

CIRCULAR TO CREDITORS

15 May 2025

Dear Creditors

Abra Mining Pty Ltd (Administrators Appointed)

Please find enclosed an Order of the Supreme Court of Western Australia granting the Administrators relief pursuant to section 447A of the *Corporations Act 2001* (Cth) from personal liability in relation to additional funding advanced to the Company by Taurus Mining Finance Fund No 2. L.P.

A copy of the Court's reasons for decision is also enclosed.

Should you have any questions, please do not hesitate to contact Aaron Swaffield of this office by email to aswaffield@kordamentha.com.

Yours sincerely



Robert Hutson
Administrator

Enc.



IN THE SUPREME COURT OF WESTERN AUSTRALIA

COR/68/2024

EX PARTE:

**Richard Scott TUCKER as joint and several
administrator of ABRA MINING PTY
LIMITED (ADMINISTRATORS
APPOINTED) (ABN 110 233 577) -and-**

First named First Plaintiff

**Robert William HUTSON as joint and several
administrator of ABRA MINING PTY
LIMITED (ADMINISTRATORS
APPOINTED) (ACN 110 233 577) -and-**

Second named First Plaintiff

**ABRA MINING PTY LIMITED
(ADMINISTRATORS APPOINTED) (ACN 110
233 577)**

Second Plaintiff

**ORDERS OF THE HONOURABLE JUSTICE COBBY
MADE ON 14 MAY 2025**

**UPON THE APPLICATION of the plaintiffs by ex parte interlocutory process
dated 4 February 2025 AND UPON HEARING Mr P R Edgar SC for the
plaintiffs IT IS ORDERED THAT:**

1. Pursuant to s 447A of the Corporations Act 2001 (Cth) (Act), Part 5.3A of the Act is to operate as if section 443A(1) of the Act is modified to provide that any debts or liabilities of the first plaintiffs incurred under a funding agreement with Taurus Mining Finance Fund No. 2 L.P. and the second plaintiff dated 11 June 2024 as amended by the Abra Mining Pty Limited (Administrators Appointed) US\$ Syndicated Facility Agreement amendment dated 9 January 2025, under section 443E(5) of the Act, to support the working capital needs and administration costs of the second plaintiff (Amended Loan Agreement) (including but not limited to monies borrowed, interest in respect of monies borrowed and borrowing costs) are in the nature of debts incurred by the first plaintiffs in performance and exercise of their functions and powers as joint and several voluntary administrators of the second plaintiff, such that any liability arising against the first plaintiffs in relation to the Loan Agreement and Amended Loan Agreement is limited solely to the assets of the second plaintiff.
2. Pursuant to section 447A of the Act, that the operation of section 443A(1) of the Act is modified, insofar as it applies to any liability of the first plaintiffs (in their capacities as joint and several administrators of the second plaintiff) pursuant to the Loan Agreement, so that if the indemnity of the first plaintiffs under section 443D of the Act from the second plaintiff is insufficient to meet any amount for which the first plaintiffs might be liable arising out of or in connection with the Amended Loan Agreement, then the first plaintiffs will not be personally liable to repay any such

amount to the extent of the insufficiency.

3. Pursuant to Order 67B, rule 5 of the Rules of the Supreme Court 1971 (WA), until further order, the confidential affidavit of Robert William Hutson sworn 30 January 2025 and the annexures to it (First Confidential Hutson Affidavit), be restricted to all persons except judicial officers and staff of the Court for the purpose of their employment, the plaintiffs and their legal advisers, on the basis it contains information that is confidential, such affidavit to remain confidential for a period of 12 months commencing on the date of termination of the administration of the second plaintiff.
4. Any application for access to the First Confidential Hutson Affidavit pursuant to Order 67B rule 11 RSC:
 - (a) be referred to the Court; and
 - (b) not be determined until notice of the application is given to the deponent, by his solicitor, and the deponent has reasonable opportunity to be heard in opposition to the application for inspection.
5. Liberty is granted to any person, including any creditor of the Second Plaintiff, who can demonstrate a sufficient interest to modify or discharge the orders made pursuant to this application on not less than 48 hours' notice to the Plaintiffs.
6. Within two (2) business day of the making of these orders, the first plaintiffs are to cause notice of these orders, together with a copy of the Court's reasons for decision delivered 14 May 2025, to be given to:
 - (a) the creditors (including persons claiming to be creditors) of the Second Plaintiff by publishing on www.kordamentha.com/creditors and emailing creditors;
 - (b) the Australian Securities and Investments Commission, by sending an email to RL.Legal@asic.gov.au; and
 - (c) Commonwealth Department of Employment and Workplace Relations, by sending an email to feg@dewr.gov.au.
7. Liberty to apply is granted to the first plaintiffs in relation to any further extension of the convening period or any other matter arising in the administration of the second plaintiff.
8. The plaintiffs' costs of this application, save for all costs of and incidental to the preparation of the affidavit of the first named first plaintiff sworn 20 February 2025, the open affidavit of the second named first plaintiff sworn 30 January 2025 and the first plaintiffs' written outline of submissions filed 28 February 2025, be treated as costs in the administration of the second plaintiff, to be paid from the assets of the second plaintiff, .

BY THE COURT

THE HONOURABLE JUSTICE G COBBY

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : RE ABRA MINING PTY LTD; EX PARTE TUCKER
and HUTSON as joint and several administrators of
ABRA MINING PTY LTD [No 3] [2025] WASC 174

CORAM : COBBY J

HEARD : 4 MARCH 2025

DELIVERED : 14 MAY 2025

FILE NO/S : COR 68 of 2024

EX PARTE

RICHARD SCOTT TUCKER as joint and several
administrator of ABRA MINING PTY LTD (ABN 110
233 577)
First named First Plaintiff

ROBERT WILLIAM HUTSON as joint and several
administrator of ABRA MINING PTY LTD
(ADMINISTRATORS APPOINTED) (ACN 110 233
577)
Second named First Plaintiff

ABRA MINING PTY LTD (ADMINISTRATORS
APPOINTED) (ACN 110 233 577)
Second Plaintiff

Catchwords:

Corporations - Administration - Funding agreement already entered by
administrators - Application for order relieving administrators of personal

liability for existing agreement - Whether disentitling conduct - Turns on own facts

Legislation:

Corporations Act 2001 (Cth) s 443A, s 443B, s 443D, s 447A

Result:

Application granted

Category: B

Representation:

Counsel:

First named First Plaintiff	:	Mr P Edgar SC
Second named First Plaintiff	:	Mr P Edgar SC
Second Plaintiff	:	Mr P Edgar SC

Solicitors:

First named First Plaintiff	:	Clayton Utz
Second named First Plaintiff	:	Clayton Utz
Second Plaintiff	:	Clayton Utz

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

Mentha Re Griffin Coal Mining Company Pty Ltd (administrators appointed)
[2010] FCA 1469; (2010) 82 ACSR 142
Secatore, Re Fletcher Jones & Staff Pty Ltd (administrators appointed) [2011]
FCA 493

COBBY J:

1 The first plaintiffs are the joint and several administrators of the
second plaintiff, Abra Mining Pty Ltd (ACN 110 233 577)
(Administrators Appointed).

2 By an ex parte interlocutory process filed 4 February 2025, the
first plaintiffs sought orders for relief pursuant to s 447A of the
Corporations Act 2001 (Cth) from personal liability for debts or
liabilities incurred under a funding agreement with Taurus Mining
Finance Fund No. 2 L.P. and the company dated 11 June 2024 (the
funding agreement), as amended by the Abra Mining Pty Limited
(Administrators Appointed) US\$ Syndicated Facility Agreement
amendment dated 9 January 2025 (the amended funding agreement).

3 On 11 June 2024, the first plaintiffs caused the company to enter
into the funding agreement with Taurus, whereby Taurus agreed to
provide a US \$7.45 million loan facility to the company.

4 On 24 June 2024 Master Russell made an order pursuant to s
447A¹ to the effect that debts and liabilities incurred by the first
plaintiffs under that agreement to support the working capital needs and
administration costs of the company would be in the nature of debts
incurred by the first plaintiffs as joint and several voluntary
administrators of the company, such that any liability arising against the
first plaintiffs would be limited to the assets of the company. The
Master further ordered, in effect, that the operation of s 443A(1) be
modified so that the first plaintiffs would not be personally liable to
repay any amount in the event that the assets of the company were
insufficient to indemnify the first plaintiffs in respect of any liability
they might have under that agreement.

5 On 20 November 2024, the plaintiffs applied by an interlocutory
process for an order extending the convening period for the second
meeting of creditors of the company.

6 That application was made on an urgent basis, and was heard on
26 November 2024.

7 The application was supported by an affidavit of Richard Scott
Tucker sworn 20 November 2024, which attached a cash flow forecast
for the period for which the extension was sought. Mr Tucker deposed

¹ References to statutory provisions are to the provisions of the Act unless otherwise stated.

that the monthly cost of continuing to operate the mine were approximately \$20 million. At [40] of his affidavit, Mr Tucker stated:

To assist in the funding, Mr Hutson and I will likely draw on the USD 7.0 million facility from Taurus to ensure there is sufficient funds to cover all costs. The Administrators have not previously drawn down such account.

8 However, the cash flow forecast showed the company would trade profitably over the period for which the extension was sought, and that the company would not draw on the loan facility provided by Taurus over that period.

9 As at 26 November 2024, the plaintiffs had previously applied for and had been granted, first, an extension of four months to convene the second meeting of the creditors of the company, and then a second extension of another 13 weeks, so that the convening period for the second meeting of creditors of the company would expire on 29 November 2024.

10 I made the order granting the second extension of 13 weeks on 27 August 2024. At that time, I raised with counsel for the first plaintiffs the lack of information provided as to the likely costs to the company of continuing to trade over the period for which the extension was sought.

11 At the hearing on 26 November 2024, the plaintiffs sought orders extending the convening period for the second meeting for a further 13 weeks, extending the period to 28 February 2025.

12 The first plaintiffs were represented by senior counsel. In the course of the hearing I raised with senior counsel both that the cash flow showed the company would trade at a profit of about \$9 million over the period for which the extension was sought, and that, while Mr Tucker's evidence was that the first plaintiffs might need to draw on the standby facility to fund the company's operations over that period, the cash flow showed the facility would remain undrawn over the period.

13 I was told by senior counsel, in effect, that there were some capital works to be carried out at the company's mine, and that there was some question whether there would be 'interruptions with the weather', so that 'it [was] only Mr Tucker's view that there may be an overrun'.

14 The fact that the company would trade profitably over the period
in question was a significant factor in my decision to grant a further
lengthy extension of the convening period.

15 In fact, the first plaintiffs had determined by 25 November 2024
that they would fully draw the US \$7.45 million facility, and did so on
27 November 2024. That information was only disclosed to the court
on 20 February 2025, nearly three months later, in circumstances
addressed further below.

16 On 24 December 2024 the first plaintiffs caused the company to
enter into an agreement with Taurus whereby Taurus agreed to increase
the facility provided by an additional US \$10 million, to a total of
US \$17 million. The security provided for the repayment of the loan
facility, as amended, remained unchanged.

17 The parties entered into the varied funding agreement to record the
terms of that arrangement on 9 January 2025.

18 By their present application, the first plaintiffs seek orders in
relation to the funding agreement as varied by the agreement made
9 January 2025 to similar effect as those previously made by Master
Russell.

19 The application was filed on 4 February 2025 and was initially
listed for hearing on 11 February 2025. As filed, the application was
supported by an affidavit of Robert William Hutson sworn 30 January
2024, together with a confidential affidavit of Mr Hutson sworn the
same date.

20 On 10 February 2025 the solicitors for the first plaintiffs advised
the court that they had instructions to request that the hearing 'be
vacated to provide further material to the court'.

21 On 20 February 2025 the first plaintiffs filed an affidavit of
Mr Tucker, sworn on that date. In that affidavit, Mr Tucker deposed
that 'on around 20 November 2024, [he] was alerted by Mr Swaffield,
and believe, that the Company was experiencing delays in transporting
the concentrate to the Port of Geraldton owing to closure of the ABD
road due to the floodings commencing 19 November 2024'.
Attachment 'RST-59' to Mr Tucker's 20 February 2025 affidavit
comprises a copy of an email from Mr Swaffield to the first plaintiffs,
from which the date it was sent cannot be discerned. In referring to
attachment RST-59, Mr Tucker makes mention of an earlier email from

Ciro Olivares to Mr Swaffield dated 20 November 2024 regarding flooding at Cungina crossing, which Mr Tucker recalls having been forwarded to him on 21 November 2024, but makes no mention of Mr Swaffield's undated email which comprises the bulk of the attachment.²

22 In his email, Mr Swaffield stated, amongst other things:

Richard and Rob

Please find the updated cash flow forecast attached.

The headline is that we will need to draw down the VA facility to cover November month end payments unless we want to seek to defer Byrnecut (and pay them interest under the contract). However, given the road is closed and we are already behind on haulage, I suggest we draw down the full USD 7.0 million as I suspect we will drop \$5.8 million in receipts due to haulage/weather.

Cash flow comments

Abra reported negative EBITDA in October of \$3.2 million. Capex costs are also up with the TSF extension and raise bore works underway.

Cash receipts MTD are behind prior estimates. We should have three invoices issued by now (\$12.6 million) - but the HC-2 was only issued to MRI yesterday, and even that was below what we would hope for due to only barely getting 2,500 WMT within proximity of Port.

Lead prices are off which is hurting revenue. LME pricing is currently USD1,940 /tonne. Forward pricing is also flat at USD1,983 for three month contracts.

Byrnecut's costs for October include a back charge for roof support that was missed in its September claim, a \$732k excl GST impact not previously accounted for. The cheque this month is \$8.7 million ex GST.

Lambton Construction is well ahead of forecast on the TSF works. Its claim was \$400k higher than forecast based on last progress claim estimates provided. We had expected more work occur in December/January, but at this rate, the costs will be largely incurred this year.

² Although Mr Tucker refers to the email as having been dated 20 November 2024, the date of the email does not appear on the attachment (other than it follows an email which was sent at 7.40 am on 20 November 2024) and the cash flow to which it refers appears to have been dated 15 November 2024.

Ciro has also flagged potential delay claims by Raisebore Australia - in the order of \$150k. He will work through this as he thought much of the downtime was caused by Raisebore Australia.

Administration funding facility

The VA facility was initially sized off high-level pre-appointment cash flow forecast which was rolled out to August and included no capex other than Byrnecut mine development.

The VA facility has a utilisation period of six months; which expires on 11 December 2024. Clutz is drafting and amending deed to address this - but I think we need to draw down the facility in full which will negate the requirement to amend the facility.

Regardless whether or not we are to trade-on or place the mine into care and maintenance, we need more funding. We have less cash and less concentrate today than we did at the start of the job - and the mine is now loss making having previously tread water.

Subject to where matters get to tomorrow with Byrnecut, we need to start thinking about pressing Taurus for an appropriate facility to operate through the wet season/ place the mine into C&M and to ensure you are off risk.

- 23 Mr Tucker's evidence in February 2025 was that '[o]n or about 25 November 2024' he and Mr Hutson considered that it was clear that they would need to draw down on the funding agreement. On 25 November 2024, Mr Tucker sent an email to the investment director of Taurus which stated in part:

As foreshadowed, we will need to draw down the administration facility shortly owing to challenging weather conditions which have compounded the operating loss recorded in October and the build of concentrate at site (effectively locking out cash and inventory). The cost of extending the TSF [that is, tailings storage facility] and completing the raised bore work (both essentially to operating beyond December) is also depleting our cash position. Back-charged September roof bolt costs of \$730,000 has also impacted the position compared to prior forecasts.

- 24 In short, the first plaintiffs knew, before the hearing on 26 November 2024, that the company would likely not trade profitably over the period of the extension sought, and that they intended to draw down the whole of the amount available under the funding agreement during that period.

25 None of that information was disclosed to the court. I infer that the
first plaintiffs did not inform senior counsel of those matters prior to the
hearing.

26 Although Mr Tucker acknowledged at [69] of his February 2025
affidavit that he 'ought to have provided the court of those
developments along with an updated cash flow after 16 November
2024', he did not give any explanation for his failure to do so, other
than to refer to it as an 'oversight'.

27 I do not accept that as an explanation, in circumstances where
there were only four clear days between Mr Tucker deposing to the
circumstances in which the plaintiffs sought an extension of time, and
the making of the decision to fully draw the facility. Nor does
Mr Tucker depose that he did not know or had forgotten that the
application for an extension of time was to be heard on 26 November
2024.

28 Mr Tucker argues, at [73] of his February 2025 affidavit, that the
first plaintiffs did not issue the utilisation notices under the funding
agreement until the day after my decision, but that ignores the fact that
the decision had been made to fully draw down the facility the day
before the first plaintiffs' application was heard.

29 The failure to disclose the true position was material, because the
information available to the first plaintiffs showed not only that the first
plaintiffs intended to draw down the whole of the US \$7.45 million
facility (as opposed to it being merely a possibility, as I was informed
by senior counsel) but that the company would not operate at a profit
over the course of the period for which the third extension of the
convening period was sought. Moreover, it occurred in circumstances
where the court had previously indicated that it wished to be informed
of the likely costs to the company of continuing to trade during any
extension of the convening period.

30 Against that background, I return to Mr Hutson's open affidavit of
30 January 2025, in which Mr Hutson deposed that the company's
business was generating sufficient cash flow to cover the expenses of
its business operations '[u]p and until late November 2024', and that
'[o]n or about 27 November 2024' he caused the company to draw down
the facility in two tranches of US \$3.5 million.

31 Mr Hutson went on to say that the amendments to the funding
agreement were negotiated and executed in December 2024 on an

urgent basis in order to address the urgent funding requirements of the company in relation to stabilising operations at the company's Abra mine; continuing to meet the first plaintiffs' obligations, including employee entitlements, creditor demands and operational expenses; providing sufficient time and resources to explore restructuring and/or further recapitalisation options, and to avoid any formal liquidation process of the company.

32 At [9] of his open affidavit, Mr Hutson stated:

In view of the urgency of the funding requirements, the requirement for the administrators to seek s 447A relief from personal liability in relation to the increase of US\$10 million was a condition subsequent rather than a condition precedent.

33 That paragraph was inadmissible because it constituted an opinion as to the legal characterisation of a condition Mr Hutson claimed had been agreed with Taurus, and there was nothing to indicate that Mr Hutson was qualified to provide it. More importantly, the basis on which it was suggested that there had been a 'requirement' or condition of the arrangements between the first plaintiffs and the secured lender that the first plaintiffs obtain an order excusing them from personal liability in relation to the amended loan facility was not identified.

34 The written submissions filed in support of the application on 28 February 2025, which sought to explain the first plaintiffs' failure to inform the court of what had occurred prior to the hearing on 26 November 2024, also asserted that there had been a condition subsequent to the varied funding agreement, referring to [9] of Mr Hutson's open affidavit.

35 Neither Mr Tucker nor Mr Hutson has deposed to any discussion or other communication with a representative of Taurus to the effect that it was a condition (whether precedent or subsequent) of the agreement to vary the funding facility that the first plaintiffs obtain an order restricting their liability under the agreement as varied.

36 As the evidence stands, it is highly unlikely that there was such a communication.

37 A copy of the agreement to vary the existing loan agreement was attached to the confidential affidavit of Mr Hutson, also sworn 30 January 2025 and filed on the same date. Clause 9 and cl 10 of that agreement provide:

The parties acknowledge that the Administrators may, after the Effective Time, apply for any court order (including pursuant to section 447A of the *Corporations Act*), which they consider necessary in respect of the increase to the Commitment (including to ensure that any limitation of liability set out in the Facility Agreement remains effective) effected by clause 8 of this document and that they may disclose this document and any other Finance Document to the court to the extent necessary to do so.

The Administrators undertake to promptly advise the Lender in writing whether or not they will apply for a court order under paragraph 9 and, if such application is made, to provide the relevant court orders to the Lender promptly after such orders are made, and in any event, within two Business Days of the relevant orders being made.

38 Contrary to Mr Hutson's assertion at [9] of his open affidavit, therefore, the agreement did not impose any 'requirement' on the first plaintiffs to seek 's 447A relief from personal liability in relation to the increase of US\$10 million'.

39 There is nothing in the terms of the agreement which would support the assertion made by Mr Hutson. On a fair, and in my view obvious, reading of the agreement, it was left entirely to the first plaintiffs to decide whether they would make such an application.

40 When asked at the hearing of the application on 4 March 2024, senior counsel for the first plaintiffs was unable to explain how Mr Hutson's affidavit came to be drawn in the terms in which it was sworn. Mr Hutson has not provided an explanation, although to be fair the court did not require that he do so.

41 Were it not for the conduct of the first plaintiffs in their dealings with the court, the determination of their application would be straightforward. Regrettably, it has become necessary to consider whether the conduct of the first plaintiffs disentitles them to the relief they seek.

42 Each of the first plaintiffs deposes to being a registered liquidator, and are consequently officers of the court, although they do not act as such in their present capacity as voluntary administrators.

43 The court expects to be able to place confidence in the evidence of insolvency practitioners, such as the first plaintiffs, not least because they, in their capacity as voluntary administrators of various companies, regularly make urgent applications to this court on an ex parte basis,

with no real opportunity being given to any other person to oppose the orders being sought by them.

44 Those applications often involve voluminous materials, to an extent that the court is required to rely on the first plaintiffs and those representing them to draw significant matters to its attention. By way of example, at the hearing on 4 March 2025 Mr Hutson formally sought to refer to six previous open affidavits of Mr Tucker (not including his affidavit of 20 February 2025) and a further three confidential affidavits previously filed in the proceedings, in addition to his own two affidavits of 30 January 2025. Those documents comprised over 1,000 pages.

45 It is also concerning that, notwithstanding that the court continues to raise concerns regarding insolvency practitioners expressing opinions without disclosing the basis for those views, issues similar to that presented by [9] of Mr Hutson's open affidavit continue to arise.

46 The first plaintiffs seek the exercise of the court's discretion in their favour, and for their personal benefit. If an order is not made as they seek, they will be personally liable for the amounts already borrowed by them for the operations of the company. While that risk is largely diminished by the terms of the loan agreement itself, the amounts involved no doubt give rise to justifiable concern on the part of the first plaintiffs.

47 I have given considerable thought to whether the court should refuse the first plaintiffs' application because of the conduct of Messrs Tucker and Hutson, either individually or assessed together.

48 With some hesitation, I have determined that it would be inappropriate to refuse the application on that basis, for two reasons.

49 First, the first plaintiffs eventually sought to disclose the true position prior to the hearing of their application. Although Mr Tucker's 20 February 2025 affidavit was filed belatedly, and in circumstances where the court had already discerned that what it had been told on 26 November 2024 was not consistent with the position disclosed in Mr Hutson's open affidavit sworn 30 January 2025, the first plaintiffs did make attempts, incomplete though they may have been, to disclose the true position, including delaying the hearing of the application in order to put further material before the court.

50 Secondly, it was possible for the court to discern the true position regarding Mr Hutson's unexplained claim that there was a 'condition subsequent' to the agreement to vary the existing funding agreement by reference to the copy of the agreement dated 24 December 2025 attached to his confidential affidavit sworn 30 January 2025, although the submissions filed in support of the application suggest that may have been fortuitous.

51 While the lack of an explanation as to how that claim came to be made on oath is concerning, ultimately the court was not misled by it.

52 I therefore turn to the merits of the application.

53 Ordinarily, an administrator is personally liable for any debts he or she may incur in the performance or exercise, or purported performance or exercise, of their functions and powers as administrators by operation of s 443A.

54 Section 443D provides that an administrator is entitled to be indemnified out of the company's property for the debts for which they are liable under s 443A.

55 Where an administrator enters into a loan agreement with a financier, the loan and the interest payable upon it are not ordinarily a debt falling within the scope of s 443A and the indemnity contained in s 443B, so that, unless the court modifies the operation of pt 5.3A of the Act, administrators will ordinarily be personally liable for the loan and any interest payable upon it obtained by them in the course of the administration.

56 Section 447A empowers the court to make orders limiting the personal liability of the administrator where the court is satisfied that the loan agreement is made for the purpose of allowing the company to trade or to continuing operating for the benefit of the creditors.³

57 In general, the courts have expressed the view that administrators should not be expected to expose themselves to substantial personal liability in the course of an administration. Orders are often made relieving administrators from personal liability in respect of loan borrowings, and those orders permit the administrators to make commercial decisions about the ongoing operations of a company under

³ *Secatore, Re Fletcher Jones & Staff Pty Ltd (administrators appointed)* [2011] FCA 493, 23.

administration by focusing on what is in the best interests of creditors, rather than their potential personal liability.

58 The factors that the court will take into account in determining an application under s 447A to vary the liability of administrators under s 443A were summarised by Gilmour J in *Mentha Re Griffin Coal Mining Company Pty Ltd (administrators appointed)*.⁴

59 In the present case, the key terms of the loan agreement as varied can be summarised as follows:

- (1) the first plaintiffs have entered into a funding agreement in their capacity as joint and several administrators of the company, which is also party to the funding agreement;
- (2) Taurus will make available for drawdown a further US \$10 million to the first plaintiffs, for which interest will be charged in the same manner as funding provided by the lender to the company under the original funding agreement, with no additional security being provided for the loan;
- (3) the varied funding agreement sets out how the loan can be accessed, what the funds may be used for, and provisions for its repayment.

60 The first plaintiffs drew down US\$3.5 million under the varied funding agreement on 30 December 2024 and a further US\$3 million on 22 January 2025, which Mr Hutson deposes was applied to the payment of the company's suppliers and employees.

61 On the evidence as presented on 4 March 2025, leaving to one side what had been adduced prior to that date, I am satisfied that it would be appropriate to make the orders sought for two reasons.

62 First, I accept that the purpose of the funding was to provide capital for the administration and to fund the continued operation of the company. One benefit of that funding is that the company was that the company was able to continue trading, which was to the benefit to its smaller creditors and employees. I also accept that the company would have been unable to continue trading without the further funding provided by Taurus.

⁴ *Mentha Re Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 1469; (2010) 82 ACSR 142, 30.

COBBY J

63 Secondly, I accept that the company continuing to operate the mine has the potential benefit of enabling an agreement for the sale of the company's assets or the submission of a deed of company arrangement by a party, most likely Taurus, to occur, although the prospects of that occurring appear to be diminishing the longer the company trades.

64 I am therefore satisfied that it is appropriate to grant the application and will accordingly make orders in terms of the interlocutory process, save as to the costs of the application. The creditors of the company should not bear the costs associated with the preparation of Mr Tucker's affidavit sworn 20 February 2025, Mr Hutson's open affidavit sworn 30 January 2025 and the outline of submissions filed 28 February 2025 in support of the application. Those costs should not be paid out of the assets of the company, and I will make orders to that effect.

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

LT

Associate to the Hon Justice Cobby

14 MAY 2025