Goldus Pty Ltd (Subject to a Deed of Company Arrangement) v Cummins (No 4) [2021] FCA 1095

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| File number: |  |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 10 September 2021 |
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| Catchwords: | **CORPORATIONS** - application for declarations that mining tenements held by plaintiff not subject of security interest in favour of fourth defendant - application for declarations that fourth defendant not taken valid control or possession of tenements - where fourth defendant and plaintiff entered into joint venture agreement to carry out exploration and mining for alluvial minerals on mining tenements - where plaintiff and fourth defendant entered into deed of cross security - whether mining tenements property of the joint venture - whether defaults by plaintiff under the joint venture agreement - whether party in default under joint venture agreement able to take action against another defaulting party - whether fourth defendant entitled to enforce security under deed of cross security on basis of default by plaintiff - whether controllers and receivers validly appointed  **CORPORATIONS** - cross-claim for declarations that appointments of controller, receivers and managers valid and fourth defendant entitled to mining tenements or interest in them  **EQUITY** - application by cross-claimants for transfer of shares in company - where cross-claimants claim that default by company in failing to pay funds created 'locked box' in respect of company's assets - where cross-defendants used funds to acquire shares in company instead of paying into bank account in accordance with security deed requirements - whether control event occurred and triggered locked box provisions - whether cross-claimants entitled to trace proprietary interest into acquired shares - consideration of tracing principles |
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| Legislation: | *Corporations Act 2001* (Cth) ss 418A, 444D, 444G, 444GA  *Mining Act 1971* (SA) s 83  *Personal Property Securities Act 2009* (Cth) |
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| Cases cited: | *Action Scaffolding & Rigging Pty Limited (in liq) v Citadel Financial Corporation Pty Ltd, in the matter of Action Scaffolding & Rigging Pty Limited (in liq)* [2019] FCA 327  *Alesco Corporation Limited v Te Maari* [2015] NSWSC 469  *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* [2000] WASCA 27; (2000) 22 WAR 101  *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99  *Black v S Freedman & Co* (1910) 12 CLR 105  *Boscawen v Bajwa* [1995] 4 All ER 769; [1996] 1 WLR 328  *Brady v Stapleton* (1952) 88 CLR 322  *Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd (in liq) & Courtenay House Capital Trading Group Pty Ltd (in liq) (No 2)* [2020] NSWCA 117; (2020) 102 NSWLR 537  *City of Swan v Lehman Brothers Australia Ltd* [2009] FCAFC 130; (2009) FCR 243  *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544  *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640  *Evans v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75  *Finesky Holdings Pty Ltd v Minister for Transport for Western Australia* [2002] WASCA 206; (2002) 26 WAR 368  *Foskett v McKeown* [2000] UKHL 29; [2001] 1 AC 102  *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; (2009) 76 NSWLR 603  *Goldus Pty Ltd v Australian Mining Pty Ltd* [2015] SASC 32  *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296  *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (Receivers and Managers Appointed)* [2018] WASCA 163; (2018) 53 WAR 325  *Heperu Pty Ltd v Belle* [2009] NSWCA 252; (2009) 76 NSWLR 230  *Hewett v Court* (1983) 149 CLR 638  *Kadam v MiiResorts Group 1 Pty Ltd (No 5)* [2018] FCA 1086  *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181  *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579  *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104  *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636  *Parker v The Queen* (1997) 186 CLR 494  *Re Antqip Hire Pty Ltd (subject to deed of company arrangement) (in liq)* [2020] NSWSC 487  *Re Diplock* [1948] Ch 465  *Re Global Finance Group Pty Ltd (in liq)* [2002] WASC 63; (2002) 26 WAR 385  *Re Hallett's Estate* (1879) 13 Ch D 696  *Re Oatway; Hertslet v Oatway* [1903] 2 Ch 356  *Reed Constructions Australia Ltd v DM Fabrications Pty Ltd* [2007] NSWSC 1190  *RnD Funding Pty Limited v Goldus Pty Limited (Subject to a Deed of Company Arrangement)* [2021] FCA 1096  *Selvaratnam v St George - A Division of Westpac Banking Corporation (No 2)* [2021] FCA 486  *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536  *Sze Tu v Lowe* [2014] NSWCA 462; (2014) 89 NSWLR 317  *Toksoz v Westpac Banking Corporation* [2012] NSWCA 199  *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; (2004) 218 CLR 530 |
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| Number of paragraphs: | 346 |
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| Date of hearing: | 27-29 January 2021 & 19 April 2021 |
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| Counsel for the Plaintiff: | Mr S Carragher (27-29 January 2021)  The Plaintiff did not appear (19 April 2021) |
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| Solicitor for the Plaintiff: | WRP Legal & Advisory (27-29 January 2021) |
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| Counsel for the First and Second Defendants: | The First and Second Defendants filed submitting notices save as to costs |
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| Counsel for the Third, Fourth and Fifth Defendants: | Mr DL Cook SC |
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| Solicitor for the Third, Fourth and Fifth Defendants: | MathasLaw |
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| Counsel for the Cross‑Claimants: | Mr DL Cook SC |
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| Solicitor for the Cross‑Claimants: | MathasLaw |
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| Counsel for the Cross‑Defendants: | The Cross-Defendants did not appear |

ORDERS

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|  | | NSD 461 of 2020 |
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| BETWEEN: | GOLDUS PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT (ACN 076 662 149)  Plaintiff | |
| AND: | ANDREW JOHN CUMMINS  First Defendant  PETER PAUL KREJCI  Second Defendant  JOE NAKAT ALSO KNOWN AS JOSEPH NAKAT  Third Defendant  **AUSTRALIAN MINING PTY LTD (ACN 000 184 985)**  Fourth Defendant  **RND FUNDING PTY LIMITED (ACN 612 200 183)**  Fifth Defendant | |
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| AND BETWEEN: | RND FUNDING PTY LIMITED (ACN 612 200 183)  First Cross-Claimant  **AUSTRALIAN MINING PTY LTD (ACN 000 184 985)**  Second Cross-Claimant | |
| AND: | GOLDUS PTY LIMITED (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)  First Cross-Defendant  **RONCANE PTY LIMITED**  Second Cross-Defendant  **SYNERGY METALS GROUP PTY LIMITED**  Third Cross-Defendant | |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 10 September 2021 |

THE COURT DECLARES THAT:

1. The Deed of Cross Security entered into between the plaintiff and the fourth defendant does not create a security interest in or charge over the mining tenements held by Goldus described in the Schedule to these orders (**Tenements**).
2. The purported appointment of the first and second defendants as receivers and managers of the Tenements has no force or effect.
3. The purported exercise by the fourth defendant of power to take possession of and control over the Tenements is of no force and effect.
4. The purported appointment of the third defendant as a controller of the Tenements has no force or effect.

THE COURT ORDERS THAT:

1. There be liberty to the plaintiff to apply within 30 days of the date of these orders for such further relief which the plaintiff claims to be appropriate in order to give effect to these reasons by filing a minute of those proposed orders.
2. Within 30 days of the date of these orders, the fourth and fifth defendants do bring in a minute of any orders that they seeks on the cross-claim to give effect to these reasons.
3. There be liberty to each of the parties to apply within 30 days of the date of these orders for any orders as to the costs of these proceedings by filing a minute of the proposed orders as to costs together with an outline of submissions of no more than 5 pages and any affidavit in support of those proposed costs orders.
4. If any minute of orders is filed then the matter be listed for a case management hearing.

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

## Schedule

Mining Tenements means Mining Leases: ML5337, ML5471, ML5485, ML5486, ML5546, ML5550, ML5759, ML5886, and MLP Miscellaneous Purpose Lease: MPL28 and Exploration Licence: EL5896 issued by the Department for Energy and Mining of South Australia.

REASONS FOR JUDGMENT

COLVIN J:

1. RnD Funding Pty Limited (**RnD Funding**) (an entity controlled by Mr Joseph Nakat) has been taking steps to seek to recover $1,670,000 plus interest, fees and charges advanced to Australian Tailings Group Pty Ltd (**ATG**) (an entity controlled by Mr John Hillam). At the time of the advances, Australian Mining Pty Ltd (**Australian Mining**) (another entity then controlled by Mr Hillam) agreed to be a joint obligor with ATG under the terms of a General Security Deed provided as security for the facility agreements between RnD Funding and ATG. The agreement of Australian Mining as joint obligor was recorded in instruments described as deeds of accession. Issues have arisen as to the nature and extent of the rights and interests of Australian Mining that may be relied upon by RnD Funding in seeking to recover the advances made to ATG by pursuing its security rights under the General Security Deed against Australian Mining as a joint obligor.
2. Australian Mining is in a mining joint venture with Goldus Pty Ltd (**Goldus**) (an entity that came to be controlled by Mr Hillam in 2019). The venture is over land the subject of certain mining tenements in the vicinity of Teetulpa in the Flinders Ranges in South Australia. The eight mining tenements over the land the subject of the venture are held by Goldus. There are two other mining tenements owned by Goldus.
3. RnD Funding claims to have appointed a controller and receivers over the assets of Australian Mining. For various reasons, those assets are said to include the eight tenements registered in the name of Goldus or at least an interest in those tenements. The receivers of Australian Mining claim to have appointed receivers over the assets of Goldus.
4. There is a separate and alternative claim by Australian Mining to the effect that it is the sole venturer in the mining venture in Teetulpa because Goldus relinquished its participating interest under the terms of a deed of company arrangement. The claim by Australian Mining is advanced at the instigation of individuals claiming to have been appointed as receivers and managers of Australian Mining.
5. RnD Funding also claims that funds that were received by Australian Mining and were the subject of RnD Funding's security were paid through Prop Fest Pty Ltd (**Prop Fest**) (another company controlled by Mr Hillam) to Roncane Pty Ltd (**Roncane**) (yet another entity controlled by Mr Hillam). It says the funds were used by Roncane to purchase all of the shares in Goldus. RnD Funding says that it can trace those funds into the shares in Goldus which are held on constructive trust or are subject to a security interest in favour of RnD Funding.
6. RnD Funding also has a separate claim to certain mining equipment located on the land the subject of the tenements held by Goldus (**Equipment**) which it says is the subject of a security interest in favour of RnD Funding. The Equipment is held by either Goldus or Synergy Metals Group Pty Ltd (**Synergy Metals**) (another entity controlled by Mr Hillam).
7. Therefore, the subject matter of the present disputes between the parties is the tenements, the mining venture in Teetulpa, the shares in Goldus and the Equipment. Goldus disputes the claims to the tenements, the interest in the mining venture and the shares. Goldus and Synergy Metals dispute the claims to the Equipment.
8. Goldus is the plaintiff in the present proceedings. It claims relief under s 418A of the *Corporations Act 2001* (Cth) to the effect that the tenements are not the subject of a security interest in favour of Australian Mining and that Australian Mining has not taken valid control or possession of the tenements. It brings those proceedings against those individuals said to have been appointed as receivers and managers of Australian Mining, Mr Nakat (who claims to have been appointed as a controller of the tenements and other property), Australian Mining and RnD Funding as defendants. It should be noted that the declaratory relief sought does not extend to a challenge to the appointments as controller and receivers generally. Rather, the relief sought is confined to those appointments to the extent that they purport to relate to the tenements. Nevertheless, in certain respects, the contentions advanced by Goldus challenged the appointments as a whole.
9. RnD Funding and Australian Mining cross-claim for relief to the effect that the appointments of the controller and the receivers and managers are valid and that Australian Mining is entitled to the tenements or an interest in them. They also claim orders requiring Roncane to transfer the shares in Goldus to RnD Funding. Finally, they claim orders that the Equipment is subject to a security interest in favour of RnD Funding and seek orders for delivery up to RnD Funding of the Equipment.

## Separate hearing of the claims concerning the tenements and the shares in Goldus

1. All claims were listed for hearing in January 2021. When the hearing commenced it emerged that not all issues could be determined in the time available. With the encouragement of the parties, orders were made to the effect that the hearing would proceed on all claims except the issues in relation to the Equipment. The cross-claim as to the Equipment was to be heard at a later time. It was hoped that the claims other than the Equipment claims might be concluded within the allocated dates. In the result, the case for Goldus was opened, there was a short form opening for the defendants/cross-claimants, the evidence was concluded and, subject to certain limited matters, closing submissions were received for the defendants/cross-claimants.
2. The hearing was then adjourned until April 2021 on the basis that certain matters relating to a tracing claim would be addressed by further submissions and the hearing that had been commenced in January would then be completed and would be followed by the hearing of the cross‑claims to the Equipment.
3. In the course of the January hearing dates, an amendment was allowed to the pleading as to the claim by Goldus that added paragraph 45(aa) and particulars to that claim. The amendment was made provisionally, subject to a final ruling after the conclusion of the hearing as to whether the amendment would be allowed having regard to any prejudice demonstrated by the defendants during the course of the hearing.
4. Upon the resumed hearing, Goldus sought an adjournment which was refused. Counsel appearing was only briefed to seek an adjournment. When the adjournment was refused, counsel withdrew and the matter proceeded without representation for Goldus or for the additional cross-defendants. There was no further evidence and only brief further submissions for the defendants and cross-claimants. Therefore, no closing submissions were advanced for Goldus.
5. The hearing of the claims as to the Equipment was then conducted. It was conducted on the basis, acknowledged in oral submissions, that the evidence in the first part of the proceeding was evidence in the cross-claim as to the Equipment although no formal order was made to that effect. Submissions and further evidence were received for the cross-claimants. No further evidence was received for the defendants to the cross-claim concerning the equipment. The cross-claim as to the Equipment is the subject of separate reasons to be delivered at the same time as these reasons: *RnD Funding Pty Limited v Goldus Pty Limited (Subject to a Deed of Company Arrangement)* [2021] FCA 1096.
6. These reasons concern (a) the claim by Goldus to relief under s 418A of the *Corporations Act* concerning the alleged security interests in the tenements; (b) those aspects of the cross-claim that raise related issues and seek alternative relief as to the claimed security interests in the tenements; and (c) the claim to the shares in Goldus based upon tracing principles in equity.
7. The affirmative case for Goldus on its claim was opened and it is only the issues as opened that need to be addressed. However, the case for Goldus was opened on the basis that the factual issues raised by the cross-claim were not addressed and that the matters alleged by the cross-claimants to support their cross-claim were not conceded (see para 7 of the written opening submissions for Goldus). Therefore, to the extent necessary to support the cross-claims, those matters must be established by Australian Mining and RnD Funding as cross-claimants. Otherwise, the issues to be determined are those that were addressed orally. For that reason I do not deal with the full extent of the many alternative formulations expressed in the pleadings. In particular, I do not deal with affirmative assertions by Goldus in its cross-claim that were not the subject of written or oral submissions by way of opening. It was for Goldus to open all the issues. There was no claim that it was entitled to advance a case in reply.
8. I also confine my consideration of the cross-claim to those aspects that were maintained in submissions.

## The Teetulpa Venture and the Tenements

1. In 2007, Goldus Pty Ltd formed an unincorporated joint venture with another entity to carry out exploration and mining for gold, silver and other alluvial minerals on eight mining tenements (**Tenements**). In 2012, Australian Mining acquired the participating interest of the other venturer and part of the participating interest of Goldus to become the holder of a 51% participating interest. Goldus retained a 49% participating interest.
2. The joint venture was described by the parties as the Teetulpa Alluvial Joint Venture (**Teetulpa Venture**). Goldus and Australian Mining recorded the ongoing terms of the Teetulpa Venture in a joint venture agreement (**JVA**) that amended and restated the agreed terms for the venture. In the JVA, the parties described the purpose and scope of the venture as being to explore for and mine alluvial minerals on the Tenements to a depth of no more than 15 metres (**Alluvial Zone**).
3. At all material times Goldus was, and is, the registered holder of the Tenements. It is also the holder of a miscellaneous purpose lease (being MPL28) and an exploration licence (being EL5896) over land in the same area. However, those tenements are not subject to the terms of the Teetulpa Venture. For convenience, I will refer to all the tenements as the **Ten Tenements** and reserve the use of the term Tenements to refer to the eight tenements the subject of the JVA.

## Chronology of events

1. Broadly speaking, the overall chronology of events is not contentious. In addition to the findings I have made concerning the Teetulpa Venture, I make the following findings as to those events, principally based upon the admissions in the pleadings:
2. In 2012, Goldus and Australian Mining entered into the JVA for the Teetulpa Venture which was to be confined to mining and exploration on the Alluvial Zone of the Tenements.
3. At that time, Goldus was the manager of the Teetulpa Venture under the terms of the JVA.
4. Goldus and Australian Mining also entered into a Deed of Cross Security as required by the terms of the JVA (**Deed of Cross Security**). The extent of the security conferred by the Deed of Cross Security is contentious and will be considered in due course.
5. At some time before 13 March 2013, Australian Mining became the manager of the Teetulpa Venture under the terms of the JVA.
6. In 2014, the sole shareholder in Australian Mining proposed to sell its shareholding to Teetulpa Metals Pty Ltd (**Teetulpa Metals**) on terms that were to be guaranteed by ATG. Goldus claimed that it had pre-emptive rights and brought an action for breach of contract against Australian Mining. The claim was unsuccessful: *Goldus Pty Ltd v Australian Mining Pty Ltd* [2015] SASC 32. The transaction proceeded and Teetulpa Metals (a company controlled by Mr Hillam) became the sole shareholder in Australian Mining.
7. On 19 August 2015, Mr John Hillam became a director of Australian Mining. Since then, the actions of Mr Hillam have loomed large in the affairs of the Teetulpa Venture.
8. In October 2017, administrators were appointed to Goldus and there were extensive negotiations as between the administrators and Mr Hillam as to the terms of a deed of company arrangement for Goldus.
9. In late December 2017, ATG entered into a facility agreement (**First Facility Agreement**) with RnD Funding.
10. At the time of entering into the First Facility Agreement, ATG granted security over all of its assets to RnD Funding for the performance of its obligations under any agreement entered into by ATG with RnD Funding including, without limitation, the First Facility Agreement (**General Security Deed**).
11. On 27 December 2017, RnD Funding advanced $320,000 to ATG under the terms of the First Facility Agreement.
12. On 10 May 2018, RnD Funding and ATG entered into a further facility agreement (**Second Facility Agreement**) for the purpose of providing funds that were to be used to make payments into a fund to be established under the terms of a proposed deed of company arrangement (**DoCA**) concerning Goldus and also to undertake exploration and mining.
13. Also on 10 May 2018, Australian Mining and Teetulpa Metals executed a deed of accession in favour of RnD Funding (**Deed of Accession**) pursuant to which Australian Mining and Teetulpa Metals each agreed to comply with the provisions of the General Security Deed fully and in the same manner as if it were an obligor as from the date of the General Security Deed.
14. The following day, on 11 May 2018, Mr John Hillam and various Hillam Entities, including Australian Mining, entered into the DoCA pursuant to which payments were to be made by the Hillam Entities into a fund (**Fund**) and also control of Goldus was to pass to an entity nominated by Mr Hillam or if that could not occur then the Ten Tenements were to be transferred to Mr Hillam's nominee.
15. On 25 June 2018, this Court gave leave under s 444GA of the *Corporations Act* for the administrator to transfer all of the shares in Goldus to Roncane, the nominated entity of Mr Hillam, on the basis of an undertaking by the deed administrator that the shares would not be transferred until the required amounts had been paid into the Fund by the Hillam Entities.
16. Between 17 April 2018 and 8 October 2018, RnD Funding advanced $1,350,000 under the Second Facility Agreement (noting that some amounts were advanced before the parties entered into the Second Facility Agreement but were nevertheless subject to its terms).
17. On 8 October 2018 a further deed of accession was executed by Australian Mining and other entities (**Further Deed of Accession**) pursuant to which Australian Mining agreed to become a party to the General Security Deed as an obligor (as defined in the General Security Deed).
18. On 15 October 2018, the principal then outstanding under the First Facility Agreement was due for payment by ATG to RnD Funding and no payment was then made or has since been made by ATG of the outstanding principal.
19. On or about 10 October 2019, all of the shares in Goldus were transferred to Roncane.
20. Under the terms of the General Facility Deed, ATG was obliged to cause Goldus to enter into a deed of accession but that did not occur.
21. On 22 October 2019, Mr Nakat signed a notice on behalf of RnD Funding that was issued to Australian Mining stating that RnD Funding was exercising powers under the General Security Deed and assuming control of the property of Australian Mining secured by the General Security Deed.
22. On 23 October 2019, a notice of appointment of RnD Funding as a controller in respect of Australian Mining with effect from 22 October 2019 was lodged with the Australian Securities and Investments Commission.
23. On 25 October 2019, Mr Nakat on behalf of Australian Mining (controller appointed) issued a notice to Goldus stating that Goldus was in default under the terms of the JVA and Goldus was required to remedy that default within 30 days (**JVA Default Notice**).
24. On 31 October 2019, Goldus gave a written notice to Australian Mining claiming that Australian Mining was in default under the JVA (**Goldus Default Notice**).
25. On 25 November 2019, Mr Nakat on behalf of Australian Mining (controller appointed) issued a notice to Goldus stating that an event of default had occurred under the Deed of Cross Security and also stating that Australian Mining 'has given notice to Goldus that Goldus is prohibited from dealing in any tenements held by Goldus and executing any documents' (**Cross Security Default Notice**).
26. On 12 March 2020, RnD Funding executed a deed of appointment stating that Mr Cummins and Mr Krejci were appointed as receivers and managers of Australian Mining under the Deed of Accession.
27. On 12 March 2020, Mr Cummins and Mr Krejci executed a deed of appointment on behalf of Australian Mining which stated that they were appointed as receivers and managers of Goldus.

## The competing claims

1. Broadly speaking, the dispute between the parties concerns the nature and extent of the security (particularly whether it extends to the Ten Tenements) and the validity of the various notices that were given in reliance upon the alleged security interests (particularly whether they effected the valid appointment of the controller and receivers). Part of that dispute concerns whether the defaults occurred as alleged or whether, in any event, Goldus was in default under the JVA in respects that could be relied upon by Australian Mining as a basis for enforcing its security under the Deed of Cross Security. There is also the issue raised by cross‑claim concerning the circumstances of the transfer of the shares in Goldus to Roncane.

## The claim by Goldus

1. Goldus claims declaratory relief to the following effect:
2. the Deed of Cross Security did not create a security interest in or charge over the Ten Tenements in favour of Australian Mining;
3. Mr Cummins and Mr Krejci have not been validly appointed as receivers and managers of the Ten Tenements;
4. Mr Nakat has not been validly appointed as a controller of the Ten Tenements;
5. RnD Funding has not been validly appointed as a controller of Australian Mining; and
6. Australian Mining has not validly taken possession or control of the Ten Tenements.
7. The substance of the claim by Goldus is that it is only Goldus that has an interest in the Ten Tenements and that despite the events which have occurred, including any default by Australian Mining under the JVA or the terms of the DOCA, the interest of Goldus in the Ten Tenements remains unencumbered. The claim by Goldus was characterised in oral opening submissions as a challenge to the appointment of receivers and managers as well as a controller to Goldus. It appears to be principally a challenge to the extent of those appointments on the basis that they do not include the Ten Tenements. The claim to the declaration that RnD Funding had not been appointed as a controller of Australian Mining was abandoned by Goldus in opening.
8. The claim by Goldus was said to have two main elements. First, a claim based on the proper construction of the key transactional documents. Second, a claim concerning the defaults and notices to the effect that the necessary defaults had not occurred and the notices were not valid.
9. The approach to be adopted where a party disputes the validity of the appointment of a controller or receiver under s 418A of the *Corporations Act* is to consider whether the plaintiff has demonstrated doubt and, if that is so, then to consider whether the parties supporting the appointment have demonstrated its validity: see the position adopted in *Action Scaffolding & Rigging Pty Limited (in liq) v Citadel Financial Corporation Pty Ltd, in the matter of Action Scaffolding & Rigging Pty Limited (in liq)* [2019] FCA 327 at [4]‑[7] (Gleeson J) relied upon by Goldus and not disputed by the defendants.

## The defence and cross‑claims

1. The defendants to the claim by Goldus are Mr Cummins, Mr Krejci, Mr Nakat, Australian Mining and RnD Funding. In addition, as has been mentioned, there is a cross‑claim. It was advanced by RnD Funding and Australian Mining. They sought alternative declaratory relief concerning the validity of the appointment of the receivers and managers to Australian Mining and as to the consequences that flowed from the exercise of alleged security rights in the Ten Tenements. Australian Mining also claimed that there should be orders to give effect to its claim that the rights and interest of Goldus in the Joint Venture had passed to Australian Mining under the terms of the DoCA.
2. In the alternative to the claims to the Ten Tenements, RnD Funding advanced a tracing based claim to the shares in Goldus. It alleged that upon default by ATG under the facility agreements with RnD Funding, ATG was required to pay all monies that it received into a specific bank account for the benefit of RnD Funding (established in accordance with the requirements of the General Security Deed). It was claimed that, unknown to RnD Funding, ATG had received substantial funds by way of GST refunds and instead of those monies being dealt with in accordance with the security interest under the General Security Deed they had been provided by ATG through Prop Fest and applied to acquire the shares in Goldus in the name of Roncane without any consideration being provided by Roncane. RnD Funding said that the knowledge of Mr Hillam and the lack of consideration meant that it was entitled to trace those funds into the shares.
3. Finally, RnD Funding also made claims to the Equipment which it said had been owned by ATG and had been purportedly disposed of by ATG contrary to the terms of negative pledge provisions in the General Security Deed. It was claimed that a purported sale of the Equipment to Synergy Metals occurred with knowledge of the negative pledge provisions, and was void. The Equipment was said to be located on the land the subject of the Tenements and in the control of Goldus or Synergy Metals and orders were sought to recover the property from Synergy Metals or Goldus. As has been noted, those claims were the subject of a separate hearing and are not addressed in these reasons.
4. In summary, the relief sought on the cross‑claim (excluding the relief relating to the Equipment) was as follows:
5. A declaration that the rights of Goldus under the Teetulpa Venture had passed to Australian Mining.
6. Orders to give effect to the transfer of the interest of Goldus in the Teetulpa Venture to Australian Mining.
7. A declaration that Goldus holds its rights in the Ten Tenements as bare trustee for Australian Mining, alternatively such part of those rights as are required to undertake the Teetulpa Venture to mine alluvial gold to no more than 15 metres below the surface.
8. Orders to transfer to Australian Mining the interest held by Goldus as bare trustee.
9. A declaration that the shares in Goldus are held by Roncane on constructive trust for RnD Funding, alternatively are subject to a security interest in favour of RnD Funding.
10. Orders to require the transfer of the shares in Goldus by Roncane to RnD Funding.

## The defence of the cross-claims

1. As to those aspects of the cross-claim that concern the alleged security interests, they were defended by Goldus maintaining the matters raised in its claim. As has been observed, the main factual chronology as to those matters was not in dispute. Otherwise, as has also been observed, Goldus did not concede matters relied upon in support of the cross-claim.
2. The tracing claim was answered by Goldus making contentions to the following effect:
3. at the time that the monies were used to purchase the shares there was no default under the First Facility Agreement or the Second Facility Agreement and, as a result, no security interest prevented the monies being provided through Prop Fest to purchase the shares in Goldus;
4. Prop Fest advanced the monies to Roncane by way of loan and the agreement to repay the monies meant that Roncane received those monies *bona fide* and for value;
5. the amounts that were paid by Prop Fest to the administrators of Goldus were not paid to acquire the shares but rather were paid under the terms of the DoCA into the Fund in circumstances where the consideration received by the Hillam Entities under the terms of the DoCA were not confined to the transfer of the shares to a nominated entity; and
6. any claim in equity to the shares in Goldus was not a proprietary claim to the shares but, at its highest, was a claim to an equitable lien (described in submissions as a charge) over the shares in the amount of money that could be traced from ATG into the shares held by Roncane.
7. For Goldus it was submitted that further matters may be advanced to deal with the tracing based claim but in the result it ceased to be legally represented and those foreshadowed submissions were never provided.

## Issues for determination

1. Broadly speaking there are three matters for consideration (a) the competing claims concerning the alleged security interest in the Tenements and the validity of the appointment of the controller and receivers (including the claim by the defendants based on the DoCA); (b) the alleged defaults by Goldus under the JVA; and (c) the tracing claim to the shares. As has been mentioned, the claims to the Equipment were heard separately.
2. As to (a), the following issues arise for determination concerning the alleged security interest in the Tenements and the validity of the appointment of the controller and the receivers:
3. Are the Tenements (or an interest in them) property of the Teetulpa Venture?
4. Did the Deed of Cross Security provide security in favour of Australian Mining to assets of Goldus that were not assets of the Teetulpa Venture?
5. Is the power to appoint a receiver under the Deed of Cross Security limited to the interest of the defaulting party in the assets of the Teetulpa Venture?
6. If no to Issues (1), (2) or (3), is any provision purporting to create an interest in the Tenements void because the consent of the Minister was not obtained under the *Mining Act 1971* (SA)?
7. Assuming that there had been defaults by Goldus under the JVA as alleged by the defendants, have the notice requirements under the terms of the JVA and Deed of Cross Security been met?
8. Can a party who is in default under the JVA take action against another defaulting party?
9. Was Australian Mining in default at the time that it purported to take action to appoint receivers?
10. If no to Issue (6) and yes to Issue (7), is Australian Mining prevented from taking action to enforce the Deed of Cross Security based upon general law principles?
11. Was any property interest in the Tenements transferred to Australian Mining under the terms of the DoCA?
12. If yes to Issue (9), was any such transfer void because the consent of the Minister was not obtained under the *Mining Act*?
13. Was the consent of Goldus required before there could be any security interest created by Australian Mining in favour of RnD Funding?
14. Is any receivership of Goldus by reason of default under the Deed of Cross Security confined to securing defaults under the JVA?

As to (b), the following further questions concerning the alleged default by Goldus arise even if the above questions are determined adversely to the claims by Goldus:

1. Was Goldus in default under the JVA in the manner alleged under the JVA Default Notice?
2. If no to Issue (13), was Goldus otherwise in default under the JVA Default Notice? Resolution of this issue requires a determination as to whether an amendment to the claim by Goldus should be allowed to raise the default the subject of paragraph 44(aa) of the claim.
3. On the basis of the answers to Issues (1) to (14), what if any declaratory relief should be granted?

As to (c), the tracing based claim, the following further issues arise:

1. What is the precise nature of the tracing based claim to the shares in Goldus held by Roncane?
2. What are the relevant principles to be applied in determining the tracing based claim?
3. Was there a Control Event under the terms of the General Security Deed at the time of payment of monies by ATG to Prop Fest?
4. Is the claim by RnD Funding to the funds in ATG's bank account a proper proprietary foundation for the tracing based claim?
5. Are the Goldus shares held by Roncane the tracing proceeds of the funds in ATG's bank account?
6. If the tracing based claim is upheld are the shares in Goldus held on constructive trust for RnD Funding or is the interest of RnD Funding confined to a charge over the shares?

## The evidence

1. Detailed affidavit material was received into evidence. The principal affidavits were provided by Mr Hillam and Mr Nakat. They were both cross-examined on their affidavits. In the result, the factual issues in dispute that are necessary to resolve in order to determine the competing claims are of relatively narrow compass. Those matters concern the context for the DoCA, the alleged defaults by Goldus that are relied upon by Australian Mining (through the receivers) and certain of the facts relied upon to support the tracing based claim. However, as has already been observed, much of the case turns upon the proper characterisation of events that were not in dispute and the application of legal principles to those events.

## General principles as to the construction of commercial instruments

1. Many of the issues for determination concern the proper construction of the commercial instruments referred to in the above chronology of events. The principles to be applied in construing the terms of commercial instruments are well established. It is necessary to ask what a reasonable businessperson would have understood the terms to mean. Consideration must be given to the language used, the surrounding circumstances known to them and the commercial purposes or objects secured by their contract and they must be given a businesslike interpretation: *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at [35]; and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at [46]‑[52].
2. The task should be approached on the basis that the parties intended to produce a result that makes commercial sense given the evident commercial object: *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544 at [17]. However, care must be taken to ensure that it is the evident commercial object that is being given effect recognising that minds may differ as to the commerciality of a particular outcome: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 at [43]. There is a difference between resolving an ambiguity in language so as to avoid a construction which is commercially unreasonable or plainly inconsistent with the evident commercial object of the instrument and choosing between alternatives on the basis of a sense of commercial fairness. The task of the Court is to construe the words used not to remake the commercial bargain. Therefore, reasoning by reference to commerciality has its limits and must conform to any contrary intention expressed in the instrument: *Mount Bruce* at [51].
3. The Court should construe commercial instruments fairly and broadly without being too astute or subtle in finding defects: *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99 at 109‑110. Commercial instruments should be interpreted in a practical and realistic way, not by adopting an overly theoretical approach: *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579 at [22], [81], [197].
4. Documents that form part of a suite of commercial instruments should be construed together: *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56; (2004) 218 CLR 530 at [82].
5. Recitals can be used to construe the operative provisions: *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; (2009) 76 NSWLR 603 at [379]‑[390] (Campbell JA, Allsop P and Giles JA agreeing).
6. Save for the interpretation of the DoCA, the parties focussed their attention upon the language of the instruments and their context within the other instruments rather than any claim concerning the resolution of ambiguity by reference to relevant surrounding circumstances. The extent to which there might be regard to surrounding circumstances in construing the terms of a public instrument such as a deed of company arrangement is considered below when dealing with the competing contentions as to the meaning of the DoCA.

## Issue (1): Are the Tenements (or an interest in them) property of the Teetulpa Venture?

1. The JVA required Australian Mining to contribute up to $1,000,000 to cover the costs of establishing alluvial mining operations in the Designated Area (it being agreed that $400,000 had already been contributed). For present purposes, the Designated Area equates to the Alluvial Zone. The JVA also specified the percentage interests of Goldus and Australian Mining in the Teetulpa Venture.
2. The purpose and scope of the Teetulpa Venture is specified in cl 4.3 of the JVA. It states:

The Joint Venture is constituted for the purposes of accessing the Tenements and carrying out exploration and Mining Operations on the Designated Area for alluvial gold, silver and all other alluvial minerals as may be considered by the Joint Venturers convenient to include in its exploration and mining programmes (**Alluvial Mineral Rights**).

1. It may be noted that the purpose and scope of the Teetulpa Venture is expressed in terms of 'accessing the Tenements' not in terms of owning and exploiting the Tenements, or any other language that might suggest that the venturers were acquiring the Tenements or any interest in them for the purposes of the Teetulpa Venture. Further, there is no provision in the JVA by which Goldus is required to contribute the Tenements or any interest in the Tenements to the Teetulpa Venture or transfer some interest in the Tenements to the Teetulpa Venture.
2. Before turning to the terms of the JVA that concern the property of the Teetulpa Venture there is one further matter to be noted. As has been observed, the JVA was a restatement of the terms of a joint venture that was originally established in 2007 between Goldus and another entity. If the venture had been established on the basis that the Tenements or an interest in the Tenements was to form part of the Teetulpa Venture then you would expect that position to be reflected in the terms of the JVA given that it was restating the terms of a venture that had already been established. Yet, the recitals to the JVA begin with the statement 'Goldus is the registered holder of the Tenements'. An unqualified statement in those terms is consistent with the observations that have already been made as to the scope of the Teetulpa Venture when it came to acquiring an interest of some kind in the Tenements. If indeed an interest in the Tenements had been acquired by the Teetulpa Venture then you would expect the terms of the recital to have been qualified to reflect that position by the time of the restatement in the JVA.
3. As to the operative terms of the JVA, the JVA defined Joint Venture Assets to mean property:

… acquired or leased for the purposes of conducting the Joint Venture Activities … or by the Manager on behalf of the Joint Venturers and owned by the Joint Venturers as tenants in common or held under lease by the Joint Venturers (as the case may be) in accordance with their respective Participating Interests including the Designated Area.

1. The Tenements had been acquired by Goldus well before the Teetulpa Venture. There is no evidence to the effect that they were acquired or leased for the purpose of conducting the activities of the Joint Venture.
2. In that context, cl 4.11 of the JVA provides:

The parties acknowledge that the Joint Venture is the holder of the Alluvial Mineral Rights and that Goldus is the sole holder of all rights conferred by the Tenements other than the Alluvial Mineral Rights (**Basement Mineral Rights**).

1. The terms of cl 4.11 then deal with the priorities that apply when it comes to access to the Tenements for the purpose of exercising the Alluvial Mineral Rights. In particular, the clause specifies that in exercising the Basement Mineral Rights during a priority period of four years, Goldus could not undertake Mining Operations that may interfere with the Alluvial Mineral Rights without the consent of the venturers in the Teetulpa Venture. A provision to that effect assumes that Goldus retained the right to undertake mining operations as to the Basement Mineral Rights. As stated in cl 4.11, those rights were all of the rights other than the Alluvial Mineral Rights. The source of that entitlement could only come from Goldus retaining its ownership of the Tenements. Certainly there was no provision in the JVA that conferred the Basement Mineral Rights on Goldus.
2. By reason that the Basement Mineral Rights are defined as 'all rights conferred by the Tenements other than the Alluvial Mineral Rights' and the Alluvial Mineral Rights are not ownership rights, the language used indicates that Goldus retains all ownership rights of the Tenements and thereby all other rights to undertake exploration and mining as conferred by the Tenements. This conclusion is further supported by the terms of cl 4.11(b)(iv) by which Goldus agrees 'not to Dispose of the Basement Mineral Rights' during the priority period unless the buyer agrees to be bound by the JVA. Expressed in those terms, cl 4.11(b)(iv) assumes that it is Goldus that retains the rights to dispose of the Basement Mineral Rights without the consent of Australian Mining. If, as is contended by Australian Mining and RnD Funding, Goldus had transferred the Tenements or an interest in the Tenements to the extent of the Alluvial Mineral Rights to Australian Mining then it would not need the protection of a clause expressed in the terms of cl 4.11(b)(iv).
3. If indeed the Tenements had become Joint Venture Assets then Goldus would need the agreement of the venturers in the Teetulpa Venture in order to undertake any activities on the Tenements. The same would be the case if the Joint Venture Assets were confined to an interest in the Alluvial Zone being the way the case was put for Australian Mining and RnD Funding in oral submissions. The consequence would be that there could be no exploration or mining without the consent of the venturers because it would interfere with the Alluvial Zone. However, there is no term of the JVA dealing with such consent or the circumstances in which Goldus might be allowed to undertake exploration or mining. The absence of any such provision supports the conclusion that the rights conferred upon the venturers to the Tenements were contractual.
4. For Australian Mining and RnD Funding reliance was placed upon the final part of the definition of 'Joint Venture Assets' in the JVA. The whole of definition (to which reference has already been made) is expressed in the following terms:

**Joint Venture Assets** means property, present and future, real and personal, held, developed, constructed acquired or leased for the purposes of conducting the Joint Venture Activities by the Joint Venturers or by the Manager on behalf of the Joint Venturers and owned by the Joint Venturers as tenants in common or held under lease by the Joint Venturers (as the case may be) in accordance with their respective Participating Interests including the Designated Area.

1. The submission for Australian Mining and RnD Funding focussed upon the final words, namely 'including the Designated Area'. The term 'Designated Area' was defined to mean, relevantly for present purposes, 'the whole of the Alluvial Zone within the area enclosed by the external boundaries of the Tenements'. Therefore, the final words of the definition of Joint Venture Assets were not directed to the Tenements themselves, but rather the area in respect of which the Teetulpa Venture was to operate.
2. The fact that the Joint Venture Assets were defined in a manner that included any property that was held, developed, constructed, acquired or leased for the purposes of the venture including the Alluvial Zone did not mean that the Tenements became such assets. The reference to Designated Area was simply the means by which to identify the extent to which assets that related to an area of land (and the space below that area of land that formed part of the Alluvial Zone) may fall within the Teetulpa Venture. It did not mean that every asset, such as the Tenements, that related to the Designated Area became an asset of the venture.
3. Further, the use of the term 'Designated Area' would be a very clumsy way to describe an asset of the Teetulpa Venture, particularly one as important and obvious as the Tenements. If indeed they were to be included in the 'Joint Venture Assets' then you would expect the term Tenements to be included in the definition.
4. Clause 6.13 of the JVA is expressed in the following terms:

The Manager shall do all things necessary including (without limitation) expending money to maintain all Tenements and other like interests in good standing.

1. An obligation expressed in those terms does not assume that the Tenements are Joint Venture Assets. It is obviously in the interests of the venturers that the Tenements be kept in good standing. However, the acceptance of an obligation to undertake those steps necessary to keep the Tenements in good standing may also form part of the contractual consideration provided to obtain the authority to undertake Joint Venture Activities on the Tenements.
2. A similar conclusion applies concerning the significance of cl 20.1 of the JVA which requires the Joint Venturers to comply with 'all obligations under any statute or the Tenements relating to the protection of the environment' and to bear all costs of doing so. The fact that the JVA imposes such an obligation is consistent with each of the competing positions. Significantly it is confined to environmental obligations 'which are applicable to Joint Venture Activities'. It is a reasonable and commercial arrangement for parties conducting a joint venture on the basis that it enjoys a contractual right to explore and mine in the Alluvial Zone to be expected to have a contractual obligation to meet the environmental responsibilities associated with the exercise of those rights. Indeed, the expression of such a responsibility would not be required if the Teetulpa Venture acquired the Tenements or an interest in them. In such circumstances, it may be expected that the relevant responsibilities would fall on the holder of the Tenements or the interest in them.
3. There are rights conferred by the JVA for caveats to be lodged by each party 'to protect its interest under [the JVA]' (cl 21.10) and to register the JVA against the Tenements (cl 21.11). No reliance was placed upon these provisions by the parties. However, their existence tends to suggest that the Tenements were not being transferred to the participants in the Teetulpa Venture nor was any form of interest that might be registered.
4. For all those reasons, the asset that the Teetulpa Venture had was a contractual right to exploit the Alluvial Zone for alluvial minerals. It was conferred by the agreement of Goldus as a party to the JVA. The Tenements themselves remained the property of Goldus and the venturers acquired no interest in the Tenements beyond the contractual rights conferred by the JVA.
5. Therefore, under the terms of the JVA, Goldus retained ownership of the Tenements and created contractual rights in favour of Australian Mining, being the Alluvial Mineral Rights.
6. The JVA contemplated the forfeiture of the interest of a joint venturer by a process of deemed withdrawal in circumstances of default. There was a detailed provision as to how that may occur in cl 11 of the JVA. It dealt with the transfer of the participating interest of the 'Defaulter' to the 'Non-Defaulter'. Therefore, inherent in the terms of the joint venture that were confirmed by the JVA was the prospect that Goldus may cease to have a participating interest in the Teetulpa Venture. However, the transfer of the participating interest would not terminate the provisions of the JVA. In particular, it would not terminate the provisions by which Goldus conferred contractual rights in favour of the participants in the joint venture to access and undertake exploration and mining in the Alluvial Zone. Those provisions would continue to take effect even if Goldus no longer had a participating interest by operation of cl 11. The absence of any provision dealing with an interest in the Tenements in the event of forfeiture of the participating interest of Goldus is consistent with the construction already outlined. Therefore, if the participating interest of Goldus was forfeited, the ownership of the Tenements and any interest in them remained with Goldus.

## Issue (2): Did the Deed of Cross Security provide security in favour of Australian Mining to assets of Goldus that were not assets of the Teetulpa Venture?

1. Even though the Joint Venture Assets do not include the Tenements, it is still possible that the Deed of Cross Security conferred a security interest over all of the assets held by the venturers, relevantly Goldus. Therefore, it is necessary to consider the extent of the assets in respect of which security interests were created by the Deed of Cross Security.
2. The Deed of Cross Security was required in order to satisfy the terms of cl 5.1(a) of the JVA. It provided that:

Each Joint Venturer must at its own cost:

(a) execute and deliver to the other Joint Venturer a Cross Charge at the time of executing this document in order to secure the payment by each Joint Venturer of any amount due by that Joint Venturer under this Agreement;

1. The term 'Cross Charge' was defined in the JVA to mean the 'deed of cross security referred to in clause 5.1, the form of which is set out in Annexure A'. The version of the JVA produced in evidence did not include an annexure. However, there was in evidence a Deed of Cross Security which recited that it is the deed of Cross Charge required by the JVA. In the absence of evidence to the contrary it may be inferred that it was expressed in the terms contemplated by the parties at the time that they entered into the JVA. That was the common position of the parties.
2. Therefore, the Deed of Cross Security is an instrument that is to be construed in the context of the JVA, particularly the language used in cl 5.1(a) which created the obligation to enter into the Deed of Cross Security. Further, it is to be noted that the Deed of Cross Security provides expressly in cl 24.11 that if the Deed of Cross Security is inconsistent with the JVA then the JVA prevails to the extent of the inconsistency.
3. The charging provision in the Deed of Cross Security is to be found in cl 2.1. It provides that each party 'as beneficial owner' grants to the other 'a security interest … over all PPS Property; and … a fixed charge over all Non-PPS Property'.
4. PPS Property is defined as 'all … property constituted by the Joint Venture Assets'. Non‑PPS Property is defined as 'all … property constituted by the Joint Venture Assets … that is not PPS Property'.
5. The definitions provision also states that terms used in the Deed of Cross Security that are not defined in that document but are defined in the JVA will have the meaning given to those terms in the JVA: cl 1.2. The definition of the term 'Joint Venture Assets' in the JVA has already been considered. It does not include the Tenements.
6. Therefore, the main charging provision in the Deed of Cross Security does not create a security interest in favour of Australian Mining in the Tenements.
7. For Australian Mining and RnD Funding, reliance was placed upon the terms of cl 2.2 of the Deed of Cross Security which deals with priorities and states:

The Security Interest created by this document is intended to take effect as a first ranking security subject only to those Permitted Security Interests created, attempted to be created or permitted to exist by a Party in relation to its Secured Property.

1. It was submitted that the definition of Security Interest indicated that the security created by the Deed of Cross Security extended to all property of the parties to the deed. The term was defined in two parts. The first part stated that in relation to PPS Property, the term had the same meaning as in the *Personal Property Securities Act 2009* (Cth). The second part stated that in relation to other property, the term:

… means any security for the payment of money or performance of obligations including any security or preferential interest or arrangement of any kind, or any other right of or arrangement with any creditor to have its claims satisfied prior to other creditors with, or from the Proceeds of, any asset including, without limitation, retention of title other than in the ordinary course of business and any deposit of money by way of security.

1. The defendants focussed upon the words 'any security for the payment of money'. Reading the terms of the definition of Security Interest into cl 2.2 it was submitted that there was an implicit recognition that the 'Security Interest created by this document' is any security which can be created. The submission should not be accepted. The opening words do no more than refer to the security created elsewhere in the Deed. The language used in cl 2.2 does not create that security. It takes the security as having been created elsewhere and describes the priority to be afforded to that security. The use of the general term 'Security Interest' in that context is not a sufficient basis upon which to found a conclusion that the parties intended to create a general security over all property of the parties.
2. In addition, it appeared to be submitted that the use of the defined term 'Secured Property' was significant. In effect, the claim by the defendants was that a necessary implication from the form of cl 2.2 was that the Deed of Cross Security was intended to create a 'Security Interest' in relation to 'Secured Property' as that term was defined in the Deed.
3. However, that is not the manner in which cl 2.2 is expressed. It is dealing with priorities. The term Secured Property is used to describe the extent of the type of property in respect of which the priority is afforded. The security created by the Deed of Cross Security (as expressed in cl 2.1) ranks first subject only to permitted securities in relation to the 'Secured Property' of a party. The fact that the extent of the securities which are to be afforded priority are defined broadly is a weak linguistic foundation on which to expand the scope of the security created by the Deed of Cross Security despite the terms of cl 2.1.
4. The significance of the defined term 'Secured Property' for the extent of the power to appoint a receiver under the Deed of Cross Security is addressed as part of Issue (3) below. However, at this point the contention advanced for Australian Mining and RnD Funding is that the Security Interest that is said to take a first ranking security is, by implication, broadly defined because the securities that may take priority are broadly defined. Assuming for present purposes that the defined term for Secured Property is broader (as to which, see below), the fact that the definition is expressed more broadly does not lead to the conclusion that it is the scope of the definition of Secured Property and not the scope of cl 2.1 that determines the extent of the charging provision. It is quite possible for the charging provision to be given precedence. Indeed, not to read the Deed of Cross Security in that way would be to ignore the charging provision and interpret the instrument as creating a wider Security Interest than that described in the only provision that expresses the nature and extent of the grant of security.
5. Further, the definitions of 'Security Interest' and 'Secured Property' are not operative provisions. Definitional provisions only apply to the extent that they are given operative effect by the terms of the relevant instrument. Even then they only operate 'unless the context otherwise requires'. Given the terms of cl 2.1, the context otherwise requires in the present case. The language of the definition of 'Security Interest' and 'Secured Property' takes effect subject to the clear terms of the operative provision as to the extent of the charge, namely the charging provision in cl 2.1.
6. For those reasons, there would need to be compelling reasons based upon the definition of the term 'Secured Property' and the use of that term to reach a conclusion that the Deed of Cross Security granted a security interest that was broader than that described in cl 2.1. The opening words of cl 2.2 do not suggest that they are themselves creating the relevant security interest. Rather, they point to the creation of that interest elsewhere in the instrument. As has been noted, the charging provision is to be found in cl 2.1.
7. Therefore, subject to an issue (addressed below in dealing with Issue (3)) as to whether the power to appoint a receiver is broader than the charging provision (or the terms of that provision suggest a different answer as to the scope of the security interest created by the Deed of Cross Security), the Deed of Cross Security does not create a security interest in favour of Australian Mining over assets of Goldus that were not assets of the Teetulpa Venture, particularly the Tenements.
8. It was submitted for the defendants that the explanation for the form of the charging provision was that the Deed of Cross Security had been updated to deal with the introduction of the *Personal Property Securities Act* at about that time. That submission must be rejected given that cl 2.1 is the charging provision under the instrument and, as has been noted, the definitions of PPS Property and Non-PPS Property used in that clause are not generic but rather refer to the 'Joint Venture Assets'. The use of that language manifests terminology tailored to the particular circumstances. The evident purpose of referring to the Joint Venture Assets was to confine the scope of the security to assets that relate to the joint venture rather than to encompass all assets of the Teetulpa Venturers.
9. Once that explanation is rejected, the position is that, on the argument advanced for the defendants, the language of cl 2.1 serves no purpose. So much was accepted by counsel in the course of opening. It is most unlikely that the parties included a provision in the Deed of Cross Security as the only provision that adopted the language of a charging clause on the basis that it would serve no purpose and would be overtaken in some way by the form of the general definition of Security Interest.
10. Finally, reliance was placed by the defendants upon the terms in which cl 6 of the Deed of Cross Security is expressed. It is concerned with the way in which the security rights conferred by the Deed of Cross Security may be enforced. It is expressed in the following terms:

If an Event of Default has occurred and is continuing, the Non-Defaulting Party may take action (in its own name) under this document to enforce a Security Interest created under this document and exercise the powers in this document in respect of all indebtedness and Other Obligations owing to it by the Defaulting Party after it gives notice to each other Party (but without the need for the consent or agreement of any other Party).

1. It may be noted that cl 6 refers to steps being taken to enforce a Security Interest. The definition of that term uses language that is consistent with a construction of the Deed of Cross Security that gives operative effect to cl 2.1 as the charging provision. It is not expressed in terms that suggest any particular scope to a security interest. Rather, as cl 6 makes clear, the action that can be taken is to 'enforce a Security Interest created under this document'. For reasons that have been given that security interest is confined to the Joint Venture Assets and does not include the Tenements.

## Issue (3): Is the power to appoint a receiver under the Deed of Cross Security limited to the interest of the defaulting party in the assets of the Teetulpa Venture?

1. It was submitted for Goldus that where there had been an Event of Default then the power conferred by cl 7.1 of the Deed of Cross Security to appoint a receiver was limited to the interest of the Defaulting Party in property that formed part of the Teetulpa Venture. So, if Goldus defaulted under the JVA, the power to appoint a receiver was confined to the interest of Goldus in the property of the Teetulpa Venture.
2. For the defendants it was submitted that whatever the position in relation to cl 2.1 and cl 2.2, the parties had agreed that upon an Event of Default, a receiver could be appointed over the whole of the assets of the Party to the Deed of Cross Security that was in default.
3. Clause 7.1 of the Deed of Cross Security provides:

A party entitled under clause 6 to take action to enforce this document may at any time after it becomes entitled to enforce this document … appoint a Receiver of all or part of a Defaulting Party's Secured Property …

1. The first point to note is that cl 7 is expressed to apply where a party is entitled under cl 6 to take action. As has been explained cl 6 is confined to action to enforce the security interest created by the Deed of Cross Security. Therefore, the opening words confine the circumstances in which a receiver may be appointed. This is an entirely commercial and consistent approach. It ensures that the receiver is able to be appointed to the extent of the security created by the Deed of Cross Security and no more. It would be most unusual if an instrument of security confined the assets that were the subject of the security but conferred a right to appoint a receiver over all property of the party (including property not the subject of the security created by the instrument).
2. The term 'Secured Property' is extensively defined. Within the list are 'PPS Property and Non‑PPS Property'. For reasons already given, those terms are confined to property of the Teetulpa Venture and they do not include the Tenements. However, the definition goes on to include (cl 1.1.25):

in relation to a Grantor, interest at any time in everything in relation to which the Grantor has a sufficient right or interest to be able to grant a Security Interest, including:

1.1.25.1 its Participating Interest, including its Participating Interest share of the Tenements and all other Joint Venture Assets;

1.1.25.2 its Participating Interest share of Products produced by the Joint Venture;

1.1.25.3 its right and interest in all agreements and other documents made by the Joint Venturers for the purpose of the Joint Venture, including all its rights and interest in all contracts for the sale of its Products produced by the Joint Venture and any proceeds of sale of those Products;

1.1.25.4 its Participating Interest share of all present and future proceeds of insurance taken out under the Joint Venture Agreement; and

1.1.25.5 its Participating Interest share of moneys held by the Manager for and on behalf of the Joint Venture and all claims and entitlements for money or other property to be paid or transferred to the Joint Venture.

1. The term 'Grantor' is defined to mean 'a Party to the extent that it grants a Security Interest under this document'. Plainly, it includes Goldus.
2. There is perhaps a degree of ambiguity in the language of the definition of Secured Property when considered in the context of the other provisions of the Deed of Cross Security. The definition begins by referring to PPS Property and Non-PPS Property, being the property the subject of the security clause (cl 2.1). As has been noted, that property is confined to joint venture property and does not extend to the Tenements. It may be thought that given the terms of the security clause that would be the limit of the definition, but it is not. The definition goes on to refer in the most general terms to 'everything in relation to which the Grantor has a sufficient right or interest to be able to grant a Security Interest' (and then provides a list of rights or interest included in that general language).
3. The immediate matter to note is that the 'including' list is confined to categories of rights and interests that are described by reference to the Participating Interest in the Teetulpa Venture. The term Participating Interest is thereby incorporated from the JVA and, as may be expected, is defined in terms that are confined to the Teetulpa Venture. Therefore, the inclusive list is quite narrow given the general opening words.
4. Also, the general language follows on from the reference to the property that is the subject of the security clause.
5. In the context of the security clause and the 'including' list, the appropriate construction of the general words is that they are ensuring that the deed provisions apply not only to the assets of the Teetulpa Venture but also the interest of Goldus and Australian Mining in the venture and minerals produced by the activities of the venture. It is appropriate for the ambiguity or tension in the language of the definition to be resolved by limiting its scope by reference to the charging provision. As has been observed, it is most unlikely that commercial parties would state clearly the limit of the charging provision but then provide for certain provisions, such as the right to appoint a receiver, to be exercised in respect of property not described in the charging provision.
6. Therefore, the Deed of Cross Security did not confer a right upon Australian Mining to appoint a receiver to the Tenements in the event of default by Goldus.

## Issue (4): Is any provision purporting to create an interest in the Tenements void because the consent of the Minister was not obtained under the *Mining Act 1971* (SA)?

1. At the time of entry into the JVA and the Deed of Cross Security, s 83 of the *Mining Act* provided that:

A lease or licence, or an interest in a lease or licence, under this Act shall not be assigned, transferred, mortgaged, sublet, or made the subject of any trust or other dealing, whether directly or indirectly, without the consent in writing of the Minister, and any such transaction entered into without that consent shall be void.

1. Save to note the further legal argument raised by Goldus, given the conclusions reached as to Issues (1), (2) and (3) it is not necessary to consider the application of s 83 to the present circumstances. However, I do observe that for reasons given by Ipp J (Pidgeon J agreeing) in *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* [2000] WASCA 27; (2000) 22 WAR 101 at [102]‑[105], an agreement of the present kind gives rise to a contractual right to enter, not a proprietary interest. A provision of the kind expressed in s 83 is concerned with agreements that transfer proprietary interests.
2. Otherwise, provisions such as s 83 may lead to the conclusion contended for by Goldus: see the consideration of different provisions, albeit in a similar legislative context, in *Finesky Holdings Pty Ltd v Minister for Transport for Western Australia* [2002] WASCA 206; (2002) 26 WAR 368 at [34]‑[48] (Steytler J, Wallwork and Parker JJ agreeing). All would depend upon construction of the relevant provisions in the *Mining Act*. In that regard, I note that the legal foundation for the submission by Goldus was not developed and the position adopted by the defendants was to the effect that such issues might be addressed if and when relief was to be granted in respect of an interest in the Tenements. For reasons that have been given as to Issues (1), (2) and (3) there is no entitlement to such relief on the part of the defendants and therefore no need for the matters raised by Issue (4) to be addressed.

## Issue (5): Assuming that there had been defaults by Goldus under the JVA as alleged by the defendants, have the notice requirements under the terms of the JVA and Deed of Cross Security been met?

1. For Goldus, submissions were advanced as to the requirements that must be met before there would be an Event of Default for the purposes of the Deed of Cross Security that may then lead to the exercise of rights to the security created by the Deed of Cross Security. The propositions advanced are considered below.
2. The submissions rely upon the terms of cl 6 of the Deed of Cross Security. For convenience of reference it is reproduced below:

If an Event of Default has occurred and is continuing, the Non-Defaulting Party may take action (in its own name) under this document to enforce a Security Interest created under this document and exercise the powers in this document in respect of all indebtedness and Other Obligations owing to it by the Defaulting Party after it gives notice to each other Party (but without the need for the consent or agreement of any other Party).

### First, does the Deed of Cross Security only secure monetary defaults?

1. Goldus claimed that the Deed of Cross Security only secured monetary defaults under the JVA.
2. The term 'Event of Default' as used in cl 6 of the Deed of Cross Security is one of the terms that are defined by referring to the definition in the JVA. Within the JVA, the term 'Event of Default' is defined in cl 11.1 which defines the circumstances in which a Joint Venturer may forfeit its participating interest. It states:

A Joint Venturer is a 'Defaulter' [if] it defaults in the performance of any of its obligations under this Agreement ('**Event of Default**'), and such default continues for a period of thirty days after the Manager or (where the defaulting Joint Venturer is the Manager) another Joint Venturer shall have given written notice to the defaulting Joint Venturer specifying the default and (where such default is remediable) requiring its remedy, and requiring the payment of a reasonable sum to cover the costs of issuing the said notice, then the Defaulter shall be deemed to have withdrawn from the Joint Venturer and it shall transfer its Participating Interest in the Joint Venture to the non‑defaulting Joint Venturer or Joint Venturers (as the case may be) ('**Non‑Defaulter'**) …

1. Clause 11.2 then deals with those instances where the default 'comprises the non payment of Contributions or other monies due to the Joint Venture'. It may be inferred from the terms of that provision that the Event of Default as defined in cl 11.1 is not confined to monetary default.
2. Further, there are provisions of the terms of the Deed of Cross Security that are consistent with an intention that it secures non-monetary defaults. They include the following:
3. the Deed of Cross Security recites that under the terms of the JVA each party must perform 'certain obligations' and that the deed is to 'secure the performance of those obligations'. The use of such language is generic and is not confined to monetary obligations;
4. for reasons that have been given, the definition of Event of Default in the JVA (as applied to the Deed of Cross Security) is not confined to monetary defaults; and
5. the Deed of Cross Security has provisions that apply to 'the Defaulting Party's Indebtedness' and to 'the Defaulting Party's Other Obligations' in circumstances where the term 'Other Obligations' means 'in relation to a Party, all its covenants, agreements, obligation (other than the obligation to pay Indebtedness) and liabilities arising under from or in connection with' the JVA.
6. However, as has been noted, cl 5.1(a), in imposing the obligation to execute a Cross Charge, states that it is to be executed and delivered 'in order to secure the payment … of any amount due … under [the JVA]'. Further, it should be observed that cl 9.2 of the Deed of Cross Security provides that the powers, rights and discretions of an enforcing party under the deed 'are in addition to all other powers, rights and discretions conferred on it by law and subject always to the Joint Venture Agreement'.
7. For Goldus, it was submitted that the combination of the language used in cl 5.1 of the JVA and the adoption in the Deed of Cross Security of the definition of Event of Default in JVA meant that the only default secured by the Deed of Cross Security was a monetary default. It was submitted that the rights conferred by cl 6 of the Deed of Cross Security should be read down to avoid inconsistency by reason of cl 24.11 which provides that the JVA prevails to the extent of any inconsistency.
8. For the defendants it was submitted that there was significance to be given to the fact that the terms of the Deed of Cross Security were annexed to the JVA. It was also submitted that there would be commercial circumstances in which non-monetary defaults would be significant. It submitted that if Goldus as the holder of the Tenements was to refuse access then there were good commercial reasons why the security might allow Australian Mining to appoint a receiver and be able to enter the property.
9. There is merit in each of the competing submissions. The following matters appear to bear upon the proper construction.
10. First, if indeed it was intended to confine the Deed of Cross Security to monetary defaults then you may expect that the Deed of Cross Security would have been expressed in those terms (especially given the fact that it contains various terms specific to the circumstances of the venture, notably the terms as to the extent of the charging provision to which reference has already been made). This supports the submission by Australian Mining and RnD Funding.
11. Secondly, if there was a concern about non-monetary defaults then the principal concern of Australian Mining would be an ability to secure access to the Tenements. Yet, for reasons that have been given, the Deed of Cross Security provided no security interest over the Tenements. Further, the Deed of Cross Security does not confer rights of a kind that suggest that they were to be exercised in a manner that might remedy non-monetary defaults. This supports the position of Goldus.
12. Thirdly, the provisions of the Deed of Cross Security concerning the application of monies received in exercise of the security refer to payment to meet 'Indebtedness' or to satisfy rights of indemnity: cl 13. There is no provision allowing for such monies to be applied to meet damages for non-monetary default. The term 'Indebtedness' is defined to mean 'in relation to a Party, any amount (including interest) that is owing by that Party (whether alone or with any other person) to another Party' under the Deed of Cross Security, the JVA and 'any right to contribution or indemnity arising under general law or under statute in connection with any liability incurred by that Party'. These provisions support the construction contended for by Goldus.
13. Fourthly, the terms of cl 6 of the Deed of Cross Security provide that if an Event of Default occurs then the Security Interest created by the Deed may be enforced 'in respect of all Indebtedness and Other Obligations owing … by the Defaulting Party'. There are two aspects to this clause. First, it applies the definition of Event of Default which, for reasons that have already been given, is adopted from the JVA where it is used to include non‑monetary defaults. Second, it refers to enforcement in respect of Indebtedness and Other Obligations. Other Obligations is defined to mean:

in relation to a Party, all its covenants, agreements, obligations (other than the obligation to pay Indebtedness) and liabilities arising under, from or in connection with the Agreement.

1. The word 'Agreement' is not defined. The defined term 'Joint Venture Agreement' refers to the JVA. The term 'this document' is used throughout to refer to the Deed of Cross Security. There are very many provisions of the Deed of Cross Security that use the term 'Joint Venture Agreement'. It may be that the occasional references to 'Agreement' reflect the use of a template. The fact that they do not use the defined term 'Joint Venture Agreement' despite its otherwise consistent use in the rest of the Deed of Cross Security (especially in all its key provisions) suggests that close attention was not paid to the provisions that use the term 'Agreement'.
2. The term 'Agreement' appears in cl 2.5 of the Deed of Cross Security which deals with variations 'under the Agreement or this document'. However, it is used to express confirmation as to the Indebtedness, not Other Obligations. These matters appear to be equivocal.
3. Fifthly, the JVA did have consequences for non-monetary defaults. In particular, as has been noted, they could lead to the forfeiture of the participating interest of a defaulting party: cl 11.1. Therefore, the commerciality of confining the Deed of Cross Security to monetary defaults is not to be approached on the basis that there would otherwise be no consequence under the JVA for a non-monetary default. The parties to the JVA would also be able to resort to common law remedies. This provides some support for the position of Goldus.
4. Sixthly, it was the provision of funds to undertake the exploration and mining activities that was fundamental. The principal obligation of the Teetulpa Venturers under the JVA was to fund the activities of the venture. It was then the responsibility of the manager to undertake the relevant activities. There are good commercial reasons why a party would seek to confine its liability in respect of a risky commercial venture such as mining for gold and other alluvial minerals to the interest of that party in the assets of the venture. The express terms of the agreement between the parties to the JVA as to the reason for the Deed of Cross Security was in order to secure the payment 'of any amount due' under the JVA. In those circumstances, there was a commerciality for the terms of the Deed of Cross Security to be confined to securing the payment of money due under the JVA.
5. Seventhly, it follows that to the extent that there is ambiguity it is not to be resolved by considering the commerciality or reasonableness of the alternatives. Both are commercially logical. In those circumstances, it is necessary to pay close regard to the language of cl 5.1(a) in the context of the JVA and the Deed of Cross Security.
6. Overall, the terminology used in the Deed of the Cross Security has provisions that suggest that it is confined to Indebtedness (monetary defaults) and other provisions that suggest it applies to Indebtedness and Other Obligations (monetary and non-monetary defaults).
7. Returning then to the language used in cl 5.1(a) which addresses the issue directly. It is to the effect that each Joint Venturer must execute and deliver a Cross Charge (in the terms annexed) 'in order to secure the payment … of any amount due'. For the defendants it may be said that if the Deed of Cross Security also secured non-monetary obligations then the terms of cl 5.1(a) are still satisfied. The obligation to execute and deliver the Cross Charge is not said to be required *only* in order to secure payment of amounts due. However, the terms of cl 5.1(a) express directly the purpose to be served by the Deed of Cross Security. They do so in terms that manifest the expressly the commercial purpose for the Deed of Cross Security. For reasons that have been given, there is support in the terms of the Deed of Cross Security for its terms to be confined to securing Indebtedness as defined, being monetary defaults.
8. The argument for the defendants depends largely upon the scope of the term 'Event of Default' as used in the JVA (and adopted by the Deed of Cross Security) and the terminology of cl 6. However, the adopted meaning of Event of Default must submit to the context within the Deed of Cross Security and the scope of the deed must be understood from considering all of its provisions. In that regard, close consideration must be paid to the provisions of cl 13.1 which deal with the application of the proceeds of resort to the security under the Deed of Cross Security. In particular, as to a receivership, they provide in cl 13.2:

**Application by Secured party or Receiver**

When the Secured Party or a Receiver receives money under or because of this document, and applies it in payment to the Secured Party of the Indebtedness, the Secured Party or the Receiver (as the case may be) may apply different parts of the money received to different parts of the Indebtedness, regardless of any appropriation by the Grantor, as the Secured Party or Receiver chooses.

There is no reference to applying the money to meet Other Obligations, particularly non‑monetary obligations.

1. On balance, giving effect to the terms of cl 5.1(a) of the JVA, the Deed of Cross Security only secures monetary defaults. A construction to that effect should be adopted to the extent that there is inconsistency in the Deed of Cross Security with cl 5.1(a) of the JVA (as required by cl 24.11 of the Deed of Cross Security) and to confine the enforcing party's powers, rights and discretions under the Deed on the basis that they are subject always to the JVA (as required by cl 9.2). It is supported by the aspects of the Deed of Cross Security that focus upon Indebtedness, recognising that there is some inconsistency in the provisions of the Deed in that regard.

### Second, was a notice and continuing default of 30 days required before enforcement of the Deed of Cross Security?

1. As has been noted, the Deed of Cross Security adopted the definition of Event of Default used in the JVA. The definition appears in cl 11.1 of the JVA (quoted above) which deals with forfeiture. The relevant part of the provision bears repeating for present purposes. It says:

A Joint Venturer is a 'Defaulter' [if] it defaults in the performance of any of its obligations under this Agreement ('**Event of Default**'), and such default continues for a period of thirty days after the Manager or (where the defaulting Joint Venturer is the Manager) another Joint Venturer shall have given written notice to the defaulting Joint Venturer specifying the default and (where such default is remediable) requiring its remedy.

1. It should be noted that the language adopted by the defined term Event of Default (expressed in parentheses after the relevant language) does not incorporate continuance of the default for 30 days. Rather, the terminology refers to any default in the performance of any obligation under the JVA. Then, if such a default continues for 30 days after notice has been given then the Defaulter is deemed to have withdrawn. The structure is significant. The 30 day notice does not establish the existence of an Event of Default. Rather, it establishes the basis for a self-executing forfeiture of the participating interest of the Defaulter. Therefore, under cl 11.1, a 30 day notice is served in order to bring about the forfeiture not to establish the Event of Default.
2. This analysis is supported by the terms of cl 11.2 which make clear that notwithstanding the right to give a 30 day notice that may lead to the forfeiture of the participating interest of the Defaulter, a default that comprises non-payment of monies due continues and there is a liability to pay. That obligation is not conditioned on a 30 day notice.
3. So, when the Deed of Cross Security adopts the definition of 'Event of Default' from the JVA, it adopts a definition that does not depend upon a 30 day notice. Such a notice is only required if the Non-Defaulter seeks to forfeit the interest of the Defaulter.
4. In that context, cl 1.3.3 of the Deed of Cross Security then deals with the concept of continuing default. It states:

An Event of Default is **'continuing'** to the extent that it has not been remedied, to the extent possible, in accordance with Joint Venture Agreement or waived by the Non-Defaulting Party.

1. Therefore, the notion of continuing default under the Deed of Cross Security points to an unremedied default in respect of obligations under the JVA. It does not require the default to continue after notice has been given.
2. For Goldus it was submitted that before there could be enforcement of the Deed of Cross Security there must be a notice of default served and the default must continue for 30 days. The submission relied upon two aspects of cl 6 of the Deed of Cross Security (set out above). First, the opening words which stated '[i]f an Event of Default has occurred and is continuing'. Second, the concluding words which stated the action to enforce may be taken 'after … notice to each other Party (but without the need for the consent or agreement of any other Party).
3. It may be noted that the Deed of Cross Security secures obligations under the JVA the terms of which contemplate that there may be more than two parties to the agreement. The JVA also has provisions that confer pre-emptive rights where a Joint Venturer seeks to dispose of 'all or any of its Participating Interest': cl 13.3(a). Provided there is compliance with the right of pre-emption, the minimum interest that may be assigned is 5%: cl 13.6. The short point to be made is that the JVA contemplates that it may have more than two parties each of whom must assume the obligations under the JVA (including the obligation to enter into a Deed of Cross Security).
4. In the above context, the reference to 'each other Party' in the concluding part of cl 6 should be construed as referring to each other party to the JVA (and hence to the Deed of Cross Security). This construction is supported by the reference in parentheses to the fact that the requirement for notice does mean that consent is required of the 'other Party'. There would be no commercial sense to a requirement that the powers under the Deed of Cross Security to enforce the obligations of the Defaulting Party could only be exercised with the consent of the defaulting party. Therefore, the requirement to give notice imposed by cl 6 is not a requirement to give notice to the Defaulting Party. The submission on behalf of Goldus to the effect that there is such a requirement should not be accepted.
5. As to the effect of the requirement in the opening words of cl 6 for a continuing default, for reasons that have been given it did not incorporate any requirement for there to be a notice before a default could be said to be continuing. The fact of the default and its continuation was all that was required.
6. For that reason, I do not accept the submission of Goldus to the effect that there must be default for 30 days after a notice has been given before there can be an Event of Default. Default in the performance of payment obligations under the JVA is all that is required for there to be an Event of Default. Then, under the terms of cl 6 of the Deed of Cross Security, if that Event of Default is continuing (that is, has not been remedied) then action can be taken to enforce the Security Interest under the Deed. It is not necessary that the Event of Default be demonstrated to have continued for 30 days after notice has been given.
7. There is no part of the language in cl 11.1 or in cl 6 that requires notice to be given before there can be enforcement under the Deed of Cross Security. All that cl 6 requires is that an 'Event of Default' has occurred and is continuing. Therefore, in order to enforce the terms of the Deed of Cross Security all that is required is default in the performance of the payment obligations under the JVA that is continuing at the time that the enforcement action is taken.
8. On the facts, those requirements have been met. Therefore, assuming that the Defaults are established by the defendants or there is another default that can be relied upon by them (as to which see Issues (13) and (14)) then the requirements of the Deed of Cross Security have been met.

## Issue (6): Can a party who is in default under the JVA take action under the Deed of Cross Security against another defaulting party?

1. It may be noted that cl 6 of the Deed of Cross Security (quoted above) refers to action that can be taken by the Non-Defaulting Party to enforce obligations owing to it by the Defaulting Party. It was submitted for Goldus that the language should be construed to mean that a Defaulting Party cannot enforce the Deed. There is no language in the Deed to that effect. Clause 6 does not refer to action that may be taken by a party who is not in default. It simply uses the terms 'Non-Defaulting Party' which is defined to mean 'where there is a Defaulting Party, the other Party' and 'Defaulting Party' which is defined to mean 'a party which has committed an Event of Default'. Therefore, where there is a Defaulting Party the only characteristic that is required to qualify a Party as the Non-Defaulting Party is that it is not the party who has committed the relevant Event of Default. Significantly, Defaulting Party is not a term that is applied to a party who is in default. Rather, it is defined as the party who has committed an Event of Default, that is, the terms apply by reference to an identifiable Event of Default.
2. Likewise, cl 6 applies where an Event of Default has occurred. Therefore, the provision operates in respect of a particular Event of Default. The Party who is not the Defaulting Party for that Event of Default is the Non-Defaulting Party and it is that party who can take action. It is irrelevant that the 'Non-Defaulting Party' for that Event of Default may otherwise be in default.
3. Therefore, the terms of the Deed of Cross Security do not prevent a party in default under the JVA from taking action under the Deed of Cross Security against another Party in respect of an Event of Default by that other Party (the Defaulting Party). If that outcome was intended, it could have been easily expressed in the definition of Non-Defaulting Party, but for reasons that have been given that is not what was recorded in the Deed of Cross Security.
4. Goldus submitted that the above conclusion would mean that, at the same time, joint venturers could be appointing receivers over each other's property and that would be an uncommercial result. It was not explained why it would be uncommercial. For the instance given by Goldus to arise there would need to be a particular default by each venturer. For reasons that have been given, that default would have to be a monetary default. The appointment of the receiver would be in respect of the participating interest of each venturer and would be to the extent of the monetary default. There would not be competing receiverships over the same property. The security interest would be exercised in order to recover funds to cover the monetary default. There is no reason why that outcome may not arise in a scenario where both parties were in default. In effect, the Joint Venture Assets (which include any production) would be applied to remedy the default. It is not a reason to reach a different conclusion to that which is indicated by the language used in the definitions in the Deed of Cross Security.
5. Goldus also submitted that there would be similar difficulties for the exercise of rights under cl 11.1 of the JVA to forfeit the participating interest of a Defaulting Party. It was submitted that if the party giving the notice required by cl 11.1 could be a party in default of obligations then there could be competing attempts by each venturer to forfeit the interest of the other. However, the submission by Goldus to that effect assumed that the meaning of Defaulter and Non-Defaulter under cl 11.1 had the same meaning as Defaulting Party and Non-Defaulting Party as used in the Deed of Cross Security. There is no reason for those terms to have the same meaning. Indeed the use of different (separately defined) terminology in the Deed of Cross Security strongly indicates that the terms were to have different meanings. Therefore, it is not possible to reason from consequences under cl 11 of the JVA to a conclusion as to what is meant by Non-Defaulting Party under the Deed of Cross Security. This further contention by Goldus is also not a reason to reach a different conclusion to that which is indicated by the language used in the definitions in the Deed of Cross Security.
6. Therefore, a party who is in default under the JVA can take action under the Deed of Cross Security against another defaulting party.

## Issue (7): Was Australian Mining in default at the time that it purported to take action to appoint receivers?

1. This issue arises because of a submission by Goldus to the effect that the question raised by Issue (6) should be answered in the negative and that Australian Mining was in default with the consequence that it could not take steps to appoint receivers under the terms of the Deed of Cross Charge. Therefore, given the conclusion as to Issue (6), it follows that it is not necessary to determine Issue (7). However, as the question was raised, I will deal with it briefly. I do so noting that the parties did not devote any real attention to the matters the subject of Issue (7).
2. On 31 October 2019, Goldus gave written notice to Australian Mining that it was in default of the JVA by failing to prepare and submit a programme and budget for the Teetulpa Venture for the financial years ending June 2015 to June 2020 and failing to convene meeting to approve the annual programme and budget.
3. There was evidence to the effect that the notice was given and evidence from Mr Hillam to the effect that the programmes and budgets had not been prepared. That evidence was not contradicted. In those circumstances, the default by Australian Mining is established.
4. The defendants claimed that before the notice period for the Goldus notice had expired, the time for compliance with the earlier notice served by Australian Mining had expired with the consequence that under cl 11 of the JVA the participating interest of Goldus had already been forfeited. This claim assumes that a party in default under the JVA could rely upon cl 11. This is a very different question to whether a party who had committed an Event of Default (which operated for the purposes of both the JVA and the Deed of Cross Security) could exercise rights under the Deed of Cross Security. For reasons already given in answer to Issue (6), a party in default can exercise those rights. The issue now raised is whether a party in default under the JVA could forfeit the participating interest of another party in reliance upon cl 11.1. As noted cl 11 uses the terms 'Defaulter' and 'Non-Defaulter'.
5. A party in default under the terms of the JVA is a Defaulter. If a notice is issued under cl 11.1 to a Defaulter and the default continues for 30 days then 'the Defaulter shall be deemed to have withdrawn' from the venture. Clause 11.1 then specifies the further consequence that the Defaulter 'shall transfer its Participating Interest in the Joint Venture to the non-defaulting Joint Venturer'. The non-defaulting venturer is defined as the 'Non-Defaulter'. Therefore, in order to be the Non-Defaulter, the party must be 'the non-defaulting Joint Venturer'.
6. There are two construction possibilities. First, the Non-Defaulter is simply the party who is not the Defaulter, or not the party who has committed the default specified in the notice. Second, the Non-Defaulter must be a party who is a 'non-defaulting' party. The gravity of the consequence is a contextual matter to be brought into account. The Non-Defaulter is entitled to forfeit the interest of the other party. If a party who is in default can be the Non-Defaulter then in circumstances where both parties were in default then, simply by virtue of being the first party to serve the notice, a defaulting party could forfeit the interest of the other defaulting party. That has the appearance of an unreasonable or uncommercial result. Taking that aspect into account, the second construction is to be preferred. The Non-Defaulter must be a party who, at the time of seeking to forfeit the interest of the other party is not a Defaulter. In this context, the use of the terminology 'non-defaulting Joint Venturer' means a party who is not in default rather than the party who is not the Defaulter.
7. Therefore, as Australian Mining was itself in default at the time that it served the notice under cl 11 during the 30 day period for Goldus to remedy the default specified in the notice, Australian Mining was a Defaulter and the consequence of forfeiture did not result from any failure by Goldus to remedy the Defaults specified in the notice (assuming that they occurred).
8. The same result pertains to the claim by Goldus that Australian Mining has forfeited its interest in the Teetulpa Venture by reason of its failure to comply with the Goldus notice. Therefore, if Goldus was in default (as to which see Issues (13) and (14)), the Goldus notice did not lead to the forfeiture of the participating interest of Australian Mining in the Teetulpa Venture.

## Issue (8): If no to Issue (6) and yes to Issue (7), is Australian Mining prevented from taking action to enforce the Deed of Cross Security based upon principles of unconscionability and estoppel?

1. Goldus submitted that it would be unconscionable to allow Australian Mining to rely upon defaults by Goldus in paying contributions to the expenditure for the Teetulpa Venture in circumstances where Australian Mining had itself failed to pay the corresponding invoices for its share of the same expenditure. The pleading of the claim was expressed in terms of estoppel. However, the claim was opened on the basis that it would be unconscionable for one venturer to take action under the Deed of Cross Security and appoint receivers over the assets of Goldus when that venturer had not satisfied its corresponding obligations.
2. Assuming the factual claims to be correct, the way in which principles of unconscionability may apply in such a case was not explained or developed in any way. There was no claim based upon statutory principles. It is not apparent how common law principles would apply where one party was exercising a contractual right and no other factual aspects were relied upon as a basis for a claim of unfair or special disadvantage. There was no claim based upon application of an implied duty of good faith in the performance of the JVA.
3. Further, it is important to differentiate between steps being taken to forfeit the interest of a party in a joint venture on the one hand and steps being taken to secure payment by resort to the security interest afforded by the Deed of Cross Security on the other hand. In the present case, it is the enforcement of rights under the Deed of Cross Security that is being pressed by Australian Mining. For reasons that have been given, both parties may press for such enforcement.
4. In all the circumstances, the claim based upon unconscionability and estoppel was insufficiently articulated in order to provide an answer to the claim by Australian Mining.

## Issue (9): Was any property interest in the Tenements transferred to Australian Mining under the terms of the DoCA?

1. The contentions advanced by the defendants rely upon the terms of the Second Facility Agreement as providing context for the DoCA. Therefore, it is necessary to begin with the terms of that agreement before considering the terms of the DoCA.

### Second Facility Agreement

1. On 10 May 2018, RnD Funding and ATG entered into the Second Facility Agreement. It contained the following recital:

[RnD Funding] has agreed to provide the Facility to [ATG] on the terms of this Agreement. The purpose of the Facility is to:

1. Provide funding to ATG and Affiliates to satisfy financial obligations pursuant to the [DoCA]. At a meeting of creditors convened and held on 12 April 2018 … the creditors of [Goldus] resolved that [Goldus] execute the DoCA;

2. Provide funding to ATG to commence mining of tenements under its control in respect of the Teetulpa Gold Project.

1. It must be remembered that ATG was the shareholder in Australian Mining. The term 'Affiliate' was defined to mean a subsidiary or a holding company and any guarantor under the provisions of the Second Facility Agreement. Australian Mining was both the holding company and a guarantor.
2. The facility limit was specified as '$1,500,000, as may be adjusted under this Agreement'. The Second Facility Agreement also referred to conditions precedent set out in cl 4.2 of the agreement that were required to be satisfied before there could be further advances beyond certain specified advances (some of which had already occurred). It also provided for an establishment fee of $175,000 and an arranger fee equal to the Loan Amount (with a minimum arranger fee of $650,000).
3. Clause 3.1 of the Second Facility Agreement required the advances under the agreement to be used for purposes expressed in similar terms to the recital (quoted above). The conditions precedent in cl 4.2 included various provisions that were directed to ensuring that Goldus could undertake mining operations and included the following:

Satisfactory evidence that [Australian Mining], or [Goldus] (on behalf of the Teetulpa Alluvial Joint Venture between [Australian Mining] and [Goldus]) owns [the Tenements]

[Program for Environment Protection and Rehabilitation] in respect of [the Tenements]

Evidence that the Teetulpa Alluvial Joint Venture has complied with s 62 of the Mining Act South Australia and lodged a bond in the form of a $330,000 Bank Guarantee for [the Tenements] in respect of the [Program for Environment Protection and Rehabilitation]

1. There was also provision in cl 6.4(a) which required 30% of sale proceeds from mining operations to be used to repay outstanding principal. It was expressed in the following terms:

[ATG] … must at [RnD Funding's] direction no earlier than 4 months from the date of this agreement, proceed to sell gold and any other mineral of value it has mined, either in its processed form or mined but unprocessed, for full market value ('Sale Proceeds'). Thirty Percent (30%) of Sale Proceeds, will be used to repay Principal Outstanding.

1. It may be noted that cl 6.4(a) applied only if there was any mineral of value that had been mined by ATG. It is also to be noted that other provisions of the Second Facility Agreement referred to mining tenements 'owned outright' by ATG being tenements on which mining operations could be carried out.
2. Clause 9 recorded various representations made by Australian Mining to RnD Funding. They included the following:

The [DoCA] proposed by Australian Mining … (and other Hillam Entities … ) is true, complete and accurate in its entirety.

1. Clause 10.1 recorded various undertakings to be met by Australian Mining for so long as monies were outstanding. They included requirements that Australian Mining must:

do all things necessary to comply with terms of the DoCA and ensure that all Affiliates comply with their obligations in respect of the DoCA;

not seek to transfer any assets procured under the [DoCA] to any entity other than [ATG] or Affiliates or as approved by the lender;

if requested by [RnD Funding] to do so, do all things necessary and requested by [RnD Funding] to ensure that [Goldus] becomes a Guarantor under a Deed of Accession in the form of the Deed of Accession on or about the date of this Deed;

1. So, in summary, on 10 May 2018, RnD Funding agreed to provide funds to ATG in order to make payments under the DoCA and then arrange to undertake mining operations including mining operations under the Teetulpa Joint Venture. It did so on the basis of a covenant that it was Australian Mining or Goldus on behalf of the Teetulpa Venture that owned the Tenements and on the basis that Goldus would become a guarantor.
2. On 8 October 2018, a Further Deed of Accession was executed by a number of entities controlled by Mr Hillam, including Australian Mining. However, the Deed was not executed by Goldus. At that time, Goldus was not yet under the control of Mr Hillam.
3. The Further Deed of Accession was expressed to be supplemental to the General Security Deed that had been granted by ATG in favour of RnD Funding on 22 December 2017. It expressed the terms upon which each Guarantor would be bound by the terms of the General Security Deed. In other words, it was a means by which Goldus would be bound to meet the obligations of ATG to RnD Funding.
4. For now, the significant points to note are that (a) the Second Facility Agreement included a condition precedent that required ATG to provide satisfactory evidence that Australian Mining or Goldus (on behalf of the Teetulpa Venture) owns the Tenements; (b) RnD Funding had the right, while any monies were outstanding, to call on Goldus was to sign a Deed of Accession which, if signed by Goldus, would make it liable to meet the obligations of ATG to RnD Funding; and (c) Goldus did not execute a Deed of Accession.

### The DoCA

1. The day after the parties entered into the Second Facility Agreement, on 11 May 2018, the DoCA was executed. There are five parties to the DoCA in addition to the administrators. They are Goldus, Mr Hillam, Courela Minerals Pty Ltd (**Courela**), Sathya Holdings Pty Ltd (**Sathya**) and Australian Mining.
2. At the time, Courela was a minority shareholder in Goldus and was a company controlled by Mr Hillam. On the evidence, Sathya was also an entity controlled by Mr Hillam. Therefore, the counter parties to the DoCA are the administrators on the one hand and Mr Hillam and entities controlled by him on the other hand. The DoCA used the defined term 'Hillam Entities' to mean 'John Hillam personally and companies and persons associated with John Hillam' and Goldus was described as 'the Company'.
3. The terms of the DoCA provided for the creation of a fund which was to comprise two tranches of funds to be provided by the Hillam Entities and the current assets of Goldus 'comprised of cash at bank and debtors' (**Fund**): cl 4.2. Significantly, all assets of Goldus including any mining tenements were 'not included in the Fund': cl 4.3.
4. Clause 5 of the DoCA was headed 'HILLAM CONDITIONS' and stated:

5.1 The Hillam Entities will pay to an account nominated by the Administrators the Costs Sum within 7 days of the execution of this deed by the Company.

5.2 The Costs Sum will be applied exclusively by the Administrators as required towards the costs and expenses incurred by them in achieving the condition set out in clause 5.4 and may be paid by the Administrators to any solicitors or agents engaged by them so as to satisfy that condition.

5.3 If there is any surplus of the Costs Sum following completion of the condition set out in clause 5.4, the Administrators will pay that surplus back to the Hillam Entities.

5.4 The Administrators will oversee and procure the Company to make all necessary applications and execute all necessary documents to obtain approval for a transfer of all shares in the Company to an entity nominated by Hillam for the purpose of receiving and owning such shares.

5.5 All legal work required to give effect to such transfer will be undertaken by the solicitors acting for the Administrators, under instructions from the Administrators, acting at all material times as agents of the Company.

5.6 The Administrators and the Company are to do all they reasonably can to ensure that the transfer of the shares will occur on or before 2 July 2018.

5.7 If the transfer of shares does not occur by 2 July 2018, then subject to them paying the contribution provided for in 4.2.2 of this deed, the Hillam Entities may request and require that the Company deliver up to them executed transfer documents to give effect to the transfer of all Mining and Exploration Licenses held by the Company.

5.8 Subject to clause 5.10, the Administrators agree that they will procure and obtain a sale and transfer to the Hillam Entities of EL number EL 5895, currently owned by Mintech, for a price of $75,000 plus GST.

5.9 Subject to clause 5.10, the Administrators will procure and obtain a sale and transfer to the Hillam Entities of EL number EL5894, currently owned by Mawson, for a price of $35,000 plus GST.

5.10 The parties acknowledge that all transfers of [mining tenements] provided for under this deed are subject to approval of the Minister and that the ultimate decision of the Minister in this regard is out of the control of the Administrators.

5.11 Subject to the contributions being paid under clause 4.2, the Company will provide full releases to the Hillam entities, and in particular [Australian Mining], to any and all rights, interest and or claims that it may have relating to the [Teetulpa Venture] and any joint venture agreement with Sathya.

5.12 Subject to the contributions being paid under clause 4.2, the Company will transfer any and all rights to any royalties that the Company may receive or has a right to receive from any resource payments, production payments and/or any other royalty that may be payable on the value of any product that is payable by Magnetite Mines Limited to the Company pursuant to any and all agreements between the Company and Magnetite Mines Limited.

1. It can be seen that cl 5 provides for the administrators of Goldus to procure a transfer of all the shares in Goldus to an entity nominated by Mr Hillam. The effect of the transfer of that shareholding would be to transfer to the relevant Hillam entity control over the mining tenements that were to remain with Goldus (as stated in cl 4.3). However, if the shares could not be transferred, then at the request of the Hillam Entities, Goldus was to deliver up executed transfer documents for all mining and exploration licences held by Goldus. Those mining tenements will include the Tenements. Therefore, by the terms of the DoCA, either Mr Hillam would obtain control of Goldus (and thereby the Tenements) or an entity controlled by him would become the holder of the Tenements.
2. The DoCA also has detailed provisions in cl 7 under the heading 'RELEASES'. They are expressed in the following terms:

7.1 Upon payment by the Hillam Entities of the contributions to be made by them pursuant to clause 4.2, the Company forever withdraws and releases Hillam, Courela, Sathya, Australian Mining and all other Hillam Entities from all claims it has or purports to have against them and will withdraw or discontinue any proceedings issued by the Company against Hillam, Courela, Sathya, Australian Mining and all other Hillam Entities and Hillam, Courela, Sathya, Australian Mining and all other Hillam Entities and the Company will execute all documents and consent to all and any applications necessary to give effect to such withdrawal and releases. This will include the Company consenting to the release to Australian Mining of the sum of $160,000 currently held by the Supreme Court of New South Wales.

7.2 Except to the extent necessary to ensure that all current Court proceedings as between them are withdrawn and discontinued on the basis the parties bear their own costs of such proceedings, Hillam, Courela, Sathya and Australian Mining do not release the Company from their claims against the Company, and the proofs of debt filed by each of them are not revoked by reason of this deed.

7.3 Hillam, Courela, Sathya, Australian Mining and all other Hillam Entities will discontinue any and all proceedings that have been issued by them or any of them against the Company, but otherwise do not release the Company from any claims they have or purport to have, except as otherwise provided for in this deed.

7.4 Upon payment by the Hillam Entities of the contributions to be made by them pursuant to clause 4.2, and upon completion of the conditions set out in clause 5 of this deed, noting and subject to clause 6 of this deed, Hillam, Courela, Sathya, Australian Mining and all other Hillam Entities release and discharge Mintech, Mawson and the Estate of Lewis from all claims they have or purport to have against them and will discontinue any and all proceedings they have against them and will execute all documents and consent to all applications as necessary to give effect to this clause. In consideration of this release being given the administrators will procure a reciprocal release and discharge from Mintech, Mawson and the Estate of Lewis to Hillam, Courela, Sathya, Australian Mining and all other Hillam Entities.

7.5 Upon payment by the Hillam Entities of the contributions to be made by them pursuant to clause 4.2, if Hillam or the Hillam Entities propose a deed of company arrangement, scheme of arrangement or similar for Mintech which is acceptable to the liquidators of Mintech, following which such proposal is submitted to the creditors of Mintech for approval, then the proofs of debt already submitted by Hillam and Hillam Entities to the liquidators of Mintech will be considered as proofs of debt for voting purposes only when considering and voting on that proposal for the same value as that which was accepted by the administrators of Mintech at the first and second meeting of creditors in that administration. Hillam and Hillam Entities accept and agree that if a proposal is put forward it will contain a condition that indicates there will be no distributions made to Hillam or the Hillam Entities under any circumstances whatsoever.

7.6 Upon payment by the Hillam Entities of the contributions to be made by them pursuant to clause 4.2 and upon completion of the conditions set out in clause 5 of this deed, noting and subject to clause 6 of this deed, Hillam, Courela, Sathya, Australian Mining and all other Hillam Entities release and discharge the Administrators and each of them from all claims they have or purport to have against them concerning their conduct of the Administrations of the Company, Mintech and the Estate of Lewis and will discontinue Supreme Court proceedings number 1283 of 2017 which they have issued against the Administrators, Goldus and Mintech.

7.7 Upon payment by the Hillam Entities of the contributions to be made by them pursuant to clause 4.2, and upon completion of the conditions set out in clause 5 of this deed, noting and subject to clause 6 of this deed, Australian Mining Pty Ltd will arrange for the appointment of receivers over the Teetulpa Alluvial Joint Venture to end.

7.8 Any discontinuance, withdrawal or termination of any action by any party pursuant to this clause is to be on the basis that the parties will bear their own costs in all respects.

1. It can be seen that cl 7 includes a general release by Goldus of all Hillam Entities (including Australian Mining): cl 7.1. However it also provides that various Hillam Entities, including Australian Mining, do not release Goldus from their claims against Goldus and maintain their proofs of debt in the administration of Goldus: cl 7.2 and cl 7.3. It may be noted that these releases do not deal with the interests in the Teetulpa Venture or any other joint venture. Further, the releases are not dealing with rights and interests. Rather, clause 7 is dealing with claims and court proceedings that are made against identified parties. This is the subject matter of the whole of cl 7 (save for cl 7.7 which deals with the receivership of Goldus, see below). In that respect the language may be contrasted with cl 5.11 which deals with 'rights, interest and or claims' that Hillam Entities 'have' that are 'relating to the Teetulpa … Venture'.
2. Within cl 7 there is also a 'release and discharge' by Hillam Entities of various companies and a 'reciprocal release and discharge' by those companies that will arise upon payment of the contributions provided for in the DoCA and provisions concerning future rights of Hillam Entities in the insolvent administration of an entity Mintech: cl 7.4 and cl 7.5. There is a 'release and discharge' of the administrators of Goldus: cl 7.6. Then, cl 7.7 provides:

Upon payment by the Hillam Entities of the contributions to be made by them pursuant to clause 4.2, and upon completion of the conditions set out in clause 5 of this deed, noting and subject to clause 6 of this deed, Australian Mining Pty Ltd will arrange for the appointment of receivers over the Teetulpa Alluvial Joint Venture to end.

1. Therefore, a further part of the context for the DoCA is that Australian Mining has appointed receivers over the Teetulpa Venture. By cl 7.7 the receivership is to be brought to an end.
2. As to the terms of the DoCA, the contentious provision for present purposes is cl 5.11. It must be construed in the context that has been described. In particular, it must be construed in the context of the main provisions of the DoCA which will see:
3. payments of $550,000 made by the Hillam Entities in return for the control of Goldus (including the Tenements) or the transfer of the Tenements to an entity nominated by Mr Hillam;
4. detailed provisions for release and discharge of claims as expressed in cl 7; and
5. the end of the receivership of the Teetulpa Venture.
6. Australian Mining and RnD Funding rely upon the terms of drafts of the DoCA and the evidence of the course of negotiations of the DoCA to support its position as to the construction of cl 5.11. For reasons given below, those matters cannot bear upon the proper construction of the DoCA and therefore the evidence in that regard is not relevant to the present task.
7. As has been noted cl 5.11 of the DoCA provides:

Subject to the contributions being paid under clause 4.2, the Company will provide full releases to the Hillam entities, and in particular [Australian Mining] to any and all rights, interest and or claims that it may have relating to the [Teetulpa Venture] …

1. The submission advanced for the defendants is that cl 5.11 provides for Goldus to give up its interest in the Teetulpa Venture with the consequence that all of the assets of the joint venture (including, on its case, the Tenements) pass to Australian Mining. However, for reasons that have already been given, the assets of the joint venture did not include the Tenements. The JVA was not structured in that way. Therefore, even if the submission is accepted it does not provide a basis for a claim that Australian Mining became entitled to the Tenements.
2. However, for the following reasons, despite the degree of obscurity in the language of cl 5.11, the claim advanced by the defendants concerning the effect of cl 5.11 should be upheld. That is, cl 5.11 provides for a relinquishment to the Hillam Entities of rights, interest and claims of Goldus in respect of the Teetulpa Venture rather than a release of the Hillam Entities from claims against the Hillam Entities by Goldus in respect of the Teetulpa Venture. In particular:
3. The DoCA is structured so that cl 5 records the dealings that are to take place with Mr Hillam and the Hillam Entities. That is to say, it records the commercial terms of the deal to be effected by the Deed through the provisions of funds by the Hillam Entities to establish the Fund. Clause 6 then deals with the circumstances in which compliance with those conditions may be waived by Mr Hillam or the Hillam Entities and the circumstances in which the conditions may be varied. Clause 7 then provides for the releases and discontinuances of court proceedings that are to take effect if the conditions in cl 5 are completed. They include bringing to an end the appointment by Australian Mining of receivers to the Teetulpa Venture. The structure indicates that the condition recorded in cl 5 forms part of that which has to occur before the consequential terms of cl 7 take effect.
4. In contrast to the language used in cl 7, the terms in which cl 5.11 are expressed do not reflect the usual language of a release from claims. In particular, the language that is used refers to the provision of full releases to the nominated parties 'to any and all rights, interest and or claims'.
5. The words used indicate an intention that the rights, interest and or claims of Goldus in the Teetulpa Venture are to be relinquished by Goldus rather than an intention to simply provide a release from claims. First, the use of the terminology of a release 'to' claims rather than a release 'from' claims sits uncomfortably with a release as properly so‑called. Second, the clause provides for releases by Goldus to the nominated parties to 'rights, interest and or claims' that Goldus may have to the Teetulpa Venture. The use of the term release in respect of a right or interest held by the releasing party indicates a relinquishment of such rights. Third, the clause refers to 'interest' singular which is consistent with an intention that the clause is dealing with the interest that Goldus may have in the Teetulpa Venture. It is that interest that is to be released to the 'Hillam entities, particularly Australian Mining'. Fourth, the subject matter of cl 5.11 is 'rights, interest and or claims … relating to the Teetulpa … Venture'. It is of the nature of a joint venture that the interest of a venturer may be relinquished by a party withdrawing from the venture. The effect of withdrawal is that the continuing parties accede to the interest of the relinquishing party. Therefore, the subject matter of the condition explains the use of the term 'release' rather than transfer.
6. It is cl 7 and not cl 5 that deals with releases properly so-called. It may be noted that the DoCA provides that headings do not affect interpretation (cl 1.2.1), but it is the collection of the release provisions in cl 7 that is significant rather than the heading 'RELEASES'. Therefore, the inclusion of cl 5.11 within the body of provisions which set out the dealings with Mr Hillam and the Hillam Entities is significant.
7. There is within cl 7.1 a general release by Goldus of 'all claims it has or purports to have' against Australian Mining and all other Hillam Entities. So, there is no need to repeat such a release in more limited terms in cl 5.1.
8. Alternatively, the terms of cl 5.11 may be referring to 'rights, interest or claims' that Goldus may otherwise have as a continuing joint venturer in the Teetulpa Venture as against Australian Mining as the other continuing venturer. On such an approach, cl 5.11 ensures that Goldus is left with its original agreed participating interest and no more. In effect, any basis upon which Goldus might claim that it has some other rights, interest or claims in the Teetulpa Venture are abandoned.
9. It may be acknowledged that some aspects of the terms of the Second Facility Agreement, particularly those concerned with the ownership of the Tenements, appear to have been prepared with a somewhat different conception of the position in relation to the ownership of an interest in the Tenements than that suggested by the above analysis. Its terms appear to reflect a view that the Teetulpa Venture had some type of interest in the Tenements and that the DoCA would result in that interest passing to Australian Mining. On that view, the provisions in the Second Facility Agreement whereby RnD Funding could call for Goldus to enter into a deed of accession may have been incorporated to deal with the possibility that the DoCA did not proceed. However, for reasons stated below, the terms of the Second Facility Agreement (and other contextual matters) should not be deployed as part of the context for construing the DoCA.

### Evidence of negotiations and context of DoCA not relevant

1. As has been indicated, the evidence of the drafts exchanged and matters known to Mr Hillam and others about the context which provided part of the background (not evident from the terms of the DoCA itself) are not relevant to the construction of its terms. Even though the DoCA is a commercial instrument, it is public in character and affects the rights of other parties, particularly creditors, who are not parties to the dealings that preceded the terms. It is presented to the creditors, and in the present case the Court, for approval. Those parties will consider the instrument divorced from its context.
2. The DoCA operates as a form of statutory instrument which has binding effect upon the persons specified in s 444D and s 444G of the *Corporations Act*. For those reasons, it is necessary to focus upon the terms of the instrument itself and perhaps matters of context that will be known to anyone interested in the affairs of the company. As to these matters see: *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636 at [25] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Reed Constructions Australia Ltd v DM Fabrications Pty Ltd* [2007] NSWSC 1190 at [20]‑[24] (Barrett J); *City of Swan v Lehman Brothers Australia Ltd* [2009] FCAFC 130; (2009) FCR 243 at [5]‑[9] (Stone J), [62]‑[63] (Rares J) expressing views not disturbed on appeal to the High Court); and *Re Antqip Hire Pty Ltd (subject to deed of company arrangement) (in liq)* [2020] NSWSC 487 at [65]‑[73] (Rees J).
3. If indeed a deed of company arrangement is to be understood in a particular commercial context then the appropriate course is for those matters to be recited within the deed. Then parties whose interests will be affected by the terms of the instrument (and who will have to decide whether to challenge its operation) will be able to understand the manner of its operation by considering its terms.

### Factual findings as to surrounding circumstances

1. Against the possibility of an appeal in which reliance is sought to be placed upon the surrounding circumstances (contrary to the conclusions I have reached) I make the following factual findings as to those circumstances.
2. At the time of the negotiation of the terms of the DoCA, detailed formal proposals were advanced by Australian Mining to the administrators of Goldus. Two such proposals were dated 16 March 2018 and 21 March 2018 respectively. They were each sent on the letterhead of Australian Mining and were signed by Mr Hillam. Somewhat begrudgingly and after denying that the contents of the first letter had been brought to his attention before, Mr Hillam accepted in cross-examination that he had read the first of the two letters and signed it before it was sent. The same conclusion should be reached as to the second letter.
3. Nevertheless, Mr Hillam sought to distance himself from the contents of the drafts suggesting that the contents had been included without his instructions. Eventually, after being taken to the content of the 16 March proposal and then to the 21 March proposal, there was the following exchange:

And should the court infer that this [the 21 March proposal] is a document that you would have read before you sent?---The court can - can assume that I probably did read it, but as I said, there was a number of proposals in relation to the DOCA and the final proposal doesn't have - I'm not sure which one it is. I think the final proposal is more - is a different one, but anyway - - -

And this letter [dated 21 March 2018] was a proposal that was sent on your behalf, or it's on - it's on the letterhead of Australian Mining, but ultimately, these were proposals that you were putting forward to the deed administrators - sorry, to the administrators of Goldus, correct?---There were proposals we put to the administrator, yes.

And could I then ask - - -?---And normally what happens is - is the proposal has to be sent to the administrator and the administrator then would have to - it would discuss it. It had to be signed, a proposal was. It doesn't say 'draft proposal'. It had to be a proposal. It had to be signed. And the administrator would come back and we would negotiate about the terms. The final - the final deed and the final terms are very much different than these - these earlier drafts.

1. Given the formality with which each of the proposals is expressed, the fact that each is signed by Mr Hillam personally, the evident experience of Mr Hillam in negotiating the terms of a DoCA, the extent of his professed familiarity with the commercial circumstances of the Teetulpa Venture at other points in his evidence, the detail expressed in his own affidavits and the fact that the DoCA was being negotiated in his interests (which was reflected in the terms that operated by reference to himself and Hillam Entities), I have no hesitation in concluding that Mr Hillam was very familiar with the terms of the two proposals at the time that they were sent. I also infer that they reflect his knowledge and understanding of the factual circumstances at the time, as well as his intentions and, to the extent that the document was drafted by others, his instructions.
2. I reject the evidence of Mr Hillam which sought to distance himself from the content of the documents. I find that they reflect the circumstances at the time in relation to the affairs of the Teetulpa Venture and the dealings between Goldus and Australian Mining. I also find that at the time Mr Hillam's interest was in Australian Mining and he was seeking to advance its interests and his own interests in the terms that he proposed. The persistent unwillingness of Mr Hillam to acknowledge these matters when confronted with questions which assumed that to be the case reflected adversely upon his credibility as a witness.
3. Mr Hillam was also unwilling to accept that in 2017 he had caused Australian Mining to issue a default notice to Goldus under cl 11.1 of the JVA. However, he did accept that he was aware that if such a notice was sent and the default was not remedied within 30 days then the effect would be that Goldus would be deemed to have withdrawn. He also understood at the time that if there was a withdrawal then there would be a determination of compensation to be paid in accordance with the JVA.
4. Mr Hillam was taken to cl 16(d) of the 16 March proposal which formed part of the following provision:

Goldus agrees:

(a) that [Australian Mining] is entitled to own, and the owner of Goldus' participating interest in the [Teetulpa Venture];

(b) to do all things necessary to transfer Goldus' participating interest (including, without limitation, Goldus' interest in the Goldus leases which form part of the [Teetulpa Venture]);

(c) to do all things necessary to transfer, and will transfer, to an entity to be nominated by Hillam the entire participating interest of Goldus in the [Teetulpa Venture], for no consideration other than the contribution by the Hillam entities, in full and final settlement of any claim by Goldus to payment by [Australian Mining] for Goldus' participating interest pursuant to the provisions of the [Teetulpa Venture], including without limitation for payment pursuant to the provisions of clause 11.1 of the [Teetulpa Venture];

(d) to release, and releases, AML from all claims in connection with the [Teetulpa Venture] and in particular, without limiting the foregoing, any claim for payment for the transfer to AML of Goldus' participating interest in the [Teetulpa Venture] pursuant to clause 11 of the [Teetulpa Venture] or otherwise.

1. Mr Hillam did not accept that the terms of cl 16(d) indicated that a default notice had been issued by Australian Mining and what was proposed was that Goldus release Australian Mining from any claim to compensation that would be payable under cl 11 of the JVA where the interest of a joint venture participant was forfeited. I do not accept the credibility of this evidence.
2. If indeed there had been no notice issued under cl 11 by Australian Mining then the terms of cl 16(d) would make no sense. It was obvious that the terms of the proposal reflected a claim by Australian Mining based upon the operation of cl 11, a claim that could not arise unless a notice had been served. The denial of that position by Mr Hillam in the course of his evidence reflected the alignment of his interests with Goldus by the time of the proceedings. His evidence was most unconvincing and manifested a willingness to give evidence in a form that he believed served his own interests by the time of the final hearing rather than in terms that reflected his genuine recollection of the events.
3. It may be inferred from the contents of the two letters that, at the time, the proposal was being advanced on the basis of a context where it was known to the administrators and to Mr Hillam that the position being maintained by Mr Hillam and Australian Mining was that:
4. Australian Mining had served a notice of default under cl 11 of the JVA.
5. Australian Mining maintained that the notice was valid and that Goldus had not remedied the default within 30 days.
6. Australian Mining maintained that Goldus had forfeited its interest under the JVA.
7. The proposal being advanced by Mr Hillam through Australian Mining (and in the interest of the Hillam Entities) was one which would reflect those claims and release Australian Mining from any claim to compensation as a result of the forfeiture by Goldus of its participating interest in the Teetulpa Venture.
8. In addition, it has been shown that by the time of the negotiation of the terms of the DoCA, Australian Mining had issued a breach notice to Goldus under cl 11 of the JVA and had appointed receivers to the joint venture assets of Goldus in the Teetulpa Venture.
9. Following the cross-examination of Mr Hillam, the defendants obtained further documents on subpoena. They provided further support for the above findings.
10. No attempt was made to demonstrate that any of the above factual matters provided the foundation upon which court approval was obtained and that therefore the terms of the statutory instrument were to be construed in the context of the matters that formed the basis for that approval. As I have explained, notwithstanding the above findings, I have not taken the evidence of surrounding circumstances into account in construing the terms of the DoCA.

## Issue (10): If yes to Issue (9), was any such transfer void because the consent of the Minister was not obtained under the *Mining Act*?

1. This issue does not arise. It concerns a question that is principally a legal one. As has already been explained it was not the subject of any real argument. In those circumstances, I do not need to resolve the issue.

## Issue (11): Was the consent of Goldus required before there could be any security interest created by Australian Mining in favour of RnD Funding?

1. Goldus claimed that the JVA prevented Australian Mining creating any security over its interest in the Teetulpa Venture without the consent of Goldus. It maintained that its consent was not obtained and the evidence in that regard was not refuted.
2. Clause 13.1 of the JVA provides that no venturer shall charge or encumber its participating interest without the prior written consent of the other joint venturer 'which consent shall not be unreasonably withheld'. The provision goes on to require agreement by any chargee or mortgagee that the interests of other venturers 'will not be subject to or prejudiced by' the charge or encumbrance.
3. Goldus also relied upon negative pledge provisions in cl 3.1 of the Deed of Cross Security by which Australian Mining agreed not to create any security interest in property that included the interest of Goldus in the joint venture. It was contended that the terms of the Deed of Accession were contrary to the negative pledge.
4. However, these provisions operate *inter partes*. They are not terms to which RnD Funding agreed. The security that RnD Funding enforced was the security granted by ATG in the form of the General Security Deed to which Australian Mining became an obligor by the terms of the Further Deed of Accession.
5. The mere fact that Australian Mining may have breached cl 13.1 of the JVA or cl 3.1 of the Deed of Cross Security by becoming a party to the Deed of Accession does not make the covenants in that deed void or unenforceable at the behest of RnD Funding. It was an issue to be raised as between Goldus and Australian Mining.
6. Mr Hillam was cross‑examined about whether he disclosed to Mr Nakat the terms of cl 13.1 of the JVA and its effect upon the ability of Australian Mining to grant security to Australian Mining. It produced the following exchange:

Assuming that you knew that consent was required under clause 13.1 in order for Australian Mining to enter into the deed of accession, do you accept that that is something that you would have had to disclose to Mr Nakat, in your negotiations with him, for finance?---Yes.

And you accept you did not disclose that to him in your negotiations with him?---I wasn't aware of it at the time, so the answer is, no, I didn't.

1. Further, Mr Hillam conceded in cross-examination that when he assumed control of Goldus (through Roncane) by operation of the provisions of the DoCA he raised no complaint about Australian Mining having provided security to ATG. Indeed, it would have been bizarre for him to do so given that he procured the security by his dealings with RnD Funding in order to secure the funds necessary for the DoCA to be implemented and for him to take control of both Goldus and Australian Mining.
2. Therefore, there is nothing in the claim raised by Goldus that in the absence of consent from Goldus the security interest of Australian Mining could not be enforced.

## Issue (12): Is any receivership of Goldus by reason of default under the Deed of Cross Security confined to securing the defaults under the JVA?

1. Given the conclusions reached in relation to Issues (1), (2) and (3), much of the significance of this issue falls away. Australian Mining has no security over the Tenements which remain the property of Goldus. As has been explained, the security interest of Australian Mining claimed by the defendants under the Deed of Cross Security was to secure the obligations of Australian Mining under the JVA. The Indebtedness of Australian Mining to RnD Funding as joint obligor with ATG under the terms of the General Security Deed is not part of the liabilities secured by the terms of the Deed of Cross Security.
2. However, RnD Funding as controller of Australian Mining (or the receivers appointed by RnD Funding to Australian Mining) in the valid exercise of rights conferred by the General Security Deed could:
3. exercise all of the rights and interest of Australian Mining under the JVA including the right of Australian Mining to forfeit the participating interest of Goldus; and
4. on the basis of the rights of Australian Mining to the whole of the assets of the Teetulpa Venture as conferred by the DoCA (as a result of the determination of Issue (9) in favour of the defendants), RnD Funding could claim all of the interest in the Teetulpa Venture.
5. Therefore, if Australian Mining had been successful in demonstrating that assets of the Teetulpa Venture included the Tenements (or an interest in them) then the property of Australian Mining would include the Tenements (or the interest in them) and it could exercise its security interest as against that property.
6. To the extent that the defendants did suggest that the Deed of Cross Security created a security interest in favour of Australian Mining for liabilities of Goldus beyond those created by the JVA, for reasons that have been given that submission should not be accepted. Therefore, assuming that there has been default by Goldus under the JVA, Australian Mining could only exercise rights under the Deed of Cross Security to the extent that was necessary to remedy defaults by Goldus under the JVA.

## Issue (13): Was Goldus in default under the JVA in the manner alleged in the JVA Default Notice?

1. As has been explained, there is a distinction between a default under the JVA and a default that continues for 30 days after a notice has been given under cl 11.1 of the JVA. The latter may lead to forfeiture of the participating interest of the Defaulter under the terms of the JVA. The former, of itself, is sufficient for action to be taken to enforce the security interest created by the Deed of Cross Security. There is no need for a notice of default before exercising rights under the Deed of Cross Security. Therefore, the question for the purposes of enforcing the Deed of Cross Security is not whether the JVA Default Notice was valid but rather whether there was default under the JVA.
2. Given the conclusion reached as to Issue (9), the participating interest of Goldus in the Teetulpa Venture was relinquished by Goldus. It released to Australian Mining any claim it might have to a right, interest or claim under the terms of the DoCA. Therefore, the whole of the participating interest of Goldus that was the subject of the Deed of Cross Security now forms part of the property of Australian Mining. Therefore, there is no relevance to determining whether there was any default by Goldus under the JVA.
3. The same goes for any claim by the defendants that the interest of Goldus in the Teetulpa Venture has been forfeited by operation of cl 11.1. The interest has passed to Australian Mining under the terms of the DoCA. There is no interest of Goldus to be forfeited under the terms of the JVA that could depend upon the validity of the JVA Default Notice.
4. Therefore, strictly speaking, it is not necessary to determine Issue (13). Further, I have determined that only monetary defaults under the JVA may be relied upon as a basis for the exercise of rights under the Deed of Cross Security and therefore, for that additional reason, non-monetary defaults are of no significance when it comes to considering the validity of the purported appointments of the controller and receivers to Goldus. Nevertheless, I will address the principal competing contentions.
5. The JVA Default Notice specified the following defaults:
6. when Goldus ceased to be the manager of the Teetulpa Venture it failed to immediately deliver to Australian Mining as the new manager all assets of the venture and all documents, books, records and accounts relating to the joint venture;
7. when Goldus ceased to be manager it also failed to transfer title to the assets of the joint venture to Australian Mining as the new manager;
8. Goldus had failed to contribute its proportion to programmes and budgets approved on 13 March 2013; and
9. Goldus had failed to contribute its proportion to programmes and budget approved on 18 October 2017.

### The first default

1. The first alleged default concerns compliance with cl 6.2(d) of the JVA. It is expressed in the following terms:

Upon a new manager commencing its duties, … the previous Manager must immediately deliver to the new Manager all Joint Venture Assets and all documents, books, records and accounts relating to the Joint Venture held by it or under its control.

1. As has been noted, Australian Mining became manager of the Teetulpa Venture between 17 July 2012 and 13 March 2013. Therefore, the default as alleged occurred, at the latest, in about March 2013. The defendants point to no evidence concerning the affairs of the joint venture prior to the events in relation to the exercise of claimed security rights the subject of the present proceedings. In effect, they claim that Australian Mining does not have the records of the joint venture and therefore Goldus must have failed to perform the obligations under cl 6.2.
2. There is no evidence to suggest that there have been significant commercial activities undertaken by the Teetulpa Venture. There is no evidence from the defendants to establish that to be the case. There is no evidence to indicate that there were records held by Goldus that have not been passed to Australian Mining. The relevant transition occurred many years ago. There is no suggestion that during the intervening period Australian Mining raised any issue with Goldus about the records. Therefore, real questions arise as to whether there has been a breach of the kind alleged and, if so, whether Australian Mining could still insist upon its performance given the passage of time.
3. For those reasons, I am satisfied that Goldus has raised a sufficient basis to question whether there has been a default of the kind alleged. That being the case, consistently with the authorities concerning applications for relief under s 418A of the *Corporations Act*, the burden falls upon Australian Mining to demonstrate the basis for the validity of the alleged appointment. It has failed to do so. The notice fails to identify any records that have not been provided and there is no evidence identifying any particular records that have not been provided.
4. In addition, Goldus relies upon the terms of the DoCA to support its claim that by the time of the alleged appointment of the controller and receivers to Australian Mining the alleged default could not be relied upon by Australian Mining. It is not disputed that the DoCA is still in operation. Clause 8.1 of the DoCA provides that while the deed is in operation each 'Deferred Creditor' will defer its claim against Goldus. Australian Mining is a deferred creditor. The DoCA is still in operation. The alleged default preceded the operation of the DoCA. There is merit in this claim. The defendants have not demonstrated why such a default may be relied upon to support the exercise of rights under the Deed of Cross Security.
5. Therefore, to the extent that the claims by the defendants depend upon the first default, that default has not been established.

### Second default

1. The second alleged default is a failure by Goldus to transfer title to the Joint Venture Assets to Australian Mining in accordance with a requirement to do so expressed in cl 6.2(e) of the JVA. As has been explained neither the Tenements nor an interest in them formed part of the Joint Venture Assets. Otherwise, the defendants do not identify assets which should have been transferred to Australian Mining but were not.
2. The same reasoning applies to the second default as to the first default.
3. Therefore, to the extent that the claims by the defendants depend upon the second default, that default has not been established. Counsel for the defendants accepted as much in closing submissions.
4. There is the further point that the complaint by the defendants concerning the transfer of Joint Venture Assets seems to focus upon the Tenements (or an interest in them). For reasons that have already been given there was no such asset of the Teetulpa Venture.

### Third default

1. The third alleged default is a failure by Goldus to contribute in accordance with its participating interest to the amount of a budget approved in accordance with the JVA on 13 March 2013.
2. As to this default, Goldus contends that it elected to dilute its interest rather than make the required contribution. In that regard, Mr Hillam produced a circulated resolution, apparently stamped with a receipt dated 2 August 2013, recording the payment of stamp duty in South Australia which recorded amongst other things the dilution of the interest of Goldus in the Teetulpa Venture from 49% to 33.67% in respect of the contribution otherwise to be made for a budget submitted on 1 March 2013. The resolution is dated 13 March 2013 and is apparently signed for and on behalf of both Goldus and Australian Mining.
3. The third default also precedes the DoCA and the defendants have not demonstrated why such a default may be relied upon to support the exercise of rights under the Deed of Cross Security given the terms of the DoCA to which reference has been made.
4. Therefore, to the extent that the claims by the defendants depend upon the first default, that default has not been established.

### Fourth default

1. The fourth alleged default is a failure by Goldus to contribute in accordance with its participating interest to the amount of a budget approved in accordance with the JVA on 18 October 2017 (being a few days after the appointment of voluntary administrators to Goldus).
2. As to the fourth default, Goldus contends that the resolution that purportedly approved the budget on 18 October 2017 was invalid and therefore there is no amount owing by Goldus as a participant in the Teetulpa Venture. It says that (a) cl 8.3 of the JVA required 21 days' notice to be given of a meeting to approve the budget and insufficient notice was given; (b) there was no quorum because no representative of Goldus attended the meeting; and (c) the resolution purported to attribute the full amount of the prospective programme and budget to Goldus contrary to the terms of the JVA. It was also claimed that there was no right to invoice Goldus for work never undertaken or incurred which formed part of the budget. Finally, it was claimed that Australian Mining has never contributed its share.
3. It is the case that the JVA requires that a meeting to approve a programme and budget shall be submitted not less than 21 days after the submission of the programme and budget. Further, the approval of the programme and budget does not, of itself, create a liability to make a contribution. Rather, contributions are required to be made in arrears in respect of expenditure actually incurred. In that regard, cl 9.2 provides:

The Manager shall invoice each Joint Venturer for its proportionate share of Joint Venture Expenditure incurred during the preceding calendar month, within thirty (30) days after the end of that month. The Manager may, in its discretion, invoice the Joint Venturers for estimated Joint Venture Expenditure in respect of a calendar month not more than thirty (30) days prior to the commencement of that month. All invoices submitted by the Manager shall be paid within fifteen days after receipt.

1. However, the claim that there is no liability on the part of one venturer to contribute an invoiced amount if the other party has not done so should not be accepted. The language of the JVA does not support that construction.
2. Mr Hillam first deposed that he convened the relevant meeting in his capacity as a director of Australian Mining. He then said:

At the time that the Invoice was issued, the remediation activities referred to in the Invoice had not been undertaken and no expenditure had been incurred by the Joint Venture for those activities. There was no expenditure on the remediation activities between October 2017 and September 2019. No invoice was issued to Australian Mining in relation to the remediation activities referred to in the Invoice.

I did not have any legal advice in relation to the meeting of the Management Committee or issuing the invoices to Goldus. I now realise that the Joint Venture Agreement requires both Australian Mining and Goldus to contribute to Joint Venture expenditure incurred, in the manner provided for in the Joint Venture Agreement, in proportion to their respective participating interests and the Joint Venture Agreement did not allow for one but not the other of them to contribute. In these circumstances, I acknowledge that the Invoice should not have been issued to Goldus and the amount in the Invoice is not payable under the Joint Venture Agreement. The administrators of Goldus at the time rejected Australian Mining's claim that Goldus owed the money the subject of the Invoice.

1. It may be noted that in this first account, Mr Hillam deposed to no defect in the manner in which the relevant meeting of the Teetulpa Venture had been convened and did not suggest that the meeting did not take place or that the budget was not approved. Rather, he described the fact that the expenditure as to remediation activities had not yet been incurred and that there was not a separate invoice issued to Australian Mining.
2. Even so, the submission that there is no default unless and until an invoice is issued should be accepted. The defendants point to no such invoice in the notice. Therefore, the fourth default as described in the JVA Default Notice has not been established.
3. Finally, as to the fourth default, I note that the provisional amendment that I allowed to introduce paragraph 45(aa) concerned this default. The amendment introduced the claim that there was no default because 21 days' notice of the meeting was not given and therefore the budget had not been approved.
4. The objection raised to the amendment was expressed in the following terms by senior counsel for the defendants:

It would seem from the evidence that that process has never been followed in any of the years that the joint venture agreement operated such that there is a reasonable basis to conclude that there may well have been a conventional estoppel between the parties that that requirement not be met or a different procedure adopted in relation to the approval of budgets, or at least a waiver on the part of Goldus to require that requirement.

The difficulty that the late amendment causes us is that that is a matter from which we could have sought discovery from Goldus as to any records to indicate whether that clause was ever complied with to make good that argument. The timing of the amendment doesn't allow us to seek that disclosure. I thought whether it could be addressed by Goldus making an admission that the procedure was never followed in any of the years since the beginning of the joint venture, that might assist it, but merely because it didn't happen doesn't mean that there was a conventional estoppel that it need not happen.

1. There is support for the submission concerning the past practice adopted within the Teetulpa Venture from the fact that Mr Hillam raised no complaint of that kind when he first dealt with the claim concerning the default.
2. I allowed the amendment provisionally to see whether, in the way matters unfolded, the concerns raised by counsel might be addressed in running. The conventional estoppel case was then raised by way of response and some particulars were provided for the defendants of its answer based upon conventional estoppel. I accept the force of the submission for the defendants that they were hampered in doing so by the fact that the amendments were raised relatively late in the day.
3. There was some dispute as to whether the amendments were late in any material sense. What is evident is that the relevant amendment was proposed by Goldus (with other amendments that, in the result, were not opposed) about eight weeks before the scheduled commencement of the final hearing at the end of January. This was many months after detailed pleadings and evidence. The proposed amendments met with requests for information from the solicitors for the defendants. A response was provided on 2 December 2020. It was considered by the defendants to be not satisfactory. There was no concession by the defendants that the relevant amendment would be accepted. Goldus did not move immediately on its amendments but foreshadowed that it would do so. An application was made on Christmas Eve. Relevant disclosure of matters that would be relevant to the issues raised by the amendment was not provided at the time. Mr Hillam is at a considerable forensic advantage when it comes to the history of events in relation to the Teetulpa Venture.
4. In allowing the amendment on a provisional basis it was anticipated that the parties would press on with dealing with the plea and with the defendants' answer of a conventional estoppel. It was anticipated that Goldus would plead a response to the conventional estoppel plea and would provide further disclosure as to such matters and that Mr Hillam may give further evidence as to the administrative practices of the Teetulpa Venture when the hearing resumed. In the result, Goldus ceased active participation in the proceedings. Therefore, the basis upon which the provisional leave was given was not carried into effect.
5. The principles to be applied in considering whether to grant leave to amend were recently summarised by Stewart J in *Selvaratnam v St George - A Division of Westpac Banking Corporation (No 2)* [2021] FCA 486 at [28]. Taking account of those considerations, for the following reasons, I consider that it would be unfair to allow Goldus to rely upon the amendment and I revoke the leave to amend to introduce paragraph 45(aa) of the claim by Goldus. First, leave was given on the basis that there would be ongoing interlocutory steps taken by way of disclosure and responses guided by the performance of legal representatives engaged for Goldus to the basis for the plea of conventional estoppel. The possibility for those steps being taken was interrupted by Goldus not continuing to engage lawyers to represent its interests in the proceedings. Second, there was delay by Goldus in raising the claim which introduced the risk of unfairness which has not been able to be adequately addressed. Third, if the matter to be introduced by the amendment was a real issue between the parties then you would expect it to have been raised when the original pleadings and affidavit evidence was settled and filed. No adequate explanation has been given as to why that did not occur. Fourth, even though counsel for Goldus maintained that the amendment was important, in the result it seeks to raise a matter that it is not necessary to determine in order to resolve the dispute between the parties.

### Alleged insufficient particulars

1. It was submitted for Goldus that the defaults specified in the notice are insufficiently particularised for it to operate as a valid notice. However, that submission presupposes the existence of a notice requirement. For reasons that have been given there was no such requirement.

## Issue (14): If no to Issue (13), was Goldus otherwise relevantly in default under the JVA for the purposes of enforcement of the Deed of Cross Security?

1. As to the further alleged defaults relied upon by the defendants (being 17 in number), Goldus said that a default notice was required and as there had been no such notice the defaults could not be relied upon by Australian Mining. For reasons that have already been given, no such notice was required before exercising rights under the Deed of Cross Security.
2. Goldus also submitted that it was only monetary defaults that could be relied upon as a basis for enforcement action under the Deed of Cross Security. For reasons that have been given, that submission should be accepted.
3. Otherwise, for reasons that have been given, under the terms of the DoCA the interest of Goldus in respect of the Teetulpa Venture was relinquished so that Australian Mining became the sole participant in the venture. Therefore, it was not necessary for the defendants to demonstrate the existence of the alleged defaults and action under the Deed of Cross Security in order to support claims to the property of the Teetulpa Venture against Goldus. Australian Mining was the sole party entitled to that property.
4. It remains the case that Australian Mining could take action against Goldus under the Deed of Cross Security for past monetary defaults. However, for reasons that have been given, the security provided was confined to the participating interest in the Teetulpa Venture and the assets of the venture. Control of those matters are now in the hands of Australian Mining.
5. Therefore, no purpose would be served by considering the detail of each of the 17 defaults. Further, detailed submissions were never put as to each of the 17 defaults relied upon by the defendants as defaults that might support the appointment of the controller and receivers. The defaults were pleaded in detail. However, when closing submissions were put on behalf of the defendants, senior counsel adopted the position that he would let counsel for Goldus persuade the Court that each and every one of those identified breaches fails, and then deal with the position of Goldus in reply. Otherwise, only submissions at a high level of generality were advanced for the defendants to support the breaches. They addressed three major points.
6. First, to the extent that breaches were said to have occurred prior to the DoCA it was accepted by the defendants that they could not be relied upon for so long as the moratorium effected by the DoCA was in place. However, it was submitted that those breaches would not mean that there could be declaratory relief as to the invalidity of the appointments. Rather, there could only be declaratory relief to the effect that no steps could be taken until the end of the moratorium.
7. Second, a number of the breaches were said to arise from matters specified in a mining inspection report prepared for the Department for Energy and Mining in South Australia. The report referred to inspections conducted on 19 March 2020 and 29 April 2020 and specified respects in which mining related activities had been conducted on the Tenements that were not in conformity with the approved program for environmental protection and rehabilitation or PEPR for the area. It appears from the inspection report that activities had been carried out on the Tenements without permission and without paying required insurance and rent. It might be inferred that the activities were carried out by Goldus because of reference within the report to correspondence with solicitors for Goldus. However, there was no reference to evidence to establish who was responsible for those activities. Given that ATG and other entities controlled by Mr Hillam have been involved in relevant activities it was by no means clear as to the basis upon which those activities were attributed to Goldus.
8. It was submitted that the activities were a breach of cl 20.1 of the JVA which provides that the joint venturers must 'comply (and exercise their rights and powers to ensure that the Manager complies) with all obligations under any statute or the Tenements relating to the protection of the environment'. Reliance on an alleged breach of cl 20.1 was objected to by Goldus on the basis that such a claim was not pleaded. Although there is reference to cl 20.1 in the defence, there is an issue as to whether the activities were characterised as a breach of cl 20.1 and issues arise as to whether the activities might be properly so characterised.
9. Third, a claim that there were unpaid invoices. These were said to have been issued after the DoCA. Submissions were not made as to the details.
10. Therefore, the manner in which submissions were advanced means that the 17 alleged breaches were not addressed in any detail by either party at the first hearing. There were issues to be considered if they were to be relied upon. They were not revisited at the resumed hearing when Goldus was not represented. Unassisted by detailed submissions and given the findings I have made I do not propose to address them. If it had been necessary to consider whether they provided a basis for the appointments, I would have invited written submissions. Indeed, that was a course that had been proposed at one stage by senior counsel for the defendants as a way in which the basis for the claims as to the 17 defaults might be addressed.

## Issue (15): On the basis of the answers to Issues (1) to (14) what if any declaratory relief should be granted?

1. It follows from the conclusions reached as to Issues (1) to (14) that Goldus has demonstrated that there has been no valid appointment of a controller or receivers to Goldus and no appointments could be made that would confer control over the Tenements or any interest in them.
2. Further, it has not been demonstrated that the participating interest of Goldus in the Teetulpa Venture has been forfeited. Rather, by operation of the terms of the DoCA that interest has been relinquished and Australian Mining continues as the sole venturer under the Teetulpa Venture. It remains entitled to the contractual rights conferred by Goldus in favour of the participants in the Teetulpa Venture in respect of the Tenements. Those rights are recorded in the JVA to which Goldus remains a party, though not as a participant in the Teetulpa Venture.
3. Therefore, on its application, Goldus is entitled to declaratory relief to the following effect:
4. the Deed of Cross Security does not create a security interest in or charge over the Ten Tenements;
5. the purported appointment of Mr Cummins and Mr Krejci as receivers and managers of the Ten Tenements has no force or effect;
6. the purported exercise by Australian Mining of power to take possession of and control over the Ten Tenements is of no force and effect; and
7. the purported appointment of Mr Nakat as a controller of the Ten Tenements has no force or effect.
8. I would also reserve liberty to apply for such further relief to which Goldus claims to be appropriate to give effect to these reasons. To be clear that liberty would not extend to allow any application for further relief beyond that determined by these reasons. The hearing of the application by Goldus has been finally determined by these reasons.
9. The position of the defendants was that the precise terms in which relief might be granted should await the determination of the substantive issues. Therefore, the course that I propose to follow as to relief on those aspects of the defendants' cross-claim that concern the claim to the Ten Tenements and the appointments of the controller and receivers is to deal with the relief sought by Goldus to the extent that its claims have been successful but otherwise, I will order that the defendants bring in a minute of any orders that they seeks on the cross-claim to give effect to these reasons.

## Issue (16): What is the precise nature of the tracing based claim to the shares held by Roncane in Goldus?

1. The claim advanced by the defendants to the shares in Goldus held by Roncane (or a charge over those shares) begins with the terms of the General Security Deed. The defendants claim that there was a 'Control Event' under the General Security Deed by reason of a failure by ATG to pay monies due to RnD Funding which default created a 'locked box' in respect of ATG's assets. They then claim that after the Control Event, ATG received approximately $2.7 million in GST refunds into its bank account. It is said in a general way that when those funds were received by ATG they became the property of RnD Funding because of the default under the General Security Deed. It is then claimed that when a payment of $520,000 was made out of ATG's bank account to Prop Fest on 4 October 2019 those funds were the traceable proceeds of the property of RnD Funding. It is then said that four days later when Prop Fest used $400,000 of those funds to make the final payment to the Fund as required by the DoCA, those funds were used to acquire the shares in Goldus in the name of Roncane. It is then claimed that the shares in Goldus are the traceable proceeds of the monies in ATG's bank account that were the property of RnD Funding by reason of the default under the General Security Deed and should be determined to be held on constructive trust for RnD Funding. Finally, it is said that if RnD Funding is not entitled to a declaration of a constructive trust over the shares in its favour then it is entitled to an equitable charge over those shares by reason of its security.
2. The claim was put in different terms in the written opening submissions for the defendants. It was said that there was significance in the alleged breach of terms of the Second Facility Agreement which would have seen Goldus being bound under a Deed of Accession to the terms of the General Security Deed. As ATG has since been wound up, it is no longer possible for RnD Funding to press for performance of the obligation by ATG to cause Goldus to become a party to General Security Deed. It is difficult to see how such matters could form the basis for some form of tracing based claim. In any event, a formulation of the case for the defendants in those terms was not advanced by way of closing.
3. There were other allegations pleaded in the cross-claim concerning payments to other parties but they were not the subject of any submissions on behalf of the defendants. The only claim that was pressed in oral submissions was the claim to the Goldus shares consequent upon the payment of the amount of $520,000 to Prop Fest on 4 October 2019. Therefore, it is only necessary to deal with that claim.
4. There are two aspects that are fundamental to the claim as articulated. First, a claim that a Control Event triggered the locked box provisions. Second, a claim that the operation of the locked box provisions meant that RnD Funding had a proprietary interest which it could trace into the Goldus shares. The precise nature of the proprietary interest was not addressed. It was simply put on the basis that upon default by ATG the money in its bank account became the property of RnD Funding. Indeed, submissions were put on the basis that there had been a theft of the money and RnD Funding could trace the proceeds into Roncane. However, that submission was founded on the proposition that by means of the locked box provisions, the amount of $520,000 paid to Prop Fest was the property of RnD Funding.
5. Before considering the merits of the two key aspects of the tracing claim as advanced by RnD Funding, I will first address the relevant principles.

## Issue (17): What are the relevant principles to be applied in determining the tracing based claim?

1. Tracing has been described as a process rather than a right or remedy. The nature of what is described by the term of tracing was put in the following terms by Allsop P (as the Chief Justice then was), Campbell JA and Handley AJA agreeing, in *Heperu Pty Ltd v Belle* [2009] NSWCA 252; (2009) 76 NSWLR 230 at [89]:

Tracing has been said to be neither a claim nor a remedy, rather the process by which a claimant demonstrates what has happened to its property, identifies its proceeds and the persons who have handled or received them; and the successful completion of a 'tracing exercise' may be a preliminary to the making of a personal or proprietary claim, to the extent such is available.

1. However, tracing is a term that is also used more broadly (perhaps inaccurately) to describe the overall outcome that can achieved through the tracing process as if it were an entitlement to a distinct type of remedy. So, for example, terminology such as a right to trace or, as in the present case, tracing claim may be used. The reason for being critical of such usage is that tracing is an evidentiary process by which an incident of ownership is recognised rather than a right in and of itself. The proprietary right of a property owner provides the foundation for a claim to property or proceeds or value derived from that property that has found its way into the hands of third parties. The tracing process is an incident of the underlying property right. Tracing describes the circumstances in which part or all of the proceeds of property held by the third party can be separately identified and can be shown to be causally derived from the property of the claimant. Despite the change in its character or its mixing with other property, the ownership rights of the original property trace their way into the new property. For that reason, the ability of a property owner to claim the traceable proceeds of property is part of the law of property: *Foskett v McKeown* [2000] UKHL 29;[2001] 1 AC 102 at 127 (Lord Millett).
2. In consequence, a proprietary claim to the traceable proceeds of the original property may be recognised to exist in respect of the new property, such as by an order for the transfer of the new property, a declaration of the existence of a constructive trust, the recognition of a charge by way of subrogation or the recognition of an equitable lien entitling the party to sell the new property. Further, as the passage from *Heperu* indicates, the proprietary claim may provide the foundation for personal claims such as an account of profits or a claim for compensatory relief for appropriation of the property or its traceable proceeds.
3. The term 'following' is used to describe the related circumstances in which part or all of the property itself may be claimed even though it has passed into the hands of someone other than the legal owner of that property.
4. Importantly, in all cases, a claim that depends upon the application of tracing principles must begin with a 'proprietary base'; that is, a foundational property claim: *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296at [560]‑[561] (Finn, Stone and Perram JJ). A common law property right will be a sufficient proprietary base. However, an issue arises as to the extent to which any equitable interest in property that is proprietary in character may be a sufficient proprietary base for a property claim based upon the process of tracing. It may be that the process of tracing only applies where the equitable claim is as the beneficiary of trust property. This issue is considered separately below.
5. In these reasons, I will use the term *foundational property interest* to refer to the property right that may form the basis for a claim based upon the process of tracing and the term *original asset* to refer to the subject matter of that property interest. I will use the term *tracing* to refer to the evidentiary process by which part or all of the asset or its proceeds in the hands of a third party may be relevantly identified as something which can be the subject of a claim based on the foundational property interest.
6. As will emerge, the modern cases describe tracing as involving a factual inquiry to determine whether there is an asset or proceeds in the hands of a third party where part or all of the value of that asset or proceeds may be said to be so causally derived from the original asset that it may be identified as a direct substitute for the original asset. Tracing has its factual limits such as where an asset or its proceeds are destroyed or consumed or can longer be meaningfully distinguished as the product or derivative of the original asset. Principles have been developed as to the extent to which the mixing of an asset or its proceeds in a way that means that the original asset can no longer be precisely identified as the physically distinct product or derivative of the original asset or the substitution of one asset for another may still allow for the identification of the traceable proceeds of the original asset. Many of those principles are concerned with the mixing of property or proceeds. They mark out the limits within which tracing can occur. Subject to those principled limits, tracing involves a factual inquiry to identify the extent to which there are *traceable proceeds* of the original asset in which the claimant held the foundational property interest.
7. Whether the traceable proceeds which comprise the particular asset in the hands of the third party may then be the subject of a proprietary or personal claim based upon the foundational property interest will depend upon legal principles to be applied wherever one party has possession of an asset that is claimed to be the property of another. The outcome may be affected by the nature of the foundational property interest. As was observed by McLure J in *Re Global Finance Group Pty Ltd (in liq)* [2002] WASC 63; (2002) 26 WAR 385 at [95] given the nature of the tracing process 'it is necessary to have a clear understanding of the nature of the claimant's property interest and when and how it arose in order to assess whether the claimant can trace to the traceable product'.

### Tracing as a process

1. Historically, the common law and equity adopted different approaches to tracing. The classical expression of the difference is to be found in *Re Diplock* [1948] Ch 465 where the Court of Appeal said at 518, 520:

The common law approached [tracing] in a strictly materialistic way. It could only appreciate what might be called the 'physical' identity of one thing with another. It could treat a person's money as identifiable so long as it had not become mixed with other money. It could treat as identifiable with the money other kinds of property acquired by means of it, provided that there was no admixture of other money. It is noticeable that, in this latter case, the common law did not base itself on any known theory of tracing such as that adopted in equity…

Equity adopted a more metaphysical approach. It found no difficulty in regarding a composite fund as an amalgam constituted by the mixture of two or more funds, each of which could be regarded as having, for certain purposes, a continued separate existence. Putting it another way, equity regarded the amalgam as capable, in proper circumstances, or being resolved into its component parts.

1. However, since then, distinctions between law and equity as to the nature of the tracing process have been eroded. The emphasis now is upon tracing as an evidentiary process by which a causal connection is demonstrated between the foundational property interest and the proceeds of that property. Where there is a sufficient causal connection demonstrated in fact and the principles as to the limits of tracing are satisfied, then the proceeds in the hands of the third party may be described as traceable proceeds. On such an approach, the tracing process is contextual. Although there are common instances that may be treated in a similar way, the question is whether, on the evidence adduced in the particular case, there is shown to be a sufficient causal connection (both factually in the particular case and within the limits of general tracing principles) between the foundational property interest and the proceeds in the hands of the third party. If so, the proceeds are traceable.
2. The above matters emerge from the cases considered below.
3. In *Brady v Stapleton* (1952) 88 CLR 322 at 336-338, Dixon CJ and Fullager J stated the principles in terms that applied equally to legal ownership and equitable ownership, beginning their analysis in the following way:

Cases in which one who has in his hands the property of another converts that property into some other form or mixes property of another with his own have been familiar both to courts of law and courts of equity. Courts of law were concerned with legal ownership, and courts of equity with equitable ownership, but, up to a point, as is well known, the doctrines of the two systems were identical.

1. However, equity has long gone further than the common law and allowed the person with legal or equitable ownership to trace the property rights into 'identifiable forms into which it is changed': *Parker v The Queen* (1997) 186 CLR 494 at 502 (Brennan CJ).
2. In *Foskett v McKeown*, Lord Millett (Lord Browne-Wilkinson and Lord Hoffman concurring) said at 127-128:

The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances. In the present case the plaintiffs do not seek to follow the money any further once it reached the bank or insurance company, since its identity was lost in the hands of the recipient (which in any case obtained an unassailable title as a bona fide purchaser for value without notice of the plaintiffs' beneficial interest). Instead the plaintiffs have chosen at each stage to trace the money into its proceeds, viz. the debt presently due from the bank to the account holder or the debt prospectively and contingently due from the insurance company to the policy holders.

…

We also speak of tracing one asset into another, but this too is inaccurate. The original asset still exists in the hands of the new owner, or it may have become untraceable. The claimant claims the new asset because it was acquired in whole or in part with the original asset. What he traces, therefore, is not the physical asset itself but the value inherent in it.

Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset. If he held only a security interest in the original asset, he cannot claim more than a security interest in its proceeds. But his claim may also be exposed to potential defences as a result of intervening transactions. Even if the plaintiffs could demonstrate what the bank had done with their money, for example, and could thus identify its traceable proceeds in the hands of the bank, any claim by them to assert ownership of those proceeds would be defeated by the bona fide purchaser defence. The successful completion of a tracing exercise may be preliminary to a personal claim (as in *El Ajou v. Dollar Land Holdings* [1993] 3 All E.R. 717) or a proprietary one, to the enforcement of a legal right (as in *Trustees of the Property of F.C. Jones & Sons v. Jones* [1997] Ch. 159) or an equitable one.

Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity. One set of tracing rules is enough. The existence of two has never formed part of the law in the United States: see *Scott The Law of Trusts* 4th. ed. (1989), pp.605‑609. There is certainly no logical justification for allowing any distinction between them to produce capricious results in cases of mixed substitutions by insisting on the existence of a fiduciary relationship as a precondition for applying equity's tracing rules. The existence of such a relationship may be relevant to the nature of the claim which the plaintiff can maintain, whether personal or proprietary, but that is a different matter.

1. The factual nature of the relevant inquiry is evident in the statement of the approach to tracing in *Toksoz v Westpac Banking Corporation* [2012] NSWCA 199 where Allsop ACJ (Hoeben JA and Sackville AJA agreeing) said at [7]‑[10]:

Tracing has been said not to be a right or remedy, but a process of demonstration or proof of what has happened to property …

Money can be traced notwithstanding an inability of the follower to connect each link in the chain of accounts. Commonsense and reasonable inference play their part, especially if there is fraud involved and if there is a lack of explanation, when the circumstances cry out for honesty to be explained, if it can be.

A number of cases reveal a sensible robust approach to the tracing of moneys from theft … Where the facts as proved are sufficient to permit the inference that moneys have been received or property bought without there being an honest source available to explain the wealth and the sums or value can be seen as referable to the following party's property wrongfully obtained, such that the inference is open that the wrongfully obtained funds were the source of the wealth, the funds can be so treated. One does not need to be able to show every link in the chain of accounts from and through which the money passed. Inferences will be more easily drawn, as here, in circumstances where the funds were stolen, the person who is said to have provided the funds was one of the thieves who stole money from the follower, when the recipient has an apparent close relationship with the thief, which recipient gave no value for it, has no personal source of income and gives no explanation as to the source or circumstances of the receipt of the money or any honest source of it.

None of this is the expression of a principle of law. It is the expression of the available approach to fact finding in the presence of fraud and lack of explanation when plainly called for.

1. In *Alesco Corporation Limited v Te Maari* [2015] NSWSC 469, after quoting the passage already cited from *Heperu*, Hallen J said at [138]:

Thus, by the process of tracing, a claimant demonstrates what has happened to its property, identifies its proceeds, identifies the person who has, or the persons who have, handled, or received, its property, and justifies its claim that the proceeds can properly be regarded as representing the claimant's property. The process identifies the traceable proceeds of the claimant's property and enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of its claim … When completed, the court can then determine what rights, if any, the claimant can, on the particular facts, assert, and whether on those facts, the claimant's rights will be personal, proprietary, legal or equitable.

1. In *Kadam v MiiResorts Group 1 Pty Ltd (No 5)* [2018] FCA 1086, Lee J at [48] described tracing as 'an evidentiary process, not a remedy itself' and said that:

The process is concerned with identifying a causal chain or connexion from the original property owned by the claimant to other property in the hands of another.

His Honour also quoted with approval the following summary of the position by Dr Aruna Nair, in *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (Oxford University Press, 2018), at page 138 ([4.05]‑[4.06]):

Tracing usually requires a claimant to affirmatively prove the transactional links between his original asset and the asset that he wishes to identify as its traceable product. It is not usually enough for him to show that the defendant has, in the past, misappropriated his assets and that she cannot, or refuses to, identify the source of every asset that she now holds: it is up to the claimant 'to adduce evidence to prove the necessary nexus' …

This does not, however, mean that the claimant must be able to positively, and with total certainty, identify each and every transaction that leads from her asset to the substitute asset. The ordinary civil standard of proof applies, so that courts may infer the existence of transactional links based on various factors that suggest the likelihood of such links, on the balance of probabilities.

(citations omitted)

1. In *Caron and Seidlitz v Jahani and McInerney in their capacity as liquidators of Courtenay House Pty Ltd (in liq) & Courtenay House Capital Trading Group Pty Ltd (in liq) (No 2)* [2020] NSWCA 117; (2020) 102 NSWLR 537 the Court was asked to give advice to liquidators about how to approach the distribution of funds held in a bank account where there were competing claims to the funds. The balance of the account was insufficient to meet all claims. The case on appeal was approached on the basis of an assumption that the funds in the bank account were held on trust for the claimants. The main issue was whether the lowest intermediate balance rule should be applied in determining the distributions to competing claimants. If so, claimants whose monies had been paid into the account before the balance reduced to below the total value of their claims would be reduced to a proportion of that lower balance.
2. Bell P (Bathurst CJ and Macfarlan JA agreeing), concluded that the value of the interest of each claimant in the co-mingled fund in the bank account was to be determined on the available evidence: at [146]. The 'quintessentially factual approach' was said to be 'superior to the fiction or presumption upon which the so-called rule in *Clayton's Case* rests, and is also superior to the simple *pari passu* approach because, whilst incorporating a modified form of rateability, it is more consistent with equitable principle and the rules of tracing': at [147]. The emphasis upon the approach to tracing being founded on the available evidence in the particular case was then emphasised in the following passage of reasoning (at [148]-[149]):

As Gordon J explained in *Sonray* (at [86]), 'if a claimant can establish a remedy founded on tracing, the Court will grant relief founded on that evidence because it permits it to reach a different conclusion in respect of that claimant' compared to the result that would follow upon the application of a simple *pari passu* approach. To similar effect, in *French Caledonia* [*Re Sutherland; French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361; [2003] NSWSC 1008], Campbell J observed (at [189]):

If ever the court is able to give a remedy founded on tracing some individual claimants, it is because evidence is available which enables the property of those individual claimants to be more specifically traced. It should not be a cause for surprise that evidence of these different types can lead to different types of conclusion.

The importance of evidence to determine the most appropriate approach to distribution of a limited fund and the conduct of a reliable tracing exercise was also emphasised by Hargrave J in *Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd* (2017) 52 VR 664; [2017] VSC 101 at [423]-[430]. His Honour pointed out a number of issues upon which further evidence and submissions were required. The necessary analysis is a task for the party or parties wishing to invoke the lowest intermediate balance rule cf. *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230; [2009] NSWCA 252 at [121].

### Foundational property interest

1. Where, as here, the foundational property interest is said to be an equitable interest then an issue arises as to whether the extension of the proprietary character of the equitable interest into traceable proceeds requires a claim as a beneficiary to trust property or whether the process of tracing applies where there is any equitable interest that might be said to be proprietary. The issue is of significance because of the very general way in which the claim was put on behalf of RnD Funding.
2. It is an issue that arises because equitable interests assumed their particular incidents by equity acting according to conscience. The incidents of proprietary equitable interests are not universal. The extent to which equity affords particular aspects of the characteristics of common law property rights to a party with a particular kind of interest recognised in equity vary depending upon the nature of the interest. There is a hierarchy of equitable estates. Consequently, issues arise, for example, as to whether particular interests recognised in equity are transmissible, carry a right to due administration of the property, allow the holder to require the sale of the property or allow the holder to claim an interest in priority over other interests. Likewise, an issue arises as to the extent to which tracing is available as an incident of a particular kind of equitable interest.
3. Importantly, there was no claim in the present case that there was a constructive trust that arose from any alleged wrongdoing by any party. There was no claim that there was a fraud perpetrated on RnD Funding by which it was deprived of its property or that there was a breach of fiduciary duty by ATG in which Prop Fest participated or from which it benefited. The claim relied upon the proposition that the money in the hands of ATG was the property of RnD Funding. On that basis the reasoning in the long standing Australian authority of *Black v S Freedman & Co* (1910) 12 CLR 105 was called in aid. It may be noted that *Black v S Freedman & Co* rests upon the proposition that money that is stolen is trust money in the hands of the thief. In such cases, the trust that is recognised (and sometimes given the description constructive trust) is institutional in character. Therefore, there is no need for remedial intervention to establish the proprietary interest: see the analysis in *Sze Tu v Lowe* [2014] NSWCA 462; (2014) 89 NSWLR 317 at [141]‑[162]. In such cases, it appears that the process of tracing may be explained on the basis that it is applied because the stolen property in the hands of the thief is actual trust property not that it is trust property by reason of the recognition of a remedial constructive trust in respect of the stolen property.
4. In *Grimaldi*, significance was attached for the purpose of determining whether there could be tracing to the distinction between trust property and what was termed corporate property (being the property of a company that is administered by directors with fiduciary obligations in respect of the property of the company). Their Honours reasoned as follows at [562]‑[567]:

When trust property in the strict sense is transferred into the hands of a person other than a bona fide purchaser for value without notice, little difficulty arises in following the property into that person's hand and in tracing it into other property which is its substitute. The *antecedent* entitlement of the trust beneficiaries will in the usual case permit both following and tracing because it will establish the required property base in the asset in the recipient's hands.

The real difficulty arises where the property sought to be followed and traced is not trust property in the strict sense but is corporate property. The analogy between the two is an imperfect one. As Buckley LJ put it in *Belmont Finance* at 405:

A limited company is of course not a trustee of its own funds; it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co* [1894] 1 Ch 616 at 631, 638, per Lindley and Kay LJJ). So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.

So far as the recipient is concerned, it is its knowledge of the directors' misapplication of the company's funds, ie their breach of fiduciary duty, that can turn it into a constructive trustee and thus give the company its proprietary base justifying both following its property into the recipient's hand and tracing into its substitutes: *Evans v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75 at [159]-[160]. The constructive trusteeship envisaged here is what Lord Selbourne in *Barnes v Addy* described as that of a person who receives and becomes chargeable with the 'trust property': see also *Bell Group (No 9)*, at [4750]-[4779].

At the time of *Belmont Finance*, the received view in England and in Australia, as has been seen earlier in these reasons, was that constructive notice in its traditional equitable sense - or category (v) of the *Baden* quintet - sufficed: see eg *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* at 173 ff. We have earlier concluded that that species of knowledge does not now suffice to attract the first limb of *Barnes v Addy* and that the liability imposed on the recipient is fault based.

If, then, a proprietary base sufficient to justify following and tracing corporate property turns critically on the court imposing a constructive trust on the property received (the company having no antecedent interest in it in the recipient's hands), the fundamental question becomes whether the court has any discretion not to do so.

It may be conceded that a court would ordinarily as of course award proprietary relief against a knowing recipient where the property received (or its proceeds) was still extant. Such cases, though, are something of a rarity and tend to raise the Robins problem to which we have earlier adverted: but see *Linter Group Ltd v Goldberg* at 662 ff (tracing into shares purchased with misused corporate funds). Nonetheless, consistent with what we have said earlier in relation to discretion and the constructive trust as a remedy - and it is being used as such in this context - we consider that, both as a matter of binding authority and of proper principle, the court is not obliged to do so. The circumstances may be such as to make it appropriate to leave the company to its personal remedies of an account of profits or compensation in equity. As a practical matter, these are the remedies most commonly given in misuse of corporate property cases for the reason that the recipient no longer holds traceable proceeds of the property received.

1. What the above analysis indicates is that in the absence of a 'proprietary base' (that is, a foundational property claim) on the part of the claimant which takes the form of a vested beneficial interest in trust property, including such an interest that arises by reason of the recognition of a remedial constructive trust, there is an insufficient foundation for the tracing process. Equity only affords the characteristic of property that allows for tracing into the hands of third parties where the interest takes the form of a vested beneficial interest in trust property. Other interests, such as an equitable lien, are an insufficient proprietary foundation to support the application of tracing. The point is made clear later in the reasons at [669] when their Honours said:

We earlier indicated (i) the need to establish a proprietary base before one can follow or trace and the problem this gives rise to in relation to misapplied corporate property; and (ii) that for a constructive trust to be imposed to give proprietary relief (and in consequence to provide a proprietary base for tracing) in a case such as the present that form of relief must be appropriate in the circumstances of the case.

1. Therefore, although the tracing process may now be undertaken in a similar manner in law and equity, it remains the case that where the foundational property claim is said to be an equitable interest, it must be an interest in trust property or there must be demonstrated to be circumstances such that the Court would recognise the existence of a remedial constructive trust.
2. Putting to one side the effect of the Australian possibilities of a remedial constructive trust and the application of the reasoning in *Black v S Freedman & Co* there appears to be no Australian decision that has embraced a complete departure from the requirement that there must be a fiduciary relationship before tracing can apply on the basis of an equitable foundation. As was said by then Millett LJ in *Boscawen v Bajwa* [1995] 4 All ER 769; [1996] 1 WLR 328 (at 335):

It is still a prerequisite of the right to trace in equity that there must be a fiduciary relationship which calls the equitable jurisdiction into being: see *Agip (Africa) Ltd v Jackson* [1991] Ch 547 CA at p.566 per Fox LJ.

1. As to these matters, see also: *Evans v European Bank Ltd* [2004] NSWCA 82; (2004) 61 NSWLR 75 at [160]‑[161] (Spigelman CJ, Handley  and Santow JJA, agreeing).

### Remedies

1. A tracing claim may found a claim to an equitable lien which is an interest that arises by operation of law: *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536 at 554 (Gummow J). It enables a party to obtain an order for the sale of the traceable proceeds of its foundational property interest: *Hewett v Court* (1983) 149 CLR 639 at 663-664 (Deane J). It may also found a claim to the property that comprises the traceable proceeds. The choice between the two has been described as a matter about which the claimant can elect: *Re Hallett's Estate* (1879) 13 Ch D 696at 709. As will emerge it is not necessary to consider whether the Court has a role to play in determining which relief may be appropriate in cases where the foundational property interest is equitable.

### Reprise of the two key aspects to the tracing claim by RnD Funding

1. With the above principles in mind, we can now return to the two key aspects of the tracing claim as advanced by RnD Funding. First, a claim that a Control Event triggering the locked box provisions. Second, a claim that the operation of the locked box provisions meant that RnD Funding had a proprietary interest in the money in the bank account of ATG which provides the necessary foundation upon which it could trace into the Goldus shares.

## Issue (18): Was there a Control Event under the General Security Deed and if so what was its consequence?

1. The tracing claim by the defendants begins with a claim that there was a Control Event under the General Security Deed that occurred before the receipt of the GST refunds. There is no dispute that the GST refunds were received by ATG between July and November 2019 and totalled $2,707,182. Of that amount, about $500,000 was received by 5 September 2019. Further, on the evidence it was the GST refunds that put ATG in sufficient funds to enable it to pay $520,000 to Prop Fest on 4 October 2019.

### The nature of the security interest created by the General Security Deed

1. The General Security Deed created a security interest in the Secured Property of ATG: cl 2.1(a). As to Revolving Assets, the security was a floating charge: cl 2.1(c). Money is a Revolving Asset. Despite the security interest, ATG was permitted to withdraw or transfer money from its bank account in the ordinary course of its ordinary business: cl 4.7. However, if a Control Event occurred in respect of any Secured Property then that Secured Property ceased to be a Revolving Asset, ceased to be the subject of a floating charge and became a fixed charge and ATG could no longer deal with that property (relevantly for present purposes, money in its bank account) under cl 4.7: cl 4.8. Further, the right of ATG to deal with any asset that formed part of the Secured Property (relevantly, the money in the bank account) ceased immediately upon a Control Event: cl 5.4.

### The Control Event under the General Security Deed

1. The term Secured Property is defined in the broadest of terms, as follows:

**Secured Property** means in respect of each Obligor, all of the Obligor's present and after-acquired property (including without limitation the Relevant Property). It includes anything in respect of which the Obligor has at any time sufficient right, interest or power to grant a security interest.

1. The term Control Event is defined in terms that include 'in respect of any Secured Property, that is, or would have been a Revolving Asset, an Event of Default that is subsisting'. An Event of Default means, relevantly for present purposes, an Event of Default as defined in the 'Principal Agreement'. As has already been noted, the Principal Agreement means any agreement entered into by the Grantor with RnD Funding 'including without limitation the Facility Agreement' (being the First Facility Agreement).
2. Therefore, while an Event of Default is subsisting under any facility agreement between ATG and RnD Funding, there is a Control Event in respect of the money in the bank account of ATG (and any other Obligor).

### Event of Default under the First Facility Agreement

1. Under the terms of the First Facility Agreement, the term 'Event of Default' is defined to mean any event or circumstance specified in cl 12.1. It includes a failure to pay on the due date any amount payable pursuant to a 'Finance Document' (a term that includes the First Facility Agreement). By cl 6.1 the principal outstanding and any other unpaid sums under the First Facility Agreement are repayable on the Termination Date. The Termination Date is defined to mean the earlier of various dates including the Maturity Date which is specified to be 15 October 2018. Therefore, it is a default if the whole of the amounts due under the First Facility Agreement are not repaid by 15 October 2018.
2. It is common ground that the initial advance of $320,000 was made under the First Facility Agreement on 27 December 2017. It is common ground that there was no repayment by ATG under the First Facility Agreement. Therefore, ATG was in default in repaying the principal amount of $320,000. The First Facility agreement also provides for fees and interest to be paid by ATG. Liability to pay any such amounts is disputed. RnD Funding has not sought to quantify those amounts as at 15 October 2018 or as at 4 October 2019 (when monies are said to have been paid out of the bank account of ATG to Prop Fest contrary to the locked box provision). Therefore, by 15 October 2018 there was an Event of Default by ATG under the First Facility Agreement. The extent of the default (and consequently the extent of the extent of the Control Event) that has been demonstrated is confined to $320,000.

### Event of default under the Second Facility Agreement

1. It was also alleged by the defendants that by 10 September 2018 (being 4 months after entry into the Second Facility Agreement) there was also default under cl 6.4 of the Second Facility Agreement. Clause 6.4(a) provided that ATG:

must at [RnD Funding's] direction no earlier than 4 months from the date of this agreement proceed to sell gold and any other mineral of value it has mined whether in its processed form or mined but unprocessed, for full market value ('Sale Proceeds'). Thirty Percent (30%) of Sale Proceeds, will be used to repay Principal Outstanding.

1. There was no evidence of any such direction being given by RnD Funding or of any mining operations having commenced.
2. Clause 6.4(b) then provided that ATG:

can, in lieu of any obligation in clause 6.4(a) above, pay $200,000 per month to [RnD Funding] until the Maturity Date starting 4 months from the date of this agreement to reduce the Principal Outstanding. In the event that a Government Agency closes access roads required to get to and from [ATG] mining operations … the number of days of closure up to a cumulative total of 60 days can be added to the date of commencement for reducing the Principal Outstanding under this sub clause (b);

1. Under cl 6.5, all amounts not expressed to be payable on a specified date were 'payable by [ATG] on demand by [RnD Funding] on the Termination Date', being 31 October 2019 (or demand following an Event of Default).
2. The terms in which cl 6.4(b) are expressed indicate that if cl 6.4(a) is triggered then ATG had the option of paying $200,000 per month rather than an amount calculated in accordance with cl 6.4(a). Significantly, cl 6.4(b) is not expressed in terms that the amount of $200,000 would be payable in any event, that is irrespective of whether there were mining operations and a direction by RnD Funding. It did not create a separate obligation to pay. It created an alternative that was available to ATG if the requirements of cl 6 were met.
3. If there was reliance placed by RnD Funding upon a direction then an issue may have arisen as to whether the direction could be given even where mining operations had not commenced and whether that might trigger an obligation on the part of ATG to pay $200,000 per month if there were no Sale Proceeds that could be secured. However, no such question arises.
4. It may be noted that reference was made in submissions for RnD Funding to the terms of cl 10.1 of the Second Facility Agreement, by which ATG agreed to do all things necessary to comply with the DoCA and also not to seek to transfer any asset procured under the DoCA to any entity other than ATG (or a holding company or subsidiary of ATG). Therefore, on the evidence, ATG was under an obligation to cause the shares in Goldus which were to be procured by a Hillam Entity under the DoCA to be held by ATG or Australian Mining (there being no evidence of any subsidiary of ATG). However, those events were not pleaded as a relevant default.
5. Therefore, the claim by RnD Funding that as at 10 September 2018 there was a failure to pay monies due under the Second Facility Agreement should not be accepted.

## Issue (19): Is the claim by RnD Funding to the funds in ATG's bank account a proper proprietary foundation for the tracing based claim?

1. The claim made by RnD Funding was based upon its security rights under the General Security Deed. It sought to characterise those rights as being ownership rights in respect of the secured property upon default by ATG but it claimed in the alternative that its interest as equitable chargee was a sufficient foundational property interest to be able to identify traceable proceeds as being the subject of its equitable charge.
2. As has been noted, if a Control Event occurs, then the permission for ATG to be able to use monies in its bank account in the ordinary course of its business comes to an end. All of the property of ATG is impressed with a fixed charge in favour of RnD Funding and must not be dealt with contrary to that security interest. It may be noted that we are not here concerned with the priorities afforded by the *Personal Property Securities Act* in respect of security interests attaching to circulating and non-circulating assets. Therefore, the rules described in that legislation are not relevant. Rather, we are concerned with general law principles as to the process of tracing the proceeds of proprietary interests.
3. The claim advanced by RnD Funding is that the 'locked box' provisions of the General Security Deed gave rise to the result that the money in the bank account of ATG was its property. It was submitted that, in equity, the money in the bank account was the property of RnD Funding and it could not be dealt with by ATG. Repeated submissions were made to the effect that the money in the bank account of ATG was the property of RnD Funding. Those submissions rest upon the operation of what was described in submissions as the locked box. Therefore, it is important to pay close attention to the provisions described by the defendants as giving rise to the locked box.
4. Under cl 2.5 of the General Security Deed, if a Control Event occurs then ATG is obliged to deposit into the 'Controlled Account' the proceeds received 'in respect of any book debt, insurance policy and/or third party claims or any other debts or other amounts now or in the future payable' to ATG. The Controlled Account is required to be established from the outset of the creation of the security and must have officers of RnD Funding as the signatories: cl 2.4. Funds may be disposed from the Controlled Account by RnD Funding without the consent of ATG. Finally, cl 2.5 states that a power created by the requirement to pay monies into the Controlled Account is not waived by any failure or delay in its exercise.
5. There was no compliance with these provisions after the default in the repayment of $320,000 to RnD Funding on 15 October 2018. However, RnD Funding continued to advance monies under the Second Facility Agreement and it was not until a year later that the events complained of took place. During the intervening period, it is apparent on the evidence that ATG continued to operate its own bank account without giving effect to the locked box.
6. There was no explanation provided by RnD Funding as to why it took no steps to insist upon compliance with cl 2.5.
7. The terms of the Controlled Account provisions do not purport to transfer title to funds in the Controlled Account to RnD Funding. They do not purport to create a trust for the benefit of RnD Funding upon an Event of Default. Rather, they impose obligations upon ATG to place monies in the Controlled Account and place limits upon what can be done by ATG with the money in that account. They also confer rights upon RnD Funding to take money from the Controlled Account without the consent of ATG.
8. In any event, what is certain is that there were no funds deposited into the Controlled Account and there were no steps by RnD Funding to secure compliance with the obligation on the part of ATG to do so.
9. There was no real effort to explain the basis for the claim that the funds in the bank account of ATG being amounts that were not deposited into the Controlled Account became the property of RnD Funding such that they might provide the basis for a tracing claim. There was also no claim that RnD Funding took any steps to enforce its security interest prior to the events which took place a year later whereby funds received by ATG were paid to Prop Fest and then to the deed administrators. The steps it took to enforce its security were taken months later.
10. Therefore, relevantly for present purposes, the effect of the Control Event in the form of the default is that it brought to an end the permission to expend funds in the ordinary course of the business of ATG and, on the evidence, brought into existence a fixed charge to the extent of the amount of $320,000. However, ATG continued to operate its own bank account.
11. It may be accepted that an equitable charge is a form of property right recognised in equity which may provide the foundation for a proprietary remedy: *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536 at 554 (Gummow J). In *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (Receivers and Managers Appointed)* [2018] WASCA 163; (2018) 53 WAR 325 the nature of the interest of the holder of a charge was summarised as follows (at [49]):

In general terms, the essence of an equitable charge is a proprietary interest granted by way of security, without any transfer of title (outright title as opposed to an equitable interest), or possession, to the chargee. Specific property of the chargor is expressly or constructively appropriated to, or made answerable for, the payment of a debt or other obligation. The chargee is given the right to resort to that property for the purposes of having it realised and applied in or towards the payment of the debt. Thus, the equitable chargee (unlike the beneficiary of a trust) has remedies against the property itself, and not against the holder of the property.

(footnotes omitted)

1. It may be accepted too that a party who takes a transfer of property with notice of the existence of the charge, takes the transfer subject to that proprietary interest. However, that was not the claim by the defendants. Rather, they claimed that RnD Funding could trace a proprietary interest in the monies held in the locked box to the proprietary interest of Roncane as a shareholder in Goldus. The foundation for that claim is not established.
2. It was submitted for the defendants that the present case was akin to a case like *Black v S Freedman & Co* and for that reason there was no need to demonstrate that there was a breach of fiduciary duty by ATG. However, that submission rested on the proposition that the monies in the bank account of ATG were the property of RnD Funding that had been appropriated by Prop Fest. For reasons that have been given, that has not been established.
3. It follows that the claim by RnD Funding to the funds in ATG's bank account is not a proper proprietary foundation for the tracing based claim.

## Issue (20): Are the Goldus shares held by Roncane the traceable proceeds of funds in ATG's bank account?

1. Assuming, contrary to my reasons as to Issue (19), that there is a proper proprietary foundation for the tracing based claim advanced by RnD Funding then the issue arises as to whether RnD Funding has demonstrated that the Goldus shares are the traceable proceeds of the property of RnD Funding, being the monies in the bank account of ATG.
2. I find that Mr Hillam was the controlling mind of ATG, Prop Fest and Roncane at the time that the amount of $520,000 was transferred to Prop Fest. It was Mr Hillam who arranged the payment to Prop Fest and by reason of the contemporaneous nature of the dealings it may be inferred that he did so for the purpose of securing the outcome of the issue of the shares to Roncane. He may also be taken to have known that ATG was in default and that the provisions of the General Security Deed that allowed payments to be made in the ordinary course of the business of ATG despite the charge had ceased to apply.
3. Mr Hillam was cross-examined about the circumstances in which payments were made that resulted in Roncane becoming the controlling shareholder in Goldus. It was put to him that the GST refunds received by ATG were the source of the funds that were used to make the final payment due under the DoCA and he was only able to complete the DoCA by reason of the receipt by ATG of those funds. Mr Hillam disagreed with that statement. He maintained that Roncane obtained the funds from monies it was owned and from money from other entities. He was then reminded of the claim made in the proceedings by Goldus that Roncane received the funds from Prop Fest. He accepted that was the case. However, he would not accept that Prop Fest received the monies from ATG.
4. As to the payments, Mr Hillam produced a bank statement for Prop Fest which recorded the following:
5. two transfers into the account on 4 October 2019 in the amounts $20,000 and $500,000 with the note 'atg 2 prop fest'; and
6. a payment out of the account on 8 October 2019 in the amount of $400,000 with the note 'GOLDUS DOCA'.
7. There were existing funds in the account of Prop Fest. However, I accept the submission that it should be inferred that the transfers into the account came from the account of ATG and that the payment out indicates that it was made to meet the obligation under the DoCA to make the second payment of $400,000.
8. At the time of payment into the account there was an amount of $68,976.44 standing to the credit of Prop Fest. After the payment out there was $67,713.44 standing to the credit of Prop Fest. Therefore, if there was to be consideration of tracing, the funds came into an account that was a mixed fund. Even assuming that the $520,000 that came into the account were funds that could be traced at the behest of RnD Funding (at least to the extent of the default in payment of $320,000), it is apparent that some part of the mixed fund could be applied by Prop Fest as it considered appropriate. Usually, the Court would presume that the party dealing with the mixed funds would draw out its own money first: *Brady v Stapleton* at 337‑338. However, for the defendants, that aspect was passed over on the basis that the amount that came from ATG is readily identifiable and the timing of the payments led to the conclusion that the $400,000 passed through the account. It is probably the case that where Prop Fest has no funds the more satisfactory remedy for RnD Funding would be applied such that the amount of $400,000 (at least to the extent of the interest of $320,000) could be traced into whatever property was obtained by the payment of that money: see *Re Oatway; Hertslet v Oatway* [1903] 2 Ch 356.
9. I find that the oral evidence of Mr Hillam which suggested that there may have been some source other than ATG of the funds that Prop Fest received to be unconvincing and contrary to the documents. His failure to acknowledge the obvious evidence from the bank records is another matter which reflects adversely on his credibility.
10. Mr Hillam was then cross-examined to the effect that he sought to keep confidential from Mr Nakat of RnD Funding the fact that the final payment was being made under the DoCA by which Goldus would obtain control of the Tenements. Mr Hillam denied that was the case and maintained that he would have no reason for doing so.
11. The terms of an SMS message sent on 16 October 2019 were then put to Mr Hillam. It read:

Joe N is harassing by ringing and writing to Duncan Powell. They do not have to reply and I will be doing so citing confidentiality.

Confidentially for your information only we have completed the Goldus DoCA and I am sole director now and sole shareholder although it is yet to appear on ASIC due to imaging delays.

…

1. The SMS was subsequently identified as having been sent by Mr Hillam. It appeared to have been accidentally sent to Mr Nakat. The reference to Mr Powell is a reference to one of the administrators of the DoCA.
2. When confronted with the SMS message, Mr Hillam initially said that he did not recall ever sending the SMS message. He accepted that he became the sole director of Goldus on 10 October 2019 when Roncane took a transfer of all the shares in Goldus. He denied that he kept matters from Mr Nakat.
3. I find that Mr Hillam took steps to complete the DoCA in circumstances where he sought to keep those steps confidential from Mr Nakat and RnD Funding. The timing of those events was significant because by the time of the SMS message, ATG was in default in repaying substantial amounts to RnD Funding. If RnD Funding had known that ATG was in receipt of substantial funds by way of GST refunds it would be likely to have sought to insist upon compliance with the provisions of the Second Facility Agreement which required the transfer of any assets procured under the DoCA to be transferred to an affiliate of ATG and for Goldus to enter into a deed of accession. By those provisions, RnD Funding could take steps to ensure that its security rights extended to include such assets.
4. Later in his evidence, Mr Hillam was asked whether he chose not to disclose to Mr Nakat the receipt of those GST refunds. Contrary to his earlier evidence he answered: 'I think that's correct, but I don't think I had to disclose them to him at all'.
5. Eventually, Mr Hillam gave evidence that he recalled that the text message had been sent to a Mr Liebeskind who was assisting him while he, Mr Hillam, was in hospital. He then questioned whether it was sent or whether it was the whole of the message. Eventually he seemed to accept that it was sent by him to Mr Liebeskind.
6. The whole course of this evidence by Mr Hillam was unsatisfactory. I accept the submission advanced by Australian Mining and RnD Funding that he identified the matters in the SMS as being unhelpful to his case. In that respect he was correct. The content of the SMS message indicated an attempt to keep the source of the funds that were used to make the payment under the DoCA confidential from Mr Nakat. The course of the evidence reflected adversely on the credibility of the account given by Mr Hillam. It was given evasively and in a manner that was unconvincing.
7. As to the independent evidence as to what occurred when the last payment was made under the DoCA, there was a payment out of the bank account of Prop Fest to the administrator of the DoCA. The funds did not come into the hands of Roncane. Rather, Prop Fest paid $400,000 to the administrator of the DoCA (being the second tranche required to make up the Fund). The payment of the second tranche was the final condition that needed to be met in order for the obligation of the administrator to transfer the shares in Goldus to an entity nominated by Mr Hillam to fall due for performance. It may be inferred that Mr Hillam nominated Roncane to be that entity.
8. There is no indication that Prop Fest gave valuable consideration for the receipt of the money or that it was anything other than a volunteer. By reason of Mr Hillam's control of Prop Fest, and his efforts to keep matters from Mr Nakat, inferences may be readily drawn to such effect in the absence of evidence from Mr Hillam to the contrary.
9. The obligation to pay the $400,000 was not Roncane's obligation. It was the obligation of the Hillam Entities which meant Mr Hillam personally and companies and persons associated with him. However, I conclude that the payment was made to secure benefits which included the issue of the shares to Roncane. I accept the submission that the fact that the payment secured other benefits, such as the releases recorded in the DoCA and the relinquishment by Australian Mining of its interest in the Teetulpa Venture did not mean that the shares were not the traceable proceeds of the $400,000.
10. The evidence of Mr Hillam was that Prop Fest agreed to lend the $400,000 to Roncane and the payment to the administrator was made by Prop Fest at the direction of Roncane. There is in evidence an instrument of loan that was executed as between Roncane and Prop Fest. It was suggested in submissions for RnD Funding that the existence of that loan should be ignored. The only evidence to support those arrangements is the evidence of Mr Hillam. For reasons I have given, I do not accept his evidence.
11. Therefore, I find that the $400,000 that came from ATG passed through the hands of Prop Fest and was paid to the administrators of the DoCA in order to procure for Roncane the benefit of the shareholding in Goldus. It follows that if I had reached a different conclusion concerning Issue (19), I would have upheld the tracing based claim.

## Issue (21): If the tracing based claim is upheld are the shares in Goldus held on constructive trust for RnD Funding or is the interest of RnD Funding confined to a charge over the shares?

1. The parties did not provide detailed submissions as to the precise remedial consequences that would flow if the tracing based claim was upheld. If the claim had been established then I would have invited further submissions as to the precise terms of relief. In the result, for reasons I have given, the claim has not been made out. Therefore, it is not necessary to determine Issue (21).

## Change in control provisions

1. For completeness I note that there was agitation about a matter that the defendants proposed to raise concerning the change in control of Goldus effected by the transfer of the shares in Goldus to Roncane. It was said that the transfer triggered a change in control of Goldus for the purposes of certain rights of pre-emption conferred the JVA. Goldus objected to a proposed amendment to raise such a claim. In the result, the claim was not pressed by the defendants.

## Relief concerning the proper construction of the DoCA

1. In closing submissions, Australian Mining sought declaratory relief based on its case as to the proper interpretation of the terms of the DoCA to the effect that Goldus has no further right, interest or claim to a participating interest in the joint venture established by the JVA. As has been noted, it claimed that the participating interest of Goldus in the JVA has been relinquished and Australian Mining is the sole venturer and is entitled to the rights of the venture as against Goldus. For reasons that have been given, that claim has been upheld. Consistently with the approach I have indicated as to the declaratory relief sought by Australian Mining and RnD Funding, the liberty to apply for final declaratory relief should be taken to include that aspect.

## Conclusion

1. As I have indicated, Goldus has succeeded in respect of aspects of its claim for declaratory relief. RnD Funding and Australian Mining have succeeded as to the proper construction of the DoCA. Provision will be made to allow the parties to apply for relief, including orders as to costs, to give effect to these reasons.

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| I certify that the preceding three hundred and forty-six (346) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 10 September 2021