

# SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

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## EX NF PTY LTD (IN LIQ) & ANOR v MUNNEKE & ORS

[2025] SASC 165

Judgment of the Honourable Justice Bampton

2 October 2025

**CORPORATIONS - MANAGEMENT AND ADMINISTRATION - DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION - FIDUCIARY AND RELATED STATUTORY DUTIES - REMEDIES AND PENALTIES FOR BREACH OF DUTY - CONSTRUCTIVE TRUST**

**CORPORATIONS - WINDING UP - CONDUCT AND INCIDENTS OF WINDING UP - PROCEEDINGS BY OR AGAINST THE COMPANY - GENERALLY**

The company in liquidation and the liquidator, the applicants, seek to recover asserted property of the company for the benefit of the company's creditors. The applicants seek a declaration that cryptocurrency purchased using company funds is the property of the company. The applicants also seek declarations that the first respondent purchased the properties on O'Connell Street, North Adelaide ("O'Connell Street transaction") and Ward Street, North Adelaide ("Ward Street transaction") in breach of his statutory and fiduciary duties as director. In the alternative, the applicants seek orders setting aside the transactions as unreasonable director-related transactions pursuant to s 588FDA of the *Corporations Act 2001* (Cth).

Whether the cryptocurrency bought with company funds was and remains the property of the company – whether the duty to consider the interests of creditors was enlivened when the O'Connell Street and Ward Street transactions were contemplated – whether the payment out of company funds and incurring of a liability to ANZ in the O'Connell Street transaction was a breach of the first respondent's fiduciary and statutory duties as director – whether the payment out of company funds in the Ward Street transaction was a breach of the first respondent's fiduciary and statutory duties as director – whether breaches were ratified by the sole shareholder – whether the O'Connell Street and Ward Street transactions were unreasonable director-related transactions.

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**Applicants: EX NF PTY LTD (IN LIQUIDATION) AND ANTHONY JOHN ARTHUR PHILLIPS  
Counsel: MR B ROBERTS KC WITH MR T KENTISH - Solicitor: O'HALLORAN LAW**

**First Respondent: DEREK JAMES MUNNEKE      Counsel: MR L GENTRY - Solicitor: MADSEN O'DEA AGNEW**

**Second to Fourth Respondents: LINDA ZACCARA, 106 WARD STREET PTY LTD, AND 28 O'CONNELL PTY LTD      Counsel: MR RJ WHITINGTON KC WITH MS L AMABILI - Solicitor: OUWENS LAWYERS**

**Hearing Date/s: 15/04/2024 to 22/04/2024, 03/05/2024**

**File No/s: CIV-21-001837**

**B**

Held:

1. The cryptocurrency was and remains the property of the company;
2. The first respondent breached his statutory and fiduciary duties by causing or allowing the payment out of the company's funds and incurring of a liability to ANZ in the O'Connell Street transaction, and was an unreasonable director related transaction; and
3. The first respondent breached his statutory and fiduciary duties by causing or allowing the company's funds to be used in the Ward Street transaction, and was an unreasonable director-related transaction.

*Corporations Act 2001* (Cth) ss 9, 95A, 180, 181, 182, 189, 254T, 256B, 256C, 286, 588E, 588FDA, 588FE, 588FF, 588G, 588M, 597, 1317E, 1317H, 1317S, 1318; *Uniform Civil Rules 2020* (SA), referred to.

*Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement) (No 4)* [2019] FCA 1846; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1; *Angas Law Services Pty Ltd (in liq) & Anor v Carabelas & Anor* (2005) 226 CLR 507; *Australian Securities and Investments Commission v Edwards* (2005) 220 ALR 148; *Australian Securities and Investments Commission v Mitchell & Anor (No 2)* (2020) 382 ALR 425; *Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (Receivers and Managers Appointed) (In Liq)* (2009) 25 VR 411; *Burnett & Anor v Randwick City Council* [2006] NSWCA 196 ; *CEG Direct Securities Pty Ltd v Cooper as Liquidator of Runtong Investment and Development Pty Ltd (In Liq)* (2025) 309 FCR 66; *Connective Services Pty Ltd v Sleat Pty Ltd* (2019) 267 CLR 461; *Crowe-Maxwell v Frost* (2016) 91 NSWLR 414; *Daniels v Anderson* (1995) 37 NSWLR 438; *De Bourbel Pty Ltd (in liq) v Distilleria Pty Ltd & Anor* [2023] SASC 88; *Fisher v Divine Homes Pty Ltd*; *Allen v Harb* (2011) 85 ACSR 512; *Gordon v Leon Plant Hire Pty Ltd (in liq)* (2015) 16 ASTLR 185; *Great Southern Finance Pty Ltd (in liq) v Rhodes* (2014) 103 ACSR 137; *Hanwood Pastoral Co Pty Limited v Kelly (No 2)* [2022] FCA 850; *Herrman v Simon* (1990) 4 ACSR 81; *Jones v Dunkel* (1959) 101 CLR 298; *Jarrett v Perpetual Trustee Co Ltd* (2007) 64 ACSR 552; *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557; *Kinsela v Russell Kinsela Pty Ltd (In Liq)* (1986) 4 NSWLR 722; *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465; *Macleod v The Queen* (2003) 214 CLR 230; *Miller v Miller & Miller* (1995) 16 ACSR 73; *Nicholson v Permakraft (NZ) Ltd (in liq)* [1985] 1 NZLR 242; *Pascoe Ltd (in liq) v Lucas* (1999) 75 SASR 246; *Pilmer v The Duke Group Ltd* (2001) 207 CLR 165; *Re CSR Ltd* (2010) 183 FCR 358; *Re Duomatic Ltd* [1969] 2 Ch 365; *Re Freehouse Pty Ltd*; *Jordan v Avram* (1997) 26 ACSR 662; *Re Pine Forests of Australia (Canberra) Pty Ltd* (2010) 80 ACSR 377; *Re Newark Pty Ltd* [1993] 1 Qd R 409; *Re New World Alliance Pty Ltd*; *Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425; *Shum Yip Properties Development Ltd v Chatswood Investment and Development Co Pty Ltd* (2002) 166 FLR 451; *Taylor v Australia and New Zealand Banking Group Ltd* (1998) 13 ACLR 780; *Termite Resources NL (in liq) v Meadows, in the matter of Termite Resources NL (in liq) (No 2)* (2019) 370 ALR 191; *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1; *Walker v Wimborne* (1976) 137 CLR 1; *Warner (in his capacity as joint and several liquidator of Bellpac Pty Ltd (recs and mgrs apptd) (ACN 101 713 017) (in liq) & Ors v Hung & Ors (No 2)* (2011) 297 ALR 56; *Weaver v Harburn* (2014) 103 ACSR 416; *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; *Vasudevan (as Joint and Several Liquidator of Wulguru Retail Investments Pty Ltd) (in liq) v Becon Constructions (Australia) Pty Ltd* (2014) 41 VR 445; *Yang v Wong, Axis North Pty Ltd (Recs and Mgrs Appt) (In Liq) (No 2)* [2025] FCA 693, considered.

**EX NF PTY LTD (IN LIQ) & ANOR v MUNNEKE & ORS**  
**[2025] SASC 165**

**Civil**

**BAMPTON J.**

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## Glossary

<b>Bitcoin (BTC)</b>	The most well-known and oldest popular type of <b>cryptocurrency</b> . It makes up the lion's share of cryptocurrency trading.
<b>Bitcoin white paper</b>	The <b>white paper</b> published in 2008 by <b>Satoshi Nakamoto</b> titled "Bitcoin: A Peer-to-Peer Electronic Cash System".
<b>BitPay</b>	A company that maintains a list of vendors that accept payment in <b>bitcoin</b> for goods and services.
<b>Blockchain</b>	A distributed ledger of <b>cryptocurrency</b> transactions and balances that enables storage of data across many computers controlled by different parties to create a censorship-resistant or immutable record of transactions. The data, which is all publicly accessible, is organised in "blocks" added together to form a "chain".
<b>Captology</b>	According to an internet search, the study of computers as persuasive technologies.
<b>CoinJar</b>	An Australian <b>cryptocurrency exchange</b> .
<b>Cryptocurrency</b>	A type of digital currency, transactions and balances of which are maintained by a decentralised system using <b>cryptography</b> on either a <b>blockchain</b> or another distributed ledger.
<b>Cryptocurrency exchange</b>	A platform on which users can purchase <b>cryptocurrency</b> or trade it for other assets, including fiat currencies. They may be centralised or decentralised.
<b>Cryptography</b>	The study and practice of verifying and securing data and transactions using code.
<b>Ether (ETH)</b>	The <b>cryptocurrency</b> on the <b>ethereum blockchain</b> . Unlike bitcoin, ether cannot be transacted without a trusted central party recording the transactions on a ledger.
<b>Ethereum</b>	A decentralised <b>blockchain</b> primarily founded by <b>Vitalik Buterin</b> in an attempt to resolve some of the shortcomings associated with bitcoin, including counterparty risk.
<b>Ethereum white paper</b>	The <b>white paper</b> published in 2014 by <b>Vitalik Buterin</b> titled "A Next-Generation Smart Contract and Decentralized Application Platform".
<b>Gas</b>	The fee charged for making a transaction or deploying a <b>smart contract</b> on the <b>ethereum blockchain</b> , which is recorded and visible on the blockchain. Gas is priced in one billionths of an ether and is paid to those who contribute computer power to the verification of transactions.

<b>Initial coin offering (ICO)</b>	A process whereby a company raises funds for new <b>blockchain</b> projects by offering their own <b>cryptocurrency</b> as an investment.
<b>Key</b>	An alphanumeric identifier (public key) or code (private key) that relates to a <b>wallet</b> . A public key functions as an address for a wallet, whereas a private key functions as a password, enabling the holder to access and make transactions using <b>cryptocurrency</b> recorded in a particular wallet.
<b>Living Room of Satoshi</b>	A cryptocurrency broker.
<b>Mainnet</b>	The primary public <b>ethereum blockchain</b> . <b>Smart contracts</b> on mainnet are open source, meaning that any person can view the underlying code. Deployment of a smart contract to mainnet is effectively permanent.
<b>Mining</b>	The process of compiling, verifying and confirming (through computer software) transactions and adding them to the <b>blockchain</b> in exchange for <b>cryptocurrency</b> , which process uses a lot of electricity.
<b>Satoshi Nakamoto</b>	The alias of the unknown person or persons who developed <b>bitcoin</b> and published the <b>bitcoin white paper</b> . Nakamoto presently holds nearly US\$135 billion worth of bitcoin.
<b>Silk Road</b>	An online black market, with all transactions being conducted anonymously using <b>bitcoin</b> .
<b>Smart contract</b>	Automated or self-executing code that can be interacted with once deployed to a <b>blockchain</b> . For example, a smart contract might allow for a party to place <b>cryptocurrency</b> into it and hold it until a predetermined set of variables are met by a counterparty, or distribute it over time. Apparently, they are neither smart nor contracts.
<b>Testnet</b>	A separate <b>blockchain</b> used to test new developments in a cost and risk-free environment before deploying them to <b>mainnet</b> .
<b>Vitalik Buterin</b>	The primary founder of <b>ethereum</b> .
<b>Wallet</b>	An address or entry on the ledger (public <b>key</b> ) that has some balance. Who controls a wallet will be unknown unless it can be discerned from identifying features.
<b>White paper</b>	A report addressing a specific topic or issue and providing a perspective or proposing a solution.

## Introduction

1           “Buy some Bitcoin with this, won’t you love?” Linda Zaccara (“Ms Zaccara”) alleges she repeatedly said when she handed money “over the years” to her then husband, Derek Munneke (“Mr Munneke”). Mr Munneke is a software developer, who was at all material times the sole director of NextFaze Pty Ltd (“NextFaze”), a mobile and web application development business. Ms Zaccara was at all material times its sole shareholder.

2           In 2014, Mr Munneke used NextFaze’s funds to purchase a modest amount of cryptocurrency, including bitcoin and ethereum, the value of which has since appreciated exponentially. In 2015, he applied further NextFaze funds, along with funds drawn from a loan to NextFaze, to purchase property that is now held by 28 O’Connell Pty Ltd. Finally, in 2018, Mr Munneke sold some of the ethereum to finance the purchase of property owned by 106 Ward Street Pty Ltd.<sup>1</sup> Ms Zaccara was at all material times and remains the sole director and shareholder of both 28 O’Connell Pty Ltd and 106 Ward Street Pty Ltd (“the respondent companies”). The remaining cryptocurrency and its traceable proceeds, the majority of which has been liquidated, are now worth several million dollars.

3           NextFaze was wound up on 15 May 2019 by order of the Federal Court, and Anthony Phillips was appointed liquidator. By these proceedings, NextFaze, now Ex NF Pty Ltd (In Liquidation) (“Ex NF”), and Mr Phillips (“the applicants”), seek to recover asserted property of Ex NF for the benefit of its creditors in respect of the above transactions.

## Background and overview of the claims

4           NextFaze was incorporated on 15 February 2012. It continued the business of 2Moro Mobile Pty Ltd (“2Moro”), a company co-founded by Mr Munneke and which went into liquidation on 20 January 2012.

5           In February 2014, Mr Munneke opened an account with CoinJar (“the CoinJar account”), a cryptocurrency exchange, linked to NextFaze’s National Australia Bank (“NAB”) account<sup>2</sup> (“the NAB account”). In February and August 2014, by several transactions, Mr Munneke transferred a total of \$3,050 from the NAB account to the CoinJar account, which was then used to purchase bitcoin. Part of the bitcoin was used by Mr Munneke to purchase another cryptocurrency, ethereum, including on behalf of Meeco Group Pty Ltd (“Meeco”), a client of NextFaze. Mr Munneke has since applied some of the ethereum and/or bitcoin to acquire other cryptocurrency.

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<sup>1</sup> The pleadings refer to the third respondent as 106 Ward Pty Ltd, however, the tender book documents indicate that the name of the third respondent is 106 Ward Street Pty Ltd.

<sup>2</sup> The NAB account has the account number ending in 0380. It appears it was named Nextfaze Pty Ltd Business Cheque Account until its name changed to the Nextfaze Pty Ltd Business Everyday Account in 2016. NextFaze also had a NAB account with an account number ending in 0452 named Nextfaze Pty Ltd Business Cash Maximiser (“the NAB Maximiser account”).

6 On 6 November 2015, the 28 O’Connell Trust, a discretionary family trust, was settled with Mr Munneke as trustee. On 19 November 2015, Mr Munneke, acting as trustee of the 28 O’Connell Trust, entered a contract to purchase commercial property at 28 O’Connell Street, North Adelaide (“O’Connell Street”) for \$1.7 million. He paid a deposit of \$40,000 from the NAB account.

7 At settlement on 10 December 2015, \$1,025,911.59 was paid from NextFaze’s Australia and New Zealand Banking Group Ltd (“ANZ”) Business Premium Saver account (“the ANZ account”). NextFaze was also loaned \$740,000 by ANZ (“the ANZ loan”) to fund the purchase, in respect of which NextFaze made the required repayments. NextFaze made further payments from the ANZ account totalling \$60,000 to former tenants of O’Connell Street in consideration of the early termination of their leases (“the O’Connell Street transaction”).

8 It was alleged that the purchase of O’Connell Street and associated expenses substantially used NextFaze’s available cash resources, leaving it with a cash balance of \$218,185. It is further alleged that at the time of the purchase, NextFaze had not prepared up-to-date financial records or maintained its filings with the Australian Taxation Office (“ATO”), meaning it had failed to keep records that “correctly record and explain its transactions and financial position and performance” and “would enable true and fair financial statements to be prepared and audited” as required by s 286 of the *Corporations Act 2001* (Cth) (“the *Corporations Act*”).

9 It was asserted that had proper records been maintained, NextFaze would have identified that as at December 2015, it owed the following:

1. superannuation guarantee charge (“SGC”) of at least \$119,240;
2. at least \$244,377 in respect of goods and services tax (“GST”) and pay as you go (“PAYG”) withholding;
3. \$238,913 in income tax; and
4. additional interest with the risk of ATO penalties for late filing in respect of 1, 2 and 3.

10 It was alleged that by the end of 2017, NextFaze’s financial situation had worsened. Having caught up with many of its outstanding tax filings, very substantial liabilities to the ATO had crystallised, including for SGC of \$374,035, GST and PAYG withholding of \$1,266,599, and income tax of \$174,106, all of which were subject to accruing penalties and general interest charge. By early January 2018, NextFaze’s cryptocurrency holdings were worth around \$2.6 million.

11 On 4 January 2018, Ms Zaccara entered a contract to purchase commercial property at 106 Ward Street, North Adelaide (“Ward Street”) for \$1.2 million, with

\$100,000 payable as a deposit and settlement scheduled for 31 January 2018. The contract provided that the purchaser was Ms Zaccara and/or her nominee. On 17 January 2018, 106 Ward Street Pty Ltd was incorporated with Ms Zaccara as its sole director and shareholder.

12 During January 2018, 1,100 units of ethereum were sold by Mr Munneke to realise around \$1.4 million as follows:

1. 100 units on 11 January 2018, realising \$146,850.74, which was paid into Mr Munneke's personal Commonwealth Bank of Australia ("CBA") account ("CBA account"), \$100,000 of which was used to pay the Ward Street deposit on 15 January 2018;
2. 300 units on 24 January 2018, realising \$346,464, which was paid into the NAB account; and
3. 700 units on 25 January 2018, realising \$911,445, which was also paid into the NAB account.

13 On 29 January 2018, \$1,135,920.08 was drawn from the NAB account to be paid as settlement monies for the purchase of Ward Street. The surplus of \$121,988.92 from the cryptocurrency sales paid into the NAB account was transferred from the NAB account to the NAB Maximiser account on 29 January 2018. There is no evidence the surplus from the sale on 11 January 2018 after payment of the deposit was transferred from Mr Munneke's CBA account into any of Ex NF's bank accounts.

14 On 31 January 2018, 106 Ward Trust, a discretionary trust, was settled with 106 Ward Street Pty Ltd as trustee. Mr Munneke is a beneficiary of the 106 Ward Trust. On the same date, settlement on Ward Street occurred with 106 Ward Street Pty Ltd acting as purchaser as trustee of 106 Ward Trust and payment of the settlement monies drawn from the NAB account ("the Ward Street transaction").

15 On 30 January 2019, the ATO issued a statutory demand against NextFaze for \$2,742,510.84 seeking payment of outstanding GST, PAYG withholding, income tax and superannuation. On 26 March 2019, the Deputy Commissioner of Taxation ("Deputy Commissioner") filed an application seeking an order from the Federal Court for the winding up of NextFaze.

16 Mr Munneke and Ms Zaccara separated in or around April 2019.

17 28 O'Connell Pty Ltd was registered on 9 May 2019.

18 As set out above, on 15 May 2019, the Federal Court granted the Deputy Commissioner's application for the winding up of NextFaze and appointed the Mr Phillips as liquidator. I will refer to Mr Phillips as either Mr Phillips or the liquidator.

19 On 20 May 2019, Mr Phillips sold most of Ex NF’s business assets to AllFaze Development Services Pty Ltd (“AllFaze”) for \$110,000, including GST. AllFaze also assumed leave entitlements owing to 12 employees. AllFaze is an entity controlled by Ms Zaccara. Mr Munneke continues to work as an employee of AllFaze. In his statutory report to creditors dated 31 May 2019, Mr Phillips stated that in addition to achieving a better result than would have been possible at auction, the sale had allowed for the continuation of Ex NF’s business and employment of the majority of Ex NF’s former staff.

20 On 1 July 2019, 28 O’Connell Pty Ltd replaced Mr Munneke as trustee of the 28 O’Connell Trust. Mr Munneke remained the registered proprietor of O’Connell Street.

21 On 11 July 2019, the Deputy Commissioner commenced proceedings against Mr Munneke in the District Court of South Australia for \$1,515,371.03. On 9 October 2019, Mr Munneke consented to judgment for the Deputy Commissioner in the sum \$1,515,371.03 plus costs.

22 NextFaze changed its name to Ex NF on 13 July 2019. In reciting the history of this matter, I will refer to NextFaze as Ex NF despite its name not changing until on 13 July 2019.

23 In his statutory report to creditors dated 14 August 2019 (“report to creditors”), Mr Phillips recorded that Mr Munneke “[had] ascribed the failure of [Ex NF] to losses incurred following the failure of several key customers in 2015 and an inability to recover from this set-back”. However, Mr Phillips referred to the following “other factors which more significantly contributed to the failure of [Ex NF]”:

On 10 December 2015, \$1,025,912 in [Ex NF’s] funds were withdrawn to purchase a new trading premises for [Ex NF]. At the time of the withdrawal, this represented over 80% of [Ex NF’s] cash resources.

This purchase coincided with a material reduction in [Ex NF’s] profitability that significantly impacted on [Ex NF’s] ability to pay its outstanding tax obligations. Between 10 December 2015 and my appointment, [Ex NF’s] debt to the ATO rose from \$357,929 to \$2,194,825 with respect to GST, PAYG and Income tax. During 2016, [Ex NF] also ceased to meet its superannuation and payroll tax obligations.

It is clear that, since 2015, [Ex NF] has only been able to continue its operations through the non-payment of its tax and superannuation obligations.

24 Under the heading “Cryptocurrency”, Mr Phillips noted in his report to creditors that in January 2018, funds totalling \$911,455<sup>3</sup> were deposited into the NAB account. He reported that Mr Munneke and Ms Zaccara had advised that these deposits represented the proceeds of the sale of cryptocurrency, but that the

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<sup>3</sup> The sum of \$346,464 was also deposited into the NAB account.

cryptocurrency was not the property of Ex NF, and Ex NF's NAB account was simply used to assist in the realisation process.

25 Mr Phillips examined Mr Munneke on 4 February 2021 and Ms Zaccara on 5 February 2021 pursuant to s 597 of the *Corporations Act* ("s 597 examination").<sup>4</sup>

26 The applicants subsequently commenced:

1. Supreme Court action CIV-21-001837 on 3 March 2021 against Mr Munneke, Ms Zaccara and 106 Ward Street Pty Ltd seeking to recover asserted property of Ex NF for the benefit of Ex NF's creditors in relation to cryptocurrency alleged to have been acquired with the property of Ex NF and its traceable proceeds, as well as the payment out of Ex NF's funds to acquire Ward Street; ("the cryptocurrency and Ward Street claim") and
2. Supreme Court action CIV-21-012859 on 18 November 2021 against Mr Munneke and 28 O'Connell Pty Ltd seeking to recover asserted property of Ex NF for the benefit of Ex NF's creditors in relation to the payment out of Ex NF's funds, and the entry into a commercial loan with ANZ, to acquire O'Connell Street ("the O'Connell Street claim").

27 Ex NF's priority creditors are for unpaid employee superannuation (approximately \$730,000) and unpaid employee entitlements (approximately \$170,000), which entitlements were met by the Federal Government under the Fair Entitlements Guarantee scheme and are to be repaid. Ex NF's major unsecured creditors are the ATO for approximately \$2.23 million in unpaid GST, PAYG and income tax dating from 2014, and associated interest and penalties; Revenue SA for approximately \$250,000 in unpaid payroll tax; and ANZ for \$400,000, which represents the shortfall on the ANZ loan account owing by Ex NF in respect of the purchase of O'Connell Street.<sup>5</sup>

28 By agreement of the parties, Mr Munneke who uses the monikers "Captain of Captology" and "Captain Derek", sold much of the remaining cryptocurrency in March 2024, yielding \$3,852,555.57 which was paid into Court pending the determination of these proceedings. Mr Munneke also controls and holds the cryptographic keys to the remaining cryptocurrency that was not sold, which was valued at the time of trial at just over \$500,000 as depicted in the table below.

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<sup>4</sup> Pursuant to s 597(14) of the *Corporations Act*, the transcript of an examination that is authenticated may be used in evidence against the person examined.

<sup>5</sup> Liquidator's report to creditors, Exhibit 2R4 at 5-6.

Coin	Units	Price per unit (as at 9 April 2024)	Value
ETH (Ether)	13.93116430	\$5,286.98	\$73,653.79
SNX (Synthetix)	39627.10	\$6.03	\$238,951.41
BTC (Bitcoin)	1.00000000	\$104,285.21	\$104,285.21
CEL (Celsius)	93897.93320000	\$0.32	\$30,047.34
ETC (Ethereum Classic)	1201.67916000	\$49.44	\$59,411.02
XRP	19114.85208400	\$0.93	\$17,776.81
LTC (Litecoin)	24.51744153	\$147.06	\$3,605.53
<b>Total</b>			<b>\$527,731.11</b>

### Relief sought

29 The applicants alleged that the cryptocurrency was purchased in 2014 with Ex NF's funds and as part of Ex NF's business such that it was, and to the extent it still exists, remains the property of Ex NF.

30 The applicants seek declarations that the cryptocurrency is the property of Ex NF, along with consequential orders that the funds in Court be paid out and that Mr Munneke deliver up the keys necessary for the applicants to take control of the residual cryptocurrency assets.

31 The applicants alleged that the purchase of O'Connell Street in the name of Mr Munneke (as trustee for the 28 O'Connell Trust) was a self-dealing transaction undertaken on Mr Munneke's direction and entirely funded by Ex NF to its detriment. It was further alleged that the transaction was undertaken at a time when Ex NF had woefully inadequate financial records and when it was of questionable solvency. Further, Mr Munneke did not know the true state of Ex NF's financial position and took no steps to gain such an understanding.

32 For these reasons, the applicants seek declarations that Mr Munneke used Ex NF's funds to purchase O'Connell Street in breach of his fiduciary and statutory duties as a director and consequently, that O'Connell Street is held on constructive trust for Ex NF. Alternatively, the applicants seek an order setting aside the transaction as an unreasonable director-related transaction under the *Corporations Act*.

33 The applicants contended an award of damages would not provide adequate compensation to Ex NF, as O'Connell Street is held in a trust and is not available for Mr Munneke to sell. The applicants also pointed out that as the ATO entered judgment against Mr Munneke for the sum of \$1,515,371.03 in October 2019, an award of equitable or statutory compensation would be unlikely to benefit the applicants.

34 On the basis that the ethereum used to fund the purchase of Ward Street was Ex NF's property, it was alleged that the purchase was a self-dealing transaction undertaken on Mr Munneke's direction and entirely funded by Ex NF. It was further alleged that the transaction was undertaken at a time when Ex NF was of questionable solvency and when its financial records remained woefully inadequate, particularly due to the failure to make filings with the ATO or meet tax obligations. It was argued that Mr Munneke was or ought to have been aware of Ex NF's parlous financial position and appreciated that Ex NF could not lawfully fund the purchase.

35 The applicants seek declarations that Mr Munneke used Ex NF's funds to purchase Ward Street for the benefit of 106 Ward Street Pty Ltd in breach of his fiduciary and statutory duties as a director and consequently, that Ward Street is held on constructive trust for Ex NF. Alternatively, the applicants seek an order for equitable compensation or damages, or an order setting aside the transaction as an unreasonable director-related transaction under the *Corporations Act*.

### Overview of the defences

36 Mr Munneke contended that he and Ms Zaccara determined to purchase the cryptocurrency as a family investment and that he is presumed by law to be the owner of the cryptocurrency. He maintained that funds were used from the NAB account because it was convenient, as the NAB account had already been linked to the CoinJar account to enable Ex NF to accept payment from its clients in bitcoin. It was submitted that Ex NF, as a web and application development company, was not in the business of making speculative investments. Mr Munneke contended that the \$3,050<sup>6</sup> in withdrawals offset incidental expenses that he and Ms Zaccara had personally incurred on an ad hoc basis on Ex NF's behalf or represented deductions from Ms Zaccara's loan account. Otherwise, he said the use of the funds constituted a small loan, which was later repaid. Ms Zaccara and 106 Ward Street Pty Ltd defend the cryptocurrency and Ward Street claim on the same basis, although they assert that the cryptocurrency was purchased for the benefit of only Ms Zaccara personally.

37 In respect of the O'Connell Street claim, Mr Munneke and 28 O'Connell Pty Ltd argued that in late 2015, Ex NF had been trading profitably and had surplus cash available to it. They contended that Mr Munneke and Ms Zaccara were looking for larger premises to accommodate Ex NF's growing business when the opportunity to acquire O'Connell Street arose. It was asserted that during the period immediately prior to 19 November 2015 and up to 10 December 2015:

1. of Ex NF's two significant clients, Meeco had raised significant capital in 2014, and the officers of Guvera Australia Pty Ltd ("Guvera") had informed Mr Munneke that Guvera would be publicly listed. Guvera's

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<sup>6</sup> Mr Munneke pleaded in his defence – revision 3 in the cryptocurrency Ward Street claim that the withdrawn sum pursued by the liquidator is \$2,750 which sum excluded \$300 used to purchase bitcoin as a wedding gift for Ric Santos.

Initial Public Offering was subsequently released in or about May 2016. As such, it was argued that a director in the position of Mr Munneke was entitled to believe that Ex NF's debts were recoverable and that Ex NF was in a healthy financial position;

2. Ex NF owned plant and equipment, which had value;
3. Ms Zaccara, as the sole shareholder of Ex NF, had repeatedly provided substantial financial assistance to Ex NF since Ex NF's inception and was willing and able to provide further financial assistance, including by borrowing against or realising assets held by her or related entities, principally her real estate portfolio;
4. while Ex NF had fallen behind with some ATO lodgements, it had engaged BDO to regularise them. The ATO was also directly involved in this process; and
5. Ex NF's accountant, Kishen Vijayadass of BDO ("Mr Vijayadass"), advised that Ex NF had sufficient surplus cash to justify a payment to Ms Zaccara as shareholder for the purpose of purchasing commercial premises, and assisted Mr Munneke and Ms Zaccara in establishing the 28 O'Connell Trust.

38 Mr Munneke and 28 O'Connell Pty Ltd argued that Mr Munneke relied on Mr Vijayadass' advice when he made a payment of Ex NF's surplus cash to Ms Zaccara in the form of a dividend or reduction and distribution of capital. They submitted that Ex NF benefited from relocating its operations to O'Connell Street, notwithstanding that it was recorded as the borrower of the ANZ loan, given that O'Connell Street was a larger premises and Ex NF paid less than market rent over the course of five years.

39 It was asserted that Mr Munneke reasonably relied upon Mr Vijayadass and Ms Zaccara to advise him about, and provide him with information regarding, Ex NF's financial, superannuation and taxation obligations, as well as to prepare documents and perform tasks in order to comply with the same. It was argued that the expert opinion (discussed below) of Alan Scott ("Mr Scott") vindicates Ex NF as being in a sufficiently strong financial position to release the funds to Ms Zaccara at the time of the O'Connell Street purchase, contrary to the opinion of the applicants' expert Andrew Heard ("Mr Heard").

40 Mr Munneke argued he complied with his duties as a director of Ex NF at all relevant times, and that Ms Zaccara, as sole shareholder of Ex NF, agreed, ratified, and acquiesced to the release of Ex NF's funds.

41 Finally, Mr Munneke, Ms Zaccara and 106 Ward Street Pty Ltd disputed that the ethereum used to purchase Ward Street was Ex NF's property. They also denied that Ex NF was of questionable solvency at the time of the purchase of Ward Street, that Mr Munneke complied with his duties to Ex NF at all relevant

times, and that if needed Ms Zaccara was able to inject funds into Ex NF to boost its working capital.

42 Mr Munneke, Ms Zaccara and 106 Ward Street Pty Ltd contended that if the cryptocurrency were Ex NF's property, Ex NF was solvent, and the application of the cryptocurrency to purchase Ward Street was agreed, ratified and acquiesced to by Ms Zaccara as the sole shareholder of Ex NF, notwithstanding that the transaction was not to Ex NF's benefit.

### **Crossclaim**

43 Ms Zaccara and 106 Ward Street Pty Ltd by crossclaim seek a declaration that the cryptocurrency is held by Mr Munneke as bare trustee on trust for Ms Zaccara. They also seek a declaration that 106 Ward Street Pty Ltd is the sole and entire beneficial owner of Ward Street.

### **Consolidation and trial of the claims**

44 Pursuant to an order of the Chief Justice on 15 November 2023, CIV-21-012859 was consolidated with CIV-21-001837. CIV-21-001837 was nominated the lead action and 28 O'Connell Pty Ltd as trustee of the 28 O'Connell Trust became the fourth respondent. His Honour further ordered that the evidence-in-chief of Mr Munneke and Ms Zaccara be their statements.

45 The pleadings in the consolidated action were not consolidated.

46 At trial, the applicants called lawyer and former software developer, Michael Bacina ("Mr Bacina"), who prepared an expert report dated 3 October 2023 regarding cryptocurrency and blockchains ("the Bacina report"). The applicants also called Mr Heard, a chartered accountant and registered liquidator, who prepared a report dated 8 December 2023 regarding the financial position of Ex NF at the relevant dates ("the Heard report").

47 Mr Munneke called evidence from the chartered accountant and registered liquidator, Mr Scott, who provided a report dated 14 March 2024 responding to Mr Heard's report ("the Scott report"). Mr Munneke was cross-examined on the evidence he gave during the s 597 examination and on his statement.

48 Ms Zaccara and the respondent companies relied on an expert report from Fred Taormina ("Mr Taormina") concerning the rental value of O'Connell Street. Ms Zaccara was cross-examined on the evidence she gave during the s 597 examination and her three statements.

49 It was agreed between the parties that only those documents referred to in closing submissions or a statement, as set out in the index provided by the applicants' solicitor, are to be relied on.

### The issues for determination

50 As submitted by the applicants, the objective facts as to the purchase of the cryptocurrency, O’Connell Street and Ward Street, and how those purchases were funded, are substantially not in dispute. The issues for determination are:

- (a) whether the cryptocurrency was acquired as an asset of Ex NF or as a personal asset of Mr Munneke, Ms Zaccara and/or the ZALD Trust (“the ZALD Trust”);<sup>7</sup>
- (b) whether the purchase of O’Connell Street in the name of Mr Munneke (as trustee for a discretionary family trust) was a self-dealing transaction undertaken on Mr Munneke’s direction and entirely funded by Ex NF and whether the use of Ex NF’s funds to do so was in breach of Mr Munneke’s fiduciary and statutory duties as a director, and, if so, whether that breach was in some way ratified by Ms Zaccara as shareholder; and
- (c) if the cryptocurrency was an asset of Ex NF, whether the purchase of Ward Street was a self-dealing transaction undertaken on Mr Munneke’s direction and entirely funded by Ex NF and whether the use of Ex NF’s funds to do so was in breach of Mr Munneke’s fiduciary and statutory duties as a director and, if so, whether that breach was in some way ratified by Ms Zaccara as shareholder.

51 A central question is whether ratification by Ms Zaccara was legally possible, given Ex NF’s circumstances at the times of the O’Connell Street, cryptocurrency, and Ward Street transactions. The applicants disputed the claim of ratification not only by reference to the facts, but also relying upon the principle that a shareholder cannot ratify a self-dealing transaction when, having regard to Ex NF’s financial position, creditors’ interests would be jeopardised by the transaction. The applicants asserted that, in any case, ratification is no answer to the claims that the purchases were unreasonable director-related transactions as defined by the *Corporations Act*.

52 While there are three aspects to the applicants’ claims, the multimillion-dollar question for determination is whether or not the cryptocurrency is the property of Ex NF.

53 By way of explaining the heft of these reasons, I indicate I have replicated much of the Heard and Scott reports for convenience to assist in appreciating the financial analyses conducted by the experts. I have also included a detailed recitation of Mr Munneke and Ms Zaccara’s evidence to assist in understanding the accounts they gave in the s 597 examination in 2021, their statements received as their evidence, and their cross-examination. In discussing Mr Munneke and

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<sup>7</sup> Mr Munneke and Ms Zaccara’s family trust.

Ms Zaccara's evidence, when I refer to the cross-examination of them, I am referring to the cross-examination in the trial before me.

### **Applicants' case**

#### ***Michael Bacina***

##### *Hardcore crypto lawyer*

54 To assist the Court in understanding the subject of cryptocurrency, the applicants called Mr Bacina a solicitor at Piper Alderman who has expertise in cryptocurrency law. He was formerly a software and web developer, although his experience as a developer predated the introduction of public blockchains. He is the lead partner and founder of the Blockchain Group at Piper Alderman, within the Financial Services and FinTech Group. Mr Bacina has published, lectured and presented extensively on cryptocurrency, blockchain and technology law and regulation since 2016. He told the Court that he is part of a telegram group with 187 members globally that goes by the moniker 'Hardcore Crypto Lawyers' and that there are a limited number of specialists in each country.

##### *Mr Munneke's objection to the Bacina report*

55 Mr Munneke objected to [85] to [105] and [109] to [111] of the Bacina report. These paragraphs provide responses ("responses") to the questions posed by the applicants' solicitors at [26.2] to [26.4] and [27.1] to [27.4] ("the questions") of their letter dated 29 September 2023 seeking Mr Bacina's opinion.

56 Mr Munneke submitted these responses contained irrelevant speculation on Mr Bacina's part as to the state of mind of people in the software and web development sector. He submitted that by this evidence, the applicants sought to establish Mr Munneke's intention and motivations at the time he acquired ethereum.

57 Mr Munneke also submitted that [94] conveyed Mr Bacina's interpretation of an email sent by Mr Munneke, which amounted to an irrelevant opinion on a matter of fact.

58 The applicants submitted that the paragraphs of the Bacina report comprised background derived from a person with industry experience and expertise. They also submitted some relevant concepts required explanation from a person with industry knowledge such as Mr Bacina.

59 I have determined to receive impugned responses (which were received *de bene esse*) into evidence with one exception, which I set out below.

60 The questions, insofar as they sought an opinion regarding, for example, what software and web developers might have considered or envisaged, or why they may have done something, are poorly worded, as they enquire as to the state of mind of software and web developers. Mr Bacina cannot speak to this matter.

61 The questions should have been expressed in terms of enquiring as to Mr Bacina's expert opinion as informed by his experience. For example, questions at [26.2] and [26.3] would have been better expressed as follows:

26.2 From your experience in information technology and cryptocurrency law, as at the time of the establishment of the ethereum blockchain, what was the power or benefit of a new blockchain which accommodated "smart contracts"?

and:

26.3 What, in your opinion, was the benefit in acquiring ethereum at the time of the establishment of the ethereum blockchain?

62 However, I am satisfied that Mr Bacina provided his opinion in the responses founded on his area of expertise and by reference to his experience and knowledge of cryptocurrency, blockchain, and technology law.

63 Mr Bacina provided his opinion as to why it would have been beneficial to acquire ether at the time of the establishment of the ethereum blockchain. It is evidence for me to consider, together with all the evidence in the matter, in determining the issues in dispute. However, his comment at [94] that the rationale he identified was consistent with what Mr Munneke had said in an email dated 26 January 2018 is irrelevant opinion evidence. It is for the Court to determine the meaning of Mr Munneke's email and whether it is consistent with other evidence.

*Mr Bacina's evidence and cross-examination*

64 The Bacina report is received into evidence with the qualification I have just discussed. Mr Bacina gave further evidence-in-chief and was cross-examined.

65 Mr Bacina began his evidence by defining a series of relevant concepts. These definitions have been extracted into the glossary of terms at the commencement of my reasons. He described that cryptocurrency is an intangible digital asset, transactions of which are secured by cryptographic encryption. Mr Bacina said transactions and balances are stored on either a blockchain or another distributed ledger. He explained that use of a blockchain or other ledger enables storage of data across many computers controlled by different parties to create a censorship-resistant or immutable record of transactions.

66 Mr Bacina explained that cryptocurrency itself cannot be held but rather, a person can hold a private key that enables them to make transactions using crypto assets recorded in a "wallet". He said a wallet, as distinct from a bank account or actual wallet, is an address or entry on the ledger (also called a public key) that has some balance. Mr Bacina explained that the ledger or blockchain records the type and amount of crypto assets, as well as all transactions, associated with a wallet. He said that this information is all publicly accessible, although the identity of who controls a wallet will be unknown unless it can be discerned from identifying features.

67 Mr Bacina gave evidence that cryptocurrency exchanges perform a similar function to any marketplace, such as those for trading shares. He explained that parties can store digital assets on the exchange's wallet, enabling them to trade within the central environment of the exchange's balances.

68 Mr Bacina said that bitcoin and ethereum are types of cryptocurrencies. He explained bitcoin is the most well-known and oldest popular cryptocurrency and makes up the lion's share of cryptocurrency trading. He gave evidence that bitcoin can be mined by running software on a computer that verifies transactions in exchange for bitcoin.

69 Mr Bacina gave evidence that ethereum was founded later in an attempt to resolve some of the shortcomings associated with bitcoin, including counterparty risk. He said that unlike ethereum, bitcoin can be transacted without a trusted central party recording the transactions on a ledger. He explained that ethereum represented a very significant evolution in blockchain technology by introducing smart contracts (which is apparently not an apt name because they are generally neither smart nor contracts).

70 Mr Bacina described smart contracts as automated pieces of code that operate without being overseen by someone responsible for how they run. He said smart contracts can be interacted with once they are deployed to the primary public ethereum blockchain, mainnet. He explained that a party to a transaction can place a digital asset into a smart contract which will only be released when a predetermined set of variables are met by a counterparty, such as in an escrow context. He also gave examples of smart contracts allowing a digital asset to be distributed over time and lending smart contracts, which can automatically liquidate collateral in the event of a market drop.

71 Mr Bacina explained that gas is the fee for transactions on the ethereum blockchain including transfers of ethereum and smart contract operations; it is the fuel for ethereum, and any gas associated with a transaction is recorded and visible on the blockchain. He said that gas is priced in one-billionths of an ether and is paid to those who contribute computer power to the verification of transactions. Mr Bacina gave evidence that parties offer an amount of gas they are willing to pay. He explained that if a user wants to have a transaction completed quickly, a higher fee should be offered to render the transaction more valuable, thereby incentivising those who are running the network of verifiers. Mr Bacina said in [70] of his report that gas is generally one of a developer's most significant costs.

72 Mr Bacina said that gas is also necessary for developers to deploy a smart contract to mainnet and to interact with or process a smart contract. He said that the amount of gas required to deploy a smart contract to mainnet is commensurate with its complexity. He explained that in addition to testing their own smart contracts locally on a testnet (which does not require gas), developers would be expected to conduct research in relation to other smart contracts on mainnet by interacting with them.

73 Mr Bacina reported, in his opinion, a benefit in purchasing ether at the time of the establishment of the ethereum blockchain would be:

... to mitigate any later increase in the price of Ether, which would hedge against potentially increased gas costs, and possibly provide both a competitive advantage over others seeking to operate smart contracts, or provide a capital gain via the sale of ETH to clients who might need it to run their own smart contracts.

Mr Bacina further reported that during the course of his legal practice a common question in the blockchain industry “is to enquire as to when a person first purchased a cryptocurrency as it serves as a measure of their time in the industry and carries some measure of status”.

74 In cross-examination, Mr Bacina said that deployment of a smart contract to mainnet is effectively permanent. Mr Bacina agreed that it would be sensible for a developer to advance development as far as possible in the cost-free environment of a testnet before deploying to mainnet. He also accepted that there is no basis to assume from the Meeco/NextFaze Hackathon Press Release (“the press release”) (discussed later) that the hackathon involved a live mainnet deployment as opposed to a testnet exercise.

75 Mr Bacina accepted that it is common for third party developers to be contracted by proponents of a blockchain project to undertake development work. However, he did not accept that gas costs associated with deployment to mainnet would properly be incurred by the principal rather than the contractor-developer. He said that generally developers offer a whole service to clients who do not understand cryptocurrencies and blockchain, then send a bill that may include gas costs in a manner similar to disbursements.

### ***Andrew Heard***

76 Mr Heard is a partner in the firm Heard Phillips Lieberenz. Mr Phillips is one of his partners. The Heard report was received into evidence and Mr Heard said in cross-examination that he had not been involved in any aspect of the liquidation that related to the applicants’ claims, although he vaguely recalled giving some advice at the start of the liquidation. Having been directed to an annexure to the report to creditors, where six and a half hours’ work are attributed to him, Mr Heard accepted that he had been involved in some investigation in connection with the liquidation. He explained he had not been involved with anyone who was related to the trading of Ex NF, including Mr Phillips, while he was writing his report. Mr Heard said he had gone to great lengths to avoid Mr Phillips, including by preparing most of his report at home and spending the two days prior to giving evidence at home rather than going to the office.

77 Mr Heard said he knew that Mr Phillips had received funding from the Commonwealth for the purposes of the applicants’ claims but that he had not seen the funding agreement. He agreed that he shared in the profits his firm derived from liquidations. When asked whether he indirectly benefited from the funding

agreement in this case, Mr Heard replied that he was paid by the applicants' solicitor. He said he presumed that the applicants had received funding from the Commonwealth Fair Entitlements Guarantee scheme.

78 The applicants submitted it is not uncommon for an insolvency practitioner to give expert evidence when his or her partner is the liquidator and it is not uncommon for the liquidator himself or herself to give evidence on the topic of insolvency. It was submitted that the liquidator's partner was one step removed from the liquidation. Further, the applicants submitted that it was not directly suggested to Mr Heard that his evidence was tailored or that he had not brought a true and impartial mind to the exercise of writing his report.

79 Whilst Mr Heard's involvement in the liquidation was the subject of comment in Ms Zaccara and the respondent companies' closing address, no complaint was ultimately made about this topic by the respondents.

### *The Heard report*

#### O'Connell Street

80 Mr Heard was asked by the applicants' solicitors to provide his opinion on whether Ex NF had sufficient financial resources available to it to make the payments, and assume the liability to ANZ, in respect of the purchase of O'Connell Street while retaining sufficient readily realisable assets or other financial resources to pay its debts as and when they fell due and to meet its ongoing operational requirements. In this context, he was also asked to comment on the extent to which the debts owing to Ex NF, Ex NF's work in progress ("WIP"), and the cryptocurrency were sensitive to value fluctuation, realisability, or realisability risk. Mr Heard was asked to conduct his analysis on two alternative bases:

1. Ex NF was the owner of the cryptocurrency; and
2. Ex NF was not the owner of the cryptocurrency.

81 In his report, Mr Heard explained that the financial statements were prepared by Rowe Partners on a monthly basis and on a cash basis, without incorporating debtors and creditors. He set out the methodology he adopted to determine appropriately the resources available to Ex NF at the time of the O'Connell Street purchase on 10 December 2015. This included having regard to the 30 November 2015 balance sheet and the 10 December 2015 bank balances, while estimating Ex NF's assets and liabilities, including the Estimated Realisable Value ("ERV") of any assets. Mr Heard also said that he considered Ex NF's profitability, which would allow him to comment on an appropriate level of working capital that Ex NF should have maintained.

82 Using this methodology, Mr Heard said that he estimated the financial position of Ex NF on 10 December 2015 in the following table:

**Fig – 5.1.1 – Estimated Financial Position**

<b>Net Assets</b>	<b>30-Nov-15</b>	<i>Crypto Owned</i> <b>Est 10/12/2015</b>	<i>Crypto Not Owned</i> <b>Est 10/12/2015</b>	<b>NOTES</b>
	<i>Book</i>	<i>Re-Stated</i>	<i>Re-Stated</i>	
<b>Assets</b>				
<b>Current Assets</b>				
Cash at Bank	1,290,454	218,185	218,185	A
Crypto	-	3,284	-	B
Debtors	-	623,859	623,859	C
WIP	-	80,000	80,000	D
	1,290,454	925,329	922,045	
<b>Non Current Assets</b>				
Plant & Equipment	32,231	32,231	32,231	E
Building Loan – 28 O’Connell Trust		1,825,912	1,825,912	F
Related Parties	325,853			G
	358,083	1,858,142	1,858,142	
<b>TOTAL ASSETS</b>	<b>1,648,537</b>	<b>2,783,471</b>	<b>2,780,187</b>	
<b>Current Liabilities</b>				
Tax Creditors & Accruals	428,761	603,395	603,395	H
	428,761	603,395	603,395	
<b>Non-Current Liabilities</b>				
Related Parties	103,247	45,437	45,437	G
ANZ Loans		740,000	740,000	I
	103,247	785,437	785,437	
<b>TOTAL LIABILITIES</b>	<b>532,007</b>	<b>1,388,832</b>	<b>1,388,832</b>	
<b>NET ASSETS</b>	<b>1,116,530</b>	<b>1,394,639</b>	<b>1,391,355</b>	

Source: Documents in Annexure 4, Annexure 11 analysis and opinions expressed below

83

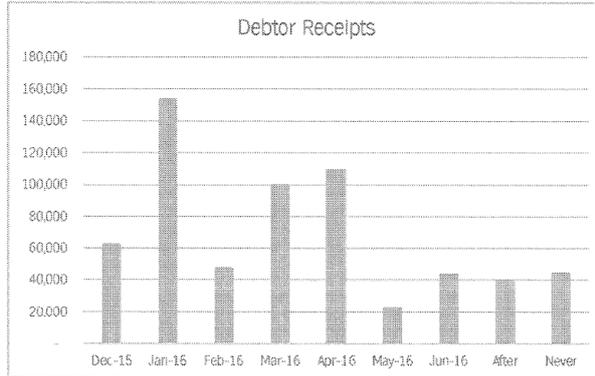
Mr Heard’s comments with respect to the table above are as follows:

Note Comment

- A On 10 December 2015 [Ex NF’s] combined bank balances were **\$218,185 (Annexures 8 and 9)**.<sup>8</sup>
- B [Ex NF’s] accounts do not record on its balance sheet on 30 November 2015 any cryptocurrency. I have been provided with and adopted a schedule of cryptocurrency (**Annexure 6**) that values the ETH held at this date at \$2,321.95 and the BTC held at this date at \$962.32 (**total \$3,284.27**).
- C [Ex NF’s] accounts do not record on its balance sheet on 30 November 2015 any Debtors. I have been provided with and adopted a list of Debtors prepared on 10 December 2015 (**Annexure 5**), drawn from the Harvest system, which totals **\$623,859.35**. The Debtors owing at this date were well beyond what would be considered normal trading terms. I illustrate the slow payment profile of the Debtor collections below.

<sup>8</sup> Mr Heard’s references to annexures are references to the annexures to the Heard report.

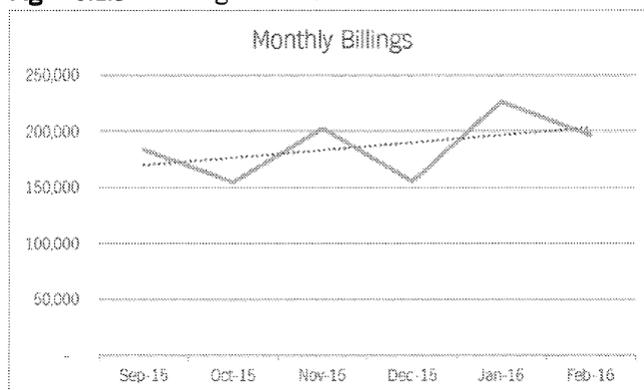
Fig – 5.1.2 – December 2015 Debtor Collections



Source: Documents in Annexure 5

D [Ex NF’s] accounts do not record on its balance sheet on 30 November 2015 any value for WIP. It is not possible to put a precise value on WIP given the way the Harvest system recorded invoicing and receipts (refer assumption 7.5). Adopting the Billing and Debtor Information spreadsheet information I have been given (**Annexure 5**) I have observed the monthly invoicing in the months before and after the O’Connell Street Property purchase and observe that average monthly billings were approximately \$186,000 per month and the trend of billing was as below. Given [Ex NF’s] main client (Meeco Group) was being billed weekly, there is unlikely to be much unbilled WIP at any stage and for the purposes of this analysis only I have given the WIP a notional book value of **\$80,000**.

Fig – 5.1.3 – Billing Information



Source: Documents in Annexure 5

- E The book value of plant and equipment reflects the written down value of assets purchased to be used in the ongoing trading of the business. These forms of assets are not available for sale to meet creditor claims unless in a liquidation scenario.
- F On 10 December 2015 [Ex NF] settled the purchase of the O’Connell Street Property. The funds used to purchase the property came from [Ex NF’s] bank account and for the purposes of this analysis only, I have recorded the amount as a loan to the 28 O’Connell Trust as follows.

**Fig – 5.1.4 – O’Connell Street Trust Loan**

Source	Est 10/12/2015
\$40,000 Deposit paid (Source Unknown) <sup>9</sup>	-
10/12/15 Loan Drawn	740,000
10/12/15 Settlement Paid	1,025,912
10/12/15 Lease Incentive	35,000
24/12/15 Lease Incentive	25,000
	<b>\$ 1,825,912</b>

Source: Documents in Annexure 8

- G I have grouped together Non-Current Assets and Liabilities (*non-current meaning the obligation to realise or discharge is not expected within the subsequent 12 months*) accounts related to the director of [Ex NF], as set out below.

**Fig – 5.1.5 – Loans**

Related Party Loans	Book Value (\$)	Realisable Value (\$)
<b>Non-Current Asset</b>		
Loans – Associated Trust	325,853	-
<b>Non-Current Liability</b>		
Capital Contributed	85,571	85,571
Conversion balances	57,810	-
Drawings	(40,134)	(40,134)
	103,247	45,437

With respect to the Non-Current Asset:

- *Loans – Associated Trusts* – I have reviewed the Non-Current Asset from July 2014 to March 2018. The loan was established earlier than July 2014 and the only loan repayments have come from manual journal entries to the *Drawings Linda Z* account. I have not seen evidence of, and I have assumed there was no intent to repay this loan.

With respect to the Non-Current Liabilities:

- *Capital Contributed* – I have reviewed the general ledgers across the 2015 to 2017 financial years (**Annexure 9**) and have seen that there were some deposits made into [Ex NF’s] accounts and some credits by way of manual journal entry. In my opinion these credits should have been off set against the *Drawings* as I have shown above.
- *Conversion Balances* – The ledger balance has not changed across the 2015 to 2017 financial years (**Annexure 9**) and given the description of the account, I assume that the balance does not reflect an obligation that is payable, rather it’s the balance left after an accountant’s unreconciled journal entry some time earlier than July 2014.

<sup>9</sup> The source was the NAB account. Two internet transfers of \$20,000 each were made on 19 November 2015.

- H I have calculated the amount of taxation and superannuation that was owing by [Ex NF] (if it had reported the tax and superannuation amounts unpaid) (**Annexure 7**). With respect to Superannuation, the amount is without regard to interest and penalties as this is calculated the date of the SGC return lodgement.

**Fig 5.1.6 – Tax, Creditors & Accruals on 10 December 2015**

Amounts Due	Wage Deductions	Activity Statement	Superannuation Guarantee	Income Tax	Total
10 December 2015	865	244,377	119,240	238,913	603,395

Source: Annexure 7

In addition to the Tax and SGC amounts that were **due on 10 December 2015**, there were, **accruals of \$122,614**, being \$93,969 of December Quarter PAYG/GST (not due until February 2016) and \$28,645 of Superannuation for the December quarter (also not due until February 2016).

- I The ANZ loan, drawn to settle the purchase of the O’Connell Street Property (**Annexure 10**).

(Footnote added)

- 84 Mr Heard stated that relying on the analysis in Fig 5.1.1 above, he considered the value of Ex NF’s assets that were able to be turned into cash quickly (i.e., excluding illiquid assets such as plant, equipment and loans not repayable) to meet the payment of debts that were overdue as detailed below:

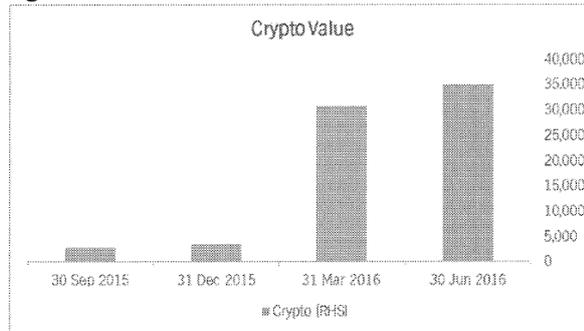
**Fig 5.1.7 – Analysis of liquid assets (assets able to be turned into cash quickly) and current liabilities.**

Liquid Assets to meet Creditors						
		<i>Crypto Owned Est</i>	<i>Crypto Not Owned Est</i>	<i>ERV</i>	<i>ERV</i>	
	<b>30-Nov-15</b>	<b>10/12/2015</b>	<b>10/12/2015</b>	<b>High</b>	<b>Low</b>	<b>Notes</b>
	<i>Book</i>	<i>Re-Stated</i>	<i>Re-Stated</i>			
<b>Liquid Assets</b>						
Cash at Bank	1,290,454	218,185	218,185	218,185	218,185	
Crypto	-	3,284	-	3,284	-	A
Debtors	-	623,859	623,859	499,087	490,087	B
WIP	-	80,000	80,000	-	-	C
Building Loan – 28 O’Connell Trust	-	1,825,912	1,825,912	-	-	D
Related Parties	325,853	-	-	-	-	D
<b>Total Liquid Assets</b>	<b>1,616,307</b>	<b>2,751,241</b>	<b>2,747,956</b>	<b>720,557</b>	<b>717,273</b>	
<b>Overdue Liabilities</b>						
Tax Creditors & Accruals	428,761	603,395	603,395	603,395	603,395	E
<b>Net Liquid Assets</b>	<b>\$1,187,546</b>	<b>\$2,147,846</b>	<b>\$2,144,562</b>	<b>\$117,162</b>	<b>\$113,878</b>	

I make the following comments with respect to the table above.

Note Comment

- A The cryptocurrency is either owned by [Ex NF] and has a realisable value equivalent to its book value or its not owned by [Ex NF] and isn't an asset for the purposes of the calculation. Relying on the data I have been given (**Annexure 6**), I can see that shortly after December 2015, the value of ETH rose quickly as illustrated in the table below, however the value of the cryptocurrency before then was negligible.

**Fig 5.1.8 – Value of Ethereum (ETH) and Bitcoin (BTC)**

Source: Documents in Annexure 6

This table highlights that some of the cryptocurrency has high value fluctuations and therefore in my opinion has a high Realisability Risk (i.e., you cannot be certain the value the asset will have on any given day). It is however my assumption it is easily Realisable and able to be converted into cash relatively quickly.

- B I have highlighted above in **Fig 5.1.2** the slow rate of collection of [Ex NF's] Debtors. Using data from **Annexure 5** from December 2015 to the end of March 2016 I can see that only \$364,000 of December 2015 Debtors were collected. Whilst the November 2015 debtors do not appear to have had a high incidence of bad debt, they were very slow paying.

Accordingly, I have reduced the book value of debtors to reflect my opinion of their quick ERV to 80% of the book value in both the high/Low ERV scenario. This discount seeks to estimate a value of debtors that could be quickly recovered to meet the payment of creditors that were due for payment.

In my view the Debtors have poor Realisability (*they are slow paying*) but low Realisability Risk (*in time, most of them pay*).

- C WIP ERV has been marked down to NIL because WIP must be converted into a debtor before it is able to be realised in cash and be available to meet the payment of creditor arrears.
- D The amount that I had recorded in **Fig 5.1.4** above as a loan to the 28 O'Connell Trust loan has been written off with Nil ERV consistent with the assumption asked of me in paragraph 2.2 of my letter of instructions dated 1 November 2023 (**Annexure 1**).<sup>10</sup>

<sup>10</sup> Paragraph 2.2 of the letter of instructions provides:

2.2 Given the defences filed in the action allege that the funds deployed to acquire O'Connell St were paid out of [Ex NF] in the form of a dividend or reduction and distribution of capital to its shareholder, the inclusion in the financial statements or management accounts of any loan as an asset of [Ex NF] in this respect was an error and no repayments would have been made to [Ex NF] in respect of any such loan.

- E I have reviewed the tax lodgement history of [Ex NF] to the ATO running accounts and the schedule of lodgements provided in my instructions (instructions 10.10) and note the following returns had not been lodged, up to and including the September 2015 quarter.

**Fig 5.1.9 – Late Lodged Returns by November 2015**

Due Date	Description	Date Lodged*	Days Late Lodging
25/11/2014	BAS <sup>11</sup> for the period ending Sept 2014	23/06/2017	969
26/05/2015	BAS for the period ending Mar 2015	18/08/2017	843
25/08/2015	BAS for the period ending June 2015	21/08/2017	755

\* as returns had not been lodged, the extent of debt would not have been calculated

Source: Annexure 7 Tax Lodgement History

The due date for the lodgement and payment Activity Statements, Superannuation Guarantee Charge Statements and Income Tax Returns are as follows.

**Fig 5.1.10 – Tax due dates**

Lodgement and Payment Due Dates	Activity Statement	Superannuation Guarantee	Income Tax
1 July to 30 September Qtr	28 October	28 November	
1 October to 31 December Qt	28 February	28 February	
1 January to 31 March Qtr	28 April	28 May	
1 April to 30 June Qtr	28 July	28 August	
30 June Financial Year			31 October

(Footnotes added)

85 Mr Heard reported that his analysis appears to indicate that on 10 December 2015, Ex NF only had \$0.7 million of liquid assets available to it to meet the \$0.6 million in overdue tax and superannuation debts.

86 Mr Heard commented that having regard to Ex NF's financial statements, whilst there were minor cash flow surpluses earned by Ex NF between July 2015 and November 2015, there were no surpluses generated thereafter that could have been used to meet the payment of overdue tax and superannuation debt on 10 December 2015. This is reflected in Fig 5.1.11 below. Mr Heard stated that in his opinion, Ex NF's trading performance in November 2015 would not have given Ex NF confidence that it could meet its tax and superannuation arrears on 10 December 2015 from trading surpluses.

**Fig 5.1.11 – Illustrative Receipts and Payments**

Profit & Loss Extract	Jul-15	Aug-15	Sep-15	Oct-15	Nov-15	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16
Total Receipts	198,561	169,325	161,587	85,931	122,173	120,701	149,047	86,831	184,548	194,475	62,654	220,151
Total Payments	76,088	86,664	81,937	70,401	114,866	182,666	90,552	126,837	171,893	141,019	98,759	618,612
<b>Net Surplus/(Deficit)</b>	<b>122,473</b>	<b>82,661</b>	<b>79,650</b>	<b>15,530</b>	<b>7,307</b>	<b>(61,964)</b>	<b>58,496</b>	<b>(40,006)</b>	<b>12,654</b>	<b>53,456</b>	<b>(36,105)</b>	<b>(398,460)</b>

Source: Annexure 4

<sup>11</sup> "BAS" means business activity statement.

In his note to Fig 5.1.11, Mr Heard noted:

“**Total Payments**” In the **June 2016** profit and loss statements is extraordinary because the accountant passed a journal entry to bring to account \$352,280.02 of PAYGW tax deductions that had not been accrued as an expense of salary and wages across the year, due to the accounts only recording the cost of salary and wage expense when net wages were paid.

87 Mr Heard reported that in his opinion, from December 2015 to the end of the financial year, Ex NF’s cash flow was in deficit, and Ex NF would not have had the resources to meet any creditor arrears from ongoing trading.

88 Relying on Fig 5.1.11, Mr Heard determined that in the 2016 financial year, Ex NF’s average overhead payments were approximately \$155,000 per month. He stated that in his opinion, a prudent director would seek to keep at least two months’ overhead costs as a working capital reserve (for the illustration he modelled a conservative provision of \$250,000), although this depends on the director’s risk appetite, the predictability of future cash collections, looming obligations, debtor collections, and trade terms. He said:

In [Ex NF’s] circumstances, given the slow debtor collections, keeping a working capital reserve of **at least 2 months overheads** would have been prudent as [Ex NF] was not aware of the tax debts that were accruing due to the non-lodgement of Activity Statements.

89 Mr Heard demonstrated in Fig 5.1.12 how Ex NF had insufficient resources to meet tax and superannuation arrears at the time it used its funds to purchase O’Connell Street.

**Fig 5.1.12 – Available Resources**

<b>Available Resources</b>	<b>ERV High</b>	<b>ERV Low</b>
<b>Est 10/12/2015</b>		
<b>Liquid Assets</b>		
Cash at Bank	218,185	218,185
Crypto	3,284	-
Debtors	499,087	499,087
WIP	-	-
Building Loan – 28 O’Connell Trust	-	-
Loans – Associated Trusts	-	-
<b>Total Liquid Assets (X Ref Fig 5.17)</b>	<b>720,557</b>	<b>717,273</b>
Less: Working Capital Provision	(250,000)	(250,000)
<i>Liquid Assets to meet Creditors</i>	<i>470,557</i>	<i>467,273</i>
<b>Overdue Liabilities</b>		
Tax Creditors & Accruals	603,395	603,395
	<u>603,395</u>	<u>603,395</u>
<b>Net Available Resources</b>	<b>(\$132,838)</b>	<b>(\$136,122)</b>

90 Mr Heard said the shortfalls of \$132,838 and \$136,122 set out above would have been even greater if the accruals totalling \$122,614 that were due in February 2016 (comprising \$93,969 of PAYG/GST and \$28,645 of superannuation for the December 2015 quarter) were included.

91 Mr Heard turned to the ability of Ex NF to assume and meet the liability owed to ANZ. Mr Heard reported that to purchase O'Connell Street, Ex NF took out a \$740,000 loan on 10 December 2015 that was on interest-only terms until 10 December 2020. The rate of interest was six percent, reconciling to an annual interest of \$44,400 per annum. Mr Heard corrected this to 5.5 percent in cross-examination.

92 Mr Heard stated that from his experience as an accountant and board director, to estimate the level of sustainable debt Ex NF could have serviced, it is appropriate to apply a benchmark covenant that Ex NF's earnings before interest, taxes, depreciation, and amortisation ("EBITDA") must be greater than 2.5 times the interest expense. He said that in his view, a lesser EBITDA would indicate a higher risk that Ex NF could not afford principal and interest obligations on loans. Using this benchmark, Mr Heard calculated that a business with an annual interest expense of \$44,400 should be earning at least \$110,000 EBITDA to be able to service that debt obligation.

93 He stated that relying on Ex NF's financial statements, in the 2016 financial year, Ex NF's reported 12-month EBITDA was negative \$61,683. He said the fact that Ex NF was not earning an EBITDA demonstrates it was not earning a sufficient profit to meet any interest cost accruing on the ANZ loan. He noted that Ex NF's 12-month EBITDA in the 2017 financial year (after deducting the rent expense that was journalled in) was \$53,763. Mr Heard said that this figure was \$56,233 less than the benchmark and only marginally more than was sufficient to meet the cost on the interest payments that were accruing on the ANZ loan.

94 Accordingly, Mr Heard concluded that Ex NF did not have sufficient financial resources available to it (regardless of whether it did or did not own the cryptocurrency) to make the payments, and assume the liability to ANZ, to purchase O'Connell Street in December 2015 while retaining sufficient readily realisable assets or other financial resources to pay its debts as and when they fell due and to meet its ongoing operational requirements. He gave the following reasons:

- a. After the payment of commitments to settle the O'Connell Street Property purchase there was just \$218,185 cash at bank, less than what I consider a prudent level of cash reserves should be for an organisation of [Ex NF's] size.
- b. Whilst the value of debtors owing to [Ex NF] was significant, they were taking nearly ½ year to collect and were therefore not liquid assets available to meet the payment of overdue debts.
- c. Whilst I have estimated a notional value for WIP, the time for WIP to convert into debtors and then be collected would exceed ½ year and therefore had no realisable

value for the purposes of assessing [Ex NF's] ability to meet the payment of overdue debts.

- d. [Ex NF's] profit and loss statement (prepared on a cash basis), shows that from December 2015 to the end of the financial year [Ex NF's] cashflow was in deficit and [Ex NF] would not have had the resources to meet any creditor arrears from trading.
- e. Relying on [Ex NF's] profit and loss statements, I consider [Ex NF] was not able to generate a sufficient level of EBITDA in 2016 or 2017 to meet the cost of the interest payments that were accruing on the ANZ loan drawn to purchase the O'Connell Street Property.

95 Mr Heard concluded that at the time of the O'Connell Street purchase, Ex NF was financially unstable, and its director should have been concerned about insolvency.

### Ward Street

96 Mr Heard was asked to determine whether Ex NF had sufficient financial resources available to it to make the payments in respect of the purchase of Ward Street while still retaining sufficient readily realisable assets or other financial resources to pay its debts as and when they fell due and to meet its ongoing operational requirements. Mr Heard was again asked to comment on the extent to which the debts owing to Ex NF, Ex NF's WIP, and the cryptocurrency were sensitive to valuation fluctuation, realisability, or realisability risk in the context of giving his opinion.

97 Mr Heard detailed that in answering this question, he adopted the same methodology as described in relation to the O'Connell Street analysis above, but updated to reflect Ex NF's financial position in January 2018. He explained that using that methodology, he estimated the financial position of Ex NF on 31 January 2018 in the table Fig 5.2.1 on two alternative bases:

1. Ex NF was the owner of the cryptocurrency and lent money to 106 Ward Street Pty Ltd to purchase Ward Street, while retaining the balance of the unsold cryptocurrency; and
2. Ex NF was not the owner of the cryptocurrency.

**Fig 5.2.1 – Estimated Financial Position**

Net Assets	31-Jan-18	Crypto Owned 31-Jan-18	Crypto Not Owned 31-Jan-18	NOTES
	Book	Re-Stated	Re-Stated	
<b>Assets</b>				
<b>Current Assets</b>				
Cash at Bank	366,610	366,610	366,610	
Crypto		1,302,100	0	A
Debtors		699,840	699,840	B
WIP		80,000	80,000	C
	366,610	2,448,549	1,146,449	
<b>Non Current Assets</b>				
Total Fixed Assets	92,960	92,960	92,960	D
Building Loan – 28 O’Connell Trust	901,434	-	-	E
Loan 106 Ward Pty Ltd	-	1,235,920	-	F
Related Party Loans	406,773	-	-	G
	1,401,168	1,328,880	92,960	
<b>Total Assets</b>	<b>1,767,777</b>	<b>3,777,430</b>	<b>1,239,409</b>	
<b>Liabilities</b>				
<b>Current Liabilities</b>				
Tax Creditors & Accruals	1,543,704	1,896,622	1,896,622	H
	1,543,704	1,896,622	1,896,622	
<b>Non-Current Liabilities</b>				
Related Party Loans	46,141	0	0	G
ANZ Loan		740,000	740,000	I
Loan D Munneke/Ex Crypto Sales		(48,851)		F
SUSPENSE ACCOUNT (Balance Sheet)	(231,626)	0	0	G
	(185,485)	691,149	740,000	
<b>Total Liabilities</b>	<b>1,358,219</b>	<b>2,587,771</b>	<b>2,636,622</b>	
<b>Net Assets</b>	<b>409,558</b>	<b>1,189,659</b>	<b>(1,397,213)</b>	

Source: Documents in Annexure 4, Annexure 12 analysis and opinions expressed below

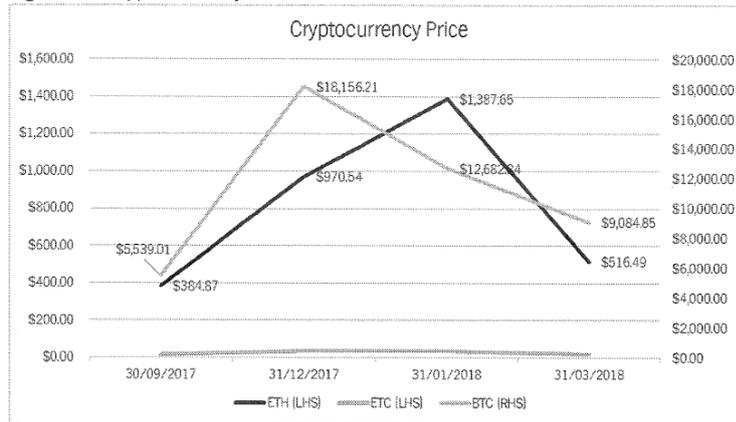
98

Mr Heard’s notes and comments regarding Fig 5.2.1 are as follows:

Note Comment

- A [Ex NF’s] accounts do not include a value for cryptocurrency owned. I have been provided with a schedule of cryptocurrency (**Annexure 6**) for the purpose of this analysis. The cryptocurrency had a low-cost price, however, by January 2018 cryptocurrency had experienced a price spike. The cryptocurrency remaining on 31 January 2018 after sales used to finance the Ward Street property purchase had a significant (**\$1,302,099.96**) and variable value as highlighted in the table and graph below.

Fig 5.2.2 – Cryptocurrency Prices/Unit



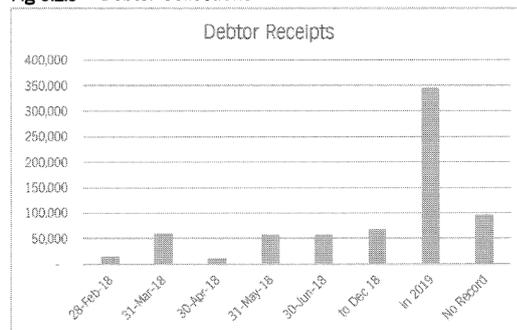
Source: Annexure 6

The graph above illustrates that the cryptocurrency has high value fluctuations and therefore in my opinion has a high Realisability Risk (i.e., you cannot be certain the value the asset will have on any given day). It is my assumption that it is easily Realisable.

If the cryptocurrency was owned by [Ex NF], the remaining cryptocurrency after the sale of the portion used to fund the purchase of Ward Street Property had a significant value. If the cryptocurrency was not owned by [Ex NF], its value is irrelevant for the purposes of [Ex NF’s] balance sheet.

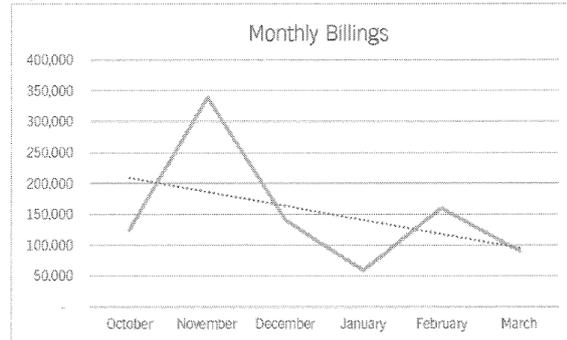
- B [Ex NF’s] accounts do not include a value for Debtors, and I have introduced this amount into the above analysis. Relying on the documents provided in **Annexure 5** I can see the Debtors owing to [Ex NF] on 31 January 2018 totalled **\$699,840**. Many of these accounts were very slow paying as illustrated by the collection profile of debtors collected after 31 January 2018 as shown below.

Fig 5.2.3 – Debtor Collections



- C [Ex NF’s] accounts do not include a value for WIP owing. It is not possible to put a precise value on WIP given the way the Harvest system recorded invoicing and receipts (refer assumption 7.5). Relying on the documents provided in **Annexure 5** I can observe invoices raised by [Ex NF] in the period before and after 31 January 2018. I illustrate below a trend in declining billings over the period reviewed, with average monthly billings over the period of approx. \$150,000. Given [Ex NF’s] major client at the time (Meeco Group) was being billed on a weekly basis, there is unlikely to be much unbilled WIP at any stage, and for the purposes of this analysis only, I have given WIP a notional book value of **\$80,000**.

Fig 5.2.4 – Profile of monthly invoicing



Source: Annexure 5

- D The book value of plant and equipment reflects the written down value of assets purchased to be used in the ongoing trading of the business. These forms of assets are not available for sale to meet creditor claims unless in a liquidation scenario.
- E The amount recorded as a loan to the 28 O'Connell Trust loan has been written off with Nil ERV consistent with the assumption asked of me in paragraph 2.2 of my letter of instructions dated 1 November 2023 (**Annexure 1**).
- F **If the cryptocurrency was owned** by [Ex NF], the Ward Street Property was purchased with [Ex NF] money and the entire amount paid (**\$1,235,920**) reflects a loan to 106 Ward Pty Ltd owed to [Ex NF] and **\$48,851** taken as drawings when the deposit was paid (see below).

Fig 5.2.5 – Source of Purchase Price

Ward Street Purchase	Amount	Applied to Ward	Balance Taken	Balance Retained
Part Crypto Sales – 11/1/2018	148,851	100,000	48,851	
Crypto Sales – 24/1/2018	346,464	346,464		
Crypto Sales – 25/1/2018	311,445	311,445		
Crypto Sales – 25/1/2018	600,000	600,000		
<b>Total Receipts</b>	<b>1,406,760</b>	<b>1,357,909</b>	<b>48,851</b>	<b>-</b>
<b>To Purchase</b>				
Deposit to Trust Account – 11/1/2018	100,000			
Payment 29/1/2018	1,135,920			
<b>Total Payments</b>	<b>1,235,920</b>	<b>1,235,920</b>	<b>-</b>	<b>121,989</b>

Source: NAB Bank Statements (**Annexure 8**)

**If the cryptocurrency was not owned** by [Ex NF], and [Ex NF's] bank account was simply used to transact receipts and payments, then monies received into the bank account from cryptocurrency sales equals disbursements out. It is worth noting that the cryptocurrency sales on 24 January 2018, should not have been recorded in the financial statements as fee revenue in January 2018.

- G I have grouped together Non-Current Assets and Liabilities (*non-current meaning the obligation to realise or discharge is not expected within the subsequent 12 months*) that are accounts related to the director of [Ex NF], as set out below.

**Fig 5.2.6 – Related Party & Suspense**

<b>Related Party Loans</b>	<b>Book Value (\$)</b>	<b>Realisable Value (\$)</b>
<b>Non-Current Assets</b>		
Div 7A Loan – 28 O’Connell 2017	55,774	-
Div 7A Loan – Linda Z 2017	98,909	-
Loan Repayments – 28 O’Connell – Interest Only	23,602	-
Loans – Associated Trusts	228,488	-
	406,773	-
<b>Non-Current Liabilities</b>		
Capital Contributed	141,750	-
Conversion balances	57,810	-
Drawings	(153,419)	-
	46,141	-
SUSPENSE ACCOUNT	(231,626)	-

With respect to the Non-Current Assets:

- The *Div 7A* loan account balances relate to journal entries for unpaid interest on overdrawn loans charged by [Ex NF] in 2017 and I have assumed there was no intent to pay this loan.
- The *Loan Repayments – 28 O’Connell* were the interest charges on the ANZ loan and in 2017 these charges were set off by a manual journal for Rent Expense and I have assumed that there was no intent to repay this loan.
- I have reviewed the account *Loans – Associated Trusts* from July 2014 to March 2018. The loan was established earlier than July 2014 and the only loan repayments have come from manual journal entries to the *Drawings Linda Z* account. I have not seen evidence of, and I have assumed there was no intent to repay that loan.

With respect to the Non-Current liabilities:

- The *Capital Contributed and Drawings* amounts should be set off against each other and I have assumed there was no intent to repay the net Drawings loan balance.
- The *Conversion Balances* – The ledger balance has not changed across the 2015 to 2017 financial years and given the description of the account, I assume that the balance does not reflect an obligation that is payable, rather it’s the balance left after an accountant’s unreconciled journal entry some time earlier than July 2014.
- The *Suspense Account* is created by journal entries processed by the accountant reflecting postings that had not been reconciled and does not reflect an identifiable obligation that is payable.

H The debts owed to the Australian Taxation Office on account of BAS, Income Tax, and SGC debts and sundry creditors are summarised below.

**Fig 5.2.7 – BAS, Income Tax and SGC debts**

<b>Wages Tax &amp; Superannuation</b>	<b>Wages</b>	<b>Activity Statement</b>	<b>Superannuation Guarantee</b>	<b>Income Tax</b>	<b>Total</b>
Due on 31 January 2018	(1,429)	1,266,599	374,035	174,106	1,813,311

*Source: Annexure 7*

**Fig 5.2.8 – Sundry Creditors**

<b>Sundry Creditors &amp; Accruals</b>	
Sundry Creditors	78,560
Credit Card	4,751
	<u>83,312</u>

*Source: Annexure 7 and Annexure 9*

The Sundry Creditors predominantly relate to Payroll Tax accruals for the 2016 and 2017 Financial Years and minor sums for Workcover and accounting fee accruals.

In addition to the Tax and SGC amounts that were **due on 31 January 2018**, there were **accruals of \$135,602**, being \$101,048 of December Quarter PAYG/GST (not due until February 2018) and \$35,554 of January PAYG Withholding (not due until February 2018) and Superannuation that I have not quantified that would have been due by April 2018.

- 99 Relying on his analysis in Fig 5.2.1, Mr Heard said he then considered the value of Ex NF's assets that were able to be turned into cash quickly (i.e., excluding illiquid assets such as plant, equipment and loans not repayable) to meet debts that were overdue for payment on 31 January 2018 as detailed in Fig 5.2.9:

**Fig 5.2.9** – Analysis of liquid assets (assets able to be turned into cash quickly) and current liabilities

Liquid Assets	Crypto Owned		Crypto Not Owned		NOTES
	31-Jan-18	31-Jan-18	31-Jan-18	31-Jan-18	
	<i>Book</i>	<i>Re-Stated</i>	<i>Re-Stated</i>	<i>High ERV</i>	<i>High ERV</i>
<b>Liquid Assets</b>					
Total Bank	366,610	366,610	366,610	366,610	366,610
Crypto	0	1,302,100	0	1,302,100	- A
Debtors	0	699,840	699,840	419,904	419,904 B
WIP	0	80,000	80,000	-	- C
Building Loan – 28 O’Connell Trust Loan 106 Ward Pty Ltd	901,434 0	- 1,235,920	- -	- -	- - C
Loans Related Parties	406,773	-	-	-	- C
<b>Total Liquid Assets</b>	<b>1,674,817</b>	<b>3,684,469</b>	<b>1,146,449</b>	<b>2,088,613</b>	<b>786,513</b>
<b>Overdue Liabilities</b>					
Tax Creditors & Accruals	1,543,704	1,896,622	1,896,622	1,896,622	1,896,622 D
<b>Total Overdue Liabilities</b>	<b>1,543,704</b>	<b>1,896,622</b>	<b>1,896,622</b>	<b>1,896,622</b>	<b>1,896,622</b>
<b>Net Liquid Assets</b>	<b>131,113</b>	<b>1,787,847</b>	<b>(750,173)</b>	<b>191,991</b>	<b>(1,110,109)</b>

100 Mr Heard made the following comments, having regard to what he considered to be reasonably high ERV values for Ex NF’s assets.

- A If the cryptocurrency was owned by [Ex NF], it was an asset able to be realised to meet the payment of creditors owing, but its value changed almost every day (**Annexure 6**). If the cryptocurrency was not owned by [Ex NF], it is not an asset available to meet creditor claims.
- B As can be seen from the table below, over 1/3 of the Debtors were aged over 90 days.

Having regard to debtors that may be collectable in time to meet the payment of creditors due for payment, in particular the 90 and 90+ day amounts and the collectible profile detailed in **Fig 5.2.3 above**, I have reduced the book value of debtors to reflect what could in my opinion be realised quickly to meet the payment of creditors that were due for payment. I have reduced Debtors to 60% of their book value.

In my view the Debtors have poor Realisability (*they are slow paying*) but low Realisability Risk (*in time, most of them pay*).

**Fig 5.2.10** – Debtors on 31 January 2018

Debtor Profile	Current	30 days	60 days	90 days	90+ days	TOTAL
Debtors	58,507	75,809	253,334	69,427	242,764	699,840

C These assets are non-repayable loans or assets of no immediate cash value that have all been marked down to \$Nil for the purposes of estimating the value that could reasonably have been realised from them for payment of overdue creditors. I have also had regard to the assumption asked of me in paragraph 2.3 of my letter of instructions dated 1 November 2023 (**Annexure 1**).<sup>12</sup>

D These were the overdue debts described in **Fig 5.2.7** and **Fig 5.2.8**.

(Footnote added)

101 Based on his analysis, Mr Heard stated if Ex NF did not own the cryptocurrency, at the time of the Ward Street purchase, there was only \$0.8 million in liquid assets at high ERV to meet the claims of overdue creditors totalling \$1.9 million. He said that if Ex NF did own the cryptocurrency, there were liquid assets (at high ERV) of \$2 million, which was only just sufficient to meet the claims of overdue creditors totalling \$1.9 million.

102 Mr Heard reported that, as can be seen from Fig 5.2.11, there were no cash surpluses generated between 1 July 2017 and 31 March 2018. He said that in his opinion, the trading performance to January 2018 would not have given Ex NF confidence that it could meet sundry creditor, tax and superannuation arrears from trading surpluses.

**Fig 5.2.11** – Illustrative receipts and payments

Profit and Loss Extract	July	August	September	October	November	December	January	February	March
Total receipts	78,148	42,605	72,298	54,418	56,349	91,756	329,890	6,475	95,227
Total Payments	94,193	163,985	138,718	142,262	160,217	132,719	156,782	117,681	127,900
Net Surplus/(Deficit)	(16,045)	(121,380)	(66,421)	(87,844)	(103,868)	(40,963)	173,107	(111,205)	(32,673)

Source: Annexure 4

103 He stated that it was his opinion that from December 2015 to 31 March 2018, Ex NF's cashflow was in deficit, and it would not have had the resources to meet any creditor arrears from ongoing trading.

104 Relying on Fig 5.2.11, Mr Heard determined that in the 2017 financial year, average company overhead payments were approximately \$137,000 per month. Mr Heard repeated his opinion that a prudent director would seek to keep at least two months' overhead costs as a working capital reserve (the modelled "conservative" provision of \$250,000), meaning that the cash noted in Fig 5.2.9 above would have been reduced to meet overdue creditors if Ex NF was able to continue to trade and meet operating costs.

105 Mr Heard demonstrated in Fig 5.2.12 how Ex NF had insufficient resources to meet tax and superannuation arrears at the time it used its funds to purchase

<sup>12</sup> Paragraph 2.3 of the letter of instructions provides:

2.3 Given the defences filed in the action allege that the funds deployed to acquire Ward St were beneficially the property of someone other than [Ex NF], the registered proprietor of Ward St (or any other party) would not have made any payments to [Ex NF] of the funds paid out of [Ex NF's] account in respect of the acquisition of Ward St.

Ward Street. Mr Heard detailed that the shortfalls of \$58,009 and \$1,360,109 identified in Fig 5.2.12 would have been even greater if the accruals totalling \$135,602 that were due in February 2018 (comprising \$101,048 of PAYG/GST for the December quarter and \$25,554 of PAYG withholding for January 2018), plus an unquantified amount of superannuation that would have been due in April 2018, were included.

**Fig 5.2.12 – Available Resources**

<b>Available Resources</b>	<i>Crypto Owned</i> <b>31-Jan-18</b>	<i>Crypto Not Owned</i> <b>31-Jan-18</b>
	<i>High ERV</i>	<i>High ERV</i>
<b>Liquid Assets</b>		
Total Bank	366,610	366,610
Crypto	1,302,100	0
Debtors	419,904	419,904
WIP	0	0
Building Loan – 28 O’Connell Trust	0	0
Loan 106 Ward Pty Ltd	0	0
Suspense and Related Party Loans	0	0
<b>Total Liquid Assets (X Ref Fig 5.29)</b>	<b>2,088,613</b>	<b>786,513</b>
Less: Working Capital Provision	(250,000)	(250,000)
<i>Liquid Assets to meet Creditors</i>	<i>1,838,613</i>	<i>536,513</i>
<b>Overdue Liabilities</b>		
Tax Creditors & Accruals	1,896,622	1,896,622
<b>Total Overdue Liabilities</b>	<b>1,896,622</b>	<b>1,896,622</b>
<b>Net Assets</b>	<b>(58,009)</b>	<b>(1,360,109)</b>

106 Mr Heard said that, in his opinion, Ex NF did not have sufficient financial resources available to it (regardless of whether it did or did not own the cryptocurrency) on 31 January 2018 when the payments were made to purchase Ward Street. He considered that Ex NF did not have sufficient liquid assets to pay all its liabilities that were due to be paid and to continue trading for the following reasons:

- a. [Ex NF] had overwhelming debts owed to the ATO on account of taxation and Superannuation obligations.
- b. The cryptocurrency asset it owned had an unreliable realisable value as the value of the cryptocurrency was highly volatile.
- c. With respect to some of the debtors owed to [Ex NF], it is clear they paid on long payment terms as illustrated in **Figure 5.2.3** above.

Mr Heard stated in his opinion Ex NF was facing insolvency at the time of the Ward Street purchase.

### Accuracy of spreadsheets

107 Mr Heard was asked to comment on whether the spreadsheet enclosed in the applicants' letter seeking his opinion, namely the Billing and Debtor Information spreadsheet, a spreadsheet detailing Ex NF's lodgement history in respect of business activity statements ("BAS") and income tax ("the lodgement history spreadsheet"), and a spreadsheet detailing Ex NF's total tax liability for BAS, income tax and SGC ("the tax liability spreadsheet") accurately reflected the records of Ex NF and the ATO.

108 Mr Heard said that he was satisfied that the Billing and Debtor Information spreadsheet reflected Ex NF's records.

109 Similarly, Mr Heard said he was satisfied that lodgement history spreadsheet reflected very closely the ATO's records, with only minor errors noted. He stated that in his opinion, the late preparation and lodgement of activity statements denied Mr Munneke the opportunity to have an accurate impression of the financial position of Ex NF.

110 Finally, Mr Heard said that he was satisfied that the tax liability spreadsheet, which included a relevant tax quarter (and part month to 10 December 2015 and 31 January 2018) calculated as if relevant returns had been lodged with the ATO by their due dates, reflected the ATO's records.

### *Mr Heard's cross-examination by Mr Munneke's counsel*

111 Mr Heard was cross-examined about Guvera going into administration in about May 2016 at which time it owed Ex NF \$462,615. He was asked whether he would accept that was an irrecoverable debt for work done and invoices rendered in the 2016 financial year that would have a substantial effect on EBITDA. Mr Heard said, "If they'd written it off as a bad debt, yes" and he agreed it would affect liquidity. He said he would agree that he could not point to any document or record that he had reviewed that would suggest it was reasonably foreseeable by a director in Mr Munneke's position as at 10 December 2015 that Guvera would be put into administration.

### *Mr Heard's cross-examination by Ms Zaccara and the respondent companies' counsel*

112 Mr Heard agreed that while he was not directly asked to comment on solvency, the questions he was asked to address in respect of the O'Connell Street and Ward Street transactions echoed s 95A of the *Corporations Act*, which provides:

#### **Meaning of solvent and insolvent**

- (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
- (2) A person who is not solvent is insolvent.

113 Mr Heard agreed that an earlier definition qualified that the person or company be able to pay its debts as and when they fell due from their own resources, but that this prescription is no longer required by s 95A. Mr Heard agreed that when considering whether Ex NF had sufficient financial resources available to it whilst retaining sufficient readily realisable assets or other financial resources, he focused on resources within the immediate control of Ex NF.

114 Mr Heard was questioned about his analysis in relation to the O'Connell Street purchase on the assumption that Ex NF did not own the cryptocurrency. He was referred to his determination that there were net liquid assets of \$113,878, and that there was negative \$136,122 in available resources once the working capital provision of \$250,000 was included. He agreed that if there were an additional injection of liquid funds of \$136,122, Ex NF would have what he considered to be the desirable working capital reserve of \$250,000.

115 Mr Heard agreed that most of Ex NF's debtors were slow to pay, but would eventually do so, and that reasonable minds might differ about how to bring to account the value of the debts at any particular time. He said he "[presumed]" that as at 10 December 2015, a director could take an opportunistic view about recovery of debts in due course. Mr Heard said that his analysis, by marking down debts by 20 percent as an incentive to debtors, takes into account that debtors can be made to respond to pressure and to pay more quickly.

116 Mr Heard was then asked about the value of \$80,000 he gave to WIP. He said that as Meeco was being billed weekly, there would not have been a build-up of unbilled work, such that WIP in relation to Meeco would have been relatively low.

117 Mr Heard was taken to the associated trust loan, which had a book value of \$325,000 but was ascribed no value by him, as he assumed there was no intention, as opposed to no capacity, to repay it. He agreed that he did not explore the capacity of the person owing that loan to repay it if called upon, and said that he was not given instructions on the subject.

118 Mr Heard agreed that he recorded the payment of \$1.825 million for O'Connell Street as a loan to the 28 O'Connell Trust, and that he treated it as not relevant for the purposes of his liquidity analysis in Fig 5.1.7 because he was instructed to do so.

119 Mr Heard agreed that the interest rate he included in his report in relation to the ANZ loan of six percent was an error and it should, in fact, have been 5.5 percent at 11 December 2015, 5.71 percent on 12 February 2016, and 5.46 percent on 13 May 2016.

120 Mr Heard was cross-examined about his opinion that a prudent director would seek to keep at least two months' overhead costs as a working capital reserve. He said that he formulated that opinion based on his experience as a

director. Mr Heard accepted that his past directorships were essentially on substantial charitable boards, and that his current directorships are of his accounting firm and Norwood Investments Pty Ltd, which is a company personally associated with him that provides director advisory services.

121 Mr Heard was asked about his reference in [43(e)] of the Heard report to Ex NF's EBITDA in 2016 and 2017. He explained that these figures had been extracted from Ex NF's profit and loss statements and agreed that these statements related to financial periods following the purchase of O'Connell Street.

122 Mr Heard said that he did not disagree with the past EBITDA figures referred to by Mr Scott in the Scott report, but noted that they were not in existence as at 10 December 2015. He agreed that the figures reflected an improvement in Ex NF's position in terms of EBITDA between the 2013 and 2015 financial years, with a small negative figure recorded in the 2016 financial year, which Mr Heard said represented a significant change.

123 Mr Heard was then questioned about his analysis of the Ward Street purchase. He agreed that if the cryptocurrency were owned by Ex NF, as at 31 January 2018, it had net assets of \$1.89 million. He accepted that this represented quite a healthy financial position.

124 Mr Heard was then questioned about his opinion that a prudent director would have maintained a cash reserve of \$250,000, which opinion he said was underpinned by the same considerations that applied with respect to the O'Connell Street analysis. He was referred to Fig 5.2.9 of his report, where he noted that if the cryptocurrency was owned by Ex NF it had positive net liquid assets valued at \$191,991 as at 31 January 2018, meaning that an additional \$58,009 would be required were a reserve of \$250,000 to be kept. Mr Heard was referred to the record of a loan to Ms Zaccara of \$98,909, which was noted in Mr Scott's report. He agreed that while he did not factor this loan into his analysis of Ex NF's liquid assets, its repayment would result in Ex NF's cash reserve exceeding \$250,000.

## **Derek Munneke's case**

### ***Alan Scott***

#### *The Scott report*

125 The Scott report detailed below was received into evidence.

#### O'Connell Street

126 Mr Munneke's solicitors sought Mr Scott's opinion regarding the following:

1. Did [Ex NF] have sufficient resources available to it, in order to meet its financial trading obligations, and to:
  - 1.1. Distribute funds to its shareholder Ms Zaccara; and
  - 1.2. Borrow funds from ANZ

Which funds were then applied in the acquisition of [O'Connell Street].

127 Mr Scott reported that he adopted the same methodology as adopted in the Heard report, unless stated otherwise. He was asked by Mr Munneke's solicitors to adopt a number of assumptions in relation to O'Connell Street, including that the amount of \$1,025,911.59 was paid out of the ANZ account as a distribution of surplus cash to Ms Zaccara as shareholder, and that at the time of the purchase, Ms Zaccara and Mr Munneke were in a position to, and would have, financially assisted Ex NF if necessary.

128 In accordance with those instructions, Mr Scott treated the sum of \$1,025,912 transferred from the ANZ account as a distribution to Ms Zaccara in her capacity as shareholder of Ex NF. He also treated the funds borrowed from ANZ as having been loaned to Ex NF in its own right, while noting that ANZ obtained mortgage security over the O'Connell Street property.

129 Mr Scott said that the financial accounts he and Mr Heard has access to were deficient in respect of several matters. He noted that Mr Heard had inserted certain assets and WIP with amounts he could reasonably estimate. He also noted Mr Heard had included tax creditors and accruals by referring to information subsequently available to the liquidator. Mr Scott said he agreed with the Heard report in respect of these matters.

130 Mr Scott set out his balance sheet analysis at [2.3.3] of his report:

<b>O'Connell Street – Balance Sheet Analysis</b>			
<b>Date</b>	<b>Book (\$)</b> <b>30/11/2015</b>	<b>Estimated (\$)</b> <b>10/12/2015</b>	<b>Notes</b>
<b>Current Assets</b>			
Cash at Bank	1,290,454	218,185	A
Crypto			B
Debtors		623,859	C
WIP		80,000	D
<b>Total Current Assets</b>	<b>1,290,454</b>	<b>922,044</b>	
<b>Non-Current Assets</b>			
Plant and Equipment	32,231	32,231	E
28 O'Connell Trust		740,000	F
Related Parties	325,853	0	G
<b>Total Non-Current Assets</b>	<b>358,084</b>	<b>772,231</b>	
<b>Total Assets</b>	<b>1,648,538</b>	<b>1,694,275</b>	
<b>Current Liabilities</b>			
Tax Creditors and Accruals	428,761	603,395	H
<b>Total Current Liabilities</b>	<b>428,761</b>	<b>603,395</b>	
<b>Non-Current Liabilities</b>			
Related Parties	103,247	45,437	G
ANZ Loan		740,000	I
<b>Total Non-Current Liabilities</b>	<b>103,247</b>	<b>785,437</b>	
<b>Total Liabilities</b>	<b>532,008</b>	<b>1,388,832</b>	
<b>Net Assets/(Liabilities)</b>	<b>1,116,530</b>	<b>305,443</b>	

131

Mr Scott notes the following to explain the schedule at [2.3.3]:

- A. Cash at Bank – I have obtained the cash at bank amounts from Annexures 8 and 9 of the Heard Report.
- B. Cryptocurrency – I agree with the calculation of cryptocurrency as set out in figure 5.1.1 and Note B of the Heard Report. For the purposes of this analysis though, I consider the amounts to be immaterial and as there is no conjecture as to ownership, I have excluded this amount from my analysis. I note however that although I have excluded that amount from my analysis, I do not make any comment as to ownership.
- C. Debtors – I agree with the analysis in figure 5.1.1 and Note C of the Heard Report.
- D. WIP – I agree with the analysis in figure 5.1.1 and Note D [of] the Heard Report.
- E. Plant and Equipment – I agree with the analysis in figure 5.1.1 and Note E of the Heard Report.
- F. 28 O'Connell Trust – The Heard Report includes the purchase price of the O'Connell Street Property as an asset in the amount of \$1,825,912. The assumptions I am to make in accordance with the Letter of Instruction and Subsequent Letter of Instruction include that surplus funds were distributed from [Ex NF] to Ms Zaccara

by way of dividend. As the funds were paid to Ms Zaccara by way of dividend there is no loan. In addition to the funds distributed to Ms Zaccara, [Ex NF] borrowed \$740,000 to fund the balance of the purchase of the O'Connell Street Property. I have not been asked to assume that the borrowings from ANZ in the amount of \$740,000 is also a dividend to Ms Zaccara. In my opinion that amount should be represented in the accounts of [Ex NF] as both an asset and a liability. I have included the amount borrowed by ANZ as being funds lent to the 28 O'Connell Trust.

- G. The line item in the general ledger is called 'Loans – Associated Trust'. The line item does not identify the ultimate debtor.

I agree with the comment in relation to Loans – Associated Trusts in figure 5.1.1, Note G of the Heard Report, that the loan was established earlier than July 2014 and the manual journal entries appear to be against 'Drawings Linda Z' account.

During the financial years ending 30 July 2014-16, adjustments are made to take into account certain requirements of Division 7A of the ITAA36. That division applies to transactions between a company and their shareholders and/or associates.

On the basis that there appears to be corresponding journal entries against 'Drawings Linda Z' and there are adjustments pursuant to Division 7A of the ITAA36, I assume that that the amount is owing by Ms Zaccara or a trust associated with her.

As I am unsure of the identity of the associated entity/entities, I have considered this asset to be of no realisable value.

- H. Tax creditors & accruals – I agree with the analysis in figure 5.1.1, Note H of the Heard Report.

- I. ANZ Loan – I agree with the analysis in figure 5.1.1, Note I of the Heard Report.

132 Mr Scott concluded that his balance sheet analysis shows that following the distribution of funds in the amount of \$1,025,912 to Ms Zaccara, Ex NF still had sufficient total assets to meet the total liabilities due, plus a surplus of \$305,433.

133 Mr Scott said that he then considered whether Ex NF had sufficient available resources to meet debts that were either due for payment at the time of the O'Connell Street purchase or were likely to be due shortly thereafter, while being able to continue trading. The following schedule at [2.4.3] of his report sets out that analysis:

<b>O'Connell Street – Available Resources</b>		
<b>Date</b>	<b>Estimated (\$) 10/12/2015</b>	<b>Notes</b>
<b>Current Assets</b>		
Cash at Bank	218,185	A
Debtors	499,087	B
<b>Total Current Assets</b>	<b>717,272</b>	
<b>Liabilities</b>		
Tax Creditors and Accruals	603,395	
<b>Total Current Liabilities</b>	<b>603,395</b>	
<b>Net Available Resources</b>	<b>113,877</b>	

134 Mr Scott stated that he agreed with the cash and debtors figures noted in the Heard report. However, he said that he did not include the \$250,000 working capital provision because in his view, there were sufficient surplus funds to meet the outstanding tax creditors and accruals, and because he was instructed to assume that Ms Zaccara had sufficient personal resources to provide funds to Ex NF when needed. He concluded that the analysis shows Ex NF had sufficient available resources to meet debts due and payable in the short term while maintaining sufficient working capital to meet ongoing cashflow requirements.

135 Mr Scott then turned to consider whether Ex NF had sufficient resources available to it to meet its trading obligations and to borrow \$740,000 from ANZ. He said that the ANZ account statements indicated that Ex NF honoured its monthly interest commitments between 10 December 2015 and 8 June 2018. Mr Scott noted that while the Heard report refers to Ex NF's EBITDA for the 2015-16 financial year, being negative \$61,683, he reviewed the profit and loss statements provided for the 2012-13 to 2015-16 financial years, which disclosed the following EBITDA amounts:

<b>EBITDA</b>	<b>Amount (\$)</b>	<b>Cumulative (\$)</b>
30-Jun-13	137,278	137,278
30-Jun-14	555,663	692,941
30-Jun-15	733,490	1,426,431
30-Jun-16	(61,678)	1,364,753

136 Mr Scott said that at the time of the ANZ loan, Ex NF had a reasonable history of profitability, which would give the director confidence that Ex NF would be able to meet its ongoing interest obligations. He stated that, in his opinion, Ex NF had sufficient available resources regardless of whether it did or did not own the cryptocurrency, noting that his calculations (taking into account the matters he was asked to assume) provided for a surplus of resources to meet Ex NF's debts due and payable.

Ward Street

137 Mr Scott was asked the following question by Mr Munneke’s solicitors regarding the Ward Street purchase:

Assuming the cryptocurrency was not [an Ex NF] asset, as contended by the Respondents in their respective Defences, what impact, if any did the sale of the portion of cryptocurrency applied in the acquisition of Ward St have on the financial position of [Ex NF]?

Mr Scott stated that, in his opinion, “if the cryptocurrency was not owned by [Ex NF], the sale of the cryptocurrency had no impact on [Ex NF’s] financial position”.

138 Mr Scott was also asked to consider the alternative hypothesis:

Assuming the cryptocurrency was [an Ex NF] asset, as contended by the Applicants in the Statement of Claim, did [Ex NF] then have sufficient resources available to it to sell the portion of cryptocurrency applied in the acquisition of Ward St, and to meet its financial and trading obligations?

139 Mr Scott said he utilised the same methodology in analysing Ex NF’s position at 31 January 2018 as detailed in his analysis of the O’Connell Street purchase. Again, Mr Scott was asked to assume that at the time of the Ward Street purchase, Ms Zaccara and Mr Munneke were in a position to, and would have, financially assisted Ex NF if necessary.

140 Mr Scott’s analysis from [4.3.1] of his report is set out in the following schedule and notes:

<b>Ward Street – Balance Sheet Analysis</b>			
<b>Date</b>	<b>Book (\$) 31/01/2018</b>	<b>Estimated (\$) 31/01/2018</b>	<b>Notes</b>
<b>Current Assets</b>			
Cash at Bank	366,610	366,610	
Crypto		1,302,100	A
Debtors		699,840	B
WIP		80,000	C
<b>Total Current Assets</b>	<b>366,610</b>	<b>2,448,550</b>	
<b>Non-Current Assets</b>			
Fixed Assets	92,960	92,960	D
Building Loan – 28 O’Connell Trust	901,434	0	E
28 O’Connell Trust	0	740,000	F
Loan 106 Ward Pty Ltd	0	1,235,920	G
Related Parties	406,773	98,909	H
<b>Total Non-Current Assets</b>	<b>1,401,167</b>	<b>2,167,789</b>	
<b>Total Assets</b>	<b>1,767,777</b>	<b>4,616,339</b>	
<b>Liabilities</b>			
Tax Creditors and Accruals	1,543,704	1,896,622	I
<b>Total Current Liabilities</b>	<b>1,543,704</b>	<b>1,896,622</b>	
<b>Non-Current Liabilities</b>			
Related Parties	46,141	0	H
ANZ Loan	0	740,000	F
Loan D Munneke/Ex Crypto Sales		0	G
Suspense	(231,626)	0	H
<b>Total Non-Current Liabilities</b>	<b>(185,485)</b>	<b>740,000</b>	
<b>Total Liabilities</b>	<b>1,358,219</b>	<b>2,636,622</b>	
<b>Net Assets/(Liabilities)</b>	<b>409,558</b>	<b>1,979,717</b>	

- A. Cryptocurrency – I agree with the calculation in figure 5.2.1 and Note A of the Heard Report.
- B. Debtors – I agree with the calculation in figure 5.2.1 and Note B of the Heard Report.
- C. WIP – I agree with the calculation in figure 5.2.1 and Note C of the Heard Report.
- D. Fixed Assets – I agree with the calculation in figure 5.2.1 and Note D of the Heard Report.
- E. Building Loan, 28 O’Connell Trust – On the basis of the assumptions, I consider that the surplus funds in the amount of \$1,025,912 advanced for the O’Connell Street Property was a distribution to Ms Zaccara and therefore there is no realisable asset.
- F. 28 O’Connell Trust – In accordance with Note F in section 2.3.3 above, I have included the amount provided to [Ex NF] by ANZ as being funds on-loaned to the 28 O’Connell Trust.

- G. Loan 106 Ward Pty Ltd – I agree with the calculation in figure 5.2.1 and Note F of the Heard Report.
- H. Related Party Loans – the related party loans as set out in figure 5.2.6 of the Heard Report include the following:

<b>Related Party Loans</b>	<b>Book Value (\$)</b>
<b>Non-Current Assets</b>	
Div 7A Loan – 28 O’Connell 2017	55,774
Div 7A Loan – Linda Z 2017	98,909
Loan Repayments – 28 O’Connell – Interest Only	23,602
Loans Associated Trust	228,488
<b>Total</b>	<b>406,773</b>
<b>Non Current Liabilities</b>	
Capital Contributed	141,750
Conversion Balances	57,810
Drawings	(153,419)
<b>Total</b>	<b>46,141</b>
Suspense Account	(231,626)

In accordance with the assumptions I have been instructed to make in both the Letter of Instruction and the Subsequent Letter of Instruction together with the documentation listed in the Subsequent Letter of Instruction, I am to assume that Ms Zaccara had the financial capacity to meet the repayment of the \$98,909 loan and the documentation of her ownership of properties supports that assumption.

For the reasons set out in Note G of section 2.3.3 above, I consider that ‘Loans – Associated Trust’ may be an amount owing by Ms Zaccara or a trust associated with her but I am unable to identify the actual debtor.

I have therefore considered that the realisable value of the related party loans is \$98,909 being the ‘Div 7A Loan – Linda Z 2017’.

I have not included the balance of the related party amounts as being realisable.

- I. Tax Creditors and Accruals – I agree with the calculation in figure 5.2.1 and Note H of the Heard Report.

141 Mr Scott stated that this analysis showed that following the purchase of Ward Street, Ex NF still had sufficient total assets to meet the total liabilities due.

142 Mr Scott then considered what assets were realisable immediately or in the short-term to meet debts due and payable as set out in the following schedule and notes:

<b>Ward Street – Available Resources</b>		
<b>Date</b>	<b>Estimate (\$)</b>	<b>Notes</b>
	<b>31/01/2018</b>	
<b>Current Assets</b>		
Cash at Bank	366,610	
Crypto	1,302,100	
Debtors	419,904	A
Related Parties	98,909	B
<b>Total Realisable Assets</b>	<b>2,187,523</b>	
<b>Liabilities</b>		
Tax Creditors and Accruals	1,896,622	
<b>Total Current Liabilities</b>	<b>1,896,622</b>	
<b>Net Assets/(Liabilities)</b>	<b>290,901</b>	

- A. I agree with the calculation of debtors as set out in figure 5.2.9 of the Heard Report.
- B. I have included the amounts which appear to be owing to Ms Zaccara in accordance with Note H of section 4.3 above.

143 Mr Scott said that he included the figure of \$98,909, which appeared to be a loan owing by Ms Zaccara. He explained that he did not include a working capital provision in his calculations, contrary to the Heard report, as he considered there were sufficient surplus funds available.

144 Mr Scott concluded that his analysis showed that Ex NF had sufficient assets on 31 January 2018 following the purchase of Ward Street to meet its liabilities, leaving a surplus of \$1,979,717. He said that further, Ex NF was able to meet debts due in the short term, leaving a surplus of \$290,901. He stated that a “significant proportion of that surplus is largely dependent on Ms Zaccara making funds available by way of repayment of her loan account, which [he had] been instructed to assume”.

#### Accuracy of spreadsheets

145 Mr Scott said he had no reason to doubt Mr Heard’s opinion that the Billing and Debtor Information spreadsheet reflected Ex NF’s records. He said he was unable to form an opinion in relation to the lodgement history spreadsheet and the tax liability spreadsheet as he did not have the source documents, nor access to the ATO business portal.

146 In relation to Mr Heard’s opinion that the late preparation and lodgement of activity statements denied the director the opportunity to obtain an accurate understanding of the financial position of Ex NF, Mr Scott said he was of the opinion that it may have denied the director the opportunity to obtain an accurate understanding of the financial position of Ex NF.

Compliance with s 286 of the Corporations Act

147 Finally, Mr Scott was asked by Mr Munneke’s solicitor to comment on whether Ex NF kept financial records that “correctly [recorded] and [explained] its transactions and financial position and performance” and “would [have enabled] true and fair financial statements to be prepared and audited” in compliance with s 286 of the *Corporations Act* at the relevant times.

148 Mr Scott referred to Ex NF utilising various accounting software to maintain financial records but said that he was otherwise unable to form an opinion as to whether Ex NF complied with s 286 of the *Corporations Act*.

*Mr Scott’s cross-examination*

149 In cross-examination, Mr Scott agreed that while he brought to account taxation liabilities in respect of which lodgements were overdue, he had not made any allowance for any penalty being levied by the ATO in respect of those late lodgements. He said that he was not aware that when the lodgements were ultimately made, significant penalties were applied by the ATO, along with general interest. Mr Scott accepted that the default position is that making late lodgements renders the taxpayer liable to penalties and general interest charges, although the amounts might be difficult to quantify prior to them being levied. He also noted that the ATO has a discretion to waive penalties and general interest charges, and that “it really depends on what their – shouldn’t say this – but what side of the bed the person got out of ... on the day they assess it”.

150 Mr Scott was asked to place himself in the position of a person advising a director in the position of Mr Munneke in 2015. He was asked whether he would have advised the director that while outstanding liabilities to the ATO could be quantified, there would also likely be penalties and general interest charge unless the ATO was persuaded to waive them. Mr Scott said that he would not take into account penalties when calculating liabilities because they would not be known and because “we all know the ATO may well waive them in certain circumstances”. He agreed he would advise directors of the potential for penalties or a general interest charge.

151 It was put to Mr Scott that when considering whether material funds of a company ought to be paid out to a shareholder, a director should first be advised to lodge outstanding returns in order to understand the company’s liabilities to the ATO. Mr Scott accepted that as a reasonable proposition. He agreed that any advice that was divergent from the proposition that it is inappropriate to pay out material funds of a company until its liability to the ATO is understood would be dangerous. When asked whether it would also be wrong, Mr Scott said “That’s probably delving into part of the law that I’m not sure of”.

152 Mr Scott was questioned about the schedule at [2.3.3] of the Scott report, where he had recorded a loan of \$740,000 to the 28 O’Connell Trust a non-current asset. He explained that he had treated the \$740,000 borrowed by Ex NF from

ANZ as having been on-lent to the 28 O'Connell Trust, which was the only way to record the transaction in circumstances where he had not been asked to assume that the funds were gifted to the 28 O'Connell Trust. When it was pointed out to him that the \$740,000 could not be brought to account as a loan if the recipient and payer did not intend for the funds to be repaid, Mr Scott maintained that he was not instructed to assume that the \$740,000 was a gift. He posed the question of why "Ex NF [would] take up a liability and not create an asset somewhere". He was asked whether by that statement, he meant that a rational director, acting in conformity with his duties, would have ensured that there was a relevant asset when the company was incurring a liability of \$740,000. Mr Scott said, "I think it's probably, that's probably right, yes, I mean otherwise you've just gifted it."

153 Mr Scott agreed that on the balance sheet analysis, whether there was a surplus of assets following the O'Connell Street purchase turns on whether it was intended that the \$740,000 be restored to Ex NF. He accepted that there would be a deficiency of \$435,000 in net assets if there were no intention to restore. Mr Scott was again asked about not having brought penalties and the general interest charge into account. He said that assuming there was an intention to restore the \$740,000, Ex NF's net assets would have been sufficient to meet any penalties and general interest charge, which he said would not have been great at that stage.

154 Mr Scott was then referred to his analysis at [2.4] of the Scott report concerning Ex NF's available resources to meet debts due at the time of the O'Connell Street purchase or shortly thereafter, which he said demonstrated that Ex NF had \$113,000 in available resources. He agreed that he did not in this analysis bring into account any penalties or the general interest charge, or the December 2015 quarter BAS. Mr Scott said that those liabilities would be contingent and unquantified. He accepted that they were only unquantified because Ex NF had failed to lodge its returns, including a BAS relating to the September 2014 quarter, the March 2015 quarter, and the June 2015 quarter. He accepted that outstanding lodgements of this length are sufficiently serious as to render Ex NF liable to penalties and general interest charge.

155 Mr Scott also agreed that he had proceeded on the basis that a working capital allowance was not necessary because in his opinion, there were sufficient surplus funds available to meet the outstanding tax creditors and accruals, and because he had been asked to assume that Ms Zaccara had sufficient personal resources to provide funds to Ex NF if necessary. He was asked whether he agreed with the proposition that the purpose of a working capital provision was to ensure that Ex NF could continue to meet operational expenses such as wages. Mr Scott said:

It's a very nice theoretical concept, but if you applied that to three-quarters of the companies in South Australia, you'd have a very much a ghost town where we're sitting at the moment, but I mean so that's the theory of it. The practice is it would be most of the businesses in this State could not operate on that basis because they just don't have the money...

156 He was asked whether, putting to one side the assumption that Ms Zaccara was able to contribute funds to Ex NF if necessary, \$250,000 was a reasonable working capital allowance. Mr Scott said “I don’t know whether it would be \$100,000, \$50,000, or \$400,000. I just don’t know”. When it was put to him that “two months’ worth of expenses is pretty skinny in terms of a rule of thumb for [a] working capital allowance”, Mr Scott repeated that three-quarters of the companies in Adelaide would be in liquidation if it were necessary to maintain such a provision.

157 It was put to Mr Scott that before a distribution can be made to a shareholder, it is necessary to consider how much working capital Ex NF has. Mr Scott replied that in his view, at 10 December 2015, Ex NF had \$113,000 in net available resources, which was sufficient for Ex NF to continue to trade, taking into account the assumption that Ms Zaccara had sufficient personal resources to provide funds when needed. When it was pointed out that Ex NF would not have sufficient existing cash resources to meet ongoing operational costs if its debtors did not pay as forecast, Mr Scott said that a company’s financial position is always changing. He maintained that a \$250,000 working capital allowance was not necessary because he adopted the assumption that Ms Zaccara was able to provide funds when needed.

158 While Mr Scott accepted that he would regard with caution a company paying out more than one million dollars in cash when less than one months’ expenses would remain, he said he was not sure whether it would be “highly imprudent” having regard to the assumption that Ms Zaccara could inject funds if necessary. Mr Scott was asked to ignore that assumption and indicate whether he would advise that it was appropriate for Ex NF to make the payment in the circumstances. He replied, “I’m not a tax advisor and I’m not a business services adviser”, then said “I wouldn’t give someone that advice, but I’m not in a position to give that advice necessarily”.

159 Mr Scott was taken to his Ward Street balance sheet analysis at [4.3.1] of his report. He explained that as he was told to assume that the funds used to purchase Ward Street were from the sale of Ex NF’s cryptocurrency, he recorded the amount as a loan to 106 Ward Street Pty Ltd. He agreed that if the cryptocurrency were a company asset but neither 106 Ward Street Pty Ltd nor Mr Munneke intended that the funds used to purchase Ward Street would be repaid (such that the \$740,000 ANZ loan and the funds from the cryptocurrency sale were given away as a gift), solvency would be very borderline, with Ex NF being marginally solvent by about \$4,000.

160 It was put to Mr Scott that if the cryptocurrency were Ex NF’s asset, the sale of \$1.4 million worth of cryptocurrency would have left Ex NF liable to remit capital gains tax (“CGT”) in the order of 30 cents in the dollar. Mr Scott said that he had not even considered CGT in that context. He agreed that the CGT liability in respect of the cryptocurrency sale would be a current liability payable within the following 12 months, which he had not factored into his balance sheet analysis.

Mr Scott was referred to Fig 5.2.2 of the Heard report concerning cryptocurrency prices. He agreed that cryptocurrencies have fluctuated very materially over time, even on a daily or weekly basis. It was put to Mr Scott that it would be highly imprudent for Ex NF to gift the funds used to purchase Ward Street to 106 Ward Street Pty Ltd, as it would leave Ex NF exposed to the present-day value of cryptocurrency to meet its forthcoming liabilities. He agreed, “it wouldn’t be prudent”. He was asked whether as at January 2018, knowing that Ex NF owed \$1.9 million to the ATO, being reliant on the cryptocurrency market to satisfy that liability would be a significant concern. Mr Scott said, “That would depend on whether I am a glass half full or a glass half empty person and not a pessimist”.

161 Mr Scott was asked:

Q ... before you would advise somebody to pay out \$1.235 million in respect of an asset that will not be available to the company for relevant purposes you would regard that as reckless insofar as you were then dependent only on the cryptocurrency to pay the tax debt.

A If there was no intention to pay that back there would be \$700,000 net, roughly \$700,000 in net assets until such time as you dealt with the 28 O’Connell Street trust matter as well. If both of those things were never intended to be paid back I believe that would not be right. I couldn’t give that advice.

Q That is you couldn’t give the advice to pay the money out.

A I couldn’t give the advice to pay the money out to buy something as a gift.

162 Mr Scott was referred to his schedule at [4.4.1], which records his opinion that Ex NF had \$290,000 in net assets as at 31 January 2018. He agreed that this figure was highly dependent on the cryptocurrency holding its value. He further agreed if the director of Ex NF was not going to sell the cryptocurrency to pay Ex NF’s liabilities it would follow that Ex NF was insolvent at 31 January 2018.

163 Finally, Mr Scott agreed that he was not aware of Ms Zaccara having injected any sums of money into Ex NF. He repeated that he had been told to assume that she was able and willing to do so.

### ***Derek Munneke***

#### *Mr Munneke’s s 597 examination*

164 In the s 597 examination, Mr Munneke said that the liquidation of 2Moro led to the formation of Ex NF. The developers from 2Moro carried on the business of software development at Ex NF. He said Ms Zaccara funded the establishment of Ex NF and he ran it.

165 Mr Munneke said he was not sure how much money Ms Zaccara put in to buy 2Moro from 2Moro’s liquidator and pay the initial salaries of the Ex NF employees. He said it would have been in the order of \$100,000.

166 He agreed that Ms Zaccara had a much more detailed involvement with the ATO and Ex NF's accountants than he did.

167 Mr Munneke said that Ms Zaccara's role as the 100 percent shareholder of Ex NF did not imply any level of control over the affairs of Ex NF. He said he gave Ms Zaccara the title of chief operations officer, a title requested by her. Mr Munneke said he was not aware of any dividends declared by Ex NF.

168 Mr Munneke said Ms Zaccara was involved with "the tax stuff" right from the beginning but as Ex NF grew, she became more and more involved. He agreed that she did a large amount of work in 2017 with Rowe Partners, Ex NF's accountants, to bring the accounts up to date and to rectify the lodgements. Mr Munneke said he signed BAS but was not involved in the preparation of those statements nor was he involved in the preparation of year-end financial accounts, or the annual taxation returns for Ex NF. He agreed that all of those matters were attended to by Ms Zaccara. He said that he kept an eye on the bank account and kept an eye on invoices going out and being paid. He was "not aware of the magnitude of the acquiring debt".

169 He said he was aware Ex NF was not filing BAS for a considerable period of time. He agreed that Ex NF was delinquent in its taxation and BAS returns from September 2013. He said poor accounting practices accounted for Ex NF not filing its BAS for that period and all subsequent BAS and returns.

170 Mr Munneke said that he had conversations with Ms Zaccara about the failure to lodge statements and returns and that she said she would get around to it. He said it was a continual source of angst.

171 He agreed that Ms Zaccara was the person responsible for retaining Rowe Partners and a new accounting package was then used following their engagement. He agreed that when the ATO began complaining about Ex NF's failure to file returns, he left that matter to Ms Zaccara.

172 He agreed that the financial records of Ex NF were at a point in time insufficient to file BAS. He said Ex NF was not keeping records to enable true and fair financial statements to be prepared. He agreed that during the time of poor record-keeping that he was not able to properly analyse the financial position of the company at any point in time.

173 He agreed that some hefty payment needed to be made by Ex NF to the ATO. He was asked whether those payments needed to be managed by ensuring Ex NF had available cash. Mr Munneke agreed that seemed reasonable. Mr Munneke was taken to an email chain between Ms Zaccara and Guvera in January 2016 where Ms Zaccara wrote:

We've also had some hefty ATO catchup payments which we still haven't completed. In short we've consumed all of our reserves. We've begun calling in debt from clients

including Guvera. ... I am in a bit of a panic as we have two weeks of operational funds left and after that, I kid you not, we have no funds available.

Mr Munneke was asked whether there was a panic when it came to the financial resources of Ex NF in January 2016 in the context of ATO catchups. He said he did not recall but he would imagine that Ms Zaccara would use language like that used in the email to encourage clients to pay.

174 Mr Munneke was asked whether he, in having very little to do with ATO matters, was unaware of the amounts required to be paid to the ATO. He agreed that he was not across how much needed to be paid to the ATO at any point in time. He agreed that at no point in time was he able to have an accurate assessment of the solvency of Ex NF as he did not know how much Ex NF needed to pay the ATO. It was put to him that he left that topic, that is, the ATO dealings and the solvency of Ex NF, to Ms Zaccara. He said he left the financial reporting to Ms Zaccara, and he should have been more diligent in his attention to solvency.

175 He was asked whether Ms Zaccara had a detailed knowledge of the amount of money that Ex NF had and would have in the future due to ATO payments, such that he effectively ceded control of that aspect and more widely of Ex NF's decision to spend money to Ms Zaccara. Mr Munneke said he did not believe that Ms Zaccara had that knowledge and that was part of the problem because they did not have true, accurate accounting books and "so it wasn't visible what the ... costs and solvency of [the] company was to anybody". Mr Munneke agreed that he did not know whether Ex NF was solvent or insolvent in January 2016.

176 Mr Munneke said he put O'Connell Street into a trust rather than Ex NF's name to protect it as an asset which was not linked to Ex NF's success or failure. When he was asked what he was trying to protect the asset from, he said he did not know and suggested it was to protect it in the event that someone bought the business.

177 Mr Munneke said the financing of O'Connell Street got a bit complicated because they wanted to purchase it in a trust. He was asked why Ms Zaccara was chosen as the primary beneficiary under the trust. He said it was because of the concern about keeping O'Connell Street separate from Ex NF. He was asked who paid the money to acquire O'Connell Street. He said it was a bank loan and there was an amount from Ex NF. He said he did not know the details. He said he believed that money was transferred somehow within the corporate structure to Ms Zaccara as a shareholder and then applied to the purchase. He said he knew that he withdrew some money from the NAB account because NAB would not give them the loan, that he put money into an ANZ account and that they went through a loan process with ANZ. Mr Munneke was asked whether it was fair to say that Ms Zaccara was the person principally driving the transaction. He said she was driving it in terms of coordinating it and that she was across the detail, whereas he was not necessarily across the detail.

178 He agreed that he understood that Ex NF would be the borrower of the ANZ loan. He was asked whether Ex NF made itself liable for the large loan from ANZ in order to secure rent-free tenancy of the building. Mr Munneke said he saw it more as being rent-free in advance for 15 years.

179 Mr Munneke was asked about the substantial amount of money transferred directly from the ANZ account to pay the balance of the purchase price. He said that was more of an extraction by the shareholder. He agreed that he regarded the contribution that Ex NF made to the purchase as effectively pre-payment of rent, being the loan amount. He said he did not get any advice about the concept of pre-payment of rent. He said he could not specifically recall who made the decision to use more than \$1 million in company money to apply to the purchase. He was asked what Ms Zaccara told him about the character of the transaction where \$1 million of company money would be used to buy the O'Connell Street property. He said he did not specifically recall, but it was "shareholder withdrawals or some sort". He was asked whether it was a dividend. He said he did not know, he left that to the accounting people to figure out.

180 He agreed it was fair to say that he did not know the specific character of the transaction, and he did not know how the transaction was accounted for in the books. He said it was his general understanding that the monies came from Ex NF to Ms Zaccara, who then applied them to the property.

181 Mr Munneke was taken to the loan documentation for the \$740,000 ANZ loan. He agreed that there was no documentation formalising his perception that it was essentially a pre-payment of rent for Ex NF. He was asked why it was in the interests of Ex NF to subject itself to a 5.5 percent interest rate on the loan if it was not actually acquiring the property that was being bought with the loan. He said because it was obtaining the lease, a home. He was asked whether he made any investigations about alternative premises which might have been available for rent. He said it just made sense at the time to purchase O'Connell Street because the property location was good, and it was close to where they lived. He agreed that its proximity to his personal residence was a factor in the decision to acquire the property.

182 Mr Munneke agreed that the withdrawal of \$1,025,911.59 left an amount of \$139,000 in the ANZ account.

183 Mr Munneke was then asked to consider a financial statement for Ex NF for the period ending 30 June 2015 prepared by Rowe Partners. He said he did not know what entries under "Non-Current Assets" which includes "Loans – Associated Trust" in the sum of \$325,000 related to. He was asked to compare that to the 2016 balance sheet and in particular the inclusion of a building loan regarding O'Connell Street for \$1.025 million under "Non-Current Assets". It was put to him that was the same amount that came out of Ex NF's bank account. He was asked whether it was accounted for as a loan from Ex NF to 28 O'Connell Trust. Mr Munneke said he did not know. Mr Munneke said he was not involved

in the retrospective preparation of the financial statements for Ex NF for 2015, 2016, and 2017. He said he was asked no questions by the accountant in relation to the character of the O'Connell Street transaction, nor did Ms Zaccara ask him any questions about it. He said he could not shed any light on the non-current assets recorded in the balance sheet. He was asked whether it appeared that it had been accounted for as a loan rather than a shareholder distribution. He said he did not really understand the accounting of it and that it is a matter he left entirely to Ms Zaccara. He did not recall discussing with anyone Ex NF making a loan of \$1.025 million to 28 O'Connell Trust. He said that he did not turn his mind as a director of Ex NF to the merits or otherwise of giving a substantial loan of this amount of money. He said that he had learned for the first time during the s 597 examination that it was recorded as a loan to the 28 O'Connell Trust.

184 Mr Munneke was asked again about his concept of the ANZ loan being a pre-payment of rent. It was put to him that Ex NF went into liquidation in 2019, so it had the benefit of occupation for four years. He said, to his knowledge, the pre-payment of rent had not been brought to account in any way, and it had not been recorded in any document.

185 Mr Munneke was taken to the email from Ms Zaccara to Guvera where she said, "We've only got a couple of weeks of operational money left". It was pointed out that the email was sent in January 2016, about a month after the acquisition of O'Connell Street. He was asked whether, in the context of the cash requirements of the business, he paused to consider whether or not it was appropriate for a million dollars of Ex NF's money to be used in a transaction in whatever form. He said "Yes". When asked what consideration he gave to it, he said:

Obviously our liquidity position was much lower. The amount that I had anticipated would be ... was much less than it had been. I think we did kind of get caught in the moment and so, yes, more was pulled out of the account than anticipated and hence part of it was to recoup those outstanding invoices.

186 It was put to him that the million-dollar withdrawal from Ex NF's accounts put Ex NF in a very bad position. He said:

... it put it in a tight position. ... I believed that, you know, had we got into a very bad position – I mean, I believed we were still solvent and we could have – well, we were calling on outstanding moneys and we could have, you know, sought other moneys as well.

187 It was put to Mr Munneke that his evidence about Ex NF being solvent was inconsistent with his previous evidence that he had no ability to assess the solvency of Ex NF because he had no visibility of the tax position. He was asked whether he had turned his mind to solvency in December 2015. Mr Munneke said he looked at what was coming in, how much they had at invoice, and he believed they would be able to continue to pay operational costs. He acknowledged that he had that view in the absence of understanding or looking at the tax liabilities and he did not appreciate the depth of the debt.

188 Mr Munneke agreed that if Ex NF had a total equity of \$722,000, he would have been concerned about adding another liability of \$740,000 if it would have brought the equity to a negative point. He was asked whether he had any vision of what the amount of tax might have been. He said he knew there was outstanding BAS, but he did not know the magnitude of the tax owing. He was asked to assume that as at 30 June 2016 there was \$915,000 of tax owing of various types, much of which had been owed for some time. He was asked to assume there was cash in hand of \$472,000. It was put to him Ex NF would have had no way to pay that tax bill. Mr Munneke said he knew they had a lot of outstanding invoices that were also unpaid for a very long time, but he agreed that the figures indicated it had no way to pay the tax bill. He was asked to assume that \$915,000 of tax was immediately due and owing, six months or thereabouts after, the \$1 million in cash was paid from the company bank account. He was asked to agree that Ex NF was “hopelessly insolvent at [that] point”. Mr Munneke disagreed, saying “it doesn’t show receivables”. He did not believe at that time there was no way of raising the money if they had to. He was asked whether Ex NF could have raised nearly \$1 million in cash to pay the ATO with cash at hand and receivables. Mr Munneke said that he believed they could have sought further investment from Ms Zaccara. He was asked whether he had discussions with Ms Zaccara about her investing further monies in Ex NF. He said he was not aware of the financial position at that time, so there was no discussion.

189 Mr Munneke was asked whether he subsequently discussed with Ms Zaccara the characterisation of the O’Connell Street transaction in Ex NF’s books. Mr Munneke said there had been some discussion about a 7A loan or other loan, but not in detail. Mr Munneke said that Ms Zaccara had not subsequently told him about the character of the \$1 million withdrawal from Ex NF.

190 Mr Munneke said that it was Ms Zaccara’s idea to buy Ward Street, and that he had nothing to do with its acquisition. He said that he understood Ms Zaccara had paid the money to acquire Ward Street from various sources including cryptocurrency. He said he knew the cryptocurrency belonged to Ms Zaccara because he had purchased it for her after she asked him to do so. He said that the bitcoin was held in a wallet that he controlled, and that the bitcoin was used to purchase ethereum, which in turn was exchanged for cash to purchase Ward Street. Mr Munneke said that he could not recall how much he paid for the bitcoin and that it was purchased over a period of time.

191 Mr Munneke was taken to the purchase of ethereum in 2014. He said that he sent an email to Ms Zaccara informing of the purchase “[b]ecause she had said we should buy some Ethereum, “we” being personally”. Mr Munneke stated that Ms Zaccara told him to make the purchase using the bitcoin in his wallet.

192 Mr Munneke said he thought that he purchased the bitcoin in February 2014 with his personal credit card. He was surprised upon being shown evidence that the funds had come from the NAB account:

Q Who paid for the \$1000 – this all stems from \$1000 Bitcoin acquired, I think you agree, in February 2014? Who paid that \$1000?

A Privilege. I don't recall.

Q If I suggested the company would you deny that?

A Privilege. I thought I did. I know there was also some Ethereum bought for a customer which is the reason why we actually bought it in the first place, and so there was a transaction – there would have been a transaction to recoup that, like, money that we invoiced to the customer.

...

Q What I want to suggest to you is that the company funded the original acquisition of the Bitcoin. The Bitcoin funded the acquisition of Ethereum, and Ethereum funded the acquisition of Ward Street. You see the lines I'm drawing, don't you?

A Privilege. Yes.

Q Do you accept that the company, through a variety of assets interchanged, funded Ward Street?

A Privilege. That's the lines that appear. It wasn't my understanding.

Q What was your understanding?

A Privilege. That I had bought that crypto from Bitcoin that I had kind of purchased separate to the company.

193 Mr Munneke said that he believed that he had records in relation to his understanding. Having been shown MYOB records, he indicated that it appeared that the purchases had been made with the company credit card.

194 Mr Munneke said that he did not know how the \$1,000 bitcoin transaction was accounted for in Ex NF books. It was put to him that Ex NF was not loaning \$1,000 to him to buy bitcoin. He said that he did not recall. It was also put to him that Ex NF was not gifting him \$1,000 to buy bitcoin. He said that he did not know.

195 Mr Munneke was asked again why he thought that the ethereum was owned by Ms Zaccara, given that the bitcoin was purchased by Ex NF. He replied that at the time of the ethereum purchase for Meeco, he recalled Ms Zaccara saying, "maybe we should buy some as well, in a personal capacity". The following exchange then took place:

Q Did she say in her personal capacity at the time? Did she use those words?

A Privilege. No, she did not use those words.

Q Or did she say, "We should buy some Ethereum"?

A Privilege. I don't recall but probably the latter.

Q Is the communication between you and Ms Zaccara about the Ethereum recorded in writing at all?

A Privilege. Only that email that was referred to earlier.

Q Yes. Is it possible that because Ms Zaccara was a shareholder of the business you simply equated her and the business [Ex NF] as the one and the same?

A Privilege. Definitely not. She would have used buy [Ex NF] Ethereum if that was what she had intended.

196 Mr Munneke said that he sold the ethereum in 2018 in three tranches on behalf of Ms Zaccara only, as opposed to on behalf of himself and Ms Zaccara together. He stated that he did not take any steps to advise the ATO of the capital gains event following the sale, and that to his knowledge, neither did Ms Zaccara. He agreed that the proceeds of the first ethereum sale were paid into his personal account with the CBA. He said he paid the \$100,000 deposit for Ward Street from that CBA account using the funds from the first sale of ethereum. He said that he was not aware of how the proceeds of the subsequent ethereum sales, which were deposited into the NAB account, were characterised in Ex NF's accounts.

197 Mr Munneke was asked why the proceeds from the sales were paid into the NAB account. He explained that settlement on Ward Street was to happen the following day and "time became of an essence". He said that the NAB account was used because the broker who sold the ethereum banked with NAB, and it was faster to make transfers between different accounts with the same bank.

198 Mr Munneke agreed that the surplus from the second and third ethereum sales of \$121,988.92 was paid into another of Ex NF's bank accounts, the NAB Maximiser account, on the same day. It was then suggested that the ethereum had always been owned by Ex NF. Mr Munneke replied, "I don't believe so." He was asked to explain why the surplus proceeds from the ethereum sales were left in Ex NF's account. He said:

Privilege. Again, available money. We have already established that, you know, there was – liquidity was low, and so having that amount available in case we needed it was prudent.

199 When asked whether he had turned his mind to the necessary liquidity of Ex NF at the time, Mr Munneke said that he did not recall. He did not accept the suggestion that his answer about the surplus funds being retained for Ex NF's liquidity being something that he had just thought of during the s 597 examination.

200 Mr Munneke agreed he had not disclosed the substantial cryptocurrency holdings until the day of the s 597 examination, and that he had told the liquidator that he had no assets over \$10,000. He accepted that ethereum was valued at over \$2,000 per unit and that he held about a million dollars' worth of ethereum. When asked whether his statement to the liquidator had been wrong, he referred to the huge surge in the value of cryptocurrency and said that at the time he made the statement, he did not believe he had a substantial cryptocurrency holding. When

it was put to him that there was a huge surge in 2018 before the acquisition of Ward Street, Mr Munneke accepted that this was part of the reason for the transaction. He was asked again whether his statement to the liquidator was incorrect. Mr Munneke replied, “Probably”, but he denied intentionally hiding the asset from the liquidator. He was again asked to explain why he did not disclose the ethereum. He said that two months prior to the s 597 examination, ethereum had been valued at only \$500 per unit, that he did not do the sums, and that he “kind of” considered that the ethereum belonged to Ms Zaccara.

201 Mr Munneke was then questioned about property at 20 South Terrace, Salisbury (“20 South Terrace”). He said it is property that Ms Zaccara operates her boarding house business from. He agreed that he understood it was owned by Linda Zaccara Holdings Pty Ltd. He said he did not know who paid for the property and it surprised him that Ex NF paid for it.

202 He was taken to the NAB account for 19 November 2013 and a withdrawal for \$200,000. He was asked to accept that it was a withdrawal which funded part of the \$260,000 purchase of 20 South Terrace. He agreed that seeing that Ex NF had paid that amount of money gave him concern. He said he did not know that Ex NF was funding \$200,000 to buy that property. He then said he recalled there were some discussions about the capacity for Ex NF to provide a loan and he agreed it was a substantial amount of money to be paid out at the start of a startup company.

203 Mr Munneke was then asked about the property at 22 South Terrace, Salisbury (“22 South Terrace”). He said that he was aware that it was also being used by the boarding house business. It was put to him that it was acquired in May 2014 for \$190,000 and placed in a trust of which Linda Zaccara Holdings Pty Ltd was a trustee. Mr Munneke said he did not know who paid for it. He was asked whether it would surprise him to learn that Ex NF paid \$170,000 of that purchase price. Mr Munneke said, “Less so now”. He said he did not recall \$170,000 being taken out of Ex NF’s bank account. It was pointed out to him that there was \$170,000 coming into the account at the same time. He suggested that might be a redraw on the mortgage that they had for their family home.<sup>13</sup>

204 Mr Munneke was asked what benefit to Ex NF the loans in relation to the purchase of 20 South Terrace and 22 South Terrace (“the South Terrace properties”) would have been. He said, “Being a loan, I would say the company interest in it was the repayment with interest”. He was asked what the interest rate was. He said he did not know as it did not look as though it was formalised correctly, and he did not know or was not aware of any documentation regarding the transactions. He said he did not consider taking security over the properties, but in retrospect it would have been a good idea. He said he was not aware whether Linda Zaccara Holdings Pty Ltd had ever paid back any money to Ex NF in

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<sup>13</sup> It appears from the NAB accounts statements that it was an internal transfer from the NAB Maximiser account on 21 May 2014.

repayment of the loans. He agreed the situation in 2013 and 2014 was that \$370,000 worth of loans were made to Ms Zaccara's related entity, and he did not insist on any interest or security and in the years since has not raised this with Ms Zaccara at all.

205 Mr Munneke was then questioned about Meeco's request in October 2018 that Ex NF defer an amount due by way of fees of \$729,346.75 for six months which Mr Munneke agreed to. He said Meeco wanted the deferral so that they could show an investor that they were not insolvent. He was asked why Ex NF agreed to it and he said because if he did not, it was likely that Ex NF would not receive a significant part of their fees back.

*Mr Munneke's statement*

206 Mr Munneke explained in his statement dated 27 March 2024 that Ms Zaccara is "quite entrepreneurial or at least my perception was that she wanted to see herself as a successful businesswoman". Mr Munneke explained that Ms Zaccara was appointed a shareholder because she contributed the startup capital to Ex NF. He stated that she was not appointed as a director because he was the person with the experience and connections in the industry and, therefore, he was running the operational side of the business of Ex NF. Ms Zaccara and Mr Munneke maintained separate bank accounts and were financially independent of each other. Rather than call himself a director or chief executive officer, Mr Munneke used the title "Captain of Captology". Mr Munneke and Ms Zaccara agreed that Ms Zaccara would be the chief operating officer. Mr Munneke explained that her role was also that of chief financial officer and she was responsible for all bookkeeping, reporting to the company accountant, and back-office operations. Mr Munneke did most of the client invoicing.

207 Mr Munneke detailed that Ms Zaccara caused the establishment of the ZALD Trust in 2008. He said it is a discretionary family trust established as his family's investment vehicle.

208 He described how Ms Zaccara's family operated a boarding house business in Salisbury, whereby the family owned multiple properties in the Salisbury area in Ms Zaccara's and her sister's name. He said Ms Zaccara would work at the boarding houses three to four days per week. He described how Ms Zaccara had said to him at various times that he put too much work and passion into the businesses of other people, and she wanted him to be working for the benefit of their family. He said as Ms Zaccara also had an education in computer science, she saw a family business as an opportunity to work alongside each other.

209 He said when 2Moro went into liquidation in January 2012, he, Ms Zaccara, and the founding members decided to start a business in mobile and web application development.

210 Mr Munneke said Ex NF initially operated the premises upstairs from a dress shop on the corner of O'Connell Street and Ward Street, North Adelaide. The

location was around the corner from Mr Munneke and Ms Zaccara's home in North Adelaide.

211 Mr Munneke stated that to start Ex NF Ms Zaccara used her cash resources to purchase the plant and equipment from 2Moro. She negotiated with the liquidator of 2Moro and Ex NF purchased the plant and equipment for \$8,500 plus GST. He said during the initial three month start up period, Ms Zaccara paid the founding employees and his salary from her own independent cash resources. He stated a loan from Ms Zaccara was recorded in Ex NF's books of \$50,000. He said Ms Zaccara would pay the staff directly from her own bank account or cash resources.

212 Mr Munneke said when Ex NF started trading, it was engaged on behalf of Guvera to provide technical support and feature development for Guvera apps. Mr Munneke said the work from Guvera kick started the focus of Ex NF to "new ventures". He said that encompassed businesses that were looking to move into new digital ventures, specifically in the mobile space. He saw an opportunity to work with founders of startup businesses or existing businesses that had not worked in the mobile space before to develop their application ideas.

213 Mr Munneke described the engagement of BDO following Ex NF's incorporation, who were the accountants for 2Moro. He said the primary contact was Mr Vijayadass.

214 Rowe Partners became Ex NF's accountant and its registered office from 20 October 2017. Mr Munneke said he relied on Ms Zaccara and BDO, and subsequently Rowe Partners, in respect of Ex NF's monitoring and taxation reporting. He generally oversaw cashflow as he approved invoices and expenses. If there was a cashflow or liability issue, Ms Zaccara would discuss it with him as she did when the ATO was conducting an employer obligations audit in early 2015.

215 Mr Munneke stated he regularly monitored Ex NF's bank account to see how cashflow was tracking, as well as reviewing the Freshbooks (later Harvest) which was Ex NF's invoicing and debtor management software. Mr Munneke said if Ms Zaccara was meeting with the accountants, he would be aware she was having a meeting but would not personally attend. After such a meeting, he would ask if something important was discussed and she would give him a high-level explanation. He said Ms Zaccara was relatively self-sufficient at attending to bookkeeping. He said, whilst he trusted Ms Zaccara, BDO and Rowe Partners, he remained responsible for reviewing and signing off on Ex NF's financial statements and liaising with the banks.

216 He stated that when the ATO conducted its first employer obligations audit the ATO was supportive and gave the impression it was helping small businesses to ensure compliance with ATO obligations. He said that gave him confidence that, by working with the ATO and BDO, Ex NF's compliance would be rectified at that time. He stated that he and Ms Zaccara later discovered that BDO had been

hands-off in its role as Ex NF's accountant and he recalled receiving little paperwork from them to sign, apart from a yearly statement regarding Ex NF's solvency. He said prior to realising this, he had relied upon BDO in respect of financial reporting and taxation matters.

217 Mr Munneke said having reviewed BDO files subpoenaed in this matter, he noted that there were emails from time to time where BDO representatives were chasing Ms Zaccara for documents to complete lodgements or emails from Ms Zaccara responding that she had been very busy, which had led to the delay in providing information.

218 He said he was aware Ms Zaccara was busy but trusted that she had all the information and data entry under control. He said BDO was aware he was the director but would not contact him by telephone to discuss the lodgements and, at all times, Ms Zaccara was the primary contact. Mr Munneke said that in late 2016 when they were put on notice of the second ATO employer obligations audit, he became concerned about the hands-off approach of BDO and that BDO was not ensuring sustainable compliance with ATO obligations. Thereafter, Rowe Partners were engaged.

219 Mr Munneke said he was aware that Ms Zaccara met with Robert McDonald of Rowe Partners ("Mr McDonald") in early 2017. Shortly thereafter, Ms Zaccara had a meeting with representatives of the ATO as part of an employer obligations audit and Rowe Partners were heavily involved in ongoing discussions with the ATO during the first half of 2017. He described that after Rowe Partners were engaged, Ex NF ceased using MYOB and transferred to Xero.

220 Mr Munneke described the catalyst to purchase O'Connell Street was that Ex NF's lease at 112 Ward Street, North Adelaide ("112 Ward Street") was due to expire and would not be renewed. He said, at the time, Ex NF had a good track record with existing clients such as Meeco and Guvera. It was making good money and had large amounts of invoiced work outstanding and a large amount of cash at hand. He explained that in or about September/October 2015, he asked Ms Zaccara to speak with Mr Vijayadass about whether the funds in Ex NF's bank account could be used to purchase a property from where Ex NF could trade and how that purchase could be structured. He said that Ms Zaccara had reported to him that Mr Vijayadass had advised that there was sufficient cash in the business to take it out as a dividend and that the cash could be used to fund the purchase of a property.

221 At [93] of his statement, Mr Munneke said he has been shown a document titled "Harvest Invoice Summary" which records that, as of 31 December 2015, Ex NF had invoiced the sum of \$1,135,312.37, received payment for those invoices in the sum of \$1,075,296.34, had written off \$60,016.03 and had WIP of \$89,912.50. He said this was consistent with his recollection at the end of 2015 that Ex NF was trading well, had healthy cashflow and WIP when O'Connell Street was purchased in December 2015. He asserted he had regard to

these matters when he transferred the money out of the ANZ account that went to the acquisition of O'Connell Street.

222 Mr Munneke contended the email dated 30 September 2015, from Mr Vijayadass to Ms Zaccara stating, "Given the property is only likely to have 50% gearing, I imagine there are many lenders who will be interested to make the loan to [Mr Munneke] and you" is consistent with the discussions he and Ms Zaccara had at the time arising from Ms Zaccara's discussions with Mr Vijayadass. That is, that there was cash that would be available to Ms Zaccara as shareholder and therefore the proposed loan to value ratio on the purchase would be low. He contended the email is also consistent with their discussions at the time that the property would be held by Ms Zaccara and him, or him or as advised by the accountant.

223 Mr Munneke's evidence was that he made the decision to use the cash at bank towards the purchase of O'Connell Street on the basis of the advice that Ms Zaccara had relayed to him from Mr Vijayadass that the funds could be paid as a dividend. He also gave evidence that in September or October 2015, at his request, Ms Zaccara sought advice about the appropriate structure of the O'Connell Street purchase from Mr Vijayadass. Mr Munneke said that he considered there was a sufficient pipeline of work to meet ongoing cashflow and a move to O'Connell Street was in the best interests of Ex NF because it would allow Ex NF to grow.

224 He described, under the heading "Assessment of Cashflow and Solvency of Company", his involvement in reviewing cashflow and financial matters. He said these matters were in his mind and he had regard to them in deciding to apply the cash at bank towards the purchase of O'Connell Street.

225 Mr Munneke said, consistent with Ms Zaccara's usual practice, she would have obtained advice from the accountant that the company trust structure was the appropriate structure to purchase the property. He said that their usual bank, NAB, was not prepared to advance the loan for the purchase so they transferred their banking to ANZ. He stated that it was initially proposed that ANZ would provide a loan and obtain a first registered mortgage up to 80 percent of the purchase price for O'Connell Street. He said on 13 November 2015, ANZ issued a letter of offer in which Ex NF was approved for a loan to facilitate the purchase in the sum of \$1 million. He said a \$40,000 deposit was paid from the NAB account. He maintained that on the advice of the accountant there were sufficient funds to pay a dividend.

226 Following an unexpected lower bank valuation, ANZ loaned \$740,000 and the balance was paid out of the ANZ account. Mr Munneke said he did not formalise the extraction of the funds from Ex NF's accounts at that time, for example, by way of a minute of a meeting or resolution. He maintained Ex NF had been provided with advice from Mr Vijayadass that its healthy cash position would enable a dividend to be paid. He said he trusted that the recording of the

transaction of the payment of the dividend would occur when the accountants prepared the end of year financial statements and tax returns.

227 Mr Munneke maintained that despite that cash being withdrawn, there was a good runway of work, particularly from Guvera and Meeco, from which ongoing liabilities would be paid. He said, from the time Ex NF operated from O'Connell Street, he caused Ex NF to pay the ANZ mortgage repayments as payment of Ex NF's rent for occupation of O'Connell Street. He said Ex NF did not make any additional payment to him, as landlord, over and above the mortgage payment by way of rent. He said Ex NF was responsible for all outgoings on O'Connell Street. There was no written lease agreement. He said the benefits to Ex NF in moving were a larger space, more visible street presence, a long-term place of business and its proximity to his and Ms Zaccara's home.

228 Mr Munneke said that in late 2013, he was contacted by Bitmap, a company that maintained a register of vendors accepting bitcoin as payment. He explained that he decided to list Ex NF on the register in the event that a customer wanted to pay using bitcoin. The CoinJar account was therefore linked to the NAB account. However, he stated that no customer of Ex NF ever paid in bitcoin.

229 Mr Munneke said that he opened a CoinJar account in January 2014 using his Ex NF email address, which he said he used for both work and personal purposes during his directorship. Mr Munneke stated that he always intended for the CoinJar account to be his personal account and noted that at the end of 2014, when usernames were introduced to CoinJar, he chose the username "@nextalias", being his personal handle. He said that he opened the account in his own name because it was not possible for companies to open accounts. He stated that if it were possible, he would have opened a second account in Ex NF's name.

230 Mr Munneke explained that CoinJar holds the key to the relevant wallet, whereas the user has a username and password, and is required to undergo two-factor authentication, to access or trade in the cryptocurrency held in the wallet. He said that no other person has ever had access to these login details.

231 Mr Munneke said that the commercial operations of Ex NF were limited to software development and that it never was in the business of trading or dealing in cryptocurrency or investing in any assets.

232 Mr Munneke stated that on a date between February 2011 and February 2012, he and Ms Zaccara spoke about mining bitcoin personally, although they never did so. He said that in late 2013 or early 2014, Ms Zaccara asked him to purchase cryptocurrency for them and their children. He noted that the ZALD Trust had been established in 2008 "for family investments of this kind".

233 Mr Munneke stated that he and Ms Zaccara first purchased bitcoin on 14 February 2014 as a wedding gift for Ex NF employee, Ricardo Santos ("Ric Santos"), who had provided an address for bitcoin gifts in lieu of a wedding

gift registry. He said that the gift was from him and Ms Zaccara personally, with Ex NF giving Ric Santos a separate gift. Mr Munneke explained that to avoid verification delays, noting that Ric Santos' wedding was to take place the next day on 15 February 2014, Ex NF's debit card was used to deposit \$300 into the CoinJar account, as the NAB account had already been linked to the CoinJar account. He said that for the same reason, on the evening of 14 February 2014, he transferred a further \$700 from the NAB account into the CoinJar account, intending to use this money to buy bitcoin as a family investment.

234 Mr Munneke said that in around mid-2014, he was asked to purchase ethereum on Meeco's behalf in the ethereum pre-sale. He asked Ms Zaccara whether they should also purchase some and she agreed. He said, "I believe she also intended it to be a family investment". Mr Munneke detailed the transactions he made in August 2014 whereby he deposited an additional \$650 from the NAB account into the CoinJar account, then purchased bitcoin which was used to acquire ethereum. He described depositing another \$1,400 from the NAB account, which was later used to purchase further bitcoin. These transactions are set out in the following table.

Date	Transaction	Bitcoin Balance	Ether Purchased	Notes
14/02/2014	CoinJar Cash Account Deposit of \$300	-		Mr Munneke made this deposit using a debit card linked to the NAB account subsequent to the \$700 deposit referred to below. While the \$700 took several days to clear, the \$300 was available in the CoinJar account immediately.
15/02/2014	CoinJar Bitcoin Buy of 0.377986 BTC for \$300	0.377986		
15/02/2014	CoinJar Bitcoin Send of -0.0200 BTC to "1K2SdxYrmhypV9nCT6R6gG3nyjpfawMEn"	0.357986		Mr Munneke sent this bitcoin from the CoinJar account to a bitcoin wallet that he controlled.
15/02/2014	CoinJar Bitcoin Send of -0.33333333 BTC to "1MrMrsWPAaK7HzGYG57ekFXbgCsFP7i1Rb"	0.02465267		Mr Munneke sent this bitcoin from the CoinJar account to a bitcoin wallet nominated by Ex NF employee, Ric Santos as a wedding gift.
15/02/2014	CoinJar Bitcoin Receive of 0.0010 BTC from "1HgQmyBaXzTAXQY2JqPLAu1hfDGQ53g6hC"	0.02565267		Mr Munneke sent this bitcoin from the bitcoin wallet he controlled back to the CoinJar account as a test. He used the bitcoin remaining in the wallet (0.0189 bitcoin) in small transactions over the following weeks, including to purchase sushi and an AB.

Date	Transaction	Bitcoin Balance	Ether Purchased	Notes
18/02/2014	CoinJar Cash Account Deposit of \$700	0.02565267		Mr Munneke made this deposit by bank transfer from the NAB account on 14 February 2014 prior to making the \$300 deposit referred to above. However, the \$700 was not credited to the CoinJar account until 18 February 2014.
25/02/2014	CoinJar Bitcoin Buy of 1.105636 BTC for \$700	1.13128867		
13/03/2014	CoinJar Bitcoin Send of -0.0282 BTC to "15EWcrAhKLw4hcaT3VLKENbjatWakSTaTT"	1.10308867		
29/05/2014	CoinJar Bitcoin Send of -0.02585775 BTC to "1LeKhZyeSSa24mukJsJGovdVf3PJrwhFbn"	1.07723092		
6/08/2014	CoinJar Bitcoin Send of -1.0152 BTC to "19ttvUHdNFif6KKyTURk5u1Jr6bpJ7UyNm"	0.06203092	2030.40	Mr Munneke purchased this ethereum on behalf of Meeco and subsequently issued an Ex NF invoice to Meeco in respect of the transaction.
7/08/2014	CoinJar Cash Account Deposit of \$650	0.06203092		Mr Munneke made this deposit by bank transfer from the NAB account on 5 August 2014.

<b>Date</b>	<b>Transaction</b>	<b>Bitcoin Balance</b>	<b>Ether Purchased</b>	<b>Notes</b>
8/08/2014	CoinJar Bitcoin Buy of 0.986BTC for \$650	1.04803092		
8/08/2014	CoinJar Bitcoin Send of -1.048 BTC to "15SL5vXryZWwku8GUWraWstMmJX3gQdjoL"	0.00003092	2001.68	The ethereum acquired by Mr Munneke in this transaction was issued to a wallet that he controlled.
8/08/2014	CoinJar Cash Account Deposit of \$1,400	0.00003092		Mr Munneke made this deposit from the NAB account on 6 August 2014.
15/08/2014	CoinJar Bitcoin Buy of 1.0000 BTC for \$575.11	1.00003092		
16/08/2014	CoinJar Bitcoin Buy of 0.3333 BTC for \$181.50	1.33333092		
18/08/2014	CoinJar Bitcoin Buy of 0.3333 BTC for \$182.49	1.66663092		
19/08/2014	CoinJar Bitcoin Buy of 0.3333 BTC for \$171.63	1.99993092		

235 As with the CoinJar account, Mr Munneke said that he was the only person to ever have access to the wallets that held the ethereum. He said that physical copies of the keys are kept in a safe.

236 Mr Munneke explained that he used the NAB account to make deposits because it could have taken three days for him to set up a new CoinJar account linked to a personal bank account. He also said that Ms Zaccara used her personal funds to meet company expenses from time to time, including sundries, office supplies, computer hardware, and Christmas presents for staff. He stated that Ex NF owed Ms Zaccara for these expenses. He said that he and other employees would also use personal funds for company expenses from time to time, then would “generally record expenses in “Freshbooks” ... and request reimbursement”.

237 Mr Munneke stated that he did not treat Ex NF’s money as his own. He said that at the time of the cryptocurrency purchases and thereafter, he was conscious that Ex NF would be recompensed for its use of funds by either setting off amounts owed to Ms Zaccara or simply repaying them. Mr Munneke stated that he “did not attribute huge significance” to the use of the NAB account because the amounts debited were relatively small, being only \$2,400<sup>14</sup> in respect of the cryptocurrency purchases for him and Ms Zaccara. He noted that in any case, Ex NF was repaid by virtue of it retaining surplus funds following the sale of the ethereum in 2018 for the Ward Street purchase.

238 Mr Munneke said that because the ZALD Trust is “the family investment vehicle, [he believed] that the cryptocurrency is an asset of the ZALD Trust”. He noted that this should have been recorded in the ZALD Trust’s financial statements, but none were ever prepared.

239 Mr Munneke explained that the cryptocurrency portfolio was managed exclusively by him by buying, selling and trading. He said that while he only ever exchanged cryptocurrency for cash in respect of the Ward Street purchase, he occasionally paid for personal expenses with cryptocurrency where it was accepted by retailers (including Sushi Planet) and transferred amounts to friends. Mr Munneke stated that following Ric Santos’ wedding, it became “customary” for him and Ms Zaccara to gift bitcoin to employees for their weddings.

240 Mr Munneke detailed that Ms Zaccara was friends with the previous owner of Ward Street, who also ran a business out of the building known as “The Doll House Anti Ageing Clinic” (“the Doll House”). That business was sold to Ms Zaccara in March 2018. Mr Munneke said Ms Zaccara signed an offer to purchase Ward Street on 3 January 2018.

241 Mr Munneke stated that between 11 and 25 January 2018, Ms Zaccara decided to sell some of the ethereum, because it was trading at a record high, and used those proceeds to purchase Ward Street by 106 Ward Street Pty Ltd.

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<sup>14</sup> Being \$3,050 less the amount invoiced to Meeco of \$650.

Mr Munneke's evidence is that the purchase of Ward Street shows that neither he, nor Ms Zaccara, intended Ex NF to own or benefit from the cryptocurrency or Ward Street. He said had they intended for Ex NF to benefit from cryptocurrency, they could have simply purchased Ward Street in the name of Ex NF and that would have been far less work. He said Ward Street housed the Doll House business, which was entirely an enterprise of Ms Zaccara's, having trained as a beauty therapist.

242 Mr Munneke said that on 8 January 2018, he was put in contact with someone through whom he could sell ethereum. He referred to his email to this contact in which he asked:

... wondering what my tax implications are (especially given the reason to cash out is to pay a company tax bill

243 He said that he did not now recall any bill that was required to be paid at that time and noted that Meeco was asking him around that time about how to cash out and whether there were any implications for doing so.

244 Mr Munneke said that the first parcel of ethereum (100 units) was sold in January 2018 to a cryptocurrency agency, Caleb & Brown, and the proceeds were paid into his personal CBA account. He stated that from this amount, \$100,000 was paid as a deposit for Ward Street. He said that he then sold further cryptocurrency to Joe Richards at BitRocket ("Mr Richards") in two transactions for \$911,445, which was paid into the NAB account. He described selling 300 additional units of ethereum to Caleb & Brown for \$346,464, which was also paid into the NAB account. Mr Munneke said that \$1,135,920.08 was paid from the NAB account to the Polson Legal Trust Account on 29 January 2018 to complete the Ward Street purchase.

245 Mr Munneke referred to the following email correspondence between him and Mr Richards on 26 January 2018, following the sale of the ethereum:

<b>From</b>	<b>Email content</b>
Mr Munneke	...  Thanks for the OTC conversion; will recommend - we have a customer that bought Ethereum for at pre-sale with us who are also likely [to] convert some soonish.  /derek
Mr Richards	Awesome, thanks!  What do you do?

Mr Munneke	<p>I have a software development studio that has focused on building new ventures, often with startups. Meeco is a client since 2012, and we actually spoke directly with Vitalik in the early days when the Ethereum project was starting, and believed in the project and the power of this new blockchain with smart contracts. <b>Bought in at the pre-sale to use it, never expected it to be an investment, just thought it was a cheaper way to get gas for development.</b></p> <p style="text-align: right;">(emphasis added)</p>
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246 Mr Munneke explained that in this email, when he said, “[b]ought in at the pre-sale to use it, never expected it to be an investment, just thought it was a cheaper way to get gas for development”, he was referring only to the ethereum purchased by Meeco for its proposed development of smart contracts, which would require gas. He stated Katryna Dow of Meeco (“Ms Dow”) expected ethereum to be important to the technology Meeco wished to develop. He said that he was not referring to any asset that was to be used in Ex NF’s business or for its own developments. Mr Munneke repeated that the purchase of ethereum in 2014 by him and Ms Zaccara was intended as an investment.

247 Mr Munneke said that from mid to late 2017, Ex NF started doing a fair amount of work with Real Time Data. Real Time Data had government contracts to produce mobile applications for fisheries departments. Mr Munneke said in late November Ex NF continued to focus a large percentage of its team on working with Real Time Data, despite that portion of the business not yet generating income. He said by late 2019, he was busy and distracted and his relationship with Ms Zaccara was deteriorating. He started to see someone else on the side. He, Ms Zaccara and their children went to the United States at Christmas 2019 for a holiday. Following their return, he and Ms Zaccara then separated.

248 In January 2019, the ATO served a statutory demand for payment on Ex NF, seeking a sum in excess of \$2.7 million. Mr Munneke said he was surprised to receive the demand and did not believe the liability to the ATO should be that high. On the advice of Rowe Partners, he and Ms Zaccara contacted an insolvency professional and in March 2019 Ms Zaccara and Mr McDonald attended a meeting with Mark Lieberenz of Heard Phillips Lieberenz. Following that meeting, Ms Zaccara told Mr Munneke words to the effect “the file was already on Anthony’s desk”, Anthony being Anthony Phillips, the liquidator. Thereafter, Ex NF went into liquidation.

249 Mr Munneke said Meeco and Guvera drove the turnover of Ex NF and that they were both ultimately invoiced weekly. He stated that during 2014, when the cryptocurrency was purchased, he believed there was sufficient funds in Ex NF’s bank accounts to pay ongoing liabilities. He stated that Ex NF had a strong period of growth during 2015 and 2016. The annual turnover in 2014 had increased significantly from 2013, from approximately \$600,000 to \$1.1 million, and it

increased again in 2015 to approximately \$1.6 million and 2016 to \$1.7 million. He stated that Guvera was always a good “payer”.

250 He was aware of the emails from Ms Zaccara to Guvera from late 2015 to early 2016, where she used words like Ex NF is in “dire straits” or that it really needs the money. He said Ms Zaccara used those words as a debt collection tactic and he had asked her not to use such tactics in the future. He maintained that at that time there were ongoing invoices being generated to each of Guvera and Meeco, as well as a healthy bank balance. He contended that in October 2015, the bank balance in the NAB Maximiser account was \$950,678.52, which had been steadily increasing over 2015 and \$427,929.98 was in the NAB account. He said in late 2015 or early 2016, he did not know Ex NF’s exact ATO liability, but he recalled it was not a significant sum. He believed it was less than \$100,000. He said he did not review the ATO portal and relied on Ms Zaccara to attend to the necessary payments to the ATO.

251 He deposed that in late 2015, Guvera officers said they were going to publicly list Guvera. He said that provided him with comfort that Guvera was tracking well and would be able to pay any outstanding invoices. He was also confident that Meeco could pay its outstanding invoices.

252 Mr Munneke referred to his perusal of the 2016 financial statements prepared by Rowe Partners in 2017 to the effect that the rent substantially increased from \$7,060 to \$140,149. He said he believes the financial statements do not capture rent for Ex NF’s previous premises because rent was usually paid upfront. He believed that the sum of \$140,149 would include the amounts paid out to former tenants of O’Connell Street to surrender the leases. Mr Munneke referred to the email from Ms Zaccara dated 12 September 2016 to Harriette Sale of BDO (“Ms Sale”), in response to Ms Sale’s email advising Ms Zaccara that BDO had received a call from the ATO regarding outstanding lodgements for Ex NF and Ms Zaccara’s response referring to circumstances that have befallen Ex NF, including a significant crisis in August 2016, being Guvera going into administration with a \$464,986.17 debt owing to Ex NF. Ms Zaccara said in that email not only was this an obscene amount of money that:

[C]ould make or break us into shock, we also had the problem of having long time employees with nothing to do. It took much effort and focus on my part to help get this company out of this predicament and not fall over. I am still working on this major event trying to recover as much money as possible.

253 Mr Munneke said he recalls that, at the time, the ATO was putting pressure on Ex NF for compliance to be dealt with quickly, but he did not believe there were issues with Ex NF’s insolvency overall. He referred to being shown a letter from the ATO dated 17 May 2018 detailing the results of an employer obligations audit and stated that Ex NF was then indebted to the ATO in respect of PAYG withholding, SGC and penalties in the sum of \$563,417.75. He said he did not recall seeing that letter prior to this litigation.

254 Mr Munneke maintained he was generally aware that Ms Zaccara was managing the compliance issue with Rowe Partners, and he believed it was under control. Mr Munneke referred to a letter from Rowe Partners to Ms Zaccara dated 1 December 2017 where Rowe Partners said, “I would like to discuss the 2018 year to date accounts as from what I have reconciled so far you are currently operating at a very large loss”. Mr Munneke did not believe Ms Zaccara brought this to his attention. He said at this time, the developers at Ex NF were allocated to the Real Time Data work which was not yet generating income and he did not believe Ex NF was operating at a loss due to the large amounts outstanding from Meeco. He said the cash balances of Ex NF as at 1 December 2017 were:

1. ANZ account – \$28,090.87;
2. NAB Maximiser account – \$1,057.46;
3. NAB account – \$39,962.61.

255 He said he signed the solvency resolution for Ex NF on 8 March 2018 and he would not have signed that document if he believed Ex NF was not solvent. He maintained he did not see the letter dated 1 December 2017 from Rowe Partners to Ms Zaccara or the email of 25 June 2018, wherein Rowe Partners advise that the financial statements for Ex NF expect to report a very significant loss for the 2018 financial year. He maintained that, at most, he recalled a discussion with Ms Zaccara in which she informed him that they should downsize their payroll as they had too many developers.

256 Mr Munneke explained that in October 2018 he agreed to Meeco’s request that Ex NF defer its debt of \$729,346.75 for 12 months. He said, up until 2019, he considered business was good and there was cashflow. He said it was only in the second half of 2018 that he caused Ex NF to over-invest time in Real Time Data which was too slow to come to fruition. As a result, cash flow became more of an issue. He said, even when Guvera when into administration in June 2016, there was a short-term hole in cashflow. The work was there, as was the ongoing work from Meeco. He said Guvera’s administration did not cause him any concerns as to Ex NF’s solvency.

257 Mr Munneke said he did not consider the insolvency of Ex NF as a relevant factor to the purchase of Ward Street as it was Ms Zaccara’s venture, purchased with the family cryptocurrency.

258 Mr Munneke said he does not recall having seen the ATO integrated client account for Ex NF dated 26 May 2018, and had he been shown a document in May 2018 that recorded that the debt then owing to the ATO was in excess of \$1 million, he would have been surprised. He was aware that efforts were being made with the ATO, via Rowe Partners, to bring the lodgements up to date. He asserted Ms Zaccara did not ever bring to his attention that the ATO liability could be that high.

259 He said that on 2 July 2018, Ex NF received an enforcement notice from Revenue SA alleging unpaid payroll tax for 2015 to 2017 financial years in the sum of \$140,114.10.

260 Mr Munneke asserted that neither Ms Zaccara or Rowe Partners informed him that the ATO debt, as at November 2018, was almost \$2 million, as detailed in the email from Rowe Partners to Ms Zaccara on 2 November 2018.

261 Mr Munneke contended that if he or Ms Zaccara were aware of any lingering debt or solvency issues throughout 2015 to 2018, they would have applied their personal funds to support Ex NF. He referred to the fact that Ms Zaccara financially supported Ex NF from the beginning when she purchased plant and equipment from 2Moro and personally paid employees' salaries. He said he and Ms Zaccara also supported Ex NF when they paid \$30,000 from their home mortgage for upfront rent at 112 Ward Street. He referred to Ms Zaccara having a large number of personal real estate properties associated with the boarding house business and that, to the best of his knowledge, none of those properties are subject to mortgage. He referred to also having access to cryptocurrency, if required, to support Ex NF, which was valued in 2017-2018 at \$1.2 million.

262 He said, as of December 2015 and January 2018, the need to support Ex NF did not arise as, at those times, Ex NF generally had a high turnover and they were working through audit and compliance requirements directly with the ATO. He contended there was also sufficient WIP to meet ongoing liabilities, that the ATO was not taking any other direct action at that time and that at all times he considered Ex NF had sufficient cash at bank to meet its expenses.

263 Finally, Mr Munneke said he was not given any prior notice of the topics that he would be examined on during the s 597 examination and, at the time of that examination, he had not refreshed his memory by reference to any books or records of Ex NF and some of the events the subject of the examination occurred six years prior.

#### *Mr Munneke's cross-examination*

264 In cross-examination, Mr Munneke acknowledged he was familiar with the responsibilities of a director of a company; the obligations to keep written financial records that would enable a true and fair financial statement to be prepared, that he was obliged to act in the best interests of the company, to act only for the proper company purposes, and to take into account the interests of creditors and to ensure that the company complied with its legal obligations.

265 Mr Munneke agreed that oversight of Ex NF's financial performance was ultimately his responsibility. He said he understood that he was the only person who could approve the lodgement of BAS and he knew that Ex NF was under an obligation to pay SGC. He then said he knew that there was an obligation to pay GST on a quarterly basis and that Ex NF was liable to pay income tax on a quarterly basis by virtue of BAS lodgements. He was aware that Ex NF was liable

to withhold the tax payable by Ex NF employees and remit to the ATO on a quarterly basis.

266 Mr Munneke accepted that by the end of March 2015, there had been no BAS lodged by Ex NF between July 2013 and March 2015, and that in a flurry in April 2015 there were lodgements for September 2013, December 2013, March 2014, and June 2014. Mr Munneke said he recalled becoming aware that Ex NF had not been lodging its BAS for close to two years. He said he said they needed to do something different, and they sought counsel from an alternative accountant.

267 When it was put to him that he knew that for a two-year period Ex NF was not paying GST, PAYG, SGC, or income tax, he said it was not in the forethought of his mind, he actually believed it was being taken care of. He was asked how he thought it was being taken care of when money was not coming out of Ex NF's bank account to make those payments to the ATO. He said there were lots of transactions in and out, and he was not explicitly looking for those transactions. He said he was primarily involved in billing, developing the projects and invoicing.

268 He said when they first set up Ex NF, he set up separate accounts that were supposed to be for deposits of cash to pay tax obligations and he expected that practice had continued after he became less involved.

269 Mr Munneke said that he thought the tax payments were being made between July 2013 and March 2015. He thought that Ex NF was covering its obligations. When it was put to him that a payment of \$46,000 in July 2013 would be something that he would notice, that being the liability for the June 2013 quarter, he said it was not something that he recalled. When asked whether he turned his mind to the lodgement of BAS, he said he knew they had to be done but he delegated that to Ms Zaccara, and he thought they were being attended to. He reiterated his focus was on getting the money in. It was put to Mr Munneke that he knew Ex NF was in manifest default of its tax obligations by the end of 2015. He said that he thought that the flurry of activity of trying to do the BAS was catching them up and by the end of 2015 he thought they had covered all of their BAS returns.

270 He was asked to explain why the flurry of activity in lodging the 2014 lodgements did not cause him to make the 2015 lodgements. He said he expected they would have been done, and he thought that in the flurry the rest of the outstanding lodgements were being attended to. He said that he left it all up to Ms Zaccara to attend to and expected the accountants would be guiding them and seeking information as required. He was asked whether he considered what the processes were for lodging quarterly BAS. He said he did not turn his mind to it, he had other things to worry about. He said he could not do everything, that is why he delegated that part of the business to Ms Zaccara and to the accountants and he focussed on the things that he had the most value in.

271 It was put to Mr Munneke that Ms Zaccara's performance in April 2015 in terms of Ex NF's tax compliance had been an abject failure. Mr Munneke said he knew that they had fallen behind, but it was something they were working through. He knew Ms Zaccara was working with the accountants to catch up and he said, "we all learn as we're building a business".

272 Mr Munneke said that the last personal tax return he filed was when he was at university. He explained that when he was in university a life insurance policy was converted to a term investment which complicated his tax return. He said he did not do a tax return that year, which he estimates was around 1995 or 1993, and he has not done one since. He said it has become very difficult to work out how to resolve it. He said he is very cognisant of the fact that he has not brought his ATO record up-to-date, and he has not had any child subsidies for his children. When asked whether he was conscious that between April 2015 and the end of 2016 that the ATO compliance issues were yet to be addressed, he said, "I was conscious that it was in the process of being remedied" and that he did not exactly know the position of default. Mr Munneke said that he did not try and ascertain the extent to which Ex NF was in default. Mr Munneke denied he had a moral objection to paying tax and denied that he had no compunction about not complying with his tax obligations. He said he understands that tax is an important part of our society, and he understands it has to be paid.

273 Mr Munneke said that he worked for certain periods without receiving payment, paying off a loan that one of Ms Zaccara's entities owed to Ex NF. Mr Munneke said that he and Ms Zaccara borrowed the money from Ex NF when they had an opportunity to buy property. They forewent salary until such time as they felt they had paid the amount back and then resumed receiving salaries. It was put to Mr Munneke that he did not ensure compliance with SGC payments after April 2015. He said he did not know about the dates, but he did create a spreadsheet and that it became a top priority to get that up to date. Mr Munneke said that after the ATO audit he was hoping and expecting that superannuation contribution payments were being maintained. He explained that he delegated and believed that it was happening. He was asked:

Q. Having had a significant sum come out of your bank account to make this due, weren't you cognisant thereafter that amounts were still not coming out of your bank account referable to tax or GST or superannuation of your employees.

A. My primary reference was, as I have said before, my primary focus was on income, on bringing business in and invoicing. So the only – typically the only time I turned my attention to the bank account was to look at the balance. I wasn't looking at the daily transactions in the bank account. I was looking at the invoices issued and the invoices paid.

274 Mr Munneke was taken to a letter from the ATO referring to Ex NF not having lodged activity statements and PAYG amounts withheld for periods for six quarters. Mr Munneke agreed it was a serious matter, but he believed that was what led to the flurry of activity. Mr Munneke said he did not recall seeing that

correspondence, but it was his understanding in June 2015 that they were catching up with tax obligations. He was then asked to look at the communication from Ms Zaccara to Darren McDougall of ANZ (“Mr McDougall”) in relation to potential borrowings for O’Connell Street. It was put to him that ANZ were indicating they were not prepared to lend money if Ex NF was not up to date with their compliance. Ms Zaccara explained to the banker in that communication that she had lodged the current BAS at that point in time for September 2015. Mr Munneke said that when Ms Zaccara said this, he was not conscious that that left unremedied failures to lodge BAS for September 2014, March 2015, and June 2015. It was put to him that:

- Q. To tell the bank that effectively ‘I have included the payment for the BAS in respect of the period that is the current period’ without disclosing that there were three quarters left unremedied was quite a misleading impression for your company to be giving to your banker, you agree.

Mr Munneke said he did not know if that was the impression that was being given. He was asked whether at any point he wanted to see that Ex NF had complied with their lodgement obligations. He said he did not at any point check what their current state was, nor did he made enquiries of Ms Zaccara. He was asked whether as at the end of the 2015 calendar year he had any understanding as to whether Ex NF was up to date with GST obligations. He said he had expected the flurry of activity with the ATO’s audit that they had been brought up to date.

275 Mr Munneke was cross-examined about the s 597 examination where he was asked questions about his understanding as at January 2016 in connection with the ATO catchup. He was reminded of the question, “So you weren’t across how much needed to be paid to the ATO at any point in time?”, and his answer of “No”. Mr Munneke agreed that evidence was true. He was asked whether his answer of “Yes” in the s 597 examination to the following question:

If that is the case and I suggest at no point in time were you able to have an accurate assessment of the solvency of the company on how much you needed to pay the ATO, is that fair?

was an honest answer. Mr Munneke said, “I mean on that proviso if you didn’t know, that is correct”. Mr Munneke agreed that at the end of the 2015 calendar year he did not know how much needed to be paid to the ATO. Mr Munneke agreed that he left the financial reporting to Ms Zaccara but accepted that solvency was ultimately his responsibility. Mr Munneke repeated throughout his evidence that he considered that in terms of solvency, his prime focus was to make sure that Ex NF was making money so that it could pay its obligations. He agreed that one of those obligations were the amounts payable to the ATO.

276 Mr Munneke agreed that at the end of the 2015 financial year, because he did not have accurate accounting records, he did not know what amounts were owed to the ATO. It was put to him therefore he did not know what Ex NF’s solvency was. Mr Munneke said Ex NF was bringing in a lot of money and the bank balance

was good, he believed they had credit in the ATO account. He agreed that as he said in the s 597 examination, he did not know in January 2016 whether Ex NF was solvent or insolvent. It was put to him that he did not know whether Ex NF had sufficient resources to pay its tax and other liabilities. Mr Munneke said he could not give a number, but he was of the belief that Ex NF was doing well. It was put to him that at that time he was unsure what tax was owed and therefore whether there were enough resources to pay tax. Mr Munneke said his understanding at the time was that there was a \$30,000 credit with the ATO and that they must have been good with the ATO, that they were making a lot of money, and had a large balance in the bank account, so it was his belief at the time that Ex NF was in a good position. It was put to him if that was truly his state of mind, he would not have given the evidence he did during the s 597 examination about not knowing whether Ex NF was solvent or insolvent. Mr Munneke said that during the s 597 examination, he felt he had been beaten down, he felt a bit disheartened, and he had just been given the wind-up notice. He said there was a degree of guilt and embarrassment at being wound up. He was in a general state of “What have I done wrong?”. It was put to him that the evidence he gave in the s 597 examination was the truth. He replied that he believed it was the truth. However, he did not say that he thought Ex NF was insolvent and he did not say he thought it was solvent. He said he was down and he should have done better.

277 Mr Munneke was taken to an email from BDO to Ms Zaccara dated 8 February 2016 seeking information for the lodgement of BAS for 2014 and 2015. He was asked whether Ms Zaccara told him in February 2016 that BDO were chasing information for the lodgement of BAS for the September 2014, March 2015, and June 2015 quarters. Mr Munneke said he could not recall. He also could not recall the email from BDO to Ms Zaccara dated 19 September 2016 stating that the income tax returns had not been filed for 2014 and 2015. It was put to him that by this stage in September 2016, there was a very material default in tax obligations. He was asked about his evidence where he referred to not realising that BDO were hands off and that BDO were not ensuring sustainable compliance. It was put to him that BDO were seeking to have Ex NF comply, and he and Ms Zaccara were not attending to the compliance. Mr Munneke said he was trying to comply, and they needed someone to come and say, “We will come to your office. We will run through the receipts, we’ll run through the invoices, and we’ll help you put it in”.

278 Mr Munneke was asked about the letter dated 8 November 2016 from solicitors acting for REST Pty Ltd, and it was put to him that Ex NF were sued for a failure to pay SGC for those employees who were members of REST Superannuation Fund. He agreed that it was very important to make sure that superannuation was being remitted.

279 Mr Munneke was taken to a letter from Rowe Partners dated 1 August 2017, forwarding the 2014 financial statements and income tax return. Mr Munneke was asked whether the entry under the heading “Non-Current Assets” on the balance sheet recording “Loans – Associated Trusts” for \$370,000 related to Ms Zaccara’s

boarding house business. He said it related to a property or a couple of properties that were associated with that business. He was asked whether at June 2014 he regarded that as being money that Ms Zaccara owed to Ex NF. He agreed but was not sure if that number was correct, he did not recall it being that high, and he considered it might be a mistake. He was asked about the entry in the balance sheet under “Non-Current Liabilities” recording “Shareholder Accounts” and the sum of \$84,789. He was asked whether that was an accurate depiction of what he regarded as Ex NF’s liability to Ms Zaccara as at June 2014. He said he flicked through the financial statements, but they are not his strength so he had trust in the accountants to prepare it appropriately. Mr Munneke was asked about his evidence during the s 597 examination about the acquisition of 20 South Terrace. It was put to him that acquisition gave rise to an associated loan referred to in the 2014 accounts prepared by Rowe Partners. Mr Munneke said the loan was repaid by Ms Zaccara and him taking reduce wages.

280 It was put to Mr Munneke that during the s 597 examination he was asked whether it would surprise him that Ex NF paid for the 20 South Terrace property and he said “Privilege. Yes” and when asked why it would surprise him, he said “Privilege. Because I didn’t think it had anything to do with the company, Ex NF”. Mr Munneke was asked whether that was his state of mind in 2021 at the time of the s 597 examination, that he knew nothing about the acquisition of 20 South Terrace having been funded out of Ex NF. Mr Munneke said that he believed the evidence he gave in the examination was his recollection of the events. Since that time, he said he has had time to consider, recall and has been shown evidence, and that during the very long s 597 examination he may have forgotten matters.

281 Mr Munneke was taken to the s 597 examination where he was asked whether “Linda Zaccara Holdings Pty Ltd paid any money back to the company, Ex NF, in repayment of the loans” and his answer was “Privilege. Not that I’m aware of”. It was suggested to him that when he was telling the Court during the s 597 examination that he was not aware of any repayment of the loan, that was in reference to the associated trust loan of \$370,000 relating to the acquisition of the South Terrace properties referred to in the 2014 accounts. It was put to him that in the s 597 examination he did not give any evidence about there being an arrangement whereby he and Ms Zaccara were taking reduced wages which was paying that loan off. He said that was correct, because at the time of the examination he did not recall the situation. Mr Munneke said that having had the time and documents being brought to his attention, he recalled the agreement that they would pay that back and that they forewent salaries for a period of time. It was put to him that during the s 597 examination, he was asked:

In 2013 and 2014 you were aware of 370,000 worth of loans being made, Ms Zaccara’s related entity, you didn’t insist on any interest or any security and in the numerous years since not raised repayment with Ms Zaccara of the loans at all.

to which Mr Munneke said during the examination “Privilege. That is accurate”. It was put to him that the situation was that there was never any arrangement for

repayment of the loan by way of salary sacrifice or otherwise, to which Mr Munneke replied, “How do you suggest, why do you suggest we didn’t take salaries for 18 months?”. He said there was an agreement, and it was an informal agreement. It was suggested to him that the evidence he gave during the course of the s 597 examination in 2021 was the truth. Mr Munneke responded, “I don’t think it is given the evidence”.

282 It was suggested to Mr Munneke that Ms Zaccara met with ANZ representatives about the O’Connell Street acquisition on 22 September 2015. Mr Munneke said he could recall a meeting with Mr McDougall, but he believed the first meeting was attended by Ms Zaccara on her own. Mr Munneke agreed that in dealing with the banker on behalf of Ex NF that he – as the sole director – was the only person authorised to deal with borrowings on behalf of Ex NF. He agreed that in September 2015 he was conscious of the importance of maintaining a separation between what were his personal financial affairs and the financial affairs of Ex NF. He agreed it made sense that for Ex NF to enter into borrowings of \$1 million or so, there would need to be a proper company purpose for any such borrowing. It was put to him that on the face of it there would be no proper purpose or basis for Ex NF to be borrowing \$1 million so that some other entity could acquire O’Connell Street. Mr Munneke said at that point in time they were aware that they were not able to continue to operate from their premises at the time and that they were looking at several properties. O’Connell Street came onto the market and they were exploring options to acquire the property and for Ex NF to move into that property. At some point he asked Ms Zaccara to talk to Mr Vijayadass to work out how they structure it with the funds at hand. Mr Munneke maintained that he did think that BDO had full information about Ex NF’s financial position at the end of 2015 and he believed that after the flurry of activity, BDO did know where Ex NF was at. He was reminded of his earlier evidence where he was cross-examined about what he said during the s 597 examination to the effect that he did not think he had accurate books and records as at the end of 2015. It was put to him if he did not have accurate books and records, it would follow that BDO could not know the financial position. Mr Munneke said that:

... the accurate records versus knowing the vibe ... to quote ... basically what was happening [was] ... there was money coming in and as such [he] felt that BDO would have an appreciation for [their] current position without necessarily having the accurate books and records.

283 He again said that he was caught up in a project and he left how to structure this purchase to Ms Zaccara, who had the interest in the property and the business entities etc. Mr Munneke agreed that by 26 October 2015 he and Ms Zaccara had agreed that the purchaser of O’Connell Street was to be him as the trustee for 28 O’Connell Trust. He agreed that he knew he did not have any funds himself to be able to purchase a \$1.7 million property. It was put to him that he knew that the 28 O’Connell Trust had yet to be formed. He said he did not know when the trust was formed. He knew there was an intention to establish it. He was asked

how he thought as at 26 October 2015 that he, in the capacity as trustee for the 28 O'Connell Trust, was going to buy O'Connell Street. He said he believed that there was a combination of a dividend to Ms Zaccara plus a loan from the bank. He was asked whether he discussed with Ms Zaccara that a dividend to her in the order of \$1 million would see her liable to pay personal tax of some \$500,000. He said he did not discuss that with her and it would have been a concern for her. He was asked whether he thought she could make her own investigations about Ex NF making a distribution to her of \$1 million so that she could lend it back to him so he could buy a property. Mr Munneke said that it was his understanding that there was no implication to Ex NF on the payout of that dividend and he did not know about Ms Zaccara's personal tax implications.

284 Mr Munneke denied he was trying to avoid tax and said that he felt that was something that accountants would consider and bring to their attention. He maintained that he asked Ms Zaccara to seek advice from Mr Vijayadass regarding taking money from Ex NF to purchase O'Connell Street.

285 It was put to him that when Ms Zaccara said in an email dated 26 October 2015 that there was consideration given to purchasing O'Connell Street as an ongoing commercial interest, that was a false statement. It was suggested to him that what he knew at that time was that they were not going to be acquiring it as an ongoing commercial interest. He said he was not exactly sure about the terms, but he guessed he knew that the intention was for Ex NF to move into O'Connell Street. It was further put to him that they were intending to have the two tenants in the property quit their tenancies on or before settlement. He said at some point they intended for them to surrender their leases. It was then put to him that he and Ms Zaccara cooked up a plan to evade the payment of GST on the transaction. Mr Munneke said he did not know. It was put to him that he did not pay any GST on the transaction. Again, he said he did not know. It was put to him they instead treated it as though it was an acquisition of a property with an ongoing commercial interest, namely two ongoing tenants. Mr Munneke said that if the leases were surrendered for another commercial tenant, he did not know how it got treated. Mr Munneke was asked whether the intention was that Ex NF would borrow \$1 million from ANZ and then loan it to the purchaser. Mr Munneke said he did not know. Mr Munneke said he was not qualified to make a decision regarding how to account for the loans and dividends, and that is why he wanted to get someone to say, "this is how to structure it". It was put to him that he never got that and he agreed he did not.

286 It was put to Mr Munneke that at the time of the purchase of O'Connell Street he did not have the financial statements for Ex NF for either 2014 or 2015. Mr Munneke conceded that the letter from Rowe Partners dated 1 August 2017 refreshed his memory that as of October 2015 he did not have the 2014 or 2015 financial statements. He agreed he did not know what was a reportable profit for the year ending 2014 or 2015 as at 27 October 2015. Mr Munneke agreed that the integrated account for Ex NF provided to ANZ as at 17 November 2015 did not include the various quarterly payments then outstanding.

287 Mr Munneke was taken to an email dated 24 November 2015 from Ms Zaccara on behalf of Ex NF to Guvera when it was owing Ex NF \$350,000. Ms Zaccara said in the email that Ex NF was in “dire straits” with the ATO on its back for several outstanding BAS returns. Mr Munneke agreed that this email was written about four weeks before the settlement of the O’Connell Street property. He agreed that as at that date Ex NF had not entered into any binding obligation to purchase the O’Connell Street property. Mr Munneke was asked whether he had turned his mind to the fact that Ex NF’s position as at 24 November 2015 was one of being in dire straits. Mr Munneke said he did not, he believed the phrase used by Ms Zaccara was used as a debt collection tactic, something that she had used in the past.

288 Mr Munneke was asked about the email correspondence dated 7 December 2015 where Ms Zaccara referred to the ANZ valuation for O’Connell Street being \$1.15 million relative to the purchase price of \$1.7 million. Mr Munneke agreed that they needed to come up with an extra \$260,000 for the purchase as the bank would only loan \$740,000, not \$1 million as they wanted, and that there was going to be an additional drain on the Ex NF resources. Mr Munneke agreed that they were needing to call in outstanding debtors in order to be able to fund the shortfall. Mr Munneke said it was his recollection that they had enough funds, but the calling in of debtors was to ensure that they had an operational buffer. It was put to him that things were pretty tight when the \$260,000 additional cash needed to be found. Mr Munneke said he did not know whether he would call it “tight”, but it would be beneficial for the large amount that they had in invoices to be paid. Mr Munneke was asked whether he knew the ATO was on Ex NF’s back and he said “For reporting yes”, but not for payment. He said that he did not realise that they still had a ATO debt.

289 Mr Munneke was taken to the s 597 examination where he was asked why it was that he put the O’Connell Street property into a trust rather than Ex NF’s name and he had said, “Privilege. Effectively, to protect it. To kind of go ‘Ok here’s an asset which isn’t linked to the company’s success or failure’”. Mr Munneke said that that answer was true. It was put to him that he wanted to put the property beyond the reach of the ATO, to which he said that was not his intention. He said this was an asset of the family; Ms Zaccara and the family, and so it made sense to separate Ex NF from the property which Ms Zaccara was using a dividend to purchase. He was asked why he would not buy the property in the name of Ex NF so it remained available for payment of outstanding creditors. He answered, “Because it wasn’t a company concern, it wasn’t a company business”. Mr Munneke referred to the payment out of in excess of \$1 million to acquire O’Connell Street as surplus cash. He agreed that it was surplus cash that was available to pay debts, including the ATO. When it was put to him that once it was paid out it was no longer available, he said, “if there was necessity for funds, then that was available either from [Ms Zaccara] herself, or from other ... customers or interested parties”. He agreed it was his state of mind at the time he paid the money out that it was okay because Ms Zaccara might decide to put money

back in if it was needed. He said there was a property Ms Zaccara had an interest in on the market, Parawae Road, as well as outstanding invoices. There was also a good runway of work.

290 Mr Munneke said that throughout the lifetime of Ex NF, Ms Zaccara was the driving force for success of Ex NF so that if they required further funding, she had assets that could assist. Mr Munneke was asked whether at the time \$1 million was paid out, he said to Ms Zaccara “I will pay out more than \$1 million in order to [buy] O’Connell Street on condition that you commit to paying money as is necessary see our creditors paid”. Mr Munneke said he did not have that specific conversation.

291 Mr Munneke maintained that the payment towards O’Connell Street was paid out as a dividend to Ms Zaccara. It was put to him that in 2017, when they were regularising the financial statements and returns for 2014 and 2015, it was not reported as a dividend. Mr Munneke said he was not involved in that process, and he did not know it was not being characterised as a dividend. He was asked how, having believed it was a dividend in 2015, did he come along in 2017, having heard reference being made to an L7 loan, and not think they were inconsistent with what he thought the actual state of affairs was. Mr Munneke said he did not understand what an L7 loan meant, and that he trusted Ms Zaccara and the accountant would account for it as per the 2015 intention. He said it was his understanding that Ex NF’s repayment of the loan instalments would be its contribution for the rent. It was put to him that in addition to the payments towards the mortgage repayments, Ex NF made payments of rent to him as the trustee of 28 O’Connell Trust. He was taken to Ex NF’s financial statements for the year ending 30 June 2016 where there is a disclosure of rent in the amount of \$140,149. It was put to him that Ex NF claimed a tax deduction for the rent and that his evidence that Ex NF received the benefit of cheaper rent was untrue because in the 2016 year it paid \$11,000 per month for six months, being \$66,000, which well exceeded the interest only payments on the ANZ loan of \$740,000. It was put to him that Ex NF paid him by virtue of a series of transactions through the accounts of Ex NF which were more than the amount owing to ANZ. Mr Munneke said he did not see any additional money in his account. It was put to him that he signed a tax return that claimed a tax deduction for a rental figure of \$140,000. He said the decision about the rental charge would have been made by Ms Zaccara and the accountant. It was put to him that accountants do not decide what is put in a tax return; they need instructions. He maintained he did not make the decision to record a rental charge that was founded upon him receiving rent from Ex NF of \$66,000 over six months.

292 Mr Munneke said he was aware that NAB had refused to lend money for the O’Connell Street purchase because Ex NF did not attend to their ATO filings and did not have up to date books. He was asked whether he checked to see whether the filings were up to date before he went to ANZ and he said that it appears that he never checked.

293 Mr Munneke was asked about the withdrawal of \$100,000 from the ANZ account for a family trip to Antarctica in the middle of 2016. He said he did not believe it was company money, it might have come out of Ex NF's account, but it was not intended to be Ex NF money. He was asked how it is that he could not be aware of \$100,000 coming out of the bank account. He said it was because he was focused on invoicing and revenues. He said he did not recall giving Ms Zaccara authority to withdraw \$100,000 for personal expenses from Ex NF's bank account. He said it surprised him that \$100,000 had come out of a company account without being recompensed. He denied that he treated Ex NF monies as his own. It was put to him to take \$100,000 out of the accounts of Ex NF, he would need to know where Ex NF was at with the creditors. Mr Munneke said he expected the money to have been paid back by a cash deposit.

294 Mr Munneke was then asked whether he was aware by mid-2016 of the emails from BDO following up the outstanding tax returns and BAS. Mr Munneke said he recalled those emails. He was asked whether he was aware that the lack of filings was far from being remedied but was becoming increasingly one of default throughout 2016. Mr Munneke said he understood there was still further that needed to be done. He said they "did a bunch and then I guess we fell behind again". He was asked whether as sole director, he regarded it as a serious matter that \$100,000 was drawn out of Ex NF's account to pay for a holiday in the context of the issues they were having with the ATO. He maintained that he did not have any knowledge that the \$100,000 had been drawn out.

295 Mr Munneke was then questioned about cryptocurrency.

296 Mr Munneke agreed that he and a Meeco representative met with Vitalik Buterin ("Vitalik"), the inventor of ethereum, before ethereum was released. Mr Munneke agreed that in the first half of 2014, precisely what ethereum might be able to do in relation to smart contracts was uncertain, and that the purpose of the meeting with Vitalik was to understand how it might work. He said that at the time, he was acting as the chief technology officer of Meeco, and that he attended the meeting in that capacity.

297 Mr Munneke said that he believed in the ethereum project and thought that it was exciting. He agreed that he viewed ethereum as very powerful for products being developed in the Meeco space. He accepted that Ex NF was providing software development services to Meeco, one of Ex NF's biggest customers. However, he denied that in mid-2014, he was developing proposals for Ex NF to develop smart contract capability for Meeco.

298 It was suggested to Mr Munneke that he met with Nick Lothian ("Mr Lothian") to develop a proposal for smart contracts for Meeco. He did not accept this and said that at the meeting, he was acting in his capacity as chief technology officer of Meeco to brief Mr Lothian on creating a proposal for development for Meeco. He explained that Ex NF did not have the capabilities or capacity to undertake a blockchain project, whereas Mr Lothian had the time and

capability to do so. Mr Munneke agreed that he was speaking to Mr Lothian about how Meeco's platforms could be advanced by way of smart contracts, which would ultimately require that Meeco have access to ethereum. He said that he was tasked by Meeco to acquire ethereum for this purpose, which he did by using bitcoin in the CoinJar account. He agreed that Ex NF invoiced Meeco for the price of the bitcoin used to acquire the ethereum.

299 Mr Munneke agreed that the CoinJar account was linked to Ex NF's NAB account to allow customers' payments by bitcoin to be made to Ex NF. Mr Munneke accepted that he linked Ex NF's email account to the CoinJar account. When it was pointed out that he also had a Gmail account, he said that he did not use that account at the time. He explained that NextFaze was his handle and online identity before he started Ex NF. He said that thereafter, he established a new handle, namely NextAlias.

300 Mr Munneke said that at the time he set up the CoinJar account, it was for Ex NF's purposes; for the receipt of bitcoin and to convert it to Australian dollars. He said that intention changed on 14 February 2014, the night before Ric Santos' wedding when he and Ms Zaccara decided to purchase bitcoin as a wedding gift. Mr Munneke agreed that at the time of purchasing the bitcoin for Ric Santos, he was aware that he could add a personal account to the CoinJar account. He said at that time, there was not enough time to establish or link a separate account. He agreed that at no point after 14 February 2014 did he seek to add a personal bank account to the CoinJar account. Mr Munneke agreed the wedding present was his first purchase of cryptocurrency. It was suggested to him that the \$300 spent on the wedding gift was never reimbursed by him. Mr Munneke agreed that \$300 was not paid back into the NAB account, but he believed it would be reconciled with debts owing to Ms Zaccara. He did not recall telling Ms Zaccara that she needed to take \$300 off any debt owed by Ex NF to her. Mr Munneke was taken to his earlier evidence where he said that he needed to use a company debit card because of the need to purchase the cryptocurrency urgently. He then agreed that the \$300 deposited into the CoinJar account would have been via bank transfer.

301 Mr Munneke was questioned about communications from CoinJar commencing from 10 February 2014. Mr Munneke was shown an SMS from CoinJar on 10 February at 10:05 pm which instructed him to go to a NAB branch and deposit \$500 in cash to CoinJar and provided account details and a reference code. It was put to Mr Munneke that there was no need to be worried about immediacy of transfer in light of this text message from CoinJar. Mr Munneke said the SMS was highly suspicious. He said if someone told him to deposit cash directly into a bank account, he would treat it is a scam and said he did not recall receiving that SMS.

302 Mr Munneke was then taken to an SMS from the same number as the previous message sent five minutes later at 10:10 pm on 10 February 2014 asking him to transfer \$500 to CoinJar. Mr Munneke said that this text message seemed more legitimate. Mr Munneke agreed this text message was instructing him to

transfer the same amount of money into the same bank account as referenced in the message sent at 10:05 pm. He said if he could verify the specific account was the same CoinJar account he was dealing with, he still would not transfer cash.

303 Mr Munneke was then shown an SMS he received on 14 February 2014 asking him to transfer \$300 to CoinJar. Mr Munneke accepted this was the wedding gift to Ric Santos of \$300. He accepted that it was sent from the same SMS and it had the bank account details as the SMS's he received on 10 February. Mr Munneke accepted that the transaction referred to in this SMS was the transaction that he fulfilled as evidenced by an email from CoinJar confirming it had received his deposit of \$300. Mr Munneke accepted that both SMS's had the same reference number. He agreed the \$300 deposited into CoinJar would have been done by electronic transfer.

304 Mr Munneke agreed that the communication on 10 February at 10:05 pm was received almost to the minute of him being in a conversation with Anthony Mansour of Alias Life ("Mr Mansour") at 9:50 pm. Mr Munneke said in that email to Mr Mansour he was going to give bitcoin to Ric Santos for his wedding. He said the email discussions seem to be around about the same time he was attempting to or looking at making a deposit to CoinJar. Mr Munneke said it made sense that at 9:59 pm on 10 February 2014 when he said now might be the time to buy, he might have triggered something to CoinJar that occasioned the response by SMS. He accepted he received by way of SMS two messages: one involving a bank transfer and one involving a cash deposit, both identifying the same bank account for deposit with CoinJar. Mr Munneke agreed that if he did not have confidence that the messages were not a scam, he would not have done any form of electronic transfer from the NAB account to the bank account identified in the CoinJar SMS.

305 Mr Munneke was asked again about the first communication from CoinJar on 10 February 2014 at 10:05 pm giving him an option to go into a NAB branch and deposit money into the CoinJar account. Mr Munneke agreed he could have gone into the NAB branch on Tuesday to Friday of that week to effect the deposit and his concerns regarding the clearance the funds would have been avoided if he had done it at that point in time. He accepted that he would not have had any need to use a company bank account to effect the transfer. It was put to Mr Munneke that his evidence that it was always his intention for the CoinJar account to be his own personal account as evident by the username he chose, being NextAlias, was not true. Mr Munneke maintained it was. It was put to him that he established the account in order to be able to receive Ex NF money. Mr Munneke said it was established in order to be able to receive payment from clients which he would then transfer to Ex NF. He said he did set it up as a personal CoinJar account because he used his email account. When asked why he did not attach his own bank account to the CoinJar account, he said because the purpose was that if someone paid Ex NF in bitcoin, they could receive the bitcoin and then deposit it as Australian dollars into the NAB account. He denied that he was lying.

306 Mr Munneke was then questioned as to why there was urgency in relation to the \$300 transaction. Mr Munneke agreed the transaction on 14 February was urgent because he had not transferred the \$300 when he indicated it was time to buy on 10 February 2014. He agreed that there was no urgency in relation to the \$700 transfer. Mr Munneke agreed that the deposit of \$700 reached the CoinJar account on 18 February and it sat in the CoinJar account until it was then the subject of a purchase of bitcoin on 25 February. He agreed that both the \$300 and the \$700 had come out of the NAB account. He agreed he could have used personal funds in order to be able to deposit anything other than the urgent \$300 transaction into the CoinJar account. He was then asked what discussions he had had with Ms Zaccara regarding the purchase of the bitcoin as the wedding gift. He said they had discussed that they should get bitcoin for the wedding and that the groom had given his bitcoin address. He recalled that at the time he said “[m]aybe we should get some bitcoin” or maybe Ms Zaccara said to him “[m]aybe we should get some bitcoin for ourselves as well”.

307 Mr Munneke said that the earliest discussions that he and Ms Zaccara had about bitcoin were probably in 2010 to 2011. He said it was when Silk Road was a thing. They talked about mining bitcoin but that was complicated. He said he was working at 2Moro and he did not have a lot of time so they looked at buying it. He explained at that time to purchase bitcoin you would arrange to meet someone in person and would pay in cash.

308 He explained that acquiring bitcoin meant bringing it into your possession, whereas buying bitcoin meant transacting with somebody else in order to achieve it. When asked how many times Ms Zaccara asked him to buy it on her behalf, he said he could not say, that it was discussed at various times and she maintained that she wanted it but it just was not on his priority list.

309 Mr Munneke maintained that in 2010 or 2011, Ms Zaccara first asked him to acquire bitcoin for her. He said back then it was probably around mining because there were not really any public exchanges. He said they would have been talking about acquiring bitcoin through the process of mining, whereby a computer program is run and bitcoin is received “if you’re lucky”. He accepted that Ms Zaccara had asked him to buy it but he did not get around to it. He was asked again when Ms Zaccara first asked him to buy bitcoin for her and he did not get around to it. He maintained that she asked him to acquire it in 2010 or 2011. He said there were no discussions about whether or not it had to be bought or whether it could be mined. He said she might have raised it when the topic came up in the news or in tech papers. He said she was not hounding him for it. He maintained he had an outstanding request in his mind from her to acquire bitcoin that took him three or four years to fulfil.

310 Mr Munneke was asked about the price of bitcoin in 2010. He agreed it could be bought it for 40 cents per bitcoin but not easily.

311 Mr Munneke was asked whether he had read Ms Zaccara's statement. He said he had read it just prior to being cross-examined. He was asked whether when he came into the witness box, he had in mind what Ms Zaccara was proposing to say. He said he was aware of some things that she had put in her statement. It was put to him that he wanted to align his story with her story as much as possible. He agreed that he read the statement for the purpose of being in court. He said he had not spoken to Ms Zaccara about the differences and similarities in their respective evidence. He said he had only read Ms Zaccara's first statement.

312 Mr Munneke agreed that he had said that the \$300 and \$700 transactions made on 14 February 2014 were made late at night. Mr Munneke was taken to an SMS he had received at 2:58 pm on 14 February 2014 telling him the \$300 had been received. It was suggested to him that there was not such a mad rush making the \$300 transfer late at night on a public holiday, as he had previously given evidence of. He said that would appear so. It was put to him that exchanges that would engage in public exchange of bitcoin had been around since 2010. He said he did not know. It was put to him that the absence of a relevant public exchange was not an impediment to him carrying out Ms Zaccara's request for him to buy bitcoin in 2013. He said not at that point in time. It was put to him that it was not an impediment to him carrying out a request in 2012. He said he could not comment, he did not know what the landscape was. It was put to him that cryptocurrency exchanges would have enabled him to readily and safely embark upon a purchase transaction. He agreed that was so for a period of time.

313 Mr Munneke said he did not recall whether Ms Zaccara gave him any money to buy bitcoin on her behalf. He said she did not ever discuss how much she wanted him to buy on her behalf. Mr Munneke said by 2013 he started to become conscious of Australian-based cryptocurrency exchanges and he was also conscious of the fact Ms Zaccara had asked him to purchase bitcoin on her behalf.

314 Mr Munneke was asked whether he agreed the price of bitcoin rose very markedly during the course of the 2013 year. He said he recalled a couple of peaks, but he did not recall the exact times. It was put to him that between the beginning and end of March 2013, bitcoin rose from \$20 to \$100. Mr Munneke said he recalled there was a peak. He was asked whether there was any discussion with Ms Zaccara about the cryptocurrency going from \$20 to \$100 and him not having done what she had asked of him. He said there was a general feeling of "have we missed the boat". He then said he did not recall any discussion where Ms Zaccara asked him why he did not buy it when it had risen so rapidly. It was then pointed out to him that between the end of March 2013 and eight days later, bitcoin rose 230 percent. He said he did not recall any conversation in that context with Ms Zaccara. It was put to him that it had reached \$1,200 by the end of November 2013. He said, "That's a big increase". Again, he said he did not recall any conversations with Ms Zaccara about not having fulfilled her purchase requests.

315 It was put to Mr Munneke that he did not refer in his statement to having any outstanding request to buy bitcoin before late-2013 or early-2014. He said he recalled during the Silk Road wanting to get bitcoin. It was put to him that he did not speak in his statement of having been asked to purchase any bitcoin on Ms Zaccara's behalf prior to the request he described in [134], where he said the actual request was late-2013 or early-2014 when it was reaching mainstream.

316 Mr Munneke denied that he had read Ms Zaccara's statement where she said she asked him to purchase cryptocurrency on many occasions prior to Ex NF being incorporated in February 2012. It was put to him that in his statement he first speaks of having discussed purchasing cryptocurrency on Ms Zaccara's behalf in late 2013 or early 2014 and he had given evidence in cross-examination to the effect that there were outstanding requests for some years between 2011 and 2014 for him to purchase cryptocurrency on Ms Zaccara's behalf. He said it went back to the acquire versus buy issue.

317 He said he referred to 2010 and 2011 because he would have looked at the possibility of acquiring bitcoin. He said a serious discussion to actually purchase was had in 2013 or 2014. He was asked whether he accepted that he had changed his evidence because he had read Ms Zaccara's statement. He said it was reasonable to say that perhaps it had influenced him:

Q What I'm suggesting is that you've changed your evidence having read para.86 of Ms Zaccara's statement where she says that she commenced asking you to purchase cryptocurrency on her behalf sometime in 2011.

A I mean, it might – it might have – it might have – I can't remember the – I can't remember the exact statement but I mean, you know, my recollection was wanting to get it and I know that that she continually talked about Bitcoin. Whether or not she yeah, as I said, I can't recall the discussions buy versus acquire.

Q Was the effect of that that you might have had your evidence affected by having read what she said.

A Today's discussion, yes.

...

Q You accept you've changed your evidence because you read Ms Zaccara's statement.

A I don't know if I could accept that. I mean, obviously your probing has tried to pull out certain pieces of information and I feel like I've been recollecting against that. But it is also reasonable to say that perhaps that influenced me.

Q When you say 'that' you don't mean my probing, you mean Ms Zaccara's statement, yes.

A Ms Zaccara's statement, yes.

318 Mr Munneke agreed that when he gave evidence in the s 597 examination, he did not recall having used Ex NF's money to buy \$700 worth of bitcoin. He

said that at the time of giving that evidence he honestly thought it had come out of his credit card. He said that his evidence in this Court was of a specific conversation he had on the night of 14 February 2014, where he said he was going to spend \$300 on the wedding gift and Ms Zaccara said, “Why don’t you buy another \$700 for us”. He agreed he did not refer to any such conversation in his statement. He said that he can recall sitting at his computer late at night on Friday 14 February 2014, having done the transaction for \$300, thinking he could continue and do the \$700 transaction. He was reminded that the \$300 transaction was made during the course of the day on the debit card and it was suggested that the \$700 transaction was processed first. He was taken to an SMS he received on 14 February 2014 at 12:16 pm. It was put to him on this date he processed a \$700 transaction with CoinJar at 12:16 pm, effecting a banking instruction to give effect to that and it was only an hour and a half or so later at 1:52 pm that he embarked upon the \$300 transaction as the wedding present. Mr Munneke agreed that was what it appeared to have occurred.

319 It was put to Mr Munneke it was not the case that he effected the wedding present transaction during the day and then late at night had a conversation with Ms Zaccara about doing the \$700 transaction. He said he does not know whether the conversation happened during the day, and he could not recall the events clearly. It was put to him he had no such conversation with Ms Zaccara on the afternoon or the evening of 14 February 2014 regarding bitcoin. He said he definitely would have discussed it because they had to agree to the amount to give Ric Santos as a present.

320 Mr Munneke was cross-examined about whether or not he had a personal bitcoin wallet. Mr Munneke agreed he had a personal bitcoin wallet “Bitcoin Account 1K2Sd-awMEen” (“1K2Sd”). He said he created the 1K2Sd wallet on the same day as the first acquisition of bitcoin in the CoinJar account which he used to test the transfer of 0.02 bitcoin before he transferred \$300 of bitcoin to Ric Santos’ bitcoin address. He referred to it as a specific wallet that would have been on his phone. It was put to Mr Munneke that the existence of the separate bitcoin wallet, 1K2Sd, had not been mentioned in any of his evidence. He said it had been to the effect that he had said he used bitcoin for various things, such as “paying for sushi, paying for an AB, like, chips and meat from North Terrace”. It was put to him that when he had given evidence in an affidavit about purchasing sushi, he had not referred to that being purchased with his personal bitcoin wallet. Mr Munneke said he was not sure if he was asked to make discovery of anything to do with the 1K2Sd account. He said the documents relating to the 1SKSd account would have been discovered by him because no-one else would have been able to access his CoinJar account. He said he provided the document which shows the transactions. It was put to Mr Munneke that when he described engaging in various personal transactions using cryptocurrency in his statement, he deliberately concealed that the bitcoin used came out of his personal bitcoin wallet as distinct from the CoinJar account. Mr Munneke said that the discovery showed multiple wallets and he was not trying to conceal the fact he had multiple wallets.

321 Mr Munneke accepted that the \$700 of Ex NF money that went into the CoinJar account on 18 February 2014 was transferred towards the purchase of 1.105636 of bitcoin on 25 February 2014, and that bitcoin sat in the CoinJar account largely untraded until the purchase of ethereum for Meeco on 6 August 2014. Mr Munneke was asked if he truly thought that \$700 was buying bitcoin for him and Ms Zaccara, why did he leave the bitcoin that was purchased with the \$700 in the CoinJar account, rather than transferring it to his personal wallet. He gave evidence the personal wallet was an app that sat on his phone and he did not want to be carrying around that much bitcoin. He said he kept small amounts of bitcoin in his personal wallet for day-to-day spending. If he lost his phone or lost his keys then he would lose access to the bitcoin, so he felt it safer to have it in the exchange account. Mr Munneke agreed it was possible that he had a key that was stored outside of his phone. It was suggested to him that losing his phone did not mean he was losing the bitcoin. He said it could and he did not recall exactly how he was managing the private keys. It was suggested all he needed to do was store a key separately and he would be able to go back in and access his personal bitcoin wallet. He agreed that in February 2014 he knew that he could back up his key, re-create and re-import the wallet.

322 Mr Munneke then gave evidence about stories in the media about people losing their phone and losing bitcoin that they had mined. He agreed that if all he was looking to do was avoid the loss of his phone, which would then amount to a loss of \$700 worth of bitcoin, there were easy ways with his skills to ensure that he could access the bitcoin wallet despite the loss of the phone. Mr Munneke maintained he did have genuine concerns, as at 25 February 2014, about losing his phone and therefore losing \$700 of bitcoin. He said that he was not treating the \$700 of bitcoin as a static asset, it was an investment asset that was going to increase in value. He said he trusted the CoinJar account to be a secure holding in the same way he might trust a bank to hold his cash.

323 Mr Munneke denied that the reason he did not transfer the \$700 of bitcoin out to his personal bitcoin wallet was because he knew and intended that \$700 of company money was to acquire company bitcoin. It was put to him it was because he was trading in a software business where bitcoin was relevantly appropriate currency for dealings in his business. He said:

We never bought any bitcoin. Ex NF the company never bought anything with bitcoin. So it had no need to hold bitcoin.

324 Mr Munneke was asked about publishing the account numbers for the CoinJar account on his Keybase account, "Nextalias". Mr Munneke described Keybase as an app where "you put a whole lot of verifying attributes". Mr Munneke said he provided his bitcoin address as personally identifying information. It was suggested to Mr Munneke that it was open to him to put his personal bitcoin address for his 1K2Sd wallet on his Keybase account if he was intending to receive bitcoin for some sort of personal purpose. Mr Munneke said

that he intended CoinJar to be his personal account, so it made full sense to use the CoinJar receipt address as his personal payment address.

325 It was suggested to Mr Munneke that when the reason for the creation of the CoinJar account was to receive bitcoin from members of the public for the provision of services, it would be the inevitable thing to do for Ex NF, to publish the CoinJar account to which people could pay Ex NF. Mr Munneke said he did not anticipate people would actually pay them in bitcoin. He said if he had, he would have used a shared email account. He said the way it was set up was clearly linked to him, not to a business facility.

326 It was put to Mr Munneke again that the whole reason for creating the CoinJar account, and linking it to Ex NF's bank account, was because Ex NF wanted to promote itself as trading in bitcoin. He said he wanted to make sure that if someone did approach Ex NF to pay in bitcoin, they had a way of transferring it. He gave an analogy.

If someone said, "We want to put you in the Amish registry and they're going to pay you in apples", I would have talked to Sidewood Cider and said, "Hey, if someone paid us in apples, how much would you give us for an apple".

327 Mr Munneke said when he held larger amounts of cryptocurrency or cryptocurrency that wasn't held within an exchange, he would write down the security key or pass phrase and keep that privately. He said he did not write down the pass phrase for the 1K2Sd account because the value of cryptocurrency in that account was not worthwhile. It was put to Mr Munneke that writing down the pass phrase for the \$700 of bitcoin in the 1K2Sd account would have been a ready way of ensuring that he could store that bitcoin if he truly believed that it was personal bitcoin rather than Ex NF's property. Mr Munneke said as he truly believed the CoinJar account was a personal account, he had no reason to move the \$700 out of that account.

328 Mr Munneke said he never used the CoinJar account to deal in company cryptocurrency. He explained how he came to purchase ethereum for Meeco. He said Meeco required bitcoin to acquire ethereum. He told Ms Dow he had some bitcoin and Ms Dow said, "Could you go ahead and do it?". Mr Munneke said this was time sensitive because it was in the pre-sale and every day the amount that could be bought decreased, so he acted quickly with the asset that he had available. He said the purchase of ethereum for Meeco was a company transaction that he actioned with his personal bitcoin. He said he regarded the bitcoin as within his control and it was a joint asset of his and Ms Zaccara.

329 Mr Munneke was then questioned about his evidence that he believed the cryptocurrency was an asset of the ZALD Trust. He said that he had purchased the bitcoin as a family investment and it was his intention for it to be an asset of the ZALD Trust. He agreed that someone had suggested to him, in the course of the proceedings, that that might be an appropriate way of characterising it. He

agreed that neither he or Ms Zaccara, nor the ZALD Trust, paid CGT when the ethereum was sold in 2018.

330 Mr Munneke was asked whether if he thought the cryptocurrency was his, did he think he had to pay CGT on the ethereum when it was sold in 2018. He said it crossed his mind that it would have to be worked out. He said that he and Ms Zaccara had a discussion in 2018 that there would be CGT on the sale of the ethereum. He said he expected there would be capital gains implications. He said he did not think he would be personally up for the tax. It was put to him he knew that because it was a company asset. He denied that and said it was because it was a trust asset and also because it was a conversion of an investment. He denied that his evidence on this topic was a deliberate falsehood and said at the time of the transaction he had started to consider and work out how capital gains might be calculated for the purposes of lodging a personal return.

331 Mr Munneke was asked why he would do so when he had not lodged a return for 30 years or so. He said up until that point, his tax position would have been very simple. He said the sale of ethereum seemed like a transaction that might change his tax position. He was asked why he did not carry through with lodging his personal return after 2018. He said because of the hurdle of “How do I catch up with my personal tax?” and the purchase of the property was Ms Zaccara’s decision and if there was any CGT, she would have to deal with it. He denied that that evidence was also deliberately false.

332 Mr Munneke was taken to his statement where he said he was conscious at February 2014 and all times thereafter that Ex NF would be recompensed for the use of the cash in its accounts to acquire the bitcoin. He was asked how that evidence sat with the evidence that he gave in the s 597 examination that he did not recall whether Ex NF was loaning him money, and that he did not know whether it was gifting him money. He said he was not sure what was happening, his memory of those events was somewhat fuzzy. He had thought that he had transacted those transactions with his own credit card, so at the time of the s 597 examination he was unsure about what was happening.

333 Mr Munneke was asked how he could reconcile his evidence in 2021 that he had no recollection of Ex NF ever loaning him money with the evidence of his statement. He said in preparing his statement he guessed that he had the opportunity to go back and recompose himself whereas in the s 597 examination he was thrown and shown a lot of things, and he started to doubt his knowledge and understanding of the situation. It was put to him that his evidence in his statement about recompensing Ex NF was simply made up. Mr Munneke said he did consider Ex NF money very separate to his own and he denied that his evidence on this topic was deliberately false.

334 Mr Munneke said he did not recall telling Ms Zaccara after the original acquisition of bitcoin that she needed to record \$1,000 against a loan account. It was put to him that if he had the state of mind he described in his statement, it

would follow that he would have to say to Ms Zacarra that it had to be charged to somebody's loan account. He agreed and also agreed that he could not have the state of mind that it would be offset against expenses without it being brought to account in Ex NF's books.

335 Mr Munneke said he considered that he personally purchased ethereum for Meeco, not Ex NF. He said he continued to hold the private key and then invoiced it from Ex NF to Meeco.

336 Mr Munneke was questioned about the August 2014 CoinJar statement. Mr Munneke accepted that there two transactions within the CoinJar account that represented the receipt of cash: one of \$650 on 7 August and one of \$1,400 on 8 August. He accepted these transactions were for the purchase of bitcoin. Mr Munneke accepted these transactions were after the existing balance of the CoinJar account on 5 August had been deployed in the purchase of ethereum for Meeco. It was put to Mr Munneke that the statements show that on 6 August almost all of the bitcoin, 1.0152 of bitcoin, in the CoinJar account was used to purchase ethereum for Meeco. Mr Munneke accepted over the next couple of days he purchased additional bitcoin comprising \$650 worth of bitcoin on 8 August and \$1,400 worth of bitcoin between 15 to 19 August 2014.

337 Mr Munneke was questioned about the claim for GST in relation to the cryptocurrency purchase. He was asked whether he agreed that the purchase of the bitcoin on 6 and 7 August 2014 in the CoinJar account was treated by Ex NF as a company expense that entitled it to a GST refund.<sup>15</sup> Mr Munneke said he agreed that appears to be the way it was reported. It was put to Mr Munneke that this was because the purchase of bitcoin was, in fact, a company transaction. Mr Munneke said he thinks it was because the books were produced in a hurry and they did not go through every line item. It was put to him that he knew that when there was a claim for money back from the ATO, there needs to be a proper basis for it. Mr Munneke said the accountant attempted to do that, but they were under pressure to get the statements in and they were done in a hurry with the understanding they could be revisited. He said the accountant should have worked more closely with them to characterise the entry. He agreed that he never went back and recalculated it.

338 Mr Munneke was then questioned about the hackathon in July 2018 promoted by Meeco and Ex NF ("Hackathon"). He said the Hackathon was not particularly regarding the use of ethereum, it was to do with programming and to bring together programmers from Ex NF and Meeco to investigate and evaluate four different blockchains. It was put to him that he was trying to promote Ex NF as being a leading authority in this style of smart contract development. He said Meeco initiated and drove that Hackathon and Ex NF, being the primary development team, was participating in it. It was put to him that it was more than that, it was a way of promoting Ex NF's business. He said it became a way to show that Ex NF

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<sup>15</sup> See table in [234] above for dates and details of the cryptocurrency transactions.

had done some blockchain work. Mr Munneke was taken to the press release written by Ms Zaccara on behalf of Ex NF promoting Ex NF's role in the Hackathon. It was suggested to him that the essence of it was that Ex NF was promoting itself as an expert in emerging technologies such as the ethereum blockchain. It was put to him that Ex NF was putting out to the market that "we are trying to learn about this" "we are a company that plays an important role in this sphere of the market". He said what they were doing was putting themselves forward as embracing emerging technologies. Mr Munneke disagreed that the need for holding ethereum was an important part of being able to participate in the ethereum blockchain. He said not a single piece of ethereum was used in the Hackathon.

339 Mr Munneke was questioned about the email from him to Mr Richards dated 26 January 2018 where he told Mr Richards that he had bought ethereum at the presale in mid-2014 to use it and "never expected it to be an investment, just thought it was a cheaper way to get gas for development". It was put to him that that was a true statement. Mr Munneke said it was true for Meeco. It was put to him that he was not dealing with Meeco's component, he was dealing with Mr Richards in relation to the ethereum that had been retained by Ex NF. He said he had just referred in the email how on behalf of Meeco, or with Meeco, he had spoken to Vitalik and that he was trying to get some kudos for having spoken directly with Vitalik. He denied that he was referring to the ethereum that he had acquired for Ex NF in 2014 when he made the statement that he never expected the purchase of ethereum to be an investment.

340 Mr Munneke said he recalled the conversation regarding whether he should buy ethereum with Ms Zaccara and it was on that speculative investment given that they had just gone through the hype of bitcoin in 2014. Mr Munneke denied that evidence was deliberately false. It was put to him that when he wrote the email to Mr Richards, he was writing to him describing the good fortune that Ex NF had by acquiring ethereum to use in its business and it had escalated in value. Mr Munneke said the email was about trying to get kudos from Meeco's perspective. He denied that Ex NF ever acquired ethereum. He agreed Ex NF's money was used to acquire bitcoin and he agreed that that bitcoin was used to convert into ethereum. Mr Munneke agreed that when he gave evidence that Ex NF's money was not used to purchase ethereum, what he was saying was that it was not directly used to purchase ethereum because bitcoin was bought as an intermediate part of the exchange. It was put to Mr Munneke that this email to Mr Richards related to the transaction leading up to the purchase of Ward Street and it did not involve the sale of Meeco's ethereum. Mr Munneke accepted that there was no involvement of Meeco's ethereum in the transaction resulting in the money that was used to purchase Ward Street.

341 It was suggested to Mr Munneke that the transaction involving the sale of the ethereum in order to acquire Ward Street was again claimed by Ex NF as part of its GST reporting to the ATO. Mr Munneke said the books were prepared in error.

342 It was put to Mr Munneke that by the time they came to acquire Ward Street, he had no intention of using the cryptocurrency then held towards payment of Ex NF's tax liabilities. Mr Munneke said he knew it was an option, it was a source of investment if they required. He said he did not know that Ex NF owed, by the time of the Ward Street acquisition, well in excess of \$1 million in tax liabilities. It was put to Mr Munneke that at the time Ward Street was purchased, Ex NF was suffering very material financial difficulties, and he did not turn his mind to Ex NF's ability to be able to pay its tax liabilities that had crystallised by January 2018. Mr Munneke said he could not recall.

343 He was taken to the email he sent on 9 January 2018 to Shannon Curtis of Caleb & Brown ("Mr Curtis") where he asked, "Wondering what my tax implications are (especially given the reason to cash out is to pay a company tax bill)". Mr Munneke was asked whether it was true that he was cashing out the ethereum to pay a company tax bill. He said, "No", he wanted to know what the tax implications were. He was asked why he said something to Mr Curtis that he regarded as untrue. He said he wanted to know what the implications were if it was applied for that purpose, both for himself and he recalled Meeco were talking about the OTC process at the time. He said he wanted to know if the cash out was required for investment "Like, if I had to invest in to pay off the tax bill, what were the implications". He was again asked why he asked about the tax implications in a context of a reason for sale of ethereum being to pay a company tax bill if that was untrue. He said it was not untrue, he wanted to know what the implications were if it was used towards that means. He asserted the ethereum had been bought "prior to the definition of crypto in the tax system". He said he wanted to know if the additional units of ethereum were cashed, what the tax implications would be.

344 It was put to Mr Munneke that when Ward Street was bought, he knew full well that he was placing Ex NF's assets beyond the reach of the current liability to the ATO. He said it did not even enter his mind because he did not consider the assets to be company assets at all. Mr Munneke denied that the evidence that he gave about him buying ethereum as some sort of investment based on some communication with Ms Zaccara was deliberately untrue.

#### *Mr Munneke's re-examination*

345 In re-examination, Mr Munneke was shown documents relating to bitcoin addresses that Mr Munneke had not raised in his evidence. One of the bitcoin addresses was described as "1Nfaze". Mr Munneke explained that this was a "vanity address" that was generated for Ex NF to publish. He explained that he instructed the computer to generate an address with NextFaze within it, "so it was recognisable and branding for the company". He said the company purpose was to create a receipt address that could be published on the Ex NF website. However, he said the "1Nfaze" address was never used for a company purpose.

**Linda Zaccara and the respondent companies' case*****Ms Zaccara's evidence****Ms Zaccara's s 597 examination*

346 Ms Zaccara said that she became the chief operating officer of Ex NF. She said in that role she reconciled invoices but did not issue invoices and was responsible for paying the bills of Ex NF. Originally, Ex NF used the MYOB accounting system. She agreed that it was fair to say that the financial records of Ex NF were not in a great state for many years. When it was suggested to her that that was connected with the failure to file BAS, she said that Ex NF was busy, it was growing so quickly, it was not a mess, and she put it down to a failure of proper attendance to that aspect of the business.

347 It was put to Ms Zaccara that Ex NF got significantly behind in its tax filings. She said the tax filings started to fall behind in 2016.

348 She was asked why the BAS for September 2013 was not filed for a number of years. She said she obviously could not cope; she had another business going that she incorporated in 2012 with another person. She said she considered it was the director's responsibility to do something about that. She said that whilst she was given the task of attending to a lot of activities related to the tax affairs of Ex NF, Mr Munneke had his finger in everything. She said Mr Munneke signed off on the BAS and he also met with the accountant.

349 Ms Zaccara said when Ex NF changed accountants from BDO to Rowe Partners in 2017 they moved to the Xero accounting system. She agreed that in 2017 the ATO was making contact with Ex NF about missed filings and remittances and it conducted an audit. She agreed that Rowe Partners were brought in to try and assist in dealing with the ATO. Ms Zaccara agreed she spent a lot of time in 2017 on the tax issue, but said she should have spent more time. She was asked, prior to the tax filings that Rowe Partners assisted Ex NF to make, did Ex NF know the amount of tax outstanding at any point in time. Ms Zaccara said she did not know the actual figure and that the accountants had to really do a lot in a rush. It was suggested to her that not knowing the amount of tax outstanding at any point in time led to the position that she did not know the financial position of Ex NF prior to the filing of tax returns. Ms Zaccara said she felt that Ex NF was doing well, there was a significant amount of money in the bank, and there was lots of billable work.

350 Ms Zaccara was asked whether the 2015 BAS were filed significantly late. She said she did not really know, she could not give a definitive answer. It was then put to her that if Ex NF was not filing its BAS in 2015 until Rowe Partners helped prepare the accounts in late 2017, whether she accepted that she would not have known the tax position in 2015. She disagreed, saying BAS returns were submitted to the ATO because Ex NF had present up-to-date BAS when it was trying to get a commercial loan in late 2015. She then agreed that she did not have an accurate recollection of when specific BAS were filed. Ms Zaccara said other

than the time she spent on the tax affairs in 2017, more time should have been allocated to tax affairs prior to that time but she could not cope with the amount of work and that is why it was not attended to.

351 It was put to Ms Zaccara that if Ex NF had not complied with its tax filings in 2015, she could not be confident about the financial position of Ex NF at any point in that year. She repeated that she did feel confident as there was money in the bank, billable work and everyone was employed. She said she knew they were late with their filings, but they were late because they were busy and did not have the right resources.

352 Ms Zaccara agreed that prior to the six weeks of work in 2017 with Rowe Partners to get the tax filings up to date, Ex NF was unable to generate and explain its true and accurate financial position. It was put to her that Ex NF could not have produced true and fair financial statements prior to this extensive six weeks of accounting work. She said she thinks it could have produced something very close, just in terms of money coming in and going out.

353 Ms Zaccara was taken to an email from Nathan Thiele of Rowe Partners (“Mr Thiele”) dated 21 August 2017 saying “FYI, we have had to lodge the June 2015 BAS for Next Phase [sic] today as the ATO have advised they will soon be forced to issue notices”. She was asked whether she accepted that by, at least 21 August 2017, she had not provided the information that Mr Thiele needed to achieve compliance. She said that was possibly correct. She was taken to another email from Mr Thiele dated 7 November 2017 referring to an ATO audit. Ms Zaccara accepted that Ex NF was so late with its filings that the ATO was conducting an audit.

354 It was suggested to her that Mr Munneke was almost unaware of the tax issues. She said she would not agree with that as she was keeping him informed on a daily basis.

355 Ms Zaccara was asked if Ex NF paid dividends to her at any point in time. She said not officially. She said when the money came out of the ANZ account to purchase O’Connell Street, the money was passed over or given to her by Ex NF, via the director, to facilitate the 28 O’Connell Trust purchasing the building. She said:

Now, whether that – we didn’t get advice about how that should be done. So whether that is – I mean, when the accountants came after the fact – and that was explained what was done, they said, “Well, let’s do it as an L7 loan”.

356 She was asked whether she was unclear about the character of the \$1 million transfer from Ex NF to her in December 2015. She said it was not transferred to her; it was to a trust she controlled. She said it was envisaged as some sort of dividend or gift to her as shareholder. She was asked whether she was unsure if it was dividend or a gift and she said they were hoping the experts could sort it out. She said it was discussed as a dividend, but it was not decided what it was. It was

put to her that she wanted to achieve the result of purchasing the property in the name of the trust and she was unconcerned at that point with the actual character of the transaction. She said:

That's right. I wasn't too concerned and nor was [Mr Munneke] about the, you know, how that transaction was going to be viewed or accounted for. It was just an advantageous situation for everyone.

357 Ms Zaccara said O'Connell Street was acquired because there was an excessive amount of money viewed as profit in the Ex NF account. She said Ex NF's former accountants, BDO, said to both her and Mr Munneke, "Look, it's not a good idea to have a lot of money just sitting around in a bank. Do something with it". She said this was also around the time they were looking for accommodation. She explained that she considered the money in the bank as profit as the money had just started to collate. She was asked "Did BDO give advice about what ought to happen with the moneys in the bank account". She answered:

No. We had perceived that opinion from our accountant many months before because the money had been collated and they had been doing all of the financials.

358 Ms Zaccara was asked why having the money in the bank was not a good idea. She said:

... it was because it's not a good idea for any company to hold large amounts of money because if things go wrong then a liquidator comes in and appropriates it.

It was put to her that things only go wrong if debts are not paid. She agreed and said they did not think things would ever go wrong.

359 When asked whether she or Mr Munneke were seeking asset protection advice from BDO at that time, she said:

No. We had received that opinion. It wasn't in writing. It wasn't anything formal. There was no sort of structure or other advice around it. Then, there was a problem with BDO. We weren't really engaging BDO anymore and we didn't engage the new accountants in 2017. So we were in a position where we were having no formal advice of any kind.

360 Ms Zaccara denied the money in the bank was transferred away so that any creditors of Ex NF could not have access to it, and said it was appropriated for the benefit of Ex NF. She said asset protection was a minor reason, but the main reason was Ex NF needed accommodation. She said the location of O'Connell Street was "fabulous" and she said putting it in a trust was a way to protect the asset. She was asked, "protect it from whom?". She said it was what she had:

... been advised from accountants and then lawyers practically throughout the whole period that I have been consulting accountants and lawyers. They've always told me the same thing. Buy property, Linda. Put it under a trust. Protect it.

361 She was asked whether she was aware, at the time, they were using Ex NF's money to purchase a property and put it in trust that Ex NF owed nearly \$1 million in tax. She said:

That's not right. That is incorrect. I'm sorry, and we are having forensics on that as well, but I totally disagree with that statement and it's very unfair.

362 It was put to Ms Zaccara that one month after the acquisition of O'Connell Street she was in a bit of a panic about the operational funds left in Ex NF. She said the only thing that was of concern was the \$450,000 that was to come from Guvera which was going to pay off the ATO debt that was remaining. She was asked whether she told Guvera a month before the acquisition of O'Connell Street that they had two weeks of operational funds left. She said, rightly or wrongly, she says things like that to clients to motivate them to pay.

363 Ms Zaccara said she did not see herself as the beneficiary of the 28 O'Connell Trust. The beneficiaries were her children. She was asked who organised the trust to be established and she said she did all of the leg work as she usually did. Mr Munneke was informed and consented. She said she dealt with ANZ to obtain the loan because Mr Munneke was more than busy. She said it saved a lot of time and she was good at it, so she negotiated with the bank and Mr Munneke signed off on it.

364 She was asked what benefit Ex NF got out of making itself liable for a \$740,000 loan and paying \$1 million to be put in someone else's name. She said O'Connell Street would be a permanent home where Ex NF could "hunker down". She said there was not a lease between the 28 O'Connell Trust and Ex NF. She said no-one asked for a lease, they thought they would produce one at some point but no-one asked, so they just carried on their busy lives and tried to get on with things that were at that time more important. When it was put to Ms Zaccara that a lot of things she spoke about being the benefit of the purchase of O'Connell Street were personal benefits, not benefits to Ex NF, she said:

You cannot divorce the personal from the business. This was a family business. We were married. ... The personal and ... the business were very much combined in this family business. So personal considerations were extremely important. Extremely important.

365 Ms Zaccara was asked how the withdrawal of \$1 million from the ANZ account and the \$740,000 ANZ loan and the acquisition of the property were recorded in the financial books of Ex NF. She said she knew it had been recorded as an L7 loan by Rowe Partners. She acknowledged it was not recorded prior to the engagement of Rowe Partners as Ex NF was not keeping books. She said they were "just doing payroll out of the accounting system, paying bills, receiving income. That is why we got the accountants".

366 It was then put to Ms Zaccara that she had given an answer earlier in the s 597 examination where she asserted that Ex NF was keeping books which were reasonably accurate, and it could produce financial statements which came close

to being true and fair. Ms Zaccara said they had a system that was recording money coming in, “that sort of thing”, but they could not produce a balance sheet. She then said that the financial records of Ex NF were formally done by Rowe Partners in 2017. She said that the O’Connell Street transaction was not recorded in any records of Ex NF prior to Rowe Partners involvement other than the bank accounts.

367 It was put to Ms Zaccara that in the 30 June 2016 accounts prepared by Rowe Partners there was an entry in the non-current assets of a “Building Loan – 28 O’Connell Trust” of \$1.025 million. She was asked whether she provided instructions to the accountants to classify that withdrawal as a loan. She said it was something they did of their own volition. She agreed the accountants had treated money withdrawn from Ex NF as a loan owed to it by the 28 O’Connell Trust and she agreed there was no loan actually entered into at the time of the transaction or subsequently. She said that she did not consider it a loan and it was pointed out to her there was no reference to the ANZ loan that Ex NF was liable for in the balance sheet. When it was put to her that one would expect to see that in the balance sheet, she said, “I don’t know”.

368 Ms Zaccara was asked whether the accountants knew about Ex NF taking out the \$740,000 loan from ANZ. She said the accountants knew everything. She was asked how the accountants knew what amounts for tax to put in the financial statements. She said she did not know and that would be a question for them. It was put to her that the financial documents prepared by the accountants showed that Ex NF owed \$775,000 in tax liabilities as at 30 June 2016. She understood that the position of Ex NF was different a year before because there were a lot of things that happened in 2016. Guvera went into administration and there were some bad decisions made by Mr Munneke because he did not decrease the workforce. She said, “who could have foreseen the figures there in 2016?”.

369 It was put to Ms Zaccara that six months prior it had been thought appropriate to take \$1 million out of Ex NF and buy a property and put it into a trust with \$775,000 tax liabilities owing six months later. She said that was not apparent at the time O’Connell Street was purchased. She said things changed dramatically in six months. She was then asked whether she realised Ex NF was subject to a half a million dollar tax liability as at June 2015. She said “No, not at the time”. She was asked what steps she took to ascertain how much Ex NF owed in tax prior to deciding to purchase O’Connell Street with Mr Munneke. She said the BAS were produced to the bank and there was an audit that was completed a little bit before the end of 2015. She then queried whether it was her responsibility to find out how much tax was owed. She said she saw four notices from the ATO about tax that was payable which were paid. She was reminded that only one quarter in 2015 was the subject of a BAS filing in 2015. The other three quarters were filed in 2017. She said they just paid what the ATO said they owed.

370 Ms Zaccara was then asked about the Ward Street purchase. She said that she paid for the property by converting her ethereum. When asked to explain why it was her cryptocurrency, she replied, “[b]ecause I invested in Bitcoin when

nobody even knew what it was, and the Bitcoin bought the Ethereum”. She said that both she and Mr Munneke were interested in bitcoin and that Mr Munneke did the transactions for her, including the initial purchase in 2012. Ms Zaccara stated that she knew the purchase occurred in 2012 because “that’s when [she] gave the money to [Mr Munneke] to buy it”. She described depositing cash and making a bank transfer into his personal account. She said she gave him several tens of thousands of dollars.<sup>16</sup>

371 Ms Zaccara estimated that Mr Munneke purchased approximately three bitcoins for her. She said that she understood that all of this bitcoin was converted to ethereum in around 2014. She maintained that she instructed Mr Munneke to make these transactions because she became aware of the trends, and she believed that ethereum would boom in the future. She said that she believed all of the ethereum was converted to cash to fund the Ward Street purchase. Ms Zaccara was asked whether she and Mr Munneke discussed how much ethereum he should sell. She said that she just told him to sell the ethereum so that they could purchase Ward Street.

372 Ms Zaccara was asked whether she owned any ethereum at the time of the s 597 examination. She said, “No. Not me, no”. She said that to her knowledge, no one in her family owned ethereum, including Mr Munneke.

373 Ms Zaccara said that she never saw any evidence that the bitcoin and ethereum had been acquired and agreed that the sole source of her information about the cryptocurrency was what Mr Munneke had said to her and the credits to the bank account in January 2018. When it was put to her that her assertion of ownership of the ethereum consequently was based only on this information, she replied, “Well, it’s my money. Yes”. Ms Zaccara agreed that she could not point to anything else to show that she owned the ethereum that was sold in 2018.

374 Ms Zaccara rejected the suggestion that the bitcoin was purchased with monies withdrawn from Ex NF’s bank account, saying that there “was no cryptocurrency that was purchased by [Ex NF]”. She said that Mr Munneke would not have done that, and that she had looked through the bank statements over the years and nothing stood out. It was put to her again that the bitcoin used to acquire the ethereum was purchased with Ex NF’s money. She said:

I wouldn’t agree that would be the case. I would – I would probably have a heart attack if that is true. [Mr Munneke] would have to account for that but the bitcoin that was converted to Ethereum was money that I paid to [Mr Munneke].

375 It was suggested to Ms Zaccara Ex NF’s money had been used to purchase 1.477 bitcoins in February 2014, of which 1.048 bitcoins were converted into ethereum in August 2014. Ms Zaccara maintained that she could not accept that

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<sup>16</sup> Ms Zaccara later said this should read “trails” not “tens”.

the ethereum had been acquired with bitcoin that had been purchased with Ex NF's money in 2014 because she and Mr Munneke had bitcoin before 2014.

376 Ms Zaccara denied being aware that Mr Munneke still held 500 units of ethereum. She said that she was unaware that Mr Munneke said that he held it on her behalf. When asked whether she paid CGT on the realisation of the ethereum in 2018, she said that the taxation had not been sorted out and she had received advice from Mr Vijayadass that the capital gain could be deferred because she was converting an investment "into another property".

377 Ms Zaccara was then asked about the South Terrace properties transactions and the monies drawn from Ex NF's account. She said the money was repaid to Ex NF. She said she effectively worked for Ex NF for two years without remuneration. She was taken to the balance sheets for 2014 and the figure of a "Loan – Associated Trusts" in the balance sheet of \$370,000. She said there was no benefit to Ex NF in using \$370,000 of its money to buy the two properties that were put into her company's name and it did not cause any harm either.

*Ms Zaccara's statements*

378 In her first statement dated 28 March 2024, Ms Zaccara said she is the sole director, secretary, and shareholder of 106 Ward Street Pty Ltd which acts trustee of the 106 Ward Trust. 106 Ward Street Pty Ltd is the registered proprietor of Ward Street. Ms Zaccara is also the sole director, secretary, and shareholder of 28 O'Connell Pty Ltd. She said that 28 O'Connell Pty Ltd acts as trustee of the 28 O'Connell Trust. She is the appointor named in the deed establishing the 28 O'Connell Trust and a specified beneficiary. She explained that on 1 July 2019 by deed 28 O'Connell Pty Ltd replaced Mr Munneke as a trustee of 28 O'Connell Trust and 28 O'Connell Pty Ltd owns the legal title to the real property of O'Connell Street.

379 Ms Zaccara gave evidence that her mother has been a strong influence in how she views finances and wealth. She stated that she finds the most difficult stress to bear is when her financial stability is threatened. She believes it is vital for a woman to be financially self-sufficient and stable. She said this could explain while during her marriage to Mr Munneke, they remained financially independent from each other. She explained how she assisted her mother in the boarding house business that her mother started and took over the business in 2001. She said she attends that business two days a week. She detailed that she owns property from which the boarding house business is conducted and explained that she deals with issues arising from that business on a daily basis including attending to calls in the middle of the night. She said the boarding house business houses socially disenfranchised men.

380 Ms Zaccara explained that in 1986 she completed a year-long diploma course in beauty therapy, completed a Bachelor of Arts degree majoring in economic history and politics in 1993, and completed an Honours degree by thesis in 1996.

381 She detailed her developing interest while studying in the new technologies that were emerging in cyberspace. She explained that she came to believe that cyberspace was a new medium that was opening up in culture and society and had the potential to profoundly transform it. She said that she has maintained her interest in cyberspace, which led her to study a graduate diploma in computer and information science at the University of South Australia where she met Mr Munneke who was studying a post-graduate degree in computer science.

382 Ms Zaccara said that in November 2008 she established the ZALD Trust. She described that in 2012, with a partner, she established a company, City Sous Chef Pty Ltd, with the intention of selling pre-packaged ingredients, recipes, and instructions for meals. She was a director of that company for two years but in the end the business did not fully develop.

383 She explained that following the liquidation of 2Moro in 2012, she was determined to invest in a business that Mr Munneke would run. She said Mr Munneke is a highly skilled software developer and has experience in leadership and management roles. Ms Zaccara said that the mobile app development industry was taking off and she expected that a business in that industry would be successful and profitable.

384 She and Mr Munneke established Ex NF which was incorporated on 15 February 2012.

385 Ms Zaccara explained that she bought the WIP and equipment of 2Moro from the liquidator and paid other expenses from her own funds, including securing office space. She also paid out 10 weeks of pay to the six employees of 2Moro, who moved to Ex NF to start up the new business. She said those payments totalled \$53,000.

386 She said in 2014/2015, the business of Ex NF exploded because under Mr Munneke's direction it came to offer "back-end" app development capacity. She explained that Ex NF moved into accommodation at 112 Ward Street, and she conducted her business interests from that premises as well. She established the company Linda Zaccara Pty Ltd to be the management company to manage the business affairs of her boarding house business and other properties she owned. She explained that \$30,000 was used to pay the upfront rent for 112 Ward Street, taken from her home mortgage. She said she agreed with Mr Munneke that she would invoice Ex NF for one-half of the rent charged to Linda Zaccara Pty Ltd. Ex NF did not have any formal subtenancy with her and, for the first year, it did not pay any rent to her and only paid outgoings. She stated that as far as she is aware, the first year's rent was never charged to any loan account maintained by her or Linda Zaccara Pty Ltd.

387 Ms Zaccara described her role in Ex NF as focussing on general housekeeping, morale boosting, new technology emerging in culture and society. She was responsible for paying bills and she was the liaison between Mr Munneke

and lawyers, accountants, ATO, Work SA, Revenue SA, and other professionals. She undertook the tasks of pay runs, calculating superannuation and end of employment obligations and entering details of the employees into the accounting system. She did not do any client invoicing, paying superannuation or ATO obligations, or making significant purchases without Mr Munneke's approval as director, and she did not sign tax returns.

388 Ms Zaccara gave evidence that Mr Munneke was involved in and oversaw all the affairs of Ex NF including, but not limited to, managing the provision of services and billing clients, accounting and taxation matters, reviewing the bank accounts to assess its cashflow position, and reviewing the Harvest invoicing and debtor control system of Ex NF. She said she also had some involvement in managing debtors and reviewing the bank position. She said under the direction of Mr Munneke, Ex NF engaged external accountants to attend to financial, superannuation, and taxation affairs, including the lodgement of BAS, superannuation returns, and tax returns with the ATO. She said BDO were the accountants from 2012 until 2017, thereafter Rowe Partners took over.

389 Ms Zaccara said she had an active interest in cryptocurrency and had been researching and collecting articles to inform herself about digital currency since it launched in about 2009. She said in or around 2010 she became aware of and read the bitcoin white paper.

390 She gave evidence that she began to talk with Mr Munneke about bitcoin around 2010/2011 as she was interested in purchasing supplements on Silk Road. Mr Zaccara said she and Mr Munneke had many conversations about cryptocurrency and her interest in it. She said she came to view bitcoin as a commodity with value itself rather than just an alternative method of payment and their conversations about the nature of bitcoin continued until they finally purchased it.

391 Ms Zaccara said she had asked Mr Munneke to purchase cryptocurrency for her on many occasions prior to the establishment of Ex NF. She recalled first asking Mr Munneke to purchase cryptocurrency sometime in 2011 and she recalled being aware that Mr Munneke had purchased some bitcoin prior to a family trip to America in July 2014. She also remembered Mr Munneke giving a fraction of a coin to Ric Santos as a wedding present in the early part of 2014. She said she could specifically recall the circumstances because she had complained to Mr Munneke that she did not want to give bitcoin away.

392 Ms Zaccara said she became aware prior to their family holiday to America that a new cryptocurrency, ethereum, was to be released. She said she had many conversations about ethereum with Mr Munneke before the holiday. She had also learnt Mr Munneke was talking about ethereum with Ms Dow and he had told her that Ms Dow had an interest in ethereum either for herself or Meeco.

393 During the family holiday, Mr Munneke had said to Ms Zaccara that Ms Dow had asked him to get some ethereum for her. When he told her that, she said to him she wanted some too. Ms Zaccara said she also took Mr Munneke to the bitcoin office in New York during the holiday and spoke with a bitcoin representative about bitcoin as an investment.

394 Ms Zaccara said she learnt about the ethereum presale and told Mr Munneke she wanted him to purchase it for her. However, she understood it could only be purchased with bitcoin and therefore there had to be a bitcoin purchase prior to purchasing ethereum. Ms Zaccara said in August 2014 she learnt that Mr Munneke had finally bought ethereum.

395 Ms Zaccara explained that since the liquidation of Ex NF she became aware that on or about 14 February 2014, the amounts of \$300 and \$700 respectively were withdrawn from the NAB account and deposited into Mr Munneke's "personal CoinJar account". She also understood that the amounts of \$650 and \$1,400 were withdrawn from the NAB account 5 August and 6 August 2014 respectively and deposited into the CoinJar account.

396 Ms Zaccara said Ex NF was not an investor in cryptocurrency or any other passive investments it was however, indebted to her for personal contributions she had made to Ex NF since its establishment on her loan account.

397 Ms Zaccara explained that as she was not aware of the withdrawals from the NAB account to buy cryptocurrency until after the liquidation, she did not turn her mind to recording the transactions in Ex NF's records as a debit to her loan account.

398 She said that it was never her intention that her personal speculative investment which Mr Munneke facilitated was in any way associated with Ex NF. She said that in none of her discussions with Mr Munneke about cryptocurrency did he suggest that the investment was being undertaken by Ex NF. Ms Zaccara explained that over the course of their relationship, she had a better personal cashflow than Mr Munneke, and over the years had provided him with a significant amount of money for his personal use. She had assumed that when Mr Munneke made investments in cryptocurrency at her request, he would fund the purchases out of his own funds.

399 In her second statement dated 8 April 2024, Ms Zaccara said that since making her first statement, she recalled reviewing Ex NF's bank statements for February and August 2014 and, around that time, noting the debits in the NAB account, being the withdrawals for the purchases of cryptocurrency in February 2014 and August 2014 and realised that they related to cryptocurrency purchases. She said as sole shareholder of Ex NF at the time, she had no difficulty with the transactions given her request to Mr Munneke to purchase cryptocurrency on her behalf. She said had she been asked at the time; she would have agreed to apply the withdrawals from the NAB account as a debit to her shareholder loan

account. She was not overly concerned with recording the transactions because of the small amount of money involved.

400 Ms Zaccara said the time of the s 597 examination in 2021 was a period of extreme stress and turmoil.

401 She recalls during the s 597 examination being surprised when told that the funds used to purchase cryptocurrency were withdrawn from the NAB account. She said she had taken additional doses of pregabalin, medication she was prescribed for chronic pain and anxiety, on the day of the examination. She said at the time of the s 597 examination, she did not recall having sighted the bank statements in 2014. Given the small amount of money withdrawn and her assumption that it would have been treated as a debit to her shareholder's loan account, she said she did not give the source of money to purchase the cryptocurrency a second thought. She said it was not until after the liquidation that she went to the trouble of having expenses paid by her for Ex NF attributed as loans made by her. She said she maintained a schedule of the receipts she kept for expenses she paid but said she never provided that schedule to BDO nor Rowe Partners to include in a loan account for her.

402 Ms Zaccara recalled being asked during the s 597 examination questions about whether she owned ethereum. She said she had not at that time turned her mind to whether there was any holding of ethereum left, as she assumed it had all been sold to purchase Ward Street.

403 Ms Zaccara gave evidence that although Ex NF accepted cryptocurrency as a form of payment, Ex NF had no other interest in cryptocurrency.

404 She said that the monies comprising the NAB account cryptocurrency withdrawals between 14 February and 8 August 2014 were withdrawn by Mr Munneke on her behalf and deposited into the CoinJar account so that he could purchase cryptocurrencies and trade in cryptocurrencies on her behalf. This included the purchase of ethereum in the pre-sale.

405 Ms Zaccara said that she was aware in the period between 14 February 2014 and 19 August 2014 that Mr Munneke was purchasing cryptocurrency, but she was not aware of the detail of the transactions. She said she was aware that Mr Munneke gave Ric Santos bitcoin as a wedding gift, and two further gifts of a fraction of bitcoin to two other individuals. She says all three wedding gifts were from her and Mr Munneke.

406 Ms Zaccara stated that the cryptocurrency purchased by Mr Munneke and which continued to be held in his name set out in her first statement was held as bare trustee for her.

407 Ms Zaccara said the cryptocurrency substantially increased in value from her initial investment of \$3,050 by virtue of the technical expertise of Mr Munneke.

408 Ms Zaccara gave evidence that when Ex NF went into liquidation on 15 May 2019, there remained in the NAB account the sum of \$168,839.63<sup>17</sup> by way of surplus proceeds from the sale of part of her cryptocurrency holdings in January 2018 as set out in her first statement. She asserted those monies are her personal property.

409 Ms Zaccara explained that BDO were the accountants for Ex NF until early 2017 and her main point of contact with BDO was Mr Vijayadass.

410 She said the three main clients of Ex NF at this time were Meeco, Guvera, and iQnet. These clients provided repeat work and revenue for Ex NF.

411 She said one of her functions was to receive and monitor the bank statements on the NAB account. She said that in about September 2015, Ex NF had \$1.4 million in the bank and in December 2015 she was also aware of the debtors outstanding and the amount of WIP not yet billed. She said to the best of her recollection, at the time of the O'Connell Street purchase, Guvera was the largest debtor. She said Guvera had the practice of running up substantial debit for work done and then paying the amount down with large amounts. She said that was the position into 2016 and that she had no qualms about Guvera's ability to pay accounts until April 2016.

412 In her first statement, Ms Zaccara said:

I can distinctly recall around this time that [Mr Vijayadass] said words to the effect that having this amount of surplus of money in the bank was not a good idea. I cannot now recall precisely the occasion when he said that although I believe to the best of my recollection it was in a face to face meeting. I cannot now recall whether [Mr Munneke] was present although I believe he may have been.

Ms Zaccara said by reference to the email from Mr Vijayadass to her dated 30 September 2015, she thinks this discussion occurred in September 2015.

413 She said she also noted in the WIP history of BDO an entry from dated 30 September 2015 referring to a telephone call between Mr Vijayadass and her in respect of:

... property [p]urchase, loan structure, acuisioon 23rustee23e [sic], lo-doc due to Linda but could use derek as 23rustee [sic] of new trust update on compliance etc

She said these documents have assisted her to recall that she was looking to purchase a property for Ex NF to use at around this time. She said the 112 Ward Street owner had informed her that 31 March 2016 was a hard lease termination date as he intended to demolish the building. She said, originally, she started looking for a rental property. However, in the middle of 2015 she was expecting to receive part of the proceeds of a sale of a family property at

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<sup>17</sup> \$121,988.92 remained in the NAB account following sale of ethereum, which sum was transferred to the NAB Maximiser account. The proceeds of the first sale of ethereum were paid into Mr Munneke's CBA account, \$100,000 was paid out as a deposit on Ward Street, leaving a surplus of \$48,850.74.

Parawae Road, Salisbury. This spurred her into considering purchasing a property to relocate Ex NF to. As that Parawae Road sale did not go through in 2015, she went back looking for suitable premises to rent.

414 She said that having had the discussion with Mr Vijayadass about Ex NF holding surplus cash, it occurred to her that she could take her money out of Ex NF and use that to buy a property for Ex NF to use. She recalled that she approached Ex NF's bank manager at NAB for a loan and the response was negative. She said the bank manager said words to the effect that Ex NF's books, accounting, and tax filings were not up to date, NAB was a conservative bank and without the filings being up to date, Ex NF could not obtain a loan.

415 Ms Zaccara said she was disappointed with NAB's attitude regarding Ex NF's accounting as it was not her perception at the time that there was any fundamental problem. She said she was reliant on BDO, which had not drawn her attention to any significant issue with Ex NF's finances and, in fact, Mr Vijayadass' "approach was to the contrary".

416 Ms Zaccara said as Ex NF had built up a large amount of cash in the bank, had significant monies owing for work it had done which it expected to collect, had projects lined up, had no long-term debt, and at that time she had every confidence in Ex NF's future success, she entered into negotiations to buy O'Connell Street. She consulted Polson Legal to assist her in establishing a new trust in which her interest in the property would be held.

417 She stated that she had further conversations with Mr Vijayadass (on dates that she cannot specifically recall) where he said words to the effect that it would be a good idea that Ex NF pay the surplus monies to her as a shareholder as a dividend or return of capital. She maintained that at no time during those discussions did Mr Vijayadass suggest that the monies would be loaned by Ex NF to her. She spoke to Mr Munneke after each discussion she had with Mr Vijayadass. She asserted that Mr Munneke was also aware that Ex NF was in a sound financial position. She had full confidence in Mr Munneke to run the business and both she and Mr Munneke accepted the advice of Mr Vijayadass.

418 Ms Zaccara stated that Mr Vijayadass assisted with the incorporation of a new entity for the purchase of the property. She said he was aware that the beneficial owner of the property was to be 28 O'Connell Trust and at the establishment of that trust Mr Vijayadass was the settlor.

419 She explained that after the rejection by NAB, she approached ANZ which made clear it would not lend to the 28 O'Connell Trust. It then became apparent to her that she could only secure the loan if it was made to Ex NF, and that Ex NF would have to then on-lend the money to 28 O'Connell Trust. She stated that ANZ was not happy that the purchaser was the trustee of a discretionary trust and would only proceed with the loan if Mr Munneke, as director of Ex NF, was the trustee and guaranteed payments to ANZ. She explained that the bank valuation came in

at \$1.15 million, which reduced the permitted borrowing component allowed by ANZ to \$740,000. She maintained that both she and Mr Munneke were aware following her discussion with Mr Vijayadass that there was sufficient cash available to pay surplus assets to her as a shareholder to facilitate the purchase of O'Connell Street. She repeated that the monies were paid out to her and applied towards the purchase of O'Connell Street as a dividend or reduction and distribution of capital to her in her capacity as sole shareholder. She said that Mr Munneke drew down the funds to settle on the purchase by obtaining a bank cheque and he did so with her agreement and authority.

420 Ms Zaccara said she agreed with Mr Munneke that the only rent payable by Ex NF for its occupation of O'Connell Street would be the instalments on the mortgage, together with outgoings such as rates and taxes. She said she considered the payment by Ex NF of mortgage repayments was concessionary and below market rent that would otherwise have been charged. She said no tenancy agreement was prepared or signed, and no rental payments were made for the period 10 December 2015 to 15 May 2019 over and above the contributions by way of mortgage instalments. Ms Zaccara said she paid approximately \$38,000 of her own money toward the refurbishment of O'Connell Street prior to Ex NF moving in in April 2016.

421 Ms Zaccara said that at a point in time after the O'Connell Street purchase, it became apparent to her and Mr Munneke that BDO had failed to attend to various tasks, including lodgement of BAS, superannuation returns, and tax returns. Thereafter, Rowe Partners were engaged. Ms Zaccara said it transpired that Rowe Partners recorded the dividend distribution to her as a loan. She maintained that she never agreed for the monies distributed to her to be treated as a loan.

422 Ms Zaccara gave evidence about her considerable property portfolio. In her second statement, she set out the valuations of her properties as close to 10 December 2015, including a number of Valuer-General valuations, together with details of any money secured against the properties.

423 She said that in relation to the Parawae Road property, she was expecting to receive \$500,000 for her share on the sale of the property. The property was sold in 2016, and she recovered a little over \$700,000. In her third statement, Ms Zaccara gave evidence that from the sale proceeds, on 28 June 2016, she deposited an amount of \$54,996.90 into Ex NF's NAB account.

424 Ms Zaccara said if she had been told in December 2015 by an accountant or lawyer that the distribution to her of the monies from Ex NF's account in December 2015 would impair the ability of Ex NF to continue to trade properly and lawfully because of a potential shortfall in available resources, she would have been prepared to commit funds to make up the shortfall out of her own assets. She said that she could have contributed hundreds of thousands of dollars by borrowing against her freehold properties or contributing an amount on account of proceeds that she expected to receive from Parawae Road. She said she only took the cash

out of Ex NF because of Mr Vijayadass' advice that Ex NF could pay her a dividend.

425 Ms Zaccara spoke about deciding to purchase Ward Street and entering into the contract on 4 January 2018. She maintained that the purchase funds came from her own personal sources, that is, from the sale of cryptocurrency. She said she told Mr Munneke that she wanted to fund the purchase from her cryptocurrency holdings, and he agreed he would sell down sufficient to allow her to complete the purchase.

426 Ms Zaccara said she consulted her solicitor, Loretta Polson ("Ms Polson"), and requested she act on the conveyance and establish a company and trust to undertake the purchase. She said the proceeds of the sale of the cryptocurrency were banked into the NAB account and the settlement monies were withdrawn shortly thereafter.

427 Again, Ms Zaccara stated that if she had been told on 31 January 2018 by an accountant or lawyer that she should assume the remaining cryptocurrency held by Mr Munneke in fact belonged to Ex NF and the payment out of Ex NF of the proceeds of the sale of cryptocurrency in January 2018 would impair the ability of Ex NF to trade continually and lawfully because of a potential shortfall in available resources, she would have been prepared to commit funds to make up the shortfall out of her own assets. She further said that if it turns out that the cryptocurrency was a company asset and not hers, then Mr Munneke had her consent and authority as a shareholder of Ex NF to distribute to her the funds which were realised from the sale of cryptocurrency and deployed in the acquisition of Ward Street.

428 Ms Zaccara said prior to the January 2018 cryptocurrency sales, she recalled Mr Munneke telling her that the exchange required the proceeds from the sale of cryptocurrency, that was received in Australian dollars, to be banked into a NAB bank account. She recalled at the time of the Ward Street acquisition, becoming anxious about the tight settlement date and the need to quickly realise the proceeds from the sale of cryptocurrency. She recalled advising Mr Munneke that because Ms Polson's trust account was a NAB bank account, paying the proceeds from the NAB account would be the fastest way to provide her with the settlement proceeds.

429 Ms Zaccara gave evidence that whether the cryptocurrency was her property or the property of Ex NF, in 2018, Mr Munneke had her agreement and approval to sell the cryptocurrency and provide the proceeds to 106 Ward Street Pty Ltd to facilitate the purchase of Ward Street as trustee for the 106 Ward Trust.

430 Ms Zaccara also referred to Mr Munneke deciding to not send invoices to Meeco in 2018 which she said led to a lack of funding for Ex NF. As at liquidation, Meeco owed Ex NF approximately \$665,000.

431 She said Real Time Data was also another major client of Ex NF from around 2017. Ex NF did nearly \$1 million of work for Real Time Data and was paid

nothing for that work. Ms Zaccara said she believes it is the failure of these two principal clients to meet their obligations to Ex NF that brought about the liquidation.

432 Ms Zaccara said she is a creditor in the Ex NF liquidation as she advanced significant monies to Ex NF from its incorporation until liquidation. She said that she has retained receipts for the purchases she made where applicable and kept a running spreadsheet. She said those payments to her total \$272,286.83 not including the amount of approximately \$53,000 that she paid to the liquidator of 2Moro and the benefit Ex NF has had of \$168,839.63 being the surplus proceeds from the sale of her cryptocurrency.

433 In her third statement dated 13 April 2024, Ms Zaccara explained that it was her typical practice to pay for work expenses in cash. If employees paid for work expenses from their own funds, she would reimburse them with cash from her personal funds and retain the receipt. She said that she retained receipts for the purchases she made on behalf of Ex NF and kept contemporaneous handwritten notes that were prepared on a monthly basis. These informal records were carried forward into a spreadsheet.

434 In her third statement, Ms Zaccara spoke about the South Terrace properties. She said on 27 November 2013, a sum of \$200,000 was loaned to her by Ex NF to acquire 20 South Terrace. Loan repayments were made to Ex NF by Mr Munneke and her not receiving remuneration for a period of two years. Additionally, she said she made a part repayment of \$58,000 into the NAB account on that same date. She said that in May 2014, she deposited an amount of \$170,000 into the NAB account and on the same day \$170,000 was withdrawn from the NAB account at her direction which was used to acquire 22 South Terrace.

435 Ms Zaccara explained that Rowe Partners prepared a Division 7A Schedule in respect of the monies withdrawn from the NAB account in 2013 and 2014 to acquire the South Terrace properties, assuming a loan amount of \$370,000. She said that the principal loan amount should have been \$142,000 because of her repayments of \$58,000 and \$170,000. She said all loan monies have been repaid in full.

*Ms Zaccara's cross-examination*

436 Ms Zaccara agreed in cross-examination that she assumed responsibility for the maintenance of the accounting functions of Ex NF and that she had principal responsibility for liaison with the accountant and with the ATO. She said that she had principal responsibility for the lodgement of the BAS, but she was delegated that job by Mr Munneke. She agreed that Mr Munneke relied on her to do the work necessary to prepare the BAS. She was asked whether he also relied on her to see that the timing of lodgements accorded with statutory obligations. Her response was that they handed that over to the accountants. She agreed that BDO would ask for certain information that they did not have access to. She was asked whether she agreed that in the period July 2013 to April 2015 no BAS were lodged.

She said that could be right and agreed it was possible that before the lodgement of BAS in April 2015 there had not been a lodgement for seven consecutive quarters. She agreed that not lodging the BAS was not an oversight and said, “It was just not having the skills and ability at the time to get those things together I suppose, and I was hoping that the accountants could help with that”.

437 She agreed that she knew in that period, July 2013 to April 2015, Ex NF was not paying GST, withholding tax, or income tax. She agreed that because there had not been payments of SGC up to April 2015, Ex NF then had to pay in excess of \$140,000 to catch up.

438 It was put to Ms Zaccara that, during the period up to the ATO audit and the catch-up payment in early 2015, she was aware that for an extended period Ex NF had not been paying the SGC entitlement of employees. She agreed but said they were not excessively behind and that she made several payments before the audit commenced. She agreed that she was responsible for the day-to-day processing of entries into Ex NF’s primary accounting records. She then said that she was not making the entries herself into the system, she was just using it for pay runs. She said that she would send material information to BDO and BDO would process the entry.

439 It was put to Ms Zaccara that leading up to 2016, BDO did not have all the information necessary to have the accounts brought up to date. She said she thought that they did. It was then put to her that if she did think they had all the information, it would have been a matter for her to request the BAS from BDO. She said it was usually BDO chasing her but there seemed to be a really large gap of not a lot of communication from around 2015.

440 It was put to Ms Zaccara that the accounting records were not sufficiently up to date in 2013 through to April 2015 to enable PAYG lodgements to be made. Ms Zaccara agreed that they were not up to date for that period and likewise for the period 2015 through to when BDO was no longer engaged by Ex NF in 2016. It was put to her that, up until the time BDO were replaced by Rowe Partners, at no stage had she been up to date in giving BDO all the information they needed to prepare accurate financial records. She maintained BDO was provided with all the information they needed to complete the returns.

441 Ms Zaccara was asked whether she agreed that up until the end of the 2015 year, at no stage, were there up-to-date financial records. She said she did the BAS in 2015. She maintained that she did look at the records; she looked at income, she looked at expenditure, she looked at GST due and she did all things to prepare the BAS in 2015. She said she did not have accounting figures to look at, but she could appreciate it from the perspective of looking at those records.

442 Ms Zaccara was asked whether she agreed that at the end of the 2016 year the September 2014 quarter BAS was outstanding. She said that she did do a BAS because ANZ required two previous BAS when they were applying for the ANZ

loan. She said she was aware that the BAS previous to those two had not been completed and she agreed there were a number that were still not completed as at the end of 2015. She agreed she was aware that left Ex NF liable to the general interest charge and penalties. She agreed that the 2014 income tax return was lodged 15 months late.

443 Ms Zaccara was taken to the 2014 financial statements and income tax return for Ex NF. She was asked whether she carefully reviewed the financial statements provided to her by Rowe Partners. She said she could not recall. She was then taken to the page of Ex NF's 2014 taxation return, which bears her signature. She was asked whether, as a public officer, she approved the taxation return to ensure it was accurate. She said she was not a public officer; she was a chief operating officer. She was pointed to the document where it says "Signature of public officer" above where she signed her name. She maintained she just signed the document and did not know what it referred to. She said she was happy to sign it because she trusted Mr McDonald, who was doing his best under the circumstances. She said she did not think she actually went through the figures herself.

444 Ms Zaccara was asked whether she signed the tax return without checking it was accurate. She said she had no reason to believe that it was not accurate. She was working with the accountants, who were trying to do things to placate the ATO, which was on their backs, so she would have just signed it.

445 Ms Zaccara was questioned about the loans made to her by Ex NF to acquire the South Terrace properties. She was asked to look at the balance sheet prepared by Rowe Partners for the year ended 30 June 2014 which recorded under current assets a "Loans – Associated Trust" in the sum of \$370,000. She agreed it was a loan owing in the consequence of a boarding house that she had in Salisbury, being funded out of Ex NF. She was asked whether, as at 20 June 2017, when she signed the tax return, she agreed that she thought that there was such a loan owing from her associated trust to Ex NF. She said:

So you've pointed out the figure and I have acknowledged the figure as I sit here, but at the time I wouldn't have acknowledged that figure. I would have just assumed the accountants had it under control.

She said she did not think she read the balance sheet before signing the tax return, nor did she think she told Mr McDonald that her trust owed \$370,000 to Ex NF. She was asked how Mr McDonald came up with the number and she said he asked her about some sums of money, and she explained they were loans to her by Ex NF and that Mr Munneke and she paid the loans off by foregoing salary for just over two years.

446 Ms Zaccara was asked whether she thought Mr McDonald made a mistake by including the loan in the accounts. She said he did not deal with it sufficiently enough and made a mistake.

447 Ms Zaccara was asked in relation to 22 South Terrace whether she specifically recalled depositing \$170,000 into the NAB account on the same day as the \$170,000 withdrawal was made. She said, “I don’t specifically remember that, but I recall having the feeling that I had done it”. She was asked again about the associated trust loan for \$370,000 and the payments she referred to at [15] and [16] of her third statement. At [15], she stated that she paid into the NAB account a part repayment of the 20 South Terrace loan of \$58,000 on 27 November 2013. It was put to her that was not true. She said she believed it was, and she said she also believed she made a deposit of \$170,000 from her personal funds in May 2014. She maintained she recalled offsetting the amount that was taken out of Ex NF’s bank account, but she was not sure whether it related to 20 South Terrace or 22 South Terrace, or both.

448 Ms Zaccara was asked to consider annexure N to her third statement, being NAB account bank statements. It was suggested to her that the \$58,000 referred to in [15] of her third statement as being a payment she made as a part payment of the loan was, in fact, a transfer out of the NAB Maximiser account into the NAB account on 27 November 2013. It was put to her that what she said in [15] of her third statement is false. She said she sees that now, but she did not see it before.

449 It was put to Ms Zaccara that the notion of having made a repayment in the nature of a part payment of the loan, as large as \$58,000, is something that she would remember. She said the reality is that all she could really remember is that she offset what was taken out and she believed that she had put it in. It was put to her that she signed her third statement on 13 April 2024 when she knew full well that she had not made a payment of \$58,000 that she claimed at [15] in the statement. She disagreed and said she believed she had.

450 Ms Zaccara was then asked about the \$170,000 deposit that she referred to at [16] of her third statement. She said she believed that amount was paid out of her personal funds into Ex NF’s bank account. It was put to her that that was false. She said, “All right. I didn’t have access to these Maximiser Account statements”. It was put to her that she did not say “There’s a possibility that I made the payment of \$170,000, but I simply can’t recall”, and instead she said she paid, by way of deposit, an amount of \$170,000 into the NAB account. She said, “Correct, and I believe that”.

451 She was taken to annexure O to her third statement and the highlighted entry of \$170,000 withdrawal on 21 May 2014 from the NAB account. She said the highlighted entry was a withdrawal from the NAB account to pay to her associated trust. She maintained that the \$170,000 credit recorded in the NAB account statement above the \$170,000 withdrawal was deposited by her into the NAB account. It was pointed out that \$170,000 was drawn out of the NAB Maximiser account on 21 May 2014 and transferred to the NAB account on the same day. She was asked whether she agreed that the \$170,000 did not come from her personal funds but out of the NAB Maximiser account. She said “yes” and maintained that she put money in to offset the loan. She maintained she deposited the amount of

\$170,000 on 21 May 2014 and said she can see that it came from the NAB Maximiser account but, strictly speaking, she said she did do the deposit. It was put to her that what she said in [15] and [16] of her third statement was false. She said she did not mean for that to happen. She agreed that her statement was false and apologised.

452 Ms Zaccara denied that she was deliberately trying to overstate any money that she says that she put into Ex NF in repayment of her loan.

453 Ms Zaccara was asked whether other deposits, including the deposits of \$300,000 and \$150,000 made into the NAB Maximiser account on 9 April 2014 and 13 June 2024, respectively, were also transfers made between the two Ex NF NAB accounts, as opposed to deposits made by her into Ex NF's banks accounts. Ms Zaccara responded, "it appears so".

454 Ms Zaccara was then taken to Ex NF's financial statements for the year ended 30 June 2016 prepared by Rowe Partners, where the loan to associated trusts was recorded as \$278,486. It was put to her that she had involvement in the preparation of the 2016 financial statements. She said she just handed everything over to the accountants. She agreed the accountants had questions relating to the 2016 account and she agreed that the accountants would ask her those questions as a matter of course, rather than ask Mr Munneke.

455 She was also asked whether she checked the 2016 financial statements to see if they were correct. She said she did not look at them. She was asked whether that was a serious answer, and she said it was the truth. She was asked whether the loan to the associated trust of \$278,486 was wrong. She said, "Well, it can't be right because that's different from the previous figure" she was shown. It was pointed out to her that two years' worth of debits and credits had been made to the loan account. She said she just does not have enough information to commit to a yes or no. She maintained that she believed it was wrong because she knew that she offset the loan account.

456 Ms Zaccara was asked about the building loan for O'Connell Street for \$1.025 million. She denied that at the time of the O'Connell Street purchase, no decision was made about how the money taken out of Ex NF in order to effect the purchase would be characterised. She was then taken to the s 597 examination where she was asked "So you're unsure whether it was a dividend or a gift" in reference to the O'Connell Street transaction and she answered:

Well, we were that hoping experts could sort that out, you know, good advice would sort that out. But you know, it was discussed as a dividend. But it wasn't decided what it was.

Ms Zaccara was asked during cross-examination whether that evidence was true. Ms Zaccara said:

It was recommended to take as a dividend. However, Rowe Partners thought it was better to do it is an L7 loan and then subsequently advice that looked through some of the accounts

said, 'Well, this looks like a gift'. So I don't know what it was but the initial recommendation and the intention was a dividend and when I told Robert McDonald ... it's a dividend, he goes 'Well, I don't know your financial position so I'm going to put it as an L7 loan'.

457 She was then taken to the question during the s 597 examination regarding the character of the transaction where she said:

No. Not the character of the transaction but, you know, what was going to be achieved with the transaction? The structure of all that was going to be decided, you know, with experts that were, you know, considering our perspective, [Ex NF's].

458 Ms Zaccara then stated that she was having trouble coping with her anxiety, fear and stress during the s 597 examination and that she overtook her prescription medication during the day of the examination, so she really was not sure about some of her answers. It was put to her that she did not say, "I'm incapable of answering this", but rather gave an answer to the effect that a decision had not been made as to how to record the transaction.

459 Ms Zaccara said it had not been decided by the accountant, Mr McDonald. It was put to her that she was asked during the s 597 examination:

Is it fair to say you wanted to achieve the result of purchasing the property in the name of the Trust and were unconcerned at that point in time with the actual character of the transaction?

and her answer in the s 597 examination was:

That's right. I wasn't too concerned and nor was [Mr Munneke] about the, you know, how that transaction was going to be viewed or accounted for. It was just an advantageous situation for everyone.

Ms Zaccara said that was the truth and she was not concerned because she thought the accountants knew the best way to deal with it.

460 It was put to Ms Zaccara that when she discussed it with the accountants in 2016, she decided to record it as a loan. She said that Mr McDonald decided to record it as a loan, and she just agreed because she thought he knew best. It was suggested to her that what Mr McDonald said was that if she declared it was a dividend she would have to be paying very large amounts of tax on the dividend. She said she did not think he put it in those terms, but it was mutually understood. She maintained it was not about the tax issue, he just needed to know the complete financial situation to make an informed decision.

461 Ms Zaccara was asked whether she told Mr Munneke that she had been told by the accountants it was better to record it as an L7 loan because otherwise tax would be payable. She said she thought she told Mr Munneke the accountant was not sure what the tax liability was. It was put to her that at no point did she correct the accounts to say that the \$1.025 million was actually intended to be a dividend, rather than a loan. She said she did not correct what Mr McDonald was suggesting

because he implied that he was putting it together the best he could under the circumstances, and he would review it within the two-year period that the ATO allows for returns to be reviewed or corrected. She was asked whether she considered it was an accurate recording of the transaction to record it as a loan. She said, “No, there wasn’t much accurate about it” and the figures were put together very quickly.

462 It was put to Ms Zaccara that she knew full well how this transaction was going to be accounted for, and what she was advising the accountant was the true nature of it. She said it was not that way at all, she was not advising him at all. It was put to her that the accountant was not going to record something against her wishes and that she was content for it to be regarded as a loan repayable by the 28 O’Connell Trust to Ex NF. She said she was content to trust his expertise and, to be frank, she did not really know the significance of the L7 loan and what it would mean.

463 Ms Zaccara denied that, as at 2016, her associated trust owed more to Ex NF than Ex NF owed her. It was suggested to her that she was fully aware that, as at 16 June 2016, her associated trust connected to the South Terrace properties were indebted to Ex NF for more than Ex NF was indebted to her. She said she believed that the debt was paid by the end of 2015.

464 Ms Zaccara was asked whether she was saying that the financial statements recording loans to the associated trust, as at 30 June 2016 for \$278,486, were wrong. She then said:

Okay. So I do have something to say about this. So the first thing to say is that [Mr Munneke] and I forewent just over two years of salary which equated to around the 220 to \$230,000 mark and then there was a sum of nearly \$60,000 that was put into the NAB account around maybe end of May, beginning of June in 2016. So, yes, the debt was paid off.

She said the documents were wrong to that extent.

465 Ms Zaccara was then taken to her first statement at [168] in relation to her evidence that she had contemporaneously, with each advance she made to Ex NF, kept a running sheet. She said she did not keep a running sheet, but she kept receipts with amounts on a piece of paper and it was put on a spreadsheet later. It was put to her that she first started preparing the spreadsheet in December 2020 and she said that might be right.

466 She was asked whether she agreed that none of the payments that she says she made, as detailed in the spreadsheet, are evidenced by any transaction out of a bank account of hers. She said they were cash purchases. She was asked where she got all the cash from. She said that she is in the accommodation business and about two-thirds of her income is cash payments of rent.

467 She was then asked about the notice to produce, directed to Linda Zaccara Pty Ltd, and the Court being told that Linda Zaccara Pty Ltd was not able to produce a tax return from 2012 to the date of trial. She said that is because it did not receive any income effectively and the ZALD Trust had not lodged a return because it had not received income either.

468 Ms Zaccara agreed that the cash she was receiving from the boarding house business was income that she was receiving in the course of her personal business that she had not paid tax on. She was asked whether there was any record of the cash being received. She maintained there were plenty of records but a tax return has not been prepared. She also said the last time she personally filed a tax return was, she believed, 2005. She was asked:

Q. Why haven't you lodged a tax return since then.

A. Well, the straight answer is that I don't exactly know but I have a rational fear, I guess you could call it, but I know that I – my psychologist and I had discussed two main things and that is the liquidation process and why I have such difficulty doing tax, paying bills, that sort of thing. He's related it to some obsessive compulsive disorder but we're breaking it down and we're trying to deal with it and all I can say is that there is an irrational relationship I do have with the tax issue. I know that when I was younger, accountants were [revered]. When the accountant came over to our house, we just sort of had to sort of prepare for royalty. However, we weren't allowed to mention the Australian taxation department. I don't know why but we weren't allowed to say that. And just probably how money was used in the family. Sort of, you know, wraps up in that. So I'm embarrassed about that. I'm ashamed about that. I carry that shame baggage with me all the time because I fundamentally understand that I'm not paying taxes is profoundly unfair to everybody else that does and I'm fully prepared to deal with it, pay my penalties, pay my interest and move forward and try to prevent falling into that type of behaviour again.

469 It was put to Ms Zaccara that when she was having discussions about acquiring O'Connell Street she was quite anxious to move assets out of Ex NF in order to not pay the tax liability. She maintained that was absolutely not true and she had nothing but care and love for Ex NF, it was her baby, she set it up and she nurtured it. She maintained she would not do anything to hurt Ex NF and she is definitely not a tax denier.

470 Ms Zaccara was asked whether in 2016 she was being chased by BDO for a significant number of outstanding PAYG, BAS statements, as well as outstanding tax returns for 2014, 2015, and 2016. She agreed and also agreed that she knew there were a significant number of BAS outstanding. It was put to her that she did not know what tax, GST, PAYG withholding and SGC was payable. She said that she had a rough estimate. She conceded she did not calculate the penalties or the general interest rate in her rough estimate.

471 Ms Zaccara was asked about money withdrawn from Ex NF's ANZ account in September 2016 to pay for a holiday.<sup>18</sup> She explained that the money was withdrawn to pay for a 24-hour, half-price deal to travel to Antarctica that she and her sister decided to take advantage of. She was asked whether she paid back the \$100,000 into Ex NF's bank account. She said her sister paid her share into the bank account. She said as far as her repayment went, she said she knew that Parawae Road was going to be sold and there would be money coming in and that there was \$60,000 that came in in the middle of 2016.<sup>19</sup> She said she did not actually get to the point of doing the figures, but she felt sure that the holiday loan would have been repaid.

472 Ms Zaccara agreed that by September 2016, Ex NF had a very significant liability to the ATO that was liable to fall due as soon as the outstanding BAS and income tax returns were lodged. However, she said at that point the ATO had communicated to her that the liability was around a couple of hundred thousand dollars. It was put to her that the ATO said no such thing, as the ATO could not tell her what the liability was until the returns were lodged. She maintained she recalled talking to the ATO about it and that she and Mr Munneke were shocked when they became aware of the \$2 million tax liability.

473 It was put to Ms Zaccara that she knew full well that Ex NF was going to owe a very significant amount of money because it was a long way behind in respect of its returns. She said she did not expect the amount owed to be over a couple of million.

474 Ms Zaccara was then taken to the following questions she was asked during the s 597 examination about Mr Munneke purchasing bitcoin on her behalf:

Q. How do you know that.

A. Because that's when I gave the money to [Mr Munneke] to buy it.

Q. And how did you give the money to him to buy it.

A. So there was cash deposited and I think there was bank transfers too.

Q. Deposited into which account.

A. His account.

Q. Personal account.

A. Personal account.

Q. And you say this was around 2012?

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<sup>18</sup> On 29 September 2016, \$50,000 was transferred from the ANZ account to Flight Centre and on 30 September 2016 \$47,101.65 was transferred from the ANZ account to Flight Centre.

<sup>19</sup> Ms Zaccara submitted the deposit into the NAB account of \$54,996.90 on 28 June 2016 was from the sale of Parawae Road.

A Around there. I'm not sure of the actual date.

...

Q. How much did you deposit into Mr Munneke's account in order for him to buy Bitcoin on your behalf?

A. Privilege. So I'm not sure of the exact amount. There are a couple of transactions but we are looking at several.

Q. Tens of thousands of dollars.

Ms Zaccara said in cross-examination the transcript of the s 597 examination should record that she said "Several trails of thousands of dollars".

475 Ms Zaccara said, over the years, she has deposited money into Mr Munneke's personal account and has given him cash as well. She said she and Mr Munneke's were talking about buying bitcoin from around 2010 or 2011. She was asked when she gave Mr Munneke cash to buy bitcoin on her behalf. She said there were a couple of times where she would give him cash. Cash was something she gave him regularly and she would say "Buy some Bitcoin with this". She said they discussed buying bitcoin for quite some time, from around 2010 or 2011 and she would say "I'm giving you this. You buy some Bitcoin". She was asked how many times she gave him cash to buy bitcoin and she said maybe between four and six times, from around 2010 to 2011, right up until the bitcoin was actually purchased in 2014.

476 Ms Zaccara was asked how many thousands of dollars she gave Mr Munneke to buy bitcoin on her behalf. She said she would give Mr Munneke anywhere from a couple of hundred at a time. She said basically there is a trail that would lead to several thousands of dollars.

477 She was asked about the evidence she gave in the s 597 examination that she did not own any ethereum. She said she does not really understand why she said that, she does recall it was late in the day, she was pretty confused and tired. She said she is not sure why she said it, but she knows that:

When the Ethereum was converted to buy 106 Ward and that was put under my entity and the trust I was an appointer of, I remember in my mind that I said 'Well if [Mr Munneke] and I ever break up at least there is half the Ethereum left so, you know, I get the building and he will get that Ethereum'.

She then went on to say that she was pretty confused during the s 597 examination and she put it down to the side effects of the pregabalin, which include drowsiness and confused thinking.

478 It was put to Ms Zaccara that she said she did not own any ethereum because it was the truth. She said, "I believed that I owned more cryptocurrency". She said the ethereum would not exist if she had not insisted on Mr Munneke buying some ethereum for her.

479 It was put to Ms Zaccara that she did not, in the s 597 examination or when she prepared her first statement, remember the money used to buy the bitcoin that was used to buy the ethereum coming out of Ex NF's bank accounts. She said in cross-examination that she remembers seeing a CoinJar entry in the bank statements around 2014 but she did not think much of it at the time or make the connection that the purchase had been made out of Ex NF's account. She maintained that she knew nothing about the cryptocurrency being paid for by Ex NF's funds. Ms Zaccara was reminded that it was put to her in the s 597 examination, "I suggest that this is not the same transaction acquisition of Bitcoin that you've had in your mind that you have described earlier", that is, \$1,000 coming out of the NAB account to buy bitcoin. She said in the s 597 examination, "No, it's not. I don't know anything about this acquisition". It was put to Ms Zaccara in cross-examination before me that that answer was not true. Ms Zaccara said that she did not understand her answers given during the s 597 examination and that she could only put it down to being confused because she specifically remembered the acquisition of the bitcoin in February 2014.

480 Ms Zaccara was then asked about her answer to the following question put to her during the s 597 examination:

Q. I think your evidence was you didn't know of any transaction where the company had bought Bitcoin?

A. That's correct.

When asked in cross-examination whether that was true, Ms Zaccara said she would have answered to the best of her ability and she would not have purposefully deceived but she does not know why she said that because she does know that Mecco was rendered an invoice for the ethereum acquired on Meeco's behalf. She was asked whether she knew of the transaction involving Ex NF buying bitcoin in order to acquire ethereum from Mecco. She said it was not Ex NF; it was Mr Munneke and he did that for Ms Dow because he had expertise. She agreed she knew Ex NF rendered an invoice for it. She was asked why Ex NF was rendering an invoice if it was just Mr Munneke doing it. She said she guessed that was the way Mr Munneke got payment for the ethereum he bought.

481 She was then asked about her evidence in the s 597 examination when she was asked about the use of the \$1,000 from Ex NF's funds to purchase bitcoin that was later used to fund the ethereum purchase. She maintained she knew nothing about the money coming from Ex NF other than she knew something about Ex NF acquiring ethereum on behalf of Meeco. Ms Zaccara maintained that Mr Munneke had given her an assurance that the payment for the bitcoin came from his account. She said there was nothing between 2014 and 2020 that suggested to her that Ex NF was buying bitcoin on her behalf and nothing that suggested that Ex NF was acquiring ethereum on her behalf as it was Mr Munneke who was acquiring it on her behalf.

482 Ms Zaccara was asked whether Mr Munneke bought bitcoin on her behalf when she asked him to and gave him money. She said he did not, and she was a bit upset about it. She said she nagged him a bit and she asked him several times whether he had done it. She maintained that he said, “I’ll get to it”. She said that she was a little bit annoyed, and he could sense that. She said that she had gifted him some thousands of dollars from around the end of 2010 right up to 2014.

483 It was suggested to Ms Zaccara that bitcoin’s price at its high point in 2010 was \$0.40 per bitcoin and whether that accorded with her recollection. She said she did not really care about what the price was, she just wanted to get into the market. She maintained that she was interested in the emerging new technology of digital monies. She said initially she was interested in it as an alternative to money, but then later she came to see it as having a lot of potential. She was asked whether she formed a view about bitcoin as an investment in the time period 2010 to 2011. She said she was interested in it to purchase supplements on Silk Road and then became interested in it as a commodity. She said around 2013 or 2014, she remembers speaking to a broker in the bitcoin office on Wall Street and they were discussing how bitcoin was going to rise as a commodity, rather than just a replacement of money. It was put to her that in her first statement she referred to having formed the view that bitcoin was appropriate as an investment by around 2010/2011. Ms Zaccara said she began to talk to Mr Munneke about bitcoin in 2010/2011 as she was interested in purchasing supplements on Silk Road. She maintained that she did not care about the price, she just wanted to acquire it because she knew it would have great value in the future. It was put to her that that meant that she would be interested in the price. She maintained she did not really care about the price, she knew that it would be relatively cheap as compared to what it would be in the future.

484 Ms Zaccara said she presumed that at the time she was asking Mr Munneke to buy bitcoin in 2010/2011, it was very cheap. It was put to her that she knew that in 2011/2012, it rose markedly. She said she did not think she knew that. She said she did not know that in early 2013 it went from about \$13 to \$150 by April. It was put to her that it was all over the news that bitcoin was escalating in value. She said she assumed from the beginning that the value would increase as time went on. It was put to her that by November 2013, it increased to \$1,200. It was put to her that she asked Mr Munneke to buy it in 2010/2011 at which time it was worth about \$0.40 a coin and then by the end of 2013 it was worth \$1,200 a coin. She was asked whether she was pretty upset at that point and might have said to Mr Munneke, “Derek, you’ve missed the boat”. She said she was not upset about that; she was just upset that he did not buy it when she asked him to. She denied that her evidence about asking him to buy it on her behalf in 2010/2011 onwards was simply untrue and that he did not do it for a few years was all made up. She said she was not aware of the price, and it was not really how she rolls. She was asked when she first learned that Mr Munneke had purchased any bitcoin. She said it was on the day of Ric Santos’ wedding when Mr Munneke said he had bought some bitcoin for Ric Santos as a gift from them. She said she was very

upset about that because she thought, “Wow, I’ve been asking you for a couple of years to buy Bitcoin and you go ahead and buy some finally and it’s not even for me, it’s for Ric”. She said she asked Mr Munneke to promise her that as soon as he got a chance he would buy them more. She told him to buy up to \$1,000 worth.

485 Ms Zaccara was taken to her third statement and her evidence about the spreadsheet of expenses that she said she maintained. She agreed that none of the expenses she claimed on pages 1 to 37 of annexure G of her third statement were ever entered into Ex NF records and she was never reimbursed for them. She maintained that Rowe Partners made an allowance of roughly \$1,000 per month for her expenses, but she was never actually reimbursed. She was asked why she did not arrange for reimbursement, and she said, “They weren’t a priority”. It was put to her that she had seven years from Ex NF’s incorporation to its liquidation to attend to it. She said, “there were lots of things that should have been attended in those seven years that weren’t”.

486 She was asked about the payments of \$2,000 to founding employees every Christmas since Christmas 2012. It was put to her that, in effect, what she was saying was that these amounts should have been added to her loan account and her loan account was in error in not reflecting the amounts that were made on behalf of Ex NF. It was put to her that if she was making cash payments to employees, she would have understood that she needed to hold back tax for the employees as being taxable income that Ex NF was obliged to withhold. She said she understood it was up to the employee to declare the income because it was not part of their salary, they were just gift bonuses.

487 It was put to Ms Zaccara that if all these expenses were proper business expenses, it would have been in Ex NF’s best interest to be claiming a tax deduction for proper business expenses. She agreed and was asked:

Q. So why didn’t you attend to entering them into the accounts and claiming a tax deduction for them.

A. I just think that the way I saw the company was a family company. I sort of dealt with it from what I knew being a sole proprietor. I cared about the company. I wasn’t too concerned at the time necessarily about, you know, getting repaid at that time. I knew that the accountants would sort it out eventually as I wasn’t the best bookkeeper. ...

488 Ms Zaccara vehemently denied that her evidence regarding the cash payments that she made that should have been added to her loan account was deliberately a lie.

489 It was put to Ms Zaccara that her evidence was that she formed the view that she wanted to acquire bitcoin as an investment when she started to read the white paper. She then said:

... back then because of my research at uni, I thought that Bitcoin did have potential for that but initially it was to just acquire Bitcoin to purchase supplements on Silk Road.

490 It was put to her again that she was aware that bitcoin was going through a significant price rise, and it had gone up about 50 times in value over the two-year period, 2010 to 2012. She said it could have, but she was not specifically aware of that. It was then put to her again that it went up to \$1,200 per bitcoin by the end of 2013, that it had gone up by a multiple of 5,000. She said, “Wow”. It was put to her that if she wanted to invest \$1,000 at the end of 2010, by the end of 2013 that would have been worth some \$5 million. She said she was generally aware and when it first came onto the market, she was interested in it because she wanted to use it like currency. She knew it was rising but she did not know specifically by how much, and somewhere along that period she started to look at it more as an investment rather than an acquisition to purchase something.

491 Ms Zaccara agreed that she knew that in order to purchase ethereum, bitcoin was needed. She was asked what bitcoin she thought he was going to be using to buy the ethereum. She said she did not turn her mind to it and left it to Mr Munneke. She was asked whether she thought he was going to be using his own money. She said she did not put her mind to it, but she would have assumed that would have been the case. She said she did not care how much the ethereum was going to cost. She said that she had passed enough money over to Mr Munneke over the years, saying “Buy some Bitcoin with this, won’t you love”.

492 She was then taken to her evidence in her first statement where she said:

... It also appears from the pleadings I have been shown in this case that the holding of Bitcoin had been reduced by 7 August 2014 down to 0.062 of a Bitcoin because [Mr Munneke] had prior to that time used 1.0152 of a Bitcoin in his wallet to acquire Ethereum on behalf of Meeco. I do not believe I was aware of that transaction as it happened, and I did not agree to it. ...

Ms Zaccara said that statement was true. She said she did not know that the holding of bitcoin from February 2014 was used to acquire the Meeco ethereum. She said she did not specifically turn her mind to the manner in which ethereum would be acquired for Meeco. She was asked whether she knew that Ex NF was buying bitcoin in August 2014. She said she had no idea. She was asked when she first learned Ex NF had bought bitcoin in 2014. She said she did not fully appreciate Ex NF had purchased that until after the liquidation, although she had seen that CoinJar expense in the bank account, but she just was not concerned about it.

493 Ms Zaccara was asked about her evidence in her first statement where she said:

As I was not aware at the time of the NAB cryptocurrency withdrawals or that the monies used to acquire the cryptocurrency had been deducted from the NAB Account, I did not turn my mind to recording the transactions in the NextFaze books and records as a debit to my loan account.

She was then taken to [11] of her second statement where she said she recalled reviewing bank statements in February 2014 and August 2014, and noting the

entries in the bank statements, and realising that they related to cryptocurrency purchases. It was put to her that the evidence cannot stand consistently with what she said in her first statement. She repeated that she did not recognise the CoinJar transaction. She then went on to say:

... with all due respect, Mr Roberts, that these subsequent statements were done – and even the first statement was late. There was great difficulty getting these statements out. The second and third statement were done quickly. ... when I reread these statements I read them very quickly, and I didn't adhere to exact phrasing that you've been pointing out to try to say that I'm contradicting myself. ...

494 She was asked whether she agreed her evidence was inconsistent and she said, "Well, if you read it per se". She was again taken to her second statement where she said she recalled noting the particular debits and realising they related to cryptocurrency purchases. She said that was true, but she did not think that she realised all were cryptocurrency purchases. She did come to realise all were cryptocurrency purchases at some point, but she did not think she realised all were at August 2014.

495 Ms Zaccara was taken to the preparation of the 2014 September quarter BAS and to the GST audit report prepared by Rowe Partners for the September 2014 quarter and asked to look at an entry of \$1,400 and an entry for \$650. It was put to her that Ex NF was claiming an input tax credit for the purchase of bitcoin in August 2014. She said that she might have to agree but that was the first time she has seen those entries, and, in that case, Rowe Partners had made a mistake. It was put to her that she stated in her second statement that, having reviewed the NAB account statements and realising they related to cryptocurrency purchases, she noted the \$650 and \$400 debits. She said she visually saw those entries but did not make that connection to cryptocurrency purchases at the time. She was asked whether she wanted to retract [11] of her second statement. She said the only thing that she would adjust in that statement is that they related to some of the cryptocurrency purchases. She was asked whether she noted the entry for \$650 referred to at [10.3] of her second statement in August 2014 and realised that that related to a cryptocurrency purchase. She said:

Not at the time, because Bill Buddy didn't strike accord [sic] with me to do with the cryptocurrency, so I would have sighted that at some point, but not at the time.

496 She was asked whether she realised that the effect of the GST lodgement was to claim an input tax credit on behalf of Ex NF for its purchase of bitcoin in August 2014. She said:

So I can see what Rowe Partners have done here, but that's obviously a mistake, and you know, Rowe Partners didn't make any secret of that. They said 'Look, we did the best we could with the information we had'. I've rung the – Robert McDonald told me had rung the ATO, and said 'Look, how long do we have to make corrections to our lodgements?' So that's what he told me. So obviously they've made a mistake. Obviously, they didn't recognise what it was about either, and they didn't ask me about it either. They just took those figures and interpreted them at their own volition.

497 Ms Zaccara was taken to the GST audit report prepared by Rowe Partners for the March 2018 quarter and questioned about the BAS lodgement for the quarter. She was referred to an entry on 24 January 2018 recording Ex NF paying GST of \$31,496.73 in relation to the sale of ethereum in 2018 to fund Ward Street. She was asked whether she was the person who gave the relevant instructions to the accountants regarding the GST in relation to ethereum. She said “No, no, not at all”. She said she remembers specifically telling Mr McDonald that the ethereum had to go through the NAB account because of the settlement issues they were having and that it was her private cryptocurrency, not Ex NF cryptocurrency. She said she was stunned later when it was pointed out to her that income from the cryptocurrency sale that came into the NAB account was put down as company income by an accountant. She said it was a clear mistake and that she did specifically tell the accountants that it was private cryptocurrency. She said it was another mistake made by accountants. She said she could not exactly recall when she told the accountant it was private cryptocurrency. She was asked:

- Q. Having told him that, did you then check on whether he’d carried your instruction into effect.
- A. No, I didn’t check, because, as I said, I trusted Robert McDonald to, you know, do the best he could under the circumstances.

She said she was stunned when she learned it had been recorded differently in March or April 2019. She was asked why she did not do anything about correcting the records. She was asked why she did not lodge an amended GST return in order to get back GST that had been remitted to the ATO. She said that she did not even think about at that stage, she was preoccupied with a lot of other things.

498 Ms Zaccara was asked about her claim to the surplus proceeds following the sale of the cryptocurrency to acquire Ward Street remaining in the NAB account. She agreed that there was nothing to record any loan being made by her to Ex NF for that purpose.

499 It was put to her that at the time the Ward Street transaction occurred, she realised that Ex NF could not pay its tax bill. She maintained that she always thought Ex NF could manage the tax bill even if the lodgements were behind. She agreed that by late 2017 the lodgements that had been made saw very significant notices of assessment. She said she did not recall a million-dollar figure, but it could have been. She was taken to a statement from the ATO dated 6 January 2018 recording \$1.264 million owing in respect of income tax. She was taken to another statement dated 5 January 2018 which recorded another \$174,000 owing. She said that she did not see the statements at the time. She was asked whether it was front and centre in her mind in late 2017 that there were very significant amounts being levied by the ATO for various heads of tax liabilities. She said it was not in the forefront of her mind. She said that she always had great belief that they would manage and that it Ex NF would manage its debts.

500 It was put to Ms Zaccara that by 2017 Ex NF was trading at a very large loss. She said she recalled a call from Mr Thiele who said that the salaries were too high. She was referred to an email from Mr Thiele dated 1 December 2017, before the Ward Street purchase, where he said:

I would also like to discuss the 2018 year to date accounts as from what I have reconciled so far you are currently operating at a very large loss.

Ms Zaccara said that she did not recall reading this email and people who work with her know that if they want to get to her, they need to call her because she misses a lot of emails. She said the information was conveyed to her by telephone by Mr Thiele.

501 It was put to her that when the ethereum proceeds were banked into the NAB account in early 2018, it was at a point in time when Ex NF had very limited resources from which to pay tax debts that had been levied. Ms Zaccara said:

Look, that may be true but the cryptocurrency doesn't belong to the company, Mr Roberts. That cryptocurrency is my cryptocurrency, so it's not something that I would have put in relation to what was happening with the company and my asset.

502 She was asked whether she agreed that without the cryptocurrency there was no means of paying the tax debts as at the end of 2017. She did not agree with that because she remembered talking to Mr Munneke and he would always reassure her:

It's okay, Linda, we will get out of this. We will get the money from Real Time Data, we will get the money from Meeco, we will get the money from iConnect and we will get out of this.

503 She said she knew the tax bill was accumulating and it would have been large. She then said:

... a client came onboard that, in my opinion, hypnotised Derek – that's real-time data – and Derek started to employ people specifically to work on that project; and in effect, they weren't paying properly for the huge amount of development that was being done for that project.

504 It was suggested to Ms Zaccara that by 2018 if she thought that the ethereum that was being sold was hers, it would have been very important to have the surplus ethereum that was left in the bank account recognised as being money that she was lending Ex NF. Ms Zaccara said she did not view leaving the money as a loan to Ex NF. She was asked what she did regard as. She said, "My money".

505 Ms Zaccara maintained that she did not see any tax bill being unmanageable. It was put to her that she never thought about putting her own money into the tax bill. She said she did not, but if someone had told that was what was required, she would have put her mind to it. She maintained Ex NF was her "baby", she loved it, and it was going to be a family legacy. It was put to her that by late 2017, she knew full well that there was a really significant tax debt. She maintained that the

tax statements were never brought to her attention. It was put to her that that evidence was deliberately dishonest. She said, “Well, Mr Roberts, you’re wrong about that. No-one actually told me”.

*Ms Zaccara’s re-examination*

506 In re-examination, Ms Zaccara was asked about her evidence in response to questions about why she did not lodge an amended GST return. She said it was because she found out about the entries in the financial records she disagreed with on the day Ex NF went into liquidation, and it was her belief that she could do absolutely nothing with company records once it went into liquidation.

**Assessment of the experts**

507 Mr Bacina’s gave evidence based on his knowledge and experience in cryptocurrency, blockchain, and technology. I have addressed Mr Munneke’s objections to certain paragraphs of the Bacina report in discussing Mr Bacina’s evidence. I make clear I have not received his evidence to assist in determining Mr Munneke’s intentions and motivations at the time he acquired ethereum. His evidence provided background to and explained concepts concerning cryptocurrencies. Except as I indicated in discussing his evidence, I accept Mr Bacina’s evidence.

508 Noting Mr Heard and the liquidator are both members of the firm Heard Phillips Lieberenz, there was no suggestion Mr Heard’s opinion was affected by unconscious bias. Whilst it would be preferable an expert witness has no connection with a party to litigation, I am satisfied Mr Heard understands his obligations as an independent expert and conformed to the standards required by the expert code of conduct prescribed by the *Uniform Civil Rules 2020* (SA).

509 Mr Heard explained clearly and logically how he arrived at his conclusions in relation to the O’Connell Street transaction:

1. that Ex NF did not have sufficient financial resources available to it (regardless of whether it did or did not own the cryptocurrency) to make the payments, and assume the liability to ANZ, to purchase O’Connell Street in December 2015 while retaining sufficient readily realisable assets or other financial resources to pay its debts as and when they fell due and to meet its ongoing operational requirements; and
2. that at the time of the O’Connell Street transaction, Ex NF was financially unstable, and Mr Munneke should have been concerned about insolvency.

510 He also explained clearly and logically how he arrived at his conclusions in relation to the Ward Street transaction:

1. that Ex NF did not have sufficient financial resources available to it (regardless of whether it did or did not own the cryptocurrency) on

31 January 2018 when the payments were made to purchase Ward Street. He considered that Ex NF did not have sufficient liquid assets to pay all its liabilities that were due to be paid and to continue trading; and

2. that in his opinion Ex NF was facing insolvency at the time of the Ward Street transaction.

511 In cross-examination, Mr Heard acknowledged he applied the incorrect interest rate in considering the ANZ loan. Mr Heard agreed in cross-examination that the EBITDA figures referred to in the Scott report reflected an improvement in EBITDA between the 2013 and 2015 financial years. Of course, EBITDA does not include tax liabilities and does not represent the total financial health of a company. Ms Zaccara and the respondent companies submitted that in relation to working capital reserve, Mr Heard's experience as a director was limited to his own private company and certain charities.

512 Mr Scott adopted the same methodology as Mr Heard and agreed with the estimations in the Heard report as to debtors, WIP, tax creditors and accruals. However, he disagreed with Mr Heard's inclusion of a working capital reserve for operational costs/overhead costs was required to assess Ex NF's financial position. I am unable to glean from Mr Scott's evidence whether he seriously considered the need for working capital, in assessing solvency as it was demonstrably evident from his cross-examination, that his assessment of Ex NF's financial position was wedded to the assumption that Ms Zaccara was willing if needed to provide cash to Ex NF to meet its liabilities ("the assumption"). This was one of the assumptions Mr Scott was asked by Mr Munneke's solicitors to make and he was most reluctant to divorce himself from or ignore for a moment that assumption. His cross-examination was peppered with his reluctance give his opinion absent the assumption. Rather he reiterated that a working capital allowance was not necessary because he adopted the assumption.

513 Mr Scott contended in cross-examination that a working capital reserve was not necessary on the basis that three-quarters of the companies in South Australia would be in liquidation. As submitted by the applicants, Mr Scott did not attempt to explain why such a reserve was not necessary or prudent. However, he ultimately accepted that he would view a distribution leaving less than one month's worth of expenses in the bank account with "some caution". Unlike Mr Heard, Mr Scott did not address head on the quantum of Ex NF's operational costs. I infer, noting that Mr Scott said he agreed with and adopted the methodology adopted in the Heard report unless otherwise stated, that he did not disagree with Mr Heard's assessment that Ex NF's average overheads for the 2015 financial year were \$155,000 per month and \$137,000 for the 2017 financial year. When he was instructed to put to one side the assumption and consider whether \$250,000 was a reasonable working capital allowance, Mr Scott said "I don't know whether it would be 100,000, 50,000, or 400,000. I just don't know". When it was put to him that "two months' worth of expenses is pretty skinny in terms of a rule of

thumb [for a] working capital allowance”, Mr Scott repeated that three-quarters of the companies in Adelaide would be in liquidation if it were necessary to maintain such a provision.

514 As submitted by the applicants Mr Scott appeared quite inflexible when asked to consider alternate hypotheses put to him in cross-examination when such hypotheses might lead to a conclusion unfavourable to Mr Munneke and he was unwilling to move beyond the facts Mr Munneke’s solicitors had asked him to assume. For example, he was reluctant to engage with the hypothesis that the sum of \$740,000 as a loan to the 28 O’Connell Trust should not be included as an asset in his analysis. He did eventually accept that if it was excluded as an asset, there was a substantial net asset deficiency. He was also remarkably reluctant to make concessions as to how imprudent it would be for a director in the position that Ex NF found itself in to have, in effect, gifted the cash to acquire both O’Connell Street and Ward Street with no ability to recover that capital.

515 The manner in which Mr Scott responded to questions during cross-examination and, in particular, his unwillingness to consider the matter in the absence of the assumption, left me wondering whether he understood his role and obligations as an independent expert. His recourse to the assumption in cross-examination suggested a lack of independence and a preparedness to advance Mr Munneke’s defence.

516 Mr Scott ultimately reluctantly made concessions as to the imprudence of the dealings undertaken by Ex NF. I have had regard to the submissions and the criticisms made by the parties regarding Mr Heard and Mr Scott’s evidence, which I have set out in more detail later in these reasons. Where Mr Scott’s evidence differs from Mr Heard’s evidence, I prefer Mr Heard’s evidence. I accept Mr Heard’s evidence and am also satisfied that Mr Heard is qualified to proffer an opinion regarding working capital reserve, which I suggest is a standard accounting concept.

### **Assessment of witnesses**

517 When witnesses speak about matters in the past, there is necessarily an element of reconstruction for the most honest of witnesses. As submitted by the applicants where there is self-interest in mind, there is an inevitability that that will unwittingly infect the reconstruction exercise, again, even for the most honest witness. The applicants suggested I approach the counterfactual evidence given by Mr Munneke and Ms Zaccara regarding what they would have done if they had been made aware of certain matters with reticence.

518 It was submitted in Mr Munneke’s closing submissions Mr Munneke was a truthful witness whose evidence should be accepted and that incongruities between his evidence at trial and that given during the s 597 examination in February 2021 are of no surprise. It was contended Mr Munneke presented to the s 597 examination and was asked detailed questions about events that had occurred more than seven years prior, and he was obliged to provide evidence without the benefit

of having any reasonable opportunity to consider and recall the events and documents in question, or to investigate the issues to assist his recollection.

519 It was submitted Mr Munneke quite reasonably explained that divergences from his evidence given in the s 597 examination have come about following the opportunity to investigate and refresh his memory on the issues being examined.

520 It was argued the applicants frequently urged the Court to measure the facts and the evidence of Mr Munneke and Ms Zaccara with a level of exaction and perfection that is simply beyond the norm and is unrealistic.

521 I accept that at the time they each gave evidence in the s 597 examination, Mr Munneke and Ms Zaccara were under stress both personally and professionally. I have no doubt each of them was under stress during cross-examination in this trial. Stress is a common feature of litigation. It was submitted by Ms Zaccara and the respondent companies that any minor discrepancy in the detail of the accounts of Mr Munneke and Ms Zaccara, noting that Mr Munneke had a better technical understanding of cryptocurrency and transacting in cryptocurrency, is a reason to accord authenticity and credibility to their evidence rather than the converse. I agree with Ms Zaccara and the respondent companies' submission that it is not surprising in the context of a marriage relationship and, in particular, after a breakdown of that relationship that there might be different views about the ultimate ownership of an asset.

522 Further, it was contended Mr Munneke and Ms Zaccara made significant admissions against interest including as to their taxation affairs, and neither sought to claim any privilege against self-incrimination. I agree it is a common feature of human experience that not all individuals conduct themselves in an organised and orderly manner and this is certainly the case with Mr Munneke and Ms Zaccara. However, their approach to the financial affairs of Ex NF was demonstrably tracking toward the extreme end of the disorganised and disordered spectrum. I point out that admissions were made in the face of compelling evidence about their unsatisfactory attention to, in particular, the tax affairs of Ex NF.

523 In assessing Mr Munneke and Ms Zaccara's reliability and credibility, I have made allowance for the passage of time between the occurrence of events and cross-examination about those events, the fact that they have endured a relationship breakdown, the demise of Ex NF and the stress of giving evidence.

524 I am left with the impression the evidence of Mr Munneke and Ms Zaccara is an evolution of their accounts from the s 597 examination, through their statements, and to their oral evidence in this Court. The evolution causes me to approach with caution the evidence they each gave in this matter. Each of them attempted to qualify or resile from evidence they gave during the s 597 examination. Ms Zaccara referred to having taken medication that affected her evidence in the s 597 examination. Mr Munneke spoke about feeling beaten down

and a bit disheartened during the s 597 examination and that he had since refreshed his memory from contemporaneous documents.

525 As White J did in relation to the witnesses who had given evidence in s 597 examinations and who gave evidence before him in *Termite Resources NL (in liq) v Meadows, in the matter of Termite Resources NL (in liq) (No 2)* (“*Termite Resources*”), I accept that the fact Mr Munneke and Ms Zaccara are respondents:<sup>20</sup>

... to serious claims is likely to have sharpened their focus on relevant events. I also accept that they may have thought about events more deeply than they had at the time of the s 597 examinations. Nevertheless, I thought that these factors could not explain many of the variances in the respective cross-examinations from the s 597 answers. I have maintained that view on re-reading of the transcript.

Further, I consider that each of Mr Munneke and Ms Zaccara:<sup>21</sup>

... realised the damaging nature of the answers in the s 597 examinations and sought to modify them. ... When this occurred, I have thought, generally that the s 597 examination are more likely to be accurate.

526 At this juncture, I indicate Mr Munneke’s evidence in the s 597 examination regarding his cryptocurrency holding and its original purchase cause me to approach his evidence with caution. It appears from the transcript of that examination that Mr Munneke had not, until the s 597 examination, disclosed the “substantial cryptocurrency holdings”, having told the liquidator he did not hold any assets above \$10,000.

527 He asserted the ethereum was owned by Ms Zaccara because she had asked him to purchase it in 2012. When asked whose money was used to purchase the cryptocurrency, he said:

... it was Bitcoin that was stored in a wallet that I would have purchased previously.

...

... Yes, so obviously family, you know, family funds but it was one that I had – yes, it was a wallet – a wallet I had control over.

Mr Munneke then corrected himself and said the ethereum was acquired in 2014. When asked who paid \$1,000 in February 2014 to acquire bitcoin, he said he did not recall. When it was suggested Ex NF paid, he said, “I thought I did”. When Mr Munneke was shown the purchase made using the Ex NF credit card account, he was asked if Ex NF was loaning \$1,000 to buy bitcoin. He said he did not recall and when asked whether Ex NF was gifting \$1,000 to buy bitcoin, he said he did not know. When it was suggested to him that Ex NF owned the ethereum all along, he said he did not believe so. Further, when asked why the surplus \$121,988.92

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<sup>20</sup> (2019) 370 ALR 191 at [52].

<sup>21</sup> (2019) 370 ALR 191 at [52].

from the sale of ethereum was left in Ex NF's account, he said liquidity was low "and so having that amount available in case we need it was prudent".

### *Assessment of Mr Munneke's evidence*

528 Mr Munneke's evidence suggested he is an experienced software developer, who focused on developing Ex NF, who kept his eye on Ex NF's bank balances and issued invoices, leaving the financial management of the business to Ms Zaccara and the accountants.

529 Mr Munneke admitted that he had read Ms Zaccara's first statement shortly before giving his evidence at trial. He accepted his evidence regarding any discussions between him and Ms Zaccara concerning the purchase of cryptocurrency was affected by having read Ms Zaccara's statement in advance. In cross-examination, Mr Munneke said his evidence might have changed having read [86] of Ms Zaccara's first statement where she said she started asking him to purchase cryptocurrency on her behalf some time in 2011. He also conceded that reading Ms Zaccara's first statement might have influenced him.

530 As the applicants pointed out, Mr Munneke's evidence about the purchase of bitcoin in February 2014 was unsatisfactory. During the s 597 examination, he said the source of the funds used to purchase bitcoin in February 2014 he thought was from his personal credit card and he was surprised when shown the purchase was made with Ex NF funds. His evidence in his statement was that he recalled the purchase was made with Ex NF's funds and it was something he had discussed with Ms Zaccara, that it was to be made for the benefit of the ZALD Trust, and that he considered the use of Ex NF's funds would in some way be offset against money owed to Ms Zaccara by Ex NF. In cross-examination, Mr Munneke spoke about having a discussion with Ms Zaccara about the purchase of bitcoin as a family investment late in the evening on 14 February 2014. As submitted by the applicants, Mr Munneke's evidence in cross-examination on this topic appeared to be a reconstruction:

1. cash was deposited to the CoinJar account in the afternoon of 14 February 2014, not at some point in the evening or middle of the night;
2. he conceded that he gave no thought to the ZALD Trust at the time of the purchase but that "it's been suggested to me that if it was viewed as a family, or a combined asset, then that would have been the appropriate vehicle that it would be within";
3. he admitted to having no specific recollection of a conversation with Ms Zaccara on the night of 14 February 2014;
4. his evidence about the order of the transactions with a first deposit of \$700 by bank transfer followed by a \$300 deposit for Ric Santos'

wedding gift from his debit card, was directly inconsistent with his earlier evidence that:

So we decided leading up to that point that we would get the Bitcoin for Rick [sic] and – but I believe it was on the evening itself that once I had made the first transaction I said – we discussed and suggested that we should also get some for ourselves.

531 I agree with the applicants' submission that the evolution in Mr Munneke's account from the s 597 examination, to his statement, to his cross-examination does not reflect well on him.

532 I am unable to accept Mr Munneke's evidence about his interactions with Ms Zaccara regarding the cryptocurrency purchase in the years before 2014 which appeared to be an attempt to align his evidence with what he had read in Ms Zaccara's first statement. In his statement, he referred to some discussions with Ms Zaccara in 2011 or 2012 about potentially mining bitcoin, which they ultimately did not do, whereas Ms Zaccara in her statement gave evidence of having made repeated requests for Mr Munneke to purchase bitcoin from 2010. In his cross-examination, Mr Munneke gave evidence about Ms Zaccara having made numerous requests for him to purchase bitcoin over the years that he did not action. He said that he did not get around to it for many years. It was submitted by the applicants that this evidence can be inferred to be a deliberate attempt by Mr Munneke to tailor his evidence to match Ms Zaccara's first statement as it was not mentioned at all in his statement.

533 It was submitted that Ms Zaccara, however, in cross-examination, by reference to what she had said in the s 597 examination, embellished the story given in her statements by adding that she had paid Mr Munneke thousands of dollars over the years to buy bitcoin. Mr Munneke made no mention of receiving any money from Ms Zaccara to purchase bitcoin in the s 597 examination, his statement, or in cross-examination.

534 I agree with the applicants that I should reject Mr Munneke's evidence, save to the extent that it was consistent with contemporaneous documentary evidence or represented a concession against his interests. Cross-examination of him left me with the impression his evidence on certain matters was at the least reconstructed.

535 Mr Munneke's evidence during the s 597 examination was to the effect that he had no idea as to Ex NF's solvency by reference to his lack of understanding of the extent of the defaults in the tax filings and to the tax liabilities.

536 Mr Munneke also gave evidence that he had not filed personal income tax returns since some time in the early 1990s. The applicants contended that his admitted failure to attend to his personal tax affairs in his personal capacity displays a wanton disregard of Ex NF's obligations to file timely returns to the ATO and make remittances.

537 Mr Munneke said in cross-examination he is ashamed that he has not filed a tax return since 1993, and Ms Zaccara spoke about the psychological assistance she was receiving to work through her tax issues. Ms Zaccara's counsel warned about the applicants' invitation to find discreditable conduct on the part of Mr Munneke and Ms Zaccara in respect of their taxation affairs, and to engage in "bad person" reasoning. I have not used the evidence given by Mr Munneke and Ms Zaccara on this issue as demonstrating that they engage in deliberate conduct to avoid payment of tax and therefore are likely to hide assets. It establishes that Mr Munneke and Ms Zaccara, by their own admission, have not attended to their personal tax obligations, which leads to an inference, together with other evidence on the topic, that as director and chief operating officer they did not attend to and had at least a *laissez-faire* approach to the timely lodgement of tax returns and making provision for tax liabilities in the operation of Ex NF.

538 I accept that Mr Munneke's evidence where it amounted to admissions against his interests was inherently likely to be true. I accept his evidence regarding his failure to attend to his personal tax affairs and his evidence regarding a lack of any substantive understanding of Ex NF's financial situation.

539 Mr Munneke admitted during the s 597 examination, and ultimately in cross-examination, that he did not have sufficient information to make a proper assessment of Ex NF's financial position in late 2015 when O'Connell Street was purchased.

540 I accept Mr Munneke's evidence that he focussed on technical matters and left dealing with tax and accounting matters to Ms Zaccara. However, as submitted by the applicants, his reliance on Ms Zaccara was not based upon any reasonable foundation or meaningful oversight of the accounting function. He had a lack of awareness of non-payment of BAS and failed to take any meaningful steps to ensure compliance or ascertain the extent to which Ex NF was in default. Mr Munneke maintained he left it all up to Ms Zaccara. When he was asked whether, in mid-2015 when back lodgements needed to be made, he considered what the process was in lodging quarterly BAS, he said he did not bring his mind to it as he had other things to worry about. When asked whether that was a serious answer, he said it was and that he could not do everything, so he delegated that part of the business to Ms Zaccara and the accountants and focussed on the things that had the most value.

541 It was put to Mr Munneke that Ms Zaccara's performance in April 2015 in terms of tax compliance had been an abject failure. He said he knew that they had fallen behind, but it was something they were working through. He knew she was working with the accountants, and it was something that "we all learn as we're building a business". He said he did not try to ascertain the extent to which Ex NF was in default in BAS reporting and gave evidence that he did not realise that Ex NF was behind in lodgements.

542 Mr Munneke was asked whether he agreed that as at the end of 2015, Ex NF did not have true and accurate accounting books. He said he did not believe that they accurately recorded their transactions. He agreed that as at the end of 2015, because they did not have accurate accounting books, he did not know what amounts were owed to the ATO. It was put to him that he did not, therefore, know what Ex NF's solvency was. He said maybe not the number but he said he knew Ex NF was doing well and bringing in a lot of money and the bank balance was good, and he believed that there was a credit with the ATO account but he said it was apparent to him that they were doing well.

543 He was reminded that in the s 597 examination, when asked, "So at this point in January 2016 would you agree that you didn't know whether Ex NF was solvent or insolvent" and he answered, "Privilege. I did not know". Mr Munneke said he did not know Ex NF had well in excess of \$1 million in tax liabilities by the time of the Ward Street transaction or that it was in very material financial difficulty. He confirmed in cross-examination that he did not know. It was submitted by the applicants that as Mr Munneke's reliance on Ms Zaccara was not based on any reasonable foundation or meaningful oversight of the accounting function, he could not avail himself to avoid the consequences of what were patent and obvious breaches of his duties as a director of Ex NF. As submitted, it is apparent that to the extent to which Mr Munneke concerned himself with financial matters, his predominant, if not entire, focus was on the revenue generated by Ex NF, and he did not have proper regard to Ex NF's liabilities at the time the O'Connell Street transaction and the Ward Street transaction were contemplated. I agree with the applicants' submission that it is unsurprising that a director who had no real regard to a company's liabilities would have an unjustifiably rosy view of Ex NF's position.

#### *Assessment of Ms Zaccara's evidence*

544 Ms Zaccara's evidence revealed that she had a lot of fingers in a lot of pies from the incorporation of Ex NF until its liquidation. At times things, particularly the taxation affairs of Ex NF, overwhelmed her and she appeared to be constantly chased by her accountants for information about Ex NF's tax affairs. Her evidence was that Ex NF was her "baby" and she wanted it to succeed. However, the evidence before me reveals she delayed addressing tax matters and was avoidant of them. She spoke of a psychological blockage when it comes to with dealing with the ATO and tax obligations. She did not act to ensure the nourishment and long-term viability of her "baby" Ex NF.

545 Ms Zaccara acknowledged in the s 597 examination that she was not the best bookkeeper.

546 Ms Zaccara blamed the accountants for errors in lodgements and returns and for not attending to details. She blamed BDO for not drawing her attention to the financial state of Ex NF. However, she admitted not checking documents submitted to her for approval by Rowe Partners. She gave evidence that

communication with BDO was poor, whilst asserting the payment of Ex NF's funds toward O'Connell Street was consequent upon advice by BDO. She was at times evasive in her evidence and tended to obfuscate.

547 As submitted by the applicants, Ms Zaccara admitted serious difficulties in separating her knowledge now from what she knew at the relevant times.

548 I accept Ms Zaccara's evidence of having made payments to Ex NF's expenses. However, the matters deposed to in her third statement and the annexures thereto (including documents prepared by her and numerous receipts, many of which are faded and unreadable), together with the evidence of Mr Heard and Mr Scott regarding the associated trust loan and the inference that the associated loan remains unpaid drawn from Mr Munneke's criticism of Mr Heard for not investigating the capacity of the associated loan debtor to repay, leave me in a position where the evidence does not disclose how much Ms Zaccara has paid.

549 I agree the evidence Ms Zaccara gave in her third statement that she had made payments of a total of \$228,000 to Ex NF to repay advances from Ex NF when the funds were in fact a transfer between Ex NF's NAB accounts on 27 November 2013 and 21 May 2014 suggests a willingness to manufacture or reconstruct evidence. As submitted, even when confronted with the clear misstatement, Ms Zaccara did not accept the falsity of her evidence but maintained, but did not identify, that some form of payment to Ex NF had been made. I note she did pay the sum of \$54,996.90 into the NAB account on 28 June 2016 following the Parawae Road sale and suggested in evidence this repaid the Antarctica holiday withdrawal in September 2016.

550 I find that Ms Zaccara's evidence regarding the cryptocurrency was a reconstruction. I do not accept her evidence of having made repeated requests and substantial payments to Mr Munneke to purchase bitcoin, which evidence cannot be reconciled with Mr Munneke's evidence on the topic.

551 I find her evidence regarding not being aware of the price unconvincing. As submitted by the applicants, that evidence was also inherently improbable given the massive appreciation in the price of bitcoin over many years at a time when Mr Munneke was apparently failing to get around to purchasing bitcoin in response to Ms Zaccara's repeated requests and having given him money specifically for that purpose. I agree it is highly unlikely that an appreciation in the price of bitcoin over 5,000 times in the period 2010 to late 2013 occasioning losses of many millions of dollars was met with such inaction.

552 Ms Zaccara's evidence in the s 597 examination was that she did not own any ethereum, nor did she know that Mr Munneke continued to control any ethereum after the purchase of Ward Street. As submitted, it is inherently implausible that if the ethereum had been purchased for Ms Zaccara then she would have known whether any was still held given its immense value. I agree Ms Zaccara's attempts to explain away her straightforward answers to

straightforward questions in the s 597 examination as being due to stress or the effects of medication are not credible.

553 I am satisfied that neither Mr Munneke nor Ms Zaccara were cognisant of the actual financial state of Ex NF at the relevant times. I am also satisfied that they understood they had a liability for tax debts even if they did not know the quantum of such debts as they each acknowledged in the s 597 examination.

554 There were a number of matters both Mr Munneke and Ms Zaccara gave evidence about in cross-examination which were inconsistent with their evidence in their respective s 597 examinations which are not supported by any contemporaneous records.

555 It is my impression that Mr Munneke and Ms Zaccara's evidence before me was affected by retrospective rationalisation.

556 The difficulties posed by Mr Munneke and Ms Zaccara's respective accounts are such that I cannot agree that they were both credible witnesses who gave plausible and coherent accounts which may readily be accepted. I have difficulty accepting the evidence they each gave which is not supported by contemporaneous documents or other evidence I accept.

***What did Mr Vijayadass advise?***

557 Ms Zaccara in the s 597 examination gave evidence about the lack of communication with BDO from around 2015. She intimated she was dissatisfied with BOS's services, that the advice "it's not a good idea for any company to hold large amounts of money because if things go wrong then a liquidator comes in and appropriates it" was advice given in the nature of asset protection, it was not in writing and was not anything formal. It is notable that the purported advice about "large amounts of money" that had "no sort of structure or other advice around it" has evolved to advice underpinning the transaction.

558 Mr Munneke and 28 O'Connell Pty Ltd pleaded in the O'Connell Street claim, and Mr Munneke and Ms Zaccara gave evidence, that the purchase of O'Connell Street occurred consequent upon advice given by Mr Vijayadass. It was asserted that Mr Vijayadass advised that Ex NF was carrying excessive surplus cash in the bank and should do something with it. Ms Zaccara said Mr Vijayadass also spoke to her about payment out to her of surplus cash by way of a dividend or distribution of capital. Ms Zaccara said she relayed this advice to Mr Munneke. Mr Munneke gave evidence that he had asked Ms Zaccara to speak with Mr Vijayadass about whether the funds in Ex NF's bank account could be used to purchase a property from where Ex NF could trade and how that purchase could be structured. Mr Munneke also said that Ms Zaccara told him around that time that Mr Vijayadass had informed her that there was sufficient cash in Ex NF to take the monies out as a dividend. Mr Munneke pleaded that he relied upon this advice in reaching his determination to pay surplus Ex NF funds to Ms Zaccara as

shareholder, and which reliance is reasonable by reason of s 189 of the *Corporations Act*.

559 It was submitted that Mr Vijayadass assisted Ms Zaccara in the establishment of a discretionary trust of which he was the settlor and known as the 28 O'Connell Trust by deed dated 6 November 2015. In this regard, the solicitor, Ms Polson, forwarded to Mr Vijayadass the trust deed for his signature by letter dated 28 October 2015.

560 The applicants pleaded in their reply in the O'Connell Street claim that insofar as there was any discussion between Ms Zaccara and Mr Vijayadass which was then relayed to Mr Munneke (which they do not admit), it was not reasonable for Mr Munneke to rely upon such conversations.

561 Mr Munneke submitted the evidence demonstrates that BDO was well aware of the financial position of Ex NF including as to its late lodgements. He said Mr Vijayadass had provided accounting services to Ex NF since January 2013, that BDO and Mr Vijayadass continued throughout 2014 to assist Ex NF catch up with outstanding lodgements, that BDO were aware of the ATO review in early 2015 and sought instructions as to the status of the review and meetings between the ATO and Ms Zaccara, that BDO prepared and lodged the 2013 tax return on 23 December 2014.

562 It was submitted by Mr Munneke that the documentary evidence also shows that BDO advised on the funding and structuring of the O'Connell Street acquisition. It was asserted BDO spoke to, and met with, Ms Zaccara regarding this subject on several occasions in late 2015 as evidenced by:

1. Mr Vijayadass' email dated 30 September 2015 where he wrote:

Good to chat after a long while. Outlined below is the contact details of a loan broker I've used in the past. Given the property is only likely to have 50% gearing, I'd imagine there are many lenders who will be interested to make the loan to [Mr Munneke] and you.

2. Mr Vijayadass' time sheet entry dated 30 September 2015 recording a 0.3 unit<sup>22</sup> call:

... with [Ms Zaccara] re property [purchase], loan structure, lo-doc due to [Ms Zaccara], but could use [Mr Munneke] as trustee of new trust, update on compliance etc".

3. Mr Vijayadass was put forward as the settlor of the 28 O'Connell Trust and he is recorded as being the settlor in the final executed deed establishing the 28 O'Connell Street Trust;

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<sup>22</sup> I infer 0.3 unit is 18 minutes.

4. on 28 October 2015, Ms Polson wrote to Mr Vijayadass and noted that:

I suggested to Ms Zaccara that she might want to speak with her accountant in order to obtain accounting advice in respect of the appropriateness or otherwise of establishing the trust (whether discretionary or a unit trust) or perhaps a superannuation fund as a property investment vehicle. Ms Zaccara instructed me to prepare a discretionary trust and indicated that you would be prepared to act as Settlor.

5. Mr Vijayadass wrote to Ms Polson on 4 November 2015 providing original executed copies of the deed establishing the 28 O'Connell Trust;
6. over the course of November and December 2015, Ms Zaccara and Mr Vijayadass communicated and met directly in connection with the acquisition of O'Connell Street as well as the preparation of the outstanding BAS lodgements;
7. BDO's assistance in catching up on late lodgements continued after the settlement of O'Connell Street;
8. an invoice rendered by BDO to Ex NF in respect of the period 1 November 2014 to 30 June 2016 recorded the following professional services were provided:

Meeting attended by [Mr] Vijayadass and [Ms] Zaccara regarding various business and taxation matters on 9 December 2015 ... Various telephone correspondence regarding the purchase of a property, loan structures, acquisition structures and ATO registrations.

9. the meeting attended by Mr Vijayadass and Ms Zaccara on 9 December 2015 occurred on the day immediately before the payment of Ex NF funds.

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Mr Munneke submitted the evidence demonstrates that:

1. BDO had been tasked with catching Ex NF up with its late lodgements;
2. BDO had access to the underlying financial records of Ex NF – sufficient to allow it to provide the services it had been engaged to perform;
3. BDO was accordingly aware of Ex NF's financial position including its late lodgements;
4. BDO was in a position to advise on the availability of surplus cash as a distribution to the shareholder;
5. Mr Vijayadass was aware that Ex NF's funds were to be used to acquire O'Connell Street through Ms Zaccara or Mr Munneke not Ex NF;

6. the 30 September 2015 email from Mr Vijayadass indicated that the purchaser was not to be Ex NF, but either Mr Munneke or Ms Zaccara. The reference to “only 50% gearing” supports the evidence that the healthy cash balance would be applied towards the purchase.

564 When asked in the s 597 examination whether BDO had given advice about what ought to happen with the money in the bank account, Ms Zaccara said:

No. We had perceived that opinion from our accountant many months before because the money had collated and they had been doing all of the financials.

When asked whether she or Mr Munneke were seeking asset protection advice from BDO at that time, she said:

No. We had received that opinion. It wasn't in writing. It wasn't anything formal. There was no sort of structure or other advice around it. Then, there was a problem with BDO. We weren't really engaging BDO anymore and we didn't engage the new accountants in 2017. So we were in a position where we were having no formal advice of any kind.

In her first statement, Ms Zaccara said she could distinctly recall around the time Ex NF was looking for new premises, Mr Vijayadass informed her that having the amount of surplus of money Ex NF had in the bank was not a good idea.

565 Mr Munneke submitted his evidence and Ms Zaccara's evidence should be accepted to the effect that O'Connell Street was not acquired with the funds of Ex NF. Rather, it had been acquired through funds which had been distributed to Ms Zaccara as shareholder and that distribution occurred after the independent advice of BDO vindicated that course.

*Mr Vijayadass was not called to give evidence*

566 Mr Munneke contended that the failure of the applicants to call Mr Vijayadass, having stated he would be called/subpoenaed to give evidence “to rebut a contention from the defence”, gives rise to an inference that the applicants abandoned their intention to call Mr Vijayadass through fear that he would corroborate the evidence of Mr Munneke and Ms Zaccara.<sup>23</sup>

567 Mr Vijayadass was not called by Mr Munneke or 28 O'Connell Pty Ltd to give evidence.

568 Whether, as contended by Mr Munneke, the applicants' decision to abandon their intention to call Mr Vijayadass gives rise to the inference that they feared he would corroborate the evidence of Mr Munneke and Ms Zaccara can be drawn depends on several matters, including the asserted significance of Mr Vijayadass.

569 It is to be noted that the applicants informed the respondents in an email dated 26 March 2024 that Mr Vijayadass was no longer prepared to provide a statement and that he had been subpoenaed. On 9 April 2024, four days before trial, the

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<sup>23</sup> *Jones v Dunkel* (1959) 101 CLR 298 at 320-321 (Windeyer J).

applicants informed the respondents that they did not propose to call on the subpoena at trial. It may be that Mr Vijayadass, having stated he no longer was prepared to provide a statement, left the applicants in the position where they were not sufficiently aware of what Mr Vijayadass would say to warrant the inference Mr Munneke contended should be drawn.

570 In my view, having considered all the evidence, the applicants abandoning their intention to call Mr Vijayadass is not sufficiently material to lead me to draw an inference that the evidence of Mr Vijayadass would not have assisted their case. It was Mr Munneke and 28 O'Connell Pty Ltd who pleaded the alleged advice which plea was put in issue by the applicants' reply. In the circumstances, Mr Munneke bears the onus of proof regarding the advice alleged to have been given by Mr Vijayadass.

571 I would expect Mr Vijayadass to be called by Mr Munneke and 28 O'Connell Pty Ltd rather than the applicants. His evidence would elucidate the issue of the asserted advice regarding payment of Ex NF's funds, and his absence has not been explained. In these circumstances, the evidence given by Mr Munneke and Ms Zaccara about the advice they alleged they relied upon regarding the use of and characterisation of the payment of Ex NF's funds may be more readily rejected.

572 It is significant that at the time of the purported advice Ex NF was again behind in its tax filings, did not have up to date financial statements, and the documentary record reveals that there been no contact from Ms Zaccara to BDO since February 2015. Notably, Mr Vijayadass commences his email on 30 September 2015 with "Good to chat after a long while". I agree with applicants that it is implausible that in the relatively short telephone conversation on the same date Mr Vijayadass gave actionable advice about Ex NF's ability to make a distribution to Ms Zaccara. The tenor of the email suggests it was Ms Zaccara who initiated the chat with Mr Vijayadass seeking contact details of a loan broker. I agree with the applicants' submission that, at most, consistent with what would have been sensible high-level advice, Mr Vijayadass may have indicated to Ms Zaccara that if Ex NF had surplus cash, they could consider how that cash might be used to fund a property purchase. I agree it is inconceivable given the state of Ex NF's tax filings and records that Mr Vijayadass advised Ms Zaccara that Ex NF could properly pay her a substantial dividend. I also agree it is inconceivable that Mr Vijayadass would have advised payment of a dividend without advising the requisite processes for the declaration of a dividend to fund the purchase in Mr Munneke's name should be followed. It is also of note that had a dividend been declared that would have led to a material tax liability for Ms Zaccara.

573 The BDO invoice for the period 1 November 2014 to 30 June 2016 recording a meeting on 9 December 2015 does not support the contention that Mr Vijayadass provided the advice Mr Munneke and Ms Zaccara said they acted on.

574 It is further to be noted that the last communication with Ms Zaccara and BDO before Mr Vijayadass' email dated 30 September 2015 was on 18 February 2015. Mr Vijayadass' email suggests Ms Zaccara had informed him about the property to be purchased that was "only like to have a 50% gearing". Ms Zaccara rescheduled an appointment with Mr Vijayadass in the week of 23 November 2015 stating in an email she had not "had a chance to update MYOB for" Ex NF's returns and had been focusing on "completing BAS for our loan requirements". She also said, "loan has been approved – subject to bank valuations". Mr Vijayadass emailed back suggesting a meeting on 2 December 2015. On 2 December 2015, Ms Zaccara emailed Mr Vijayadass asking to postpone the meeting scheduled for that day. She also said "there has still been lots of activity with financing, conveyancing and valuation this week" and "I've caught up with BAS and Super thanks to finance application".<sup>24</sup> She also made reference to "tackling overdue income returns". It appears that by reference to an email dated 3 December 2015 from Ms Zaccara to her solicitor, Ms Polson, the valuation was expected on 7 December 2015. On 7 December 2015, Ms Zaccara was "shocked" to learn that the valuation of O'Connell Street came in at \$1.15 million, significantly lower than the Registrar-General's valuation at \$1.54 million. There is no evidence that Mr Vijayadass was informed of the lower-than-expected valuation and ANZ's preparedness to loan only \$740,000, not the \$1 million as applied for. Nor is there evidence he was aware that an extra \$260,000 of Ex NF's funds would be paid out or that on 24 November 2015 Ms Zaccara was pursuing payment from a major client, saying Ex NF was in "dire straits", with the ATO on its back. If he was informed prior to settlement on 10 December 2015, there is no evidence to suggest that it occurred prior to the meeting on 9 December 2015.

575 I suspect the evidence Ms Zaccara gave during the s 597 examination reflects the true situation regarding her communication with Mr Vijayadass when she was asked whether BDO gave advice about what ought to happen with the money in the bank and she said:

No. We had perceived that opinion from our accountant many months before ...

...

... It wasn't in writing. It wasn't anything formal. There was no sort of structure or other advice around it.

and where she said, "We didn't get advice about how that should be done".

576 I am unable to accept that Mr Vijayadass gave the advice Mr Munneke and Ms Zaccara alleged. As a final note on this topic, Mr Munneke said in cross-examination that he "didn't talk to BDO about" the large surplus, and left it to Ms Zaccara.

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<sup>24</sup> This was an incorrect statement by Ms Zaccara as she had not caught up with BAS.

## Relevant principles

### *Insolvency*

#### *Meaning of insolvency*

577 Section 95A of the *Corporations Act* provides to the effect that a company which is not solvent is insolvent, and a company is solvent if, and only if, it is able to pay all the company's debts, as and when they become due and payable.

578 The question whether a company is unable to pay its debts as they fall due is a question of fact to be decided as a matter of commercial reality in the light of all the circumstances and not merely be looking at the accounts and making a mechanical comparison of assets and liabilities.<sup>25</sup>

579 As submitted by Ms Zaccara and the respondent companies, this matter is not an insolvent trading case and the applicants do not specifically call in aid the definition of insolvency in s 95A of the *Corporations Act*. It was submitted that definition may inform the Court's approach to the pleaded allegation of insolvency, and it has informed the approach of Mr Heard, to his assessment of Ex NF's financial position at relevant times. While in a case involving an allegation of insolvent trading pursuant to ss 588G and 588M the requirement to establish insolvency at the time of the incurring of the debt is essentially backward looking or retrospective, the allegations in this matter require regard to be had to the appearance of solvency from the perspective of the director, Mr Munneke, at the time of the alleged breaches of duty.

580 In assessing solvency, a debtor's financial resources are not limited to their cash resources immediately available.

581 Funds which on a "realistic commercial assessment" are capable of being raised from outside sources are relevant to the question whether a company is solvent.<sup>26</sup>

#### *Presumption of insolvency*

582 The applicants pleaded in both the O'Connell Street claim and the cryptocurrency and Ward Street claim that Ex NF was presumed insolvent under s 588E(4) of the *Corporations Act* by reason of an alleged failure to keep financial records pursuant to s 286(1) of the *Corporations Act*.

583 Section 588E(4)(a) relevantly provides that if it is proved that the company has failed to keep "financial records" in relation to a period as required by s 286(1) the company is presumed to have been insolvent throughout the period. Pursuant

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<sup>25</sup> See *Taylor v Australia & New Zealand Banking Group Ltd* (1998) 13 ACLR 780 at 784 (McGarvie J). See also *Re Newark Pty Ltd* [1993] 1 Qd R 409 at 413.

<sup>26</sup> *Australian Securities & Investments Commission v Edwards* (2005) 220 ALR 148 at [99].

to s 588E(9), the presumption of insolvency operates except so far as the contrary is proved.

584 The applicants bear the onus of proving the matters in s 588E(4). Thereafter, it is open to the party who is subject to the presumption of insolvency to prove an absence of insolvency, that is, solvency.

585 Section 286(1) relevantly provides as follows:

- (1) A company ... must keep financial records that:
  - (a) correctly record and explain its transactions and financial position and performance; and
  - (b) would enable true and fair financial statements to be prepared and audited.

586 The s 9 definition of “financial records” provides as follows:

*financial records* includes:

- (a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and
- (b) documents of prime entry; and
- (c) working papers and other documents needed to explain:
  - (i) the methods by which financial statements are made up; and
  - (ii) adjustments to be made in preparing financial statements.

587 Mr Munneke relied on a decision of Barrett J in *Fisher v Divine Homes Pty Ltd; Allen v Harb*, where the liquidator sought to rely (as here) on a presumption of insolvency arising under s 588E(4), by reason of an alleged failure to keep records pursuant to s 286.<sup>27</sup>

588 It was conceded in that case that the company had not prepared income tax returns, BAS, balance sheets, or profit and loss accounts for any period since its incorporation. Nor had it ever made any lodgements with the Australian Securities and Investments Commission.<sup>28</sup> Despite the absence of ATO lodgements, Barrett J found that there existed records that met the broader s 9 definition of “financial records”.<sup>29</sup> Justice Barrett found as follows:<sup>30</sup>

The fact that no income tax return, business activity statement, balance sheet or profit and loss account was prepared for a period does not mean that “financial records” for that period were not kept.

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<sup>27</sup> (2011) 85 ACSR 512 at [13].

<sup>28</sup> (2011) 85 ACSR 512 at [20].

<sup>29</sup> (2011) 85 ACSR 512 at [21].

<sup>30</sup> (2011) 85 ACSR 512 at [23]-[26].

For a presumption of insolvency to arise under s 588E(4)(a) and to be relied on in relation to a particular period, it must be proved either that no document whatsoever within the “financial records” description was kept in relation to that period or that such documents within the definition as were kept in relation to the period were deficient as to content, in the sense that they either did not correctly record and explain the company’s transactions and financial position and performance (for example, because they did not accurately record the matters purportedly recorded: *Woodgate v Fawcett* (2008) 67 ACSR 611; [2008] NSWSC 868) or would not enable true and fair financial statements to be prepared and audited. Separate and distinct proof is necessary in relation to each relevant period: *Sims (as liquidator of SSET Construction Pty Ltd) v Khattar* [2010] NSWSC 102.

It follows that where, as here, there is evidence that “invoices”, “receipts”, “loan documents” and “cheque books” (including cheque butts) did exist in relation to the company’s activities, the presumption will not be available in relation to a given period unless the person seeking to rely on the presumption shows that those documents were, in respect of the period in question, deficient in the sense just mentioned.

In the present case, the liquidator has proved nothing about the content of the “invoices”, “receipts”, “loan documents” and “cheque books” (including cheque butts). The fact that no income tax return, business activity statement, balance sheet or profit and loss account of Divine Homes was ever prepared says nothing about conformity of the documents that did exist with the criteria in s 286(1). In the case of a company carrying on a simple cash business it is quite conceivable that a collection of invoices and cheque butts in “raw form” (supplemented by bank statements) will satisfy those criteria.

Justice Barrett concluded:<sup>31</sup>

I therefore cannot find, in relation to any period, that the liquidator has proved the matter in s 588E(4)(a), that is, that Divine Homes failed to “keep” financial records as required by s 286(1). It is important to emphasise that it is for the liquidator to prove that the records kept were deficient, not for Mr Harb to prove that they were not.

Justice Barrett ultimately found that the liquidator had failed to prove the insolvency of the company through the presumption available at s 588E(4) and any failure to keep financial records pursuant to s 286(1).<sup>32</sup>

589 In *Adelaide Brighton Cement Limited, in the matter of Concrete Supply Pty Ltd v Concrete Supply Pty Ltd (Subject to Deed of Company Arrangement) (No 4)*, Besanko J said:<sup>33</sup>

A severe absence of records is no doubt one example of a contravention of s 286, but I do not see any justification in the words of the section for limiting the scope of the section to that example. The failure to record a major liability of the company (perhaps any liability other than one which is *de minimis*) would be a contravention of the section. That raises the prospect of the presumption of insolvency arising.

<sup>31</sup> (2011) 85 ACSR 512 at [28].

<sup>32</sup> (2011) 85 ACSR 512 at [36].

<sup>33</sup> [2019] FCA 1846 at [971].

## ***Director's duties***

### *Statutory duties*

590 The statutory duties owed by a director are:

1. to exercise his or her powers and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of the company in the company's circumstances and occupied the office held by, and had the same responsibilities within the company as the director;<sup>34</sup>
2. to exercise his or her powers and discharge his or her duties in good faith in the best interest of the company and for a proper purpose;<sup>35</sup> and
3. to not improperly use his or her position as a director to gain an advantage for himself or herself or someone else or to cause detriment to the company.<sup>36</sup>

### Section 180(1)

591 Pursuant to s 180(1) of the *Corporations Act*, a director must exercise his or her powers and discharge his or her duties with the degree of care and diligence a reasonable person would exercise if he or she were a director in the company's circumstances.<sup>37</sup>

592 Section 180(2) establishes a statutory defence to a contravention of s 180(1) known as the "business judgment rule". The director of a company who makes a business judgment is taken not to contravene s 180(1) of the *Corporations Act* if he or she:

- (a) make the judgment in good faith for a proper purpose; and
- (b) do not have a material personal interest in the subject matter of the judgment; and
- (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
- (d) rationally believe that the judgment is in the best interests of the corporation.

### Section 181(1)

593 Pursuant to s 181(1) of the *Corporations Act*, a director must exercise their powers and discharge their duties in good faith in the best interests of a corporation

<sup>34</sup> *Corporations Act 2001* (Cth) s 180(1).

<sup>35</sup> *Corporations Act 2001* (Cth) s 181(1).

<sup>36</sup> *Corporations Act 2001* (Cth) s 182(1).

<sup>37</sup> In *Termite Resources NL (in liq) v Meadows, in the matter of Termite Resources NL (in liq) (No 2)* (2019) 370 ALR 191 at [180]-[185], White J summarises the authorities on a director's duty of care and skill.

and for a proper purpose. The legal principles in relation to s 181 were summarised by Stein J in *De Bourbel Pty Ltd (in liq) v Distilleria Pty Ltd & Anor*:<sup>38</sup>

The first step is to ascertain the nature of the power in question, and the second is to identify the substantial purpose for which the power was exercised and determine whether that purpose was proper or improper.

In relation to s 181, the following matters are relevant in considering whether directors have acted for an improper purpose:

- (i) Fiduciary powers and duties are to be exercised for the purpose for which they were given and not for collateral purposes.
- (ii) It must be shown that the substantial purpose was improper or collateral to the duties of the director. The issue is not whether a business decision was good or bad but whether a director has acted in breach of their fiduciary duties.
- (iii) Honest or altruistic behaviour does not prevent a finding of improper conduct if the conduct was carried out for an improper purpose. Evidence as to the subjective intention or belief of the director is relevant.
- (iv) The Court must determine whether, but for the improper or collateral purpose, the director would have performed the act in dispute.

### Section 182(1)

594 Section 182(1) of the *Corporations Act* provides that a director must not improperly use his or her position to gain an advantage for himself or herself or someone else or cause detriment to the corporation. Justice Halley summarised the authorities on s 182(1) in *Hanwood Pastoral Co Pty Limited v Kelly (No 2)*:<sup>39</sup>

The question of whether a director has used their position improperly to gain an advantage for themselves or another or to cause detriment to the corporation is to be assessed objectively: *Earth Civil* at [969] (Ward CJ in Eq, as her Honour then was) citing *Re Colorado Products* at [432]-[433]; *Taxa Australia Pty Ltd v Wang* (2018) 130 ACSR 531; [2018] NSWSC 1412 at [33] (Black J) and the following statement by Gleeson CJ (with whom Allen and James JJ agreed) in *R v Towey* (1996) 21 ACSR 46 at 57 that impropriety is established by:

a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties powers and authority of the position and the circumstances of the case.

It is not necessary for the relevant advantage or detriment sought be achieved in order to establish a contravention of s 182(1): *Re Colorado Products* at [433] (Black J).

595 In regard to a director using company funds for personal expenses (even of a modest amount), the applicants cited the following passage of Austin J in *Shum*

<sup>38</sup> [2023] SASC 88 at [522]-[523] citing *Slea Pty Ltd v Connective Services Pty Ltd (No 9)* [2022] VSC 136, [915] (Robson J) and *Macks v Viscariello* (2017) 130 SASR 1 at [612] (Lovell J, Corboy and Slattery AJJ).

<sup>39</sup> [2022] FCA 850 at [146]-[147].

*Yip Properties Development Ltd v Chatswood Investment and Development Co Pty Ltd*:<sup>40</sup>

A director is not entitled to charge private expenses to the company's account simply because the director's loan account has been simultaneously debited with the same amount. Using the company's funds to pay a director's private expenses is a misappropriation of company property even if the director undertakes an obligation to reimburse the company, unless the transaction is specifically and properly authorised by the company.

Interests of creditors

596 The duty to act in good faith in the best interests of the company may require a director to consider the interests of creditors.<sup>41</sup>

597 The obligation to consider the interests of creditors is enlivened particularly when a company is insolvent or nearing insolvency.<sup>42</sup>

598 In *Walker v Wimborne*, Mason J (with whom Barwick CJ agreed) observed:<sup>43</sup>

... it should be emphasized that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well for them. The creditor of a company, whether it be a member of a "group" of companies in the accepted sense of that term or not, must look to that company for payment. His interests may be prejudiced by the movement of funds between companies in the event that the companies become insolvent.

599 In *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler*, Gummow J explained:<sup>44</sup>

It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors ... the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator.

(Footnotes omitted)

<sup>40</sup> (2002) 166 FLR 451 at [172].

<sup>41</sup> *Termite Resources NL (in liq) v Meadows; in the matter of Termite Resources NL (in liq) (No 2)* (2019) 370 ALR 191 at [197].

<sup>42</sup> *Termite Resources NL (in liq) v Meadows; in the matter of Termite Resources NL (in liq) (No 2)* (2019) 370 ALR 191 at [201].

<sup>43</sup> (1976) 137 CLR 1 at 7.

<sup>44</sup> (1994) 51 FCR 425 at 444-5.

600 In a case of insolvency or near insolvency, shareholders will not have the power or the authority to absolve directors from any breach of duty.<sup>45</sup> In particular, the principle permitting shareholder ratification of a director’s conduct (discussed later) is not then available.<sup>46</sup> In *Kinsela v Russell Kinsela Pty Ltd (In Liq)*, Street CJ said (with whom Hope and McHugh JJA agreed):<sup>47</sup>

In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company’s assets. It is in a practical sense their assets and not the shareholders’ assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration.

Chief Justice Street hesitated to:<sup>48</sup>

... attempt to formulate a general test of the degree of financial instability which would impose upon directors an obligation to consider the interests of creditors ... the duty arises when a company is insolvent inasmuch as it is the creditors’ money which is at risk, in contrast to the shareholders proprietary interests.

601 The courts have used a range of different language to identify when the interests of creditors must be considered as an aspect of the duty to act in the best interests of the company, for example:

- (a) “doubtful solvency”;<sup>49</sup>
- (b) “an insolvency context”;<sup>50</sup>
- (c) “should have been [concerned] for its solvency”;<sup>51</sup>
- (d) “is insolvent or nearing insolvency”;<sup>52</sup>
- (e) “financial instability”;<sup>53</sup>
- (f) when a transaction would be “prejudicial to creditors”;<sup>54</sup>

<sup>45</sup> *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 at 732G (Street CJ), citing *Nicholson v Permakraft (NZ) Ltd (in liq)* [1985] 1 NZLR 242.

<sup>46</sup> *Angas Law Services Pty Ltd (in liq) & Anor v Carabelas & Anor* (2005) 226 CLR 507.

<sup>47</sup> (1986) 4 NSWLR 722 at 729.

<sup>48</sup> (1986) 4 NSWLR 722 at 732.

<sup>49</sup> *Nicholson v Permakraft (NZ) Ltd (in liq)* [1985] 1 NZLR 242 at 249.

<sup>50</sup> *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 at 731.

<sup>51</sup> *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465 at 478.

<sup>52</sup> *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425 at 444.

<sup>53</sup> *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465 at 471, 474.

<sup>54</sup> *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1 at [4440].

- (g) “facing insolvency”;<sup>55</sup>
- (h) “a real risk that the creditors of a company in an insolvency context would suffer significant prejudice”;<sup>56</sup> and
- (i) “a real and not remote risk that [creditors] will be prejudiced.”<sup>57</sup>

### Section 189

602 Section 189 of the *Corporations Act* relevantly provides:

If

- (a) a director relies on information, or professional or expert advice, given or prepared by:
  - (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
  - (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person’s professional or expert competence; or

...
- (b) the reliance was made:
  - (i) in good faith; and
  - (ii) after making an independent assessment of the information or advice, having regard to the director’s knowledge of the corporation and the complexity of the structure and operations of the corporations; and
- (c) the reasonableness of the director’s reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;

the director’s reliance on the information or advice is taken to be reasonable unless the contrary is proved.

603 In *Australian Securities and Investments Commission v Mitchell & Anor (No 2)*, Beach J held:<sup>58</sup>

... In effect, s 189 requires that where the director relies on information, professional or expert advice, he must do so in good faith and only after having made an independent assessment of the information or advice. In this context, independent assessment requires no more than that the director, having listened to and assessed what his colleagues have said, must bring his own mind to bear on the issue using such skill and judgment as he may possess. Further, there must be evidence that he in fact relied on the information provided.

<sup>55</sup> *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 at 163 at [952].

<sup>56</sup> *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 at 358 at [2046].

<sup>57</sup> *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557 at [162].

<sup>58</sup> (2020) 382 ALR 425 at [1459].

In the present case each of those criteria are satisfied on the evidence. Therefore Mr Healy's reliance on Mr Wood is presumed to have been reasonable. And ASIC has failed to discharge the onus that it was not.

### Section 1317E

604 Section 1317E of the *Corporations Act* relevantly provides:

#### *Declaration of contravention*

- (1) If a Court is satisfied that a person has contravened a civil penalty provision, the Court must make a declaration of contravention.
- (2) The declaration must specify the following:
  - (a) the Court that made the declaration;
  - (b) the civil penalty provision that was contravened;
  - (c) the person who contravened the provision;
  - (d) the conduct that constituted the contravention;
  - (e) if the contravention is of a corporation/scheme civil penalty provision—the corporation, registered scheme or notified foreign passport fund to which the conduct related;
  - (f) if the contravention is of subsection 1211B(1) or (2) (complying with the Passport Rules for this jurisdiction)—the passport fund in relation to which the obligation was imposed on the person;
  - (g) if the contravention is of subsection 670A(4), 727(6), 728(4) or 1309(12) (misleading statements etc.)—the corporation, registered scheme or notified foreign passport fund to which the conduct related.

605 Section 1317E provides that ss 180(1), 181(1), and 182(1) are civil penalty provisions.

### Section 1317H

606 Section 1317E of the *Corporations Act* relevantly provides:

#### *Compensation for damage suffered*

- (1) A Court may order a person to compensate a corporation, registered scheme or notified foreign passport fund for damage suffered by the corporation, scheme or fund if:
  - (a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation, scheme or fund; and
  - (b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

*Damage includes profits*

- (2) In determining the damage suffered by the corporation, scheme or fund for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

### Sections 1317S and 1318

607 If Mr Munneke is found to have breached any duty, he submits he ought to be excused for any such breach pursuant to ss 1317S and 1318 of the *Corporations Act*.

608 The Court has power to grant relief, wholly or partly, from a contravention of a civil penalty provision under s 1317S if, in “eligible proceedings” brought against a person, it appears to the Court that that person has, or may have, contravened a civil penalty provision, but that person has acted honestly and, having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention.

609 Section 1318 in turn allows a Court to relieve, wholly or partly, relevantly, an officer of a corporation, from liability in any civil proceeding for negligence, default, breach of trust or breach of duty, if that person establishes that they acted honestly and that, having regard to all the circumstances of the case, including those connected with the person’s appointment, the person ought to be excused for the negligence, default, breach of trust or breach of duty, the Court may relieve the person wholly or partly from liability on such terms as the Court thinks fit.

610 Whether relief from liability should be granted under ss 1317S and 1318 depends not only on subjective honesty but also on:

- (a) the degree to which the relevant conduct fell short of the required standard;
- (b) the seriousness of the contravention and its actual or potential consequences;
- (c) any element of impropriety such as deception and personal gain;
- (d) any contrition of the applicant; and
- (e) the need for general deterrence.<sup>59</sup>

611 In *Great Southern Finance Pty Ltd (in liq) v Rhodes*, Beech J held that for a court to order relief under ss 1317S and 1318, it must be satisfied of three things:<sup>60</sup>

<sup>59</sup> *Gordon v Leon Plant Hire Pty Ltd (in liq)* (2015) 16 ASTLR 185 at [84].

<sup>60</sup> (2014) 103 ACSR 137 at 148-9.

- (a) that the defendant acted honestly;
- (b) of the value judgment that, having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention, negligence, default or breach of duty (as the case may be); and
- (c) that as a matter of discretion the court ought exercise its power to relieve the person from any liability.

612 The purpose of the relief provisions is to excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are businessmen and women who act in an environment involving risk in commercial decision-making.<sup>61</sup>

### *Fiduciary duties*

613 A director is in a fiduciary relationship with the company and by reason of that relationship, owes the following duties to it:

1. to avoid conflicts between duty and personal interest (the “conflict rule”);
2. not to misuse the fiduciary position for personal gain or benefit (the “profit rule”); and
3. to act bona fide for proper purposes.

614 In *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd*, Gageler J summarised the proscriptive fiduciary duties comprising the profit and conflict rules:<sup>62</sup>

“The first”, often referred to as the “conflict rule”, “is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest”. The unconscionability which attracts equitable remedies in circumstances where the conflict rule alone is invoked lies not so much in receipt by the fiduciary of the benefit or gain (over which the fiduciary need not have control) as in retention by the fiduciary of the benefit or gain which in conscience ought to be disgorged to the principal.

“The second”, often referred to as the “profit rule”, “is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of [the] fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing [the fiduciary’s] position for [the fiduciary’s] personal advantage.” The unconscionability which attracts equitable remedies in such circumstances lies in pursuit by the fiduciary of self-interest, or, more precisely, in pursuit of an interest other than the exclusive interest of the principal.

<sup>61</sup> *Daniels v Anderson* (1995) 37 NSWLR 438 at 525 (Clarke and Shelley JA).

<sup>62</sup> (2018) 265 CLR 1 at [68]-[70].

Consistently with the objective of imposing each obligation, in neither case does the benefit or gain to the fiduciary need to be at the expense of the principal, though it may be. And in neither case does the fiduciary need to act dishonestly or fraudulently, or otherwise than in good faith, though again the fiduciary may do so. Where a fiduciary does act dishonestly and fraudulently, however, the dishonest and fraudulent character of the breach of fiduciary duty is not without consequence for the intensity of the equitable remedies available against the defaulting fiduciary. More important for present purposes is that the dishonest and fraudulent character of the conduct of the fiduciary gives rise to the potential for similar remedies to be available in equity against another person who might knowingly participate in the fiduciary's breach.

### Ratification

615 As the fiduciary, a director is under an obligation, without informed consent, not to promote his or her personal interests by making or pursuing a gain in circumstances where there is “a conflict or a real or substantial possibility of a conflict” between their own personal interests and those owed to the company.<sup>63</sup>

616 The shareholders of a company may authorise or affirm, by unanimous consent, a decision of the directors which would otherwise be voidable because it amounts to a breach by those directors of their fiduciary duties to the company (“the unanimous shareholder consent rule”).<sup>64</sup> The rule was endorsed by the Full Court (Lander J with Millhouse and Duggan JJ agreeing) in *Pascoe Ltd (in liq) v Lucas* (“*Pascoe*”).<sup>65</sup> There cannot be assent or ratification unless the shareholders have full knowledge of the nature of the transaction and its consequences.<sup>66</sup>

617 Where it can be shown that all shareholders having a right to attend and vote at a general meeting of a company assent, with full knowledge and consent, to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.<sup>67</sup>

618 In *Pascoe*, Lander J observed that where there is only one shareholder, approval by that shareholder in advance of the transaction:<sup>68</sup>

... could amount to an authority by that shareholder for the company to enter into the transaction even if the entry into that transaction gave rise to a breach of fiduciary duties on the part of the director.

That proposition is subject to the following qualifications:<sup>69</sup>

1. the company must be solvent.

<sup>63</sup> *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [78].

<sup>64</sup> *Pascoe Ltd (in liq) v Lucas* (1999) 75 SASR 246 at [264].

<sup>65</sup> (1999) 75 SASR 246 at [265].

<sup>66</sup> *Herrman v Simon* (1990) 4 ACSR 81 at 83; *Jarrett v Perpetual Trustee Co Ltd* (2007) 64 ACSR 552 at [123].

<sup>67</sup> *Re Duomatic Ltd* [1969] 2 Ch 365 (Buckley J).

<sup>68</sup> *Pascoe Ltd (in liq) v Lucas* (1999) 75 SASR 246 at [265].

<sup>69</sup> *Pascoe Ltd (in liq) v Lucas* (1999) 75 SASR 246 at [266] (Lander J).

2. the transaction itself must be *intra vires*.
3. the directors must make full disclosure to the shareholders.
4. the directors must be acting in good faith.

619 As submitted, the *ultra vires* rule has been abolished.

620 The unanimous shareholder consent rule only applies to actual events and not hypothetical ones.<sup>70</sup>

621 It is not necessary that a formal decision of the shareholders should be made; informal consent will be sufficient. Further, where there is only one shareholder, there is even less need for a formal meeting.<sup>71</sup>

622 While ratification operates to protect a director from a claim of breach of a fiduciary duty, conduct by directors that does amount to a contravention of a statutory duty cannot be ratified by shareholders. Shareholders cannot release the directors from the obligation to perform their statutory duties.<sup>72</sup> Further, as the applicants submitted, a shareholder cannot ratify a transaction involving expropriation of company property if the company is near insolvent.<sup>73</sup>

623 Accordingly, the applicants correctly submitted that ratification is irrelevant to claims for breach of the *Corporations Act*, i.e. conduct that amounts to an unreasonable director-related transaction or a breach of a statutory director's duty cannot be ratified.

624 In *Angas Law Services Pty Ltd (in liq) & Anor v Carabelas & Anor* (“*Angas Law Services*”), Gleeson CJ and Heydon J (with whom Gummow, Hayne and Kirby J agreed) said:<sup>74</sup>

While, in some circumstances, the informed assent of all the shareholders to a transaction might be a fact relevant to a question of impropriety, the provisions of s 229 creating offences operate according to their terms. Where ratification operates to protect a director from civil liability to a company it does so upon the principle that “those to whom [fiduciary] duties are owed may release those who owe the duties from their legal obligations and may do so either prospectively or retrospectively, provided that full disclosure of the relevant facts is made to them in advance of the decision”. The shareholders of a company cannot release directors from the statutory duties imposed by sub-s (2) or sub-s (4) of s 229. In a particular case, their acquiescence in a course of conduct might affect the practical content of those duties. It might, for example, be relevant to a question of impropriety. A company's right to recover under s 229(7) depends upon the

<sup>70</sup> *Re Freehouse Pty Ltd; Jordan v Avram* (1997) 26 ACSR 662 at 678.

<sup>71</sup> *Pascoe Ltd (in liq) v Lucas* (1999) 75 SASR 246 at [270] citing *Re Duomatic Ltd* [1969] 2 Ch 365.

<sup>72</sup> See *Angas Law Services Pty Ltd (in liq) & Anor v Carabelas & Anor* (2005) 226 CLR 507 at [32]. See also *Miller v Miller & Miller* (1995) 16 ACSR 73 at 89.

<sup>73</sup> See *Macleod v R* (2003) 214 CLR 230 at [28]-[30]; *Angas Law Services Pty Ltd (in liq) & Anor v Carabelas & Anor* (2005) 226 CLR 507 at [24], [66]-[68]; *Re New World Alliance; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425 at 444D-445B.

<sup>74</sup> (2005) 226 CLR 507 at [32].

existence of a contravention. If such a contravention has occurred, the question whether a company has lost its right of action under s 229(7) because of some binding decision on the part of its shareholders to release the potential defendants is another matter, and one that did not arise in this case.

(Footnotes omitted)

625 As the applicants submitted, shareholders cannot belatedly ratify past misconduct after winding up. Once a winding up is in process, the liquidator is the company's decisionmaker. There is no scope for decisions affecting the company to be made for others.<sup>75</sup>

### ***Ability to pay dividends***

626 To the extent that the respondents contend that payments made by Ex NF to acquire O'Connell Street represented informal distributions, the applicants submitted it is relevant to consider the requirements for a company to properly make a distribution of assets to shareholders.

627 Section 254T(1) of the *Corporations Act* relevantly provides as follows:

- (1) A company must not pay a dividend unless:
- (a) the company's assets exceed its liabilities immediately before the dividend is declared and the excess is sufficient for the payment of the dividend; and
  - (b) the payment of the dividend is fair and reasonable to the company's shareholders as a whole; and
  - (c) the payment of the dividend does not materially prejudice the company's ability to pay its creditors.

Note 1: As an example, the payment of a dividend would materially prejudice the company's ability to pay its creditors if the company would become insolvent as a result of the payment.

628 Similarly, the requirements for a lawful return of capital are similarly stated in s 256B of the *Corporations Act*, which relevantly provides:

- (1) A company may reduce its share capital in a way that is not otherwise authorised by law if the reduction:
- (a) is fair and reasonable to the company's shareholders as a whole; and
  - (b) does not materially prejudice the company's ability to pay its creditors; and
  - (c) is approved by shareholders under section 256C.

629 In either case, for capital to be returned to shareholders, the transaction must "not materially prejudice the company's ability to pay its creditors".

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<sup>75</sup> See *Re Pine Forests of Australia (Canberra) Pty Ltd* (2010) 80 ACSR 377 at [13].

630 This phrase was addressed by the High Court in *Connective Services Pty Ltd v Sleat Pty Ltd* in the related context of the prohibition on a corporation giving assistance for the acquisition of its own shares in the following terms:<sup>76</sup>

The issue of material prejudice to the interests of the company or its shareholders or creditors requires an assessment of and comparison between the position before the giving of the financial assistance and the position after it to see whether the company or its shareholders or its ability to pay its creditors is in a worse position. It does not assist to gloss the concept of material prejudice by the introduction of further concepts, which themselves require further explanation, such as whether there has been a diminution of the assets of the company, whether there has been a transaction, or whether there was a net transfer of value to the person acquiring the shares. For instance, the introduction of a requirement not present in the text of s 260A(1) of a transaction with, or a net transfer of value to, the person acquiring the shares could lead to further issues such as whether the interposition of intermediaries is included within those concepts.

631 In *Re CSR Ltd*, Keane CJ and Jacobson J in the Full Court of the Federal Court stated:<sup>77</sup>

One is, we think, on safe ground, however, in treating "material prejudice" to a company's ability to pay its creditors as relating to the creation of a material as opposed to theoretical increase, in the likelihood that the reduction in capital will result in a reduced ability to pay creditors.

632 Accordingly, the applicants submitted, a distribution to shareholders will be unlawful if it increases the risk to creditors of non-payment. It is not necessary for the distribution to lead to insolvency or near insolvency, albeit that if the distribution does, then it would necessarily have materially prejudiced the interests of creditors.

### ***Unreasonable director-related transactions***

633 Section 588FDA of the *Corporations Act* provides:

- (1) A transaction of a company is an ***unreasonable directed-related transaction*** of the company if, and only if:
  - (a) the transaction is:
    - (i) a payment made by the company; or
    - (ii) a conveyance, transfer or other disposition by the company of property of the company; or
    - (iii) the issue of securities by the company; or
    - (iv) the incurring by the company of an obligation to make such a payment, disposition or issue: and

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<sup>76</sup> (2019) 267 CLR 461 at [26].

<sup>77</sup> (2010) 183 FCR 358 at [44].

- (b) the payment, disposition or issue is, or is to be made to:
  - (i) a director of the company; or
  - (ii) a relative of a director of the company; or
  - (iii) a relative of a spouse of a director of the company; or
  - (iv) a person on behalf, or for the benefit of, a person of a kind referred to in subparagraph (i), (ii) or (iii); and
- (c) it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:
  - (i) the benefits (if any) to the company of entering into the transaction; and
  - (ii) the detriment to the company of entering into the transaction; and
  - (iii) the respective benefits to other parties to the transaction of entering into it; and
  - (iv) any other relevant matter.

The obligation referred to in subparagraph (a)(iv) may be a contingent obligation).

Note: Subparagraph (a)(iv) – This would include, for example, granting options over shares in the company.

- (2) To avoid doubt, if:
  - (a) the transaction is a payment, disposition or issue; and
  - (b) the transaction is entered into for the purpose of meeting an obligation the company has incurred;

the test in paragraph (1)(c) applies to the transaction taking into account the circumstances as they exist at the time when the transaction is entered into (rather than as they existed at the time when the obligation was incurred).

- (3) A transaction may be an unreasonable director-related transaction because of subsection (1):
  - (a) whether or not a creditor of the company is a party to the transaction; and
  - (b) even if the transaction is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

634 To satisfy the description of being an unreasonable director-related transaction, the transaction must answer the criteria in each of s 588FDA(1)(a)

to (c).<sup>78</sup> The requirements of s 588FDA(1)(a) to (c) are clearly cumulative.<sup>79</sup> In *Yang v Wong, Axis North Pty Ltd (Recs and Mgrs Appt) (in Liq) (No 2)*, Derrington J set out the steps an applicant must take to prove that an impugned payments is an “unreasonable director-related transaction” pursuant to s 588FDA(1):<sup>80</sup>

[T]he applicant must:

- (1) identify the relevant “transaction” (or “transactions”); and
- (2) establish that any such transaction:
  - (a) comprises one of the dealings defined in s 588FDA(1)(a); and
  - (b) is, or is to be, made to one of the entities defined in s 588FDA(1)(b); and
- (3) establish that it may be expected that a “reasonable person”, in the company’s position, would not have entered the transaction having regard to the factors in s 588FDA(1)(c).

635 Section 588FDA is concerned with the reasonableness of the company’s conduct, objectively assessed, not the director’s conduct, in entering into the transaction.<sup>81</sup> The essential purpose of the provision is to strike at a gift or benefit at an undervalue taken by a director.<sup>82</sup>

#### *Voidable transactions*

636 An unreasonable director-related transaction may be voidable pursuant to s 588FE of the *Corporations Act*. Relevantly, s 588FE(6A) provides:

- (6A) The transaction is voidable if:
- (a) it is an unreasonable director-related transaction of the company; and
  - (b) it was entered into, or an act was done for the purposes of giving effect to it:
    - (i) during the 4 years ending on the relation-back day; or
    - (ii) after that day but on or before the day when the winding up began.

637 The Court upon finding that a transaction is voidable pursuant to s 588FE, may make an order that a person transfer the company property that the Court is

<sup>78</sup> *CEG Direct Securities Pty Ltd v Cooper as Liquidator of Runtong Investment and Development Pty Ltd (In Liq)* (2025) 309 FCR 66 at [86].

<sup>79</sup> *Yang v Wong, Axis North Pty Ltd (Recs and Mgrs Appt) (In Liq) (No 2)* [2025] FCA 693 at [52] citing *CEG Direct Securities Pty Ltd v Cooper as Liquidator of Runtong Investment and Development Pty Ltd (In Liq)* (2025) 309 FCR 66 at [14].

<sup>80</sup> *Yang v Wong, Axis North Pty Ltd (Recs and Mgrs Appt) (In Liq) (No 2)* [2025] FCA 693 at [52].

<sup>81</sup> *Weaver v Harburn* (2014) 103 ACSR 416 at [79].

<sup>82</sup> *Crowe-Maxwell v Frost* (2016) 91 NSWLR 414 at [65]-[66], citing Ford Austin & Ramsey’s *Principles of Corporations Law* at [27.220]; also see *Vasudevan (as Joint and Several Liquidator of Wulguru Retail Investments Pty Ltd) (in liq) v Becon Constructions (Australia) Pty Ltd* (2014) 41 VR 445 at [24].

satisfied fairly represents money that the company has paid under the transaction or proceeds of property that the company has transferred under the transaction.<sup>83</sup>

### **The O’Connell Street claim**

#### ***Applicants’ submissions***

638 The applicants pointed out that by April 2015 the last BAS that had been filed by Ex NF was for the quarter ended 30 June 2013. This meant that the next seven quarters of BAS filings and attendant payment obligations in respect of PAYG withheld, GST collected, and income tax were outstanding.

639 Ms Zaccara engaged in a “flurry of activity” in April 2015 causing BAS for the quarters ended 30 September 2013, 31 December 2013, 31 March 2014, and 30 June 2014 to be filed. The 31 December 2014 BAS return was filed in June 2015. This activity left outstanding as at mid-2015 the BAS for the quarters ended 30 September 2014 and 31 March 2015 with the BAS for the quarter ended 30 June 2015 due in the third quarter of the year as well as the income tax return for the year ended 30 June 2014. It was submitted that Ex NF also had a contingent liability in respect of the December 2015 quarter.

640 The applicants contended that the evidence of Mr Munneke and Ms Zaccara reveals that throughout 2015, Ex NF did not have any reliable financial statements to enable any meaningful monitoring of the state of its assets and liabilities.

641 Ex NF negotiated an extension on its tenancy at 112 Ward Street until March 2016 in mid-July 2015 and from about August or September 2015, Ms Zaccara commenced negotiations for the acquisition and financing of O’Connell Street. Ms Zaccara originally approached NAB to provide finance to purchase a property but NAB indicated that Ex NF would not be able to obtain a loan from NAB as its books, accounts, and tax filings were not up to date. The applicants argued that rather than attend to the filings, Ms Zaccara approached ANZ and engaged in negotiations on behalf of Ex NF for the company to obtain a loan of \$1 million to fund the purchase of real estate.

642 On or about 30 September 2015, Ms Zaccara had the conversation with Mr Vijayadass I discussed earlier in these reasons.

643 The applicants submitted that by early October 2015, O’Connell Street had been identified for purchase and preparation of the documentation in respect of its purchase was underway. Notwithstanding that the purchase was entirely funded by Ex NF, it was envisaged from the outset that Mr Munneke would be the purchaser. The 28 O’Connell Trust was settled on 6 November 2015 with Mr Munneke as trustee. Mr Munneke’s evidence was that the purpose in acquiring O’Connell Street in the trust was to acquire it in a structure that was not linked to the success or failure of Ex NF and in that sense put it beyond the reach of Ex NF’s

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<sup>83</sup> *Corporations Act 2001* (Cth), s 588FF(1)(d).

creditors. The applicants submitted this was undertaken with the knowledge (or lack thereof) as to Ex NF's financial position.

644 During this time, it was submitted, Ms Zaccara negotiated with the existing tenants of O'Connell Street payments totalling \$60,000 for the early termination of their tenancies, so that Ex NF would be able to take vacant possession of O'Connell Street. It was argued that notwithstanding that arrangements were in place for the tenants to vacate, the sale and purchase of O'Connell Street was conducted on a "going concern" basis which meant that GST was not payable on the sale. The applicants said if the sale been on the basis of vacant possession, it would have been subject to GST of \$170,000 and while this would have been recoverable by the 28 O'Connell Trust over time against GST collected, this would have taken a very long time and in the circumstances still effectively have been paid by Ex NF.

645 The applicants submitted that during the purchase process, on 5 November 2015, Ms Zaccara sent an email to ANZ indicating that Ex NF's ATO integrated client account was \$30,000 in credit but did not refer to the outstanding BAS returns. Thereafter, on 12 November 2015, Ms Zaccara lodged Ex NF's BAS for the quarter ended 30 September 2015 and caused Ex NF to pay \$112,865 to the ATO. On 17 November 2015, Ms Zaccara represented to ANZ that Ex NF's integrated client account with the ATO was in credit to the sum of \$30,000 after this filing and payment. The applicants submitted Ms Zaccara knew, but omitted to mention to ANZ, that Ex NF still had outstanding BAS filings at this time in respect of the quarters ended 30 September 2014, 31 March 2015, and 30 June 2015, and an outstanding tax return for the year ended 30 June 2014.

646 On 19 November 2015, Mr Munneke acting as trustee of the 28 O'Connell Trust entered a contract to purchase O'Connell Street for \$1.7 million with a deposit of \$40,000 payable and a settlement date of 10 December 2015. At Mr Munneke's direction, the deposit of \$40,000 was paid from the NAB account on 19 November 2015. At about the same time, it was submitted, Ms Zaccara was aggressively chasing Guvera for payment of invoices. Ms Zaccara stated in an email to Guvera dated 24 November 2015 that:

Unfortunately I'm in 'dire straits' currently – I have the ATO on my back for payment for several outstanding BAS returns and last years company tax that I have factored in the Guvera payments for.

It was submitted as Ms Zaccara acknowledged she was clearly aware of Ex NF's tax issues at this point. It was also submitted it was apparent from this email that Ms Zaccara was aware that the purchase of O'Connell Street would place a serious strain on Ex NF's resources. The applicants argued that Mr Munneke's evidence that Ms Zaccara's emails were a mere debt collection tactic is not credible as a company does not lightly tell its major customers that it is facing liquidity problems.

647 Just prior to the O'Connell Street settlement on 10 December 2015, a lower-than-expected bank valuation for O'Connell Street, resulted in a reduction of the amount lent by ANZ to \$740,000. The applicants pointed out the extent of Ex NF's cash commitment rose commensurately.

648 The settlement sum comprised \$1,025,911.59 paid from the ANZ bank account and the ANZ loan of \$740,000 guaranteed by Mr Munneke and secured over O'Connell Street. As discussed above, Ex NF also made the payments totalling \$60,000 to the former tenants of O'Connell Street.

649 The applicants submitted that the effect of the purchase of O'Connell Street was that Ex NF had paid away cash totalling \$1,065,911.59<sup>84</sup> and incurred a liability of \$740,000 to ANZ in respect of a property that was owned by Mr Munneke as trustee of the 28 O'Connell Trust. It was contended there was objectively no benefit to Ex NF from this transaction. Ex NF's funds were paid away and a significant liability incurred in respect of the purchase of a property that Ex NF had no interest in. It was argued the contention that Ex NF benefited from reduced rental expenses as it was only required to pay the mortgage repayments could not be sustained, including considering the evidence that Ex NF was charged market rent for the year ended 30 June 2016. It was pointed out Ex NF paid substantial interest and on winding up, ANZ applied \$337,491.93 to reduce the ANZ loan balance. Further, it was contended that if O'Connell Street had been purchased by Ex NF, it would have enjoyed the same benefit and the property would have been available as an asset to be used to pay creditors.

650 The applicants submitted that at the date of settlement on 10 December 2015, to the knowledge of both Mr Munneke and Ms Zaccara:

1. there were no up to date or accurate accounts available to Mr Munneke or Ms Zaccara as to the financial position of Ex NF;
2. Ex NF was not up to date in filing its BAS with the ATO, with returns for the quarter years ended September 2014, March 2015 and June 2015 all outstanding;
3. Ex NF was not up to date in filing its income tax returns with the ATO, with returns for the years ended 30 June 2014 and 30 June 2015 outstanding;
4. Ex NF had not lodged any statements in respect of SGC, such that the amount owing in respect of superannuation was unknown;
5. Ex NF would also be required to file a BAS for the quarter ended December 2015 early the following year; and

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<sup>84</sup> This sum comprises \$1,025,911.59 withdrawn from the ANZ account and the deposit of \$40,000 withdrawn from the NAB account.

6. Ex NF was also very likely to face further charges for interest and penalties from the ATO when it filed its long overdue BAS and income tax returns.

651 The applicants further submitted that as against this, it was also known by both Mr Munneke and Ms Zaccara that:

1. the purchase of O'Connell Street was not in the name of Ex NF but was for the benefit of Mr Munneke as trustee of the 28 O'Connell Trust;
2. the use of the trust was intended, or at the least would have the effect, of placing the property outside of the reach of Ex NF's creditors; and
3. the purchase of O'Connell Street and related expenses used substantially all of Ex NF's available cash resources, leaving a balance of \$218,185 (which it was contended left Ex NF in an immediately precarious position, even ignoring the substantial tax debts, as is apparent from Ms Zaccara's debt collection efforts with Guvera in January 2016 where she stated that "To be frank we need the money!!!" and "... I'm in a bit of a panic as we have two weeks of operational funds left").

652 It was submitted that at the time of settlement of O'Connell Street, neither Mr Munneke nor Ms Zaccara had given any serious consideration to whether, and if so how, Ex NF's funds might lawfully be paid out of Ex NF to fund the purchase. At highest, Ms Zaccara's evidence was to the effect that this was a matter that would be sorted out by the accountants later. It was submitted it is notable that when it was, it was recorded as a loan (notwithstanding Ms Zaccara's protest in evidence that the accountants had made an error). The applicants argued the indeterminate nature of the distribution meant that it was, for all intents and purposes, a gift.

653 The applicants submitted that, contrary to the contention that the transaction was some form of dividend or other distribution of profit, neither Ms Zaccara nor the ZALD Trust have filed any tax returns, declared or paid tax on the distribution that they contend that they received. It was contended the tax payable on such a distribution would be substantial.

654 The applicants submitted that, by her own admission, Ms Zaccara's evidence that she would have provided further resources to fund Ex NF if necessary should not be accepted. I am not satisfied that the following evidence of Ms Zaccara during cross-examination, relied on by the applicants, can be read as evidencing that she would not having provided further resources in 2015/2016:

- Q. When moneys were banked into the company account for Ethereum proceeds in early 2018 was it a point in time when the company had very limited resources from which to pay the tax debts that had then been levied didn't it.

A. Look, that may be true but the cryptocurrency doesn't belong to the company, Mr Roberts. That cryptocurrency is my cryptocurrency, so it's not something that I would have put in relation to what was happening with the company and my asset.

Q. Do you agree that without any reference to cryptocurrency there was no means of paying the tax debt at the end of 2017.

A. No, I don't agree with that because I remember talking to [Mr Munneke]. I was worried so I talked to [Mr Munneke] and I conveyed exactly what Nathan Thiele had conveyed to me and there had been other times when I had pointed out to [Mr Munneke] look, the bank account is getting low etc. He would always assure me 'It's okay, Linda, we will get out of this. We will get the money from Real Time Data, we will get the money from Meeco, we will get the money from iConnect and we will get out of this'.

655 The applicants said the rejection of Ms Zaccara's self-serving ex post facto contention that she would have provided further resources to Ex NF if necessary is also consistent with:

1. her subsequent use of \$100,000 of Ex NF cash to pay for the trip to Antarctica in September 2016 (at a time when Ex NF's was even more seriously behind in its tax filings and she had no way of knowing the extent of its liabilities); and
2. the actual course of events, where Ms Zaccara did not provide funds to Ex NF to pay the ATO to enable it to avoid winding up.

656 I indicate I have not taken those matters which occurred after 10 December 2015 into account in considering on a realistic commercial assessment whether funds would be provided by Ms Zaccara.

657 The applicants contended that in the circumstances of the O'Connell Street transaction:

1. Mr Munneke breached his statutory and fiduciary duties to Ex NF and Ms Zaccara could not properly excuse that breach; and
2. in any event, the transaction was an unreasonable director-related transaction under s 588FDA of the *Corporations Act*.

658 As submitted by the applicants, the actual financial position of Ex NF at December 2015 is relevant to the assessment of Mr Munneke's duties on an objective basis (i.e. a reasonable director would have known the true financial position) and as to whether breaches of duty by Mr Munneke were capable of ratification. If Ex NF had made its required tax filings and maintained proper records, it would have identified that it owed:

1. SGC of at least \$119,240;
2. at least \$244,377 in respect of GST and PAYG withholding; and

3. \$238,913 for income tax;

and in each case, plus general interest charge and the risk of the imposition of penalties by the ATO for late filing. It was pointed out that Mr Scott accepted the liability to penalties and general interest charge represents the default position, applicable unless waived by the ATO. It was also submitted that the amount of the general interest charge or penalties could not be calculated until the default in lodgements was remedied does not detract from the existence of that likely financial exposure occasioned by the default in lodgements and consequent default in the payment of tax. The applicants argued that considering these liabilities, Ex NF was in fact insolvent or was rendered insolvent by paying away its cash and assuming a \$740,000 liability through the purchase of O'Connell Street. At the least, it was submitted the transaction plainly materially prejudiced Ex NF's ability to pay its creditors.

659 The applicants submitted that, as Mr Scott accepted, the position was in fact worse than this, as both his and Mr Heard's calculations did not provide for (a) interest or penalties on the outstanding BAS taxes (PAYG, GST, and income tax) and income tax, which would depend on assessment by the ATO after the required filings were made; and (b) accrued expenses for PAYG, GST, and income tax for the quarter to that point. It was argued these accruing liabilities could not be ignored by a reasonable director.

660 As discussed above, Mr Scott considered that no working capital buffer was necessary as he relied upon the assumption that he was instructed to make that Ms Zaccara would provide funding to Ex NF if necessary.

661 It was pointed out that Mr Scott, when asked whether he would regard it highly imprudent for a company to pay out more than \$1 million dollars cash from its bank account leaving less than one months' worth of expenses in the bank account, said:

I would regard it with some caution. I'm not quite sure highly imprudent is the answer because I also have the assumption that I've been given which I'm to listen to and read and constantly read that Ms Zaccara has sufficient personal resources to provide funds to the company if needed.

I infer from Mr Scott's evidence that even relying on the assumption Ms Zaccara had sufficient personal resources to provide funds, he would regard the payment out of over \$1 million by a company in Ex NF's position with some caution. Further, when I insisted that Mr Scott ignore "the assumption", he conceded he would not give advice to a company in Ex NF's position to pay out over \$1 million leaving it with less than one months' worth of expenses.

662 As submitted by the applicants, as a matter of commercial reality, the need for working capital to pay recurring expenditure, such as wages, could not be ignored.

663 The applicants submitted, irrespective, in circumstances where Ex NF was receiving no benefit from the payment out of its resources to permit Mr Munneke to acquire O'Connell Street in his own name, it suffices for relevant purposes that Ex NF was placed in a precarious financial position by the extent of the funds paid out and the ANZ obligations incurred.

664 The applicants relied on the actual financial position of Ex NF by reference to its reconstructed balance sheet. It was pointed out that it is apparent from Mr Scott's balance sheet that on his analysis, Ex NF only had positive net assets due to the inclusion of the funds borrowed by Ex NF as an asset of \$740,000. It was also pointed out that Mr Scott accepted that if there was no intention on the part of the 28 O'Connell Trust to repay any sum to Ex NF, then the \$740,000 loan should not be recorded as an asset. The applicants said the case advanced by Mr Munneke and Ms Zaccara repeatedly disavowed the existence of any \$740,000 debt and the asset of \$740,000 should therefore not be recorded in the adjusted balance sheet. With the \$740,000 loan removed, after the purchase of O'Connell Street, it was submitted Ex NF had a deficit of assets to liabilities of \$434,557. Accordingly, the applicants submitted taking into account the objective financial position of Ex NF, it was objectively imprudent and prejudicial to Ex NF's creditors for Ex NF to have made a gift of the majority of its cash assets of over \$1 million and assumed a debt of \$740,000 for a property that it did not own.

#### ***Mr Munneke's submissions***

665 Mr Munneke submitted that the applicants have not established any breach of duty and it has not been proven that:

1. Ex NF was insolvent or of doubtful solvency at December 2015;
2. Ex NF failed to keep accurate financial records at December 2015 in accordance with s 286 of the *Corporations Act*;
3. a reasonable director in the position of Mr Munneke would not have released the funds in December 2015; and
4. Mr Munneke otherwise failed to comply with his duties.

666 Mr Munneke argued his reliance on Ms Zaccara and BDO was reasonable within the meaning of s 189 of the *Corporations Act* and in determining to release Ex NF's funds to acquire O'Connell Street, Mr Munneke exercised a business judgment for the purpose of s 180(2) of the *Corporations Act*.

667 Mr Munneke contended that the applicants have not otherwise established:

1. any breach of ss 181, 182, or fiduciary duties, when the interests of the creditors were not prejudiced and Ms Zaccara, as sole shareholder,

consented to, approved of, and ratified the release of the funds and the acquisition of O'Connell Street;

2. any damage resulting from the alleged breach, as required by s 1317H of the *Corporations Act*, such that, no entitlement to relief has been established;
3. that the acquisition of O'Connell Street was an unreasonable director-related transaction for the purpose of s 588FDA of the *Corporations Act*.

668 Mr Munneke submitted the breach of director's duty case against him requires the Court to find that, at December 2015, Ex NF was "insolvent or of doubtful solvency".

669 He submitted the applicants' case as to "doubtful solvency" must be considered against the backdrop of uncontroversial evidence that sits uncomfortably with that submission:

1. under cross-examination, Mr Heard conceded an improvement in Ex NF's EBITDA across 2013, 2014, and 2015. Prior to the acquisition of O'Connell Street, Ex NF had large amounts of cash at bank and unpaid invoiced work, and it was making "good money" from clients such as Guvera and Meeco. Ex NF's annual turnover had increased substantially from approximately \$600,000 in 2013, \$1.1 million in 2014, and \$1.6 million in 2015;
2. ANZ had required an updated ATO integrated client account to be provided ahead of advancing the loan funds for the acquisition of O'Connell Street. That account recorded bulk payment having been made in June 2015. At November 2015, Ex NF's integrated client account stood in credit by \$30,283;
3. ANZ subsequently advanced the funds to facilitate the purchase of O'Connell Street. It was submitted the Court can infer that, having regard to the active oversight by ANZ of the ATO integrated client account, if ANZ were concerned about the existing or contingent taxation liabilities of Ex NF that would or may crystallise on the lodgement of unreconciled BAS, ANZ would not have advanced the loan funds required to settle on O'Connell Street. I do not accept this submission because the information presented to the ANZ was incomplete as Ex NF still had outstanding BAS filings in respect of the quarters ended 30 September 2014, 31 March 2015, and 30 June 2015, and an outstanding tax return for the year ended 30 June 2014.

670 It was submitted that under cross-examination, Mr Heard agreed that as at 10 December 2015, and despite writing down the value of the debtors by 20 percent, most or all of the debts could be collected, but it would take time.

Mr Heard further agreed that reasonable minds may differ as to how one should bring to account the present value of the debts.

671 Mr Munneke contended that Mr Heard and the applicants sought to discount the value of the debt owed by Guvera. It was pointed out that such a discount is an exercise in retrospective accounting and is only made good with the benefit of hindsight and, as things stood at December 2015, there was no reason to believe the debt would not be paid in full.

672 It was submitted that under cross-examination Mr Heard agreed that:

1. Guvera was a significant customer of Ex NF. Ex NF had invoiced Guvera in December 2015 and, at December 2015, Guvera was slow-paying, but of low realisability risk;
2. there was no evidence to suggest that, at 10 December 2015, Guvera would become an irrecoverable debtor. Nor was there evidence that, at 10 December 2015, it was reasonably foreseeable by a director in the position of Mr Munneke that Guvera would become a bad debtor;
3. Guvera went into voluntary administration on 27 June 2016 and Ex NF proved for \$462,615 in the Guvera voluntary administration. Ex NF's debt was admitted by the administrators of Guvera for some purpose.

673 Accordingly, it was submitted that on the evidence, at December 2015, the value of the Guvera debt should be treated as being collectible in full.

674 Mr Munneke contended that Mr Heard did not undertake any investigations or inform himself as to the capacity of any associated trust debtors to repay amounts owing to Ex NF. It was submitted that Mr Heard agreed under cross-examination that he only had regard to assets apparently within the immediate control of Ex NF in his assessment of Ex NF's financial position and he did not explore the capacity for a person owing an associated trust loan of \$325,853 to repay it if called upon.

675 It was submitted there was no proper basis for Mr Heard to opine or assume, without any investigation, that the associated trust debts would not be recovered by the Ex NF and the assumption was inconsistent with the evidence of Mr Munneke and Ms Zaccara regarding their history of financially supporting Ex NF, and the substantial assets that Ms Zaccara had available to her.

676 Mr Munneke submitted the opinion of Mr Scott should be preferred regarding the need for working capital. He said if Mr Heard was correct about his significant additional working capital buffer, despite such a concept dooming most small businesses to insolvency, such a buffer is accounted for as follows:

1. the associated trust loan of \$325,853 was recoverable and would have met the "deficiency" twice over;

2. Ms Zaccara otherwise only needed to find \$136,122 from the substantial assets to fulfil any such requirement; and
3. the Guvera debt was fully collectible.

677 Mr Munneke submitted that Mr Scott's opinion regarding the recording of ANZ loan of \$740,000 as both a liability and an asset of Ex NF is unchallenged and should be accepted. Mr Munneke also submitted Mr Scott's evidence about penalties and general interest charge is unchallenged and should be accepted. Mr Munneke relied on the evidence that in early 2017, the ATO expressly indicated a willingness to review any penalties that might otherwise be payable by Ex NF when ATO officers replied to Ms Zaccara on 22 February 2017 as follows:

We look forward to working with you to achieve compliance with your outstanding lodgements. Once the lodgements have been completed we will review any unintended consequences (penalties) as discussed.

Mr Munneke, therefore, contended the possibility of penalties or interest at December 2015 was no more than a possibility, and which was then unquantifiable. He submitted that the applicants have not proven their case that Ex NF was "insolvent or of doubtful solvency" at 10 December 2015.

678 Mr Munneke submitted that applicants have not adduced any evidence and therefore have not established that a reasonable director in the role he had would not have released funds to the shareholder in the circumstances as they stood at December 2015. He further argued that the opinion of Mr Heard as to the working capital reserve that a "prudent" director may seek is not based on any recognisable specialist knowledge by Mr Heard. Accordingly, he said there is no evidence capable of establishing any breach of s 180 of the *Corporations Act* and nothing to indicate that a reasonable director would have acted differently to Mr Munneke *vis-à-vis* the release of funds to the shareholder.

679 Mr Munneke denied the allegations in the O'Connell Street claim that Ex NF is presumed insolvent under s 588E(4) of the *Corporations Act* because it failed to keep financial records that correctly recorded and explained its transactions and financial position and performance which would have enabled an assessment of Ex NF's liabilities pursuant to s 286(1).

680 Mr Munneke submitted that the applicants have not led any expert evidence which purports to opine on the accuracy or otherwise of the documents clearly available to them (and which Mr Heard was provided with and considered) and which fall under the s 9 definition of "financial records".

681 Mr Munneke relied on s 588E(9) which provides that no presumption of insolvency will be available if it is proven to the contrary. Accordingly, even if the presumption arose (which is denied), it was contended that the evidence of Mr Scott establishes that Ex NF was able to meet its obligations at all relevant times and that the evidence of Mr Scott should be accepted.

682 It was submitted that it is otherwise a strange case that would see a presumption of insolvency available where the applicants relied on primary opinion evidence as to the financial position of Ex NF, but deliberately stopped short of asking their expert, Mr Heard, to opine on actual insolvency (as distinct from the vague concept of “doubtful solvency”), and avoided asking Mr Heard outright as to the accuracy of books and records for the purpose of s 286.

683 It was submitted Mr Heard was obviously able to proffer an opinion about the underlying accuracy of the “financial records” that he had been provided and the applicants declined to ask Mr Heard that question. Accordingly, it was submitted the applicants have not proven their case on the alleged failure to keep accurate records.

684 Mr Munneke asserted the evidence proves that he fulfilled his duty of care and diligence pursuant to s 180 of the *Corporations Act*. It was submitted that in construing the nature of Mr Munneke’s duty, regard is to be had to the specific role he had within Ex NF; that Ms Zaccara had been delegated the role and acted as chief financial officer; that Ms Zaccara was unquestionably chief liaison with BDO and the ATO; that BDO was actively providing advisory and accounting services; and that, whilst reliance was placed on Ms Zaccara and the external accountants, Mr Munneke informed himself, maintained oversight, and continued to guide and monitor Ex NF.

685 Mr Munneke submitted the applicants have not established that:

1. Ex NF was “insolvent” or of “doubtful solvency” as at December 2015;
2. Ex NF failed to keep accurate financial records as at December 2015 in accordance with s 286(1) of the *Corporations Act*;
3. a reasonable director in his position would not have released the funds in December 2015;
4. he otherwise failed to comply with his duty of care and diligence.

686 Mr Munneke maintained his reliance on Ms Zaccara and BDO was reasonable within the meaning of s 189 of the *Corporations Act*. Further, he said in determining to release Ex NF’s funds, Mr Munneke exercised a business judgement for the purpose of s 180(2) of the *Corporations Act*. He submitted he had no material personal interest in the transaction, and he was not a beneficiary of the 28 O’Connell Trust.

687 Mr Munneke asserted the applicants have not established any breach of ss 181, 182, or fiduciary obligations in circumstances where:

1. BDO advised Ms Zaccara that Ex NF was in a position to release surplus cash to Ms Zaccara as shareholder;

2. each of BDO, Ms Zaccara, and he were satisfied that Ex NF was in a position to release the unutilised funds;
3. he relied on Ms Zaccara and BDO in releasing those monies;
4. the release of surplus cash was expressly for the purpose of Ms Zaccara acquiring O'Connell Street through a special purpose trust; and
5. the applicants have not established that Ex NF was insolvent or of doubtful solvency, or that the interests of creditors would be prejudiced, and Ms Zaccara, as sole shareholder, consented to, approved of and ratified the release of the funds and the acquisition of O'Connell Street.

688 Mr Munneke contended the evidence that Ms Zaccara agreed to and authorised him to distribute the funds in December 2015 is unequivocal. He argued there can be no bad faith or improper purpose or advantage when the sole shareholder, who was his wife, was not only fully informed but was herself taking steps to obtain the advice of BDO and progress the broader property acquisition which was contingent on the release of the funds to her as shareholder.

689 Mr Munneke submitted that if he is found to have breached any duty, he ought to be excused for any such breach pursuant to ss 1317S and 1318 of the *Corporations Act*. Mr Munneke submitted that in the event of any finding of breach, he ought to be relieved of any liability in circumstances where:

1. it has not been established that any loss or damage has befallen Ex NF or its creditors by reason of the release of funds in December 2015.
2. in determining to release those funds he: (a) held an honest belief that Ex NF was in a position to release those funds; (b) was not motivated by any personal advantage, and was not ultimately advantaged, not being a beneficiary of the 28 O'Connell Trust; and (c) relied on the information provided by Ms Zaccara, whom had obtained advice from BDO, regarding the release the funds being a proper course.

690 It was submitted that the release of Ex NF's funds to Ms Zaccara and the acquisition of O'Connell Street was not an unreasonable director-related transaction for the following reasons:

1. Ex NF was not insolvent or of doubtful solvency at the time, and therefore there was no risk to creditors;
2. Ms Zaccara as shareholder had full knowledge of the release of funds; and consented to or validated the distribution;
3. a bona fide distribution of funds to a shareholder cannot properly be regarded as an unreasonable director-related transaction; and

4. Ex NF benefitted by having access to a larger premises allowing its operations to grow and for which it was not required to disgorge on a cash basis the market rate rent obtainable in respect of the premises.

691 Mr Munneke submitted that no resulting trust arises by presumption in this case because:

1. O'Connell Street was not acquired from Ex NF's funds; it was purchased through the funds of Ms Zaccara; Mr Munneke having determined to pay Ex NF's surplus cash to Ms Zaccara in the form of a dividend or reduction and distribution of capital;
2. accordingly, the starting point is that Ex NF has not provided the purchase monies in "that character";
3. the purchaser of the property was the 28 O'Connell Trust; and
4. the intention of each of Mr Munneke and Ms Zaccara was that the 28 O'Connell Trust would hold the legal and beneficial interest in O'Connell Street.

692 It was further submitted Ex NF did not provide any purchase monies. Ex NF distributed funds to its shareholder, who then made the purchase monies available to the 28 O'Connell Trust. There was never any intention that Ex NF was to have any beneficial interest in O'Connell Street. The establishment of the 28 O'Connell Trust and the purchase through that entity bespeaks of an intention that the beneficial ownership would sit exclusively with that entity.

#### ***Ms Zaccara and 28 O'Connell Pty Ltd's submissions***

693 It was submitted that the applicants' case is to treat the entire compound transaction of distribution of around \$1 million from Ex NF's funds to Ms Zaccara and the ANZ loan as the one transaction to be assessed by referenced to s 588FDA of the *Corporations Act*. It is contended the case stands or falls on the pleaded case.

694 It was submitted that, critically, in this case, the evidence adduced by the applicants does not allow for a finding that the transaction was of no benefit to Ex NF. It was contended that the essence of s 588FDA is that there should be something in the nature of a gift or transfer at an undervalue and there was nothing of the sort here. It was submitted that the provision of funds to the 28 O'Connell Trust represented a distribution of capital out of Ex NF or retained earnings which in substance belonged to Ms Zaccara as sole shareholder made at her direction. In substance, it was Ms Zaccara's money. It was submitted that there was no gift but a return of capital or accumulated profits out of retained earnings.

695 It was submitted that in 2015, Ex NF's prospects were good and its business was expanding. Alternative accommodation had to be secured if Ex NF was to

continue in business as its lease at 112 Ward Street was to expire with no prospect of extension. It was submitted that Ms Zaccara was prepared to withdraw a portion of her shareholder's capital and put it into premises, providing long-term security of occupation to Ex NF.

696 It was submitted a balance of funds had to be found and ANZ was prepared to lend but its valuation came in well under expectations and it became necessary to draw more from Ex NF than originally anticipated. It was further submitted that Ex NF had the benefit of security for repayment to the bank in the form of a mortgage over the property and a guarantee from Mr Munneke, and Mr Munneke and Ms Zaccara had an arrangement or understanding that Ex NF was only to pay a consideration for occupation of the premises well below market rent.

697 It was contended reasonableness is to be tested from the perspective of Ex NF; and from the perspective of Ex NF the transaction was entirely reasonable and there was no gift or transfer of company property at an undervalue to Mr Munneke as the director, or to Ms Zaccara or any other associate of Mr Munneke.

698 It was submitted that Ms Zaccara and Mr Munneke had always contemplated supplying the difference with a distribution of dividends or capital from Ex NF (in accordance with the advice that had been received from Mr Vijayadass) and as the available loan reduced, the amount required to be drawn from Ex NF increased.

699 It was submitted that prior to the settlement on O'Connell Street, Ms Zaccara and Mr Munneke had an agreement that the rent charged to Ex NF for the occupation of O'Connell Street would be the equivalent of the instalment payments on the mortgage together with outgoings such as rates and taxes, and that Ex NF would meet those payments in the first instance in lieu of making direct payments to the owner.

700 It was submitted that Ms Zaccara gave evidence that in her view the rent charged to Ex NF was below market. Further, it was submitted Ex NF had the benefit of cheap rent by reference to the evidence of Mr Taormina that a market rent for the entire O'Connell Street premises in 2016 was \$95,205, in 2017 was \$99,013.20, in 2018 was \$102,973.73, and from December 2018 up to May 2019 was \$50,199.69. Ms Zaccara and 28 O'Connell Pty Ltd submitted that the arrangement between Ex NF and the owner was informal and not documented and would amount to an equitable lease.

701 It was submitted that the claim of an unreasonable director-related transaction cannot be made out and should be dismissed.

702 Ms Zaccara and 28 O'Connell Pty Ltd submitted that the qualification of informed consent in answer to an allegation of breach of fiduciary duty is reflected in the unanimous shareholder consent rule.<sup>85</sup>

703 It was submitted that full disclosure means material disclosure which might affect the informed consent given to directors. It was submitted that there is no doubt that the payment of funds out of Ex NF for the purchase of O'Connell Street was effected at the instigation of Ms Zaccara and there was nothing more about the transaction actually being undertaken that she was required to know. Ms Zaccara and Mr Munneke gave evidence that they understood the money was to be withdrawn from Ex NF (on the advice of Mr Vijayadass) and not by way of a loan but by way of some kind of return of company funds to Ms Zaccara. It was submitted that, accordingly, Mr Munneke acted appropriately as a sole director in facilitating the withdrawal and application of the funds in accordance with Ms Zaccara's explicit and implicit intentions as conveyed to him.

704 In relation to good faith, it was noted there is a plea that Mr Munneke acted in bad faith in obtaining (as trustee) an interest in O'Connell Street. However, it was submitted on the evidence there is no basis to find that he acted in bad faith as alleged or otherwise. Reference was made to the High Court's decision in *Angas Law Services*, which was concerned with allegations of breaches of statutory duty rather than fiduciary duty. In that context, Gleeson CJ and Heydon J held:<sup>86</sup>

The unanimous informed consent of the shareholders of ALS, the solvency of ALS and Mr Carabelas [the director who granted the loan], and the absence of any adverse effect on the interests of third parties, were facts relevant to the propriety of the mortgage transaction. ...

Their Honours went on to hold that while ratification would operate to protect a director from a claim of breach of fiduciary duty to those who ratify or release, the shareholders of the company could not release directors from their statutory duties.<sup>87</sup> It was submitted that the critical question for unanimous shareholder consent therefore becomes one of the financial state, that is, the solvency or otherwise of Ex NF at the date of the transaction.

705 It was submitted it is appropriate to consider the terms of support available to Ex NF and it is sufficient if the evidence of financial support is in the form of some non-binding indication as opposed to a binding financial promise.

706 It was submitted that should the Court be persuaded to accept the evidence of Mr Heard that a further \$136,122 was required to make up his preferred working capital reserve, and the Court should find that had it been seen necessary by Mr Munneke and called for, it would have been contributed by Ms Zaccara. It was submitted that there are two obvious points to keep in mind. The first is that

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<sup>85</sup> *Pascoe Ltd (in liq) v Lucas* (1999) 75 SASR 246 at [264].

<sup>86</sup> (2005) 226 CLR 507 at [29].

<sup>87</sup> (2005) 226 CLR 507 at [32].

Mr Heard's opinion was not strictly a solvency analysis by reference to s 95A of the *Corporations Act* but merely an analysis grounding an opinion of a suitable working capital requirement at 10 December 2015. The second is that the Court is in the unusual position of having to decide a counterfactual because this is not a case where there had been the occasion prior to 10 December 2015 to establish an explicit basis, formal or informal, upon which Ms Zaccara would provide further financial support to Ex NF. However, it was contended that it is not necessary for the shareholder's undertaking to provide support to be in a legally binding form provided the directors of the company to whom such undertakings are given are entitled to assume that the undertakings would be honoured.<sup>88</sup>

707 It was submitted that Ms Zaccara gave passionate evidence that Ex NF was her "baby", and she would not let it down. Ex NF was to be a family legacy, and it was contended that the evidence discloses that Ms Zaccara clearly had both the means and the willingness to contribute should it have come to that in December 2015.

708 Reference was made to Ms Zaccara's property portfolio and to her expectation in 2015 of the imminent receipt of funds from the Parawae Road property sale and to her evidence in her second statement regarding her property portfolio.

709 It was pointed out Ms Zaccara explained that she was expecting the sale and receipt of her share of the Parawae Road proceeds, estimated to be about \$500,000, in the middle of 2015. She explained that when the sale finally proceeded in 2016, she recovered a little under \$800,000. Reference was made to Ms Zaccara's evidence that upon receipt of her share of the sale proceeds she deposited an amount of \$54,996.90 into the NAB account on 28 June 2016.

710 As to Ms Zaccara's willingness to contribute funds, it was submitted there is ample evidence that Ms Zaccara would have been willing to do so. It was contended that her third statement is a testament to monies which she said she put into Ex NF for which she kept records, and which were not applied to a loan account where she had not received reimbursement. It was pointed out that she gave evidence in her first statement that she had paid part of the wages of Ex NF's employees in the first 10 weeks of operations but later acknowledged being reimbursed for that. In her third statement, she described her practice of keeping paper records for her payments on account of company expenses in the form of receipts, together with handwritten notes, and placing them in envelopes on a monthly basis covering the period 2012 through to 2016. She then reduced those expenses to her aggregate spreadsheet at the time of the s 597 examination. It was submitted that the total amount in the spreadsheet was \$272,286.83 as at the end

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<sup>88</sup> *Atco Controls Pty Ltd (In liq) v Newtronics Pty Ltd (Receivers and Managers Appointed) (In Liq) & Ors* (2009) 25 VR 411 at [58].

of 2016. It was submitted at the end of 2015, the amount Ms Zaccara had contributed during the period 2013 through 2015 was \$100,789.01.

711 It was submitted that there was no real challenge at trial to Ms Zaccara's evidence of continuing payment towards company expenses detailed in her third statement.

712 It was submitted that the consent of Ms Zaccara to the O'Connell Street transaction and the distribution of Ex NF's funds to her at her direction goes to absolve Mr Munneke of any fiduciary conflict. It further means, it was submitted, that he had not improperly used his position to gain an advantage for Ms Zaccara in breach of s 182 of the *Corporations Act* and that there has been no improper use of position to cause detriment to Ex NF.

713 It was submitted that the interests of Ex NF aligned with that of Ms Zaccara as the sole shareholder subject only to the possible intervention of the interests of creditors.

714 It was submitted that the applicants essentially rely on the premise that, following the transaction, Ex NF was near insolvent so as to require Mr Munneke to act in the interests of Ex NF in some wider sense. It was contended that Ex NF objectively appeared to be developing well and able to pay its debts as and when they fell due, and it was the collapse of Guvera in May 2016 which brought a significant change.

715 It was submitted that the applicants' claim turns on the financial position of Ex NF *vis-à-vis* its creditors at the time of the transaction and either on a claim of insolvency at the time of the transaction or on a claim of high susceptibility to insolvency at that time. It was contended that it cannot be enough to allege simply that the assets of Ex NF were depleted. By itself, it was argued, that is a circumstance of no relevant consequence nor is it enough to allege accrued taxation liabilities if it cannot be shown that Ex NF did not have resources to meet them, nor is it enough to assert a failure to consider the interests of creditors unless it can be shown Ex NF was insolvent or near insolvent following the transaction, which, was submitted, cannot be demonstrated on the evidence.

716 It was submitted that it is not to be expected that a reasonable person in the position of Mr Munneke would have held back amounts reasonably estimated to be payable to creditors when the applicants have not explicitly shown what amounts might be when Ex NF from the perspective of Mr Munneke had experienced increasing EBITDA across 2013, 2014, and 2015 financial years and up to November 2015 and when the debtors had proved to be good-paying, albeit slow-paying.

717 It was contended that Mr Heard's counsel of prudence which directly bears on this aspect is not soundly based. It was submitted that it was more a counsel of perfection than evidence of how an ordinary person, with the knowledge of the

director, might be expected to have acted if he were acting on his own behalf. To the extent that extends to a requisite degree of understanding of Ex NF's financial affairs and its financial capacity. The fact that Mr Munneke did not have the benefit of up-to-date accounting does not mean he could not have an appreciation and feel for Ex NF's general condition, as he said he did.

718 More importantly, it was argued, the applicants have not shown that the lack of complete financial records has caused Mr Munneke to act in a way he otherwise would or should have reasonably acted. It was submitted that even with Mr Heard's complete financial reckoning, a director in Mr Munneke's position would not have breached his duty of care and diligence in proceeding with the O'Connell Street transaction as he did.

719 It was submitted no breach of any fiduciary or statutory duty has been demonstrated by the applicants on the pleaded case.

### ***O'Connell Street findings***

720 It is my assessment that Mr Munneke completely abrogated his responsibility as a director in relying on Ms Zaccara. Further, as discussed earlier, I do not accept that he is vindicated in the purported distribution of funds to Ms Zaccara to acquire O'Connell Street which he alleges occurred after the independent advice of BDO.

721 As indicated above, I accept the evidence of Mr Heard and I accept the need for a working capital reserve.

722 Having considered all the evidence and submissions of the parties, I am satisfied that as at 10 December 2015 Ex NF's financial state was such that there was a "real and not remote risk of insolvency" enlivening the duty of Mr Munneke to consider the interests of Ex NF's creditors.<sup>89</sup>

723 The duty to consider the interests of creditors is not confined to an insolvent or nearly insolvent company. As White J stated in *Termite Resources*:<sup>90</sup>

... the obligation of directors to consider the interests of creditors is enlivened particularly when a company is insolvent or nearing insolvency. The Courts have avoided formulating any general test of the degree of financial instability necessary to give rise to a duty by directors of a company to consider the interests of its creditors.

Further, White J stated:<sup>91</sup>

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<sup>89</sup> Justice White said in *Termite Resources NL (in liq) v Meadows; in the matter of Termite Resources NL (in liq) (No 2)* (2019) 370 ALR 191 at [708]:

... [the] test is broader than "nearing insolvency" or "doubtful solvency". They indicate that the duty of directors to consider the interests of creditors is enlivened when there is a "real and not remote risk of insolvency" and when the objective circumstances require consideration of the interest of creditors.

<sup>90</sup> (2019) 370 ALR 191 at [201].

<sup>91</sup> (2019) 370 ALR 191 at [202].

... there are numerous illustrations in the authorities of actual or prospective insolvency being held to enliven a duty by directors to consider the interests of creditors as an aspect of the duty to act in the best interests of the company.

His Honour referred to *Nicholson v Permakraft NZ Ltd*<sup>92</sup> where Cooke J regarded the fact of actual or approaching insolvency as being but one instance of a circumstance in which directors may be required to consider the interests of creditors.<sup>93</sup> Justice Cooke went on to say that directors may be under a duty to consider the interests of creditors “if a contemplated payment or other course of action would jeopardise its solvency”.<sup>94</sup>

724 The decision in *Termite Resources* concerned a solvent company paying money out but placing the interests of creditors in jeopardy notwithstanding that it was neither insolvent nor nearly insolvent while the iron ore price remained high. Nevertheless, the payments out were in breach of a duty because the directors were relevantly placing the creditors in jeopardy because any fall in the iron ore price would mean that the company was at risk of no longer surviving.

725 In this matter, putting aside the penalties and general interest, the money paid out in December 2015 to acquire O’Connell Street effectively meant there was an insufficient working capital reserve, placing Ex NF in jeopardy. Mr Munneke’s duty to consider the interests of creditors in complying with his duty to act in the best interests of Ex NF was enlivened when payment of Ex NF’s funds to acquire O’Connell Street and the incurring of the \$740,000 loan was contemplated. Had he acted in compliance with his duty he would have properly informed himself as to Ex NF’s financial position and would not have paid out over \$1 million dollars and borrowed \$740,000 if that was going to jeopardise Ex NF’s solvency.

726 The payment of Ex NF’s funds was not ever declared as a dividend regularly or irregularly. The intention was to defer the decision of the characterisation of the payment out for later consideration. As submitted by the applicants, what was contemplated was a hypothetical dividend that was never declared to Ms Zaccara, which is beyond the principle of assent or ratification.

727 Contrary to s 286(1) of the *Corporations Act*, Ex NF did not maintain written financial records that correctly recorded and explained its transactions, for example, the loans to Ms Zaccara, the payments Ms Zaccara made and asserted she made, the payment of Ex NF’s funds and the ANZ loan underlying the O’Connell Street purchase, and the basis upon which Ex NF occupied O’Connell Street, and which would enable true and fair financial statements to be prepared and audited.

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<sup>92</sup> [1985] 1 NZLR 242.

<sup>93</sup> (2019) 370 ALR 191 at [207].

<sup>94</sup> [1985] 1 NZLR 242 at 249.

728 I am satisfied having regard to Mr Heard's opinion that Ex NF creditors were placed in jeopardy by reason of the withdrawal of \$1,025,911.59 from the ANZ accounts and the \$740,000 liability incurred to ANZ.

729 I find that in late 2015, Mr Munneke and Ms Zaccara were each aware:

1. there were no up-to-date or accurate accounts available to them as to the financial position of Ex NF;
2. Ex NF was not up to date in filing its BAS with the ATO, with returns for the quarter years ended September 2014, March 2015 and June 2015 outstanding;
3. Ex NF was not up to date in filing its income tax returns with the ATO, with returns for the years ended 30 June 2014 and 30 June 2015 outstanding;
4. Ex NF had not lodged any statements in respect of SGC, such that the amount owing in respect of superannuation was unknown;
5. Ex NF would also be required to file a BAS for the quarter ended December 2015 early the following year; and
6. Ex NF was also very likely to face further charges for interest and penalties from the ATO when it filed its long overdue BAS and income tax returns.
7. having caused Ex NF to lodge its BAS for the quarter ended 30 September 2015 and pay \$112,865 to the ATO, Ex NF would be exposed to further payments upon lodging of outstanding BAS and tax returns.

730 I also find Mr Munneke and Ms Zaccara were each aware that:

1. the purchase of O'Connell Street was not in the name of Ex NF but was for the benefit of Mr Munneke as trustee of the 28 O'Connell Trust;
2. the use of the trust would have the effect, of placing the property outside of the reach of Ex NF's creditors; and
3. the purchase of O'Connell Street and related expenses used substantially all of Ex NF's available cash resources, leaving a balance of \$218,185.26. This left Ex NF in an immediately precarious position. The position was even worse when the substantial tax debts are factored in.

731 I find that Ms Zaccara's plaintive debt collection tactics with Guvera in November 2015 demonstrates she was aware of existing and impending ATO liabilities. Further, she was aware in January 2016 of Ex NF's lack of operational

funds, when she stated in an email to Guvera that “To be frank we need the money” and “... I’m in a bit of a panic as we have two weeks of operational funds left”.

732 It is patently obvious that Mr Munneke and Ms Zaccara did not engage in a proper analysis of the amount required to maintain a working capital buffer before paying out Ex NF’s funds and submitting Ex NF to the ANZ loan.

733 Whilst Ms Zaccara submitted that the O’Connell Street acquisition was to be regarded as a payment to her as a dividend, she made admissions in the s 597 examination to the effect that it was not decided to be a dividend, rather its characterisation was to be a decision made later. She asserted Rowe Partners determined it was better to call it a loan rather than calling it a dividend. If it were a dividend, she would have brought herself under a tax liability of tax on the dividend being paid out at the personal tax rate.

734 I am not satisfied that Ms Zaccara would have provided funds to Ex NF if required to pay tax liabilities. It appeared she frequently made payments of cash, she purchased plant and equipment from 2Moro, and paid Ex NF’s founding employees’ salaries from her own resources at incorporation of Ex NF. However, she borrowed money from Ex NF to purchase the South Terrace properties. Whilst she maintained she and Mr Munneke had not taken a salary for two years to pay back that loan, there is no contemporaneous financial recording of this arrangement. She was also prepared to take Ex NF’s funds and expose it to the liability of the ANZ loan without her loans or ensuring financial records correctly recorded her assertion the loan was paid back. She gave evidence about payments she asserted were made to the loan which were shown to be interbank transfers not loan repayments. There are no records recording the basis upon which Ex NF’s funds were paid out and the basis upon which Ex NF took on the ANZ loan to effect the purchase of O’Connell Street. Nor are there any records regarding any agreement underlying Ex NF’s occupation of O’Connell Street.

735 Ms Zaccara did not provide ANZ with an up-to-date accurate picture of Ex NF’s financial situation when the ANZ loan was applied for. For the purposes of the loan application to the ANZ, she caused Ex NF to lodge its BAS for the quarter ended 30 September 2015 and pay \$112,865 to the ATO.

736 I have already stated I do not accept Ms Zaccara’s evidence regarding her reliance on the alleged advice from Mr Vijayadass. I am unable to accept Mr Vijayadass gave the advice she alleged. The documents relied on her to this effect are not sufficient to establish that, despite not being fully apprised of Ex NF’s financial position in late 2015, Mr Vijayadass advised a dividend of 80 percent of Ex NF’s funds were surplus funds and could be paid as a dividend. As I discussed earlier in these reasons, I infer Mr Vijayadass discussed a property purchase with 50 percent gearing. There is no evidence he was informed at any time between the date of his email and his meeting with Ms Zaccara the day before settlement that ANZ were no longer prepared to lend \$1 million, requiring Ex NF to contribute an extra \$260,000. This clearly made Ex NF’s financial position

precarious. Of note, the extra \$260,000 Ex NF contributed to the purchase is \$10,000 more than the working capital of \$250,000 advised by Mr Heard, having calculated monthly overheads as at 10 December 2015 were \$155,000. Of note, Ms Zaccara had at December 2015 never put any personal funds in to pay Ex NF's creditors and certainly never committed to paying tax creditors.

737 Mr Munneke said in cross-examination that he did not turn his mind to Ms Zaccara putting money back in when he was paying out \$1,025,911 from the ANZ account and he did not have a discussion with her about putting money back in.

738 In relation to Mr Munneke's criticism of Mr Heard not undertaking investigations regarding the capacity of the debtors to pay in relation to the debt of \$325,853, I note both Mr Heard and Mr Scott treated this debt as owed by Ms Zaccara or an entity associated with her, which was of no realisable value. Given Ms Zaccara's evidence about having paid the original loan of \$370,000 off in full, together with her evidence about paying a total of \$228,000 to the loan (which was demonstrated to be incorrect and was, in fact, two interbank transfers), I am not satisfied the debt of \$325,853 was recoverable.

739 I consider it inherently unlikely that Ms Zaccara was ever going to commit her personal funds to pay Ex NF's tax creditors. I say this having regard to her own evidence about having a "fear", "such difficulty doing tax" that it relates to "some obsessive compulsive disorder", and that she has "an irrational relationship ... with the tax issue". At the very least, I infer Ms Zaccara, whilst denying she was a tax denier, did not prioritise the payment of tax unless it is in her interest, as I infer it was when she caused Ex NF to pay \$112,865 tax following lodgement of the September 2015 BAS when applying for the ANZ loan.

740 I find that at the time of the O'Connell Street transaction and the payment out of over \$1 million dollars of Ex NF's funds and the incurring of the \$740,000 liability to ANZ, Mr Munneke was aware there was a tax liability. A reasonable director in his position ought to have apprised himself of the existing financial position of Ex NF (not just the bank balances and invoices rendered) and not paid Ex NF's funds out or incurred the ANZ loan liability until the quantum of the tax liability was known.

741 As Mr Scott stated, on the hypothesis that a director is faced with a decision whether to pay out a shareholder before a company was up to date with its filings, it was a reasonable proposition that the company lodge all returns before making any payment out. As submitted, I note that Mr Scott, in a tempered way, acceded to the proposition that effectively a director does not make a payment out before bringing the company tax up to date and the general interest and penalties are known.

742 Mr Scott's evidence was that any advice to pay out before a director has brought returns up to date and upon filing understands the liability to the ATO

would be dangerous. I agree with the applicants' submission that one does not need to be a chartered accountant to realise that any reasonable director in the shoes of Mr Munneke would know that it would be dangerous to be paying out very material sums until liability to the ATO is known.

743 Mr Scott's evidence in relation to the \$740,000 loan was that a rational director acting in conformity with his duties would have ensured that there was a relevant asset when incurring a liability on behalf of Ex NF for \$740,000 because, as he said, "otherwise you have just gifted it". Mr Scott said he could not give a director the advice to proceed with the \$740,000 loan transaction if it was never intended to be paid back to Ex NF. Ex NF was being put in a position where it was of very questionable solvency as at 10 December 2015 before general interest charge and penalties are factored in. To pay out Ex NF's money for the benefit of another where Ex NF has no interest in O'Connell Street nor any ability to recover the \$740,000 loan from anyone is patently unreasonable.

744 Mr Munneke was the recipient of the proceeds as the purchaser of O'Connell Street, so too was Ms Zaccara as one of the beneficiaries of the 28 O'Connell Trust. The transaction at the very least, placed creditors in material jeopardy from the \$1.025 million paid out and the \$740,000 loan. A rational director would not pay out that money before understanding the tax liability position.

745 A reasonable director acting with due care and diligence in the best interests of a company would want to know what is owed before a decision to pay out and incur a liability is contemplated. Mr Munneke's failure to do so demonstrates self-interest.

746 Mr Munneke breached his fiduciary duty in the strict sense because there was a conflict between his duty to Ex NF to act in its interests on the one hand, and his self-interest as the recipient of the funds on the other hand.

747 Mr Munneke gave evidence that he did not understand Ex NF's liabilities and focused on revenue. He said money was coming into the bank and invoices rendered. However, to borrow his term, "the vibe" is not enough. Whilst the EBITDA for the 2013 to 2015 financial years showed improvement, it does not take into account Ex NF's tax liability. As submitted by the applicants, a competent, rational director does not look at simply whether revenue is coming in without understanding what the liabilities are, particularly in circumstances where the liabilities are tax, penalties and general interest charge, because the more money made, the more tax owed. As further submitted, leaving tax liabilities unpaid for a long time makes it unsurprising that there will be a credit balance in the bank. I agree a rational director simply does not ignore that liabilities side of the equation.

748 Given Ms Zaccara's self-confessed issue with tax, I suspect the payment out of Ex NF's funds was just taking money out of Ex NF to buy something never intending for it to have the formalities of a dividend, from which tax would flow.

749 Further, it is be noted that s 254T of the *Corporations Act* materially limits the ability to pay a dividend if it will have any prejudicial effect on creditors.

750 There is a legal impediment to lawfully paying a dividend or otherwise making a return of capital to a shareholder unless such course does not materially prejudice the ability to pay the company's creditors. As submitted by the applicants, a dividend cannot be declared lawfully unless it is not going to materially prejudice Ex NF's ability to pay its creditors. As pointed out by the applicants, there was no evidence that BDO was ever given any indication about how much was going to be paid as a dividend or what the creditors' position was.

751 I agree with the submission that no rational director would act on the hearsay account of Ms Zaccara that BDO thought it might be a good idea to declare some sort of dividend, particularly when there had been no up-to-date financial records and in the circumstances of Mr Munneke having no idea about Ex NF's solvency.

752 I find that the effect of the purchase of O'Connell Street was that Ex NF had paid away cash totalling \$1,125,911.59<sup>95</sup> and incurred a liability of \$740,000 to ANZ in respect of a property that was owned by Mr Munneke as trustee of the 28 O'Connell Trust. There was objectively no benefit to Ex NF from this transaction. Ex NF's funds were paid away and a significant liability incurred in respect of the purchase of a property that Ex NF had no interest in. The respondents' submission that Ex NF benefited from reduced rental expenses as it was only required to pay the mortgage repayments cannot be sustained, including considering the evidence that Ex NF was charged market rent for the year ended 30 June 2016. Ex NF paid substantial interest and on winding up, ANZ applied \$337,491.93 to reduce the loan balance. Further, as contended, if O'Connell Street had been purchased by Ex NF, it would have enjoyed the same benefit and the property would have been available as an asset to be used to pay creditors.

753 I find the O'Connell Street transaction:

1. was a self-dealing transaction by Mr Munneke that was wholly for his benefit and that of his family through the 28 O'Connell Trust, with no benefit to Ex NF;
2. was undertaken entirely using Ex NF's funds comprising most of Ex NF's cash resources and Ex NF incurring a liability to ANZ of \$740,000;
3. was undertaken at a time when the books and records of Ex NF were, to Mr Munneke's knowledge, incomplete and Ex NF was, to Mr Munneke's knowledge, seriously behind in its tax filings, in

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<sup>95</sup> Comprising the deposit of \$40,000 from the NAB account, \$1,025,911.59 from the ANZ account, and \$60,000 in early lease termination payments.

circumstances where Mr Munneke accepted that he did not know and had no way of knowing Ex NF's true financial position.

754 Had the actual state of Ex NF's finances been known, as it would have been by a reasonable director, then, allowing for Ex NF's tax liabilities, the effect of paying away Ex NF's cash and incurring further debt for no benefit was to render Ex NF of doubtful solvency, or that insolvency was a real and not remote risk, and to materially prejudice its ability to pay its creditors.

755 I am not satisfied that Ms Zaccara might have contributed resources to Ex NF to pay its liabilities in December 2015.

756 Mr Munneke's breach of duty was plain and obvious. He applied the bulk of Ex NF's funds and incurred substantial further liabilities in a transaction that was solely for his own benefit in circumstances where he could have had no idea as to the full picture of Ex NF's financial status, having failed to ensure that Ex NF was up-to-date in its tax filings.

757 The statutory duties breached are as follows:

1. Mr Munneke failed to exercise due care and diligence and breached s 180(1). A reasonable director in Mr Munneke's position would have ensured that Ex NF was up-to-date with its tax filings and payments and that Ex NF maintained up to date financial statements. A reasonable director in Mr Munneke's position would not have made a gift of the bulk of Ex NF's cash and committed it to further loans without any idea of Ex NF's real financial position. A reasonable director in Mr Munneke's position would not have paid away Ex NF's assets before the ATO liabilities were paid, nor in the context of the actual financial position that Ex NF was in.
2. It is plainly evident from my findings that the statutory defence, the business judgment rule, prescribed by s 180(2) is not available to Mr Munneke.
3. Mr Munneke did not exercise his powers as director in good faith in the best interests of Ex NF or for a proper purpose and was in breach of s 181(1). It was not a proper corporate purpose for Mr Munneke to make a gift to himself of Ex NF's cash and cause Ex NF to incur further substantial debt to purchase a property for Mr Munneke's benefit. Mr Munneke admitted in the s 597 examination that the purpose of purchasing the property outside of Ex NF was to have an asset that was not tied to the success or failure of Ex NF. There was no attempt by Mr Munneke to cause the payments to be made lawfully by either declaration of a dividend pursuant to s 254T of the *Corporations Act* or as a return of capital pursuant to ss 256B and 256C and, in the circumstances, given the material prejudice to creditors from the

transaction, there was no way for the transactions to be undertaken lawfully.

4. Mr Munneke made improper use of his position as director to gain an advantage for himself and others and cause detriment to Ex NF in breach of s 182(1).
5. It is also plainly evident from my findings that Mr Munneke's reliance on Ms Zaccara and Mr Vijayadass was not reasonable as defined by s 189 of the *Corporations Act*. His own evidence is to the effect he made no independent assessment of the purported advice of Mr Vijayadass conveyed to him by Ms Zaccara and did not discuss the issue directly with Mr Vijayadass.

758 The application of Ex NF's funds and borrowings to acquire O'Connell Street was also a breach of fiduciary duty by Mr Munneke. The transaction was a disposal of Ex NF's funds that was not in any way authorised by law. It was materially prejudicial to creditors and left Ex NF either insolvent or nearing insolvency. Mr Munneke was clearly conflicted and obtained a profit from the transaction, in breach of both the conflict and profit rules.

759 The acquisition of O'Connell Street using Ex NF funds was an unreasonable director-related transaction:

1. it was a "transaction" within the broad meaning in s 9 of the *Corporations Act*;
2. the "transaction" involved both a payment of money by Ex NF in the amount of \$1,125,911.59 applied to the purchase and the incurring of a debt by Ex NF to ANZ of a further \$740,000;
3. the payment and obligation to pay were made to Mr Munneke or for his benefit;
4. a reasonable person in the circumstances of Ex NF would not have entered into the transaction. The transaction was a breach of director's duties and breach of fiduciary duties as set out above.

760 Mr Munneke's breaches are not absolved because they were encouraged by Ms Zaccara. In the circumstances of the O'Connell Street transaction, Ms Zaccara's assent to the transactions is legally irrelevant:

1. ratification or unanimous shareholder consent is irrelevant to breaches of the law. Ms Zaccara's assent is therefore irrelevant to Ex NF's claim of statutory breach;
2. Ms Zaccara could not ratify an informal distribution in circumstances where the material prejudice to creditors caused by the transaction

meant that it could not have been undertaken as a lawful dividend or capital distribution;

3. shareholders cannot, in any event, ratify conduct of directors that is adverse to the interests of creditors in circumstances of doubtful solvency, near insolvency, or the like;
4. ratification requires that the shareholder have full knowledge of the underlying facts and circumstances. Ms Zaccara had no better knowledge of Ex NF's financial situation as at December 2015 than Mr Munneke did;
5. ratification is not a principle that exists at large to fill in steps that were not taken by the parties at the time of the transaction, such as to determine the fundamental nature of the transaction itself;
6. Ms Zaccara did not, in fact, ever ratify a distribution of capital to her, whether as a dividend or otherwise. When the accountants finally looked at the transaction after the event, she said they advised not to record it as a dividend. Consequentially, the transaction was recorded as a loan. Each of Mr Munneke and Ms Zaccara now deny any liability under a loan. The effect of this is that there was not a ratification by Ms Zaccara of a dividend.

761 The O'Connell Street transaction is voidable within the meaning of s 588FE(6A) of the *Corporations Act*.

762 The relief against liability prescribed by ss 1317S or s 1318 of the *Corporations Act* is not available to Mr Munneke. It only applies where a director, as an officer of a corporation, has acted honestly and having regard to the circumstances of the case ought fairly be excused. The circumstances of this matter are not such that Mr Munneke's conduct ought fairly be excused from his breaches of the *Corporations Act*.

### **The cryptocurrency and Ward Street claim**

763 The applicants contended that the bitcoin was purchased in February and August 2014 as part of Ex NF's business and using Ex NF's funds, such that the cryptocurrency was, and to the extent that it still exists, remains the property of Ex NF. Mr Munneke contended that the purchase was a family investment and the cryptocurrency was an asset of the ZALD Trust, whereas Ms Zaccara asserted that it was a purchase for her benefit, with the use of Ex NF's funds representing repayment of a loan or loans she had made to Ex NF. The applicants submitted that it is noteworthy that the positions of Mr Munneke and Ms Zaccara are irreconcilable.

### *Applicants' submissions on cryptocurrency*

764 At the outset, I note the applicants' submission that cryptocurrency is a type of property and is therefore subject to proprietary remedies. The respondents did not advance a contrary position and in any case, most of the cryptocurrency has now been liquidated by agreement of the parties.

765 The applicants said that the evidence establishes several matters, which in turn establish that Ex NF is the owner of the cryptocurrency:

1. the bitcoin was purchased by Mr Munneke, a director of Ex NF, using Ex NF funds from the NAB account;
2. the CoinJar account was linked only to the NAB account, notwithstanding that Mr Munneke knew that it was possible for him to link a personal bank account in order to deposit personal funds;
3. relatedly, the CoinJar account was used in Ex NF's ordinary business, having originally been opened to facilitate Ex NF marketing itself as a cutting-edge software developer by accepting bitcoin for payment, which bitcoin could then be converted to Australian dollars and remitted to Ex NF using the CoinJar exchange. The CoinJar account was opened in Mr Munneke's name only because an account could not be opened by a company. Of course, as Ms Zaccara and 106 Ward Street Pty Ltd submitted, a decision to accept bitcoin for payment is distinct from a decision to purchase bitcoin for use in Ex NF's business.

766 By reason of the first to third matters above, the applicants said that the purchases of cryptocurrency were company transactions on their face. However, the applicants point to evidence establishing further matters:

1. given the purpose of establishing the CoinJar account, it is inherently unlikely that there was an intention to store bitcoin owned by Ex NF and bitcoin owned by Mr Munneke personally together in the account, noting especially that bitcoin is stored in "complicated fractions [of a bitcoin]" and also that Mr Munneke had a personal bitcoin wallet, which had been established by no later than 14 February 2014;
2. there was every reason for Ex NF to hold bitcoin as a software developer working in applications and interested in bitcoin;
3. in advance of Ric Santos' wedding on 15 February 2014, Mr Munneke had taken steps on 10 February 2014 to deposit funds into the CoinJar account. There was no need for him to have transferred funds from the NAB account on 14 February to pay for Ric Santos' gift, as he could have attended a NAB branch to deposit his own cash on any day between 10 and 14 February if his intention were to purchase bitcoin as personal property;

4. Mr Munneke did not transfer all the bitcoin from the CoinJar account to his personal bitcoin wallet, and his explanation that he did not do so because of security risks is unconvincing. The applicants also said that I should infer from Mr Munneke's failure to disclose the bitcoin wallet that he was conscious of its existence being inconsistent with the suggestion that the CoinJar account was his personal account;
5. Mr Munneke used the remaining bitcoin from the amount he had transferred to the bitcoin wallet, 1K2Sd, to make small transactions such as to purchase sushi, which is consistent with Mr Munneke establishing familiarity with bitcoin in his capacity as a developer rather than the bitcoin being a personal or family investment;
6. the residual bitcoin in the CoinJar account was used to obtain ethereum for Ex NF's client, Meeco in August 2014. Ex NF issued Meeco an invoice in respect of this transaction by reference to the bitcoin purchase price as at February 2014;
7. further, bitcoin was purchased in August 2014 to acquire ethereum. The funds used to purchase the further bitcoin were treated as a company expense for GST purposes and the bitcoin sale was partially recorded in Ex NF's GST filings. Ex NF went on to demonstrate interest in the ethereum blockchain by undertaking various activities as part of its business, including the Hackathon, Mr Munneke attending the "blockchain summit" and undertaking a blockchain software development course paid for by Ex NF.<sup>96</sup> I note Mr Munneke "tweeted" in early March 2017 (I infer while at the blockchain summit) that:

Developers, developers, developers not forgotten at #AdlBlockchainSummit;  
Ethereum largest ecosystem of developers then [sic] any other blockchain
8. The amounts of cryptocurrency acquired in 2014 were modest when compared to the property investments made by Ms Zaccara, which is inconsistent with the suggestion of the cryptocurrency being a long-term personal or family investment. However, as Ms Zaccara and 106 Ward Street Pty Ltd submitted, the small size of the investment is a neutral consideration in circumstances where cryptocurrency was in its infancy at the time of the acquisitions;
9. Mr Munneke had ample opportunity to but did not compensate Ex NF for the use of its funds to purchase bitcoin in February or August 2014, including by transferring some of the "thousands of dollars" purportedly given to him by Ms Zaccara to invest in bitcoin. I note that this submission does not advance the applicants' case in circumstances

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<sup>96</sup> Ms Zaccara and 106 Ward Street Pty Ltd point out that neither the "blockchain summit" nor the development course were taken up with Mr Munneke in cross-examination.

where it is asserted that the bitcoin was purchased with Ex NF funds to offset amounts owing to Ms Zaccara;

10. the purchases were never recorded in Ex NF's accounts as a loan or gift to Mr Munneke, Ms Zaccara or any other person, and Ms Zaccara was never informed that Ex NF funds had been used to purchase cryptocurrency, notwithstanding that Ms Zaccara maintained Ex NF's loan accounts. I note Ms Zaccara and 106 Ward Street Pty Ltd's submission that this evidence is neutral, as it would equally be expected that Mr Munneke would tell Ms Zaccara about the cryptocurrency acquisition if it were intended to be a company asset so that it could be recorded;
11. CGT has never been paid by Ms Zaccara or the ZALD Trust on the liquidation of the ethereum in 2018, the gain on sale was about \$1.4 million and CGT payable is significant and Mr Munneke's explanation for the failure to do so is unsatisfactory;
12. the funds realised from the three ethereum sales in January 2018 were paid into the NAB account.<sup>97</sup> Following the purchase of the Ward Street property, the surplus funds of \$121,988.89 were retained by Ex NF in the NAB account.<sup>98</sup> Ms Zaccara never took steps to recover these funds and her explanation for not doing so is a vague reconstruction. Further, no record was made dealing with her rights over the funds even though by this time, there was a risk of Ex NF passing into insolvency.

<sup>767</sup> The applicants relied especially on admissions, which they said illustrate most clearly that the cryptocurrency was a company asset: firstly, Mr Munneke's email to Mr Richards dated 26 January 2018 and secondly, Ms Zaccara's admissions made at the s 597 examination that it was never intended that Ex NF purchase cryptocurrency on her behalf and that she did not own any cryptocurrency.

<sup>768</sup> The email chain between Mr Munneke and Mr Richards, the broker that he used to liquidate part of the ethereum on 26 January 2018, is reproduced again in the table below:

<b>From</b>	<b>Email content</b>
Mr Munneke	... Thanks for the OTC conversion; will recommend - we have a customer that bought Ethereum for at pre-sale with us who are also likely [to] convert some soonish.

<sup>97</sup> The proceeds of the first sale of ethereum were paid into Mr Munneke's personal CBA account on 12 January 2018. It is not apparent what happened with the surplus of \$46,850.74 from the first sale of ethereum.

<sup>98</sup> On 29 January 2018, \$121,988.89 was transferred from the NAB account to the NAB Maximiser account.

	/derek
Mr Richards	Awesome, thanks! What do you do?
Mr Munneke	I have a software development studio that has focused on building new ventures, often with startups. Meeco is a client since 2012, and we actually spoke directly with Vitalik in the early days when the Ethereum project was starting, and believed in the project and the power of this new blockchain with smart contracts. Bought in at the pre-sale to use it, never expected it to be an investment, just thought it was a cheaper way to get gas for development ;)

769 The applicants said that Mr Munneke had no reason to lie in his email dated 26 January 2018 when he stated in an “unguarded way” that the ethereum had been “[b]ought ... at the pre-sale to use it, never expected it to be an investment, just thought it was a cheaper way to get gas for development”. In response to Mr Munneke’s assertion that this was a reference only to Meeco’s ethereum, the applicants pointed out that Mr Munneke was communicating with the broker about the sale of the residual ethereum held by Ex NF, not Meeco. The applicants contended that it would make no sense for Mr Munneke to send this email in answer to the broker’s question, “What do you do?”, if he were talking about Meeco’s activities and intentions. Further, the applicants submitted that Mr Munneke is not speaking on behalf of or from the position of Meeco, noting that he referred to Meeco as a “customer” or “client” elsewhere in the email correspondence and distinguishes between the ethereum the subject of the sale and the ethereum owned by Meeco. The applicants also contended that the reference could not have been to Meeco’s ethereum, as this ethereum was not available to be used by Ex NF in development. I note that while this may be so, the submission does not address the suggestion that Mr Munneke was speaking to Meeco’s intention to obtain gas for use in its own development activities.

770 The applicants said that Ms Zaccara’s admissions during the s 597 examination cannot be explained away, given the implausibility of a person owning millions of dollars’ worth of cryptocurrency but forgetting or being confused about that ownership, even having taken medication.

771 The applicants also submitted that Mr Munneke’s account of a discussion with Ms Zaccara in the late evening of 14 February 2014 about purchasing bitcoin as a family investment is a deliberate fabrication or at least a reconstruction. The applicants pointed out that funds were deposited in the CoinJar account during the afternoon, rather than the evening of 14 February. Further, the applicants relied on Mr Munneke’s concessions that he did not consider the ZALD Trust at the time of the purchase, that it was later suggested to him in the context of this litigation that the ZALD Trust would have been the appropriate vehicle for the asset, and that he had no specific recollection of the conversation he said that he had with Ms Zaccara on the evening of 14 February 2014. It was pointed out that Ms Zaccara did not give any evidence of such a conversation on or around

14 February 2014. The applicants suggested that Mr Munneke has every reason to embrace the suggestion that the bitcoin was purchased as an investment for the ZALD Trust, noting that the ATO in October 2019 entered judgment against Mr Munneke for the sum of \$1,515,371.03, so as to prevent the applicants or a bankruptcy trustee having recourse to the cryptocurrency. Ms Zaccara and 106 Ward Street Pty Ltd complained that this proposition was never put to Mr Munneke in cross-examination.

772 In addition, the applicants contended that Mr Munneke and Ms Zaccara's accounts regarding the cryptocurrency are irreconcilable with each other and the evidence they each gave in the s 597 examinations. It was also submitted that Ms Zaccara's first and second statements are inconsistent.

773 The applicants contended that Mr Munneke, by stating for the first time in cross-examination that Ms Zaccara asked him on several occasions over many years to purchase bitcoin, although he "didn't get around to [it]", was deliberately tailoring his evidence to align with Ms Zaccara's account in her first statement of repeatedly requesting Mr Munneke to purchase bitcoin from 2010. The applicants pointed out in this context that Mr Munneke admitted to having read Ms Zaccara's first statement before giving evidence. Further, the applicants emphasised that while Ms Zaccara gave evidence in cross-examination and in the s 597 examination that she paid thousands of dollars to Mr Munneke over years to buy bitcoin, this was not mentioned in her statements or by Mr Munneke at all.

774 It was also submitted that Ms Zaccara's evidence on these subjects is inherently unlikely, noting the appreciation in the value of bitcoin by nearly 5,000 times between 2010 and late 2013. The applicants said that against this background, had Mr Munneke failed to carry out Ms Zaccara's instructions during this time, this would have been the subject of "serious and upset protestations from Ms Zaccara", not the vague "missed the boat" type of evidence given by Mr Munneke. The applicants characterised Ms Zaccara's evidence that she was indifferent to the value of bitcoin as extraordinary, noting that she said she intended to acquire it as an investment. Further, the applicants pointed out that there is no documentary evidence of such a request by Ms Zaccara that Mr Munneke purchase bitcoin, nor of her giving him money for that purpose, despite her evidence that she did so by bank transfer. It was also submitted that Ms Zaccara's evidence of paying thousands to Mr Munneke to purchase bitcoin is implausible given that he only ever purchased modest amounts of it and that he used Ex NF funds to do so.

775 The applicants challenged other aspects of Ms Zaccara's evidence regarding the \$300 worth of bitcoin gifted to Ric Santos for his wedding. Ms Zaccara's account in her first statement is that she recalled being aware prior to the July 2014 trip to America that Mr Munneke had purchased some bitcoin and remembering he gave a fraction of a coin as a wedding present. She also remembered "complaining to [Mr Munneke] that [she] did not want to give the Bitcoin away like that". The applicants characterised this as an account that "she was complaining about a disposition of her cryptocurrency". However, the applicants

pointed out that cryptocurrency was purchased for the first time by Mr Munneke as a wedding gift for Ric Santos. The applicants also noted that in cross-examination, Ms Zaccara's evidence was that she expressed annoyance at Mr Munneke for purchasing bitcoin for Ric Santos and not for her. The applicants submitted that this revision is consistent with her evidence in the s 597 examination that she had no contemporaneous knowledge of Mr Munneke purchasing bitcoin, whether using Ex NF funds or otherwise. The applicants said this was a damning evolution in her story.

776 The applicants also highlighted that on Mr Munneke's account, he and Ms Zaccara agreed upon the amount of bitcoin to be gifted to Ric Santos prior to the wedding, whereas Ms Zaccara said that she was unaware of the gift until after the fact. Ms Zaccara and 106 Ward Street Pty Ltd said that this divergence is insignificant. I do not agree. This inconsistency undermines Mr Munneke's account of the phone call with Ms Zaccara on the evening of 14 February 2014, in which he said they discussed purchasing bitcoin as a family investment, notwithstanding that Ms Zaccara's evidence is that she had been asking Mr Munneke to purchase bitcoin for years. However, I note that Mr Munneke's evidence on this subject was equivocal. He said he and Ms Zaccara "would have discussed it" rather than recounting a memory of such a discussion.

777 In the applicants' submission, the fact that bitcoin was given to Ric Santos does not undermine their contention that the bitcoin was owned by Ex NF. The applicants said that the wedding gift was a sufficiently legitimate corporate expense so as to make the use of Ex NF funds appropriate.

778 The applicants submitted that I should reject Mr Munneke's evidence that at the time the bitcoin was purchased, he was aware that Ex NF would be compensated for the use of its funds to acquire the bitcoin. The applicants pointed to the inconsistency between this evidence and Mr Munneke's statements in the s 597 examination that he could not recall who purchased the bitcoin, then that he "thought" that he had paid for it. This is also inconsistent with the suggestion that the use of Ex NF funds was to repay money owing to Ms Zaccara. Further, the applicants said that Mr Munneke failed to explain this inconsistency during cross-examination, responding that he had been "frazzled" during the s 597 examination. The applicants characterised this as a material evolution of Mr Munneke's story, whereas Ms Zaccara and 106 Ward Street Pty Ltd submitted that this is not a material inconsistency but rather, is "just a difference in memory when it's probed".

779 The applicants noted that Ms Zaccara's evidence on the subject of whether she had contemporaneous knowledge of the bitcoin purchases is inconsistent. The applicants contended that the evidence given in the s 597 examination and her first statement, being that she had no knowledge of the use of Ex NF funds to purchase cryptocurrency, is most likely to be true. Further, it was submitted that each of Ms Zaccara's accounts is inconsistent with Mr Munneke's evidence that he and

Ms Zaccara discussed and agreed on the purchases of bitcoin by Ex NF as a family investment.

780 The applicants said that there is no contemporaneous evidence to corroborate the assertion that the ethereum was acquired for Ms Zaccara at her request, noting especially that she had no contemporaneous knowledge that Ex NF's funds had been used to purchase bitcoin in August 2014. The applicants also pointed to the s 597 examination, during which Ms Zaccara denied knowledge of Mr Munneke controlling residual cryptocurrency and expressed shock at him continuing to control ethereum of substantial value. The applicants submitted that I should reject her attempts to resile from this evidence in cross-examination, contending that it is inconceivable that Ms Zaccara would not be aware of the ethereum that remained following the purchase of Ward Street had it been purchased for her.

*Applicants' alternative case*

781 In the alternative, the applicants said that Mr Munneke's use of Ex NF funds to purchase the cryptocurrency as a family investment was a self-dealing transaction in breach of his statutory and fiduciary duties, notwithstanding the relatively modest value of the funds used.

782 It was submitted that the breach could not have been ratified in circumstances where Ex NF was insolvent or of doubtful solvency and where Ms Zaccara was not even aware of any cryptocurrency having been purchased on her behalf. The applicants contended that, as explained above, Ms Zaccara treated the cryptocurrency as an asset of Ex NF. The applicants said that any purported assent after the liquidation is ineffectual.

*Mr Munneke's submissions on cryptocurrency*

783 Contrary to the applicants' submissions, Mr Munneke contended that in circumstances where he is and has always been the sole holder of the private keys associated with the relevant cryptocurrency wallets, as well as the CoinJar account login details, a presumption arises that he is the owner of the cryptocurrency, which the applicants have failed to rebut. On this point, the applicants correctly submitted, relying on *Warner v Hung*,<sup>99</sup> that possession of documents associated with a chose in action or intangible property does not amount to ownership of the chose or property itself. The applicants also correctly said that possession of property by a director does not give the director rights to the property as against the company, relying on *Burnett & Anor v Randwick City Council*.<sup>100</sup>

784 In any case, Mr Munneke submitted that the evidence establishes several matters, which in turn establish that the cryptocurrency is owned by him personally:

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<sup>99</sup> *Warner (in his capacity as joint and several liquidator of Bellpac Pty Ltd (recs and mgrs apptd) (ACN 101 713 017) (in liq) & Ors v Hung & Ors (No 2)* (2011) 297 ALR 56 at [54].

<sup>100</sup> [2006] NSWCA 196 at [96].

1. the CoinJar account is in Mr Munneke's name. Mr Munneke submitted that relevant cryptocurrency has also been held in wallets in his name;
2. the private keys to the cryptocurrency wallets were held in the personal residence of Mr Munneke and Ms Zaccara;
3. while the CoinJar account was established in part to facilitate Ex NF accepting bitcoin as payment, it was also established for Mr Munneke's personal use. Mr Munneke did not anticipate any customers paying in bitcoin and while Ex NF was added to the third-party register of companies accepting bitcoin for payment, this was not at Mr Munneke's bidding. Ex NF never purchased anything in bitcoin. I note, however, that Ex NF purchased ethereum for Meeco using bitcoin in the CoinJar account;
4. Ms Zaccara asked Mr Munneke to purchase bitcoin, and it was their joint intention that the cryptocurrency be a personal investment;
5. the amounts from the NAB account used to purchase bitcoin amounted to only \$3,050 over six months, which amount was repaid by offsetting amounts owing to Ms Zaccara and if that were insufficient, by virtue of Ex NF retaining surplus proceeds from the sale of ethereum in January 2018. Ex NF was indebted to Ms Zaccara in respect of loans for startup costs and wages. Further, in mid-2013, Mr Munneke and Ms Zaccara paid \$30,000 upfront for 12 months' rent for Ex NF's new business premises, with the funds being extracted from their personal mortgage;
6. Ms Zaccara realised in February and August 2014 that debits from the NAB account related to acquisitions of cryptocurrency and "had [she] been asked at the time, [she] would have agreed to apply [those amounts] as a debit to [her] shareholder's loan account";
7. Mr Munneke established a separate bitcoin address, being a vanity address for Ex NF, that bore the name "1NFaz", having intended to publish the address on Ex NF's website for branding purposes and to facilitate clients making payments using bitcoin;
8. Ex NF never undertook activity on the ethereum blockchain or incurred gas, including during the Hackathon with Meeco, and the submissions that Ex NF needed ethereum to use as gas and that Mr Munneke's intention was to acquire ethereum for this purpose are conjecture. While Meeco had a need for gas, that was entirely distinct to the acquisition of cryptocurrency by Mr Munneke and Ms Zaccara;
9. at the time of the ethereum purchase for Meeco, Ex NF was not involved in developing smart contracts for Meeco. Rather, Mr Munneke met with and briefed Mr Lothian who was to be engaged

directly by Meeco to create a proposal for Meeco to develop a smart contract application;

10. Mr Munneke never communicated with employees that Ex NF held cryptocurrency that was available to be used in development, and Mr Munneke's evidence that he never discussed the cryptocurrency being a company asset ready to deploy for a company purpose with employees was not challenged in cross-examination; and
11. the funds realised from the sale of the ethereum in January 2018 were deposited directly into Mr Munneke's personal CBA account, then applied to purchase Ward Street. As I noted above, only the proceeds of the first of the three sales of ethereum in 2018 were paid into Mr Munneke's CBA account on 12 January 2018. Mr Munneke transferred \$100,000 out of his CBA account on 15 January 2018 to pay the deposit for Ward Street.

785 Mr Munneke said that if the applicants' characterisation of the s 597 examination as providing a platform for unguarded and honest evidence is correct, I ought to accept the statements he made therein that he thought he had purchased the bitcoin with his own funds. I have detailed my concerns regarding Mr Munneke's evidence given in the s 597 examination in discussing my assessment of his evidence.

786 Mr Munneke pointed to statements in several emails that he said are consistent with the cryptocurrency being a personal asset, including Mr Munneke referring to Ms Zaccara as "[our] bitcoin expert", Ms Zaccara referring to the ethereum being sold to fund the purchase of Ward Street as "our cryptocurrency", and Mr Munneke providing a table of "FTR.. my BTC purchases (from 3 years ago)".

787 Mr Munneke also pointed to Mr Bacina's evidence that in a lot of contracts, developers undertake development of a blockchain project in a testnet before handing over control to the principal, after which it will be deployed to mainnet and gas costs will be incurred by the principal. However, I note that Mr Bacina confined this opinion to contracts where the principal "has the skill" and that "it all depends on the nature of the arrangement between the project principal and the developer".

788 Noting that Ex NF tax documents were filed by Rowe Partners under time pressure, Mr Munneke said that his and Ms Zaccara's evidence that the cryptocurrency was recorded in tax documents as a company asset in error is supported by contemporaneous emails, in which Mr Thiele explained that documents needed to be lodged and could be amended later if necessary. However, I observe that no amendments were ever made.

789 With respect to the email from Mr Munneke to Mr Richards dated 26 January 2018, Mr Munneke submitted that on a plain reading of the words informed by the context, Mr Munneke was referring to Meeco's ethereum when he said, "[b]ought ... at the pre-sale to use it, never expected it to be an investment, just thought it was a cheaper way to get gas for development". Mr Munneke noted that in his previous email, he had referred to having "a customer that bought Ethereum ... at pre-sale with us who are also likely [to] convert some soonish". Mr Munneke said that he was speaking as to Meeco's intention and lack of expectation that the ethereum it had purchased would be an investment. Mr Munneke submitted it was possible for him to speak on these matters because he had been the acting chief technical officer of Meeco and had attended the meeting with Vitalik referred to in the email in this capacity. In any case, Mr Munneke submitted that it would be unsafe for me to accept this email as corroborating the applicants' case regarding ownership of the cryptocurrency given its informal and casual nature.

***Ms Zaccara and 106 Ward Street Pty Ltd's submissions on cryptocurrency***

790 Ms Zaccara and 106 Ward Street Pty Ltd contended that the primary issue for determination is whether the applicants have discharged their onus of proving that Ex NF owned the cryptocurrency, with the issue of which respondent or respondents own the cryptocurrency being merely consequential.

791 The applicants suggested that Ms Zaccara and 106 Ward Street Pty Ltd have adopted this approach to avoid having to reconcile their case with that of Mr Munneke. Further, the applicants noted that Ms Zaccara maintains by her crossclaim that the cryptocurrency belongs to her to the exclusion of Mr Munneke.

792 Ms Zaccara and 106 Ward Street Pty Ltd submitted that it would be perverse to act on the basis that Ex NF's records regarding the cryptocurrency transactions are accurate, noting that Mr Munneke and Ms Zaccara did not "conduct themselves in an organised and orderly way". It was submitted that they were "hopeless record keepers" and therefore, one would not expect them to attend to detailed recording of how company funds were used and credited to Ms Zaccara's loan account.

793 Ms Zaccara and 106 Ward Street Pty Ltd said that the evidence establishes several matters, which in turn establish that the cryptocurrency is owned by Ms Zaccara personally:

1. Mr Munneke used an amount of bitcoin that he had transferred to his personal wallet from the CoinJar account for personal incidentals, some being used as wedding gifts to other Ex NF employees, and it cannot be established that it was used in the conduct of Ex NF's business. Ms Zaccara and 106 Ward Street Pty Ltd said that Mr Munneke's use of small amounts of bitcoin in day-to-day spending can be explained by his expertise and interest in cryptocurrency;

2. Ex NF had no need to acquire ethereum for business purposes and never deployed ethereum in its business as gas or otherwise;
3. the Hackathon was only a testnet exercise and therefore required no ethereum for gas;
4. Mr Munneke emailed Ms Zaccara on 8 August 2014 to confirm that he had purchased 2,001 units of ethereum for 1.048 bitcoin immediately following the transaction, which it was submitted would not have been necessary if the ethereum had been purchased for Ex NF to use as gas;
5. Ms Zaccara provided financial support to Ex NF, including \$3,269.92 in January and February 2014, and an additional \$4,148.01 by the end of August 2014; and
6. Mr Munneke created a vanity address for Ex NF called “1NFaz” to facilitate Ex NF receiving payments in bitcoin, although no client ever paid Ex NF in bitcoin.

794 Ms Zaccara and 106 Ward Street Pty Ltd criticised the applicants on the basis that Mr Munneke was not cross-examined about the replenishment of the CoinJar account with bitcoin and the use of that bitcoin to purchase the second tranche of ethereum on 8 August 2014. Ms Zaccara and 106 Ward Street Pty Ltd characterise this as a “deliberate forensic choice... to avoid showing up a fundamental weakness in the [applicants’] case”. It appeared to be the submission of Ms Zaccara and 106 Ward Street Pty Ltd that although the initial purchase of bitcoin in February 2014 was intended as a family investment, with the \$700 used to fund the purchase coming from the NAB account being treated as offsetting a loan to Ms Zaccara, the application of the bitcoin to purchase the ethereum for Meeco was a company transaction. Therefore, Ms Zaccara and 106 Ward Street Pty Ltd submitted that it was rational, reasonable and proper for Mr Munneke to issue an invoice from Ex NF to Meeco in June 2015 in respect of the purchase of ethereum, noting that it could be traced to funds deposited in the CoinJar account from the NAB account. It was submitted that it was “simply commercial commonsense” for Mr Munneke to restore the CoinJar account with additional funds from the NAB account, then apply them to acquire ethereum for Ms Zaccara.

795 Ms Zaccara and 106 Ward Street Pty Ltd said that while it is accepted that Ex NF promoted itself as accepting bitcoin for payment, the applicants have made a “deliberate forensic choice” to avoid exploring why Ex NF needed to separately acquire bitcoin and ultimately have been unable to provide an explanation. When I pointed out that Ex NF used bitcoin to acquire ethereum on behalf of Meeco, which could be viewed as part of Ex NF’s business, counsel replied, “Well, it was a commercial favour we would say.” He said that the acquisition for Meeco was “a kind of commercial happenstance but it does not say anything contrary to the ultimate and original motivation to acquire and keep bitcoin.”

796 Ms Zaccara and 106 Ward Street Pty Ltd submitted that Ms Zaccara appears to have been “confused about the precise chain of events” with respect to the first acquisition of bitcoin, being the gift for Ric Santos’ wedding. It was submitted that following Mr Munneke purchasing bitcoin for Ric Santos, Ms Zaccara complained to Mr Munneke that he had still failed to buy bitcoin for her despite repeated requests. Further, noting that the SMS messages indicate that Mr Munneke made the bitcoin transactions during the afternoon of 14 February 2014, Ms Zaccara and 106 Ward Street Pty Ltd said that Mr Munneke must have been incorrect about deciding to purchase bitcoin on the evening of 14 February 2014, being the Friday prior to Ric Santos’ wedding. It was suggested that he was likely referring to Thursday evening but was mistaken about the days.

797 Ms Zaccara and 106 Ward Street Pty Ltd acknowledged that the bitcoin was purchased in February and August 2014 using funds from the NAB account. However, it was submitted that Ms Zaccara was the intended owner of the cryptocurrency and therefore, it was appropriate that the funds be applied to her loan account. Again, Ms Zaccara and 106 Ward Street Pty Ltd emphasised that Ex NF’s record-keeping was “irregular and incomplete at best”, and that there is no reason to believe that Ms Zaccara was not advancing substantial amounts to Ex NF that were not properly recorded or credited to her loan account. It was submitted that in these circumstances, “the precise accounting... is not relevant.”

798 Ms Zaccara and 106 Ward Street Pty Ltd pointed out that Ms Zaccara’s evidence was not that the monies given to Mr Munneke over time were only and immediately to be used for the purchase of cryptocurrency. It was submitted that the funds provided by Ms Zaccara were fungible and therefore, her account is not inconsistent with Mr Munneke having used company funds to purchase the cryptocurrency. In response to this submission, the applicants pointed to the following exchange during Ms Zaccara’s cross-examination:

- Q. When did you give Mr Munneke cash to buy Bitcoin on your behalf.
- A. So there were a couple of times when I would give him cash and cash was something that I gave him regularly and I would say 'Buy some Bitcoin with this'.
- Q. That was 2010 or 2011 you think.
- A. It was a couple of times. It was a little bit of a, you know, 'I'm giving you this. You buy some Bitcoin'. We had discussed for quite some time the buying Bitcoin from around the 2010, 2011 mark.
- Q. And how many times do you think you gave him cash to buy Bitcoin on your behalf.
- A. When I said those words specifically?
- Q. Yes.
- A. Maybe – actually I don’t know. I'm not going to guess. I did that at examination so I’m not going to do it again. I don't know. But I would give cash amount to [Mr Munneke] regularly. Every couple of weeks. Something like that.

Q. And how many times did you - doing the best you can, how many times did you attach to the provision of the cash 'Please buy some Bitcoin on my behalf'.

A. If you want me to guess?

Q. I don't want you to guess.

A. Because I don't know that specific amount of times but I can give you maybe a range.

Q. If you can do a range do the best you can.

A. Maybe somewhere between four and six times.

I agree the effect of this evidence is plainly that Ms Zaccara gave Mr Munneke money on separate occasions and asked him to purchase bitcoin with it.

799 Ms Zaccara and 106 Ward Street Pty Ltd submitted that Mr Munneke storing the \$700 worth of bitcoin in the CoinJar account rather than moving it to the personal wallet on his phone is consistent with the bitcoin being an investment that he expected would increase in value and therefore, that he did not want to carry around with him.

800 Ms Zaccara and 106 Ward Street Pty Ltd said that Mr Munneke's account of acquiring the 2,001 units of ethereum on 8 August 2014 as a family investment is corroborated by the evidence of the timing of the transactions, along with the fact that the amount of ethereum purchased was almost the same as the amount purchased for Meeco. However, it is difficult to see how this evidence corroborates Mr Munneke's version of events; it is equally consistent with Mr Munneke having purchased ethereum for Ex NF at the same time as having done so for Meeco.

801 Ms Zaccara and 106 Ward Street Pty Ltd submitted that Mr Munneke acquiring ethereum for Meeco on 6 August 2014 and acquiring further ethereum on 8 August 2014 is consistent with Ms Zaccara's account that upon Mr Munneke telling her that he had been asked to purchase ethereum on Meeco's behalf, she asked him to purchase some for her as well. While this may be so, contrary to the submissions of Ms Zaccara and 106 Ward Street Pty Ltd, the transaction on 8 August and the email from Mr Munneke to Ms Zaccara informing her of the purchase are not "strongly probative evidence" that Mr Munneke had finally gotten around to actioning Ms Zaccara's request to purchase cryptocurrency for her. The evidence is equally consistent with Mr Munneke having purchased cryptocurrency for Ex NF then sending Ms Zaccara the email as an "FYI".

802 Further, it was submitted that because Ms Zaccara needed to realise funds quickly to purchase the Ward Street property, the proceeds from the sale of the ethereum in 2018 were deposited into the NAB account on the advice of Mr Munneke, who had told Ms Zaccara that this would be the fastest way to provide her solicitor, Ms Polson, with the settlement funds, given that Ms Polson's trust account was also with NAB.

803 Ms Zaccara and 106 Ward Street Pty Ltd said that a large part of the applicants' case unravels if I accept Mr Munneke's evidence that he had no intention of acquiring ethereum for Ex NF to use as gas.

*Cryptocurrency discussion and findings*

804 I accept the submission that having regard to the source of the funds used to purchase it and the fact that the CoinJar account was initially intended to be used in Ex NF's business, the cryptocurrency purchases were on their face company transactions.

805 The respondents have repeatedly pointed out that Mr Munneke and Ms Zaccara were "hopeless record keepers", that they did not "conduct themselves in an organised and orderly way", that Ex NF's records were "irregular and incomplete at best", and that "there was no sophisticated accounting in much of what Mr Munneke and Ms Zaccara did within [Ex NF]". However, it is difficult to discern an intention to credit amounts to Ms Zaccara's loan account in the absence of any contemporaneous documentary record consistent with this assertion, especially in circumstances where there are objective factors consistent with the cryptocurrency being treated as a company asset.

806 I do not accept the evidence of Mr Munneke and Ms Zaccara that they intended to acquire the cryptocurrency as an investment.

807 I reject Ms Zaccara's evidence that she paid "thousands of dollars" to Mr Munneke on separate occasions over the years and repeatedly asked that he purchase bitcoin with the funds on her behalf. Her account is undermined by the fact that Mr Munneke did not "get around" to fulfilling her requests until February 2014, several years later, at which point he purchased less than \$1,000 worth of bitcoin (setting aside the amount purchased for Ric Santos) with Ex NF funds. Her evidence that she was indifferent to the increasing value of bitcoin, while continuing to pay funds to Mr Munneke, who was failing to attend to her instructions, is inherently implausible. Further, Mr Munneke has never given evidence that Ms Zaccara gave him thousands of dollars for the particular purpose of purchasing bitcoin on her behalf and there are no objective records of such transactions, notwithstanding Ms Zaccara's evidence that was a transaction by bank transfer.

808 I am also unable to accept that Mr Munneke made a phone call to Ms Zaccara one night in February 2014 during which they discussed purchasing bitcoin as an investment. Mr Munneke's account that the conversation took place on 14 February, being the night before Ric Santos' wedding, is undermined by the evidence of funds being deposited in the CoinJar account during the afternoon of that day. I am not persuaded that Mr Munneke was simply confused about the night on which the conversation occurred, noting the proximity to Ric Santos' wedding and the absence of any evidence that Mr Munneke spoke with Ms Zaccara on the phone one night then delayed purchasing the bitcoin until the following afternoon. Further, not only did Ms Zaccara fail to mention any such conversation

in her evidence, but her account of learning that Mr Munneke had purchased bitcoin for Ric Santos after the fact is inconsistent with his version of events.

809 In light of Mr Munneke's concessions during cross-examination, I am unable to accept the suggestion that the cryptocurrency was an asset of the ZALD Trust. This is especially so noting that Ms Zaccara gave no evidence consistent with this assertion. At this point, I indicate that I also reject Mr Munneke's submission that Ex NF was ultimately repaid by virtue of it retaining the surplus proceeds from the ethereum liquidations in January 2018. There is no evidence that at the time of the cryptocurrency acquisitions, Ex NF's funds were treated as a loan, and such an assertion is fundamentally inconsistent with the submission that the funds represented repayment of amounts owing to Ms Zaccara.

810 Mr Munneke and Ms Zaccara in fact each gave evidence that is inconsistent with the suggestion that the intention was to credit Ex NF's funds to Ms Zaccara's loan account. In this respect, I note Mr Munneke's evidence that at the time of the bitcoin purchases, he understood that Ex NF would be compensated for the use of its funds. I accept that this statement is inconsistent with the fact that he failed to remember who paid for the bitcoin, then said that he "thought" that he had paid for it, which itself undermines the suggestion of Ex NF's funds representing repayment of a loan to Ms Zaccara. So too does Ms Zaccara's evidence of giving Mr Munneke thousands of dollars and instructing him to purchase bitcoin with it.

811 The fact that Mr Munneke did not inform Ms Zaccara that he had used Ex NF's funds to purchase the cryptocurrency weighs against the respondents. I accept that Ms Zaccara should equally have been informed were the cryptocurrency intended to be a company asset.

812 I note the assertion that in August 2014, notwithstanding that he regarded it as a personal asset, Mr Munneke applied the bitcoin in the CoinJar account to acquire ethereum on Meeco's behalf, then issued an Ex NF invoice to Meeco before replenishing the account with further Ex NF funds. This suggestion is convoluted and implausible. While bitcoin and ethereum are fungible in the same way as regular currency, it is very convenient for Mr Munneke and Ms Zaccara to say that they treated the cryptocurrency in the CoinJar account as sometimes belonging to Ex NF and sometimes belonging to them personally. There is no evidence to explain why it would have been necessary for Mr Munneke to have recourse to the bitcoin already in the CoinJar account rather than depositing further company funds to convert to ethereum for Meeco. This would have allowed him to simply invoice Meeco for the amount of cash deposited.

813 It also makes no sense that after using 1.0152 bitcoin that was purportedly a personal asset to acquire ethereum for Meeco, Mr Munneke only replenished the CoinJar account with 0.986 bitcoin. There is no evidence that Ms Zaccara's loan account was adjusted taking into account this discrepancy of 0.0292 bitcoin. While the difference is not significant, and can arguably be explained by Mr Munneke depositing funds of an approximately equivalent value to the bitcoin already in the

CoinJar account, it could easily have been avoided altogether as I have explained above. Mr Munneke's failure to do so indicates that he did not consider that the CoinJar account held some cryptocurrency belonging to Ex NF and some belonging to him and Ms Zaccara personally.

814 In my view, the fact that Mr Munneke invoiced Meeco by reference to the price of bitcoin as at February 2014 is also consistent with the applicants' case that the cryptocurrency always belonged to Ex NF.

815 Further, there is objective evidence of the cryptocurrency being treated as Ex NF's asset, including the facts that Mr Munneke stored it in the CoinJar account rather than moving it to the bitcoin wallet that he controlled, that the proceeds from the two later sales of ethereum in January 2018 were paid into the NAB account, and that the surplus funds following the purchase of Ward Street remained in the NAB account. I do not accept Mr Munneke's evidence that he did not transfer the bitcoin to the wallet that he controlled because of security risks, noting his concessions in cross-examination that he could have simply stored the private key in a safe. While Ms Zaccara explained why the funds realised from the sale of the ethereum were deposited into the NAB account, her account of the surplus funds remaining there apparently for convenience purposes is unconvincing, especially when coupled with the absence of records dealing with her purported ownership of the funds.<sup>101</sup> Ex NF claiming a tax credit in respect of the cryptocurrency in 2014 and assuming a GST collection obligation in 2018 also indicates that the cryptocurrency was treated as a company asset.

816 I am ultimately persuaded that Mr Munneke's email to Mr Richards dated 26 January 2018 constitutes an admission as contended by the applicants. The chain of communication plainly concerns the sale of the ethereum originally acquired with Ex NF's funds. While I accept that Mr Munneke introduced Meeco into the discussion, he clearly distinguishes between his software development studio and Meeco, which he refers to as a "customer" and "client". Having done so, his statement "we actually spoke directly with Vitalik" can only be interpreted as meaning that Ex NF and Meeco together spoke directly with Vitalik. Such an interpretation is consistent with both Mr Munneke and Ms Dow attending the meeting with Vitalik. If Mr Munneke were intending to refer only to Meeco in the following sentence, it would have been necessary for him to say, "They bought [it] at the pre-sale...". However, I infer that by the following sentence, which does not commence with any pronoun, Mr Munneke was continuing to refer to both Ex NF and Meeco having "never expected [ethereum] to be an investment, just thought it was a cheaper way to get gas for development". In these circumstances, the evidence that Mr Munneke acted as Meeco's chief technical officer and was able to speak on Meeco's behalf or from Meeco's position is neither here nor there.

817 Ms Zaccara's admissions also weigh heavily against the respondents. Her statements that she did not own any cryptocurrency as at the time of the s 597

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<sup>101</sup> As I noted earlier, the proceeds from the first sale were paid into Mr Munneke's CBA account.

examination and that none was ever purchased on her behalf are unequivocal. The suggestion that Ms Zaccara was confused or had forgotten about owning such a significant amount of cryptocurrency is fanciful.

818 The only objective matter that weighs in the respondents' favour is that there is no evidence that Ex NF used cryptocurrency in its business activities save for in the purchase of ethereum for Meeco. The applicants submitted that Mr Munneke acquired this small amount in case it would prove useful for Ex NF at some point. This submission is consistent with the evidence regarding the source of the funds and the cryptocurrency being held in the CoinJar account which was linked to the company's NAB account, as well as Ex NF having been a software development company with an undeniable interest in cryptocurrency. The same can be said with respect to the acquisition of ethereum, except that its possible utility to Ex NF as gas in development was more discrete.

819 The Hackathon co-hosted by Ex NF, Mr Munneke's tweet regarding the blockchain summit, and involvement in the ethereum blockchain developer course, the email dated 20 October 2017 regarding that course which asserted "Developers are in high demand", Mr Munneke's meeting with Vitalik "in the early days when the project was starting", Mr Munneke's belief in the project and the power of the new blockchain with smart contracts, bolster a finding that the ethereum was bought for Ex NF's business purposes.

820 The evidence of Mr Bacina regarding the benefits and competitive advantages of purchasing ether at the establishment of the ethereum blockchain, together with the status/kudos for having been there at the establishment of a new cryptocurrency, further supports a finding that a developer would acquire ethereum at pre-sale for Ex NF business purposes. Mr Munneke considered ethereum exciting technology. He emailed his staff on 20 July 2018 regarding the Hackathon to be held on 30 July 2018 to 3 August 2018. The Hackathon was to "get practical experience in blockchain development as we test and evaluate 4 leading technologies [including ethereum]".

821 The document titled "Blockchain Hackathon NextFaze Syncing Their Blocks" refers to the Hackathon to be held on 30 July 2018 and records Ms Zaccara as saying:

NextFaze is a company that embraces emerging technologies in the most rapidly changing tech space of app and Web development. We aim to operate on the leading edge of the industry. NextFaze are dedicating a week for the entire crew to focus their collective expertise and proficiency to create a synergy of knowledge that is more than its parts combined. Our team will launch into the technology in a creative and supportive way that demonstrates our passion for bringing the best solutions and tech to our clients.

The document went on to state:

Having a South Australian presence in the international blockchain community helps cement the State's future as a visionary technology hub. NextFaze plays an important role in the burgeoning technology ecosystem in SA ...

822 I am satisfied that the ethereum was purchased by Ex NF in the course of its business for use in its business at some point in the future. It matters not that Ex NF did not undertake activity on the ethereum blockchain or incurred gas prior to its liquidation.

823 In my view, the evidence regarding Mr Munneke using a small amount of bitcoin in day-to-day spending, including to buy sushi and an AB, is neutral. While his conduct is plainly inconsistent with the bitcoin being a family investment, it is also inconsistent with it being a company asset. Mr Munneke clearly treated this portion of the cryptocurrency as a novelty. But the evidence does not permit me to make a finding about whether he was experimenting with the bitcoin in a personal capacity or in his capacity as a developer.

824 In circumstances where the purchases of the cryptocurrency were on their face company transactions, the objective evidence is consistent with the cryptocurrency having been treated as a company asset, and the respondents' assertions to the contrary are unsupported by the evidence, I find that the cryptocurrency purchased in February and August 2014 was acquired for Ex NF and was and remains an asset of Ex NF. In view of my findings, it is not necessary to consider the applicants' alternative case on cryptocurrency.

#### ***Applicants' submissions on Ward Street***

825 The applicants submitted that after the limited tax filings prior to the purchase of O'Connell Street, Ex NF again stopped attending to its tax affairs entirely during the course of 2016. Ms Zaccara received numerous emails from BDO over the first half of 2016 regarding Ex NF's ongoing default that did not lead to any action. By September 2016, the ATO were calling BDO seeking action on the outstanding filings. Despite representations to BDO and further calls from the ATO to BDO, no filings were made.

826 The applicants pointed out that it was during this period that Ms Zaccara (unbeknownst to Mr Munneke) withdrew a further \$100,000 from the ANZ account in September 2016 to fund a trip to Antarctica.

827 In November 2016, Ex NF was also sued for having failed to make superannuation contributions for its employees.

828 By early 2017, Ms Zaccara had been interviewed by the ATO about Ex NF's compliance and had changed accountants to Rowe Partners. In the second half of 2017, after substantial further chasing by the ATO, Ex NF prepared belated financial statements for the years ended 30 June 2014, 2015, and 2016 and made numerous BAS and income tax returns filings, the effect of which was as at the end of 2017, Ex NF had very substantial liabilities owing to the ATO for SGC (\$374,035), GST and PAYG withholding (\$1,266,599), and income tax (\$174,106), all of which were subject to accruing penalties and interest.

829 It was submitted these liabilities were all known to Mr Munneke (noting he wrote in an email 9 January 2018 to Caleb & Brown that he wanted to know the tax implication of selling ethereum “especially given the reason to cash out is to pay a company tax bill” but denied in his statement recalling that any bill needed to be paid at that time) and Ms Zaccara. It was contended Mr Munneke and Ms Zaccara also knew that there was no prospect that Ex NF could pay its tax debt from its cash and debtors alone.

830 Further, on 1 December 2017, Ms Zaccara was also warned by Rowe Partners that Ex NF was operating at a very large loss. As submitted by the applicants, notwithstanding this dire financial situation, on 4 January 2018, Ms Zaccara entered into a contract for her or her nominee to purchase Ward Street for \$1.2 million with \$100,000 payable as a deposit and settlement scheduled for 31 January 2018. To fund this acquisition, over the course of January 2018, Mr Munneke liquidated Ex NF’s ethereum which provided the funds for the purchase.

831 The ethereum sales resulted in a surplus of \$121,988.89 being retained by Ex NF in the NAB account and later transferred to the NAB Maximiser account. As detailed earlier in these reasons, despite Ms Zaccara’s assertion that the ethereum was her property, the applicants submitted she made no attempt to recover these surplus funds and it was submitted this conduct is consistent only with Ex NF being the true owner of the ethereum, and that being known to Mr Munneke and Ms Zaccara.

832 Further, as noted above, contrary to her claim to ownership of the ethereum, Ms Zaccara has not filed returns or paid CGT (either in her own right or as trustee of the ZALD Trust) in respect of the sale of the ethereum.

833 The applicants submitted that on the basis that the ethereum was Ex NF’s property, given the massive financial problems faced by Ex NF at the time, for the ethereum to have been applied to the purchase of a property for the benefit of Ward Street was plainly imprudent.

834 It was submitted that by reference to the reconstructed accounts, the consequence of Ex NF making a gift of the ethereum was that Ex NF was insolvent, even taking into account the growth in value in its holdings of cryptocurrency, and the payment away of over \$1.1 million was self-evidently materially prejudicial to Ex NF’s ability to pay its creditors. The applicants referred to Mr Heard’s summary of Ex NF’s financial position as set out in Fig.5.2.12 above in my discussion of Mr Heard’s evidence.

835 It was submitted that, as with the position regarding O’Connell Street, the position was worse than indicated by the reconstruction, particularly in circumstances where if the cryptocurrency was sold to realise cash to pay the tax debt, Ex NF would then be liable for substantial CGT on the sum realised. If the CGT liability that would arise on sale of the cryptocurrency was factored in, the

applicants submitted the financial position would be significantly worse. The CGT would be payable at the company tax rate (30 percent) on a gain of over \$1.4 million. It was submitted this analysis assumes that Mr Munneke would have deployed Ex NF's cryptocurrency in payment of Ex NF's creditors, particularly its large outstanding tax liability. Yet it was submitted Mr Munneke's actions in 2018 demonstrate that that was highly unlikely. The tax liabilities remained unpaid throughout.

836 It was contended even were the cryptocurrencies to be made available in payment of Ex NF's liabilities, the highly volatile nature of the cryptocurrency prices was such that there could be no rational assurance that the cryptocurrency would remain at a value that would see the liabilities capable of being paid. Mr Scott frankly conceded the difficulty in making any prediction as to the future value of cryptocurrencies.

837 It was submitted the stark position that Ex NF faced at the time of the acquisition of Ward Street is apparent from the balance sheet at [4.3.1] in the Scott report set out in my discussion of Mr Scott's evidence.

838 As with the position at the time of the purchase of O'Connell Street, Mr Scott's balance sheet assumes the existence of loans for both the \$740,000 applied to the purchase of O'Connell Street and the \$1,235,920 from the sale of ethereum applied to the purchase of Ward Street. Mr Scott accepted that if there was no intention for either of these amounts to be repaid to Ex NF (as was submitted was, in fact, the case) then the assets should be removed. Once removed, the applicants contended Ex NF had a borderline asset position, with a corrected net assets of about \$4,000 without taking into account any CGT liability from the sale of ethereum, meaning that the real position was worse than represented. As Mr Scott accepted, the uncertainty in the value of the cryptocurrency meant that it would not be prudent for a director to rely solely on cryptocurrency to pay Ex NF's very substantial tax debts.

839 It was submitted Mr Munneke clearly did not intend for the cryptocurrency to be available to Ex NF to meet its debts or he would have sold it to pay the outstanding tax.

840 The applicants contended the financial position of Ex NF deteriorated over the course of 2018. By June 2018, Ms Zaccara was warned by Rowe Partners that Ex NF's accounting records were showing a loss of \$606,395 for the financial year to date and a very large loss was anticipated. At November 2018, Ex NF's outstanding tax debt was at almost \$2 million. No cryptocurrency was sold, or funds provided to Ex NF, to enable it to meet its liabilities and Ex NF was ultimately wound up on 15 May 2019.

**Mr Munneke's submissions on Ward Street**

841 Mr Munneke submitted the purchase of Ward Street through 106 Ward Street Pty Ltd demonstrates there was never any intention that Ex NF would have a beneficial interest in Ward Street.

842 He argued the Ward Street breach of duty case does not arise if Ex NF's primary claims to legal or beneficial ownership of the cryptocurrency fail. He submitted the Ward Street breach of duty case is premised on the factual allegation that Ex NF's property funded the acquisition of Ward Street. Therefore, if Ex NF's primary claims to legal or beneficial ownership of the cryptocurrency fail, no property of Ex NF will have funded the acquisition of Ward Street. There would be no factual basis for the breach of duty claim to arise. Mr Munneke relied on Mr Scott's opinion to the effect that if the cryptocurrency was not Ex NF's property, then the sale of the cryptocurrency and the Ward Street acquisition was entirely neutral and had no financial impact on Ex NF whatsoever. No breach could conceivably flow if the cryptocurrency was not an asset of Ex NF.

843 Mr Munneke submitted that if it is found that the cryptocurrency was legally or beneficially that of Ex NF, the applicants have not established any breach of duty because it has not been proven that Ex NF was insolvent or of doubtful solvency as at January 2018 and/or that Ex NF failed to keep accurate financial records as at January 2018 in accordance with s 286 of the *Corporations Act*.

844 Mr Munneke contended that the applicants have not otherwise established:

1. any breach of ss 181, 182 or fiduciary duties, when Ms Zaccara, as sole shareholder, consented to, approved of, and ratified the acquisition of the cryptocurrency as well as the release of the funds and the acquisition of Ward Street using the cryptocurrency proceeds. Just as in relation to the O'Connell Street claim, Mr Munneke submitted there can be no bad faith or improper purpose or advantage when the sole shareholder, who is the wife of Mr Munneke, was not only fully informed, but herself was taking steps to progress the Ward Street acquisition which was contingent on the release of funds from her sale of the cryptocurrency;
2. any damage to Ex NF resulting from the payment out of \$3,050 from the NAB account to acquire bitcoin or from the acquisition of Ward Street, as required by s 1317H, such that, no entitlement to relief has been established;
3. that the acquisition of Ward Street was an unreasonable director-related transaction for the purpose of s 588FDA of the *Corporations Act*.

**Ms Zaccara and 106 Ward Street Pty Ltd's submissions on Ward Street**

845 It was submitted Ms Zaccara gave evidence that in early 2018, after discussing the matter with Mr Munneke, Ms Zaccara decided to purchase Ward Street. It was further submitted that Ms Zaccara decided to fund the

acquisition by selling part of her cryptocurrency holdings and she requested that Mr Munneke assist her to sell sufficient of the cryptocurrency to fund the purchase.

846 The primary position of Ms Zaccara and 106 Ward Street Pty Ltd is that the cryptocurrency used to acquire Ward Street was Ms Zaccara's property, or at least not the property of Ex NF. Accordingly, it was submitted it is only necessary to deal with the alternative that it was Ex NF's property on a hypothetical counterfactual basis.

847 It was submitted Ms Zaccara, as sole shareholder of Ex NF, agreed, ratified, and acquiesced to the application of the proceeds realised on the sale of the cryptocurrency towards the purchase of Ward Street.

848 It was submitted Mr Heard, in his report, adopting a similar methodology to that adopted in relation to the O'Connell Street transaction, concluded that if Ex NF owned the cryptocurrency then, as at 31 January 2018, Ex NF had a surplus of net liquid assets of \$191,991. It was contended Mr Heard made various assumptions adverse to Ex NF's position and opined that Ex NF, at 31 January 2018, needed at least \$250,000 in working capital. It was pointed out Mr Heard's opinion, again, is only as to the approach he considered a prudent director should have taken (and one with which Mr Scott does not agree). It was submitted that means, at 31 January 2018, adopting Mr Heard's methodology, an injection of funds in the amount of \$58,009 was required to make up the working capital to Mr Heard's preferred balance.

849 Ms Zaccara and 106 Ward Street Pty Ltd submitted, for the same reasons as put in relation to the O'Connell Street transaction, the Court can readily find that Ms Zaccara would have been both able and willing to contribute that sum to Ex NF if required to do so at that time in order to satisfy a solvency standard of the kind set by Mr Heard.

850 It was submitted that at the time of the 2018 cryptocurrency sale and use of the sale proceeds to purchase Ward Street, Ms Zaccara believed that she was using her own property. It was submitted on the basis that the Court should find that she genuinely believed that it was her property but that, objectively and in point of law, she was wrong in her belief, it would be unfair if she could not be heard to say that had she known the cryptocurrency was Ex NF's property, she would have directed and authorised, in her capacity as the sole shareholder, Ex NF's director to distribute sufficient of the proceeds of sale to her in her own right to facilitate settlement on the purchase of Ward Street.

851 It was argued on that alternative and counterfactual basis that it is open to the Court to apply the unanimous shareholder consent rule, both in answer to the allegation of fiduciary breach against Mr Munneke and the allegation of statutory breaches, for the same reasons as have been put in relation to the O'Connell Street transaction.

852 Ms Zaccara and 106 Ward Street Pty Ltd submitted the allegation that as Ex NF's funds were used to purchase Ward Street, then Ward Street must belong to Ex NF proceeds on a false premise. It was submitted that begs the question whether, even if the ethereum did belong to Ex NF, the payment of the funds to or for the benefit or at the direction of Ms Zaccara meant that someone other than Ex NF owned Ward Street free and clear of any claim of Ex NF.

853 It was submitted if the cryptocurrency did not belong to Ex NF, no issue of breach of fiduciary duty as pleaded can arise. It was further submitted that if the claim of breach of fiduciary duty must be tested on the premise that Ex NF owned the cryptocurrency, then it is only fair that it be tested on the counterfactual hypothesis that Ms Zaccara has directed and authorised the release of the funds to herself or at her direction.

854 It was contended the allegations of a failure to undertake analysis go nowhere unless the failure is consequential, and the only truly consequential allegation pressed by the applicants is that the Ward Street transaction rendered Ex NF highly susceptible to insolvency. However, it was submitted, on the assumption that the cryptocurrency belonged to Ex NF, and accepting the proposition that if a company is near insolvency the director must have regard to the interest of creditors as well as shareholders, the applicants' evidence falls short of establishing such a case.

855 It was contended in relation to the allegation that the Ward Street transaction was an unreasonable director-related transaction, it is not clear on the applicants' case how they say this is to be tested. It was submitted if the cryptocurrency at 31 January 2018 did not belong to Ex NF, then there is no relevant transaction, and the pleaded claim is inutile. Further, it was submitted if the cryptocurrency was an asset of Ex NF, then not only did Ex NF own real property into which that asset had been converted, it also held a significant residual balance of cryptocurrency. It was submitted the value of that residual holding continued to escalate up to the point of liquidation and beyond in circumstances where the escalation in price was on a consistent, upward trend albeit with some fallbacks in price from time to time. It was submitted that cannot be ignored in an objective assessment of what was reasonable on the hypothesis that the director knew that Ex NF owned the cryptocurrency.

856 Ms Zaccara and 106 Ward Street Pty Ltd submitted that, in the circumstances, and given that the proceeds of the sale of the cryptocurrency were used and applied for the benefit of the sole shareholder or at her direction, a release of Ex NF's funds to or at the direction of that sole shareholder in those circumstances was not commercially unreasonable. It was contended that if Ex NF owned the cryptocurrency, the release of the funds was a release of shareholder's funds for the sole shareholder and there was no gift or transaction at an undervalue.

857 Ms Zaccara and 106 Ward Street Pty Ltd submitted that on the hypothesis that the cryptocurrency belonged to Ex NF, the applicants have not established a

basis in the evidence for a finding of any actual or presumed intention to create a debt for the monies paid to 106 Ward Street Pty Ltd and no claim of unjust enrichment is pleaded or available.

***Ward Street discussion and findings***

858 As I have found, the ethereum sold to fund the purchase of Ward Street was the property of Ex NF and, as with the purchase of O’Connell Street, it was not open to Mr Munneke to make a gift of Ward Street to 106 Ward Street Pty Ltd as trustee of a trust held for his personal benefit.

859 By the end of 2017, having prepared belated financial statements for the years ended 30 June 2014, 2015, and 2016 and made numerous BAS and income tax returns filings, Ex NF had very substantial liabilities owing to the ATO for SGC (\$374,035), GST and PAYG withholding (\$1,266,599), and income tax (\$174,106), all of which were subject to accruing penalties and general interest.

860 Ex NF continued in its failure to maintain written financial records that correctly recorded and explained its transactions and financial position and would enable true and fair financial records to be prepared and audited including by not explaining the loans to Ms Zaccara and entities controlled by her, payments made or asserted to have been made by her, the payment of Ex NF funds, the ANZ loan underlying the O’Connell Street transaction, the basis upon which Ex NF occupied O’Connell Street, the cryptocurrency sale, and the Ward Street transaction.

861 Rowe Partners emailed Ms Zaccara on 1 December 2017 warning that Ex NF was operating at a very large loss. Mr Munneke continued to leave tax issues to Ms Zaccara and the accountant, failing to maintain an informed oversight of Ex NF’s financial affairs. It is plainly evident from my findings that Mr Munneke’s reliance on Ms Zaccara and Rowe Partners was not reasonable as defined by s 189 of the *Corporations Act*.

862 Mr Heard’s opinion was that if Ex NF did own the cryptocurrency, there were liquid assets (at high ERV) of \$2 million, which was only just sufficient to meet the claims of overdue creditors totalling \$1.9 million. Mr Heard further stated there were no cash surpluses generated between 1 July 2017 and 31 March 2018 and that the trading performance to January 2018 would not have given Ex NF confidence that it could meet sundry creditors, tax, and superannuation arrears from trading surpluses.

863 Mr Heard’s opinion demonstrated in Fig 5.2.12 reveals that Ex NF had insufficient resources to meet tax and superannuation arrears at the time it used its funds to purchase Ward Street. He detailed that on the assumption Ex NF owned the cryptocurrency, the shortfall of \$58,009 would have been even greater if the accruals totalling \$135,602 that were due in February 2018 (comprising \$101,048 of PAYG/GST for the December quarter and \$25,554 of PAYG withholding for January 2018), plus an unquantified amount of superannuation that would have

been due in April 2018, were included. Mr Heard did not factor in any CGT on the sale of the ethereum.

864 I accept Mr Heard's opinion that Ex NF did not have sufficient financial resources available to it on 31 January 2018 when the payment was made to purchase Ward Street. I accept his opinion that Ex NF did not have sufficient liquid assets to pay all its liabilities that were due to be paid and to continue trading and was facing insolvency at the time of the Ward Street purchase.

865 As submitted by the applicants, notwithstanding this dire financial situation, on 4 January 2018, Ms Zaccara entered into a contract for her or her nominee to purchase Ward Street for \$1.2 million with \$100,000 payable as a deposit.

866 Having considered all the evidence and submissions of the parties, I am satisfied that as at 31 January 2018 Ex NF's financial state, with outstanding tax liabilities of almost \$1.9 million, was such that there was a "real and not remote risk of insolvency" enlivening the duty of Mr Munneke to consider the interests of Ex NF's creditors.

867 In this matter, putting aside the penalties and general interest and any CGT on the sale of ethereum, Ex NF did not have sufficient liquid assets to pay all its liabilities that were due to be paid and to continue trading, placing Ex NF in jeopardy. Mr Munneke's duty to consider the interests of creditors in complying with his duty to act in the best interests of Ex NF was enlivened when payment of Ex NF's funds to purchase Ward Street was contemplated. Had he acted in compliance with his duty, he would have properly informed himself as to Ex NF's financial position and would not have purchased Ward Street if that was going to jeopardise Ex NF's solvency.

868 I am not satisfied that Ms Zaccara would have provided funds to Ex NF if required to pay tax liabilities. In relation to the O'Connell Street transaction, she was prepared to take Ex NF's funds and expose it to the liability of the ANZ loan without settling the associated loan or ensuring financial records correctly recorded her assertion the loan was paid back. She withdrew \$100,000 from the ANZ account in September 2016 for a 24-hour holiday sale, and she did not contribute funds to pay the ATO liabilities to avoid EX NF going into liquidation. Whilst she contributed \$54,966.90 in June 2016, there is no record other than its deposit in the NAB account identifying what it relates to. Further, Ms Zaccara's evidence about paying \$228,000 to Ex NF was proven to be incorrect and does not engender confidence in her purported willingness to contribute funds. Ms Zaccara's evidence about not seeing or being made aware of ATO notices of assessments and her psychological block to tax issues also do not imbue confidence on a "realistic commercial assessment" about her willingness to pay. I consider it inherently unlikely that Ms Zaccara was every going to commit her personal funds to pay, in particular, tax liabilities, noting her self-confessed "fear", difficulty doing tax, and irrational relationship with tax.

869 Having considered all the evidence, I am led to the conclusion, as the liquidator reported to creditors in August 2019, that, since 2015, Ex NF was only able to continue its operations through the non-payment of its tax and superannuation obligations.

870 I am satisfied that by causing or allowing Ex NF's funds to be used in the Ward Street transaction, Mr Munneke breached his statutory duties as follows:

1. Mr Munneke failed to exercise due care and diligence and breached s 180(1). A reasonable director in his position would have ensured that Ex NF was up to date with its tax filings and payments and that Ex NF maintained up-to-date financial statements. A reasonable director in his position would not have caused or allowed Ex NF's funds to be used to purchase Ward Street without undertaking any analysis, or alternatively any proper analysis, of Ex NF's liability in respect of income tax, BAS, and superannuation liabilities;
2. prior to causing or allowing Ex NF's funds to be used to purchase Ward Street, Mr Munneke failed to undertake any analysis, or alternatively any proper analysis, into the appropriate reserves that would allow Ex NF to pay the amounts owing to the creditors of Ex NF and to allow Ex NF to continue to trade;
3. Mr Munneke caused Ex NF's cash resources to be depleted and made it highly susceptible to insolvency and/or cessation of Ex NF's operations;
4. it is plainly evident from my findings that the statutory defence, the business judgment rule prescribed by s 180(2), is not available to Mr Munneke;
5. Mr Munneke did not exercise his powers as a director in good faith and in the best interests of Ex NF or for a proper purpose and was in breach of s 181(1). It was not a proper corporate purpose for Mr Munneke to make a gift of Ex NF's property to 106 Ward Street Pty Ltd as a trustee of a trust held for his benefit and he further caused Ex NF's assets to be put out of the reach of the creditors of Ex NF;
6. Mr Munneke made improper use of his position as director to gain an advantage for himself and others and cause detriment to Ex NF in breach of s 182(1);
7. it is also plainly evident that Mr Munneke's reliance on Ms Zaccara and Rowe Partners was not reasonable within the meaning of s 189 of the *Corporations Act*.

871 I am satisfied that by causing or allowing Ex NF's funds to be used in the Ward Street transaction, Mr Munneke breached his fiduciary duties:

1. by making a gift of Ex NF's property to 106 Ward Street Pty Ltd as trustee of a trust held for his personal benefit;
2. Ex NF obtained no corporate benefit from the Ward Street acquisition;
3. Ex NF's assets were depleted by the Ward Street acquisition to the extent of the payments;
4. Mr Munneke's duty to Ex NF was to ensure Ex NF property was deployed for a company purpose.

872 Turning to the issue of ratification, there cannot be assent or ratification unless there is full knowledge of the nature of the transaction and its consequences, it has been duly considered, and the course of action proposed is consented to.<sup>102</sup> I agree with the applicants' submission that no issue of ratification arises in respect of Ward Street given Ms Zaccara was, she says, unaware that Ex NF ever held cryptocurrency. Therefore, it follows that she was never consenting to Ex NF's cryptocurrency being deployed to purchase Ward Street.

873 Regardless of Ms Zaccara's knowledge, the interests of creditors having been enlivened clearly intervened such that the improper expropriation of Ex NF's property in the acquisition of Ward Street was incapable of ratification by Ms Zaccara.<sup>103</sup> I find that Mr Munneke and Ms Zaccara did not have any idea as to what the ATO liabilities, including general interest charge and penalties, were going to be, as made clear by Ms Zaccara when she said she was shocked and so too was Mr Munneke.

874 Further, I find that the use of Ex NF's funds to purchase Ward Street for the benefit of 106 Ward Street Pty Ltd as trustee of the 106 Ward Trust was plainly an unreasonable-director related transaction pursuant to s 588FDA of the *Corporations Act*. I am satisfied that:

1. it was a "transaction" within the broad meaning of s 9 of the *Corporations Act*;
2. the transaction involved a payment of money by Ex NF in the amount of \$1,235,920.08;
3. the payment was made to Mr Munneke or for his benefit;
4. I accept the applicants' contention that in the circumstances where, at November 2018, Ex NF owed almost \$2 million to the ATO, a

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<sup>102</sup> *Herrman v Simon* (1990) 4 ACSR 81 at 83; *Jarrett v Perpetual Trustee Co Ltd* (2007) 64 ACSR 552 at [123].

<sup>103</sup> See *Macleod v R* (2003) 214 CLR 230 at [28]-[30]; *Angas Law Services Pty Ltd (in liq) & Anor v Carabelas & Anor* (2005) 226 CLR 507 at [24], [66]-[68]; *Re New World Alliance; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425 at 444D-445B.

reasonable person in Ex NF's position would not have entered into the Ward Street transaction which was of no benefit to Ex NF.

875 As discussed earlier, I have found that Ex NF is the legal owner of the cryptocurrency and Ex NF's funds were deployed in the acquisition of Ward Street. I do not accept Mr Munneke's contention that Ex NF had no interest in the cryptocurrency or its proceeds and, thereby, the Ward Street transaction was relevantly between the vendor and the 106 Ward Trust.

876 I do not accept Ms Zaccara and 106 Ward Street Pty Ltd's submission that, in the circumstances, and given that the proceeds of the sale of the cryptocurrency were used and applied for the benefit of the sole shareholder at her direction, a release of Ex NF's funds to or at her direction, as sole shareholder, was commercially reasonable. I also do not accept that the release of funds, where Ex NF is the owner of the cryptocurrency, was a release of the shareholder's funds for the sole shareholder and there was no gift or transaction at an undervalue.

877 The Ward Street transaction is voidable within the meaning of s 588FE(6A) of the *Corporations Act*.

878 The relief against liability prescribed by ss 1317S or 1318 of the *Corporations Act* is not available to Mr Munneke. It only applies where a director, as an officer of a corporation, has acted honestly and having regard to the circumstances of the case ought fairly be excused. The circumstances of this matter are not such that Mr Munneke's conduct ought fairly be excused from his breaches of the *Corporations Act*.

## **Conclusion**

879 In conclusion, I have made the following findings in respect of each of the applicants' claims.

### ***The O'Connell Street claim***

880 O'Connell Street was purchased on 10 December 2015 by the payment of \$1,125,911.59 from Ex NF's bank accounts and the \$740,000 ANZ loan. At the time the O'Connell Street transaction was contemplated, Ex NF's financial state was such that Mr Munneke should have been concerned for its solvency. There was a "real and not remote risk of insolvency" enlivening the duty of Mr Munneke to consider the interests of Ex NF's creditors. By effecting the O'Connell Street transaction, Mr Munneke breached his fiduciary duties and statutory duties imposed by ss 180, 181, and 182 of the *Corporations Act* to Ex NF. The statutory defence prescribed by s 180(2) to a contravention of s 180(1), the business judgment rule, is not available to Mr Munneke. Nor can he avail himself of s 189 as his asserted reliance on Ms Zaccara and Mr Vijayadass was not reasonable. Further, Ms Zaccara could not properly excuse his breaches, and, in any event, the O'Connell Street transaction was an unreasonable director-related transaction.

881 The relief against liability prescribed by ss 1317S or 1318 of the *Corporations Act* is not available to Mr Munneke. It only applies where a director, as an officer of a corporation, has acted honestly and having regard to the circumstances of the case ought fairly be excused. The circumstances of this matter are not such that Mr Munneke's conduct ought fairly be excused from his breaches of the *Corporations Act*.

### ***The cryptocurrency and Ward Street claim***

#### ***Cryptocurrency***

882 The bitcoin Mr Munneke purchased in February and August 2014, and the ethereum acquired using part of that bitcoin in August 2014, was acquired for Ex NF and was and remains the property of Ex NF.

#### ***Ward Street***

883 The proceeds of the sale of ethereum belonging to Ex NF was used to purchase of Ward Street on 31 January 2018.

884 At the time the Ward Street transaction was contemplated, Ex NF's financial state was such that Mr Munneke should have been concerned for its solvency. There was a "real and not remote risk of insolvency" enlivening the duty of Mr Munneke to consider the interests of Ex NF's creditors. By causing or allowing proceeds of the sale of ethereum belonging to Ex NF to be used to purchase Ward Street, Mr Munneke breached his fiduciary duties and statutory duties imposed by ss 180, 181 and 182 of the *Corporations Act* to Ex NF. The statutory defence prescribed by s 180(2) to a contravention of s 180(1), the business judgment rule, is not available to Mr Munneke. Nor can he avail himself of s 189 as his asserted reliance on Ms Zaccara and Rowe Partners was not reasonable. Further, Ms Zaccara could not properly excuse the breaches, and, in any event, the Ward Street transaction was an unreasonable director-related transaction.

885 The relief against liability prescribed by ss 1317S or 1318 of the *Corporations Act* is not available to Mr Munneke. It only applies where a director, as an officer of a corporation, has acted honestly and having regard to the circumstances of the case ought fairly be excused. The circumstances of this matter are not such that Mr Munneke's conduct ought fairly be excused from his breaches of the *Corporations Act*.

#### ***Crossclaim***

886 I dismiss the crossclaim filed by Ms Zaccara and 106 Ward Street Pty Ltd.

#### ***Declarations and orders***

887 I will hear from the parties regarding the declarations I must make pursuant to s 1317E of the *Corporations Act*, the form of orders, and costs for final relief.