IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
CORPORATIONS LIST

Not Restricted

S CI 2015 01790

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — Applicant

v

PLANET PLATINUM LIMITED (LIQUIDATOR APPOINTED) — First Respondent

v

GIDEON ISAAC RATHNER — Second Respondent

JUDGE:	EFTHIM AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	23 and 24 November 2015
DATE OF JUDGMENT:	1 April 2016
CASE MAY BE CITED AS:	ASIC v Planet Platinum and anor
MEDIUM NEUTRAL CITATION:	[2016] VSC 120

CORPORATIONS – Voluntary administration – Administrator – Where directors appointed administrator – Whether at time of resolution company insolvent or likely to become so – Whether directors held requisite genuine opinion as to solvency of company – Whether voluntary administrator appointed for improper purpose – Whether curative order should be made – *Corporations Act 2001* (Cth) Pt 5.3A, ss 436A, 447A.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr M Pearce SC and Ms Z Maud	Australian Securities and Investments Commission
For the Second Respondent	Mr S Marks QC and Mr R Harris	Pointon Partners

HIS HONOUR:

1 The Australian Securities and Investments Commission ('ASIC') seeks a declaration pursuant to s 447A of the *Corporations Act 2001* (Cth) ('the Act'), that the appointment of Gideon Isaac Rathner on 4 May 2015 as the administrator of Planet Platinum Limited ('Planet Platinum') was invalid, void and of no effect.

2 In support of its application, ASIC relies on the affidavit of Brendan Francis Caridi (Senior Manager in the Corporations and Corporate Governance Enforcement Team of ASIC) affirmed on 26 May 2015 and two affidavits sworn by John Dennis Trimble (Director of Planet Platinum) on 16 September 2015 and 23 October 2015. ASIC also relies upon the evidence of Mr Rathner given in cross-examination on 1 June 2015 and the report of the Provisional Liquidator, John Ross Lindholm, dated 7 September 2015.

3 Mr Rathner, in his former capacity as voluntary administrator of Planet Platinum, applies pursuant to sections 447C and 447A(1) of the Act to declare his appointment as administrator valid. In support of his application, Mr Rathner relies on an affidavit affirmed by him on 27 May 2015. At the request of Mr Rathner, Mr Trimble was called to be cross examined in relation to his two affidavits.

Background

4 On 21 April 2015, ASIC filed an originating motion seeking to wind up Planet Platinum pursuant to s 461(1)(k) of the Act under the just and equitable ground and to appoint a provisional liquidator.

5 On 26 April 2015, the then accountant for Planet Platinum, Sandy Constantine, sent an email to Mr Trimble advising that ASIC had served the originating application proposing to appoint a provisional liquidator and that the date of the hearing was 29 May 2015. He also stated:

> Put simply, the lack of support by ASIC of Trimble and the support of ASIC of the minority, which is predominantly the domain of the Corporation's [sic] Act has been identified as the key driver for this originating process.
>
> ...

> Given the circumstances, [I] liaised with the Firm that was handling the matter pertaining to the issues of the failed minority shareholding acquisition, namely Thomson Geer and reviewed generally the documents that had been tabled in respect of the Originating Process and confirmed the concern of endeavouring to overturn the provisional Liquidator, especially given the overall riding emphasis by ASIC that Trimble should not be controlling the assets of the Public Company and in all likelihood, the sympathy that would be shown by the Court in respect of the minority interests, that it would in all likelihood fail and be a very expensive exercise.
>
> ...
>
> The alternative to same, which would see a number of the issues dealt with was to consider the appointment of an Administrator.
>
> The Administrator would have the opportunity to deal with the assets of Planet Platinum Limited and also deal with the minority interest under the Corporation's [sic] Act which allows the Administrator to make the offer to the minority shareholders and deal with them and then ask for Court approval to compulsorily acquire the remainder, providing the remainder was the minority of the minority that is, the majority of the 20% agree to be acquired under the normal circumstances that that Administrator would have at his disposal.
>
> ...
>
> It brings us to the situation that once the company was returned to you in 4-8 weeks, the Administrator would be administering the Deed only, and the company would be back in your rightful hands.

6 On 3 May 2015, Mr Trimble met with Joe Katz (solicitor), Wayne Doble (who assists Mr Trimble with various matters), and Ric Tenuta and Peter Plevritis (the deed proponents to a deed of company arrangement).

7 Mr Trimble deposes that at that meeting, Mr Katz said to him words to the effect that he needed to deal with the ASIC proceedings and the issues that he had with his accountant, Mr Constantine, by having Mr Rathner appointed as administrator. He told Mr Katz that he required a meeting and a discussion with ASIC about the concerns they had raised in their affidavit, as there must have been a chain of events leading to ASIC's decision to issue. Mr Katz informed Mr Trimble that it was too late for that to occur and that Planet Platinum needed to quickly appoint Mr Rathner as administrator.

8 Mr Trimble deposes that:

> Subsequent to this discussion, Mr Katz proceeded to telephone Mr Rathner in my presence and in the presence of the other attendees. He put Mr Rathner on speaker phone. Mr Katz said to Mr Rathner words to the effect *'We have a problem. We have ASIC breathing down our necks and the accountant* [Mr Constantine] *is controlling the Defendant's accounts and causing damage, and we don't want either of those things to continue. We want to appoint you as the administrator of the company.'* Mr Rathner asked Mr Katz a few questions and then said words to the effect *'I can accept the appointment on that basis. Come and see me tomorrow at my office.'*

9 On 4 May 2015, Mr Rathner was appointed as administrator of Planet Platinum by resolution at a directors' meeting held at 12.30pm at Mr Rathner's office. Present at the meeting were Mr Trimble, his son Michael Trimble, Mr Plevritis, Mr Tenuta, Mr Doble, Mr Rathner and Mr Matthew Sweeney (a representative from Lowe Lippmann).

10 Mr Trimble deposes that at that meeting they discussed the ASIC proceedings and he once again requested a meeting with ASIC. He deposes that Mr Rathner said words to the effect *'I will have the ASIC proceedings set aside'* and *'You should not have any concerns in relation to ASIC's proceedings. I've done this on multiple occasions, and therefore you don't need to be concerned about this'*.

11 Mr Trimble further deposes that Mr Rathner referred, during those discussions, to the loan facility which Planet Platinum had with the National Australia Bank ('NAB') in the sum of $4.7 million and which needed to be repaid by May 2015. In cross-examination on 1 June 2015, Mr Rathner gave evidence that he asked the directors whether, if there was a default under the NAB facility, it could be paid. He was told that Planet Platinum would not be able to pay the debt if it was called up, as well as the loans from private lenders. Based on the above, Mr Rathner says that he was satisfied that the directors had formed a genuine opinion that Planet Platinum was insolvent.

12 Mr Trimble also deposes that at that meeting, he, Mr Plevritis and Mr Tenuta all said to Mr Rathner that they believed that Planet Platinum should formally defend the allegations made by ASIC, because those allegations were incorrect and needed to be

addressed. He states that Mr Rathner's response was that, *'We don't need to respond to those allegations because they are irrelevant as once the DOCA is accepted, ASIC's proceeding will be dealt with.'*

13 On 12 May 2015, Mr Michael Trimble sent a draft directors statement to Mr Sweeney for comment. Later that day he had a telephone conversation in which Mr Sweeney asked Mr Michael Trimble to make a few changes to the statement. That statement was read at the first creditors meeting. It states:

> Thank you all for coming today. I know a lot of you are unsure as to what is happening or why it is happening so hopefully I can clear it up for you. As creditors of Planet Platinum you all have the right to be involved and have a say as to what happens going forward in the administration process. As you now know, on 4th of May 2015 we appointed Giddeon [sic] Rathner of Lowe Lippmann to take over the operations of the business as an administrator. The reasons we have done this are due to ongoing issues the company has had with the Australian Securities and Investments Commission (ASIC) with the manner in which the company was run as a publicly [sic] listed company. The good news for you as creditors is that the company is still solvent and the administration is only necessary due to compliance issues and not due to the face that we can't pay our bills. Our goal from the administration process is to privatize the company, removing it from the ASX and addressing the issues raised by ASIC. In the meantime, the business of Showgirls Bar 20 will continue to trade as normal.
>
> We will be working closely with Giddeon [sic] and his team over the next few weeks to assist in this process and make it as seamless as possible. It is important that you all understand that the business is not in financial crisis and all outstanding monies will be dealt with in due course. We look forward to continuing the business relationships we have established and bringing the business forward into the next level.
>
> I cannot stress enough however, the importance of the administration staying with Giddeon [sic] and his team, rather than another party. With Giddeon [sic], we have a solid plan in motion to get the company through this and come out on the other side stronger than ever.

14 The statement was made in the presence of Mr Rathner, who chaired the meeting, and he did not contradict it. The minutes of that meeting also recorded that Mr Rathner advised the meeting that his appointment as administrator of the company was due to an application by ASIC to wind up the Company.

15 At that meeting a resolution was put to the creditors that Mr Rathner be removed as administrator and that Glen Crisp and Malcolm Howell be appointed as

administrators. Eleven creditors voted in favour of that resolution and 41 creditors voted against.

16 On 12 June 2015, I appointed a provisional liquidator pursuant to s 472(2) of the Act. That application was opposed by Mr Rathner. The provisional liquidator provided a report to the Court and that report, dated 7 September 2015, concluded that Planet Platinum was not insolvent at the date of the appointment of Mr Rathner.

17 On 1 December 2015, I determined that Planet Platinum should be wound up, even though it was solvent, and I appointed Mr Lindholm as the liquidator of Planet Platinum.

The appointment of the administrator

18 Section 436A of the Act provides:

> (1) A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:
>
> (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and
>
> (b) an administrator of the company should be appointed.
>
> (2) Subsection (1) does not apply to a company if a person holds an appointment as liquidator, or provisional liquidator, of the company.

19 Section 447A of the Act provides:

> (1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.
>
> (2) For example, if the Court is satisfied that the administration of a company should end:
>
> (a) because the company is solvent; or
>
> (b) because provisions of this Part are being abused; or
>
> (c) for some other reason;
>
> the Court may order under subsection (1) that the administration is to end.
>
> (3) An order may be made subject to conditions.

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

(a) the company; or

(b) a creditor of the company; or

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

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

(e) ASIC; or

(f) any other interested person.

20 In *Kazar v Duus*,[1] Merkel J considered the operation of s 436A of the Act. His Honour stated:

> It is a precondition to the valid exercise of the power to appoint an administrator that the Board ... form an opinion as to the insolvency, or likely insolvency, of the corporate entity. It is implicit in the statutory requirement that the opinion be bona fide and genuinely formed.

21 His Honour also referred to the matters that the Court must take into account to determine whether the directors had formed an opinion that the company was solvent or likely to be insolvent. His Honour said:

> The task of the court is to determine, having regard to the actual facts and circumstances, whether on the balance of probabilities the opinion required to be formed by the repository of the power (that is, the governing committee) as a condition of its exercise, has been formed. Although statements as to subjective intention must be relevant the court must approach its task of classification of the conduct in question objectively: see *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464 at 485 ; 12 ACLR 118 per Kirby P.[2]

22 In *Downey v Crawford*,[3] Weinberg J also considered the matters the Court needs to take into account in determining this issue. His Honour said:

> As previously indicated, the question is not whether, as at that date, the company was actually insolvent, or likely to become so at some future time. It is rather whether the directors genuinely believed that this was so, and whether that belief was reasonable in the circumstances. That in turn will depend largely upon whether they took adequate steps to satisfy themselves that the statutory requirements were met before resolving to appoint Mr Downey as administrator.

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1 (1998) 29 ACSR 321, 333 ('*Kazar*').
2 Ibid 334.
3 (2004) 51 ACSR 182, 215.

23 In *Cadwellader v Bajco*,[4] Austin J considered that the actual purpose of the appointment is an important factor to take into account. His Honour said:

> Additionally, the law requires that the purpose of the resolution, as an act of the board, be ascertained, and then characterised as proper or improper. The court's task is to identify the actual purpose of the directors who voted in favour of the resolution, having regard to the character and operation of the resolution in relation to the facts in circumstances surrounding it, and not merely to the motives of individual directors (*Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 82 per Dixon J), although statements about the motives or subjective intentions of individual directors are relevant (*Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464; 12 ACLR 118 at NSWLR 485 per Kirby P; and generally, *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260). Where several purposes are identified, some of which are proper while others are improper, the court must determine whether, but for the improper purpose, the directors would have passed the impugned resolution: see *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; 70 ALR 251 at CLR 293–4 per Mason, Deane and Dawson JJ.

24 I accept Mr Rathner's submission that it is implicit in the statutory requirement that the opinion of the directors be *bona fide* and genuinely formed.

25 ASIC submits that the appointment of Mr Rathner was invalid because:

- The directors did not have a *bona fide* genuine opinion that the company was insolvent or likely to be insolvent; and
- The appointment was for an improper purpose.

The Opinion as to Solvency

26 When the resolution was passed on 4 May 2015 to appoint Mr Rathner as administrator, the directors did not have any management accounts or other financial information concerning Planet Platinum. ASIC submits that the lack of information available to the directors when the resolution was made means that at best, the directors could only have formed a tentative opinion regarding the current or future insolvency of Planet Platinum.

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4 (2001) 189 ALR 370, 418 [224].

27 I note that Mr Trimble deposed that he was concerned that his accountant, Mr Constantine, controlled all of the books and records of Planet Platinum. That is why he agreed to the appointment of Mr Rathner, in order to get to the bottom of what was occurring and had occurred with Mr Constantine. Mr Rathner submits that the explanation of Mr Trimble is a plausible explanation as to why the management accounts were not looked at and it is neither here nor there in terms of the validity of the appointment that he did not have the accounts. The lack of financial accounts is, in my view, a factor to take into account. An analysis of management accounts will lead to an indication of whether a company is solvent.

28 ASIC submits that there was a failure by the directors of Planet Platinum to make any enquiries of the NAB or the private lenders to Planet Platinum in order to determine their position in relation to the loans to Planet Platinum. That further lack of information is said to strongly support a finding that the directors did not genuinely form the requisite opinion as to solvency.

29 I accept that the directors knew of the loan from the NAB of $4.7 million and were aware that the loan expiry date was to take place on 31 May 2015. I also accept that they told Mr Rathner that they could not pay the debt when it fell due at the end of May 2015.

30 Mr Rathner deposed that the directors told him that the facilities with the NAB were extended in January 2015, with a view to the privatisation of the company, which had not occurred. He was also told that the company did not have the funds to repay the NAB. He was aware from the first affidavit of Mr Caridi that Planet Platinum had loan arrangements with three private lenders in the sum of $260,000.00. He discussed those loans with the directors. He did not know what the attitude of those lenders to the winding up application was likely to be. Mr Rathner believed that ASIC's winding up application was likely to be an event of default in relation to such facilities, entitling the second ranked secured creditors to call up their loans and enforce their security forthwith.

31 There is no direct evidence before the Court as to whether any enquiries were made by either the directors or Mr Rathner regarding these loans.

32 In my view, unless the directors knew of the attitude of the NAB or other lenders, it could not form a genuine *bona fide* opinion that the company was insolvent or likely to become insolvent. In relation to the other lenders, the total debts were only approximately $260,000.00 and the assets of Planet Platinum are in the region of $10,000,000.00. It is unlikely that those loans would be critical to the question of solvency.

33 As to the NAB, I note that it was most likely that the NAB would have extended the loan as at 4 May 2015 because it had previously extended the loan over many years. More importantly, Mr Trimble was of the view that the loan would be extended. Mr Trimble, when cross-examined regarding the loan, gave the following evidence:

> I'm asking you whether you knew - - -?---I knew, of course.
> 31 May that that debt would not be able to be repaid from the company's moneys as and when that debt fell due?---If we made the offer to the shareholders by 31 May, then the NAB would carry over.
> I see?---And if we hadn't have it by 31 May, we also paid strict penalties and that was what was transmitted to Constantine.[5]
>
> ...
>
> You knew that ASIC had moved to wind up the company; correct?---Paperwork, yes.
> You knew that there was a substantial debt owed by the company to NAB; correct? --- Substantial. Yes, I suppose - - - $4.7 million. I put the figure to you?--It was the debt, yes.
> And you knew that the NAB was demanding repayment of that loan and had been for some time, didn't you? ---No, that's not correct. That's not totally correct. That had to be - I told you what we had to do. We had to put an offer to the shareholder by 31 May and then the NAB would continue with a facility and some arrangement.[6]
>
> ...
>
> I'm not trying to badger you, Mr Trimble?---Well, you keep saying the same thing. I'm saying that technically it had to be repaid, but I know and I said this a stack of times that if Constantine had done what he was supposed to do and we had all those issues, the valuations, the 13 and 14 figures, the AGM in March and an offer to the shareholders by 31 May, then the NAB would have

5 Transcript 39.
6 Transcript 40.

rolled the facility over. I know they would have.
Mr Trimble, you never told Mr Rathner any of that, did you?---What?
You never told Mr Rathner what you have just - - -? ---Of course
I did, and I said it to Joe Katz on the Sunday afternoon.[7]

34 Merkel J in *Kazar* stated:

> The central problem was that no one was able to form a view as to whether Goolburri was, or was likely to become, unable to pay its debts. In his evidence, Kazar [the administrator] conceded that he understood that the governing committee did not have the information available to make an informed decision as to solvency or otherwise. Kazar's evidence was that, in substance, he advised the meeting that:
>
> Unless they're able to form an opinion that the organisation can pay its debts as and when they fall due, the implication must follow that at some point in the future there's a possibility that it might not.
>
> and that
>
> ... if there was some concern about the organisation [being] able to pay its debts as and when they fall due, then that is a ground upon which they could pass [the] resolution.
>
> I am satisfied that the impression created by Kazar, and intended by Kazar to be created, with members of the committee at the meeting was that if they could not form a view as to solvency of Goolburri it followed that it was or was going to become insolvent.[8]

35 Mr Rathner submits that any suggestion, as at 4 May 2015, that the directors should have formed an opinion that it was unlikely that the NAB would call up the loan, given the previous indulgences afforded to Planet Platinum, is an unrealistic view having regard to the reality that by 4 May 2015, ASIC had applied to wind up the company and to appoint a provisional liquidator. I do not accept that submission, particularly in light of the evidence of Mr Trimble.

36 There is evidence before the Court that:

- the loan had been extended over a number of years:
- Mr Trimble believed that the NAB would do so;
- the NAB had good security;

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7 Transcript 48.
8 (1998) 29 ACSR 321, 332.

- an extension was readily obtained by Mr Rathner and the provisional liquidator; and

- the NAB was paid interest throughout the term of the loan.

37 The real attitude of the directors can be gleaned from the statement made on 13 May 2015 to the shareholders. Mr Michael Trimble made a statement which had been settled by Mr Sweeney of Mr Rathner's office. Mr Trimble stated that:

> The good news for you as creditors is that the company is still solvent and the administration is only necessary due to compliance issues and not due to the fact that the company could not pay its bills.

38 Mr Rathner, as the chairman of that meeting, had ample opportunity to correct that statement and did not do so. I note that Mr Trimble did tell the meeting:

> I cannot stress enough however, the importance of the administration staying with Giddeon [sic] and his team, rather than another party.

39 Mr Rathner says that the statement made to the creditors postdates his appointment by nine days, by which time Mr Rathner, as administrator, had met with the NAB on 5 May 2015 and obtained their support to the administration and agreement to not, at that stage, enforce its securities. He says that he received notices of demand from the second ranking secured creditors on 7 May 2015 demanding repayment of their loans. He negotiated for the payment of the second ranking secured creditors by the deed proponents, with negotiations completed by 13 May 2015. He had also taken over the trading of the business known as Showgirls Bar 20 at 46 King Street, thereby giving comfort to the secured creditors and the creditors of the company more generally.

40 The opinion formed by the directors of Planet Platinum at the time when Mr Rathner was appointed was clearly based on a lack of information. The directors did not form an opinion that Planet Platinum was solvent and the only reason that they were appointing an administrator was to stop ASIC from appointing a provisional liquidator.

41 I also note that the provisional liquidator expressed an opinion in his report that Planet Platinum was solvent at the date of Mr Rathner's appointment. The provisional liquidator concluded that:

> A diligent Board of Directors, in my opinion, would have resulted in Planet Platinum being able to meet its debts as and when they fell due given:
>
> - The current trading performance of Showgirls Bar 20;
> - Rent of a commercial rate being received; and
> - The significant net asset position underpinned by bricks and mortar.

42 Pursuant to s 95A(1) of the Act, a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable. In *Sandell v Porter*,[9] Barwick CJ explained the test of solvency as follows:

> Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to money which he can procure by realisation by sale or by mortgage or pledge of his assets within a relatively short time – relative to the nature and amount of the debts and to the circumstances, including the nature of the business of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates solvency.

43 The provisional liquidator, however, did raise the following matters:

- There were 52 statutory demands, final demands and final notices received in the period between May 2014 to April 2015;
- The majority of the demands were issued from August 2014 onwards;
- The majority of demands took the form of overdue account notices, final notices, notices of intended legal action and letters from debt collection agencies;
- One statutory demand received from the Australian Tax Office was in the

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9 (1966) 115 CLR 666, 670.

amount of $176,740.00; and

- No winding up petitions were issued by creditors during the period analysed.

44 Mr Rathner submits that the Court is entitled to infer that the directors knew of those matters and the Court can also take notice that the directors knew of various matters raised in the first affidavit by Mr Caridi as to the performance, or lack thereof, of the company.

45 The factors outlined above are indicators of insolvency, but the company was asset rich and in my view was solvent when Mr Rathner was appointed. I accept the finding in the provisional liquidators report as correct. My analysis of the report and the accounts leads me to the same conclusion as the provisional liquidator. While I find that the company was solvent, in my view, this is not determinative of the question of the validity of the appointment of Mr Rathner.

46 I also have no evidence before me that Mr Rathner was told that the company was insolvent or likely to become insolvent. The evidence I have before me is that on 3 May 2015, a Sunday evening, Mr Rathner was contacted by Mr Katz a solicitor for the deed proponents Mr Plevritis and Mr Tenuta. Mr Trimble deposes that Mr Katz said to Mr Rathner words to the effect that:

> We have a problem. We have ASIC breathing down our necks and the accountant [Mr Constantine] is controlling the Defendant's accounts and causing damage, and we don't want either of those things to continue. We want to appoint you as the administrator of the company.

47 Mr Trimble further deposes that Mr Rathner asked Mr Katz a few questions, and then said words to the effect that:

> I can accept the appointment on that basis. Come and see me tomorrow at my office.

48 There is no evidence before the Court regarding what questions Mr Rathner asked. I am not prepared to draw any inference that the questions were about solvency. I accept the submission of ASIC that either Mr Rathner or Mr Katz could have been called to give evidence about that. The failure to call either of those two witnesses is

important and does not lend itself to drawing an inference that solvency was discussed.

49 The dominant purpose to appoint Mr Rathner was not because the directors held a *bona fide* view that Planet Platinum was insolvent or likely to become insolvent. It was to stop the application by ASIC and to privatise the company.

Improper Purpose

50 ASIC relies on the following evidence to demonstrate that the appointment of Mr Rathner was for an improper purpose:

- The timing of the appointment, which was made less than two weeks after ASIC issued its application seeking the appointment of a provisional liquidator and the winding up of Planet Platinum on the just and equitable ground;

- The email of Mr Constantine on 26 April 2015, notifying Mr Trimble of the proceedings commenced by ASIC and stating that the appointment of an administrator would avoid the appointment of a provisional liquidator and enable the privatisation of Planet Platinum;

- Mr Katz's statement to Mr Rathner in the presence of Mr Trimble that Mr Rathner would be appointed as administrator so as to bring the winding up proceeding and Mr Constantine's control of the books and accounts to an end; and

- The statement made by Michael Trimble at the first meeting of creditors that the appointment of the administrator was due to compliance issues and that the goal of the administration was to privatise the company.

51 Mr Rathner submits that the directors may have had the duality of purposes behind the decision to appoint Mr Rathner as administrator, however it is clear that a substantial purpose for the appointment was the fact that the company was likely to become insolvent at the end of May 2015. I do not accept that the company was

likely to become insolvent by the end of May 2015. When cross-examined, Mr Trimble gave the following evidence:

> Like, my biggest issue was I wanted to talk to ASIC before we did anything.[10]
>
> ...
>
> In fact, your concern at this stage was to try to avoid the danger of NAB stepping on it, to use your words?---Probably.
> That was a predominant concern you had, wasn't it?---My predominant concern really was I wanted to talk to ASIC.
> Yes. But you needed, didn't you, to ensure that the NAB remained on side or could be got on side, didn't you?---It was probably our advice.
> Your advice to who, please?---Probably the advice we were given.
> To Mr Rathner?---No, Mr Rathner gave to us.[11]

52 Mr Trimble was also concerned about regaining control of the financial records from his accountant, Mr Constantine. He was not concerned about the question of solvency. On the evidence it is clear that the appointment was for an improper purpose.

The relief sought

53 ASIC seeks a declaration that the appointment of Mr Rathner as administrator was invalid, void and of no effect. Mr Rathner submits that even if the directors did not hold the requisite genuine belief, or that Mr Rathner was appointed for an improper purpose, it cannot be said that he knew of either of those two matters and it cannot be said that he ought to have looked beyond the information conveyed to him by the directors.

54 In *Wagner v International Health Promotions*,[12] Santow J held that s 1322 of the *Corporations Act* (a remedial provision) does not apply to cure failure under s 436A(1) of the Act to validly appoint an administrator. A failure under s 436A(1) of the Act, according to his Honour, was not a procedural irregularity but one going to the underlying statutory basis of the appointment of the administrator.[13]

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10 Transcript 47.
11 Transcript 52.
12 (1994) 15 ACSR 419 ('*Wagner*').
13 Ibid 422.

55 However, in *Panasystems Pty Ltd v Voodoo Tech Pty Ltd*,[14] Merkel J took a broad view of s 447A of the Act and stated that a court should not hesitate to exercise the power under s 447A to overcome a failure to comply with a statutory requirement for a valid appointment of an administrator under s 436A(1)(a) of the Act. His Honour treated the issue as one of discretion rather than power.[15]

56 In *Re Keneally (as administrator of Australian Blue Mountain International Cultural & Tourist Group Pty Ltd (admin apptd))*,[16] Black J considered both *Wagner* and *Panasystems* and did not grant relief under s 447A or s 1322 of the Act, as 'the statutory preconditions of the appointment of an administrator under s 436A of the *Corporations Act 2001* (Cth) were not satisfied'.[17] His Honour referred to a submission made before him. He stated:

> Mr Sulan submits that, if the court finds, as I have, that Ms Tang and Mr Chen did not hold the opinion (or a genuine opinion) that the company was insolvent or likely to become insolvent, neither s 447A nor s 1322 of the Corporations Act are engaged. In *Wagner* at 422, Santow J held that s 1322 of the Corporations Act was not sufficiently wide to cure failure with a mandatory requirement for a resolution under s 436A of the Corporations Act, which was not a procedural irregularity for the purposes of that section and went to the underlying statutory basis for the appointment of an administrator. In *Panasystems Pty Ltd v Voodoo Tech Pty Ltd* [2003] FCA 428, dealing with s 447A of the Corporations Act, Merkel J treated the issue as one of discretion rather than of power, noting (at [19]) that the court
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> > [19] ... should hesitate to exercise the power under s 447A to overcome a failure to comply with a statutory requirement for a valid appointment of an administrator.
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> His Honour none the less exercised that power in that case, where the relevant company was in fact insolvent and it was necessary for the directors to take steps to address the position and the failure to pass a resolution complying with s 436A was the result of inadvertence. In this case, it is not necessary to decide whether any limitation on the court's power to validate the appointment is one of power or discretion, where the findings that I have made that the company was not insolvent or likely to become insolvent, and that Ms Tang and Mr Chen had not formed a genuine view to that effect, would deprive the court of power to validate the appointment on the former basis and provide a strong reason not to do so on the latter basis.
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> Mr Sulan also submits that there are additional reasons why the curative provisions under s 447A of the Corporations Act should not be applied. He

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14 [2003] FCA 428 ('*Panasystems*').
15 Ibid [19].
16 (2015) 107 ACSR 172 ('*Re Keneally*').
17 Ibid [116].

> submits that a general curative order to validate an administration under s 447A can only be made where the exercise of power is consistent with the objects of Pt 5.3A: *BE Australia WD Pty Ltd (subject to a deed of company arrangement) v Sutton* (2011) 82 NSWLR 336 ; 285 ALR 532 ; 86 ACSR 507 ; [2011] NSWCA 414 at [194] (*BE Australia*). In oral submissions, Mr Sulan refers to the decision in *BE Australia* at [194] and [207] where Campbell JA (with whom McColl JA agreed) observed that the exercise of a power under s 447A has to be for a purpose consistent with Pt 5.3A of the Act, and submits that the making of such an order would in this case not maximise the chances of the company continuing in existence or create any greater return to creditors from a winding up, or otherwise advance the purposes of Pt 5.3A of the Act. It seems to me that, as Mr Sulan submits, the administration of the company will neither increase the prospects of the business continuing in existence, where it is a special purpose vehicle with one asset being a property, nor will it increase the return to creditors compared to a liquidation, where the company has (or at least had, prior to the administration) sufficient funds held in its bank account to pay its current creditors.[18]

57 In my view, s 447A of the Act permits the Court to cure an invalid appointment, but should only be exercised where the power is consistent with the objectives of Part 5.3A of the Act. I agree with the submission of ASIC that it should only be exercised when the making of the order would maximise the chances of a company continuing in existence or would create a greater return to creditors from a winding up or otherwise advance the purposes of Part 5.3A of the Act.

58 I propose to exercise my discretion to make a declaration in the terms sought by ASIC. In my view, Mr Rathner failed to satisfy himself that the appointment was valid. At the meeting on 4 May 2015, Mr Rathner gave advice that the ASIC proceedings would be set aside and that Mr Trimble should not have any concerns in relation to the ASIC proceedings. He was aware that there was a loan facility in the sum of $4.7 million which needed to be repaid by late May 2015 and knew, according to Mr Trimble, that the NAB had previously indicated the facility could be extended, provided that Planet Platinum continued to take steps to privatise. At that meeting, when Mr Trimble, Mr Plevritis and Mr Tenuta told Mr Rathner that Planet Platinum could formally defend the allegations made by ASIC, Mr Rathner responded that, *'We don't need to respond to those allegations because they are irrelevant as once the DOCA is accepted ASIC's proceedings will be dealt with'*.

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18 Ibid [114]-[115].

59 From the evidence before me, there was not enough information before Mr Rathner to satisfy himself that the company was insolvent or likely to be insolvent. He made no enquiries with the NAB and did not have any accounts before him. I am also concerned about the minutes of the meeting of the creditors on 13 May 2015. I refer to the statement made by Mr Michael Trimble that the company was not insolvent. I have previously expressed my concern that Mr Rathner failed to contradict this statement. He was the chairman of the meeting and when an incorrect statement was made he should have said something. In addition, Mr Sweeney, an associate of Mr Rathner, knew of this statement and allowed it to be put to the creditors.

60 As Mr Rathner did not, in my view, take reasonable steps to confirm the validity of his appointment, I exercise my discretion to make the orders sought by ASIC. Insolvency practitioners must be satisfied of the statutory conditions in s 436A of the Act before accepting appointments. On the information before Mr Rather, he could not be so satisfied.

61 I accept that Mr Rathner is entitled to be paid on a *quantum meruit* for any work which he has done which has benefitted the company. He holds approximately $136,594.00 on behalf of Planet Platinum, of which he claims a lien over those funds. Those funds should be paid to the liquidator who can then deal with the *quantum meruit*.

CERTIFICATE

I certify that this and the 17 preceding pages are a true copy of the reasons for Judgment of Efthim AsJ of the Supreme Court of Victoria delivered on 1 April 2016.

DATED this first day of April 2016.

SUPREME COURT OF VICTORIA
Associate of an Associate Judge

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Associate