Supreme Court

New South Wales

Case Name:	In the matter of Swan Services Pty Limited (in liquidation)
Medium Neutral Citation:	[2016] NSWSC 1724
Hearing Date(s):	13 – 16, 20 – 23 September, 5 – 7 October 2016
Decision Date:	6 December 2016
Jurisdiction:	Equity - Corporations List
Before:	Black J
Decision:	Parties to bring in agreed orders to give effect to judgment including as to costs, within 14 days or, if there is no agreement between parties, their respective draft orders and short submissions as to differences between them, indicating whether an oral hearing is required.
Catchwords:	CORPORATIONS — charges, debentures and other borrowings — charges – whether the plaintiff was a secured creditor of the company at the time of a repayment by the company to the plaintiff – where liquidator contended that if plaintiff was not a secured creditor at the relevant time certain transactions involving the plaintiff were voidable transactions – whether loan agreement and any equitable charge derived from it fails for lack of sufficient certainty in circumstances where loan agreement did not identify which assets of the company were subject to the fixed charge and which were subject to the floating charge – whether ASIC Form 309 document was effective to create charge – whether loan agreement was partly written and partly oral such that it included terms for payment of certain interests and charges – whether there was collateral contract requiring payment of certain interests and charges.

CORPORATIONS — Winding up — Winding up in insolvency — Insolvent trading — Claim by liquidator against cross-defendants under ss 558G and 588M of the Corporations Act 2001 (Cth) for insolvent trading – where liquidator contended that first cross-defendant was de facto director of companies – whether first cross-defendant was de facto director during relevant time period – whether companies were insolvent or became insolvent by incurring the debts – whether presumption of insolvency arises under s 588E(4) of the Corporations Act 2001 (Cth) – whether contravention of s 588G established – whether "loss or damage" in s 588M of the Corporations Act 2001 (Cth) is reduced by recoveries by the liquidator that will allow distribution to creditors – whether creditors with benefit of retention of title clause whose security vests in company due to company's winding up fall within scope of s 588M of the Corporations Act 2001 (Cth) – Defences – whether defences under s 588H of Corporations Act 2001 (Cth) established – whether Court should relieve cross-defendants wholly or partly from liability under s 1317S of the Corporations Act 2001 (Cth) if contravention of s 588G is established.

Legislation Cited:

- Corporations Act 2001 (Cth), ss 9, 95A, 266, 286, 436A, 556, 588E, 588FB, 588FC, 588FDA, 588FE, 588FF, 588FL, 588FM, 588FP, 588G, 588H, 588M, 588R, 588V, 1317S, Pt 5.7B
- Evidence Act 1995 (NSW), ss 136, 140
- Fair Entitlements Guarantee Act 2012 (Cth)
- Income Tax Assessment Act 1997 (Cth)
- Personal Property Securities Act 2009 (Cth), ss 12, 267A

Cases Cited:

- Armagas Ltd v Mundogas SA [1985] 1 Ll R 1
- Australian Securities and Investments Commission v Edwards (No 3) [2006] NSWSC 376; (2006) 57 ACSR 209
- Australian Securities and Investments Commission v Edwards [2005] NSWSC 831; (2005) 54 ACSR 583
- Australian Securities and Investments Commission v Healey (No 2) [2011] FCA 1003; (2011) 85 ACSR 654
- Australian Securities and Investments Commission v Plymin (No 1) [2003] VSC 123; (2003) 46 ACSR 126

- Australian Securities and Investments Commission v Plymin (No 2) [2003] VSC 230; (2003) 21 ACLC 1237
- Ball (in his capacity as official liquidator of Wealthfarm Group Services) v Sinclair [2015] NSWSC 2103
- Bentley Smythe Pty Ltd v Anton Fabrications (NSW) Pty Ltd [2011] NSWSC 186; (2011) 248 FLR 384
- Bon McArthur Transport Pty Ltd (in liq) v Caruana [2013] NSWCA 101
- Briginshaw v Briginshaw [1938] ALR 334; (1938) 60 CLR 336
- Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd [2011] NSWCA 109; (2011) 81 NSWLR 47
- Camden v McKenzie [2007] QCA 136; [2008] 1 Qd R 39
- Campbell Street Theatre Pty Ltd (recs & mgrs apptd) (in liq) v Commercial Mortgage Trade Pty Ltd [2012] NSWSC 669
- Commercial Union Insurance Co of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389
- Cradock v Scottish Provident Institution (1893) 69 LT 380
- Craig v Silverbrook [2013] NSWSC 1687
- Daniels v Anderson (1995) 37 NSWLR 438
- Deputy Commissioner of Taxation v Austin (1998) 28 ACSR 565
- Deputy Commissioner of Taxation v Clark [2003] NSWCA 91; (2003) 57 NSWLR 113
- Edenden v Bignell [2007] NSWSC 1122
- Elliott v Australian Securities and Investments Commission [2004] VSCA 54; (2004) 10 VR 369
- Emanuel Management Pty Ltd v Foster’s Brewing Group Ltd [2003] QSC 205; (2003) 178 FLR 1
- First Strategic Development Corporation Ltd (in liq) v Chan [2014] QSC 60
- Fisher v Divine Homes Pty Ltd [2011] NSWSC 8; (2011) 85 ACSR 512
- Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6; (2012) 200 FCR 296
- Hall v Poolman [2007] NSWSC 1330; (2007) 65 ACSR 123
- Hussain v CSR Building Products Ltd [2016] FCA 392; (2016) 112 ACSR 507

- Illingworth v Houldsworth [1904] AC 355
- International Cat Manufacturing Pty Ltd (in liq) v Rodrick [2013] QSC 91
- International Cat Manufacturing Pty Ltd (in liq) v Rodrick [2013] QCA 372; (2013) 97 ACSR 200
- Lewis (as liquidator of Doran Constructions Pty Ltd) v Doran [2005] NSWCA 243; (2005) 54 ACSR 410
- Lewis v Doran [2004] NSWSC 608; (2004) 208 ALR 385
- Lewis, Re Damilock Pty Ltd (in liq) v VI SA Australia Pty Ltd [2008] FCA 1801; (2008) 68 ACSR 493
- McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477
- McLellan (in his capacity as liquidator of Stake Man Pty Ltd) v Carroll [2009] FCA 1415; (2009) 76 ACSR 67
- Metropolitan Fire Systems Pty Ltd v Miller & Ewins (1997) 23 ACSR 699
- Mistmorn Pty Ltd (in liq) v Yasseen (1996) 21 ACSR 173; 14 ACLC 1387
- Morley v Australian Securities and Investments Commission (No 2) [2011] NSWCA 110; (2011) 83 ACSR 620
- Morris v Danoz Directions Pty Ltd (in liq) (No 2) [2010] FCA 836
- Mulherin v Bank of Western Australia Ltd [2006] QCA 175
- Natcomp Technology Australia Pty Ltd v Graiche [2001] NSWCA 120; (2001) 19 ACLC 1117
- National Provincial & Union Bank of England v Charnley [1924] 1 KB 431
- Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; (1992) 110 ALR 449
- Playspace Playground Pty Ltd v Osborn [2009] FCA 1486
- Powell v Fryer [2001] SASC 59; (2001) 37 ACSR 589
- Queensland Bacon Pty Ltd v Rees [1966] HCA 21; (1966) 115 CLR 266
- Re Accolade Wines Australia Ltd [2016] NSWSC 1023
- Re Ashington Bayswater Pty Ltd (in liq) [2013] NSWSC 1008
- Re Salfa Pty Ltd (in liq) [2014] NSWSC 1423
- Re SSET Constructions Pty Ltd (in liq) – Sims v Khattar [2010] NSWSC 102

- Re Yorkshire Woolcombers Association, Ltd [1903] 2 Ch 284
- Roberts v Investwell Pty Ltd (in liq) [2012] NSWCA 134; (2012) 88 ACSR 689
- Sands and McDougall Wholesale Pty Ltd (in liq) v Commissioner of Taxation [1998] VSCA 76; (1998) 147 FLR 323
- Sandtara Pty Ltd v Longreach Group Ltd [2008] NSWSC 373
- Smith v Bone [2015] FCA 319; (2015) 104 ACSR 528
- Smith v Offermans [2015] QCA 55; (2015) 105 ACSR 230
- Societe d'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana") (1924) 20 Ll L Rep 140
- Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation [2001] NSWSC 621; (2001) 39 ACSR 305
- State of New South Wales v Hunt [2014] NSWCA 47; (2014) 86 NSWLR 226
- Swiss Bank Corporation v Lloyds Bank Ltd [1982] AC 584
- Tourprint International Pty Ltd (in liq) v Bott [1999] NSWSC 581; (1992) 32 ACSR 201
- United Builders Pty Ltd v Mutual Acceptance Ltd [1980] HCA 43; (1980) 144 CLR 673
- White Constructions (ACT) Pty Ltd (in liq) v White [2004] NSWSC 71; (2004) 49 ACSR 220
- Williams (as liquidator of Scholz Motor Group Pty Ltd (in liq) v Scholz [2008] QCA 94
- Woodgate v Davis [2002] NSWSC 616; (2002) 42 ACSR 286
- Woodgate v Fawcett [2008] NSWSC 868; (2008) 67 ACSR 611

Category: Principal judgment

Parties: Judith Louise Swan (Plaintiff/First Cross-Defendant)
Robert John Swan (Second Cross-Defendant)
Swan Services Pty Limited (in liquidation) (Defendant/First Cross-Claimant)
Anthony Wayne Elkerton (Second Cross-Claimant)
Superior Cleaners WA Pty Limited (in liquidation) (Third Cross-Claimant)

	Cleaners ACT Pty Limited (in liquidation) (Fourth Cross-Claimant) Cleaners Vic Pty Limited (in liquidation) (Fifth Cross-Claimant) Cleaners SA Pty Limited (in liquidation) (Sixth Cross-Claimant) Cleaners Qld Pty Limited (in liquidation) (Seventh Cross-Claimant) Cleaners New South Wales Pty Limited (in liquidation) (Eighth Cross-Claimant)
Representation:	Counsel: P S Braham SC/M Rose (Plaintiff/First Cross-Defendant) C R C Newlinds SC/J Hynes (Defendants/Cross-Claimants) R Notley (Second Cross-Defendant) Solicitors: Hall & Wilcox (Plaintiff/First Cross-Defendant) TressCox Lawyers (Defendants/Cross-Claimants) Clayton Utz (Second Cross-Defendant)
File Number(s):	2014/34940

JUDGMENT

The parties and the matters in issue

1 These proceedings concern the affairs of the Defendant and First Cross-Claimant, Swan Services Pty Limited ("Swan Services") and the Third–Eighth Cross-Claimants, which are several other companies within the Swan Group, Superior Cleaners WA Pty Ltd (in liq) ("Cleaners WA"); Cleaners ACT Pty Ltd (in liq) ("Cleaners ACT"); Cleaners Vic Pty Ltd (in liq) ("Cleaners Vic"); Cleaners SA Pty Ltd (in liq) ("Cleaners SA"); Cleaners Qld Pty Ltd (in liq) ("Cleaners Qld") and Cleaners NSW Pty Ltd (in liq) ("Cleaners NSW") (together "Companies"). Swan Services and the Companies previously operated a cleaning business which provided cleaning services to major corporate groups, shopping centres and public facilities. It appears that Swan Services and the Companies were together the fifth largest cleaning contract business in Australia at the time that administrators were appointed to them.

2 Broadly, Swan Services held the majority of cleaning contracts within the Swan Group, purchased consumables and acquired equipment and paid the majority of creditors of the Swan Group. The Companies employed cleaning staff and performed cleaning services, although Cleaners Qld was a party to several cleaning contracts, and several of the other Companies were party to other cleaning contracts. The structure contemplated that Swan Services would charge wages and expenses paid on behalf of the subsidiaries to them and they would charge management fees to Swan Services. However, the implementation of that process had broken down over the period in issue in these proceedings, including the period from 1 November 2012 to 22 May 2013 ("relevant period").

3 Swan Services and the Companies are now in liquidation and their liquidator, Mr Anthony Elkerton, is the Second Cross-Claimant in the proceedings. Mr Elkerton was appointed (with Mr David Young) as administrator of Swan Services and the Companies under s 436A of the *Corporations Ac*t 2001 (Cth) on 22 May 2013. Messrs Elkerton and Young subsequently became liquidators of Swan Services and the Companies when their creditors resolved that they be wound up, at a second meeting of creditors held on 27 June 2013. Mr Young subsequently ceased to be liquidator of Swan Services and the Companies on 30 September 2013 and Mr Elkerton continued in that role.

4 The Plaintiff and First Cross-Defendant in the proceedings is Ms Judith Swan, who is the former wife of Mr Robert Swan. Ms Swan had a significant involvement with the affairs of Swan Services from at least 1998 and throughout the relevant period, although the character of that involvement is a central issue in the proceedings. The Second Cross-Defendant, Mr Swan, was the managing director of Swan Services and its subsidiaries and the sole shareholder of Swan Services since 1991. Mr Swan has been a director of Swan Services since June 1969 and has been the sole director of Swan Services (at least in a formal sense) since September 1998 and its sole secretary from October 1998.

5 The proceedings are complex and involve, variously, a claim by Ms Swan for an extension of time for the registration of a security; a claim for insolvent

trading brought by the liquidator against Ms Swan on the basis of an allegation that she was a de facto director of Swan Services and the Companies; and a claim for insolvent trading brought by the liquidator against Mr Swan who was a director of Swan Services and the Companies. The proceedings were heard over eleven days commencing 13 September 2016, with oral submissions concluding on 7 October 2016.

6 In assessing the evidence in this case, to which I will refer below, I am conscious of the importance of the credit of witnesses where there is, in respect of some issues, inconsistencies in the oral evidence: *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at [28]; *Craig v Silverbrook* [2013] NSWSC 1687 at [142] per Sackar J. I also recognise that the credibility of a witness and his or her veracity may be tested by reference to the objective facts proved independently of the testimony given, in particular by reference to the documents in the case, his or her motives and the overall probabilities: *Armagas Ltd v Mundogas SA* [1985] 1 Ll R 1 at 57. I have also had regard to Atkin LJ's observation in *Societe d'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* (1924) 20 Ll L Rep 140 at 152 that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour"; substantially the same view was taken by Keane JA in *Camden v McKenzie* [2007] QCA 136; [2008] 1 Qd R 39 at [34], by Leeming JA (with whom Barrett JA and Tobias AJA agreed) in *State of New South Wales v Hunt* [2014] NSWCA 47; (2014) 86 NSWLR 226 at [56]: see also *Craig v Silverbrook* above at [141].

7 I will now refer briefly to the affidavit evidence generally, although I will primarily deal with the evidence that is relevant to particular issues in dealing with those claims below. I will then deal with the relevant claims in the order in which the parties addressed submissions, dealing first with the liquidator's cross-claim, which is of wider scope than Ms Swan's claim, and then with Ms Swan's claim.

8 Mr Elkerton's first affidavit dated 12 December 2014 (in 199 paragraphs) ("Elkerton 1") exhibits eight lever arch folders of documents relevant to the

financial position of Swan Services and the Companies, including bank statements and records, financial statements, documents relevant to a calculation of a quick asset ratio and documents relevant to creditors. That affidavit also outlined several aspects of the history of Swan Services and the Companies, provided information as to the nature of their business, accounting systems and financial statements, and provided Mr Elkerton's analysis of the financial position of Swan Services and the Companies, including by reference to a quick asset ratio ("QAR") summary, a calculation of its debtors and creditors, and an analysis of the tax position of Swan Services and the Companies. Mr Elkerton also dealt with other matters that were relevant to the solvency of Swan Services and the Companies, including indicia of insolvency, non-current assets and liabilities, cashflows and access to borrowed funds.

9 Mr Elkerton's second affidavit dated 12 December 2014 in 194 paragraphs ("Elkerton 2") exhibits three further lever arch folders of documents relating the circumstances in which a charge was given by Swan Services to Ms Swan in 2013 ("2013 Charge") and to the role of Ms Swan within Swan Services. Mr Elkerton's evidence is also that some 73 unsecured creditors had submitted proofs of debt in the liquidation totalling $8,378,392.68, although he had not yet formally called for proofs of debt; if the 2013 Charge is held to be valid, Mr Elkerton estimates that unsecured creditors would not receive a dividend in the liquidation; and, if the 2013 Charge was held to be invalid, and he made no further recoveries from unrelated recovery actions, he estimates that unsecured creditors would receive a pro rata distribution of up to five cents for every dollar of their total claim (Elkerton 2 [36]–[38]). An issue subsequently arose in respect of that evidence, since Mr Elkerton subsequently recovered a substantial preference, in the order of approximately $2.5 million, in respect of tax payments made by the Swan Group to the Australian Taxation Office ("ATO").

10 Mr Elkerton's further affidavit dated 9 May 2016 exhibited correspondence between Ms Swan and other persons which was intended to demonstrate the significance of her role within the Swan Group. By his further affidavit dated 31 August 2016, Mr Elkerton led evidence as to a further calculation of the claim against the Cross-Defendants under ss 588G and 588M of the *Corporations*

Act, involving a modest reduction in that claim. As I will note below, that claim was further reduced in the course of submissions at the hearing. By his fifth affidavit dated 6 September 2016, Mr Elkerton led evidence of wages incurred by the Companies to employees in the relevant period, as to which substantial amounts remained outstanding, and monies received from the Department of Employment which were distributed to eligible employees in respect of unpaid employee entitlements incurred by the Companies prior to his appointment, pursuant to the *Fair Entitlements Guarantee Act* 2012 (Cth). In my view, Mr Elkerton gave honest and fair evidence, making appropriate qualifications or concessions in cross-examination.

11 The liquidator also relied on the affidavit of Mr David Lombe dated 7 January 2016 which exhibited his expert report dated 21 December 2015. Mr Lombe is a partner in the restructuring services practice of Deloitte Touche Tohmatsu and has extensive experience. Mr Lombe was instructed to provide an opinion on the methodology adopted by Mr Elkerton to assess the financial position of Swan Services and its subsidiaries, and specifically whether the QAR analysis undertaken by Mr Elkerton was an appropriate method to assess Swan Services' and/or the Swan Group's financial position, and whether each of the companies within the Swan Group were insolvent in the relevant period. Mr Lombe was cross-examined and was a precise and impressive witness in cross-examination. I will address the detail of Mr Lombe's evidence below in dealing with the question of solvency.

12 The liquidator also relied on an affidavit of Ms Ann Brewer dated 18 July 2016. Ms Brewer was at the relevant time the Chief Executive for the Centre for Continuing Education and Sydney Learning Pty Ltd ("Sydney Learning"), which was associated with the University of Sydney, and provided consulting services to Swan Services. Ms Brewer also had a personal friendship with Ms Swan, although the extent of that friendship was in dispute, and her son had worked for a period within the Swan Group. Ms Brewer was vigorously cross-examined by Mr Braham who appeared with Mr Rose on behalf of Ms Swan. It was put to Ms Brewer, on behalf of Ms Swan, that aspects of her evidence were false. One possible explanation for Ms Brewer having a degree of antagonism to Ms Swan was identified (T390).

13 The liquidator submits that Ms Brewer gave firm, impartial and considered evidence and the Court should accept Ms Brewer's evidence without qualification. It seems to me that Ms Brewer's cross-examination demonstrated that aspects of her recollection were incorrect, and inconsistent with contemporaneous documents or the sequence of events, and she was generally reluctant to depart from her account in her affidavit in cross-examination, even when those inconsistencies were exposed (for example, T221, T227, T261). For example, Ms Brewer was at least incorrect as to the timing of a conversation with Ms Swan concerning Mr Itaoui's responsibilities, which she attributed to a time after Mr Itaoui had left the Swan Group. Ms Brewer's affidavit evidence did not fully disclose the extent of her personal friendship with Ms Swan, at the time they were working together, which was evident in the tone of their email communications, and Ms Brewer was also reluctant to concede that matter in cross-examination (for example, T211–212). There was a lack of precision in her evidence as to different roles which she and Sydney Learning dealt with Swan Services, with Sydney Learning at one point providing training for cleaners and managers, Ms Brewer or Sydney Learning at another point advising Swan Services in respect of a cultural change project required by a major client, Sydney Airport Corporation Limited ("SACL"), and Ms Brewer at another point conducting workshops or meetings with senior management of Swan Services, whether on her own behalf or on behalf of Sydney Learning. I have concerns as to an element of overstatement in Ms Brewer's affidavit evidence and her evidence in cross-examination and I consider her evidence should be approached with a degree of caution.

14 Ms Swan relied on several affidavits. Ms Swan's affidavit dated 29 January 2014 ("JS1") was directed to support her claim in respect of the 2013 Charge. Ms Swan's second affidavit dated 23 May 2014 referred to repayment to her of the amount of $868,200 on 21 May 2013 and to the additional amount which she claimed was due to her, should her claim in respect of the 2013 Charge be successful. Ms Swan's third and lengthy affidavit dated 5 June 2015 ("JS3") referred to her background, her marriage to Mr Swan and her involvement with Swan Services over the period since 1998. Ms Swan's third affidavit also responds, at length, to matters raised in Mr Elkerton's affidavit dated 12

December 2014 of 199 paragraphs. I will refer to other aspects of that affidavit below. Ms Swan also relied on her further affidavit dated 24 March 2016, which took issue with significant aspects of Ms Brewer's evidence. By a further affidavit dated 8 September 2016, Ms Swan responded to Mr Elkerton's affidavit dated 9 May 2016, Ms Brewer's affidavit dated 18 July 2016 and Mr Itaoui's affidavit dated 25 August 2016 (which was ultimately not read in the proceedings). There are difficulties with aspects of Ms Swan's evidence including, as the liquidator points out, the extent to which she sought to qualify her affidavit evidence and gave oral evidence inconsistent with her affidavit evidence, in the course of cross-examination. Ms Swan's evidence in cross-examination frequently had a somewhat self-serving character, which is perhaps not surprising given the substantial risk she faced in the proceedings.

15 Ms Swan also relies on affidavits of Mr Richard Allsop, who was a solicitor and was retained by Ms Swan over the relevant period, dated 30 January 2014 and 10 June 2015. Mr Allsop's first affidavit refers to the matters which led to a delay in registration of the 2013 Charge on the Personal Property Securities Register ("PPSR") and his second affidavit addresses two matters to which I will refer below. Ms Swan also relied on the affidavit of Mr Renner-Mitchel sworn 4 December 2014 which provided further evidence as to the circumstances leading to the delay in registration of the 2013 Charge.

16 Ms Swan relies on an affidavit of Mr Michael Bell dated 24 March 2016. Mr Bell was the chief financial officer for Swan Services from 1 March 2013 to 9 May 2013 and continued as a consultant with Swan Services for about two weeks after that time. Ms Swan submits, and I accept, that particular weight should be given to Mr Bell's evidence, because he only had a short association with Mr Swan and Ms Swan between his employment on 1 March 2013 and the appointment of an administrator on 23 May 2013, and can be treated as a genuinely independent witness, without personal loyalty to the parties to the proceedings. Mr Bell was cross-examined, and presented as a credible and convincing witness, who had no particular reason to give inaccurate evidence.

17 Ms Swan also relied on Mr Wickenden's affidavit dated 5 June 2015. Mr Wickenden refers to the circumstances in which he was approached by Mr

Allsop, and subsequently engaged by Ms Swan. He also sets out, at some length, the work done in the course of that engagement. Ms Swan also relied on a further affidavit of Mr Wickenden dated 14 August 2015, which took issue with an aspect of Mr Swan's evidence. The liquidator accepted, and I also accept, that Mr Wickenden's evidence in cross-examination was direct, forthright and honest.

18 Ms Swan relied on an affidavit of Mr Petrie dated 5 June 2015. Mr Petrie was a young solicitor who commenced employment with Cleaners NSW as program delivery coordinator in April 2012, reporting to Ms Swan, and assisting her with projects in the area of employment law, public liability, compliance, administration and commercial disputes. I will refer to Mr Petrie's evidence, which is relevant to identifying the role played by Ms Swan within the Swan Group, below. Mr Petrie was cross-examined, and it appears that he had initially met Ms Swan in a social setting, and that she had arranged for his employment by Cleaners NSW. There is, however, no reason to think that Mr Petrie did not give honest evidence of his observations.

19 Ms Swan relied on an affidavit of Mr Winterbottom dated 24 March 2016, which annexed a report setting out a calculation of the amount due to Ms Swan under the 2013 Charge if its validity is sustained. That calculation ultimately appeared to be uncontroversial.

20 Mr Swan relied on his affidavit dated 6 July 2015 ("RS1"). By a second affidavit dated 29 March 2016 ("RS2"), Mr Swan referred to his having read Ms Swan's affidavit dated 5 June 2015, and expressed his agreement with several aspects of that affidavit, although qualifying or indicating that he did not recall other matters in that affidavit which were potentially adverse to him. The liquidator submits, and I accept, that Mr Swan's affidavit evidence did not provide any detailed account of his involvement in the business and that Mr Braham's cross-examination which sought to elicit further evidence from him was undertaken at a high level of generality. There also seems to me to be substantial force in the proposition put to Mr Swan in cross-examination, but denied by him, that he has a financial interest in Ms Swan's success in the proceedings, so far as he is presently resident in a property owned by Ms

Swan, for which he is not paying rent, and that position may be at risk if a substantial judgment is obtained by the liquidator against Ms Swan in the proceedings. Mr Swan also relies on affidavits of his solicitor, Mr Collins dated 13 September 2016, and a further affidavit of another solicitor retained by him, Mr Dayal dated 13 September 2016, which it is not necessary to address further for present purposes.

21 Evidence was not led from several other persons who had significant roles in Swan Services, including Mr Tony Baddour who was the financial controller for the Swan Group from February 2008 to March 2013 and Mr Fred Itaoui who was the chief executive officer for the Swan Group from March 1993 until October 2012.

Insolvent trading claim by Swan Services and the Companies against Ms Swan and Mr Swan

22 By the Second Further Amended Points of Cross-Claim, filed by leave on 20 September 2016, Swan Services and the Companies bring an insolvent trading claim against Ms Swan in respect of the relevant period, on the basis of an allegation that she was a de facto director of Swan Services and the Companies within that period. Swan Services and the Companies also bring an insolvent trading claim against Mr Swan who was a director of Swan Services and the Companies.

23 In order to establish liability for insolvent trading on the part of Ms Swan (and Mr Swan) under s 588G of the *Corporations Act*, the liquidator must establish, relevantly, that (1) she (or he) was a director of Swan Services or the Companies at the time it or they incurred a debt; (2) Swan Services, or it and the Companies, was or were insolvent at the time the debt was incurred, or became insolvent by incurring the debt; (3) at the time the debt was incurred, there were reasonable grounds to suspect that Swan Services, or it and the Companies was or were insolvent or may become insolvent by incurring the debt; (4) and Ms Swan (or Mr Swan) was aware that there were reasonable grounds to suspect insolvency or a reasonable person would have been aware of that matter. The fact that Mr Swan was a director of Swan Services and the Companies during the relevant period is uncontroversial and the balance of those matters will need to be determined in the claim against him.

24 In *Woodgate v Davis* [2002] NSWSC 616; (2002) 55 NSWLR 222; 42 ACSR 286, Barrett J (as his Honour then was) observed (at [36]) that:

> "Section 588G and related provisions serve an important social purpose. They are intended to engender in directors of companies experiencing financial stress a proper sense of attentiveness and responsible conduct directed towards the avoidance of any increase in the company's debt burden. The provisions are based on a concern for the welfare of creditors exposed to the operation of the principle of limited liability at a time when the prospect of that principle resulting in loss to creditors has become real."

25 Ms Swan submits, and I proceed on the basis that, an insolvent trading claim must be established having regard to the standard recognised in the general law in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361–362; *Playspace Playground Pty Ltd v Osborn* [1938] ALR 334; [2009] FCA 1486. I also recognise that s 140 of the *Evidence Act* 1995 (NSW) similarly provides that, in a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities and that, without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matters alleged. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449 at 450, the plurality observed that:

> "The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."

Whether Ms Swan was a de facto director of Swan Services and the Companies

26 The parties agreed that the first issue to be determined in the proceedings, which arises only in respect of Ms Swan, was:

> "At any time during the period 28 November 2012 to 22 May 2013 was Ms Swan a "de facto" director of [Swan Services] or any or all of the [Companies] and, if so:

> a over which of the companies within the Group was she a “de facto” director; and
>
> b during what part of the period 28 November 2012 to 22 May 2013 was she a “de facto” director.”

27 As I noted above, in order to establish liability for insolvent trading on the part of Ms Swan under s 588G of the *Corporations Act*, the liquidator must first establish that she was a director of Swan Services or the Companies at the time it or they incurred a debt. The definition of the term “director” in s 9 of the *Corporations Act* extends, in paragraph (b)(i) (unless the contrary intention appears), to a person who is not validly appointed as a director but who is acting in the position of director. A person may be a "de facto" director if he or she is engaged in the affairs of a company generally, as distinct from performing specific functions as a consultant: *Mistmorn Pty Ltd (in liq) v Yasseen* (1996) 21 ACSR 173; 14 ACLC 1387 per Davies J at 1395. In *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565 at 570; 16 ACLC 1555, Madgwick J observed that that whether a person acts as a director:

> “will often be a question of degree, and requires a consideration of the duties performed by that person in the context of the operations and circumstances of the particular company concerned.”

His Honour also observed (at 569) that, in order to establish that a person was "acting in the position of a director" so as to fall within the definition of "director" in the former s 60 of the *Corporations Law*, it would be necessary to show that he or she "exercises what might be called the actual (and statutorily extended) top level of management functions". His Honour noted (at 570) that a conclusion that a person acted in the position of a director could well be justified, if he or she acted in relation to matters of great importance for a small company, other than as an arm's length expert engaged for a limited purpose.

28 In *Natcomp Technology Australia Pty Ltd v Graiche* [2001] NSWCA 120; (2001) 19 ACLC 1117, Stein JA (with whom Spigelman CJ and Heydon JA agreed) applied the approach in *Deputy Commissioner of Taxation v Austin* above and noted (at [13]) that issues relevant to whether a person acted as a de facto director would include how outsiders who dealt with the company would have reasonably perceived that person and whether that person held himself or herself out as director. In *International Cat Manufacturing Pty Ltd (in*

liq) v Rodrick [2013] QSC 91 at [189], McMurdo J in turn identified several factors, on the facts of that case, relevant to whether the defendant had become a de facto director of the relevant company.

29 The liquidator relies on the observations of the Full Court of the Federal Court of Australia as to the concept of a "de facto director" in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 at [64]–[76]. The Full Court there observed (at [66]) that whether the roles and functions performed by a person are such as to constitute that person a director for the purposes of the *Corporations Act* will often be a question of degree having regard to the "nature of the functions or powers which are exercised and the extent of their exercise"; the relationship of a person with a company may evolve over time into that of a de facto director (at [67]); the question is one of substance and not simply how the person has been described in or by the company (at [68]); and whether a person is a director will turn on the nature and extent of the functions he or she performs (both in and beyond the engagement) and on the constraints imposed on him or her (at [68]). The Full Court also observed that the fact that a company has an active director apart from the alleged de facto director does not preclude a finding that that person was a de facto director (at [74]) and that perceptions by others that the person was a director can have evidentiary significance, particularly if those perceptions were "independently formed, reasonable in the circumstances and support the appearance that the person was acting 'under colour of office'" (at [75]).

30 In closing submissions, Ms Swan points out, and I accept, that the *Corporations Act* distinguishes between the position of an "officer", which includes persons who make or participate in making decisions that affect the whole or a substantial part of the business of a corporation, or who have the capacity to affect significantly the corporation's financial standing, and the position of a "director", including a de facto director. Even if Ms Swan was involved in making decisions that affect the whole or a substantial part of Swan Services' or the Companies' business, or decisions which had the capacity to affect Swan Services' or the Companies' financial standing, it does not follow that she was a de facto director, rather than a person falling within the

extended category of “officer”, and liability for insolvent trading is not imposed upon company officers as distinct from company directors.

31 Ms Swan also submits that care should be exercised before characterising a member of a director’s family, who provides assistance in a period of crisis, as a de facto director. There is some support for that proposition in the observations of Madgwick J in *Deputy Commissioner of Taxation v Austin* above. However, I can see little reason to treat a family member differently from any other person who becomes involved in a company’s management, whether in a position of crisis or otherwise, in determining whether he or she should properly be characterised as a de facto director of the company. Even if he or she has, for praiseworthy reasons, chosen to become involved in making high level management decisions, consistent with his or her characterisation as a de facto director, that seems to me to provide little reason not to treat him or her as subject to the obligations imposed upon a director in respect of such decisions. To that extent, I would differ from the observations of Madgwick J in *Deputy Commissioner of Taxation v Austin* above, although those observations do not seem to me to be necessary to his Honour’s decision and that question is also not determinative in this case.

32 Ms Swan also submitted, in closing submissions, that a secured creditor may, by reason of its negotiating position, make demands or requests of a debtor company and the company’s compliance with those demands or requests does not establish that a secured creditor had become a de facto or shadow director: *Emanuel Management Pty Ltd v Foster’s Brewing Group Ltd* [2003] QSC 205; (2003) 178 FLR 1; *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109; (2011) 81 NSWLR 47 at [215]. While I accept that that proposition is plainly established by the case law, it seems to me of limited assistance in this case, which is not one where Ms Swan was, for example, requiring Swan Services or the Companies, acting by their officers, to take particular steps as a condition of her continuing financial support, but instead one where Ms Swan was, to a significant extent, attending to matters herself. It seems to me that a secured creditor who himself or herself acts on a company’s behalf, in appropriately significant matters, may more readily be characterised as a de facto director than a secured creditor which set

requirements which a company may have to meet as a condition of continuing financial support. Whether Ms Swan is in fact a de facto director must depend upon a detailed analysis of the actions which she took, as set out in the affidavit evidence and outline of facts below.

The evidence as to Ms Swan's role within the Swan Group

33 I will now refer to the evidence which set out Ms Swan's role within the Swan Group, and also to evidence as to Mr Swan's role which provides important context for Ms Swan's role. To some extent, the numerous emails from Ms Swan referred to below create a misleading impression of the level of her activity, by comparison with Mr Swan, since she was a regular and he a more limited user of email.

34 Mr Elkerton's second affidavit referred to numerous communications involving Ms Swan and her various roles with Swan Services, extending over the period from 1999, shortly after she married Mr Swan in November 1998, through to 2013. Ms Swan objected to the tender of numerous documents relating to the earlier period, which I held were relevant, so far as Ms Swan's role with Swan Services in the earlier period could create a proper basis for findings as to her role in the later period. It seems to me that those documents establish that Ms Swan plainly had the skills, arising from her professional qualifications as a legal practitioner, and the capacity to provide significant assistance to Swan Services and the Companies in periods of difficulty, and had done so in earlier years, and also had ambitions to take a wider role with Swan Services and the Companies beyond the role that she had in fact been permitted to undertake. Ms Swan ultimately acknowledged as much, at least in her cross-examination, although she had been less forthcoming as to that question in her affidavit evidence. Beyond that, it seemed to me that there was ultimately little utility in examining Ms Swan's role in earlier years, in order to determine her role in the relevant period from November 2012, since it was plain that Ms Swan's role had changed significantly, from time to time, over the very lengthy period in which she had involvement with Swan Services. I will nonetheless address the evidence of Ms Swan's role over the lengthy period that was addressed in the evidence.

35 Ms Swan commenced working with Swan Administration Trust as General Manager in January 1999 (JS1 [6]; JS3 [19]). There is evidence that, at various times, Ms Swan was content to be understood to have a significant role within the Swan Group. A curriculum vitae of Ms Swan, prepared about 2000, refers to her having been General Manager (Administration) and Acting CEO for Swan Services from July 1998 and to having been responsible, not only for industrial relations and employment matters, and various other specific responsibilities, but also, as Acting CEO, for introduction of cultural change management, restructuring the senior management team, setting strategies and liaising with clients (Ex CC13, 780). At the same time, it must be recognised that a curriculum vitae of an executive will not always be the most objective or reliable record of the level of his or her responsibilities and that the nature of Ms Swan's role, pre-2000, is in any event of limited relevance to determining her role during the relevant period. When further tax difficulties arose in respect of the Swan Group in 2002, Mr Swan responded to payment demands by appointing Ms Swan as the point of contact for the ATO in relation to the Swan Group's tax debts (Ex CC13, 785–787). Ms Swan later held executive positions with the Swan Group from time to time and worked with Cleaners NSW as General Manager, Legal and Human Resources from 2003 to 2011.

36 There are also several occasions in which Ms Swan described herself as playing a significant role in the Swan Group in correspondence with friends and acquaintances. In an email sent on 13 March 2003 to a friend (Ex CC13, 818–819), Ms Swan wrote that she had "just fired our CEO" and described her role in terms that:

> "We own and manage a contract cleaning company with over 1300 employees … My main responsibilities up until recently were taking care of IR, legals and insurance matters. Now I am also flooded with the financials because the CEO, in a nutshell, stuffed up"

The nature of Ms Swan's role in 2003, whether or not overstated, again says little as to her position in the relevant period.

37 Ms Swan, in 2004, had prepared (or, she suggested in cross-examination, others may have prepared) a draft letter to the ATO (which may or may not have seen sent) describing herself as the General Manager of Swan Group,

setting out matters which had then caused the Swan Group to run into financial difficulty at that time, and referring to steps which she had undertaken to restructure Swan Services at earlier times. That letter also pointed to matters which limited Mr Swan's management capacity and submitted that he had been a director of the company "in name only" when another person was appointed as chief executive officer in May 2001 (Ex CC13, 990ff).

38 Ms Swan had considerable difficulty, in cross-examination, in explaining the submission to the ATO as to Mr Swan's role which had been prepared in her name, seeking to suggest that it may have been prepared by others, including Mr Allsop, and that it was a statement "in mitigation" and may have underplayed certain circumstances (T299). That explanation was not a credible explanation of a statement to the ATO that Mr Swan was a director of Swan Services in name only, if that were not the case. Ms Swan, not surprisingly, also had difficulty in maintaining the position that the statement that Mr Swan was a director of Swan Services in name only was not a lie (T299) while at the same time not accepting that it was an accurate description of the position. Ms Swan's evidence in cross-examination was that Mr Swan was running the Swan Group, in respect of matters other than payments to the ATO (T301), but that was not, of course, what had been said to the ATO. Ms Swan also had difficulty in giving a fair answer to the question whether the Swan Group's difficulties with the ATO in 2003 amounted to a "crisis", having initially characterised the position as no more than a "hiccup", before ultimately accepting that it was a "crisis", and then seeking to reconcile the two answers by suggesting that "in hindsight it was a hiccup; at the time it was a crisis" (T302).

39 In April 2004, Ms Swan sent an email to Mr Swan's son from his earlier marriage, Ben Swan (Ex CC13, 929–930) which stated that:

> "Swan's precarious financial circumstance were not caused by me. I have spent most of the past six and a half years, except for 2002 when I was selling the Hotel licence, trying to fix them. Unfortunately, in 2001 I was distracted due to the demise of HIH Ltd. I had set up an arrangement with the ATO that John failed to follow and he failed to advise me of this. I was only made aware of this on 18 February 2003 …
>
> You set out to put a proposal to Bob [Swan] for Swan where I was not included and was not even considered, despite the reliance that Swan has on me for

> both financial and administrative input and had the audacity to infer that I was in a less superior position to Bob [Swan] in the company and then when finding this out, you chose to explain it away as if it meant nothing …"

40 The liquidator also relies on emails sent from Ms Swan to members of Swan Group's management, including one in March 2005 (again many years prior to the relevant period) where Ms Swan sought operational information in respect of Swan Services. For example, Ms Swan sent an email to Mr Itaoui, then the General Manager, Business Development, in March 2005 (Ex CC13, 1094) which stated:

> "What is happening with our contracts? What jobs have we started? What is required from us pertaining security? When do we start security contracts? We need to be informed and I know nothing."

41 In 2008, still several years before the relevant period, Ms Swan appears to have sought to review correspondence between companies in the Swan Group and third parties, before it was sent (Ex CC13, 1199). In February 2009, Ms Swan wrote to a friend (Ex CC13, 1221) stating that:

> "… Now I just run a big business with 3000 employees and it gives me headaches (like managing children). That with four children means that I do not have much time for anything else. It could be worse. I spoke to a friend of mine in South Africa whose business employs 100,000 employees.
>
> My husband is 62 and has a huge yacht (which he is sailing now). It is a good thing as it means that he doesn't interfere too much …"

That email, if taken on its face, would suggest Ms Swan had a substantial role and Mr Swan a minimal role in Swan Services and the Companies. That characterisation is plainly not consistent with the bulk of the evidence and I read that email as an overstatement of Ms Swan's role.

42 Ms Swan and an Operations Manager assumed management of a contract with Colonial First State Properties ("Colonial"), which was Swan Services' largest contract, in 2011 as a result of dissatisfaction by Colonial with Mr Itaoui's performance (RS1 [36]–[37]). An email in February 2011 from Ms Swan to Mr Itaoui and others (Ex CC13, 1362) stated that:

> "I am involved as a consequence of being responsible for HR, being CEO, being the company's lawyer, being Bob's wife and being locus in parentis to Joe. Thanks Alan for the update."

43 Ms Swan's aspirations to a wider leadership role in the Swan Group were also evident in her dealings with Ms Brewer and other members of Swan Group's

management involving Ms Brewer in 2011. In September 2011, a first workshop took place involving Ms Brewer and the Swan leadership group (Brewer 18.7.16 [29]; Ex CC13, 1386). Ms Swan set out the nature of her role in a document headed "Role Clarification Questionnaire" provided to Ms Brewer on 29 September 2011, which described her position as "CEO" but also recorded that her supervisor was the managing director, presumably Mr Swan. Little weight should be given to the title "CEO" which seems to have been allocated to Ms Swan in a somewhat contrived attempt to persuade Colonial that she was qualified for a supervisory role in respect of the contract with it, after Colonial fell out with Mr Itaoui and requested his replacement in that role. That document in turn recorded that Ms Swan's responsibilities were (Ex CC13, 1394):

> "Managing all employment matters, all legal matters, major client matters eg Colonial, compliance, OHS, workers compensation and contract reviews."

That document stated that Ms Swan was fully responsible for "legal, employment and compliance", partially responsible for "contract reviews, OHS, workers compensation" and noted that (Ex CC13, 1396):

> "There is a clash between [Mr Swan] and me with regard to the importance of administration/compliance versus operations"

That document stated that she took on a role as account manager of Colonial when the Swan Group was "not performing" and that the contract was now successful. Ms Swan also recorded (Ex CC13, 1394ff) that she sought clarification as to the "CEO" role and was unclear as to what others expected of her in that role and noted that she would like others to recognise, in respect of the work that she did:

> "That it is important. Not only do they underestimate its value, but they undermine it and my staff."

44 That document does not seem to me to provide any substantial support for a contention that Ms Swan in fact made significant strategic or corporate decisions, of a kind that would be consistent with a director's role, and emphasises the extent to which others in the Swan Group did not accept Ms Swan's aspirations as to her role. Ms Brewer accepted in cross-examination that at the time she received relevant role questionnaires, including that of Mr Swan and that of Ms Swan, she understood that Mr Swan considered that he

was running the Company and that all the senior people were reporting to him, although she also pointed to Ms Swan having sought clarification as to the scope of the "CEO" role which she (I interpolate, nominally) held (T236).

45 Mr Swan's attitude to Ms Swan's ambition is well illustrated by an email sent by Ms Swan to Ms Brewer after a management workshop on 3 November 2011 (Ex CC13, 1418), which recorded that Mr Swan had been "ballistic" at Ms Swan since that meeting, on the basis that he believed Ms Swan had insulted Swan Services' financial controller, Mr Baddour, and that she was "not qualified to be CEO" and "should find another job". Ms Swan, incidentally, there also recorded the view that "because the accounts are so behind, the banks won't lend to [Swan Services]", although they would lend to Ms Swan because she held assets. Ms Brewer suggested, in cross-examination, that that email implied that Ms Swan's motivation "is and was to be CEO and that she was under threat by taking up that position" (T241). I accept that, at the relevant time, Ms Swan wished to be chief executive officer in substance, and not merely in name, but it seems to me clear on the evidence that she failed to achieve that objective. Ms Brewer also recognised, both in a report which she prepared following the workshop on 3 November 2011 (Ex CC13, 1423) and in her cross-examination that the Swan Group's senior leadership team, and in particular Mr Itaoui and Mr Swan, were not supportive of Ms Swan performing the role of chief executive officer, and none of them thought that Ms Swan should be calling herself "CEO", because they did not feel she was capable of performing that role and resented her seeking to give instructions to them (T242).

46 In a later email dated 6 November 2011 to Ms Brewer (Ex CC13, 1425–1426), Ms Swan stated that:

> "Prior to the global financial crisis, I insisted on being debt free and stripping ourselves of unnecessary staff members. We were therefore in a perfect position, strategically, when this happened. Bob has a short memory and forgets these strategic decisions made by me. I have a lot vested in the company too."

That email also indicates Ms Swan's aspirations to exert a greater degree of influence over Swan Services, in stating that Mr Swan had appointed her as CEO for "succession planning" reasons and because it seemed the "natural

thing to do" and that future turnover of the Swan Group "can rise without much effort, if [Mr Swan] allows [Ms Swan] to take some control". Again, it seems to me that this email indicates what Ms Swan wished to have happen, rather than what had happened, and itself recognises that Mr Swan at that point was not allowing Ms Swan to exercise the degree of control that she wished to.

47 Ms Swan had an argument with the Swan Group's then chief executive officer, Mr Itaoui, in September 2012 in which she claimed she was able to call up her loan to Swan Services and "take over" if Mr Swan did not repay her; suggested that she had Mr Swan's support and that he had seen "the mess" that Mr Itaoui had created; and that she would be a "lot more in [Mr Itaoui's] face" when she returned from a trip to South Africa which she was about to take (JS3 [171]). Mr Itaoui resigned by letter dated 17 September 2012 following this argument (Ex CC13, 1490). By email dated 18 September 2012 to Mr Itaoui (Ex CC13, 1492), presumably before knowing of Mr Itaoui's resignation, Ms Swan advised him that:

> "Finally, if you ever question my authority or right of ownership of Swan or if you ever swear at me again, I will have no hesitation but to ask you to leave.
>
> From now on, despite what you think, I will be getting involved in the management of operations, tenders and other matters and you will be held accountable. We will set KPI's for you and if you fail to meet them, you will be addressed on this".

48 In October 2012, a suggestion that Mr Swan would be managing director and Ms Swan would be chief executive officer of the Company, at the same level as Mr Swan, was reflected in an organisational chart prepared by Mr Petrie, reflecting Ms Swan's wishes (Ex CC15, T399). Ms Swan also accepted in cross-examination that, at that time, she was "pushing heavily" to seek to assert her position in the Swan Group, as an equal with her husband, where she would jointly make all important decisions (T400). Ms Swan did not, however, accept that she achieved that position or that that had occurred from December 2012 (T401). Ms Swan also gives evidence of having been busy, in the period from October 2012 until December 2012, "putting out spot fires" after Mr Itaoui's resignation, but her evidence is that that was an "interim ad hoc role until new managers were appointed" by Mr Swan (JS3 [182]). That evidence is not wholly consistent with her evidence (to which I refer below) of her only

having been asked to return to work, at least on a full-time basis, in November 2012. However, I will also refer below to the evidence that other persons, Messrs Spiller and Webb, not Ms Swan, took up the senior management roles in the Swan Group at this time, with Mr Spiller performing a role broadly equivalent to Mr Itaoui's role, and Mr Webb being responsible for operational matters.

49 In late November 2012, significant unreported tax liabilities owed by the Swan Group to the ATO were drawn to the attention of Mr Swan and Ms Swan, by its financial controller, Mr Baddour, and it became apparent in early December 2012 that those liabilities were as much as $10 million. I will refer to these matters in dealing with the issues as to solvency below, but they provide important background to Ms Swan's role from November 2012 to which I now turn. Ms Swan's evidence is that, after these tax issues were identified in November 2012, Mr Swan requested that she return to Swan Services on a full time basis and she required that she be paid a salary in order to do so (JS3 [183]). Ms Swan also engaged Mr Allsop, and Mr Allsop engaged Mr Wickenden, to advise her in respect of these issues. She had an obvious interest in obtaining such advice as a substantial creditor of the Swan Group.

50 By email dated 30 November 2012 (Ex CC13, 1530), Ms Swan advised Mr Allsop that:

> "A lot is happening and I am having to do some high level managing. I have again been let down by [Mr Swan] …"

51 By email dated 2 December 2012 (Ex CC13, 1539), Ms Swan advised Mr Webb, with a copy to Mr Spiller that:

> "[Professor] Ann Brewer who is assisting me with the restructuring of the business would like to have a meeting with you, me and Jason [Spiller] on Saturday afternoon … ."

52 Ms Swan was recorded as becoming an employee of the Swan Group from 3 December 2012 in payment records (Ex CC13, 1542). Mr Baddour resigned by email dated 3 December 2012 (Ex CC13, 1543) addressed to both Mr Swan and Ms Swan, although he subsequently continued work beyond that date. By email dated 4 December 2012, Ms Swan responded to Mr Baddour's email

resignation (Ex CC13, 1544) in a manner that again suggested that she was taking responsibility for managing events, as follows:

> "Tony we need to focus on what is ahead. We can talk about this when it is done. We don't have time to nit-pick and figure out what went wrong where. It is plain. Unprofitable contracts, low margins, high overheads. Now we change all that, negotiate with clients, cut overheads, reduce in size and we will survive. No time to weep or bleed."

53 By letter dated 5 December 2012 (Ex CC13, 1554) from HLB Mann Judd to Mr Allsop, that firm recorded its engagement for "tax consulting, accounting and business advice" in relation to the management and payment of the Swan Group's outstanding tax and business liabilities. The liquidator seeks to rely on that matter as indicating that the retainer by Ms Swan of Mr Wickenden was undertaken on behalf of Swan Services and the Companies. I do not draw that inference, and it seems to me that this was no more than an erroneous reference to an investigation of Swan Services' and the Companies' outstanding tax and business liabilities, which was plainly relevant to Ms Swan as a substantial creditor of Swan Services. That matter is made clear by the detailed description of the scope of the engagement, as follows (Ex CC13, 1555):

> "● To undertake meetings and telephone calls to discuss and advise [Ms Swan] on the management and payment of [Swan Group's] outstanding tax and business liabilities.
>
> ● To review and advise [Ms Swan] on the Swan Group's current and projected financial positions.
>
> ● To assist [Ms Swan] in interpreting the Swan Group's financial accounts and cashflow projections showing its current and projected financial positions.
>
> ● If necessary, to enter into discussions and negotiations with the [ATO] on behalf of [Ms Swan] concerning arrangements for the payment of Swan Group's outstanding tax liabilities. …"

54 At a meeting with Ms Swan and Mr Allsop on 6 December 2012, Mr Wickenden was advised (Ex CC13, 1566) that:

> "[Ms Swan] has never been a director of any of these companies but has been an employee and is presently CEO of Swan Services Pty – discussed risk of being a deemed director."

Ms Swan's evidence is that Mr Wickenden referred to the risk that "they will try and have a go at you as a deemed director" at that meeting (JS3 [193]). That conversation plainly contemplated the risk of insolvency and the liquidation of

Swan Services, since (putting aside any question of directors' duties) that is the primary circumstance in which a characterisation as "deemed" director or de facto director would be relevant. Ms Swan also sets out, at some length, the description of her role which she provided to Mr Wickenden, in that conversation, in explaining why she says she was not a director of Swan Services. Mr Allsop's evidence (Allsop 10.6.15 [6]) is that the possibility that Ms Swan might be treated as a "deemed" or de facto director had been raised at that meeting, by reference to her title of chief executive officer, and (in evidence admitted under s 136 of the *Evidence Act* 1995 (NSW) as proof of conversation and not proof of fact) that she had emphasised that Mr Swan ran the company and always had the final say on everything, and that Mr Itaoui and Mr Baddour reported to Mr Swan. Shortly after the meeting between Mr Wickenden and Ms Swan on 6 December 2016, Ms Swan ceased to use the title "CEO".

55 On 6 December 2012, Swan Services and several of the Companies authorised Mr Wickenden to act on their behalf in dealing with the ATO in respect of their accounts and financial position, in letters signed by Mr Swan (Ex CC13, 1570–1580). Mr Wickenden's evidence was that he understood he was acting for Ms Swan personally, although in relation to the Swan Group's affairs, prior to receiving the letters of confirmation allowing him to deal with the ATO on behalf of Swan Services and the Companies (T466). In cross-examination, Mr Wickenden accepted that, at a later meeting on 5 March 2013, he understood that Ms Swan had power to make some decisions and was able to give instructions as to what the Swan Group might do (T482). Mr Wickenden also accepted that Ms Swan provided later instructions as to the proposals which should be made to the ATO (T483). However, Mr Wickenden made clear in re-examination that he primarily reported, when agreement was reached with the ATO, to the chief financial officer of the Swan Group, primarily Mr Baddour and subsequently Mr Bell (T484). Mr Swan's evidence in cross-examination was that he authorised Mr Wickenden to deal with the ATO; and he conceded that, because the authorities sent to the ATO "confirmed" Mr Wickenden's authority, he must previously have been given that authority (T525). It seems to me that that is too technical a reading of the term "confirm" in those letters.

56 The liquidator relies on the retainer of Mr Wickenden, and the subsequent authorisation given to him to act on behalf of Swan Services and the Companies, for a submission that Ms Swan thought she had authority to retain solicitors and accountants on behalf of Swan Services and the Companies at this time. I do not accept that submission. It seems to me that Ms Swan retained Mr Wickenden and Mr Allsop for herself, although they were subsequently authorised by Mr Swan to represent Swan Services and the Companies in negotiations with the ATO, and appear to have undertaken other work for Swan Services and the Companies, and the costs of their retainer were ultimately paid by the Swan Group. It is significant, in this respect, that Swan Services and the Companies did not themselves seek to enter a retainer agreement with either Mr Allsop or Mr Wickenden. While the arrangement for advisers acting for Ms Swan also to act in the Swan Group's interests may be somewhat informal in its character, it does not seem to me to indicate that Ms Swan was acting as a company officer, still less as a director, in dealing with Mr Allsop or Mr Wickenden.

57 A third workshop, or at least a meeting, took place on 8 December 2012 attended by Ms Brewer, Ms Swan, Mr Spiller and Mr Webb (Brewer 18.7.16 [73]–[75]; Ex CC13, 1587). There was a difference between Ms Swan and Ms Brewer as to whether that meeting was a wider management workshop, or was a narrower assessment by Ms Brewer of their suitability for senior management roles (T395). That difference does not need to be resolved in order to determine these proceedings.

58 The liquidator also relies rely on an "organogram" prepared by Ms Brewer on about 8 December 2012 (Ex CC13, 1586). That document shows the CEO and managing director of Swan Group at the same level and a general manager reporting to the CEO. There were plainly difficulties with that document, so far as it was apparently produced for the 8 December 2012 meeting with Mr Spiller and Mr Webb to discuss their proposed roles as general manager and chief operating officer in Swan Group, but did not accurately identify those roles, or the role of chief financial officer or financial controller and also contained other errors (including as to the name of a major client) that suggested, at least, a lack of engagement by Swan Services with it (T257–258). It seems to me that,

at its highest, that document goes no further than to record Ms Brewer's understanding of an ambition that Ms Swan plainly held, or had held, to elevate her role as nominally "CEO" of Swan Services to the point at which she had an equal role in Swan Services with Mr Swan. However, the evidence to which I will refer indicates that Ms Swan never achieved that objective.

59 There is some, although limited, evidence that third parties understood Ms Swan to have a significant role within the Swan Group. An email dated 7 December 2012 from SACL to Ms Swan (Ex CC13, 1593) stated that:

> "We also understand that the entire Swan organisation, not just the Swan business at Sydney Airport, is going through a period of significant change. We appreciate you are busy with the whole of the business …"

60 Ms Swan's evidence is that, on 19 December 2012, she and Mr Swan had a reconciliation and Ms Swan said that Mr Swan would have to speak to her advisers until the loan was repaid, and they would "need to have complete access to the accounts department and no more lies", and Mr Swan promised to speak to Ms Swan's advisers and to provide such access (JS3 [205]). The liquidator also relies on this matter to submit that Ms Swan exercised ultimate control of the Swan Group and I will address that submission below.

61 By an email dated 9 January 2013, Ms Swan wrote to Mr Allsop in a manner which again suggested a significant involvement with management issues (Ex CC13, 1730) as follows:

> "I have been in back-to-back management meetings with the staff and putting in place structural changes, seeking increases, meeting clients etc so have been fairly under the pump with these matters. Tony [Baddour] has resigned. I want to take a statement from him too. Also do you have a good solid financial guy who wants to earn say $150k and is possibly a cost accountant that you know to employ replace him?"

62 It appears that Ms Swan took at least some role in directing Mr Baddour's work over the relevant period. An email dated 10 January 2013 (Ex CC13, 1732) from Mr Baddour recorded that:

> "Judy and Bob have assigned a number of key projects to me in the past week which require my urgent attention."

63 Ms Swan was developing a proposal from late January 2013 that, had it been agreed, would have led at least Mr Swan to take a reduced role in Swan Group's management. In her second affidavit, Ms Swan refers (JS3 [214]) to a

meeting between herself, Mr Allsop and Mr Wickenden in early 2013, which led to a proposal, which Ms Swan attributes to Mr Allsop, that there should be a board of directors for the Swan Group. Ms Swan then suggested that Mr Allsop and Mr Wickenden would need to raise that matter with Mr Swan, who would not listen to her in respect of it. Ms Swan, in cross-examination, alternatively attributed the suggestion for the development of a board, and that Mr Swan would be chairman, to Ms Brewer (T395). Whether or not Mr Allsop or Ms Brewer was the origin of that suggestion, it seems to me that Ms Swan was promoting it at least by the time of her dealings with Mr Allsop, Mr Wickenden and Ms Brewer as to these matters in early 2013.

64 An email dated 24 January 2013 from Ms Swan to Mr Allsop and Mr Wickenden (Ex CC13, 1850), headed "Proposal for Swan Services", stated that:

> "I refer to our meeting today and confirm that it was agreed that: …
>
> 2. Meet with Bob to present him with a letter setting out the proposed management structure of the business**. Date 29/1/2013 Richard and Neil**
>
> 3. The new management proposal makes Jason Spiller as the manager of the business with Jon Webb as the head of operations. **Immediate**
>
> 4. Judy stands aside and focuses on risk, employment, training, systems, special projects or requests by Jason and Jon and communication. **Immediate**"
>
> 5. Proposal Bob stands aside and becomes Chairman of the Board …"

65 The liquidator submits that the proposal at the meeting on 24 January 2013 that Mr Swan and Ms Swan stand aside was not implemented, so far as Ms Swan was concerned, and she continued in the same capacity, in exercising control and oversight of the Swan Group, from 24 January 2013. I do not accept that submission, as will emerge below.

66 By email dated 25 January 2013 from Ms Swan to Mr Spiller, Mr Webb and Ms Brewer (Ex CC13, 1864) relating to "Interviews for CFO", Ms Swan stated that:

> "Neil Wickenden and Richard Allsop are assisting me with structural matters and other matters as discussed. Neil Wickenden wants us to interview the new recruits for the CFO position at his office in Kent Street on Wednesday at 6pm."

67 By email dated 25 January 2013 from Mr Allsop to Mr Wickenden, copied to Ms Swan, relating to the "Proposal for Swan Services" (Ex CC13, 1872) he noted that:

> "I confirm that we are to meet Bob Swan at your offices at 9:30am on Tuesday, 29 January 2013.
>
> At that meeting we are to outline to Bob what is proposed and to seek his approval.
>
> I confirm that it is my belief that we must try and ensure that Bob [cooperates] with the proposed review and restructuring of the business … ."

68 The meeting between Mr Allsop, Mr Wickenden and Mr Swan took place on 29 January 2013 (Ex CC13, 1880). Mr Wickenden responded to Ms Swan's email of 24 January 2013 on 30 January 2013, after that meeting with Mr Swan, noting that Mr Swan's role was discussed at the meeting but "any change in the role will probably evolve over time" (Ex CC13, 1881). That statement reflects a lack of immediate agreement by Mr Swan to such a change. Ms Brewer also met with Mr Swan on 29 January 2013 and, by email dated 29 January 2013 to Mr Swan (Ex CC13, 1875), she recorded that:

> "You have agreed to consider stepping back and taking on a different role including being a board member of Swans … ."

69 By email dated 17 February 2013, Mr Spiller advised Ms Brewer (Ex CC13, 1978) that:

> "There remains an undercurrent of tension between [Mr Swan] & [Ms Swan].
>
> This stems from [Ms Swan's] vision of where the business needs to go and [Mr Swan's] insistence that everything can remain the same.
>
> This tension is picked up in the office by the other members of staff and has created an office environment that is divided not so much by loyalties to either [Mr Swan] or [Ms Swan], but fear that if direction is not followed they are afraid of losing their position. This has created confusion and angst amongst the office team. It is my belief this will change once structures are implemented."

70 In mid-February 2013, Ms Swan was involved with the recruitment of Mr Bell. Mr Bell referred (in evidence which was limited under s 136 of the *Evidence Act* to proof of the conversation, not the asserted facts) to Ms Swan's description of Swan Services, at the time of his interview with Swan Services, as follows (Bell 24.3.16 [10]):

> "Swan Services is [Mr Swan's] company and he is the only director and shareholder. I am a secured creditor of the company. I'm just coming back in

> to help out because there are problems with the business. I've done this before when necessary but with having to look after the kids I've stayed away.
>
> We had someone running the business up until September, but there were problems in relation to the cleaning contracts and he left the company. We're also having some problems with tax debts – we have some payment arrangements in place and we need to get the financials updated first to see what we need to get the remaining arrangements in place with the ATO."

71 I accept Mr Bell's evidence as to the substance of what was said to him by Ms Swan at that time. That evidence is significant in several respects, notwithstanding the limited basis on which it was admitted. First, it emphasises that, at least by February 2013, Ms Swan advised a potential senior employee that she had a more limited role with Swan Services than that to which she had previously aspired. Second, importantly, it allows an inference as to Ms Swan's understanding as to the state of Swan Services and the Companies' then financial records, although not (because of the limiting order) a conclusion as to the underlying fact, so far as Ms Swan acknowledged the need to "update" the financials before remaining arrangements could be finalised with the ATO.

72 Mr Bell also refers to having then met with Mr Spiller and Mr Webb, who were by then the general manager and operations manager of the Swan Group, and to Mr Spiller having referred to the need to get used to the way in which Mr Swan "runs the business and the way that he micro-manages every aspect of the business" and to Mr Spiller or Mr Webb also having referred to the fact that Ms Swan was not in the office much, but that she and Mr Swan sometimes argued when she was present (Bell [23]–[24]). That evidence is also significant, so far as it indicates both Mr Swan's continuing involvement in the management at least of operational aspects of the business and Ms Swan's limited presence in the Swan Group's office.

73 The letter appointing Mr Bell as chief financial officer (Ex CC13, 1993) was signed by Mr Swan and stated that:

> "10. You will carry out this role under the guidance and control of Judy Swan, our Managing Director and General Manager … ."

Mr Newlinds made clear, in the course of Ms Swan's cross-examination, that it was not suggested that that appointment letter indicated that Ms Swan was in fact the managing director and general manager of Swan Services, but only that it provided for Mr Bell to report to three people, one of whom was Ms Swan

(T404–405). That concession was rightly made, since it is plain that Mr Swan remained as managing director and Mr Spiller had been appointed as general manager at this time. Ms Swan accepted in cross-examination that Mr Bell was required to report to her, but only in relation to employee matters, which were within her human resources role (T405). Mr Bell's letter of appointment also provided that only Mr Swan had authority to sign or bind the company in any contractual situation (Ex CC13, 1991). The organisational chart which was later provided to Mr Bell showed Mr Swan as the managing director and chairman, Mr Spiller as general manager and Mr Webb as national operations manager, and described Ms Swan, who was shown as reporting to Mr Spiller, as "head of legal, HR, risk and compliance". That description is inconsistent with a characterisation of Ms Swan as exercising a wider strategic role.

74 A memorandum dated 11 April 2013 prepared by HLB Mann Judd set out recommendations concerning a possible restructure of the Swan Group and was emailed to Ms Swan, Mr Swan and Mr Bell (Ex CC13, 2170). During April 2013, Mr Wickenden and Mr Allsop continued to deal with Ms Swan in relation to potential restructurings of Swan Services and its subsidiaries, including changing the name of the Companies, presumably in anticipation of the possibility that they would be placed in administration or liquidation.

75 I turn now to further affidavit evidence dealing with Ms Swan's role within the Swan Group. In her second affidavit dated 5 June 2015, Ms Swan referred to earlier occasions on which she had assisted Mr Swan and Swan Services in dealing with issues which had arisen in respect of failure to comply with taxation liabilities, initially in 1998, shortly after Mr Swan and Ms Swan had married and again in 2003–2004 (JS3 [20]–[30], [62]–[66]). Ms Swan also sets out, at some length, the extent of her involvement with Swan Group in the years prior to the relevant period. Ms Swan refers, in particular, to her involvement in dealing with employment and industrial relations issues on behalf of the Swan Group. She also refers to the circumstances in which Mr Swan asked her to become involved with the cleaning contract for one of Swan Group's largest clients, Colonial, and gives evidence that (as I noted above) she was allocated the title "Chief Executive Officer" after a representative of Colonial had questioned what the General Manager of Human Resources and

Legal knew about cleaning. Her evidence is that, although she received that title, her role, duties and authority did not change. Ms Swan also leads evidence as to her involvement with SACL in respect of the contract to clean Sydney Airport won by Swan Services. Ms Swan's position in cross-examination was that, while she held the title CEO, she held that role only nominally (T354). Ms Swan's evidence in cross-examination (T376) was also that:

> "I never had the authority to make any directions to any staff members in that company either in a limited sense and on instructions of [Mr Swan], I never had any access to any financial information of the company, I never made strategic decisions for the company. At any time, when I asked for meetings to be held they were never held, so I was never ever treated or never ever called a director, and never ever did actions which I understood a director undertakes, and that is to make decisions on behalf of the company. That was always [Mr Swan's] role and [Mr Swan] did that, firstly, with Fred Itaoui, and when Fred left with Tony Baddour."

76 Ms Swan was not prepared to accept in cross-examination, at least at some points, that she was determined to ease Mr Swan out of the Swan Group or at least to co-manage with him, or that she had been thinking of doing that for some time (T387). I do not accept that aspect of her evidence. At other points in her cross-examination, Ms Swan frankly conceded that there were times when she had wanted to be at the same level in the Swan Group as her husband, although her evidence was that there was never any time that she could have been, because Mr Swan rejected that possibility (T398). I accept that evidence.

77 Mr Swan's evidence, in cross-examination by Mr Braham, was that he looked over the financial side of the Swan Group with its financial controller, Mr Baddour, including information relating to creditors and debtors and also looked after major clients throughout Australia (T494) and that Ms Swan's role was mainly dealing with human resources and insurance matters, including workers compensation and public liability matters. Mr Swan acknowledged that, since late 2012, Ms Swan also had customer responsibilities with major companies, including Colonial, GPT and SACL after those customers had asked for Mr Itaoui to be removed from those contracts (T495–496). Mr Swan's evidence was that he gave Ms Swan the title "chief executive officer" in late 2011 because Swan Services needed to present Ms Swan in an executive role

in respect of those customers. Mr Swan's evidence in cross-examination was also that, in December 2012, Mr Spiller was appointed as general manager, in Mr Itaoui's role, and Mr Webb was appointed to take over operations (T497).

78 Mr Swan denied in cross-examination that he was told by Ms Swan or anyone else that Ms Swan was taking over responsibility for the finances of the Swan Group and his evidence was that he, in December 2012, was making decisions in relation to the Swan Group (T501). Mr Swan also denied that anything was put to him by Mr Allsop or Ms Brewer in January 2013 about his stepping aside from the Swan Group, although his evidence in that respect appears to be inconsistent with the contemporaneous correspondence to which I have referred above (T501). Mr Swan's evidence in cross-examination by Mr Braham was that his role remained the same from February 2013 until May 2013, Ms Swan's role had not changed in March 2013 and that he was going into the office every day, and that she attended about three times a week (T503). Mr Swan denied that he had come to an agreement with Ms Swan that no important financial decision would be made unless her financial advisers agreed to it (T533). Whether or not such an agreement was reached, it does not seem to me that it was implemented.

79 In his affidavit dated 24 March 2016, Mr Bell refers to the circumstances in which he was interviewed for employment by Swan Services, by Ms Swan, in February 2013, and to his subsequent employment with the Swan Group. Mr Bell's evidence is that Mr Swan's approval was required before he paid invoices or staff wages and for entry into any payment arrangement with a contractor or creditor (Bell [31]) and that Mr Swan signed all cheques as sole signatory (Bell [33]). Mr Bell also referred to Mr Swan's invariable practice of checking incoming mail, including mail which was not addressed to him (Swan [35]). Mr Bell observed that Mr Swan primarily focused on issues to do with debtors and creditors, and was less involved with the preparation of updated financial statements or the reconstruction of accounts and did not show any positive interest in the accounts, and was less involved with discussions with the ATO (Bell [36]). While there was substantial focus on dealings with the ATO in this case, it should of course be recognised that operational issues and

debtors and creditors are of obvious importance in the management of a cleaning company.

80 Mr Bell's evidence, which I accept, was that Ms Swan was only in the office for approximately two or three days a week, during the period in which he was employed with Swan Services, and that his interactions with her generally related to human resources or legal issues (Bell [51]). Mr Bell confirmed in cross-examination that Ms Swan did not work on a full-time basis during the period he was working at Swan Services (T444). That is consistent with other evidence of Ms Swan's role in respect of legal and human resources issues within the Swan Group. Mr Bell also refers to dealing with Ms Swan in relation to how the cashflow was progressing and the progress of information requested by Mr Wickenden's firm for the negotiations with the ATO; general discussions on the progress of updating accounting information; and discussions between Mr Swan and Ms Swan regarding her secured loan (Bell [51]). These matters are consistent with Ms Swan's involvement in dealing with the ATO and as a secured creditor. Mr Bell's evidence, which I also accept, is that he cannot recall any instance where anyone referred to Ms Swan as a director of Swan Services, or she gave him a direction or conveyed an approval with respect to a financial matter, other than in respect of human resources issues.

81 Mr Petrie gives evidence of his observations of the work undertaken by Ms Swan on a part-time basis between April and August 2012, and to the fact that he commenced reporting, in part, to Mr Itaoui from July 2012 (Petrie [9]–[10]). He refers to Ms Swan commencing full-time work with Swan Services from September 2012, although that date is earlier than the date on which Ms Swan indicated she returned to full time work. Mr Petrie was given responsibility for review of draft contracts and analysis of current contracts, and for handling contractual and commercial disputes, from October 2012 and he refers to a conversation with Ms Swan in January 2013 as to a suggested increase in the price for a cleaning contract, and to her observation that he would need Mr Swan to approve it since he dealt with pricing. Mr Petrie's evidence is that he observed Mr Swan giving instructions on various matters to senior executives in the Swan Group, and to his understanding that Mr Swan had the final say on

all important decisions in relation to the Company's business and to his observation that others including Ms Swan deferred to Mr Swan who asserted, on several occasions that (Petrie [33]):

> "This is my company. I make the decisions around here."

Mr Petrie also refers (in evidence admitted with a limiting order under s 136 of the *Evidence Act* as proof of the conversation and not the asserted fact) to other occasions on which he approached Ms Swan in relation to pricing or settlement figures in relation to legal matters, and Ms Swan approved the wording but referred him to Mr Swan about pricing on the basis that Mr Swan "makes all the decisions when it comes to money" (Petrie [35]). Mr Petrie's observations (albeit subject to that limiting order) are also consistent with other evidence that Ms Swan had a more limited role in Swan Services than that to which she had at one point aspired, or on occasions had suggested that she held.

82 I should also refer to Ms Brewer's affidavit evidence, which addresses some of the events to which I have referred above. Ms Brewer's evidence at least indicates that Ms Swan had aspirations to assume a greater degree of control over the Swan Group, at least from early September 2011, and concerns that Swan Group had outgrown Mr Swan's management style. It is plain that Ms Swan did have such aspirations and did have such doubts as to Mr Swan's management of the Swan Group. It is also plain that Mr Swan and others within the Swan Group, including Mr Itaoui and Mr Baddour, were not prepared to accept Ms Swan assuming the wider role which she wished for herself. It seems to me that Ms Brewer's evidence is largely relevant to demonstrating Ms Swan's aspirations rather than the role which Ms Swan actually performed, although it seems to me that Ms Brewer did not sufficiently distinguish those different matters in her evidence. In particular, it seems to me that Ms Brewer's evidence establishes that Ms Swan aspired to occupy a chief executive role, consistent with the "CEO" title that had been conferred on her for a period, but I do not accept that Ms Brewer's evidence establishes that she in fact exercised real authority within the Swan Group, which might have been consistent with such a role. Ms Brewer's evidence of the conflicts concerning Ms Swan's role seem to me to demonstrate that Ms Swan in fact failed to exercise real

authority, outside the areas of legal matters within the Swan Group, negotiations with the ATO and personnel matters which Mr Swan and other executives within the Swan Group were prepared to permit her to perform. Mr Braham submits, and I accept, that Ms Brewer's suggestion that the appointment of Mr Spiller and Mr Webb to new positions, in late 2012 and early 2013, was connected with Ms Swan's taking control of the Swan Group is unsupported by any other evidence and is inconsistent with the documentary evidence in respect of their roles. I also cannot accept Ms Brewer's evidence in cross-examination, by which she continued to maintain that the new chief executive officer, to be appointed in late 2012, was Ms Swan rather than Mr Spiller (T262).

The issues raised in submissions

83 In closing written submissions, the liquidator contended, not that Ms Swan was a de facto director to Mr Swan's exclusion, but that Mr Swan and Ms Swan both exercised powers of a director, with Ms Swan exercising those powers in relation to the financial position of the Swan Group, the books and records of the Swan Group and the indebtedness to the ATO. The liquidator points out that the Swan Group and the Companies did not hold formal director's meetings and the question whether Ms Swan is a de facto director must therefore be determined by what she did, and what others within the Swan Group, including particularly Mr Swan did.

84 The liquidator identifies numerous matters on which he relied to submit that Ms Swan held the role of de facto director. I will, for convenience, group several of those matters together and otherwise address them sequentially. I have, of course, also had regard to the cumulative effect of these matters to the extent they were established. I should also note that it seems to me that the liquidator's submissions as to these matters overstated, often to a substantial extent, the effect of the evidence which was identified to support them. Mr Braham reviewed that evidence in closing oral submissions, demonstrating that the particular documents relied on for these submissions often did not support them.

85 The liquidator submits that Ms Swan engaged solicitors and accountants to act for the Swan Group in relation to significant matters affecting it, including its solvency and used the advisers to maintain control of the Swan Group, and relies on Ms Swan's engagement of Mr Allsop and Mr Wickenden in November 2012 and early December 2012 to act in relation to the Swan Group. Ms Swan's position in cross-examination was that Mr Swan, rather than her, instructed Mr Wickenden to do work for Swan Services and the Companies (T367). I have referred above to the circumstances of Mr Allsop's engagement, and I do not accept the characterisation of the engagement of Mr Allsop and Mr Wickenden as having been undertaken on behalf of the Swan Group, as distinct from on behalf of Ms Swan as a secured creditor. As I observed above, that position is not altered by the fact that their work was subsequently extended, on Mr Swan's instructions, to dealing with the ATO.

86 The liquidator submits that Ms Swan provided instructions to the advisers as to dealings with the ATO in respect of the default in the payment of tax and that Ms Swan's work during the relevant period involved managing and overseeing the advisers' work in connection with the outstanding tax liability of the Swan Group and its overall financial affairs. Although Ms Swan retained Mr Wickenden and Mr Allsop to advise her, their involvement in representing Swan Services with the ATO and advising the Swan Group plainly reflected the instructions of Mr Swan. While Ms Swan gave instructions to Mr Wickenden and Mr Allsop as to aspects of dealings with the ATO, I have also noted Mr Wickenden's evidence above that he reported to the financial controller of the Swan Group, Mr Baddour and later Mr Bell, in respect of those matters.

87 The liquidator also relies on the fact that, in the period following December 2012, all material email contact with the advisers was with Ms Swan, rather than Mr Swan. It seems to me that that proposition has limited weight, because the advisers were retained by Ms Swan and were dealing with her in respect of matters involving the ATO and there is evidence that both Mr Wickenden and Mr Bell also dealt directly with Mr Swan, and Mr Wickenden reported to Mr Baddour and Mr Bell. The liquidator also submits that Ms Swan made significant decisions including whether accounts should be audited or whether restructures should occur. Ms Swan expressed views as to those matters, and

was likely to have had some influence in respect of them, given her position as a secured creditor and her legal expertise, but it again did not seem to me that the level of that influence reached the level, alone or with other matters, of her making high level management decisions or acting as de facto director, as distinct from performing executive-level responsibilities subject to Mr Swan's ultimate control or, at least, Mr Swan's ultimate veto over any result that he did not accept.

88 The liquidator submits that Ms Swan led a potential corporate group restructure in connection with her advisers. As I noted above, a memorandum dated 11 April 2013 was prepared by HLB Mann Judd containing recommendations concerning a possible restructure of the Swan Services Group and was emailed to Ms Swan, Mr Swan and Mr Bell (Ex CC13, 2170). During April 2013, Mr Wickenden and Mr Allsop continued to deal with Ms Swan in relation to potential restructurings of Swan Services and its subsidiaries, including changing the name of the Companies, presumably in anticipation of the possibility that they would be placed in administration or liquidation. The liquidator submits that these matters were being addressed by Ms Swan in her capacity as a de facto director of Swan Services and the Companies, and by Mr Wickenden and Mr Allsop as advisers to the Companies. Ms Swan responds that the relevant recommendations were made by Mr Wickenden in a memorandum addressed to both Mr Swan and Ms Swan. It seems to me that the fact that that memorandum was addressed to Ms Swan is neither surprising, nor sufficient to establish that Ms Swan had control of the potential restructure, where Ms Swan was Mr Wickenden's client. It seems to me that these matters were being addressed by Mr Wickenden and Mr Allsop as advisers to Ms Swan, albeit with the authorisation provided on behalf of Swan Services and the Companies to deal with the ATO, and in circumstances that Ms Swan plainly had an interest, both as a lender to Swan Services and as Mr Swan's then wife, in the continued survival of Swan Services and the Companies. It has not been established that Ms Swan in fact led such a restructure, at least in a capacity that involves the necessary level of decision-making on Swan Services and the Companies' behalf.

89 The liquidator also submits that Ms Swan orchestrated, with her advisers, an internal restructure of the Swan Group's business, involving a revaluation of the Swan Group's major contracts and a change in the Swan Group's culture, and that Ms Swan's work during the relevant period involved implementing a "change management process" with Ms Brewer's assistance; restructuring the affairs of the Swan Group at the suggestion of SACL; and preparing a substantial contract submission for SACL signed by Ms Swan (Ex CC13, 1762, 1773). The suggested "change management process" involving Ms Brewer's assistance did not progress to any substantial extent; the dealings with SACL were particular to its requirement for a change in the approach of Swan Services' cleaning staff at the airport, and consistent with Ms Swan's existing responsibilities in respect of personnel and, to some extent, that client. I recognise that the suggested restructuring of the Swan Group, in late December 2012, would have involved the appointment of a new chief executive officer with operational responsibility, but it seems to me that Ms Brewer was not correct in understanding Ms Swan was to take that role other than, possibly, as a matter of her aspiration. The objective evidence makes clear that, at least by the end of 2012 or early 2013, Mr Spiller was appointed to that role. The liquidator submits that Ms Swan's work during the relevant period also involved appointing a national operations manager and general manager, a financial controller and putting in place a "talent management process" (Ex CC13, 1587, 1595, 1614, 1754, 1964). It seems to me that Ms Swan's involvement in relation to the appointment of the general manager and operations manager, Mr Spiller and Mr Webb, and Mr Bell as chief financial officer was consistent with her personnel role and did not involve an ultimate decision-making role. The liquidator also submits that Ms Swan led a potential capital raising in respect of the Swan Group. This submission depends on several dealings between Ms Swan and potential advisers to, or investors in, the Swan Group in early 2013. It does not seem to me that the evidence establishes that these were matters of any real substance.

90 The liquidator submits that Ms Swan managed finalisation of the Swan Group's accounts. He points to further meetings between Ms Swan, Mr Bell, Mr Wickenden and Mr Allsop on 5 March 2013 and 18 March 2013 which are

consistent with her continuing to take an active role in respect of addressing the financial issues facing the Swan Group where those issues were exacerbated by the failure of the Swan Group's computer server containing accounting information (to which I will refer below) in the second week of February 2013. I have had regard to these matters, and the significance of the issues that were addressed to them, but again I am not persuaded that Ms Swan's involvement, at this point, rose beyond the level of executive responsibility for a particular, although important, issue for the Swan Group to that of a de facto director.

91 The liquidator submits that Ms Swan decided to change the names of companies within the Swan Group. The evidence does not establish that Ms Swan was involved in a decision-making role, rather than in giving effect to that change, which would be consistent with her legal role within Swan Services, and Mr Bell's recollection was that the matter was discussed with both Mr Swan and Ms Swan (T437). The liquidator also submits that Ms Swan directed the appointment of voluntary administrators to companies in the Swan Group. However, it appears that Mr Swan made the decision to appoint an administrator, although Ms Swan's demand upon her loan may have accelerated, or at least provided a basis for, that step.

92 The liquidator submits that Ms Swan managed a number of the Swan Group's key clients. I recognise that, for a period, Ms Swan was given responsibility for dealings with, or at least client relationship issues with, Colonial and SACL, which were two of the Swan Group's largest and most important clients, particularly in respect of a cultural change project which SACL was pressing Swan Group to undertake. I recognise that Ms Swan's operational responsibilities in respect of Colonial and SACL provide some limited support for the characterisation of her role as that of de facto director, although they are also consistent with the performance of executive duties within the Swan Group.

93 The liquidator submits that Ms Swan requested and was provided with financial information in relation to the Swan Group, and points to the provision of financial information, including cashflows, to Ms Swan. In fact, Ms Swan and

her advisers seem to have had difficulty in extracting reliable financial information from Swan Services over the relevant period, and it seems to me that the information which was provided to them was consistent with an attempt to accommodate her requirements as a secured creditor, rather than with the exercise of a director's role within Swan Services or the Companies.

94 The liquidator submits that Ms Swan held herself out as, and was held out by Mr Swan as, a person of significant authority in respect of the Swan Group's affairs. I have addressed the occasions on which Ms Swan expressed a broader view of her role above. Mr Braham draws attention to the fact that there is little evidence of dealings with third parties, in which Ms Swan was holding herself out as having any capacity to bind Swan Services or the Companies. There is also a telling occasion (Ex CC13, 1523), during the period when Ms Swan held the title "CEO" when a client was advised that a document could not be signed, because Mr Swan was away until the next day, and the document could only be signed by him, because the Company "only [had] one director".

95 The liquidator submits that Ms Swan gave contrary directions and acted contrary to the directions or wishes of Mr Swan; that she gave directions to Mr Swan; and that she gave directions to senior staff of the Swan Group. There is evidence that Ms Swan did challenge directions given by Mr Swan from time to time, particularly in respect of personnel matters where she had responsibility, and it was also apparent to staff members (as was noted in Mr Spiller's email to Ms Brewer to which I referred above) that she was seeking to challenge Mr Swan's authority. However, these matters do not establish that Ms Swan exercised any position of authority over Mr Swan, still less that Mr Swan acted in accordance with any directions given by Ms Swan. It does not follow from the fact that Ms Swan did not willingly take direction that she exercised the level of responsibility within Swan Services or the Companies that would make her a de facto director. Ms Swan accepts that she gave direction to some staff, although others resisted her direction, and submits that she reported to Mr Swan both informally and formally when required. Ms Swan submits, and I accept, that there are many examples in the documentary evidence of her asking Mr Swan for approval of particular actions during the period. The

evidence also indicates that staff would have understood that Mr Swan had the ultimate control of Swan Services and the Companies, although they were also aware that Ms Swan was seeking to exert some influence over them, and, likely, that she was at times, but without substantial success, seeking to exercise a wider role with them.

96 The liquidator submits that Ms Swan took a controlling leadership role relating to substantial crisis events concerning the Swan Group. The matters to which I have referred above indicate that Ms Swan also played a significant role, from time to time, in dealing with serious issues facing the Swan Group. The liquidator relies on events over an extended period to illustrate that matter, although it seems to me that earlier events are of little relevance to the narrower question whether Ms Swan was a de facto director of Swan Services or the Companies in the relevant period. I recognise that Ms Swan's significant role in dealing with the tax issues that confronted the Swan Group in earlier years and which were identified again from December 2012 provides some support for the characterisation of her role as that of de facto director, although they are also consistent with the performance of executive duties within the Swan Group. The liquidator submits that Ms Swan provided undertakings or assurances on behalf of the Swan Group. The liquidator also points to Ms Swan's decision-making involvement in settling disputes, authorising payments and terminating contracts, but the evidence did not establish that Ms Swan's role in this respect extended beyond the areas of her particular legal and personnel responsibilities. The liquidator also submits that Ms Swan had an intimate knowledge of the Swan Group's operations and a significant understanding of its financial affairs. That would not, in itself or combined with the other matters to which I have referred, support a characterisation of Ms Swan as a de facto director.

97 The liquidator also relied on a folder of emails tendered by Ms Swan, which he submitted showed that Mr Swan's continued role as a director of the Group involved trivial activities. That submission disregarded the substantial bulk of the evidence demonstrating Mr Swan's continued exercise of authority as to significant matters within the Swan Group, which evidence seemed to me to establish that Mr Swan in fact maintained his continued control of the Swan

Group until the point of its failure, and Ms Swan's attempts to take a more significant role were unsuccessful in substantial respects. Ms Swan also points, in closing submissions, to the importance of Mr Swan's role in focusing on cleaning operations and client dealings, and I accept her submission that those matters were of substantial significance in a cleaning business, notwithstanding the other issues which also faced Swan Services and the Companies in the relevant period. I also accept Ms Swan's submission that the evidence establishes that Mr Swan was involved in significant matters throughout the relevant period, including exercising oversight of Mr Spiller, Mr Baddour and other senior staff, determining issues relating to payroll for management and dealing with debtors and contract matters. The extent of Mr Swan's involvement in the continued control of the Swan Group's affairs is evident from independent and credible evidence, including Mr Bell's evidence. I also accept Ms Swan's submission that the case on which the liquidator opened, namely that Ms Swan had displaced Mr Swan during the relevant period, is not established, although that would not necessarily prevent the alternative finding, for which the liquidator ultimately contended, that Mr Swan and Ms Swan exercised joint control of Swan Services and the Companies.

98 In summary, I accept that Ms Swan exercised a significant level of responsibility within Swan Services and the Companies during the relevant period in respect of their dealings with the ATO. She also sought, at times and largely without success, to exercise greater authority in the management of the Swan Group. Although she had, in prior periods, involvement with major clients of Swan Services and the Companies, it seems to me that that involvement was reduced after Mr Spiller and Mr Webb were appointed to more senior managerial roles. It does not seem to me that Ms Swan had significant influence over the operational aspects of Swan Services and the Companies' affairs, or the financial terms of its dealings with clients, which were critical to its activities. It also seems to me that, as Mr Braham pointed out, Ms Swan's attempts to exert influence within Swan Services and the Companies were largely internal to it, and did not involve presenting her to third parties, particularly in the relevant period, as having the ability to reach significant decisions on behalf of Swan Services or the Companies, without reference to

Mr Swan. It seems to me that, throughout the period, Ms Swan in fact had limited ability to make such decisions, and that Mr Swan retained ultimate control of the Swan Group within the language of *Grimaldi v Chameleon Mining NL (No 2)* above, notwithstanding that he permitted Ms Swan (with Mr Wickenden, Mr Allsop and later Mr Bell) to assume a significant level of day-to-day responsibility for dealings with the ATO in respect of the Swan Group's tax issues. I am not satisfied that it has been established that Ms Swan was a de facto director during the relevant period.

99 Ms Swan also submits, in closing submissions, that even if it were found that she was a de facto director of Swan Services for some period, there is no evidence of her taking any steps as a director in relation to the Companies. It seems to me that there was little, if any, evidence that would support any extension of any finding that Ms Swan was acting as a de facto director of Swan Services (which I have not in any event made) to the position in respect of the Companies.

The financial issues facing Swan Services and the Companies in the relevant period

100 Before turning to the questions whether Swan Services and the Companies were presumed insolvent, or were insolvent in fact, in the relevant period, I should refer to the issues which arose in respect of the Swan Group's financial position from November and December 2012 and the steps which were taken to assess, and to some extent, address, those issues.

101 In late 2012, following a tax audit, Cleaners NSW entered an instalment plan to pay off tax obligations of $2.751m to the ATO (Elkerton 1 [126(a)]). Cleaners NSW defaulted on payment due under that plan when it was due in the next month and negotiated a lower payment, and the payment plan was further revised in November 2012. Mr Swan's evidence is that, in November 2012, Mr Baddour, the Swan Group's financial controller, disclosed to him and Ms Swan that it had an unreported tax liability to the ATO, initially in an extra amount of $2 million (RS1 [47]). Ms Swan's evidence is that she and Mr Swan were advised, by Mr Baddour, in late November 2012, that the Swan Group was behind in group tax by approximately $2–$3 million and were then advised by Mr Baddour, in early December 2012, that Swan Services owed approximately

$1.9 million to the ATO and that the Companies owed approximately $8 million to the ATO for amounts of PAYG deductions not paid, although Mr Baddour suggested that those Companies could enter into arrangements with the ATO to pay off those amounts.

102 Ms Swan then retained Mr Allsop and Mr Wickenden, to act for her in respect of those matters (JS1 [33]) and she gives evidence of further communications with Mr Wickenden and representatives of his firm in respect of the Swan Group's financial position in the first part of 2013. I have referred to several of those communications in dealing with the evidence in relation to Ms Swan's role within the Swan Group above, and now expand on the chronology of those dealings.

103 Mr Allsop attended a meeting with Ms Swan, Mr Swan and Mr Baddour on 3 December 2012 (Allsop 30.1.14 [3], 10.6.15 [2]). By email dated 3 December 2012, Mr Allsop advised Ms Swan that, even on the view expressed by Mr Swan and Mr Baddour that Swan Services could pay liabilities owed by it in the "near future", the Companies could not then pay their liabilities to the ATO without a payment arrangement (Ex CC13, 1549).

104 Mr Allsop described his retainer in an email dated 4 December 2012 to Mr Wickenden, and it is helpful to quote from that document at some length (Ex CC13, 1548):

> "I have been retained by [Ms Swan] in relation to financial difficulties being experienced by Swan Services Pty Ltd (SS) and its related entities (Swan Group).
>
> SS is a large commercial cleaning company with revenues of about $8 million per month.
>
> The shares in SS are held by Bob Swan (Bob), [Ms Swan's] husband.
>
> There are other companies in the Swan Group which employ the cleaners.
>
> There is a labour hire company in each State.
>
> [Mr Swan] holds the shares in each of these companies.
>
> [Mr Swan] is the director of each company. …
>
> In 2003 [Ms Swan] entered a loan agreement with SS, pursuant to which she advanced $1.5 million.
>
> [Ms Swan] holds a charge over the assets of SS which was entered on 16 April 2003 and registered on 22 April 2003. …

> [Ms Swan] has worked from time to time in the business …
>
> I am instructed that in about 2011 SS engaged in a significant expansion of its business.
>
> Apparently the management systems have not been sufficient to properly manage this expansion. Apparently in times gone by, it was the practice in the cleaning industry and in SS to put in low tenders to get contracts and then seek variations to make the contracts viable for the cleaning contractor.
>
> In recent years the building owners and managers have refused to agree to the variations.
>
> Significant contracts were taken on by SS in the last year or so which have proved to be unprofitable.
>
> The margins on this sort of business are thin.
>
> Recently, Judy lent a further $500,000 to SS.
>
> Recently, SS has been dealing with unprofitable contracts and is attempting to negotiate variations.
>
> There has been some success with this process but it is still on-going.
>
> Also, significant reductions in management staff have occurred in the past few months, such that there has been a reduction in the wages of the Swan Group of about 10%.
>
> Yesterday, [Ms Swan] was advised that there are significant outstanding liabilities owed by the Swan Group.
>
> Up to date management accounts are currently being prepared.
>
> However, an estimate of the liabilities were given to [Ms Swan] yesterday.
>
> The labour hire companies owe more than $8 million in PAYG payments to the ATO.
>
> SS owes $1.9 million in GST and has outstanding trade creditors of about $3 million.
>
> At the end of December, SS should have $4 million in cash in the bank and $6 million in outstanding current trade debtors.
>
> The view has been expressed by [Mr Swan] and the in-house financial controller that SS can pay the liabilities owed by it in the near future, but the labour hire companies cannot pay the liabilities to the ATO unless they enter an arrangement with the ATO in respect of the outstanding PAYG liabilities.
>
> [Ms Swan] has instructed me to retain an accountant to advise her concerning these issues and I have recommended you.
>
> This will include a review of the business of SS to ascertain whether the business is viable, or can be made viable."

It will be noted that the view expressed in this email as to Swan Services' ability to pay its liabilities depended upon cashflow estimates which were the subject of subsequent review by Mr Wickenden. That email in any event contemplated that Swan Services could pay its liabilities, not at that point, but

in the “near future” and that the Companies’ ability to pay their liabilities to the ATO depended on reaching an arrangement with the ATO, which was reached in respect of some but not all of those Companies.

105 Ms Swan was provided with cashflow information in respect of the Swan Group at least from December 2012. Mr Baddour prepared cashflows on 11 December 2012 (Ex CC13, 1604–1611) and sent them to Mr Wickenden, with a copy to Ms Swan and others. A further meeting took place on 12 December 2012 between Ms Swan, Mr Wickenden, and Mr Allsop (JS3 [195]; Ex CC13, 1622). By a further email dated 13 December 2012, sent to both Mr Swan and Ms Swan (Ex CC13, 1655), Mr Baddour again resigned as financial controller, but again continued to work on. On 18 December 2012, Mr Baddour prepared a further cashflow and sent it to Mr Wickenden (Ex CC13, 1691-1692). On 19 December 2012, Mr Wickenden sent a cashflow forecast to the ATO (Ex CC13, 1696).

106 Mr Allsop, rightly, expressed continuing concerns as to the adequacy of the financial information that was provided to Mr Wickenden, Mr Allsop, and Ms Swan (directly and through them) throughout the relevant period. By email dated 10 January 2013 to Ms Swan, copied to Mr Swan (Ex CC13, 1749), Mr Allsop noted that:

> “Clearly, these draft accounts are incomplete and do not properly set out the financial position of the companies as at 31 October 2012”

107 By an email dated 16 January 2013 to Ms Swan and Mr Wickenden, Mr Allsop again expressed concerns as to draft financial statements which he had been provided by Mr Baddour, noting that they did not deal with GST relating to management fees and that he did not understand the basis for adjustments made in them (Ex CC13, 1790).

108 On 23 January 2013, Swan Services’ external accountant, Mr Foster, also advised Ms Swan that the Swan Group’s financial records were out of date, (Ex CC13, 1847) noting that:

> “[a]ttached is a very high level summary of the financials as at 31 October 2012...
>
> In any event it does appear that there is a substantial liability to the [ATO] which should be reconciled with the [ATO] portal …

> Given that the liability with the ATO is substantial we really need to get the financials up to date so that you and [Mr Swan] can ascertain the overall group['s] financial position."

109 An email dated 24 January 2013 from Mr Baddour to Mr Wickenden and Mr Allsop, copied to Ms Swan, attached a revised cashflow with variations (excluding GPT) (Ex CC13, 1862A–1862B).

110 By email dated 25 January 2013 from Mr Allsop to Mr Wickenden, copied to Ms Swan (Ex CC13, 1872), he summarised matters that were to be raised with Mr Swan at a meeting the next day, to which I have referred above, which included that Mr Wickenden's "preliminary inquiries tend to show that the business is sound" but had been affected by unprofitable contracts and unsatisfactory management and that significant tax liabilities were not identified early enough by the accounting system in place. The apparently optimistic tone of that comment was undermined by a recommendation for a review of the accounting system and records of the Swan Group to enable negotiations to take place with the ATO with certainty about the financial standing of the companies in the Swan Group and the further statement that:

> "Until this review is carried out, the extent of the liabilities to the ATO and the companies in the [G]roup which have liabilities cannot be accurately determined."

Mr Allsop also noted that, while Ms Swan was proposing that a board of directors be appointed, any director "will want to know that the accounts are accurate and the financial position of the companies is sound before consenting to be a director" (Ex CC13, 1873). That observation implied that that matter was then unknown.

111 By email dated 7 February 2013 to Mr Wickenden, copied to Ms Swan (Ex CC13, 1926), Mr Allsop expressed his concern that Mr Baddour kept deferring the date for commencement of Mr Wickenden's review and noted that:

> "It is now two months since we were retained to investigate the financial affairs of the Swan Group, but we still have not received a set of financial statements which seem reliable."

Ms Swan acknowledged in cross-examination that, as at that date, she understood that email to indicate Mr Allsop's view that he and Mr Wickenden had not seen a set of financial statements that seemed reliable in that two month period (T339). Ms Swan also accepted in cross-examination that the

verification of the Swan Group's financial position was not advanced between Mr Allsop's advice of 7 February 2013 and the failure of the server on which key financial information was retained in mid-February 2013 and that, from the point at which the server failed, it was impossible to work out the financial position of Swan Services and the Companies, other than that debtors and creditors could be recreated from separate accounting systems (T340).

112 By email dated 15 February 2013 (Ex CC13, 1969), Mr Wickenden advised Ms Swan, with a copy to Mr Allsop, that

> "Given the lack of currency of the management accounts that [have] been found to date, I am sure you are anxious for us to complete the review and report back to you. At present, I think you would have to be cautious in placing complete reliance on the management accounts and on cashflow projections that follow from them."

Ms Swan accepted in cross-examination that the effect of that email was that, at that date, Mr Wickenden was not prepared to indicate that he had formed any opinion as to the Company's financial health (T341). This position existed before Swan Group's server containing one of its accounting systems failed in mid-February 2013, and was subsequently exacerbated by that failure.

113 At least by February 2013, both the seriousness of the Swan Group's financial position and the inadequacy of its financial records were apparent to Ms Swan's advisers. By email dated 20 February 2013 (Ex CC13, 2008), Mr Wickenden advised Ms Swan that:

> "… I am becoming increasingly concerned about the difficulty of obtaining current financial and accounting information from the Swan Services group. Although the reasons for this are understandable, the fact is that the latest management accounts we have are to 31 October 2012 and we have not been able to commence our review of the accounts since this was planned for 4 February last, two and a half weeks ago. I am sure you are equally concerned.
>
> Given the apparent gravity of the group's financial position, it would be normal to make the production of current financial information a priority. Without this information, it must be increasingly difficult to properly manage the group's business and it is also very difficult for us to deal in an informed way with the Taxation Office on behalf of the group companies. It could also be that one or other of the companies is trading insolvent without the director's knowledge, although we are not reviewing this possibility."

This email is of significance both for the risk of insolvent trading that it identifies and for its confirmation that Ms Swan's advisers did not in fact have responsibility for monitoring the solvency of Swan Services and the

Companies, undermining Mr Swan's and Ms Swan's claims (to which I refer below) that they relied on those advisers in that respect.

114 A meeting took place on 5 March 2013 between Ms Swan, Mr Bell, Mr Baddour, Mr Inglis, Crowe Horwath and HLB Mann Judd (Ex CC13, 2066). Mr Wickenden sent Ms Swan a further cashflow on 10 March 2013 (Ex CC13, 2073–2075).

115 Ms Swan relied, in cross-examination, on a conversation with Mr Wickenden and Mr Allsop at the meeting on 18 March 2013 as supporting the solvency of Swan Services and the Companies' solvency (JS3 [239]). Her evidence was that, in the context of discussion of the grant of the 2013 Charge, a conversation took place in her presence to the effect that:

> Allsop: "… Based on the profit and loss statements and the balance sheet provide[d] by Swan as at 31 October 2012, it would be reasonable to suggest that Swan is solvent, of course providing the figures are real figures and are not inaccurate.
>
> Wickenden: "Yes exactly."
>
> Allsop: "There may be concern with the other companies but Swan Services is a stand-alone company and [Ms Swan's] loan is over Swan services. The real issue is that in the absence of audited financial data, it will be difficult to tell. …"

Ms Swan accepted in cross-examination that, on her account of what was said, that conversation was subject to the proviso that the figures reported in the accounts were not inaccurate (T334). Ms Swan seems to have suggested in cross-examination that everyone was satisfied at that meeting that those figures were accurate and that the relevant debts would be collected, although her answer in that respect was somewhat unclear (T334.24); if that was what she suggested, then that evidence is inconsistent with Mr Wickenden's evidence that I discuss below and with the fact that Mr Wickenden then had no basis either to be satisfied as to the accuracy of the information, still less the collectability of Swan Services' and the Companies' debts. Ms Swan was also not prepared to accept that Mr Allsop or Mr Wickenden had never said to her unequivocally that they considered that Swan Services or the Companies were solvent, and suggested that it was her "impression" that Mr Wickenden thought that Swan Services and the Companies were solvent (T334). If Ms Swan had that impression, it did not have a reasonable basis both because of the limits of

Mr Wickenden's retainer (to which I referred above) and because, as Mr Allsop and Mr Wickenden had made clear, an assessment of solvency depended on accurate financial information which the Swan Group did not, and could not, provide to Ms Swan or her advisers.

116 At the meeting on 18 March 2013, in relation to the circumstances in which monies would be repaid to NAB and then loaned again to Swan Services under the 2013 Loan and 2013 Charge, Mr Allsop observed (Allsop 10.6.6 [7]) that:

> "The management accounts as at 31 October 2012 show Swan Services is solvent, *provided the figures are real*" [emphasis added].

That statement does not provide any real support for a belief in Swan Services' solvency, given the significance of the qualification to it. Mr Allsop confirmed in cross-examination that he had not formed the opinion as at 18 March 2013 that the financial statements that were provided by the Swan Group were accurate and also did not recall having confirmed the Swan Group's solvency at the meeting on 18 March 2013, beyond the statements which were set out in his affidavit (T422). Mr Wickenden's evidence in cross-examination was that he had not formed any view whether the financial information that had been provided to him by the Swan Group was reliable or not; he did not recall having advised either Ms Swan or Mr Allsop that those figures were reliable; it became clear in the course of dealing with Ms Swan and Mr Allsop that they lacked faith in the Swan Group's financial reports, and that those reports were also not up-to-date as at December 2012; and the latest management accounts that had been seen, well into April 2013, were as at October 2012 (T475–476).

117 It seems to me that Mr Wickenden had clearly communicated that the information that had been provided to him was not sufficient to allow him to form a view as to the solvency of the Swan Group, and I do not accept Ms Swan's evidence so far as she seeks to rely on Mr Wickenden's advice as providing any confirmation of solvency. In particular, I do not accept Ms Swan's evidence that Mr Wickenden and Mr Allsop indicated to her that it would be "safe" to relend the money to the Swan Group or that the Swan Group "was solvent and … it was okay to relend the money" (T335). That evidence is itself difficult to reconcile with Ms Swan's evidence that the moneys were redrawn by Mr Swan without her authority, and with her pleading relying on the absence of

such a confirmation from Mr Wickenden. In cross-examination, notwithstanding her acceptance of the qualification to Mr Wickenden's and Mr Allsop's advice, Ms Swan's evidence was that she had been informed on 18 March 2013 by her advisers that "the company would survive" (T345). I do not accept that evidence, which seems to me to be inconsistent with the measured approach taken by Mr Wickenden throughout the period, the limits to his retainer; the inadequacies in the financial information which plainly prevented any reasoned conclusion of that kind; and the repeated advice to Ms Swan as to the risks arising from inaccuracy in the financial information then available.

118 By 19 March 2013, Mr Allsop had discussed his concerns with Ms Swan as to the instructions given that Swan Services could not pay more than it was currently paying to the ATO (Ex CC13, 2093), and Ms Swan advised Mr Allsop that "without the accounts up to speed" the identification of the level at which payments could be made to the ATO "is a stab in the dark" (Ex CC13, 2093; T341).

119 On 28 March 2013, the ATO served a director penalty notice on Mr Swan in relation to Cleaners SA (Ex CC13, 2100), which indicated that penalty would be remitted if Cleaners SA's liability was discharged within 21 days of the issue date of that letter. That notice related to amounts of $180,342 with respect to the period 1 June 2012 to 30 June 2012 and $27,341.52 for the period 1 July 2012 to 31 July 2012 which were said to be unpaid (Ex CC13, 2100). A further director penalty notice also dated 28 March 2013, also in relation to Cleaners SA, related to further amounts totalling approximately $134,000 for the period 1 August 2012 to 31 January 2013 in respect of PAYG instalment amounts due by Cleaners SA.

120 On 5 April 2013, Mr Wickenden advised Ms Swan that, if the payment arrangement between Cleaners SA and the ATO could not be complied with, then consideration would need to be given to the appointment of an administrator to Cleaners SA prior to 18 April 2013 (Ex CC13, 2151). By 6 April 2013, Mr Wickenden had advised Ms Swan that Cleaners SA was in default of its payment arrangement with the ATO and that "strictly speaking, the ATO may demand payment of the balance in full and without delay" (Ex CC13,

2149). By a further email dated 6 April 2013 from Mr Wickenden to Ms Swan and others (Ex CC13, 2153), he advised Ms Swan that:

> "… my comment that we shall have to give consideration to the appointment of an administrator to SA prior to 18 April next was to highlight the time limit. It is not intended as a recommendation and, in fact, I would recommend that everything be done to avoid placing the company – or Swan (Qld) and Swan (VIC) – into administration. However, if this course becomes inevitable I would consult with our Business Recovery and Insolvency lead partner, Barry Taylor".

121 On 22 April 2013, Mr Allsop emailed Mr Wickenden, with a copy to Ms Swan, indicating his understanding that no final opinion about the solvency of the companies in the Swan Group could be given until the accounts were in an acceptable form (Ex CC13, 2192) and Mr Wickenden confirmed that position (Ex CC13, 2194). That view is significant, not only for the fact that no final opinion could be given at that date, but for the fact that that position subsisted at all times during the relevant period prior to that date.

122 I now turn to other affidavit evidence and cross-examination as to the Swan Group's financial position during the relevant period. In his affidavit dated 5 June 2015, Mr Wickenden expresses the view, which he held at various times, that Swan Services would be able to maintain tax payments and pay outgoings and expenses, but with a qualification as to the accuracy of the information contained in and assumptions underlying cashflows prepared by Mr Baddour on behalf of the Swan Group. Mr Wickenden was never in a position to verify that information or those assumptions or to determine that Swan Services and the Companies were solvent, other than on a basis which was limited by that critical assumption, as he and Mr Allsop had made clear in the correspondence to which I referred above.

123 Mr Wickenden acknowledged in cross-examination that he primarily focused on taxation work as an accountant and did not hold himself out as having particular expertise in insolvency (T463–464). Mr Wickenden considered that he could provide assistance in working out the tax liabilities of the Swan Group and dealing with the ATO to see if an instalment arrangement could be reached (T464). Mr Wickenden acknowledged that, in the course of the early meetings, it was made clear to him that there was not only an issue as to the arrears of tax, but also an issue that the Swan Group could not work out how

much tax was owed (T464). Mr Wickenden characterised his firm's retainer, in cross-examination, as being to examine the financial status of Swan Services to which Ms Swan had advanced money and also to assist with resolving Swan Services' tax debt (T472). Mr Wickenden did not accept that one of the matters that he was being asked to look at, when he was engaged, was whether the companies were solvent or whether they could, in the future, pay their debts as and when they fell due; and he also did not accept that his firm analysed cashflow projections, as distinct from reviewing information that had been provided by the chief financial officer of the Swan Group (T473). That evidence, which I accept, undermines Ms Swan's and Mr Swan's reliance on Mr Wickenden's work as providing a reasonable basis for a view as to Swan Services' or the Companies' solvency.

124 Mr Wickenden also confirmed in cross-examination that his firm was not retained to develop cashflow projections or other financial reporting documents but only to assist Ms Swan in interpreting the documents prepared by Swan Services and the Companies (T474–475). Mr Wickenden made clear that his firm's assessment that Swan Services and the Companies were likely to be able to meet their tax payment arrangements was premised on the accuracy of the figures provided by Swan Services and that he had not formed any view as to whether those figures are reliable or not and did not recall advising Ms Swan or Mr Allsop that he had satisfied himself that those figures were reliable (T475). Mr Wickenden also accepted that an issue as to lack of confidence in Swan Services' and the Companies' financial reports emerged in the course of the matter (T476).

Whether Swan Services is presumed insolvent

125 The parties identified the second issue to be determined, after the question whether Ms Swan was a de facto director which I have addressed above, as:

> "At any time during the period 1 November 2012 to 22 May 2013, were the books and records of any of the companies that formed the Group in such a state that the presumption contained in s. 588E(4) is satisfied, and if so:
>
> a during what part of that period; and
>
> b in respect of which of the companies within the Group."

126 The liquidator contends that Swan Services and the Companies are presumed insolvent by operation of s 588E(4) of the *Corporations Act* within the relevant period (SAFPC [94]–[95]). This allegation was based on a claim that Swan Services and the Companies failed to keep financial records which correctly recorded and explained their transactions and financial position and performance as required by s 286(1) of the *Corporations Act* within that period (SFAPC [96]).

127 Section 588E(4) of the *Corporations Act* provides for a presumption of insolvency throughout a period in which a company has failed to keep financial records as required by s 286(1) of the *Corporations Act*, which requires a company to keep financial records that correctly record and explain the company's transactions and financial position and performance and which would enable true and fair financial statements to be prepared and audited. The effect of that section is that a company is presumed insolvent throughout the period in which a failure to comply with s 286 of the *Corporations Act* existed. In order to establish the presumption of insolvency for a particular period, the position must be separately and distinctly proved for that period; and it must be proved either that no documents within the description of "financial records" were kept in that period or that the documents which were kept were "deficient as to content", because they did not correctly record and explain the company's transactions and financial position and performance (for example, because they did not accurately record the matters purportedly recorded) or would not enable true and fair financial reports to be prepared and audited: *Woodgate v Fawcett* [2008] NSWSC 868; (2008) 67 ACSR 611; *Re SSET Constructions Pty Ltd (in liq) – Sims v Khattar* [2010] NSWSC 102; *Fisher v Divine Homes Pty Ltd* [2011] NSWSC 8; (2011) 85 ACSR 512 at [24]. The liquidator accepts that the presumption under s 588E(4) of the *Corporations Act* does not arise merely because of a failure to keep or prepare income tax returns, business activity statements, balance sheets or profit and loss accounts: *Fisher v Divine Homes Pty Ltd* above at [23]. However, the liquidator submits that the financial records maintained by Swan Services and the Companies were deficient to the point that they did not “correctly record

and explain the company's transactions and financial position and performance": *Fisher v Divine Homes Pty Ltd* above at [24].

128 Ms Swan and Mr Swan, in their joint submissions as to solvency, refer to my observation as to the scope of s 588E(4) of the *Corporations Act* in *Campbell Street Theatre Pty Ltd (recs & mgrs apptd) (in liq) v Commercial Mortgage Trade Pty Ltd* [2012] NSWSC 669 at [24]:

> "Section 286 of the *Corporations Act* requires a company to keep written records that correctly record and explain its transactions and financial position and performance and would enable true and fair financial statements to be prepared and audited. Section 588E(4) establishes a presumption of insolvency arising from a failure to keep and retain proper financial records under s 286 of the *Corporations Act*. In order to establish the presumption of insolvency for a particular period, the position must be separately and distinctly proved for that period; and it must be proved either that (1) no documents within the description of "financial records" were kept in that period or that (2) the documents which were kept were "deficient as to content", because they did not correctly record and explain the company's transactions and financial position and performance (for example, because they did not accurately record the matters purportedly recorded) or would not enable true and fair financial reports to be prepared and audited: *Woodgate v Fawcett* [2008] NSWSC 868; (2008) 67 ACSR 611; *Re SSET Construction Pty Ltd (in liq); Sims v Khattar* [2010] NSWSC 102; *Fisher v Divine Homes Pty Ltd* [2011] NSWSC 8; (2011) 85 ACSR 512 at [24]."

129 The liquidator's evidence is that signed copies of financial statements for any year other than 2003 could not be located (Elkerton 1 [43]–[44]) and financial statements had not been finalised beyond 30 June 2008 at the time Mr Elkerton was appointed as administrator (Elkerton 1 [45]). The last management accounts available as at April 2013 had been prepared as at October 2012, so that, throughout the relevant period, any attempt to determine Swan Services' and the Companies' financial position would be based on out-of-date material. The inadequacy of those records is also demonstrated by the discrepancies to which the liquidator points, for example a difference of nearly $8 million between the income disclosed in the 2011 tax return and that recorded in the unsigned financial statements.

130 Mr Lombe also expressed the view that the financial records of Swan Services and the Companies were poorly maintained and they had difficulty producing reliable, timely and accurate financial data. Although that proposition appeared to be in contest in the hearing, it seems to me to be self-evidently correct where the financial records maintained by Swan Services and Companies did

not properly record their taxation obligations, with business activity statements being incomplete and PAYG withholding liabilities being incorrectly reported. It necessarily followed, as the evidence amply demonstrated, that it was not possible to determine the financial position of Swan Services or the Companies from their financial records at any relevant time. While that difficulty was worsened by the failure of the servers on which the InterAcct data system, on which the Swan Group maintained accounting information, was maintained in February 2013, it existed prior to that time. That conclusion is reinforced by the fact that, as I noted above, financial statements for Swan Services and the Companies had not been finalised beyond 30 June 2008. The inadequacy of the financial records of Swan Services and the Companies was plainly also recognised by Ms Swan's advisers at all relevant times, including by Mr Allsop's emails dated 10, 16 and 25 January 2013 and 7 February 2013 to Ms Swan, Mr Foster's email dated 23 January 2013, and Mr Wickenden's email dated 15 February 2013 to which I have referred above.

131 Mr Swan accepted in cross-examination that, as at November 2012, the financial records of Swan Services and the Companies were not up to date and did not correctly record the amounts outstanding to the ATO, and that he and Ms Swan had lost confidence in the Swan Group's financial controller, Mr Baddour, and in its former external accountants, who were also involved in some aspects of preparation of the Swan Group's financial records (T523–524). Mr Swan acknowledged in cross-examination that management accounts were also not up-to-date (T524).

132 Mr Swan and Ms Swan submit that there is no evidence from the liquidator about the books and records in the possession of Swan Services' accountants and the evidence therefore does not prove any deficit in the financial records maintained by Swan Services and the Companies. That submission should be rejected. There is no basis to infer that, throughout the several months where Swan Services, the Companies and Ms Swan and her advisers were unable to identify the true financial position of Swan Services and the Companies, and were facing significant difficulties in dealings with the ATO, creditors and debtors in consequence, the documents that would have allowed them to determine the Swan Group's financial position had been in the possession of

Swan Services' and the Companies' accountants, without any attempt being made to obtain them. Mr Foster's email dated 23 January 2013, to which I referred above, is also inconsistent with that suggestion. Mr Swan and Ms Swan also point to the processes which were adopted to maintain and prepare financial records by Swan Services and the Companies, and to the records (such as bank statements, cheque butts, contracts with customers) that were available to the liquidator on his appointment. It does not seem to me that these matters assist in displacing the presumption of insolvency, where it is plain from the evidence that the availability of those documents to Swan Services and the Companies, prior to the liquidator's appointment, did not in fact allow a proper explanation of Swan Services' or the Companies' financial position or performance, whether to Swan Services or the Companies or Ms Swan and her advisers.

133 The liquidator also points, with substantial force, to the fact that Ms Swan's criticisms (to which I refer below) as to the evidence of the insolvency of Swan Services and the Companies, and to the liquidator's evidence as to when debts were incurred, were premised on the unreliability of the underlying books and records of Swan Services and the Companies, although combined with criticism of the liquidator for not developing more accurate financial information than that which was available to him on his appointment. Whatever the merit of any individual criticisms of the liquidator's efforts to develop such information, which I address below, he would not have needed to undertake that task had Swan Services and the Companies maintained financial records that correctly recorded and explained the companies' transactions and financial position and performance and which would enable true and fair financial statements to be prepared and audited.

134 For these reasons, I have concluded that the presumption in s 588E(4) of the *Corporations Act* applies in respect of each of Swan Services and the Companies throughout the relevant period. It is therefore strictly not necessary to determine whether the insolvency of Swan Services and the Companies is established as a matter of fact, although I will address that question below.

Whether Swan Services and the Companies were insolvent in fact in the relevant period

135 The parties identified the next issue to be determined as:

> "At any time between 1 November 2012 to 22 May 2013, were any or all of the companies that formed the Group insolvent and if so:
>
> a during what part of that period; and
>
> b in respect of which of the companies within the Group."

136 The question whether Swan Services and the Companies was or were insolvent, in fact, at the time the relevant debts were incurred, or became insolvent by incurring those debts, is to be determined by reference to s 95A(1) of the *Corporations Act.* That section has effect that a company is solvent if, and only if, it is able to pay all its debts, as and when they became due and payable. Section 95A(2) of the *Corporations Act* has effect that a person who is not solvent is insolvent. That definition adopts a "cashflow test" of insolvency which turns upon the income sources available to the company and the expenditure obligations that it has to meet, although a balance sheet test can provide context for the application of the cashflow test: *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* [2001] NSWSC 621; (2001) 39 ACSR 305; *Australian Securities and Investments Commission v Plymin (No 1)* [2003] VSC 123; (2003) 46 ACSR 126 at [370]ff , aff'd *Elliott v Australian Securities and Investments Commission* [2004] VSCA 54; (2004) 10 VR 369. Whether a company is able to pay its debts as and when they fall due and payable is a question of fact to be determined objectively and without hindsight in all the circumstances, including the nature of its assets and business, and the court will have regard to commercial realities in that regard: *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* above at [54]; *White Constructions (ACT) Pty Ltd (in liq) v White* [2004] NSWSC 71; (2004) 49 ACSR 220 at [289]; *Lewis (as liquidator of Doran Constructions Pty Ltd) v Doran* [2005] NSWCA 243; (2005) 54 ACSR 410 at [103]; *Bentley Smythe Pty Ltd v Anton Fabrications (NSW) Pty Ltd* [2011] NSWSC 186; (2011) 248 FLR 384 at [48]–[49]. In determining whether a company is solvent, the court has regard to commercial reality in assessing whether, as at the relevant date, a company is able to pay its debts as they become payable: *Lewis (as liquidator of Doran Constructions Pty Ltd) v Doran*

[2004] NSWSC 608; (2004) 208 ALR 385 at [108]–[116] and on appeal [2005] NSWCA 243; (2005) 54 ACSR 410, where Giles JA (with whom Hodgson and McColl JJA agreed) noted (at [109]) that "the key concept is *ability* to pay the company's debts as and when they become due and payable" (emphasis in original).

137 Matters which may support a finding of insolvency include those referred to in *Australian Securities and Investments Commission v Plymin (No 1)* above at [386], where Mandie J identified several indicia of insolvency including: continuing losses; liquidity ratios below one; overdue Commonwealth and State taxes; a poor relationship with the lenders, including any inability to borrow further funds; no access to alternative finance; inability to raise further equity capital; suppliers placing a company on cash on delivery arrangements or otherwise demanding special payments before resuming supply; creditors unpaid outside trading terms; the issuing of postdated cheques; dishonoured cheques; special arrangements with selected creditors; solicitors' letters, summonses, judgments or warrants issued against a company; payments to creditors of rounded sums not reconcilable to specific invoices; and inability to produce timely and accurate financial information to display a company's trading performance and financial position, and make reliable forecasts. In *Lewis, Re Damilock Pty Ltd (in liq) v VI SA Australia Pty Ltd* [2008] FCA 1801; (2008) 68 ACSR 493, Mansfield J observed (at [16]) that:

> "In any particular case, one or more of those factors, or other factors, may have particular significance and one or more of them may not exist. The absence of one or more of those factors does not, of itself, establish solvency."

In *Morris v Danoz Directions Pty Ltd (in liq) (No 2)* [2010] FCA 836 at [13], Perram J described those indicia as 'common sense indicators' of a company's inability to pay its debts as and when they fall due.

138 I summarised the relevant test in *Re Ashington Bayswater Pty Ltd (in liq)* [2013] NSWSC 1008 at [3]–[4] as follows:

> "Section 95A(1) of the *Corporations Act* has effect that, relevantly, the Company was solvent if and only if it was able to pay all its debts, as and when they became due and payable. Section 95A(2) has effect that a person who is not solvent is insolvent. That definition adopts a "cashflow test" of insolvency which turns upon the income sources available to the Company and the expenditure obligations that it has to meet, rather than a balance sheet

> test which focuses on the value of the Company's assets and liabilities reflected in its books, although a balance sheet test can provide context for the application of the cashflow test: *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* [2001] NSWSC 621; (2001) 53 NSWLR 213; (2001) 39 ACSR 305; *Australian Securities and Investments Commission v Plymin (No 1)* [2003] VSC 123; (2003) 46 ACSR 126; (2003) 21 ACLC 700 at [370]ff.
>
> Whether the Company was able to pay its debts as and when they fall due and payable is a question of fact to be determined objectively and without hindsight in all the circumstances, including the nature of its assets and business, and the court will have regard to commercial realities in that regard: *Southern Cross Interiors Pty Ltd (in liq) v Deputy Commissioner of Taxation* above at [54]; *Lewis v Doran* [2005] NSWCA 243; (2005) 54 ACSR 410 at [103]; *Bentley Smythe Pty Ltd v Anton Fabrications (NSW) Pty Ltd* [2011] NSWSC 186; (2011) 248 FLR 384 at [48]–[49]. In *Playspace Playground Pty Ltd v Osborn* [2009] FCA 1486 at [40], [43]; Reeves J observed that a determination of solvency is not based on a simple analysis of a company's current assets and liabilities or liquidity at a particular point in time and must involve a consideration of its financial position in its entirety, including matters such as expected profits and other sources of income and funding. …."

139 In determining a company's solvency, the court may also have regard to the likelihood that it will have funds available to it from sources with which it has no formalised agreement or understanding, including loans from its directors or from third parties, at least if they are not repayable in the short term: *Mulherin v Bank of Western Australia Ltd* [2006] QCA 175; *Williams (as liquidator of Scholz Motor Group Pty Ltd) (in liq) v Scholz* [2008] QCA 94 at [110]; *International Cat Manufacturing (in liq) v Rodrick* [2013] QCA 372; (2013) 97 ACSR 200; *First Strategic Development Corporation Ltd (in liq) v Chan* [2014] QSC 60 at [67]–[69]. The company's ability to borrow funds can also be taken into account: *Lewis (as liquidator of Doran Constructions Pty Ltd) v Doran* above at [109]–[112].

Evidence as to insolvency in fact

140 Mr Elkerton's evidence is that, in the financial year ended June 2012, Swan Services and the Companies had revenue of approximately $86 million. Swan Services was party to the majority of the relevant cleaning contracts, and derived approximately 71% of the Swan Group's revenues, although some contracts were held by, and some revenue was derived by, the Companies (Elkerton 1 [34]). Cleaning staff were employed by the subsidiary in the state in which work was performed and paid by that subsidiary although Swan Services generally contracted with and paid trade creditors (Elkerton 1 [37]). The Swan

Group maintained one main operating bank account which was held in the name of Swan Services and three of the Companies and all revenue was banked into that account and all expenses were paid from that account (Elkerton 1 [40]). Mr Elkerton also refers to several other accounts into which and out of which monies were transferred from time to time (Elkerton 1 [41]).

141 Mr Elkerton notes that the last income tax return lodged by Swan Services was for the year ended 30 June 2011, for Swan Services and several of the Companies as a consolidated tax group, although he notes that he has been unable to reconcile the income stated in that tax return to the lesser figure for income recorded in unsigned financial statements for the Swan Group, on a consolidated basis, for that financial year (Elkerton 1 [46]). Mr Elkerton also notes that the Swan Group used two computerised systems to record its transactions, one of which recorded financial transactions, and another of which recorded payroll transactions for cleaners employed by the subsidiaries. He refers to the fact that, about three months after significant issues arose in respect of the financial position of the Swan Group, the computer system which maintained its financial records suffered multiple hard drive failures in the second week of February 2013, and electronic backups that had apparently been regularly made were unusable, with the last effective backup having been made in July 2012. There was no submission that those matters involved anything other than misfortune notwithstanding their unfortunate timing. Mr Elkerton's evidence is that the Swan Group was unable to produce management accounts from the time of the system failure, although he had located hard copies of management accounts printed prior to that event for the period between July 2012 and December 2012 (Elkerton 1 [49]). The Swan Group's payroll system, which involved a separate computer system, remained functional after that time.

142 Mr Elkerton's first affidavit also referred to his preparation of a summary setting out immediately available assets and immediately payable liabilities of the Swan Group at the twenty-first day of each month for each of the six months prior to the date of his appointment as administrator. The QAR summary provided by Mr Elkerton was used to calculate a QAR, by dividing the realisable value of immediately available assets by the total value of

immediately payable liabilities, to provide an indicator of Swan Services' and the Companies' short term liability. Mr Elkerton notes that, the lower the QAR, the worse is a company's liquidity position, and a QAR of less than one is (as noted in Mandie J's observation in *Australian Securities and Investments Commission v Plymin (No 1)* above) an indicator of insolvency. Mr Elkerton concluded, in evidence admitted with a limiting order under s 136 of the *Evidence Act* 1995 (NSW) as submission but founded on his analysis, that Swan Services and the Swan Group each had significant deficiencies in money available to meet their liabilities throughout the period.

143 Mr Elkerton's evidence (which, at Elkerton 1 [76]–[77] was admitted as submission only, but was supported by his detailed workings) was that the deficiency in short term assets for the Swap Group disclosed by the QAR summary ranged between $7.28 million at the start of the relevant period to a maximum of over $12.9 million. The QAR summary prepared by Mr Elkerton identified the deficiency for Swan Services as at 21 November 2012 as in the order of $2.8 million; as at 21 December 2012 in the order of $1.765 million; as at 21 January 2013 in the order of $1.186 million; as at 21 February 2013 in the order of $2.663 million; as at 21 March 2013 in the order of $2.221 million; as at 21 April 2013 in the order of $2.54 million and as at 21 May 2013 in the order of $5.446 million. Although I am conscious that the position of the relevant companies needs to be determined individually, the QAR summary also identified the deficiency on a group basis as in the order of $7.283 million at 21 November 2012; $6.739 million as at 21 December 2012; $6.452 million as at 21 January 2013; $8.017 million as at 21 February 2013; $8.381 million as at 21 March 2013; $9.148 million as at 21 April 2013; and $12.936 million as at 21 May 1993.

144 As I noted above, Mr Elkerton also relies on the affidavit of Mr David Lombe dated 7 January 2016 and the expert report exhibited to it. Mr Lombe's report assessed insolvency both by reference to a balance sheet test, indicating a net current asset deficiency for each of Swan Services and the Companies (other than Cleaners SA) as at 31 October 2012; and by a cashflow review, and Mr Lombe also referred to the issue as to overdue creditors which I will address below. Mr Lombe points to the fact that management accounts of the Swan

Group, as at 31 October 2012, disclosed a substantial net asset deficiency of $10.6 million, and each of Swan Services and the Companies had a deficiency of net assets after adjusting for uncollectable intercompany loans (Ex CC11, [2.4(b)]). Mr Lombe also observes that, as at 31 October 2012, after adjusting for inter-company and related party transactions, Swan Services had a modest deficiency of net current assets, Cleaners SA had positive net current assets, and each of the other Companies had negative net current assets, with Cleaners NSW having negative net current assets in excess of $2.4 million and Cleaners Qld having negative net current assets in excess of $3.8 million (Ex CC11 [5.8]).

145 Mr Lombe also refers to Mr Elkerton's QAR summary and notes that the Swan Group's QAR declined from 0.50 in November 2012 to 0.31 by May 2013, reflecting the availability of between $0.50 and $0.31 in short term assets to pay every $1 of short term debt over the period (Ex CC11 [6.10]). Mr Lombe's evidence was that he had reviewed Mr Elkerton's methodology for assessing the solvency of Swan Services and the Companies and considered that methodology was sound, and provided the most accurate reflection of the Swan Group's financial position during the relevant period, in the absence of complete and accurate management accounts. While Mr Lombe identified some adjustments which he would make to the calculation, he noted that they did not materially impact Mr Elkerton's findings (Ex CC11 [2.5], [6.7]). He concluded that Mr Elkerton's methodology in calculating the Swan Group's QAR during the relevant period was an appropriate methodology to assess Swan Services and the Companies' ability to pay their debts as and when they became due and payable (Ex CC11 [6.11]).

146 Mr Lombe also expressed the view that, although he had assessed the solvency of individual companies within the Swan Group separately, the intermingling of assets and liabilities across the companies was such that none of them could operate on a standalone basis (Ex CC11, [2.2]). In particular, he observes that the Companies incurred expenses for staff, in performing contracts as to which revenue was derived by Swan Services and that Swan Services' ability to derive that revenue in turn depended upon the Companies' performance of those services (Ex CC11 [3.5]–[3.7]). Mr Lombe also noted that

Swan Group had been able to trade for a longer period than would otherwise have been possible, by not reporting GST and PAYG obligations to the ATO, and thereby deferring tax liabilities which would otherwise have arisen (Ex CC11 [2.7]). Mr Lombe noted that, on a cashflow basis, each of the Companies did not hold sufficient contracts to meet their operating costs and generated losses, requiring the support of Swan Services for continued trading. He observed that Swan Services was profitable in its own right, since it received income from cleaning contracts without incurring cleaning staff costs which were largely incurred by the Companies, but its profits were in turn insufficient to support the trading activities of the Companies (Ex CC11 [7.6]). Mr Lombe also referred to cashflows prepared by Mr Baddour on behalf of Swan Services in January 2013, and noted several issues as to the accuracy of the assumptions in that cashflow, and that subsequent revisions of that cashflow indicated cashflow deficiencies at December 2013, with funding requirements as early as July 2013 (in the April revision) and April 2013 (in the May revision) (Ex CC11 [7.25]).

147 Mr Swan and Ms Swan submit, and I accept, that an analysis of current assets and liabilities, of the kind undertaken by the QAR prepared by Mr Elkerton and reviewed by Mr Lombe, is not sufficient in itself to establish insolvency: *Playspace Playground Pty Ltd v Osborn* above at [40]; *Re Ashington Bayswater Pty Ltd (in liq)* above at [4]. Mr Lombe fairly accepted that matter in cross-examination (T194). However, the liquidator does not reply on the QAR alone in order to establish insolvency.

148 Mr Elkerton and Mr Lombe were challenged, in cross-examination, as to numerous aspects of the QAR summary, and Mr Swan and Ms Swan submit that adjustments should be made to that calculation in respect of debtors, trade creditors, entries in respect of the “Paid on 21st” category including the treatment of an amount for wages on 21 November 2012, several aspects of the treatment of GST, PAYG tax and a tax assessment for Cleaners NSW. The result of those criticisms was reflected in a schedule relied on by Mr Notley in closing submissions which I will also address below. Mr Swan and Ms Swan did not seek to lead any expert evidence to seek to support those challenges or adjustments. A significant part of Mr Swan’s and Ms Swan’s attack on the QAR

summary appeared to depend on the proposition that it was derived from incomplete or inaccurate information that was available after the server failure and that the liquidator ought not to have relied on the financial information that was then available from Swan Services and the Companies in respect of that analysis. If that submission were accepted, on the basis that the financial information then available from Swan Services and the Companies was not sufficient to correctly record and explain its transactions and financial position and performance, that would reinforce the conclusion that I have reached above that the presumption under s 588E(4) of the *Corporations Act* is established.

149 First, Mr Swan and Ms Swan criticise the treatment of debtors in the QAR summary, so far as that calculation relied on an aged debtors summary as at 27 May 2013 prepared by Mr Batajoo, an employee of Swan Services (Ex CC13, 3902–3913). Mr Elkington accepted in cross-examination that the figure for "Debtors" for 21 May 2013 used in the QAR summary was derived entirely from the aged debtor information provided by Mr Batajoo and the figures for "Debtors" in the QAR summary for previous months were calculated from and depended on the figure for 21 May 2013 (T124). Mr Swan and Ms Swan submit, by reference to the email by which Mr Batajoo provided that information to a member of the liquidator's staff, that the information is "unreliable" for the use to which it has been put and could have been a draft or a work in progress that was still being worked on at the time (Ex CC13, 3902). They point out that Mr Batajoo was asked to provide "an aged debtor report as soon as possible" on the basis that he was "still working on the extras" and should provide "what is completed so far". Mr Swan and Ms Swan point out that Mr Batajoo emailed the information fifteen minutes later, although it does not follow that he had prepared the information within that short time, rather than sent information that was already available from previous work. Mr Swan and Ms Swan also point to the loss of accounting information by the server crash in February 2013 and that a process of reconstructing the debtors and creditors ledgers in the InterAcct accounting system was then undertaken by entering transactions dating from shortly after the loss of the data going backwards; that the internal accountants were also recording the transactions going forward from that date;

and the process was incomplete at the time the liquidator was appointed (Elkerton 1 [79]).

150 It seems to me that the liquidator could reasonably rely on the information requested from Mr Batajoo, where he had responsibility for that matter within Swan Services, and it was provided to the liquidator as the information that was available at that time, although work to recreate the Swan Group's financial position was ongoing. As I noted above, if the information then available was not adequate to provide a fair view of Swan Services' and the Companies' aged debtors, that would support a conclusion that the presumption of insolvency under s 588E of the *Corporations Act* is established, given the importance of the position in respect of debtors to a proper understanding of the Swan Group's financial position at any point in time.

151 Mr Swan and Ms Swan also submit that the aged debtors information provided by Mr Batajoo did not take into account invoices for variations issued by Swan Services in May 2013. Mr Elkington accepted in cross-examination that Swan Services, under his control, issued variation invoices for May 2013 (T127). Mr Swan and Ms Swan submit that the issue of those invoices gave rise to debtor receivables as at 22 May 2013, which were not recorded in the QAR summary (T126–127). Mr Swan and Ms Swan submit that the Court should not infer in favour of the liquidator that the amount involved is not material to solvency. It seems to me that at least an evidentiary onus to establish the materiality of a criticism which Mr Swan and Ms Swan advance rested upon them and was not discharged. I do not consider that this issue displaces the conclusions that would otherwise be drawn from the QAR summary and the other evidence of insolvency to which I refer below.

152 Mr Swan and Ms Swan also submit that the value of receivables from 90+ day debtors has been assessed at nil in the QAR summary without any proper basis. They submit that the evidence establishes that such debtors had a real value that was "potentially material". Mr Elkington accepted in cross-examination that, as at 27 May 2013, Mr Batajoo was working manually on a spreadsheet that quantified the amount that could be recovered from aged debtors over 90 days (T126–127). Mr Lombe also fairly accepted in cross-

examination that such a document would be relevant to determining the solvency of the Swan Group (T181–T182), although I would understand that evidence to depend upon the contents of such a document. Neither the liquidator nor Mr Swan and Ms Swan tendered such a document and its significance, or otherwise, is a matter of speculation. Mr Swan and Ms Swan also submit that the cashflows produced by Swan Services allowed for 5% of revenue in respect of 90+ day debtors or about $400,000 per month. That matter does not advance that issue, since the reliability of those cashflows was plainly uncertain, as I have noted at length above, and has not been established.

153 Mr Elkington, in cross-examination, went no further than to accept that he "should have potentially taken [90+ day] recoveries into account" (T130). Mr Elkerton's approach to this issue was supported by Mr Lombe, who confirmed, in cross-examination, that he considered that it was reasonable not to attribute any value in Mr Elkerton's report to 90+ day debtors, because the quantum recorded for that figure was inconsistent with historical balance sheets of the companies over a number of years, and the Swan Group was not including a level of income consistent with those balances when preparing cashflows (T180). Mr Lombe also pointed out, importantly, that the figure shown for such debtors in Swan Group's records was manifestly unreliable and should be excluded on that basis (T197). I accept Mr Lombe's analysis of that position and it seems to me that amount should properly have been excluded as Mr Elkerton had done. Mr Swan and Ms Swan also rely on Mr Swan's evidence that he personally dealt with debtors over 90 days (T505, 508), to which I refer further below, which did not extend to evidence of the amount of recoveries achieved from them.

154 It seems to me that Mr Elkington and Mr Lombe rightly accepted in cross-examination that 90+ day aged debtors had at least potential relevance to the solvency of the Swan Group. It seems to me that both were also correct in their view that the information available from the Swan Group's financial records as to the level of 90+ day debtors was too unreliable to be taken into account. There is no satisfactory evidentiary basis for an inference that recoveries of debts that were already 90 days due would, in the relevant circumstances,

have been material to the solvency of Swan Services and the Companies, given the other issues to which I have referred. If they were material, then the financial records of Swan Services and the Companies plainly did not accurately record them and that would reinforce my conclusion that the presumption of insolvency under s 588E(4) of the *Corporations Act* is established.

155 In his schedule relied on in closing submissions, Mr Notley submits that the QAR summary should be adjusted, in respect of Swan Services, by allowing an additional amount for debtors of $750,000 in each of the relevant months. Mr Notley's adjustment for debtors is based on the estimate that 5% of aged debtors over 90 days would be received each month, but then makes an adjustment of nearly double that amount, sought to be justified on the basis that Mr Swan and Ms Swan do not know what the adjustment should be (T721) and by reference to Mr Swan's acceptance of the proposition put to him in cross-examination by Mr Newlinds that he was "hounding" overdue debtors to pay the money owed to the Swan Group. I do not consider that I can draw the inference that 5% of aged creditors would have been received each month, where its only basis is a cashflow of uncertain accuracy, still less increase that figure by a substantial amount.

156 Mr Swan and Ms Swan also advance criticisms of Mr Elkerton's assessment of trade creditors, as derived from the liquidator's assessment of creditors as at 21 May 2013, again primarily directed to the adequacy of the source material from which Mr Elkerton had based that assessment. Criticism is also made of Mr Elkerton's reliance on records from Swan Services InterAcct system, on the basis that it was known to be unreliable at the time, but that once more leads back to the presumption of insolvency. Mr Swan and Ms Swan criticise the liquidator's approach of relying on information provided by creditors, by way of proofs of debt, where it differed from the InterAcct figure for that creditor, but that approach seems to me to have been a reasonable approach to the issues of reliability as to the InterAcct figures which Mr Swan and Ms Swan themselves raise.

157 Mr Swan and Ms Swan submit that Mr Elkerton's analysis of creditors was also developed from the position as at 21 May 2013. Mr Elkerton relied, for that purpose, on an aged creditors summary as at 31 May 2013 prepared by Mr Bell (Ex CC13, 4067–4071) and a spreadsheet which he prepared, largely derived from Mr Bell's aged creditors listing (Ex CC13, 4072–4074). Mr Elkington accepted in cross-examination that the figures for "trade creditors" in the QAR summary depended on the figure for 21 May 2013 (T132), although this was again a consequence of the inadequacy of the financial records available on his appointment. Mr Elkerton also accepted that the figure for trade creditors for 21 May 2013 was derived from Mr Bell's aged creditors listing and that he had only checked that information by comparing it to proofs of debt that he had received (T132).

158 Mr Swan and Ms Swan again seek to rely on the inadequacy of the Swan Group's financial records to challenge the calculation of trade creditors, submitting that it relies on records from InterAcct "which was known to be unreliable at this time" and also criticising the approach taken by Mr Elkerton in preferring the figure provided by a creditor's proof of debt where available. Mr Swan and Ms Swan also submit that the email from Mr Bell suggests that information is also a work in progress, because it is described as "updated". I understand that description to indicate only that the document was updated from, and more current than, an earlier version, and not to undermine its accuracy. Mr Swan and Ms Swan also submit that the figure of $5,254,592.71 derived by Mr Elkerton for trade creditors is greater than other figures for trade creditors as at that date, which they submit are more reliable. Mr Swan and Ms Swan also rely on a concession by Mr Elkerton in cross-examination that it was "reasonable" to exclude from the amounts for trade creditors in the QAR summary any amount for a creditor whose debt was not incurred in the six months prior to 21 May 2013, who has made no attempt to chase the debt for the six months prior to 21 May 2013, and who had lodged no proof of debt (T134–135). It is by no means clear to me that that concession should be accepted, since there are practical reasons why creditors may not lodge proofs of debts in insolvencies, including pessimism as to the likelihood of a distribution to creditors in a winding up and a concern that work on a proof of

debt may be wasted if a company makes no distribution to creditors. However, little turns upon that, since Mr Swan and Ms Swan have also not discharged an evidentiary onus to raise any real question as to the extent of creditors who may fall within that category (as to which they rely on MFI 7).

159 Mr Swan and Ms Swan also point to the more detailed analysis of creditors undertaken by Mr Elkington in his affidavit of 31 August 2016 in seeking to establish the loss and damage claimed in these proceedings. Mr Swan and Ms Swan point out that Mr Elkerton concluded, in paragraph 13 of his affidavit of 31 August 2013 (which was limited under s 136 of the *Evidence Act* as submission only), that the total debts incurred by Swan Services to trade creditors during the period 1 November 2012 to 22 May 2013 and which presently remain outstanding is $2,492,223.29, and that figure is significantly less than the $5,254,592.71 claimed by the liquidator as the total amount for "*Trade creditors*" as at 21 May 2013. Mr Swan and Ms Swan submit that the difference between $5,254,592.71 and $2,492,223.29 is $2,762,369.42, and that amount should be deducted from each of the amounts in the QAR summary for trade creditors for 21 April 2013, 21 March 2013, 21 February 2013, 21 January 2013, 21 December 2012 and 21 November 2012.

160 In his schedule relied on in closing submissions, Mr Notley submits that the QAR summary should therefore be adjusted by deducting an amount for trade creditors of $2,762,369.42 in each of the relevant months, to reflect the lesser amount of trade creditors now relied upon to support the liquidator's claim for loss and damage. As I noted above, notwithstanding the liquidator's concession in that regard, I am not persuaded that it would be reasonable to exclude trade creditors whose debts were not incurred in the six months prior to 21 May 2013 and who did not pursue the debt or lodge a proof of debt, where a creditor's lack of engagement with a winding up process may readily be explained by matters other than the non-existence of the debt to which I referred above. I am also not persuaded that an adjustment in the amount for which Mr Swan and Ms Swan contend should be made and it does not seem to me that their approach either establishes an evidentiary basis for any alternate adjustment, or for a finding that, if any adjustment should be made, it would be

sufficiently material to affect the conclusion of insolvency that arises from the QAR summary and the other matters to which I refer.

161 The QAR summary includes entries referable to amounts "Paid on 21st", where the summary was calculated as at that date, and Mr Elkerton's evidence (Elkerton 1 [69]) is that:

> "This amount reflects the total of the payments made to creditors (other than the ATO) on each of the QAR Dates as shown on the statements for the CBA Account. Summaries of the total payments made as at each of the QAR Dates, prepared by my staff, are at pages … No payments were made to trade creditors on 21 April 2013 or 21 May 2013 and accordingly this row has been left blank for those QAR Dates."

162 Mr Swan and Ms Swan submit, in their joint solvency submissions, that:

> "No amount for "*Paid on 21st*" should be included in the QAR [s]ummary. The purpose of the QAR [s]ummary is to determine the immediately available assets and the immediately payable liabilities of the Group *at a particular point in time*, being the beginning of the day on each of the respective dates. That is why the analysis relies on the *opening* balance of each of the bank accounts of the Group. If the analysis seeks to take into account amounts paid from the bank accounts, other than those already incorporated into the calculation of "*Trade creditors*", then it is no longer analysing the position of the Group at the same point in time."

This submission was, in substance, a bare assertion as to matters of accounting methodology, unsupported by expert evidence, and I am not persuaded by it.

163 A particular issue arises in respect of the treatment of an amount of approximately $1,100,000 made for wages and included in an entry in the QAR summary on 21 November 2012. It was put to Mr Elkerton and Mr Lombe that that approach was incorrect, having regard to the purpose of a QAR summary. Mr Lombe responded, in cross-examination, confirming the appropriateness of the adjustment by reference to accrual principles in accounting. I accept his evidence in that regard, which was again uncontradicted by any expert or lay evidence led by Mr Swan and Ms Swan. Alternatively, Mr Swan and Ms Swan submit that another adjustment recommended by Mr Lombe should be made, to remove a total of $238,562 from the entries for "Paid on 21st" as those payments were included in the calculation of amounts for "Trade Creditors". I accept that that adjustment should properly be made. However, Mr Notley's

schedule demonstrates that that adjustment is immaterial to determination of the solvency of Swan Services or the Companies.

164 Mr Swan and Ms Swan also advance detailed criticisms of the treatment of an amount of a GST RBA figure for 21 November 2012 in the QAR summary; the treatment of unreported GST amounts in the QAR summary; the treatment of PAYG withholding tax amounts in the QAR summary; and an amount for a superannuation guarantee charge for Cleaners NSW in the QAR summary. Mr Swan and Ms Swan invite me to draw various inferences as to the status of those amounts, and matters which might have occurred in respect of them, and to make various adjustments to the QAR summary, none of which are supported by any substantive lay or expert evidence led by Mr Swan or Ms Swan. Mr Notley also makes a further adjustment for GST pm management fees where Swan Services had claimed an input tax credit in its activity statements, which was later reversed by the liquidator where no corresponding GST had been reported or remitted to the ATO by the Companies. That adjustment proceeds on the basis that the management fee would be added back into Swan Services' assets, and Mr Notley makes corresponding adjustments for the Companies to report an additional liability for GST which, of course, they will now not be able to pay. The difficulty with that course is that the management fees were not in fact rendered, there was no proper basis for Swan Services claiming the input tax credit and the reconstruction undertaken in this way is not consistent with events as they occurred. In his schedule relied on in closing submissions, Mr Notley sets out the effect of these adjustments, submitting that an adjustment for GST RBA Late (21 November 2012) of $3,784,895 should be made in Swan Services on 21 November 2012; and an adjustment of GST Unreported of $1,741,132 should be made in Swan Services in each of the relevant months; and an adjustment for input tax credits for GST on management fees of $505,000 should be made in Swan Services in each of the relevant months, except for 21 April 2013, where an adjustment of $455,000 was sought. Mr Notley also contended for adjustments for PAYG withholding for several of the Companies and for assessments for superannuation guarantee charge in Cleaners NSW. The effect of the adjustments for which Ms Swan and Mr Swan contend, in respect of the QAR

summary, was to establish a positive outcome in each month until 21 May 2013 for Swan Services and a positive outcome in each month until 21 March 2013 in respect of the Companies.

165 It does not seem to me that the Court could accept these submissions, which involve accounting adjustments of real complexity, where they are largely not supported by lay or expert evidence, although I recognise that some aspects of them were put to Mr Elkerton and Mr Lombe in cross-examination who largely disagreed with them. I am not persuaded that those adjustments should be made. I should add that Mr Notley also contended that other lesser adjustments should be made, for example, an amount of $40,000 for GST remitted by Cleaners SA in November 2012. Those adjustments would not affect the outcome, where I have not been persuaded that the material adjustments sought should be made. I therefore need not address those lesser adjustments.

166 Mr Swan and Ms Swan also criticise the cashflow analysis undertaken by Mr Lombe, so far as it was based on the QAR summary prepared by Mr Elkerton, and relied on the criticisms that I have addressed above in respect of that QAR summary. Since I have largely not accepted those criticisms, they do not undermine that analysis. Mr Swan and Ms Swan also pointed to the fact that the balance sheet on which Mr Lombe had relied to perform his balance sheet test was not used for internal management purposes, but was provided to external accountants to allow financial statements for the Swan Group to be prepared. No attempt was made to explain why a document provided by Swan Group to its external accountants to prepare proper financial statements should be treated as unreliable. I do not consider that criticism should be accepted.

167 Mr Swan and Ms Swan also submit that the QAR summary fails to take account of what is described as unchallenged evidence of Mr Swan that the Swan Group had successfully renegotiated most of its unprofitable contracts in early 2013, such that clients had agreed to requested adjustments in fees by March 2013 (RS1 [54]). Mr Swan's evidence to support that proposition is in the most general terms; the evidence suggests that those adjustments did not take effect in the relevant period, so as to assist Swan Services' or the

Companies' solvency in the relevant period; and Mr Swan and Ms Swan made no attempt to establish, by evidence, the effect of such adjustments, if they were made, upon Swan Services' or the Companies' solvency. I do not accept that this submission undermines the liquidator's analysis.

A reality test – the Swan Group's dealings with creditors

168 Mr Elkerton's evidence also refers to many examples of creditors pursuing Swan Services in relation to payment, some of which had stopped supply, or which were being paid rounded amounts or instalments, and he exhibits two volumes of documents which record correspondence with creditors extracted from records of Swan Services. His evidence (Elkerton 1 [184]) is that there were many examples of creditors pursuing Swan Services in respect of late payment, some of which had stopped supply and some of which were paid rounded amounts.

169 By way of examples, which exist both before and during the relevant period, by email dated 13 December 2011, Mastercom advised that unless it received payment on that day, it would disable Swan Services' radios at Sydney Airport until the money was paid; Mr Itaoui advised Mr Swan that Swan Services needed to pay Mastercom because of the cost if the radios went off at the airport; and Mr Baddour recorded having advised Mastercom that Swan Services would get "some payment" to it by Friday. In June 2012, Cleaners Qld was in correspondence with Acorshe, by which Acorshe referred to many requests to clear old debt which were ignored. By letter dated 24 July 2012, United Resource Management Group advised Swan Services of a shortfall of payment of $358,570 and advised that, if payment was not made within 14 days, services would cease. By email dated 13 November 2012, KS Environmental advised Swan Services of invoices that were overdue for payment and that the matter would be passed to their finance department and handled with mandatory warnings and then suspension of trading. By email dated 31 December 2012, Alsco advised Swan Services that its account was on stop trade due to unpaid invoices. On 6 March 2013, Citywide Print advised Swan Services that its account was on hold until outstanding invoices were paid. By email dated 4 April 2013, Mr Valencour, Swan Services' National Commercial Manager, requested a representative of Bunzle to advise whether

Swan Services needed to action any payment to ensure delivery for the week. By email dated 16 April 2013, Mr Spiller recorded Bunzle's advice that it would not deliver supplies required for Queensland sites as it had not been paid. By email dated 2 May 2013, Central Cleaning advised Swan Services that unless it received a confirmation of a payment plan by close of business on that day its account would be placed on hold until the matter was resolved.

170 Mr Lombe also points to creditor pressure over the period, including demands for payment and cessation of supply from June 2012 onwards, and the Companies' inability to comply with the terms of payment plans negotiated with the ATO. Mr Lombe also referred to numerous overdue payment notices from June 2012 onwards, numerous instances of trade creditors threatening to cease supply and ceasing to supply Swan Services due to non-payment from September 2012 onwards, and multiple demands for payment totalling $5 million from July 2012 onwards (Lombe Ex CC11 [7.19]ff, Ex CC13, vols 9A–9B).

171 Mr Swan and Ms Swan also rely on Mr Swan's evidence, in cross-examination by Mr Braham, that his practice with creditors was that, if larger clients paid on the correct date, the Swan Group would pay the creditors on the same date (T494). Mr Swan's evidence was that he approved the payment of all invoices and did not approve some invoices, when the price was too high or the service provider did not do a "good enough job" (T495). Mr Swan accepted that in the period before Mr Itaoui resigned, creditors were often chasing the Company for payment, because its "liquidity was drying up a bit" and the Company had a few outstanding debtors that it was chasing (T495). It seems to me that that evidence substantially understated the extent of issues with Swan Services' creditors. Mr Swan also gave evidence, in cross-examination by Mr Braham, as to the fact that approaches would be made to debtors of the Company whose debts had been outstanding for 60 or 90 days to follow up for payment (T505). Mr Swan was asked as to his recollection of addressing long outstanding creditors in early 2013, but pointed to only two such creditors (T508).

172 Mr Swan and Ms Swan respond to Mr Lombe's analysis of the number of creditors who had demanded payment, ceased to supply, or threatened to

cease to supply, during the relevant period, by submitting that creditors "may not have been paid because Swan Services, although it could pay them, had decided for some reason not to pay them" and that Mr Lombe had not investigated whether Mr Swan "regularly paid people within [trading] terms" (T176). It seems to me that that submission and Mr Swan's evidence does not undermine Mr Lombe's analysis. First, Mr Swan's evidence was at too high a level of generality to answer the substantial evidence of creditors who were not paid when due, or to create any rational inference that that was by choice rather than by financial necessity. Second, the correspondence to which I have referred above indicates that creditors were, in fact, often not paid because of an inability to pay them, rather than by reason of the matters to which Mr Swan referred. The attack on Mr Elkerton's QAR summary and Mr Lombe's evidence in cross-examination did not engage with the inference of insolvency which followed from the Swan Group's dealings with creditors in the relevant period.

173 Mr Lombe also summarises Swan Services' and the Companies' position in respect of negotiation of repayment plans with the ATO from early September 2012. On 16 November 2012, Cleaners NSW entered into payment arrangement with the ATO (Ex CC13, 4622). On 21 December 2012, Swan Services entered a payment arrangement with the ATO (Ex CC13, 4252). On 18 January 2013, Cleaners ACT entered into a payment arrangement with the ATO (Ex CC13, 4900). An email dated 20 February 2013 from Matthew Fielden to Mr Baddour, Mr Swan and Ms Swan attached an ATO Payment Demand Notice in respect of Cleaners SA (Ex CC13, 1977, 2002). Director penalty notices were issued by the ATO to Mr Swan on 26 March 2013 (Ex CC13, 2098, 2101). Cleaners SA entered a payment arrangement with the ATO on 2 May 2013 (Ex CC13, 4852). Mr Lombe points out that Swan Services and the Companies defaulted in respect of all but one of those payment plans, which is again a significant indicator of insolvency.

174 Mr Elkerton also expressed the view that the Swan Group did not have access to borrowed funds from financial institutions and banks during the relevant period, given the extent of its unpaid tax liabilities that had already emerged prior to February 2013, and the fact that it was unable to produce reliable financial accounts from at least the second week of February 2013 when its

accounting system crashed (Elkerton 1 [198]). It appears that the only alternative source of borrowings for the Swan Group would have been Mr Swan and primarily Ms Swan to the extent that they were prepared to make additional funds available. Mr Swan and Ms Swan rely on Ms Swan's evidence in cross-examination that, until 23 April 2013, she had funds available to invest in Swan Services and was prepared to do so but that, after that date, she "wanted out" (T408). Mr Swan and Ms Swan submit that the ability of the Swan Group to borrow further funds from Ms Swan is an indicator of solvency and should be taken into account in determining whether or not the Swan Group was insolvent during the relevant period. It seems to me that a commitment to provide financial support to the Swan Group which could be, and was, withdrawn by reason of differences emerging between Mr Swan and Ms Swan was far too fragile to provide any support for solvency.

Conclusion as to solvency

175 For the reasons set out above, I have concluded that, in addition to being presumed insolvent by reason of s 588E(4) of the *Corporations Act*, it has been established that each of Swan Services and the Companies was insolvent in fact throughout the relevant period.

Whether there were reasonable grounds for suspecting Swan Services or the Companies were insolvent and Ms Swan and Mr Swan were aware, or a reasonable person in a like position would be aware, of that matter

176 The parties identify the next issue to be determined as:

> "Whether during any period of insolvency, in respect of any of the companies found to have been insolvent:
>
> a there were reasonable grounds to suspect that the relevant companies were insolvent or would become insolvent as a consequence of incurring a debt referred to below and, if so, during which period – s 588G(1); and
>
> b Mr Swan and/or Ms Swan was aware that there were such grounds for so suspecting that the relevant company was insolvent, or would so become insolvent, as the case may be (s 588G(2)(a)) or a reasonable person in a like position in a company in the company's circumstances would be so aware (s 588G(2)(b))."

177 Swan Services and the Companies plead that there were reasonable grounds to suspect, and that Ms Swan was aware that there were reasonable grounds to suspect, that Swan Services was, or Swan Services and each of the Companies were, insolvent or would become insolvent in the relevant period

(SFAPC [98], [99]) and that Ms Swan failed to prevent Swan Services, or Swan Services and each of the Companies, from incurring the pleaded debts (SFAPC [100]). Swan Services and the Companies also plead that there were reasonable grounds to suspect, and Mr Swan was aware that there were reasonable grounds to suspect, that Swan Services was, or Swan Services and each of the Companies were, insolvent or would become insolvent in the relevant period (SFAPC [98], [99A]) and that Mr Swan failed to prevent Swan Services, or Swan Services and each of the Companies, from incurring the pleaded debts (SFAPC [100A]).

178 In order to establish that Ms Swan and Mr Swan are liable under s 588G of the *Corporations Act*, the liquidator must establish, first, that there were reasonable grounds for suspecting that Swan Services or the Companies are insolvent, or would become insolvent by incurring the relevant debt or debts: s 588G(1). This requirement adopts a lower threshold of the existence of reasonable grounds for "suspecting" that the company was insolvent or would become insolvent as a result of the transaction, rather than of an expectation that the company was insolvent or would become insolvent as a result of the transaction. The reference to "suspect" denotes "an actual apprehension or fear" that the fact may exist, and not merely reason to question whether it might exist: *Queensland Bacon Pty Ltd v Rees* [1996] HCA 21; (1966) 115 CLR 266 at 303. In *Hall v Poolman* [2007] NSWSC 1330; (2007) 65 ACSR 123 at [234], Palmer J noted that the standard of "suspicion" of insolvency:

> "falls somewhere between a belief that insolvency exists, on the one hand, and a mere wondering whether it exists, on the other. Suspicion is a positive feeling of apprehension, an admittedly tentative belief, without sufficient evidence to form a concluded and supportable opinion."

179 The question whether there were reasonable grounds to suspect that Swan Services and the Companies were insolvent during the relevant period, for the purposes of s 588G(1), involves an inquiry into the objectively formed state of mind of a person of ordinary competence. In *Powell v Fryer* [2001] SASC 59; (2001) 37 ACSR 589 at [76]–[77], Olsson J (with whom Duggan and Williams JJ agreed) observed that:

> "The test to be applied in relation to s 588G(1)(c) is objective: Metropolitan Fire Systems Pty Ltd v Miller (1997) 23 ACSR 699 at 702–3. As Duggan J pointed

> out in Group Four Industries Pty Ltd v Brosnan (1991) 56 SASR 234 at 238; 5 ACSR 649, the state of knowledge of a particular director and any assessment which he may have made as to the ability of the company to pay its debts is irrelevant. The court must make its own judgment on the basis of facts as they existed at the relevant time and without the benefit of hindsight."

180 The question whether such reasonable grounds to suspect insolvency existed is to be determined by reference to the position of a director of reasonable competence and diligence, who performed his or her duties imposed by law, and reached a reasonably informed opinion as to the financial capacity of Swan Services and each of the Companies: *Smith v Bone* [2015] FCA 319; (2015) 104 ACSR 528 at [367]. Reasonable grounds for a suspicion of insolvency could be established, for example, where a director of ordinary competence, viewing the whole of a company's circumstances objectively, would have had no real idea where to find the necessary money to pay debts at the time they were incurred: *Australian Securities and Investments Commission v Edwards* [2005] NSWSC 831; (2005) 54 ACSR 583 at [251].

181 I have reviewed the factual matters relevant to this question at length above. I am satisfied that a director of Swan Services and each of the Companies of reasonable competence and performing his or her duties, would have suspected that each of Swan Services and the Companies were insolvent throughout the relevant period. The matters which, objectively, gave rise to reasonable grounds to suspect insolvency include that the director would know at least of the delays in paying creditors and the demands for payment to which I have referred above, which had existed before tax issues emerged in late 2012; that the director would know, throughout much of the relevant period, of Swan Services' and the Companies' liabilities to the ATO, and know that they were substantial although he or she could not quantify them precisely; that the director would know that the Swan Group had not yet reached payment plans which would allow all of the Companies to discharge their liabilities, or complied with payment plans that had been agreed; and that the director would also know that he or she could gain no comfort from cashflow information which was known to be unreliable, and that each of Swan Services and the Companies were interdependent in their financial and business operations.

182 In order to establish that Ms Swan and Mr Swan are liable under s 588G of the *Corporations Act*, the liquidator must also establish that Mr Swan and Ms Swan or either of them was aware, or a reasonable person in a like position in a company in Swan Services or the Companies' circumstances would be aware of that matter: s 588G(2). This requirement may be satisfied either by proof that a director had a subjective awareness of grounds that constitute reasonable grounds for suspecting insolvency, or that a reasonable person in the position of the director would have been aware of the existence of such grounds: *Australian Securities and Investments Commission v Plymin (No 1)* above at [426]. In *Powell v Fryer* above at [77], Olsson J (with whom Duggan and Williams JJ agreed) observed that:

> "By reason of s 588G(2)(b) it is sufficient that a reasonable person in a like position in a company in the company's circumstances would be so aware. Regard is to be had to the facts and circumstances that the director ought to have known, as well as to the facts and circumstances that were actually known to him: *Credit Corp Australia Pty Ltd v Atkins* (1999) 30 ACSR 727 at 769."

183 I do not consider it necessary to determine whether Mr Swan or Ms Swan had actual knowledge of the grounds for suspecting that Swan Services and the Companies were insolvent, although they in fact knew of the matters to which I refer below, where I am comfortably satisfied that a reasonable person in their position would know of the grounds for suspecting insolvency, and that is sufficient to establish the requirement in s 588G(2). I will largely focus on the latter question below.

184 Ms Swan points to the size of Swan Services' business and its annual turnover, and submits that it would not have been necessary or appropriate to appoint an administrator, or liquidator, at the first hint of difficulty with the ATO. That proposition seems to me to add nothing to the statutory test under s 588G of the *Corporations Act*, since the answer to that question will depend upon the matters specified in that section, including whether there were reasonable grounds to suspect insolvency at the relevant time. Ms Swan also points to the fact that the liquidator's proof of insolvency relies, in part, upon unreported tax liabilities for PAYG tax dating back to 2011, and submits that there is no evidence that those debts were known to anyone in Swan Services and the Companies other than perhaps Mr Baddour. Ms Swan points out that that

amount has been included in each month's solvency analysis as part of the debts owed by Swan Services and the Companies to the ATO. Ms Swan submits that that liability should be excluded when considering whether Ms Swan had reasonable grounds to suspect that Swan Services and the Companies were solvent, but identifies no authority for that proposition, and advances it as no more than a bare assertion. It seems to me that, in determining whether there were reasonable grounds to suspect insolvency and whether a reasonable person in the director's position would be aware of those matters, the Court would have regard to tax liabilities of which a reasonable person would be aware, if he or she had taken reasonable steps to inform himself or herself of the company's tax position and ensure that a company complied with its tax obligations.

185 Ms Swan recognises the issues as to the reliability of the Swan Group's October 2012 management accounts, and submits that Swan Services' and the Companies' solvency could be determined by reference to other matters, including for example, its bank statements, debtors' ledger prior to the crash of its accounting system in February 2013, listing of creditors and other financial records. I do not accept that submission, which is inconsistent with the evidence that Ms Swan's advisers, Mr Wickenden and Mr Allsop, were unable to satisfy themselves of solvency during the relevant period by reference to those matters. Ms Swan also submits that Swan Services and the Companies either had payment plans in place, or were in negotiations towards payment plans with the ATO in respect of their obligations during the relevant period. It is not necessary to determine whether the fact that a company is negotiating towards a payment plan, which it has not yet achieved, is sufficient to avoid a suspicion of insolvency arising. The fact that such payment plans had not been achieved in respect of all of the Companies, the defaults in respect of payment plans in respect of those Companies for which they were achieved, the issues concerning the accuracy of the financial records, the dealings with creditors to which I have referred above, the concerns raised by Mr Wickenden and Mr Allsop and their inability to satisfy themselves as to solvency during the relevant period, are such that a reasonable person in Mr Swan's or Ms Swan's

position, adequately performing the duties of a director, would have suspected insolvency.

186 The matters to which I have referred above, in finding that there were reasonable grounds to suspect the insolvency of each of Swan Services and the Companies during the relevant period, were each known to Mr Swan and Ms Swan, or would have been known to a reasonable person performing the duties of a director of Swan Services and the Companies, and support the conclusion at least that a reasonable person in a like position in Swan Services' and the Companies' circumstances would have known of those matters. I am satisfied that the matters which were known to Mr Swan and Ms Swan, and the matters that would reasonably have been known to Mr Swan as a director and Ms Swan (if she was in fact a de facto director of Swan Services and the Companies over the relevant period) would have led a reasonable person in their position to suspect that each of Swan Services and the Companies were insolvent. It does not seem to me that the cashflows produced by Mr Baddour would have displaced that suspicion, given the matters that were known to each of Mr Swan and Ms Swan as to the inadequacies of the then financial records of the Swan Group, quite apart from the clear concerns expressed by Mr Allsop and Mr Wickenden to Ms Swan as to those matters.

187 Ms Swan also relies on evidence which she gave in cross-examination that she believed that Swan Services' debtors were sufficient to meet claims of creditors (T328); that Mr Swan assured her that debtors would continue to pay (T350), and they did so (I interpolate, at least to an extent); and that Swan Services and the Companies were engaged in negotiations to enter into payment arrangements in respect of obligations to the ATO, a matter to which I have referred above. If (contrary to the conclusion I reached above), Ms Swan was properly characterised as a de facto director of Swan Services or the Companies, it does not seem to me that these matters are sufficient to displace the suspicion of insolvency that would have arisen, for a reasonable person in her position, from the other matters that were known to her, or would have been known to a reasonable person performing the duties of a director, to which I have referred above. Ms Swan also refers to the steps taken by her

advisers, including Mr Wickenden and Mr Allsop, throughout the relevant period, to which I have referred above. These matters do not seem to me to assist Mr Swan or Ms Swan where Mr Wickenden and Mr Allsop had not been able to satisfy themselves of Swan Services' or the Companies' solvency throughout the relevant period, and had made that clear to Ms Swan.

188 Mr Swan also relies, in seeking to displace knowledge of the grounds for suspecting insolvency, on the fact that he had no knowledge of the failure to comply with the Swan Group's tax obligations in 2011 (T504). That matter also does not seem to me to assist Mr Swan, since issues of tax compliance were of obvious importance to Swan Services and the Companies, and a reasonable director, complying with his or her obligations, would have had knowledge of those matters, even if the day-to-day responsibility for dealing with them was delegated to Mr Baddour. Mr Swan also submits that the Court should not find that the tax delinquencies in 2011 are facts that should have been known to Mr Swan, given the size of the Swan Group, and his suggested entitlement to rely on the Swan Group's financial controller to ensure that the Swan Group was meeting its tax reporting obligations. I do not accept that submission. Mr Swan submits that, to the extent that he was aware of the relevant tax delinquencies in 2012 and 2013, the Swan Group had payment plans in place, or were in negotiations with the ATO in respect of their obligations. I do not accept that submission is sufficient to displace knowledge of the grounds for suspecting insolvency, for the reasons I have noted in dealing with Ms Swan's submissions above. Mr Swan also submits that the cashflows prepared for the Swan Group during the relevant period showed generally positive cashflows (Ex CC13, 3167–3177) and refers to his meetings with Mr Bell and Mr Wickenden to address Swan Services' financial position. It does not seem to me that those matters assist Mr Swan, given the known issues as to the accuracy of the underlying information contained in those cashflows.

189 Mr Swan also submits that the facts relied upon by the liquidator do not establish that a reasonably competent director in the position of Mr Swan would have had reasonable grounds to suspect that Swan Services and the Companies were insolvent, rather than simply experiencing a period of temporary illiquidity during the relevant period. The difference between

temporary illiquidity and insolvency may, to some extent, be a question of degree. However, it seems to me that the matters to which I have referred above were such that a reasonable person in Mr Swan's position would have suspected insolvency, and not merely temporary illiquidity, during the relevant period.

190 It seems to me that, at best, Mr Swan and Ms Swan could have had a hope that, if events turned out well, the information contained in such financial information as they had was correct, the ATO would be cooperative in respect of the Companies in which payment plans had not been agreed, and Swan Services and the Companies would be able to survive until increases in rates which had been negotiated took effect in the new financial year, then Swan Services and the Companies could potentially reach a position where they could meet their debts as and when they fell due at some point in the future. That hope is not sufficient either to displace the reasonable grounds that then existed to suspect insolvency, or to displace the knowledge that a reasonable person in the position of Mr Swan or Ms Swan (if she were a de facto director) would have had of those grounds, or to establish reasonable grounds for a belief in solvency for the purposes of the defences to which I refer below.

Issues as to recoverable loss and damage

191 The liquidator points out, in closing submissions, that the debts incurred by Swan Services and the Companies over the relevant period comprise, in large part, debts owing to the ATO; wages and employee entitlements; and amounts owing to trade creditors. The liquidator also points out that wages and employment entitlements were each incurred during the relevant period where the employees performed their services during that period. The liquidator also refers to the observation of Barrett J (as his Honour then was) in *Australian Securities & Investments Commission v Edwards* above (at [81]) that debts are "incurred" by any "act omission or other circumstance which causes the company to owe the debt". Although the liquidator's evidence seeks to allocate the debts incurred on a monthly basis, it is not necessary for me to address that allocation, where I have held that the presumption of insolvency applies throughout the relevant period, and that each of Swan Services and the

Companies has also been shown to be insolvent in fact throughout the relevant period.

192 The parties identify several issues to be determined in respect of the claim for loss and damage by the liquidator. The parties identify the issues in this regard in relation to trade creditors as follows:

> "a In relation to each of the debts concerning trade creditors not registered on the PPSR (being those marked "P" on MFI-15), whether those debts were unsecured for the purpose of s 588M(1).
>
> b In relation to each of the debts concerning trade creditors relating to services provided by sub-contractors (being those marked "S" on MFI-15), whether those debts are proved to have been incurred during the relevant period.
>
> c In relation to the debt to URM detailed on MFI-15, whether that debt should be treated as being incurred during the relevant period, and if so, whether the liquidator is entitled to claim that disputed debt as part of his claim under s 588M."

193 The first issue raised in respect of categories of trade creditors relates to certain creditors who had, or claimed to have, securities that were not registered as a security interest on the PPSR and which vested in Swan Services under ss 12(2)(d) and 267A of the *Personal Property Securities Act* 2009 (Cth) ("PPSA"), with the consequence that the debts were unsecured. Mr Braham refers, for example, to invoices issued by Alltech Sweepers and Scrubbers (Ex CC13, 10A/36) which contained a retention of title clause in respect of goods supplied, and submits that entity should be treated as a secured creditor and its debt should be excluded for the purposes of calculating the recoverable loss and damage, although that security had vested in Swan Services. The liquidator responds that that security was not registered on the PPSR and that the creditor claims to be an unsecured creditor.

194 Section 588M(1) of the *Corporations Act* applies, relevantly, where a debt was wholly or partly unsecured when the loss or damage was suffered. Mr Braham submits that the liquidator bears the onus of establishing that the relevant debt was not secured at the time the loss and damage occurred as a result of insolvency, and submits that each of these debts was secured at this point, notwithstanding the subsequent vesting of the security in Swan Services under the *PPSA*. The question of any impact of s 267A of the *PPSA* on whether a retention of title holder should be treated as a secured creditor appears to have

been raised, but not pressed, in *Hussain v CSR Building Products Ltd* [2016] FCA 392; (2016) 112 ACSR 507 at [165]. I proceed on the basis that, putting aside the effect of vesting under s 267A of the *PPSA*, a creditor with the benefit of a retention of title clause would properly be categorised as a secured creditor, since proceeds of sale of property subject to a retention of title clause would be paid to satisfy the unpaid debt prior to claims of unsecured creditors: *Hussain v CSR Building Products Ltd* above at [164]. It is not, however, necessary to express a final view as to that matter in this case.

195 Mr Braham submits that the question whether loss or damage is suffered is distinct from the point at which one can assess the loss or damage. While that proposition may well be correct, it does not seem to me to assist Mr Braham, because whether a creditor would suffer such loss or damage (as distinct from the quantum of it) may well depend on whether the debt is secured and ranks ahead of debts of unsecured creditors, at least in respect of particular property and whether the creditor suffered any such loss or damage (as distinct from its quantum) also could not be determined until it were established whether the creditor would receive a distribution of 100 cents in the dollar as an unsecured creditor in the winding up.

196 As I noted above, Mr Braham submits that the relevant debt owed to such a creditor was secured at the time the loss and damage occurred as a result of insolvency, notwithstanding the subsequent vesting of the security in Swan Services under s 267A of the *PPSA.* I do not accept that submission. It seems to me that the relevant loss or damage was suffered by the creditor in the winding up, when its debt became unsecured by reason of the vesting of the security in Swan Services, and if it did not then receive a distribution of 100 cents in the dollar in the winding up. The assumption in Mr Braham's submission that any loss or damage suffered by such a creditor occurs prior to the point of the winding up and the vesting of its security in the company seems to me to be inconsistent, in principle, with the fact that the amount of that loss or damage is quantified, as I note below, by reference to the recovery, or likely recovery, of that creditor in the winding up. It also seems to me that there is no reason, in principle or policy, to adopt the approach for which Mr Braham contends, unless the terms of the legislation require it, where that

would impose an unfair loss upon a creditor whose security had vested in the company, leaving it in a worse position than it would have been as an unsecured creditor, since it would have neither the security nor the ability to have its debt included as an unsecured debt in a claim under s 588M of the *Corporations Act*, or itself bring a claim as a creditor under s 588R of the *Corporations Act*. That disadvantage would extend to other unsecured creditors to the extent that assets available for distribution under s 556 of the *Corporations Act* were reduced.

197 The second issue relates to debts concerning services provided by subcontractors, where Ms Swan raises a question whether those debts were incurred during the relevant period. For example, an invoice issued by Bizzi Jack (Ex CC13, vol 10A/116) relates to "cleaning services … as per subcontract agreement starting from 28th April 2012". Mr Braham points out that no subcontract agreement is in evidence, although it appears that the agreement for the provision of the services was entered into prior to the relevant period and that there is no evidence as to when the debt was incurred. The liquidator responds that there is no evidence to suggest that there was an underlying fixed term contract. It seems to me that, in respect of each of the claims falling within this category, the liquidator had an evidentiary onus to establish that a debt arose in the relevant period which is discharged by the tender of an invoice issued for the provision of the service in that period. To the extent that Ms Swan contends that the debt did not arise in that period, as a matter of fact, because there existed, for example, some longer term arrangement that had arisen outside the relevant period which amounted to incurring the debt, she had an evidentiary onus to establish that matter. That matter has not been established in respect of any of the claims falling within this category. Accordingly, it seemed to me that each of these debts should be treated as incurred during the relevant period.

198 The third question as to trade creditors relates to invoices issued by Environmental Services Pty Ltd ("URM") which refers to a "fixed collection fee". Ms Swan submits that this term suggests that a contract existed, although there is no evidence of that contract, its term or termination and also submits that this debt, or perhaps half of it, is disputed (Ex CC13, 10C/936). The

liquidator denies that the reference to a "fixed collection fee" suggests the existence of a contract. It does not seem to me that that term is sufficient to create an inference that there exists some other contract, which is not in evidence, where it could readily refer to a fee that is set at a fixed level, as nominated by the supplier from time to time, by contrast with a volume-based fee. It seems to me that the liquidator has discharged the evidentiary onus of establishing that a debt arose in the relevant period by tendering the relevant invoices issued in that period, and that an evidentiary onus rests on Ms Swan if she seeks to contend that the debt was incurred prior to that period under a fixed term contract. The evidence is not sufficient to discharge that onus and this debt should be treated as incurred in the relevant period.

199 The liquidator accepts that Swan Services, at one point, disputed approximately half of the debt claimed by URM (T156). It is not entirely clear whether the liquidator also disputes that debt, or part of it. There is, however, no evidence led by either party to establish that that dispute had a genuine basis or any substantive grounds for it. It does not seem to me that liability under s 588M of the *Corporations Act* is displaced, in respect of any or all of a company's debts, simply because the company claims to dispute any or all amounts claimed by any or all of the company's creditors, unless it also established, at least, that the dispute had a genuine basis. It seems to me that this matter does not prevent the liquidator including this debt as part of his claim under s 588M of the *Corporations Act*.

200 The next issue identified by the parties is how to calculate the loss and damage referrable to the debt owed by Swan Services and the Companies to the ATO and, in particular, whether:

> "a payments made to the ATO during the period 1 November 2012 to 22 May 2013 recorded in the ATO's Running Balance Account (for example 8B/4193) reduce the quantum of the loss and damage claimed by the Liquidator as it relates to the ATO debts incurred (as the Swans contend); or
>
> b the Liquidator is entitled to claim each of the debit entries appearing on the ATO's Running Balance Account and other unreported amounts during the relevant period as separate debts (as the Liquidator contends)."

201 The issue in respect of payments to the ATO was ultimately of limited scope, because it appeared that such payments totalled in the order of $2.7 million,

but the ATO then repaid an amount of approximately $2.5 million in respect of a preference claim. Debts were incurred for PAYG withholding tax and payments were made within an RBA account maintained by the ATO. The question identified by Ms Swan is whether payments reflected in credits to that account have to be taken into account in assessing whether the ATO has suffered loss or damage in respect of the debt. Ms Swan accepts that the relevant loss or damage was "in relation to" the debt for the purposes of s 588M(1)(b) because it was connected to the relevant debt. Mr Braham submits that the reference to "loss and damage" in s 588M(1)(b) of the *Corporations Act*, in relation to the debt owed to the ATO, is not satisfied simply by reason that the debt remains unpaid. Mr Braham also submits that, where the ATO accounts for and treats the debt as forming part of a running account (or more precisely an RBA or "running balance account"), then the question of loss and damage is assessed by reference to that running account and that, if, over the relevant period, the ATO receives more from the debtor than is incurred in additional debts, it has not suffered loss or damage in relation to the debt and has improved its position. I was not taken to any of the complex statutory provisions in the *Income Tax Assessment Act* 1997 (Cth) and other legislation dealing with the status of running balance accounts maintained by the Australian Taxation Office and do not address those matters where the parties did not invite me to do so.

202 Mr Newlinds submits that the loss or damage is suffered in respect of each of the debts recorded in the RBA account maintained by the ATO over the relevant period, without reference to the credits for payments made in that period. It seems to me that, as a matter of principle, payments made during the relevant period (to the extent they have not previously been recovered as preferences) reduce the quantum of the "loss or damage" that can be claimed by the liquidator, so far as it reflects debts owed to the ATO. It seems to me that the concept of "loss or damage" contained in s 588M(1)(b) directs attention to the loss the creditor has suffered in relation to the debt, and that loss or damage must properly be calculated after taking into account a payment made to the creditor that will reduce it, just as a dividend payable in the winding up to

creditors would be treated as a reduction in that loss or damage for the reasons noted below.

203 In reply, Mr Newlinds also submits that a running account analogy is not available in respect of dealings with the ATO, because the ATO does not provide services in response to the payments made to it, and refers to the decision in *Sands & McDougall Wholesale Pty Ltd (in liq) v Commissioner of Taxation* [1998] VSCA 76 at [38]ff; (1998) 147 FLR 323 which supports that proposition. Mr Newlinds also submits that that proposition holds good, even if the ATO itself treats the relevant account as a form of running account. I will assume, without deciding, the correctness of that proposition. It does not seem to me to follow from that proposition that the loss or damage suffered by the ATO, if the particular debts recorded in that account are not paid, should be assessed without regard to the payments which it had received referable to those debts. Mr Newlinds submits that the loss and damage must be assessed in relation to the particular debt, not the other debts that may exist around it and, presumably, by extension, not the payments that may be made in respect of those debts collectively. However, that proposition is inconsistent with the fact that, as the majority of the cases (to which I will refer below) have held, a distribution in the winding up would be taken into account in determining the loss or damage in respect of a debt or several debts owed to a creditor. Accordingly, it seems to me that payments made to the ATO, in the relevant period, but only to the extent they have not been repaid as preference, must be treated as reducing the loss or damage claimed by the liquidator in respect of individual debts owed to the ATO within the RBA accounts.

204 The third issue identified by the parties is whether the liquidator must, in proving loss or damage for the purpose of s 588M, bring to account any anticipated or estimated return to creditors in the relevant insolvencies. Ms Swan submits that the liquidator is required to, but has failed to, factor in any anticipated dividend in calculating his damages claim. The parties indicated that they were agreed that the only such return raised on the evidence is the recovery of $2.5 million as a preference from the ATO.

205 The scope of this issue altered somewhat in the course of evidence and submissions. The liquidator's case was largely conducted on the basis that there would be no recoveries to creditors. A challenge to that proposition was raised by evidence as to the recovery of $2.5 million as a preference from the ATO, to which I referred above. Mr Elkerton's evidence was that, if the 2013 Charge was held to be valid (contrary to the result I reach below), he estimated that unsecured creditors would not receive a dividend in the liquidation; and if (consistent with the result reached below) the 2013 Charge was held to be invalid and he made no further recoveries from other unrelated recovery actions, he estimated that unsecured creditors would receive a pro rata distribution of up to five cents for every dollar of their total claim (Elkerton 2 [37]–[38]). That estimate was qualified by the reference to unidentified further recoveries from unidentified other recovery actions, and there has been reference to at least one such action against Mr Wickenden's firm, but there is no further evidence as to the character of or prospects of such actions. Mr Newlinds contended in oral submissions that that evidence was directed only to whether the grant of the 2013 Charge to Ms Swan was a preference, and he pointed out that the section of the affidavit in which the evidence appears is headed "Effect of 2013 Charge on unsecured creditors" (T622). To that extent, Mr Newlinds seemed to disavow the use of that evidence to provide any basis for determining the likely recovery by creditors by way of any dividend in the liquidation, as a basis for establishing the loss or damage recoverable by the liquidator under s 588M of the *Corporations Act*.

206 In oral submissions, Mr Newlinds submitted that the liquidator's contention was that, as a matter of law, the liquidator did not need to put forward an estimate of the ultimate dividend that creditors whose debts were the subject of his claim would receive in the liquidation. He submitted that the liquidator was not purporting to put forward any evidence that would allow the Court to make any estimate as to what might happen at the end of the liquidation and that the liquidator (or, less dramatically, his case) "will live and die by that decision" (T620). If that submission were accepted, in its terms, then the consequence would be that the liquidator's claim under s 588M of the *Corporations Act* must fail if the Court follows the decision of the Court of Appeal of the Supreme

Court of Queensland in *Smith v Offermans* [2015] QCA 55; (2015) 105 ACSR 230 and other decisions at first instance to which I refer below. As I noted above, the parties' agreed statement of issues for determination appears to proceed on the basis that the question for determination is a somewhat narrower one, not whether the liquidator has failed to establish loss or damage by reason of a failure to establish likely recoveries to creditors, but only whether any amount recoverable against Ms Swan and Mr Swan should be reduced by the recovery of $2.5 million as a preference from the ATO.

207 Mr Braham submits that the Court would treat the $2.5 million recovered from the ATO as a preference (Ex CC16) as a deduction from the amount of any loss or damage recoverable by the liquidator on the basis that it would be distributed to unsecured creditors. Although Mr Braham recognises that there would be costs of the liquidation, he notes that there may also be other recoveries and other assets in the liquidation and that the liquidator has not led evidence as to the amount of those costs, recoveries or other assets. Mr Braham submits that, in that case, the most favourable inference to Ms Swan should be drawn on the limited information that is available (T695). Mr Braham indicated in oral submissions that Ms Swan was only concerned to address the actual recovery received from the ATO, by way of preference, and did not ask the Court to take into account other hypothetical recoveries (T698), presumably referring to other recoveries in other proceedings of which there was no evidence. Ms Swan confirmed that position in written supplementary submissions.

208 The authorities are divided as to this question; two appellate decisions of state courts take different views, and several decisions at first instance in New South Wales take the position for which Ms Swan contends. The liquidator relies on the decision of the Full Court of the Supreme Court of South Australia in *Powell v Fryer* above. Olsson J (with whom Duggan and Williams JJ agreed) there observed (at [87]) that the "focus" of the provisions is "on the incurring of further debts when a company is insolvent and the consequent detriment to creditors by virtue of the non-payment to them of the amounts of their claims." His Honour observed (at [88]) that:

> "I entertain no doubt that, read in context, the loss and damage adverted to is the amount of the unpaid debt due to the creditor in question. This is the view which was obviously taken by Austin J in Tourprint International Pty Ltd (in liq) v Bott [above] (Tourprint), and, in my experience, has always been applied to the practical administration of the statute. While the provisions of the Corporations Law, so applied, may give rise to some practical consequences which could be said to be somewhat arbitrary and possibly inequitable in some respects, the insolvency law has always, as a matter of practicality and commercial expediency, had to adopt certain parameters which are arbitrary. There is nothing particularly novel in the approach here in question. By way of contrast, the adoption of the approach espoused by [the defendant] would render administration in insolvency virtually unworkable. The legislature could not possibly have envisaged creating the inevitable complexity and requirement for detailed examination of collateral issues which [the defendant] propounds.
>
> I therefore reject [the defendant's] submissions and conclude that the "loss or damage" in question will normally be the quantum of relevant unpaid debts."

209 Olsson J there relied on the decision in *Tourprint International Pty Ltd (in liq) v Bott* [1999] NSWSC 581; (1992) 32 ACSR 201 at [79], where Austin J observed that, where the ingredients of s 588M(1) had been made out, the company's liquidator could recover from a director, as a debt due to the company, an amount equal to the amount of the loss or damage of the creditors, which in that case was the amount of their debts. It seems to me that that observation was a conclusion as to the position on the particular facts and not a wider proposition of law. It also seems to me that Olsson J's reference to an "unpaid" debt may also require qualification if a creditor later receives a distribution in the winding up which discharges, in part, the liability that would otherwise be unpaid. His Honour's observation (at [89]) that the "loss or damage" referred to in s 588M(1) of the *Corporations Act* will "normally" be the quantum of relevant unpaid debts leaves open the scope of exceptions to that "normal" position, including whether the circumstance that a creditor receives a distribution in the winding up is such an exception.

210 In Edenden v Bignell [2007] NSWSC 1122 at [30], Barrett J (as his Honour then was) observed that s 588M of the *Corporations Act*:

> "… does not allow recovery of the amount of the creditor's debt as such. Rather, it is a provision allowing recovery of compensation measured by reference to loss or damage suffered by the creditor in relation to the debt because of the debtor's insolvency. In some cases — perhaps most cases — this will be the equivalent of the amount of the debt … In others — for example where a proof of debt is admitted and a substantial payment is made to all creditors rateably — the relevant loss or damage may be less than the amount

> of the debt. There may perhaps be circumstances in which the amount of the loss or damage exceeds the amount of the debt."

That observation plainly contemplated that, where a proof of debt was admitted and a substantial payment was made to creditors rateably, the relevant loss or damage would in fact be less than the amount of the debt.

211 In *Re Salfa Pty Ltd (in liq)* [2014] NSWSC 1493, Brereton J also dealt with the question of the quantification of loss and damage under s 588M of the *Corporations Act*. His Honour there expressed the view (at [21]–[24]) that s 588M of the *Corporations Act* makes recoverable the loss or damage suffered by the creditor in relation to the debt because of the insolvency, not the original amount of the debt and that, although the amount of the debt will be the starting point, it is not necessarily the amount of the loss. His Honour also observed that the cases that are sometimes wrongly cited for the proposition that the loss is equivalent to the debt do not in fact say that. Mr Newlinds submits that that case was an ex parte application for summary dismissal, and submits that the decision is inconsistent with that of the Full Court of the Supreme Court of South Australia in *Powell v Fryer* above (T567).

212 Ms Swan relies on the decision of the Court of Appeal of the Supreme Court of Queensland in *Smith v Offermans* above, where the Court of Appeal of the Supreme Court of Queensland held that it was essential for the Commissioner of Taxation to establish its loss under s 588M of the *Corporations Act,* that it establish the amount it would recover in the liquidation and observed (at [65]) that:

> "It was essential to establishing the claim for compensation in the [amount claimed] that the respondent deposed, as at the time of the claim, what the quantum of the loss suffered was. It could not simply be assumed to be the same as the debt owed to the DCT, especially given the evidence that there had been some recovery by the liquidator."

213 In *Ball (in his capacity as official liquidator of Wealthfarm Group Services) v Sinclair* [2015] NSWSC 2103 at [15], Brereton J similarly observed that:

> "Assessment of the loss or damage suffered by a creditor by reason of the insolvency must necessarily bring to account any dividend paid or likely to be paid to the creditor. … That sum should be deducted from the total amount of the debts to calculate the amount of the loss or damage suffered by the creditors by reason of the company's insolvency."

214 There will plainly be practical challenges, as *Powell v Fryer* above recognised and Mr Newlinds emphasises, where a liquidator pursues several preference claims, in establishing the amount of loss and damage that would be recoverable in a claim under s 588M of the *Corporations Act*. However, it seems to me that those matters could be addressed by the liquidator leading his or her best estimate of recovery in such claims, and costs incurred in them, and it would be open to a defendant to contest that estimate if it sought to do so. I also recognise the risk that that course could involve an attempt, in one proceeding, to seek to anticipate the likely result of other proceedings. Mr Braham accepted that the process of assessing future recoveries in a liquidation may be a complex one. However, Mr Braham also pointed out, with substantial force, that that exercise is regularly undertaken in litigation, where either future loss needs to be assessed, or loss needs to be assessed on a hypothetical basis, for example, in respect of the potential outcome of legal proceedings that were not run by reason of the lapse of a limitation period (T699).

215 Mr Braham also points out that the approach adopted in *Powell & Anor v Fryer* above could have the consequence that no regard would be had to amounts that would be distributable to unsecured creditors in a liquidation, arising not only from recoveries that may be complex to calculate, but potentially also from recoveries that would be straightforward to determine, for example, if a judgment had already been rendered in favour of the liquidator in a preference claim and had already been enforced, or could readily be enforced against assets that would be straightforward to access such as amounts held in a bank account. It seems to me that that approach would have, in some circumstances, unjust results, so that, for example, a successful action to set aside the grant of a security as an uncommercial transaction may significantly increase the return to unsecured creditors but, on that approach, that outcome or potential outcome would be disregarded in determining the amount of loss or damage recoverable against directors under s 588M of the *Corporations Act*. In some circumstances, that approach would have the odd result that the liquidator could recover more, by way of voidable preference actions and

claims against directors under s 588M of the *Corporations Act* than the total unpaid claims of creditors.

216 I consider that I should follow the decisions in *Smith v Offermans* above, *Re Salfa Pty Ltd (in liq)* above and *Ball (in his capacity as official liquidator of Wealthfarm Group Services) v Sinclair* above, in preference to the approach in *Powell v Fryer* above, because I consider that the former approach is preferable to the latter in principle. The concept of "loss and damage" adopted in the section seems to require that account be taken of matters that will reduce the amount of that loss or damage, including recoveries by the liquidator that will allow a distribution to creditors, and that result is consistent with fairness so far as it does not result in the defendant, in a claim under s 588M of the *Corporations Act*, being required to compensate for loss and damage which will not be suffered once other recoveries are made. While the process of establishing loss or damage taking into account future recoveries may be challenging in a particular case, it is by no means impossible. That approach seems to me necessary to establish the amount of "loss or damage" that a creditor will in fact incur and should avoid or limit the risk that judgments are given under s 588M of the *Corporations Act* for more than the amount of that loss or damage.

217 The parties were agreed that, once findings are made on the issues noted above, they can determine the respective liability of Mr Swan and Ms Swan, subject to the Court's findings in relation to defences. The parties noted that, if the relevant periods are exact calendar months, then the calculation can be derived from annexure A to the liquidator's closing submissions together with MFI-15. I will allow the parties an opportunity to agree that calculation.

Defences relied on by Mr Swan and Ms Swan

218 The parties identified the next issue to be determined as defences raised by Mr Swan and Ms Swan as follows:

> "Whether at the time that the debts referred to above were incurred, Mr Swan and/or Ms Swan:
>
> a had reasonable grounds to expect, and did expect, that the relevant company was solvent, and would remain solvent even if it incurred the debts and any other debts that it incurred at the time – s 588H(2);

> b had reasonable grounds to believe and did believe that a competent and reliable person was responsible for providing adequate information about whether the relevant company was solvent; and that that person was fulfilling that responsibility; and expected, on the basis of information provided, that the relevant company was solvent at that time and would remain solvent even if it incurred the debt and any other debts that it incurred at that time – s 588H(3)."

219 By paragraph 38 of her Defence to the Further Amended Points of Cross-Claim, Ms Swan pleaded, first, that she had reasonable grounds to expect, and did expect, that Swan Services and the Companies were solvent at the relevant time. Mr Swan also raises a defence to the insolvent trading claim that he had reasonable grounds to expect, and did expect, that Swan Services and each of the Companies was solvent at the time and would remain solvent even if Swan Services and each of the Companies incurred the relevant debts and any other debts that it and they incurred at those times.

220 A defence to a claim under s 588G of the *Corporations Act* is available under s 588H(2) of the *Corporations Act* where, at the time a debt was incurred, a person has reasonable grounds to expect and does expect that the company was solvent at that time and would remain so even if it incurred the debt. In order to establish an expectation that the company is solvent for the purposes of s 588H(2), a director must establish a measure of confidence or actual expectation that the company is solvent, and more than a mere hope or possibility of solvency; the grounds on which the director forms the view as to the company's solvency must be reasonable when considered objectively in the light of the relevant circumstances; and the director must have a reasonable basis for an expectation that the debts will be paid as they fall due for payment, not merely at some future time: *Metropolitan Fire Systems Pty Ltd v Miller & Ewins* (1997) 23 ACSR 699 at 711; *Tourprint International Pty Ltd (in liq) v Bott* above at 215; *Hall v Poolman* above at [265]; *Smith v Bone* above at [375]. That defence will not be established if a director did not take reasonable steps to perform his or her duties, including obtaining relevant information from the company's management: *Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91; (2003) 57 NSWLR 113 at 131–134; *Australian Securities and Investments Commission v Plymin (No 1)* above.

221 I have addressed many of the issues relevant to this defence in addressing the question whether there were reasonable grounds to suspect insolvency above.

In this case, as in many cases, the matters that establish that a director knew, or a reasonable person in his or her position would know, that there were reasonable grounds to suspect that the relevant company was insolvent, to which I have referred above, undermine any conclusion that the director had reasonable grounds to expect, that the company was solvent at the relevant time and would remain so after incurring the relevant debts.

222 I should, however, refer to the reliance that is placed on Ms Swan's dealings with Mr Wickenden and Mr Bell to establish this defence and the defence under s 588H(3) of the *Corporations Act* which I address below. Ms Swan relies on the information provided by Mr Wickenden and Mr Bell to support this defence. I have set out the dealings between Ms Swan and Mr Wickenden and Mr Allsop, the limits of Mr Wickenden's retainer and the qualifications to his advice above. I have referred above to the fact that Mr Wickenden was unable to advise that Swan Services or the Companies were solvent throughout the relevant period and his advice does not assist Ms Swan or Mr Swan. Mr Bell's evidence in cross-examination was that there was visibility as to the cashflow of Swan Services and the Companies through the bank statements; that he could not initially be satisfied as to the Swan Group's ability to meet its immediate liabilities to the ATO, although he referred to the fact that (I interpolate, some of) the Companies reached agreements with the ATO; he did not have enough financial information as to the assets and liabilities of the Swan Group, although he considered that he could determine its cashflows in the short term (T439); and, when he commenced employment with the Swan Group, he did not know the full extent of the Swan Group's tax debts "in relation to the ability of whether they could pay its debts as and when they fell due" and did not know whether Swan Services and the Companies could do so, based on the information that was then available (T439). Mr Bell's evidence in cross-examination was that he provided Ms Swan with cashflow information from time to time, but that was the only financial information that he provided to her (T443). That evidence also did not assist Mr or Ms Swan in establishing a reasonable basis for a belief in solvency.

223 I should add that Ms Swan was not prepared to accept, in cross-examination, that there was every chance that Swan Services would "go under" as at

December 2012, and pointed out that it had previously gone through similar circumstances and traded out of them. However, she accepted, as she had to, that she could not then make an assessment whether Swan Services would survive that crisis, and that it was certainly a possibility and a real possibility that Swan Services would not survive (T382). That recognition seems to me to tend strongly against the claim that Ms Swan had reasonable grounds to expect that Swan Services or the Companies were solvent, as distinct from a hope that they may be able to trade out of their difficulties, leaving creditors to the risk that that did not occur.

224 Mr Swan also refers, in his first affidavit, to Mr Wickenden's involvement from December 2012 and to having been advised by Mr Wickenden in December 2012 that the amount by which the Swan Group was behind in tax was about $4.1 million rather than $2 million. Mr Swan's evidence is that Mr Wickenden's firm "became responsible for all external accounting advice to Swan Services" and was given authority to act on behalf of Swan Services as its tax agent and to liaise with the ATO regarding the tax liability. It should be noted that the retainer of Mr Wickenden and his firm was then with Ms Swan, not with Swan Services, although Mr Wickenden had in fact been given authority to act on behalf of Swan Services and the Companies in dealing with the ATO. I have referred to the limits of Mr Wickenden's retainer and the advice that he was able to give in respect of solvency above.

225 Mr Swan also refers to the appointment of Mr Bell as financial controller to replace Mr Baddour in early December 2012. Mr Swan's evidence as to reliance on Mr Bell (RS1 [51]) was in general terms, as follows:

> "Throughout early 2013, I attended meetings with Mr Bell twice a week, usually on Monday afternoon and Friday morning, at which he provided me with information regarding the cashflow situation for [companies in the Swan Group], including the status of all company debts. I carefully considered that information, plus other information such as the costings of the wages payable to staff for each of the contracts. On the basis of the information provided to me by Mr Bell, I was satisfied that [companies in the Swan Group were] solvent."

This paragraph does not identify either the particular information provided to Mr Swan by Mr Bell or any reasoning process from that information to a conclusion that Swan Services or the Companies were solvent.

226 Mr Swan also refers to meetings with Mr Wickenden and another representative of his firm at least once a week in early 2013, but his evidence of those matters is even more general (RS1 [52]–[55]), to the effect that meetings with Mr Wickenden gave Mr Swan "confidence that the business could continue", and that he expected that Mr Bell and Mr Wickenden would have told him if Swan Services or the Companies were not solvent, or there was any reason for concern that they may not be solvent.

227 Mr Swan also refers to information which he considered to be important to the business viability in early 2013, including the fact that companies in the Swan Group had no overdraft, owned their own equipment and had only one lease (although, I interpolate, there are references elsewhere to other leased equipment); that companies in the Swan Group were paying their "debts in accordance with the invoice terms, save for a few larger debts in relation to which the companies entered into payment terms with its creditors"; that Mr Swan understood that Mr Wickenden was negotiating an arrangement for companies in the Swan Group to repay the amount owed to the ATO; and that Mr Swan was seeking to, and in some cases had, negotiated increased fees in respect of unprofitable cleaning contracts, although those increases were not to commence until 1 July 2013 (Swan [54]). Mr Swan's claim that Swan Services and the Companies were paying their debts in accordance with invoice terms is inconsistent with the objective evidence of multiple demands from creditors, and the renegotiation of contracts provides no assistance with solvency in the relevant period, so far as the suggested increases did not commence until 1 July 2013. I have otherwise addressed these matters in dealing with other issues above.

228 I am not satisfied that this defence is established for the reasons set out above.

Whether Ms Swan or Mr Swan had reasonable grounds to believe, and did believe that, competent and reliable people were responsible for providing adequate information about whether Swan Services and the Companies were solvent

229 Ms Swan also pleads that she had reasonable grounds to believe, and did believe that, competent and reliable people were responsible for providing her adequate information about whether Swan Services and the Companies were

solvent and were fulfilling that responsibility; and that she expected, on the basis of information provided to her by those people, that Swan Services and the Companies were solvent at that time. Mr Swan also pleads that he also had reasonable grounds to believe, and did believe, that competent and reliable persons, being Mr Baddour until around December 2012 and Messrs Bell and Wickenden from December 2012 until 22 May 2013, were responsible for providing to him adequate information about whether Swan Services and each of the Companies were solvent and were fulfilling that responsibility and expected, on the basis of information provided to him by them, that Swan Services and each of the Companies were solvent at those times and would remain solvent even if it incurred those debts and any other debts that it incurred at those times.

230 A defence is available under s 588H(3) of the *Corporations Act* if a director had reasonable grounds to believe, and did believe, that a competent and reliable person was responsible for providing adequate information about whether the company was solvent and that the other person was fulfilling that responsibility, and expected, on the basis of information provided by that other person, that the company was solvent and would remain solvent even if it incurred the relevant debts. That defence requires that the other person is in fact responsible for providing adequate information to the director whether the company is solvent: *Australian Securities and Investments Commission v Plymin (No 1)* above at [559]–[560]; aff'd *Elliott v Australian Securities and Investments Commission* above; *McLellan (in his capacity as liquidator of Stake Man Pty Ltd) v Carroll* [2009] FCA 1415; (2009) 76 ACSR 67 at [184]–[185]. That defence will not be established if a director was put on inquiry to the reliability of information provided by management and did not make the necessary inquiry: *Australian Securities and Investments Commission v Plymin (No 1)* above at [559]; aff'd *Elliott v Australian Securities and Investments Commission* above.

231 Mr Swan submits that he relied on Mr Baddour, Mr Bell and Mr Wickenden during the relevant period. It does not seem to me that Mr Swan's evidence, in the most general terms, as to reliance on Mr Baddour, can establish this defence, where it does not extend to establish the specifics of the information

which Mr Baddour was to, or did, provide as to Swan Services' and the Companies' solvency. Such reliance was also not reasonably based after the issues as to Mr Baddour's failure properly to identify the Swan Group's tax liabilities and the issues as to the adequacy of the financial records emerged.

232 Mr Swan submits that he reasonably believed that Mr Baddour, Mr Bell and Mr Wickenden were competent and reliable and that, during the relevant period, one or more of them was responsible for providing him adequate information about whether the Swan Group was solvent; that he reasonably believed that one or more of them was fulfilling that responsibility and one or more of them was in fact doing so; and he expected, on the basis of the information provided to him by one or more of them, that the Swan Group was solvent at that time and would remain solvent. I have referred to Mr Swan's evidence of his dealings with Mr Bell and Mr Wickenden above. Ms Swan also submits that she relied at least on Mr Wickenden in respect of these matters and I have addressed her dealings with Mr Wickenden, the limits of Mr Wickenden's retainer, and the qualifications to his advice in respect of the accuracy of the financial information available to him above.

233 I have addressed the information provided to Ms Swan and Mr Swan by Mr Wickenden and Mr Bell above. I am satisfied that Mr Wickenden and Mr Bell were competent and reliable people. However, it has not been established that Mr Wickenden was responsible for providing Ms Swan or Mr Swan with adequate information about whether Swan Services and the Companies were solvent, since his retainer did not go that far, and he was relying on the accuracy of information provided to him by Swan Services and the Companies to make any assessment of the Swan Group's financial position and of solvency. I am satisfied that Mr Bell was responsible for providing Mr Swan (and Ms Swan, if she were a de facto director) with adequate information about whether Swan Services and the Companies were solvent, although his ability to discharge that responsibility was necessarily also limited by the information available to him. I am also satisfied that Mr Wickenden and Mr Bell were fulfilling their respective responsibilities, subject to the limits noted above, although at least Mr Wickenden did so by making clear that he could not confirm the solvency of either Swan Services or the Companies in the relevant

period. However, Ms Swan and Mr Swan cannot establish the second element of this defence, that they expected, on the basis of information provided to them by Mr Wickenden and Mr Bell, that Swan Services and the Companies were solvent at that time. That information did not provide a reasonable basis for that conclusion.

Relief from liability under s 1317S of the Corporations Act

234 The parties identified the next issue to be determined as whether:

> "… Mr Swan and/or Ms Swan ought be relieved either wholly or partly from a liability to which they would otherwise be subject, or that might otherwise be imposed on them, because of that contravention - s 1317S."

235 Ms Swan pleads that, if she contravened s 588G of the *Corporations Act*, then she acted honestly and, having regard to all the circumstances of the case and s 1317S of the *Corporations Act*, she ought fairly to be excused for the contravention and relieved either wholly or partly from the liability which would otherwise be imposed because of it. Mr Swan also pleads that, if he contravened s 588G of the *Corporations Act*, then he acted honestly and, having regard to all of the circumstances of the case, ought fairly be excused for the contravention and seeks relief from liability under s 1317S of the *Corporations Act*.

236 The court has power to grant relief from a contravention of a civil penalty provision under s 1317S of the *Corporations Act* if, in "eligible proceedings" brought against a person, it appears to the court that that person has or may have contravened a civil penalty provision, but that he or she had acted honestly and, having regard to all the circumstances of the case (including those connected with his or her appointment as an officer of a corporation), the person ought fairly to be excused for the contravention. In *Daniels v Anderson* (1995) 37 NSWLR 438 at 525, Clarke and Sheller JJA observed that this section allows the court:

> "to excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are businessmen and women who act in an environment involving risk in commercial decision-making."

237 Matters relevant to relief under this section include whether the defendant acted honestly; a value judgment whether, having regard to all the

circumstances of the case, the defendant ought fairly to be excused for the contravention; and whether, as a matter of discretion, the court should exercise its power to relieve the defendant in whole or part from any liability and, if in part, to what extent: *Australian Securities and Investments Commission v Edwards (No 3)* [2006] NSWSC 376; (2006) 57 ACSR 209 at [10]; *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 85 ACSR 654 at [83]–[84]; *Smith v Bone* above at [395].

238 Whether relief from liability should be granted under this section depends not only on subjective honesty but also on the degree to which the relevant conduct fell short of the required standard, the seriousness of the contravention and its actual or potential consequences, any element of impropriety such as deception and personal gain and any contrition of the applicant and the need for general deterrence is also relevant: *Morley v Australian Securities and Investments Commission (No 2)* [2011] NSWCA 110; (2011) 83 ACSR 620 at [44], [49]–[50]. In determining whether a person ought fairly to be excused for a contravention of s 588G under this section, the court should have regard to matters including, but not limited to, any action the person took with a view to appointing an administrator of the company; when that action was taken; and the results of that action: s 1317S(3); *Australian Securities and Investments Commission v Plymin (No 2)* [2003] VSC 230; (2003) 21 ACLC 1237. In *McLellan (in his capacity as liquidator of Stake Man Pty Ltd) v Carroll* above, the court found that a company had traded while insolvent but granted relief under this section to a director who had acted honestly and with the benefit of professional advice and had actively taken steps to improve the company's financial position.

239 I am conscious of, and give weight to, the difficulty faced by a director where a company suffers from liquidity issues, or worse, as noted by Palmer J in *Hall v Poolman* above at [329]:

> "it is sometimes a difficult decision for a director of a trading corporation suffering from liquidity problems to decide whether, and when, to abandon hope of a change in the company's fortunes and to summon the administrators. There are often pressing interests involved in the decision: the jobs of employees will be lost, the investment of shareholders will evaporate, and a promising venture in which a great deal of personal effort may have been expended will end in failure. On the other hand, the livelihood of creditors

> whose businesses depend on reasonably prompt payment may also be ruined if a company continues to trade while insolvent. When confronted with the necessity of making a decision involving these factors, a director cannot afford to procrastinate or to avoid confronting realities. He or she must ask and honestly answer the hard questions … ."

I am also conscious that, as Palmer J noted in *Hall v Poolman* above at [331]:

> "Experienced company directors … would appreciate that, in some cases, it is not commercially sensible to summon the administrators or to abandon a substantial trading enterprise to the liquidators as soon as any liquidity shortage occurs. In some cases a reasonable time must be allowed to a director to assess whether the company's difficulty is temporary and remediable or endemic and fatal. The commercial reality is that creditors will usually allow some time for payment beyond normal trading terms, if there are worthwhile prospects of an improvement in the company's position. The ATO, likewise, will often defer recovery proceedings in certain circumstances, as the evidence shows."

240 I proceed on the basis that each of Mr Swan and Ms Swan acted honestly. However, the evidence to which I have referred above does not indicate that Mr Swan closely engaged with the issues as to solvency facing Swan Services or the Companies, or that he permitted Swan Services and the Companies to continue to trade and incur debts only following any careful consideration of the risk posed to creditors of taking that course. It seems to me that, at best, he had a hope that Swan Services and the Companies could trade through their difficulties as they had done in the past, although taking that course would expose creditors to the losses which they have now suffered, if it did not succeed. I am not satisfied, given the findings that I have reached above, that Mr Swan ought fairly be excused from liability.

241 Ms Swan submits that matters which support relief from liability under s 1317S of the *Corporations Act* include that she did not consider herself to be a director, or to occupy a position that carried the responsibility of ensuring that Swan Services and the Companies did not trade while insolvent, in the relevant period; that she had no power to call a meeting of directors or to cause the appointment of an administrator and that Mr Swan did not accept that she had the powers of a director during that period; she could not have prevented the relevant debts being incurred and could not have "resigned"; and she had reason to believe that Mr Swan was well-advised by Mr Bell and Mr Wickenden. Ms Swan also submits, and I accept, that the fact that she was taking advice as to her responsibilities from Mr Allsop and Mr Wickenden is a

relevant factor in addressing the defence under s 1317S of the *Corporations Act*, even if, as I have held, that advice did not establish the defences under s 588H of the *Corporations Act*: *McLellan (in his capacity as liquidator of Stake Man Pty Ltd) v Carroll* above. That proposition, however, does not seem to me to assist Ms Swan, where the advice provided by Mr Allsop and Mr Wickenden was not sufficient, at any time, to establish that Swan Services and the Companies were likely to be solvent or that their continued trading would not expose creditors to the risk which has now come home for them. It seems to me that Ms Swan's claim under s 1317S of the *Corporations Act* is also not assisted by the fact that, at a time that she knew of the particular difficulties facing Swan Services and the Companies, she sought to take steps to improve her security position, which may not have then been available to other creditors who lacked her detailed knowledge of the Swan Group's position.

242 The question whether Ms Swan should be excused from liability would only arise if, contrary to the conclusion that I have reached above, Ms Swan was a de facto director of Swan Services and the Companies. It would then have to be addressed in the context of quite different findings than those that I have reached. It seems to me preferable not to express a view as to that question when, in the only case that it would need to be determined, following an appeal from this decision, that determination would likely have to be made on a different factual basis.

Claim under s 588V of the Corporations Act

243 The Second Further Amended Points of Cross-Claim also pleaded a claim under s 588V of the *Corporations Act*, on the basis of an allegation of holding company liability. That matter was not identified in the parties' statement of issues as requiring determination and it does not seem to me that, on the findings that I have reached, there would be any utility in determining it. I will, however, hear the parties if they consider that that claim has continuing relevance in respect of the findings that I have reached.

Ms Swan's claim in respect of the 2013 Charge and factual background

244 By her Amended Originating Process, Ms Swan seeks a declaration that a charge given by Swan Services to Ms Swan bearing the date 2 April 2013

("2013 Charge") came into effect on 4 April 2013, although it was dated 2 April 2013, or alternatively an order that the time for registration of the 2013 Charge be extended pursuant to s 588FM(1) of the *Corporations Act*, nunc pro tunc, to and including 3 May 2013. Ms Swan claims the repayment of the balance of the amount advanced in 2013, quantified as $1.345 million, less an amount of $868,200 paid to her on 21 May 2013, totalling $471,053.25. (I appreciate there is an arithmetical difficulty with these figures which will need to be corrected in making orders.)

245 It is convenient to set out the relevant events at this point, before turning to the complex pleadings as to this issue and the simpler case run at trial. On or about 15 March 2003, Ms Swan and Mr Swan obtained a home loan from the National Australia Bank ("NAB") with a limit of $1.5 million ("NAB Facility") (Ex CC13, 791–801). Ms Swan's affidavit evidence is that a joint application for that loan was made by Mr Swan and herself, in circumstances that she did not earn sufficient income to satisfy the requirements of NAB as lender. That loan was secured by a mortgage granted to NAB by Ms Swan over a property she owned in Bellevue Hill, New South Wales (Ex CC13, 821–822). On 15 April 2003, an amount of $360,000 was paid to Swan Services, pursuant to the NAB Facility secured by Mr Swan and Ms Swan. Throughout the period of the loan, Swan Services met the interest payments due to NAB on the loan to Mr Swan and Ms Swan.

246 A loan agreement dated 16 April 2003 between Swan Services and Ms Swan (Ex JS-1) ("2003 Loan Agreement") relevantly provided that:

> "1. [Swan Services] requires bridging finance for the purposes of continuing its business operations. [Ms Swan] has agreed to assist [Swan Services] from time to time and in accordance with the financial means of [Swan Services] up to the limit of $1,500,000 (one and a half million dollars).
>
> 2. [Swan Services] agrees to repay [Ms Swan] initially by the payment of $10,000 per month from the commencement date of this agreement being 16 April 2003. The initial amount of the loan is $360,000.
>
> 3. [Ms Swan] as security for such loan, will acquire a fixed and floating charge over the assets of the company and the shares of the company which is to be registered immediately following the transfer of the initial funds."

247 Ms Swan referred in her affidavit evidence to the circumstances in which the 2003 Loan Agreement was executed, and discussions as to the preparation of

a formal charge document to be registered in relation to the loan agreement, which did not occur after stamp duty issues arose (JS2 [55]–[56], [58]–[61]).

248 Notification of details of a charge (dated 16 April 2003) which attached the 2003 Loan Agreement was subsequently lodged with Australian Securities and Investments Commission ("ASIC") although no stamp duty had been paid upon it (Ex CC13, 824).

249 Ms Swan accepted, in cross-examination, that there was a further discussion in July 2004 with the Swan Group's accountant, who had been asked to prepare a formal charge document to be registered in relation to the 2003 loan (T311). Ms Swan's evidence was that she was told at the time that there might be a problem with the "mechanics" of the 2003 Loan Agreement and that it was being rectified, and her evidence was that she understood that whatever had been registered in 2003 "needed to be firmed up" (T312). Ms Swan's evidence was that she could not recall the "exact conversation", although she had given evidence, in her 5 June 2015 affidavit, of being told that a formal charge document was to be prepared and registered in relation to the 2003 Loan Agreement (T314). Ms Swan's affidavit evidence was that she was then told that stamp duty issues had arisen, and her evidence in cross-examination was that that was the last she heard of the matter (T317).

250 Ms Swan refers in her affidavit evidence to further drawdowns on the NAB Facility in 2009 and early 2010, at the time Swan Services was awarded a national contract to clean buildings owned by Colonial and was purchasing equipment and machinery for the purposes of that contract. Ms Swan refers to a further drawdown of that facility of $500,000 in June 2010, at a time the balance outstanding under the facility had been reduced to approximately $378,000 and further drawdowns in October 2010 which increased the balance owing under it to $1,470,720.

251 After Mr Allsop was engaged to advise Ms Swan, by email dated 17 December 2012 (Ex CC13, 1666), he recommended to Ms Swan that she should:

> "discharge the existing charge and then enter a new charge for any further advances".

252 Ms Swan accepted in cross-examination that, by December 2012, Mr Allsop and Mr Wickenden had advised her that there was a problem with her security position, although she did not accept that they had told her that she was not necessarily secured, and recalled someone having said, possibly Mr Allsop, that she needed to "[shore] up your loan" (T320). Ms Swan also referred, in cross-examination, to Mr Allsop or Mr Wickenden having referred to the absence of a mechanism for the appointment of a receiver or administrator, and that there was a problem with the enforceability of the 2003 Charge (T320).

253 Ms Swan also refers (JS3 [239]) to a conversation in respect of the provision of a new charge (which was admitted with a limiting order under s 136 of the *Evidence Act* as proof of the conversation and not the asserted facts), in which Mr Allsop described the process that was to be adopted as follows:

> "The most effective way to do this is to repay the full amount of oewed [sic] to the NAB and to extinguish the current security and to relend the amount changing the security."

That observation emphasises the extent to which the repayment of the relevant amount and the relending of it was a single transaction. Ms Swan also refers to Mr Allsop's qualified observation (JS3 [239]) that:

> "Based on the profit and loss statements and balance sheet provide [sic] by Swan as at 31 October 2012, it would be reasonable to suggest that Swan is solvent, of course providing the figures are real figures and are not inaccurate."

That observation was qualified, in its terms, by the proviso that the figures were accurate, quite apart from the obvious difficulty in drawing any conclusion as to solvency, in March 2013, from figures prepared several months earlier, in October 2012. Ms Swan also refers to Mr Wickenden's agreement with that proposition and to Mr Allsop's reference to the possibility of a "concern", implicitly as to solvency, with the other companies.

254 By email dated 23 January 2013 (Ex CC13, 1847), to which I have referred above, Mr Foster, from a firm of accountants that acted for Swan Services and the Companies, advised Ms Swan that:

> "Further and more importantly you will need to seek legal advice to ensure that your loans to the [G]roup are secured. You mentioned that you were doing this when we met."

255 In January 2013, Ms Swan and Swan Services executed a new loan agreement ("2013 Loan Agreement") and a fixed and floating charge ("2013 Charge") on the basis that those documents would be held in escrow by Mr Allsop pending repayment under the 2003 Loan Agreement (Allsop 30.1.14 [6]–[7]).

256 Ms Swan also gives affidavit evidence of discussions with Mr Swan in late 2012, following the events to which I have referred above, in respect of the repayment of the monies borrowed from NAB, in which Mr Swan pointed to the need for further funding for the Companies after monies were repaid to NAB (JS1 [36]). Her evidence is that she said she would agree to further drawdowns if Mr Wickenden advised her that it was "alright to do so" (JS1 [37]). It is plain that neither Swan Services nor the Companies had the capacity to repay funds to Ms Swan, or NAB, at that time, other than on a basis that they were redrawn within a very short period.

257 At 2 April 2013, the balance of the NAB Facility (and Ms Swan contends, the amount of the debt due by Swan Services to Ms Swan under the First Loan) was $1,351,235.41 (Ex CC13, 3879). Swan Services paid NAB the amount of $1,345,809.91 (Ex CC13, 3879) on that date, the charge registered in 2003 referable to the 2003 Loan Agreement was discharged and the 2013 Loan Agreement between Swan Services and Ms Swan (Ex JS-2) and the 2013 Charge were then dated 2 April 2013. On 4 April 2013, the NAB Facility was redrawn and a payment of $1,345,000 was made from it to Swan Services' CBA Account (Ex CC13, 3662). Ms Swan now contends that the 2013 Charge came into force on that date.

258 Ms Swan was initially not prepared to accept, in cross-examination, that Swan Services did not have the capacity to repay her the amount of approximately $1.5 million which it owed her in late 2012, given its then cashflow (T308), although that matter appeared to emerge clearly from the evidence. However, Ms Swan later acknowledged in cross-examination that, at the time of the transaction of repayment and redrawing on the loan, Swan Services needed the funds to survive and that she wanted the company to survive (T325). She also accepted that the point of the transaction was not to obtain repayment of

the loan, but to replace the old security with the new security which would seem to be in her interest and that she had been told that Mr Swan needed the money to keep the business in operation, and the company could not pay its daily operating costs unless it drew back on the money that was secured (T326). Mr Swan accepted in cross-examination that, at the time NAB was repaid, companies in the Swan Group needed the money and that companies in the Swan Group had not been in a position between December 2012 and April 2013 to repay the amount of approximately $1.3 million due to Ms Swan (T535). Mr Bell's evidence in cross-examination was that he had discussed that amount and how long the funds would be drawn down for with Mr and Ms Swan and that Mr Swan had told him the funds would be withdrawn within a few days (T441). Mr Wickenden also accepted, in the course of cross-examination, that the only difference that would result from the transaction involving the repayment of Ms Swan's loan and the further advance of the monies was that the earlier security held by Ms Swan would be replaced by a better security and that he was not aware of any further conditions being placed on money being relent to the Swan Group (T477).

259 The 2013 Loan Agreement recorded that Ms Swan had advanced monies to Swan Services from time to time pursuant to the 2003 Loan Agreement; that those monies were borrowed from NAB pursuant to a facility in the name of Mr Swan and Ms Swan, and included monies secured by mortgage over the property owned by Ms Swan at Bellevue Hill; recites that those advances to Swan Services were secured by a fixed and floating charge over Swan Services' assets as provided in notification of details of charge registered on 22 April 2003; and further recites that:

> "D. [Ms Swan] has called for repayment of the monies advanced by her.
>
> E. The Company has agreed to repay those advances at the date of this Agreement.
>
> F. The Company has requested [Ms Swan] provide further financial assistance from time to time.
>
> G. Thereafter [Ms Swan] may advance further monies to the Company from time to time, at her absolute discretion."

Those recitals fall somewhat short of indicating the true position, as it emerges from the evidence, namely that Swan Services would not have survived

beyond April 2013 unless the monies repaid to NAB had immediately been redrawn, and immediately paid to Swan Services, to allow it continued working capital. The 2013 Charge was significantly more onerous than the 2003 Charge, in several respects, including its treatment of the costs and expenses which would be recoverable from Swan Services on enforcement. However, Mr Newlinds ultimately did not submit that the entry into the 2013 Charge amounted to an uncommercial transaction on that particular basis and I need not address that matter further.

260 For completeness, I note that Ms Swan travelled to South Africa between 17 and 22 April 2013. In her second affidavit, Ms Swan refers to her discovery, after returning from South Africa, of a further drawdown by Mr Swan from a self-managed superannuation fund on her return, which it appears Mr Swan had paid into the business. Ms Swan also refers to having been advised that the loan had been drawn down again, two days after it had been repaid. While Ms Swan expressed discontent as to that matter, it seems to me to be that the redraw of the loan (although not any dealing with the superannuation fund) was plainly contemplated, as Mr Swan had then responded, by the earlier discussion with Mr Allsop.

261 Mr Allsop lodged the 2013 Charge for registration on the PPSR on 24 April 2013 (Ex CC13, 2220). For several reasons, which ultimately now do not need to be further explored, the registration of the 2013 Charge was not completed until 3 May 2013 (Ex CC13, 2448–2449) and it is at least arguable that registration was not completed within the time specified in s 588FL(2)(b)(ii) of the *Corporations Act*.

262 By letter dated 21 May 2013 from Ms Swan to Swan Services, she required "immediate repayment of all monies advanced by me" (Ex CC13, 2334). On 21 May 2013, a payment of $868,200 was made from Swan Services' bank account to Ms Swan (Ex CC13, 3728). Ms Swan refers in her affidavit evidence to her having served a demand for repayment on Mr Swan on 21 May 2013, and to Mr Swan then having made payment (I interpolate, out of Swan Services) of the amount of $868,200 (JS3 [259]). On the same day, Mr Wickenden sent an email to Ms Swan, copied to Mr Allsop, recommending Mr

Elkerton and Mr Young as administrators (Ex CC13, 2332A). Mr Swan also gave evidence, which was at best seriously incomplete, of the circumstances in which Swan Services was placed in administration in May 2013, following a demand by Ms Swan (RS1 [56]). In particular, that evidence omitted reference to the steps which had been taken, immediately before that occurred, to pay that amount to Ms Swan, and to the fact that Mr Swan had attended to making that payment, after Mr Bell had, to his credit, declined to do so.

The pleaded dispute

263 By their Second Further Amended Points of Cross-Claim, the Cross-Claimants plead that the 2003 Loan Agreement did not, in its terms, require Swan Services to pay interest on the amount of the loan. The liquidator also pleads that Ms Swan was a director of Swan Services, or of Swan Services and each of the Companies, within the extended definition in s 9 of the *Corporations Act* on the basis that she was, relevantly, a person who acted in the position of director but had not been formally appointed as such. Alternatively, the Cross-Claimants plead that Ms Swan was a close associate of Mr Swan, being his then wife.

264 The Cross-Claimants also plead, in a relatively complex pleading, that the composite of dealings comprising the 2 April Payment (as defined), the grant of the 2013 Charge and the 4 April Payment (as defined) was an uncommercial transaction within the meaning of s 588FB(1) of the *Corporations Act* or an unreasonable director-related transaction of Swan Services within the meaning of s 588FDA(1) of the *Corporations Act*; and that the above composite of dealings was an insolvent transaction of Swan Services within the meaning of s 588FC of the *Corporations Act*. The Cross-Claimants also plead that, by reason of those matters, the relevant dealings were voidable under s 588FE of the *Corporations Act* and advance similar allegations, separately, in respect of the 2 April Payment.

265 By her Defence to the Cross-Claim, Ms Swan responded that it was a term of the 2003 Loan Agreement that Swan Services would pay her all interest that she was liable to pay NAB under the facility provided by NAB to Mr Swan and Ms Swan and would otherwise indemnify her against that liability. That

arrangement was particularised as oral and subsequently recorded in writing and as having been concluded by discussions between Mr Swan and Ms Swan in March and April 2003 and subsequently recorded in the loan agreement dated 16 April 2003. Possibly in the alternative, that matter is alleged to form an implied term of the 2003 Loan Agreement by reason that Swan Services in fact made all repayments, including interest repayments, to NAB under the relevant facility between 2003 and 2013. Alternatively, claims in estoppel, for misleading and deceptive conduct and for unconscionable conduct were pleaded in the Defence, but they were not the subject of submissions and I assume they were not pressed. There was also, at one point, a dispute as to whether conditions precedent to the making of the loan, or the grant of the 2013 Charge, contemplated in discussions with Ms Swan had been satisfied. As I understood it, that dispute was displaced by a focus on other issues in closing submissions, and I need not address it further.

266 The issues in respect of Ms Swan's application for an extension of time under s 588FM of the *Corporations Act* significantly narrowed at the hearing. The liquidator accepted that, unless he established the challenge to the grant of the 2013 Charge under his Cross-Claim, the extension of time sought under s 588FM of the *Corporations Act* should be granted. It seems to me that the liquidator was correct in taking that view and that, unless the matters raised in the Cross-Claim are established, the Court would readily grant the extension of time that is sought. The liquidator's challenge to the 2013 Charge was in turn based on the proposition that, on its proper construction, the 2003 Loan Agreement did not create a charge over the assets of Swan Services and that, as at 2 April 2013, Swan Services was either not indebted to Ms Swan pursuant to the 2003 Loan Agreement, or, if she was indebted to Swan Services, that indebtedness was unsecured.

267 The narrowing of these issues was reflected in the parties' identification of the issues that were required to be determined in respect of the 2013 Charge. The first of those issues was:

> "11 Whether, as at the date of repayment on 2 April 2013, Ms Swan was a secured creditor for all or part of the amount paid to her. The only issues relevant to this issue are:

a Whether, on a proper construction of the [2003 Loan Agreement], the agreement afforded to Ms Swan a security interest such that she was a secured creditor of Swan Services.

b Whether the ASIC Form 309 document (3A/825) alone created a charge."

The parties' submissions

268 Mr Newlinds summarised the liquidator's case in respect of this issue in closing submissions as being that, as of 2 April 2013, Ms Swan was an unsecured creditor; she was then repaid the amount of $$1,345,809.91, which discharged Swan Services' indebtedness; that money was then readvanced to Swan Services and the 2013 Charge taken; these matters amounted to a single transaction, which was an uncommercial transaction within the scope of s 588FB of the *Corporations Act* or an unreasonable director-related transaction within the scope of s 588FDA of the *Corporations Act* (T574–575). Mr Newlinds made clear, in opening, that the liquidator did not oppose an extension of time, other than by reason of the contention that the grant of the 2013 Charge was void against the liquidator (T37).

269 In opening submissions, Mr Braham drew attention to the principles applicable to an extension of time under s 588FM of the *Corporations Act*, as summarised by Brereton J in *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023 at [13]–[14]. I proceed on the basis that such an order can be made, even after liquidation, provided the circumstances are such as to render it just and equitable to grant relief, notwithstanding the grant of relief would defeat rights of unsecured creditors. It was common ground between the parties, and it seems to me that, it would be just and equitable to grant relief, given the short delay and the circumstances in which it occurred, unless the transaction is liable to be set aside on the substantive basis on which it is attacked by the liquidator. Mr Braham also accepted, in opening, that the transactions of 2 and 4 April 2013 stand or fall on the proposition that Ms Swan was already a secured creditor on 2 April 2013 (T39). Both parties accept that, if Ms Swan was not a secured creditor on 2 April 2013, then the payment made on that date was a preference, and Ms Swan would be required to discharge the net amount by which she benefited, after relending money to Swan Services and receiving partial repayment of it, namely $868,000 and should not recover the

additional amount for which she claimed, which was the balance of the amount of $1,345,809.91 (T39).

270 The real issue in dispute is therefore whether the 2003 Loan Agreement was effective to create a charge over the assets of Swan Services, or contemplated the grant of a charge in the future and did not itself charge any property, or was uncertain. Mr Braham submits that a charge was intended to come into existence upon the execution of the 2003 Loan Agreement, and that the words "will acquire" in cl 3 of that agreement should be understood "will hereby acquire" without the need for a further request or other step to be taken by Ms Swan. Alternatively, Mr Braham submits that, if that clause did not itself create a charge, it created an obligation on Swan Services to give Ms Swan a charge in registrable form immediately upon execution of the 2003 Loan Agreement.

271 Mr Newlinds submitted that any charge created under, or derived from, the 2003 Loan Agreement was uncertain, because it failed to identify the assets that would be charged at the future date the charge was to be granted, and, I interpolate, also failed to identify which assets of Swan Services would be subject to a fixed charge and which assets would be subject to a floating charge. Mr Newlinds submitted that a promise to provide a fixed or floating charge, or a charge which is both fixed and floating, at some point in the future lacked certainty as to the property that is to be the subject of the security (T36).

272 In his written closing submissions, the liquidator submits that any charge given in 2003 is void on the basis that that it is "impossible to identify what property is to be charged" and refers to *Roberts v Investwell Pty Ltd (in liq)* [2012] NSWCA 134; (2012) 88 ACSR 689 at [27]–[30], which I will address below. The liquidator also submitted that that charge purported to give a charge over the "shares of the company", which were not property of the company and were held by Mr Swan (Ex CC13, 2380–2391) and submitted that Swan Services could not give a charge over property of another. In oral closing submissions, Mr Newlinds submitted that the 2003 Loan Agreement amounted to an agreement to grant a charge at some time in the future but was never perfected, and was not effective to create a charge because it was impossible to identify the property that was to be charged. In closing submissions, Mr

Newlinds also submitted that equity would not enforce the 2003 Loan Agreement as a charge because of a lack of certainty as to the charged assets (T575).

273 I also requested, and was provided, helpful supplementary submissions as to the issue of certainty of the charge by the liquidator and Ms Swan. In his supplementary written submissions, the liquidator submitted that the failure to identify which assets are subject to a fixed charge and which assets are subject to a floating charge led to the failure of the 2003 Loan Agreement and any consequential charge. As the liquidator points out, a "floating" charge is a charge on a class of assets of the company, present or future, which in the ordinary course of business changes from time to time, and permits the company to carry on its business in the ordinary way, employing that class of assets in the business, unless the charge in future becomes fixed: *Re Yorkshire Woolcombers Association, Ltd* [1903] 2 Ch 284 at 295; *United Builders Pty Ltd v Mutual Acceptance Ltd* [1980] HCA 43; (1980) 144 CLR 673 at 681–682. The liquidator also referred to *Illingworth v Houldsworth* [1904] AC 355 at 358, where Macnaghten LJ observed that:

> "A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

274 In his supplementary written submissions, the liquidator submitted that the failure, in the 2003 Loan Agreement and any associated charge, to identify which assets are caught by either the floating element or the fixed element presents an unworkable situation which must render the instrument so uncertain that it fails. The liquidator also submitted that that omission results in an inability of the parties to the security to identify at any time prior to crystallization what property of the company may not be disposed of, being property that is caught by the fixed charge, and the property of Swan Services which may be treated as circulating assets and subject to the floating element of the charge. The liquidator also submitted that there is no scope to call into aid any process of construction in an attempt to give the instrument meaning, including by guessing what property might fall under either element.

275 In her supplementary written submissions, Ms Swan rightly recognised that the 2003 Loan Agreement did not identify which assets of Swan Services were subject to a fixed charge, and which to a floating charge and also recognised that raised the possibility that the charge was void for uncertainty. She submitted that that the fact that the 2003 Charge did not distinguish between which assets were subject to the fixed and the floating charge did not have the effect that the 2003 Charge was void for uncertainty.

276 Ms Swan referred to numerous authorities that recognise that, where there is a contractual intention and part performance, the courts should do their best to uphold the bargain, even where difficulties of construction or difficulties because of incompleteness arise. I accept that proposition, and note that the principles were well-expressed by Bergin J (as her Honour then was) in *Sandtara Pty Ltd v Longreach Group Ltd* [2008] NSWSC 373 (at [87]), where her Honour pointed to:

> "Judicial statements to the effect that the Courts should not be seen as contract wreckers and that implications of what is just and reasonable are able to be ascertained by the Court as a matter of machinery where the contractual intention is clear but silent on some detail are not controversial."

277 Ms Swan submitted, and I also accept, that that the charge (or, more precisely, the 2003 Loan Agreement) is to be construed objectively, according to what each party by words and conduct would have led a reasonable person in the position of the other party to believe, and by reference to the surrounding circumstances known to the parties, the purpose and object of the transaction, and that the process of construction may legitimately involve words being supplied, omitted or corrected, in an instrument, where that is clearly necessary in order to avoid absurdity or inconsistency or correct an obvious mistake.

278 Ms Swan submitted that the charge (or, more precisely, the 2003 Loan Agreement) can be read as conferring on her a wholly floating charge over the assets of Swan Services and as not conferring a fixed charge over any of those assets. She submits that result can be achieved, first, by omitting the words "fixed and" as part of the construction exercise, where it could not have been the intention of the parties that the fixed charge be over all the assets of Swan Services. She submits that the extraneous evidence makes it plain that it was contemplated by the parties at the time the charge was given that Swan

Services would continue to trade normally (and without needing continued involvement from Judy Swan) having given the charge, and that a fixed charge over all the assets of the company, including cash and accounts receivable, would be inconsistent with the common intention of the contracting parties, objectively ascertained, because it would have prevented the continued normal trading of Swan Services. Accordingly, she submits, it is reasonable to construe the document as intending a floating charge over all the assets of the company, and not a fixed charge.

279 I accept that it is unlikely, in the circumstances, that the parties intended that the charge be fixed in all respects, both because it was described as "fixed and floating" and because of the need for Swan Services to be able to deal with accounts receivable and smaller physical assets in the ordinary course of business. However, it does not follow that I can infer a common intention that the charge be only a floating charge, disregarding its express terms, and where there is no evidence that, and it is not self-evident that, the parties' objective intention was not that the charge be fixed over major assets, such as larger equipment or fixed assets, that would be retained and used in Swan Services' business.

280 Alternatively, Ms Swan submits that the "fixed" part of the charge related only to the shares in Swan Services, which are the only assets specifically referred to in the charge and, on that reading of the charge, it was fixed over the shares, and floating over the assets of Swan Services. However, that submission has the difficulty, first, that it would give no effect to the fixed charge, since Swan Services did not own and could not charge the shares in itself. Second, it has the difficulty noted above, that there is not there is no evidence that, and it is not self-evident that, the parties' objective intention was not that the charge be fixed over major assets of Swan Services. Third, it has the difficulty that there is no conceptual or evidentiary basis for the Court to determine whether Ms Swan's first construction of the charging clause in the 2003 Loan Agreement or the alternative construction would better reflect the parties objective intentions in the relevant circumstances.

Conclusion as to validity of the 2003 Charge

281 It is clear enough that an equitable charge can be created where property is expressly or constructively made liable, or appropriated to, the discharge of a debt and the chargee is given a right of realisation by judicial process. In *Cradock v Scottish Provident Institution* (1893) 69 LT 380 at 382, it was observed that:

> "To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security."

282 In *National Provincial & Union Bank of England v Charnley* [1924] 1 KB 431 at 449–450, Atkin LJ observed that:

> "… I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court. If those conditions exist I think there is a charge. If, on the other hand, the parties do not intend that there should be a present right to have the security made available, but only that there should be a right in the future by agreement, such as a licence, to seize the goods, there will be no charge."

283 In *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584 at 594, Buckley LJ observed that:

> "If there has been no legal transfer of a proprietary interest but merely a binding undertaking to confer such an interest, that obligation, if specifically enforceable, will confer a proprietary interest in the subject matter in equity. The obligation will be specifically enforceable if it is an obligation for the breach of which damages would be an inadequate remedy. A contract to mortgage property, real or personal, will, normally at least, be specifically enforceable, for a mere claim to damages or repayment is obviously less valuable than a security in the event of the debtor's insolvency. If it is specifically enforceable, the obligation to confer the proprietary interest will give rise to an equitable charge upon the subject matter by way of mortgage."

284 In *Roberts v Investwell Pty Ltd (in liq)* above at [27]–[30], the Court of Appeal considered a similar question to this case, whether a payment made to a creditor, at the time a company was insolvent, could be sustained on the basis that it was a payment in respect of a secured debt and did not constitute an

unfair preference or a voidable transaction. Bathurst CJ there observed (at [29]) that:

> "What is clear from the authorities is that for either an equitable mortgage or equitable charge to come into existence there must be an intention to create an immediate proprietary interest or immediate right of recourse to identifiable, present, or in the case of a charge, future property."

His Honour also observed (at [31]) that:

> "… the question depends, in my view, on the construction of the clause in question. If the provision on its true construction confers an immediate equitable interest in particular property, or grants an immediate right of recourse to present or future property, then the grantee will be secured to the extent of his or her interest in, or right to, the property. If it does not, the creditor will be unsecured."

The Chief Justice held that the clause in issue in that case did not confer an immediate right of recourse to the property, inter alia, because the form of security was not settled but was required to be in a form acceptable to the legal advisers to the creditor. The present agreement does not contain such a provision.

285 While I accept that the Court will do its best to seek to avoid a contract failing for uncertainty, it seems to me that the 2003 Loan Agreement, and any equitable charge derived from it, was too uncertain to be enforceable. As Ms Swan accepts, the 2003 Loan Agreement identifies the assets that were the subject of either a fixed or a floating charge, namely the assets of Swan Services, but does not identify which assets were subject to the fixed charge and which to the floating charge. The lack of attention to that question would not be surprising, if the parties contemplated that a more detailed charge would be executed and registered. That question was of critical importance, since Swan Services' ability to deal with assets in the ordinary course of business without Ms Swan's consent would only extend to those assets that were subject to a floating rather than a fixed charge. Recourse to surrounding circumstances does not assist in determining which property was to be the subject of the fixed component of the charge, and which property was to be the subject of the floating component of the charge, since there is no evidence that either Swan Services or Ms Swan turned their mind to that question. The boundary to be drawn between which assets were subject to a fixed charge and not able to be dealt with by Swan Services without Ms Swan's consent,

and which assets were subject to a floating charge, could have been drawn in different places, even if there exists common practices in that respect, and it does not seem to me that the Court can settle where it should be drawn where the parties did not do so.

286 Ms Swan's alternative case that the Form 309 notification of details of a charge to ASIC lodged 22 April 2003 gives rise to a charge must also fail for the same reason. That document does not purport itself to be a charge, but appears to be notification of the charge created by cl 3 of the 2003 Loan Agreement, and cannot be effective where the 2003 Loan Agreement does not give rise to an enforceable charge by reason of the lack of certainty noted above. It is not necessary to deal with the liquidator's further submission that the notification did not adequately identify the property charged or that s 266 of the *Corporations Act* would have operated to avoid the charge had Ms Swan relied on it as security.

287 The issues identified for determination by the parties suggest that Ms Swan does not now press a further alternative claim that a notification of details of a charge document provisionally accepted by ASIC on 11 June 2004 (Ex CC13, 1033) constituted an effective charge. If it were necessary to determine that proposition, it seems to me that that document would also not be effective as a charge, both because it misdescribed the relevant interest as a "floating charge" only, and not as a fixed and floating charge, and also because it also depended on the terms of the 2003 Loan Agreement, and the uncertainty that deprived that agreement of effect would also deprive a notification derived from it of effect.

288 On that basis, the repayment to Ms Swan in 2013 was a preference and the grant of the 2013 Charge was an uncommercial transaction.

The amount owing to Ms Swan as 2 April 2013

289 The parties identified a further issue as to the amount owed to Ms Swan as at 2 April 2013. The parties noted that the first question relevant to this issue was:

> "Whether interest and other charges can be included as part of the amounts owing under the 2003 Loan Agreement notwithstanding the absence of any written terms in relation to such items in the 2003 Loan Agreement."

290 The Parties identified a second question relevant to this issue as:

> "Whether there is a separate agreement collateral to the 2003 Loan Agreement providing for the payment of interest and charges (Collateral Agreement)."

291 The 2003 Loan Agreement did not, in its terms, provide for interest to be payable on the amount of the loan. No basis was shown on which such a term could be implied. Such a term could only be implied in fact, rather than in law, and the requirements for the implication of that term are those set out by the majority of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282–283, as approved by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 347, namely the specified term (1) must be reasonable and equitable; (2) must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) must be so obvious that "it goes without saying"; (4) must be capable of clear expression; and (5) must not contradict any express term of the contract. In my view, an implied term that interest be payable is neither necessary to give business efficacy to the contract nor so obvious it goes without saying, where it may be logical and commercially sensible for a shareholder or person interested in a company's success to provide a loan to it on an interest free basis.

292 Ms Swan contends that there were other, oral terms of the 2003 Loan Agreement, or a collateral contract, and that it was agreed that Swan Services repayment obligation would be equal to that required to be paid by Ms Swan under the loan from NAB to Mr Swan and Ms Swan. Ms Swan's evidence as to that matter is that she and Mr Swan had a conversation at the time of entry into the 2003 Loan Agreement in the following terms (JS3 [55]):

> Ms Swan: "… [W]hatever I owe NAB on the house mortgage, Swan will owe me on the loan. The loan must be secured and registered. The NAB has indicated that the amount repayable each month will be fixed at approximately $10,000. We will have to make the loan repayment terms this amount. That means that Swan will have to make loan repayments to me for the same amount. I expect the loan to repaid [sic] as soon as possible and not in 20 years."
>
> Mr Swan: "That is fine. To make it simple, Swan will make the monthly repayment to NAB directly each month."

293 There are several reasons to approach Ms Swan's evidence as to this matter with scepticism. They include that Ms Swan is giving evidence of a conversation that is said to have occurred some 12 years before she swore her affidavit dated 5 June 2015; that the conversation has an obviously self-serving character, given the matters that are now in issue in these proceedings; that Ms Swan repeatedly departed from her affidavit evidence, in respect of other matters, in the course of cross-examination; and that it would be odd, in the extreme, if after the parties reached a detailed oral agreement as to the terms on which repayments would be made, they then proceeded to execute a written loan agreement in substantially different, and less detailed, terms. I am not persuaded by Ms Swan's evidence as to the terms of this conversation, given the time that had passed since it occurred; the risk that hindsight and the intervention of the dispute would affect Ms Swan's recollection of the relevant events; and the inconsistency between the conversation and the terms of the 2003 Loan Agreement. If I had accepted Ms Swan's evidence of that conversation, I would have found that it amounted to an informal arrangement that payments would take place in a particular manner, not reflected in the 2003 Loan Agreement, which was not intended to have legal effect. The fact that Swan Services, under Mr Swan's control, subsequently acted in accordance with that arrangement, whether or not it had been the subject matter of any earlier conversation, takes the matter no further.

294 The liquidator also points out, and I accept, that the parole evidence rule excludes, with limited exceptions, evidence of earlier statements of intention and antecedent negotiations to add, vary or contradict the language of a written agreement: *Bon McArthur Transport Pty Ltd (in liq) v Caruana* [2013] NSWCA 101 at [30]–[31]. The parole evidence rule will apply only where the parties' agreement is wholly in writing. In the present case, the recital to the 2003 Agreement provides support for a conclusion that the 2003 Agreement was of that character, since it records the fact that the terms of the 2003 Agreement record the earlier loan agreement, and the 2003 Loan Agreement appears to be complete and workable on its face. Even if I were wrong in that view, additional oral terms of the 2003 Loan Agreement, or a collateral agreement,

are not established where I have not accepted Ms Swan's evidence as to the conversation on which those terms are based.

295 The parties identified a consequential question, if a collateral agreement is found to exist, whether the obligations under that agreement were the subject of an equitable charge such as to make Ms Swan a secured creditor for monies advanced under the collateral agreement. Ms Swan submitted that she did not consider that issue needed to be determined for the reasons raised in the transcript at T589–590. It is not necessary to address that issue since I have found that the collateral agreement has not been established.

296 The parties identified further issues, which it is also not strictly necessary to decide given the conclusion I have reached above, whether the sum of $200,000 drawn down on the NAB Facility on 28 October 2003 and whether the sum of $279,000 drawn down on the NAB Facility on 6 November 2003 were each a drawdown under the 2003 Loan Agreement. The difference between the liquidator and Ms Swan in respect of the drawdowns of 28 October 2003 and 6 November 2003, arises from the fact that the liquidator cannot find evidence that those sums, although withdrawn from the NAB facility, were paid into Swan Services' bank accounts. Ms Swan recognises that, if those amounts were not paid to Swan Services, and less than the amount repaid to NAB on 2 April 2013 was owed by Swan Services to Ms Swan, then the excess will be a voidable transaction under Pt 5.7B of the *Corporations Act*.

297 Ms Swan refers, in respect of the drawdown of 6 November 2003 of $279,000, to a further transaction on 5 December 2003, by which Swan Services remitted that amount to the NAB. I am not satisfied that that matter indicates, on the balance of probabilities, that the drawdown on the NAB loan of $279,000 was made for Swan Services, where that conclusion would be founded on no better basis than a coincidence in amount and a degree of proximity in timing.
Ms Swan also refers to a later email from Ms Swan to Swan Services' external accountants in which Ms Swan included the two amounts in a list of advances from NAB provided to Swan Services (Ex CC13, 1039) and those accountants later responded indicating that they were "wanting to confirm that the balance

is correct" and seeking bank statements in order to do so. It does not seem to me that those matters demonstrate anything beyond Ms Swan's understanding as to the character of those amounts.

298 The liquidator submits, and I accept, that the fact that Mr Swan and Ms Swan did not lead further evidence as to the manner in which the borrowings on 28 October 2003 and 6 November 2003 were disbursed should lead to an inference that their evidence would not have assisted as to this matter: *Commercial Union Insurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418–419. To the extent that Ms Swan bears an evidentiary onus in respect of these transactions, it seems to me that she has not established that these amounts were referable to advances to Swan Services.

Claim under s 588FP of the Corporations Act

299 The parties identified a further issue whether the 2013 Charge is void by virtue of s 588FP of the *Corporations Act*. The liquidator contends that the Second Charge is void by reason of s 588FP of the *Corporations Act* because it was enforced within six months of its creation without leave of the Court and Ms Swan was an associated person within the meaning of the *Corporations Act*. The liquidator submits that any requirement for such leave, that Ms Swan establish that Swan Services was solvent, could not be satisfied, and that is consistent with the findings that I have reached above. There is a question whether Ms Swan took any step to enforce the charge, where the true position appears that Swan Services, under Mr Swan's control, made a payment to Ms Swan, to the disadvantage of other creditors, without her doing more than request immediate payment (Ex CC13, 2333–2334). It does not seem to me to be necessary to determine this matter, where the parties are agreed that the consequence of the finding that I have reached in respect of the 2003 Loan Agreement is that the liquidator succeeds in its claim for the net amount that was paid to Ms Swan, and Ms Swan fails in her claim to recover any further amount from Swan Services in preference to unsecured creditors.

300 Had I accepted that, contrary to the view that I have reached, there was an effective charge reflecting the terms of the 2003 Loan Agreement, then I would have accepted the liquidator's calculation of the amount owing to Ms Swan,

excluding the two disputed payments and on the basis that no interest or other charges were payable, as $106,549.91, so the transaction on 2 April 2013 would have amounted to a preference to the extent of $1,239,260.33 (Elkerton 2 [28]). That amount would have had to be adjusted, so far as a judgment against Ms Swan was concerned, to the extent necessary to take account of the subsequent readvance to Swan Services and repayment to Ms Swan, as the parties have accepted. It is not necessary to make that adjustment given the findings that I have reached on other grounds.

Result of determination in respect of charge

301 The parties indicated that, once the issues noted above in respect of the 2003 Loan Agreement and the 2013 Charge were determined, the parties could calculate any relief to which the liquidator is entitled under s 588FF of the *Corporations Act* in respect of the payment made on 2 April 2013. The parties also agreed that, if Ms Swan is found to be a secured creditor as at the date of repayment on 2 April 2013, and the security is not found to be void by virtue s 588FP, then she is entitled to the relief claimed in the Amended Originating Process under s 588FM, there being no opposition to the exercise of the discretion in her favour. That result does not arise on the findings I have reached.

Summary and orders

302 In summary, I have held that it has not been established that Ms Swan was a “de facto” director of Swan Services or any of the Companies during the relevant period.

303 I have held that the presumption of insolvency under s 588E(4) of the *Corporations Act* applies during the whole of the relevant period in respect of both Swan Services and the Companies. I have also held that it has been established that, throughout the relevant period, each of Swan Services and the Companies were insolvent as a matter of fact. I have held that there were reasonable grounds to suspect that Swan Services and each of the Companies were insolvent or would become insolvent by incurring the relevant debts throughout the relevant period for the purposes of s 588G(1) of the *Corporations Act*. I have held that a reasonable person in the position occupied

by Mr Swan and Ms Swan (if, contrary to the conclusion I have reached, she was a de facto director) in a company in Swan Services' and the Companies' circumstances would be aware that there were such grounds for so suspecting that each of Swan Services and the Companies were insolvent or would become insolvent by incurring the relevant debts throughout the relevant period for the purposes of s 588G(2) of the *Corporations Act*.

304 I have reached findings as set out above in relation to the identified issues as to the debts claimed under s 588M of the *Corporations Act*. In particular, I have held that the liquidator must, in proving loss or damage for the purpose of s588M, bring to account any anticipated or estimated return to creditors in the relevant insolvencies, and to that extent have followed the approach stated in *Smith v Offermans* above in preference to that stated in *Powell v Fryer* above. The recovery of $2.5 million as a preference from the ATO, and the fact that the ATO will be entitled to proof in the liquidation for the amount repaid, should therefore be taken into account in determining the loss or damage recoverable by the liquidator. I note the parties' agreement that they will be able to determine the respective liability of Mr Swan and Ms Swan on the basis of those findings.

305 I have held that neither Mr Swan nor Ms Swan (if, contrary to my findings, she was a de facto director) has established that he or she had reasonable grounds to expect, and did expect, that Swan Services and the Companies was solvent, and would remain solvent even if they incurred the debts and any other debts that they incurred at the time, for the purposes of s 588H(2) of the *Corporations Act.* I have held that neither Mr Swan nor Ms Swan (if, contrary to my findings, she was a de facto director) has established the defence under s 588H(3) of the *Corporations Act.* I have held that Mr Swan should not be relieved either wholly or partly from a liability to which he would otherwise be subject, under s 1317S of the *Corporations Act*. I have not determined that question in respect of Ms Swan, where that question would likely only arise for determination on a different factual basis, if an appellate court took a different view from that which I have formed as to whether she was a de facto director of the relevant companies.

306 I have held that, as at the date of repayment on 2 April 2013, Ms Swan was not a secured creditor for all or part of the amount paid to her, because the 2003 Loan Agreement was ineffective to create a charge by reason of uncertainty in identifying which property was subject to a fixed and floating charge. I have held that the Form 309 document subsequently lodged by Ms Swan did not create an effective charge, since it depended on the terms of the 2003 Loan Agreement and was affected by the same uncertainty.

307 It is therefore not necessary to determine the amount owed to Ms Swan as at 2 April 2013. However, against the contingency that an appellate court might take a different view, I have addressed that question and held that interest and other charges payable by Mr Swan and Ms Swan to NAB were not included as part of the amounts owing under the 2003 Loan Agreement, absent any written terms in relation to such items in the 2003 Loan Agreement. Ms Swan's claim that a separate agreement collateral to the 2003 Loan Agreement providing for the payment of interest and charges has not been established. I have held that it has not been established that the sum of $200,000 drawn down on the NAB Facility on 28 October 2003 or the sum of $279,000 drawn down on the NAB Facility on 6 November 2003 were drawdowns under the 2003 Loan Agreement. I note the parties' agreement that, once these issues have been determined, they can calculate any relief to which the liquidator is entitled under s 588FF of the *Corporations Act* in respect of the payment made to Ms Swan on 2 April 2013.

308 I have not determined the question whether the 2013 Charge dated 2 April 2013 is void by virtue of s 588FP of the *Corporations Act* where it does not seem to require determination, given the grant of that charge would be set aside as an uncommercial transaction, or the time for its registration not extended, on the basis of the other findings that I have reached. I understand it to be common ground between the parties that, where I have held that Ms Swan was not a secured creditor as at the date of repayment on 2 April 2013, then she ought not be granted the relief claimed in the Amended Originating Process under s 588FM of the *Corporations Act* in respect of the 2013 Charge.

309 The parties should bring in agreed orders to give effect to this judgment, including as to costs, within 14 days or, if there is no agreement between them, their respective draft orders and short submissions as to the differences between them, indicating whether an oral hearing is required.

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