FEDERAL COURT OF AUSTRALIA

Albarran (Liquidator) v Kimberly Pearl Tours Pty Ltd, in the matter of Kimberley Pearl Tours Pty Ltd [2026] FCA 877

File numbers:	NSD 643 of 2026 NSD 662 of 2026 NSD 685 of 2026
Judgment of:	**FEUTRILL J**
Date of judgment:	8 July 2026
Catchwords:	**BANKING AND FINANCIAL INSTITUTIONS** – loan agreements and security instruments – financial services – application for interlocutory injunction to restrain exercise of power of sale – financial services – alleged statutory unconscionable conduct – system of conduct or pattern of behaviour – terms of contract – manner in which and extent to which contract is carried out – asset-based lending – inequality of bargaining power – standard form contracts – unfair terms – penalty interest – conditions not reasonably necessary for the protection of legitimate interests – undue influence or pressure – unfair tactics – unreasonable failure to disclose intended conduct and risks arising from intended conduct – bad faith – improper purpose **BANKRUPTCY AND INSOLVENCY** – receivers and managers – application for interlocutory injunction to restrain exercise of power of sale – alleged statutory unconscionable conduct – alleged breach of general law and statutory duties – alleged appointment in bad faith and for improper purpose – undue influence or pressure – unfair tactics – threat to wilfully sacrifice interests of grantor – unreasonable remuneration and expenses – bad faith – improper purpose – misuse of position **PRACTICE AND PROCEDURE** – interlocutory injunctions – security instruments – application to restrain exercise of power of sale – alleged unenforceability of security instrument due to statutory unconscionable conduct – consideration of applicable principles – serious question to be tried and balance of convenience – applicability of the *Inglis* rule and exceptions – strength of statutory unconscionability claim – risk of irreparable damage if refused – predetermination of final injunctive relief if refused – risk of hardship if granted – inadequacy of undertaking as to damages – necessity to make payment

into court if granted – risk of injustice of grant or refusal

CORPORATIONS – derivative action – receivers and managers appointed – administrators appointed - application by director and member to bring and defend proceedings in name of and on behalf of company – inherent or implied power of the Court – consideration of applicable principles – legal costs and expenses of proceeding – risk of adverse costs order against company – conditions necessary to mitigate risks of diminishment of property of the company available to secured creditor, receivers, unsecured creditors and administrators

BANKRUPTCY AND INSOLVENCY – administrators – application to restrain voluntary administrators from performing functions – application to extend period for convening and holding meetings of creditors – adjournment of second meeting of creditors – alleged invalid appointment of administrators – bad faith – improper purpose – unenforceability of security interest – serious question to be tried and balance of convenience – consideration of applicable principles for declaring invalid and terminating or validating appointments of administrators – consideration of objects of Pt 5.3A of the *Corporations Act 2001* (Cth) – public interest in compliance with statutory requirements – public interest in preventing insolvent trading – public interest in investigating potential claims against director – public interest in potential solvency of company

PRACTICE AND PROCEDURE – suppression orders – confidential and commercially sensitive information – commercial harm if disclosed publicly – public interest in principle of open justice not absolute – suppression order necessary to protect the proper administration of justice

Legislation:

Australian Securities and Investments Commission Act 2001 (Cth) ss 12BF, 12BG, 12BH, 12CB, 12CC, 12GD, 12GM

Corporations Act 2001 (Cth) Pt 2F.1A, Pt 5.3A, Div 2, Div 3, Div 4, Div 5, Div 6, Div 7, Div 8, Div 9, ss 180, 181, 182, 198G, 236, 237, 420A, 425, 435A, 435C, 436A, 436B, 436C, 438A, 439A, 439B, 439C, 440B, 440D, 440F, 440G, 441A, 441B, 443A, 443B, 443BA, 443C, 443D, 443E, 443F, 447A, 447C, 451E, 451G, 482, 1322, 1324

Evidence Act 1995 (Cth) s 76, s 79

Federal Court of Australia Act 1976 (Cth) ss 23, 37AF, 37AG, 37AH, 37AJ, 53A

Insolvency Practice Schedule (Corporations), being Sch 2

to the *Corporations Act 2001* (Cth) s 90-10 and s 90-15

Federal Court Rules 2011 (Cth) Pt 28, Div 28.3

Insolvency Practice Rules (Corporations) 2016 (Cth) r 75-140, 75-225

Conveyancing Act 1919 (NSW) ss 115, 115A

Real Property Act 1900 (NSW) ss 57-58A, 60

Cases cited:

Adsett v Berlouis (1992) 37 FCR 201

Aliprandi v Griffith Vintners Pty Ltd (in liq) (1991) 6 ACSR 250

Andrew Garrett Wine Resorts Pty Ltd v National Australia Bank Ltd [2004] SASC 60; 206 ALR 69

Andrews v Australia and New Zealand Banking Group Ltd [2012] HCA 30; 247 CLR 205

Angelatos v National Australia Bank (1994) 51 FCR 574

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; 208 CLR 199

Australian Broadcasting Corporation v O'Neill [2006] HCA 46; 227 CLR 57

Australian Competition and Consumer Commission v Cement Australia Pty Ltd (No 2) [2010] FCA 1082

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40; 285 FCR 133

Australian Innovation Ltd v Dean-Willcocks [2002] NSWSC 24; 166 FLR 360

Australian Securities and Investments Commission v Financial Circle Pty Ltd [2018] FCA 2; 123 ACSR 624

Australian Securities and Investments Commission v Kobelt [2019] HCA 18; 267 CLR 1

Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd [2002] NSWSC 741; 42 ACSR 605

Australian Securities and Investments Commission v Parkes (2001) 38 ACSR 355

Australian Securities and Investments Commission v Pegasus Leveraged Options Pty Ltd (2002) 41 ACSR 561

Australian Securities and Investments Commission v Sweeney [2001] NSWSC 114

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

Bank of New Zealand v Essington Developments Pty Ltd

(1991) 5 ACSR 86

Bayblu Holdings Pty Ltd v Capital Finance Australia Ltd [2011] NSWCA 39; 279 ALR 166

Beecham Group Ltd v Bristol Laboratories Pty Ltd [1968] HCA 1; 118 CLR 618

Blacktown City Council v Macarthur Telecommunications Pty Ltd [2003] NSWSC 883; 47 ACSR 391

Blakeney v Blakeney [2016] WASCA 76; 113 ACSR 398

Blundell v Associated Securities (1971) 19 FLR 17

Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd [2006] FCA 1352; 236 ALR 720

Bridgewater v Leahy [1998] HCA 66; 194 CLR 457

Bristol-Myers Squibb Australia Pty Ltd v Astra Pharmaceuticals Pty Ltd [1999] FCA 256; 45 IPR 144

Bullock v The Federated Furnishing Trades Society of Australasia (1985) 5 FCR 464

Carey v Korda [2012] WASCA 228; 45 WAR 181

Carpenter v Pioneer Park Pty Ltd [2008] NSWSC 551; 71 NSWLR 577

Cawthorn v Keira Constructions Pty Ltd (1994) 33 NSWLR 607

Chahwan v Euphoric Pty Ltd (t/as Clay & Michel) [2008] NSWCA 52; 245 ALR 780

Clairview Developments Pty Ltd v Law Mortgages Gold Coast Pty Ltd [2007] QCA 141; 2 Qd R 501

Conlan as liquidator of Rowena Nominees Pty Ltd (receivers and managers appointed) (in liq) v Adams [2008] WASCA 61; 65 ACSR 521

Country Care Group Pty Ltd v Director of Public Prosecutions (Cth) (No 2) [2020] FCAFC 44; 275 FCR 377

Dalton v Naegeli [2024] NSWCA 51; 385 FLR 449

Darin Re Palamedia Limited [2010] NSWSC 451

David Securities Pty Ltd v Commonwealth Bank of Australia (1990) 23 FCR 1

Dean-Willcocks v Powerline GES [2002] NSWSC 40; 40 ACSR 516

Deangrove Pty Ltd (Receivers and Managers Appointed) v Commonwealth Bank of Australia [2001] FCA 173; 108 FCR 77

Downsview Nominees Ltd v First City Corporation Ltd [1993] AC 295

Dunlop Pneumatic Tyre Company Ltd v New Garage and

Motor Company Ltd [1915] AC 79

El-Saafin v Franek (No 2) [2018] VSC 683

Eltran Pty Limited v Westpac Banking Corporation (1988) 32 FCR 195

Eng Mee Yong v Letchumanan s/o Velayutham [1980] AC 331

ENT Pty Ltd v McVeigh (1996) 6 Tas R 202

Ernst & Young (Reg) v Tynski Pty Ltd [2003] FCAFC 233; 47 ACSR 433

Expo International Pty Ltd v Chant [1979] 2 NSWLR 820

Films Rover International Ltd v Cannon Film Sales Ltd [1986] 3 All ER 772

Forsyth v Blundell; Associated Securities Ltd v Blundell [1973] HCA 20; 129 CLR 477

Glandore Pty Ltd v Elders Finance & Investment Co Ltd (1984) 4 FCR 130

Harris v Western Australian Exim Corporation (1994) 56 FCR 1

Harvey v McWatters (1948) 49 SR (NSW) 173

Huguenin v Baseley (1807) 14 Ves Jun 273; 33 ER 526

In the matter of Cyprus Community of NSW Ltd [2024] NSWSC 1629

Inglis v Commonwealth Trading Bank of Australia [1972] HCA 74; 126 CLR 161

Kazar v Duus (1998) 88 FCR 218

Kellas-Sharpe v PSAL Ltd [2012] QCA 371; 2 Qd R 233

Kowalczuk v Accom Finance Pty Ltd [2008] NSWCA 343; 77 NSWLR 205

Legione v Hateley [1983] HCA 11; 152 CLR 406

Leitch v Natwest Australia Bank Ltd (Unreported, Federal Court of Australia, 9 March 1995, Kiefel J)

M & J Pty Ltd v Australian & New Zealand Banking Group Ltd (Unreported, Federal Court of Australia, 27 March 1988, Heerey J)

Mainbanner Pty Ltd v Dadincroft Pty Ltd (1988) ATPR 40-896

McMaster v Eznut Pty Ltd [2006] WASC 109; 58 ACSR 199

Merryweather, in the matter of HMG Westhill Pty Ltd (Administrators Appointed) [2009] FCA 1068

Milton Park Country Club Pty Ltd v Yasuda Trust Australia

Ltd (Unreported, NSWSC, 8 March 1991)

Motorola Solutions Inc v Hytera Communications Corporation Ltd (No 2) [2018] FCA 17

O'Dea v Allstates Leasing System (WA) Pty Ltd [1983] HCA 3; 152 CLR 359

Paciocco v Australian and New Zealand Banking Group Ltd [2016] HCA 28; 258 CLR 525

Panasystems Pty Ltd v Voodoo Tech Pty Ltd [2003] FCA 428

Perpetual Trustee Co Ltd v Khoshaba [2006] NSWCA 41; 14 BPR 26,639

Pendlebury v Colonial Mutual Life Assurance Society Ltd [1912] HCA 9; 13 CLR 676

Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission [2024] HCA 27; 281 CLR 338

Rawcliffe v Custom Credit Corporation (1994) ATPR 41,922

Re Banksia Securities (in liq) (receivers & managers appointed) [2017] NSWSC 540; 35 ACLC 17-020

Re Batemans Bay Holdings Pty Limited (Unreported, Federal Court of Australia, 5 September 1986, Burchett J)

Re Beechworth Land Estates Pty Ltd (No 3) [2015] NSWSC 336; 106 ACSR 495

Re CGH Engineering Pty Ltd [2014] NSWSC 1132; 104 ACSR 245

Re Cyprus Community of NSW Ltd [2024] NSWSC 1629

Re F & A Henry (Gowie) Pty Ltd (deregistered) [2012] NSWSC 1061

Re Keneally [2015] NSWSC 937; 107 ACSR 172

Re Pasdonnay Pty Ltd [2005] FCA 335

Re Pine Forests of Australia (Canberra) Pty Ltd [2010] NSWSC 1127

Samsung Electronics Co Ltd v Apple Inc [2011] FCAFC 156; 217 FCR 238

Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr [2017] NSWCA 38; 93 NSWLR 459

Shercliff v Engadine Acceptance Corporation Pty Ltd [1978] 1 NSWLR 729

Sino-Resource Imp & Exp Co Ltd v Oakland Investment Group Ltd (No 2) [2018] QSC 133

State Bank of New South Wales v Chia [2000] NSWSC

552; 50 NSWLR 587

Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science (No 2) [2018] FCAFC 47

St Leonards Property Pty Ltd v Ambridge Investments Pty Ltd [2004] NSWSC 851; 210 ALR 265

Stubbings v Jams 2 Pty Ltd [2022] HCA 6; 276 CLR 1

Templeton v Australian Securities and Investments Commission [2015] FCAFC 137; 108 ACSR 545

Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd (1988) 20 FCR 540

Venetian Nominees Pty Ltd v Conlan (1998) 20 WAR 96

Welldog Pty Ltd v Prox Pty Ltd [2017] WASCA 62

Wilson v Ferrier (Unreported, New South Wales Supreme Court, 26 February 1985, Needham J)

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	248
Date of hearing:	29 May 2026
Counsel for the Plaintiffs in NSD643/2026; the First to Fifth Respondents in NSD662/2026; and the Second Defendant in NSD685/2026:	Mr B Le Plastrier with Mr A Chowdhury
Solicitor for the Plaintiffs in NSD643/2026; the First to Fifth Respondents in NSD662/2026; and the Second Defendant in NSD685/2026:	Hopgood Ganim
Counsel for the Second to Fourth Defendants in NSD643/2026; the Applicants in NSD662/2026; and the Plaintiff in	Mr Z Mason

NSD685/2026:

Solicitor for the Second to Fourth Defendants in NSD643/2026; the Applicants in NSD662/2026; and the Plaintiff in NSD685/2026:	Adero Law
Solicitor for the Fifth Defendant in NSD643/2026:	Mr DL McClelland of Platinum Lawyers
Counsel for the Sixth and Seventh Respondents in NSD662/2026:	Mr R Cowen
Solicitor for the Sixth and Seventh Respondents in NSD662/2026:	Cowen Schwarz Marschke
Counsel for the First Defendants in NSD685/2026:	Mr S Marsh
Solicitor for the First Defendants in NSD685/2026:	Arrow White Lawyers

ORDERS

NSD 643 of 2026

IN THE MATTER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)

BETWEEN:	**RICHARD ALBARRAN AND BRENT KIJURINA AS THE RECEIVERS AND MANAGERS OF THE PROPERTY OF KIMBERLY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)** First Plaintiff
	BLACKBIRD PRIVATE EQUITY PTY LTD (ACN 657 766 535) Second Plaintiff
AND:	**KIMBERLY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 676 697 439)** First Defendant
	DANIEL BARRY BROWN Second Defendant
	JULIE ANNE RUTLEDGE (and others named in the Schedule) Third Defendant

ORDER MADE BY: **FEUTRILL J**

DATE OF ORDER: **29 MAY 2026**

THE COURT ORDERS THAT:

1. The case management hearings in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 and the applications for interlocutory relief in the originating application in proceeding NSD662 to 2026 filed 24 April 2026 and in the originating process in proceeding NSD685 of 2026 filed 29 April 2026 listed for 29 May 2026 be heard and determined together and, on the applications for interlocutory relief, the evidence adduced and submissions made in proceeding NSD662 of 2026 be evidence adduced and submissions made in proceeding NSD685 of 2026 and vice versa.

2. On the ground that it is necessary to prevent prejudice to the proper administration of justice, disclosure (by publication or otherwise) of paras 5, 8(a), 10(j), 15 and 16(c)

and annexure SRW-51 of the confidential affidavit of Stewart Raymond Wilkinson sworn 26 May 2026 and para 4 and annexure PGB-03 of the confidential affidavit of Paul George Anthony Betros sworn 29 May 2026 be restricted to the Court and the parties and their legal representatives in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 until 5.00 pm (AEST) on the day that is five years after the final day of the trial in proceeding NSD662 of 2026 or further or other order of the Court and, in the meantime, those paragraphs and annexures of those affidavits be confidential and forbidden from publication to a person who is not a party for the purposes of r 2.32(3) of the *Federal Court Rules 2011* (Cth).

3. Any person mentioned in s 37AH(2) of the *Federal Court of Australia Act 1976* (Cth) may apply to set aside or vary para 2 of these orders (including an application to shorten or extend the period of the restriction on publication) upon 48 hours' written notice.

4. Judgment on the applications for interlocutory relief in each of proceeding NSD662 of 2026 and proceeding NSD685 of 2026 be reserved and, in the meantime, the interim injunction granted in para 7 of the orders of 29 April 2026 in proceeding NSD662 of 2026 be extended to 4.30 pm (AWST) on the day that judgment is delivered on the application for interlocutory relief made in proceeding NSD662 of 2026.

5. The case management hearings in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 be adjourned to a date to be fixed with costs reserved.

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

ORDERS

NSD 662 of 2026

IN THE MATTER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)

BETWEEN:	**KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)** First Applicant
	DANIEL BARRY BROWN Second Applicant
	JAMES VINCENT MCMAHON (and another named in the Schedule) Third Applicant
AND:	**RICHARD ALBARRAN IN HIS OWN CAPACITY, AND AS JOINT AND SEVERAL RECEIVER AND MANAGER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439)** First Respondent
	BRENT TREVOR-ALEX KIJURINA IN HIS OWN CAPACITY, AND AS JOINT AND SEVERAL RECEIVER AND MANAGER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) Second Respondent
	HALL CHADWICK (NSW) PTY LTD (ACN 103 221 352) (and others named in the Schedule) Third Respondent

ORDER MADE BY: **FEUTRILL J**

DATE OF ORDER: **29 MAY 2026**

THE COURT ORDERS THAT:

1. The case management hearings in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 and the applications for interlocutory relief in the originating application in proceeding NSD662 to 2026 filed 24 April 2026 and in the originating process in proceeding NSD685 of 2026 filed 29 April 2026 listed for 29 May 2026 be heard and determined together and, on the applications for interlocutory relief, the

evidence adduced and submissions made in proceeding NSD662 of 2026 be evidence adduced and submissions made in proceeding NSD685 of 2026 and vice versa.

2. On the ground that it is necessary to prevent prejudice to the proper administration of justice, disclosure (by publication or otherwise) of paras 5, 8(a), 10(j), 15 and 16(c) and annexure SRW-51 of the confidential affidavit of Stewart Raymond Wilkinson sworn 26 May 2026 and para 4 and annexure PGB-03 of the confidential affidavit of Paul George Anthony Betros sworn 29 May 2026 be restricted to the Court and the parties and their legal representatives in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 until 5.00 pm (AEST) on the day that is five years after the final day of the trial in proceeding NSD662 of 2026 or further or other order of the Court and, in the meantime, those paragraphs and annexures of those affidavits be confidential and forbidden from publication to a person who is not a party for the purposes of r 2.32(3) of the *Federal Court Rules 2011* (Cth).

3. Any person mentioned in s 37AH(2) of the *Federal Court of Australia Act 1976* (Cth) may apply to set aside or vary para 2 of these orders (including an application to shorten or extend the period of the restriction on publication) upon 48 hours' written notice.

4. Judgment on the applications for interlocutory relief in each of proceeding NSD662 of 2026 and proceeding NSD685 of 2026 be reserved and, in the meantime, the interim injunction granted in para 7 of the orders of 29 April 2026 in proceeding NSD662 of 2026 be extended to 4.30 pm (AWST) on the day that judgment is delivered on the application for interlocutory relief made in proceeding NSD662 of 2026.

5. The case management hearings in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 be adjourned to a date to be fixed with costs reserved.

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

ORDERS

NSD 685 of 2026

IN THE MATTER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)

BETWEEN:	**DANIEL BARRY BROWN** Plaintiff
AND:	**TRAJAN JOHN KUKULOVSKI AND LIAM BELLAMY AS THE JOINT AND SEVERAL ADMINISTRATORS OF KIMBERLEY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)** First Defendant
	BLACKBIRD PRIVATE EQUITY PTY LTD (ACN 657 766 535) Second Defendant
	KIMBERLEY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 676 697 439) Third Defendant

ORDER MADE BY: **FEUTRILL J**

DATE OF ORDER: **29 MAY 2026**

THE COURT ORDERS THAT:

1. The case management hearings in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 and the applications for interlocutory relief in the originating application in proceeding NSD662 to 2026 filed 24 April 2026 and in the originating process in proceeding NSD685 of 2026 filed 29 April 2026 listed for 29 May 2026 be heard and determined together and, on the applications for interlocutory relief, the evidence adduced and submissions made in proceeding NSD662 of 2026 be evidence adduced and submissions made in proceeding NSD685 of 2026 and vice versa.

2. On the ground that it is necessary to prevent prejudice to the proper administration of justice, disclosure (by publication or otherwise) of paras 5, 8(a), 10(j), 15 and 16(c) and annexure SRW-51 of the confidential affidavit of Stewart Raymond Wilkinson sworn 26 May 2026 and para 4 and annexure PGB-03 of the confidential affidavit of

Paul George Anthony Betros sworn 29 May 2026 be restricted to the Court and the parties and their legal representatives in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 until 5.00 pm (AEST) on the day that is five years after the final day of the trial in proceeding NSD662 of 2026 or further or other order of the Court and, in the meantime, those paragraphs and annexures of those affidavits be confidential and forbidden from publication to a person who is not a party for the purposes of r 2.32(3) of the *Federal Court Rules 2011* (Cth).

3. Any person mentioned in s 37AH(2) of the *Federal Court of Australia Act 1976* (Cth) may apply to set aside or vary para 2 of these orders (including an application to shorten or extend the period of the restriction on publication) upon 48 hours' written notice.

4. Judgment on the applications for interlocutory relief in each of proceeding NSD662 of 2026 and proceeding NSD685 of 2026 be reserved and, in the meantime, the interim injunction granted in para 7 of the orders of 29 April 2026 in proceeding NSD662 of 2026 be extended to 4.30 pm (AWST) on the day that judgment is delivered on the application for interlocutory relief made in proceeding NSD662 of 2026.

5. The case management hearings in proceedings NSD643 of 2026, NSD662 of 2026 and NSD685 of 2026 be adjourned to a date to be fixed with costs reserved.

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

ORDERS

NSD 643 of 2026

IN THE MATTER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)

BETWEEN:	**RICHARD ALBARRAN AND BRENT KIJURINA AS THE RECEIVERS AND MANAGERS OF THE PROPERTY OF KIMBERLY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)** First Plaintiff
	BLACKBIRD PRIVATE EQUITY PTY LTD (ACN 657 766 535) Second Plaintiff
AND:	**KIMBERLY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 676 697 439)** First Defendant
	DANIEL BARRY BROWN Second Defendant
	JULIE ANNE RUTLEDGE (and others named in the Schedule) Third Defendant

ORDER MADE BY: **FEUTRILL J**

DATE OF ORDER: **8 JULY 2026**

THE COURT ORDERS THAT:

1. Upon the plaintiff in proceeding NSD685 of 2026 complying with the conditions of paragraph 2 of the orders made in that proceeding on 8 July 2026, the second defendant in this proceeding be permitted at his cost and risk to defend this proceeding in the name of and for and on behalf of the first defendant.
2. The proceeding be referred to mediation in accordance with Part 28 of the *Federal Court Rules 2011* (Cth) to be completed on or before 31 August 2026 or as soon as practicable thereafter.

3. By 10 July 2026, the parties provide via email to registrar.allocations@fedcourt.gov.au a combined list of their unavailable dates for July and August 2026 to attend a mediation conference before a Registrar of the Court.

4. The parties have liberty to apply for further or other order on 48 hours' written notice.

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

ORDERS

NSD 662 of 2026

IN THE MATTER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)

BETWEEN:	**KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)** First Applicant
	DANIEL BARRY BROWN Second Applicant
	JAMES VINCENT MCMAHON (and another named in the Schedule) Third Applicant
AND:	**RICHARD ALBARRAN IN HIS OWN CAPACITY, AND AS JOINT AND SEVERAL RECEIVER AND MANAGER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439)** First Respondent
	BRENT TREVOR-ALEX KIJURINA IN HIS OWN CAPACITY, AND AS JOINT AND SEVERAL RECEIVER AND MANAGER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) Second Respondent
	HALL CHADWICK (NSW) PTY LTD (ACN 103 221 352) (and others named in the Schedule) Third Respondent

ORDER MADE BY: **FEUTRILL J**

DATE OF ORDER: **8 JULY 2026**

THE COURT ORDERS THAT:

1. Upon the plaintiff in proceeding NSD685 of 2026 complying with the conditions of paragraph 2 of the orders made in that proceeding on 8 July 2026, the second applicant in this proceeding be permitted at his cost and risk to prosecute this proceeding in the name of and for and on behalf of the first applicant.

2. Upon the second, third and fourth applicant giving:

(a) the usual undertaking as to damages; and

(b) an undertaking to use his or her best endeavours to prosecute the proceeding to final hearing with all due expedition,

until final judgment in the proceeding or further order of the Court, the first respondent, second respondent and fourth respondent be restrained and an injunction be granted restraining them whether by themselves, their officers, employees, agents or otherwise from selling or otherwise dealing with the property of the first applicant.

3. Continuation of the injunction granted in paragraph 2 of these orders is subject to and conditional upon the second, third and fourth applicants paying the first and second respondents' reasonable costs of preserving and storing the property of the first applicant for the duration of the restraint to be paid to the first and second respondents monthly in advance in an amount agreed between the second, third and fourth applicants and the first and second respondents or, failing agreement, in an amount determined by further order of the Court.

4. The interim injunction made by order of the Court on 29 April 2026, as varied on 29 May 2026, be discharged.

5. Except as to paragraphs 1 to 4 of these orders, the application for interlocutory relief in the originating application be stood over and adjourned to a date to be fixed with costs reserved.

6. The proceeding be referred to mediation in accordance with Part 28 of the *Federal Court Rules 2011* (Cth) to be completed on or before 31 August 2026 or as soon as practicable thereafter.

7. By 10 July 2026, the parties provide via email to registrar.allocations@fedcourt.gov.au a combined list of their unavailable dates for July and August 2026 to attend a mediation conference before a Registrar of the Court.

8. Paragraph 3 of these orders be stayed until 31 August 2026.

9. The parties have liberty to apply for further or other order on 48 hours' written notice.

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

ORDERS

NSD 685 of 2026

IN THE MATTER OF KIMBERLEY PEARL TOURS PTY LTD (ACN 676 697 439) (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)

BETWEEN:	**DANIEL BARRY BROWN** Plaintiff
AND:	**TRAJAN JOHN KUKULOVSKI AND LIAM BELLAMY AS THE JOINT AND SEVERAL ADMINISTRATORS OF KIMBERLEY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED)** First Defendant
	BLACKBIRD PRIVATE EQUITY PTY LTD (ACN 657 766 535) Second Defendant
	KIMBERLEY PEARL TOURS PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ADMINISTRATORS APPOINTED) (ACN 676 697 439) Third Defendant

ORDER MADE BY: **FEUTRILL J**

DATE OF ORDER: **8 JULY 2026**

THE COURT ORDERS THAT:

1. The plaintiff have leave to bring this proceeding against the third defendant under s 440D of the *Corporations Act 2001* (Cth).

2. Upon the plaintiff:

   (a) providing the first defendants with a deed, in a form approved by the Registrar, indemnifying the first and third defendants against all costs, charges or expenses (including the first defendants' remuneration and expenses) arising out of or in connection with proceedings NSD662 of 2026 and NSD643 of 2026; and

   (b) paying the sum of $10,000 to the first defendants to be held in trust and on account of the first defendants' reasonable remuneration and expenses and to

be applied to costs, charges or expenses arising out of or in connection with proceedings NSD662 of 2026 and NSD643 of 2026 if and when incurred and, otherwise, to be refunded to the plaintiff upon final judgment in those proceedings; and

(c) providing to the first defendants security for the costs of the plaintiffs in proceeding NSD643 of 2026 and the costs of the respondents in proceeding NSD662 of 2026 in a form and amount agreed between the plaintiff and the first defendants in this proceeding or, failing agreement, as determined by further order of the Court,

the plaintiff be permitted at his cost and risk to prosecute proceeding NSD662 of 2026 and defend proceeding NSD643 of 2026 in the name of and for and on behalf of the third defendant.

3. Paragraph 1 of the orders of the Court made on 23 June 2026 be varied such that the second meeting of creditors of the third defendant be adjourned to 11:00am on the day that is 10 business days after final judgment is pronounced in proceeding NSD662 of 2026 or such other day as may be determined by further order of the Court.

4. Except as to paragraphs 1 to 3 of these orders, the application for interlocutory relief in the originating process be dismissed with costs reserved.

5. The proceeding be referred to mediation in accordance with Part 28 of the *Federal Court Rules 2011* (Cth) to be completed on or before 31 August 2026 or as soon as practicable thereafter.

6. By 10 July 2026, the parties provide via email to registrar.allocations@fedcourt.gov.au a combined list of their unavailable dates for July and August 2026 to attend a mediation conference before a Registrar of the Court.

7. The parties have liberty to apply for further or other order on 48 hours' written notice.

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

REASONS FOR JUDGMENT

FEUTRILL J:

Introduction

1 Mr Brown is the sole director of and majority shareholder in Kimberley Pearl Tours Pty Ltd (Company). Until earlier this year, the Company operated a tourist charter business using a converted fishing trawler, the 'Kimberley Pearl', in the northern waters of Australia. The Company borrowed funds from Blackbird Private Equity Pty Ltd to finance the Company's operations. Mr Brown, his stepfather, Mr McMahon, and his mother-in-law, Ms Rutledge, guaranteed the Company's loan. The loan and guarantees were secured by security interests granted in property of the Company, Mr Brown, Mr McMahon and Ms Rutledge (collectively, the Brown parties). Ms Rutledge's guarantee was also secured by a first registered mortgage over her residence in Wingham in New South Wales. Mr McMahon's guarantee was also secured by second registered mortgages over real property in Harrington and Jones Island in New South Wales. The loan agreement and security instruments are described later in these reasons and are referred to as the Blackbird Private Equity Facility. That facility was arranged through a finance broker, Mr Laird of Reform Financial Australia Pty Ltd.

2 The Company is in default. In January Blackbird Private Equity appointed Mr Albarran and Mr Kijurina of Hall Chadwick (NSW) Pty Ltd receivers and managers of all property of the Company (Receivers). The Receivers have taken control of the Kimberley Pearl and three smaller JimFab custom boats used in conjunction with the Kimberley Pearl. In March the Receivers took steps to sell the vessel and boats through an online auction, but later ceased that process. The vessel and boats remain unsold and under their control. The Brown parties dispute the validity of the appointment of the Receivers and the enforceability of the Blackbird Private Equity Facility by which they were appointed. Amongst other things, they contend that the Blackbird Private Equity Facility is liable to be set aside under s 12GM of the *Australian Securities and Investments Commission Act 2001* (Cth) on the ground that Blackbird Private Equity and the Receivers engaged in unconscionable conduct in contravention of s 12CB of that Act (statutory unconscionability claim).

3 In April Blackbird Private Equity appointed Mr Kukulovski and Mr Bellamy of Mackay Goodwin administrators of the Company under s 436C of the *Corporations Act 2001* (Cth)

(Administrators). Mr Brown, as director and member of the Company, disputes the validity of that appointment. He contends that the Administrators' appointment was invalid on the ground that Blackbird Private Equity exercised the power under s 436C in bad faith and for an improper purpose or, otherwise, Blackbird Private Equity was not entitled to exercise the power under s 436C because the Blackbird Private Equity Facility was unenforceable by reason of the statutory unconscionability claim.

4 On 21 April 2026 the Receivers filed an originating process, as plaintiffs, in proceeding NSD 643 of 2026 in which, amongst other things, they apply for a declaration to the effect that their appointment as receivers and managers to the property of the Company was valid. The Brown parties and Nationlink Solutions Pty Ltd are the defendants in that proceeding. Nationlink Solutions had earlier approved a loan to refinance the Blackbird Private Equity Facility and it had also contended that the appointment of the Receivers was invalid.

5 On 24 April 2026 the Brown parties filed an originating application, as applicants, in proceeding NSD 662 of 2026. The Receivers are the first and second respondents, Hall Chadwick is the third respondent, Blackbird Private Equity is the fourth respondent, BPE Loans 2 Pty Ltd is the fifth respondent, Mr Laird the sixth respondent and Reform Financial Australia the seventh respondent. In these reasons the Receivers, Blackbird Private Equity and BPE Loans 2 are referred to as the Blackbird parties. BPE Loans 2 and Blackbird Private Equity are related through another company that holds an ultimate majority interest in each of those companies and, in these reasons, they are referred to collectively as the Blackbird Lenders. In NSD 662 the Brown parties assert various causes of action against the Blackbird parties, Hall Chadwick, Mr Laird and Reform Financial Australia and it is in those proceedings that they seek, amongst others, an order setting aside the Blackbird Private Equity Facility by reason of the statutory unconscionability claim.

6 On 29 April 2026 Mr Brown filed an originating process, as plaintiff, in proceeding NSD 685 of 2026 in which he applies for a declaration that the appointment of the Administrators was invalid and an order terminating the administration of the Company under s 447C and s 447A of the Corporations Act. The Administrators are the first defendants, Blackbird Private Equity the second defendant, and the Company the third defendant in that proceeding.

7 In the originating application in NSD 662 the Brown parties apply for interlocutory orders permitting Mr Brown to bring the proceeding in the name of the Company as the first

applicant and for an interlocutory injunction to restrain the Blackbird parties from enforcing the Blackbird Private Equity Facility and selling or dealing with any of the property of the Brown parties. That application was first heard as an urgent duty matter and an interim injunction was granted restraining all respondents from selling or dealing with any of the assets of the Brown parties. These reasons concern, in part, whether and, if so, on what terms there should be a continuation or discharge of the interim injunction.

8 In the originating process in NSD 685 Mr Brown applies for interlocutory orders to the following effect.

(a) Leave under s 440D of the Corporations Act to commence the proceeding against the Company as a defendant.

(b) An order under s 447A of the Corporations Act permitting Mr Brown to instruct legal representatives on behalf of the Company in respect of NSD 643 and NSD 662.

(c) An interlocutory injunction restraining the Administrators from performing their functions under Pt 5.3A of the Corporations Act.

(d) Orders, in substance, under s 447A and s 1322(4)(d) extending the period for the Administrators to convene and hold and for creditors to vote on the future of the Company under s 439A of the Corporations Act.

These reasons also concern, in part, whether and, if so, on what terms any interlocutory orders should be made in NSD 685.

9 Although NSD 662 and NSD 685 are separate proceedings raising different legal and factual questions, there is a significant overlap in the background, parties and the factual context relevant to the determination of the interlocutory applications in both proceedings. Due to that overlap, orders were made for the interlocutory applications to be heard together and for evidence and submissions in one proceeding to be evidence and submissions in the other and vice versa. As will be explained in greater detail later, the extent to which the Brown parties have demonstrated that the statutory unconscionability claim raises a prima facie case is of relevance to the exercise of both the Court's power to grant an interlocutory injunction in NSD 662 and the Court's power to permit Mr Brown to prosecute NSD 662 and defend NSD 643 in the name of the Company. Therefore, a principal issue for determination on the interlocutory applications is whether the statutory unconscionability claim raises a serious question to be tried.

10 The other main issues that arise for determination on the interlocutory applications are as follows.

(1) If there is a serious question to be tried in NSD 662, should Mr Brown be permitted to prosecute NSD 662 and defend NSD 643 in the name of Kimberley Pearl Tours?

(2) If there is a serious question to be tried in NSD 662, should the Blackbird parties be restrained from selling or dealing with the property of each of the Brown parties?

(3) Is there a serious question to be tried in NSD 685 with respect to the validity of the appointment of the Administrators and, if so, should they be restrained from performing their functions as administrators of the Company?

(4) In any event, should the period for the creditors to vote on the future of the Company at the second meeting of creditors under s 439A be extended until after resolution of NSD 662?

(5) What, if any, terms or conditions should be imposed on any interlocutory orders made on the applications?

11 For the reasons that follow, upon certain conditions, Mr Brown should be permitted to bring NSD 662 and defend NSD 643 in the name of the Company. Upon certain other conditions, an interlocutory injunction should be granted to restrain the Receivers and Blackbird Private Equity from exercising the power of sale over the property of the Company (in particular, the Kimberley Pearl and JimFab boats) until the final judgment in NSD 662. The Administrators should not be restrained from performing their functions as administrators of the Company, but the operation of Pt 5.3A of the Corporations Act in relation to the Company should be modified to adjourn the second meeting of creditors to a date after final judgment in NSD 662. Although not strictly a term or condition of the grant of the interlocutory orders, an order will also be made referring all three proceedings to mediation under s 53A of the *Federal Court of Australia Act 1976* (Cth) and Pt 28 Div 28.3 of the *Federal Court Rules 2011* (Cth) to be convened and held on an expedited basis.

Evidence and other materials upon the applications

12 The parties filed, read and relied upon an extraordinary volume of material for the purposes of interlocutory applications of the kind the subject of these reasons.

13 The Brown parties read the following affidavits, which, together with annexures or exhibits, ran to more than 1,200 pages.

(a) An affidavit of Mr Guerin sworn 28 April 2026 (Exh 1). Mr Guerin is a legal practitioner in the employ of Adero Law, the Brown parties' legal representatives. His affidavit was filed in NSD 685 and largely annexes documents relating to the application made in that proceeding.

(b) Affidavits of Mr Brown sworn 6 and 26 May 2026 (Exh 2.1 and 2.2). Mr Brown is the second applicant in NSD 662 and plaintiff in NSD 685. His affidavits were filed in NSD 662 and relate to the application for an interlocutory injunction. His evidence addresses most of the material facts upon which the Brown parties' claims in NSD 662 are based.

(c) An affidavit of Ms Rutledge sworn 25 May 2026 (Exh 3). Ms Rutledge is the fourth applicant in NSD 662. Her affidavit was filed in NSD 662 and relates to the application for an interlocutory injunction. Her evidence addresses the circumstances in which she became a shareholder in the Company and guarantor under the Blackbird Private Equity Facility as well as her present financial circumstances.

14 The Blackbird parties read the following affidavits, which, also with annexures or exhibits, exceeded 1,000 pages.

(a) An affidavit of Mr Bellamy affirmed 13 May 2026 (Exh 4). Mr Bellamy is one of the Administrators and first defendants in NSD 685. His affidavit was filed in NSD 685 and relates to the application in that proceeding.

(b) Affidavits of Mr Seiffert affirmed 14 and 20 May 2026 filed in NSD 662 (Exh 5.1 and 5.2). Mr Seiffert is the sole director of Marine Auctions Pty Ltd. In March 2026 the Receivers appointed Marine Auctions to sell the Kimberley Pearl and JimFab boats. His evidence relates to that appointment and the estimated market value of the vessel and boats.

(c) An affidavit of Mr Moulden affirmed 15 May 2026 filed in NSD 662 (Exh 6). Mr Moulden is the Chief Operating Officer of Blackbird Private Equity. His evidence relates to the circumstances in which the BPE Loans 2 Facility was refinanced with the Blackbird Private Equity Facility.

(d) An affidavit of Mr Court sworn 15 May 2026 filed in NSD 662 (Exh 7). Mr Court is a chartered accountant in the employ of Hall Chadwick and has responsibility for the day-to-day management of the receivership of the Company. His evidence relates to

the steps taken in that receivership, including arranging for sale of the Kimberley Pearl and JimFab boats, and the Receivers' remuneration and expenses.

(e) Affidavits of Mr Wilkinson sworn 18 and 26 May 2026 filed in NSD 662 (Exh 8.1 and 8.2). Mr Wilkinson is the sole director of Blackbird Private Equity. His evidence relates to the structure and business of Blackbird Private Equity, its relationship with Mr Laird and Reform Financial Australia, the circumstances in which the BPE Loans 2 Facility was provided to the Company and refinanced through the Blackbird Private Equity Facility, the receiverships of Mr Brown, Mr McMahon and the Company, including the circumstances of the Receivers' appointments, commencement of NSD 643, appointment of the Administrators, Blackbird Private Equity's security position, and other matters in response to the Brown parties' allegations in NSD 662.

(f) An affidavit of Mr Betros sworn 19 May 2026 filed in NSD 662 (Exh 9.1). Mr Betros is a legal practitioner and partner of the firm HopgoodGanim Lawyers, the legal representatives of the Blackbird parties. His affidavit merely annexes documents that were intended to be annexed to Mr Wilkinson's first affidavit.

15 The Blackbird parties also read the following confidential affidavits. For reasons given later, a suppression order was made with respect to certain paragraphs and the annexures to these affidavits.

(a) A confidential affidavit of Mr Wilkinson sworn 26 May 2026 filed in NSD 662. (Exh 8.3.) In the confidential affidavit Mr Wilkinson gives evidence relating to the costs Blackbird Private Equity is likely to incur and loss of profit (opportunity cost) if restrained from selling the Kimberley Pearl, JimFab boats and the Wingham property.

(b) A confidential affidavit of Mr Betros sworn 29 May 2026 filed in NSD 662. (Although not given an exhibit number during the oral hearing, this affidavit is received as Exh 9.2.) In the confidential affidavit of Mr Betros he gives evidence, on information and belief, of calculations Mr Moulden has undertaken regarding Blackbird Private Equity's likely loss of profit (opportunity cost) if restrained from selling the Kimberley Pearl and JimFab boats.

16 In addition, the parties filed lengthy written submissions in which, collectively, the parties cited more than 70 legal authorities (excluding legislation) running to almost 3,000 pages. The oral hearing of the applications also consumed an entire day.

Is there a serious question to be tried in NSD 662?

Background

17 The Company was registered in April 2024 and entered into an agreement to acquire a charter business for $2.2 million. The assets of the business included the Kimberley Pearl and JimFab boats. The contract was completed in July 2024. At that time, Mr Brown was the sole director and shareholder (member) of the Company.

18 The Company engaged Reform Financial Australia as its mortgage broker to assist it to obtain finance for the acquisition and initial operating costs of the business. Mr Laird, of Reform Financial Australia, assisted to arrange a loan of $1,386,000 made to Mr Brown and Mr McMahon by ScotPac Property Finance Pty Ltd and loans of $375,000 and $60,000 made to the Company by BPE Loans 2.

19 The ScotPac loan was secured by first registered mortgages over Mr McMahon's Harrington and Jones Island properties. The BPE Loans 2 loans were secured by guarantees of Mr Brown and Mr McMahon and security interests granted by each of the Company, Mr Brown and Mr McMahon to BPE Loans 2 (as grantee) in all present and future property of the grantor. The BPE Loans 2 loan agreement and security instruments are referred to in these reasons as the BPE Loans 2 Facility.

20 The Company defaulted upon its obligation to pay interest under the BPE Loans 2 Facility and, as a consequence, BPE Loans 2 served a notice on the Company demanding payment of $514,481.99. Subsequently, BPE Loans 2 appointed the Receivers as receivers and managers to the property of Mr Brown and Mr McMahon under the terms of the BPE Loans 2 Facility.

21 In July 2025, after the appointment of the Receivers, the BPE Loans 2 Facility was refinanced and the principal, interest and costs paid in full by an advance of $776,021.80 made by Blackbird Private Equity under the terms of the Blackbird Private Equity Facility. The refinancing facility was also arranged through Mr Laird of Reform Financial Australia. The refinancing loan was secured by guarantees given by Mr Brown, Mr McMahon and Ms Rutledge and security interests granted by each of the Company, Mr Brown, Mr McMahon and Ms Rutledge to Blackbird Private Equity (as grantee) in the property of the grantor. The guarantee of Mr McMahon was also secured by second ranking registered mortgages over the Harrington and Jones Island properties. The guarantee of Ms Rutledge was secured by a first ranking mortgage over her Wingham property. After the Blackbird

Private Equity Facility was made and the refinancing loan advanced, Ms Rutledge became a member and holder of 25% of the issued shares in the Company.

22 The Company defaulted upon its obligation to pay interest under the terms of the Blackbird Private Equity Facility. On 10 November 2025 Blackbird Private Equity served a notice of default on the Company demanding payment of the then outstanding interest in the sum of $31,040.87. After that was not paid, on 22 January 2026, Blackbird Private Equity appointed the Receivers as receivers and managers to the property of the Company including the Kimberley Pearl and JimFab boats.

23 In the meantime, on 6 January 2026, the Kimberley Pearl was taken out of the water for repair and maintenance work and to prepare her for her 10-year Australian Maritime Safety Authority (AMSA) survey. That work was commenced, but not completed, at the time of the appointment of the Receivers. After unsuccessful attempts to bring about the retirement of the Receivers and release of the security through refinancing with Nationlink Solutions, in March 2026, the Receivers commenced a process for selling the Kimberley Pearl and the JimFab boats. That process was disrupted by certain actions of Mr Brown and Nationlink Solutions and the Receivers ceased the sale process.

24 In late March 2026 the Company requested Blackbird Private Equity and the Receivers give an undertaking to cease all dealings with property of the Brown parties on the ground that the Blackbird Private Equity Facility was liable to be set aside for unconscionable conduct under the ASIC Act. The parties exchanged further correspondence and evidently had without prejudice settlement discussions through their legal representatives in late March and early April 2026. That correspondence resulted in Mr Brown, Blackbird Private Equity and the Receivers signing a mutual undertaking by which Blackbird Private Equity and the Receivers undertook not to sell or deal with the assets of the Brown parties without providing three business days' written notice upon Mr Brown giving Blackbird Private Equity and the Receivers the usual undertaking as to damages.

25 On the day the undertaking was given by Mr Brown (13 April 2026) and before it was signed by Blackbird Private Equity and the Receivers (15 April 2026), Hopgood Ganim (the Blackbird parties' legal representatives) gave Adero Law (the Brown parties' legal representatives) written notice that Blackbird Private Equity and the Receivers intended to exercise their power of sale with respect to the property of the Brown parties within seven days. They also requested that the Brown parties commence a proceeding before

18 April 2026 and advised that the Receivers intended commencing their own proceeding to confirm the validity of their appointment on 20 April 2026. Then, on the day Blackbird Private Equity and the Receivers signed the mutual undertaking (15 April 2026), Blackbird Private Equity also appointed the Administrators joint and several administrators of the Company under s 436C(1) of the Corporations Act. Thereafter, as already mentioned, the Receivers and Blackbird Private Equity commenced NSD 643 on 21 April 2026; the Brown parties commenced NSD 662 on 24 April 2026; and Mr Brown commenced NSD 685 on 29 April 2026.

26 By letter dated 19 April 2026 from Adero Law to the Administrators, Mr Brown (and purportedly the Company) asserted that the appointment of the Administrators was not valid because it was for the ulterior or extraneous purpose of enforcing Blackbird Private Equity's security or an act in aid of the realisation of that security in circumstances in which the Company and Mr Brown disputed the enforceability of Blackbird Private Equity's security interest. It was asserted that these matters ought to have been clear to the Administrators and, in those circumstances, they ought to have refused to accept the appointment. The Administrators were requested to confirm that they would cease acting and end their appointment failing which proceedings would be commenced to compel them to do so. The Administrators, through Arrow White as their legal representatives, amongst other things, denied that their appointment was not valid.

27 On 29 April 2026 Mr Brown commenced NSD 685 against the Administrators. Blackbird Private Equity and the Company are also defendants in that proceeding. Amongst other things, Mr Brown seeks a declaration to the effect that the Administrators' appointment was invalid and an order terminating the administration of the Company.

The statutory unconscionable conduct claim

28 The Brown parties have filed a statement of claim which, amongst other claims, pleads the material facts and particulars of their causes of action based on s 12CB and s 12GM of the ASIC Act. The affidavits of Mr Brown and Ms Rutledge were read in support of the pleaded facts. However, the allegations in the statement of claim are not straight-forward and the Brown parties' affidavit evidence is not entirely complete in that, in part, it provides evidence that is sufficient to support, but not necessarily prove to a prima facie degree, the pleaded allegations. Further, the Blackbird parties' affidavit evidence contradicts or puts in issue most of the key factual elements of the Brown parties' pleaded claims. As a consequence, due to

the length, nature and complexity of the allegations in the statement of claim, the volume and contested nature of the affidavit evidence and the content of the parties' submissions, the statutory unconscionability claim is most efficiently considered and evaluated thematically and descriptively rather than by reference to the pleaded allegations.

29 Broadly, the Brown parties' relevant allegations of fact may be summarised as follows.

(1) The Blackbird Lenders engaged in a business (system of conduct or pattern of behaviour) of asset-based lending using standard form instruments that, due to the terms of those instruments, comprised a risky (dangerous) financial product for the borrowers and guarantors under those instruments.

(2) Part of the system of conduct or pattern of behaviour included the absence of any control (or sufficient control) to avoid the Blackbird Lenders approving applications for loans to be made under the standard form instruments to vulnerable borrowers and guarantors for whom there was a high likelihood there would be a default and the security under the standard form instrument would be enforced. The Blackbird Lenders' only relevant criterion for approval of a loan application (control) was that the security the borrowers and guarantors provided was sufficient to cover the loan, interest and other costs payable under the financial product in the event of default.

(3) Part of the system or pattern of conduct included incentivising third-party brokers to arrange for loan applications to be made by prospective borrowers and guarantors irrespective of the ability or likelihood of those borrowers and guarantors repaying the principal, interest and other costs under the terms of the financial product.

(4) Part of the system of conduct or pattern of behaviour included that the standard form terms of the financial product were 'unfair'. In particular, a penalty rate of interest became payable upon a single instance of default and irrespective of the nature (gravity) of the default.

(5) Part of the system of conduct or pattern of behaviour included appointing the Receivers under the terms of the standard form instruments who had undisclosed interests in the Blackbird Lenders which incentivised the Receivers to improperly use their position to gain an advantage for themselves and the Blackbird Lenders and cause a detriment to the grantors of security interests (borrowers and guarantors).

(6) Part of the system of conduct or pattern of behaviour included appointing the Receivers under the terms of the standard form instruments for the improper purpose

of placing financial pressure on the grantors of the security interest (borrowers and guarantors) to repay or refinance the outstanding principal, interest and costs on terms favourable to the Blackbird Lenders and Receivers rather than for the proper purpose of exercising the powers conferred on receivers and managers under the terms of the instruments.

(7) After the Company defaulted under the BPE Loans 2 Facility, BPE Loans 2 appointed the Receivers to the property of Mr McMahon and Mr Brown for the improper purpose of placing financial pressure on them so as to cause the Company to refinance the BPE Loans 2 Facility with Blackbird Private Equity on terms favourable to the Blackbird Lenders and Receivers and disadvantageous to the Brown parties. The Brown parties were in a financially vulnerable position at that time, in part, due to unfair terms of the BPE Loans 2 Facility that included penalty interest and, in part, because all personal property of Mr Brown and Mr McMahon was under the control of the Receivers. BPE Loans 2 and the Receivers took advantage of that financial vulnerability to secure payment of penalty interest to BPE Loans 2, unreasonable fees to the Receivers that were not reasonably necessary for the protection of the legitimate interests of the recipients of those payments. Blackbird Private Equity also took advantage of that financial vulnerability to secure the Brown parties' agreement to the payment of fees and other charges and standard form terms of the Blackbird Private Equity Facility (including an unfair term requiring payment of penalty interest) that were not reasonably necessary for the protection of the legitimate interests of Blackbird Private Equity.

(8) After the Company defaulted under the Blackbird Private Equity Facility, Blackbird Private Equity appointed the Receivers to the property of the Company in bad faith and for the improper purpose of placing financial pressure on the Company to repay principal, interest and other costs due under the legal terms of that facility and not for the proper purpose of exercising the Receivers' powers under that facility in good faith and in a manner reasonably necessary for the protection of the legitimate interests of Blackbird Private Equity. The Receivers threatened to sell and have taken steps to sell the property of the Company under their control in bad faith for less than market value and for the improper purpose of placing financial pressure on the Brown parties to refinance and pay Blackbird Private Equity the full amount it demands is

due and payable under the Blackbird Private Equity Facility including payment of unreasonable fees to the Receivers and penalty interest to Blackbird Private Equity.

30 Although an allegation is raised that Ms Rutledge was made a shareholder of the Company to avoid the perception that she was a volunteer, the statement of claim does not plead any clear individual claims that the Blackbird parties engaged in unconscionable conduct specifically with respect to the manner in which it obtained each individual Brown party's agreement to his or her guarantee and the security interests and mortgages granted with respect to his or her property. The individual Brown parties' claims, as guarantors, are evidently largely parasitic on the Company's claims in that, due to the alleged unconscionable conduct in the formation and performance of the facilities, it is alleged that neither the BPE Loans 2 Facility nor the Blackbird Private Equity Facility was or is enforceable against any of the Brown parties or, at least, the individual Brown parties are entitled to insist by way of pro tanto defence on a reduction of any amount due under the guarantees.

31 The approach to be taken when assessing if there is a serious question to be tried with respect to these claims is to take into account all evidence on the applications (that is, of both the Brown parties and the Blackbird parties). However, in general, it is not appropriate to attempt to resolve conflicts of affidavit evidence: *Shercliff v Engadine Acceptance Corporation Pty Ltd* [1978] 1 NSWLR 729 at 734 (Mahoney JA, Glass and Samuels JJA agreeing). The question is whether 'if the evidence remains as it is there is a probability that at the trial of the action the [applicants] will be held entitled to relief': *Beecham Group Ltd v Bristol Laboratories Pty Ltd* [1968] HCA 1; 118 CLR 618 at 622 (Kitto, Taylor, Menzies and Owen JJ). Typically, that question is to be answered on the basis that the statements of fact contained in the affidavits in support are accepted as true: *Bristol-Myers Squibb Australia Pty Ltd v Astra Pharmaceuticals Pty Ltd* [1999] FCA 256; 45 IPR 144 at [91]-[94], [99], [101]-[102] (Weinberg J); *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* [2006] FCA 1352; 236 ALR 720 at [43]-[45] (Rares J). Nonetheless, 'this does not mean that [the Court] is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporaneous documents or other statements by the same deponent, or inherently improbable in itself it may be': e.g., *Eng Mee Yong v Letchumanan s/o Velayutham* [1980] AC 331 at 341 (Lord Diplock).

Statutory unconscionable conduct

32 Relevantly, s 12CB of the ASIC Act provides:

> **12CB Unconscionable conduct in connection with financial services**
>
> (1) A person must not, in trade or commerce, in connection with:
>
> (a) the supply or possible supply of financial services to a person; or
>
> (b) the acquisition or possible acquisition of financial services from a person;
>
> engage in conduct that is, in all the circumstances, unconscionable.
>
> …
>
> (3) For the purpose of determining whether a person has contravened subsection (1):
>
> (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
>
> (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.
>
> (4) It is the intention of the Parliament that:
>
> (a) this section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct; and
>
> (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
>
> (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
>
> (i) the terms of the contract; and
>
> (ii) the manner in which and the extent to which the contract is carried out;
>
> and is not limited to consideration of the circumstances relating to formation of the contract.

33 Section 12CC(1) of the ASIC Act provides:

> **12CC Matters the court may have regard to for the purposes of section 12CB**
>
> (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 12CB in connection with the supply or possible supply of financial services to a person (the ***service recipient***), the

court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the service recipient; and

(b) whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the service recipient was able to understand any documents relating to the supply or possible supply of the financial services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the service recipient or a person acting on behalf of the service recipient by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the financial services; and

(e) the amount for which, and the circumstances under which, the service recipient could have acquired identical or equivalent financial services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the service recipient was consistent with the supplier's conduct in similar transactions between the supplier and other like service recipients; and

(g) if the supplier is a corporation—the requirements of any applicable industry code (see subsection (3)); and

(h) the requirements of any other industry code (see subsection (3)), if the service recipient acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the service recipient:

(i) any intended conduct of the supplier that might affect the interests of the service recipient; and

(ii) any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient); and

(j) if there is a contract between the supplier and the service recipient for the supply of the financial services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the service recipient in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the service recipient engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the service recipient for the supply of the financial services; and

(l) the extent to which the supplier and the service recipient acted in good faith.

34 No issue was taken on the applications that the alleged conduct in which the Blackbird parties engaged (whether that of the Receivers, BPE Loans 2 or Blackbird Private Equity) was not in trade or commerce in connection with the supply or possible supply of financial services. That includes alleged conduct in which the Receivers engaged 'as agent' for Mr Brown or Mr McMahon or the Company after appointment as receivers and managers under the terms of the BPE Loans 2 Facility or Blackbird Private Equity Facility.

35 Otherwise, for the purpose of an interlocutory application, the following principles concerning the interpretation and application of these provisions may be regarded as settled or, at the very least, reasonably arguable.

(1) 'The term "unconscionable" is not defined in the ASIC Act and is to be understood as bearing its ordinary meaning. The proscription in s 12CB(1) is of conduct in connection with the supply of financial services that objectively answers the description of being against conscience. The values that inform the standard of conscience fixed by s 12CB(1) include those identified by Allsop CJ in *Paciocco v Australia & New Zealand Banking Group* [(2015) 236 FCR 199 at [296] (Besanko and Middleton JJ agreeing)]; certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made, and "the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage"': *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; 267 CLR 1 at [14] (Kiefel CJ and Bell J).

(2) Section 12CB 'operates to prescribe a normative standard of conduct which the section itself marks out and makes applicable in connection with the supply or possible supply of financial services. … The Court needs to administer that standard in the totality of the circumstances taking account of each consideration identified in s 12CC if and to the extent that those considerations are applicable in the circumstances.' The use of the term 'unconscionable' as the expression of the normative standard serves to signify the gravity of the conduct necessary to be found by the Court to be satisfied of a breach of that standard. It is no slight matter and behaviour is only unconscionable where there is some real and substantial ground based on conscience for preventing a person from relying on what are, in terms of general law, that person's legal rights. The conduct proscribed by s 12CB is that which is 'so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct offensive to conscience': *Kobelt* at [87]-[93].

(3) The factors in s 12CC(1) are non-exhaustive and provide guidance as to the norms and values that are relevant to and inform the meaning of unconscionable in s 12CB(1) and its practical operation: *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* [2024] HCA 27; 281 CLR 338 at [100] (Gordon J). But, the judgment required to be made for the purpose of s 12CB is not to be arrived at 'through a mere balancing of the applicable considerations identified in s 12CC': *Kobelt* at [101].

(4) Further, while the presence or absence of each matter in s 12CC(1) is not a mandatory relevant consideration to be weighed in every case, irrespective of circumstances, that:

> … does not mean that the required evaluation involves nothing more than, as the College put it, an "instinctive reaction that the legislation sought to avoid". The normative standard set by [s 12CB(1)] is tethered to the statutory language of "unconscionability". While that term is not defined in the legislation and, in its statutory conception, is "more broad-ranging than the equitable principles", it expresses "a normative standard of conscience which is permeated with accepted and acceptable community standards", and conduct is not to be denounced by a court as unconscionable unless it is "outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience". The items listed in [s 12CC(1)(a)-(l)] are matters that the legislation requires to be considered, in the overall evaluation of the totality of the circumstances to be undertaken for the purpose of [s 12CB(1)], if and to the extent those matters are applicable. This is why both "close attention to the statute and the values derived from it, as well as from the unwritten law" and "close consideration of the facts" are necessary.

Productivity Partners at [60] (Gageler CJ and Jagot J), see, also [100]-[101] (Gordon J).

(5) The legislature has expressly indicated that s 12CB is not limited by the concept of unconscionability within the meaning of the unwritten law: s 12CB(4)(a). As a consequence, although the statutory concept of unconscionable conduct would extend to, it is not limited to circumstances where uncontentious advantage is taken of a person with a special disability or vulnerability: *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; 285 FCR 133 at [82]-[93] (Allsop CJ, Besanko and McKerracher JJ).

(6) The legislature has also expressly indicated that s 12CB is capable of applying to a system of conduct or a pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour: s 12CB(4)(b). As a consequence, a system of conduct or pattern of behaviour may be unconscionable, even though not every individual affected by the conduct or behaviour is or has been disadvantaged by the conduct or behaviour. There need not be loss or disadvantage for a 'system' to be unconscionable: *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6; 276 CLR 1 at [76] (Gordon J).

(7) 'Conduct can be unconscionable even where the innocent party is a willing participant; the question is *how that willingness or intention was produced*' (emphasis original): *Kobelt* at [157] (Nettle and Gordon JJ) citing *Bridgewater v Leahy* [1998] HCA 66; 194 CLR 457 at [118] (Gaudron, Gummow and Kirby JJ), quoting *Huguenin v Baseley* (1807) 14 Ves Jun 273; 33 ER 526 at 536 (Lord Eldon LC); *Stubbings* at [76] (Gordon J); *Dalton v Naegeli* [2024] NSWCA 51; 385 FLR 449 at [132] (Stern JA, Ward P and Griffiths AJA agreeing).

(8) Section 12CB(3)(a) provides that the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention. 'By corollary, for the purpose of determining whether conduct in which a person has engaged is unconscionable, a court can have regard to circumstances that were reasonably foreseeable at the time of the alleged contravention': *Productivity Partners* at [51] (Gageler CJ and Jagot J).

36 It follows that commercial conduct that is otherwise lawful is not 'unconscionable' within the meaning of s 12CB(1) unless it falls outside societal norms.

Asset-based lending

37 Asset-based lending or pure asset lending involves a lender advancing money to a borrower exclusively on the basis of the value of the assets securing the loan without regard to the ability of the borrower to repay the money advanced and interest in accordance with the terms of the applicable loan agreement, in the knowledge that adequate security is available in the event of default: *Stubbings* at [1]. Lending of that kind was described by Basten JA as 'a potentially fruitless enterprise' because there is 'no risk of loss': *Perpetual Trustee Co Ltd v Khoshaba* [2006] NSWCA 41; 14 BPR 26,639 at [128]. However, while it may be accepted that there is nothing inherently unconscionable about asset-based lending as a general proposition, the particular circumstances in which such a loan is made and secured may render the lender's conduct unconscionable and (or) the transaction unjust: *Stubbings* at [4]-[5]; *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; 77 NSWLR 205 at [96]-[99] (Campbell JA, Hodgson and McColl JJA).

38 Short-term asset-based lending to an asset-rich but income-poor borrower for the purpose of the borrower overcoming a temporary liquidity problem or to permit refinancing or sale of property is normal commercial behaviour. But lending in those normal commercial circumstances is quite different to lending an asset-rich but income-poor borrower where it is inevitable that there will be default and the security will be enforced to recover the lender's loan, interest and costs. In circumstances of inevitable default, in substance, the transaction is more akin to a sale of the secured property (at less than its market value) to the lender than a true loan transaction where the commercial object of both the borrower and lender is that the borrower will repay the principal and interest from the borrower's income. Thus, with a default interest rate (e.g., 48% per annum), an asset-based lender has the ability to turn a relatively modest initial advance into a handsome profit within six to 12 months with no (or virtually no) risk of loss of the lender's initial capital outlay. Accordingly, where the borrower (or guarantor) lacks the financial acumen to understand the gross imprudence of an effective sale of the secured property to the lender for less than its market value, it is not difficult to see how permitting the lender to retain the benefit of such a transaction could be unjust and fall within the meaning of unconscionable in s 12CB(1) of the ASIC Act.

39 *Stubbings* was an example of a circumstance in which asset-based lending to a vulnerable borrower was unconscionable. In that case, the borrower lacked commercial understanding and the ability to repay the loan from his own income or other non-secured assets and default was inevitable as a matter of objective fact. The lenders, through their agents, had knowledge

of the borrower's disadvantage and exploited it for their own profit. That was unconscionable and intervention was justified not merely to relieve the borrower from the consequences of his own foolishness or imprudence, but to prevent his victimisation: *Stubbings* at [5]. Justice Gordon was also of the view that the lenders' system of conduct or pattern of behaviour was unconscionable because the lenders' system did not and was not designed to prevent them from taking advantage of vulnerable borrowers. The system sought to immunise the lenders from claims to set aside transactions as unconscionable by avoiding inquiry about why or in what circumstances property was provided as security despite the lenders recognising that a loan of the kind they were offering could be a dangerous product in the wrong hands and wreak significant damage on the guarantor: *Stubbings* at [76]-[84].

40 The failure to implement controls in a system to prevent victimisation was also a feature of the conduct found to be unconscionable in *Productivity Partners*. In that case, a company (the College) provided online vocational education and training funded through a Commonwealth scheme known as the Vocational Education and Training Fee Higher Education Loan Program. Through the VET scheme the Commonwealth assisted people to fund their VET by paying tuition fees directly to the College on the basis that the person funded would incur a debt to the Commonwealth that would be repaid over time through the taxation system. The VET scheme involved a 'moral hazard' insofar as the College received a benefit but did not bear the cost of enrolling persons who did not have a proper understanding of the obligation to pay the course fees or a realistic capacity to complete the course in which they were enrolled. The College used marketing and sales agents who were incentivised to recruit people to enrol at the College. The incentive structure was such that it encouraged recruitment agents to enrol people who were unsuitable to undertake the courses. The courses were also online which meant there was no face-to-face contact with students increasing the risk of unsuitable enrolments. The College removed two controls from its 'system' that had been used to ameliorate the risk of enrolling unsuitable students. The consequences of removing the controls were foreseeable and foreseen. By its revised system of enrolments, the College intended to take advantage of people who were enrolled as a result of agent misconduct or who were otherwise unsuitable for enrolment so as to claim VFH revenue from the Commonwealth. That system of conduct or pattern of behaviour was able to be characterised as unconscionable within the meaning of s 12CB(1) of the ASIC Act: *Productivity Partners* at [106]-[144] (Gordon J), [307] (Steward J, agreeing), [236]-[251]

(Edelman J); see, also, [61]-[69] (Gageler CJ and Jagot J), [310], [340] (Gleeson J and Beech-Jones J, agreeing).

41 In this case there is tension between the Brown parties' assertion of financial vulnerability, on the one hand, and their assertion of the solvency of the Company and loss or damage (loss of profits) resulting from the Receivers seizing the Kimberley Pearl and preventing the Company from conducting its operations during the 2026 tourist season, on the other. The evidence suggests that the purchase of the business was primarily financed by the ScotPac loan made to Mr Brown and Mr McMahon. The BPE Loans 2 Facility was intended to be a short-term loan, in effect, for working capital and to be refinanced after the 2024 tourist season with another lender based on the trading record of the Company. That is, on the face of it, the BPE Loans 2 Facility was an ordinary asset-based loan advanced to cover a short-term deficiency in the Company's liquidity. Mr Brown deposes facts to the effect that, notwithstanding the default and appointment of the Receivers, he believes that the Company had the ability to continue meeting the payments of interest under the BPE Loans 2 Facility at the lower interest rate (the Lower Interest Rate described later in these reasons). Therefore, on the Brown parties' case, the Company was not a financially vulnerable borrower in the sense that it was inevitable that the Company would default or there was a high likelihood that the Company would default in payment of interest under the BPE Loans 2 Facility. Likewise, neither Mr Brown nor Mr McMahon were financially vulnerable guarantors in the sense that they were exposed to an inevitable or high risk of the Company defaulting. Therefore, financial vulnerability of the kind that made asset-based lending predatory in the circumstances of *Stubbings* is absent, on the affidavit evidence, from the circumstances of the Brown parties' claim against BPE Loans 2.

42 A similar observation may be made with respect to the Blackbird Private Equity Facility. Mr Brown also expresses the belief that the Company would have been able to make payments of interest at the lower interest rate (the Lower Interest Rate described later) under the Blackbird Private Equity Facility if the Receivers had not been appointed and taken control of the Kimberley Pearl. Therefore, again, on the Brown parties' case, even though Mr Brown, Mr McMahon and Ms Rutledge were exposed to the risk of financial failure of the Company as guarantors and each of them had little means of repaying the facility from his or her own income or non-secured property, on the affidavit evidence, none of the Brown parties was financially vulnerable in the sense that there was an inevitability or high risk that the Company would default.

43 As the Brown parties' affidavit evidence does not reveal a case in which the Company was financially vulnerable, neither BPE Loans 2 nor Blackbird Private Equity could have exploited such a vulnerability of the Company knowingly or through a system of conduct or pattern of behaviour. Likewise, neither the BPE Loans 2 Facility nor the Blackbird Private Equity Facility could be characterised as a 'dangerous product' to provide to the Company (and the individual Brown parties as guarantors) in the sense that the Company had no income from which to repay the principal and interest under the applicable facilities. In short, on the Brown parties' affidavit evidence, their statutory unconscionability claim is not founded on an assertion that the Company was not a suitable borrower for an asset-based lending product because it had no capacity to repay the loans.

44 It follows that, even if the Blackbird Lenders engaged in a system of conduct or pattern of behaviour involving asset-based lending that was unconscionable within the meaning of s 12CB(1) because it had features that would inevitably result in exploitation through the supply of financial services to *some* vulnerable borrowers and guarantors, on the affidavit evidence, it is difficult to understand how the Brown parties could establish that they suffered loss or damage *by* that unconscionable conduct. If the Company was a suitable borrower for an asset-based lending product, it is not obvious that the financial failure of the Company and loss of the secured property could have been caused by the alleged unconscionable system of conduct or pattern of behaviour as opposed to extraneous factors affecting the economic success of the Company's business. Accordingly, the applicants' claim for relief under s 12GM on the ground that the Blackbird Lenders engaged in a system of conduct or pattern of behaviour involving asset-based lending does not appear particularly compelling.

Unfair terms

45 In their statement of claim the Brown parties plead that many terms of the BPE Loans 2 Facility and Blackbird Private Equity Facility were unfair within the meaning of s 12BG of the ASIC Act. For the purposes of the present applications, it is only necessary to consider their claim that the terms providing for the 'Higher Interest Rate' as defined in each facility was a penalty and unfair.

46 The BPE Loans 2 Facility is comprised of documents styled: 'Facility Document'; 'Facility Terms and Conditions'; and 'Deed of Amendment'. The Blackbird Private Equity Facility is comprised of documents styled: 'Facility Document', 'Facility Terms and Conditions'; and 'Specific Security Deed'; and registered mortgages over the Harrington, Jones Island and

Wingham properties that incorporated a further document styled 'Memorandum of Common Provisions'. The Facility Document and Facility Terms and Conditions are the core documents of each facility. Although notionally prepared by different firms of lawyers, the provisions of these documents appear to be standard form and the same or substantially the same for each Blackbird Lender.

47 Each of the Facility Terms and Conditions is comprised of 21 main provisions and five schedules of provisions that relate to subject matter that may or may not be applicable; namely: Sch 1 – Project Provisions; Sch 2 – Mortgage Terms; Sch 3 – General Security Terms; Sch 4 – Personal Guarantee Terms; and Sch 5 – Corporate Guarantee Terms. Relevantly, cl 6.2(a) of the main provisions of the Facility Terms and Conditions provides that interest on the 'Loan accrues daily and is to be computed on the basis of the actual number of days elapsed and a year of 365 days'. In practice, the Blackbird Lenders have interpreted and applied that clause as providing for simple interest.

48 Clause 6.2(b) then provides:

> (b) The rate of interest payable on each Loan for each Interest Period shall be the Higher Interest Rate, provided that if no Event of Default has occurred the Lender will accept interest at the Lower Interest Rate.

49 In the case of the Blackbird Private Equity Facility, the 'Interest Period', relevantly after the first three months, is one month, the 'Higher Interest Rate' is 4% per month (48% per annum) and the 'Lower Interest Rate' is 2% per month (24% per annum). In the case of the BPE Loans 2 Facility, there were two advances. In each case, the Higher Interest Rate was 4% per month, but in the case of the first advance, the Lower Interest Rate was 1.7% per month and, in the case of the second advance, the Lower Interest Rate was 3% per month.

50 Relevantly, ss 12BF, 12BG and 12BH of the ASIC Act provide:

> **12BF Unfair terms of consumer contracts and small business contracts**
>
> (1) A term of a consumer contract or small business contract is void if:
>
> (a) the term is unfair; and
>
> (b) the contract is a standard form contract; and
>
> (c) the contract is:
>
> (i) a financial product; or
>
> (ii) a contract for the supply, or possible supply, of services that are financial services.

(2) The contract continues to bind the parties if it is capable of operating without the unfair term.

…

12BG Meaning of *unfair*

(1) A term of a contract referred to in section 12BF is ***unfair*** if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(b) the extent to which the term is transparent;

(c) the contract as a whole.

…

(4) For the purposes of paragraph (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

12BH Examples of unfair terms

(1) Without limiting section 12BG, the following are examples of the kinds of terms of a contract referred to in section 12BF that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

…

51 The Brown parties claim that cl 6.2(b) of the Facility Terms and Conditions is unfair within the meaning of s 12BG of the ASIC Act because it has the effect of penalising the borrower and guarantors for a breach of contract. The Blackbird parties contend that claim is untenable because it is well-established that 'there is no penalty where it is agreed to charge a certain

rate of interest on condition that if payment is made punctually the rate will be reduced': *O'Dea v Allstates Leasing System (WA) Pty Ltd* [1983] HCA 3; 152 CLR 359 at 366-367 (Gibbs CJ).

52 In *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) 23 FCR 1 at 29, Lockhart, Beaumont and Gummow JJ referred to the 'well-known, if not much praised, distinction' between a loan clause providing an incentive for prompt payment and a penalty clause where the rate of interest is increased for failing to make prompt payment. Their Honours also made reference to criticism of the distinction for favouring form over substance, but observed that '[h]owever anomalous, the distinction between an increase in the rate of interest (which attracts the doctrine of penalties), and a covenant offering an incentive by reduction of the rate upon prompt payment (which does not attract the doctrine) is well established'. More recently, reference to criticism and anomaly of the distinction was made in the Queensland Court of Appeal but all members of the court were not persuaded that an intermediate appellate court should depart from the long-established semantic distinction upon which the commercial world has acted: *Kellas-Sharpe v PSAL Ltd* [2012] QCA 371; 2 Qd R 233 at [2]-[4] (Margaret McMurdo P), [32]-[49] (Gotterson JA), [57]-[60] (Fryberg J).

53 It is doubtful that the anomalous distinction which applies to the application of the contractual principles relating to penalties and which plainly favours form over substance would constrain the meaning of an 'unfair' term of a contract described in s 12BG of the ASIC Act. It is also doubtful that form would prevail over substance in the application of the concept of a 'term that penalises' for the purposes of s 12BH(1)(c). It is also possible that the anomalous distinction may not now survive scrutiny following the High Court's clarification and explanation of the contractual penalty doctrine in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; 247 CLR 205 and *Paciocco v Australian and New Zealand Banking Group Ltd* [2016] HCA 28; 258 CLR 525. In *Andrews* French CJ, Gummow, Crennan, Kiefel and Bell JJ said:

> [10] In general terms, a stipulation prima facie imposes a penalty on a party (the first party) if, *as a matter of substance*, it is collateral (or accessory) to a primary stipulation in favour of a second party this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party. …
>
> (emphasis added.)

54 The essence of a penalty is payment of money stipulated as in terrorem of the offending party. It is in the nature of punishment for non-observance of a contractual stipulation:

Paciocco at [16], [22] (Kiefel J) citing *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1915] AC 79 at 86 (Lord Dunedin) and *Legione v Hateley* [1983] HCA 11; 152 CLR 406 at 445 (Mason and Deane JJ). Further, the penalty doctrine is not confined to breach of contract and extends to payment of a sum of money on the happening of an event other than breach of a contractual obligation: *Andrews* at [78] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

55 In *Paciocco* at [18], Kiefel J observed that the 'distinction drawn in *Andrews,* between the primary stipulation and the penalty which is collateral to it, directs attention to penal bonds, which were largely used historically to bind a person to the performance of an obligation.' Her Honour then provided an example of a simple money bond as one where A loans B £100 and B executes a bond to pay £200 to A on a fixed day subject to condition of defeasance that if B pays £100 before the due date the bond will be void. Within the *Andrews* framework of a primary and collateral stipulation, it is difficult to logically distinguish a bond to pay twice the loan advanced on a date (collateral stipulation) subject to a condition of defeasance if the loan is repaid on the due date (primary stipulation), from an obligation to pay interest at a particular rate (collateral stipulation) subject to a condition of acceptance of payment of interest at half the rate if the interest payment is made on the due date (primary stipulation). It is incongruous that one should potentially be a penalty and the other not. At the very least, it is reasonably arguable that the well-established distinction to which reference is made in *Kellas-Sharpe* is ripe for reconsideration in light of *Andrews* and *Paciocco*.

56 Clause 6.3 of the Facility Terms and Conditions imposes an obligation on the Borrower to pay the Lender interest on the Loan on the first day of each Interest Period. Clause 14.1 describes various circumstances that are an Event of Default and these include non-payment of interest in accordance with cl 6.3. Therefore, the effect of cl 6.2(b) is to impose on the Borrower an obligation to pay interest at the rate of 4% per month (48% per annum) upon the failure of the Borrower to pay interest at the rate of 2% per month (24% per annum) on the due date.

57 From the foregoing consideration of the provisions of the ASIC Act and general law principles relating to penalties, it is reasonably arguable that the imposition of twice the rate of interest (and a rate of 48% per annum) for non-payment of interest on the due date 'penalises or has the effect of penalising [the Borrower] for a breach … of the contract' within the meaning of s 12BH(1)(c) of the ASIC Act, causes a 'significant imbalance in the

parties' rights and obligations arising under the contract' and 'is not reasonably necessary in order to protect the legitimate interests' of the Lender and 'would cause detriment' to the Borrower if it were applied or relied upon and, as a consequence, cl 6.2(b) is an 'unfair' term within the meaning of s 12BG(1) of the ASIC Act.

58 In considering whether conduct to which a contract relates is unconscionable within the meaning of s 12CB(1), a court's consideration of the contract may include consideration of 'the terms of the contract' and 'is not limited to consideration of the circumstances relating to formation of the contract': s 12CB(4)(c)(i) of the ASIC Act. Further, the Court may have regard to 'whether, as a result of conduct engaged in by the supplier, the service recipient was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier' and 'the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the service recipient' and 'the terms and conditions of the contract': s 12CC(1)(b), s 12CC(1)(j) of the ASIC Act. Therefore, irrespective of whether or not cl 6 of the Facility Terms and Conditions is regarded as part of a system of conduct or pattern of behaviour, in the context of the specific circumstances of the BPE Loans 2 Facility and Blackbird Private Equity Facility, it is reasonably arguable that the inclusion of an unfair term that imposes a penalty interest rate is a separate and independent instance of unconscionable conduct within the meaning of s 12CB(1) of the ASIC Act.

Receivers' appointment and conduct

59 There are a number of ways in which the Brown parties allege that the Receivers' conduct and (or) the Blackbird Lenders' conduct in appointing them contributed towards the unconscionable conduct of the Blackbird Lenders and, separately, comprise unconscionable conduct and breach of duties on the part of the Receivers. As with the assertions relating to asset-based lending and unfair terms, the allegations of unconscionable conduct in contravention of s 12CB(1) of the ASIC Act in relation to the appointment and conduct of the Receivers arise and may be advanced separately and irrespective of whether or not the appointment of the Receivers is also to be regarded as an element of a system of conduct or pattern of behaviour.

Receivers' duties

60 Receivers and managers generally act as agents of the company and are able to deal with its property and manage its business in that capacity. The agency is of a special character in that

the receivers are not subject to the company's control. In *Carey v Korda* [2012] WASCA 228; 45 WAR 181 (Murphy JA, Martin CJ and Newnes JA agreeing) summarised the principles applicable to the position of a receiver appointed out of court, relevantly, as follows:

> 45 The essential elements of the law of modern receivership are generally regarded as deriving from the dissenting judgment of Rigby LJ in *Gaskell v Gosling* [1896] 1 QB 669, which was affirmed in the House of Lords (*Gosling v Gaskell* [1897] AC 575), and referred to with evident approval in *Australian Mutual Provident Society v George Myers & Co Ltd (in liq)* (1931) 47 CLR 65 at 82, 95. Rigby LJ described the "almost penal liabilities" imposed on a mortgagee in possession at law and observed that courts favoured "any means which would enable the mortgagee to obtain the advantages of possession without its drawbacks" (at 691). In order to overcome the disadvantages, mortgagees began to include, in the mortgage, a covenant requiring the mortgagor to appoint a receiver with wide powers of management, to receive income from the mortgaged property in order to effect payments to the mortgagee. The covenant was enforceable at the suit of the mortgagee.
>
> 46 Mortgage instruments later evolved to include a stipulation that the mortgagee itself, and not the mortgagor, should have the right to appoint the receiver. Though it was the mortgagee who appointed the receiver, the object of the parties was that the receiver should act as agent of the mortgagor. It was a term of the contract that the mortgagor would not revoke the appointment of the receiver. Rigby LJ observed (at 692):
>
> > Of course the mortgagor cannot of his own will revoke the appointment of a receiver, or that appointment would be useless. For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with. The appointment so made will stand good against himself and all persons claiming through him, except incumbrances having priority to the mortgagee who appoints the receiver.
>
> 47 Under the general law, the existence of the agency also assisted the receiver by imposing liability in respect of his or her dealings with third parties upon the mortgagor, rather than upon the receiver personally: *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 433; cf the statutory personal liability for certain debts incurred, including for services rendered and property leased, under s 419 of the *Corporations Act*.
>
> 48 In *Visbord v Federal Commissioner of Taxation* (1943) 68 CLR 354 at 381-382, Williams J referred to this "well-established legal device" as enabling the mortgagee to obtain the benefits, but without being subject to the liabilities, of the mortgagee in possession. His Honour added:
>
> > The appointment of the receiver divests the mortgagee of all powers with respect to the mortgaged property which the receiver is appointed to exercise (*Woolston v Ross* (1900) 1 Ch 788). The receiver takes complete control of the mortgaged property and the mortgagor is as effectively dispossessed from control as he would be if the mortgagee had entered into possession (*Inland Revenue Commissioners v Thompson* (1937) 1 KB 290; *Meigh v Wickenden*

(1942) 2 KB 160, at pp 168, 169).

> Although the receiver is in law the agent of the mortgagor, he occupies a very special position. He is appointed to and may be removed from office by the mortgagee.

49 Reference was made by Dawson, Gaudron and Gummow JJ in *Sheahan v Carrier Air Conditioning Pty Ltd* (at 432-433) to the above observations of Williams J. Dawson, Gaudron and Gummow JJ continued, with respect to the true character of the agency (at 436):

> That character is indicated in the following passage from the judgment of Sir Raymond Evershed MR in *In re B Johnson & Co (Builders) Ltd* [1955] Ch 634 at 644-645:
>
> > [A] person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realise the security; that is the whole purpose of his appointment; and the powers which are conferred upon him, and which I have to some extent recited, are … really ancillary to the main purpose of the appointment, which is the realisation by the mortgagee of the security.
>
> More recently, in *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301 at 1305; [1986] 3 All ER 94 at 97; affd [1988] 1 WLR 1231; [1989] 1 All ER 261, Hoffmann J, in referring to this passage, said that a receiver and manager "is no ordinary agent" and continued:
>
> > Although nominally the agent of the company, his primary duty is to realise the assets in the interests of the debenture holder and his powers of management are really ancillary to that duty.

50 In that regard, there is no general fiduciary relationship between the receiver and the company in receivership: *State Bank of New South Wales Ltd v Chia* (2000) 50 NSWLR 587 at [869]-[870]; *Bride v Freehill Hollingdale & Page* [1996] ANZ ConvR 593 at 596.

51 Under the general law, a receiver's duties are, in broad terms:

(a) to the mortgagee, to collect and realise the assets, in order to discharge the secured debt;

(b) to the mortgagee, a duty to keep it informed about the progress of the receivership;

(c) as donee of the power, to exercise the powers and duties in good faith and for proper purposes;

(d) to the mortgagor, to act in good faith in the exercise of the powers of sale, in the same way that a mortgagee owes duties of good faith in that regard; and

(e) to the mortgagor, to hold the balance of the proceeds of sale after discharge of the secured debt, on trust for the mortgagor.

See *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (4th

ed, LexisNexis, 2002) [28-225]-[28-235], and the cases there cited.

52 Section 419 of the *Corporations Act*, relevantly provides:

> (1) A receiver … who, whether as agent for the corporation concerned or not, enters into possession or assumes control of any property of a corporation for the purpose of enforcing any security interest is, notwithstanding any agreement to the contrary, but without prejudice to the person's rights against the corporation or any other person, liable for debts incurred by the person in the course of the receivership, possession or control for services rendered, goods purchased or property hired, leased … used or occupied.
>
> (2) Subsection (1) does not constitute the person entitled to the security interest a mortgagee in possession.

53 As to s 419, see *AGL Victoria Pty Ltd v Lockwood* (2003) 10 VR 596 at [23]-[31].

54 The general law duties have also been modified by statute to include a duty, in a sale of the property of a corporation, to exercise reasonable care to obtain market value or the best price otherwise reasonably available: s 420A of the *Corporations Act*, read with the definition of "controller" in s 9. There are also certain statutory duties, including duties of care and diligence and good faith, imposed under ss 180, 181, 182, 183 and 184 of the *Corporations Act*, read with the definition of "officer" in s 9 of that Act.

61 Section 420 of the Corporations Act relevantly confers the following powers on receivers.

> **420 Powers of receiver**
>
> (1) Subject to this section, a receiver of property of a corporation has power to do, in Australia and elsewhere, all things necessary or convenient to be done for or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed.
>
> (2) Without limiting the generality of subsection (1), but subject to any provision of the court order by which, or the instrument under which, the receiver was appointed, being a provision that limits the receiver's powers in any way, a receiver of property of a corporation has, in addition to any powers conferred by that order or instrument, as the case may be, or by any other law, power, for the purpose of attaining the objectives for which the receiver was appointed:
>
> (a) to enter into possession and take control of property of the corporation in accordance with the terms of that order or instrument; and
>
> (b) to lease, let on hire or dispose of property of the corporation; and
>
> …
>
> (h) to carry on any business of the corporation; and
>
> …

62 The contractual powers arising under a security agreement are also subject to an implied qualification that they are exercisable only for the purpose of attaining the objectives for which the receivers were appointed. In short, those objectives are the preservation, recovery and realisation of the secured property in order to repay the secured moneys and (or) receive performance of the secured obligations: *Bank of New Zealand v Essington Developments Pty Ltd* (1991) 5 ACSR 86 at 88 (McLelland J).

63 The basal duty of receivers is to comply with the terms of the instrument of their appointment and to exercise the powers conferred on them for the purpose of securing or realising the appointor's security. However, an exercise of the powers of the receivers which wilfully sacrifices the interests of the grantor of the security interest or subsequent secured parties is an abuse of the powers involving bad faith: *State Bank of New South Wales v Chia* [2000] NSWSC 552; 50 NSWLR 587 at [879] (Einstein J), citing *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295 at 312 (Templeman LJ); *Barns v Queensland National Bank Ltd* [1906] HCA 26; 3 CLR 925 at 941-945 (Griffith CJ, Barton and O'Connor JJ); *Forsyth v Blundell; Associated Securities Ltd v Blundell* [1973] HCA 20; 129 CLR 477 at 493-494 (Menzies J), 506-507 (Mason J); and *Pendlebury v Colonial Mutual Life Assurance Society Ltd* [1912] HCA 9; 13 CLR 676 at 691-692 (Griffith CJ), 694 (Barton J), 700-703 (Isaacs J); see, also, *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820 at 834 (Needham J). Receivers who accept an appointment not for the purpose of enforcing a security, but for a collateral purpose may also involve the exercise of power in bad faith for an improper purpose: *Downsview Nominees* at 317-318.

64 In general, as a corollary of the usual position that a receiver is agent of the mortgagor, a mortgagee has no power or authority to instruct or direct a receiver whom the mortgagee has appointed in the performance and exercise of the receiver's functions and powers. Nevertheless, it is unrealistic to consider that there will not be a degree of consultation and communication between the mortgagee (appointor) by which the preferences of the mortgagee are conveyed to the receiver. However, if the mortgagee establishes a relationship with the receiver under which the receiver exercises his or her powers in accordance with the instructions of the mortgagee, both the mortgagee and receiver may be liable to the mortgagor for breaches of the receiver's duties: *Chia* at [880]-[886].

Appointment in good faith for a proper purpose

65 Equity has developed principles relating to the enforcement of a security interest granted in property (by whatever label: legal or equitable mortgage, charge, pledge, lien or other hypothecation) over many centuries. 'The most basic principles [are], first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage.' As a consequence of these basic principles, the powers conferred on the grantee under a security agreement must be exercised in good faith for the purpose of obtaining repayment and, subject to so doing, the powers conferred on the grantee may be exercised although the consequences may be disadvantageous to the grantor. The same principles apply to the exercise of a power to appoint a receiver and manager by the grantee: *Downsview Nominees* at 312 (Lord Templeman for the Board). That principle has been accepted in Australia: see e.g., *ENT Pty Ltd v McVeigh* (1996) 6 Tas R 202 at 208-209 (Slicer J); *Sino-Resource Imp & Exp Co Ltd v Oakland Investment Group Ltd (No 2)* [2018] QSC 133 at [10]-[14] (Henry J). Accordingly, it is reasonably arguable that the Blackbird Lenders were required to exercise the powers to appoint the Receivers and to 'fix the rate of remuneration' of the Receivers in good faith and for the *proper* purpose of obtaining repayment of the amount due under the BPE Loans 2 Facility and Blackbird Private Equity Facility.

Undisclosed interests in the Blackbird Lenders

66 The Brown parties allege in their statement of claim that Mr Albarran had undisclosed interests in the Blackbird Lenders that incentivised him to act in bad faith and sacrifice the Brown parties' interests recklessly and improperly to use his position to gain an advantage for himself and the Blackbird Lenders. The alleged interests were as a shadow director or officer and indirect financier and secured creditor of the Blackbird Lenders. An unreasonable failure to disclose intended conduct (appointment of Mr Albarran) that might affect the Brown parties or present a risk to them from that intended conduct is a matter to which the Court may have regard for the purpose of determining whether conduct is unconscionable: s 12CC(1)(i).

67 There was little affidavit evidence to support the allegation that Mr Albarran is a shadow director or officer of the Blackbird Lenders. Such evidence as the Brown parties adduced was hearsay to the effect that Mr Laird had expressed the opinion that Mr Albarran was the 'money man' behind the Blackbird Lenders; a statement by Mr Wilkinson that he would

speak to Mr Albarran about the 'new loan'; and a double-hearsay statement that Mr Laird said that Mr Wilkinson said he was going to get Mr Albarran to 'sign off' on the new loan. There is also evidence that the trustee of the Albarran Family Trust No 2 has a security interest in the personal property of Blackbird First Mortgage Corporation Pty Ltd.

68 Blackbird First Mortgage Corporation is the sole shareholder of Blackbird Private Equity. However, Blackbird First Mortgage Corporation does not hold a direct or indirect shareholding interest in BPE Loans 2. Another company, Blackbird Finance Pty Ltd, holds 70% of the issued shares in Blackbird First Mortgage Corporation. Mr Wilkinson is the sole director and shareholder of Blackbird Finance. Therefore, relevantly, Blackbird Finance and Mr Wilkinson are the common parties related to BPE Loans 2 (90% indirect interest) and Blackbird Private Equity (70% indirect interest).

69 At the time of the statements regarding Mr Wilkinson speaking to and obtaining Mr Albarran's 'sign off' on the new loan, Mr Albarran was a receiver and manager of the assets of Mr Brown and Mr McMahon. Therefore, Mr Albarran's involvement and agreement to the terms upon which the loan under the BPE Loans 2 Facility was repaid and refinanced is explicable on the basis that his appointment as receiver in control of the property of Mr Brown and Mr McMahon would cease or not be required upon repayment of the loan they had guaranteed. It may be inferred that Mr Albarran would not agree to retire as receiver until he was satisfied that the secured creditor (BPE Loans 2) would be fully repaid and the Receivers' fees would also be paid. It follows that the affidavit evidence upon which the Brown parties rely does not raise a prima facie case that Mr Albarran is a shadow director or officer of either of the Blackbird Lenders.

70 As to the security interest of the trustee of the Albarran Family Trust No 2 in the property of Blackbird First Mortgage Corporation, in the absence of any other evidence, it may be inferred in all the circumstances that the trustee and family trust are associated with Mr Albarran. It may also be inferred that the applicable trust is a discretionary family trust with usual terms to the effect that Mr Albarran and members of his immediate family are objects of a discretionary power of appointment vested in the trustee of that trust. Therefore, it may be inferred that objects of the discretionary power of appointment have an indirect beneficial interest in the financial success of Blackbird Private Equity through Blackbird First Mortgage Corporation's shareholding in Blackbird Private Equity and through the trustee's status as a creditor of Blackbird First Mortgage Corporation. Such an indirect interest, albeit

quite remote and of an unknown magnitude, is a matter that could have an effect on the independence of Mr Albarran as a receiver appointed by Blackbird Private Equity to the property of the Brown parties.

71 The affidavit evidence also tends to suggest that there was, at least, an established and relatively close professional relationship between Mr Albarran and Mr Wilkinson such that Mr Albarran was likely to be appointed as receiver to the assets of the Company or a guarantor if Blackbird Private Equity decided to exercise the power to appoint a receiver under the Blackbird Private Equity Facility.

72 For the purpose of determining whether a person has engaged in unconscionable conduct in contravention of s 12CB(1), the Court may have regard to 'the extent to which the supplier unreasonably failed to disclose to the service recipient' 'any intended conduct of the supplier that might affect the interests of the service recipient' and 'any risks to the service recipient arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the service recipient)': s 12CC(1)(i) of the ASIC Act. Although the affidavit evidence upon which the Brown parties rely is quite thin, there is sufficient evidence to sustain an allegation that Blackbird Private Equity unreasonably failed to disclose to the Brown parties: (1) that Mr Albarran was likely to be appointed receiver to their assets in the event of a default; and (2) Mr Albarran had an indirect financial interest in Blackbird Private Equity that could affect his ability to discharge his duties as receiver independently. These were matters that presented a risk to the applicants of Mr Albarran failing to perform his duty as receiver in good faith. However, on the affidavit evidence as it stands, these allegations are no more than arguable and should not be regarded as raising a prima facie case as a stand-alone claim or as an element of a system of conduct or pattern of behaviour.

Brown and McMahon receivership purpose

73 In the event of a default, under the terms of the BPE Loans 2 Facility, BPE Loans 2 had power to appoint a receiver and manager to the property of one or more of the Company, Mr McMahon and Mr Brown. In accordance with usual terms, the lender had power to 'fix the rate of remuneration of each Receiver', a receiver so appointed was an agent of the grantor of the security interest, and numerous powers were conferred on the receivers: BPE Loans 2 Facility (Facility Terms and Conditions: Sch 3 - General Security Terms, cl 7).

74 The Brown parties assert that BPE Loans 2 acted in bad faith and for an improper purpose in that it appointed the Receivers to the property of Mr McMahon and Mr Brown not for the purpose of receiving income or realising property, but for the purpose of placing financial pressure on Mr McMahon and Mr Brown so as to incentivise them to bring about the refinancing of the BPE Loans 2 Facility and repayment in full of the principal, interest and costs claimed under that facility. The Brown parties largely rely on inferences drawn from the facts and circumstances of the appointment and the conduct of BPE Loans 2 and the Receivers after the appointment.

75 Notwithstanding the volume of affidavit evidence read on the applications, there is no evidence that the Receivers took any steps towards 'getting in' or 'realising' any property of Mr Brown or Mr McMahon. The affidavit evidence suggests that the Receivers were almost entirely focussed on securing full payment of all sums BPE Loans 2 demanded through the Company negotiating the refinancing of the BPE Loans 2 Facility rather than obtaining any payment from the property of the guarantors that was notionally under the Receivers' control. With regard to the purpose of BPE Loans 2 appointing the Receivers, the affidavit evidence of Mr Wilkinson is also instructive.

76 Mr Wilkinson deposes that Hall Chadwick were engaged before the appointment of the Receivers as investigative accountants and, after that engagement, BPE Loans 2 issued the Company with a notice of default. Thereafter, there were discussions between Mr Speziali and Mr Wilkinson, as representatives of BPE Loans 2, and Mr Brown and Mr McMahon before the Receivers were appointed. In the course of those discussions Mr McMahon accepted that it was necessary for him to sell the Harrington property or Jones Island property and Mr Wilkinson said Mr McMahon would be afforded a short period of time to negotiate terms and complete a sale of one of those property but, if he did not, BPE Loans 2 would be forced to take enforcement action. Following those discussions, BPE Loans 2 instructed Hall Chadwick to cease all investigative work. Subsequently, the Company made a payment of $18,150 under the BPE Loans 2 Facility. Mr Wilkinson deposes that then:

> Over the next three weeks, nothing more was done. I discussed the matter with Mr Speziali, and we agreed that a formal enforcement step needed to be taken, to procure a better response from Mr Brown and Mr McMahon.

77 The Receivers were appointed to the property of Mr McMahon on 2 April 2025 and to the property of Mr Brown on 6 June 2025. Mr Wilkinson deposes that the receiverships were 'deliberately limited in scope' to Mr McMahon and Mr Brown for reasons that Mr Speziali

and Mr Wilkinson wanted to mitigate harm to the Company's business and, in any event, it was logistically difficult and prohibitively expensive to seize the Kimberley Pearl due to its location and, further: 'the appointment of the Receivers to the individuals should have been enough to ensure that one or both of the McMahon Properties were sold, and that should have been enough to bring about full repayment of the ScotPac and BPE 2 Loan'.

78 It follows from the facts Mr Wilkinson deposes that he admits, in effect, that the purpose of appointing the Receivers to the property of Mr McMahon and Mr Brown was not to enforce the security interests they had granted in their property but to use the receiverships to place pressure on Mr McMahon to sell real property that was not the subject of the security interest. Thus, on the affidavit evidence, it is reasonably arguable that the appointments of the Receivers to the property of Mr McMahon and Mr Brown were in bad faith and not for a proper purpose.

79 As already mentioned, there is no direct evidence that any property of Mr Brown or Mr McMahon was actually under the control of the Receivers at any time and there is no evidence that the Receivers seized control of any particular property. Based on the available evidence, the value of any personal property that was or could have been under the Receivers' control is likely to have been relatively modest. As also mentioned, there is also no evidence that the Receivers received any income from any property or realised any property for the benefit of and in repayment of the BPE Loans 2 Facility. The receivership of Mr Brown's property was for just under two months and the receivership of Mr McMahon's property just under four months. There is no evidence of what work the Receivers performed, if any, during those receiverships. On the available evidence, the work the Receivers appear to have performed was largely confined to ensuring that the full amount claimed under the BPE Loans 2 Facility was paid, not through realising property of Mr McMahon and Mr Brown under the Receivers' control, but through the company refinancing the facility. Further, it may be inferred that the Receivers retired after the BPE Loans 2 Facility was refinanced by the Blackbird Private Equity Facility and upon payment of the full amount claimed to BPE Loans 2.

80 In general, the duties owed by a receiver and manager do not compel that person to adopt any particular course of action, by selling the whole or part of the controlled property or by carrying on business or by exercising any other powers or discretions conferred on that person. But, as a security interest is granted as security for a debt, a receiver and manager will

breach the duties owed if the powers are abused by exercising them otherwise than for the special purpose of enabling the controlled property to be preserved and realised for the benefit of the grantee: *Downsview Nominees* at 314.

81 On the affidavit evidence it is reasonably arguable that it may be inferred that the Receivers accepted their appointment and acted as receivers and managers not for the purpose of enforcing the security of BPE Loans 2 over the property of Mr McMahon and Mr Brown, but for the improper purpose of pressuring Mr McMahon and Mr Brown into bringing about refinancing and repayment by the Company of the full amount claimed under the BPE Loans 2 Facility. Therefore, it is also reasonably arguable that the Receivers acted in bad faith and for an improper purpose in the course of performing their receiverships of Mr McMahon and Mr Brown.

Brown and McMahon receivership remuneration

82 The Brown parties also assert that the Receivers acted in bad faith, exercised their powers for an improper purpose, and misused their position in securing payment of excessive and disproportionate remuneration and expenses for work notionally performed during the receiverships of Mr McMahon and Mr Brown. That payment was secured out of the advance under the Blackbird Private Equity Facility for the amount claimed to discharge the Company's liability under the BPE Loans 2 Facility. It may be inferred that, without payment of the full amount claimed for the Receivers' remuneration and expenses, the Receivers would not have retired from the receiverships over the property of Mr McMahon and Mr Brown.

83 The instruments appointing the Receivers to the property of Mr Brown and Mr McMahon were not in evidence. Further, no instrument by which BPE Loans 2 fixed the 'rate of remuneration' of the Receivers was otherwise in evidence. Therefore, there was no evidence regarding the manner in which Receivers' remuneration was determined for the receiverships over the property of Mr Brown and Mr McMahon.

84 Common bases for calculation of receivers' remuneration are: (a) time-based charging; and (b) a commission based on a percentage of recoveries (amounts received as income from or upon realisation of the secured property): *Re Banksia Securities (in liq) (receivers & managers appointed)* [2017] NSWSC 540; 35 ACLC 17-020 at [37] (Gleeson JA). Therefore, it may be assumed that the Receivers' remuneration for the receiverships over the property of Mr Brown and Mr McMahon was to be calculated on one of those bases.

85 On the application of an external administrator, the Court may fix the amount to be paid by way of remuneration to a receiver appointed to the property of a corporation under a security instrument: s 425(1), s 425(5) of the Corporations Act. In exercising the power to fix the remuneration, the Court must have regard to whether the remuneration is 'reasonable' taking into account a number of matters including the extent to which the work performed by the receiver was reasonably necessary, the period during which the work was performed, the complexity (or otherwise) of the work performed, the value and nature of any property dealt with by the receiver and, if the remuneration is ascertained in whole or in part on a time basis, the time properly taken by the receiver in performing the work and whether the total remuneration is capped: s 425(8) of the Corporations Act. Many of the matters in s 425(8) have the concept of proportionality as a unifying theme. The work done must be proportionate to the difficulty and importance of the task in the context in which it needs to be performed. Generally, proportionality involves an assessment of the value of the service rendered. However, that does not mean that a receiver is not entitled to remuneration for work that does not lead to the receipt of income or realisation of property if it otherwise reasonably necessary: *Re Banksia Securities* at [41]-[46]; *Sanderson, as liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* [2017] NSWCA 38; 93 NSWLR 459 at [55]-[60] (Bathurst CJ, Beazley P, Gleeson JA, Barrett and Beach AJJA agreeing); *Templeton v Australian Securities and Investments Commission* [2015] FCAFC 137; 108 ACSR 545 at [31]-[33] (Besanko, Middleton and Beach JJ); *Conlan as liquidator of Rowena Nominees Pty Ltd (receivers and managers appointed) (in liq) v Adams* [2008] WASCA 61; 65 ACSR 521 at [47] (McLure JA, Buss JA and Newnes AJA agreeing).

86 By analogy with the power conferred on the Court to fix the remuneration of a receiver appointed out of court to the property of a corporation, it is reasonably arguable, that whatever 'rate of remuneration' was fixed by BPE Loans 2, the Receivers were only entitled to charge 'reasonable' remuneration in accordance with the applicable fixed rate of remuneration. Therefore, the Receivers' remuneration was required to be proportionate and for services of 'value' rendered in the discharge of their functions and powers taking into account matters of the kind to which reference is made in s 425(8) of the Corporations Act. It is also reasonably arguable, by analogy with trustees, external administrators and court appointed receivers, that the Receivers were entitled to be reimbursed for costs and expenses 'properly incurred'. Namely, costs and expenses prudently and reasonably incurred in the discharge of the Receivers' functions and powers. If a cost or expense was not so incurred or

was unreasonable or unnecessary, it was not 'properly incurred': e.g., *Adsett v Berlouis* (1992) 37 FCR 201 at 209-212 (Northrop, Wilcox and Cooper JJ); *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 100-101 (Kennedy and Ipp JJ, Wallwork J agreeing).

87 The amount claimed and paid for the Receivers' remuneration and expenses for the receiverships over the property of Mr Brown and Mr McMahon was $100,000. Having regard to: the absence of any evidence of the rate of remuneration that was fixed; the relatively short period of the receiverships; the absence of evidence of the nature of any property the subject of control; the evident limited nature of any work performed; and the absence of any evidence of the work actually performed or expenses actually incurred, an amount of $100,000 for remuneration and expenses appears disproportionate. By way of comparison, where a receiver is appointed pursuant to a power conferred under the *Conveyancing Act 1919* (NSW), the receiver may charge commission at a rate not exceeding 5% of the gross amount received: s 115(1), s 115(6) of the Conveyancing Act. At that rate, a fee of $100,000 implies gross receipts of $2,000,000 from the receivership which manifestly was not the case. It is also unclear, but the remuneration may have included work Hall Chadwick performed before the Receivers were appointed as part of the investigations to which Mr Wilkinson deposed. If so, the Receivers were not entitled to charge and recover remuneration for that work out of the property of Mr Brown or Mr McMahon.

88 It follows that, on the affidavit evidence as it stands, without any explanation of the work performed or expenses incurred, a reasonably arguable inference arises that the Receivers charged and recovered unreasonable remuneration and expenses for any work performed or expenses incurred in the receiverships of the property of Mr Brown and Mr McMahon. Thus, it is reasonably arguable that they acted in bad faith, for an improper purpose, and used their position to gain an advantage for themselves to which they were not entitled.

Blackbird Private Equity refinancing

89 The Brown parties also assert that the Blackbird Lenders acted in bad faith, exerted undue financial pressure and used unfair tactics to secure the Brown parties' agreement to the terms of the Blackbird Private Equity Facility which included terms that were not reasonably necessary for the protection of the legitimate interests of the Blackbird Lenders. As already mentioned, it is reasonably arguable that:

(a) BPE Loans 2 appointed and the Receivers performed the receivership over the property of Mr McMahon and Mr Brown in bad faith and for the improper purpose of

placing pressure on them to bring about the Company repaying the full amount demanded under the BPE Loans 2 Facility;

(b) the Receivers demanded and received payment of $100,000 for the Receivers' remuneration and expenses in bad faith, for an improper purpose and misused their position; and

(c) at least, the terms of the BPE Loans 2 Facility and Blackbird Private Equity Facility requiring payment of the Higher Interest Rate in circumstances of default were not reasonably necessary for the protection of the Blackbird Lenders' legitimate interests.

90 In these circumstances, it is also reasonably arguable that the receiverships of the property of Mr McMahon and Mr Brown coupled with interest notionally continuing to accrue at the rate of 48% per annum and the looming possibility of appointing receivers and managers to the property of the Company (which would destroy its business), were intended to and had the effect of placing undue financial pressure on the Company, Mr McMahon and Mr Brown, and were an unfair tactic used, to extract payment of the full amount demanded under the BPE Loans 2 Facility. Similarly, it is reasonably arguable that, in the circumstances, Blackbird Private Equity was aware of that undue pressure and unfair tactic and took advantage of it to secure the Brown parties' agreement to refinancing the BPE Loans 2 Facility on the terms of the Blackbird Private Equity Facility, including an unfair term requiring payment of the Higher Interest Rate, the provision of additional security by Mr McMahon and Ms Rutledge and payment of certain fees and charges upon establishment of that facility.

91 Excluding capitalised pre-paid interest at the Lower Interest Rate and fees and other charges, the amount of money actually advanced to the Company by BPE Loans 2 was $395,125. That sum comprised $343,125 advanced in July 2024 and $52,000 advanced in September 2024. Therefore, the 'principal' sum that was refinanced by the Blackbird Private Equity Facility was also $395,125. However, the notional amount advanced under the Blackbird Private Equity Facility was $776,021.80. Almost half that amount, $378,493.55, comprised interest under the BPE Loans 2 Facility, the Receivers' remuneration and expenses, and pre-paid interest, fees and other charges under the Blackbird Private Equity Facility comprised of the following:

Description	**Amount**
BPE Loans 2 interest	$130,671.76
Receivers' remuneration and	$100,000.00

expenses	
Blackbird Private Equity interest	$40,741.14
Application/Establishment Fee	$25,000.00
Valuation Fee	$25,000.00
Risk Management Fee	$25,000.00
Legal Costs	$8,800.00
Broker Fees	$23,280.65
Total	**$378,493.55**

92 Ignoring separate legal personalities and viewing the Blackbird Lenders as a group, it follows that the total amount of loan capital the Blackbird Lenders actually risked was $395,125. Third party fees (Receivers, lawyers and brokers) may also have been paid to those third parties increasing the amount of capital the Blackbird Private Equity actually 'paid out' and risked. But, in any event, the amount of capital that the Blackbird Lenders 'risked' was significantly less than $776,021.80.

93 As to the valuation fee, there is evidence that BPE Loans 2 obtained valuation review reports with respect to the Harrington Road and Jones Island properties (Mr McMahon's real properties) dated 23 May 2025. These reports contain a disclaimer that they were not a valuation report or a current market value of the property and should not be relied upon to make financial lending decisions. In the case of the Wingham property (Ms Rutledge's real property) no report of any description was obtained. Evidently, a mere oral appraisal from a local real estate agent was all that was obtained. In these circumstances it is quite doubtful that the actual valuation fees could have been as much as $25,000.

94 Otherwise, putting to one side fees for lawyers and brokers and pre-paid interest, the loan sum Blackbird Private Equity advanced was increased by $75,000 for fees it demanded upon establishing the Blackbird Private Equity Facility. That sum ($75,000) was about 10% of the sum it notionally advanced ($776,021.80). It is reasonably arguable that these fees were fictitious or non-genuine charges and were not reasonably necessary to protect the legitimate interests of Blackbird Private Equity.

95 As of 4 March 2026, Blackbird Private Equity claimed that it was owed $1,026,841.64 under the Blackbird Private Equity Facility. Therefore, again ignoring the separate legal personalities, the Blackbird Lenders collectively made a notional gross return of $631,716.64 on an initial capital outlay of only $395,125. That is a notional gross return of 160% in about 19 months or 100% per annum. Although the initial capital outlay was (and remains) notionally 'at risk', having regard to the security interests granted to the Blackbird Lenders, there was (and remains) virtually no risk of the Blackbird Lenders not recovering the initial

capital and it is only the notional return or opportunity costs of using that capital elsewhere that was (and remains) 'at risk'. Having regard to these matters, as a matter of pure optics, it is reasonably arguable that the Blackbird Lenders' reliance and insistence on their rights under the legal terms of each of the BPE Loans 2 Facility and Blackbird Private Equity Facility was and is unfair, profligate and out of proportion to that which was (and is) reasonably necessary to protect their legitimate commercial interests.

Kimberley Pearl Tours receivership purpose

96 In the event of default, under the terms of the Blackbird Private Equity Facility, Blackbird Private Equity has power to appoint a receiver and manager to the property of the Company. Blackbird Private Equity has power to 'fix the rate of remuneration of each Receiver', the receiver so appointed is agent of the Company and numerous powers are conferred on that receiver including a power to sell the property of the Company: Blackbird Private Equity Facility (Facility Terms and Conditions: Sch 3 – General Security Terms, cl 7).

97 The Brown parties assert that Blackbird Private Equity acted in bad faith and for an improper purpose in that it appointed the Receivers to the property of the Company, not for the purpose of receiving income or realising that property, but for the purpose of placing financial pressure on the Company to repay the full amount claimed to be owing under the Blackbird Private Equity Facility including penalty interest. Based on inference from the following facts and circumstances, the Brown parties' assertion is reasonably arguable.

(1) The Receivers were appointed to the property of the Company shortly after the Kimberley Pearl was taken out of the water and was undergoing repair and maintenance work. That had the effect of preventing completion of the repair and maintenance work, the 10-year AMSA survey and delaying the return of the vessel to operations. Thus, it had the potential to prevent the Company from undertaking operations during the 2026 tourist season. Therefore, the timing of the appointment had the effect of placing the Company under significant financial pressure.

(2) The Receivers' conduct, described later, whereby during the early part of the receivership they were focussed on negotiating refinancing of the Blackbird Private Equity Facility and demanded full payment of all amounts Blackbird Private Equity claimed (including the Receivers' remuneration and expenses) and otherwise refused to retire and release the secured property until there was such full payment.

(3) The Receivers' conduct, described later, whereby they threatened to sell the Kimberley Pearl for less than market value and evinced an intention to carry out that threat. That had the potential to cause financial harm to all the Brown parties and incentivised them to facilitate the Company making a payment to Blackbird Private Equity of the full amount claimed under the Blackbird Private Equity Facility.

(4) The Receivers' conduct was performed with evident knowledge and approval and (or) acquiescence of Blackbird Private Equity.

98 It is also reasonably arguable that it may be inferred from these facts and circumstances that the appointment of the Receivers was not reasonably necessary to protect the legitimate interests of Blackbird Private Equity, was used to place undue pressure on or involved unfair tactics against the Company and the Receivers accepted their appointment and acted in bad faith and for the same improper purposes.

Kimberley Pearl Tours receivership remuneration

99 After the Receivers were appointed to the property of the Company Mr Brown secured the agreement of Mr Prince (a third party, described as an investor) to advance $1.2 million to discharge the balance of the principal, interest and costs payable under the Blackbird Private Equity Facility.

100 On 23 and 24 February 2026 Mr Laird, on behalf of the Company, and Mr Albarran, Mr Chirume and Mr Court of Hall Chadwick, on behalf of the Receivers, exchanged a number of emails regarding a possible payout of the Blackbird Private Equity Facility. Mr Laird started that exchange with a statement that he had an investor willing to pay $315,000 and the investor would fund the repairs to get the Kimberley Pearl back in the water. Mr Laird said he would need two weeks to find the balance ($700,000) and in the meantime Blackbird Private Equity would have a registered mortgage over the Wingham property. Mr Court responded positively with an indication, in effect, that if the $315,000 were paid in cleared funds by close of business on 24 February 2026, the Receivers would retire from their appointment, but Blackbird Private Equity would not release the security. The investor would be able to register a second ranking security interest over the Kimberley Pearl and the Company and once Blackbird Private Equity's debt and costs were paid in full the security would be released and the investor would have a first ranking security. After a number of further exchanges, on 24 February 2026 Mr Laird sent an email to Mr Wilkinson, Mr Albarran and Mr Court in which he said that the investor wanted a first ranking security

and Blackbird Private Equity to release the Kimberley Pearl, but he guessed 'that's not going to happen'. Mr Court responded with an email later that day that the 'investor will have a first ranking charge once Blackbird and costs are paid out in full'. In the meantime, Mr Laird sent an email to Mr Brown in which he said:

> During my telephone discussions with Blackbird and later, with Richard Albarr[a]n, Managing Partner of Hall Chadwick Insolvency, where I was attempting to negotiate a more favourable outcome for yourself and the Kimberley Pearl, Mr Albarran made the comment to me that he is "happy to lose $350,000 and let the boat go to scrap – it would not bother him".
>
> Given the above, I would suggest we move quickly to see if the Investors are willing to payout Blackbird in its entirety.

101 After these email exchanges involving Mr Laird, between 25 February and 5 March 2026 there were a series of emails between Mr Geoff Shannon of Unhappy Banking, evidently on behalf of the Company, and Mr Albarran and Mr Wilkinson, on behalf of the Receivers and Blackbird Private Equity.

102 On 25 February 2026 Mr Shannon sent an email to Mr Albarran and Mr Wilkinson in which he represented that Nationlink Solutions had approved finance to enable the full payout of the Blackbird Private Equity Facility. The letter of finance offer was in the sum of $1,200,000. Mr Shannon requested certain information to facilitate settlement including the total amount required to pay out the facility in full. Mr Shannon also requested that in the interim the Kimberley Pearl be released to allow essential maintenance to be completed.

103 On 26 February 2026 Mr Court responded with, amongst other things, a payout figure, but said that the Receivers were 'finalising the WIP and expenses incurred by the Receivers and Managers during the appointment (and an estimate to finalise) which will need to be added to this amount'. Mr Court also requested 'proof of funds referred to in the letter of finance offer'. Mr Shannon responded to Mr Court with an email in which, amongst other things, he drew attention to Mr Laird's email to Mr Brown recording the statement of Mr Albarran to the effect that he was happy to let the Kimberley Pearl go to scrap. Mr Shannon also said:

> We raise this not to be confrontational, but because we believe it is important that all parties are aware that this communication has been brought to our attention. Comments of this nature, if accurately reported, are deeply concerning given the duty of care owed by Receivers and Managers to all interested parties, including the Director and the company's creditors. We would expect and hope that the approach taken going forward reflects a genuine commitment to achieving the best possible outcome for all parties, which in the current circumstances is plainly the orderly completion of the refinance.

> Finally, we would be remiss not to mention that we have some awareness of the nature of the relationship between the Receivers and Managers and Blackbird Private Equity Pty Ltd. We raise this not to make any specific allegation at this stage, but simply to note that we are not without knowledge in this area, and we would hope that all parties approach the resolution of this matter in a transparent and good faith manner. We remain committed to doing the same.

104 Mr Albarran responded with a short email to the effect that his legal representatives had 'instructions to accept service'. Mr Shannon then sent a conciliatory email in which he sought a final payout figure and serious consideration of granting Mr Brown working possession of the Kimberley Pearl before settlement. Mr Albarran responded with an email in which he indicated, amongst other things, that 'we remain ready, willing and able to settle' and that 'if you believe our conduct inappropriate and wish to vent same. To that end Gavin McInnes has instructions to accept service.'

105 On 1 March 2026 Mr Shannon sent a lengthy response to Mr Albarran's email of 27 February 2026. In that email, amongst other things, Mr Shannon sought clarification of the amount of the Receivers' fees recovered from the property of the Company and full particulars of all invoices rendered by the Receivers in connection with the appointment together with a complete account of all funds collected by the Receivers during the appointment. Similar information was requested with respect to the previous receivership over the property of Mr Brown and Mr McMahon. Other information was requested relating to amounts paid for valuations. As to these matters, Mr Albarran again responded with an email to the effect that Mr McInnes had instructions to accept service. Mr Shannon responded with an email in which he indicated that no allegations were made and that his correspondence should be understood as asking questions and that '[i]f the answers are straightforward, we see no reason they cannot be provided'. Mr Shannon indicated that settlement could not be effected while there was ambiguity concerning certain funds recovered from the Company.

106 On 2 March 2026 Mr Chirume sent an email to Mr Shannon in which he indicated that the all-inclusive payout figure up to 4 March 2026 was $1,198,868.48 and comprised of the following amounts:

Particulars	**Amount Inc GST ($)**	**Amount ($)**
Blackbird Loan (per statement)		1,026,841.64
Receivers Fees and Disbursements up to 4 March 2026	210,698.40	
Less Funds recovered by Receivers to date	(73,822.81)	

Add Receivership liabilities incurred and ongoing expenses	35,151.25	
	172,026.84	172,026.84
Total Payout Figure - Blackbird and Receivership (valid up to 4 March 2026)		**1,198,868.48**

107 The email also provided the requested clarification regarding funds recovered from the Company. On 4 March 2026 Mr Chirume sent a further email in which he requested confirmation that the Company would be proceeding with the refinance.

108 There is no evidence that any confirmation was given. Nor is there any direct evidence of any approval of finance the Company obtained from Nationlink Solutions. However, there is evidence that there were unsuccessful 'without prejudice' communications between Mr McInnes and Mr Shannon and a lawyer who had been engaged to act for Mr Brown in the days after 4 March 2026. Nonetheless, there is no evidence that the Receivers provided the Company with any invoices or information regarding the work performed or expenses incurred in the course of the receivership over the property of the Company.

109 On 9 March 2026 Marine Auctions, which had been engaged by the Receivers, advertised the Kimberley Pearl and JimFab boats for sale by an 'on-line' auction that was to commence on 25 March 2026. On 11 March 2026 Mr Shannon sent an email to Mr Anderson and Mr Seiffert of Marine Auctions in which he asserted that Nationlink Solutions and Mr Brown held registered security interests over the assets of the Company including the Kimberley Pearl and JimFab boats. He also asserted that the appointment of the Receivers was disputed. After that communication, the Receivers instructed Marine Auctions to cease marketing the vessel and boats. Before the online auction was withdrawn potential purchasers had indicated that bids of $200,000 to $250,000 would be made for the Kimberley Pearl.

110 On 26 March 2026 Mr Prince paid $760,000 into the trust account of Adero Law. The funds are available as a loan to pay out any agreed amount or amount to which Blackbird Private Equity is legally entitled.

111 As of 4 March 2026, the Receivers claimed to be entitled to remuneration and expenses associated with the receivership in the sum of $210,698.40 and claimed an additional amount of $35,151.25. Of that sum, the Receivers had been paid $73,822.81 as of 2 March 2026. Since 4 March 2026, the Receivers claim to have unbilled work-in-progress in connection with the receivership in the amount of $396,764.98. It is unclear if that amount includes the sum of $210,698.40 or is in addition to it. Therefore, the Receivers now claim to be entitled

to charge the Company remuneration and expenses of about $400,000.00 or about $600,000.00 for services rendered during the receivership.

112 There is authority for the proposition that the Receivers are obliged to account to the Company upon discharge of the security, not only for any surplus but the conduct of the receivership: *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820 at 834 (Needham J). That would include accounting to the Company for costs, charges and expenses (including the Receivers' remuneration) paid out of the property of the Company. Given that a final payment of the full amount payable to Blackbird Private Equity and discharge of the security was contemplated through refinancing the Blackbird Private Equity Facility, it is reasonably arguable, that the Company was entitled to request and the Receivers were obliged to account to the Company for the conduct of the receivership up to the point of the contemplated discharge (including their remuneration and expenses). There is no evidence that the Receivers have accounted to the Company for their claimed remuneration and expenses.

113 Under the terms of the instrument appointing the Receivers as receivers and managers to the property of the Company, the Receivers were to be paid their remuneration from the proceeds of the sale of the assets of the Company, the assignment of the security or from the proceeds of the discharge of the security and the Receivers have no recourse against Blackbird Private Equity whatsoever in respect of the Receivers' remuneration. However, the Receivers and Blackbird Private Equity also made a deed of indemnity pursuant to which Blackbird Private Equity agreed to pay to the Receivers 'all reasonable charges, costs, fees and expenses' except for their remuneration or professional fees of Hall Chadwick to the extent that the Receivers do not apply moneys available to them as Receivers in payment of that remuneration and those fees. The Receivers are also 'entitled to apply moneys available to them in the Receivership in payment of all remuneration (at the rates specified in the Schedule) payable to the Receivers in relation to the Receivership'. The Schedule sets out various hourly rates by position from which it may be inferred that the Receivers' remuneration is fixed at the rates set out in the Schedule to be calculated on a time-charging basis. For the reasons given earlier, it is reasonably arguable that, the Receivers are only entitled to charge and be paid remuneration that is reasonable taking into account matters of the kind referred to in s 425(8) of the Corporations Act and to be reimbursed for expenses properly incurred.

114 As explained later in these reasons, the Blackbird parties assert that the market value of the Kimberley Pearl and JimFab boats is no more than $395,000. In those circumstances, in the absence of any explanation of the work performed or expenses incurred in the receivership over the property of the Company, remuneration and expenses of about $400,000 or $600,000 appear disproportionate. At least, on the affidavit evidence as it stands, a reasonably arguable inference arises that the amount the Receivers claim for their remuneration and expenses is unreasonable.

115 It follows that, on the affidavit evidence, it is reasonably arguable that it is to be inferred from the Receivers' conduct in refusing reasonable requests for information about claimed remuneration and expenses incurred and insisting on payment 'in full' of the claimed remuneration and expenses was not in good faith and for a proper purpose, but was an attempt to misuse their position to gain a financial benefit for themselves in the form of payment for unreasonable remuneration and expenses. Further, such conduct was not reasonably necessary for the protection of the legitimate interests of Blackbird Private Equity or the Receivers and, otherwise, involved undue pressure on or unfair tactics against the Company and other Brown parties.

Receivers proposed sale of the Kimberley Pearl

116 Amongst other things, the Brown parties allege that the Receivers threatened to sell assets of the Company at below market value if they did not pay in full the amount claimed by Blackbird Private Equity and the Receivers. The Brown parties claim that threat involved a breach of the Receivers' duties to exercise their powers in good faith and for a proper purpose, including not to sacrifice the Brown parties' interests recklessly, not to use their position and powers to improperly gain an advantage for themselves or someone else, and not to act beyond their power to improperly gain an advantage for themselves or someone else. The alleged breach of the Receivers' duties is also alleged to be conduct in which the Receivers engaged in relation to the enforcement of the Blackbird Private Equity Facility that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the ASIC Act.

117 Although no express claim for final injunctive relief to restrain a sale of the Kimberley Pearl and JimFab boats is made in the originating process or statement of claim, in their written submissions the Brown parties contend that the Court has power to grant injunctive relief under s 12GD of the ASIC Act. Under s 12GD(1) the Court may grant an injunction in such terms as it determines to be appropriate if satisfied that a person has engaged or is proposing

to engage in conduct that constitutes or would constitute a contravention or attempt to contravene s 12CB(1) of the ASIC Act. Under s 12GD(3), if in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under s 12GD(1) of the ASIC Act. Therefore, by the Brown parties' submissions and application for an interim (or interlocutory) injunction, in substance, they seek to engage the Court's power to grant a final injunction under s 12GD(1) of the ASIC Act.

118 Although hearsay, there is evidence to the effect that Mr Albarran, in substance, threatened to sell the Kimberley Pearl (property under the control of the Receivers) as scrap if the full amount to which the Receivers claimed Blackbird Private Equity was entitled was not paid. When that allegation was put to Mr Albarran in writing his response was that Mr McInnes had instructions to accept service. He did not deny the allegation. Despite the extensive affidavit evidence filed, read and relied upon by the Blackbird parties in opposition to the applications, there is also no statement from Mr Albarran or any other person on behalf of the Receivers denying the allegation. Nonetheless, the issue of the market value of the Kimberley Pearl and the affidavit evidence regarding that value was the subject of significant objection and contest between the parties. Put another way, the Blackbird parties, in effect, contend that the value of the Kimberley Pearl is essentially 'scrap'.

119 The Blackbird parties rely on the affidavit of Mr Seiffert in which he deposes that, in response to the online marketing of the Kimberley Pearl, potential buyers indicated that they would bid between $200,000 and $250,000 for that vessel and that, in his opinion, the market value of the JimFab boats is $45,000 in total ($15,000 per boat). Relying on that evidence, the Blackbird parties submit that the value of the Kimberley Pearl is $200,000 to $250,000 and the three JimFab boats $45,000. Therefore, a sale of the vessel for $200,000 to $250,000 would not amount to 'scrap' value, but the current market value of the vessel. However, that valuation, and the only form of sale the Receivers evidently contemplated, depends upon selling individual property (vessel and boats) at an online auction and not selling the business of the Company (of which the vessel and boats form part) as a going concern.

120 At the time the Receivers took control of the Kimberley Pearl she was out of the water on a hardstand at the Gold Coast City Marina. The vessel had undergone partial repairs and maintenance in connection with the AMSA 10-year survey, was in the midst of further repairs and its engine had been removed. The Receivers obtained estimates of the cost of the

work necessary to return the vessel to the water. The total of that estimate is approximately $589,000.

121 The Brown parties rely on an affidavit and opinion evidence of Mr Brown and dispute that the current market value of the Kimberley Pearl is $200,000 to $250,000 and that a reasonable estimate of the remaining repair and maintenance costs is in the order of $589,000. The Blackbird parties object to Mr Brown's opinion regarding the value of the Kimberley Pearl on the ground that it is not admissible to prove a fact under s 76(1) of the *Evidence Act 1995* (Cth). The Brown parties submit that Mr Brown's opinion evidence is admissible under the exception in s 79 of the Evidence Act which applies if a person has specialised knowledge based on the person's training, study or experience and the opinion of that person is wholly or substantially based on that knowledge. Mr Brown's opinion evidence was received provisionally at the hearing on the basis that a ruling on admissibility would be made in these reasons.

122 Dealing first with Mr Brown's evidence regarding the estimated costs of completing the repairs and maintenance, as no objection was taken to that evidence, it is received as evidence to the extent that Mr Brown deposes an opinion or fact relating to those costs. Based on Mr Brown's evidence, a reasonable estimate of the cost of the remaining repair and maintenance work is $250,000 to $300,000. However, it is not possible to resolve the contested affidavit evidence on an interlocutory application of this nature. Therefore, for the purposes of estimating the remaining repair and maintenance costs, it may be accepted that the likely costs were between $250,000 and $589,000 as of January 2026.

123 With respect to his opinion of the market value of the Kimberley Pearl, Mr Brown deposes facts by which he seeks to demonstrate that he has specialised knowledge based on his experience as a Master mariner for seven years and as a mariner for more than 20 years. He deposes that by reason of his experience he has gained knowledge of various matters relating to the features and attributes of charter vessels and other boats, sale prices of such vessels and boats, and the costs of repairs.

124 Mr Brown deposes facts regarding the prices at which various vessels with which he is familiar have been offered for sale on publicly available webpages. He deposes facts by which he explains the differences and similarities between those vessels and the Kimberley Pearl and, in substance, the extent to which each vessel is comparable to the Kimberley Pearl. He then deposes that having considered the vessels, their listed price, likely market value

range, and comparability with the Kimberley Pearl, he estimates that the market value of the Kimberley Pearl would be $2.2 million to $2.8 million after completion of the remaining repair and maintenance work. He deposes, in substance, that he estimates the current value of the Kimberley Pearl (before completion of the work and out of the water) to be in the range of $1.2 million to $1.8 million.

125 For the purposes of an interlocutory application and affidavit evidence without cross-examination, it may be accepted that Mr Brown has gained knowledge of the matters to which he deposes by reason of his experience and that his knowledge is not of a kind that is generally held in the community. That is, his knowledge is 'specialised knowledge' for the purposes of s 79 of the Evidence Act. Although not specialised knowledge of the kind that would qualify him as a 'valuer' of marine craft, it may be accepted that Mr Brown has specialised knowledge of a kind that places him in a position to express an opinion as to the value of marine craft with which he is familiar in much the same way that a farmer might have specialised knowledge of the value of farming land in the district in which that farmer operates or a person engaged in buying and selling a particular commodity has knowledge of the current 'market price' of that commodity. Otherwise, Mr Brown deposes to the information upon which he has based his opinion, the process of reasoning, and the manner in which he has used his specialised knowledge to arrive at an opinion of the market value of the Kimberley Pearl.

126 For the purposes of an interlocutory application, Mr Brown's opinion valuation evidence is admissible as an exception under s 79 of the Evidence Act. However, the weight that may be attributed to that evidence is another matter. Given the limited nature of Mr Brown's specialised knowledge and the use of advertised sale prices rather than actual sale prices as a guide to his valuation, it is not accepted, for the purposes of the interlocutory application, that the market value of the Kimberley Pearl (as it is on the hardstand and under repair) is in the range $1.2 million to $1.8 million. Nonetheless, on the basis of the evidence before the Court, it is accepted that with appropriate marketing it is reasonably arguable that the vessel has a market value significantly higher than $250,000.

127 There is also evidence that suggests that sale of the Kimberley Pearl and JimFab boats as separate property is unlikely to realise the market value of the business operated using that property or the best price reasonably obtainable for that property if sold as part of the business. The Company acquired the business (including the Kimberley Pearl and JimFab

boats) for $2.2 million in July 2024. The Company has also acquired permits to operate in the East Arnham Land region, Wessel Islands as well as Horizontal Falls, Cape York and the Torres Strait and certain of those permits provide for exclusive access to certain areas. The business operated multi-day charter cruises of seven, ten and 13 nights from $1,300 per person per night. At the time of the appointment of the Receivers, the Company had secured contracted bookings for the 2026 tourist season to a value of $4,510,800. After operating costs, Mr Brown estimates gross profit on the 2026 season of $2,860,800. Having regard to these matters, a collective sale of the Kimberley Pearl and JimFab boats with contracted bookings and permits as a going concern might be expected to realise a higher price than sale of the individual vessel and boats even allowing for a discount for the costs associated with completion of the 10-year AMSA survey work.

128 There is no evidence of the Receivers ascertaining or even considering if sale of the business was feasible or likely to bring about a better overall price for the property of the Company under their control. On the contrary, the only step they appear to have taken is to instruct an auctioneer to conduct an online sale of the vessel and boats within a four-week period. Otherwise, the Receivers have been refunding deposits to customers with respect to bookings.

129 On 5 March 2026 the Receivers appointed Marine Auctions to sell the Kimberley Pearl and JimFab boats by auction. The contract of appointment set no reserve price for the auction, but the seller was to subsequently advise the agent in writing of the reserve price no later than the morning of the day of the close of the auction. The marketing and advertising fee was $1,375 (including GST) suggesting that an extensive marketing and advertising campaign was not contemplated. The auction was to be ‘on-line’ and conducted between 25 and 31 March 2026.

130 Taking into account the foregoing matters, it is reasonably arguable that, upon instructing Marine Auctions to sell the Kimberley Pearl and JimFab boats on 5 March 2026, the Receivers took a step towards carrying out a threat to sell the Kimberley Pearl for less than the market value of that vessel. Therefore, it is reasonably arguable that from no later than 5 March 2026 the Receivers evinced an intention to sell the vessel and boats for less than the market value of that property or less than the best price reasonably obtainable for them in the circumstances. That is, it is reasonably arguable that the Receivers evinced an intention to recklessly sacrifice the interests of the Company in conducting an online auction of the vessel and boats. It is also reasonably arguable that an inference may be drawn that advertising the vessel for sale in an online auction was undertaken with the intention of increasing financial

pressure on the Company to pay out the full amount the Receivers claimed was owed to Blackbird Private Equity (including their remuneration and expenses) under the terms of the Blackbird Private Equity Facility.

131 It follows that it is reasonably arguable that the Receivers are proposing to engage in conduct that would be in breach of their duties as receivers and managers. Further, that they are proposing to engage in conduct that would be in breach of the Receivers' duty of care in exercising the power of sale under s 420A of the Corporations Act and their statutory duties as officers of the Company to exercise their powers with reasonable care and diligence in contravention of s 180 and (or) to exercise their powers in good faith and for a proper purpose in contravention of s 181 of the Corporations Act. It is also reasonably arguable that the Receivers have engaged in conduct in bad faith that exerted undue pressure on or used unfair tactics against the Company.

132 The affidavit evidence also suggests that there is a good arguable case that the Company was in a position to pay out the unpaid balance of the Blackbird Private Equity Facility as of 4 March 2026, but 'settlement' of that payment was subject to verification of the Receivers remuneration and expenses. Further, that the Receivers unreasonably and in breach of their duties refused to account to the Company for the remuneration and expenses they claimed and, thereby, the Receivers prevented the Company from discharging the Blackbird Private Equity Facility. Thus, it is reasonably arguable that the Receivers' breach of duty has resulted in them remaining in control of the Company's property and in a position to sell the Kimberley Pearl and JimFab boats. Put another way, it is reasonably arguable, that the Brown parties would not have needed to apply for an injunction to restrain the sale of the property of the Company *but for* the Receivers' breach of duty.

Conclusions

133 In sum, taking into account that:

(a) it is reasonably arguable that the terms of the BPE Loans 2 Facility and Blackbird Private Equity Facility requiring payment of the Higher Interest Rate are penalties, unfair terms and not necessary to protect the legitimate interests of the Blackbird Lenders: ss 12CB(4)(c)(i), 12CC(1)(b), 12CC(1)(j);

(b) it is arguable that the Blackbird Lenders failed to disclose that the Receivers were likely to be appointed and had interests in the Blackbird Lenders that presented a risk

that they would not exercise their powers independently and in accordance with their duties: s 12CB(4)(c)(i), s 12CC(1)(i);

(c) it is reasonably arguable that the Blackbird Lenders appointed the Receivers in bad faith, for improper purposes, in circumstances in which it was not reasonably necessary for the protection of their legitimate interests, and to place undue pressure on or use unfair tactics against the Brown parties: ss 12CB(4)(c)(ii), 12CC(1)(b), 12CC(1)(d), 12CC(1)(l); and

(d) it is reasonably arguable that Blackbird Private Equity took advantage of undue financial pressure exerted on or unfair tactics used against the Brown parties to secure payments and terms under the Blackbird Private Equity Facility that were not reasonably necessary to protect the legitimate interests of Blackbird Private Equity: ss 12CB(4)(c)(i), 12CC(1)(a), 12CC(1)(b), 12CC(1)(d), 12CC(1)(j),

the applicants have established that it is reasonably arguable that the Blackbird Lenders engaged in conduct in trade or commerce in connection with the supply of financial services to the Brown parties that was, in all the circumstances, unconscionable in contravention of s 12CB(1) of the ASIC Act. It is also reasonably arguable that the Brown parties have or will suffer loss or damage by that conduct and, as a consequence, that the BPE Loans 2 Facility and Blackbird Private Equity Facility should be set aside under s 12GM of the ASIC Act. Further, that statutory unconscionability claim is reasonably arguable irrespective of whether or not the conduct forms part of a system of conduct or pattern of behaviour of the kind the Brown parties have pleaded in their statement of claim.

134 Separately, with respect to the proposed sale of the Kimberley Pearl, the Company has established that it is reasonably arguable that the Receivers are proposing to engage in conduct in trade or commerce in connection with the supply of financial services to that company that would be, in all the circumstances, unconscionable and in contravention of s 12CB(1) of the ASIC Act. As a consequence, the Court may grant an injunction to restrain the Receivers from engaging in that conduct (sale of the Kimberley Pearl and JimFab boats) under s 12GD(1). An injunction of that kind may be granted whether or not there is imminent danger of substantial damage to any person: s 12GD(5)(c). The Court may also grant an interim injunction pending determination of an application under s 12GD(1): s 12GD(3). For similar reasons, it is reasonably arguable that the Receivers propose engaging in conduct that would be a breach of one or more of ss 180, 181, 420A of the Corporations Act and that a

final or interim injunction may be granted under s 1324 of that Act, again, whether or not there is imminent danger of substantial damage to any person: ss 1324(1), 1324(4), 1324(6).

Should Mr Brown be permitted to conduct proceedings in the Company name?

135 Although it is well-established that after the appointment of a receiver to all property of a company the company's directors retain a residual power or authority to bring proceedings on behalf of the company to challenge the appointment of the receiver, upon the appointment of an administrator under Pt 5.3A of the Corporations Act, the directors have no authority to perform the functions of a director without the written approval of the administrator or the Court or the director is otherwise permitted by the Corporations Act to act: s 198G(1) of the Corporations Act. Accordingly, Mr Brown had no authority to file the originating application in NSD 662 in the name of the Company.

136 In NSD 662 an interlocutory order is sought, to the extent necessary, granting Mr Brown leave pursuant to s 237 or s 440D of the Corporations Act or otherwise to bring the proceeding on behalf of the Company. In NSD 685 an interlocutory order is sought under s 447A or otherwise granting Mr Brown leave to instruct solicitors and carry on proceedings on behalf of the Company in respect of NSD 643 and NSD 685. An interlocutory order is also sought, to the extent necessary, granting Mr Brown leave pursuant to s 440D to commence NSD 685 against the Company.

137 Mr Brown makes few submissions in support of these proposed interlocutory orders. The Blackbird parties make no written submissions on the topic and evidently do not oppose the Court granting Mr Brown authority to represent the Company and do not submit that any order should be made on any condition relating to their legal costs and expenses. Likewise, the Administrators made no submissions in favour or against the application and evidently have taken a neutral position on the issue. Therefore, it may be inferred that the Administrators neither consent nor oppose an order permitting Mr Brown to bring NSD 662 and defend NSD 643 in the name of the Company.

138 Insofar as Mr Brown applies for leave under s 440D of the Corporations Act to bring NSD 662, the application is misconceived. Section 440D operates to stay a proceeding in a court *against* the Company or in relation to any of its property without the Administrators' written consent or leave of the Court. NSD 662 is a proceeding that is purportedly brought, in part, by the Company not against it. Otherwise, as to Mr Brown's application for leave to bring NSD 685 against the Company under s 440D of the Corporations Act, that leave will be

granted on the basis that the Company and the Administrators were necessary parties to Mr Brown's application for an order authorising him to bring NSD 662 and defend NSD 643 in the name of the Company.

139 Sections 236 and 237 of the Corporations Act confer power on the Court to grant a director or member of a company leave to bring proceedings in the name of and on behalf of a company if the Court is satisfied that:

(a) it is probable that the company will not itself bring the proceeding (s 237(2)(a)); and

(b) the applicant is acting in good faith (s 237(2)(b)); and

(c) it is in the best interests of the company that the applicant be granted leave (s 237(2)(c)); and

(d) there is a serious question to be tried (s 237(2)(d)); and

(e) 14 days' notice is given to the company or it is appropriate to dispense with notice (s 237(2)(e)).

However, Mr Brown's reliance on s 237 is also misconceived because Pt 2F.1A of the Corporations Act has no application to a company under external administration: *Re CGH Engineering Pty Ltd* [2014] NSWSC 1132; 104 ACSR 245 at [8]-[15] (Brereton J); *Chahwan v Euphoric Pty Ltd (t/as Clay & Michel)* [2008] NSWCA 52; 245 ALR 780 at [124]-[125] (Tobias JA, Beazley and Bell JJA agreeing).

140 Nonetheless, there is authority for the proposition that the Court has an inherent power (or in this Court an implied power) and (or) supervisory power derived from s 90-10 and s 90-15 of the *Insolvency Practice Schedule (Corporations)*, being Sch 2 to the *Corporations Act 2001* (Cth) to permit a contributory (member) or director of a company under external administration to bring a proceeding in the name of the company in circumstances in which the external administrator has not done so and it is probable that the external administrator will not do so: *Chahwan* at [124(i)]-[124(n)]; *Re CGH Engineering* at [14]-[20]; *Aliprandi v Griffith Vintners Pty Ltd (in liq)* (1991) 6 ACSR 250 at 252 (McLelland J); *Carpenter v Pioneer Park Pty Ltd* [2008] NSWSC 551; 71 NSWLR 577 at [23]-[37] (Barrett J).

141 In the exercise of the implied or supervisory power the Court will typically take into account the following factors: *El-Saafin v Franek (No 2)* [2018] VSC 683 at [167]-[171] (Lyons J).

(1) The extent to which there is a sufficient degree of merit as to be neither vexatious nor oppressive and present a reasonable prospect of success (i.e., a serious question to be tried).

(2) The attitude of the external administrator to the proposed proceeding.

(3) The extent to which practical considerations support the initiation of the proceeding, with particular reference to the financial protection for the external administrator and the property of the company by means of indemnity and, if appropriate, security.

142 In the case of an administration, the Court may be more reluctant to grant leave because an administration is intended to be a short-term arrangement resulting in return of the company to control of its directors through an end to the administration or a deed of company arrangement or liquidation of the company. Therefore, in general, these considerations may weigh heavily against granting leave: *Re CGH Engineering* at [16]. For similar reasons, less weight may be given to the attitude of an administrator than would be given to the attitude of a liquidator when taking into account the second factor: *El-Saafin* at [170]-[171].

143 In this case, the power to grant Mr Brown leave either as director or member of the Company to bring NSD 662 and, in effect, to defend NSD 643 in the name of the Company must also be considered in circumstances where the Administrators were appointed by Blackbird Private Equity under s 436C(1) of the Corporations Act and the validity of that appointment is challenged. For reasons that are given later, there is a serious question to be tried concerning the validity of that appointment and the extent to which Blackbird Private Equity exercised that statutory power in good faith and for a proper purpose. Therefore, it is reasonably arguable that Mr Brown should be regarded as continuing to enjoy the residual power as a director of the Company to bring proceedings in its name to challenge the appointment of the Receivers and the Blackbird Private Equity Facility.

144 Further, an aspect of the grounds upon which Mr Brown challenges the Administrators' appointment is an assertion that Blackbird Private Equity lacked authority to exercise the power under s 436C(1) because, due to its alleged unconscionable conduct, it was not entitled to enforce any security interest in the property of the Company. Therefore, the resolution of the validity of the Administrators' appointment will turn, in part, on the resolution of NSD 662. For the reasons given later, it is appropriate, in the circumstances of this case, to exercise power under s 447A to modify the manner in which Pt 5.3A operates in relation to the Company to extend the period of the administration until final judgment in NSD 662. In

those circumstances, the generally short-term nature of an administration is of less significance than might be the case in a more typical administration of a company. Otherwise, for the reasons already given, there is a serious question to be tried in NSD 662 and, insofar as that proceeding proposed to be brought in the name of the Company, it is not vexatious, is brought in good faith, and has reasonable prospects of success.

145 The Administrators were required to form an opinion about whether it would be in the interests of the Company's creditors for the Company to execute a DOCA, for the administration to end or for the Company to be wound up: s 438A(b). The Administrators were also required to convene a meeting of the Company's creditors under s 439A(1). The purpose of that meeting is for creditors to vote on the future of the Company and, in particular, whether the Company should execute a deed of company arrangement (DOCA), the administration should end, or the Company should be wound up: s 439C. At the time of convening the meeting of creditors under s 439A, the Administrators were required to send a notice to creditors accompanied by a report about the Company's business, property, affairs and financial circumstances and a statement setting out, amongst other things, the Administrators opinion formed for the purposes of s 438A: r 75-225(3) of the *Insolvency Practice Rules (Corporations) 2016* (Cth).

146 In this case, the Administrators sent a notice convening a meeting for the purposes of s 439A on 20 May 2026 accompanied by the r 75-225(3) report. That report indicates that no DOCA proposal has been received, in the Administrators' opinion the Company is insolvent and may have been insolvent as early as 30 June 2025 and the creditors would not receive any return from a winding up of the Company. The Administrators recommended that the creditors vote to wind up the Company. The report was prepared in circumstances in which Mr Brown challenged the Administrators' appointment and had refused to deliver the Company's books and records to them or to complete a report on company activities and property (ROCAP). The Administrators identified a number of potential contraventions of the Corporations Act involving Mr Brown that could potentially be further investigated and pursued if the Company were wound up and a liquidator appointed. The report identified that NSD 643, NSD 662 and NSD 685 had been commenced and, as a consequence, the Administrators recommended that the meeting of the creditors be adjourned for 45 days. However, there was no analysis of the claims made in NSD 662, the prospects of any of those claims succeeding, or the likely impact on the solvency of the Company or the return to creditors if NSD 662 were successful.

147 The Administrators are liable for debts incurred in the performance or the exercise or purported performance or exercise of functions and powers as administrators of the Company: s 443A(1). The Administrators are also liable for rent or other amounts and to the Commissioner of Taxation in certain circumstances, but otherwise they are not liable for the Company's debts: ss 443B, 443BA, 443C. The Administrators are entitled to be indemnified out of the property of the Company (other than certain PPSA secured property) for the debts for which they are liable under ss 443A, 443B, 443BA in priority to payment of other debts secured by a lien over the property of the Company: ss 443D, 443E, 443F.

148 In this case, all property of the Company is under the control of the Receivers and is not available to indemnify the Administrators. In these circumstances, Blackbird Private Equity, as the appointing secured creditor, has indemnified the Administrators for remuneration and expenses up to $50,000.

149 Taking all the preceding matters into account, it is highly unlikely that NSD 662 would be prosecuted by the Company, through the Administrators, or, if the Company were wound up, through liquidators. If wholly or substantially successful, it is possible (if not probable) that the Company would be solvent and unsecured creditors (then including Blackbird Private Equity) would receive full payment of outstanding debts. Therefore, subject to exposure of the property of the Company to litigation costs and the risk of adverse costs orders, it is in the best interests of the Company as a whole that Mr Brown be permitted to bring NSD 662 and defend NSD 643 in the name of the Company. Thus, subject to certain conditions described later in these reasons, Mr Brown should be granted authority to prosecute NSD 662 and defend NSD 643 at his own cost and risk.

Should the Blackbird parties be restrained from selling the Kimberley Pearl?

150 The orders the Brown parties ultimately seek for interlocutory injunctions are not straightforward. In effect, each Brown party applies for a separate interlocutory injunction to restrain the Receivers and Blackbird Private Equity from enforcing the security interest that Brown party granted in the property of that party. The Brown parties also proposed that each party give separate undertakings as to damages with respect to each separate proposed injunction.

Principles applicable to the grant of interlocutory injunctions

151 Section 23 of the Federal Court Act confers power on the Court to make such orders, including interlocutory orders, as the Court thinks appropriate. The principles applicable to the exercise of that power to order an interlocutory injunction are well-established. The Full Court set out the 'correct approach' in *Samsung Electronics Co Ltd v Apple Inc* [2011] FCAFC 156; 217 FCR 238 at [52]-[74] (Dowsett, Foster and Yates JJ). There are two main inquiries. Applicants must first show that they have a prima facie case in the sense of 'a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial': *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; 227 CLR 57 at [65] (Gummow and Hayne JJ, Gleeson CJ and Crennan J agreeing at [19]). This is commonly referred to as a serious question to be tried. What will be sufficient will depend on 'the nature of the rights [the applicant] asserts and the practical consequences likely to flow from the order he seeks': *Beecham* at 622. The second inquiry is whether the balance of convenience and justice favours the grant of an interlocutory injunction or the refusal of that relief.

152 These two questions are not entirely distinct. To the contrary, as the Full Court emphasised in *Samsung Electronics*, the strength of an applicant's case is a factor to be considered in determining where the balance of convenience lies. Consequently, as Woodward J observed in *Bullock v The Federated Furnishing Trades Society of Australasia* (1985) 5 FCR 464 at 472 (Smithers and Sweeney JJ agreeing at 467 and 469 respectively):

> … [A]n apparently strong claim may lead a court more readily to grant an injunction when the balance of convenience is fairly even. A more doubtful claim (which nevertheless raises "a serious question to be tried") may still attract interlocutory relief if there is a marked balance of convenience in favour of it. …

153 There is no inflexible rule. The extent to which it is necessary, or appropriate to examine the merits of an applicant's claim depend upon the circumstances of the case: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199 at [18] (Gleeson CJ). Nonetheless, as the Full Court observed in *Warner-Lambert Company LLC v Apotex Pty Ltd* [2014] FCAFC 59; 311 ALR 632 at [70] (Allsop CJ, Jagot and Nicholas JJ):

> '[i]t will often be necessary to give close attention to the strength of a party's case when assessing the risk of doing an injustice to either party by the granting or withholding of interlocutory relief especially if the outcome of the interlocutory application is likely to have the practical effect of determining the substance of the matter in issue or if other remedies, including an award of damages, or an award of

compensation pursuant to the usual undertaking, are likely to be inadequate'.

154 As already mentioned, the Brown parties invoke the power of the Court to order an injunction under s 12GD of the ASIC Act in their written submissions albeit not in the originating application. Section 12GD of the ASIC Act provides:

> **12GD Injunctions**
>
> (1) If, on the application of the Minister, ASIC or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
>
> (a) a contravention of a provision of this Division; or
>
> (b) attempting to contravene such a provision; or
>
> (c) aiding, abetting, counselling or procuring a person to contravene such a provision; or
>
> (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision; or
>
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
>
> (f) conspiring with others to contravene such a provision;
>
> the Court may grant an injunction in such terms as the Court determines to be appropriate.
>
> …
>
> (3) If in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
>
> …
>
> (5) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
>
> (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
>
> (b) whether or not the person has previously engaged in conduct of that kind; and
>
> (c) whether or not there is an imminent danger of substantial damage to any person if the first mentioned person engages in conduct of that kind.
>
> …

155 To the extent that the Brown parties seek to restrain the Receivers from exercising the power of sale, and that involves a prospective contravention or breach of ss 180, 181, 182 and 420A

of the Corporations Act, ss 1324(1), 1324(4) and 1324(6) of that Act are in similar terms with respect to conduct or proposed conduct in contravention of that Act.

156 Section 23 of the Federal Court Act engages the power of the Court exercising the exclusive, concurrent, or auxiliary equitable jurisdiction to grant an interlocutory injunction. Section 12GD of the ASIC Act and s 1324 of the Corporations Act, on the other hand, concern the exercise of statutory remedial powers that are expressed in broad terms and are not necessarily confined by principles observed by courts exercising traditional equitable jurisdiction. Therefore, while principles applicable to the exercise of equitable jurisdiction may inform or provide guidance concerning an appropriate exercise of the statutory powers, the statutory powers are not constrained or limited by any equitable principle: *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540 at 545 (Davies, Gummow and Lee JJ). As the source of the injunction power (final, interlocutory or interim) is statutory, the discretionary factors influencing the exercise of that power are to be found mainly, if not entirely, within the framework of the statute. Accordingly, an injunction should not be granted unless the order is directed to and appropriate to achieve an end such as enforcing and giving effect to the statute: *Australian Securities and Investments Commission v Sweeney* [2001] NSWSC 114 at [32], [34]-[36] (Austin J); *Australian Securities and Investments Commission v Parkes* (2001) 38 ACSR 355 at [9] (Austin J); *Australian Securities and Investments Commission v Pegasus Leveraged Options Pty Ltd* (2002) 41 ACSR 561 at [108]-[109] (Davies AJ); *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* [2002] NSWSC 741; 42 ACSR 605 at [12]-[21] (Palmer J).

157 In *Mauer-Swisse Securities* Palmer J summarised the applicable principles in relation to the power to grant an interim injunction under s 1324(4) of the Corporations Act as follows:

> 36 At the risk of some repetition, I summarise the principles which I draw from the presently applicable authorities:
>
> – the jurisdiction which the Court exercises under s.1324 CA is a statutory jurisdiction, not the Court's traditional equity jurisdiction;
>
> – Parliament has made it increasingly clear by successive statutory enactments that the Court, in exercising its statutory jurisdiction under s.1324, is not to be confined by the considerations which would be applicable if it were exercising its traditional equity jurisdiction;
>
> – amongst the considerations which the Court must take into account in an application for an injunction under s.1324 CA are the wider

issues referred to by Austin J in *Sweeney* and *Parkes*, and by Davies AJ in *Pegasus*; they may be gathered under the broad question whether the injunction would have some utility or would serve some purpose within the contemplation of the *Corporations Act*;

– these considerations are to be taken into account regardless of whether the application is for a permanent injunction under s.1324(1) or for an interim injunction under s.1324(4);

– where an application under s.1324(4) is made by ASIC rather than a private litigant the Court is more likely to give greater weight to the broad question whether the injunction would serve a purpose within the contemplation of the *Corporations Act*;

– where there is an appreciable – that is, not fanciful – risk of particular future contraventions of the *Corporations Act* by a defendant, it would serve a purpose within the contemplation of the *Corporations Act* that the Court grant not only a permanent injunction but, in an appropriate case, an interim injunction restraining such conduct. Section 1324 evinces an intention that the possibly severe consequences and the relative promptness of proceedings for contempt of Court be added to criminal prosecutions as a deterrent to contraventions of the *Corporations Act*;

– although the questions whether there is a serious question to be tried and where the balance of convenience lies will not circumscribe the Court's consideration in an application for an interim injunction under s.1324(4), the interests of justice will always require that those questions be examined carefully when restrictions are sought to be imposed before the case has been properly examined by the Court, even where the protection of the public is said to be involved: see per Young J (as his Honour then was), in *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd* (1986) 11 ACLR 566, at 570-571;

– the balance of convenience will be viewed differently according to whether the applicant under s.1324(4) is ASIC or a private litigant. Where ASIC is acting to protect the public interest, the absence of an undertaking as to damages, exempted by s.1324(8), will usually be of little consequence. However, where the proceedings are brought to advance a plaintiff's private interests, then if such an undertaking is not proffered even though it is likewise exempted by ss.(8), the Court may take that circumstance into account as a matter of practicality, common sense and fairness in determining where the interests of justice lie and whether "*it is desirable*" to grant the injunction: see per Young J in *Lombard Nash* at 571.

158 In *Australian Securities and Investments Commission v Financial Circle Pty Ltd* [2018] FCA 2; 123 ACSR 624 at [13]-[14] Moshinsky J accepted that the principles applicable to s 1324(4) as summarised by Palmer J were equally applicable to s 12GD(3) of the ASIC Act. Moreover, these statutory powers permit the grant of an injunction 'even in circumstances where traditional equitable considerations would normally [lead] a court of equity to refuse an injunction'.

159 Although NSD 662 is a proceeding between private parties and not a proceeding in which ASIC is pursuing a remedy for enforcement of a statutory purpose in the public interest, there remains a public policy element and statutory purpose in granting a private party an injunction to prevent a contravention of the ASIC Act or Corporations Act. A statutory injunction granted in favour of a private party protects both the private interest in avoiding harm and the public interest in preventing non-compliance with the statute. Relevantly, the public interest in the statutory purpose may be undermined if an interlocutory injunction were refused and that were to turn out to be the 'wrong' decision.

160 Nonetheless, notwithstanding the statutory nature of the power to order an interim injunction and that the factors to be taken into account in the exercise of that power should be informed by the purposes of the applicable statute, at least in a proceeding between private parties, it is accepted that the principles applicable to the exercise of power under s 23 in the equitable jurisdiction of the Court inform and guide the exercise of the statutory power to the extent those principles are consistent with and give effect to the statutory purposes. Therefore, the 'correct approach' described in *Samsung* should be taken into account in the determination of the present application for interlocutory injunctions. But, when considering the balance of convenience, the statutory purposes of the ASIC Act and Corporations Act are relevant factors to be taken into account. In that context, the statutory purpose may dictate that an injunction be granted where a pure application of equitable principles would result in refusal.

The Inglis rule and exceptions

161 Before considering the issue of a serious question to be tried and the specific factors to be taken into account assessing the balance of convenience, it is necessary to address a well-settled general rule that conditions the grant of an interlocutory injunction to restrain the exercise of a mortgagee's power of sale with a requirement that the mortgagor pay the full amount of the claimed principal, interest and costs into court and the recognised exceptions to that general rule. The parties, in particular the Blackbird parties, devote a significant portion of their written submissions and effort to an exposition of the general rule, exceptions and application. Although it is common ground that an exception is capable of operating in the circumstances of this case, the Blackbird parties submit the exception only applies where the claim upon which it is founded is 'strong' and, if applicable, insist any interlocutory injunction must be conditioned by payment of, at least, interest into court.

162 In *Inglis v Commonwealth Trading Bank of Australia* [1972] HCA 74; 126 CLR 161 at 164 Walsh J said:

> A general rule has long been established, in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this be not in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court.

163 The origins and history of and rationale for the *Inglis* rule were explained by Fox J in detail in *Blundell v Associated* Securities (1971) 19 FLR 17 at 45-48. These lie in the nature of the legal estate or interest of mortgagee and the equitable estate or interest of a mortgagor (equity of redemption) in secured property under a common law mortgage and the mortgagor's right to bring an action in equity for redemption against the mortgagee. In the case of a common law mortgage, in general, if the mortgagor wants to prevent the mortgagee from acting as the legal owner of the secured property (including exercising a power of sale), the mortgagor is required to assert its equitable rights as owner of the equity of redemption by offering to redeem and bringing an action against the mortgagee for redemption. Payment of the principal and interest is a necessary condition of obtaining final relief in an action for redemption. Thus, where a common law mortgagor brings an action for redemption it can obtain an interlocutory injunction to restrain the mortgagee from selling the legal estate in the secured property upon payment of the claimed principal, interest and costs into court. In effect, payment into court is security for redemption and the mortgagor is required to bring that amount into court at an earlier stage than would otherwise be required to obtain final relief in the action for redemption.

164 Although the rationale for the *Inglis* rule may be regarded as having less relevance to a mortgage of land under a Torrens system where a legal mortgage operates as a statutory charge and not as a conveyance of the mortgagor's legal interest in the property to the mortgagee, the rule has generally been considered applicable to Torrens system mortgages, equitable mortgages and charges as well as common law legal mortgages: *Town & Country Sport Resorts* at 544-545. Therefore, in the context of a proceeding in which a mortgagor purports to exercise a right founded on the equitable estate (equity of redemption) it has been accepted that to obtain an interlocutory injunction it is necessary, in effect, to redeem. In such a case, there is no dispute as to the existence of the mortgagee's legal estate or interest in the secured property because, without such a legal estate, the mortgagor would not have an equity of redemption. Therefore, it flows from the principles and reasoning upon which the

Inglis rule depends that the rule applies to the class of case and only the class of case where there is no question of the existence of the mortgage, default and the power of sale: *Harvey v McWatters* (1948) 49 SR (NSW) 173 at 178 (Sugerman J).

165 Otherwise, there is a long-recognised exception to the *Inglis* rule where the mortgagor challenges the existence or enforceability of the mortgagee's security interest (including the power of sale) under the security instruments: *Bayblu Holdings Pty Ltd v Capital Finance Australia Ltd* [2011] NSWCA 39; 279 ALR 166 at [58] (Campbell JA, Tobias and Macfarlan JJA agreeing). In this second class of case, the mortgagor is not asserting a right founded on the equity of redemption and, consequently, it is not necessary, as a matter of principle, for the mortgagor to offer to redeem to assert the relevant claim or right with respect to the secured property. As regards interlocutory applications, this second class of case is governed by similar but different principles and reasoning which permit of greater flexibility to the principles and reasoning governing the first class of case. In the second class of case, it is not necessary to pay the full amount of the mortgagee's claim into court and the 'terms may be moulded so as to require payment in of so much only as suffices to give adequate protection to the mortgagee'. The principles applicable in this second class of case rest on the possible inadequacy of the usual undertaking as to damages in the context of litigation between a mortgagor and mortgagee: *Harvey v McWatters* at 177-178.

166 It follows that, notwithstanding that Walsh J expressed a 'general rule' in *Inglis*, it is accepted that the *Inglis* rule is not inflexible and there are recognised exceptions to that rule: *Welldog Pty Ltd v Prox Pty Ltd* [2017] WASCA 62 at [36]-[38] (Buss P and Newnes JA). There, the exceptions were summarised as follows.

> [37] … subject to the overriding discretion of the court as to the terms and conditions (if any) to be imposed on the grant of interlocutory injunctive relief, and depending on the facts and circumstances and overall justice of the particular case, payment into court may not be required where it is alleged that:
>
> "(a) the power of sale under the mortgage is not properly exercisable: *Inglis* (164-165); *Bayblu Holdings Pty Ltd v Capital Finance Australia Ltd* [2011] NSWCA 39; (2011) 279 ALR 166 [58] (Campbell JA, Tobias & Macfarlan JJA agreeing);
>
> (b) the mortgage is invalid, or a breach of the mortgage has not occurred which engages the power of sale, or a notice required to engage the power of sale is ineffective: *Allfox Building Pty Ltd v Bank of Melbourne* (1992) NSW Conv R 55-634, 59,626-59,627 (Powell J);
>
> (c) the power of sale is being exercised for an improper motive: *Milton*

Park Country Club Pty Ltd v Yasuda Trust Australia Ltd (Unreported, NSWSC, 8 March 1991) (Bryson J) 11-15; or

(d) the mortgage or the power of sale is impugned pursuant to the Australian Consumer Law or the Australian Securities and Investments Act or equitable principle: *Glendore Pty Ltd v Elders Finance & Investment Co Ltd* (1984) 4 FCR 130, 133-136 (Morling J); *Town & Country Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd* (1988) 20 FCR 540, 545 (Davies, Gummow & Lee JJ)."

[38] It must be remembered that, where the source of the court's injunctive power is not that of a court of equity but is supplied by statute, the court may (as a matter of power rather than as an exercise of discretion in the particular case) grant interlocutory injunctive relief that does not correspond with the relief that would follow from an application of the traditional rules of equity. See *Town & Country Resorts* (545).

167 As to the last observation in *Welldog*, as already mentioned, the Brown parties invoke s 23 of the Federal Court Act and s 12GD of the ASIC Act as sources of the Court's power to order an interlocutory injunction. The *Inglis* rule and the exceptions apply to the exercise of power under s 23 where a mortgagor applies for an interlocutory injunction in the exercise of the Court's equitable jurisdiction to restrain the exercise of a mortgagee's powers under security instruments. For the reasons already given, the power conferred on the Court to order an injunction, including an interim or interlocutory injunction, under statutory provisions such as s 12GD of the ASIC Act is not confined by principles observed by courts exercising traditional equitable jurisdiction. Moreover, exercise of the statutory power for the statutory purposes may strengthen the inclination of the Court, in an appropriate circumstance, to refrain from requiring a mortgagor to provide adequate security for its indebtedness before restraining a mortgagee from exercising its powers: *Town & Country Sport Resorts* at 545.

168 The authorities upon which the Blackbird parties rely do not support their submissions to the effect that the onus on the mortgagor to demonstrate that an exception to the *Inglis* rule applies is a 'heavy one' or that courts have consistently required 'proof of a strong case'. Rather, the authorities, including those upon which the Blackbird parties rely, support the proposition that the relative strength of the mortgagor's claim in challenging the existence of the security interest or power of sale is merely *a* factor to be taken into account in deciding whether to exercise the power to grant an interlocutory injunction. Further, a claim that raises a serious question to be tried is all that is necessary to engage an exception to the *Inglis* rule. Otherwise, the following principles may be drawn from the authorities.

(1) Where a serious question to be tried is demonstrated, or accepted, the Court will take into account all the circumstances of the case to determine whether an interlocutory injunction should be conditioned on payment of a sum of money into court, including payment of the full amount of principal, interest and costs the mortgagee claims: *M & J Pty Ltd v Australian & New Zealand Banking Group Ltd* (Unreported, Federal Court of Australia, 27 March 1988, Heerey J) at pp 3-5; *Glandore Pty Ltd v Elders Finance & Investment Co Ltd* (1984) 4 FCR 130 at 135-136 (Morling J); *Re Batemans Bay Holdings Pty Limited* (Unreported, Federal Court of Australia, 5 September 1986, Burchett J); *Leitch v Natwest Australia Bank Ltd* (Unreported, Federal Court of Australia, 9 March 1995, Kiefel J); *Andrew Garrett Wine Resorts Pty Ltd v National Australia Bank Ltd* [2004] SASC 60; 206 ALR 69 at [49]-[53] (Besanko J); *Harris v Western Australian Exim Corporation* (1994) 56 FCR 1 at 13-14 (Hill J); *Eltran Pty Limited v Westpac Banking Corporation* (1988) 32 FCR 195 at 200-205 (Spender J, Gallop J agreeing); *Rawcliffe v Custom Credit Corporation* (1994) ATPR 41,922 at 41,923-41,924 (Rowland J).

(2) In taking into account all of the circumstances of the case, a claim that is merely colourable (or with a prospect, however modest, of success) may not satisfy the Court that there is sufficient merit in the claim to treat it as a *real* challenge to the existence of the security interest or power of sale so as to relax the *Inglis* rule: e.g., *Town & Country Sport Resorts* at 545; *Mainbanner Pty Ltd v Dadincroft Pty Ltd* (1988) ATPR 40-896 at 49,663 (Pincus J); *Clairview Developments Pty Ltd v Law Mortgages Gold Coast Pty Ltd* [2007] QCA 141; 2 Qd R 501 at [39] (Jerrard JA); *Yousha v Terziovski* [2025] VSC 780 at [93] (Craig J).

(3) The absence of a 'strong case' may, along with other factors, result in refusal of an interlocutory injunction: *Welldog* at [39]-[48].

(4) 'As a matter of discretion the relaxation of [the *Inglis*] requirement in this Court usually would be restricted to cases where the allegations which ground the plea for use of the Court's powers under [s 12DA of the ASIC Act or equivalent] are clearly arguable and not merely colourable and to cases which show an obvious nexus between the allegations of [contravention of the ASIC Act or equivalent] and the formation of the security documents sought to be varied or rendered unenforceable by the exercise of those powers': *Town & Country Sport Resorts* at 545.

169 The authorities upon which the Blackbird parties rely also demonstrate that, in appropriate circumstances, the Court may grant an interlocutory injunction to restrain a mortgagee from exercising a power of sale upon the condition of the mortgagor paying interest to the mortgagee or into court. However, there are other authorities where interlocutory injunctions have been granted without any payment of interest to the mortgagee or of any money into court. Thus, there is no inflexible rule requiring payment of interest or any other money into court. The extent to which payment of any sum into court is required as a condition of the grant of an injunction depends upon all the circumstances of the case in question.

170 In *Harvey v McWatters* at 178 Sugerman J was of the view that an amount should be paid into court to be ascertained by reference to the value of the security and the possible loss resulting from loss of a sale or depreciation of the value of the security but made no order leaving it to the parties to agree on the sum or adduce evidence for further order. In *Glandore* at 135-136 Morling J considered that an amount should be paid into court 'so as to ensure adequate protection to the mortgagee and to otherwise do justice between the parties…'. He ordered payment of unpaid interest and interest as a condition of granting an injunction under s 87 of the *Trade Practices Act 1974* (Cth) (the equivalent of s 234 of the Australian Consumer Law) because it was 'not right' that the mortgagor should have the use of the mortgagee's money without paying interest on it. Similarly, in *Re Batemans Bay Holdings Pty Limited*, Burchett J ordered the mortgagor to pay the mortgagee the unpaid interest as a condition of the grant of an interlocutory injunction under s 87 of the Trade Practices Act. In *Leitch v Natwest Australia Bank Ltd* Kiefel J refused to grant an interlocutory injunction for reasons that included that there was not a clearly claimed challenge to the security instruments but also because her Honour considered a payment into court to cover interest or deterioration in the secured property was a necessary condition for the grant of an interlocutory injunction which the mortgagor could not meet. In *Andrew Garrett Wine Resorts Pty Ltd* at [50] Besanko J was also of the view that an interlocutory injunction should be granted on the condition of payment of interest past and future for similar reasons to those given by Morling J in *Glandore*.

171 In *Harris* at 13-14 Hill J granted a mortgagor an interlocutory injunction under s 87 of the Trade Practices Act upon the mortgagor giving the usual undertaking as to damages which was understood to be inadequate in the circumstance of that case. A significant factor in favour of the grant of the injunction was that, if the power of sale were exercised, the secured

property, which had unique characteristics, would be lost and the mortgagor would be deprived of a substantial part of the subject matter of the proceeding.

172 In *Eltran Pty Limited v Westpac Banking Corporation* (1988) 32 FCR 195 the Full Court (Fox, Gallop and Spender JJ) allowed an appeal from the primary judge refusing to grant an interlocutory injunction under s 87 of the Trade Practices Act. It was not disputed that there was a serious question to be tried and the principal issue was the balance of convenience. The usual undertaking was inadequate and the mortgagor was not able to pay any sum into court. These were the principal reasons for the primary judge refusing to grant the injunction. Justice Spender (Gallop J agreeing) considered the primary judge's approach was erroneous in the circumstances of that case. Relevantly, his Honour said:

> In my view this approach has the effect of overtaking the principal proceedings and pays insufficient regard to the interlocutory aspect of the injunction being sought. The function of the court on an application for interlocutory injunction is to make such orders as the circumstances call for pending the resolution of the issues in the primary proceeding. The orders a court makes on such application are ancillary to the resolution in the principal proceeding and, generally speaking, should not involve a predetermination of those issues.
>
> It seems to me that what occurred in the present matter is that on a comparison of the possible financial detriments to each party, Westpac was, by the refusal to grant an interlocutory injunction, to be given, in substance, the benefit of a judgment in its favour before the day of judgment. On the other hand, a granting of the interlocutory injunction would not have had the effect of giving judgment to the applicants before the day of judgment was at hand: the right of Westpac to sell would merely have been postponed, the postponement being accompanied by some slight possibility of financial detriment to it.

173 In re-exercising the power, the Full Court granted the mortgagor an interlocutory injunction upon the usual undertaking and a further undertaking to prosecute the proceeding with expedition. In the consideration of the balance of convenience, Spender J (Gallop J agreeing) took into account that the secured property was under the control of receivers and sufficient income was being earned from the property to cover interest and other expenses. Further, on the available evidence, it was not possible to form a view on the possibility of the value of the secured property diminishing resulting in the mortgagee being worse off if the injunction were granted. In *Angelatos v National Australia Bank* (1994) 51 FCR 574 at 581 Branson J accepted that the Court has a discretion not to insist upon payment of any amount into court as a condition of the grant of any injunction, but, in the circumstances of that case, considered it appropriate to order an injunction conditional upon the mortgagor continuing to meet interest payments.

174 In *Rawcliffe* Rowland J granted a mortgagor an interlocutory injunction under s 87 of the Trade Practices Act without ordering the payment of any amount into court and in circumstances of an inadequate undertaking as to damages. The secured property was not sufficient to cover the mortgage debt, if owing, the value of secured property was not likely to decrease and the debt, if enforceable, would increase with interest. The secured property was the mortgagor's principal residence and home. He had little income and his action was funded through the Law Society of Western Australia. The ultimate loss to the mortgagee, if the security instruments were not set aside, would have been entirely monetary. The loss to the mortgagor, if the secured property were realised, was difficult to quantify in monetary terms, but would have grave personal consequences for the mortgagor which could not be adequately compensated in monetary terms if the mortgagor succeeded. That last factor tipped the balance of convenience in favour of the mortgagor.

175 There are other examples of courts granting interlocutory injunctions upon the usual undertaking as to damages and without any payment into court in circumstances in which it was reasonably arguable that the mortgagee was threatening to exercise a power of sale in bad faith or for an improper purpose: *Wilson v Ferrier* (Unreported, New South Wales Supreme Court, 26 February 1985, Needham J); *Milton Park Country Club Pty Ltd v Yasuda Trust Aust. Ltd* (Unreported, New South Wales Supreme Court, 8 March 1991, Bryson J).

176 The relevant principle to be derived from all the authorities to which reference has been made is that the Court will take into account the risk of harm to the mortgagee when considering the question of the balance of convenience. If the balance of convenience so requires, as a means of mitigating the potential harm to the mortgagee, the Court may make the grant of an interlocutory injunction conditional upon payment of an amount of money to the mortgagee or into court. It follows that, as part of the consideration of the question of the balance of convenience, the following matters should be addressed.

(1) Any risk of harm to which the mortgagee is exposed should the grant of an injunction turn out to be wrong.

(2) What measures are available to mitigate any risk of harm to the mortgagee.

(3) With or in the absence of such measures, does the gravity of the residual risk of harm to the mortgagee if an injunction be granted outweigh the risk of harm to the mortgagor if an injunction be refused.

The extent to which there is a serious question to be tried

177 The Blackbird parties submit that the Brown parties' statutory unconscionability claim is 'barely arguable'. Therefore, in substance, the Blackbird parties submit that the Court should refuse the grant of an injunction because the Brown parties' claim is of insufficient merit, when taken with the risk of financial harm to Blackbird Private Equity, to warrant preservation of the *status quo*.

178 For the reasons already given, the Brown parties have demonstrated that the statutory unconscionability claim raises a serious question to be tried. In order to reach that conclusion, the statutory unconscionability claim was addressed at a level of detail and length that is not normally necessary on an application of this nature. However, dealing with that issue at a level of mere impression was not sufficient in this case for three reasons. First, the Blackbird parties resisted the notion of a prima facie claim through their characterisation of the claim as barely arguable. Second, the Brown parties have not paid any amount into court or have not proffered any security and, given their financial circumstances, their proposed undertakings as to damages are of little, if any, value. Therefore, the relative merit of the statutory unconscionability claim is of greater significance in the assessment of the balance of convenience than might otherwise have been the case. Third, the relative merit of the claim was also relevant to the question of whether Mr Brown should be authorised to bring and defend proceedings in the name of the Company.

179 Having assessed its relative merits, the statutory unconscionability claim is better characterised as a 'reasonably arguable' or 'clearly arguable' or 'good arguable' claim. On any of those characterisations, there is undoubtedly a serious question to be tried, and the claim has far more merit than a 'barely arguable' claim. Moreover, if the evidence were to remain as it is, as a matter of impression and without in any way attempting to predict the outcome, the Brown parties' claim that the Receivers are proposing to engage in conduct in breach of their duty to act in good faith and for a proper purpose and in contravention of provisions of the ASIC Act and Corporations Act has relatively good prospects of success. That is a significant factor diminishing the risk of harm to Blackbird Private Equity should an injunction be granted and increasing the risk of harm to the Brown parties (and harm to the public interest) should an injunction be refused.

The extent to which there is an imminent threat of the exercise of the power of sale

180 In the case of Mr Brown, Mr McMahon and Ms Rutledge, although the Blackbird parties gave notice on 13 April 2026 that they intend to exercise their power of sale with respect to the assets of the Company, Mr Brown, Mr McMahon and Ms Rutledge within seven days of that notice, the only act of enforcement taken thus far has been to appoint the Receivers to the property of the Company. Following the notice, the Brown parties filed the originating application in NSD 662 on 24 April 2026 and an interim injunction was granted on 29 April 2026 restraining all the respondents from selling or dealing with the property of the Brown parties. Nonetheless, there is no evidence that Blackbird Private Equity took any steps to appoint receivers to the property of Mr Brown, Mr McMahon or Ms Rutledge, or otherwise took steps to take possession or control of their property or exercise a power of sale or deal with their property between 20 and 29 April 2026. Therefore, as matters stand, in effect, it is the Receivers who are in the position to and are likely to exercise the power of sale and that is limited to the property of the Company.

181 There is no evidence that Mr Brown, Mr McMahon or Ms Rutledge have any personal property of significant value that Blackbird Private Equity could realise through exercise of the power of sale. The confidential affidavits of Mr Wilkinson and Mr Betros ignore any personal property of the individuals in estimating the capital loss that would result from restraining the exercise of the power of sale with respect to the Brown parties' collective property. Therefore, it appears quite unlikely that receivers would be appointed to the personal property of any of the individual Brown parties or that the power of sale would be exercised with respect to any of their personal property.

182 The evidence indicates that Ms Rutledge has real property that has an estimated market value of $825,000. Although no steps have yet been taken to do so, it appears likely that Blackbird Private Equity will take steps to enforce its registered mortgage over that property. However, there is no evidence that Blackbird Private Equity has, at this time, taken any of the steps that are necessary pre-conditions to the exercise of a mortgagee's power of sale under the provisions of the *Real Property Act 1900* (NSW): see, ss 57-58A. Further, a receiver may not exercise a power of sale in respect of that real property unless the mortgagee is able to exercise a power of sale: s 115A(3), s 115A(4) of the Conveyancing Act (NSW). Moreover, while in theory a mortgagee may exercise a power of sale without possession of real property, as the Wingham property is Ms Rutledge's private residence, it is highly unlikely that the power of sale would be exercised without Blackbird Private Equity first obtaining possession

of the property. Assuming that Ms Rutledge refuses to give possession voluntarily, it would be necessary for Blackbird Private Equity to commence proceedings for and obtain judgment for possession of the Wingham property: s 60 of the Real Property Act (NSW). No doubt any action for possession would be and could be defended on the basis of the causes of action raised in NSD 662.

183 It follows that the evidence indicates that the only property that is the subject of an imminent threat of sale or dealing are the Kimberley Pearl and JimFab boats. Interlocutory injunctions are not necessary to prevent the imminent sale or dealing with the property of Mr Brown, Mr McMahon and Ms Rutledge. Therefore, an interlocutory injunction is not necessary, at this time, to preserve any *status quo* with respect to that property. For that reason, insofar as interlocutory injunctions are sought to restrain the sale or dealing with the property of the individual Brown parties the interim injunction should not be continued. However, it is evident that circumstances may change, particularly with respect to the Wingham property. Therefore, insofar as the application relates to the property of the individual Brown parties, the application will be stood over and adjourned to a date to be fixed and an order will be made to the effect that Blackbird Private Equity must give the applicants 48 hours' written notice before taking any step to enforce any security interest granted in any property of the individual Brown parties. The interlocutory application may then be relisted for further hearing in the event that circumstances change before the final determination of NSD 662.

The extent to which the grant or refusal of interlocutory relief would be determinative

184 The Brown parties assert that the Blackbird Private Equity Facility is unenforceable by reason of the statutory unconscionability claim. The Brown parties' primary ground for interlocutory injunctive relief is that the Receivers were not validly appointed under that *unenforceable* facility and there is no power of sale that can be exercised because that facility is *unenforceable*. However, a refusal to grant interlocutory relief would not deprive the Brown parties of final relief to have the Blackbird Private Equity Facility set aside or for damages or compensation arising from the exercise of the power of sale. Equally, grant of injunctive relief would not ultimately deprive Blackbird Private Equity or the Receivers of the ability to exercise the power of sale. Therefore, on the Brown parties' primary ground grant or refusal of the relief will not be determinative of the parties' rights and, in that sense, the balance of convenience is neutral.

185 However, for the reasons already explained, it is implicit that the Brown parties apply for final injunctive relief under s 12GD of the ASIC Act and (or) s 1324 of the Corporations Act with respect to prospective contraventions of s 12CB(1) of the ASIC Act and (or) ss 180, 181 and 420A of the Corporations Act by the Receivers. The refusal of an interlocutory injunction would be determinative of the Brown parties' claim for that relief. For the reasons also already given, the Brown parties claims relating to the prospective contraventions by the Receivers is relatively strong and a refusal would not only be determinative of the Brown parties' claims for final relief, but risks undermining the statutory purposes of the ASIC Act and Corporations Act. Therefore, the determinative nature of refusal of a statutory interlocutory injunction is a powerful factor in favour of the grant of an interlocutory injunction in the circumstances of this case.

The extent to which there will be irreparable damage

186 The appointment of the Receivers to the property of the Company has already resulted in harm to the business of the Company. The principal property of the Company is in the control of the Receivers who are not operating the business, the necessary repair and maintenance work for the 10-year AMSA survey has been interrupted and remains incomplete, and none of the revenue for contracted bookings for the 2026 tourist season has been received. As an interlocutory injunction has not been sought in a form that could or would restore control of the Kimberley Pearl and JimFab boats to the Company, an injunction to restrain sale of the vessel and boats could only preserve any remaining value of the business of the Company associated with ownership of that property. Clearly, any loss or damage to the business of the Company resulting from the appointment of the Receivers and any sale of the vessel and boats at less than market value could be compensated by an award of damages. Nonetheless, the Blackbird parties have made no submission that damages would be an adequate remedy or that sale of the vessel would not result in irreparable damage to the business of the Company. On the other hand, the Brown parties, in substance, submit that sale of the Kimberley Pearl would, in effect, destroy the subject matter of NSD 662 and result in irreparable damage to the Company's business.

187 The affidavit evidence, such as it is, suggests that the Kimberley Pearl is a somewhat unique vessel. She is a converted fishing trawler. It may be inferred from her name that she has an historical connection with, at least, the waters in the Kimberley region in which the Company's tourist business was partly operated. The Company, in turn, takes its name from

the vessel. Therefore, the Company's business and name are closely associated with the vessel. Without the vessel it can be expected that the Company's current business will be non-existent and there will be no prospect of reviving what remains of that business and reputation following the appointment of the Receivers. Thus, due to the unique nature of its personal property, it is reasonably arguable that damages would not be an adequate remedy and sale of the Kimberley Pearl would cause irreparable harm to the Company's business.

The extent to which there will be hardship for the secured creditor

188 The Company has not paid interest on the Blackbird Private Equity Facility. Interest notionally continues accruing on the outstanding amount of the facility at a rate of 4% per month (48% per year). Based on the Blackbird parties' estimated value of the Wingham property, Kimberley Pearl and JimFab boats, the realisable value of the secured property is insufficient to recover the currently outstanding amount of principal, interest and costs under the facility. It follows that the Company's liability for payment of future interest on the unpaid balance of the debt is effectively unsecured. The magnitude of the total amount of unpaid future interest will be affected by delay in realising the secured property because the net proceeds from the sale of that property would be used to decrease the amount of the presently outstanding debt upon which interest will accrue in the future. Therefore, in substance, the potential loss to Blackbird Private Equity resulting from delay in the exercise of the power of sale is loss of use of the net proceeds from the sale of the secured property for the duration of the period of any interlocutory restraint.

189 Delay in exercising the power of sale will also result in the Receivers continuing to incur costs associated with preserving and storing the Kimberley Pearl and JimFab boats. Otherwise, the Blackbird parties do not assert that there is any risk of diminution in the value of the secured property arising from delay.

190 The confidential affidavit of Mr Wilkinson deposes to the likely loss of revenue and profit to Blackbird Private Equity if restrained from selling the Wingham property, Kimberley Pearl and JimFab boats. He deposes estimates of loss of net earnings on the net proceeds for periods of six, 12, 18 and 24 months. The estimated losses are substantial. As there is no imminent threat of sale of the Wingham property and an interlocutory injunction will not be made, at this time, to restrain exercise of the power of sale over that property, the real question is the extent to which Blackbird Private Equity may be prejudiced by restraining the sale of the Kimberley Pearl and JimFab boats.

191 The confidential affidavit of Mr Betros deposes to the likely loss of revenue and profit to Blackbird Private Equity if restrained from selling the Kimberley Pearl and JimFab boats. The estimated losses are significantly less than estimates that include the Wingham property. Nonetheless, the estimated losses over 24 months are meaningful, but of a magnitude for which the risk of loss, in an ordinary circumstance, would be mitigated by the usual undertaking as to damages. Here, it is unlikely that the usual undertaking as to damages would be adequate due to the financial circumstances of Mr Brown. However, the estimated loss of profit to which Mr Betros deposes on information and belief need not be accepted uncritically.

192 The evidence upon which the Blackbird parties rely includes evidence that assumes that, if the power of sale were exercised, the Kimberley Pearl and JimFab boats would be sold for $295,000. As already mentioned, the Receivers claim remuneration and expenses associated with the receivership of the Company of about $400,000 or $600,000. Under the terms of the Receivers' appointment, their remuneration is to be paid out of the property of the Company. Therefore, assuming they are properly claimed, after allowing for payment of the Receivers' remuneration and expenses, on the evidence of the Blackbird parties, Blackbird Private Equity will not receive any net proceeds from sale of the vessel and boats. Accordingly, the Blackbird parties have not demonstrated that restraining the Receivers from exercising the power of sale will deprive Blackbird Private Equity of deriving any benefit from its security interest or that it will result in any opportunity cost arising from loss of use of net sale proceeds.

193 Paradoxically, if the Kimberley Pearl has the market value Mr Brown estimates, Blackbird Private Equity will actually be in a better position if the Receivers are restrained from selling the vessel without proper marketing at an online auction. For the reasons already given, I am inclined to accept that the true market value of the Kimberley Pearl is higher than the amount of the Blackbird parties' estimate. Therefore, there is a prospect that Blackbird Private Equity will be in a better position if the Receivers are restrained and sale of the vessel is delayed.

194 Taking all the foregoing matters into account, the risk of hardship to Blackbird Private Equity from a delayed exercise of the power of sale has not been demonstrated to be particularly significant.

The extent to which there is or should be payment of money into court

195 The Company has had the use of Blackbird Private Equity's money for about a year without paying any significant interest on the loan. Nonetheless, there is a good argument that payment of interest at the Higher Interest Rate is a penalty and unfair term. In those circumstances, it would not be just to require payment into court of past or future interest at the Higher Interest Rate as a condition of any injunction to restrain sale of the Kimberley Pearl and JimFab boats. There is also a good argument that a significant portion of the principal sum upon which interest would be payable (at the Lower Interest Rate or Higher Interest Rate) was for charges that were unfair or unconscionable. It would also not be just to require payment into court of past or future interest, at any rate, on money that Blackbird Private Equity has not actually advanced or paid to third parties, but has merely capitalised as payments to itself for penalty interest or unfair or unconscionable administrative charges.

196 Insofar as the Kimberley Pearl and JimFab boats have the market value the Blackbird parties ascribe to that property, for the reasons already given, in substance, Blackbird Private Equity has a registered mortgage over the Wingham property as security for principal and past interest payments. As to future interest, it is effectively unsecured due to a deficiency in the value of the property over which it has security. That deficiency cannot be cured by sale of the vessel and boats because of the magnitude of the Receivers' claimed remuneration and expenses. Therefore, as Blackbird Private Equity is unlikely to be deprived of the 'use' of any funds if sale of the vessel and boats is restrained and is unlikely to be deprived of past interest on any funds advanced if sale of the vessel and boats is restrained, there is no evident risk of harm that a payment of a sum of money into court would secure.

The extent to which an undertaking as to damages is valuable

197 In the case of the vessel and boats, the Company and Mr Brown intend proffering the usual undertaking as to damages. The Blackbird parties submit, in substance, that given the financial circumstances of the Company, the absence of any evidence that Mr Brown has any real financial means and that his property is already the subject of an all present and future security interest, these undertakings are inadequate. That submission is accepted insofar as there is a risk that Blackbird Private Equity may suffer loss of the magnitude deposed in the confidential affidavit of Mr Betros. However, as already mentioned, the magnitude of that loss is questionable in circumstances in which the Receivers' claimed remuneration and expenses will exceed the assumed market value of the Kimberley Pearl and JimFab boats.

Nonetheless, the undertakings as to damages are unlikely to be adequate to meet the ongoing preservation and storage costs of the vessel and boats.

198 Given the financial circumstances of the Company, its proposed undertaking is not of any real value. The evidence, such as it is, also does not demonstrate that Mr Brown's undertaking would be of any real value. There is evidence that Mr McMahon had significant income at the time he and Mr Brown applied for the ScotPac loan. Therefore, an undertaking given by Mr McMahon may have some value. The evidence also does not suggest an undertaking by Ms Rutledge would be of any real value as she evidently has a modest income and the Wingham property is the subject of the registered mortgage. It follows that it is accepted that any undertaking as to damages is unlikely to be of any real value or adequate to mitigate any loss Blackbird Private Equity may suffer if a restraint is ordered and that turns out to be the 'wrong' decision.

Balancing the risk of injustice

199 In *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772 at 780-781 Hoffmann J said:

> … I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', ie useful generalisation about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle.

200 In this case, granting an interlocutory injunction is the course that carries the lower risk of injustice. A refusal of an injunction that turns out to be the 'wrong' decision would have quite devastating consequences for the Company. Sale of the Kimberley Pearl would effectively determine the Brown parties' application for final injunctive relief under s 12GD(1) of the ASIC Act and destroy any hope of the business of the Company continuing in the future in any meaningful way. Likewise, if refusal of an injunction should turn out to be the 'wrong' decision the statutory and public purposes of the ASIC Act and Corporations Act would be undermined. On the other hand, it does not appear that the grant of an injunction is likely to have any significant financial impact on Blackbird Private Equity if it turns out to be the

'wrong' decision in the peculiar circumstances of this case. Further, such risk to which Blackbird Private Equity is exposed is diminished and the risk to the Brown parties is increased by the relatively good prospects the Brown parties have, at least, of succeeding in their claims that the Receivers proposed to exercise the power of sale in breach of duties and in contravention of statutory provisions.

201 Ultimately, the balance of convenience favours granting an injunction to restrain the Receivers from exercising the power of sale to sell the property of the Company. However, that injunction should be subject to the conditions described later in these reasons.

Should the Company Administrators be restrained from acting?

202 If there is doubt on a specific ground about whether a purported appointment of an administrator is valid, on application, the Court may make an order declaring whether or not the appointment was valid: s 447C of the Corporations Act. The Court also has power under s 447A of the Corporations Act to make such order as it thinks fit about how Pt 5.3A is to operate in relation to a particular company including an order terminating the administration.

203 Mr Brown asserts that the appointment of the Administrators was invalid because Blackbird Private Equity acted in bad faith and for an improper purpose when purporting to exercise the power under s 436C(1). He also invokes the power of the Court to grant an interlocutory injunction under s 23 of the Federal Court Act to restrain the Administrators from exercising their powers and performing their functions under Pt 5.3A of the Corporations Act to preserve the status quo pending final determination of the validity of the appointment. Therefore, the well-established 'correct principles' to which reference has already been made apply to Mr Brown's application for an interlocutory injunction in NSD 685.

Is the validity of the Administrators' appointment a serious question to be tried?

204 The object of Pt 5.3A of the Corporations Act is to provide 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: s 435A. Part 5.3A makes provision for a company (through its directors), a liquidator or provisional liquidator, or a secured creditor to appoint an administrator: ss 436A, 436B, 436C. After appointment, an administrator assumes control of the company's business, property and affairs and, subject to certain exceptions,

there are restrictions on prosecuting proceedings and enforcing securities and judgments against the company: Pt 5.3A Div 3, Div 6, Div 7. The administrator is required to hold two meetings of creditors within a relatively short period of time after appointment, investigate the affairs of the company and report and make recommendations to creditors about the future of the company: Pt 5.3A Div 2, Div 4, Div 5. Various powers and rights are conferred and liabilities imposed on the administrator for these purposes: Pt 5.3A Div 8, Div 9. At the second meeting of creditors, they are to vote on whether the administration is to end, the company is to execute a deed of company arrangement (DOCA), or be wound up: s 439C.

205 It is well-established that the power of the directors to appoint an administrator under s 436A must be exercised for a proper purpose; namely, in furtherance of the object of Pt 5.3A. If the power is exercised for an ulterior or extraneous purpose and that purpose is substantial in the sense that the power would not have been exercised without it, then the exercise of the power to appoint the administrator will be invalid: e.g., *Kazar v Duus* (1998) 88 FCR 218 at 233 (Merkel J); *Blacktown City Council v Macarthur Telecommunications Pty Ltd* [2003] NSWSC 883; 47 ACSR 391 (Barrett J); *St Leonards Property Pty Ltd v Ambridge Investments Pty Ltd* [2004] NSWSC 851; 210 ALR 265 (Barrett J); *Re Keneally* [2015] NSWSC 937; 107 ACSR 172 at [96] (Black J); *McMaster v Eznut Pty Ltd* [2006] WASC 109; 58 ACSR 199 at [135] (Simmonds J); *In the matter of Cyprus Community of NSW Ltd* [2024] NSWSC 1629 at [87] (Black J). There is no reason in principle for considering that the exercise of the power to appoint an administrator by a secured creditor under s 436C would also not be invalid if exercised substantively for an improper purpose.

206 Section 436C(1) provides that a person who is entitled to enforce a security interest in the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the security interest has become, and is still, enforceable. The appointment of an administrator by a secured creditor is not regarded as part of the process of enforcing the security: *Re Beechworth Land Estates Pty Ltd (No 3)* [2015] NSWSC 336; 106 ACSR 495 at [44]-[45] (Robb J). However, it does not follow that after a secured creditor has begun to enforce the security interest that secured creditor continues to have the power to appoint an administrator under s 436C(1). Indeed, the text of s 436C(1) and context and purpose of Pt 5.3A all tend to suggest that, after the appointment of a receiver to the whole or substantially the whole of the property of a company, the ability of the secured creditor to exercise its right under s 436C(1) may be spent.

207 Section 436C(1) uses the expressions ‘entitled to enforce’ and ‘has become, and is still, enforceable’. These expressions are indicative of a state of affairs in which the secured creditor has a right, at the time of the appointment of an administrator, to enforce the security interest but has not yet exercised the right to enforce that security interest. There are other provisions in Pt 5.3A that also support that construction of s 436C(1).

208 Where an administrator has been appointed and the whole, or substantially the whole, of the property of a company under administration is subject to a security interest, certain provisions that would otherwise prevent enforcement of that security interest (ss 198G, 440B, 440F, 440G, 451E, 451G), do not apply if before the appointment of the administrator or within 13 business days after that appointment the creditor enforced the security interest or took certain steps for the purpose of enforcing the security interest: ss 441A, 441B, 9 (definition, ‘decision period’). As Palmer J observed in *Australian Innovation Ltd v Dean-Willcocks* [2002] NSWSC 24; 166 FLR 360 at [27]-[33]:

> [27] … the power conferred on a chargee by s 436C(1) of the Corporations Act to appoint administrators is not conferred in furtherance of the chargee's security under the charge and in aid of the realisation of that security.
>
> [28] Section 436C is part of a scheme embodied in Part 5.3A of the Corporations Act, the purpose of which is to provide a moratorium on the enforcement of a creditor's rights, including a secured creditor's rights, in order to enable the company and its creditors to determine whether the company can trade out of its difficulties and continue in existence, or else whether it may be able to realise its assets in some way which is more beneficial to creditors than a winding-up. So, for example, s 435A states that the object of Part 5.3A is to maximize the chances of the company continuing in existence.
>
> [29] Section 435C anticipates three possible results of an administration. First, a deed of company arrangement may be entered into; second, the administration may simply come to an end; or third, the company may be placed in liquidation.
>
> [30] Section 440B provides that during the administration of a company a person cannot enforce a charge over its property without the administrator's consent or the leave of the Court.
>
> [31] Section 440F provides that no enforcement proceedings can be taken against a company's property during the administration without the Court's leave.
>
> [32] Sections 441A and 441B allow chargees, in certain circumstances, to enforce their charges where steps are taken to do so either before the appointment of an administrator or within ten days after such appointment.
>
> [33] The legislature has conferred on a chargee, as well as upon the company itself and its liquidator, the power to invoke the potentially beneficial provisions of an administration because a chargee may otherwise be compelled to rely only upon its strict rights as a secured creditor when a less drastic remedy would be to the benefit of all concerned. The invocation by a

> chargee of a right to appoint an administrator conferred by statute is not, in my opinion, a purported step in the enforcement of the chargee's rights conferred by the charge in aid of the realisation of the chargee's security. On the contrary, appointment of an administrator by a chargee is a step which may often result in the chargee's rights under the charge never being enforced at all.

209 As it was not the subject of any submission, no concluded view is expressed on the proper construction of s 436C(1). It is raised merely to observe that there appears to be an open and available construction of s 436C(1) that would suggest that Blackbird Private Equity was deprived of power to appoint the Administrators under s 436C(1) in circumstances in which it had already appointed the Receivers to the whole of the property of the Company.

210 In any event, as a matter of observation, irrespective of the proper construction of s 436C(1), the appointment of a receiver to the whole or substantially the whole of the property of a company in the enforcement of a security interest may be regarded as inconsistent with the statutory purpose of conferring a right on such a secured creditor to appoint an administrator under s 436C(1). That is, taking the 'drastic' measure of enforcing the security interest is inconsistent with taking the 'less drastic' measure of appointing an administrator with a view to achieving the object of Pt 5.3A. Therefore, irrespective of whether or not, as a matter of statutory interpretation, the right of a secured creditor to appoint an administrator under s 436C survives enforcement of the security interest, it is reasonably arguable that there was no evident purpose, consistent with the object of Pt 5.3A, served by Blackbird Private Equity purporting to appoint the Administrators after it had already appointed the Receivers. That observation and circumstance begs the question: what was the legitimate purpose for Blackbird Private Equity purporting to appoint the Administrators?

211 The Brown parties submit that improper purpose is to be inferred from the timing and circumstances in which the appointment was made. They submit that in circumstances in which after the Receivers were appointed Mr Brown (as the director) retained authority to commence proceedings in the name of the Company to challenge the appointment of the Receivers, Mr Brown had indicated that he intended to bring such proceedings, and shortly after evincing that intention the Administrators were appointed, it is to be inferred that the purpose of the appointment of the Administrators was to prevent Mr Brown from continuing to have authority to bring proceedings on behalf of the Company to challenge the Receivers' appointment because, by operation of s 198G of the Corporations Act, he no longer has that authority.

212 Mr Wilkinson deposes facts by which he denies that the appointment of the Administrators was for an ulterior or extraneous purpose. He deposes to his non-expert opinion that the Company is 'hopelessly insolvent'. Due to the Company continuing to incur debts in circumstances in which investigating the affairs of the Company was outside the purview of the Receivers' responsibilities, the Administrators were appointed to 'protect the interests of employees and other unsecured creditors'. He also deposed to losing confidence in Mr Brown and expressing a view that his 'uncooperative' behaviour featured in his decision to appoint the Administrators to take control of the Company's affairs. He deposes to other conduct of Mr Brown relating to the Company's affairs that was outside the purview of the Receivers to investigate and that was of a nature that only an administrator or liquidator could investigate and pursue.

213 In terms of the state of the affidavit evidence, there is a conflict between the natural and ordinary inference that arises from the circumstances in which the Administrators were appointed and the direct affidavit evidence of Mr Wilkinson. That conflict cannot be resolved on an interlocutory application. Mr Wilkinson's denial and explanation of the reasons for appointing the Administrators is plausible up to a point and arguably consistent with the object of Pt 5.3A. However, it has not been tested by cross-examination. In this respect, as a matter of impression, the narrative that a secured creditor which had appointed a receiver to all the property of a company would take the step of appointing an administrator and indemnifying that administrator with respect to costs up to $50,000 so as to protect the interests of unrelated unsecured creditors, without a more in-depth explanation, does not land as particularly convincing.

214 In short, if the evidence were to remain as it is, on the facts and circumstances upon which the Brown parties rely, taken together with the absence of any evident s 436C or Pt 5.3A purpose for exercising the power to appoint administrators, a reasonably arguable inference arises that Blackbird Private Equity purported to exercise the power under s 436C(1) for an improper purpose. That inference is capable of displacing Mr Wilkinson's direct evidence to the contrary. Consequently, it is reasonably arguable that the Administrators were not validly appointed.

215 Separately, Mr Brown contends, in substance, that the Blackbird Private Equity Facility should be set aside ab initio or treated as unenforceable at the time of the purported appointment of the Administrators by reason of the statutory unconscionability claim. For the

reasons already given, that claim is reasonably arguable. Accordingly, it may be accepted that if that claim were successful the Court may grant relief that would extend to unwinding the ill-effects of the Blackbird Private Equity Facility including the appointment of the Administrators under s 436C(1) of the Corporations Act.

Is termination of the administration a serious question to be tried

216 In NSD 685 Mr Brown also applies for an order under s 447A to terminate the administration. The Court's discretion under s 447A(1) is wide and there is nothing on the face of the subsection that suggests the power should be read down: *Australasian Memory Pty Ltd v Brien* [2000] HCA 30; 200 CLR 270 at [17], [20] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ). However, rather than terminate an administration, courts have regularly utilised s 447A(1) to cure a defective or invalid appointment of an administrator: see, e.g., *Re Cyprus Community of NSW Ltd* [2024] NSWSC 1629 at [116]-[128] (Black J). Nonetheless, in general, the power under s 447A should only be exercised where it would be consistent with the objectives of Pt 5.3A: *Re Keneally* [2015] NSWSC 937; 107 ACSR 172 at [115] (Black J). Thus, while neither the Administrators nor any other person has applied for an order to validate the appointment, it is highly likely that the Court would give consideration to the objectives of Pt 5.3A when deciding whether an order should be made to terminate the administration in the event the Court finds that the Administrators' appointment was invalid.

217 Consistently with attainment of the objectives of Pt 5.3A, it has been accepted that the Court should hesitate to exercise the power under s 447A to overcome a failure to comply with a statutory requirement for a valid appointment of an administrator. Yet, if the company is insolvent, it may be consistent with the objects of Pt 5.3A to validate the appointment notwithstanding non-compliance with a statutory requirement: *Panasystems Pty Ltd v Voodoo Tech Pty Ltd* [2003] FCA 428 at [15]-[20] (Merkel J); *Re Pasdonnay Pty Ltd* [2005] FCA 335 at [16]-[22] (Gyles J). Likewise, where the company is solvent or likely solvent and administration will not otherwise increase the return to creditors compared to liquidation the Court may refuse to exercise the power: *Re Keneally* at [114]-[116]. Further, the absence of bad faith or improper purposes may also be relevant to cure non-compliance with a statutory requirement for a valid appointment: *Darin Re Palamedia Limited* [2010] NSWSC 451 at [20] (Barrett J). However, where the appointment of an administrator is invalid due to bad faith or improper purpose, there may well be grounds for the Court to refuse to exercise

power under s 447A to validate the appointment: see, *Re Cyprus Community of NSW* at [129]-[131].

218 It is reasonably arguable that the Court would make an order terminating the administration in the circumstances of this case for two reasons. First, it is reasonably arguable that the Administrators' appointment was invalid. Second, the statutory unconscionability claim is reasonably arguable and, therefore, the Company may be solvent. If so, it is unlikely that the Administrators' appointment would be validated.

Balance of convenience

219 A proceeding like NSD 685 is not merely a contest between private parties. Notice is required to be given to ASIC and the interests of third parties (unsecured creditors) may be affected by any restraint or other order that modifies the manner in which Pt 5.3A operates in relation to the Company. Therefore, the object of Pt 5.3A is also relevant to the balance of convenience and the public interest in the due administration of a company that is or may be insolvent.

220 In the circumstances of this case, the whole of the property of the Company is in the control of the Receivers. The Administrators opine in the r 75-225(3) report that the Company is insolvent. As already mentioned, the solvency and future business of the Company depend on the successful prosecution of NSD 662. As Mr Brown will be given authority to prosecute that claim in the name of the Company, there does not appear to be any other property, business or affairs of the Company to be administered by the Administrators until NSD 662 is resolved.

221 If the creditors were to vote at a meeting convened under s 439A at the present time, the most likely resolution would be to wind up the Company. In that circumstance, Mr Brown could remain authorised to prosecute NSD 662 and defend NSD 643 in the name of the Company on the same terms despite the Company being in liquidation. If the prosecution and defence of those proceedings were successful resulting in solvency of the Company, the liquidation of the Company could be terminated: s 482 of the Corporations Act; e.g., *Re F & A Henry (Gowie) Pty Ltd (deregistered)* [2012] NSWSC 1061 at [16] (Black J); *Re Pine Forests of Australia (Canberra) Pty Ltd* [2010] NSWSC 1127 at [3] (Barrett J). In the meantime, a liquidator of the Company would have the ability to investigate and potentially prosecute the potential claims against Mr Brown the Administrators identify in the r 75-225(3) report. Therefore, any restraint of the Administrators or delay in completion of the administration may work to the potential disadvantage of creditors and advantage of Mr Brown in a manner

that is inconsistent with the broader public interest in the investigation of misconduct in the management of the Company.

222 On balance and taking all factors into account, it is not appropriate to restrain the Administrators from acting as voluntary administrators pending final determination of the validity of their appointment. The Administrators, whether or not validly appointed, may continue to perform an important function in protecting the interests of unsecured creditors in circumstances in which, unless the Company is successful in NSD 662 and NSD 643, the Company is most likely insolvent and should be wound up and potential claims against Mr Brown should be investigated in the public interest.

Should the period for voting at the second creditors meeting be extended?

223 Section 439A of the Corporations Act requires the administrator of a company under administration to convene a meeting of the company's creditors within a certain period described in that section. The meeting must be held within five business days before or within five business days after the end of the convening period. At a meeting convened under s 439A the creditors may resolve to execute a deed of company arrangement, that the administration should end, or that the company be wound up: s 439C.

224 Rule 75-140(1)(b) of the IPRC provides that such a meeting may be adjourned from time to time and from place to place by the person presiding at the meeting. Rule 75-140(3) provides that a meeting convened under s 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. Section 435C(3)(e) of the Corporations Act provides that the administration of a company will end if a meeting convened under s 439A ends without a resolution under s 439C being passed at the meeting.

225 The effect of ss 439A, 439C and 435C(3)(e) of the Corporations Act and r 75-140 of the IPRC is that if the creditors do not pass a resolution at the meeting of creditors convened under s 439A within 45 business days after the first day on which the original meeting was held, the administration will end: see, e.g., *Cawthorn v Keira Constructions Pty Ltd* (1994) 33 NSWLR 607 at 609 (Young J).

226 The evidence indicates that the Administrators convened a second meeting of creditors under s 439A of the Corporations Act and that meeting was to be held on 20 May 2026. Although there was no evidence regarding the outcome of that meeting, it was common ground that the

meeting was adjourned for the maximum period of 45 business days in accordance with r 75-140(3) of the IPRC. It follows that, if the creditors do not pass a resolution on the day to which the meeting convened under s 439A was adjourned, the administration will terminate by operation of s 435C(3)(e).

227 In *Cawthorn* Young J exercised the power conferred on the Court under s 447A of the Corporations Act to extend the time to which a meeting convened under s 439A was permitted to be adjourned (then under s 439B) even after that meeting was completed without the creditors passing a resolution. In so doing, Young J observed:

> Although the flavour from this material is that there is to be a short moratorium, and that the interim administration, before the creditors make the appropriate resolution, is not to be indefinite, there is also the flavour that whilst the court is to keep on the sideline as much as possible, it is to be involved in a supervisory capacity, it is to be involved to ensure that secured creditors are not prejudiced and, indeed, it is to be involved and to use its powers to tailor make a procedure for each company, so that the spirit and objects of the Part will be implemented.
>
> It seems to me that this reinforces the construction that I have placed on s 447A, that the Court is to have plenary powers to do whatever it thinks is just in all the circumstances, but the court is to bear in mind when exercising those powers the rights of the various groups of people that are affected by voluntary administration, and that there is a very great public interest in not permitting such voluntary administration to go on for a long period of time. Provided that those principles are borne in mind, the court is to ensure that the object of the exercise, that is to consider whether in everybody's interest it is better to have some form of administration short of winding up, is fulfilled.

228 The view Young J expressed regarding the purposive, remedial and plenary nature of the power conferred under s 447A is consistent with later observations of the High Court to the effect that the power is wide, but not entirely without limit and is a general power that is an integral part of the legislative scheme for which Pt 5.3A provides: *Australasian Memory* at [19]-[20], [24]. Section 447A permits the making of orders which alter the way in which Pt 5.3A operates in relation to a particular company in a manner that is consistent with the provisions and object of that part. Having regard to *Cawthorn* and *Australasian Memory*, the power conferred by s 447A is 'quite clearly' available to extend the last day to which a meeting convened under s 439A is permitted to be adjourned: *Dean-Willcocks v Powerline GES* [2002] NSWSC 40; 40 ACSR 516 at [6] (Barrett J). This line of authority has been consistently followed in this and other Courts: see e.g., *Merryweather, in the matter of HMG Westhill Pty Ltd (Administrators Appointed)* [2009] FCA 1068 at [5]-[7] (Stone J).

229 As a consequence of the potential for the Administrators to be required to hold the second meeting of creditors before the judgment on the interlocutory applications was pronounced,

an order was made by consent on 23 June 2026 by which power was exercised under s 447A and s 1322(4) of the Corporations Act extending the day to which the meeting was adjourned to the day that is ten business days after pronouncing that judgment or 23 July 2026 whichever is the later. Notwithstanding the existing extension and order, it is self-evident that the validity of the appointment of the Administrators will not be resolved before the end of that period.

230 As already mentioned, if the second meeting of creditors proceeds, it is most likely that the creditors would pass a resolution to wind up the Company. However, as also already mentioned, it is reasonably arguable that the appointment of the Administrators was invalid. Therefore, permitting the second meeting of creditors to proceed may result in injustice and would, in effect, determine the outcome of NSD 685. Further, for the reasons already given, there is a prospect that the Company would be solvent if it is successful in its claims in NSD 662. Otherwise, there does not appear to be any realistic prospect of the creditors receiving a dividend if the company were wound up. In these circumstances, it is in the best interests of the creditors and the Company as a whole, in effect, for the period of the administration to be extended until NSD 662 is resolved. Subject to further order, there will be an order adjourning the second meeting of creditors to the day that is ten business days after final judgment in NSD 662 is pronounced.

What conditions, if any, should be imposed on the grant of the interlocutory orders?

Conditions upon authorising proceedings in the name of the Company

231 As NSD 662 is brought by Mr Brown, Mr McMahon and Ms Rutledge, and all property of the Company is under the control of the Receivers, it may be inferred that the legal costs and other expenses incurred by the Brown parties in connection with NSD 662 and NSD 643 have, thus far, been met and will continue to be met by the individuals under the terms of the retainer upon which their legal representatives act for them. Nonetheless, for the reasons that follow, it is appropriate that the creditors of the Company be insulated from legal costs and expenses incurred in the prosecution and defence of the proceedings and from the consequences of any adverse costs order made against the Company in those proceedings.

232 In circumstances in which a director of a company brings proceedings in the name of the company to challenge the appointment of a receiver and (or) the appointor's security instruments, the director is usually required to provide the company with a satisfactory indemnity against costs to avoid diminishing the value of the security interest: *Deangrove Pty*

Ltd (Receivers and Managers Appointed) v Commonwealth Bank of Australia [2001] FCA 173; 108 FCR 77 at [40], [47] (Sackville J); *Ernst & Young (Reg) v Tynski Pty Ltd* [2003] FCAFC 233; 47 ACSR 433 at [26] (Branson, Marshall and Stone JJ). However, as the indemnity is for the benefit of the secured creditor, if the secured creditor does not request the provision of an indemnity against costs, it may be assumed that the secured creditor's interests do not require the protection that would be afforded by an indemnity: *Tynski* at [26]-[27].

233 Similarly, in considering whether it is in the best interests of a company as a whole to grant a person leave to bring derivative proceedings on behalf of the company under s 236 and s 237, the court may take into account the extent to which the person applying for leave has given or can give an adequate indemnity to the company for the costs of the litigation and any adverse costs order against the company: *Blakeney v Blakeney* [2016] WASCA 76; 113 ACSR 398 at [64]-[68], [85] (Buss and Murphy JJA, Beech J). In the case of the exercise of a court's implied power to authorise a creditor or contributory to bring proceedings in the name of a company in liquidation, an order may be made authorising a person 'at [that person's] own expense as to costs' to use the name of the company' in proceeding: *Aliprandi* at 254 (McLelland J).

234 In this case, as already mentioned, Blackbird Private Equity has not requested the provision of an indemnity against its costs. Otherwise, Mr Brown submits that he should not be required to give an indemnity as a condition of granting him authority to bring or defend proceedings in the name of the Company for two reasons. First, NSD 662 would be brought and NSD 643 defended by the individual Brown parties irrespective of whether or not the Company is a party to those proceedings. Therefore, Blackbird parties would be exposed to similar levels of legal costs and expenses. Second, the benefit of an indemnity applies only to Blackbird Private Equity and not all the Blackbird parties. These submissions are not accepted.

235 To the extent that the Company incurs a liability to the Brown parties' legal representatives in the prosecution of NSD 662 or defence of NSD 643, the property of the Company will be diminished to the extent of that liability. Therefore, the interests of the unsecured creditors, to the extent there is or may be any property available for distribution to them, is at risk if Mr Brown is authorised to bring or defend proceedings in the name of the Company.

236 While any costs order made in favour of any of the Blackbird parties, Hall Chadwick, Mr Laird or Reform Financial Australia is likely to be made against the Brown parties jointly and severally, due to the Brown parties' financial circumstances and the terms of the Blackbird Private Equity Facility, if a costs order were made against the Brown parties it is highly unlikely that the beneficiary of that order would recover the costs award out of surplus property of the individual Brown parties. Therefore, any surplus property of the Company is at risk and will be diminished to the extent of any costs award made against the Brown parties. Thus, an indemnity against an adverse costs order would benefit the Company as a whole and not merely protect Blackbird Private Equity against the possibility of diminishment of its security. Accordingly, is not to the point that none of the Blackbird parties has specifically requested that permitting Mr Brown to bring and defend proceedings in the name of the Company should be conditional upon him indemnifying Blackbird Private Equity against an adverse costs order.

237 It follows that, subject to a satisfactory indemnity with respect to the legal costs and expenses the Company incurs and with respect to any adverse costs order against the Company, it is in the best interests of the Company that Mr Brown be authorised to bring NSD 662 and defend NSD 643 in the name of the Company. Accordingly, there will be an order authorising Mr Brown, at his own expense and risk as to costs, to use the name of the Company as applicant in NSD 662 and defendant in NSD 643. The order will be conditional upon Mr Brown delivering to the Administrators a deed executed by him indemnifying the Company and the Administrators against any costs, charges or expenses (including the Administrators' remuneration) in connection with or arising out of the proceedings together with a payment to the Administrators of $10,000 to be held by the Administrators in trust and to be applied to any such costs, charges or expenses if and when incurred, and subject thereto to be refunded to Mr Brown. The order will also be conditional upon Mr Brown delivering to the Administrators security for any adverse costs order made against the Company in the proceedings in a form and amount to be agreed between Mr Brown and the Administrators and, failing agreement, as determined by the Court by further order.

Conditions upon restraining the sale of the Kimberley Pearl and JimFab boats

238 As all Brown parties stand to benefit from NSD 662 and an interlocutory injunction restraining the sale of the Kimberley Pearl and JimFab boats, the interlocutory injunction will be conditional upon all the individual Brown parties giving the usual undertaking as to

damages. Having regard to the limited authority of Mr Brown regarding using the name of the Company to bring and defend proceedings, there will be no requirement for the Company to proffer an undertaking.

239 Notwithstanding that all individual Brown parties will be required to give undertakings, the value of such undertakings remains highly doubtful. Therefore, the interlocutory injunction will also be conditional upon the individual Brown parties paying the Receivers' reasonable costs of preserving and storing the Kimberley Pearl and JimFab boats for the duration of the restraint. Such costs to be agreed between the individual Brown parties and the Receivers and paid monthly in advance. Failing agreement as to the reasonable costs, as determined by further order of the Court.

240 The injunction should also be conditioned upon the individual Brown parties undertaking to use their best endeavours to prosecute NSD 662 of 2026 expeditiously.

Mediation orders

241 Amongst other things, Mr Prince (an investor) has evidently paid a relatively large sum of money into the trust account of Adero Law. At an earlier point this year, Nationlink Solutions had evidently approved a refinancing loan for the Company in the sum of $1.2 million. In these circumstances, it is not beyond the realms of possibility that the disputes in all proceedings may be resolved and (or) a DOCA proposed in terms that could be acceptable to the Company's creditors.

242 There will be an order referring the parties to all proceedings to mediation to be conducted on an expedited basis and completed before 31 August 2026 or as soon thereafter as is reasonably practicable. The practical effect of that order will be that it will not be necessary for Mr Brown to deliver a deed of indemnity to the Administrators or provide security for adverse costs orders in NSD 643 and NSD 662 until after the mediation is completed and only then if the mediation is not successful. Additionally, operation of the order requiring the individual Brown parties to pay for the continued preservation and storage of the Kimberley Pearl and JimFab boats will be stayed until 31 August 2026.

The reasons for suppression and confidentiality orders

243 The affidavit of Mr Wilkinson deposes facts to the effect that information of the kind deposed in his affidavit and the confidential affidavit of Mr Betros is confidential and commercially sensitive in the sense that if a trade rival were to acquire knowledge of that information it

could be used to the advantage of that rival and disadvantage of Blackbird Private Equity. It is accepted that the information in question is confidential and commercially sensitive in that sense.

244 At the oral hearing the Blackbird parties applied for an order under s 37AF(1)(b)(i) and s 37AG(1)(a) of the Federal Court Act for an order restricting disclosure of the confidential and commercially sensitive information to the Court, parties and their legal representatives on the ground that such an order is necessary to prevent prejudice to the proper administration of justice. An order to that effect was made for the following reasons.

245 The principles applicable to the exercise of the power to make a suppression or non-publication order are well-established. These were set out in *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth) (No 2)* [2020] FCAFC 44; 275 FCR 377 at [4]-[9] (Allsop CJ, Wigney and Abraham JJ) and need not be repeated. Although the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice, that is not the only objective of the administration of justice. Therefore, notwithstanding the public interest in open justice, where it is *necessary* to prevent prejudice to the proper administration of justice it would be an error for the Court not to make a suppression or non-publication order.

246 In general, the administration of justice is concerned with quelling controversies and the public has an interest in the Court doing justice between parties according to law. Where in the administration of justice disclosure of information that is otherwise confidential and commercially sensitive will or is likely to cause financial harm to a person involved in a proceeding (whether a party or non-party), in general, it will not be in the interests of the administration of justice that the information be disclosed in such a manner as to cause that harm: *Australian Competition and Consumer Commission v Cement Australia Pty Ltd (No 2)* [2010] FCA 1082 at [13]-[14], [23] (Greenwood J); *Motorola Solutions Inc v Hytera Communications Corporation Ltd (No 2)* [2018] FCA 17 at [8]-[9] (Perram J); *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science (No 2)* [2018] FCAFC 47 at [8]-[9] (Perram, Pagone and Bromwich JJ).

247 The resolution of the interlocutory applications presently before the Court do not require publication of Blackbird Private Equity's confidential information in order for the public to understand and appreciate the reasons for that decision. Therefore, the requested suppression order does not unduly interfere with the public interest in the principle of open justice.

Otherwise, the integrity of the litigious process would likely be jeopardised if trade rivals were free to benefit from publication of the confidential information. Thus, to protect the public interest in the integrity of the administration of justice the requested order is necessary.

248 A suppression or non-publication order operates for the period decided by the Court and specified in the order: s 37AJ(1) of the Federal Court Act. Having regard to the nature of the information, five years from the final day of the trial in NSD 662 is a reasonable period for operation of the order. Further, s 37AH(2) provides that certain persons are entitled to appear and be heard by the Court on an application for a suppression or non-publication order. Due to the manner in which the application was made and heard, it was not possible to afford such persons that opportunity. Therefore, an order was also made permitting any person mentioned in s 37AH(2) to apply to set aside or vary the suppression order.

I certify that the preceding two hundred and forty-eight (248) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Feutrill.

Associate:

Dated: 8 July 2026

SCHEDULE OF PARTIES

NSD 643 of 2026

Defendants

Fourth Defendant:	JAMES VINCENT MCMAHON
Fifth Defendant:	NATIONLINK SOLUTIONS PTY LTD ACN 633 216 609

NSD 662 of 2026

Applicants

Fourth Applicant:	JULIE ANNE RUTLEDGE

Respondents

Fourth Respondent:	BLACKBIRD PRIVATE EQUITY PTY LTD (ACN 657 766 535)
Fifth Respondent:	BPE LOANS 2 PTY LTD (ACN 676 690 841)
Sixth Respondent:	IAN ANDREW LAIRD
Seventh Respondent:	REFORM FINANCIAL AUSTRALIA PTY LTD (ACN 601 619 943)