandra Matthews of KordaMentha were appointed as joint and several receivers and managers of all the Company's property, assets and undertaking. This appointment was pursuant to a first ranking General Security Deed granted by the Company in favour of Macquarie Bank Limited (**MBL**), which had been entered into on 14 August 2012 (**the first ranking security**). This appointment took effect on and from 26 March 2014.

18 At the first meeting of the Company's creditors held on 2 April 2014 pursuant to s 436E of the Act, resolutions were passed removing Messrs Ross and Kijurina as administrators and appointing Messrs Strawbridge and Tracy as joint and several administrators in their place. The creditors also resolved to form a committee of creditors.

19 At a later time, a question arose as to whether Messrs Ross and Kijurina, and hence whether Messrs Strawbridge and Tracy, had been validly appointed. A curative order was made by the Court: *Strawbridge and Tracy in their capacity as joint and several administrators, in the matter of Oceanlinx Limited* [2014] FCA 524. In the same proceeding, orders were made pursuant to s 439A(6) of the Act, extending the period within which the administrators were required to convene a meeting of creditors under s 439A of the Act.

20 Within this extended period, various DOCA proposals were made. Ultimately, however, these proposals were withdrawn and competing offers were made to purchase certain of the Company's assets, the principal remaining asset (after MBL's claims as first ranking creditor) being the Company's intellectual property. Although the administrators conducted a marketing campaign in an attempt to achieve the highest possible price for these assets, the main competing offers came from two internal sources. For convenience they can be referred to as **the Baghaei interests** on the one hand, and **the Vertes interests** on the other.

21 I will describe in greater detail below how this competition developed, with particular focus on the events leading up to the sale of assets to WPR. For present purposes, it is sufficient to note that WPR, the ultimate purchaser, can be taken as associated with the Baghaei interests.

The financing of the Company's business

The Robit Noted Deed

22 The primary sources of funding for the Company were:

- capital contributions by shareholders;
- secured and unsecured loan facilities from MBL including the first ranking security;
- loans from non-financial institution investors, backed by both secured and unsecured redeemable convertible notes issued by the Company;
- monies provided by the Australian Government through AusIndustry in the form of research and development tax rebates paid by reference to research and development expenses incurred in a previous financial year; and
- monies provided by the Australian Renewable Energy Agency.

23 The loans from non-financial institution investors are of particular relevance to this proceeding.

24 On 15 June 2012, the Company and Robit entered into the Robit Note Deed. It appears that Robit was acting as trustee for the Vertes Family Trust. Under the Robit Note Deed, Robit covenanted to provide funds to the Company totalling $3 million. These funds were to be provided in six tranches upon certain "milestones" being reached. The Robit Note Deed also provided that the Company would procure the completion of all acts necessary to appoint Mr Vertes as a director of the Company and as Chairman of the board. These appointments were to remain in effect for at least 12 months from the date of the final "milestone" (identified as 30 September 2013) and, thereafter, subject to review by the board.

25 As events transpired, Robit advanced only $370,000 under the Robit Note Deed, despite receiving several drawdown requests. This was because, somewhat surprisingly, Robit simply did not have the funds to meet its commitments under the Robit Note Deed. Nevertheless, Mr Vertes considered it to be appropriate that he should remain as both a director of the Company and as Chairman of its board. I should mention that, on 24 May 2013, Robit expressed its intention to make available "a further loan facility to the extent of AUD$1,000,000 to enable completion of the construction of the [Company's] commercial size unit in South Australia". Despite being referred to as "a further loan facility", it seems that the funds were to be provided under the Robit Note Deed. No funds were provided.

26 At a board meeting on 25 October 2013, after the identified date of the last "milestone", Mr Baghaei, as Chief Executive Officer, provided an update on the Company's position. He noted that it would be possible to complete construction of the green WAVE unit by the end of November 2013, provided Robit's promise of funding was "delivered immediately". Mr

Baghaei noted that project completion had been delayed due to the non-delivery of the promised funds. The minutes of the meeting, which are not disputed, record that, at that time, it was critical that Robit provide funding under the Robit Note Deed as soon as possible, otherwise the Company would have to discontinue the construction of the green WAVE unit and stop its normal activities.

27 Mr Vertes informed that meeting that he had made alternative arrangements to provide funding. Certain real property at Sussex Inlet in New South Wales would be used as security to raise $1 million which, in turn, would be made available to Robit so that it could provide those funds under the Robit Note Deed. Mr Vertes confirmed at the meeting that "it was certain" that the $1 million funding would be forthcoming. Payment would bring the funds provided under the Robit Note Deed to $1.37 million (out of a total promised funding of $3 million). Mr Vertes said that the $1 million should be available within five days. In cross-examination, Mr Vertes accepted that the Company had an urgent need for funds as a consequence of Robit's inability to provide the $3 million as originally promised.

28 On the basis that the $1 million would be available within one week, the directors instructed Mr Baghaei to "go ahead with commitments to all Techport suppliers and proceed with the completion of the construction phase and the commencement of the Port MacDonnell installation".

29 However, as events transpired, the $1 million funding did not materialise.

30 At the same meeting, it was noted that "management" (meaning, essentially, Mr Baghaei) was "continually presenting to potential investors" but that no offers of investments had been received. Mr Baghaei confirmed that he had privately made available to the Company a "come and go facility" of up to $500,000. The evidence is unclear as to whether it was necessary for Mr Baghaei to advance funds under this facility.

31 Twelve days later, through various emails, Mr Vertes, Mr Baghaei and Mr Rodrigues communicated with each other on the state of the Company's finances. The context in which these communications took place was the fact that the "certain" funds of $1 million promised by Mr Vertes had not been provided.

Events on 6 to 8 November 2013

32 At 7.45 pm on 6 November 2013, Mr Vertes sent an email to Mr Baghaei. This email appears to be a draft of an email that Mr Vertes was going to send to Mr Rodrigues. In that

email, Mr Vertes referred to the fact that Mr Baghaei had been trying to attract new investors within his circle of family and friends "to bridge the delay in my financing and/or to add to the resources of the Company".

33 Later that evening, Mr Vertes sent an email to Mr Rodrigues, which was also copied to Mr Baghaei. This email is based on the email referred to immediately above. It was an exchange between all three directors. In it, Mr Vertes said:

> Ali [Mr Baghaei] and I have both made every possible effort to try to secure further funding for the company. However, it is proving exceedingly difficult, if not impossible, to do so on the basis of the current circumstances, which I detail below.
>
> Given the current financial state of the company, and manifest uncertainty as to its future funding requirements, it is clear that any prospective investor would require provision of a security interest against the company's assets. However, given Macquarie's first ranking senior security, their consent is required to any such equal ranking or subordinate security. If at all, Macquarie will only allow a subordinate security interest, and not a security of equal footing. Short of buying out Macquarie's entire loan account, this is a significant impediment.

34 Mr Rodrigues responded to this email. The response appears to have been sent at 8.09 pm on 7 November 2013. The email was sent to Mr Vertes and copied to Mr Baghaei. In the email, Mr Rodrigues referred to the Company's situation as "very, very concerning". He continued:

> If we do not get additional funding the company will be in a very bad shape.
>
> That can be achieved either through the existing Convertible Note (I understand you have been trying your best to honor that agreement and, if I understood well, were convinced you would be able to provide $1 million in the very near future) or through either a similar Note instrument subscribed by other people. Those Notes are senior to everything else with the exception of the Macquarie loan (which is itself secured by the R&D refunds).
>
> This type of funding is probably the one that has the best chance of being secured in a very short time frame, given all the contacts that you and Ali [Mr Baghaei] have had, namely during the recent launching event.

35 It is clear from these emails that all three directors knew, at that time, if not earlier, that Mr Baghaei, as well as Mr Vertes, had been seeking to raise funds for the Company. Mr Vertes appreciated that any prospective investor would require the provision of security by the Company. Mr Rodrigues agreed. In cross-examination, Mr Vertes accepted that, in his responding email, Mr Rodrigues had signified that funding could proceed by way of providing security over the Company's assets, subordinated to MBL's first ranking security.

36 Mr Vertes also accepted that, by 6 November 2013, he was well aware that Mr Baghaei was trying to raise money from his family and friends in order to bridge the shortfall in the

Company's funds created, in effect, by Mr Vertes and that he (Mr Vertes) was fully supportive of that action. Indeed, in cross-examination, Mr Vertes said that he had no objection to Mr Baghaei trying to raise money for the Company.

37 Curiously, at 5.49 pm on 7 November 2013, Mr Vertes sent, without any explanation, a redemption notice, purportedly issued under the Robit Note Deed seeking, in effect, repayment of the $370,000 which Robit had advanced to the Company. The validity of this notice was immediately rejected by the Company the following morning, in a letter sent by Mr Parbery to Mr Vertes, as the relevant director of Robit.

38 Even more curiously, at 12.10 am on 8 November 2013, some four hours after Mr Rodrigues' email to which I have referred at [34], Mr Vertes sent an email to Mr Baghaei, with a copy to Mr Parbery, expressing concern as to whether the Company was in a position to incur "further substantial financial obligations". Mr Vertes expressed his belief that "the proposed intended transaction is outside of your designated authority and self-serving".

39 It is not suggested that this email was sent with Mr Rodrigues' authority or was even sent with his knowledge. Indeed, later correspondence (to which I will refer) shows that Mr Rodrigues did not share Mr Vertes' position. Mr Vertes' position in this email is plainly inconsistent with the position reflected in the immediately preceding email correspondence. In this connection, I infer that "the proposed intended transaction" to which Mr Vertes referred was the raising of funds for the Company, secured against the Company's assets.

40 Mr Vertes' email continued:

> For the avoidance of doubt, in my capacity as a Director of the Company, I hereby provide you, in your capacity as Managing Director of the Company, with formal notice that you do not have the express nor implied delegated authority of the Board, unless the Board resolves to grant you such authority, to:
>
> - enter into any financing transaction, including, without limitation, a loan, overdraft, lease, or hire purchase agreement, that is not in the ordinary and proper course of the day-to-day operations of the company and in an amount that is reasonable in the circumstances so as to satisfy those purposes;
> - pledge the Company's credit or the mortgaging, charging or encumbering of any of the Company's assets or the giving of any guarantee or of any security in support of any financial obligations; nor
> - create or grant any security interest, fixed or floating charge, lien or other encumbrance over the whole or any part of the undertaking, property or assets of the Company.
>
> Further, I hereby provide you, in your capacity as Managing Director of the Company, with formal notice that you do not have the express nor implied authority

> on behalf of the Company to make, vary, ratify or discharge a contract pursuant to section 126 of the Corporations Act.
>
> Unfortunately, based on your advices as to your planned course of action with respect to incurring further significant financial indebtedness irrespective of the satisfactory resolution of the numerous significant financial and operational impediments the Company now faces, I have found it necessary and prudent in the circumstances to reduce my concern to writing.
>
> Our powers as Directors of the Company must be exercised at all times with care and diligence, in good faith and for a proper purpose.
>
> You have given me every reason, in the present circumstances, to question whether you are exercising your duties in discharge of those duties.
>
> Should you wish to table a resolution at a meeting of the Board to authorise you to incur such any indebtedness and/or security interest in the assets of the Company, then please arrange for the same at the earliest opportunity in the usual manner.
>
> Colin is cc'd on this email, in his capacity as Secretary of the Company, to ensure his awareness of my concerns and the restriction on delegated powers.
>
> I accordingly request that this mail forms part of Company records as a formal notice on behalf of all shareholders of the Company.
>
> Tibor

41 The plaintiffs place great reliance upon this email. The email was specifically discussed in one of Mr Vertes' affidavits. However, in doing so, he did not refer to, or draw attention to, any of the other correspondence passing between the three directors at this time in relation to fundraising.

42 At this juncture, I record that on 8 October 2013, one month before these events, Mr Vertes sought to vary the Robit Note Deed. The most significant variation was that security would be granted to Robit by a General Security Deed in respect of all monies and other amounts due to Robit (being, at that time, the $370,000 which had been advanced). The variations to the Robit Note Deed were not made, but the documentation submitted for that purpose—in particular, the draft General Security Deed—was used as a template to secure other loans which came to be made.

43 The point of present significance is that, when submitting "execution versions" of the relevant documentation to vary the Robit Note Deed, it appears to have been Mr Vertes' expectation that the Company would execute them. There is no evidence of any specific board authorisation for that purpose, or any suggestion by Mr Vertes in his covering correspondence that any such authorisation was required in order for Mr Baghaei to do so. This is at odds with a central plank in the plaintiffs' case; that Mr Baghaei did not have general authority to execute documents providing security for loans made to the Company

and that such documents could only be executed by Mr Baghaei pursuant to specific board approval given at a properly convened board meeting.

44 Mr Baghaei responded to Mr Vertes' email later in the morning on 8 November 2013. Mr Baghaei said that he considered any instruction from Mr Vertes to be invalid "unless supported by the Board and the Management of the Company".

45 Mr Baghaei then sent an email to Mr Rodrigues. In that email, Mr Baghaei said:

> As I have discussed with you previously and today, I have been extremely concerned that Robit Nominees is not fulfilling its obligations under the CN deed signed between OLX and RN.
>
> I have therefore, with the assistance of my senior management, sourced approximately $300-$500K in addition to my own $500K existing facility provided to OLX.
>
> I now require your approval to proceed with the new deed of convertible note and associated charge on the company for the above monies (including my own) which is similar and based on that we were ready to sign with RN.

46 I pause here to note that, in this part of the email, Mr Baghaei was referring to documentation substantially in the form of the documentation that Mr Vertes had submitted to Mr Baghaei for execution on 8 October 2013 to amend the Robit Note Deed and to secure the Company's obligations thereunder.

47 Mr Baghaei's email to Mr Rodrigues continued:

> This is needed to operate the company as going concern [sic] and it will allow me to proceed with completion of the SA PROJECT. I have to sign today a bank guarantee for $110K, a licensing deed and a letter to remove the OWC by 30 Nov 2013. I have already signed all of the above yesterday in the best interest of the company, as I did not expect any untoward reaction from Mr Vertes.
>
> I would like your full approval and support in writing by return to allow me to proceed.

48 The plaintiffs relied on this email as demonstrating Mr Baghaei's knowledge that he did not have authority to enter into loans or to execute documentation, including security documentation, without prior board approval. The plaintiff submitted that, by seeking approval from Mr Rodrigues, Mr Baghaei was acknowledging his own lack of authority.

49 I am not persuaded that this is necessarily the case. On the current state of the evidence, it is equally likely that, in light of what appears to have been Mr Vertes' unilateral direction to Mr Baghaei—which was completely at odds with what seems to have been the previously agreed position between the directors—Mr Baghaei was seeking confirmation from

Mr Rodrigues that he (Mr Baghaei) should continue to raise funds (as agreed) and, for that purpose, to execute documentation in a form that had previously been considered as appropriate.

50 Mr Rodrigues replied promptly the same morning. In an email sent to Mr Baghaei and copied to Mr Parbery, Mr Rodrigues said:

> I am in agreement with your decisions, as they are in the best interests of the company and its shareholders.

51 The following events also occurred on the morning of 8 November 2013.

52 First, the solicitors then acting for Robit, Quinert Rodda & Associates Pty Ltd (**Quinert Rodda**), sent a letter of demand to the Company. In that letter, Quinert Rodda claimed ownership of the copyright in the Robit Note Deed and the documentation that previously had been sent by Mr Vertes to Mr Baghaei to vary and secure the Robit Note Deed (see [42] above). The letter said:

> It has come to our attention that you are intending to re-use, or already have re-used, certain documentation provided to our client, Robit Nominees Pty Ltd, which has been provided to you in the course of commercial negotiations and dealings between you and our client, in circumstances outside the scope of the instructions for which those documents were provided to, and for the benefit of, our client.

53 The letter made certain demands which need not be summarised here. I accept that Mr Vertes must have been the source of information which led to Quinert Rodda writing to the Company in these terms.

54 Secondly, on the morning of 8 November 2013, Robit was asked to provide at least $500,000 of the $1 million that had been promised at the board meeting on 25 October 2013. However, in the afternoon of the same day, Mr Vertes, advised Mr Baghaei that he (Mr Vertes) had no intention of proceeding with the commitment under the Robit Note Deed. Further, he advised Mr Baghaei that the $370,000 advanced by Robit must be secured under the General Security Deed, which was then being offered to new investors, or the Company must stop all operations and appoint a receiver.

55 This event is recorded in a later letter from the Company (written by Mr Baghaei) to Mr Vertes. When this letter was put to Mr Vertes in cross-examination, he appeared to deny the event. However, the same event is recorded in the minutes of the Company's Annual General Meeting held on 22 November 2013. These minutes were signed by Mr Vertes as a

true and correct record of the meeting. In cross-examination, Mr Vertes accepted that this part of the minutes was correct. Relevantly, the minutes state:

> In the morning of 8 November 2013, Robit Nominees was asked to provide at least $500,000 of the promised money. In the afternoon of the same day, for the first time, Mr Vertes advised that he had no intention to proceed with his commitment under the convertible note facility and that the CEO must either include his previous $370,000 as part of the new deed of general security offered to the new investors or to stop all operations including the SA project and appoint a receiver.

56 I am satisfied, based on the documents in evidence, and the answers given by Mr Vertes in cross-examination, that he did make the ultimatum recorded above.

57 The minutes also record the following:

> As a result of this advice by Robit and to avoid any adverse effect on the Company by the shortfall in funds, the Company proceeded with securing $2.5M convertible note facility from friends and family (including $500,000 from the CEO) to ensure that the company did not default and operated legally and within the rules of the Corporations Act.

58 There is debate between the parties about what the word "securing" means in this passage. The defendants contend that it means that the loan facility had been secured on the Company's property—consistently, they say, with the authority that Mr Baghaei already had or which had been agreed between the three directors in the course of the email correspondence on 6 and 7 November 2013. The plaintiffs contend that "securing" means no more than that the loan funds had been obtained. For reasons which will become apparent, it is not necessary for me to resolve that dispute.

59 When Mr Vertes advised Mr Baghaei that he had no intention of proceeding with the commitment under the Robit Note Deed, Mr Baghaei sought Mr Vertes' resignation as Chairman of the board. This request was repeated in an email from Mr Baghaei to Mr Vertes sent on 18 November 2013. Mr Vertes responded by stating that he had no intention of resigning his current position. His response was contained in an email dated 19 November 2013. On the same day, Mr Baghaei responded in an email which said:

> Thanks for your response below, but I am placed in a very difficult position as the board cannot support you as the Chairman/Director.
>
> You have no clue how much I had trusted you and how badly you have let me and hence the company down (you had told the board on 25 Oct and several times subsequently that your $1M would become available within days). You have abused our trust and I therefore request you to reconsider your position on an urgent basis to avoid any unnecessary complications.
>
> Of course, we would welcome your contribution towards the balance of Robit

> Nominees' $3M CN outstanding. When you are in a position to do that, you may ask the company to reconsider restoring you as a director on the board.

60 On 19 November 2013, Mr Rodrigues and Mr Baghaei signed what purports to be a "circulating resolution" of directors pursuant to Article 16.14 of the Company's constitution. In that document Mr Rodrigues and Mr Baghaei resolved to remove Mr Vertes as Chairman of the board and to appoint Mr Baghaei in his stead.

61 Further, on 20 November 2013, the Company formally wrote to Mr Vertes seeking his resignation as Chairman and as a director of the Company. The letter stated that if Mr Vertes did not resign by 21 November 2013, a special general meeting of the Company would be called to seek Mr Vertes' removal.

62 Notwithstanding these requests, and Mr Vertes' refusal to resign, no further action appears to have been taken to remove him as a director. Strangely, in cross-examination, Mr Vertes did not accept that, at this time, his fellow directors wished him to resign as a director. On the evidence before me, that was plainly the case.

63 Later, on 29 January 2014, Mr Vertes sent an email to Mr Baghaei stating that he would be in a position to advance a further sum to the Company, not exceeding $950,000 by on or about 15 February 2014. In cross-examination, Mr Vertes agreed that, at that time, he contemplated that, in principle, this advance would be on the basis of the same convertible note deed and security documentation that the Company had with the other investors. The email concluded by Mr Vertes stating:

> You are doing a fantastic job & I can tell you again that if I didn't think that I would not be proceeding with the above advance.

64 In that email, Mr Vertes also requested that all outstanding legal fees be paid to Quinert Rodda, including for "work done including the security documentation". Mr Vertes was cross-examined on this email and another email sent by him to Mr Baghaei on 29 January 2014 which included certain invoices.

65 In the later email on 29 January 2014, Mr Vertes made clear that he was seeking payment for "the security documentation" because the Company had used the Second Variation to Redeemable Convertible Note and the General Security Deed (which had not been entered into but which had been submitted to the Company for execution on 8 October 2013: see [42] above) as the basic template when obtaining loan funds from others.

66 I am satisfied that, in the period 6 to 8 November 2013, Mr Vertes knew that, in the fund-raising that Mr Baghaei intended to undertake, the documentation previously submitted by Mr Vertes to vary the Robit Note Deed would be used by the Company to document and secure the loans of the new investors. I make this finding having regard, in particular, to the Quinert Rodda letter of 8 November 2013.

67 By the time of the Annual General Meeting on 22 November 2013, Mr Vertes knew that secured loans had been made to the Company. He raised no complaint about those loans at that time. In his emails of 29 January 2014, he raised no complaint about those loans. His contemplation was that he (presumably, Robit) would make a loan to the Company on the same basis as the other investors had made their loans. In his first email of 29 January 2014, he requested copies of the relevant documentation that had been executed by the Company in that regard.

The secured loans

68 In the period 11 November 2013 to 26 February 2014 secured loans totalling $1,400,001 were made to the Company in the circumstances described below (**the secured loans**).

69 On 7 November 2013, the Company entered into a Redeemable Secured Convertible Noteholder Deed (**the first SCND**) with Mr Baghaei, TTL Nominees Pty Ltd (**TTL**) and Ian Chi-Ping Cheng. The first SCND was executed by Mr Baghaei in his capacity as a director of the Company and by Mr Parbery in his capacity as secretary of the Company.

70 On 11 November 2013, the Company entered into a Redeemable Secured Convertible Noteholder Deed (**the second SCND**) with Makinti Pty Ltd (**Makinti**). The second SCND was executed by Mr Baghaei in his capacity as a director of the Company and by Mr Parbery in his capacity as secretary of the Company.

71 On 11 November 2013, the Company executed a General Security Deed (**the second ranking security**) in favour of Mr Baghaei, TTL Nominees, Mr Cheng and Makinti (**the first secured convertible noteholders**). The second ranking security was executed by Mr Baghaei in his capacity as a director of the Company, by Mr Rodrigues in his capacity as a director of the Company, and by Mr Parbery in his capacity as secretary of the Company. The second ranking security was registered on the Personal Property Securities Register (**the PPSR**) on 12 November 2013.

72 The first secured convertible noteholders made the following loans:

- TTL - $200,000 (6 December 2013) and $100,000 (30 January 2014);
- Ian Chi-Ping Cheng - $50,001 (11 November 2013) and $100,000 (1 December 2013); and
- Makinti - $300,000 (25 November 2013) and $200,000 (29 January 2014).

73 On 17 February 2014, the Company entered into a further Redeemable Secured Noteholder Deed (**the third SCND**) with Lei Tan, Xuemei Li and Yibing Tan (**the second secured convertible noteholders**). The third SCND was executed by Mr Baghaei in his capacity as a director of the Company and by Mr Parbery in his capacity as secretary of the Company. On 17 February 2014 the Company executed a General Security Deed (**the third ranking security**) in favour of the second secured convertible noteholders. The third ranking security was executed by Mr Baghaei in his capacity as a director of the Company and by Mr Parbery in his capacity as secretary of the Company. The third ranking security was registered on the PPSR on 3 March 2014.

74 The second secured convertible noteholders made the following loans:

- Lei Tan - $50,000 (20 February 2014) and $50,000 (24 February 2014);
- Xuemei Li - $100,000 (26 February 2014); and
- Yibing Tan - $100,000 (24 February 2014).

75 On 25 February 2014, the Company entered into a further Redeemable Secured Convertible Noteholder Deed (**the fourth SCND**) with Windsor Group Holdings Pty Ltd (**Windsor Group**) and Wu Ching-Chun Huang (**the third secured convertible noteholders**). The fourth SCND was executed by Mr Baghaei in his capacity as a director of the Company and by Mr Parbery in his capacity as secretary of the Company. On 25 February 2014, the Company executed a General Security Deed (**the fourth ranking security**) in favour of the third secured convertible noteholders. The fourth ranking security was executed by Mr Baghaei in his capacity as a director of the Company and by Mr Parbery in his capacity as secretary of the Company. The fourth ranking security was registered on the PPSR on 3 March 2014.

76 The third secured convertible noteholders made the following loans:

- Windsor Group - $75,000 (26 February 2014); and
- Wu Ching-Chun Huang - $75,000 (26 February 2014).

77 It is convenient to refer to the first, second, third and fourth SCNDs as, collectively, **the secured convertible note deeds**. It is convenient to refer to the first, second and third secured convertible noteholders as, collectively, **the secured convertible noteholders**.

78 The plaintiffs draw particular attention to the first SCND and the second ranking security because Mr Baghaei was a party to these transactions. TTL was also a party. Caroline Chen is a director, shareholder and the secretary of TTL. At relevant times, Ms Chen was employed by the Company as its Business Development Manager. There is also some evidence that Ms Chen was a lawyer. I mention this matter because Ms Chen was involved with Mr Baghaei in putting certain proposals to the administrators. She also witnessed telephone discussions between Mr Baghaei and Mr Rodrigues in relation to the raising and securing of the funds to which I have referred. There is evidence that teleconferencing was the ordinary way in which board meetings were conducted. Finally, Ms Chen is recorded as the founding member and sole director of the ultimately successful purchaser of the assets, WPR. Ms Chen can be taken to be part of the Baghaei interests.

79 The plaintiffs also place reliance on the fact that, in the second, third and fourth ranking securities, Mr Baghaei is referred to as the "Lead Investor". I note, however, that Mr Baghaei is not recorded as having lent funds to the Company in relation to any of the transactions evidenced by these documents.

80 Despite his email of 8 November 2013 (see [40] above), Mr Vertes took no steps in the period immediately after each of the above loans were made, to set aside the secured convertible note deeds or the second, third or fourth ranking securities, or to cause the Company to repay the secured loans. Indeed, by 29 January 2014, he appears to have condoned the raising of the loans which, by then, had been made. In this connection, Mr Vertes' email of 29 January 2014 indicates his preparedness to advance funds with the knowledge that other loans had been made and that security interests had been created. The only thing which Mr Vertes was seeking at that time was that the Company should pay Quinert Rodda for the use of the loan documentation. Nevertheless, after the Company went into administration, Mr Vertes challenged the validity of the security interests that had been created.

THE CHALLENGE TO THE VALIDITY OF THE SECURITY INTERESTS

81 The minutes of the first meeting of creditors held on 2 April 2014, while Messrs Ross and Kijurina were administrators, record that Mr Ross had sought legal advice in relation to the

validity of the secured loans. The evidence does not record what was said at the meeting about that question or, indeed, whether any legal advice was in fact obtained by Messrs Ross and Kijurina in response to that request.

82 As I have recorded, at the first meeting of creditors, Messrs Strawbridge and Tracy were appointed as administrators in place of Messrs Ross and Kijurina. In the course of events relating to the submission of competing DOCA proposals, Mr Vertes informed the administrators that he had obtained advice concerning the validity of the security interests that had been created in respect of the secured loans.

83 On 25 September 2014, the administrators asked Mr Vertes for further details of this advice, saying:

> Obviously we will need to consider the note holders security when assessing any DOCA proposal. We have reviewed the position and formed the view that this security is valid. You have previously indicated a different view. If you still contend that the security is invalid please provide details for the basis of any defect in the security.

84 On 7 October 2014, the Vertes interests submitted a DOCA proposal. In a covering letter, the solicitors for the Vertes interests, JPM Law (**JPM**), drew a number of matters to the administrators' attention regarding the validity of the security held for the secured loans.

85 First, they said that the secured convertible note deeds and "the granting of the security interests thereunder" had not been tabled or approved at any meeting of the Company's board. Secondly, they said that the funds raised by the issue of the convertible notes were used, in part, to repay an unsecured loan made by Mr Baghaei for $500,000. In this connection, they also referred to Mr Vertes' email of 8 November 2013, which I have discussed at [38]-[41] above. Thirdly, they argued that the secured parties should be deemed to be an "associated person" of a "company officer" for the purposes of s 588FP of the Act.

86 Following receipt of this covering letter, the administrators retained Bridges Lawyers (**Bridges**) to conduct a review and provide written advice as to the validity of the secured convertible note deeds and the security interests granted by the Company. The administrators also forwarded JPM's comments to Mr Baghaei for comment.

87 Mr Baghaei's response was provided by the solicitors for the Baghaei interests, ERA Legal (**ERA**). In a letter dated 10 October 2014, ERA said, firstly, that Mr Baghaei denied that he

had lent $500,000 to the Company. It followed that there had been no repayment of $500,000 to Mr Baghaei.

88 Secondly, ERA said that Mr Baghaei refuted the allegation that the board had not authorised the Company to enter into the secured convertible note deeds. In this connection, ERA said that not only was the board wholly supportive of the proposed convertible note issue, but Mr Vertes had been personally supportive of it. In this connection, ERA referred to the minutes of the Company's Annual General Meeting on 22 November 2013 (which recorded the fact that funds had been raised (see [55]-[58] above) and Mr Vertes' offer on 29 January 2014 to lend $950,000 to the Company, presumably on the same basis as the secured convertible noteholders had advanced funds (see [63]-[64] above).

89 Thirdly, ERA argued that anyone dealing with the Company was entitled to make the assumptions in s 129 of the Act, including that the secured convertible note deeds and the second, third and fourth ranking securities had been properly executed by the Company. It followed that if there was an irregularity, that fact could not be used to impugn the position of the secured convertible noteholders.

90 Fourthly, ERA argued that the security agreements in favour of the secured convertible noteholders had been adopted by the Company and that the security interests were valid and enforceable by the secured convertible noteholders under the *Personal Property Securities Act 2009* (Cth) (**the PPS Act**).

91 Fifthly, s 588FP of the Act was irrelevant because no steps had been taken to enforce the security interests.

92 On 17 October 2014, a meeting was held between the administrators and the Vertes interests to discuss the DOCA proposal that those interests had put forward. The question of the validity of the security interests was also discussed but not resolved. The matter was left on the basis that Michael Vertes (from JPM) wished to conduct further research on the matter and that he and Dominic Calabria (from Bridges) would have further discussions. On 21 October 2014, Mr Calabria reported to the administrators on these discussions. Mr Calabria wrote:

> Michael Vertes appears resigned to the fact (having obtained the benefit of counsel's advice) that the general security deeds which secure the Company's obligations to the secured redeemable convertible noteholders ... are not invalid by virtue of [s 588FP of the Act]. Accordingly, he has conceded that any revised [DOCA] proposal will need to be able to factor in the priority payments payable to the Convertible

> Noteholders under their respective security. ...

93 On 27 October 2014, Bridges provided written advice to the administrators on the validity of the security interests. The written advice noted the letter from JPM dated 7 October 2014 and the three matters raised by that letter. It also noted the meeting on 17 October 2014 at which the validity of the security interests had been discussed. Bridges advised, amongst other things, that the second, third and fourth ranking securities had been executed in accordance with s 127(1) of the Act and that the secured convertible noteholders were entitled to rely on the assumptions provided in s 129 of the Act. Accordingly, they were entitled to assume that the second, third and fourth ranking securities, as applicable to them, had been executed with the requisite authority of the Company. Bridges expressed the opinion that the second ranking security and, subject to stamping, the third ranking security and the fourth ranking security, were valid and enforceable and that the secured convertible noteholders were entitled to vote for the full amount of their respective debts at the second meeting of creditors to be held under Pt 5.3A of the Act.

94 On 13 November 2014, at a time when the administrators had an unconditional offer to purchase the assets of the Company, which required imminent acceptance, and when the administrators had placed a deadline on the Vertes interests for making their own unconditional offer (see [125] below), JPM wrote to the administrators, stating:

> Whilst not for our client to decide, but material information for the consideration of all creditors, a full and thorough investigation appears warranted in the circumstances where the PPSA security interest registrations in respect of the security interest of the holders of secured convertible notes (whom we understand to be part of the revised DOCA offer consortium) was registered on 03/03/2014, and the stranding of the greenWAVE unit occurred on 02/03/2014; for instance, whether such transaction was entered into for purposes of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company.

95 Bridges responded by letter dated 14 November 2014, noting (in effect) that, previously, the Vertes interests had been invited to identify the legal basis, with factual support, for asserting that the registered security interests were in any way invalid, void or unenforceable, but had not done so. The letter continued:

> Your correspondence appears to now assert that the security interests granted by the Company to the secured convertible noteholders were entered into with an intention to defeat creditors by registering their security interest a day after the greenWAVE unit incident occurred on 2 March 2014. *You appear to accept that the security interest was validly granted to the secured convertible noteholders prior to the incident on 2 March 2014, but take issue with the fact that that security interest was subsequently registered (on 3 March 2014, immediately after the incident) on the [PPSR].*

(Emphasis added.)

96 The letter concluded on this topic by stating:

> We would be grateful if you could provide us with any judicial authority that supports your proposition that a party who is entitled to register their security interest, and does so, is vulnerable to a claim that they have intended to defeat creditors. ...

97 JPM responded by letter on the same day. The response did not take issue with Bridges' statement that JPM appeared to accept that the security interests had been validly granted and that what had now been raised was an issue concerning the timing of the registration of certain of the security interests on the PPSR. Continuing in this vein, JPM said:

> Whilst the entry into a security agreement may have occurred prior to the relevant date, no doubt you appreciate that the security interest will not have "perfected" within the meaning of the PPSA (and therefore be unenforceable against an Administrator/Liquidator) until it had been validly registered. We submit the act of registration itself is a "transaction" within the meaning of Part 5.7B of the Act.

98 Bridges responded on 17 November 2014, stating that the matters set out in JPM's letter were not accepted. The evidence does not disclose any further debate between the parties on this matter.

THE SALE OF ASSETS

99 At the time of Messrs Strawbridge's and Tracy's appointments as administrators on 2 April 2014, the Company had no material cash at bank or other liquid assets which could easily be realised. All cash which had been available at the appointment date had been transferred to the receivers and managers or was held by the former administrators subject to a lien for professional fees and disbursements.

The Baghaei interests submit a DOCA proposal

100 On 9 April 2014, the Baghaei interests informed the administrators that they were formulating a DOCA proposal which would likely require the existing shareholders to transfer their shares to the DOCA proponent or its nominee.

101 On 30 April 2014, a draft proposal along these lines was submitted to the administrators. It involved the secured convertible note holders contributing certain sums to a fund in return for the transfer to them of shares which they did not already own. It also provided that the secured convertible note holders would not prove in the fund.

102 On 27 May 2014, a meeting was held to discuss the draft proposal. The Baghaei interests were represented by Thomas Russell from ERA. At the meeting, Mr Strawbridge said that before he could assess a DOCA proposal from the Baghaei interests, he would need to form a view as to the value of the Company's assets. The key asset was the Company's intellectual property. He canvassed the possibilities of either obtaining an independent valuation or conducting a sale process to test the market. Mr Russell expressed his clients' preference for an independent valuation.

103 On 25 August 2014, a further draft DOCA proposal was submitted by the Baghaei interests. The proponents were WER and the secured convertible noteholders. The proposal involved the secured convertible noteholders foregoing their claims and making an advance of $400,000 in return for the transfer of the Company's intellectual property, and the transfer of the Company's shares in its subsidiaries, to them or a nominee (**the WER proposal**).

The Vertes interests submit a DOCA proposal

104 On 24 September 2014, the administrators informed Mr Vertes that a DOCA proposal had been received and invited him to submit his own DOCA proposal, if that was his intention.

105 On 7 October 2014, the Vertes interests submitted a DOCA proposal. The proponents were Mr Vertes, Tom Wilson, and the plaintiffs. It involved a fund comprising the anticipated payout under the Company's insurance policy in respect of the greenWAVE unit, after payment of certain expenses, including an amount set aside for salvage charges. The proposal involved Mr Wilson and Ocean Energy foregoing their entitlements, as creditors; Mr Vertes foregoing his entitlement to unpaid directors' fees, entitlements and expenses; and Robit foregoing its entitlement as a creditor provided that its entitlement was converted to shares in the Company under the Robit Note Deed. The proposal contemplated salvage of the greenWAVE unit and the prototype unit (**the Vertes proposal**).

106 At this time, the administrators did not have funds to obtain an independent valuation of the Company's assets. They therefore decided to conduct an expression of interest campaign for those assets. This involved the placement of an advertisement in *The Australian Financial Review* and the sending of letters to known participants in the renewable energy sector. The letters sought expressions of interest before 14 October 2014. A number of expressions of interest were received. These later matured into certain offers of purchase. These offers were of somewhat little value in providing a return to creditors.

107 On 17 October 2014, a meeting was held between the administrators and representatives of the Vertes interests to discuss the Vertes proposal (see at [92] above). A key issue in relation to the Vertes proposal was the level and timing of the anticipated insurance payout for the greenWAVE unit and the consequent amount of the fund likely to be available to creditors. Certain scenarios discussed at the meeting indicated that, under the Vertes proposal, there would be a substantial shortfall to creditors. The meeting concluded with Mr Vertes stating that the Vertes interests would be submitting an amended DOCA proposal.

108 On 22 October 2014, Mr Vertes informed the administrators that the Vertes proposal was withdrawn and that at the second meeting of creditors (to be held on 3 November 2014) he would be voting to place the Company in liquidation.

The administrators' section 439A report

109 On 24 October 2014, the administrators issued their report to creditors under s 439A(4) of the Act (**the section 439A report**). In that report they stated that, in their view, based on legal advice, the security interests of the secured convertible noteholders were valid. The administrators discussed the likely outcome for creditors based on a liquidation and on the WER proposal which, by then, had been amended in certain respects. The WER proposal was the only DOCA proposal that had been made (and not withdrawn). The administrators noted that the major variable under both scenarios was the quantum of funds to be received from the receivers and managers, which at that time was estimated to be less than $3.5 million. The administrators expressed the opinion that it would be in the creditors' best interests to resolve that the Company execute a DOCA because it would likely result in a higher return to creditors than a liquidation.

110 It is convenient to note, here, that, in their report to creditors, the administrators noted two contingent creditor claims. The first was a contingent liability to South Australia Maritime for an estimated $3 million for the salvage of the greenWAVE unit. The second was a contingent liability to Roads and Maritime Services (NSW) (**RMS**) for an estimated $0.5 million in respect of clean-up operations at Port Kembla related to the prototype unit.

The Vertes interests submit an acquisition proposal

111 On 28 October 2014, the Vertes interests made an offer to purchase the Company's intellectual property and the greenWAVE unit (**the Vertes acquisition proposal**). The consideration—referred to by the Vertes interests as "deemed consideration"—was

$4.441 million. This comprised two components. First, Robit and Ocean Energy would not prove as creditors in a liquidation of the Company. This was valued by the Vertes interests at $0.941 million. Secondly, the Vertes interests would assume the contingent liabilities of $3.5 million to which I have referred. The proposal, which was made through JPM, stated that the Vertes interests would immediately enter into discussions with South Australia Maritime and RMS and seek that those authorities agree not to prove as creditors in a liquidation of the Company. JPM requested that, at the forthcoming meeting of creditors, the Vertes acquisition proposal be put to creditors as an alternative for their consideration.

112 On the same day, the administrators informed Mr Vertes that they would need certainty with regard to South Australia Maritime and RMS foregoing any claims against the Company.

The second meeting of creditors

113 On 3 November 2014, the second meeting of creditors was adjourned. RMS had submitted a claim for $3.55 million, substantially more than the amount ($0.5 million) estimated in the administrators' section 439A report. The creditors were informed of the Vertes acquisition proposal which offered to take on the Company's liabilities to South Australia Maritime and RMS and which could, therefore, significantly improve the return to creditors on a liquidation of the Company. In a subsequent letter to creditors dated 4 November 2014, the administrators advised that the second meeting of creditors would be reconvened on 7 January 2015 and that at this meeting they, the creditors, would be asked to decide the future of the Company.

The Baghaei interests submit an acquisition proposal

114 On 11 November 2014, ERA informed the administrators that the WER proposal was withdrawn and that the proponents now offered to acquire all the Company's assets (other than its insurance claim) **(the WER acquisition proposal)**. This was later clarified. The asset which the proponents wished to acquire did not include the greenWAVE unit or the prototype unit.

115 ERA said that under the WER acquisition proposal, the proponents would procure Mr Baghaei to pay the Company $50,534.24 on a "without admissions" basis. This amount represents what the administrators had identified in their section 439A report as a likely unfair preference under s 588FA of the Act, arising from what appears to have been an incentive payment made to Mr Baghaei to remain with the Company following the stranding

of the greenWAVE unit. The purchaser of the assets would be a company to be nominated, which would pay cash consideration of $400,000, less the amount to be paid by Mr Baghaei (in other words, approximately $349,465.76). The purchaser would also procure the consent of the secured convertible noteholders to the sale; release all security under the sale proceeds; release all security over the insurance claim and any associated proceeds; and refrain from proving any claim (secured or unsecured) in the liquidation of the Company. The assets to be acquired were also identified as including any claim by the Company against any officer or former officer for breach of duty. ERA said that the offer was required to be accepted, and documents executed, by 4.00 pm on 13 November 2014, failing which the offer would automatically lapse.

116 Within a very short time of receiving the WER acquisition proposal, Mr Strawbridge had a telephone conversation with Mr Vertes. Mr Strawbridge informed Mr Vertes that the WER proposal had been withdrawn and that the WER acquisition proposal had been made, with a deadline. Mr Strawbridge informed Mr Vertes of the need for the Vertes interests to finalise and confirm the Vertes acquisition proposal before that deadline.

117 Later, on the afternoon of 11 November 2014, Mr Strawbridge had a further telephone conversation with Mr Vertes. Mr Vertes informed Mr Strawbridge that the Vertes interests were almost in a position to submit an offer to the South Australian Government regarding the stranded greenWAVE unit. Mr Vertes enquired whether the administrators would be seeking an extension of the deadline for acceptance of the WER acquisition proposal. Mr Strawbridge said that the administrators would be seeking an extension, but did not want to lose the WER acquisition proposal in the event that the Vertes acquisition proposal did not "come through".

118 Also, on 11 November 2014, the administrators wrote to Ben Garnaut, a Senior Solicitor in the Civil Litigation Section of the Crown Solicitor's Office in South Australia. Relevantly, the letter stated:

> As you are aware, Mr Tibor Vertes has submitted an offer ... to acquire the Company's intellectual property. Part of the sale consideration involves his undertaking to salvage the GreenWAVE generator currently located off the coast of Carrickalinga.
>
> In order to consider the offer proposed by Mr Tibor Vertes to acquire the intellectual property assets of the Company, I require a full release of any claim being made against the Company by the Department of Planning, Transport and Infrastructure (South Australia Maritime). Please advise me on the current status of your negotiation with Mr Vertes and whether you are likely to provide a full release to the

Company by 13 November 2014.

An extension of deadline

119 Later, in the early evening of 11 November 2014, the administrators sent a letter to ERA requesting an extension of the deadline for accepting the WER acquisition proposal. The extension that was sought was the close of business on 18 November 2014. ERA was informed that the administrators needed additional time to speak to the Company's major creditors and other interested parties before being in a position to accept any offer for the Company's assets.

120 On 12 November 2014, ERA responded. For reasons given, ERA said that the deadline could not be extended to 18 November 2014. However, the deadline would be extended to close of business on 14 November 2014. Further, ERA said that it would be sufficient if the administrators accepted the WER acquisition proposal "in principle", on the basis that no binding agreement would come into existence until documents were prepared and executed. ERA said that, in this event, a further period would be allowed for documentation to be completed and for final conditions to be satisfied.

121 On 12 November 2014, the administrators wrote to Mr Vertes (care of JPM) informing him that the deadline for acceptance of the WER acquisition proposal had been extended to close of business on 14 November 2014. The letter continued:

> In order to consider your offer, I require you to provide...confirmation from the Department of Planning, Transport and Infrastructure (South Australia Maritime), that based on your proposal to them, they would be willing to provide a full release of any claim being made by them against the Company. Please provide this confirmation from South Australia Maritime by close of business on Thursday, 13 November 2015.

The Vertes interests approach the South Australian Government

122 On 13 November 2014, JPM wrote to Mr Garnaut at the Crown Solicitor's Office in South Australia. JPM said that it acted for New Wave, which was described as an investment vehicle for a consortium of investors (said to be creditors, officers and shareholders of the Company) that was seeking to purchase "the tangible and intangible intellectual property assets" of the Company. JPM said that New Wave was willing to purchase the assets for a "deemed consideration" of $3.941 million. The "deemed consideration" was the value, to creditors, of the plaintiffs and the South Australian Government not proving in the liquidation of the Company. JPM said:

> As you are aware, the Administrators of Oceanlinx have sought comfort that you would be willing to not prove as a creditor of Oceanlinx in liquidation in respect of any creditor claim if our client's offer of salvage of the greenWAVE unit which is presently stranded off the coast of Carrickalinga, South Australia, is acceptable to you.

123 After canvassing various background matters, JPM then conveyed their instructions from the Vertes interests to make an offer—presumably to obtain an assurance from the Crown Solicitor's Office that South Australia Maritime would not prove as a creditor in the liquidation of the Company. The offer was that New Wave would assume, and provide an indemnity against all contingent liabilities related to the salvage of the greenWAVE unit and provide a bank guarantee (or other acceptable form of surety) in the amount of $750,000 to guarantee its assumed obligations in this regard. JPM stressed that funds were available for the bank guarantee.

124 The letter to Mr Garnaut was copied to the administrators. By way of response, Mr Strawbridge, on behalf of the administrators, wrote to JPM on 13 November 2014, referring to the administrators' letter of 12 November 2014 and JPM's letter to Mr Garnaut, and stated:

> As you are aware, I have received an unconditional offer from the former DOCA proponents for the assets of the Company. This offer is due to expire at close of business tomorrow.
>
> At present I do not have an offer from your client that is capable of being accepted. In order for me to be able to consider a sale of the Company's assets to your client I require by 4 pm on Friday 14 November 2014 your client's best and final offer, which needs to be unconditional and include proof of funding. In the event that part of the consideration for the purchase of the Company's assets involves the salvage of the greenWAVE unit, then I will also require your client to provide information from the South Australian Government that based on your client's salvage proposal, the government will provide a full release to me in respect of any claim being made against the Company. For the avoidance of any doubt, the confirmation from the South Australian Government is also required by 4.00pm tomorrow.

125 JPM responded by letter on the same day. The letter referred to the WER acquisition proposal as a "varied DOCA offer". The WER acquisition proposal was not, of course, a DOCA proposal. It was a proposal to acquire assets on the footing that the Company would, in fact, be wound up. Nevertheless, JPM said that, by imposing the deadline for acceptance (then extended to the close of business on 14 November 2014), the conduct of the "DOCA sponsor" was "entirely inappropriate and unreasonable". JPM said that it was the opinion of the Vertes interests that the Company should be placed in liquidation "in order for a proper and orderly winding up of the company, and any necessary recovery actions being available

to the liquidator". It was in the course of expressing these views that JPM raised the argument that the registration of certain security interests on the PPSR might be a transaction entered into for the purpose of defeating, delaying or interfering with the rights of creditors on a winding up (see [94] above).

126 JPM continued:

> We hereby provide formal request that you do not accept the revised DOCA offer unless and until our client and the South Australian Government reach formal agreement or abandon negotiations; in the premises, we consider a further one (1) week in order to do so to be reasonable.
>
> If agreement for the sale of the assets of Oceanlinx is entered into by you and the sponsor of the revised DOCA on Friday 14 November 2014, we have been instructed to make application to the Court for an injunction on the exercise of such power under sections 447B & 447E of the Corporations Act. If necessary, our clients reserve the right to produce this letter to the Court on the question of costs.

127 The foreshadowed application for an injunction to restrain the administrators from accepting the WER acquisition proposal was not made.

128 The administrators obtained a company search of New Wave. The search revealed that New Wave had been registered on 13 November 2014 (ie on the same day as JPM's response) with an issued capital of $100.00 represented by 10,000 issued shares. Mr Vertes, Michael Vertes and another gentleman were shown as directors, with Michael Vertes as company secretary.

The administrators accept the WER acquisition proposal

129 On 14 November 2014, Bridges responded to JPM on behalf of the administrators. It is convenient to set out a number of paragraphs of that response:

> 4. You are well aware that our clients have already sought an extension of the deadline for the offer to be accepted and that they have been advised that the Offer must be accepted by 5.00 pm today or it will be withdrawn.
>
> 5. To be clear, what has been received is not a "varied DOCA offer". The Offer is not a DOCA proposal at all. It is an offer to purchase some of the assets of the Company. There is no DOCA proposal at the moment. Accordingly, as things presently stand, irrespective of whether the Offer is accepted, the Company will go into liquidation. This may allay your client's concerns about the loss of actions that are only available in liquidation.
>
> 6. You will appreciate that our clients have duties to act in the best interests of creditors which includes to obtain the best possible return to creditors.
>
> 7. We note your client's proposal that our clients allow the Offer to lapse and wait for a week to see whether an agreement can be reached between your client and the South Australian Government. You accept that it is possible that your

negotiations with the SA government could be "abandoned". The potential result of adopting such an approach could be that:

(a) our clients accede to your request and await the outcome of your negotiations with the South Australian Government;

(b) in the meantime, the Offer is permanently withdrawn by the Offeror; and

(c) negotiations between your client and the South Australian Government are subsequently abandoned;

resulting in any return available to creditors being severely impacted or disappearing completely.

This would potentially open our clients up to criticism from creditors.

8. Indeed, our clients could still be open to criticism from creditors if our clients accede to your request and an agreement is reached between your client and the South Australian Government but the return to creditors is inferior to the Offer.

9. Our clients are well aware of their obligations in relation to obtaining the best price for the assets of the Company. They have advertised the sale of the assets of the Company, fielded countless expressions of interest and conducted negotiations with a number of parties over an extended period of time. We note that Mr Tibor Vertes has communicated that he considers the assets of the Company, particularly the Intellectual Property to have a very large value and that the market value is much higher than the amount contained in the DOCA Proposal. You will appreciate that the market value of an item is determined by what the market is prepared to pay for it. We are again instructed to invite Mr Vertes and/or your client to put to our clients their best offer for the assets of the Company that they wish to purchase.

10. The most competitive interest in the assets of the Company remains from your client and the Offeror. It is understandable why your client wishes for our client to reject the Offer. If our clients do not accept the Offer and the Offeror permanently withdraws from negotiations, this will obviously be to your client's advantage.

130 The response went on to deal with the new argument concerning the registration of the security interests on the PPSR. I have already referred to that response at [95]-[96] above.

131 The response concluded by stating that, in the absence of "a compelling response" from the Vertes interests, the administrators had no alternative but to consider and deal with the WER acquisition proposal within the stipulated timeframe.

132 Later that day, Mr Strawbridge had a telephone conversation with Mr Vertes. In the course of that conversation Mr Vertes said that, on 17 November 2014, he would apply for an injunction to prevent the sale of the assets under the WER acquisition proposal. Once again, no application was made.

133 JPM also responded to Bridges' earlier letter. Once again, part of this response was directed to the new argument concerning the registration of certain of the security interests on the PPSR. I have already summarised that response at [97] above. JPM's response concluded by stating:

> We trust it is not in contention that in Administration, creditors of a company are not obligated to accept the "best cash offer", and are at liberty to accept another "inferior offer" for their own reasons. Your client is on notice that creditors holding substantial claims against the company do not wish the assets of the company to be sold without further reversion to creditors. Accordingly, we respectfully submit your client resist the demands being made on it by the former DOCA sponsor, and revert to creditor to ascertain their wishes.

134 Later, on the afternoon of 14 November 2014, the administrators wrote to ERA accepting the WER acquisition proposal on the basis that no legally binding agreement would arise until formal documentation had been prepared and executed by the relevant parties.

135 On 17 November 2014, Bridges wrote to JPM advising that the administrators had accepted the WER acquisition proposal and that formal documentation was being prepared. Bridges said that it was anticipated that the sale would complete that week.

136 Mr Strawbridge gave evidence that, at this time, he was acutely aware of the threatened withdrawal of the WER acquisition proposal at close of business on 14 November 2014. Mr Strawbridge said that this proposal was the best offer that the administrators had received in relation to the purchase of the Company's intellectual property. He said that despite his attempts to do so, he had not received a competitive offer from the Vertes interests which was capable of acceptance—particularly when the South Australian Government had failed to confirm support for the Vertes acquisition proposal. However, the Baghaei interests had said that the WER acquisition proposal was capable of being accepted "in principle", with a binding agreement only arising upon the preparation and execution of documentation by the relevant parties. Mr Strawbridge said that, in those circumstances, he genuinely considered it to be in the best interests of the Company and its creditors that the administrators accept the WER acquisition proposal on that basis. He explained that by doing so, it would allow the administrators to progress the proposal while leaving open the possibility that a more competitive and certain offer might be made by the Vertes interests.

The Vertes interests submit a new acquisition proposal

137 On 19 November 2014, the Vertes interests made a new offer to the administrators. The offer was to acquire the Company's intellectual property. The consideration included a cash

payment of $2.465 million. Further, the plaintiffs would forego their claims to prove as creditors in the liquidation of the Company. As I have noted, these claims were assessed at $0.941 million (**the new Vertes acquisition proposal**). The offer had a deadline for acceptance of 28 November 2014, although it was made clear that any request for an extension would be reasonably considered. Unlike the first offer, there was no offer to assume liability for the salvage of the greenWAVE unit, although it was said that negotiations with the South Australian Government would continue.

138 The administrators analysed the new Vertes acquisition proposal and concluded that it appeared to result in a higher return to unsecured creditors than the WER acquisition proposal or on a liquidation of the Company (without either proposal having been accepted). However, Mr Strawbridge gave evidence that he was wary of whether the Vertes interests would in fact be able to complete the purchase contemplated by the proposal. This was because the Vertes interests had previously made offers that included terms with which they could not comply. Further, New Wave was a newly-created investment vehicle. Mr Strawbridge said that, aside from the plaintiffs (which were referred to in the new Vertes acquisition proposal), he had no way of knowing who or to what extent there were other investors who had or were prepared to contribute funds to enable New Wave to complete the proposed purchase. Mr Strawbridge reasoned that the WER acquisition proposal should not be put at risk, but that further enquiries should be made of the Vertes interests in order to reach a level of satisfaction that New Wave had the financial capacity to complete the proposed purchase.

139 As events transpired, JPM wrote to Bridges on 20 November 2014 stating that they were awaiting bank confirmation of the availability of funds to satisfy the administrators that New Wave had the ability to complete the proposed purchase. Later that day, JPM wrote to Bridges enclosing a letter from National Australia Bank stating that Robit had a deposit with the bank of not less than $900,000. JPM said that the Vertes interests were prepared to pay $60,000 to the administrators as a deposit to provide further comfort of an ability to complete the offer. JPM also informed Bridges that they expected to receive a letter from Westpac Banking Corporation (**Westpac**) confirming that the bank held funds on deposit sufficient to fund the balance of the purchase price.

140 On 21 November 2014, JPM wrote to Bridges enclosing a letter from Westpac stating that Alexander Delius Haege had funds in excess of $3 million deposited with the bank. JPM

described Mr Haege as "a member of the New Wave Energy Pty Ltd investor consortium". The letter concluded by stating that JPM was awaiting urgent advice as to whether the administrators would now proceed to formalise an asset purchase agreement with New Wave.

141 Mr Strawbridge gave evidence that he remained unconvinced by the letters from the banks. He said that without Robit and Mr Haege providing guarantees to support New Wave's proposed purchase, which the Company could legally enforce, their assets could not form part of his consideration of New Wave's ability to complete the purchase. Mr Strawbridge reasoned that, in these circumstances, it was important to keep the WER acquisition proposal alive. He therefore sought to pursue and progress both offers at the same time, whilst seeking further assurances of New Wave's ability to complete its proposed purchase.

142 I should record that, while these events with the new Vertes acquisition proposal were taking place, the administrators were also proceeding with the documentation of the WER acquisition proposal. To this end, Bridges and ERA were engaged in ongoing discussions regarding the drafting of that documentation and other matters relevant to that proposal.

143 On 21 November 2014, Bridges wrote to JPM, stating:

> Based on the Offer, we understand the proposed purchasing entity is New Wave Energy Limited (**New Wave**). We also understand that New Wave is a company which was registered on the ASIC register on 13 November 2014, has $1,000 in issued share capital and otherwise has no other assets that it holds.
>
> In circumstances where:
>
> - Mr Haege is not known to our clients and has not, insofar as our clients are aware, had any connection to New Wave until now;
> - None of the documents provided confirm any evidence of an agreement that Mr Haege is prepared to pay part or all of the cash component of the purchase consideration under the Offer on behalf of New Wave; and
> - whilst the NAB Letter of Comfort and the Westpac Letter of Comfort appear to indicate that there is sufficient cash available to Mr Haege and Robit Nominees Pty Ltd to complete the transaction proposed in the Offer, it is not readily apparent why the full cash component of the purchase consideration of $2,465,000 has not already been transferred into a bank account in the name of New Wave or to your solicitors trust account,
>
> our clients take no comfort from the NAB Letter of Comfort or the Westpac Letter of Comfort as to your clients' ability and preparedness to proceed with the transaction proposed in the Offer. Similarly, the proposal to pay a refundable deposit of $60,000 does not provide any comfort to our clients on this issue.
>
> We are therefore instructed to request that you provide evidence to our office by **4:00pm** on **Monday, 24 November 2014** that the amount of $2,465,000 (being the cash component of the asset purchase priced payable under the Offer) has been

> transferred to your solicitors trust account. In the absence of this confirmation being received by this time, our clients will assume that your clients are not in a position to proceed with the transaction that is the subject of the Offer and our clients otherwise be at liberty deal with the assets as they deem fit.
>
> In the meantime, so that negotiations may be progress, we **attach** for your consideration draft:
>
> - asset sale deed; and
> - deed of release,
>
> for your comments. Please provide any comments you may have as soon as possible. These draft deeds are provided to you subject to our clients' instructions. Nothing in this letter should be construed by your clients as our clients having accepted the Offer. ...
>
> (Emphasis in original.)

144 On 22 November 2014, Mr Strawbridge and Mr Vertes had a telephone conversation in which Mr Vertes informed Mr Strawbridge that his (Mr Vertes') consortium needed until the end of the following week to pay the purchase price. However, Mr Strawbridge told Mr Vertes that the deadline of 24 November 2014 was a genuine deadline and that he (Mr Strawbridge) did not wish to risk losing the WER acquisition proposal, which was backed up with proof of funding.

145 By the time of this conversation, the WER acquisition proposal documentation had been agreed upon. Moreover, on 21 November 2014, the administrators had informed ERA that they had received an offer that was superior to the WER acquisition proposal in terms of quantum. In this context, on Sunday 23 November 2014, ERA sent Bridges executed versions of the agreed documentation requesting that an exchange take place immediately or, alternatively, that Bridges effect an exchange within their office by 10.00 am on 24 November 2014.

Events on 24 and 25 November 2014

146 Exchange was not effected by 10.00 am on 24 November 2014 and, shortly thereafter, ERA began to pursue Bridges. However, Bridges responded by referring to the fact that ERA had been informed on 21 November 2014 that a superior proposal had been made and that, as a result, the administrators were duty bound, in the interests of creditors, to consider that proposal. Bridges informed ERA that the administrators would not be in a position to "complete [the WER] transaction before 4.00pm today, at which point in time our clients' [sic] will reconsider their position".

147 Also, on that day, JPM wrote to Bridges complaining about the shortness of the deadline for depositing the entire cash component of the purchase under the new Vertes acquisition proposal. In their letter, JPM said that they did not hold a trust account and that New Wave was presently in the process of opening a bank account to facilitate the deposit of monies to fund the cash component of its offer. JPM said that the Vertes interests were prepared to increase the deposit of $60,000 to $120,000.

148 Bridges responded on the same day. It is convenient to set out a number of paragraphs of that response:

> 1. The negotiations with the two main parties interested in the assets of the Company have been ongoing for months.
> 2. The other offeror is ready willing and able to complete with cleared funds;
> 3. The other offeror has set a deadline for this to take place and provided reasons for same. Our clients express no view as to the validity of those reasons nor the reasonableness of that deadline. Our clients are merely trying to maximise the result for creditors based on the offers that they have been provided with. They are assessing both the quantum of the offers and the security of them actually being completed.
> 4. Our clients continue to seek certainty and comfort in respect of your client's offer.
> 5. You have communicated to us that entities associated with your client have sufficient cleared and immediately available funds to complete the purchase. You have not expressly confirmed that those two entities will actually use any of those funds to complete the purchase. Accordingly any comfort being provided by them appears to be on the basis that they can complete the transaction – but only if they chose to.
>
>   If they are making an irrevocable commitment the money could have been paid and can still be paid before 4pm today.
>
>   **If we are mistaken in any of these matters, please advise by return.**
>
>   To the contrary, you have communicated to us that the funds to be used for the purchase still need to be raised in order to complete the purchase – hence the need to have settlement on Friday this week.
>
>   The two 'comfort-providers' could pay the purchase consideration forthwith and take the risk of raising the funds. However, in the absence of an irrevocable commitment having been provided by the 'comfort-providers', the risk of your client raising the funds to be able to complete the sale is being borne by our clients, the Company and the creditors; with the risk of an enormous loss to the creditors of the Company if the other sale is lost.
>
>   If the parties providing the letters of comfort were prepared to actually use their money to complete the purchase the 4pm deadline is more than reasonable.
>
>   Notwithstanding that you firm does not have a trust account, and that your client is today opening a bank account, such monies can be deposited into our firm's trust account – with appropriate authorities being provided.
>
>   ...
> 6. Your client's offer could have been and can still be supported by any number of corporate and personal guarantees.

...

8. In light of all of the above, we are instructed to hereby invite your client to make a revised offer which includes the following:

   (a) The payment of a 10% deposit – with evidence of same having been paid;

   (b) Guarantees being provided by

      i. Mr Tibor Vertes;

      ii. Robin [sic] Nominees Pty Limited; and

      iii. Mr Alexander Haege.

9. It is entirely a matter for you as to whether you elect to respond to the draft documents that have been provided to your office. We note that you advise that there are not many changes that you expect will be required.

(Emphasis in original.)

149 Shortly after this response was sent, Bridges received an email from ERA stating that the secured convertible noteholders were concerned that inadequate efforts were being made by the administrators to "secure the sole bona fide offer that was made following [the administrators'] sales campaign". ERA stated that, unless contracts were exchanged with respect to the WER acquisition proposal by 4.30 pm that day, the secured convertible noteholders may appoint a receiver to complete the sale, without further notice.

150 Bridges responded by seeking to reassure the Baghaei interests that every effort was being made to conduct and complete a sale as soon as possible in the interests of creditors. Bridges also reminded ERA of the requirements of s 440B(2) of the Act, with respect to the need for the secured convertible noteholders to obtain the leave of the Court in order to enforce their security interests.

151 Further, that day, Bridges wrote to ERA seeking confirmation that the Baghaei interests remained "ready, willing and able to complete" the WER acquisition proposal up to 5.30 pm on 28 November 2014.

152 On that evening, JPM sent a letter to Bridges relating to the correspondence that had passed between JPM and Bridges on that day, including a telephone conversation between Michael Vertes and Mr Calabria. This letter provided a point by point response to the Bridges' letter quoted at [148] above. With respect to paragraph 6 of the Bridges' letter, JPM said that their clients would not agree to provide personal or corporate guarantees. However, JPM said that, in order to progress the matter, their clients offered to provide a deposit of $400,000.

153 Mr Strawbridge gave evidence that, on receipt JPM's letter, he noted that Robit, Mr Vertes and Mr Haege were not prepared to provide guarantees. He reasoned that, whether or not that they were investors in New Wave, they would not be the only persons contributing funds to New Wave to enable it to complete the new Vertes acquisition proposal. This was because, if they were the only investors, then presumably they would have had no problem in providing the guarantees that had been sought. Mr Strawbridge said that it therefore appeared to him that New Wave was still in the process of raising funds in order to undertake the purchase. This heightened the risk, in his mind, that if the new Vertes acquisition proposal was accepted, but New Wave was unable to raise the requisite funds to complete the proposed purchase by 28 November 2014, the proposal would fail and the Company would only have recourse against New Wave, which, to Mr Strawbridge's knowledge, had no material assets.

154 Notwithstanding these matters, Mr Strawbridge also considered that if a deposit of $400,000 could be paid, as offered, then that fact might indicate that any third party fundraising activities required to complete the proposed purchase were, at least in the minds of the Vertes interests, more or less imminent. Mr Strawbridge said that the problem for the administrators was that they were under considerable pressure from the Baghaei interests to complete the WER acquisition proposal.

155 Mr Strawbridge gave evidence that, in his view, if New Wave had, and was prepared to pay, $400,000 as a deposit, he could see no reason why that sum could not be paid immediately, especially having regard to the two bank letters which confirmed that Robit and Mr Haege had sufficient cash on hand to pay that deposit on behalf of New Wave. Mr Strawbridge also said that his predominant concern remained the lack of security that was being offered to ensure that New Wave could complete its proposed purchase by 28 November 2014.

156 On 25 November 2014, Bridges wrote to JPM, providing a point-by-point response to JPM's earlier letter. JPM's letter had taken issue with the statement in Bridges' letter of 24 November 2014 that funds for the proposed purchase still needed to be raised. It is not necessary for me to go into the details of that debate save to note that, in responding, Bridges did point out that, if the Vertes "investor syndicate" was exhausted by Robit and Mr Haege, then, based on the letters from the banks, those investors had sufficient available funds to complete the transaction and that they could have transferred the requisite funds already.

157 Bridges also communicated Mr Strawbridge's view that if New Wave was in a position to pay the deposit of $400,000 by 4.00 pm that day (as stated in JPM's letter) then there was no

reason why the deposit could not be paid by 12.00 pm. Bridges then said that the administrators required evidence of the payment of the deposit to Bridges' trust account by no later than that time. The letter was sent by Bridges to JPM by email at 9.22 am.

158 At 11.00 am, ERA sent a letter to Bridges, in response to the confirmation that had been sought that the Baghaei interests would be ready, willing and able to complete the sale under the WER acquisition proposal up to 5.30 pm on 28 November 2014 (see [151] above). Relevantly, the ERA letter stated:

> Ms Chen, our client's director, is furious that having accepted the offer in principle, having accepted the $50,000 payment required by the sale contract and having prevailed upon her to front the balance of the cash component (which she has – it is sitting in our trust account), the administrators now seem to be intent on using her offer as leverage in a protracted Dutch auction process.
>
> This is exacerbated by the fact that the counter-party to the Dutch auction has an axe to grind with Ms Chen and seems intent on causing as much disruption as possible very late in the day in circumstances where he has literally had months to formulate an offer and raise funds.
>
> Ms Chen has thought hard about the request in your letter. It has been a difficult decision. However, the line has to be drawn somewhere. The purchaser is categorically not prepared to become involved in a Dutch auction. Accordingly, on behalf of the purchaser, we are instructed to advise:
>
> 1. The purchaser is not prepared to keep its offer open as requested in your letter.
>
> 2. Unless contracts are exchanged by 12.30 pm today (Tuesday, 25 November 2014), the offer is withdrawn, and the funds we currently hold in trust will no longer be retained on account of the purchase price.

159 Mr Strawbridge gave evidence that, after receiving this letter, he was greatly concerned by the prospect of losing the WER acquisition proposal. He said that this was particularly so when he still did not have the comfort that New Wave would be able to complete its own purchase proposal. He said that it seemed to him that the Baghaei interests had lost patience with the sales process and were ready to walk away from their offer. If so, this would cause considerable harm to any possible return that might otherwise be available to the Company's unsecured creditors.

160 Later that morning, at 11.27 am, JPM sent a further letter to Bridges stating that JPM did not intend to respond to Bridges' earlier letter and that their clients' position remained unaltered. JPM said that the deposit would be paid by 4.00 pm on 24 (meaning, 25) November 2014.

161 Bridges' responded shortly thereafter, relevantly stating:

> 1. Further to our letter, we have received today correspondence from the other

offeror that unless our clients proceed with completion of the sale to them by **12:30 pm today**, their offer is withdrawn and they shall not proceed.

2. In all the circumstances, including:
   a) our clients have been seeking certainty as to your clients ability and willingness to be able to complete any purchase since 24 October 2014;
   b) that you have not provided any evidence to either our office or our clients that the entity which is the purchasing entity proposed under your clients' offer holds any assets;
   c) no other entities from your clients' consortium of investors have proferred or agreed to provide any form of guarantee or enforceable comfort in support of your client's offer;
   d) for your clients' undisclosed reasons, you have advised that your clients shall not be transferring the deposit of $400,000 by 12:00 pm today; and
   e) that in the absence of the above, after 12:30 pm our clients are faced with the prospect that they will lose the other offer to purchase assets of the Company and potentially be left with an offer from your client which your client is unable to complete,

   we are instructed to place you on notice that our clients shall be proceeding to complete the sale of the assets the subject of the other parties' offer at 12:30 pm today without further notice to you.

(Emphasis in original.)

The administrators sell the assets to WPR

162 The deposit under the new Vertes acquisition proposal was not paid by 12.00 pm on 25 November 2015. Mr Strawbridge gave evidence that, at the time, it was necessary for him to make a difficult commercial decision on behalf of the Company. He could either enter into an asset sale agreement with WPR (the nominated purchaser under the WER acquisition proposal) or he could allow that proposal to lapse and take the risk that the Vertes interests would pay the deposit under the new Vertes proposal and subsequently complete that proposed purchase. Mr Strawbridge also gave evidence that, at that time, he did not consider that there was a realistic prospect of the Company continuing in business. Mr Strawbridge said that it was his honest belief that entering into an asset sale agreement with WPR was in the best interests of the Company and its creditors. The sale to WPR proceeded accordingly and was completed on that day.

The events following the sale

163 The sale to WPR was for a value of approximately $2 million. A significant component of this was the release of the secured convertible noteholders' claims and their agreement not to participate in a dividend to creditors. At the relevant time, the administrators valued this component at approximately $1.6 million. At that time, the administrators expected to

receive a surplus of between $2.23 million and $2.4 million from the receivership. But for the releases obtained, the secured convertible noteholders would have been entitled to full payment from this surplus.

164 The assets sold to WPR included any claim (other than a claim arising in the liquidation of the Company) which the Company might have against Mr Baghaei for breach of duty to the Company.

165 On 10 December 2014, the administrators issued a supplementary report to creditors advising on, amongst other things, the sale to WPR and the expected receipts from the receivership.

166 On 17 December 2014, the adjourned second meeting of creditors was held. At this meeting, the creditors resolved to place the Company into liquidation. The administrators were appointed as the liquidators.

THE PLAINTIFFS' CASE

167 The plaintiffs' case is that the asset sale agreement with WPR should be set aside. In this regard they rely on s 447E(1) and s 1321(1) of the Act.

168 Section 447E(1) provides:

> Where the Court is satisfied that the administrator of a company under administration, or of a deed of company arrangement:
>
> (a) has managed, or is managing, the company's business, property or affairs in a way that is prejudicial to the interests of some or all of the company's creditors or members; or
>
> (b) has done an act, or made an omission, or proposes to do an act, or to make an omission, that is or would be prejudicial to such interests;
>
> the Court may make such order as it thinks just.

169 Section 1321(1) relevantly provides:

> A person aggrieved by any act, omission or decision of:
>
> (a) ...
>
> (b) ...
>
> (c) an administrator of a company
>
> (ca) ...
>
> (d) ...
>
> may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case

may be, and make such orders and give such directions as it thinks fit.

170 The plaintiffs say that by 11 November 2014 (when the Baghaei interests withdrew the WER proposal and submitted the WER acquisition proposal), any prospect that the Company would be rescued by a DOCA had disappeared. The Company was not trading and its assets were under the control of the receivers and managers who had been appointed by MBL. The plaintiffs say that the most likely, if not inevitable, outcome for the Company was that, at a second meeting of creditors, the creditors would resolve that the Company be wound up: see s 439C(c) of the Act. In that event, a liquidator of the Company would have had complete power to conduct an orderly sale of the Company's assets. The plaintiffs say that the only asset likely to produce any significant amount of money for creditors was the Company's intellectual property. They say that a future liquidator was as well placed as the administrators to undertake such a sale.

171 The plaintiffs say that, as at early November 2014, the Baghaei interests and the Vertes interests had demonstrated a substantial interest in obtaining control of the Company's intellectual property. Those interests remained highly motivated potential purchasers. The plaintiffs say that, in those circumstances, if there was to be a sale during the administration, the Company's creditors were entitled to expect that the administrators would adopt an approach that would produce the best result for the creditors, namely the maximum amount that could reasonably be extracted from the bidding process. The plaintiffs say that the decision to enter into and complete the asset sale to the Baghaei interests (through the asset sale agreement with WPR), and lose the benefits which would have been received by a sale to the Vertes interests through New Wave, was unreasonable and prejudicial to creditors for a number of reasons. Those reasons can be summarised as follows.

172 First, the plaintiffs submit that by treating with the Baghaei interests in relation to the WER acquisition proposal, the administrators brought upon themselves the need to make a determination about a critical matter—the validity of the convertible note securities—in a hurried fashion. The plaintiffs submit that, as a result, there is reason to believe that the administrators came to a wrong conclusion as to the validity of at least the second ranking security in favour of TTL for its advance of funds under the first SCND.

173 By way of explanation, the plaintiffs say that, apart from being an employee of the Company, Ms Chen was a director, shareholder and the company secretary of TTL (see [78] above). The plaintiffs also say that Ms Chen was previously a partner at a Sydney law firm. The

basis for that contention is a statement made by the first-appointed administrators, Messrs Ross and Kijurina, in the first report to creditors. The source of that information is not stated in the report and its accuracy as a statement of fact was not otherwise proved. The plaintiffs contend that Ms Chen had notice that there was no proper authorisation for the granting of the security interest to TTL. The plaintiffs also submit that further investigations by a liquidator may well have established that the other secured convertible noteholders were similarly affected by notice, although no reasons were advanced by the plaintiffs as to why that might be the case.

174 Specifically, the plaintiffs point to the fact that:

- there is no board minute containing any decision of the approval of the secured convertible note deeds, or of the second, third or fourth ranking securities, or of any resolution approving the Company's entry into those transactions;
- there is no evidence that the provisions of the Company's constitution which bear upon related party transactions or the issue of security over the Company's assets were complied with; and
- Mr Vertes' evidence was that the directors sitting as a board did not consider or approve these arrangements.

175 The plaintiffs also say that, when Mr Baghaei realised that he did not have Mr Vertes' support (see [38]-[40] above), he sought to remove him (Mr Vertes) as Chairman (see [60] above) and side-stepped proper board processes by dealing only with Mr Rodrigues on the question of whether the transactions should be entered into and the relevant documents executed (see [45]-[50] above).

176 The plaintiffs submit that Mr Baghaei's exchanges with Mr Rodrigues in this regard could not constitute a valid decision of the board: *Northside Developments Pty Ltd v Registrar General* (1990) 170 CLR 146; [1990] HCA 32 at 205; *Eden Energy Ltd v Drivetrain USA Inc* (2012) 90 ACSR 191; [2012] WASC 192 (***Eden Energy***) at [72]. The plaintiffs further submit that nothing which had occurred at the board meeting on 25 October 2013 (see [26]-[30] above) or at the Annual General Meeting on 22 November 2013 (see [55]-[58] and [67] above) could make up for this lack of approval.

177 The plaintiffs submit that the validity of each of the security interests was a critical feature of the WER acquisition proposal and that that issue demanded a more considered approach.

178 Secondly, the plaintiffs submit that the administrators failed at a number of stages to assess, critically, whether the threats by the Baghaei interests to withdraw from the bidding process were anything other than "mere bluff". The plaintiffs argue that the administrators reacted passively to what were, according to the plaintiffs, a series of unjustified demands and deadlines made by the Baghaei interests that effectively shut out the Vertes interests. The plaintiffs argue that the new Vertes acquisition proposal offered a substantially higher cash component for the Company's assets than the WER acquisition proposal and would have produced a better return to creditors, even assuming the validity of the security interests created in respect of the convertible notes.

179 Relatedly, the plaintiffs refer to an aspect of the asset acquisition by WPR, which included any claim that the Company might have against Mr Baghaei in relation to or arising from a breach of duty owed to the Company as a director, other than a claim that may only be prosecuted by a Company in liquidation or by the liquidator of such a Company. The plaintiffs submit that no advantage was received by the Company in return for giving up claims in respect of which there had never been a thorough investigation. They further submit that no explanation has been provided by the administrators as to why it was appropriate to include any claim against Mr Baghaei as part of the sale. The plaintiffs submit that it should be inferred that the administrators had lost the ability or inclination to bargain effectively in the interests of creditors, at least where Mr Baghaei was concerned.

180 The plaintiffs also complain that the administrators proceeded to complete the sale to WPR early in the afternoon of 25 November 2014 when the total cash consideration payable in respect of the WER acquisition proposal was less than the amount which the Vertes interests had proposed to pay as a deposit less than two hours later. The plaintiffs submit that there was no serious risk that, by delaying an exchange in respect of the WER acquisition proposal by two hours, the Company was likely to suffer prejudice. The plaintiffs submit that the creditors were entitled to expect the administrators would take that approach (ie wait until the time that the Vertes interests said they would pay the deposit) and "thereby secure the very substantial additional benefits available under the alternative transaction". The plaintiffs say that, at the very least, the administrators should have consulted members of the committee of creditors to ascertain their views.

181 The plaintiffs argue that, if the Court should find that creditors have been prejudiced by the administrators' acts or omissions, there is no reason why an order under s 447E(1) or

s 1321(1) of the Act should not be made to remedy the prejudice, such as by crafting orders designed to put the Company into the position it would have been in but for the administrators' conduct giving rise to that prejudice. In this connection, the plaintiffs refer to the approach taken by Allsop J in *Labocus Precious Metals Pty Ltd v Thomas* [2007] FCA 1154 (***Labocus Precious Metals***) in what the plaintiffs say is the analogous context of a review under s 178 of the *Bankruptcy Act 1966* (Cth). Alternatively, the plaintiffs argue that the administrators should compensate the Company in an amount that would put the Company back into the position it would have been in had the asset sale to WPR not been completed.

182 The plaintiffs' case in respect of s 447E(1) and s 1321(1) of the Act, that was advanced at the hearing, is not on all fours with their pleaded case. In the Further Amended Points of Claim the plaintiffs particularised three bases for alleging that entering into the sale agreement with WPR was prejudicial to the interests of creditors. First, the plaintiffs say that the pool of funds available to creditors in the winding up of the Company "are less than they would have been but for the decision to enter into the sale agreement". Secondly, the plaintiffs say that the Company lost the chance of concluding a transaction (a sale to New Wave) which would have produced a larger dividend than that which has been produced by the decision to enter into the sale agreement with WPR. Thirdly, the plaintiffs say that, in October and November 2014, it was in the interests of creditors that any sale of the Company's assets be conducted in a way designed to maximise the prospects of the Company achieving the best price reasonably obtainable for those assets. The plaintiffs say that the administrators' decision to enter into the sale agreement with WPR was "not so conducted".

183 The plaintiffs' case at the hearing focused on the second and third grounds. No case has been advanced under the first ground that stands separately from the case advanced under the second and third grounds. There is certainly no evidence that the funds available to creditors are less than they would have been because the administrators entered into the asset sale agreement with WPR.

184 There are two other aspects to the plaintiffs' case.

185 First, the plaintiffs assert an entitlement to bring proceedings in their names to enforce duties which they say the administrators, as officers of the Company, owed under ss 180 to 182 of the Act, and at common law and in equity. That said, the plaintiffs accept that the bringing of such claims involves an extension of the present law and is inconsistent with authority

binding on me sitting as a Judge at first instance: *Spies v The Queen* (2000) 201 CLR 603; [2000] HCA 43 at [93]-[96]. The plaintiffs' concession is well-made. Nevertheless, they seek to reserve their position to argue such a case on appeal, if need be.

186 Secondly, the plaintiffs contend that if the Court finds that there has been some failure of approach or duty by the administrators, then an order should be made under s 503 of the Act removing them as liquidators of the Company. The plaintiffs argue that this would enable a thorough investigation to be undertaken of the administrators' actions by a party who would have the power to pursue all available claims, including claims for breach of duty. The plaintiffs say that such an order would be "to the distinct advantage of the creditors".

CONSIDERATION

Some general observations

187 The administrators had the power to dispose of any part of the Company's property and thus the power to sell the assets to WPR under the WER acquisition proposal: s 437A(1)(c) of the Act. In exercising that power, the administrators were acting as the Company's agent: s 437B of the Act. In undertaking that sale, the administrators were not under a duty to obtain "the best possible price". They were entitled to take into account a wide range of considerations: *Hausmann v Smith* [2006] NSWSC 682 at [10].

188 Inevitably, the exercise of such a power involves business and commercial judgments with which, generally speaking, courts are reluctant to interfere. With regard to s 447E(1), Black J in *In the matter of Joe & Joe Developments Pty Limited (subject to a Deed of Company Arrangement)* [2014] NSWSC 1444 said (at [7]):

> It is important to recognise that this section does not contemplate that the Court will enter into the field of commercial decision-making undertaken by an administrator or remake business and commercial decisions of an administrator, even if those decisions have a legal element or legal context, and the notion of what is or would be prejudicial in that section "must be set against the background of the *Act* and the sorts of considerations which have time and again been identified by the courts about the care with which interference with business decisions especially of people such as liquidators and administrators should be made": *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* [1998] HCA 30; (1998) 195 CLR 1 at [53]-[54]; *Naumoski v Parbery* [2002] NSWSC 1097; (2002) 171 FLR 332 at [13]-[15]; *Re Pan Pharmaceuticals Ltd (admins apptd)*; *Selim v McGrath* [2003] FCA 855; (2003) 47 ACSR 139 at [50]-[51]. ...

189 There are four significant matters about the plaintiffs' case under s 447E(1) (and, relatedly, under s 1321(1)) of the Act that should be emphasised at the outset.

190 First, as I have already noted (at [10] above), the plaintiffs stop short of saying that the secured loan transactions and the security interests thereby created are invalid. The highest they have put the matter in submissions is that "there is reason to believe" that the administrators came to the wrong conclusion as to the validity of at least the second ranking security in favour of TTL, and that "further investigations" may lead to a similar view in respect of the other security interests. I will consider those matters in the next section of these reasons: see [199]-[223] below. The point of present significance is that the plaintiffs seek to enliven their claims to relief under s 447E(1) and s 1321(1) of the Act on the basis that the validity of the security interests is sufficiently in doubt to warrant further investigation.

191 Secondly, when considering the existence or likelihood of prejudice in the context of s 447E(1) of the Act, one is concerned with actual, not theoretical, prejudice. In *Honest Remark Pty Ltd v Allstate Explorations NL* (2006) 201 FLR 456; [2006] NSWSC 735, Brereton J referred to the wide operation of s 447E(1) of the Act, particularly the Court's power to "make such order as it thinks just". However, at [79] his Honour said:

> Nonetheless, the orders that the court may make are not unlimited. First, there is a pre-requisite to exercise of the power: before the power to make any such order arises, one of the grounds referred to in s 447E(1) must be established. That requires satisfaction of the court that the administrator has managed or is managing the company's business property or affairs in a way that is prejudicial to the interests of some or all of the creditors or members, or has done or proposes to do an act or omission that is or will be prejudicial to such interests. It is insufficient that the conduct *might* be prejudicial; establishment of the ground for exercise of power under s 447E requires proof of conduct or proposed conduct that *is or would be* prejudicial - not that *might* be prejudicial.
>
> (Emphasis in original.)

192 His Honour later remarked (at [82]) that demonstration of prejudice requires comparison between the actual position of creditors or members and their hypothetical position absent the conduct about which complaint is made. In other words, a counterfactual analysis is required.

193 In the present case, the plaintiffs do not suggest that there was any proposal seriously competing with the WER acquisition proposal, other than the new Vertes acquisition proposal. Their counterfactual case advances the new Vertes acquisition proposal as one that was capable of acceptance. Inherent in that case is an assumption that the Vertes interests actually had the funds available to pay, by 4.00 pm on 25 November 2014, the deposit of $400,000 that they had offered, as well as the ability to pay, on completion, the balance of the

cash consideration of $2.456 million. However, remarkably, the plaintiffs adduced no evidence of either fact. The evidence stands no higher than the assertions made by JPM in the correspondence I have summarised.

194 In that state of affairs, one is caused to wonder how the deposit of $400,000 would eventuate at 4.00 pm on 25 November 2014 if it could not be paid by 12.00 pm on the same day. At the time, the Vertes interests offered no explanation about that matter. In correspondence, they did no more than complain about the shortness of notice and doggedly resisted earlier payment of the deposit, even when it was plainly in their interests to do what the administrators had asked. In this proceeding, they have offered no explanation as to why the deposit could not have been paid at 12.00 pm, as opposed to 4.00 pm, on 25 November 2014.

195 In the absence of evidence to show that New Wave had funds available to pay, and would have paid, the deposit of $400,000 on 25 November 2014 and, further, that it had funds available to pay, and would have paid, the balance of the cash consideration upon completion (had the new Vertes acquisition proposal been accepted), it is difficult to identify what prejudice exists that would enliven the plaintiffs' recourse to s 447E(1) of the Act. The absence of demonstrated prejudice is an important element of the defendants' case. Indeed, even if the sale to WPR were to be set aside now, there is no evidence that New Wave or the Vertes interests presently have funds to pay the deposit and complete a sale under the new Vertes acquisition proposal. I will return to an aspect of that matter in a later section of these reasons: see [262]-[265] below.

196 Thirdly, there is no dispute that funds in the amount of $1,400,001 were advanced in respect of the secured loans. There is no dispute that the Company required those funds to further its objective of commissioning the greenWAVE unit. I have no hesitation in concluding that, on the evidence before me, the reason why the Company required these funds was because Robit failed to honour its obligations under the Robit Note Deed and because Mr Vertes failed to come good on his own promise in October 2013 to provide funds of $1 million.

197 Fourthly, the secured convertible note deeds and the second, third and fourth ranking securities are all in a standard form which, in 2013 and early 2014, the directors considered to be satisfactory for the purpose of raising funds for the Company. In that connection, I refer to my findings at [63]-[67] and [88] above.

198 Having made these general observations, I now turn to consider the two main contentions advanced by the plaintiffs in support of their case for relief under s 447E(1) and s 1321(1) of the Act.

The position of the secured convertible noteholders

199 As recorded above, the plaintiffs' case focuses on what they argue was a lack of process at the board level to properly authorise the Company, in accordance with its constitution, to enter into the secured convertible note deeds and each of the second, third and fourth ranking securities. On the other hand, the defendants' case focuses on the enforceability, by the secured convertible noteholders against the Company, of the security interests that had been created.

200 In my view, the defendants' approach is the correct approach. After all, this had to be the focus of the administrators' attention when examining the competing acquisition proposals at the relevant time. Even if there had been a failure of process at the board level because of, say, a failure to comply with the Company's constitution when the Company executed the relevant documents, this was not necessarily the concern of the secured convertible noteholders.

201 Under s 128 of the Act, the general position is that a person is entitled to make certain assumptions in relation to that person's dealings with a company. In proceedings relating to those dealings, the company is not entitled to assert that these assumptions are incorrect: s 128(1) of the Act. The assumptions include an assumption that the company's constitution has been complied with: s 129(1) of the Act. The assumptions also include an assumption that a document has been duly executed by a company if it appears to have been signed in accordance with s 127(1) of the Act: s 129(5) of the Act. Here, the secured convertible note deeds and the second, third and fourth ranking securities were signed in accordance with s 127(1) of the Act. They are also expressed to be executed as a deed: s 127(3) of the Act.

202 However, a person is not entitled to make any of these assumptions if, at the time of the dealings, the person knew or suspected that the assumption was incorrect: s 128(4) of the Act.

203 In *Soyfer v Earlmaze Pty Ltd* [2000] NSWSC 1068 at [70], Hodgson CJ in Eq said that an entitlement to make an assumption under s 129 of the Act is lost under s 128(4) only if it is shown that the person in question actually knew or actually suspected that the assumption in

question was incorrect. His Honour said that it was not enough to show that a reasonable person would be put upon an inquiry as to the facts: see also *Eden Energy* at [83]; *Correa v Whittingham* (2013) 278 FLR 310; [2013] NSWCA 263 (***Correa***) at [159]. Therefore, a person does not lose the benefit of the assumptions merely because, in the circumstances, his or her suspicions ought to have been aroused: *Sunburst Properties Pty Ltd (in liq) v Agwater Pty Ltd* [2005] SASC 335 at [178].

204 Further, the word "suspect" in this context means more than a mere idle wondering whether something exists or not. It denotes a positive feeling of actual apprehension or mistrust amounting to "a slight opinion but without sufficient evidence": *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; [1966] HCA 21 at 303; *Eden Energy* at [83]; *Correa* at [160]; *Oris Funds Management Ltd v National Australia Bank Ltd* [2003] VSC 315 at [118]; *Silver v Dome Resources NL* (2007) 62 ACSR 539; [2007] NSWSC 455 at [77].

205 As s 128(4) of the Act makes clear, the relevant state of mind that would engage the provision must be possessed when the dealings take place, not merely at some later time.

206 The plaintiffs direct attention to the first SCND and the second ranking security, and the respective positions of Mr Baghaei and Ms Chen. As I have noted, Ms Chen's position is relevant because she was a director, shareholder and the company secretary of TTL. The relevant dealings with the Company in relation to the first SCND and the second ranking security took place no later than about 7 or 11 November 2013, when the first SCND and the second ranking security, respectively, were executed.

207 Mr Baghaei was a party to the first SCND and the second ranking security. He was named as the Lead Investor in all the secured convertible note deeds, but was not a party to the second, third or fourth SCND. Under the secured convertible note deeds, the Lead Investor is the person entrusted with forming an opinion as to whether an event or series of events may have a Material Adverse Effect (as defined) and, thus, constitute a Default Event (as defined). The secured convertible note deeds refer to other events which constitute a Default Event, such as the failure of the Company to pay interest or any other amount that is payable under the relevant note deed.

208 There is no evidence that Mr Baghaei advanced any funds to the Company under any of the secured convertible note deeds. Thus, his position can be put to one side. He made no claim to be a secured creditor of the Company.

209 There was a faint suggestion in the plaintiffs' oral submissions that, by dint of his standing as Lead Investor, Mr Baghaei was an agent for all the secured convertible noteholders. The implicit suggestion seems to be that the other secured convertible noteholders were thereby affected by any knowledge that Mr Baghaei had that approval, in accordance with the Company's constitution, had not been given to the Company to enter into the secured convertible note deeds or the second, third or fourth ranking securities.

210 There is no warrant for finding that Mr Baghaei was the agent of any of the secured convertible noteholders in any relevant sense. In any event, as I have discussed, s 128(4) of the Act requires proof of actual knowledge or actual suspicion on the part of the person seeking to rely on the statutory assumptions. Thus, what is of significance in the present case is not Mr Baghaei's knowledge or suspicion, but whether any secured convertible noteholder, who claimed to be a secured creditor of the Company as at 25 November 2014, had actual knowledge or actual suspicion that the Company did not have approval, in accordance with its constitution, to enter into the relevant transaction that created that person's asserted security interest.

211 So far as TTL's/Ms Chen's position is concerned, the plaintiffs rely on an email sent by Ms Chen to the administrators on 16 September 2014 (**the 16 September email**). The evidence does not reveal the precise circumstances in which the email was sent. It states, relevantly:

> Please see attached the following documents:
>
> 1. emails between the directors of Oceanlinx in November 2013 regarding the approval by 2 directors of the company, Ali Baghaei and Joaquim Servulo Rodriguez to enter into the secured convertible note deed and general security deed.
> 2. Oceanlinx' copy of the general security deed signed by Joaquim Servulo Rodriguez, Ali Baghaei (as 2 directors of Oceanlinx) and Colin Parbery (as company secretary of Oceanlinx).
> 3. Signature pages for the secured convertible note deeds signed in November 2013.
>
> In or around early November 2013, I attended several telephone conferences between Mr Servulo Rodriguez and Mr Baghaei discussing the offer to the CN Holders of issuing convertible notes to the CN Holders secured over the assets of Oceanlinx when Mr Tibor Vertes' entity (Robit Nominees PL) failed to provide the promised convertible note funding of $3M. The directors resolved to fill up the balance of $3M convertible notes and offer same or similar terms to other prospective investors. Mr Servulo Rodriguez counter-signed the documents.
>
> Mr Tibor Vertes was well aware of this action and in fact he himself wanted to subscribe to the new secured convertible notes.

> The board of Oceanlinx and the shareholders supported and consented to the secured convertible note facility and the security deeds for approximately $2.5M. This matter was also discussed at the 22 November 2013 AGM of Oceanlinx. I was present at the AGM in late November 2013.

212 The email included an email dated 19 November 2013 from Mr Rodrigues to Mr Baghaei and Mr Parbery, an email dated 12 November 2013 from Mr Baghaei to Mr Rodrigues, and copies of the execution pages of the first and second SCNDs and the second ranking security.

213 Further light is thrown on the 16 September email by another email sent by Ms Chen to the administrators on 16 October 2014 (**the 16 October email**). The email relevantly states:

> Ali just telephoned me to ask me to drop you this note in relation to the board approval. He just remembered and asked me to put this in writing.
>
> I was personally present in at least 2 telephone conferences between Ali and Joaquim, being 2 out of 3 directors of the company resolving via telephone clearly to proceed with the granting of the security to the new convertible notes. Several telephone discussions were specifically about the granting of the security and the associated CN deed. Joaquim was sent that CN Deed and security documents via email for which he had reviewed for a few days and signed.
>
> Two directors together with the significant shareholders had a telephone meeting in November 2013 resolving and approving the $2.5m secured convertible notes amongst other matters relating to the financial position of the company. I was also present in that meeting together with the company secretary.

214 This email appears to have been sent as part of the administrators' investigation into the enforceability of the secured convertible note deeds and the second, third and fourth ranking securities. It makes clear that the "several telephone conferences" to which Ms Chen referred in the 16 September email was in fact two telephone conferences, possibly more.

215 It is, of course, the plaintiffs who question whether the statutory assumptions are available to the secured convertible noteholders who, as at 25 November 2014, claimed to be secured creditors of the Company. They bear the burden of persuasion that s 128(4) of the Act would (or, on the way in which they have advanced their case, might) operate to deprive those secured convertible noteholders of their entitlements to rely on those assumptions.

216 So far as TTL is concerned, the plaintiffs submit that, based on the documents (in particular, the 16 September email), there is a case to be investigated that Ms Chen knew or suspected (presumably as at, or no later than, 7 or 11 November 2013) that the Company did not have approval in accordance with its constitution to enter into the first SCND and the second ranking security.

217 In my view, the evidence falls far short of showing that Ms Chen actually knew or actually suspected that the Company did not have the approval required by the constitution to enter into the first SCND and the second ranking security (or, indeed, the other security transactions), if that be the case: see the submission advanced by the defendants at [231] below.

218 The emails indicate that Ms Chen was speaking from a mixture of first-hand and second-hand (or later) knowledge. Apart from Ms Chen's statement about her presence at the telephone conferences and, apparently, her attendance at the Company's Annual General Meeting in November 2013, one cannot tell what information in the 16 September email and the 16 October email was first-hand knowledge and what information was second-hand (or later) knowledge or, in the case of the latter, when that knowledge was acquired. There is no evidence of what was actually said in the telephone conferences between Mr Baghaei and Mr Rodrigues that Ms Chen witnessed. There is no evidence that Ms Chen had access to the Company's constitution or, more importantly, that she had knowledge of the specific provisions of the constitution that might bear on whether approval, in accordance with the constitution, had been given to the Company to enter into the relevant transactions. In any event, the 16 September email and the 16 October email, taken at face value, seem to demonstrate a genuine belief on Ms Chen's part that Mr Baghaei and Mr Rodrigues were participating in regularly constituted board meetings and that they had given valid approval, with Mr Vertes' knowledge and apparent acquiescence, for the Company to enter into the secured convertible note deeds and the second, third and fourth ranking securities. There is no evidence before me that would properly justify a contrary conclusion. As I have previously noted (at [78] above), there is evidence that teleconferencing was the usual mode of conducting board meetings.

219 In expressing these conclusions, I do not leave out of consideration the plaintiffs' contention that Ms Chen was a lawyer. I am not satisfied that that fact has been established to the required standard. Nonetheless, even if it had been, it would make no difference to the conclusions I have reached. That fact (if it be a fact) could not make up for the paucity of evidence before me on this issue or otherwise seriously call into question the apparent genuineness of the views expressed by Ms Chen in these emails.

220 Although, in this proceeding, the Court is not asked to adjudicate on the enforceability of the security interests which the secured convertible noteholders were advancing as at

25 November 2014, no case of sufficient substance has been put before me that would indicate that there is cause to investigate whether any of those noteholders was not entitled to rely on the assumptions in s 129 of the Act in respect of the enforceability against the Company of that person's security interest, such as to warrant the granting of relief under s 447E(1) or s 1321(1) of the Act.

221 As I have summarised (at [86]-[91] above), on 10 October 2014 the Baghaei interests (through ERA) responded to the allegation made by the Vertes interests that the secured convertible note deeds and the second, third and fourth ranking securities had not been entered into by the Company with valid board approval. One matter raised by ERA was the existence of the statutory assumptions under s 129 of the Act. The Vertes interests did not challenge that contention (whether in respect of Ms Chen/TTL or any other person) at the time it was advanced or at any later time, until now. It may, of course, be possible that, as at 10 October 2014, the Vertes interests were unaware of Ms Chen's involvement with TTL until later in the piece. But what is clear is that, by 21 October 2014, the Vertes interests accepted that any DOCA proposal would need to "factor in" the interests of the secured convertible noteholders as secured creditors: see [92] and [95] above.

222 On 27 October 2014, Bridges gave written advice to the administrators that the secured convertible noteholders were entitled to rely on the assumptions in s 129 of the Act; that the second, third and fourth ranking securities, subject to the requirement to stamp the third and fourth ranking securities in New South Wales, were valid and enforceable; and that the secured convertible noteholders were entitled to vote for the full amount of their respective debts at the second meeting of creditors: see [93] above. In my view, the administrators were entitled to rely on that advice at the time it was given.

223 Subsequently, on 13 November 2014, the Vertes interests raised a different argument to attack the enforceability of certain of the security interests. That argument was based upon the timing at which certain of the security interests were registered on the PPSR. This argument was not persisted with at the time and was not relied upon in this proceeding: see [94]-[98] above.

224 The Company and the administrators advance some additional arguments as to why the security interests had been validly created and were enforceable, or should be treated as such. WER and WPR join in these submissions. However, these are not matters that exercised the administrators' minds at the time they came to consider the validity of the security interests.

225 First, they submit that the secured convertible noteholders could, if necessary, call in aid the provisions of s 1322(4)(a) of the Act, which provides:

> Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:
>
> (a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
>
> ...
>
> and may make such consequential or ancillary orders as the Court thinks fit.

226 Section 1322(6) of the Act is also relevant. It provides:

> The Court must not make an order under this section unless it is satisfied:
>
> (a) in the case of an order referred to in paragraph (4)(a):
>
> (i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
>
> (ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or
>
> (iii) that it is just and equitable that the order be made; and
>
> (b) in the case of an order referred to in paragraph (4)(c)—that the person subject to the civil liability concerned acted honestly; and
>
> (c) in every case—that no substantial injustice has been or is likely to be caused to any person.

227 The Company and the administrators submit that if the secured convertible note deeds and the second, third and fourth ranking securities had not been validly entered into by the Company because of a failure to comply with its constitution, the Court, by recourse to s 1322(4)(a) of the Act, could nevertheless declare that the secured convertible note deeds and the second, third and fourth ranking securities had been validly entered into. They submit that there is no doubt that the Company needed the funds. This need arose from Robit's failure to honour its legal obligations under the Robit Note Deed, including Mr Vertes' failure to provide for the Company's use, the $1 million he had unequivocally promised at the board meeting on 25 October 2013 (see [27] above). Mr Vertes knew that the Company was incurring debts based on his assurance that the further $1 million would be made available. The secured convertible note deeds and the second, third and fourth ranking securities were in a form

which, according to the evidence, was satisfactory to the Company and its directors. Further, there is no dispute that two out of the three directors, at least, approved the Company entering into the transactions.

228 In *Weinstock v Beck* (2013) 251 CLR 396; [2013] HCA 14, French CJ said (at [39]):

> Corporations, in contemporary Australian society, serve the purposes of enterprises, large and small, owned and operated by men and women, some of whom are sophisticated, knowledgeable and well-advised on matters of corporate governance and some, perhaps many, of whom are not. Section 1322(4) and related provisions reflect a long-standing legislative recognition that mistakes will happen in corporate governance and that it is not in the public interest that the validity of decisions made in relation to corporations be unduly vulnerable to innocent errors which may be corrected without substantial injustice to third parties. In accordance with its evident purpose, s 1322(4)(a) is to be construed broadly and applied pragmatically, principally by reference to considerations of substance rather than those of form.

229 At [53], Hayne, Crennan and Kiefel JJ observed that s 1322(4)(a) of the Act is cast in very broad terms. At [55], their Honours said that the power thereby given is "not to be hedged about by any implied limitation". Quoting from *Owners of Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404; [1994] HCA 54 at 421, their Honours said that "[i]t is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words".

230 The Company and the administrators submit that "if ever there was a case to exercise those powers, this would be it".

231 Secondly, the Company and the administrators submit that the three directors, in fact, had agreed that "management" (meaning Mr Baghaei) could and should proceed to raise additional funds for the Company, given the funding crisis in which it was placed. The Company and the administrators say that this is implicit from the minutes of the board meeting held on 25 October 2013 (see [30] above) and is confirmed by the email exchange between the directors on 6 and 7 November 2013 (see [32]-[36] above). Thus, the Company and the administrators argue, Mr Baghaei had been given authority by the board to raise the funds that were necessary, and execute the relevant documentation. The Company and the administrators submit that the email sent by Mr Vertes early in the morning on 8 November 2013 (see [38]-[40] above), purporting to limit Mr Baghaei's authority in that regard, was without legal effect. According to them, it was a unilateral act which did not revoke the authority which the directors had already conferred on Mr Baghaei. Thus, there was no failure of process at board level as alleged by the plaintiffs.

232 Thirdly, the Company and the administrators submit that the existence of these arrangements is reflected in the minutes of the Company's Annual General Meeting (see [57] above), which refer to Mr Baghaei having raised funds of $2.5 million. Mr Vertes neither objected to these arrangements at the Annual General Meeting nor called into question Mr Baghaei's authority to cause the Company to enter into them. The Company and the administrators argue that it can be taken that, at the Annual General Meeting, the directors in fact ratified the actions taken by Mr Baghaei to raise the funds.

233 The three additional arguments I have summarised at [225]-[232] above were not specifically addressed by the plaintiffs in reply, although, as I have noted at [176] above, they did make a general submission in chief that nothing which had occurred at the board meeting on 25 October 2013 or at the Annual General Meeting on 22 November 2013 could make up for what they said was the lack of board approval. This submission was not further developed in the context of the defendants' submissions.

234 Having regard to the particular way in which the plaintiffs have advanced their case under s 447E(1) and s 1321(1), I do not think that it is appropriate that I should decide more than is necessary to either grant or refuse the relief that they seek. My finding at [220] is sufficient to dispose of this aspect of the plaintiffs' case. Any further finding in favour of the defendants could only bolster their position. Any finding that would be adverse to the defendants in respect of the additional arguments would make no difference to the outcome of the case on this issue.

235 Moreover, there is no application before me for relief under s 1322(4)(a) of the Act, in particular by those having an appropriate interest in claiming such relief. In those circumstances, I do not think that I should venture to express what would really be no more than a tentative answer to an abstract question.

The decision to accept and complete the WER acquisition proposal

236 I have set out at [99]-[162] the course of events leading to the acceptance and completion of the WER acquisition proposal. It is convenient at this point to briefly recapitulate some of the main events.

237 In the context of the Baghaei interests and the Vertes interests each having expressed an interest in submitting DOCA proposals, the administrators tested the market, by way of an expression of interest campaign, for the sale of the Company's assets. It is fair to say that this

elicited little interest from purchasers seeking to purchase the Company's assets for any substantial value. There is no criticism of the way in which the administrators conducted this campaign. The simple fact is that there were only two serious purchasers for the assets—the Baghaei interests and the Vertes interests.

238 After some months of dealing with competing DOCA proposals, the administrators received, on 11 November 2014, a proposal from the Baghaei interests—the WER acquisition proposal—that was capable of acceptance. The offer was subject to a deadline. Within a very short time of receiving that proposal, Mr Strawbridge telephoned Mr Vertes and informed him of the need for the Vertes interests to formalise and confirm their own acquisition proposal—the Vertes acquisition proposal—before that deadline. The Vertes acquisition proposal had been submitted earlier on 28 October 2014. The proposal required the co-operation of South Australian Maritime and RMS and was not capable of acceptance by the administrators at that time. Quite properly, the administrators sought an extension of the deadline that had been imposed for acceptance of the WER acquisition proposal. The granting of an extension was not a matter within their control. They were not able to achieve the extension they wanted. Nevertheless, a limited extension was granted in terms which enabled the administrators to accept the WER acquisition proposal "in principle", whilst keeping alive the Vertes acquisition proposal.

239 The Vertes interests used this opportunity to submit a new proposal—the new Vertes acquisition proposal—on 19 November 2014. This proposal was superior to the WER acquisition proposal in that, by its cash component of $2.465 million, it provided a higher return to unsecured creditors. However, as I have noted at [138] above, Mr Strawbridge was wary of whether the Vertes interests would be capable of completing their proposal. On the evidence before me, those concerns were entirely justified.

240 By 22 November 2014, the documentation for the WER acquisition proposal had been agreed upon and the Baghaei interests were pressing for an exchange and completion. The administrators pressed the Vertes interests for "certainty and comfort" with respect to the new Vertes acquisition proposal. I refer, in particular, to the letter from Bridges to JPM on 24 November 2014, from which I have quoted at [148] above.

241 The administrators sought to delay the Baghaei interests, but were met with a deadline for an exchange of contracts (and consequent completion) by 4.30 pm on 24 November 2014. The administrators sought to extend the deadline to 5.30 pm on 28 November 2014. Plainly, this

was sought to accommodate the Vertes interests. Earlier, on 22 November 2014, Mr Vertes had explained to Mr Strawbridge, in a telephone conversation, that he needed that time to be able to pay the purchase price under the new Vertes acquisition proposal (see [144] above). At that time, Mr Strawbridge cautioned Mr Vertes that he considered the deadline of 24 November 2014 to be a genuine one and that he (Mr Strawbridge) did not wish to risk losing the WER acquisition proposal, which had been backed up with proof of funding.

242 The administrators' request for an extension to 5.30 pm on 28 November 2014 was met with a response (from which I have quoted at [158] above) that threatened the withdrawal of the WER acquisition proposal if contracts were not exchanged by 12.30 pm on 25 November 2014. In that response, the Baghaei interests expressed their exasperation with the sale process and vented their concern, in a somewhat hostile way, that the WER acquisition proposal was simply being used by the administrators as a lever apparently to ultimately favour the Vertes interests, notwithstanding that the Baghaei interests had done everything required of them to ensure that the WER acquisition proposal could proceed to an exchange and completion. I have no hesitation in accepting Mr Strawbridge's evidence that, after receiving this response, he was greatly concerned by the prospect of losing the WER acquisition proposal, particularly in circumstances where he continued to harbour reservations that New Wave would be able to complete a purchase under the new Vertes acquisition proposal. He was entirely justified in coming to the view that the Baghaei interests had lost patience with the sale process and were ready to walk away from it.

243 Earlier in the morning on 25 November 2014, prior to receiving this response from the Baghaei interests, the administrators had informed the Vertes interests that if New Wave was in a position to pay a deposit of $400,000 by 4.00 pm that day (as the Vertes interests said it would) then there was no reason why the deposit could not be paid by 12.00 pm. However, curiously, the Vertes interests simply maintained their position that they would pay the deposit by 4.00 pm that day, knowing the consequences that might ensue. I have already reflected on these matters at [194]-[195] above.

244 As at about 12.00 pm on 25 November 2015, the administrators were faced with a real dilemma. As I have discussed at [162] above, the administrators could enter into an asset sale agreement with WPR (then the nominated purchaser under the WER acquisition proposal) or allow that proposal to lapse, as threatened by the Baghaei interests, and take the risk that New

Wave would pay the deposit under the new Vertes proposal and subsequently be in a position complete its proposed purchase.

245 The facts present a paradigm case in which the administrators were required to weigh up the risks attending alternative courses of action and to come to a commercial decision on which course to follow, exercising their business judgment.

246 On the evidence before me, no valid criticism can be levelled at the administrators because they decided, in the circumstances, to proceed with the WER acquisition proposal on 25 November 2014. I reject what appears to be the plaintiffs' implicit submission that the administrators should have treated the threats of the Baghaei interests to withdraw the WER acquisition proposal as "mere bluff". The effect of Mr Strawbridge's evidence, which I accept, is that the administrators gave consideration to this possibility but, on weighing up the situation, were not prepared to take the risk that the Baghaei interests were bluffing in light of the risk that the only competing proposal for the sale of the Company's assets was one that was unfunded and would remain unfunded, despite assurances to the contrary.

247 Those assurances must be seen in context. New Wave, as the intended purchaser, was a company with a minimal share capital. There was no evidence before the administrators that it was in possession of the funds to pay the offered cash component of $2.456 million. Moreover, the Vertes interests had flatly refused to provide guarantees from those standing behind the company, including from Mr Vertes, to back up New Wave. New Wave's unwillingness to pay the deposit of $400,000 at 12.00 pm, as opposed to 4.00 pm, on 25 November 2014 was unexplained and, to this day, remains unexplained. As I have already remarked at [195] above, the plaintiffs have adduced no evidence in this proceeding that New Wave had funds available to pay, and would have paid, the deposit of $400,000 on 25 November 2014 and, further, that New Wave had funds available to pay, and would have paid, the balance of the cash consideration upon completion. The clear inference is that New Wave simply did not have the money. Mr Strawbridge's assessment, which was open to him on the evidence, was that, despite having offered a significant amount of cash for the Company's assets, it appeared that even as late as the evening of 24 November 2014, New Wave was still trying to raise funds.

248 It is thus apparent that the choice facing the administrators was to run the risk of losing a fully-funded proposal that was capable of acceptance for a competing proposal that had all the appearances of being unfunded. There is simply no evidence to support the view that

acceptance by the administrators of the new Vertes acquisition proposal, in preference to the WER acquisition proposal, would have produced a better return to creditors.

249 It is necessary for me to say something about an aspect of the WER acquisition proposal on which the plaintiffs place some reliance. As I have noted at [115] above, the WER acquisition proposal included the acquisition of any claim by the Company against any officer or former officer for breach of duty. That aspect of the proposal was not, in fact, accepted by the administrators, although they did agree that the assets would include any claim that the Company might have against Mr Baghaei in relation to or arising from a breach of duty owed by him to the Company (but not including any claim that may only be prosecuted by a company in liquidation or by the liquidator of such a company). The plaintiffs say that no advantage was received by the Company in return for giving up claims against Mr Baghaei in respect of which there had never been a thorough investigation. The difficulty facing this submission is that there is no evidence that the administrators either knew of any such claim against Mr Baghaei or should have known of such a claim, despite having been administrators of the Company since 2 April 2014 and having reported to the creditors on the Company's affairs. Moreover, there is no evidence from the plaintiffs themselves that there are any facts, circumstances or matters that might have given rise to any such claim. The suggestion that the administrators had given up something of value to the Company, sufficient to warrant setting aside the sale to WPR, is illusory. I reject the plaintiffs' submission that the administrators had lost the ability or inclination to bargain effectively in the interests of creditors where Mr Baghaei was concerned. There is simply no evidence to support that submission.

250 For these reasons, I am not satisfied that the plaintiffs have established any matter attending the acceptance and completion of the WER acquisition proposal that would warrant the granting of relief under s 447E(1) or s 1321(1) of the Act.

Conclusions on the case brought under s 447E(1) and s 1321(1)

251 The plaintiffs have failed to establish a case for relief under either s 447E(1) or s 1321(1) of the Act. Moreover, with respect to s 447E(1) of the Act, the plaintiffs have failed to establish that the sale of assets to WPR involved an act or omission that was prejudicial to their interests. As I have found at [195] above, in the absence of evidence to show that New Wave had funds available to pay the cash consideration under the new Vertes acquisition proposal,

it is difficult to identify what prejudice exists that would enliven the plaintiff's recourse to s 447E(1) of the Act in any event.

252 In submissions, WER and WPR raised a number of discretionary reasons why relief should not be granted under s 447E(1) or s 1321(1) of the Act should a case for relief otherwise be made out. It is not necessary for me to address those matters.

253 Further, in submissions, the defendants questioned the appropriateness of the plaintiffs' reliance on s 447E(1) of the Act in the present case. The defendants emphasised that the Court's jurisdiction under s 447E(1) of the Act is essentially supervisory in nature. They submitted that it is not for the Court to manage a company in administration or to interfere with what are commercial decisions of an administrator requiring the exercise of business judgment. The defendants argued that still less is s 447E(1) of the Act an avenue for prosecuting civil claims against an administrator for breaches of duty owed to a company or for claims in tort or contract or otherwise arising in equity. WER and WPR advanced similar submissions with respect to the plaintiffs' case under s 1321(1) of the Act.

254 It is not necessary for me to address what might be the outer limits of the Court's jurisdiction under either provision. Even if those provisions have the scope and purpose which the plaintiffs say they have, their case nonetheless fails, for the reasons I have given.

The case for breaches of duty

255 As I have noted at [185], the plaintiffs accept that their case against the administrators for breach of duty cannot succeed, in light of authority binding on me as a Judge at first instance.

256 In their Further Amended Points of Claim, the plaintiffs identified these duties as:

- a duty on the part of the administrators to exercise their powers and discharge their duties with a degree of care and diligence that a reasonable person would exercise if they were on officer of a corporation in the Company's circumstances and occupy the office held by, and have the same responsibilities in the corporation as, the officer;
- a duty on the part of the administrators to exercise their powers and discharge their duties in good faith in the best interests of the Company and for a proper purpose; and
- a duty on the part of the administrators not to improperly use their position in the course of the administration.

257 The evidence before me would not justify a finding that these duties have been breached.

The case for removal under s 503 of the Act

258 Section 503 of the Act provides that the Court may, on cause shown, remove a liquidator and appoint another liquidator.

259 The plaintiffs submit that the phrase "on cause shown" is not confined to allegations of misconduct or incapacity directed towards the liquidator: *Re Keypak Homecare Ltd* [1987] BCLC 409 at 415-416. The plaintiffs accept that it is for them to establish, by evidence, a proper basis for removal but say that, although fairness to the liquidator is not to be ignored, the real issue is the substantial and real interest of the liquidation: *In re Adam Eyton Limited; Ex parte Charlesworth* (1887) 36 Ch D 299.

260 Here, the plaintiffs says that if the Court does find that there has been some failure of approach or duty by the administrators then an order for their removal as liquidators should be made. The plaintiffs submit that such an order would allow for a thorough investigation of the actions of the administrators by a party who undoubtedly would have power to cause the Company to pursue all available claims including for breach of duty. They argue that such an order would be to the distinct advantage of the creditors.

261 In light of the findings I have made, no case for removal of the administrators as liquidators of the Company has been established. The plaintiffs' case under s 503 of the Act fails.

A FURTHER MATTER

262 In the course of making their last submission in reply, late in the afternoon of the fourth day of the hearing, the plaintiffs sought to make an open offer. It seems that the terms of this offer had been communicated to the defendants earlier in the day, at some time after 2.15 pm. This course was opposed by WER and WPR. The precise terms of the offer are not known to the Court, but what is known is that the plaintiffs' purpose in seeking to make such an offer was to satisfy the Court that, if a case for relief under s 447E(1) or s 1321(1) of the Act was made out, the Court should not refuse to grant relief out of concern that the new Vertes acquisition proposal might not remain in place: see *Labocus Precious Metals* at [7]-[9] and Annexure A thereto.

263 The prejudice in making such an offer at that time is apparent. The question of whether New Wave was ever in a position to pay the cash consideration under the new Vertes acquisition proposal was an important issue in the case. Mr Vertes had been cross-examined extensively on the past failures of Robit, as trustee of the Vertes Family Trust, to advance funds to the

Company under the Robit Note Deed, notwithstanding his assurances made in that regard. Had this intended open offer been made in a timely way—as it should have been—then I have little doubt that Mr Vertes would have been cross-examined on it as well.

264 After some observations made by me, and after some submissions made by counsel for WER and WPR, the position was reached where counsel for the plaintiffs submitted that, if I was not prepared to accept such an offer at that stage of the proceeding, I should proceed to decide the case without making final orders so that, if I came to the view that a case warranting intervention under s 447E(1) or s 1321(1) of the Act had been established, an opportunity would then be provided to the plaintiffs to address me further on the question of relief. On the other hand, if I came to the view that no such case had been established, the argument then before me would "go away".

265 As no case for relief under either s 447E(1) or s 1321(1) of the Act has been established, the question of making an open offer does not now arise.

CONCLUSION AND DISPOSITION

266 In light of the conclusions to which I have come, the proceeding should be dismissed. I can see no reason why the plaintiffs should not pay the defendants' costs. However, WER and WPR wish to make certain submissions on that question. It may be that the parties can agree on the appropriate costs order. If not, I will allow all parties to make submissions on that question. The submissions are to be in writing and limited to three pages in length other than for submissions in reply which are to be limited to one page. Subject to further order, the question of costs will be determined on the papers.

I certify that the preceding two hundred and sixty-six (266) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Yates.

Associate: 

Dated: 11 March 2016

SCHEDULE OF PARTIES

NSD 1304 of 2014

Plaintiffs

Second Plaintiff:	OCEAN ENERGY CONSTRUCTIONS PTY LTD

Defendants

Second and Third Defendants	VAUGHAN NEIL STRAWBRIDGE AND JASON TRACY IN THEIR CAPACITIES AS JOINT AND SEVERAL LIQUIDATORS OF OCEANLINX LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)
Fourth Defendant	WAVE ENERGY RESOURCES PTY LTD
Fifth Defendant	WAVE POWER RENEWABLES LIMITED (HONG KONG COMPANY 2063597)