Equity Division
Supreme Court
New South Wales

Case Title:	Warner v Ulysius International Trading Pty Ltd
Medium Neutral Citation:	Warner v Ulysius International Trading Pty Ltd [2011] NSWSC 329
Hearing Date(s):	28, 29, 30 March and 7 April 2011
Decision Date:	20 April 2011
Jurisdiction:	Equity Division
Before:	Tamberlin AJ
Decision:	Direct the parties to bring in short minutes of order to give effect to the findings and reasons as set out in this judgment and dealing with costs and the cross-claims.
Catchwords:	EQUITY – lien – patent attorney's lien; nature and scope - possessory lien as passive right of retention which does not create charge on property – waiver of lien by subsequent loan agreement. EQUITY – interests – agreement to create a charge constitutes a charge - priorities between equitable charges – intention of parties. CORPORATIONS LAW – duty of liquidator to exercise reasonable care in power of sale – duty of liquidator to obtain best price reasonably obtainable.
Legislation Cited:	Corporations Act 2001 (Cth) Patents Act 1990 (Cth) Supreme Court Act 1970 (NSW)
Cases Cited:	Caruana v Port Macquarie-Hastings Council [2007] NSWLEC 109 Clifford Harris & Co v Solland International

Ltd [2005] EWHC 141 (Ch); [2005] 2 All ER 334
Cordelia Holdings Pty Ltd v Newkey Investments Pty Ltd [2004] FCAFC 48
Ex parte Patience; Makinson v The Minister (1940) 40 SR(NSW) 96
Firth v CentreLink [2002] NSWSC 564; (2002) 55 NSWLR 451
Gartside v Silkstone and Dodworth Coal & Iron Company (1882) LR 21 Ch D 762
Gregory v Commissioner of Taxation of the Commonwealth of Australia [1971] HCA 2; (1971) 123 CLR 547
Lyddon v Moss (1859) 4 De G & J 104; 45 ER 41
McMillan v Dunoon [2005] VSC 440
MMAL Rentals Pty Ltd v Bruning [2004] NSWCA 451; (2004) 63 NSWLR 167
Re Universal Distributing Co Ltd (in liq) [1933] HCA 2; (1933) 48 CLR 171
Scammell & Co v Workcover Corporation [2006] SASC 258;(2006) 95 SASR 278
Shirlaw v Taylor (1991) 5 ACSR 767
Spencer v The Commonwealth [1907] HCA 82; (1907) 5 CLR 418

Texts Cited: Alan Hyam, The Law Affecting Valuation of Land in Australia, 4th ed 2009

Category: Principal judgment

Parties: Anthony John Warner as Liquidator of Carl-Louis Pty Ltd (in liquidation) and as Receiver and Manager of the Foodpack Trust Unit Trust (First Plaintiff and First Cross-Defendant to First and Second Cross-Claims)

Carl-Louis Pty Ltd (in liquidation) (Second Plaintiff and Second Cross-Defendant to First and Second Cross-Claims)

Ulysius International Trading Pty Ltd (First Defendant and Cross-Claimant on Second Cross-Claim)

Carl Karam (Second Defendant and Third Cross-Defendant on Second Cross-Claim)

Fraser Patison Old as Trustee for Fraser

	Old & Sohn (Third Defendant; Cross Claimant on First Cross Claim and Fourth Cross-Defendant on Second Cross-Claim)
Representation	
- Counsel:	S A Wells (First and Second Plaintiff and First and Second Cross-Defendant to First and Second Cross-Claims) G P McNally SC (First Defendant and Cross-Claimant on Second Cross-Claim) B Katekar (Second Defendant and Third Cross-Defendant on Second Cross-Claim) A Spencer (Third Defendant; Cross Claimant on First Cross Claim and Fourth Cross-Defendant on Second Cross-Claim)
- Solicitors:	Breene & Breene, (First and Second Plaintiffs and First & Second Cross Defendants to First and Second Cross-Claims Matthews Dooley & Gibson (First Defendant and Cross-Claimant on Second Cross-Claim) PMF Legal (Second Defendant and Third Cross-Defendant on Second Cross-Claim) Sally Nash & Co (Third Defendant; Cross Claimant on First Cross Claim and Fourth Cross-Defendant on Second Cross-Claim)
File number(s):	2010/368241
Publication Restriction:	None

JUDGMENT

INTRODUCTION

1 Mr Warner is an official liquidator appointed by the Court on 23 August 2010 as liquidator of Carl-Louis Pty Ltd (in liq) (the Company) and as receiver and manager of the assets of another company not party to the proceedings, Foodpack Trust Unit Trust (the Foodpack Trust), pursuant to s 67 of the *Supreme Court Act 1970* (NSW).

2 When the Company was placed into liquidation on 23 August 2010 its only asset was intellectual property in registered designs and patents for coffee cups and lids (the property) in Australia and overseas. The Company is the trustee of the Foodpack Trust and holds the property in its capacity as trustee of that trust. The Company on 11 April 2008, granted an exclusive licence to use the property to Foodpack Pty Ltd (Foodpack). The directors of the Company at the relevant times were Mr Billy Zamagias, Mr Carl Karam (the second defendant) and Mr Louis Kourgialis, a solicitor.

3 The first defendant, Ulysius International Trading Pty Ltd (Ulysius) holds a registered charge over the Company. This charge was registered on 15 October 2008. The charge is to secure an amount of $200,000 plus interest. Ulysius was a shareholder of the Company and held one ordinary issued share out of the three issued shares and also held one of three units of the Foodpack Unit Trust.

4 The second defendant, Mr Carl Karam also holds a registered charge over the property of the Company. This charge and the charge of Ulysius were both registered with ASIC on 15 October 2008 at the same time. Under this charge Mr Karam claims the sum of $111,896. He is also a director of the Company and holds one of the three issued shares in the Company.

5 The third defendant, Fraser Patison Old is a registered patent attorney who provided services in that capacity to Foodpack from 8 June 2006 to 21 November 2008 and thereafter services to the Company over the

period 1 November 2008 to 20 August 2010. Mr Old in his amended cross-claim seeks a declaration that he is entitled to a possessory lien or alternatively a fruits of action or particular lien over the Company's property which has priority over any valid charges including the registered charges of the first and second defendants and any claim to remuneration by Mr Warner. He claims an amount of $278,121 for the period 8 June 2006 to 20 August 2010, or alternatively $118,121 in respect of professional fees and disbursements and other expenditure which he claims to be secured by his liens. Mr Old lodged a proof of debt on 27 August 2010 for an amount of $288,410.

6 Mr Warner seeks advice from the Court under s 479(3) of the *Corporations Act 2001* (Cth) (the Act) as to how the sum of $300,000 being the sale price of the property pursuant to an agreement made by him as liquidator on 21 October 2010, ought to be distributed upon completion and in particular as to the priority of any payments due to the defendants from the sale proceeds. He also seeks orders requiring the defendants to release their securities and lien to enable completion of the sale of the property and he seeks orders for his costs and remuneration.

7 By its amended second cross-claim Ulysius seeks a declaration that its charge takes priority over the proceeds of sale of the property and also over the claims of Mr Karam and Mr Old and over any claim for remuneration by Mr Warner as liquidator. It also seeks damages for alleged breach of duty by Mr Warner under s 420A(1) of the Act from the proceeds of sale. Ulysius also seeks an order that Mr Warner is not entitled to recover any remuneration, costs or assets relating to the sale of intellectual property from the assets of the Company and an enquiry into the sale of the property of the Company for $300,000. The breach of duty is based on allegations by Ulysius that Mr Warner did not exercise reasonable care and sold the property for substantially less than the market value or alternatively for less than the best price reasonably obtainable because he failed to take reasonable steps to properly market and sell the intellectual property. Ulysius alleges that the price accepted

by Mr Warner on sale of the property for $300,000 was made in a sale at a gross undervalue and that the true value of the sold property was in the order of $3 million.

ISSUES

8 The issues are:

1. What is the relative priority of the registered charges of Ulysius and Mr Karam?

2. What is the nature and priority of any claim by Mr Old for work done in relation to the property?

3. Did Mr Warner, in exercise of his power of sale in respect of the property breach the duty of care under s 420A(1) of the Act in failing to take all reasonable care to sell the property for not less than the market value or for the best price reasonably obtainable?

4. Is Mr Warner entitled to any costs and remuneration and if so where does he rank in priority in relation to the defendants?

BACKGROUND

9 The Company was incorporated on 27 November 2006 and as from 4 December 2006 acted as trustee for the Foodpack Trust. Thereafter, the Company as trustee for the Foodpack Trust held the property on behalf of that trust.

10 The Company originally had two directors, Mr Carl Karam and Mr Louis Kourgialis. Billy Zamagias became a director when Ulysius became a shareholder of the Company.

11 Mr Dennis Zamagias, the father of Billy, is the sole director of Ulysius and he authorised his son Billy on behalf of Ulysius to conduct business for it

from time to time with Foodpack. From about 22 August 2006 Ulysius lent money to Foodpack and by 11 April 2008 when Ulysius became a shareholder these loans totalled several hundred thousand dollars.

12 Foodpack commenced business in or about August 2005 distributing packaging for takeaway food and it held some intellectual property. It took steps to register and exploit a particular design of a takeaway coffee cup referred to as the "twist cup" and a "stackable lid" for such cup together with other designs. Mr Karam the designer was the secretary of Foodpack from 16 August 2005 until 11 April 2008 and he owned 15,000 of the 30,000 shares issued in that company. The Company was a non-operating company but held all of the intellectual property for the twist cup and other designs and patents for coffee cups and lids. The right to exploit the property was licensed to Foodpack.

13 By early 2008, Foodpack was in serious financial distress and needed an injection of funds.

14 On 11 April 2008, by agreement for sale of the Company shares Ulysius acquired one third of the shares in the Company and one third of the units in the Foodpack Trust for a total consideration of $450,000. This agreement also provided that previous licence agreements of 5 December 2006 and 16 May 2007 would be terminated with no obligation under these agreements on either party. A new licence agreement was entered into between the Company and Foodpack on 11 April 2008 which replaced the prior agreements.

15 The liquidity position of the Company thereafter further deteriorated so that by early August 2008, Foodpack urgently required more funds and arrangements were made to obtain funds from Ulysius in the sum of $200,000. On 14 August 2008, a loan agreement was executed to that effect. On the same day a loan agreement was also executed between the Company and Mr Karam for $111,896. The circumstances surrounding the agreements to enter into these transactions and the

intention of the parties is contested. They are relevant to determining whether Ulysius's loan predates Mr Karam's for the purpose of determining priority.

16 Mr Old was originally retained to provide services for Foodpack and later for the Company. In his capacity as a patent attorney, he expended his own funds to maintain the registration of the patents for the intellectual property. He also claims moneys owing for his professional fees. On 31 October 2008 he executed a loan agreement with the Company for $160,000 plus interest.

17 In January 2010, the TMA Group of Companies Ltd (TMA) furnished an offer to purchase shares in the Company for $3 million. The directors were unable to agree regarding the offer and it was rejected.

18 On 21 January 2010, Foodpack was placed into administration.

19 On 18 May 2010 a licence agreement was made between the Company as licensor and RL Global Group Pty Ltd (RL Global) as licensee. The sole director of that company was a Mr Helou who was a partner of Mr Louis Kourgialis. It provided for an exclusive licence to use the property in Australia for a licence fee of $200,000. There was also provision for a royalty of 10 per cent of the cost of goods to be paid within 14 days of the invoice provided to the licensee by the manufacturer, exporter or seller. The amount of $200,000 was to be paid by 31 July 2010. No fee or royalty was ever paid under this agreement and it was subsequently terminated by Mr Warner.

20 There was another licence agreement concerning overseas registrations in draft form known as the Milton licence which did not generate any fee or revenue and which has never been implemented.

21 On 19 May 2010, Mr Karam filed proceedings for the winding up of the Company on the oppression ground. This proceeding was settled on 22

July 2010 by Heads of Agreement between Mr Kourgialis, Billy Zamagias and Ulysius who agreed to buy out the shares of Mr Karam in the Company, whereupon he resigned as director. The moneys due and payable under this agreement were never paid and thereafter the Company was wound up.

22 On 23 August 2010, Mr Warner was appointed liquidator and immediately took steps to obtain reports as to the affairs of the Company from the directors.

23 On 11 October 2010, Mr Warner received a firm offer from TMA to purchase the intellectual property for $300,000 plus GST.

24 On 15 October 2010, there being no other offers received he accepted the offer of TMA after giving consideration to the necessity of procuring a sale. He received a deposit of $50,000 from TMA on 21 October 2010 together with a signed copy of the sale agreement. He has been unable to complete the sale because the defendants have refused to take the necessary actions to release their claims in order to enable completion.

25 Mr Warner gave evidence that there will be insufficient funds from the sale of the intellectual property to all secured creditors in full as the total amount claimed by the defendants, exclusive of interest, is over $590,000 and the amount realisable from the sale if completed is $300,000.

LEGAL PRINCIPLES

26 It is not disputed that an agreement to execute a charge constitutes an equitable charge: see *McMillan v Dunoon* [2005] VSC 440, and s 9 of the Act which defines "charge" to include an agreement to give a charge.

27 As to priorities between equitable charges, the general rule is that where there are several instruments which create equitable encumbrances executed on the same day, they take priority according to the order of

execution subject to any contrary intention appearing in the documents, or otherwise in evidence, and in cases of doubt an enquiry may be carried out by the Court to determine which document was executed first: see *Gartside v Silkstone and Dodworth Coal & Iron Company* (1882) LR 21 Ch D 762 at 767-768. In that case the Court emphasised the importance of having regard to the intention of the parties as shown in the documents.

28 The possessory lien asserted by Mr Old in this case is based on Mr Old having physical possession over property in the form of records, documents and certificates the subject of the lien. It is a right of retention. Once possession is lost or the right waived the possessory lien no longer exists. It is protective and passive in nature and it does not provide a basis for actively enforcing a demand and it does not create a charge on the property or give any right to payment out of the property the subject of the lien. The authorities make it clear that a possessory lien can be waived or extinguished where the lienor enters into an arrangement inconsistent with the continued existence of the possessory lien.

29 Under Regulation 20.53 of the *Patents Regulations 1991* (Cth), a registered patent agent has the same right of lien over documents and property of a client as a solicitor. Similar provisions are found in the legislation relating to registered designs and trade marks.

30 In *Clifford Harris & Co v Solland International Ltd* [2005] EWHC 141 (Ch); [2005] 2 All ER 334 it was held that a solicitor waived the lien if he/she took security inconsistent with the lien in the sense that there was some feature of the security which was incompatible with the lien.

31 In that case, after a detailed review of the authorities relating to waiver of a possessory lien the Deputy Judge in Chancery gave an example of what is meant by the concepts of inconsistency or incompatibility in this context at [51]:

> "It follows that CH had in my judgment no enforceable right to claim interest against Mr and Mrs Solland under the terms of their retainer. It is not disputed that the charge does confer a right to interest, and it is clear from the authorities that a solicitor who takes a security conferring a right to interest which he did not otherwise possess will be regarded as waiving his right to a lien unless he expressly reserves it, and I see no reason why the same principle does not apply to the s 73 right. I therefore conclude that the s 73 right was waived by CH by the taking of the charge."

32 There is no right to interest arising from a relationship of solicitor and client in respect of costs in the absence of any provision by contract or statute: see *Lyddon v Moss* (1859) 4 De G & J 104; 45 ER 41 at 130. The same principles which apply to a solicitor's possessory lien are applicable to the circumstances of Mr Old in this case in relation to the property: see Regulation 20.53 of the *Patents Regulations* (Cth).

33 In order to make a claim for a "particular" lien or a "fruits of action" lien it is necessary for the lienor to establish that the lienor has created a fund by his or her actions against which the claim can be made.

34 The leading case as to the rights of a solicitor to have costs paid out of the fruits of litigation is *Ex parte Patience; Makinson v The Minister* (1940) 40 SR (NSW) 96 at 100 per Jordan CJ:

> "A solicitor has no lien for his costs over any property which has not come into his possession. If, however, *as the result of legal proceedings* in which the solicitor has acted for the client, *the client obtains a judgment or award or compromise for the payment of money*, or the solicitor acquires no common law title to his client's right to receive the money or to any part of that right, *he acquires a right to have his costs paid out of the money*, which is analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor. That is to say *the solicitor has an equitable right to be paid his costs out of the money*, and if he gives notice of his right to the person who liable to pay it, only the solicitor and not the client can give a good discharge to that person for an amount of money equivalent to the solicitor's costs. ... If the person liable to pay refuses, after notice to pay the costs of the solicitor, the solicitor may obtain a rule of court directing that the amount of his costs be paid to him and not to the client and payment by the judgment debtor to the client after notice of the solicitor's claim is no answer to an application for such a rule." (Emphasis added.)

35 The authorities indicate that the solicitor's "particular lien" or "the fruits of action" lien entitles a solicitor to recover the costs and expenses if he or she has, by his or her own efforts, brought into court a fund in the administration of which various parties are interested and his or her costs and expenses should be a first claim upon the fund: see *Shirlaw v Taylor* (1991) 5 ACSR 767 at 774-775 and *Firth v CentreLink* [2002] NSWSC 564; (2002) 55 NSWLR 451 at [33]-[39] per Campbell J; *Scammell & Co v Workcover Corp* [2006] SASC 258; (2006) 95 SASR 278 at [30]-[62].

36 In relation to the valuation of shares and other property it is well settled that the best indicator of market value of property is what a willing but not over-anxious purchaser would pay to a willing but not over-anxious vendor and that an offer to buy is generally not admissible as direct evidence of the value of property or shares: see *Spencer v The Commonwealth* [1907] HCA 82; (1907) 5 CLR 418 at 432, 436-437, 440-441; *Gregory v Commissioner of Taxation of the Commonwealth of Australia* [1971] HCA 2; (1971) 123 CLR 547 at 562.

37 However, this is not a universal rule and in some cases an offer may be taken into account. In *MMAL Rentals Pty Ltd v Bruning* [2004] NSWCA 451; (2004) 63 NSWLR 167, Spigelman CJ, after reviewing the authorities, concluded at [96] that, for example, where it is necessary in making a valuation to refer to a special potentiality of a particular property for a specific purchaser an offer by that purchaser to purchase that property is relevant. That is not the question in the present case.

38 There is a helpful overview of the authorities relating to the admissibility of offers to purchase as evidence of value in *The Law Affecting Valuation of Land in Australia,* 4th ed 2009 by Alan Hyam at pp 139 – 141. See also *Cordelia Holdings Pty Ltd v Newkey Investments Pty Ltd* [2004] FCAFC 48 at [121]-[125] and *Caruana v Port Macquarie-Hastings Council* [2007] NSWLEC 109 at [29]-[32] per Biscoe J.

39 Where offers are taken into account it is appropriate to consider the relevance of matters such as whether the offer was genuine; whether it was made at arm's length; when it was made; and the terms and conditions of the offer. These matters may be of central importance. In some cases an offer may be simple, direct and unconditional. In other cases the conditions of the agreement proposed may be complex and onerous on the purchaser. Other relevant considerations in assessing the relevance and weight to be attributed to an offer include equality of bargaining power; the experience of the person making the offer for the property in question; the ability of the offeror to pay; the consideration for the purchase, namely as to whether it is for cash, shares, credit or by way of exchange; whether there was any objective valuation exercise carried out to support the price offered or whether it was to supply a special need of the purchaser or to confer a particular unique benefit on the offeror. In the case of share valuation there may be special factors involved, for example, an acquisition of an additional parcel may confer control of the company which gives the shares an additional value over and above that which would otherwise be attributed to the shares.

PRIORITY AS BETWEEN THE CHARGES OF ULYSIUS AND MR KARAM

40 The first question for determination is the priority of the charges of Ulysius and Mr Karam. Both loan agreements are dated 14 August 2008 and are signed by the parties. The security for both agreements is stated to be the intellectual property of the Company and the agreements are substantially identical.

41 The loan agreements were executed on the same day pursuant to s 263 of the Act by the Company in favour of Ulysius and Mr Karam and they were both registered at the same time on 15 October 2008 at 8.36 am with ASIC. Both notifications of the details of charge were signed by Mr Karam as a director of the Company.

42 Both charges were signed on 14 August 2008 at or after a meeting of the directors and shareholders of the Company was held. Minutes of that meeting are signed by Mr Dennis Zamagias, Mr Billy Zamagias, Mr Carl Karam and Mr Kourgialis. The Minutes were prepared by Mr Kourgialis.

43 These Minutes are important on the issue as to priority between the registered charges of Ulysius for $200,000 and of Mr Karam as to $111,896. The Minutes read:

> MINUTES OF MEETING
>
> MINUTES of meeting of the Directors and share-holders of the Company held on the 14th Day of August, 2008
>
> Present: Louis Kourgialis, Carl Karam, Olga Gousetis, Billy Zamagias & Dennis Zamagias
>
> Appointment of Directors
>
> RESOLVED that the appointment of Billy Zamagias as a Director of the Company be hereby approved and recorded.
>
> Carl-Louis Pry Limited to borrow the sum of $200,000 from Ulysius International Trading Pty Limited
>
> RESOLVED that in accordance with and pursuant to the loan document produced at this meeting the company borrow the sum of $200,000 plus interest from the share-holder Ulysius International Trading Pty Limited on the terms and conditions specified in the said loan document.
>
> Intellectual Property owned by Carl-Louis to be used as security for the loan
>
> RESOLVED that in accordance with and pursuant to the said loan document produced at this meeting all share-holders perform all acts and do all necessary things to enable the equitable securities, equitable charges, mortgages or other security contemplated in the loan document to take effect namely, to use the Intellectual Property owned by Carl-Louis Pty Limited as security for the said loan.
>
> Licensing Agreement with Food Pack Pty Limited
>
> RESOLVED that Carl-Louis Pty Limited pay Food Pack the sum of $200,000 upon Food Pack Pty Limited's agreement to pay Carl-Louis Pty Limited a Royalty fee in the minimum sum of $600.00 per week. This weekly payment is to increase or decrease in accordance

with interest is as declared from time to time by St George Bank Limited.

Company to repay loan within 5 years

RESOLVED that the company shall take all reasonable steps to effect repayment of the loan within 5 years of the date hereof.

Carl-Louis Pty Limited to borrow the sum of $111.895.82 from the Director Carl Karam

RESOLVED that in accordance with and pursuant to the loan document produced at this meeting the company borrow the sum of $111,895.82 inclusive of interest from the Director Mr. Carl Karam on the terms and conditions specified in the said loan document.

Intellectual Property owned by Carl-Louis to be used as security for the loan

RESOLVED that in accordance with and pursuant to the said loan document produced at this meeting all share-holders perform all acts and do all necessary things to enable the equitable securities, equitable charges, mortgages or other security contemplated in the loan document to take effect namely, to use the Intellectual Property owned by Carl-Louis Pty Limited as security for the said loan.

Company to repay loan within 3 years

RESOLVED that the company shall take all reasonable steps to effect repayment of the loan within 3 years of the date hereof or sooner in periodic payments if reasonably practicable to do so. Executed hereunder in confirmation of the above resolutions by all persons present at the meeting ...

44 In the present case there is no evidence as to the order in which the charge documents were executed by the parties. There is nothing in the Minutes of 14 August which refers to priorities. The mere fact that one resolution to execute an agreement appears above another in the Minutes is not indicative of priority.

45 It is therefore necessary in this case to determine the intention of the parties and see whether there is any evidence that there was any intention as to relative priority.

46 There is a direct conflict of evidence between Mr Karam and Messrs Zamagias as to discussions said to have taken place between them prior to and at the meeting of 14 August 2008 when the resolutions were passed. The questions posed from this conflict are whether there was a meeting a few days before 14 August 2008, between Mr Karam, Mr Kourgialis and Messrs Billy and Dennis Zamagias at which Mr Dennis Zamagias agreed to Mr Karam having a first charge on the property and whether there was any discussion of priorities at the meeting.

47 According to Mr Billy Zamagias there had been very few meetings of the directors or the shareholders of the Company and these related to raising additional funds by way of loan or otherwise. He says that he was present at a meeting with Mr Karam and Louis Kourgialis a few days before 14 August 2008 when he was approached to lend $200,000 to the Company. He recalls that Mr Karam said to him that he would put in as much as was needed at a later stage but could not put in any further money presently because it was tied up in a family trust. His father, Mr Dennis Zamagias, said that he would agree to lend $200,000 to the Company but he wanted a charge over the Company. It is claimed that Mr Karam said words to the effect that if Mr Zamagias wanted a charge, then he wanted a charge for his $111,000 over the Company. It is then said by Mr Billy Zamagias that Mr Dennis Zamagias said: "Carl I will agree to you having a charge provided mine is first. I have already bought into the company and you're asking me to put in more when you're not putting in any more money." Mr Karam is then alleged to have said "Okay". Louis Kourgialis who was also present and who mentioned a "charge" was allegedly unhappy about being denied a charge, but said: "I will draw up some Loan Agreements".

48 The evidence of Mr Dennis Zamagias is in similar terms as that of his son Billy. This conversation is denied in its entirety by Mr Karam.

49 The evidence of Mr Karam is that on 14 August 2008 the Company held a directors' and shareholders' meeting and he agrees that the above Minutes are an accurate record of the resolutions passed. He says there

was no discussion or agreement as to priority prior to or at that meeting about whether the charge to be given by the Company to Ulysius would have priority over the charge given by the Company to him. He also says that there was no discussion at the meeting in relation to priority. His case is that the two charges are contemporaneous and should rank equally. He does not claim that his charge should prevail over that of Ulysius.

50 Ulysius submits that because this arrangement was made before the meeting, it must be taken that the resolutions were passed on the basis that Ulysius would have priority.

51 As at August 2008 it is common ground that the Company was in desperate need of finance and although Mr Karam had substantial claims against the Company for his past investments there was no suggestion that he would provide funds to the Company at that point in time. Accordingly, it is submitted for Ulysius this makes it more likely that Mr Karam would have agreed to postpone his charge. The $200,000 was to come from Mr Zamagias and it is logical he would have wanted security. Ulysius submits that the question of a charge to secure moneys was raised at the preceding meeting because Mr Dennis Zamagias was concerned about some security for his advance of $200,000. This led to Mr Karam asserting that he should get a charge too, but he had not been pressing for a charge before the suggestion of security was raised by Mr Dennis Zamagias.

52 Unfortunately, neither party sought to call evidence from Mr Kourgialis who formulated the resolutions and drafted the agreements.

53 Ulysius relies also on the fact that as a matter of sequence the resolution to create the charged mentioned is dealt with in the first resolution passed and this is some indication it should have priority.

54 I do not attach any particular significance on the sequence in which the resolutions were passed on 14 August. The question is whether there was

any agreement to give priority. This depends on accepting or rejecting the evidence as to what is alleged to have transpired a few days earlier.

55 The evidence of Messrs Zamagias was challenged in cross-examination on the basis that in earlier proceedings affidavits in relation to the winding up had been sworn by Messrs Zamagias recounting the conversation said to have taken place a few days before 14 August but making no reference to the question of priority of claims or any agreement by Mr Karam to give priority. In other respects the two versions of the conversation are identical. Those proceedings were commenced on 19 May 2010. Their earlier affidavits refer to the case of the expression "charge" but there is no reference to priority or ranking in their earlier affidavits: see the affidavit of Billy Zamagias of 3 June 2010, paragraph 14. This earlier account of the conversation stops short of the reference to priority. The extra paragraphs appear in the affidavit of Billy Zamagias of 31 January 2011 but were not in the earlier version. No satisfactory explanation has been given by them as to why the two critical passages as to priority were omitted from the earlier affidavit when it was conceded that the full conversation was important and relevant to the earlier proceedings.

56 There are no contemporaneous records or indeed any record of confirmation or corroboration of the earlier alleged conversation, or of any discussion as to priority between charges. Since priority is asserted by Ulysius it bears the onus of establishing this assertion.

57 Insofar as the actual execution of the charge documents themselves is concerned, there is no evidence as to the order in which they were executed. Indeed I note that the numbers assigned on registration of the charges by ASIC indicate that Mr Karam's charge was notified first but it was not suggested that this affected priority.

58 Another significant matter is that under cross-examination there was uncertainty in the mind of Messrs Zamagias as to whether the discussion turned around the question of "security" or "charge". Mr Dennis Zamagias

agreed that prior to August 2008, he had never entered into a "charge" and he did not really understand about ranking of charges at that time. A further consideration is that the evidence of Mr Billy Zamagias must be treated with caution as well as that of his father. In cross-examination Mr Billy Zamagias was shown to be evasive and lacking in frankness and in the case of Mr Dennis Zamagias his recollection did not appear reliable.

59 On the other hand, Mr Carl Karam was generally a more definite and reliable witness, and although I approach his evidence with some caution having regard to the criticisms made in relation to his discussions with his brother in relation to the offer by TMA to buy the property, I am nevertheless satisfied that I should accept his evidence in preference to that of Messrs Zamagias in relation to whether discussions took place concerning the priority of the charges.

60 Another matter to take into account is that as at 14 August 2008 the parties were on good terms and there was no reason to anticipate that there was any likelihood that there would be a need to rely on the priority of charges as between Mr Karam and Ulysius and both parties had already committed substantial funds to the Company at that time.

61 If priority was considered as being important and a real issue between Mr Karam and Ulysius, one would have expected there would have been some mention in documentary form or corroboration or other record to support this central element in the arrangement. Mr Kourgialis was a solicitor and the parties were careful to spell out in the detailed Minutes and in the loan agreement the arrangement between them. Yet there is no mention, indication or reference of any kind to priority. Mr Kourgialis was not called and there was no evidence of any approach being made to him to give evidence by either party. There is no indication that he was unable to attend if subpoenaed.

62 In these circumstances I am not satisfied that Ulysius has any priority in relation to its charge over Mr Karam. I am satisfied and find that the true position is that these two charges rank equally in the winding up.

MR OLD'S INTEREST: PATENT ATTORNEY LIEN

63 In relation to the claims of Mr Old the patent attorney, the background and circumstances are as follows according to Mr Old.

64 Mr Old was first retained by the Company to carry out work in about October 2008. He was first retained by Foodpack in early 2007 which was the predecessor in business of the Company. His retainer was verbal and "entirely general". He says the retainer was to represent his clients before the Australian Patent Office in order to protect the intellectual property in Australia and to represent them in liaising with foreign patent attorneys to protect their property in foreign countries and to maintain the currency of the intellectual property for each company comprising all patents, trademarks and registered designs.

65 He says that the work which he carried out is detailed in the numerous tax invoices tendered. These invoices were issued from time to time to Foodpack first and later to the Company. The work was carried out under the legislation relating to patents, trademarks and registered designs and included obtaining foreign registration for the property. Oral instructions were normally given by Louis Kourgialis or Mr Karam, as directors of the Company, and written instructions were given in response to written reminders about renewals or other actions, such as requests for examination which had a specific due date.

66 Mr Old says that Foodpack and the Company have not made payments needed by him for maintenance of its registrations and that they did not pay all of his fees. He made a number of payments from his own funds on behalf of each company to preserve the intellectual property of each

company in order to prevent lapse of the registrations and consequent loss of protection.

67 By the time he had expended in excess of $160,000 of his own funds to ensure protection of the patent as he understood it there was a corporate reorganisation involving Foodpack whereby pending applications and granted registrations in the name of Foodpack were assigned to the Company. Mr Old states that because he had expended his own funds to preserve the intellectual property he requested an agreement for payment whereby Mr Karam informed him that he was sincerely trying to meet the demands of Mr Old for payment and he believed he could pay out the total outstanding debt by April 2009 and make the first significant payment by 17 April 2008. There is a handwritten notation on the written proposal from Mr Karam to Mr Old's firm of 8 April 2008 which reads:

> "AGREED SUBJECT TO BOTH FOODPACK P/L & CARL LOUIS P/L AGREEING TO THE MORTGAGE OF IP OWNED BY CARL LOUIS P/L WITH INTEREST AND 0.8% EACH MONTH ON THE BALANCE OUTSTANDING AT THE END OF THE MONTH.
>
> FRASER OLD & SOHN"
> (Signed by Fraser Old.)

68 There are other handwritten annotations on that page, copies of which passed between the parties by fax, which state: "Agreed by Foodpack Pty Ltd" and "Agreed by Louis Pty Ltd". This letter was signed by Mr Karam and Mr Kourgialis. It has never been registered.

69 There is also in evidence an executed loan agreement dated 31 October 2008, between Mr Old and the Company duly signed by all parties. This has not been registered and was entered into after the meeting and registered charge agreements of 14 August 2008. This loan agreement appears to have been drafted by Mr Kourgialis and is substantially in identical terms to the earlier agreements made with Ulysius and Mr Karam of 14 August 2008. It recites that Mr Old has agreed to lend the Company

$160,000 plus interest and that the Company and all its shareholders have agreed to take over all liability in respect of a loan facility set up by Fraser Old & Sohn to advance a loan in the sum of $160,000. A further recital states that the Company and all its shareholders have agreed to provide Fraser Old as lender with limited security to the value of $160,000 plus interest and to use all intellectual property owned by the Company as security for the said loan.

70 On 22 May 2009, the first invoice after the restructure was sent from Fraser Old to the Company and on 3 June 2009 the first claim was made for interest by Fraser Old in an invoice.

71 Although there were some items claimed by Mr Old which could not be the proper subject of a lien by Mr Old, which emerged in cross-examination, I am satisfied that he has carried out substantial work in relation to the property from the date of his first retainer with Foodpack through to the present time. I am also satisfied that he is entitled to a possessory lien in respect of any documents or property held by him in relation to work carried with respect to the property after 31 October 2008 when the Company entered into the loan agreement with him and granted a charge over the property to secure its indebtedness. Mr Old's claim is that from the time of his first work in relation to the intellectual property he had the entitlement to a lien.

72 On the first day of hearing Mr Old filed a further amended first cross-claim extending the claim of a possessory lien as originally claimed to include a claim for a "particular" lien or a "fruits of action" lien. To support this amended claim there was no need for additional evidence to be adduced by Mr Old and I therefore permitted the amendment notwithstanding the objection raised that this matter had not been previously included in the relief sought.

73 Mr Old initially had a possessory lien but as Ulysius points out it is purely a protective personal right which confers only the right to retain property

which would entitle Mr Old to refuse to hand over documents and records subject to the lien. Such a lien gives no entitlement to a proprietary interest or to payment out of property the subject of the lien and in particular it does not operate as an encumbrance or equitable charge. Ulysius says that there has been a waiver of the lien in effect in respect of work before 31 October 2008 by Mr Old entering into an agreement and taking a security inconsistent with the lien by entering into the loan agreement to lend the Company $160,000 which gave a right to interest on the represented outstanding fees of Foodpack at that time. This October agreement gave a charge but notice of it was never given under the Act and as a consequence it was void as against Mr Warner under s 266(1) of the Act. Ulysius submits that the agreement and the provision of security in relation to the moneys outstanding as at 31 October 2008, waived the lien so far as it related to moneys owing up to that point in time. I agree. The loan agreement and the equitable charge provided are inconsistent with the rights under the possessory lien.

74 The relevant principles relating to waiver of a possessory lien are considered at paragraphs [30] to [32] above.

75 The taking of the charge by Mr Old on 31 October 2008 gave a right to interest which would not otherwise have accrued and amounted to a waiver of the possessory lien in respect of claims prior to that date. Entry into the October 2008 loan agreement extinguished the possessory lien to hold documents in respect of work done and moneys expended prior to that date in exchange for a new secured obligation to pay a specific sum at a specified time with a specified rate of interest.

76 Mr Old also argues he is entitled to a charge on the property because he has taken steps to "preserve" the property and that he is therefore entitled to enjoy the "fruits of his efforts" namely the property the subject of his efforts. He contends that this is similar to the right of a solicitor to claim security given to a person such as a solicitor or a liquidator who can resort to a fund to meet the costs of obtaining that fund or asset.

77 The authorities cited by him generally do not support the existence of a particular lien where there is no litigation or settlement and no fund has been produced by the efforts of the patent attorney; cf *Re Patience*, and *Scammell* cited above.

78 There is no authority cited to me which indicates that the registration, maintenance, renewal or procuring of defensive registrations here or overseas by a patent attorney in respect of intellectual property can operate to enliven any additional rights to those which apply in the case of a solicitor's "fruits of action" lien. Here there is no action no fund and no "fruit". The authorities are concerned with production of a fund to which the lien or claim will attach. There is no enforceable specific agreement or arrangement as against Mr Warner or the defendants which would justify the existence of any entitlement by him to be paid in priority for his work and expenditure.

79 Accordingly, I find that Mr Old does not have any charge, equitable lien, or security against the property respect of his fees and disbursements or other expenditure. I find that he has a possessory lien in relation to the costs, fees and disbursements incurred after 31 October 2008, which was the date of his unregistered loan agreement.

THE SALE OF THE PROPERTY

80 Ulysius says that Mr Warner, in exercising the power of sale in respect of the property did not take all reasonable care to sell at not less than the market value and/or did not obtain the best price reasonably obtainable having regard to the circumstances at the time the property was sold in breach of s 420A of the Act.

81 After appointment in August 2010 Mr Warner made enquiries into the affairs of the Company. The cash amount available to him in the Company's bank account was $22,000. He met with Mr Karam and

obtained details of the history of the Company and of the property. Mr Warner was informed by Mr Karam that during 2010 competitors had entered the market for cups and that the liquidation of Foodpack may have had an impact on the brand. He then took legal advice to enable the property to be held on trust. At that point Foodpack had been trading for five years and had suffered financial difficulties to such an extent that it could not pay rent and the landlord had taken possession of the leased premises. Foodpack went into administration in January 2010 and liquidation on 26 February 2010. He was informed that there had been disagreement and lack of co-operation between the members of the board of the Company to the extent that it had become "dysfunctional".

82 Mr Warner ascertained that designs had been registered overseas but the Company had not penetrated any markets, although there had been some revenue generated in New Zealand to the extent of $65,000 over a period of 18 months. However, that arrangement had terminated. The overseas registrations were basically defensive and attempts to effectively market in other countries had not proceeded.

83 On 27 August 2010, four days after appointment, Mr Warner received a copy of a partly executed licence agreement with RL Global and of employment contracts for Mr Zamagias and Mr Kourgialis. Mr Warner conducted enquiries and obtained further information about the Company's affairs and the nature and extent of the property.

84 Mr Warner took steps in late August to make enquiries from Mr Fordyce, the solicitor for TMA and the eventual purchaser of the intellectual property. He was told that in January 2010, TMA furnished a proposal for $3 million for shares in the Company which had been rejected and that this had been repeated in July 2010 but did not proceed due to differences of opinion among directors. He also made further enquiries in relation to the RL Global licence agreement.

85 On 1 September 2010, Mr Warner spoke with Mr Helou, the director of RL Global seeking the licence agreement, but this was not given.

86 On 6 September 2010, Mr Warner received a Report as to Affairs prepared by Mr Louis Kourgialis in which the value of the property was estimated by him to be in the range of $2,000,000 - $5,000,000. He was not called to give evidence.

87 On 7 September 2010, Mr Billy Zamagias sought an extension of time to complete his Report as to Affairs, asking for a further period of three weeks.

88 On 9 September 2010, Mr Warner made further enquiries of Mr Helou, about the licence agreement with RL Global and the $200,000 payment due on 1 July 2010 and was told that the licence fee had not been paid and that at least a further three months was required before it could be paid.

89 Shortly thereafter on 17 September 2010, Mr Warner terminated the RL Global licence agreement.

90 He then began to take steps for the immediate sale of the intellectual property and on 20 September 2010 he prepared an Information Memorandum in connection with the proposed sale attaching a copy of a draft agreement. This provided that the time for submission of offers would close at midday on 11 October 2010, a period of three weeks. It was sent to the directors of RL Global, Ulysius and TMA, who Mr Warner thought were the most likely prospects for purchase.

91 The Information Memorandum was posted on the website of CRS Warner Kugel which is the website of Mr Warner on 20 September 2010 showing photographs of the product.

92 Mr Zamagias received the memorandum of 24 September 2010. He said he read it on that day and was aware of the deadline. He told his father about it on 24 September 2010 but took no action in relation to it until 7 October, four days before the closing date for offers.

93 On 27 September and 2 October 2010, Mr Warner placed advertisements regarding the sale of the Company's intellectual property in the Weekend Australian. On about 7 October 2010, after receiving a letter from Mr Billy Zamagias, enclosing a list of potentially interested parties, Mr Warner immediately sent copies to these parties. This was only four days before the close of the offer period, thereby providing virtually no time to contact these parties.

Value of Property

94 Expert reports have been provided by two experts, Dr Ferrier on behalf of Mr Warner and Mr Samuel on behalf of Ulysius.

95 The valuers have consulted and prepared a joint report setting out the essential issues and differences between them: see Exhibit D1.6. This is dated 29 March 2011.

96 The experts agree that there are three accepted methodologies for valuing intellectual property assets, these are the market approach, the income approach and the cost approach.

97 The primary approach it was agreed is the market approach with the other two approaches being in the nature of a check or as providing support for the figure arrived at using the market approach. The experts describe this approach as the "market comparable approach". As to the income approaches the experts agreed on methodology but differed as to its utility, the discount rate to be applied, and the necessary adjustments required to be made to it. In relation to the cost approach both experts agreed that it was rarely a useful guide as to the value of intellectual property because it reflected historical cost whereas the valuation exercise is designed to

reflect future cash flows. The experts did not agree as to the way in which the approaches should be applied in the present case.

98 In relation to the market approach there are three matters which fall for consideration. The first which Mr Samuel has relied heavily on is the draft offer of a proposed share sale agreement between an unspecified corporation in TMA and the Company in January 2010, which was never accepted, for the sale of the shares in the Company for $3 million. Dr Ferrier does not give any significant weight to this offer.

99 The second agreement is the actual sale agreement concluded by the liquidator of the Company with TMA on 21 October 2010 which has been executed and is presently in force and provides for sale of the property for $300,000.

100 The third arrangement is the Heads of Agreement dated 22 July 2010 wherein Mr Karam agreed to settle proceedings initiated by him as an oppression suit to wind up the Company. The settlement sum specified was for $800,000 and Mr Samuel relies on this as evidence of a market value for the shares greatly in excess of the $300,000 realised by the liquidator on 21 October 2010. Dr Ferrier does not agree that the July Heads of Agreement are of any assistance in ascertaining market value.

101 In reaching his conclusion that the intellectual property was worth in the order of $2.925 million, Mr Samuel bases his calculation primarily on the draft offer made in January 2010.

102 It is well settled that in assessing market value it is appropriate to consider the price that would be paid by a willing and informed but not anxious purchaser to a willing but not anxious vendor: see *Spencer*.

103 In this case the Company declined to proceed with the January draft proposed offer which indicates that the Company was not a willing seller. Mr Samuel did not investigate the circumstances surrounding this offer,

and did not analyse the detailed terms and conditions. He did not discount the offer on the basis that Foodpack and the Company had since gone into liquidation or because over eight months had elapsed since the offer. He was unable to say whether the price mentioned would have varied following due diligence. His position in relation to the offer is that any offer for the property was potentially relevant. In order to determine the relevance and weight to be given to an offer it is clearly appropriate to investigate the offer in detail and the circumstances surrounding it.

104 As counsel for Mr Warner points out, the January offer had a substantial number of significant limitations and qualifications which must impact on the weight to be given to it.

105 The draft dated 19 January 2010 was expressed to be a draft. It did not nominate the purchaser but referred to it being with "a newly incorporated subsidiary of the TMA Group". There is therefore uncertainty as to the identity of the purchaser. The agreement contained a completion date as being no later than 1 October 2010. Although the purchase price was expressed to be $3 million the manner in which that amount was to be paid is significant. Mr Samuel approached it on the basis that it would be a payment in cash. However, the purchaser had discretions and entitlements to decide that the purchase price might be paid by issue of shares by the purchaser on the completion date. There were put and call options, not considered in any detail by Mr Samuel, which included the right of the vendor to convert the shares into cash. The difficulty with these price provisions is that the purchaser may not have had the capacity to meet its obligations when the time arrived for payment. This capacity of the purchaser to pay was not investigated or considered by Mr Samuel. The offer was never accepted and the draft agreement never signed by any party. This is not a case where there was a simple uncomplicated offer to pay cash or give clearly specific valuable consideration in return for purchasing the shares in the Company.

106 In addition, the January offer included restraints on shareholders as part of the total consideration. No value was attached to this in the agreement. The offer could be perceived as not being at arm's length because the managing director of TMA was the brother of Mr Carl Karam. No evidence was referred to of any independent valuations to support that offer price and it is not known what the unnamed prospective purchaser had taken into account in arriving at that figure. In addition, since the date of offer relied on and the valuation date of 30 September 2010, the liquidator had been appointed and Dr Ferrier considers this would have had an adverse effect on any market value or realisable value of the property as at the date of sale by Mr Warner.

107 The position of Mr Samuel in summary is that without any thorough analysis of the January agreement or its detailed terms and conditions he has relied on this as being the best reliable indicator of the value of the intellectual property notwithstanding it was made eight months earlier.

108 It appears that a similar offer was made later in the year in about July 2010, but it was not taken up and there is nothing to indicate that the circumstances had materially changed from the January offer.

109 I prefer the evidence of Dr Ferrier and in light of his consideration of the January offer I consider that little or no weight can be placed on the proposal to make an offer as set out in the draft share sale agreement.

110 The second significant agreement in relation to the market approach is Mr Warner's binding agreement to sell the shares in October 2010 for $300,000.

111 The position taken by Dr Ferrier is that this is the best indicator of the then current market value. Mr Samuel disagrees, and gives weight to the earlier offer by TMA although he did not refer to the 21 October offer or give it any consideration.

112 Mr Samuel was expressly directed not to take into account the sale of 21 October 2010 for $300,000. Accordingly, he did not direct his mind to this. In cross-examination he conceded that it was a relevant matter which he would, absent such limited instructions, have taken into account and investigated.

113 The express elimination from consideration of the liquidator's sale in October 2010 is a powerful factor leading me to reject the evidence of Mr Samuel in relation to the market value and to prefer the evidence of Dr Ferrier. It is obviously relevant and important to investigate and take into account the circumstances of this sale and the price which was realised before any proper opinion can be expressed as to the market value of the shares. I should add that generally I found the evidence of Dr Ferrier to have been more considered and reliable than that of Mr Samuel.

114 In relation to the other matters concerning value I should note that little or no reliance was placed on the cost method by either party and therefore it is not necessary to consider that further.

115 In relation to the income approach, Dr Ferrier considered that the commercial success of the products comprising the intellectual property had not been established any that the exploitation of the intellectual property had failed to establish any sound basis for assuming that it would be profitable. As at 30 September 2010, Dr Ferrier also took account of the adverse effect on marketability of the property as a result of the liquidation of Foodpack and that substantial losses could be anticipated in overcoming this problem.

116 There were two licence agreements referred to. One with RL Global in which the sole director and shareholder was a business partner of the broker of Louis Kourgialis and therefore there is some doubt as to whether a bona fide commercial arrangement had been entered into between that company and RL Global. Mr Samuel did not take this into account. Another licence agreement was referred to in evidence, namely the draft

licence agreement with Milton. However, no revenue had been generated under either of the agreements and Mr Samuel did not appreciate that the time for payment of the licence fee under the RL Global agreement had passed by many months at the time of sale. He did not explore the circumstances relating to that agreement. In his report he relies solely on the minimum quantities in the RL Global agreement having been fulfilled. In fact no moneys were ever paid by RL Global. There was no historical cash flow on which to base any reliable valuation or base any reliable cash flow prediction. Mr Samuel did not properly investigate or give weight to the capacity of RL Global to pay the licence fees. His calculations are hypothetical and based on agreements which have never produced any cash flow of significance. The discount rate adopted by Dr Ferrier was 55 per cent which was more than double that of Mr Samuel which was 24.74 per cent. I prefer the evidence of Dr Ferrier that the discount factor for uncertainty, risk, and uncertainty as to profit should be much greater than that adopted by Mr Samuel. The future profitability of the intellectual property was open to great doubt on the evidence. I do not consider the income method of valuation provides any support for the market value assessed by Mr Samuel.

117 Having regard to the above considerations I am not satisfied that the first defendant has failed to make out its case that the items were sold at a value less than the market value.

Reasonable Care

118 The second basis on which Mr Warner is said to have breached his duty under s 420A is that he did not take all reasonable care in selling the property for the best price reasonably obtainable having regard to the circumstances existing when the property was sold.

119 Ulysius contends that the intellectual property had a market value in the order of $2.95 million and in selling the property for $300,000 to TMA without proper investigation and marketing Mr Warner breached his duty.

120 Ulysius contends there were manifest deficiencies in the way in which Mr Warner undertook the advertising and marketing of the property.

121 The criticisms levelled at the conduct of Mr Warner are essentially as follows:

122 Although he knew very little about selling intellectual property, and this was his first involvement in the liquidation of a company that owned intellectual property he did not seek advice from specialist brokers or others experienced in dealing with marketing intellectual property as to the best way to market the sale of the property. He did not take steps to advertise the property for sale in overseas jurisdictions or investigate the cost. For example, it is said he did not speak to Mr Old, and had he done so he might have obtained valuable information as to how to market the intellectual property.

123 Although he was aware of the offer by TMA to purchase shares for $3 million first made in January 2010 he did not seek a valuer's opinion as to the value of the property. Nor did he speak to other consultants as to the value of the property apart from talking with his partner. He unreasonably relied almost exclusively on discussions with Mr Karam who was the brother of the chief executive officer of TMA, Mr Anthony Karam, and he was aware that the TMA offer was from a party related to Mr Karam. It must have been obvious to him that Mr Karam would not give objective advice and in addition it is noted he did not ask any of the directors to identify potential interested parties who might make a reasonable offer to purchase. Although somewhat belatedly, Mr Billy Zamagias gave him details of potential purchasers, which he sent out at the last moment. This gave them only four days in which to make an offer. This was manifestly insufficient time and Mr Warner should have delayed acceptance and sought other offers. Mr Warner said in evidence that if anyone had contacted him and asked him to extend the time he would have done so, but this is not referred to in the Information Memorandum. His reason for not doing so it is said was not sustainable. There was no urgency in

effecting the immediate sale of the property, nor was there any substance in the assertion that the offer might be withdrawn if there were an extension because TMA had shown itself to be a keen purchaser. Moreover, Mr Warner knew of an earlier offer by TMA yet made no effort to negotiate with TMA to bid up the offer from $300,000 which would have been an appropriate step to take.

124 The evidence is that since his appointment Mr Warner has been active in taking steps to effect a sale. Mr Warner has filed a detailed affidavit which sets out the steps he took to sell the property. He gave evidence that at the time of his appointment he had only $22,000 in the Company's bank account. Thereafter he commenced making enquiries into the affairs of the Company. A few days later he had a meeting with Mr Karam and was informed as to the history of Foodpack and its relationship to the Company and its affairs including the fact that Foodpack went into administration in January 2010 and liquidation on 26 February 2010. He was told that the board of the Company was not functioning properly due to disagreements. He referred also to the fact that brochures were sent overseas and that there was no interest in relation to the cup samples and lids which were the commercially viable embodiments of the intellectual property and he said that the overseas registrations were defensive. He pointed out that there was a claim by Mr Old for over $280,000 for work done on the property. He continued his investigation over the next four or five days and sought reports as to the affairs of the Company. He was told that Mr Karam's estimate of the value of the property was $200,000.

125 Mr Karam informed him that competitors had emerged in the market for coffee cups since January 2010 and that the liquidation of Foodpack may have affected the brand.

126 He asked the solicitor for TMA why the $3 million offer in January 2010 had not been offered again and was told that it was an offer for shares and that there had been disputes as to buy back prices for the shares. He was told that offer had been withdrawn and TMA was only prepared to offer

$300,000 cash. Mr Warner made further enquiries as to the RL Global licensing agreement and sought a copy. Upon initially being refused he made further enquiries and obtained a copy.

127 On 6 September he received a Report as to Affairs prepared by Mr Kourgialis in which the estimated value of the property was said to be in the order of $2 – 5 million. He was informed in early September that RL Global did not have any funds to pay the fees under the agreement and would need further time. On 17 September 2010 Mr Warner terminated the RL Global licence agreement.

128 Mr Warner considered who would be the most likely purchaser of the intellectual property and formed the view it would probably be someone related to the directors and shareholders of the Company with knowledge of its affairs. He also considered that the best course would be to first offer the property to the directors and shareholders to allow them to bid. He prepared an Information Memorandum to which he attached a schedule of the intellectual property. He attached a copy of the asset sale agreement to the Information Memorandum and also wanted to ensure a significant deposit was paid on exchange of agreements.

129 The deadline for submission of offers was 11 October 2010 which provided three weeks for offers and expressions of interest. A copy was sent to directors of the Company and RL Global, Ulysius and TMA. It was also posted on a website and photographs of the property were placed on the website.

130 On 20 September he sent copies of the Information Memorandum to the directors of the Company, namely Mr Karam and Billy Zamagias and Louis Kourgialis and to RL Global, Ulysius and TMA. Mr Billy Zamagias received the Information Memorandum on 24 September 2010 but took no steps to suggest other interested parties until 7 October 2010, four days before the cut off date for offers, thereby depriving the liquidator of sufficient time within which to investigate further possible offers. However, Mr Warner

sent out copies of the Information Memorandum to these additional 20 entities and there was no response.

131 On 27 September and 2 October 2010 Mr Warner placed advertisements regarding the sale of the intellectual property in the Weekend Australian. These advertisements were criticised as being too small and obscure. I have taken this into account.

132 On 11 October 2010, Mr Warner received only one offer which was from TMA to purchase the intellectual property. I accept that he was told by Mr Fordyce, the solicitor for TMA that there was no guarantee the offer would not be withdrawn or a lower offer made. He spoke to his solicitor Mr Breene and attempted to get a higher offer. He was told that Mr Fordyce was not prepared to bid against himself which he took as a refusal to increase the bid. He was concerned because no other offers were received and he reasonably feared that if he attempted to make a counter offer the offer of $300,000 would be either reduced or withdrawn.

133 With the benefit of hindsight and without giving weight to the urgent need to realise the wasting asset there may have been other steps that might have been taken by Mr Warner. But is it is necessary to consider the situation in which Mr Warner was placed in the period after his appointment.

134 Mr Warner's actions must be considered in the context of assets which required substantial ongoing expenses in order to preserve and maintain the property and ensure due registration and extensions were effected and information given to the relevant intellectual property offices in Australia and overseas in order to prevent expiry or loss of protection. He was faced with property which was producing no significant revenue whilst requiring significant ongoing expenditure and this called for a timely disposal.

135 The fact that he did not advertise overseas must be considered in the context of the fact that the only revenue shown to have been produced outside Australia was an amount of $65,000 from New Zealand and nothing appears to have been generated from anywhere else.

136 Consideration of the state of the Company's affairs revealed that there would be insufficient funds resulting from the sale of the property to pay secured creditors because the total amount claimed by the defendants, not including interest, is in the order of $590,000.

137 In these circumstances I am satisfied that Mr Warner made proper enquiries as to the history of and dealings with the property in order to obtain the relevant documents and to acquaint himself with the Company and to promptly market the sale of the property in the period between his appointment on 25 August and mid-October 2010 and I am satisfied that he made a proper and reasonable attempt to negotiate the offer of $300,000 higher.

138 Having regard to the foregoing including [36] – [39] above and particularly taking into account the limited funds available to the liquidator, the unsatisfactory nature of the earlier proposed sale offer as any indicator of value and the fact that the assets were continuing to require expenditure together with the fact that he reasonably perceived there was a real danger of the offer being withdrawn, I am satisfied that Mr Warner took all reasonable care and steps to obtain the best price available in the circumstances and the time pressures on him.

139 Accordingly, for the above reasons I reject the claim that there has been any breach of duty by the liquidator to take reasonable care to obtain the best price reasonably obtainable.

Remuneration

140 Order 5 of the Court Orders of 23 August 2010 appointing Mr Warner as liquidator and receiver provided that he was entitled to remuneration for

work performed at the rates charged in respect of official liquidators. In view of the finding that he has not breached his duty of care under the Act and in the absence of any prior claim I am satisfied that he is entitled to costs on the winding up ranking ahead of the defendants: see *Re Universal Distributing Co Ltd (in liq)* [1933] HCA 2; (1933) 48 CLR 171. This entitlement can be satisfied from the proceeds of the property obtainable as a consequence of the sale.

CONCLUSION

141 I do not propose to make orders at this stage. I direct the parties to bring in short minutes to give effect to my findings and reasons as set out in this judgment and dealing with costs and the cross-claims.

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I Certify that this and the 37
preceding pages are a true copy
of the reasons for judgment herein
of the Honourable Acting Justice
Lamberton
Associate [signature] Date 20-4-11