FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Bilkurra Investments Pty Ltd [2016] FCA 371

File number:	VID 924 of 2015
Judge:	**BEACH J**
Date of judgment:	15 April 2016
Catchwords:	**CORPORATIONS** – promotion of land banking schemes – involvement of corporate entities participating therein – ASIC investigation of transactions – need for investigation by liquidator – potential voidable transactions – potential contraventions of ss 180 to 184, 286, 601ED, 911A and 1041E to 1041H of the *Corporations Act 2001* (Cth) – whether entities should be wound up – just and equitable ground – insolvency – ss 459A, 459P, 461(1)(k) and 464 of the *Corporations Act 2001* (Cth) – whether winding up application should be adjourned – appointment of provisional liquidator as an alternative – winding up orders made
Legislation:	*Corporations Act 2001* (Cth) ss 9, 51C, 95A, 286, 459A, 459C, 459D, 459P, 461(1)(k), 462, 464, 588FE, 1305, Pt 5.7B
Cases cited:	*Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189 *Australian Securities and Investments Commission v Midland Hwy Pty Ltd (administrators appointed); in the matter of Midland Hwy Pty Ltd (administrators appointed)* [2015] FCA 1360 *In the Matter of Statewide Developments Pty Ltd* [2011] NSWSC 1537 *Noxequin Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWSC 87 *Re National Computers Systems & Services Ltd* (1991) 6 ACSR 133 *Re Nuhan Ltd* (1980) 5 ACLR 69
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Counsel for the Intervener:	Mr P Fary
Solicitor for the Intervener:	Stacks Law Firm
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ORDERS

VID 924 of 2015

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**BILKURRA INVESTMENTS PTY LTD (ACN 097 182 182)** First Defendant
	FOSCARI HOLDINGS PTY LTD (ACN 158 434 578) Second Defendant
	PROJECT MANAGEMENT (AUST) PTY LTD (ACN 151 902 126) Third Defendant
	MICHAEL STEFAN GROCHOWSKI Fourth Defendant
	TPC (VIC) PTY LTD (ACN 610 523 138) Intervener
JUDGE:	**BEACH J**
DATE OF ORDER:	**15 APRIL 2016**

THE COURT ORDERS THAT:

1. Pursuant to s 459P of the *Corporations Act 2001* (Cth) (Act), the plaintiff be granted leave to apply for the first and second defendants to be wound up in insolvency.
2. The first and second defendants be wound up in insolvency and pursuant to s 461(1)(k) of the Act on the ground that it is just and equitable that the defendants be wound up.
3. Nicholas Martin and Craig Crosbie be appointed as joint and several liquidators of the first and second defendants.
4. The plaintiff's costs of and incidental to its application be costs in the winding up of the first and second defendants.
5. Paragraphs 1 to 4 of the order made on 21 December 2015 be discharged.

6. Subject to further order, pursuant to s 37AF(1) of the *Federal Court of Australia Act 1976* (Cth) (FCA) the following evidence is to remain confidential on the Court file and is not to be disclosed to or inspected by any person other than the parties to this proceeding:

   (a) The following parts of the affidavit of Andrew Price sworn on 15 December 2015: tabs 18, 19, 21, 26, 27, 28 and 29 to exhibit "AJP-1";

   (b) The affidavit of Naomi Johnston sworn on 11 April 2016 and exhibit "NMJ-1".

7. The order in paragraph 6 is necessary to prevent prejudice to the proper administration of justice as stipulated in s 37AG(1)(a) of the FCA.

8. The liquidators have access to the documents held by the plaintiff in relation to the first and second defendants.

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

REASONS FOR JUDGMENT

BEACH J:

1 ASIC seeks orders for the winding up of the first defendant (Bilkurra) and the second defendant (Foscari) on the just and equitable ground pursuant to ss 461(1)(k) and 464 of the *Corporations Act 2001* (Cth) (the Act), alternatively in insolvency pursuant to leave granted under s 459P and under s 459A of the Act.

2 ASIC has conducted an investigation involving, *inter alia*, Bilkurra and Foscari regarding suspected contraventions of ss 180 to 184, 286, 601ED(5), 911A and 1041E to 1041H of the Act, ss 12DA, 12DB, 12DC and 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) and ss 81, 92, 176 and 179 of the *Crimes Act 1958* (Vic). It says that its investigation has revealed that Bilkurra, Foscari, the third defendant (PMA), the fourth defendant (Grochowski), Midland Hwy Pty Ltd (in liq) (Midland) and Brookfield Riverside Pty Ltd (Brookfield) have been involved in such suspected contraventions in relation to three land banking schemes: the Hermitage Bendigo scheme, the Veneziane scheme and the Foscari scheme. The Veneziane scheme can be put to one side for present purposes.

3 Each scheme has operated in a similar way. Investors have purchased an option to acquire a lot of land or purchased a lot of land on an unregistered plan of subdivision. Investors have been promised high returns if the land, being rural and undeveloped, was rezoned and redeveloped.

4 The Hermitage Bendigo scheme involves land owned by Bilkurra. Investors paid approximately $24 million to purchase options in the scheme. Midland (who entered into a contract to purchase but did not end up purchasing the Bilkurra land) was the counterparty to the option deeds. Midland is now in liquidation and has lodged a caveat over the Bilkurra land.

5 The Foscari scheme involves land owned by Foscari. Investors paid up to $2.9 million (plus GST) to purchase options in the scheme. Foscari was the counterparty to the option deeds.

6 The schemes targeted unsophisticated retail investors. They appear likely to have been induced to enter into the schemes by misleading representations or misleading or deceptive conduct on the part of the promoters, some of whom arguably acted as agents for the said

corporate entities including PMA, Bilkurra and Foscari. Neither scheme is close to completion.

7 The option deeds provided that once an investor paid the option fee, such fee became the absolute property of the grantor and the grantor was free to direct and use the option fee as it saw fit and for any purpose whatsoever. Despite the breadth of such clauses, there is some evidence that potential investors were told that the option fees would be used for the purposes of the schemes.

8 Ian Stephens (Stephens) is the current sole director of Foscari and Bilkurra. But as the *sole* director, he counterintuitively has eschewed any suggestion that he was acting as an executive director. Ben Skinner (Skinner) is the former director of Foscari and Bilkurra. He is a partner of Evans Ellis Lawyers (EEL). Grochowski has had day-to-day control of Foscari and Bilkurra and the schemes. He is also a director of PMA. Grochowski in my view has acted and continues to act as a shadow director of Bilkurra and Foscari.

9 The shares in Foscari and Bilkurra are owned through a web of corporate and trust structures involving or controlled by the same people.

10 I am satisfied that I should make the winding up orders sought by ASIC on both grounds. It is convenient to summarise at this point my principal conclusions.

11 First, in my view both Foscari and Bilkurra are cash flow insolvent. Further, Foscari clearly displays balance sheet insolvency; Bilkurra less so.

12 Second, I have little confidence in the management of either company. Stephens is not performing an executive function and the management thereof is still being carried out by the shadow director, Grochowski. Indeed, the connotative dimensions to the related adjectival form of that attribute are not inapposite to describe the broader influence of that individual. Grochowski is a party to this proceeding but chose not to give evidence. Relevantly, only Stephens gave evidence for the defendants and was cross-examined. I do not doubt Stephens' bona fides as to the performance of his accounting role and his optimism for the success of the projects. Nevertheless, the fact remains that even today he has allowed others to exercise the real control of Bilkurra and Foscari.

13 Third, the financial records of Bilkurra and Foscari are in an unsatisfactory state. Indeed, Foscari has not lodged a tax return since incorporation. Bilkurra has not lodged a tax return since 2013. Generally there have been substantial breaches of s 286 of the Act. Further, the

dollied up balance sheets and profit and loss statements recently prepared by Stephens have little probative value. There are clear errors. The liabilities have been understated. Further, liabilities have been wrongly re-categorised as equity. Further, the values of assets have been significantly overstated, both as to the value of the Bilkurra land and the Foscari land and related party loans shown as assets. Further, the foundation or justification for many of the entries appears to be anecdotal and based upon ad hoc instructions given by individuals who appear to have been involved in these schemes that have siphoned off $24 million or more of retail investors' funds.

14 Fourth, and generally speaking, both Bilkurra and Foscari have been knowing participants in schemes that have facilitated the misappropriation of investors' funds.

15 Relatedly, the orders that I propose to make are necessary in the public interest and to protect investors. There is the chance for some potential recovery of the moneys presently lost at the behest of and after a full investigation by a liquidator.

16 I appreciate that investors (i.e. the optionholders) oppose liquidation. They would rather that a further opportunity be given to allow potential deeds of company arrangement to be put in place with a white knight taking over the developments and injecting value back into their investments. But in the events that have transpired, this is little more than wishful thinking. But even if that prospect had a sliver of reality, it does not outweigh the above concerns.

17 Relatedly, I gave TPC (VIC) Pty Ltd (TPC) leave to intervene in this proceeding. It put itself forward as an entity that could take the developments forward. It promised much, but delivered little. Its proposal has now fallen over. Accordingly, I have revoked its leave.

18 Fifth, the defendants sought to put a finessing position to avoid liquidation. Mr Farid Assaf, counsel for the defendants, put the superficially alluring submission that I should adjourn the application over to allow a voluntary administrator to be appointed, alternatively that I should only appoint a provisional liquidator. I have declined his invitation. Let me turn to the facts.

FACTUAL BACKGROUND

(a) The Hermitage Bendigo scheme

19 The Hermitage Bendigo scheme was previously known as Acacia Banks. It is operated by Bilkurra.

20 The scheme has the following features. The scheme involves land located at lots 1 and 2 Midland Highway, Bagshot, Victoria (Volume 10270 Folio 178, Lot 1 on TP 005002H and Volume 10270 Folio 179, Lot 2 on TP 005002H) (the Bilkurra land). Bilkurra is the registered proprietor of the Bilkurra land. A report prepared by the administrators (now liquidators) of Midland (administrators' report) records the following:

(a) On 18 October 2011, Bilkurra agreed to sell the Bilkurra land to PMA.

(b) On 10 November 2011, PMA nominated Midland as the purchaser of the land.

(c) Between late 2011 and 19 June 2012, Midland paid $1.4 million to Bilkurra as part payment for the Bilkurra land.

(d) The sale contract between Midland and Bilkurra has been cancelled. As part of that transaction, Midland agreed to pay a cancellation fee of $600,000 to Bilkurra.

(e) Midland has never been the owner of the Bilkurra land.

(f) Midland has not recovered any part of the $1.4 million or any part of the cancellation fee.

21 On 11 September 2015, Midland lodged a caveat over the Bilkurra land.

22 Between December 2011 to December 2013, investors participated in the scheme in the following way:

(a) First, approximately 408 retail investors entered into option deeds with Midland in order to participate and invest in Hermitage Bendigo. The option deeds gave investors the right to purchase a lot of land on an unregistered plan of subdivision subject to certain conditions. Investors paid between $35,000 and $50,000 for each option. Midland received approximately $24 million from such investors. Midland entered into the option deeds in circumstances where it was not the registered proprietor of the Bilkurra land and, following the cancellation of the sale contract referred to above, has been unable to satisfy its obligations under those deeds.

(b) Second, approximately 85 investors entered into contracts to buy lots in the unregistered plan of subdivision. Settlement was due 60 days after the vendor's legal practitioner notified the purchaser's legal practitioner in writing of the registration of a plan of subdivision. Investors paid a 10% deposit.

Based on the administrators' report, it appears that the deposits were paid into the trust account of EEL. Skinner at all relevant times has been a partner of EEL.

23 On 9 September 2014 the City of Greater Bendigo approved a development plan for Hermitage Bendigo, but no separate permit application had as at November 2015 been made for any stage of the development.

(b) The Foscari scheme

24 The Foscari scheme is operated by Foscari. The Foscari scheme has the following features. The scheme involves land located at 99 Palmers Road, Truganina, Victoria (Volume 09336 Folio 613, Lot 8 on PS 130043) (the Foscari land). On 29 March 2012, the Foscari land was purchased from the Chilean Club of Victoria Inc for $3.3 million. Foscari is the registered proprietor of the Foscari land.

25 From August 2013 until late 2014, investors participated in the scheme in the following way:

(a) First, approximately 41 retail investors entered into option deeds with Foscari in order to participate and invest in Foscari. The option deeds gave investors the right to purchase a lot of land on an unregistered plan of subdivision subject to certain conditions. Investors paid between $35,000 and $50,000 for the option. Foscari received approximately $858,000 from such investors.

(b) Second, approximately 108 investors entered into contracts of sale with Foscari to buy a lot in the unregistered plan of subdivision. Settlement was due 60 days after the vendor's legal practitioner notified the purchaser's legal practitioner in writing of the registration of a plan of subdivision. Investors paid a 10% deposit. Approximately $1.5 million was deposited into EEL's trust account under such contracts.

26 In relation to the development approval phase:

(a) there are three stages for development approval;

(b) as to the first stage, Foscari has obtained a planning permit but has not obtained endorsed plans;

(c) Foscari had not satisfied the second and third stages for development approval.

(c) The Companies

27 Prior to 1 October 2014, Skinner was the sole director of each of Bilkurra and Foscari. Since then, Stephens has been the sole director of the companies. But on his own evidence, he has not performed any executive director role.

28 Skinner was the director of the companies when the option deeds and sale contracts were entered into. He received $4,000 to $5,000 per entity per month to act as a director of those companies. Skinner is a current director of Evans Ellis Management Pty Ltd (EEM). He did not give evidence before me. He is presently one of the individuals the subject of ASIC's investigation.

29 The shares in Bilkurra are held by Greater Bendigo Consolidated Pty Ltd. The shares in Greater Bendigo have been held by EEM and Skinner. The shares in Foscari are held by EEM. There is a lack of transparency as to EEM's non-beneficial holdings as trustee of various discretionary trusts.

(d) Grochowski and PMA

30 Grochowski is the sole shareholder and director of PMA.

31 It appears that Grochowski is the real controller of the day-to-day business and affairs of Bilkurra and Foscari (including their bank accounts) and is a de facto or shadow director of those companies. Unsatisfactorily, the bank accounts for those companies have been and still are in the name of and controlled by PMA.

32 Grochowski is also a former director of Sovereign MF Ltd, the responsible entity of two managed investment schemes. On 27 April 2012, Grochowski was banned by ASIC from providing financial services for four years in relation to his conduct as a director and responsible officer of Sovereign. Undoubtedly that banning order does not prevent and has not prevented Grochowski from acting as a director or shadow director in relation to Bilkurra, Foscari or PMA, but it hardly gives one confidence as to his competence or probity and consequently the competence or probity of the management and those in control of Foscari and Bilkurra.

33 In the course of its investigation, ASIC has been provided with four unsigned and undated agreements titled "Project Management Agreement" including a PMA agreement between PMA and Bilkurra and a PMA agreement between PMA and Foscari. Each agreement contains substantially similar terms.

34 In each agreement, PMA appears to have been incorrectly described as the "principal" rather than the "project manager".

35 PMA was appointed as agent (cl 1.2(a) and 6) and through various clauses appears to have been given complete power to operate the schemes on behalf of the companies (cl 1.2(b), 3 and 7). In exchange, the Principal (the companies) had to pay fees to PMA in accordance with clause 5 and the first schedule.

36 During Stephens' s 19 examination, Stephens said that:

(a) the PMA agreements gave PMA "total discretion as far as developing those pieces of land";

(b) he was paid by PMA for his work as the director of Bilkurra and Foscari;

(c) in respect of corporate decisions, he discussed "everything with Michael and Michael discusse[d] everything of a corporate nature with me".

37 During Grochowski's s 19 examination, Grochowski said:

(a) he was currently working on the Foscari, Hermitage Bendigo and Veneziane schemes;

(b) he was a signatory to approximately ten bank accounts operated by PMA that related to each scheme.

(e) Promotion of the schemes

38 Global 1 Training Pty Ltd, Market First Group Pty Ltd, Market First Group (Australia) Pty Ltd (now called Asia Pacific Real Estate Pty Ltd), Market First Property Consulting Pty Ltd (collectively the Market First Group) and Property Direct (International) Pty Ltd (Property Direct) were involved in the promotion and sale of options and contracts of sale in the Hermitage Bendigo and Foscari schemes.

39 The Foscari scheme was promoted to potential investors by the Market First Group.

40 During the period January 2013 to November 2013, Endre Botfa was employed by the Market First Group to sell and promote the Foscari and Veneziane schemes.

41 During Botfa's s 19 examination, Botfa said the following:

(a) He met Grochowski at a training session in January 2013 where Grochowski was introduced as being "on the development team";

(b) Grochowski attended the Market First Group's offices every second month;

(c) The Market First Group would target "[a]spirational, unsophisticated Mum and Dads … they were people who'd lost money, people who had little super, maybe small business people who'd gone broke, that type of thing, and they were looking … for a quick fix. They definitely targeted the people. There's no question";

(d) Potential investors would be contacted by a solicitor organised by the Market First Group to provide legal advice about the proposed investment;

(e) The legal advice was initially provided by Colin Adno and then by Adam Zuchowski of Slater & Gordon;

(f) Julia Feldman (Botfa's manager at the Market First Group) told Botfa that if "someone at the seminar wanted to use their own solicitor … they were to be told 'We will put you on a waiting list' and they were not to be processed".

42 I note that on 10 February 2014, Slater & Gordon wrote to investors in the Foscari scheme and the Veneziane scheme to whom it had provided legal advice. The email contained the following text:

> We refer to our recent correspondence with you concerning your investment in the Veneziane or Foscari property developments.
>
> Our recent investigations into these developments have identified some matters in respect of which we recommend you obtain advice. Unfortunately, as a result of a potential conflict of interest, we are no longer able to act for you in relation to the contract or advise you in relation to any claims that you may have against Market First or the developers. The potential conflict of interest arises because you might seek advice concerning the adequacy of any advice that you received from Slater & Gordon concerning your investment.
>
> Notwithstanding the above, there are certain facts that we think you should be made aware of and which may be relevant to any legal rights or obligations that you may have:
>
> - It appears that Market First may have made some misleading or inaccurate pre-sale representations to some investors regarding the developments.
> - The purchase price paid for your lot is likely to significantly exceed its true value, based on the purchase price paid for properties in other developments in the area.

> • The solicitors acting for the developers will not disclose the identity of all of the individuals behind the developments. …
>
> We recommend that you obtain independent legal advice about your rights and obligations in relation to your investment and the options you might have in relation to it, including whether you should take steps to attempt to withdraw from the contract. We strongly recommend that you engage lawyers that have not been recommended by Market First, Clamenz Evans Ellis or the developers. …

43 In relation to the Hermitage Bendigo scheme, Property Direct provided marketing and promotional services for Midland. Examples of the marketing and promotional material used by Property Direct on behalf of Midland included the following misleading and deceptive statements:

(a) "a 'never seen before' property investment opportunity that enables you to secure prime land for a measly, tiny fraction of what others could ever negotiate";

(b) "a fool-proof plan to grab seven properties over twelve years worth potentially millions of dollars — without relying on the banks or unmanageable payments";

(c) "potential to make $1.25m in return in 10 years' time with the buy and hold strategy, or 125% return in two years if you want to sell out and cash it out early. Feel at ease, safe and secure with our no-risk exit strategy".

44 Before proceeding further I should note at this point several submissions made by the defendants. It is said that the entities or persons who made such misleading statements were not Foscari or Bilkurra. It is also said that investors have no claims against such corporate entities. I disagree. First, in relation to the Foscari scheme there is a good argument that the promoters were acting as agent for Foscari. More generally, in my view Bilkurra and Foscari are likely to have knowingly assisted in the contraventions and breaches of fiduciary duty of the promoters and other entities *vis-à-vis* third party investors such as to be liable to the investors. Further, Bilkurra and Foscari may be knowing recipients of some or a substantial part of investors' funds procured in breach of fiduciary duty. Moreover, another way to look at the matter in relation to the Hermitage Bendigo scheme is that the investors may be able to equitably trace via Midland or take the benefit of Midland's equitable interest in the Bilkurra land. I have discussed this in *Australian Securities and Investments Commission v Midland Hwy Pty Ltd (admins apptd)* [2015] FCA 1360 (*ASIC v Midland*) at [92]. I do not need to

elaborate further. It cannot be said that investors have no reasonably arguable claims against Foscari or Bilkurra, whether in terms of damages or a remedial constructive trust or the like. Separately and for completeness, on 21 December 2015 the parties eschewed the suggestion of any recusal application arising from *ASIC v Midland*.

45 Further, the defendants have pointed out that each of the options deeds provided that once the option fee was paid by the grantee, the option fee became the absolute property of the grantor and that the grantor was free to direct and use the option fee as it saw fit and for any purpose whatsoever (Hermitage Bendigo option deed, cl 5.2; Foscari option deed, cl 4.2).

46 During his s 19 examination, Grochowski said that he had received legal advice confirming that Midland was able to use the option fees received by Midland for any purpose. Apparently:

(a) option fees were paid into a bank account operated by EEL;

(b) the option fees would then be transferred from an EEL account at the instruction of Grochowski to a bank account held by PMA;

(c) the fees were then spent how he saw fit.

47 But clearly in my view, the overriding at least implicit constraint was the fees had to be applied bona fide and for the proper purposes of the schemes. At all events, some $24 million or more seems to have not properly been accounted for to the detriment of investors.

48 More generally, the relevant companies have never held Australian Financial Services Licences and have not been otherwise authorised to deal in financial products. Further, no disclosure statements were produced in respect of the Hermitage Bendigo scheme or the Foscari scheme. The schemes have not been registered with ASIC and are not being operated by a holder of an Australian Financial Services Licence.

49 The defendants have contended that there was nothing wrong with this state of affairs. They have asserted that no contravention of Chapter 5C of the Act has been established. Accordingly they have asserted that such a factor was irrelevant to the present winding up applications. I agree that this factor is not of central importance or an element of direct relevance to the just and equitable ground. But it is not an irrelevant contextual matter. In part, it is the absence of the Chapter 5C protections that provided the environment conducive to the shifting money flows and deceptive promotional activities that have occurred.

TPC (VIC) PTY LTD

50 On 4 March 2016, I gave TPC leave to intervene in this proceeding. At the commencement of the hearing on 13 April 2016, I made orders revoking such leave and excused TPC from further participating in the proceeding. I also made orders that ASIC and TPC file short submissions in respect of any application by ASIC for costs against TPC, which application I will deal with on the papers. Let me explain this further.

51 TPC is a special purpose vehicle that was set up for the purpose of acquiring the shares of Bilkurra and Foscari so that they and TPC could complete both developments. TPC has acquired the mortgages of Laycon Investments Pty Ltd and Bourke & Queen Mortgages Pty Ltd over the relevant land. TPC is in the process of acquiring and has "paid for" the mortgage held by NWC Finance Pty Ltd (NWC) over the relevant land. An associated company of TPC has entered into a contract with Adelaide Properties Pty Ltd and Lezak Nominees Pty Ltd to acquire the mortgage granted by Foscari.

52 TPC originally opposed the winding up proceedings and advanced the following interests in support of such opposition:

(a) as mortgagee under its mortgages;

(b) as an entity with a commercial interest in the relevant land and the developments;

(c) as an entity intending to acquire the shares; and

(d) as an entity who was in the process of acquiring the NWC mortgage.

53 By letter from Stacks Law Firm, solicitors for TPC, to Brian Ward and Partners, the then solicitors for Bilkurra and Foscari dated 4 February 2016, TPC offered to purchase the relevant shares. But that proposal is no longer being pursued. Let me make a number of observations. First, this proposal was ephemeral. Second, I am not satisfied in any event that TPC had the wherewithal to complete the developments. Third, I am quite unclear as to the identity or financial strength of TPC's backers. I make these observations at this point because one of the suggestions made by the defendants was that I should adjourn the present application to allow a voluntary administrator to be appointed to then somehow permit TPC to put a later DOCA to creditors that might then save these developments. I have no confidence that any such steps, particularly the latter aspects, are realistic. In any event, even if a liquidator was appointed, later conversion to voluntary administration and potentially a

DOCA could still occur if TPC put anything meaningful on the table. And indeed, if TPC were genuine, they could purchase the relevant land directly and deal directly with the optionholders, leaving Bilkurra and Foscari as essentially shell entities. In other words their *legitimate* commercial interests in pursuit of saving the developments do not necessarily require the route of voluntary administration or DOCAs for Bilkurra and Foscari. I must say that I have a broader concern with the position of TPC. They have taken over mortgages of the relevant land that contain very high interest rates; one mortgage is at the "standard" rate of 24% per annum with the default rate around 60% per annum. It is not hard to see how in its capacity as mortgagee and with any later potential receivership of the entities, any profit from the developments could be effectively siphoned off through the usurious interest charges to the diminution of any otherwise profit, and in a manner ranking ahead of the optionholders. Those matters have not been explored and I will say nothing further.

LEGAL PRINCIPLES

(a) Just and equitable ground

54 There is power to wind up a company on just and equitable grounds (s 461(1)(k)). ASIC has standing to seek such an order (ss 462(2) and 464).

55 Generally speaking, a company may be wound up where there is a justified lack of confidence in the conduct and management of the company's affairs such as to give rise to a real risk to the public interest that warrants protection (see *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 2)* (2013) 93 ACSR 189 at [20] per Gordon J).

56 In relation to the exercise of this power, there are three factors that are of central significance:

(a) First, is there a justifiable lack of confidence in the conduct and management of the relevant company or its affairs?

(b) Second, is there a real risk to the public or the public interest that warrants protection by such an order and the incidents flowing from liquidation?

(c) Third, is the relevant company solvent? A court may be reluctant to wind up a solvent company.

57 In *ASIC v ActiveSuper Pty Ltd (No 2)*, her Honour at [21] to [24] elaborated on these three themes in the following terms:

> In relation to the first, a lack of confidence may arise where, "after examining the entire conduct of the affairs of the company" the Court cannot have confidence in "the propensity of the controllers to comply with obligations, including the keeping of books, records and documents, and looking after the affairs of the company" …
>
> …
>
> In relation to the second, a risk to the public interest may take several forms. For example, a winding-up order may be necessary to ensure investor protection or where a company has not carried on its business candidly and in a straightforward manner with the public … Alternatively, it might be justified in order to prevent and condemn repeated breaches of the law …
>
> In relation to the third, it has been said that "a stronger case might be required where the company was prosperous, or at least solvent" … Solvency, however, is not a bar to the appointment of a liquidator on the just and equitable ground, particularly where there have been serious and ongoing breaches of the Act …

58 Given one of the defendants' arguments, let me raise one issue at this point on the solvency question. If a company is solvent, that may point against a winding up on the just and equitable ground, but it is not a bar. Conversely, if there is good reason to believe that a company is either cash flow insolvent or balance sheet insolvent, whether or not the formal elements of s 459A have been satisfied, I see no good reason why such circumstances cannot be taken into account under the just and equitable ground in any event as one of the factors to consider. In other words, the two grounds are not mutually exclusive in the sense, as submitted by the defendants, that no issue of *insolvency* can be considered under the just and equitable ground.

(b) Insolvency ground

59 With leave under s 459P(2)(d), ASIC may apply under s 459P(1)(f) for an order that an insolvent company be wound up under s 459A. A person is solvent if the person is able to pay all the person's debts as and when they become due and payable (s 95A(1)). A person who is not solvent is insolvent (s 95A(2)). A cash flow test is adopted (*Noxequin Pty Ltd v Deputy Commissioner of Taxation* [2007] NSWSC 87 at [14] per Barrett J). Contingent and prospective liabilities may be taken into account (s 459D). Further, a court will have regard to commercial realities. Accordingly, unless there is evidence to the contrary, it is appropriate to proceed on the basis that a contract debt is payable at the time stipulated for payment in the contract.

60 Further, the Court must presume that a company is insolvent if, during or after the three months ending on the day when the application under ss 459P, 462 or 464 was made, a receiver was appointed (s 459C(1) and (2)(c)). To discharge the presumption, the company must prove it is solvent (s 459C(3)). This may be a challenging forensic exercise for a company. In *In the Matter of Statewide Developments Pty Ltd* [2011] NSWSC 1537, Barrett J said at [56] and [57]:

> The task faced by a company seeking to prove its solvency was described and discussed by the Court of Appeal (Santow JA; Meagher JA and Handley JA concurring) in *Expile Pty Ltd v Jabb's Excavations Pty Ltd* [2003] NSWCA 163; (2003) 45 ACSR 711. The central and vital message (at [16]) was that "proper verification of assets and liabilities is critical to rebut the presumption of insolvency".
>
> The Court of Appeal expressly approved a number of propositions set out in the judgment of Weinberg J in *Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd* [1999] FCA 728, including the following:
>
> 1. In order to discharge the onus of proving solvency, the company should ordinarily present the court with the "fullest and best" evidence of its financial position.
>
> 2. Unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative of solvency; nor are bald assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared.
>
> 3. There is a distinction between solvency and a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company's assets, and its ability to convert those assets into cash within a relatively short time, at least to the extent of meeting all its debts as and when they fall due, must be considered in determining solvency.
>
> 4. The adoption of a cash flow test for solvency does not mean that the extent of the company's assets is irrelevant to the inquiry. The credit resources available to the company must also be taken into account.
>
> 5. The question of solvency must be assessed at the date of the hearing. However, this does not mean that future events are to be ignored.

61 Now audited accounts may not always be necessary to rebut the presumption of insolvency. But they are more likely to be required where it is apparent that the company's financial position is questionable and its financial records have not been properly kept. In the present case I do not have the benefit of any audited accounts.

APPLICATION OF PRINCIPLES

(a) Insolvency of Bilkurra

62 In my view, Bilkurra is insolvent in terms of a cash flow test. I also doubt its balance sheet solvency.

63 Bilkurra has no source of income and it has significant interest expenses which it cannot meet.

64 The defendants have submitted that as at June 2015, Bilkurra's assets exceeded its liabilities by about $10.7 million. But that submission assumes the value of the Bilkurra land was $14.6 million as at 30 June 2015, which is highly unlikely. It also assumes that the 2015 financial statements prepared by Stephens are accurate, which in my view they were not. Further, the defendants' submission says nothing about the *current* financial position of Bilkurra. I have no up to date information on that question.

65 The defendants submit that TPC has taken assignments of securities over the assets of Bilkurra. But that merely changes the identity of the real creditor but does not extinguish any liability.

66 The defendants submit that Bilkurra is in a position to borrow funds on "deferred payment" terms. But there is no probative evidence to support that submission. The defendants at one stage pointed to the proposed syndicated joint venture agreement and the TPC restructure. But neither proposal has eventuated or enabled Bilkurra to borrow funds on "deferred payment" terms.

67 In my view, Bilkurra is insolvent on a cash flow test at the least and should be wound up under s 459A; I will give ASIC leave accordingly under s 459P(2).

(b) Insolvency of Foscari

68 In my view, Foscari is insolvent. Moreover and in any event, there is a presumption that has arisen under s 459C(2)(c) that has not been discharged.

69 Foscari is the registered proprietor of land that was purchased for $3.3 million. The land has been valued at $13.4 to $14 million. Foscari has raised up to $2.9 million (plus GST) in option fees from investors. It has liabilities of about $9 million (plus interest which is accruing at exorbitant rates). It is in default under its primary facility agreement. Midland paid Foscari approximately $4.768 million and that payment may be a voidable transaction.

Further, if a right of refund is triggered in respect of the Foscari scheme, it is not apparent how, due to its financial position, Foscari could satisfy its obligations under the option deeds.

70 In any event, receivers were appointed to Foscari on 30 November 2015. There is therefore a presumption of insolvency. Foscari had to rebut the presumption by presenting to me the fullest and best evidence of its financial position. It has failed to do so. The defendants assert that a presumption under s 459C(2)(c) did not arise because the receivers were not appointed under a "circulating security interest". I pointed out to counsel during the course of argument sufficient to indicate my rejection of that argument and the reasons for my rejection. By reason of s 51C(b) and the definition of "floating charge" under s 9, then by operation of clauses 226 to 229 (including the definition of "Charged Assets") in the Memorandum of Common Provisions incorporated in the Deed of Charge given in favour of NWC Finance Pty Ltd, there was an appointment under a circulating security interest. But in any event, even absent reliance upon the statutory presumption, insolvency has been substantively proved in any event.

71 The defendants contend that Foscari is solvent. But that submission should be rejected. In short, Foscari's current liabilities exceed its current assets and it has significant interest expenses which it cannot meet.

72 The defendants submit that as at July 2015, the Foscari land was worth $13.4 million based upon a valuation commissioned by PMA. But that valuation is based upon a number of critical assumptions that have not been proved by the defendants and are incorrect. Moreover, there is more probative evidence before me regarding the value of the Foscari land. A valuation commissioned by NWC Finance Pty Ltd valued the Foscari land as at September 2015 at between $8 million (on a forced sale) and $9.5 million (market value). A realistic valuation shows a deficiency of assets as compared with liabilities.

73 Further, the defendants' submission also assumes that the 2015 financial statements prepared by Stephens are accurate. They are not. Further, the defendants' submission says nothing about the current financial position of Foscari.

74 There is little doubt that Foscari is insolvent on any measure, whether on a cash flow basis or a balance sheet basis. I will make orders for the necessary winding up of Foscari under s 459A and grant ASIC leave under s 459P(2).

(c) Just and equitable ground — application

75 In my view, the following factors justify winding up both Bilkurra and Foscari on the just and equitable ground.

76 First, I have little confidence in the management of these companies. Stephens does not have control or day-to-day management of the companies. Skinner had no meaningful involvement in the management of the companies when he was a director. Grochowski is and always has been responsible for all aspects of the day-to-day business of those companies.

77 Second, the financial records of these companies are in an unsatisfactory state to say the least. Let me elaborate on this aspect.

78 It is not possible to have confidence in the financial statements produced by Stephens for the following reasons.

79 The financial statements appear to contain various errors and in other respects are doubtful.

80 Further, financial statements for Foscari and Bilkurra only exist up to and for the period ending 30 June 2015. No statements exist that disclose the true financial position of the companies today. Since June 2015, the following transactions have occurred:

(a) Lezak Nominees and Adelaide Properties have lent a further $2.465 million to Bilkurra and Foscari (AP & LN Loan);

(b) Rotal Investments lent $500,000 to Foscari (Rotal Loan). Stephens is unsure if that loan is secured by a fifth mortgage over the Foscari land; and

(c) Laycon Investments Pty Ltd lent money to Bilkurra and Foscari.

81 Further, significant uncertainty exists as to whether amounts paid to Bilkurra and Foscari by Midland are properly recorded as equity rather than debt. Stephens has prepared the statements on the basis that those amounts, entered in the books as loans, should be characterised as equity investments. He did so based on "discussion[s] with Mr Grochowski that these advances were made as equity investments … at the direction of Mr Wood" (the now deceased former director of Midland) and because Wood was "a specified beneficiary in respect of the shares in Foscari". These transactions were not properly documented by Bilkurra and Foscari so as to make it clear what the transactions were. There should have been no need for any "discussion" with Grochowski to work out what transactions Bilkurra

and Foscari had entered into. Grochowski also had doubts about the true nature of the transactions. During his section 19 examination, Grochowski first said that the transfers were undocumented loans. But later he said that they were an opportunity for Midland to "invest" in the projects, suggesting that it was an equity transaction. At one stage, Grochowski referred to the payments as "equity loans".

82 Generally, I have no confidence in the accuracy or completeness of the books of Foscari and Bilkurra. Further, there have been clear breaches of s 286. Further, if s 1305 applies to the recently prepared accounts, I would give them little weight in any event as *prima facie* evidence.

83 Third, in my view Foscari and Bilkurra are insolvent.

84 Fourth, the bank accounts for Foscari and Bilkurra would appear to be in the name of PMA and controlled by Grochowski. Grochowski is a shadow director of Foscari and Bilkurra. On 27 April 2012, Grochowski was banned by ASIC from providing financial services for four years as I have said at [32] above.

85 Fifth, funds raised from investors who entered into option deeds were transferred (via EEL's trust account) to PMA and then transferred between Foscari, Bilkurra, Midland and Brookfield at the direction of Grochowski with apparent disregard to the obligations that may be owed to investors and without documents recording the purpose of the transactions.

86 Sixth, Stephens, Skinner and Grochowski have been unable to provide an adequate explanation for the transactions. Nor have they been able to produce adequate or accurate written financial records documenting those transactions.

87 Seventh, investors in the schemes may have invested in the land banking schemes on the basis of misleading representations, with the defendants involved in various contraventions of the Act.

88 Eighth, millions of dollars invested in the schemes appear to have been lost. Liquidation will allow a full investigation. It will also enable potential recovery proceedings that only a liquidator can pursue. Generally, it is in the best interests of the creditors, including investors, that the winding up orders be made. It is also in the public interest. Let me elaborate on some aspects of potential recoveries.

89 The evidence reveals the existence of a number of transactions that may be voidable under Part 5.7B, Division 2 of the Act. Only a liquidator can take advantage of the relevant provisions in that Part. The transactions which may be voidable include the following. I should note that the defendants said little of substance against the following analysis.

90 Between 5 July 2012 and 7 December 2015, PMA caused Foscari to pay $1,445,548.78 to PMA itself from account 193-879 447252255 (the Foscari bank account which was operated by PMA and in its name). Some or all of those payments may be uncommercial transactions or unreasonable director-related transactions and therefore voidable under ss 588FE(3), (4) and (6A) of the Act. Grochowski is a shadow director of Foscari.

91 Further, between 2 July 2012 and 25 July 2014 Foscari paid $115,930 to Skinner from the Foscari bank account. He appears to have done nothing or very little to earn more than $50,000 per year from Foscari. There are grounds to believe that Skinner was a director of Foscari in name only. He left, *inter alia*, the operation of the company's bank accounts up to Grochowski. Some or all of the payments made to Skinner may be uncommercial transactions or unreasonable director-related transactions and therefore voidable under ss 588FE(3), (4) and (6A) of the Act. ASIC does not currently have bank statements for Bilkurra, however, Skinner has acknowledged that he received $4,000 to $5,000 per month for each company of which he was a director. Payments made to Skinner by Bilkurra may also be voidable transactions.

92 Further, one or all of the following loans may be unfair loans and therefore voidable under s 588FE(6):

(a) On 5 August 2015, a further $2.465 million was advanced under the AP & LN Loan at an "agreed rate" of 4.25% per month compounding (equivalent to an annual rate of 64.78%) and a "discounted rate" of 3.25% per month compounding (equivalent to an annual rate of 46.78%).

(b) On 17 June 2015, NWC Finance Pty Ltd lent Foscari $2.12 million at a "lower rate" of 24% per annum and a "higher rate" of 60% per annum. On 24 June 2015, NWC and Foscari entered into a deed of variation of loan by which the principal amount loaned to Foscari was increased to $2.63 million.

(c) At some time in October 2015, it appears that Laycon Investments Pty Ltd entered into a loan agreement with Bilkurra and Foscari by which Bilkurra and Foscari borrowed $230,000 at an interest rate of 3% per month compounding

(42.58% p.a.). The principal sum was increased in November 2015, December 2015 and January 2016 and the balance (as at January 2016) was $577,857.07.

(d) On 5 July 2013, Bourke & Queen Mortgages Pty Ltd (a company owned by Henry Kaye and Julia Feldman) lent Foscari $1.37 million at an interest rate of 2% per month compounding (26.82% p.a.) and a default rate of 4% per month compounding (60.1% p.a.). The repayment date was 30 days from the date of the agreement or any later date at Bourke & Queen's discretion. If Bourke & Queen did not agree to an extension (and there is no evidence that it did), interest has presumably been payable at the default rate since August 2013 and continues to be charged at that rate.

(e) On 24 December 2013, pursuant to the AP & LN Loan, Foscari and Bilkurra borrowed $3.5 million at a "discounted rate" of 12.75% per annum and an "agreed rate" of 18.75% per annum.

93 The above loans warrant investigation if a liquidator is appointed.

94 Further, the 30 June 2015 profit and loss statement for Bilkurra records forgiven debts of $1,244,320.52 as an expense. No substantial explanation has been given for those transactions in terms of the benefit to Bilkurra flowing from that forgiveness. They may be uncommercial and require further investigation.

95 Further, the Bilkurra balance sheet includes as an asset a loan to Greater Bendigo Consolidated Pty Ltd for $5.4 million. The balance sheet produced to ASIC on 13 November 2015 did not include that asset. It may be an uncommercial transaction and in any event requires further investigation.

96 Further, there are a number of inter-company payments for which no legitimate explanation has been given. For example, between 5 April 2013 and 4 December 2015, the Foscari bank account had debits totalling $609,000 and credits totalling $1,875,000 as a result of payments between Foscari and Brookfield (a company involved in the Veneziane scheme). Some or all of those payments may be uncommercial transactions and therefore voidable under s 588FE of the Act. Similarly, between 5 April 2013 and 23 February 2016, the Foscari bank account had debits totalling $682,500 and credits totalling $26,794 as a result of payments between Foscari and Bilkurra.

97 The transactions identified by ASIC are not a comprehensive list of potentially voidable transactions. Upon further investigation by a liquidator, additional voidable transactions may be identified. But importantly also for present purposes, only a liquidator can bring an action under Part 5.7B, Division 2 of the Act.

98 Finally, the defendants contest the proposition that funds raised from investors who entered into option deeds were transferred between Foscari, Bilkurra, Midland and Brookfield with apparent disregard to the obligations owed to investors. The defendants dispute this on the following basis:

> This submission again highlights ASIC's failure to distinguish Bilkurra and Foscari from Midland, for the purpose of this proceeding: has there been any conduct by Bilkurra and Foscari which disregards the obligations in fact owed by them to investors? In that regard, it must be remembered that no option deeds were entered into by Bilkurra so no obligations are owed to option-holders by that company. Second, the option deed with Foscari (and Midland to the extent it might be relevant) expressly provided that those companies were free to use the option fee as they saw fit.

99 But that submission lacks commercial reality. As ASIC rightly submitted, Midland, Bilkurra and Foscari were controlled by Grochowski at the time the funds were raised and dissipated. The funds were raised on the basis of promises to develop land in a way that would benefit the investors. Further, even if there was no express contractual restriction on the use of funds paid by investors, that is beside the point. The funds raised from investors were wrongly dissipated through the payment *inter alia* of extraordinarily large fees to misleading spruikers and to Grochowski's company. That left such insufficient funds for the developments that the companies undertaking them were forced to borrow from lenders of last resort at usurious interest rates. I refer to what I have said at [44] to [47] above.

100 Further, as to the point that only Midland and Foscari, and not Bilkurra, entered into option deeds, Bilkurra at one stage had regarded itself as "bound" by the Midland options.

ADJOURNMENT OR PROVISIONAL LIQUIDATION?

101 The defendants have submitted as their first option that I should adjourn over the present application. I reject that submission.

102 The following principles are relevant to the question whether liquidation is appropriate rather than an adjournment to enable administrators to be appointed and for a possible DOCA to be implemented.

103 First, it is not necessary for the Court to be satisfied that a winding up would, on the balance of probabilities, produce greater dividends for creditors than in an administration and a possible DOCA. More generally, the loss of an ability to carry out an effective investigation by a liquidator into relevant transactions and the opportunity for returns may render a DOCA contrary to the creditors' interests: *ASIC v Midland* at [74].

104 Second, the public interest that may favour liquidation includes considerations of commercial morality and the interests of the public at large: *ASIC v Midland* at [68].

105 Relatedly, where there has been misconduct in the affairs of a company requiring investigation, it is detrimental to commercial morality to prevent such an investigation.

106 Third, a winding up will be beneficial from a public policy perspective where investigations and recovery proceedings are likely to be funded and the investigations could lead to at least some of the persons responsible for the company's demise being brought to account: *ASIC v Midland* at [68].

107 Fourth, the appropriate course in the case of a *prima facie* insolvent company is to order its winding up as it is against the public interest and commercial morality to allow a *prima facie* insolvent company back into the marketplace.

108 Fifth, and relatedly, an adjournment of proceedings (s 467(1)(b)) where insolvency is established is justified only in exceptional circumstances. It is in the public interest that an application to wind up a company in insolvency be determined without avoidable delay: *Re National Computers Systems & Services Ltd* (1991) 6 ACSR 133 at 135 per McLelland J. Further, under the Act an application for a company to be wound up in insolvency is to be determined within six months after the application is made: s 459R(1).

109 The defendants seek an adjournment of the winding up application to enable an administrator to consider a proposal similar to the TPC proposal. I will not grant that indulgence.

110 There is no proper material before the Court that would warrant such an adjournment. Moreover, each of the above principles apply to the facts in the present case.

111 Let me deal with some other matters dealing with the defendants' first option. First, the defendants have had more than adequate opportunity to appoint administrators. Second, the prospects of a DOCA which would be approved by creditors is remote. Third, if there was a DOCA, it would be liable to be terminated or set aside for the reasons set out in *ASIC*

v Midland in any event. Fourth, given the cash flow difficulties of Foscari and Midland, I am not satisfied (even with limited assistance from a third party) that the administrator would have access to sufficient funds in order to carry out the investigation required by Part 5.3A before discharging his obligations under s 439A. Fifth, as I say, in appropriate circumstances even if a liquidator was appointed, there can later be a conversion to a Part 5.3A process. In the circumstances, I refuse the adjournment. In doing so, I have taken into account the interests of the creditors, investors and the public interest. For completeness, I note that strictly the adjournment sought is only until 28 April 2016, but in substance its effect is designed to postpone liquidation indefinitely if various contingent events occur.

112 Further, the defendants have put forward as their second option the appointment at this stage only of a provisional liquidator. I see no advantage or justification in that course as compared with the winding up orders that ASIC seeks. Whatever a provisional liquidator can do relevant to the present context, so too can a liquidator.

THE SELECTION OF LIQUIDATORS

113 The defendants as their third option have challenged the appropriateness of the individuals identified by ASIC to be appointed liquidators given their position with Midland. The solicitors for the defendants wrote to ASIC on 12 April 2016 and said:

> Our client [sic] is concerned that PPB has a conflict (owing to their claimed debt owing from each of the companies) and has spoken to some insolvency practitioners who have no association with any of the parties or Mr Skinner.
>
> While our client is generally unconcerned with the identity of the insolvency practitioner, they do not wish to see an expensive firm appointed and do not wish to see the company (and creditors) burdened with the quantum of costs that PPB have incurred. Therefore, our client intends to see if they can negotiate a fixed fee for the administration period and will have some consent's [sic] to act ready for the hearing.

114 The mere existence of a possible conflict does not necessarily warrant different insolvency practitioners being appointed as liquidators of Bilkurra and Foscari. It is common for the same insolvency practitioners to be appointed to a group of related companies. As officers of the Court, such liquidators frequently consider issues of potential conflict and address them in a variety of practical ways including by applying to the Court for directions or in serious cases for the appointment of a special purpose liquidator. In the present case, it would be inefficient for different liquidators to be appointed to Bilkurra and Foscari.

115 In *Re Nuhan Ltd* (1980) 5 ACLR 69, one person was appointed as liquidator of three related companies despite the fact that conflicts were apparent between two of the companies. Needham J said at 76:

> I think that in the first instance I should appoint one liquidator only. My reason for this conclusion is that, as I have said, much investigation still needs to be done. It is, I think, preferable in the interest of economy that only one liquidator be appointed initially. The liquidator appointed is an officer of the court, in the sense that he is under the control of the court, and he will be aware that should the stage be reached that conflicts cannot fairly be resolved without the appointment of another liquidator he should approach the court to be relieved of one of the offices. …

116 Generally, even where there is some *potential* for conflict to arise, questions of advantages and efficiency may support the appointment of a person who is already liquidator of another related company.

117 To the extent that any conflict does arise, Mr Martin and Mr Crosbie can approach me for directions. If necessary an independent liquidator can be appointed to fulfil the role of a special purpose liquidator. That approach will minimise costs.

118 A key focus of the liquidators is likely to be investigating the role played by the shadowy figures and companies behind the schemes. That task is likely to be most efficiently discharged if Mr Martin and Mr Crosbie are appointed liquidators of Bilkurra and Foscari.

119 Further, it is not in the interests of creditors for me to appoint a "fixed fee" insolvency practitioner chosen by those who control Bilkurra and Foscari.

120 Finally, I reject the defendants' contention that I should somehow assess suitability for appointment by simplistically comparing the proposed charge out rates.

CONCLUSION

121 I will make the orders sought by ASIC.

I certify that the preceding one hundred and twenty-one (121) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate: 

Dated: 15 April 2016