JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	DALIAN HUARUI HEAVY INDUSTRY INTERNATIONAL COMPANY LTD -v- CLYDE & CO AUSTRALIA (A FIRM) [2020] WASC 132
CORAM	**:**	KENNETH MARTIN J
HEARD	**:**	23 MARCH 2020 & BY FURTHER WRITTEN SUBMISSIONS OF 30 MARCH 2020 & BY LEAVE ON 6 & 7 APRIL 2020
DELIVERED	**:**	24 APRIL 2020
FILE NO/S	**:**	CIV 1279 of 2020
BETWEEN	**:**	DALIAN HUARUI HEAVY INDUSTRY INTERNATIONAL COMPANY LTD Plaintiff AND CLYDE & CO AUSTRALIA (A FIRM) First Defendant DURO FELGUERA AUSTRALIA PTY LTD Second Defendant CLYDE & CO AUSTRALIA (A FIRM) Plaintiff by Counterclaim AND DALIAN HUARUI HEAVY INDUSTRY INTERNATIONAL COMPANY LTD Defendant by Counterclaim

Catchwords:

Trusts and trustees - Express trust created by contract - International Arbitration - Funds held in controlled moneys account by trustee in Australia to secure enforceability of potential future International Arbitral Award - Success by plaintiff in obtaining substantial award against second defendant - Written direction by Arbitral Tribunal to Trustee to pay Trust Amount as per contract establishing trust to plaintiff - Subsequent appointment of voluntary administrators to second defendant - Trustee seeking court's advice as to trust funds - PPSA security interest considerations - Plaintiff's vested interest in trust funds post written direction of Tribunal to trustee - Trust funds no longer the subject of any residual equitable interest in second defendant - Upon vesting trust funds become property of the plaintiff as security interest perfected

Legislation:

Corporations Act 2001 (Cth)
International Arbitration Act (Singapore)
International Arbitration Act 1974 (Cth)
Personal Property Securities Act 2009 (Cth)
Rules of the Supreme Court 1971 (WA)
Trustees Act 1962 (WA)

Result:

Directions to trustee regarding obligation to make payment of Trust Amount
Trustee directed to pay Trust Amount to plaintiff subject to caveats mentioned

Category: A

Representation:

Original Action

Counsel:

Plaintiff	:	Mr J D MacLaurin SC
First Defendant	:	Mr T J Porter
Second Defendant	:	Ms J Taylor SC & Ms L D Coci

Solicitors:

Plaintiff	:	Squire Patton Boggs (AU)
First Defendant	:	Assured Legal Solutions
Second Defendant	:	Ashurst Australia

Counterclaim

Counsel:

Plaintiff by Counterclaim	:	Mr T J Porter
Defendant by Counterclaim	:	Mr J D Maclaurin SC

Solicitors:

Plaintiff by Counterclaim	:	Assured Legal Solutions
Defendant by Counterclaim	:	Squire Patton Boggs (AU)

Case(s) referred to in decision(s):

AKN v ALC [2015] SGCA 18
Christie v Robinson (1907) 4 CLR 1338
Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2014] VSCA 326; (2014) 49 VLR 86
Ellis v Goulton (1893) 1 QB 350
Flightline v Edwards [2003] 1 WLR 1200
Front Carriers Ltd v Atlantic & Orient Shipping Corp [2006] SGHC 127
Gas Sensing Technology Corporation v ProX Pty Ltd [2019] WASC 10
Grant v O'Leary (1955) 93 CLR 587
H&C S Holdings Pte Ltd v Mount Eastern Holdings Resources Co;, Limited [2015] SGHC 323
Hughes v Pluton Resources Ltd [2017] WASCA 213; (2017) 52 WAR 456
Koolan Iron Ore Pty Ltd v Rizhao Steel Holding Group Co Ltd [No 2] [2010] WASC 386
Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd [2011] NSWSC 1305
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42; (2008) 237 CLR 66
Swift-Fortune Ltd v Magnifica Marine SA [2006] SGCA 42
Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd [No 4] [2014] WASC 405

WA Sherratt Ltd v John Bromley (Church Stretton) Ltd [1985] 1 QB 1038
Wood (as Co-executor and Trustee of the Will of the Deceased) v Wood [No 5] [2015] WASC 28

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KENNETH MARTIN J:

Introduction

1 This was an electronic trial heard urgently on Monday, 23 March 2020 in the face of COVID-19 considerations.

2 The action concerns the fate of $AUD27 million still held in a controlled moneys account in Sydney, New South Wales, under the control of, and on trust by, the first defendant ('Clyde & Co') in circumstances I will come to explain ('Trust Amount').

3 By its originating summons filed in this court on 25 February 2020 commencing the current action, the plaintiff ('Dalian') seeks relief, in effect, to compel Clyde & Co, as trustee of the Trust Amount, to pay the $AUD27 million to its own lawyers' trust account in Western Australia - being Squire Patton Boggs ('SPB').

4 Clyde & Co does not resist the court issuing orders dealing with the Trust Amount (subject to certain qualifications I will enumerate). In fact, pursuant to the urgent orders and directions I issued on 12 March 2020 affording it leave to counterclaim for relief as a trustee, Clyde & Co counterclaims to obtain the court's advice pursuant to s 92(1) of the *Trustees Act 1962* (WA) as to it dealing with the Trust Amount. This is on the basis that Clyde & Co is a trustee in respect of those funds and that, as a trustee, is entitled to seek the assistance of the court.

5 The Trust Amount, as I will explain, is the subject of a written agreement perfected on 23 October 2019, between Dalian, the second defendant ('Duro') and Clyde & Co, which agreement is expressly governed by West Australian law ('Trust Agreement').

6 I will provide a more comprehensive explanation of the background to the proceedings later in these reasons. However, it is sufficient to presently note that the parties to this proceeding were all, in some way, involved in an international arbitration seated in Singapore ('Tribunal'). It is as a result of various orders and awards made by the Tribunal and subsequent steps taken by the parties that the present disputes have unfolded.

7 Despite the international context and relatively large sums of money in dispute, the ultimate question to be answered is a simple one - what should happen to the $AUD27 million currently sitting as the Trust Amount? The answer, however, is less simple, as will emerge.

The primary issue - the Trust Amount

8 The base contention of Dalian is that, pursuant to the terms of the Trust Agreement, the Trust Amount was, and continues to be held absolutely for it by Clyde & Co, as a trustee. Pursuant to the express terms of cl 4 of the Trust Agreement, Dalian submits that the Trust Amount must be immediately paid over to it by Clyde & Co and into an SPB trust account in Western Australia. This is contended on the basis of Dalian, and especially after 24 January 2020, holding an unqualified and fully vested beneficial interest in those funds.

9 I should note that the perfection of the Trust Agreement and the payment of the Trust Amount into the trust arose in the wake of the Procedural Order 15 ('PO 15') as issued by the Tribunal, on 30 September 2019. By PO 15 the Tribunal granted Dalian's application seeking security for its claim. The Tribunal duly ordered that Duro pay the Trust Amount. However, the Tribunal by PO 15 largely left it to the parties to agree to a process to give effect to its orders. Hence, the execution of the Trust Agreement that followed.

10 Specifically, cl 4 of the Trust Agreement (relevantly) provides as regards the Trust Amount:

> The Trustee [ie, Clyde & Co] **may only release or pay** the Trust Amount, or any part of the Trust Amount, in accordance with a written direction addressed to the Trustee signed by a below named partner of both Squire Patton Boggs and Clyde & Co or a **direction of the Tribunal** in the Arbitration ... (my emphasis in bold)

11 Following the execution of the Trust Agreement in October 2019, funds were paid to Clyde & Co shortly thereafter, to be held by it as trustee. Subsequently, Dalian was successful before the Tribunal in that international arbitration (seated in Singapore), obtaining a substantial monetary award against the second defendant, Duro. On 19 December 2019, the Tribunal issued a first partial final award of $US32,898,858.18 (translating at, say, $US1 = $AUD1.61730 (at 31 March 2020) = $AUD53,243,957.22) in Dalian's favour against Duro ('First Partial Final Award').

12 That award has not yet been enforced in Australia, but that event is pending. Another proceeding, also pending before me, filed by Dalian in this court as ARB 2 of 2020 against Duro, seeks, pursuant to s 8(2) of the *International Arbitration Act 1974* (Cth), to enforce that First Partial Final Award in Australia, as if it were a judgment of this court. However, no substantive orders have issued to date in ARB 2 of 2020, as I explain later.

13 By its originating summons commencing this action, Dalian primarily seeks relief, it says, as against Clyde & Co as named first defendant and as trustee of the Trust Amount.

14 Dalian's originating summons in the present action relevantly seeks:

> 1. As arising from the First Defendant's failure or omission to, under clause 4 of a Trust Agreement executed 23 October 2019 (Trust Agreement), pay to the Plaintiff moneys held on trust in the sum of AUD27,000,000 (Trust Moneys) that are required to be so paid in accordance with a direction dated 24 January 2020 of an Arbitral Tribunal in an arbitration held in the Seat of Singapore, and pursuant to section 94 of the *Trustees Act 1962* (WA) Order 58 rule (2), section 16(1)(d)(i) of the *Supreme Court Act 1935* (WA) or in this Honourable Court's inherent jurisdiction:
>
> a) a direction or order that the First Defendant pay the Trust Moneys to the Plaintiff forthwith; and
>
> b) a declaration that the Trust Moneys ought to have been paid by the First Defendant to the Plaintiff on 24 January 2020 and that the Plaintiff is entitled to a payment of interest from the First Defendant on the Trust Moneys from that date until payment at such rate as to this Honourable Court may seem just.
>
> 2. That the Defendants pay the Plaintiff's costs of this originating summons on such basis as to this Honourable Court may seem just.
>
> 3. Such further or other orders as to this Honourable Court may seem just.

15 Dalian's originating summons was supported by an affidavit affirmed on 25 February 2020 of Mr Timothy James O'Shannassy, a lawyer of the lawyers of local record in these proceedings for Dalian and who also represent Dalian in the Singapore international arbitration. (Note: in that arbitration Clyde & Co are the lawyers representing Duro).

Procedural history - 12 March 2020 hearing

16 The plaintiff's originating summons in this action was first returned for directions before me in chambers on 12 March 2020 ('12 March 2020 hearing'). Also returnable, at the same appointment time, was Dalian's other originating process, ARB 2 of 2020 seeking enforcement of the First Partial Final Award of the Tribunal in this court.

ARB 2 of 2020

17 As mentioned, in ARB 2 of 2020 Dalian seeks orders pursuant to s 8(2) of the *International Arbitration Act* to the end that the First Partial Final Award be enforced in this court, as if that award were a judgment or order of this court.

18 At the 12 March 2020 hearing, Mr MacLaurin SC, representing Dalian, recognising that Duro had been placed into voluntary administration (on 28 February 2020), asked for the proceedings ARB 2 of 2020 to be stood over without substantive orders and with liberty to apply. Such orders were then made uncontroversially in ARB 2 of 2020, with costs reserved.

CIV 1279 of 2020

19 The present proceeding posed more controversial issues for direction, as Dalian, in effect, wished to urgently proceed against Clyde & Co, on the expressed basis that Clyde & Co controlled the Trust Amount to which Dalian claimed it then enjoyed a fully vested beneficial entitlement in that fund and, unlike for Duro, Clyde & Co was not in voluntary administration.

20 It was contended for Dalian that Clyde & Co, as regards the Trust Amount, was a trustee then in default vis-à-vis Dalian of an explicit contractual and fiduciary obligation, first under cl 4 of the Trust Agreement in the face of the written direction given to it by the Tribunal to pay the trust funds to Dalian and, second, to remit the Trust Amount to Dalian as the beneficiary, via a payment into SPB's nominated trust account.

Appearances in CIV 1279 of 2020

Dalian

21 As mentioned, Mr MacLaurin SC appeared for Dalian at the 12 March 2020 hearing (instructed by SPB).

Clyde & Co

22 At the time of the 12 March 2020 hearing, Clyde & Co had entered a memorandum of conditional appearance, through Sydney lawyers, Assured Legal Solutions. The memorandum of conditional appearance of 12 March 2020, lodged pursuant to *Rules of the Supreme Court 1971* (WA) (RSC) O 12 r 6, expressed itself (in part) as follows:

> The first defendant reserves its right to enforce an arbitration clause contained within an agreement titled 'Trust Agreement' and dated 23 October 2012 which is the subject of the proceedings.

23 Subsequent to the filing of the conditional appearance, Clyde & Co took no step within the 14-day period allowed by RSC O 12 r 6(2) to apply to have the jurisdictional issue raised on the face of the conditional appearance decided. Consequently, by RSC O 12 r 6(2), Clyde & Co's conditional appearance has become and operates as an unconditional appearance.

24 At the 12 March 2020 hearing Clyde & Co Australia was represented by Mr Porter of counsel (instructed by Assured Legal Solutions).

Duro

25 At 12 March 2020 there had been no memorandum of appearance filed on behalf of Duro, as the named second defendant. However, I was satisfied by then that Dalian had effected service of its originating summons, plus Mr O'Shannassy's supporting affidavit (exhibit 1), prior to 28 February 2020, under the service acceptance provisions of the Trust Agreement (see cl 10).

26 At the 12 March 2020 hearing, Mr Mengler, a legal practitioner (instructed by Ashurst Australia) presented at the bar table. Mr Mengler, in effect, then sought leave to speak on behalf of voluntary administrators of Duro, who I was informed had been appointed on 28 February 2020. The administrators in question are Mr Rahul Goyle, Mr Scott Langdon and Mr John Bumbak, all of

KordaMentha, a well-known Australia wide insolvency accounting practice.

27 I duly gave leave for Mr Mengler to address on behalf of the voluntary administrators at that directions hearing. He pointed out, correctly, that the time for the filing of a memorandum of appearance by Duro, in effect, as stipulated on the originating summons of Dalian was 21 days and so at then, the 21-day period to effect service had not yet fully run.

Leave to proceed against Duro

28 It was also pointed out by Mr Mengler then that, pursuant to s 440D(1) of the *Corporations Act 2001* (Cth), a statutory stay of proceedings against Duro was delivered by reason of s 440D(1). That provision provides:

> During the administration of a company, a proceeding in a court against the company or in relation to any of its property, cannot be begun or proceeded with, except:
>
> (a) with the administrator's written consent; or
>
> (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

29 CIV 1279 of 2020 was commenced on 25 February 2020, prior to Duro appointing voluntary administrators. The question then, by s 440D(1), was whether leave should be given for this proceeding to be 'proceeded with' as against Duro after 28 February 2020, subsequent to when the voluntary administrators were appointed to Duro.

30 Mr MacLaurin SC, on behalf of Dalian, submitted, in effect, that the primary relief Dalian was seeking, and urgently so, was as regards the Trust Amount that was still held in trust by Clyde & Co, as the first defendant. Mr MacLaurin SC submitted, in effect, that substantive relief against Duro was not being sought. Hence, the submission of Dalian was that the statutory stay by s 440D(1) was not applicable and so, leave to proceed, strictly speaking, was not required as against Duro.

31 Mr MacLaurin SC further submitted, in effect, that Dalian's action was not being taken against or made then, in relation to Duro's property. That contention, of course, is the hotly contested issue at this trial. The basis of Dalian's submission is primarily advanced by reason

of the Tribunal's First Partial Final Award issued in Dalian's favour against Duro. That event is then coupled to and allied with a resulting event -being the written direction as issued by the Tribunal on 24 January 2020, under its Procedural Order No 17 ('PO 17'). PO 17 had ordered and expressly directed Clyde & Co to 'immediately' proceed in accord with cl 4 of the Trust Agreement (to which I earlier referred) and to:

> ... upon receipt of this written direction, must immediately release the Trust Amount, being AUD27 million, to the [law practice trust account of Squire Patton Boggs Au at the Commonwealth Bank, William Street, Perth branch, with a designated BSB, account number and SWIFT code].

32 Consequently, the essential submission of Dalian by Mr MacLaurin SC at the 12 March 2020 hearing, was that whatever might have been the position before, that as from 24 January 2020, the position as regards Clyde & Co, and the Trust Amount that it held on trust pursuant to the Trust Agreement was now crystal clear. By reference to the express written direction of the Tribunal issued in accord with cl 4 of the Trust Agreement, from 24 January 2020, there could be no serious dispute that Dalian from then held, in effect (some weeks before the appointment of the voluntary administrators to Duro on 28 February 2020) a fully vested and unconditional beneficial interest in all the trust funds that were held and controlled by Clyde & Co as trustee.

33 Dalian's submission was that they were not, but that even if the funds comprising the Trust Amount had ever at any prior time been caught under the *Personal Property Securities Act 2009* (Cth) ('PPSA') as the property of Duro (with 'property' under the PPSA being defined in that legislation and also in the *Corporations Act* in extremely wide terms), that following the issuance to Clyde & Co of PO 17, that those funds, at least from then, were no longer arguably Duro's property (viewed under the PPSA, or otherwise). Rather, those trust funds, post 24 January 2020, were held in the full beneficial ownership of Dalian.

34 Of course, that ownership position was not accepted by the administrators of Duro as being so clear cut. At the 12 March 2020 hearing Mr Mengler, for the voluntary administrators, was relaying that the administrators were still in the early stages of their enquiries, following their appointment on 28 February 2020. Hence, no assumptions or conclusions could or ought then be drawn, it was said, concerning what proprietorial or equitable interests Duro might, or

might not, then still hold over the trust funds - which also presented as the significant asset of Duro in the administration at that time.

Orders 1 and 2 - leave to proceed against Duro granted

35 Given such issues, it may then be seen that the orders 1 and 2 of the orders and directions which I issued on 12 March 2020, attempted to address issues of participation, urgency and the ramifications of s 440D(1) of the *Corporations Act* as regards Duro. Orders 1 and 2 of 12 March 2020 were that:

> 1. Time is abridged for the second defendant [ie, Duro] to file its notice of appearance until 4.00 pm (WST) on Friday, 13 March 2020 in this proceeding.
>
> 2. There is leave, if necessary, for the plaintiff to proceed against the second defendant under s 440D(2) of the *Corporations Act* (Cth) by this proceeding.

36 As regards the effects of s 440D(1) of the *Corporations Act* and the unconditional leave to proceed against Duro that I granted under my order 2 (by what should, on reflection, be formally corrected to read as a reference to s 440D(1)(b), rather than s 440D(2) as the order currently reads) I accepted, in effect, Mr MacLaurin SC's core submission concerning commercial urgency. Allied to that was Dalian's then demonstrated strong prima facie entitlement to receive the $AUD27 million as was held in trust for it, by Clyde & Co pursuant to the terms of the Trust Agreement. It was also true that the primary relief sought in respect of the funds was directed then by Dalian at Clyde & Co (as trustee and the first defendant) rather than at Duro. Duro had been (properly) joined, essentially, as an interested party as regards those funds. But no other relief was sought against Duro.

37 I assessed then that leave to proceed against Duro under s 440D(1) of the *Corporations Act* was appropriate, given Duro was represented by a skilled, well resourced and nationally operative insolvency practice and, of course, by well resourced international commercial lawyers of repute.

38 Given all that, I saw the, as then, relatively narrow presenting aspects of the urgent dispute over the Trust Amount - to be capable of being dealt with without undue disruption or prejudice to the conduct of an overall administration of Duro.

39 It was essentially out of an abundance of caution over the issue of whether or not leave was strictly needed to proceed against Duro as the second defendant, that leave to proceed was granted, in the terms as seen. In this context, I had also noted the observations of Hammerschlag J made in ***Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd*** [2011] NSWSC 1305, as regards the issuance of leave under s 440D(1) of the *Corporations Act* in that context of a recognition and enforcement of a proceeding as regards an arbitral award and an exercise of discretion under those not entirely analogous factually but, nonetheless, instructive observations. I refer particularly to [36] of his Honour's reasons as to discretion, at [38] towards the objects that may be facilitated by a stay of proceedings imposed by s 440D, at [39] concerning circumstances which may warrant a displacement of the stay under s 440D, to the bespoke circumstances presented by each distinct application as referred to in [40] and, finally, as to the scale of curial exercise being weighed, see [49].

40 A further relevant consideration towards granting leave to proceed under s 440D(1) was that Duro, unlike for some insolvent administration circumstances, did not then appear to be an actively trading entity any longer within Australia. It had, of course, previously been involved as a contractor to Samsung - in the Roy Hill iron ore mine establishment project. Dalian had been a subcontractor to Duro under that project - all giving rise at the end to widespread non-payment disputes, many of which became the subject of the Singapore seated arbitrations. As the reasons accompanying the Tribunal's PO 15 point out, there had been a settlement of one of the arbitrations, as between Duro and Samsung, resulting in an August 2019 receipt of substantial funds by Duro from Samsung (see the reasons accompanying PO 15 at par 7(3), 15, 33(3), 47, 49 and 56). I should note that no evidence of the quantum of this substantial payment was before the court in this trial. This event was discussed by senior counsel for Dalian at trial (ts 33, 45 - 46), in reference to correspondence passing between the parties' lawyers, wherein SPB had stated they understood from discussions with the Duro's administrators that a transfer of funds from Duro to its Spanish parent corporation, Duro Felguera SA occurred (O'Shannassy affidavit affirmed 18 March 2020, TJO-2 page 7). See also the assertion in Dalian's written submissions of 20 March 2020, par 22(e)(iii), as to an $AUD95,000,000 payment by Duro to its parent corporation. However, there is no evidence that I could locate to sustain that submission of Dalian.

41 As regards the appearance from Duro, it is a matter of record that on 13 March 2020, a memorandum of unconditional appearance was filed on its behalf - through the voluntary administrators' lawyers, Ashurst Australia. Consequently, that issue was resolved.

The position of Clyde & Co

42 On 12 March 2020 it was evident through the submissions of Mr Porter for Clyde & Co Australia that the stance then articulated for that firm saw it effectively seeking to 'interplead', as regards the Trust Amount, under the terms of the Trust Agreement.

43 As named trustee of the Trust Amount as trust property, it was foreshadowed by Mr Porter that Clyde & Co as a trustee would be seeking advice from the court as to those funds, in accord with s 92 of the *Trustees Act*, within Pt 7 div 3 thereof, so as, in effect, to be protected as regards a dealing with the funds (see s 95).

44 At the time, Clyde & Co was essentially faced with conflicting demands for the Trust Amount. As already seen, Dalian was claiming the funds, on the basis that it held an absolute beneficial entitlement to all those funds under the circumstances I have now described. But, at the same time, after 28 February 2020, Clyde & Co was receiving a contrary message from the administrators of Duro, effectively seeking to maintain the status quo over the funds, while the voluntary administrators conducted their enquiries.

45 The voluntary administrators' lawyers had requested Clyde & Co not to disburse the $AUD27 million to Dalian. Part of the expressed concern by the voluntary administrators as to paying the funds over to Dalian's Australian lawyers, SPB, was concern over an anticipated future inability to ever recover those funds, if they were likely to be remitted by SPB to their client, Dalian, in the People's Republic of China.

46 The administrators' recovery concern, essentially, arose out of the potential eventuality wherein Duro could not trade out of administration and Dalian, for whatever reason, was paid the Trust Amount. Thus, it would follow that Duro would then need to be wound up. There may then follow a liquidator's claim to the Trust Amount made on various possible bases, such as those funds being received by Dalian as an unfair preference payment over other of Duro's unsecured creditors, or on a basis that Dalian's claim to the Trust Amount was later found to be cut down by Australian law on a basis, say, of being an unregistered

and unperfected 'security interest' assessed under the provisions of the PPSA. For those hypothetical circumstances, it was argued that recovery steps by future liquidators towards Duro's assets for creditors generally would then be frustrated. Hence, the administrators told Clyde & Co that they wished the Trust Amount to continue to be held within the controlled moneys account, until at least the time that an administration period was effectively completed.

47 As regards such putative future unfair preference arguments, Mr MacLaurin SC for Dalian advanced a submission (at the trial) to the effect that, based on various assembled debt and liability information emerging at an early creditors' meeting, a potentiality of Dalian ever being assessed as unfairly preferred as a creditor over other creditors of Duro, was remote (ts 44 - 45). However, at this stage, on what is only very early and sketchy information, I am not at all prepared to speculate to render any undue preference assessments over that issue.

48 Given the foreshadowing by Clyde & Co to Dalian, of a pursuit of curial advice under s 92 of the *Trustees Act*, it seemed to me to be both convenient and expeditious to allow Clyde & Co to urgently seek that advice by way of a counterclaim in these same proceedings. I held a concern, however, that because the current proceeding had been commenced by originating summons, there was insufficient procedural scope for a defendant to formally counterclaim.

49 I addressed that potential procedural concern for Clyde & Co's s 92 advice application as a trustee, by order 3 outlined below.

Other directions and orders

50 On 12 March 2020, I also ordered an expedited trial, without pleadings or discovery, to be conducted on the basis of exchanged affidavits and within as short a timeframe as then, looked to be feasible.

51 I set out below my further orders 3 through 8 as issued in chambers on 12 March 2020:

> 3. Proceeding CIV 1279 of 2020 being originally commenced by Originating Summons shall henceforth proceed and be treated as if it had been commenced by Writ and shall so proceed as an action without pleadings or discovery to an expedited trial to be conducted on exchanged affidavit evidence as outlined in order 7 below.

4. Within CIV 1279 of 2020 leave is granted to the first defendant (ie, Clyde & Co Australia) to counterclaim for relief as a trustee, pursuant to provisions of Pt 7 Div 3 of the *Trustees Act 1962* (WA).

5. A trial is to proceed by exchanged affidavits with the plaintiff and all defendants to file and serve:

   (a) any further affidavit materials relied upon for trial by 4.00 pm (WST) on Tuesday, 17 March 2020; and

   (b) any reply affidavit material by 4.00 pm (WST) on Wednesday, 18 March 2020.

6. The parties shall mutually file and serve:

   (a) written submissions for trial to be relied upon (including case authorities) in support of their positions and for the relief sought by 4.00 pm (WST) on Thursday, 19 March 2020; and

   (b) any further written submissions in reply by 4.00 pm (WST) on Friday, 20 March 2020.

7. The matter is listed for an expedited trial on Monday, 23 March 2020 at 11.30 am in respect of the primary issue relief as outlined in the plaintiff's minute of proposed orders dated 11 March 2020 and any relief counterclaimed brought by the first defendant pursuant to order 4 above.

8. The costs of today's directions hearing are reserved.

Narrowing of issues for the trial

52 By order 7 above, I was, in effect, accepting Mr MacLaurin SC's proposal on behalf of Dalian, that the principal issue of urgency needing to be addressed at first, was Dalian's claim to obtain the Trust Amount from Clyde & Co in the not insignificant amount of $AUD27 million.

Foreshadowed breach of trust claims

53 However, it was also apparent on 12 March 2020 from the materials in Mr O'Shannassy's affidavit that Dalian was also articulating some strong potential grievances against Clyde & Co. These particularly concerned Clyde & Co not acting much earlier, to remit the Trust Amount to SPB, first in the aftermath of the Tribunal's 19 December 2019 First Partial Final Award (which had then ordered Duro to pay Dalian $US32,898,858.18) and then, by defying the

Tribunal's PO 17 written direction as regards remitting the Trust Amount to Dalian via SPB. Secondly, Dalian was also expressing a grievance that Clyde & Co as trustee under the Trust Agreement, suffered a severe conflict of interest, in terms of it still apparently continuing to act as lawyers for Duro within the Singapore arbitration before the Tribunal and, notwithstanding that Clyde & Co was also to act as the named trustee of the Trust Amount, governed by the terms of the Trust Agreement.

54 By cl 9, which I detail later in my reasons, the Trust Agreement was expressly stated to be governed by the laws of Western Australia (see [161]). Clause 4 envisaged the named trustee releasing the 'Trust Amount', upon a written direction addressed to the trustee, either signed jointly by the as named partners of SPB and Clyde & Co, subsequent to 19 December 2019, or otherwise, by a fallback position, as was also as provided for by cl 4 (see [10]). Repeated efforts, as might be expected, had been made by Dalian post 19 December 2019 to obtain the co-signature of the identified partner of Clyde & Co (Mr Glen Warwick), so that a joint SPB and Clyde & Co co-signed written direction could be issued to the trustee (Clyde & Co) under cl 4, for Clyde & Co as trustee to then release the funds to Dalian. However, despite repeated efforts of SPB made through Mr O'Shannassy and others, nothing had come of all those efforts, in the period between 19 December 2019 and to mid-January 2020.

55 In consequence, Dalian at mid-January 2020 had needed to resort to obtaining a direction of the Tribunal invoking, in effect, the fallback position as was expressly contemplated by cl 4, to obtain a viable written direction to cause the trustee to remit the fund to Dalian via SPB.

56 Ultimately, by its PO 17 issued on 24 January 2020, the Tribunal did then order and expressly direct Clyde & Co as trustee in accord with cl 4 of the Trust Agreement, to immediately release the trust amount to the nominated law practice trust account of SPB (ie, for Dalian).

57 Contemporaneous reasons as issued by the Tribunal to support its PO 17 (see attachment TJO-19 to Mr O'Shannassy's 25 February 2020 affidavit), display that Dalian's application to the Tribunal was made at 13 January 2020, but was then resisted by Clyde & Co, acting on behalf of Duro. Submissions were then filed with the Tribunal by Clyde & Co for Duro resisting that relief by a way of a written direction. In

particular, a 15-day adjournment had then been sought, so that Duro could 'confirm its position'. All that is apparent from the face of the reasons of the Tribunal underlying its PO 17 of 24 January 2020.

58 It is not necessary to elaborate any further on the history of that opposed application for a written direction of the Tribunal to engage with cl 4 of the Trust Agreement.

59 Then, notwithstanding the PO 17 express direction of the Tribunal to Clyde & Co, it was not actioned. The remainder of January 2020, then almost all of February 2020, passed before, on the very last day of that month, voluntary administrators were appointed to Duro. Across all that time Clyde & Co had not remitted the Trust Amount, as was directed by the Tribunal at 24 January 2020.

60 The Tribunal's written direction of 24 January 2020 to Clyde & Co to 'immediately' pay over the funds to Dalian's lawyers (SPB) is still not acted upon as at trial.

61 Consequently, Dalian also foreshadows, via Mr O'Shannassy's affidavits, a breach of trust claim against Clyde & Co pursuing damages, particularly lost interest on $AUD27 million which Dalian contends, in effect, it has lost by reason of the Tribunal's PO 17 not being acted upon immediately, or at all by Clyde & Co. That is said for circumstances where the Trust Agreement explicitly provides as regards the interest under cl 5 favouring Duro (not Dalian) by providing:

> Any and all interest accrued on the Trust Amount shall be paid to Duro.

62 Axiomatically, if the Trust Amount funds had been remitted to Dalian via SPB, there would seem to follow the correlative interest earning opportunities for Dalian, rather than to Duro.

63 Needless to say, however, these breach of trust grievances as articulated and foreshadowed by Dalian as against Clyde & Co, present as something of a lesser order of priority. The greater focus of Dalian at 12 March 2020 was to obtain the Trust Amount, and sort such other matters out later.

Primary issue relief

64 As seen, order 7 of my orders and directions of 12 March 2020 above directed an expedited trial **only** in respect of the 'primary issue

relief'. It refers to the relief as outlined in Dalian's minute of proposed orders of 11 March 2020. That minute had read in the following terms:

> 1. The First Defendant pay to the Plaintiff, by payment to the Plaintiff's solicitors' trust account, the sum of AUD27,000,000 being trust moneys under a Trust Agreement executed 23 October 2019 (**Trust Agreement**) that are required to be so paid under clause 4 of the Trust Agreement.
>
> 2. Other issues arising under the Originating Summons including:
>
> (a) whether there should be a declaration that the Trust Moneys ought to have been paid by the First Defendant to the Plaintiff on 24 January 2020 and that the Plaintiff is entitled to a payment of interest from the First Defendant on the Trust Moneys from that date; and
>
> (b) any further or other consequential orders,
>
> be programmed for hearing in such manner as this Honourable Court may seem just.

65 Consequently, the primary issue to be determined at the trial, is only that as is described under par 1 of the above minute. For Dalian, that is all that I am presently concerned with. Apart from Clyde & Co's counterclaim seeking advice from the court about the funds it still holds as a trustee, the other issues as seen described under par 2 of Dalian's minute, including as to interest and, as part of that any alleged breaches of trust by Clyde & Co Australia (as trustee), all remain for another day.

66 Given the potential seriousness of foreshadowed breach of trust allegations related to a claim against Clyde & Co as trustee, I will, of course, later require that all contentions of breach of trust by Dalian be explicitly articulated, prima facie, under pleadings with full particulars. It also goes without saying, almost, that there should also be a full opportunity for Clyde & Co as trustee to respond and to answer all such residual issues in due course, if they are persisted with. The process would undoubtedly take some time to unfold. At this time, that is less urgent than the primary issue to be confronted under par 1 of the orders as seen in Dalian's minute above.

The expedited trial (23 March 2020)

67 As I have already mentioned, the trial of these now identified issues (see RSC O 32 r 4) was ordered on an expedited basis. Given

concerns regarding the subsisting COVID-19 pandemic, the trial was eventually conducted wholly by audio-link and by written submissions.

68 Of course, the primary trial issue concerns the Trust Amount of $AUD27 million. On the face of the terms of the Trust Agreement (and the ostensible engagement of cl 4 thereof), and under circumstances where on 24 January 2020, the Tribunal has ordered and directed (by PO 17) that Clyde & Co immediately release the Trust Amount to SPB, and where that written instruction had not been acted upon at the time of trial - my assessment was that those facts essentially meant that Duro (acting now under the direction of its voluntary administrators) ought provide some rationale for why Dalian (via its lawyers SPB) was not presently entitled to receive the Trust Amount (via SPB).

Written submissions

69 Extensive written submissions were exchanged as between all parties under the expedited trial programming orders made on 12 March 2020. To that end I came to receive:

(a) Dalian's primary written submissions of 19 March 2020 (electronic document 16);

(b) Duro's primary submissions opposing the relief sought by Dalian of 19 March 2020 (electronic document 17);

(c) Clyde & Co's written submissions for hearing of 19 March 2020 (electronic document 14);

(d) Dalian's submissions in response to Duro of 20 March 2020 (electronic document 19);

(e) Dalian's submissions in reply to Clyde & Co of 20 March 2020 (electronic document 22);

(f) Duro's submissions in reply to Dalian of 20 March 2020 (electronic document 20); and

(g) Clyde & Co's reply submissions of 20 March 2020 (electronic document 24).

70 After the trial, by leave, I also received tranches of further written submissions from Dalian and Duro on 30 March 2019, to address, first, some greater background as to s 12(1)(g) of Singapore's *International Arbitration Act* (Cap 143A, 2002 Rev Ed) ('SIAA'). The other aspect of

the post trial written submissions concerned the PPSA and sought to address further the distilled question arising at the trial over whether or not what might once have been viewed as a PPSA s 12 'security interest' held by Dalian, in the Trust Amount at before 24 January 2020, had changed character and was ended, as a result of the Tribunal's PO 17 direction to Clyde & Co, to then immediately pay the Trust Amount over to Dalian. The refined question to be evaluated post 24 January 2020 was whether Dalian's vested interest in the Trust Amount was then caught by the PPSA? At the trial, Ms Taylor SC for Duro had asked for some further time to address that refined question. Given its importance, I allowed more time to all parties for it to be addressed further. On my assessment, that question presents as the determining issue as regards the ultimate fate of the Trust Amount.

71 Later still, on 6 April 2020, I gave further leave for the parties to file some short further written submissions as against each other over further issues said to require rebuttal or clarification. I received a last wave of submissions from Duro on 6 April 2020 and from Dalian on 7 April 2020.

The trial affidavit evidence

72 Only Dalian and Duro (by its administrators), filed, read and relied upon affidavit evidence at the trial. I will mention it all briefly below.

Dalian's trial affidavit evidence

73 Regarding Dalian's trial evidence I have already referred to the first affidavit of Timothy James O'Shannassy, affirmed 25 February 2020. It became exhibit 1 at the trial. For the purposes of the action, in accord with my directions for an expedited trial on affidavits, Mr O'Shannassy later affirmed three (3) further affidavits, respectively of 12 March 2020 (electronic document 7), which became exhibit 2, of 17 March 2020 (electronic document 10), which became exhibit 3, and of 18 March 2020 (electronic document 13), which became exhibit 4.

74 There was no cross-examination at the trial, sought or conducted, in respect of any of this affidavit material. Further, no hearsay objections were raised against the contents of these O'Shannassy affidavits despite their affirmation largely on the basis of secondary evidence from a party's lawyers and even though final relief is sought at the trial. That largely makes up the underlying evidence relied upon at the trial - subject to a further augmentation as explained below.

75 Although filed with the court as part of another affidavit of Mr O'Shannassy, affirmed on 25 February 2020 (attachment TJO-1) the reasons of the Tribunal as to the First Partial Final Award are not before the court at this trial. That affidavit was filed in ARB 2 of 2020.

76 The Tribunal provided, as might be expected, very extensive reasons for their First Partial Final Award of 19 December 2019, ultimately favouring Dalian against Duro, and ultimately ordering Duro to pay Dalian $US32,898,858.18, as the 'First Award Sum'.

77 Ultimately, there was no controversy at the trial over that award amount favouring Dalian against Duro being accepted as a fact for the purposes of this trial, and thereby alleviating any need to formally receive the 200 plus pages of reasons of the Tribunal given in support of its award.

78 There was also no controversy at trial over the character of the Tribunal's award to Dalian against Duro as essentially money due for goods provided, or as damages for non-payment, payable to Dalian by Duro. However, nothing about that money liability of Duro to Dalian suggests that Dalian was, as the liability was incurred by Duro, anything beyond an unsecured creditor for that money claim, there being no suggestion of Dalian enjoying any elevated secured creditor status arising from out of the nature of that claim. Even if that award amount is ultimately registered to be enforced in this court as if it were a judgment, Dalian was at best an unsecured judgment creditor of Duro for that sum. It was not until PO 15 issued in Dalian's favour at 30 September 2019 by the Tribunal that it held a partial level of security for its money claim to the extent of the $AUD27 million when paid by Duro to abide the terms of the Trust Agreement.

Duro's trial affidavit evidence

79 Duro, of course, presently acts under the control of its administrators. In that respect, one of the administrators, Mr Rahul Goyal, filed for the trial a brief affidavit sworn 17 March 2020 (electronic document 11), dealing with some issues from the perspective of the conduct of the administration. Mr Goyal's affidavit was received as exhibit 5.

80 By his affidavit, Mr Goyal explains that he is a chartered accountant and a registered liquidator based in Sydney, New South Wales. He was, along with Mr Bumbak and Mr Langdon, appointed as the joint and several administrators of Duro, on 28 February 2020.

Their notification to the Australian Securities and Investments Commission (ASIC) of that day is annexed to Mr Goyal's affidavit (RG-1).

81 The balance of Mr Goyal's affidavit essentially refers to appended documentation.

82 Part of those documentary materials includes a communication from Clyde & Co detailing even greater funds as are currently held by it in trust. As regards Dalian, reference is made (see attachment RG-2, page 8 of the affidavit of Mr Goyal) to the amount of $AUD27,036,633.97 as currently held in 'Controlled Money Account'. A breakdown of that amount as regards funds of $AUD27 million 'pursuant to trust agreement dated 23/10/2019 - 30/10/2019' is mentioned, along with the amounts of interest accruing at monthly dates as identified therein.

83 At RG-2, page 17, as regards the Clyde & Co trust account, further information is given there concerning Clyde & Co's receipt of $AUD27 million - seen as a credit amount on 17 October 2019 and described under a Reasons/Comments column as:

> On account of funds pursuant to the freezing order made by the tribunal pursuant to procedural order 15.

84 Also seen there is a subsequent debit amount entry for the same sum on 24 October 2019 and referring to it as paid to 'Clyde & Co CMA ITF Duro Felguera Australia Pty Ltd ... Money on Account'. A Reasons/Comments column referring to that debit amount entry, says:

> Payment of transfer of funds to CMA [which I interpolate means Controlled Moneys Account] as per trust agreement dated 23.10.19 to Clyde & Co CMA ITF [which I interpolate to be In Trust For] Duro Felguera Australia Pty Ltd ...

and giving a reference then to a BSB and account number that I do not need to relate in these reasons.

85 Then, by his attachment RG-3, Mr Goyal refers to an email sent by a senior associate of Ashurst Australia on behalf of the administrators to Mr Glen Warwick, the relevant partner at Clyde & Co. The email had attached a letter directed to Mr Warwick and advising him of the appointment of the three administrators on 28 February 2020. The letter and email are both of 3 March 2020.

86 The letter had requested that Clyde & Co not transfer, or otherwise make any payment of any Duro related amounts held in any trust accounts as controlled by it in relation to Duro trust sums, 'pending completion of' the administrator's investigation of the affairs of Duro and the identification of Duro's assets.

87 The letter also requested Mr Warwick provide at least seven days' written notice to Ashurst Australia if Clyde & Co intended to transfer or otherwise deal with, or make any payment of the trust sums as identified in that communication. The Ashurst letter concluded, seeking that Clyde & Co agree to comply with the request.

88 I interpolate that Clyde & Co does appear subsequently to have adhered to the request of the voluntary administrator's lawyers of 3 March 2020. It is established as a fact that the $AUD27 million remains held in the controlled moneys account established by Clyde & Co. That remained the position at the time of trial.

89 Finally, by an email of 17 March 2020, Mr Warwick of Clyde & Co communicated with a Ms Clemente of Ashurst Australia (RG-5). This letter was seeking advice as to the status of the voluntary administrator's investigations and as to the voluntary administrator's position in respect of other trust funds controlled by Duro, as were listed in the 3 March 2020 letter. Mr Warwick now advised (page 31):

> We will endeavour to provide as much notice as practicable prior to making any payment out of funds held in trust ...

He also advised of a perceived obligation at then to pay out certain amounts falling due on 20 March 2020 to certain named persons who were acting (I infer as arbitrators) in another arbitration then being conducted in Australia as between Trans Global Projects Pty Ltd (in liq) ('TGP') and Duro.

Clyde & Co's position at the trial

Appearance

90 I have earlier mentioned Clyde & Co's conditional appearance (see [22] - [23]). At the trial on Monday, 23 March 2020, Clyde & Co was again represented by Mr Porter of counsel (acting on the instructions of Assured Legal Solutions). At no point of the trial was any issue raised verbally or by writing against this court's jurisdiction to issue orders concerning the Trust Amount, as sought by Dalian. I will return to this point later in greater detail. Consequently, any potential issue over

jurisdiction as had once been raised by the memorandum of conditional appearance of Clyde & Co as originally filed, may be put to one side, as no longer relevant.

Relevance objections towards evidence by Clyde & Co

91 Given the truncated range of issues for final resolution at the expedited trial entered under order 7 of the 12 March 2020 directions, Mr Porter, for Clyde & Co, objected (only on the basis of irrelevance) to many paragraphs within the submitted affidavits of Mr O'Shannassy, as tendered at trial on behalf of Dalian and ultimately received by the court. Clyde & Co, given the regime of current determination, did not file any evidence of its own by the way of answering Dalian's foreshadowed breach of trust grievances.

92 Under urgent circumstances, it was not necessary for me to render a line by line formal relevance ruling against the Dalian affidavit materials of Mr O'Shannassy, insofar as they also direct criticisms in the nature of breach of trust allegations at Clyde & Co. But Mr Porter's relevance objection was well taken. It is plain that Clyde & Co, in all the circumstances, has not yet had a sufficient or viable opportunity to answer or address such breach of trust allegations. None are admitted. As stated, such matters are all for a later day, if pressed.

93 Obviously, Clyde & Co should have a full opportunity to answer those matters in due course, once all such grievances of Dalian are assembled, pleaded and particularised.

94 The evidentiary materials received from Dalian upon the present application have been received only to the extent of addressing the primary issue concerning the $AUD27 million rival claims to that Trust Amount and for resolving Clyde & Co's counterclaim that seeks the advice of the court as trustee.

Clyde & Co's counterclaim for advice as a trustee pursuant to s 92 of the *Trustees Act* (WA)

95 As was envisaged by order 7 of my 12 March 2020 directions, on 18 March 2020 a counterclaim was lodged on behalf of Clyde & Co by its New South Wales based lawyers of record, Assured Legal Solutions.

96 The counterclaim as filed then read in the following brief terms:

> The First Defendant (**Clyde & Co**) applies for directions pursuant to s 92(1) of the *Trustees Act 1962* (WA) addressing the following matter:

> If Clyde & Co is the trustee of a trust of which the plaintiff [**Dalian**] is a beneficiary, then, subject to Clyde & Co's right of reimbursement under s 71 of the *Trustees Act 1962* (WA):
>
> 1. Is Clyde & Co obliged to pay the sum of $27 million, presently held by it (**Fund**) to [Dalian] by reason of cl 4 of the Agreement between [Dalian], the Second Defendant (**Duro**) and Clyde & Co dated 23 October 2019, and order 2 of procedural order 17 dated 24 January 2020?
>
> - and -
>
> 2. Does Clyde & Co's obligation continue in circumstances where a voluntary administrator has been appointed to Duro?

Concerns over the counterclaim's terminology as filed

97 It will be observed in respect to the initial iteration of Clyde & Co's counterclaim, that its chapeau reads as somewhat equivocal, as regards its trusteeship. This issue was raised during the trial. In the first place, Clyde & Co's written submissions unequivocally accept that it was, and remained a trustee in respect of the Trust Amount (see the written submissions of 19 March 2020). It, of course, articulates no beneficial claim of its own to, or over them. Nor has it ever done.

98 By par 13 of its reply written submissions (electronic court document 25) of 22 March 2020, Clyde & Co had said:

> As to [55(a)] of [Dalian's] submissions, there is no question that Clyde & Co holds the Trust Amount as trustee. Clyde & Co either holds the money on trust for Duro, or it holds it on trust for [Dalian]. Clyde & Co does not advance a case as to which of those options is correct. That is a matter as between the administrators and [Dalian]. The counterclaim is framed on the basis advanced by [Dalian], which appears to be that it is the beneficiary of the trust. But Clyde & Co seeks the Court's guidance regardless of who is the beneficiary. To make this plain Clyde & Co moves to amend the first line of the counterclaim so that it reads:
>
> > 'If Clyde & Co is the trustee of the trust of which the Plaintiff [**Dalian**] or the Second Defendant (**Duro**) (or both), is a beneficiary ... '

99 The problematic terminology of the proposed to be amended chapeau still left Clyde & Co's status as trustee as equivocal - putting that status at issue by use of the precatory word, 'If'. Yet the very basis

of Clyde & Co holding standing to (uniquely) approach a court to obtain its advice in a non-adversarial environment (as I discussed in ***Wood (as Co-executor and Trustee of the Will of the Deceased) v Wood [No 5]*** [2015] WASC 28) is wholly predicated upon the court being asked to assist a trustee: see ***Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand*** [2008] HCA 42; (2008) 237 CLR 66. Clearly, the word 'If' must go.

100 Another problem arises to be addressed. The proposed counterclaim's further reference by the chapeau to s 71 of the *Trustees Act*, as regards a right of reimbursement by the trustee against trust assets, is also problematic, as regards seeking the advice of the court.

101 If Clyde & Co is, indeed, a trustee and if it can show that it has, as trustee, properly engaged with the terms of s 71, then s 71 of the *Trustees Act* would then be engaged. The section provides in the following terms:

> A trustee may reimburse himself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.

102 Future problems might no doubt loom over Clyde & Co engaging with the phrase 'reasonably incurred', as seen used in s 71. Plainly, on the materials filed to date, Dalian foreshadows grievances against Clyde & Co's conduct as a trustee. But, as also seen, these are matters all to be resolved at a later time.

103 I will say for the record that for the purposes of this expedited trial, Clyde & Co filed brief written submissions essentially of an interpleader position character. But Clyde & Co has not to date filed any answering affidavit material seeking to answer or engage with Dalian's criticisms, arguments or contentions concerning its conduct as a trustee. Under all the circumstances, that was the correct stance to take, given I am presently concerned only with the Clyde & Co counterclaim and with the primary issue over the ultimate destination of $AUD27 million.

Form of the counterclaim

104 Across the course of the trial over Monday, 23 March 2020, I had discussed with Mr Porter, for Clyde & Co, some potential amendments to the form of the questions as were posed under Clyde & Co's counterclaim -to cater for the issue raised under Clyde & Co's

foreshadowed amendment, but also to address the problematic concerns I have now outlined above.

105 After some discussion, I suggested some further amendments to the terms of the questions for the court by the advice counterclaim, ultimately to the following essential form (see ts 75 - 76), namely:

> 1. Is Clyde & Co as a named trustee under the written Agreement made between Dalian, the second defendant (**Duro**) and Clyde & Co dated 23 October 2019, and order 2 of the Procedural Order number 17 dated 24 January 2020, obliged to pay the sum of $AUD27 million presently held by Clyde & Co (fund), to Dalian, or to Duro?
>
> 2. If so, from when was Clyde & Co so obliged?
>
> 3. Does Clyde & Co's obligation continue in circumstances where voluntary administrators have been appointed for Duro on 28 February 2020?

106 It may be seen from what has been canvassed to date that the essential controversy at the trial is as regards the destination of $AUD27 million. That primary issue sees Clyde & Co essentially declaring that it abides by the court's eventual determination to be rendered as between Dalian and Duro over that issue.

Entitlement to approach the court

107 I mentioned earlier the correctly taken irrelevance objection by Mr Porter on behalf of Clyde & Co to materials within Mr O'Shannassy's affidavits going beyond addressing the primary issue (or counterclaim). Mr MacLaurin SC for Dalian had attempted by a response to submit that the O'Shannassy paragraphs criticising, in effect, the conduct of Clyde & Co as trustee, were both legitimate and relevant - on the basis that Dalian was submitting that Clyde & Co by past conduct, was disqualified and no longer entitled to approach the court to obtain advice pursuant to s 92 of the *Trustees Act* (and, in that process, potentially gain the immunity protections allowed for a trustee as conferred by s 95 of the *Trustees Act*).

108 I should record that s 95 of the *Trustees Act* (WA) provides in the following terms:

> (1) Any trustee acting under any direction of the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as trustee in the subject-matter of the direction, notwithstanding that the order giving the direction is

> subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.
>
> (2) This section does not indemnify any trustee in respect of any act done in accordance with any direction of the Court if he has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the Court making the order giving the direction.

109 I rejected the submission of Dalian by senior counsel to the effect that it was too late, or was inappropriate for Clyde & Co to make application to the court as a trustee for direction, under s 92 of the *Trustees Act* concerning trust property and its management or administration of that property as trustee. Whatever the past, the underlying advice issue is still relatively young in its emergence and is as well important, urgent and, I assess, still proper for a consideration by the court under present circumstances.

110 I am also satisfied that all persons potentially interested in the application under the requirements of s 92(2) of the *Trustees Act*, have been served with and are participating in the present proceedings, and particularly the counterclaim as regards the fate of the funds.

111 I was and remain of the view that, in the presenting circumstances, it is appropriate and still open to Clyde & Co as a trustee, particularly whilst is is still the holder of significant trust funds the subject of rival claims, to approach the court to obtain urgent advice in the revised questions for advice as I have now identified.

112 Hence, I propose to proceed and answer the as revised three counterclaim advice questions seen above. I repeat, however, that none of that suggests I am dealing with or resolving any further issues the subject of par 2 of Dalian's minute of proposed orders of 11 March 2020, as seen earlier set out.

Facts found

113 By reference then to the four received affidavits of Mr O'Shannassy and the one affidavit of Mr Goyal, essentially, what stands fundamentally in issue as between Dalian and Duro at the present trial is a legal dispute, rather than a dispute of fact.

114 Nonetheless, as a matter of formality towards collecting and assembling the underlying core facts established at trial, I must next set out briefly, but working largely from a helpful chronology of events as

was provided by Dalian's lawyers, the essential factual environment which is the setting for the present disputes.

115 I will commence with a brief background to the arbitration and Dalian's application for provisional relief, resulting in the Tribunal issuing PO 15 on 30 September 2019.

The arbitration

116 A Singaporean seated Tribunal comprising Sir Vivian Ramsay QC (presiding Arbitrator/Chairman of the Tribunal), Dr Michael Hwang SC (Co-Arbitrator) and Dr Robert Gaitskell QC (Co-Arbitrator) is conducting an international arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law 2010 (UNCITRAL).

117 The arbitration between Dalian as claimant and Duro as respondent arises out of a subcontract issued to Dalian for the design and supply of mobile stackers, reclaimers, a fixed stacker, car dumper and ship loader for the Roy Hill Iron Ore Project in the Pilbara region of WA under a subcontract of 31 August 2011. Within that arbitration Dalian was claiming ¥223,554,584.25 (Renminbi, the Chinese currency) as moneys payable for goods supplied and delivered under that subcontract.

118 On 30 September 2019, the Tribunal determined Dalian's application for provisional relief seeking ¥122,471,177.25 (approximately $AUD27 million) as security in that amount, or alternatively for a freezing or asset preservation order preventing Duro from disposing or diminishing the value of any of its assets in Australia, up to that amount.

119 Dalian's application to the Tribunal for security was made under s 12(1)(g) of the SIAA. It is convenient to set out below s 12(1)(g), (h) and (i) from that Singaporean legislation, which is found cited in PO 15.

120 The SIAA provisions provide:

> Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for -
>
> ...
>
> (g) securing the amount in dispute;

> (h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (i) an interim injunction or any other interim measure.

121 A fuller background towards s 12(1) of the SIAA is provided later in the reasons (see [129] - [147]).

122 The Tribunal effectively accepted Dalian's arguments upon its application seeking security for its claim against Duro in that arbitration. See pars 53 - 57 of the arbitral reasons to PO 15 by which the Tribunal weighed the alternatives of issuing an order requiring the amount in dispute in the arbitration to be paid as security under s 12(1)(g) or instead, to otherwise issue a freezing or asset preservation order under SIAA s 12(1)(h) or (i), or under Article 26 of the UNCITRAL rules.

123 At par 57 of its PO 15 reasons the Tribunal said:

> In those circumstances, the Tribunal considers that it should exercise its discretion under s 12(1)(g) of the Act and make an order for security for the following reasons. First, the Tribunal expects to make an award in the near future and any award should be enforceable and enforced. There would be irreparable harm to [Dalian] if it had an award which could not be enforced because assets were not available. Secondly, Duro has received a substantial sum which is more than is needed to satisfy current commitments and it seems likely that funds will be transferred at some stage to Duro Felguera SA in Spain. The Tribunal considers that, despite the statement on behalf of Duro, there is a likelihood of dissipation of assets. Thirdly, whilst the funds under the TGP Freezing Order might become available to [Dalian], it is not certain that they would as the purpose of the TGP Freezing Order was to secure sums that might be awarded to TGP. In those circumstances [Dalian's] right to security should be dealt with separately or by way of an order for security.

124 At par 58 the Arbitral Tribunal rejected the counter proposal of Duro to increase the financial limit of sums then the object of a Freezing Order issued earlier in respect of TGP. It said this:

> Rather, the Tribunal considers that the most satisfactory arrangements, given the current financial position of Duro, is for Duro to provide security in the sum of AUD 27 million.

125 The Tribunal continued at pars 59 and 60:

> The Tribunal, in the first instance, directs that Duro must forthwith take all necessary steps to deposit AUD 27 million in a bank account in the joint names of the solicitors for Duro and (Dalian), to be dealt with in accordance with the agreement of the parties or the direction of the Tribunal. The parties should thereafter be at liberty to agree and/or apply to the Tribunal for another appropriate form of security.
>
> That security is provided on the basis of [Dalian's] cross undertaking in damages. It would be appropriate for the parties to agree the form of that undertaking including the terms of any fortification. In the absence of agreement, the Tribunal will make any necessary orders.

126 At the end the Tribunal, on 30 September 2019, ordered and directed by order 3 of its PO 15, as follows:

> On the basis of a cross undertaking by [Dalian] in damages, that pending further order, Duro must forthwith take all necessary steps to deposit AUD$27M in a bank account in the joint names of the solicitors for Duro and [Dalian], to be dealt with in accordance with the agreement of the parties or the direction of the Tribunal.

Chronology following PO 15 at 30 September 2019

127 Dalian's chronology of relevant events of 19 March 2020 is a helpful document. It provides event descriptions which may largely be accepted as the established trial facts. For the most part the collected events are cross-referenced to documents to be found within Mr O'Shannassy's 25 February 2020 affidavit. At some places I have elaborated as required towards those now assembled facts:

Date	Event Description	Affidavit Annexure
16 October 2019	Dalian applies to the Tribunal over the form of its cross-undertaking which it needed to give and duly gave in order to comply with PO 15.	TJO-8 and TJO-9
21 October 2019	The Tribunal issues Procedural Order No 16, giving directions on the form of the cross-undertaking by Dalian.	TJO-10
23 October 2019	Dalian, Duro and Clyde & Co enter into the Trust Agreement with Clyde & Co identified as acting as Trustee.	TJO-11
28 October 2019	Clyde & Co inform Squire Patton Boggs (SPB) that 'the transfer is complete and AUD27M is now held in the Trust Account.'	TJO-12

19 December 2019	The Singapore Arbitral Tribunal issues the First Partial Final Award (First Award) determining that Duro should pay Dalian $US32,898,858.18 (**First Award Sum**).	Agreed Fact
23 December 2019	Dalian writes to Duro requesting Duro sign and return an enclosed written direction to Clyde & Co and that Duro also pay the balance of the First Award Sum.	TJO-13
2 January 2020	Dalian writes to Duro requesting Duro immediately comply with the request made in the preceding 23 December 2019 communication.	TJO-14
6 January 2020	Clyde & Co emails SPB informing that due to the Christmas period it was still in the process of seeking instructions from Duro.	TJO-15
8 January 2020	Dalian emails Clyde & Co requesting confirmation that Duro will comply with requests made in the 23 December 2019 and 2 January 2020 communications and provide an update as to its financial position by COB that day.	TJO-15
10 January 2020	Clyde & Co emails SPB advising it was still obtaining instructions from Duro and that it expected to be in a position to respond later that day.	TJO-15
13 January 2020	Dalian writes to the Tribunal noting that Duro had not returned a signed written direction to the Trustee advising the Trustee to release $AUD27 million to Dalian in respect of the First Award.	TJO-16
16 January 2020	Duro writes to the Tribunal requesting a 15 day adjournment to allow Duro an opportunity to confirm its position.	TJO-17
20 January 2020	Dalian writes to the tribunal rejecting the request for an adjournment.	TJO-18
24 January 2020	The Tribunal issues its PO 17 under which it determined, amongst other things, *'[t]hat the Trustee, in accordance with clause 4 of the Trust Agreement, upon receipt of this written direction, must immediately release the Trust Amount, being AUD 27 million, to [bank account nominated by the Plaintiff]'.*	TJO-19

29 January 2020	Dalian writes to Clyde & Co (as Trustee) requesting that it comply with PO 17 by releasing the Trust Amount to the as nominated SPB bank account.	TJO-20
30 January 2020	Clyde & Co responds to SPB's 29 January 2020 communication, asserting amongst other things that Duro did not hold sufficient funds in Australia to satisfy the First Award Sum and that '*… Clyde & Co in its capacity as trustee, is concerned that … a transfer of the [Trust Monies] may expose Clyde & Co (and indeed Dalian) to claims by creditors that would otherwise have benefited from the funds held in trust*', and also seeking an undertaking that SPB would hold any trust moneys in its account for a minimum period.	TJO-21
31 January 2020	Dalian responds to Clyde & Co's 30 January 2020 letter.	TJO-22
3 February 2020	Clyde & Co responds to SPB's 31 January 2020 communication. SPB responds to Clyde & Co's communication of the same day.	TJO-23 and TJO-24
6 February 2020	SPB writes to Clyde & Co advising that they hold instructions on behalf of Dalian to commence proceedings against Clyde & Co and Duro.	TJO-25
11 February 2020	Clyde & Co write to SPB referring to a commencement of court proceedings under *Trustees Act 1962* (WA).	TJO-26
12 February 2020	SPB responds to Clyde & Co's 11 February 2020 communication seeking further information.	TJO-27
13 February 2020	Clyde & Co emails SPB providing a '*working draft*' of an Originating Summons issued pursuant to seeking relief under s 92(1) of the *Trustees Act*.	TJO-28
14 February 2020	SPB responds to Clyde & Co's email of the previous day commenting on the form of the Originating Summons and requesting urgent attention.	TJO-29

17 February 2020	SPB emails Clyde & Co seeking an update as to its foreshadowed Originating Summons application under s 92(1) of the *Trustees Act*.	TJO-30
25 February 2020	Dalian via its lawyers SPB commences ARB 2 of 2020 and CIV 1279 of 2020 out of the Supreme Court of Western Australia both supported by affidavits of Mr O'Shannassy.	
26 February 2020	Dalian serves the two proceedings immediately mentioned upon Duro and Clyde & Co.	
28 February 2020	Mr Goyal, Mr Langdon and Mr Bumbak of KordaMentha appointed a voluntary administrators of Duro.	
4 March 2020	KordaMentha issues a Circular to Creditors and Suppliers.	
11 March 2020	First meeting of Creditors at KordaMentha's Sydney office.	
12 March 2020	First directions hearing in ARB 2 of 2020 and CIV 1279 of 2020 before Martin J. Expedited trial ordered for 23 March 2020.	

128 Given the international context in which the Arbitration leading to this proceeding occurred, it is appropriate to render some further brief observations upon the somewhat unique aspects of the Singaporean legislation (the SIAA) around which the Arbitration took place and which was ultimately utilised by the Tribunal in issuing its PO 15 at 30 September 2019.

The Singapore International Arbitration Act

129 The SIAA is the legal regime that governs international arbitrations seated in Singapore. The SIAA also governs non-international arbitrations where parties have a written agreement for Part II of the SIAA or the UNCITRAL Model Law on Commercial Arbitrations to apply.

130 The SIAA was initially enacted in 1994, having been amended several times, with the most recent edition being that of 2002 and which remains in force.

131 The overarching objective of the SIAA is undisputed. At the fore is the promotion of international arbitration in Sinagpore: see ***Swift-Fortune Ltd v Magnifica Marine SA*** [2006] SGCA 42 at [14]. The other critical policy of the SIAA is that of minimal curial intervention in arbitral proceedings: see ***AKN v ALC*** [2015] SGCA 18 at [37].

132 In ***Swift-Fortune*** at [14] the former Chief Justice of Singapore, Chan Sek Keong CJ, delivering the judgment of the Court of Appeal, further explained [14]:

> We can conclude ... that the purpose of the [S]IAA is to promote the kind of international arbitration that would augment the legal and other kinds of services already available in Singapore, and which is conducive to promoting Singapore as an international arbitration centre.

133 Whilst the Model Law is explicitly incorporated in the SIAA, from inception the intent of the drafters was to take the SIAA beyond that. Presumably this was done with the hope that doing so would increase the attractiveness of Singapore as a seat of arbitration.

134 An explicit expansion objective beyond the Model Law was evident from the Law Reform Committee, Singapore Academy of Law, Report of the SubCommittee on Review of Arbitration Laws (1993) ('1993 Report'), being the report of the subcommittee tasked with drafting the SIAA.

135 By the 1993 Report at par 31, the subcommittee explicitly recommended that the powers of the Arbitration statute of Singapore be substantially increased to enable the proper functioning of international arbitrations in Singapore. The subcommittee had noted at par 30 that although it was generally accepted that an arbitrator has general powers to give directions for the conduct of an arbitration, those powers are necessarily implied by the trilateral agreement between the parties and the arbitrator and not by reason of a statutory power.

136 The subcommittee had recommended at par 31:

> [T]he Model Law provisions should be expanded to include the powers set out in the UNCITRAL Rules, [Singapore International Arbitration Centre] Rules and such other powers as a Court should have, such as:
>
> (a) orders for preservation, interim custody or sale of any property which are the subject matter of the dispute;
>
> (b) orders for securing the amount in dispute;

> (c) orders for ensuring that any award which may be made in the arbitration proceedings is not rendered ineffectual by the dissipation of assets by the other party; and
>
> (d) interim injunctions or other interim orders.

137 Even further than this, the subcommittee identified that there was a 'lacuna' in the Model Law which needed to be filled in by the SIAA, to ensure that final awards, when made, were not merely a 'paper award' (see par 34). The as perceived lacuna was that under the Model Law arbitrators lacked the ability to make enforceable interim procedural orders including, as identified by the subcommittee, 'orders relating to interim preservation of property'. A proposed remedy was to ensure that the orders made under the powers as outlined by par 31 of the 1993 Report be registrable and therefore enforceable by the courts.

Section 12(1)(g)

138 In ***Front Carriers Ltd v Atlantic & Orient Shipping Corp*** [2006] SGHC 127 at [15], Ang J discussed that the measures within s 12(1) of the SIAA:

> [A]re essentially remedies aimed at assisting in the just and proper conduct of arbitration, or in the preservation of property which is the subject matter of the arbitration.

139 In that context, and as I have previously outlined (see [120]), s 12(1)(g) of the SIAA reads:

> **Powers of arbitral tribunal**
>
> 12.- (1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for -
>
> ...
>
> (g) securing the amount in dispute;

140 It should be noted that the terms of the eventual subsection 12(1)(g) were essentially recommended under the subcommittee's draft bill 1993, although then under a different subsection letter.

141 Perhaps most telling as to a relationship between the drafter's initial objective when drafting the SIAA and that objective's implementation via s 12(1), are the comments of the subcommittee in the 1993 Report, at par 49:

> The Committee therefore felt that on balance such procedures as the law allows to provide security for parties engaged in litigation in the curial system should also be made available to parties who chose to arbitrate, rather than litigate, international disputes of a similar nature. **As the basic reason for the adoption of the Model Law is to build Singapore as an arbitration centre, the arbitration procedure should not be less attractive than the courts in relation to security for claims.** (my emphasis in bold)

142 Whilst s 12(1) of the SIAA encapsulates Article 17 of the Model Law, it also, as discussed, expands on that generalised position. Article 17 in 1985 had read:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

143 Although the Model Law was amended in 2006, Singapore did not adopt those amendments into the SIAA (see Henderson, A and Mahendra, V in 'Interlocutory Applications' in The Honourable The Chief Justice Sundaresh Menon and Brock, D (eds) *Arbitration in Singapore: A Practical Guide* at [11.098]).

144 To date there has been little discussion by the Singaporean Courts as to the basis on which the specific power to grant security conferred under s 12(1)(g) might be exercised. By their respective further written submissions of 30 March 2020, Dalian and Duro sought to address the position of this provision of the SIAA. As was helpfully identified by senior counsel for Duro, only two case authorities seem to discuss s 12(1)(g), and then only briefly. Those decisions touch upon the provision and do not provide additional insights: see ***H&C S Holdings Pte Ltd v Mount Eastern Holdings Resources Co; Limited*** [2015] SGHC 323; and ***Front Carriers Ltd v Atlantic & Orient Shipping Corp*** [2006] SGHC 127 at [8].

145 This position was also recognised by Henderson and Mahendra in *Arbitration in Singapore* at [11.092]. The editor-in-chief of that volume was the current Chief Justice of Singapore, Menon CJ.

146 The position as to limited case authority on s 12(1)(g) also, unsurprisingly, applies to Australian case law.

147 Despite limited curial insights towards s 12(1)(g), Henderson and Mahendra in *Arbitration in Singapore* (as well as both Dalian and Duro

by their respective submissions), contextually recognise that s 12(1)(g) is followed by s 12(1)(h) (prevention of dissipation of assets) and by s 12(1)(i) (injunctive orders akin to Mareva and freezing orders). Thus, when looking to evaluate the power to grant security conferred under s 12(1)(g), its ostensibly stronger and elevated character (distinct from following powers to be seen under (h) and (i)), must be viewed in that surrounding legislative context.

148 Before next proceeding to evaluate aspects of the respective positions of the parties, I need to say something more about the express terms of the Trust Agreement made then between Dalian, Duro and Clyde & Co.

The Trust Agreement

149 I have already referred to certain clauses from this pivotal document. But some further observations are required.

Recitals and PO 15

150 As expressed by its recitals it is plain that PO 15, issued by the Tribunal of 30 September 2019, was a key driver towards the subsequent entry into of the contractual agreement. Hence, PO 15 is a relevant surrounding circumstance or extrinsic fact for construction purposes, if required towards the Trust Agreement. The recitals also suggest as much. In particular, see recitals (C) and (D), in terms:

> (C) The Tribunal has ordered, by way of Order 3 in Procedural Order No 15, on the basis of a cross undertaking by [Dalian] in damages, that pending further order, Duro must forthwith take all necessary steps to deposit AUD 27 million in a bank account in the joint names of the solicitors for [Dalian] and Duro to be dealt with in accordance with the agreement of the parties or the direction of the Tribunal.
>
> (D) The parties have entered into this agreement to facilitate compliance with Order 3 of Procedural Order No 15.

151 Clearly, PO 15, in particular Order 3 thereof, provides important surrounding context as to creating the environment from which the Trust Agreement eventually emerged.

152 And as already seen, within PO 15 itself, there is internal reference to the local legislative SIAA base for the Tribunal to order 'security'. This was by reference to s 12(1)(g) of the SIAA 'securing the amount in dispute.' Ultimately, such security for Dalian's pending claim against

Duro was ordered by the Tribunal on 30 September 2019, upon Dalian's application (see PO 15).

153 Moreover, relief by 'security' was specifically resolved upon as being appropriate, as a matter of discretion by the Tribunal under PO 15. That choice was adopted by the Tribunal then, in preference to the alternatively canvassed lesser relief of a freezing or asset preservation order - also available under s 12(1) subparagraphs (h) or (i) of the SIAA. The Tribunal had given consideration to that lesser in personam relief, but ultimately rejected it, in favour of ordering 'security' in the amount of $AUD27 million under s 12(1)(g). That is an important consideration towards rejecting one of senior counsel for Duro's opening submissions at the trial, as regards the position being analogous to that of the grant of a freezing order.

154 By reference to the decision of ***Flightline v Edwards*** [2003] 1 WLR 1200, it was submitted for Duro that all that the Tribunal had required by PO 15 was, as had been the case in ***Flightline***, a freezing order and no more. That submission became the basis for a further submission that all the Trust Agreement had ultimately achieved seeking to implement PO 15, was to provide a fund held on trust exclusively and always only for Duro (not for Dalian), and so as to constitute a frozen fund of Duro assets held in Australia - but not conferring any 'security' to Dalian over that fund as a claimant unsecured creditor.

155 On my assessment, the presenting facts here are very different to those in ***Flightline***. Section 12(1)(g) of the SIAA (discussed earlier) is wholly unique as a provision enabling the ordering of pre-judgment security for a claim. The provision extends well beyond the power to order security for a party's costs of litigation or arbitration - more familiar to Australian lawyers. The s 12(1)(g) SIAA power extends, further, to the ordering of security to be provided for the subject matter of the arbitral claim itself. Here, the funds were ordered by the Tribunal under PO 15, as security for Dalian, and it is my view Dalian held equitable rights over the Trust Amount funds once they were paid by Duro to Clyde & Co.

Clauses

156 In relation to the substantive provisions of the Trust Agreement, clauses 1 and 2 are also contextually important. They provide:

> 1. The Trustee [ie, Clyde & Co] will establish an interest bearing control money account (the '**Trust Account**') in the name of Clyde & Co at National Australia Bank, 255 George Street, Sydney, New South Wales, 2000 ('**the Bank**') providing for withdrawals only upon the written authority of the Trustee in accordance with the terms of this Agreement.
>
> 2. Duro will use its best endeavours to pay, as soon as practicable but no later than 28 October 2019, AUD 27,000,000 (without deductions or charges) into the Trust Account in compliance with Order 3 of Procedural Order No 15 of the Tribunal ('**Trust Amount**').

157 I have already mentioned the terms of the pivotal cl 4 within the Trust Agreement (see [10]). But for present convenience, I will set out most of it again:

> The Trustee may only release or pay the Trust Amount, or any of the Trust Amount in accordance with a written direction addressed to the Trustee signed by a below named partner of both Squire Patton Boggs and Clyde & Co or a direction of the Tribunal in the Arbitration or a tribunal constituted pursuant to clause 9 ...

And then identifying the respectively named partners at both Clyde & Co (Mr Glen Warwick) and at Squire Patton Boggs (Mr Greg Steinepreis) who could be signatories of such a written diection to the trustee under cl 4.

158 I have already mentioned cl 5 (see [61]) of the Trust Agreement in relation to interest on the trust funds that accrues on the 'trust amount' whilst held, to be paid to Duro, not to Dalian.

159 Clause 6 deals with the form of any written direction to be given under the agreement which must be in writing, in English, and delivered to the Trustee at care of a certain identified person.

160 No suggestion was put to me within the current trial to the effect that the written direction, as it was issued by the Tribunal to Clyde & Co on 24 January 2020 under its PO 17, was not in full accord with the form requirement for a written direction as envisaged under the Trust Agreement, specifically by reference to meet cl 6 thereof.

161 I also mention cl 9 which provides:

> This agreement shall be governed by and construed in accordance with the laws of Western Australia and any dispute, controversy or claim arising out of or relating to this agreement, or the breach, termination or

> invalidity thereof shall be settled by arbitration. The arbitration tribunal shall be the Tribunal in the Arbitration unless that Tribunal is functus officio, in which case the following applies. The apportioning authority shall be the Singapore International Arbitration Centre. The number of arbitrators shall be 3. The seat of the arbitration shall be Singapore. The language used in the arbitration shall be English.

162 Clause 10, the final clause of the Trust Agreement, saw an irrevocable instruction from Duro to Clyde & Co to accept service of any proceedings arising out of the agreement. Similarly, SPB was instructed on behalf of Dalian to accept service of any proceedings arising out of the agreement.

Execution

163 The Trust Agreement concluded with an execution page provided for Duro, Dalian and for Clyde & Co (there referred to as 'Trustee'). Mr Glen Warwick can be seen to have executed the document on its execution page for and on behalf of Duro (as agent only for Duro). Further, as is seen, Mr Warwick also executed the document as 'partner for and on behalf of Clyde & Co (Trustee).'

Construction of trusts

164 It goes without saying, almost, that the Trust Agreement is not to be interpreted by reference to documents or events which occurred subsequent to 23 October 2019. Hence, PO 17, as it was issued by the Tribunal at 24 January 2020, cannot bear upon or provide any relevant background or context for any required interpretation of provisions of the Trust Agreement. Any exercise in interpretation would be conducted in its relevant context as it was entered. That was at 23 October 2019, not later. As stated by Heydon and Crennan JJ in ***Byrnes v Kendle*** [2011] HCA 26; (2011) 243 CLR 253 at [102], 'the rules for the construction of contracts apply also to trusts'. Their Honours at [105] had also observed, by reference to observations made earlier by Mason and Deane JJ in ***Gosper v Sawyer*** (1985) 160 CLR 548 at 560 - 569, that:

> 'The contractual relationship provides one of the most common bases for the *establishment* or implication and for the *definition* of a trust.' By 'establishment' their Honours referred to deciding whether a trust existed. By 'definition' they referred to ascertaining its terms. The two enquiries are closely related: for the terms of a document or oral dealing determine whether it creates a trust.'

See also from ***Byrnes v Kendle***, per Gummow and Hayne JJ at [59].

165 The security arrangements implemented by reference to the Trust Agreement consequently created an express trust in respect of the amount of $AUD27 million. That sum, as has been seen, was subsequently paid over by Duro to Clyde & Co to become the Trust Amount, following the issuance by the Tribunal of PO 15 and particularly order 3 therein. Towards that point, see ***Byrnes v Kendle*** per Heydon and Crennan JJ at [117].

166 As also seen, Clyde & Co by its reply written submissions fully accepts it is a trustee over the Trust Amount funds it still controls (see par 13).

Consideration

Some preliminary observations

The nature of the funds held on trust

167 Parts of the early passing correspondence between the parties' lawyers might be read to contend that the funds, the subject of the Trust Agreement, were not funds the subject of a trust - although I did not detect that precise submission made by, or on behalf of, Duro at the trial. If that position were seriously contended, then I would reject it as wholly out of alignment with the explicitly clear text of the Trust Agreement, and with one of its key surrounding circumstances, namely, with PO 15.

168 At the trial the somewhat distinct thrust of the opening submissions on behalf of Duro, as put by senior counsel, was that the Trust Amount was held on trust for Duro, and only ever for Duro, albeit subject to the Trust Agreement, as a contract affording (I infer) some contractual rights to Dalian. But again the clear text of the Trust Agreement, I would assess, is against that argument. Nor, as I have said, was PO 15 and the arrangements effected under the Trust Agreement merely an effort to establish a freezing order fund scenario over assets Duro held in Australia. Rather, an express trust was created over a fund of money regulated by the express terms of a trust made under contract and with interests in the fund to be held, when established, by both Dalian and by Duro.

The consensual nature of the Trust Agreement

169 Addressing the Trust Agreement, I must, however, point out that the end arrangements as perfected by it, as regards only Clyde & Co

receiving and holding the Trust Amount funds in a controlled money account, do not precisely align with the Tribunal's PO 15.

170 As seen, PO 15 had envisaged and, indeed, ordered the payment of funds into a jointly named account. Clearly, that did not happen. And it did not happen as a matter of consensus reached later by the parties through their respective lawyers. The consensual dealing by way of the entry of the Trust Agreement and the holding of the Trust Amount only by Clyde & Co as trustee, bears upon, as I would assess, the non-engagement here of exclusions under s 8 of the PPSA. Here, the Trust Agreement came in the end to be consensually perfected, following a payment of the Trust Amount by Duro into the trust account of Clyde & Co.

171 As now seen, order 3 of PO 15 had envisaged a deposit of $AUD27 million in a bank account operated in the joint names of the solicitors for Duro and Dalian. For what now are immaterial commercial reasons, at the time a joint lawyers' names trust account outcome was, consensually, never implemented. Around October 2019, it appears there had then been discussion between Duro and Dalian's lawyers over holding the funds in an Australian account only in the name of SPB, acting as the trustee. That suggestion was also not implemented.

172 Ultimately, the final arrangements as seen perfected by the Trust Agreement's express terms were for Clyde & Co (the lawyers still acting for Duro in the arbitration before the Tribunal), to solely hold the funds as a sole trustee under the terms of the Trust Agreement.

173 That, as modified end arrangement, distinct to the PO 15 envisaged joint lawyers account and then the ensuing Trust Agreement, were consensual arrangements, albeit driven by PO 15. Those variations suited the parties for tax or other reasons in Australia. That observation of course says nothing about their underlying wisdom, which hindsight would now call significantly into question.

174 For the purposes of the PPSA, however, if the Trust Account funds fall to be captured and cut down as a s 12 PPSA security interest of Dalian, given by Duro as grantor, then by those arrangements, a non-engagement of s 8 as an exception to s 12 of the PPSA carries the potential to be a significant event.

175 In this area, I must also reject Mr MacLaurin SC's submissions for Dalian that the tenor of the Trust Agreement arrangements were of a

compulsive character implemented for the purposes of meeting PO 15 and so excluded from the reach of s 12, by s 8 of the PPSA. As seen now, they were not so excluded by PPSA s 8 as compulsively ordered measures in Australia. They were never orders of a court. The arbitration conducted in Singapore was a private, consensual event as unfolding between Duro and Dalian. No orders of a court were involved.

No undertakings by Dalian

176 As one further diversion before returning to the primary issue, I should note what had been said concerning a risk of remission of the Trust Amount to Dalian, in the People's Republic of China, and a potential future irrecoverability, if ever viewed later as an unfair preference, or by a PPSA avoidance determination locally. On that basis, at the trial I enquired with senior counsel for Dalian whether Dalian would be prepared to offer an undertaking, to the effect that, if its Australian lawyers (SPB) were to receive the Trust Amount under an order of this court, that Dalian would then correlatively undertake to leave the funds in Australia for a finite time (ts 28 - 29). This measure would allow the position of the voluntary administrators of Duro, to conduct and finalise their enquiries and address the as expressed concern, about a significant and irrecoverable asset remission scenario to China that way, effectively on an interim basis. I left that question for consideration by senior counsel for Dalian over the luncheon adjournment during the trial.

177 However, I was advised at the resumption by senior counsel for Dalian that instructions could not be obtained within the limited time then available over lunch (ts 30). But since the trial conducted on 23 March 2020, there has been ample time to obtain instructions on the issue, particularly given that I needed to reserve my decision and have since allowed and received two further tranches of written submissions from both Dalian and Duro upon other issues. There has been no concession by Dalian as to holding the funds in Australia.

178 Consequently, I must approach the present evaluation on the basis that no undertaking or assurance is offered from Dalian. To that end, I assess that there is, indeed, a likelihood that upon a receipt of the funds by SPB, that SPB would be likely to be instructed by Dalian to remit all those funds from out of Australia to the People's Republic of China, where Dalian is based. Naturally enough, SPB would be obliged to act upon their client's instructions. I further assess, this being a

commercial court, that the future task of recovering such money later, if hypothetically a judgment be obtained for it, say, in a winding up of Duro, would then be highly problematic. My still well remembered experiences with the Rizhao litigation conducted in this court (see, for instance, ***Koolan Iron Ore Pty Ltd v Rizhao Steel Holding Group Co Ltd [No 2]*** [2010] WASC 386 at [21]) renders me sanguine about enforcing and recovery prospects, were they required. There is, of course, no reciprocal judgment enforcement treaty as between China and Australia at present (see Garnett, R, 'Increasing Co-operation between Australia and China in the Recognition and Enforcements of Judgments' (2018) 19(2) *Melbourne Journal of International Law* 750).

179 Consequently, I will proceed from here on on the basis that I am indeed satisfied that there is a real prospect of a scenario of a swift remission of the trust funds out of the country to China, upon Clyde & Co remitting the funds to SPB under PO 17, or upon the order of this court, and then that there would be adverse money recovery repercussions flowing from that, in the event that eventual liquidators of Duro sought to recover those funds in the course of a winding up of Duro.

Relief in the action - jurisdiction of this court

180 I should also note, before turning to other arguments of Duro (by its administrators) concerning the Trust Amount funds, that no submission has been made by either defendant to the effect that this court does not hold the power or jurisdiction to issue orders of the character as is currently pressed for by Dalian against Clyde & Co. I also assess that as being the correct position as regards the amenability of the relief sought by Dalian.

181 From the face of its Originating Summons, Dalian grounds its application for final relief upon the court's power vis-à-vis trustees and further, over trust property under s 94 of the *Trustees Act*. From the basis that Dalian holds an equitable interest in the Trust Amount funds and is aggrieved by the omission of Clyde & Co as trustee, by reason of an alleged continuing failure by that trustee to act and to remit the funds to Dalian, as was directed by the Tribunal by PO 17 from 24 January 2020, this court, I assess, is enabled to make as against the Trust Amount funds, such order under those premises, as the circumstances require.

182 As already seen, the Trust Agreement, by cl 9 thereof, is expressly said to be governed by the laws of Western Australia.

183 The court holds the power to issue final orders over the Trust Amount funds as it sees fit. Equally, if necessary as a matter of pure contract, the court, being so moved by Dalian, could act to enforce the trustee's obligations under the Trust Agreement by a final order, effectively requiring a contracting party (the trustee -Clyde & Co) to perform its obligation as promised. The court might also issue a vesting order over the trust funds held by Clyde & Co as trustee under the circumstances, pursuant to s 78(2)(h) of the *Trustees Act*.

184 In such clear premises then there is no need to canvass any further the issues of power or jurisdiction concerning the final (not interlocutory) relief that is sought by Dalian at the trial.

185 I can now turn then to some more of the resistance arguments as advanced by Duro at trial (through its administrators) against the Trust Amount funds being ordered to be remitted to Dalian via SPB.

Evaluation of the arrangements under which the Trust Amount was held in trust

186 The position so far is that I would assess that Dalian held a contingent equitable interest (by way of a charge or lien) over the Trust Amount that arose by reason of the consensual arrangements effected under the Trust Agreement (implementing at least broadly in spirit the Tribunal's PO 15) and then, substantively, upon Clyde & Co's receipt as trustee of those funds from Duro at 28 October 2019.

187 However, by my assessment, the character of the equitable interest enjoyed by Dalian from 28 October 2019, to potentially receive those funds once they came to be held by Clyde & Co, altered, after 24 January 2020, to mature then from a contingent equitable interest to be an absolute and unqualified beneficial entitlement in equity to receive the Trust Amount.

188 As now seen, 'security' of 'the amount in dispute' had been ordered by the Tribunal, under PO 15. The order for security issued then by the Tribunal pursuant to the procedurally unique security provision s 12(1)(g) of the SIAA, as discussed in an earlier section of these reasons.

189 Every chattle security situation is different and always requires a bespoken evaluation by a court. There are usually no perfect analogues. But here, the ordered provision of security by the Tribunal for some component of the amount in dispute in the arbitration pending

in Singapore, between Dalian as claimant and Duro as respondent, I assess, was well beyond a scenario of an 'in personam' freezing order made over assets of a potential judgment debtor. Here, the position was more akin, on my view, to that as seen in ***WA Sherratt Ltd v John Bromley (Church Stretton) Ltd*** [1985] 1 QB 1038 (discussed by Santamaria JA in his reasons in ***Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd*** [2014] VSCA 326; (2014) 49 VLR 86). In ***WA Sherratt*** the amount in dispute had been paid over as a condition of the obtaining of the court's leave to defend that action. To that end, Lord Justice Robert Goff had said at page 1057:

> It is plain that there is an established line of authority ... that a plaintiff is treated as a secured creditor to the extent of money paid into court, whether that money has been paid in involuntarily, i.e. as a condition of defending the action, or voluntarily.

190 By my assessment, it is important to distinguish Dalian's holding of 'security' over a dedicated fund of money to be specifically constituted in Australia for the purpose of providing some assurance to Dalian of substantive (partial) recovery, if it were ultimately to be successful in that arbitration against Duro -in contra distinction to a mere creditor's claim against the property or assets of someone which becomes the subject of a bare in personam freezing injunction or, to use venerable terminology, a Mareva injunction.

191 As regards such in personam injunctive orders over a putative debtor's assets, it was long established that a plaintiff beneficiary of such in personam 'freezing order' relief, would not thereby obtain for themselves any superior interest above that of other unsecured creditors in property or assets of the party who ultimately becomes a judgment debtor. That was the position at common law at the time of the emergence of such, then somewhat novel, freezing orders (Mareva injunctions).

192 Addressing a then relatively new phenomenon in Australia of Mareva injunctions in January 1985, I had written then (see Martin K J, 'Mareva Injunctions' (1985) 59 *Australian Law Journal* 22, 29):

> The Mareva injunction is usually limited in terms to a restraint against dealing with assets up to the value of the sum in issue. It is, however, relief in personam only, and confers no priority upon the plaintiff vis-à-vis other creditors ...

193 That position has not altered since. But as discussed, the Tribunal's PO 15 ordering security over the 'amount' in dispute found eventual implementation and embodiment under the consensually entered terms of the Trust Agreement, as regards the Trust Amount. The objective seen then to be implemented by the agreed terms of the Trust Agreement, particularly under cl 4, was achieved by reference to the three possible classes of issuers of a written direction that could issue to the trustee as to the Trust Amount. Upon receipt of such a direction, the trustee was required to deal with the Trust Amount as so directed. It was afforded no discretion by the terms of the Trust Agreement.

194 Such arrangements for security thereby conferred on Dalian an equitable interest at minimum, by equitable charge or lien over those funds, from the time they were received by Clyde & Co as trustee at 28 October 2019.

195 Dalian's interest in that 'Trust Amount' can initially be seen to be contingent on it eventually winning its case against Duro, in the pending arbitration before the Tribunal. Then there was a need for a direction issuing to the trustee under cl 4 of the Trust Agreement. All that eventually happened, as seen.

196 That, of course, is not to say that Duro, as original provider of the Trust Amount funds, had immediately upon its payment to Clyde & Co, then lost all beneficial interest in them. Clearly, had Dalian (hypothetically, say) not been successfully vindicated on its claims in the arbitration against Duro, then a need for the security, as then only contingently provided (to cover the amount at issue), would have been removed. Or Duro might instead have paid all of any eventual award from other sources - hypothetically again.

197 I assess the status of the trust funds, once held and controlled by the trustee, prior to the determination and First Partial Final Award of the Tribunal of 19 December 2019, in many respects, was effectively akin to that of payment to a neutral stakeholder of funds, pending a property acquisition settlement. I mention the stakeholder scenario as considered by the High Court of Australia, namely ***Grant v O'Leary*** (1955) 93 CLR 587. There the court (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) assessed stakeholder held funds at pages 592 - 593, by reference to some earlier cases including ***Ellis v Goulton*** (1893) 1 QB 350 and the observations of Isaacs J made upon stakeholders in ***Christie v Robinson*** (1907) 4 CLR 1338 at page 1355.

198 At 19 December 2019, however, upon Dalian then being successful in obtaining from the Tribunal the First Partial Final Award in its favour, in the amount of $US32,898,858.18, the equitable claim of Dalian over the funds held by Clyde & Co as security, strengthened considerably. Still, in theory at this time, Duro might then have paid all the award sum (close to double the security) from out of other financial sources and then claimed back the Trust Amount held by Clyde & Co. Or it might have applied to set aside and stay the award. That, of course, did not happen.

199 As regards Duro's position, at 19 December 2019, Duro then had substantively lost before the Tribunal and in an aggregate amount almost double (in Australian dollar terms) the Trust Amount. Duro had provided the Trust Amount funds as security in Australia to Clyde & Co to provide for that very eventuality, in part. Duro's residual interest in possibly regaining the security funds it provided was now correspondingly diminished.

200 However, the equitable interest in the funds of Dalian was, in my view, fully perfected upon the Tribunal's issue (and the receipt by the trustee) of PO 17 on 24 January 2020 - which incorporated therein a cl 4 Trust Agreement written direction to Clyde & Co as trustee at that time, that it must 'immediately' release the trust amount to the account of Dalian's Australian lawyers, SPB.

201 On my assessment, what had before that been a contingent equitable interest by Dalian, held by way of charge or lien over the trust funds post 28 October 2019, was then perfected to fully vest unconditionally upon the Tribunal's communication of PO 17 to Clyde & Co. The Tribunal's written direction fully engaged with the terms of cl 4 of the Trust Agreement at that time.

202 So, at 24 January 2020, on my assessment, Dalian had then progressed from once holding a contingent equitable interest by way of security over the Trust Amount to, at then, holding a fully vested equitable interest, under the terms of the express trust governing the Trust Amount.

203 I cannot accept in this sphere, Duro's arguments of construction directed at cl 4 of the Trust Agreement to the effect that the word 'may', seen in the phrase 'may only release', as regards the trustee paying the trust amount, was conferring or indicating any level of discretion in

Clyde & Co as trustee, as to it not acting upon a properly issued written direction that engaged with cl 4 of the Trust Agreement. The language used, assessed in context, simply does not support that interpretation.

204 To the contrary, I assess the word 'may' used in that context of cl 4 as a mandatory constraint against the trustee paying away the Trust Amount or a part thereof, on any basis other than in accord with the category of (tripartite) potential cl 4 written directions that the trustee may receive as to it dealing with the Trust Amount funds it held, as explicitly provided for, by cl 4 of the Trust Agreement.

205 The second of cl 4's explicitly provided for potential issuers of a written direction to the trustee as regards the Trust Amount funds was the Tribunal itself. That came to pass on 24 January 2020 under PO 17.

206 Upon that happening, the trustee then enjoyed no residual discretion to not act in timeous accord with such a cl 4 direction - unless the terms of some other Australian law or laws at the time, somehow, were also engaged then, to permit Clyde & Co as trustee to disregard the 24 January 2020 PO 17 direction of the Tribunal, given under cl 4 of the Trust Agreement.

207 That observation, of course, poses the next trial inquiry to be addressed. And in that arena the real issue is whether an appointment of voluntary administrators at a time (28 February 2020), some six weeks or so after 24 January 2020, changed matters at all for the trustee.

Duro's submissions: PPSA post 28 February 2020

208 By reason of Duro being placed into voluntary administration on 28 February 2020, it is contended the Trust Amount should not be paid over to Dalian (by its agent, SPB) 'at this time'. Paragraph 3 of Duro's primary written submissions of 19 March 2020 says this:

> All of its property is governed by Pt 5.3A of the *Corporations Act 2001* (Cth) (Act). 'Property' means any legal or equitable estate or interest (whether present or future or whether vested or contingent): s 9. Upon payment by Duro into the Clyde & Co account, the Funds remained the property of the company (or, at least, property in the company's use or possession) within the meaning of provisions such as ss 437A, 437D, 440B, 440D and 440G of the Act.

209 Interpolating at this point and at a general level, I have no difficulty with what is seen contended by the voluntary administrators on behalf of Duro above. Whilst I cannot accept without some more qualification the observation that the funds 'remained the property of' Duro, I can accept that Duro had, after its original 28 October 2019 payment, still retained some degree of residual equitable interest in the paid over funds after that, ie, after Duro paid them over to Clyde & Co - from then to be held in accord with the parties' respective obligations under the Trust Agreement.

'Property' and 'security interest' - *Corporations Act* and PPSA

210 There is a very expansive definition used towards the word 'property' (vis-à-vis Duro) used in the PPSA and, as well, by s 9 of the *Corporations Act* extending to include an equitable estate or interest (whether present, future or vested or contingent in real or personal property of any description and including a thing in action). That expansive definition of 'property' would, I consider, have embraced Duro's residual equitable interest in the $AUD27 million, as first held by Clyde & Co at 28 October 2019. I also accept that the Trust Agreement's security directed features favouring Dalian would, as regards the Trust Amount, see the arrangements meet those expansive definitions of the word 'property', as regards property of Duro and then also s 12 of the PPSA as a security interest of Dalian, held over Duro's personal 'property' (ie, the Trust Amount funds). That follows by reason of the equitable rights still held in the Trust Amount by Duro, in effect, to potentially receive its money back should, in due course, that 'security' amount now held on trust by Clyde & Co, not be needed or called upon to be paid over to Dalian, as a result of the Tribunal's forthcoming award decision, or for other hypothetical reasons canvassed earlier.

211 Here, as well, I must also mention s 51 of the *Corporations Act*, there defining the term 'PPSA security interest', by reference to the PPSA definition of 'security interest': see the PPSA at s 8, s 12 and Chapter 9.

212 By reference to s 51A of the *Corporations Act*, the term 'security interest' as used within the *Corporations Act* means:

(a) a PPSA security interest, or

(b) a charge, lien or pledge.

213 Then, within Pt 5.3A of the *Corporations Act*, the 'property' of a company includes any PPSA 'retention of title property' of the company (see s 435B). The extended and expansive definition of the word 'property' (of Duro) also applies by reference to s 444E(3) and (4) of the *Corporations Act*. I will note as well s 51F(2) as regards the applicability or otherwise of a PPSA retention of title property.

214 On my view, before 24 January 2020 that expansive definition of 'property' (of Duro) would be met here as regards the Trust Amount, once held by Clyde & Co as trustee, in accord with the terms of the Trust Agreement. In particular, that Trust Amount money was then:

(a) personal property;

(b) arguably, still used by Duro;

(c) once paid over to Clyde & Co, not held under the (legal) title of Duro any longer;

(d) of such a nature that a PPSA security interest had attached to it (in accord with the terms of s 12 of the PPSA) once it was paid to Clyde & Co on 28 October 2019, from then to be held in accord with the terms of the Trust Agreement; and

(e) the consensual and non-curial nature of those security arrangements under the Trust Agreement being such that the s 8 PPSA categories of exceptions nominated within the PPSA to the creation of a security interest in Dalian were, not then applicable.

215 I also reject other generalised submissions put against that conclusion by Dalian, including that it had not, in effect, intended to create, or to be a party to, any 'security interest' under the PPSA. But subjective intent is irrelevant here. The question is whether the Trust Agreement transaction (as it is to be evaluated for the purposes of the PPSA) and as then effected by the Trust Agreement is caught or not, objectively assessed as a security interest. It would have been before 24 January 2020, I assess.

216 I also reject Dalian's generalised submission that the s 12 PPSA 'security interest' obligations cannot or do not apply to trust property. To the contrary, they can and they do, in my view, under the explicit terms of the PPSA, if otherwise engaged.

217 As regards key provisions of the PPSA, I would refer, without repeating all over again, to my earlier discussion about that topic as recently conducted under my reasons for decision given in ***Gas Sensing Technology Corporation v ProX Pty Ltd*** [2019] WASC 10 and dealing with PPSA provisions commencing at [259]. I see no need to repeat again what I canvassed at some length there as regards PPSA provisions.

218 At [263] of ***ProX***, I had cited the s 12(1) PPSA definition of 'security interest' by reference to that definition in reference to a '**transaction**' that in substance secures payment or performance of an obligation. I am satisfied here that the Australian arrangements by the Trust Agreement that led to the payment by Duro of the Trust Amount under the Trust Agreement met that definition.

219 Until 24 January 2020 then at least, there was, I assess, a relevant PPSA '**transaction**'. Duro was the grantor, creating thereby a (PPSA) 'security interest' enjoyed by Dalian over the Trust Amount as held in Australia by Clyde & Co. Of course, s 8 of the PPSA, which I discuss at [264] of the ***ProX*** reasons, excludes certain interests, in particular, excluding under s 8(1)(c) an interest held (ie, by Dalian) in respect of a 'lien, charge, or other interest in personal property, that is created, arises or is provided for **by operation of the general law**'. But here, as was also the case in ***ProX***, s 8 is not, as I earlier mentioned, engaged under the presently presenting non-curial circumstances, as regards the Trust Amount and the Trust Agreement which are not compulsive.

Perfection under the PPSA

220 At [268] of the ***ProX*** reasons, I refer to the concept of a perfection under the PPSA and to this being usually affected by a registration, although the PPSA also permits security interests in certain types of collateral to be perfected by their possession or control. It is not contended that Dalian's equitable (by charge or lien) interest in the trust amount (which I assess was a PPSA security interest) immediately after 28 October 2019 (and before 24 January 2020), was ever the subject of a PPSA registration of data that was implemented under Chapter 5 of the PPSA.

221 Consequently, Dalian's 'security interest' in the Trust Amount prior to 24 January 2020 was, in my view, at then, exposed to potentially of the vitiating effects of s 267 of the PPSA, under a circumstance where Duro (as the grantor of the PPSA security interest) was placed into administration, or liquidation.

222 As is now known, there was an appointment of voluntary administrators to Duro on 28 February 2020.

223 It should also be noted that the relevant time period (ie, the potential relation-back six-month period for insolvency purposes, should Duro in due course ever needed to be wound up) looks to run back to the end of August 2019. So then, when Duro paid over $AUD27 million to Clyde & Co at late-October 2019, that payment event would look to fall well within a potential relation-back period window, should Duro ever be liquidated.

224 Referring back to the PPSA and to a 'security interest' enjoyed by Dalian over the Trust Amount, the next and critically important question is whether the event of the issuance of the written direction by the Tribunal at 24 January 2020 (as a part of PO 17), otherwise perfected the interest of Dalian in those Trust Amount funds.

225 'Perfection' is addressed by s 21 of the PPSA. The perfection concept is discussed by the Court of Appeal of Western Australia in ***Hughes v Pluton Resources Ltd*** [2017] WASCA 213; (2017) 52 WAR 456. The ***Hughes*** reasons, at the end, contain a Schedule collecting verbatim most of the relevant provisions of the PPSA and regulations, to be conveniently accessed and read there.

226 But for the issuance of the written direction of the Tribunal under PO 17 engaging with cl 4 of the Trust Agreement on 24 January 2020, the PPSA position looks relatively straightforward, as regards there being an unregistered security interest held by Dalian in the Trust Amount and contingently then held by Clyde & Co, as trustee for either Dalian or Duro, depending on the eventual arbitral outcome and exposed to Dalian's security interest being potentially undermined by an administration under s 267 of the PPSA.

227 By s 21(2)(c) of the PPSA, Dalian as a secured party had possession of the Trust Amount (ie, the collateral) in an ADI account (meaning an Australian Deposit-taking Institution account), when Dalian came to hold a fully vested equitable entitlement in those funds - by reason of the written direction of the Tribunal under PO 17 at 24 January 2020. Nevertheless, by s 25 of the PPSA, control of an ADI account is seen to be limited to the secured party being the ADI itself. Plainly, as regards s 21(2)(c) PPSA, that is not this case here for Dalian as regards control of the Trust Amount.

228 But as regards PPSA s 21(2)(b), the question is did Dalian have 'possession' of the collateral? Applying the PPSA's extended definition of 'possession', by reference to s 24(2) of the PPSA, the answer is 'yes'. That is because I assess the trustee, Clyde & Co, post 24 January 2020, was for the purposes of the s 24(2) the then 'another person' who then on behalf of Dalian (as the PPSA 'secured party'), held (and actually then possessed) the Trust Amount (the PPSA 'property'), then solely on behalf of Dalian - then as a fully vested beneficiary of those funds.

229 Hence, by s 24(2) of the PPSA, I assess the security interest Dalian held over the Trust Amount was perfected for the purposes of s 21(1)(b)(iii) and s 21(2)(b) PPSA, by the possession held for Dalian then absolutely, by Clyde & Co as trustee of the collateral (Trust Amount).

Duro's status quo submissions

230 The resistance stance of Duro, by the voluntary administrators, was run at trial on a potential threefold basis (by reference to cl 4 of its primary written submissions of 19 March 2020).

First basis

231 First, it was put:

> [T]he Funds are held on trust for Duro, albeit subject to a contract (ie, the Trust Agreement). In this event, they are 'property of the company' and are governed by ss 437A and 437D of the *Corporations Act*, and should be made available to all creditors on a winding up.

232 The contention is that the Trust Amount held by Clyde & Co was always held on trust, but only for Duro, and for no other person. As I have said earlier, I cannot accept that argument. The argument is, of course, linked to a correlative Duro argument that by PO 15, all the Tribunal had directed, by reference to s 12(1)(g) of SIAA, was an in personam injunction and freezing order situation, rather than afford any elevated security status to Dalian as a potential judgment creditor of Duro. Put more correctly, Dalian was an arbitral award creditor, until the arbitral award received recognition and enforcement by a court. However, as now seen, I have now rejected both those commencing arguments of Duro made by its administrators.

233 On my view, the Trust Agreement, objectively assessed, was seeking to implement and give effect to PO 15 and with a security over some of the amount in dispute in the arbitration objective, for Dalian, until an outcome of the arbitration then pending before the Tribunal was delivered.

234 The First Partial Final Award event happened on 19 December 2019. And, as seen, Dalian was successful then as against Duro before the Tribunal in the award amount of almost $US32 million, an award sum very considerably exceeding the amount held as security in trust by Clyde & Co in Australia.

235 Consequently, Duro's submission to the effect that the Trust Amount was always to be held on trust solely for Duro and for no-one else cannot, in the end, be accepted. That outcome would be a position contrary to the text and surrounding context (being chiefly PO 15 and the Tribunal's reasons and, indeed, directly contradicting the objective of an order for security issued under s 12(1)(g) of the SIAA). Moreover, it would be a result against overall commerciality and the consequent consensual arrangements as later perfected under the Trust Agreement for the Trust Amount. The object of those arrangements was from then to afford a realistic conferral of security for some of the amount in dispute in the arbitration to Dalian, and was to be achieved by the Duro payment of the $AUD27 million to Clyde & Co at 28 October 2019.

Second basis

236 Duro's second general argument was to the effect that:

> [T]he Funds are charged in favour of [Dalian], either as a security interest within the meaning of the PPSA, or by reason of a charge arising at general law. In this event, the Funds are governed by s 440B of the [*Corporations Act*], and the Court should not order that they be paid forthwith to [Dalian] during the course of the administration.

237 This, I assess, is the pivotal argument potentially favouring Duro upon the present application. I will return to discuss s 440B of the *Corporations Act* further in due course. But, as indicated, if Dalian held a PPSA security interest under the PPSA before 24 January 2020, then on my assessment that security interest came to be perfected well before 28 February 2020 by reason of the written direction of the Tribunal in PO 17 on 24 January 2020. From that time, Duro no longer held any residual equitable rights to the Trust Amount.

Correspondingly, Dalian, through the possession of the funds from then held on its exclusive behalf by the trustee, from then enjoyed unqualified fully vested equitable ownership in the Trust Amount fund.

238 The situation post 24 January 2020 can be expressed even more simply. The Trust Amount as from then, for PPSA purposes (and for *Corporations Act* purposes as regards 'property'), was now the property of Dalian, not the property of Duro.

Third basis

239 A third alternate position contended on behalf of Duro was that:

> [T]he funds are held on trust for [Dalian] ... Even if this is so, the Funds are still the property of [Duro] within the meaning of ss 9 and 437D [of the *Corporations Act*], or property 'used or occupied by, or in the possession of, [Duro]' and are subject to the restrictions in the meaning of s 440B of the [*Corporations Act*].

240 So seen, a heavy component of the second and third related residual arguments put on behalf of Duro is grounded upon s 440B of the *Corporations Act*. Thus, it is necessary to look more closely to scrutinise the terms of that provision found in div 6 of Pt 5.3A.

Section 440B of the *Corporations Act*

241 During the course of oral arguments at the trial, no relevant case authority was cited about s 440B of the *Corporations Act*. Nor was anything by way of relevant extrinsic materials put as to s 440B in its present form. The section appears to have been substituted in 2010 by amending Act 96 of 2010 s 3 sch 1, effective from 30 January 2012.

242 Section 440B(1) now reads in terms:

> During the administration of a company, the restrictions set out in the table at the end of this section apply in relation to the exercise of the rights of a person (the ***third party***) in property of the company, or other property used or occupied by, or in the possession of the company, as set out in the table.

243 A note to s 440B(1) reads:

> The property of the company includes any PPSA retention of title property of the company (see section 435B).

244 Then, s 440B(2) simply says that the restrictions in a table at the end of the section do not apply in relation to the exercise of third party rights in property, if the rights are exercised either with the administrator's written consent or with the leave of the court. Neither exception is applicable here, at least yet.

245 Yet it is possible, theoretically, that I could give leave for the funds to be paid over to Dalian, even if I were to conclude that the funds had otherwise met some part of the expansive definition of the 'property' (of Duro) under the *Corporations Act*.

246 Next, s 440B(3) deals with possessory security interests. It says:

> If a company's property is subject to a possessory security interest, and the property is in the lawful possession of the secured party, the secured party may continue to possess the property during the administration of the company.

247 So seen, s 440B(3) poses a question concerning whether or not the trust amount is a possessory security interest. The further question is whether or not it is in the lawful possession of Dalian, in which case Dalian can continue to possess the funds during a voluntary administration.

248 The enquiry posed out of s 440B(3) is whether under present circumstances, by which I assess Clyde & Co as holding the Trust Amount post 24 January 2020 as a fully vested beneficial interest upon an express trust for Dalian and without any residual qualifications (in light of the Tribunal's PO 17) is this: is that Trust Amount (as a chattel) to be assessed as being in the lawful possession of Dalian. As earlier discussed, especially given s 24(2) of the PPSA, that indeed is my end assessment, because Clyde & Co since 24 January 2020 holds the Trust Amount solely on behalf of Dalian and not for Duro. On no view, of course, does Clyde & Co hold those funds for itself beneficially.

249 Where personal property (ie, money) is held under an express trust, by a trustee for an absolutely entitled beneficiary, the beneficiary should be considered as being in a lawful possession of that property.

250 But even if I were wrong about the engagement of s 440B(3) favouring Dalian, the s 440B(1) argument put by senior counsel for Duro was only put by reference to item 1 of the s 440B table. That provision relevantly reads as regards the restrictions placed upon an

exercise of third party rights - interpolating that the relevant third party would be Dalian. Hence, item 1 of the s 440B table would read:

> If the third party is ... a secured party **in relation to property of the company [ie, Duro]**, and is not otherwise covered by this table, then ... the third party [ie, Dalian] cannot enforce the security interest. (my emphasis in bold)

251 Clearly, a strong status quo asset protective legislative intent during any administration underlies s 440B (and, indeed, the whole of Pt 5.3A of the *Corporations Act*). That objective must be fully recognised and respected, so far as the text permits. Section 440B is a provision that seeks to deliver a status quo retention over the corporation's property while an administration unfolds. To that end, the terminology used describing the items in the s 440B table is extraordinarily wide.

252 Even so, on my assessment, there is a problematic obstacle here for Duro, arising from the text of s 440B(1) and then also, in the terminology in item 1 of the table.

253 The problem for Duro arises by way of what I assess is a relevant textual non-engagement for Duro, against the term 'property of the company' (ie, property of Duro). Nor does item 1's further terminology of 'in relation to' help Duro. That is not met. This is because, under s 440B(1), the reference is to an exercise of rights of a person (the third party, ie, Dalian) 'in property of the company', ie, again relevantly here, in the property of Duro.

254 My view as to 'property of the company' not being engaged by Duro for s 440B(1) purposes would seem to align with some observations of Allanson J in ***Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd [No 4]*** [2014] WASC 405. There, Technomin was in voluntary administration. Beforehand it had made a payment into court as security (for Xstrata's costs). Later the costs of Xstrata had been taxed as successful party. Xstrata sought an order for payment out of those security moneys in court. His Honour at [24] said this:

> The result, in my opinion, is that on the entry of judgment in January 2013, at the latest, the money in court was charged in favour of the defendants. Technomin had an interest that the money should be held and paid out only in accordance with the orders made by the court. But it had no right to the money itself, and could not call for it to be paid to it or at its direction. I doubt that, in those circumstances, the money

> could be regarded as the property of the company so that payment out would be a transfer or other disposition of its property, or would be a payment made by it. (my emphasis)

255 By my assessment, no part of s 440B(1) looks to be engaged here for Duro. That is, once again, because on Clyde & Co's receipt of the Tribunal's PO 17 at 24 January 2020, the Trust Amount funds, as the subject of the Trust Agreement, from then, were no longer in any way to be potentially to be viewed as property of Duro (howsoever widely defined the word 'property' is stretched by the PPSA, or by the *Corporations Act* - unless it were to be defined, say, as the company's formerly owned property - a bridge too far, I suggest).

256 Consequently, some six weeks on from 24 January 2020, when Duro had then entered voluntary administration, still with Clyde & Co as trustee of the funds, not acting on the written direction of the Tribunal of 24 January 2020, the inaction of the trustee is essentially not to the point, as regards s 440B. Upon Clyde & Co's undoubted receipt of the Tribunal's PO 17 written direction of 24 January 2020, there was no longer a basis to say that Duro then held any level of 'property' interest in the trust amount, even taking the concept of (personal) 'property' to be widely extended by definition or otherwise, under the *Corporations Act*, or by the PPSA.

257 On that basis, I must necessarily reject, as a result, all of Duro's arguments that s 440B(1) is engaged here. The Trust Amount funds were no longer the property of Duro, after 24 January 2020. Correlatively, those funds were from then possessed by Clyde & Co as trustee for Dalian, by reason of Dalian's fully vested and unqualified beneficial right to those funds.

Duro's penultimate written submissions of 30 March 2020

258 Duro's penultimate tranche of written submissions, filed by my leave granted at the trial, had sought to further address the implications of the Tribunal's written direction of 24 January 2020 issued under its PO 17 to Clyde & Co. It will be remembered that the direction was to 'immediately' pay the Trust Amount to SPB's identified Perth trust account (on behalf of SPB's client Dalian). The lawyers for Duro now sought at the end to invoke various other provisions of the *Corporations Act* in seeking to have the court, in effect, order Clyde & Co not to remit the Trust Amount to Dalian, as Dalian seeks, during the pendency of the administration (pars 14 - 43 of Duro's submissions of 30 March 2020).

259 Specifically, Duro seeks to invoke to that end a desired Trust Amount status quo, arising under the *Corporations Act* and, in particular, from div 7 of Pt 5.3A thereof and, specifically, s 441AA - s 441D.

260 Provisions such as s 441D(2) would require a formal application made to the court by the administrator. It is the case that no such application has yet been made, albeit foreshadowed, if needed, by Duro's penultimate submissions. Naturally, I would allow the administrators some time to file such an application, were I to be of a view that such a procedural requirement were the only significant inhibition against status quo relief as is sought over the Trust Amount. But Duro's difficulties extend someway beyond the merely procedural.

261 The written submissions of Duro of 30 March 2020, towards a submission that the court not allow the Trust Amount to leave Australia, duly invoke, in somewhat omnibus fashion, a contended potential engagement favouring Duro (by its administrators) to secure the status quo over the trust amount for a time, of provisions of the *Corporations Act* list below, including:

(i) s 441AA;

(ii) s 441A;

(iii) s 441B;

(iv) (presumably not s 441C, dealing as it does with perishable property); and

(v) s 441D which, by subsection (1) makes reference internally to 'act' under s 441B(1) and hence to the s 440B Table - which I have addressed earlier in the reasons.

262 However, towards all these status quo retention submissions concerning the Trust Amount by Duro, an underlying and repeated difficulty I invariably encounter, is by reason of Duro's inability to satisfy the 'property of the company' (ie, property of Duro) textual threshold premise (post 24 January 2020).

263 Thus, once the cl 4 Trust Agreement, written direction of the Tribunal of 24 January 2020 issued and was received by Clyde & Co as trustee, as regards the trustee remitting the trust amount to Dalian 'immediately', then, as I have now assessed matters as from that time:

(a) There was no longer any interest, equitable or otherwise, in those funds that can arguably be then validly described as the property of Duro.

(b) Correlatively, Dalian from that time now held a fully vested beneficial entitlement over the trust amount.

(c) Furthermore, Dalian no longer held an unperfected PPSA 'security interest' in those funds. Dalian's beneficial entitlement to those funds was now wholly unqualified and was perfected by the possession of the funds held for Dalian by Clyde & Co. Hence, Dalian, from 24 January 2020, enjoyed full beneficial ownership of the funds. Dalian was no longer, from then, a PPSA 'security holder'. Nor was Dalian, from then, a holder of a PPSA 'security interest'. Dalian was now entitled to those funds as if they were its own property and no-one else's. Clyde & Co from 24 January 2020, as trustee of the funds, possessed them for Dalian and was under an unqualified obligation to remit them to Dalian as it had been directed by the Tribunal under cl 4 of the Trust Agreement.

(d) The position might alternatively be evaluated from a PPSA security interest perspective as the possessory engagement and perfection by Dalian with s 21 of the PPSA by perfection, by reason of possession (by Clyde & Co on Dalian's behalf for s 24(2) PPSA purposes).

(e) Alternatively, even further, s 440B(3) *Corporations Act* was engaged in the circumstances by Dalian.

(f) Consequently then, none of s 440B(1), s 441AA, s 441A, s 441B nor s 441D was, or is, relevantly engaged, given the absence at 28 February 2020 (and since 24 January 2020) of any security interest in the Trust Amount capable of being so regarded as the property (then) of Duro. At that time, the Trust Amount was to be regarded as the property of Dalian and no-one else.

264 Consequently, Duro's submissions as regards maintaining the status quo by a court order over the funds during the pendency of the voluntary administration cannot be accepted by reference to any of these provisions.

Clyde & Co advice as a trustee

265 As already indicated, the position as ultimately articulated for Clyde & Co as trustee at the trial, effectively, was to interplead as regards the Trust Amount that it holds and to seek the advice of the court - in terms of the questions which have earlier been identified, by reference to the amended questions under Clyde & Co's counterclaim: see [105].

266 In that counterclaim context, the answers to the questions ultimately posed for advice to Clyde & Co as trustee, as the reformulated questions, must follow as being essentially self-evident from the conclusions I have now reached vis-à-vis the arguments I have herein resolved as between Dalian and Duro. Consequently, then, the three (3) questions may be answered as follows.

267 Question 1:

> Is Clyde & Co as the named Trustee under the written Agreement made between Dalian, the second defendant (**Duro**) and Clyde & Co dated 23 October 2019, and order 2 of the Procedural Order number 17 dated 24 January 2020, obliged to pay the sum of $AUD27 million presently held by Clyde & Co (fund), to Dalian or to Duro?

Answer: 'Yes, to Dalian.'

268 Question 2

> If so, from when was Clyde & Co so obliged?

Answer: From the time of Clyde & Co's receipt of a written direction the subject of (PO 17) issued by the Tribunal on 24 January 2020, upon a timeous ascertainment and verification that such written instruction was given in accord with cl 4 and cl 6 of the Trust Agreement (as it was), then from that time Clyde & Co was so obliged as regards Dalian.

269 Question 3:

> Does Clyde & Co's obligation continue in circumstances where voluntary administrators have been appointed for Duro on 28 February 2020?

Answer: In the circumstances, as further discussed by these reasons below, the answer is 'Yes, subject to [270] - [277] that follow.'

Some further matters

Publication and orders

270 In the event that I did reach a conclusion adverse to the contentions of Duro (put on its behalf by its administrators), as I now have, it was requested I refrain from issuing orders or, in effect, to stay my orders for a reasonable period, so as to allow Duro by its administrators to consider its position.

271 In the somewhat unpreceded circumstances of an international pandemic and a somewhat complex evaluation as now undertaken, I am of the view that that is not an unreasonable request.

272 Consequently, I will simply publish these reasons to the parties and otherwise refrain from issuing any orders giving effect to the reasons for a period to be discussed as between the parties, following their publication.

273 Given the current COVID-19 pandemic, I would provisionally assess that a period of two weeks (14 days from publication) should suffice. But I will hear the parties about that if necessary.

Section 71 *Trustees Act* application by Clyde & Co

274 One further complication arises as regards the position as expressed by Clyde & Co as a trustee. This is in circumstances where Clyde & Co foreshadows exercising rights under s 71 of the *Trustees Act*, as regards protecting itself by retaining a portion of the Trust Amount, so that it might effectively reimburse itself in respect of its legal expenses as trustee anticipated to be incurred by it in future. This would arise by Clyde & Co potentially facing future claims by Dalian for breach of trust, including for lost interest, by reason of Clyde & Co failing to remit the Trust Amount to SPB's trust account (as agent for Dalian) at or more proximately to 24 January 2020, as directed by the Tribunal.

275 Absent some explicit indication from Dalian of no future breach of trust claims being made against Clyde & Co (other than to a lost interest claim for the period between shortly after 24 January 2020 and the time that Dalian actually receives the benefit of the funds), I regret I will need to hear the parties further on this issue. A hearing would need

to canvass the amount of a retention amount sufficient to cover Clyde & Co's future legal costs, in the event that it needs to defend itself against contentions of breach of trust. This sum will be based on a hypothesis that Clyde & Co would ultimately be successful in resisting those claims, or at least in persuading a court it has not acted unreasonably as a trustee in terms of conducting itself in a fashion that justifies the removal or denial of a trustee's orthodox indemnity rights against trust assets.

276 During the course of arguments at the trial a figure of $AUD500,000 was canvassed. Subject to hearing the parties, I am inclined to think that if Dalian does not equivocally resile from pursuing future breach of trust challenges against Clyde & Co, that funds of at least that amount ought to be preserved in Australia and so, not be remitted to Dalian - so that the trustee might then still hold some viable indemnity amount of trust assets accessible in Australia, if Clyde & Co is ultimately vindicated.

277 In any event, I will need to hear the parties about all that, if it remains an issue in contention. The parties should communicate their respective positions about this further issue being determined within the 14-day period that I have otherwise mentioned in [273] of these reasons.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

IH
Research Orderly to Justice Kenneth Martin

24 APRIL 2020