FEDERAL COURT OF AUSTRALIA

Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement) (No 4) [2019] FCA 1846

File number:	SAD 12 of 2018
Judge:	**BESANKO J**
Date of judgment:	12 November 2019
Catchwords:	**CONTRACTS** — where the plaintiff seeks to recover monies said to be owed to it for cement supplied over a period of approximately nine years — whether the plaintiff agreed to provide the first defendant with a discount or rebate in relation to the supply of cement **ESTOPPEL** — whether the plaintiff is estopped from denying that it agreed to provide the first defendant with a discount or rebate in relation to the supply of cement — whether the first defendant had a genuine belief that it was entitled to a discount or rebate **CONSUMER LAW** — whether the first defendant engaged in misleading or deceptive conduct in contravention of s 18 of the Australian Consumer Law (Sch 2 of the *Competition and Consumer Act 2010* (Cth)) — whether the fourth to sixth defendants were involved in conduct which contravened s 18 — whether the first defendant's silence was misleading or deceptive — whether the plaintiff is taken to have been aware of the true level of indebtedness of the first defendant by reason of the knowledge or conduct of one of the plaintiff's employees **EQUITY** — whether the first defendant held cement which was received but not paid for, and income generated using that cement, on trust for the plaintiff — whether the first defendant committed a breach of trust or fiduciary duty for which it must account to the plaintiff — whether the fourth to sixth defendants procured or knowingly assisted or benefitted from that breach **CORPORATIONS** — whether the first defendant failed to maintain adequate books and records in contravention of s 286 of the *Corporations Act 2001* (Cth) — whether a severe absence of records is required to demonstrate a

contravention of s 286 or whether the failure to record a major liability is sufficient

CORPORATIONS — where the first defendant is subject to a deed of company arrangement — application under s 445D the Corporations Act to set aside the DOCA — whether the investigations conducted by the second and third defendants were inadequate — whether the second and third defendants ought to have sought an extension of the convening period — whether the second and third defendant's second report to creditors contained false or misleading statements and/or material omissions within the meaning of s 445D(1)(a), (b) and (c) of the Corporations Act — whether the Court should exercise its discretion to terminate the DOCA — whether it is in the public interest that a liquidator be appointed to the first defendant

CORPORATIONS — application under s 447A of the Corporations Act to terminate or set aside the DOCA — where the plaintiff alleges that the DOCA is an abuse of Pt 5.3A of the Corporations Act

CORPORATIONS — application under ss 75-42 and 90-15 of Sch 2 of the Corporations Act for an order that the resolution that the first defendant execute the proposed DOCA, passed on the casting vote of the second defendant, be set aside — application under ss 75-43 and 90-15 of Sch 2 of the Corporations Act for an order that the resolution that the first defendant be placed into liquidation, defeated on the casting vote of the second defendant, be taken to be passed — whether the second defendant's exercise of the casting vote was unreasonable — whether the second defendant failed to have regard to a number of relevant considerations

Legislation:

Australian Consumer Law (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) ss 2, 18, 20, 236, 237

Competition and Consumer Act 2010 (Cth) ss 87CB, 87CC, 87CD, 87CE, 137B

Corporations Act 2001 (Cth) ss 180, 181, 182, 183, 286, 435A, 436E, 438, 438A, 438B, 438C, 438D, 439A, 444, 444E, 445D, 445H, 446AA, 447A, 491, 588E, 588FA, 588FB, 588FD, 588FDA, 588FG, 588G, 588H, 590, 596, 600B, 600C, 1307, 1308, 1309

Evidence Act 1995 (Cth) ss 79, 131, 135, 140

Income Tax Assessment Act 1936 (Cth) s 252

Trade Practices Act 1974 (Cth) s 52

Insolvency Practice Schedule (Corporations) 2016 (Sch 2 to the *Corporations Act 2001* (Cth)) ss 75-42, 75-43, 75-45,

75-140, 75-225, 90-15

Limitation of Actions Act 1936 (SA)

Cases cited:

Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to a Deed of Company Arrangement) [2018] FCA 315

Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to a Deed of Company Arrangement) (No 2) [2018] FCA 1003

Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to a Deed of Company Arrangement (No 3) [2018] FCA 1058

Adelaide Brighton Cement Ltd v Burgess [2018] SASC 134

AIC Retail Finance Ltd v Savill [1986] 2 NZLR 679

Ashbury v Reed [1961] WAR 49

Australasian Memory Pty Ltd v Brien [2000] HCA 30; (2000) 200 CLR 270

Australian and New Zealand Banking Group Limited v Richard Kay Liebmann [2010] NSWSC 545

Australian Competition and Consumer Commission v IMB Group Pty Ltd [2003] FCAFC 17

Australian Securities and Investments Commission v Edge [2007] VSC 170; (2007) 211 FLR 137

Australian Securities and Investments Commission v Hellicar [2012] HCA 17; (2012) 247 CLR 345

Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452

Barnes v Addy (1874) 9 Ch App 244

Beach Petroleum NL v Johnson [1993] FCA 392; (1993) 43 FCR 1

Bidald Consulting v Miles Special Builders [2005] NSWSC 1235; (2005) 226 ALR 510

BHP v Robertson [2002] NSWSC 336

Blue Ring Pty Ltd v Landshore Pty Ltd (subject to a Deed of Company Arrangement) [2006] WASC 245

Borden (UK) Ltd v Scottish Timber Products Ltd [1981] 1 Ch 25

Briginshaw v Briginshaw (1938) 60 CLR 332

Brisconnections Management Company Limited, In the matter of Thames Blund Holdings Pty Ltd (In Liquidation) [2009] FCA 626; (2009) 72 ACSR 233

Britax Childcare Pty Ltd, in the matter of Infa Products Pty Ltd v Infa Products Pty Ltd (Administrators Appointed)

[2016] FCA 848; (2016) 115 ACSR 322

Canadian Dredge and Dock Co Ltd et al v The Queen (1985) 19 DLR (4th) 314

Commercial Union v Beard [1999] NSWCA 422; (1999) 47 NSWLR 735

Commonwealth Bank of Australia v Fernandez [2010] FCA 1487; (2010) 81 ACSR 262

Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84

Consul Developments Pty Ltd v DPC Estates Pty Ltd [1975] HCA 8; (1975) 132 CLR 373

Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd [2001] NSWSC 89; (2001) 37 ACSR 394

Deputy Commissioner of Taxation v Pddam Pty Ltd [1996] FCA 235; (1996) 19 ACSR 498

Deputy Commissioner of Taxation v Portinex Pty Ltd [2000] NSWSC 99; (2000) 156 FLR 453

DSG Holdings Australia Pty Ltd v Helenic Pty Ltd [2014] NSWCA 96; (2014) 86 NSWLR 293

Eco Heat (Vic) Pty Ltd v Syndicate Forty Four Pty Ltd (Subject to Deed of Company Arrangement) [2018] VSC 156

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89

Federal Commissioner of Taxation v Wellnora Pty Ltd [2007] FCA 1234; (2007) 163 FCR 232

Fisher v Devine Homes Pty Ltd; Allen v Harb [2011] NSWSC 8; (2011) 85 ACSR 512

Fowler v Midland Electric Corporation for Power Distribution Ltd [1917] 1 Ch 656

Giorgianni v R [1985] HCA 29; (1985) 156 CLR 473

Global Realty Development Corp v Dominion Wines Ltd (in liq) [2005] NSWSC 1221; (2005) 56 ACSR 474

Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6; (2012) 200 FCR 296

Grundt v Great Boulder Pty Gold Mines Ltd [1937] HCA 58; (1937) 59 CLR 641

In re Pantmaenog Timber Co Ltd [2003] UKHL 49; [2004] 1 AC 158

Hagenvale Pty Ltd v Depela Pty Ltd & Serrada Holdings Pty Ltd (1995) 17 ACSR 139

Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1) [1988] FCA 40; (1988) 39 FCR 546

Henry v Hammond [1913] 2 KB 515

JA Pty Ltd v Jonco Holdings Pty Ltd [2000] NSWSC 147;

(2000) 33 ACSR 691

J C Houghton & Co v Nothard Lowe & Wills Ltd [1928] AC 1

Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298

Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd [1989] FCA 54; (1988) ATPR 40-853

Kirwan v Cresvale Far East Ltd (in liq) & Ors [2002] NSWCA 395; (2002) 44 ACSR 21

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; (2011) 243 CLR 361

Linen House Pty Ltd v Rugs Galore Australia Pty Ltd [1999] VSC 126

Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd (Subject to Deed of Company Arrangement) (No 2) [2011] FCA 178

Michael Wilson & Partners v Nicholls [2011] HCA 48; (2011) 244 CLR 427

Mighty River International Limited v Hughes [2018] HCA 38

Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31; (2010) 241 CLR 357

Mondello Farms Pty Ltd v Annatom Pty Ltd (Subject to Deed of Company Arrangement [2007] SASC 296; (2007) 64 ACSR 91

Owen, in the matter of RiverCity Motorway Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) v Madden (No 5) [2013] FCA 1443

Phoenix Lacquers & Paints Pty Ltd v Free Wesleyan Church of Tonga in Australia Inc (admins apptd) [2012] NSWSC 214; (2012) 87 ACSR 658

Pilmer v Duke Group Ltd (In Liq) [2001] HCA 31; (2001) 207 CLR 165

Plumbers Supplies Co-operative Limited v Firedam Civil Engineering Pty Limited [2011] NSWSC 325

Re Allebart Pty Ltd (in liq) [1971] 1 NSWLR 24

Re Bartlett Researched Securities Pty Ltd (Administrator Appointed) (1994) 12 ACSR 70

Re Coalleen Pty Ltd (Administrator Appointed) [2000] 1 Qd R 245; (1999) 30 ACSR 200

Re Hampshire Land Co [1896] 2 Ch 743

Re Hayes; Estate Property Group Ltd [2007] FCA 935

Re Martco Engineering Pty Ltd (Administrator Appointed); Deputy Commissioner of Taxation v Martco Engineering Pty Ltd (1999) 32 ACSR 487

	Re Recycling Holdings Pty Ltd [2015] NSWSC 1016; (2015) 107 ACSR 406
	Re TEN Network [2017] NSWSC 1247
	Rogers v Nationwide News Pty Ltd [2003] HCA 52; (2003) 216 CLR 327
	Sidhu v Van Dyke [2014] HCA 19; (2014) 251 CLR 505
	Southern Cross Interiors Pty Ltd v Commissioner of Taxation [2001] NSWSC 621; (2001) 53 NSWLR 213
	The Bell Group Ltd (In Liq) v Westpac Banking Corporation Ltd (No 9) [2008] WASC 239; (2008) 39 WAR 1
	Thompson v Palmer [1933] HCA 61; (1933) 49 CLR 507
	TiVo, Inc v Vivo International Corporation Pty Ltd (subject to deed of company arrangement) [2014] FCA 789
	Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387
	Wardley Australia Ltd v Western Australia [1992] HCA 55; (1992) 175 CLR 514
	Whitlam v Australian Securities and Investments Commission [2003] NSWCA 183; (2003) 57 NSWLR 559
	Yeshiva Properties No 1 Pty Ltd v Marshall [2005] NSWCA 23; (2005) 219 ALR 112
	Yorke v Lucas [1985] HCA 65; (1985) 158 CLR 661
	Young v Sherman [2002] NSWSC 281; (2002) 170 FLR 86
	Austin RP and Ramsay IM, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, subscription service)
	Dal Pont GE, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014)
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ORDERS

SAD 12 of 2018

IN THE MATTER OF CONCRETE SUPPLY PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT)

BETWEEN:	**ADELAIDE BRIGHTON CEMENT LIMITED ACN 007 870 199** Plaintiff
AND:	**CONCRETE SUPPLY PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 007 848 580** First Defendant
	DOMINIC CHARLES CANTONE IN HIS CAPACITY AS ADMINISTRATOR OF CONCRETE SUPPLY PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) Second Defendant
	NICHOLAS DAVID COOPER IN HIS CAPACITY AS ADMINISTRATOR OF CONCRETE SUPPLY PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (and others named in the Schedule) Third Defendant

JUDGE:	**BESANKO J**
DATE OF ORDER:	**12 NOVEMBER 2019**

THE COURT ORDERS THAT:

1. The plaintiff file and serve draft minutes of order which reflect the conclusions expressed in these reasons and contain such other orders as it seeks on or before (a date to be fixed).
2. The proceeding be listed for the making of final orders on (a date to be fixed).

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

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APPENDIX A

BESANKO J:

INTRODUCTION

1 The plaintiff in this proceeding is Adelaide Brighton Cement Limited (ABCL). ABCL is a public company incorporated in Australia and it carries on business in South Australia of supplying cement and lime. It is one of the subsidiaries of Adelaide Brighton Limited (ABL), which is listed on the Australian Securities Exchange (ASX). There are a number of companies in the Adelaide Brighton Group.

2 There are six defendants to the proceeding. The first defendant is Concrete Supply Pty Ltd (subject to Deed of Company Arrangement) (Concrete Supply). As its name indicates, it is a private company and it carries on business in South Australia of supplying concrete. It is currently the subject of a deed of company arrangement (DOCA). There are two companies which are related to Concrete Supply and they are Mantina Earthmovers and Constructions Pty Ltd trading as Mantina Quarries (Mantina Earthmovers), and Mantina Investments Pty Ltd (Mantina Investments). These three companies are the main operating companies in the Mantina Group. The directors and shareholders of Mantina Earthmovers and of Mantina Investments are the same as the directors and shareholders of Concrete Supply. The one exception is that Ms Patricia Pacillo, who is not a director of any of the three companies, has a small shareholding in Concrete Supply and Mantina Earthmovers.

3 The second and third defendants are Mr Dominic Charles Cantone and Mr Nicholas David Cooper respectively and, at all relevant times, they were registered liquidators and chartered accountants. They are members of Worrells Solvency & Forensic Accountants (Worrells). On 14 November 2017, the directors of Concrete Supply resolved to put the company into administration on the basis that, in the directors' opinion, the company was insolvent, or was likely to become insolvent at some future time, and to appoint Messrs Cantone and Cooper as joint and several administrators of the company. A DOCA was subsequently proposed by the directors of Concrete Supply and it was approved at a second meeting of creditors of the company on 19 December 2017. Messrs Cantone and Cooper were appointed deed administrators. For convenience, I will refer to them as the administrators.

4 The fourth defendant is Mr Pelegrino Obbiettivo. He was referred to in the course of the evidence as Rino and for convenience, and without intending any disrespect, I will refer to him in that way. His late father and his mother established the business of Concrete Supply in 1987. At all material times, Rino was a director and shareholder of each operating company in the Mantina Group.

5 The fifth defendant is Mr Genesio Obbiettivo. He was referred to in the course of evidence as Jason and for convenience, I will refer to him in that way. He is Rino's brother. At all material times, Jason was a director and shareholder of each operating company in the Mantina Group.

6 The sixth defendant is Mrs Tina Obbiettivo. For convenience, I will refer to her as Tina. She and her late husband established Concrete Supply and she is the mother of Rino and Jason. At all material times, Tina was a director and shareholder of each operating company in the Mantina Group. As I will explain in due course, she played a part in the conduct of the business, but not a major part.

7 Where necessary, I will refer to Concrete Supply and Rino, Jason and Tina as the Concrete Supply defendants, and Rino, Jason and Tina as the directors.

8 Concrete Supply was incorporated on 18 October 1977 as Karkiwarri Pty Ltd. The name of the company was changed to Concrete Supply on 26 April 1988. The company commenced operating a concrete batching plant at 76 Research Road, Pooraka in the State of South Australia (the Pooraka property) in about 1987. The Pooraka property is owned by Tina and she leases it to Concrete Supply. Concrete Supply continues to operate a concrete plant at the

Pooraka property. It also operates concrete plants at a property at 216 East Terrace, Kapunda (the Kapunda property) and a property at Roadtrain Drive, Two Wells (the Two Wells property). The concrete plant at the Two Wells property was established in about September 2017.

9 Mantina Earthmovers (then known as Mantina Earthmovers Pty Ltd) was incorporated on 28 February 1977. The company changed its name on 29 October 1982. The Kapunda property comprises a hard rock quarry and other rural land. Mantina Earthmovers operates the quarry.

10 Mantina Investments was incorporated on 10 August 2004. It is the trustee of the Mantina Investments Unit Trust and it owns the Kapunda property and the Two Wells property.

11 This proceeding was commenced by ABCL on 17 January 2018. ABCL's case is that between 1 August 2009 and 6 November 2017, it supplied cement to Concrete Supply to the value of $32,599,450.55, but that Concrete Supply has made payments to it of only $20,938,867.69 for the cement it supplied. ABCL's case is that the difference between these two amounts, together with an opening balance as at 30 July 2009 of $787,259.72, namely an amount of $12,477,842.58, is a debt due to ABCL by Concrete Supply. Concrete Supply does not dispute part of this alleged debt, being an amount of $2,168,328.51. The balance of the alleged debt is in dispute.

12 The fact that ABCL is seeking to recover monies said to be owed for cement supplied over a period of approximately nine years is but one of many unusual features in this case.

13 ABCL established the primary amounts of $32,599,450.55, $20,938,867.69 and $787,259.72 respectively and, by the end of the case, I did not understand those amounts to be in dispute. In any event, as I will explain in due course, I am satisfied that the amounts are established by the evidence. The Concrete Supply defendants' case (putting it generally at this point) is that the difference between the amounts is not a debt due to ABCL because ABCL by its conduct gave substantial discounts or rebates to Concrete Supply in connection with its supply of cement to the company.

14 At the second meeting of creditors of Concrete Supply, ABCL's alleged debt was admitted in the full amount for voting purposes. Mr Cantone was the chairperson of the meeting. The meeting considered alternative resolutions for the future of the company, namely, the execution of a DOCA proposed by the directors or a winding up. A resolution was carried on

the casting vote of Mr Cantone that the company execute the proposed DOCA and that was subsequently done. ABCL seeks orders on various grounds that would see the DOCA terminated or set aside and Concrete Supply placed into liquidation.

15 In its Originating Process, ABCL sought the following relief:

1. Pursuant to section 440D of the *Corporations Act* the plaintiff have leave to begin and proceed with this proceeding against the Company.

2. Pursuant to section 75-42 of sch 2 of the *Corporations Act* that the resolution that the Company execute a deed of company arrangement, passed on the casting vote of second defendant, be set aside.

3. In the alternative to paragraph 2, pursuant to section 90-15 of sch 2 of the *Corporations Act* setting aside the second defendant's decision to exercise his casting vote in favour of the resolution that the Company execute the deed of company arrangement.

4. In the further alternative to paragraph 2, pursuant to section 445D or 447A of the *Corporations Act* that the deed of company arrangement executed by the Company be terminated.

5. Pursuant to section 75-43 or 90-15 of sch 2 of the *Corporations Act* that the proposed resolution that Company be wound up, defeated on the casting vote of the second defendant, be taken to have been passed and that Messrs Martin Lewis and David Kidman be appointed as joint liquidators.

6. In the alternative to paragraph 5, pursuant to section 447A of the *Corporations Act* that the Company [be] wound up and Messrs Martin Lewis and David Kidman be appointed as joint liquidators.

7. In the further alternative to paragraph 5, pursuant to section 90-15 of sch 2 of the *Corporations Act* that the second and third defendants be removed as external administrators of the Company and Messrs Martin Lewis and David Kidman be appointed as external administrators.

8. Pursuant to section 483 of the *Corporations Ac*t, that the second to sixth defendants deliver, convey or surrender the Company's books to the liquidators of the Company as soon as practicable.

9. A declaration that the Company owes the plaintiff $12,457,472.22;

10. A declaration that the Company failed to maintain adequate books and records in contravention of section 286 of the *Corporations Act*.

11. A declaration that the Company engaged in misleading or deceptive conduct or unconscionable conduct in contravention of sections 18 and 20 of the *Australian Consumer Law* or unconscionable conduct under the general law.

12. A declaration that the fourth to sixth defendants were involved in conduct by the Company which contravened Chapter 2 of the *Australian Consumer Law* within the meaning of sections 2, 236 and 237 of the *Australian Consumer Law*.

13. A declaration that the Company held cement which was received but not paid for, and any income generated using that cement, on trust for the plaintiff.

> 14. A declaration that (a) the Company breached its fiduciary duty to the plaintiff by disposing of property held on trust for the plaintiff; and (ii) [sic] the fourth to sixth defendants procured or knowingly assisted or benefited from that breach of trust by the Company.
>
> 15. Damages.
>
> 16. Equitable compensation.
>
> 17. Interest.
>
> 18. Costs.
>
> 19. Such further or other order as the Court thinks fit.

16 ABCL required the leave of the Court to begin or proceed with the claims for relief described in paras 9, 10, 11, 13 and 14(a) above by reason of s 444E(3) of the *Corporations Act 2001* (Cth) and, on 14 March 2018, I granted such leave, nunc pro tunc (*Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to a Deed of Company Arrangement)* [2018] FCA 315). One of the issues which I discussed in those reasons was the advantages and disadvantages of hearing and determining the issue of whether the DOCA should be set aside or terminated before considering other issues in the case and, in particular, ABCL's claim in debt. In the result, I decided that a determination of all issues at the one time was the appropriate course (see the discussion in the reasons at [31]–[54]). The course of these proceedings has only confirmed in my mind that that was the appropriate course.

17 There have been a number of other interlocutory disputes in this proceeding, including an application for an order which varied the DOCA and an order that this proceeding proceed on pleadings (*Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to a Deed of Company Arrangement) (No 2)* [2018] FCA 1003) and applications for discovery (*Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to a Deed of Company Arrangement (No 3)* [2018] FCA 1058).

18 The Concrete Supply defendants had common representation in this proceeding and the second and third defendants had their own separate representation.

19 ABCL summarised the issues which are raised by their claims. It is a useful broad and general summary. However, it is only a summary and, as will become apparent, it does not encapsulate all of the issues and sub-issues which are raised.

20 First, is Concrete Supply indebted to ABCL in the amount of $12,457,472.22? If yes, has Concrete Supply in those circumstances failed to comply with s 286 of the Corporations Act, having regard to the fact that the books and records of Concrete Supply showed a liability by Concrete Supply to ABCL of only $2,168,328.51?

21 Secondly, are the directors of Concrete Supply also liable for the amount claimed against the company by reason of their participation in misleading or deceptive conduct by Concrete Supply and their participation in breach of fiduciary duty by Concrete Supply?

22 Thirdly, should the DOCA be terminated pursuant to s 445D of the Corporations Act and Concrete Supply placed into liquidation by reason of the facts (if the facts are established) that the investigations of the administrators and the Second Report to Creditors were deficient in various respects and Mr Cantone's exercise of the casting vote at the second meeting of creditors cannot be sustained?

23 Finally, even if the administrators' investigations and the Second Report to Creditors were not deficient, should the DOCA be brought to an end by an order under s 447A(2) of the Corporations Act because, on the circumstances now known to the Court, the DOCA is an abuse of Pt 5.3A or for other reason? The submission is that an order bringing the DOCA to an end is appropriate, having regard to the public interest and considerations relevant to commercial morality.

24 I will identify the witnesses as I address the issues which are raised and I will make findings with respect to their evidence. The standard of proof is the civil standard, namely, on the balance of probabilities. Some of the findings I am asked to make involve serious allegations of improper conduct and I must bear that in mind when deciding whether the finding should be made: s 140(2) of the *Evidence Act 1995* (Cth); *Briginshaw v Briginshaw* (1938) 60 CLR 332 at 362 per Dixon J (as his Honour then was); *Whitlam v Australian Securities and Investments Commission* [2003] NSWCA 183; (2003) 57 NSWLR 559 at [115]–[121].

ABCL'S CLAIM IN DEBT

Mr Darryl Hughes

25 In October 2017, it came to the attention of ABCL that its books and records were not accurate and that Concrete Supply had underpaid for cement supplied to it by ABCL in an amount in excess of $10 million. ABCL launched an investigation into the matter and a manager, Mr Darryl Hughes, was involved in the investigations.

26 Mr Hughes gave evidence before this Court. He was an honest witness and I accept his evidence. As I will explain, he identified certain false entries in the books and records of ABCL by a Ms Glenda Burgess. Ms Burgess was a credit manager at ABCL's office at Birkenhead. She is not a party to this proceeding and did not give evidence in this proceeding. She faces a civil claim by ABCL in the Supreme Court of South Australia. That proceeding was stayed pending a criminal investigation (*Adelaide Brighton Cement Ltd v Burgess* [2018] SASC 134). I am mindful of these matters, but findings as to Mr Burgess' conduct and its character are central to a number of issues in this case. The evidence before me does not reveal a motive for Ms Burgess making the false entries. ABCL said that it was not part of its case to prove collusion between Ms Burgess and Concrete Supply or that Concrete Supply procured her conduct.

27 During the course of this hearing, I was required to make various rulings. Those rulings and my reasons for them are set out in Appendix A to these reasons.

28 The first ruling arose as a result of certain objections made by the Concrete Supply defendants to Mr Hughes' affidavits. The ruling is described in Appendix A and it led to the filing of a Reply and a Rejoinder. I will refer to features of the Reply and Concrete Supply's Rejoinder before addressing Mr Hughes' evidence because those features will make clear the relevance of a number of matters which Mr Hughes' evidence addressed.

29 In ABCL's Reply, it denied that any knowledge of Ms Burgess was to be equated with "a conscious and deliberate decision by the plaintiff" or was otherwise the knowledge of ABCL, and it denied that Ms Burgess was authorised by ABCL to agree the lump sum deductions and the Recipient Created Tax Invoices (RCTIs) deductions, or that these were ever "agreed as between ABCL and Concrete Supply". ABCL alleged that conduct by Ms Burgess whereby ABCL stopped sending invoices and statements to Concrete Supply, or otherwise did not object to the lump sum deductions and the RCTI deductions, was not authorised by ABCL and was contrary to and not in the course of Ms Burgess' ordinary duties. ABCL further alleged in para 3 of the Reply that between 2009 and 2017, Ms Burgess engaged in the conduct described below without authority from ABCL and contrary to and not in accordance with her ordinary duties with ABCL and to the financial benefit of Concrete Supply and in fraud of ABCL:

> 3.1 allocated payments made by other customers against Concrete Supply's account:

3.2 transferred debt from Concrete Supply's account to other customers' accounts;

3.3 "refreshed" Concrete Supply's debt by raising new debt to meet outstanding and overdue debt owed by Concrete Supply;

3.4 omitted to reveal the full extent of Concrete Supply's debt in the reports which she prepared for the Board of ABCL;

3.5 failed to reveal Concrete Supply's true indebtedness at the sales and marketing meetings which she attended;

3.6 deleted any reference to Concrete Supply from aged trial balances provided to ABCL's auditors;

3.7 increased Concrete Supply's credit limit; and

3.8 did not pursue payment of Concrete Supply's true indebtedness in accordance with its actual credit limit and terms of trade.

30 Concrete Supply filed a Rejoinder to ABCL's Reply in which it denied ABCL's allegations. It pleaded that the conduct of Ms Burgess, as referred to in para 3 of the Reply and set out above, was known, or ought to have been known, to other employees of ABCL based at its Birkenhead office. The particulars of this allegation were that the other accounts receivable staff, the sales representatives and Ms Burgess' supervisors also accessed customer accounts in which the alleged transactions occurred and, therefore, would have known, or ought to have known, of the unauthorised transactions and that the size and frequency of the transactions were such that other employees would have known of them. Concrete Supply alleged that Ms Burgess did have authority, either actual authority or implied authority. It further alleged that the absence of any controls and supervision of Ms Burgess by ABCL gave rise to an estoppel against ABCL from it now alleging that she did not have any authority. Finally, Concrete Supply pleaded that further, and in any event, if the conduct of Ms Burgess was in fraud of ABCL, it was still attributable to ABCL because of the matters pleaded in the Rejoinder and because it was not a total fraud of ABCL and ABCL benefited from an ongoing trading relationship being maintained between it and Concrete Supply.

31 I turn now to the evidence of Mr Hughes.

32 Prior to September 2018, Mr Hughes was the general manager of finance of ABL. In that role, he was responsible for the corporate reporting of ABL and its subsidiaries, including ABCL. Mr Hughes is employed by one of ABL's subsidiaries, Adelaide Brighton Management Limited, which provides corporate management services to the Adelaide Brighton Group, including ABL and ABCL. Mr Hughes commenced his role as general manager of finance in 2011 and he reported to Mr Michael Kelly, who was ABL's chief

financial officer. Mr Hughes set out his responsibilities in more detail in his evidence-in-chief, but it is not necessary for me to describe those matters. In September 2018, Mr Hughes became the acting chief financial officer of ABL and it was at about this time that Mr Michael Kelly left ABL.

33 Mr Hughes is and has always been located in Sydney. He has been a director of ABL since about 2012. He was not personally involved in the Concrete Supply account and the trading relationship between ABCL and Concrete Supply.

34 ABCL met as a board to fulfil its statutory obligations, but where there was an issue of board significance in respect of Birkenhead, then a meeting of the board of ABL would be convened.

35 ABCL's financial records consist of entries in a "SAP" accounting software system and in supporting documentation. Prior to 1 August 2009, ABCL's financial records were contained in a programme known as "Protean".

36 ABCL manufactures cement, lime and pre-packaged dry-blended products. It operates two manufacturing plants in South Australia, one at Birkenhead and the other at Angaston. The Adelaide Brighton Group has offices at Birkenhead where a number of staff are employed.

37 ABCL's product can be purchased in bags, including "bulker" bags or it can be purchased in bulk and loaded directly into a tanker. The product can be collected directly from ABCL's plants or delivered by ABCL to customers.

38 ABCL has a process for the purchase and delivery of bulk product from its plants which is largely automated. Customers can send a purchase order to ABCL which sets out the type and volume of cement or lime required which is entered into ABCL's Central Administration System (CAS) or, as is the case with most customers, they have a general purchase order which covers all deliveries to them. Where a customer collects bulk cement using its own cement tankers, as was the case with Concrete Supply, the customer has an electronic card for each of its tankers. The card is linked to CAS and it enables ABCL to identify both the customer and the order being fulfilled. The tanker is weighed, both before and after loading, and the information is recorded in CAS which produces a delivery docket for the driver of the tanker. Mr Hughes produced CAS records for deliveries to Concrete Supply between 1 August 2009 and 6 November 2017.

39 CAS sends information to the SAP system as to the following matters:

(1) the date of supply;

(2) the type and quantity of product supplied;

(3) the customer being supplied;

(4) the purchase order which the supply related to; and

(5) the docket number.

40 The SAP system contains details of the terms of trade with each customer which, with the information received from CAS, is used to generate invoices and to record sales in ABCL's general ledger and customer accounts. ABCL invoices are a combination of information contained in CAS and information in the SAP system.

41 Although sales are automatically recorded in the SAP system, invoices in hard copy must be printed and then sent by post to the customer by a member of ABCL's accounts receivable section. Mr Hughes said that in the ordinary course, ABCL invoices are sent to customers by post or by email. Mr Hughes is aware that that ordinary course was not followed with respect to Concrete Supply, at least for part of the relevant period. Mr Hughes said that it was nevertheless possible for Concrete Supply to calculate the amount it owed to ABCL by referring to delivery dockets and letters from ABCL to Concrete Supply advising Concrete Supply of price increases for product. As I will explain, that evidence is correct.

42 In the usual case, when a customer pays by cheque, the amount is deposited in ABCL's bank account that day or the following day. Upon receipt of the proceeds into the bank account, the payment is entered into the SAP system and allocated to the relevant customer's account. When a customer pays by an electronic funds transfer, the payment is entered in the SAP System and allocated to the relevant customer's account at the time the payment appears in ABCL's bank account. Payments are all allocated against the invoices being paid which enables ABCL to track which invoices are outstanding and the age of the customer's debt.

43 Mr Hughes described his understanding, based on the books and records of ABCL, of the trading relationship between ABCL and Concrete Supply.

44 ABCL commenced supplying cement and lime to Concrete Supply in 1988. On or about 27 June 2008, ABCL and Concrete Supply entered into an agreement for the supply of cement by ABCL to Concrete Supply. The agreement is entitled "Bulk Supply Agreement" and I will refer to it as the BSA. Rino signed the BSA as the authorised officer of Concrete Supply and Jason signed as the witness to Rino's signature. The commencement date is

specified in the BSA as "1 August 2008" and the term of the BSA is specified as "Minimum Term 3 years". Schedule 1 to the BSA sets out the price for the product by reference to the type of product and the ABCL plant from which the product is obtained. It specifies an ABCL list price, a discount amount and then a price per tonne taking into account a discount. Within that part of the BSA containing special conditions, there is a clause to the effect that ABCL may adjust the price on 60 days' written notice to Concrete Supply.

45 Between 1 August 2008 and 6 November 2017, ABCL sent a number of letters or notices, or both, to Concrete Supply advising it of price increases. These documents were referred to in the evidence as "the price increase letters" and I will use that description. These price increase letters were produced by Mr Hughes. As I will indicate later in these reasons, I find that these price increase letters were sent by ABCL and received by Concrete Supply.

46 According to ABCL's books and records and information provided to Mr Hughes, ABCL provided the following discounts to Concrete Supply:

(1) General Purpose (Normal Portland) cement – in 2007 a discount of $19.00 per tonne; in 2008 (i.e., at the time of the BSA) a discount of $20.00 per tonne; in late 2010 a discount of $25.00 per tonne; and

(2) other discounts for other types of cement.

47 Mr Hughes produced a schedule showing the base price, the discount and the discounted price for the supply by ABCL of General Purpose (Normal Portland) cement to Concrete Supply. It is as follows:

Period	**Base Price (ex GST) ($/t)**	**Discount ($/t)**	**Discount Price (ex GST) ($/t)**	**Discount (%)**
1 August 2008 to 30 September 2008	$193	$20	$173	10.4%
1 October 2008 to 31 March 2009	$199	$20	$179	10.1%
1 April 2009 to 31 March 2010	$213	$20	$193	9.4%
1 April 2010 to 31 October 2010	$213	$20	$193	9.4%
1 November 2010 to 31 December 2010	$219	$20	$199	9.1%
1 January 2011 to 31 March 2011	$219	$25	$194	11.4%
1 April 2011 to 31 March 2012	$225	$25	$200	11.1%
1 April 2012 to 16 December 2012	$231	$25	$206	10.8%
17 December 2012 to 31 March 2013	$231	$25	$206	10.8%
1 April 2013 to 31 March 2014	$237	$25	$212	10.5%

1 April 2014 to 31 March 2015	$237	$25	$212	10.5%
1 April 2015 to 31 March 2016	$243	$25	$218	10.3%
1 April 2016 to 30 September 2016	$248	$25	$223	10.1%
1 October 2016 to 31 March 2017	$258	$25	$233	9.7%
1 April 2017 to 6 November 2017	$268	$25	$243	9.3%

48 One slight qualification to the pricing structure is that from time to time ABCL was unable to supply product to a customer which that customer normally took, and in those circumstances, ABCL offered an alternative product at a price that was not dissimilar to the price of the product that the customer normally took. In other words, a customer would receive a higher priced product at a price similar to the price of the product the customer would normally take. From time to time, this occurred in the case of Concrete Supply.

49 Mr Hughes set out his understanding of certain terms in the BSA. Ultimately, those matters are matters for the Court and I do not need to refer to this evidence.

50 On 7 November 2017, ABCL changed the terms of trade such that Concrete Supply was required to pay for future supply prior to delivery.

51 The background to Mr Hughes' investigation is that in early October 2017, Mr Hughes was told by Mr Martin Brydon, the chief executive officer of the Adelaide Brighton Group, that irregularities had been identified in ABCL's accounts with respect to Concrete Supply. Mr Bruce Shaddock, who was the divisional manager for cement and lime, had identified the irregularities and had advised Mr Brydon and Mr Brad Lemmon of their existence. Mr Shaddock was based in Munster, south of Perth in Western Australia. He did not give evidence at the trial. Mr Lemmon did give evidence and I refer to his evidence below.

52 Mr Hughes was informed that Mr Shaddock had identified irregularities while reviewing a customer account in the absence of Ms Burgess who was not available at that time. Mr Shaddock had replaced Mr Claude Taeger as the divisional head of cement and lime. Mr Hughes was instructed to investigate the irregularities.

53 Mr Hughes said that between 3 October 2017 and early December 2017, he spent almost seven days a week reviewing and going through the transactions.

54 I have referred to the transfer from Protean to the SAP system. At the time of the transfer, all unpaid invoices in Protean were transferred to the SAP system. By reference to the unpaid

invoices, there was an amount owing by Concrete Supply to ABCL of $787,259.72 as at 31 July 2009 in relation to product supplied, but not paid for, between April 2009 and July 2009.

55 One of the exercises Mr Hughes carried out in November 2017 in relation to the books and records of ABCL and the supply of bulk product to Concrete Supply between 1 August 2009 and 6 November 2017 was the transfer of entries relating to Concrete Supply from CAS and the SAP system respectively to Excel files so that the information could be produced to the Court and more easily understood.

56 The Excel file which contains entries from CAS relating to Concrete Supply consists of the date, product, quantity and purchase order for every collection of product by Concrete Supply from ABCL in the period 1 August 2009 to 6 November 2017.

57 The Excel file which contains entries from the SAP system consists of entries recording details of automated invoices (designated "RV" entries) and manual entries (designated in some other way) such as payments by Concrete Supply. It was in relation to the manual entries that Mr Hughes discerned a number of entries which did not reflect dealings between ABCL and Concrete Supply and which he described as false entries. Mr Hughes explained that in relation to RV entries, the SAP system takes a file from CAS overnight and processes that file. The entry itself is done by a batch programme and there is no need for the accounts receivable staff to enter the document or the invoice. Mr Hughes explained that batch programmes are able to be operated under a user ID and, therefore, track the user ID within the SAP system as the user running the programme, but that does not mean that that person physically entered invoices into the system one by one. Mr Hughes explained that a ZV document is a payment process document, namely, a document recording a payment from a customer. A person goes into the function within the SAP system that would allocate a payment to a customer and processes a payment to a customer's account. This process is what Mr Hughes refers to as a "manual entry". Mr Hughes explained that a manual entry, namely a payment, is a reduction in the customer's account in the balance owing. To see a positive amount is the reverse of what one would expect to see when a payment is made to a customer's account or a payment is allocated to a customer's account.

58 At all events, from the information in the two Excel files, Mr Hughes was able to discern that ABCL sold Concrete Supply the following volumes of product:

Period	Tonnes	Total Sales

1 August to 31 December 2009	6,549.40	$1,343,609.21
1 January to 31 December 2010	15,984.85	$3,299,101.23
1 January to 31 December 2011	15,852.30	$3,355,131.73
1 January to 31 December 2012	13,038.95	$2,844,128.17
1 January to 31 December 2013	15,533.15	$3,444,507.97
1 January to 31 December 2014	16,417.05	$3,657,678.11
1 January to 31 December 2015	18,450.35	$4,204,627.56
1 January to 31 December 2016	20,519.00	$4,951,479.70
1 January to 6 November 2017	21,118.75	$5,499,186.87
Total	**143,463.80**	**$32,599,450.55**

59 I will return to Mr Hughes' evidence with respect to the false entries after I have identified the difference between total sales to Concrete Supply by ABCL and total payments by Concrete Supply. After the false entries are removed, the details of the actual payments made by Concrete Supply between 1 August 2009 and 6 November 2017 are as follows:

Period	Number of Payments	Amount
1 August to 31 December 2009	40	$1,028,791.42
1 January to 31 December 2010	86	$3,082,220.79
1 January to 31 December 2011	78	$2,848,820.07
1 January to 31 December 2012	48	$2,036,309.58
1 January to 31 December 2013	64	$2,121,799.49
1 January to 31 December 2014	77	$2,185,980.94
1 January to 31 December 2015	95	$2,537,955.95
1 January to 31 December 2016	92	$2,453,998.14
1 January to 6 November 2017	87	$2,642,991.31
Total		**$20,938,867.69**

60 The effect of this evidence, which I accept, is that, assuming the entries identified by Mr Hughes as false entries are properly so characterised and, leaving aside Concrete Supply's argument that it is entitled to a discount or rebate, the true position is that, according to ABCL's books and records, Concrete Supply has not paid for product received from ABCL in an amount of $12,447,842.58 comprised as follows:

(1) the amount outstanding as at 1 August 2009 of $787,259.72; and

(2) the amount of $11,660,582.86 being the difference between the amount of $32,599,450.55 and the amount of $20,938,867.69.

61 I turn now to the false entries detected by Mr Hughes. As I have said, they relate to the manual entries in the SAP system. Mr Hughes investigated 116 entries in the manual entries report which he had produced and examined the underlying journal entries. He discovered that 115 of the 116 entries did not relate to trading between ABCL and Concrete Supply. He described the matters to which these entries appeared to relate as follows:

> 43.1 4 relate to payments made by other customers;
>
> 43.2 5 relate to journal entries transferring indebtedness from Concrete Supply to other customers;
>
> 43.3 57 relate to journal entries which record the payment of Concrete Supply's debt by the creation of new credit;
>
> 43.4 49 relate to journal entries which record the payment of Concrete Supply's debt by a combination of the creation of new credit and the application of a legitimate payment; and
>
> 43.5 one entry (recording a payment in the amount of $108,814.57 on 26 October 2017) was genuine.

62 Mr Hughes also identified a further instance of a payment by another customer being allocated to Concrete Supply and a further 11 entries which relate to journal entries which record the payment of Concrete Supply's debt by the creation of new credit.

63 The false or anomalous entries involved a user ID of one of ABCL's accounts receivable staff, Ms Burgess.

64 Ms Burgess was responsible for customer accounts, including the customer account of Concrete Supply. Her duties included the following: (1) sending invoices and monthly account statements to Concrete Supply; (2) taking action to ensure overdue accounts are paid; (3) dealing with any queries from Concrete Supply concerning invoices or statements; and (4) reporting to the executive management team on the level of indebtedness of Concrete Supply and other customers. Ms Burgess reported directly to Mr Shaddock, and Mr Shaddock in turn reported to the executive general manager, Mr Lemmon.

65 Mr Hughes set about investigating the false entries with a particular emphasis on Ms Burgess. A search of email records revealed that there was no correspondence between the accounts section of ABCL and Concrete Supply after 12 September 2012. There was some correspondence regarding invoices and payments prior to this date. Furthermore, Mr Hughes was not able to locate any invoices or statements from ABCL to Concrete Supply since 2012. Other evidence in this case enables a more precise finding to be made, that is, that statements of account ceased after April 2012 and invoices after March 2013.

66 Concrete Supply provided two RCTIs in October 2017 and at the time he swore his first affidavit on 16 January 2018, Mr Hughes had found one such invoice dated 10 June 2017 in Ms Burgess' office. Mr Hughes said that the practice of customers issuing RCTIs is not the norm for ABCL's customers and ABCL had only one customer which did so. Mr Hughes later clarified this when he said that he was aware of only a handful of customers on an RCTI arrangement. Mr Hughes is not aware of any written agreement between ABCL and Concrete Supply whereby the latter is to provide RCTIs to the former. Other evidence in the case establishes that from a time in 2013, Concrete Supply sent RCTIs with cheques to ABCL.

67 Mr Hughes explained in his oral evidence-in-chief that since swearing his first affidavit, he had discovered that there were a number of RCTIs generated by Concrete Supply in Ms Burgess' office and in cross-examination, he said that he was prepared to accept that a number of RCTIs were sent to Ms Burgess by Concrete Supply. Mr Hughes explained that it was not the RCTI that was processed into the SAP system, but rather the cheque payment itself. Mr Hughes explained that RCTIs for ABCL's customers were "exceptionally rare". ABCL has between 600 and 700 customers within the Cement and Lime Division, and (as I have said) Mr Hughes was aware of only a handful of customers on what he called an RCTI arrangement.

68 The Goods and Services Tax Ruling 2000/10 relevant to the generation of RCTIs was tendered by ABCL as part of Mr Hughes' evidence-in-chief.

69 Mr Hughes and a Mr Mark Tosolini, who is the group information technology manager at ABCL, investigated entries in the SAP system which had been identified as suspicious by forensic accountants (KPMG) engaged by ABCL. The investigation revealed that numerous entries had been made using the user ID and work station of Ms Burgess which did not reflect legitimate entries and which resulted in ABCL's accounts materially understating the indebtedness of Concrete Supply to ABCL.

70 Mr Hughes identified one of the suspicious transactions and he reviewed all user activity in the accounts receivable section of ABCL at the time of the transaction. He found that all user IDs were active at their usual workstations, including Ms Burgess' ID at her usual workstation. Furthermore, the review showed that all other users were engaged in other work at their workstations.

71 In order to access the SAP system, a user needs to log in using a registered ID and password. Each user ID has a set of "permissions" which define the level of access the user has within the SAP system, including the changes or entries that user may make. Ms Burgess' user ID was "GLENDAB". The accounts receivable section was based at the Birkenhead site and comprised Ms Burgess and three other employees. The SAP system records "session information" each time a person logs into the system and that session information records when the user ID logged into the system and transactions, including reports, which were run during the session. In addition, ABCL records the activities of users who are logged onto its network through a Wyse terminal. That audit log records information, including the terminal from which the user accessed ABCL's network, the applications run during the session and all websites visited during the session.

72 Mr Hughes reviewed the SAP system security log and work time data for Ms Burgess and the other members of the accounts receivable section for the period from August 2009 to October 2017. He drew the following conclusions from the review. First, all false entries referred to in his evidence were made using Ms Burgess' user ID, "GLENDAB" at a time when Ms Burgess was logged into the SAP system for an extended period of time. Secondly, at the time the false entries were made, all other members of the accounts receivable section either did not log into the system for the entire day, or were logged into the system for an extended session. Mr Hughes expresses the opinion (which I accept) that the SAP system security log and work time data was not consistent with a person logging into the system using Ms Burgess' user ID, making a false entry and logging out again. He said that the SAP system security log and work time data for Ms Burgess and the accounts receivable section runs to thousands of pages.

73 Under ABCL's system, the only entries which should be made in a customer's debtor account by a staff member in the accounts receivable section relate to records of invoices (automatically generated), records of payment by the customer and of credit notes. They are the only legitimate entries. In fact, there were numerous entries made using the user ID of Ms Burgess which did not fall into the above categories, but rather were false entries of the following types.

74 First, there were misallocations of payments whereby payments made by ABCL customers were allocated to the accounts of other customers in the absence of any evidence of instructions from the customer making the payment to do that.

75 Secondly, there were journal entries whereby indebtedness was transferred between customers in the absence of any authority from the affected customers to do that.

76 Thirdly, there were journal entries in ABCL's accounts whereby an indebtedness was transferred to ABCL's cash account at the end of certain months, which had the effect of disguising a customer's accounts receivable balances. The balance was then transferred back to the customer a short time later.

77 Finally, there were journal entries which purported to be payments of invoices, but which were not supported by any evidence of payment. Instead what occurred was that the affected customer was extended new credit. Mr Hughes explained that refreshing a debt means an entry which is posted which leaves the account balance at the same value as before the entry, but because of the entry itself, a debit and credit within the account, the credit would be applied to old debt which was past due, or past due and payable and the new entry, the debit that would result at the end of the process, would then have a due date which would reflect the actual date of the transaction. The net result is that the balance does not change, but the age of the account is refreshed and brought more up to date. Mr Hughes identified ZV transactions which apparently involved the refreshing of a debt. Mr Hughes explained that refreshing a debt did not necessarily involve processing the entry against the oldest invoices. It was up to the person who was engaged in the process to identify the relevant invoices.

78 I referred earlier to entries in Concrete Supply's debtor account involving transfers from other customer's accounts and the misallocation of other customers' payments. These entries had a net effect of reducing the balance owing on Concrete Supply's debtor account of $8,355,817.97 as follows:

Date	Amount	Description
31.12.2012	-$1,439,434.84	Transfer of debt to ABCL's Northern Cement business unit
18.06.2013	$430,936.26 -$886,371.76	Misallocation of payment of $455,435.50 by BHP Billiton to Concrete Supply account and "refreshing" of $430,936.26 debt to pay $886,371.16 of Concrete Supply invoices.
30.09.14	-$776,139.28	Transfer of debt to BHP Billiton's debtor account
30.06.15	-$1,113,032.64	Transfer of debt to Halliburton Australia's debtor account
29.02.2016	-$895,711.32	Transfer of debt to Oz Minerals' debtor account

27.04.2016	-$2,652.13	Misallocation of payment of $3,367,448.49 by
	-$2,251,763.72	Independent Cement and Lime to Concrete Supply and other customers
31.12.16	-$1,036,679.75	Transfer of debt to Jaffa Limestone and Kittle Group debtor accounts
30.01.2017	-$384,968.79	Misallocation of payment of $2,910,776.58 by Independent Cement and Lime to Concrete Supply
	-$8,355,817.97	

79 There were two other important matters Mr Hughes discovered as a result of his investigations.

80 First, the accounts receivable manager for each division was required at the end of each month to provide to senior management a schedule setting out the account balances of the largest debtors for their division. The schedule for each division was then merged to produce a single report for ABL. The report is then provided to the board of ABL so that it has information as to the financial position of the company. Ms Burgess was responsible for providing the schedule for the Cement and Lime Division of ABL to Mr David Patterson who was the group credit manager for ABL. Mr Patterson in turn provided it to the group accountant. The group accountant collated the information into a performance report for the board and that report included a section on debtors. The summary of debtors in fact showed the largest 21 debtors in respect of ABL's Cement and Lime Division, although the obligation was to provide a list of the 10 largest debtors. On 27 November 2017, Mr Hughes compared the debtor records in the SAP system with the summary of debtors for the period from October 2016 to September 2017. That comparison revealed that Concrete Supply should have appeared on the summary of debtors for each month, but in fact only appeared on the summary of debtors for the month of February 2017. By the time of the trial, he had updated this information to include the position between August 2009 when the SAP system was introduced, and September 2016. A similar pattern of non-reporting of information about Concrete Supply emerged and Mr Hughes said that Concrete Supply should have been on about 85% of the reports to management within that period.

81 Secondly, each customer of ABCL who received cement on credit from ABCL has a credit limit. Under the delegated authorities issued by ABCL only ABL's chief executive officer and managing director had authority to approve credit limits over $1 million. Mr Hughes' examination of the books and records revealed the following:

(1) Ms Burgess increased Concrete Supply's credit limit from $400,000 to $1 million on 23 August 2010 without authorisation;

(2) Ms Burgess increased Concrete Supply's credit limit from $1.5 million to $3 million on 27 November 2014 without authorisation; and

(3) even accepting the false entries, Concrete Supply was trading well above the recorded credit limit of $3 million (over $4 million) as at 25 October 2017.

82 Mr Hughes and another ABL representative interviewed Ms Burgess on 25 October 2017. At that time, she was suspended from her duties and she subsequently provided medical certificates to the effect that she was unfit for work. On 15 February 2018, Ms Burgess' employment was terminated for serious and wilful misconduct. Other employees of ABL or ABCL have spoken to Ms Burgess on other occasions. Mr Hughes' investigations did not reveal the reasons Ms Burgess made false entries in the records of ABCL. Mr Hughes expressed the view that there were two alternatives. First, although Ms Burgess did not intend to benefit Concrete Supply, she made entries over eight years which coincidentally benefited Concrete Supply. Secondly, and in the alternative, Ms Burgess intended to benefit Concrete Supply for some undisclosed reason. He considers it a "striking fact" that the benefit to Concrete Supply corresponded precisely with the quantum of invoices which Concrete Supply declined to pay on the basis of an alleged "discount" or "rebate" on certain invoiced amounts.

83 I discuss below the ABCL statement of account for March 2012 (the March 2012 Statement of Account) (at [187]–[195]). Mr Hughes' evidence establishes that the SAP system records of ABCL show the same outstanding balance of $2,045,377.11 as Concrete Supply's books and records. Mr Hughes produced the March 2012 Statement of Account for Concrete Supply available within the SAP system. Mr Hughes has confirmed that the March 2012 Statement of Account sent by Ms Sandra Cook of ABCL to Ms Heather Booth of Concrete Supply with an email dated 26 April 2012 recorded an incorrect balance of $1,428,588.16, rather than the correct balance of $2,045,377.11. The difference between the two amounts is that a debt of $622,196.38 and a credit entry of $5,407.43 have been removed. Mr Hughes is not aware of how this could have been done. He said that he had instructed ABCL's IT team to investigate how the two entries might have been removed from Concrete Supply's statement, either inadvertently or deliberately, but at the time of swearing his second

affidavit, he had not been informed of how it could have happened. He did not provide any information as to the results of this investigation in his oral evidence.

84 Mr Hughes reviewed the minutes of meetings of ABCL's sales and marketing team at which Ms Burgess was present. He noted that there was a standing item on the agenda for those meetings regarding the reporting of problem debtors. The minutes do not record Ms Burgess ever disclosing that Concrete Supply was trading significantly outside of its terms of trade, both as regards its credit limit and the age of its debt.

85 Mr Hughes was cross-examined at some length. The focus of the cross-examination was on exposing deficiencies in ABCL's system in terms of checks that might have brought the false entries to light earlier and on circumstances suggesting that others at Birkenhead knew of the false entries. Those matters are relevant to attribution and contributory negligence which I address later in these reasons.

86 Mr Hughes had dealings with ABCL employees at Birkenhead from 2008 onwards. Mr Taeger, who was based at Birkenhead, was the most senior member of the cement and lime finance team. Mr Hughes identified other members of the finance team at Birkenhead. He said he did not have much interaction with the sales and marketing team. His estimate of the number of employees located at Birkenhead between 2011 and 2014 was 50 to 60.

87 Mr Hughes was taken to entries for 30 June 2011 in the Excel file he prepared and it was put to him that any person from the accounts receivable section at Birkenhead who looked at the information ought to have formed the view that the entries looked unusual. Mr Hughes said that if a member of the accounts receivable staff at Birkenhead had looked at that level of detail and identified those particular transactions, they would have seen that they were out of scope with the other transactions within the account. He said:

> So yes, they – that would have flagged it as being unusual.

88 Mr Hughes was asked the same question in relation to entries on 9 September 2011 and he gave a similar answer. The entries would have been seen as vastly different to other transactions within the accounts and, therefore, identified as unusual. The entries were different because they were of a very different quantum. Furthermore, one of the entries, being an increase in a liability of $953,741.66, would have been seen as unusual. Mr Hughes gave similar evidence with respect to entries on 10 October 2011 and other entries in 2011.

89 Mr Hughes said that from mid-2011 to November 2017, the persons from the accounts receivable section at Birkenhead who were accessing the SAP system records in relation to Concrete Supply were primarily Ms Burgess and Ms Cook.

90 By reference to a modified document prepared by the Concrete Supply defendants, Mr Hughes was able to identify uses of the Concrete Supply customer account information in the SAP system by Ms Cook. In 2009, "DZ" was an early version of "ZV", a customer payment. Mr Hughes admitted that there was manual entries by Ms Cook.

91 Mr Hughes interviewed Ms Cook as part of his investigations. Mr Hughes was accompanied by Ms Bronwyn Schoen, who is the general manager of HR Services. A record of the interview is contained in the Court Book. It seems that Ms Cook had on occasions made use of Ms Burgess' ID and that that was contrary to ABCL's IT policy. Ms Cook did not give evidence and Mr Hughes was not aware of any reason Ms Cook could not have given evidence.

92 In 2009, Concrete Supply was purchasing cement from ABCL at a value of approximately $200,000 to $300,000 per month. The same position applied in 2011. Mr Hughes agreed that the customer balance records in the SAP system showed large amounts in June, September and October 2011 that appeared to be "out of kilter and irregular". He agreed that with its profile, Concrete Supply was not likely to have debits of $4 million in October 2011. Mr Hughes agreed that the feature of debits and credits far exceeding the sales and purchases was something apparent from the years that followed, namely, from 2012 to 2017. He agreed that there were "similar patterns" throughout that period. Mr Hughes agreed that if a member of the accounts receivable section had seen those matters, then he or she would have seen those discrepancies.

93 Mr Hughes was taken to a document entitled "Summary of Issues" prepared by Mr Matthew Beeby and Mr James Rivett of KPMG as part of KPMG's investigation. This document was prepared following an "initial review" of the accounts receivable of ABCL by internal auditors from KPMG. The investigators identified dormant accounts as an issue. The issue was that a dormant account, being an account that did not have trading activity, had balances outstanding within that account. Mr Hughes discovered when examining the transactions in those accounts that they had been transferred in from other accounts within the accounts receivable system, that is, other customer accounts. He agreed that there was no rational explanation as to why the dormant accounts would be involved in a way suggesting a recent

trading history. The second issue was identified as "Unusual entries in low value customers' accounts". The issue here was that there were large entries in a customer's account in circumstances where the customer was doing a small amount in terms of sales per year. The third issue was unusual entries in the account of "Concrete Supply", having regard to the profile of a company with sales of approximately $500,000 a month. For example, there is a debit entry in September 2017 of $1.4 million approximately. The fourth issue identified is "ICL's payments used to offset other debtors' balances". ICL (Independent Cement and Lime) is a joint venture in which Adelaide Brighton has a 50% share. The other partner is the Barro Group which is a large shareholder within Adelaide Brighton. Mr Hughes agreed that the investigation showed that debit balances or amounts due had been transferred into the ICL account and were sitting there as if it was an amount due from ICL. The effect was to over inflate ICL's indebtedness. The final issue was "Payments outside of terms (by multiple months)". Mr Hughes was taken to a printout of the full debtors ledger for September 2017 and to five entries which had been flagged as unusual entries by KPMG. Mr Hughes agreed that someone looking at the detailed records would have identified the unusual transactions. Mr Hughes did not agree that Mr Taeger should have picked up the unusual transactions. It was not his job to run through every single transaction that went through the debtors ledger. The credit team were responsible for that area. They were then to provide the information to Mr Taeger. At the same time, Mr Hughes agreed that had Mr Taeger looked through the detail of the "individual customer account", then the transactions in that account that were unusual would have flagged something was occurring within that account.

94 Mr Hughes said that on his analysis the "refreshing" conduct began in mid-2011 and he agreed that had anybody from ABCL in 2013 or in 2014 looked within the detail of a specific customer account and identified those transactions, they would have come across those transactions.

95 Mr Hughes agreed that in December 2017, KPMG had identified 46 customers who had been affected by the irregular transactions. The period was from 1 August 2009 to 2017, and although Mr Hughes could not remember the precise number of unusual transactions, there were a "substantial" number. Mr Hughes said that he did not consider it implausible that the only person who knew about the irregular transactions at Birkenhead was Ms Burgess. There were between 600 and 700 customers to manage. As far as the credit or accounts receivable section was concerned, Ms Burgess took primary responsibility for the ledger, that is to say

ABCL's ledger, and whilst entries had been posted by others, they were of limited scope in terms of invoicing and processing payments.

96 It seems that by about February 2018, the number of customers affected by the unusual transactions had been identified as 59.

97 In early January 2018, Mr Hughes went through the BHP Olympic Dam (BHP) ABCL account (3,036) and provided a report to Mr Michael Kelly. He noted that the summary of the account for the period since 1 August 2009 revealed a shortfall in payments from BHP in most years, some $1.9 million over the time period. Mr Hughes formed the opinion that there had been an irregularity at the time of the transfer from Protean to the SAP system. There were short payments between what ABCL had invoiced BHP and had recorded in its system compared to what BHP had paid. Mr Hughes agreed that the "investigation team" identified items such as re-aging, which disguised the lack of payment from a customer.

98 BHP is a customer which generates RCTIs in relation to its purchases from ABCL and it is the second largest customer after Concrete Supply in terms of short payments. In the case of BHP, the short payments total an amount of approximately $3.7 million. Towards the end of January 2018, the investigation had identified 60 customers affected by the irregular transactions, and the total impact in terms of the profit and loss of ABCL was $17.1 million.

99 Mr Hughes agreed that Concrete Supply would have been within the top 25 customers of the Cement and Lime Division. Mr Patterson was the national credit manager and he was based in Sydney. Mr Hughes is not aware of any reason why he could not give evidence in the proceeding. Mr Hughes did not know what checks and balances Mr Patterson went through in reviewing the spreadsheet which showed the top 25 customers at that time. He said it was not part of Mr Patterson's role to check the amounts that appeared on the spreadsheet against the underlying amounts in the SAP system. Mr Patterson's role was to review the information in terms of credit exposure. The credit managers were the people who were to compile the information from the SAP system and provide it to Mr Patterson as part of monthly reporting. The main user ID of the file which was shared as between Mr Patterson and Ms Burgess was the user ID of Ms Burgess.

100 Mr Hughes agreed that if Mr Taeger or Mr Shaddock had been aware of the amount that Concrete Supply "traded", then they would have identified a credit limit of $3 million as unusual. Unless a specific amount was drawn to Mr Taeger's attention, Mr Hughes did not

agree that Mr Taeger would have known how much Concrete Supply "traded". Ms Burgess did not have authority to increase the credit limit, but she did have the ability to record an increase in the credit limit approved by an unauthorised person.

101 Mr Hughes agreed that during the period 2009 to 2017, KPMG did a series of internal audits. He agreed that the investigation which he carried out identified a number of credit limit changes, such as the one involving Ms Burgess, that had resulted in adjusted credit limits outside the scope of delegated authorities.

102 The documents indicate that KPMG expressed concern about ABCL's credit policies in October 2010. Mr Hughes was not aware of what was done in relation to credit policies between October 2010 and November 2017.

103 KPMG conducted a complete review of the credit area and accounts receivable area in late 2017 and identified a number of issues and recommended remedial action.

104 Mr Hughes is aware that under the BSA, the seller is obliged to prepare tax invoices. He was unable to say who made the decision at ABCL or why the decision was made to stop sending tax invoices to Concrete Supply.

105 Mr Hughes agreed that he filed an affidavit in the civil proceeding ABCL has brought against Ms Burgess in the Supreme Court of South Australia. In that connection, he was referred to a customer aging report which showed Concrete Supply's debt to ABCL at 30 days at $1.99 million. He agreed that given the values that are set out against that particular customer, the amount in the 30 days appeared unusual. He agreed that it would appear to be the case that that came about as a result of the refreshing of debt. Mr Hughes said it would be most unusual for a customer to go from $300,000 per month (the current amount shown in the report was $324,056.61) to $1.99 million in a single month. Mr Hughes described an aged trial balance as a document used within the credit section to assess where particular customers are up to and which customers they needed to follow up for payment.

106 Mr Hughes said in practice that Mr Patterson did not go into the SAP system, but rather received information from individual credit teams "in terms of managing those accounts which had been flagged by the individual credit teams".

107 Mr Hughes agreed that various entries in the general ledger in relation to the Concrete Supply customer account were unusual because of the amounts involved. He was taken to an entry of $1,648,296.49 for Concrete Supply which had been posted on 31 December 2015. He was

asked whether he agreed that if a person from the accounts receivable section at Birkenhead saw that he or she would recognise it as an unauthorised transaction. He said that if such a person understood the value Concrete Supply would normally do, then an entry of that value "would have raised a flag". Mr Hughes agreed that there was a tendency for the transactions identified to appear at key times, including at the end of a financial reporting period. Mr Hughes described what would appear on a customer's monthly statement where a debt had been refreshed. The invoices which had been selected (whether they be the oldest invoice or not) would be removed from the monthly statement and there would be a much larger lump sum value in the statement. He did not agree that the customer would know and, in addition, anyone from the accounts receivable section at Birkenhead would know over time that the lump sum amounts were appearing on the monthly statements. When asked whether the person processing a cheque received would be aware of the refreshing, Mr Hughes said the following:

> Depending upon the customer account, the screens that you go into when you allocate the invoice – or the payment, sorry, against invoices presents from the oldest invoice through to, at the top of the page and depending on the number of invoices that you have on the account outstanding, can run to many pages, inter-screen pages. So if you're allocating, and generally payments come in oldest – sorry – a customer paying oldest, you would allocate it to the first series of invoices that are on that screen and may not get to the screen in which that refreshing entry appears on.

Mr Hughes could not say how often a person other than Ms Burgess would be involved in that process.

108 Mr Hughes was taken to KPMG's report for ABL dated 18 July 2018. In that report, KPMG state that it had identified 44 instances where amounts had been inappropriately transferred between customers totalling an amount of $39,148,675.75. This was referred to by KPMG as category 2. Category 1 comprises transactions where amounts were inappropriately miscalculated to customers and the amount involved was $15,877,166.12. The category 1 and category 2 transactions affected approximately 60 customer accounts. Mr Hughes was taken to some of the transactions comprised first, in category 1. He was taken to transaction 2.05a which involved an amount of approximately $1.4 million. The amount of approximately $1.4 million was transferred from Concrete Supply's account and went into the account of a company called Newmont Tanami Pty Ltd. The effect of the transaction was to reduce Concrete Supply's account and increase that of Newmont Tanami. Concrete Supply's liability to ABCL was reduced within the SAP system. Approximately one month later, there was a transfer of the amount from Newmont Tanami to Darwin Cash Sales. That

meant that the Newmont Tanami account was reduced by $1.4 million approximately and the Darwin Cash Sales account was increased by $1.4 million. Approximately two months later, the amount was transferred from Darwin Cash Sales back to Newmont Tanami. Mr Hughes agreed that refreshing was the irregularity in addition to the irregularities comprising categories 1 and 2. Another example involves information in relation to both categories 1 and 2. On 24 March 2016, ABCL received cash in the sum of $139,000 approximately from Premix Concrete SA. That was incorrectly allocated to BHP. On 29 March 2016, Premix Concrete SA's indebtedness was reduced by $139,403.44 and BHP Billiton (ODC) Pty Ltd was increased by that amount. Mr Hughes said that the investigation team did identify that there were transfers between various customer accounts, that is to say, from one customer account to another over time. Mr Hughes did not agree that it was inconceivable that either Mr Taeger or Mr Patterson were unaware of what was occurring and nor did he agree with the proposition that he was deliberately understating the role and functions of Mr Taeger and Mr Patterson.

109 Mr Hughes did not have a clear recollection of the time at which staff held various positions in the sales department. Mr John Niarchos was the sales and marketing manager for South Australia for ABCL in 2016 and for a period before that. Mr Hughes accepted that he would expect Mr Niarchos as the sales and marketing manager to have an understanding of the profile of the customers with whom ABCL dealt.

110 Mr Hughes said that in 2016, the head of the sales department was either Mr Niarchos or Mr John Plunkett. He said that Mr Greg Fiedler was Mr Niarchos' predecessor. Mr Mike Miller was at some point the head of the sales department. Mr Hughes agreed that Mr Taeger's role between 2012 and 2017 included managing the accounts receivable credit section and that that would include a level of monitoring and of reviewing the debtors' accounts. Mr Hughes' belief was that Mr Taeger relied upon the credit department to manage the individual customers and would not necessarily go to the individual transactions, namely, the unusual ones identified.

111 Mr Hughes was referred to communications between Mr Taeger and Ms Burgess concerning the low percentages of collections in relation to Concrete Supply, but it is not necessary for me to set out the details.

112 Mr Hughes' evidence establishes that the amount claimed by ABCL represents the difference between the price payable by Concrete Supply under the BSA and the price increase letters

and the amount paid by Concrete Supply. Subject to an argument concerning the operation of the BSA and an argument that the difference represents a discount or rebate given to Concrete Supply by ABCL, Concrete Supply is indebted to ABCL for this amount. Mr Hughes' evidence also establishes that a large number of false entries were made in the books and records of ABCL by Ms Burgess, an employee of ABCL, over an extended period of time which had the effect of disguising the level of indebtedness of Concrete Supply and other customers. Whether others at ABCL were involved in the false entries and whether those entries can and should have been detected earlier is considered later in these reasons.

Mr Brad Lemmon

113 The other witness called at the trial from the Adelaide Brighton Group was also a senior member of the Group's management team.

114 Mr Brad Lemmon is the executive general manager for the Cement and Lime Division of ABL. He is responsible for managing the Cement and Lime Division of ABL and all components thereof. He reports to Mr Brydon. ABL's operational managers, sales managers, and market, financial and support managers report to him. Mr Lemmon was an honest witness and I accept his evidence.

115 As I have said in the context of Mr Hughes' evidence, there is an issue between the parties as to whether Ms Burgess' knowledge or conduct is to be attributed to ABCL. One circumstance said to be relevant to that issue is whether her conduct was in total fraud of ABCL. The Concrete Supply defendants submitted that it was only if it was that there could be no attribution of Ms Burgess' conduct to Concrete Supply. This argument prompted ABCL to attempt to lead further evidence from Mr Lemmon as to ABCL's costs per tonne to produce cement.

116 Mr Lemmon's first affidavit was affirmed on 12 January 2018. He affirmed a second affidavit on the second day of trial and ABCL sought to tender the affidavit.

117 In his second affidavit, Mr Lemmon explained how he prepared a confidential table showing a comparison between the price paid per tonne of cement by Concrete Supply and the cost of production to ABCL of cement (per tonne) for the calendar years 2015, 2016 and 2017. This analysis showed ABCL making a profit per tonne in 2015 and a loss per tonne in 2016 and 2017. The costs of production included fixed costs, variable costs, corporate overheads and costs of capital, being 10% of funds employed. ABCL produced a further document showing

a different and lower percentage for "Capital Allocation". This document was marked "Document "B". The problem in terms of admissibility related to the amount allowed for the weighted average cost of capital (WACC).

118 My ruling was that I declined to receive Mr Lemmon's evidence with respect to the WACC. My reasons for that ruling are set out in Appendix A.

119 I received Mr Lemmon's evidence on the voir dire excluding the reference to the figure for the WACC consistent with my ruling. That evidence establishes some of the costs of production, but it does not establish the cost of capital. I am prepared to accept that there is a cost of capital, but the figure has not been established. I make two further observations. First, even if the evidence had been admitted, the material would have shown a profit per tonne for the years 2012, 2013, 2014 and 2015 and a loss for the years 2016 and 2017 and, if it be relevant, an overall profit over the six years in the order of $265,000. Secondly, in closing submissions, ABCL developed different arguments to refute the argument that Ms Burgess' knowledge or conduct was to be attributed to it in the absence of total fraud. I will deal with those arguments when I consider the attribution issue.

120 Mr Lemmon said that he had a telephone conversation with Mr Albert D'Alessandro on 2 November 2017. Mr D'Alessandro was employed by Concrete Supply as its financial controller or chief financial officer. During the conversation, Mr Lemmon discussed with Mr D'Alessandro the commercial resolution of the dispute. The topics were then changed and he discussed the historical matters which had been discussed at an earlier meeting on 25 October 2017. Mr D'Alessandro explained to Mr Lemmon that he had told Rino and Jason some time ago that the "discount" they were obtaining was "not right" and that they needed "paperwork" in place to verify it. Mr Lemmon said that Mr D'Alessandro said that the response from Rino and Jason was to the effect that Adelaide Brighton loved them and that it was not a problem. Mr D'Alessandro said to Rino and Jason that it should be a major concern for them and that it will come back on them one day. There was a dispute between the parties as to whether this evidence was protected as evidence of settlement negotiations (see s 131 of the Evidence Act). I heard evidence on the voir dire on this issue. It was common ground that there were discussions which were without prejudice discussions and that they involved a proposal from one side of the negotiations as well as counter-proposals from the other side. Mr Lemmon said that another matter discussed during his discussions with Mr D'Alessandro was the ongoing supply of cement by ABCL to Concrete Supply. Mr

Lemmon believed that the order of discussions was the settlement negotiations, the ongoing supply of cement by ABCL to Concrete Supply, and then the comments made by Mr D'Alessandro. He said that it came towards the end of the conversation. He considered that Mr D'Alessandro's tone was reflective. At the time Mr D'Alessandro made his comments, he and Mr D'Alessandro had moved on from discussing settlement negotiations. Mr Lemmon agreed that at the time of the discussions, legal proceedings were a potential outcome. He agreed that at no time during the discussions did either say that they were closing the without prejudice discussions. In cross-examination, Mr Lemmon said that the without prejudice settlement discussions did not involve specifics and were more about the logistics of getting together as the parties continued those discussions. Mr Lemmon said that the telephone conversation went for 15 to 20 minutes at the most. Mr Lemmon did not fully agree with the proposition that the settlement negotiations and the ongoing supply were interlinked or relevant to each other.

121 Counsel for the Concrete Supply defendants submitted that the conversation was part of the without prejudice negotiations and protected by s 131 of the Evidence Act. I ruled against that submission and the evidence was admitted. My reasons for so ruling are set out in Appendix A.

122 A good deal of the body of Mr Lemmon's first affidavit was either not pressed by ABCL because it dealt with settlement negotiations or was received on a limited basis such that it does not call for comment.

123 Mr Lemmon's direct involvement in the matter began on 7 October 2017 when he was informed by Mr Shaddock that Mr Shaddock had identified anomalous entries in ABCL's accounting records. Mr Shaddock advised him that the anomalous records had been made using the user ID of Ms Burgess. Mr Lemmon informed Mr Brydon and Mr Michael Kelly of the situation. Approximately one week later, Mr Lemmon was informed by Mr Michael Kelly that ABCL had engaged KPMG to assist the company to investigate the anomalies and that false entries appeared to be disguising a large undisclosed debt owed to ABCL by Concrete Supply. Some weeks later, Mr Shaddock reported to Mr Lemmon that he believed "that there were what appeared to be deliberate manipulations of various transactions in the sense that amounts were recorded as being paid and then transferred between different accounts so as to disguise the fact that there was certain other outcomes in other accounts".

124 In October 2017, Mr Plunkett was ABCL's sales and marketing manager. At Mr Lemmon's request he arranged a meeting between Mr Lemmon and Jason. The meeting took place on 25 October 2017. Mr Lemmon and Mr Michael Kelly attended the meeting. At the beginning of the meeting, Jason was the only representative for Concrete Supply, but he was later joined by Rino, Mr D'Alessandro and Ms Devika Senanayake. Mr Lemmon took a detailed note of the meeting. At the beginning of the meeting, Mr Michael Kelly handed Jason a letter from ABCL which pointed out that ABCL had identified a shortfall in payments by Concrete Supply over the period 2009 to 2017 of more than $10 million. Mr Lemmon also explained to Jason that ABCL had identified an underpayment totalling more than $10 million by Concrete Supply. Jason responded that the difference between the price for the product supplied and the amounts paid was because Mr Fiedler, a sales representative of ABCL, had put in place a "discount structure" because Concrete Supply was a loyal customer.

125 Further meetings followed, including a meeting on 27 October 2017.

126 On 3 November 2017, Adelaide Brighton received a letter from Tindall Gask Bentley, solicitors acting for Concrete Supply. That letter was tendered in evidence. In the letter, Tindall Gask Bentley refer to the fact that Concrete Supply has had a longstanding arrangement with ABCL regarding the supply of materials to Concrete Supply and that the basis of this longstanding arrangement is set out in the BSA between the two companies. The letter goes on to say that the solicitors are instructed that the foundations set out in the agreement (with variations) "remain binding on the parties to this day". The solicitors refer to a longstanding arrangement which grants Concrete Supply a "30% rebate" on the wholesale price of product of ABCL's products. The solicitors state the following:

> 8. We are instructed from 2009 until 2012 you prepared and provided our client with tax invoices and statements which confirmed that you agreed to provide our client with the Agreed Rebate Amount.
>
> 9. We are instructed that during this time you developed and implemented your own formula to calculate the Agreed Rebate Amount (**'formula'**).
>
> 10. **Enclosed** is a copy of your letter to our client dated 2 December 2009 confirming the above.

(Emphasis in original.)

127 The enclosed letter is a letter from ABCL to Concrete Supply dated 2 December 2009 wherein ABCL asks Concrete Supply to confirm the balance in ABCL's favour of $971,210.70 as at 31 October 2009. The letter is signed by Glenda Burgess, who is described

as "Credit Manager – Cement & Lime Division". The letter is signed by Rino. This letter, which I refer to as the "audit confirmation letter", is discussed in detail below.

128 The letter from Tindall Gask Bentley states that from April 2012, ABCL stopped sending invoices to Concrete Supply. A statement in the letter that RCTIs issued by Concrete Supply since 2012 have taken into account the agreed rebate amount is not strictly correct on any view. The true position is that from time to time certain RCTIs and cheques made out in relation to them were not paid to ABCL and the cheques were cancelled.

129 Mr Lemmon gave evidence of ABCL's pricing of cement and the extent to which the alleged discount or rebate would be consistent with ABCL's approach to the pricing of cement. ABCL supplied two types of cement product to Concrete Supply. The first type was general purpose cement or GP, or ordinary Portland cement. It is more expensive than the second type which is general blended cement. Over the period of supply to Concrete Supply, these types of cement have been supplied in a proportion of approximately 50/50 with slightly more general blended cement in the later years. As a general proposition, ABCL sets its pricing in the Cement and Lime Division by reference to a range of factors, but as Mr Lemmon put it, "essentially, by a concept of what the market will bear specific to a particular market sector". Mr Lemmon said, and I accept, that he would not be prepared to authorise the supply of cement to Concrete Supply at the prices actually paid by Concrete Supply. Those prices are below the prices offered to other customers and below the objectives ABCL had for a return on funds applied. It would also affect adversely parity and relativity of pricing with other customers. Mr Lemmon said, and I accept, that there are a small number of customers, two as he understood it, who have prices which facilitate them having a competitive price in the market relative to their peers in that sector. Those arrangements are called "favoured nation arrangements". Concrete Supply is not one of those customers. If the type of price actually paid by Concrete Supply was approved by ABCL, then it would have to be provided, as Mr Lemmon put it, "on a broader footing".

130 Mr Lemmon said, and I accept, that the level of the rebate asserted by Concrete Supply would be "unprecedented" in this market segment. Assuming a rebate of 34% was applied in addition to the discount already given by ABCL, the result is a total discount or rebate in excess of 40%. Mr Lemmon set out his understanding of the position in the following table.

Period	Base Price (ex GST))	Discount	Discount Price (ex	Price after additional	Total Discount

			GST)	**"rebate"**	
1 August 2008 to 30 September 2008	$193	$20	$173	$114	41%
1 October 2008 to 31 March 2009	$199	$20	$179	$118	41%
1 April 2009 to 31 March 2010	$213	$20	$193	$127	40%
1 April 2010 to 31 October 2010	$213	$20	$193	$127	40%
1 November 2010 to 31 December 2010	$219	$20	$199	$131	40%
1 January 2011 to 31 March 2011	$219	$25	$194	$128	42%
1 April 2011 to 31 March 2012	$225	$25	$200	$132	41%
1 April 2012 to 16 December 2012	$231	$25	$206	$136	41%
17 December 2012 to 31 March 2013	$231	$25	$206	$136	41%
1 April 2013 to 31 March 2014	$237	$25	$212	$140	41%
1 April 2014 to 31 March 2015	$237	$25	$212	$140	41%
1 April 2015 to 31 March 2016	$243	$25	$218	$144	41%
1 April 2016 to 30 September 2016	$248	$25	$223	$147	41%
1 October 2016 to 31 March 2017	$258	$25	$233	$154	40%
1 April 2017 to 6 November 2017	$268	$25	$243	$160	40%

131 Mr Lemmon states that in his experience of more than 20 years in the cement industry, discounts or rebates in the order of 40% have never been given to independent customers in the premixed concrete sector.

132 Mr Lemmon was cross-examined on various matters, including ABCL's fixing of credit limits for customers, the fact that a customer's profile, that is, their average purchases per month, would include the size of the transactions one would expect to see, or not see, as the case may be, in a customer's account, the information available on the SAP system if it is properly interrogated, the fact that ABCL stopped sending monthly statements and invoices to Concrete Supply, competition in the market of the production and sale of cement and other customers affected by the false entries. Before examining those matters, it is convenient to outline Mr Lemmon's experience in more detail.

133 In 1994, Mr Lemmon commenced employment with Cockburn Cement Limited (Cockburn Cement) in Kalgoorlie in Western Australia. He then moved to Dongara and thereafter he

moved to Perth where he assumed a role in the marketing department. He was working in the marketing department of Cockburn Cement when the company merged with Adelaide Brighton in 1999. He was involved in sales and had the role of area manager or account manager. In this role, he visited customers who were primarily involved in mining. It was part of his role to understand their profile and their account. He described that as a fundamental aspect of the role. Such an awareness included an awareness of volume and pricing and revenue generated from the sales. Mr Lemmon's visits to customers gave him a good understanding of their processes and how their businesses worked.

134 In 2001, Mr Lemmon was appointed to the role of lime development manager and part of his role was to identify opportunities to expand "the lime position". In or about 2004, Mr Lemmon became the sales and marketing manager for the Western Australian part of the business and the area manager of sales reported to him. Mr Lemmon said that at that time there were five or six area managers plus sales administration people and also technical resources.

135 In 2008, Mr Lemmon was appointed to the role of general manager, sales and marketing, for the Cement and Lime Division. The Cement and Lime Division included the territories of Western Australia, South Australia and the Northern Territory, and, managed through the South Australian operations, the sale of products into the east coast of New South Wales and some joint ventures on the east coast. Mr Miller was the sales and marketing manager for the South Australian/New South Wales business and he reported to Mr Lemmon. Mr Lemmon held this position until early 2011 and Mr Miller was the sales and marketing manager for that entire time.

136 In 2011, Mr Lemmon became general manager for strategy and business development of the Cement and Lime Division. That role included responsibility for considering various strategic projects and managing the business' international trade arrangements at that time. Thereafter, Mr Miller and his counterpart in Western Australia, reported to the executive general manager of the Cement and Lime Division, who at that time was Mr Brydon.

137 In early 2014, Mr Lemmon became the executive general manager of cement and lime for the Western Australian and Northern Territory parts of the business. In 2014, Mr Miller was the executive general manager, cement and lime for South Australia and New South Wales and he reported to Mr Brydon, who was at that time, the chief executive officer of the Adelaide

Brighton Group. In May 2016, accountability for the South Australian and the New South Wales operations was added to Mr Lemmon's responsibilities.

138 Since he became the executive general manager of the Cement and Lime Division in early 2014, Mr Lemmon has been part of the senior leadership team within Adelaide Brighton.

139 The effect of Mr Lemmon's evidence is that his contact with South Australia occurred between 2008 and early 2011 when he was general manager, sales and marketing, and since May 2016 as executive general manager for cement and lime.

140 Mr Lemmon became aware during the course of the investigation in 2017 that Ms Burgess had made an entry in the SAP system authorising a credit limit of $3 million for Concrete Supply. Mr Lemmon was unable to state the reasons there were no locks put on in respect of the appropriate people in terms of the credit limits that they could authorise.

141 In the course of the investigation, Mr Lemmon became aware that in October 2017, Concrete Supply's accounts stood at about $4 million. Mr Lemmon was unable to explain how Concrete Supply was able to trade over the credit limit of $3 million. Mr Lemmon made the point that other sales staff relied on information provided by Ms Burgess and that she routinely attended sales meetings and did not raise the issue. He agreed that a member of the sales staff could have observed the fact that Concrete Supply was trading at $4 million "within the SAP platform". He agreed that all one would have had to have done is bring up the customer account in respect of Concrete Supply, or any number of reports, and it would have indicated that Concrete Supply had an indebtedness of $4 million.

142 Mr Taeger was the finance manager for cement and lime, South Australia and New South Wales and he was located in South Australia. Mr Lemmon was taken to the document in evidence which consists of a message from Mr Taeger to Ms Burgess and accompanying spreadsheets referring to debtors' balances. One of the spreadsheets shows that Concrete Supply was, as at early December 2015, indebted to ABCL in an amount of approximately $3.2 million. Mr Lemmon agreed that this was inappropriate and that "potentially" anyone who looked at that and who had an understanding of the profile of Concrete Supply would have concluded that there were problems. He said that "potentially" it ought to have caused Mr Taeger to make inquiries in respect of Concrete Supply's account.

143 Mr Lemmon was taken to the screenshot of the entry in the SAP system which shows that on 27 November 2014, Ms Burgess increased the credit limit of Concrete Supply from

$1.5 million to $3 million. Mr Lemmon said that it was his understanding that Ms Burgess did not have a delegated authority to authorise this increase in the credit limit. Mr Lemmon said that the delegated authorities were available in 2014. Mr Lemmon said, and I accept, that the fact that Ms Burgess made the entry did not of itself indicate that the increase was not authorised because Ms Burgess would have had the authority to enter into the system the increase approved by a person who was properly authorised.

144 In November 2010, Mr Lemmon sent a memorandum to Mr Miller and others in which he expressed concern about a number of shortcomings identified within the credit management processes. Mr Lemmon said in evidence that he could not remember the "specifics". In November 2010, Mr Terry Linto, who was sales administration officer for the sales and marketing team, prepared a table which referred to the need for the development of a credit policy and that the responsible person was Ms Burgess. Mr Lemmon could not remember whether or not Ms Burgess in fact developed a credit policy.

145 Mr Lemmon said that in November 2014, he would expect the SAP system to be "interrogated" from time to time to produce aged debtor balances. The aged debtor balances would show the debts aged 30 days, 60 days and 90 days respectively. Mr Lemmon said that in 2014, he would expect Mr Taeger, Mr Miller, who was executive general manager at the time, and Mr Niarchos of sales and marketing to receive aged debtor balances.

146 Mr Lemmon agreed that the SAP system is an advanced database system that can be interrogated and used to produce reports. He was taken to a hard copy of a customer balance display for the 2017 calendar year. He said that he would not look at this particular report "typically". He said that he would look at information that is pulled together to produce a broader report of debtor balances etc. Mr Lemmon agreed that the customer balance display to which he was taken, showed sales of between 200,000 and 700,000. It also showed a maximum debit of $1.7 million and a maximum credit of $1.5 million. Mr Lemmon agreed that the size of those debits and credits would appear to be unusual. In response to a question as to whether somebody noticing those debits and credits and sales on the same page ought to have made a further inquiry in respect of the company, Mr Lemmon said that it would depend on who was looking and for what purpose. He said that had it been him, he would have "potentially made inquiries".

147 Mr Lemmon agreed that he became aware in the course of the investigation that in or about May 2012, ABCL stopped sending monthly statements to Concrete Supply, and he agreed

that that was a "wholly unusual fact" in terms of the business of ABCL. He agreed that he would expect other members of the accounts receivable section to know that monthly statements were not being sent to Concrete Supply. He also became aware in the course of the investigation that about a year later, ABCL stopped sending invoices to Concrete Supply and he said that he would have expected the accounts receivable section to know that invoices were not being sent to Concrete Supply. Mr Lemmon said that Ms Burgess went to some lengths to avoid a situation where the failure to carry out various tasks would be highlighted.

148 At the end of 2017, Mr Plunkett was the head of sales and marketing and he was located at Birkenhead. Before that, Mr Adam Needra was the head of sales and marketing for a short period. Before Mr Needra, Mr Niarchos was the head of sales and marketing, and Mr Lemmon said that he thought that Mr Niarchos had held that position for about two years. Mr Lemmon considered that Mr Niarchos would have had "a reasonably sound understanding" of the production of cement.

149 Mr Lemmon was asked whether Cement Australia was a competitor of Adelaide Brighton Cement. He said that it was in 2018, but it had not been in 2009 and 2010. He had an understanding of the South Australian market and he said that at that time, Cement Australia was a customer of ABCL, not a competitor. Mr Lemmon was taken to the minutes of various sales and marketing meetings beginning on 20 April 2009. It would seem that Ms Burgess was at the meeting so it is more accurate to describe it as a meeting of sales and marketing, and accounts receivable. Mr Lemmon slightly modified his evidence and said that Cement Australia is not a major competitor. Mr Lemmon was taken to minutes of a meeting of the sales and marketing department on 17 May 2010. He said that the minutes did not show that Cement Australia was a competitor in the bulk cement sector. Mr Lemmon was taken to minutes of 16 July 2010 and minutes of the sales and marketing department dated 2 May 2011. As a result of being taken to these references, Mr Lemmon agreed that "there were incidents where Cement Australia did compete in a – in a small level". It seems to me that Mr Lemmon's evidence on this topic was to the effect that his understanding of the market in South Australia and the level of competition within it was, as he described it, no more than "broad".

150 Mr Lemmon was questioned about whether it was an easy matter at the time for ABCL to increase production at the Birkenhead site. He agreed that there would be someone from

Birkenhead who would be able to answer questions about "forecast scheduling and production scheduling". I think it is fair to say that Mr Lemmon did not have a detailed understanding of this topic.

151 Counsel for the Concrete Supply defendants asked Mr Lemmon about his analysis of the costs incurred by ABCL in producing cement and, in particular, his figure for divisional costs between 2012 and 2017. He focused on the figure per tonne for 2016. It was put to Mr Lemmon that that would be the figure used internally in ABCL as the cost of producing cement. As I understand the proposition, that means that in the minds of, for example, the sales and marketing staff, the capital allocation figure and the allocation of divisional corporate overhead figure are excluded. Mr Lemmon appeared to accept that proposition to a point.

152 As a result of the investigation, Mr Lemmon understood that one of the customers that had an excessive amount due to ABCL, but which was nevertheless not disclosed in ABCL's accounts was BHP. Mr Lemmon was briefed about this matter and "very generally" about accounting standard AASB108.

153 Concrete Supply was the largest beneficiary of the anomalous transactions. Mr Lemmon had not seen the ABCL document which is dated 15 February 2018 and which contains the comment in relation to Concrete Supply as follows:

> ABCL has financed CS over a period of time – rationale to expand.

154 Mr Lemmon is not aware of any reason why Mr Niarchos could not give evidence in the proceeding. Mr Lemmon was aware that Jason was invited to attend and did attend Adelaide Brighton's corporate box at the grand final of the AFL football in 2014 and he was aware that invitations to the corporate box are reserved for important customers.

155 Mr Lemmon believes the following to be correct. The records of ABCL show the indebtedness of Concrete Supply was about the same amount as the discount or rebate that was being claimed by that company as at 25 October 2017. Mr Lemmon's understanding is that approximately 60 customers were actually impacted by the anomalous transactions. ABCL has, since the investigation, made entries in its accounts which reflect what it considers to be the true position. In response to a suggestion that no-one within ABCL or ABL was supervising Ms Burgess, Mr Lemmon said that she was reporting to a finance manager.

156 In re-examination, Mr Lemmon made it clear that he would expect statements of account and invoices to be sent *and* he would expect that others, beyond Ms Burgess, would have some understanding and knowledge of that practice.

Mr Brian Morris

157 Mr Brian Morris was ABCL's final witness. He is a chartered accountant and auditor. He practices as a forensic accountant which is a discipline in which he has considerable experience. I will not set out the details of that experience and Mr Morris' qualifications. They are contained in Mr Morris' curriculum vitae which is an annexure to his first affidavit.

158 Mr Morris prepared two documents which contain his expert opinions. The first document is an affidavit which he swore on 16 January 2018 and which became exhibit A8 in the proceeding. The primary focus of his expert opinions in the affidavit is the conduct of the administrators and the Second Report to Creditors of Concrete Supply. There are references to the discount or rebate issue, but that issue is dealt with more comprehensively in his later document i.e., his second report, and those references can be put to one side. I will refer to this document as Mr Morris' first report.

159 The second document prepared by Mr Morris is a report dated 19 October 2018 which is annexed to an affidavit which became exhibit A7 in the proceeding. The primary focus of the expert opinions in this report are the accounting records of Concrete Supply and the inferences to be drawn from those records in relation to the discount or rebate issue. It is fairly described as involving a substantial forensic accounting exercise. I will refer to this document as Mr Morris' second report.

160 The focus of this section of my reasons is the alleged discount or rebate and, as I have said, that topic and the books and records of Concrete Supply are dealt with in Mr Morris' second report. I will deal with Mr Morris' first report when I address ABCL's challenge to the DOCA.

161 There were some hearsay objections to Mr Morris' second report, but they were withdrawn and I was asked to treat them as matters going to the weight to be accorded to the evidence.

162 Mr Morris prepared his report in response to a request from ABCL's solicitors. He was provided with the affidavits which had been filed by Concrete Supply and some of Concrete Supply's financial records relating to the recording of the rebate in the company's management reports, business activity statements (BAS) and income tax returns. He was also

provided with some of the administrators' records of their investigations in November and December 2017, prior to their recommendation to the creditors of Concrete Supply that they accept the DOCA proposed by the directors. Mr Morris was asked to address a number of questions concerning the alleged discount or rebate and Concrete Supply's method of accounting for purchases from ABCL, payments to ABCL and the alleged "rebate" from ABCL.

163 Mr Morris was cross-examined by the administrators and the Concrete Supply defendants. The focus of the administrators' cross-examination was Mr Morris' first report and allegations of a lack of independence and expertise were put to him.

164 As I have said, I will deal with Mr Morris' first report and the administrators' cross-examination with respect to it when I deal with ABCL's challenge to the DOCA. One matter which emerged from Mr Morris' cross-examination may be noted at this stage because of its importance to the administrators' case. Mr Morris was asked in cross-examination by counsel for the administrators whether he could say the return to creditors on a liquidation would be as good as the return to creditors under a DOCA. In answer to this question, Mr Morris said that there were matters which "cried out" for investigation, but that he did agree that it could possibly be the case that the matters which he identified as requiring investigation might be investigated "at great expense", but with the result that there is less money available to creditors at the end of that process "than is on the table now".

165 The focus of the Concrete Supply defendants' cross-examination of Mr Morris was a discrete number of topics relating to his second report: (1) the March 2009 Statement of Account; (2) the March 2012 Statement of Account and the April 2012 Statement of Account, including whether the alleged discount or rebate was permanent beyond April 2012; (3) the quantum of the alleged discount or rebate during the relevant period, particularly during the 28 month period from July 2015 to October 2017; (4) whether Concrete Supply properly accounted for the alleged discount or rebate in its books and records for income tax and Goods and Services Tax (GST) purposes; and (5) whether Mr Morris had carried out a solvency analysis, that is, an analysis to determine the date upon which Concrete Supply became insolvent. I will address the matters which emerged from the cross-examination of Mr Morris in the context of those particular topics.

166 Subject to these matters, a good deal of the evidence in Mr Morris' second report was not challenged and, in any event, is established by the documentary evidence or evidence

adduced by the Concrete Supply defendants. Mr Morris did express certain opinions on the existence or otherwise of the alleged discount or rebate having regard to the accounting evidence. I do not need to pause on the admissibility or weight to be given to that evidence because ultimately, the question is one for the Court based on all the evidence, including the accounting evidence.

167 Before examining the details of Mr Morris' second report, and in order to understand the relevance of a number of the issues he addressed, it will assist if I identify some key matters.

168 First, the Concrete Supply defendants referred to the benefit the company received as a discount or rebate and often the terms were used interchangeably in the evidence. Dictionary definitions suggest that a discount is a reduction in the price of goods, and a rebate, while it can include such a reduction, can also include a payment of monies or relief from an existing obligation to pay. The administrators sought to rely on dictionary definitions of the word "rebate", perhaps, as will become clear, in an effort to justify the unusual way in which Concrete Supply took advantage of the alleged discount or rebate. At all events, there is no written or oral agreement which uses the word "discount" or "rebate" and I am not persuaded that the matter turns on the precise meanings of the words, *discount* or *rebate* respectively.

169 Secondly, for a reason or reasons never made clear in the evidence, ABCL stopped sending monthly statements to Concrete Supply after April 2012 and stopped sending invoices to Concrete Supply after March 2013. Thereafter, Concrete Supply began preparing RCTIs and from March 2013, Concrete Supply prepared RCTIs for its cement purchases. The RCTIs were based on delivery dockets issued by ABCL and, for the most part, were calculated at the agreed price of cement. The RCTIs which Concrete Supply intended to pay were sent to ABCL with the relevant cheque. Concrete Supply would account in its own books and records for all of the cement purchased from ABCL at the full value of ABCL's invoices or the RCTIs. It would draw cheques payable to ABCL for all of the invoices or RCTIs as if it was intending to pay in full for the cement it had purchased. It would make entries in its accounting records reflecting those cheques. However, Concrete Supply would retain the cheques in its safe. It would remit some of the cheques to ABCL from time to time. For the most part, it was not sending those cheques within 30 days of the invoices or RCTIs, or in the month following the purchase. Concrete Supply would not send to ABCL a number of the cheques which had been completed and those cheques were subsequently cancelled and

written back into Concrete Supply's accounting records. The cheques were intended to represent the discount or rebate that Concrete Supply contends that it was entitled to receive.

170 Thirdly, there is a document prepared by ABCL and provided to the administrators during the administration which sets out the composition of ABCL's claim in terms of the value of cement supplied, but not paid for, in the years comprising the relevant period of 2009–2017. The document is in the form of a table and is as follows:

Overview of invoices and payments
by Concrete Supply Pty Ltd

Year	**invoices**	**payments**	**Net increase in balance owing**
2009	Opening Balance		787,259.72
2009	$1,343,609.21	-1,028,791.42	$314,817.79
2010	$3,299,101.23	-3,082,220.79	$216,880.44
2011	$3,355,131.73	-2,848,820.07	$506,311.66
2012	$2,844,128.17	-2,036,309.58	$807,818.59
2013	$3,444,507.97	-2,121,799.49	$1,322,708.48
2014	$3,657,678.11	-2,185,980.94	$1,471,697.17
2015	$4,204,627.56	-2,537,955.95	$1,666,671.61
2016	$4,951,479.70	-2,453,998.14	$2,497,481.56
2017	$5,499,186.87	-2,642,991.31	$2,856,195.56
			$12,447,842.58

171 Fourthly, there is a document prepared by Concrete Supply and provided to the administrators in mid-November 2017 in response to a request by the administrators for details of the alleged discount or rebate. The document is as follows:

Concrete Supply Rebate profile

- 2009 discounts deducted from ABC statements by ABC $529,423
- 2012 discounts deducted from ABC statements by ABC $616,788
- Between 2012 & 2017 CS deducted between 30 to 35% discounts annually
- Between 2012 % 2017 ABC no longer provided invoices and statements and CS took the initiative to process purchases by raising Recipient Created Invoices.
- Between 2012 and 2017 there was no contact by any credit management from ABC to advise that the account was out of terms.
- CS took this as an endorsement of the rebates taken over this time
- Oct 2017 ABC advised that there was a discrepancy in the account and demanded repayment of all rebates taken by CS.

It is important to note that this document, and indeed all the evidence in the case, makes it clear that the entitlement to the discount or rebate is not based on a written or oral agreement.

172 In summary, Concrete Supply's case is that ABCL, by its conduct, agreed, or is estopped from denying that it agreed, to provide it with a discount on the price of cement ABCL provided to it of between 30% and 40%. The agreement or estoppel arose by reason of the conduct of both parties, in particular, ABCL, over a number of years. The first stage is a discount provided in March 2009 and evidenced in the March 2009 Statement of Account prepared by ABCL and provided to Concrete Supply. The second stage is a discount provided in March 2012 and evidenced in the March 2012 Statement of Account prepared by ABCL and provided to Concrete Supply. After March 2012, Concrete Supply considered that it was entitled to a permanent and continuing discount of between 30% and 40% on the price of cement supplied by ABCL and, under the regime of RCTIs prepared by Concrete Supply, it only paid invoices to the extent of 60% to 70% of the relevant amounts and that occurred without complaint from ABCL until October 2017.

173 I turn now to the details of Mr Morris' evidence.

The March 2009 Statement of Account

174 All the monthly statements of account in issue in the case were prepared by ABCL and sent to Concrete Supply. The statements of account consist of a number of pages and they set out details of the dates and amounts of relevant invoices and a total amount outstanding. Various amounts which in total comprise the amount outstanding are identified in the statements as current, 30 days, 60 days, and 90 days or over.

175 In the case of the March 2009 Statement of Account, $223,672.86 is identified as current, $148,297.69 as 30 days, $91,476.36 as 60 days and $319,229.90 as 90 days or over. Someone has handwritten on the March 2009 Statement of Account "March" for current, "Feb" for 30 days, "Jan" for 60 days and for 90 days or over the following:

Dec 08	223, 625.61
Nov 08	95,604.39 (?)
	319,262.55

Ms Senanayake said that the handwriting was her handwriting.

176 The dates of the invoices in the March 2009 Statement of Account range from 18 November 2008 to 31 March 2009 and the amounts in each invoice are generally around the $4,000 to $6,000 mark.

177 Mr Morris refers to evidence given by Ms Senanayake by way of affidavit about what happened in relation to the March 2009 Statement of Account. Ms Senanayake is an employee of Concrete Supply who gave evidence in the case. I will examine her evidence later. She states that a number of cheques in respect of purchases between September 2008 and March 2009 had been prepared by Concrete Supply and they totalled $1,312,099.97, but these cheques had not been remitted to ABCL. They were kept in the safe in Concrete Supply's premises. A working paper of Concrete Supply indicates that a conclusion was drawn of a final rebate received of $529,423.03 with GST.

178 As at 31 March 2009, Concrete Supply's financial accounts recorded an outstanding balance of $1,312,099.97 owed by Concrete Supply to ABCL in respect of cement supplied. The difference between this amount and the outstanding amount which is shown in the March 2009 Statement of Account of $782,676.89, that is to say, an amount of $529,423.08 was equivalent to the total amount of invoices issued by ABCL to Concrete Supply in respect of part of September 2008, the whole of October 2008 and part of November 2008. The March 2009 Statement of Account did not show any invoices for the months of September and October 2008 or for the period from 1 November 2008 to 17 November 2008. Concrete Supply took the discount or rebate by cancelling nine cheques totalling $563,205.12.

179 Mr Morris carried out a reconciliation in order to determine whether the balance reported on the March 2009 Statement of Account was anomalous in the sense that it did not appear again, or was a permanent reduction in the debt as recorded on ABCL's debtors ledger and

reported on ABCL's statements of account. He was handicapped to some extent by the fact that, as I have said when discussing Mr Hughes' evidence, ABCL replaced its accounting software package on 1 August 2009. It replaced the Protean accounting package with the SAP system. Mr Morris said that this meant that he did not have complete accounting information for ABCL prior to August 2009. Nevertheless, his reconciliation exercise led Mr Morris to reach the conclusion that as at both 30 June 2009 and 31 October 2009, the reduction in the debt as recorded in ABCL's debtors ledger and as reported in ABCL's statements of account was permanent, in the sense that it did not reappear.

180 The amount of $529,423.08 is a 40% reduction of the amount of $1,312,099.97. I will address in due course whether or not this was a discount or rebate.

The Audit Confirmation Letter

181 On or about 2 December 2009, ABCL sent the following letter to Concrete Supply:

> Dear Financial Controller
>
> In connection with the audit of our financial statements, we are writing to you requesting that you confirm the following balance in our favour of $971,210.70 at 31 October 2009.
>
> If your records are in full agreement with the above balance, please confirm this on the attached copy of this letter by signing and returning it directly to our auditors, PricewaterhouseCoopers, attention: Carly Waterman, GPO Box 418 Adelaide SA 5001. If your records are not in full agreement with the above balance, please provide PricewaterhouseCoopers with the amount shown in your records together with details of all differences, including balances on any accounts not listed above.
>
> This letter is not a request for payment and accordingly please do not enclose cheques or other payments with your confirmation.
>
> We thank you in advance for your cooperation in complying with this request and apologise for any inconvenience caused.
>
> Yours faithfully
>
> [signature]
> Glenda Burgess
> Credit Manager – Cement &Lime Division
> Adelaide Brighton Cement
>
> We are in agreement with the above mentioned balance of $971,210.70 in your favour at 31 October 2009
> or:
> We are not in agreement for the following reasons:
>
> [signature]
> (Signature)
> Rino Obbiettivo – Director

(Name and title of customer official)

The letter was signed by Rino in the space provided at the bottom of the letter. In Mr Lemmon's copy of the letter, the option, being the first chosen, is identified, whereas it is not identified in the copy of the letter produced by Rino.

182 Mr Morris investigated two matters in relation to this letter.

183 The first matter was whether the balance outstanding in favour of ABCL of $971,210.70 as at 31 October 2009 shown in the letter was consistent with ABCL's books and records. He considered that it was and that is consistent with the conclusion he reached concerning whether the reduction in price in connection with the 2009 Statement of Account was a permanent reduction.

184 The second matter was whether the balance outstanding in favour of ABCL of $971,210.70 as at 31 October 2009 shown in the letter was consistent with Concrete Supply's books and records. Mr Morris concluded that it was not. Even if Concrete Supply was entitled to the reduction, nevertheless, its books and records did not reflect an outstanding balance of $971,210.70, but rather reflected a larger sum outstanding. That follows from the way Concrete Supply accounted for the alleged discount or rebate. As I have said, once the cheques were written, Concrete Supply's books and records were altered to reflect the incurring of a liability. It was only when the cheques were later cancelled that the "transaction" was reflected in the company's books and records. Two of the nine cheques written for purchases in the period from September 2008 to November 2008 inclusive were cancelled and written back on or about 30 June 2009, and one cheque as at 31 July 2009. Concrete Supply continued to hold the remaining six cheques which totalled $360,315.88. Concrete Supply's books and records showed an outstanding balance to ABCL as at 31 October 2009 of $1,296,107.43 which exceeded the amount in the audit confirmation letter by $324,893.73.

185 Mr Morris carried out an analysis of the position as at 31 October 2009 on the assumptions that Concrete Supply intended to cancel the cheques to the extent of the alleged discount or rebate (as was later done) and that it was appropriate for Concrete Supply to reflect that intention in the response to the audit confirmation letter. On those assumptions, Mr Morris expressed the opinion that the amount in the audit confirmation letter was understated by an amount of $35,419.15. Mr Morris said that to work on the basis that all nine cheques totalling $563,205.12 were or were to be cancelled would be to claim an amount of

$33,782.09 in excess of the alleged discount or rebate of $529,423.08. Ms Senanayake carried out a similar analysis on the basis that it was appropriate to proceed on the basis that the discount or rebate had been given. She reached the conclusion that the amount in the audit confirmation letter overstated the amount owing by $1,637.06 because the July to October 2009 ($935,791.55) and a balance amount for November 2009 ($33,782.09) totalled $969,573.64.

186 Mr Morris agreed in cross-examination that, subject to an amount of $1,637.06, the audit confirmation letter was correct in recording what was in ABCL's books and records and those of Concrete Supply on the following assumptions: (1) the amount of $33,782.09 is a balancing item as explained by Ms Senanayake; (2) the reduction of $529,423.03 in the March 2009 Statement of Account was a discount or rebate; and (3) it was not inappropriate for the purpose of the audit confirmation letter to treat the cheques Concrete Supply intended to cancel as having, in effect, been cancelled.

The March 2012 Statement of Account

187 The March 2012 Statement of Account was in a similar form to previous statements. It identified an amount outstanding of $1,428,588.16 which was comprised of "Current" $285,807.45 (with respect to which Ms Senanayake has handwritten "March"); 30 days $254,334.38 ("Feb"); 60 days $170,971.75 ("Jan"); and 90 days and over $717,474.58 ("Dec & prior").

188 Ms Senanayake has handwritten the following notes on the last page of the statement:

Feb statement	$1,837,944.53
March Purc's	285,807.45
	$2,123.751.98
March Pmts	(78,374.87) Aug 11
March (Total) s'd be	$2,045,377.11
March statement	$1,428,588.16
Disc	616,788.95
Disc	616,788.95 x 100
	2,045,377
Incl GST	616,788.95
Less GST	560,717.23

GST	56,071.72

189 The following matters are clearly established:

(1) The February 2012 Account Statement showed an outstanding balance of $1,837,944.53.

(2) Concrete Supply purchased cement to the value of $285,807.45 during March 2012.

(3) Concrete Supply paid one cheque to ABCL in March 2012 and that was cheque number 006286 for $78,374.87.

(4) On the foregoing analysis, Concrete Supply owed ABCL the amount of $2,045,377.11 as at 31 March 2012.

190 Mr Morris expresses the opinion that the payment of $78,374.87 was dealt with in ABCL's debtors ledger as follows:

14 invoices for purchases in October 2011 treated as paid and do not appear on the March statement	(78,190.45)
Credit entry GIB 790 dated 22 February 2012, created when ABCL processed a payment of $73,151.86 on or about 22 February 2012 and appeared on the February statement, treated as cleared and does not appear on the March statement	5,223.01
Credit entry GIB 803 dated 20 March 2012 created when ABCL processed the payment of $78,374.8878 on or about 20 March and appears on the March statement	(5,407.43)

191 Mr Morris compared the March 2012 Statement of Account sent to Concrete Supply and a March 2012 statement of account "generated from the ABCL system" and produced by Mr Hughes.

192 Mr Morris said that the March 2012 Statement of Account sent to Concrete Supply treated the payment of $78,374.87 as if it was a payment of $695,163.82 resulting in the recorded outstanding liability of $1,428,588.16. Mr Morris said that a debit entry which was given a number of 2000047727 was created on 31 December 2011. That appeared in the February Statement of Account, but was not in the March 2012 Statement of Account sent to Concrete Supply. The difference between $2,045,377.11 and $1,428,588.16 is $616,788.95. The amount of $2,045,377.11 recognises the payment of $78,190.45 and credit of $5,223.01.

193 Mr Morris expresses the opinion that the "missing" entries in the March 2012 Statement of Account sent to Concrete Supply compared to the statement generated by ABCL's system are as follows:

Date	Invoice No.	Debit	Credit
31.11.11	2000047727	622,196.38	
20.3.12	GIB 803		5,407.43

The aggregate of these amounts is $616,788.95.

194 Mr Morris notes that the amount of $616,788.95 is 30.16% of $2,045,377.11.

195 Mr Morris analysed the April 2012 Statement of Account with a view to determining whether the "error" in the March 2012 Statement of Account was anomalous or permanent in the same way he had done in relation to the March 2009 Statement of Account. I turn to the April 2012 Statement of Account.

The April 2012 Statement of Account

196 The April 2012 Statement of Account identifies a total amount outstanding of $1,837,982.31 comprised of current $570,457.69; 30 days $285,807.45; 60 days $254,334.38; and 90 days and over $727,382.79. There is an unusual debit entry in the statement for 17 April 2012 entitled "GIB 832" for $381,763.65.

197 Mr Morris' analysis leads him to conclude that the April 2012 Statement of Account was prepared on the basis that the amount outstanding as at 31 March 2012 was $2,045,377.11, not the lesser sum of $1,428,588.16. Mr Morris concludes that the "provision" of a "discount" in the March 2012 Statement of Account was anomalous. Another way of putting the point is to say that the March 2012 Statement of Account was prepared in error. Mr Morris was not able to say how the erroneous March 2012 Statement of Account was created.

198 Mr Morris notes various handwritten annotations on the April 2012 Statement of Account. One relates to the liabilities which are identified as "current" where the amount is $188,694.04. By taking this figure and the figure relating to payments in March, one arrives at a starting figure for 31 March 2012 of $2,045,377.11. I refer to Mr Morris' calculations which are set out in the document which became exhibit A6. I do not need to discuss any further the detail of those calculations because Mr Morris' conclusions as to the basis upon which the April 2012 Statement of Account was prepared were not challenged.

199 In cross examination, Mr Morris was taken to the February 2012 Statement of Account and an entry for the date 31 December 2011 of a debit of $622,196.38. As to this entry, Mr Morris agreed that it was an *unusual* debit and probably hid a number of earlier invoices which had been cancelled. Mr Morris did not know for certain whether the debit entry cleared a number of earlier invoices or an earlier debit entry; either way, it made the debt look younger than it was and purchases in December 2011 higher than they in fact were. As I understood Mr Morris' evidence, the debit was likely to be related to invoices earlier than the earliest invoice shown in the statement, that is, 7 October 2011. By reference to ABCL's records, Mr Morris identified the entry on 31 December 2011 as one of the irregular transactions and likely to be a refreshing of debt. He agreed that the debit of $622,196.38 should never have appeared on the statement of account because its effect is to remove invoices or an earlier debt. He assumed the entry or the "transaction" which formed the basis of the entry was authorised.

200 Mr Morris was taken to the April 2012 Statement of Account and he agreed that the figure for "current" of $570,457.69 was in excess of the usual monthly amount for Concrete Supply and was unusual. In other words, it was inconsistent with Concrete Supply's profile. Mr Morris agreed that the entry of $381,763.65 on 17 April 2012 was unusual and should not be "there at all".

201 Mr Morris was cross-examined about the ABCL March 2012 Statement of Account. He agreed that it showed the amount that would have been on the March 2012 Statement of Account had the reduction not been made. It was put to Mr Morris that he overlooked a number of matters in concluding that the March 2012 Statement of Account was anomalous. The matters put to him and his responses were as follows: (1) both the relevant statements said to involve a discount or rebate were dated March (i.e. March 2009 and March 2012). Mr Morris said that he noticed this circumstance; and (2) the debts "removed" by the reduction related to old debts and the reductions were respectively 40% and 30% approximately. Mr Morris did not see any particular significance in those matters.

202 Mr Morris was taken to a customer balance display in ABCL's records for 2012 for Concrete Supply which shows a balance for March of $2,045,377.11. This is taken from Mr Hughes' affidavit. Mr Morris said that he presumed the customer balance display represented the position "today".

203 Mr Morris agreed that there was an unusual entry in or with respect to 31 December 2012, namely, a credit in favour of Concrete Supply of $1.4 million approximately.

204 Mr Morris said that the facts of this case were unusual and it is helpful to set out his explanation of the reasons he considers that to be so given in response to questions in cross-examination:

> MR DUGGAN: And, if so, how?
>
> THE WITNESS: Well, the – the facts are unusual, insofar as the records that I've seen, in the period at least to April 2012, reflect some form of entries that are probably fraudulent that have disguised the age of the debt owed by Concrete Supply to Adelaide Brighton. The March 2009 anomaly suggests that somebody initiated transactions within the record of Adelaide Brighton that reduced the Concrete Supply debt by $500,000. The Hughes affidavit deposes to Adelaide Brighton discovering entries that reduced the debt by some $8.4 million. Remarkably, the – I have not been able to identify – and I'm probably not in a position to do so – how it is that the apparent fraudster benefitted from this behaviour. I find that most unusual. As a general rule, the frauds that I've investigated there has clearly been a benefit accruing to the fraudster. The fact that the transactions were unexplained and – and no one seems to have done anything other than to presume that – no one at Concrete Supply seems to have done anything but to presume that they were receiving the benefit of some strange undocumented rebate. I find that unusual. There are many aspects of this that are strange.
>
> MR DUGGAN: Yes. And it's hardly the sort of thing that an administrator is going to be able to get to the bottom of within the time restrictions referred to in the Corporations Act, is it?
>
> THE WITNESS: I agree that it is hardly the sort of thing that an administrator would get to the bottom of, and I don't think I've ever put that as my view. It's certainly the sort of thing that an administrator ought to be smart enough to see.

205 Mr Morris has not analysed the transactions or entries after December 2012 in ABCL's books and records where other accounts were also involved. Nevertheless, Mr Morris said that if he analysed ABCL's general ledger and, in particular, that part of it dealing with Concrete Supply, he would not conclude that the records establish a consistent rebate of 30%, but rather that they reveal, as he put it, fraudulent entries.

206 As I understood Mr Morris' evidence in cross-examination, he agreed that he restricted his analysis of whether the alleged discount or rebate in the March 2012 Statement of Account was permanent largely due to the April 2012 Statement of Account which was the last statement of account sent to Concrete Supply by ABCL. As I understood the evidence, investigations into events later in the year, especially December 2012, will reveal some false entries of the nature described by Mr Hughes.

Concrete Supply's Process or Method of Applying the Alleged Discount or Rebate

207 Concrete Supply recorded purchases of cement from ABCL in the "Suppliers" module of its Attaché accounting system. The entries recorded by Concrete Supply were based on the invoices issued by ABCL until February 2013 and on the RCTIs generated by Concrete Supply from and after March 2013. The entries that were brought to account in respect of purchases from ABCL were the basis for determining Concrete Supply's indebtedness to ABCL, recording purchases of cement in the company's general ledger, for the purpose of determining Concrete Supply's profit and taxable income each year, and determining GST paid, or payable, by Concrete Supply for the purposes of its quarterly BAS and the payment of GST each quarter.

208 Concrete Supply would draw cheques payable to ABCL in respect of purchases made each month and the cheques were recorded in Concrete Supply's Attaché general ledger system. There is no dispute that this had the effect of discharging the debt recorded as owed to ABCL in respect of cement purchases in Concrete Supply's accounting records. The practice of Concrete Supply was to draw several cheques to pay the ABCL debt each month for amounts that, in aggregate, coincided with the purchases of the preceding month. Mr Morris examined the "Supplier Aged Trial Balance", and he concluded that the entries made in it suggest that Concrete Supply would pay ABCL for cement purchases at or about the end of the month following purchase and, in the absence of further information, the cheques that were drawn would discharge the debt that arose in respect of the previous month's purchases. The records suggested that Concrete Supply was paying ABCL on a timely basis. That is contradicted by Mr Morris' examination of the statements issued by ABCL between June 2011 and April 2012. Mr Morris examined the statements ABCL sent to Concrete Supply in each of the months from June 2011 to April 2012 and by reference to the information on those statements as to how long the amounts had been overdue, he concluded that during this period Concrete Supply was indebted to ABCL in respect of debts that were incurred more than three months earlier.

209 It seems that Concrete Supply had a practice of withholding cheques for a period of time and that that caused the debt it owed to ABCL to become substantially overdue.

210 Mr Morris identified 179 cheques which were not remitted by Concrete Supply to ABCL. This figure comprised nine cheques aggregating $563,205.12 that had been drawn for purchases made during the 2009 financial year and a further 170 cheques that had been drawn

in respect of purchases made in the financial years 2012 to 2018. Mr Morris also prepared an analysis of nine cheques drawn between 11 November 2008 and 19 January 2009, and relating to purchases by Concrete Supply of cement in September, October and November 2008, and cheques drawn by Concrete Supply between May 2009 and September 2017 for cement purchased between April 2009 and August 2017 comprising both cheques that were remitted to ABCL and cheques that were cancelled from and after 1 September 2009. He drew the conclusion from his analysis that there was no pattern to the conduct of Concrete Supply paying or not paying ABCL for purchases.

211 Mr Morris reiterated the comment that Concrete Supply would hold cheques for some time before remitting them to ABCL and that whilst the Supplier's module suggested that Concrete Supply was settling its debt to ABCL within two months after the month of purchase, this was not the case as the cheques that had been drawn had not been sent. The 179 cheques that Concrete Supply had drawn during the period from 11 November 2008 and 18 September 2017, and which had not been sent to ABCL, totalled $10,045,106.79.

212 Mr Morris examined documents titled "Journals Report" from Concrete Supply's general ledger system. He also examined documents titled "Transaction by Account" reports from Concrete Supply's general ledger system in relation to purchases of cement. He prepared a table that summarised the total entries recorded on the Transaction by Account reports for each financial year. Mr Morris concludes that Concrete Supply's "Transaction by Account" reports record Concrete Supply purchasing cement from ABCL over the period from July 2008 to October 2017 having a total value of $31.8 million, and Concrete Supply's report of profit or loss each year and its taxable income being based on cement purchases of $24.3 million.

213 Mr Morris had a document which he considered had been in the possession of the administrators, titled "ABC Discounts 2018 (not processed to rebates yet)". The document listed 39 cheques with dates commencing in August 2016 and concluding in August 2017. Mr Morris was able to state that the first four cheques had, in fact, been processed to rebates in late September 2017 in the case of two cheques, and late October 2017 in the case of the other two cheques. Thirty five cheques had not been processed and they totalled an amount of $1,757,336.25. Mr Morris said that whilst these cheques had the effect of reducing the debt recorded in Concrete Supply's creditors system as owing to ABCL, entries had not been

made in Concrete Supply's accounting records to cancel the cheques and bring to account purported rebates.

214 Mr Morris was asked to provide an opinion on the way in which Concrete Supply dealt with the alleged discount or rebate in its accounting records on the assumption that it was entitled to the rebate. He said that the way in which Concrete Supply dealt with the alleged rebate was to account for the purchase of cement from ABCL as an expense of the month in which the cement was purchased, to draw cheques paying for that cement in a subsequent month, usually in the month following the purchase or the month after that, and the entries that were processed recording the cancellation of cheques were processed many months after the cheques had been drawn. To the extent of the cheques subsequently cancelled, the amounts that Concrete Supply recorded as cement purchases each year were overstated, the report of profit of Concrete Supply was understated, and the taxable income of Concrete Supply was understated. Mr Morris prepared a table setting out the extent to which profit had been understated during the period from the 2009 financial year through to October 2017 and his conclusion was that the manner in which Concrete Supply dealt with the rebate meant that it had understated its profits during that period by approximately $1.6 million. Furthermore, the accounting records portrayed the ABCL debt as if the cheques that had been drawn for cement purchases had been remitted to ABCL when that was not in fact the case. That meant that at all relevant times the debt recorded in Concrete Supply's accounting records was understated to the extent of the cheques that were held. Furthermore, when Concrete Supply made entries in its general tax ledger system recording the cancellation and writing back the cheques that had not been remitted, it reduced the amounts recorded in its general ledger as cement purchases by the amount of those entries. The two practices meant, in the opinion of Mr Morris, that Concrete Supply's accounting records failed to record correctly its cement purchases; the debt it owed to ABCL; its income tax liabilities; and its net asset position. Mr Morris expressed the opinion that Concrete Supply had not complied with the requirements of s 286 of the Corporations Act.

The Amount of the Alleged Discount or Rebate Taken

215 Mr Morris' Appendix 3 sets out 179 cheques discovered by Concrete Supply. His Appendix 10 sets out details of cheque reversals. His Appendix 9 identifies 35 cheques which had not been reversed at the time of the administration. Mr Morris concludes that a total of 144 cheques were written back in the company's accounting records between June

2009 and October 2017. They constituted, according to Concrete Supply, the alleged discount or rebate. The 144 cheques which had been discovered and which had been reversed in the company's accounting records amounted to $8.287 million, and the 35 cheques which had been discovered which had not been written back at the date the administrators were appointed amounted to $1.758 million. Mr Morris notes that percentages vary from month to month after November 2011 and range from 0% where none of the cheques drawn in a particular month were cancelled to 100% where all of the cheques drawn were cancelled. Mr Morris summarised the annual totals and proportions from and after November 2011 in a table which I set out below:

Period	Total	Remitted to ABCL	Not remitted to ABCL	Retained
	$	$	$	%
Nov 11 to Jun 12	2,273,154.61	1,619,744.28	653,410.33	28.7%
FY13	2,987,019.99	1,741,199.33	1,245,820.66	41.7%
FY14	3,660,376.72	1,712,748.26	1,947,628.46	53.2%
FY15	3,801,502.58	2,414,353.33	1,387,149.25	36.5%
FY16	4,557,619.21	2,636,653.18	1,920,966.03	42.1%
FY17	4,291,631.19	2,558,232.91	1,733,398.28	40.4%
Jul to Sep 17	1,189,267.51	595,738.24	593,529.27	49.9%
	22,760,571.81	**13,278,669.53**	**9,481,902.28**	**41.7%**

216 He notes that the variations in the average value of cheques drawn that were unpaid each year varied between 28.7% for the eight months November 2011 to June 2012, and 53.2% for the 2014 financial year and that the average for this period was 41.7%. Mr Morris said that amounts described as "Reported Purchases" in the table set out below are the amounts recorded in the general ledger of Concrete Supply as cement purchases in each financial year which were included in its statement of profit and loss. The amounts recorded in the general ledger were the actual purchases made in each financial year reduced by the cheques that were cancelled in that year. The cheques that were cancelled each year comprise mainly cheques that have been drawn in earlier financial years in respect of purchases made in those earlier financial years. In order to determine Concrete Supply's actual purchases in any financial year, it is necessary to add back the cheques that were written back each year. The table set out below illustrates the aggregate of cheques that were written back in respect of a particular year's purchases. The table is as follows:

		Cheques Cancelled					Rebates Taken			
Financial Year	Reported Purchases	Drawn in current year	Drawn in prior years	Total for the year	% of year's purchases	Actual Purchases	Taken in current year	Taken in later years	Rebates for period	% of year's purchases
	$	$	$			$		$	$	%
2009	2,118,369	120,323	-	120,323	5%	2,238,692	120,323	391,681	512,205	23%
2010	2,472,049	-	391,681	391,681	14%	2,863,731	-	-	-	0%
2011	2,950,784	-	-	-	0%	2,950,784	-	-	-	0%
2012	2,619,385	269,055	-	269,055	9%	2,888,441	269,055	496,578	765,634	27%
2013	2,150,677	118,653	496,578	615,231	22%	2,765,908	118,653	843,196	961,849	35%
2014	2,472,574	-	843,196	843,196	25%	3,315,771	-	1,849,435	1,849,435	56%
2015	2,144,072	-	1,452,950	1,452,950	40%	3,597,021	-	1,259,180	1,259,180	35%
2016	2,719,851	-	1,345,553	1,345,553	33%	4,065,403	-	1,817,279	1,817,279	45%
2017	3,166,968	-	1,789,794	1,789,794	36%	4,956,762	-	1,427,871	1,427,871	29%

to Oct 17	1,494,950	-	706,931	706,931	32%	2,201,881	-	539,572	539,572	25%
Total		**508,031**	**7,026,684**	**7,534,715**	24%	**31,844,393**	**508,031**	**8,624,793**	**9,132,824**	29%
Average 1	**2,534,97**			**758,643**	23%	**3,293,613**			**954,806**	29%
Average 2	**2,545,588**			**1,052,630**	29%	**3,598,218**			**1,346,875**	37%

Note: Average 1 is 2009 to 2017. Average 2 is 2012 to 2017

217 Mr Morris makes a number of points about this table. First, Concrete Supply wrote back cheques during the 2009 financial year which resulted in rebates that aggregated $120,323. These cheques represented 5% of Concrete Supply's actual purchases for the 2009 financial year. Secondly, Concrete Supply also wrote back other cheques in respect of purchases in the 2009 financial year of $391,681. The cheques were written back during the 2010 financial year. The total of rebates taken in respect of purchases of the 2009 financial year was $512,005 which represented 23% of actual purchases for 2009. If one looks at the dates upon which the cheques totalling $391,681 were written back, the rebates taken in the 2010 financial year represented 14% of the purchases that Concrete Supply made in 2010. Thirdly, Concrete Supply took no rebates in respect of purchases made during the 2010 financial year. Fourthly, Concrete Supply took no rebates during the 2011 financial year, that is to say, no cheques were written back during that year. It took no rebates in respect of purchases during the 2011 financial year, and none of the cheques drawn in respect of purchases in the 2011 financial year were subsequently cancelled. Fifthly, Concrete Supply wrote back cheques in respect of purchases of $269,055 during the 2012 financial year which was equivalent to 9% of the purchases for that year. Sixthly, Concrete Supply also wrote back additional cheques that had been drawn in respect of purchases in the 2012 financial year of $296,576. The cheques were written back in the 2013 financial year. The total of the rebates taken in respect of the 2012 financial year purchases was $765,634 which were taken in cheques written back over the 2012 and 2013 financial years representing 27% of the cement purchased in the 2012 financial year. Seventhly, Concrete Supply wrote back cheques for purchases of $615,000 during the 2013 financial year of which $118,653 were in respect of the 2013 financial year, and $476,578 were for purchases in the prior year. The rebates taken during the 2013 financial year amounted to 22% of the purchases for the year. Eighthly, Concrete Supply also wrote back additional cheques drawn for purchases in the 2013 financial year of $843,196 resulting in total rebates taken in respect of purchases made in the 2013 financial year of $961,849 which amounted to 35% of the purchases of that year. Ninthly, the cheques that were written back in each of the financial years 2014 to 2017 were in respect of purchases during prior years. The value of purchases written back increased from $843,196

in 2014 to $1,789,794 in 2017 representing between 25% (2014) and 40% (2015) of the actual purchases made in each year. Finally, the rebates that were taken in respect of purchases in the financial years 2014 to 2017 were between $1,259,180 (2015) and $1,849,435 (2014) and range between 29% (2017) and 56% (2014) of the year's cement purchases.

218 Mr Morris also said that the table showed three important matters. First, Concrete Supply had withheld cheques that had been drawn for purchases between 1 July 2008 and 31 October 2017 thereby taking or intending to take rebates of $9.13 million which represented 29% of purchases for that period. Secondly, the average value of rebates taken or to be taken during the financial years 2009 to 2017 was $954,806 which was equivalent to 29% of purchases. Thirdly, the average value of rebates taken or to be taken in the financial years 2012 to 2017 was $1,346,875 which was equivalent to 37% of the purchases of those years.

219 Mr Morris states that it is not said that ABCL provided a rebate to Concrete Supply between March 2009 and March 2012. If the alleged rebate or discount given in March 2012 is calculated as a percentage of purchases between April 2009 and March 2012, the percentage is approximately 6.5% of the cement purchased.

220 Mr Morris examined a number of management accounts of Concrete Supply and discovered that the alleged discount or rebate was described in those accounts as "Expendable Stores". He also calculated the ratio in percentage terms between the discount or rebate on the one hand, and the purchases of cement on the other. The results are set out in an appendix to Mr Morris' report which I set out in full:

Date	Expendable Stores	Purchase Cement	Rebate
Jul-15	$109,522.00	$310,655.00	35%
Aug-15	$89,252.00	$316,117.00	28%
Sept-15	$133,872.00	$353,139.00	38%
Oct-15	$128,456.00	$390,865.00	33%
Nov-15	$150,609.00	$379,751.00	40%
Dec-15	$98,375.00	$327,439.00	30%
Jan-16	$97,777.00	$228,464.00	43%
Feb-16	$138,338.00	$433,020.00	32%
Mar-16	$142,426.00	$342,701.00	42%

Apr-16	$132,850.00	$372,120.00	36%
May-16	$140,272.00	$385,336.00	36%
Jun-16	$47,800.00	$290,414.00	16%
	$1,409,549.00	**$4,130,021.00**	**34%**
Jul-16	$97,203.00	$286,138.00	34%
Aug-16	$135,911.00	$353,599.00	38%
Sep-16	$168,468.12	$341,429.33	49%
Oct-16	$183,626.01	$511,234.00	36%
Nov-16	$162,484.00	$495,835.00	33%
Dec-16	$159,252.00	$403,954.00	39%
Jan-17	$90,781.00	$183,572.00	49%
Feb-17	$157,011.00	$358,125.00	44%
Mar-17	$178,622.00	$468,500.00	38%
Apr-17	$183,689.00	$430,913.00	43%
May-17	$122,598.00	$496,632.00	25%
Jun-17	$150,149.00	$626,831.00	24%
	$1,789,794.13	**$4,956,762.33**	**36%**
Jul-17	$189,652.00	$516,898.00	37%
Aug-17	$182,361.00	$505,609.00	36%
Sep-17	$160,595.00	$577,411.00	28%
Oct-17	$174,323.00	$601,963.00	29%
	$706,931.00	$2,201,881.00	32%
28 Mths	**$3,906,274.13**	**$11,288,664.33**	**35%**

The discount or rebate refers only to cheques reversed or written back. Mr Morris states that one can draw the conclusion from this table that the amounts taken as credits in each month during this period varied between 16% in June 2016 and 49% in September 2016 and January 2017, and averaged 35% over the 28 month period.

221 Mr Morris noted that the cheques that were written back by Concrete Supply were credited to the account "Cement Purchases" in the company's general ledger. It was Mr D'Alessandro who commenced a practice for the 2016 financial year when preparing management accounts for Concrete Supply to report the amounts written back as rebates in an expense line described as "Expendable Stores". Mr D'Alessandro said that in earlier years, the amounts written back as rebates were not separately identified in the management accounts.

222 Mr Morris concluded that there was no pattern or consistency to the cancellation and write back of cheques by Concrete Supply in taking the alleged discount or rebate. I agree with that assertion in that, depending on the time period chosen, the discount or rebate can vary considerably in terms of the percentage amount. Mr Morris also concluded that the amounts taken as a rebate were not consistent with Concrete Supply being entitled to a rebate of 30% of the value of cement purchased.

The Financial Position of Concrete Supply between 2009 and 2017 without the Alleged Discount or Rebate

223 Mr Morris examined Concrete Supply's financial performance for the period 2009 to 2017 on the assumption that it was not entitled to the alleged discount or rebate. He proceeded on the basis that the cheques which had been reversed had not been reversed and examined the effect of that circumstance on reported profits and on reported assets. He drew the following conclusions from his analysis. First, Concrete Supply understated cement purchases recorded in the company's ledger each year. Secondly, Concrete Supply understated the expense item "Materials" reported in the company's statement of profit and loss each year. Thirdly, Concrete Supply overstated "Gross Profit from Trading" reported in the company's statement of profit and loss in each year. Fourthly, Concrete Supply overstated the company's reported profit each year. Fifthly, Concrete Supply overstated the amounts reported as retained earnings and total equity on the company's balance sheet each year. Sixthly, Concrete Supply understated the company's current liabilities in respect of "Trade and Other Payables" on the company's balance sheet each year. Finally, Concrete Supply overstated the net assets reported on the company's balance sheet each year.

224 Mr Morris drew the following conclusions with respect to Concrete Supply's financial performance on the assumption that it was not entitled to the alleged discount or rebate. First, Concrete Supply actually incurred losses in every financial year from 2010 to 2017. Secondly, the actual losses made by Concrete Supply during the nine year period amounted to $5.5 million. Thirdly, the liabilities of Concrete Supply exceeded its assets at all relevant times from and after at least 30 June 2012. Fourthly, Concrete Supply's balance sheet understated liabilities at 30 June 2017 by $6.4 million. Finally, the liabilities of Concrete Supply exceeded its assets by $5.1 million as at 30 June 2017.

225 Mr Morris agreed that he has not undertaken an analysis of the solvency of Concrete Supply at relevant times. However, he did make the following points. First, at all times from and

after the 2009 financial year, Concrete Supply did not settle the debt owed to ABCL which caused the debt to increase to the point where it was $12.4 million in early November 2017. Secondly, Concrete Supply incurred operating losses in all years from and after the 2010 financial year. Thirdly, Concrete Supply's liabilities exceeded its assets at all relevant times from and after at least 30 June 2012. Finally, Concrete Supply was unable to meet the debt owed to ABCL when it was called upon to do so in November 2017. Mr Morris summarised his opinion by saying that the alleged discount or rebate was the difference between "the company reporting modest profits and substantial losses each year".

The Income Tax and GST Implications of the Alleged Discount or Rebate and the Method of its Application by Concrete Supply

226 In his consideration of this matter, Mr Morris proceeded on the basis that the alleged rebates attach to the purchases and for income tax and GST purposes should be claimed in the same financial year as the purchase had been made. In this case, some part of the rebate or the whole of the rebate was not recognised until later financial years. It became clear in the course of Mr Morris' evidence that, although he was firm in his view, he was not aware of any accounting standard which so provided.

227 Mr Morris was asked if Concrete Supply had accounted properly to the Australian Taxation Office (ATO), assuming that the company was entitled to the alleged discount or rebate. He concluded that it had not because the cheques which were cancelled in later years, were not recorded as an expense in the month in which the cement was purchased. It was often many months after the cheques had been prepared that the reversal took place in Concrete Supply's books and records. In those circumstances, Concrete Supply recorded amounts as cement purchases each year which were overstated. The reported profit of the company was understated and the taxable income which the company reported to the ATO was understated. Mr Morris concluded that, on the assumption referred to, Concrete Supply prepared accounts that understated the company's profits in the period from 1 July 2008 to 31 October 2017 by approximately $1.6 million and consequently it underpaid income tax in the 2009 to 2017 financial years in a total amount of approximately $520,000. In addition, Mr Morris said that the company inappropriately claimed input tax credits in connection with purchases for which it would later claim a rebate, thereby understating its liability for GST and underpaid GST by amounts that peaked at approximately $264,000 in December 2016, and were approximately $193,000 at 30 September 2017.

228 Mr Morris agreed that, as a matter of principle, the accounting for a rebate by way of a reversal of expenses, which was the method adopted by Concrete Supply, was not inappropriate. He agreed that another way that it could have been done was to have an income account, such as a rebate account. As Mr Morris put it, either way the effect on the bottom line is the same.

229 Mr Morris was cross-examined by the Concrete Supply defendants about his opinion that, even if Concrete Supply was entitled to the alleged discount or rebate, the company had not properly accounted for the discount or rebate because the discount or rebate, or at least part of it, had not been claimed in the financial year in which the cement, to which it relates, had been purchased. The failure to do this led, in Mr Morris' opinion, to the underpayment of income tax and GST, even if Concrete Supply was entitled to the alleged discount or rebate.

230 Mr Morris answered the suggestion put to him that the alleged discounts or rebates given in the March 2009 Statement of Account and the March 2012 Statement of Account were claimed in those financial years by pointing to evidence that the whole of the discounts or rebates were not so claimed. Mr Morris is clearly correct.

231 Counsel for the Concrete Supply defendants suggested to Mr Morris that the timing of a claim for discounts or rebates was a "grey area in accounting". He firmly rejected that suggestion. I accept Mr Morris' evidence that a discount or rebate should be claimed in the same financial year as the expense (i.e., the purchase to which it relates). The alternative, that it can be claimed at a time that suits the purchaser in a later financial year, seems to me to be most improbable. Mr Cooper gave some evidence on this topic which I will address in due course. Nothing Mr Cooper said dissuades me from accepting Mr Morris' evidence on this topic.

232 The position with the RCTIs and the system Concrete Supply adopted is even more complex. In that case, there is no one event, such as a statement of account, which is said to give rise to the discount or rebate. The system adopted by Concrete Supply is a reason for concluding that there was no discount or rebate, but the present assumption is that there was a discount or rebate. Even on that assumption, the notion that the discount or rebate could be claimed when Concrete Supply considered it appropriate is difficult to accept as an appropriate accounting for the discount or rebate and, at the least, it raised a serious matter for the consideration of the administrators.

233 If Concrete Supply was not entitled to the alleged discount or rebate, Mr Morris was of the opinion that Concrete Supply has paid too much tax because it has overstated its profit and, on Mr Morris' calculations, Concrete Supply has a claim to a refund in the order of $1.162 million. Mr Morris notes that this was not an issue considered by the administrators.

Mr Morris' Opinion about the Alleged Discount or Rebate

234 Mr Morris expresses the view that, in his experience, arrangements are always clearly documented between the supplier and its customers even though those arrangements might (and often do) remain confidential between the parties. Mr Morris states that he has never encountered an unrecorded rebate arrangement of the nature alleged by Concrete Supply and its directors. Mr Morris said that he would have expected any rebate arrangement to operate as follows. The total purchases for any month would appear on an RCTI or remittance advice for the total amount. The discount would be calculated in order to arrive at the amount payable in respect of that month's purchases. A cheque or cheques would be remitted for the net amount together with the RCTI or remittance advice setting out clearly the calculations that were undertaken to arrive at the net amount that was payable to ABCL. Furthermore, Mr Morris expresses the opinion that Concrete Supply's practice of deferring recognition of the rebates had the effect of misreporting the actual financial performance of Concrete Supply. He concludes that Concrete Supply's records did not recognise cement purchases at the amounts that should have been reported if Concrete Supply had been entitled to the rebates. As I have already said, the effect of Mr Morris' evidence is that Concrete Supply's method of dealing with the alleged discount or rebate, assuming it was entitled to such a discount or rebate, resulted in an underpayment of income tax and GST.

The Reduction of the Mantina Earthmovers' Debt

235 Mr Morris addressed the reduction of the Mantina Earthmovers' debt. He considered Concrete Supply's performance reports for the 2017/2018 financial year which disclosed a reduction in the loan account for Mantina Earthmovers from $2.9 million in September 2017 to $1.1 million by December 2017 and purchases of approximately $1.5 million of aggregate in October and November 2017. His attention was drawn to the fact that the documents disclosed by the administrators included invoices from Mantina Earthmovers dated September 2017 in the sum of $392,931 and $240,446 respectively which purport to be deliveries of aggregate and concrete sand in September 2017.

236 Mr Morris was asked whether the transactions were consistent with the financial statements for the relevant months of Concrete Supply and Mantina Earthmovers respectively, or if they appeared anomalous. As at 30 June 2017, Mantina Earthmovers was indebted to Concrete Supply in the amount of $2,802,388. This debt was reduced to $1,223,365 as at 31 December 2017, and to $421,181 as at 31 May 2018. Mr Morris was provided with three invoices issued by Mantina Earthmovers to Concrete Supply purportedly relating to the supply of cement treated aggregate, cement treated sand and assorted aggregate in September and October 2017. He identified several apparent irregularities with respect to these invoices.

237 Mantina Investments was indebted to Concrete Supply for $99,739.51. Mr Morris noted that in the administrators' report, Mantina Investments was not included in the list of "known unsecured creditors". There was a statement that asserted that Concrete Supply was owed $1,333,930 by Mantina Earthmovers. Mr Morris considered that this was consistent with the administrators: (1) incorrectly assuming that Mantina Earthmovers and Mantina Investments were the same entity; (2) presuming that the debts owed by Concrete Supply to Mantina Earthmovers for the supply of materials and services and the indebtedness of Mantina Earthmovers and Mantina Investments to Concrete Supply pursuant to the transactions recorded in the loan accounts, could be offset; and (3) presuming that the various entries that were recorded in the Mantina Earthmovers loan account in October and November 2017 were made in good faith.

The Bulk Supply Agreement

238 With respect to ABCL's claim in debt, the principal argument advanced by the Concrete Supply defendants is that Concrete Supply was entitled to a discount or rebate. However, they also put a substantial argument to the effect that irrespective of the company's entitlement to the alleged discount or rebate, ABCL's claim, which is based on the BSA and the price increase letters, cannot succeed for various reasons. They rely on the fact that there is no pleading by ABCL and, therefore, no claim by ABCL of an oral agreement or recovery on the basis of restitution. They submit that this is not a mere pleading point because a decision that the amount claimed can be recovered on a basis other than the BSA as varied by the price increase letters would have consequences in terms of the determination of the date of insolvency.

239 The BSA is dated 27 June 2008 and it is a pro forma agreement which consists of General conditions (GC) and Special conditions (SC) and provision at the front of the agreement and

in the schedules to the agreement for the insertion of details relating to the particular parties and their contractual arrangements. The agreement is between ABCL and Concrete Supply. Mr Miller, as the Sales and Marketing Manager for South Australia, Victoria and New South Wales, has signed the agreement on behalf of ABCL, and Mr Fiedler has witnessed his signature. As I have said, Rino has signed the agreement as the authorised officer for Concrete Supply and Jason has witnessed his signature.

240 GC 1 provides that the agreement terminates at the end of the term unless terminated earlier in accordance with the conditions contained in the agreement. The word "Term" is defined to mean the following:

> … the term of this Agreement set out in item 2 of Schedule 1 commencing on the Commencement Date.

The Commencement Date is defined to mean the date set out in item 1 of Schedule 1. Item 1 in Schedule 2 identifies the Commencement Date as 1 August 2008, and item 2 identifies the term in the following way:

> Minimum Term 3 years

241 The product to be supplied by ABCL to Concrete Supply under the agreement means the product set out in item 3 of Schedule 1. That item identifies the product as follows:

> Type GP cement, Type GB cement, Type SR cement, Type HE cements.

242 The price for the product is defined to mean the price set out in item 5 of Schedule 1 as varied from time to time. Item 5 of Schedule 1 is as follows:

> The Price for the Product as at the commencement date will be based on the Seller' [sic] standard ex works published price list as amended from time to time and set out below.

Product	Sellers Published List Price	Discount	Price Per Tonne
Birkenhead Works			
Type GP Cement	$193.00	$20.00	$173.00
Type GB cement	$186.00	$19.50	$166.50
Angaston Works			
Type HE Cement	$201.00	$11.00	$190.00
Type SR Cement	$201.00	$11.00	$190.00
Type HE Brightonlite	$243.00	$13.00	$230.00

243 GC 3 deals with the price and payment. It is as follows:

3. Price and Payment

3.1 Price

The Buyer must pay to the Seller the amounts listed in the Seller's invoices calculated by the multiplication of the Price by the quantity of the Product set out in the Delivery Dockets. The Buyer must also pay to the Seller any costs, taxes and duties including GST incurred by the Seller in supplying the product to the Buyer.

3.2 Non-payment

(a) If the Buyer delays in paying the full amount due and owing, the Seller may charge interest on the amount owing at the rate of 1.5% per month from the date when the amount became due up to the date the Buyer pays the amount due in full.

(b) The Buyer agrees to pay the Seller all charges and expenses (including legal costs on a solicitor-client basis) incurred in the recovery of the overdue amount by the Seller from the Buyer.

3.3 No set-off

The Buyer may not withhold, make deductions from or set-off against the amounts due for any reason.

244 GC 4 deals with risk and title to the product. GC 4.1 provides that the risk in each delivery of product passes to the buyer once the product has been delivered to the delivery point. GC 4.2 deals with ownership. It provides as follows:

4.2 Ownership

Title to and ownership in each delivery of the Product only passes to the Buyer when:

(a) the amount set out in the corresponding Delivery Docket (including any accrued interest) has been paid for in full; and

(b) all other Delivery Dockets for the delivery of Product have been paid for in full.

Until then:

(c) title to and ownership of all delivered Product remains with the Seller;

(d) the Buyer holds such Product as bailee and fiduciary for the Seller;

(e) the Buyer must store such Product separately from its own goods; and

(f) the Buyer must keep records which relate to such Product separately from those which relate to its own goods.

245 SC 3 provides for an exclusive supply arrangement between ABCL and Concrete Supply. SC 4 deals with the weighing of the product. It is as follows:

> **4.1 Weighbridge**
>
> Each delivery of Product will be weighed using the Seller's weightometer in accordance with the Seller's weighing procedures.
>
> **4.2 Weights and assay**
>
> (a) The weight of each delivery of Product will be set out in the Delivery Docket.
>
> (b) Except in the case of manifest error, the weight of a delivery set out in the Delivery Docket (rounded to the nearest 10 kilograms) will be final for calculation and settlement purposes under this Agreement.

246 SC 5 deals with price review and method of payment. SC 5.1 provides that the seller may adjust the price on 60 days' written notice to the buyer. ABCL issued the price increase letters pursuant to this cause. Clause 5.3 is important. It provides as follows:

> **5.3 Invoices**
>
> The Seller will invoice the Buyer at the end of each week. The Buyer must pay to the Seller the amount invoiced within 30 days of the date of the tax invoice from the Seller.

247 Rino admitted signing the BSA, but he said he did not read it and, in particular, GC 4.2(d). He said that the BSA was not the outcome of negotiations between ABCL and Concrete Supply and that he considered that it was ABCL's way of making the relationship official. Rino agreed that Concrete Supply received the price increase letters from time to time. Jason said that he did not read the BSA. He said that ABCL's sales staff (Mr Fiedler and Mr Miller) handed him the BSA in 2008 and said that he and Rino should sign the document and "everything stays the same". Jason said that he trusted Mr Fiedler and Mr Miller and he was happy to sign the document. It was not Concrete Supply's practice at that time to obtain legal or financial advice on legal documents provided to it by ABCL. Jason said he had read bits and pieces of the document over the weekend before he gave evidence. He said that the deduction off the March 2009 Statement of Account changed the BSA. I note this evidence, but neither party sought to make anything of whether Rino and Jason read and understood the BSA. The fact is that the BSA was binding when it was executed.

248 ABCL issued a Notice to Admit in this proceeding. Concrete Supply responded by way of a Notice to Dispute. It is an agreed fact that between 1 August 2009 and 6 November 2017,

Concrete Supply procured 143,463.8 tonnes of cement from ABCL at the time, quantity and type listed in the schedule attached to the Notice to Admit.

249 ABCL sought a further admission from Concrete Supply to the effect that between 1 August 2008 and 6 November 2017, it sent to Concrete Supply the price increase letters attached to the Notice to Admit. The price increase letters advise of price increases effective from 1 October 2008 through to price increases effective from 1 April 2017. Concrete Supply's response in its Notice of Dispute is a partial admission and a partial denial. It admits receiving the price increase letters for price increases effective from 1 April 2012 through to the price increases effective from 1 April 2017. Ms Booth, in or about April 2013, used ABCL's delivery dockets recording the quantity of cement supplied and the ABCL price list to calculate the amounts payable by Concrete Supply to ABCL for cement supplied and to generate an invoice for the cement supplied by ABCL using Concrete Supply's Attaché accounting software programme. Ms Booth checked each and every RCTI in order to "make sure" that it was correct. The invoices ABCL did prepare and send to Concrete Supply before ceasing to do that in or about March 2013 are, for the most part, before me. They have been prepared having regard to the prices set out in the BSA as varied by the price increase letters. There is no evidence of any complaint by Concrete Supply about increases shown in the invoices.

250 I infer that Concrete Supply received the price increase letters from that price increase letter which specified prices effective from 1 October 2008. I am satisfied, having regard to the quantity of cement supplied and the type of cement supplied, that the overall amount claimed by ABCL (and partly paid by Concrete Supply) is the total price calculated in accordance with the BSA as varied by the price increase letters.

251 As I understand the submission of the Concrete Supply defendants, it is that even if it is not entitled to the alleged discount or rebate and there may be a liability by Concrete Supply to ABCL, it is not a liability under the BSA because that agreement expired on 31 July 2011, that is to say, three years after the commencement date of the agreement, namely, 1 August 2008.

252 The Concrete Supply defendants relied on a number of matters in support of their general submission that the BSA came to an end on 31 July 2011. They submitted that this was the only way in which sense could be made of GC 1 (i.e., the definition of the term of the agreement) and that ABCL's construction would mean that the agreement was indefinite, or

as counsel put it, "evergreen". The Concrete Supply defendants submitted that their construction of the agreement was supported by the way the parties to the agreement subsequently acted because there were significant departures from the terms of the BSA.

253 First, the Concrete Supply defendants submitted that SC 5.3 was never insisted upon in the sense that Concrete Supply did not pay invoices within 30 days of the date of the invoice and ABCL did not insist that it do so. In this respect, they relied on the evidence of Rino who said that he had always understood that Concrete Supply's trading terms with ABCL were 90 days. He said that that was the period "we" have always aimed to pay within. He said that he was never told anything to the contrary despite the terms of the BSA. He said that the BSA was not consistent with how Concrete Supply had always paid, or with communications the company was receiving from ABCL. He said that he was not aware of any communication coming through Concrete Supply and he definitely had never received a request himself for Concrete Supply to pay within 30 day terms. He said:

> It is not how we ever conducted business with ABCL.

254 Rino said that in his opinion the correspondence from Ms Burgess referred to below supported a practice of payment at about 90 days.

255 Rino said that until 2009, as far as he was concerned, Concrete Supply was doing business on the basis of the BSA and the letters the company was receiving from ABCL from time to time. I presume the significance of the date, 2009, from Rino's point of view is that this is the date of the first alleged discount.

256 There was other evidence from Concrete Supply suggesting that payment terms were about 90 days. Mr D'Alessandro said that his practice was to release cheques for payment in order of age, that is to say, oldest ones being released first "with a view to paying Adelaide Brighton on approximately 90 day terms". He said that in his time, Concrete Supply was always paying ABCL at around the 90 day mark and that the company had never paid within 30 days in the whole time he had been with the company. He said that nobody from ABCL ever contacted him to say that the company needed to bring its account down to 30 days. Mr D'Alessandro can remember an occasion in about 2015 or 2016 when he was sitting near Jason and Mr Niarchos in the Concrete Supply's premises when they were discussing payment terms and he can recall Mr Niarchos saying words to the following effect:

> Just make sure your account is under 90 days.

He could not remember any further detail about the status of Concrete Supply's account, such as what was outstanding or whether anything was outside the 90 day terms.

257 Both Mr D'Alessandro and Ms Senanayake produced correspondence from Ms Burgess between September 2010 and February 2011 wherein Ms Burgess was making requests of Ms Senanayake to ensure that the 90 day amounts were cleared as soon as possible.

258 Secondly, and more generally in terms of the evidence of the directors as to the BSA, the Concrete Supply defendants submitted that the provision of a discount in March 2012 was inconsistent with the provisions of the BSA. Furthermore, the Concrete Supply defendants submitted that the fact that ABCL stopped sending invoices to Concrete Supply after March 2013 and Concrete Supply adopted the practice of preparing RCTIs was inconsistent with the provisions of the BSA and, in particular, SC 5.3.

259 Thirdly, the Concrete Supply defendants relied on the fact that Concrete Supply has always purchased materials on a "just in time" basis. Rino said that Concrete Supply did not purchase and hold product due to the significant material cost involved in the products produced. Concrete Supply generally uses what is purchased within 24 to 48 hours of supply. Rino referred to this practice as purchasing product on a "just in time" basis. There is a further reason cement is not held for any length of time and that is that to do so gives rise to the risk of the cement coming into contact with moisture and setting. Rino said that in his experience in the concrete industry the purchasing of materials on a "just in time" basis is common throughout the industry. In addition, he said that during the time of Concrete Supply's relationship with ABCL, a number of quality issues arose with respect to cement supplied by ABCL to Concrete Supply for incorporation into concrete works. He said that where a quality issue arose, it was not uncommon for ABCL to advise of that issue, say a week later, and ask Concrete Supply where the cement had been used. ABCL would then advise Concrete Supply as to whether the cement could remain where it had been installed or whether the concrete needed to be "ripped up". Rino said there was an example of this type of event in April 2017 when Mr Plunkett of ABCL informed Concrete Supply that ABCL had a quality issue with cement that Concrete Supply had purchased two days previously and that the cement did not meet industry standards. Mr Plunkett told Concrete Supply that anything that had been constructed with the cement incorporated would likely need to be demolished. Rino said he had a detailed discussion with Jason about this as it impacted on multiple projects that Concrete Supply were working on at the time. Concrete Supply provided ABCL

with information about where the cement had been used over the previous two day period. As I understood the submission of the Concrete Supply defendants, it was that in light of the practice of paying within about 90 days, the "just in time" basis of operating means that GC 4.2 of the BSA could not operate according to its terms. Title and ownership of all delivered cement could not remain with ABCL until payment and Concrete Supply could not hold such cement as bailee and fiduciary for ABCL until payment. Nor could Concrete Supply store such cement separately from its own goods within GC 4.2 (e). This "just in time" practice will also be relevant when I come to consider ABCL's case that the directors are liable for participating with knowledge in Concrete Supply's breach of trust or fiduciary duty.

260 Finally, the Concrete Supply defendants rely on evidence that the parties had in mind a new BSA. One of the documents in evidence is a document referred to as a "Draft" dated 1 December 2011, "Supply Agreement" between ABCL and Concrete Supply. The draft does not contain a commencement date and the term is said to be as follows:

> Term means 3 years (**Initial Term**) and shall thereafter continue unless and until terminated by not less than 12 months of written notice given by one party to the other, such notice not to be given 12 months before the expiry of the Initial Term.

261 Rino said that he could recall that in 2011, Concrete Supply was presented with a second ABCL BSA by Mr Fiedler. He said that this document was given to Jason and himself. He said that he could not recall executing the agreement and that he was unable to locate a copy of the agreement (which he called the second BSA) despite undertaking a search of Concrete Supply's records. He said that he could not recall the content of the document. There is also evidence before the Court of a new Supply Agreement being discussed at meetings of the sales and marketing section of ABCL. The meetings are referred to as sales and marketing department meetings. There was a meeting on 25 February 2013 and under the heading "Contracts" in the minutes or notes of the meeting, the following appears:

> – Still need to follow up on Concrete Supply.

Mr Miller is the designated actor and the date by which the act is to be done is specified as 1 March 2013.

262 At a further meeting on 18 March 2013, there is a reference under the heading of "Contracts" in the minutes or notes of the meeting to the following:

> – Get approval to sign Concrete Supply agreement.

Mr Miller is the designated actor and the date by which the act is to be done is said to be 29 March 2013.

263 There was a meeting of the sales and marketing section on 20 January 2014 and under the heading of "Contracts" in the minutes or notes of the meeting, there is the following reference:

> – Concrete Supply Agreement up for review.

264 For its part, ABCL submitted that, in the absence of anything new (i.e., a new agreement), the parties proceeded as if they were operating under the BSA with some variations. In the alternative, ABCL submitted that the relationship between the parties was regulated by the price increase letters which provided that the price list was subject to "our general conditions of sale" and that payment terms were "Strictly 30 days from the end of month of delivery date".

265 As I understood it, ABCL's case as to the terms of payment was that payment was to be made within 30 days of the end of the month in which the product was delivered. This was a variation from the term in the BSA which was to the effect that payment was to be made within 30 days of the date of the invoice (SC 5.3). This variation arose as a result of a practice adopted by the parties and is referred to in the price increase letters. Furthermore, it is reflected in a number of invoices which ABCL sent to Concrete Supply. As I understand ABCL's case, it is that although Ms Burgess wrote to Concrete Supply asking it to pay the amounts outstanding for 90 days or more, and a number of payments were made many months after the product had been delivered, in strict contractual terms, payment was due within 30 days of the end of the month in which delivery took place. Mr Morris gave evidence of payments made many months after the delivery of product. On the other hand, it is significant that both ABCL and Concrete Supply kept their books on the basis that payment was to be made within 30 days from the end of the month in which delivery took place.

266 I do not accept the submissions of the Concrete Supply defendants.

267 I start by noting that after the negotiations between the parties in October and November 2017 had broken down, the then solicitors for Concrete Supply wrote to the solicitors for ABCL and the letter not only outlined Concrete Supply's defence to the debt claim, but also contained an assertion by Concrete Supply that the foundations set out in the BSA (with variations) "remain binding on the parties to this day".

268 I do not consider that the resolution of the competing contentions as to the time for the payment of invoices determines the issue of whether the BSA applied after 31 July 2011. On either contention, there was a departure from the terms of the BSA. Significantly, that departure occurred prior to 31 July 2011. In my opinion, the practice as to the time for payment, whether it be 30 days from the end of the month of delivery or 90 days, was a variation to the BSA agreed to by the parties.

269 With respect to the submission of the Concrete Supply defendants that the giving of discounts was inconsistent with the BSA, I have reached a conclusion that discounts were not in fact given. In these circumstances, this matter is of no weight.

270 With respect to the submission of the Concrete Supply defendants that the failure of ABCL to provide invoices after 31 March 2013 was a course of conduct inconsistent with the continuance of the BSA, in my opinion, the parties adopted a different practice which involved the preparation of RCTIs by Concrete Supply. I note the point made by the Concrete Supply defendants that ABCL claims that the RCTIs were not authorised under the relevant ruling of the ATO and were not prepared and sent in accordance with the ruling. However, the fact is they became part of the practice between the parties. Mr D'Alessandro said that in the early years after he had joined Concrete Supply, the RCTIs generated by the company for ABCL through the Attaché system, simply had "Attaché company name" at the top of the document. The RCTIs did not identify either Concrete Supply or ABCL in the heading. In early 2015, somebody from the accounts receivable section at ABCL telephoned Concrete Supply to discuss the RCTIs and the telephone call was put through to Mr D'Alessandro. Mr D'Alessandro could not remember the woman's name. The woman said words to the effect of "could you change the company name on the RCTI to 'Adelaide Brighton Cement Limited' and also the address of Adelaide Brighton?" Mr D'Alessandro agreed with this request and he did not say anything about the lack of an RCTI agreement. He made arrangements for the Attaché software manager who managed Concrete Supply's account to effect the change. Concrete Supply was invoiced for the work with respect to the RCTI which was done on 13 July 2015. Mr D'Alessandro thinks that he received the telephone call early in July 2015. Ms Booth was also able to recall this incident. She recalls being told in 2015 that ABCL had requested the change. Although Concrete Supply did not send to ABCL the RCTIs which were stapled to cheques which were ultimately cancelled, that circumstance, in the absence of an estoppel in relation to the alleged discount or rebate, cannot assist Concrete Supply in the present argument. The RCTIs were prepared by

Concrete Supply in accordance with the delivery dockets and price increase letters and Concrete Supply recorded the liabilities shown in the RCTIs in its books and records and relied on them for GST and income tax purposes.

271 With respect to the submission of the Concrete Supply defendants based on the "just in time" practice, that was also a practice adopted during the first three years of the BSA. In other words, it did not first arise after the expiration of the first three year period of the BSA suggesting that the parties were then operating pursuant to some other agreement. The submission of the Concrete Supply defendants must be rejected.

272 In my opinion, the parties to the BSA agreed on a minimum term of three years. I would not interpret the agreement as meaning a term of three years. It seems to me that the parties were operating on good commercial terms with Concrete Supply being a reasonably major customer of ABCL and that it is likely that they considered that at a mutually agreed time, they could, if necessary, negotiate a further agreement. I am not satisfied that any of the other matters identified by the Concrete Supply defendants leads to a different conclusion, or to a conclusion that the parties abandoned the BSA, which was one of the submissions made by the Concrete Supply defendants. It seems to me that, for the most part, the parties continued to deal with each other on the same basis that they had in previous years. They did that without entering into a new agreement. There is, in those circumstances, no reasonable inference of abandonment. It seems to me that such changes as there were, were variations in what was required and not inconsistencies. In the circumstances of this case, to find otherwise would be to hold that the parties were in a "holding pattern" of an oral agreement for six to seven years. That seems to me to be most unlikely. Finally, I do not consider that there is any reason to infer, as was submitted by the Concrete Supply defendants, that, in the absence of an explanation from a witness working at Birkenhead explaining why a new BSA was required or contemplated, the BSA was at an end. I am satisfied on all the evidence that the BSA continued to govern the commercial relationship between the parties.

273 The second argument advanced by the Concrete Supply defendants was that even if the BSA continued to operate, there is no liability under that agreement for the amount claimed because an invoice from ABCL was a pre-condition to liability and absent such a document, no liability arose. As I have said, I consider that the BSA continued to apply and the RCTIs represent the relevant invoices and the Concrete Supply defendants are not able to rely on the fact that the RCTIs which were not the subject of payment were not sent to Concrete Supply.

The fact is that ABCL continued to supply cement to Concrete Supply and Concrete Supply continued to make payments on a periodic basis. As the evidence of Ms Booth indicates, the RCTIs were prepared in accordance with the delivery dockets and the price increase letters. In those circumstances, I do not consider that the absence of invoices from ABCL after 31 March 2013 means that no liability arose. The submission was made that there was a particular need for invoices in view of the fact that ABCL's price list was not available and the secretive nature of prices in the cement industry. I found this argument difficult to follow and reject it. The fact is that Concrete Supply had no difficulty preparing RCTIs from the delivery dockets and the price increase letters.

An Agreement or an Estoppel with respect to the Alleged Discount or Rebate

Introduction

274 In its Defence to ABCL's claim in debt, Concrete Supply alleges that the deductions which it made between early 2012 and September 2017 of between approximately 30% and 40% of the amount due on RCTIs were agreed between it and ABCL. I do not think that the allegation of an agreement was pursued by Concrete Supply in submissions. In any event, it fails for the same reason the claim of an estoppel fails. Concrete Supply also alleged and pursued a claim that ABCL is estopped from asserting that Concrete Supply is not entitled to the deductions it made from early 2012 until September 2017.

The Relevant Principles

275 The issue of whether there is a single unifying doctrine of estoppel has not been resolved (*Sidhu v Van Dyke* [2014] HCA 19; (2014) 251 CLR 505 at [1] per French CJ, Kiefel J (as her Honour then was), Bell and Keane JJ). The Concrete Supply defendants did not make detailed submissions on the relevant principles in relation to the different types of estoppel. They referred in their submissions to cases dealing with an estoppel in pais (*Thompson v Palmer* [1933] HCA 61; (1933) 49 CLR 507 (*Thompson v Palmer*) at 547 per Dixon J; *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58; (1937) 59 CLR 641 at 674–675) and promissory estoppel (*Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387).

276 In *Thompson v Palmer* at 547, Dixon J said:

> The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a

> departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, as in *Yorkshire Insurance Co. v. Craine*; cp *Cave v. Mills*; *Smith v. Baker*; *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co*.; and *Ambu Nair v. Kelu Nair*; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted.

(Citations omitted.)

277 This passage identifies three elements of an estoppel: (1) that the party claiming the estoppel assumed a certain state of affairs to exist. In this case, that means that Concrete Supply assumed or had a genuine belief that it was entitled to the alleged discount or rebate; (2) that the other party knew of the assumption or contributed to it. In this case, that means that ABCL knew of the assumption or belief or contributed to it; and (3) that the party claiming the estoppel (in this case, Concrete Supply), will suffer a material disadvantage if there is a departure from the assumed state of affairs.

278 It is not necessary for me to discuss the law of estoppel any further because I find that the first necessary element of an estoppel is not made out in this case. I do not accept that Concrete Supply had a genuine belief that it was entitled to the alleged discount or rebate.

Preliminary Matters and Approach to the Evidence

279 The following preliminary matters are relevant to the issue of whether Concrete Supply made an assumption or had a belief that it was entitled to the alleged discount or rebate and should be noted. First, the directors, Tina, Rino and Jason, are the controlling mind of the company. As I will explain below, Tina took very little part in the financial affairs of Concrete Supply and no part in the pricing issues involving the purchase of cement from ABCL and, in those circumstances, it is the belief of Rino and Jason which is the belief of Concrete Supply. Secondly, Concrete Supply adduced evidence from employees of the company who were involved in the events relevant to the alleged discount or rebate and their evidence must be considered as part of the whole of the evidence which is relevant to the issue of whether Rino and Jason had a genuine belief that Concrete Supply was entitled to the alleged discount or

rebate. However, their evidence, even if it was that they had the relevant belief, is not necessarily decisive. Thirdly, as I have previously said, ABCL does not allege in this proceeding that Concrete Supply acted in concert with Ms Burgess or procured her to make the false entries. Finally, Concrete Supply does not put an alternative case that in the event its case that throughout the relevant period it held the belief that it was entitled to the alleged discount or rebate fails, nevertheless, a genuine belief arose during the relevant period after it implemented the system involving the RCTIs. In other words, even though it may be part of its case that its belief grew stronger as the years passed, it is not suggested that if Concrete Supply (i.e., Rino and Jason) did not have a genuine belief at the time it implemented the system involving the RCTIs, I should find that a genuine belief arose later in say, 2015. The directors did not give evidence to that effect and, in fact, having regard to Concrete Supply's case, they could hardly have done so.

280 A number of matters which are established by the evidence are important in terms of providing the context in which the evidence of the witnesses is to be assessed.

281 First, in March 2000, ABCL implemented a system of net pricing for the provision of product to Concrete Supply, that is to say, the provision of a discount from the price payable rather than the provision of a rebate by later credits and that remained the system until 2009, on Concrete Supply's case, and throughout, on ABCL's case.

282 Secondly, there was no written agreement or oral agreement which embodied the alleged discount or rebate.

283 Thirdly, the alleged discount or rebate in the March 2009 Statement of Account and in the March 2012 Statement of Account involved the removal of lump sum amounts and the alleged discount or rebate under the RCTI system involved the non-payment of groups of invoices to a value of approximately just over one-third of the total value of the invoices.

284 Fourthly, the reduction in the March 2012 Statement of Account was reinstated after appropriate adjustments in the April 2012 Statement of Account.

285 Fifthly, ABCL was a monopoly, or near monopoly, supplier throughout most of the relevant period. Although Rino and Jason were regularly asking ABCL's sales representatives for ABCL's best price, there is no suggestion that they threatened to cease dealing with ABCL in the periods leading up to the March 2009 Statement of Account or the March 2012 Statement of Account.

286 Sixthly, it is a most unusual circumstance that without any explanation ABCL would cease its well-established practice of sending monthly statements of account after April 2012 and invoices after approximately March 2013.

287 Seventhly, a discount or rebate of between 30% and 40% is a very substantial discount or rebate, far more than anything Concrete Supply had received in the past.

288 Finally, a discount or rebate where the purchaser selects the amount between 30% and 40% is most unusual to say the least, and it is unusual that the purchaser would be entrusted with the ability to decide when the discount or rebate is taken.

289 The looseness of the arrangement alleged by Concrete Supply can be seen in the following passage in Rino's evidence:

> True or false: it was your discretion as to when claims would be made for cancelling cheques and when they wouldn't be?---It wasn't my discretion.
>
> You tell his Honour seriously, do you, that it wasn't a matter for your discretion. Is that what you say to his Honour?---It was 30 or 40 per cent is what we assumed. And that's what we tried to abide by.
>
> This was - - -?---At all times.

290 I turn now to the evidence of the directors and other employees.

Tina

291 Tina gave evidence with the assistance of an interpreter in the English language. She understood basic English, but there were obvious limitations in her understanding. For example, I have no difficulty in accepting that she did not understand the meaning of the word, "insolvency". She was 82 years old when she gave her evidence and had had some health problems. Although she was at times keen to make the point that she did not understand or had no involvement in the matters about which she was asked, and I formed the view that, on occasion, she knew more than she was prepared to reveal, I accept that she was not centrally involved in the relevant events and circumstances and, to the extent that she was involved, her understanding was quite limited. An example of her lack of knowledge and, as I have said, on occasion an unwillingness to attend directly to the question is her evidence when she was asked about her interest in the quarry at the Kapunda property:

> MR LIVESEY: You also have an interest in the Mantina Quarry, don't you?
>
> THE INTERPRETER: No. I don't know anything.
>
> MR LIVESEY: You're one of the owners.

> THE INTERPRETER: I'm the owner but I do not get – I'm not interested. I give up. My sons – they know what they're doing.

292 Although I have some reservations about Tina's professed lack of knowledge, I do not think that it was designed to hide a detailed understanding of the relevant events or circumstances, and I generally accept her evidence.

293 Tina emigrated from Italy to Australia in December 1961. She described the family's early activities in Australia and the establishment of Concrete Supply. She became a director of Concrete Supply at about the time of her husband's death in December 2003. She owns the Pooraka property. She described the circumstances surrounding the acquisition of the quarry at the Kapunda property.

294 In the early 1990s, Tina worked in the morning at a rest home on Glen Osmond Road carrying out domestic duties like cleaning and laundry. Apart from performing those duties, she did the shopping for the business of Concrete Supply, provided for the employees of the company, cleaned the premises at the Pooraka property and performed other domestic duties. She countersigned cheques with her husband for payments to creditors of the business and the administrative staff in the office would prepare the cheques and she would sign them.

295 Tina's role in Concrete Supply remained the same until the end of 2017. At that time, her responsibilities were reduced and she stopped signing cheques for the company. Although prior to the end of 2017 she was signing cheques and she saw the names of creditors on the cheques, Tina said, and I generally accept, that she did not know what the payments related to and that she trusted the administrative staff. I do note that Tina's evidence about signing cheques on behalf of Concrete Supply was, at times, confusing. She said that she stopped signing cheques on behalf of the company in 2015 because of her illness. That is clearly not correct and it is difficult to know the reason she would suggest that, in view of the largely mechanical nature of that process from her point of view. In any event, it is not correct.

296 Nevertheless, I accept that Tina did not have a detailed understanding of the financial matters relating to the business and that she often signed documents, including cheques, because she was asked to do so. At the time she signed cheques, she did not know the total debts of the business. She never asked, and nor did she ask, about the total assets of the company or the extent of the company's overdraft.

297 Tina did not undertake any managerial or administrative work for Concrete Supply. She did the shopping and cleaning for the business and her role was to support the business in any

way she was able to. She received weekly wages from Concrete Supply. After her husband died, Tina's sons, Rino and Jason, who had grown up working in the company, took over her husband's role. Jason is based in the premises at the Pooraka property, and Rino works mostly in the quarry at the Kapunda property. Tina never attended management meetings for the company. Tina said, and I generally accept, that she was told what she needed to know about the business by Rino and Jason and she trusted them to conduct and manage the business. She knew that ABCL had supplied cement to Concrete Supply, but she never had any direct dealings with ABCL. She signed cheques made out to ABCL, but she did not and does not know the circumstances surrounding the payments.

298 In addition to her ownership of the Pooraka property, Tina owns her own home in Burnside in South Australia and a farm located in the Barossa Valley.

299 Two year ago, Tina bought some land made available for sale by the Department of Planning adjacent to the Pooraka property. She did that because additional space for the trucks was needed.

300 Tina agreed that she received rent from Concrete Supply in relation to the Pooraka property and that she was paid a directors' fee. She said that she did not know of the rental increase in 2018 of approximately $30,000 in relation to the Pooraka property.

301 Tina was asked about the payment of two amounts to her, one of $10,794 in or about December 2018, and the other of approximately $25,000 on or about 19 March 2019. She did not know the reasons for those payments.

302 Tina agreed that she signed the resolution appointing the administrators, but she said that she did not know the reasons for it and they were not explained to her. She said that she signed the resolution because she trusted her sons and she did not know why she needed to sign the document. At about the time she signed the resolution, she had heard that "things were not going too good". She considered the business to be her sons' business. I generally accept that evidence. Tina signed a number of BAS on behalf of Concrete Supply. She would be asked by her sons to do so. She said that she did not know the reasons she was signing the documents. She was taken to the BAS for Concrete Supply for the period from July to September 2012 and when asked whether she understood what a BAS was, she said the following:

THE INTERPRETER: But I don't know who would deliver this statement. I

> wouldn't know the details or – I don't get involved in that. If they tell me to sign, I just sign it.

303 Tina agreed that she had signed a number of documents as a public officer without asking questions. When it was suggested to her that she had not taken her responsibilities as a director seriously, she said the following:

> THE INTERPRETER: I'm not a director. I'm like the sons. I'm the same – my husband was the boss and I was with him. But my husband did trust my sons and I do the same. My children know much more. So they do more and I do whatever I can.

304 I am satisfied that Tina was not involved in Concrete Supply's dealings with ABCL or in the circumstances surrounding the alleged discount or rebate. Tina's lack of direct involvement in the financial affairs of Concrete Supply and in its relationship with ABCL is supported by other witnesses in the case, including Rino and Jason whose evidence on this topic I accept (see [309], [390] and [391]), and by Mr D'Alessandro (see [501] below).

Rino

305 Rino gave evidence on a number of matters which are not contentious. On the critical issue concerning Concrete Supply's alleged entitlement to the discount or rebate, I do not accept that Rino had a genuine belief that Concrete Supply was entitled to the discount or rebate. Insofar as it is necessary for me to make a finding about what he did, in fact, think, it is that he considered the "reductions" effected by the March 2009 Statement of Account and the March 2012 Statement of Account were likely to be mistakes and that he would say nothing in the hope that ABCL would do nothing to correct them. As far as the system involving sending only some RCTIs and cancelling other cheques is concerned, Rino believed that ABCL was for some reason being inattentive to the collection of monies it was owed and that Concrete Supply would take advantage of that circumstance for as long as it could. In reaching that conclusion, I have taken into account Rino's evidence, the evidence of the other witnesses discussed in this section of my reasons, the matters identified above (at [280]–[289]), the other evidence in the case and the gravity of the finding.

306 Mantina Earthmovers (then known as Mantina Earthmovers Pty Ltd) was established in 1977. The business of Concrete Supply was established by Rino's parents in 1987. The quarry at the Kapunda property became part of business operations of Rino's father in 1990. The quarry was purchased by Mantina Investments as trustee for the Mantina Investments Unit Trust in 2010.

307 Rino's father died in December 2003. At that time, Rino and Jason became directors of Concrete Supply. Rino said that Tina is not involved in the day-to-day business decisions of Concrete Supply and does not attend management meetings or make management decisions. She regularly attends at the offices of Concrete Supply to talk with employees, clean or bring food for the staff and Rino and Jason. Rino confirmed the evidence of Tina (and Jason) that Tina is a signatory to the company's bank accounts and signs cheques on behalf of Concrete Supply at the request of the office staff. This is done for practical reasons as Rino and Jason (and previously Rino's father) were often out of the office.

308 Rino handles the day-to-day operations of the quarry and the quarry plant at the Kapunda property, and Jason operates the concrete business at the Pooraka property. Rino and Jason jointly make all decisions which affect the family companies, including financial and corporate decisions. They keep each other informed on a regular basis as to what is happening in the sphere of activity in which each other operate.

309 Rino liaises with Jason many times a day in relation to the ongoing workings of the business. He has formal meetings with Jason and the company's sales representatives and financial advisers. At these meetings, those present discuss the financial position of the family companies, sales projections and forecasting generally. Tina does not usually attend these meetings. Other meetings are held as the occasion requires.

310 The family operations involve a landholding company, Mantina Investments, a company which operates the quarry at the Kapunda property, Mantina Earthmovers trading as Mantina Quarries, and the company which operates at the Pooraka property, namely, Concrete Supply.

311 Concrete Supply has a fleet of concrete trucks located at the Pooraka property and they are used to service customers with concrete mix. The company also has plant at the Two Wells property. Concrete Supply purchases its aggregate and some sand products from Mantina Earthmovers. Concrete Supply employs approximately 30 people, although the number can vary as the company employs a number of casual drivers. Mantina Earthmovers employs a similar number of people.

312 Concrete Supply has a number of long term suppliers and, until recently, those long term suppliers included ABCL.

313 The company's administration staff acting under the direction of Mr D'Alessandro handle day-to-day purchasing and payments to suppliers. As a general proposition, it is correct to

say that Rino has not historically been involved in instructing "these accounts employees directly". Mr D'Alessandro reports to Rino and Jason at monthly management meetings and provides an update of the position with respect to Concrete Supply's debtors and creditors.

314 In late 2004, Ms Senanayake commenced her employment with Concrete Supply. In 2008 and 2009, she was in charge of the company's debtors and creditors as well as other financial dealings within Concrete Supply. In 2013, Ms Senanayake went on maternity leave and Mr D'Alessandro was employed in July 2013 shortly before Ms Senanayake taking leave. He was employed to take over her role. Ms Senanayake returned to Concrete Supply after her child had been born. She now takes care of Concrete Supply's general ledger. The company's debtors and creditors are part of Ms Booth's responsibilities.

315 I have already summarised Rino's evidence concerning the company's purchase of cement on a "just in time" basis.

316 Concrete Supply commenced purchasing cement from ABCL in 1987. For most of that time and until quite recently, ABCL had a virtual monopoly (as Rino described it) over the supply of cement in South Australia. In those circumstances, Rino considered that it was very important for Concrete Supply to maintain a good relationship with ABCL.

317 I accept Rino's evidence that he was working from the Pooraka property in the 1990s and early 2000s. He was regularly dealing with and speaking to sales representatives from ABCL. Rino began managing the quarry at the Kapunda property in 2003 and his dealings with the sales representatives of ABCL thereafter diminished. Rino said that from 2003 until October 2017, he would speak to ABCL's sales representatives approximately four or five times a year. He said that from the early 2000s, he and Jason dealt with Mr Miller, Mr Phillip Earl, Mr Fiedler and Mr Niarchos of ABCL. He said that those representatives would come to the Concrete Supply's offices and plants periodically and it was in this context that he gave his estimate of an average of four to five times a year.

318 I accept Rino's evidence that he would always talk about volumes of purchases with the ABCL's sales representatives. They would comment on whether Concrete Supply's volumes were up or down, and how the company was tracking generally in the marketplace. The discussions would include discussions as to whether the company was "in sync" (to use Rino's expression) with market trends, whether the concrete industry was busy or not, and whether ABCL was doing more business in the mining sector or the construction sector.

They never discussed competitors specifically. The meetings with sales representatives generally took an hour or two and thereafter, on a reasonably frequent basis, Rino and Jason would go out to lunch with the sales representatives.

319 I accept Rino's evidence that in the early 2000s, Mr Fiedler mentioned to him a couple of times in passing that Concrete Supply needed to keep its account "within terms". He said that Mr Fiedler never mentioned what those terms were and never told him that Concrete Supply was outside of the terms. Rino considered that in accordance with the structure of Concrete Supply, Ms Senanayake or Ms Booth would deal directly with ABCL about those matters. Rino understood that Concrete Supply's terms of payment were 90 days and he said that he was never told differently by anyone from ABCL.

320 It is now necessary to move from findings to a summary of Rino's evidence about which I will make findings later. It has to be said that, as will be apparent, some of this evidence was expressed in quite general terms.

321 Rino said that prior to 2009, at the meetings which he and Jason had with ABCL's sales representatives, they would frequently ask ABCL to increase their discounts to Concrete Supply. They would say words to the effect of "you need to give us more of a discount" and "aren't we worthy of a higher discount — we've had a good month". He said that these sorts of comments were a common theme in the meetings with ABCL's sales representatives. Rino said that Mr Fiedler, who was the sales manager at the time, was usually quite official in his response in that he would say words like "we're not here to talk about the accounts" or "we'll get back to you about that". Rino assumed from Mr Fiedler's response that he needed to talk to someone else within ABCL to have a discount approved. He said that there was never a direct yes or no response or discussion about what a discount would look like, how much it would be, or when it would be given. Rino said that he was suspicious that discounts in the industry were alive and well and were being given to others and that there was no real equality in the prices being given across the industry. He said that he based that suspicion on the circumstance that competitors in the marketplace were repeatedly below Concrete Supply's prices in relation to the supply of concrete.

322 Rino said that, as far as pricing was concerned, Concrete Supply received price lists from ABCL approximately once a year, although they were sometimes provided more frequently. Rino's understanding was that the prices were for Concrete Supply specifically and were not standardised price lists which were circulated across the industry. Rino said that he was told

by ABCL's sales representatives that the price lists incorporated a "discounted" price, but he was never given any information or information as to a standard price in the industry.

323 Rino expressed the opinion that the pricing of cement to concrete manufacturers is very private and secretive. He said that, in his experience, it is impossible to find out what competitors are paying for cement. Competitors do not discuss the pricing of cement and it is not a matter of public record in South Australia. He said that in his entire time in the industry, he had never received information as to the prices other manufacturers of concrete were paying for cement. He said that that was true, not only of the competitors themselves, but also of suppliers. He said that his uncle ran a concrete business called Ideal Mix Concrete and that, although he had a good relationship with his uncle, he has never had a conversation with him about the pricing of cement.

324 Rino said that a lack of understanding of the pricing of cement in the broader industry means that it is very difficult for an individual company to know whether it is receiving competitive prices for cement. There is no benchmark to use as a basis of negotiations for better price. In those circumstances, he could not assess the accuracy or otherwise of statements by sales representatives that his company was obtaining a discount in the price list.

325 Rino did notice that the prices of his competitors in the sale of concrete were lower and he inferred from that that his competitors were paying a lower price to ABCL. He said that in the early to mid-1990s he became frustrated by this circumstance, particularly as he considered that his company was an efficient organisation.

326 In the mid-1990s, Concrete Supply employed a Mr Gene Paoletti as a manager. Mr Paoletti was previously employed by Boral Concrete. Rino discussed his concerns about pricing with Mr Paoletti, and, in particular, his concern that Concrete Supply was not "seemingly competitive" in the concrete sector. Mr Paoletti explained to Rino that there were rebates in the industry and said that Boral Concrete had received substantial rebates from ABCL. Mr Paoletti said that all the "big boys" in the industry received rebates and discounts on cement pricing. Mr Paoletti said that he considered that Concrete Supply should negotiate with ABCL for a rebate. Mr Paoletti subsequently did so and ABCL gave Concrete Supply a rebate.

327 Rino said that this rebate was never fully documented. He described the method by which it was given as follows. Concrete Supply would receive an invoice for the "full amount" of

cement purchases by reference to the official price list which was issued to Concrete Supply. Concrete Supply would pay the full amount shown on the monthly statements as issued by ABCL, and ABCL would periodically credit amounts against outstanding balances of the company's account with ABCL. The outstanding balance of monthly statements was reduced by ABCL by a rebate amount being applied. Rino never discussed this rebate with anyone at ABCL and it was never documented in an agreement.

328 Rino produced some documents relating to this rebate. They included a letter from ABCL to Concrete Supply dated 20 September 1996 and he made the observation that the rebate amounts were credited usually on a monthly basis and were not set out in a written agreement.

329 Rino assumed that Concrete Supply was receiving rebates along the same lines as those given to other concrete companies. He said that he still does not know if this is correct. He said:

> It was simply never discussed between myself and ABC. I understood that it was not a matter for open discussion.

330 Rino produced some documents relating to the rebate which applied between 1996 and 2000. The documents are not easy to comprehend, but so far as I can see, the rebate was a relatively modest one compared with the discounts or rebates which are the subject of this proceeding.

331 Rino described the existence of the rebate as "very secretive" and not generally discussed or recorded.

332 Rino said that Concrete Supply did not take the rebates into account in its pricing of concrete products as it did not know what the payments would be from month to month, or over time generally. He concluded that because Concrete Supply was not the biggest supplier in the marketplace, its direct competitors were getting similar and likely higher rebates based on higher purchase volumes.

333 The position with rebates changed in 2000. By that time, Mr Paoletti had left the employ of Concrete Supply. On 28 March 2000, Mr Fiedler wrote to Rino in the following terms:

> Further to our recent discussion regarding adjustments to the payment of your rebate. We wish to confirm as agreed, we will move to net pricing beginning 1 April 2000.
>
> Thank you for your co-operation in this matter. We trust this change will be of mutual benefit to both organisations.

Rino said that he understood that the effect of this letter was that Concrete Supply would receive a discount to the list price for cement and no longer receive rebates. He said that this

is what occurred and that this system of pricing was in place from the time of the letter until "the discount given in 2009". He said that over time he became concerned that Concrete Supply was paying more for cement than its competitors because of the better prices they were offering for concrete. He said that he again felt that Concrete Supply was no longer a member of the "inner club".

334 Rino and Jason were presented with the BSA in July 2008. As I have said, Rino executed the document and Jason signed as a witness. Rino said that over the course of Concrete Supply's dealings with ABCL they were notified of changes to pricing generally annually or biannually.

335 I make the following findings: (1) the rebates given prior to 2000 were not the subject of a written rebate agreement in the sense of an agreement which set out the terms and conditions of the rebate. The rebate given was modest and I infer from Rino's evidence was shown as a credit on the monthly statement of account; (2) Rino was aware as a result of the ABCL letter dated 28 March 2009 that rebates of that nature would no longer be given and that there would be a discount on the price otherwise payable; (3) that is the system which applied thereafter for nine years, even on Concrete Supply's case; (4) the deduction of a dollar amount was the means of providing a discount adopted in the BSA; (5) Rino (and Jason) were aware of the discount which Concrete Supply was receiving. Whatever else the directors understood about the terms and conditions of the company's contractual relationship with ABCL, they understood that the company was receiving a fixed dollar amount per tonne by way of what ABCL called a discount. The amount was a relatively modest amount. Rino may well have thought it was well below what the company deserved, but he understood what was happening; (6) I accept that there is some secrecy surrounding cement pricing and that it was difficult for a company to ascertain what its competitors were paying; (7) it is difficult to know what to make of Rino's evidence suggesting Concrete Supply's competitors were receiving larger discounts or rebates. It was very general in two senses. It was spread over a long period and not at all specific as to price differences and the quantum of the discounts or rebates. I am prepared to accept that, in a general sense, Rino from time to time, considered that his competitors were receiving discounts or rebates that Concrete Supply was not; and (8) Rino (and Jason) regularly asked the sales representatives for a better price and the response they received was generally along the lines described by Rino.

336 Rino considered that in March 2009, Concrete Supply received a substantial rebate from ABCL. He became aware of the rebate when Ms Senanayake came to him with the March 2009 Statement of Account from ABCL. Ms Senanayake showed Rino the monthly statement and pointed out the total outstanding balance. She said that she had performed calculations and that the figure should have been approximately $500,000 higher and that the figure had been "dropped off" from the 90 days and over part of the account. Rino said that at that time, Concrete Supply was in the process of raising cheques to pay all 90 day accounts and that his understanding was that the company's terms of payment were 90 days.

337 Rino then said the following:

> I was pleased and immediately thought that ABC had addressed our ongoing requests for additional discounts. Overall, my thoughts were that the discount was good and that we were again part of the club.

338 Rino explained that he was not surprised that Concrete Supply had not been formally notified of the discount by ABCL. The absence of an explanation was consistent with the circumstances under which "our previous rebate" operated and the private nature of ABCL's pricing and discounts. Rino said that in the period up to March 2009, he had a very good relationship between the people at ABCL and that in 2009, the sales representatives from ABCL continually confirmed how good Concrete Supply's volume purchases were at all of their meetings. He considered that ABCL were going out of their way to "wine and dine us". He said that he and Jason were taken out to lunch on multiple occasions, to movie nights with his whole family, and to the ABCL corporate box at the AFL, and to dinner. He considered ABCL's generosity to be an endorsement that Concrete Supply had again been accepted as worthy of a discount. He said that never once did any of the sales representatives from ABCL say anything negative. They never said that Concrete Supply was beyond payment terms, or that there was any issue with the company's account, or that the company owed a debt of longstanding, or at all. Whenever he asked the sales representatives whether everything was okay, he received a positive response.

339 I accept that Concrete Supply was regularly asking ABCL for lower prices, that there was some secrecy in the industry about prices, discounts and rebates, and that ABCL considered that Concrete Supply was a valued customer, but a discount of this size, over a half a million dollars, out of the blue and effected in a manner never previously used (i.e., dropping a batch of invoices off a statement of account) was improbable in the extreme and I do not believe Rino when he states that he believed that the relevant amount was a discount or rebate. He

must have realised that it was probably a mistake, but he considered that it might go undetected and it was a mistake of which Concrete Supply might take advantage.

340 I add that I reject entirely the first suggestion by Rino in cross-examination that Ms Senanayake identified the missing $529,000 from the March 2009 Statement of Account as a discount. He gave the following evidence in cross-examination:

> MR LIVESEY: And you agree that, for example, the very first time that Ms Senanayke said to you there has been a discrepancy with the accounts, you spoke to her about what should happen with the cheques that were already signed and sitting in the safe?
>
> THE WITNESS: We had a discussion. We had a discussion and I said, well, let's just wait because we had received a statement telling us we had received a discount.
>
> MR LIVESEY: Well, can I suggest to you that all she said is, "There's a discrepancy and over $500,000 has been missed"?
>
> THE WITNESS: No, I think she used the word discount.
>
> MR LIVESEY: And no one said anything at all in that first conversation about a discount, did they?
>
> THE WITNESS: She used the word discount.

341 I am unable to accept that anyone, let alone the company accountant, having regard to the history of net pricing between 2000 and 2009 would draw that conclusion.

342 Rino was shown the audit confirmation letter by Ms Senanayake at about the time it was received by Concrete Supply. Ms Senanayake told Rino that apart from a minor discrepancy of less than $2,000, the amount in the audit confirmation letter reconciled with Concrete Supply's records. Rino said that he was aware that the audit confirmation letter reflected the March 2009 deduction, which he considered was further confirmation of the rebate. Ms Senanayake said that the small anomaly of less than $2,000 was the sort of thing that occurred frequently and Rino said that he thought that it was reasonable to agree the amount stated in the audit confirmation letter in the expectation that any accounting anomaly would be identified and resolved in the coming months. He did not consider the amount of less than $2,000 to be significant.

343 I do not accept Rino's evidence that the audit confirmation letter confirmed or further confirmed his belief that the difference in the March 2009 Statement of Account was a discount or rebate. I consider that he continued to see it as a mistake which had not been corrected.

344 Rino said that the audit confirmation letter was the only letter of its type received by Concrete Supply. He noted that the letter was signed by Ms Burgess. He said that he had never met or spoken to Ms Burgess at any time during his dealings with ABCL.

345 Rino said that in March 2012, a further amount was deducted by ABCL from amounts which had previously been indicated on statements as outstanding for payment by Concrete Supply to ABCL. These further deducted amounts were identified by Ms Senanayake and pointed out to him. He said that Ms Senanayake explained to him that having regard to the March 2012 Statement of Account totals, an amount of just over $600,000 had been deducted from ABCL's statement. Ms Senanayake had already drawn cheques for the payment of the amount in the invoices which had been deducted. Rino instructed her to reverse the cheques out of the company's accounting system and to make the necessary adjustments to balance the accounts, including reversing any GST input tax claims made on the amounts with the ATO. Rino said that his thoughts when Ms Senanayake showed him the March 2012 Statement of Account were "ok – excellent. This is another rebate". He said that he did not think anything else of it and, consistent with previous practice, he received no contact from ABCL about the rebate amounts, nor did he expect to.

346 I do not accept Rino's evidence as to his state of mind as a result of Concrete Supply receiving the March 2012 Statement of Account for similar reasons I have given in relation to the March 2009 Statement of Account. Rino saw this as, in all likelihood, another mistake by ABCL of which Concrete Supply could take advantage.

347 ABCL ceased issuing statements to Concrete Supply in April 2012. That would have appeared to Rino as an unusual circumstance. Rino said that Ms Booth became really frustrated and that he told her to contact ABCL to get the statements or confirmation of when the statements would be issued. At some point thereafter, Ms Booth told Rino that she was not having any success with ABCL in that regard. The problem was never fixed.

348 In March 2013, ABCL ceased issuing invoices to Concrete Supply. Rino was informed of that fact by Ms Booth. Again, that would have appeared to Rino as an unusual circumstance. Again, he told Ms Booth to contact ABCL and ask for invoices and statements. Again, Ms Booth reported back to him that she was having no success with ABCL.

349 Rino's evidence was that Concrete Supply needed to facilitate statements moving forward; do the right thing by ABCL as the company had always done; and do the right thing by the ATO

and with Concrete Supply's accounting for these purchases generally. He had discussions with Jason, Mr Tull and Ms Booth about the failure by ABCL to issue invoices and statements of account and "how to bring to account the past rebates which had being [sic] given by ABC". Rino thinks that Ms Senanayake told him that Mr Tull had suggested that Concrete Supply raise RCTIs so that it could satisfy its ongoing GST and tax obligations. Rino was aware that that could be done by reference to the cart notes or delivery dockets and the price increase letters. He was also aware that ABCL would have the same information on their computerised system. Concrete Supply implemented the RCTI "process". It would send the RCTI to the accounts department at ABCL with Concrete Supply's cheques stapled to it. Rino said the following:

> 92 In respect of ongoing rebates, Jason and I decided that in order to bring to account rebates consistent with those previously given by ABC, we should, as closely as possible follow the approach adopted by ABC with the 2012 deduction. That is, no percentage deductions per invoice, but rather that parcels of invoices not be paid. In order to do this Concrete Supply's:
>
> 92.1 accounts department raised RCTI's [sic] for all purchases using ABC's delivery dockets from the weighbridge;
>
> 92.2 raised cheques against all invoiced amounts (as Concrete Supply had always done); and
>
> 92.3 brought to account the rebates.
>
> 93 My thinking at the time (and what I discussed with Jason) was that ABC had given us lump sum incentives in 2009 and 2012 which equated to approximately 30% - 40% discount for purchases in those statement periods. In order to reflect this rebate in the same manner (ie the giving of lump sum credits rather than a percentage discount per invoice), we considered that it would achieve the same result if we simply did not pay the whole of selected invoices.

350 Thereafter, Rino, Jason and Ms Senanayake were directing which cheques be released and which ones were to be held in order to reflect the rebates. Rino said that approximately seven out of ten RCTIs were posted and paid, and three out of ten RCTIs were reversed as rebates. All the cheques were stapled to their relevant RCTIs. RCTIs which were not paid were still held by Concrete Supply. Rino said the following:

> 97 Concrete Supply did not receive any opposition or communication from ABC in relation to either the use of RCTI's [sic] or the fact that we were applying the rebates by non-payment of various invoices raised. The feedback from ABC sales representatives in 2013 and following was that Concrete Supply was "*going really well*" or "*you guys deserve a pat on the back, you're going great guns*." Or words to that effect.
>
> 98 Concrete Supply received no demands for payment or any indication from

> ABC that its account was not in order, including being within terms. I knew that ABC had access to both the weighbridge dockets and our RCTI's [sic] and that it would be very easy to identify what was being paid for by us and what was not. In all the circumstances, I believed that ABC agreed with the process of us issuing RCTI's [sic] and not paying some of them.

351 Rino was informed by Mr D'Alessandro at one of the management meetings that ABCL had asked Concrete Supply to retitle the RCTIs so as to include ABCL's name. Rino said that the RCTIs contain references to the cart notes or delivery dockets and it would be easy to determine what payments were being made by Concrete Supply.

352 Concrete Supply did not receive any complaints from ABCL between the initiation of the RCTI process in 2013 and October 2017. During that time, ABCL's sales representatives visited Concrete Supply's premises and repeatedly told Rino and Jason that Concrete Supply was an excellent customer. Invitations from ABCL to Rino and Jason continued, and Jason and his wife attended the 2014 AFL Grand Final as guests of ABCL.

353 I do not accept Rino's evidence as to his state of mind when he authorised implementation of the process or system involving the RCTIs. For reasons I have given, I do not accept that he had a genuine belief that the reductions in 2009 and 2012 were discounts or rebates. Since then, an unusual circumstance of ABCL ceasing to send statements of account and invoices had arisen and that, with all the other circumstances, suggested that there was something seriously amiss in ABCL's process for enforcing its right to payment. There are other reasons to reject Rino's evidence. If the belief which motivated the system involving RCTIs was as claimed the "discounts" in 2009 and 2012, why not wait for another discount of between approximately $500,000 and $600,000 in 2015 or, if discounts or rebates were to be implemented immediately, work on the basis of a discount of approximately $500,000 to $600,000 over the coming three years?

354 There is another reason I do not accept Rino's evidence and it emerged more clearly from the evidence of Jason who had the greater contact with the sales representatives from ABCL. I will discuss it in that context. It is that not only did Jason not thank the sales representatives for the alleged discount or rebate, but he kept asking for ABCL's best price as if nothing had changed.

355 I also found Rino's evidence unconvincing about his role in giving instructions about the cancellation of cheques. I accept that Rino works at the quarry at the Kapunda property for a good deal of the time carrying out management and some physical tasks. Nevertheless,

I consider that he tried to downplay his role and enhance the role of Ms Senanayake, Mr D'Alessandro and others in terms of the cancellation of cheques and more generally. An example was when he was questioned about whether he would nominate the cheques to be cancelled. Furthermore, I do not accept Rino's evidence when he said on at least two occasions that he did not know that there needed to be tax refunds following the reversal of cheques.

356 As I said earlier, in assessing the evidence of Rino and Jason, I must also take into account the evidence of the other employees called by the Concrete Supply defendants. I have done that. As I will explain, Ms Senanayake's evidence was unsatisfactory in a number of respects. Ms Booth was not a decision-maker. She took her lead from the conduct of Rino and Jason. It is true that they were referring to a discount or rebate, but they had to justify their conduct in some way and this consideration cannot outweigh the other matters I have identified for rejecting their evidence. When Mr D'Alessandro joined Concrete Supply, the system involving the RCTIs was already in place. It is true that he accepted it in one sense, but he also raised his concerns with Rino and Jason on a number of occasions. Mr Tull said that he had nothing to do with the pricing arrangements between Concrete Supply and ABCL.

357 Rino gave evidence relevant to other issues in the case and it is convenient to identify it at this point. The relevance of this evidence will become clearer when I come to examine ABCL's challenge to the DOCA.

358 I have already referred to Rino's understanding of the time within which Concrete Supply was to pay ABCL. Rino said that he had never really thought about the credit limit of Concrete Supply and that he was unaware that ABCL had increased the company's credit limit from $400,000 to $1.5 million on 23 August 2010, and then from $1.5 million to $3 million on 27 November 2014.

359 On 25 October 2017, Rino, Jason, Mr D'Alessandro and, at one point, Ms Senanayake met with Mr Lemmon and Mr Michael Kelly at the Pooraka property. ABCL handed Jason a letter alleging that Concrete Supply owed it more than $10 million. I have referred to this meeting above (at [124]).

360 On 6 November 2017, Rino, Jason and Mr D'Alessandro spent the day negotiating with Mr Michael Kelly in relation to the future supply of cement so that Concrete Supply could continue to carry on business. Mr Michael Kelly said that ABCL would not allow Concrete

Supply further credit and required cash before any product was supplied. Concrete Supply had no choice but to agree to those terms if it was to continue in business. The company agreed to pay the sum of $40,000 into ABCL's account as a starting point. On the same day, Rino, Jason and Mr D'Alessandro received confirmation that the $40,000 had been received and, in addition, that Concrete Supply's account moving forward would be cash before delivery. Concrete Supply's solicitors sent a letter to ABCL asserting, on behalf of Concrete Supply, that the company considered ABCL's behaviour to be oppressive and unwarranted.

361 On 7 November 2017, Concrete Supply received a letter from ABCL's solicitors in which Concrete Supply was advised that ABCL was preparing an application to wind up Concrete Supply and, in addition, according to Rino, it threatened a criminal investigation.

362 On 13 November 2017, Rino and Jason met with Mr Cantone to take advice about whether Concrete Supply should be placed into voluntary administration. Mr D'Alessandro was also in attendance at the meeting which took place at the Pooraka property. Rino said that they discussed with Mr Cantone that it would not be good for creditors, employees of Concrete Supply or the directors if a winding up application was brought. On the evening of the same day, Concrete Supply's solicitors received an email from ABCL's solicitors attaching outstanding invoices for product supplied between July and November 2017.

363 Rino said that as a director he did not consider that he had any alternative but to proceed down the path of voluntary administration even though he disputed the debt. He considered that to be the case because if ABCL proved that there was a debt due of more than $10 million, then Concrete Supply would be insolvent.

364 On 14 November 2017, Mr Cooper and Mr Cantone were appointed as the administrators of Concrete Supply.

365 Rino referred to certain negotiations with ABCL dealing with the subject of the purchase of the business by ABCL.

366 Rino considered, and still considers, that Concrete Supply is a profitable entity. He said that in the lead up to the appointment of the administrators and to his knowledge, Concrete Supply had received no statutory demands from ABCL or any other creditor, had no overdue ATO or superannuation liabilities; and was not issuing part-payments for invoices or electing to pay one creditor in lieu of any other creditor.

367 A DOCA was proposed and subsequently entered into on 21 December 2017 as a result of a vote taken at the second meeting of creditors. Prior to that meeting, Rino received telephone calls from creditors who had been contacted by ABCL and asked to vote against the DOCA.

368 Rino said that since being placed in voluntary administration, Concrete Supply had its biggest trading month on record in November 2017. Furthermore, since implementing the DOCA and the return of Concrete Supply to the control of his brother and himself, the company had exceeded forecast revenue (along with the quarry) each month, the company's customer base had remained strong, it had not lost any customers that he was aware of and, in fact, had picked up further customers, and the employees of the company are stable with no full time employees resigning or being terminated, and no positions being made redundant.

369 Rino said that Concrete Supply had secured an alternative source of cement supply. He said that the alternative supplier's price for cement "is substantially less than the price which we were previously paying to ABC for cement". He said that this cheaper price was given to Concrete Supply without any request for a discount and in circumstances where the alternative supplier knew that Concrete Supply was "over a barrel" in relation to the need to purchase cement in order that it could continue to trade.

370 As at 4 April 2018, Rino said he did not own any interest in real property and the vehicle he drives is a work vehicle. He has very limited personal effects or furniture. He previously had an interest in a property at Encounter Bay and a property at Kensington Gardens. His interest in those properties was transferred to his former spouse in or about February 2018 as part of a property settlement following their separation.

371 Rino accepted that the landholdings within the Mantina Group could be valued at as much as $12 million to $13 million, or possibly more.

372 Concrete Supply owed monies to Maxi-Tankers Pty Ltd (Maxi-Tankers) in the amount of $272,225.70 at the date of administration. This debt related to the provision of diesel fuel by Maxi-Tankers to Concrete Supply. Rino and Jason had guaranteed this debt. Maxi-Tankers had lodged caveats with respect to the debt. In January 2018, Rino paid the sum of $278,823.20 to remove the caveat lodged in respect of an outstanding debt. Rino said that the payment was in the nature of a director's loan to Concrete Supply. He said that if Concrete Supply is placed into liquidation, he will be proving as a creditor in the amount of the payment, or any balance which remains unpaid at that time.

373 The DOCA provides for the establishment of a Deed Fund and that fund includes an amount of $2,500,000 to be paid by the directors within six months of the execution of the DOCA, that is to say, by 21 June 2018. Clause 8 of the DOCA provides that if it terminates, then the amount of the Deed Fund will become the property of Concrete Supply in its administration or winding up. Rino states that the six month period was sought to enable the directors to decide which person or entity would borrow and to obtain funding to make their $2.5 million contribution to the Deed Fund. In June 2018, it was decided that the funds would be borrowed by Mantina Earthmovers and guaranteed by the directors. However, the directors did not want to pay the $2.5 million into the Deed Fund established by the DOCA in circumstances in which the DOCA was under challenge and it was possible that it would be terminated. In June 2018, Rino said that he was confident that Mantina Earthmovers could obtain the necessary loan funds. He said that the company was running "very well and profitably". The directors were having difficulty in raising the funds because of the uncertainty created by the litigation. Once that uncertainty is removed, then, according to Rino, there will be no difficulties. The directors have sought extensions to the date in the DOCA and these extensions have been granted by the Court.

374 Rino responded to aspects of Mr Morris' second report in an affidavit which he swore on 12 November 2018. In addition, he produced an "in principle" commitment from Bank SA to provide the funds the directors are required to contribute to the Deed Fund.

375 As I have already said, Mr Morris identifies anomalies in the commercial relationship between Concrete Supply and Mantina Earthmovers in the period immediately leading up to the appointment of the administrators. Rino responds to the statements made by Mr Morris. He states that as a director of both companies, he tries to ensure that the two businesses deal with each other on an arm's length basis. However, he accepts that processing transactions between the two companies has been a lower priority compared with external transactions and that, for this reason, "Mantina could on occasion be slow to invoice Concrete Supply for product or services supplied".

376 Rino also refers to two events during 2016 and 2017 which kept him particularly busy and which increased the products that were being supplied from Mantina Earthmovers to Concrete Supply and the amounts being charged by Mantina Earthmovers to Concrete Supply. These two events were first, a breakdown of equipment at Concrete Supply's concrete batching plant located at the Kapunda property and secondly, the completion of the

construction of the concrete plant at the Two Wells property. Rino describes the breakdown of two augers in or around June 2016 at the concrete plant at the Kapunda property. This severely impacted on Concrete Supply's ability to produce concrete and during the time the augers were broken, Concrete Supply hired a pugmill from Mantina Earthmovers and used it at the Kapunda quarry. The pugmill allowed Concrete Supply to weigh cement before it was mixed with other products to make concrete. The augers were broken from approximately July 2016 to June 2017. Rino said that there was a delay in Mantina Earthmovers invoicing Concrete Supply for the hire of the pugmill and the supply of aggregate during the time the augers were broken. He attributed this delay to the fact that he was busy. He states that one of the invoices dated 29 September 2017 (invoice no 56376) relates to the hire of the pugmill and the supply of aggregate. This was one of the invoices identified by Mr Morris.

377 The construction of the Two Wells batching plant was completed in September 2017. Mantina Earthmovers supplied product to Concrete Supply which was used in the construction of the Two Wells plant. Whilst Mantina Earthmovers supplied this product over a long period of time, it was not invoiced to Concrete Supply until the project was completed. Rino produced log books showing the tonnages of quarry sand and cement treated quarry sand supplied to Concrete Supply and used as general fill and the base for the concrete slab respectively. He states that invoice nos 56344 and 55977 (the second invoice referred to by Mr Morris) relate to the supply of quarry sand and cement treated quarry sand respectively. With respect to invoice no 56346 he states that this relates to overnight cartage for July to October 2017. He said that although the invoice may be high, it relates to several months of cartage charges.

378 With respect to invoice no 56378 (the third invoice referred to by Mr Morris), Rino states that this invoice relates to aggregate supplied by Mantina Earthmovers to Concrete Supply from July to October 2017 for use in concrete. He states that intercompany invoices were often slow and, although the invoice may appear unusually high, it relates to the supply of aggregate over a period of four months. With respect to invoice no 56345, Rino states that this invoice relates to the supply of recycled aggregate from Mantina Earthmovers to Concrete Supply during the months of January to June 2017. The recycled aggregate was used at the Kapunda property by Concrete Supply in its concrete plant to make concrete and it was not driven out of the quarry so it was not weighed like deliveries to the Pooraka property and no cart note was produced. He used details in his log book as a basis for this

invoice. Rino said that although the invoice appears unusually high, it relates to the supply of aggregate over a period of six months.

379 Finally, Rino gave evidence that as at November 2018, Concrete Supply's trading performance was positive.

Jason

380 Jason gave a fulsome and helpful description of the operations of the family businesses, Tina's role, the financial records generated by Mr D'Alessandro, Concrete Supply's relationship with ABCL over the years, his belief as to the payment terms for ABCL's accounts, visits by sales representatives of ABCL, the BSA and rebates received from ABCL in the 1990s all of which I generally accept as correct.

381 Jason said that he and Rino usually agree on matters, although Rino is the final decision-maker if that becomes necessary. The exception is decisions in relation to land purchases and, in those cases, Tina is also involved. Rino has been the final decision-maker since his father died in 2003.

382 Jason described the three main business operations as Mantina Earthmovers, Concrete Supply and Mantina Investments. These corporate structures were established with the assistance of Mr Tull who is the external accountant for the family businesses.

383 Jason said that although he knows generally what the family businesses do from day-to-day in an operational sense, he does not focus on the structure of the companies or the "administrative side of things". He said that he relied on other people to look after those aspects of the family businesses.

384 Jason said that his mother was never involved in the day-to-day running of Mantina Earthmovers. She would come to the office and sometimes spend time with his father at the workshop, but she never worked in the business or with machinery or in the office of the business.

385 Rino and Jason became directors and secretaries of Mantina Earthmovers in 2003.

386 Concrete Supply commenced operating a concrete batching plant in 1987 at the Pooraka property. Jason said that his duties include working as a loader, operator and concrete batcher, and for these duties he receives a regular wage. Concrete Supply has two sales representatives and they report to Rino and Jason.

387 As I have said, the Pooraka property is owned by Tina, and Mantina Investments owns the property at Kapunda and the property at Two Wells. Concrete Supply operates three concrete plants at each of the three properties. I have already referred to the concrete plant at the Pooraka property. The concrete plant at the Kapunda property was set up in or around the late 1990s. The concrete plant at the Two Wells property was set up in or about September 2017. Concrete Supply employs 32 people and they include company officers, employees working in office administration, truck drivers, a maintenance fitter and plant operators. Concrete Supply produces concrete and delivers it to its customers. The four main components of concrete are cement, sand, aggregate and water. The concrete is mixed at each of the three plants by loading it into a concrete truck which is located under the loading hoppers. The sand, cement, aggregate and any additives are loaded into the concrete truck in dry form, to the correct mix requirement, and then water is added. At the point where the plant operators are satisfied with the mix, the concrete truck goes to a site and unloads. The concrete trucks are owned by the family business and Concrete Supply employs truck drivers to operate those trucks and complete deliveries. There are approximately 24 concrete agitator mixers (commonly known as a concrete truck) and two 25 tonne semi-trailer size cement tankers that were purchased in 2005 and 2010 respectively. One cement tanker can supply all of the concrete depots unless there is an extraordinary demand in which case the business may use the older cement tanker as well. Jason said that the older cement tanker is kept as a spare in case the new cement tanker is off the road for any reason. Prior to the purchase of the first cement tanker in 2005, Concrete Supply engaged a company called Screenings Transport to pick up cement from ABCL and deliver it to the concrete plants. Since the purchase of the business' own cement tanker, the business has always picked up all the cement it requires from ABCL. The cement is replenished on a daily basis as the business works on a "just in time" basis. Jason said that any unmixed cement is usually stored for a maximum of one or two days. The silos are of a size that they hold a few days' supply at each location, sometimes less depending on the demand. The hoppers for sand and gravel are loaded as required using a large loader at each location and those materials are delivered regularly by suppliers and as required. Jason said that this is "just in time" delivery as well. Jason said that it is not good to store cement for a long period as it can absorb moisture and that if this occurs, the cement cannot be used.

388 Concrete Supply supplies its customers with ready-mixed concrete. Most of Concrete Supply's customers are in the residential housing industry, and most are project builders.

Jason said that large commercial projects requiring very large quantities of concrete were more difficult for Concrete Supply to secure because the company could not compete with the low prices being offered by other concrete suppliers for very large jobs in the South Australian market. Jason said that the locations in the inner north, the Barossa Valley and now at Two Wells mean that Concrete Supply can cover the new housing sectors sprawling in the northern suburbs. The company can deliver at short notice, and deliver large domestic or small commercial quantities with limited travel distance. By reason of their fleet of concrete trucks, the business is able to have a number of trucks on sites very early in the morning to get large house pours completed early.

389 Jason said that in the early days of Concrete Supply, he was usually at the concrete plant at the Pooraka property in the morning working on various jobs involving the supply of concrete. In the afternoon, he would generally be meeting with current and prospective customers, with a view to increasing sales for the concrete business. Jason described his duties since approximately 2003 and his usual day at the Pooraka property. He said that Rino manages the operations at the Kapunda property on a daily basis and he described Rino's duties.

390 Tina visits the Pooraka property and the Kapunda property once a week and chats with people who work for the business. She is a signatory to the Concrete Supply bank accounts and she has assisted Rino and Jason with signing cheques from time to time. The practice was that the administration staff would provide Tina with the cheques to be signed attached to the relevant statement or invoice. Tina signs the cheques and hands them back to the administration staff. She also helps with the banking if that becomes necessary. Jason said that Tina was never involved with the decision-making for Concrete Supply, any discussions regarding the finances of the business, or dealings with suppliers, or the negotiation of terms of trade.

391 Since 2003, Rino and Jason have managed the family businesses and made the decisions necessary for that purpose. Those decisions, as I have said, are made jointly by Rino and Jason, and Jason did not recall having any arguments with Rino when making decisions about Concrete Supply. Tina is only involved in discussions regarding larger borrowings by the family businesses relating to the purchase of land. As far as Jason can see, Tina trusts Rino and Jason with the day-to-day running of the family businesses and is not involved in any directors' meetings, or sales and management meetings.

392 Concrete Supply has always employed an internal accountant to deal with the financial aspects of the business and he or she works from the main office at the Pooraka property. Jason described the role of the internal accountant as involving the following duties:

(1) overseeing the daily bookkeeping and data entry for the financial records of Concrete Supply and advice to Rino and Jason when required of any issue requiring their attention or a decision;

(2) reporting on monies coming in and out, that is, the cashflow;

(3) setting sales budgets and sales targets, in consultation with Rino and Jason;

(4) convening monthly meetings with sales representatives to discuss how the businesses are performing in relation to their set key performance indicators; and

(5) convening monthly directors' meetings to report to Rino and Jason about issues and having decisions made that were not handled in the daily tasks that Rino and Jason carried out.

393 Rino and Jason receive all the same reports from the internal accountant, who he identified as Mr D'Alessandro, and aside from minor day-to-day operational issues, they make all the decisions regarding the business together. If one of them makes a decision and the other needs to know about it, then they meet in the following days and advise each other of those decisions.

394 Jason said that in recent years, Mr D'Alessandro prepared and sent to Rino and himself monthly financial reports, including spreadsheets or tables containing financial data for the previous month in order to prepare for the monthly meetings involving the three of them. At those meetings, the financial aspects of the business were discussed and then there would be a discussion with the sales representatives about sales targets, as well as any production, quality, delivery, plant or equipment issues. Jason said that the meeting usually occupied a total of approximately two hours.

395 Mr Tull has been working for the family businesses for approximately 40 years and he is responsible for preparing Concrete Supply's taxation returns.

396 Concrete Supply had an overdraft with the National Australia Bank Limited (NAB). It no longer trades with an overdraft while it is in administration.

397 Jason said that when Concrete Supply started purchasing cement from ABCL in 1987, it was the main supplier in South Australia. Concrete Supply purchased all of its cement from ABCL until December 2017.

398 Jason said that in the early years, Jason's father and Rino handled the relationship between ABCL and Concrete Supply and he, Jason, was not involved. He did know that his father met regularly with Mr Fiedler who he understood to be a sales representative employed by ABCL. Mr Fiedler would come to the Pooraka property on regular occasions and meet with Jason's father. As far as he was concerned, Concrete Supply had a good working relationship with Mr Fiedler up to the date of the latter's retirement in about 2012. As far as Jason knows, Concrete Supply had no disputes with ABCL until late 2017.

399 Jason is informed by Ms Senanayake and Mr D'Alessandro that Concrete Supply's payment terms with ABCL were 90 days from the statement at the end of the month. He is unware of Concrete Supply's credit limit with ABCL. He said that, as far as he knew, Concrete Supply never applied for an increase in its credit limit. He said that up to the point where Concrete Supply no longer received statements from ABCL, he understood that the company paid 90 days from the end of the month. He cannot recall ever being told by any person from ABCL that Concrete Supply was outside of its payment terms, or beyond its credit limit at any time.

400 Gradually, Jason began dealing with Mr Fiedler when he visited the Pooraka property and that increased when Jason took on a senior sales role in or about the mid-1990s. He dealt with Mr Fiedler face-to-face and he was the person to discuss any issues which Concrete Supply had. Jason gave as an example issues related to product quality. The practice was that he would be notified of Mr Fiedler's proposed visit a day or so before and he would arrange a meeting. Sometimes Mr Fiedler arrived unannounced. Jason could not remember the precise dates.

401 Jason said that sometime shortly before 2012, Mr Miller began assisting Mr Fiedler. Furthermore, there was a transition period when Mr Fiedler was preparing for retirement and Mr Niarchos was preparing to replace him. Jason would meet with either, or sometimes both, Mr Miller and Mr Niarchos. Jason also recalls another sales representative, Mr Adam Niederer, who took over from Mr Niarchos when he finished in around 2016. Mr Niederer worked for a short time for ABCL, "maybe 8 months".

402 Jason dealt with Mr Plunkett when Concrete Supply experienced an issue relating to cement quality in April 2017. He got to know him better during that period. Jason also had some dealings with Mr Andrew Daminato in 2016. Mr Daminato was a product development engineer at ABCL and he was helping Rino and Jason with a mix design for a "green star" environmentally rated concrete.

403 Another name mentioned by Jason was Mr Phillip Earl. Jason had little to do with Mr Earl. Rino dealt with Mr Earl.

404 Jason said that he did not have any dealings with anyone else at ABCL. He said that he is now aware of the name, Ms Glenda Burgess, but he had never met with her or had any dealings with her in any capacity. He has no idea who Ms Burgess is and would not recognise her if he passed her in the street. Jason does not know anyone else that works or has worked in ABCL's credit team.

405 Jason described the practice of his dealings with ABCL's sales representatives as follows:

(1) the sales representatives would sometimes call beforehand or appear unannounced at the Pooraka property;

(2) when he met the sales representative on site, they would mention that they had checked Concrete Supply's account and would then make comment on the preceding months' sales volumes;

(3) there would then be a discussion about any concerns concerning the quality of the product supplied or anything else that had arisen. The sales representatives would make a note of these issues and raise any issues on ABCL's part. Apart from the April 2017 cement quality issue, Jason could not recall any issue of significance;

(4) there would be a discussion about how the industry was performing generally. It was usually at that point in the conversation that Jason asked the sales representatives for a better price, "because of market pressures and to try and keep the price of Concrete Supply's concrete competitive"; and

(5) this part of the conversation was usually met with a comment from the sales representatives to the effect of "We will look into it and come back to you".

406 Jason said that his dealings with Mr Niarchos, Mr Miller and Mr Plunkett were good and he felt he had a trusting relationship with them similar to the relationship the company had with Mr Fiedler. He occasionally spoke to all of them on the telephone.

407 The sales representatives of ABCL regularly invited Jason to social events. That would occur up to two to three times a year. The invitations were also extended to Rino. The social events would include football games, building industry lunches and "get-together" lunches. Jason produced a series of emails evidencing these invitations. Jason said that he never had a bad word said to him about Concrete Supply at any of these functions. Jason said that he was made to feel that Concrete Supply was considered a good, loyal and trusted customer of ABCL and that ABCL wanted to look after Concrete Supply and reward it for its hard work and large purchases of cement from ABCL.

408 Rino also dealt with the same people from ABCL and Jason said that in the last 10 or 11 years, the sales representatives usually attended the Pooraka property first and then went to the Kapunda property.

409 Jason said that he received letters from ABCL notifying Concrete Supply of price increases from time to time. He produced a number of these letters. He said that it was difficult to know whether the figures in the price increase letters represented a trade price or a retail price. He noted that the price increase letters do not show any discounts.

410 Jason said that he and Rino often asked the sales representatives from ABCL for a competitive pricing structure in relation to the supply of cement. He said that market pressures meant that the price of concrete could not always be increased to absorb the annual price increases for cement from ABCL. This meant that Concrete Supply could not pass on price increases for cement to its customers. Jason said that from time to time he discussed the verbal requests he made to the sales representatives with the internal accountants employed by Concrete Supply. He referred to the fact that the set-up of the office at Pooraka was open plan and he would see the office administrative staff on a daily basis.

411 Jason referred to the execution of the BSA in 2008. I have already referred to his evidence on that topic.

412 Jason referred to the fact that Concrete Supply started receiving rebates from ABCL in the mid-1990s. He said that this continued until 25 October 2017. He said that it was around the mid-1990s that Concrete Supply employed a new internal accountant, Mr Gene Paoletti, who was an ex-employee of Boral. Mr Paoletti told Rino and Jason that Boral were receiving rebates from ABCL. Mr Paoletti worked hard in negotiating with ABCL for the provision of a rebate to Concrete Supply. Rino was the person who was primarily dealing with Mr

Paoletti. Jason said that he knew rebates were provided in the 1990s and as he had also asked for more competitive prices from ABCL, he was not surprised to learn that Concrete Supply had starting receiving rebates. He said that Rino always dealt with the details and dealings internally concerning rebates.

413 Jason gave evidence about the alleged discount or rebate which I consider was unsatisfactory. I will summarise the evidence and then explain the reasons I consider his evidence to be unsatisfactory.

414 Jason said that he was made aware that approximately $550,000 was taken off or "rebated from" Concrete Supply's statement from ABCL in March 2009. He and Rino were first notified of this by Ms Senanayake. Ms Senanayake said to Jason words to the effect of "I think they are finally rewarding us with an incentive". Jason does not otherwise recall the specifics of the conversation. Jason said that he had previously informed Ms Senanayake of the history of rebates by ABCL by reason of her role. Jason said that although the transaction was not described in any way, he understood that it was a rebate in response to his verbal requests to the sales representatives for assistance. He said that this was the first time that a rebate had been received in the form of a "lump sum" deduction "off the statement". He understood that previously and, in particular, in the mid-1990s the rebates received were cash repayments credited to Concrete Supply's account or deducted monthly. The transaction did not strike Jason as odd and he never queried the transaction. He did not speak to anyone at ABCL about it as he believed the following:

(1) Concrete Supply was finally making headway with its verbal requests to the sales representatives of ABCL for assistance in relation to the pricing structure;

(2) on those occasions when Jason asked if everything was okay during subsequent meetings with the sales representatives from ABCL, which continued to occur throughout 2009 and subsequently, he was assured that everything was "fine"; and

(3) as ABCL was an ASX listed company with good systems, the discount had to have been intended (it is, in fact, ABL which is the ASX listed company).

415 Jason said that ABCL was in control of Concrete Supply's account and the issuing of invoices and statements. He understood that it had a computer system that calculated the weight of measured loads picked up by cement tankers to the kilogram, exact quantities appeared on the subsequent invoices and statements, and payment by Concrete Supply was accurately accounted for in the monthly statements. He said that he could not recall in his

dealings with ABCL up to 2009 anything other than an accurate recording of the financial relationship between ABCL and Concrete Supply. Jason said that the March 2009 Statement of Account which contained a discount by "writing off" and then continuing to maintain a reduced balance owing in subsequent statements, did not appear to him to be anything other than a rebate for good sales or purchase levels by Concrete Supply. He said that his relationship with Messrs Fiedler, Niarchos and Miller continued as per normal with the same stream of conversation and continual reference to having checked Concrete Supply's recent figures. There were no "red flags" or complaints raised by ABCL, and Jason was repeatedly assured by Mr Fiedler that the account was "all good". Jason said that having had success in securing a discount in March 2009, he continued to ask ABCL's sales representatives for a better price.

416 In March 2012, Jason was made aware that roughly $612,000 was taken off or reduced from Concrete Supply's statement from ABCL. He and Rino were notified of this deduction "off the statement" by Ms Booth. Ms Booth spoke to Jason about this. It was not unusual for her to speak to him about debtors or creditors. Jason remembers being in the workshop on site when Ms Booth came out and said words to the effect of "We got another discount from ABC". Jason thought that the company's hard work had paid off and that it was receiving another loyalty rebate.

417 Jason could not recall the timing between this deduction and the next on-site visit by sales representatives employed by ABCL. However, they continued to occur and, again, nothing was raised at any time by a representative employed by ABCL until late 2017.

418 Jason was aware that Concrete Supply ceased receiving statements from ABCL from shortly after April 2012 and invoices stopped being sent roughly a year later. He did not make any inquiries with ABCL as to why this occurred. Concrete Supply's administrative staff were handling it. He is aware that the administrative staff asked for both on a number of occasions. He was not aware of any response from ABCL to these requests for statements, and later invoices, to be provided.

419 Approximately six or seven weeks after ABCL stopped issuing invoices, Rino and Jason addressed the issue of paying ABCL for the cement Concrete Supply had purchased. They met with Mr Tull, Ms Senanayake and Ms Booth and discussed how Concrete Supply could pay ABCL and deal with GST. Mr Tull suggested creating an RCTI as a solution to paying ABCL.

420 Jason said that he, Rino and Ms Senanayake calculated from the deductions in 2009 and 2012 respectively, that the rebate the company received was about 30–40% of the amount otherwise owing. They talked about how they could apply this rebate on a monthly basis and Rino worked out a process that would enable Concrete Supply to do so. Jason said that he relied on Rino and the administrative staff to formulate and give effect to this process.

421 Jason did not prepare the RCTIs himself. He relied on Mr Tull and the administrative staff to do this. His understanding was that Concrete Supply calculated the amount of the RCTIs by using the information about tonnage from the loading dockets (i.e., delivery dockets) received from the cement tanker drivers to calculate the company's monthly cement usage which required payment. Concrete Supply started issuing RCTIs and that continued until late October 2017. ABCL continued to supply Concrete Supply with cement on a daily basis as per normal.

422 Jason said that there were never any issues raised in relation to either Concrete Supply's account or the company's payment method using RCTIs, and throughout all of Concrete Supply's dealings with ABCL, the company had never been put on "stop supply" until the dispute which arose in late 2017. Jason said that a few years ago he recalled Mr D'Alessandro telling him that someone from ABCL's accounts department telephoned Concrete Supply requesting a change to the format of its RCTIs to include ABCL's name in the heading. A change in the heading was arranged and the payment of RCTIs continued without any concern being expressed by ABCL. Jason said that he considered that at all times ABCL was aware of the quantity of cement purchased by Concrete Supply because of the figures used when he met with ABCL's sales representatives.

423 This then is a summary of Jason's evidence with respect to the alleged discount or rebate. I reject Jason's evidence as to this matter for the following reasons.

424 First, at a general level, Jason's evidence in response to a number of questions was argumentative and failed to address the question. Furthermore, I consider that he downplayed his involvement in a number of matters. Jason signed cheques and BAS. Although the accounting staff of Concrete Supply may have provided advice and Rino may have taken the lead role, I consider that Jason downplayed his role in selecting the cheques which were to be paid and the cheques which were to be cancelled. There is abundant evidence in this case, including documentary evidence, that supports the conclusion that Jason played a role in these matters. As I have already said, Jason swore that Concrete

Supply had no outstanding taxation or superannuation liabilities. However, Concrete Supply had a number of cheques in its safe awaiting processing to claim the rebate. That would have led to a reduction in the deductions claimed for taxation purposes and in the input tax credits claimed. Finally, at a general level, Jason's evidence as to the central issues concerning the discount or rebate is inconsistent with other evidence and improbable for the reasons set out below.

425 Secondly, Jason was prepared to give evidence as to certain matters that he knew were untrue, or in respect of which he did not have the knowledge to make the assertion which he made. For example, he states that even after Concrete Supply stopped receiving statements from ABCL, he understood that Concrete Supply paid 90 days from the end of the month. Plainly, that was not correct as the other evidence in this case clearly shows that on a number of occasions, Concrete Supply sent cheques in payment of accounts many months after the account was due for payment. I find it difficult to think that in light of the meetings Jason attended when decisions were made as to which cheques were to be paid and which were to be cancelled, that he did not know that this was taking place. In the alternative, if he did not know, he was not really in a position to venture an opinion on the matter. In the course of his evidence, he said on a number of occasions that he left the relevant matter to the accounts staff and that he was not in a position to comment.

426 Thirdly, I do not accept Jason's evidence that in or about March 2009, Ms Senanayake said words to the effect that she thought that ABCL were finally rewarding Concrete Supply with an incentive. I do not accept that Ms Senanayake referred to a discount and that she said that ABCL had finally listened to Jason. Ms Senanayake said that there was a discrepancy between the March 2009 Statement of Account and Concrete Supply's records in the amount of $529,423.08 which she raised with Jason and Rino. She said that she could remember that Rino and Jason thought that the outstanding amount in the March 2009 Statement of Account was good news because they had been hoping to get a discount on the cement supplied by ABCL. She did not give evidence to the effect that she said to Rino and Jason that ABCL was finally rewarding Concrete Supply with a discount and that they had finally listened to Jason. Furthermore, I consider it most unlikely that Ms Senanayake would have said this to her employer in relation to a very substantial sum of money which, if it was a discount, was totally unexpected, even accepting Jason's evidence that he was continually asking for a discount.

427 Fourthly, I find Jason's reasons for considering that the amount left off the March 2009 Statement of Account was a discount and that Concrete Supply was entitled to make its own arrangements for a discount thereafter unconvincing. I do not think that Jason knew a great deal about the rebates offered to Concrete Supply by ABCL between 1995 and 2000. Rino was the one with knowledge as to those matters. For example, Jason did not know of the letter from ABCL to Concrete Supply dated 28 March 2000 wherein ABCL advised Concrete Supply that the rebates were coming to an end and that ABCL would thereafter adopt a net pricing regime. It is difficult to know the precise extent of his knowledge, but, as I will explain below, to the extent he did know about the rebates, they do not provide a basis for considering that the amount left off the March 2009 Statement of Account was a discount. Prior to March 2009, Rino and Jason had signed the BSA in 2008 and that agreement provided for a specified discount per tonne. Furthermore, they had received and continued to receive the price increase letters from ABCL. Jason agreed that the price increase letters were received by Concrete Supply. Jason's reasons for considering that the amount left off the March 2009 Statement of Account was a discount are set out above. As I have said, they are unconvincing when account is taken of the fact that the discount is quite unlike anything that had occurred before and was received unexpectedly.

428 Fifthly, Jason's evidence as to the basis upon which he said to Ms Booth in or about March 2012 that he was expecting another discount was unconvincing. It is apparent that his expectation was not based on anything said by any person at ABCL. When he was asked to explain why he did not find another "discount" unusual, he said the following:

> … Sorry. I wouldn't – I wouldn't have found it unusual because the relationship we had with Adelaide Brighton was so great and so good and trusting I dare say they were going to give us another discount. At no point there were any red flags with our account.

429 Ms Booth said that she said to Rino and Jason words to the effect that "We have got our rebate". I do not consider that that supports Jason's evidence because Ms Booth's evidence is based on the fact that Jason had said to her that he was expecting another rebate. Jason's evidence as to his knowledge of the correction in the April 2012 Statement of Account and the reason for it was unsatisfactory. It is convenient to set out part of that evidence. It is as follows:

> MR LIVESEY: Well, can I put this to you as a matter of fairness for you to comment on?
>
> THE WITNESS: Yes.

MR LIVESEY: If it's true to say that those four invoices were dropped from the March 2012 invoice, but they came back on to the April 2012 invoice, what you've been describing as a discount starts looking much more like a discrepancy or error, doesn't it?

THE WITNESS: I said to you earlier a discrepancy will be picked up by the end of the month and be corrected.

MR LIVESEY: And that's what this is, isn't it?

THE WITNESS: Corrected?

MR LIVESEY: Yes?

THE WITNESS: Right. But how come it's not corrected again?

MR LIVESEY: It was. I'm suggesting to you that in the months that follow - - -?

THE WITNESS: So we would have asked – so we would have – Heather would have dealt with this. She would have asked for information.

MR LIVESEY: Well, can I suggest to you that she knew full well what was going on, that there had been a discrepancy the prior month, the invoices had come back on in April. They had picked up the error, hadn't they?

THE WITNESS: Again, I can't comment on that.

MR LIVESEY: I see?

THE WITNESS: Is that the exact figure that was – I'm not sure.

MR LIVESEY: You see what you decided to do, with or without your brother, Rino, was to exploit the March 2012 error going on into the future even though you well knew that it had been picked up and corrected in the April 2012 statement, didn't you?

THE WITNESS: Again, I can't comment on that. Was it fully corrected? Was it the full amount? I can't comment on that.

MR LIVESEY: I'm putting to you that it was?

THE WITNESS: Well, again, this is the first time I've seen this.

430 Sixthly, I find Jason's explanation for not thanking the sales representatives of ABCL for the alleged discounts or rebates to be unsatisfactory. I also find that his explanation for continuing to ask for a rebate in the face of the "discounts" already provided to be unsatisfactory. Jason said that he asked the ABCL's sales representatives four or five times a year for a better price. He agreed that his expression "better price" or "best possible price" was interchangeable with "discount" or "rebate". He said that he did not express gratitude to the sales representatives because they did not like talking about discounts. I do not accept this explanation. At another point he said that he kept asking for discounts to "keep it going". At one point, Jason gave the following evidence:

MR LIVESEY: You didn't think to say to anyone, "Listen, we're really grateful that

> we've now got $1.1 million in discounts over and above the 10 per cent that's coming off the list price"?
>
> THE WITNESS: Like I told you, they did not like talking about discounts or rebates.

It seems to me that the most likely explanation for Jason's approach is that he knew that the sales representatives did not know about the "discounts" and that it was likely to be an error. He did not want to say anything that would cause an inquiry to be made and the position corrected.

431 Seventhly, as I have mentioned, I consider that Jason underplayed his role in deciding which cheques were to be reversed. I say this having regard to the evidence of Rino, Mr D'Alessandro, Ms Senanayake and the documentary evidence. He said that Ms Senanayake would tell him which cheques were going to ABCL in late 2012 and early 2013. He said that in late 2011, he never got involved in which cheques would have been sent or which ones were held back. The administration staff handled all of that. When asked about specific occasions, he said that he could not remember. Later in his evidence he said that he was not involved in the RCTIs and that he was told about it. Still later again, he said he was not involved in paying ABCL and that he was notified which cheques went to ABCL and "that's it". Later still, he denied knowledge of the implications of the RCTI practices which were adopted by Concrete Supply.

432 Eighthly, I do not accept that there was a plausible reason for the adoption of ongoing deductions of "about 30–40% of the amount otherwise owing". Even if Rino and Jason genuinely considered that the amounts left off the statements in March 2009 and March 2012 were discounts (which I do not accept), that could only lead to a conclusion that Concrete Supply might receive a sizeable discount once every three years. It would not provide a basis for considering that Concrete Supply ought to receive a 30–40% discount on all amounts owing. I have already referred to this matter in the context of my discussion of Rino's evidence. Jason's explanations were unconvincing. When asked whether the scheme that was adopted was unlike anything he had heard of in business, Jason said that it worked out to 29% as per Mr Morris' report and Concrete Supply was a small family business. There was some confusing evidence from Jason about whether he considered that the discount to which Concrete Supply was entitled was 29%. He was unable to explain why the discount reached 50% or thereabouts in 2016 and 2017.

433 Ninthly, Jason's explanation for not acting on Mr D'Alessandro's warning was unconvincing. One may ask why the directors, if they genuinely believed that they were entitled to a rebate, did not seek some confirmation of their entitlement to the rebate even if that was sought and provided on a confidential basis.

434 Finally, Jason gave some evidence which was not easy to follow about what he would have done had he been told at the AFL Grand Final in 2014 by ABCL's chief executive officer that Concrete Supply owed ABCL $4 million. At one point he said that he would have "paid the money", and at another point he said that he does not know whether he would have paid the money.

435 As with Rino, in reaching these conclusions concerning Jason's state of mind, I have had regard to the evidence of the other employees of Concrete Supply who were involved in the circumstances surrounding the alleged discount or rebate.

436 As with Rino, Jason gave evidence as to a number of other issues in the case which I will briefly identify. The relevance of this evidence will become clearer when I come to examine ABCL's challenge to the DOCA.

437 Jason referred to the meetings with ABCL's representatives in October and November 2017. He said that on 6 November 2017, he received two emails from Mr Lemmon attaching revised trading terms that required payment on a cash on delivery basis. This was the first time that Concrete Supply had been put on a cash on delivery basis and Jason said that such a basis would have a negative effect on the cashflow of Concrete Supply and that "things would be very tight". He and Rino decided that they needed another source of cement supply.

438 As I have said, Jason said that Concrete Supply had no outstanding taxation or superannuation liabilities and that, prior to this dispute, it had not received any creditors' statutory demands for payment and was not a party to any legal disputes. Concrete Supply began receiving letters of demand from ABCL and Jason was concerned with the threat of legal action. Tina had been informed about the issues with ABCL and was obviously distressed. Jason said that on 14 November 2017, Rino obtained details of an administrator at Worrells, Mr Cantone, from Mr Tull. He, Rino and Mr D'Alessandro met with Mr Cantone on the morning of 14 November 2017 at the Pooraka property. Mr Cantone read ABCL's demand letter which Rino had given him and they discussed generally the financial issues

that had arisen because of the dispute with ABCL. Jason does not recall Mr Cantone asking for financial information at this time. Jason and Rino advised that if the debt was in fact $10 million, then the company could not pay that amount of money. Mr Cantone explained in general terms the effect of a liquidation and the appointment of a liquidator on Concrete Supply and its creditors and the effect of an administration and the appointment of an administrator on Concrete Supply and its creditors. He understood that liquidating the company would mean that the liquidator would sell the business and all its assets at a public auction and the employees would risk losing their jobs. The assets would not be realised for value and a poor return would be received by creditors and the employees would be unlikely to keep their jobs. The appointment of an administrator would allow Concrete Supply to potentially work through the alleged debt issue with ABCL and continue trading. Jason said that he and Rino estimated that Concrete Supply's assets might be worth about $2.5 million if they were sold and that was how they came up with their contribution. Jason said that he and Rino did not get advice, nor did they ask, if they or any company of which they were a director would be better off by administration as compared with liquidation. Their two main concerns were returns to creditors which were better in the administration, and preserving the employees' jobs if that were possible. Based on the advice they were given, he and Rino believed that the best option for Concrete Supply was to appoint an administrator. He was not involved in, nor does he recall, any discussions about the intercompany loan balance with Mantina Earthmovers in the context of the administration. Jason said it was clear that Concrete Supply was unable to pay the alleged debt to ABCL and that if that debt was proven to exist, then the company could not pay its debts when they fell due and payable. In the circumstances, he and Rino agreed to appoint Mr Cantone and his partners as administrators as Concrete Supply. Later on 14 November 2017, they went back and signed the necessary paperwork to appoint the administrators. Jason said that Mr Cooper was not present at this meeting on 14 November 2017 and that he (Jason) had not had anything to do with either of the administrators prior to the morning of 14 November 2017. Jason is wrong about the date of the meeting with Mr Cantone. There were two meetings with Mr Cantone before the appointment of the administrators, one on 2 November 2017 and the other on 13 November 2017.

439 During one of their conversations with Mr Cantone at the Pooraka property, Mr Cantone discussed the possibility of the company entering into a DOCA. Jason said that as Concrete Supply was a family business, it was very important to him that everyone at Concrete Supply

kept their jobs. He said that he understood from his discussions with Mr Cantone that the proposed DOCA would enable their employees to keep their jobs.

440 Mr Cantone visited the Pooraka property frequently in November and December 2017 in order to obtain further financial information from Mr D'Alessandro, Ms Senanayake and Ms Booth. Each of those employees were told to cooperate with any requests made by the administrators. In time, a DOCA was going to be proposed and Jason, Rino and Tina were to raise about $2.5 million to pay creditors of Concrete Supply a percentage of what they claimed they were owed. Arrangements commenced for the $2.5 million to be financed by them personally (subject to security) if the proposed DOCA was upheld.

441 Jason and Rino attended the second meeting of creditors at which time the proposed DOCA was approved. ABCL's lawyers were at the second meeting of creditors. The DOCA was signed on 21 December 2017.

442 Jason said that Concrete Supply is trading well under the DOCA and he gave his reasons for making that assertion.

443 Jason does not have any real property registered in his name.

444 Jason gave general evidence about what Concrete Supply would have done had they realised that they were not entitled to the discount. At one point he said that they would have restructured the business, but he did not provide any details. At another point, he said that they would have looked at the company's capital expenditure and production costs. At yet a further point he suggested that they might have been able to do something in 2014 and finally, he said that they would look at their capital expenditure and production costs.

445 In cross-examination, Jason was asked about the issuing of invoices by Mantina Earthmovers for materials supplied to Concrete Supply at a time shortly prior to the appointment of the administrators and further payments made during the administration and deed administration which had the effect, according to Concrete Supply's accounts, of reducing the debt of Mantina Earthmovers to Concrete Supply. He seemed to suggest that he was not aware that in July 2017 the debt was approximately $2.8 million. He could not say whether Concrete Supply had made a demand for repayment of the debt and he said he could not comment on the proposition that he had done nothing to collect the debt and he denied that he had preferred the interests of Mantina Earthmovers to those of Concrete Supply. He said that he had not seen the financial documentation showing the pre-payment of legal expenses on or

about 30 April 2018 and said he did not know "how it's structured". He left that matter to Concrete Supply's external accountants and internal accountants. He did not know where the money to pay legal expenses had come from. Jason did know Rino was issuing invoices for materials Mantina Earthmovers supplied to Concrete Supply prior to the appointment of the administrators, but he did not know "exact" dates. They were, he said, "justifiable invoices".

446 There is also an allegation that Concrete Supply, contrary to its interests, was paying rent well above market value to Tina. In cross-examination, Jason was asked about how the rent payable to Tina under the lease of the Pooraka property was fixed. He was taken to the valuation of various properties and income streams prepared in the first half of 2018 in connection with an assessment of Concrete Supply's capacity to borrow monies. He was not aware the rental income was valued. He denied that he, Rino or Tina were in a position of conflict of interest when the rent was increased to an amount of approximately $161,000 per annum in the first half of 2018. He could not explain the reasons that he and Rino agreed to an increase in the rent, although he said that there must be an explanation. He could not recall any discussions with Rino or Tina about the increase in rent in 2018. He claimed that he had not had time to investigate the matter.

447 Jason was asked about his ability with Rino to borrow the money required to be paid into the Deed Fund. Jason said that he did not know anything about emails passing between Mr John Costa of Chase Finance acting for Jason and Rino, and Mr Shane Hagan of Bank SA in December 2018. I found his lack of knowledge surprising in view of the importance of the matters dealt with in the correspondence. Jason could not answer whether Mantina Earthmovers could borrow $2.9 million (if that was the Mantina Earthmovers' debt to Concrete Supply) together with the amount of $2.5 million if it was required to pay those amounts to Concrete Supply.

448 With respect to his dealings with Mr Cantone, Jason said he could not remember whether he told Mr Cantone that he, Rino and Tina owned the quarry. He said that he could not remember whether he was asked by Mr Cantone or any member of his staff to prepare a Report as to Affairs (RATA). The effect of Jason's evidence appeared to be that he did not tell Mr Cantone of his ownership of shares or of other property. Jason did not have a good recollection of his meetings with Mr Cantone.

449 Jason agreed that Concrete Supply approached various banks in late 2017 to see if it could borrow money to pay out the ABCL debt.

Ms Devika Senanayake

450 Ms Senanayake described herself as the company accountant for Concrete Supply. She has business and accounting qualifications from institutions in Sri Lanka. She is a member of the Institute of Public Accountants and is in the process of completing her studies to become a certified public accountant.

451 I found some aspects of Ms Senanayake's evidence unconvincing. I take into account that she appeared nervous in the witness box and she said on occasions that English was her second language. Nevertheless, some aspects of her evidence were unsatisfactory.

452 Ms Senanayake commenced her employment with Concrete Supply in late 2004. Initially she worked under the supervision of the then company accountant, Mr John Ngatia. Mr Ngatia left Concrete Supply in early 2005 and Ms Senanayake became the company accountant. She reported directly to Rino and Jason and her duties included managing the company's general ledger, overseeing and reporting on the company's daily cash position, and carrying out bank and general ledger reconciliations. She also assisted with the end of financial year statements.

453 Ms Senanayake remains an employee of Concrete Supply. She has had two periods of maternity leave, one for three months between June and September 2008, and the other for the period August to November 2013. In or about July 2013, Concrete Supply employed Mr D'Alessandro as its financial controller or chief financial officer. Ms Senanayake began reporting to Mr D'Alessandro when she returned from her second period of maternity leave.

454 Ms Senanayake has worked with Ms Booth and Ms Gabriele Collins. Ms Booth gave evidence and her evidence is referred to below. Ms Booth has been responsible for the creditors and customers of Concrete Supply, and between about June 2000 and August 2013, she assisted Ms Senanayake with the daily cash position. Ms Booth then assisted Mr D'Alessandro with the daily cash position after he had become responsible for that task. Ms Collins is responsible for payroll.

455 Concrete Supply uses an accounting software programme called Attaché. The tasks for which Ms Senanayake is responsible are (as she put it) "run through" Attaché.

456 Ms Senanayake has also worked closely with Mr Tull and she seeks advice from him from time to time on accounting issues.

457 In her affidavit, Ms Senanayake said that she did not like making decisions concerning Concrete Supply without first consulting Rino and Jason and sometimes Mr Tull. She said that if there was an important decision to be made, she went to Rino, Jason and/or Mr Tull for instructions and assistance.

458 Ms Senanayake considered that the relationship between Concrete Supply and ABCL was a very good customer relationship. She was not involved in any negotiations or agreements between Concrete Supply and ABCL. She had met Mr Fiedler and she understood him to be a sales representative employed by ABCL. She had no dealings with Mr Fiedler in relation to business matters. Ms Senanayake said that she understood Ms Glenda Burgess to be a credit officer at ABCL. She had dealings with Ms Burgess, but she could not recall if she had met Ms Burgess. She spoke to Ms Burgess over the telephone and received emails from her from time to time concerning Concrete Supply's account with ABCL.

459 Ms Senanayake produced a letter from Concrete Supply and Mantina Earthmovers to Ms Burgess of ABCL dated 14 March 2005 wherein those companies advised ABCL that they could not absorb price increases on fixed price customer contracts they had for the supply of concrete. Ms Senanayake also produced an email being the last email she received from Ms Burgess about the account between ABCL and Concrete Supply and the payment of amounts on the account.

460 Ms Senanayake believed that the trading relationship between ABCL and Concrete Supply was such that Concrete Supply issued as many cheques as possible to ABCL between 60 and 90 days. She did not receive any complaints from Ms Burgess or anyone at ABCL about this practice. She produced a number of messages from Ms Burgess between 2008 and February 2011 asking Concrete Supply to ensure that the "90 day amount" (that is, the amount outstanding for 90 days or longer) was cleared.

461 Ms Senanayake said that at a date soon after 31 March 2009, Ms Booth came to her with an account statement received from ABCL for the month ending 31 March 2009. She produced the statement which contained handwritten notations made by Ms Senanayake. The outstanding balance on the account was $782,676.89, whereas the books and records of Concrete Supply showed that as at 31 March 2009, the balance of the account in favour of ABCL was $1,312,099.97. Ms Senanayake said that there was a "discrepancy" between the March 2009 Statement of Account and Concrete Supply's records in the amount of $529,423.08 which she raised with Rino and Jason. She produced her calculations of the

discrepancy. Ms Senanayake concluded that the difference was the equivalent of the sum of the invoices issued by ABCL to Concrete Supply in respect of part of September 2008, the whole of October 2008 and part of November 2008. Concrete Supply had not issued cheques to ABCL for those invoices. The cheques had been written, but had not been issued. They were kept in the safe at the Pooraka premises.

462 Ms Senanayake said that she assumed that "the discrepancy of $529,423.08" was the result of a credit adjustment in ABCL's accounting system. In April 2009, she met Mr Tull and raised the discrepancy in the March 2009 Statement of Account with him. She showed Mr Tull her calculations on the computer. Mr Tull agreed with the calculations. Ms Senanayake then had a meeting with Rino and Jason and she said that she made some notes during the meeting. The notes were produced.

463 The notes contain various calculations and an identification of the cheques to be cancelled. They comprised one cheque in September 2008, four in October 2008 and four in November 2008. The calculations also contained a note which Ms Senanayake said read as follows:

> Rino agreed on this amount but said this is not the time to do a cheque & hence will be done later when the cashflow is healthier.
>
> 29/01/2010

464 Ms Senanayake said that Rino agreed with her calculations. She said that Rino and Jason thought that the outstanding amount in the March 2009 Statement of Account was good news because they had been hoping to get a discount on the cement supplied by ABCL for some time.

465 Concrete Supply issued cheques to ABCL in accordance with the March 2009 Statement of Account. The company subsequently cancelled the nine cheques which Ms Senanayake had identified. That was done over the financial years ended 30 June 2009 and 30 June 2010. Ms Senanayake recorded the adjustments in the general ledger. In addition, the GST previously claimed as an input tax was repaid to the ATO on the reversal of the cheques. The cheques which were cancelled totalled an amount which was $33,732.09 more than the difference of $529,423.08.

466 Ms Senanayake said that she updated her notes (which she produced) following cheque adjustments. She said that she only adjusted and reversed cheques after she had consulted with or received a request from Rino, Jason and/or Mr Tull. ABCL continued to issue

account statements which were consistent with an outstanding account balance of $782,676.80, being the amount recorded in the March 2009 Statement of Account.

467 With respect to the audit confirmation letter, Ms Senanayake carried out various calculations in connection with the letter and she concluded that the difference between the amount specified in the letter and the outstanding amount recorded in the books and records of Concrete Supply was $1,637.07, being a difference of approximately 0.17%. She produced the March 2009 Statement of Account and referred to the fact that it recorded a credit of $1,637.07. She said that she does not know what she made of the difference at the time, but whatever it was she told Rino that there was a difference of $1,637.07 in the audit confirmation letter.

468 Ms Senanayake said that in about 2012, Concrete Supply received another statement of account from ABCL with a discrepancy similar to the March 2009 Statement of Account. She produced a copy of the statement which also contains her handwritten notations. Ms Booth received the statement and raised it with Rino and Jason who then contacted Ms Senanayake. The statement recorded an outstanding balance of $1,428,588.16, whereas the outstanding balance according to the books and records of Concrete Supply in favour of ABCL was $2,045,377.11. Ms Senanayake said that there was a discrepancy between the March 2012 Statement of Account and Concrete Supply's books and records of approximately $616,788.95. She produced her calculations of the difference. She reached the conclusion that the difference was equivalent to the sum of the invoices issued by ABCL to Concrete Supply for part of September 2011, the whole of October 2011 and part of November 2011. As at 31 March 2012, Concrete Supply had written cheques for these invoices, but they had not been sent. Ms Senanayake said that she notified Rino and Jason about the discrepancy in the March 2012 Statement of Account. She cannot remember if she showed Mr Tull her calculations in relation to the discrepancy, but believes that she would have done so.

469 The cheques in Concrete Supply's safe for part of September 2011, all of October 2011 and part of November 2011 were subsequently cancelled. That was done over a period of time and Ms Senanayake recorded the adjustments in the general ledger. Again, GST previously claimed as an input tax credit was repaid to the ATO on the reversal of the cheques. Ms Senanayake said that she only adjusted and reversed cheques after she had consulted with or received a request from Rino, Jason and/or Mr Tull.

470 Ms Senanayake was aware that ABCL stopped issuing statements of account and invoices to Concrete Supply and that, as a result, Concrete Supply started creating RCTIs on Attaché. She said that she was not involved in creating RCTIs for ABCL. She said that part of her role as the company accountant was to carry out bank reconciliations at the end of each month and that in doing so she realised that not all of the cheques written to ABCL had been banked.

471 Ms Senanayake's evidence was unsatisfactory in the following respects.

472 Ms Senanayake's evidence that Concrete Supply issued as many cheques as possible to ABCL between 60 and 90 days and that her understanding was that ABCL would accept Concrete Supply paying within this time frame, provided that payments were made within 90 days of the relevant monthly account statement, says nothing about the important fact which must have been known to her that Concrete Supply was often sending cheques in the safe to ABCL six months or longer after the month in which the product had been supplied.

473 Ms Senanayake referred to the difference between the March 2009 Statement of Account and the March 2012 Statement of Account on the one hand, and the amount owing according to Concrete Supply's books and records as discrepancies in her affidavit of evidence, whereas in her oral evidence she tended to refer to the difference as a discount or rebate. This was part of evidence that she gave that suggested that with input from others, she had formed the view that the difference in the amount shown in the March 2009 Statement of Account and the amount in Concrete's Supply books and records was a discount. I do not accept this evidence. In my opinion, for whatever reason, Ms Senanayake was advocating the cause of Concrete Supply in giving that evidence. There would be no reason for her to think that ABCL would, in effect, provide a rebate of such an unusual nature "out of the blue" of over half a million dollars. I do not accept her evidence that her account statement told her that there was a discount and that there was no need to query the matter with ABCL. It was Rino and Jason who decided that the difference should be treated as a discount or rebate. For similar reasons, her evidence with respect to the March 2012 Statement of Account should be rejected.

474 Ms Senanayake gave evidence that she considered the amount of $33,782.09 which was not paid by Concrete Supply to ABCL in 2009 and was still unpaid in 2012 would be cancelled by ABCL. Her evidence that she thought that because it was a small amount in the scheme of things was unconvincing because there is no reason to think, having provided, on her account, a large discount, ABCL would ignore such an amount.

475 Ms Senanayake tended to suggest that she made the decisions as to which cheques to cancel, at least in the early years, and that that was done over a period of time because the discount would have been earnt over a period of time. She tended to baulk at suggestions that Rino and Jason made the decisions as to the cheques to be cancelled and the state of the cashflow was a major consideration in those decisions. I accept that the position is not black and white and that she may well have made recommendations, but, even accepting that, I consider that having regard to the documentary evidence, she exaggerated her role in deciding which cheques should be cancelled and underplayed the importance the company's cashflow played in the decision as to the timing of the cancellations.

476 Ms Senanayake's evidence concerning the April 2012 Statement of Account and whether it corrected the discrepancy in the March 2012 Statement of Account was unsatisfactory. Why she would refuse to draw any conclusions because she had only a faxed copy and then not follow up the obtaining of an original copy was not satisfactorily explained.

477 Finally, I consider that in her affidavit evidence Ms Senanayake completely underplayed her role in the establishment of what she referred to as the "mechanism" for claiming a "rebate" or "discount" in relation to the RCTIs. The other evidence in the case indicates that, although she did not create the RCTIs herself, she played a role in how the mechanism would be structured.

Ms Heather Booth

478 Ms Booth is employed by Concrete Supply as an administration officer. She commenced her employment with Concrete Supply in that position on 13 March 2007. Ms Booth does not have any formal qualifications.

479 Ms Booth was generally a satisfactory witness. I have some reservations about her ability to recall conversations in 2009 and 2012.

480 Ms Booth reported to Ms Senanayake and Rino and Jason prior to July 2013, and thereafter she reported to Mr D'Alessandro. Prior to a date in May or June 2008, her duties were to oversee the processing and reporting of Concrete Supply's creditors and debtors and these duties included an accounts payable function. After that time, her duties also included allocating expenses against the relevant general ledger code for the expense in Concrete Supply's Attaché software programme.

481 Ms Booth's general practice was to collate suppliers' invoices and enter them into the Attaché programme against the relevant general ledger code for that expense. As far as invoices were concerned, she did not review each invoice to check that the quantities and amounts in the invoices were correct, although if the invoice was for a large amount, she would check with Rino or Jason to confirm that the amount shown in the invoice was correct. As far as account reconciliations were concerned, it was (and is) Ms Booth's practice to check the supplier's monthly statements of account against Concrete Supply's records to confirm that the invoices in the statement match those in the Attaché programme. In circumstances where they do match, Ms Booth would then proceed to write out cheques for the amounts shown in the invoices. Those cheques would then be signed by one of Rino, Jason or Tina and placed in an envelope with the month written on the face of the envelope. The cheque was then placed in the company's safe. Tina would come in and sign a number of cheques given to her by Ms Booth. Generally, Tina did not ask any questions. Ms Senanayake or Mr D'Alessandro would send, or supervise the sending of, cheques to the supplier. When a cheque was sent out, Ms Booth would note that in the daily balances. Ms Booth was not involved in the process of deciding which cheques were sent out. As part of her general practice, Ms Booth would, if there was a difference between the supplier's statement of account and Concrete Supply's accounting records, contact the supplier in order to clarify the difference.

482 Ms Booth's contact person at ABCL was Ms Glenda Burgess. Ms Booth has never met Ms Burgess in person and her contact with Ms Burgess has been by telephone. Leaving aside the periods immediately following about April 2012 when ABCL stopped sending monthly statements of account to Concrete Supply and immediately following about March 2013 when ABCL stopped sending invoices to Concrete Supply, Ms Booth had brief telephone conversations with Ms Burgess about account related issues, such as requesting a copy of an invoice or cart note. The frequency of such conversations varied and could be as long as six months apart.

483 Before about March 2013, ABCL issued invoices in hard copy and sent them by post to Concrete Supply every few days. Concrete Supply was collecting product from ABCL multiple times a day. Before April 2012, ABCL issued statements of account in hard copy and sent them by post to Concrete Supply at the end of each month. Throughout the relevant period, price increase letters were sent to Concrete Supply by ABCL from time to time and Jason gave these to Ms Booth.

484 Ms Booth would group invoices from ABCL so that the total amount of each group was approximately $50,000 and then she would prepare a cheque for the group of invoices and place that cheque in a window-face envelope. She wrote the month and the amount of the cheque on the face of the envelope. The cheque payments were entered into the Attaché programme.

485 Ms Booth received the March 2009 Statement of Account from ABCL. Ms Booth noticed that there was a difference between the amount shown in Concrete Supply's accounting records and the amount shown in the statement. It appeared to her that invoices outstanding for 90 days or over had been left off the statement, although no credit was shown on the statement. She raised the difference with Ms Senanayake who said that the difference was a discount. Ms Booth was cross-examined about whether Ms Senanayake had used the word "discrepancy" rather than the word "discount". She firmly denied this suggestion. It seemed to me that Ms Booth had no clear recollection of what word was used; she said that she knew it was a credit or rebate. I have some doubts about whether Ms Booth could categorically say what word Ms Senanayake used after such a lapse of time, but whatever Ms Booth was told, it seems clear that she thereafter believed that Concrete Supply was not bound to pay, and would not pay, the difference and she proceeded to perform her accounting tasks accordingly. She was after all, as she herself said, not involved in the terms of the commercial relationship between Concrete Supply and ABCL.

486 Ms Booth received the March 2012 Statement of Account. Prior to receipt of the March 2012 Statement of Account, Jason said to Ms Booth words to the following effect:

> [W]e are due to be receiving a rebate soon due to the rebate received in 2009.

487 Ms Booth carried out her reconciliation with respect to the March 2012 Statement of Account and noticed a difference compared to Concrete Supply's accounting records. She believed it was the rebate Jason was referring to and did not consider the fact of the difference to be unusual. She said to Jason words to the following effect:

> [W]e got our rebate.

Ms Booth proceeded to process the March 2012 Statement of Account accordingly.

488 With respect to the March 2012 Statement of Account, Ms Booth's affidavit of evidence ended at this point. There was no mention by her of the fact that the error (if error it be) in

the March 2012 Statement of Account was corrected, subject to appropriate adjustments, in the April 2012 Statement of Account.

489 Approximately eight months after her first affidavit, and shortly prior to trial, Ms Booth filed a second affidavit of evidence in which she addressed the April 2012 Statement of Account. She said that it was not in her first affidavit of evidence because at that time she was rushing to go overseas the following day. She said that the statement had, after taking account of payments made by Concrete Supply, reinstated what she had believed to be a rebate or discount of $616,788.95 given by or in the March 2012 Statement of Account by including an amount of $381,763.65. She believed the difference in the March 2012 Statement of Account was a rebate or discount because "Jason had told me that he was expecting the rebate prior to receiving the March 2012 Statement".

490 Ms Booth said that she contacted Ms Burgess by telephone at about this time and had a conversation with her involving words to the following effect:

> Ms Booth: I have received the April 2012 monthly statement. There is a figure of $381,763.65. I don't understand why that figure has appeared on the statement. Can you explain to me what that figure is for?
>
> Ms Burgess: I'll get back to you.

Ms Burgess did not get back to her and Ms Booth tried to contact her by telephone about a week later and then a week after that, each time being told she (Ms Burgess) was not available. Ms Booth kept Ms Senanayake informed of her attempts to contact Ms Burgess.

491 Concrete Supply did not receive a statement of account for May 2012 and Ms Booth contacted ABCL's account department. She spoke to a person whose name she could not remember; it was not Ms Burgess. The person told her that they would send out the monthly statement, but Concrete Supply did not receive a monthly statement then or at any time prior to the appointment of the administrators. Ms Booth did not remember Ms Burgess giving her a reason for ABCL not sending statements of account to Concrete Supply. Ms Booth processed invoices by matching them with the corresponding delivery dockets in the absence of statements of account.

492 As of 31 March 2013, Concrete Supply stopped receiving invoices from ABCL and the company did not receive invoices between April 2013 and late 2017. Ms Booth tried to contact Ms Burgess and after some unsuccessful attempts to do so, she spoke to her and queried the lack of invoices. Ms Burgess said words to the following effect:

> I'll get them out to you.

Ms Booth had a few telephone conversations with Ms Burgess over a period of several weeks. Often her telephone calls were not answered. Ms Booth could not remember Ms Burgess providing an explanation as to the reasons ABCL stopped sending invoices to Concrete Supply.

493 Although the exact time sequence is not clear, it appears that for a period of time, Concrete Supply continued to "pay" ABCL by Ms Booth calculating the amounts owing by reference to the delivery dockets and price increase letters and entering the amounts in the Attaché programme and preparing cheques in accordance with its previous practice. Meanwhile, Ms Booth continued to try and contact Ms Burgess, telephoning her once a week or so for a period of six or eight weeks.

494 At about this time, Ms Booth spoke to Rino and asked whether Concrete Supply could start issuing its own invoices for product supplied by ABCL. Ms Booth said that this conversation was a few weeks after Concrete Supply stopped receiving invoices from ABCL. Rino agreed to Concrete Supply issuing RCTIs. Ms Booth said that it was her idea to use RCTIs because she was aware that the Attaché programme had a capacity to generate such invoices (of which she was aware). I accept that she may have raised the matter, but clearly the decision to proceed with the use of RCTIs was made by the directors.

495 Ms Booth said that the process of Concrete Supply issuing RCTIs involved the following:

(1) Ms Booth would use the delivery dockets and price increase letters to calculate the amount owing to ABCL for product it supplied to Concrete Supply;

(2) Concrete Supply, through its Attaché programme, would generate an invoice with respect to the product supplied to it;

(3) although the invoice contained a notation that it was an invoice from ABCL, initially the invoice at the top had the words, "Company Name". This changed some time in 2015 and ABCL's name appeared on the top of the invoice. Ms Booth was told by somebody at Concrete Supply that ABCL had requested this change;

(4) Ms Booth would write cheques, having regard to the amounts in the RCTIs, again trying to group the invoices into amounts totalling about $50,000. The cheques were stapled to the relevant RCTI, placed in envelopes and then the envelopes were placed in the safe; and

(5) the process added to Ms Booth's work in that she had to enter details from the delivery dockets into Attaché and she was required to carry out reconciliations with invoices or statements of account from ABCL.

496 No-one from ABCL questioned the use of RCTIs with Ms Booth.

497 Ms Booth agreed that from time to time she used the price for cheaper cement even though more expensive cement was being supplied. Sometimes that was because of instructions from Rino or Jason. On other occasions, it was because she did not have time to do otherwise.

Mr Albert D'Alessandro

498 Mr D'Alessandro has practised as an accountant since about 1975. He is a Certified Practising Accountant. As I have already said, he commenced working on a contract basis with Concrete Supply in July 2013 and became a full time employee in November 2013. He resigned as a full time employee with effect from 22 December 2017 and, since January 2018, he has been providing financial and accounting consultancy services to Concrete Supply on a contract basis. Mr D'Alessandro was not an employee of Concrete Supply at the time of the March 2009 Statement of Account or the March 2012 Statement of Account, or the decisions made concerning the system involving the RCTIs. The system involving the RCTIs, which he described in his evidence, was operating when he joined Concrete Supply.

499 Mr D'Alessandro was an honest witness. He gave frank evidence in cross-examination about his concerns with the discount or rebate arrangement.

500 Mr D'Alessandro described the structure of the three companies, Concrete Supply, Mantina Earthmovers and Mantina Investments. He said that each company was owned by the same three shareholders, Rino, Jason and Tina. The customers of Concrete Supply and Mantina Earthmovers include a mixture of large corporate businesses, governments and local councils, construction businesses and individuals. Concrete Supply has about 30 to 35 employees at any one time and Mantina Earthmovers has approximately 35 employees. Mantina Earthmovers supply aggregate and manufactured sand to Concrete Supply. Mr D'Alessandro said that the trading relationship between the three companies is undertaken on commercial terms. For example, when Mantina Earthmovers sells aggregate and manufactured sand to Concrete Supply, it invoices Concrete Supply at a price that is a little below the market, but benchmarked to it. About two years ago, Mr D'Alessandro was involved in a review of the

price charged between Mantina Earthmovers and Concrete Supply. The outcome of that review was to increase it in line with his assessment of the market. I accept this evidence at a general level. However, it does not obviate the need to examine the circumstances surrounding the substantial reduction in the Mantina Earthmovers' debt between September 2017 and November 2017. Mr D'Alessandro also said that Mantina Earthmovers pays a royalty to Mantina Investments for the materials it extracts from the quarry.

501 Mr D'Alessandro said that from his observations, Rino and Jason conduct the business and he reports to them on financial and management issues. Generally, he does not deal with or report to Tina on financial or management issues. His observations are that Tina comes into the office each day, although she is not involved in the direction or operational management of the business. She purchases office supplies and cleans the office on Saturdays. She is paid approximately $15,000 per annum for this role. To the best of Mr D'Alessandro's knowledge, Tina does not have any direct interaction with customers or suppliers of either Concrete Supply or Mantina Earthmovers. He is not aware of her having any business dealings with them. Rino and Jason are paid salaries for the work they do. They do not receive directors' fees.

502 Mr D'Alessandro said that Mantina Investments is the landholding entity for the family businesses. It holds some land which is not used in connection with the concrete and earthmoving businesses. That land includes farming properties located on Killarney Road and East Terrace in Kapunda. The property at Killarney Road was acquired in 2017. The farming properties generate share farming income from farmers who use the land.

503 Tina owns the Pooraka property. At the time the administrators were appointed, Concrete Supply paid Tina rent of $10,000 per month plus GST. In February 2018, the rent payable by Concrete Supply to Tina was increased to $12,250 per month plus GST.

504 As I have said, Tina also owns a vineyard at Rosedale in the Barossa Valley. She manages the vineyard which produces and sells shiraz grapes.

505 Mr D'Alessandro was aware of Concrete Supply's banking arrangements with its banker, NAB. Mr D'Alessandro outlined the securities which NAB holds.

506 In January 2018, Rino and Jason each lent money to Concrete Supply to assist it with cashflow after the loss of the overdraft. Rino lent approximately $280,000 and Jason lent approximately $170,000 to Concrete Supply.

507 Mr D'Alessandro prepares annual financial statements for the three companies as part of his role. He does so with the assistance of the external accountant for the businesses, Mr Tull. Mr Tull prepares the relevant tax entries and he sets them out in the accounts to produce the financial statements.

508 Mr D'Alessandro said that there are loan agreements in place for some of the related party loans between Mantina Investments, and Concrete Supply and Mantina Earthmovers. He produced a loan agreement dated 30 June 2014 between Concrete Supply as lender and Mantina Investments as borrower.

509 Mr D'Alessandro said that Concrete Supply's taxation payments and superannuation contributions were up to date as at the time Concrete Supply entered administration. The ATO proved as a creditor in the administration of Concrete Supply.

510 Mr D'Alessandro said that he was initially engaged on a temporary basis to cover the role of Ms Senanayake while she was on maternity leave. His initial role was more in the nature of bookkeeping work. Ms Booth was managing accounts payable and receivable, and Ms Collins was managing payroll. They each handled the entry of invoices and payments into Attaché, while Mr D'Alessandro focused on reconciliations and other work.

511 Mr D'Alessandro said that Mr Tull mainly undertook the company's tax work, including the preparation and lodging of BAS, Fringe Benefits Tax and income tax returns. Mr D'Alessandro undertook the "grunt" work and Mr Tull reviewed his work and prepared tax lodgements.

512 Mr D'Alessandro described the Attaché software programme as the company's financial books and records and he said that it produced profit and loss and balance sheets. He described how it can be used to generate a number of financial reports.

513 Mr D'Alessandro prepares monthly management reports in Excel. The information in those reports is taken from Attaché. He reports financial results on three levels, being profit and loss, balance sheet and cashflow. Changes in the balance sheet drive the cashflow.

514 For each of these three levels, both actual performance and a forecast are provided. The amounts for actual performance year to date are taken from the financial information reported in Attaché. There is no forecast in the June reports as that is the last month in the financial year. The management reports also include a comparison of year on year results.

515 Mr D'Alessandro is interested in business analytics and forecasting. When he commenced work full time with Concrete Supply, he developed a forecast model using Excel which he incorporated into monthly management reports. Mr D'Alessandro said that he provided hard copies of the management reports to Rino and Jason respectively. He did not provide a copy of the monthly management reports to Tina.

516 A monthly management meeting was held each month in the boardroom at the Pooraka property. Tina does not attend the meetings. They are not formal affairs. Mr D'Alessandro said that he spoke with Rino and Jason every day. Mr D'Alessandro said that Concrete Supply wrote back unpaid cheques to ABCL approximately eight to ten months after they were issued. He knew exactly the value of the cheques which were to be written back over that time frame. He entered what he called the ABCL rebate manually based on his knowledge of unpresented cheques.

517 As to the rebate or discount, Mr D'Alessandro said that he did not manage or get involved in the commercial relationship between ABCL and Concrete Supply until 25 October 2017. He has no direct knowledge of whether rebates or discounts were offered or agreed, or even discussed, with representatives of ABCL.

518 Mr D'Alessandro said that when he started his role and was undertaking the bank reconciliations, he could see that there were significant balances of unpresented cheques. He said that he recalled first learning about the rebate with ABCL in about November 2013 when he was developing the monthly management reports and forecasting model. The rebate was an issue in preparing the management reports and he had to work out how to report the cost of supplies. He asked Rino and Jason about the arrangement with ABCL. He needed to understand the arrangement so he could determine how to account for it. He said that purchases from ABCL were a major expenditure item and Concrete Supply was withholding cheques that had been written out to ABCL. He said that he needed to understand the arrangement to effectively manage and report the income and expenditure of Concrete Supply.

519 At first, Rino provided the main explanation of the rebate. However, he had a number of discussions with Rino and Jason over the first few months after he had learnt of the rebate and was working on developing the management reports and forecasting model. He said that he had a clear recollection of what was discussed, but as there were several discussions close together, he could not recall exactly when or in which discussion the matters he gave

evidence about were said. He said that they were all said across a course of discussions in late 2013 and early 2014. The explanation provided by Rino and Jason was as follows:

(1) in 2012, ABCL processed credits of about $600,000 as a deduction off Concrete Supply's statement balance;

(2) this equated to a 30% discount or rebate;

(3) the discount was ABCL's way of rewarding a loyal customer like Concrete Supply, but in a way that ensured it was confidential and could not be revealed to the marketplace in general. ABCL did not want the market to be informed of the way it was giving discounts;

(4) ABCL did not want to be seen to be giving favourable discounts to Concrete Supply and therefore ABCL's way of rewarding Concrete Supply was to take it off the statement balance;

(5) Concrete Supply was still writing back that credit in its accounts at the time of these discussions, as it was too large an amount to write back to profit in one go; and

(6) it was not the first that this had happened because in 2009 there was a deduction of about $500,000 and this discount or rebate also equated to about 30%.

520 Mr D'Alessandro was shown the statements and workings for the 2009 and 2012 discounts respectively by Rino and Ms Senanayake.

521 Mr D'Alessandro was also told by Rino and Jason that ABCL had stopped issuing invoices to Concrete Supply earlier in 2013 and that the company had overcome the lack of invoices from ABCL by issuing RCTIs to ABCL for cement purchases. They told Mr D'Alessandro that Concrete Supply was paying approximately 70% of the RCTIs by value and taking the remaining 30% as a rebate. They told him that it was doing that by preparing RCTIs and drawing cheques for all purchases of product, but only sending to ABCL cheques that were drawn against selected RCTIs which came to a value of about 70% of total purchases. Mr D'Alessandro was informed that this process started just before he joined Concrete Supply and that the business was still gradually writing back the approximately $600,000 discount it received in March 2012. Mr D'Alessandro was told that Concrete Supply wished to write back the $600,000 over time to avoid a spike in profit and that all of this amount had to be written back before the more recent unpaid invoices could be written back in Concrete Supply's accounts. Mr D'Alessandro said that as a result, Concrete Supply was writing back cheques and RCTIs for purchases from ABCL about eight or nine months after they were

generated by it. That continued through to when the administrators were appointed. When Concrete Supply entered into voluntary administration in November 2017, there were still cheques from 2016 that had not been presented to ABCL or written back in Concrete Supply's accounts.

522 Mr D'Alessandro said that when he was first advised of this process, he assumed that there was an agreement in writing to support what Concrete Supply was doing. He asked Rino and Jason about this, but was told that there was no such agreement. He said that he had never seen an arrangement like the one that had been described to him and that during the course of a number of conversations in the first few months after he learned of the rebate, and during the period in which he was preparing the management reports and forecasting model, he said to both Rino and Jason words to the following effect:

> 1. it is a little bit unusual, this arrangement;
> 2. we are dealing with a public company where an arrangement with a certain level of management would need to be in writing, because unlike family companies a lot of managers leave. If that manager leaves Adelaide Brighton, that discount could disappear; and
> 3. even if the arrangement is confidential, you should have a confidential letter that you can pull out of your drawer and say, 'here's the 30%'.

523 Rino and Jason would typically respond to Mr D'Alessandro's statements with words to the effect that he should not worry, that ABCL loved Concrete Supply and that ABCL would have told the directors if it did not want them to continue with the RCTI arrangements. He said that Rino also said words to the effect that because ABCL had stopped sending statements and invoices, he and Jason had decided to adopt the approach of paying about 70% of the value of the RCTIs to ensure that what he described as loyalty rebates continued to be received. Mr D'Alessandro also became aware that there was no formal agreement between ABCL and Concrete Supply to allow Concrete Supply to issue RCTIs. He said that he did not push the issue particularly hard at the time as he was new to the business and to the concrete industry and Rino and Jason had worked in the business for 30 years. He said that although he did not necessarily want to see a signed contract, he believed that Concrete Supply should have something in writing to acknowledge the discount in order to avoid a dispute or a loss of the discount if there was a change of personnel at ABCL. He could see a risk that if the manager at ABCL changed, the arrangement could come to a grinding halt. He had seen the impact of poorly documented arrangements on businesses and he thought Rino and Jason needed to manage that risk.

524 Mr D'Alessandro said that on a number of occasions Rino had said to him words to the effect of "Adelaide Brighton love us. If we were doing something wrong, they would have told us. We have been doing this for years".

525 Mr D'Alessandro said that in his discussions with Rino and Jason over time, they said words to the effect that the concrete industry operated with a high degree of confidentiality and was very secretive in order to ensure that deals could not be discovered by others in the market. Again, because Mr D'Alessandro had not been in the industry very long, and Rino and Jason knew the industry so much better than he did, he generally deferred to them.

526 Mr D'Alessandro said that when making a decision about which cheques to release and which to withhold, he would generally look at the last three or so cheques for a month and try to find an amount that equated to about 30% of the total account for the month. He would often do this with Rino and Jason at a monthly management meeting where the three parties would review the daily cash position report, which included a list of cheques to be presented. They would run down the list and discuss which cheques to withhold from ABCL. Rino would generally nominate the cheques to withhold to reach the 30% target. Mr D'Alessandro said that it was never exact because the cheques were in varying amounts. From month to month it might be a bit more or a bit less. He tried to get close each month, but if he was a bit out he was not so concerned provided the longer-term average of withheld cheques was about 30%.

527 Mr D'Alessandro said that Concrete Supply did not generate credit notes for the RCTIs and cheques that were not presented to ABCL. They applied the credit through direct entries into the accounting system.

528 Mr D'Alessandro produced a list of the cheques which Concrete Supply held at the time the administrators were appointed. The company was still holding cheques written as far back as August 2016.

529 Mr D'Alessandro records the rebate or discount in the monthly management reports under the line item headed "Expendable Stores". That expression has no particular meaning in connection with the rebate. The practice of using the expression "Expendable Stores" started in about 2015.

530 Mr D'Alessandro explained that Concrete Supply accounts for the rebate for the purposes of the GST. BAS are prepared on the basis of all RCTIs that have been generated by Concrete

Supply during the reported period and not written back. When the rebate is written back, Concrete Supply repays the input tax credit that was previously claimed. Write-backs occur monthly, but BAS are lodged quarterly. Consequently, each quarter there is a credit to the ATO for input tax credits previously claimed. Mr D'Alessandro said that he was generally trying to withhold cheques equal to 30% of purchases over the long term. He did not maintain a separate worksheet to calculate the long term average rebate. It was a calculation he performed from time to time. It was a fairly easy calculation to perform with reference to the cheque reconciliation schedules maintained by the business which tracked the cheques that had been written for ABCL and then written back. Mr D'Alessandro described the change on the heading of the RCTIs from "Attache Company Name" to the name of ABCL. He said that in early 2015, somebody from the accounts receivable section of ABCL telephoned Concrete Supply to discuss the RCTIs. The call was put through to Mr D'Alessandro. He could not recall the woman's name, but she said words to the effect of:

> Could you change the company name on the RCTI to "Adelaide Brighton Cement Limited" and also add the address of Adelaide Brighton?

531 Mr D'Alessandro agreed with that request. He did not say anything about a lack of an RCTI agreement. He subsequently made arrangements for that change to be made. He believes the telephone call was made in early 2015. Mr D'Alessandro agreed that it could have been Ms Burgess who rang and requested a change in the heading of the RCTIs.

532 Mr D'Alessandro had very limited business dealings with ABCL prior to 25 October 2017. From his observations, Jason handled the relationship between Concrete Supply and ABCL, and would regularly meet with ABCL's relationship managers. He saw Mr Niarchos and Mr Plunkett at the Pooraka property. He met Ms Burgess on one occasion at a Kemps Builders Bureau meeting. He said that he joined Kemps in late 2014 and that he recalled that he met Ms Burgess at either the first meeting that he attended in 2014, or perhaps the second meeting he attended in February 2015. He described meetings of Kemps Builders Bureau as a forum for credit managers of businesses in the building and construction industry to meet and exchange notes on which creditors were overdue or performing poorly. He went to a few meetings, but he does not recall seeing anybody else from ABCL. He had no discussions with Ms Burgess about the business relationship between ABCL and Concrete Supply. He recalls Ms Burgess making a complimentary remark to the effect that the frequency of Concrete Supply's payments had improved.

533 Mr D'Alessandro said that he had no discussion with anyone at ABCL about increasing Concrete Supply's credit limit. He said that during his time with Concrete Supply, the company was always paying ABCL at about the 90 day mark. The company never paid within 30 days in the time he was there. Nobody from ABCL ever contacted him to say that Concrete Supply needed to bring its account down to 30 days. He can recall an event in 2015 or 2016 when he heard Mr Niarchos say to Jason words to the following effect:

> Just make sure your account is under 90 days.

534 Mr D'Alessandro said that he attended a series of meetings between representatives of ABCL and Concrete Supply on 25, 26, 27 and 31 October 2017 and was involved in other related communications with representatives of ABCL in early November 2017.

535 Mr D'Alessandro was asked about the warnings he gave to the directors concerning the discount or rebate. He agreed that the arrangement appeared to him to be very unusual. He agreed that he warned the directors that there were risks associated with not having a written record of the arrangement. He agreed that he gave those warnings on a number of occasions and he said that it was his job to give advice. He said that whether the directors liked it or not, it was his obligation to give advice. He said that he was told not to worry because there was an arrangement. He gave the following evidence:

> … I was told not to worry because if we were doing something wrong they would have told us by now. And this was, like, 2015 or whatever, 2014. We had been doing it for a number of years. They – they always go back when I questioned them – and I questioned them quite a lot about it. I put a lot of pressure on them. They said, "Look, if we were – we've been doing this for years now. If there was – Adelaide Brighton love us. They want us to grow. If there was anything wrong they would have told us by now. If they haven't told us, just keep doing what we're doing. We're okay." So it's unusual. Yes, it is very unusual but the way that the – that industry is and the time that I've been in there, I – I just called it, my term, secret cement business. And I said, "Well, it's – it is an unusual scenario that we were in." And every – the way they – the boys, Rino and Jason, described it is that the concrete cement – the concrete business or the cement business is highly secretive. The only way that they wanted to keep arrangements of discounts with suppliers to make sure it didn't get out to the general public, because this is the way they will take it out. They will take out lumps here and lumps there. And everything to me at the time seemed deliberate. 2009, 2012, 2013 they stopped sending invoices and statements. We take up their job. So, okay, I wasn't there when it happened. We started doing RCTIs. Now, I know RCTIs have got to have arrangements in place but that was well in train by the time I got there. So, I mean, there's so many pitfalls in this – in this relationship. It's – but it's all based around this secrecy of the business. And so I just accepted that.

536 A little later, he gave the following evidence:

> MR LIVESEY: What you've described as deliberate, being 2009, 2012, and so

> forth?
>
> THE WITNESS: Yes, that's right.
>
> MR LIVESEY: You didn't think that these were deliberate things at the time you first saw them, did you?
>
> THE WITNESS: When you say "deliberate things", I – I'm a person that has come in cold. I see Adelaide Brighton and I – I don't know anything about anything else. I see in – they make a deliberate $600,000 deduction in 2009 – sorry, 500,000 in 2009. A deliberate one in 2012. And then the stopping of supply – the stopping of invoices and statement in early 2013. They all seemed deliberate steps. Now, for a – if I'm looking at it and I'm thinking, "Well, okay, this is Adelaide Brighton. Surely there wouldn't be" – in terms of malice or something happening, deceptive conduct within Adelaide Brighton, that would never, ever come into my mind because Adelaide Brighton's in the top 200 in – at – in the stock exchange and governance is totally unquestioned. And the boys didn't question their governance processes as being an issue.

537 Mr D'Alessandro recognised that the lack of written confirmation of the agreement was a potentially existential threat to the business and he told the directors that they needed to have the arrangement recorded in writing.

538 Mr D'Alessandro agreed that he spoke to Mr Lemmon in late October 2017 and said words to the effect that he had told the directors that what they were doing was not right. He told Mr Lemmon that he had told the directors that they needed to have the paperwork, but that they did not get it. Mr D'Alessandro said that he told Mr Lemmon that the directors had in effect fobbed him off by saying that ABCL loved them and that he had warned them that this should be a major concern for them and it would come back on them one day. He agreed that they were things that he had said to the directors and that he had done so on many occasions. He said that that was his job. He said that he could only defer to Rino and Jason as owners of the business who had a commercial relationship with ABCL since 1988. He said, "You reckon there would be some sort of arrangement there somewhere".

539 Mr D'Alessandro was told by Rino and Jason that the arrangements with ABCL were secret. He said that they were "definitely were in that secret men's – secret cement business". He agreed that he was given the very clear message that he was not to make contact with ABCL about the "secret cement business". He deferred to Rino and Jason.

540 Mr D'Alessandro was questioned about the deletion of the 30 days from the RCTIs when the RCTIs were altered to include ABCL's name. I accept his evidence on that point that that was an oversight.

541 Mr D'Alessandro was asked why he did not raise the unusual features of the arrangement between ABCL and Concrete Supply with ABCL. He gave the following evidence:

> MR LIVESEY: Can I suggest to you that the reason you didn't follow up the telephone call about the RCTIs or Ms Burgess at the CEMS meeting was that you were fearful that if you raised any of these issues she would turn around and say to you, "What are you talking about?"?
>
> THE WITNESS: Not really.
>
> MR LIVESEY: That's what happened, isn't it, Mr D'Alessandro?
>
> THE WITNESS: No, not really, no.
>
> MR LIVESEY: You didn't want to raise these matters openly with your employers because you feared that they would give you an answer that wasn't satisfactory?
>
> THE WITNESS: This is all hearsay. That's not the way it happens in those meetings.
>
> MR LIVESEY: You didn't raise it with Ms Burgess?
>
> THE WITNESS: No, I didn't.
>
> MR LIVESEY: Because you likewise feared what she might say and reveal what you suspected, namely, that there wasn't any authority to do any of this?
>
> THE WITNESS: But if that's the case, she knew too. So why – why is it all – why is all your cross-examination one way when she was there, she could have actually told me what was going on as well. She didn't. I didn't. We just left it at that. We parted ways.
>
> MR LIVESEY: Is what I put to you the reason you didn't raise these matters or not?
>
> THE WITNESS: Probably, yes.
>
> MR LIVESEY: You recognised that what was going on was just too good to be true, didn't you?
>
> THE WITNESS: It was an unusual transaction that seemed to have a substance and a basis.
>
> MR LIVESEY: You recognised that it was unlike anything you had ever seen and it just didn't make sense. That's why you kept raising it with the directors?
>
> THE WITNESS: It was an unusual – it was an unusual thing. Yes. I agree. I found it unusual.
>
> MR LIVESEY: You found it safer to simply go along with it and say nothing, didn't you?
>
> THE WITNESS: I went along with – I – my responsibility is to the directors. The directors had the interaction with Adelaide Brighton. I didn't know anybody at Adelaide Brighton. I left all – I deferred all the management of the relationship with Adelaide Brighton, whether it be financial or production-wise with Rino and Jason, and that's where it stopped for me.
>
> MR LIVESEY: You recognised that there was something deeply wrong about this, but you also recognised that it was for the directors to deal with it, and not you?

THE WITNESS: That's right.

Mr Graham Tull

542 Mr Graham Tull is a chartered accountant and a chartered tax advisor. He is 76 years old. He commenced working as an accountant in 1968 and established his own practice in 1975. He was previously an air engineer. He currently works in a sole practice and he provides accounting services to small and medium businesses, predominantly in engineering or businesses working with machinery.

543 Mr Tull's recollection of conversations and events was general rather than precise. He was generally a satisfactory witness and, subject to one qualification, I accept his evidence. The one qualification is that I consider that Mr Tull agreed in cross-examination that evidence he gave in his affidavit about whether Tina performed administrative duties was wrong.

544 Mr Tull has had a long association with the Obbiettivo family. In 1978, Manfredo and Tina were in partnership operating a small earthmoving business, Mantina Earthmovers, in Norwood. Mr Tull had an office on Norwood Parade and they engaged him as their accountant. Mr Tull set up Mantina Earthmovers in or about 1982. He also set up Concrete Supply in 1989. Mr Tull was aware of the purchase of the quarry at the Kapunda property. Mr Tull is familiar with the company structure. He said that Mantina Investments is the trustee of the Mantina Investments Unit Trust. He said that that trust is a hybrid trust, being a mix between a unit trust and a discretionary trust. There is no fixed entitlement or interest to beneficiaries and distributions can be made at the discretion of the trustee. The trust owns the property at Kapunda, being a quarry site and other rural land, and the industrial land at Two Wells. The trust earns royalties from the quarry which is operated by Mantina Earthmovers. Mantina Earthmovers also owns the equipment. Mr Tull identified the intercompany loans within the group of companies.

545 As the external accountant, Mr Tull is involved in the preparation of the end of year financial statements for all entities in the group based on information provided to him by Concrete Supply's internal accounting staff. He is also responsible for preparing and lodging taxation returns, including income tax, Fringe Benefits Tax and BAS. The BAS are prepared from information supplied by the staff at Concrete Supply. In addition to these tasks, Mr Tull also deals with queries raised by telephone by persons employed by Concrete Supply. These queries may relate to a variety of matters, including taxation issues, royalty and rent payments, and end of year adjusting entries such as entries showing interest, loan repayments

and dividends paid. Mr Tull said that ordinarily he dealt with Rino and Jason, or the internal accounting staff. He did not speak to Tina about business issues. Mr Tull said that Concrete Supply has always employed internal accounting staff and the qualifications of those staff have improved. Mr D'Alessandro is a fully qualified accountant who has been employed by the company for approximately five years. Prior to Mr D'Alessandro's employment, Ms Senanayake was in charge of financial administration. She is a Sri Lankan qualified chartered accountant.

546 Mr Tull said that Concrete Supply is a small proprietary company and is not required to have an audit done of its accounts. He said that Mr D'Alessandro prepares monthly financial reports for the company and its associated company. The companies are required to report quarterly by the bank in connection with covenants under the loan agreements. Mr D'Alessandro has also set up cashflow and forecasting systems for the business in spreadsheet form.

547 Mr Tull said that in connection with ABCL's allegation that Concrete Supply may have purchased materials from Mantina Earthmovers at inflated prices, he had always advised Concrete Supply never to transfer anything at above market price between group companies. He believes that Concrete Supply followed that advice. His understanding is that, for a time, Concrete Supply was not even paying the market rate for product from Mantina Earthmovers.

548 Mr Tull referred to the remuneration paid to Rino, Jason and Tina. In 2015, Mr Tull suggested that Concrete Supply restructure Tina's remuneration to reflect a commercial rent payment for the Pooraka property and a smaller wage for the work she continued to do in the business. He said that Tina is 83 years old, but still came to the Pooraka property and did administrative tasks and the cleaning. In 2016 and 2017, Tina received wages of approximately $16,000 to $17,000 per annum. Tina also received dividends of between $14,000 and $20,000 per annum and did not receive any director fees. Mr Tull said that her dividends reflected her shareholding in the company.

549 Mr Tull produced the Memorandum of Lease between Tina and Concrete Supply dated 30 June 2015. The annual rent specified in the agreement is $132,000 plus GST. Mr Tull said that the parties entered into a new lease recently in connection with the purchase of a small strip of land adjacent to the Pooraka property from the Department of Planning, Transport and Infrastructure. He produced a copy of a Memorandum of Lease dated 8 February 2018 under which the annual rent payable to Tina is $161,700.

550 Mr Tull did not know very much about the rebates Concrete Supply was receiving from ABCL. He said that as far as he was concerned, the directors managed pricing and the price for product supplied was the price. He is unable to say when he first became aware of the rebates, other than that it would have been no later than 2009. He recalls a discussion with the directors prior to Mr D'Alessandro starting with the company about Concrete Supply being able to meet the market with prices offered by ABCL. He also recalled discussions with Ms Senanayake about accounting entries. After Mr D'Alessandro started, he believes that conversations about the rebates occurred internally and that he was not usually a party to them. Mr Tull produced a document headed "ABC Ltd Reconciliation" dated 2 April 2009 which recorded journal entries in connection with rebates. He referred to the fact that this document contains a note about having a meeting with him to go through this and the fact that he agreed with "this calculation". He did not specifically recall the meeting, but he said that it was consistent with the types of queries Ms Senanayake would ask him at about this time with regard to "debits and credits" and accounting for tax. He said that he recalled a discussion with Ms Senanayake about rebates in relation to an issue Mr D'Alessandro was having in accounting for GST and the impact on cashflow in accounting for product received and then accounting for the rebates.

551 Mr Tull said that in 2012, Concrete Supply sought his advice in circumstances where ABCL had stopped sending invoices. He advised Concrete Supply that it could create RCTIs, but that this would have to be agreed to by both parties. He recalls from his discussions with either Ms Senanayake or Ms Booth that Concrete Supply decided to issue RCTIs, not only to provide ABCL with payment information, but also in order that Concrete Supply had a way to claim GST on its purchases.

552 Mr Tull was on a retainer of $2,000 per month with Concrete Supply. He said that the arrangement whereby he was put on a retainer was because of the difficulty that Concrete Supply had sometimes in meeting his final bill. Concrete Supply would pay the bill in advance and they had a credit. Then when Mr Tull did the work at the end of the year, Concrete Supply did not receive such a large bill, if indeed it received a bill at all. He agreed that a large bill at the end of the year might cause difficulties. Mr Tull agreed that the advice which he provided to Concrete Supply was not limited to "pure accounting work" and included matters relevant to ensuring that commercial rates were charged within the group. It also included questions raised by him or by the directors from time to time. Mr Tull agreed that the matters he discussed with Rino on 4 November 2017 included the role of a liquidator,

the investigations which would be undertaken by a liquidator, the potential for a liquidator to commence actions against the directors, amongst others, and the potential for the liquidator to call up intercompany loans. Mr Tull's recollection was that at the time the intercompany loan was $2.3 million. Mr Tull gave advice that any invoices rendered to Concrete Supply by Mantina Earthmovers needed to involve a commercial arrangement and be supported by evidence. Mr Tull assumed that the material provided by Mantina Earthmovers to Concrete Supply was aggregate. Mr Tull could not remember when the conversation took place. He thinks the conversation occurred when consideration was being given to putting the company into administration. Mr Tull said that as far as his retainer of $2,000 per month was concerned, his accounts are issued to Concrete Supply and that company has an internal allocation between Mantina Earthmovers and Concrete Supply.

553 Mr Tull attended a meeting involving NAB and a meeting involving Bank SA. He was shown the emails from Mr Hagan of Bank SA dated 6 December 2018 and 13 December 2018 respectively. Mr Tull agreed that he was asked to provide information which would be provided to the finance broker who, in turn, would provide it to Bank SA. Mr Tull recalls attending a meeting involving Hanson and the possibility of a joint venture between Hanson and the Mantina Group being discussed. That meeting occurred before the appointment of the administrators. There was discussion about the creation of a joint venture entity or vehicle. There was discussion to the effect that the Mantina Group would bring product and expertise to that vehicle and Hanson would contribute cash. The cash was going to be used to deal with the ABCL debt. Present at the meeting were Rino, Mr D'Alessandro and Mr Tull. Mr Tull was unsure as to whether Jason was at the meeting. Mr Tull agreed that in very broad terms, during the first half of November 2017, the Mantina Group were exploring the possibility of obtaining finance to pay out the ABCL debt. In the result, finance was not forthcoming.

554 Mr Tull attended three meetings at which Mr Cantone was present. Two were before the appointment of the administrators. It was Mr Tull who had suggested that the directors contact Worrells, and in particular, Mr Cantone.

555 Mr Tull recalled that generally, at the first meeting with Mr Cantone, the basics of the Mantina Group were conveyed to Mr Cantone. He identified his own handwriting was part of the group structure shown on one of the documents in the administrators' working papers. At the time he made the note, his understanding was that the debt owed by Mantina

Earthmovers to Concrete Supply had been reduced to $1.2 million and he had been told about the invoicing which had taken place between Mantina Earthmovers and Concrete Supply. He did not review the invoices at the time. Mr Tull said that he had been shown by the directors some material about commercial rates a long time ago. Mr Tull said that he emphasised to Mr D'Alessandro that the rate should not be non-commercial. He agreed that in November 2017, he did not know the prevailing commercial rate. Mr Tull agreed that a sum of money in the order of $2 million to $2.5 million might have been mentioned at the first meeting with Mr Cantone. Mr Tull agreed that he might have said at the first meeting with Mr Cantone that the assets of the group might be worth something in the order of $20 million.

556 The second meeting with Mr Cantone took place on 13 November 2017. Rino, Jason, Mr D'Alessandro, Mr Tull and Mr Cantone were present. The discussion centred on the fact that the directors wished to consider voluntary administration. There was discussion at this meeting, or the earlier meeting, about a dispute concerning what was described as a rebate. Mr Tull could not recall Mr Cantone saying that a voluntary administration with a DOCA was the best option, although he agreed that that was the effect of what Mr Cantone said. Mr Tull recalled that at the second meeting with Mr Cantone on 13 November 2017, it was stated that there would be a meeting of the directors and an appointment made on the following day.

557 Mr Tull was taken to the two lease agreements and asked to compare the rent paid under each of those agreements with the McGees' valuation. Mr Tull was not a party to any conversation between Rino and Jason on behalf of Concrete Supply, and Tina as landlord in connection with either the 2015 lease or the 2018 lease. Mr Tull agreed that objective verifiable evidence was not obtained before the execution of the lease in February 2018.

558 Mr Tull could recall the mention of rebates in 2009. He did not have a memory of Ms Senanayake asking to meet with him and he had no recollection of a specific meeting over the matter. He accepts that there was a conversation between him and Ms Senanayake and that she showed him various calculations which she had carried out. Mr Tull was shown Ms Senanayake's worksheet. Mr Tull agreed that he had checked that Ms Senanayake's calculations were correct. He did not check whether the "rebate was applicable". He had no information at the time about whether there was or was not any agreement concerning a discount or a rebate. Mr Tull was aware that Concrete Supply was receiving a rebate with respect to supplies by ABCL in the mid-1990s. He was not aware of the rebates coming to an end during the 2000 year, although his accounting work did not involve any accounting for

rebates after the year 2000. Mr Tull agreed that what was proposed by Ms Senanayake through her worksheet was the cancellation of cheques and this would require a correction to be made in respect of GST returns previously submitted and in respect of tax deductions claimed in relation to cement purchases. He agreed that that was necessary because the practice of Concrete Supply on receipt of a delivery docket was to enter into the records of the company the cement expenses at or about the time the cheque was prepared, signed and held. Mr Tull was aware that cheques were kept in the safe. Mr Tull agreed that there was a number of cheques which had not been processed through the bank account of Concrete Supply, but which had been made out to suppliers and not presented during the financial year. He was taken to a document and he agreed that the cheques had built up over time. He said that no-one at Concrete Supply told him about this practice, but it is something that he possibly observed in 2009. It was probably something he knew about when Ms Senanayake spoke to him. He agreed that cancellation of the cheques would have an effect on cashflow. He agreed that not paying suppliers for product that a company is producing and selling has a positive effect on cashflow. That comes about because the company is being paid for the product it supplies, but is not paying for the ingredients it obtains. Similarly, it affects the amount payable in respect of GST and income tax. Mr Tull agreed that the negative cashflow impact was brought to account in the financial year in which the reversal was actually effected and there was no correction of prior financial year returns. Mr Tull agreed that it was not his advice to leave the adjustment for GST for some later quarter into the future and it would not be in accordance with his advice to do that for cashflow reasons.

559 Mr Tull was asked about the March 2012 Statement of Account. He was also asked about the April 2012 Statement of Account. He agreed that the April 2012 Statement of Account appeared to correct the discrepancy in the March 2012 Statement of Account. He did ask about the entry of $381,000 in the April 2012 Statement of Account. He asked questions about that entry and he was told that Concrete Supply had not asked ABCL any questions about the entry. Mr Tull said that neither the March 2012 nor the April 2012 Statements of Account were brought to his attention in the middle of 2012.

560 As far as the topic of RCTIs is concerned, that first came to Mr Tull's attention in a telephone conversation with Ms Booth. Ms Booth told Mr Tull that Concrete Supply was not receiving invoices from ABCL. Mr Tull suggested that there was a method involving the use of RCTIs, but both parties had to be in agreement for that to occur. Mr Tull thought that that conversation took place a couple of months after ABCL stopped issuing invoices. Mr Tull

said that Mr D'Alessandro and Ms Booth both presumed that the female who made the call asking Concrete Supply to alter the heading on the RCTIs was Ms Burgess.

561 Mr Tull said that there needed to be a tax invoice in order for GST to be claimed. He was asked why he did not advise Concrete Supply to write to ABCL pointing out that it was not receiving invoices. He responded as follows:

> Well, Mr Livesey, there are two qualified accountants in there. If they can't sort of take that step themselves, well, then, how much nose-wiping do I have to do.

562 Mr Tull thinks that he told Mr D'Alessandro that the RCTIs needed to be agreed to by both parties. Mr Tull said he followed the issue up from time to time. He does not recall ever sending an email about the issue. The following exchange occurred in his cross-examination:

> MR LIVESEY: Isn't it something that required you to address very seriously the requirements of the GST ruling?
>
> THE WITNESS: Yes, but I also believe that Adelaide Brighton aren't exactly dealing with this properly either.
>
> MR LIVESEY: Yes. Is that something you said to your client at the time, is it?
>
> THE WITNESS: No. No. No. That wasn't given as an excuse, I'm just bringing it to your attention.
>
> MR LIVESEY: Why?
>
> THE WITNESS: Because I think it's getting a little one-sided.

563 There were no corrections made to any RCTIs as required by the GST ruling after the cheques had been cancelled.

564 Mr Tull expressed the opinion that Tina was probably not capable of understanding the nature of her appointment as a public officer under s 252 of the *Income Tax Assessment Act 1936* (Cth) in the latter years. He agreed that he did not have any conversations with Tina about the solvency declarations and what they meant. He did have such conversations with Rino and Jason. Mr Tull agreed that the RCTIs were an essential part of the mechanism because they "fed into" the quarterly BAS and the annual taxation returns. Without the RCTIs, Concrete Supply could not have made the disclosures required for BAS and income tax purposes. Mr Tull said in answer to a question to the effect that if there had been compliance with the GST requirements laid down by the ATO, none of this could have kept going, that he thinks that they (Concrete Supply) probably would have gone into liquidation in 2013, or, perhaps, earlier. He agreed that to a point what was happening was that Concrete Supply was

able to charge the full amount of its product without paying the full amount for its supply of cement.

565 Mr Tull said that he warned the directors in about October or November 2017 about the risks that they would confront in an insolvent trading claim and that the debts might add up to many millions of dollars. He agreed that they understood, based on what he had told them, that they might avoid an insolvent trading claim if a voluntary administration proceeded. Mr Tull said that he had had three conversations with Mr Cantone since his appointment in November 2017. Most of these conversations were in the convening period. Mr Tull attended the second meeting of creditors and he recalls that Mr Skip Lipman of Lipman Karas asked a question about the directors' capacity to meet insolvent trading claims. He recalls the administrators stopped the meeting for a time and went outside and spoke to the directors. He could not remember whether the administrators came back in and announced that the directors had the capacity to meet claims in the amount of about $2 million. He agreed that if that had been said, it would be inaccurate.

566 Mr Tull has never been asked to advise on the transactions which have had the apparent effect of paying down the Mantina Earthmovers' debt.

567 Mr Tull agreed that, with respect to the cheques found in the safe on the appointment of the administrators, those cheques represented amounts which had been processed through the accounts of the company as amounts paid by the company and were the subject of declarations in the BAS and the annual income tax returns. To the extent there may have been cancellations, there might have been a need to make payments to the ATO.

568 Mr Tull was asked about Mr Morris' analysis of Concrete Supply's financial performance between 2009 and 2017, assuming Concrete Supply was not entitled to the alleged discount or rebate. He agreed that if the analysis had been done year on year, the solvency declarations could not have been given. If it was recognised that there was no loyalty bonus or similar, the solvency declarations could not have been given during the years 2009 to 2017. Mr Tull said that Concrete Supply was charging market price to their customers and they would never have been able to get any more for their concrete. He said that they were meeting the market and had they had to pay ABCL what ABCL was saying it should have been paid, "well, then, they certainly would have been out of business a long time ago". Mr Tull did add this qualification in re-examination. He understood Mr Morris' analysis to be based on the assumption that there was an entitlement in ABCL to make a demand at an

earlier point in time, namely, not in October 2017, in respect of the outstanding debt. Mr Tull has not done an insolvency report in relation to Concrete Supply based on that assumption. He did not feel qualified to provide an expert opinion. If the assumption is made that there was an accumulating debt rather than a debt which existed at the end of the period in October 2017, he has not done an insolvency report on that assumption. Furthermore, he has not done an analysis of the ability of the directors to raise funds from related companies at earlier points in time.

Conclusion

569 Having considered the whole of the evidence, and for the reasons I have given, I am not satisfied that Rino and Jason had a genuine belief that Concrete Supply was entitled to the alleged discount or rebate. The claim in estoppel (and, insofar as it is pursued, of an agreement) fails. It is not necessary to consider the other elements of an estoppel. Concrete Supply was indebted to ABCL in the amount of $12,457,472.22 at the date the company was put into administration.

SECTION 286 OF THE CORPORATIONS ACT 2001 (CTH)

570 ABCL seeks a declaration that Concrete Supply failed to maintain adequate books and records in contravention of s 286 of the Corporations Act.

571 Section 286 is set out below (at [968]). As I explain in the context of considering Mr Heard's evidence, I do not accept his opinion that for a contravention of the section to take place there must be a severe absence of records. The failure to record a major liability of a company is a contravention of s 286 of the Corporations Act.

572 Concrete Supply's books and records correctly recorded the liabilities reflected in the RCTIs and calculated in accordance with the delivery dockets and price increase letters. The taking of the alleged discount or rebate to which it was not entitled meant that Concrete Supply's books and records did not comply with s 286 of the Corporations Act.

573 Subject to a more precise formulation, ABCL is entitled to the declaration it seeks.

MISLEADING OR DECEPTIVE CONDUCT AND UNCONSCIONABLE CONDUCT

Introduction

574 In its Originating Process, ABCL alleges contraventions by Concrete Supply of ss 18 and 20 of the *Australian Consumer Law* (Sch 2 to the *Competition and Consumer Act 2010* (Cth)),

and unconscionable conduct under the general law, and that the directors were involved in that conduct within ss 2, 236 and 237 of the Australian Consumer Law. In addition to declarations, the relief sought by ABCL includes damages.

575 There are two distinct aspects to ABCL's claim of misleading or deceptive conduct. The first allegation of misleading or deceptive conduct relates to Concrete Supply's response to the audit confirmation letter dated 2 December 2009 and Rino's execution of the letter. The terms of that letter are set out above (at [181]). The second allegation of misleading or deceptive conduct broadly relates to the failure to pay for product between March 2012 and November 2017 and is said to involve the directors acting dishonestly. In its submissions, ABCL referred to the first group of allegations as the 2009 Misrepresentation Case and the second group of allegations as the 2012 Misrepresentation Case. For convenience, I will use those descriptions.

576 ABCL's closing written submissions made it clear that the thrust of its case was misleading or deceptive conduct and not unconscionable conduct. There was a passing reference to unconscionable conduct in connection with the 2009 Misrepresentation Case (paras 190 and 206.1), but that was all. The Concrete Supply defendants submitted that, although ABCL opened on an unconscionability case under s 20 of the Australian Consumer Law in its written opening, it has not pleaded such a case. In those circumstances, no findings in relation to unconscionability should be made. Alternatively, no findings should be made on the evidence. I do not consider it appropriate to consider an unconscionability case. Although s 20 and the general law as to unconscionability is referred to in one of the claims for relief in the Originating Process, unconscionability is not pleaded in the Further Amended Statement of Claim (Statement of Claim) and nor was it the subject of any substantial submissions in ABCL's closing written and oral submissions.

577 ABCL's closing submissions also made it clear that the misleading or deceptive conduct case involved misleading or deceptive conduct by Concrete Supply and accessorial liability by at least Rino in relation to the 2009 Misrepresentation Case, and misleading or deceptive conduct by Concrete Supply and accessorial liability by Tina, Rino and Jason in relation to the 2012 Misrepresentation Case. I say at least Rino in relation to the 2009 Misrepresentation Case because it was not always clear whether ABCL was or was not saying that Jason and Tina were liable as accessories in relation to the 2009 Misrepresentation Case.

ABCL's Submissions in relation to the 2009 Misrepresentation Case

578 The key elements of ABCL's 2009 Misrepresentation Case are as follows.

579 First, Rino, on behalf of Concrete Supply, signed the audit confirmation letter which confirmed a balance of $971,210.70 in ABCL's favour as at 31 October 2009.

580 Secondly, Concrete Supply's accounts as at 31 March 2009 showed an outstanding balance owing to ABCL of $1,312,099.97. I note that that assertion is correct.

581 Thirdly, Concrete Supply's accounts as at the date of the audit confirmation letter (i.e., 2 December 2009) showed a balance of $1,296,893.73 as at 31 October 2009 for deliveries received, but not paid for, as at 31 October 2009. This included six cheques held by Concrete Supply and not yet cancelled totalling $360,315.88. I note that these assertions are established by the evidence of Mr Morris and are correct.

582 Fourthly, had Concrete Supply responded to the audit confirmation letter in a way that reflected its own books and records, the error or discrepancy in the March 2009 Statement of Account would have been detected and corrected and that not having occurred meant that ABCL lost the opportunity to investigate and rectify the error in the March 2009 Statement of Account and ensure Concrete Supply paid its accounts in full.

583 Fifthly, Rino procured or was directly or indirectly knowingly concerned in the contravention. As I have already said, it is not clear whether a similar allegation is made by ABCL against Jason and Tina in relation to the 2009 Misrepresentation Case. They, after all, did not sign the audit confirmation letter.

584 Sixthly, Rino's involvement in the contravention is established by the following matters:

(1) Rino (and Jason) were responsible for the decision to cancel the cheques prepared for the payment of invoices which were omitted from the March 2009 Statement of Account;

(2) Rino (and Jason) made a deliberate decision not to raise the "error" in the March 2009 Statement of Account; and

(3) Rino (and Jason) knew that Concrete Supply was required to pay for cement purchased from ABCL at the price stated in the price increase letters in accordance with the BSA, or in the alternative, in accordance with the general conditions incorporated in the annual price increase letters.

585 Seventhly, Rino (and Jason) benefited from Concrete Supply's misleading or deceptive conduct through the receipt of wages, dividends, loans and rent directly and through their related companies. It is certainly the case that Rino (and Jason) received wages and dividends from Concrete Supply.

586 Eighthly, the cause of action under s 18 of the Australian Consumer Law accrued on 14 November 2017 when ABCL's loss crystallised upon Concrete Supply being placed into administration in circumstances where ABCL's debt had not been paid and was subject to compromise by a dividend to be paid under a DOCA or in a liquidation. In those circumstances, the Concrete Supply defendants' plea that the cause of action is beyond the statutory time limit of six years and, therefore, statute-barred should be rejected. ABCL relies on *Wardley Australia Ltd v Western Australia* [1992] HCA 55; (1992) 175 CLR 514 (*Wardley*).

587 Ninthly, ABCL claims that the fraud in claiming the alleged discount or rebate would have been exposed had Concrete Supply informed ABCL through PricewaterhouseCoopers (PwC) that the account balance did not match and that the sum of $529,423 had "gone missing" from the 2009 March Statement of Account. Instead, the fraud continued, so ABCL contends, resulting in the circumstance that Concrete Supply did not pay for $10,622,574 worth of cement it received between March 2012 and November 2017.

588 Tenthly, ABCL's loss as a result of the misleading or deceptive conduct comprising its 2009 Misrepresentation Case is the amount of $12,457,472.22 or, in the alternative, $10,622,574. ABCL submitted that the matter can be analysed in any one of three ways, all of which lead to the same result. One approach is to take the market price of the goods ABCL delivered to Concrete Supply, without payment, as a consequence of the misleading or deceptive conduct. In relation to this approach, ABCL relied on cases which supported the proposition that where a person is wrongfully induced to part with goods, the measure of his or her loss is the market value of the goods, not the cost of replacing them: *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 489–490 per Lord Atkin; *Pilmer v Duke Group Ltd (In Liq)* [2001] HCA 31; (2001) 207 CLR 165 at [63] per McHugh, Gummow, Hayne and Callinan JJ. Another approach is to consider the detriment to ABCL. That detriment is that ABCL would be better off to the extent of $12,457,472.22 because it would have been paid that amount as it would, on being alerted to the fraud, have required payment in full, rather than being left with a proof of debt against an insolvent company. Jason certainly gave evidence that had he

been alerted to a debt of $4 million at the time of the AFL Grand Final in 2014, Concrete Supply would have paid the money, although he followed that evidence up a short time later by saying that he did not know whether he would pay the money. A third approach is to conclude that Concrete Supply would have been unable to, or refused to, pay in full for all of its cement purchases. Concrete Supply would not have been able to find an alternative commercially viable supplier and its market share in the sale of concrete would have been picked up by other concrete manufacturers who would have purchased the cement from ABCL and the price charged to such manufacturers would have been the same as or better than the price charged to Concrete Supply.

589 Finally, Rino procured the contravention or was knowingly concerned in or party to the contravention because he signed the audit confirmation letter and thereafter did not correct the error.

The Concrete Supply Defendants' Submissions in relation to the 2009 Misrepresentation Case

590 The Concrete Supply defendants submitted that ABCL's case in relation to the audit confirmation letter is confused because the case is that the understatement is $324,893.73 or $35,419.15 and not the amount left off the March 2009 Statement of Account of $529,423.08. The Concrete Supply defendants' description of the error alleged by ABCL is correct and comes about because of the following:

> … ABCL cannot verify whether the March 2009 Statement did in fact understate the amount owing by Concrete Supply as it changed its accounting software in August 2009 and can no longer audit its pre-August 2009 accounts.

(ABCL's closing written submissions (para 192).)

591 As I understand it, this means that ABCL has conducted this part of its case by reference to Concrete Supply's books and records. The amount of $324,893.73 represents cheques Concrete Supply intended to cancel, but had not yet cancelled and, therefore, there had been no change in the books and records of the company. The amount in the audit confirmation letter assumes all the cheques intended for cancellation by Concrete Supply had been cancelled. As I understand it, the nub of ABCL's case is that the higher amount was the appropriate amount and the audit conformation letter did not reflect Concrete Supply's books and records by an amount of $324,893.73.

592 The Concrete Supply defendants submitted that the six year time limit under the Australian Consumer Law expired on 2 December 2015 because the cause of action (assuming there is one) accrued on 2 December 2009. The submission about when the cause of action accrued is linked to when the loss or damage was suffered. The argument is that the natural and foreseeable loss is the shortfall in the audit confirmation letter, namely, on ABCL's case, the amount of $324,893.73. That loss or damage was sustained on or about 2 December 2009. In addition to *Wardley,* the Concrete Supply defendants referred to *Keen Mar Corp Pty Ltd v Labrador Park Shopping Centre Pty Ltd* [1989] FCA 54; (1988) ATPR 40-853.

593 The submission of the Concrete Supply defendants distinguishes between the position in December 2009 and the position in April 2012. The natural and foreseeable loss as a result of the incorrect completion of an audit confirmation letter was the amount of the understatement. Unlike ABCL's case of misleading or deceptive conduct for the period from April 2012 onwards, the case of misleading or deceptive conduct in 2009 was firmly anchored, so it was submitted, in the incorrect completion of the audit confirmation letter.

594 I should record in this context that neither ABCL nor the Concrete Supply defendants addressed the *Trade Practices Act 1974* (Cth) and the effect of its repeal and replacement by the Competition and Consumer Act.

595 The Concrete Supply defendants submitted that no misleading or deceptive conduct has been established against the directors. The submission was that as far as Jason and Tina are concerned, it is quite unclear whether a case of involvement is put against them, having regard to the Statement of Claim and ABCL's closing written submissions. Unlike the pleading against Rino where it is alleged that he completed the audit confirmation letter, no acts, facts or matters are pleaded or were identified in closing submissions which would form a basis for concluding that they were involved.

596 As far as Rino is concerned, the Concrete Supply defendants contend that it has not been shown that he completed the audit confirmation letter. The audit confirmation letter produced by Mr Lemmon is set out above. Rino signed the letter, but, according to his evidence, he did not write the word "YES" or cross out the sentence which reads as follows:

> We are not in agreement for the following reasons:

597 Rino produced a copy of the audit confirmation letter signed by him, but with nothing else (other than his name) printed by way of other words, or words crossed out.

598 The Concrete Supply defendants submitted that, in any event, the audit confirmation letter did not amount to misleading or deceptive conduct because the outstanding balance was, in fact, as shown in the letter.

599 The Concrete Supply defendants submitted that ABCL's submission as to what it would have done had the representation not been made is either not supported by evidence or is contrary to the evidence. The allegation that the auditors would have confirmed that the balance was an error and not an undocumented rebate and that they would have been alerted to the fact that ABCL's accounts were not correct is unsupported by any evidence from the auditors and, to the extent that there is evidence, it is to the effect that the auditors would have referred the issue to the alleged fraudster, Ms Burgess. There is evidence that in 2010 when a discrepancy arose in relation to Cement Australia, PwC referred the issue to Ms Burgess. I was asked to infer that no action by ABCL would have been taken if the matter had been referred to Ms Burgess.

600 The Concrete Supply defendants submitted that there is simply no causal link between a response in 2009 and the conduct of not paying for all deliveries of product made to Concrete Supply after the March 2012 Statement of Account. In other words, the latter could have taken place even if an "accurate" response to the audit confirmation letter had been provided in December 2009.

Analysis of the 2009 Misrepresentation Case

601 The thrust of the submissions on both sides was the involvement of the directors, rather than the case against Concrete Supply.

602 I begin with the involvement of Rino. It is difficult to know what to make of his evidence that when he signed the audit confirmation letter, neither of the alternatives were crossed out. It seems that Rino signed the letter, intended to agree with the balance referred to and someone else put in the tick and wrote "yes" and crossed out the sentence indicating disagreement. I do not know on the evidence whether the person who wrote on the letter was a member of Concrete Supply's staff or a member of ABCL's staff. In the end, I have decided that it does not matter. To my mind, Rino's signature on the letter indicates assent because that is the natural inference. As it happens, the Court also knows that that was his intention. I reject the argument that there was no representation and, therefore, no misleading or deceptive conduct by the audit confirmation letter because it was incomplete.

603 As far as Jason is concerned, he did not sign the audit confirmation letter and that means he is not liable on the 2009 Misrepresentation Case because the audit confirmation letter is integral to that case. The same result applies in the case of Tina. In her case, as I will state when addressing the 2012 Misrepresentation Case, there are additional reasons she is not liable.

604 The execution of the audit confirmation letter by Rino on behalf of Concrete Supply was misleading or deceptive conduct by Concrete Supply in which Rino was involved. The amount in the letter was inaccurate. It did not accord with Concrete Supply's books and records. Concrete Supply cannot rely on its intention to cancel cheques. For reasons I have already given, it had no entitlement to cancel some cheques it had already cancelled or to cancel the cheques that it proposed to cancel.

605 Despite the above conclusion, I consider that Ms Burgess was aware of the true level of indebtedness of Concrete Supply to ABCL from time to time and that, for reasons I will give in detail in the context of the 2012 Misrepresentation Case, her knowledge and conduct is attributable to ABCL. This means the 2009 Misrepresentation Case must fail.

606 Although it is not strictly necessary for me to do so, I will, in case I am wrong, address the other arguments. I do that in the context of the 2012 Misrepresentation Case. One matter I do address in this context because it only arises in this context, is the submission that the claim in relation to the 2009 Misrepresentation Case is statute-barred because it was not brought within a period of six years after the cause of action accrued.

607 The issue here is when the cause of action accrued and whether it accrued within six years of the date upon which the Originating Process was issued, that is to say, on or after 18 January 2012. This, in turn, raises an issue as to what loss or damage may be recovered in relation to the 2009 Misrepresentation Case. I am far from convinced, bearing in mind that I have not heard evidence from Ms Burgess or the auditors, that disclosure by Concrete Supply in the audit confirmation letter would have avoided the loss or damage which flowed from events in 2012 and 2013. It is now known that the unauthorised transactions between 2012 and 2017 which were undetected were part of a broader number of transactions over a 10 year period and involving hundreds of transactions and many millions of dollars. One can say, I think, all other things being established, that disclosure of the shortfall would have led to a correction to the amount in the audit confirmation letter, but that amount as a loss, whether it be $360,315.88 or the understatement in the March 2009 Statement of Account of $529,423.08,

accrued at or shortly after the audit confirmation letter and an action to recover the amount is beyond the time limit of six years.

ABCL's Submissions in relation to the 2012 Misrepresentation Case

608 ABCL's 2012 Misrepresentation Case is similar to its 2009 Misrepresentation Case, but there are some important differences. It is a case of misleading or deceptive conduct involving a failure to do certain things. First, there was a failure to inform ABCL that its March 2012 Statement of Account understated the correct amount owing by $616,788.95. Secondly, there was a failure to pay for between 28% and 52% of cement purchased from ABCL between March 2012 and October 2017. Thirdly, there was a failure to inform ABCL that it was not paying for between 28% and 52% of cement purchased from ABCL.

609 The case which ABCL advances is that Concrete Supply's silence about these matters was misleading or deceptive because it was under an obligation to speak. Silence can be misleading or deceptive (*Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* [1988] FCA 40; (1988) 39 FCR 546 at 556–558 per Lockhart J (with whom Burchett J agreed); *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84).

610 The duty to speak in this case arose (so it was said) from the course of correspondence leading up to the application of the alleged rebate and the obligation at common law of a debtor to seek out and pay his creditors. The course of correspondence between the accounts receivable sections of ABCL and Concrete Supply respectively about the timing and allocation of payments gave rise to an expectation on the part of ABCL that it would be asked whether the understatement in the March 2012 Statement of Account was intended.

611 There was indeed a flow of information from Ms Burgess at ABCL to Ms Senanayake at Concrete Supply about matters associated with Concrete Supply's account (i.e., statements, the sending or release of cheques bringing the account to under 90 days) starting (on the evidence before this Court) on 3 November 2008 and ending on 12 September 2012. ABCL points to the fact that the April 2012 Statement of Account corrected the error in the March 2012 Statement of Account and that ABCL was entitled to expect that Concrete Supply would contact ABCL and ask whether the non-inclusion of invoices was an error, or was indeed a discount. ABCL submits that Concrete Supply, in effect, stayed silent in the hope that it "would get away with it". That approach is further evidenced by the events in March 2013 when Concrete Supply implemented the rebate through the RCTIs, that is to say: (1) not contacting ABCL before claiming the ongoing rebate; (2) only sending RCTIs which

were to be paid in full; and (3) claiming for purchases they never intended to pay and writing-back a reduction in expenses 12–18 months later when the lapse of time might have suggested that Concrete Supply had "got away with" it.

612 ABCL submitted that Concrete Supply's non-payment for cement worth millions of dollars from March 2013 to October 2017 was misleading or deceptive when considered against Concrete Supply's duty to seek out and pay its creditors. It referred to a common law rule that it is the duty of the debtor to find and pay his or her creditor (*Fowler v Midland Electric Corporation for Power Distribution Ltd* [1917] 1 Ch 656 at 661 per Warrington LJ; *AIC Retail Finance Ltd v Savill* [1986] 2 NZLR 679 at 687 per Chilwell J). As Einstein J said in *Australian and New Zealand Banking Group Limited v Richard Kay Liebmann* [2010] NSWSC 545 at [55], it is the debtor's obligation to pay a debt, not the creditor's obligation to demand payment.

613 ABCL submitted that had Concrete Supply informed it that the March 2012 Statement of Account understated the amount which it believed that it owed ABCL, or that from March 2013 it was unilaterally applying a rebate of between 30% and 40% on the invoiced price for all purchased product, ABCL would have done the following: (1) confirmed that it had not authorised any discount or rebate beyond the discount or rebate reflected in the price increase letters; (2) confirmed that the March 2012 Statement of Account was in error; and (3) confirmed that the April 2012 Statement of Account reflected the correct position.

614 ABCL submitted that all three directors were involved in misleading or deceptive conduct in relation to the 2012 Misrepresentation Case. It referred to the duty of directors to inform fellow directors of significant matters and of reasonable inquiry and, in that regard, pointed to the fact that ABCL was Concrete Supply's largest supplier and the discount or rebate had a significant effect on the company's financial position.

615 As far as the involvement of Rino and Jason is concerned, ABCL relied on the following matters: (1) Rino and Jason decided to cancel the cheques that had been prepared for the payment of the invoices omitted from the March 2012 Statement of Account; (2) Rino and Jason decided to routinely cancel between 28% and 52% of cheques prepared in connection with purchases from ABCL; (3) Rino and Jason decided which cheques would be cancelled and, therefore, which deliveries would be paid for; (4) Rino and Jason decided not to raise with ABCL the error in the March 2012 Statement of Account or the ongoing practice of Concrete Supply from March 2013 of withholding payment for between 28% and 52% of its

purchases from ABCL; (5) Rino and Jason knew Concrete Supply was required to pay for cement purchased from ABCL at the price stated in the price increase letters in accordance with the BSA, or in the alternative, in accordance with the general conditions incorporated into the annual price increase letters; and (6) Rino and Jason benefited from Concrete Supply's misleading and deceptive conduct through the receipt of wages, dividends, loans and rent, directly and through their related companies.

616 As far as Tina's involvement is concerned, ABCL relied on the following: (1) Tina demanded to be and remained a director of Concrete Supply; (2) Tina demanded to sign cheques issued by Concrete Supply and to be in control of the cheque book. She knew, or ought to have known, of the cancellation of cheques; (3) Tina was kept informed of the financial position of Concrete Supply by Rino and Jason and must be taken to be aware of the approach Concrete Supply took to its largest supplier (*Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 (*Yorke v Lucas*); *Ashbury v Reed* [1961] WAR 49 at 51); and (4) Tina was the public officer for income tax purposes and signed documents reflecting the cheques and their subsequent cancellation.

617 ABCL's case in terms of loss suffered is similar in the case of the 2012 Misrepresentation Case as it is with the 2009 Misrepresentation Case, save that the loss claimed seems to be $10,622,574 being, according to ABCL, the value of cement received, but not paid for by Concrete Supply between March 2012 and November 2017.

The Concrete Supply Defendants' Submissions in relation to the 2012 Misrepresentation Case

618 The Concrete Supply defendants addressed the case that Concrete Supply was guilty of misleading or deceptive conduct in failing to inform ABCL that it was claiming a rebate by characterising ABCL's case as involving an allegation of misleading or deceptive conduct by omission and submitting that that case cannot succeed in view of the express representations made by Concrete Supply to ABCL about the deliveries of cement in respect of which they were making payment to ABCL.

619 Concrete Supply developed this submission by making the following points. First, Concrete Supply issued RCTIs and when it paid ABCL, it sent an RCTI with a cheque attached. The deliveries were clearly identified in the RCTI. Secondly, ABCL's automated system as described by Mr Hughes was such that the details of deliveries in CAS were automatically transferred to the SAP system inserting the prices and level of indebtedness against the

customer account. Thirdly, payments were manually entered into the system and that would be done by a person who had the RCTI which indicated the deliveries to which it related and who would manually identify those deliveries. Concrete Supply submitted that, in these circumstances, ABCL knew what deliveries were paid for and it had the means to know, or in fact its staff did know, what deliveries were not being paid for. Another way of putting the submission is that if a representation is made as to the deliveries being paid for, there cannot be misleading or deceptive conduct in failing to disclose those deliveries in respect of which payment has not been made. It is further submitted that the point is reinforced when one considers the relative sophistication of ABCL's systems to record and retrieve information with the system of Concrete Supply.

620 The Concrete Supply defendants submitted that there was no duty to inform ABCL of the amounts Concrete Supply was paying for deliveries of cement by ABCL if ABCL knew at all times of the true level of indebtedness of Concrete Supply.

621 The Concrete Supply defendants advanced a number of arguments with respect to the attribution of knowledge to ABCL. First, Ms Burgess knew at all times the true level of indebtedness of Concrete Supply and her knowledge is to be attributed to ABCL. Even if Ms Burgess acted fraudulently, she did not act in total fraud of ABCL and, in those circumstances, attribution of her knowledge to ABCL is not avoided. Secondly, I was asked to infer that other ABCL employees must have known of the true level of indebtedness of Concrete Supply to ABCL and their knowledge is to be attributed to ABCL. Thirdly, as I understood it, I was asked to infer that the true level of indebtedness of Concrete Supply was revealed in ABCL's books and records and that, therefore, ABCL had the relevant knowledge. An allied submission to these submissions was that ABCL's failure to join Ms Burgess to this proceeding in circumstances where it ought to have done so is a further reason to draw "an adverse inference as to [ABCL's] knowledge of the status of Concrete Supply's credit account with [ABCL]".

622 The Concrete Supply defendants submitted that their failure, even if misleading or deceptive conduct, did not cause loss or damage to ABCL.

623 The Concrete Supply defendants submitted that even if they were guilty of misleading or deceptive conduct and that conduct caused loss or damage to ABCL, any award of damages should be reduced on the basis that Ms Burgess was a concurrent wrongdoer within Part VIA

of the Competition and Consumer Act and by reason of contributory negligence on the part of ABCL.

624 Finally, the Concrete Supply defendants submitted that even if all of the aforesaid arguments failed and Rino and Jason were held liable, Tina should not be held liable because she was not a person involved in the misleading or deceptive conduct.

Analysis of the 2012 Misrepresentation Case

625 I have found Rino and Jason did not have a genuine belief that Concrete Supply was entitled to the alleged discount or rebate. In those circumstances, their failure to point out the reduction in the March 2012 Statement of Account and to implement the scheme involving the selected payment of RCTIs was misleading or deceptive conduct. The fact is that Concrete Supply was receiving large quantities of cement for which it was obliged to pay, but did not pay. I reject the submission that the payment of selected RCTIs was in some way an express representation to ABCL that Concrete Supply was not paying the amounts it was obliged to pay.

626 The issue of whether Ms Burgess' knowledge should be attributed to ABCL is a complex one. She was the credit manager and in charge of the day-to-day operations of Concrete Supply's account. I did not understand ABCL to submit that she occupied such a position within ABCL that her knowledge was irrelevant in terms of the knowledge of ABCL.

627 As I have said previously in these reasons, it is not part of ABCL's case in this proceeding that Concrete Supply procured Ms Burgess' conduct or colluded with her in the false entries. Furthermore, it is a puzzling aspect of this case that no financial motive for Ms Burgess' conduct has been established on the evidence in this case.

628 Nevertheless, and fully recognising the gravity of the finding and the fact that I have not heard evidence from Ms Burgess, I have concluded that Ms Burgess' conduct was fraudulent. The making of a large number of false entries over such an extended period of time not only rules out the possibility of mistake, but was completely inconsistent with Ms Burgess' employment duties and well outside any authority she may have had. Furthermore, her conduct means that she knew, if not down to the last dollar, the substance of the true indebtedness of Concrete Supply to ABCL.

629 In those circumstances, ABCL submitted that any knowledge she had could not be attributed to ABCL because she had acted fraudulently. The Concrete Supply defendants responded by

submitting that if this point was reached, attribution could only be negatived if Ms Burgess' conduct was in total fraud of ABCL. This raises a legal and factual issue of some complexity.

630 In *Re Hampshire Land Co* [1896] 2 Ch 743, the Court said (at 749–750):

> The case is very much more like the one which both Mr. Bramwell Davis and Mr. Jenkins had to admit was an exception to the general rule that they sought to lay down, for they admitted that if Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Mr. Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company.

(see also J C Houghton & Co v Nothard Lowe & Wills Ltd [1928] AC 1.)

631 In *Canadian Dredge and Dock Co Ltd et al v The Queen* (1985) 19 DLR (4th) 314, Estey J said (at 351):

> In my view, the outer limit of the delegation doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. Where this entails fraudulent action, nothing is gained from speaking of fraud in whole or in part because fraud is fraud. What I take to be the distinction raised by the question is where all of the activities of the directing mind are directed against the interests of the corporation with a view to damaging that corporation, whether or not the result is beneficial economically to the directing mind, that may be said to be fraud on the corporation. Similarly, but not so importantly, a benefit to the directing mind in single transactions or in a minor part of the activities of the directing mind is in reality quite different from benefit in the sense that the directing mind intended that the corporation should not benefit from any of its activities in its undertaking. A benefit of course can, unlike fraud, be in whole or in part, but the better standard, in my view, is established when benefit is associated with fraud. The same test then applies. Where the directing mind conceives and designs a plan and then executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate. The same reasoning and terminology can be applied to the concept of benefits.
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> Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind of the corporation and consequently his acts could

> not be attributed to the corporation under the identification doctrine. This might be true as well on the American approach through *respondeat superior*. Whether this is so or not, in my view, the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation, and (c) was by design or result partly for the benefit of the company.

632 In *Beach Petroleum NL v Johnson* [1993] FCA 392; (1993) 43 FCR 1 (*Beach Petroleum*), von Doussa J addressed the attribution of the knowledge of a director of a company to the company in circumstances where the director has acted fraudulently. His Honour said (at 30–32):

> 22.32 In my opinion, this statement of the law in Canada provides compelling guidance to the law which should be applied in this case. If, for the purposes of criminal responsibility, a company is imputed with the knowledge and intention of a person who is the directing mind of the company, acting in the field of operation assigned to him, when his actions are not totally in fraud of the company and by design or result are partly for the benefit of the company, the imputation of the knowledge and intention of that person to the company for the purposes of civil responsibility should be no less extensive: see *Dixon v Deacon Morgan McEwen Easson et al* (1990) 70 DLR (4th) 609. Under the test propounded by *Canadian Dredge and Dock Co Ltd*, to determine whether the fraud of directors is totally in fraud of the company, it is necessary to consider whether all the activities of those people are directed against the interests of the company with a view to damaging it. In determining this question, the question of benefit, if any, to be received by the company will be of particular importance.
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> …
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> 22.34 These authorities indicate that if a company is to be imputed with the conduct and knowledge of a director, the director must be acting within the scope of his or her authority, that is, within the scope of his or her actual or apparent authority. The scope of the authority of a director may vary widely from company to company and according to the circumstances of the case. In many instances a director might not be formally appointed by resolution of the board to act on the company's behalf for a particular purpose, but may assume that role without dissent from those who customarily run the company, perhaps even assume the role of managing director: *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480. Provided that the director is acting within the scope of his or her authority, in civil proceedings the state of mind of a director ordinarily will be attributed to the company where there is a duty on that director to communicate his or her knowledge to the company. *The exception to this rule is where the director is acting totally in fraud of the company, that is, where all the director's activities are directed against the interests of the company, and not partly for the benefit of the company. If the director is guilty of fraudulent conduct which is not totally in fraud of the corporation, and by design or result the fraud partly benefits the company, the knowledge of the director in the transaction will be attributed to the company*.

(Emphasis added.)

633 In *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 (*Grimaldi*) the Full Court of this Court said at [282]–[284]:

> 282 This matter can be dealt with shortly. As Murchison put it in its submission, it was common ground that, subject to one exception, Mr Grimaldi's knowledge with respect to the matters in issue in the case was at all material times to be imputed to Murchison. The exception relied upon was that knowledge of a director's own fraud committed upon his or her company was not to be imputed to that company: *Re Hampshire Land Company* [1896] 2 Ch 743. It was not the knowledge of that company.
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> 283 This "fraud exception", as it has been called, has been controversial in a number of common law countries: see Watts, "Imputed Knowledge in Agency Law — Excising the Fraud Exception" (2001) 117 LQR 300; 3 Am Jur 2d "Agency" 280; Dal Pont, The Law of Agency (2nd ed, 2008), [22.57]–[22.59]; *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 at [99]–[108]; and see *Re Parmalat Securities Litigation* (2009) 659 F Supp 2d 504 at 519 for the view taken in some number of US States jurisdictions:
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>> … the principal suffers imputation as long as the agent in some respect served the principal or, stated another way, unless the agent totally abandoned the principal's interests. The rule of imputation absent total abandonment, moreover, is not simply a matter of mechanics or rhetoric. It embodies a determination that it would be undesirable to permit principals to avoid responsibility for an agent's actions or knowledge whenever an agent could be said to have acted even in part for the agent's own interest notwithstanding that the agent simultaneously served the interests of the principal.
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> See also *Restatement of Agency* 3rd §504.
>
> 284 The fraud exception to imputation has not only been accepted in first instance decisions in this country: *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 esp at 22.14–22.35; it also has been extended beyond knowledge of fraud to that of breach of fiduciary duty "at least where the fiduciary's conduct is morally reprehensible": *Aequitas Ltd v AEFC Leasing Pty Ltd* (2001) 19 ACLC 1,006 at 1,062; see also *Farrow Finance Company Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* [1999] 1 VR 584 at 627–628. Nonetheless, the exception itself has been qualified in a fashion which resonates with that suggested in the *Parmalat* quotation above. As von Doussa J observed in *Beach Petroleum* (at 22.34), while a director's knowledge will not be imputed to a company where the director's activities are directed against the interests of the company, it will be otherwise if his or her conduct is not totally in fraud of the company if, "by design or result the fraud partly benefits the company": see also *Canadian Dredge & Dock Company Ltd v The Queen* (1985) 19 DLR (4th) 314 at 351 which von Doussa J considered provided "compelling guidance".

634 In my opinion, the proposition which emerges from these authorities is that an agent's knowledge or conduct will be attributed to a company even where the agent was fraudulent unless the fraud was total fraud, being fraud where there is no benefit to the company, whether by design *or result*. In other words, if the company partially benefits in the result, then the fraud exception to the rules of attribution is not engaged.

635 ABCL recognised that this was a possible approach to attribution and the fraud exception, and this, it seemed to me, was the reason for its attempt to adduce the evidence in Mr Lemmon's second affidavit. That attempt failed insofar as there was an attempt to prove the WACC. As I have previously noted, even if that evidence had been received, there may well have been arguments as to its effect in terms of whether there was, in fact, a partial benefit to ABCL from its continuing trading relationship with Concrete Supply (at [119]).

636 Counsel for the Concrete Supply defendants asked me to find that, in fact, ABCL made a profit from its trading relationship with Concrete Supply between 2012 and 2017 of nearly $2.5 million. This amount had been calculated on the basis of costs for "Divisional costs" and "Allocation of divisional corporate overheads" and no allowance for the cost of capital. I am not prepared to make that finding because what has not been established on the evidence is the *quantum* of the cost of capital. I have no difficulty in accepting that in an industry involving large expenditure on the purchase and maintenance of plant and equipment and ongoing operations that there would be a cost of capital and it would not be insignificant. That was the evidence of Mr Lemmon which I accept. However, I do accept that ABCL has not established that it did not partially benefit from its trading relationship with Concrete Supply in the sense of receiving amounts over and above its costs per tonne of cement or other product supplied.

637 In its closing submissions, ABCL advanced two quite different arguments as to why Ms Burgess had acted in total fraud of ABCL and, therefore, her knowledge or conduct should not be attributed to it.

638 First, ABCL submitted that it would not have sold cement to Concrete Supply at the prices reached after the application of the alleged discounts or rebates and it lost the opportunity to sell its cement at the prices Concrete Supply should have paid or higher prices. As I will explain later in these reasons, I accept Mr Lemmon's evidence that the cement supplied to Concrete Supply would have been sold elsewhere if not sold to Concrete Supply and I accept that that was likely to have been at the prices Concrete Supply should have paid. The difficulty for ABCL is that, although it has not made the money it could have made, it has not shown that it has not received a partial benefit. A partial benefit of its nature means something less than a full benefit.

639 Secondly, ABCL submitted that it is not appropriate to characterise the trading relationship as one in which Concrete Supply took a discount of between 30% and 40% on each delivery of

cement. Rather, it was appropriate to characterise the relationship as one in which Concrete Supply did not pay at all for certain deliveries of cement and, with respect to those deliveries, there was a total failure of consideration.

640 I was initially attracted to this argument. After all, even if it turned on form over substance in that the argument would not be available if Concrete Supply had paid between 60% and 70% of each invoice, that form was the form adopted by the Concrete Supply defendants with no genuine belief that Concrete Supply was entitled to the alleged discount or rebate. However, on further reflection, I do not think that I should accept the argument. This was a long term trading relationship between a supplier and a purchaser governed by a general agreement, namely, the BSA, and payments were made by reference to batches of invoices, not invoice by invoice. It seems unrealistic in those circumstances to find that there was a total failure of consideration in the context of such a relationship.

641 There are other matters in this area of the law that might be deployed in favour of ABCL's argument. If part of the rationale for attribution is to protect parties who deal with the company in good faith, then that rationale hardly applies in this case where I have found that the Concrete Supply defendants had no genuine belief that Concrete Supply was entitled to the alleged discount or rebate (Dal Pont GE, *Law of Agency* (3rd ed, LexisNexis Butterworths, 2014) at [22.49] et seq). If one considers only the design part of the rule, then it is strongly arguable that whatever Ms Burgess' intentions, they were not to benefit ABCL in any way.

642 Despite these matters, I consider the statements in *Beach Petroleum* and *Grimaldi* are clear and that I should follow them. The effect of that approach is that the fraud exception has not been established and Ms Burgess' knowledge is attributable to ABCL. As I have said, she was aware of the true level of indebtedness of Concrete Supply and, in those circumstances, the claim of misleading or deceptive conduct against the Concrete Supply defendants must fail.

643 This conclusion may also have been relevant to the second element of the estoppel plea, although had it been necessary to consider it in that context, there may have been some additional considerations before deciding whether the second element of the estoppel plea was established.

644 Although, in view of these conclusions, it is not strictly necessary for me to consider the other arguments advanced in relation to the misleading or deceptive conduct claim, I will do so to the extent possible in case I am wrong with respect to the attribution of Ms Burgess' knowledge to ABCL.

645 The Concrete Supply defendants contended that there were a number of other employees of ABCL who, it should be inferred from the evidence in this case, knew of Concrete Supply's true level of indebtedness. They submitted that the sales staff who knew from time to time of the volume of cement most recently purchased by Concrete Supply must have been aware of the true level of indebtedness. They submitted that accounts receivable staff, such as Ms Cook and Ms Penny Wong, must have been aware that ABCL had stopped sending statements of account and invoices and that Concrete Supply was generating RCTIs and must have known the true level of indebtedness because they were manually entering the payments into the SAP system. Finally, they submitted that Mr Taeger must have known of the anomalies and accounting irregularities in the Concrete Supply account. Mr Taeger's role at ABCL was identified by Mr Hughes in his evidence (see [86], [93], [100], [110]–[111] above).

646 The type of false entries made by Ms Burgess were identified by Mr Hughes in his evidence (see [61], [63], [74]–[77] above). All the false entries were made by Ms Burgess (see [72] above), although Ms Cook also made manual entries in the Concrete Supply account (see [89]–[91] above).

647 As I understood the submission of the Concrete Supply defendants, the failure of ABCL to call any of the witnesses stationed at Birkenhead at the relevant time should support the drawing of adverse inferences in terms of their knowledge of the true level of Concrete Supply's indebtedness (*Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 (*Jones v Dunkel*) at 308 per Kitto J; at 312 per Menzies J; at 320–321 per Windeyer J; *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 (*Kuhl*); *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 (*Hellicar*)).

648 It is important to identify with precision the inferences the Concrete Supply defendants ask me to draw more confidently having regard to the failure of ABCL to call any witnesses from Birkenhead. It is not, or not merely, that one of the accounts receivable staff was aware of Concrete Supply sending RCTIs or could have, acting diligently, detected Ms Burgess' false entries or that sales representatives obtained details of the recent amounts, in volume, of

cement purchases by Concrete Supply before their visits to the company's premises. Rather, it is an inference that they were aware of Concrete Supply's true level of indebtedness. As I understood it, armed with this inference, the Concrete Supply defendants' arguments ranged from inviting me to conclude that, in fact, the whole accounting by Ms Burgess was approved by ABCL and designed to disguise the discount or rebate and thereby avert complaints by other customers receiving discounts or rebates such as the "favoured nation arrangements" (see [129] above) to inviting me to conclude that others were part of Ms Burgess' plan and scheme. I must say, I am not sure what the latter proposition adds to the case on attribution of the Concrete Supply defendants.

649 In *Hellicar*, the plurality referred to a holding in *Jones v Dunkel* as follows (at [167]):

> But the Court held "that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence".

(*Jones v Dunkel* at 309 per Kitto J; see also at 312 per Menzies J; at 320–321 per Windeyer J.)

650 In *Kuhl*, Heydon, Crennan and Bell JJ said (at [63] and [64]):

> 63 The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn…
>
> 64 The rule in *Jones v Dunkel* permits an inference, not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party…

(Citations omitted.)

651 It may be accepted that at least most of the witnesses identified by the Concrete Supply defendants were available to be called. However, the important point is whether there is a ground in the evidence for drawing the inference sought by the Concrete Supply defendants.

652 In my opinion, there is no ground in the evidence to infer that officers and employees of ABCL were aware of Concrete Supply's level of indebtedness and authorised a large number

of false entries in its books and records in order to disguise a discount or rebate to Concrete Supply. Such a course of action makes no sense.

653 Nor do I think there is a sufficient basis in the evidence to infer that other employees of ABCL were part of Ms Burgess' plan or scheme. That is a very serious allegation and I do not think that there is a sufficient basis for it in the evidence. Poor systems and inattention over a prolonged period there may have been, but I do not think there is a ground in the evidence for an inference beyond that.

654 I reject the argument that other employees of ABCL knew of the true level of indebtedness of Concrete Supply and that that knowledge should be attributed to ABCL.

655 I turn to the next submission of the Concrete Supply defendants, that is, that knowledge of Concrete Supply's true level of indebtedness was contained within ABCL's accounting records and that knowledge can and should be attributed to ABCL.

656 The Concrete Supply defendants relied on three matters in support of the submission that the company's true level of indebtedness and the irregularities would have been easily discovered by an examination of ABCL's accounting records as follows: (1) direct evidence of Mr Hughes of the information stored on CAS concerning deliveries and its automated transmission to the SAP system; (2) the fact that Mr Shaddock discovered anomalies involving the user ID of Ms Burgess in early October 2017 in a routine inquiry carried out in the absence of Ms Burgess; and (3) the inference more confidently drawn in the absence of any evidence from the staff who worked at Birkenhead during the relevant period.

657 I have considered the cases to which the Concrete Supply defendants referred: *Commercial Union v Beard* [1999] NSWCA 422; (1999) 47 NSWLR 735; *Rogers v Nationwide News Pty Ltd* [2003] HCA 52; (2003) 216 CLR 327; *The Bell Group Ltd (In Liq) v Westpac Banking Corporation Ltd (No 9)* [2008] WASC 239; (2008) 39 WAR 1. It seems to me that in order to resolve this argument there are a number of complex issues which would need to be resolved, including the effect of the fact that ABCL's books and records contained false entries and the fact that that was known to an employee who was acting fraudulently. Those matters were not addressed in any detail in this particular context and, in circumstances where it is not essential that I express a view, I refrain from doing so.

658 The Concrete Supply defendants submitted that ABCL's failure to join Ms Burgess to this proceeding in circumstances where it ought to have done so is a further reason to draw "an

adverse inference as to [ABCL's] knowledge of the status of Concrete Supply's credit account with the [ABCL]". I have decided that Ms Burgess' knowledge should be attributed to ABCL. However, it is not by reason of this submission which I reject. I now explain the reasons I reject this submission.

659 As developed, the submission was that Ms Burgess should have been joined in this proceeding and that ABCL made a "deliberate forensic decision" to pursue Ms Burgess in the Supreme Court of South Australia. As I have said, that proceeding has been stayed because of the prospect of criminal proceedings.

660 The starting point for the submission that Ms Burgess should have been joined to this proceeding was reliance by analogy on the observations of Bryson JA (with whom Mason P and Beazley JA agreed) in *Yeshiva Properties No 1 Pty Ltd v Marshall* [2005] NSWCA 23; (2005) 219 ALR 112 (*Yeshiva Properties*) at [77] as follows:

> 77 When claims based on alleged accessary liability and the second limb of *Barnes v Addy* are made it is usual, in my experience, that the trustee or fiduciary whose liability is alleged to be the principal liability is joined in the suit and that appropriate equitable remedies are claimed against that person. This accords with the usual approach taken by courts of equity in which, so far as is practicable, all aspects of the controversy are brought under consideration and resolved in the same suit. This approach is sometimes expressed in the obscure maxim "Equity delights to do justice", which alludes to the courts' wish to resolve the whole controversy and give effect to all equities of all persons involved in the controversy. The same policy is expressed in ss 60 and 63 of the Supreme Court Act 1970. Except when the principal cannot be found, is insolvent, has a bankruptcy discharge, or is unavailable to be sued for some other reason, it is appropriate that that person should be joined as a defendant. There may be advantages for the attainment of justice if that person can be required to produce documents on discovery, answer interrogatories or otherwise to participate in the proceedings. It is not safe to assume that all relevant aspects of the principal person's conduct are known to an accessary.

661 I say, by analogy, because in this case, the principal wrongdoer is said to be Concrete Supply and the accessories are the directors. To what extent any of the observations made by the plurality in *Michael Wilson & Partners v Nicholls* [2011] HCA 48; (2011) 244 CLR 427 affect this issue was not addressed by the parties.

662 The next step in the argument is that the Concrete Supply defendants contend that they have been prejudiced by ABCL's failure to join Ms Burgess to this proceeding in that had it done so, she may have filed an affidavit going to ABCL's knowledge and they may have had the opportunity to cross-examine her.

663 I reject this submission. The situation is not the same as that in *Yeshiva Properties*. The principal wrongdoer in this case (as alleged by ABCL) is Concrete Supply and it has been joined to the proceeding. In any event, what is being referred to is the usual practice and clearly there may be cases where a trustee or fiduciary has no assets and is not joined for that quite understandable reason. Even if I am wrong about these matters, I cannot see how the fact that Ms Burgess was not joined as a party to this proceeding adds weight to a case for "drawing an adverse inference as to [ABCL's] knowledge of the status of Concrete Supply's credit account with [ABCL]".

664 The Concrete Supply defendants put causation arguments at a number of levels. First, they submit that even if their conduct in failing to inform ABCL that they were not paying the full amount was misleading or deceptive, it did not change anything because the person they would most likely have informed is Ms Burgess and she is unlikely to have done anything. It is probably correct to say that had the "duty" been performed, the directors would have contacted Ms Burgess or arranged for her to be contacted at some stage, perhaps as a first contact. However, I consider that the submission should be rejected for a number of reasons.

665 First, the easiest way of correcting the situation would have been to remedy the other failure alleged against the Concrete Supply defendants, namely, to pay the full amount owing. Secondly, it is difficult to know what Ms Burgess would have done had Concrete Supply advised her that it was not paying ABCL in full. It can be said, however, that the submission tended to proceed on the assumption that one telephone call to ABCL would have discharged the duty and I do not accept that that is the case. Thirdly, and relatedly, I do not accept that it is inevitable that contact would have been made only with Ms Burgess. There would have been ample and regular opportunities to raise the fact of the discount or rebate with, for example, sales representatives who visited the Pooraka property on a regular basis.

666 The broader causation argument advanced by the Concrete Supply defendants is that there has been no loss or damage because all that happened was that ABCL and Concrete Supply continued a trading relationship which was profitable. I have already addressed the issue of profitability. The undertone of this submission may have been that even if fully advised of what Concrete Supply was doing, ABCL would have done nothing. If that is the submission, then I reject it. There is nothing to suggest that ABCL properly informed would have tolerated a discount or rebate of the nature claimed or, on the whole of the evidence, to suggest that ABCL would have done other than insist on payment in full in accordance with

the price increase letters. That conclusion is consistent with the evidence of Mr Lemmon (see [130] above).

667 It was part of ABCL's case that it was unlikely that Concrete Supply had the capacity to pay the full price. For example, ABCL pointed to the following matters: (1) Concrete Supply's cashflow was a major consideration in determining the timing of the payment of cheques to ABCL and in the cancellation of cheques made out to ABCL. Full payment at the stipulated time (whether it be 30 days or 90 days) would have caused significant cashflow difficulties; and (2) Mr Morris' analysis of Concrete Supply's financial performance between 2009 and 2017 adding back in as a liability from time to time the alleged discount or rebate, raises a serious issue (at least) as to the solvency of Concrete Supply at various times in the past, that is, its ability to pay its debts.

668 These submissions meant it was necessary for ABCL to establish that it could have sold the cement it sold to Concrete Supply to another party if it had needed to. Concrete Supply disputed that proposition.

669 Mr Lemmon's evidence is important in this respect. As I have said, he swore two affidavits. His first became exhibit A11. In his second affidavit, he described, in general terms, the nature of ABCL's operations and its two manufacturing plants in South Australia. None of this is contentious. In para 8 he states as follows:

> 8. During my time with ABCL, all of the product which has been manufactured in South Australia has been sold. Over the past 20 years, there has not been a surplus of product. When South Australian customers have from time to time ceased trading, other customers have taken up the share. Although Cement Australia has started importing cement into the South Australia market, that did not produce any product surplus. All of the product that ABCL has manufactured here has been sold, either locally or into Victoria through the ICL joint venture.

670 Mr Lemmon's second affidavit was not tendered at the time he gave evidence. I indicated that at that stage that it would be marked for identification. There is some confusion in the transcript as to whether it was given a separate number or was part of MFI A13 (see T 501–502). Counsel for the Concrete Supply defendants subsequently cross-examined Mr Lemmon on the basis that the evidence in para 8 was part of the evidence and the thrust of his cross-examination was that Mr Lemmon did not have the knowledge of the market which would enable him to express any reliable opinions. That is sufficient to bring the evidence in.

671 Mr Lemmon was well qualified to express the opinion he did and I accept his evidence. I accept that ABCL would have been able to sell the cement to another party had it not been sold to Concrete Supply at an equivalent or near equivalent price to that price Concrete Supply ought to have paid. In view of the ultimate conclusion in this section, it is not necessary for me to consider whether there should be some small allowance for contingencies.

672 The next submission to be addressed is the submission of the Concrete Supply defendants that any damages awarded against them should be reduced because of the contributory conduct of ABCL, including the conduct of Ms Burgess. The contributory conduct of ABCL, aside from the contributory conduct of Ms Burgess, may be broadly described as a failing of systems and processes within ABCL. I will refer to this as the alleged ABCL systems failures.

673 At the time of closing submissions, the directors' Defence contained the following pleas:

> **Contributory Negligence**
>
> 13. In the event that the Fourth to Sixth Defendants are found liable for misleading and deceptive conduct (which cause of action is denied), they say that the amount of the loss or damage claimed by the Plaintiff ought to be reduced to take into account the Plaintiff's contributory negligence and the contributory negligence of its external auditors.
>
> 14. The Plaintiff failed to:
>
> 14.1 issue its own invoices, which was a breach of the Bulk Supply Agreement;
>
> 14.2 send regular statements to the First Defendant;
>
> 14.3 monitor its own accounts;
>
> 14.4 inform the First Defendant that its credit limit had been exceeded;
>
> 14.5 give proper and adequate consideration to its own financial affairs and books and records;
>
> 14.6 prevent the reporting of creditor balances by way of manually-generated Excel spreadsheets, and the Fourth to Sixth Defendants refer to annexure DH9 to the affidavit of Darryl Hughes, sworn 16 January 2018;
>
> 14.7 ensure that proper internal auditing of the Plaintiff's books and records was undertaken and, without limiting that plea, failed to ensure that an audit was undertaken of manual journal entries recorded in its SAP accounting system; and
>
> 14.8 the Fourth to Sixth Defendants repeat the matters pleaded in paragraph 6A herein;

15. The Plaintiff's external auditors failed to:

    15.1 give proper and adequate consideration to the Plaintiff's financial affairs and books and records; and

    15.2 undertake an audit, or in the alternative, undertake a proper and diligent audit, of manual journal entries recorded in the Plaintiff's SAP accounting system, including by causing the Plaintiff to generate a manual entry report of the kind set out at annexure DH9 to the affidavit of Darryl Hughes, sworn 16 January 2018, which, had they done so, would have alerted the external auditors to the alleged false entries described in paragraph 74 of Mr Hughes' affidavit.

16. Had the Fourth to Sixth Defendants been informed by the Plaintiff that the credit limit of the First Defendant had been exceeded, they would have caused the First Defendant not to have incurred the alleged debt either by not purchasing the cement or by renegotiating the terms, including the price or by shipping in their own cement at a lower price or by going to another supplier.

674 In addition to their oral submissions in closing, the Concrete Supply defendants relied on extensive written submissions. The submissions addressed the above pleas. A summary of the submissions on this topic, leaving aside those relating to the audit confirmation letter, is as follows:

(1) ABCL's claims against the directors for being involved in alleged misleading or deceptive conduct by Concrete Supply are apportionable claims pursuant to s 87CD of the Competition and Consumer Act;

(2) damages should only be awarded against Concrete Supply to the extent it can justly and equitably be regarded as contributing to, or being responsible for, ABCL's overall loss and to the extent that ABCL, or some other party, has contributed to its own loss, it must bear a portion of the loss;

(3) in relation to the damages sought in connection with the RCTI practice adopted after March 2013, the "dominant" cause of ABCL's loss was the conduct of Ms Burgess "in hiding the indebtedness of Concrete Supply and other customers";

(4) Ms Burgess' conduct was facilitated by failings internal to ABCL i.e., the systems failures to which I referred earlier. The failures were identified as follows:

    (a) ABCL ignored the recommendations of internal auditors in relation to deficiencies within its credit control function;

    (b) ABCL (or ABL) maintained a practice of outstanding debtor balances being reported manually and in Excel, rather than a report generated automatically from ABCL's accounting systems;

(c) ABCL gave Ms Burgess the ability to amend credit limits within its books and records to a level which is alleged to be above the authorised credit limit set for Concrete Supply and which is also more than Concrete Supply would require based on its average monthly purchases, even assuming trading terms were 90 days and not 30 days; and

(d) ABCL failed to review creditor aging records that would disclose irregularities in ABCL's debtor records for Concrete Supply.

(It will be necessary for me to come back to these when I consider the substance of the plea of contributory negligence.)

(5) the fact that ABCL has brought proceedings against Ms Burgess in the Supreme Court of South Australia illustrates that ABCL's internal problems, including the conduct of Ms Burgess, were the major cause of its loss; and

(6) ABCL's internal failings, including the conduct of Ms Burgess, means that ABCL should bear the majority of the losses claimed, "at least in the order of 80% of those losses".

675 The following points should be noted about these submissions. First, there is no express allegation directed to the plea by the directors that there was contributory negligence on the part of ABCL's external auditors. In the circumstances, that plea does not call for further consideration. Secondly, the submissions proceeded on the basis that Ms Burgess' conduct should be attributed to ABCL.

676 ABCL subsequently submitted that it had not had the opportunity to address the apportionment submissions of Concrete Supply defendants at the time of closing submissions. On 17 May 2019, I made the following orders:

> 1. The plaintiff file and serve any written submissions (limited to five pages) relating to the question of apportionment of liability as between the plaintiff and the fourth to sixth defendants on or before 4:00pm on Monday, 20 May 2019.
>
> 2. The fourth to sixth defendants file and serve any written submissions in response (limited to five pages) on or before 4:00pm on Monday, 27 May 2019.

677 ABCL filed written submissions as envisaged by these orders. A summary of those submissions is as follows:

(1) reference was made to s 87CD of the Competition and Consumer Act and it was said that the directors' submission should, by reference to s 87CD(3)(a), be taken as directed to an allegation of contributory negligence;

(2) it was not alleged that Ms Burgess was a concurrent wrongdoer and should be held responsible as such;

(3) the allegations of contributory negligence by the Concrete Supply defendants should be restricted to its allegations of ABCL's internal failings which, leaving aside the audit confirmation letter, it described in the following way:

(a) an alleged failure by ABCL to adopt "recommendations of internal auditors in relation to deficiencies within its credit control function"; and

(b) ABCL was allegedly negligent in failing to identify irregularities in Concrete Supply's account.

(4) the alleged failures in the preceding paragraph were not made out; and

(5) if apportionment is appropriate, then it should be no more than 12.5%.

678 The respective submissions to this point may be summarised as follows. The Concrete Supply defendants submitted that ABCL's contributory negligence consisted of the conduct of Ms Burgess and the systems failures. ABCL submitted that only the alleged systems failures qualify as contributory negligence. Ms Burgess' fraudulent conduct is not attributable to ABCL. At most, she is a concurrent wrongdoer and that allegation is not pleaded by the directors.

679 I should note, perhaps in passing, that the relevant contributory negligence section, if I may put it that way, in the Competition and Consumer Act is s 137B and not s 87CD(3)(a). The latter section is directed to how the Court goes about apportionment where there is contributory negligence "under any relevant law". I note that although ABCL has variously referred to the conduct of the Concrete Supply defendants as dishonest and deceitful and I have made findings about that conduct, it has not run a case that contributory negligence is excluded by reason of s 137B(d). In making that observation, I am not to be taken to be making any observation as to whether or not such a case was available to it.

680 In response to ABCL's submissions, the directors did two things. First, they filed submissions in reply. Secondly, they sought the consent of the other parties to amend their Defence to allege that Ms Burgess was a concurrent wrongdoer. ABCL did not consent to

the directors having leave to amend their Defence and the directors issued an interlocutory application supported by an affidavit of their solicitor seeking leave to amend para 13 of their Defence so that it reads, relevantly, as follows:

> 13. In the event that the Fourth to Sixth Defendants are found liable for misleading and deceptive conduct (which cause of action is denied), they say that the amount of the loss or damage claimed by the Plaintiff ought to be reduced to take into account the Plaintiff's contributory negligence, ~~and~~ the contributory negligence of its external auditors, and in the event that the Plaintiff makes out paragraph 3 of its Reply, the contributory conduct of Glenda Burgess in her own capacity.

681 I will come back to the submissions in reply insofar as they deal with submissions as to substantive matters concerning apportionment in due course. For present purposes, a summary of those submissions and the solicitor's affidavit with respect to the application to amend is as follows:

(1) Ms Burgess' conduct should be attributed to ABCL for the purposes of contributory negligence because, even if that conduct was fraudulent, ABCL benefited from her conduct;

(2) ABCL has always asserted that Ms Burgess was fraudulent and its case is that her conduct was fraudulent. It was on this basis that it was given leave during the trial to file a Reply alleging that her conduct was fraudulent;

(3) ABCL's written submissions on apportionment were the first time that it alleged that the directors had not alleged that Ms Burgess was a concurrent wrongdoer "notwithstanding that her alleged conduct was not in issue and formed the basis of the matters pleaded at para 13 of the Defence"; and

(4) leave to amend the Defence will not lead to the directors seeking leave to reopen their case or lead further evidence or make any further submissions.

682 ABCL opposed the application by the directors to amend their Defence. A summary of their submissions in support of its opposition to the application is as follows:

(1) as a general submission, the amendment should not be allowed because it is a significant departure from the case the directors conducted at trial, it is uncertain in scope and as a late amendment it will, if allowed, cause prejudice to ABCL;

(2) the directors' pleaded case is one of contributory negligence;

(3) the opening of ABCL made it clear that Ms Burgess' knowledge could not be attributable to ABCL because of her fraudulent conduct;

(4) the directors limited their case at trial to failures which meant that there was a failure to prevent the fraud perpetrated by Ms Burgess;

(5) ABCL has not had the opportunity to address the Court on the apportionment of liability between the director defendants and Ms Burgess (as distinct from ABCL) or the effect of s 87CC of the Competition and Consumer Act in the event that the Court accepts that Ms Burgess is a concurrent wrongdoer;

(6) the directors seek to expand their apportionment case to include an allegation that Ms Burgess is a concurrent wrongdoer on the premise that Ms Burgess' conduct is not attributable to ABCL. The relevant conduct is not identified in the proposed Amended Defence;

(7) the key relevant principles as identified in the authorities indicate that substantial matters against allowing an amendment are as follows:

    (a) the lateness of an application to amend and the inadequacy of the explanation proffered;

    (b) prejudice or injustice to the opposing party which cannot be compensated by costs; and

    (c) whether the party seeking the amendment deliberately framed his or her existing case in a particular way from which it now seeks to resile;

(8) the directors proffer no explanation for not pleading that Ms Burgess was a concurrent wrongdoer. They acknowledge that they have not pleaded that allegation. Their case has always been, and has always been limited to, an assertion that Ms Burgess' conduct is attributable to ABCL;

(9) the fact that the directors have restricted their case to a case that Ms Burgess' conduct is attributable to ABCL may be seen from the following:

    (a) the plea of contributory negligence in the directors' Defence does not make any separate allegation of negligence or breach of contract against Ms Burgess;

    (b) on 10 April 2018, the directors wrote to ABCL giving it notice pursuant to s 87CE of the Competition and Consumer Act of their contention that ABCL's external auditors were concurrent wrongdoers and proportionately liable for

the misleading and deceptive conduct claims. Ms Burgess was not identified as a concurrent wrongdoer;

(c) on 6 June 2018, the directors wrote to ABCL noting that ABCL sought to recover the same loss against Ms Burgess in the proceedings in the Supreme Court of South Australia as it sought from the directors in these proceedings and reiterated their case that Ms Burgess' conduct was attributable to ABCL. There was no suggestion that Ms Burgess was a concurrent wrongdoer in her own right; and

(d) no attempt was made to suggest that Ms Burgess was a concurrent wrongdoer during ABCL's opening or when ABCL sought leave to file a Reply despite it being made clear by ABCL that its case was that Ms Burgess' conduct was not attributable to it.

(10) ABCL has been prejudiced in that it could have addressed in its written submissions the relative culpability between Ms Burgess and the directors and the relative causal effect of their respective conduct. ABCL may have sought to adduce evidence from Mr Lemmon and its sales representatives regarding the comparative reliance they placed on Ms Burgess and the directors' conduct and representations at their meetings.

683 It may be convenient if I summarise the issues to this point. A plea of contributory negligence is raised by the directors, but there is no plea that Ms Burgess was a concurrent wrongdoer. ABCL alleged that Ms Burgess' knowledge and conduct was not attributable to ABCL. The directors denied this, but they did, as an alternative, plead that Ms Burgess was a concurrent wrongdoer in order to take advantage of the provisions of Part IVA of the Competition and Consumer Act. The directors sought to remedy that by an application made after closing submissions.

684 I have found that Ms Burgess' knowledge is to be attributed to ABCL and that the misleading or deceptive conduct claim must fail. This argument is, therefore, hypothetical, but I have decided to consider it in case I am wrong on the attribution issue. The assumption on which I considered it is that Ms Burgess' conduct is not attributable to ABCL.

685 Sections 87CB and 87CD of Part VIA are in the following terms:

87CB Application of Part

(1) This Part applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 236 of the Australian Consumer Law for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 18 of the Australian Consumer Law.

(2) For the purposes of this Part, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Part, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Part, apportionable claims are limited to those claims specified in subsection (1).

(5) For the purposes of this Part, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

87CD Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:

(a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and

(b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:

(a) liability for the apportionable claim is to be determined in accordance with the provisions of this Part; and

(b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

(3) In apportioning responsibility between defendants in the proceedings:

(a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and

(b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

> (5) A reference in this Part to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Part, under rules of court or otherwise.

686 Counsel for the directors submitted that they misapprehended the position such that they thought it would be sufficient for them in dealing with concurrent wrongdoing to rely on the conduct of ABCL, rather than the conduct of one of its employees, Ms Burgess. They considered that it was sufficient to rely on the conduct of ABCL. I accept that explanation. It seems to me the most likely in the circumstances, coupled with the fact that their primary focus was the case that Ms Burgess' conduct was attributable to ABCL. I accept that the absence of a plea of the nature the directors now wish to advance was due to a misapprehension or inattention to an alternative allegation and was not held back for a forensic reason. None is obvious in the circumstances.

687 On the one hand, the application to amend comes at a very late stage and at a time when the company is under deed administration and that deed is under challenge. On the other hand, if the directors are not able to rely on the conduct of Ms Burgess as a concurrent wrongdoer, then the only contributory conduct upon which the directors could rely would be what I have described as the alleged ABCL systems failures.

688 In the circumstances, I was particularly anxious to determine what prejudice ABCL might suffer if the amendment was allowed. The absence of an opportunity to make submissions on relative culpability could be cured by an order giving the parties the opportunity to make submissions within a short time frame. Of more concern was the significance of s 87CC referred to in ABCL's written submissions. I called the parties back to identify clearly the significance of s 87CC.

689 It became clear from what the parties said that ABCL would wish to rely on s 87CC to defeat the directors' claim that Ms Burgess was a concurrent wrongdoer should the directors be permitted to raise that allegation. The directors indicated that they would strongly oppose ABCL being able to rely on s 87CC. It seemed to me that the effect of the attitude of the parties was that had I allowed the Concrete Supply defendants to allege that Ms Burgess was a concurrent wrongdoer, there would be further pleading arguments. That was enough to persuade me that the application to amend by the directors should be refused. As it happens, it should be refused on the basis that it is, in the circumstances, unnecessary. Had it been necessary, I indicate that I would have refused it on the merits.

690 Finally, the Concrete Supply defendants submitted that, even if all their other arguments were rejected, Tina was not involved in the misleading or deceptive conduct.

691 It is well-established that for a person to be involved in a contravention the person must have knowledge of the essential matters which make up the offence (*Yorke v Lucas* at 667 and 670 per Mason ACJ, Wilson, Deane and Dawson JJ). In the case of a representation, there must be actual knowledge of the falsity of the representation. Actual knowledge includes wilful blindness and is more readily inferred in the case of a person who has intimate knowledge of the company's operations and was actively and directly involved in the company's management.

692 There is, with respect, a helpful summary of the law as to the knowledge required in order for a person to be involved in a contravention in *Australian Competition and Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17 at [133]–[135]. It is as follows:

> 133 For a person to be involved in a contravention within the meaning of s 75B(1)(c) of the Act, a person must be an intentional participant in the contravention, the necessary intent being based upon knowledge of the essential elements of the contravention: see *Yorke v Lucas* (1985) 158 CLR 661 at 670. Thus, while it is not necessary to establish that the individual Respondents had knowledge that there was a contravention of a provision of Pt V of the Act, it is necessary to demonstrate that each individual Respondent had knowledge of each of the essential elements of the contravention.
>
> 134 In order to establish whether any of the individual Respondents was involved in a contravention, it is necessary to examine the state of mind of each of them separately in relation to each alleged contravention. Here the Commission's pleading did not permit of such a course. It did not ever identify the contravention that the particular Respondent was said to be involved in. We do not understand any of the Respondents to have addressed any case specific to them. Rather, his Honour appears to have assumed that merely being a director of IMB and being involved in promoting its activities was sufficient to attract the operation of s 75B(1)(c) in relation to any contravention on the part of IMB that occurred during the time that the individual was involved in promoting IMB's activities. However, his Honour made no finding concerning the state of mind of any of the individual Respondents. Further, the Full Court was not invited by the Commission to make findings in that regard. Rather, the Commission sought to support the conclusions reached by the primary judge.
>
> 135 It is not necessary to establish any subjective element in relation to a contravention of Pt V of the Act. A contravention may be committed unintentionally. That is to say, a person may contravene a provision of Pt V even though that person does not have knowledge of all of the essential elements that constitute the contravention. However, before any accessorial liability will arise, it is necessary to establish the subjective element of knowledge of each of the essential elements of the contravention. That

> knowledge may be constructive in the sense that it may be possible to show wilful blindness in relation to the elements of a contravention. However, absent a finding of wilful blindness, it is necessary to establish actual knowledge on the part of a person to whom it is sought to sheet home accessorial liability in respect of a contravention of Pt V.

693 The Statement of Claim contains the following particulars of "involvement" in the contravention:

> 81 The Fourth to Sixth Defendants acted dishonestly in that they:
>
> 81.1. were aware of the First Defendant's trading terms and indebtedness to the Plaintiff consistent with their obligations to the First Defendant as pleaded at paragraphs 3 and 6 above;
>
> 81.2. knew (based on the matters referred to in paragraphs 7 to 25) that the First Defendant was not entitled to receive Purchased Product without paying for it in accordance with the terms of the Bulk Supply Agreement and the Price Increase Letters;
>
> 81.3. caused the First Defendant to make the Credit Entries, cancel RCTIs and withhold payment for $12,457,472 of Purchased Product between March 2012 and November 2017; and
>
> 81.4. failed to disclose to the Plaintiff that the First Defendant was making the Credit Entries, cancelling RCTIs and withholding payment totaling [sic] $12,457,472 between March 2012 and November 2017.

694 The evidence establishes the following:

(1) that whilst Rino and Jason were involved in the day-to-day operations of the business, Tina was not;

(2) further, Tina was not involved in the day-to-day decisions of the business;

(3) Tina's involvement in decision-making was limited to major investment decisions;

(4) Tina signed cheques on a regular basis, including cheques made out to ABCL; and

(5) Tina was the public officer of Concrete Supply under s 252 of the Income Tax Assessment Act and she signed income tax returns and BAS from time to time. Those documents reflected the system adopted by Concrete Supply in claiming the rebate.

695 Although I formed the opinion Tina was keen to disclaim any knowledge of the details of the business (see [292] above), I am not satisfied that she knew the matters in paras 81.3 and 81.4, even if she knew aspects of the matters in para 81.1 and 81.2. Even if it can be said that she ought to have known all the matters in paras 81.3 and 81.4, that is not equivalent to knowledge (*Giorgianni v R* [1985] HCA 29; (1985) 156 CLR 473) and knowledge is essential to a claim of knowing involvement.

696 The claim against Tina fails for the reason previously given but also because she was not involved in the misleading or deceptive conduct.

697 ABCL's misleading or deceptive conduct claim against the Concrete Supply defendants fails.

698 With respect to the allegation of contributory negligence on the part of ABCL, the Concrete Supply defendants identified the following alleged ABCL systems failures:

(1) the alleged discount or rebate in the March 2009 Statement of Account and its origins within ABCL's business was not brought about by any conduct of Concrete Supply;

(2) ABCL ignored the recommendations of internal auditors in relation to deficiencies within its credit control function;

(3) ABCL, or its parent company, ABL, maintained a practice of outstanding debtor balances being reported manually and in Excel, rather than a report generated automatically from ABCL's accounting systems;

(4) ABCL gave Ms Burgess the ability to amend credit limits within ABCL's books and records to a level which is alleged to be above the authorised credit limit Concrete Supply would require based on its average monthly purchases, even assuming trading terms were 90 days and not 30 days; and

(5) ABCL failed to review creditor ageing records that would disclose irregularities in ABCL's debtor records for Concrete Supply.

699 I have addressed a number of arguments in relation to ABCL's misleading and deceptive conduct claim on the assumption that my conclusion that Ms Burgess' knowledge of Concrete Supply's level of indebtedness is to be attributed to ABCL is wrong, with a view to addressing as many issues as is possible.

700 However, in this area, I consider that the assumptions I would need to make to determine the issue of contributory negligence mean that the process would be artificial and unhelpful and I do not propose to undertake it. I would need to assume the following: (1) that Ms Burgess' knowledge was not to be attributed to ABCL; (2) that Ms Burgess' conduct was to be left out of account because it was not pleaded that she was a concurrent wrongdoer; and (3) the assessment of contributory negligence would involve an assessment of the wrongdoing of the Concrete Supply defendants and the alleged ABCL systems failures.

BREACH OF TRUST OR FIDUCIARY DUTY

701 ABCL alleges that in connection with the cement it supplied to Concrete Supply, Concrete Supply committed a breach of trust or fiduciary duty for which it must account to ABCL. When I asked counsel for ABCL what such a claim adds to the debt claim if ABCL is successful with respect to that claim, he said that it is an alternative basis for holding Concrete Supply liable.

702 The rationale of ABCL's breach of trust or fiduciary duty claim is, in large measure, as a basis for holding the directors liable. ABCL alleges that the directors knowingly assisted Concrete Supply in its breach of trust or fiduciary duty. For present purposes, it is sufficient to identify the claim as a claim for knowing participation in a breach of trust or fiduciary duty. The well-known cases which have considered such a claim are *Barnes v Addy* (1874) 9 Ch App 244; *Consul Developments Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8; (1975) 132 CLR 373; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89.

703 ABCL's case is that the trust or fiduciary obligation on Concrete Supply arose by reason of a clause in the BSA or in ABCL's General Conditions of Sale. Concrete Supply, as a purchaser of cement from ABCL, would ordinarily be under an obligation to pay for the cement and the relationship between the parties would, in the absence of something more, be that of a creditor and a debtor. However, ABCL alleges that cl 4.2 of the BSA or the equivalent clause in ABCL's General Conditions of Sale also gives rise to an equitable obligation by way of a trust or fiduciary obligation.

704 I have already set out cl 4.2 of the BSA but I set it out again because of its central importance in this section:

> **4.2 Ownership**
>
> Title to and ownership in each delivery of the Product only passes to the Buyer when:
>
> (a) the amount set out in the corresponding Delivery Docket (including any accrued interest) has been paid for in full; and
>
> (b) all other Delivery Dockets for the delivery of Product have been paid for in full.
>
> Until then:
>
> (c) title to and ownership of all delivered Product remains with the Seller;
>
> (d) the Buyer holds such Product as bailee and fiduciary for the Seller;

(e) the Buyer must store such Product separately from its own goods; and

(f) the Buyer must keep records which relate to such Product separately from those which relate to its own goods.

705 The following points should be noted about this clause. First, the clause provides that the trust or fiduciary obligation persists until not only payment has been made for the particular delivery of cement, but also until payment has been made for all other deliveries of cement. Secondly, Concrete Supply, no doubt like most customers of ABCL, uses the cement to make concrete which is then delivered to its customers for building and construction purposes. Concrete Supply is paid by its customers for that concrete. Clause 4.2 does not contain a provision that there is a trust or fiduciary obligation over, or with respect to, the proceeds of the sale of concrete.

706 ABCL's case as pleaded and as advanced is that Concrete Supply is liable for the unpaid balance of $12,477,842.58 in relation to the supply of cement to it by ABCL. I have found that Concrete Supply is liable to ABCL for that amount and I have rejected the submission that there was an agreement that Concrete Supply was entitled to a discount or rebate for that amount, or that ABCL is estopped from recovering that amount from Concrete Supply.

707 ABCL's case as pleaded and advanced is that by reason of cl 4.2 of the BSA, Concrete Supply held the cement and any proceeds generated using the cement on trust for ABCL. It claims that that conclusion follows from the terms of cl 4.2. The cement received by Concrete Supply, but not paid for, was held by Concrete Supply on trust for ABCL and Concrete Supply committed breaches of trust by using the cement to manufacture concrete and by selling the concrete so manufactured without payment in full of the amounts set out in the delivery dockets. ABCL alleges that Concrete Supply dissipated all or substantially all of the "Trust Fund" (not defined in the pleading) between March 2012 and November 2017. The context of the term in the pleading suggests that the Trust Fund is comprised of the proceeds received by Concrete Supply of the sale of the concrete manufactured using the cement.

708 ABCL's case as pleaded and advanced is that the directors had knowledge of the matters constituting the breaches of trust and fiduciary obligation and acted dishonestly. For reasons which will become clear, it will not be necessary for me to consider those allegations.

709 It is convenient to start with the matters advanced by Concrete Supply and the directors in support of their contention that this claim is not maintainable.

710 The first matter advanced by Concrete Supply and the directors is that cl 4.2 of the BSA was not part of the contractual relationship between ABCL and Concrete Supply. I have already addressed this argument and rejected it. The BSA, including cl 4.2, governed the contractual relationship between ABCL and Concrete Supply. In the alternative, the General Conditions in the BSA, including cl 4.2 and other documents, governed the contractual relationship between ABCL and Concrete Supply.

711 The second matter advanced by Concrete Supply and the directors is that cl 4.2 does not accord with the "commercial reality" and is "inconsistent" with practice adopted by Concrete Supply and known to ABCL in taking delivery of cement from ABCL and using it to manufacture concrete which is then sold to its customers. I outline this practice below. At this point, it is convenient to note this argument is said to support four key propositions. First, the provisions of cl 4.2 and the notion that title and ownership will only pass upon the payment of all delivery dockets is internally inconsistent with the payment terms between ABCL and Concrete Supply. Secondly, there was an implied permission for Concrete Supply to use the cement to manufacture concrete and to sell the resulting concrete before payment to ABCL and there was no breach of trust or fiduciary duty in "dissipating" the cement. Thirdly, cl 4.2 did not create a trust or fiduciary duty over, or with respect to, the proceeds of the sale of the cement and there can be no breach of trust or fiduciary duty for "dissipating" the proceeds of sale. Finally, if indeed a trust or fiduciary obligation arose at any time with respect to the cement, it ended when the cement was used to manufacture concrete.

712 The practice adopted by Concrete Supply as to the use of the cement it received from ABCL and the payment of invoices, RCTIs or delivery dockets was the subject of evidence from the directors which I have already summarised. However, it is convenient to summarise the key points at this stage:

(1) At no point in time has Concrete Supply paid for all delivery dockets for the delivery of product and, therefore, it follows that during the period, the requirements of cl 4.2 for the transfer of title have never been satisfied.

(2) ABCL extended credit to Concrete Supply in relation to the supply of cement. As will become clear, the resolution of the precise period of credit is not critical for the purposes of determining the present argument. Special Condition 5.3 in the BSA specifies that payment is to be made within 30 days of the invoice. The price increase letters refer to 30 days from the end of the month of delivery date, as did the invoices

prepared and sent by ABCL. The RCTIs prepared by Concrete Supply referred to "Terms" of "30 days". By contrast, Concrete Supply's case is that, in practice, they were given 90 days to pay.

(3) Concrete Supply purchases materials on a "just in time" basis which means that it generally uses what is purchased within 24 to 48 hours of supply. There are two reasons for this practice. First, there are significant costs associated with the materials used to produce the product. Secondly, there is a risk of cement setting if it comes into contact with moisture. In those circumstances, Concrete Supply would, within one to two days of taking delivery, mix the cement with sand, aggregate and water to produce concrete.

(4) The purchase of materials, particularly cement, on a "just in time" basis is common throughout the concrete industry. That was the evidence of Rino which I accept on this point. Mr Lemmon was familiar with a "just in time" practice and the dangers of moisture reacting with cement whilst it is stored.

(5) ABCL was aware of Concrete Supply's practice concerning the use of cement it received from ABCL. The long association between the two companies and the frequent visits by sales representatives to Concrete Supply's premises suggests that that inference should be drawn. More importantly, when issues arose from time to time about the quality of the cement, it was clear from the conversations that took place that ABCL knew that the cement had been used to manufacture concrete and then delivered to a customer within a few days of the cement having been collected by a Concrete Supply driver from an ABCL depot.

713 It is important to appreciate precisely how ABCL puts its contention that the directors knowingly participated in a breach of trust or fiduciary duty. In that context, the time of breach is of particular importance.

714 The first and primary argument advanced by ABCL is that the breach occurred at the point when Concrete Supply sold the manufactured product, that is, concrete, and dissipated the proceeds without paying ABCL. At that point, ABCL was the equitable owner of the concrete. ABCL accepted that, but for two subclauses in cl 4.2, it would not have equitable ownership in the concrete in those circumstances. ABCL did submit that it would have a charge over the concrete in those circumstances, but I do not need to consider that possibility

with the issues it may raise as to registration because ABCL's case was put on the basis of equitable ownership in the concrete, rather than a charge.

715 The two subclauses in cl 4.2 which were said by ABCL to lead to a conclusion of equitable ownership are subclause (e) which requires the buyer to store the product separately from its own goods, and subclause (f) which requires the buyer to keep records which relate to the product separately from those which relate to its own goods.

716 The second and alternative argument advanced by ABCL is that, assuming the act of mixing the cement to manufacture concrete destroyed ABCL's equitable ownership of the cement, the act of mixing was a dissipation of the cement in breach of the fiduciary duty in cl 4.

717 It is convenient to deal with the alternative argument first. It relies on a breach at an earlier point in time in the transformation from the cement to concrete and then to the proceeds of sale paid or payable by Concrete Supply's customers.

718 The starting point is that, aside from the practice adopted by Concrete Supply, the very nature of the product in this case gives rise to an expectation that it will be used for resale or by consumption in a process. In *BHP v Robertson* [2002] NSWSC 336, Barrett J made the following observations (at [16]):

> A point of commercial reality needs to be addressed here. Goods of the nature presently in question, steel products, are obviously needed by customers for commercial purposes. They are not goods of a kind which anyone keeps either simply for the sake of having and enjoying them or to put them to some continuing use. They are different therefore from a painting or a piece of furniture or a machine. The common expectation must be that the customer will turn items such as steel products to account by re-sale or by consumption in some process, if only because that is the most obvious way in which the customer is going to generate cash to pay the outstanding price. Commercial reality leans against the idea that the customer must keep the goods idle lying in the store provided for in par (d), hoping somehow to generate cash from some other source to satisfy the price. To the extent that it may be necessary to imply the missing words of positive authority or permission to sell as agent (and I have already said that I doubt the necessity), I think these commercial circumstances cause them to be applied according to the principles in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

719 It is true that an alleged wrongdoer cannot rely on a breach of an obligation to avoid liability for a breach of trust or fiduciary obligation. In *Henry v Hammond* [1913] 2 KB 515 (*Henry v Hammond*), Channell J said (at 521):

> I am aware that, if the defendant was bound to keep the money separate, the fact that he did not do so cannot assist him; he has committed a breach of his obligation. The only use of looking at the facts to see whether in the particular case he has kept the

> money as a separate fund is to see whether he has recognized his obligation, the obligation itself being the essential thing. This principle seems to me to reconcile all the cases.

720 There may be an issue in this case as to whether, assuming Concrete Supply did not repudiate the contract or become insolvent and continued to use the cement in the normal and accepted way, there was a contract of bailment with respect to the cement at any time. In *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] 1 Ch 25 (*Borden*), Bridge LJ (as his Lordship then was) said (at 35):

> I can well appreciate that in the present circumstances, if the defendants repudiated the contract, or became insolvent, before the resin had been paid for, they might then have become a bailee of any resin which at that time remained unused. But so long as the business transacted between these parties continued in the ordinary way and resin was delivered for use in the manufacturing process at a time before it could have been paid for, in circumstances in which the plaintiffs clearly had no right to call for its return or to object to its use in the manufacture of chipboard, and where it was never intended that the resin should be recovered, either in its original or in its altered form or at all, it seems to me quite impossible to say that this was a contract of bailment. The contract was essentially one of sale and purchase, subject only to the reservation of title clause, whatever its effect may have been.

I do not need to decide that point.

721 I do not consider that, having regard to the nature of the product and the practice adopted by the parties, Concrete Supply's act of mixing the cement to manufacture and, indeed, in then selling the concrete to its customers before payment was due, was a breach of cl 4.2 of the BSA. Clause 4.2 must be read so as to accommodate the practice adopted by Concrete Supply and known by ABCL and not objected to by it. That practice involved the making of concrete by using cement and other ingredients and the sale of the concrete to customers before payment was due. I reject ABCL's alternative argument.

722 I turn to ABCL's primary argument.

723 In *Borden*, the product was resin and it was used as an ingredient in making chipboard. In that case, the Court of Appeal held that title in the resin disappeared at the moment it was used in the manufacturing process to make chipboard. Bridge LJ said (at 35):

> But I am quite content to assume that this is wrong and to suppose that up to the moment when the resin was used in manufacture it was held by the defendants in trust for the plaintiffs in the same sense in which a bailee or a factor or an agent holds goods in trust for his bailor or his principal. If that was the position, then there is no doubt that as soon as the resin was used in the manufacturing process it ceased to exist as resin, and accordingly the title to the resin simply disappeared.

724 Templeton LJ (as his Lordship then was) said (at 44):

> When the resin was incorporated in the chipboard, the resin ceased to exist, the plaintiffs' title to the resin became meaningless and their security vanished. There was no provision in the contract for the defendants to provide substituted or additional security. The chipboard belonged to the defendants.

725 Finally, Buckley LJ said (at 46):

> It is common ground that it was the common intention of the parties that the defendants should be at liberty to use the resin in the manufacture of chipboard. After they had so used the resin there could, in my opinion, be no property in the resin distinct from the property in the chipboard produced by the process. The manufacture had amalgamated the resin and the other ingredients into a new product by an irreversible process and the resin, as resin, could not be recovered for any purpose; for all practical purposes it had ceased to exist and the ownership in that resin must also have ceased to exist.

726 In a similar way, in this case, ownership or title in the cement ceased when it was mixed to make concrete.

727 To succeed, ABCL must show that it had (as it put it) equitable ownership in the concrete or, having regard to the practice adopted, in the proceeds of sale of the concrete.

728 It is true that a requirement to keep money or goods separate can be an indication, perhaps a strong indication, of a trust or fiduciary obligation rather than a mere creditor and debtor relationship. In *Henry v Hammond*, Channell J said (at 521):

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law.

729 I do not think that the obligation in subclause (e) in the BSA and the allied provision in subclause (f) assists ABCL. That subclause relates to the cement and not the concrete or the proceeds of sale of the concrete.

730 The difficulty for ABCL is that the BSA does not contain a clause giving it rights over the finished product i.e., the concrete, or the proceeds of sale of the concrete. Again, the observations of the Court of Appeal in *Borden* are pertinent. Bridge LJ said (at 42):

> The lesson to be learned from these conclusions is a simple one. If a seller of goods to a manufacturer, who knows that his goods are to be used in the manufacturing process before they are paid for, wishes to reserve to himself an effective security for the payment of the price, he cannot rely on a simple reservation of title clause such as

> that relied upon by the plaintiffs. If he wishes to acquire rights over the finished product, he can only do so by express contractual stipulation. We have seen an elaborate, and presumably effective, example of such a stipulation in *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.* [1976] 1 W.L.R. 676.

731 Templeton LJ said (at 44):

> I agree that in a commercial contract of this nature no agreement should be implied for the furnishing of additional security. In the absence of any implied or express agreement to provide substitutional security, equity has nothing to trace; the resin and the title and the security disappeared without trace. I am in any event unwilling to imply a term or invoke the aid of equity to produce a result which other creditors of the defendants might justifiably regard as a fraudulent preference.

732 Buckley LJ said (at 46):

> The condition does not expressly deal with any property in the chipboard, or create any equitable charge upon the chipboard, produced by the manufacture. If any term is to be implied, that must be a term which is necessary to give the contract business efficacy, but it must also be a term which the court can see unambiguously to be a term which the parties would have inserted into their contract had they thought it appropriate to express it. If no such term can be identified, then the court may have to conclude that the contract was inept to achieve any valuable, practical result in that respect.
>
> Is it possible here to imply any term giving the plaintiffs a proprietary interest in the chipboard manufactured by the defendants, or giving the plaintiffs an equitable charge upon that chipboard?
>
> Common ownership of the chipboard at law is not asserted by the defendants; so the plaintiffs must either have the entire ownership of the chipboard, which is not suggested, or they must have some equitable interest in the chipboard or an equitable charge of some kind upon the chipboard. For my part, I find it quite impossible to spell out of this condition any provision properly to be implied to that effect.

733 The absence of such a clause is fatal to ABCL's primary argument. ABCL's breach of trust or fiduciary duty claim fails. In those circumstances, it is not necessary to consider the directors' participation and knowledge, although findings relevant to these matters have been made in relation to other claims and defences raised in this case.

ABCL'S CHALLENGE TO THE DEED OF COMPANY ARRANGEMENT

734 This section of my reasons is organised under the following headings:

- A Brief Chronology of the Administration;
- The Second Report to Creditors and the Investigations Carried Out by the Administrators;
- The Second Meeting of Creditors;
- The Nature of the Claims made by ABCL;

- The Key Witnesses — Messrs Cantone, Cooper, Morris and Heard;
- The Evidence of Trade Creditors and Employee Creditors;
- The Relevant Principles;
- Analysis of the Issues; and
- Conclusions.

A Brief Chronology of the Administration

735 It is convenient at the outset to set out a brief chronology of the course of the administration from a point shortly prior to the appointment of the administrators on 14 November 2017 to 21 December 2017 when the DOCA was executed. The matters which follow are not in dispute and are established either by admissions on the pleadings, Mr Patrick Leader-Elliott's evidence about which he was not cross-examined, or such parts of the evidence of Mr Cantone and Mr Tull which are not the subject of challenge.

736 At the time of the events of the administration, ABCL's solicitors were Lipman Karas, including Mr Lipman, Mr Scott Foreman and Mr Leader-Elliot. The administrators' solicitors were O'Loughlins Lawyers, including Mr Samuel Black. Concrete Supply's solicitors were Tindall Gask Bentley Lawyers.

737 In early October 2017, senior management of ABL and ABCL identified certain irregularities in ABCL's accounts with respect to Concrete Supply. I have already referred to the irregularities which were subsequently identified (at [61]).

738 On 25 October 2017, a meeting took place between Mr Lemmon, Mr Michael Kelly, Jason, Rino, Mr D'Alessandro and Ms Senanayake. I have already referred to this meeting and it is sufficient to reiterate that at the beginning of the meeting Mr Lemmon handed a letter to Jason which alleged that Concrete Supply owed ABCL more than $10 million (see [124] above).

739 On 27 October 2017, a meeting took place between Mr Lemmon, Mr Clayton (ABL's General Counsel and Company Secretary) and Mr Niarchos. On the same day, Mr Lemmon and Mr Michael Kelly also met with Jason, Rino and Mr D'Alessandro. On 31 October 2017, there was a meeting between representatives of Concrete Supply and ABCL.

740 On 2 November 2017, Mr Lemmon had a telephone conversation with Mr D'Alessandro. I have already referred to the content of part of that conversation (at [120]). On the same day,

there was a meeting between Mr Tull, Mr Cantone, Rino, Jason and other advisors to Concrete Supply (see [878] below).

741 On 3 November 2017, ABCL received a letter from Tindall Gask Bentley (see [126] above). The letter contained the following assertions: (1) Concrete Supply was entitled to a 30% rebate; (2) the entitlement to the rebate was based on the 2 December 2009 audit confirmation letter; and (3) the "arrangement" had been "reaffirmed verbally" by ABCL on "numerous occasions".

742 On 3 November 2017 and again on 6 November 2017, the solicitors for ABCL, Lipman Karas, responded by letter to the letter from Tindall Gask Bentley Lawyers. In those letters, Lipman Karas denied that ABCL had agreed to grant Concrete Supply the alleged rebate and sought particulars of the alleged arrangement, including the person who is said to have affirmed the agreement on behalf of ABCL.

743 On 4 November 2017, Rino met with Mr Tull. I already have referred to the matters discussed at that meeting (see [552] above).

744 On 6 November 2017, there was a meeting between Mr Michael Kelly, Rino, Jason and Mr D'Alessandro regarding the future supply of cement by ABCL to Concrete Supply so that the latter could continue to carry on business (see [360] above).

745 On 13 November 2017, there was a meeting between Mr Cantone, Rino, Jason, Mr D'Alessandro and Mr Tull (see [362] and [556] above). In summary, the following occurred at the meeting: Mr Cantone was told that the negotiations with ABCL had broken down; Mr Cantone explained the voluntary administration process and the possibility of the directors proposing a DOCA; and the directors indicated that they would consider their options.

746 On the same day, Lipman Karas wrote to Tindall Gask Bentley Lawyers providing invoices for Concrete Supply's purchases between 1 July 2017 and 6 November 2017 and seeking payment forthwith. Furthermore, on the same day, ABCL released an announcement to the ASX which was in the following terms:

> ABCL (ASX: ABC) advises that it has identified certain financial discrepancies which relate to transactions under which a small number of customers may have underpaid for product supplied to them. The Company is investigating the matter fully, including the possible involvement of an employee of the Company, with the assistance of forensic accountants KPMG.

> While the investigation is still in process, based on the information currently available, it appears that there may have been deliberately hidden underpayments by customers over a sustained period, which may have a negative impact on FY17 EBIT currently estimated to be up to $14 million, less the impact of any recoveries which may be made. Pending completion of the investigation and subject to any recovery action, it is likely that an additional provision for doubtful debts of $14 million will be made. No material cash flow impact is expected.
>
> The matter was identified under ABCL's existing compliance and risk management systems and processes. The Company is strengthening these further in the light [sic] of this matter.
>
> The Company has reported this matter to its auditors and will co-operate with relevant authorities as appropriate as the investigation proceeds.

747 On 14 November 2017, the directors of Concrete Supply held a meeting at which they resolved that they were of the opinion that Concrete Supply was insolvent, or likely to become insolvent, at some future time and to appoint Mr Cantone and Mr Cooper as joint and several administrators of Concrete Supply pursuant to s 436A of the Corporations Act. Rino then called Mr Cantone confirming that the directors of Concrete Supply had resolved to appoint Mr Cantone and Mr Cooper as administrators of Concrete Supply. On the same day, Mr Cantone attended to a number of "day one" tasks in relation to the administration. These tasks included: telephone calls with Rino and Jason to discuss the operations of the business of Concrete Supply, including details of main suppliers, staff and customers; a telephone call with Mr Tull to discuss financial aspects of the business; conducting company and internet searches in relation to Concrete Supply; preparing a Form 505 with the Australian Investments and Securities Commission (ASIC); drafting day one appointment letters; and planning for a meeting at Concrete Supply the next day, including information to be provided to employees, suppliers and creditors who would need to be contacted.

748 On 15 November 2017, Mr Cantone attended the premises of Concrete Supply. I will return to detail the tasks undertaken by Mr Cantone when I consider his evidence.

749 On 15 November 2017, Mr Foreman, Mr Lipman and Mr Clayton met with Mr Cantone. It is not in dispute that Mr Lipman informed Mr Cantone of the following: (1) ABCL had supplied approximately $32 million of cement to Concrete Supply, but had only been paid $20 million, leaving a shortfall of $12 million; (2) Concrete Supply had acknowledged that it had received approximately $32 million of cement, but only paid $20 million; (3) Concrete Supply denied that it was liable for the shortfall on the basis that it was entitled to a "rebate"; but (4) Concrete Supply had not applied the alleged "rebate" across all purchases from ABCL, but rather had withheld payment in relation to certain purchases; (5) Concrete Supply

could not identify the amount of the alleged "rebate", and had asserted on various occasions that the applicable rate was 30%, 32–33%, 35% and 38%; (6) Concrete Supply had not identified any written or oral agreement supporting the alleged "rebate"; and (7) Concrete Supply's approach of paying some invoices in full and not paying other invoices at all, and unilaterally changing the rate of the alleged rebate, demonstrated that the alleged rebate was a nonsense, and a genuine rebate would have been for a fixed, agreed amount and applied across all invoices.

750 On 17 November 2017, the administrators circulated what they called an initial Advice to Creditors. Mr Cantone said, and I accept, that that advice contained details of the first meeting of creditors (e.g., when and where it was to be held), limited information concerning the current position of Concrete Supply based on the investigations undertaken to that date, details of the rights of creditors where a company is in administration, a Declaration of Independence, Relevant Relationships and Indemnities, details of the administrators' proposed remuneration, and a proof of debt form.

751 Between 17 November 2017 and 24 November 2017, the administrators received proof of debt Forms from 34 creditors.

752 On 23 November 2017, ABCL lodged a proof of debt for the sum of $12,457,472.22.

753 On 24 November 2017, the first meeting of creditors was held at the offices of Worrells. The meeting was attended by eight individuals, including Mr Cantone as chairperson holding proxies on behalf of 32 creditors, Mr Foreman holding a proxy on behalf of ABCL and Southern Quarries Pty Ltd (Southern Quarries) (a related entity of ABCL) and Mr Clayton as an observer. Mr Cantone said, and I accept, that the agenda for the first meeting of creditors was to consider whether any creditor wished to propose a resolution for the removal of the administrators and whether the creditors wished to appoint a committee of inspection. There was no resolution proposed in relation to either matter.

754 On 29 November 2017, Mr Foreman and Mr Lipman met with Mr Cantone, Mr Cooper and Mr Black. It is not in dispute that at the meeting Mr Lipman repeated the matters discussed at the meeting on 15 November 2017 and suggested that in briefing counsel, the administrators and their solicitors draw to counsel's attention the methodology used to calculate the alleged discount, the variation in the alleged discount from month to month, and the absence of any correspondence supporting any variation to the BSA. Mr Cantone

provided a short update on the administrators' progress and stated that the administrators had asked the directors of Concrete Supply to provide RCTIs and the creditor account for ABCL, but were still waiting for those documents, had taken statements from the directors of Concrete Supply concerning ABCL's proof of debt, would be sending a brief to counsel to advise on ABCL's proof of debt, and had reviewed the proof of debt lodged by Southern Quarries, which had been admitted (subject to a small discrepancy of $5,000). Mr Black asked whether the price in ABCL's price increase letters and invoices was the base price or the discounted price. Mr Foreman responded that the price increase letters and invoices referred to the discounted price. Mr Lipman said that the directors of Concrete Supply had told ABCL that they had only been paying two-thirds of invoices each month since 2012 and not paying the remaining one-third, that he considered that this approach was wholly inconsistent with any suggestion that Concrete Supply was applying a percentage rebate, and that the alleged discount varied from month to month, which showed that there was not any agreement on a discount. Mr Cantone responded that the administrators were still trying to investigate the validity of the rebate alleged by the directors of Concrete Supply. Mr Cantone made a request that ABCL provide additional documentation relevant to its proofs of debt, including all statements and invoices and said that Concrete Supply's books and records did not contain any invoices or statements issued by ABCL to Concrete Supply after April 2012. Mr Cantone also asked Mr Lipman and Mr Foreman whether ABCL had identified any link between the directors of Concrete Supply and the employee of ABCL who had allegedly engaged in fraudulent activities, and was told that no connection had been identified.

755 On 7 December 2017, Mr Black received from Mr Foreman all invoices purportedly issued by ABCL between 2009 and October 2017 in support of ABCL's proof of debt.

756 On 11 December 2017, the administrators circulated the Second Report to Creditors and a Notice of Second Meeting of Creditors. I will return discuss the Second Report to Creditors in detail below, but I note at this point that the report recommended that creditors resolve that Concrete Supply execute the proposed DOCA.

757 On 17 December 2017, it came to the attention of Mr Cantone that one or more creditors of Concrete Supply had been contacted by agents or representatives of ABCL by telephone or by email asking the creditors to nominate ABCL's representative as proxy for the second meeting of creditors.

758 On 18 December 2017, Mr Cantone sent an Advice to Creditors which relevantly stated:

> It has come to our attention that an unsecured creditor of the Company has written to various other unsecured creditors requesting that they complete a proxy form appointing that creditor's solicitor to vote on their behalf at the upcoming second meeting of creditors to be held at 10:30 am on 19 December 2017. Further, in the correspondence it was stated:
>
> "In our view the Administrators are not acting in the best interest of us the unsecured creditors in recommending that we accept a DOCA, and we would appreciate your vote as a fellow creditor"
>
> In that email it was also stated:
>
> "If you the owner of [.....] support us in our endeavours I assure you we will support your business in the future."
>
> We reject any assertion that we are not acting in the best interest of the unsecured creditors. That statement is without any foundation. The reasons for our recommendation that the unsecured creditors accept the DOCA proposal are outlined in our detailed report to creditors dated 11 December 2017. Ultimately it is for each individual creditor to consider the DOCA proposal and vote on it at the second meeting as they see fit. Each individual creditor has the right to vote at the second meeting on each of the proposed resolutions (including the proposal for a DOCA) without interference. We encourage any unsecured creditor to seek legal independent advice should they have any concerns regarding this administration or alternatively to contact us with any queries.

759 On the same day, Mr Cantone received signed proxies in favour of Mr Lipman on behalf of Barossa Valley Hire Pty Ltd, BASF Pty Ltd, Bianco Constructions Supplies Pty Ltd, Bianco Reinforcing Pty Ltd, Marleston Pty Ltd, MaxiPARTS Pty Ltd and Normetals Pty Ltd, in addition to the proxies of ABCL and Southern Quarries that had already been received. Mr Cantone said, and I accept, that Mr Leader-Elliott sent an email to Mr Cantone the following day confirming that Barossa Valley Hire Pty Ltd had provided its proxy appointing Mr Lipman in error and that it should be withdrawn, and that Mr Cantone had previously received a signed proxy from that creditor appointing the chairperson as special proxy.

760 On 19 December 2017, the second meeting of creditors was held. The meeting was attended by Mr Cantone as chairperson, Mr Cooper, Mr Montgomery Wolf of Worrells, Mr Black, Mr Lipman, Mr Peter Mackintosh of the ATO (by telephone), as well as Rino, Jason, Mr Tull, Mr Clayton, Mr Leader-Elliott, Mr Tony Bell, Mr John Caruso and Mr Danee Ranatann as observers. Proxies were held by Mr Cantone, Mr Lipman and Mr Mackintosh representing 40 creditors. Mr Cantone held 32 special proxies on behalf of individual creditors each voting in favour of the proposed resolution to execute the DOCA. The events at this meeting are addressed in detail below. It is sufficient at this point to note that the creditors by number voted in favour of the DOCA and against liquidation, the creditors by value voted against the

DOCA and in favour of liquidation, and Mr Cantone exercised his casting vote in favour of the DOCA.

761 On 21 December 2017, Concrete Supply and the administrators executed the DOCA, which was lodged with ASIC on the same day. The administration concluded on this day and the administrators became deed administrators.

The Second Report to Creditors and the Investigations Carried Out by the Administrators

762 The Second Report to Creditors is divided into six sections which are as follows:

(1) Introduction;

(2) Overview and Statutory Information;

(3) Notice of Meeting of Creditors;

(4) Financial Position Summary;

(5) Investigations and Insolvent Transactions; and

(6) Voting Options and Recommendation.

763 In the Introduction, the administrators state that the report concerns the voluntary administration of Concrete Supply and that the report is issued pursuant to s 75-225 of the *Insolvency Practice Schedule (Corporations) 2016* which is Sch 2 to the Corporations Act (IPS (Corporations)). The purpose of the report is said to be to outline: (1) Concrete Supply's current financial position; (2) the results of the realisation of Concrete Supply's assets (if any); (3) the results of trading during the administration (if any); (4) the administrators' investigations into the affairs of Concrete Supply, including any insolvent transactions; (5) the administrators' recommendation for the most appropriate future for Concrete Supply; (6) the calling of a meeting of creditors to decide the future of Concrete Supply; (7) the anticipated dividend to creditors; (8) creditors' voting options; and (9) the administrators' remuneration. The administrators state that the information in the report is based on their investigations and analysis. They state that their role since their appointment has been to secure the assets of Concrete Supply, trade the business as a going concern, secure the books and records of the company, and investigate the affairs of the company. They state that their findings are presented in the report.

764 In the Overview and Statutory Information section, the administrators summarise the history of Concrete Supply and identify the available assets and liabilities of the company as at the

date of their appointment. With respect to their general investigations, the administrators state that part of their role is to conduct preliminary investigations into various matters and to advise creditors on whether there would be amounts recovered for insolvent trading and preferential payments should Concrete Supply be wound up. They also state that they are required to examine possible offences and report their findings to ASIC, but that no report has been issued to ASIC as at the date of their report. They also indicate by way of several "ticked boxes" that they: (1) have established an initial date of insolvency; (2) have not found any potential "Void Transactions"; (3) have not found a potential insolvent trading claim; and (4) have not found any offence committed by the officers of Concrete Supply.

765 As to the future of Concrete Supply, the administrators state that:

> A Deed of Company Arrangement (DOCA or Deed) has been proposed. This proposal is meant to give a higher dividend to creditors than liquidating the Company. It will also mean that the Company will avoid liquidation and the recoveries mentioned above will not be available. We have made a recommendation to creditors based upon *commercial* reasons. We have also tried to determine whether the Company will be able to comply with the proposed Deed during the period of the Deed.

(Emphasis in original.)

766 The administrators also set out the alternatives available to creditors, which are: (1) accepting the proposed DOCA; (2) winding up the company; or (3) ending the administration and handing control of Concrete Supply back to the directors. The administrators also set out their recommendation:

> We recommend that creditors vote to accept the proposed DOCA. Creditors should read the body of this report before attending the next meeting.

767 The administrators then set out matters relevant to what they call "statutory information", including the name of the company, the names of the directors, the names of the secretaries, the names of the shareholders, the date of incorporation, the registered office, the principal place of business, registered security interests, whether the company is acting as a trustee, and the names of associated companies, being Mantina Earthmovers and Mantina Investments.

768 In the Notice of Meeting of Creditors section, the administrators set out the Notice of the Second Meeting of Creditors to be held on 19 December 2017.

769 In the Financial Position Summary section, the administrators set out three tables which summarise the results of their preliminary investigations into the financial position of

Concrete Supply and which provide an opinion of a potential dividend under the proposed DOCA and in a liquidation. These tables are as follows:

Deed (Worst Case)	Deed (Best Case)		Liquidation (Worst Case)	Liquidation (Best Case)
		Tangible Assets		
$1,019,977	$1,155,974	Sundry Debtors	$917,979	$1,040,376
$57,148	$57,148	Cash at Bank	$57,148	$57,148
$0	$0	Plant, Machinery & Motor Vehicles (Equity)	$823,368	$873,368
$0	$0	Related Party Loan	$333,483	$665,465
$1,077,125	**$1,213,122**	**Total Tangible Assets**	**$2,131,978**	**$2,636,357**
Nil	Nil	Less: Floating Securities	Nil	Nil
$1,077,125	**$1,213,122**	**Balance of Assets**	**$2,131,978**	**$2,636,357**
		Potential Recoveries		
Not applicable	Not applicable	Preferential Payments	$0	$0
Not applicable	Not applicable	Insolvent Trading	$0	$0
Not applicable	Not applicable	Other Void Transactions	$0	$0
$2,500,000	$2,500,000	**Contributions Under Deed**	Not applicable	Not applicable
$3,577,125	**$3,713,122**	**Total Resources Available**	**$2,131,978**	**$2,636,357**

Deed (Highest)	Deed (Lowest)		Liquidation (Highest)	Liquidation (Lowest)
		Priority Creditors		
$23,200	$23,200	Employee Entitlements	$166,228	$166,228
		Non Priority Creditors		
$13,278,825	$10,821,353	Trade Creditors	$13,278,825	$10,821,353
Not applicable	Not applicable	Excluded Employee Entitlements	$439,246	$439,246
$44,386	$44,386	Taxation Debts	$44,386	$44,386
$0	$0	Bank Overdraft	$0	$0
$0	$0	Loans – Liabilities	$0	$0
$0	$0	Finance Shortfalls	$0	$0
Not applicable	Not applicable	Recovered Preferential Payment Claims	$0	$0
$13,346,411	**$10,888,939**	**Total Liabilities**	**$13,928,685**	**$11,471,213**

Deed (Worst Case)	Deed (Best Case)		Liquidation (Worst Case)	Liquidation (Best Case)
		Total Resources Available		
$120,000	$90,000	Cost of Administration	$120,000	$90,000
$25,000	$20,000	Administrators' Legal Fees	$25,000	$20,000
$70,000	$30,000	Cost of Deed	Not applicable	Not applicable
$50,000	$30,000	Provision for Deed Administrators' costs for claim adjudication	Not applicable	Not applicable
$20,000	$10,000	Deed Administrators' Legal Fees	Not applicable	Not applicable
$30,000	$20,000	Provision for legal fees for claim adjudication	$30,000	$20,000
Not applicable	Not applicable	Cost of Liquidation	$225,000	$170,000
Not applicable	Not applicable	Provision for Liquidators' costs for claim adjudication	$50,000	$30,000
Not applicable	Not applicable	Liquidators' Legal Fees	$100,000	$50,000
$315,000	**$200,000**		**$550,000**	**$380,000**
$23,200	$23,200	Priority Creditors	$166,228	$166,228
100.00	**100.00**	**Estimated Dividend to non-priority creditors (cents in the dollar)**	**100.00**	**100.00**
$3,238,925	$3,489,922	Available for Non-Priority Creditors	$1,415,750	$2,090,129
$13,323,211	$10,865,739	Non-Priority Creditors	$13,762,457	$11,304,985
6 months	6 months	Estimated Time Period	2 years	1.5 years
24.31	**32.12**	**Estimated Dividend to non-priority creditors (cents in the dollar)**	**10.29**	**18.49**

770 The administrators also provide information under the heading, "Financial Position Notes". These notes address the following matters in relation to the company: interests in land; sundry debtors; cash at bank; plant, machinery and motor vehicles; related party loans; voidable transactions; insolvent trading; priority creditors; excluded employee entitlements; unsecured creditors; statutory creditors; secured creditors; and provision for costs of claim adjudication.

771 With respect to plant, machinery and motor vehicles, the administrators record that Concrete Supply owns various items of plant and equipment and motor vehicles used in the business and that they have engaged Pickles Auctions (Pickles) to conduct a formal valuation of the assets. They summarise that valuation as follows:

Asset Group	Value	Security Value
Trucks & Agitators	$1,111,000	$265,325
Motor Vehicles	$153,500	$18,836
Batching Plant	$230,000	$130,174
Plant & Equipment	$119,800	$84,452

772 The administrators also estimate that due to the nature, quality and location of the assets, they will incur sale costs of approximately 15% of realisable value. The result of their approach as set out in the report is as follows:

Cumulative Asset Value	$1,614,300
Less allowance for auctioneer's costs (15%)	($242,145)
	$1,372,155
Less Security	($498,787)
	$873,368

773 The administrators state that they have made an allowance of $50,000 under a "worst case" liquidation scenario for the prospect of these assets being realised for less than the expected sale price and any unforeseen costs.

774 With respect to related party loans, the administrators state that Concrete Supply is owed $1,333,390 by a related entity, Mantina Earthmovers, and that they have undertaken investigations to assess the collectability of the loan account. They state that their investigations have identified that a creditor has a registered security interest over all of the present and after acquired property of Mantina Earthmovers and that multiple other secured creditors have registrations over specific assets. The administrators express their view that it may be necessary to wind up Mantina Earthmovers in order to collect the loan account and that that would involve the incurring of significant costs. They also state that the loan account would rank as a non-priority claim behind any outstanding employee entitlements. They further state that creditors should note that 40% of Mantina Earthmovers' business is with Concrete Supply meaning that should Concrete Supply be placed into liquidation, Mantina Earthmovers' financial position would be affected and this would affect the return to creditors in a liquidation. Based on these matters, the administrators estimate that 25% of the loan would be recoverable in a "worse case" scenario and that 50% of the loan would be recoverable in a "best case" scenario.

775 With respect to unsecured creditors, the administrators set out in a table the known unsecured creditors with amounts in relation to each creditor identified as an amount and an amount claimed. In the case of ABCL, the identified amount is shown as $2,168,328.51 and the amount claimed is $12,457,472.22. Immediately following the table, the administrators make the following statement regarding ABCL's debt:

> A major unsecured creditor has lodged a Proof of Debt in the amount of $12,457,472. Prior to our appointment, there was a dispute over the debt and we are currently seeking independent legal advice including advice from Counsel in this regard.

> Further information will be made available to creditors in due course. For the purposes of our dividend estimates, we have used the full amount of the Proof of Debt in a "worst case" scenario and the amount of $10,000,000, in a "best case" scenario based solely on our preliminary assessment of the Proof of Debt without yet having obtained advice from our solicitors and from Counsel. Accordingly, the amount that the Proof of Debt may be admitted for in a "worst case" scenario may change upon the receipt of our independent legal advice and upon final adjudication of the Proof of Debt.

776 In relation to the provision for costs of claim adjudication, the administrators state the following:

> As discussed earlier in the report, prior to our appointment there was a dispute in respect of a claim by a major unsecured creditor of the Company.
>
> In both a DOCA and liquidation scenario, we are required to adjudicate on that Proof of Debt by considering all relevant documents provided by the creditor as well as the Company's books and records. Given the quantum of the claim and the surrounding circumstances, we are seeking independent legal advice (as set out above) in respect of the creditor's claim.
>
> As this is a complex process and involves review of voluminous documents, we have made provisions for the additional costs to be incurred by us as either the Liquidators or Deed Administrators, as well as the associated legal costs.
>
> We have estimated in a "Best case" scenario that the appointees will incur costs of $30,000 and legal fees of $20,000, and in a "Worst case" scenario costs of $50,000 and legal fees of $30,000.

777 In the Investigations and Insolvent Transactions section, the administrators set out their conclusions with respect to their examination of Concrete Supply's financial statements, their assessment of the adequacy of the books and records, their examination of the company's solvency, and their findings as to offences, voidable transactions or insolvent trading by the directors.

778 With respect to the financial statements of the company, the administrators summarise the results for the financial years ended 30 June 2015 and 30 June 2016 respectively. With respect to net assets, the statements record net assets of $832,347 for the year ended 30 June 2015, and $1,048,532 for the year ended 30 June 2016. With respect to net profit, the statements record net profit of $431,157 for the year ended 30 June 2015, and $280,772 for the year ended 30 June 2016.

779 With respect to the adequacy of the company's books and records, the administrators state that they have made inquiries with the directors about the types of records kept by Concrete Supply and have made a preliminary assessment of their adequacy. The administrators indicate by way of several "ticked boxes" that Concrete Supply has: (1) adequate trading

budgets and cash budgets; (2) regular internal management statements; (3) prepared quarterly financial statements; (4) maintained a detailed aged trade debtors ledger; (5) maintained a detailed aged trade creditors ledger; (6) an external accountant; (7) a dedicated internal accountant; and (8) basic source documentation. They also indicate in the same manner that Concrete Supply has not lodged a tax return for the previous year. The administrators also express their conclusion by way of a "ticked box" that the books and records comply with s 286 of the Corporations Act.

780 With respect to the solvency of the company, the administrators make the following statement:

> Part of our role as Administrators is to conduct a preliminary examination of the Company's solvency to determine whether the Company is currently solvent, whether the Company may be able to return to solvency and when the Company first became insolvent. This examination is preliminary and based on the best information available at this time. Our preliminary examination indicates that that the Company became insolvent at about 13 November 2017.

The administrators also indicate by way of several "ticked boxes" that Concrete Supply is not currently solvent and that the creditors would not be paid in full with the sale of the company's assets.

781 With respect to voidable transactions, the administrators provide a summary or overview of the provisions of the Corporations Act relevant to voidable transactions, including preferential payments (s 588FA), uncommercial transactions (s 588FB), unfair loans (s 588FD) and unfair director related benefits (s 588FDA). They state that these sources of recovery would only be available to a liquidator and would not be a potential source of realisation under a DOCA. They state that they have considered whether certain transactions involving Concrete Supply may be voidable, that their views are preliminary, and that they have to estimate a potential recovery using this information for the purposes of the report. They state that their findings are as follows:

> As advised earlier in the report, the Company was issued with a demand shortly prior to our appointment, which could have caused it to become insolvent assuming the claim was pursued.
>
> Based on our investigations, we do not believe that the Company was insolvent prior to the issuing of the demand. Therefore, no recoveries will be made from voidable transaction claims in a liquidation scenario.

782 With respect to insolvent trading by the directors, the administrators state that the initial part of their investigation lies with proving the date of insolvency. They restate their view that the

company became insolvent shortly prior to their appointment. They also state that the second part of the preliminary assessment is to determine what unpaid debts were incurred after the date of insolvency. The administrators also provide a summary or overview of the defences to insolvent trading, namely reasonable presumption of insolvency, reliance on others, reasonable steps, and illness.

783 The administrators state that they have attempted to determine whether the directors would have the capacity to meet an insolvent trading claim. They indicate by way of several "ticked boxes" that the directors own real property but that it is unknown whether the directors: (1) own motor vehicles; (2) have cash assets; (3) are owed money from others; (4) own shares; or (5) own any other assets. They state that they will "confirm" the position should Concrete Supply be placed into liquidation.

784 The administrators state that their findings about insolvent trading are as follows:

> As the Company became insolvent shortly prior to our appointment and incurred nominal unsecured debts after that time, we consider that no recoveries would likely be made from any insolvent trading claim in a liquidation.

785 With respect to offences under the Corporations Act, the administrators state that they must investigate any potential offences and report those offences to ASIC for its consideration. They state that their preliminary investigations have shown no potential offences under the following sections of the Corporations Act: contravention of care and due diligence (s 180); contravention of good faith (s 181); contravention of use of position (s 182); contravention of use of information (s 183); contravention of good faith, use of position and information (s 184); non-disclosure, misrepresentation on certain matters (s 590(1)); knowingly receiving property (s 590(5)); frauds by officers (s 596); falsifications of books (s 1307); false or misleading statement (s 1308); false information (s 1309); and dishonest insolvent trading (s 588G(3)).

786 In the Voting Options and Recommendations section, the administrators provide a summary of the proposed DOCA, set out the potential resolutions that the creditors may consider at the second meeting of creditors, and state their recommendation pursuant to s 439A of the Corporations Act.

787 As I have said, the administrators' recommendation is that the creditors should accept the proposed DOCA. They state that in their opinion, for commercial reasons, it would be in the creditors' interests to resolve that Concrete Supply execute the proposed DOCA. With

respect to the terms of the DOCA, the administrators indicate by way of several "ticked boxes" that: (1) the directors or associated parties are not guaranteeing the provisions of the DOCA; (2) there is no security being offered by any party; (3) there are no surplus assets available for sale; (4) the business will keep trading; and (5) the financial statements will be made available to the deed administrators. With respect to the benefits of the DOCA, the administrators state that the dividend to unsecured creditors will be higher under the proposed DOCA than under a liquidation, the company's solvency will be resolved, the business will have the opportunity to continue to operate, the staff will continue to be employed, and there will be a much faster return to creditors.

788 The administrators state that in their opinion it would not be in the interests of creditors to resolve that Concrete Supply be wound up. They state that the company is insolvent because it has insufficient current assets to meet its commitments and that placing the company into liquidation will also provide the liquidator with powers to conduct further investigations into the affairs of the company, look at the matter of insolvent trading, recover any preferential payments, examine and recover any other insolvent transactions, and examine the general affairs of the company. With respect to the benefits of a liquidation, the administrators indicate by way of several "ticked boxes" that: (1) there will be no recovery of preferential payments; (2) there will be no claim for insolvent trading; (3) there are no other voidable transactions to recover; (4) there will be a dividend in a liquidation; (5) the administrators will be issuing a report to ASIC; and (6) the company will be deregistered after the liquidation.

789 The administrators state that in their opinion it would not be in the interests of creditors for creditors to resolve that the administration end. They state that such a resolution would hand control of Concrete Supply back to the directors. They also state that the company is insolvent and its affairs should be formally resolved. They further state that it is likely that a creditor would apply to have the company wound up shortly after the administration ends as the company is unable to pay all of its debts in full.

790 The administrators state that they confirm that there is no other information that they are aware of at the time of the report that would assist creditors in making the decision as to whether or not they should accept the proposal for a DOCA.

791 The investigations by the administrators which preceded the Second Report to Creditors were the subject of evidence from Mr Cantone and Mr Cooper. That evidence is discussed below (at [873]–[926]).

The Second Meeting of Creditors

792 I now set out a summary of the relevant parts of minutes of the second meeting of creditors held on 19 December 2017 which the administrators lodged with ASIC (the administrators' minutes). Those minutes were signed by Mr Cantone on 4 January 2018 as a correct record of the meeting. The Court also received Mr Leader-Elliott's notes of the meeting which are important in one respect which I will explain in due course.

793 As I have said, the meeting was attended by Mr Cantone, Mr Cooper, Mr Wolf, Mr Black, Mr Lipman, Mr Mackintosh of the ATO (by telephone), as well as Rino, Jason, Mr Tull, Mr Clayton, Mr Leader-Elliott, Mr Tony Bell, Mr John Caruso and Mr Danee Ranatann as observers.

794 Mr Cantone was the chairperson and he opened the meeting. He stated that he had been appointed as the chairperson of the meeting. He tabled a copy of the Second Report to Creditors, which included the Notice of Meeting. He noted that a quorum was present and that the meeting could proceed.

795 Mr Cantone indicated that he had received a number of proxies which he tabled. He also tabled the proofs of debt lodged with the administrators and indicated that they were admitted only for the purposes of voting at the meeting. I set out below a summary of those proxies and the amounts owed according to attendance register annexed to the administrators' minutes:

Creditor name	Proxy (General or Special)	Name of proxy nominated by creditor	Amount of proof lodged
Finance & Insurance (Brokers) Australia Pty Ltd	Yes (Special)	The Chairperson	$1,485.00
Adelaide Independent Bandag	Yes (Special)	The Chairperson	$12,205.05
RTWSA	Yes (Special)	The Chairperson	$12,395.25
Concrete Barrell Solutions	Yes (Special)	The Chairperson	$5,718.00
Modbury Press Pty Ltd	Yes (Special)	The Chairperson	$643.00
Normetals Pty Ltd	Yes (General)	Mr Skip Lipman	$6,468.00
Mixer Services Pty Ltd	Yes (Special)	The Chairperson	$3,657.00

Diesel Exhaust	Yes (Special)	The Chairperson	$1.00
Barossa Valley Hire	Yes (Special)	The Chairperson	$2,677.95
Gunther Engineering	Yes (Special)	The Chairperson	$143.00
Graham Tull Chartered Accountant	Yes (Special)	The Chairperson	$12,670.00
Complete Alignments	Yes (Special)	The Chairperson	$1,215.50
Hi-Tec Oil Traders Pty Ltd	Yes (Special)	The Chairperson	$35,230.30
Mario Forte	Yes (Special)	The Chairperson	$23,093.00
Marcello Obbiettivo	Yes (Special)	The Chairperson	$4,437.79
Antonio Silvestri	Yes (Special)	The Chairperson	$35,926.26
Clinton Stevenson	Yes (Special)	The Chairperson	$4,437.79
Gabriele Collins	Yes (Special)	The Chairperson	$3,397.33
Jason Obbiettivo	Yes (Special)	The Chairperson	$437,809.38
Lance [Gillies]	Yes (Special)	The Chairperson	$11,283.79
Devika Senanayake	Yes (Special)	The Chairperson	$16,226.35
Albert D'Alessandro	Yes (Special)	The Chairperson	$34,088.44
Mirella Obbiettivo	Yes (Special)	The Chairperson	$972.68
Susan Daly	Yes (Special)	The Chairperson	$2,453.05
Heather Booth	Yes (Special)	The Chairperson	$4,096.53
Maxi-Tankers Pty Ltd	Yes (Special)	The Chairperson	$272,225.70
St James First Aid	Yes (Special)	The Chairperson	$223.00
Top Notch Promotions & Marketing Pty Ltd	Yes (Special)	The Chairperson	$5,229.80
Gawler Motor Rewinders	Yes (Special)	The Chairperson	$3,564.00
Office Select	Yes (Special)	The Chairperson	$137.12
Eagle Fuels Pty Ltd	Yes (Special)	The Chairperson	$56,562.00
Ringtread SA	Yes (Special)	The Chairperson	$2,308.00
Southern Quarries Pty Ltd	Yes (General)	Mr Skip Lipman	$189,129.00
Adelaide Brighton Cement Ltd	Yes (General)	Mr Skip Lipman	$12,457,472
BASF Australia	Yes (General)	Mr Skip Lipman	$26,716.00
Bianco Constructions	Yes (General)	Mr Skip Lipman	$10,514.00
Marleston	Yes (General)	Mr Skip Lipman	$3,700.00
MaxiParts	Yes (General)	Mr Skip Lipman	$23,157.00
Bianco Reinforcing	Yes (General)	Mr Skip Lipman	$963.60
Australian Taxation Office	Yes (General)	Mr Peter Mackintosh	$158,827.67

796 Mr Cantone advised those present that the agenda for the meeting was:

(1) to decide the future of the company;

(2) to resolve the remuneration of the voluntary administrators;

(3) to resolve the remuneration of the deed administrators or liquidators as appropriate;

(4) to resolve to appoint a committee of inspection; and

(5) to resolve the destruction of the books and records of the company.

797 Mr Cantone provided an overview of the Second Report to Creditors and an update on the administration. He asked the creditors whether there were any matters or questions that they wished to raise at the meeting. The minutes indicate that the following discussions took place at the meeting:

(1) ***NAB demand:*** Mr Lipman queried whether any demand had been issued to Concrete Supply by NAB. Mr Cantone stated that a demand had been issued by NAB which had since been repaid. Mr Lipman queried whether NAB would remain a secured creditor and, if so, the level of its debt. Mr Cantone stated that there were ongoing leasing arrangements with NAB which were being maintained by Concrete Supply, but that he did not have available to him NAB's current payout figure. Mr Lipman queried whether NAB would participate under the DOCA. Mr Cantone stated that it would not as it was fully secured.

(2) ***The debts of secured creditors and the Pickles valuation report:*** Mr Lipman queried the current balance of debts of secured creditors. Mr Cantone referred to p 12 of the Second Report to Creditors which detailed the debts secured against each asset group of Concrete Supply (see [771]–[772] above). Mr Lipman queried how the available equity in the assets was determined. Mr Cantone stated that an independent valuation had been undertaken by Pickles and the security was deducted. Mr Lipman queried whether the valuation report could be made available to him. Mr Cantone stated that it would not be made available to creditors in the interests of commercial confidentiality. Mr Cooper stated that making the valuation report available to creditors would compromise the sale process of the assets in any liquidation of Concrete Supply.

(3) ***Sale of the business as a going concern:*** Mr Lipman queried whether the administrators had tried selling Concrete Supply's business as a going concern. Mr Cooper stated that they had not as a DOCA had been proposed by the directors and that, in any event, a sale would not have been able to be completed within the voluntary administration period. Mr Cooper stated that a sale of the business would be attempted should the company be placed into liquidation, but noted that the premises from which Concrete Supply operates is owned by related parties who also had personal relationships with the customers of Concrete Supply. He stated that these factors might cause difficulties in attempting to sell the business because a successful sale would require the cooperation and support of the related parties.

(4) ***Directors' assets:*** Mr Lipman queried whether the administrators had made inquiries as to the financial position of the directors. Mr Cantone stated that the administrators had conducted searches to confirm properties owned by the directors, but that due to the time constraints in the voluntary administration period to date, they had not conducted exhaustive investigations, but that this matter would be further investigated in any liquidation. Later in the meeting and following an adjournment, Mr Cooper stated that during the adjournment the administrators had spoken to Jason and Rino about their personal financial positions and the financial position of Tina. He stated that they had discussed their properties and the associated mortgages and that their advice matched the searches previously conducted by the administrators. He stated that the cumulative value of the equity in their properties was advised to them to be in the range of $1,500,000 to $1,700,000. Mr Cooper noted that this was significantly less than the contribution under the proposed DOCA. Mr Lipman queried whether searches had been undertaken to identify the value of any shareholdings of the directors. Mr Cooper stated that they had considered the information on shareholdings from publicly-available information, but had not commissioned valuations of such shareholdings. For reasons I will explain, it is important to note at this point that Mr Leader-Elliott's notes are to the effect that Mr Cooper said that the administrators had *not* made inquiries about the shares owned by the directors.

(5) ***Source of funds for DOCA contribution:*** Mr Lipman asked what inquiries the administrators had made to identify the directors' source of funds to make the proposed contribution to the Deed Fund establishment by the DOCA. Mr Cantone stated that they had spoken with the directors and noted that funds are to be provided from various sources, including the sale of one of the directors' properties and from a financier. Mr Lipman queried whether the administrators had negotiated with the directors to increase their proposed contribution. Mr Black stated that it was a matter for the directors, not the administrators, to put forward whatever proposal they wished to put forward. Mr Cantone noted that he had invited the directors to make a proposal which they considered to be reasonable and had made them aware that creditors may ask the directors to increase their proposed contribution.

(6) ***Claims against the directors:*** Mr Lipman queried the assessment in the Second Report to Creditors that no claims had been currently identified against the directors, as he believed that the debt owing to ABCL had been accruing over the past six years.

Mr Black noted that the circumstances surrounding the debt were unusual because of ABCL's failure to issue invoices to Concrete Supply after April 2012. He said that these omissions by ABCL contributed to the alleged debts not being identified by Concrete Supply until ABCL issued a demand to Concrete Supply shortly prior to the appointment of the administrators. He confirmed that the administrators were awaiting counsel's advice on ABCL's debt. Mr Cooper stated that in his opinion a liquidator would have difficulty in pursuing an insolvent trading claim against the directors as they were likely to maintain that they had a reasonable expectation of Concrete Supply's solvency given that the company was paying ABCL what they believed to be due and this was not disputed by ABCL until recently.

(7) ***The administrators' view on ABCL's debt and potential claims:*** Mr Lipman stated that he believed that the administrators should be presenting a final view to creditors on ABCL's debt before voting on the future of Concrete Supply as it would affect the return to creditors, as well as any potential claims against the directors. Mr Black stated that the matter on which counsel's advice was being sought was not straightforward given ABCL's continued supply to Concrete Supply while the debt allegedly grew and that invoices were not issued by ABCL to Concrete Supply after approximately April 2012. Mr Cantone stated that the creditors have been made aware of the potential quantum of the claim and that estimates have been made in the Second Report to Creditors on an alternative "high" and "low" basis. Mr Cooper noted that even if the ABCL debt was admitted for the full amount claimed, it did not necessarily follow that there was a sustainable claim against the directors, but advice would nonetheless be taken in any liquidation.

(8) ***Concrete Supply continuing as a going concern:*** Mr Lipman queried whether a commitment had been made by Concrete Supply to continue trading if the DOCA was executed. Mr Cantone stated that he believed that that was the intention, but that it would be at the discretion of the directors. Mr Lipman queried whether the administrators had inquired with the directors as to whether they intended to sell any assets if the proposed DOCA was executed. Mr Cantone stated that they had not indicated such an intention to him but that it was at the discretion of the directors.

(9) ***Date of insolvency:*** Mr Lipman queried how the administrators came to the view that Concrete Supply became insolvent shortly prior to their appointment. Mr Cantone

stated that they believe it became insolvent upon the presentation of the demand from ABCL.

(10) ***Adequacy of the books and records:*** Mr Lipman noted that the Second Report to Creditors stated that the administrators believed that the books and records of Concrete Supply were maintained to an acceptable standard and queried whether they show a debt of approximately $12 million owing to ABCL. Mr Cantone stated that they did reveal a debt to ABCL, but not of that amount. Mr Black noted that Concrete Supply's records did not show invoices being provided by ABCL after 2012. Mr Lipman queried whether the records show receipt of product from ABCL. Mr Cantone stated that they did, hence the need to seek advice from counsel on ABCL's proof of debt.

(11) ***How rebate effected:*** Mr Lipman queried the administrators' understanding of Concrete Supply's processes to give effect to the claimed rebate in respect of invoices from ABCL. Mr Black reiterated that invoices were not received from ABCL after 2012. Mr Cooper stated that the directors had been questioned on the matter and it was currently being considered by counsel.

(12) ***Claim for breach of directors' duties:*** Mr Lipman stated that the preceding matter was important to creditors because it could result in a claim against the directors for breach of their directors' duties. Mr Cooper indicated that the administrators had considered the issue and had doubts that the directors' conduct, even if it amounted to a breach of duty to Concrete Supply, which was unclear, caused any significant loss to the company. Mr Lipman stated that a court may assess the loss as the increase in the deficiency of Concrete Supply's net assets over a number of years. Mr Cooper indicated that if ABCL's debt was ultimately found to have been incurred earlier, and a breach of duty was found, an assessment of any loss to Concrete Supply from the directors' conduct was problematic. He indicated that upon a reconstruction of Concrete Supply's accounts, with ABCL's debt shown as being incurred earlier, the deficiency in net assets would also be shown earlier, so any loss from an increased deficiency in net assets would not be for the quantum suggested and, further, the benefits to Concrete Supply in deferring payment would also be relevant in an assessment of any loss to Concrete Supply.

(13) ***Insolvency analysis and viability of an insolvent trading claim:*** Mr Lipman queried whether the administrators had conducted an analysis of Concrete Supply's financial

position on the basis it had accounted for the ABCL debt as claimed by ABCL. Mr Cooper confirmed that the administrators had not formally conducted that analysis. Mr Lipman stated that he considered this would show Concrete Supply was unable to pay its debts. Mr Cooper stated that such an analysis would not by itself establish a sustainable insolvent trading claim against the directors because the defence of reasonable expectation as to the solvency of Concrete Supply would also need to be considered, as he had noted earlier. Mr Lipman queried whether the administrators had interviewed the directors as to their states of mind. Mr Cooper confirmed that they had questioned the directors. Mr Leader-Elliott's notes are different on this topic. They state that Mr Cooper said that he could not answer whether the directors had been questioned. No party in its closing submissions suggested that this difference was material.

798 Mr Cantone tabled the draft DOCA and invited creditors to examine the document. He summarised the provisions of the proposal, including the provisions for breaches of the DOCA and the remuneration of the deed administrators.

799 Mr Cantone invited a resolution for the future of Concrete Supply.

800 Mr Mackintosh, as general proxy for the ATO, moved the following motion that Concrete Supply execute the proposed DOCA:

> That the Company execute the proposed Deed of Company Arrangement and that Dominic Charles Cantone and Nicholas David Cooper be appointed the Joint and Several Administrators of that Deed of Company Arrangement.

801 Mr Lipman, as general proxy for ABCL, moved the following motion that Concrete Supply be placed into liquidation:

> That the Company be wound up and that Dominic Charles Cantone and Nicholas David Cooper be appointed the Joint and Several Liquidators of the Company.

802 Mr Cantone conducted a poll on both motions the results of which are summarised below:

Motion for Company to execute proposed DOCA:

	$	%	No.	%
For	$1,163,278.59	8.38	31	77.5
Against	$12,718,119.60	91.60	8	20.0
Abstain	$2,308.00	0.02	1	2.5

Motion for Company to be wound up:

	$	%	No.	%
For	$13,002,740.55	93.65	10	25.0

Against	$869,106.64	6.26	29	72.5
Abstain	$12,760.00	0.09	1	2.5

(Note: it may be that the figure of $12,760 should, in fact, be $12,670.)

803 Mr Cantone noted that both motions were deadlocked. He confirmed that he was required to consider whether it was in the interests of creditors for him to exercise a casting vote. Mr Cantone stated that he had considered the following matters:

- that the return to both priority and non-priority creditors was expected to be higher under the proposed DOCA compared to a liquidation of Concrete Supply;
- the recommendation made by the administrators in the Second Report to Creditors;
- the general view of the creditors of Concrete Supply, being that 31 had voted in favour of accepting the DOCA and that only 8 had voted against, although the creditors voting against were a majority in terms of dollar value;
- the position of the ATO, who are a major creditor and regular attendees at creditors meetings, to vote in favour of the DOCA;
- that creditors would receive faster payment of a dividend under a DOCA than in a liquidation; and
- a DOCA would allow the ongoing trade of Concrete Supply, which includes the retention of approximately 30 staff and ongoing business for suppliers who were also creditors.

804 Mr Cantone stated that, "with" consideration of these matters, in his opinion it was in the interests of creditors for him to exercise his casting vote and that he exercised his casting vote in favour of the motion that Concrete Supply execute the proposed DOCA.

805 Mr Lipman stated that ABCL would be applying to Court to have the resolution that the DOCA be executed overturned and asked that the administrators keep this in mind. Mr Cooper noted the comment and confirmed that the DOCA was likely to be executed within a few days.

The Nature of the Claims made by ABCL

806 ABCL challenges the DOCA on a number of grounds.

807 First, ABCL seeks an order that the resolution passed at the second meeting of creditors on 19 December 2017 that Concrete Supply execute the DOCA be set aside. That resolution

was passed on Mr Cantone's exercise of his casting vote in favour of the resolution. ABCL challenges Mr Cantone's exercise of his casting vote under s 75-42 of the IPS (Corporations). That section is in the following terms:

> **75-42 Creditors' resolution passed because of casting vote—Court review**
>
> *Application of this section*
>
> (1) This section applies if:
>
> (a) a resolution is passed at a meeting of creditors of a company under external administration; and
>
> (b) the resolution is passed because the person presiding at the meeting exercises a casting vote.
>
> *Application to the Court*
>
> (2) ASIC may apply to the Court for an order setting aside or varying the resolution.
>
> (3) A person (other than ASIC) may apply to the Court for an order setting aside or varying the resolution, but only if:
>
> (a) the person voted against the resolution in some capacity (even if the person voted for the resolution in another capacity); or
>
> (b) a person voted against the resolution on the first-mentioned person's behalf.
>
> *Court may make orders*
>
> (4) On application under subsection (2) or (3), the Court may:
>
> (a) by order set aside or vary the resolution; and
>
> (b) if it does so—make such further orders, and give such directions, as it thinks fit.
>
> (5) On and after the making of an order varying the resolution, the resolution has effect as varied by the order.

808 ABCL also seeks an order that the resolution which was not passed at the second meeting of creditors that Concrete Supply be placed into liquidation be taken to have been passed. The proposed resolution was not passed on Mr Cantone's exercise of his casting vote against the proposed resolution. ABCL challenges this exercise by Mr Cantone of his casting vote under s 75-43 of the IPS (Corporations). That section is in the following terms:

> **75-43 Proposed creditors' resolution not passed because of casting vote—Court's powers**
>
> *Application of this section*
>
> (1) This section applies if:

(a) a resolution is not passed at a meeting of creditors of a company under external administration; and

(b) the resolution is not passed because the person presiding at the meeting exercises a casting vote, or refuses or fails to exercise such a vote.

Application to the Court

(2) ASIC may apply to the Court for an order under subsection (4).

(3) A person (other than ASIC) may apply to the Court for an order under subsection (4), but only if:

(a) the person voted for the proposed resolution in some capacity (even if the person voted against the proposed resolution in another capacity); or

(b) a person voted for the proposed resolution on the first-mentioned person's behalf.

Court may make orders

(4) On application under subsection (2) or (3), the Court may:

(a) order that the proposed resolution is taken to have been passed at the meeting; and

(b) if it does so—make such further orders, and give such directions, as it thinks fit.

(5) If an order is made under paragraph (4)(a), the proposed resolution:

(a) is taken for all purposes (other than those of subsection (1)) to have been passed at the meeting; and

(b) is taken to have taken effect:

(i) if the order specifies a time when the proposed resolution is taken to have taken effect—at that time, even if it is earlier than the making of the order; or

(ii) otherwise—on the making of the order.

809 ABCL also challenges Mr Cantone's decisions with respect to the exercise of his casting vote under s 90-15 of the IPS (Corporations). That section relevantly provides:

90-15 Court may make orders in relation to external administration

Court may make orders

(1) The Court may make such orders as it thinks fit in relation to the external administration of a company.

…

Examples of orders that may be made

(3) Without limiting subsection (1), those orders may include any one or more of the following:

(a) an order determining any question arising in the external administration of the company;

(b) an order that a person cease to be the external administrator of the company;

(c) an order that another registered liquidator be appointed as the external administrator of the company;

(d) an order in relation to the costs of an action (including court action) taken by the external administrator of the company or another person in relation to the external administration of the company;

(e) an order in relation to any loss that the company has sustained because of a breach of duty by the external administrator;

(f) an order in relation to remuneration, including an order requiring a person to repay to a company, or the creditors of a company, remuneration paid to the person as external administrator of the company.

…

810 I do not understand ABCL to contend that s 90-15 adds anything to its case under ss 75-42 and 75-43.

811 Section 75-45 provides that acts done pursuant to a resolution in force before an order is made under s 75-42 setting aside the resolution are valid and binding on and after the making of the order, "as if the order had not been made".

812 Secondly, ABCL seeks an order under s 445D of the Corporations Act terminating the DOCA. Section 445D is in the following terms:

445D When Court may terminate deed

(1) The Court may make an order terminating a deed of company arrangement if satisfied that:

(a) information about the company's business, property, affairs or financial circumstances that:

(i) was false or misleading; and

(ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;

was given to the administrator of the company or to such creditors; or

(b) such information was contained in a document that accompanied a notice of the meeting at which the resolution was passed; or

(c) there was an omission from such a document and the omission can reasonably be expected to have been material to such creditors in so

deciding; or

(d) there has been a material contravention of the deed by a person bound by the deed; or

(e) effect cannot be given to the deed without injustice or undue delay; or

(f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:

(i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or

(ii) contrary to the interests of the creditors of the company as a whole; or

(g) the deed should be terminated for some other reason.

(2) An order may be made on the application of:

(a) a creditor of the company; or

(b) the company; or

(ba) ASIC; or

(c) any other interested person.

813 It is not in dispute that the party, in this case ABCL, seeking an order under s 445D must bring the case within one of the paragraphs in subsection (1) and that the Court then has a discretion whether or not to make an order terminating the DOCA.

814 ABCL's case focused primarily, if not entirely, on paras (a), (b) and (c) of s 445D(1). Furthermore, the information referred to in those paragraphs, which was the focus of ABCL's case, was the information in (or omitted from) the administrators' Second Report to Creditors, with one exception. The one exception relates to information provided orally by Mr Cantone to one of Concrete Supply's creditors, Mr David Kelly of Eagle Fuels Pty Ltd (Eagle Fuels).

815 ABCL's case is that the administrators' investigations into Concrete Supply's affairs were inadequate by a wide margin. They were not in the position to recommend to creditors in the Second Report to Creditors that the company enter into the proposed DOCA. Even on the investigations they did carry out, there were a number of other deficiencies in the Second Report to Creditors. ABCL's case is that the Second Report to Creditors was false and misleading in material respects and omitted material information.

816 It is convenient at this point to set out two other relevant sections in Pt 5.3A. Section 435A identifies the object of the Part in the following terms:

> **435A Object of Part**
>
> The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:
>
> (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
>
> (b) if it is not possible for the company or its business to continue in existence—results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

817 Section 438A identifies the administrator's obligation to investigate the affairs of the company. It is in the following terms:

> **438A Administrator to investigate affairs and consider possible courses of action**
>
> As soon as practicable after the administration of a company begins, the administrator must:
>
> (a) investigate the company's business, property, affairs and financial circumstances; and
>
> (b) form an opinion about each of the following matters:
>
> (i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;
>
> (ii) whether it would be in the creditors' interests for the administration to end;
>
> (iii) whether it would be in the creditors' interests for the company to be wound up.

818 Part 5.3A contains two sections dealing with the consequences of an order terminating a DOCA under s 445D. An order under s 445D terminating the DOCA has the effect that the company is taken to have passed a resolution under s 491 that the company be wound up (s 446AA). The termination of the deed does not affect the previous operation of the deed (s 445H).

819 Thirdly, ABCL seeks an order under s 447A that the DOCA be terminated. As far as I can see from the authorities, it is not uncommon for an application under s 445D to be coupled with an application under s 447A. ABCL suggested a field of operation for s 447A in addition to the operation of s 445D. It advanced two arguments. First, it contended that Concrete Supply and the directors, in advancing the DOCA in the circumstances, were

abusing the provisions of Pt 5.3A and secondly, that there was a public interest in upholding and enforcing commercial morality by, in this case, appointing a liquidator to investigate the affairs of Concrete Supply and the conduct of the directors. As I will explain in due course, most, if not all, of the matters advanced in support of these contentions are also relevant to the matters which arise under ss 75-42, 75-43 of the IPS (Corporations) and s 445D of the Corporations Act.

820 The above is the legal framework of ABCL's claim.

821 In the next part of this section, I will attempt, by reference to ABCL's Statement of Claim and its closing submissions, to provide an overview of the factual allegations made by ABCL in its challenge to the DOCA. In addition, there are some secondary or subsidiary maters which I can both identify and address at this stage.

822 ABCL alleges in paras 42 to 45 of the Statement of Claim that the administrators' investigations in connection with the administration were inadequate.

823 In para 42, ABCL alleges that the administrators knew, or ought to have known, a number of matters about ABCL's claim, the Concrete Supply defendants' claim to a rebate, the solvency or insolvency of Concrete Supply depending on whether it was entitled to the rebate, and the accuracy or otherwise of Concrete Supply's books and records.

824 In para 43 of the Statement of Claim, ABCL alleges that the administrators knew, or ought to have known, that ABCL was entitled to the full amount of its claim and Concrete Supply was not entitled to the claimed discount or rebate.

825 In para 44, ABCL sets out 11 tasks any reasonable insolvency practitioner would undertake, having regard to the matters alleged in paras 42 and 43 before forming a view on the merits of the DOCA, recommending to the creditors of Concrete Supply that they accept the DOCA, or exercising a casting vote in favour of the DOCA. I mention, at this stage, two matters. First, ABCL alleges that the administrators should have obtained advice from senior counsel as to the following matters: (1) whether Concrete Supply owed ABCL the shortfall (i.e., the difference between the amount paid and the amount claimed by ABCL; (2) when Concrete Supply's obligation to pay for the purchased product accrued and was payable; (3) whether Pt 5.3A applied at all and, if so, when Concrete Supply became insolvent; and (4) whether a liquidator appointed to Concrete Supply might have a claim against the directors for breach of one or more of the duties in to ss 180–182 of the Corporations Act or at common law,

insolvent trading, void transactions or for offences committed by them or Concrete Supply. The second matter that a reasonable insolvency practitioner would do is investigate the capacity of the directors to satisfy a judgment on any claim which a liquidator might pursue against them. For convenience, I will refer to this second matter as *the directors' assets*.

826 The allegations in para 45 of the Statement of Claim are dealt with below (at [829]).

827 In para 46, ABCL alleges that the administrators failed to undertake investigations or seek the advice referred to in para 44 before forming a view on the merits of the DOCA, before circulating a report to creditors recommending that creditors accept the DOCA, before exercising a casting vote in favour of the DOCA, or at all.

828 The major allegation of inadequacies in the administrators' investigations relates to ABCL's claim and the alleged discount or rebate and includes related matters such as the date of insolvency, the need for advice from senior counsel, the taxation implications, claims and offences under the Corporations Act and the investigation into the directors' assets. I will refer to this matter as *ABCL's claim and the alleged discount or rebate*.

829 In para 45, ABCL alleges failures in the investigations conducted by the administrators in other respects.

830 First, ABCL alleges that the administrators failed to investigate the value of Concrete Supply's business as a going concern. I will refer to this matter as *the sale of the business as a going concern.*

831 Secondly, ABCL alleges that the administrators failed to investigate the recoverability of a debt Mantina Earthmovers owed to Concrete Supply at the date of the administration of $1,333,930 and the capacity of a liquidator or administrator appointed to Mantina Earthmovers to trade or sell the business of Mantina Earthmovers as a going concern, so as to repay some or all of the $1,333,930 loan from Concrete Supply. I will refer to this matter as *the recoverability of the Mantina Earthmovers' debt.* The evidence in the case dealt with a further matter relating to the relationship between Concrete Supply and Mantina Earthmovers and this was the subject of ABCL's closing submissions. ABCL alleges that there were a number of transactions between Concrete Supply and Mantina Earthmovers in the period immediately before the administration which led, by way of an alleged set-off, to a substantial reduction to the Mantina Earthmovers' debt to Concrete Supply. ABCL alleges

that these transactions were anomalous and yet were not investigated by the administrators. I will refer to this matter as *the transactions involving Mantina Earthmovers.*

832 Thirdly, ABCL alleges that the administrators failed to investigate whether a more favourable DOCA could be negotiated with the directors or a third party. This allegation was not pursued by ABCL in its closing submissions and I need say no more about it.

833 Finally, ABCL alleges that the administrators failed to investigate the capacity of the directors to satisfy their obligations under the DOCA and, in particular, to make the required payment to the Deed Fund. It did not seem to me that this allegation standing alone was pursued in ABCL's closing submissions. However, a related and overlapping submission was pursued and that was the administrators did not investigate the directors' capacity to make the required contribution to the Deed Fund of $2.5 million *and* Mantina Earthmovers' capacity to repay the Mantina Earthmovers' debt. I will refer to this matter as *the ability to pay.*

834 ABCL alleges that none of these four matters I have identified were investigated or were the subject of a request by the administrators for advice before they formed a view on the merits of the DOCA, before circulating a report to creditors recommending that creditors accept the DOCA, before exercising a casting vote in favour of the DOCA, or at all.

835 Paragraphs 47 to 52 of the Statement of Claim contain allegations concerning the Second Report to Creditors. The paragraphs identify false or misleading statements, a misleading statement and various non-disclosures.

836 There are three statements which are alleged to be false or misleading, namely, that Concrete Supply was not insolvent prior to receiving a demand for payment from ABCL on 13 November 2017, that Concrete Supply prepared quarterly financial statements and regular internal management statements, and that the value of particular recoveries by a liquidator appointed to Concrete Supply from preference payments, insolvent trading claims and other voidable transactions was likely to be zero. The second of these allegations concerning financial statements and internal management reports was not pursued by ABCL in closing submissions and I need say no more about it.

837 The misleading statement related to the recoverability of the Mantina Earthmovers' debt in that, so it is alleged, the statement in the report suggested that the administrators had conducted a reasoned analysis or investigation when that was not, in fact, the case.

838 The non-disclosures fall into two categories. The first relates to the directors and is that, having regard to the fact that the directors proposed the DOCA, the Second Report to Creditors should have disclosed the collateral benefits to the directors from the DOCA and the directors' capacity to make the required contribution to the Deed Fund. The collateral benefits alleged, in addition to avoiding examination by a liquidator and liability for insolvent trading, voidable transactions and offences, are two-fold.

839 First, the directors are said to benefit from the fact that Mantina Earthmovers will not be required to repay its debt and it, therefore, avoids the risk of administration or liquidation. The directors are also the directors and shareholders of Mantina Earthmovers. The ground has shifted since these allegations appeared in the Statement of Claim. In the Second Report to Creditors, no value was placed on the Mantina Earthmovers' debt in the event that a DOCA was entered into. Almost a year after the DOCA was executed, the administrators realised that they had made a mistake and that the Mantina Earthmovers' debt is part of the Deed Fund. I will refer to this matter as to *the mistake as to the Mantina Earthmovers' debt*.

840 Secondly, ABCL alleges that an amount of $439,246 owed by Concrete Supply to Jason is not compromised by the DOCA and that this is a collateral benefit to him. It is undoubtedly the case the Concrete Supply's debt to Jason is not compromised by the DOCA (see cl 14.3 of the DOCA). There is a related issue in that ABCL alleges that the creditors were misinformed about the effect of the DOCA with respect to debts owed by the company to its directors because they were told in the Second Report to Creditors that such debts were subordinated when, in fact, they were not compromised by the DOCA. I will refer to this matter as the *subordination of debt*.

841 The other category of non-disclosure is one of failing to disclose the extent of their investigations into the following matters: (1) *ABCL's claim and the alleged discount or rebate,* (2) *The sale of the business as a going concern;* and (3) *The recoverability of the Mantina Earthmovers' debt.*

842 There are then pleas about the opinions that ABCL alleges would have been formed by a reasonable insolvency practitioner. An important allegation in para 53 is that a reasonable insolvency practitioner would have formed the opinion that ABCL's claim appeared to be accurate and following that opinion, would have formed further opinions about the following matters: (1) insolvency; (2) claims against the directors; (3) inaccuracy of the books and

records, including financial records; and (4) the need for a careful forensic examination and advice from senior counsel.

843 It is alleged that a reasonable insolvency practitioner would have recommended to creditors that the company be placed into liquidation and against entry into the DOCA.

844 Paragraph 58 contains a list of the administrators' alleged failings which, in one form or another, have been pleaded previously.

845 Paragraphs 59 to 67 deal with the exercise of the casting vote. I do not need to set out the details, other than to say that it is alleged by ABCL that a reasonable insolvency practitioner would not have exercised the casting vote in the way in which Mr Cantone did.

846 Paragraph 68 is important because it summarises ABCL's case as to the reasons the casting vote in favour of the DOCA and the decision by the administrators to recommend that the company enter into the proposed DOCA be set aside or reversed. Those reasons are said to be the following:

(1) the overwhelming majority of creditors by value voted against the DOCA;

(2) 13 of the 31 creditors who voted in favour of the DOCA will not have their debts compromised by the DOCA;

(3) the DOCA confers the collateral benefits on the directors previously identified in the pleading;

(4) the DOCA works an injustice on ABCL or is otherwise oppressive to it in that it prevents it from pursuing its claim against Concrete Supply;

(5) the provisions of Pt 5.3A are being used for an improper purpose, namely, to prevent the investigation of the affairs of Concrete Supply, including the examination of the directors by a liquidator appointed to Concrete Supply;

(6) the DOCA is contrary to the interests of the company as a whole and its creditors because it deprives them of the value of the claims that the company or a liquidator might have against the directors;

(7) the DOCA is contrary to the public interest because it prevents the investigation of the affairs of Concrete Supply, including suspect transactions conducted by the current management of Concrete Supply. The suspect transactions are not identified in this paragraph;

(8) the administrators failed to undertake adequate investigations before recommending to creditors that they vote in favour of the DOCA;

(9) the Second Report to Creditors was misleading;

(10) the administrators acted unreasonably in recommending that creditors vote in favour of the DOCA and voting in favour of the DOCA, and in recommending against liquidation and voting against liquidation; and

(11) it is otherwise in the interests of justice that a liquidator be appointed to Concrete Supply to conduct a careful forensic investigation of the company's affairs, including the circumstances giving rise to ABCL's claim and the company's past and current financial position.

847 I turn now to ABCL's closing submissions.

848 ABCL submitted that the administrators, and Mr Cantone in particular, lacked independence in conducting the administration. It submitted that they were appointed by the directors as administrators on the understanding that they, the administrators, would do what was necessary to get a DOCA in place, as a means of the directors avoiding having to pay the ABCL debt and that the administrators were appointed to advocate for the DOCA proposed by the directors. This is a submission of an understanding between the administrators and the directors and is a serious allegation of professional misconduct. A summary of the matters relied on by ABCL will suffice for present purposes: (1) pre-appointment conversations between the directors and the administrators; (2) deficiencies and inadequacies in the investigations, particularly in relation to matters concerning the directors such as insolvent trading claims and directors' assets; (3) a number of differences between the Worrells' precedent for a second report to creditors and the Second Report to Creditors (ABCL identified approximately six differences, but I consider only three to be of any significance). First, there is provision in the precedent for a statement to be made about when the company began to experience financial difficulty and for information as to the directors' advice as to the reason for the insolvency of the company. The Second Report to Creditors states that the administrators believed, based on their preliminary examination, that the company became insolvent on 13 November 2017, and that the demand could have caused the company to become insolvent, assuming the claim was pursued. Secondly, the precedent contains provision for a deficiency statement which is a reconciliation between the company's last balance sheet and its present position. The Second Report to Creditors did not contain such a

statement. As I have indicated, it did contain a balance sheet summary and profit and loss summary for the financial years ended 30 June 2015 and 30 June 2016 respectively, produced by the company and not audited. Thirdly, the precedent contains provision for some explanation of the insolvency including any information from the directors. Other than the statements already referred to, the Second Report to Creditors did not contain such information.

849 ABCL relies further on an allegation that the recommendation in the Second Report to Creditors was based on inaccurate and misleading information and what was said to be Mr Cantone's general lack of attention to detail and unwillingness to take responsibility for his actions.

850 ABCL submitted that the administrators' investigations were inadequate. It identified a number of what it called "red flags" which I took to mean matters which were apparent and which called for further investigation of either that matter or related or consequential matters, or both.

851 The first red flag related to the alleged discount or rebate, its nature, Concrete Supply's method of claiming it and the manner in which it was recorded in Concrete Supply's books and records.

852 The second red flag related to the transactions involving Mantina Earthmovers.

853 The third red flag was said to be that some creditors (i.e., Messrs Kelly, Matthew Hughes, Wijendra, Cannata and Formichella and Ms King) were told by the directors that their debts would be paid in full. I cannot see how this matter even if correct can be used against the administrators. There is no evidence that they were aware of it and there is nothing to suggest that they should have been aware of it.

854 The fourth red flag is that the debt owed to ABCL constituted 90% of the amount to creditors.

855 ABCL then makes a number of submissions directed to the ultimate conclusion that the "Administrators' investigations were hopelessly inadequate and warrant the setting aside of the DOCA".

856 First, there are a number of submissions about matters the administrators did not investigate properly or pursue, including the date of insolvency, the transactions involving Mantina Earthmovers, seeking advice from senior counsel or even junior counsel in respect of

ABCL's claim, the directors' assets, the sale of the business as a going concern, the subordination of debt, the mistake as to the Mantina Earthmovers' debt, and the ability to pay.

857 Secondly, ABCL alleged that the administrators failed to recognise and pursue overpaid tax and failed to set out the probable benefits of liquidation and, in particular, failed to investigate potential insolvent trading claims.

858 Finally, in their closing submissions ABCL relied on four failings by the administrators in the course of their investigations which were not pleaded by ABCL, but which were identified in the course of evidence.

859 The first of these is that the administrators did not pursue the directors for the RATA of the company which the directors are required to provide under s 438B of the Corporations Act.

860 The second matter is that the administrators failed to consider whether Concrete Supply ought to have traded on after the convening period, including a failure to scrutinise what was said to be Rino's fallacious assertion that Concrete Supply had saved 33% in transport costs in 2018. I can deal with this now. The administrators cannot be criticised for failing to scrutinise an assertion about transport costs in 2018 before their Second Report to Creditors dated 11 December 2107. It is not clear what ABCL means by the assertion "ought to have traded on". If the assertion means no more than that the administrators' conclusion that the company should not be put into liquidation, then that submission is covered by earlier allegations. If ABCL means by the assertion that the company could trade on after the convening period, this allegation is not pleaded, but in any event, it has been answered. The administrators did not represent in the Second Report to Creditors that they had done an analysis of the company's ability to operate for a particular period into the future and I accept Mr Heard's evidence that it is relatively easy for a company to trade during administration because the debts of the company are "ruled off" and generally, administrators are not required to investigate a company's ability to operate after a DOCA unless the Deed Fund is to be made up of, in whole or in part, of future trading profits.

861 The third matter concerns the Pickles' valuation of plant and equipment. Pickles did not value a number of items owned by Concrete Supply, including a concrete plant. The administrators did not, by reference to the company's depreciation schedule, identify this circumstance and that was a failing on their part. This matter arose in the course of cross-

examination and was not capable of reasonable dispute. I can take it into account as a general failing in the work of the administrators. However, it is not pleaded as giving rise to a false or misleading statement in the Second Report to Creditors or a material omission from the report.

862 The fourth matter concerns the lease agreement between Tina and Concrete Supply in relation to the Pooraka property. ABCL submitted that the administrators accepted, without further investigation, the directors' false statements to them that there were no leases between Tina and Concrete Supply when, in fact, there was a lease agreement which commenced in July 2015. The allegation concerning the sale of the business as a going concern was pleaded and it was clearly an issue as to whether there was a lease agreement in place because that affected whether the business could be sold as a going concern. Rino was cross-examined over objection about the rent being paid to Tina by Concrete Supply under the written lease agreement executed in 2015 and a subsequent lease executed in 2018 being rent which appeared to be significantly over market value. I overruled the objection because I considered the evidence might be relevant to credit. After all, it was Mr Tull, a witness called by the Concrete Supply defendants, who produced the leases and who asserted that they provided for the payment of a commercial rent. In the end, I do not think that this matter can be taken very far. There is certainly some evidence that the rent is well above a commercial rent, but I am not disposed to reach a final view where it is not necessary I do so and I am not confident the matter was fully ventilated.

863 ABCL then makes a number of submissions about the exercise of the casting vote. It submits that Mr Cantone's exercise of the casting vote was completely unreasonable. It refers to the inadequacies in the investigations, the circumstance that Mr Cantone's reliance (according to his affidavit) on the fact that the next two largest creditors, the ATO (admitted for $158.827.67) and Maxi-Tankers (admitted for $272,225.70) voted in favour of accepting the DOCA was (so it was said) flawed, there was serious doubt about Mr Cantone's opinion that "there would be a higher return to creditors as a whole by accepting the DOCA proposal", and to the extent that the Court gives weight to the votes of the creditors who supported the DOCA, they should be given less or no weight for various reasons.

864 What then followed in ABCL's closing submissions was a statement of the reasons it contends that the DOCA should be set aside. This section focuses on the substantive and principal submissions and provides the framework in which the matter may be considered.

865 As to the investigations by the administrators, ABCL submits that they were inadequate as to the following matters:

(1) ***ABCL's claim and the alleged discount or rebate:*** The key submissions in relation to this matter are as follows: (1) where further time is required for necessary investigations, then an application should be made to the Court for an extension of the convening period; (2) in this case, *any* independent analysis would have revealed that the alleged rebate was a *nonsense* and the directors could not reasonably have believed that Concrete Supply was entitled to the discount or rebate (emphasis added); (3) Concrete Supply did not account for the alleged rebate in the books and records of the company consistently with the understanding that they were entitled to apply the rebate in the manner alleged; (4) at the very least, the evidence before the administrators, or the evidence they should have obtained, should have raised a suspicion with the administrators that the matter required proper investigation and legal advice; (5) the books and records of Concrete Supply did not comply with s 286 of the Corporations Act and the administrators erred in concluding that they did; (6) it is not clear whether ABCL is suggesting that Concrete Supply was insolvent even in the absence of the alleged discount or rebate. The reference to overdue invoices in March 2009 and March 2012 even before the application of the alleged discount or rebate suggests that, but the evidence before me is insufficient to establish that the company was insolvent, even if it was entitled to the alleged discount or rebate; (7) the administrators' opinion that the company only became insolvent on the demand being made on 13 November 2017 was wrong for three reasons. First, a company which owes a debt which is payable on demand and which it is unable to meet is not solvent simply because a demand has not been made. The contrary view that it is solvent is wrong as a matter of law. Secondly, the books and records of Concrete Supply were inaccurate and did not comply with s 286. That can give rise to a presumption of insolvency. The books and records were inaccurate because there was no entitlement to the alleged discount or rebate and, for reasons previously given, the administrators ought to have known this fact. Even if Concrete Supply was entitled to the alleged discount or rebate, the books and records were not accurate because they were recording liabilities which the company and its directors knew, or believed, were not liabilities. It seems to me that the Concrete Supply system with respect to the RCTIs and its significance melds into the reasons there was no rebate. Thirdly, in any

event, ABCL submits that the RCTIs prepared by Concrete Supply triggered a debt to fall due. ABCL submits that, in any event, the administrators could not have formed a firm view about the date of insolvency and that circumstance and the possibility of an earlier insolvency date should have been reflected in the Second Report to Creditors; (8) assuming Concrete Supply was entitled to the discount or rebate, the administrators were on notice of "tax fraud" in that Concrete Supply had claimed expenses in its income tax returns and BAS, which it had no intention of paying. If, on the other hand, Concrete Supply was not entitled to the alleged discount or rebate, then it seems that it had overpaid tax and the administrators should have investigated this and the prospects of recovery of the overpaid tax. There was some evidence from Mr Morris and Mr Heard about the amount which might be recovered. I do not think that I can reach a firm view on the evidence about the amount which might be recovered.

(2) ***The recoverability of the Mantina Earthmovers' debt and the transactions involving Mantina Earthmovers:*** The key submissions in relation to these matters are as follows: (1) the administrators accepted that it was incumbent on them to review intercompany loans or related party loans and assess their recoverability; (2) there was reason to investigate the quantum of the Mantina Earthmovers' debt because of the transactions involving Mantina Earthmovers; (3) the administrators did not investigate the quantum of the Mantina Earthmovers' debt; (4) the administrators did not assess adequately the recoverability of the Mantina Earthmovers' debt. The administrators' analysis of recoverability on liquidation was 25% to 50% and yet the directors claimed that (at least at one point) that they can (or could) raise the contribution to the Deed Fund of $2.5 million through Mantina Earthmovers.

(3) ***The directors' assets:*** The key submission is that the administrators did not undertake asset searches of the directors to determine their ability to meet any claim against them or request a RATA from the directors.

866 These then are the principal matters raised by ABCL as to the inadequacies in the investigations by the administrators.

867 I turn now to the key submissions made by ABCL as to the Second Report to Creditors.

868 The key submission was that the Second Report to Creditors contained false or misleading statements which were material or the report did not contain material matters.

(1) ***Non-compliance with s 286 of the Corporations Act:*** ABCL submits that the Second Report to Creditors stated that the company's books and records complied with s 286 of the Corporations Act and yet that is incorrect. ABCL's submission is that assuming there is no discount or rebate, the financial reports or statements for the financial years ended 30 June 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017 each overstate profit and net assets and, in fact, there was a loss and a net asset deficiency and the income tax returns and BAS for these periods similarly overstated the company's profit and income. Section 286 is not complied with when the books and records represent the company as profitable and reporting its taxation obligations accurately when, in fact, it is hopelessly insolvent and not reporting its taxation obligations accurately.

The conclusion that the statement that the company's books and records complied with s 286 is inaccurate means that two further statements in the Second Report to Creditors are inaccurate, namely, that Concrete Supply only became insolvent on 13 November 2017 and that there were no insolvent trading, preference or voidable transaction claims open to a liquidator appointed to the company.

(2) ***A flawed conclusion as to insolvency in any event:*** The key submission is that even if s 286 "does not apply" (I assume this means that the submission that s 286 was not complied with, for the purposes of the submission, is to be put to one side) the administrators' conclusion that Concrete Supply only became insolvent on 13 November 2017 and there were no insolvent trading, preference or voidable transaction claims in a liquidation was flawed in any event. This submission relates back to the earlier attack made on the administrators' solvency analysis minus reliance on non-compliance with s 286 i.e., (1) a company is not solvent where it clearly could not pay a debt payable on demand merely because a demand has not been made; and (2) the RCTIs prepared by Concrete Supply provide the necessary trigger for the obligation to pay the debt. In any event, the administrators were not in a position to form a firm view and that circumstance and the possibility of an earlier insolvency date should have been reflected in the Second Report to Creditors.

(3) ***The statements in the Second Report to Creditors concerning insolvency were misleading:*** ABCL addressed two other matters flowing from its submissions on the date of insolvency and the existence of insolvent trading claims insofar as the defendants relied on these matters as bearing on either the materiality of any false or

misleading statements or omissions, or on that element of the discretion under s 445D which involves a consideration of whether the DOCA is in the best interests of creditors. They are the defences which the directors may have to, for example, an insolvent trading claim and the directors' capacity to pay any judgment awarded against them. With respect to these matters, ABCL submitted that the directors never had a genuine belief that they were entitled to the discount or rebate and that would be relevant to whether there were defences available to the directors and there was evidence that the directors may well have access to substantial assets.

(4) ***The recoverability of the Mantina Earthmovers' debt and the Transactions involving Mantina Earthmovers:*** The key submission is that the Second Report to Creditors conveyed to creditors that the administrators had undertaken an analysis of the quantum and recoverability of the debt "when no analysis had been undertaken".

(5) ***The failure to disclose in the Second Report to Creditors the collateral advantages of the DOCA to the directors and officers:*** In its submissions, ABCL refers to directors and officers, but only one of the "advantages" of the DOCA — avoiding being examined in relation to the company's affairs — seems to apply to an officer. Obviously it could be an "advantage" to an officer. The officers referred to by ABCL are not identified in the submissions. In those circumstances, I put to one side the allegation insofar as it refers to officers.

As far as the directors are concerned, the advantages of the DOCA are said to be the following:

(a) they avoid being examined in relation to the company's affairs;

(b) they avoid liability for insolvent trading, voidable transactions, breaches of directors' duties or offences committed by them or the company;

(c) they protect their other companies, Mantina Earthmovers and Mantina Investments from liquidation;

(d) they preserve their excluded employee entitlements; and

(e) they preserve Jason's claim of $437,809.

(6) ***The failure to disclose the extent of the administrators' investigations into the applicability of Pt 5.3A, the alleged rebate and ABCL's entitlement to the debt claimed from Concrete Supply, when Concrete Supply became insolvent, the merits and value of the claims which might be available to a liquidator appointed to***

Concrete Supply and the capacity of the directors to meet any claim made against them: With respect to this matter, ABCL's submission is that the limited investigations into these matters should have been disclosed in the Second Report to Creditors together with the related (in the sense of arising as possibilities having regard to the limited nature of the administrators' investigations) matters previously identified.

(7) ***Non-disclosure of the extent of the administrators' investigations into the sale of the business as a going concern:*** ABCL's submission is that that administrators failed to disclose the extent of their investigations into the value of the business of Concrete Supply if sold as a going concern.

869 For these reasons, ABCL submits that the DOCA should be terminated.

870 With respect to Mr Cantone's exercise of the casting vote, the key submissions made by ABCL are as follows:

(1) The administrators' lack of independence and the adequacies of their investigation lead to the conclusion that Mr Cantone's exercise of the casting vote was "completely unreasonable".

(2) One of Mr Cantone's reasons in support of his exercise of the casting vote, being that the next two largest creditors after ABCL voted in favour of the DOCA, was flawed.

(3) There is serious doubt about Mr Cantone's opinion that there would be a higher return to creditors as a whole by accepting the DOCA by reason of the administrators' lack of independence and the inadequacy of their investigations.

(4) Trade creditors expected or were promised payment in full eventually or were misled by statements in the Second Report to Creditors.

(5) As to the employees, ABCL made the following submissions. First, a number did not know what they were voting on. Secondly, a number did not know of the meeting at all.

(6) The public interest, including considerations of commercial morality, are relevant to the review of the administrators' decision and they lead to the conclusion that the decision should be set aside.

871 Finally, ABCL submitted that:

(1) The votes of ATO and Maxi-Tankers respectively were procured or resulted from misleading or inadequate information in the Second Report to Creditors; and

(2) 11 out of the 31 creditors who voted in support of the DOCA would not have their debts compromised by the DOCA.

The Key Witnesses — Messrs Cantone, Cooper, Morris and Heard

872 It is convenient at this stage to provide a short summary of the evidence-in-chief of each of the key witnesses. I will return to their evidence, including their evidence in cross-examination, when I come to analyse the issues.

Mr Dominic Cantone

873 Mr Cantone qualified as a chartered accountant in 2007 and he was appointed a registered liquidator by ASIC on 24 February 2017.

874 Mr Cantone began working in insolvency in October 2000. He was employed by BRI Ferrier as a senior accountant from 2000 to 2005 and thereafter as a supervisor, and ultimately as a manager in 2008. He was employed by KordaMentha as a manager from April 2011 to June 2015. He became a manager with Worrells in 2015.

875 Mr Cantone has been involved in a number of complex insolvency matters and those insolvency matters have involved voluntary administrations and liquidations.

876 Worrells' policy is to seek the appointment of joint and several administrators in the case of voluntary administrations due to the short time constraints imposed by the Corporations Act in such administrations and because it is a requirement that an appointee personally chair the meetings of creditors.

877 Mr Cantone was subject to a vigorous cross-examination. He was defensive and, on occasion, evasive. On some occasions, he appeared to have difficulty understanding the concepts involved in the questions put to him in cross-examination. As I will explain in the analysis section set out below, Mr Cantone's investigations were inadequate and the administrators' Second Report to Creditors engaged the provisions of s 445D(1) of the Corporations Act. I will also set out examples where I consider that Mr Cantone's evidence was unsatisfactory and not reliable.

878 Mr Cantone's involvement in the affairs of Concrete Supply began on 2 November 2017 when he was contacted by telephone by Mr Tull, the accountant for Concrete Supply.

Mr Tull invited Mr Cantone to an urgent meeting at 100 Pirie Street, Adelaide, in relation to a possible insolvency appointment to Concrete Supply. Mr Cantone attended the meeting and the other attendees were Mr Tull, Rino, Jason and other advisers to the company. The discussions at the meeting were largely concerned with a demand by ABCL of payment of approximately $10 million. Mr Cantone understood that at that time it was the intention of the directors of Concrete Supply to negotiate an agreement with ABCL in relation to the alleged debt and he said that by reason of that fact, there was very little discussion about an insolvency appointment. The directors said that ABCL's demand had come "out of the blue" and that they believed that they were entitled to a discount on the cement supplied by ABCL because of a rebate arrangement they had with ABCL. Mr Cantone said that he had very little involvement in the first meeting, by which I took him to mean, in the discussions at the meeting.

879 A second meeting between representatives of Concrete Supply and Mr Cantone was held on 13 November 2017. That meeting took place at the Pooraka property and the attendees were Mr Cantone, Rino, Jason, Mr Tull and Mr D'Alessandro. Rino told Mr Cantone that the negotiations with ABCL had broken down. As to the rebate arrangement, Rino told Mr Cantone that Concrete Supply and ABCL had come to an agreement on a rebate entitlement in or about 2012. To give effect to the rebate entitlement, ABCL had written-off a large portion of Concrete Supply's debt. Following the agreement, the rebate was applied by Concrete Supply by non-payment of approximately 30% of the RCTIs issued each week by the company for all of the product supplied to the company by ABCL. The directors indicated that they were concerned that ABCL would issue winding up proceedings against the company. They told Mr Cantone that if it was found that the debt to ABCL was due and owing, then Concrete Supply was likely to become insolvent. Mr Cantone explained the voluntary administration process to those present at the meeting and that explanation included a reference to the possibility that the directors would propose a DOCA. The directors indicated that they would consider their options.

880 On the following day, Mr Cantone was contacted by telephone by Mr Tull and Mr Tull advised him that the directors had resolved to appoint him and Mr Cooper as administrators of the company. I have already described the tasks that Mr Cantone carried out on that day (at [747]).

881 On 15 November 2017, there was a meeting at the Pooraka property involving Mr Cantone, Rino, Jason, Tina, Mr D'Alessandro and Ms Booth. At about this time, Mr Cooper and Mr Cantone decided to continue to operate the company's business and it was agreed between them that Mr Cantone would manage the day-to-day trading of the company, and included within that would be obtaining access to the books and records of the company. Mr Cantone described the tasks that he carried out, including a request he made of Mr D'Alessandro and Ms Booth to provide certain information from Concrete Supply's books and records.

882 At the time of the appointment of the administrators, the company held $336,835.77 in a bank account with NAB. The bank accounts Concrete Supply had with NAB were frozen. As a result, the wages of employees of Concrete Supply during the first week of the administrators' appointment were paid by Mantina Earthmovers. At about this time, there were discussions about the ongoing supply of cement by ABCL. ABCL refused to supply cement to Concrete Supply on terms involving the provision of credit and an alternative supplier of concrete was arranged. That alternative supplier was Cement Australia which, according to the evidence, is a member of the Hanson Group. On 18 November 2017, Mantina Earthmovers entered into a credit arrangement with the Hanson Group with respect to the supply of cement and the cement supplied to Concrete Supply allowed it to continue to trade.

883 Mr Cantone had discussions with the solicitors for ABCL, Lipman Karas, and representatives of ABCL and the details are set out earlier in these reasons.

884 Mr Cantone described the security interests held by NAB in and over the company's assets. He also described his dealings with secured creditors who had registered interests according to the Personal Property Securities Register.

885 On 17 November 2017, Mr Cantone caused an initial Advice to Creditors to be sent to all identified creditors of Concrete Supply. He received a number of proofs of debt from creditors and he produced those proofs of debt. The first meeting of creditors was held in the offices of Worrells on 24 November 2017. Eight individuals, including Mr Cantone as chairperson, attended the meeting. Mr Cantone held proxies for 32 creditors.

886 Mr Cantone outlined the investigations the administrators undertook for the purposes of preparing the Second Report to Creditors. Mr Cantone described the purpose of the report as

being "to provide creditors of a company in administration with sufficient information about the affairs of the company to enable the creditors to make an informed decision about the future of the company at the second meeting held pursuant to s 439A of the Corporations Act".

887 Mr Cantone said that a number of investigations were associated with the completion of the report and they included undertaking property and asset searches with respect to the directors to determine their ability to meet any claim that has been identified (para 83.7). Mr Cantone described the steps that he undertook to identify any potential unfair preference claims in the event that Concrete Supply passed into liquidation. He said that the administrators identified the date of the insolvency of Concrete Supply in the Second Report to Creditors as 13 November 2017, and that if that date be correct, then any preference claims were substantially reduced as that day fell one day prior to the date of the appointment of the administrators. Mr Cantone concluded that there were no unfair preference claims that could be made against creditors in the event of the company's liquidation that needed to be identified.

888 Mr Cantone described the work he undertook to review intercompany or related party loans. The loan to Mantina Earthmovers was discussed in this context. Mr Cantone advanced various reasons in support of his estimate that between 50% at best, and 25% at worst, of that loan was recoverable.

889 Mr Cantone said that he considered the reasons for the failure of Concrete Supply. He said that Rino told him that the directors decided to place the company into voluntary administration because of the demand for payment made by ABCL for an amount in excess of $10 million. Mr Cantone said that on 24 October 2017, ABCL had placed Concrete Supply's supply account on a "cash on delivery" basis and that those trading terms would not have been sustainable by Concrete Supply in the long term in circumstances where all of the cement supplied to Concrete Supply was obtained from ABCL.

890 Mr Cantone then said:

> While the directors considered there was a defence available to the Company to the plaintiff's claim, in the event that a Court would find that debt was owing, the directors considered that the Company was likely to become insolvent.

891 Mr Cantone arranged for the company's plant and equipment to be valued by Pickles.

892 Mr Cantone estimated that approximately 85% of Concrete Supply's accounts receivables were collectable. He has recovered $3,252,024.37 in trade debtors of Concrete Supply being debts which arose prior to the administrators' appointment and during the period of the administration.

893 Mr Cantone said that he considered insolvent trading claims against the directors and breach of duty claims against the directors. He said that it was necessary to consider the approximate date upon which the company became insolvent, and the extent of the company's trading thereafter, including any possible defences available to the directors of the company. He said that part of that assessment included an assessment of whether the books and records produced by the company were compliant with the requirements of s 286 of the Corporations Act and, therefore, whether an incoming liquidator would be entitled to rely on a presumption that the company was insolvent from an earlier period.

894 Mr Cantone concluded that the company was up to date with its BAS, maintained up to date accounting software and regularly produced financial accounts. Mr Cantone reached the conclusion that Concrete Supply maintained adequate books and records. With respect to ABCL's claim, Mr Cantone said that he was aware that the company accounted for the alleged rebate and that RCTIs were contained in the books and records of the company. He said that from a review of the books and records with Mr D'Alessandro, he understood that Concrete Supply wrote back the non-payment of a percentage of those invoices into profit. That did not alter his view that the books and records maintained by Concrete Supply were not deficient so as to give rise to a breach of s 286 of the Corporations Act. Mr Cantone believed that ABCL had not issued any invoices or statements of account since April 2012 and that fact, and the fact that it had not made any demand in relation to their alleged claim until October 2017, led him to believe that there would be a defence available to the directors of Concrete Supply to the effect that they had a reasonable basis for expecting that the company was solvent up to the date of that demand, or the date on which the negotiations with ABCL broke down on or about 13 November 2017.

895 Mr Cantone set out the property and asset searches which he undertook to determine the directors' ability to meet any claim that had been identified. He said that he had discussions with Jason and Rino with respect to their personal asset positions and that of Tina. He said that Tina owned the Pooraka property and was Concrete Supply's landlord in respect of the property. He identified the real property of the directors of the company which he was able

to determine from discussions with them. He also produced copies of title and valuation searches for the properties he identified. Mr Cantone reached the view that "at best, the sum of $2,000,000.00 would be realisable by a complete liquidation of all of the assets of the directors". He believed that that was the maximum amount that might be recovered by a liquidator against the directors for any claim for insolvent trading or breach of duty. Mr Cantone said that he was aware from his discussions with the directors that any claim for insolvent trading would be defended and he was aware that legal costs would diminish the asset position of the directors.

896 Mr Cantone described the investigations he undertook and the opinions he formed with respect to the viability of selling the business of Concrete Supply as a going concern. In that context, he made the statement that there was no current written lease agreement between Concrete Supply and Tina. He said that he did not consider a sale of the business of Concrete Supply as a going concern was viable for the following reasons: (1) a sale would require the cooperation and support of Tina, which would not be forthcoming; (2) a sale would require the cooperation and continued support of Mantina Earthmovers which would not be forthcoming or possible; and (3) subject to the purchase of the necessary plant and equipment, the directors of Concrete Supply would have the industry expertise and experience to commence a competing business from the same premises.

897 Mr Cantone held the opinion that any insolvent trading claim would involve legal costs which could exceed $500,000 and would involve a significant amount of money and substantially diminish the funds already available to meet the claims of creditors.

898 Mr Cantone produced the proof of debt lodged by ABCL. It was lodged in the administration on 23 November 2017 and is for the amount of $12,447,842.58 for cement supplied to Concrete Supply, but not paid for, between April 2009 and November 2017, and a further sum of $9,962.64 for aggregate supplied in September and November 2017. Mr Cantone described the documents provided with the proof of debt and the discussions he had with ABCL and its solicitors. There was a meeting on 29 November 2017. Mr Cantone's belief was that the directors of the company considered that "the Company was entitled to the Rebate" and, in addition, "the Company also accounted for the alleged Rebate in the books and records of the Company consistently with the understanding that they were entitled to apply the Rebate in the manner alleged".

899 Mr Cantone said that during the meeting on 29 November 2017, he asked ABCL's solicitors whether ABCL had identified any link between the directors of Concrete Supply and the employee of ABCL who had allegedly engaged in fraudulent activities, and was told that no connection had been identified. The administrators formed the view that adjudication of ABCL's claim would be costly, time consuming and would require them to obtain detailed legal advice. They did not consider that adjudication on the proof required them to extend the time for the convening period in the administration. However, it was appropriate for them to identify the likely costs of that process in the Second Report to Creditors. Mr Cantone noted that, for the purposes of finalising the DOCA or in any subsequent liquidation, it would be necessary to formally adjudicate on ABCL's proof of debt. Mr Cantone did not consider that it was in the interests of creditors to prolong the administration process for the purpose of investigating ABCL's claim.

900 Early in their appointment, Rino and Jason had informed Mr Cantone that they would be proposing a DOCA. The directors initially proposed a sum of $2 million by way of a contribution, but after discussions with Mr Cantone, that amount was increased to $2.5 million.

901 Mr Cantone said that he was aware from his discussion with the directors that the amount of $2.5 million would be sourced from the sale of two real properties and a refinance of the company's banking facilities. He said that as the contribution sum was not going to be sourced from the ongoing trading profit of the company, he did not need to undertake an assessment of the company's ability to continue to trade profitably.

902 The second meeting of creditors was held on 19 December 2017. I have already set out who attended the meeting (see [760] above). Mr Cantone's recollection of the meeting was as follows.

903 Mr Lipman asked a number of questions at the meeting. Furthermore, he asked that the meeting be adjourned for a short period to allow the administrators to question the directors further as to their personal financial positions. During the adjournment, the directors told the administrators that the cumulative value of the equity in the property owned by them was between $1,500,000 and $1,700,000. Mr Cantone said that that information was consistent with the searches that had been conducted and his previous discussions with the directors.

904 Mr Mackintosh, on behalf of the ATO, moved the resolution that the company execute the proposed DOCA. Mr Cantone exercised the votes of the special proxies he held in favour of the resolution. Mr Lipman exercised his general proxies, each in opposition to the resolution. Mr Cantone also called for the resolution to be moved to place Concrete Supply into liquidation. That resulted in a deadlock. That resolution was moved by Mr Lipman and included a resolution that Mr Cooper and Mr Cantone be appointed as the company's joint and several liquidators. Mr Lipman called for a poll. The results were deadlocked and, according to Mr Cantone, "required me to exercise my casting vote in favour of one of the resolutions". In his evidence-in-chief (i.e., his affidavit), Mr Cantone said that in exercising his casting vote, he considered the following matters:

> 126.1 there would be a higher return to creditors as a whole by accepting the DOCA proposal;
>
> 126.2 that was consistent with our recommendation in the 75-225 Report;
>
> 126.3 the majority in numbers (being 31 to 8) voted in favour of accepting the DOCA;
>
> 126.4 while the vast majority in value had opposed, most of that value was represented by the plaintiff's debt;
>
> 126.5 The major creditor, being the plaintiff voted in favour of the liquidation, however the next two major creditors, being the ATO and Maxi-Tanker Pty Ltd voted in favour of accepting the DOCA. Mr Mackintosh from the ATO also had the benefit of hearing Lipman's questions and the answered provided by Cooper and me;
>
> 126.6 creditors would receive a faster dividend under the DOCA, while a liquidation was likely to be lengthy (I estimate at least 3 years) and involve protracted litigation prior to any dividend being paid;
>
> 126.7 the DOCA would allow ongoing trade which would preserve the jobs of approximately 30 employee creditors and ongoing business for supplier creditors;
>
> 126.8 overall I considered it was in the interests of the creditors as a whole to exercise any casting vote in favour of the DOCA.

Mr Cantone exercised his casting vote as chairperson in favour of Concrete Supply executing the proposed DOCA.

905 Mr Cantone rejects the criticism that the administrators should have, but did not, undertake a complete reconstruction of the books and records of Concrete Supply to reflect the company's obligation to pay for product supplied by ABCL on the basis that that obligation arose on the date that the product was supplied. He said that the costs of such a reconstruction, which he estimated would be in excess of $150,000, would not be justified,

nor would an application to the Court to extend the convening period of the administration in order to enable that exercise to be carried out. He said that while that task may result in a finding that Concrete Supply was insolvent at an earlier point in time, if the company was not entitled to the alleged discount or rebate, it would not change his view on the prospects of success of any claim by the liquidator. In addition, during that period the overall asset position of the directors would remain either unchanged or possibly diminished. It followed that even if a higher claim was identified against the directors, the directors' ability to meet any judgment would remain unchanged. In the circumstances, the cost of the process would be out of proportion to any benefits it provided to the creditors as a whole.

Mr Nicholas Cooper

906 Mr Cooper qualified as a chartered accountant in 1995. He was appointed a registered liquidator by ASIC in 2002 and an official liquidator in 2004. He was appointed a registered trustee in bankruptcy in 2009. Mr Cooper became a full member of the Australian Restructuring Insolvency and Turnaround Association (ARITA) (then known as the Insolvency Practitioners Association of Australia) in 2002.

907 Mr Cooper undertook legal studies in 1996 and he graduated with a Bachelor of Laws and Legal Practice in 2002. As a liquidator, Mr Cooper has been involved in unfair preference claims and insolvent trading claims and the latter claims have involved a consideration of the various defences which can be raised by a director. In the final year of his legal studies, Mr Cooper prepared a thesis on insolvent trading and directors' defences. In addition, he has published a number of articles on unfair preference claims.

908 Mr Cooper was an intelligent witness who understood the concepts involved in a number of questions put to him in cross-examination. He listened carefully to the questions he was asked and answered them as precisely as he could. Generally speaking, other than his opinion as to the date of insolvency, his role in the administration was secondary to that of Mr Cantone. With respect to some matters upon which Mr Cooper gave evidence, it was not always clear whether the evidence was of his reasoning at the time or was more developed reasoning as a result of having time after the event to reflect on the matter. Having regard to the whole of the evidence, and for the reasons in the analysis section set out below, I do not accept Mr Cooper's opinions on certain key matters, notably his evidence and conclusions with respect to the date of insolvency.

909 On 2 November 2017, Mr Cooper was told by Mr Cantone of their possible appointment as administrators of Concrete Supply.

910 Mr Cooper was appointed an administrator of Concrete Supply on 14 November 2017 with Mr Cantone.

911 Mr Cooper and Mr Cantone agreed that Mr Cantone would be the primary appointee in relation to the administration and that he (Mr Cantone) would be responsible for the day-to-day running of the administration. Mr Cantone would consult Mr Cooper as required. Mr Cooper said that he made regular inquiries of Mr Cantone about the administration and that he reviewed documents as required. He and Mr Cantone would discuss the conduct of the administration at least once a day. All of the important decisions regarding the conduct of the administration were made by Mr Cooper and Mr Cantone jointly.

912 Mr Cantone told Mr Cooper on a number of occasions that the directors of Concrete Supply intended to propose a DOCA. One such occasion was after a meeting with the directors on 13 November 2017. That was the day before the company was placed into administration.

913 Mr Cooper and Mr Cantone decided to continue to operate the business of Concrete Supply, at least in the short term following their appointment, having regard to the directors' intention to propose a DOCA and in the interests of the employees of the company.

914 Mr Cooper did not participate in any pre-appointment meetings between Mr Cantone and the directors and advisors of the company.

915 As I have said, Mr Cooper has extensive experience as an insolvency practitioner and that experience includes being personally involved in "many protracted insolvent trading claims". In light of that experience, his role in preparing the Second Report to Creditors was to consider the possible claims which may be available to a liquidator if the creditors resolved to place the company into liquidation. Mr Cooper reviewed and commented upon each draft of the Second Report to Creditors. He said that the report follows the structure of the pro-forma Worrells' Reports to Creditors, although the pro-forma is "customised" with a view to the report meeting the particular requirements of each administration. Mr Cooper described the aim of the report as to ensure that creditors were given such information as is necessary to inform their decision in an accurate and clear manner.

916 Mr Cooper considered the possible sale of the business of the company. He said that in his experience, the sale of a business as a going concern in distressed circumstances is extremely

difficult. One of the reasons he considered that the sale of the company's business as a going concern was not feasible was that the $12 million debt claimed by ABCL would be disclosed to any potential purchasers and it would have eroded the value of any goodwill attached to the business. Another reason was that Concrete Supply's main supplier was a related entity, Mantina Earthmovers. Both companies traded from the same premises and the owner of the premises was a director of the company. It was apparent that Concrete Supply's business was driven by the directors' personal relationships with its customers. These circumstances meant, in Mr Cooper's opinion, that a purchaser of the business would not necessarily have the support of a primary supplier to the company, the company's landlord and potentially its customers.

917 Mr Cooper and Mr Cantone obtained a formal valuation of the plant and equipment of the company from Pickles. Mr Cooper considered that the value of the business would not exceed the value of the plant and equipment given the distressed financial circumstances of the company in the absence of the support of the related parties referred to above. The directors had indicated that they would make a substantial contribution under a DOCA and Mr Cooper understood that the contribution was significantly in excess of the likely value of the company's plant and equipment. In the circumstances, Mr Cooper considered that efforts to attempt to sell the company's business as a going concern would not achieve any benefit for the company's creditors and would incur unnecessary costs.

918 One of the important roles that Mr Cooper undertook in the course of the administration was to investigate and provide an opinion with respect to the date upon which Concrete Supply became insolvent. He said that he was aware of the alleged debt claimed by ABCL and the circumstances surrounding the claim. Mr Cooper is aware of the cashflow test of solvency and the factors relevant to an assessment of solvency. Mr Cooper's understanding based on the books and records of Concrete Supply, including the company's financial statements for the year ending June 2016, the reports produced from the company's accounting software, and his discussions with Mr Cantone was that: (1) the lodgement of BAS was up to date; (2) the company was not in arrears with the ATO; (3) except for ABCL's claim, the company was not significantly outside the terms of trading with other creditors; (4) the entitlements of the company's employees, including superannuation, were paid and up to date; and (5) generally, except for ABCL's claim, the company was paying its debts as and when they fell due.

919 Mr Cooper was aware of the following matters: (1) the BSA between ABCL and Concrete Supply; (2) the supply of cement by ABCL to Concrete Supply; (3) the fact that from April 2012 ABCL did not send any invoices or statements to Concrete Supply and that from that date, Concrete Supply would cause RCTIs to be issued to ABCL relating to the supply of cement; (4) Concrete Supply considered that it was entitled to a rebate on the supply of cement and applied that rebate by withholding payment of certain invoices to ABCL; and (5) that since August 2009, ABCL had not issued any demands to the company in respect of its debt apart from the October 2017 demand. Mr Cooper was also aware that in October 2017, ABCL, upon becoming aware of the perpetration of an alleged fraud by an internal employee of ABCL, issued a demand to Concrete Supply in the amount of $10,021.229.00.

920 Mr Cooper formed the opinion that the company became insolvent on 13 November 2017. He explained his reasoning in the following way. Mr Cooper said that he was familiar with various authorities that govern the issue of when a debt is "due and payable" for the purposes of establishing insolvency. By way of example, he said that he was familiar with the decision in *Southern Cross Interiors Pty Ltd v Commissioner of Taxation* [2001] NSWSC 621; (2001) 53 NSWLR 213 (*Southern Cross Interiors*) in reference to the proposition that "in determining when a debt is 'due for payment' it is appropriate to take into account any arrangements between the Company and the creditor, including the course of conduct of the supplier which may give rise to an inference of an agreement or, potentially, an estoppel preventing the supplier from relying upon the stipulated time for payment of the debt". Mr Cooper said that given ABCL had not issued invoices or statements from April 2012 and that it made no demands for payment at any time within the eight years preceding the administrators' appointment, apart from a demand in October 2017, it was possible that part of ABCL's debt was statute-barred by reason of the *Limitation of Actions Act 1936* (SA). He said that further, the authority of *Southern Cross Interiors* indicated that ABCL's debts, regardless of when they were incurred, were not due and payable until such time as ABCL made its demand in October 2017. It was by reference to these matters that Mr Cooper expressed the "preliminary view" in the Second Report to Creditors that Concrete Supply became insolvent on 13 November 2017 because it was on that date it failed to comply with a demand from ABCL and the directors accepted that the company was indebted to ABCL for an amount which the company could not pay. He said that the matters to which he had referred (i.e., no invoices and no demands) were also relevant to the assessment by him of the available defences to any potential claims by a liquidator. Mr Cooper said that he recognised

that on ABCL's case, the company may have been insolvent at an earlier date, but for reasons he gave, even if that was so, his view was that the DOCA represented a better outcome for the creditors of the company as a whole.

921 Mr Cooper also gave his reasons for considering that a reconstruction of the company's books and records was an exercise which was not justified. Those reasons, that is, costs, the need to extend the convening period and the absence of an ultimate benefit to creditors, even if an earlier date of insolvency was established, were similar to those of Mr Cantone.

922 Mr Cooper considered the possibility of unfair preference claims by a liquidator should the company be placed into liquidation. He considered that such claims would have little prospect of success, even if the company was found to be insolvent at an earlier date than 13 November 2017. He said that nearly all creditors were paid within their respective terms of trading, including all payments to the ATO; there was no express suggestion which would have been "ascertained" by a creditor that the company was in financial difficulty; and the usual indicators of insolvency or pending insolvency of which a creditor may be aware were notably absent. Those matters included rounded payments, making arrangements with creditors, outstanding BAS and payments, suppliers placing the company on cash on delivery terms, non-payment of superannuation, receipt of statutory demands, debt recovery action, etc. At the time of the preparation of the Second Report to Creditors, Mr Cooper considered that creditors who received payment from the company within the relevant period prior to the relation-back day would clearly have a defence to an unfair preference claim under s 588FG(2) of the Corporations Act.

923 Mr Cooper also considered the possibility of insolvent trading claims. He said that even if it was ultimately established that Concrete Supply was insolvent prior to 13 November 2017, he considered that there were defences available to the directors in response to any such claims. He refers to the defences in ss 588H(2) and 588H(3), both of which contain a reference to the state of mind of a director. I have already referred to the various matters Mr Cooper considered significant, but to reiterate those matters in this context, Mr Cooper proceeded on the basis that ABCL had not issued any invoices or statements of account since April 2012, and nor had it issued any demands to Concrete Supply in the eight years preceding the date of appointment. Furthermore, except for ABCL's claim, Concrete Supply was meeting its debts to its creditors as and when they fell due. Having regard to those matters, Mr Cooper considered, at the time the Second Report to Creditors was prepared, that the directors would

be able to make out defences to an insolvent trading claim if Concrete Supply were to enter liquidation. Furthermore, Mr Cooper's experience in litigation involving insolvent trading claims led him to estimate the cost of prosecuting a defended insolvent trading claim against the directors in the liquidation of the company, as likely to exceed $600,000. Mr Cooper said that based on Mr Cantone's searches regarding the asset position of the directors, he concluded that even if a liquidator was successful in prosecuting insolvent trading claims, the directors were unlikely to possess assets which were capable of satisfying a substantial part of the potential claims. In those circumstances, he considered that it was foreseeable that such assets as the directors had may well be largely absorbed in meeting the costs of the litigation and the liquidators' fees leading to little benefit to creditors.

924 Mr Cooper addressed an assertion by ABCL that a reasonable insolvency practitioner would have sought advice from senior counsel as to whether a liquidator would have a claim against the directors for breach of directors' duties. He considered possible claims under s 180 of the Corporations Act. He reached the view that each time there was a short payment, Concrete Supply did not suffer any loss as, on ABCL's case, the balance of the purchase was still owing. Furthermore, he considered that Concrete Supply gained a benefit from the short payments in that it had the use of the monies it short-paid for a significant number of years. The use may have been interest saved on finance facilities or interest earned on investments. Mr Cooper considered that Concrete Supply obtained a benefit (and did not suffer a detriment) by generating the RCTIs and paying ABCL in the manner in which it did. Mr Cooper noted that the transactions did not involve a material personal interest to the directors or cause an advantage to be gained by the directors personally. He therefore considered that a liquidator could not bring a sustainable claim against the directors for a breach of their duties in respect of the transactions and that advice from senior counsel was not warranted. The minutes of the second meeting of creditors indicate that he did not express his views on this topic with the same degree of certainty at the meeting (see [797](12) above). The capacity of the directors to meet any judgment was also a consideration. Mr Cooper had been informed by Mr Cantone that the net asset position of the directors was approximately $2 million. Furthermore, if Concrete Supply were to enter liquidation, the net asset position would be substantially eroded by their defences of any insolvent trading claim and breach of duty claim. The net assets of the directors then available to creditors would be substantially less than the $2.5 million offered as a contribution under the DOCA.

925 Mr Cooper attended the second meeting of creditors on 19 December 2017. As I have said, Mr Cantone was the chair of the meeting and Mr Wolf and Mr Black also attended the meeting.

926 Mr Cooper was taken to the minutes of the second meeting of creditors, and in particular, the following statement in the minutes:

> Mr Cooper stated that they had considered the information on shareholdings from publicly-available information but had not commissioned valuations of such shareholdings.

He said that he did not make such a statement at the meeting.

The Evidence of Mr Morris in relation to the Administration

927 Mr Morris was asked to examine the Second Report to Creditors and express his expert opinion on the conclusions, opinions and recommendations contained in that document.

928 There were a number of hearsay objections to Mr Morris' first report (and, as I have already noted, his second report), but they were not pressed as objections to admissibility. The defendants reserved the right to make submissions about the weight to be accorded to the evidence.

929 The principal objection to admissibility was made by the administrators and was directed, in the main, to Mr Morris' first report. The objection was that Mr Morris did not have the expertise to express a number of the opinions which he expresses in his first report. In expressing his criticisms of the work of the administrators in his first report, Mr Morris uses the standard of a competent forensic accountant and competent (or reasonable) insolvency practitioner.

930 A voir dire was held in relation to Mr Morris' expertise. Mr Morris has not been an official liquidator and is not now a registered liquidator. Nor is he a registered trustee in bankruptcy. He has no formal qualifications in the insolvency discipline. He has never been an administrator or done a report to creditors in an administration, or exercised a casting vote at a meeting of creditors. He has no liquidation experience.

931 Mr Morris accepted that he had no expertise in some of the tasks carried out by insolvency practitioners, such as the sale of assets and the conducting of meetings. However, he expressed the opinion that a forensic accountant had expertise in investigating the affairs of a company and in carrying out an analysis as to the solvency of a company. Mr Morris

accepted, in relation to administrations in particular, that he had no specialised knowledge, training or expertise in relation to the specialised skills of administration. However, he contended that an administrator's report, while raising matters relating to the administrative skills of an administrator, also raised matters which involved the application of accounting skills. He had expertise as to the application of accounting skills.

932 The administrators submitted that Mr Morris lacked the expertise to give expert evidence relating to the conduct of an administration. He did not have the specialised knowledge referred to in s 79 of the Evidence Act. In particular, they submitted that there were a number of areas in which he did not have the expertise to proffer expert evidence. They identified, by way of example, an examination of the sufficiency of an administrator's investigations, an examination of the sufficiency of the Second Report to Creditors, and an examination of the appropriateness of a particular exercise of the casting vote by the chairperson of the second meeting of creditors. They submitted that the decision as to the advice to be given to creditors involved an exercise of judgment and that bore upon the assessment of the sufficiency of the Second Report to Creditors.

933 It seemed to me that there were matters in Mr Morris' first report about which he had the expertise to provide an opinion, and there were likely matters about which he did not have such expertise. The admissibility issue was complicated somewhat by the fact that, in respect of some matters, Mr Morris expressed himself in a way which went beyond the province of an expert. In those circumstances, rather than ruling on the objections to paragraphs in his first report, I required ABCL to lead Mr Morris on the contents of his first report. The report was then received as exhibit A8, subject to two qualifications. First, paras 41, 91–101 and 186 were not pressed and were excluded from the tender. Secondly, paras 65, 88, 113, 121, 130, 141, 142.2, 144, 160, 163, 177, 179, and 184 were received as expressions of his opinion as to the reasoning and conduct of a competent accountant of basic experience, rather than as his opinion as to the reasoning and conduct of "a competent forensic accountant or insolvency practitioner". As a result of cross-examination by the administrators, it seems that Mr Morris would exclude a recently qualified accountant from the class of "a competent accountant of basic experience". There were some expressions of opinion which, I infer by oversight of the parties, were not expressly identified in the ruling (e.g., paras 121, 133, 149 and 183). I will treat them as covered by the same standard. I note, although it is of no moment in turns of the basis upon which the first report was received, that Mr Morris does

not accept the limitation insofar as it may exclude the accounting skills to be exercised by an insolvency practitioner.

934 In effect, the only ruling I was required to make was that Mr Morris be led orally as to the contents of his first report and thereafter, ABCL led him by reference to the standard of a competent accountant of basic experience. I am not sure that this attempt to solve the problem of Mr Morris' lack of expertise in the area of administrations under Pt 5.3A has achieved its purpose, but I do not consider that ultimately it matters. I will explain the reasons for this view after I have briefly summarised Mr Morris' principal views and dealt with a challenge by the administrators to Mr Morris' independence.

935 With respect to the possible sale of the business of Concrete Supply as a going concern, Mr Morris expressed the opinion that the possibility of such a sale warranted serious consideration as it may have resulted in an outcome for creditors that was far more favourable than the proposed DOCA.

936 With respect to the Mantina Earthmovers' debt owed to Concrete Supply, Mr Morris expressed the opinion that a competent accountant of basic experience would not proffer an opinion about the collectability of the loan without having due and proper regard to the business of Mantina Earthmovers, its ability to continue to operate profitably, and the nature and value of Mantina Earthmovers' assets, including the quarry and that the administrators appear not to have addressed these matters.

937 With respect to the ABCL debt, Mr Morris expressed the opinion that the inclusion of the ABCL debt at between $10 million and $12.457 million is consistent with the administrators concluding that Concrete Supply was actually indebted to ABCL for at least $10 million at the date of their appointment. On this basis he expressed his opinion that a competent accountant of basic experience would appreciate that: (1) Concrete Supply's books and records would not comply with s 286 of the Corporations Act; (2) Concrete Supply was likely to have been insolvent from the date at which the debt was so large that it could not have been repaid; (3) further information was required to determine that date which was likely to have been at least two years before the appointment of the administrators; (4) Concrete Supply had been trading whilst insolvent from that date; and (5) a liquidator could be expected to investigate and pursue insolvent trading and preference claims.

938 With respect to the estimated dividend under a liquidation, Mr Morris expressed the opinion that the administrators have understated the estimated dividend to non-priority creditors under a liquidation scenario in the event that the Mantina Earthmovers' loan is recoverable in full and the amounts shown in the list of known unsecured creditors are recoverable.

939 With respect to the adequacy of the books and records, Mr Morris expressed the opinion that a competent accountant of basic experience would not form an opinion about compliance with s 286 of the Corporations Act absent a robust examination of relevant financial records of Concrete Supply. He also expressed his opinion that, in light of the facts and circumstances of the ABCL debt that were known to the administrators, a competent accountant of basic experience would have called for and examined Concrete Supply's trading budgets, cash budgets, management statements, quarterly financial statements and detailed aged creditors ledger. He also expressed the opinion that, in light of the fact that Concrete Supply's financial records indicated that the ABCL debt was only $2.168 million, the administrators should have recognised and reported the fact that Concrete Supply's source documentation was incorrect or incomplete and the financial statements were unlikely to be correct. He also said that in his opinion, a competent accountant of basic experience would have formed the opinion that this matter required close examination.

940 With respect to the discount or rebate, Mr Morris expressed the opinion that no competent accountant of basic experience would conclude that the circumstances of the ABCL debt did not warrant a forensic analysis of the accounting records of both ABCL and Concrete Supply and a careful consideration of the assertions being made by personnel of ABCL and the directors and other relevant personnel of Concrete Supply.

941 With respect to the profits reported by Concrete Supply for 2015 and 2016, Mr Morris expressed the opinion that a competent accountant of basic experience would recognise that the reported profits of Concrete Supply for 2015 and 2016 were inconsistent with the profits expected from a company that had enjoyed the benefit of the unauthorised discounts, and that this warranted diligent investigation, careful analysis and a full explanation in the Second Report to Creditors.

942 With respect to the date of insolvency, Mr Morris expressed the opinion that a competent accountant of basic experience aware of the information that was provided or available to the administrators at the time of the publication of the Second Report to Creditors would not conclude that Concrete Supply was solvent at all relevant times prior to 13 November 2017

and first became insolvent on that date without: (1) undertaking an investigation of Concrete Supply's circumstances, including an analysis of trading and the manner in which the ABCL debt arose, and (2) the benefit of an opinion from senior counsel that reached that conclusion.

943 With respect to insolvent trading, Mr Morris expressed the opinion that a competent accountant of basic experience would observe that if the ABCL claim was established, or largely established, Concrete Supply is likely to have been trading whilst insolvent for part of the period to which the debt relates.

944 With respect to potential recoveries, Mr Morris expressed the opinion that the appropriate course of action for a competent accountant of basic experience was to undertake a robust investigation into the affairs of Concrete Supply, in view of the fact that the DOCA would render possible recoveries unable to be pursued.

945 With respect to offences, Mr Morris expressed the opinion that the statement by the administrators that their preliminary investigations had shown that there were no potential offences was entirely inconsistent with any proper consideration of the matters Mr Morris had addressed. He also expressed the opinion that a competent accountant of basic experience, informed of the ABCL claim and the surrounding circumstances, could not have formed the opinions expressed by the administrators.

946 With respect to the administrators' recommendation, Mr Morris expressed the opinion that if due consideration is given to the facts and circumstances relating to the ABCL debt, a competent accountant of basic experience would conclude that there was a need to more carefully analyse the circumstances of Concrete Supply, which would be likely to lead to a number of conclusions regarding the date of insolvency, and the likelihood of insolvent trading claims and preference claims. He said that it was difficult to accept that the administrators' recommendation was based on a reasonable analysis of the facts that were, or should have been, available to them.

947 With respect to the exercise of the casting vote, Mr Morris expressed the opinion that in exercising their vote at the meeting of creditors, a competent accountant of basic experience would have given due consideration to the matters set out in Mr Morris' first report. He also expressed his opinion that a competent accountant of basic experience would have identified and given due consideration to the benefit that the directors would enjoy if the proposed DOCA was accepted and a liquidator was not appointed.

948 There was an attack by the administrators on Mr Morris' independence primarily in relation to his first report. There was considerable cross-examination on the topic. The attack was based on the form and contents of his first report, the time he spent with solicitors in preparing that report and an assertion that he "knowingly destroyed evidence".

949 I reject the challenge to Mr Morris' independence. It is true that he spent considerable time with solicitors in the course of preparing his first report and he did not keep any notes. The first report is strongly expressed and, to a point, expresses opinions outside his field of expertise. To my mind, whilst these matters suggest that Mr Morris was certain about the correctness of his own views, they do not indicate a lack of independence.

950 In any event, I do not propose to place any weight on Mr Morris' opinions going to the duties of administrators under Pt 5.3A of the Corporations Act. Some of his evidence in his first report is helpful in exposing the issues and identifying uncontroversial and basic accounting concepts and practice, such as the steps which may be taken, for example, to ascertain the recoverability of an intercompany debt, but beyond that, I do not propose to rely on the opinions in Mr Morris' report. I should record that I do not detect any significant reliance on the opinions in Mr Morris' first report by ABCL.

Mr Andrew Heard

951 Mr Heard qualified as a chartered accountant in 1993. He is a Fellow of Chartered Accountants Australia & New Zealand. Mr Heard completed the Advanced Insolvency Course of the Insolvency Practitioners Association of Australia (IPAA) in 1994 and he is a Fellow of ARITA. Mr Heard was registered by ASIC as a company liquidator in 1999. The details of Mr Heard's other qualifications and memberships are set out in his first report. There is no need for me to set them out.

952 Mr Heard was a director of Corporate Recovery at KPMG between 2001 and 2004 and during that time he was the principal appointee in seven voluntary administrations. He was a partner at PPB Chartered Accountants between 2004 and 2007, and he was the principal appointee in 19 voluntary administrations and the joint appointee in a further 18 voluntary administrations. Mr Heard has been a principal of the firm, Heard Phillips Chartered Accountants, since 2007. He practises in the area of corporate insolvency, restructuring, advisory and forensic accounting. He has been the principal appointee or joint appointee in 67 voluntary administrations.

953 The voluntary administration regime was introduced in 1993 and from that date to 2001, Mr Heard has been the appointee or has managed a significant number of voluntary administrations.

954 Mr Heard prepared two reports with respect to the voluntary administration issues in this case. His first report is dated 18 April 2018 and his second report, which is a response to Mr Morris' second report, is dated 19 November 2018.

955 Mr Heard was well qualified in the area of voluntary administrations. He was a careful and considered witness in giving his evidence. Nevertheless, as will become clear, there are a number of opinions which he expressed which I do not accept.

956 Mr Heard explained that ARITA is the peak body for insolvency practitioners in Australia. The ARITA Code of Professional Practice (ARITA Code) came into effect on 21 May 2008. It replaced the IPAA Code of Conduct. The current version of the ARITA Code came into effect on 1 January 2014. Mr Heard expressed the opinion that the parts of the ARITA Code which were relevant to the issues in this matter were chapter 1, which contains an introduction and a statement of the purposes of the Code; chapter 8, which contains directions as to communications with affected parties by insolvency practitioners; chapter 24, which addresses creditors' meetings; and chapter 25, which addresses reports under s 439A of the Corporations Act (see now s 75-225 of the IPS (Corporations)).

957 In addition to producing those chapters of the ARITA Code, Mr Heard produced the following ASIC Guidelines: (1) "Voluntary Administration: A Guide for Creditors"; (2) "What Books and Records Should my Company Keep?"; and (3) "Insolvency: A Guide for Directors". In addition, Mr Heard referred to the report produced by the Australian Law Reform Commission in 1988 titled "General Solvency Enquiry" (known as the Harmer Report). That report preceded the enactment of what is now Pt 5.3A of the Corporations Act.

958 Mr Heard expressed the opinion that the standard to be applied by an administrator in carrying out a voluntary administration under Pt 5.3A of the Corporations Act is one in which the administrator:

(1) applies the guidance set out in the ARITA Code;

(2) meets the expectations of the ASIC Guideline titled "Voluntary Administration: A Guide to Creditors";

(3) issues reports which comply with s 75-225 of the IPS (Corporations) and Pt 5.3A of the Corporations Act generally;

(4) exercises his or her professional judgment so as to maintain a balance between speed and accuracy; and

(5) expresses an opinion of the best options available to creditors based on his or her professional judgment.

959 Mr Heard expressed the opinion that the timing specified in Pt 5.3A is such that a prompt process must be carried out and the amount of information that can be provided to creditors is necessarily less than it might otherwise be. The administrator's investigation is necessarily a preliminary investigation which involves the administrator carrying out his or her investigations in a manner which is modified in light of the tight time frame and associated constraints provided for by Pt 5.3A. He referred to the decision in *Britax Childcare Pty Ltd, in the matter of Infa Products Pty Ltd v Infa Products Pty Ltd (Administrators Appointed)* [2016] FCA 848; (2016) 115 ACSR 322 (*Britax Childcare*) at [88] per Burley J.

960 Mr Heard considered that the key sections in the Corporations Act were as follows: (1) s 438 which requires the voluntary administrator to commence investigations as soon as practicable after the administration of a company begins; (2) s 438B, which requires the directors to deliver to the administrator a report as to the company's business, property, affairs and financial circumstances; (3) s 438C which requires persons with the company's books to deliver the books to the administrator upon request; and (4) s 438D which provides that the administrator must lodge reports with ASIC if he or she considers that a past or present officer or employee or a member of the company may have been guilty of an offence, or a person who has taken part in the formation, promotion, administration, management or winding up of the company may have misapplied or retained or may have become liable or accountable for money or property of the company, or may have been guilty of negligence, default, breach of duty or breach of trust in relation to the company.

961 Mr Heard noted that the administrator must exercise judgment to decide if additional time is needed for the investigation of the company's affairs. If it is, then the administrator should seek an extension of the convening period, or the creditors should be asked if the meeting should be adjourned.

962 Section 439A of the Corporations Act provides for the convening of a meeting of creditors at which the company's future is decided. The meeting must be convened within the convening

period which, relevantly, is a period of 20 business days beginning on the day after the administration begins and the meeting must be held within five business days before, or within five business days after the end of the convening period. Under s 439A(6), the Court may extend the convening period.

963 Mr Heard expressed the opinion that the standard investigation which he considers is "anticipated" by Pt 5.3A of the Corporations Act is a swift and practical one, and less than would be expected in a liquidation, and far less than would be anticipated in a forensic accountant review.

964 Mr Heard referred to the evidence of the administrators. He had been provided with their affidavits. He expressed the following conclusions: (1) administrators are required to exercise their discretion as to the extent of necessary investigations to be conducted, having regard to the purposes of Pt 5.3A of the Corporations Act; (2) administrators must balance a number of factors, including the purpose of Pt 5.3A, the requirement to express an informed opinion, the limited time frame to form that opinion, and the extent of investigative powers provided in an administration, when determining the scope of inquiries and investigations to be conducted; (3) the size of the company and complexity of its business will guide the extent of the investigations required; (4) the costs of investigation and the time frame within which investigations are to be completed must be balanced by voluntary administrators; (5) the level of investigations in a voluntary administration are less than the level of investigations completed in a liquidation; (6) the extent of investigations described in the respective affidavits of the administrators covered the areas Mr Heard would expect to be appropriate for a company of the size of Concrete Supply; and (7) it was appropriate for the voluntary administrators to estimate and factor in the risks to any potential recovery highlighted in the Second Report to Creditors so that the creditors were able to balance the two parameters of risk and return adequately.

965 Mr Heard expressed the opinion that the Second Report to Creditors conformed with the administrators' obligations under the Corporations Act and relevant Regulations.

966 Mr Heard addressed the question of the adequacy of the company's books and records.

967 In this context, it is convenient at this point to set out the relevant sections in the Corporations Act.

968 Section 286 of the Corporations Act provides as follows:

> (1) A company, registered scheme or disclosing entity must keep written financial records that:
>
> (a) correctly record and explain its transactions and financial position and performance; and
>
> (b) would enable true and fair financial statements to be prepared and audited.
>
> The obligation to keep financial records of transactions extends to transactions undertaken as trustee.
>
> Note: Section 9 defines ***financial records***.
>
> *Period for which records must be retained*
>
> (2) The financial records must be retained for 7 years after the transactions covered by the records are completed.
>
> *Fault based offence*
>
> (3) A person commits an offence if the person contravenes subsection (1) or (2).
>
> *Strict liability offence*
>
> (4) A person commits an offence of strict liability if the person contravenes subsection (1) or (2).

969 Section 444(1) of the Corporations Act provides that a director of a company contravenes the section if they fail to take all reasonable steps to comply with or secure compliance with, among other sections, s 286.

970 Finally, s 588E(4) of the Corporations Act provides as follows:

> (4) Subject to subsections (5) to (7), if it is proved that the company:
>
> (a) has failed to keep financial records in relation to a period as required by subsection 286(1); or
>
> (b) has failed to retain financial records in relation to a period for the 7 years required by subsection 286(2);
>
> the company is to be presumed to have been insolvent throughout the period.

971 Mr Heard expressed the opinion that a "severe absence of records" is what is needed to meet the threshold for a failure to comply with s 286 of the Corporations Act and that the company's books and records did not meet that threshold (*Fisher v Devine Homes Pty Ltd; Allen v Harb* [2011] NSWSC 8; (2011) 85 ACSR 512 at [24] per Barrett J). Put another way, as I understood Mr Heard's opinion, it is that a company would not fail to comply with s 286 in relation to its written records, even if there were errors with its record keeping and the accuracy of its records, unless the departure from the standard identified in s 286 involved, "a severe absence of records". I do not accept this particular opinion of Mr Heard. A severe

absence of records is no doubt one example of a contravention of s 286, but I do not see any justification in the words of the section for limiting the scope of the section to that example. The failure to record a major liability of the company (perhaps any liability other than one which is de minimis) would be a contravention of the section. That raises the prospect of the presumption of insolvency arising.

972 Mr Heard expressed the opinion that in the circumstances of the administration of Concrete Supply, the administrators were not required to consider whether the sale of the business as a going concern was a viable option. He expressed the opinion that there was not likely to be any goodwill associated with the business. He expressed the opinion that Mr Morris' criticisms of the administrators' conduct in relation to that issue set the bar too high.

973 Mr Heard expressed the opinion that it was open to the administrators to form the opinions they did as set out in the Second Report to Creditors and to make the recommendations set out in that report. Mr Heard said that he did not consider that it was necessary for the administrators to seek legal advice on the issue of insolvency because such advice would be indicative only and not conclusive. He said that Mr Cooper had a long history in insolvency, had published on the subject, had legal qualifications in addition to his accounting qualifications, and was equipped to reach the opinion which he did.

974 Mr Heard rejected Mr Morris' criticisms of the administrators' conduct. He expressed the view that it was open to Mr Cantone to vote in the way in which he did, including voting against the company being placed into liquidation. It seems to me that it is significant that in the immediately preceding paragraph to that in which he expresses these opinions, Mr Heard states as follows:

> I have not read in the affidavit material of Morris any specific details of legal claims identified and their prospects for successful recovery in liquidation, and I have commented above regarding my views with respect to Morris' conclusions regarding the maintenance of financial records/Section 286 of the Act.

975 The matters addressed by Mr Morris in his second report have already been identified. Putting the matter generally at this stage, Mr Heard was asked to address whether a reasonably competent administrator would have investigated and reported on a number of matters addressed by Mr Morris in his second report.

976 With respect to chapter 5 of Mr Morris' second report which deals with the irregularities in the March 2009 Statement of Account and the March 2012 Statement of Account, Mr Heard expressed the opinion that the investigations carried out by Mr Morris were not justified,

having regard to the lack of proximity between the statements and the date of administration and relevance to any potential legal claims. Mr Heard expressed the opinion that Mr Morris' opinions do not highlight recoveries that are likely to result in an improved dividend return to creditors in a liquidation as opposed to the dividend return under a DOCA. He would not have investigated the matter to the extent set out in Mr Morris' report.

977 With respect to chapter 6 of Mr Morris' second report which deals with Concrete Supply's accounting records, Mr Heard said that he saw no reason to change his opinions as a result of Mr Morris' analysis. Mr Heard relies on evidence of Mr D'Alessandro as set out in his affidavit. Mr Heard's approach seems to be predicated on a premise about the books and records a company is required to keep, rather than the accuracy of those books and records.

978 With respect to chapter 7 of Mr Morris' second report which deals with the extent to which the rebate was applied consistently, Mr Heard said that he would not change his opinion. The following should be noted. Mr Heard said that he would not have extended investigations beyond asking the directors for an explanation of the method of accounting for the rebate and considering the persuasiveness of the response. Further, Mr Heard said that in the time available to prepare a report to creditors, he may have formed the preliminary view that the inconsistency and methodology of applying the rebate was unusual and that may have caused him to consider whether the directors exercised the level of care and diligence one would expect of a director as set out in s 180(1) of the Corporations Act. However, Mr Heard said that no concluded view could have been formed other than that consideration should be given to noting the fact in a report to ASIC under s 438D of the Corporations Act.

979 With respect to chapter 8 of Mr Morris' second report which deals with the audit confirmation letter, Mr Heard expressed the view that this matter is too remote to be raised in the Second Report to Creditors.

980 With respect to chapter 9 of Mr Morris' second report which deals with the April 2012 Statement of Account, Mr Heard said that he would not change his opinions.

981 With respect to chapter 10 of Mr Morris' second report which deals with the impact of income tax and GST, assuming Concrete Supply was entitled to the alleged rebate, Mr Heard said that he would not investigate to this level of detail. He said that in the time available to prepare a report to creditors, he does not consider that he would have formed a preliminary view that would have pointed to a breach of s 180(1) of the Corporations Act. Even if he had

reached that preliminary view, the outcome would have been no more than consideration of a note in a report to ASIC under s 438 of the Corporations Act.

982 With respect to chapter 11 of Mr Morris' second report which deals with his view about the reasonableness of Concrete Supply's rebate contention, Mr Heard expressed the view that given the difficulty of resolving accurately the entitlement to a rebate in the time period of a voluntary administration and the disclosures made in the administrators' report, he did not consider that he would have reported on these matters further. Mr Heard's opinion was qualified to some extent in cross-examination. It is connected with the evidence about the obtaining of legal advice. I deal with these matters below.

983 With respect to chapter 12 of Mr Morris' second report which deals with what Concrete Supply's financial performance would look like, assuming that it was not entitled to the alleged rebate, Mr Heard expressed the opinion that he would not have done the analysis carried out by Mr Morris, or he would not have reported this analysis in the Second Report to Creditors. He expressed views on certain factual matters and by reference to the changes which the company made in late 2017, he expressed the view that if the company rationally believed that they were not entitled to a rebate, then he believed that they would have changed their behaviour i.e., changed suppliers, argued for a better trading deal etc., rather than trading onto inevitable failure.

984 With respect to chapter 13 of Mr Morris' report which deals with the issue of whether, assuming the company was not entitled to the alleged rebate, the company had over paid tax, Mr Heard's opinions are best explained by reference to his oral evidence (see [989] below).

985 With respect to chapter 14 of Mr Morris' report which deals with movements in the loan account of Mantina Earthmovers, Mr Heard proceeded on the assumption that Rino's evidence is correct.

986 Mr Heard gave further evidence-in-chief orally. He was asked about the related party loan, that is, the loan by Concrete Supply to Mantina Earthmovers. He said that, in his opinion, the related party loan fell within the terms of the DOCA. In the circumstances, to show zero under the DOCA (worst case), and zero under the DOCA (best case) is incorrect. The figure should be $2.8 million or $1.3 million. Which of the two amounts should be included turns on whether there is a right of set-off. As I understand it, if the amount should be $2.8 million (assuming no right of set-off), then the creditors should be increased by $1.5 million, being a

claim by Mantina Earthmovers against Concrete Supply. This analysis does not take account of any argument concerning the improper inflating of the value of the product provided to Concrete Supply by Mantina Earthmovers.

987 Mr Heard was asked to comment on dividend calculations premised on recoveries in a liquidation of between $3 million and $5 million for insolvent trading claims with additional costs of the recovery proceedings of between $500,000 and $500,000. These dividend calculations are set out in ABCL's aide-memoire 1.

988 Mr Heard said that he was puzzled by the allowance of the same amount (i.e., $500,000) for the liquidators' costs of recovery proceedings in liquidation whether it be worst case or best case. He considered that whether or not the proceedings were successful would affect the recovery of costs. Furthermore, he considered that a range of $3 million to $5 million for the insolvent trading claims was not correct. The claims were likely to be hotly contested and a failure of the claims was a possibility. He would have put a range which includes zero as the worst case. Mr Heard referred to the fact that the minutes of the second meeting of creditors record that the directors' assets were $1.7 million. In other words, there is an issue as to how much could be actually recovered. Mr Heard said that he was concerned about the ability of a liquidator to recover any assets held by the Mantina Investments Unit Trust. There are three unit holders in the trust, but their identity is not revealed. There are 13 issued units which raises the possibility of other parties being involved. Mr Heard referred to the uncertainty here as the "trust quandary". I note that the Deed of Settlement identifies the directors as the original unitholders holding one unit each.

989 Mr Heard said that recovering the overpaid tax if a rebate did not exist was not a straightforward matter. First, there is the uncertainty associated with the ability of parties to lodge amended tax returns and the application of time limits. Secondly, as I understood Mr Heard's evidence, it is to the effect that the Commissioner of Taxation will set-off his claim against any claim by the company, and any claim by the company will be for a percentage of the input tax credit which reflects the percentage of the dividend received in the liquidation.

990 Mr Heard said that the figure for priority creditors in a liquidation would be higher than is shown in ABCL's calculations (and, for that matter, in the Second Report to Creditors) because of payments in lieu of notice and redundancy payments.

991 Mr Heard said that he considered the estimated time period for the recovery of the dividend in a liquidation of (worst case) two years, and (best case) one and-a-half years was overly optimistic. He considered that the time period for liquidation (best case) should be three years.

992 Mr Heard maintained his opinion that the proposed DOCA was the preferred scenario.

The Evidence of Trade Creditors and Employee Creditors

993 Between them, the administrators and the Concrete Supply defendants adduced evidence from a number of trade creditors and employees who voted in favour of the DOCA. The relevance of that evidence will be discussed in due course. The present section contains a summary of that evidence.

Trade Creditors

994 There was no reason for me to doubt the honesty of the trade creditors. Mr Tull gave evidence on other issues in the case. I accept the evidence he gave as a trade creditor.

Mr Mark Landells

995 Mr Mark Landells was called by the administrators. As with all of the witnesses, he gave his evidence-in-chief by way of an affidavit. He was cross-examined by counsel for ABCL.

996 Mr Landells is a director of Concrete Barrel Solutions Pty Ltd (CBS). CBS provides de-dagging services for concrete trucks. CBS has provided such services to Concrete Supply and Mantina (presumably Mantina Earthmovers) for approximately 10 years. He said that CBS provides services to Concrete Supply at their premises approximately four times a year, which equates to approximately $20,000.00 per year in income for CBS.

997 CBS lodged a proof of debt in the administration of Concrete Supply for the amount of $5,718.01.

998 Mr Landells said that Concrete Supply and Mantina Earthmovers have always paid their accounts on time. He said that CBS has had a good working relationship with Concrete Supply and Mantina Earthmovers for a number of years and that he wanted to support them to continue to trade as they are a family business with family orientated values. He said that he completed the proxy form in favour of the proposed DOCA for these reasons.

999 In cross-examination, Mr Landells was asked about the arrangement between CBS, Concrete Supply and Mantina Earthmovers. He said that there was no contract in place and that he would send invoices to Mantina Earthmovers and not to Concrete Supply. He agreed that the statement in his affidavit that Concrete Supply and Mantina Earthmovers have always paid their accounts on time needed to be changed because CBS did not receive payments from Concrete Supply, it only received payments in relation to invoices made out to Mantina Earthmovers.

1000 Mr Landells agreed that he would expect to get payment from Mantina Earthmovers within 30 days. He was asked about the payment of invoices in November 2017. He said that Mantina Earthmovers had not paid within 30 days by the time the proof of debt was submitted, but that this was not unusual for any company. He agreed that those invoices were about 60 days overdue. He said that he spoke to Jason or Rino at that time about the fact that payment had not been made. He said that they told him words to the effect that there was a problem with ABCL not getting paid and that Concrete Supply was going into administration. He agreed that they said to him that they would like his support. He said that he told them he would support them. He said that money was not the issue at all.

1001 Mr Landells was also asked about the Second Report to Creditors. He said that he scanned it and read through to see who was owed. He agreed that he was not too interested in whether the report suggested that there might be more money for creditors in an administration compared with a liquidation. He agreed that this was because he was there to support Jason and Rino.

1002 Mr Landells also agreed that he did not read anything in the Second Report to Creditors about the fact it was suggested that there was money owed by Mantina Earthmovers to Concrete Supply of well over a million dollars. He also said that he has not seen the DOCA.

1003 Mr Landells was also asked about whether he thought it would be unfair if Jason and Rino were paid in full while CBS received a few cents in the dollar under the DOCA. His evidence was as follows:

> MR LIVESEY: Yes. So if Jason and Rino were getting their debts paid in full, that would be unfair, wouldn't it?
>
> THE WITNESS: Well, hang on, I've answered that incorrectly. I – I've misinterpreted what you've said.
>
> MR LIVESEY: Have you?

THE WITNESS: Look, for me, yes, they're a family business and I supported them. The money like that, if they got paid, I'm pretty sure that between them we would work something out.

MR LIVESEY: Yes. In other words, if Jason and Rino got paid in full, you would expect them to fix you up later on, wouldn't you?

THE WITNESS: Yes, correct.

MR LIVESEY: They had to pay your debt in full, too. You would expect that?

THE WITNESS: Yes.

MR LIVESEY: That's how friends operate, isn't it?

THE WITNESS: Yes.

MR LIVESEY: And they suggested that they were prepared to do that, didn't they, when they spoke to you about the administration?

THE WITNESS: No, I can't recall that being discussed, that they were going to pay me that at all.

MR LIVESEY: Come on, Mr Landells. They told you that they sought [sic sort] you out, didn't they?

THE WITNESS: Well, no, because I would remember that if they told me that. They never told me that at all.

MR LIVESEY: You expected them to help you out, didn't you?

THE WITNESS: I expected them to, but that was never said or spoken about.

MR LIVESEY: And you expected if you were prepared to help them, they would help you. That's how it - - -?

THE WITNESS: Correct.

MR LIVESEY: - - - worked, isn't it?

THE WITNESS: Correct.

…

MR LIVESEY: You will get helped out by Jason and Rino?

THE WITNESS: Well, if it goes all in their favour, I'm expecting I should.

1004 Mr Landells was asked whether his decision-making would have been affected if there were claims available to a liquidator against Jason and Rino for insolvent trading over a number of years. He said that it would not have affected his decision-making because he was not interested in doing anything other than supporting Jason and Rino.

1005 In re-examination, Mr Landells was asked why CBS sent invoices directly to Mantina Earthmovers. He said that it was because that was the billing address to which he had always sent the invoices.

Mr David Kelly

1006 Mr Kelly was called by the administrators. He was cross-examined by counsel for Concrete Supply and counsel for ABCL.

1007 Mr Kelly is the chief executive officer of Eagle Fuels. Eagle Fuels has been a supplier of fuel products to Concrete Supply since June 2013. It supplied approximately $2 million worth of product to Concrete Supply between June 2013 and November 2017. It continues to supply Concrete Supply with fuel products and did so throughout the course of the administration.

1008 Eagle Fuels lodged a proof of debt for the amount of $52,562.00.

1009 On 11 December 2017, Mr Kelly received the Second Report to Creditors. He said that he read and considered the report and the various options available to unsecured creditors, including the terms of the proposed DOCA.

1010 Mr Kelly said that he was told by Ms Ann McEleney, the HR/Admin Manager of Eagle Fuels, that on 14 December 2017 she received an email from Mr Brett Brown, the General Manager of the Concrete and Aggregate Division of ABCL encouraging Eagle Fuels to sign a proxy in favour of ABCL. Mr Kelly was told that Ms McEleney did not respond to Mr Brown's email.

1011 On 18 December 2017, Mr Kelly instructed Mr Daniel Rantanen, the State Manager of Eagle Fuels, to complete a special proxy on Eagle Fuel's behalf.

1012 Mr Kelly said that after reading the Second Report to Creditors, he calculated that Eagle Fuels would receive the approximate sum of: $13,631.65 in a worst case scenario under the DOCA; $18,167.99 in a best case scenario under the DOCA; $5,820.32 in a worst case scenario in a liquidation; or $10,458.47 in a best case scenario in a liquidation.

1013 Mr Kelly said that he believed that the DOCA would provide the best outcome for all unsecured creditors and it would ensure the greatest return to Eagle Fuels. He also said that he believed that if Concrete Supply was placed into liquidation, then Eagle Fuels would receive a smaller dividend and that the company would have to wait longer to receive its dividend. He said that he estimated that Eagle Fuels will supply approximately $1.2 million in fuel to Concrete Supply over the next few years if Concrete Supply continues to trade.

1014 Mr Kelly said that he does not have a personal relationship with the directors or employees of Concrete Supply. He said that the first time he spoke with a director of Concrete Supply was

following the appointment of the administrators on a date that he cannot now recall. He said that the employees of Eagle Fuels undertake the day-to-day dealings with Concrete Supply and its staff.

1015 Mr Kelly said that he was provided with ABCL's Points of Claim dated 30 January 2018. He said that from reading the Points of Claim he understands that ABCL alleges that the Second Report to Creditors was misleading to creditors. He said that he does not believe that the report is misleading or lacking in detail, but that, in his view, the only issue that requires further careful consideration is the veracity of the claim made by ABCL. He said that he understands from reading the report that the administrators are seeking legal advice in relation to that claim before making a final decision on the dividend that will be payable to ABCL. He said that he also understands from reading the report that the administrators used a "low" amount of $10 million for the ABCL claim to give creditors an idea of the likely dividend payable if ABCL can prove the "lion's share" of its claim.

1016 Mr Kelly said that ABCL also alleges in the Points of Claim that the administrators did not take into account potential claims against the directors that may result in a greater return to creditors in a liquidation scenario. He said that he was not able to comment on whether those claims may be available or result in a greater return to creditors, but that he believes that the DOCA provides greater certainty for Eagle Fuels as to the dividend amount it will receive under the DOCA compared with a liquidation.

1017 Mr Kelly said that he also believes that Eagle Fuels will receive a dividend far more quickly under a DOCA than in a liquidation, which he understands could take a number of years.

1018 Mr Kelly said that on behalf of Eagle Fuels he still supports the DOCA remaining on foot despite having read the allegations set out in the Points of Claim.

1019 In cross-examination by counsel for Concrete Supply, Mr Kelly was asked about where he obtained information about how long it may take to get a dividend. He said that he knew from being in business for approximately 13 years that receiving dividends from a liquidated company can take years. He was also asked whether he would have been influenced in his decision as to how Eagle Fuels would vote if he had been told that under a liquidation any recovery would be delayed by a minimum of six months and up to possibly one to two years. He said that the primary consideration was the return he would receive as a creditor. He agreed that he would have been influenced in his decision if it turned out subsequently that

the return may increase due to another payment made by the directors into the Deed Fund of $1.3 million. He also agreed that he would have been influenced in his decision if there was a "return of tax" which increased the Deed Fund by another $800,000 meaning that the total Deed Fund might be in the region of $5 million. He also agreed that he would have been influenced in his decision if the return to creditors turned out to be better than expected under the DOCA. He also said that at the time Concrete Supply went into administration, its account with Eagle Fuels had been paid as and when it fell due.

1020 In cross-examination by counsel for ABCL, Mr Kelly was asked whether it would have been material to him in terms of his decision if the administrators had said in the Second Report to Creditors that the return under a liquidation would be approximately 60 cents in the dollar as opposed to 30-odd cents in the dollar under administration. He said that it would and that, in some respects, it would have swayed his vote.

1021 Mr Kelly agreed with the suggestion that he would have regarded it a material matter to his decision if the administrators had set out in the Second Report to Creditors a statement that the directors had been guilty of insolvent trading over a number of years in contravention of the Corporations Act. Mr Kelly agreed that he would have regarded it a material matter if the administrators had set out a statement that the directors had a practice of claiming input tax credits and deductions against their assessable income in respect of amounts which they had no intention of paying and that might tip his vote in favour of liquidation. Mr Kelly agreed that he would have regarded as a material matter the circumstance that the directors' claims were not being subordinated, but in fact being excluded from the DOCA such that they would be paid in full. He agreed that that would be a "most unfair" situation.

1022 Mr Kelly said that during his discussion with one of the directors of Concrete Supply, the director asked for his support. He could not remember the name of the director. Furthermore, Mr Kelly said that he asked questions about the ABCL claim and was told that Concrete Supply did not owe the amount ABCL was claiming.

1023 Mr Kelly sent an email to Mr Wolf on 13 December 2017 asking questions about whether counsel's opinion would be available prior to the meeting because the Second Report to Creditors suggested that the administrators were going to obtain counsel's opinion before the meeting and because he recognised it as a matter of great importance. This email is in the following terms:

> I am just going through the Report to Creditors.
>
> There is a large difference between the company's view of the debt owed to Adelaide Brighton, and that of Adelaide Brighton view, $2.168M versus $12.457M.
>
> The meeting is schedule [sic] for the 19th December, will you have counsel's opinion on the matter prior to the meeting?
>
> The Best case scenario you put creditors, [sic] was $0.3212 cent in the dollar, but that is based on $10M being admitted to Adelaide Brighton, which is still $8M above the company's view.
>
> If counsel's opinion is one that the debt is actually only $2.168M, what happens?
>
> If Adelaide Brighton moves to take legal action, I assume the company based in counsel's opinion if favourable will defend the action, and if this is the case, will the directors and shareholders pay for the legal fees, or would that come out of the kitty?
>
> Is having the meeting on the 19th premature, or should we adjourn the meeting until counsel's opinion is received?
>
> Look forward to your response, if it is easier call me to discuss.

(Original formatting retained.)

1024 Mr Kelly said that Mr Cantone then telephoned him and said words to the effect that he was going to get counsel's advice. Mr Cantone did not say that he had already received counsel's advice. Mr Cantone said that he hoped to have the advice prior to the second meeting of creditors. Mr Kelly was prepared to support an adjournment of the meeting in order to obtain counsel's advice.

Ms Kylie King

1025 Ms Kylie King was called by the administrators. She was cross-examined by counsel for ABCL.

1026 Ms King is the office manager employed by Modbury Press Pty Ltd (Modbury Press). Modbury Press is an office supply and printing business. It has provided office supplies and printing services to Concrete Supply since 2002. Mr King said that it continues to supply Mantina (presumably Mantina Earthmovers) after a new account was set up at the request of Ms Booth at or about the time that Concrete Supply went into administration.

1027 Modbury Press lodged a proof of debt in the administration for the amount of $643.00.

1028 Ms King received the Second Report to Creditors on 11 December 2017. She said that she read the report and calculated the dividend Modbury Press was likely to receive based upon each of the "high" and "low" scenarios as set out in the report. She said that she considered that it was in the best interests of Modbury Press to vote in favour of the DOCA and to

support Concrete Supply to continue to trade because it was the best chance of Modbury Press getting paid any amount for its debt. She said that although the debt owed by Concrete Supply was $643, this was still a significant amount of money to a small business like Modbury Press. She said that she also considered that the ongoing commercial relationship with Concrete Supply was of value to Modbury Press. She said that Modbury Press wanted to support Concrete Supply because of the longstanding commercial relationship it had with it. She estimated that Concrete Supply or Mantina Earthmovers is likely to purchase in the order of $7,000 worth of office supplies over the next two years based on trading over the previous years.

1029 Ms King does not have any personal relationships with Concrete Supply's staff or its directors. She considered that Concrete Supply has been a longstanding loyal customer and has paid its debts on time.

1030 Ms King completed the proxy form on behalf of Modbury Press on 13 December 2017 and forwarded it to the administrators.

1031 On 14 December 2017, Ms King received a telephone call from Mr Brown during which Mr Brown said words to the effect that he wanted Modbury Press to change its vote and support ABCL. She said that he said words to the effect that if Modbury Press supported ABCL it would support Modbury Press in the future. She said that she asked Mr Brown to send her an email so that she could consider the request and speak to management. She received that email on 14 December 2017, in which Mr Brown stated that "if you and the owner of Modbury Press support us in our endeavours I assure you we will support your business in the future". She did not respond to the email but forwarded it to her manager, Mr Geoff King, who advised her to inform Concrete Supply about the email. On the same day, she called Ms Booth and forwarded the email to her.

1032 On 15 December 2017, Ms King received a telephone call from Ms Tammy Di Giacomo of ABCL. She said that Ms Di Giacomo said to her words to the effect that Modbury Press should change its vote and that ABCL would support it in the future if it did so and that ABCL would spend $900 with Modbury Press on stationery. Ms Di Giacomo sent two emails to Ms King to this effect on the same day.

1033 In cross-examination, Ms King was asked how she learned that Concrete Supply had gone into administration. She said that Ms Booth came to the offices of Modbury Press and told

her. Ms Booth and Mr D'Alessandro asked Ms King to complete the proxy form in favour of the chairperson at the meeting and she was prepared to do that. She was asked why she did not include that in her affidavit. She responded that she did not understand all the legal terms and thought that that was included in some form.

1034 The decision to vote in favour of the DOCA was a joint decision of Ms King and her father, Mr Geoff King, and what was important to them was the future relationship and future trading.

1035 Ms King agreed that her vote would have been swayed if the administrators had indicated that there had been offending under the Corporations Act.

Mr Matthew Hughes

1036 Mr Matthew Hughes was called by the administrators. He was cross-examined by counsel for ABCL.

1037 Mr Matthew Hughes is a director of Finance & Insurance (Brokers) Australia Pty Ltd (FIA). FIA has been the finance and insurance broker for Concrete Supply since 2002. FIA is also the finance and insurance broker for Mantina (presumably Mantina Earthmovers). FIA has continued to supply finance and insurance broking services to Concrete Supply since it entered into voluntary administration and subsequently deed administration.

1038 FIA lodged a proof of debt in the administration for the amount of $1,485.00.

1039 Mr Matthew Hughes received the Second Report to Creditors on 11 December 2017. On 13 December 2017, he completed a special proxy form on behalf of FIA and sent it to the administrators. He said that he caused FIA to vote in favour of the DOCA because of the longstanding commercial relationship between FIA and Concrete Supply. He said that he had had a good working relationship with the directors of Concrete Supply for approximately 16 years and wished to see Concrete Supply continue to trade. He said that Concrete Supply continuing to trade was far more important to him and FIA from a financial perspective than any return that FIA might receive under the DOCA or in a liquidation. He said that he still supports Concrete Supply in its efforts to continue to trade.

1040 On 14 December 2017, Mr Matthew Hughes received an email from Mr Brown in which Mr Brown requested that Mr Matthew Hughes complete a proxy form and return it to him. He said that he did not respond to Mr Brown's email.

1041 In cross-examination, Mr Matthew Hughes said that he read the Second Report to Creditors. He said that he spoke briefly to Rino about the administration after he received the report. He said that Rino assisted him with how to complete the proxy form. He denied that Rino asked for his support at the second meeting of creditors, but said that he would support the DOCA at the meeting.

1042 Mr Matthews Hughes agreed that his decision about how to vote would have been affected if he had read in the Second Report to Creditors that the directors were guilty of various offences under the Corporations Act and under Australian taxation laws and that he would have had to consider those matters. He agreed that he would have thought long and hard about a recommendation in favour of liquidation in those circumstances.

Mr Hans Fischer

1043 Mr Hans Fischer was called by the administrators. He was cross-examined by counsel for ABCL.

1044 Mr Fischer is the director of Adelaide Independent Tyres Pty Ltd trading under the registered business name "Adelaide Independent Bandag" (AIB). AIB is a tyre dealer for cars, 4WDs, off-road vehicles, light trucks, trucks, agricultural vehicles and industrial vehicles.

1045 Mr Fischer said that AIB has been supplying Concrete Supply and Mantina (presumably Mantina Earthmovers) with tyres since approximately 2003 or 2004. He said that AIB is a family owned business and wants to support other family owned businesses in South Australia such as Concrete Supply and Mantina Earthmovers. He said that AIB has always had a good working relationship with Concrete Supply and Mantina Earthmovers and that the companies have always paid their accounts within approximately 35 days, which is very good for this industry. He said that AIB supplies between $5,000 and $12,000 worth of tyres per month to Concrete Supply and Mantina Earthmovers.

1046 AIB lodged a proof of debt in the administration for the amount of $12,205.05.

1047 Mr Fischer received the Second Report to Creditors on 11 December 2017. He completed a proxy form on behalf of AIB and forwarded it to the administrators on 13 December 2017.

1048 On 14 December 2017, Mr Fischer received a telephone call from Mr Brown during which Mr Brown said to him words to the effect that he did not believe that the administrators were doing the right thing and that they were one-sided. Mr Fischer said that Mr Brown asked him

whether AIB would support ABCL by completing a proxy form in favour of it and said words to the effect that if AIB supported ABCL, then it would make sure AIB got its tyre business. Mr Fischer received a follow up email from Mr Brown on the same day, but did not respond to that email.

1049 Mr Fischer said that AIB supported the DOCA rather than liquidation because it wanted to see Concrete Supply continue to trade for the reasons set out at [1045] above and because Mr Fischer did not believe what Mr Brown had said to him. He said that the ongoing commercial relationship with Concrete Supply and Mantina Earthmovers was of more value to AIB than what it might receive under a DOCA or from a liquidation. He said that he continues to support the DOCA rather than Concrete Supply being placed into liquidation.

1050 In cross-examination, Mr Fischer said that he was contacted by Rino seeking support for the DOCA. He did not give a reason as to why that circumstance was not mentioned in his affidavit.

1051 Mr Fischer said that he read the Second Report to Creditors and read the summary provided about the returns available under a liquidation as against the DOCA. He said that in his experience AIB receives very little after a company is placed into administration.

1052 Mr Fischer said that it would not have been of interest to him if the administrators had said that he might get 60 cents in the dollar under a liquidation and that what was of interest to him was ongoing business. It would not have been of the highest relevance if the administrators had said that the directors were guilty of insolvent trading. It would not have mattered to him if the administrators had explained that the directors would be paid in full while all other creditors received a dividend. The most important thing to him was the opportunity for ongoing business under the DOCA. It would be irrelevant, as far as he was concerned, if he learned that the directors had other businesses which owed money to the company that owed AIB money, but the directors did not have to pay that money into the company. He agreed that as far as he was concerned, it was just a matter of supporting the Obbiettivo's and Concrete Supply going forward under a DOCA.

Mr Kandiah Wijendra

1053 Mr Kandiah Wijendra was called by the administrators. He was cross-examined by counsel for ABCL.

1054 Mr Wijendra is the director of Top Notch Promotions & Marketing Pty Ltd (Top Notch). Top Notch is in the business of providing marketing and promotional goods and services. Mr Wijendra said that he previously provided marketing and promotional materials to Concrete Supply for approximately nine or 10 years through a different business and that Top Notch has been providing those goods and services to Concrete Supply for approximately one year.

1055 Top Notch lodged a proof of debt in the administration for the amount of $5,229.80.

1056 Mr Wijendra said that he read the Second Report to Creditors and calculated what dividend might be received by Top Notch under the proposed DOCA compared with a liquidation. He said that he understood the report and believed that it was in the best interests of creditors and Top Notch to vote in favour of the DOCA. He said that he also telephoned Mr Wolf to ask when a dividend was likely to be paid under the proposed DOCA. Mr Wolf told him that under a DOCA a dividend was likely to be paid in August or September 2018.

1057 Mr Wijendra said that on 14 December 2017 he completed a proxy form on behalf of Top Notch for the second meeting of creditors and sent it to Worrells.

1058 Mr Wijendra said that he caused Top Notch to vote in favour of the DOCA for the following reasons: (1) Top Notch and Concrete Supply had an excellent business relationship; (2) Concrete Supply had been a longstanding customer of Mr Wijendra through a previous business and now through Top Notch; (3) Concrete Supply had always paid their accounts on time; (4) he considered that Top Notch would receive more money under the proposed DOCA than in a liquidation; and (5) Top Notch was likely to receive a dividend far quicker under the DOCA than in a liquidation.

1059 Mr Wijendra said that he continues to support the DOCA rather than Concrete Supply being placed into liquidation.

1060 In cross-examination, Mr Wijendra agreed that Top Notch had generally allowed Concrete Supply to trade outside trading terms and that Concrete Supply generally did not pay Top Notch within the 30 day term stipulated on Top Notch's invoices.

1061 Mr Wijendra said that Rino contacted him in November or December 2017 asking for his support for the proposed DOCA and Mr Wijendra said that he responded that he had no problem supporting him.

1062 Mr Wijendra said it was hard for him to say that it may or may not have affected his vote if the administrators had said something about the directors contravening Australian taxation laws. He said that it may or may not have affected his vote if the administrators had recommended a liquidation and said that the return under a liquidation was likely to be better than under a DOCA.

Mr Steven Goodfellow

1063 Mr Steven Goodfellow was called by the administrators. He was cross-examined by counsel for ABCL.

1064 Mr Goodfellow is a worksite manager at Norstoy Pty Ltd trading as "Gunther Engineering" (GE). GE's services include repairs to machinery and equipment, manufacturing and replacing parts, modification of equipment, maintenance fitting and general machine work, and on-site line boring. GE has provided its services to Concrete Supply and Mantina (presumably Mantina Earthmovers) for at least 25 years.

1065 Gunther Engineering lodged a proof of debt in the administration for the amount of $143.00.

1066 Mr Goodfellow received the Second Report to Creditors on 11 December 2017. He completed the proxy form on behalf of GE and forwarded it to Worrells on 14 December 2017.

1067 Mr Goodfellow received a telephone call from Mr Brown during which Mr Brown asked him whether GE would be prepared to support ABCL by providing it with a proxy form for them to vote at the second meeting to appoint liquidators to Concrete Supply. Mr Brown also said to him words to the effect that if GE supported ABCL, then it would support GE in the future. Mr Goodfellow received a follow up email on the same day, but did not respond.

1068 Mr Goodfellow said that GE supported a position whereby Concrete Supply would continue to trade for the following reasons: (1) GE and Concrete Supply and Mantina Earthmovers have had a very long and good working relationship of over 25 years; (2) the account of Concrete Supply and Mantina Earthmovers with GE is worth between $5,000 and $10,000 per year, which revenue would be lost if liquidators were appointed; and (3) GE did not wish to see a South Australian family business put into liquidation.

1069 Mr Goodfellow said that on behalf of GE he remains of the view that Concrete Supply should be allowed to continue to trade under the DOCA rather than be placed into liquidation.

1070 In cross-examination, Mr Goodfellow did not remember whether he read the Second Report to Creditors, but said that he would have "read over it" and thought it was not going to interest him because the amount owed was so small. He said that he did not speak with Rino or Jason about being paid.

Mr Paul Cannata

1071 Mr Paul Cannata was called by the administrators. He was cross-examined by counsel for ABCL.

1072 Mr Cannata is the state manager for South Australia and Western Australia of Hi-Tec Oil Traders Pty Ltd (Hi-Tec). Hi-Tec has been a supplier of oil products to Concrete Supply since 2010. It has continued to supply Concrete Supply with oil products since the appointment of the administrators and the subsequent execution of the DOCA.

1073 Hi-Tec lodged a proof of debt in the administration for the amount of $35,230.30.

1074 Mr Cannata received the Second Report to Creditors on 11 December 2017. He said that he carefully considered the report and the various options available to unsecured creditors, including the proposed DOCA. He said that he also forwarded the report to Hi-Tec's chief financial officer, Mr Adam Monaco, and general manager, Mr Mario Racki, for their consideration prior to making any decisions on the way in which Hi-Tec would vote at the second meeting of creditors.

1075 On 13 December 2017, Mr Cannata completed a special proxy form on behalf of Hi-Tec in which Hi-Tec voted, amongst other resolutions, in favour of the proposed DOCA. He said that he calculated that Hi-Tec would receive the approximate sum of: (1) $8,564.48 in a worst case scenario under the proposed DOCA; (2) $11,315.97 in a best case scenario under the proposed DOCA; (3) $3,625.19 in a worst case scenario in a liquidation; and (4) $6,514.08 in a best case scenario in a liquidation.

1076 On 14 December 2017, Mr Cannata received a telephone call from Mr Brown during which Mr Brown said to him words to the effect that he was seeking Hi-Tec's support regarding ABCL's vote against the DOCA and that ABCL would not forget it in the future if Hi-Tec helped them out. Mr Cannata asked that Mr Brown send him an email so that he could consider the request. Mr Cannata received that email on the same day.

1077 On 15 December 2017, Mr Cannata received a follow up telephone call from Mr Brown's secretary, during which he advised that he had already sent his voting forms to the administrators.

1078 Mr Cannata said that he believes that the DOCA will be the best outcome and ensure the greatest return to Hi-Tec and that if Concrete Supply is placed into liquidation then Hi-Tec will likely see very little or no financial return on its debt or that any dividend is unlikely to be paid for a number of years. He said that although the dividend payable to Hi-Tec under both the DOCA and liquidation scenarios was an important consideration for voting in favour of the proposed DOCA, prior to voting he considered that the future trading relationship of Hi-Tec with Concrete Supply was of greater importance and of significantly more value than any return than might be paid by the administrators or liquidators appointed in the future. He said that he estimates that if Concrete Supply continues to trade, it will generate approximately $400,000 in sales for Hi-Tec over the next two years. He also said that because Hi-Tec is a family owned business with community values "front of mind", it considers it important to support other similar family owned businesses such as Concrete Supply, and that Hi-Tec does not wish to see Concrete Supply go out of business, which will likely result in its staff losing their jobs.

1079 Mr Cannata does not have any personal relationship with the directors or employees of Concrete Supply and his only dealings with them have been in a working capacity. He has always found Concrete Supply's directors and staff to be very good to deal with and it has always paid its accounts in a timely manner. If Concrete Supply had any difficulty in paying a particular account, its staff would communicate with Hi-Tec and Hi-Tec would work with them to assist with any issues. Mr Cannata had confidence when voting in favour of the proposed DOCA that the directors of Concrete Supply would honour their commitment to contribute the sum of $2.5 million to the Deed Fund and that the rest of the terms of the DOCA would be satisfied.

1080 Mr Cannata said that he was also instructed by Hi-Tec's chief financial officer and general manager to vote in favour of the DOCA for the reasons set out above at [1078] and [1079].

1081 Mr Cannata said that he was given a copy of ABCL's Points of Claim dated 30 January 2018. He said that he understood generally from paras 39, 40 and 47 to 52 inclusive that ABCL alleges that the Second Report to Creditors was misleading to creditors. He said that he does not believe that the report is misleading because it clearly sets out the return to creditors on

both a "high" and "low" basis in a liquidation compared with under a DOCA. Mr Cannata said that he also understood from reading the Points of Claim that ABCL alleges that the administrators did not take into account potential claims against the directors that may result in a greater return in a liquidation of Concrete Supply. He said that although he is not in a position to comment on whether or not those claims may be available or result in a greater return, in his view the DOCA provides far greater certainty for Hi-Tec as to the amount it will receive as a dividend and, importantly, that Hi-Tec will receive a dividend within approximately six months. He said that he understands from his commercial experience that in a liquidation the timing for payment of a dividend is highly uncertain and may not occur for some years.

1082 Mr Cannata said that he still supports the DOCA remaining in place having read the Points of Claim.

1083 In cross-examination, Mr Cannata agreed that he would have had to rethink which way he might have voted if the administrators had recommended a liquidation because the directors were guilty of contraventions under the Corporations Act, under Australian taxation laws, and because liquidation would have resulted in a better return to creditors.

1084 Mr Cannata also said that Rino called him seeking his support for the DOCA. He said that he would not tell him how Hi-Tec would vote and that the question was going to Hi-Tec's head office with his "analysis".

Mr Nick Formichella

1085 Mr Nick Formichella was called by the administrators. He was cross-examined by counsel for ABCL

1086 Mr Formichella is a director of Galhill Pty Ltd trading as Diesel Exhaust Systems (Diesel Exhaust). Diesel Exhaust has been a supplier of goods and services to Concrete Supply for approximately 10 years. He estimates the commercial relationship with Concrete Supply over the past 10 years has been worth $6,000 on average per year to Diesel Exhaust and he said that Diesel Exhaust continues to supply goods and services to Concrete Supply. He said that it is difficult to estimate precisely the value of the goods and services that Diesel Exhaust will supply to Concrete Supply over the next few years as Concrete Supply uses its services on an "as needs basis", but that he estimates that in the ordinary course of business, Diesel

Exhaust is likely to supply approximately $6,000 to $10,000 in goods and services to Concrete Supply over the next two years.

1087 Diesel Exhaust submitted a proxy form but did not lodge a proof of debt. It was admitted at the meeting for voting purposes for $1.00.

1088 Mr Formichella said that Diesel Exhaust voted in favour of the proposed DOCA because he believed that it would result in the best return for his business. He said that he has had dealings with approximately 15 other companies that have been placed into liquidation and from his experience Diesel Exhaust has not received any dividend once a company has been liquidated. He said he considered that if Concrete Supply was placed into liquidation Diesel Exhaust would receive no return on the debt owed to it by Concrete Supply. He said that he wanted to see Concrete Supply trade on because it has had a long trading history with Diesel Exhaust and, in his opinion, the future trading relationship with Concrete Supply was going to be far more profitable than any return in a liquidation or under the DOCA.

1089 In cross-examination, Mr Formichella said he spoke to Rino about supporting the proposed DOCA. He said that he was happy to give support and that he wanted Concrete Supply to continue trading.

1090 Mr Formichella also said that he did not read the Second Report to Creditors properly and that he had a quick glance at it and then dismissed it. He said that whatever the administrators said about their recommendation was not important. He said that even if the administrators had recommended a liquidation, he would have still voted for the proposed DOCA because he believes that trading out of a situation is better than liquidation.

Mr Graham Tull

1091 Mr Tull is an unsecured creditor of Concrete Supply in relation to accounting services he provided. He was called by the Concrete Supply defendants and I have already referred to his evidence in the context of ABCL's claim in debt against Concrete Supply.

1092 Mr Tull lodged a proof of debt in the administration for the amount of $12,760.00.

1093 Mr Tull received the Second Report to Creditors. He attended the second meeting of creditors. He said that he submitted a special proxy in favour of the chairperson of the meeting.

1094 Mr Tull voted in favour of the proposed DOCA. He said that he was cynical as to whether he would actually receive a real return if the business went into liquidation. He said that the two major accounting practices he had previously worked in had liquidation divisions and he had heard of many poor returns to creditors in a winding up. He said that he thought that the proposed DOCA would provide a better return than liquidation.

1095 Mr Tull said that he did not think at the time about the possibility that the assets of other companies in the Mantina Group might have been available in a liquidation, potentially increasing a return to creditors. He said that had he done so it nevertheless would not have changed the way in which he voted. He also said that he would have voted the same way even if the administrators had indicated that there might be successful unfair preference claims or insolvent trading claims against the directors on a winding up.

1096 Mr Tull said that in exercising his vote he was thinking of the Obbiettivo family more than himself. He said that, in comparison, the amount of money owed to him was not that important.

1097 In cross-examination, Mr Tull said that he did not read the Second Report to Creditors or the proposed DOCA.

Summary of the Evidence

1098 Although there is some repetition, a summary of the above evidence will be helpful.

1099 Mr Landells, Mr Kelly, Ms King, Mr Matthew Hughes, Mr Fischer, Mr Cannata and Mr Formichella gave evidence that they wanted to support Concrete Supply's wish to continue to trade.

1100 Mr Landells and Mr Kelly gave evidence that they were approached by Jason and/or Rino for support. Mr Matthew Hughes, Mr Fischer, Mr Wijendra, Mr Cannata and Mr Formichella gave evidence that they were approached by Rino. Ms King gave evidence that she was approached by Ms Booth.

1101 Mr Landells gave evidence that he expected that ultimately if the business continued, his debt would be paid.

1102 Mr Landells, Mr Kelly, Ms King, Mr Matthew Hughes, Mr Fischer, Mr Wijendra and Mr Cannata gave evidence that they read the Second Report to Creditors. Mr Goodfellow

gave evidence that he did not recall reading the report. Mr Cannata gave evidence that he did not read the report properly. Mr Tull gave evidence that he did not read the report.

1103 Mr Landells gave evidence that he did not read the terms of the proposed DOCA.

1104 Mr Kelly gave evidence that he read the terms of the proposed DOCA.

1105 Mr Landells gave evidence that if the administrators had included in the report information to the effect that the directors might be liable for insolvent trading then this would not have affected his decision.

1106 Mr Matthew Hughes and Mr Cannata gave evidence that if the administrators had included in the report information to the effect that the directors might be liable for offences under the Corporations Act and Australian taxation laws, then they would have had to consider those matters. Mr Wijendra gave evidence that these matters might have affected his vote.

1107 Mr Kelly gave evidence that if the administrators had included in the report information to the effect that the directors might be liable for insolvent trading then this would have affected his decision. Ms King gave evidence that if the administrators had included in the report information to the effect that there might be offending under the Corporations Act, then it would have affected her decision.

1108 Mr Kelly gave evidence that if the administrators had included in the report information to the effect that the administrators might be liable for contraventions of Australian taxation laws, then this would have affected his decision.

1109 Mr Kelly gave evidence that if the directors' claims were to be excluded from the DOCA such that the directors would be paid in full, then this would have affected his decision.

1110 Mr Fischer gave evidence that if the directors' claims were to be excluded from the DOCA such that the directors would be paid in full, then this would not have affected his decision.

1111 Mr Kelly, Ms King, Mr Matthew Hughes, Mr Fischer, Mr Goodfellow and Mr Cannata gave evidence that they were approached by ABCL.

1112 Mr Kelly and Mr Wijendra gave evidence that they expected a dividend under the DOCA to be paid sooner than a dividend in a liquidation.

1113 Mr Kelly, Mr Matthew Hughes, Mr Fischer, Mr Wijendra, Mr Goodfellow and Mr Cannata gave evidence that they support the DOCA remaining on foot.

Employee Creditors

1114 With respect to the employee creditors who did give evidence in relation to ABCL's claim in debt against Concrete Supply, there is no reason to doubt their honesty, although I find it difficult to accept one piece of evidence given by Mr Gillies. However, I accept that he was generally honest. With respect to the employee creditors who gave evidence on other issues in the case, I have made findings earlier about the extent to which I accept their evidence. On the matters set out below, I accept their evidence.

Mr Mario Forte

1115 Mr Mario Forte was called by the Concrete Supply defendants. He was cross-examined by counsel for ABCL.

1116 Mr Forte is an assistant to Jason. His role does not have a particular title. He has been employed by Concrete Supply for about nine years and on an "on-and-off basis" for about 25 years. He said he has known Jason and Rino for a long time.

1117 Mr Forte lodged a proof of debt in the administration for the amount of $23,093.00, representing annual leave and long service leave

1118 Mr Forte said that he voted in favour of the DOCA because he has a good relationship with Jason and Rino. He said that they had always treated him with respect and looked after him well over the years. He said they were like family to him.

1119 Mr Forte also said that he believed that he would keep his job under the DOCA. He said that although the DOCA allowed employees to keep their employee entitlements that was not a reason why he voted for it. He said that he would have supported Jason and Rino regardless of whether he received employee entitlements or not. He said they worked really hard to keep Concrete Supply going. He said that that he works long hours at Concrete Supply, but is prepared to go above and beyond for Jason and Rino and that he would not do that for anyone else.

1120 Mr Forte said that he voted for the DOCA out of loyalty to Jason and Rino and how they have treated him. He said that the money that he might receive does not matter to him all.

1121 In cross-examination, Mr Forte said that he worked as a batcher and an allocator. He explained that a batcher puts material in concrete trucks and that an allocator organises and

sends the trucks out to the correct addresses. He said that another name for that job is dispatch.

1122 Mr Forte said that he works at the office at Pooraka. He mainly works in a "batching hut" or "batching office" which is located outside the main office and is where the trucks are loaded.

1123 He was asked whether he remembered Jason having meetings with Mr Tull or Mr D'Alessandro in the main office in November 2017. He said that they were always having meetings and that was something that happened all the time. He said that he could not recall whether Jason was spending more time in the main office. He also said that he did not remember the administrators coming onto the site or accountants asking questions about what was going on.

1124 Mr Forte was also asked about the proposed DOCA. He said that he approached and spoke to Jason before the second meeting of creditors. He said that Jason explained to him the effect the DOCA would have if it was approved. He disagreed with the suggestion that Jason told him that if the DOCA was upheld he would be able to keep his job. He agreed that Jason said words to the effect that if creditors voted in favour of the DOCA then the business would continue, if creditors did not vote in favour of the DOCA, then the business would go into liquidation, and if the company went into liquidation, then he would lose his job.

1125 Mr Forte said that Jason did not say anything about trading on with new owners. He agreed that Jason did not mention whether Concrete Supply was in the trouble in which it found itself because he and Rino had dishonestly avoided paying ABCL for cement over a number of years. He also agreed that Jason did not say anything about him and Rino dishonestly delaying their taxation payments over a number of years. He agreed with the hypothetical suggestion that if he had the choice to work for a business where the owners were dishonestly not paying for product over a number of years compared with a business where the owners were paying for their product on time, he would prefer the honest owners who were paying for product on time.

Mr Marcello Obbiettivo

1126 Mr Marcello Obbiettivo was called by Concrete Supply. He was cross-examined by counsel for ABCL.

1127 Mr Marcello Obbiettivo is the brother of Jason and Rino. He was initially employed by Concrete Supply as a diesel mechanic from mid-1982 to 1992. He returned to Concrete

Supply and has been working as an employee for about a year. He is a concrete batcher and is stationed at the Two Wells property and, when that is not operating, the Kapunda property.

1128 Mr Marcello Obbiettivo lodged a proof of debt in the administration for the amount of $4,437.79, representing annual leave.

1129 Mr Marcello Obbiettivo said that when Concrete Supply went into administration he voted for the proposed DOCA because his father built Concrete Supply from scratch. He said that he was young when his father was building the business up and that he wants to keep it alive for him. He said that voting for the proposed DOCA meant that they had a chance of keeping Concrete Supply alive. He said that he voted for the proposed DOCA to keep his father's dream alive.

1130 In cross-examination, Mr Marcello Obbiettivo said that he could not be sure when his brothers first told him that Concrete Supply was facing liquidation. He denied that they said to him words to the effect that Concrete Supply owed a lot of money to ABCL or that they told him they had not been able to raise finance to pay that debt. He subsequently said that his brothers never suggested to him that the company was in trouble.

1131 Mr Marcello Obbiettivo was also asked about the second meeting of creditors. He said that he was not involved and that he did not fill out a proxy form for the meeting. He denied that his brothers suggested that they would appreciate him voting in favour of any DOCA that they might propose. He was pressed about whether his brothers asked for his support. He said that he offered his support to them, but that this support was only "emotional" support.

1132 In re-examination, Mr Marcello Obbiettivo was taken to his proxy form and he said that he recognised his signature and remembered putting his signature on the document.

Mr Lance Gillies

1133 Mr Lance Gillies was called by Concrete Supply. He was cross-examined by counsel for ABCL.

1134 Mr Gillies has been employed by Concrete Supply as a driver on an "on-and-off basis" for about 15 years.

1135 Mr Gillies lodged a proof of debt in the administration for the amount of $11,283.79, representing long service leave.

1136 Mr Gillies signed a proxy form supporting Concrete Supply entering into the DOCA. He said that he understood that voting for the proposed DOCA meant that all his entitlements would be paid, which was one factor he considered when voting. He said that the biggest consideration in his mind was that he wanted to keep his job. He said that he likes the people he works with and he enjoys his job. He said that he does not want to change jobs at 60 years of age.

1137 Mr Gillies said that he knew that voting in favour of the proposed DOCA meant that he would keep his job and that all his workmates would keep their jobs as well. He said he would rather work at Concrete Supply than anywhere else. He said that Concrete Supply has always been fair to him and that he wanted to give Jason and Rino a chance to keep doing business.

1138 In cross-examination, Mr Gillies agreed that he decided to vote in favour of the DOCA because he wanted to continue working for Concrete Supply and because he wanted to support Jason and Rino. He said that he never had any conversations with Jason and Rino or anyone else about what was going on.

1139 Mr Gillies said that he saw the Second Report to Creditors, but did not read it. He said he knew what to do by way of helping Jason and Rino because someone told him. He could not recall who this person was, but that it was not an employee of Concrete Supply or Jason and Rino. I find it difficult to accept that it was not one of this group. He said that this person said "If you vote yes, ... you will keep your job, the workmates will keep their job [sic], and it will help the company". He agreed that when put in those terms it was a pretty straightforward decision.

1140 Mr Gillies said that the same person provided him with his proof of debt form as had his leave entitlements. At trial, he said that he did not recognise the handwriting on this document, but recognised his signature and his name and address. He said that he could not recall if someone else filled the document out for him, but agreed that some, but not all, of the boxes had been filled out for him.

Ms Susan Daly

1141 Ms Susan Daly was called by Concrete Supply. She was cross-examined by counsel for ABCL.

1142 Ms Daly has been employed by Concrete Supply for nearly 12 months. Her role at Concrete Supply is to programme the jobs and goods. She said that when new jobs or orders come in, she checks that Concrete Supply has trucks to fill them and programmes when they can do the job so that they do not become over-booked.

1143 Ms Daly worked at ABCL in its Direct-Mix Concrete and Southern Quarries business prior to working at Concrete Supply. She said that she performed a very similar role at ABCL to the one she performs with Concrete Supply.

1144 Ms Daly said she has known Jason and Rino for about 15 years through her previous employment with ABCL. She said that her concrete manager often expressed to her that he had a lot of respect for Jason and Rino and that that had rubbed off on her. She said that he built a good relationship with Jason and Rino over the past 14 years.

1145 In evidence admitted only as to Ms Daly's state of mind, she said that in about early 2017, Jason and Rino knew that she was not happy in her role with ABCL. They suggested that she speak to them about working for Concrete Supply. She did that and handed in her resignation notice to ABCL on the next day.

1146 Ms Daly lodged a proof of debt in the administration for the amount of $2,453.05, representing annual leave.

1147 Ms Daly said that when Concrete Supply went into administration, she filled out a proxy form and voted for a DOCA. She said she voted for the DOCA because she needed a job, and because she believed that voting that way ensured that she would keep it. She said that more than keeping her job, she voted for the DOCA because she has a lot of respect for Jason and Rino and they deserve her loyalty. She said that Jason and Rino work very hard and that she wants to see Concrete Supply keep going rather than being wound up. She said that money was not really a factor she considered when she decided to vote in favour of the DOCA. She said that it was about job security and supporting Jason and Rino.

1148 With respect to her proof of debt form, Ms Daly said that she was asked to sign a document by Mr D'Alessandro and at the time he explained to her what was happening with the business. She said that no one else had spoken to her about what was happening with the business before that conversation. She said that Mr D'Alessandro did not say anything about whether the business owed debts or that the business was in difficulty. She said that he tried to explain to her what was happening to Concrete Supply and why she had to sign the proof

of debt form. She said that the signature and the writing on the bottom of the page was her handwriting and that the rest was probably the handwriting of Mr D'Alessandro.

1149 Ms Daly said that no one said anything to her about the following matters: the meeting of creditors; whether creditors would vote at that meeting; whether a large sum of money was owed by Concrete Supply to ABCL; that the directors of Concrete Supply had dishonestly avoided making payment to ABCL for cement over a number of years; and that the directors dishonestly delayed payment of their taxation over a number of years. She said that even if she had known these things or had been told these things it would not have affected her decision.

Mr Antonio Silvestri

1150 Mr Antonio Silvestri was called by Concrete Supply. He was cross-examined by counsel for ABCL.

1151 Mr Silvestri has been employed as a sales manager with Concrete Supply since July 2009. He holds a fitter and turner trade certificate and an associate diploma in mechanical engineering.

1152 Mr Silvestri said that he is aware that Concrete Supply went into administration in late 2017 and that he had employee entitlements owing at that time.

1153 Mr Silvestri lodged a proof of debt in the administration for the amount of $35,926.26, representing annual leave and long service leave.

1154 Mr Silvestri said that he completed a proxy form to vote in favour of Concrete Supply entering into a DOCA. He said that he remembers looking at both proposals, that is, entering into a DOCA or the winding up Concrete Supply, before signing the proxy form.

1155 Mr Silvestri said that he voted for the proposed DOCA quite simply because he thought the alternative meant that Concrete Supply was going to be wound up and he would be left without a job. He said that it was a simple decision for him considering that winding up Concrete Supply meant losing his job and that he would get 10 cents in the dollar and have to make a claim for the balance of entitlements from "Government FED [sic]" compared to entering into a DOCA and keeping his job with entitlements carrying on.

1156 Mr Silvestri said that he may not have supported a sale of Concrete Supply's business. He said that he would have looked at it on its merits. He said that he believed that there were no

guarantees that someone would buy Concrete Supply. He said that he had been an employee of a business that was sold to Futuris in about 2006 and that, although his employee terms and conditions of employment were supposed to carry over, he was made redundant about two years later in 2008 and his redundancy conditions were capped. He said that he lost two years' worth of redundancy payments or entitlements when that happened.

1157 Mr Silvestri said that he knew what entitlements he would receive from Concrete Supply but understood that his entitlements would continue when Concrete Supply was under the DOCA. He said that this was not, however, the main reason that he voted in favour of the DOCA. He said that the main reason for voting in favour of the DOCA was that it meant that he would keep his job.

1158 In cross-examination, Mr Silvestri indicated that he performed his sales duties for both Concrete Supply and Mantina Earthmovers, but predominantly for Concrete Supply. He said that his employer was Concrete Supply.

1159 Mr Silvestri was also asked about the circumstances in which he heard that there might be some difficulties for Concrete Supply. He said that he heard something about that from Jason in early November 2017 when he was told about money owed to ABCL.

1160 Mr Silvestri said that when he was given his proxy form and proof of debt he was told that the document was for voting for the DOCA.

1161 Mr Silvestri said that he read the Second Report to Creditors and learned from the report that the DOCA was the best result for his circumstances. He agreed that if the administrators had said in the report that the directors had been dishonestly doing things contrary to the Corporations Act and Australian taxation laws, then it would have been relevant to his decision.

1162 Mr Silvestri said that he approached Jason during November 2017 and asked him questions about what was going on. He said that Jason did not say anything to him about supporting Concrete Supply at the meeting of creditors. Jason did tell him that ABCL had come to Concrete Supply looking for money and that the administrators were appointed for that reason.

1163 Mr Silvestri agreed that voting in favour of the DOCA meant he would be supporting Concrete Supply and that voting against the proposed DOCA and in favour of winding up was not supporting Concrete Supply. He said that he did not have an understanding of that

from anything Mr D'Alessandro or Jason said to him and agreed that it came back to the Second Report to Creditors.

Mr Clinton Stevenson

1164 Mr Clinton Stevenson was called by the Concrete Supply defendants. He was cross-examined by counsel for ABCL.

1165 Mr Stevenson has been employed by Concrete Supply for about three years. He is a diesel mechanic at the workshop at Pooraka.

1166 Mr Stevenson lodged a proof of debt in the administration for the amount of $4,437.79, representing annual leave.

1167 Mr Stevenson said that he voted in favour of the DOCA. He said that he would not have voted in favour of winding up even if it meant more money for creditors. He said that he understood that his employee entitlements would be protected under the DOCA, but that that was not his main reason for voting for it. He said that he believed voting in favour of the DOCA meant that his job would be secure. He described Jason as the best boss he has ever had and he really enjoys working for him and Rino. He said that he does not want to lose his job at Concrete Supply and that voting in favour of the DOCA would ensure that he would keep it.

1168 In cross-examination, Mr Stevenson said that he could not remember putting the ticks on his proxy form and that they might have already been there. He said that he could have been given his proof of debt and proxy form by Mr D'Alessandro. He said that he could not remember the conversation that he had with Mr D'Alessandro when he gave him the documents, but that it is possible that Mr D'Alessandro might have said something to the effect that if he signed the documents there was a better chance of Mr Stevenson keeping his job. He said that he was happy to do that.

Ms Gabriele Collins

1169 Ms Collins was called by the Concrete Supply defendants. She was not required for cross-examination.

1170 Ms Collins has been employed part-time at Concrete Supply for 11 years. She is the payroll officer for the company.

1171 Ms Collins lodged a proof of debt in the administration for the amount of $3,397.33, representing annual leave and long service leave.

1172 Ms Collins voted in favour of the DOCA because she did not believe that putting Concrete Supply into liquidation was the right answer. She wanted to keep her job and believed that voting in favour of the DOCA would ensure she kept it. In considering her vote, she was not overly worried about her entitlements as an employee. She was more worried about Concrete Supply and keeping the business going. She believes in Concrete Supply and wants to see Jason, Rino and Tina run the family business as they always have.

Mr Albert D'Alessandro

1173 Mr D'Alessandro was sent the Second Report to Creditors in respect of his employee entitlements.

1174 Mr D'Alessandro lodged a proof of debt in the administration for the amount of $34,088.44, representing annual leave.

1175 Mr D'Alessandro said that he was aware that Jason and Rino were supporting a DOCA. He said that he signed a proxy form to vote in favour of the DOCA at the second meeting of creditors.

1176 Mr D'Alessandro said that he voted in favour of the proposed DOCA because he believed that it meant he had a better chance of continuing to have an involvement with the company. He said that even though he resigned as an employee at about the time of the Second Report to Creditors, he had been discussing with Rino and Jason that he would return on a part-time basis as a financial consultant and continue to work in the business. He said that although he was thinking about winding down to retirement, he was not thinking about stopping work completely and that he would not want to look for another role at his age. He said that he knew that under cl 9.2 of the DOCA his employee entitlements would continue and therefore believed that he had a better chance of retaining his entitlements leading into retirement if the DOCA was approved.

1177 Mr D'Alessandro said that he also voted in favour of the DOCA because he enjoys the team at Concrete Supply and the environment in which they work, and did not want that to be lost. He said that he also did not want to see a family business suffer at the hands of a major corporation. He said that he was confident that the business would be able to work through the DOCA and continue into the future.

1178 Mr D'Alessandro said that his views on the DOCA were also influenced by the way Adelaide Brighton's representatives conducted themselves during meetings in which he was involved from 25 October 2017 through to early November 2017. He said that he was really annoyed at Adelaide Brighton and that he felt like Adelaide Brighton wanted to flick a small company off the face of the earth and that it was very arrogant in its approach.

1179 In cross-examination, Mr D'Alessandro said that he read the Second Report to Creditors, but did not attend the second meeting of creditors. He said that he prepared a proof of debt and a proxy form for himself. He said that he also assisted seven or eight employees with their proofs of debt and proxy forms. He said that he wrote in each proof of debt the amount of such things as annual leave and long service leave to which he had access from the books and records of the company. He said that he did not assist any employees with which boxes to tick on the proxy forms. He said that he assisted the employees on his own initiative and that he was not requested by any employee or director, but that he did, at some stage, let the directors know what he was doing. He said that they did not tell him to stop. He said that he could not recall whether once the forms were completed he gave them to the directors or sent them to Worrells. He said that he would explain to the employees his understanding of what approval of the DOCA might entail and how they might vote to give effect to their wishes. He said that he did not want to bring any influence to bear and tried to keep himself separate from the decision-making process. He denied that he helped with the ticks on the boxes on the proxy forms but conceded that it was possible that his memory could be failing him in that respect.

Ms Devika Senanayake

1180 Ms Senanayake said that she is aware that Concrete Supply is in administration, subject to a DOCA. She said that she was informed that she was a creditor of Concrete Supply because she had employee entitlements. She received a copy of the Second Report to Creditors.

1181 Ms Senanayake lodged a proof of debt in the administration for the amount of $16,226.35, representing annual leave and long service leave.

1182 Ms Senanayake said that she completed a proxy form to vote in favour of the proposed DOCA because she loves working at Concrete Supply and wanted Concrete Supply to continue as a business. She said that money was not a deciding factor for her. She said that she did not turn her mind to what would happen to her employment with Concrete Supply if liquidators were appointed.

1183 In cross-examination, Mr Senanayake said that she did not know whether the directors spoke to all of the staff of Concrete Supply at the time the administrators were appointed. She said that she did not have a conversation with Jason or Rino about how she should vote. She said that she will always vote for her company. She had been there for 14 years and had seen their commitment to keeping their families going. She wants Concrete Supply to continue as a business and will always support that.

1184 Ms Senanayake was asked whether she was not too interested in whatever the administrators said in the Second Report to Creditors, but was interested in whether her job with Concrete Supply would be preserved. She responded:

> Not my job will be preserved. All of us wanted Concrete Supply to be there as an organisation and for us to work because we simply enjoy working for hardworking people. We – we work hard too. Each one of us, we put our best effort, and that's all how we – we seen that, and, yes, personally, it was very stressful, as I once mentioned before.

1185 She was also asked whether she felt a loyalty to the Obbiettivo family. She said that she is loyal when she knows that they are doing the right thing and they are honest.

Ms Heather Booth

1186 Ms Booth said that she is aware that Concrete Supply is in administration and subject to a DOCA. She said that she was informed that she was a creditor of Concrete Supply because she had employee entitlements. She received a copy of the Second Report to Creditors.

1187 Ms Booth lodged a proof of debt in the administration for the amount of $4,096.53, representing annual leave and long service leave.

1188 Ms Booth said that she completed a proxy form to vote in favour of the proposed DOCA because Concrete Supply is like family to her and she wanted Concrete Supply to continue as a business. She said that she therefore wanted the DOCA to be approved. She said that she understood that if she voted in favour of liquidators being appointed to Concrete Supply it was likely that she would be made redundant or asked to leave Concrete Supply. She said that she did not want to lose her job. She said that money was not a deciding factor for her. She said that she would have voted in favour of the proposed DOCA even if it was likely that she would receive a smaller repayment from Concrete Supply under the DOCA compared to the liquidation of Concrete Supply.

1189 In cross-examination, Ms Booth said that she enjoys her work at Concrete Supply and enjoys spending time with the people with whom she works. She said that she is on good terms with the directors and that she feels a very strong sense of loyalty towards the business.

1190 Ms Booth said she recalled Mr D'Alessandro speaking to her about her proof of debt. She said that he handed her the proof debt with her name on it. She said that he said to her that it was up to her as to how she voted. She said she could not recall whether she gave it back to Mr D'Alessandro or sent it to Worrells. She said Mr D'Alessandro might have also helped her with her proxy form. She said that she did not remember having a conversation about what the vote involved. She said that it was a straightforward decision. She said that she did not have a conversation with anyone in relation to filling out the form other than her husband.

Summary of the Evidence

1191 Again, although there is some repetition, a summary of the above evidence will be helpful.

1192 Mr Forte, Mr Gillies, Mr Daly, Mr Silvestri, Mr Stevenson and Ms Collins gave evidence that they voted in favour of the DOCA because they wanted to keep their jobs. Mr Marcello Obbiettivo said that he voted for the DOCA because he wanted Concrete Supply to continue trading.

1193 Mr Silvestri said that he read the Second Report to Creditors. Mr Gillies said that he did not read the report.

1194 Mr Silvestri gave evidence that he would not have supported a sale of the business of Concrete Supply. Furthermore, he said that if the administrators had said in the Second Report to Creditors that the directors had been dishonestly doing things contrary to the Corporations Act and the Australian taxation laws, then that would have been relevant to his decision-making.

The Relevant Principles

The Termination of the DOCA — s 445D of the Corporations Act

1195 As I have said, ABCL seeks an order under s 445D of the Corporations Act terminating the DOCA. ABCL's case focuses primarily, if not entirely, on paras (a), (b) and (c) of s 445D(1) (see [812]–[815]).

1196 The Harmer Report referred to the public policy criteria which form the basis of the grounds identified in paras (a), (b) and (c) of s 445D(1) (at [123]). The Report contains the following:

Termination of deed by court

123 *Three types.* The bases for termination of a deed (other than non-compliance with the legislation) can be divided into three types.

- Factors which go to the heart of the effective operation of the legislation:
  - if a party to the deed has failed to carry out or comply with a provision of the deed and
  - if arrangements under the deed cannot be carried out without injustice or undue delay.
- Factors which reflect public policy criteria developed by the courts for invalidation of schemes of arrangement such as:
  - false or misleading information given to the administrator or the creditors, which was material to the acceptance of the proposal and
  - omission of a material particular from the information given to creditors.
- A general provision for termination of the deed 'for some other sufficient reason'. This will enable the court to draw on the case law which has been developed in respect of schemes of arrangement. Examples of public policy reasons which may lead a court to avoid or to terminate the deed and which have been cited in cases concerning schemes of arrangement are
  - the proposal has a fraudulent or wrongful purpose
  - the terms of an arrangement do not comply with the companies legislation generally (for example, a deed of company arrangement must not contain a provision indemnifying an insolvency administrator for wrongful action in administering the deed)
  - the deed contemplates that the company would, after the arrangement set out in the deed had been carried out, continue commerce in an insolvent financial condition.

An application for termination of the deed on these bases will be able to be made by a creditor of the company or the CAC.

(Emphasis added; footnotes omitted.)

(see *Deputy Commissioner of Taxation v Portinex Pty Ltd* [2000] NSWSC 99; (2000) 156 FLR 453; (*Portinex*) at [97]–[98] per Austin J.)

1197 One of the elements of para (a) of s 445D(1) is that information given to the creditors about the company's business, property or affairs is false or misleading. Information or a statement is misleading where it has the capacity to lead the recipient of it into error (*Bidald Consulting v Miles Special Builders* [2005] NSWSC 1235; (2005) 226 ALR 510 (*Bidald*) at [148] per

Campbell J). The decision about whether the paragraph is engaged is made by the Court in the sense that the section requires that the Court be satisfied of the matter. The decision is made on the basis of the information available to the Court and is not restricted to the information available at the time the information in question was given. The issue of whether the information is false or misleading is determined objectively and is not dependent on whether a person was actually misled. The intention or knowledge of the person who provided the information is not relevant (*Bidald* at [147] per Campbell J; *Mondello Farms Pty Ltd v Annatom Pty Ltd (Subject to Deed of Company Arrangement* [2007] SASC 296; (2007) 64 ACSR 91 at [97] per Layton J). In *Bidald*, Campbell J pointed out the difference between s 445D and the then s 52 of the Trade Practices Act in its application to statements about the future in explaining the reason the state of mind of the person who provided the information is irrelevant to the issue of whether the information is misleading within s 445D. His Honour said (at [151]–[152]):

> 151 Even though there is some similarity between section 445D(1)(a) and (b) on the one hand, and section 52 of the *Trade Practices Act 1974* (Cth) on the other, there are also very significant differences. The prohibition in section 52 is against *engaging in conduct* that is misleading or deceptive or likely to mislead or deceive. "*Conduct*" is necessarily human action, and deciding whether *conduct* is misleading or deceptive can, particularly when the conduct in question consists of making statements about the future, involve evaluation of the state of mind of the person who makes the statement: *James v ANZ Banking Group Ltd* (1986) 64 ALR 347 at 372 per Toohey J.
>
> 152 In contrast, section 445D(1)(a) and (b) attaches the description "*false or misleading*" to "*information*". In that way, s 445D(1)(a) and (b) look at the truth or falsity of the information itself, and whether the information is misleading, without any consideration of the state of mind of the person who provides the information. This is consistent with the concern of section 445D(1)(a) and (b) being with the adequacy of the information base which is presented to the administrator, or to the creditors, to enable them to make decisions.

1198 In order to engage paras (a) or (c) of s 445D(1), the false or misleading information or omission must be such that it can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the DOCA. This requirement of materiality means something included or omitted which was relevant and did affect, or might have affected, the outcome, namely, the decision at the second meeting of creditors that the company execute the DOCA. The test of materiality is an objective one and the actual views of creditors are not relevant to materiality, although, as I will explain in due course, there is an issue as to whether they are relevant to the exercise of the discretion. Finally, in terms of materiality, false or misleading information or omissions

are considered cumulatively and may satisfy paras (a) or (c) as a whole, even though a single piece of information or omission may not alone satisfy the test of materiality. *Bidald* and the cases referred to therein are authority for these propositions (at [165]–[169]).

1199 As I said earlier, satisfaction of one of the paragraphs in s 445D(1) does not automatically lead to an order terminating the DOCA. The Court has a discretion as to whether an order terminating the DOCA is made. It is sufficient to refer to *Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd* [2001] NSWSC 89; (2001) 37 ACSR 394 (*Cresvale*) at [225] per Austin J; *Re Recycling Holdings Pty Limited* [2015] NSWSC 1016; (2015) 107 ACSR 406 (*Recycling Holdings*) at [29] per Brereton J; and *Britax Childcare* at [90] per Burley J. I will identify the considerations which are relevant to the exercise of the discretion in this case in due course. I note at this point that Campbell J in *Bidald* (at [285]) and Lindgren J in *Federal Commissioner of Taxation v Wellnora Pty Ltd* [2007] FCA 1234; (2007) 163 FCR 232 (*Wellnora*) (at [171]) said that, in addition to the interests of creditors, considerations of commercial morality and the public interest may, depending on the facts of the case, be relevant to the exercise of the discretion under s 445D. I will refer to some further authorities when I come to consider the exercise of the discretion under s 445D in this case.

1200 It will be apparent from what I have said to this point that in this case matters which are of fundamental importance to the decisions to be made under ss 75-42, 75-43 of the IPS (Corporations) and s 445D of the Corporations Act are the adequacy of the investigations carried out by the administrators and the sufficiency (putting the matter generally at this point) of the Second Report to Creditors.

1201 A consideration strongly advanced by the administrators and the Concrete Supply defendants is that in assessing the relevant matters, the Court must have regard to the short time limits imposed by Pt 5.3A of the Corporations Act.

1202 Sections 436E, 438A, 438B and, in particular, 439A are all indications that an administrator is required to act expeditiously (see *Wellnora* at [198] per Lindgren J). As Heerey J noted in *Deputy Commissioner of Taxation v Pddam Pty Ltd* [1996] FCA 235; (1996) 19 ACSR 498 (*Pddam*) (at 510) (which I consider in more detail below), "[t]he tight timeframes set for the convening of the first and second meetings of creditors are consistent with that need".

1203 It is clear from the Harmer Report that the administration procedure under Pt 5.3A is designed to be capable of swift implementation (see, for example, para 54). The second

reading speech to the Corporate Law Reform Bill 1992 explains that the emphasis of the procedure is on informality, flexibility and speed of action (see also *Mighty River International Limited v Hughes* [2018] HCA 38 (*Mighty River International*) at [37] per Kiefel CJ and Edelman J). Further, the Explanatory Memorandum to the Bill provides that:

> The new Part is accordingly intended to provide for:
>
> - speed, and ease of commencement, of administration;
> - minimisation of expensive and time-consuming court involvement and formal meeting procedures;
> - flexibility of action at key stages in the administration process; and
> - ease of transition to other insolvency solutions where an administration does not by itself offer all the answers.

1204 Accordingly, the investigation of the company's affairs by the administrator is intended to be "a swift and practical one", to use the words of Heerey J in *Pddam* (at 510). It has been noted that clearly an administrator does not have the time and may not have the resources to conduct the type of investigation that would be carried out by a liquidator in a winding up. In this respect, there is an illuminating passage in the reasons of Cohen J in *Hagenvale Pty Ltd v Depela Pty Ltd & Serrada Holdings Pty Ltd* (1995) 17 ACSR 139 (*Hagenvale v Depela*) at 145–146:

> As a preliminary matter, it should be noted that Pt 5.3A has its objects as set out in s 43A, namely the provision for the business, property and affairs of an insolvent company to be administered in a way that maximises the chances of the company, or as much as possible of its business, continuing in existence, or, if that is not possible, results in a better return for the company's creditors and members than would result from an immediate winding up of the company. The intention was, as has been indicated in several cases, to provide a more expeditious and less expensive way of assisting those creditors and members than under the greater formality of a winding up or of the entry into a scheme of arrangement. One result, however, is that an administrator, constrained as he or she is by the time limits imposed under the Part, cannot carry out a detailed investigation of a company in the same way as can a liquidator, and accordingly the administrator's actions must be looked at in the light of that more restricted range of activities which are available to him. A further result, when dealing with a deed of company arrangement under Pt 5.3A, is that the amount of detailed information which would be given to creditors in a scheme of arrangement under s 411 of the Corporations Law is not available, again because of time restrictions and the need to have material sent to the creditors quickly.

(see also *Mediterranean Olives Financial Pty Ltd v Loaders Traders Pty Ltd (Subject to Deed of Company Arrangement) (No 2)* [2011] FCA 178 (*Mediterranean Olives Financial*) at [62] per Dodds-Streeton J; *Britax Childcare* at [88] per Burley J.)

1205 I also note the administrators' reference in their closing written submissions to the statements of Lindgren J in *Wellnora* that an administrator is not expected to conduct a "moral crusade", nor is he or she required to pursue "a wide ranging inquiry into the public interest and commercial morality" (at [206] and [210]).

1206 Nevertheless, there is a duty on an administrator to make inquiries where the circumstances call for such inquiries. The "delicate balance" between speed and accuracy was discussed by Austin J in *Portinex* (at [125]–[127]). The passage is lengthy, but, with respect, it is helpful to set it out in full:

> 125 If an insolvent company is to be saved and restored to health, the commercial reality is that decisions about its future must be taken speedily after its insolvency has been identified. Additionally, speed is required because rights of enforcement against the company are suspended during the period of administration, and it would be unfair to extend the period of suspension for longer than is absolutely necessary. Therefore Part 5.3A sets a very short timetable for the creditors' decision about the future of the company. It is an unfortunate but unavoidable consequence of the scheme established by Part 5.3A that the creditors must make their decision on the basis of information that is likely to be imperfect …
>
> 126 The balance between speed and accuracy is a delicate one. An administrator who accepts the company's information uncritically and without exercising judgment, cutting corners to complete the administration and receive his fee, will be treated harshly by the Court, since the whole scheme of Part 5.3A depends on the independence, competence, professionalism and hard work of the insolvency practitioners who accept appointments as voluntary administrators.
>
> 127 The distinction between an adequate preliminary investigation, leading to the conclusion that there are grounds for suspecting insolvent trading and unfair preferences but going no further, and an inadequate preliminary investigation which fails to assemble available information with respect to insolvent trading and unfair preferences, is a matter of degree. If the administrator has conducted an adequate preliminary investigation in accordance with the principles in the *Hagenvale* case, his obligation is to bring the results of the investigation to creditors so that they can decide what is to be done next. If the administrator's preliminary investigation has been adequate, he is entitled to decline to embark upon further substantial investigations unless funds are made available to cover his fees and expenses of doing so.

1207 The duty of an administrator to carry out proper inquiries was, with respect, forcefully articulated by Gillard J in *Linen House Pty Ltd v Rugs Galore Australia Pty Ltd* [1999] VSC 126 at [75]–[79]. The passage is lengthy, but again, with respect, it is helpful to set it out in full:

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

> 76 Whilst there are strict time limits and the administration is intended to proceed speedily there is no excuse for failing to carry out a full and proper investigation. What is a full and proper investigation will depend on all the circumstances but matters of concern to creditors are preferences, possible directors' breach of duty, possibility of recovering compensation from directors who conduct the company's business knowing it is insolvent, and recovery of compensation from de facto directors. Another matter of importance is the recovery of any of the corporation's property which has been unlawfully transferred.
>
> 77 In my opinion it is no excuse to limit a full and careful investigation by reference to the time limits set out in the Law. Time limits require expedition, and a full investigation may require further resources being used and if necessary the second meeting be adjourned or an application for extension of time be made. Further resources would include the employment of enough personnel to adequately perform the task. The fact that the second meeting can be adjourned from time to time supports the view that the administrator should not refuse to investigate fully a matter because of time constraints. In the end result the creditors must know. They are entitled to a thorough investigation. They rely on the administrator performing his task. Failure to properly investigate puts at risk the whole object of Pt5.3A which ultimately leaves the decision to the creditors making an informed decision. If the administrator is unable to make a proper investigation in respect of matters of importance to the creditors' decision he should tell them. He should alert them that there are matters relevant to their interests which should be further investigated. Much can be gained by shareholders, directors and others from a deed of company arrangement "wiping the debts" and putting beyond the reach of the law the delinquencies of directors and others involved with the company's business. It behoves an administrator to properly fulfil his duty.
>
> 78 There are dicta in the cases suggesting that the time limits imposed for the convening of the second meeting can affect the amount of information that should be provided to the creditors. An administrator should not take those observations as being an excuse for failing to properly, adequately and carefully investigate matters which are material to the decision of the creditors or failing to inform the creditors on material matters.
>
> 79 The administrator has extensive powers and it is no excuse not to fully, carefully and adequately investigate a matter which would bear on the decision of the creditors. There is a tendency to assume that if any money is available to a creditor pursuant to a deed of company arrangement which is in excess of any amount that would be recovered on a liquidation, that is a proper basis for opining the view that company arrangement is the best alternative. Therefore there is no necessity to concern the creditors about other issues. The argument is the bottom line is money, and irrespective of how much, a receipt of something is better than nothing. But there are other factors which may influence creditors. They should have the benefit of a proper investigation.

1208 The circumstances surrounding the inquiries carried out, and those which should have been carried out, may be such that there is an obligation on the administrator to obtain legal advice arises (see, for example, *Cresvale* at [136]–[137]).

1209 In terms of the sufficiency of the report to creditors, it has been said that the contents and scale of the report to creditors will depend on the circumstances and the size of the administration: *Australian Securities and Investments Commission v Edge* [2007] VSC 170; (2007) 211 FLR 137 at [331] per Dodds-Streeton J, quoted by Black J in *Re TEN Network* [2017] NSWSC 1247 at [45].

1210 In *Mighty River International*, Kiefel CJ and Edelman J stated that:

> The opinions expressed by the Administrators were no less genuine because they were based only upon "the information available". The requirement in s 438A(b) that an administrator must form the relevant opinions as soon as practicable after the administration begins necessarily requires that the opinions might be formed without the administrator having fully investigated and assessed all relevant matters. Opinions have no fixed voltage. They can be expressed with varying degrees of confidence. They may depend upon the precise terms of the deed proposed. Section 439A(4) did not require the Administrators to provide a quantitative opinion comparing the likely financial recovery under each possible option.

1211 In assessing the adequacy of the information in the report to creditors, the Court must recognise that investigations must be conducted "in a short timeframe, and with limited resources and limited powers of compulsion", and that there will only be an omission for the purposes of s 445D if the relevant information is not known or is reasonably capable of being ascertained by the administrators: *Recycling Holdings* at [33] per Brereton J.

1212 As Austin J noted in *Portinex* (at [125]), this may lead to the "unfortunate but unavoidable consequence" that the creditors make a decision as to the future of the company on the basis of imperfect information.

1213 Nevertheless, in *Mighty River International*, Kiefel CJ and Edelman J stated that in circumstances in which there is insufficient information for an administrator to express the requisite opinions in the report to creditors "the only possibility is for the administrator to apply to the Court to extend the convening period". I will return to consider the possibility of extending the convening period in due course.

1214 Both the Concrete Supply defendants and the administrators sought to rely on *Pddam*, in which Heerey J considered an application by a major creditor, the ATO, for orders that a DOCA be set aside.

1215 In that case, the company in question operated a small manufacturing business from one premises. The company had 18 employees. The company had been in receivership for three

months and, prior to that, under informal supervision by NAB for approximately five months. Following the appointment of an administrator, the directors proposed a DOCA. At the adjourned second meeting of creditors, all creditors except the ATO resolved that the company execute the proposed DOCA. The creditors voting in favour were 23 in number and $1,089,316.67 in value. The ATO's debt represented $616,581.32.

1216 In assessing the investigations undertaken by the administrator, Heerey J was not satisfied that the administrator had failed to satisfy the investigation required by s 438(a), noting (at 510) that:

> Perhaps more enquiries could have been made. Perhaps what the administrator was told by the directors and the receiver might not have been taken at face value. It is often possible to say of an investigation that, in retrospect, more could have been done. However the case that the applicant seeks to make out is not one of an inadequate or negligent investigation, but of a failure to comply with a statutory requirement, so that there was in truth no investigation at all. The passages already cited from the Harmer Report and the explanatory memorandum indicate that the investigation is intended by Parliament to be a swift and practical one. Part 5.3A assumes that the company in question is either trading while insolvent or likely to be in that position within a predictable period of time: see s 436A(1)(a). It is self-evidently essential that such a state of affairs be brought to an end promptly, either by the execution of a deed or by winding up. The tight time frames set for the convening of the first and second meetings of creditors are consistent with that need.
>
> …
>
> … In the present case the investigation concerned a business with about 18 employees operating from the one premises. On the spectrum of manufacturing enterprises, it would be small rather than medium or large. The company had already been in receivership for over three months and under the informal supervision of its banker for some five months prior to that. The nature of the investigation and the time spent and cost seem to me to be within the limits of practical proportionality in the circumstances.

1217 His Honour was, however, satisfied of various deficiencies in the administrator's report to creditors. His Honour concluded that the administrator did not comply with s 439A(4)(a), did not provide a report about the company's business, property, affairs and financial circumstances, and did not set out the administrator's opinions as to the matters in s 439A(4)(b). His Honour noted that (at 511):

> It is not enough, in my opinion, that creditors might have inferred that the administrator thought a deed of company arrangement was preferable to winding up.… [T]he whole point of [s 439A(4)(b)] is that creditors are to have the opinion of an independent expert as to each of the matters referred to in s 439A(4)(b)(i), (ii) and (iii), together with the reasons for those opinions.

1218 His Honour also found (at 511) that the directors had failed to provide, and the administrator had failed to procure, a RATA in the correct form and within the prescribed time frame.

1219 His Honour ultimately declined to set aside the DOCA, notwithstanding the various criticisms of the administrator which his Honour labelled as "substantial departures" from the law. In reaching this conclusion, his Honour had regard (at 512) to the fact that:

(1) there was no basis on which to conclude that setting aside the DOCA and ordering that the company be wound up would confer any "practical benefit" on any creditor;

(2) the company had no assets, and no realistic prospect for recovery of assets had been demonstrated;

(3) the DOCA would cause "real hardship" to former employees; and

(4) the DOCA was not opposed by any creditor other than the applicant and was positively supported by some creditors who swore affidavits.

1220 As to this last point, I make the following observations about the relevance of the evidence of creditors in the context of the exercise of the discretion under s 445D(1):

(1) the Court is not bound by the opinions of creditors regarding a DOCA, although those opinions are entitled to be given at least some weight in the exercise of the discretion (*Pddam* at 512 per Heerey J);

(2) the interests of "related creditors" cannot be disregarded for the purposes of the discretion simply because of the fact they are related, unless there is some "illegitimate ulterior purpose" such as the avoidance of examination (*Mediterranean Olives Financial* at [203] per Dodds-Streeton J); and

(3) an administrator must be concerned with the interests of the company's creditors in their capacity as creditors. It would be impermissible for an administrator to support a proposed DOCA by reference to the interests of creditors in some other capacity, such as the capacity of director. The "uniting characteristic" of creditors is the debt which they are owed, and the only relevant interest they have at the second meeting of creditors is "the timing and magnitude and risk attending to their having some of their debts being repaid and, in some cases, the desirability of continuing to provide goods or services to the company": *DSG Holdings Australia Pty Ltd v Helenic Pty Ltd* [2014] NSWCA 96; (2014) 86 NSWLR 293 at [93]–[95] per Leeming JA, quoting *Wellnora* at [211] per Lindgren J.

The Termination or Setting Aside of the DOCA — s 447A of the Corporations Act

1221 I do not propose to say a great deal at this point about the relevant principles concerning s 447A. It is sufficient for me to say that the scope of the section was considered by the High Court in *Australasian Memory Pty Ltd v Brien* [2000] HCA 30; (2000) 200 CLR 270. In *Portinex* (at [30]), Austin J summarised the propositions which emerge from that decision. It is not necessary for me to set them out. Clearly, s 447A is a source of power to terminate a DOCA.

The Exercise of the Casting Vote — s 75-42 of the IPS (Corporations)

1222 As I have said, ABCL challenges Mr Cantone's exercise of his casting vote in favour of the resolution that Concrete Supply execute the DOCA pursuant to s 75-42 of the IPS (Corporations). ABCL also challenges Mr Cantone's exercise of his casting vote against the proposed resolution that Concrete Supply be placed into liquidation pursuant to s 75-43 of the IPS (Corporations).

1223 Sections 75-42 and 75-43 are in substantially the same terms as the sections in the Corporations Act which they replaced (i.e., ss 600B and 600C) and it is clear from the authorities that the principles developed in relation to the repealed sections are relevant to a consideration of the scope and operation of ss 75-42 and 75-43. The Explanatory Memorandum for the Corporate Reform Bill 1992 which contained what became s 600B contained the following explanation of the proposed section:

> **Proposed section 600B — Review by Court of resolution of creditors passed on casting vote of chairperson of meeting**
>
> 1199. The insertion of proposed section 600B is consequential upon the proposed implementation of the Harmer Report's recommendation that all matters requiring the decision or resolution of creditors be reduced to a single voting formula in place of the existing variety in requirements for a valid resolution by creditors. The voting formula recommended by the Harmer Report was that:
>
> - voting be by simple majority in number of all creditors present and voting either in person, by proxy, by attorney or by such other means as may be permitted (for example by 'absentee vote');
> - if two or more creditors so request, voting be by majority in number and value;
> - if a vote according to majority in number and value results in a deadlock, there be provision for an application to the Court by the relevant insolvency administrator for a resolution of the conflict.
>
> 1200. The Harmer Report further recommended that there should be provision for an appeal to the Court by a dissatisfied creditor. However, the right of appeal to the

> Court in the first instance to resolve a deadlock would erode funds available to creditors. It is thus proposed that the Harmer Report's recommendation be amended to provide that the chairperson of the meeting resolve the deadlock in the first instance. It is also proposed that where a resolution has been passed by a meeting of creditors by the casting vote of the chairperson, a creditor may apply to the Court for the variation or cancellation of the resolution.
>
> 1201. A large part of these reforms are to be implemented by amendment of the Corporations Regulations, with the exception of the proposed review by the Court of a resolution of creditors passed on the casting vote of the chairperson of the meeting. That aspect of the reforms is to be implemented by proposed section 600B.
>
> 1202. Proposed section 600B will apply where at a meeting of creditors held under proposed Part 5.3A or a deed of company arrangement executed by the company, or in connection with winding up the company, a resolution is passed by the casting vote of the chairperson (proposed subsection (1)). Application may to be made to the Court, by a person who voted against the resolution, for an order setting aside or varying the resolution (proposed subsection (2)). The Court may set aside or vary the resolution and, if it does so, make such further orders and give such directions as it thinks necessary (proposed subsection (3)). Where an order is made varying a resolution, the resolution will have effect as varied by the order (proposed subsection (4)).

1224 In a review under s 75-42, the Court may review the administrator's reasons for the exercise of his or her casting vote (*Cresvale* at [111] per Austin J) and, in considering the administrator's exercise of his or her casting vote, the Court should have available to it all of the material available to the administrator (*Young v Sherman* [2002] NSWSC 281; (2002) 170 FLR 86 (*Young v Sherman*) at [78] per Hodgson JHA).

1225 In addition to *Cresvale* and *Young v Sherman*, I was referred to, or I have myself referred to, a large number of cases on the nature and extent of the Court's power to review an administrator's exercise of his or her casting vote. Those cases (some of which have already been referred to) include the following: *Re Bartlett Researched Securities Pty Ltd (Administrator Appointed)* (1994) 12 ACSR 707; *Re Coalleen Pty Ltd (Administrator Appointed)* [2000] 1 Qd R 245; (1999) 30 ACSR 200 (*Re Coalleen*); *Re Martco Engineering Pty Ltd (Administrator Appointed); Deputy Commissioner of Taxation v Martco Engineering Pty Ltd* (1999) 32 ACSR 487; *Global Realty Development Corp v Dominion Wines Ltd (in liq)* [2005] NSWSC 1221; (2005) 56 ACSR 474; *Blue Ring Pty Ltd v Landshore Pty Ltd (subject to a Deed of Company Arrangement)* [2006] WASC 245*; Wellnora*; *Brisconnections Management Company Limited, In the matter of Thames Blund Holdings Pty Ltd (In Liquidation)* [2009] FCA 626; (2009) 72 ACSR 233 (*Brisconnections Management Company*); *Commonwealth Bank of Australia v Fernandez* [2010] FCA 1487; (2010) 81 ACSR 262; *Plumbers Supplies Co-operative Limited v Firedam Civil Engineering Pty Limited* [2011] NSWSC 325 (*Plumbers Supplies v Firedam Civil Engineering*); *Phoenix*

Lacquers & Paints Pty Ltd v Free Wesleyan Church of Tonga in Australia Inc (admins apptd) [2012] NSWSC 214; (2012) 87 ACSR 658; *Britax Childcare*.

1226 It seems clear that the Court's power of review of the exercise of a casting vote is not a review on the merits and that the focus of the Court's examination of the exercise of the casting vote is on the process adopted by the decision-maker. In Austin RP and Ramsay IM, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis, subscription service) at [26.171.27] (update 139), the authors put the matter as follows:

> The basic test of propriety in relation to the decision appears to be whether the person with the casting vote acted honestly for proper purposes in accordance with what he or she believed to be the best interests of the persons who might be affected by the decision and not in a manner in which no reasonable liquidator, administrator or deed administrator (as the case may be) could have acted: *Re Martco Engineering Pty Ltd (Administrator Appointed): Deputy Commissioner of Taxation v Martco Engineering Pty Ltd* [1999] NSWSC 702; *Young v Sherman* [2002] NSWCA 281; (2002) 170 FLR 86; *Kirwan v Cresvale Far East Ltd (in liq)* (2002) 44 ACSR 21 at [372]; *Global Realty Development Corp v Dominion Wines Ltd (in liq)* [2005] NSWSC 1221; (2005) 56 ACSR 474; *Commonwealth Bank of Australia v Fernandez* [2010] FCA 1487; (2010) 81 ACSR 262 at [25]; *Phoenix Lacquers & Paints Pty Ltd v Free Wesleyan Church of Tonga in Australia Inc (admins apptd)* [2012] NSWSC 214; (2012) 87 ACSR 658.

1227 In *Plumbers Supplies v Firedam Civil Engineering* at [41]–[42]), Barrett J said:

> 41 The function of the court under s 600B is not simply to come to a decision of its own as to how the casting vote should have been exercised and, if that decision differs from that made by the chairperson, to set aside the resolution and make orders implementing the decision that it thinks should have been made.
>
> 42 The function of the court is, rather, to evaluate the decision-making process in which the chairperson engaged with a view to determining whether the decision was conscientiously made by reference to all relevant considerations appropriately identified and weighed by him or her.

(*Britax Childcare* at [98] per Burley J.)

1228 I do not think that these slightly different formulations involve differences of substance. An administrator must act honestly and have regard to the best interest of the creditors. The administrator must appropriately consider and weigh the considerations that a reasonable and prudent insolvency practitioner would consider to be relevant to the decision.

1229 The authorities have identified the matters the Court will consider when reviewing an exercise of the casting vote by an administrator. They are as follows:

(1) whether the proposed DOCA is opposed by a major creditor, especially when there is a large disproportion between the major debt and other debts;

(2) whether the proposed DOCA is supported by the directors in circumstances where it will deliver some advantage to them;

(3) whether creditors who voted in favour of the proposed DOCA will be prejudiced if the Court sets aside the resolution;

(4) whether the administrator carried out adequate investigations before exercising the casting vote; and

(5) whether the administrator's report contained misleading information.

(*Cresvale* at [112]–[113]; *Re Coalleen* at [7] and [13] per Moynihan J; *Plumbers Supplies v Firedam Civil Engineering* at [44] per Barrett J; *Wellnora* at [217]–[218] per Lindgren J.)

1230 The courts have made it clear that there is no general presumption or rule in favour of a majority creditor or the majority in value (*Kirwan v Cresvale Far East Ltd (in liq) & Ors* [2002] NSWCA 395; (2002) 44 ACSR 21 at [371]–[372] per Young CJ, referring to *Young v Sherman* at [48]–[55] per Sheller JA). The fact that a majority creditor or the majority in value opposed and oppose the DOCA is a relevant consideration, but it is not decisive (*Re Coalleen*; *Cresvale* at [115]; *Wellnora* at [218]; *Brisconnections Management Company* at [12] per Gordon J).

1231 Finally, considerations of commercial morality and the public interest are matters which the Court may take into account in addition to the interest of creditors in reviewing the exercise of a casting vote under s 75-42. In *Wellnora*, Lindgren J said (at [171]):

> In my view, the power conferred on the Court by s 600B is an ample one which can be exercised by reference, not only to the interests of creditors, but also by reference to the public interest and commercial morality. A similar observation applies in relation to the power conferred on the Court by s 447A. Although *Bidald Consulting v Miles Special Builders* (2005) 226 ALR 510 concerned an application to set aside under s 445D, I treat what Campbell J said in that case at [286] ff about the relevance of public interest considerations to the exercise of the Court's discretion as applicable, generally speaking, to the discretion under the two sections just mentioned.

1232 Before leaving this section, it should be noted that the ARITA Code contains an instruction or a guideline to insolvency practitioners about the exercise of a casting vote. The guideline is as follows:

> 24.7.4 Use of the casting vote

Applicable to Voluntary Administrators, Deed Administrators and Liquidators only

The casting vote provides to the Appointee a very powerful tool. Practitioners must exercise the casting vote according to law using their professional judgment in the circumstances of the particular Administration.

The legal principles that govern the exercise of the casting vote are explained in the case law and texts and are summarised below:

- the Chairperson has discretion whether to exercise the casting vote. The chair 'should proceed to exercise the casting vote and resolve the deadlock (thereby resorting to the power for the purpose for which it exists) unless there is some good reason to refrain from doing so'. Failure to exercise the casting vote for some irrational or irrelevant reason is inconsistent with the person's duty;
- the Chairperson must weigh up all relevant factors and act honestly and according to what they believe to be in the best interests of those affected by the vote; and for a proper purpose;
- the exercise of the casting vote is most appropriate in circumstances where either creditors with a majority in value have such an overwhelming interest that it is inappropriate to allow a majority in number, who do not have the same monetary interest to carry the day, or vice versa. However, there is no presumption in favour of the majority in value, although any large disproportion between the values of the debts of the numerical minority and the numerical majority will be a factor to be taken into account; nor is there any presumption in favour of maintaining the status quo;
- The Practitioner is entitled to, and should, bring his or her experience and practical considerations to bear in deciding how to exercise the vote;
- In a Voluntary Administration, the objectives of Part 5.3A must be considered in making the decision.

Some matters for consideration when exercising a casting vote are, but not limited to:

- Do creditors with a majority in value however not in number have an overwhelming interest over those in number?
- What opinion, if any, was proffered by the Practitioner in support or opposition of the resolution in any report to creditors or otherwise?
- Has any information come to the Practitioner's attention since the Practitioner formed his or her opinion that might require a change in support of that opinion?
- Do any of those creditor(s) voting have a motive that serves their own interests, which may not be in the best interests of all creditors and/or contrary to the purpose and objectives of the appointment?
- Are those creditors opposing the Practitioner's opinion making an informed and unbiased decision?
- Can the purpose for exercising the casting vote be substantiated by independent, objective and impartial reasoning?
- Will any unfair advantages accrue to the directors by exercising a casting vote in a particular way?

> - Should the Practitioner seek to adjourn the meeting for the purpose of further consideration or taking advice?
> - What proxies have been given on the basis that the Practitioner would vote in accordance with his or her recommendation?
>
> A Practitioner must not be influenced by any direct or indirect opportunity of financial benefit that he or she may receive in deciding how to exercise the casting vote; for example, the fact that Remuneration will be higher if a deed is entered into. Practitioners should also be aware of the need to avoid any negative perception of self interest swaying the decision.
>
> Except in very limited circumstances, a Practitioner should not use the casting vote in relation to any resolution determining or fixing the Practitioner's Remuneration.
>
> A Practitioner must declare the rationale for:
>
> - exercising his or her casting vote (whether for or against a particular resolution), or
> - choosing not to exercise, his or her casting vote.
>
> The reasons must be minuted.

(Footnote omitted.)

This instruction or guideline does not have any legislative force. For reasons I will give, it is significant that part of it is a summary by ARITA of the principles that emerge from the case law and texts.

1233 ABCL's overarching contention is that Mr Cantone's exercise of the casting vote should be set aside because he failed to have regard to a number of relevant considerations or his exercise of the casting vote was unreasonable, or both.

Extension of the Convening Period

1234 In their written closing submissions, the administrators deal with the possibility of extending the convening period. The administrators seem to suggest that the "maximum statutory limit" for an extension of the convening period is 45 business days.

1235 The provision to which the administrators refer in their submissions is s 75-140(3) of the IPS (Corporations). That rule deals with the adjournment of the second meeting of creditors and relevantly provides that "… a meeting convened under section 439A of the Corporations Act must not be adjourned to a day that is more than 45 business days after the first day on which the original meeting was held".

1236 There are, however, two provisions of the Corporations Act under which an administrator may apply for an extension of the convening period.

1237 The first is s 439A(6). That subsection provides that the Court may make an order extending the convening period upon an application made during or after the convening period. Section 439A(7) provides that the Court may only extend the convening period if satisfied that it would be in the best interests of creditors. Section 439A(8) provides that if an application to extend the convening period is made after the convening period the Court must have regard to that fact, any other conduct engaged in by the administrator, and any other relevant matters.

1238 The second is s 447A. Section 447A(1) provides that the Court may make such order as it thinks appropriate about how Pt 5.3A is to operate in relation to a particular company. Section 447A(4)(c) provides that such an order may be made on the application of an administrator where the company is under administration. This would include an application for an order that the convening period be extended (see *Mighty River International* at [78] per Nettle and Gordon JJ).

1239 Neither of these provisions provides for a "maximum statutory limit" of 45 business days and, indeed, recent authority makes clear that the convening period could be extended well beyond this time. For example, in *Mighty River International*, Nettle and Gordon JJ noted (at [73]) that:

> Consistent with the legislative intention of Pt 5.3A that the administration of a company be brought to an end within a short period of time, there is a presumptive expectation that extensions will be brief. But over time, the courts have come to recognise that significant extra time may be required, and should be allowed, in complex cases.

(Footnotes omitted).

1240 In *Owen, in the matter of RiverCity Motorway Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) v Madden (No 5)* [2013] FCA 1443, Logan J extended the convening period for approximately six months under s 439A(6), having previously ordered extensions of approximately 18 months and 12 months. His Honour noted (at [25]) that these extensions "may well evidence something of a record in relation to Pt 5.3A of the Corporations Act".

1241 It is also clear that the Court may grant extensions in stages by granting a short extension and then, at a later date, deciding whether to grant a further extension (see *Re Hayes; Estate Property Group Ltd* [2007] FCA 935).

1242 I will discuss below whether it was appropriate for the administrators to seek an extension of the convening period in this case or, failing that, recommend an adjournment of the second meeting of creditors.

Analysis of the Issues

1243 I start with the allegations that the investigations carried out by the administrators were inadequate.

The Investigations carried out by the Administrators

ABCL's Claim and the Alleged Discount or Rebate

1244 The starting point is to examine what the administrators knew about the dispute between Concrete Supply and ABCL. Mr Cantone's knowledge as at 2 November 2017 and 13 November 2017, is identified above (at [878]–[879]). Even on what Rino told Mr Cantone on 13 November 2017 there were some unusual features of the alleged discount or rebate. First, there was apparently no written agreement for what was a significant discount or rebate. Secondly, Concrete Supply issued RCTIs to ABCL. Thirdly, the rebate was *applied* by Concrete Supply. Fourthly, the discount or rebate was *approximately* 30%. It must have occurred to Mr Cantone, or at least should have, that an approximate figure for a discount or rebate was unusual. Finally, Mr Cantone was told by Rino that the discount or rebate was applied in respect of approximately 30% of invoices, not of the amount in each individual invoice. Further, in addition to these matters, Mr Cantone was told the agreement had been made in 2012 and there was no mention of the 2009 "discount".

1245 Mr Cantone asked for a note from Concrete Supply as to the circumstances surrounding the alleged discount or rebate. This request was made on or about 14 or 15 November 2017. He received the document which is set out above (at [171]).

1246 A number of matters about this document should be noted. First, there is a reference in the third point to deductions of between 30% and 35% annually. This is further confirmation that what was being claimed was not a discount or rebate of a fixed amount or percentage, but a range of percentages. Secondly, although it is not particularly material to the present issues, factually the position is that the sending of statements of account by ABCL stopped after April 2012, the sending of invoices by ABCL stopped after approximately March 2013. Thirdly, the sixth point read in context suggests that, as far as Concrete Supply was

concerned, its belief that it was entitled to a discount or rebate arose sometime after 2012 and as a result of it not being challenged by ABCL.

1247 At about this time (i.e., 14 or 15 November 2017), Mr Cantone was given the document, "ABCL Discounts 2018 (not processed to rebates yet)" which is described above (at [213]). Furthermore, he knew the system adopted by Concrete Supply with respect to cancelling cheques. As he said in his evidence-in-chief, he had carried out a review of the books and records with Mr D'Alessandro (see above at [894]). He knew that cheques were kept for a substantial period of time. At the time the cheques were written out, Concrete Supply's books and records were adjusted to reflect that circumstance and BAS and tax returns were filed on the basis that payment had been made or was to be paid. Sometime later, normally the following financial year, the cheques were cancelled and reversals were made on the BAS and tax returns.

1248 Mr Cantone was also aware that ABCL's claim included an assertion that its debt had accrued over a period of about nine years. The table set out above (at [170]) was part of his working papers.

1249 Mr Cantone was aware from his meetings with ABCL and its legal representatives on 15 November 2017 and 29 November 2017 of the various contentions being made by ABCL (see above at [749] and [754]).

1250 In his evidence, Mr Cantone agreed that there were a number of strange things about the discount or rebate. He acknowledged that there was no written agreement dealing with the discount or rebate. He was asked about whether he was told that there was a verbal agreement. His evidence on this topic was either unnecessarily defensive or evasive. The following passage is an example:

> MR LIVESEY: You see, Mr Cantone, do you accept this, that if you had been told that there was a verbal agreement the first thing you would have done is asked with whom that verbal agreement was made and when it was made?
>
> THE WITNESS: Could have your Honour.
>
> MR LIVESEY: Well, if you're acting independently as a professional administrator it's an obvious question, isn't it?
>
> THE WITNESS: Put that way, yes, your Honour.
>
> MR LIVESEY: But you never asked it, did you?
>
> THE WITNESS: Not specifically.

> HIS HONOUR: Well, I don't understand not specifically. What ---?
>
> THE WITNESS:--- Well, I asked ---
>
> HIS HONOUIR: What do you mean?
>
> THE WITNESS: I asked – I asked questions, but Mr Livesey was asking me a particular question.
>
> HIS HONOUR: Well, I think the question was did you ask who the verbal agreement was made between or with?
>
> THE WITNESS: Yes. And I didn't – no-one specifically admitted to that.
>
> HIS HONOUR: Well, what do you mean? No-one within Concrete Supply?
>
> THE WITNESS: Yes.
>
> HIS HONOUR: Well, when you say "admitted to that", I'm not quite sure I understand what that means?
>
> THE WITNESS: So I never was made aware who this agreement either written or verbally was made with.

1251 Mr Cantone agreed in cross-examination that he was aware of the following unusual features of the system implemented by Concrete Supply:

(1) the stockpiling of a large number of cheques, including the large number of cheques found at the time the company went into administration;

(2) the fact that expenses and GST were claimed at the time the cheques were written out;

(3) the fact that the cheques were, some time later, written back; and

(4) the fact that there was no set rebate.

1252 As to this last matter, Mr Cantone, when asked whether he knew that there was no set rebate percentage taken off every cheque payment, said the following:

> No set – so they estimated 30 to 40 per cent. Yes, your Honour. Yes.

1253 On 20 November 2017, Mr Cooper gave Mr Cantone an instruction to obtain legal advice in relation to the adjudication of ABCL's claim. Mr Cooper was to deal with the date of insolvency of Concrete Supply, but legal advice would be needed concerning the adjudication of ABCL's claim. Mr Cooper made it clear in his evidence that he was to give the opinion about the date of insolvency and that was not a matter upon which the administrators intended to take legal advice. Mr Cantone agreed that on 20 November 2017, Mr Cooper gave him an instruction to obtain legal advice.

1254 I have already identified the two passages in the Second Report to Creditors which refer to the fact that the administrators were seeking legal advice in relation to the dispute over the debt claimed by ABCL (at [775]–[776]).

1255 Mr Cantone was asked about what legal advice he had sought and, in view of the reference in the Second Report to Creditors that the administrators were *currently* seeking independent legal advice, including advice from counsel, what advice he had asked counsel to give and was awaiting (emphasis added). Mr Cantone claimed legal professional privilege as to the substance of the advice he had been given or was awaiting which was the administrators' right. Nevertheless, his evidence on this topic was confusing and unsatisfactory.

1256 The matter developed in the following way. In the course of dealing with this topic, Mr Cantone identified two meetings with his solicitors, one on 22 November 2017 "re legal position NAB and ABC claim", and the other on 29 November 2017 "re todays ABC meeting, secured creditor and admin legal issues" and one with his solicitors and junior counsel on 23 November 2017 "re file in general and ABC claim issue". In his evidence, Mr Cantone said that he obtained legal advice in accordance with Mr Cooper's instruction, but he noted that the advice was privileged.

1257 Mr Cantone described the advice he had as preliminary or indicative:

> MR LIVESEY: And so it would have been right to say, as at 11 December, that you had sought independent legal advice about the Adelaide Brighton debt, wouldn't it?
>
> THE WITNESS: It would have been privileged between us, but it would have been indicative advice. There wouldn't have been able to be anything prepared in full before then.
>
> MR LIVESEY: You had had access to the proof of debt by the time of those meetings?
>
> THE WITNESS: Yes, your Honour.
>
> MR LIVESEY: You were able to present that, if you wished to do so, to solicitors and counsel for advice?
>
> THE WITNESS: Yes, your Honour.
>
> MR LIVESEY: And so what is it that you meant in this paragraph when you said that you were currently seeking legal advice if you had already obtained advice?
>
> THE WITNESS: Well, I had sought advice, but it wasn't final, I believe, at the time. This was preliminary. And to be fair - - -
>
> HIS HONOUR: Sorry, what was preliminary? The report or the advice?
>
> THE WITNESS: Both.

> HIS HONOUR: Right?---
>
> THE WITNESS: So---
>
> HIS HONOUR: You're not being asked about the content of the advice. You're being asked about the timing of the advice?
>
> THE WITNESS: Yes.
>
> HIS HONOUR: You understand that?
>
> THE WITNESS: So I had advice, but I wouldn't say it was – I would say it would have been more indicative advice, your Honour, rather than final advice.

1258 Mr Cantone asserted that he had sought advice by 11 December 2017 and that was from Mr Black of O'Loughlins and Mr Douglas of counsel. What he had difficulty explaining was what further advice he was expecting as is suggested by the statement in the Second Report to Creditors to the effect that the administrators "are currently seeking advice". Before identifying some of that evidence, I will refer to a related matter of Mr Cantone's dealings with Mr Kelly of Eagle Fuels.

1259 I have already set out Mr Kelly's email to the administrators dated 13 November 2017 and his evidence of his conversation with Mr Cantone shortly after that email (at [1023]–[1024]).

1260 Mr Cantone's evidence about his conversation with Mr Kelly was unsatisfactory. For example, the following exchange occurred in cross-examination:

> MR LIVESEY: Did you tell him about the legal advice that you had obtained from solicitors and counsel before that email?
>
> THE WITNESS: No, I did not.
>
> MR LIVESEY: Did you explain to him the effect of the advice that you've received?
>
> THE WITNESS: No, your Honour.
>
> MR LIVESEY: Are you sure?
>
> THE WITNESS: I can't be 100 per cent sure.
>
> MR LIVESEY: You see, if you had spoken to solicitors and counsel on the topic of the Adelaide Brighton Cement and you had done so only a week or two before the email, it would have been a very simple thing to say to Mr Kelly, "I've already got advice," wouldn't it?
>
> THE WITNESS: Yes, your Honour.
>
> MR LIVESEY: And to tell him the effect of the advice that you've received?
>
> THE WITNESS: It was still preliminary. I hadn't – it wasn't anything that I could bank on assuring Mr Kelly.
>
> MR LIVESEY: Do you agree or disagree it would have been a simple matter for you

to simply tell him, "This is the effect of the advice I've got to date"?

THE WITNESS: I don't think it's a simple matter, no.

MR LIVESEY: Is it, in fact, something that required very considered legal advice?

THE WITNESS: Potentially.

MR LIVESEY: That you didn't get?

THE WITNESS: I had the advice that I had been given.

1261 Mr Cantone's evidence about why, in the circumstances, he told creditors in the Second Report to Creditors dated 11 December 2017 that the administrators were currently seeking advice from counsel is not credible. The following exchange occurred in cross-examination:

MR LIVESEY: You see, the true position is that, as at the date of your report, and notwithstanding what Mr Kelly said, you weren't expecting any counsel's opinion before the vote at the second creditors meeting. You agree with that, don't you?

THE WITNESS: No. I don't totally agree with that. Counsel could have contacted me in between my last meeting and – and the meeting. I – I can't be sure.

MR LIVESEY: Why would counsel contact you?

THE WITNESS: If they had any development on what had personally been discussed between us prior to the meeting.

MR LIVESEY: Did you or did you not give an instruction that any opinion be provided to you before the second creditors meeting?

THE WITNESS: Yes, and I received that prior to – to the report going out.

MR LIVESEY: And was that advice given to you during the conferences that we've been discussing and which are mentioned in your fee notes?

THE WITNESS: Yes, your Honour.

MR LIVESEY: Apart from those conferences, you were not expecting any further advice from counsel, were you?

THE WITNESS: Well, not unless they contact me. No.

MR LIVESEY: Mr Cantone, did you leave any of the meetings that have been mentioned in your fee notes with a request to either solicitors or to counsel, "I await your written advice"?

THE WITNESS: Well, that's privileged, your Honour.

MR LIVESEY: Well, your Honour, I intend to press that, if I may.

HIS HONOUR: Well, isn't it privileged? What's the - - -

MR LIVESEY: Well, I'm not going into the substance of the advice, but I'm happy to come back to it, your Honour.

MR LIVESEY: You see, Mr Cantone, apart from the conferences, you weren't expecting to have any further conferences with solicitors or counsel before the second meeting, were you?

> THE WITNESS: Not at that point in time, no, your Honour.
>
> MR LIVESEY: And you didn't have any expectation that anyone was going to write to you out of the blue on the topic, did you?
>
> THE WITNESS: Can't have any expectation on what anyone would write to me on the – in the blue, Mr Livesey.
>
> MR LIVESEY: And you didn't have any expectation that anyone advising you was going to telephone you for some reason between the time of the meetings and the time of the second creditors meeting?
>
> THE WITNESS: Well, then, I'm available to any ..... to ring me. I – that's in the report.

1262 I have reached the following conclusions with respect to the legal advice the administrators had received from counsel and were going to seek from counsel with respect to ABCL's claim. First, Mr Cooper was going to provide the opinion as to the date of insolvency. As will become clear, that was in fact linked to ABCL's claim. Secondly, Mr Cantone had obtained some "preliminary" or "indicative" advice from junior counsel on 23 November 2017 and that advice had something to do with ABCL's claim. Thirdly, the administrators were not currently seeking advice from counsel as at the date of the Second Report to Creditors or the second meeting of creditors. Finally, whatever advice the administrators obtained, it was not the advice the administrators had in mind in their advice to creditors in the Second Report to Creditors. That is abundantly clear from the passage in the Second Report to Creditors set out above (at [775]), the responses the administrators gave to questions at the second meeting of creditors (see [796](7) and (11) above) and Mr Kelly's account, which I accept, of his conversation with Mr Cantone.

1263 Before leaving this topic, I should address one of the written submissions made by the administrators. In answering an allegation that they failed to obtain legal advice regarding the rebate prior to the second meeting of creditors, the administrators submitted:

> 63.6 the Plaintiff has misconstrued the Report to Creditors and implied that legal advice was sought but never received, whereas the Administrators' evidence is that legal advice was received verbally and not reduced to writing because the Creditors resolved in favour of entry into the Deed;
>
> 63.7 the Administrators took legal advice that was, necessarily, preliminary given the nature of the convening period and formed their views in the light of that advice;
>
> 63.8 the Administrators balanced the possibility of obtaining further, more detailed advice against the possibility of the Company being placed into liquidation and elected not to incur that expense during the convening period; and

> 63.9 once the Deed intervened, any perceived need to obtain more detailed legal advice became inconsequential.

1264 With respect to para 63.6, the Second Report to Creditors does suggest that advice was being sought, as do the terms of Mr Cantone's conversation with Mr Kelly and the administrators' responses to questions at the second meeting of creditors. With respect to para 63.9 and the submission that the "intervention" of the DOCA made the need to obtain more detailed legal advice inconsequential, that is a surprising submission in view of the passage in the Second Report to Creditors dealing with provision for the costs of claim adjudication (see [776] above).

1265 Mr Cantone was aware of the provisions of s 286 and of the general effect of s 438D of the Corporations Act. He was aware that he would be reporting to creditors as to whether the administrators' preliminary investigations had revealed offences under a range of sections in the Corporations Act.

1266 Mr Cantone was aware that he could make an application to the Court for an extension of the convening period and he was aware that a creditors' meeting could be adjourned from time to time. The possibility of adjourning the meeting was, in fact, raised by Mr Kelly of Eagle Fuels.

1267 Mr Cantone said that he considered seeking an extension of the convening period, examining relevant persons and seeking directions. He considered the first matter, but if he considered the other two matters, it was a cursory consideration. The administrators, and Mr Cantone in particular, did not consider that adjudication on the proof of debt required them to extend the time for the convening period in the administration. It was appropriate for them to identify the likely costs of that process in the Second Report to Creditors which they did. Mr Cantone was aware that, for the purposes of a DOCA or a liquidation, it would be necessary for deed administrators or liquidators to adjudicate on ABCL's proof of debt, but he did not consider it to be in the interests of creditors to prolong the administration process to investigate ABCL's claim.

1268 As I have said, Mr Cooper provided the opinion as to the date of insolvency. Before addressing that matter directly, I need to say something more about his evidence of his role and his knowledge of the circumstances surrounding the discount or rebate and how it was dealt with in the books and records of Concrete Supply.

1269 Mr Cooper formed an opinion that the date of insolvency was 13 November 2017. He said in cross-examination that he considered the due date for payment of the ABCL debt was clear and he never considered that he might be wrong about his opinion. Mr Cantone described Mr Cooper's opinion as "definitive" and he accepted that the date of insolvency was important in terms of the recommendations made in the Second Report to Creditors.

1270 I mention, although it is not central to the present issue, that Mr Cooper was asked why, if the date of the demand was the critical event, he had chosen 13 November 2017 rather than the date ABCL made a demand in late October 2017. It seems 13 November 2017 was chosen because by then it was clear that repayment was required. Mr Cooper said that he would need to check to determine if the correspondence from ABCL in October 2017 amounted to a demand.

1271 The tables in the Second Report to Creditors contain an alternative figure for the debt due to ABCL of approximately $10 million and Mr Cooper explained how the alternative figure for the ABCL debt was arrived at. He said that he considered that it was important for the creditors of Concrete Supply to have a range of values and that it would not be realistic to have a figure of zero for the lowest amount in liquidation. The figure of approximately $10 million was an estimate, "which would result in a return, under either scenario, which is not out of the realms of what it could be". He agreed that there was no legal advice which bore on the determination of the figure of approximately $10 million.

1272 Mr Cooper did not agree with the suggestion that the Second Report to Creditors contained no statements about the implications for insolvent trading claims and preference claims of the debt to ABCL was owed over a number of years. He said that it would be obvious that a debt of $12 million would not be incurred during the one financial year. He considered that the reader of the report would have understood that.

1273 Mr Cooper considered that the period of time over which the debt was incurred was not relevant to the issue of insolvency. He said it should have been obvious to the reader of the report that the debt related to an extended period of time given the company's turnover was less than the debt claimed. Mr Cooper said that what was relevant to insolvency was the date the debt was due for payment. Mr Cooper agreed that if the debt was incurred and had become payable over a period of time, then that would have implications on insolvency. However, whilst the claim could be worth some millions of dollars, the likely recovery was, according to Mr Cooper, a different story. Mr Cooper agreed that there is no working paper

which he prepared with respect to a consideration of the defences. Mr Cooper agreed that he had proceeded on the basis that the directors had assets worth approximately $2 million.

1274 As to the need for legal advice, Mr Cooper drew a distinction between legal advice as to the date of insolvency, which he did not consider necessary, and legal advice as to the quantum of ABCL's claim. The administrators planned to take legal advice as to the quantum of ABCL's claim. Related or other matters upon which the administrators might have taken legal advice were put to Mr Cooper, including the taxation implications and potential offending by the directors and the prospects of an insolvent trading claim. As to the latter, he said that such a claim was tied up with the date of insolvency. Mr Cooper did not consider during the course of the administration the issue of the need for an adjustment note to the RCTIs. He agreed that had this matter been brought to his attention, it would have been appropriate to raise them in the Second Report to Creditors.

1275 Mr Cantone did not explain to Mr Cooper that the company had a practice of signing cheques, creating RCTIs and then keeping the cheques for a period of time and then working out which ones would be paid and which ones would be cancelled. Mr Cooper agreed that that was unusual. He was asked whether, in the course of his practice as an insolvency practitioner, he was aware of any rebate agreement under which the customer works out what it decides to pay and what it decides not to pay. He was not aware of such a case and referred to the circumstances in this case as "very unusual". The difference in the percentage of payments made over time is also an unusual feature.

1276 Mr Cooper said that it would not be appropriate to tell the directors that their best option was a DOCA, rather than a liquidation. He said that he would not couch it along those lines. He said:

> I would certainly express a view as to what would be in the best interests of creditors rather than the directors personally.

1277 Mr Cooper could not recall whether Mr Cantone advised him about the cheques being held by Concrete Supply at the time of the administration. He did not have a specific recollection of being told by Mr Cantone that there were cheques going back to August 2016 which added up to approximately $1.8 million. Mr Cooper agreed that the "stockpiling" of cheques could be an indication of insolvency. He said that it was certainly a matter which should be investigated. The stockpiling of cheques is not referred to by Mr Cooper in his insolvency analysis.

1278 In my opinion, the administrators' investigations into ABCL's claim and the alleged discount or rebate were inadequate. I will set out my reasons for rejecting a number of Mr Heard's opinions on this topic in due course.

1279 There were a number of factors which suggested that the claimed discount or rebate was unusual, if not very unusual. The most prominent of these matters were the following:

(1) there was no written agreement setting out the terms of the alleged discount or rebate;

(2) there was no evidence of an oral agreement being reached between two or more identified persons, one or more from ABCL and one or more from Concrete Supply;

(3) the alleged discount or rebate was a very substantial one, particularly in light of the fact it was not documented or the subject of an identified oral agreement;

(4) ABCL had stopped sending statements of account and invoices to Concrete Supply, Concrete Supply had adopted a practice of sending RCTIs to ABCL and there was an allegation of fraud by an employee of ABCL;

(5) the fact that the alleged discount or rebate was a range of percentages apparently determined by the beneficiary of the discount or rebate, rather than a set amount or percentage, was a most unusual circumstance. Any person with a basic knowledge of commercial practice or contract law would recognise that as a most unusual arrangement;

(6) Concrete Supply's system of paying some RCTIs and not others, rather than deducting amounts from each invoice; and

(7) Concrete Supply's practice of recording correctly the liability and then at some considerable time thereafter, and at a time determined by it, cancelling the cheques and adjusting its books and records was unusual.

1280 These matters alone ought to have raised in the minds of the administrators a substantial doubt as to Concrete Supply's entitlement to the alleged discount or rebate. At the very least, they raised a clear case for further investigations to be carried out.

1281 It seems that the administrators relied principally on two matters in deciding that they need not conduct such investigations. First, Mr Cooper was confident that he could express a view, or a sufficiently reliable preliminary view, as to the date of insolvency, even on the assumption that Concrete Supply was not entitled to the alleged discount or rebate. Secondly, the administrators relied on the fact that they had included the ABCL debt at the amount it

claimed in the highest case scenario under both the DOCA and on liquidation. The amount of $10 million approximately on the lowest case scenario appears to have no logical basis in terms of amount, but that circumstance is not central to the present issues.

1282 In my opinion, the approach of the administrators was erroneous because it overlooked the effect proper investigations may, or may well, have had on the first issue and on other matters included in the Second Report to Creditors, or which should have been included in that report.

1283 If proper investigations had revealed that Concrete Supply was not, or was probably not, entitled to the alleged discount or rebate, then that raised a raft of issues which would have had to have been addressed in the Second Report to Creditors.

1284 The first issue is one that was, in fact, probably raised on the information the administrators had. It would have assumed great prominence had proper investigations been carried out. Mr Cooper's reliance on the absence of a demand for repayment and the absence of invoices from ABCL under the BSA to form his opinion that Concrete Supply was not insolvent until 13 November 2017 was misplaced, even on the information available to him. The administrators knew of Concrete Supply's system of issuing RCTIs and recording the liability in Concrete Supply's books. Even if Mr Cooper did not know that, Mr Cantone did and Mr Cooper is taken to have Mr Cantone's knowledge. The liability was correctly calculated, having regard to the product taken and the price increase letters. Even leaving aside the argument that the RCTIs had by practice replaced the ABCL invoices, it ought to have occurred to Mr Cooper that Concrete Supply may have difficulty in denying an existing enforceable liability which Concrete Supply itself correctly recorded in its own books and records and which had remained there until it took a discount or rebate to which it was not entitled. As to the suggestion that the debt did not become payable until demanded because of what transpired (or did not transpire) between the parties, Mr Cooper ought to have realised that any conclusion about this matter may well be affected by a conclusion that not only was Concrete Supply not entitled to the alleged discount or rebate, but that was for the reason, or included the reason, that the directors did not hold a genuine belief that Concrete Supply was entitled to the alleged discount or rebate. In my opinion, another matter relevant to the date of insolvency should have occurred to Mr Cooper. That was the effect that a failure to comply with s 286 of the Corporations Act may have in terms of the presumption of insolvency. It ought to have occurred to Mr Cooper that it was at least fairly arguable that a

company that correctly records liabilities, but then incorrectly reverses the liabilities, has books and records which do not comply with s 286 and a presumption of insolvency may well have arisen at a much earlier date than the date he selected. Had these matters been followed through or properly investigated, there was the prospect of a much earlier date of insolvency. It is true that Mr Morris had not done an insolvency analysis leading to the identification of a date of insolvency. Nevertheless, the analysis he did do which was a relatively simple one and is described above (at [223]–[224]) suggested that Concrete Supply may well have been insolvent some years prior to the date it went into administration if it was not entitled to the alleged discount or rebate. An earlier insolvency date would give rise to the prospect of insolvent trading claims against the directors and the need, in those circumstances, to consider carefully those matters and the need to address them in the Second Report to Creditors.

1285 The second issue is whether the company had complied with s 286. Instead of advising the creditors as it did in the Second Report to Creditors, on the basis that proper investigation revealed that Concrete Supply was not, or was probably not, entitled to the alleged discount or rebate, then the administrators would have to advise the creditors that the company's books and records did not comply with s 286 because they did not at all times reveal substantial liabilities of the company.

1286 The third issue which would have had to be disclosed to the creditors where proper investigations revealed that Concrete Supply was not, or was probably not, entitled to the alleged discount or rebate was that, in those circumstances, the company had understated its expenses and may well have a claim for the overpaid GST and income tax.

1287 The fourth issue which would have had to be disclosed to the creditors where proper investigations revealed that Concrete Supply was not, or was probably not, entitled to the alleged discount or rebate was whether, in those circumstances, the directors had been in breach of their duties to the company and committed contraventions of the Corporations Act and taxation laws.

1288 These matters are not answered by saying that the administrators did not know that Concrete Supply was not, or was probably not, entitled to the alleged discount or rebate. The fact is that had the investigations led to that conclusion, then that would have had a material bearing on the contents of the Second Report to Creditors and the investigations should have been carried out. The matter was a complex one and counsel's advice would have been necessary

as to the investigations to be carried out. I am reluctant to say that it needed to be senior counsel, but it would certainly need to be counsel experienced in the law of insolvency and commercial and company law. With respect, I consider Mr Cooper's opinion on the date of insolvency was deficient on the information the administrators had, and once that is accepted, it is clear the issue could not be compartmentalised and it formed part of the proper investigations into ABCL's claim and the alleged discount or rebate.

1289 I should note that even leaving aside further investigations of the nature I have identified, and even on the assumption that Concrete Supply was entitled to the alleged discount or rebate, the administrators failed to investigate whether Concrete Supply had properly accounted for the alleged discount or rebate. There is no evidence that Mr Cantone turned his mind to this issue at the time. Mr Morris gave evidence to the effect that Concrete Supply had not properly accounted for the rebate which I have discussed and which I accept (see [226]–[233] above). Mr Cooper gave some evidence about the proper accounting for a rebate. Mr Cooper has been a registered tax agent since 1993 and he had some knowledge of taxation matters. He was asked about the way in which Concrete Supply dealt with the discount or rebate. The records indicate that the company's books were prepared on the basis that at the time of purchase the full liability had been incurred. Sometime later, the discount or rebate was recorded in the books by way of a reduction in cement purchases, i.e., expenses. This had the same effect as bringing the discount or rebate to account by way of income. Mr Cooper said that it was not uncommon with rebates to either reduce an expense or claim income at a time after product was purchased. It was suggested to Mr Cooper that in terms of appropriate accounting treatment it was perfectly appropriate not to claim the rebate as income until after the purchase and at the time the entry was made. He agreed with that proposition adding that there may well be an explanation for that. It was put to Mr Cooper that the "very accounting treatment" sets a rebate apart from a straight out discount. Mr Cooper agreed with that proposition and said that if it was a discount, it would be applied at the time of purchase. He said "a rebate is something that by nature is – is different". The example of volume rebates was put to Mr Cooper as a case where one did not know at the time of purchase whether or not the rebate would be received or the extent to which it would be received. Mr Cooper agreed with that and said that that does happen at a later date in time.

1290 I am prepared to accept that a rebate, such as a volume rebate which is payable when a certain volume is achieved, or at the end of a certain period if the volume is achieved in that period, may be accounted for in the manner outlined by Mr Cooper. In those cases, the rebate

is payable on the occurrence of a certain event or at a particular time. This case is not like that situation. Concrete Supply were recording liabilities, 30–40% of which, on its case, it never intended to pay. It decided in its discretion as to when it would cancel the cheques and adjust its books and records. As I have said, I accept the evidence of Mr Morris. In the alternative, if the position is unclear, it plainly required investigation and most likely advice.

1291 I come now to the reasons I do not accept some of the key opinions of Mr Heard. Mr Heard is a well qualified expert in the area of administrations. His evidence was the only independent expert evidence on the topic of the actions of a reasonably competent administrator. I have already indicated how I will deal with Mr Morris' evidence on this topic. Furthermore, as I have said, Mr Heard gave his evidence in a careful and considered way. His evidence was heavily relied on by the Concrete Supply defendants and the administrators.

1292 A major premise of Mr Heard's opinions about the adequacy of the administrators' investigations in this case was that they were required to complete their investigations within a tight time frame. The convening period is 20 days. Self-evidently, that time frame bears on what an administrator can and cannot do. I accept that, although in this case, I consider that more could and should have been said in the Second Report to Creditors about alternative dates of insolvency and the doubtful nature on the evidence of the alleged discount or rebate, even having regard to the limited time of the convening period. I do not pause on those matters at this stage.

1293 Mr Heard was alive to the possibility of obtaining from the Court an order extending the convening period. He proceeded on the basis that in this case it was not unreasonable for the administrators not to apply to the Court for an extension of the convening period.

1294 Mr Heard made the following observations in his second report:

> In my experience, organisations the size of this Company can be investigated adequately within the timeframes provided in Part 5.3A of the Act and meet the standards of reporting recommended in the Harmer Report. Typically, extensions of time in order to investigate further are reserved for much larger companies that may have significantly more employees, far greater turnover and multiple locations of administration operation.

(Footnote omitted.)

1295 He was asked about extensions of the convening period in cross-examination and he said he did not think such an application should be made for the following reasons: (1) courts are

reluctant to grant extensions of time; (2) an extension of time is costly in the administration; (3) an extension of time involves risk in that it is not clear how things will turn out; and (4) an extension of time is a source of worry and concern for creditors.

1296 These matters may be accepted as relevant and appropriate in many cases involving small to medium size companies, but I do not accept that they mean an application for an extension of time should not have been made in this case. I consider that such an application should have been made, having regard to the circumstances known to the administrators. If it is necessary to describe the circumstances as exceptional (*Wellnora* at [201] per Lindgren J), then I would have no hesitation in so describing them. On the circumstances known to the administrators, I consider that the options for them were to clearly indicate the limited nature of their investigations and the possible consequences of further investigations or to apply for an extension of the convening period. I do not consider that a reasonably competent administrator is likely to have adopted the former course because it would have resulted in a heavily qualified report. The administrators in this case did not heavily qualify their report. It will be apparent from what I have said that it was not an option to put proper investigations to one side and prepare a report within the 20 day convening period without the heavy qualifications to which I have referred. I recognise that costs are a consideration, but from time to time a case will arise where the nature of the circumstances require a greater degree of investigation than normal. This was such a case.

1297 In my opinion, a reasonably competent administrator would have sought an extension of the convening period to enable proper investigations to be carried out. To the extent that many of Mr Heard's opinions are based on the limited time frame of the convening period, I do not accept them.

1298 Furthermore, I consider that a properly presented application for an extension of the convening period was likely to have been granted. The defendants and, in particular, the administrators pointed to the difficulty and complexity of the matters and, as I understand it, pointed to the fact that it had taken a 20 day trial in this Court to expose the issues to the extent they have now been exposed. I reject that submission. To carry out no or little investigations and to say nothing was not an option. A reasonable extension of the convening period would have led to an informed position and proper advice to creditors, even if there needed to be some qualifications. The same may be said of an adjournment of the creditors' meeting up to the statutory maximum of nine weeks or 45 business days.

1299 In my approach to Mr Heard's evidence, I have also taken the following matters into account.

1300 First, although I do not seek to cast any doubt on the fact that the administration of companies is a field of expertise, it is an area of expertise where the principles of proper practice are informed by the decisions of the courts from time to time. That can be seen from the ARITA Code itself which, in the context of the exercise of the casting vote, refers to the legal principles that govern the exercise of the casting vote as explained in the case law and texts.

1301 Secondly, Mr Heard quite properly made some concessions in the course of cross-examination.

1302 Mr Heard was asked by the administrators' counsel in cross-examination whether he would state in the Second Report to Creditors that the directors of Concrete Supply had been engaged in fraud. He answered that question no, but it is what he said in the course of his answer which is significant. He said that he would have pointed out in the report the reason for the significant difference of opinion, namely, that one party believed there was an entitlement to a rebate and the other did not. I note that not even that very general fact is in the Second Report to Creditors.

1303 Mr Heard seemed to say, again in answer to questions from the administrators' counsel in cross-examination, that it was incumbent on the administrators to form a preliminary opinion with respect to the ABCL debt, although they could not be expected to form a final opinion. I think that it is correct to say that in this case, the administrators did not even form a preliminary opinion about the ABCL debt. Mr Heard agreed that an analysis of the debt claimed by ABCL would involve a consideration of the proof of debt, the invoices, the terms of payment, the BSA, the RCTIs, questions as to the rebate agreement and questions concerning staff of ABCL being involved in fraudulent transactions and the involvement of the directors of Concrete Supply in that fraud.

1304 As to the date of insolvency, counsel for the administrators sought to cross-examine Mr Heard as to whether multiple possible insolvency dates should be included in a report to creditors. Counsel for ABCL indicated that that was not ABCL's argument. ABCL's argument is that Mr Cooper had erred in fixing on one date and not considering and reporting upon another date. Counsel for ABCL was not suggesting that multiple insolvency dates should be referred to in the report.

1305 Mr Heard said that he would not reach the conclusion that there was no debt due to ABCL until a period in late October or early November 2017 with "a high degree of confidence" and he agreed that the administrators would be faced with a difficult decision. Mr Heard gave the following evidence in cross-examination:

> MR LIVESEY: But the equivocal view takes into account both sides of the dispute, doesn't it?
>
> THE WITNESS: Yes. It requires me to consider both sides of the argument.
>
> MR LIVESEY: And it may be, in order to meet your fiduciary and other obligations, that you've got to lay that out very clearly for creditors so that they can make an informed decision as to what to do next?
>
> THE WITNESS: So laying it out before creditors in a clear way?
>
> MR LIVESEY: Yes?
>
> THE WITNESS: There's a different level of interpretation potentially there. I always have to consider the users of the report, and I would try to describe to the creditors in as simple layman's terms as I could the circumstances that caused me to form a view or a difficult view that was in there. A comprehensive view is probably beyond the grasp of most readers of these reports.
>
> MR LIVESEY: Well, let me be clear, Mr Heard?
>
> THE WITNESS: Yes.
>
> MR LIVESEY: I'm not suggesting that one needs to write an essay on the topic?
>
> THE WITNESS: Indeed.
>
> MR LIVESEY: One needs to, in simple, clear language, outline the problem and outline that there might be differing approaches to the solution of that problem?
>
> THE WITNESS: I would agree.
>
> MR LIVESEY: One couldn't take one single view at the risk of misleading the creditors as to the alternative?
>
> THE WITNESS: The view was – what's the view taken for the financial analysis or for the written analysis of the issue?
>
> MR LIVESEY: Both?
>
> THE WITNESS: Both. Well, one can take an equivocal view on the financial analysis, but I think it needs to be balanced by at least a narrative that says that there is a risk.

1306 I think Mr Heard agreed with the proposition that whether it is a tick in the box or whether it is a line statement, the issues about a possible breach of directors' duties and insolvent trading should be flagged for the attention of creditors.

1307 In an important passage in cross-examination, Mr Heard has identified for him by counsel for ABCL, and he himself identified, the competing considerations. On the one hand, there is the

allegation of a debt which was increasing over time, the invoices, the agreements, the 30 day terms, the allegation of a fraudulent employee at ABCL and the fact that there is nothing in writing and the absence of an oral agreement, and on the other, the fact that there was ongoing supply and no demands made by ABCL of Concrete Supply. Mr Heard agreed that it was not possible to get to the bottom of the issue within the 20 day convening period. He agreed that a reasonable and careful insolvency practitioner would have made a comment about insolvent trading prior to October 2017. The passage is as following:

> MR LIVESEY: - - - and let's simplify it for the sake of my question. On a hypothetical basis, let us say that you're aware of the allegation by Adelaide Brighton of debt building up over a nine-year period. You're aware that that, on the face of it, is backed by invoicing and agreements and the like with 30-day terms. You're also aware that there's an allegation that an Adelaide Brighton employee has been engaging in fraudulent transactions over much of that period, and you're aware that, although the directors claim to have the benefit of a rebate agreement, there's nothing in writing and there's nothing oral on which they can rely. On the face of it, there's an insolvent trading claim that might need to be investigated?
>
> THE WITNESS: There is an issue that needs to be investigated. Is it an insolvent trading claim? I'm not certain, because the factors that would worry me is there's ongoing supply, there's no demands – you know, the typical attributes of a person who can't pay their debts and their suppliers are grumpy with them is they have their credit cut off.
>
> MR LIVESEY: Yes?
>
> THE WITNESS: And those sorts of issues didn't appear in it. So that causes the quandary.
>
> MR LIVESEY: This raises the difficulty of the issue, doesn't it?
>
> THE WITNESS: It does.
>
> MR LIVESEY: Because one of the explanations may be that the directors of Concrete Supply are working in conjunction with the employee of Adelaide Brighton. That's a possibility, isn't it?
>
> THE WITNESS: I – if you phrase the question that way, then it's a possibility, but I would inquire.
>
> MR LIVESEY: And during the 20-day convening period, it's simply not possible to get to the bottom of that issue, is it?
>
> THE WITNESS: No, it wouldn't be.
>
> MR LIVESEY: No. And, on those bare facts, saying nothing about an insolvent trading claim prior to October 2017 is not an option, is it?
>
> THE WITNESS: It's not the view that I would have formed.
>
> MR LIVESEY: And it's not a view that any insolvency practitioner, acting carefully and reasonably, could form?
>
> THE WITNESS: I think that an insolvency practitioner in most circumstances

would have made comment.

1308 Counsel for the administrators asked Mr Heard about the possibility of unfair preference claims. He expressed the opinion that there were unlikely to be unfair preference claims because, as far as he could see, those creditors were likely to have good faith defences.

1309 Mr Heard was asked about whether there were various "red flags". One matter he agreed that would be a red flag is if the directors said that they had $20 million worth of assets available to them, and then later said that they had assets of only $1.7 million.

1310 Mr Heard agreed in cross-examination that the administration of Concrete Supply was by no means an ordinary administration and that the facts made it an unusual administration. The facts he had in mind, I think, were, on the one hand, ABCL's claim for payment for cement provided over a number of years, but in circumstances in which a demand had not previously been made, and an allegation of fraud by an ABCL employee and, on the other hand, the provision of RCTIs by Concrete Supply and the taking of a discount or rebate in the absence of "obvious" agreement, that is to say, a written agreement or one that arose from discussions. Mr Heard said that as an administrator, he would have exercised particular care in the circumstances and probably sought and obtained legal advice. As I have said, Mr Cantone agreed that a number of matters were strange and Mr Cooper agreed on a number of occasions that the circumstances of the discount or rebate and Concrete Supply's approach to it were unusual and that he had never seen such circumstances before.

The Directors' Assets

1311 The Second Report to Creditors does not provide an estimate of the value of the directors' assets. It proceeds on the basis that it is unnecessary to do so because of the conclusion as to the date of insolvency. The same can be said of potential defences to say, an insolvent trading claim, that is, they are not addressed on the facts, seemingly, because of the administrators' conclusion about the date of insolvency.

1312 As I have previously said, the minutes of the second meeting of creditors, which Mr Cooper said were settled by Mr Cantone, record that Mr Cooper said at the meeting that from discussions with the directors during an adjournment of the meeting, he had ascertained that the equity in the directors' properties was worth between $1,500,000 and $1,700,000. The minutes also record Mr Cooper stating that they had considered the information on shareholdings from publicly-available information, but had not commissioned valuation of such shareholdings. However, in relation to this last statement, Mr Cooper in evidence said

that he did not make such a statement. I accept Mr Cooper's denial that he made this statement. It is consistent with Mr Leader-Elliott's notes of the meeting.

1313 By contrast to Mr Cooper's denial, Mr Cantone in cross-examination appeared to accept that Mr Cooper said at the second meeting of creditors that searches of the publicly-available information of the directors' shareholdings had been carried out. He agreed that such a statement is inaccurate and that he heard Mr Cooper answer the question and yet he said nothing. He agreed that he allowed misinformation to go forward to the meeting. This is an example of Mr Cantone's unreliability as a witness. He had a poor recollection about a number of matters and that, or a state of confusion, or both, explains this particular example. His recollection was not assisted by keeping the detailed and precise notes. He did not keep detailed and precise notes in the case of this administration.

1314 The contents of the Second Report to Creditors, insofar as it deals with the directors' assets, is summarised above. Mr Cantone's evidence-in-chief as to his investigations and views about the directors' assets is set out above.

1315 Mr Heard said that a reasonably competent administrator would make inquiries about the assets of the directors unless there was to be no DOCA, which, of course, is not the case here. It is plainly an important aspect of the administrator's tasks because those tasks include assessing whether there are claims against the directors available to a liquidator on a liquidation should the creditors decide to put the company into liquidation, notably an insolvent trading claim under s 588G of the Corporations Act (see also the ARIA Code at section 25.6.3). None of these matters are in dispute. It is the nature and quality of the administrators' investigations and, in particular, Mr Cantone's investigations (who undertook this task) which are in dispute.

1316 Mr Cantone's investigations of the directors' assets consisted of asking the directors what assets they had. Mr Cantone did produce searches of the real property owned by the directors, but it soon became clear in cross-examination that he carried out those searches in January 2018 and not at the time of his inquiries of the directors. Mr Cantone did not carry out any searches of shareholdings held by the directors. Mr Cantone was asked about the statement in the Second Report to Creditors that it was unknown whether the directors owned shares and the apparent inconsistency between that statement and the fact that he was told that the directors owned shares in two companies. Mr Cantone seemed to attempt to distance himself from the statement in the Second Report to Creditors. I did not find Mr Cantone's

evidence satisfactory when he was pressed in cross-examination about his failure to conduct searches and, more generally, to make inquiries about the directors' assets. He was at times defensive and argumentative. There was an element of circularity about his reasoning. When pressed on the possibility of an earlier date of insolvency, he referred to limited value of the directors' assets, and when pressed about his limited inquiries into the value of the directors' assets, he referred to the administrators' view as to the date of insolvency.

1317 It follows from my conclusions about the inadequacy of the administrators' investigations in relation to the ABCL's claim and the alleged discount or rebate that the administrators' investigations into the directors' assets were inadequate. Without the investigations into the first matter, they could not have known whether their investigations into the directors' assets were sufficient and adequate.

1318 Even if the investigations into the directors' assets are treated as a separate topic, the administrators' investigations were inadequate. The administrators knew the topic was relevant. Mr Cantone asked questions of the directors, formed an opinion that the directors' assets were unlikely to exceed $2 million and the administrators answered a question about the topic at the second meeting of creditors.

1319 As I have previously said, Mantina Investments is the trustee of the Mantina Investments Unit Trust. Mantina Investments is the owner of the real property within the group, including the quarry at the Kapunda property. The evidence suggests the real property is worth millions of dollars. The Mantina Investments Unit Trust is a unit trust. The Settlement Deed was tendered in evidence.

1320 The structure of the companies in the Mantina Group and an amount of $20 million is shown on a handwritten note of a meeting which took place in all likelihood on 2 November 2017 and at which Mr Cantone was present. The reference to $20 million is not in Mr Cantone's handwriting and he said in evidence he remembers very little of this meeting. Even if he did not hear the reference to $20 million at the meeting on 2 November 2017, he knew that there were other companies in the Group and other properties and it was well short of the appropriate standard to do no more than rely on what the directors said. It is telling that Mr Heard gave evidence, which I accept, that he would ordinarily ask the directors for a statement of their financial position in a form that they have to swear.

1321 The Concrete Supply defendants and the administrators submit that ABCL had not shown that the directors had assets worth more than $1.5 million to $1.7 million ($2 million at best) and, as the administrators put it, that was after a trial occupying 20 days. I assume, although it was not made express, that this is said to be relevant to the materiality of investigations on this topic or the exercise of the discretion under s 445D or both. In either event, I do not accept the submission. The evidence before me establishes that the directors may well have substantial assets and, in particular, the quarry at the Kapunda property and the quarry business which a liquidator could access.

1322 The evidence which supports this conclusion is as follows.

1323 First, the directors are directors and shareholders of the three main companies in the Mantina Group, namely, Concrete Supply, Mantina Earthmovers and Mantina Investments.

1324 Secondly, somebody at the meeting on 2 November 2017, probably Mr Tull, mentioned an amount of $20 million in the course of explaining the structure of the Mantina Group. A liability of $1.6 million was also mentioned.

1325 Thirdly, the valuation prepared for Bank SA put before the Court advances a valuation for the quarry business as a going concern of $17.7 million,

1326 Fourthly, Jason agreed in his evidence that whatever the structure might be, it is as simple as he, Rino and Tina own the quarry.

1327 Finally, the directors say that they can raise the required contribution to the Deed Fund of $2.5 million and that Mantina Earthmovers can pay the debt of $1.3 million if that is required. On their case, they have access to substantial assets. I realise that that is not the same as the liquidator gaining access to the assets, but it is an indication.

1328 In conclusion, although Mr Heard referred to the trust “quandary” and one cannot be completely sure, I am satisfied based on the foregoing that the directors may well have substantial assets which could be “accessed” for the purpose of satisfying an insolvent trading claim.

The Recoverability of the Mantina Earthmovers' Debt and the Transactions involving Mantina Earthmovers

1329 I have already referred to Mr Cantone's evidence-in-chief about the assessment of the recoverability of the Mantina Earthmovers' debt to Concrete Supply (see [888] above) and the statements in the Second Report to Creditors about this issue (see [774] above).

1330 Mr Cantone agreed in cross-examination that it was part of his investigations to assess any intercompany loans or related party loans and to assess their recoverability. He purported to do so in advance of and in the Second Report to Creditors. He proceeded on the basis that Mantina Earthmovers owed Concrete Supply the amount of $1,333,930. He proceeded to assess the recoverability or what he called the "collectability" of the loan. He identified as factors relevant to that exercise, the following:

(1) one creditor had a registered security interest over all of Mantina Earthmovers' present and after acquired property and a number of other creditors had registered security interest over specific assets;

(2) in order to recover the debt, Concrete Supply may have to wind up Mantina Earthmovers and if it did, it would incur legal costs and there would be liquidator's fees, the costs of an auctioneer and the potential of the plant and equipment being sold at well below market value. Furthermore, Concrete Supply would have the status of a non-priority creditor ranking behind outstanding employee entitlements.

1331 These matters were identified in the Second Report to Creditors and, in addition, the administrators asked the creditors to note that 40% of Mantina Earthmovers' business was with Concrete Supply and that, if Concrete Supply was to enter liquidation, that would "inherently affect the financial position of Mantina Earthmovers and the rate of return to the creditors in a liquidation". Taking these matters into account, the administrators estimated that 25% of the debt would be collectable in a "Worst case" scenario and 50% in a "Best case" scenario.

1332 Mr Cantone was pressed at some length in cross-examination about how he had assessed the recoverability of the loan owed to Concrete Supply by Mantina Earthmovers at between 25% and 50% of the debt. In the result, he agreed that it was "an educated estimate". As ABCL points out, this is in a context in which the directors have said that they can raise the $2.5 million contribution to the Deed Fund through Mantina and if Mantina Earthmovers has to pay the Mantina Earthmovers' debt into the Deed Fund, it will do so. I note that the other

way the submission was put by ABCL was that if Mr Cantone is correct that only 25%–50% of the Mantina Earthmovers' debt is recoverable and the directors' assets do not exceed $2 million, then it is difficult to see how the controllers of the Mantina Group could provide the contribution to the Deed Fund and repay the Mantina Earthmovers' debt.

1333 With respect to the alleged anomalous transactions, I have already set out Mr Morris' evidence on this topic (at [235]–[237]) and the evidence given by Rino explaining the transactions (at [375]–[378]).

1334 The administrators did not verify independently the prices in the invoices, the pugmill hire cost or the quotation provided. As ABCL submits, if the invoices are accurate, it means that $400,000 was spent on fill for the Two Wells plant which itself was valued at only $200,000 approximately by Pickles.

1335 Mr Cantone identified the debt owed by Mantina Earthmovers to Concrete Supply as at the end of the financial year ended 30 June 2016 at $2.5 million approximately.

1336 Mr Heard agreed that, with respect to the loan Mantina Earthmovers owed to Concrete Supply and the supply of materials by the former to the latter, the facts seem to be that the amount owing in August/September 2017 was $2.8 million approximately, and the amount owing on 14 November 2017 was $1.2 million approximately. This reduction in the loan came about because of invoices totalling $1.5 million approximately in the weeks before 14 November 2017. Mr Cantone agreed that the loan had been reduced from approximately $2.5 million to approximately $1.2 million by reason of various invoices.

1337 I have no difficulty in accepting that when administrators go into a company, its books will not often be nicely "lined off" and that the company may need to "catch up" in terms of sending invoices and making payments.

1338 In this case, there was such a dramatic fall in the debt in the period shortly before the administration, that careful investigation of the circumstances was required. That was not done by the administrators. I should add that whilst the so-called anomalous transactions may ultimately be shown to be legitimate, I am not satisfied of that on the evidence put before this Court.

1339 The matters the administrators identified in the Second Report to Creditors as relevant to an assessment of the recoverability of the Mantina Earthmovers' debt were, on their face, relevant and appropriate matters for Mr Cantone to take into account. The difficulty is that I

am not satisfied that he has engaged with the circumstances of Mantina Earthmovers such that he had a reasonable basis for his assessment. In order to undertake and perform the task correctly, the assessor needs to identify the potentially relevant factors and then apply them to the facts. Having heard Mr Cantone's cross-examination, I am not satisfied he carried out the second step to the extent required. As I understand it, he did not examine the financial statements of Concrete Supply. If materiality in the exercise is required, then it is provided by the Concrete Supply defendants who, in the course of this proceeding, said that they could raise the required contribution to the Deed Fund of $2.5 million through Mantina Earthmovers and that, if Mantina Earthmovers was required to repay the Mantina Earthmovers' debt, then it would do so. This is not to use events after the Second Report to Creditors to prove Mr Cantone's conclusion about recoverability was wrong, but to dispel any notion that an investigation of Mantina Earthmovers' financial records would have been immaterial.

1340 In my opinion, the investigations which the administrators carried out into the recoverability of the Mantina Earthmovers' debt were inadequate.

Subordination of Debt

1341 ABCL submitted that there is a material disparity between statements in the Second Report to Creditors as to how the proposed DOCA would deal with debts which Concrete Supply owed to its directors and the terms of the DOCA as executed.

1342 One of the matters which must be addressed in the Second Report to Creditors is details of the proposed DOCA (IPS (Corporations) s 75-225(3)(b)(vii)). In this case, the administrators addressed the details of the DOCA in dot point form in section 6 of the Second Report to Creditors. One of the points is as follows:

> That the directors, associated parties and associated entities will subordinate any claim that they may have against the Company (whether priority or not) behind those of the ordinary non-priority unsecured creditors.

1343 The effect of the DOCA as executed is that the directors are defined as related parties who are not entitled to participate in the Deed Fund. Their debts are affected by the moratorium imposed by the DOCA, but they are not extinguished by the DOCA and may subsequently be enforced against the company.

1344 Mr Heard said, and I accept, that a DOCA under which the directors do not participate in the Deed Fund, but their debts are not extinguished, is not uncommon.

1345 It is not clear what creditors would make of a statement that directors' claims are subordinated behind their claims. If they had some understanding of debt subordination, they might conclude that directors' debts are not paid until their debts are paid, but as their debts are not to be paid in full, that would mean that directors' debts are extinguished without any payment. Clearly, that is not the effect of the DOCA.

1346 This seems to be a matter of mistake rather than a failure to investigate. It does mean that the statement in the Second Report to Creditors is not accurate. However, in light of Mr Heard's evidence, it is not a major matter.

Sale of the Business as a Going Concern

1347 ABCL submitted that the administrators failed to investigate adequately the sale of Concrete Supply's business as a going concern.

1348 I have set out above Mr Cantone's evidence as to the reasons he did not consider the sale of Concrete Supply's business as a going concern to be viable (at [896]). One of the reasons he advances is wrong. There was a current written lease agreement between Tina and Concrete Supply and he acknowledged that fact in cross-examination. Mr Cooper also gave evidence as to his consideration of the matter (at [916] above).

1349 Mr Heard said in cross-examination that he would not consider the sale of Concrete Supply's business as a going concern. He gave the following evidence:

> MR LIVESEY: And you will have seen, from Mr Cantone's affidavit, that he refers to the question of there not being a lease in respect of that land holding?
>
> THE WITNESS: Right. So you were talking about the land on which they traded as opposed to some – okay.
>
> MR LIVESEY: You understand what I'm talking about?
>
> THE WITNESS: Yes. I am now. Yes.
>
> MR LIVESEY: Because it would be relevant, wouldn't it, to sale as a going concern to know whether new operators of that business could continue to operate from that site?
>
> THE WITNESS: In the period of voluntary administration, I wouldn't consider a sale as a going concern.
>
> MR LIVESEY: Would you agree that considering whether there should be a sale as a going concern would be an issue to consider?
>
> THE WITNESS: If a deed of company arrangement was not accepted, then a liquidator would turn their mind as to how that business should be sold.
>
> MR LIVESEY: Do you not agree with this: that one of the things to consider when

> going through the convening period is whether there should be a sale as a going concern and not merely whether there would be a deed or liquidation?
>
> THE WITNESS: No.
>
> MR LIVESEY: If an insolvency administrator did give consideration to sale as a going concern, that's a matter for that person's judgment, isn't it?
>
> THE WITNESS: It is a matter of judgment.
>
> MR LIVESEY: And you're not criticising Mr Cantone for giving some thought to sale as a going concern, are you?
>
> THE WITNESS: No. I think it's relevant to consider that in the context of what were the asset values be realised in a liquidation.
>
> MR LIVESEY: But if your reason for not further considering that issue was that you did not think that there was a lease in respect of the property, when, in fact, there was a lease, that's a problem with the analysis, isn't it?
>
> THE WITNESS: If those facts are, then, yes, the analysis may not have been done on correct assumptions.
>
> MR LIVESEY: Because if it's simply a question of asking, "Is there a lease?", and being shown the lease, or not going into that at all, then that raises further questions about the analysis undertaken by the insolvency practitioner, doesn't it?
>
> THE WITNESS: If, on the facts that you've said, then yes.

I accept that evidence.

1350 Mr Cantone was not obliged to consider the sale of Concrete Supply's business as a going concern. The fact that he did and made an erroneous assumption in the course of doing so is of no consequence in terms of whether the DOCA is set aside.

Ability to Pay and Mistake as to the Mantina Earthmovers' Debt

1351 Mr Cooper said in cross-examination that he discovered in late November 2018, nearly a year after the DOCA had been executed, that the Mantina Earthmovers' debt fell within the terms of the DOCA and was part of the Deed Fund. He had previously missed that and, as I have said, the tables in the Second Report to Creditors attribute no value to the Mantina Earthmovers' debt under the DOCA. Mr Cooper said that the definition of "debtors" in the DOCA includes all debts. Mr Cooper said that the administrators had not made a written demand for the repayment of the debt, but there had been discussions between the solicitors for the administrators and the solicitors for the directors.

1352 Mr Heard agreed with the proposition that if the directors of Mantina Earthmovers had said that they would pay the debt, then the amount should not be reduced. He agreed that the debt

should be recovered and that there might be a possible breach by the administrators of their duties.

1353 Had the administrators not made the mistake which they did, they would have been required to assess the ability of Mantina Earthmovers to repay the debt it owed to Concrete Supply (assuming for present purposes that it was $1.3 million and not a larger amount) under the DOCA in circumstances in which they assessed recovery in liquidation at between 25% to 50%.

Other Matters

1354 There were two other areas where ABCL submitted that the administrators failed to carry out adequate investigations. As I understand it, neither of them is advanced as a reason the DOCA should be terminated.

1355 As I have said, the administrators engaged Pickles to value the company's plant and equipment and Pickles prepared a valuation which is referred to in the Second Report to Creditors. The amount of the valuation after the deduction of auctioneer's costs and security interests was $873,368.

1356 Pickles did not value certain plant and equipment of Concrete Supply at the Two Wells property and the plant and equipment at the Kapunda property. That is clear from Concrete Supply's depreciation schedule and is not in dispute. It was not picked up by the administrators and clearly, it should have been. I do not think Mr Cantone took issue with that during his cross-examination. Mr Cooper said that Mr Cantone engaged a representative of Pickles to undertake a valuation of Concrete Supply's plant and equipment and was unable to comment on whether plant at the Kapunda property had been overlooked in terms of the valuation. He did not personally check the valuation against Concrete Supply's depreciate schedule.

1357 The Second Report to Creditors identified nil value for Concrete Supply's plant and equipment under a DOCA. That was appropriate as clearly it was not part of the Deed Fund. The report identified the amount of $873,368 for plant and equipment under a liquidation and this was misleading because not all of the company's plant and equipment had been valued.

1358 ABCL did not attempt to prove the difference between the amount of $873,368 and the true value of Concrete Supply's plant and equipment. As far as I can see, the failure to value all of Concrete Supply's plant and equipment does not form part (or at least a substantial part) of

ABCL's case as to why the DOCA should be set aside. It is an example of the lack of care by the administrators and it was put forward as an aspect of ABCL's case that the administrators' investigations were inadequate.

1359 The directors of Concrete Supply were obliged to give the administrators a report in the prescribed form about the company's business, property, affairs and financial circumstances within five business days after the administration of Concrete Supply began, or such longer period as the administrators allowed (s 438B(2)). A failure to comply with this obligation is an offence of strict liability (s 438B(5)), subject to a defence of reasonable excuse (s 438B(6)). It is clear that this obligation in the Corporations Act is designed to assist the administrator in his or her investigation of the company's affairs.

1360 The directors of Concrete Supply did not provide a RATA to the administrators and the administrators did not disclose this failure in the Second Report to Creditors. Mr Cantone agreed that he did not obtain a RATA from the directors. He said that the requirement on directors to provide such a report had only been introduced recently.

1361 The ARITA Code at [25.6.2] makes it clear that it is proper practice for administrators to outline the content of the directors' RATA and to include the administrator's comments as to the administrator's estimate of realisable value of assets and liabilities in the Second Report to Creditors. If the directors fail to provide a RATA, this must be disclosed. Mr Cooper agreed that the administrators' failure to disclose the fact that the directors had not provided a RATA was not in accordance with the ARITA Code and that it is proper practice for administrators to make a disclosure concerning whether a RATA has been provided. Mr Heard said, and I accept, that it is good practice for administrators to ask the directors for a RATA and if it is not provided, to disclose that failure in the Second Report to Creditors. He also said that if a report was not provided, he would include reference to that failure in a report to ASIC under s 438D. It is quite unclear in this case whether Mr Cantone asked the directors for a RATA. The administrators certainly did not refer to the directors' failure to provide such a report in the Second Report to Creditors.

1362 This is another example of a lack of care by the administrators and, in particular, Mr Cantone. It is also a failure to comply with proper practice.

Independence

1363 ABCL submitted that the administrators, and Mr Cantone in particular, lacked independence. I have identified the matters ABCL relied upon (at [848]). There can be no doubt that administrators must be independent and must act independently. The quality of independence is referred to repeatedly in the ARITA Code (Parts 2.5 and 6).

1364 This was a testing administration. It involved unusual issues and the involvement of parties with legal representation.

1365 I have concluded that the administrators' investigations were deficient by a substantial margin, but that in itself does not establish a lack of independence.

1366 I have considered the conversations relied on by ABCL. There is no doubt that administrators must be careful during pre-appointment meetings with directors (see ARITA Code, Part 6.8). However, even if I proceed on the basis that Mr Cantone did say to the directors that a voluntary administration was the best option, the precise significance of the statement is still to be determined by the context in which the statement was made and I have no evidence of that context. The other statement relied on by ABCL, that the directors should make the best and final offer, does not seem to me to carry a sinister connotation.

1367 In relation to the comparison between the Worrells' precedent and the Second Report to Creditors, ABCL's argument seems to be that the omissions suggest a lack of independence. I am not prepared to draw that conclusion. I consider that the omissions show a deficient approach to the necessary investigations, rather than a lack of independence. I would make the observation in this context that more information as to the directors' view of the insolvency issue may well have resulted in an observation that if the directors were correct, the company was not insolvent. A creditor asked to compromise his or her debt may well wish to know that and how difficult it might be in terms of time and cost to resolve that issue.

1368 I do not think that Mr Cantone was acting at the behest of the directors, although I do consider that he formed the view early on that a DOCA was the appropriate way to proceed and that that coloured his approach.

The Second Report to Creditors dated 11 December 2017

1369 There are two relevant sources of information about Concrete Supply's business, property, affairs or financial records. The first source is the telephone conversation between Mr Cantone and Mr Kelly which took place a short time after Mr Kelly's email dated 13

December 2017. This is very much a subsidiary issue in this case. The main source of information which is said by ABCL to engage s 445D(1) of the Corporations Act is the Second Report to Creditors.

1370 The relevant paragraphs of s 445(1), having regard to ABCL's submissions, are paras (a), (b), (c). To satisfy one or more of those paragraphs there must be information that is false or misleading or an omission from the relevant document and, in each case, the information or omission must be material in the sense that it can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the DOCA. This requires an objective assessment by the Court of the information or omission to determine whether it could reasonably be expected to be material to the creditors' decision.

1371 There is a considerable overlap between information which is false, information which is misleading and a material omission from a document, particularly in the case of information which is misleading and a material omission from a document. For example, a statement of fact without a material qualification may be characterised as misleading, or the absence of the qualification, may be characterised as a material omission from the document. Another example is a statement of opinion which implies that adequate investigations or an adequate analysis has been carried out when that is not the case and the statement may be characterised as misleading or as involving a material omission from the document containing the opinion, the omission being a statement which outlines the limited nature of the investigations or analysis undertaken.

1372 In determining whether one or more of the three defects is established, particularly misleading information or a material omission, it is appropriate to consider all the circumstances of the case in much the same way as that is done in the context of misleading or deceptive conduct in s 18 of the Australian Consumer Law (*Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 241 CLR 357 at [14]–[23] per French CJ and Kiefel J).

1373 Clearly, there will be almost an inevitable link between an inadequate investigation in substantial respects and whether the information in the Second Report to Creditors is false or misleading or there are material omissions from the report. That is the case here where, as I have found, the investigations undertaken were inadequate in substantial respects.

1374 Before moving to that matter, I should make it clear even on the investigations carried out there were misleading statements or material omissions in the Second Report to Creditors. First, on any view, the books and records of Concrete Supply appeared not to comply with s 286 of the Corporations Act whether or not there was a discount or rebate or not. If there was a discount or rebate, nevertheless, it does not appear to have been accounted for properly for reasons previously given. If there was no discount or rebate, then the "taking" of the discount or rebate and recording it in the books and records was inaccurate. This topic has a flow-on effect in terms of the presumption of insolvency. Secondly, the opinion in the report as to the date of insolvency should have been expanded upon to raise other approaches, such as that based on the presumption of insolvency or that Concrete Supply's liability to ABCL was due for payment each time Concrete Supply prepared an RCTI and recorded an existing liability in its own books and records. These conclusions, in turn, have flow-on effects in terms of information about breaches of directors' duties, insolvent trading claims, directors' defences and directors' assets. It is true that in certain parts, the Second Report to Creditors refers to a *preliminary* investigation or examination into the date of insolvency, but that cannot operate to exonerate the administrators. The fact is they did not apply for an extension of the convening period or suggest an adjournment of the meeting or qualify their opinion. As Mr Cooper said in evidence, he was confident that their opinion was correct.

1375 The quantum of the Mantina Earthmovers' debt and its recoverability were material matters to creditors because they bore on the amount available on a liquidation. If the Second Report to Creditors was to go ahead in early to mid-December 2017, then some qualification to the opinions (express and implied) expressed as to those matters was necessary to make it clear that there were transactions not investigated which substantially reduced the debt shortly prior to the administration and that, in assessing recoverability, no effective analysis of the financial records of Concrete Supply had been undertaken.

1376 The statement in the Second Report to Creditors that the administrators were currently seeking legal advice from counsel was not correct and what Mr Cantone said to Mr Kelly was misleading, but I am unable to see how, without more, either was material in the relevant sense.

1377 As I have already said, the investigations which were required in this administration were such that an extension of the convening period should have been sought. In the alternative, the second meeting of creditors should have been adjourned. If the report was to proceed

when it did, then in order for it not to be misleading or omit information as to material matters, it needed to be heavily qualified as to the inability to express any final view as to a whole range of material matters, including the date of insolvency, potential insolvent trading claims, potential claims for breaches of directors' duties, other contraventions of the Corporations Act, potential taxation and GST issues, directors' defences and directors' assets. Most significantly, the Second Report to Creditors would need to say that the administrators were not then in a position to say that they recommend to creditors that the company execute the proposed DOCA. The Second Report to Creditors did not contain any of these qualifications or caveats.

The Discretion under s 445D of the Corporations Act

1378 Before I address the exercise of the discretion under s 445D, I will identify two related matters.

1379 First, ABCL also seeks an order under s 75-42 of the IPS (Corporations) setting aside the resolution passed on the casting vote of Mr Cantone that the company execute the proposed DOCA. As the authorities make clear, the public interest and considerations of commercial morality are relevant under this section as they are in the exercise of the discretion under s 445D(1).

1380 Secondly, ABCL's application to terminate or set aside the DOCA is also made under s 447A of the Corporations Act. It is not in dispute that the power in s 447A includes the power to make such an order. ABCL submitted that an order under s 447A terminating or setting aside the DOCA should be made on either of two broad grounds.

1381 First, ABCL submitted that the DOCA should be set aside or terminated on the basis that it is an abuse of the procedure in Pt 5.3A. The argument is that the impropriety is that the directors used the Part to unilaterally settle a very large claim which ABCL had made against Concrete Supply and to which the directors had no plausible defence. ABCL submitted that the company cannot use the mechanism provided for in Pt 5.3A to unilaterally settle claims brought against it by invoking the support of its employees, directors and minor creditors to override any opposition by the creditor whose claim is being compromised. It submitted that, in this case, that has been done with the acquiescence of the administrators. This argument, insofar as it invites consideration of matters which include ABCL's debt and the composition of respective voting groups, overlaps with the arguments raised under s 445D of the Corporations Act and s 75-42 of the IPS (Corporations). I do not need to consider it as a

separate argument because I have found that ABCL is entitled to relief under s 445D and s 75-42.

1382 Secondly, ABCL submitted that the DOCA should be terminated on the basis that it is in the public interest that a liquidator be appointed to Concrete Supply because a liquidator would be an officer of the Court with a public responsibility to, as appropriate, investigate breaches of the Corporations Act and conduct falling short of the requisite standards of commercial morality (*Re Allebart Pty Ltd (in liq)* [1971] 1 NSWLR 24; *In re Pantmaenog Timber Co Ltd* [2003] UKHL 49; [2004] 1 AC 158 at [52] per Lord Millett and at [77] per Lord Walker). ABCL submits that the matters which warrant investigation include the "persistent" non-payment of more than $12 million of invoices by Concrete Supply based on nothing more than an alleged "assumption" that it did not have to pay that debt sum; the "curious" manner in which Concrete Supply accounted for the alleged rebate; the various anomalies in Concrete Supply's tax returns and BAS and the purported reduction in the intercompany loan between Concrete Supply and Mantina Earthmovers. These matters are matters which I can and do consider under s 445D and s 75-42. Again, I do not need to consider them as separate arguments because I have found that ABCL is entitled to relief under s 445D and s 75-42.

1383 There are a number of matters which are or may be relevant to the exercise of the discretion under s 445D.

1384 A relevant matter is whether creditors are likely to receive a better return under the DOCA than they are likely to receive in a liquidation. That consideration involves a comparison between a known situation which produces a relatively certain calculation and a prediction or forecast as to what might happen in a liquidation. This can be, depending on the facts, a difficult and uncertain exercise. On an application to terminate a DOCA under s 445D(1) where it is clear that one or more of the paragraphs in s 445D(1) has been established, the Court would not, ordinarily at least, have a trial to finally determine and quantify claims that might arise in a winding up. There was not a great deal said by the parties on the authorities dealing with the onus with respect to the discretion under s 445D(1). There is authority to the effect that once s 445D(1) is engaged and it is clear that the company and its business cannot continue in existence (as is the case here), the onus shifts to the proponents of the DOCA to establish that the DOCA will result in a better return to creditors than a winding up (*TiVo, Inc v Vivo International Corporation Pty Ltd (subject to deed of company arrangement*) [2014] FCA 789 (*TiVo Inc*) at [55] per Gordon J; *JA Pty Ltd v Jonco Holdings Pty Ltd* [2000]

NSWSC 147; (2000) 33 ACSR 691 at [90]). I was referred to *Eco Heat (Vic) Pty Ltd v Syndicate Forty Four Pty Ltd (Subject to Deed of Company Arrangement)* [2018] VSC 156 where the Court said that the onus was on the person seeking the termination of the DOCA to establish that the case came within the section and that the discretion should be exercised to terminate the DOCA. I note that decision but, with respect, it does not contain any detailed reasoning and the authorities relied upon do not seem clearly to support the proposition. Furthermore, it is reasonable to assume that the onus as to discretion does not depend on which paragraph in s 445D(1) is made out, and with respect to some of the later paragraphs in s 445D(1), it is hard to see why if one of those paragraphs was made out, the onus would not be on the person resisting an order to establish that an order terminating the DOCA should not be made. I will come back to the question of onus.

1385 As I have said, ABCL produced as an aide-memoire a reworking of the administrators' table concerning likely dividends under a DOCA and in a liquidation respectively, and injected into the calculations a recovery of $3 million to $5 million for an insolvent trading claim and additional liquidator's costs of recovery proceedings. The reworking showed a higher dividend in a liquidation than under a DOCA.

1386 Mr Heard, with considerable force in some areas, was critical of various assumptions in the reworked table. He said that he would still support a DOCA because of the delay and uncertainty of recovering the projected dividends in a liquidation. The certainty of a slightly lesser dividend under a DOCA as against the uncertainty of a higher dividend in a liquidation and the periods in which payments will be made are certainly legitimate considerations creditors may, and no doubt do, take into account. However, what is significant in what Mr Heard said is that it is not just a matter of determining the likely amount of the dividends.

1387 The administrators submitted that an additional $1.3 million should be included in the DOCA side of the comparison being the Mantina Earthmovers' debt owed to Concrete Supply. That results in a higher dividend being received under the DOCA. I have considerable reservations about including that amount. I do not understand the administrators to have investigated the present capacity of Mantina Earthmovers to repay the full amount in circumstances where at the time of their Second Report to Creditors they considered only 25% to 50% of the debt recoverable by Concrete Supply in liquidation.

1388 The Concrete Supply defendants also relied on uncertainties associated with the claims against the directors (including defences) and the directors' assets. I have referred to the

countervailing considerations identified by ABCL. There are grounds to think that directors' defences would be defeated, particularly in light of my conclusion that the directors did not have a genuine belief that Concrete Supply was entitled to the alleged discount or rebate, and a liquidator may well be able to access substantial assets. Whilst there may be difficulties with claims for breaches of directors' duties (ss 180–182) it is quite impossible for me to say at this stage that they have no prospect of leading to substantial recoveries.

1389 The Concrete Supply defendants also relied on the fact that Mr Morris agreed in the course of cross-examination that he could offer no assurance that the creditors would receive a better return in a liquidation and that it was possible that there was no return even after a lengthy and costly investigation. I have already referred to that evidence.

1390 I have considered all of the evidence and the material, including calculations, advanced by the parties. I do not consider that it is possible to reach a firm conclusion either way as to which course of action produces a better return to creditors. If the defendants bear the onus on the matter, then they have failed to show that the DOCA should not be terminated. However, I propose to consider the matter on the basis that a number of factors are relevant to the exercise of the discretion and that it is a matter of balancing them to determine the appropriate exercise of the discretion.

1391 A relevant matter in the exercise of the discretion is the support the DOCA received from the creditors of the company. If it was overwhelmingly supported by the creditors, then that might well be a consideration in determining whether the DOCA should be set aside on the application of a dissatisfied minority creditor who has managed to engage one of the provisions in s 445D(1). That is not this case. The majority creditor in value with an interest of over 90% opposes the DOCA. The resolution was passed on a casting vote of Mr Cantone which is itself challenged. That is a significant consideration. I think that it is appropriate to consider the evidence of the trade creditors and the employees who voted in favour of the DOCA in this context. The desire to retain one's employment, to maintain an existing and future commercial relationship, to avoid the uncertainties (based on experience) of receiving a dividend in a liquidation and a desire to support a family business are all matters creditors are perfectly entitled to take into account. I am unable to see how the evidence can be taken much further than that when, on the other side, creditors exceeding 90% in value voted against the company entering into the DOCA and it was one of the administrators, acting as chairperson, who resolved the deadlock.

1392 A relevant matter in the exercise of the discretion is the extent of the departure which has engaged the provisions of s 445D(1). In my opinion, in this case, the departure was significant. There is no analysis in the Second Report to Creditors and very little analysis conducted by the administrators of the alleged discount or rebate and the discount or rebate issues and those matters are linked to fundamental aspects of a company's operations and the administration, being the accuracy of the company's books and records, whether, in fact, the company was insolvent, if it was insolvent, the time at which it became insolvent, and whether there are claims against the directors in relation to the company's solvency or otherwise and whether any contraventions or offences have been committed under the Corporations Act and income tax legislation.

1393 A relevant consideration in the exercise of the discretion is the public interest and within that concept considerations of commercial morality. This is an important matter in the context of this case. Justice Gordon addressed this matter in *TiVo Inc.* Although lengthy, it is helpful, with respect, to set out her Honour's comments in full (at [60]–[62]):

> 60 The Court's power under s 445D(1) is discretionary. There is some authority that the "primary consideration" is the interest of creditors: *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510 at [272]. What is clear is that the discretion is to be exercised having regard not only to the interests of creditors as a whole but also the public interest: *Emanuele v Australian Securities Commission* (1995) 63 FCR 54 at 69-70; *Deputy Commissioner of Taxation v Portinex Pty Ltd (subject to deed of company arrangement); Deputy Commissioner of Taxation v Silindale Pty Ltd (subject to deed of company arrangement); Deputy Commissioner of Taxation v Dalvale Pty Ltd (subject to deed of company arrangement)* (2000) 34 ACSR 391 at [105] and *Bidald* at [287]. "Public interest" includes, in this context, whether the continuation of the DOCA is conducive or detrimental to commercial morality and to the interests of the public at large: *Emanuele* at 69 citing *Re Data Homes Pty Ltd (in liq) and the Companies Act* [1972] 2 NSWLR 22 at 26. The Court has a duty with regard to the commercial morality of the country. That duty is longstanding and exists in relation to schemes of arrangement (*Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 at 229-230 and 239 and *Re Mascot Home Furnishers Pty Ltd (in liq); Re Spaceline Industries (Australia) Pty Ltd (in liq)* [1970] VR 593 at 596), the bankruptcy of an individual (see *Re Telescriptor Syndicate Lt*d [1903] 2 Ch 174 at 180-1, Re Flatau [1893] 2 QB 219 at 223 and *Re Zero Population Growth (Formerly David Roy Hughes)* (unreported, Federal Court of Australia, Burchett J, 30 May 1990) at pg 4), the winding up of a company (*Re Denistone Real Estate Pty Ltd and Companies Act* [1970] 2 NSWR 327 at 329; *Re Data Homes* at 26 and Keay AR, *McPherson's Law of Company Liquidation*, (3rd ed, Sweet & Maxwell, 2013) [17-007]) and deeds of company administration (*Emanuele* at 69).
>
> 61 Two statements in *Re Hester* (1889) 22 QBD 632 are worth restating. At 639 Lord Esher MR stated:

> [The Court] will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large ...

And at 641 Lord Justice Fry stated:

> It is an idle notion that the Court is bound by the consents of the creditors. The Court has far larger and more important duties to perform than merely to consider whether the creditors have consented to the rescinding of the order. We are bound in the exercise of our discretion in such a matter, and I think I might almost say in all matters under this Act, to take a wider view. We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country.

62 In *Re Flatau* at 222-223, Lord Esher MR referred to his judgment in *Re Hester* in these terms:

> "The cases are clear that the Court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to" (that is, all the creditors) "is for the benefit of the creditors as a whole," that is, for their benefit, although they have consented. The Court will protect them against their own carelessness and folly, because we know perfectly well that over and over again the creditors of a debtor are quite willing to write off their debts as bad, to write off the whole thing, and let the debtor begin again, and incur fresh debts. …

Although the context was different, the statements by the Master of the Rolls and Lord Justice Fry are equally applicable to the exercise of the discretion under s 445D(1).

1394 In *Bidald*, Campbell J identified four matters relevant to the public interest and commercial morality as follows: (1) the public policy in not allowing an insolvent company to continue to trade and in such a case, the onus may be on the proponents of the DOCA to establish that the company will be able to trade profitably in the future; (2) the reasons the company failed and may indeed have been insolvent for some time; (3) the public interest in the thorough examination of the directors' conduct; and (4) the public interest in allowing bona fide claims for insolvent trading or breach of directors' duties to be pursued.

1395 I have found that the directors did not have a genuine belief that Concrete Supply was entitled to a discount or rebate. Concrete Supply may have been insolvent for a reasonably substantial period of time before the date of administration. The alleged discount or rebate had features which were unusual (i.e., no written or oral agreement), but the implementation of the alleged discount or rebate had features which were even more unusual, such as not being claimed at the time, but rather later in time, sometimes much later in time, and being

claimed at times and in amounts which varied and were at the discretion of the purchaser. It is in the public interest and in the interests of commercial morality that these matters, claims against the directors and contraventions of the Corporations Act and income tax legislation, be investigated by an appropriate person and that person is a liquidator.

1396 In my respectful opinion, the matters relevant to the discretion firmly favour an order under s 445(1) terminating the DOCA.

1397 As I understood it, the Concrete Supply defendants contend that I should have regard to the effect liquidation will have on the employment of existing employees of Concrete Supply. I am not sure the legislation empowers me to take this matter into account, but even if it does, it cannot outweigh the clear case otherwise established.

1398 The DOCA should be terminated under s 445D(1) of the Corporations Act.

The Casting Vote Exercised by Mr Cantone

1399 The principles which govern the Court's review of Mr Cantone's exercise of the casting vote are set out above.

1400 The minutes of the second meeting of creditors record the matters to which Mr Cantone had regard when exercising his casting vote in favour of the motion that the company execute the proposed DOCA. The ARITA Code provides that if the casting vote is exercised, details and the reasons for how it was cast should be included in the minutes (cl 24.9). The matters which the minutes of the meeting record are set out above (at [797]).

1401 The matters which Mr Cantone said in his affidavit he considered when deciding to exercise his casting vote are also set out above (at [904]). They are not exactly the same and in two respects the differences are material. I will identify the two material differences as I proceed through my consideration of the relevant matters.

1402 The first two matters may be considered together. They are that a vote in favour of the proposed DOCA was expected to result in a higher return to creditors under the proposed DOCA compared to a liquidation of Concrete Supply, and a vote in favour of the proposed DOCA was consistent with the recommendation made by the administrators in the Second Report to Creditors.

1403 The first reason focuses on the expected return to creditors under the alternative scenarios of a DOCA and of a liquidation. This is essentially a reference to the dividend table in the

Second Report to Creditors and a comparison between the range of 24.31 to 32.12 cents in the dollar under a DOCA, and a range of 10.29 to 18.29 cents in the dollar in a liquidation. The return to creditors is a legitimate and relevant consideration. However, as I have held, this analysis is flawed as it did not have a sufficient basis, and if it did not have a sufficient basis because the administrators' investigations were inadequate in substantial respects (as I have found), then the administrators cannot rely on the analysis. The administrators cannot, in effect, rely on the inadequacy of their own investigations. The second reason of consistency with a recommendation that the company execute the proposed DOCA requires a consideration of the reasons the administrators made the recommendation they did. Consistency is not in itself a reason. The reasons the administrators gave for their recommendation in the Second Report to Creditors are as follows:

(1) the dividend to unsecured creditors will be higher under the proposed DOCA than under a liquidation; and

(2) the resolution of the company's solvency and the opportunity for the continued operation of the company's business, the ongoing employment of staff and a much faster return to creditors.

1404 The matter in para (1) is the same as the first reason. The matter in para (2) is picked up in the further matters identified in the minutes. I will deal with them in that context.

1405 The third reason identified in the minutes is said to be the general view of creditors of Concrete Supply being that 31 had voted in favour of accepting the DOCA and that only 8 had voted against. A qualification is then added, "although the creditors voting against were a majority in terms of dollar value". With respect, I consider that this reason is erroneous. It involves giving priority to the numerical majority in value. It fails to take into account the fact that, although there is no presumption or rule that the wishes of the majority in value will prevail, the views of the majority in value are a factor to be taken into account and where the majority in value is overwhelming as it is in this case (93.65%), then it is an important factor to be taken into account. There is no recognition in this reason by Mr Cantone of the significance of the overwhelming majority in value being opposed to the proposed DOCA.

1406 What might be seen as the equivalent reasons in Mr Cantone's affidavit are that the majority in number (being 31 to 8) voted in favour of accepting the DOCA and whilst the vast majority in value had opposed, most of that value was represented by ABCL's debt. Those

reasons suffer from a similar flaw and an additional flaw that there would be no reason to discount the majority in value because most of the value resided in one creditor.

1407 The fourth reason identified in the minutes is that the ATO voted in favour of the DOCA and it was a major creditor and is a regular attendee at creditors' meetings. Mr Cantone did not explain in his evidence the significance of the ATO being a regular attendee at creditors' meetings. The decision was Mr Cantone's decision, not one to be made by reference to the views of an experienced creditor. In any event, this reason is flawed because it may be reasonably inferred that the ATO relied on the contents of the Second Report to Creditors and that report was, for the reasons already given, flawed. There is a further consideration in the case of the ATO. Even considering the matter at a very basic level, it ought to have occurred to the administrators that there were likely to be GST and income tax issues if there was no discount or rebate and, because of Concrete Supply's system of accounting for the alleged discount or rebate some considerable time after the purchase (often in the following financial year) there were likely to be issues, even if there was an alleged discount or rebate. Those issues were likely to be of interest to the ATO.

1408 There is a different slant on this reason in Mr Cantone's affidavit. Maxi-Tankers is also identified as the next major creditor, the ATO's regular attendance at creditors' meetings is not relied on and it is the attendance of the ATO at this meeting which is said to be significant. As to this reason, I am disposed to think that I should rely on the way it is expressed in the minutes. For completeness, and should it be appropriate to rely on the way the reason is expressed in Mr Cantone's affidavit, I should say I would reject one of ABCL's arguments with respect to Maxi-Tankers. It was suggested that its vote should be discounted because it was always going to be paid in full. It is by no means clear that Mr Cantone did know that and, in any event, even if he knew that Maxi-Tankers was likely to be paid in full, I was not referred to any principle which was to the effect that, in those circumstances, the value or weight to be attached to its vote should in some way be reduced or minimised.

1409 The fifth reason identified in the minutes of a faster payment of a dividend under a DOCA than in a liquidation is a legitimate and relevant consideration. It is illuminating to consider how Mr Cantone put the broad equivalent of this reason in his affidavit:

> 126.6 creditors would receive a faster dividend under the DOCA, while a liquidation was likely to be lengthy (I estimate at least 3 years) and involve protracted litigation prior to any dividend being paid;

1410 I note the estimate in the dividend table in the Second Report to Creditors for the period of a liquidation is 1.5 to 2 years and there is no possible litigation referred to in the Second Report to Creditors that would arise in a liquidation, but not under a DOCA. In other words, the ABCL claim adjudication arises under both outcomes.

1411 The final reason identified in the minutes is that a DOCA would allow the ongoing trading of Concrete Supply, which includes the retention of approximately 30 staff and ongoing business for suppliers who were also creditors. I would not classify this as an irrelevant consideration, but, in terms of weight, it needs to be steadily borne in mind that the administrators' opinion is to be directed to the course of action which "would be in the creditors' interests" (see, for example, s 75-225(3) of the IPS (Corporations)).

1412 In conclusion, I consider that Mr Cantone's exercise of the casting vote was flawed by the consequences of an inadequate investigation, a report which was deficient in material respects, and by an error in his approach to the significance of the fact that an overwhelming majority in value opposed the company entering into the proposed DOCA.

1413 As I have said in the discussion of the relevant principles, considerations of the public interest and commercial reality may also be relevant to a consideration of whether the resolution should be set aside. I would balance those matters and the countervailing considerations in the same way as I have in considering the exercise of the discretion under s 445D.

1414 In view of these conclusions, there is no need for me to deal with other arguments advanced by ABCL. Those arguments related, in one way or another, to the characteristics or circumstances of those creditors who voted in favour of the resolution that the company enter into the proposed DOCA. It was not made clear in submissions whether ABCL submitted that the matters it identified were relevant considerations which Mr Cantone failed to take into account or whether they were matters relevant to the exercise of the discretion whether or not to set aside the resolution. Nevertheless, I should identify the arguments and the reasons I am, in the main, disposed to reject them.

1415 First, ABCL submits I should take into account that 11 of the 31 creditors who voted in favour of the proposed DOCA are continuing employees or directors of Concrete Supply who, if the company enters into the DOCA, will not have their debts compromised by the DOCA. As an assertion of fact, that appears to be correct (DOCA cl 9.2 (continuing employees) and cl 9.3 (directors)), but it is not clear where the submission goes from there.

These persons take the risk that the company will be able to pay their entitlements in the future.

1416 Secondly, ABCL submits that I should take into account the facts that some of the creditors who gave evidence: (1) were unaware of the meeting; or (2) had not read the Second Report to Creditors and, in exercising their vote, only had in mind keeping their jobs which they would do under a DOCA; and (3) admitted that they might have voted differently had they known of potential contraventions and offences by Concrete Supply and its directors. I do not think it appropriate for the Court to embark on the exercise this submission seems to entail. Practically, it would be very difficult to do so. In any event, the critical point is that the creditors were properly informed. If one or more of them chooses to focus on only one consideration, then that is a matter for them.

1417 Finally, ABCL submits that I should take into account the fact that directors and officers who stood to receive collateral benefits of the company entering into a DOCA voted in favour of the company entering into the DOCA. I have said that I reject the submission insofar as it refers to officers. That leaves one director, Jason, who voted in favour of the resolution. Even if I take into account his interest in the DOCA proceeding, as one creditor that would not have a material bearing on the analysis.

1418 Unless there is no need for an order, or to make an order would be inconsistent with the order I will make under s 445D(1), an order should be made setting aside the resolution of 19 December 2017 that the company enter into the DOCA.

Conclusions

1419 An order should be made under s 445D terminating the DOCA. In addition, and if necessary, an order should be made setting aside the resolution passed on the exercise of Mr Cantone's casting vote on 19 December 2017.

CONCLUSIONS

1420 For these reasons, I have reached the following conclusions:

(1) Concrete Supply is indebted to ABCL in the amount of $12,457,472.22.

(2) Concrete Supply failed to keep written financial records which complied with s 286 of the Corporations Act.

(3) The claim against the Concrete Supply defendants for misleading or deceptive conduct contrary to s 18 of the Australian Consumer Law must be dismissed.

(4) The claim against the Concrete Supply defendants for breach of trust or fiduciary duty must be dismissed.

(5) The Deed of Company Arrangement executed on 21 December 2017 must be terminated pursuant to s 445D of the Corporations Act.

(6) The resolution passed at the second meeting of creditors of Concrete Supply held on 19 December 2017 that Concrete Supply enter into the proposed Deed of Company Arrangement should be set aside.

1421 I will give ABCL a short period to bring in draft minutes of order containing the orders it seeks in light of these reasons.

I certify that the preceding one thousand four hundred and twenty-onel (1421) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 12 November 2019

APPENDIX A

1. **Ruling with respect to the Reply and the Rejoinder**

Mr Darryl Hughes swore two affidavits in the proceeding. The Concrete Supply defendants objected to certain paragraphs in Mr Hughes' affidavits. The principal ground of objection related to Mr Hughes' first affidavit and it was that evidence given by Mr Hughes of an internal fraud within ABCL by Ms Glenda Burgess had not been pleaded by ABCL. I heard argument on this objection and I ruled that ABCL's case, with respect to Ms Burgess, needed to be pleaded by ABCL. I indicated at the time of my ruling that there appeared to be good grounds for allowing ABCL to amend, even at a late stage, in light of the affidavits it had filed. ABCL's affidavits suggesting an internal fraud by Ms Burgess had been filed and served nearly 12 months before the commencement of the trial. The company and its directors were clearly on notice of the case that ABCL advanced. I subsequently granted ABCL leave to file a Reply.

2. **Ruling with respect to Mr Lemmon's evidence concerning the WACC**

I heard evidence on the issue from Mr Lemmon on the voir dire. Mr Lemmon explained his calculations. He described what he considered to be fixed costs and the costs of capital and the costs of a range of overheads. He considered that fixed costs will be primarily the costs of labour maintenance and reliability. Reliability costs are the costs associated with performing various shutdowns and ongoing repairs and maintenance to various pieces of equipment. The primary element of variable costs are the costs of energy. Corporate overheads are the costs of corporate functions, such as human resources, finance, health, safety and environmental professionals. They are costs associated with the overall running of the business leading to the production of cement, but are not directly related to the actual production of the product. Mr Lemmon said that as far as the costs of capital were concerned, the nature of the cement production business is that it is a capital intensive business and there is a significant amount of capital that is associated with establishing equipment and maintaining that and also for working capital for the ongoing operation. He said the following:

> The cost of that capital which is a function of debt and equity funding is required to understand the cost of providing that capital to the business.

He explained how he arrived at his original percentage figure of 10%. It is a "hurdle" cost used in the course of decision-making and he has since learned that the figure used by ABCL is lower. It seems to me that, in those circumstances, it would not be correct for the Court to receive and act on this evidence when it is not the figure used by ABCL.

After he had prepared his calculations based on 10%, Mr Lemmon made some further inquiries and spoke to Mr Hughes. He was provided with a particular document which showed a lower figure for the WACC. The document was from an investment house called Blackpeak Capital and Mr Lemmon said that his understanding was that it is considered a reliable tool. He said that the lower percentage figure referred to in the Blackpeak Capital report was the figure actually used by ABCL. Mr Lemmon also said that what had not been included in the figures that he had put forward was an appropriate proportion of ABCL's share of ABL's corporate overhead nationally (corporate finance, corporate legal, internal and external audit, Australian Stock Exchange costs and the like). That was not done because he was not in a position to provide accurate numbers at that point in time. He described the functions in more detail in his evidence. Mr Lemmon also described how he calculated the figures in the document which was marked "Document B".

Mr Lemmon agreed that his Document B showed that ABCL made a profit from its trading with Concrete Supply even at the discounted price, save and except for the 2016 and 2017 years. Counsel for the Concrete Supply defendants put to Mr Lemmon that if the matter was looked at over the entire period from 2012 to 2017, Adelaide Brighton made a profit in the order of $265,000. That, in fact, is correct. Mr Lemmon agreed in cross-examination that he received the Blackpeak Capital document from Mr Hughes. He agreed that he is not an expert in determining the WACC, although he did say that he had economic training and a broad and good understanding of the various components and of the concept of the WACC and how it was used. Mr Lemmon said that he did not know what was meant by the words "(illustrative only)" in the Blackpeak Capital document. Mr Lemmon agreed that he had not used a weighted average cost of capital figure of the percentage he now uses in any source document or report prepared by his division.

To recapitulate the major points, they are as follows:

(1) I would not receive the evidence of the figure of 10% for the cost of capital for the reasons I have given;

(2) Mr Lemmon was not aware of the lower figure in the Blackpeak Capital document. He was told that by Mr Hughes who at the time Mr Lemmon was giving his evidence had completed his evidence;

(3) Although, as one would expect, Mr Lemmon had some knowledge of the concept of the cost of capital as a cost item, the opinion or statement as to the appropriate figure in this case was not his opinion or statement; and

(4) The Blackpeak Capital document did not contain a reasoned analysis of the subject such that the Court could be satisfied of the soundness of the opinion. The document itself stated that reliance had been placed on, inter alia, independent experts' reports and assessment by analysts. It refers to some of the models in relation to capital asset pricing models as illustrative only.

I could not see a basis to receive the document and, even if there was, I reached the firm view that it should be excluded under s 135 of the Evidence Act because its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to the Concrete Supply defendants, or misleading or confusing..

3. **The Telephone Conversation between Mr Lemmon and Mr D'Alessandro**

Counsel for ABCL submitted that the evidence was admissible. His arguments were as follows. First, s 131(1) of the Evidence Act preserves the difference between statements of fact and statements made in the course of and for the purpose of negotiation. I accept that submission. Having regard to Mr Lemmon's evidence, I do not consider that Mr D'Alessandro's statements were made in connection with settlement negotiations. Secondly, counsel submitted that s 131(1) does not apply because the exception in s 131(2)(c) applies. Section 131(2)(c) provides that subsection (1) does not apply if the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced. In that connection, counsel referred to the affidavit of Mr D'Alessandro which had been filed by the respondents with a view to Mr D'Alessandro giving evidence at the trial. In particular, counsel referred to [97] and [98] wherein Mr D'Alessandro referred to raising the unusual nature of the rebate arrangement with the directors and the need for a "confidential letter". He also referred to Rino and Jason's response to the effect that Adelaide Brighton loved

Concrete Supply. I also accept that submission. In the circumstances, the evidence from Mr Lemmon was admissible.

4. **The Order in which the Defence Cases are Presented**

There was a dispute between the parties as to which of the defendants should present their case first. ABCL submitted that as the first defendant on the Court record, Concrete Supply should present its case first. The administrators and the Concrete Supply defendants submitted that the administrators should present their case first followed by the Concrete Supply defendants because the reality was if Concrete Supply went first, then that would also involve the directors who are the third, fourth and fifth defendants, going first. The submission was that serious allegations are made against the directors and they should not be required to go first.

I ruled in favour of the Concrete Supply defendants. I do not have any doubt that if Concrete Supply was ordered to go first, then that would also entail the directors going first. The directors faced personal claims of misleading or deceptive conduct and breach of trust and fiduciary duty and, although I did not consider the issue to be one of great significance overall, I concluded that they should have the benefit of hearing evidence that might be used against them before responding.

5. **Application to Amend Statement of Claim**

Approximately half way into the trial, ABCL applied to amend its Statement of Claim to add a further allegation to allegations of inadequate investigations by the administrators. In para 44, ABCL set out acts that it claimed any reasonable insolvency practitioner would carry out upon being appointed administrator of Concrete Supply. Those acts included whether, on the assumption that Concrete Supply was not entitled to the alleged discount or rebate, investigating whether the company had overpaid GST and income tax. The allegation which ABCL sought to add was on the opposite assumption that Concrete supply was entitled to the alleged discount or rebate, whether Concrete Supply had underpaid GST and income tax. In other words, the allegation ABCL sought to add was that any reasonable insolvency practitioner appointed the administrator of Concrete Supply would have undertaken an analysis on the assumption that Concrete Supply was entitled to the alleged discount or rebate of whether, in the circumstances, Concrete Supply had underpaid GST and income tax.

The background to the application to amend was as follows. In his second report, Mr Morris had carried out such an analysis and he reached the conclusion that on the

relevant assumption that Concrete Supply had not accounted for GST and income tax and he provided figures in relation to the underpayments (at [227] above).

In his second report, Mr Heard responded to this section of Mr Morris' report by expressing the opinion that an administrator would not be required to undertake such an analysis and he provided reasons for that opinion.

I ruled that leave to amend should be granted.

The natural reflex of what a reasonable insolvency practitioner would have done on the assumption that Concrete Supply was not entitled to the alleged discount or rebate is what investigations such a practitioner would have done on the opposite assumption and with knowledge, as the administrators had in this case, of Concrete Supply's system of accounting. The Concrete Supply defendants had the opportunity to respond to this case and had done so in Mr Heard's second report.

SCHEDULE OF PARTIES

Defendants

Fourth Defendant:	PELEGRINO OBBIETTIVO
Fifth Defendant:	GENESIO OBBIETTIVO
Sixth Defendant:	TINA OBBIETTIVO