FEDERAL COURT OF AUSTRALIA

Champions Quarry Pty Ltd v GSQ Holdings Pty Ltd, in the matter of Champions Quarry 2 Pty Ltd [2019] FCA 459

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| File number(s): |  |
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| Judge(s): | **GREENWOOD J** |
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| Date of judgment: | 3 April 2019 |
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| Catchwords: | **CORPORATIONS** – consideration of an interlocutory application for the appointment of provisional liquidators in the context of an application filed by the plaintiff for a winding‑up order of Champions Quarry 2 Pty Ltd ACN 600 281 061 on the just and equitable ground and on the footing that the 51% majority shareholder has been conducting the affairs of the company in a manner that is oppressive or unfairly prejudicial to a member holding 49% of the issued shares in the company and on the footing that the company has been conducted in a manner contrary to the interests of the shareholders as a whole |
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| Legislation: | *Corporations Act 2001* (Cth), ss 232, 233, 461, 462, 472 |
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| Cases cited: | *Australian Securities and Investments Commission v Activesuper Pty Ltd (No 2)* (2013) 93 ACSR 189  *Australian Securities and Investments Commission v Uglii Corporation Pty Ltd* (2016) 116 ACSR 389  *Australian Securities Commission v Solomon* (1996) 19 ACSR 73  *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625  *Lubavitch Mazal Pty Ltd v Yeshiva Prospects No 1 Pty Ltd* (2003) 47 ACSR 197  *Montgomery & Windsor (NSW) Pty Ltd v Ilopa Pty Ltd* (1984) 2 ACLC 224  *Re Back 2 Bay 6 Pty Ltd* (1994) 12 ACSR 614  *Re Club Mediterranean Pty Ltd* (1975) 11 SASR 481  *Re Global SDR Technologies Pty Ltd; Australian Securities and Investments Commission v Global SDR Technologies Pty Ltd* (2004) 51 ACSR 42  *Re New Cap Reinsurance Corporation Holdings Ltd* (1999) 32 ACSR 234  *Riviana (Aust) Pty Ltd v Laospac Trading Pty Ltd* (1986) 10 ACLR 865 |
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| Date of hearing: | 1 April 2019 |
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| Date of last submissions: | 1 April 2019 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 92 |
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| Counsel for the Plaintiff: | Mr B W J Kidston |
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| Solicitor for the Plaintiff: | Mahoneys |
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| Solicitor for the Defendant: | Mr D Kendell, Stack Law |
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| Solicitor for the Receiver and Manager of Champions Quarry Pty Ltd: | Ms F Doré, Cronin Millar |

ORDERS

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|  | | QUD 924 of 2018 |
| IN THE MATTER OF CHAMPIONS QUARRY 2 PTY LTD | | |
| BETWEEN: | CHAMPIONS QUARRY PTY LTD ACN 127 774 949  Plaintiff | |
| AND: | GSQ HOLDINGS PTY LTD ACN 616 359 338  Defendant | |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 3 APRIL 2019 |

THE COURT ORDERS THAT:

1. William Roland Robson and William Paul Cotter be appointed as provisional liquidators of Champions Quarry 2 Pty Ltd ACN 600 281 061 pursuant to s 472(2) of the *Corporations Act 2001* (Cth).
2. The solicitors for the plaintiff are directed to submit orders giving effect to Order 1 of these orders to the Court as soon as possible.
3. Costs reserved for later determination.
4. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published from Chambers.

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

REASONS FOR JUDGMENT

GREENWOOD J:

1. These proceedings are concerned with an interlocutory application for the appointment of provisional liquidators of Champions Quarry 2 Pty Ltd (the “company” or “CQ2”) pursuant to s 472(2) of the *Corporations Act 2001* (Cth) (the “Act”). Ancillary orders are also sought should provisional liquidators be appointed to the company.
2. The application for a winding up order was filed on 12 December 2018. In that application, the plaintiff, Champions Quarry Pty Ltd (“CQPL”), seeks a winding‑up order under s 461(1)(e), (f) and (k) of the Act and under s 233(1)(a) in reliance upon the grounds contemplated by s 232(d) and (e) of the Act.
3. As to s 461(1), those grounds are these:

(e) directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any manner whatsoever that appears to be unfair or unjust to other members; or

(f) affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or in a manner that is contrary to the interests of the members as a whole; or

(k) the Court is of the opinion that it is just and equitable that the company be wound up.

1. As to s 232 of the Act, the Court may make an order that the company be wound up under s 233(1)(a) if the conduct of the company’s affairs is:

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

1. Section 233(2)(a) and (b) provide that if a winding‑up order is made under s 233, the provisions of the Act relating to the winding‑up of companies apply as if the order were made under s 461 and with such changes as are necessary.
2. All of these matters go to questions of final relief in the principal application. However, these matters represent the contextual background against which the application for the appointment of liquidators, provisionally, is made for the period prior to the making of a winding‑up order (should such an order be made). The functions and powers of a liquidator appointed provisionally are contained in s 472(3) to s 472(6).
3. CQPL puts its case for the appointment of liquidators provisionally, in this summary way. It says that CQPL, by its director, Mr Jeffrey Francis Champion (“Mr Champion”), claims that persons with a relationship to entities associated with the majority defendant shareholder (51%) have:
4. installed themselves as director and secretary without the approval of the members of the Company and [as to the position of secretary] without any approval;
5. thereafter been involved in a concerted effort to transfer the assets of the Company into the sole name of the defendant (which has been effective); and
6. conducted the business in a way that is oppressive to the plaintiff, including [conduct of] excluding the plaintiff (as shareholder) and Mr Champion (as the Company’s director) from the affairs and management of the Company.
7. CQPL contends that the company is not being conducted in accordance with its Constitution, the Act and a Shareholders Agreement. It says that the company is under the control of Mr Robert Richards who is associated with the majority shareholder. It says that Mr Richards is “hopelessly conflicted” and is permitting “what is left of the assets of the Company to be used by the defendant to exploit the assets it has impermissibly taken from the Company for the benefit of the defendant”.
8. CQPL filed its application for a winding‑up order on 12 December 2018 in its capacity as a contributory. CQPL has standing to apply for a winding‑up order on the grounds as sought, having regard to s 462 of the Act. CQPL holds 120 of the 245 issued shares in the company. However, 25 of those shares numbered 96 to 120 are the subject of a charge granted to Flintstone Investments Pty Ltd (“Flintstone”).
9. On Friday, 15 March 2019, Flintstone as trustee for the Flintstone Investments Trust appointed Mr Jason Bettles as receiver and manager of the 25 ordinary shares held by CQPL in the company the subject of the charge to Flintstone.
10. The interlocutory application for the appointment of liquidators provisionally was listed for hearing on Monday, 18 March 2019. In view of the appointment of Mr Bettles, the interlocutory application was adjourned to 1 April 2019 in order to enable CQPL to form a view about the consequences for CQPL and the present application of the appointment of Mr Bettles.
11. On 1 April 2019, Mr Champion filed a further affidavit in which he says that 87 of the shares held by CQPL are also the subject of a charge granted to third parties. However, shares number 83 to 87 and 93 to 95 are unencumbered. Accordingly, at least in respect of those shares, CQPL has standing to make an application for a winding‑up order and standing to apply for the appointment of liquidators provisionally.
12. The receiver appeared by his solicitor on the hearing of the application and accepts that CQPL has standing. The defendant does not contest the standing of CQPL in these proceedings.
13. It is now necessary to explain the background to the application.
14. The application for the appointment of liquidators provisionally is supported by a number of affidavits. The principal affidavit (1,029 pages) is an affidavit by Mr Champion affirmed on 12 December 2018.
15. He says these things.
16. Mr Champion is the sole director and secretary of CQPL. He is also a director of the company (CQ2), Reavill Farm Pty Ltd (“Reavill”), Tucki Hills Pty Ltd (“Tucki”) and Piha Holdings Pty Ltd (“Piha”). CQPL holds 49% of the issued shares in the company. The remaining shares are held by the defendant, GSQ Holdings Pty Ltd (“GSQH”). The sole director of GSQH is Mr Kevin Bruce Small. Mr Champion says that in all his dealings with GSQH he has never had any contact with Mr Small. GSQH is the trustee for the GSQ Holdings Unit Trust and the unitholders in that trust are Flintstone holding seven of the 12 units and Barnrock Investments Pty Ltd (“Barnrock”) which holds the remaining five units in the trust.
17. The directors of Flintstone are Mr Robert Richards and his brother, Mr Rhys Richards. The secretary of Flintstone is Ms Gillian Richards, the sister of Robert and Rhys Richards. Gillian Richards is the partner of Mr Small.
18. Mr Robert Richards is also a director of the company.
19. The directors of Barnrock are Mr John Barnes and Mr Michael Barnes.
20. On the hearing of the interlocutory application, the defendant was represented by its solicitor Mr David Kendell. Mr Kendell says that so far as allegations of conduct are made against the defendant, the principal actor for the defendant was, at all times, Mr Robert Richards. Mr Kendell says that from time to time Mr Robert Richards would take advice from his brother, Mr Rhys Richards, and from time to time Mr Michael Barnes provided advice and assistance to Mr Robert Richards. However, Mr Kendell accepts that it is correct to say that the principal actor in the various events, so far as the defendant is concerned, is Mr Robert Richards (who I will refer to simply as Mr Richards).
21. Mr Champion says that since about 1985 he has been involved in the operation of a sandstone quarry business located on land in Tuckurimba in New South Wales. The quarry comprises Lots 1, 2, 3, 4 and 5 on the relevant development plan. From 1985 to about July 2007, Lot 5 was owned by Reavill and Tucki.
22. In about 2006, the Lismore City Council granted development consent for the extraction of approximately 64,000 tonnes of sandstone per annum for up to 15 years from Lot 5. In 2007, geological testing revealed that Lot 5 contained reserves of 13 million tonnes of sandstone and Lot 2 contained reserves of 2 million tonnes of sandstone. In 2009, the quarry was recognised as a “State Significant Resource”. On 30 August 2012, the development approval for the quarry was expanded to allow extraction of up to 250,000 tonnes per annum from Lot 5 for a period of 25 years. In August 2014, testing carried out on Lots 3 and 4 which surround Lot 5 were found to contain an additional 20 million tonnes of sandstone.
23. The quarry operated from 1985 to approximately May 2018 under the trading name “Champions Quarry”.
24. From 1 October 2007 to 30 June 2014, CQPL operated the quarry.
25. On 23 June 2014, CQ2 was incorporated with CQPL as the sole shareholder. On 1 July 2014, CQ2 began trading as “Champions Quarry”.
26. In about August 2014, CQPL sold 50% of its interest in the quarry to Yansea Operations Pty Ltd (“Yansea”) and at the same time, Yansea acquired 50% of the issued shares in the company from CQPL. At the same time, Reavill and Tucki sold their interest in Lot 5 to Yansea. Yansea granted Reavill and Tucki (or nominees of those entities) a five year option to purchase a 50% interest in Lot 5 for $2,300,000 adjusted for CPI (the “option arrangement”). At this time, as part of this transaction, Yansea entered into a lease of the quarry to the company for a term of 24.5 years (plus any relevant extension) for the greater of $250,000 plus GST per annum or 10% of the company’s gross sales.
27. This lease is called the “First Lease” and is an annexure to Mr Champion’s affidavit.
28. On 12 July 2016, Piha entered into an agreement with Yansea for the purchase of Lot 5 (the “Piha Contract”). Completion of the Piha Contract was to occur simultaneously with the purchase of 50% of the shares in the company then owned by Yansea.
29. On 3 February 2017, CQPL purchased the shares held by Yansea in the company. It then sold 51% of the shares in the company to GSQH for $3,945,000.
30. On 3 February 2017, CQPL also granted GSQH security over the shares held by CQPL in Piha on particular terms and granted GSQH security over 25 shares held by CQPL in the company. CQPL and GSQH also entered into a Shareholders Agreement on 3 February 2017.
31. On 3 February 2017, Yansea terminated the option granted to Reavill and Tucki and it terminated the First Lease of Lot 5 to the company. On 3 February 2017, Yansea entered into a lease with the company of Lot 5 for a term of one year commencing on 23 December 2016 (the “Second Lease”) for $250,000 plus GST. Also on 3 February 2017, Yansea granted Piha an extension of the completion date on the Piha Contract for the purchase of Lot 5 to 22 December 2017 in consideration of the payment of $716,243.16 to be deducted from the purchase price on settlement or forfeited to the vendor should default occur on 22 December 2017. On 3 February 2017, Piha granted GSQH an option to purchase Lot 5 subject to any lease between Piha (on completion) and the company at the date of purchase. Piha also granted an option to the company to lease Lot 5 for a term of 25 years for consideration of $250,000 plus GST per annum. Reavill and Tucki granted an option to the company to lease Lots 3 and 4 on particular terms.
32. As part of the 3 February 2017 transaction, Mr Champion and his wife, Mrs Diana Champion, gave a personal guarantee to GSQH concerning the obligations of CQPL.
33. On 26 April 2017, Mr Champion, on behalf of the company, was told that the company’s tender for the supply of quarry materials for an upgrade of 155 kilometres of the Pacific Highway had been successful. That led to an agreement between “NSW Roads and Maritime Services” (“RMS”) and the company dated 7 June 2017 (the “Master Supply Agreement”); a supply deed between CPB Contractors Pty Ltd and the company dated 6 December 2017 (the “CPB Deed”) and a supply deed between Lendlease Engineering Pty Ltd and the company dated 15 August 2017 (the “Lendlease Deed”).
34. Mr Champion says that these three deeds represent “a significant portion of the Company’s future revenue”.
35. On 3 August 2017, Mr Champion sent an email to Mr Robert Richards attaching a consent to act as director of the company. Counsel for CQPL accepts that Mr Champion understood and acquiesced in Mr Richards becoming a director of the company although no proper formal step was taken to appoint Mr Richards either by the shareholders or by an exercise of a power of appointment conferred on the director. A consent to act signed by Mr Richards was returned to Mr Champion. However, on 8 March 2018, a Form 484 entitled “Change to company details” was lodged with ASIC by the company’s accountant, Crowe Horwath (Queensland) Ltd. The form recites that Mr Champion certifies, as director, that the information is true and correct. Mr Champion says that he did not sign the form and he did not certify as to the accuracy of the information in it. The form recites that Mr Richards was appointed director of the company on 8 March 2018 and that Ms Gillian Richards was appointed company secretary. Mr Champion also says that he did not authorise the form to be submitted to ASIC asserting those matters. Mr Champion says that there was no discussion or meeting of members to appoint Ms Richards as company secretary. Mr Champion says that he did not become aware of the appointment of Ms Richards or Mr Richards until 16 May 2018 when he received an email from the NSW Department of Planning and Environment asserting those matters.
36. On 21 November 2017, Mr Michael Barnes (of Barnrock) told Mr Champion that he had caused a mail re‑direction to be established for six months with the result that all mail delivered to the company’s post office box would be re‑directed to a mail box controlled by GSQH, that is, PO Box 642, Lismore, NSW, 2480.
37. Mr Richards affirmed an affidavit on 21 January 2019 in response to the principal affidavit of Mr Champion of 12 December 2018. It is convenient to mention aspects of this affidavit now having regard to the chronology at this point.
38. The affidavit was prepared by Mr Richards himself without the aid of lawyers and, in that sense, the affidavit addresses in a direct way the various issues set out in Mr Champion’s principal affidavit.
39. Mr Richards says that he is a director of CQ2 and the representative of GSQH. He says that after Yansea terminated on 3 February 2017 the option granted to Reavill and Tucki and terminated, on the same day, the First Lease to CQ2, due, he says, to Piha’s default in completing the purchase of Lot 5 (which ultimately resulted in an extension of the completion date to 22 December 2017), Mr Richards negotiated the Second Lease (being the one year lease which was backdated to commence from 23 December 2016) and the extension to the Piha purchase contract. Mr Richards says that he took these steps “on behalf of Jeff Champion” as “the relationship between the owners of Yansea and Jeff had broken down due to trust issues”: para 10 of the affidavit of Mr Robert Richards.
40. Mr Richards says that the Second Lease between Yansea and the company expired on 23 December 2017. He says that he and his sister, Gillian Richards, had “extensive discussions with the owner of Yansea during late 2017 and early 2018 to try and negotiate an extension to the lease between Yansea and CQ2”.
41. The owner of Yansea is Mr Bruce Neumann. Mr Richards also says this at para 11 of his affidavit:

… however it was made clear by the owners of Yansea that they were not willing to enter into any further business arrangement that Jeff or his daughters were involved with and that they would only consider a new lease of the Quarry to an entity *solely owned and operated by myself or [my] family*.

[emphasis added]

1. At this point, in these “late December 2017 and early 2018” negotiations, Mr Richards was acting as the representative of the 51% shareholder in CQ2 in which CQPL was a 49% shareholder and he was acting, or purporting to act, as a director of CQ2.
2. Mr Richards says that in several telephone conversations with Mr Champion in late 2017 and early 2018, he told Mr Champion of the view expressed by the owners of Yansea (Mr Neumann). Mr Richards says that Mr Champion suggested that any lease of the quarry taken up by Mr Richards or his family entity could then be the subject of a sublease to the company. Mr Richards says that he told Mr Champion that the owners of Yansea would not agree to a sublease to the company and he says that he told Mr Champion that “I would be breaking their trust if I attempted to carry out such unscrupulous conduct”.
3. Mr Neumann deposed an affidavit on 11 February 2019 in which he says that he is the owner of Yansea and that he conducted the negotiations with Mr Robert Richards and Ms Gillian Richards. He says that the things Mr Richards says at paras 10 and 11 of his affidavit (as described in these reasons) are true. The ultimate factual questions on this issue are a matter for the final hearing. However, it should be noted that Mr Neumann does not address the issue in para 12 of the affidavit of Mr Richards raised by Mr Champion (so as to preserve CQ2’s position) about whether a sublease to CQ2 might have been possible once the primary lease relationship had been established with Mr Richards or a family entity controlled by him (or alternatively with GSQH).
4. All of this assumes, for the moment, that it was open, as a matter of law in any event, to Mr Richards in a way consistent with his fiduciary duties to take up for himself or for his family company or for GSQH (the 51% shareholder he was representing on the Board of CQ2), a lease of Lot 5 in all the circumstances.
5. As to the question of whether, metaphorically, Mr Champion was entirely persona non grata in the eyes of Mr Neumann, Mr Champion observes that in March 2018, Mr Neumann was continuing to engage in discussions with him (and his entity) to purchase Lot 5. On 19 March 2018, Mr Neumann’s lawyers wrote to the lawyers for Mr Champion and said that whilst Mr Neumann was reluctant to enter into any further negotiations with Mr Champion, Mr Neumann would “entertain your client’s offer [from Mr Champion and his entity] on the following terms”, and the terms were then set out.
6. It is correct to say, and Mr Kendell for GSQH accepts that it is correct to say, that the entire thrust of the response from Mr Richards to the various allegations and factual concerns expressed by Mr Champion in his principal affidavit, is that because the lease to the company from Yansea came to an end on 23 December 2017 with the result that CQ2 “had no further business in relation to the Quarry”, it was open to Mr Robert Richards (in particular) and his sister, Ms Gillian Richards, to take up the opportunity of a lease (now not available to the company) either in the name of Mr Richards or one of his companies or alternatively, for GSQH itself.
7. As events transpired, Mr Richards and Ms Gillian Richards, as a result of their discussions with Mr Neumann between late 2017 and early 2018, secured a lease of Lot 5 for GSQH which was executed in May 2018 and which took effect from 24 December 2017, the day after the expiration of CQ2’s Second Lease.
8. Prima facie, once it became clear that the company was unable to secure a lease of Lot 5 (for whatever reason) so as to conduct quarrying operations, the normal course of events would have been for the directors to meet and consider that position and for the members to meet and determine the steps to be taken to enable the company to continue to operate or not. If not able to operate, the proper course may have been to either wind up the company or take such steps as may be considered possible to enable the company to conduct those operations the shareholders believed it best able to then undertake (if any).
9. In the principal proceeding when that application comes forward for determination, a question to be addressed is the nature of the discussions between Mr Robert Richards (and Ms Gillian Richards) on the one hand, and Yansea on the other hand, in the period described by Mr Richards as “late 2017 and early 2018” when the 49% shareholder in the company (CQPL) and Mr Champion as director of the company was seeking to preserve the company’s interest in Lot 5 and the undertaking of the quarry generally.
10. The responses of Mr Richards in his affidavit at paras 19, 20, 21, 22, 23, 24, 28, 30 and 31 all recite the factual proposition that the lease between Yansea and the company came to an end on 23 December 2017. This factual matter is, in effect, said by Mr Richards to be a complete answer to all of the many conduct concerns expressed by Mr Champion relating to substituting GSQH as the beneficiary of the assets and undertaking of the company’s business.
11. As to these matters, it is necessary to identify aspects of those steps which are relied upon in support of the application for the appointment of liquidators provisionally.
12. To do so, it is necessary to return to the chronology of events after 23 December 2017.
13. Mr Champion says that since at least March 2018, Ms Gillian Richards and Mr Michael Barnes, began advising business contacts of “Champions Quarry”, as it was known, that there had been a change to all company contacts, including email addresses, telephone numbers and postal addresses. He says that the effect of this step was that communication concerning the company’s affairs was transferred away from employees of the company to email and postal addresses and telephone numbers associated with GSQH and not accessible to employees of the company.
14. In his affidavit at para 42, Mr Champion sets out a table which identifies the postal address, telephone numbers, email address (also used for sales), compliance email address, accounts receivable email address, accounts payable email address and the postal address for the company all of which were changed to addresses for GSQH in the period 21 November 2017 to 3 July 2018 with five of those addresses changed on 9 March 2018.
15. By letter dated 9 March 2018 signed by Ms Gillian Richards as company secretary of CQ2, addressed to the New South Wales Department of Planning, Ms Richards said this:

We advise that GSQ Holdings Unit Trust (GSQ) acquired shares in Champions Quarry 2 Pty Ltd *giving it 51% majority ownership*, on 03 February 2017. The shareholders of GSQ being Flintstone Investments Pty Ltd and Barnrock Investments Pty Ltd. *Mr Michael Barnes* is a Director and Secretary of Barnrock Investments Pty Ltd and *was appointed Manager* of Champions Quarry 2 Pty Ltd in October 2017.

[emphasis added]

1. The letter attached a company structure chart for the company together with an ASIC extract of company details. Ms Richards said that she anticipated that this information would satisfy the Department’s requirements as to “proof of ownership and Michael’s position”. Ms Richards advised that the appropriate email address for the company was the new email address. That letter also contained a notice under the heading: “Please be advised of our new contact and mailing details effective immediately”. It set out the name of the company, the new address and contact telephone numbers and the new email addresses for sales, accounts receivable and accounts payable.
2. Mr Champion says that the directors did not appoint Mr Barnes to any such position and nor did the shareholders meet to resolve to appoint Mr Barnes as manager of the quarry.
3. Mr Champion says that the company’s environmental consultants were told that the company had new owners. On 11 May 2018, Mr Barnes notified the email host (“Website Essentials”) that the account details for the company had changed to the new address details rather than those of the company. On 17 May 2018, Mr Barnes advised Website Essentials that the registrant contact information had changed so as to nominate him rather than the company’s employee, Ms Belinda Nott. Mr Barnes also requested to be added as a user with the result that Mr Barnes was able to access and alter the contents of the company’s website. On 2 and 3 July 2018, seven changes were made to the company’s website by Mr Barnes concerning contact information, mobile telephone numbers and appropriate email addresses for particular information.
4. On or about 7 August 2018, a note was placed on the company’s website advising that “Champions Quarry” is now called “Richmond Quarry” and that all current information could be found no a new website address. Since 7 August 2018, emails addressed to the company’s prior email address have been re‑directed to a new email address.
5. In order to carry out extractive activities at the quarry, the company must have an Environmental Protection Licence. On 11 December 2018, Mr Champion caused a search to be conducted of the Register of Licences maintained by the Environmental Protection Authority under the *Protection of the Environment Operations Act 1997* (NSW) for licences held by “Champions Quarry” and “Champions Quarry 2” in the suburb of Tuckurimba. The result of the search revealed that no licence is held by either Champions Quarry or Champions Quarry 2 and that the only licence issued is now held in the name of GSQH. On 25 June 2018, Mr Champion received an email request from Mr Michael Barnes asking him to sign and return a single page of an application for transfer of the company’s EPA Licence. Mr Champion requested the full transfer application document which he says was provided to him. He says this at para 57 of his principal affidavit although counsel for the plaintiff applicant makes submissions that the full document was not provided to Mr Champion. It may be that Mr Champion has left the word “not” out of the relevant sentence in para 57. I proceed on the basis of Mr Champion’s affidavit. Mr Champion says that he refused to sign the application because doing so, in his view, was not in the best interests of the company.
6. The application to transfer the licence was signed on behalf of the company by Mr Richards, as director and Ms Richards, as company secretary. It was signed for GSQH by Mr Small. The application recites that the specific reason for requesting the transfer of the licence is “acquisition of licensed operations”.
7. Mr Champion says that he objected repeatedly to the transfer of the licence to GSQH. The licence was transferred on 6 July 2018.
8. As to the business name, the quarry had operated under the business name “Champions Quarry”. Mr Champion says that a meeting occurred on 9 November 2017 at which a resolution was reached that Champions Quarry be renamed “Tucki Sands”. Mr Champion says that that name was adopted at the request of Mr Richards, Ms Richards, Michael Barnes and John Barnes. Mr Champion took the view that that name would be confusing. On 22 May 2018, the business name “Richmond Quarry” was registered with ASIC by GSQH as trustee of the GSQH Unit Trust. On 23 May 2018, Mr Champion sought a response from Mr Richards, Mr Michael Barnes and Mr John Barnes as to why the name “Richmond Quarry” had been registered to GSQH rather than the company. Mr Champion did not receive a response. In late May 2018 and before 1 June 2018, the sign at the quarry “Champions Quarry” was replaced with the name “Richmond Quarry”.
9. As to the Master Supply Agreement with RMS, the CPB Deed and the Lendlease Deed, Mr Michael Barnes sent an email on 20 July 2018 to “Pacific Complete” addressed to Mr Danny Palhares. That entity is the program manager for the Pacific Highway Upgrade Project. The email advised Pacific Complete that the business structure of the quarry had changed and that the Master Supply Agreement would need to be assigned. On 23 July 2018, Mr Palhares responded to Mr Champion saying that a letter of request would be necessary to seek approval to novate the Master Supply Agreement to Richmond Quarry. That letter would need to be sent from the “nominated Representative duly authorised”. Mr Palhares said that after review and approval, Richmond Quarry and all contractors affected would be formally notified. On 24 July 2018, Mr Champion sent an email to Mr Palhares in these terms:

Further to your email and our discussion yesterday, I wish to advise that, as the authorised representative of Champions Quarry 2 Pty Ltd on the Master Supply Deed with Pacific Complete, I ***DO NOT*** give my authority for the Master Supply deed to be assigned, now or in the future.

Should you receive any applications purporting or seeking to assign, please contact me directly to discuss.

Should you have any further queries please do not hesitate to contact me.

1. By letter dated 6 August 2018 signed by Mr Richards and Ms Richards on behalf of the company addressed to Mr Palhares, the company sought approval from RMS to novate the Master Supply Agreement to GSQH trading as Richmond Quarry. The letter attached a copy of an ASIC Company Statement for CQ2 identifying the shareholding in the company and a record of registration of the business name “Richmond Quarry”. That letter and the attachments was sent to Mr Palhares by email by Mr Richards on 7 August 2018. The effect of the change was that GSQH became the sole supplier, trading as Richmond Quarry, under the Master Supply Agreement.
2. Mr Champion asserts that since at least May 2018 he has made many requests for meetings with, and information from, Mr Richards as a director of the company and he says that for the most part those requests have been ignored. Examples of his requests for information are set out at pp 742, 751, 765, 766, 767 and 768 of his affidavit.
3. Mr Champion says that notwithstanding that he is a director of the company, he has not been provided with management accounts or financial statements for the company for the financial years ended 2017 or 2018. He says that he has not been provided with any meaningful financial information about the company since GSQH became its 51% shareholder. In addition, Mr Champion says that he has held the position in the company of “Production Manager” apart from his role as director. In June 2016, Mr Champion requested (of Mr Richards, Mr Michael Barnes and Mr John Barnes) that weekly meetings about quarry operations be re‑established. Mr Champion advised them that he would undertake weekly inspections of the quarry site in his capacity as production manager. Mr Champion says that he was prevented from doing so because he could not gain access to the quarry.
4. Mr Champion says that prior to 3 February 2017, the company employed Mr Champion, Ms Belinda Nott (Mr Champion’s daughter), Ms Cath Champion (Mr Champion’s daughter), a man named Martyn and Mr John Sage. Ms Nott and Ms Champion were both made redundant in November 2018 and July 2018 respectively. Martyn was made redundant in 2018. Mr Duff was appointed as the site foreman. Mr Duff reported to Mr Michael Barnes notwithstanding that Mr Champion was the production manager. Although it seems to be suggested by GSQH that Ms Nott and Ms Champion resigned voluntarily, it should be noted that in a letter dated 23 October 2018 to the company Ms Nott asserted that she had been “constructively dismissed”. In a letter from Ms Champion sent by email to the company, Mr Richards, Mr Michael Barnes and Mr John Barnes, Ms Champion said: “[O]n the basis that I have been forced into resignation, I would be pleased if you would calculate confirm and pay my entitlements including [nominated matters]”.
5. There are two further matters that need to be mentioned.
6. The *first* is that Mr Champion asserts that there are three assets that were purchased by the company, namely: a Hyundai Loader HL780‑9 the subject of the invoice at JC‑69 to Mr Champion’s affidavit of 29 January 2019 in an amount of $200,000 (excluding GST) and referred to in detail at RER‑11 to the affidavit of Mr Richards (at p 11); a Caterpillar Dozer D10R the subject of the invoice at JC‑70 to Mr Champion’s affidavit of 29 January 2019 in an amount of $320,000 (including GST) and referred to in detail at RER‑11 to the affidavit of Mr Richards (at p 30); sand washing plant the subject of the invoice at JC‑55 to Mr Champion’s affidavit of 12 December 2018 in an amount of $293,800 (including GST) and referred to in detail at RER‑11 to the affidavit of Mr Richards (at p 35). On the face of the invoices, these three assets have a purchase price of approximately $813,000. The present depreciated value of these assets is not clear. These assets appear to be being used by GSQH.
7. The *second* matter concerns the draft income statement annexed to the affidavit of Mr Richards as RER‑6. It is a draft income statement for the company for the period 1 January 2018 to 31 December 2018. It shows no operating revenue. It shows plant hire income of $453,636.66. There is no detail of the plant hired under any relevant hire agreements. It raises the question of whether plant has been hired to GSQH. However, the question of whether the terms and conditions of the hiring of plant are reasonable in all the circumstances whether hired to GSQH or not, is not clear. There is no explanation of these matters. The draft statement shows administration fees of $463,551.56. There appears to be no explanation of that matter. As to plant operating expenses, it seems that the company is meeting the costs of fuel and oil ($109,595.02), insurance costs ($33,669.75), plant repair and maintenance costs (“labour oncosts” of $148,891.75) and repairs and maintenance parts for plant ($113,181.78). These expenses appear to be consumables in the operation of particular plant and equipment which would seem to be expenses to be borne by the operator which appears to be GSQH. This is especially so since the company appears not to be conducting any quarrying operations of its own and certainly it is not deriving any operating revenue.
8. All of these matters going to the factual contentions asserted by Mr Champion are ultimately matters to be determined in the resolution of the principal application for a winding‑up order on the grounds relied upon by CQPL. They are mentioned here simply to give context to the application for the appointment of liquidators provisionally. The matters at [72] and [73] concern issues of immediacy in relation to the protection of assets of considerable value and an examination by provisional liquidators of the revenue and expenses issues relating to the company and particularly its position as to those matters inter se with GSQH.
9. As to the exercise of the wide discretionary power conferred upon the Court by s 472(2), the following considerations, as applied in the circumstances of the present interlocutory application, are important.
10. *First*, the applicant asserts in its principal application that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory, against CQPL and in a manner contrary to the interests of the members as whole. CQPL contends that it is just and equitable that the company be wound up. I am satisfied that there is an arguable case of some strength that that is so. Accordingly, I am satisfied that there is an arguable case that the company ought to be wound up.
11. *Second*, I am satisfied that there are assets of the company which need to be protected. I am also satisfied that there are questions to be addressed in some urgency in relation to the particular arrangements put in place as between the company and GSQH.
12. *Third*, I am satisfied that there is an arguable basis for contending that GSQH has conducted the affairs of the company as if it were a wholly owned subsidiary of GSQH. I am satisfied that there is an arguable case that the affairs of the company are not being conducted in the interests of the members *as a whole*.
13. *Fourth*, I am satisfied that there is an arguable case that independent supervision is necessary having regard to the arguable case on the facts in relation to conduct in the affairs of the company and also having regard to matters relating to the three items of plant and equipment and the unexplained matters of revenue and expenses all of which suggest that independent supervision is necessary. I am satisfied that there is a risk to the assets of the company that requires protection.
14. *Fifth*, I am satisfied that there appears to be a breakdown in the relationship between the 49% shareholder in the company (represented by Mr Champion as the sole director of CQPL), on the one hand and the 51% shareholder GSQH and its representatives Mr Robert Richards, Ms Gillian Richards and, apparently, Mr Michael Barnes, on the other hand. Clearly, there is a dispute between these participants.
15. *Sixth*, apart from the assets already described, Mr Champion has deposed in his affidavit to assets amounting, in all, to over $2 million which need to be protected. Having regard to the arguable case in relation to the dissipation of assets such as the novation of the Master Supply Agreement (and the revenues attached to it) and the transfer of the EPA Licence taken together with the assumption of the management and administration of the company by GSQH, I am satisfied that the interim position of the company in relation to these other assets and the nature of the expenses the company is being asked to bear, requires interim protection by a provisional liquidator.
16. *Seventh*, the affairs of the company apart from being conducted as if it were a wholly owned subsidiary of GSQH has been conducted without compliance with the Act throughout 2017 and 2018. I note that there has not been a directors meeting for over 18 months and only one meeting of members. I also note a failure to provide any management accounts or financial statements to CQPL or Mr Champion.
17. *Eighth*, Mr Champion contends that CQPL has been denied any meaningful information about the company’s financial performance since GSQH became a 51% shareholder in the company. Moreover, there has been only one meeting of members between that time and the date of the hearing and that was concerned with the change to the business name.
18. *Ninth*, the notion that GSQH is 51% shareholder and therefore at relevant meetings of members is in a position to determine the outcome of particular resolutions at particular meetings of the relevant character does not mean that the majority shareholder is entitled to conduct the affairs of the company without proper regard to the interests of a minority shareholder and especially a shareholder having an interest in the company amounting to 49% of the issued shares in the entity.
19. *Tenth*, GSQH was served with all of the material upon which the plaintiff relies. It had an opportunity to file an extensive answer to many of the factual matters raised by Mr Champion. However, Mr Richards put on an affidavit in which he takes the position that the answer to the vast majority of the concerns asserted by Mr Champion is simply that the company lost the opportunity to take up a lease of Lot 5 due to a breakdown in trust between Mr Neumann and Mr Champion with the result that Mr Neumann would only offer a lease to Mr Richards or companies associated with him. Apart from that underlying rationale, Mr Richards does not *address* the detailed concerns of Mr Champion *in any specific way*. As to this matter, I note the observation of Young J in *Riviana (Aust) Pty Ltd v Laospac Trading Pty Ltd* (1986) 10 ACLR 865 at 866 in these terms: “If the plaintiff’s affidavits raise matters to which a court would expect there to be some answer and there is no answer provided then that in itself raises a matter of suspicion that it may well be in the public interest to put in a provisional liquidator”. Although it is not the position in this case that there is “no answer”, there certainly is no adequate answer to the many contentions made by Mr Champion. Mr Kendell, in oral submissions, says that GSQH was confronted with a circumstance that it had paid a large amount of money for 51% of the shares in the company and that it was confronting a circumstance where the company was about to lose its leasehold interest in the quarry. Mr Kendell says that in order to protect its investment in the purchase of a 51% interest in the company, GSQH took steps to do the various things Mr Champion now complains about. Mr Kendell says that GSQH had no choice but to act in the way it did to protect its investment in the company. Mr Kendell also says that the affairs of the company may not have been conducted in accordance with the Act but there certainly was no dishonesty on the part of Mr Roberts or Ms Gillian Roberts. These submissions are an explanation of, but not an answer to, criticism that the affairs of the company have been conducted by GSQH as if the company were a wholly owned subsidiary of GSQH rather than an entity in which there is another 49% shareholder.
20. As to the matters at [76] to [85] of these reasons, I particularly note and rely upon the observations of Gordon J in *Australian Securities and Investments Commission v Activesuper Pty Ltd (No 2)* (2013) 93 ACSR 189 at [11] to [16]. I also rely upon the principles derived from the following authorities: *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625 at 636; *Australian Securities Commission v Solomon* (1996) 19 ACSR 73 at 80; *Re New Cap Reinsurance Corporation Holdings Ltd* (1999) 32 ACSR 234 at [32]; *Lubavitch Mazal Pty Ltd v Yeshiva Prospects No 1 Pty Ltd* (2003) 47 ACSR 197 at [106] and [107]; *Australian Securities and Investments Commission v Uglii Corporation Pty Ltd* (2016) 116 ACSR 389 at [72]; *Re Club Mediterranean Pty Ltd* (1975) 11 SASR 481 at 483 and 484; *Re Back 2 Bay 6 Pty Ltd* (1994) 12 ACSR 614 at 615‑616 (at lns 12‑13; 20‑21; 37‑38 and 47‑51); *Re Global SDR Technologies Pty Ltd; Australian Securities and Investments Commission v Global SDR Technologies Pty Ltd* (2004) 51 ACSR 42 at [50]; *Montgomery & Windsor (NSW) Pty Ltd v Ilopa Pty Ltd* (1984) 2 ACLC 224.
21. The following further matter should be mentioned.
22. On 26 July 2016, Flintstone entered into a loan agreement with Tucki in its capacity as trustee of four trusts by which Flintstone advanced an amount of $1,868,000 to Tucki. The drawdown occurred on 27 July 2016 and the repayment date was 12 months later. The guarantors of the loan were CQPL, Mr Champion and Mrs Diana Champion. Apart from the loan agreement, CQPL both in its own capacity and as trustee of the Champions Quarry Trust, granted a specific security in favour of Flintstone in support of the guarantee of the loan. That specific security was also dated 26 July 2016. That instrument charges particular shares held by CQPL in the company. It seems that Tucki fell into default under the loan agreement and the guarantors were subject to obligations in relation to that advance. It seems that it was open to Flintstone for some very considerable period of time to take steps to enforce the specific security and if thought fit, appoint a receiver under the specific charge in relation to particular shares. However, as events transpired, Flintstone took steps to appoint a receiver to the charged asset of the shares on Friday, 15 March 2019 immediately before the hearing of the application for the appointment of liquidators provisionally on Monday, 18 March 2019. CQPL invites the Court to draw an inference that that step was taken in an attempt to prevent the Court from considering the interlocutory application by CQPL on the footing that CQPL would then have no standing to apply for the interlocutory relief.
23. I am willing to infer that there is at least an arguable basis for contending that one of the considerations motivating Flintstone to appoint a receiver to the charged asset of the shares is the probability that such a step would have the effect of preventing the applicant from moving for the interlocutory relief. However, because only some of CQPL’s shares in the company were subject to the charge, CQPL’s standing to apply is not in doubt.
24. The plaintiff offers an undertaking as to damages.
25. No offer has been made by GSQH to conduct the business of the company in the ordinary course of business and to keep proper records in the ordinary course of business pending the determination of the principal application and no offer has been made not to dispose of the assets of the company pending the determination of the principal application.
26. I am satisfied that having regard to all of the facts and circumstances, it is appropriate to exercise the discretion under s 472(2) of the Act to appoint liquidators to the company provisionally. Consequential orders will also be made. The question of costs is reserved for later determination. The applicant will be directed to submit draft orders to the Court for approval this morning.

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| I certify that the preceding ninety‑two (92) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 3 April 2019