Federal Court of Australia

Habrok (Dalgaranga) Pty Ltd v Gascoyne Resources Ltd [2020] FCA 1395

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| File number(s): | VID 519 of 2020 |
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| Judgment of: | **BEACH J** |
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| Date of judgment: | 29 September 2020 |
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| Catchwords: | **CORPORATIONS** – gold mining group – insolvency – voluntary administration – deed of company arrangement – rival deeds of company arrangement – dual track process – inadequacy of sale process – recapitalisation – capital raising of $85 million – role of administrators – conflict of interest – relevance of work prior to administration – adequacy of investigation – report to creditors – deficiency in report to creditors – precluding creditors from considering rival deeds of company arrangement – failure to adjourn second meeting of creditors – terminating deed of company arrangement – liquidation – application under ss 445D and 447A of *Corporations Act 2001* (Cth) – COVID-19 special measures – relief refused |
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| Legislation: | *Corporations Act 2001* (Cth) ss 51C, 60, 435A, 436DA, 437A, 438A, 439A, 440B, 442B, 443D, 443E, 443F, 445D, 444DA, 444GA 447A, 556, 561, 563A, 588FA, 588FB, 588FC, 588FE, 588FJ, 588FL, 588GA and 600H; schedule 2 ss 5-30, 75-42, 75-43, 80-55, 90‑15 and 90‑20  *Insolvency Practice Rules (Corporations) 2016* (Cth) ss 75-140 and 75-225  *Personal Property Securities Act 2009* (Cth) ss 12, 267 and 340 |
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| Cases cited: | *Allatech Pty Ltd v Construction Management Group Pty Ltd* (2002) 167 FLR 324  *Australian Securities and Investments Commission v Midland Highway Pty Ltd* (2015) 110 ACSR 203  *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510  *Correa v Whittingham* (No 3) [2012] NSWSC 526  *Deputy Commissioner of Taxation (Cth) v Pddam Pty Ltd* (1996) 19 ACSR 498  *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337  *Re Ten Network Holdings Ltd* (2017) 252 FCR 519  *Shafston Avenue Construction Pty Ltd v McCann* (2019) 138 ACSR 299  *Young v Sherman* (2002) 170 FLR 86 |
| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Number of paragraphs: | 842 |
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| Date of hearing: | 11, 14 to 18 September 2020 |
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| Counsel for the Plaintiff: | Mr B Walker SC, Dr E Boros, Mr T Boyle and Ms E Delany |
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| Solicitor for the Plaintiff: | Arnold Bloch Leibler |
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| Counsel for the Defendants: | Mr B Dharmananda SC, Ms S Nadilo, Mr P Walker and Mr S Tomasich |
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| Solicitor for the Defendants: | Herbert Smith Freehills |

ORDERS

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|  | | VID 519 of 2020 |
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| BETWEEN: | HABROK (DALGARANGA) PTY LTD (ACN 640 780 141)  Plaintiff | |
| AND: | GASCOYNE RESOURCES LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 139 522 900)  First Defendant  GNT RESOURCES PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 139 522 900)  Second Defendant  GASCOYNE RESOURCES (WA) PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 139 823 822) and others named in the Schedule  Third Defendant | |

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| ORDER MADE BY: | BEACH J |
| DATE OF ORDER: | 29 September 2020 |

THE COURT ORDERS THAT:

1. The proceeding be dismissed.
2. The plaintiff pay the defendants’ costs of and incidental to the proceeding including any reserved costs.

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

REASONS FOR JUDGMENT

BEACH J:

1. The plaintiff (Habrok) commenced the present proceeding on 4 August 2020 seeking orders under ss 445D and 447A of the *Corporations Act 2001* (Cth) terminating the deed of company arrangement (DOCA) executed on 26 June 2020 by the first to seventh defendants (the GCY Group) and the eighth defendant (the administrators) that had been propounded by the administrators. Habrok also seeks the appointment of liquidators.
2. The administrators were appointed as such to the GCY Group on 2 June 2019. The administrators then undertook a dual track process that investigated the possibility of either:
3. a recapitalisation of the GCY Group; or
4. a sale of the GCY Group’s assets, including the Dalgaranga gold mine in the Murchison region of Western Australia (the Mine).
5. Ultimately, the administrators recommended to the creditors of the GCY Group that a DOCA should be entered into involving a recapitalisation. Prior to this time the administrators had received two offers to purchase the assets of the GCY Group which were insufficient. Contrastingly, the DOCA proposed by the administrators involving a recapitalisation provided for a projected return of up to 100 cents in the dollar to all unsecured creditors through a combination of cash and shares.
6. At the second meetings of creditors of the GCY Group held on 25 June 2020 (the second creditors’ meetings), the creditors voted on whether to adjourn the meetings to consider two other DOCA proposals, including one from Habrok Mining Pty Ltd (Habrok Mining), which was at the time the holding company of Habrok. In the case of Habrok Mining’s DOCA proposal, it was received on the day before the meetings. The creditors voted not to adjourn the meetings and voted to execute the DOCA put forward by the administrators, which was then executed.
7. Now at the time, Habrok was not a creditor of any entity in the GCY Group. Accordingly, it was ineligible to vote at the second creditors’ meetings. In addition, no representatives of Habrok attended the second creditors’ meetings, which were held virtually given the COVID‑19 restrictions in place.
8. Following the execution of the DOCA, steps have now been undertaken to implement it, including:
9. quantifying the debts due to the creditors;
10. paying entitlements to former employees of the GCY Group; and
11. putting in place steps for the capital raising contemplated by the DOCA, including the holding of an extraordinary general meeting (EGM) of shareholders of the first defendant (GCY) on 5 August 2020 to approve the proposed share issues, entering into an underwriting agreement with Cannacord Genuity (Australia) Ltd (Cannacord) and issuing the prospectus for the capital raising.
12. Habrok’s grounds for seeking termination of the DOCA under s 445D focus on:
13. the pre-appointment involvement of FTI Consulting (FTI), a firm associated with the administrators, and Herbert Smith Freehills (HSF) with GCY;
14. the inadequacy of the administrators’ investigations;
15. the inadequacy of the sale process conducted by the administrators and the treatment and assessment of competing proposals to the DOCA; and
16. the risk of future insolvency of the GCY Group notwithstanding the proposed capital raising.
17. Habrok’s principal complaint against the administrators is that having assisted GCY to formulate a turnaround plan in late 2018 when FTI were consultants to GCY, the administrators pursued their plan for the DOCA with single-minded determination during the administration, and in the process:
18. disregarded material conflicts of interest;
19. failed to carry out adequate and independent investigations as required by s 438A and Pt 5.3A of the *Corporations Act*;
20. squandered the opportunity to pursue a sale proposal from Adaman Resources Pty Ltd (Adaman);
21. precluded creditors from considering rival DOCAs; and
22. preferenced the interests of NRW Holdings Limited (NRW), the principal mining contractor at the Mine.
23. Let me elaborate on some of these themes for a moment.
24. First, Habrok says that there has been preferential treatment of the second‑ranking secured creditor, NRW, in relation to:
25. the terms on which NRW became a second‑ranking secured creditor;
26. the inadequacy of investigations into whether the NRW security was void;
27. the commerciality of NRW’s rates under the NRW mining contract;
28. the renegotiation of the amount that NRW was to receive under the DOCA, which coincided with a stated intention by NRW to support the DOCA and vote against an adjournment of the second creditors’ meetings to consider rival DOCAs; and
29. the fact that NRW stands to derive a profit from the administration despite being a member of the committee of inspection (COI).
30. Second, Habrok says that there has been a lack of genuine engagement with alternatives to the DOCA, including the consideration of rival DOCAs and also the consideration of a sale of assets as opposed to recapitalisation. I will discuss this later concerning what has been described as the dual track process.
31. Third, Habrok says that there has been an inadequate investigation of claims that could potentially be pursued in a liquidation in relation to:
32. potential claims by shareholders in relation to the two capital raisings undertaken by GCY in August 2018 and May 2019;
33. whether the NRW security should be set aside on the basis that it was given and registered within six months of the appointment of the administrators and/or was registered more than 20 business days after it was created;
34. whether NRW has received preferential payments from the GCY Group; and
35. insolvent trading in circumstances where the GCY Group experienced a lack of liquidity including being insolvent in March and April 2019.
36. Fourth, Habrok says that there has been inadequate disclosure in the administrators’ report to creditors issued on 18 June 2020 (the administrators’ report) regarding the proposed capital raising and in particular whether, even if successful, it will return the GCY Group to solvency; in particular, it is said that there was no forecast cash flow analysis or restructured balance-sheet and financial position.
37. Fifth, Habrok says that there has been inadequate disclosure in the administrators’ report regarding the creditors’ trust and other matters dealing with some of the above issues.
38. Sixth, Habrok says that there has been an inappropriate extinguishment of shareholders’ claims.
39. Now the defendants oppose Habrok’s application.
40. First, they say that Habrok does not have standing as an assignee creditor to seek the relief claimed. Moreover, they say that Habrok is not “any other interested person” for the purposes of s 445D as it has no material rights or economic interests that would be affected by the operation of the DOCA. Habrok had no involvement in the administration of the GCY Group. Its only connection was that on the day before the second creditors’ meetings its holding company submitted a proposed DOCA. But this did not give Habrok material rights or an economic interest that could be affected by the DOCA process. And as to Habrok’s standing under s 447A, whilst s 447A captures a broad class of applicants, the defendants say that this does not extend to Habrok.
41. Second, the defendants say that Habrok, having sought to buy into the DOCA by acquiring the debt of Orlando Drilling Pty Ltd (Orlando) after the DOCA was entered into, cannot now seek to challenge the DOCA. It is said that Habrok cannot purchase its standing to set aside the DOCA on the basis of an assignment of a debt after the DOCA has been made.
42. Third, the defendants say that none of the grounds enlivening the exercise of power under ss 445D and 447A have been made out.
43. Fourth, I have a discretion in deciding whether to set aside a DOCA. And such a discretion should be exercised by reference to the interests of the creditors and the public interest. But the defendants say that even if the conditions for the exercise of power under ss 445D and 447A have been enlivened, in the exercise of my discretion I should not terminate the DOCA.
44. More generally, the defendants say that it is not beneficial for the creditors to have the GCY Group wound up. The return to unsecured creditors is projected to be greater under the DOCA than on a winding up. The unsecured creditors stand to potentially receive 100 cents in the dollar. Moreover, under the DOCA the operations of the GCY Group will continue, with a corresponding benefit in the continued employment of its employees.
45. For the reasons that follow, in my view Habrok has not justified the orders that it seeks. Indeed, to terminate the DOCA would not be conducive to achieving the objective reflected in s 435A(a).
46. Before proceeding further, let me say something about the conduct of this case. This matter had to be heard and disposed of quickly given the capital raising of $85 million for the GCY Group that is part way through completion, with 30 September 2020 being the deadline. This required an expedited time-table with special procedures to deal with and digitally churn through 35 volumes of material, and to conduct a pre-trial voir dire and a five day hearing using video technology for large teams of lawyers and witnesses in Victoria, New South Wales and Western Australia.
47. Further, given the significance of this matter, including the consequences of this litigation for the GCY Group, the Mine and the large workforce, and the necessity for the matter to be disposed of by 30 September 2020, the Chief Justice gave this matter priority status so that the Stage 4 COVID-19 restrictions in Victoria could properly be tailored to facilitate the expeditious exercise of federal judicial power.
48. I should also record here that during the video conference hearing, counsel for the parties presented their cases with notable efficiency. Moreover, it was a pleasant surprise that the technology exceeded expectations. And except by the use of such technology, how else could one transcend the current border restrictions between the States to satisfactorily deal with such litigation?
49. Let me now turn to some facts.

# SOME FACTUAL BACKGROUND

1. Let me begin by saying something about the relevant entities.
2. Habrok, an Australian company, is a special purpose vehicle established for the acquisition of the assets, whether by asset sale or share purchase, of the GCY Group. Habrok was established in May 2020 and was until recently a subsidiary of Habrok Mining, a privately owned investment company established in 2019 which has interests in both gold and iron ore projects in Western Australia. Habrok Mining is a holding entity for a range of investments made by Remagen Capital Pty Ltd, a privately owned investment firm that specialises in distressed and expansion debt and equity capital investments in the mining sector.
3. Habrok is a creditor of the second defendant (GNT Resources), one of the GCY Group companies, pursuant to a deed of assignment. Habrok acquired the debt owed by GNT Resources from Orlando, a creditor that sought to adjourn the second creditors’ meetings to enable time for consideration of alternative DOCA proposals to that propounded by the administrators.
4. Adaman is a privately-owned resource investment company established in 2017. A fund managed by Remagen Capital holds a 20% interest in Adaman. On 2 September 2020, Habrok Mining sold its shares in Habrok to Adaman.
5. In addition to its investments in Habrok and Adaman, Remagen Capital also has a range of other mining investments in original equipment manufacturers and equipment rental and mining contractor investments, in debt, convertibles and equity.
6. In late 2019, Adaman sought to participate in the sale track of the dual track process that was conducted in parallel with the recapitalisation track. According to Habrok, Adaman’s ability to formulate and submit a timely and compelling proposal was hampered by a lack of engagement by the administrators.
7. Habrok Mining subsequently submitted a DOCA in respect of the GCY Group on 24 June 2020 (Habrok Mining DOCA proposal). The Habrok Mining DOCA proposal was not put to a resolution at the second creditors’ meetings because a resolution to adjourn the meetings in order to give creditors sufficient time to consider the Habrok Mining DOCA proposal (and another DOCA proposal) was not passed. The meetings proceeded and resolutions were carried in respect of the DOCA propounded by the administrators.
8. The GCY Group comprises the following companies:
9. GCY;
10. GNT Resources;
11. the third defendant, Gascoyne Resources (WA) Pty Ltd;
12. the fourth defendant, Dalgaranga Operations Pty Ltd;
13. the fifth defendant, Dalgaranga Exploration Pty Ltd;
14. the sixth defendant, Gascoyne (Ops Management) Pty Ltd; and
15. the seventh defendant, Egerton Exploration Pty Ltd.
16. The GCY Group carries out gold mining and exploration activities and holds mining assets and exploration tenements in the Gascoyne and Murchison regions of Western Australia, with its main project being the Mine.
17. GCY is an Australian publicly listed company. Its shares were and still are suspended from trading on the ASX following the appointment of the administrators in June 2019.
18. The second to seventh defendants are subsidiaries of GCY.
19. Mr Ian Francis, Mr Michael Ryan and Ms Kathryn Warwick of FTI, in their capacity now as joint and several deed administrators of the first to seventh defendants, are the eighth defendant.
20. The GCY Group has had various dealings with NRW and NRW Pty Ltd, the trustee for the NRW Unit Trust, before and during the administration of the GCY Group, involving a mining services contract, working capital facility and a general security agreement. NRW is an Australian publicly listed mining services company.
21. In December 2017, GNT Resources executed a contract with NRW for the provision of open pit mining services in respect of the Mine (NRW mining contract).
22. As at the date of the administrators’ report, the amount due under the NRW mining contract was $21,067,000, which is in addition to NRW’s $12 million loan amount and a contingent claim that NRW has for $15,347,681 in respect of early termination charges arising from termination of the NRW mining contract.
23. On 16 August 2018, GCY announced a placement to raise up to $15 million by the issue of up to 50 million ordinary shares at $0.30 per share, with the ability to accept oversubscriptions of up to an additional $4 million (the August 2018 capital raising). In its equity raising presentation, GCY stated that the proceeds of this capital raising would be used as follows:
24. $6.5 million as payment for the remaining Dalgaranga construction capital and critical spares;
25. $1.5 million as a final payment to Dalgaranga vendor;
26. up to $5 million for exploration at the Mine and at the Glenburgh gold mine, a pre-development project in the Southern Gascoyne region of Western Australia; and
27. the remainder for corporate costs and general working capital.
28. On 20 August 2018, GCY announced that it had completed the August 2018 capital raising and had raised $19 million. GCY also offered its existing shareholders an opportunity to subscribe for up to a maximum of $15,000 worth of shares at the placement issue price of $0.30 per share to raise an additional $5 million in capital.
29. On 6 November 2018, FTI were engaged by the GCY Group to provide assistance in assessing the GCY Group’s financial position. The engagement included a review of the GCY Group’s current financial position and turnaround plan developed by management, a review of the GCY Group’s economic modelling / cash flow forecasting systems and tools and a rebuild of the GCY Group’s financial model to reflect the transitioning in the GCY Group’s operations from mine exploration / development only to include the mining operations at the Mine.
30. Its work for the GCY Group involved constructing a rebuild of the GCY Group’s financial model between the period from 8 November 2018 to 19 January 2019. On 19 December 2018, FTI delivered its findings in a report that I have described as the 19 December 2018 FTI report, which provided an overview of the GCY Group’s financial position and a review of a turnaround plan developed by the GCY Group’s management.
31. The 19 December 2018 FTI report came to be provided in January 2019 to HSF, in its capacity as the GCY Group’s legal advisor. Further, at this time the board of the GCY Group sought legal advice from HSF in relation to whether safe harbour protection from insolvent trading claims was available to the board.
32. On 24 December 2018, GCY announced to the ASX that NRW had agreed to provide a $12 million loan facility to GNT Resources (NRW loan agreement). Security for the repayment of the NRW loan was a general security agreement between NRW Pty Ltd and GCY over all of the assets of GNT Resources dated 21 December 2018 (the NRW security or the NRW GSA). To elaborate:
33. NRW Pty Ltd agreed to provide a short term second‑ranking secured loan for $12 million repayable in six monthly instalments, commencing 31 July 2019;
34. no physical payment was made to GNT Resources under the NRW loan agreement, as GNT Resources had agreed to pay the full amount of the loan to NRW on account of outstanding invoices ($10 million), loan facility fees ($800,000), and prepaid interest ($1.2 million); and
35. in addition to taking security for repayment of the loan amount, a term of the NRW loan agreement also allowed NRW Pty Ltd to take security for all future amounts payable under the NRW mining contract.
36. The amount of NRW’s secured debt was $32.7 million as at the date of the appointment of the administrators.
37. An organisation grantor extract for GNT Resources obtained from the Personal Property and Securities Register (PPSR) on 1 August 2020 shows that on 7 January 2019, NRW Pty Ltd in its capacity as trustee for the NRW Trust registered an “all present and after acquired property” security interest on the PPSR.
38. The NRW security was registered within six months of the appointment of the administrators on 2 June 2019. Further, if the NRW security was created on 21 October 2018 (as indicated in the DOCA proposed by the administrators) it was also registered outside the 20 business day period for registration required by s 588FL of the *Corporations Act*.
39. Mr Ryan and Mr Matthew Chivers of FTI held meetings with Mr Mike Ball, the former Chief Financial Officer of the GCY Group, on 11 January 2019 and 15 January 2019 to discuss FTI’s financial model. On 19 February 2019, Mr Chivers met with Mr Ball for a general update discussion regarding the GCY Group.
40. On 23 February 2019, Mr Ryan met with Ms Sally-Anne Layman, the then chairwoman of the GCY board, to discuss closing out the FTI engagement.
41. On 18 March 2019, FTI provided the GCY Group with a document titled “Overview of the VA Process Paper” that provided, inter-alia:
42. how a voluntary administration may be utilised to effect a restructure in the GCY Group’s circumstances; and
43. implications for creditors and shareholders in a voluntary administration scenario.
44. In an operational and corporate update to shareholders dated 27 March 2019, GCY stated that external mineral resource specialists had recommended that it consider developing an alternative to the ordinary kriging estimate technique, the orebody reconciliation model that it used at the time.
45. The external mineral resource specialists recommended an alternative model using a non-linear estimate method such as localised uniform conditioning (LUC) or localised inverse kriging. The announcement stated that GCY had engaged Cube Consulting to prepare the alternative model.
46. As a part of its operational update to shareholders, GCY stated that an equity raise was being progressed to provide additional working capital as production from the Mine increased.
47. On 28 March 2019, in an equity presentation to investors GCY announced another capital raising (May 2019 capital raising) generally in the following terms:
48. a placement to raise $3.86 million before costs by the issue of up to 77.3 million new fully paid ordinary shares at an issue price of $0.05;
49. a 4:5 pro-rata non-renounceable entitlement offer at $0.05 per share to raise $20.6 million, subject to entry into underwriting agreements; and
50. a “top-up placement” whereby GCY would separately make an offer at the issue price of $0.05 upon conclusion of the placement and entitlement offers to raise an additional $3 million.
51. In its presentation to investors, GCY stated that the proceeds of the May 2019 capital raising would be applied towards strengthening its balance sheet and meeting working capital requirements with the uses being:
52. $24.1 million to be used as working capital;
53. $2.6 million to be applied towards the payment of expenses relating to the entitlement offer and placement; and
54. $7.2 million to be paid to NRW in settlement of an invoice due as at the date of the presentation.
55. The May 2019 capital raising was announced to the ASX on 1 April 2019. On the same day, NRW announced to the ASX that it had agreed to sub-underwrite up to $5.3 million of the entitlement offer and that its participation in the capital raising would be applied to the trade receivable owing to it and to return the balance to contractual terms.
56. The prospectus sent to eligible shareholders in advance of the May 2019 capital raising stated that NRW would be paid $7.2 million from the $24.5 million proceeds of the capital raising.
57. On 8 May 2019, GCY announced that it had issued 412,252,289 new shares under the entitlement offer and raised approximately $20.6 million and that it had determined not to proceed with the top-up placement.
58. On 10 May 2019, NRW filed a notice of initial substantial holder with GCY and the ASX. This document shows that NRW was issued 86,238,410 fully paid ordinary shares to be applied against the $4,311,920.50 trade receivable owed to NRW.
59. The balance of the May 2019 capital raising, being about $18 million, was subsequently applied as follows:
60. $10.56 million was used to pay further amounts said to be owing to NRW; and
61. $7.8 million was used as working capital.
62. Although the information provided by GCY to its shareholders in advance of the May 2019 capital raising indicated that NRW would be paid $7.2 million, the administrators’ report revealed that NRW received $14.86 million in equity and cash from the May 2019 capital raising.
63. On 29 May 2019, about three weeks after the placement of the shares issued pursuant to the May 2019 capital raising, Mr Ryan and Mr Chivers held a meeting with Mr Richard Hay, the recently appointed Chief Executive Officer of the GCY Group, and Mr Ball to discuss:
64. GCY Group’s recent operating performance, cash flow and financial position;
65. various forms of insolvency appointments and potential options available to the GCY Group having regard to the GCY Group’s financial position; and
66. the process following an insolvency appointment.
67. On 30 May 2019, GCY’s securities were placed on a trading halt at its request pending an announcement to the market.
68. On 2 June 2019, the directors of the GCY Groupresolved to appoint Mr Ryan, Ms Warwick and Mr Francis as administrators under Pt 5.3A.
69. At the time:
70. GCY had experienced issues with reconciling production from ore reserves with the data outputs of the mineral resources models it used;
71. on 28 May 2019, a preliminary LUC resource model had been recommended by consultants to GCY’s board as the preferred model from several that had been developed;
72. after urgently preparing pit mining schedules based on the new model, GCY discovered that it would incur a material cash flow shortfall;
73. GCY had investigated options to address the cash flow shortfall including obtaining financial accommodation from creditors and shareholders but it had become apparent that those options would not successfully address the cash flow shortfall; and
74. consequently, the directors of GCY determined to appoint administrators.
75. On 5 June 2019, the administrators provided the creditors of the GCY Group with a document titled “Initial Information for Creditors and Suppliers.” The first creditors’ meetings were held on 13 June 2019.
76. On 27 June 2019, on application of the administrators, the Supreme Court of Western Australia extended the period for convening the second creditors’ meetings pursuant to s 439A(6) of the *Corporations Act* to 4 November 2019.
77. In a circular to creditors dated 2 July 2019, the administrators informed creditors that an extension to the convening period had been sought to enable the administrators to pursue a dual track process to realise the value from the assets of the GCY Group.
78. On 31 October 2019, on application of the administrators, the Supreme Court of Western Australia further extended the period for convening the second creditors’ meetings pursuant to s 439A(6) to 6 March 2020.
79. In a circular to creditors dated 4 November 2019, the administrators informed creditors a further extension to the convening period to 6 March 2020 had been obtained to allow the dual track process to continue.
80. The dual track process, initially announced by the administrators in the circular to creditors dated 2 July 2019, involved an investigation of the possibility of a recapitalisation of GCY and/or GNT Resources through a further capital raising or merger and the sale of the Mine and other assets of the GCY Group.
81. In summary, the dual track process involved the following steps:
82. the administrators appointed Investec Australia Ltd (Investec) as a corporate and financial advisor to assist in facilitating the dual track process;
83. an expression of interest campaign for the sale or recapitalisation of GCY was initiated;
84. on 18 October 2019, 11 first round non-binding indicative offers were received for the GCY Group’s assets;
85. on 22 November 2019, two “final” offers were received for the assets; and
86. later steps were taken.
87. Apparently, according to the administrators the offers made for the GCY Group’s assets were not considered to satisfactorily reflect the value of the GCY Group having regard to the updated Life of Mine Plan (LoMP) developed in late 2019 and early 2020.
88. I will elaborate further in a separate section of my reasons concerning the sale process.
89. On 20 February 2020, on application of the administrators, the Supreme Court of Western Australia further extended the period for convening the second creditors’ meetings pursuant to s 439A(6) to 30 June 2020.
90. The premise of the application to the Supreme Court of Western Australia on 20 February 2020 was to obtain a further extension of the convening period in order to investigate the possible recapitalisation of GCY and to allow Investec to continue discussions with interested parties as part of the sale process.
91. The following steps were taken in relation to the recapitalisation of GCY.
92. In March 2020, the administrators established a due diligence committee for the purpose of advancing a capital raising and completed due diligence of two potential non‑executive directors to form the newly constituted board of GCY post‑recapitalisation.
93. In April 2020, the administrators engaged Canaccord as the lead manager and bookrunner for the proposed capital raising.
94. The administrators’ report was issued on 18 June 2020 pursuant to s 75-225 of the *Insolvency Practice Rules (Corporations)* *2016* (Cth) (*Insolvency Practice Rules*) and contained additional information in relation the GCY Group and the administrators’ DOCA proposal and intentions with respect to GCY Group’s future.
95. The administrators’ report stated that the sale process did not achieve a satisfactory value having regard to the two key factors of, apparently, improved mine performance and the significant movement in the gold price in the first half of the 2020 calendar year.
96. On 18 June 2020, the administrators also despatched notices of the second creditors’ meetings and a meeting of eligible employee creditors.
97. The key elements of the proposed DOCA by the administrators in their report were the following:
98. The DOCA was propounded by the administrators in their then capacity as voluntary administrators.
99. The deed administrators would cause GCY to undertake a capital raising in the order of $70 to $80 million, by way of entitlement offer and placement of shares.
100. The secured creditors were not bound by the DOCA and repayment of the debts owed to secured creditors would be negotiated under separate agreements. As a condition precedent to the completion of the DOCA:
     1. after a partial repayment of the senior secured debt owed to the National Australia Bank and Commonwealth Bank of Australia (the senior secured creditors) from the proposed capital raising, there would be a refinance of part of the senior secured debt and subsequent release of their security; and
     2. NRW would restructure its debt and release its security.
101. A creditors’ trust would be established for the purpose of the DOCA and the deed administrators appointed as trustees. Upon completion of the DOCA, unsecured creditors would release their debts in consideration for the right to participate as beneficiaries of the creditors’ trust.
102. All inter‑group loans for the GCY Group would remain in place and would not be affected by the DOCA.
103. Once the relevant conditions precedent were satisfied, including completion of the proposed capital raising, execution of the creditors’ trust deed, appointment of certain directors and the deed administrators securing various releases of security, the DOCA would terminate and control of the GCY Group would revert to the directors.
104. On 22 June 2020, Hanking Australia Investment Pty Ltd (Hanking), another interested party, submitted a DOCA proposal as an alternative to the DOCA proposed by the administrators (the Hanking DOCA proposal). I will discuss this in more detail later.
105. On 24 June 2020, at around 5.30 pm, Mr Simon Raftery, a director of Habrok and also Adaman, called Mr John Park, the managing partner of FTI’s insolvency division, to advise that Habrok Mining would be submitting a DOCA proposal and that Habrok Mining would request that the second creditors’ meetings be adjourned so that creditors could properly consider Habrok Mining’s DOCA proposal. Mr Park advised him to send through Habrok Mining’s DOCA proposal.
106. On 24 June 2020, Habrok Mining provided the administrators a term sheet for the Habrok Mining DOCA to be put forward at the second creditors’ meetings. Habrok Mining submitted its DOCA proposal as soon as Adaman SPV, a subsidiary of Adaman, had receipt of a funding term sheet from BlackRock (Singapore) Limited – APAC Fixed Income Portfolio Management Group.
107. Habrok Mining’s DOCA proposal proposed to establish a fund, to be funded by Habrok Mining and BlackRock in an amount of around $85 million, which would consist of inter-alia:
108. an amount required to pay the senior secured creditors in full;
109. an amount equal to the full entitlements of any non-continuing employee entitlements;
110. an amount required to pay unsecured creditors:
     1. with debts less than $10,000 (small unsecured creditors), 100 cents in the dollar; and
     2. with debts greater than $10,000 (large unsecured creditors), with respect to the first $10,000, 100 cents in the dollar; and
111. $3 million to pay large unsecured creditors in addition to the first $10,000 as just described.
112. On 24 and 25 June 2020, Mr Raftery exchanged emails with the administrators requesting that the administrators adjourn the second creditors’ meetings to enable the creditors sufficient time to consider the Habrok Mining DOCA proposal as against the other DOCA proposals.
113. The second creditors’ meetings took place on 25 June 2020.
114. Shortly prior to the second creditors’ meetings, the administrators announced to the ASX that NRW would be voting against the adjournment of the second creditors’ meetings and in favour of the DOCA proposed by the administrators. The ASX announcement did not mention Habrok Mining’s DOCA proposal. The ASX announcement also mentioned that the upfront payment NRW was due to receive from the proceeds of the capital raising under the administrators’ DOCA would increase from 5% to 8.75%.
115. At the second creditors’ meetings, creditors were first asked to vote on resolution 1, being a resolution adjourning the meeting to 12 pm on Friday, 10 July 2020. The results of the poll in relation to the adjournment resolution were as follows:

|  |  |  |
| --- | --- | --- |
| **GNT Resources Pty Ltd** | | |
| **Option** | **Number** | **Creditor value** |
| **In favour** | 13 | $3,229,447 |
| **Against** | 22 | $35,238,896 |
| **Abstain** | 1 | $104,049,253 |

|  |  |  |
| --- | --- | --- |
| **Gascoyne Resources Ltd** | | |
| **Option** | **Number** | **Creditor value** |
| **In favour** | 1 | $11,803 |
| **Against** | 15 | $154,329 |
| **Abstain** | 1 | $11,520 |

1. The creditors were next asked to vote on resolution 2, being that the GCY Group enter into the DOCA proposed in the administrators’ report. The results of the poll in relation to the administrators’ DOCA resolution were as follows:

|  |  |  |
| --- | --- | --- |
| **GNT Resources Pty Ltd** | | |
| **Option** | **Number** | **Creditor value** |
| **In favour** | 34 | $35,738,430 |
| **Against** | 10 | $2,571,591 |
| **Administration end** | 1 | $5,315 |
| **Abstain** | 1 | $104,049,253 |

|  |  |  |
| --- | --- | --- |
| **Gascoyne Resources Ltd** | | |
| **Option** | **Number** | **Creditor value** |
| **In favour** | 8 | $165,966 |
| **Against** | 1 | $11,803 |

1. The attendance register records that NRW was admitted to vote in the amount of $34,780,390.83 and that it was secured for that amount. It may be inferred from the ASX announcement and the record of the votes in the minutes that NRW voted against the adjournment resolution and in favour of the administrators’ DOCA resolution. NRW’s vote, with a value of $34,780,390.83, resulted in the adjournment resolution failing and the administrators’ DOCA resolution being passed.
2. By the time of the second creditors’ meetings, the administrators had received two DOCA proposals: one from Hanking and the other from Habrok Mining.
3. Both Hanking and Habrok Mining requested that the administrators adjourn the second creditors’ meetings to enable creditors sufficient time to review and understand the competing DOCA proposals in accordance with the administrators’ powers to adjourn the meetings under s 75-140(1)(b) of the *Insolvency Practice Rules*.
4. At the meetings, the administrators declined to adjourn and instead put the adjournment requests to a vote in circumstances where NRW had previously indicated that it would vote against an adjournment and in favour of the DOCA proposed by the administrators.
5. Based upon the votes cast for the adjournment resolution in respect of GNT Resources and GCY, but for NRW’s vote, there would have been a deadlock between the number and value of votes cast on the adjournment resolution and the administrators’ DOCA resolution, which would have necessitated the administrators exercising their casting vote, a power that is subject to review under ss 75-42 and 75-43 of sch 2 to the *Corporations Act* (*Insolvency Practice Schedule)*.
6. On 26 June 2020, the administrators executed the administrators’ DOCA and creditors’ trust deed.
7. On 6 July 2020, the deed administrators of GCY despatched the notice of EGM and accompanying explanatory statement to the shareholders of GCY.
8. The EGM was convened on 5 August 2020 in order to consider and vote on resolutions to facilitate the capital raising required by the DOCA.
9. In particular, the shareholders voted on the following resolutions, inter-alia:
10. a resolution to approve the issue of shares under the entitlement offer;
11. a resolution to approve the issue of 1,750,000,00 shares under the placement;
12. a resolution to approve the issue of 600,000,000 shares to NRW in satisfaction of NRW debt in accordance with the debt-to-equity conversion proposed in the DOCA; and
13. a resolution to approve the issue of shares to the trustees of the creditors’ trust for the benefit of the large unsecured creditors.

# THE ADMINISTRATION – THE DETAIL

1. It is appropriate at this point to now say something more concerning the steps taken by the administrators.
2. At the time of the appointment of the administrators, the GCY Group operated the following three projects in Western Australia:
3. the Glenburgh mine;
4. the Egerton gold mine, which consists of two mining leases and two exploration licences covering approximately 180 km2 of the Lower Proterozoic Egerton inlier in the Gascoyne region of Western Australia; and
5. the Mine.
6. The Mine is a currently operating mine with fully established infrastructure and processing facilities. All power at the Mine is generated by third party contractors. The Mine is owned by GNT Resources. All of the shares of GNT Resources are held by Dalgaranga Operations Pty Ltd, which in turn is wholly owned by GCY. The Mine has three deposits: Gilbey’s deposit, Golden Wings deposit and Sly Fox deposit.
7. The Mine employs 99 staff, 87 staff of whom are employed by GNT Resources and 12 of whom are employed by GCY, and three directors. There are a further approximately 300 persons employed by site contractors who provide mining and ancillary services at the Mine. All people who work on-site are on “fly‑in fly‑out” rosters and travel to site on charter air flights. GNT Resources engages with a number of other small and medium businesses in the nearby Geraldton and Mount Magnet areas, which rely on workflow from the Mine.
8. As at the date of the appointment of the administrators, the key stakeholders were:
9. the senior secured creditors;
10. critical suppliers to the business, including:
    1. NRW through its associated entity– mining contractor;
    2. Zenith Pacific (DGA) Pty Ltd (Zenith) – power generation facilities;
    3. Wesfarmers LNG Pty Ltd trading as EVOL LNG – LNG supplier to Zenith;
    4. Nantay Pty Ltd trading as Maroomba Airlines – charter flight operators; and
    5. Northern Rise Village Services Pty Ltd – on‑site catering and cleaning;
11. the unsecured creditor group;
12. employees; and
13. shareholders.
14. The first creditors’ meetings were held on 13 June 2019. But as I have said, given the complexity of the business, the administrators sought and were granted three extensions of time in which to convene the second creditors’ meetings on 27 June 2019, 31 October 2019 and 20 December 2019.
15. A COI was formed at the first creditors’ meetings.
16. There were six meetings of the COI. The COI was comprised of representatives of large creditors and representatives of different creditor classes.
17. At the first creditors’ meetings, creditors voted in favour of resolutions that members of the COI of GNT Resources and GCY and related parties of such members were entitled to enter into arms‑length transactions or dealings in the ordinary course with the administrators, GCY or GNT Resources or their creditors.
18. Now immediately following their appointment, the administrators took steps to commence stakeholder communication, including attending to their statutory duties regarding meetings with creditors and complying with the voluntary administration timelines and to commence their investigation into the causes for failure in order to prepare a report to creditors pursuant to s 75-225(3) of the *Insolvency Practice Rules*.
19. In addition, the administrators identified three key work streams that required immediate actions. They developed a systematic approach to the address these matters in these work streams.
20. First, they focused on operations and trading. This involved reviewing the existing operations to determine if there was a way to maintain the business as a going concern in the short term, including to stabilise operations and support for continued trading.
21. Second, they focused on technical aspects, including implementing an interim mine plan (IMP).
22. Third, they prepared for the dual track sale and recapitalisation process. They appointed a financial advisor, namely, Investec, to advise on and manage the dual track process. Investec was appointed following a formal selection process. Ten parties were approached, including Macquarie Capital Advisors, Investec, PCF Capital, Azure Capital, Treadstone Partners, Hartley’s Limited, Zephyr Capital, Origin Capital, Argonaut Corporate Finance and Discovery Capital. Five submitted compliant proposals and were interviewed. Investec was selected based on its technical expertise, experience in the resources space and distressed asset situations, global reach and strong relationships with potential investors.
23. The administrators were responsible for the management of different work streams, together with other staff under their direction. Broadly, as between Mr Francis, Ms Warwick and Mr Ryan:
24. Mr Ryan was responsible for the overall approach to, and management of, the administration and had specific involvement with:
    1. operations and trading;
    2. technical development, including engaging with mining consulting firms, together with his colleague at FTI, Mr Andrew Bantock, on the implementation of the IMP;
    3. dealing with proposals for financial advisors and development of the dual track process;
    4. stakeholder engagement including with NRW and Zenith; and
    5. finalising the administrators’ report;
25. Ms Warwick was responsible for liaising with the senior secured creditors; and
26. Mr Francis commenced investigations, managed the preparation of the administrators’ report, chaired the first three committee of inspection meetings and was responsible for the first two extension of time applications.
27. Following their initial assessment of the then state of operations at the Mine and the mineral resource modelling and mine planning, the administrators determined that in order to achieve the best value for creditors, it would be preferable, if possible, to continue to trade the Mine, rather than place it into care and maintenance.
28. It was considered that placing the Mine into care and maintenance would be destructive of value and would result in significant job losses. The administrators engaged an external mining consultant, Mr Gary Davison of Mining One, to assist with this review.
29. The administrators also maintained the engagement of geological and mine engineering consultants Cube Consulting to work on the LUC resource model.
30. It was anticipated that by continuing to trade the Mine the administrators would be able to demonstrate a reconciliation of mined ore delivery against the revised technical ore‑body modelling and that such proven performance of the Mine, assuming it was achieved, would be value accretive and therefore would assist in negotiations with potential investors or purchasers of the Mine, with a view to increasing the return to creditors.
31. By focusing on and understanding the technical and commercial aspects of the business, the administrators were able to develop a greater understanding of the value of the operations.
32. In June 2019, in conjunction with Mining One and the management team, the administrators developed the IMP. The IMP was necessarily a short-term outlook and developed with a view to ensuring the operation could trade on a cash positive basis and could also be monitored closely and stopped if there were material negative deviations encountered.
33. On 24 June 2019, the administrators provided a report to the senior secured creditors on the IMP titled “Interim Mine Plan - High Level Overview (updated draft)” summarising preliminary work undertaken as at that date.
34. The administrators formed the view that the IMP had provided enough confidence to cause the Mine to operate on a longer term basis which would involve investing in certain longer term capital commitments and, accordingly, they prepared subsequent LoMPs.
35. On 19 September 2019, a revised LoMP titled “Gascoyne Valuation Model - September 2019 LOMP” (the September 2019 LoMP) was finalised.
36. On 10 December 2019, a further revised LoMP titled “Gascoyne Valuation Model - December 2019 LOMP” (the December 2019 LoMP) was being prepared based on the LUC resource model and an updated ore reserve. At the least, modelling had been updated by mid-December but work had not been completed.
37. In July 2020, the administrators finalised a further revised LoMP titled “Gascoyne Valuation Model - July 2020 LOMP” (the July 2020 LoMP).
38. On 31 July 2020, there was a release made to the ASX concerning an updated life of mine production target and ore reserve estimate which indicated that:
39. over 400,000 ounces of gold were estimated to be mined and processed at the Mine over a seven year period;
40. the average cost per ounce was estimated to be between $1,400 and $1,500;
41. over the next three financial years, a further $115 million to $130 million was estimated to be spent on capital waste earth moving works to access the gold ore, as follows:
    1. FY2022, an estimated $40 - 45 million; and
    2. FY2023, an estimated $5 - 10 million; and
42. capitalised waste mining was planned to be funded from operational free cash flows generated in the normal course of operations.
43. Mr Ryan gave evidence that he had more recently reviewed the July 2020 LoMP. He identified that the amount shown in cell K892 in the sheet entitled “D1. Key Inputs” had been incorrectly inputted as $13.7 million instead of $20.7 million. He then caused an updated version of the July 2020 LoMP (the updated July 2020 LoMP) to be prepared.
44. The updated July 2020 LoMP corrected the amount shown in cell K892. It also updated cell G237 in the sheet entitled “F4. Debt Equity” to reflect the change to the timing of the upfront cash payment to NRW which was to be paid in August 2020, but is now proposed to be paid in September 2020. This change reflects the current recapitalisation timetable.
45. Based on the updated July 2020 LoMP and using a gold price assumption of $2,400 per ounce and the forecast cost of production, the administrators have calculated that over the seven years of operations, the Mine will generate:
46. surplus cash of $307 million;
47. project NPV (pre-tax) of $224 million;
48. free cash flows to equity of $198 million; and
49. equity NPV of $161 million.
50. Based on the updated July 2020 LoMP and using a gold price assumption of $2,900 per ounce and the forecast cost of production, it is calculated that over seven years of operations, the Mine will generate:
51. surplus cash of $466 million;
52. project NPV (pre-tax) of $352 million;
53. free cash flows to equity of $358 million; and
54. equity NPV of $287 million.
55. Now such estimates do not have regard to any additional ore recoveries. That is, these estimates are based on the reserves at the Mine and do not take into account resources, adopting the language used in the *Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves*, 2012 Edition.
56. According to the administrators, the Mine is therefore currently profitable. It has demonstrated continued high levels of steady state performance, which together with the current relatively high gold price, gives GCY a significant opportunity to raise new equity now from its existing shareholders and other investors.
57. For completeness, I would note at this point that Ms Tejal Magan, the Head of Finance of the GCY Group, gave uncontested evidence addressing various alleged discrepancies in the various LoMPs produced in 2020 that had been raised by Mr Raftery in his evidence. I accept her evidence. His criticisms went nowhere. Although Mr Raftery was frank, composed and commercial in his evidence, he lacked first-hand knowledge of the details.

## (a) The dual track process: sale or recapitalisation

1. Shortly after the administrators’ appointment, they received a number of enquiries from parties who were interested in either an asset purchase or recapitalisation of the GCY Group.
2. Based on this level of interest, the administrators undertook a process to seek proposals from a number of financial advisors to assist them with this work stream.
3. As discussed, the administrators engaged Investec as their advisor in July 2019. In addition to the sale process, the administrators instructed Investec to consider a restructure of the GCY Group, via either a capital raising and/or debt refinancing, that is, a recapitalisation. They considered that they should pursue both of these tracks in order to maximise the potential for return to all creditors, not just the senior secured creditors.
4. The administrators therefore determined to pursue the dual track process. A dual track process is commonly used for listed companies where there is a possibility that the underlying business can be turned around with the injection of new capital. The dual track process embraced exploring the possibility of a sale of the GCY Group’s assets either as a whole or on a breakup basis or a recapitalisation of the GCY Group via a DOCA.
5. The administrators considered that there were advantages and disadvantages of both the asset sale and recapitalisation tracks.
6. According to the administrators, the reason for exploring a sale of the GCY Group’s assets was driven by a number of factors. The senior secured creditors had a preference for a sale so that they could recover money owed as quickly as possible. In the administrators’ experience, it is appropriate to determine whether a sale is a better way to proceed so as to maximise a return to creditors, even if there is a longer term possibility of ensuring that the relevant business of the company in administration continues. Sometimes, that possibility is not realistic because of the costs involved in proceeding to develop ways in which the business might continue. In this case, in contrast, given the administrators’ investigations including the fact that the Mine was continuing to produce gold, there was a way forward for the GCY Group’s business to continue and for all creditors and other stakeholders to obtain a return.
7. The reason to pursue a recapitalisation track was driven by the knowledge that GCY was listed on the ASX and therefore had the ability to raise further capital from the equity markets. Further, GCY had only recently established the Mine at significant cost. Therefore if the business could be turned around there was a likelihood that this cost could be recovered. There were also significant carry forward tax losses (exceeding $100 million as at 30 June 2019) in the GCY Group that would be available to offset tax liabilities in the future if it was able to be traded out of its financial difficulties.
8. A further reason for pursuing recapitalisation was that knowledge of that possibility usually encouraged interested parties to offer a higher price for the assets, knowing that a fire sale was not the only alternative that is available. In the present case, given the administrators’ investigations and the fact that the Mine was continuing to produce gold, a recapitalisation was a real possibility that could not be discounted. In the event, it appeared that a recapitalisation would be successful and would enable the GCY Group business to continue, with all creditors being paid in full.
9. The sale process ran from September 2019 into 2020. Investec was responsible for administering the sale process.
10. During the sale process, Ms Warwick kept the senior secured creditors informed. Mr Ryan’s role included monitoring the operational performance of the GCY Group. As part of this, he attended at the site and spoke with employees to ensure that they understood the administration process and were aware that their jobs were not necessarily at risk. He also spoke with GCY’s large shareholders to determine whether they would be willing to provide funding that he thought might have been necessary to keep the Mine operations going whilst the GCY Group’s position and a way forward were being investigated.
11. Given the trading performance of the Mine before the administrators’ appointment and then the improved trading performance and the improved gold price environment, the possibility of a recapitalisation increased over time in the latter part of 2019 and into 2020 as the value of the GCY Group’s assets increased.
12. Ultimately the outcome of the sale process was unsatisfactory. Investec was responsible for the sale process but decisions about whether to accept any proposal remained with the administrators. The administrators formed the view that none of the proposals were acceptable. Hanking made the highest offer. But Hanking’s offer was not sufficient even to repay the senior secured creditors in full. That would have left nothing for the other creditors and the other stakeholders.
13. Whilst the sale process was proceeding, the gold price had continued to rise, production had remained reasonable, a new resource and reserve estimate had been released, a new mine plan had been developed and a new life of mine model had been prepared. Also, as a consequence of the mining technical work that was undertaken, the administrators formed the view that the Mine was more valuable than the offers received through the sale process.
14. After discussion with the administrators, the senior secured creditors, NAB and CBA, were willing to permit a further investigation as to whether the Mine’s performance could be improved to obtain a higher return and were willing to have any further step in the sale process deferred whilst that occurred. NAB and CBA had the right to appoint a controller at any time if they thought that was the best way to recover money owing under their securities. NAB and CBA continued to monitor the operational performance of the Mine.
15. Whilst the administrators were further investigating the position and how best to proceed in the creditors and other stakeholders’ interests, they received enquiries from parties interested in the assets of the GCY Group, including from Hanking and Adaman. They also received enquiries from parties interested in the Glenburgh Mine and Egerton Mine. The administrators considered these enquiries but none of them were proposing to purchase the GCY Group’s assets at a price that would maximise returns to all stakeholders. In the administrators’ view, none of these parties were willing to pay for what appeared to be the improved value in the GCY Group.
16. Over the period between the beginning of 2020 and 25 June 2020, these expressions of interest remained “on the table” and improved somewhat. This gave the administrators confidence that the sale process remained available if needed albeit at a lower value outcome than they expected from the recapitalisation process. It showed that the competitive tension being applied by the dual track process achieved what the administrators had aimed for it to do.
17. It is convenient at this point to deal with Habrok’s misplaced criticisms of the sale process undertaken by the administrators.
18. Let me say at the outset that I do not accept that Adaman was dealt with inappropriately in the sale process. And before going through the chronology, let me say something about some of the witnesses.
19. The evidence of Mr Stefan Edelman, an executive director of Investec, reliably established that Adaman had access to whatever material it needed and requested to put in a bid. But the fact is that Adaman only bid at the level of $42 million, which was later increased to $65 million. But if it had wanted to go higher, assuming that it had the financial capacity to do so which was questionable, it could have done so. It chose not to.
20. Mr Edelman gave clear and accurate evidence. Contrary to Habrok’s cross-examination, it was reasonable for Mr Edelman not to have volunteered an updated LoMP to Adaman after submission of final offers in November 2019, given that Adaman was not the preferred bidder. Adaman was aware of the sale process and its timing. Throughout, Adaman had made proposals, incapable of immediate acceptance, with insufficient value. Moreover, it was reasonable to adopt a process under which only bidders with the best offers would be provided with further information after final offers had been provided.
21. Mr Mark Rowsthorn, the chairman of Adaman’s board, gave evidence. In his email of 6 April 2020, Mr Rowsthorn did not offer that Adaman would pay $140 million for the GCY Group’s assets; indeed, Mr Rowsthorn gave short evidence which did not seek to portray his email as such an offer. And Mr Edelman understood the email as a clear statement that Adaman could not offer sufficient value. The $140 million represented the total amount that Adaman might be able to borrow to repay its own liabilities and fund an acquisition of the GCY Group, which, after allowing for Adaman’s existing funding needs, would not be sufficient even to pay out the GCY Group’s secured debt. Based on that understanding, which was consistent with his previous discussions, Mr Edelman informed Mr Rowsthorn in a responsive email that it was unnecessary for Adaman to formalise any offer, but that lines of communication should be kept open. That was a reasonable position where Adaman had said it could not meet value expectations. I will discuss the significance of this 6 April 2020 email shortly.
22. Further, Mr Edelman’s evidence clearly establishes to my mind that there is no substance to Habrok’s assertion or the suggestion of its witnesses, Mr Rowsthorn and Mr Gary Ireson, Adaman’s Corporate Development Officer, that Adaman was denied relevant information.
23. Mr Rowsthorn asserted that Adaman lacked key information for its two $42 million offers, and was unable to submit better offers as a result. But Adaman’s second offer did not complain of any lack of information. Adaman also made overtures to Investec about increasing its offers to $65 million without receiving any further information. Further, apart from a few minor exceptions, whenever Adaman asked Investec for more information, that information was promptly given.
24. Now Mr Rowsthorn also insisted in his evidence that the administrators, or Investec, did not engage with Adaman and its bids throughout the sale process. But Investec had multiple meetings, site visits, email exchanges and phone-calls with Adaman’s representatives, kept them informed about the sale process, and was prompt in responding to their communications and in providing information where requested.
25. Mr Ireson gave evidence about the sale process. This included an asserted lack of information to support Adaman’s offers and a suggested lack of engagement by the administrators with the sale process. I do not accept the validity of his complaints. Although Mr Ireson said that when he reviewed the data room he noticed a number of important documents were missing, he did not ask Investec to supply that data with any promptness, despite making other requests. Mr Ireson also failed to articulate how Investec had failed to engage with Adaman about the sale process.
26. Ms Warwick also gave evidence. Contrary to Habrok’s submission that the administrators were only interested in pursuing a recapitalisation, Ms Warwick made it clear that in late November 2019 she was not prepared to put at risk the offer made by Hanking where, at that time, the recapitalisation track was uncertain. Further, around that time, in circumstances where the administrators were dealing with an offer from Hanking to purchase the assets of the GCY Group, it was not in the interests of the creditors to start a new sale process. Further, into 2020 the sale process was not going well and the recapitalisation track became more certain. But even then, Investec was instructed to keep discussions open with Hanking and Adaman.
27. Let me now say something more about the relevant chronology of events.
28. Adaman was sent a “teaser” document and confidentiality agreement on 12 September 2019 which it signed.
29. On 20 September 2019, Adaman was granted access to the phase 1 data room in which due diligence materials were provided including:
30. the financial model prepared by FTI for the Mine based on the LoMP current at the time;
31. an information memorandum relating to GCY’s assets prepared by Investec;
32. updated reserve and resource reports;
33. technical information on the geology, mining, processing and TSF/Infrastructure at the Mine including mine designs for the LoMP;
34. GCY’s audited financial statements; and
35. technical information on other exploration projects controlled by GCY.
36. On 24 and 26 September 2019, Adaman requested pit designs and historical as built pit data. Mr Edelman sought these documents from the administrators and made them available in the data room, and informed Adaman of this on 25 September and 1 October 2019.
37. On 15 October 2019, Mr Edelman emailed Mr Ireson requesting a phone call to obtain an update on how Adaman was progressing in respect of its offer. They arranged a call the following day.
38. On 18 October 2019, Adaman submitted a non-binding indicative offer for the whole of the GCY Group’s assets in the amount of $42 million.
39. On 24 October 2019, Mr Mischa Mutavdzic emailed Mr Ireson to confirm that Adaman had been selected to progress to “Round 2 of the Gascoyne sale process” and to inform Adaman that the due date for binding offers was 22 November 2019.
40. More detailed information was then uploaded to the data room for those third parties who had progressed through to phase 2, including Adaman. This included:
41. updated technical information;
42. monthly operating reports;
43. tenement information;
44. permitting information;
45. detailed management accounts;
46. details of tax losses;
47. creditor breakdown by subsidiary; and
48. key contracts and supplier invoices.
49. With respect to the information that Mr Rowsthorn in his evidence complained about not receiving, most of this information was provided with the exception of the debt facility documents and the NRW mining contract which was withheld due to a perceived conflict with Adaman’s associated contracting business, SMS Mining Services.
50. On 29 October 2019, Mr Anthony Hawke of Investec, Mr Mutavdzic and Mr Edelman met with Mr Ireson, Mr Craig Bradshaw and Mr John Fitzgerald of Adaman in Perth. They discussed the process and timeline for phase 2 along with the corporate history of Adaman; the basis for Adaman’s first round indicative offer; potential transaction structures; potential funding of an offer and intentions with respect to NRW’s ongoing operation. They also encouraged Adaman to look at opportunities to increase its first round offer as it was materially below other first round bids received.
51. On 30 October 2019, Mr Ireson emailed Mr Edelman referring to the meeting held the previous day, and setting out a detailed list of information requests. Mr Edelman responded to Mr Ireson’s email on 31 October 2019, and indicated where in the data room the documents had been uploaded.
52. On 1 November 2019, Mr Edelman enquired whether the Adaman team would be available to conduct a site visit, which was then arranged for 14 November 2019.
53. On 5 November 2019, Mr Ireson requested a copy of the end of month survey for October 2019. Mr Edelman arranged for that survey to be uploaded to the data room the following day once it had been completed.
54. The site visit referred to above occurred on 14 November 2019. Mr Richard Clayton from Investec attended along with the following representatives of Adaman: Mr Ireson, Mr Bradshaw, Mr Clay Gordon (Head Geologist), Mr Michael Di Trento (Process Manager) and Mr Simon Kelly (Mine Planning Engineer). At the site visit, Adaman was provided with detailed information on technical aspects of the Mine operation by Mr Hay and the site management team.
55. On 19 November 2019, Mr Hawke, Mr Mutavdzic and Mr Edelman met with Mr Bradshaw and Mr Ireson in Perth to discuss the final offer process. In the meeting they discussed feedback from the site visit and due diligence process, and expected transaction structures. They also reiterated to Adaman that it should significantly increase its first round offer. At that meeting, Mr Edelman received a question about mining costs. He provided a response to that question, and a follow-up question, the following day.
56. Final bids were due on 22 November 2019. Adaman could not meet this deadline and was granted an extension until 25 November 2019, at which time Adaman submitted a final non-binding offer to Investec in the amount of $42 million. Adaman chose not to increase its first round offer despite advice from Investec that its offer value was uncompetitive.
57. Mr Edelman responded to Mr Ireson’s email submitting Adaman’s final offer on the same day to say that Investec had received Adaman’s final offer and that they would discuss the offer with the administrators and get back to him.
58. Mr Edelman provided a further update to Mr Ireson on 29 November 2019 stating that Investec would not be in a position to provide feedback upon final offers until the following week.
59. After receiving Adaman’s offer, Mr Edelman informed Mr Ireson that Adaman’s offer was materially lower than another offer which had been received.
60. On 12 December 2019, Mr Edelman emailed Mr Ireson to confirm that the administrators were considering the offers received and would provide feedback in due course.
61. On 17 December 2019, Mr Edelman received an email from Mr Rowsthorn which stated that the “shareholders of Adaman are prepared to provide a significantly improved offer for the Gascoyne assets. We have advanced discussions with our funders. This will be a straightforward structure. If this is something you would consider can you let me know and we can set up a call”. He responded to Mr Rowsthorn’s email on 18 December 2019 and they thereafter arranged a call to discuss on 19 December 2019.
62. On the telephone call on 19 December 2019, Mr Edelman told Mr Rowsthorn that a $42 million offer was not going to be competitive and that they had relayed this previously to the Adaman management team. Mr Rowsthorn said to him words to the effect that Adaman’s bid for the GCY Group was opportunistic and that Adaman’s management team had not relayed Investec’s advice to improve the $42 million offer to Adaman’s board of directors. Mr Rowsthorn asked him whether Adaman should look to increase its offer, to which he agreed. Mr Rowsthorn told him that Adaman would send Investec an updated offer.
63. On 22 December 2019, Mr Rowsthorn informed Mr Edelman that Adaman’s shareholders had made a decision, which had been endorsed by the Adaman board, to increase its offer to $65 million, on terms identical to its previous proposal dated 25 November 2019.
64. On 24 December 2019, Mr Edelman emailed Mr Rowsthorn to say that he had spoken to one of the administrators but as the other two administrators were away until early January 2020, he would not have any meaningful feedback until then. Mr Rowsthorn responded to say that he understood.
65. On 7 January 2020, Mr Edelman informed Adaman, after consultation with FTI, that its offer of $65 million was insufficient and that the administrators were not proceeding with its offer but that Investec was willing to continue to engage with Adaman should it want to present a revised offer.
66. On 6 February 2020, Mr Byron Gordon of Investec and Mr Edelman attended a meeting in Perth with Mr Ireson, Mr Fitzgerald and Mr Bradshaw, during which they provided a general update on the Mine and dual track process.
67. On 11 March 2020, Mr Edelman attended a lunch at Cecconi’s restaurant in Melbourne with Mr Hawke, Mr Rowsthorn and Mr Anderson. In this meeting Mr Rowsthorn discussed other possibilities for Adaman to make its offer more attractive. To be attractive, they suggested a transaction would need to enable secured creditors to be paid out in full with some returns for unsecured creditors and shareholders. Mr Rowsthorn gave evidence that “Mr Brown of Investec told us that Investec and the Administrators were not interested in a sale proposal unless the sale price was in the order of approximately AU$150 million”. Mr Rowsthorn’s reference to Mr Brown is a reference to Mr Hawke. Mr Edelman did not recall a number of $150 million being mentioned.
68. One such suggestion at the 11 March 2020 meeting was to merge Adaman and GCY and refinance both group’s outstanding liabilities, which they agreed to look into. Investec reviewed cash flow information provided by Adaman to assess the debt carrying capacity of the combined projects.
69. On 26 March 2020, there was a conference call between representatives of Investec and Adaman. Mr Mutavdzic, Mr Hawke and Mr Edelman attended for Investec and Mr Rowsthorn and Mr Anderson attended for Adaman. On that phone call, the Investec team provided a high level operational update on the Mine and informed Adaman that the sale process was still being considered, but that improved offers were required. Mr Edelman does not recall telling Mr Rowsthorn or Mr Nicholas Anderson of Adaman that the administrators desired a price of around $150 million for the whole of the assets of the GCY Group. They also discussed the possible refinancing of the merged assets but concluded that this would be challenging and it was not clear that Adaman could provide the equity required.
70. As I have mentioned, on 6 April 2020, Mr Rowsthorn sent an email stating that “we will struggle to meet Fti expectations, on value etc, given lending constraints”. By such expectations, Mr Edelman understood Mr Rowsthorn to mean what they had discussed as set out above, namely, it was necessary to make an offer that would enable secured creditors to be paid out in full with some returns for unsecured creditors and shareholders. I will discuss this email further shortly, but it is appropriate to mention it again briefly now.
71. Mr Edelman does not recall Mr Rowsthorn at any point indicating to him that Adaman required further technical information in order to reassess its bid. As discussed below, Adaman did not have access to the data room between 27 November 2019, that is, after receipt of its “final” offer on 25 November 2019, and 30 April 2020.
72. Mr Raftery gave evidence that the administrators did not engage with Adaman between 1 January 2020 and 24 June 2020 other than a discussion with Investec on 26 March 2020. But this was inaccurate. Investec had been engaged by the administrators to handle the sale process and Investec had corresponded with representatives of Adaman on at least the following occasions:
73. on 19 January 2020, a phone conversation with Mr Rowsthorn;
74. on 6 February 2020, a meeting in Perth with Mr Ireson, Mr Fitzgerald and Mr Bradshaw;
75. on 11 March 2020, a lunch at Cecconi’s restaurant with Mr Hawke, Mr Rowsthorn and Mr Anderson;
76. on 26 March 2020, a conference call between representatives of Investec and Adaman; and
77. emails with Mr Rowsthorn between 4 April 2020 and 14 April 2020, where Mr Rowsthorn stated that Adaman could not meet value expectations due to financing constraints.
78. Let me say something about Adaman’s access to the data room.
79. Access to the data room was only provided once a confidentiality agreement was signed by an interested third party.
80. Set out below is a list of individuals from Adaman that were given access to the data room, and a summary of their data room activity. Mr Ireson was the third most active person who accessed the data room.

|  |  |  |
| --- | --- | --- |
| **Name** | **Number of logins** | **Number of documents viewed** |
| Gary Ireson | 49 | 235 |
| John Fitzgerald | 6 | 13 |
| Craig Bradshaw | 14 | 112 |
| Linton Putland | 1 | 1 |
| Nicholas Anderson | 5 | 112 |
| Russell Hall (also a director of Habrok Mining) | 4 | 10 |

1. Adaman personnel accessed the data room:
2. 13 times in September 2019;
3. 16 times in October 2019;
4. 20 times in total prior to submitting its indicative offer on 18 October 2019;
5. 26 times in November 2019;
6. 55 times in total prior to submitting its final offer on 25 November 2019 and revised offer on 22 December 2019;
7. 18 times in May 2020; and
8. 6 times in June 2020.
9. The data room was not accessed by Adaman representatives from 22 November 2019 to 30 April 2020 (inclusive).
10. Once Investec received binding phase 2 offers, the data room was closed to all bidders while it awaited instructions regarding the next steps from FTI and the senior secured creditors.
11. Adaman did not request from Investec additional information at any point after Adaman was advised in January 2020 and before 1 May 2020 that the administrators were not proceeding with its “final” offer of $65 million. As such, there was no need to reinstate Adaman’s access to the data room until Adaman’s contact on 1 May 2020.
12. On 1 May 2020, at Adaman’s request, Mr Edelman arranged for Mr Ireson, Mr Bradshaw, Mr Fitzgerald and Mr Anderson to be reinstated with access to the data room. On 14 May 2020, Mr Edelman arranged for Mr Russell Hall and Mr Linton Putland to have their access reinstated at Adaman’s request.
13. On 21 May 2020, Mr Edelman received a request from Mr Fitzgerald for a copy of the April operations report. He responded on 25 May 2020 to advise that the report had been added to the data room and to tell Mr Fitzgerald where it could be located in the data room.
14. On 22 May 2020, Mr Edelman received a request from Mr Fitzgerald for a copy of the GCY Group’s current organisational chart, which request was complied with.
15. On 25 May 2020, Mr Edelman received an email from Mr Fitzgerald requesting access to “(1.) The last 4 months actual cashflow (2.) The current mine plan - (3.) The latest face positions i.e. where are they in the pit”. To the best of Mr Edelman’s recollection, Mr Fitzgerald was not provided with the cash flows but the December 2019 LoMP was in the data room and the latest face positions, being the April 2020 survey data, was provided on 9 June 2020.
16. On 26 May 2020, Mr Edelman had a teleconference with Mr Ireson and Mr Fitzgerald during which he provided an update on the Mine and the progress of the recapitalisation process.
17. Mr Rowsthorn gave evidence that, “Despite Adaman’s requests between September 2019 and March 2020 for more information including an updated LoMP, details of the NRW mining contract, details of the GCY Group’s debt and security arrangements, Investec never provided the information sought and Adaman was hampered in its ability to formulate and submit a competitive and appropriate proposal to acquire the GCY Group’s business and assets through the Sale Process”.
18. Mr Edelman was not aware of any information having been requested by Adaman that was not provided or available to Adaman in the data room, with the exception of the NRW mining contract and the cash flows referred to above.
19. Mr Raftery stated that Adaman and Habrok did not have the benefit of information pertaining to the value of the GCY Group’s assets, particularly the December 2019 LoMP, and could not properly formulate and revise Adaman’s or Habrok’s bids at the time. Habrok and Habrok Mining did not submit any proposal at any time to acquire the GCY Group’s assets nor did they sign the required confidentiality agreement.
20. Mr Raftery says that the administrators did not revert to Adaman with information regarding an updated LoMP after December 2019. But the position appears to be as follows.
21. At the time of submitting its “final” offer on 25 November 2019, Adaman had access to all of the information in the data room, including the September 2019 LoMP. At that time, the December 2019 LoMP was in progress but was not completed.
22. Subject to what has been said above, whenever Adaman requested additional information, that information was provided to it.
23. Neither Habrok nor Habrok Mining requested information from Investec pertaining to the value of the GCY Group’s assets, including the December 2019 LoMP, for the purpose of formulating a bid or proposal, whether via access to the data room or in any other form.
24. Neither Habrok nor Habrok Mining had access to the data room because they did not execute a confidentiality agreement.
25. The December 2019 LoMP and associated explanatory memorandum were uploaded into the data room on 10 December 2019 and as it continued to evolve, and were therefore available to those with access to the data room from that date.
26. Further, below is a table summarising which representatives of Adaman viewed the December 2019 LoMP and the explanatory memorandum which has been extracted from the individual activity logs generated by FTI from the data room.

|  |  |  |
| --- | --- | --- |
| **Name** | **December 2019 LoMP** | **Explanatory memorandum** |
| Gary Ireson | Once on 1 May 2020 | Once on 1 May 2020 |
| John Fitzgerald | Once on 22 May 2020 | Once on 22 May 2020 |
| Nicholas Anderson | Once on 1 May 2020 | Three times on 1 May 2020  Once on 4 May 2020  Twice on 5 May 2020  Once on 7 May 2020 |
| Russell Hall | Did not view. | Once on 15 May 2020  Once on 18 May 2020 |

1. There are a few points to be drawn from the chronology.
2. First, Adaman was not hindered in relation to access to material.
3. Second, the administrators and Investec were quite entitled to treat with Hanking as the preferred bidder in priority to Adaman from mid-December 2019.
4. Third, Adaman had in essence demonstrated by April 2020 that there were difficulties in bidding above $65 million for the assets. I say that for the following reasons.
5. Let me begin with Mr Rowsthorn’s 6 April 2020 email. It is important that I set this out fully:

Hi Stefan,

1. Adaman board remain highly focused on Gascoyne. It is undoubtedly a sound strategic fit for our current assets.

2. The broad outline of the boundaries of a deal indicated by Anthony are understood in terms of expectation

Ie banks/ nrw, secured debt paid in full. And contributions made to unsecured creditors and equity would be required.

3 . Lending support for adaman would tap out at 140 m senior and a mezz piece would still be required to provided to provide the funds needed to enable something close to this.

4. Security would be required on all adaman assets.

The current thinking is that we will struggle to meet Fti expectations, on value etc, given lending constraints.

Adaman April numbers are continuing to improve and snake well ounces should be introduced

In July /August.

That said, we can provide the basis of a proposal, short of ftis [sic] thinking but don’t want to waste anyone’s time.

Let me know what you think.

Regards Mark

1. Clearly this was not an offer by Mr Rowsthorn of $140 million for the assets; indeed his own evidence did not say as much.
2. Mr Edelman gave the following evidence in cross-examination:

Well, from what you’ve told his Honour, this afternoon, the figures, to quote the email, yield of 140 million senior and a mezzanine piece, that is something over and above 140 million, would certainly have been enough, as you understood it, to trump recapitalisation; is that right?---No, that’s not right. I think, would you like me to explain this.

Please do?---Point 3.

Yes, take your time?---So this email, my understanding from Mark, was around the concept that was broadly discussed at the lunch in Melbourne, which was whether you could put the assets of Adaman together with the assets of Gascoyne and refinance both sets of assets. So the $140 million senior lending support, that is referred to in this email, my understanding of that number is that it is the amount required to refinance Adaman’s own debt position, as well as, fund a bid for Gascoyne.

Thank you. To be fair to you, I don’t want the wrong impression to be given, is that what you were referring to in general terms in paragraph 46 of your affidavit?---Yes.

Paragraph 45 of the affidavit, of course, you had referred to a transaction leading to enable secured creditors to be paid in full with some returns for unsecured creditors and shareholders; do you see that?---Yes, I do.

And there had been favourable response to that, in this email of 6 April; hadn’t there been?---Yes.

Now coming back to the question about 140 million senior and a mezzanine piece, do you agree that that, on its face, and such as to be understood by you as referring to a price to be paid?---No.

You understood it to mean money which would be available to be – to fund repayment of secured creditors; correct?---My understanding of that 140 million is that money that could be used to refinance Adaman’s own debt facilities, which needed to be refinanced as well as fund a bid for Gascoyne, and at the time, my understanding was, Adaman had debt in the order of 60 to 70 million plus a large trade creditors position that needed to be normalised.

On any view, you understood that, whatever the structure, the 140 million plus would provide funding to pay out secured creditors in full. Correct?---Well, no. If there’s – if there’s 70 million being used to refinance Adaman’s own debt, that would leave 70 million which still wouldn’t pay out secured creditors in full for Gascoyne.

Item 2 in the email said that that, in broad outline, was what would happen?---Well, my interpretation of 2 is that Mr Rowsthorn is saying “I understand the FTIs expectations that the banks and NRW secured debt would be paid in full.”

I see. Well, did you have any further dealings, in the conversations you refer to I think in paragraph 49 of your affidavit, so as to enable you to understand the benefit for creditors and shareholders and the kind of bid that Adaman was showing ..... focus interest in making?---I’m sorry, could you repeat that question?

Did you do anything to find out what was the intended effect on creditors, secured and unsecured, and shareholders - - -?---No.

- - - for the kind of bid that they were interested in putting?---No.

Isn’t that an elementary step to take if you’re trying to encourage a bid as favourable as possible to stakeholders?---In the context of this email, Mr Rowsthorn says that he will not be able to meet our value expectations, which I believed were clearly explained.

1. I accept that evidence. It accords with both a natural reading of the email and the absence of evidence from Mr Rowsthorn that he had made an informal offer at the time on behalf of Adaman of $140 million. Further, the implicit figure of $70 million is more consistent with the $65 million that had been offered in late December 2019.
2. Fourth, I doubt Mr Rowsthorn’s evidence concerning the reference to a $150 million figure on or around 11 March 2020. None of the other witnesses recalled this. Further, if that were truly mentioned, his 6 April 2020 email, properly construed made little sense. Clearly, the email was not a $140 million offer for the assets. Further, if $150 million had truly been mentioned on 11 March 2020, the email would clearly have been an exercise in futility.
3. It is convenient now to finally dispose of Habrok’s case under s 445D concerning the sale process.
4. There are several matters to note concerning what the evidence reveals about the sale process.
5. First, that process was never completely stopped. Options were being kept open. For example, an email from Mr Edelman to Mr Ryan and Mr Hay of 9 June 2020 stated:

We have been keeping Hanking and Adaman warm throughout this process in case we had to abandon the recap. Both have reached out to me today (probably off the back of the good production announcement) seeking further DD info.

Given how well advanced we are on the capital raise, we could consider breaking off further engagement with them, informing them that we are no longer pursuing a sale of the company or its assets. If we do so we just need to be prepared that this might get back to CBA and NAB.

Do you want to discuss how to handle this?

1. Second, this email and earlier emails sourced from either the administrators or Mr Edelman reflected the fact that the administrators perceived that the senior secured creditors wanted the sale process to bubble along at the same time as recapitalisation was also being looked at.
2. Third, it is apparent that by May 2020 Investec was being repurposed in terms of being a potential source of debt and hedging facilities to GCY. But its mandate concerning the sale process had not been terminated by that time.
3. Fourth, perhaps there is some substance to Habrok’s point that by March 2020 little enthusiasm was being shown by the administrators for the sale process (see for example the email string on 25 March 2020 reflecting little appetite by the administrators for the appointment of a separate sales advisor as distinct from one advisor for both strands, namely, sale and recapitalisation). But where does any of this take Habrok? The administrators were quite entitled to make such judgment calls, including prioritising the recapitalisation. And this must be so when around that time, Mr Ryan perceived Hanking to be “time wasters” who would “never pay full value” (see his email to Mr Edelman of 24 March 2020).
4. Fifth, at no stage were Hanking or Adaman anywhere near the range of an offer that would definitely clear the senior secured creditors, let alone something for NRW or indeed unsecured creditors generally.
5. Sixth, of course, at an earlier stage some within FTI were excited by hypotheticals (see Mr Bantock’s email to Mr Ryan on 20 October 2019 saying “If it is really $120M to $140M, trumps a recap…”). But any offer was never close to that, even when the data room was re-opened in May 2020 with an LoMP available for inspection.
6. Seventh, perhaps it may be said that throughout March to May 2020 the administrators dampened enthusiasm for offers. But if that be so, that may simply be a reflection of the low ball bids that had been served up by Hanking and Adaman. Moreover, nothing was to stop Adaman in May/June 2020 making more realistic offers. It chose not to. Instead the strategy in its broader camp seems to have shifted to a Habrok DOCA proposal. But that was their choice.
7. Eighth, Habrok said that it was obvious that a proper and competitive sale process required better information about the Dalgaranga mining operations, such as a more up to date LoMP and LoMP model, to be provided to bidders, but the formal sale process came to an end in November 2019 when the administrators were well aware that work was being done to prepare an updated LoMP model that would be ready just weeks later in December 2019.
8. Now it may be accepted that a phase of the sale process came to an end by the end of November 2019. But the administrators cannot be criticised for that. And it may also be accepted that new modelling had been done by 10 December 2019, although the December 2019 LoMP was not finalised until later. But where does this go? The administrators were entitled to treat with Hanking as the preferred bidder. And Hanking does not complain of any lack of updated information. And so far as Adaman was concerned, when the data room was re-opened to it in May 2020, it had complete access to the updated information and did nothing with it. It did not make any updated offer from its earlier $65 million. Further, the suggestion in Habrok’s written opening submissions that it had floated a $140 million figure turned out to lack substance.
9. Ninth, Habrok said that the administrators were reluctant to provide updated information to Hanking and Adaman. In my view that submission is not a fair reflection of the evidence. There is no evidence that any request for information by a bidder was refused by the administrators.
10. Tenth, in my view Habrok’s case thesis on defects in the sale process fell apart once it became clear that, contrary to its original assertions, Adaman had never floated a $140 million figure around 6 April 2020. At most by that time, it was in the $65 million to $70 million range. And when provided with updated information in May 2020 it chose not to improve its offer.
11. Eleventh, I accept that the 27 November 2019 emails passing between Ms Warwick and Mr Ryan concerning the then sale process suggest problematic aspects of the process at that time and an awareness of potential deficiencies. But I need not conduct any elaborate inquiry into the sale process. I see nothing in the evidence that would justify me in second guessing the administrators’ preference for recapitalisation over sale in the first half of 2020. Moreover, the application before me concerns questions going to the termination of the DOCA. Further, even if I thought that there were deficiencies in the sale process, they go nowhere in light of my previous comments.
12. Finally and more generally, Habrok has asserted that the sale process was deficient and for that reason the DOCA is “oppressive and unfairly prejudicial to creditors”.
13. Section 445D(1)(f)(i) provides that the Court may order the termination of the DOCA if “the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be oppressive or unfairly prejudicial to … one or more such creditors”. But it is not apparent how the sale process could possibly have the effect described in s 445D(1)(f)(i). Nothing in the DOCA validates any asserted deficiency in the sale process nor depends on the sale process.
14. Further, Habrok’s complaint that it or a related party could, if they had more information, have made a better competing proposal (even assuming its correctness) is not a complaint made by Habrok in its capacity as a creditor. The complaint (if true) is the complaint of a failed bidder. In any event, the evidence that I have recited does not support the complaint.
15. Habrok’s criticisms about the sale process have not been substantiated. In any event, even if they were well made they would not justify termination of the DOCA.

## (b) Operational performance and work done

1. From the end of 2019, GCY continued to report on the monthly results of the operational performance of the Mine by announcements to the ASX, which showed the continuing improved performance of the Mine. These disclosures were made to comply with GCY’s continuous disclosure obligations.
2. The GCY Group’s trading performance has continued to improve since the start of 2020.
3. The June 2020 quarterly report for GCY, being the most recent publicly announced operational report, shows:
4. a record quarter with 20,550 ounces of gold produced (compared to 18,841 ounces in the March quarter);
5. that production guidance was achieved and, as noted above, there had been six consecutive months of production of greater than 6,000 ounces;
6. resource definition drilling at Gilbey’s main zone confirmed a higher‑grade zone;
7. GCY remains unhedged, selling 21,072 ounces at spot, averaging $2,602 per ounce;
8. throughput tonnage processed of 682,927 tonnes (compared with 740,702 tonnes in the March quarter);
9. processed record grade of 1.03g/t (compared to 0.85g/in the March quarter);
10. the all-in sustaining costs increased to $1,541 per ounce (compared to $1,217 in the March quarter);
11. free cash flow of $6.0 million was generated in the quarter, with $5.6 million cash on hand;
12. the two batch trials undertaken on Gilbey’s main zone ore exceeded expectations; and
13. the updated ore reserve and LoMP was finalised after the end of the quarter, showing seven years of mine life.

## (c) Engagement with stakeholders

1. From the beginning of the administrator’s appointment, they considered that stakeholder engagement had both important administrative and commercial aspects. Commercially, there were a number of stakeholder groups to manage and communicate with in order to attempt to achieve the strategy of continued trading to improve the value outcome for all stakeholders.
2. Let me pass by the senior secured creditors for the moment and say something about the other stakeholders.

#### NRW

1. NRW was and is a key stakeholder; for convenience I will describe either or both NRW entities as simply NRW unless I stipulate otherwise. NRW is the on-site mining contractor that is responsible for all mining activities and supplies the mining fleet including four excavators and seventeen trucks, as well as the labour to carry out its activities. NRW’s services are provided pursuant to the NRW mining contract.
2. Prior to the commencement of the administration the administrators had never met with anyone from or had any dealings with NRW. But in order to attempt to implement the approach that the administrators had taken of continuing to trade it was important that NRW continued providing its services.
3. NRW is also a large creditor and held a second‑ranking security in relation to the assets of GNT Resources. NRW became a secured creditor of GNT Resources under the NRW GSA. This was within six months of the appointment as administrators.
4. Mr Ryan caused legal advice to be obtained from HSF about whether the NRW GSA and payments made after the NRW GSA was granted would be able to be attacked in a liquidation of GNT Resources. The administrators obtained advice that there was an issue about the NRW GSA and these payments, but it could not be said with certainty that the NRW GSA and these payments could definitely be attacked in a liquidation of GNT Resources. In essence, the issue turned on whether GNT Resources was insolvent when the NRW GSA was granted and whether NRW had a good faith defence to any claim.
5. During the administration, in Mr Ryan’s discussions and negotiations with NRW he proceeded on the basis that there remained doubt about NRW’s security position, which would be the subject of further investigations in any liquidation of GNT Resources. This was reflected in the administrators’ report. However, Mr Ryan proceeded on the basis that it was better to maximise the chances of the GCY Group continuing and all creditors being paid in full, rather than focus on what might or might not occur in a liquidation of GNT Resources or the GCY Group.
6. In the event, regardless of NRW’s security position, Mr Ryan negotiated a position whereby all other creditors would be paid in full before NRW was paid in full. It was proposed that NRW would receive a deferred payment of around $13 million and the repayment regime depended on the gold price and the amount of gold sold. For example, at a constant gold price per ounce of:
7. $2,700, NRW would be repaid by around June 2023;
8. $2,550, NRW would be repaid by around December 2023; and
9. $2,430, NRW would be repaid by around June 2025.
10. More generally, following the administrators’ appointment, and together with Mr Bantock, Mr Ryan was responsible for maintaining engagement with NRW.
11. Initially, NRW requested that it be paid $1.5 million in advance. The administrators considered the option of going to market and engaging a new contractor. However, through their deliberations and discussions with management and operational staff, they formed the view that the viability of this option was very low. They did not agree to NRW’s request for advance payment. Ultimately, they did agree to seven day payment terms.
12. In the circumstances, as the administrators perceived it, it was very unlikely that another contractor would have agreed to enter into a mining contract with a company in administration, on favourable terms, including as to deferred payment. Even if such a contractor could have been found and an appropriate deal struck, there would inevitably have been an operational hiatus. NRW would have had to demobilise and a new contractor would have had to come to the site and start afresh. There would have been a cost for such a demobilisation and a cost in this disruption. This would have been significantly inefficient. It would have impacted the ongoing production of gold. Under the NRW mining contract, there was an obligation to pay demobilisation costs and a termination fee and these were claimed by NRW to be $15,347,681.23 in its first proof of debt for the purposes of the first creditors’ meetings.
13. On 14 June 2019, GNT Resources received a show cause notice in respect of $9,243,343 that was due and payable to NRW pursuant to the NRW mining contract, which required GNT Resources to show cause in writing by 21 June 2019 why NRW should not suspend the works under the NRW mining contract and stated that if GNT Resources did not show cause, NRW may suspend the works, and if the breach was not remedied within 28 days after the date of suspension, NRW may terminate the contract.
14. Given the tight liquidity position of the GCY Group at the time, as the administrators perceived it, the operation could not have afforded any hiatus or extra payment obligation that would have been caused by NRW ceasing to be the mining contractor and the upfront costs required to mobilise a new contractor.
15. In Mr Ryan’s negotiations with NRW, he proceeded bearing the above risks in mind.
16. In early 2020, Mr Ryan approached NRW to seek extended credit terms (beyond the seven day terms) of 21 days. This was to assist with working capital funding which was needed whilst the accelerated cut back of the western wall of the Mine took place. NRW agreed to this on the basis that trading terms returned to seven days as soon as possible and no later than 30 June 2020.
17. Further, I should note that NRW is a substantial shareholder holding approximately 8% of the issued capital of GCY.

#### Other suppliers

1. There were in excess of 50 companies and sole traders that provide services to the operation of the Mine. During the administrators’ appointment, Mr Ryan was responsible for maintaining engagement with Zenith, the contractor responsible for power supply to the Mine.
2. Mr Chivers was responsible for engagement with other key suppliers, including Maroomba, Wesfarmers and EVOL.
3. One of the key issues in engaging with suppliers is to ensure continuity of service. For the majority of suppliers, they were agreeable to providing services without being paid old debts and on new credit terms. Two suppliers, being Orlando and Viva Energy Australia Pty Ltd (Viva Energy), refused to continue to provide credit and services. Viva Energy was the pre‑appointment supplier of diesel to the Mine. Because Viva Energy would not continue supply of diesel unless it was paid its pre-appointment debt in full, the administrators had to obtain alternate supply from WA Fuels, which supplied diesel during the administration and continues to do so.

#### Employees

1. As I have already mentioned, there are 87 employees at the Mine and 12 at head office, excluding three directors. On the administrators’ appointment, there was significant concern about job security. The administrators had a number of group and one-on-one meetings with employees explaining the administration process to them and the strategy of continuing to trade. In June and July 2019, a number of employees nevertheless resigned. This put a strain on the GCY Group’s ability to continue to trade, but this was managed and now staff turnover has returned to normal industry levels.
2. The administrators have held regular meetings with employees during the administration and have worked closely with management. At these meetings, it was apparent to the administrators that employees, some of whom were minor shareholders, hoped that by helping to turnaround the operation to a profitable and sustainable level, the GCY Group could survive, particularly GNT Resources, the owner of the Mine. Whilst they understood a sale was possible and largely out of their control it was apparent that this is not the outcome they wanted.
3. A number of employees voted in favour of the DOCA proposed by the administrators as they saw this as the outcome they had worked hard for and hoped would be achieved.
4. There have been very few redundancies due to the appointment of administrators or deed administrators.

#### Shareholders

1. Throughout the period of the administration, the administrators continued to maintain contact with the larger GCY’s shareholders to monitor their likely interest in being part of another capital raising process. Such funds would be used to pay down the secured debts, fund a DOCA and for ongoing working capital.
2. This involved Mr Ryan travelling to Germany, the United Kingdom and Sydney to meet with various shareholders. He spoke on the telephone with shareholders in the United States of America and South Africa.
3. During these discussions, all of these shareholders encouraged the recapitalisation track of the dual track process saying they would most likely re-invest subject to the business case at the time. In his discussions with the GCY’s larger shareholders, no shareholder told Mr Ryan that they considered they had a claim against GCY or the GCY Group for anything that had occurred before their appointment as administrators. No shareholder told him that they considered they had a claim because of the capital raisings that GCY had undertaken before the appointment of administrators.
4. GCY shareholders with whom Mr Ryan spoke included the following and whose shareholding at the date of the administrators’ appointment was the following:

|  |  |  |
| --- | --- | --- |
| **Shareholder** | **Ownership percentage** | **Number of shares held** |
| Deutsche Balaton AG | 18.4% | 185,316,417 |
| NRW Holdings Limited | 8.6% | 86,238,410 |
| First Sentier | 8.3% | 83,181,701 |
| Lim Advisors Limited | 4.7% | 46,931,539 |
| Franklin Resources, Inc | 2.9% | 29,416,520 |
| Craton Capital (Pty) Ltd | 2.9% | 28,800,000 |
| Rahn+Bodmer Co. | 1.9% | 18,743,594 |
| Lowrie Family | 1.8% | 18,519,729 |
| Hirschmann Capital LLC | 1.4% | 13,888,906 |
| Total | 50.9% | 511,036,816 |

1. Reference to Deutsche Balaton AG, which is the largest shareholder group, includes Delphi Unternehmensberatung AG. In Mr Ryan’s discussions with Mr Thomas Zours, the CEO of Delphi, he had always been supportive of the administration and the administrators’ efforts in seeking to recapitalise and relist the GCY Group.

## (d) Investigation into the cause for failure

1. Mr Francis was responsible for managing the investigation work into the key areas that would need to be covered in the administrators’ report. The administrators commenced this work immediately.
2. Areas which were investigated during the administration and updated and completed prior to issuing the administrators’ report were:
3. the August 2018 capital raising;
4. the May 2019 capital raising;
5. possibility of insolvent trading;
6. breaches of directors’ duties;
7. NRW’s security position;
8. antecedent transactions; and
9. the senior secured creditors’ security position.
10. I will elaborate on this matter later when I deal in more detail with Habrok’s complaints.

## (e) Steps in the recapitalisation and refinancing proposal

1. Significant work went into the recapitalisation and refinancing proposals, in parallel to the sale process which I have already described. Ultimately, this background effort and work done helped the administrators to get comfortable that the DOCA proposed by the administrators could be delivered. Mr Ryan formed the view that for such a proposal to work, the senior secured debt would need to be refinanced and the administrators would need to come up with a solution for other creditors to receive the amounts owing to them that would also provide the GCY Group with sufficient working capital going forward.
2. The administrators initially considered that an asset sale was the most likely outcome because the performance of the Mine had been marginal. However, there were five key factors that contributed to their later view of the value and the possibility of a successful recapitalisation. These were:
3. completion of the accelerated waste cut-back on the western wall;
4. the improved operational performance to achieve above 6,000 ounces of gold production per month;
5. the technical findings in relation to the wall-steepening, which resulted in circa $70 million of estimated cost savings over the life of the Mine;
6. the continued increase in the gold price from June 2019; and
7. the reported profit before tax from January 2020.
8. From July 2019, as part of the dual track process, there were discussions with Macquarie Bank and others about the possibility of the recapitalisation. This occurred while Investec was running the sale process. Investec was also involved in later discussions with Macquarie Bank.
9. Mr Ryan had the conduct of these discussions with Macquarie Bank initially. The communications with Macquarie Bank included the following:
10. On 17 December 2019, the administrators received a letter of offer from Macquarie Bank setting out the costs and details of a refinancing proposal.
11. On 24 December 2019, Mr Hawke sent a letter to Mr David Wailes and Ms Vanessa Lenthell of Macquarie Bank in relation to its proposal, providing further information and seeking clarifications on the basis of assumptions in the Macquarie proposal.
12. On 31 January 2020, there was a telephone call between representatives of Investec and Macquarie Bank, during which Macquarie Bank made it clear to Mr Hawke that it wanted to charge comparatively high interest rates and high hedge margins and wanted to obtain a royalty regime and an equity component.
13. On 27 February 2020, the administrators received an updated indicative offer from Mr Wailes.
14. On 2 March 2020, Mr Hawke sent Mr Ryan an email setting out Investec’s thinking around a possible way forward and the merits of the proposed financing approach.
15. In April 2020, the administrators received from Investec a discussion paper in respect of the recapitalisation and refinancing. A component of this discussion paper was that the administrators approach the senior secured creditors to restructure their existing debt.
16. On 6 May 2020, the administrators received an update from Investec on their discussions with Macquarie Bank. From the information provided by Macquarie Bank, Mr Ryan formed the view that this would be a very expensive refinancing option, and would inhibit the success of any capital raising, in particular as regards any equity value for shareholders.
17. In light of Investec’s suggestion that the administrators approach the senior secured creditors to restructure their existing debt, the administrators wrote to the senior secured creditors putting forward this proposal. Ms Warwick was responsible for this process.
18. In or around November 2019, the administrators engaged a mining finance advisory firm, Blackbird Partners, to find potential international options for refinancing the senior secured debt. Ultimately, Blackbird Partners was unable to find any financier that was willing to lend the whole of the required amount, being approximately $80 million.
19. Given the amounts necessary to pay the senior secured creditors and the other creditors of the GCY Group, namely an amount in the order of $120 million, it became clear to the administrators that to be able to successfully move the GCY Group out of administration with a view to its businesses continuing, it was necessary to obtain both debt and equity, the latter through a capital raising.
20. It was difficult to obtain debt finance at appropriate rates from any financier. As discussed, Macquarie Bank’s proposals were very expensive. Investec assisted the administrators to negotiate with Macquarie Bank and to attempt to find debt funding that was not so expensive. Mr Ryan raised with Investec whether it was willing to provide debt funding. Investec was concerned that it was too risky to provide debt funding to the GCY Group; it was also concerned to provide independent advice to the administrators.
21. In early May 2020, when it became clear to the administrators that debt funding was very difficult to obtain at an appropriate cost, they formally requested that Investec consider providing the administrators with a refinancing facility for the existing debt.
22. Investec considered the administrators’ formal request and formed the view that it would be willing to provide debt funding through the Australia Branch of its related UK company, Investec Bank Plc (the refinance financier). Apparently, Investec had become less concerned about the risk the GCY Group posed, given the progress that had been made in investigating the future of the Mine and given that the debt funding was to be a part of a wider capital raising.
23. Between around February and March 2020, the administrators, together with Investec, commenced roadshow presentations to engage a suitable and willing broker that would support the proposed capital raising.
24. The parties they met with included: Canaccord, Morgans, Ashanti Capital, UBS, Macquarie Bank’s equity division, Bell Potter, Argonaut, Foster Stockbroking, Bridge Street Capital Partners, Euroz Limited and Hartleys Limited. Mr Ryan attended various meetings with these parties, either by phone or in person, together with Mr Edelman and Mr Hay.
25. The parties that they met were interested in supporting the proposed capital raising. They received competing proposals from a number of the parties.
26. Following a formal review process, the administrators ultimately proceeded with Canaccord. Canaccord’s proposal was successful because:
27. it had a strong international network and exposure to equity markets;
28. it presented a competitive price point;
29. Canaccord representatives were very involved in the process, having attended the Mine site, and were optimistic they could achieve a successful and fully underwritten raise; and
30. it had demonstrated performance in the industry, having recently raised $98 million for Dacian Gold Ltd, which had operational similarities to GCY.
31. On 14 April 2020, Mr Ryan received an email from Mr Edelman reporting on a telephone call he had with Canaccord, in which Canaccord had said that its initial enquiries indicated that the proposed capital raising would attract much interest.
32. On 15 April 2020, the administrators received a draft engagement letter from Mr Duncan St John of Canaccord.
33. On 16 April 2020, Mr Ryan received an email from Mr Edelman recording the details of a telephone call that he had with Canaccord as to its draft engagement letter and proposal.
34. On 21 April 2020, Canaccord were appointed as lead broker.
35. Between its appointment and the release of the administrators’ report, the administrators continued to engage with Canaccord. On 7 May 2020, they received a letter of support for the proposed capital raising, which stated that Canaccord was highly confident that it could execute and fully underwrite a capital raising of between $50 million to $80 million.
36. On 28 June 2020, the administrators received a further letter from Canaccord indicating its support for the administrators’ recapitalisation and relisting proposal contemplated in the DOCA and its intention to fully underwrite a capital raising of between $70 million to $80 million.

## (f) Genesis of the DOCA

1. In 2020, whilst they were working on seeking debt funding and equity, the administrators did not receive any DOCA proposal from any entity.
2. Toward the end of March 2020, given the improving business position and the interest expressed by existing shareholders for the recapitalisation, and soundings made with brokers, the administrators began to formulate a DOCA proposal. The DOCA proposal had the support of the senior secured creditors and required NRW to agree to an arrangement under which its claim for payment would be structured so as to give the GCY Group time to repay the whole of its claim, to enable an acceptable proposal and an acceptable return for the unsecured creditors (including employees) of the GCY Group.
3. Under the original DOCA proposal, these agreements with NRW resulted in a part of NRW’s claim to rank behind a part of the unsecured creditors’ claims, including wholly behind the small unsecured creditors.
4. On 7 April 2020, the administrators formed a due diligence committee and began to hold regular meetings with respect to the DOCA proposal and the proposed capital raising. Subsequent meetings of the due diligence committee were held on 12 May 2020, 29 June 2020, 30 July 2020, 7 August 2020, 12 August 2020 and 13 August 2020.
5. By early June 2020, the administrators instructed HSF to engage with the ASX in relation to the proposed capital raising and to discuss re-listing conditions. A copy of the draft report to creditors was provided to ASX on 15 June 2020.
6. At the time that the administrators’ report was issued and at the second creditors’ meetings, the administrators had confidence in their DOCA proposal because of the following:
7. positive engagement from shareholders, in particular with Delphi;
8. positive engagement from critical suppliers, including Zenith;
9. positive feedback from brokers, including the agreement with Canaccord;
10. the continuing strength of the gold price and improving market sentiment generally;
11. engagement with the senior secured creditors;
12. the administrators had engaged with three prospective directors that had agreed to accept appointment as directors;
13. the consistent operational performance of the Mine;
14. draft agreements with Investec with respect to the refinancing; and
15. the NRW side-agreement, which I will mention in a moment.
16. On 18 June 2020, the administrators’ report was sent to creditors and made available on the GCY Group’s creditors’ portal. An ASX announcement was also made as to the administrators’ recommendation that creditors approve their DOCA proposal. The administrators proposed that the second creditors’ meetings should be on 25 June 2020, in accordance with s 439A(2). I will return to discussing the administrators’ DOCA proposal shortly. But at this point it is useful to identify the rival DOCA proposals and their genesis from the administrators’ perspective.

## (g) Hanking DOCA proposal

1. On 22 June 2020, Mr Ryan received a telephone call from Mr Matt Selby of Argonaut. Mr Selby informed him that his client, Hanking, was going to submit a competing DOCA proposal.
2. Following that telephone call, Mr Selby sent Mr Ryan a draft of the Hanking DOCA proposal and requested an urgent meeting with Mr Selby and Hanking to discuss the proposal.
3. The administrators responded to this request by sending Hanking a letter requesting additional information because certain matters were unclear, including the conditions for funding, the implementation of the Hanking DOCA proposal and the timing for the implementation.
4. The administrators discussed the Hanking DOCA proposal with Investec, Canaccord and HSF to seek to understand how it compared with the administrators’ DOCA proposal and any issues regarding completion risk.
5. On 22 June 2020, Mr Ryan sent the Hanking DOCA proposal to NRW and asked for comment.
6. On 23 June 2020, Mr Andrew Walsh of NRW called Mr Ryan to discuss it. During this conversation Mr Walsh said words to the effect that Hanking was offering NRW a larger payment and that NRW felt it needed to receive an improved proposal from the GCY Group. Mr Ryan tried to convince NRW of the uncertainty of the Hanking DOCA proposal and asked for its continued support for the GCY DOCA proposal without any changes being made to it.
7. Because of that conversation, Mr Ryan recognised that, in order to preserve the certainty of outcome for all creditors, it would be necessary to increase the upfront cash payment of equal to 5% of the gross capital raising proceeds referred to in the administrators’ report. Based on a proposed capital raising of around $80 million, the 5% equated to about $4 million.
8. Mr Ryan had a further telephone call with Mr Walsh later that day after Mr Ryan had reflected on the position, discussed it with Ms Warwick and Mr Ryan’s legal advisors, and considered what was in the best interests of all creditors.
9. During that further discussion Mr Walsh said words to the effect that NRW desired an upfront repayment of $7 million; under the Hanking DOCA proposal, Hanking was offering an upfront payment of $10 million to NRW. Mr Ryan said words to the effect that any amount needed to be capped as a proportion of the proceeds of the gross capital raising, and after some discussion, he proposed the upfront payment to NRW should be 8.75% of the gross capital raising proceeds but capped at $7 million. They reached an in‑principle agreement that NRW would receive an upfront repayment calculated at 8.75% of the gross proceeds of the capital raising, capped at $7 million, which was an increase from the $4 million that had previously been agreed (i.e. the 5% of the gross proceeds).
10. The result of this in-principle agreement was that NRW would receive a smaller upfront payment than that proposed by the Hanking DOCA proposal, but which was more than the administrators’ DOCA proposal. The in‑principle agreement that Mr Ryan made was documented in the NRW letter agreement and agreed finally on 24 June 2020 (the NRW side-agreement). I will discuss the NRW side-agreement further in a separate section of my reasons.
11. On 23 June 2020, the administrators sent a letter to the GCY Group’s creditors informing them of the Hanking DOCA proposal, provided a comparison between it and the administrators’ DOCA proposal, and said they were seeking clarification from Hanking about the Hanking DOCA proposal and the potential risks associated with it.
12. On 24 June 2020, Mr Ryan discussed the Hanking DOCA proposal and possible changes to the administrators’ DOCA proposal with Investec, NRW and the incoming board of GCY. Mr Ryan’s aim was to try and improve the return to unsecured creditors further, in the light of his discussions with NRW and the Hanking DOCA proposal.
13. On 24 June 2020, the administrators made changes to their DOCA proposal. In effect, the changes were to enable unsecured creditors to be paid earlier than the repayment of a part of NRW’s claim. These changes were made during the course of 24 June 2020. They were the subject of GCY’s announcement to the ASX on 25 June 2020 and were put to the creditors at the second creditors’ meetings on 25 June 2020.
14. Having made the change to the structure of NRW’s repayment, Mr Ryan wanted to improve the outcome for unsecured creditors so that it offered a similar outcome for unsecured creditors to that being proposed by the Hanking DOCA proposal being that they would be repaid at an earlier date than was originally proposed under the administrators’ DOCA proposal.
15. In deciding how to give effect to this, Mr Ryan:
16. obtained legal advice to ensure that a change to the administrators’ DOCA proposal at this point in time was permissible;
17. conferred with Ms Warwick regarding the structure of such a proposal;
18. conferred with the proposed new directors of GCY, as they would be responsible for ensuring payment would be made;
19. liaised with NRW, as this would result in money being paid out to unsecured creditors before NRW was repaid in full; and
20. liaised with the refinance financier, as this would result in additional, and previously unplanned, cash outflow from the GCY Group, and Mr Ryan was concerned that this was not the basis on which the refinance financier had agreed to its refinancing proposal.
21. All of the above stakeholders agreed to a proposal to bring forward the second tranche cash component to be paid for the benefit of the large unsecured creditors by ensuring the requisite payment was made within six months of the effectuation of the administrators’ DOCA. This change was announced at the second creditors’ meetings on 25 June 2020.
22. On 24 June 2020 at 2:37 pm, Hanking responded to the administrators, and requested that the second creditors’ meetings be adjourned.
23. That same day at 6.57 pm, the administrators responded to Hanking and confirmed that the administrators would put a resolution to adjourn the creditors’ meetings to the vote.
24. NRW did not support the Hanking DOCA proposal and had agreed to the NRW side-agreement. GCY announced to ASX on 25 June 2020 that NRW would oppose an adjournment of the second creditors’ meetings and supported the administrators’ DOCA proposal subject to the presentation of a better offer or an adjournment of the meetings.
25. Ultimately, the decision that the administrators made to decline Hanking’s request for the second creditors’ meetings to be adjourned and to allow creditors to decide was made for the following reasons.
26. First, an adjournment in the terms above had the potential to put the proposed capital raising at risk, and would increase the exposure to gold market risk and general operational risk.
27. Second, there were a number of execution risks with the Hanking DOCA proposal and the Hanking DOCA proposal was not supported by NRW, without whose support the return to creditors could not be further improved.
28. Third, the proposed prospectus relied on financial accounts prepared as at 31 December 2019 and an adjournment that led to an extended delay would have meant that there would have been further delays because it would then have been necessary to rely on updated accounts for 30 June 2020 to be prepared and audited.
29. Further, on 25 June 2020 at 11.27 am, Mr Ryan received an email from Delphi informing him that as the major shareholder of GCY, Delphi supported the administrators’ DOCA proposal and did not support the Hanking DOCA proposal.
30. On 25 June 2019 at 11.29 am, the administrators received a letter advising of amendments to the Hanking DOCA proposal.

## (h) Habrok Mining DOCA proposal

1. As I have already said, Habrok Mining submitted a DOCA proposal at approximately 5.30 pm on 24 June 2020. I have set out some of the detail earlier.
2. The administrators had to consider the Habrok Mining DOCA proposal urgently and decide how best to proceed. Ms Warwick took responsibility for this. In short, however, because the Habrok Mining DOCA proposal did not deal adequately with all of the claims of all creditors, among other issues, it was not possible for the administrators to recommend that the creditors should explore or accept the Habrok Mining DOCA proposal.

## (i) The DOCA propounded by the administrators

1. The GCY Group’s creditors’ claims excluding intercompany debt and employees entitlements as at the date of the appointment of the administrators is as follows, save that in the case of the debt due to the senior secured creditors (the senior secured debt) this debt includes interest accrued since their appointment:

|  |  |  |
| --- | --- | --- |
| **Name of creditor** | **Debtor company** | **Details** |
| NAB and CBA | GNT Resources, Dalgaranga Operations and GCY | In total, approximately $55 million of senior secured debt, secured over the GCY Group’s assets. |
| NAB and CBA | GNT Resources, Dalgaranga Operations and GCY as guarantors | In total, approximately a further $25 million of senior secured debt, secured over the GCY Group’s assets, as a consequence of the close out by NAB and CBA of gold hedging facilities under ISDA master agreement. |
| NRW | GNT Resources | Approximately $32.7 million (excluding GST) by way of second ranking secured debt over assets of GNT Resources (subject to NRW’s security potentially being an unfair preference or voidable charge). |
| Various suppliers (being approximately 33 for GCY and approximately 93 for GNT Resources) | GCY and GNT Resources | Approximately $6.4 million. |

1. The DOCA, which was approved at the second creditors’ meetings, and the accompanying creditors’ trust deed facilitates a recapitalisation of the GCY Group and, assuming successful completion under the DOCA, it is currently anticipated that all of the secured and unsecured creditors of the GCY Group will recover 100 percent of the amounts outstanding to them.
2. The funds necessary to pay the debts due to the creditors are to come from three sources being:
3. the proposed capital raising of $85 million, in respect of which a prospectus was issued by GCY on 13 August 2020;
4. the proposed refinance facility (the refinance facility) under which the GCY Group will borrow $40 million from the refinance financier; and
5. cash generated from the trading operations of GNT Resources in respect of the Mine which either has, or will, fund the balance of the amounts due to creditors.
6. The payment of the creditors is to be effected as follows:
7. The senior secured debt is to be repaid in full, as to $40 million, by the financing obtained from the refinance facility, further by the payment of ongoing instalments of $1 million per month that commenced 1 July 2020, from trading operations (until funds are received from the proposed capital raising), and, as to the balance, using part of the proceeds of the proposed capital raising.
8. The debt due to NRW is to be paid in full:
   1. as to part, by a cash payment representing 8.75% of the proceeds of the proposed capital raising, capped at $7 million;
   2. as to $12 million, by the issue of shares in the capital of GCY on or about the same time, and at the same price, as the issue of shares under the proposed capital raising; and
   3. as to the balance, in quarterly instalments, by cash generated by the future trading operations of the Mine, calculated in a way which sees NRW paid out of profits generated by the future mine operations; it is currently estimated that, at a constant gold price of $2,550 per ounce and gold production as forecast, the balance of the debt due to NRW will be repaid in full by December 2023; NRW will release its second‑ranking security when it receives the payment referred to in sub-paragraph (b)(i) and the shares referred to in sub-paragraph (b)(ii).
9. $1 million will be applied to pay all unsecured creditors the first $10,000 of the debt due to them, or up to $10,000 if the debt is less than that, out of the proposed capital raising. In this regard, there are:
   1. 61 small unsecured creditors that will be paid in full; and
   2. 57 large unsecured creditors.
10. As to the balance owed to the large unsecured creditors these creditors will receive:
    * 1. 50% of the balance of the debt due to them in shares in GCY, which shares are to be issued to the deed administrators acting as trustees of the creditors’ trust on or about the same time, and at the same price, as the issue of shares under the proposed capital raising; these shares will, at the option of each large unsecured creditor, either be transferred to that creditor or sold and the proceeds paid to that creditor within two or three months of completion under the DOCA;
      2. as to the remaining 50% of the balance of the debt due to them (the second tranche cash component), within six months, cash from the trading operations of GNT Resources; in fact, due to the current gold price and the success of recent mining operations at the Mine, GNT Resources is in a position to immediately pay this amount.
11. On 20 August 2020, the new directors of GCY resolved to place the amount of the large unsecured creditor balance, thought to be approximately $2.5 million, into a separate bank account as soon as practicable so that the second tranche cash component could be transferred to the creditors’ trust immediately after effectuation of the DOCA, instead of toward the end of the six month period after effectuation of the DOCA as previously contemplated, and thereafter paid to beneficiaries as soon as practicable.
12. On 24 August 2020, the directors noted that the analysis of the deed administrators indicated that the likely quantum of the large unsecured creditor balance would be in the range of $2.75 million to $2.85million, further resolved to pay $2.85 million into the deed administrators’ trust account and directed the deed administrators to transfer that money into the creditors’ trust upon effectuation of the DOCA. If the DOCA is not effectuated, or if there is a surplus, that money is to be transferred back to the GCY Group.
13. Completion under the DOCA is subject to the satisfaction or waiver of the conditions precedent which are set out in cl 3.1 of the DOCA. In summary, those conditions require the following to occur on or before 30 November 2020 or such later date as may be specified in a written notice issued by the deed administrators to the creditors:
14. The DOCA being approved by the creditors of the GCY Group at the second creditors’ meetings, which condition was satisfied on 25 June 2020, and the execution of the DOCA, which condition was satisfied when the DOCA was executed on 26 June 2020.
15. The execution of the creditors’ trust deed, which condition was satisfied when the creditors’ trust deed was executed on 26 June 2020. The version of the creditors’ trust deed attached to the DOCA has some cross-referencing errors. They were corrected before the creditors’ trust deed was executed.
16. Repayment of the senior secured debt and the release of the security held in respect of the senior secured debt, which condition has been substantially progressed. The senior secured debt is to be repaid from the proceeds of the refinance facility, from ongoing trading and from the proposed capital raising.
17. Repayment of the facility extended to the administrators by CBA (administrators’ facility), which condition was satisfied in June 2020.
18. Entry into of the refinance facility and related security agreements, which condition has been satisfied.
19. Entry into of the hedging agreement with the refinance financier, which condition has been satisfied.
20. Entry into of the NRW side-agreement, which will see the debt to NRW paid and the release of the security held by NRW over GNT Resources, which condition has been satisfied.
21. Appointment of new directors to the GCY board, which condition was satisfied by way of resolutions passed at a shareholders’ meeting.
22. Completion of the proposed capital raising on terms satisfactory to the deed administrators, which condition has been substantially progressed.
23. On 13 August 2020, the relevant GCY Group entities entered into the following agreements (the refinance documents) with the refinance financier and its related entities:
24. a facility agreement between, amongst others, the refinance facility financier, Investec Australia Limited (the security trustee) and the GCY Group, pursuant to which the refinance facility financier agreed to advance $40 million to GCY to enable the senior secured debt to be refinanced to that extent;
25. a security trust deed between, amongst others, the refinance financier, the security trustee and the GCY Group;
26. a general security agreement between the security trustee and the GCY Group; and
27. a mining mortgage between the security trustee and GNT Resources.
28. On 13 August 2020, GNT Resources entered into an ISDA master agreement and schedule with the refinance financier. The hedging agreement will facilitate the entry into hedges for at least 40% of GNT Resources’ gold production, and for the first 18 month period, at a price of not less than $2,400 per ounce. These hedges will be executed on or around the time of completion under the DOCA.
29. As at 26 August 2020, the debts due to the majority of creditors have been quantified. By a circular to creditors dated 3 July 2020, the administrators called for formal proofs of debt.
30. The administrators received the following unsecured creditor claims that have been adjudicated on.

|  |  |  |
| --- | --- | --- |
| **Entity** | **Number** | **Value ($)** |
| GNT | 92 | 5,965,511.67 |
| GCY | 33 | 441,289.68 |
| **Total claims** | **125** | **6,406,801.35** |

1. The entitlements of the non‑continuing employees of the GCY Group, being employees whose employment terminated prior to or during the administration, have been determined and were paid on 24 July 2020 pursuant to the DOCA. A summary of the total amounts paid to non‑continuing employees is set out below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Entity** | **Number** | **Value ($)** | **PAYG ($)** | **Net payment ($)** |
| GNT | 31 | 154,485.93 | 60,043.97 | 94,441.96 |
| GCY | 8 | 78,628.19 | 31,694.43 | 46,933.76 |
| **Total claims** | **39** | **233,114.12** | **91,738.40** | **141,375.72** |

1. Directors and officers insurance was agreed and put in place as of 28 July 2020 and was paid on 12 August 2020, as the payment terms of that policy required payment to be made within 30 days.
2. As I have mentioned, an amount of $2.85 million has been paid into the administrators’ trust account. This amount equates to the amount needed to distribute the second tranche cash component to the large unsecured creditors. If the DOCA is not effectuated, or if there is a surplus, that money is to be transferred back to the GCY Group.

## (j) Proposed capital raising

1. Given the lead time required to conduct a capital raising of the nature contemplated by the proposed capital raising, with a view to reducing the risks associated with the proposed capital raising in advance of the second creditors’ meetings, HSF was instructed to engage with the ASX to:
2. request confirmation of the conditions the ASX will require GCY to satisfy before its shares can be reinstated to trading;
3. seek ASX approval of the timetable for the proposed capital raising in accordance with the ASX Listing Rules;
4. seek ASX approval of the notice of EGM seeking shareholder approval for the issue of shares in connection with the proposed capital raising, as well as ancillary matters such as the appointment of new non‑executive directors; and
5. seek standard waivers of certain ASX Listing Rules for the purposes of the proposed capital raising.
6. The ASX has advised that it can see no reason why the securities of GCY should not be reinstated to official quotation, subject to compliance with certain specified conditions (ASX reinstatement conditions). Until the present proceedings are resolved, there is a risk as to whether the following ASX reinstatement conditions and requirements will cause concerns to ASX:

23.15. An update on all litigation with respect to GCY (if any).

23.16. A statement confirming that there are no legal, regulatory or contractual impediments to GCY undertaking the activities the subject of the commitments disclosed in the Prospectus.

1. Let me now say something about shareholder approval.
2. For the purposes of the proposed capital raising, GCY required shareholder approval, including for the purposes of the ASX Listing Rules and GCY’s constitution, in relation to the issue of shares in connection with the proposed capital raising.
3. The notice of EGM was prepared and submitted to ASX for review as required by the ASX Listing Rules. The ASX reinstatement conditions were set out in sch 2 of the notice of EGM and an indicative timetable for the proposed capital raising was set out in s 1.8 of the notice of EGM.
4. The notice of EGM was despatched to the shareholders of GCY on 6 July 2020.
5. The meeting of shareholders as contemplated by the notice of EGM was held on 5 August 2020.
6. All resolutions put to shareholders at the EGM, in accordance with the notice of EGM, were passed by over 99% of the votes cast by the shareholders of GCY, with approximately 65% of the shareholders of GCY having voted at the meeting, in person or by proxy. Details of the proxy votes and votes cast on the poll for each resolution were announced to the ASX, pursuant to an announcement dated 5 August 2020.
7. The issue of shares for the purposes of the proposed capital raising as contemplated by the notice of EGM and approved by shareholders comprises the following:
8. an accelerated non-renounceable entitlement offer of new shares to raise approximately $50 million (entitlement offer); the entitlement offer itself comprises an accelerated institutional component and a subsequent retail component;
9. a placement of new shares to sophisticated, professional or experienced investors to raise approximately $35 million (placement);
10. an issue of new shares to NRW as part of its debt‑to‑equity conversion;
11. an offer of new shares to the trustees for the benefit of large unsecured creditors; and
12. an offer of new shares to Mr Hay, the chief executive officer of GCY, in accordance with his employment contract.
13. The terms on which shareholders approved the issue of these shares at the EGM included that the shares must be issued no later than three months after the date of the EGM, such date being 5 November 2020, or such later date to the extent permitted by any ASX waiver or modification of the ASX Listing Rules.
14. Let me elaborate further on the proposed capital raising.
15. The indicative timetable for the proposed capital raising set out in s 1.8 of the notice of EGM proposed the launch of the proposed capital raising on 6 August 2020, being the date immediately after the date of the EGM. Given the issue of these proceedings, it was determined, in consultation with the lead manager, Canaccord, to delay the launch. The uncertainty caused by these proceedings had to be assessed by Canaccord and the underwriting agreement had to be amended to take account of these proceedings.
16. On 10 August 2020, HSF wrote to ASX seeking confirmation of the proposed timetable for the proposed capital raising based on a proposed launch date of 13 August 2020.
17. On 11 August 2020, the ASX responded to HSF by email confirming that the proposed timetable was not inconsistent with the ASX Listing Rules.
18. On 13 August 2020, GCY lodged a prospectus with ASIC in connection with the proposed capital raising.
19. The entitlement offer and placement are fully underwritten by Canaccord.
20. In respect of the relevant events undertaken as part of the proposed capital raising:
21. The institutional component of the entitlement offer and the placement opened on 13 August 2020.
22. The institutional component of the entitlement offer and the placement closed on 17 August 2020 and were heavily oversubscribed. GCY received commitments for approximately $26.3 million under the institutional component of the entitlement offer and for $35 million under the placement. Details of the results of the entitlement offer and placement were announced to the ASX, pursuant to an announcement dated 17 August 2020.
23. The prospectus was despatched to eligible shareholders of GCY on 20 August 2020.
24. The retail component of the entitlement offer opened on 20 August 2020.
25. All but one of the shareholders who made significant investments in the May 2019 capital raising is participating in the proposed capital raising.
26. In respect of the current timetable relevant to the proposed capital raising:
27. The retail component of the entitlement offer, which is fully underwritten, closed on 17 September 2020.
28. The settlement date for the entitlement offer and the placement is 29 September 2020.
29. New shares are scheduled to be issued on 30 September 2020.
30. The expected date for shares to recommence trading on ASX, following satisfaction of the ASX reinstatement conditions, is early October 2020.
31. Apparently, any delay to an event specified in the timetable requires Canaccord’s consent as underwriter of the entitlement offer and placement. If the delay exceeds five business days, Canaccord has a right to terminate the underwriting agreement in its absolute discretion. If the underwriting agreement is terminated, the proposed capital raising cannot complete on its current terms. Apparently Canaccord has already agreed to such an extension, which is factored into the above timetable.
32. If the proposed capital raising does not complete, creditors of the GCY Group will be prejudiced. The return to creditors of 100 cents in the dollar contemplated by the DOCA, which is conditional upon the proposed capital raising, will not be able to be paid or at least will be significantly delayed.

## (k) Other matters

1. CBA and NAB hold first-ranking security over all of the GCY Group’s assets and, as noted, are jointly owed approximately $80 million, being approximately 68% of the total creditor claims against the GCY Group excluding employees.
2. Upon the appointment of the administrators, it was agreed with CBA and NAB that a deed of consent would be entered into pursuant to which CBA and NAB retained the right to enforce their security at any time on 24 hours’ notice. However, despite this right to enforce their security at any time, CBA and NAB have supported the administration process; and throughout the process, they have been kept informed so that they could make a proper assessment at all times as to whether to exercise their security rights.
3. In June 2019, CBA provided a $2 million overdraft facility, which was increased to $5 million in November 2019, referred to as the administrators’ facility, to the GCY Group, to assist with the working capital requirements of the GCY Group, particularly during the period between November 2019 and February 2020, when it was anticipated that there may be a cash flow shortfall due to extra costs for accelerated waste earth moving activity, to be able to continue to access sufficient gold ore bearing material for the Mine to be operated profitably and in a more reliable manner. As anticipated, during that period, the administrators’ facility was fully drawn down. However, since that accelerated waste earth moving activity was undertaken, the Mine has been trading on a cash flow positive basis, which enabled the administrators’ facility to repaid in June 2020, thereby satisfying that condition under the DOCA.
4. CBA and NAB have supported the recapitalisation of the GCY Group by agreeing to exclusivity arrangements. Pursuant to the exclusivity arrangements, the CBA and NAB have given the GCY Group until early October 2020 to complete the proposed capital raising and the relisting of GCY, which will enable the GCY Group to pay the CBA and NAB all amounts owing to them in full. In particular, CBA and NAB have agreed that they will not accept or enter into, or offer or agree to accept or enter into, any transaction which may jeopardise the completion of the DOCA. These arrangements support the DOCA and consequent proposed capital raising, by providing the market with certainty with respect to the senior secured debt during the recapitalisation phase.
5. Completion of the proposed capital raising in accordance with the timetable set out in the prospectus will mean that the CBA and NAB will be repaid in or around early October 2020.
6. If the DOCA is allowed to move to completion, the senior secured creditors will be repaid their debt in full in the short term. It also means that all other creditors of the GCY Group will obtain full value either in cash or shares for their claims against the GCY Group. It is likely that unsecured creditors, including employees, small unsecured creditors and large unsecured creditors, will get full value in the short term. This includes the claim of Orlando that has assigned its claim to Habrok.

# THE SIGNIFICANT QUESTIONS

1. The relevant statutory provisions sought to be invoked by Habrok are ss 445D and 447A. I should set these out before proceeding further.
2. Section 445D provides:

(1) The Court may make an order terminating a deed of company arrangement if satisfied that:

(a) information about the company’s business, property, affairs or financial circumstances that:

(i) was false or misleading; and

(ii) can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed;

was given to the administrator of the company or to such creditors; or

(b) such information was contained in a document that accompanied a notice of the meeting at which the resolution was passed; or

(c) there was an omission from such a document and the omission can reasonably be expected to have been material to such creditors in so deciding; or

(d) there has been a material contravention of the deed by a person bound by the deed; or

(e) effect cannot be given to the deed without injustice or undue delay; or

(f) the deed or a provision of it is, an act or omission done or made under the deed was, or an act or omission proposed to be so done or made would be:

(i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or

(ii) contrary to the interests of the creditors of the company as a whole; or

(g) the deed should be terminated for some other reason.

(2) An order may be made on the application of:

(a) a creditor of the company; or

(b) the company; or

(ba) ASIC; or

(c) any other interested person.

1. Section 447A provides:

(1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.

(2) For example, if the Court is satisfied that the administration of a company should end:

(a) because the company is solvent; or

(b) because provisions of this Part are being abused; or

(c) for some other reason;

the Court may order under subsection (1) that the administration is to end.

(3) An order may be made subject to conditions.

(4) An order may be made on the application of:

(a) the company; or

(b) a creditor of the company; or

(c) in the case of a company under administration—the administrator of the company; or

(d) in the case of a company that has executed a deed of company arrangement—the deed’s administrator; or

(e) ASIC; or

(f) any other interested person.

1. It is also not in doubt that these sections must be construed and applied in light of the objects set out in s 435A, which provides:

The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

(b) if it is not possible for the company or its business to continue in existence—results in a better return for the company’s creditors and members than would result from an immediate winding up of the company.

1. Clearly the DOCA in the present case is consistent with the object in s 435A(a) as Mr Brahma Dharmananda SC for the defendants pointed out. Contrastingly, Habrok’s application, if I accede to it, is calculated to produce the opposite result.

## (a) Does Habrok have standing?

1. An order under ss 445D and 447A may be made on the application of a “creditor of the company” or “any other interested person”. The defendants contend that Habrok is neither such a creditor nor an interested person.
2. The defendants say that Habrok is not a creditor because it was not a creditor when the second creditors’ meetings occurred or when the administration of the GCY Group commenced. It says that this is what is required under both ss 445D and 447A. Further, it is said that Habrok is not an interested person.
3. It may be accepted that Habrok was not a creditor of any entity in the GCY Group when the second creditors’ meetings were held. Habrok took an assignment of the claim of Orlando against GNT Resources only on 4 August 2020, the day on which this proceeding was commenced. This was of course after the second creditors’ meetings had occurred and after the DOCA had been executed.
4. Further, Habrok did not make any proposal for the creditors to consider at the second creditors’ meetings. Rather, Habrok Mining made a DOCA proposal at about 5.30 pm on 24 June 2020, being the eve of the second creditors’ meetings.
5. Further, neither Habrok nor persons associated with it are employees of the GCY Group. So it cannot purport to complain on their behalf. And indeed, on the evidence, employees of the GCY Group have not raised complaints of the type now raised by Habrok concerning the DOCA, including Habrok’s points concerning priority creditors that I will discuss later.
6. Further, Habrok is not a shareholder of GCY or any other company in the GCY Group. So it cannot purport to complain on their behalf. Indeed, on the evidence, shareholders have not raised complaints of the type now raised by Habrok. Many shareholders support the DOCA. Further, they have supported the proposed capital raising. Moreover, the relief Habrok now seeks is the winding up of the GCY Group. And it is not clear how in a winding up of the GCY Group any alleged shareholder claims would receive value, given the debts owed to the senior secured creditors and the other creditors.
7. In *Allatech Pty Ltd v Construction Management Group Pty Ltd* (2002) 167 FLR 324 Austin J held that Allatech was an “other interested person” when Allatech sought to terminate a DOCA. Austin J said that “other interested person” are words of wide scope, intended to encompass applicants whose material rights or economic interests are or may be affected by the operation of a DOCA at least where the effect is substantial. But it is said that in the present case, Habrok had and has no material right or economic interest relating to the GCY Group. And the fact that its former parent company, Habrok Mining, put forward the Habrok Mining DOCA proposal on the eve of the second creditors’ meetings does not demonstrate that Habrok has an interest. Moreover, it is said that Habrok Mining also has no material right or economic interest relating to the GCY Group. At best, it made a proposal on the eve of the second creditors’ meetings to acquire a new interest. But that cannot be sufficient for the purposes of ss 445D or 447A. And in any event, Habrok Mining does not sue.
8. Further, it is said that Habrok does not have standing to apply under s 90‑15 of the *Insolvency Practice Schedule*, assuming that s 90‑15 is a relevant source of power. Section 90‑20(1)(a) of the *Insolvency Practice Schedule* relevantly gives standing to a person with a “financial interest in the external administration of a company” to apply for an order under s 90‑15. Section 5‑30(a)(ii) of the *Insolvency Practice Schedule* provides that a person has such a financial interest if, relevantly, the person is a creditor of the company. But it is said that Habrok was not a creditor at the requisite time.
9. Further, the defendants say that the fact that Habrok has no standing can be demonstrated by considering the assertions it makes relying on one or other of the criteria in s 445D to terminate the DOCA. The defendants make three points.
10. First, the defendants say that Habrok’s assertion that information provided about the GCY Group was materially false or misleading has consequences under s 445D(1)(a) only if such information was relevantly given to the GCY Group’s creditors. But it is said that Habrok cannot complain that it was misled as a creditor, which is the matter to which s 445D(1)(a) is directed.
11. Second, the defendants say that Habrok’s assertion that there were material omissions in the administrators’ report under s 445D(1)(c) is engaged only when such omissions were material to creditors in deciding whether the DOCA should be made. But it is said that Habrok cannot complain because it was not involved in that decision nor did it have any right to be involved.
12. Third, the defendants say that Habrok’s assertion that the DOCA would be oppressive or unfairly prejudicial under s 445D(1)(f) is enlivened if such oppression or prejudice is to one or more “creditors”. But it is said that Habrok cannot complain because it was not oppressed or treated prejudicially as a creditor.
13. Moreover, the defendants point out that Habrok acquired Orlando’s claim against GNT Resources. But under the DOCA, it is expected that Orlando will receive full value for its claim. So, if the assignment to Habrok is valid, Habrok will obtain full value as an assignee creditor. Accordingly, the defendants contend that even as an assignee creditor, otherwise unaffected by what occurred at the second creditors’ meetings and what was said in the administrators’ report, Habrok cannot legitimately assert that it has a right to complain. Habrok chose to buy in to its present position, and for the collateral purpose of putting the GCY Group into liquidation so that it could buy the Mine and other assets cheaply. Accordingly, as an assignee creditor it has nothing validly to complain about.
14. Further, the defendants say that where the GCY Group’s creditors will obtain full value under the DOCA, the GCY Group’s business will continue and GCY will be relisted giving value to shareholders, there is no reason why Habrok should be permitted to force the GCY Group to be wound up. That would not be in the creditors’ or shareholders’ interests. It would only serve the interests of Habrok, Habrok Mining or Adaman in their capacity as entities that wished to acquire the GCY Group or its assets.
15. Further, the defendants say that no creditor of the GCY Group who would have standing has applied for relief. In this context, the defendants say that the position of Viva Energy, being, as I have mentioned, one of two suppliers that refused to continue to provide credit and services to the GCY Group during the administration, does not advance Habrok’s position. Viva Energy makes no claim itself. Further, the suggestion that Viva Energy would be interested in resuming supply if the DOCA were terminated is not to the point. Moreover, qua present creditor, Viva Energy will receive full value under the DOCA; such a suggested interest in resuming supply would be qua future creditor. In any event, the defendants say that all future creditors will benefit if the GCY Group’s business continues as contemplated by the DOCA. The DOCA aims to keep the GCY Group’s business going in the interests of all creditors, including existing and future suppliers. Similar points can be made concerning the position of Cater Care Services Pty Ltd, which was replaced as the on-site caterer in May 2019.
16. I would reject the defendants’ contentions concerning the question of standing. Habrok is both a creditor and an interested person.
17. Orlando lodged a proof of debt in the administration for $616,953.01. Orlando was accepted to vote as a creditor on that basis. Habrok took an assignment of that debt on 4 August 2020, prior to initiating this proceeding, and it is not now in doubt that Habrok has a claim against GNT Resources in the amount of $616,953.01.
18. Therefore, to the extent that there is a distinction between pre‑administration and post‑administration debts for the purposes of the definition of “creditor” in s 445D(2)(a), Orlando’s debt was a pre-administration debt. And a person who took an assignment of a pre‑administration debt before the issue of a proceeding would fall within the definition of “creditor”.
19. In these circumstances, Habrok has standing as a “creditor” to bring the application pursuant to s 445D(2)(a), and likewise under s 447A(4)(b). Indeed, there is a stronger case for not distinguishing between pre-administration debts and post-administration debts under s 447A(4)(b).
20. But in any event, Habrok has standing to bring the application as “any other interested person” pursuant to s 445D(2)(c). The expression “any other interested person” is to be interpreted broadly. And the test is that laid down by Austin J in *Allatech*, namely, whether the person’s material rights or economic interests are or may be affected by the operation or effect of the deed of company arrangement that they seek to challenge.
21. In my view, in the present case, the assignment of the debt to Habrok gives it standing as “any other interested person” under s 445D(2)(c), since the consequence of that assignment is that it has an economic interest in the operation of the DOCA.
22. Further, for similar reasons, Habrok has standing as “any other interested person” under s 447A(4)(f) and as “a person with a financial interest in the external administration of the company” under s 90‑20 of the *Insolvency Practice Schedule.*
23. In summary, I would reject the defendants’ arguments on the question of standing. But clearly some of the matters that the defendants have raised go to the question of discretion that I will discuss later and support my ultimate conclusion that even if the triggers for the exercise of my powers under ss 445D and 447A were to have been enlivened, nevertheless in the exercise of my discretion I would refuse to terminate the DOCA in any event.

## (b) What are the principles for ss 445D and 447A to be engaged?

1. Let me begin by saying something about s 445D.
2. Section 445D(1)(a) gives me a discretion to terminate the DOCA if information in the administrators’ report was materially false or misleading. Section 445D(1)(a) expressly provides that the allegedly false or misleading information has to be expected reasonably to have been material to creditors in their decision to vote for or against the DOCA. This requires the position to be considered by reference to a reasonable creditor. The test of materiality is an objective one.
3. Further, s 445D(1)(c) gives me a discretion to terminate the DOCA if there was an omission in the administrators’ report and that omission could reasonably be expected to have been material to creditors in deciding whether to vote for or against the DOCA. Again, an objective materiality test applies.
4. Further, s 445D(1)(f) gives me a discretion to terminate the DOCA if it or its effectuation would be oppressive or unfairly prejudicial to one or more of the creditors. The DOCA will be oppressive or unfairly prejudicial only if there is unfairness when the *whole* effect of the DOCA is considered, bearing in mind the interests of the other creditors, the GCY Group and the public interest. In evaluating if there is oppression or unfair prejudice, the standard to be adopted is that which reasonable commercial persons acting bona fide would think to be fair. Relevant considerations include a comparison between the return to creditors under the DOCA and that likely on a winding up, and the comparative prejudice suffered by differing groups of creditors. Further, it may be difficult to establish unfairness where creditors are better off under a DOCA than in a liquidation. Further, any differential treatment as between creditors under the DOCA does not necessarily equate to *unfair* prejudice. Differential treatment may be permissible if the creditors who are less favourably treated receive more than they would receive in a liquidation and there is a reasonable basis for the discrimination, such as a commercial justification for it, consistent with the objects of Pt 5.3A. The phrases to be applied are “unfairly prejudicial to” and “unfairly discriminatory against”, not prejudice or discrimination simpliciter.
5. Further, s 445D(1)(g) gives me a discretion to terminate the DOCA if it is considered that for “some other reason” this should occur. For example, the Court may terminate a DOCA under s 445D(1)(g) if it is contrary to the public interest, which includes notions of commercial morality. In an analogous context, in *Australian Securities and Investments Commission v Midland Highway Pty Ltd* (2015) 110 ACSR 203 at [68] to [74] I said:

The public interest includes considerations of commercial morality and the interests of the public at large (*Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510 at [287] per Campbell J). Where there has been misconduct in the affairs of a company requiring appropriate investigation by a liquidator and appropriate recovery proceedings being considered and undertaken, it is detrimental to commercial morality to prevent or hinder such steps through the device of a DOCA propounded by entities and individuals who ought be the subject of investigation and the target of such proceedings. A winding up will be beneficial from a public interest perspective where investigations and recovery proceedings are likely to be funded and the investigations and appropriate recovery proceedings could realistically lead to the relevant persons who have engaged in the suspect transactions being brought to account: *Public Trustee (Qld) v Octaviar Ltd (subject to a deed of company arrangement)* (2009) 73 ACSR 139 at [182] per McMurdo J.

More specifically and of direct relevance to the present context, the Court has power under s 447A to set aside a resolution to enter into a DOCA and to order the winding up of the company. In exercising such a power, the Court can apply by analogy any one or more of the principles applicable to s 445D. In other words, if a DOCA if entered into pursuant to the relevant resolution could be terminated under s 445D, then by analogy in the scenario where a DOCA has not yet been executed pursuant to that resolution, s 447A can be used to prevent the DOCA from being entered into. But none of this is to deny or limit the broader ambit of s 447A. Section 447A can be used to make the orders sought by ASIC, whether or not any element of s 445D could be hypothetically or contingently invoked, although I accept that s 445D(1)(g) is broad and on one view unconstrained, save by its context and s 435A generally, such that this proposition may only be of theoretical interest. But it is correct to say that even if none of the elements of s 445D could be satisfied, the orders sought could still be made under s 447A. But let me address s 445D for a moment.

The Court may set aside a DOCA pursuant to s 445D even where creditors may be better off under the DOCA than with a liquidation: *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* at [286] to [291] per Campbell J. It may do so in the public interest.

Where the relevant company is not trading and there is no likelihood of its resuming its former business, the public interest in placing the company in the hands of a liquidator may prevail over the interests of creditors (see *Australian Securities and Investments Commission v Storm Financial Ltd (recs and mgrs apptd) (admin apptd)* (2009) 71 ACSR 81 at [69] and [71] per Logan J).

In *QBI Corporation Pty Ltd v Plantation Rise Pty Ltd (admins apptd) (recs and mgrs apptd)* (2010) 77 ACSR 573 a DOCA was set aside where there was no continuing business preserved and the structure designed and enshrined in the DOCA was to allow and facilitate the director of the company and third parties who were susceptible to voidable transactions to be protected from relevant action.

Generally, the breadth of s 445D(1)(g) is such that in a particular case the public interest can justify the termination of a DOCA even where it is not established that this would necessarily be in the creditors’ interests.

Finally, in any event, the preclusion of an effective investigation by a liquidator into relevant transactions and the opportunity for greater returns may render a DOCA contrary to the creditors’ interests overall (see *Canadian Solar v ACN 138 535 832 Pty Ltd* [2014] FCA 783 at [37] per Perry J).

1. But generally speaking, one should not terminate a DOCA and order a company to be wound up if the DOCA will restore the company to financial health and the DOCA does not have the purpose or effect of unjustifiably quarantining third parties from investigation. If the company is trading and it is likely that its business will continue, then unless there are real public interest concerns, termination of a DOCA and causing a company to be wound up are inappropriate outcomes. The interests of creditors should be the primary consideration, but they may be outweighed if the DOCA has a fraudulent or wrongful purpose.
2. I would say now that, in the present case, the primary consideration of the creditors’ interests and the advantages that arise under the DOCA, if effectuated, far outweigh the many speculative assertions made by Habrok that allegedly call for investigation. I will come back to Habrok’s “commercial morality” arguments later.
3. Further, even if any of the criteria in s 445D are satisfied, I still retain a discretion whether to terminate the DOCA, having regard to the creditors’ interests and the public interest.
4. So, for example, in the present case the delay in making the application to terminate the DOCA is an important discretionary factor. But of course, the weight to be placed upon delay will depend on its length, whether it is explained, and whether opportunities have been lost to the company or to third parties flowing from the delay, or whether other prejudice has been caused to persons including creditors and employees.
5. So, in the present case, the second creditors’ meetings occurred on 25 June 2020, the DOCA was executed on 26 June 2020 and, thereafter, numerous steps were taken to effectuate the DOCA. But it was only on 4 August 2020, some six weeks later, that Habrok applied to terminate the DOCA. I will return to this and other discretionary factors later.
6. Finally, on questions of principle, I need say little about s 447A at this point save to say that in this context some of the principles applicable to s 445D apply by analogy to s 447A as well (see also *Midland Highway* at [64] to [74], [80] and [100]).

## (c) FTI’s and HSF’s pre-appointment involvement with the GCY Group

1. Habrok contends that the pre-appointment work of FTI and HSF raises clear conflict issues that were both inadequately disclosed and impaired their ability to act impartially in the interests of creditors.
2. It points out that both the administrators and HSF are fiduciaries and accordingly have general law obligations to avoid situations where there is a real and sensible possibility of conflict of interests.
3. Further, it points out that administrators are also subject to statutory duties as “officers” of the company and are required to make a declaration of relevant relationships and indemnities (DIRRI) pursuant to s 436DA of the *Corporations Act*. The explanatory memorandum to the *Corporations Amendment (Insolvency) Bill* *2007* that introduced the DIRRI requirement explains that it was designed to address a perception of lack of independence where an administrator had earlier acted as an advisor to the appointing board of directors, particularly if the administrator may later be required to investigate the conduct of current and former directors.
4. Habrok drew my attention to *Re Ten Network Holdings Ltd* (2017) 252 FCR 519 where O’Callaghan J found apprehended bias on the part of the administrators, KordaMentha, as a result of their previous involvement as potential administrators. His Honour addressed this by appointing another insolvency practitioner as an independent administrator to prepare a limited report on certain matters, including any claims arising from the conduct of the directors, officers, advisors and KordaMentha as potential administrators, and whether the remuneration for pre-appointment work by KordaMentha was a voidable preference. Habrok points out that no such steps were taken by the administrators in the case before me. Habrok has also pointed out that a key feature of the *Ten Network* case was that no advice was given by the administrators to the board of directors, management, creditors or other stakeholders of the Ten Group. But notwithstanding this, a finding of apprehended bias was made. I will return to this case in a moment.
5. Contrastingly, according to Habrok, in the case before me FTI’s 19 December 2018 presentation (19 December 2018 FTI report) was made to GCY’s board. Officers of FTI communicated directly with members of GCY’s board and management and the GCY board caused GNT Resources to enter into the NRW GSA two days later. According to Habrok, the 19 December 2018 FTI report dealt with, inter-alia, the following matters:
   1. the solvency of the GCY Group into the future, noting that the GCY Group would appear to exhaust its cash reserves around the week ending 5 April 2019;
   2. the GCY Group’s mining operations; it noted, for example, that since the commencement of mining at the Mine, the unit cost per ounce produced was 84.7% over the GCY Group’s budget;
   3. different options for restructuring the GCY Group;
   4. advice as to what might occur if the directors could enter safe harbour protections under s 588GA of the *Corporations Act*; and
   5. the modelling of various cash flow scenarios for the GCY Group.
6. Further, Habrok points out that the 19 December 2018 FTI report was provided to HSF in January 2019.
7. In those circumstances, according to Habrok, it is difficult to see that FTI and HSF could properly investigate the matters which their role in the administration required, such as whether claims could be pursued against the directors of the GCY Group in relation to insolvent trading. Indeed, according to Habrok, an aspect of the 19 December 2018 FTI report considered the negotiations of the NRW GSA, which fell to be considered by the administrators as to its enforceability. Accordingly, in circumstances where the administrators and HSF, which drafted the NRW GSA, in their pre‑appointment advisory capacity had said one thing about these matters, Habrok says that one can readily see that there was a potential conflict or that they would be unable to view matters in a clear and objective fashion when considering them through the administration prism. Further, according to Habrok, whether they had such an inability does not necessarily require determination. Rather it is the appearance which matters, particularly when the voluntary administration process is necessarily dependent on the independence of registered insolvency practitioners.
8. Now Habrok points out that Mr Ryan, one of the three administrators, gave evidence that he did not have concerns about a potential conflict in FTI accepting the appointment as voluntary administrators because:
   1. the financial model built by FTI was not implemented before their appointment as administrators;
   2. FTI had not previously advised the GCY Group on what creditors to pay or how to manage its creditors during the period prior to appointment; so this meant that the administrators did not have any concern about considering antecedent transactions, including preference payments, and whether the directors of the GCY Group had engaged in insolvent trading;
   3. FTI had not assisted the GCY Group in managing its day‑to‑day cash situation;
   4. FTI did not provide safe harbour advice to the GCY board; and
   5. FTI’s pre-appointment involvement ceased before the May 2019 capital raising.
9. But according to Habrok, Mr Ryan’s evidence understates the true extent of the pre-appointment work undertaken by FTI for the GCY Group and the nature of that work.
10. Further, according to Habrok, there were several omissions from FTI’s DIRRI. But despite this, no updated DIRRI was forthcoming in accordance with s 436DA(5).
11. Habrok provided to me an amended DIRRI listing pre-appointment work conducted by the administrators which purportedly was compiled from documents produced in response to a notice to produce. The amended DIRRI purported to identify multiple meetings or other communications between the administrators and the GCY Group that were not disclosed in the DIRRI, including three omissions conceded by Mr Ryan.
12. More generally, according to Habrok, between early November 2018 and 27 February 2019, the GCY Group supplied FTI with cash forecasts, weekly reports, monthly reports and a LoMP. According to Habrok, FTI used this information to rebuild the GCY Group’s financial model, which included sensitivity analyses and closing cash positions based on various assumptions. On 19 January 2019, FTI’s then current model was provided to Macquarie Capital, which had been engaged to achieve either a sale of some of the GCY Group’s assets or a capital raising in early 2019, to be made available in a virtual data room.
13. Further, Habrok says that FTI considered and discussed the application of the safe harbour regime with the GCY Group, and further, were involved in discussions of reconciliation errors which impacted solvency. Habrok points to the following matters.
14. On 30 November 2018, Cube Consulting delivered its draft report on resource versus grade control model estimates. The draft report stated that:

Potentially the single largest improvement recommended is the implementation of a process by which inappropriate data within the database is excluded from estimation within the [grade control estimation system] process.

1. On 7 December 2018, FTI collated GCY’s action plan and safe harbour checklists into a single excel workbook, identifying key considerations under the safe harbour regime, for discussion between FTI and GCY the following Monday. FTI then issued what I have described as the 19 December 2018 FTI report. The NRW GSA was granted two days later on 21 December 2018.
2. On 8 January 2019, Mr Ian Kerr, the Development Manager at the GCY Group and a director of the GCY board, emailed the other board members regarding the steps he was taking in response to errors that had been reported in gold reconciliation in November and December 2018, which had meant that the GCY Group did not achieve guidance for the December 2018 quarter.
3. On 11 January 2019, GCY emailed FTI alerting it to concerns raised by a director as to the impact of the reconciliation errors on GCY’s short term plans and the flow-on effect on solvency and safe harbour.
4. According to Habrok, Mr Ryan raised a number of questions with Mr Chivers regarding the implications of this information for the cash flow forecasts, the sale process and capital raising efforts and whether it should be reported to ASX and how it would be perceived by creditors.
5. According to Habrok, Mr Chivers emailed Mr Ball on 14 January 2019, referring to conversations about this topic between Mr Ryan and Ms Layman and raised for FTI’s consideration the questions listed in Mr Ryan’s email to him. Mr Ryan and Ms Layman then exchanged texts in relation to the provision by FTI of information regarding the reconciliation issues to Mr David John of HSF between 12 and 16 January 2019.
6. But according to Habrok there was no reference to these matters in the DIRRI.
7. Further, Mr Ryan gave evidence that he caused a conflict assessment to be made by FTI’s internal conflict management team and that that assessment did not prohibit FTI from accepting the appointment. But according to Habrok, the decision of the internal conflict management team necessarily depended on the quality of information provided to it.
8. Further, Habrok points out that HSF were GCY’s solicitors prior to the appointment of administrators. And during the pre-appointment period, HSF:
   1. prepared the prospectus for GCY’s May 2019 capital raising;
   2. prepared the NRW loan agreement and the NRW GSA;
   3. received the 19 December 2018 FTI report that provided information as to GCY’s cash flow position;
   4. were privy to information regarding reconciliation issues that were, ultimately, the primary reason for the GCY Group’s entry into voluntary administration; and
   5. provided safe harbour advice to the board of GCY.
9. HSF are now the solicitors to the administrators. Moreover, in that capacity the administrators have sought advice from HSF including in relation to:
   1. a review of PPSR issues;
   2. the status of the NRW GSA; and
   3. payments made to NRW under the NRW GSA and payments made to NRW that were thought to not be covered by the NRW GSA.
10. Now the administrators did obtain independent advice from other lawyers, namely, Lavan Legal. That advice was sought in respect of potential insolvent trading claims and misleading or deceptive conduct claims against the directors or GCY.
11. But according to Habrok, it is apparent that legal advice in relation to NRW was not obtained, other than from HSF, who were in a position of conflict given their previous advice, particularly in relation to the NRW loan agreement and NRW GSA and to the directors in relation to safe harbour.

#### Analysis

1. Generally, Habrok asserts that the prior dealings the administrators had with the GCY Group were not independent and therefore they could not as administrators investigate properly nor make appropriate recommendations about the GCY Group’s future.
2. It may be accepted that the administrators had implied duties of independence and impartiality. But that does not entail that the administrators must have no prior involvement with the GCY Group; I should say here that the present context does not involve the suggestion of any connection between the administrators and any creditor of the GCY Group that may be disqualifying. The question is more whether the prior involvement with the GCY Group would likely impede them from acting independently and impartially. Further, in terms of impartiality, not only the reality but the perception of impartiality are important; an appearance of bias arising from prior involvement may be disqualifying. Now for the present context, I accept the “double might” test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] as per the plurality, but the context and nature of the office holder are all important in applying such a test. I am not here dealing with judges or administrative decision makers. Further, I accept that an appearance of partiality might arise from a conflict of interest.
3. Further, I should say that the situation faced by O’Callaghan J in *Ten Network* is not analogous to my context.
4. First, as he said (at [67]):

For the reasons I have given, a fair-minded lay observer might reasonably apprehend that the administrators might not bring an impartial mind to the resolution of two issues:

(1) the fact that the administrators were appointed by Gilbert + Tobin, have a referral relationship with that firm, were paid by that firm and may have to investigate it; and

(2) the fact that the administrators will have to consider, in the course of their investigations and reporting, whether their pre-appointment payments are voidable preferences in any subsequent liquidation.

1. That is not my case. FTI did not have any such conflicts.
2. Second, even in that case and even with such conflicts, it was considered that Mr Korda’s removal would have been disproportionate. So, as his Honour said (at [68]):

ASIC did not suggest, in the circumstances of this case, that the two potential conflicts identified by ASIC should require the removal of the administrators. Removal would be disproportionate and, where an order of the type the Court has made here, handing responsibility to an experienced and wholly independent liquidator, is tailored to meet the circumstances of the case, it would be wholly unnecessary. It would also be disproportionate because Mr Korda and KordaMentha have obtained a considerable level of familiarity with the companies comprising the Ten Group, their operations, their financial circumstances and their financial arrangements, which would be lost if the administrators were removed. Mr Korda and KordaMentha have had dealings, and no doubt have established relationships with, major creditors, shareholders and advisers. They have also designed, during the pre-appointment engagement period, what ASIC agreed was “a well-developed and complex administration plan”. That, after all, is the point of engaging a potential administrator.

1. In that case, a partner of Ferrier Hodgson was appointed to carry out a limited investigation of the matters the subject of the two conflicts of interest.
2. Third, in my case we are far removed from the scenario faced by O’Callaghan J. The administrators are now deed administrators. Further, I do not have the luxury of appointing another practitioner to carry out a separate investigation. I am here dealing with an application to terminate the DOCA. Further, there have been no such direct conflicts involving FTI of the type dealt with by O’Callaghan J.
3. Fourth, in *Network Ten*, O’Callaghan J accepted (at [20]) that KordaMentha had not, pre-appointment, “provided advice to the board, the directors or the management of the Ten Group … in relation to the management of the Ten Group, its affairs, its insolvency, or the obligations and duties of the board, individual directors and management”. Contrastingly, Habrok contends that in the present case such advice was given.
4. But no detailed advice was given on such questions, as the 19 December 2018 FTI report makes clear. In any event there are no hard and fast rules. In my view, the involvement of FTI pre-appointment did not compromise its independence or objectivity on, inter-alia, any insolvency analysis, whether as a matter of reality or appearance by a hypothetical fair minded observer.
5. Before dealing with the arguments in detail, let me say something about some of the key witnesses.
6. In my view, Mr Ryan gave clear and reliable evidence that the prior work did not impair FTI’s independence and ability to act as administrators. Mr Ryan described FTI’s involvement as “arms and legs” assistance to the GCY Group. FTI did not provide advice on safe harbour, on a turnaround plan or restructuring, or on NRW. Further, the scope of engagement set out in the letter of engagement between FTI and GCY was not fully executed. I will discuss the scope of FTI’s pre-appointment engagement in further detail shortly.
7. Further, the financial model prepared by FTI, which was not implemented by the GCY Group, was passed on to Macquarie Capital, who amended it for its own purposes.
8. Now it was put to Mr Ryan that he was deliberately diminishing the significance of FTI’s work pre‑appointment. But despite efforts by Habrok to elevate FTI’s pre‑appointment involvement to something that it was not, the work was not of such a nature so as to preclude FTI, or any reasonable administrator in their position, from acting as administrators.
9. As to NRW, FTI had nothing to do with NRW before the administration. And NRW’s status, including as secured creditor, its PPSR registrations, and the rates it was charging, was not later uncritically accepted by the administrators. For example, despite NRW’s position as the incumbent mining contractor, Mr Ryan considered replacing NRW. But this step was not practical. I accept Mr Ryan’s evidence that there was no lack of effort by the administrators to investigate NRW. Further, the administrators were not looking to do favourable deals to benefit NRW.
10. Further, I agree with the defendants that Mr Ryan did not take shortcuts when he instructed HSF not to undertake a long insolvency analysis. HSF had already made clear to Mr Ryan that it could not act as to insolvent trading issues. The insolvency analysis had properly been undertaken by Mr Simon Skelton, an experienced practitioner. This was, in effect, Mr Skelton’s sole function and he was brought in specifically to undertake this role. It is understandable that Mr Ryan would not want HSF to perform an expensive insolvency analysis, which had already been completed by Mr Skelton, when considering the legal issues as to the possible voidability of the NRW GSA. In my view, HSF was given proper and sufficient instructions to allow it to consider the legal position.
11. Further, Mr Ryan was taken through Habrok’s amended DIRRI and asked to comment on which items he agreed were factually correct. Mr Ryan’s evidence on these entries was not then challenged.
12. In my view, Mr Ryan was a seasoned insolvency practitioner who gave reliable evidence that accorded with the commercial realities.
13. Let me say something about Mr Francis. As to work done during the administration, Mr Francis gave me an accurate description of the respective roles of Mr Skelton and Mr Chivers in the insolvency investigations. Whilst Mr Skelton was the primary author of the insolvency analysis, Mr Chivers assisted Mr Skelton by acting as a liaison between Mr Skelton and the GCY Group. There was no sidelining as such of Mr Chivers within the administration of the GCY Group on matters relating to solvency.
14. Mr Francis was not involved in the pre-appointment engagement. Mr Francis’ understanding of the scope and nature of FTI’s pre-appointment engagement arose out of his involvement in the preparation of, and terms of, the DIRRI. In the light of that knowledge, he was not concerned that the administrators would be reviewing their own work.
15. Now Habrok attempted to suggest that Mr Chivers was excluded from the insolvency investigation because of his involvement in the prior engagement with the GCY Group. But Mr Francis explained, which explanation I accept, that there were no conflict issues limiting Mr Chivers’ duties.
16. Mr Chivers was cross-examined as to his pre-appointment involvement with the GCY Group.
17. Pre-appointment, Mr Chivers assisted Mr Ball, who was otherwise busy. Mr Chivers accepted that the work involved FTI collating and reformatting two workbooks into one. This was consistent with Mr Ryan’s evidence that Mr Ball required “arms and legs” to assist with matters at the GCY Group.
18. Mr Chivers was questioned on his role regarding solvency issues and developing reconstruction strategies. The evidence is that FTI did not give safe harbour advice, but provided some financial analysis. And characterising that analysis as advice does not entail that FTI had a conflict and was unable to accept appointment as voluntary administrators.
19. Mr Chivers knew that HSF had been retained to advise on safe harbour and that this was not FTI’s role. Mr Chivers understood that FTI’s role was to provide an overview of the GCY Group’s financial position, restructuring options, cash flows and working capital and to provide an overview of the turnaround plan that had been prepared internally by GCY management.
20. Mr Chivers was also questioned as to an email from Mr Ball on 29 May 2020, sent in the hours before the formal request to FTI to act as administrators. Mr Chivers and Mr Ryan had earlier that day met with Mr Ball and Mr Hay to discuss, amongst other things, insolvency appointments. Mr Ball’s email contained information which was provided to assist with preparing for a voluntary administration appointment and did not contain the work product of FTI’s earlier work. This is consistent with the timing of the email. It suggests no disqualifying prior involvement with the GCY Group.
21. In my view, Mr Chivers generally speaking was a reliable witness, although at times he sought to re-characterise and diminish the significance of his pre-appointment work in a manner that was not wholly convincing.
22. Mr Skelton had limited involvement in the administration of the GCY Group. Mr Skelton had no pre-appointment involvement with the GCY Group. Mr Skelton was responsible during the administration for undertaking the insolvency analysis for the GCY Group. He undertook this analysis without any significant assistance from Mr Chivers.
23. Based on an analysis of the financial position of the GCY Group in the 12 months prior to the appointment of the administrators, Mr Skelton formed the view that the GCY Group was not insolvent. Mr Skelton was cross-examined at length on what was said to be a false dichotomy between a temporary lack of liquidity on the one hand, and insolvency on the other hand. Mr Skelton’s analysis, on a cash flow basis, was that there was a liquidity issue (and therefore a potential question of insolvency) only in March and April 2019.
24. I am not persuaded that Mr Skelton’s analysis is substantially inaccurate, save that it would seem to me that the position in March and April 2019 is better described as likely insolvency rather than a temporary liquidity problem.
25. Further, the suggestion that Mr Skelton did not consider all available information does not permit a conclusion that the administrators’ view in the administrators’ report was incorrect or materially incorrect. There was no challenge to the substance of Mr Skelton’s insolvency analysis except the characterisation of the March and April 2019 period. Given that Mr Skelton had concluded that the GCY Group was not insolvent, except perhaps in March and April 2019, although he described this as a temporary liquidity problem, it was not necessary for him to then consider whether the NRW GSA was voidable by reason of the financial position at the time of grant.
26. Mr Skelton also investigated the use of the proceeds from the May 2019 capital raising. Mr Skelton’s evidence on this was not challenged.
27. I have said something briefly about the witnesses. Let me now say something about the chronology.
28. The DIRRI shows that in November 2018, FTI was engaged by GCY to provide specific financial advisory services. The letter of engagement between FTI and GCY is dated 6 November 2018. The scope of FTI’s services is set out in section 2 of that engagement letter.
29. One of the key aspects of that engagement was to rebuild GCY’s financial model. However, as noted in the DIRRI, the financial model built by FTI was not implemented before the appointment of administrators.
30. Much was made by Habrok concerning the scope of FTI’s letter of engagement of 6 November 2018 and in particular what was described as the scope of FTI’s services.
31. So, section 2 was described in the following terms:

**Scope of Our Services**

FTI Consulting will undertake the following work under this Engagement:

1. Review the Company’s current working capital position

2. Review the Company’s economic modelling / cashflow forecasting systems and tools.

3. Rebuild the Company’s financial model to reflect the transitioning in the Company’s operations from mine exploration/development only to include the mining operations at Dalgaranga mine.

4 Provide advice regarding a turnaround plan which is to be developed by management, including: development and monitoring of milestones in achieving the plan; and liaising with the Company’s legal adviser on the “Safe Harbour” regime, including providing the necessary information to the legal advisor for it to provide its advice.

5. Preparing reports for management to provide to the Company’s two lenders, CBA and NAB, regarding the financial position of the Company and performance of the business as against management’s turnaround plan.

6. Subject to the results of the above, assist with the implementation of the turnaround plan, including ongoing monitoring and adjustments of the plan (as required).

1. But the evidence demonstrates that only items 1 to 3 were carried out together with part of item 4. But the fact is that FTI did not give detailed advice on the safe harbour plan. And it only gave generic advice on restructuring options. So, in the 19 December 2018 FTI report, generalised restructuring *options* were set out on the section 7 slides for GCY to consider. And so far as the section 9 slide was concerned, this was stated in the following terms:



1. Clearly this was indicating that detailed advice concerning the safe harbour regime was being sought elsewhere. Further, it was indicating that GCY should formulate a turnaround plan, rather than that FTI was doing this detailed work for GCY.
2. It is well apparent that the section 9 slide does not greatly assist Habrok.
3. First, it states that “we understand that the Board is seeking independent legal advice with respect to whether Safe Harbour is available to the Company”. Clearly, FTI was not giving that advice.
4. Second, steps 1 to 3 are merely advice as to the *generic* steps that GCY would need to take “Assuming the availability of Safe Harbour”.
5. Third, FTI was not saying anything about the detailed elements of any “Turnaround planning”. That was for GCY to develop. All that FTI was advising was as to the generic factors that should be considered and included. But the detail was for GCY. FTI was not giving such advice. What it was saying was that FTI had to engage in such planning.
6. Fourth, as part of the “Next steps”, reference was made to “obtain independent legal and financial advice…”. Clearly FTI was not giving such advice at the time.
7. Fifth, when one appreciates the slide in context, references to “should” and characterising the slide as “advice” do not really carry Habrok far in its case concerning demonstrating a lack of independence or objectivity or a reasonable perception of such a lack by a hypothetical fair minded observer.
8. Now Habrok made the argument that FTI was doing financial work that amounted to insolvency work. Its next step was to argue that this was integral to any safe harbour advice and any turnaround plan. Therefore, indirectly if not directly, FTI was involved in giving safe harbour advice and should have been disqualified from taking a subsequent appointment as administrators.
9. The theoretical logic of this reasoning is attractive. But the difficulty is that when one considers what was done at the earlier time, it could hardly be described as a substantial insolvency analysis. Mr Chivers was doing financial work but in the sense of setting up or suggesting systems for GCY to use to populate with financial information. Looking at the matter substantively, neither he nor FTI were giving solvency/insolvency advice let alone of a fashion to preclude subsequent appointment.
10. Let me continue with the chronology. The 19 December 2018 FTI report was provided to HSF in January 2019.
11. Further, since the commencement of these proceedings, Mr Ryan has identified three additional matters which were, by reason of oversight, omitted from the DIRRI. First, on 8 January 2019, Mr Chivers and Mr Bantock attended a meeting at GCY with attendees from Macquarie Capital. Second, on 22 February 2019, Mr Ryan had lunch with Ms Layman. He organised that lunch to mark the end of FTI’s engagement. Nothing of relevance was discussed. Third, on 18 March 2019, Mr Ryan attended a meeting with Ms Layman and Mr Ball. Later that day, he provided the document entitled “Overview of Voluntary Administration” to Ms Layman and Mr Ball. This document was largely a generic document detailing aspects of the voluntary administration process under the *Corporations Act*. However, Mr Ryan tailored certain aspects and options that are available in the administration process having regard to his knowledge of the size and activities of the business of the GCY Group.
12. Subsequently, the May 2019 capital raising occurred by which GCY raised $24 million. FTI had no involvement in and provided no advice in relation to the May 2019 capital raising.
13. The final meeting held between FTI and representatives of the GCY Group that occurred prior to the appointment of administrators was on 29 May 2019. On that day, Mr Chivers and Mr Ryan met with Mr Hay and Mr Ball. One of the purposes of the meeting was to discuss the GCY Group’s recent operating performance, cash flow and financial position. Further, having regard to the GCY Group’s financial position, a purpose was to explain the various forms of insolvency appointments, potential options available to the GCY Group, and the consequences of the various types of insolvency appointments and to outline the process following an insolvency appointment.
14. Now the prior engagement between FTI and the GCY Group as disclosed in the DIRRI did not affect any ability as administrators to carry out their obligations under the *Corporations Act.*
15. FTI had not previously advised the GCY Group on what creditors to pay or how to manage its creditors during the period prior to appointment. Accordingly, the administrators did not have any concern about considering antecedent transactions, including preference payments, and whether the directors of the GCY Group had engaged in insolvent trading.
16. Further, FTI had not assisted the GCY Group in managing its day‑to‑day cash situation. Further, FTI did not provide safe harbour advice to the GCY Group.
17. Further, FTI’s involvement ceased before the May 2019 capital raising.
18. Further, at all times the administrators took legal advice, including where necessary from lawyers other than HSF if they thought that HSF could not provide independent advice. Independent advice was taken from Lavan Legal as to a number of matters including as to potential insolvent trading claims and whether there were any potential misleading conduct claims against the directors or GCY.
19. Further, the administrators were not involved in the management of the GCY Group. And the administrators had no dealings with NRW.
20. Further, I have no doubt that FTI’s prior dealings with the GCY Group were substantively and accurately described in the DIRRI.
21. In evidence were what I would describe as duelling DIRRIs. There was the administrators’ original version, an amended version produced by Habrok that contained additional entries, particularly in terms of Appendix I, a defendants’ updated DIRRI to accord with the evidence and a document described as a DIRRI marked up with the defendants’ submissions on Habrok’s amended version.
22. Without getting too bogged down in this low point of the trial, let me make several points. First, after Mr Ryan had given evidence it was apparent that approximately half of Habrok’s additions to Appendix I were incorrect. Second, the defendants’ updated DIRRI is more consistent with the evidence. Consequently, Habrok’s criticisms of the administrators’ original DIRRI, although showing some omissions, did not amount to very much at the end of the day.
23. Now s 436DA of the *Corporations Act* required the administrators to make a “declaration of relevant relationships”. Section 60(1) of the *Corporations Act* sets out what this entails. What was required was a written declaration of a prior “relationship with” the GCY Group. That required a statement of the prior connection between the administrators and the GCY Group. This is not a requirement to state, in the minutiae, each and every occasion where the disclosed connection occurred.
24. In my view, the administrators disclosed their relationship or connection with the GCY Group. Mr Ryan candidly identified some meetings that were not disclosed in the DIRRI. Yet, what was required was no more than disclosure of the prior relationship or connection. The alleged omissions from the DIRRI do not show that there was non-disclosure of the prior relationship or connection. The disclosure was made in compliance with s 436DA.
25. Further, in my view, the nature of FTI’s prior involvement would not have been sufficient to support the administrators’ removal nor ground the assertion that they have not properly investigated the GCY Group’s position. It is commonplace for a company to seek professional advice as to apprehended insolvency and for advice to be received as to voluntary administration; this does not preclude the advisor from becoming the administrator.
26. As I have said, FTI was not involved in the management of the GCY Group before the administrators’ appointment. And FTI did not have any substantial involvement with the affairs of the GCY Group before the administrators’ appointment such as to be disqualifying.
27. Let me at this point say something about industry standards.
28. On the question of the administrators’ independence, Habrok placed much emphasis on publications of the Australian Restructuring Insolvency and Turnaround Association (ARITA), particularly its Code of Professional Practice: Insolvency Services, Practice Statement Insolvency 1, and Practice Statement Insolvency 2.
29. Now putting to one side that the versions of these documents in evidence were approved only on 16 September 2019, being after the date of the administrators’ appointment, but accepting that prior versions were in similar terms, the fact is that industry codes with their precepts, guidance and aspirational verbiage cannot dictate the proper construction and application of the relevant statutory provisions.
30. But concerning the submissions of Mr Bret Walker SC for Habrok, there is one matter that I should briefly address. My attention was drawn to s 1.6.8 of the Practice Statement Insolvency 1 which discussed appointments following a safe harbour engagement. In essence s 1.6.8 suggested that if an insolvency practitioner had provided advice to a company or its directors which they intend to, or do rely upon, to avail themselves of the safe harbour provisions, the practitioner cannot take a subsequent appointment as administrator.
31. In elaboration under what was described as an “Independence example” it was stated:

If you were approached to act as an adviser in a restructuring plan and at your first meeting with the directors, before you provide any advice, you form the view that a restructure is highly unlikely and you recommend that the company enter into voluntary administration, you would be able to take the appointment as this would fit within the ‘Pre-appointment Advice’ exception.

However, if after three months of acting as the company’s adviser and providing advice to the board, it became apparent that the restructure is not likely to succeed and the company has to enter into voluntary administration or liquidation, you would be unable to take the Appointment as you have a prior professional relationship with the company that does not fit within one of the exceptions.

1. But in my view, this guidance is not directly applicable to the circumstances I am considering.
2. In substance, FTI did not substantively undertake the work of a safe harbour engagement. Moreover, in substance it did not give advice on the elements of or the implementation of a restructuring plan. The substantive advice on safe harbour was given by HSF. And FTI only ever advised on *generic* elements of a restructuring plan or “turnaround planning” as described in the 19 December 2018 FTI report.
3. Further, putting aside what was meant by “advice” and such plans, in my view in substance the work carried out by FTI pre-administration did not so affect their independence or impartiality such as to preclude later appointment as administrators.
4. Now I accept that the witnesses called by the defendants resisted suggestions by Mr Walker SC in cross-examination suggesting that substantial work and advice on insolvency and safe harbour had been done by FTI pre-administration.
5. Accordingly, Habrok predictably says that FTI sought to minimise and devalue its pre-appointment work. But in my view this is an unfair criticism of the evidence of Mr Ryan and Mr Francis. But there is greater force in such a criticism concerning the evidence of Mr Chivers. But at the end of the day when one considers the *documentary* evidence showing what was done pre-appointment including the 19 December 2018 FTI report, it seems to me that the defendants’ witnesses gave a largely accurate characterisation.
6. Now as I have indicated, Habrok says that FTI’s pre-appointment work and in particular its pre-appointment modelling of cash flows and its engagement with GCY and HSF in the context of safe harbour, made it inappropriate for FTI to accept the appointment as voluntary administrators of GCY, because its post-appointment investigation of insolvency involved it revisiting its pre-appointment modelling and forecasting work. Further, for analogous reasons, it says that it was not appropriate for FTI to seek advice from HSF in relation to matters that involved HSF revisiting its pre-appointment advice on solvency and/or safe harbour.
7. But I do not consider that FTI’s administration work on insolvency was compromised by the limited pre-appointment modelling work of Mr Chivers concerning financial data presentation. Moreover, Mr Chivers did not take an active and detailed role in the administration in assessing the question of insolvency.
8. And as to criticisms concerning FTI’s engagement of HSF, where does this really go? HSF’s advice concerning solvency questions involving NRW was up in the air. Indeed, it was for the administrators themselves to crunch the numbers, not lawyers. But perhaps it may have been more prudent for HSF not to have been engaged.
9. Let me note the following passages in the cross-examination of Mr Ryan by Mr Walker SC:

Those preference issues would include consideration of dealings – in particular, between NRW and the company – throwing light upon the status of insolvency and the status of NRW’s knowledge concerning it. Is that right?---Yes.

And I suggest to you the connection that Freehills had in relation to the grant of that security in favour of NRW is as disqualifying of Freehills to give advice after appointment, regardless whether it was advice given to FTI, the company, or NRW. What do you say to that?---Well – do I say to that. Freehills said to me at the beginning of the matter that they couldn’t add act in relation to the insolvent trading issues, which is why we engaged Lavan. They didn’t say such a thing in relation to the preference claims.

So does it come down to this – that you relied upon Freehills telling you in which areas it was proper for them not to act, and in which areas it was proper for them to act. Is that correct?---Well, that and my – and my own thoughts on the matter.

…

And before you were appointed administrators, the advisory work you had done for the company had informed you of the significance of NRW as the provider of the mining work. Correct?---Correct.

And the significance of the fact that NRW was, by reason of its significant work for the company, the largest of the creditors apart from the banks. Correct?---Correct.

And that it was a creditor in the sense of being overdue for payment. Correct?---When?

Before your appointment - - -?---Yes.

- - - you became aware there was a history of late payment; correct?---Yes.

…

And you understood that by the end of December 2019, supposedly NRW had the benefit of a security for the moneys outstanding to it; correct?---Yes.

…

Did it ever occur to you that having been involved in the grant of the security back at the end of 2018, Freehills should not now be asked to advise on the legal validity or efficacy of that work?---No, it didn’t occur to me, Mr Walker.

…

In any event – in any event, I want to draw to your attention your response to advice given concerning matters of NRW’s security where in about line 7 or so, you say:

*I don’t want to turn this into a long insolvency analysis –*

etcetera, etcetera. Do you see that?---Yes.

Now, first of all, you were there writing on your clear understanding that the relevant issues concerning NRW’s security involved consideration of insolvency – correct?---Yes.

Second, you understood that that might be a matter which could take quite a long time?---Well, we had already done the insolvency analysis as part of our investigation.

That was, you say, an investigation superintended or supervised by Mr Francis – is that correct?---Yes, undertaken by Mr Skelton.

…

Well, now, it’s clear – isn’t it, that you were warning Mr John in that email that you weren’t necessarily inviting him to go ahead with work that might involve a long insolvency analysis. Is that right?---Yes, yes.

But, you volunteered, there would be a need to consider the facts to some extent – in order to answer your question about risk to NRW. Do you see that?---Yes.

And you understood that that meant that the lawyers would need to look at facts concerning relevant insolvency. Is that right?---Yes.

…

It is clear, is it not, that you were offering through Mr Clowes, in mid-May 2020, to help Freehills with what they had to opine about insolvency and the effect on securities with material generated by FTI in the course of the administration. Is that correct?---Yes.

1. Overall, I do not consider that FTI or HSF were sufficiently compromised because of their pre-appointment work. And more generally as to the administrators, there is no evidence of actual bias. And even if there was apprehended bias, one would not necessarily have ordered that the administrators be replaced. One would do so only if satisfied that it would be for the better conduct of the administration. One would consider the stage of the administration, the remaining functions of the administrators, issues of cost and delay and the extent to which removal, or some other response such as an appointment of a special purpose administrator to attend to one or more discrete tasks, was more proportionate.
2. In summary, I would draw the following conclusions.
3. First, the DIRRI was substantially accurate.
4. Second, FTI only performed a limited role pre-appointment.
5. Third, Habrok’s case concerning the role of Mr Chivers pre-appointment, and his role during the administration, was flawed. Pre-appointment, he did not do a detailed insolvency analysis. Post-appointment he was not principally engaged in any insolvency analysis. That was more the role of Mr Skelton and others.
6. Fourth, there was nothing in FTI’s pre-appointment work that substantially compromised its independence or objectivity either in reality or appearance, or precluded it from having three of its principals appointed as administrators.
7. Fifth, and as I will now come to, none of FTI’s pre-appointment work substantially contaminated the quality of the administrators’ investigations or their disclosures to creditors in the administrators’ report.

## (d) Were the administrators’ investigations adequate or compromised?

1. I accept that there is an obvious connection between the administrators’ independence and their ability to carry out the necessary investigations*.* Habrok in the present case contends that the administrators’ lack of independence contaminated their investigations.
2. Habrok says that FTI’s pre-appointment work compromised its independence and objectivity such that this led to insufficient and inadequate investigations during the administration.
3. First, it says that notwithstanding the attempt at minimisation, FTI advised on solvency pre-appointment, and for that reason their post-appointment investigations were conflicted. The outcome of those investigations turned on the critical question of the solvency of the GCY Group and NRW’s belief on the solvency of the GCY Group during the period of time when FTI were (pre-appointment) advising the GCY Group on that same issue.
4. Second, it says that despite that, no attempt was made by FTI post-appointment to bring in a third party to review the question of solvency, or even create an internal Chinese wall separating staff that worked on issues relevant to solvency pre-administration from those opining/instructing on solvency for the purposes of investigations post-appointment as administrators. In other words FTI opined on their pre-appointment conclusions.
5. Third, it says that FTI’s investigations were perfunctory. Their instructions to Lavan Legal were incomplete and conflicted, the advice from Lavan Legal was contradictory and uncertain in its terms, and there was no follow up by FTI.
6. Fourth, it says that both FTI and HSF were conflicted because of their earlier work on solvency and safe harbour, and HSF’s earlier advice on the NRW GSA and loan agreement. Notwithstanding, FTI engaged HSF to provide advice on the strength of the NRW security and other potentially voidable transactions relating to NRW. The advice from HSF was uncertain in its terms, based on FTI instructions, and yet nothing was done to progress further investigation of this issue or bring in independent advisors.
7. Fifth, according to Habrok, a lack of importance placed on investigations by FTI is demonstrated by the fact that investigation did not form one of the three work streams adopted by the administrators on their appointment. Further, based on the remuneration disclosures to the COI, the administrators spent a total of 138.3 hours and charged $92,088 in relation to the tasks relating to investigations out of a total of $7,287,024 in fees (or 1.3%).
8. Habrok complains that there were inadequacies of the administrators’ investigations into:
   1. insolvent trading claims;
   2. claims relating to the previous capital raisings, including against the directors and their advisors; and
   3. dealings between the GCY Group and NRW.
9. Mr Francis gave evidence that an insolvency analysis was undertaken by Mr Skelton and Mr Chivers under his supervision, and that they briefed Lavan Legal to advise whether:
   1. any potential legal actions may exist against the directors; and
   2. any offences may have been committed by the directors prior to the appointment of the administrators.
10. Mr Skelton gave evidence that Lavan Legal’s advice was received in May 2020 and that the administrators’ report contained a summary of the results of the analysis of these matters.
11. Now although the administrators’ report identified periods of a temporary lack of liquidity in March and April 2019 and flagged the date of insolvency as an issue requiring further investigation in a liquidation, the administrators concluded that a successful claim for insolvent trading was unlikely given the May 2019 capital raising and because the directors arguably had safe harbour protection.
12. To be more precise the administrators’ report stated:

For the purposes of insolvent trading, we consider that it is likely the Group would have only been insolvent for a very short period prior to the Administrators’ appointment, given the funds received from the capital raise on 8 May 2019. We also note that the Directors arguably had protection under the Safe Harbour provisions.

1. Habrok says that FTI’s inherent conflict in conducting these investigations is apparent when one considers that FTI had been providing financial modelling advice and cash flow forecasts as well as becoming involved in operational matters that might adversely impact the assumptions on which those forecasts were based in the lead up to the administration. HSF was also involved in providing safe harbour advice at the time.
2. I would reject Habrok’s case.
3. Potential claims against directors, including as to insolvent trading, were independently investigated by a firm other than HSF, namely, Lavan Legal. The administrators’ investigations in this regard included briefing Lavan Legal with the relevant documents relating to the possible insolvent trading claim and obtaining advice on this issue. The results of the investigation were summarised in the administrators’ report. Further, there is no evidence to support any claim against advisors that allegedly was not investigated.
4. In evidence were two letters of advice from Lavan Legal to the administrators dated 4 October 2019 and 11 May 2020 concerning possible insolvent trading and breaches of directors’ duties. The first letter indicated that Lavan Legal did not have sufficient information, including on the question of pre-administration insolvency. More information and documents were sought. The second letter recorded that additional information and material had been provided.
5. Now because the letters were addressed to Mr Francis, Mr Chivers and Mr Skelton, Habrok suggested that Mr Chivers was somehow substantially involved in giving insolvency/financial information or advice during the administration that substantially overlapped with his work in late 2018. But in my view, the evidence was clear that it was Mr Skelton who was providing such detail to Lavan Legal.
6. Further, it was suggested that Lavan Legal had not properly been briefed concerning the position of NRW; see [14] and [15] of the second letter which omitted [14.11] and see also [58.4.3]; but this can be contrasted with [26]. I agree with Habrok that there is a tension in the second letter. But on balance, I do not consider its conclusions in [58] to have been significantly impugned. But even if they were, I do not consider that this takes Habrok far in terms of the relief that it seeks. And even if Mr Skelton had given more information to Lavan Legal concerning the deferral of payment arrangements with NRW and its advice had been more circumspect on the insolvency question, where does that really go now?
7. Further, the administrators’ report was not defective in any material respect. The administrators’ opinion was that the directors did not engage in insolvent trading and that it did not appear that the directors had breached their obligations. The administrators’ report recorded that further analysis of this issue would be required in the event of a liquidation of the GCY Group.
8. Let me say something about NRW at this point, although I will deal with other NRW points in the next section of my reasons. HSF gave written advice sometime after 8 May 2020 and before 13 May 2020 on the NRW security position.
9. I should say something about the emails passing between Mr Andrew Clowes of FTI and Mr John of HSF between 8 and 12 May 2020. Mr Ryan was also involved in some of these communications.
10. First, the administrators and NRW had not initially perceived that the NRW GSA covered any more than the $12 million commitment in the NRW loan agreement. But HSF pointed out that it might cover more. A question arose as to how this should be dealt with. I do not need to elaborate on this.
11. Second, in terms of the insolvency question and what was being sought from HSF, Mr Ryan said in an email on 8 May 2020 to Mr John and Mr Clowes:

I don’t want to turn this into a long insolvency analysis but I understand you will need to consider the facts to some extent in this regard so please let us know what information you will need as Andrew Clowes may have these easily to hand.

1. A request for information was made by Mr John to Mr Clowes on 11 May 2020. That request was met on 12 May 2020. In my view there is no suggestion that the administrators withheld from HSF any information that HSF may have required.
2. It suffices to say that HSF could not opine on accounting questions and was not asked to do so. It expressed uncertainty on the insolvency question. It considered that it was arguable that the security could be set aside as a preference. Generally, it is fair to say that HSF kept its options open on the solvency question and the good faith defence. Now perhaps HSF should not have given any advice on NRW. But where does any of this go now? The fact is that it did advise. Further, the correctness of its advice has not been substantially impugned. Moreover, any undesirability in it advising is too remote to the matter which I am dealing with concerning whether there are now substantial grounds to terminate the DOCA.
3. Further, Habrok complains that the administrators did not properly investigate shareholder claims arising out of the May 2019 capital raising. Now the administrators’ report refers to the May 2019 capital raising as an exculpatory factor in relation to a potential insolvent trading claim. But the administrators’ report does not acknowledge that the capital raising itself may have given rise to claims requiring investigation, namely a claim by shareholders who participated in the capital raising, which closed only a matter of weeks before the administrators’ appointment.
4. For example, Habrok says that the explanations in the evidence of Mr Skelton for the payments to NRW from the proceeds of the May 2019 capital raising do not withstand scrutiny. The prospectus for the May 2019 capital raising states that payment of the amount of $7.2 million owed to NRW in respect of progress claim 11 “will normalise the Group’s payables position”. But contrary to the assertions of Mr Skelton:
   1. NRW’s progress claim 12 for $6,884,772.13 was issued on 28 February 2019 and was due for payment on 2 April 2019;
   2. NRW’s February invoice for $407,542.29 in respect of the tailings storage facility was issued on 28 February 2019 and was due for payment by 1 April 2019;
   3. NRW’s progress claim 13 for $8,161,803.52 was issued on 31 March 2019 and was due for payment by 30 April 2019; and
   4. NRW’s March invoice for $346,382.30 in respect of the tailings storage facility was issued on 31 March 2019 and was due for payment by 30 April 2019.
5. Accordingly, in those circumstances the payments in excess of $7.2 million were not for “ongoing working capital”, but rather for liabilities that had already accrued. Therefore, the statement in the prospectus that payment of $7.2 million to NRW would normalise the GCY Group’s payables position was incorrect and misleading to investors who invested pursuant to the prospectus.
6. But in my view it is very doubtful that shareholders would have been misled and have a claim for damages on the basis that payments to NRW post the May 2019 capital raising were not properly disclosed. The prospectus for the May 2019 capital raising makes proper disclosure that an unpaid debt owed to NRW would be paid from the proceeds of the May 2019 capital raising and that the proceeds from the capital raising would also be used for working capital. That is what occurred. Any suggestion that working capital cannot be used to pay debts that had already accrued should not be accepted. No shareholder could reasonably have been misled.
7. The fact that NRW was an underwriter of the May 2019 capital raising was also disclosed.
8. Further, if anything said in the prospectus for the May 2019 capital raising about how money would be used turned out to be inaccurate, it was a prediction which, without more, cannot ground a claim for misleading or deceptive conduct. It is difficult to see what loss shareholders would have suffered on account of any inaccuracy, assuming causation were demonstrated. The May 2019 capital raising was to raise money for the GCY Group to be able to pay old and new debt. The money was used for that purpose.
9. In my view, Habrok’s assertions concerning these so called shareholder claims are speculative at best. Its assertion concerning the August 2018 capital raising is even more specious.
10. Further, throughout the period of the administration, the administrators continued to maintain contact with the larger GCY shareholders. And since their appointment on 2 June 2019, no shareholder including those who participated in the May 2019 capital raising have told the administrators that they considered they had a claim against GCY in relation to the capital raisings undertaken prior to the administrators’ appointment or encouraged or raised the prospect of pursuing litigation in relation to any capital raising. Rather, all of the significant shareholders have encouraged the administrators to pursue the recapitalisation track of the dual track process. Indeed, around 80% (in value) of those that invested in the May 2019 capital raising have committed to invest again in the current capital raising, and only one significant investor out of the top ten has not invested again.
11. Further, nothing in the DOCA proposed by the administrators impacts upon the ability of shareholders to make claims against the directors and officers of GCY.
12. The position of a shareholder under the DOCA proposed by the administrators needs to be contrasted to the position of a shareholder should GCY go into liquidation. In a liquidation, shareholder claims are subordinated until all other debts are satisfied (see s 563A). Therefore, unless and until all other unsecured creditors are paid in full, shareholders will not be entitled to any dividends in a winding up.
13. In the case of GCY, if shareholders have shareholder claims that could sound in damages against GCY in relation to the May 2019 capital raising, those claims will only have value if, in a liquidation scenario, asset sales and recoveries exceed approximately $120 million, being the total of all secured, priority and unsecured creditors. And it is unlikely that such a recovery would occur in a liquidation scenario. No offer was made during the administration offering to acquire the GCY Group or its assets for anywhere near $120 million. For completeness I also note that the GCY Group did not have Side C coverage. Therefore, there would appear to be no available insurance to cover shareholder claims.
14. In my view, on the evidence, the shareholders are no worse off under the DOCA than under liquidation in relation to any potential shareholder claim. Further, if the DOCA successfully completes, the shareholders will retain value in their shares, and have the opportunity to increase their shareholding. If the GCY Group enters liquidation, there will be no value in the shares held by shareholders.
15. Further, ss 563A and 600H of the *Corporations Act* make it plain that any shareholder has no valuable claim in a liquidation unless all creditors are paid in full, nor an automatic right to vote at a creditors’ meeting.
16. Further, the primary relief Habrok seeks is for the DOCA to be terminated and the GCY Group wound up. In that event, shareholders will rank last and will not receive a return on their investment of any real value, unless the GCY Group is recapitalised and GCY is relisted.
17. I reject the suggestion that shareholder claims have somehow been unfairly or oppressively extinguished or dealt with.
18. I do not accept that any case has been demonstrated by Habrok that the administrators carried out substantially defective investigations.
19. First, in relation to the directors and insolvent trading claims, Lavan Legal provided separate advice. Further, the whole insolvency question was doubtful. And even accepting that there was insolvency in March and April 2019 because of a lack of liquidity, this was looked at.
20. Second, even if it could be said that the briefing of Lavan Legal was less than perfect or that the investigations concerning claims against the directors could have been more fully investigated, any such deficiencies do not arise from any so-called lack of independence of the administrators. And in any event how do such deficiencies go anywhere now? As I explain later, the administrators’ report disclosed the uncertainties. And the DOCA was overwhelmingly in favour of creditors. This is not a case where the DOCA has been put up to protect and hide the directors from the scrutiny of their activities by a liquidator.
21. Third, as to the position of NRW, I am now about to discuss this in detail. I should say now that ultimately there is little in Habrok’s case on this aspect, save the point that it would have been preferable for HSF not to have been briefed on any such question.
22. Further, the administrators’ report did not involve material mis-statement or non‑disclosure. It disclosed the true position. Creditors were not misled. There is no basis for the DOCA to be terminated on this footing.

## (e) NRW – Dealings with the mining contractor

#### Habrok’s complaints

1. Let me first deal with the NRW security.
2. The administrators’ report identified the possibility of a voidable transaction claim in relation to the NRW GSA, on the basis that it was registered within six months of the administrators’ appointment and was therefore potentially voidable under s 588FJ.
3. HSF also advised that the payments made to NRW under the NRW GSA might be preference payments under s 588FA. In addition, HSF pointed out that preference issues potentially arose in relation to the payments to NRW for tailings facility invoices, which were unsecured debt at the time the payments were made, and in relation to payments to NRW following the May 2019 capital raising.
4. Despite this, Habrok complains that no estimate was given in the administrators’ report as to the financial consequences to creditors of the NRW GSA being void. Nor was any consideration given to the possibility of a range of payments to NRW unrelated to the NRW GSA being regarded as preferences under s 588FA.
5. Now the GCY Group’s solvency is a key factor on such questions. But according to Habrok, FTI’s conflicted position in investigating insolvency necessarily had flow-on implications as to its ability to make an independent assessment of the GCY Group’s transactions with NRW.
6. Further, according to Habrok, a further indication that the NRW GSA was never properly investigated by FTI arises from the fact that it was only on 6 May 2020 that the administrators first sought advice regarding the NRW GSA. By then the administrators had already had various dealings with NRW.
7. Moreover, Habrok says that as early as 25 September 2019, Mr Ryan said in email correspondence with Investec that arguably in a liquidation NRW’s debt is all unsecured.
8. Habrok says that the extent and, more importantly, the nature of the pre-appointment work for the GCY Group placed the administrators in a compromised position in conducting independent investigations of solvency. This in turn had implications for their ability to investigate preference claims and voidable transactions.
9. Habrok says that those difficulties were compounded by the fact that it was HSF who had drafted the NRW GSA and contemporaneously advised the directors of GCY on safe harbour protection, and who were then briefed on behalf of the administrators to advise as to whether the NRW GSA could be attacked in a liquidation.
10. Further, Habrok says that there is no analysis in the HSF advice of NRW’s knowledge of GNT Resources’ financial position in the pre-administration period.
11. Further, Habrok says that it is clear that NRW was already aware of GNT Resources’ cash flow difficulties from at least September 2018.
12. Further, Habrok says that the fact that the NRW GSA secured all existing and future indebtedness of GNT Resources to NRW raises a further question that appears not to have been investigated by the administrators or referred to by HSF, namely whether the NRW GSA amounted to an uncommercial transaction.
13. Let me turn to Habrok’s complaint concerning the NRW plant and equipment.
14. Habrok points out that there were 20 registrations by NRW under the *Personal Property Securities Act 2009* (Cth) (PPSA) against GNT Resources on 30 and 31 May 2019, just days before it entered voluntary administration. A further 24 security interests were registered between November and December 2019, after the date of the administrators’ appointment.
15. According to Habrok, it is not possible to ascertain from the registration information whether these security interests arise from the NRW mining contract. But if they do, then according to Habrok they would potentially be void by operation of s 588FL(2)(b).
16. Further, according to Habrok, on 7 June 2019 NRW wrote to the administrators seeking confirmation that NRW would be treated as the owner of the fleet during the voluntary administration.
17. The administrators responded that they were bound by their obligations to conduct investigations in relation to the PPSR issue. In that context HSF was asked to review PPSR registrations, and appears to have drafted a deed of consent for the purposes of s 440Bto enable NRW to enforce certain registered securities during the administration. However, according to Habrok, the deed seems not to have been executed and there is no indication in the administrators’ report as to what, if any, investigation was undertaken in relation to NRW’s PPSR registrations in relation to plant and equipment or the removal of plant and equipment from the mine sites. Habrok says that the omission from the administrators’ report is unexplained given that the administrators were on notice of the PPSA issues with respect to the NRW mining contract.
18. Habrok has estimated that the current value of the relevant plant and equipment is $52,350,000 and the cost of purchasing that equipment new would be $112,800,000.
19. Further, Habrok says that there were two further important respects in which NRW has received preferential treatment that warrant attention because of their connection with the DOCA: first, its mining charges; and second, the circumstances surrounding the NRW side-agreement.
20. Let me first consider the mining charges.
21. On 16 July 2019, in an email to the administrators, NRW sought to vary the NRW mining contract from a schedule of rates to a reimbursable payment model. An interim proposal was informally presented to FTI on 23 July 2019 (the interim proposal). In addition to varying the mining contract from a schedule of rates to a fixed and variable rates model, under the interim proposal NRW would also receive a more substantial stand-by fee when equipment requested by GNT Resources sat unutilised through no fault of NRW.
22. The interim proposal was agreed to by the administrators on the basis that it would operate in the “short term”. As Mr Hay said in his evidence:

As a result, to keep operations at Dalgaranga moving, the view was taken that we would need to accept the Proposed Model for the immediate short term (i.e. during the “emergency phase”) until a full review by Gerry Lowe had been completed, which would provide the administrators with the necessary information to challenge or accept the Proposed Model.

1. Mr Hay gave evidence based on his 30 years’ experience. He was honest and commercial. Mr Hay accepted that his position could be affected by the outcome of this case, but said he was not self-motivated but concerned to achieve the best outcome to preserve the GCY Group’s operations and jobs.
2. Mr Hay’s evidence demonstrated that the administrators’ dealings with NRW were not inappropriate. When possible, GNT Resources challenged NRW’s claims and took issue with NRW’s failure to perform. Mr Hay was personally involved in obtaining significant reductions on excess claims by NRW. Before March or April 2020, there was no scope for GNT Resources to renegotiate with NRW about the interim proposal or to otherwise test the market. GNT Resources needed a strong track record of performance. It was only after three months of strong performance, around April 2020, when sufficient drilling had been undertaken and a reliable production profile had been developed, that a revised LoMP could be prepared and negotiations with NRW could begin.
3. Mr Hay was questioned on the NRW mining contract and the proposed terms going forward. Internal analysis, based on considerable experience, was carried out to determine a reasonable price for a long-term mining contract. Mr Hay prepared comparisons against low-cost competitors as a tactic for negotiations with NRW to apply pressure to NRW. It was not until the revised LoMP model that the GCY Group had a viable bargaining position. Mr Hay, and the GCY Group, negotiated very hard, resulting in a fair and commercial agreement. As Mr Hay put it, long term contracts operate more effectively when both parties have skin in the game, which is what the new terms reflect. Going forward, the pricing to which NRW has now agreed is within 2% of the GCY Group’s internal estimate. There is no evidence that NRW was improperly benefited or advantaged.
4. Mr Ryan gave evidence of NRW’s hard-nosed negotiating position in his engagement with NRW to keep the Mine open.
5. Habrok says that notably absent from this analysis is any mention of the administrators’ bargaining position arising from:
6. the position of NRW as an unsecured creditor in a liquidation given that the NRW GSA was likely void;
7. the late PPSR registrations over plant and equipment;
8. the factors pointing against GNT Resources’ liability for the termination fee; or
9. the overestimation by Mr Paul Jago of the hiatus involved in mobilising an alternative contractor.
10. Mr Jago is the mine manager at the Mine. Mr Jago’s evidence was directed to the assertion that the rates under the NRW mining contract are uncommercial. Mr Jago was not responsible for the payment terms for NRW, and was not involved in those negotiations, during the initial phase of the administration. Mr Jago reviewed the report of Mr Gerry Lowe of GDL Contract Consulting Pty Ltd, an external consultant who had been engaged by the GCY Group to undertake a review of the interim proposal, when it was published. While many of the recommendations were not implemented given that they represented minor matters in the context of an $8 million a month contract, Mr Jago gave evidence that GNT Resources did reduce the “float” and the number of engineers NRW was providing. This reduced the overall spend at the Mine under the NRW mining contract.
11. Now according to Habrok, there is no explanation for the fact that the administrators did not implement the independent advice they obtained from Mr Lowe on 14 October 2019 that identified a number of areas of overcharging by NRW, collectively amounting to $132,148.75 per month. He also advised that GNT Resources should seek to enter a schedule of rates pricing with specified performance measures, and if that was rejected by NRW, GNT Resources should go to market to obtain the services of another contractor or undertake long term equipment hire and employ personnel directly to eliminate the margins applied by NRW under the NRW mining contract.
12. Mr Lowe explained in relation to the interim proposal that: “Effectively NRW are now relieved of the fleets productivity risk while recovering the value of that risk.” Moreover, this appears to have been the explicit intention of the proposal from NRW’s perspective.
13. On 14 April 2020, FTI prepared a document entitled “proposal for New NRW Mining Contract for discussion” in which FTI put the case for a model under which NRW’s fixed costs would be guaranteed, but with the variable component changing to a unit rate $/BCM in preparation for a recapitalisation, rather than the fixed cost and hourly SMU based variable rate model adopted during the voluntary administration. Based on the information contained in that presentation, Habrok says that it had calculated that NRW was overpaid in the order of at least $17,168,559 and up to $18,282,100 in respect of the load and haul and drill and blast rates charged under the interim proposal which it sought to make permanent.
14. Now Habrok says that some steps to advance the adoption of a new mining contract can be seen in:
15. the reference to agreeing new mining rates prior to the capital raising in early drafts of the agreement to amend the interim proposal;
16. the reference to executing a variation to the mining contract as a proposed precondition in early drafts of the term sheet for the NRW side-agreement; and
17. the preparation of a deed of variation to NRW’s mining rates.
18. But Habrok says that the terms relating to new mining rates did not survive into the executed versions of either the agreement to amend the interim proposal or the term sheet for the NRW side-agreement, and the deed of variation to NRW’s mining rates was prepared but never executed. It therefore seems that the rates under the interim proposal are continuing.
19. Let me say something about the NRW side-agreement.
20. Habrok points out that NRW approached Mr Ryan to renegotiate the term sheet for the NRW side-agreement on the basis that Hanking was offering NRW a payment of $10 million, which was more than it would receive under the DOCA.
21. Mr Ryan was unable to persuade NRW of the uncertainty of the Hanking proposal, and so in the interests of securing a certain outcome for all creditors he improved the upfront payment to NRW under the DOCA from $4 million to $7 million.
22. But Habrok says that subsequent correspondence from NRW suggests that it did not require any financial persuasion to encourage it to vote as it did at the second creditors’ meetings, and that their concern was with remaining the mining contractor to GCY.
23. On 29 June 2020, NRW sent the administrators a letter expressing their ongoing support for the DOCA and the capital raising. They also expressed concerns regarding the senior secured creditors and impressed upon the administrators that the capital raising could be derailed if NAB and CBA were in discussions with the other DOCA proponents.
24. More specifically, NRW stated that it had voted against an adjournment of the second creditors’ meetings because the Habrok proposal might have resulted in NRW being displaced as mining contractor. NRW was concerned that Habrok might undermine that outcome by acquiring the senior secured debt.
25. But Habrok says that regardless of the administrators’ understanding, the practical outcome appears to be that at a time coinciding with the advent of the rival Hanking DOCA, NRW was able to negotiate an accelerated benefit in return for its vote to foreclose debate on an alternative proposal. And this occurred in circumstances where it appears from subsequent correspondence that NRW never had any intention to vote for the alternative proposal in the first place.
26. Further, according to Habrok, effectively at NRW’s bidding the administrators then negotiated an exclusivity agreement with the senior secured creditors until 30 August 2020 whereby NAB and CBA agreed that they would not enter into any other transaction between 30 June 2020 and 30 August 2020 in exchange for monthly payments of $1 million to be applied against outstanding interest. The exclusivity period has been subsequently extended.
27. Let me also mention Habrok’s complaint about disclosure of the NRW GSA to the market. It asserts that there were misleading disclosures to the market concerning the NRW GSA. I will deal with the details of this issue in a moment.

#### Analysis

1. Now various assertions have been made by Habrok concerning the position of NRW. But in my view none of them merit the termination of the DOCA.
2. First, let me say something on whether the NRW GSA was properly investigated.
3. Habrok asserts that the NRW GSA was granted within six months of GNT Resources’ administration’s commencing, making it voidable, and that issue was not properly investigated.
4. But advice was sought and received from HSF to the effect that the NRW GSA and payments made to NRW were attackable under ss 588FA, 588FC, 588FE and 588FJ unless GNT Resources was not insolvent at the relevant time or NRW had a good faith defence.
5. Further, HSF had not acted for NRW. HSF did not strictly have any conflict of interest or duty in considering the voidability of the NRW GSA. Nevertheless, perhaps it may have been desirable for them not to be involved.
6. Further, I am inclined to agree with the defendants that where it was expected that all of the creditors would receive full value if the DOCA was effectuated and where NRW had agreed to defer repayment of a part of its claim so that it obtained payment after the unsecured creditors, and where it had agreed to give up its security under the NRW GSA for these later payments, there was arguably no need to further investigate or address what might happen if the NRW GSA was voidable.
7. Further, there was no certainty that the NRW GSA was necessarily voidable. In my view the administrators’ report describes the position fairly and accurately. The administrators said that recovery for the benefit of creditors of an unfair preference was remote, including because at the relevant time there was a temporary lack of liquidity.
8. Second, let me say something on whether the NRW GSA was uncommercial under s 588FB. In my view, the suggestion that the NRW GSA, because it secured all indebtedness, was uncommercial within s 588FB is incorrect. The NRW GSA did not benefit NRW to the detriment of GNT Resources. NRW was owed money under the NRW mining contract. NRW was not gifted anything. Further, if GNT Resources was not insolvent, there can be no uncommercial transaction (s 588FE(2)).
9. Third, let me say something on whether the NRW GSA position was disclosed to the market.
10. Habrok asserts that the market was told that the NRW GSA secured only $12 million and the administrators’ report, although it allegedly refers to a secured debt of more than $33.6 million, does not make the position clear, including by failing to disclose the terms of the NRW GSA, the NRW loan agreement and the NRW mining contract.
11. But information as to the terms of the NRW GSA and the NRW loan agreement had been publicly disclosed including when the NRW GSA was entered into. Moreover, the value of the security was not said to be limited to $12 million.
12. The $33.6 million referred to in the administrators’ report is, as is apparent on its face, part of the directors’ report on company activities and property. And the administrators’ report correctly refers to the NRW debt as $32.7 million.
13. The market was not informed that the NRW GSA secured only $12 million, nor was the market informed that $12 million had been advanced.
14. In December 2018, GNT Resources entered into a loan agreement with NRW for $12 million. As set out in the ASX announcement made by GCY on 24 December 2018, the NRW loan agreement and the amounts due under the NRW mining contract were secured by the NRW GSA over the assets of GNT Resources.
15. The NRW GSA was dated 21 December 2018. The NRW GSA was registered on the PPSR on 7 January 2019. The NRW GSA was therefore registered within the 20 business day period referred to in s 588FL.
16. At the time of the second creditors’ meetings, the following information was publicly available:
17. the ASX announcement released by NRW on 24 December 2018 in which NRW announced its agreement to support GCY through the provision of a $12 million loan facility, which stated: “The facility and associated mining contract is secured by [the NRW GSA] over the assets of GNT”;
18. the ASX announcement released by GCY on 24 December 2018, which stated: “[the] working capital facility and associated mining contract are secured by the [NRW GSA]”;
19. page 45 of the administrators’ report, which stated: “In December 2018, NRW agreed to provide a short term second ranking secured loan of $12m repayable in 6 monthly instalments, commencing 31 July 2019”; and
20. page 77 of the annual financial report for the year ended 30 June 2019, which was released on 31 January 2020, which stated: “On 21 December 2018 the [GCY] Group secured a $12.0 million working capital facility from [NRW] ... The facility and associated mining contract are secured by [the NRW GSA] over the assets of [GNT Resources] until full repayment of both the facility and the associated mining contract”.
21. Further, the prospectus for the May 2019 capital raising does not say that the security granted to NRW was limited to $12 million. It says that the facility limit under the NRW loan agreement was $12 million.
22. Further, the quantification of NRW’s secured debt is in the administrators’ report and the amounts recorded are $33.067 million on the basis of the management accounts, and $33.605 million on the basis of estimated realisable value.
23. Further, in the months prior to the second creditors’ meetings there was an extensive reconciliation process conducted between NRW and GCY’s management team to agree the amount owing to NRW for the purpose of agreeing the term sheet between NRW and GNT Resources. The outcome of that reconciliation and negotiation process was that the amount of NRW’s secured debt was agreed at $32.7 million.
24. Mr Raftery in his written evidence asserted that various matters had not been disclosed.
25. But the ASX announcement released by GCY on 24 December 2018 stated that a $12 million working capital facility had been obtained from NRW and then went on to say that the facility was repayable by the end of 2019 and expressed appreciation for NRW’s support.
26. Further, the ASX announcement released by NRW on 24 December 2018 said that NRW had agreed to support GCY by providing a $12 million loan facility which “effectively extends payment terms to circa 75 days” and this loan would be used by GNT Resources to meet “working capital requirements” and would be repaid in the second half of 2019. That is, these announcements made it clear that NRW was not being paid immediately for money owing to it and, instead, money otherwise payable to NRW was able to be used for working capital.
27. Further, announcements were made by NRW and GCY to the ASX that the NRW GSA secured money owing under the NRW mining contract.
28. Further, the administrators’ report made the relevant position clear about the NRW loan agreement, NRW GSA and what had occurred following the May 2019 capital raising.
29. Further, it was not necessary for the full terms of the NRW loan agreement, the NRW GSA and the NRW mining contract to be referred to either in the prospectus for the May 2019 capital raising or the administrators’ report. The prospectus was not prepared by the administrators. And the administrators’ report contained sufficient disclosure as to the nature and value of NRW’s secured debt. The administrators’ report disclosed adequately the amount owed to NRW, that NRW’s debt was secured and that the amount owing under the NRW mining contract is the subject of the NRW GSA.
30. Further, Habrok asserts that there was a discrepancy between the information provided in the prospectus for the May 2019 capital raising and the actual payments to NRW from the proceeds of the capital raising as reported in the administrators’ report. The alleged discrepancy is said to be borne out by the following documents:
31. the ASX announcement made by NRW on 1 April 2019, which showed that NRW agreed to sub-underwrite the May 2019 capital raising for an amount of up to $5.3 million;
32. the prospectus, which proposed that a total of $24.5 million would be raised and of those funds:
    1. $14.9 million would be for ongoing working capital;
    2. $7.2 million was to pay an outstanding invoice owing to NRW; and
    3. $2.4 million was for expenses incurred; and
33. the administrators’ report, which showed that NRW received $14.86 million in equity and cash from the May 2019 capital raising, being $4.3 million in shares as sub-underwriter and $10.56 million in relation to amounts owing.
34. It is asserted that the amounts paid to NRW from the proceeds of the May 2019 capital raising were not adequately disclosed in the administrators’ report and that the alleged discrepancy referred to above was not scrutinised nor investigated.
35. But Mr Skelton investigated the position and did not identify any matter of concern requiring further investigation. Further, in or around September 2019, the administrators complied with a s 33 notice issued by ASIC. Since complying with that notice, ASIC has not raised any issue as to what was said in the prospectus regarding the proposed amounts that would be paid to NRW specifically.
36. In my view Habrok’s concerns go nowhere.
37. Fourth, let me deal with the administrators’ report concerning NRW. Although I will discuss the administrators’ report in more detail later, it is more convenient to dispose of all NRW issues at this point.
38. In my view, the administrators’ report adequately disclosed the amount owed to NRW and that NRW’s debt was secured but potentially voidable.
39. Further, the creditors were informed that NRW would, in effect, agree to defer part of its claim. This appears in the administrators’ report. Now Habrok asserts that the DOCA required a restructure of NRW’s debt but this was said to be “commercial in confidence” and not disclosed. But the criticism is misplaced. In the administrators’ report, a condition precedent to effecting the DOCA was said to be reaching an agreement with NRW to restructure its debt. And it was said that significant advances had been made but the negotiations were “commercial in confidence”. Now both GCY and NRW were ASX listed entities that had obligations of continuous disclosure. Such obligations constrained disclosure of incomplete negotiations. In any event, negotiations with NRW advanced after the administrators’ report of 18 June 2020.
40. By 24 June 2020, NRW had agreed that it would receive a payment of up to $7 million, then shares in GCY of $12 million, and with the remainder of its claim (about $13 million) to be paid after unsecured creditors. Further, NRW would release the NRW GSA.
41. Fifth, there was no improper secret deal with NRW. The NRW side-agreement was fully disclosed. Moreover, there was nothing inappropriate about the NRW side-agreement.
42. There was an accurate disclosure to the ASX on 25 June 2020 before the second creditors meetings and also to the creditors before they voted on the relevant arrangements. The disclosure to the ASX was in the following terms:

The Voluntary Administrators of Gascoyne Resources Ltd and each of its wholly owned subsidiaries (All Administrators Appointed) (“Gascoyne”, ASX:GCY) refer to Gascoyne’s ASX announcement of 18 June 2020 regarding the agreement with NRW in relation to payment of its pre-administration debt. Gascoyne has now agreed with NRW that the amount of the upfront payment will be 8.75% of the gross proceeds of the equity raising to be conducted pursuant to the Deed of Company Arrangement (“DOCA”) proposal set out in the Voluntary Administrators’ report to creditors on 18 June 2020 (“GCY Proposal”), up to a maximum amount of $7 million.

The Voluntary Administrators also refer to Gascoyne’s ASX Announcement of 24 June 2020 regarding the alternative DOCA proposal, recapitalisation and relisting plan received from Hanking Australia Investment Pty Ltd on 22 June 2020 (“Hanking Proposal”). NRW has confirmed to the Voluntary Administrators that NRW intends to vote in favour of the GCY Proposal and to vote against an adjournment of the meeting of creditors for the purpose of further considering the Hanking Proposal. In the event that a further DOCA proposal is made or the meeting of creditors on 25 June 2020 is adjourned or delayed, NRW has reserved its ability to maintain or change its position.

The meeting of creditors will be held later today, 25 June 2020. An update regarding next steps in relation to the recapitalisation and relisting plan will be provided to shareholders in due course following this meeting.

1. Further, the amendment to the NRW side-agreement on 24 June 2020 did not mandate that NRW vote against the adjournment and for the DOCA. It was expressed as a confirmation of its advice to the administrators based on the current information. And as it was expressed, it said the following:

The purpose of this letter agreement is to record:

(a) that NRW, GCY and GNT hereby agree that the amount of the Upfront Payment will be equal to 8.75% of the gross proceeds of the Capital Raising up to a maximum amount of $7.0 million and paragraph 5(b) of the Binding Term Sheet is amended accordingly. For the avoidance of doubt, the parties acknowledge that this amendment does not affect the validity or enforceability of the Binding Term Sheet and paragraphs 9 to 12 of the Binding Term Sheet apply to this letter agreement as if each reference to “this term sheet” was a reference to this letter agreement.

(b) NRW’s confirmation of its advice to the Administrators of GNT and GCY that, based on the current information provided to NRW, NRW (including in its capacity as a secured creditor of GNT):

(1) has been provided with a copy of the proposal for an alternative deed of company arrangement which has been received by the Administrators from Hanking Australia Investment Pty Ltd (Hanking) dated 22 June 2020 (Hanking DOCA Proposal);

(2) has considered the Hanking DOCA Proposal and discussed its terms with representatives of Hanking;

(3) does not support the Hanking DOCA Proposal and is not prepared to take those steps which would enable those conditions in the Hanking DOCA Proposal which require the consent, agreement or participation of NRW to be satisfied; and

(4) in the absence of:

(A) any further deed of company arrangement proposal or proposals being made (including a new proposal or a change in the terms of any existing deed of company arrangement proposal); or

(B) the meeting of creditors on 25 June 2020 being adjourned, or otherwise delayed for any reason,

NRW will:

(C) vote in favour of the deed of company arrangement proposal set out in the Administrators’ report to creditors issued on 18 June 2020 and recommended by the Administrators of GCY and GNT at the meeting of creditors on 25 June 2020; and

(D) vote against any adjournment of the meeting of creditors on 25 June 2020 if that adjournment is proposed solely for the purpose of further consideration of the Hanking DOCA Proposal.

For the avoidance of doubt, if an event contemplated by paragraphs (b)(4)(A) or (B) occurs, the confirmations set out in paragraphs (b)(4)(C) and (D) will cease to apply and NRW may act as it sees fit.

1. Cases such as *Young v Sherman* (2002) 170 FLR 86 concerning improper inducements to induce creditors to vote in a particular way are far removed from the present context.
2. But in any event, where does any of this go? If NRW had not voted, the chairman of the meetings, one of the administrators, could have exercised a casting vote against adjournment and for the DOCA.
3. Under the Hanking DOCA proposal, NRW was to receive $10 million but, in the interests of all stakeholders, the administrators negotiated a lesser payment of up to $7 million, in the face of the competitive tension created by the Hanking DOCA proposal. There was nothing improper in this. The purpose was not to obtain NRW’s vote at the second creditors’ meetings. NRW retained the right to vote for another proposal if one was presented. Further, there was no accelerated benefit to NRW. Indeed, NRW stands to get paid last of the creditors.
4. The present case is not a situation where secret deals were done with some creditors to obtain their proxy votes.
5. Sixth, let me now address the NRW plant and equipment question.
6. Habrok asserts that NRW registered 45 security interests under the PPSA and that the position about the NRW plant and equipment appears not to have been investigated, and that the NRW equipment may have vested in GNT Resources under either s 267 of the PPSA or s 588FL of the *Corporations Act*.
7. But the position as to whether the NRW equipment had vested in GNT Resources was investigated and legal advice obtained as to the issue.
8. Section 12(1) of the PPSA provides that a security interest is an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation without regard to the form of the transaction or the identity of the title holder.
9. But under the relevant transaction, namely, the NRW mining contract, no interest in personal property including the NRW equipment secured payment or performance of any obligation. That is, the NRW equipment was not the subject of any security interest within s 12 of the PPSA, which required registration. Under the NRW mining contract, NRW agreed to provide works and services and NRW did not become a secured party by leasing on a “dry hire” basis, bailing or creating any other security interest over any of the NRW equipment to GNT Resources. The following provisions of the NRW mining contract are relevant:
10. NRW agreed to perform the works which were defined to include plant and equipment; and “Plant” was defined as NRW’s mobile earthmoving and drilling equipment.
11. NRW agreed to provide all plant required for the works, which it had to maintain.
12. GNT Resources gave NRW non-exclusive possession of the Site sufficient to enable NRW to do the works.
13. It seems to me that, contrary to Habrok’s assertions, the position was investigated and, following that investigation, it was accepted that NRW always owned the NRW equipment.
14. In my view Habrok’s complaint on this question has no substance. No security interest was created which required registration. No vesting in GNT Resources occurred.
15. Seventh, in my view the NRW mining contract rates were commercial.
16. Habrok asserts that the rates charged by NRW under the NRW mining contract were uncommercial, both prior to and during the administration. Habrok’s attack under ss 445D or 447A that the administrators’ report was materially insufficient for a reasonable creditor or that the DOCA unfairly prejudices any creditor because allegedly NRW may obtain some extra value under the NRW mining contract is unsustainable.
17. In any event, the evidence is that the terms of the NRW mining contract were not uncommercial. They were in every case negotiated at arm’s length, taking into account the bargaining position of GNT Resources and NRW.
18. Now Habrok has asserted that the administrators did not properly investigate whether NRW’s charges under the NRW mining contract were above market and uncommercial, both prior to and during the administration. As I have indicated, NRW was and continues to be a key supplier in respect of GNT Resources’ mining operations. NRW has been the on-site mining contractor for GNT Resources since December 2017 pursuant to the NRW mining contract.
19. But contrary to Habrok’s assertions, the administrators’ investigations found that NRW was selected as the mining contractor for GNT Resources in December 2017 following a thorough, open and competitive tender process. That tender process was conducted by a third party advisor appointed by GCY, Nick Bell Consulting. Further, the various proposals received pursuant to that tender process were the subject of detailed consideration by the board of GCY in the period from September to December 2017.
20. Further, Mr Ryan reviewed various books and records of the GCY Group associated with that tender process, including the following: emails dated 7 July 2017 from Nick Bell Consulting attaching the invitation to tender and various tender documents to various entities; a summary of bids as at 5 October 2017, which disclosed the NRW bid as having the lowest estimated mining cost including diesel costs by nearly $12 million; documents relating to the board of GCY’s consideration of entry into of the mining contract including board papers and minutes; and the pre-execution contract review dated 1 December 2017 prepared by Mr Kerr, which included a record of the board of GCY approving entry into of the NRW mining contract.
21. In summary, the NRW mining contract was made in December 2017 after a competitive tender process, where NRW was the cheapest option and following detailed consideration by the board of GCY.
22. Further, Habrok relied on a report created by the Kamara Group assessing the rates charged by NRW. Habrok sought to then compare the NRW charges against the rates charged by “Indus Mining”, a company apparently associated with Mr Raftery that had itself gone into administration. This comparison was inapposite and I do not need to linger on it.
23. Further, Habrok has asserted that the rates *presently* charged by NRW are uncommercial. But how this assertion connects with the application under ss 445D or 447A is not clear. Further and in any event, the ongoing rates charged by NRW were the subject of a proper negotiation and were reviewed by an independent third party advisor, Mr Lowe. There is no basis to suggest that the ongoing rates are uncommercial in circumstances where a thorough and transparent negotiation process has been undertaken.
24. Further, the administrators were concerned to ensure GNT Resources’ mining business continued and they were aware that if NRW exercised its rights and a substitute mining contractor had to be found, the costs would have been far greater, at the significant expense of the GCY Group’s business continuing in an uninterrupted manner. NRW was also aware of these matters. NRW claimed early termination demobilisation costs of $15.3 million. Further, on 14 June 2019, NRW had issued a show cause notice to GNT Resources requiring it to pay $9.2 million by 21 June 2019, failing which it would have suspended work as it was entitled to do.
25. Section 437A gave the administrators full power to carry on the GCY Group’s business and manage its property and affairs, including the power to perform any function and exercise any power that the companies or any of its officers could perform or exercise. Habrok’s attempt to second guess the administrators’ commercial judgment made during the course of a complex administration fails. The pellucid observations made by Black J concerning the former s 447E in *Correa v Whittingham* (No 3) [2012] NSWSC 526 at [115] have more general application to the role of administrators under Pt 5.3A.
26. Now Habrok has asserted that NRW had no right under the NRW mining contract to refuse to supply its services unless the payment terms were varied under the interim proposal. But the assertion is based on a part of the NRW mining contract referring to the rates which apply if the contract is terminated due to the default of the contractor. But clearly, that part of the NRW mining contract did not apply as NRW was not in default. Rather, GNT Resources was in default and had received a show cause notice from NRW, which would have grounded a right in NRW to terminate and claim an early termination fee of $15.7 million if GNT Resources did not come to an agreement with it.
27. The interim proposal was made in this context, as a temporary measure in the exercise of the administrators’ commercial judgment within their powers under s 437A. Had the interim proposal not been accepted, and had NRW terminated the NRW mining contract, then it would have taken realistically at least three to four months to put in place a replacement contractor. But there were only three weeks of gold stocks left and virtually no cash available to the administrators. The Mine would have been placed on care and maintenance once the ore ran out and it would then have been very expensive for the Mine to have been restarted. Such an outcome would have been catastrophic to the employees and creditors, including those who had continued to provide goods and services to GNT Resources.
28. Further, Mr Lowe recommended that at least during any period of administration GNT Resources should continue the relationship with NRW. Further, GNT Resources commenced negotiating with NRW on a re-priced schedule of rates in April 2020, which was when the financial situation had stabilised. This was consistent with Mr Lowes’ recommendation. And as a result of that negotiation, a new schedule of rates to replace the interim proposal has recently been agreed.
29. Now Habrok has relied on a GNT Resources presentation to NRW made in the course of the negotiations in support of its assertion that GNT Resources overpaid NRW between $17.1 million and up to $18.2 million under the interim proposal. But the presentation is not evidence of overpayment. It was prepared by GNT Resources for use in negotiations with NRW in an effort to obtain the most favourable rates possible. To that end, it sought to illustrate a worst-case outcome for NRW. It did not include various allowances for costs and variations that NRW would have been likely to claim against GNT Resources. It also used the lowest possible drill and blast rates from NRW’s competitors.
30. In my view, there is nothing to suggest that NRW has been overcharging GNT Resources for the period of the administration. Further, there is nothing that supports Habrok’s attempts to second-guess the administrators’ exercise of commercial judgment in their dealings with NRW during the administration.
31. Eighth, Habrok contends that GNT Resources’ dealings with NRW during the administration were not permitted by s 80-55 of the *Insolvency Practice Schedule.* Pursuant to ss 80-55(1) and 80-55(2), as a member of the COI of GNT Resources, NRW was prohibited from directly or indirectly deriving any profit or advantage from GNT Resources’ administration including from a transaction made by the administrators for or on account of GNT Resources.
32. However, s 80-55(3) provides that s 80-55(1) does not apply if the creditors resolve otherwise. At the first creditors’ meeting of GNT Resources on 13 June 2019, NRW was appointed a member of the COI. Also, GNT Resources’ creditors relevantly resolved that members of the COI were entitled to enter into arms-length transactions or dealings in the ordinary course with the administrators, GNT Resources or its creditors. In my view the evidence demonstrates that the administrators and GNT Resources entered into dealings with NRW at arms-length. It follows that s 80-55 was not contravened.
33. Ninth, in my view the proposed re-structure involving the NRW debt is unremarkable.
34. As set out in the DOCA, it is a condition precedent of successful completion of the DOCA proposed by the administrators that the NRW debt is restructured and the NRW security released.
35. The administrators’ report set out proposed arrangements with NRW, which included an upfront cash payment equal to 5% of the gross capital raising proceeds. However, as set out in the ASX release of 25 June 2020, prior to the second creditors’ meetings the NRW side-agreement was amended. Specifically, it was agreed that the upfront payment would be increased to 8.75% of the gross proceeds of the capital raising, up to a maximum amount of $7 million. This had the effect of bringing forward a part of the deferred contingent payments to NRW.
36. Mr Ryan informed the creditors of the GCY Group of this change at the second creditors’ meetings. Consistent with this, the explanatory statement to the notice of the EGM held on 5 August 2020 repeated this summary of the NRW side-agreement.
37. The administrators’ report set out details of the proposed capital raising which would reduce the secured creditors’ debt, fund a creditors’ trust to facilitate payment to unsecured creditors and provide additional working capital for the GCY Group. The administrators’ report detailed inter-alia that the senior secured creditors would be repaid in full from a combination of the proposed capital raising and a refinancing and that NRW’s debt would be restructured to allow for an upfront cash payment equal to 5% of the gross capital raising proceeds and the remaining balance would be payable on a contingent arrangement. It stated that unsecured creditors would be paid in full as to claims below $10,000 and for unsecured claims above $10,000, they would receive a first tranche cash component of $10,000. As to the balance, they would receive 50% of the balance in shares in GCY. With these latter unsecured creditors’ claims, the administrators’ report stated that the remaining 50% of the balance, being the second tranche cash component, would be paid once the senior secured creditors and NRW had been paid in full.
38. At the second creditors’ meetings, Mr Ryan explained to creditors that since the administrators’ report and the Hanking DOCA proposal, the administrators had improved their DOCA proposal for unsecured creditors and changed the arrangement with NRW. The improvement for unsecured creditors was that large unsecured creditors would be paid the second tranche cash component *before* NRW was paid in full. The change to the arrangement with NRW was that its debt had been restructured to allow for an upfront cash payment equal to 8.75% of the gross capital raising proceeds capped at $7 million and NRW would not get paid the remainder of its claim until after all unsecured creditors had been paid in full. Also, creditors were informed that NRW would be paid the balance of its claim over time from operating cash flows subject to certain conditions being met.
39. In those circumstances, the assertion that the detail as to the contingent arrangement for the payment of the balance of NRW’s debt was not set out in the administrators’ report does not permit the conclusion that the administrators’ report, and what was disclosed to creditors at the second creditors’ meetings, was materially inadequate.
40. Tenth, and more generally, I reject the suggestion that there has been any inappropriate or undisclosed preferential treatment of NRW by the administrators.
41. It is asserted that the DOCA appears to give preferential treatment to the NRW entities in several ways. I have already dealt with some aspects, but let me summarise the position.
42. It is said that the administrators did not take steps to investigate the possibility of bringing an action to avoid the NRW GSA in the event of the liquidation of GNT Resources and the likely return to unsecured creditors which would result from such an action. I disagree. The administrators considered the question of whether the NRW GSA and payments made after the NRW GSA was granted would be able to be attacked in a liquidation of GNT Resources, taking into account legal advice on the question.
43. Further, regarding the mining rates charged prior to the administration, a competitive tender process was undertaken in mid-to-late 2017. Further, regarding the mining rates charged by NRW during the administration, these rates were agreed during a negotiation process. And as part of that process the administrators engaged a third party expert advisor to provide advice on the reasonableness of the proposed rates. From the work that had been done and the third party advice that had been received, the administrators were satisfied that the rates NRW sought were not exorbitant or inappropriate. Further, the negotiations with NRW were conducted by Mr Ryan with an awareness of the strength of NRW’s bargaining position.
44. Further, the increase from 5% to 8.75% of the upfront payment from the capital raising does not increase the amount that will be paid to NRW. The increase brings forward the deferred contingent payment pursuant to the agreement with NRW which was announced to the ASX on 18 June 2020. Mr Ryan agreed this with NRW in the light of the Hanking DOCA proposal, where NRW was being offered an upfront payment of $10 million. I have already explained this.
45. Further, the DOCA does not give preferential treatment to NRW. All secured and unsecured creditors will receive value of 100 cents in the dollar. Further, pursuant to the agreement with NRW which was announced to ASX on 18 June 2020, NRW agreed (in effect) to give up its security. As a secured creditor, it has agreed to part of its debt being converted to equity and part of its debt being deferred for a number of years. In my view the regime by which NRW is paid its debt is the least favourable in terms of timing of payments, as it may not be repaid for a number of years. By comparison, in terms of timing for payment, other unsecured creditors are to be repaid ahead of NRW.
46. In summary, I reject Habrok’s multi-dimensional assertions concerning NRW.

## (f) The administrators’ report

1. Self-evidently, there is a link between an inadequate investigation in substantial respects and whether the information in the report to creditors is false or misleading or there are material omissions. The former may produce or be reflected in the latter.
2. Let me deal with Habrok’s complaints concerning the administrators’ report to the extent that I have not already covered them.

#### Habrok’s complaints

1. First, Habrok says that the administrators’ report did not mention that the NRW plant and equipment may have vested in GNT Resources by reason of not being registered under the PPSA. It says that this issue does not appear to have been investigated or reported to the senior secured creditors or other creditors. Given the estimated value of the plant and equipment of $50 million and the possibility it may have vested in GNT Resources and therefore fallen within the scope of the senior secured creditors’ security (securing a debt of $80 million), according to Habrok this is a material omission.
2. Second, the administrators stated that the potential for recovery of unfair preference payments is remote. But Habrok says that statement does not adequately reflect the advice of HSF that there was an increased prospect that the amounts paid to NRW from the May 2019 capital raising might have been preference payments due to the proximity of those payments to the entry of the GCY Group’s into voluntary administration.
3. Third, the administrators’ report stated that the NRW security, granted within six months of administration, may be void under s 588FJ. But notwithstanding this possibility, the administrators represented to creditors that an action was unlikely as a liquidator would be required to establish that the GCY Group was insolvent at the time the NRW security was granted and that NRW had knowledge of the GCY Group’s position. According to Habrok, the impression created by these statements underplayed the concerns expressed in the advice from HSF that the risk that the NRW security was void was not insignificant.
4. Fourth, Habrok complains that the administrators’ report did not provide an estimate of the potential recoveries from claims in respect of any actions arising from the administrators’ investigations.
5. Fifth, Habrok complains that the administrators’ report lacked sufficient detail to enable creditors to form their own view on the reasonableness of the value ascribed to the assets of the GCY Group in liquidation. In particular:
6. the administrators did not provide a complete list of assumptions underpinning the value ascribed to the assets of the GCY Group for the purposes of the estimated outcome analysis in liquidation;
7. there does not appear to have been any investigation as to whether NRW’s plant and equipment vested in GNT Resources; and
8. the administrators did not elaborate on the key drivers behind the disclosed valuation, particularly the low side scenario.
9. Sixth, Habrok complains that the administrators’ report was also deficient and misleading in its calculation of the estimated returns to creditors under the DOCA.
10. The administrators estimated that priority creditors may achieve a return of between 0 and 100 cents in the dollar. But Habrok says that the administrators incorrectly subordinated priority creditors to unsecured creditors with respect to circulating assets. This lead to a material mis‑statement of the estimated outcome on the low side of liquidation. Habrok says that, having regard to the waterfall prescribed by s 556(1), priority creditors of GNT Resources should expect to receive 100 cents in the dollar instead of between 0 to 100 cents.
11. Seventh, Habrok complains about inadequate disclosure regarding the creditors’ trust.
12. Now ASIC’s *Regulatory Guide 82* *External administration: Deeds of company arrangement involving a creditors’ trust* (RG 82) identifies information that would be material to a creditor considering a DOCA proposal involving a creditors’ trust.
13. According to Habrok, the administrators’ report failed to comply with RG 82 in the following respects. It provided only an outline of terms in the DOCA, rather than a copy of the creditors’ trust deed. Further, the reasons for entering into a creditors’ trust were buried in appendix 2 of the administrators’ report, where they escaped the attention even of an expert reader. Further, there was no discussion of the differences in protections available to beneficiaries of a creditors’ trust compared with the protections available to creditors under a DOCA. Further, there was no comparative information regarding a potential return to creditors if the DOCA did not involve a creditors’ trust. Further, the administrators provided insufficient information as to the actual and potential implications of the options available to creditors, including a scenario where the GCY Group was wound up, so as to enable creditors to assess for themselves the risk of the creditors’ trust. In particular, the administrators did not adequately investigate and account for alternative claims available to creditors in a liquidation, including possible recoveries from voidable antecedent transactions. Further, the creditors were not afforded adequate opportunity to obtain professional advice given the additional complexity involved in the creditors’ trust. Further, the administrators did not provide information regarding the taxation implications for creditors of the creditors’ trust. This was relevant given that the creditors’ trust was proposed to be capitalised by both cash and shares.
14. Eighth, Habrok complains that the administrators’ report did not make any disclosure of the following information in respect of the capital raising proposed by the DOCA:
15. the indicative capital structure of the capital raising;
16. the intended use to be made of the funds raised;
17. the costs associated with the capital raising;
18. the quantity of shares to be issued to NRW and other contractual arrangements with NRW; and
19. the solvency of GCY Group post the capital raising.
20. Moreover, Habrok says that the omission of information relating to the solvency of the GCY Group was material given its history, including having conducted two capital raisings in the 12 months prior to entering voluntary administration. Further, Habrok says that this information was relevant given that large unsecured creditors were to be paid 50% of the balance of their debts that exceeded $10,000 in shares rather than cash.
21. Ninth, Habrok says that the consequences of the omissions referred to above, in particular the failure to place a dollar value on the prospect of recoveries in a liquidation, were that the returns to creditors under the DOCA, other than secured creditors whose claims would be paid in full, were estimated to be in the range of between 0 and 100 cents in the dollar. That range did not provide meaningful information to creditors.
22. Let me deal with the above points to the extent that I have not already addressed them expressly or by necessary implication from what I have already said.

#### Disclosure as to the risks of the creditors’ trust

1. Habrok asserts that there was insufficient disclosure about the creditors’ trust and its risks. It is asserted that the creditors’ trust proposed in the DOCA and in the administrators’ report was not compliant with RG 82.
2. Now it was not mandatory to attach the proposed creditors’ trust deed to the administrators’ report. The full terms of the creditors’ trust deed had not been prepared but the mechanisms under it were accurately detailed in the administrators’ report.
3. Further, the proposed value of the creditors’ trust could be reasonably estimated because the value of the claims of unsecured creditors of about $6 million was known and made clear in the administrators’ report. Further, the term sheet for the DOCA proposed by the administrators gave details as to what was payable and when to form the creditors’ trust. Further, the value of the creditors’ trust did not depend on the success of the proposed capital raising because if the capital raising did not succeed, the DOCA would not be effectuated and the creditors’ trust would not be created.
4. Further, the administrators’ report made it plain that the creditors’ trust was to be used to accelerate the GCY Group’s exit from external administration, thereby avoiding the GCY Group having to trade “subject to DOCA”, and to enable the administrators as trustees of the creditors’ trust to be responsible for the distributions to creditors. These reasons were, in my view, unremarkable.
5. Further, the administrators’ reportstated that “Creditors should note, should the conditions for instalment 3not be satisfied, creditors have no recourse under the [*Corporations Act*] toenforce payment against [the] GCY Group”. I have previously described this payment to large unsecured creditors as the second tranche cash component. But, in any event, this risk has been managed. $2.85 million has already been put into FTI’s trust account so that the risk of this payment not being received had been minimised. Apart from this risk, all payments or shares for creditors need to be made when the DOCA is effectuated. Further, the administrators are the trustees of the creditors’ trust. This again minimised risks. In the circumstances, the suggestion that the administrators had not adequately communicated the risks associated with the creditors’ trust was not correct.
6. Further, at the second creditors’ meetings, Mr Ryan explained that the second tranche cash component would bepaid to the large unsecured creditors earlier within six months and before NRW was paid in full.
7. Further, theadministrators’ report contained RG 82 as appendix 3. This was to ensure that creditors were able to understand what ASIC regarded as the risks involved with creditors’ trust deeds so that creditors were able to consider this information and were in no doubt about the risks.
8. Further, it was not necessary for the administrators to provide speculative information about a potential return if the DOCA proposed by the administrators had not contained a proposal for the creditors’ trust deed. For GCY to be relisted on the ASX it was necessary for GCY to come out of administration. That is another reason why it was necessary for the creditors’ trust deed to be part of the DOCA proposed by the administrators.
9. Further, it was incorrect to conflate the apparent risks involved in a capital raising with risks to creditors under the DOCA proposal. It is onlyaftera successful capital raising occurs that the DOCA is effectuated.
10. Finally, it may be accepted that the administrators’ report does not deal with the tax implications for creditors of the creditors’ trust deed. But that is not a material non-disclosure. It would have been impractical for the administrators to address, in generality, what if any tax implication might exist for particular creditors. In any event, Habrok does not identify a real tax issue of real concern to any creditor.
11. In summary, Habrok’s complaints about the creditors’ trust lack substance.

#### Disclosure of priority creditor returns on liquidation

1. Habrok says that there are three inconsistent references to the amounts owed to employee creditors in the administrators’ report. But when the different pages are considered it is apparent that they are conveying different information about the position as to employee creditors.
2. First, the figure of $616,000represented total pre‑appointment entitlements as at 31 May 2020 owed to both former employees who resigned following the appointment of administrators and current employees of the GCY Group. Specifically, this figure comprises $398,000 for pre-appointment entitlements owed to the current employees and $218,000 for pre-appointment entitlements owed to the former employees. The pre-appointment entitlements owed to former employees of $218,000 appeared in an appendix of the administrators’ report as the sum of the total employee claims of $141,000 and $77,000. Further, the $398,000 for pre-appointment entitlements owed to current employees is the difference between $616,000 and $218,000.
3. Second, the figure of $783,000 is taken from the report on company activities and property which was prepared as at 31 May 2019. The difference to the figure above is attributable to a combination of the use of pre-appointment leave by the current employees and payments to the former employees in certain circumstances.
4. Third, as I have said, the figure of $218,000 represents the value of pre‑appointment entitlements owed to the former employees. This analysis assumes that GCY and GNT Resources employees would be transferred and their entitlements assumed by the purchaser under a liquidation scenario.
5. In any event, it is not explained how the alleged inconsistency justifies setting aside the DOCA. These points made by Habrok go nowhere.
6. Let me deal with another issue.
7. In the tables appearing in the administrators’ report, when the return to creditors is estimated on a liquidation there is no separate treatment of circulating assets that would be available to pay priority creditor debts or employee claims (priority creditor claims) in priority to the senior secured creditors and NRW, which is treated in the tables as a second‑ranking secured creditor.
8. But to the left hand side of the tables, it is said, “In a liquidation … there is likely to be a return to priority creditors from circulating asset realisations (which take priority over the [s]ecured [c]reditor debts)”. That is, on a fair reading, priority creditor claimants were alerted to this entitlement on a liquidation.
9. Further, on a liquidation, the priority creditor claims of employees would have been eligible for payment under the Fair Entitlements Guarantee Scheme (FEG Scheme). This is mentioned three times in the administrators’ report. That is, employees would reasonably have known that their return with respect to their priority creditor claims had value on a liquidation because of the FEG Scheme.
10. Moreover, when eligible employee creditors were given notice of the meeting of eligible employee creditors for the purposes of s 444DA of the *Corporations Act*, which occurred immediately before the second creditors’ meetings, they were informed of this entitlement on a liquidation. It was envisaged that on a liquidation there may be a sale of the GCY Group’s business as a going concern and either employees would be transferred and their entitlements assumed by the purchaser or if they were terminated, they would be entitled to payment under the FEG Scheme. With that knowledge, the employees voted in favour of the DOCA proposal, as regards their rights, at the employee creditors meeting.
11. Accordingly, the low basis estimation that on a liquidation priority creditor claims might not receive any dividend, albeit incorrect, was not a material mistake.
12. In any event, it is necessary to consider what circulating assets might have been available on a liquidation to pay priority creditor claims. Section 561 of the *Corporations Act* provides that if property of a company is insufficient to pay creditors other than secured creditors, payment of priority creditor claims must be made in priority over the claims of the secured party in relation to a “circulating security interest created by the company and may be made accordingly out of any property comprised in or subject to the circulating security interest”. Section 51C defines a “circulating security interest” either as a PPSA security interest, if it has attached to a “circulating asset” within the meaning of the PPSA, or as a floating charge. By s 340(1) and (5) of the PPSA, personal property is a circulating asset if it is:
13. an account that arises from granting a right, or providing services, in the ordinary course of a business of granting rights or providing services of that kind;
14. an account that is the proceeds of inventory;
15. an ADI account (other than a term deposit);
16. currency;
17. inventory;
18. a negotiable instrument; or
19. in any other case – the secured party has given the grantor express or implied authority for any transfer of the personal property to be made, in the ordinary course of the grantor’s business, free of the security interest.
20. Further, whether the GCY Group had circulating assets to pay priority creditor claims was to be determined by reference to whether there were any circulating assets when the administration began on 2 June 2019.
21. Now when the administration began, certain inventory and money held in six accounts at CBA constituted the circulating assets of the GCY Group. The intergroup debt owing by GNT Resources to GCY of about $104 million, even if it is treated as an account and, as such, as a circulating asset, would have had no value in a liquidation on a low basis.
22. The inventory consisted of consumables, run of mine ore (i.e. gold bearing rocks) and gold in circuit. This inventory was consumed or used during the administration. Section 442B(2) of the *Corporations Act* permitted the administrators to consume or use this inventory. Section 443D gave the administrators an indemnity over the GCY Group’s property to pay debts, for liabilities and for remuneration. Section 443E gave the administrators’ right of indemnity priority over debts secured by a circulating security interest. Section 443F secured the administrators’ right of indemnity with a lien over the GCY Group’s property, which had priority over other security interests only in so far as the administrators’ right of indemnity had priority over the debts secured by those security interests.
23. Consistently, the administrators’ expenses, liabilities for which the administrators were personally liable under s 443D(a) and the administrators’ remuneration were given a higher priority in a liquidation under s 556(1)(a), (c), (dd) and (de), ahead of priority creditor claims under, for example, s 556(1)(e), (g) and (h).
24. Accordingly, the inventory, having been consumed or used by the administrators, would not have been available on a liquidation of the GCY Group to pay priority creditor claims.
25. This all but left the money held in the accounts at CBA totalling, for GCY, about $7.7 million and, for GNT Resources, about $4.7 million. But the money in these accounts was taken by the senior secured creditors exercising their right of set-off. Now on a liquidation, the liquidators may have had a claim against the senior secured creditors to recover these amounts on the basis that they were circulating assets and used them to pay priority creditor claims, to the extent necessary. Indeed some authorities suggest that such a right must exist. But the issue is not without complexity. It cannot be said that liquidators would easily be able to obtain value for circulating assets taken by the senior secured creditors.
26. Accordingly, even if the administrators had analysed the position as to the availability of circulating assets to pay priority creditor claims first as against the secured creditor claims, they could not have concluded, on the evidence, that the return for priority creditor claims on a low basis was clear beyond doubt.
27. In summary, I reject Habrok’s complaints. They lack materiality.

#### Risks of DOCA proposal sufficiently disclosed

1. Habrok has asserted that the administrators have not adequately disclosed the risks and details associated with GCY’s ability to successfully raise the amount required, being $70 to $80 million.
2. Now the administrators’ report:
3. set out the relevant risk to the DOCA, that the completion of the capital raising is a condition precedent and that if the DOCA does not complete, the creditors will be left with the choice at a future creditors’ meetings of putting the GCY Group into liquidation or varying the DOCA;
4. set out the prospects of the GCY Group being able to execute the recapitalisation and therefore the proposed capital raising;
5. in addition, stated:

Should the conditions precedent of the DOCA fail to be met (discussed on the prior page), [the] GCY Group may be placed into liquidation. All additional unpaid debts incurred during the DOCA period will then be provable in a liquidation of the GCY Group.

Accordingly, there is a prospect of a larger quantum of creditor claims in a liquidation following a failed DOCA, than the current creditor pool in the Administration. This is a generic risk associated with executing DOCA proposals.

1. foreshadowed that the ASX would require a “full form prospectus pursuant to section 710 of the [*Corporations Act*]”, which most creditors would have understood is a detailed process;
2. set out various ongoing regulatory and third party work streams that were required in order for the proposed capital raising to be completed, and these work streams would have demonstrated to creditors that there were additional steps required to implement the proposed capital raising; and
3. set outdetails regarding the “Other features of the DOCA”, including by explaining that:

Importantly, creditors’ claims will only be extinguished and become beneficiaries of the Creditors’ Trust upon the Creditors’ Trust receiving:

* funds from the capital raise enabling a dividend to unsecured creditors of up to $10,000 per claim (Instalment 1); and
* new shares equivalent to 50% of the remaining balance of unsecured creditor claims (instalment 2).”

1. Further, as explained in the administrators’ report, the preparation of the proposed capital raising was well advanced as follows:

In April 2020, we engaged Canaccord to act as the lead manager and bookrunner for the proposed capital raising.

Canaccord is working closely with us, GCY management, our financial advisor (Investec), and legal adviser (HSF).

Existing shareholders, including major shareholder Deutsche Balaton AG, remain supportive of the proposed capital raise whilst lnvestec continues to hold discussions with possible financiers and existing interested persons.

1. Further, the administrators’ report contained appropriate disclosures given that no significant risks had been identified in respect of the proposed capital raising prior to the issuing of that report other than inherent risks involved in all capital raisings. Also, the majority of the creditors by value, being more than 90% of total debt, comprised the senior secured creditors and NRW, who were sophisticated investors, and other commercial parties, such as Zenith, Wesfarmers, GR Engineering, Viva Energy, Metso Australia Ltd and BOC Ltd.
2. Further, as to an apparent inconsistency between what is said in the administrators’ report and the explanatory statement to the notice of EGM, Mr Ryan addressed the issue of the underwriting of the proposed capital raising at the second creditors’ meetings. He made it clear to all creditors that Canaccord, who was acting for the administrators and the GCY Group, had indicated that it would underwrite the proposed capital raising once the EGM had been held and the prospectus had been issued.
3. In any event, there was no inconsistency between the administrators’ report and the explanatory statement to the notice of EGM. The administrators’ report stated that the DOCA proposed by the administrators was formulated as part of a broader recapitalisation plan, which had the objective of the continued existence of the GCY Group in its current structure.
4. At the time that the DOCA term sheet was formulated it was intended that the proposed capital raising would be structured as an underwritten non-renounceable entitlement offer and a placement. This was referred to in the DOCA term sheet. That remained the position when the administrators’ report was issued.
5. Now paragraph 2.4 on page 18 of the explanatory statement to the notice of EGM stated:

At the date of this Notice, the Company has not entered into an underwriting commitment in respect of the Capital Raising. This will be the subject of continued discussions prior to the lodgement of the Prospectus.

1. Paragraph 2.4 signalled a clear intention to continue to pursue an underwriting commitment in respect of the proposed capital raising prior to the lodgement of the prospectus, which is what is contemplated by the administrators’ report. This was also consistent with what Mr Ryan told the creditors at the second creditors’ meetings.
2. For there to be an inconsistency with the DOCA term sheet as asserted, the explanatory statement to the notice of EGM would have had to state that it was no longer intended that the proposed capital raising be underwritten. But that was not the effect of the explanatory statement to the EGM and was not what occurred in practice.
3. Further, it is asserted that the administrators’ report did not explain the feasibility of the proposed capital raising by providing an adequate forecast cash flow analysis and financial position. But it is not identified how the alleged lack of explanation justifies setting aside the DOCA. The basis of this allegation is also unclear.
4. The objective of the administrators’ report was to provide sufficient information to the creditors so they understood their likely return if the DOCA was successful compared to a liquidation scenario. The administrators’ report contained appropriate disclosures in respect of the proposed capital raising given the support the administrators had received and that no significant risks had been identified.
5. Now the administrators’ report did not provide information as to the indicative capital structure of the capital raising, the intended use of the proceeds, and the associated costs. But at the time of the administrators’ report those matters were still being finalised. Further, those matters would form part of the prospectus, which was a condition precedent to the DOCA proposed by the administrators. It would not have been commercially sensible to pre-empt the disclosure in the prospectus in the administrators’ report.
6. Further, in relation to the issue of shares to, and contractual arrangements with, NRW, those matters were disclosed in the administrators’ report and in ASX announcements released by both NRW and GCY.
7. In the light of these matters, there was adequate disclosure of any risks associated with the proposed capital raising.
8. Finally, given that a successful capital raising is a condition precedent to the effectuation of the DOCA, any risk is purely theoretical because in the event that the DOCA is not effectuated, creditors will be in substantially the same position as they were; and in that event, no creditors or shareholders will have had pre‑existing claims extinguished.
9. As I have mentioned, effectuation of the DOCA is conditional on completion of the capital raising and the DOCA, on effectuation, requires the proceeds from the capital raising to be paid to creditors. Accordingly, it is incorrect to conflate the apparent risks involved in a capital raising with risks to creditors under the DOCA proposal. It is only after a successful capital raising occurs that the DOCA is effectuated.
10. In my view, Habrok’s criticisms on this aspect lack substance.

#### No risk of insolvency post capital raising requiring disclosure

1. Habrok has asserted that the administrators’ report did not provide adequate information as to the GCY Group’s solvency after the proposed capital raising.
2. The DOCA proposed by the administrators contemplated a capital raising of $70 to $80 million, which would create additional working capital for operational purposes and would result in the GCY Group’s debt burden being reduced to:
3. the refinance facility of $40 million;
4. the balance of the debt payable to NRW, payable out of future trading profits; and
5. about $2.6 million due to large unsecured creditors.
6. Further, the administrators’ report adequately explained the following matters. First, NRW’s contingent claim would only arise if the NRW mining contract was terminated such as if the GCY Group entered liquidation. Accordingly, there was no need to consider the impact of that early termination fee under the DOCA proposed by the administrators, which, if effectuated, ensured that the business of the GCY Group would continue. The fact that the DOCA avoided this contingent liability from crystallising was simply another benefit to the unsecured creditors of the DOCA. Second, whether or not NRW’s debt was secured or not had no bearing on the solvency of the GCY Group *after* the proposed capital raising.
7. Further, there is now a fully underwritten proposed capital raising of $85 million and refinance facility of $40 million.
8. Further, the quantum of external creditor claims and the contemplated manner of their payment or extinguishment for value did not suggest any real risk of insolvency. Accordingly, the administrators’ report did not need to analyse in detail the issue of whether the GCY Group would remain solvent if the DOCA was effectuated. The administrators were not operating on any unfounded assumption about the viability of the Mine producing sufficient revenue.
9. In any event, there is no evidence that there is any real issue about the GCY Group’s solvency if the DOCA is effectuated. Indeed, the evidence from the independent experts that have considered the position in some detail is that the GCY Group will remain solvent until at least 30 June 2021.
10. There were three experts who gave written evidence including producing a joint expert report. None of them were cross-examined.
11. Mr Marcus Ayres, a chartered accountant and managing director of Duff & Phelps, prepared an expert report for Habrok. He expressed views about a number of alleged inadequacies in the administrators’ report. He also addressed the solvency of the GCY Group post-deed administration. But I prefer the opinions of Mr Campbell Jaski, a partner in the financial advisory division of PricewaterhouseCoopers, and Mr David McEvoy, a partner in the business restructuring services practice of PricewaterhouseCoopers, who prepared expert reports for the defendants, to those of Mr Ayres. Mr Ayres’ report had a number of problematic features.
12. Mr Ayres asserted, based on his own analysis of and adjustments to GCY’s cash flow model, that after emerging from the DOCA, the GCY Group would be insolvent after March 2021. But Mr Ayres’ model double-counted capitalised waste mining costs and made other errors. Mr Ayres’ solvency analysis was suspect.
13. Mr Ayres also expressed the view that the administrators’ report failed to have regard to s 561 of the *Corporations Act* and did not correctly estimate the likely return to priority creditors of GNT Resources on a liquidation low case basis. But Mr Ayres did not base his own, alternative, estimate of the return to priority creditors of GNT Resources on the available circulating assets at the date of the commencement of the administration, being 2 June 2019. Rather, Mr Ayres used the forecast cash surplus as at 30 September 2020, as provided for in the administrators’ report. The estimated return for priority creditors of GNT Resources referred to in Mr Ayres’ report was accordingly incorrect. There was also a problem with Mr Ayres’ opinion that, in estimating the return to priority creditors of GCY, intercompany debts owing to GCY would be considered a circulating asset capable of meeting priority creditor claims. I do not need to dwell on the difficulties.
14. Mr McEvoy prepared two reports in response to Mr Ayres’ report. The first report responded to Mr Ayres’ cash flow and solvency analysis by reference to Mr Jaski’s report. But in the light of Mr Ayres’ concessions on this point, which are reflected in the joint report, the solvency issue post deed administration is no longer in issue.
15. Mr McEvoy’s second report responded to other aspects of Mr Ayres’ report. Those remaining issues concerned various alleged inadequacies, including alleged mis-statement or non‑disclosures, in the administrators’ report. On these issues, to the extent of disagreement between Mr Ayres and Mr McEvoy remaining after the filing of the joint report, I have no reason not to accept the analyses and opinions of Mr McEvoy for the reasons he gives in his second report and otherwise in the joint report.
16. Mr Jaski prepared a report that reviewed Mr Ayres’ analysis of and adjustments to the GCY Group’s cash flow model for the purposes of his solvency analysis. Mr Jaski considered that Mr Ayres had made several errors in his analysis, including the double-counting of capitalised waste mining costs. As a result of Mr Jaski’s analysis, Mr Ayres now accepts that his earlier solvency analysis was wrong.
17. In summary, the preponderance of the expert evidence supports the position that the GCY Group will or is likely to be solvent after the administration of the DOCA has been completed. Accordingly, in my view, there was no material non-disclosure in the administrators’ report as to the future solvency of the GCY Group if the DOCA is put into effect and the transactions contemplated by it completed.

#### Other matters

1. Let me deal with a number of other matters.
2. First, it is said that the table on page 9 of the administrators’ report stated that unsecured creditors of GCY can expect a return under the DOCA ranging from 0 cents to 100 cents in the dollar and that this range is so broad as to be misleading regarding any possible return to creditors. But this is incorrect. The return in *liquidation* may be 0 to 100 cents. But the return estimated under the DOCA is stated to be “up to 100 cents via a combination of debt repayment and equity conversion, paid via 3 instalments”. That estimated return was further clarified in the “Timing of Payments” section in the row entitled “Unsecured”, which stated that all unsecured creditors would receive their outstanding amounts up to $10,000, paid within two months, and the remaining balance dealt with pursuant to the terms of the DOCA proposed by the administrators that were further set out in the administrators’ report.
3. Second, Habrok, complained that there was no reference to NRW being investigated in relation to uncommercial transactions. That is true. But the point is of little substance given that one would in a liquidation be looking at pre-administration transactions. There is little to suggest that NRW was a party to uncommercial transactions pre-administration.
4. Third, I accept that the administrators’ report only compared the DOCA scenario to a liquidation scenario. Accordingly a third possible scenario, namely, sale was not compared. But at the time of the administrators’ report, the sale process had been disappointing to say the least. I refer to my earlier discussion. Unsurprisingly then, the administrators considered the more likely scenarios in the frame at the time of the second creditors’ meetings and compared those scenarios. And at that time, a serious and competitive sales proposal was not on the table. I do not think that the administrators can be criticised.
5. Fourth, I accept that Mr Chivers may have reviewed the overall content of the administrators’ report in case he could detect any inaccuracy. But that is a different thing from saying that he undertook a detailed insolvency analysis during the administration. He did not. Mr Skelton did; again there was no lack of independence or objectivity or a reasonable apprehension of such a lack.
6. Fifth, the administrators’ report made it clear that more detailed insolvency work could be carried out in a liquidation. But in context, in my view the work that the administrators did carry out was adequate and fairly reported on. And none of the opinions that the administrators expressed could be said to have lacked a reasonable foundation. Further, there had to be a sense of proportionality. In the context of the advantages of the DOCA, how NRW was to be treated under the DOCA, the importance of NRW as the mining contractor and the uncertainties involved in any liquidator being able to successfully pursue voidable transactions, the administrators’ investigations of NRW were proportionate in that context. Moreover, is it seriously suggested that I should terminate the DOCA with its considerable advantages for all creditors merely on Habrok’s speculative possibilities concerning NRW?
7. Sixth, I think that there is little in Habrok’s criticisms concerning the dual track process described in the administrators’ report. Even accepting some of the criticisms made as to what had been described and disclosed, the real question is what was on the table at the time the report was prepared. At that time there was no reasonably viable purchase offer on the table. And I do not accept that the administrators are to be blamed for this. Hanking and Adaman had had all the necessary time to formulate and put a viable offer. They chose not to do so.
8. Seventh, there is little in Habrok’s point concerning the vagueness in statements such as the DOCA “provides for a possible return of up to 100 cents in the dollar to unsecured creditors” or “enough to allow all creditors to receive up to full repayment of their claims”. When one reads the administrators’ report and what was disclosed at the second creditors’ meetings concerning the DOCA, it is clear that the unsecured creditors were being given meaningful and detailed information as to the benefits and returns likely to flow to them under the DOCA.
9. Eighth, Habrok complains that the administrators’ report did not mention that the NRW plant and equipment may have vested in GNT Resources. But for the reasons that I have sought to explain earlier, that speculative possibility had no underlying substance. Therefore it did not need to be disclosed.
10. Ninth, Habrok complains that the administrators’ report did not reflect the vague HSF advice concerning NRW preference payments relating to the May 2019 capital raising. That is so. But in my view the report sufficiently flagged with creditors that the NRW position generally could be looked at in more detail in a liquidation. And more generally, and contrary to Habrok’s contentions, I do not consider that the administrators’ report under-played the advice from HSF concerning the potential voidability of the NRW security in a fashion such as to materially mislead creditors.

## (g) Rival DOCAs

1. Habrok says that the administrators were “wedded” to their DOCA and has made a number of criticisms.
2. First, Habrok says that Hanking complained about the lack of meaningful engagement by the administrators with its DOCA proposal, and the apparent rush by the administrators to push through the administrators’ DOCA at the second creditors’ meetings. Now Hanking may have had that perception, but in my view that was not the reality. Moreover, and as I will shortly explain, it was well apparent that there were deficiencies in its proposal as compared with the administrators’ DOCA proposal.
3. Second, Habrok says that when presented with two additional DOCA proposals shortly before the second creditors’ meetings, rather than exercising their power to adjourn the meetings to allow creditors to consider the rival proposals, the administrators entered into the NRW side-agreement to ensure that the votes in favour of their DOCA and against an adjournment would be carried. I do not think that this is a fair characterisation of events which I have detailed elsewhere.
4. Habrok also says that this raises the more general question of the administrators’ preferential treatment of NRW. I have dealt with that topic earlier. I would disagree with Habrok’s perception and characterisation of the relevant events.
5. Now I accept that Hanking sought an adjournment of the second creditors’ meetings. But as chairman, Mr Ryan did not make a decision on whether or not to adjourn the second creditors’ meetings. Rather, he put the question of adjourning the second creditors’ meetings to the creditors to enable them to decide how they wished to proceed. And he was entitled to so proceed.
6. Further, prior to the vote on the adjournment resolution, there was discussion with representatives of Hanking as to the length of an adjournment and, as chairman, Mr Ryan invited all creditors to voice their opinion. But only one person took advantage of this opportunity, namely Mr Joel Skipworth of Orlando.
7. Following discussion, a resolution was put to the creditors at the second creditors’ meetings that the meetings be adjourned until 12 pm on 10 July 2020, being an adjournment of 15 days. But that resolution was not passed.
8. Now as chairman, Mr Ryan held general proxies with respect to the intercompany loans owed by some of the GCY Group subsidiaries to GCY, totalling about $121.068 million. Very properly in my view, he abstained from voting those proxies on both the adjournment resolution and the subsequent resolution for entry into the DOCA proposed in the administrators’ report. He wanted the unrelated creditors of the GCY Group to decide.
9. In my view, Mr Ryan acted entirely appropriately in how he conducted the second creditors’ meetings.
10. Third, Habrok says that there was a lack of engagement concerning the Habrok Mining DOCA proposal. I would reject such an assertion if this is said to be a criticism of the administrators.
11. The first time the administrators were even aware that Habrok Mining intended to put forward a DOCA proposal was on the evening before the second creditors’ meetings were to be held.
12. The Habrok Mining DOCA proposal was uploaded onto the GCY Group creditors’ portal on the morning of the second creditors’ meetings, being the morning after it was received.
13. Prior to the second creditors’ meetings, Ms Warwick had a telephone conversation with Mr Raftery to clarify the terms of the proposal and to advise that it would be tabled at the second creditors’ meetings. The administrators were not provided with the Blackrock term sheet by Mr Raftery before the second creditors’ meetings. Further, Habrok Mining did not seek any information from the administrators or Investec before submitting the Habrok Mining DOCA proposal.
14. Further, Mr Ryan advised the creditors in the course of the second creditors’ meetings that the Habrok Mining DOCA proposal had been received and gave details of it to the meetings. But no one representing Habrok Mining attended the second creditors’ meetings to talk to the Habrok Mining DOCA proposal.
15. In my view, Habrok has no legitimate criticism as to how the administrators dealt with the Habrok Mining DOCA proposal.
16. But more generally, there is something artificial in my view about these criticisms concerning the rival DOCAs. After all, the DOCA propounded by the administrators was more favourable to the stakeholders than the rival DOCAs.
17. Under the DOCA:
18. GCY will raise about $85 million in equity and refinance debt by borrowing up to $40 million.
19. the senior secured debt (approximately $80 million) will be repaid in full.
20. NRW’s debt (approximately $32.7 million) will be restructured and paid by up to $7 million in cash and $12 million of GCY shares. NRW will then release the NRW GSA and receive the balance of the amounts owing to it over the next few years, depending on the gold price and the amount of gold sold.
21. Priority employee creditors if continuing will keep their jobs and be paid their full entitlements in the ordinary course. Priority employee creditors if departing will be paid their full entitlements within one month. Departing employees have, in fact, already been paid these entitlements within this one month.
22. Save for intra-group claims and any shareholder claims, unsecured creditors will be paid through the creditors’ trust. They will be paid up to $10,000 in cash very quickly. And for any balance above $10,000, they will be paid 50% of the balance in GCY shares within two months or, if they choose, the cash equivalent of those shares within three months. And they will be paid the remaining 50% in cash within eight months. But, GCY’s directors have already put $2.85 million into FTI’s trust account to ensure that the remaining 50% in cash is secure and will be able to be paid very soon after effectuation.
23. Intra-group creditors (approximately $104 million) will be deferred and paid only when sufficient funds are available. Any shareholders with claims may recover out of GCY’s insurance if it responds. No shareholder claims have been made.
24. On the DOCA’s effectuation, control returns to a new board of directors.
25. Now the Hanking DOCA proposal was similar to the administrators’ DOCA proposal, but had greater risk. Under the Hanking DOCA proposal:
26. GCY was to raise $90 to $100 million in equity.
27. The secured debt (approximately $80 million) was to be repaid in full.
28. NRW’s debt (approximately $32.7 million) was to be restructured and paid as to $10 million in cash and $12 to $15 million of GCY shares. NRW was to then release the NRW GSA and was to receive the remaining amounts owing over the next few years. However, the position under the administrators’ DOCA was more certain. This is because agreement had been reached with NRW by 24 June 2020 under the NRW binding term sheet as amended by the NRW letter agreement. Also, NRW supported the administrator’s DOCA proposal and not the Hanking DOCA proposal.
29. Priority employee creditors if continuing were to keep their jobs and would be paid their full entitlements in the ordinary course; and if departing would be paid their full entitlements.
30. Save for intra-group claims and any shareholder claims, unsecured creditors were to be paid through a creditors’ trust from $6 million provided by Hanking.
31. Intra-group creditors were to be deferred. Any shareholders with claims were to recover out of GCY’s insurance if it responds. Control was to return to a new board of directors.
32. Funding referred to in paras (c) and (e) above were conditional on agreement with NRW on terms acceptable to Hanking and on a convertible note deed on terms that had to be acceptable to Hanking.
33. In essence, the main differences between the administrators’ DOCA proposal and the Hanking DOCA proposal were that Hanking had *not* come to an arrangement with NRW. So, Hanking had effective optionality as to whether to proceed. Moreover, there were potential FIRB issues floating around.
34. The Habrok Mining DOCA proposal was even worse. It did not propose nor address with certainty how all creditors would be paid whether in full or in part. The following was proposed under the Habrok Mining DOCA proposal:
35. The senior secured debt was apparently to be repaid by debt acquisition or refinancing. But exactly how funding for this had been secured was not clear from the evidence. The Habrok Mining DOCA proposal asserted that funding would come from BlackRock (Singapore) Limited – APAC Fixed Income Portfolio Management Group (BlackRock) and funds and accounts managed on behalf of Remagen Capital Management Pty Ltd. There was a BlackRock term sheet.
36. But it was proposed that NRW and Habrok Mining had to reach “a settlement of NRW’s claim against any DOCA Company reasonably satisfactory to [Habrok Mining]”. Clearly, no agreement had been made with NRW, and any proposed agreement was to be a settlement to Habrok Mining’s satisfaction. Now Habrok asserts that the arrangements made by the administrators with NRW were unsatisfactory as to pricing, but the Habrok Mining DOCA proposal would appear to have been a proposal with considerable uncertainty associated with it. Further, the timing for any agreement with NRW was not specified. The Habrok Mining DOCA proposal was not capable of immediate acceptance by the creditors; there was uncertainty.
37. Priority employee creditors if continuing were to keep their jobs and would be paid their full entitlements in the ordinary course; and if departing would be paid their full entitlements.
38. All other unsecured creditors were to release their claims. Small unsecured creditors were to receive full value and large unsecured creditors were, as to the amount of more than $10,000, to receive a pari passu entitlement from $3 million. But this meant that large unsecured creditors would not have received full value. Intra-group creditors were not dealt with separately. Shareholder claims were not dealt with at all. And despite not all creditors receiving full value but being required to extinguish their claims, new directors were to take control of the companies.
39. Further, either an asset sale or a transfer of shares under s 444GA of the *Corporations Act* was envisaged. But both of these options would have provided no value to shareholders.
40. Further, the provenance of the BlackRock term sheet and how it was a source of funds for Habrok Mining was opaque to say the least. No binding agreement for funding was provided by BlackRock. Moreover, the Blackrock term sheet was signed by Mr Raftery on behalf of Adaman, not Habrok Mining nor Habrok, on 23 June 2020. Further, subject to certain narrow exceptions, the BlackRock term sheet was expressly stated to be indicative only, not legally binding and not to constitute an offer or commitment to arrange or finance the facility.
41. Further, the borrower was identified in square brackets as “Adaman SPV”, whose parent was said to be Adaman. But at that time, Habrok Mining’s parent was Ethele Pty Ltd, not Adaman. Now Habrok has provided some information that as of 2 September 2020, Remagen Lend ADA Pty Ltd, whose parent apparently is Remagen Group Pty Limited, had two accounts with about $22.7 million. But that does not demonstrate that any Remagen entity had funds when the Habrok Mining DOCA proposal was put forward. Indeed, the Habrok Mining DOCA proposal refers to the “Incoming Lenders” having funds managed on behalf of Remagen Capital Management. This was all quite problematic if I may say so.
42. Further, the purpose of the funds to be advanced by BlackRock on one view was not to fund the Habrok Mining DOCA proposal, but rather to fund “the purchase of all the senior secured debt of Gascoyne Resources Limited…”. But I do note that BlackRock’s email to Mr Raftery stated that the funding continued to be on foot “to enable you (either Adaman or Habrok) to acquire Gascoyne via either a senior debt purchase or acquisition of the underlying business through either a DOCA or asset sale”. The arrangements were all clouded in obscurity.
43. In summary, on the face of the administrators’ DOCA proposal, the Hanking DOCA proposal and the Habrok Mining DOCA proposal, it cannot be said that the Habrok Mining DOCA proposal provided more certainty or promised a greater return to all creditors. The administrators’ DOCA proposal was more advanced and agreement had been made with NRW pursuant to which NRW had agreed to release the NRW GSA and defer repayment until after all other creditors were paid in full.

## (h) Unfair prejudice

1. According to Habrok, the matters that it has raised collectively contributed to the DOCA having an unfairly prejudicial effect on creditors. I disagree.
2. First, Habrok points to the unfairness of the benefits that NRW received in the course of the administration, including:
3. the uncommercial rates charged by it under the interim proposal; and
4. the restructure of debts under the DOCA, including the NRW side-agreement.
5. But in my view there has been no inherent unfairness. There were no uncommercial rates. Moreover, the restructure of debts and the NRW side-agreement were quite appropriate and advantageous for all concerned. And if there was any prejudice, it could hardly have been said to be unfair in all the circumstances.
6. Now Habrok says that this unfairness was exacerbated by NRW’s role as a COI member for GNT Resources. It says that in that position, s 80-55 of the *Insolvency Practice Schedule* prohibits NRW from deriving any profit or advantage from the external administration of the GCY Group without approval.
7. But a resolution was passed at the first creditors’ meetings to the following effect:

That members of the Committee of Inspection and related parties of members are entitled to enter into arms-length transactions or dealings in the ordinary course with the Administrators, GNT Resources Pty Ltd (Administrators appointed) or its creditors.

1. But Habrok says that any consent was ineffective unless it was fully informed. Further, it says that this resolution was passed in advance of any of the preferential dealings between the administrators and NRW. Further, it says that there is no sense in which the interim proposal, the NRW side-agreement, which improved NRW’s position under the DOCA, or the agreement to amend the interim proposal, which provided for NRW to receive performance shares as part of its consideration under any revised mining contract, could be regarded as “arms-length transactions”. But I reject Habrok’s assertions. The dealings were clearly at arms-length. The resolution covers the matter. And in any event there is no substance to Habrok’s underlying criticisms.
2. Second, Habrok says that there is also a specific detriment under the DOCA to deferred shareholder creditors. It says that there is potential for shareholders who participated in the May 2019 capital raising to bring an action in relation to inaccurate disclose or non-disclosure in the prospectus regarding the amounts to be paid to NRW from the proceeds of that capital raising.
3. But Habrok says that the DOCA provides that shareholders with possible claims against GCY will not be able to participate as beneficiaries of the creditors’ trust. Those shareholder claims will be subject to the provision of an indemnity and to the extent that they are covered by a responsive insurance policy.
4. Now Habrok says that the administrators have disclosed in the administrators’ report that there may not be any directors’ and officers’ insurance policy responsive to claims by shareholders for insolvent trading or in respect of any failure by the GCY Group to maintain its disclosure obligations. And if that is the case, Habrok says that the DOCA effectively extinguishes possible shareholder claims including those arising from the May 2019 capital raising.
5. But in my view, this criticism is not well made for reasons that I have previously given. There appear to be no such viable claims. But even if there were and they have been extinguished, so what? Now there was no Side C cover. But those claims would have been worthless in a liquidation anyway.

## (i) Any other reasons to terminate the DOCA?

1. Habrok points to the following matters as justifying terminating the DOCA.
2. First, Habrok says that its application under s 445D(1)(g) is made on the ground that the administration was affected by conflicts of interest. Accordingly, it should not be sanctioned by allowing the DOCA to proceed. But I have already rejected such assertions.
3. Second, Habrok says that not only were there conflicts of interest during the administration, but the omissions and failings of the administrators were of such a scale, including in respect of the possibility of avoiding the NRW security, that the administration was seriously flawed and misleading to creditors. But I have rejected these assertions as well.
4. In summary, I am not able to find that any of the conditions set out in s 445D enlivening my power and discretion to set aside the DOCA have been made out.
5. Likewise I see no proper basis for the exercise of any power under s 447A.

## (j) Discretion

1. But even if my power to terminate the DOCA had been enlivened, I would not in the exercise of my discretion order that the DOCA be terminated.
2. On the exercise of the discretion, the primary consideration is the interests of the creditors as a whole. But I accept that the public interest also has importance. So, if the DOCA is significantly detrimental to commercial morality and more broadly the public interest, this may outweigh the interests of the creditors as a whole. And of course I am not bound by the consent of the creditors (or the relevant majority) to enter into the DOCA, although it is a significant consideration (*Deputy Commissioner of Taxation (Cth) v Pddam Pty Ltd* (1996) 19 ACSR 498 at 512 per Heerey J). As Reeves J pointed out in *Shafston Avenue Construction Pty Ltd v McCann* (2019) 138 ACSR 299 at [50], “Pt 5.3A is intended to vest the commercial judgment about whether to enter into a DOCA in the majority of the creditors of a company”.
3. Let me say something about commercial morality and the public interest.
4. In *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510 Campbell J said (at [289] to [291]):

One public policy which can be applied is the policy against allowing an insolvent company to continue to be in a position to trade ([260] ff above). That policy applies in the circumstances of this case.

For a director to avoid public examination about the affairs of the corporation, and the possibility of the type of clawback litigation which is possible in a winding up, by making a payment to creditors, can also be a factor in favour of termination: cf *Paton v Campbell Capital Ltd* at 32. It is in a relevant sense “detrimental to commercial morality” to dispense with the opportunity which the winding up law provides for the investigation of the affairs of a failed company: *Re Data Homes Pty Ltd (in liq)* [1972] 2 NSWLR 22 at 26 *Emanuele v Australian Securities Commission* at FCR 69; ALR 520; ACSR 15.

How much weight is given to the fact that the affairs of the company will not be investigated depends upon whether there are circumstances which suggest that investigation is called for. Sometimes, the fact that only a small dividend will be paid to creditors is itself such a circumstance: *Lancaster v NZI Capital Corporation Ltd* (Sheppard J, Federal Court of Australia, 3 September 1991 unreported, but quoted and approved in *Paton v Campbell Capital Ltd* at 32). Sometimes, the fact that it appears that there may be prospects of preference or uncommercial transaction or insolvent trading recoveries can be such a circumstance. In the present case, it is clear that only a small dividend will be paid to creditors, if any dividend at all. There is some basis for believing that insolvent trading recoveries might be possible, but the evidence concerning that topic is fairly slight, and any actual recoveries would depend on a liquidator obtaining the funding to sue.

1. Now of course the first scenario of allowing a company to trade whilst insolvent does not apply in my case. And as for the investigations point, in the present context this is not an overwhelming point.
2. In terms of what Habrok has said concerning the asserted inadequate investigations by the administrators of claims against the directors and claims against NRW, Habrok has gone nowhere close to demonstrating that there is a real prospect of obtaining a better return for creditors by pursuing such investigations and proceedings in a liquidation as compared to the obvious and considerable advantages to the creditors of the DOCA now available.
3. Now I said in *Midland Highway* (at [74]) that “the preclusion of an effective investigation by a liquidator into relevant transactions and the opportunity for greater returns may render a DOCA contrary to the creditors’ interests overall”. But in the matter before me there is no such realistic “opportunity for greater returns” in a liquidation of the GCY Group. Further, the DOCA in the matter before me is not the sort of DOCA I was considering in *Midland Highway* where its primary purpose or effect was to limit if not hinder a full investigation of various entities and persons in relation to what I described as shadowy transactions.
4. Now I do accept that in some cases, even if a DOCA offers more than a liquidation, nevertheless the public interest and commercial morality might justify terminating the DOCA. But that is not the present case. I accept that the Court may set aside a DOCA pursuant to s 445D even where creditors may be better off under the DOCA than with a liquidation. And the public interest can sometimes justify the termination of a DOCA even where it is not established that this would necessarily be in the creditors’ interests. And to grant such relief may sometimes be in the interests of “commercial morality” in the sense that expression is used in the authorities. But we are here nowhere close to such a scenario for reasons that I have already given. The investigations were adequate in context. Further, the DOCA was not proposed in order to protect the directors or NRW from the scrutiny of a liquidator. Further, the suggested potential recoveries in a liquidation are very speculative and nowhere near the benefits to be provided by the DOCA.
5. Let me make the following further points on discretion.
6. First, if the DOCA is put into effect the senior secured creditors will be paid in full. Further, all external unsecured creditors including employees will be paid in full or receive considerable value within a short period. And NRW, whether it is a second-ranking secured creditor or not, will be paid up to $7 million and receive GCY shares valued at $12 million, upon which it will give up its secured creditor position and be paid depending on the performance of the Mine. Further, other stakeholders will also benefit. GCY’s shareholders will hold shares in a company whose business will continue along with its subsidiary companies, rather than hold shares in a company in liquidation with likely no value.
7. Second, if the GCY Group is permitted to implement the DOCA, it will emerge from the voluntary administration process as solvent. The GCY Group will have approximately $60 million in debt, including approximately $40 million of senior secured debt, ongoing business liabilities and the contingent amount owed to NRW of $13 million, compared to when the GCY Group went into administration with approximately $120 million in debt. Further, the GCY Group will have approximately $30 million of cash. And it will have the Mine producing profitable quantities of gold with 40% hedged at historically strong gold prices, compared with those at the commencement of the administration.
8. Third, let me now deal with one of the surprise developments in the case. On 17 September 2020, Habrok through its solicitors, Arnold Bloch Leibler, made an open offer to the defendants to pay $140 million “to acquire the GCY Group” with a willingness to structure the transaction as “an acquisition of GCY’s shares in the operating subsidiaries” by varying the DOCA.
9. In particular, clauses 6 to 8 thereof provided as follows:

The proposal to pay $140 million would pay all creditor claims in full and provide a significant contribution to shareholders. Our client’s proposal is to structure the payments as follows:

(a) $111.2 million payable upfront upon orders being made (including for the execution of necessary documentation to execute the transaction) to immediately pay in full:

(i) senior lenders (approximately $80 million);

(ii) any non-continuing employees (approximately $200,000);

(iii) ordinary unsecured creditors (approximately $6 million);

(iv) an upfront instalment to shareholders of $5 million;

(v) an upfront instalment to NRW of $20 million;

(b) subject to independent assessment of the rates charged by NRW post-appointment, the balance of NRW’s claim of $12.7 million will be paid in quarterly instalments with the first instalment being made on 31 March 2021;

(c) the balance of $16.1 million will be paid to existing shareholders (in proportion to their shareholdings) in full by no later than 31 March 2022.

If NRW wishes to receive some part of its entitlement by way of shares, our client is open to adjusting this proposal accordingly.

Our client believes that this proposal, which would involve upfront payments to shareholders and an up-front payment to NRW of $20 million (compared to $7 million), is demonstrably superior to the existing DOCA.

1. On 17 September 2020, the defendants through their solicitors, HSF, responded in the following terms:

For the purposes of enabling our client to consider the Proposal, please clarify the following issues:

(a) as we read the Proposal, your client would be obliged to pay $111.2 million ‘up front’, with further amount to be paid over time. Please provide evidence of unconditional funding for an amount of $111.2 million. You will appreciate that such an issue gives rise to a significant completion risk, in circumstances where the Capital Raise contemplated by the existing Deed of Company Arrangement (DOCA) is fully documented, funded and underwritten and would have completed by now, save for the above proceedings;

(b) with respect to the proposed payment to NRW of $12.7 million over time on a quarterly basis commencing 31 March 2021, please advise:

(1) whether it is still intended that NRW be proposed to be the mining contractor going forward;

(2) what is the source of funding for the payment to NRW; and

(3) how is it proposed that that payment will be secured;

(c) with respect to the payment of $16.1 million to existing shareholders by no later than 31 March 2022, please advise as to how that payment is to be funded, and what security it is proposed will be provided to secure the performance of that obligation.

You will appreciate that NRW is significantly impacted by your proposal, and our client has shared the Proposal with them, to obtain their input.

You will also appreciate that the Proposal, not only by way of the timing aspects, but also as to quantum, compares unfavourably with the return to stakeholders under the existing DOCA. We attach a schedule which summarises the return to stakeholders the DOCA [sic]. It is apparent that the existing DOCA gives a greater return to stakeholders in a comparable or quicker timeframe that under the Proposal (ie depending on the relevant stakeholder). In such circumstances, our client does not accept that the proposal your client has put forward is in the best interests of the stakeholders unless it is materially improved.

Finally, in our view, it would not be possible for the court to make an order varying the existing DOCA, which fundamentally changes the terms of the DOCA approved by the creditors under section 447A of the Corporations Act and/or section 90-15 of the Insolvency Practice Schedule. Are you able to refer us to any authorities which support the proposition that changes can be made to DOCA [sic] of such a fundamental nature?

1. There are a number of points. Habrok’s availability of finance to fund its offer was suspect to say the least. Further, as the defendants’ solicitors’ letter makes apparent from its schedule, Habrok’s proposal was not shown to be more favourable than the DOCA so far as stakeholders were concerned. Further, it is problematic to say the least as to whether I have the power to vary the DOCA in the terms contemplated without having relevant meetings of creditors. But even if I did, I would not so exercise it. The proposed changes are contentious and may be prejudicial to some stakeholders. Now of course s 447A is of very broad amplitude. But how could I justifiably over-ride the requirements of s 445A particularly given the nature of what is proposed?
2. I will not speculate further. This open offer is too little, too late. If my discretion had otherwise been enlivened to terminate the DOCA, the existence of Habrok’s open offer adds little in favour of termination given its problematic features.
3. Fourth, the DOCA has the overwhelming support of the GCY Group’s creditors. Although the senior secured creditors did not vote for the DOCA, they are supportive of it as evidenced by the exclusivity agreements they have made. Together with the other creditors that voted, more than 90% of the total creditor pool has shown support for the DOCA including employees.
4. Fifth, at the EGM of GCY’s shareholders held on 5 August 2020, shareholders voted overwhelmingly in favour of the recapitalisation of the GCY Group.
5. Sixth, Habrok has substantially delayed in bringing the present application and prejudice in terms of costs, expense, inconvenience and the lost opportunity to pursue other options has been caused to the GCY Group and third parties flowing therefrom.
6. Seventh, Habrok was not a creditor of the GCY Group at any earlier time than near the launch of the present proceedings.
7. Eighth, Habrok acquired Orlando’s debt for the purpose of commencing this action. This discloses a collateral purpose. Further, other than recovering the $308,476.50 which Habrok paid to acquire Orlando’s debt, Habrok does not stand to further benefit financially as a creditor under the DOCA, since any balance received over and above what Habrok paid is apparently to be remitted to Orlando under the terms of the assignment. Further, Mr Raftery accepted that Habrok brought this action, not in its interests as a creditor of GNT Resources, but as an attempt to acquire the assets of the GCY Group in a winding up. Mr Raftery was entirely honest and frank on Habrok’s true collateral purpose. Indeed and more generally, many of the arguments put by the defendants on Habrok’s lack of standing, which I rejected, nevertheless apply to justify why I ought not terminate the DOCA at the *behest* of Habrok. Further, for completion, the support given by two other creditors to Habrok’s application adds little to the calculus.
8. Finally, the implementation of the DOCA is consistent with the objective in s 435A(a). Moreover, to terminate the DOCA would be contrary to the interests of the creditors of the GCY Group as a whole.

# CONCLUSION

1. For the foregoing reasons, the proceedings will be dismissed with costs.

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| I certify that the preceding eight hundred and forty-two (842) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach. |

Associate:

Dated: 29 September 2020

SCHEDULE OF PARTIES

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| --- | --- |
|  | VID 519 of 2020 |
| Defendants |  |
| Fourth Defendant: | DALGARANGA OPERATIONS PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 616 858 550) |
| Fifth Defendant: | DALGARANGA EXPLORATION PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 623 055 550) |
| Sixth Defendant: | GASCOYNE (OPS MANAGEMENT) PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 619 342 979) |
| Seventh Defendant: | EGERTON EXPLORATION PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) (ACN 163 614 551) |
| Eighth Defendant: | IAN CHARLES FRANCIS, MICHAEL JOSEPH PATRICK RYAN, KATHRYN GUINIVERE WARWICK (IN THEIR CAPACITIES AS JOINT AND SEVERAL ADMINISTRATORS OF THE FIRST TO SEVENTH DEFENDANTS) |