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TRANSCRIPT OF PROCEEDINGS

O/N H-638922

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

MR C. NG, Deputy District Registrar

No. NSD 619 of 2015

APPLICATION IN THE MATTER OF BRUCK TEXTILE TECHNOLOGIES PTY LTD (IN LIQUIDATION)

SYDNEY

10.30 AM, TUESDAY, 2 FEBRUARY 2016

MR P. KULEVSKI appears for the liquidators

MR M.J. STEVENS appears for the examinee

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THE REGISTRAR: Yes.

MR P. KULEVSKI: May it please the court, Registrar, Kulevski again for the company in liquidation.

5

THE REGISTRAR: Yes, Mr Kulevski.

MR KULEVSKI: If I could just, Registrar, give you a one-minute outline of what we expect to happen today.

10

THE REGISTRAR: Yes.

MR KULEVSKI: Mr Tsiakis was stood over from last time, as you may recall, the partner of DLA Piper. The second partner of DLA Piper will be called first. We don't expect that to take much longer than an hour.

15

THE REGISTRAR: All right.

MR KULEVSKI: And then we will have perhaps your regular morning tea.

20

THE REGISTRAR: And who do you anticipate after that, Mr Kulevski?

MR KULEVSKI: Mr Nicodemou.

25

THE REGISTRAR: Mister who, sir?

MR KULEVSKI: Nicodemou, Costa Nicodemou of BRI Ferrier.

THE REGISTRAR: Is he here? Is Mr Nicodemou here now?

30

MR KULEVSKI: No, he's not. We've advised him to make himself available for 12.

THE REGISTRAR: All right.

35

MR KULEVSKI: And also it's preferable that he not be here while Mr Tsiakis gives - - -

THE REGISTRAR: Sure. But he knows – so your instructing solicitors have a phone number to contact him if we - - -

40

MR KULEVSKI: Yes.

THE REGISTRAR: The timetable varies, is that right, Mr Kulevski?

45

MR KULEVSKI: Yes, Registrar.

THE REGISTRAR: Are we ready to proceed with the first examinee for this morning?

5 MR KULEVSKI: We are, Registrar. We are. Thank you.

<KON ANASTIOS TSIAKIS, SWORN [10.31 am]

10 THE REGISTRAR: All right. Thank you. Just take a seat, sir. Just for the record, state your name?---Kon Anastasios Tsiakis.

And your occupation, sir?---Partner of DLA Piper.

15 And current address, please?---3 Irymple Avenue, I-r-y-m-p-l-e, Glen Iris, Victoria.

All right. Are you represented by anybody?---No.

20 No. Okay. The purpose of today, you would understand, is a summons has been issued pursuant to the Corporations Act. And as a lawyer, you probably understand this already but the normal course would be if there was anything which you thought was incriminating or make you liable for a civil penalty, you can say the word “privilege” before you answer. Anything you say will not – cannot be used in any other proceedings in the context I’ve described, unless the evidence later turns out to be false. Are you familiar with that process?---Yes.

25 All right. I think we can proceed, Mr Kulevski.

MR KULEVSKI: Thank you, Registrar.

30 THE REGISTRAR: Yes.

<CROSS-EXAMINATION BY MR KULEVSKI [10.32 am]

35 MR KULEVSKI: Mr Tsiakis, could you please tell the Registrar what your area of speciality is at DLA Piper?---Litigation and restructuring.

40 And has that always been your area of speciality?---Yes.

Were you responsible for collating the documents that were produced in answer to the summonses?---In part.

45 Did you produce all the documents that were available to you?---Yes.

We have been unable to – and this is not necessarily a criticism. I’m just checking. We have been unable to locate any file notes that seem to be taken in your hand. Is that correct? Were any file notes produced?---Not that I recall, no.

5 Does that mean you didn’t take any file notes at meetings or - - -?---Look, from –
from recollection, there might have been some – some scribbles but there was only
one meeting I think I attended with both Mr Bart and Mr Parker, and subsequent
meetings with Mr Lindholm. And it became clear that I personally wasn’t going to
10 be involved in this matter. And within a period of time I think I essentially scrapped
the file notes. In other words, I – I didn’t open a file and, yes, basically I didn’t have
any great involvement.

We will get to the circumstances over why you chose not to be involved in a
moment. If I could just sort of ask you some questions about how we were told Mr
15 Catanzariti approached you for advice on this matter, and see if that accords with
your recollection?---Sure.

And I’m just – for ease, I – no offence intended, I might just call him Rick and call
you Kon. Is that acceptable to you?---Sure, yes.

20 Now, Rick told the court that, prior to your involvement, the client had come to him
a number of times and complained that their enterprise bargaining agreement was
very inflexible, and that he was concerned that he had given advice that what he
called GEERS which morphed into FEG. Are you aware of what GEERS and FEG
25 are?---Yes.

Thank you. That those payments would not be made available to restructure Bruck,
and that that was a concern he had. Were you ever aware of that concern?---No.

30 He indicated to us that he was concerned that the management of Bruck, notably Mr
Parker, may have been presenting restructuring opportunities which were really just
getting a way for GEERS but really FEG to pay for the restructuring. Did he
communicate those concerns to you?---From recollection, not as possibly in that
direct language. But I understood he was, from recollection, given some advice in
35 respect of GEERS to the company.

He also said to us that it crossed his mind that the intention of management into
suggesting that Bruck might go into liquidation was to use GEERS, or really FEG,
payments to supplement the restructure of the business and – is that something he
40 conveyed to you?---No.

He said he was also concerned with whether the transactions would survive the
scrutiny of the department that administered the FEG scheme, and he had brought
you in for independent advice on the transactions. Does that accord with your
45 recollection?---No.

5 Could you then, please, describe how you came to be involved in the transactions?---So I had only joined the firm on 1 May 2014 so I had no prior dealings with Bruck, or Rick for that matter. And he indicated that – think it was both Mr Parker and Mr Bart were going to attend the offices and they had – or they were experiencing some financial difficulties with the company and he thought it might be appropriate if I attend that meeting. So prior to the meeting I had no real – or no documents, financial statements or otherwise with respect to the company. And the general summary from Rick as to they were involved in the textile industry and they were experiencing some financial difficulties.

10 And you had had no previous involvement with Mr Bart or Mr Parker?---Correct.

15 If I could ask you to just keep volume 2 of the documents produced by DLA Piper Australia in front of you. Now, before we turn to that, we're only going to go to a few documents. Do you recall what your first – I know it has been a long time. Do you recollect what took place in your first conversation with Rick about the matter?---Look, probably not much more than I've just suggested in the sense that there was a client that he had for some time. They were experiencing financial difficulties. He might have indicated that they had other advisers in Sydney but, in any event, they were in Melbourne and they were going to catch up with him, and he thought it would be a good idea if I also attended.

20 Now, the first file note we've been able to find mentioned your involvement in the matter is behind tab 112. If I could ask you to turn to that, please. Now, it's Rick's file note and it's dated 21 May 2014. It says that he has been called by Geoff Parker. And the first line is – I will let you read through it, but the first line is “Kon was very good” which is always a good vote of confidence I imagine, a fellow partner?---Yes.

30 And the second last line says:

He will speak to us and Kon's recommendation.

?---Yes.

35 Now, do you recall whether at that time there had been some recommendation from you, or whether there had been some meeting between you and the client?---From recollection, this might have occurred – this phone call might have occurred after our meeting with Geoff Parker and Phillip Bart on – I think on the same day.

40 And do you recollect that meeting?---Yes, in general.

45 Could you tell the court in general what you recollect about that meeting because we don't have any record from you about that meeting?---Sure. So essentially – I mean, again, I – the company was experiencing some financial difficulties. They had employees, from recollection, of around 200. They had recently lost some contracts, some supply contracts. It was envisaged that into – into the short future they wouldn't have enough orders to be able to keep all employees busy. That they had

obtained some advice from I think both Sydney accountants – or insolvency business, I think, and some lawyers about - - -

5 I'm sorry to interrupt you. Do you remember who those advisers were? Was one Mr Nicodemou, Costa Nicodemou of BRI Ferrier?---I don't recollect the name. They might have mentioned the firm though.

BRI Ferrier?---Yes, yes.

10 Do you recollect what they did?---Look, if not on that occasion, it might have been at a subsequent occasion but - - -

15 I understand?---My recollection is at least the name had been mentioned at some point. And they were really having a general discussion about what the possibilities might be if they ultimately faced issues of insolvency. And in the context of – they may have mentioned at that meeting that they had a general security agreement, or someone – someone had some security registered with the company, so that offered a possibility of a receivership. I think GE had a debt owing to it of somewhere around the \$5 million mark, if recollection serves. And they were considering the possibility of voluntary administration or liquidation. It seemed that – and I never saw anyone
20 of voluntary administration or liquidation. It seemed that – and I never saw anyone else's advice, but it seemed that they, at that time at least, were sort of exploring the best way forward for the company in the circumstances in which it was facing.

25 And at that point in time did it seem, from what had been told to you, that they had decided on any particular course of action?---No.

30 That they – did it occur to you that they were inclined to a particular course of action?---Not particularly. I mean, from my context, it was really – I mean, again, sort of first meeting, no document – or no documents to look at, and it was a general discussion. And I think there was certainly, you know, a possibility of a pre-appointing voluntary administrators or a pre-pack type arrangement that might have also been discussed. But there didn't seem to be necessarily any strong view to one option or another.

35 Now, if I could turn you to the next file note, please, at 113. That's Rick's file note, it says, of a call with you. I don't know whether it was a meeting or a call. And perhaps if I give you a moment to read through that?---Yes.

40 So at that point, what did you understand your role in this matter to be?---Well, the – the recommendation that was discussed, I think, in the previous email – file note was – I mean, it seemed to me that they needed to speak to an insolvency practitioner, and my recommendation was that they go and speak to – to one in Melbourne, and I ultimately referred them to John Lindholm at Ferrier Hodgson because it just seemed to me that it was more of a financial question that would influence, potentially, the
45 opportunity or the avenue that they might take with respect to the ultimate insolvency option that they choose. And they weren't seeking, from me at least, any insolvent trading advice or – or otherwise, and it seemed to me, at that time at least, that it was

really more of a sort of expert insolvency practitioner to give them some suggestions, possibly, or direction as to the – the way forward.

5 So what's the reference to "Don't do a deal a day or week before you put it into a VA"?---I don't – I don't recall – well, it's – it's unclear who has made that statement. Whether it was – there's, obviously, Rick's file note. I mean, if I was to hazard a guess – and, again, I'm not sure if I said or Rick said it, but it might be that – whether – whether there was contemplation of a sale occurring before the company is then placed into voluntary administration.

10 So I would suggest that it's probably more likely that you've said it, given your area of expertise, rather than Rick has - - -?---Possibly.

15 And do you recall why you would have said, "Don't do a deal a day or week before you put it into a VA"? Was that a general bit of advice, or was it a specific bit of advice?---Look, I think with respect to the discussion with – with – with Rick, and knowing that that has, I think, occurred on the same day as the meeting just – just a general comment with respect to, you know, the – one – one of the opaqueness of – of the information that we had, which was really – had very little information, but just a general – a general statement about, you know, how that might look.

20 See, given these – and why might it not look good?---Look, there had been plenty of matters in the – in the – in the press previously about, you know, obviously, employees losing their jobs or otherwise and – and possibly related party transactions. I mean, on any view, any, you know, insolvency practitioner, if appointed, would clearly look at transactions that have occurred within a short period of time prior to the company going into some insolvency.

30 And your understanding at that time was that there was a related party transaction contemplated?---No. We weren't, from recollection, provided with any great detail as to what was contemplated other than some options, so it was unclear as to whether it was to be – or whether the view was that there was going to be a transaction before a VA, after a VA, through a liquidation or a receivership. It might have – there might have been some mention made to a sale as one of those options, but it was unclear as to which of any of those options, at least to my understanding, they were contemplating to pursue.

40 I understand. And then there's a reference to – possibly a question. It says, "Any GEERS payments around 2009." Do you recall what that was about?---No.

45 So someone seems to have checked about whether perhaps this company previously received a payment from GEERS in 2009. Does that ring a bell at all?---It would – it would be a matter that was possibly known by – by Rick. I mean, it wouldn't – wouldn't have been a statement that I would have made. I had no background - - -

No. Is that a question you may have asked of Rick that had sprung out of the meeting with the client?---Look, not – not – not from recollection.

And so given these various advisers that were in the mix, what did you understand the role for you and, more generally, DLA Piper was at that point in time?---Look, from – as I say, I had no history with the company. I was aware from discussions with Rick that he had had, well, a number of years’ dealings with them just from the employment perspective. So it seemed that they might have been seeking specific advice from – from him relevant to Bruck at the time. With respect to my own part, it was a bit – it was – it was a bit unclear, really, as to what they sought from me. It seemed to me – other than the general discussion that I had with them on that first meeting, it became clear to me that they really needed to speak to insolvency practitioners, as opposed to myself, in light of the context of their consideration of these options for insolvency, be it the ones that we’ve already mentioned or – or – or the sale and how that – the timing of the sale.

If we could turn to the next tab. It’s an email from you to Mr Parker and to Rick. It says:

I’ve spoken to Rick this afternoon, confirmed that earlier today, I met with John Lindholm, partner of Ferrier Hodgson, in connection with the current financial circumstances of Bruck Textile Technologies.

If I could just ask you to read the rest to yourself?---Yes.

Was that meeting just between you and Mr Lindholm?---Yes.

And do you recall what happened at that meeting?---I, essentially, conveyed what had been said the – I think it might have been the previous day, in the actual meeting with – with Geoff and – and – and Phillip. Again, no documents other than a general discussion with John that we had had this client that had come in and had given us a general background as to their current financial predicament. I relayed that on – on to John, and he was then happy to meet with, I think, Geoff Parker, which occurred maybe in the next few days of the same week.

So nothing concrete was decided at that meeting between you and Mr Lindholm?---No. I mean, again, I – I had no financial position or balance sheet or otherwise to give John, so, really, it was – I merely conveyed what had been conveyed to me the – the – the day prior and indicated to him that I had recommended to Geoff and to Phillip that they ought speak to him about their – their views and their predicament.

And so perhaps if I could just summarise, to this point, you’ve been told by the client that this is a company in serious difficulty that does not have a good prognosis, but you have no documents to establish or not establish those facts; is that correct?---Yes.

And at this point, had you been provided with any documents underlining these matters?---No. I think the – the first documents that I saw were something that, actually, Ferrier Hodgson had – had been able to obtain some financial information

and background on Bruck Textiles from some – some website that they have access to, and I think that was the first time I actually saw a written document relevant to, you know, the shareholdings and the – the directors and so forth of the company.

5 I understand. Perhaps before we go on, then, to go to the next documents, could you then perhaps, given your short involvement, perhaps at a general level, sketch out what your subsequent involvement was in the matter and why you chose to no longer be involved?---So from – from – from that day on – what was it, 21 May – from
10 recollection, there was a – I attended another meeting with John and – and Geoff, and Geoff Parker was able to convey to John directly what – what the issues were. Again, I can't recall whether at that meeting – because I note in that email there was some reference to some documents being provided. I can't recall whether at that meeting any documents were provided for John Lindholm to – to – to review. And, I think, subsequent to that, John Lindholm was travelling to Sydney, and I suggested
15 that maybe he meet with Phillip Bart directly, which I understood that he did within, I think, the same week, or it might have been early the week after. And I didn't attend that meeting either physically or by phone, so I'm not sure what was discussed at that meeting, although John contacted me the – the subsequent day, from recollection, and indicated that all these options that I've just previously referred to were still being considered. And, I think, subsequent to that – and I should say, the context of this was that – that Rick was the main contact with the client, so in one sense, I was being informed about how the client was progressing through Rick, as opposed to being directly contacted by the client. But subsequent to that meeting with Phillip Bart and my discussion with John Lindholm, from recollection, I had no
20 further involvement with the company at all or discussions with Geoff Parker or Phillip Bart.

Perhaps if I go through. Do you recall being asked to give some advice on charges in the security agreements?---During one of the meetings, either Geoff or Phillip Bart
30 had indicated that there had been some registration of a general security agreement, and I think from recollection we – we prepared a – an – an email with respect to the timing of its registration. We never saw – we – we were never provided a copy of the security agreement. We had understood, I think, as I indicated earlier, that they had lawyers in Sydney in any event, so I was loath to really just provide any sort of
35 tangible advice, really, in those circumstances, because it seemed to me that we more than likely wouldn't have any great involvement going forward, and I didn't really want to be put in the position of – without seeing – or better understanding the whole picture, giving any advice with respect to the options that they were considering. And ultimately, as I say, I – I never – I – I had no further involvement, I think, post
40 the subsequent week, when John Lindholm met up with Phillip Bart.

So would it surprise you if it was your email of advice that was relied on as the date that was chosen for the company to go into liquidation?---Yes. From – from
45 recollection, I think I noted a caveat in that advice, which was that they ought seek advice from a banking lawyer.

Yes. Perhaps if we get to that. So if we then turn to the next tab, which is 115, it's an email from Mr Harlem. Does he work for Mr Lindholm, or did he at the time?---As I understand, yes.

5 And could you tell us who Amy Nolan is?---She's a special counsel in my group.

And so then:

10 *Hi, Kon and Amy. Further to your meeting with Mr Lindholm this morning in relation to above, please find attached the group structure and information that we obtained from Company 360.*

There's a document attached, and is that the document you referred to earlier as being provided to you by Ferrier Hodgson?---Yes.

15 And you will see there that, according to that document in the end of the first paragraph, the revenue and the net profit for the company had actually gone up in the years described, rather than gone down?---Yes.

20 And so at that point, was anyone discussing – were you – sorry. I withdraw that. Were you involved in any conversations or any exchange that gave consideration to the substantive commercial difficulties that may be involved with this client?---Well, I – I was informed at that first meeting that they had lost some substantive orders and that, obviously, would have an ultimate negative impact on their ability to be able to trade as they had in the past. Again, I wasn't provided with any documents in relation to that, but that's what I've been told.

25 So never – you were never actually asked to interrogate any actual information about whether those matters were true or not?---Correct.

30 So then if we turn to the next tab, you will see the email from you to Mr Parker and Rick, and it says that you met with John Lindholm, and it says:

35 *In substance, he was in agreement that what was contemplated by BTT ought to be undertaken by way of a formal insolvency transaction, rather than have a transaction effected pre-appointment.*

?---Yes.

40 Now, do you remember anything more than that about what Mr Lindholm might have said?---Again, I – I can't recall whether any balance sheet or otherwise or list of creditors was provided by Geoff. Well, certainly I didn't provide any of that information to John Lindholm. I can't recall whether - - -

45 Sorry to interrupt you - - -?---Yes.

--- but I would suggest from the next paragraph that that had not yet been provided?---Yes. Yes. Okay. So again, from recollection, Geoff expressed to John the matters that I was aware of from – from the first meeting of their financial difficulties. And from – from recollection, I suspect – I recall that John obviously
5 asked – not obviously, but asked more detailed questions about the financial position, and I think that’s where I became aware that GE was also owed, I think, \$5 million. I can’t recall if it was a debt factoring facility or some sort of loan facility. And there
10 was, from recollection, an indication that there was approximately 200 employees that the orders that they had on – in their books at the time would not be able to sustain those employees going forward, from – from recollection, and – and – and hence the advice that they were – they were seeking from, as – as it turns out, BRI Ferrier and whoever else they were using in Sydney.

And so at that point you then set up a meeting, did you, with Mr Lindholm and Mr
15 Parker? If you turn to 118, perhaps?---Yes. That’s correct.

It’s an email from you, just for the record, to Mr Parker, copied to Mr Bart, saying:

20 *Dear Geoff, the meeting will be held at the offices of Ferrier Hodgson, level 43/600 Bourke Street. I look forward to seeing you there at 3.30 pm today.*

And did that meeting take place?---Yes.

And who attended that meeting?---So recollection – myself, Geoff and – and just
25 John Lindholm.

And so Mr Bart was copied on that email, but did he attend the meeting?---He didn’t physically attend, and I can’t recall whether he might have been on the telephone.

30 Sorry. When you split that answer up, you can’t recall that he might have been on the telephone?---Yes. So he wasn’t physically there.

Yes?---He – he might have joined by – by phone from Sydney.

35 You don’t know one way or the other, or you don’t have a recollection one way or the other?---I don’t have a recollection.

And so do you recall what was discussed at that meeting? Perhaps the next file note might help you. And once again, you didn’t keep a file note of that meeting, did
40 you?---No.

So at tab 119 is a file note from Rick that says he has been called by you, and if I just read out the file note:

45 *I spoke with Geoff, John and Phillip – the issue of the stock and its value and consideration of it. Geoff was a bit nervous, but soon was agreeable better to*

*go for VA. May need to renegotiate the enterprise bargaining agreement.
Union may be reasonable if they realise 180 people may lose their job.*

Do you recall having that conversation with Rick?---Not specifically.

5

Okay. So if we just take it piecemeal:

Spoke with Geoff, John and Phillip –

10 that would indicate the meeting of the afternoon previously. Is that correct?---Yes.

So that would indicate that Mr Bart had been either attending – sorry – had been available either by phone or some other means at that meeting?---Yes. Well, by – by – by phone only.

15

Now, do you recall what the issue of the stock and its value and consideration of it was?---I think it's a – it's a matter that arose from questioning by John Lindholm to ascertain what the actual position or financial position of the company was. Now, whether the – whether – and I can't specifically recall, but whether it was a question 20 as to the book value of the stock or some realisable value, be it in some insolvency appointment, whether the value might still be the same or – or something different.

20

Now, it says here that Geoff was a bit nervous but soon was agreeable that it was better to go for VA. Do you recall what that's about?---Look, I – and I – I'm not 25 sure if that's something that has arisen from the meeting or whether Rick has had a discussion with Geoff and that's – that's his comment.

25

Do you recall at all anything around that comment?---Not – not – not specifically, but I don't recall at the meeting Geoff necessarily being nervous or otherwise about a 30 general discussion as to the options that might be available to – to the company.

30

And so do you remember whether Mr Lindholm gave any advice at that meeting?---Well, I – I – I wouldn't – well, I don't recall any specific advice. I think, given that it was the first actual meeting, there was more general discussion as – 35 discussion as to what might be available to the – the company in the circumstances it was facing, especially in circumstances where, again, John Lindholm, from recollection, didn't have any documents to review.

35

Yes. So perhaps then if we turn to the next tab, which is at 120, and that's an email 40 from you to Mr Parker, copied to Mr Bart?---Yes.

40

And if I allow you to read that to yourself, that may be the advice you spoke of earlier?---Yes. That's right. Yes.

45

Have you had a chance to read that?---Sorry. Yes.

Sorry. So that advice concerns whether interest created – security interest created would survive an insolvency. Is that correct?---Yes.

5 And you give some advice that, in regard to section 588FJ of the Corporations Act, any – if a liquidator is appointed on or after 10 June 2014, then the interest will not be rendered void?---Yes.

10 And for the purposes of 588FL of the Act, if the liquidator or administrator is appointed on or after 10 July 2014, it won't vest in the company. Is that correct?---In substance, yes.

Yes. But you do advise twice that it's not your area of expertise and that you recommend that:

15 *you receive legal advice from your Sydney lawyers in relation to this matter.*

20 ?---Yes. I mean, in the context that, again, we hadn't seen the actual security agreement that had been signed or – or – or lodged and that it was a – I can't recall if it arose at the first meeting or whether Rick had mentioned this – this to me. But, I mean, again it seemed odd to me at the time that they hadn't thought of this or that maybe the Sydney lawyers hadn't thought of this or - - -

Sorry to interrupt you, but who are the Sydney lawyers? Do you know?---No.

25 Did you know at the time or now?---No.

Thank you?---Because it just seemed to me that it – it was an odd – ultimately an odd thing to ask in isolation, certainly without any documents.

30 And when you say “in isolation”, how did it come to you? Was there a phone call saying, “We've got these” – because there are no other emails or file notes. Was it a phone call that said, “We've got these security agreements and we would like some advice on them,” or – do you recall?---Look, I don't recall how it came about but, to the best of my recollection, it might have been raised at the first meeting when I met
35 Geoff, the first time I – I was introduced to them. There might have been some reference made then when exploring the options that there had been – or an entity had registered a security interest, and then exploring the option of a potential receiver being appointed or liquidator or what have you. I might have asked the question, look, when – when was the security interest registered and was it – was it
40 filed appropriately and so forth, and I – from recollection, it may have arisen from that initial meeting.

And it seems to have been, from the first line of your email, a request from Phillip for advice – Mr Bart?---Well, his – his query.

45 Yes?---And so – so it didn't seem to be any – any higher than that, really.

And were you told what the nature of the security interests were, even though you weren't provided with the documents? Were you told what they were?---No. From recollection, no.

5 Were you told which companies had been granted security?---No.

So perhaps if you turn to the next tab, please, Mr Tsiakis?---Yes.

Tab 121. That's an email from you to Mr Parker and copied to Mr Bart. It says:

10

Dear Geoff and Phillip, John Lindholm will be in Sydney on Monday and will be available for a meeting with Phillip on Monday after 12.30. Let me know if you would like to avail yourselves of the opportunity.

15 Did that meeting occur?---As I understand, it did.

Did you attend?---No

20 Did Mr Lindholm tell you what had occurred at that meeting?---From recollection, he might have called me after the meeting, on his way back to the – to the airport. But it didn't – from recollection, I don't think he provided me with any information greater than I already knew from the couple of discussions that I had with – with Geoff and – and John and Phillip previously. So really no – no new information, and it – you know, I think that's – so no – no new or specific information.

25

Now, perhaps if I ask you to turn to the next tab. Now, tab 22 is an internal DLA Piper memo, and I know it's not addressed to you. But it's a memo from Mr Runia, who was a junior lawyer in Rick's group, to Rick, and it's dated the same day that you're organising the meetings between Mr Lindholm and Mr Bart. And perhaps –
30 the memo gives advice on whether Bruck's proposal to reorganise its business falls within the GEERS policy, which refers to GEERS not intending to supplement any form of business restructuring. Do you remember this being an issue at the time at which you were discussing these matters with Mr Bart, Mr Parker or Mr
35 Lindholm?---Look, not – not specifically from recollection, and I – I can't recall seeing this memorandum either.

So perhaps if – and you don't recall seeing the memorandum. But if I take you to part – to paragraph 5 and paragraph 6, the memorandum says:

40 *Bruck is proposing to effectively liquidate the Bruck business as part of the inventory, currently valued at 10 million, although this may not be a true reflection of its value, will be sold. The 180 employees will effectively be made redundant. However, a new company will be formed which will purchase the assets of Bruck. This new company will also be owned by the same*
45 *shareholders in the broader Bruck Group.*

And you will see the handwritten comment there underneath the “new company”, which says “phoenix”?---Yes.

5 Now, Rick told us that that handwritten comment was Mr Runia’s. Do you remember any conversation or concerns at that point in time about, first, that Bruck had hardened on a course to effectively liquidate the Bruck business?---Not – not specifically on the – on the – on the 23rd.

10 So - - ?---I mean, I think the – the first time I became aware of what they actually did or which option they chose was once they had actually chosen that option, and Rick had informed me of – and I can’t recall now – you know, put into voluntary administration or liquidation or whatever they had done. So I became aware of it after the fact.

15 And were you aware at any time at that point in time – sorry. I withdraw that. Were you aware at that point in time about any concerns being raised that the proposal might involve a phoenix company?---No.

20 So then the next couple of emails involve you setting up the meeting between Mr Lindholm and Mr Bart. So perhaps if we then skip to the tab 126, and that’s Rick’s call to you, or your call to Rick, or a meeting between you and Rick. Do you know which of those it would be on 26 May?---A – a – a call but, as to who initiated it, I’m not entirely clear.

25 And the file note reads:

30 *Hold off until we have a plan, also timing. They have registered their security interests out of time. If it goes into liquidation, it is void unless there are at least six months before liquidation. Registered on 8 January 2014. What will GEERS think?*

Do you recall that conversation?---Not – not – not specifically.

35 Now, do you recall that there must have, by this point, been a concern about GEERS or FEG – I will use the generic GEERS – or however it was expressed playing a part in these transactions?---Not – not – not directly but, certainly, I think from discussions with Rick he may have mentioned that he had been requested to provide some advice relevant to – to GEERS, and I – I can’t recall what he actually addresses in that memo. But it became apparent that insolvency might result in, obviously,
40 some – some people losing their – their jobs.

Now, unfortunately, we don’t have any further memos or anything from you, except for another file note from Rick at tab 132. If I could ask you to turn to that?---Yes.

45 Now, that’s a call or a – some four days – on 27 May, between you and he again. Now, you didn’t take file notes of any of these conversations. Is that correct?---From recollection – I mean, if – if – if I did, I’ve subsequently discarded them.

Is it your practise to keep file notes of all conversations you have?---Well, look, I mean, for a period. I mean, obviously if I take a file note of a – for a client that is an actual client, obviously they’re retained in the client file. I mean, this to me was really Rick’s client. They never sought any specific any advice from myself. So ultimately I discarded those file notes – or I certainly couldn’t find them.

Can I ask you to read through that?---Yes.

So it reads:

Update is I got on well with Phillip.

Who – do we know who got on well with Philip? Was it you? Or Mr Lindholm? Or ---?---I would hazard a guess Mr Lindholm.

He conceded - - -

I’m sorry?---So this, I suspect, is subsequent to the meeting that he attended in Sydney.

He conceded we will have to wait until July. John thinks he preferred a pre-appointment sale, whereas John thinks do the sale through a VA. John is loath to be involved if it’s a pre-appointment sale. I have obtained government grants over the period, made money over the period, now saying cannot make money moving forward.

Then there’s a reference to section 596AB of the Corporations Act, and it says:

Transactions that may adversely affect an employee’s entitlements. If you enter into a transaction that leaves 80 employees behind that don’t get any redundancy from the company could be a breach of that, I will not include that in my advice.

We have to talk about this file note, Mr Tsiakis.

Someone with Phillip, they conceded would have to wait well until July.

Is that a reference to security interests the period provided for in the Corporations Act?---I would assume so.

Well, could I suggest to you that you were at this point the person who had contact with Mr Lindholm, is that correct?---Yes.

Rick didn’t have contact with Mr Lindholm directly?---No.

So this is information coming to you from Mr Lindholm, is that correct?---Yes.

And you're passing it on to the person you say as the partner with the relationship with the client?---Yes.

5 Now John thinks her prefers a pre-appointment sale, and that – by that he means Mr Bart, is that correct?---It would seem so.

Whereas John thinks you have to do the sale through a VA?---Yes.

10 Now, John is loath to be involved if it's a pre-appointment sale. Now, surely the fact that you mentioned this to Rick means that you thought this was important enough to pass on? You would accept, wouldn't you, that Mr Lindholm is a person with a reputation for integrity in the industry?---Yes.

15 And that he is an experienced consultancy practitioner?---Yes.

20 And he has expressed to you that he is loath to be involved in this matter if it's a pre-appointment sale. Do you recall the conversation you had with Mr Lindholm about this?---Look, again, from recollection, John didn't have any great information as to the actual financial position of the company. But the way in which it was being described to him from recollection by Phillip, and whether it was the valuation of the stock, the creditors that were outstanding, the consideration that was to be paid if it was a pre-appointment sale, he had some reservations from recollection. Now, I don't recall any of the if you like, of any of those creditors or otherwise, or even the consideration that was contemplated in being paid, but – and again, without documents my sense was that John wasn't going to a better and appropriate understanding of the transaction, maybe a more informed understanding, wasn't going to agree or otherwise with anyone's suggestion as to which way this company might, you know, how it might deal with its asset and then be put into some form of insolvency.

30 And then there's a reference to the fact that the company has obtained government grants over the period, and has made money of the period which we discussed earlier, and now it is saying it cannot make money moving forward. And then the reference to 596AB, talking about transactions that may adversely affect the employee's entitlement. What I want to suggest is that you and Rick are having a conversation at this point where what is being expressed is a concern that you have a client that has made money previously, is now expressing that it can't make money moving forward. You have a man with a good reputation in Mr Lindholm saying that is loath to be involved in this matter the way it looks at the moment, and then a discussion that they may be entering transactions that may adversely affect an employee's entitlement in breach of the Corporations Act. So what I want to suggest is that at this point in time you and Rick had a concern that your client was embarking on a course that could potentially breach the Corporations Act. Is that correct?---Well, again, the information we had was very opaque, and in those circumstances, really, there be a whole range of concerns or not, without documentation or otherwise. And with respect of the grants and so forth, that's something that I wasn't aware of. I suspect Rick might have informed me of that. I

was aware of section 596AB, and I suggest that that – or recall that that might have just arisen as a consequence of what he had indicated to me, that look, if there is a transaction to be done people ought be aware of this provision.

5 Now, do you recall why you – either you or he, or you both decided that you
wouldn't include that in your advice?---I wasn't preparing any advice, so why Rick
decided not to I can't particularly recall. I mean, other than again, as I say, it was
unclear as to what actual option with respect to the sale or insolvency be they were
10 outside dealing with the questions that he had specifically been asked about.

So what further involvement did you have in the matter?---27 May. Look, from
recollection, very little, if any. Other than being informed by Rick at a later time as
15 to the company being placed into, I think, either voluntary administration or
liquidation. I can't recall.

And that was all just that one sort of conversation, after?---Well, I had been informed
after the fact as to what had come of the company.

20 And did you have any concerns about the way that this had all arisen?---No, not any
specific concerns, because as I say, I really never – was never really provided with a
full picture or otherwise of what was being contemplated, and you know, possibly
value attributed to the assets or consideration paid. I mean, no great detail of any of
that. I suspect John Lindholm probably had more understanding once he had the
25 discussion with Phillip Bar, but I wasn't privy to that.

Did you have further conversations with Mr Lindholm about the money?---I may
have after the company had been placed into liquidation. I'm not sure if John
thought – John Lindholm thought that he might ultimately have a role or not, I'm not
30 sure. So it wasn't hit the press. I might have called him, I can't recall, and said
"Look, it has gone into liquidation", or voluntary administration, or whatever
happened to it.

And you said that Mr Lindholm might have expressed that he had a – would have a
35 role in the liquidation did you say?---No, I wasn't sure whether as a consequence of
his discussion with Phillip Bart whether he expected or thought he might have some
role or not, because I wasn't aware of whether the company for example was going
to go into receivership and also have a voluntary administrator appointed. just
unclear as to which of those – any of those options were going to be taken up by the
40 company.

Were you aware that there had been a sale of the business a day before it was placed
into liquidation - - -?---After the event, after reading the press or being told by Rick.

45 - - - and that that sale had taken place to a related party?---Again, after the event.

I think – and it’s made more difficult, without any criticism that there are no file notes from you on this, but at this point, it’s difficult to believe that conversations were happening with you and Rick about what will GEERS think about this whole thing and discussions about 596AB of the Corporations Act and Mr Lindholm
5 indicating that he’s loath to be involved in what’s being proposed and that you don’t have a better – and junior lawyers mentioning phoenix companies and that you don’t have a better recollection that this was a primary concern at this point in time?---Well, again, I mean, the advice that they were seeking was primarily from
10 Rick, who’s an employment lawyer. I’ve attended one meeting and then referred them to an insolvency practitioner, and other than providing that security advice with all those caveats, it wasn’t – it wasn’t a matter that was – there was no advice being sought from myself. It seemed that, you know, in – in – in general, they might have been stress-testing advice they had already received from insolvency practitioners or lawyers in Sydney, so I wasn’t really taking this – well, not – not – not think – (1) as
15 I say, wasn’t asked for the advice, but (2) not thinking that it’s going to be a client, ultimately, that sought or was going to want advice from myself, and, as I say, was never asked for that. So it was certainly – I wouldn’t put it any higher than, you know, bit part, piecemeal, where we’re really just being told I don’t think the whole story, necessarily. I never understood the whole financial situation otherwise. So it
20 wasn’t something that I overly exercised my mind to.

Did Mr Lindholm express to you that either he or the client was concerned about the involvement of GEERS/FEG in this?---Sorry? That – that he - - -

25 That either he or the client in their meetings had expressed concern about the way GEERS would perceive this restructure?---Look, from – from recollection, during the meeting with Geoff and John, John may have provided some information as to his previous dealings with GEERS because it seemed apparent that a number of people would, ultimately, lose their – their – their jobs, from what we were being
30 told, and, obviously – well, not obviously, but John had provided some information as to possibly his expectations as to how GEERS might – might deal with that.

Now, did you develop the concern that Rick developed that I mentioned to you earlier, that the client may be using GEERS to impermissibly restructure their
35 business?---That – that view didn’t – didn’t arise for myself.

Didn’t arise for you?---No. Well, it wasn’t – it wasn’t – it wasn’t my – it wasn’t my view.

40 Why did you raise section 596AB with Rick, then?---Again, given the opaqueness of what was being suggested to us, it seemed to me that, again, there was no specificity as to the transactions and how they were to unfold, but certainly that would be a section that people ought be aware of when they’re contemplating a transaction, again, the specifics of which we weren’t told, or I wasn’t told, certainly.

45 Can I suggest this: if the transaction being suggested to you is very opaque and it involves, potentially, a number of different external administration options and,

thirdly, possible dealings with related parties – that there would be any number of provisions in the Corporations Act that might arise in those sort of circumstances. Do you agree with that?---Yes.

Comment [DLM1]:

5 Why is it, then, that in the very few conversations you have with Rick and the clients, the focus seems to be on how GEERS will perceive this or whether there's a breach of 596AB of the Corporations Act? Do you know the answer to that?---Look, I – I would only be surmising, but – and it seemed evident from what Mr Bart and Parker had indicated that, fundamentally, people were going to lose their – their – their jobs.
10 In other words, there was to be a reasonable – as a consequence of the – the orders, the customers that they had lost – that the number of employees, which, I think – recall to have been at that time 200. A material number of those people – you know, there – there wasn't a business to sustain that employment. So it seemed that that was, obviously, something that was on the forefront of people's minds.

15 So for 596AB to be raised, did you understand that Mr Bart had a objective to restructure this business in a way that would allow him to continue to maintain control of the essential business?---No.

20 So what possible purpose could there be for 596AB to be raised if none of the transactions were being entered into in order to avoid employee entitlements?---Well, again, it was just a – given the – the importance or the – the substance of the employees – the number of employees potentially losing their – their positions on the go-forward situation, then that – that section may have been appropriate, again, in –
25 in the limited information that we had.

So what I want to suggest is this: that you had previously had a conversation about what GEERS will think of this; is that correct?---With?

30 With Rick, based on that earlier file note I took you to?---Yes.

Then you're told by Mr Lindholm, after his meeting with the client, that the client is considering a pre-appointment sale, and he's loath to be involved in that; is that correct?---Yes.

35 Then you're told that they've received government grants over the years and that they've made money over the period and they're now saying they can't make money moving forward. That's correct?---Yes.

40 So let's take those together: what will GEERS think of this; experienced insolvency practitioner saying, "I'm loath to be involved in any pre-appointment VA, and our client is telling us they can't make any money going forward, but they've made money over the past period, and they've received government grants." That's a correct summary, isn't it?---All of those various different conversations over
45 different days and times.

Yes. But we don't have any other information about anything else that was in the conversations; is that correct?---That's correct, I mean, in the sense of just to put that into context as to those three statements, but yes.

5 But we don't have file notes about concerns about provisions of the Corporations Act that deal with related party transactions, do we?---No. I mean, certainly I wasn't specifically asked about that.

10 No. So what we're concerned about is a very specific part of the Corporations Act, which his transactions that are entered into to defeat employees' entitlements; is that correct?---Arising from Rick's area, which is, obviously, the employee issue.

15 And arising directly from the fact that Mr Lindholm had said, "It looks like these guys want to do a pre-appointment sale, and I'm loath to be involved in that." Isn't that correct?---The context of that is – is unclear as to whether it related to the employees or whether it related to value that was to be attributed to the assets to be sold, pre-appointment.

20 Were you told at any point in time that a significant concern this client had was its inflexible enterprise bargaining agreement?---No.

You were never told that the client felt that it had a punitive EBA?---No.

25 You were never told that one of the biggest concerns that the client had was its liabilities to employee entitlements, including vast redundancy payments?---From recollection, no.

30 If you didn't know those things, why were you discussing 596AB of the Corps Act? Why were you concerned that employee entitlements might be adversely affected by a transaction?---Well, again, it was unclear as to the way in which the transaction was to be effected, either pre-appointment or post. But also the value of the transaction and what was to come of the 200 employees that they had, and how many were to be retained post the transaction.

35 You see, 596AB only applies, as you know, if one of the intentions of the transaction is to defeat employees' entitlements. Is that correct?---Yes.

40 So you've already discussed what will GEERS think and raised a provision that only applies if the intention of the transaction is to defeat the employee's entitlement. That's correct, is it?---Yes.

45 So why are you having very much difficulty accepting that I've asked you to help me on is how it could not possibly have been discussed with you in order for these issues to be raised, that the concern that the client had was getting around its employee entitlements?---Well, the context, you know, from what I understood it initially was that the business would be unable to sustain the number of employees going forward, and that they weren't in a financial position to pay the redundancies of a great

number of those employees because of the level of orders that they had at the time. So it clearly – it seemed to have to deal with employees in circumstances where they didn't have funds to deal with any redundancies.

5 But that wouldn't – if a company goes naturally insolvent because it can't pay its debts as and when it falls due, that will not raise a 596AB problem, would it?---Well, it depends how – it depends what sort of appointment or what's done with the assets of the company at the time of insolvency, before or after.

10 Well, prior to the insolvency. That's correct, isn't it?---Yes.

So it would only arise if there were a transaction or a series of transactions entered into with the intention to defeat the employees' entitlements. Is that correct?---Potentially, yes.

15 Yes. So if you're a shopfront and customers just stopped coming to you, and you had to go under because you've got no customers, that will not normally raise 596AB concerns, would it?---Possibly not.

20 Unless transactions had been entered into prior to the insolvency that were aimed to defeat the entitlements of employees?---Yes.

So DLA was retained to advise on getting GEERS or FEG money, was it not?---Look, that – I'm not sure. I mean, obviously Rick was advised to give certain advice that I may or may not have – I don't recall seeing, but I certainly wasn't. So I really can't speak for whether that was particular. But clearly Rick, I suspect, has indicated what his request for advice was.

25 But either a concern came from you to Rick, or from Rick to you, about what GEERS would think about this re-organisation. That's correct, isn't it?---It – from recollection, it didn't come from me.

30 But it was a conversation had between the two of you?---I recall it arising during the discussion between Geoff Parker and John Lindholm as well.

35 Okay. So now you recall – so could you please, now that you recall that, tell me what Mr Lindholm and Mr Parker said about GEERS?---Well, there was a discussion as to – and I think I referred – mentioned this earlier, but there was a discussion as to how GEERS, or John's experience, from memory, as to how GEERS might deal with a number of redundancies or payments for employees in a liquidation scenario.

40 Were you just – did you discuss at all how a process might be undertaken as to how you would advise to do such a pre-appointment sale?---No.

45 And if you were instructed, what would the process be normally undertaken on your advice as to stress testing, as you called it, a pre-appointment sale?---Look, I mean, fundamentally there would need to be, you know, consideration of the value of the

business being transferred, especially in circumstances of consideration of, you know, being a commercial or uncommercial transaction. And you need to be able to satisfy a liquidator, or whoever else, on a sort of hindsight view that in the circumstances of the pre-appointment sale it was appropriate. Now - - -

5

So what are some of the issues that could be raised in terms of appropriateness, just from your own experience?---Well, I mean, certainly value consideration, what's left behind, what happens to the business. I mean, often you – or sometimes you have those situations where there's very few buyers and you can – you can effect a sale to, you know, a limited number of people – or one specific buyer that would bring about the continuation of the business and saving the jobs of hopefully the majority of employees and less diminution in value. I mean, these are all matters that – and, again, really a matter for John Lindholm in the first instance. But these are really matters that you need to have a good think about when you think about which avenue to pursue.

10

15

Would preferences normally be – unfair preferences normally be a concern?---Look, they – they would come into the – into the analysis, for sure.

20

All the provisions around related party transactions?---Yes.

Can you think of any others?---Look, obviously the – you know, what duties the directors of the company - - -

25

Yes?--- - - - would obviously have with respect to ensuring that, you know, all the creditors obtain the best return they possibly can.

And they are all very common issues that arise in any insolvency. Isn't that correct?---Yes.

30

What GEERS would think about an insolvency or a breach of 596AB of the Corporations Act are, you would accept, wouldn't you, relatively compared to those uncommon considerations that would arise in an insolvency?---Sorry, can you ask that again?

35

Sorry. So some of the issues you raise, like directors' duties, related party transactions, uncommercial transactions and preferences, all of those are more commonly considered in the event of an insolvency than a breach of 596AB of the Corporations Act?---Yes.

40

And certainly they're more commonly considered than what GEERS might think about insolvency?---Possibly, yes.

Well, how many insolvencies have you been involved in?---A large number.

45

Would you say tens?---Hundreds.

5 Hundreds. And in those hundreds what proportion, roughly, would you say you had given advice in relation to directors' duties?---Look, obviously a number of those were – I had acted for the insolvency practitioners as opposed to directors. I mean, a less – less number acting for directors in – for their consideration as to which option to potentially pursue, but a reasonable number.

And what about uncommercial transactions?---Again, a reasonable number.

10 And what about preferences?---Similar.

How many times have you given advice on 596AB of the Corporations Act?---Maybe a dozen or so.

15 A dozen out of hundreds. And how many times have you given advice on what GEERS might think about the insolvency or a sale that has just happened?---Rarely.

20 Rarely. So what I want to ask you is why, in this matter in which you say you – and I accept that, weren't provided with too many documents and things were opaque, where Rick has drawn on you for your insolvency experience is the only matter that has been discussed between you and Rick what GEERS will think and 596AB of the Corps Act. There must have been something that arose that caused that to come to the fore?---Well, ultimately that's – I was – Rick was providing some advice for with respect to GEERS. Ultimately we would – we would – in consideration obviously, the number of employees we were informed might be made redundant, and some discussion about a potential pre-appointment sale leads itself to, well, how is this transaction as a possibility going to reconcile with 596AB.

25 And that's the point, isn't it, that you had been put on notice that there would be a pre-appointment sale?---Not that there would be, but it was being – it was one of the options.

30 And that Mr Lindholm was loathe to be involved in any such transaction?---As a consequence of his discussion with Phillip Bart that day being – because of not being provided with sufficient information or otherwise, that's – that's unclear as to his level of – well, what his loatheness, if you like, was attributable to.

And he didn't express to you that it was because there would be a sale to a related party the day before - - -?---No.

40 - - - it went into liquidation?---No.

45 And so he has expressed that he's loathe to be involved because there will be a pre-appointment – there's potentially going to be a pre-appointment sale. That's correct, isn't it?---Potentially, yes.

And Rick tells you that this is a company that has received many government grants over the years, and has been profitable over the period but now saying it can't make money going forward. That's correct, isn't it?---Yes.

5 And then Rick is discussing with you what will GEERS think. That's correct, isn't it?---I'm not sure if he was necessarily asking me that – that question but I suspect he was – he was looking to provide some advice in relation to that. So I certainly didn't proffer any opinion in relation to that, from recollection.

10 Did you understand your role as being that Rick had brought you in to pressure test whether his concerns that GEERS was being used impermissibly in these insolvency transactions was well-founded?---No.

15 And did you ever express to Rick that he had a right to be concerned about the way in which GEERS was potentially being used?---No.

If you could just excuse me for a moment, please.

20 THE REGISTRAR: Yes.

MR KULEVSKI: Perhaps if we could just have the morning teak break now, Registrar. I just have a couple more questions for this witness.

25 THE REGISTRAR: Yes. We will take the break now. We will come back – you can step down, Mr Tsiakis, from your – from the witness box. We will resume sitting in about 15 minutes or so.

MR KULEVSKI: Thank you.

30 THE REGISTRAR: Temporarily adjourn.

ADJOURNED

[11.43 am]

35

RESUMED

[12.12 pm]

40 THE REGISTRAR: Yes. Mr Kulevski, are you ready to continue?

MR KULEVSKI: Yes. Thank you, Registrar.

45 THE REGISTRAR: All right. Just come back into the witness box. Did you say to me before that Mr Tsiakis won't be that much longer, Mr Kulevski?

MR KULEVSKI: Yes. Yes.

THE REGISTRAR: And you have the next examinee ready to go straightaway.

MR KULEVSKI: Yes. We do.

5 THE REGISTRAR: All right. Please continue. You're under the same oath that you were before, Mr Tsiakis?---Yes.

10 Mr Tsiakis, I just want to draw to your attention some things that Mr Catanzariti said at his examination. Perhaps if I might just read to you a portion of the transcript, to see if that accords with your recollection. So my question to Rick was:

So at the point that you're brought in –

15 I will just put the context:

At this point, are we concerned at all about things looking good simply, or about the lawfulness of the conduct that has taken place?

20 Rick says:

I can't speak for Mr Tsiakis. I mean, I know I, you know, had some concerns. I suppose for me it was more about having moved it into the hands of people, yourself, who knew more about it than I did.

25 And my question:

30 *And your concern, was it, at the time was that GEERS was being used to supplement redundancy payments?---I think I was just concerned that if they were going to have a transaction where the company goes into liquidation and, you know, perhaps one or more of the same people come back into it, that it better be the right legal thing to do.*

Right –

35 my question;

And were you concerned at the time that it might not be the right legal thing to do?

40 His answer:

Well, I thought it sounded somewhat odd.

And I asked him:

45 *You hadn't been faced with it before, had you?*

He said:

No. I haven't.

5 Then I asked him again:

And you had been told, hadn't you, that it was being used or that companies used this process with GEERS to supplement their restructures. They were the words used?---Yes.

10

And you had known from your previous advice that that was not a basis on which GEERS would be paid?---Yes. Back in the 2013 year, I had given that advice. That's right.

15 My question:

So weren't you concerned with the fact that the reason why it looked bad was that you had given the advice that GEERS will not be paid for a business restructure and now it was looking to you like that's exactly what Mr Parker intended?---I was concerned that the company was doing that. Yes.

20

My question:

And were you concerned that that was an intention of why they were going into liquidation? Isn't that right?---It had certainly crossed my mind.

25

Well, you had been told that, hadn't you, that that's what companies do?---Yes. Yes. That's correct. And as I said, it certainly crossed my mind, and I was concerned that I had a good relationship with Mr Parker and I wanted to make sure that he was doing the right thing.

30

And my question:

And by making sure he was doing the right thing – can you amplify that, given that we're here for the company. You sensed that he wasn't doing the right thing, and you wanted to put him on a course with an expert in the field. Isn't that right?---Yes. Look, I had a concern that there might be some questions raised about the transaction, if I can call it that. That's why I spoke to Mr Tsiakis, and he seemed to share my view, and suggested that there may be some issues with it, and that's where he obviously spoke to Mr Lindholm. But my concerns were justified to that extent.

35

40

And my question back to him:

45 *And justified how?---In the –*

and his answer:

In the sense that Mr Tsiakis obviously didn't say to me, "No. You're an idiot."

And I respond:

5 *No. I don't think anyone would have said that to you at that point, that you're an idiot, because you had been told that this was a common way in which people were using GEERS to supplement the business when you had given advice that that's not a purpose for which it could be used?---I had heard that. I had been told that. Yes.*

10

So, Mr Tsiakis, what I want to suggest to you is that the reason why the file notes, such as they are, only reference matters to do with GEERS or 596AB of the Corporations Act is both you and Rick shared a concern that the contemplated transaction was being used impermissibly to use GEERS to pay to restructure the business; is that correct?---No. I mean, fundamentally, I didn't form a view or otherwise about GEERS and – and the funding aspect of it because, really, that's not a matter that I often give – give advice on. So I was more concerned about – well, not necessarily concerned, but more my views, I thought, at least from that first meeting, was – is that – is potential – insolvency is being contemplated, and these are the financial circumstances of – of the company, and those options were being explored. Now, no doubt that was front of mind for Rick, relevant to the GEERS, because he was, obviously, giving advice about that, but that wasn't a matter that necessarily I was concurring with Rick about or – or – or otherwise, because I don't usually give clients advice about the GEERS and the funding scheme.

25

When Rick said that you were brought in to pressure-test these concerns and that you shared those concerns, is he not telling the truth?---Well, it depends what concerns he has.

30

About GEERS being used to – as I just read to you, GEERS being – the concern he had was GEERS was being used to impermissibly restructure the business?---Well, it's not – it's not necessarily the concern that I – I had because of – because I never provided advice with respect to GEERS, but I can see the context, obviously, as to why 596AB has arisen because that's something that would be on – on – on my mind with respect to, you know, the – the – the opaque options that were being suggested to us. I mean, it was, obviously, something that – that might arise given the right set of circumstances as to the transaction.

35

40

But there must have been something about this transaction, I suggest to you, that indicated these were the right set of circumstances to elevate relatively rare 596AB concerns over the more common, other concerns that arise in a liquidation?---Well, the – the consideration of a transaction being undertaken pre-liquidation where a number of people, presumably, were to lose their job and - - -

45

And also that the people that were presently involved in the business would continue to run the business? Was that your understanding?---That – that was never made – made clear as to which entity might be involved, but it wouldn't have been a surprise

if it was a related entity. But I wasn't aware as to which entity, shareholding, directors that might – the purchasing vehicle might be.

5 Now, do you and Mr Lindholm have a longstanding professional relationship?---Reasonably long.

Have you referred work to each other in the past?---Yes.

10 And it has gone both ways?---Yes.

Would you consider yourself friends?---Yes.

15 What I want to suggest to you is that Mr Lindholm was grateful to you for having referred work to him, potential work to him, and as a courtesy, after meeting with the client, he rang you and explained to you why he would have no further involvement with this client. Do you recollect that?---He never indicated that he would have no further involvement.

20 He didn't indicate to you something along the lines of, "Look, Kon, thanks very much for this. I really appreciate it, mate, but I'm loath to be involved with these people because of the transaction that they're contemplating"?---No.

25 So when you've told Rick, "John is loath to be involved if it's a pre-appointment sale," you don't recall Mr Lindholm saying something along those lines to you?---Well, he – he was loath, with respect to the information that he had at the time, to be involved in the pre-appointment sale. The details of what information he had, what he knew or didn't know, I wasn't – I wasn't aware of. But it seemed, at least from that statement, that what had been put to him, presumably, or information he gained with his meeting with Mr Bart – that he had at least formed that view, the particulars of which are unclear at the moment in my memory, at least, other than he – he either wanted more information to become more comfortable or, the way in which it was put to him, he – he didn't personally want to be involved.

30 Isn't it the latter? Isn't it that he was told, "We've decided on this course of action" and that "I'm telling you, Kon, as a courtesy because you referred this work to me, that they've told me they're going to do this pre-appointment sale, and I'm loath to be involved with this matter"?---No.

40 That's not what happened, or you don't - - -?---No.

- - - recollect whether that happened?---No. That's – that's not what happened, in the sense that it was never put to me that there – it had been mentioned to him that a decision had been made one way or another - - -

45 Or even that - - -?--- - - - as – as to the way forward.

Or even that there was a preference for that being the way forward and that's why he was no longer involved – he was loath to be involved, I'm sorry?---Look, it was, obviously, discussed, but as to whether that was now the preferred option, that wasn't put to me in that way by John.

5

And so Mr Lindholm wasn't, effectively, saying to you, "Look, I don't want anybody to be embarrassed here, Kon. You've offered to refer me this work, but I don't want anything to do with these guys"?---That was never suggested to me.

10 No words to that effect?---No.

I don't have any further questions for Mr Tsiakis. Thank you, Mr Tsiakis.

15 THE REGISTRAR: All right. Mr Tsiakis, normally, if you had a legal representative, they could ask you any questions by way of re-examination to clarify anything you raised. Is there anything you want to add or say at this stage?---I'm content, thanks.

20 All right. Well, in that case, what do we do with Mr Tsiakis' summons, Mr Kulevski? Just adjourn it generally?:

MR KULEVSKI: Adjourn generally, may it please, Registrar.

25 THE REGISTRAR: All right. Mr Tsiakis, I'm going to adjourn your summons generally, which means it has a life of six months. So in that time, you may be required to return for ongoing examination. Otherwise, after that date, it expires, and the liquidator will need to ask the court for a new summons. But for the time being, you're excused?---Thank you.

30

<THE WITNESS WITHDREW

[12.22 pm]

35 THE REGISTRAR: Yes.

MR KULEVSKI: Registrar, I'm in your hands. Mr Nicodemiou is available. Would you like to start, or would you like to take an early break or - - -

40 THE REGISTRAR: I'm content to continue till about 1 o'clock if that helps to expedite the – how long do you think you will be with Mr Nicodemiou?

MR KULEVSKI: At least the rest of the afternoon.

45 THE REGISTRAR: I see. I think we will just continue now so we don't - - -

MR KULEVSKI: Thank you, Registrar.

THE REGISTRAR: We will take the break at 12.50.

MR KULEVSKI: 12.50?

5 THE REGISTRAR: Yes.

MR KULEVSKI: Thank you, Registrar.

10 THE REGISTRAR: All right. We will have Mr – is it Mr Nicodemiou? Is he here?

MR KULEVSKI: Yes.

THE REGISTRAR: Just have him brought him.

15 MR KULEVSKI: I call Mr Nicodemiou, please.

THE REGISTRAR: He's outside, is he, Mr Kulevski?

MR KULEVSKI: Yes.

20 THE REGISTRAR: Whilst that's happening, Mr Kulevski, I just want to check with you. So after Mr Nicodemiou, is there anybody else for the afternoon?

MR KULEVSKI: Not today, Registrar. Thank you.

25 THE REGISTRAR: Yes. I just need you to come into the witness box, Mr Nicodemiou.

30 MR STEVENS: Registrar, if it please the court, my name is Stevens. I appear Mr Nicodemiou on the instructions of SR Legal. Mr Nicodemiou was just going to the gents'.

THE REGISTRAR: I see.

35 <COSTA ANDREW NICODEMOU, SWORN [12.25 pm]

40 <EXAMINATION BY MR KULEVSKI

THE REGISTRAR: All right. Take a seat, sir. Just for the record, I will need you to speak into the microphone. I think it's the one with the red light, Mr Nicodemiou. So just speak in a reasonably audible voice. For the record, your full name?---Yes.

45 Costa Andrew Nicodemou.

Your occupation, sir?---Accountant.

And an address?---192 The Esplanade, Sylvania Heights, New South Wales.

Thank you, Mr Nicodemiou. I understand you're represented today by Mr Stevens; is that right?---Yes.

5

Mr Nicodemiou, before I start, this is an examination under the Corporations Act, and you've been summonsed pursuant to section 596B of the Corporations Act, and no doubt you understand – you've had legal advice about how the summons works?---I have.

10

I should just indicate to you that you are not excused to answer any question if you think it may either incriminate you or make you liable for a civil penalty. If you think that's going to happen, you need to say the word "privilege" before you proceed to answer, and anything you say cannot be used against you, as I said – not admissible against you in either a criminal proceeding or a civil penalty proceeding. The only time that that protection doesn't apply is if your answer is in respect to a false answer. Do you understand that?---Yes.

15

But I think Mr Stevens is here to represent you, and if anything at all – no doubt he will raise any objections, and I will consider them. Mr Kulevski, ready to proceed?

20

<CROSS-EXAMINATION BY MR KULEVSKI

[12.26 pm]

25

MR KULEVSKI: Thank you. Mr Nicodemou, could you please tell the court what your current position is?---I'm employed as a partner at – or a principal at an accounting firm called BRI Ferrier.

30

Thank you. And in response to an examination summons did you call some documents to be produced to my solicitors?---Yes.

And were you responsible for collating those documents?---No, I wasn't.

35

Could you please tell the court who was responsible for collating those documents?---I believe one of the secretaires produced all the emails and photocopied the folders

40

And how was that process undertaken?---In terms of the physical records I reviewed the files and gave all the files to her to collate and copy. In terms of the soft copy records, I believe that they were copied onto a USB drive which was provided. In terms of the email records, the email directories of myself and one of the staff at the time that worked on the matters, their email directories were imaged or put onto a hard drive as well.

45

And who identified what documents would be captured by this process?---All documents were provided, whatever information we had.

And – I’m sorry, perhaps I wasn’t clear, how was that process determined about what ‘all documents’ were?---In terms of this matter our assignment was quite limited. There was only two people that worked on the matter: myself and another gentleman by the name of Robert Garafano. We’re the only ones that had any information. He
5 subsequently left prior to the subpoena. We went into his email archive and copied any emails that were filed in the folder relating to these matters.

10 So the email – the documents that were captured that were in the email system, were they captured by reference to word searches or just about whether they fell within a particular folder?---We have a system of archiving emails in regards to the matter they relate to. So there was a specific folder on, for example, my Outlook system as well as his that would capture any emails that related to that.

15 Automatically capture? Or be a process for you?---Not automatically. They would be manually dragged in from your inbox or your sent items.

So it would depend on whether the person who was in control of the inbox had dragged the email across?---I suppose so, yes.

20 Yes. Mr Nicodemou, if I could perhaps please hand up to you the three folders of documents produced by BRI Ferrier.

THE REGISTRAR: Do we still need the other folders that are there?

25 MR KULEVSKI: No, I’m sorry. No, not the DLA.

THE REGISTRAR: Can those be returned so there’s a bit more space for Mr Nicodemou?

30 MR KULEVSKI: Yes. Of course. And what I will also have provided for you, Mr Nicodemou, is just a – separately, a clean copy of your letter of engagement?---Yes.

35 Of 13 May, and a clean copy of your final report, only because – and this is no criticism, in the various photocopies the annexures have not come out clearly so we have done an A3 copy of the annexures?---Okay.

Thank you. Now, Mr Nicodemou, could you please tell the court what your speciality is?---In terms of my practise area?

40 Yes?---It predominantly relates to property and construction-related insolvency, advisory matters.

And how long have you been at BRI Ferrier?---Since January 2012.

45 And where were you before that?---Immediately prior to that I worked for Bank of Scotland, and prior to that I worked at Ferrier Hodgson.

Yes. Now, did you come across as a principal or a partner or whatever it's called at BRI?---I came across as a director.

5 And could you – sorry, just for my ignorance, could you please explain the difference between a principal and a director?---It's – a principal is equivalent to a partner of, I guess, in other practices. It's a more senior position than a director.

10 And when did you start doing work for any companies controlled or associated with Mr Phillip Bart?---He was a creditor on a matter called Baseline Constructions in mid-2012 that I had worked on.

At BRI Ferrier?---Yes.

15 Now, had you been brought onto that matter by someone else? Or had the matter come to you from - - -?---No, by someone else.

And who were you – and that was an insolvency?---Yes.

20 And you were the VA? Or - - -?---I – no, I had carriage of the matter. I was not the appointee. I didn't have my ticket or license at that point in time.

When did you acquire your license?---I think it was mid – sorry, mid-2014.

25 And so what – when did you first become involved in respect of the company in liquidation?---Which company?

The company in liquidation, Bruck?---I think it was May 2014.

30 May 2014. And prior to that were you involved in any external administrations to deal with any other companies that Mr Bart controlled?---Yes.

And what were they?---So I have already mentioned Baseline Constructions.

35 Yes?---Of which he was a secured creditor. There was another matter called BBB Constructions of which he was – I can't recall if he was director or not, but I believe he was a shareholder, which was a voluntary administration. And subsequent to that there were two matters: one called New Bounty Pty Limited and Australian Weaving Mills.

40 And did you have day-to-day carriage of the last two that you mentioned?---Yes. Like, I had staff that did most of the work on them, but yes, I had – I was responsible for the two files.

45 And in the documents you have produced, and we will go to some of them in detail soon, documents you have produced involve not only the company in liquidation, but in line with the examinable affairs, companies that have a relationship with the company in liquidation. That's correct, isn't it?---Yes.

And so - - -?---Or one of the companies, I believe.

Yes?---Australian Weaving Mills I think is the only one.

5 Yes. And there's some documents from New Bounty of course in here as well?---Yes. Yes, okay.

10 So the New Bounty – you received instructions in the New Bounty matter two months earlier when you met with Mr Bart in relation to the advice for New Bounty, is that correct?

15 MR STEVENS: Can I object at this point? I don't think it's established it was two months earlier. That hasn't been put to him, but I assume it's wrapped up on that question that's what you're saying?

MR KULEVSKI: Yes. Well, perhaps if I break it up, Registrar. So you met with Mr Bart in relation to this company in early May 2014, is that correct?---In terms of Bruck? Or in terms of - - -

20 Bruck, yes?---I don't think it was early '14. I can't recall, but I thought it was closer to the middle of '14, but - - -

No, sorry, early May 2014?---Yes. Yes. That's correct. Yes.

25 And exactly two months earlier than that, had you met with Mr Bart in relation to giving advice in the New Bounty matter?---I haven't given advice in the New Bounty matter, but I had met with him to discuss a possible appointment.

30 At the first meeting with Mr Bart in relation to New Bounty he provided you with notes he had prepared to show that New Bounty would be made insolvent, is that correct?---He may have. I really don't recall.

35 You had day-to-day carriage of the external administration of New Bounty, and gave advice to Mr Bart and Mr Parker, the director of Bruck, prior to New Bounty being placed into VA, is that correct?---No, I didn't give advice.

Didn't give advice. You didn't keep notes of those – of that initial meeting with Mr Bart in relation to New Bounty, did you?---I don't believe so, no

40 Now, New Bounty went into VA because a company controlled by Mr Bart, Baron, which held just over 90 per cent of the shares, issued a demand that crippled New Bounty, is that correct?---I believe he did call – Baron did call demand, yes – issue a demand.

45 And you were a witness in the Supreme Court case dealing with that matter, weren't you?---Yes.

And the Supreme Court of New South Wales held that Mr Bart's actions in causing New Bounty to go into VA were an abuse of Part 5.3A of the Corporations Act. Isn't that correct?---I haven't reviewed the judgment so I don't know.

5 And you administered the DOCA in that case, did you not?---Yes.

And the DOCA that you administered acted so as to increase Mr Bart's stake in New Bounty, did it not, from 90 per cent to almost 99 per cent?---I didn't administer the DOCA. I had carriage of the matter but I wasn't one of the deed administrators on the file.

10 Who were the deed administrators?---I believe it was Brian Silvia and Peter Cretchi.

Of your firm?---Yes.

15 But you had day-to-day carriage of the matter?---I did have day-to-day carriage.

And presumably the only reason you didn't administer it because you didn't get your -- have your ticket. Is that correct?---Yes.

20 Now, in that matter Mr Bart had given a number of purported legitimate financial and business reasons for the demand, but the Supreme Court held, did it not, that the real reason why the demand was issued was to impermissibly dilute the interests of the minority shareholders?---I don't know. I've not read the judgment. I gave some evidence and I've not had any discussions with anyone since or taken any involvement with it.

25 So no one has brought to your attention that you had day-to-day carriage of a DOCA which was found by the Supreme Court of New South Wales to be an abuse of Part 5.3A of the Corporations Act?---No, no. I've had nothing to do with it since.

30 No one has brought that matter to your attention?---No.

And you never read the judgment?---No.

35 And you were a witness in the case in which a DOCA you were administering, it was being alleged was an abuse of Part 5.3A of the Corps Act, and that was found to be the case. And you say that has never been brought to your attention?---I -- I wasn't involved with the outcome so I don't - - -

40 MR STEVENS: I object on the basis that it's a wrapped up question. I don't know that this witness has actually said that he accepts that it was found to be an abuse. I may be in fact a result of the judgment, but it actually hasn't been accepted by this witness.

45 THE REGISTRAR: I think - - -

MR KULEVSKI: So – I'm terribly sorry, Registrar.

5 THE REGISTRAR: I was going to say, I think the answer was partly answered – the question was partly answered already when the objection – I mean, does anything turn on it, Mr Kulevski?

MR KULEVSKI: Well, I will probably just break it up so – my friend is quite correct. I will probably just break up the question.

10 THE REGISTRAR: Yes.

15 MR KULEVSKI: Has it been brought to your attention whether the Supreme Court of New South Wales found that the DOCA was an abuse of process of Part 5.3A of the Corporations Act?---What I understood is that the outcome achieved in those proceedings was – was actually in Mr Bart's favour, or Baron's favour because I never heard anything again about it. I never spoke to anyone about it. I could have read the judgment but I didn't and I haven't. I didn't – there was nothing further for me to do on the matter.

20 And so someone told you at some point, did they, that the outcome was favourable to Mr Bart, did they?---Yes.

25 And by favourable to Mr Bart, did they tell you that while the relief that the plaintiff sought in that matter wasn't granted, nonetheless the conduct had been found to be an abuse of Part 5.3A of the Corps Act?---Not that I recall.

Perhaps if I might give you a copy of that judgment?---Thank you.

30 I might just give a spare copy to my friend. I'm sorry, I didn't mean to be - - -

MR STEVENS: I'm indebted to my friend.

35 MR KULEVSKI: So if we look at the first paragraph of – even though it's a – so it's a case of – this is just for the lawyers, it's a case at trial but determined by Sackville AJA. And paragraph 2, it says – do you have that in front of you?---Yes.

Mr Bart controls Baron and a number of other companies involved in transactions that were the subject of evidence. Those companies include New Bart Holdings, Australian Weaving Mills Proprietary Limited and Collerand.

40 Do you see that?---Yes.

45 And two of those companies, the first two, are intimately involved with the company Bruck in liquidation. That's correct, isn't it?---I thought Australian Weaving Mills was. I can't recall if New Bart was.

New Bart is a secured charge holder, do you recall that?---I can't – I don't but - - -

We will get to that in the report in a moment but nothing turns on that for the moment. If I might just ask you to read to yourself, so that I don't read it out loud, paragraphs 3, 4 and 5 of the judgment, Mr Nicodemou?---Yes.

5 Now, just for the benefit of everyone here, your credit wasn't questioned in this case and I'm not bringing it into question in relation to this judgment now. So I just thought I would point that out. Paragraph eight – if you could turn to paragraph 83, please. So it says:

10 *On 5 and 19 March 2014 Mr Bart met with Mr Nicodemou of BRI Ferrier. Rather curiously Mr Nicodemou kept no notes of the meeting. However, Mr Bart prepared an undated document entitled Notes for Meetings which, as he confirmed in evidence, set out his thoughts in advance of the meetings. Mr*
15 *Nicodemou accepted that he received a copy of the notes at the first meeting and they provided the basis for discussions between Mr Bart and himself.*

Do you recollect those events?---I do remember getting a note prior to a meeting, yes.

20 And that you kept no notes of that meeting where you received that note?---Yes.

So perhaps if you then turn, please, to paragraph 151, and that's just to point out the fact that I had already raised with you, Mr Nicodemou:

25 *Mr Nicodemou had the day-to-day carriage of the external administration of New Bounty and gave advice to Mr Bart and Mr Parker prior to New Bounty being placed in voluntary administration.*

30 Now, earlier you said you did not give that advice?---Sorry, what paragraph was that?

Sorry. I'm terribly sorry. 151?---Mmm.

35 I will let you read 151 to yourself?---Yes.

Now, earlier you had said to me that you didn't give advice to Mr Bart and Mr Parker prior to New Bounty being placed in voluntary administration, but that wasn't a correct answer, was it?---Advice – when I say advice, it's referenced to specific natures of the company as opposed to saying, for example, this is a voluntary
40 administration, this is a liquidation, this is a receivership, so - - -

I'm sorry?---I – I distinguished between the two. Your question earlier – I assumed you were – you were asking whether, in fact, I had given specific advice about the company. That is not the case, but I – I suspect and I – I believe we would have
45 talked about what are the options available to a director in – in this set of circumstances.

I'm sorry. I don't understand that answer, Mr Nicodemou. You have the day-to-day carriage of the external administration. That's correct?---Yes.

5 And you gave advice to Mr Bart and Mr Parker prior to New Bounty being placed in voluntary administration. That's correct, isn't it?---Advice limited to what types of administration they may consider as – as a director of the company.

10 Thank you. Well, we will test that proposition by reference to the judgment later. Now, if I ask you to turn to paragraph 212, please, and I will just read that out aloud. Sorry. If I go up to 209. The first sentence of 209 says:

When Mr Bart made the demand on behalf of Baron, he intended to cause New Bounty to become insolvent.

15 Do you recall that?---I recall the demand being made, yes.

And do you recall that a number of justifications were presented by Mr Bart as to why the demand was made and the DOCA was put up but that the only – do you recall that?---I don't recall the exact justifications, no.

20 You don't recall any of the justifications he gave - - -?---No.

- - - both business and financial?---No. I – I believe there was – on my recollection, I believe there was something in the report that he – that – that was referenced to – to why it was done, but I don't recall exactly what they were.

25 If I ask you to then turn back to paragraph 206. His Honour has said:

30 *In substance, the only result achieved by placing New Bounty into administration and giving effect to the DOCA was to dilute the interests of the minority shareholders. That result was as Mr Bart intended from before he made the demand on behalf of Baron. This is not a case in which Mr Bart intended to utilise part 5.3A of the Corporations Act to achieve a result contemplated by the legislation, while also having an ulterior purpose outside the scope of the legislation. His intention and purpose was to utilise part 5.3A to achieve an object not contemplated by the legislation and thus outside its scope.*

40 You say that you were never put on notice that that finding was made?---No.

And you say that you never were put on notice that despite all the justifications given in evidence in the case in which you were a witness for why the demand was made, his Honour only accepted that it was made for an ulterior purpose?

45 MR STEVENS: I object. It hardly can fall to a witness as to the process of a judicial mind.

THE REGISTRAR: Mr Kulevski?

MR KULEVSKI: Your Honour, I was asking about whether he was brought notice of the outcome, which is that none of the others were accepted.

5

MR STEVENS: Again, the justifications or otherwise of the processes that took place, given in evidence by the people, could not be a matter for comment for this person once a judicial process is undertaken and that judicial process has been determined. It is unfair for this person to then be expected to comment on that, and one wonders about – and I've given my friend latitude – as to the relevance to the affairs of the company in question in respect of a judgment that has taken place in a different court.

10

THE REGISTRAR: How is the opinion of Mr Nicodemou relevant for the purposes of this examination, Mr Kulevski?

15

MR KULEVSKI: No, no, no. I'm terribly sorry. It must have been my fault, Registrar. The question wasn't what his opinion is. The question was, was he aware, was it brought to his notice, that none of the other justifications were accepted in the judgment, not what the reasoning was as to why they weren't accepted, just simply that the only motive that was found for Mr Bart was an ulterior one. None of the justifications he gave were accepted. I'm not asking him to delve behind that. I'm just asking was he aware that that was the result of the litigation.

20

THE REGISTRAR: I will let that question.

25

Can you answer the question, Mr Nicodemou?---As I've said, I've not read this judgment, so it wasn't brought to my attention, any of the basis or anything that was mentioned in the judgment.

30

MR KULEVSKI: And so if I ask you to turn to paragraph 214:

In my view of the findings I have made –

35

sorry. 213:

In these circumstances, I think Mr Bart's purpose should be regarded as the purpose of procuring the administration and of the DOCA. For the reasons I have given, that purpose involved an abuse of the provisions of part 5.3A.

40

That was the DOCA you had day-to-day carriage of, and you say that this finding was never brought to your attention?---Correct.

THE REGISTRAR: Is that a convenient time, Mr Kulevski? I was going to break at 12.50, as I indicated earlier.

45

MR KULEVSKI: Yes. Thank you, Registrar. Thank you.

THE REGISTRAR: I understand that Mr Nicodemou is going to be continuing into the afternoon for the rest of the day; is that right?

5 MR KULEVSKI: That's correct, Registrar, yes, may it please.

THE REGISTRAR: We will take the lunch break. You're not to speak to anyone about your evidence so far in the lunch break, Mr Nicodemou. We will continue the examination at 2.15.

10 **ADJOURNED** [12.50 pm]

15 **RESUMED** [2.25 pm]

THE REGISTRAR: Yes. Mr Kulevski, ready to continue?

20 MR KULEVSKI: Yes, please, Registrar.

THE REGISTRAR: Yes. Can we have the examinee back in the witness box.

25 Yes. Mr Nicodemou, you're on the same oath that you took before?---Yes. Thank you.

Yes. Please continue, Mr Kulevski.

30 MR KULEVSKI: Mr Nicodemou, now that you've had, sort of, the lunch break, I just want to ask you again: is it still your evidence that you never considered the decision in New Bounty delivered by Sackville J?---Correct.

35 And the findings that Sackville J made, that the DOCA was an abuse of process of part 5.3A of the Corporations Act, the DOCA which you administered – that finding has not been brought to your attention?---Not – not in the detail that you've discussed.

What has been brought to your attention - - -?---I – I - - -

40 - - - prior to today?--- - - - recalling speaking to the solicitor involved some time after passing - - -

45 Who was the solicitor involved?---Mark Ryckmans from Somerset Ryckmans, and something along the – he did make some comments that the matter was successful in – in his eyes, in terms of his client, and there was some other detail around there, but he – I can't recall exactly what was – what – what was talked about, and I certainly didn't review the – the judgment.

And could you remind me again who the administrators were?---Brian Silvia, I believe, and Peter Kretjci.

5 And you never discussed those findings with either of them?---Not that I recall, no.

Thank you. If I could just take you back to that judgment, please, Mr Nicodemou. We don't be too much longer on this. Do you have that in front of you?---Yes.

10 If I could take you to paragraph 166, please. I'm sorry. I don't have page numbers on it. The judge seems to have issued it without page numbers.

THE REGISTRAR: No paragraphing at all?

15 MR KULEVSKI: Only paragraphs. No page numbers.

THE REGISTRAR: Perhaps you can take Mr Nicodemou to the paragraph.

MR KULEVSKI: No. I have. Sorry. 166.

20 And if you could just read that quietly to yourself, please, and anything you feel that you need to read around it for context. Take your time?---Okay.

25 And so what you will see is that Sackville J has recorded that Mr Bart gave a number of reasons why he said he issued the demand, including financial reasons, but that his purpose in shaping the DOCA was only "to remove or greatly dilute the interests of the minority shareholders". Do you see that?---Yes.

30 So what the judge found was, essentially, this: (1) that Mr Bart came to you with a proposal on 5 April. Yes?---I would have to check those dates. I – I don't know what – which meeting, if that was prior to - - -

Sorry. We went to that earlier?---Was that – was that after the appointment? Prior to the appointment?

35 No. Prior to the appointment?---He didn't come to me with a proposal.

If we go back to paragraph 83:

40 *On 5 and 19 March - - -*

?---Sorry. Could I just find that.

I'm sorry?---Yes.

45 Continuing:

On 5 and 19 March 2014, Mr Bart met with Mr Nicodemou of BRI Ferrier. Rather curiously, Mr Nicodemou kept no notes of the meetings. However, Mr Bart –

5 had:

...prepared an undated document entitled “Notes for meetings” which, as he confirmed in evidence, set out his thoughts in advance of the meetings. Mr Nicodemou accepted that he received a copy of the notes at the first meeting and that they provided the basis for discussions between Mr Bart and himself.

10

See that?---Yes.

And then if you turn to paragraph 87 on the next page:

15

According to Mr Nicodemou, whose evidence was not challenged, Mr Bart informed him at the first meeting that Baron intended to make the demand and that New Bounty would then be insolvent.

20 ?---Yes.

Do you see that? So Mr Bart came to you with some notes for discussion. That’s correct?---Mmm.

25 They included a proposal that New Bounty be made – it would make a demand, and New Bounty would be insolvent?---I believe so, yes.

Well, as you gave evidence, and as the judge found. Yes?---Yes. I – I don’t have the document in front of me, but I believe that was the – the context of – of – of the piece of paper.

30

Well, is Sackville J wrong when he says that:

According to Mr Nicodemou, whose evidence was not challenged, Mr Bart informed him at the first meeting that Baron intended to make the demand and that New Bounty would then be insolvent.

35

?---I – I don’t recall the – exactly what’s on that piece of paper, but it seems familiar. Like, it’s – I think that’s what was on there.

40

And that in shaping the terms of the DOCA, Mr Bart gave the court a number of considerations, he said, which informed him, but it’s true, isn’t it, that Sackville J found that the only consideration that informed him was to dilute the interests of the minority shareholders?---Yes, based on what you’ve taken me through there, yes.

45

Thank you. Now, if we can turn to this matter. Could I take you, please, to your engagement letter dated 13 May 2014. Do you have that in front of you?---I believe so. Yes.

5 Now, you will see that the letter says:

10 *I refer to our telephone conversation on 5 May 2014 and my email to you dated 6 May 2014 in relation to BRI Ferrier undertaking a financial review and report on Bruck Textile Technologies Proprietary Limited and providing strategic advice on BTTs options for restructure.*

Now, that letter is addressed to Mr Bart. It's on BRI Ferrier letterhead, and it's signed by you as a director. Did you draft that letter?---I didn't draft it, but I – yes, I signed it.

15

Do you know who did draft it?---I suspect it would have been Robert Garafano.

And I assume you read it before you signed it?---Yes.

20 And you agreed with its contents?---Yes.

The letter goes on to say this:

25

Based on our initial discussions, I understand the following.

First dot point – and I should just point out, Mr Nicodemou, that I won't read all the documents I take you to but just this one for the moment:

30

BTT is a specialist manufacturer of textiles of all kinds.

You see that?---Yes.

The second is:

35

BTT currently employs approximately 180 employees with a punitive enterprise bargaining agreement, EBA, that provides for significant redundancy payments and inflexibility.

Do you see that?---Yes.

40

The third dot point:

The value of BTTs assets are contingent on BTT being a going concern.

45 Fourthly:

BTT needs to restructure its operation in order to revive its profitability.

And, fifthly:

BTT requires advice on BTTs restructure options and the most appropriate option it should take along with the implications of that option.

5

Do you see that?---Yes.

And that was correct, wasn't it?---Yes.

10 So it then goes on to say:

The letter, together with the enclosed general terms and conditions, sets out the terms of our engagement.

15 And you understood that the scope of your engagement was as on the following page. Is that correct? That:

BTT would like to engage BRI Ferrier to complete a financial review of it and prepare a report detailing BTTs restructure options and advice on the most appropriate option for BTT. This report will require BRI Ferrier to complete a review of the financial statements, a review of BTTs restructure options and the creation of a model to test the options, and a scenario analysis of the options.

20

25 And then something is written there in handwriting. Who added that handwriting?---I believe that's – that's Mr Bart's addition.

Risk analysis, both legal and regulatory of proceeding down any particular path.

30 So your understanding was that was the scope of your engagement based on the assumptions contained on the first page. Is that correct?---That was the initial scope, yes.

35 When you say the initial scope, was there a subsequent scope of engagement letter?---There wasn't a subsequent letter but, in reality, the first bullet point, there wasn't really a review of the financial statements.

40 I see. So you didn't review the financial statements?---We obtained copies of them but we didn't critically assess, for example, their accuracy or – or anything like that. It was merely to use them to categories the four options that we ran through.

I see. So whatever numbers were provided to you, was it by Mr Bart?---Not directly by Mr Bart. I believe it was provided by employees of BTT.

45 So whatever was provided to you by BTT, you would accept at face value. Is that correct?---Yes, and I say that in my report.

You say that in your report. Well, we will get to the report. And so you didn't critically test any of the numbers?---No.

5 You didn't – you didn't examine the commercial basis for any of the transactions?---Sorry, in what respect?

10 Well – okay. I'm sorry. That's probably unfair. So when you say you didn't critically analyse the numbers, you didn't go into the underlying transactions that the numbers represented?---No.

15 And so, therefore, you didn't test the commerciality or otherwise of those underlying transactions, did you?---We accepted the numbers as they were put to us, made a series of assumptions on those numbers which were agreed with the client, and then based on those assumptions and those numbers analysed each of the four options that we outlined. And then essentially concluded on what was the least impact on the various classes of creditors.

20 I understand. Now, in terms of the – the assumptions on the first page of the letter never changed though, did they?---I would – I would say that the assumptions – further assumptions were made and - - -

Further assumptions were made?---Yes.

25 But those assumptions remained constant, didn't they?---I believe those – those were maintained, but several other assumptions were brought into play.

30 Thank you. Thank you very much. Now, if we turn to your report and – is the final report the report entitled Bruck Textile Technologies Proprietary Limited, Financial Review of Options, dated 11 June 2014?---I will just check it's the signed version. Yes. Well, it has got - - -

So you would have – do you only sign one version of the final report?---Generally speaking, yes, unless there's some error that's subsequently identified or something.

35 Was there only one signed version of this report?---I believe so.

So this is the final version?---Yes.

40 You will see that on the first page of the report, substantively under Executive Summary - - -?---Yes.

- - - that four options are given. One, option 1, sell the business of BTT as a going concern?---Yes.

45 Two, option 2, wind down the operations of BTT?---Yes.

Three – excuse me a moment, sorry. Three, option 3, sell part of BTTs business and assets to Asset Co and Labour Co, collectively referred to in this report as A and L, and subsequently place BTT into liquidation?---Yes.

5 Or, four, option 4, liquidate BTT. That’s correct?---Yes.

10 Can you tell us which of those involve a restructure of BTT?---I think the term – restructure, from memory, was used in terms of altering the structure and nature of this business at the moment from what it presently was to what it may be at a future point in time from undertaking one of these. So it wasn’t necessarily option 1 or 2 or 3 or 4. It was, this isn’t working for whatever reason. The shareholders, the board have decided that they’re concerned about the future of this business and on that basis, they are considering all options, all restructuring options.

15 So but in answer to my – they’re considering all restructuring options, which of those options is a restructuring option?---I believe all – well, I would suggest that all of them are restructuring options apart from perhaps number 4 which is putting the company – the business as it is into liquidation.

20 So the option you decided on, sell part of BTTs business and assets to Asset Co and Labour Co and subsequently place BTT into liquidation, is a restructure of BTT, is it?---I think that’s one of a number of restructuring options.

25 That was the option you decided on?---That was the option that I suggested has the least impact within the scope of the review.

And that was your idea?---No.

30 Whose idea was that?---I believe the company was considering those – those options that are put forward there.

35 So those four options were not decided upon by you. They were presented to you?---Both presented or discussed in the meetings that we had previously, that they’re thinking about different options, and the future of the business.

So is it fair to say that the company presented to you the four options and, in your view, it was your job to provide financial analysis as to which of the four options to choose?---Yes.

40 But you weren’t to interrogate any of the financial numbers?---Within the scope that we were given and the budget for this job, it wouldn’t have facilitated a full review of the financials of a business of this nature and size and complexity.

45 No. I understand. So the position is this: the company came to you with four options, and they said, “Here are some numbers. Put those numbers into a report and select an option”; is that correct?---Not select an option but, essentially, outline the

numbers as – as they fall to various – or as they impact various creditors should the shareholder remove support.

Now, if we go back to the letter, the scope of engagement, it says:

5

BTT employs approximately 180 employees with a punitive enterprise bargaining agreement that provides for significant redundancy payments and inflexibility.

10 All the way through this, that was the predominant concern of the company, wasn't it, the punitive enterprise bargaining agreement?---I would suggest so, yes – believe so.

And then it says:

15

The value of BTTs assets are contingent on BTT being a going concern.

20 ?---Sorry. Can I just add it was also the wage bill moving forward, so not just the costs of, for example, reducing the workforce but also the cost of maintaining the workforce at its present capacity.

But if you reduced the workforce, you wouldn't have the workforce going on in its present capacity, would you?---Yes.

25 So, really, if you were concerned about the size of your current employee force, one way to deal with that would be to reduce your employee force, but they did not want to do that because of the redundancy payments; is that correct?---I don't – I don't think they could do it, and without either a substantial capital injection into the business in some way, I don't think that was an option that they could have done,
30 based on what I saw.

So based on what you saw, they didn't have the money to pay those redundancy entitlements. Is that what you're saying?---Yes.

35 The next dot point says:

The value of BTTs assets are contingent on BTT being a going concern.

40 None of these options, however, have BTT as a going concern, do they?---Sorry. Can I just - - -

Of course. Take your time. I think that option 2 and 3 would.

45 So wind down the operations of BTT?---Sorry. Sorry. My mistake. Option 1: sell – sell BTT as a going concern if – if it is possible, or, alternatively, option 3, which is the option that they took.

So the option that they took, which has BTT as a going concern, involves selling part of BTTs business and assets to Asset Co and Labour Co and subsequently placing BTT into liquidation. If BTT is going into liquidation, how does that have BTT as a going concern?---I agree.

5

You agree?---Yes.

So what I'm trying to understand is if the value of BTTs assets are contingent on BTT being a going concern, do you know why an option was selected whereby BTT would not be a going concern?---No. I don't.

10

Is it possible that what's meant by "BTT being a going concern" is taking the best parts of BTT and selling them to a related entity run by the same people, as BTT being a going concern?---Yes.

15

And so what happened in this case, isn't it, is that Mr Bart and Mr Parker wanted to retain control of this business?---I can't answer that. I don't know exactly what they were thinking in their minds.

20

Well, they conveyed to you, did they not, that they were selling the business to a related party controlled by Mr Bart?---They – what they conveyed to me was that they were considering these options, and on – on the basis of those options and proposals that the board would put together for either a sale or some strategy to resolve the current business' issues, the shareholder would consider advancing funds or continuing to advance funds to the business.

25

And so in this case, as it turned out, the shareholder only considered advancing funds to the business if that business was a company controlled by Mr Bart; is that not correct?---I don't know that.

30

That was never - - -?---No.

- - - raised with you?---No.

35

It just so happens the business was sold to a company controlled by Mr Bart, wasn't it?---As I understand, yes.

Were you informed of that sale?---Yes. I was.

40

At the time it happened, after or before?---Both. At all times.

So you knew the business was going to be sold to a related party before the company was placed into liquidation?---Yes.

45

Did you know that that would happen a day before?---No. I didn't know when, but I understood that that was what they were doing. I was asked to – once this report was finished, I was asked to do a number of other things, including finding a liquidator,

because they were considering option 3, and then subsequent to that, I was asked if I would assist a couple of the directors or senior managers in terms of any questions they had over that period.

5 I see. So were you also told that the landlord, which was another related party, would only give consent to the premises being occupied by the further related party that the business was sold to?---Yes.

10 So you were told that you have – the company Bruck, which you’re advising on, its business is sold – parts of its business are sold to a related party controlled by Mr Bart, and you’re also told – and that’s correct, isn’t it?---Yes.

15 And you’re also told by Mr Bart, I presume – tell me if that’s wrong – that the landlord of your company, which is yet another related party controlled by Mr Bart, will only give consent to a business controlled by Mr Bart; is that correct?---That is correct.

20 I understand. Now, when it says that the assets of the business are contingent on BTT being sold as a going concern, would you agree with me that what that means is taking the best parts of this current business and leaving the liabilities, the heavy liabilities, the redundancy payments, in BTT, which will go into liquidation?---No. I don’t agree with that.

25 Well, tell me how, if BTT is going into liquidation, it can also be true that the value of BTTs assets are contingent on it operating as a going concern?---What was meant when that statement – if you’re referring to the engagement letter – is in terms of realising stock and realising plant and equipment, highly specialised plant and equipment, highly specialised stock. Its going-concern value – or, sorry, its value and its balance sheet is only upheld if it’s operating, if it’s trading in its – in its ordinary course, as opposed to if a liquidator is appointed and a liquidator offers that plant and equipment or stock for auction, for example.

35 And so was that value in those assets ultimately upheld, as you say?---In terms of the sale?

40 Yes?---I don’t know the – the final sale that – that went through. I don’t know the terms of – of the sale. If it went through on – on the basis of which it was outlined to us, the assets were recorded at valuation basis, not at a going-concern basis or ERV basis – estimated realisable value basis.

45 So before we go into the documents, Mr Nicodemou, and given what has happened in New Bounty, I want to give you an opportunity, given the formal circumstances in which you’re in, to put some suggestions to you. Do you understand what I’m about to do? I’m going to put some suggestions to you, and I want you to answer yes or no, whether you agree with them?---Yes.

So I want to suggest that, like in New Bounty, Mr Bart came to you with a plan that would result in the eventual liquidation of Bruck; is that correct?---I can't answer that. I don't know what he was thinking.

5 What I want to suggest to you is that you were told at the initial meeting that Bruck thought they were confronted with a punitive EBA. Is that correct?---Yes, that's correct.

10 And you were told that a particular part of the punitive nature of that EBA was their outstanding redundancy payments?---Yes.

15 And that it was suggested to you at that first meeting that the preferable course of action would be for the successful – sorry, the assets of the business to be sold to a related entity, and to take the worst parts of the business and leave it in Bruck?---No, that wasn't put to me.

That wasn't put to you?---No.

20 I want to suggest that it was put to you that Mr Bart and Mr Parker wanted to continue to run the business but with less employees and with more management friendly workplace conditions?---Yes.

25 And they wanted to come up with a way in which they could continue to run the business Bruck was running without the heavy redundancy liabilities that they were presently exposed to?---Yes.

30 And they wanted you to test some options for transactions they wanted to enter in way in which they could reduce those employee entitlements?---I don't – sorry, could you just explain that again?

35 I will say it again. They wanted you – I'm sorry. They wanted you to prepare a report about the various transactions that they wished to enter that would help them reduce their employee entitlements?---I would – I would suggest that they – they asked me to prepare an analysis on the numbers, and they were going to then do their own analysis on what the board decided on what they were going to do.

40 And they – that was, wasn't it, about the best transactions that could be entered to enable them to continue to run the business but reduce the heavy redundancy liabilities?---I think they wanted to understand the implications of the four options that they had discussed or were thinking about in terms of what that meant to each category of creditor.

They didn't want to give Bruck up, did they?---I don't believe so, no.

45 So they wanted to continue running essentially the same business that Bruck was now running. That's correct, isn't it?---Yes.

And you knew that from the start, didn't you?---Yes.

And they didn't want anybody else to be running the business Bruck was running?---No.

5

And they told you that?---They didn't phrase it like that.

10

How did they phrase it?---The conversation was a lot more general, along the lines – along the lines of, if we're going to advance – or if the secured creditor here is going to advance more funds to this business it had already – it had already loaned some money to the business. I believe - - -

15

Who was the secured creditor?---I think it's in the report. I can't remember if it's – it's an entity related to Phillip Bart but I can't remember the name of the entity.

20

Yes?---I can't remember if it's Baron or something, or Bruck something. They had advanced some funds to the company. They were considering advancing further funds but they were only going to do that on the basis that there was a viable business at the back end of that.

I understand. And so the only way for there to be a viable business was to get rid of the punitive conditions of this EBA, wasn't it?---That was a major factor, yes.

25

And so Bruck had to come up with a way to restructure the business so as to keep the best parts of the business but remove the punitive aspects of the EBA?---Yes.

30

And so they wanted – so they wanted to analyse with you what transactions they could enter to achieve this outcome?---Not analyse what transactions. They put the transaction to us and said, "This is what we are considering along with the other options, what do you think has – what are the implications in terms of how does this play out from a financial point of view? What are the shortfalls to employees, what are the shortfalls to the secured creditors, what are the shortfalls to other creditors?"

35

I understand. So – but you weren't given the raw data or the background in order to test the viability of those numbers, were you?---What – what – what raw data would you – are you thinking of?

40

Well, sorry, I'm suggesting what you originally said, which is you didn't test – you didn't analyse the – sorry, I'm putting words in your mouth. What did you say about what the limitations were on the data that you were given?---We were provided with accounts, some of which were published accounts. I don't recall if they were audited or not. And then we were provided in the final review some management accounts.

45

And what do you say you weren't engaged to do?---We were not engaged to assess, for example, the solvency of that business. We were asked to assume that it was solvent. We were not engaged to, for example, analyse the trading performance over the last number of years for the accounts that were provided. We were not asked to

test the values that were put on different assets and liabilities in the balance sheet. We were essentially asked to take these at face value and accept them for the purpose of the work that we were going to do.

5 And without being critical, because it's obviously something that has been done in a very quick amount of time and with probably a limited budget. Is that correct?---That is correct.

10 What actually, in layman's terms, was your task?---Essentially getting those financial statements, putting those into the model that's annexed to the report.

Who provided that model?---We put that model together.

15 Based on?---Based on the financials that we were given.

Yes. I understand?---And then based on the four scenarios that were discussed and agreed with in the scope, we then analysed how they would play out in the insolvency context.

20 I understand?---So, for example, if option 1, if you were to sell the business, how does that play out, and vice versa.

25 So cause and effect. Here are the numbers given to you from the client. If I put those numbers into a model, these are the numbers that will spit out the other end?---Yes.

30 Thank you. So – and just – I just want to be sort of clear and fair as possible. So the situation is this, BTT come and tell you that they can't continue as a going concern primarily because they have a punitive EBA with large redundancy payments?---No. What they said was, they're concerned in the short to medium term the operations of the business, given that they have declined over the last number of years. And they are concerned what will happen in the foreseeable future, given a number of – a number of issues. In addition to the EBAs, they were also concerned about the general textiles industry, the decline in sales that had impacted the business, the high
35 Australian dollar. There were a number of things that they were considering or that they were suggesting were impacting on what was previously a reasonably profitable business but in recent years had declined substantially. And there was an expectation by management that that profitability would decline further and potentially, at some point in time, may even raise questions as to its solvency.

40 But they weren't interested in getting out of the business, were they?---No.

45 They wanted to continue the business which means that – and I – I will start again. I withdraw that. I don't want us to make the same mistake that was made in New Bounty, which is, to get lost in a sea of other supposedly appropriate considerations where, really, there's only one consideration, and the one consideration in this case that pops up through the documents that you've provided is what stops this from

presently being a going concern is the punitive EBA, because all the other considerations you mention means, “We wouldn’t want to be in this business at all”?---Yes.

5 That’s right, isn’t it?---Yes.

And they want to continue in this business. The thing that’s stopping them from continuing in this business is the punitive EBA; is that not correct?---Yes.

10 So the way for us to continue in this business is to somehow reduce this punitive EBA or ameliorate this punitive EBA; is that correct?---And – and the workforce, but yes.

15 Yes. So one or the other, because if you reduce the workforce, you have to pay the redundancy payments - - -?---Yes.

- - - unless there’s another legitimate way that doesn’t involve redundancy for reducing the workforce. By the way, did you ever see a plan to manage out the workforce - - -?---No.

20 - - - in any way?---Not – not that I recall, no.

25 Did you see any consideration being given on how to restructure the business in a manner that reduced the workforce in other legitimate ways?---I didn’t see any other information other than what has – what has been given.

I understand. Before we get to that, just quickly, you were presented with a number of extraordinary items, extraordinary transactions that occurred over the previous three years, were you not?---Yes. Yes.

30 You weren’t ever asked to test the commerciality underpinning those, were you?---I was asked to apply a liquidator’s view on some of those – on those transactions, ie, if, for example, I was the liquidator and assessing those transactions, how would I look at them, would I pursue them, did I think they were of – of concern.

35 So primarily on the basis of solvency, though. That’s correct, isn’t it?---Yes. Yes.

40 You were never asked to consider, for instance, that if those extraordinary transactions didn’t take place, whether BTT would have had the money to restructure its workforce - - -?---No. I wasn’t.

- - - were you?---No.

45 And you didn’t consider that option?---No.

And you weren’t asked to. That’s fair, isn’t it?---Yes.

And you weren't ever asked to consider whether the commercial reasons for undertaking those transactions were justified, were you?---No.

5 You just accepted that they happened at face value, and you, effectively, just determined about whether there was enough money at the time to make those payments - - -?---Yes.

- - - whether the company was solvent?---Sorry. Whether the company was solvent at - at - - -

10

At the time at which it engaged in those transactions?---I was told that I was to assume the company was solvent each time that those transactions were undertaken.

15 Sorry. I see. So you weren't asked to - and I'm not being critical. Please don't take that from my tone. I just want to make that clear. You weren't asked to judge the commerciality of the transactions. You weren't asked to assess whether the company was solvent at the time they were made, but you were to take the approach that a liquidator would take if they were assessing them. I'm just wondering what's left after that?---The instructions we were given were on the basis that, assuming the company was solvent and these transactions were undertaken in the ordinary course of the business, how would you assess them if you were the liquidator of BTT.

20

25 And I genuinely want to know the answer to this: what's left to assess?---I guess it's an issue of whether you would look into them further, whether you would argue that they required more investigation.

But hasn't the key answers already been given to you as an assumption?---Potentially, yes.

30 Yes. I understand. Okay. So Mr Bart controls Bruck. That's correct? At the time?---Yes.

He controls the business that Bruck is sold to?---I believe so, yes.

35 And he controlled the landlord upon which Bruck was operating its premises; is that correct?---Yes.

And Mr Bart is also the primary funder, the secured creditor, of Bruck?---Yes.

40 So you are told that Mr Bart will not continue to fund Bruck unless the business is made more profitable by selling it to a related party; is that correct?---No. I was told that unless the board of BTT put to the shareholder a viable business plan for the medium term, he would not consider funding it.

45 But you were you also told, were you not, that the landlord would not consider granting consent to an assignment to the lease to anyone but this related party; is that

correct?---No. I believe it was they wouldn't agree to assign the lease to a non-related party.

5 I see. So if the company went into liquidation without having sold the part of its business to a related company, then the liquidator would be placed in a position where the landlord wouldn't consent to a transfer?---I believe so, yes.

10 Yes. Okay. I understand. So the situation is this: the only real consideration that's stopping the present management from being involved in this textile business is the punitive EBA?---Yes.

15 And they presented to you a range of transactions that would allow the business to continue without having to make those redundancy payments?---Sorry. Could you repeat that?

They presented a range of options that would allow the business to continue without having to make those payments that they say would cripple the business?---I would say that the company didn't have the money to make those payments.

20 But they wanted the business to continue?---Yes.

25 So they needed to come up with a set of transactions that would allow the business to continue without having to make the payments; is that correct?---Not – not necessarily.

Well, let's take it back. You said that they didn't have the money to pay, but they wanted the business to continue?---Yes.

30 And under the present business, if people were made redundant, they would have to make the payments?---If everyone was made redundant, yes.

Yes. So whoever was made redundant would be entitled to their redundancy payment - - -?---Yes.

35 - - - whether it's one person, 20 people, 100, 180. That's correct. "So we can't run the current business with our redundancy obligations." Correct?---You can't run the – the business based on the current workforce.

40 I understand?---Yes. Like, if – if – if the business sales, for example, were twice what they were or a whole raft of circumstances happened and you needed 180 employees, that's a different set of circumstances, but on the current – or where they saw the sales going and where they saw the business trading in the short to medium-term future, in their view, they couldn't run it with the current structure, workforce, whatever you want to call it.

45

And they couldn't, they said to you, afford to reduce that workforce and make the redundancy payments?---I don't believe the related entities were willing to lend them the money that was required.

5 But they wanted to continue to be in the business with a more manageable workforce?---Yes.

10 And so they had to come up with a set of transactions – I'm not saying you came up with them. They had to come up with a set of transactions that would enable them to continue to run the business without being exposed to those redundancy payments?---Yes.

Thank you. Registrar, might I indulge you just for a five-minute break, please?

15 THE REGISTRAR: Yes.

MR KULEVSKI: Thank you.

20 THE REGISTRAR: You just need to get some instructions, is it, Mr Kulevski?

MR KULEVSKI: Yes. Thank you.

25 THE REGISTRAR: All right. I will just go off the bench temporarily. Just let my assistant know when you would like to resume.

MR KULEVSKI: Thank you.

30 THE REGISTRAR: You can step down for the time being, Mr Nicodemou?---Thank you.

ADJOURNED

[3.10 pm]

35 **RESUMED**

[3.17 pm]

MR KULEVSKI: I'm grateful to you, Registrar, for the indulgence.

40 THE REGISTRAR: Yes. Ready to continue?

<COSTA ANDREW NICODEMOU, RECALLED

45

<CROSS-EXAMINATION BY MR KULEVSKI

MR KULEVSKI: Yes, please. Mr Nicodemou, if I could take you to volume 1 of the documents that BRI Ferrier produced. Sorry, I will just provide a copy for my friend.

5 THE REGISTRAR: Yes.

MR KULEVSKI: So if I could take you please to tab 4. And so is that the draft scenario document that was provided by Mr Bart to you at that first meeting?---I don't remember when it was provided, but it was definitely prior to the – prior to us taking the assignment, but I don't know if it was a first or second meeting.

So before 13 - - -?---Yes.

Before the engagement letter?---Yes.

15

If I could just ask you to read that to yourself quietly?---Yes.

Thank you. And what I want to suggest to you is much like in the other matter decided by Sackville J, New Bounty, that this document presented to you early on was the basis for the talking points to leap off? That's correct, isn't it?---I don't quite understand the reference to New Bounty.

20

In the sense that in New Bounty it was said that Mr Bart came to you at the first meeting, gave you a bunch of notes and they formed the basis for future discussions on the matter?---Yes.

25

And so similarly these draft scenarios presented by Mr Bart provided the talking basis for future discussion about disengagement, did it not?---Yes.

30 So what we're told in the first bit is – and this is to keep you up to speed, obviously – to get you up to speed, is that BTT is a specialist manufacturer of textiles of all kinds, and that was reproduced in your scope of engagement letter, wasn't it?---Yes.

It has an extensive weaving mill, converting mill and coating facility.

35

So the very next thing says is:

It currently employs circa 180 people with a punitive EBA which provides for huge redundancy payments and major inflexibility. BTT has a strong balance sheet, but the strength of that balance sheet is contingent on the business being a going concern.

40

Then if we skip down one paragraph it says:

BTT has a long-term contingent liability to its landlord, Bruck Properties, of approximately \$8 million in the form of a long-term lease.

45

Now, have you written on there “What is this?” Is that you?---Yes. That’s my writing.

5 Yes. Now, what we subsequently worked out, or what you subsequently worked out, I apologise, or were told, was that the property – or the land on which – the building and the land on which the business was being conducted was valued at \$2 million, wasn’t it?---I can’t recall that. I’m not sure.

10 Was that not the number ascribed to it in your report?---I would have to check in the report. I couldn’t tell you offhand.

Do you recall what the annual rent payments were?---No.

15 So if we – I’m sorry, just to do this now, I will – if we go to the annexures of your report, Mr Nicodemou please – which I have conveniently misplaced, but I will get there, sorry. So if do you see the BTT rent calculation annexure to your report?---Rent - - -

20 It’s a one-page document that looks like this?---Yes, I do.

So do you see what the annual rent there is?---Yes.

And how much is it?---The first year, 2013, is \$700,000 excluding GST.

25 And the landlord is a related entity. That’s correct?---Yes.

But the landlord – but the land used to be owned by Bruck, did it not?---Yes.

30 And it was sold to a related entity?---Yes.

35 And – excuse me just a moment. I’m just trying to find the place, I’m sorry, just because the writing is so small where you indicate that you’ve been told it’s \$2 million. I apologise for that. I will take you to that in a moment. But let’s assume that the value is two million as you’ve been told, and when I find – when my solicitors dig that up, I will – I’m terribly sorry. So if one looks to the background, the schedule of extraordinary items, annexure D?---Yes.

40 If you go to transaction reference 9, halfway down the page, sale of Bruck Properties Proprietary Limited by BTT to Bruck Group?---Yes.

And in the middle of your preliminary opinion based on info available, it says:

45 *BTT has advised that the sale price was based on the original cost of the land and improvements in the books of BTT as at the day of the transaction. BT has further advised that prior to the sale, CB a kerbside valuation of the property which was significantly below the value of the purchase consideration, valued at approximately \$2 million.*

?---Yes.

So you were told that a valuation had valued the property at \$2 million. Is that correct?---Kerbside valuation.

5

And to what – when you say kerbside valuation, it would not be significantly out, would it?

MR STEVENS: I object.

10

MR KULEVSKI: I'm sorry. What did you understand kerbside valuation to mean when you put that in your report?---That's basically someone driving past, having a look, and saying I think it's about this. But normally a valuer in assessing the valuation of a property will go through a process that's deemed appropriate by their governing body in terms of getting comparables and inspecting the property internally, reviewing leases, tenancies, all that kind of stuff. So it's not something that, for example – it's not something that you would hang your hat on, if I can use that term.

15

20

I understand. Bruck did commission a valuation that came out as freehold with improvements at \$2.8 million. Is that not right?---I don't recall.

You don't recall. In any event, would you just assume for present purposes that the value is \$2.8 million?---Yes.

25

A yield of 25 per cent, ie, a rent of \$700,000 a year is an extraordinary yield on that sort of property, isn't it?---Yes.

MR STEVENS: I object. Is my – is my – is Mr Nicodemou being - - -

30

MR KULEVSKI: He answered "yes". You have a property background, don't you?---Yes.

MR STEVENS: Thank you.

35

MR KULEVSKI: Thank you.

MR STEVENS: I didn't know that.

40

MR KULEVSKI: Didn't you?

MR STEVENS: No.

45

MR KULEVSKI: No. I thought that came out – that came out at the beginning. You must have missed it.

Yes. So 25 per cent is an extraordinary yield, particularly on a property in Wangaratta. Is that not correct?---I don't agree with that statement, but I agree it's a high yield. Generally - - -

5 Do you – have you come across many properties that have a rental yield of 25 per cent?---No. But, generally speaking, regional properties trade at substantially high yields than capital city properties.

10 What would be the average in your experience?---It depends on the economic environment but, you know, if you look where there's a downturn, they're in the mid-teens, things like that. If it's a buoyant market, they're probably in the low teens.

15 Low teens. But you would not have seen one at 25 per cent before, would you?---Surprisingly I have, but again strange circumstances.

20 Yes. Now, you were told that the landlord was not prepared to reduce the rent for this business, but for the related party business it would reduce the rent. Is that correct?---I can't recall if we discussed rent. I don't think we went to that level of detail, to be honest with you. I can't recall that.

So, I'm sorry, if you just go back to the draft scenarios document?---Yes.

25 And so the next paragraph says:

BTT needs to radically restructure its operation to revive profitability. This means restructuring of the workforce which may cost up to a further \$8 million. BTT does not have the cash to undertake this restructure and, as such, the directors are concerned about the medium term future.

30 So you understood, didn't you, from what you were being told by Mr Bart at that first meeting, or at the meeting where this scenario were – these scenarios were discussed that the critical issue was that BTT did not have the cash to undertake the restructure that was needed of the workforce?---Yes.

35 And that was why the directors were concerned about the medium term future, according to this document?---Yes.

40 But you weren't asked to consider whether the extraordinary transactions that were made over the previous few years would have put BTT, if they had not have been made, in a position where it could have fought this restructure, were you?---No.

Did you, yourself, give any consideration to that?---No.

45 And you didn't consider whether those transactions that have taken place over the previous three years were commercial?---I did, but on the assumptions that were given.

Right. So the assumptions – and I'm not being rude, but on the assumptions that they were commercial, they were commercial?---The assumptions that the company was – on the assumptions that the company was solvent and they were in the ordinary course of business - - -

5

See - - -?--- - - - I believe that they were not transactions that had I been appointed liquidator, and bearing in mind you put 10 liquidators in a room and you get 10 different views.

10 Yes?---I – they're not transactions that I would have thought were worthwhile pursuing.

I understand. Perhaps it's my English failing me at this point in time, and it may very well be, but you were presented with a list of extraordinary transactions. That's correct?---Yes.

15

All, you would told to assume, were made in the ordinary course of business. There's a disjunct for me in that. Could you explain it to me?---Well, I can't explain what they were thinking, but I took that at the time to mean this business is in the business of operating or producing textile products, and, you know, they – they buy a product from a related entity, they manufacture it to a certain stage, sell it to a related entity. The transactions that were mentioned were not in the ordinary course of business, ie, they were not from selling textiles products. They were financially related. They were structurally related, all those – along those sorts of lines. That's why – that's how I interpreted it when they said they were outside the ordinary course of operations.

20

25

And what about, say, the massive unfranked dividends?

30 MR STEVENS: I object

MR KULEVSKI: What about the large - - -

MR STEVENS:

35

MR KULEVSKI: Sorry?

MR STEVENS:

40 MR KULEVSKI: What about the unfranked dividends in excess of \$2 million?---I was told at the time that on a yearly basis, they would pay dividends. I don't recall whether it was franked, unfranked or whatever it is, but, again, that was in the nature of this business historically, that it would distribute its – a certain level of its profits.

45 And you never were asked to consider – do you remember how much capital was taken out of the business through these extraordinary actions over the previous three years?---It was quite substantial.

How much is that? Do you recall?---I remember there was one transaction where it was – there was a capital reduction of about 8 million, and I believe there was a property transaction. It was – it could have been a similar amount, but I – I can check the – the notes to see what it was.

5

So you're told at this first meeting of this draft scenarios document – so at least 8 million?---I believe so, but if you would like me to be certain - - -

Well, we will get to that, but just – you recall it to be at least 8 million?---Yes.

10

And you do remember that there were dividends in excess of 2 million?---I don't know if they were – I don't remember if they were dividends or in the terms of – or they were a capital reduction. I think some of the transactions were a capital reduction. There was different classes of – of things that happened.

15

And so you're told in this draft scenario document – the proposition is being put to you that this business is unviable because it needs to restructure the workforce, and it can't restructure the workforce because that will cost up to \$8 million; that's correct?---It can't - - -

20

That's what it says in the middle of the page?---It can't restructure the workforce because it doesn't have the money to restructure it.

Correct, because it will cost up to \$8 million, which it cannot afford?---Yes.

25

But you were never asked to consider that, had it had that in excess of \$8 million that had been taken out in extraordinary items over the previous three years – whether it could have afforded that restructure?---I wasn't asked to consider that.

30

No. You weren't, no. So if we skip one paragraph. The moment that the directors deem that this business is no longer a going concern, certain questions need to be asked. Now, no longer a going concern on – you understand at no point was this business insolvent, was it?---I assumed that was never insolvent.

35

So what did you understand by “no longer a going concern”?---I – I'm not sure what I thought at the time, to be honest with you, in terms of that specific sentence. I don't know.

40

So then we have three options presented by the client to you: the first two which represent the final two options you're asked to consider, and the third option is your final option. 3 and 4 are variations on this current option 3; is that correct?--- That option 3 is option 4 in – in my report.

45

Yes. I apologise. So option 1, option 2, equate to option 1 and option 2 in your report?---Mmm.

And option 3 equates to option 4. So what's not being discussed at the moment is the option 3 that's ultimately decided upon, what's not listed there?---Do you mind if – could I just read that?

5 No. Please. Please, take your time. Sorry. I thought you had read it earlier?---No. I did. Sorry. I just wouldn't mind reading it again.

No. Please take your time. It only works if you've read it?---Yes.

10 So option 1, which is the option 1 ultimately considered in your final report, says:

Can the business be sold as a going concern? Answer: no, not likely, because the landlord will not lease the premises or allow the lease to be assigned to a new buyer.

15 And the landlord is a related entity, is it not?---Yes.

Which until recently was this company?---Yes.

20 Continuing:

There is an insolvency provision in the lease which triggers the lease cancellation but preserves the contingent liability. Also, notwithstanding the landlord issue, the probability of a buyer for the whole business in Australia being found is very slim.

25 So much like in New Bounty, hasn't the client already answered for you what they think about option 1?---I don't necessarily agree with that – the – the comparison with New Bounty.

30 I'm terribly sorry. Hasn't the client already come to you in this matter, telling you that they don't think option 1 will work?---That's their view, yes.

35 So they've presented the option. It was never your job to advise them on the options. That's correct, isn't it?---They did ask for a recommendation in our report, which – which we gave.

Based on the assumptions they gave you?---Yes.

40 And they're telling you at the very first meeting or in the very first document that the assumption is that option 1 is not going to work; is that correct?---Not the assumption, but their view is that it won't work for those reasons.

45 Correct. Now, option 1, orderly wind-up of the business:

It would be hugely costly to effect an orderly wind-up of the business. It could take 18 months to sensibly realise the value of some of the stock, and as Bruck

is really the only local producer of many of these items, the customers would immediately place orders overseas, using Bruck for only the next month or two. In other words, the cost of the orderly wind-down would outweigh the benefits. Also, the financier and landlord may not agree.

5

So option 2, they think, is a negative option as well, don't they?---Yes.

Option 3, which is option 4 in the report, is one they also didn't want to consider; is that correct?---Yes.

10

So what we already know from the first meeting is that – and Mr Bart prepared this, did he not?---Well, he presented it to me, so I can only assume he did, but I don't know.

15

Yes. So he sent you an email on 5 May, which we will get to, but we don't have that in our records. Was this document attached to that email?---I – I don't believe he sent this by email. I think he – when we met, he presented this.

To you?---That's my recollection, but - - -

20

So of the four options in your report, three are named in the very first document and dismissed as being, in their view, not what they see happening; is that correct?---In their view, yes.

25

And then a statement is made:

In a perverse way, if the liquidator was successful in undoing the transition, then the employees by W and C would be made redundant and GEERS' loss would double! If the ongoing labour hire arrangement proves unviable, it will cease, and at this point, an administrator will be appointed who, before his appointment, will have been asked to ratify the sales. The administrator will then appoint a liquidator who will apply to GEERS to fund the payment of all entitlements to the residual employees.

30

35

So was it, at this stage, fairly clear that the attitude of the client was that – Mr Bart's attitude was that none of these three options are really preferable; is that correct?---Yes.

40

That the preferable option would be finding a way for us to continue to run this business, while minimising some of the liabilities; is that correct?---Yes.

45

And the landlord would facilitate that by agreeing to rent to a related party; is that correct?---I – I can't speak on behalf of the landlord so I don't know. But I was told that, under the arrangement put forward, under option 3, the landlord would consent to that party.

I see. But you're told that would not consent to option 1?---Yes.

So it's a specialist property, obviously, for the manufacturer of textiles, is it not?---I haven't inspected the property so I don't know.

5 I see. But have you been told to assume that it has got fittings and fixtures and machinery that allow it to manufacture textiles?---Yes.

And if someone else wants to manufacture textiles, it would be pretty important that they be able to do it on those premises; is that correct?---Unless they've got another building down the road.

10 Correct. And you're being told, in option 1, that – sorry. To be clear, exactly as you put it: first, you're told that, if it's sold as a going concern, under option 1, the landlord will not lease the premises; correct?---Yes.

15 But, if it's sold to a related party, the landlord would be prepared to consent to lease the premises. So we want the – and the landlord being an existing related party?---Yes.

20 So option 1 is not going to happen because they're not going to have the premises; we know that from the first meeting?---Yes.

They don't want to liquidate the business; is that correct? They want to restructure the business?---I don't think I can answer what they wanted to do.

25 Sure. Well, what was said to you? You're entirely correct, Mr Nicodemou, and I apologise?---What was said to me is, as I've said previously, these are the options that they're considering and you obviously have the note that was put there, that they wanted to, obviously, keep the business or keep some resemblance of – of what the business was.

30 But, to be fair, they're not really considering these three options, are they? They want another option – an option where they get to keep the business and make it profitable.

35 MR STEVENS: Well, I object on the same basis that Mr Nicodemou couldn't answer the last question. He can't say what they're thinking, unless it was expressed to him that's what their thoughts were. And, if he's putting that, then he should say, "That's what they said".

40 MR KULEVSKI: Yes. I'm sorry.

MR STEVENS: If he's putting something else, then he can't answer on behalf of somebody else.

45 THE REGISTRAR: You might want to rephrase it, Mr Kulevski.

MR KULEVSKI: Yes. Thank you, Registrar.

Your understanding of the document that was presented to you was that they weren't genuinely considered options 1, 2, 3, as outlined in this document, were they?---I don't know. I can't answer that.

5 What did you understand – was anything said to you at the meeting about the prospects of accepting 1, 2 or 3?---No.

10 But, certainly, based on what's written there and – what was discussed at the meeting was that options 1, 2 and 3 were unpalatable, weren't?---I don't think they – I don't think he believed – Mr Bart believed that those options would get an outcome for anyone.

So what was actually said?---Exactly that. So - - -

15 Exactly that?--- - - - exactly what's there, from recollection; that either of those options don't solve the circumstances or improve the circumstances for anyone.

20 And so it wasn't – did Mr Bart say to you, then, then what would solve the circumstances is to somehow keep this business going but reduce and – but be able to restructure the – radically restructure the workforce in order to make it profitable?---What he said was he expects the board of the company to come to him with a proposal for him to consider, as shareholder, as to whether he funds the business moving forward.

25 And he would be prepared to fund it under what circumstances?---Where there's a viable business plan put forward.

30 And was it expressed to you that that business plan would be to keep the business – find a way to keep the business as a going concern, while restructuring the workforce?---Potentially. Yes.

And that was the option that he wanted to consider; isn't that correct?---Well, I don't – I don't think he used those words.

35 What words did he use?---I – I can't recall exactly what – what was said. It's about two years ago.

40 Sure?---But they were – the only thing I do remember is – in terms of his comments – is I'm not going to put more money into this thing if it's – if there isn't a viable plan. If there isn't some – some light at the end of the tunnel.

45 And what – was it discussed at the meeting how there could be light at the end of the tunnel? Because, clearly, 1, 2 and 3 presented no light at the end of the tunnel; is that correct?---Yes.

So what must have been discussed – he must have had an idea, as an experienced business, on how could there possibly be light at the end of the tunnel?---I believe we discussed what is option 3.

5 All right. So options 1, 2 and 3 on this document, which are – and I apologise – options 1, 2 and 4 in your final report, present no light at the end of the tunnel; is that correct?---Again, I can't answer from his point of view. Sorry. I don't know.

10 But that was your understanding, based on the document and the conversation you had, wasn't it?---He didn't see those as viable options - - -

Yes?--- - - - is probably a better that I would suggest.

15 But he presented what he considered to potentially be a viable option – potentially?---I can't remember to what extent, at that meeting, it was discussed but, yes, there was what other options are available and what else could be done.

At some point it was discussed, though, wasn't it?---Yes.

20 And it wasn't your idea, was it?---No.

Option 3?---No.

25 So, at some point, Mr Bart said to you, "I have another option"; is that correct?---I – I don't recall if it was put like that. I don't know how – they were – they were discussed but I – I can't remember the details of, you know, how – how it was done, whether they said, okay, this is what we want to do or whatever it is. But at some point between this here and, obviously, the engagement letter, that was the idea that was – was put forward to us as an - - -

30 By Mr Bart?---I – I can't even remember if it was Mr Bart or if it was Mr Parker or who it was. But, in those discussions, that was a fourth option that we were asked to assess, in terms of how that played out.

35 And the only way it could play out is if the business – if they continued to – if a related entity continued to run the business – that's correct because only a related entity would get the lease?---Yes.

40 So the only way it could play out is if a related entity continued to run the business but the punitive aspects of the EBA were removed; is that correct?---Within the current circumstances. Yes.

45 Yes. Because there's no point just selling the whole business to a related entity and keep the EBA; correct? Keeping 180 employees and keeping – there's no point doing it for nothing?---No.

So you had to find a way to transfer the business to a related entity but remove the bits of the business that were considered punitive?---Yes.

5 And the bit that was considered punitive was the huge redundancy payments?---Again, I will say the redundancy and the issue of having 180 staff in circumstances where, in their view, they need 80, 100 or whatever that number ended up being.

10 Sure. But the way you do that in a current business, isn't it, I've got 180 staff, 80 of you are genuinely redundant, here's your 75 week pay out; that's correct?---Yes.

They didn't want to do that, did they?---As I said, I don't believe they could do it, unless someone provided the capital to allow them to do that.

15 I understand. And Mr Bart was prepared to continue to fund this business if it was sold to a related entity without those punitive obligations?---The words I believe he used were provided the board can come up with a viable plan in the medium term, I will consider funding the working capital of the business or funding the business.

20 And the plan that was decided upon was a transfer of the business to a related party, without the punitive redundancy?---Yes.

25 So that was the viable plan that they determined?---Well, that – I – I was not involved in – in that, but I suspect so.

And so this business would be viable but for those redundancy payments needing to be made?---I don't know. I don't know.

30 But that's what you were told?---That's what I was told, yes.

Yes. But you obviously weren't asked to check that, were you?---No.

35 So you were told the business would be viable but for the redundancy payments. "We need to find the way to transfer the business without having to make the redundancy payments." That's correct, isn't it?---We need to find a – an alternative to the current circumstances.

40 But surely you must, after what we've been through, accept my statement that what you were effectively being told is, "We need to find a way to transfer the parts of the business that we want to run the business without having to meet these large redundancy payments"?---Yes.

45 And so could I ask you to turn to the next tab, please, Mr Nicodemou. You're going to have to help me with this, I'm afraid. Is that your handwriting?---It is, and I apologise in advance.

That's okay. You don't – and once again, I'm not being critical, but do you generally sort of date your file notes and say who's attending?---Actually, this may not be my handwriting

5 It may not be?---It may not be. No. It's not.

Whose do you think it is?---I think it could be Robert's.

10 Who else was involved on the matter at this point?---It – it must be Robert's. There was no one else involved.

Right. Are you okay with reading his handwriting, because I was hoping we might be able to make a fist of this together?---I can give it a go.

15 Thanks. So the client BTT, obviously?---Yes.

Now, at the top – so scenario – sorry. There's a one in a circle and it says "liquidation"?---Sorry. Are you referring - - -

20 Under "discussion"?---Under - - -

Isn't there a one in a circle and it says "liquidation"?---Yes. Yes. Sorry.

25 And there are some branches off that word?---Yes.

The top branch, which has probably been added later which is why it's the top branch, is "what is desktop liquidation". Is that right?---Yes.

30 And what's that, AR Penny or - - -?---I think that refers to – I think there may have been someone called Penny. I – there may have been an employee of BTT that provided some documentation. I vaguely remember that name, someone Penny, that I saw on some emails or something.

35 Is this a file note – perhaps the best way to approach this, given its difficulty, is for you to try and make what you can of it to yourself and then maybe I can ask you some questions about it. Thanks, Mr Nicodemou. You right? Do we think that that's a file note of that first meeting?---No. It isn't. I – I think this is a file note of a meeting I had with Robert to discuss the scenario, the circumstances and what work
- - -

40 I understand?---And what he needed to do.

45 Now, liquidation – can you help me with the top – not the desktop liquidation branch, the original top branch. What does that say? Liquidating – liquidators
- - -?---The first word is an abbreviation for liquidation or liquidator.

Yes?---Something sell – I assume – business landlord liquidation claim, perhaps.

“Liquidator can sell because landlord” – anyway. And can you make out the second one?---I think the first word is “business”.

5 Yes. Is the third one “no jobs”?---I think it is – yes. I think under a liquidation scenario, I think what’s – what that means is essentially everyone is made redundant.

And “SC” – what’s SC?---I couldn’t tell you offhand, but if you would like I can have a think about it over the next couple of days and try and piece together what
- - -

10 It’s likely you will be back just for a short time next time?---Okay. Yes.

So that would be wonderful. Thank you?---Yes.

15 And do you know what the next part is, to the right?---Point 2?

No, to the right?---Sorry.

20 “Something funds to take”?---That first limb up the top, that’s P&E, the second word. I think maybe “liquidation value P&E”, plant and equipment. Second, the next limb down, “unable to something” – it could be debtors.

Perhaps we should move on to number 2, then, the sale, and what’s after that? “Buys
25 receivables”?---“Receivables inventory at” – I think it says there – I think it’s “at cost”.

“Cost”. Yes. “But takes liabilities under less” – what’s - - -?---I don’t know what that word is in brackets. “But takes liabilities under - - -”

30 “Less” - - -?---I don’t know.

And then the next dash point is “which employees will be taken”?---Yes. Yes.

35 “The assumption is that the company is solvent but deteriorating performance”?---Yes.

“After the sale” – is that “after the sale” or “AL sale”?---A&L sale, I believe.

40 Assets and labour?---Yes.

“Assets and labour sale if company” – and what’s this – “went into liquidation, then it would need certain things to recover”?---“Went into liquidation – went into liquidation, then - - -”

45 The liquidator?--- - - - “liquidator would need certain” – something. Don’t know what that last word is.

So the sale option at this point is, “We buy the receivables, the inventory at costs, we take some of the liabilities and we decide which employees will be taken with us.” Is that correct? That’s the sale option?---Sorry. Could you repeat that.

5 Just as it says. “Buy the receivables and the inventory at cost but take liabilities under less” – and there’s a word we don’t know – “and which employees will be taken”?---Yes.

10 “Transfer the business to a related entity which – it will need the receivables and the inventory, and we will decide which employees to take with us”?---Yes.

Thank you. So if I could then ask you to turn to tab 16, please, which is the first draft of the report. And I know it’s sort of marked out because something is photocopied over but up until very close to the final report, the report was entitled
15 Restructuring Options, wasn’t it?---It would appear so.

And the mark-ups are mark-ups made by the client, aren’t they? So, for instance, on page 1, under the executive summary, the client has removed the words in item 3, “Weave Co and Convert Co”?---Yes.

20 So options 1, 2 and 4, as presented in the draft scenarios. Option 3 has now reared itself, and that was presented to you by the client. That’s correct?---Yes.

And you had written:

25 *Sell part of BTTs business and assets to Asset Co and Labour Co –*

collectively referred to in this report as A and L, but you had originally called them Weave Co and Convert Co, and the client had removed that. That correct?---I
30 believe so.

Then on the next page, the client deleted the words “changes in the manufacturing environment in Australia”, did it not?---Yes.

35 And it also deleted the word you had said:

BTT needs to restructure its operations in order to revive its profitability.

40 The client has now changed that to “rethink”, hasn’t it?---I would have – I would have to check whatever it says in the finalised report.

But certainly on this draft, the client has changed it from “restructure” to “rethink”?---Yes.

45 Yes. Thank you. And then you will see the assumption that we’ve been speaking about on the next page, which is made early, that:

5 *We've assumed that the landlord of the premises that BTT currently occupies is agreeable to BTT selling part of its business and assets to related entities, A and L, and allowing A and L to lease a portion of the site on a short-term basis. We have been advised that the landlord will not consent to a transfer to any other party.*

And that was an assumption you were given; is that correct?---Yes.

10 Now, putting on your adviser's hat, that made the sale as a going concern to anyone but a related party practically impossible, didn't it?---Made it unlikely unless you were another – unless you were another manufacturer of – of this – or interested in this – this business for whatever reason. So - - -

15 And were you aware of any that had the facilities capable to manufacture textiles of this nature?---I was – I was told that the products that are being manufactured are so heavily specified and accredited that it was difficult for someone else, without the appropriate accreditations and experience, to manufacture these goods.

20 And, I assume, the machinery that goes with those highly specific products; is that correct?---I don't know about that.

25 You don't know? But certainly on what was presented to you, selling it as a going concern was a near impossibility given that the landlord wasn't going to consent to the premises?---I was difficult. I wouldn't – yes, it was difficult.

30 Could you conceive of circumstances where it might be possible?---Anything is possible, but it depends at – at what value and – and how - - -

35 But how would it - - -?---

40 - - - be possible if they weren't going to be given the premises?---Well, as I mentioned, there could be a competitor that operates a similar business or – or – or manufactures similar products that – that wants to buy something within this business. I don't know. R and D, for example, or – or the machinery. It is unlikely. I agree it is unlikely.

45 Certainly the circumstances were much more attractive to a related party given that it would get the consent to the lease?---Yes.

50 Yes. Thank you. If I could ask you to turn to tab 22. Now, this is not an email you're copied on. So could you just please explain to me, if you're able to, what the purpose of this email is, because it was produced by either you or Mr Garafano, I take it?---It wasn't produced by any – either of us. It was produced by another person: Samuel Savaras.

Do you know why it was produced in this matter?---I – I suspect it’s something in regards to a conflict check, perhaps, prior to taking the appointment on one of the other matters on Australian Weaving Mills.

5 And so your firm was doing a fair amount of work for companies associated with Mr Bart at this point in time, was it not?---The assignments weren’t substantial, no.

They weren’t as – but - - -?---There was three matters, including this, that – combined, I would be surprised if they were \$100,000.

10

In terms of the scope of engagement, what was the budget you were given in order to prepare this report?---I think it was about \$30,000.

15 That’s low in the sense that that really wouldn’t enable you to do anything but work on the assumptions that you were given. That’s correct, isn’t it?---I agree. That’s why – that was the basis of the report, that we couldn’t check or – or – any of the items that we discussed previously.

20 So it’s fair to say, then, really, isn’t it, that your report, for right or for wrong, was really being used to justify a course of conduct that management had already inclined itself towards?

MR STEVENS: Object.

25 THE REGISTRAR: You press the question in that form, Mr Kulevski?

MR KULEVSKI: No. I don’t, Registrar. I withdraw it.

30 What did you understand the purpose of your report to be?---As – as I mentioned earlier, Mr Bart was considering whether he would put some money into this business. He had given direction to his board to reconsider the future of the business. He contacted me, and, obviously, you have the note in the meeting that we discussed. He said that he thinks there are a number of options available; he’s considering those. He wanted someone to run the numbers that are associated with those options and to provide some comments on that.

35

40 If you were, in your experience, to properly consider the viability of those options with your own view, you would have needed to spend significantly more money, testing the assumptions, wouldn’t you?---If I was to remove the assumptions or – yes, or test the assumptions or remove them from the report and provide an opinion or conclusion on them, yes.

45 And if a company is just short of distress – so let’s assume the assumption that “We have been a profitable business, but we need to restructure in order to remain profitable in the future.” So could you make that assumption for me?---Yes.

5 And someone was to come to a person in your position for advice. The advice would normally be, wouldn't it, "Please, you tell us. Spend the money and tell us what the options are to restructure this business"; is that correct?--- You can get asked to do any number of – of things, and asked to provide a view on anything – matters that are not as complicated as this – matters that are far more complicated. You can get asked to do full solvency reports. It's – you know, we do all – all sorts of work in – in this space.

10 This, however, this task is not asking for any real significant input of your professional judgment, though, is it?---It's based on the information and assumptions that were given. It is not a very complicated matter.

15 Because it is effectively plug in the numbers at one end, and see what it spits out at the other, is that not correct?---Yes.

20 Next – if I could just ask you to – now, I've just seen this for the first time – tab 46 – if I could ask you to turn to the document with the number 119 in the top right-hand corner, that ends 0119. So it must be about 10 pages in, because the first one starts 0109.

THE REGISTRAR: I see.

MR KULEVSKI: You see - - -?---Sorry, you – are you referring to - - -

25 So behind tab 46?---Yes.

And then, top right-hand corner, it should say "BRI004 005 0119"?---0119? Yes.

Yes?---Yes?

30 Down the bottom of the page, something has been crossed out in handwriting, which says:

35 *On 19 March 2014 Mr Nicodemou met with Mr Bart and his solicitor, Mr Mark Ryckmans at our office. They discussed the company's financial position, and Mr Nicodemou provided general information about Vas.*

?---Mmm.

40 Was your understanding that Mr Ryckmans was providing advice to my client, the company?

45 MR STEVENS: Well, hang on. I object. This is Australian Weaving Mills' report. Are you talking about that company, or are you talking about another company?

MR KULEVSKI: So this is in relation to: was Mr Ryckmans providing advice in relation to the New Bounty DOCA? Is that what this document's about, or the AWM DOCA? This is the AWM - - -?---This relates to - - -

5 - - - matter?--- - - - AWM. I – well, I don't know what – I suspect it – yes, there has to be in – in regards to AWM.

Yes?---Yes.

10 So Mr Ryckmans was providing advice on New Bounty. He was also providing advice on AWM, to your knowledge?---I don't know what advice he gave.

I understand?---I – I don't know if that progressed anywhere.

15 Do you understand whether he was acting for the – Bruck?---I don't – I – I don't know if he was on – on AWM. I - - -

So - - -?---He – he – I – I don't think he did on AWM. Simply because AWM came straight out of administration.

20 I see. So if we skip through Mr Nicodemou to tab 57?---Yes.

25 Could you please tell me what the purpose, or what this memo's in relation to? It wasn't clear to me why it was relevant to this matter?---It's – the reference is AWM, at the top. It could be that in filing this email, it has – it has gone into – I don't – in this discovery process, I believe the AWM files were – were also discovered. I – I don't know if this was in an AWM or – or in – in this matter.

30 I understand. Okay. So perhaps we will just pass that over for now. And so this is pretty much – 58 perhaps provides, the day before you sign the – sorry. The day after you first met Mr Bart, if you look at the bottom part of the email, from you to Mr Bart. So it's dated the 6th of May?---Yes.

35 And it says:

Dear Philip, I refer to our discussion yesterday in regards to the above matter and your request for an outline of costs to conduct a review of BTT and to provide strategic advice on the options available I envisage it would involve the following –

40 I want to concentrate more on what it would not involve, if that's okay. So if we turn the page over:

45 *I have based the above estimate on the following assumptions: (1) the advice will not, in any way, include comment on the directors' personal legal positions but, rather, the options available to BTT in its current circumstances. As you can appreciate, I know little about BTT and its financials, to the extent that the*

5 *information is prepared and easy to follow, the above estimate will be reduced and vice versa. I do not anticipate visiting the premises. I will not be reviewing any historical transactions or financials of BTT. Your staff have prepared the estimates on asset ERVs etcetera; I will not be auditing any information received but assume it to be correct.*

Did that, essentially, remain true right up until the completion of the report?---In terms of those assumptions or limitations?

10 Yes?---Yes.

Thank you. If I could ask you – perhaps before – one final thing, before we finish for the day, if I could ask you to turn to – with your indulgence, Registrar - - -

15 THE REGISTRAR: Yes.

MR KULEVSKI: - - - tab 59. This was a draft, was it not, of the scope of engagement letter?---Yes.

20 Now, the dot points are the same as what ends in the final, except for one, which is hand crossed out:

BTT does not currently have the financial capacity to undertake a restructure of its workforce.

25 Who crossed that out?---I'm not sure but I suspect it would have been – I suspect it would have been in a discussion between myself and – and Robert that – I don't know why that's crossed out.

30 But it was crossed out because it wasn't – you didn't know whether it was true or not; that's correct, isn't it?---I can't recall as to why it was crossed out. Don't know the reason why it was crossed out.

35 But, certainly, it wasn't an assumption that Mr Bart or anybody else was asking you to make?---I don't know

Registrar, I think it's probably appropriate that we leave it there for today.

40 THE REGISTRAR: Yes. All right.

MR KULEVSKI: Thank you.

THE REGISTRAR: Mr Stevens, is there anything you have in re-examination?

45 MR STEVENS: Yes. If I maybe take this opportunity, just in case - - -

THE REGISTRAR: Yes.

MR STEVENS: - - - Mr Nicodemou is not asked to return.

MR KULEVSKI: He will be; I'm

5 MR STEVENS: It also might be a bit difficult for him to recall, given the effluxion of time when he does return.

10 <RE-EXAMINATION BY MR STEVENS

[4.17 pm]

15 MR STEVENS: Mr Nicodemou, you were asked some questions about whether you gave advice or not and my friend asked you some questions about whether you had been engaged to give advice; do you remember that being asked of you, in respect of New Bounty?---Yes.

20 And you were asked some questions as to why it is that you said that you didn't give advice but you referred – but there was reference in the judgment to advice being given. You drew a distinction, in your mind, when you answered that question and you articulated that to my friend. Are you able to explain what you mean by the difference in your answers?---I was distinguishing between giving advice to the company, as opposed to giving or making general comments about the insolvency process and the options available to a director, different from giving financial advice or otherwise.

25 Would it be correct to say the distinction is - - -

MR KULEVSKI: I object.

30 MR STEVENS: Is it – is the nature and – sorry. Is it the extent of the advice that you were giving or is it the nature of the advice?---The nature.

35 The differentiation?---Well, both. I interpreted the question to say that I was giving any – any number of – or making any number of comments or providing advice specific to the circumstances.

Okay. Now, did you sit through the evidence that was given in the New Bounty case?---No.

40 So would it be fair to say that you're unable to comment as to what evidence was given to his Honour in respect of Mr Bart's motivation in entering into the transactions that eventually shaped the DOCA?---Yes.

45 Were you involved in the sale process that ultimately took place between the Bruck entity that is being represented by my friend and the eventual purchaser?---No.

No further questions.

THE REGISTRAR: All right. Thank you.

5 Mr Nicodemou, I'm going to adjourn your summons generally, which means it has a life of six months. So in that time, at a mutually convenient time, if necessary, you may need to come back and resume your examination?---Okay.

But otherwise, you're free to go now?---Thank you.

10 MR KULEVSKI: Registrar, if I might just, for Mr Nicodemou's benefit - - -

THE REGISTRAR: Sorry. You had something arising out of that - - -

MR KULEVSKI: We've got a date next Tuesday, so we were - - -

15 THE REGISTRAR: I see. Is that when we're back for this ongoing - - -

MR KULEVSKI: We've got every Tuesday now for the next - - -

20 THE REGISTRAR: Yes. I remember now.

MR KULEVSKI: - - - four weeks or - - -

THE REGISTRAR: So is that when Mr Nicodemou should be coming back?

25 MR KULEVSKI: Yes. Just for an hour or hour and a half, if that's possible, Mr Nicodemou?---Yes. What - what time, or has that been - - -

10.15.

30 THE REGISTRAR: 10.15. So I will adjourn your summons to 10.15 on next Tuesday, which is 9 February 2016. So you will be required back then, Mr Nicodemou?---Okay.

35 MR KULEVSKI: And the other summons adjourned generally.

THE REGISTRAR: Yes. Mr Tsiakis' summons is adjourned generally. So you're free to go now?---Thank you.

40 Thank you.

<THE WITNESS WITHDREW

[4.21 pm]

45 THE REGISTRAR: In relation to all that material that Mr Nicodemou looked at, I will - - -

MR KULEVSKI: My solicitors will take care of that if that's convenient for you.

5 THE REGISTRAR: Yes. All right. My court officer will, after I've gone off the bench, arrange for that to be returned to your instructing solicitors, Mr Kulevski. So on this matter of the Application in the Matter of Bruck Textile Technologies Proprietary Limited (In Liquidation), the examination will continue on 9 February 2016 at 10.15 am before me here in this court complex. Is there anything that needs to be marked, Mr Kulevski, today?

10 MR KULEVSKI: No.

THE REGISTRAR: I think you just relied on the previously marked documents; is that right?

15 MR KULEVSKI: Yes, may it please, Registrar, except – I apologise – the scope of engagement letter and the final report should be marked 1 and 2.

THE REGISTRAR: Where is that material? Is that - - -

20 MR KULEVSKI: Registrar, the three folders that were being dealt with today I am instructed have not been marked at all.

THE REGISTRAR:

25 MR KULEVSKI: So what's being presented is three folders of documents produced by BRI.

THE REGISTRAR: Yes.

30 MR KULEVSKI: And more legible copies of the scope of engagement letter and the final report of Mr Nicodemou – of BRI Ferrier.

THE REGISTRAR: So there was a scope of – sorry, what was the one after the three folders,?

35 MR KULEVSKI: That's one document, sorry. The scope – the report is attached to the scope of engagement letter, I am instructed. So the fine – it can just simply be called the final report.

40 MR: The final report has four annexures, one of which is the engagement.

MR KULEVSKI: Yes. That has been put on the front as well.

45 THE REGISTRAR: I will just have those three folders retrieved for me. I will ask my assistant. On the last occasion, Mr Kulevski, there were two folders which became 1A and 1B.

MR KULEVSKI: Yes, Registrar.

THE REGISTRAR: Those were from Mr Catanzariti.

5 MR KULEVSKI: Well, they were from DLA Piper, so from both Mr Catanzariti and - - -

THE REGISTRAR: Yes. Okay. So in relation to the bundles today - - -

10 MR KULEVSKI: They could be 2A, 2B and 2C.

THE REGISTRAR: All right. They can be 2A, 2B, 2C.

MR KULEVSKI: And then the document.

15

THE REGISTRAR: Is that that small bundle of documents that's still there?

MR KULEVSKI: Yes. So I'm instructed that's one document, so that could be 2B, with respect, Registrar.

20

MS: What about this?

MR KULEVSKI: That's the judgment of Sackville J.

25

THE REGISTRAR: Does that need to be marked or not?

MR KULEVSKI: No, no, it's a judgment

30

THE REGISTRAR: All right. Well, that can be returned to him, and – so the final report which is under cover of an email from a Malcolm Kelly, that can become MFI 3.

MFI #3 FINAL REPORT IN EMAIL FROM MALCOLM KELLY

35

THE REGISTRAR: I'm not sure if that material might be now mixed up from the examinee looking at it and pieces, but that's the first page I have.

40

MR KULEVSKI: We will sort that out for you, Registrar.

THE REGISTRAR: In relation to the three folders they will become – so volume 2 will be 2B. So those documents are marked now, accordingly, Mr Kulevski. My assistant will formally mark them after I have gone and you just need to retrieve – I will return them to the instructing solicitor so you can look after the material until next Tuesday.

45

MR KULEVSKI: May it please, Registrar.

THE REGISTRAR: I will just speak to my The examination is adjourned to next Tuesday.

5

MR: Yes.

THE REGISTRAR: All right. I will adjourn.

10

MATTER ADJOURNED at 4.25 pm UNTIL TUESDAY, 9 FEBRUARY 2016

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