Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Ransley and Commissioner of Taxation (Taxation) [2018] AATA 4359 (21 November 2018)

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2015/5453 & 2015/5454**

Re: **Nera Ransley**

APPLICANT

And **Commissioner of Taxation**

RESPONDENT

DECISION

Tribunal: **Justice Jagot, Deputy President**

Date: **21 November 2018**

Place: **Sydney**

The parties confer and file agreed or competing proposed orders for the disposition of the proceedings within 14 days.

.....[SGD].....

Justice Jagot, Deputy President

Catchwords

TAXATION – tax treatment of net profits realised from sale and exchange of shares – whether net profits assessable as ordinary income or on capital account – appeal to Court and application for review to Tribunal – concurrent hearing – applicant involved in business operation or commercial transaction – shares held and sold on revenue account – profits assessable as ordinary income – application for review and appeal to be dismissed

TAXATION – administrative penalties – recklessness – whether taxpayer's position reasonably arguable – safe harbour exemption inapplicable – penalty upheld

LEGISLATION

Income Tax Assessment Act 1936 (Cth) s 264
Income Tax Assessment Act 1997 (Cth) ss 6-5
Independent Commission Against Corruption Act 1988 (NSW), s 73
Taxation Administration Act 1953 (Cth) ss 14ZZ, 14ZZO, 14ZZK, 284-15, 284-75, 284-90, 284-225, 298-20

CASES

August v Commissioner of Taxation [2013] FCAFC 85; (2013) 94 ATR 376
Bartlett Estates Pty Ltd v Federal Commissioner of Taxation [1979] FCA 27; (1979) 9 ATR 853
Cameron Brae Pty Ltd v Commissioner of Taxation [2006] FCA 918; (2006) 63 ATR 488
Commissioner of Taxation (Cth) v Myer Emporium Limited [1987] HCA 18; (1987) 163 CLR 199
Edwards (Inspector of Taxes) v Bairstow [1955] WLR 410; [1956] AC 14

Federal Commissioner of Taxation v Cooling [1990] FCA 297; (1990) 22 FCR 42
Federal Commissioner of Taxation v Whitfords Beach Pty Ltd [1982] HCA 8; (1982) 150 CLR 355
Greig v Commissioner of Taxation [2018] FCA 1084
Hart v Commissioner of Taxation [2003] FCAFC 105; (2003) 131 FCR 203
Kratzmann v Federal Commissioner of Taxation (Cth) (1970) 44 ALJR 293
McCormack v Federal Commissioner of Taxation [1979] HCA 18; (1979) 143 CLR 284
McCurry v Federal Commissioner of Taxation [1998] FCA 512; (1998) 39 ATR 121
Ransley v Commissioner of Taxation [2016] FCA 778
Resource Capital Fund IV LP v Commissioner of Taxation [2018] FCA 41; (2018) 355 ALR 273
Steinberg v Federal Commissioner of Taxation [1975] HCA 63; (1975) 134 CLR 640
The Chairmen1 Pty Ltd and Guildford Coal Limited [2010] ATP 10
Visy Industries USA Pty Ltd v Commissioner of Taxation [2011] FCA 1065; (2011) 284 ALR 455
Visy Packaging Holdings Pty Ltd v Commissioner of Taxation [2012] FCA 1195; (2012) 91 ATR 810
Walstern Pty Ltd v Commissioner of Taxation [2003] FCA 1428; (2003) 138 FCR 1
Watson v Foxman (1995) 49 NSWLR 315
Westfield Ltd v Commissioner of Taxation [1991] FCA 97; (1991) 28 FCR 333

REASONS FOR DECISION

Justice Jagot, Deputy President

21 November 2018

1. THE MATTERS

1. Nera Ransley appealed to the Court against the **Commissioner** of Taxation's objection decision of 19 March 2015 and applied to the Administrative Appeals **Tribunal** for a review of the Commissioner's objection decision of 12 August 2015.

2. On 5 July 2016, I made orders consequential upon reasons for judgment which stayed the proceedings pending the conclusion of committal proceedings against Craig Ransley, Ms Ransley's former husband: *Ransley v Commissioner of Taxation* [2016] FCA 778. Mr Ransley was found not guilty of the relevant criminal charges laid against him in November 2017 and March 2018 respectively. In March 2018, I ordered the proceedings concerning Ms Ransley and the Commissioner to be heard concurrently before me exercising the jurisdiction of the Court and the Tribunal.

3. These matters concern the tax treatment of the net profits Ms Ransley made on the sale and exchange of shares in Doyles Creek Mining Pty Ltd (**DCM**) for shares in NuCoal Resources NL (**NuCoal**) and the subsequent sale of shares in NuCoal in the 2010 and 2011 tax years.

4. Ms Ransley declared the net profits she made from these transactions as capital gains and claimed the scrip for scrip rollover relief on the exchange of shares. The Commissioner assessed tax on the basis that the net profits should be treated as ordinary income, as provided for in s 6-5 of the *Income Tax Assessment Act 1997* (Cth), and imposed administrative penalties for the tax shortfall for the 2010 tax year. Ms Ransley objected to amended and revised assessments for both tax years, and the associated administrative penalty for the 2010 tax year. Those objections were disallowed to the extent that they concerned the tax treatment of the net profits and the administrative penalty.

5. A person dissatisfied with a reviewable objection decision may either appeal to the Court against the decision or apply to the Tribunal for review of the decision: s 14ZZ(1) of the *Taxation Administration Act 1953* (Cth) (the **TAA**).

6. These reasons relate to both the appeal to the Court and the application for review to the Tribunal.

7. By ss 14ZZO(b)(i) and 14ZZK(b)(i) of the TAA Ms Ransley had the burden in each matter of proving that the assessments are excessive. She sought to discharge that burden on the basis that as the net profits from exchanging and selling the shares were capital gains and not ordinary income, the assessments are necessarily excessive. She also contended that if the net profits were ordinary income then, in any event, her position was

reasonably arguable and she took reasonable care in relation to her tax affairs so that no administrative penalty should have been imposed.

8. At the start of the hearing, and with the consent of the parties, I ordered that evidence in one proceeding be evidence in the other proceeding.

9. I have decided that Ms Ransley has failed to discharge her burden of proof and that both the appeal and the application for review must be dismissed.

2. APPLICABLE PRINCIPLES

10. The primary facts were not in dispute. They are set out in a statement of agreed facts which is in Schedule 1. Terms defined in that statement are also used in these reasons.

11. The relevant principles also were not in dispute, subject only to a matter of emphasis concerning the extent to which Ms Ransley's intention at the time she acquired the shares encompassed the means by which she ultimately made the profit. This dispute concerned the degree of precision with which the relevant intention at the time of acquisition of the assets and the means by which the profit was made should be identified. Ms Ransley's approach focused on the need for her intention at the time of acquisition to include the specific means by which the profit was made. The Commissioner submitted that it was neither necessary nor appropriate to identify either the intention or the means by which the profit was made with the degree of precision which was proposed on behalf of Ms Ransley.

12. It is convenient now to set out the relevant authorities that the parties have relied upon for their competing contentions.

13. In *Federal Commissioner of Taxation v* ***Whitfords Beach*** *Pty Ltd* [1982] HCA 8; (1982) 150 CLR 355 at 360-361 Gibbs CJ explained:

> *A profit made on the sale of an asset may be treated as assessable income within the Income Tax Assessment Act 1936 (Cth), as amended, ("the Act") for one of a number of reasons. In the first place, if the profit should be regarded as income in accordance with the ordinary usages and concepts of mankind, it will be assessable income within s. 25(1) of the Act. When the owner of an investment chooses to realize it, and obtains a greater price for it than he paid to acquire it, the enhanced price will not be income within ordinary usages and concepts, unless, to use the words of the Lord Justice Clerk in Californian Copper Syndicate v. Harris*

(1904) 5 Tax Cas 159, at p 166 , that have so frequently been quoted, "what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business". The Lord Justice Clerk went on to say (1904) 5 Tax Cas, at p 166:

> *"What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being - Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?"*

In Jones v. Leeming (1930) AC 415 it was held by the House of Lords that, assuming that there was no adventure or concern in the nature of trade within s. 237 of the Income Tax Act 1918 (U.K.), the profit made on an isolated transaction of purchase and resale did not become income merely because the property was bought with the intention of reselling it at a profit. This decision did not involve any new question of law, as Viscount Dunedin pointed out (1930) AC, at p 421. It depended on the finding of fact that there was no adventure or concern in the nature of trade. Prima facie, an accretion to the capital value of a security between the date of purchase and that of realization is a capital gain (Colonial Mutual Life Assurance Society Ltd. v. Federal Commissioner of Taxation (1946) 73 CLR 604, at p 614), and the ground of the decision in Jones v. Leeming [(1930) AC 415] was simply that "the profit on an isolated sale which is not a trading transaction" is a capital accretion and therefore not income: see per Lord Macmillan (1930) AC, at p 430. The case did not decide that the fact that the purchase and resale was an isolated transaction necessarily meant that it was not a trading adventure - many cases, before and since, including Californian Copper Syndicate v. Harris (1904) 5 Tax Cas 159 and Edwards (Inspector of Taxes) v. Bairstow (1956) AC 14 , are opposed to that proposition; what was held was that if, as a matter of fact, the transaction was not a trading transaction, the profit did not become income merely because the asset had been bought with the intention of making a profit on its resale. Jones v. Leeming was decided under English legislation the scheme of which is different from that provided by the Act. However, the conclusion that a profit made on the realization of a capital asset does not become income by reason only of the fact that the asset was acquired for the purpose of profit-making by sale accords with ordinary concepts. Such a profit is ordinarily regarded as a capital gain, even though the asset was bought for the purpose of making the gain.

14. *Edwards (Inspector of Taxes) v Bairstow* [1955] WLR 410; [1956] AC 14 concerned the purchase and sale of a spinning mill. At 29-30 Viscount Simonds explained why it was clear that the case involved an asset acquired and sold as part of a business. The nature of the asset lent itself to commercial transactions. Unlike stocks and shares, a complete spinning mill “produces no income” and “is a commercial asset and nothing else”. At 36-37 Lord Radcliffe also considered that the only reasonable answer was that the profit on sale was the result of “an adventure in the nature of trade”. The purchasers bought the mill, had no intention of using it, derived no income or enjoyment from it, planned to sell it at the time of purchase, sold it and made a profit. His Lordship said at 37 that this

inescapably was “a commercial deal in second-hand plant”, with as much organisation involved “as the transaction required”.

15. In *Commissioner of Taxation (Cth) v **Myer** Emporium Limited* [1987] HCA 18; (1987) 163 CLR 199 at 209-210 the High Court said:

> *Although it is well settled that a profit or gain made in the ordinary course of carrying on a business constitutes income, it does not follow that a profit or gain made in a transaction entered into otherwise than in the ordinary course of carrying on the taxpayer's business is not income. Because a business is carried on with a view to profit, a gain made in the ordinary course of carrying on the business is invested with the profit-making purpose, thereby stamping the profit with the character of income. But a gain made otherwise than in the ordinary course of carrying on the business which nevertheless arises from a transaction entered into by the taxpayer with the intention or purpose of making a profit or gain may well constitute income. Whether it does depends very much on the circumstances of the case. Generally speaking, however, it may be said that if the circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the taxpayer's business. Nor does the fact that a profit or gain is made as the result of an isolated venture or a "one-off" transaction preclude it from being properly characterized as income (Federal Commissioner of Taxation v. Whitfords Beach Pty. Ltd. (1982) 150 CLR 355, at pp 366-367, 376). The authorities establish that a profit or gain so made will constitute income if the property generating the profit or gain was acquired in a business operation or commercial transaction for the purpose of profit-making by the means giving rise to the profit.*

16. Their Honours continued at 212–213:

> *The judgments in some of the English decisions naturally reflect the language of the United Kingdom statutory provisions, which have no precise counterpart in this country. However, over the years this Court, as well as the Privy Council, has accepted that profits derived in a business operation or commercial transaction carrying out any profit-making scheme are income, whereas the proceeds of a mere realization or change of investment or from an enhancement of capital are not income…*
>
> *The proposition that a mere realization or change of investment is not income requires some elaboration. First, the emphasis is on the adjective "mere" (Whitfords Beach, at p.383). Secondly, profits made on a realization or change of investments may constitute income if the investments were initially acquired as part of a business with the intention or purpose that they be realized subsequently in order to capture the profit arising from their expected increase in value - see the discussion by Gibbs J. in London Australia, at pp.116-118 [London Australia Investment Co. Ltd. v. Federal Commissioner of Taxation (1977) 138 CLR 106]. It is one thing if the decision to sell an asset is taken after its acquisition, there having been no intention or purpose at the time of acquisition of acquiring for the purpose of profit-making by sale. Then, if the asset be not a revenue asset on*

other grounds, the profit made is capital because it proceeds from a mere realization. But it is quite another thing if the decision to sell is taken by way of implementation of an intention or purpose, existing at the time of acquisition, of profit-making by sale, at least in the context of carrying on a business or carrying out a business operation or commercial transaction.

17. In *McCormack v Federal Commissioner of Taxation* [1979] HCA 18; (1979) 143 CLR 284 at 301–302 Gibbs J said:

> *In a case arising under s. 26 (a) the taxpayer is usually the person best able to give evidence as to the purpose for which the property in question was bought. Although evidence given by a taxpayer as to the purpose with which he acquired property must, for obvious reasons, "be tested most closely, and received with the greatest caution" (Pascoe v. Federal Commissioner of Taxation (1956) 30 ALJ, at p 403; 6 AITR, at p 320 citing Cox v. Smail (1912) VLR 274, at p 283), I completely agree with Barwick C.J. in Gauci v. Federal Commissioner of Taxation (1975) 135 CLR, at p 86 , that it would be wrong for a judge to regard the evidence of a taxpayer as prima facie unacceptable. The taxpayer's evidence must of course be considered on its merits, in the light of the circumstances of the case, without any prepossession, favourable or unfavourable. …*
>
> *Of course the fact that the taxpayer did not give evidence, if unexplained, could be taken into account in deciding what inferences should be drawn from the evidence (Jones v. Dunkel (1959) 101 CLR 298, at pp 308, 312, 320-322). And the fact that the taxpayer was disbelieved could, in appropriate circumstances, itself give rise to an inference adverse to the taxpayer's case (Steinberg v. Federal Commissioner of Taxation (1975) 134 CLR 640, at p 694).*

18. *Federal Commissioner of Taxation v Cooling* [1990] FCA 297; (1990) 22 FCR 42 concerned the tax treatment of an incentive payment received by a firm of solicitors to induce the firm into renting a new premises. Hill J (with whom Lockhart and Gummow JJ agreed) at [25] – [30] said:

> *It was Lord Greene M.R., who, in Inland Revenue Commissioners v. British Salmson Aero Engines, Ltd (1938) 2 KB 482 at 498 said of the distinction between income and capital that:*
>
> > *"There have been many cases which fall on the borderline. Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons."*
>
> *That view is unduly pessimistic especially in the light of the many guiding principles which the authorities have laid down as relevant to the distinction. Nevertheless it emphasises, as all who have essayed the task in cases near to the borderline will concede, that the task of drawing the distinction is often difficult.*
>
> *The cases make it quite clear that whether an amount is income in ordinary concepts depends upon its quality in the hands of the recipient…*
>
> *The test to be applied will be objective rather than subjective…*
>
> *Where a taxpayer carries on a business, the proceeds of that business will be income in his hands and thus assessable… It will often be necessary to make a*

"wide survey" and "an exact scrutiny of" a taxpayer's activities: Western Gold Mines NL v. Commissioner of Taxation (WA) (1938) 59 CLR 729 at 740, cited with approval by Gibbs J. in London Australia Investment Co Ltd v. Federal Commissioner of Taxation (1976-7) 138 CLR 106 at 116 to determine whether a particular profit derives from the business operation or is part of the business operations of a taxpayer.

As the London Australia case illustrates, where the profit arises from the disposal of property the question whether the profit is on revenue account will be answered by applying the tests stated by the Lord Justice-Clerk in Californian Copper Syndicate (Limited and Redmead) v. Harris (1904) 5 Tax Cas 159 at 165-6. The principle was stated as follows in Colonial Mutual Life Assurance Society Ltd v. Federal Commissioner of Taxation (1946) 73 CLR 604 at 614:

> *"Prima facie the depreciation in or accretion to the capital value of a security between the date of purchase and that of realization is a loss of or accretion to capital and is therefore a capital loss or gain and does not form part of the assessable income. . . But in the words of the Lord Justice Clerk in Californian Copper Syndicate v. Harris (supra) which have been so often quoted, 'it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.'"*

19. At [54] – [55] Hill J said:

> *A scheme may be a profit making scheme notwithstanding that neither the sole nor the dominant purpose of entering into it was the making of the profit. …*
>
> *In Moana Sand Pty Ltd v. Federal Commissioner of Taxation (1988) 88 ATC 4897, the profit made by a taxpayer on the sale of land acquired with the twofold purpose of working and/or selling surplus sand on it and thereafter holding the land until some time in the future when it became appropriate to sell it at a profit, was held to be income in ordinary concepts. This was so despite a finding that the dominant purpose of the company in acquiring the land was not resale of the land at a profit. The Court (Sheppard, Wilcox and Lee JJ.) applied Myer's case in so holding.*

20. At [56] his Honour concluded that the obtaining of commercial profit was a "not insignificant purpose" of the transaction, with the consequence that the incentive payment was ordinary income.

21. In *Westfield Ltd v Commissioner of Taxation* [1991] FCA 97; (1991) 28 FCR 333 Hill J (with whom Lockhart and Gummow JJ agreed) at 342, after referring to *Myer* at 209, said:

> *The judgment, not only in this passage, but in several later passages (at 211-213), emphasises that where a transaction occurs outside the scope of ordinary business activities, it will be necessary to find, not merely that the transaction is "commercial" but also that there was, at the time it was entered into, the intention or purpose of making a relevant profit.*

What was said in Myer has been applied in a number of cases in this court since. Among them are Moana Sand Pty Limited v Federal Commissioner of Taxation (1988) 88 ATC 4897, and Federal Commissioner of Taxation v Cooling (1990) 22 FCR 42. It does not, however, follow from the judgment in Myer, or for that matter, from the judgments in any later cases, that every profit made by a taxpayer in the course of his business activity will be of an income nature. To so express the proposition is to express it too widely, and to eliminate the distinction between an income and a capital profit. A taxpayer carrying on a business might sell its headquarters in order to move to larger premises and make a profit over historical cost. The transaction of sale may be one which arises in the ordinary course of the taxpayer's business, but that profit will not ordinarily be income, particularly where, at the time of acquisition of the site, there was no intention or purpose of profit-making by sale when the premises became too small. The profit in Cooling, the receipt of a leasing incentive payment, was one intended to be made at the time the transaction with the lessor was entered into, just as the profit in Myer was one which underlay the whole transaction.

When in Myer the High Court spoke of profits made in the ordinary course of business, their Honours were not speaking in a temporal sense. Rather, as the judgment of the full court of this court in Federal Commissioner of Taxation v Spedley Securities Limited (1988) 88 ATC 4126 at 4130 points out, it is necessary that the purpose of profit-making must exist in relation to the particular operation.

22. At 343 Hill J explained:

In London Australia [London Australia Investment Company Limited v The Commissioner of Taxation [1977] HCA 50; (1976-7) 138 CLR 106], Gibbs J held that the sale of shares by the taxpayer in that case was a normal operation in the course of the business operations, it was a part of the very business itself. That holding depended upon a finding of fact by the judge below, that it was an integral part of the taxpayer's business to deal in shares, in the sense that switching of investments was necessary, or at least desirable, if the policy of growth potential adopted by the taxpayer was to be adhered to. Jacobs J, on the other hand, spoke (at 128) of the necessity that profit-making by sale (the manner of realisation there involved) needed to be a purpose, albeit not a dominant one, where the acquisition and disposal of property is part of a business of so doing. The facts of that case indicated the necessary purpose, intention or expectation.

23. His Honour continued at 343-345, in the context of explaining why the appeal should be allowed in that case:

Once it is clear that the activity of buying and selling, which generated the profit, was not an activity in the ordinary course of business, or, for that matter, an ordinary incident of some other business activity, the profit in question will only form part of the assessable income of the appellant, by virtue of its being income in accordance with the ordinary concepts of mankind, if the appellant had a purpose of profit-making at the time of acquisition. What is meant by "profit-making" in this context?

Sheppard J [the primary judge] was of the opinion that there was, in the relevant sense, an overall scheme of "profit-making". The scheme of profit-making was said to be a scheme to achieve participation in the development of a shopping centre.

However, in my opinion, that is not enough in the circumstances of this case. First, the obtaining of the contract to construct and manage the centre is not, of itself, relevantly a scheme of profit-making, it is scheme for deriving assessable income, which income is derived from the performance of the work under the building and management contracts. Second, where a transaction falls outside the ordinary scope of the business, so as not to be a part of that business, there must exist, in my opinion, a purpose of profit-making by the very means by which the profit was in fact made. So much is implicit in the decision of the High Court in Myer. There may be a case, the present is not one, where the evidence establishes that the taxpayer has the purpose or intention of making a profit by turning an asset to account, although the means to be adopted to generate that profit have not been determined: cf Steinberg v Federal Commissioner of Taxation (1972-75) 134 CLR 640. Steinberg was a case decided under the second limb of the then s.26(a) of the Act. The taxpayer had, having obtained an option to purchase some land (The Rockingham land), caused a company to be incorporated, the shareholders of which included his family and himself, intending to turn the land to account in the most advantageous way, in particular, either by selling the shares in the company, or liquidating the companies, distributing the assets in specie, and then selling those assets. It was the latter course that was taken. The court by majority held, affirming Mason J at first instance, that it was not necessary to fall within the second limb, that every step which culminates in the making of a profit should be planned or foreseen. In the words of Mason J (at 670):

> *"In a business transaction of this kind where property is acquired with the intention that a profit should be made out of its anticipated appreciation in value by whichever means prove most suitable, it matters not that the particular means by which the profit is to be made are left for subsequent decision."*

To the same effect, is the judgment of Gibbs J (at 699-700) and of Stephen J (at 704-705).

While a profit-making scheme may lack specificity of detail, the mode of achieving that profit must be one contemplated by the taxpayer as at least one of the alternatives by which the profit could be realised. Such was the case in Steinberg. But, even if that go too far, it is difficult to conceive of a case where a taxpayer would be said to have made a profit from the carrying on, or carrying out, of a profit-making scheme, where, in the case of a scheme involving the acquisition and resale of land, there was, at the time of acquisition, no purpose of resale of land, but only the possibility (present, one may observe in the case of every acquisition of land) that the land may be resold. The same may be said to be the case where s.25(1) of the Act is involved. As the court observed in Myer, in the passage already set out, the property, which generates the gain, must be acquired in an operation of business or commercial transaction:

> *"... for the purpose of profit-making by the means giving rise to the profit" (emphasis added).*

24. In *McCurry v Federal Commissioner of Taxation* [1998] FCA 512; (1998) 39 ATR 121 Davies J at 123 referred to Barwick CJ's statement in *Steinberg v Federal Commissioner of Taxation* [1975] HCA 63; (1975) 134 CLR 640 at 686 that the "retention of property in

the hope or expectation that its value will increase is a justifiable form of investment". At 124 his Honour said:

> *In a case such as the present where the taxpayers were not carrying on a business, the profit to be assessable must have been derived from a transaction that can be described as a commercial dealing. A profit making undertaking or scheme is such a dealing. In Steinberg at 699, Gibbs J expressed his view as to the nature of a relevant scheme or undertaking:*
>
> > *A profit-making scheme within s 26(a) is a plan, design or programme of action devised and put into effect for the purpose of making a profit. It must be a scheme carried out by the taxpayer himself or on his behalf. It appears that it should - at least where the transaction is one of acquisition and resale - exhibit features which give it the character of a business deal. The mere realization of a capital asset, albeit in an enterprising way, would not amount to the carrying out of a profit-making scheme.*

25. At 127 Davies J also said:

> *In a case such as this, where the Court must examine the purpose of a transaction, the Court is entitled to have regard not only to the evidence which the taxpayers give of what they had in mind but also to the surrounding facts and to the events which actually occurred. Those events, by hindsight, can throw light upon the considerations which the taxpayer had at the time when the dealing was initiated. That which a person does is a guide to that which he had in mind to do.*

26. In *Visy Packaging Holdings Pty Ltd v Commissioner of Taxation* [2012] FCA 1195; (2012) 91 ATR 810 Middleton J at [232] referred to the statement of Gordon J in *Visy Industries USA Pty Ltd v Commissioner of Taxation* [2011] FCA 1065; (2011) 284 ALR 455 at [78] that:

> *It is well established that a gain from a transaction will be assessable as ordinary income under s 6–5 of the 1997 Act if it was realised in an isolated business operation or commercial transaction in circumstances in which the taxpayer, at the time it engaged in the transaction, had the intention or purpose of making the gain*

27. Justice Middleton continued:

> *[234] I am again mindful of the danger in making references to schemes and plans, but do so only to put the transactions that occurred on 31 January 2001 in context. By way of analogy only, and for the purpose of context, the following judicial observations are relevant. There is no requirement for the scheme to have been delineated in all of its eventual detail for it to be able to be concluded that such a scheme exists. A sufficient scheme will be present even if only a general, plan or expectation or intention has been formed. As Gibbs J (as he then was) said in Steinberg (1975) 134 CLR 640 at 699-700:*
>
> > *I am in agreement with the view expressed by Mason J. that "it is not an essential element of a profit-making scheme in s. 26(a) that every step which culminates in the making of a profit should be planned or foreseen*

> *before the scheme is put into operation". Schemes may be precise or vague; every detail may be arranged in advance, or the working out of the plan may be left for decision in the light of circumstances as they arise. It is no objection to a plan that it allows room for manoeuvre. When property is bought with the purpose of making a profit in the easiest or most advantageous way that may present itself, and the taxpayer adopts "one of the many alternatives" that his plan leaves open, thereby returning himself a profit, he will rightly be said to be carrying out a profit-making scheme: cf. Premier Automatic Ticket Issuers Ltd. v. Federal Commissioner of Taxation (1933) 50 C.L.R. 268, at p. 300; Buckland v. Commissioner of Taxation (1960) 34 A.L.J.R., at p. 62; [1960] A.L.R., at p.p. 602-603; 12 A.T.D., at p. 169."*
>
> …
>
> *[244] …a profit-making scheme can have flexibility and options by which a profit is captured.*

28. At issue in *August v Commissioner of Taxation* [2013] FCAFC 85; (2013) 94 ATR 376 was whether the development, tenanting and subsequent sale of property was part of a profit-making scheme. There the Full Court referred to *Kratzmann v Federal Commissioner of Taxation* (Cth) (1970) 44 ALJR 293 saying:

> *[151] In Kratzmann a taxpayer purchased land to carry out a profit-making scheme involving the borrowing of money to erect a building and the realisation of units in the building to cover the repayment of the loans and the cost of the project, leaving him with a substantial asset which would constitute a surplus. For financial reasons, he gave up the idea of so developing the land, and sold it at a profit. Menzies J held that the profit on the sale was not assessable income because the sale did not arise from the carrying on or carrying out of the profit-making scheme. Menzies J said (at 294):*
>
> > *For the Commissioner it was argued that, because the purchase was part of a profit-making scheme, any profit arising from the purchase was a profit from the carrying on or carrying out of that scheme. It seems to me, however, that the profit here arose not from the purchase but from the sale and because the sale was not part of the profit-making scheme the profit did not arise "from the carrying on or carrying out" of that scheme. Indeed, the profit in question did not arise until the scheme had been abandoned.*
> >
> > *Accordingly, I am of the opinion, that the taxpayer is entitled to have the assessment, including this profit as part of his assessable income, amended to exclude it.*
>
> *Kratzmann's case is quite different from the present case. In Kratzmann's case the sale was not part of the profit-making scheme. In the case of the Hume property, a sale was part of the profit-making scheme and we do not think the fact that it took place without the property being leased or being subdivided takes it outside the profit-making scheme. In this case, the scheme had not been abandoned in the relevant sense.*

29. In *Resource Capital Fund IV LP v Commissioner of Taxation* [2018] FCA 41; (2018) 355 ALR 273 Pagone J summarised the principles in these terms at [50]:

> *Ordinary income for the purposes of s 6-5(3) is defined by s 6-5(1) to include "income according to ordinary concepts". Jordan CJ said in Scott v Commissioner of Taxation (1935) 35 SR (NSW) 215 at 219 that the word "income" was not a term of art and that what receipts ought to be treated as income was to "be determined in accordance with the ordinary concepts and usages of mankind". It has long been held that income may be derived from an isolated transaction where it arises from a business operation or commercial transaction entered into with the intention or purpose of making a profit or gain from the transaction: see Californian Copper Syndicate Ltd v Harris (Surveyors of Taxes) (1904) 5 TC 159; Federal Commissioner of Taxation v Myer Emporium Ltd (1987) 163 CLR 199, 211; Commissioner of Taxation v Montgomery (1999) 198 CLR 639, [104]-[106]. A receipt from an isolated transaction may be stamped with the character of income where the profit purpose or profit making intention can be seen from the receipts arising in the ordinary course of the business, or where the receipt is an incident of the business: see London Australia Investment Co Ltd v Federal Commissioner of Taxation (1977) 138 CLR 106, 117-8, 128, 130. A receipt may not have the character of income where it was derived outside of the ordinary scope of the business and the taxpayer did not have the purpose of making profit by the very means by which the profit was in fact made (see Westfield Ltd v Federal Commissioner of Taxation (1991) 28 FCR 333, 344) but the receipt will bear the stamp of income where the taxpayer, as here, did have the purpose of making profit from the ultimate disposal of investments. It is true, as was submitted for the applicants, that the details of the disposal were not contemplated at the time of the investments, but profit by "the very means by which the profit was in fact made" (see Westfield Ltd v Federal Commissioner of Taxation (1991) 28 FCR 333 at 344) was part of the purpose of profit making undertaken by the partners in the partnership: see also Steinberg v Federal Commissioner of Taxation (1975) 134 CLR 640, 669-670, 715-716; and Visy Packaging Holdings Pty Ltd v Federal Commissioner of Taxation (2012) 91 ATR 810, [234]-[235].*

30. In *Greig v Commissioner of Taxation* [2018] FCA 1084 Thawley J reviewed many of the principal decisions concerning the distinction between profits or losses made on revenue or capital account at [105]-[135]. At [109], referring to *Myer* at 211, his Honour said:

> *Where the owner of an investment, such as a share, chooses to realise it and thereby obtains a greater price for it than the original acquisition price, the enhanced price is not income unless "what is done is not merely a realisation or change of investment but an act done in what is truly the carrying on or carrying out of a business": Colonial Mutual Life Assurance Society Ltd v Federal Commissioner of Taxation (1946) 73 CLR 604 at 607, per Starke J. Starke J stated: "The test to be applied is whether the amount in dispute is a gain made in an operation of business in carrying out a scheme of profit making", citing – amongst other cases – Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes) (1904) 5 TC 159.*

31. After referring to *Myer* at 213 (quoted above), Thawley J said at [115]:

It is relevant to note three of the matters referred to as to when profit on a realisation or change of investment would be income: first, the High Court spoke of a realisation or change of investments "initially acquired as part of a business"; secondly, those investments were so acquired "with the intention or purpose that they be realised subsequently in order to capture the profit arising from their expected increase in value"; and thirdly, the intention or purpose had to exist at the time of acquisition.

32. Thawley J concluded his review of the principles with these observations:

[130] I proceed on the following basis. Where assets are acquired with a sufficient profit-making purpose, in a "business operation or commercial transaction", then absent other reasons supporting a contrary conclusion, the profit on disposal is ordinary income (and any loss incurred will generally be on revenue account) irrespective of whether the acquisition occurred in the course of an existing business. However, the circumstance that the taxpayer is engaged in business at the time of the relevant transaction or acquisition is relevant…

[131] Gordon J stated in Visy Industries USA Pty Ltd v Federal commissioner of Taxation (2011) 85 ATR 232 at [80] and [81]:

> *[80] The concept of a "commercial transaction" stands in contradistinction to a private, recreational or other non-business activity…*
>
> *[81] So, for example, where a transaction occurs in the ordinary course of, or is an incident of, carrying on a business, it will generally be stamped with the character of a commercial transaction… Consistent with those principles, a one-off transaction entered into by a taxpayer may still be a commercial transaction or an adventure in the nature of trade. …*

[132] The fact that a taxpayer is not carrying on business when an asset is acquired is likewise a relevant circumstance in determining whether the acquisition of the asset is stamped as being on revenue account. The acquisition of an asset by a person carrying on business might be seen differently to the acquisition of the same asset by a person not carrying on business. It depends on the circumstances.

[133] An asset will generally not be a revenue asset if a taxpayer acquires the asset pursuant to a private, recreational or non-business activity: Visy Industries at [80]; Haass [Federal Commissioner of Taxation v Haass [1999] FCA 1088; (1999) 91 FCR 132] at [16]-[18]. The purchase of an investment by a private investor, without more, does not have the quality of a "business operation or commercial transaction" and may be better described as an activity of a private, recreational or other non-business nature: Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 150 CLR 355 at 378-9; London Australia Investment Company Limited v Federal Commissioner of Taxation (1977) 138 CLR 106 at 129.

[134] Mason J in Whitfords Beach at 378-9 stated:

> *Unfortunately there is an element of ambiguity in the expressions "business deal" and "operation of business" as there is in the adjectives "business", "commercial" and "trading" which have about them a chameleon-like hue, readily adapting themselves to their surroundings, different though they may be. In some contexts "business deal" and "operation of business" may signify a transaction entered into by a person in the course of carrying on a*

> *business; in other contexts they denote a transaction which is business or commercial in character.*
>
> *[135] In McCurry v Federal Commissioner of Taxation (1998) 39 ATR 121 at 124, Davies J referred to Myer and Whitfords Beach and stated:*
>
> > *In a case such as the present where the taxpayers were not carrying on a business, the profit to be assessable must have been derived from a transaction that can be described as a commercial dealing.*
>
> *[136] It is important to emphasise that the relevant acquisition must be made "in an operation of business or commercial transaction" …*
>
> *[137] In my view, the Nexus shares were not acquired as part of a "business operation or commercial transaction" such that, on acquisition, they were stamped as being acquired on revenue account. I accept that the Nexus shares were acquired as a whole with the desire that the shares would go up in value and would be sold for a profit. Purchasers of listed shares often make the decision to acquire shares with a view to profiting from dividends or an increase in the share price or both. That hope or expectation does not necessarily make the purchase of the shares a "business operation or commercial transaction". The purchase in such circumstances is an example of an ordinary investment engaged in by innumerable private investors each day and, without more, does not lend itself easily to the description of a "business operation or commercial transaction" (Myer) or a "commercial dealing" (McCurry).*

33. Mrs Ransley's submissions also referred to *Bartlett Estates Pty Ltd v Federal Commissioner of Taxation* [1979] FCA 27; (1979) 9 ATR 853, in which Toohey J (with whom Bowen CJ and Brennan J agreed), in an analogous context to the present case, said at 859-860:

> *It may be that the taxpayer had in mind that the ten acres would appreciate in value over a period of years; it would be surprising if it did not. But that is not enough to bring the taxpayer within the first limb of s. 26(a): "The question in the application of s. 26(a) is not whether the taxpayer, when purchasing, hoped that at some time in the future he could sell the land at an enhanced value. The question is whether he was then intending to sell it at a profit, doing so as a matter of 'business'. The purchase of land as a long term investment, or as a hedge against the depreciating value of money does not, in my opinion, come under s. 26(a)" (Gauci's case per Barwick C.J. (1975) 135 CLR, at p 87 [Gauci v Federal Commissioner of Taxation [1975] HCA 54; (1975) 135 CLR 81]). I do not say that this was a case of acquisition as a hedge against depreciation. But, in my view, it was not a case in which the taxpayer acquired land intending to sell it at a profit, as a matter of business. This land was acquired in 1959 and no profits were derived from the sale of any part of it until 1967, and only then because of the action of creditors in forcing a sale. Over that intervening period of nearly ten years the warehouses had been let, income derived and the land used in a manner entirely consistent with the taxpayer's avowed purpose of acquisition for income and for storage.*
>
> *…*

In McClelland v. Federal Commissioner of Taxation (1970) 120 CLR 487 the Privy Council saw s. 25(1) as introducing no new element leading to a different conclusion from that reached in regard to s. 26(a): "The whole of the facts have still to be considered; the same criteria have to be applied; the question to be asked and answered is still whether the facts reveal a mere realization of capital, albeit in an enterprising way, or whether they justify a finding that the appellant went beyond this and engaged in a trade of dealing in land albeit on one occasion only" (1970) 120 CLR, at p 496.

3. THE COMPETING CASE THEORIES

3.1 Ms Ransley's case

34. For Ms Ransley it was submitted that there is no evidence that she, either alone or in conjunction with her then husband, Craig Ransley, had any intention of selling her shares in DCM or NuCoal at a profit by the means that actually gave rise to the profit at the time she acquired the shares. To the contrary, the evidence from Ms Ransley and Mr Ransley is clear. At the time the shares in DCM and NuCoal were acquired they were intended to be held as an investment with no thought given to selling them or the means by which they might be sold. There was no dealing of the required kind, of a business or commercial nature, when the shares were acquired. At best, there might have been a mere possibility or hope of sale at profit in the future but this is insufficient to involve a profit-making scheme of the kind required for the profit to be treated as income rather than a capital gain. Ms Ransley first contemplated selling shares only when circumstances had changed when another company in which she and her then husband were involved, **ResCo** Services Pty Ltd, was in financial difficulty and her mother-in-law died causing her husband substantial distress. The profit made was itself fortuitous in that the exploration licence granted to DCM permitted mining to a lower depth than had been sought, increasing the potential yield of the proposed coal mine.

35. Further, there is no evidence that Ms Ransley was carrying on any kind of business in acquiring the shares. Ms Ransley had never carried on a business involving the acquisition and sale of shares. The only shares she sold were those in DCM and NuCoal. Her shares in ResCo were transferred to a family trust and she otherwise continues to hold shares in other companies of which her husband was a director. Nor is there evidence that she was involved in Mr Ransley carrying on any relevant business. At all times Mr Ransley's role was confined to that of a director of ResCo, DCM and NuCoal. He has no history of establishing companies and selling his interest in them. The only two

previous occasions on which he has done so involved unexpected circumstances, the first involving a business dispute and the second involving an unexpected takeover offer in which he did not wish to sell but was outvoted by the major shareholder.

3.2 The Commissioner's case

36. For the Commissioner it was submitted that the facts squarely demonstrate that at the time of each relevant acquisition of shares Ms Ransley, with her then husband, had the intention of making a profit and was engaged in conduct properly characterised as a business operation or commercial transaction. The Commissioner submitted that neither Ms Ransley's nor Mr Ransley's evidence of their intentions at the time they acquired the shares would be believed. Further, the evidence of Mr Ransley's fellow director of ResCo, Andrew Poole, was immaterial because his evidence was that he never had any discussion with Ms Ransley or Mr Ransley about their intentions in relation to the shares. The objective contemporaneous evidence should be preferred to the evidence of Ms Ransley and Mr Ransley. From that evidence it is apparent that Ms Ransley, with her then husband, was engaged in a business operation intended to make a profit which involved the acquisition of shares in a start-up coal mining company established for the purpose of obtaining a directly conferred exploration licence on the basis that the proposed coal mine would function as a "training mine", following which Ms Ransley would turn her shares into profit resulting from the increased value of the shares resulting from the exploration licence, the means of achieving that profit being sale or otherwise as might appear most advantageous at the time. As such, the profits made should be treated as ordinary income.

4. THE CREDIT ISSUES

37. The submissions for Ms Ransley relied on her evidence, the evidence of Mr Ransley and Mr Poole, and documents, both contemporaneous and otherwise, including transcripts of records of interview with each of Ms Ransley and Mr Ransley conducted in 2013.

38. I have concluded that the evidence of Ms Ransley and Mr Ransley about their intentions at the time they acquired and disposed of the shares in question cannot be accepted.

39. On 13 December 2013 they were each interviewed under (then) s 264 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**). Section 264 provided that:

> *1 The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connexion with any department of a Government or by any public authority:*
>
> *(a) to furnish the Commissioner with such information as the Commissioner may require; and*
>
> *(b) to attend and give evidence before the Commissioner or before any officer authorized by the Commissioner in that behalf concerning the person's or any other person's income or assessment, and may require the person to produce all books, documents and other papers whatever in the person's custody or under the person's control relating thereto.*
>
> *2 The Commissioner may require the information or evidence to be given on oath or affirmation and either verbally or in writing, and for that purpose the Commissioner or the officers so authorized by the Commissioner may administer an oath or affirmation.*
>
> *…*

40. While I am focusing on their credit in this section, it is convenient also to record their evidence relevant to the substantive issues in the proceedings.

4.1 Ms Ransley's s 264 interview

41. Ms Ransley had four of her legal and financial advisers present throughout the interview. She gave evidence on affirmation. She was informed at the start of the interview that it was an offence to make a false or misleading statement to a taxation officer. She was told she could seek advice from her advisers but was required to answer the questions, although she could claim legal professional privilege but not the privilege against self-incrimination. Ms Ransley said she understood these matters. In this regard it is relevant to note that Ms Ransley was admitted as a legal practitioner in Tasmania in 1997. She was employed as a solicitor at the Australian Securities and Investments Commission (**ASIC**) between August 1997 and January 1999. Between mid-1999 and 2005 she was employed as an in-house counsel at financial planning firm in Tasmania. In her interview in December 2013 she described herself as a "qualified lawyer", although said she had not been employed since about 2009. I infer that Ms Ransley fully understood her obligation to be truthful during her interview.

42. Ms Ransley was frequently non-responsive and evasive before giving an answer in the s 264 interview as in the following exchange:

> *Scruby* *Well -well, let me ask you, on page 492, is that your signature or your husband's signature, or someone else's?*

Ransley	*It's not my signature.*
Scruby	*Do you believe it's your husband's signature?*
Ransley	*You would have to ask my husband.*
Scruby	*I'm asking you what you believe.*
Ransley	*I can't really make out the signature.*
Scruby	*You - have you seen your husband's signature before?*
Ransley	*Yes.*
Scruby	*And are you saying that this doesn't - you're not sure if this looks like your husband's signature, as you recall it? ·*
Ransley	*It appears to be his signature.*

43. The same pattern of evasion and eventual answer is apparent when she was asked whether she had any real doubt that her husband had drawn a cheque for $350,000 to purchase 350,000 shares in ResCo. She eventually agreed she did not have any such doubt.

44. She gave evidence that she had discussions with her husband about acquiring the shares in ResCo but did not recall the discussions. When pressed she said she could not recall anything said in those discussions. She repeatedly maintained this whenever asked a question to the same effect.

45. When asked why she acquired the ResCo shares she said "I acquired the shares because I wanted to acquire the shares". When pressed as to why, she said "because it was a good business venture". When asked why this was so, she said that it was a "unique concept that I wanted to be a part of". When asked what was unique about it, she said the company was going to provide a "complete mining-services package to coal producers within the Hunter Valley".

46. She said she could not recall discussing with her husband her acquisition of shares in DCM and acquired those shares "because [she] participated in the capital raises". She did so because she "believed in the training mine" which she saw as a "unique opportunity" which had never been done in Australia and she "wanted to be involved in it". She repeated that she believed in the project because of its "uniqueness".

47. When asked if she saw the prospect of some financial gain in acquiring the DCM shares Ms Ransley said "[c]an I just ask what you mean by financial gain"? When pressed, she

said she was not thinking of "shares or value" but was thinking of the project, she liked "unique projects". She said "I invest in ventures that are unique". This exchange then ensued:

Scruby	*You invest to make money, don't you?*
Ransley	*I invest because I like the investment.*
Scruby	*Are you saying that when you invest, the prospect of making a profit is not something that is of any importance to you? You're not saying that, are you?*
Ransley	*I invest because I want to establish a portfolio.*
Scruby	*And in the case of this investment, you thought that it would generate profit for you, didn't you?*
Ransley	*I had no thought.*
Scruby	*You're saying you never turned your mind to it.*
Ransley	*I was involved because I liked the concept. It was unique. It had never been done before in Australia. I wanted to support the concept, so I did.*
…	
Scruby	*When you describe it as investment, aren't you saying that you thought that the shares that you bought would go up in value?*
Ransley	*No.*
Scruby	*You're saying you gave no thought at all to that, at the time you acquired those shares?*
Ransley	*I was not concerned with the value of shares. I was concerned with the project.*
Scruby	*I don't want to misunderstand you, but are you saying, out of some form of community spirit or altruism, you were concerned with it?*
Ransley	*No.*
Scruby	*You were concerned with it because you wanted to make money for you - - -*
Ransley	*No.*
Scruby	*- - - and for your husband, correct?*
Ransley	*No.*

48. I find this evidence evasive and unbelievable.

49. She did not recall the content of any discussions with her husband about acquiring further shares in DCM in March 2008. Again, she said she wanted to be a shareholder at this time because of "its uniqueness" and had no view about how long she wanted to hold shares in DCM. When pressed, however, she said that she was "interested in, for the

long term", "[f]or whatever period", "however long it took to establish" the training mine but could not recall giving any consideration to what steps had to be taken for this to occur. She also said she did not take into consideration how much she had to pay for the shares. Similarly, she did not recall anything about acquiring shares in DCM in October 2009, saying only that she recalled that she "participated in all capital raising for Doyles Creek".

50. In relation to the sale of some of her shares in DCM to **Taurus** Funds Management Pty Ltd in October 2009, she recalled discussing the sale with her husband but not the substance of the discussions. She says she had no view at the time about how much she should be paid for her shares, could not recall discussing price with her husband or taking any other step to ascertain what would be a fair price.

51. In relation to the sale of some of her shares in DCM to Gordon Galt (a director of Taurus) in December 2009, she said that, as with Taurus, he was "like-minded and it was felt that it was in the interest of the company to have him on board as a shareholder" and this view would have been based on discussions including with her husband. Again, she could not recall considering the price at which these shares should be sold or the number of shares that she should sell to Mr Galt. Otherwise she did not recall discussing this sale with her husband.

52. She recalled that she obtained NuCoal shares in early 2010 in exchange for her shares in DCM. She thought this was a "good move" but could not recall why, other than that she agreed it made the training mine more likely. When asked about the sale of her shares in NuCoal, she said she did not recall deciding to do so or any discussions with her husband about doing so. When asked what she intended to do with the money received for one tranche of the sales, $565,000, she said the purpose could have been so she could make another investment. She said she had not decided in March 2010 to exit her investment but "circumstances change. There was a GFC [global financial crisis]. My husband's mother died. I was looking at my portfolio, re-evaluating" and to the best of her recollection that was why she sold the shares. She recalled selling her shares at different times but not the dealings by which this was done or why the shares were sold in stages or what instructions she had given about the sales to the brokers or whether she had any discussions with her husband about these sales. She said she did not know if her husband was communicating with the brokers.

4.2 Ms Ransley's affidavit

53. In her affidavit in these proceedings Ms Ransley, however, recollected that her husband had said to her in 2007 that with the funds from his sale of his shares in **TESA** Group Pty Ltd (a labour hire business established by Mr Ransley) he wanted to set up a training mine and that this would involve acquiring mine sites which she thought was a unique opportunity and encouraged. She then arranged for the incorporation of **ROSA** Holdings Pty Ltd and ResCo with Mr Poole as the original sole shareholder and director of both companies as her husband was still employed by TESA. She said that she and her husband agreed that she should become the shareholder in ROSA and may have received advice from the accountant to this effect, and that her husband would be working in the business and a director. She said that when she became the owner of the shares in ROSA and in a unit purchased in her name from the TESA funds "they were our investments for our future together" and she did not consider how or when they might be sold. She said as far as she was concerned when she was issued shares in DCM in May 2007 it was as a part of the restructure of ROSA and a consequence of her shareholding in ROSA to which she gave little attention at the time and no particular thought. She also said that in December 2008 she was issued shares in **Springsure** Mining Pty Ltd, a company having the same business plan as DCM in that it would establish a training mine in Queensland and ResCo would provide contracting services to it, and she still held her shares in Springsure.

54. I note that Springsure was incorporated after the Minister notified DCM in August 2008 that it could lodge an application for an exploration licence over land which Mr Ransley had acquired in trust for DCM. DCM lodged this application with the Department of Primary Industries in September 2008. It is common ground that, in the ordinary course, the capacity to apply for an exploration licence in NSW would be subject to a competitive tender process.

55. In respect of her acquisition of further shares in DCM through 2007 to 2009, Ms Ransley said that she was happy to continue to support her husband's business and the concept of the training mine and accordingly agreed with him that "we should invest further in DCM through each of the capital raisings, with the new shares also being acquired in my name" and that her husband organised to pay for the shares from their joint account. She said that her purpose was the same as with the ROSA shares, that the shares represented

"our investments for our future together" and she gave no thought to selling the shares at that time. She said "Craig's business was integral to our lives and we relied on it for our future" and that she considered her shares in DCM would be diluted if she did not participate in the capital raisings of DCM.

56. By 2009, after the global financial crisis had started, her husband was stressed. He told her that things were difficult and Westpac was pressuring him about the overdraft facility and ResCo needed immediate funds to pay wages and other expenses so they needed to sell some shares in DCM "to fix this". He said "we have managed to get an interested purchaser who would also be a cornerstone investor". As she wanted a "happy" husband, she said she would not presume to know what was best for his business and would do what she could to help. In around October 2009 Mr Ransley told her that Taurus wanted to invest in DCM and would be prepared to pay her $5 million for a parcel of her shares. She said she then decided to sell these shares and directed that $2.5 million be paid to ResCo.

57. Ms Ransley said she sold another 3,005 DCM shares to Mr Galt on 24 December 2009 and, to the best of her recollection, her husband asked her to sell these shares to Mr Galt because he had recently become a director of DCM in anticipation of the listing of the company and he wanted to have shares in the company. She said she received an information memorandum about receiving shares in the to be listed company, NuCoal, in exchange for her shares in DCM and she thought this was "in our best interests because it would allow the company to more easily raise capital to enable it to establish the training mine". She said she did not recall any specific conversation with her husband about the NuCoal transaction and gave no particular thought to selling her shares in NuCoal and "just saw the NuCoal shares as a continuation of the business that Craig had established back in late 2006 early 2007".

58. Ms Ransley said that over a six month period from March 2010 she decided that she would sell all her shares in NuCoal, noting that her husband was stressed due to his mother's illness and ResCo's continuing financial problems. Her mother-in-law died in March 2010 which affected her husband a great deal and this "was the main factor which led me to decide to sell my NuCoal shares" as she thought she could use the proceeds of the sale to invest further funds in ResCo, for other investments of her own, and for private expenditure to make her husband happy and no longer stressed. She used the proceeds

of sale, after tax, to invest in ResCo, to make other investments and for personal expenditure.

4.3 Ms Ransley's oral evidence

59. Ms Ransley was cross-examined.

60. Ms Ransley confirmed that she was still a legal practitioner and understood the importance of her affirmation meaning that she had to give evidence which was truthful, accurate and complete, and this is what she had done in giving her affidavit. She agreed that she had the same understanding when giving her answers in the interview under s 264 of the ITAA 1936 in December 2013 under affirmation. She said she had given evidence that was true, accurate and complete to the best of her ability in December 2013. She confirmed that she had reviewed the transcript of the s 264 interview before giving oral evidence. When it was put to her that she had not found it necessary to correct anything in the transcript she said that there was a need to do so, as:

> *…at the time of the 264 hearing I was under considerable stress. My then husband was going through an ICAC inquiry, I was very nervous at the time of the interview, I was faced with – I believe it was five ATO officers, a bundle of documents and I was overwhelmed.*

61. She also said that she had not adequately refreshed her memory before the s 264 interview despite having said in the interview she had refreshed her memory. Ms Ransley did not accept that her memory of events that had occurred between 2005 and 2010 would have been better in 2013 than in 2015 when she gave her affidavit. To the contrary, she believed her memory had improved over time because:

> *… at the time of the hearing, I was under considerable stress and when I was faced with five ATO officers, a group of – sorry, a bundle of documents, I was overwhelmed. So while I was trying to answer very truthfully … Sorry. I was trying to answer very truthfully. At that time they were the truthful answers because my memory was a complete blank and I just tried to answer the questions to the best of my ability.*

62. Ms Ransley agreed that by December 2013 the Independent Commission Against Corruption (**ICAC**) had completed its inquiry and report into the grant of the exploration licence for Doyles Creek and her then husband had been interviewed both privately and publicly at a much earlier time during ICAC's investigation. Ms Ransley said, however, that the pressure was constant due to media coverage and scrutiny.

63. This exchange followed:

> *Ms Ransley, because of the way in which the companies names changed, will you follow my questioning if I threw out – call the entity that was Rosa but became ResCo, if I refer to that as ResCo? Yes.*
>
> *And I will refer to DCM as DCM, notwithstanding it started as ResCo? That's fine.*
>
> *Okay. If, at any point, you are not sure which of the two entities I am talking to you about, then please stop and ask me to clarify? Okay.*
>
> *Now, you were being asked questions during your 264 examination that had to do with what your intention was at the time you acquired the initial share in what became ResCo. Correct? Correct.*
>
> *And you were being asked questions about what your intention was at the point in time when you acquired each parcel of shares in what became DCM. Correct? Correct.*
>
> *And you were being asked questions about what your intention was when you agreed to enter in to the option agreement to exchange your shares in DCM for shares in NuCoal. Correct? Correct.*
>
> *Now, all of those basic questions were questions in respect of which, if you had a recollection, you would have been in a position to answer. Correct? Yes.*
>
> *And you were not being asked questions about the alleged corruption that your husband was being investigated and indeed had been found corrupt by the Public Report – by ICAC, at that point in time? No.*
>
> *So I suggest to you that when you were being examined in December 2013, you repeatedly gave answers that you did not recall. Do you remember that? You've looked at the transcript? Sorry. Yes.*
>
> *And would you agree with me that on very many occasions, you answered questions by saying, "I don't recall"? I do.*
>
> *And at that point in time, if you had had a recollection, you would have given that evidence under solemn affirmation, have set out what your intention was. Correct? As I said, at the time of the interview, it was basically that I had a mental blank. So I tried to answer the questions to the best of my ability by saying, "I don't recall," because at that point in time when I was being interviewed, I did not recall.*

64. Ms Ransley agreed that although she had reviewed the transcript of her s 264 interview before giving her affidavit, she had not suggested in her affidavit that it was inaccurate or taken any other step to correct answers that now appeared to be incomplete or inaccurate.

65. I found Ms Ransley's explanation for her improved memory between 2013 and 2015 (and 2018, when she was giving oral evidence) unconvincing. While I would accept that Ms Ransley found the s 264 interview stressful, I do not accept that in 2013 she could recall virtually nothing of her intentions and discussions with her then husband in respect of her share acquisitions and sales and in 2015 (or 2018), as a result of a more careful review of

the documents, could recall the effect of conversations and material details about her intentions and those discussions. There are no documents recording her intentions or the discussions. Her explanation for her improved memory is inherently unbelievable. When I take this into account with the pattern of evasion (as opposed to mental blankness due to stress) apparent from both her s 264 interview and her oral evidence and the other matters discussed below, I am forced to the conclusion that Ms Ransley's evidence about her intentions and discussions with her then husband in respect of her share acquisitions and sales is unreliable. Whether this unreliability is the result of a combination of self-interest and deliberate untruthfulness or of a combination of self-interest, the passage of time and the reconstruction of events in her own mind to the most favourable end she can envisage, I cannot and need not say.

66. Another example of Ms Ransley's tendency towards evasion was apparent when she was asked why she had recently moved from Singapore to Bangkok. Ms Ransley said that there "was no particular reason, it was just that I decided that I would like to live in Bangkok". When Mr Ransley gave evidence it emerged that Ms Ransley was in business with a person in Bangkok. It must be inferred that her business interests were a reason she moved but for reasons known only to her, Ms Ransley did not disclose this in her evidence.

67. Ms Ransley agreed that the money Mr Ransley had received from the sale of his shares in TESA (about $3.8 million) involved a significant improvement to their financial circumstances. They purchased a unit in Newcastle which was put in her name because, with the advice of their accountant Benjamin Mahoney, it had been decided that she should "hold the investments". This, along with all relevant decisions, was a "joint decision" she made with her then husband. She did not accept that her then husband had told her that as the mining industry was highly regulated he would be exposed to personal liability as a director of the company which made it preferable for her to be the owner of the shares rather than him. Ms Ransley said she recalled only that that they had advice and acted on it, not the content of the advice. Mr Ransley's evidence that he had told her why it was preferable that she hold the shares is plausible and I accept it, but I do not draw any inference adverse to Ms Ransley's credit from her lack of recall about this matter. What her (understandable) lack of recall of the discussions about this issue indicates, however, is that it is equally unlikely she could recall the details of the

discussions with Mr Ransley which she gave evidence about in her affidavit, some seven years after the event.

68. Ms Ransley agreed that she had never invested in a private company before her investments in ROSA and ResCo. She agreed that the model of labour hire business that Mr Ransley had established at TESA was to be the same as that for ROSA and ResCo. She agreed that Mr Ransley had succeeded in creating and growing TESA into a significant labour hire business "from the ground up" to the point where TESA attracted substantial private equity investment and that this process, from start-up to Mr Ransley being bought out of TESA, took about 30 months (January 2004 to August 2006). Further, that by the time of the buy-out in August 2006, TESA was Australia's largest privately owned labour hire business in Australia, with the sale of Mr Ransley's shares in TESA being a "watershed improvement in [their] financial circumstances as a couple". She agreed that they made a joint decision to sell all of their shares in TESA (noting that Ms Ransley also held a small number of shares in that company) and for the new companies to be established for the new business (using the same model as TESA) which she expected to succeed. This evidence was then given:

> *And, on the back of the TESA buyout, you at all times knew that, if Craig succeeded again, it was likely that one outcome of your investment in the company would be that you would, at a suitable opportunity, again sell out at a profit; correct? No.*
>
> *Do you say you didn't even conceive of that as a possibility? It was a possibility, but we were more interested in a long-term investment in the form of dividends. There was a hope that a dividend would be able to be received once the company became profitable.*

69. Ms Ransley accepted that at all times the intention was for the Ransley interests in the new business to equate to the Poole interests (that is, the shareholdings associated with Mr Poole). She accepted that one of the objectives of the business was to obtain a direct allocation of an exploration licence for the mine. She agreed that this, the direct allocation of an exploration licence, was a necessary first step in the new business venture which she had discussed with Mr Ransley before the companies were created. While the new business was to use the same labour hire model as TESA it was also to be "more expansive". But the same model, of start-up, acquire business, attract investors and build up the business as a "pit to port" business was to be used.

70. This exchange then occurred:

> *…the second aspect of the business venture was the establishment of a commercial – sorry, obtaining an exploration licence by direct allocation; correct? It was the establishment of a training mine.*
>
> *In order to do that, you would need an exploration licence; correct? Correct.*
>
> *Okay. So the first stage was to obtain an exploration licence, and the objective was to obtain that by direct allocation; correct? What do you mean by direct allocation, please?*
>
> *I mean without competitive tender? I don't know.*
>
> *Do you have no recollection of there being a significant issue in your life and in your husband's life when you were still married to him about the circumstances in which the exploration licence was obtained? I understand that was the result of an ICAC investigation. Yes.*
>
> *Okay. And your objective – sorry. The business plan was to obtain an exploration licence over property that had not yet been licensed; correct? Correct.*
>
> *And the plan was to promote the development of a commercial mine and a training mine; correct? Correct.*
>
> *And the exploration licence was to cover both; correct? Correct.*
>
> *And the plan was to seek to obtain the exploration licence by direct allocation? Correct.*

71. Ms Ransley's equivocation about the fact that the plan was for the company to obtain an exploration licence without that licence being subject to a commercial tender fits the pattern of evasion which characterised much of her evidence. The obtaining of the exploration licence by direct allocation was fundamental to the business plan. The companies were start-ups. They were not coal mining companies. Neither Mr Ransley nor Mr Poole had experience in running a coal mining company. They could not have hoped for their business to compete and succeed in a tender process. This is why the training mine concept was essential. The fact that the proposed mine would function as a location for the training of coal miners was the only reason which might possibly justify a direct allocation of an exploration licence. And indeed hindsight shows that is precisely what occurred. The idea that Ms Ransley did not understand at all times that the training mine was critical because it could be used to justify the direct grant of an exploration licence is beyond belief. That she ultimately agreed with this again indicates her tendency to evasion if possible.

72. Ms Ransley agreed that the purpose of the restructure in 2007 involved "DCM pursuing the mine with a training mine and …ResCo pursuing broadly the TESA model". She then gave this evidence:

You knew that, if the companies were successful in that objective of obtaining an exploration licence in the name of the company over property owned by the company, that that would result in a substantial increase in the value of the company; correct? I wasn't thinking in terms of value of the company.

Is it your evidence that you didn't take an interest in the value of the investment that you were making? I saw it as a long-term investment, and a long-term investment – value didn't come into account because it was a start-up business.

Can you explain that? I had no comprehension of the value of the company because it was a start-up business. There were too many ifs, buts and whatevers as to what could actually happen. So it was basically we would continue to invest in the company to get it to the stage where it could have a commercially viable training mine.

Now, in terms of it being "investment for our future", "our" being yours and Craig's, your words, one of the ways in which that was a potential investment for your future was that the value of the company would increase and that you would be able to sell out at a profit as had been done with TESA; correct? It was a possibility.

And it was always a possibility that you had in contemplation, wasn't it? No.

You had just done the same thing in TESA? It's not the same thing.

73. I find Ms Ransley's evidence that she "wasn't thinking in terms of value of the company" both unresponsive to the question and unbelievable. It must have been obvious to Ms Ransley that the grant of an exploration licence over land controlled by DCM would substantially increase the value of the shares in DCM. Given the recent experience with TESA, where Mr Ransley had taken a start-up company to a sell-out of his (by then) minority shareholding for over $3 million in 30 months, the evidence that Ms Ransley never considered value because the new business involved a start-up defies common sense. The profound implausibility of her evidence in this regard is apparent from the following exchange:

So you – an opportunity came to sell out of TESA, a business about which Craig was passionate and had built up from scratch; correct? Correct.

And you supported Craig in his decision to take the profit; correct? Correct.

So, when Craig moved to his next business venture and he was again promoting a plan which would, if successful, result in the value of the shares in the company increasing, you had in contemplation, didn't you, that you may, in an appropriate circumstance, again sell out at a profit? This was more about a long-term investment, not a quick sale.

Whether it was long, quick, you contemplated, and you were cognizant of the fact, that one of the ways in which this investment would provide for the future of your family was by selling out at a profit? It was a possibility.

Yes. From the inception? Well, from the inception, it was all about creating an asset that could be carried through to the future.

Yes. And, at an appropriate juncture, if the opportunity arose to sell out at a profit by disposing of your interest, you would be open to doing so? We were more about receiving a dividend.

When did you think you would receive dividends from either ResCo or from DCM? Well, once the training mine was established.

How long did you think that would take? A number of years.

How many? I don't know.

No idea? A number of years.

So, when you discussed with Craig whether or not you would take the TESA proceeds, this massive change in financial circumstances, and again venture then for your family's future, did you not give any consideration to when you would start to see a return on the investment? Well, because it was a start-up company, I didn't know when the investment would actually start to yield a profit in order for a dividend to result.

But you did know that, if an exploration licence was obtained, that that would materially increase the value of the company; correct? Correct.

You knew it was a valuable asset? Correct.

You knew from the inception that the objective was to obtain it? Not from the inception. No.

From late 2006? No.

I suggest to you, Ms Ransley – I'm not going to ask you those questions again – I suggest you've already agreed with that. You knew in terms of there being a dividend stream that would support your family's future that, in a venture such as contemplated by DCM, there were any number of things that could seriously push out the forecast return, didn't you? Yes.

You knew that the exploration licence might have taken a long time to get? Yes.

You knew that, once obtained, there might be difficulties in adequately raising finance to take the next steps to exploit that exploration licence? Yes.

…

You knew that the projected time of getting a return by way of dividend stream could be affected by the market conditions in relation to coal price? Yes.

And that was something that was obvious from the beginning. Correct? Correct.

74. She agreed she knew all these matters when she acquired her shares in ROSA and her intentions remained the same when she acquired her shares in DCM because obtaining her shares in DCM was a mere consequence of her ownership of ROSA shares. But she continued to deny that she had any intention when she acquired the shares to sell at a profit if and when the opportunity arose. She said "[i]t was all about ensuring the success of ResCo. ResCo was always the core business. If you had a successful commercial training mine, ResCo would also benefit", "[i]t was all about the training mine" and "my understanding was the training mine. It was all about establishing whatever was required

to set up a training mine". Despite this evidence about the training mine this evidence was then given:

> *You knew – and I suggest to you that the transcript will show that you have already agreed that you knew that the exploration licence was to cover both a commercial mine and a training mine? Now, how could I know that?*

75. It is plain from the evidence as a whole that there was only ever to be one mine – that one mine would have to commercially viable as a coal mining enterprise because that was the only way in which the training component could be funded.

76. In any event, Ms Ransley then gave this evidence which I do not accept:

> *And I suggest to you that at all times, you were alive to the fact that there was likely to be considerable profit to be obtained in disposing of your shares in DCM once an exploration licence had been obtained? No.*
>
> *And similarly, with – once NuCoal had been floated? No.*

77. The idea that Ms Ransley was not even alive to the fact that if she disposed of her shares she would stand to make a considerable profit if an exploration licence had been granted is highly implausible. The explanation for this unbelievable evidence appears to be Ms Ransley's concern to bolster her case that it never entered her mind to sell the shares at a profit at the time of acquiring her shares if and when an exploration licence was obtained, despite the obtaining of such a licence being the essential first goal of the new business (and, I might add, must necessarily have been the same goal for the Springsure business).

78. Ms Ransley agreed that she sold shares to Taurus and Mr Galt before her mother-in-law died (which she had said was the main reason she sold all her shares in NuCoal) and thereby made a profit of some $5 million but insisted that she only sold her shares in NuCoal as a result of a change in circumstances being the death of her mother-in-law and the financial difficulties of ResCo. She agreed that the profit she realised from the sale of her NuCoal shares "could have been 8 million, 9 million, 10 million. I don't recall the exact amount".

79. From the profits of around $15 million from her sales of DCM and NuCoal shares, $2.5 million was initially invested in ResCo, roughly $1 million was spent on making Mr Ransley happy, and some was spent on Ms Ransley making other investments. She

also made two further investments in ResCo of just over $3 million. This evidence was then given:

> *Now, 5.6 million was applied to ResCo shares. Correct? Yes.*
>
> *You said that 1 million was spent on personal expenditure on your husband to assuage his grief who – with his mother's death. Correct? Correct.*
>
> *And you said that you had other investments at that point in time. You looked at a number of things, but the only things you identified as having invested in were the two companies I asked you about first thing this morning: the uranium company and the gold company. Correct? Correct.*
>
> *Now, doing your best, how much did you invest in those two companies? From recollection, it would have been around 200,000 in Zaraiya.*
>
> *200,000 in the uranium company? Yes.*
>
> *Yes. And in PDI, the gold company? I don't recall an amount.*
>
> *Do you remember if it was in the tens of thousands, hundreds of thousands? Hundreds of thousands.*
>
> *Hundreds of thousands. But certainly less than a million. Correct? Correct.*
>
> *Is it your recollection that your investment in both the gold company and uranium company added together was less than $1 million? Yes.*
>
> *Okay. So using those rough figures, that accounts for $7.6 million of the over $15 million you received from the sale of DCM and NuCoal. Do you agree with that? Yes.*
>
> *What did you do with the balance? From recollection, we acquired another apartment.*
>
> *Where was that? King Street.*
>
> *King Street, Newcastle? Newcastle.*
>
> *And how much did you pay for that apartment? I can't recall the exact amount, but it was I think around 2 million.*
>
> *Around 2 million? That's only an estimate.*
>
> *…*
>
> *Okay. And you bought that outright; you didn't obtain a loan or financing to pay for that? I think there was also finance in place as well.*
>
> *So do you think your contribution from the NuCoal proceeds was roughly 2 million, or that was the total purchase price and only some of that was funded and the rest of it was financed? Yes.*

80. In other words, even with the changed circumstances as identified, and her determination to make a long-term investment because she was allegedly passionate about and committed to the training mine, it appears that Ms Ransley liquidated about $5 million of shares which were not needed for ResCo, were not needed to make Mr Ransley happy,

and were not needed for any other unique investment opportunities in which she had an interest. Later in her evidence this exchange occurred:

> *Now, Ms Ransley, can you explain why it was that you sold out entirely from your investment in this business if all you needed for ResCo was the amount that I took you to, the investments that you made in those capital raisings and that you only spent $1 million on things to make your husband happy? Why didn't you stay in for the long term? I can't explain why.*
>
> *Well, I suggest to you that the reason was because what you did was what you always intended to do. What you did in selling out when that profit went through the roof after the exploration licence had been obtained, after the company had been reversely stood was to put your foot on the profit, to take the profit and to get out. Do you agree with that? No.*
>
> *I suggest that your last answer is not the truth? You can suggest that, but I don't agree with it.*
>
> *And from the inception, a motivating part of your purpose that you discussed with Craig was to repeat the experience that you had had in TESA and to again have a financial watershed moment where you sold out of a business that Craig had built up at the very point when its – sorry, when its value was at a crescendo. Do you agree with that? I do not.*

81. One subsequent investment which Ms Ransley did not mention in her oral evidence, despite being asked what she had invested in at this time, was a company, again established by Mr Ransley and Mr Poole, known as **TheChairmen1** Pty Ltd. While Ms Ransley mentioned this company in her affidavit, saying "I have minimal net assets due to the recent collapse in value in my major remaining share investment in Chairmen1 Pty Ltd. Chairmen1's major asset is shares in a publicly listed company, Guilford Coal Ltd, which were trading at 20 cents in May 2013 and are now trading at approximately 3 cents per share", she did not mention that this was another venture of Mr Ransley and Mr Poole in which she had invested and also did not mention the investment when given the opportunity to do so in oral evidence. The reason why she did not mention any of this information is suggested by her response to the issue being raised with her in cross-examination. This exchange occurred:

> *Now, I was taking you yesterday to questions about your then husband, Craig, and Andrew Poole's business ventures, starting – they met when Andrew Poole became involved in TESA. Correct? Correct.*
>
> *And then they moved on to the venture that we spent a lot of yesterday talking about that ultimately became ResCo and DCM. Correct? Correct.*
>
> *And then NuCoal obviously? Yes.*
>
> *Now, they were also – they have also been involved in other ventures after DCM and – excuse me – after ResCo and DCM, haven't they? I'm not aware of those.*

You give evidence in your affidavit of having a substantial amount of your assets tied up in the company known as TheChairmen – numeral 1. Correct? What – what relevance

Let me assist you. At paragraph 4 of your affidavit:

> *I have minimal net assets due to the recent collapse in the value in my major remaining share investment in Chairmen1 Pty Limited. Chairmen1's major asset is shares in a publicly listed company, Guildford Coal Limited, which were trading at 20 cents in May 2013 and are now trading at approximately 3 cents per share.*

What was your understanding of the business of TheChairmen1? I don't recall.

You have no recollection? I don't.

Wasn't it an investment company that was set up by Mr Poole and Craig? I don't recall.

You have no recollection of having any connection with that company at all? I don't recall.

Do you – can you tell her Honour what caused you to invest in TheChairmen1? I don't recall.

Do you have any recollection of Guildford Coal? Yes.

What is your recollection in relation to Guildford Coal? It was a mining company.

And was it interested in coal exploration? Yes.

Did it obtain a number of coal exploration licences? I don't recall.

Do you have any recollection if the coal exploration licences were obtained from the Queensland company with the mining – with the training mine associated with it? I don't recall.

No recollection at all? No.

Okay. You were a director of Chairmen1 Pty Limited, weren't you? Is that what the ASIC website says?

Yes? Then I agree.

Okay. Do you have any recollection of being a director? No.

Do you – TheChairmen1 Pty Limited was incorporated with both yourself and Craig as the founding directors. Correct? Is that what the ASIC website says?

82. Again, I find Ms Ransley's evidence unconvincing. Her investment in TheChairmen1 was her major remaining share investment in 2015. She mentioned it in her affidavit but only in the context of disclosing her minimal assets. When asked about it in cross-examination, her initial response was to question the relevance of the issue. She did not suggest she could not recall any such investment. She then gave answers to the effect that she recalled nothing about the investment. This might be true or it might not be. If true, it tends to undermine the reliability of her evidence that when she came to give her affidavit she managed to recall her intentions and discussions with her then husband

about her share acquisitions in ROSA and ResCo and share sales of shares in DCM and NuCoal, which occurred earlier in time. If not true, it tends to suggest that she was concerned in her evidence to conceal her intention in acquiring these shares because she thought it might undermine her claimed intentions when acquiring the shares in ROSA and ResCo (and, thereby, DCM and Nucoal). The relevant point for present purposes is that the evidence is difficult to reconcile with her improved memory between 2013 and 2015 and seems to fit the pattern of her interview in 2013 of denying any recollection of the events which might be perceived to be inconsistent with her case.

83. After more evidence to the effect that she recalled nothing about her investment in TheChairmen1, this exchange occurred:

> *I suggest to you that TheChairmen1 was the next business venture in which your husband and Mr Poole were involved; you agree with that? I'm sorry, I'm just trying to think. It's possible.*
>
> *It's something you remember, isn't it, Ms Ransley? No, it isn't.*
>
> *You have no recollection of you becoming a shareholder of a large amount of a company associated with your company in 2010? I don't remember.*
>
> *And you don't recall what you did with the proceeds of the NuCoal shares apart from what I've taken you through this morning? Correct.*
>
> *And you just don't know what happened to it? I just don't recall.*
>
> *At the time you knew, didn't you? I don't recall.*
>
> *You don't recall whether you knew or not? I don't recall the period.*
>
> *At all? No.*
>
> *Okay. So you – if you accept from me that you resigned as a director within a very short time after your mother-in-law died – I think you said she died on 2 March – and you resigned as a director mid-March? I don't recall the date.*
>
> *Okay. But you do recall resigning? I don't.*
>
> *If the ASIC records show that you resigned on 15 March 2010, you agree that was within two weeks of your mother-in-law's death? Yes.*
>
> *And you, in resigning, left your husband, Craig, to carry on as one of the continuing directors on that – in that business, correct? Correct.*
>
> *Why did you do that if you were so concerned about Craig's ability to cope with business affairs after the [death] of his mother? I don't recall.*
>
> *Can you offer any explanation as to why you would do that if it was true that your major motivating force for selling down your NuCoal shares was the dealt of Craig's mother? This was a very traumatic period and the only thing I clearly recall is the death of my mother-in-law.*
>
> *And the very traumatic period had to – there was no hint of the ICAC investigation that was to come at this time, was there? I'm talking – I'm asking you questions*

about March 2010. Would it assist to know that Parliament referred the allocation of the exploration licence to ICAC in late 2011? Yes.

So when you say it was a very traumatic period, that trauma stemmed entirely from the death of your mother-in-law? Yes.

Now, I suggest to you, Ms Ransley, that you did invest the proceeds of the NuCoal share disposal in Craig's next business venture. Do you agree with that? I don't recall.

So you just do not know one way or another? I do not.

Now, if you did that, that would have been something that you would have discussed with Craig. Correct? You wouldn't have done it in isolation, without speaking to him at all, would ? No.

you? And there's no way that you and he would become directors of a company together without ever having had a discussion about it? Correct.

All right. So is your evidence to her Honour that although you cannot remember anything about the circumstances, you accept that that was something that you did with Craig? Yes.

And you did it to invest in his next planned business venture? Yes.

Now, part of that next business venture was to establish a public company, Guildford Coal, wasn't it? I don't recall.

You are unable to assist her Honour in any way? Not in this period, no.

So if the ASIC records show that Guildford Coal Limited was registered as an Australian public company on 7 May 2010, do you agree that that is likely to be the correct timing? Yes.

84. Yet again, I find much of this evidence inherently implausible. It is obvious that TheChairmen1 was another business venture of Mr Ransley and Mr Poole, involving the same model as had succeeded so spectacularly with DCM, in which Ms Ransley chose to invest. While I do not doubt that the death of Mr Ransley's mother was very stressful for the Ransleys, particularly Mr Ransley, the events surrounding the establishment and investment in TheChairmen1 are difficult to reconcile with the evidence that her death was a major reason for Ms Ransley selling her shares in NuCoal, the aim being to relieve Mr Ransley of stress.

85. Nor did Ms Ransley recall in oral evidence the details of another business venture of Mr Ransley and Mr Poole in which she invested involving Springsure, based on the same model of a start-up company obtaining an exploration licence as a result of a training mine proposal, albeit in Queensland not New South Wales. Ms Ransley gave this evidence:

What's your recollection about the training mine proposal that Craig and Mr Poole were pursuing in Queensland? I don't recall any details.

Do you recall anything? No.

Do you recall anything about the company known as Springsure Mining Pty Limited? The name.

Just the name? Yes.

Don't recall being an original shareholder, a founding shareholder of Springsure? No.

86. Ms Ransley had recalled the founding and purpose of Springsure in her affidavit, which had adopted the same business plan as DCM. The fact that Ms Ransley later claimed not to recall any details about Springsure in her oral evidence again places the reliability of her recollections about all of these matters in doubt.

87. Ms Ransley agreed that her 2010 and 2011 tax returns were the "the most significant tax returns [she] had had to file in [her] life, given the profit that [she] had made" and that it was "a very important thing for [her] to properly and truthfully account for [her] income during that year". She agreed that it would have been prudent to obtain written advice in relation to how the profits should be treated in her tax returns and to have "fully and comprehensively briefed Mr Mahoney in relation to the circumstances of how [she] had funded [her] investment in those companies and how [she] had been involved as a stakeholder for both [her] and [her] husband's interests in the business". The evidence continued in these terms:

It would have been important to tell Mr Mahoney, or whoever you sought advice from, the full context and a description of the circumstances in which you had come to acquire the shares, the DCM and NuCoal shares. Correct? Correct.

And it would have been prudent to explain the business venture that you were involved in and supporting your husband in? Correct.

And it would have been prudent for you to have laid all of that out clearly in instructions to your adviser. Correct? Correct.

And if you were – in order for you to rely on that advice, it was only ever going to be as good as the instructions that you had provided to your advisor. Correct? Correct.

Now, you say in your affidavit, you cannot recall his advice? I don't.

And you cannot recall what questions he asked? I don't.

And you gave him what he asked for? Correct.

You don't have any recollection, do you, of comprehensively briefing Mr Mahoney in relation to the matters I've just put to you – the full circumstances that led to your acquisition of the various share parcels in DCM and the allotment in NuCoal? I don't.

It would have been important to tell Mr Mahoney, or whoever you sought advice from, the full context and a description of the circumstances in which you had come to acquire the shares, the DCM and NuCoal shares. Correct? Correct.

And it would have been prudent to explain the business venture that you were involved in and supporting your husband in? Correct.

And it would have been prudent for you to have laid all of that out clearly in instructions to your adviser. Correct? Correct.

And if you were – in order for you to rely on that advice, it was only ever going to be as good as the instructions that you had provided to your advisor. Correct? Correct.

Now, you say in your affidavit, you cannot recall his advice? I don't.

And you cannot recall what questions he asked? I don't.

And you gave him what he asked for? Correct.

You don't have any recollection, do you, of comprehensively briefing Mr Mahoney in relation to the matters I've just put to you – the full circumstances that led to your acquisition of the various share parcels in DCM and the allotment in NuCoal? I don't.

And, in fact, I suggest to you that you never outlined all of that to Mr Mahoney when you consulted him in relation to your 2010 and 2011 tax returns? Incorrect.

You have no recollection? I would have provided him with everything that was required.

And everything that was required, you had no idea what was required, did you, other than what he had told you? No.

Yes. So you gave him what he told you to give him? Yes.

Okay. And nothing more? Not that I recall.

The last two answers that you've given in relation to what you have done, that's just speculation as you sit there in the witness box, isn't it? You have no recollection either way. Ms Ransley, I note there has been a very long pause. Are you going to answer that question? I'm sorry. I'm trying to answer you truthfully, so I'm thinking of the question.

Please go on? My only recollection is providing information to Ben.

The information that he asked for? Yes.

88. I find it difficult to accept that Ms Ransley had an actual recollection of giving Mr Mahoney what he asked for as distinct from a belief that she would have done so in the ordinary course. What is apparent from her evidence is that despite the tax returns being the most significant in her life and her lack of knowledge about the tax implications of the very large profit she had made, Ms Ransley's approach to her tax accountant was to give him the information he requested and no more. I infer she volunteered nothing but that she owned some shares as investments and then left it to Mr Mahoney to attempt to identify potentially relevant documents.

89. Ms Ransley also confirmed that Mr Ransley was funding this litigation and that they had had general discussions to the effect that she would direct some money to Mr Ransley if she succeeded in the litigation.

90. In summary, there are profound inconsistencies between Ms Ransley's inability to recall notable events and discussions in 2013 and her improved memory of such things in 2015 and 2018. Her explanation for the improvement was implausible. Her answers in 2013 appeared evasive about key issues. She appeared equally evasive in giving evidence in 2018. Her reliance on the death of her mother-in-law as a primary motivating factor in selling shares in NuCoal was unbelievable when the circumstances of TheChairmen1 are taken into account. Her inability to explain why she sold all her shares in NuCoal when that money was not invested in ResCo, was not used to cheer up Mr Ransley and was not re-invested and she had been passionately committed to a long-term investment which would see the training mine come to fruition was irreconcilable with the existence of any such commitment at any time.

4.4 Mr Ransley's s 264 interview

91. Mr Ransley gave evidence after being affirmed. He said he understood that it was an offence to make a false or misleading statement in his answers, and that he could not refuse to answer a question on the ground of the privilege against self-incrimination, but could claim legal professional privilege. Mr Ransley also had four legal and tax advisers present with him during the interview.

92. Mr Ransley gave evidence in this exchange:

Scruby	*Yes. Can we take it from that that you, as a director of ResCo, had some involvement in your wife acquiring that share on 15 February?*
Ransley	*No, I don't recall.*
Scruby	*That's what you recall. What do you now know about - - -*
Ransley	*No, I said, "I don't recall."*
…	
Scruby	*Sitting there today though, do - what do you know about your wife's acquisition of that one share? Do you know anything about it at all?*
Ransley	*No, nothing specifically.*
Scruby	*What do you know generally?*

Ransley	*Generally, the - generally ResCo was formed to be a mining services company full stop.*

93. The idea that Mr Ransley did not recall having any involvement in Ms Ransley acquiring shares in ResCo defies belief. It is equally implausible that Mr Ransley knew nothing about ResCo except that it was formed to be a mining service company.

94. Mr Ransley, in common with Ms Ransley, also gave evasive evidence in the interview such as this:

Scruby	*And in what circumstances did you become a director of ResCo?*
Ransley	*I was an employee.*
Scruby	*Yes. And how did you come to be a director?*
Ransley	*Well, I was a managing director.*
Scruby	*Yes, but why did you become the director?*
Ransley	*Because that's what the founding shareholders wanted. That was my expertise. That was my field.*
…	
Scruby	*…But isn't this…the position…at some point in early 2007 you and Mr Poole decided that you would be a director of ResCo?*
Ransley	*I was the Managing Director.*

95. Mr Ransley denied that he had caused any shares in ResCo to issue to his wife. When asked if it was his position that he had no idea how she came to acquire her shares Mr Ransley said that was his position. This cannot be believed.

96. When asked about his signature on a cheque to purchase the shares, Mr Ransley said that if his wife wanted to make an investment she would ask him and he would write the cheque for her. He denied deciding anything about her acquisition of ResCo shares. He said he could not recall anything she said to him but that it was normal practice for him to write the cheque if she asked. The thrust of this evidence is also highly implausible unless Mr Ransley had suffered a complete lapse of all memory associated with his business activities. Yet Mr Ransley, it is apparent, did recall other things about the business provided those things were not potentially relevant to Ms Ransley's intentions in acquiring the shares.

97. Later in the interview Mr Ransley confirmed that Ms Ransley decided to participate in the DCM capital raisings as her "investment decision" and that she asked him to sign cheques

many times and was a "fairly well-educated woman". He did all the banking because she did not like doing it and he could not recall any specific conversations they had about her share acquisitions because it "was too long ago", but he agreed that they were all her decisions and she had probably seen how passionate he was about getting the training mine operational.

98. Mr Ransley also said he did not recall any discussions about the price for the sale of Ms Ransley's shares in DCM to Taurus and that the end of 2009 and beginning of 2010 were "pretty much a blur" because his mother was dying. Nor could he recall anything about the sale of some of her shares in DCM to Mr Galt other than that he was to be the listing chairman of NuCoal and should have "skin in the game" to show his commitment to the company. He could not recall what he did with the $2.5 million received from the sale which Ms Ransley had not reinvested in ResCo. When asked whether he and his wife jointly decided what the proceeds would be used for Mr Ransley's response was "I can't say". They would have had a discussion but he could not recall the specifics.

99. Mr Ransley said that in early 2010 Ms Ransley had told everyone on the board she was interested in selling her shares in NuCoal. This exchange followed:

Scruby	*And did she tell you that she was interested in selling her shares?*
Ransley	*Oh, I can't recall specifically.*
Scruby	*Do you know why she was interested in selling her shares?*
Ransley	*…a change in direction with mum going and a lot of other things happening, and Nera wanted to start a family…so it was just a change in circumstance, to the best of my recollection.*
Scruby	*…And did she explain to you why selling shares in NuCoal would assist in the change of direction?*
Ransley	*No. No.*

100. He could not recall whether the broker Austock gave his wife any advice about selling her NuCoal shares or anything more than Taurus recommending Austock as a broker so the board could bring in preferred shareholders as it wanted. He also could not recall any discussions with Ms Ransley about the series of disposals which led to the sale of all her shares in NuCoal over time. A series of prompts about purpose, price and the like did not jog any memory. Nor could he recall any discussions with the later broker Macquarie Private Wealth.

4.5 Mr Ransley's affidavit

101. In his affidavit Mr Ransley explained that after an earlier venture into a vegetation slashing business in Tasmania he established TESA for the purpose of bidding for a labour hire business. He became TESA's managing director and a founding shareholder and his wife also had shares in TESA. TESA carried on a business of labour hire and from early 2004 it provided staff to coal mines in the Hunter Valley. The business grew substantially. Further capital was required to continue growth and in 2006 a private equity firm invested $14.8 million and became the majority shareholder. Mr Ransley continued as managing director. The private equity funds were used to purchase two businesses largely owned by the Construction, Forestry, Mining and Energy Union (**CFMEU**) which provided labour hire and training services to the mining industry. Mr Ransley moved to Newcastle in 2005 to be closer to TESA's workforce in the Hunter Valley. His wife moved to Newcastle in 2006.While at TESA Mr Ransley became aware of the need for coal mining training opportunities. He had numerous discussions with Vince Martin, the managing director and major shareholder in a company that operated an underground mining services business to which TESA supplied staff. The discussions were about the prospect of establishing a training mine in which miners could be trained in underground mining operations. He began looking for mines saying he "started looking for an underground mine that had been or was about to be put into 'care and maintenance' (i.e. 'mothballed') where TESA could conduct underground mining training services. I wanted a mine that had sufficient reserves to be commercially sustainable but without the demands of a fully commercial mine". These proved not to be feasible.

102. In late 2005 he was introduced to Mr Poole. Mr Poole became a director of TESA. By 2006 Mr Ransley's shareholding in TESA was 5% and TESA was the largest privately owned labour hire company in Australia. Another company wished to acquire TESA. Mr Ransley said the approach to TESA was "entirely unsolicited". The proposed acquisition was ultimately put to TESA's board and the board's other five directors voted to sell the company. The sale of all shares was completed in August 2006. Mr Ransley ceased to be a director of TESA on 31 August 2006 but remained an employee until he resigned in February 2007. Before resigning he had discussions with Mr Poole about his idea for a business providing mining services including a training mine. Mr Ransley said Mr Poole agreed there was a niche for such a business. Mr Ransley continued:

> *Because of her background in corporate governance with ASIC, I discussed the idea with Nera and asked if she could help to establish a corporate structure to enable me to implement this strategy. After my discussion with her, Nera caused ROSA Holdings Pty Ltd ("ROSA") and a wholly owned subsidiary Res Co Services Pty Ltd ("ResCo Services") to be incorporated in November 2006. Andrew Poole was the original shareholder and director of both companies because at that stage I was still an employee of TESA. I later became a director of ROSA and ResCo Services in February 2007 after I left TESA.*
>
> *I established ROSA and ResCo Services to carry on a 'pit to port' mining services business including the provision of labour, training and other services to the mining industry including the development of a training mine.*

103. Mr Ransley had been told in 2006 about an unallocated tenement known as Doyles Creek in the Hunter Valley near mining tenements owned by Peabody and Xstrata (coal mining companies). There was a meeting on 15 January 2007 involving John Maitland, a geologist, Mr Poole and Mr Ransley, as well as Mr Martin. The geologist explained the coal reserves available at Doyles Creek. The deposit was said to be "highly faulted" which had discouraged the larger coal producers. Mr Ransley formed the view Doyles Creek would be a suitable site for a training mine. Mr Ransley obtained legal advice about the process for applying for an exploration licence for Doyles Creek. At that time he "had no knowledge about the process of acquiring a mining tenement or how coal resources were established" but knew only that there had to be a sufficient resource to support the training mine which he considered there was based on the geologist's advice. He said he knew it would take at least four or five years to achieve an operating mine.

104. On 15 February 2007 Mr Ransley was appointed as a director of ROSA and ResCo Services, Ms Ransley was issued one share in ROSA and Mr Maitland was appointed a director of ResCo Services. Mr Maitland was the Chairman of the NSW Coal Competence Board and had recently retired as National Secretary of the CFMEU.

105. Mr Ransley continued:

> *Nera received her 1 ordinary share in ROSA after many conversations with me about my plans for ROSA and Resco Services. Nera was very supportive of me and my business ideas in this regard. By this stage Nera had stopped working and the income from the companies' businesses, by way of dividends on the shares and my salary as a director, would be our sole source of income. I decided that Nera should hold the shares in ROSA because I understood the mining industry to be highly regulated and becoming a director of a mining company would expose me to the risk of claims against me personally. I thought that it was preferable for her to hold the shares to protect them from claims that might be made against me.*

> *At the time ROSA and ResCo Services were incorporated, I did not give any particular thought to the prospect the disposal of the ROSA shares in the future. No[r] did I ever discuss it with Nera, my only focus was to implement my strategy and grow the companies into a profitable business.*
>
> *On 15 February 2007, Mr Maitland sent a letter to Mr Ian McDonald ("the Minister"), who was the responsible Minister in the NSW Government, in which ResCo Services applied for consent under s 13(4) of the Mining Act 1992 to apply for an Exploration Licence for the Doyles Creek site…. I was aware that the Minister could decide that the Exploration Licence should go out to tender. However, I thought that the training mine proposal might enable the Minister to grant the Exploration Licence without a tendering process, but if the licence was to go out to tender we should pursue the training mine proposal in another way.*

106. Mr Ransley had a long-standing relationship with Westpac. He decided to approach their private equity arm, Westpac Direct Equity Investments Pty Ltd (**WDEI**) about the best way to raise capital for the businesses of ROSA and Resco Services. In about April 2007 he and Mr Poole met David Hurford, a director of WDEI who advised it would not invest in resources. As a result, the board of ResCo Services:

> *… decided to undertake a restructure whereby ROSA and ResCo Services would split (with the shares in ResCo Services to be held by the shareholders of ROSA in the same proportions), ROSA would be renamed ResCo Services Pty Ltd and ResCo Services would be renamed Doyles Creek Mining Pty Ltd. Doyles Creek Mining Pty Ltd would pursue the training mine business and the other company would pursue all other aspects of the business, and would provide contracting services to Doyles Creek Mining Pty Ltd and use its training facility.*

107. Mr Ransley said he did not recall discussing this restructure with his wife but as a shareholder she was informed by letter from Mr Maitland.

108. ROSA became ResCo Services Pty Ltd and ResCo Services Pty Ltd became Doyles Creek Mining Pty Ltd. Mr Ransley said that on "or about 5 June 2007, DCM issued 1599 new ordinary shares, and ResCo transferred its 1 ordinary share in DCM, to the existing shareholders in Resco in the same proportions as their shareholding in ResCo". Thereafter:

> *In September 2007, WDEI acquired 1 ordinary share in ResCo from Nera and subscribed $5 million for a convertible note issued by ResCo. These funds were used to fund the acquisition of a number of businesses in the Hunter Valley…. WDEI subsequently converted the convertible note into ordinary shares in ResCo in November 2008.*

109. Mr Ransley said that as he was ResCo's managing director this occupied nearly all his time while DCM was pursuing the exploration licence, although of course he was also a director of DCM.

110. According to Mr Ransley:

1 *"In February 2008, DCM engaged Opes Prime to provide support in raising funds to establish the training mine".*

2 *"So that DCM would be in a more advantageous position to apply for an Exploration Licence and to conduct drilling were a licence to be granted, the Board of DCM decided to implement a strategy of acquiring land on which DCM proposed applying for an Exploration Licence. The funds for the purchase price were to come from capital raisings and loans from Westpac. To that end [he] entered into several contracts to buy land in Jerry's Plains as trustee for DCM".* The purchases were funded by a facility with Westpac.

111. He and Mr Poole were having regular meetings with John Baxter of Westpac. Mr Ransley had reviewed a memo written by Mr Baxter which said:

> *The said mining exploration licence has some 140 million tonne of terminal coal and the said land provides the best site for pit-top etc. The mine could commence in approx. 2 years. The principals of Doyles Creek Mining have however no long term intention of operating a coal mine and it is likely the land and exploration licence and training status would be sold to a large operator for significant financial gain. The land adjoins an Xstrata mine site.*

112. Mr Ransley said:

> *While I may well have mentioned to Mr Baxter that I would not be involved in the day-to-day operation of the coal mine (I personally had no such experience), at no time did I ever say to Mr Baxter or anyone else that I (or Nera) had no long-term intention of investing in a coal mine or that DCM intended 'selling' the land and exploration licence and 'training status' to a large operator. That was the opposite of what I was thinking. The training mine had been a long-term goal of mine and I was working hard to make it become a reality. I was keen to get a large investor in DCM because a substantial amount of capital (in the order of $400 million) would be required to get the mine up and running. I met with Mr Baxter frequently and had many conversations with him in which I discussed DCM's need to find a large investor to fund these capital requirements, for example I recall discussing with him the possibility of Xstrata becoming the major investor. At no time did I, or to my knowledge any of the other directors, attempt to or even mention the possibility of "selling" the exploration licence to a large operator. All efforts by myself and the other Board members of DCM were directed to securing a significant investor (which we referred to as a "cornerstone" investor) so that there would be sufficient funding to continue the work necessary to commence mining operations and establish the training mine.*

113. He also said that he "never mentioned the existence of 140 million tonnes of 'terminal coal'" (and had never heard of that term).

114. Much time and effort was spent on garnering support for the training mine resulting in numerous letters to the Minister about the request to the Minister in March 2008 to consent to the making of an application for an exploration licence. The Minister consented to DCM making an application on 21 August 2008 and DCM then lodged its application with the Department of Primary Industries on 29 September 2008. In or about October 2008 ResCo engaged lawyers to draft an Operating and Maintenance contract between ResCo and DCM for the training mine so that ResCo would have a role in operating the training mine. Mr Ransley said that "[f]inalisation of the agreement was put on hold in early 2009 until such time as DCM had raised sufficient capital so that it would be in a position to implement it (at that stage mining operations were not expected to commence until at the earliest 2012). Ultimately, the agreement was not entered into due to the decision to float NuCoal".

115. The Minister granted DCM the exploration licence on 15 December 2008 and the conditions required the development of a training program and training mine. Mr Poole and Mr Maitland were going to China in January 2009 to seek out investors and DCM obtained advice about the resource covered by the exploration licence. Mr Ransley said:

> *On or about 24 December 2008, I received an email from Mr Lewis [formerly the general manager of Xstrata Coal's NSW mining operations and now Chief Operating Officer of Resco Underground Services Pty Ltd], setting out his views … This was the first time that I became aware that as the Exploration Licence was not "stratified" (i.e. limited to any particular depth) and that it granted to DCM access to seams below the Whybrow and Redbank Creek seams which potentially significantly increased the in situ coal resource available to DCM.*

116. DCM required additional capital and Ms Ransley participated in all but one of DCM's capital raisings between February 2008 and October 2009. Mr Ransley noted that two lots of shares were issued to them as trustees for their superannuation fund as they had discussed this and he believed it could be done but this was in error and the shares were ultimately issued to Ms Ransley alone. Ms Ransley participated in the capital raisings borrowing funds from Westpac secured over properties in her name in Tasmania and Newcastle.

117. By 2008 Mr Martin was an employee of ResCo and informed Mr Ransley about a potential site for a training mine in Queensland. Springsure was incorporated on 9 December 2008 "to establish a training mine business in Queensland". Ms Ransley was an "original shareholder of Springsure and still holds 245,000 shares" as at August 2015 and Mr Ransley was a director from 8 December 2008 to 18 May 2010. Springsure lodged an application for an exploration permit on 21 January 2009. Mr Ransley believed that this would be granted because no-one else had applied over this land but the application still included the training mine. The application was subsequently granted on 30 June 2010. In April 2012 Guilford Coal Limited acquired a 50.52% shareholding interest in Springsure and in May 2012 drilling commenced.

118. Mr Ransley said that:

> *While DCM pursued the training mine proposal and the exploration licence, ResCo pursued the acquisition strategy I had implemented until late 2008 [that is, acquisitions of other labour hire businesses] by which time it had operating revenue (on an annualized basis) of well over $100 million (ResCo's revenue for the year ended 30 June 2009 was $120 million) and approximately 2500 employees providing labour, training and other services to the mining industry.*

119. To assist it, ResCo had a finance facility with Westpac and by 30 June 2008 had borrowings of approximately $11 million by way of overdraft and $19 million which was secured. When the global financial crisis hit in late 2008 ResCo lost all of its business in Queensland and its debt was unsustainable. Mr Ransley and Mr Poole negotiated with Westpac to raise new share capital of $5 million which was required to be underwritten by Mr Ransley and Mr Poole. Mr Ransley continued:

> *At this time I recall saying to Nera words to the effect that Westpac had given an ultimatum that unless ResCo repaid $5 million Westpac will pull the pin and everything would be gone.*
>
> *It was about this time that Nera suggested to me that she sell some of her DCM shares and invest the proceeds into ResCo. I said to Nera words to the effect that ResCo was currently our only secure source of income and that I thought it was a good idea.*

120. DCM's board had been looking for a "cornerstone" investor and Taurus then acquired a parcel of shares in DCM including $5 million from Ms Ransley. Subsequently, Ms Ransley sold a parcel of DCM shares to Mr Galt, a principal of Taurus and director of DCM, for $100,006.40 as he wanted to hold some shares in DCM personally and Mr Ransley informed Ms Ransley of this. Then, in October 2009, ResCo issued 10,388,842 shares to

its existing shareholders at an issue price of $0.50 per share raising a little over $5 million, of which Ms Ransley invested $2.5 million. This money as used to reduce ResCo's debt to Westpac.

121. Mr Ransley said:

> *On 6 April 2010, ResCo raised a further $2,883,685 by the issue of 5,767,370 shares to its existing shareholders. Nera subscribed for 2,284,885 shares in ResCo at an issue price of $0.50 per share ($1,142,443) using part of the proceeds from the earlier sale of her NuCoal shares. The capital raised from the share issue was used to reduce ResCo's debt to Westpac.*
>
> *…*

122. In October 2010 another labour hire and recruitment group proposed a merger with ResCo which occurred and all shares in ResCo were acquired on 29 December 2010. Mr Ransley resigned as a director in October 2012.

123. Returning to DCM, despite efforts to interest equity investors in 2008, none were attracted. Nor was the visit to China to attract investors successful. As a result, on or about 6 March 2009 DCM engaged Trident Capital Pty Ltd to undertake a reverse listing aimed at forming a vertically integrated coal mining company incorporating DCM, ResCo and Springsure. This proposal was put on hold while DCM's board continued to search for a "cornerstone" investor and Springsure ceased to be part of the reverse listing proposal. Mr Ransley said that on 23 November 2009 NuCoal entered into agreements with each shareholder giving NuCoal the option to acquire all the shares in DCM in return for the shareholders of DCM being issued shares in NuCoal in proportion to their shareholdings in DCM, requiring it to raise $10 million in capital, and providing for it to be re-listed.

124. Mr Ransley said:

> *At the time the agreement with NuCoal I recall discussing the proposed listing in broad terms with Nera but I have no recollection of either of us raising the possibility of any future sale of the shares.*

125. Mr Ransley resigned as a director of DCM on 27 November 2009 because he was "completely occupied with managing ResCo".

126. The NuCoal prospectus was lodged with ASIC on 2 December 2009 and on 5 February 2010 NuCoal exercised its options and acquired all shares in DCM. Ms Ransley "received 46,529,778 shares in NuCoal fully paid at $0.20 per share in exchange for her shareholding in DCM (148,736 shares), which represented approximately 8.24% of Nu Coal's issued capital".

127. Mr Ransley said:

> *Throughout 2010 Nera would tell me when she wanted to sell a certain number of NuCoal shares and I would call Macquarie Equities to arrange the sale. I do not recall any specific discussions with Nera about any of the sales. The sales came at a very difficult time for me, as what spare time I had was taken up visiting my Mum, who had been diagnosed with cancer in early 2009. I visited her as often as possible and spoke with her twice a day. I was very close to her and her illness caused me considerable distress. My mother passed away on 2 March 2010.*

128. Mr Ransley also said:

> *I have no particular recollection of any conversation with Nera about the affairs of DCM. To the best of my recollection I only ever mentioned in general terms the financial difficulties ResCo was facing following the GFC….*
>
> *I don't recall ever speaking to Nera in any detail about the capital raisings or telling her what she should do.*

4.6 Mr Ransley's oral evidence

129. Mr Ransley was cross-examined.

130. Mr Ransley agreed that he was funding this litigation and continued otherwise to financially support Ms Ransley. They had separated in late 2013 and divorced in early 2014. He said that there was no verbal or written agreement that he would be paid money if Ms Ransley succeeded in this litigation but agreed they had discussed the issue and they would work out what he would be paid at the end if she succeeded.

131. When asked why Ms Ransley had moved to Thailand from the rental accommodation belonging to Mr Ransley in Singapore in which she had been living, Mr Ransley said "[b]usiness, lifestyle and cost of living" and that the business reason was that Ms Ransley "has got a sports nutrition business with another Australian guy" and moved to Bangkok to pursue that interest.

132. Mr Ransley confirmed that he knew he had an obligation to tell the truth, to be complete and to be accurate when he was interviewed in December 2013. He was asked if he fulfilled these obligations during the interview and said he had done so. He also agreed that he had legal advice for the purpose of the ICAC investigation and spent time with his lawyers going through documents in early 2013 in perhaps March or April.

133. Mr Ransley acknowledged that he had had many conversations with Ms Ransley about his plans for ROSA and ResCo before they were established. He also agreed that he had the concept of a commercial mine which was a training mine in his mind at least two years earlier when he was working at and a shareholder of TESA and investigated this matter. He said this:

> *It's not two separate mines. It's a commercially run training mine. It's not a commercial mine and a training mine alongside each other. It's one mine. A training mine that is funded by the commercial operations of a mine, and they're one and the same – same panels, same workings, same infrastructure.*

134. The mine would have to be profitable or else the training could not occur.

135. When asked what he could recall of the many conversations he had with Ms Ransley about his concept he said:

> *I suppose the only recollection I've got is general – general chitchat, continuation of the business that was TESA, which the primary focus was on training people for the mining industry on the east coast of Australia.*

136. Mr Ransley agreed that as soon as the approach was made to TESA for the buy-out he was considering what his next venture would be. He said that he had not wanted to sell his TESA shares but only held 5% of the shares and was outvoted by the private equity interest he had brought in earlier. He agreed that he received about $3.8 million for the sale of his TESA shares which went into their joint account. H agreed that he discussed his next business idea with Ms Ransley but "not to micro detail" and said:

> *I had been doing – I had been doing training in mining for four years prior to this, so there was no difference in this training mine other than actually being the owner of the lease to the business I had been conducting since 2001.*

137. When pressed for the details of his discussions this exchange occurred:

> *When you say that you were – that Nera was supportive of you and your business ideas following many conversations, what was said by you to her? Explain the*

effect of your conversation? Sorry. It's 11 years ago. I can't give you specifics of conversations 11 years ago.

Well, what was the general effect of those discussions? The general effect of the conversations are what a husband and wife has when they're at home, sitting around a table and having a chat of an evening.

I'm not asking you a question about the convivial atmosphere or otherwise ? I wasn't answering that.

in which the conversations – the general effect? What was the meaning conveyed? What's the ? What we

substance of what you told her about your business ideas? What we were going to do which was an extension of the business that we had already been doing since 2000.

And when did you first start talking to her about that? I can't recall when I first started talking to her about that. It's 11 years ago.

138. He agreed that he decided that Ms Ransley should own the shares in ROSA because of the risk he might be personally liable for claims against the new business given he would be a director and a principal of that business in a highly regulated industry.

139. This exchange then occurred:

Now, when you were examined in your 264 examination about how Nera came to acquire the shares in Rosa, you had no recollection, did you? No. Correct.

And you were ? Are we talking about the one share?

The one share? Yes.

And you were repeatedly asked, did you recall anything specific ? Okay.

or anything generally? Correct.

140. Other answers Mr Ransley had given in the s 264 interview about his lack of recall or knowledge of anything to do with how Ms Ransley came to acquire shares in ROSA were then identified and he was asked:

…which of the pieces of evidence you've given under oath is correct: is it true that, in December 2013, that you had no idea how she came to be – to acquire her first share in Rosa, or is it true that you, in fact, decided that she should hold it to protect it against third-party claims against you personally and the company?

141. He answered "[t]he second" (meaning his affidavit and oral evidence in Court and not his evidence in the s 264 interview). When asked why he had not attempted to indicate that the answers he gave in the s 264 interview needed to be corrected, he said he had not reviewed the whole transcript and did not realise he had to do so. This evidence was then given:

So the evidence that you've given in the 264 examination about having – that your recollection – your position, as you call it, that you know nothing about how Nera came to hold the original share in Rosa, is neither truthful, correct or accurate, is it? Incorrect. That was my recollection at the time.

And your recollection has got better since 2013? I never said that.

So your recollection was that you had no idea, but, by the time it came to swear this affidavit, you had a very clear idea? I never said that.

…

…in terms of what you've said here, it is more detailed and precise, and it is, in fact, a recollection that is different to what was in 2013; correct? Yes.

And this is different in the sense that it is materially more detailed, isn't it? Yes. Because I had time to actually research and do – go back and look at old documents, which I never had time before the 264 hearing.

142. This exchange then occurred:

So you've got documents, have you, that record your decision that Nera should hold the shares in Rosa because you understood ? We had three or four different companies where Nera, being an ex-ASIC lawyer, registered the companies with ASIC, right, and was the initial shareholder and the initial director. It doesn't mean she paid for the

Are you ? shares.

I'm just going to interrupt you for a minute? Yes.

Are you suggesting that your evidence as you sit there in the box ? Yes.

is that Rosa was incorporated by Nera, and, for that reason, she was the founding shareholder and director? Was incorporated, from memory, by Nera and Andrew Poole.

Yes? Yes.

And you say that she became shareholder ? No. I say that what I've said here is correct, the risk from the mining sector.

In your answer you've just diverted to having – telling me about some four or so companies that you had during your marriage to Nera ? Yes.

that you had her incorporate? Correct.

And you start to say that she was founding shareholder and director? Correct.

Okay. That wasn't the case with Rosa, was it? No.

No. She didn't acquire any share in Rosa ? She got it for nothing. So did Andrew.

No, no. Just – let's just try and let me finish the questions? Yes.

Okay. She didn't obtain any share in Rosa until such time as you were clear of the restraint of trade from Skilled Group; correct? Correct.

And, on that very same day, you became a director and she became a shareholder? Yes. Okay. I agree.

Yes. And you had held off becoming a director or having her become a shareholder until such time as from your understanding you were released from the restraint of trade; correct? That would be correct.

So the initial founding shareholder and sole director of Rosa was Andrew Poole alone, wasn't it? Paperwork-wise, but it was never the intent.

The intent was what? That it was always going to be a partnership, Andrew and Nera and about eight other shareholders who all

So ? all obtained their shares, I think, three months from when the company was incorporated.

143. The cross-examination then returned to the difference between Mr Ransley's affidavit and the answers he gave in the s 264 interview in his evidence:

– I'm going to return to my question about the improvement in the quality of your memory. In December 2013, you have no idea – at least that's your "position" – as to why she became a shareholder in Rosa; correct? Yes.

And, in signing your affidavit in December 2015, you say that you reviewed some records and that enabled you to assert that you had decided that Nera should hold the shares in Rosa because you understood the mining industry to be highly regulated and becoming a director of a mining company would expose you to the risk of claims against me personally. You thought it was preferable for her to hold the shares to protect them from claims that might be made against me? Yes.

You had no document that refreshed your memory in that regard, did you? Timing and a lot of documents and circumstance.

I suggest to you that the evidence that you give on the occasions on which you give it is informed by what you think will best assist you as regards to the outcome, regardless of the truth; what do you say to that? I disagree.

144. As noted, there are no documents in evidence which record or refer to or otherwise identify the content of the discussions between Mr and Ms Ransley about what they or each intended with respect to Ms Ransley's various share acquisitions (apart from their affidavits and the s 264 interviews). As with Ms Ransley, I find Mr Ransley's explanation for his significantly improved memory implausible.

145. Mr Ransley said that the financial difficulties of ResCo continued between about July 2008 and December 2010 when Westpac were paid out. He agreed that he frequently discussed ResCo's financial difficulties with Ms Ransley. He said his affidavit evidence that Ms Ransley suggested to him he sell some of her DCM shares in September 2009 was true, accurate and complete to the best of his recollection. He could not recall if his personal guarantee to Westpac was specifically discussed but "it would have been a general focus of the conversation". When reminded that during the s 264 interview he said he could not recall anything about Ms Ransley's sale of shares to Taurus, Mr Ransley

said "Yes. 264 – 264 examination, for me, wasn't a good day". When asked to explain he said:

> *Look, I went in with a – I went into that examination with the wrong mindset. Nera was in there for four hours and she came out crying her eyes out and shaking like a leaf, so the moment I walked in the door I was a redheaded male.*

146. He agreed that he was under an obligation to tell the truth in the s 264 interview, being under affirmation. He said "[a]nd, to the best of my recollection, at the time, I did". He agreed that the fact that he was angry during the s 264 interview did not justify him not being truthful, accurate and complete in his answers.

147. From this evidence, I consider that Mr Ransley's proposition in cross-examination that he believed he had given truthful evidence during the s 264 interview cannot be accepted. I infer that he did not do so during the s 264 interview because he was angry about the process despite knowing he was under an obligation to be truthful.

148. More evidence from his s 264 interview, the effect of which was that Mr Ransley recalled nothing and could say nothing in answer to the questions, was then put to him in cross-examination. This exchange then occurred:

> *Now, the evidence that you've given in your affidavit is a substantial improvement of memory about discussions you had with Nera about the sale of the DCM shares in 2009, isn't it? Yes.*
>
> *And I suggest to you again, Mr Ransley, that you have, on each occasion you've given evidence under oath that I've taken you to, given the answer which you perceived to be the most advantageous to your own position, regardless of the truth? Sorry. What date was the 264?*
>
> *December 2013? And the date of the affidavit?*
>
> *August 2015? So I had two years to go through countless documentation with three legal teams in preparation for two trials, which I've since successfully won, to refresh my memory.*
>
> *…*
>
> *You don't suggest for a minute, do you, that there is any document that you have where you recorded the discussions you now say you had with Nera? No. I don't suggest that at all.*
>
> *And so what you've in fact ? I'm suggesting that my memory has changed because of the research on all the other facts on Taurus, etcetera, because it was all a point in the ICAC process.*
>
> *So you have looked at what the objective evidence is; correct? I've looked at the minutiae.*

You've looked at the documentary evidence, right? With the exception of discussions between Nera and I, yes.

Yes. Because there is no documentary evidence of that, is there, nor would you expect there to be? Correct.

Correct to both propositions? Correct, correct.

What you've done, I suggest to you, Mr Ransley, is to craft your evidence in this affidavit to best navigate the shoals so that you advance Nera's position in these proceedings. Do you agree with that? No.

149. I find Mr Ransley's evidence unconvincing. It is not possible that he could have had a better recollection of so many matters in 2015 having had no recollection of anything of the kind in 2013. In particular, reviewing the contemporaneous documents could not have prompted recollections of discussions which are nowhere referred to in the documents and for which no documentary evidence exists. The fact that I infer Mr Ransley was being obstructive in the s 264 interview does not mean that I should accept his proposition that the version of events in his affidavit is what occurred. To the contrary, as discussed below, I find key parts of his affidavit and oral evidence unreliable.

150. Mr Ransley agreed that it was he who had always instructed the brokers to sell Ms Ransley's shares in NuCoal. He gave this evidence:

Now, on 11 March, there were two discrete bundles of shares sold: first parcel slightly short of 3 million shares; second parcel slightly over 4 million shares. Were those shares sold in those parcels because Nera told you – she was sitting watching the market and she wanted to sell them in those terms or did she just give you, as you've described in your affidavit, an instruction that on 11 March 2010 she wanted to sell a certain number of NuCoal shares, that is, the addition of [2,974,380] shares plus 4,034,556 shares? No, I don't think she gave me any instruction for each individual lot, from the best of my memory; just a quantum in dollar terms.

So she – when you refer to she wanted to sell a certain number of NuCoal shares, what she was in fact doing was saying, "Sell $1 million worth of shares"? Yes.

Okay. So on 22 March 2010, is it your evidence that she gave you instructions to sell $386,130 worth of shares? To the best – to the best of my knowledge, yes.

…

And, equally, your evidence is that she told you to sell the specific amounts that were sold on each day. Not individual parcels, but the total amount sold each day ? To – to the best of my recollection, yes.

was a direction that came from Nera? Yes. To the best of my recollection, yes.

I suggest to you that is just absolute nonsense. What do you say to that? I can't say anything to that.

Well, do you agree with ? I said that's to the best of my recollection. No, I don't agree with your comment.

Okay. You were living with Nera during this period? Yes.

Okay. Did you have discussions about, "Why do you want to sell 371,545 shares on 21 April"? I can't recall those discussions.

At any point did you say, "Why aren't you giving me round numbers? What's driving this?"? Well, there was a dollar figure. So – and when traders get a sale, they get a sale for a certain amount of shares and they call up.

The figure I'm putting to you ? Yes.

is the dollar figure? Okay. No, I can't recall. Sorry.

But you suggest to her Honour that that's what happened? Yes.

151. I do not accept this evidence. It is not plausible that Ms Ransley instructed Mr Ransley to sell in these terms. I infer that Mr Ransley was reconstructing what he believed might have occurred in a manner which he thought might support Ms Ransley's case.

152. Further, the inconsistency between this evidence and the answers he had given in the s 264 interview (in effect, that he recalled no discussions with Ms Ransley about these sales) was then put to Mr Ransley, leading to this evidence:

This is another instance, Mr Ransley, where your recollection of conversations you had with your wife has improved between December 2013 and the time you swore your affidavit in these proceedings; isn't it? My recollection has improved?

Yes? Yes.

Do you agree that your recollection at a time closer to the events you're being asked about would be better than your recollection some two years on? Depends what happened during that time but I can't disagree with that.

This is not an instance where you have been able to locate any documents in which you recorded the instructions that you say Nera gave you throughout 2010 where she communicated to you that she wanted to sell a certain number of NuCoal shares? No. There were no recordings of any of those discussions.

I suggest to you that what you've done on the two occasions, first in the 264 examination and then when you came to swear your affidavit in these proceedings, was to put forward a version of events that you thought would best advantage you and Nera's interests in the two different contexts. Do you agree with that? No, I don't.

153. Again, I find Mr Ransley's evidence unconvincing.

154. The topic of the relationship between the training mine and the commercial mine was then raised. Mr Ransley said they were "one and the same thing" (that is, there was only to be one mine) and it would have taken six to seven years for the mine to become operational. He agreed that one report he put to DCM's board recommended that if the exploration licence could not be obtained by direct allocation, the Doyles Creek site should be abandoned. He then gave this evasive answer to a question, before acknowledging the obvious:

> *The training mine aspect was important for achieving a direct allocation of that licence; wasn't it? The – the intent was always to establish a training mine because that was my core business.*
>
> *Okay. I know that's your evidence? Yes.*
>
> *You've said that repeatedly. I'm asking you a different question? Okay.*
>
> *The question is, you appreciated, did you not, that the way to avoid having to go to competitive tender for the exploration licence was to include something that would justify the Minister directly allocating the licence; correct? I can't argue with that.*
>
> *And the something that you relied on for DCM was the training mine concept; correct? It was my business. Yes.*
>
> *…*
>
> *My question is that you knew that in order to obtain the exploration licence, so before you had obtained it, that a critical factor in obtaining that licence without competitive tender was to push the concept of the training mine? I can't disagree with that.*
>
> *And one of the things that you were attempting to do throughout the period leading up to the exploration licence being granted was to build support and momentum around the idea of the training mine being a good thing; correct? Can't argue with that either.*
>
> *And you went to various – and whether you personally or those you were working with, you sought to obtain a wide variety of letters of support; didn't you? The CEO of Doyles Creek did. Yes.*
>
> *…*
>
> *Correct? That was – the supporting material was actually requested by the Minister.*
>
> *And you understood that to be because the Minister needed to be able to justify not having gone to competitive tender; correct? Don't disagree.*

155. An email from Mr Ransley to Xstrata (a mining company which owned tenements adjoining Doyles Creek) was then put, which said:

> *On another issue we have been talking at great length internally about finding an area to get our training mine up and running immediately, so as to build the PR trains momentum for Doyles. I'm not looking for anything but a commercial opportunity, but Teralba came to mind, if there would be an opportunity to take this*

off your hands at the right price, and work to set up a training mine sooner rather than later let me know. Alternatively if you know of any other operations that may suit, please let me know.

156. This exchange took place:

Now, what I want to suggest to you, Mr Ransley, is what you said there was exactly what you meant. You always saw the training mine as a way of building the PR trains momentum for the Doyles Creek application; correct? I can't argue with that. That was the aim of the board. That's the aim of the exercise.

You knew that if an exploration licence was obtained then that would materially increase the value of the Doyles Creek company; correct? Yes.

And that was something that was within your contemplation from the inception of the business venture after you left TESA; correct? No.

You weren't cognisant of the prospect ? I've testified to this numerous times.

No, no ? My plan was to build a training mine.

…

… from the very beginning of that exercise you appreciated – you must have appreciated that if that had come off there would be a number of key points in which what was a start-up would increase in value; correct? Correct.

And one of the critical milestones would have been the obtaining of an exploration licence; correct? Yes.

And you appreciated from the outset that had you been successful in obtaining an exploration licence over property that was in the name of the company that there would be an opportunity for the shareholders of the company to make substantial profits if they could dispose of their shares and crystallise the increasing value; correct? Not correct, from the point of view of depending on what you mean by substantial profits, because an exploration licence, until you drill, could be worth five million, could be worth 10 million, could be worth zero.

So you knew, though, that a company like ..... DCM ? Yes.

its inherent value to the shareholders ? Would appreciate.

would appreciate ? Yes.

upon the mere event of obtaining the exploration licence; correct? Correct.

So when you say "could appreciate", you don't agree with substantial profit, but ? No, I don't.

it would definitely appreciate in value? I think the technical evidence has been somewhere between zero to 10 million.

And so you appreciated that, depending on where you were in – the range you were in for that, there would be a prospect, at that point in time, to sell out and take a profit? No, not on that asset.

You didn't think that you could? No, because the asset – and all evidence for the last five years has been that asset was geologically challenged, heavily faulted and that evidence was from the miners that own the assets side-by-side. So until we drilled it, we had no idea what was under the ground.

I suggest to you, Mr Ransley, that from the inception, you knew that if an exploration licence was granted over the Doyles Creek mine, that you – all the risk and expense associated with taking the operation from exploration licence approval through to the mine being operational – in your own estimation I think you said six to seven years – could be bypassed by a quick sale where you took out profits if the opportunity ? No.

occurred? Did

You ? Because that's the not the way exploration licences work. The value would appreciate to the company, but people hadn't wanted that asset for 10 years and they were the biggest miners in the world. So we had to drill the asset, spend 30-something million dollars on the asset to actually understand what was under the grass.

And you say that that was done before DCM was reversed into ? Yes.

NuCoal? Yes, they did drill. Yes.

157. I do not accept that Mr Ransley did not appreciate that the mere grant of an exploration licence, in and of itself, would not materially increase the value of the land to which the licence related. Given that exploration licences are generally subject to competitive tender, the fact that DCM had obtained a licence without going to tender and the rights which the licence gave, necessarily would have been perceived by someone of Mr Ransley's experience as highly likely to materially increase the value of the land.

158. Mr Ransley agreed that he frequently met Mr Baxter of Westpac. He gave this evidence:

Well, I suggest to you that in the course of talking to him about the finance application to acquire those properties that you told him that one possible outcome of the venture was if an exploration licence was granted, that profit could be crystallised by taking advantage of an increase in value on the basis that that the exploration licence had been obtained? No, I disagree.

Okay. But you don't, in fact, recall discussing this with him, do you? I don't.

Okay. You also – I suggest to you that you also raised with him that if the opportunity to take a satisfactory profit did not arise, that another option would be in the event that it hadn't been sold prior to becoming operational, that ResCo could provide the management and operations expertise for conducting the Doyles Creek mine. Do you ? That was always going the case. ResCo were going to be the manager of the mine ever since day 1 in every presentation that has ever been done.

And that's something you would have told Mr Baxter? Yes.

Yes? I've got no problem with it.

And you would have told him that that was only going to be the case if it hadn't been sold out of at earlier point in time; correct? No, I can't – I can't agree, because I can't remember.

But you just had no recollection? I had no recollection.

I suggest to you that that's exactly what you did tell Mr Baxter that in the long term there was – there was no long-term intention of operating a coal mine. It was likely that the land, the exploration licence and the training status would be sold to a large operator for significant financial gain and you also told him that, in that respect, it was notable that the land adjoined the Xstrata mine site. Do you agree with that? No, I don't.

I suggest to you, Mr Ransley, that the intention that was operative each time that Nera obtained more shares in DCM as a result of capital raisings always included the potential for the exit strategy to be to sell if the conditions were right to make a profit. Do you agree with that? No, I don't.

I suggest to you that that was an intention that you discussed between yourself and Nera? I don't – I don't agree.

And it was something that, in working together as a team, motivated you and Nera throughout, each time she acquired DCM shares. Do you agree with that? No, I don't.

And it also motivated her to agree to exchange her DCM shares for NuCoal shares? I don't agree.

159. He agreed that the exploration licence was granted in December 2008 and that in the first half of 2009 he and Mr Poole began working on another coal exploration in Queensland involving Springsure. He agreed that he and Ms Ransley also formed TheChairmen1 which made a large investment in Guildford Coal Ltd and that Ms Ransley held shares in TheChairmen1. He gave this evidence:

Now, I suggest to you, Mr Ransley, that, when seen in context, what you were doing and what your mode of operation was with your wife was to start up companies, to build the value in them and then to sell out and crystallise a profit. Do you agree with that? No.

You've done that ? I've done that once.

You've done that with TESA? No. Because I owned five per cent. And, as I said, the private equity company were the ones that called for the sale, not me.

You made a profit of 3.8 million? I thought that's what building companies was meant to be for, yes. I did.

Yes. And then with the sale of – I'm just going to say DCM/NuCoal, but you know I'm picking up both? Yes.

The shares were held in Nera's name ? Yes.

because that was a decision that you had come to and with which she agreed; correct? In regards to risk, as we discussed, yes.

Yes. And, all up, she realised a profit of around $15 million from the sale of her DCM and NuCoal shares; correct? Less tax, yes.

And that was banked into your joint account? Correct.

And from that joint account, the investment in Chairmen1 Pty Limited was funded; correct? Correct.

As soon as the exploration licence had been obtained and given the fact that you were able to achieve a listing of what became NuCoal, you did what you had always intended to do: take advantage of that opportunity to make a profit and use that – deploy that – in your next business venture; correct? Not correct.

And that was consistently what you and Nera did during your marriage as a team ? I still own 50

to build your wealth? I still own Springsure.

Yes? Well, it doesn't fit the theory, does it? I still own it.

Have you finished? I didn't sell out of ResCo.

Anything else you want to say? No.

160. It is apparent from the latter part of this exchange that Mr Ransley was keen to put forward his own case theory rather than merely answer the questions put to him.

161. In re-examination this exchange occurred:

MR RICHMOND: Mr Ransley, you recall you gave an answer that you had no idea why she became the holder of the one share, which is around February – early February 2007. And you recall that your evidence today and in your affidavit is that the decision was made for the reasons that you gave that she would hold the share. I'm asking you why you said on the earlier occasion that you had no idea? I just couldn't recall at the time, full stop. I can't give any other explanation for that, Mr Richmond.

162. I consider that this is because there is no credible explanation for the inconsistencies between Mr Ransley's s 264 interview and his affidavit and oral evidence.

4.7 Conclusions about credit

163. I do not accept Ms Ransley or Mr Ransley as reliable witnesses. The submissions on behalf of Ms Ransley to the contrary are unpersuasive.

164. I infer that both were obstructive in their s 264 interviews and, for the purposes of this case, each reconstructed evidence which they thought might best suit the proposition that Ms Ransley had acquired all relevant shares as a mere long-term investor with no thought of disposing of her shares for profit and no involvement in any commercial or business operation in which, jointly, Mr Ransley and Ms Ransley decided to establish companies for the purpose of obtaining the direct allocation of an exploration licence on the basis that the proposed mine would be a self-funding training and commercial mine to which services could be provided thereby substantially increasing the value of Ms Ransley's

shares and enabling her to dispose of the shares in both companies as and when seemed opportune for the purpose of realising the profit of this commercial or business operation.

165. One thing which is clear is that Mr and Ms Ransley functioned as a team. They made joint decisions about all matters relevant to their financial position and future. It is not that Mr Ransley's intentions may be attributed to Ms Ransley. It is that they shared the same intentions at all relevant times. While I would accept that Ms Ransley was not involved in the day-to-day running of any of the companies, I consider that what she was involved in, jointly and equally with Mr Ransley, was all conduct by which she and Mr Ransley came to be involved in ROSA, ResCo, DCM and NuCoal, as well as Springsure and TheChairmen1.

166. The inconsistences between their s 264 interviews and affidavits and oral evidence, their evasiveness in the s 264 interviews and some of the oral evidence, the unbelievable nature of their proposition that their memory had improved between 2013 and 2015 due to looking at documents which did not mention any discussions between them, the dubious reasons each gave for their obstructive position in the s 264 interviews, and the entire thrust of their evidence has forced me to the conclusion that nothing Ms Ransley or Mr Ransley say about any contested matter can be accepted as reliable. I infer further that in the s 264 interviews each was concerned to conceal the position rather than disclose what they could recall. This inference in turn lends weight to the conclusion that they each believed that if they disclosed the truth it may or would be contrary to Ms Ransley's interests.

5. MR POOLE'S EVIDENCE

167. Mr Poole gave an affidavit and oral evidence. He explained that he was a director of TESA between April and August 2006 and became a director of ROSA and its subsidiary ResCo in November 2006, having first met Mr Ransley in early 2006. Mr Poole said the offer TESA received to be acquired came out of the blue as he was not aware of the board taking any steps to sell TESA. Towards the end of 2006 Mr Ransley and he discussed establishing a new "pit to port" mining services business formed by acquiring and consolidating existing businesses in the industry and Mr Ransley's object of providing mining training services as there was a significant skills shortage in the industry. Mr Poole believed that there was a market opportunity to meet this shortage and he agreed to

invest in a new business. ROSA and ResCo were then incorporated. Mr Poole was the original shareholder of ROSA and sole director of both companies, the object being ROSA would be the holding company into which equity investments would be made and ResCo would be the operating entity.

168. Mr Ransley then mentioned approaching Mr Maitland. They met Mr Maitland in December 2006 and outlined the "vision" for ResCo. In January 2007 Mr Ransley told Mr Poole he had organised a meeting about a training mine. Mr Poole said he did not know what that was and attended the meeting with Mr Ransley and Mr Maitland who was very interested in the concept. Mr Poole said that from his perspective "the mine would have to be sufficiently profitable to justify the expense of establishing the training facilities and conducting the training". He also attended the meeting with the geologist about the Doyles Creek site. Mr Poole said:

> *I also recall that Mr Maitland or Mr Ransley raised during the meeting the possibility that the Minister might grant us an exploration licence for the Doyles Creek deposit on the basis that we would conduct a training mine there and Dr Palese then said words to the effect "Well, good luck with that".*

169. On 15 February 2007 Mr Maitland and Mr Ransley became directors of ResCo Services and Mr Ransley's wife Nera was issued one share in ROSA.

170. Mr Poole said:

> *I did not have any discussions with either Mr Ransley or Mrs Ransley about their expectations regarding the shares held by Mrs Ransley in ROSA or when they might sell that interest. It was a topic that was never discussed in my presence.*

171. I accept this evidence. Further, it cannot be inferred or assumed that the intentions of Ms Ransley were the same as those of Mr Poole.

172. Mr Poole said he agreed with the report of Mr Ransley to the board that DCM should not participate in a competitive tender process for an exploration licence for Doyles Creek, saying:

> *I considered that the proposal for a training mine was the best way of persuading the Minister that he should grant an exploration licence without going out to tender because of the benefits which the training mine would provide to the mining industry, but if we were unsuccessful we should explore other ways of implementing the training mine concept.*

173. I accept that Mr Poole considered the training mine to be the best way to avoid a competitive tender process. Mr Ransley's evidence was to the same effect and, as I have said, it must have been and I infer was known to Ms Ransley before she acquired her share in ROSA that the concept of the training mine was essential to the obtaining of an exploration licence without needing to compete in a tender process.

174. Mr Poole explained that after meeting Mr Hurford of WDEI he arranged a restructure of ROSA and ResCo:

> *…whereby the shares in ResCo Services would be issued to the shareholders of ROSA in the same proportions as their shareholdings in ROSA. ROSA was renamed ResCo Services Pty Ltd ("**ResCo**") and ResCo Services was renamed Doyles Creek Mining Pty Ltd ("**DCM**"). DCM would pursue the training mine business and ResCo would continue with all the other business. The aim was that ResCo would provide contracting services to DCM including operating the proposed training facility. I was a director of ResCo from November 2006 to 23 November 2011 and a director of DCM from November 2006 to 9 August 2012.*

175. Mr Poole said that he recalled speaking to Mr Baxter of Westpac with Mr Ransley about arranging finance for the required land acquisitions. In response to the internal Westpac memorandum that Mr Baxter prepared Mr Poole said:

> *While I cannot recall the content of every conversation I had with Mr Baxter, it is quite possible that I said that I would not be the operator of a coal mine (I had no experience whatsoever in managing or operating a coal mine and expected that experts in the area would take over the director roles). However I certainly never said to Mr Baxter or anyone else that I had no long-term intention of maintaining my investment in DCM. Nor did I ever hear Mr Ransley say any words to that effect.*

176. Mr Poole continued:

> *While I always contemplated that a large coal mining operator may acquire a substantial equity interest in DCM (so that DCM had the substantial capital needed to establish mining operations) or that the necessary funds may be raised by issuing shares under a public float, I never said, or heard Mr Ransley say, to Mr Baxter or anyone else that it was likely the land and exploration licence and training status would be sold to a large operator for significant financial gain. That was never in my contemplation.*
>
> *As I noted above, Mr Ransley (or Mrs Ransley) never mentioned to me that they intended to sell any shares in DCM or any other company. Mr Ransley never discussed with me his or Mrs Ransley's investments or their intentions concerning them and I never discussed mine with him.*
>
> *I also never said anything to Mr Baxter about "140 million tonne of terminal coal". I have never heard of the term 'terminal coal' - the coal deposit at Doyles Creek was*

> *soft coking coal - and I have no recollection of mentioning to anyone the figure of 140 million tonnes for the resource.*

177. I note that it is clear that Mr Ransley met Mr Baxter far more frequently than Mr Poole did and that, accordingly, there must have been many meetings between Mr Ransley and Mr Baxter which Mr Poole did not attend. As I have said, it also cannot be inferred or assumed that Mr Poole's intentions were the same as those of Ms Ransley and Mr Ransley.

178. Mr Poole said that in October 2009 he:

> *…transferred 8,069 shares in DCM to Mrs Ransley for no consideration. The transfer came after a conversation with Craig in which I said words to the effect that because we founded ResCo and DCM together our shareholdings should be roughly equal, and the transfer of 8,069 shares would bring our shareholdings broadly into balance.*

179. Otherwise Mr Poole referred to ResCo's financial difficulties and the capital raisings and his role as a director of NuCoal.

180. In his oral evidence Mr Poole, who holds an MBA and has been a financial officer and director of companies for many years, said he was aware that a private equity house had acquired a substantial part of TESA before he joined the board. He gave this evidence:

> *And is it the case that both in your tertiary study life and your professional life, you've come to learn a little bit about what private equity houses do for a living? Correct.*
>
> *And you know that they are investment entities generally with short-term time horizons or timeframes? Relatively three to five years is, kind of, their mantra, as I understand it.*
>
> *And they're generally entities that focus on trying to turn an investment into a profitable one as quickly as possible? I believe that would be one of their goals. Yes.*
>
> *And one of the things they're focused on is the need to have in place a cogent or clear exit strategy? Generally speaking, yes, I guess.*

181. Mr Poole also gave this evidence:

> *Okay. But at some point along the way, you became aware, didn't you, that Mr Ransley was passionate about pursuing an opportunity in the mining services space? Yes.*
>
> *You also became aware that he had another passion that involved potentially running a coal mine? No. I don't believe Craig ever wanted to run a coal mine.*

Well, you became aware that he was passionate about potentially obtaining a site in respect of which an exploration licence could be obtained? Yes. For a training mine. Yes.

Well, you stress that for a training mine. Are you suggesting there was going to be no component – no commercial component to the venture? Absolutely not. In my mind, there was always a commercial component that would have to pay for the training component.

You see, it's a furphy to talk about a training mine as a stand-alone concept, isn't it, sir? I don't believe so, sir. No.

Well, are you suggesting that one could have a training mine without an operational mine that was part of the project? Not our project, no. That was never our intention.

And did you come to learn that the specific opportunity that Mr Ransley became interested in involved an unallocated tenement in the Hunter Valley? Yes, sir.

That it was called Doyles Creek? We called it Doyles Creek, yes.

And that it was neighboured by two of the largest coal mining companies in the world, Xstrata and Peabody? Yes. That's my recollection.

182. Mr Poole agreed he had been instrumental in the negotiation of the sale of TESA once the proposal had been put to the board and had sold his TESA shares in that process, as had all shareholders. He also agreed that before he was a director of TESA he was involved in another company, the ownership of which had been transferred to a private equity house. He said he and Mr Ransley then co-invested in the ResCo business as a business venture. He also said:

I've asked you the question about how it came to pass that you or an interest associated with you was the original shareholder of ResCo or Rosa formerly? Yes.

It was also the case, wasn't it, that you were the sole director of each of ResCo and DCM at inception? Yes, I believe so, yes.

And, sir, the circumstances in which that occurred, could you educate us? It was similar. I was the sole owner and the sole director until we got our – what I will call our corporate ducks in a row and decided on the full structure and the board that we wanted.

Well, when you say your "corporate ducks in a row", was one of those ducks the fact that Mr Ransley had – was, in fact, still working at TESA? TESA – he may have been working at Skilled, I don't believe he was with TESA at that stage.

Well, the entity that became the merged TESA/Skilled entity? Yes, I believe Craig worked there for some months, if I recall.

And was one of the key drivers, sir, of you becoming a director of each of these two companies at inception the fact that Mr Ransley had a non-compete clause? Yes, well, I certainly would never have wanted to compromise Craig in any non-compete that he had.

> *Well, I didn't ask you whether you would want to compromise him, I asked you whether that was a key driver of the decision for you to be a director? Yes, with the benefit of hindsight, you're probably right. I'm sure that was in the back of the mind then.*
>
> *Well, sir, what was in the front of mind, if not that? Well, we needed to get going, sir, and it was – it was just the easiest way to do it. I don't believe we undertook any activities for some months.*
>
> *It was the case, wasn't it, that in February of 2007 Mr Ransley became a director of DCM? Yes, that's right.*
>
> *And Mrs Ransley became a shareholder of Rosa or eventually ResCo? Yes, I believe that's right.*

183. Mr Poole confirmed his affidavit evidence that he had never discussed with Mr Ransley or Ms Ransley their investments or intentions concerning them. He also agreed that it had been a common intention that the Ransley and Poole interests in the business venture should be broadly equal. He transferred a parcel of 8,069 shares to Ms Ransley for no consideration in October 2009, which was something he had never done before for a non-family member. The purpose was to bring the Ransley and Poole shareholdings broadly into balance. Mr Poole also agreed that since the ResCo and DCM business ventures he had entered with Mr Ransley they had also "sat on the board of a number of different companies since then together, and invested in the same companies". He continued:

> *There was Springsure Mining, which was a training mine in Queensland, but still active, and I was on the board up until about two months ago now. There was – and there was Chairmen1. I wasn't involved in the setup of Chairmen1, from memory. I came some time later in about, if I recall, 2012. I believe it had been running for a little while then. We have a small investment company together called More Investments. That is still active. That held shares in Bluestone. I believe that was the only activities it did, but it may have held shares in something else, and it actually loaned money, from memory, to the Bluestone organisation. And we had another one called Some More Investments, that held some real estate, if I recall, sir. There may have been others but I don't recall.*

184. Mr Poole had become a director of TheChairmen1 in October 2010.

185. Mr Poole agreed that he had met Mr Baxter of Westpac both with and without Mr Ransley and it was possible Mr Ransley had also met with Mr Baxter without Mr Poole. He said:

> *Mr Baxter, I believe, was Craig's personal banker too so I assume they met but I don't recall an instance, no.*

186. Mr Poole was aware of the memorandum Mr Baxter had written. He accepted that Westpac would have been "keenly interested in, in such context…the business plan or the

business strategy that is proposed by the entity applying for the loan to implement or execute". This exchange then occurred:

> *And, sir, I want to suggest to you that that document is a faithful summary of the information that was provided to Mr Baxter on behalf of DCM by its principals. What do you say to that? I have – I cannot accept that, sir, if I am one of the principals because I absolutely did not say that stuff to John Baxter.*
>
> *Well, can I suggest to you that a number of things were told to Mr Baxter by you and Mr Ransley. That's the case, isn't it? Or you and or you or Mr Ransley, that's the case; isn't it? Yes, sir. We had a number of discussions.*
>
> *You and/or Mr Ransley, as principals of DCM, indicated to Mr Baxter that DCM was desirous of acquiring land on which the exploration licence would be sought? Sir, I'm not sure that Mr Ransley and I are the principals of DCM in Mr Baxter's mind. But in answer to your question, we did say that we were after the land and a loan for the land.*
>
> *And it was indicated, wasn't it, to Mr Baxter that an application had been made to the New South Wales government for an exploration licence in respect of that tract of land? Yes, sir. I certainly wouldn't deny saying that.*
>
> *It was also indicated that DCM wanted to pursue a training mine concept in relation to that area of land? Yes, sir. That was in our document.*
>
> *It was also indicated, wasn't it, that the training mine status of this proposed initiative or venture didn't entitle that venture to any additional government support? I don't ever recall that discussion, sir, but I read that in his memo.*
>
> *It was made clear at the time that DCM was not a trading entity. That's correct? That is correct.*
>
> *And information was provided to Mr Baxter about your and your wife's personal financial circumstances. That's correct? Yes, sir.*
>
> *And indeed such information was provided by Mr Ransley to Mr Baxter about the personal circumstances of he and his wife? I don't know, sir. I saw it in Mr Baxter's memo. I don't know where he got that from.*
>
> *Sir, I want to suggest to you that it was made clear by you or Mr Ransley to Mr Baxter that DCM had no intention of operating a coal mine in the long-term. What do you say to that? I absolutely reject that those comments were ever made in my company, sir. I certainly had no intention of operating a coal mine in the long-term. Nothing to do with the investments.*
>
> *I want to suggest to you that it was made clear by you and/or Mr Ransley to Mr Baxter that DCM had no intention at all of operating a commercial coal mine in the long-term. What do you say to that? I have no recollection of that discussion having been made with Mr Baxter or indeed with anyone, sir.*
>
> *And I want to suggest to you, sir, that what was made clear by you or Mr Ransley to Mr Baxter was that what was likely was that the land that DCM sought to acquire, the exploration licence it sought to obtain and the training mine status it was after would be sold to a large operator in the industry. What do you say to that? Absolutely not, sir. The thought never crossed my mind and was never discussed in my presence.*

And I want to suggest to you that what was indicated to Mr Baxter that, not only would those three things be sold to a large operator in the industry, that would be done for a significant financial gain. What do you say to that? Absolutely never discussed by myself or in front of me with Mr Baxter or anyone else.

And now, out of fairness to you, Mr Poole, in light of the answers you've just given, I want to suggest to you that the evidence you've given as to – or taking issue with certain select passages from the Westpac memo is evidence you've given that's not truthful? I don't believe that's right, sir.

And I want to suggest to you that it's evidence you've given so as to support Mrs Ransley in these proceedings rather than to do your best to tell the truth. What do you say to that? I absolutely refute that, sir. To the best of my knowledge, and ability and recollection, everything I've said in this room is true.

187. Mr Poole agreed that he and Mr Ransley had been required to give personal guarantees to support the loan from Westpac. He gave this evidence:

The bank here, the lending institution, sought from the principals of DCM, personal guarantees. Correct? They sought it from Craig and myself. Yes.

Are you taking issue with the idea that you and Mr Ransley were the principals of that entity? Small P – I take no exception to, sir. I'm not too sure who Mr Baxter was referring to as the principals.

You just said "small P". Is there in your mind, sir, a distinction between "P" with a capital and "p" with a lowercase letter "principal"? In terms of Mr Baxter's memo, I am not sure he was referring to Craig and I because, certainly, in my own case, I didn't ever say what Mr Baxter put in the memo.

…

It was the case, wasn't it, that it was you and Mr Ransley that were heading up those efforts on behalf of DCM? Yes, sir.

It was the case that Mr Maitland was chairman at the time, but he wasn't involved in those discussions, was he? Not in my presence, sir, but I do notice his name on Mr Baxter's memo.

Well, he wasn't one of the people that the banks sought a personal guarantee from, was he? I don't recall if the bank sought it, sir. No. I don't believe so, but I don't know.

The truth is only two personal guarantees were sought, isn't it, Mr Poole: one from you and one from Mr Ransley? Certainly only two were given, sir. I do not know if the banks sought a third one. I just don't know that.

188. Mr Poole still holds shares in NuCoal.

6. THE WESTPAC MEMORANDUM

189. The memorandum dated 10 March 2008 which Mr Baxter prepared states:

> *The said mining exploration licence has some 140 million tonne of terminal coal … The mine could commence in approx. 2 years. The principals of Doyles Creek Mining have however no long term intention of operating a coal mine and it is likely the land and exploration licence and training status would be sold to a large Operator for significance [sic] financial gain. The land adjoins an Xstrata mine site.*

190. It was submitted for Ms Ransley that this document did not support an inference that Ms Ransley had no intention of holding the DCM shares as a long-term investment. The submission was that:

> *Much was made of the memo of Mr Baxter being evidence of Mr Ransley (and through him Mrs Ransley) having no intention of holding the DCM shares as a long-term investment. That inference should not be drawn for several reasons. First, the memo is not nor purports to be a file note of a conversation with Mr Ransley and certainly not a contemporaneous one. Both Mr Ransley and Mr Poole denied ever telling Mr Baxter that DCM intended to sell the land and exploration licence to a large operator for significant financial gain. Second, the memo does not say or indeed justify an inference that any of the (unnamed) principals of DCM actually told Mr Baxter that "it is likely the land and exploration licence and training status would be sold to a large Operator for significance (sic) financial gain". It is and only purports to be Mr Baxter's supposition. Third, the memo is not consistent with what in fact took place – DCM applied for the exploration licence after the date of the memo, and the exploration licence was then issued on 15 December 2008. Thereafter, DCM took steps to raise the necessary funds to satisfy the conditions attached to the exploration licence, including raising equity from other mining companies, other investors and then ultimately a "back door listing" was chosen. At no stage in this process did DCM seek to sell the "land and exploration licence and training status". Indeed, to the contrary, Nucoal continued to take steps to establish the training mine until the cancellation of the exploration licence in January 2014. Fourth, the memo contains unexplained errors that cast serious doubt on its accuracy. There is no basis whatsoever for Mr Baxter concluding the tenement held inferred resources of 140 million tonnes. The contemporaneous documentary evidence is that the inferred resource was 125 million tonnes. And the term "terminal coal" is an expression unknown to Mr Ransley and Mr Poole. If Mr Baxter meant "thermal coal" (which is used in electricity generation) then he was equally mistaken as the DCM tenement contained soft coking coal (used in steel production).*

191. It may be accepted that the memorandum is not a contemporaneous file note of a conversation. Nevertheless, it is a business record of Westpac, created by Mr Baxter, an officer of Westpac, for the serious commercial purpose of lending money to DCM. As Mr Poole acknowledged, Westpac must have wanted to know the plans of both DCM and the guarantors, Mr Ransley and Mr Poole. The fact that both Mr Ransley and Mr Poole deny telling Mr Baxter that DCM would sell the land and exploration licence to a large operator for significant financial gain does not mean the memorandum is inaccurate.

192. First, Mr Baxter was Mr Ransley's personal banker which is why he was approached by Mr Ransley and Mr Poole on behalf of DCM. As such, Mr Baxter must have had many conversations with Mr Ransley without Mr Poole being present.

193. Second, as discussed above, I do not accept Mr Ransley as a witness of truth about contested matters.

194. Third, Mr Poole said that he had never been privy to the intentions of Mr Ransley or Ms Ransley about her shares in the companies involved in the Ransley/Poole business ventures.

195. Fourth, insofar as Mr Poole's evidence is concerned, it is a well-known human phenomenon that recall of past discussions is deeply imperfect. The clearest expression of this fact remains the statement of McLelland CJ in Equity in *Watson v Foxman* (1995) 49 NSWLR 315 at 319:

> *…human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.*

196. To this must be added, that Mr Poole is not a disinterested witness. He had a close business relationship with Mr Ransley and he continues to hold shares in some of the companies which they established as part of their business ventures, being companies in which Ms Ransley also continues to hold shares. As such, the submission that "it would be extraordinary for [Mr Poole] to perjure himself when he has no interest whatsoever in the outcome of the proceedings" is beside the point. It is not necessary to find that Mr Poole was perjuring himself to conclude that his version of events involving Mr Baxter is wrong and that a relatively contemporaneous business record created for the serious purpose of the provision of a loan by a bank is more likely to be reliable than Mr Poole's recollection of what he and/or Mr Ransley said to Mr Baxter in 2008.

197. Further, it cannot be seriously be doubted that the "principals" Mr Baxter had in mind were Mr Ransley and Mr Poole. The fact that they were the ones meeting with Mr Baxter about the loan, were directors of DCM, Mr Ransley also being the managing director, and that

they alone were required to give the personal guarantees leaves no room for doubt about the identity of the principals.

198. I also do not accept that the memorandum is recording Mr Baxter's mere supposition as opposed to what he had been informed by Mr Ransley and Mr Poole. The approach in the submissions for Ms Ransley is to parse the text of the key paragraph in an unrealistic manner. In my view, it is clear that the memorandum is recording what Mr Ransley and Mr Poole told Mr Baxter about their intentions as the principals of DCM, being to sell the land with an exploration licence to a large operator. The fact that the Doyles Creek site was adjoined by tenements held by Xstrata and Peabody, large mining companies, provides objective support to the existence of this intention. That Mr Baxter expressly referred to the adjoining Xstrata land is strong support for the inference that he had been told this by Mr Ransley and Mr Poole because it added credibility to the likelihood that, if an exploration licence was obtained, there would be a willing buyer (although, in the event, this turned out to require more effort and time than the Ransleys might have expected or hoped). As discussed below, there are many other contemporaneous circumstances which also support this inference.

199. The inconsistency argument (between the memorandum and what took place) does not particularly assist Ms Ransley's case.

200. First, DCM did apply for an exploration licence after the memorandum. Read as a commercial document, the memorandum is not assuming that an exploration licence existed. It is referring to the intended obtaining of an exploration licence.

201. Second, it should be inferred that steps to satisfy the exploration licence were necessary to maintain its value while DCM searched for ways to realise the value of the rights it was holding. DCM tried to interest Xstrata in the site (as Mr Baxter had been told it would) but failed, meaning it had to search for investors to maintain and enhance the value of its rights if they were to have any hope of realising that value. DCM could not simply sit on its hands and do nothing hoping that a large coal mine operator would propose some deal in which DCM shareholders could realise the increased value of their shares and, hopefully, ResCo would be the appointed services provider to the operator. The fact that equity was raised and a "back door listing" option ultimately chosen is consistent with the necessary action to maintain and enhance the value of the rights but is not inconsistent

with a continuing intention of Ms Ransley (jointly with Mr Ransley) to realise a profit from the sale of shares as part of a commercial or business operation of their own in which they establish a company (or companies) for the purpose of obtaining an exploration licence (or licences) with the intention of selling shares for profit when and in the manner that appeared to be the most opportune.

202. The errors in the memorandum do not cast doubt on its accuracy about what Mr Ransley and Mr Poole told Mr Baxter. The key information Mr Baxter needed and recorded was that the intention of the principals of DCM was to obtain an exploration licence which would significantly increase the value of the land, enabling them to realise the value of their investment in DCM at a profit.

7. MR MAHONEY'S EVIDENCE

203. Mr Mahoney is a chartered accountant and tax agent. He commenced acting as Ms Ransley's tax agent in 2008 when Mr Ransley approached him to prepare their 2007 returns. Mr Mahoney then prepared Ms Ransley's returns for 2007 to 2012.

204. Mr Mahoney said that it was his practice "during my meetings with clients as part of the preparation of their tax return to discuss with them a detailed checklist each year to assist me preparing their tax returns". The checklist is in evidence. It is detailed but it would not elicit information about a taxpayer's intentions at the time of acquiring shares. Mr Mahoney could not recall any specific conversations with Ms Ransley other than she informed him that she was not employed on a full-time basis but had some investments. He also said that Ms Ransley:

> *…always promptly provided me with the documents or information I requested and answered the questions I asked of her. In particular Mrs Ransley provided me with the details of any shares she acquired and the sale contracts or transfers of any shares she sold.*

205. Mr Mahoney said that:

> *From my discussions with her and her answers to my checklists and questions I formed the view that Mrs Ransley was not share trader and a was not otherwise carrying on any business activity. There was nothing that I saw or understood from my interactions with her that made me think she was anything other than a long-term investor.*
>
> *…*

> *On or about 9 May 2011 I met with Mrs Ransley in regard to the preparation of her income tax return for the 2010 income year. After that meeting I completed the annual checklist on information provided by Mrs Ransley…. After my discussions with Mrs Ransley and reviewing her responses on the annual checklist I formed the opinion that the shares she acquired in Doyles Creek Mining Pty Ltd ("**DCM**") were acquired on capital account and were consequently subject to the capital gains tax provisions.*
>
> *During my meeting with Mrs Ransley she informed me, among other things, that her remaining shares in DCM were 'swapped' for shares in NuCoal Resources NL ("**NuCoal**") as part of a public float. I received a holding statement showing the shares received by Mrs Ransley as part of the float…. The handwritten words "No CGT re scrip for scrip" are mine and reflect my conclusion that the CGT roll-over provisions in Division 126 of the Income Tax Assessment Act 1997 applied to Mrs Ransley's acquisition of the NuCoal shares.*

206. In his oral evidence Mr Mahoney agreed that his ability to "properly and comprehensively and truthfully inform" the Commissioner about a taxpayer's affairs depends on the information provided by the taxpayer. He agreed that it was his practice to take a careful and comprehensive note of his conversations with clients and would keep the documents on file. He had included all documents he could find about his dealings with Ms Ransley in his affidavit. He accepted that of the tax returns of Ms Ransley's that he had seen the returns for 2010 and 2011 were "far and away the most significant", as they "declared gains and windfalls in respect of the sale of assets that were enormous relative to previous experience of Mrs Ransley". This exchange occurred:

> *Can the court take this to be the case, Mr Mahoney, that if Mrs Ransley had sat down with you and in a chapter and verse way set out with you in granular detail the background to her investments in these companies ? I*
>
> *into ResCo, into DCM, ultimately into NuCoal, you would have quite comprehensive and detailed notes of those discussions? Yes. I don't recall having any sort of – I don't recall any specific discussions*
>
> *Well ? and I don't recall having the detailed notes on discussions.*
>
> *And in light of the answer you gave to her Honour earlier about your general practice, can the court assume that if such detailed granular conversations had occurred about the backstory in terms of Mrs Ransley buying into or acquiring the assets in question, they would have been in your records and they would be annexed to your affidavit? If I thought that they were required to support the checklist that I had prepared. And*
>
> *Well ? To support that, yes.*
>
> *that's not quite my question? Okay.*
>
> *You're not suggesting, are you, that you've got back in the office detailed records of really granular ? No.*
>
> *involved conversations you had with Mrs Ransley ? No.*

around these income tax returns? No.

You're not suggesting for a moment that there's a body of such documentation that you've put to one side, are you? No, no, no.

My question is in light of the evidence you've given to her Honour about your practice of taking careful notes ? Yes.

when you meet with taxpayers ? Yes.

around the lodgement of tax returns, can we assume, Mr Mahoney, that if you had had such detailed granular conversations with Mrs Ransley, there would be detailed notes in your affidavit to that effect? Yes.

And the fact that they're not there means, to your mind, in light of your practice, that you didn't have any such ? Detailed

conversations? Yes.

…

Mr Mahoney, is this the case, sir, that to the best of your recollection, Mrs Ransley did not have detailed, comprehensive, granular discussions with you about the circumstances in which she came to acquire shares in DCM? I don't recall. I – I – I don't recall the – there being specific discussions – detailed discussions.

If they did exist, you would have taken a note of them? I would think so, yes.

And the fact that there's no such note attached to your affidavit makes you believe, in light of your practice, that they probably didn't occur; correct? That would be correct.

If I asked you the same question about whether you had such detailed discussions with Mrs Ransley about the circumstances in which she came to acquire a share in the entity Rosa that subsequently became ResCo and all of the surrounding circumstances in that regard, is it the case that you don't recall any such conversations? I don't recall discussions, no.

And can we also assume that if they did exist, you would have had a careful detailed note of those conversations? Yes.

And you would accept that the absence of any such note annexed to your affidavit means those conversations probably didn't exist? Well, it depends how detailed, I suppose, the conversations. I – in order to answer the checklist, I would have had discussions about the transactions involving the shares. I'm – I'm sorry. I'm not exactly sure what you mean by the – the detailed conversations.

Well, I mean detailed conversations going to all of the surrounding circumstances: the role, for example, that her husband was playing in establishing the relevant entities; the role, for example, that others were playing alongside her husband in establishing those entities; the circumstances in which, for example, it was decided as between her and her husband that she was to own the original share in Rosa. You didn't have detailed conversations with her around those issues, did you? I don't recall having a detailed conversation.

No. And, sir, when you say you don't recall, you would accept, wouldn't you, that the fact that there is no note attached to your affidavit in relation to such matters indicates they probably – those conversations probably did not occur? Yes. Yes.

That's, yes, you accepting that proposition? I accept that, yes.

207. Mr Mahoney also gave this evidence:

> *Do you think in light of the substantial nature of those two income tax returns, it would have been a prudent thing for Mrs Ransley to obtain written advice in relation to them? I – I – no. I can't – I can't say I would definitely agree with that.*
>
> *In any event, sir, the reality is this, isn't it: firstly, you were never asked to provide such written advice? Right. No, I wasn't.*
>
> *And the case is that you never gave such written advice? That's right.*
>
> *And you're not aware of any such written advice ever having been given? No.*

208. As noted, Mr Mahoney's checklist involves a series of pro-forma questions including a section headed "Net income from Business". The first question under this heading is "Did the Taxpayer derive income from business" against which the "No" box is ticked. Another section is headed "Capital gain or loss" which includes these two questions, each of which has the "Yes" box ticked:

- Did the Taxpayer sell, dispose or redeem any other asset during the year? If so, refer to the Capital Gains Tax Checklist.
- Does the Taxpayer require a capital gains tax register to be prepared?

209. I infer from the evidence of Mr Mahoney, and the evidence of Ms Ransley about her dealings with Mr Mahoney, that she told him she held shares in companies as investments and otherwise answered questions he asked and provided him with documents he requested. I infer that she did not volunteer to Mr Mahoney detailed information about her intentions (which were also held by Mr Ransley) with respect to those shares or details about the business ventures involving the Ransleys and Mr Poole. I describe the business ventures as involving the "Ransleys" and Mr Poole because Ms Ransley was necessarily a part of the ventures. She, along with Mr Ransley, decided what role she would play in the ventures (shareholder) and what role he would play (director and managing director). It does not matter that Mr Poole was unaware of the intentions of and arrangements between Mr Ransley and Ms Ransley. Ms Ransley was as much a part of the business venture as Mr Ransley.

8. INFERENCES FROM THE EVIDENCE

210. I consider that a large number of objective contemporaneous circumstances support the inference that Ms Ransley acquired all of the relevant shares as part of a business or commercial operation in which she and Mr Ransley were both involved as equal partners.

The essence of the relevant business or commercial operation or transaction to which Ms Ransley was a party was a scheme to establish a company or companies in which Ms Ransley was a shareholder and Mr Ransley a director and manager, and in which Mr Poole also was involved or to be involved as a director, for the purpose of the company or companies obtaining directly allocated exploration licences. This would be achieved on the basis of a proposal that the mine would function as a commercial mine funding a training mine, thereby increasing the value of Ms Ransley's shares in the company and enabling that profit to be realised by sale as and when and in the manner most opportune.

211. It is not inconsistent with that business or commercial operation that Ms Ransley continues to hold shares in Springsure and TheChairmen1 or that Mr Poole also holds such shares, as well as shares in NuCoal. As to Mr Poole, it cannot be known one way or another whether, from his perspective, it was most opportune to sell his shares in NuCoal at the same time as Ms Ransley sold her shares. The fact that he continues to hold NuCoal shares, having not sold them in 2010, is not surprising given that it is an agreed fact that on 23 November 2011 both Houses of the NSW Parliament referred to the ICAC under s 73 of the *Independent Commission Against Corruption Act 1988* (NSW) the following issues:

> *(1) the circumstances surrounding the application for and allocation to DCM of Exploration Licence No 7270 under the Mining Act 1992 (NSW) ("Mining Act").*
>
> *(2) the circumstances surrounding the making of profits, if any, by the shareholders of NuCoal Resources NL as proprietors of DCM.*
>
> *(3) any recommended action by the NSW Government with respect to licences or leases under the Mining Act over the Doyles Creek area.*
>
> …

212. As to Ms Ransley continuing to hold shares in ResCo, Springsure and TheChairmen1, again, it is not possible to know if circumstances have been opportune for the sale of those shares. For example, ResCo met with financial difficulty and the venture did not succeed so it may be inferred that there was no opportunity to sell for a profit. It also cannot be inferred that there was any opportunity to sell the shares in Springsure and TheChairmen1 which Ms Ransley refrained from taking as a result of her avowed intention to be a long-term investor only. It is equally possible that no opportunity to profit existed.

213. Otherwise, I accept the Commissioner's submissions that Mr Ransley and Ms Ransley were a team in relation to the business ventures into which they entered who played

different roles, Ms Ransley's role being the holder of the shares in the relevant companies. As the Commissioner submitted the objective circumstances support the inference that:

> *Ms Ransley's activities in acquiring shares in DCM and later NuCoal were not an exercise in passive investment entered into with a mere hope of making a profit. She, with her then husband, was engaged in the conduct of a business, or an overarching commercial transaction or dealing or a series of commercial transactions or dealings, one of the purposes which was contemplated was to build up the DCM business venture and to sell out of the venture to realise a profit if a suitable opportunity arose to do so.*

214. I also accept the Commissioner's submission that:

> *The evidence demonstrates that the relationship between Mr and Ms Ransley was not limited to that of a director and a shareholder at arm's length. Mr Ransley was one of the key persons involved in the DCM business venture, Ms Ransley, was his wife and a lawyer, by agreement with him was the stakeholder of the Ransley interest in the ventures. She was privy to many conversations with Mr Ransley in which they made decisions together in relation to their common pool of funds and the business ventures with which they were concerned. Each considered the other's interests. It is artificial to make findings through the lens of the director/shareholder relationship when the evidence demonstrates that the Ransleys were acting as a "team" in the business venture throughout.*

215. I agree with the Commissioner that based on what had occurred with TESA and his concept of a training mine as a possible way of receiving a direct allocation of an exploration licence, Mr Ransley and Ms Ransley both contemplated that the new business venture with Mr Poole (ROSA, ResCo, DCM) had as a not insubstantial part of the purpose (and, indeed, as a substantial part of the purpose) that if an appropriate opportunity arose to do so, Ms Ransley would realise a profit by selling her interest. This was Ms Ransley's intention at all material times.

216. It is not to the point that Mr Ransley said he did not want to sell his shares in TESA. He founded TESA. He decided to bring in private equity interests as the majority shareholder. And when the majority shareholder voted on the sale, Mr Ransley also sold all his shares at a substantial profit made in respect of a start-up in a period of only 30 months. I agree with the Commissioner that this was a "watershed" moment for the Ransleys in that they appreciated that the training mine concept provided an opportunity to replicate the success experienced with TESA but on a larger scale. And, as hindsight shows, their plan succeeded.

217. I agree with the Commissioner that:

> *Ms Ransley's activities were in no way analogous to those of an investor for profit in a listed company. Applying a business conception to the case, Ms Ransley's activities, were clearly, undertaken in support of and coordinated to promote Mr Ransley's objectives having regard to his role in the DCM business venture. A not insubstantial purpose which they both contemplated from inception was to achieve a profit upon divestment following the grant of an Exploration Licence.*

218. Ms Ransley assisted in establishing the companies. She was joint decision-maker with Mr Ransley about the business venture and their respective roles. Further, as the Commissioner said:

> *She realised and agreed with the use of the proceeds of the TESA sale to pursue the new business. She provided security over both her Newcastle and Tasmanian residential properties to fund additional equity contributions to ResCo and DCM …. She had access to and discussed matters pertaining to the business of the companies with persons engaged in the business, including her husband.*

219. As the Commissioner also submitted, Ms Ransley's avowed purpose of investing in order to ultimately obtain dividends is objectively unbelievable. The companies were all start-ups. DCM had no operating revenue. DCM was not an established coal mining company. Its land adjoined tenements of established coal mining companies. Ms Ransley had no basis to assume that dividends would ever be paid. By contrast, it was obvious that the value of her shares in DCM would substantially increase if DCM obtained the direct allocation of an exploration licence.

220. The Westpac memorandum, as discussed, also supports the inference that I have drawn about Ms Ransley's intentions at all material times. As the Commissioner said:

> *The clear inference is that, at least by 10 March 2008, Mr Ransley and/or Mr Poole had represented to Mr Baxter that a not insubstantial objective of the DCM venture was to divest for profit prior to any mine becoming operational. The fact that Mr Baxter was also given information as to other contingencies including that ResCo Services would manage and operate the mine if it was not sold prior to becoming operational and that selling the land was a possibility if an Exploration Licence was not granted does not detract from the inference that Mr Ransley intended from inception to profit by divestment after an Exploration Licence was obtained and that this was conveyed to Mr Baxter as the primary objective by at least 10 March 2008. That Mr Baxter does not refer in precise terms of the form which a future disposal might take does not detract from the weight that should be afforded to this contemporaneous record.*
>
> *Ms Ransley shared Mr Ransley's purpose in this regard as is evident from their joint approach "many discussions" and joint co-ordinated actions in divesting for profit when the opportunity arose to do so.*

221. I accept the Commissioner's submission that:

> *The timing of Ms Ransley's disposal of the whole of her DCM and NuCoal shares; her inability to explain in a meaningful way her purported desire to invest for the long term coupled with her protestation that she gave no thought to any sale at any future time; her lack of any credible explanation for why she abandoned her purported intention to hold the shares for the long term; and her inability to "recall" her subsequent investment in Mr Ransley's next venture (vis. The Chairmen1 Pty Ltd), gives rise to a compelling inference on objective grounds that from inception Ms Ransley's purposes included selling out to realise a profit after the Exploration Licence was obtained. Ms Ransley was in fact acting on the intention which she had had from the outset as a not insubstantial part of her purpose, namely to divest herself of the relevant shares to realise a profit when a suitable opportunity arose to do so.*

222. These submissions accord with the conclusions I have reached above and make sense in the objective contemporaneous circumstances. In contrast, the evidence of Ms Ransley and Mr Ransley as to their joint intentions makes no sense in the objective contemporaneous circumstances.

223. Consistently with the Commissioner's submissions, I consider that the evidence given by Ms Ransley and Mr Ransley in the s 264 interviews in December 2013 was, in many respects, untrue, inaccurate and incomplete. I infer that they presented such evidence because they were concerned to conceal the true nature of their jointly held intentions in respect of Ms Ransley's acquisition of the relevant shares. This, in turn, supports the inference that their true intentions were as I have described them, rather than as they have described them (that is, for Ms Ransley to hold the shares long-term in the hope of ultimately receiving income by way of dividends and with no thought given to the prospect that once an exploration licence had been obtained by direct allocation rather than through a competitive tender process as a result of the inclusion of the training mine concept, the shares could be sold at a substantial profit).

224. I accept the Commissioner's propositions that Ms Ransley's rationale for selling shares was unconvincing.

225. First, she sold all her shares in NuCoal which yielded far more than she invested in ResCo. She had no credible explanation for having done so given her avowed passionate commitment to seeing the training mine established. I also agree that the fact that Ms Ransley continues to hold shares in various companies which formed part of the venture is neutral. As the Commissioner put it, for example:

> *The fact that Resco did not resolve its financial difficulties and that Ms Ransley continues to hold shares in Resco is neutral. It does not give rise to an inference that her original intention was to invest for the long term in Resco, and does not give rise to any inference in relation to the DCM venture. The stronger inference is that her intention in relation to realising a quick profit in relation to Resco (as with TESA upon which the Resco venture was based) was not fulfilled because ultimately her expectation that Mr Ransley would repeat the TESA "watershed" with Resco did not eventuate.*

226. Second, she sold shares in DCM well before the death of her mother-in-law. I again adopt the Commissioner's submissions as follows:

> *Her suggestion that this event suddenly triggered a desire to sell the relevant shares is inherently implausible, and should be rejected as a self-serving attempt to mask one of her true intentions from inception. Moreover, this explanation cannot be reconciled with Ms Ransley resigning as director of the Chairmen1 immediately after the death of her mother-in-law leaving a grief-stricken Mr Ransley as the sole director of the Chairmen1 for a period. That is particularly so having regard to the activities of the Chairmen1 at around this time as revealed by the report of the Takeover Panel [TheChairmen1 Pty Ltd and Guildford Coal Limited [2010] ATP 10].*

227. The report of the Takeover Panel discloses that TheChairmen1 proposed a capital raising by way of placement and rights issue in circumstances where TheChairmen1 had promoted the initial public offering and listing of Guildford Coal which listed on 22 July 2010. Given Mr Ransley's roles as director of TheChairmen1 and Guildford Coal, and the complex relationship between all of the business ventures in which the Ransleys and Mr Poole were involved as shown in the diagram at [6] of the report, the proposition that Ms Ransley sold shares in NuCoal to make her husband happy given the death of his mother cannot be accepted.

228. I agree with the Commissioner that the fact that some shares in DCM were initially acquired by the Ransley's superfund is of no particular assistance to Ms Ransley's case. As the Commissioner submitted, the argument depends on the false premise that shares acquired in a superfund are necessarily intended to be held as long-term investments.

229. I do not find the submissions for Ms Ransley to the contrary of these conclusions persuasive.

230. The sale of TESA is significant because it demonstrated the kind of money that could be made if a start-up company is sufficiently successful to attract a takeover offer. But it is what happened next that matters most. Buoyed by the "watershed" moment that the

funds from the sale of Mr Ransley's TESA shares, and knowing (as I infer he did), that the concept of a training mine might enable the grant of an exploration licence other than through a competitive tender process in circumstances where a start-up company could not otherwise hope to succeed against established coal mining companies, Mr Ransley decided on his next business venture. The venture depended on the direct grant of an exploration licence. If this could be achieved, then the value of whatever entity constituted to hold the licence would substantially increase and provide an opportunity for the Ransleys to both make a substantial profit by the most opportune means. It was essential to this venture that Mr Ransley and Ms Ransley agree on their respective roles and they did so. Ms Ransley would be the shareholder in the companies established for the venture. Mr Ransley would be the director and involved in management.

231. The fact that Mr Ransley's venture also included a mining services company to provide the training and other commercial mine services at the mine is not inconsistent with the nature of the business or commercial operation or scheme in which the Ransleys were involved. Once an exploration licence had been obtained, there would be many opportunities for deals to be done, including with respect to the services provision. I infer it must have always been in their joint contemplation that their shares in the services company would themselves be sold for profit if the profit opportunity was good enough. I do not accept that the "training mine concept was a genuine adjunct to the mining services business which evolved into the proposal to establish ROSA in November 2006". This submission fails to appreciate the centrality of the training mine to the scheme. If anything, the mining services business was an adjunct to the training mine concept which would enable a substantial profit to be obtained in a relatively short period compared to the period which it would have taken to establish a mine and for it to produce dividend income. This is supported by the fact that it must have been obvious to the Ransleys that if an exploration licence could be directly obtained then the company holding the licence would substantially increase in value. Leaving aside the issues which the ICAC report involved, once an exploration licence was so granted the increased profit was effectively risk free. In comparison, establishing and operating a coal mine with the hope of receiving dividends would have been high risk and require the kind of capital expenditure that a company such as DCM could not have hoped to access without the involvement of a major investor, most likely an established coal mining company (two of which controlled adjoining tenements). In this context, the idea that Ms Ransley was a mere long-term investor hoping for dividend income from an established coal mine defies belief. There

was a much easier way to make a relatively quick and substantial profit which was the training mine concept enabling the direct grant of an exploration licence.

232. The fact that Mr Ransley conceived of the training mine idea while at TESA and investigated possible mine options does not lead to any contrary conclusion. Had he not already invited private equity into TESA which held a majority interest, TESA may have been the company used to pursue the training mine concept. As it was, he had sold the majority interest in TESA and TESA was not interested in pursuing the concept. The Ransleys jointly decided to go into business with Mr Poole in respect of the training mine and mining services concept, with the Ransleys deciding between themselves what their respective roles would be (that is, Ms Ransley as the shareholder in the companies to be established). In my view, as between themselves, Mr Ransley and Ms Ransley were involved in a business or commercial operation or scheme a substantial object of which was for the value of the shares Ms Ransley held to be increased by the obtaining by the chosen corporate vehicle of a directly allocated exploration licence after which Ms Ransley could sell her shares for profit. While another object, no doubt, was for Mr Ransley to be employed in managing the corporate vehicles of their commercial enterprise during the period whilst Ms Ransley held the shares, I do not accept that this fact meant that they intended Mr Ransley would be so employed long-term with Ms Ransley holding shares in the companies as an associated long-term investment.

233. I do not consider that the way in which Ms Ransley acquired her shares in DCM, initially or otherwise, indicates that a contrary conclusion should be reached. She did acquire those shares as a result of her shares in the ROSA and ResCo companies. The relevant point is that it is apparent that her original intention with respect to those shares continued, that intention and profit making purpose being as described above.

234. I accept that there was no certainty that an exploration licence would be directly allocated and that Mr Ransley explored the possibility of acquiring another mine that had largely ceased operations. However, the email which involved this possibility, in fact, says this, which is consistent with my conclusions:

> *On another issue we have been talking at great length internally about finding an area to get our training mine up and running immediately so as to build the PR trains momentum for Doyle's. I'm not looking for anything but a commercial opportunity but Teralba came to mind, if there would be an opportunity to take this off your hands at the right price and work to set up a training mine sooner rather*

than later let me know, alternatively if you know of any other operations that may suit please let me know.

235. In other words, the defunct Teralba mine was an aspect of supporting Mr Ransley's real objective which was to obtain the exploration licence over the Doyles Creek site by direct allocation. It can hardly be doubted that this was so given that Mr Ransley recommended, and DCM's board accepted, that if they could not persuade the Minister to directly allocate the exploration licence then DCM would not pursue the exploration licence at Doyles Creek at all.

236. The fact that Ms Ransley did not hold the majority of the shares in DCM, in my view, is immaterial. The obtaining of a directly allocated exploration licence would substantially increase the value of her shares providing an array of opportunities for realising their value as part of the business or commercial scheme which the Ransleys developed after the sale of TESA. Ms Ransley's subsequent acquisitions of shares in DCM, I infer, were part of the same business or commercial scheme, the shares all being acquired with the same intention. The fact that all shares were acquired before the grant of the exploration licence, to my mind, supports the conclusions I have reached. It was the grant of the exploration licence which would substantially increase the value of the shares. Ms Ransley was involved in a speculative venture, effectively dependent on the capacity of Mr Ransley and Mr Poole to manage the companies in a way which enabled the case for the directly allocated exploration licence to be made to the Minister. To that end, they brought Mr Maitland on board and built a case for the direct allocation of the exploration licence which succeeded, just as Mr Ransley and Ms Ransley had intended, thereby opening up opportunity to realise the substantially increased value of her shares.

237. While I accept that the fact of the exploration licence not being limited in depth provided an unexpected windfall, I do not accept Mr Ransley's evidence that the value of the resource as originally anticipated would be between zero and $10 million. The mine had to be commercially viable. This is clear from Mr Poole's evidence. The mine had to fund the training component. Contrary to the submissions for Ms Ransley, the fact that it was not clear that the site would be a commercially viable mine supports my conclusion that she was involved in a speculative venture where the source of the hoped for increased value was to be the exploration licence itself. The windfall provided by the condition of the exploration licence simply yielded an even greater increased value than the Ransleys initially anticipated.

238. I do not see the fact that Springsure also applied for an exploration permit in Queensland including a training mine when apparently that was not required to obtain the permit leads to a different conclusion. The fact remains that, as the Ransleys knew at all times, the training mine was essential to the prospect of obtaining a directly allocated exploration licence in New South Wales.

239. The submission for Ms Ransley that her case is supported by the fact that DCM sought to negotiate a joint venture with Xstrata should not be accepted. In other parts of the submissions for Ms Ransley it was correctly emphasised that the relevant intention and purpose is that of Ms Ransley, not of the companies in which she held shares. The fact that DCM wished to pursue a joint venture with Xstrata is not inconsistent with my conclusions about Ms Ransley's intention and purpose at all material times. DCM could not implement the exploration licence and maximise its potential value without further capital. A joint venture with Xstrata would have further increased the value of Ms Ransley's shares enabling their sale at a profit. The "backdoor" listing of DCM was another way of achieving the same object of maintaining and maximising the value of the exploration licence. The submission that Ms Ransley did not "sell out of the business at the first opportunity" is similarly unpersuasive. First, it is not apparent that there was an opportunity to sell out shares in DCM before she did so as no investor had been found. Second, waiting until what seems to be the most opportune time to sell is consistent with my view about Ms Ransley's intention and profit making purpose.

240. For the same reason, the fact that DCM brought in people experienced in mining does not support Ms Ransley's case. It discloses DCM's understandable object of ensuring that it was able to maximise the value of the opportunity which it had obtained.

241. I accept that Ms Ransley obtained her shares in NuCoal because she held shares in DCM. The consequence is that the acquisition of those shares involved the same intention and profit making purpose as I have found above.

242. I do not accept the submission that:

> *The Applicant's activities were limited to acquiring, passively holding of shares in DCM and then Nucoal, reading information provided to shareholders and then disposing of the shares, and was not involved in day to day management*

243. Ms Ransley is a well-educated person, legally qualified, established ResCo and ROSA, knew or came to know the people involved in DCM, and was not infrequently in the office discussing how things were going. I infer she kept herself well informed about how the venture was proceeding. She did so because that bore directly upon the success of the business or commercial scheme in which she and her husband were involved of ensuring that the shares she held increased in value to such an extent that it was opportune for their value being realised.

244. While I accept that ResCo's financial difficulties were a reason which motivated the timing of Ms Ransley's sale of some of her DCM shares I do not accept that this circumstance undermined her intention of being a long-term investor. As the Commissioner noted, she could not explain why she progressively sold all of her shares, far more than she invested in ResCo, despite being allegedly passionately committed to being a long-term investor in the training mine.

245. Nor do I accept that Mr Ransley's resignation as a director of DCM on 27 November 2009 and his focus on ResCo explains why Ms Ransley continued to sell down her shares. Similarly, the fact that they continued to hold shares in ResCo says nothing because it cannot be inferred that there was any opportunity for such shares to be sold at a profit. Sale of the shares, be it DCM or NuCoal shares, was part of the commercial transaction into which Ms Ransley entered when she first acquired her ROSA and ResCo shares.

246. I do not consider that the Commissioner's case or my conclusions conflate the business of DCM with the business in which Ms Ransley was involved. The relevant business or commercial scheme or dealings are those of Ms Ransley in acquiring and disposing of her shares. The scheme, as I have said, involved the intention of increasing the value of her shares by obtaining a directly allocated exploration licence and then realising the profit at a time and in a manner as appeared most opportune. The profits were not the result of a mere realisation of an investment but of a commercial transaction into which Ms Ransley entered for the purpose of making a profit.

247. I also do not accept Ms Ransley's evidence that she never intended to sell the shares once an exploration licence was obtained because she was interested in making a long-term investment and circumstances forced her to change her mind. The fact that she did not sell immediately on the obtaining of the exploration licence, in my view, is immaterial.

The licence was granted to DCM on 15 December 2008. To maximise the value of the licence (and thus the shares in DCM) it was necessary to find investors who would acquire shares. Ms Ransley, in effect, had no choice but to hold her shares until the right investor had been found (Taurus) which did not occur until October 2009. Ms Ransley then divested $5 million of her DCM shares, being 50% more than she reinvested in ResCo. She then sold further shares to Mr Galt, a director of Taurus. Her remaining DCM shares were acquired in exchange for NuCoal shares on 4 February 2010. Ms Ransley then sold all of her NuCoal shares in tranches between March and September 2010. This course of events is inconsistent with the proposition that Ms Ransley acquired the shares with a view to making a long term investment and ultimately deriving income from the shares by way of dividends.

248. I accept the Commissioner's submission that Ms Ransley's intention and purpose at the time of the acquisitions was not required to include the precise means by which the profits were obtained. The requisite level of generality or specificity to be applied to the concept of "the means giving rise to the profit" (*Myer* at 210) must depend on the nature of the business operation or commercial transaction being pursued. The "particular operation" (*Westfield* at 342) into which Ms Ransley and Mr Ransley entered from late 2006 (at least insofar as they were concerned) involved establishing corporations which Mr Ransley would manage and in which Ms Ransley would hold shares for the purpose of obtaining exploration licences based on the concept of a training mine and the provision of mining services to that training mine, the objective being to increase the value of the shares to enable them to be sold at a profit at the most opportune time and in the most opportune manner. This operation or transaction was sufficiently broad in scope to encompass the changes in corporate structure and arrangements which occurred between 2006 and 2011. The operation or transaction, and its profit-making purpose, remained consistent at all material times. In this sense, the transactions into which Ms Ransley entered selling her shares did not fall outside of the ordinary scope of the business operation or transaction in which she was involved from the outset. In any event, as Hill J said in *Westfield* at 345 while "a profit-making scheme may lack specificity of detail, the mode of achieving that profit must be one contemplated by the taxpayer as at least one of the alternatives by which the profit could be realised". The mode by which Ms Ransley achieved the profit was simply the selling of shares in the corporation established for the purpose of being the vehicle to hold the exploration licence. This was one of the modes of making the intended profit which Ms Ransley (and Mr Ransley) must have had in mind

from the inception of the scheme. The fact that the corporate vehicle changed as a result of the requirements of the financier and the exigencies of the circumstances did not itself need to be in specific contemplation.

249. For these reasons I am satisfied that the DCM and NuCoal shares were acquired on revenue (not capital) account and the profit she made on their sale is assessable as ordinary income. It follows that Ms Ransley cannot succeed in either proceeding.

250. Leaving aside the issue of administrative penalties, Ms Ransley also noted (as an alternative argument) that she had only claimed the losses she made on the disposal of her ResCo shares on capital account. On Ms Ransley's behalf it was submitted that:

> *…if the DCM shares were acquired on revenue account then so were the ResCo shares. As the two companies were established at the same time and were intended to operate as part of the same group, if it is concluded the DCM shares were acquired on revenue account then by parity of reasoning the ResCo shares were also on revenue account and the loss on their disposal would be deductible.*

251. The issue is Ms Ransley's acquisitions of the ResCo shares on 21 October 2009 and 6 April 2010 which she subsequently transferred for nil consideration (and thus at a loss) to the RednBlonde Pty Ltd.

252. The Commissioner submitted that the acquisition of these shares was made to capitalise ResCo in circumstances where Westpac indicated that it would not meet ResCo's expenses and would liquidate the company. The Commissioner also noted that Ms Ransley had not explained why she transferred the shares to RednBlonde on 18 May 2010 for nil consideration.

253. I am not satisfied that Ms Ransley has discharged her onus of proof in relation to this issue. While I would accept that her initial share in ROSA was acquired on revenue account (consistent with my conclusions above about her DCM and NuCoal shares), by 2009/2010 circumstances relating to the company had changed. As Mr Ransley's evidence disclosed, once the global financial crisis hit, Westfield required ResCo to repay money under threat of liquidation. This led to capital raising efforts by ResCo in which Ms Ransley took part in order to ensure that the company could meet its expenses such as the payment of wages. In these circumstances I am unable to infer that Ms Ransley acquired these ResCo shares on revenue account.

9. ADMINISTRATIVE PENALTIES

254. The administrative penalty imposed (and amended) relates to the 2010 tax year.

255. By s 284-75(1) and (2) of Sch 1 to the TAA a person may be liable to an administrative penalty for statements to the Commissioner which are false and misleading or not reasonably arguable respectively. Section 284-15(1) provides that:

> *A matter is reasonably arguable if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect, or is more likely to be correct than incorrect.*

256. By s 284-90 a shortfall amount resulting from recklessness involves a base penalty amount of 50% of the shortfall amount and a shortfall amount resulting from a failure to take reasonable care to comply with a taxation law involves a base penalty of 25% of the shortfall amount.

9.1 Ms Ransley's submissions

257. For Ms Ransley it was submitted that:

1) "In assessing whether a taxpayer has a reasonably arguable position, a decision maker does so from the standpoint that the taxpayer's argument has already been found to be wrong and consequently caution must be given to the benefit of hindsight": citing *Walstern Pty Ltd v Commissioner of Taxation* [2003] FCA 1428; (2003) 138 FCR 1 at [71] and *Cameron Brae Pty Ltd v Commissioner of Taxation* [2006] FCA 918; (2006) 63 ATR 488 at [78]-[79].

2) "A taxpayer will have a reasonably arguable position if on balance the taxpayer's argument can objectively be said to be one that, while wrong, could be argued on rational grounds to be right. That is, the case must be one where reasonable minds could differ as to which view was correct": citing *Walstern* at [108].

258. Further, it could not be said Ms Ransley was reckless. In this regard, the submissions for Ms Ransley referred to the judgment of Hill and Hely JJ in *Hart v Commissioner of Taxation* [2003] FCAFC 105; (2003) 131 FCR 203 at [43] that:

> *Recklessness is a concept well known to the law, particularly in the fields of tort and criminal law. In those fields, recklessness will usually be found to have been established if the person's conduct shows disregard of, or indifference to,*

consequences foreseeable by a reasonable person. In some contexts a subjective test is applied, but in others the test is objective. In BRK (Bris) Pty Ltd v Commissioner of Taxation (2001) ATC 4111 at 4129 Cooper J made the following observations in relation to recklessness in the context of s 226H:

> *'Recklessness in this context means to include in a tax statement material upon which the Act or regulations are to operate, knowing that there is a real, as opposed to a fanciful risk, that the material may be incorrect, or be grossly indifferent as to whether or not the material is true and correct, and that a reasonable person in the position of the statement-maker would see there was a real risk that the Act and regulations may not operate correctly to lead to the assessment of the proper tax payable because of the content of the tax statement. So understood, the proscribed conduct is more than mere negligence and must amount to gross carelessness.'*

259. On this basis these propositions were put for Ms Ransley:

1) "In declaring the profits on the sale of her DCM and NuCoal shares as capital gains, the Applicant adopted a position that was supported by authority and consequently adopted a position that was reasonably arguable".

2) "Moreover, she took reasonable care by engaging a tax agent, Ben Mahoney, to prepare her tax returns and by providing him with the information relating to her acquisition and disposal of the DCM and NuCoal shares".

3) "If the Applicant's position was not reasonably arguable – the tax shortfall arose as a consequence of adopting that position and not any recklessness on its [sic] part".

4) "There is no evidence to support a conclusion that the Applicant was reckless in adopting the position that the profits on the sale of the shares were properly characterised as capital gains. She engaged a tax agent who considered her position and that position was supported by authority…".

5) "Further, and in the alternative, because the Applicant provided all relevant information to her tax agent, no penalty applies due to the safe harbour exemption in s.284-75(6)".

260. Section 284-75(6) of Sch 1 to the TAA, I note, provides that a person is not liable to an administrative penalty if, amongst other things, the person engaged a registered tax agent, gave the registered tax agent all relevant taxation information and the false or misleading nature of the statement did not result from any intentional disregard of or recklessness by the agent as to the operation of a taxation law.

9.2 The Commissioner's submissions

261. The Commissioner submitted that the administrative penalty imposed for the 2010 tax year for recklessness should be upheld for the following reasons.

262. There was a false or misleading statement made by failing to return the proceeds of sale from Ms Ransley's sale of shares in DCM and NuCoal as ordinary income.

263. Ms Ransley failed to take reasonable care in making the statement (noting the terms of s 284-75(5) of Sch 1 to the TAA which provides that a person is not liable to an administrative penalty if the person or their agent "took reasonable care in connection with the making of the statement". In this regard, the Commissioner said that Ms Ransley:

> *…was admitted to practice law and previously worked at ASIC. One would expect her to have a high degree of commercial knowledge. She also used a tax agent to prepare and lodge her returns. If she was not aware of the tax consequences arising from the disposal of the DCM and NuCoal shares she could have consulted with her tax agent or retained professional tax advice. She also could have requested a private ruling from the Commissioner. Given the size of the amounts in dispute one would expect a taxpayer in the position of the Applicant to have been reticent in preparing her returns. The Applicant's behaviour fell short of the behaviour that would be expected from a reasonable person in similar circumstances.*

264. Ms Ransley's position was not reasonably arguable as:

> *Having regard to the decisions in BRK (Bris) Pty Ltd v Federal Commissioner of Taxation (2001) 46 ATR 347 [[2001] FCA 164] at [77] and Hart v Federal Commissioner of Taxation [[2003] FCAFC 105] (2003) 131 FCR 2003 at [33] and [43], the Court would conclude that the Applicant included material in the relevant tax returns, knowing there was "a real, as opposed to fanciful risk that the material may be incorrect" or that the Applicant was "grossly indifferent as to whether or not the material was true and correct", and that a "reasonable person in the position of [the Applicant] would see there was a real risk" that the relevant provisions of Australia's taxation legislation "may not operate correctly to lead to the assessment of the proper tax payable because of the content" of those returns (BRK at [77]).*

265. Ms Ransley's statement was reckless resulting in a shortfall amount, as a "reasonable person would infer that the receipts from the sale of the shares in DCM and NuCoal should have been returned on revenue account. The Applicant's decision to treat the disposal as being on capital account was erroneous and amounts to gross carelessness". Further:

> *A reasonable person in the Applicant's position would have appreciated the risk presented in the disposal of shares in DCM and NuCoal and that the operation of*

the taxation acts could lead to a conclusion that those gains were on revenue account. Given the Applicant's background and personal circumstances, she was reckless in returning the gain from the sale of shares in DCM and NuCoal on capital account. The risk of there being a shortfall was significant and the Applicant took insufficient steps to mitigate against that risk. Further, the safe harbour exemption in s 284-75(6) does not apply for the reasons stated in page 36 of the Objection Decision.

266. The reasons at p 36 of the objection decision are as follows:

- *It is considered unlikely that you provided your tax agent with sufficient information to make a wide survey and an exact scrutiny of your (and Craig Ransley's) activities. According to paragraph 61 of PS LA 2012/5, 'the exception is not available even if the entity genuinely believes they provided all relevant taxation information required , but in fact omitted any part of the relevant information, or gave incorrect or conflicting information'.*
- *While the Objection refers to advice as having been obtained regularly, it does not provide further detail of the advice obtained. Moreover, it is difficult for the Commissioner to discern the contents of any communications you may have had with your tax agent (Ben Mahoney of Mahoney Consultants Pty Ltd).*
- *According to subsection 284-75(7) of the TAA 1953, the evidential burden to demonstrate that you provided your tax agent all 'relevant taxation information' is borne by you.*
- *The false or misleading nature of the statement resulted from recklessness by your agent (or by you) as to the operation of a taxation law and therefore the safe harbour exemption cannot apply (see subparagraph 284-75(6)(d)(ii) of the TM 1953.*

267. There are no mitigating factors pursuant to s 284-225 of Sch 1 to the TAA (which refers to the voluntary provision of information to the Commissioner).

268. There are no circumstances revealing that the Commissioner erred in exercising the discretion under s 298-20 of Sch 1 to the TAA in declining to exercise the discretion to reduce the amount of the administrative penalty.

9.3 Discussion

269. I accept the Commissioner's submissions.

270. The problem for Ms Ransley is that, on my conclusions about her credit and that of Mr Ransley, the relevant spectrum of possibilities is between a worst case of Ms Ransley deliberately concealing her intentions and details of the profit-making commercial

operation from Mr Mahoney, her tax agent, and a best case of Ms Ransley being grossly indifferent or grossly careless about the provision of relevant information about her intentions and details of the profit-making commercial operation to Mr Mahoney.

271. In my view, this explains why Ms Ransley could say nothing other than that she gave Mr Mahoney the documents he requested (a fact which I do not accept she could recall one way or another) and why Mr Mahoney has no notes of conversations in which Ms Ransley explained her intentions and details of the profit-making commercial operation, his documentary record being confined to a pro-forma style checklist. In circumstances where Ms Ransley was dealing with what she must have known was by far and away the most important tax return she had ever lodged, to fail to provide Mr Mahoney with full details about her intentions and the profit-making commercial operation constituted recklessness.

272. This is not to look at the matter with the benefit of hindsight. It is to consider the matter prospectively, from the position Ms Ransley was in, at the time the 2010 return was prepared.

273. Contrary to the submissions for Mr Ransley I do not accept that because it has been necessary for me to scrutinise the relevant conduct of Ms Ransley and Mr Ransley in detail it must necessarily follow that Ms Ransley's position was reasonably arguable. Ms Ransley was the person who was required to provide Mr Mahoney with complete and accurate information to enable him to prepare the 2010 return. She failed to do so and, as I have said, the explanation for her failure lies somewhere between deliberate dishonesty and gross carelessness. It necessarily follows that s 284-75(6) of Sch 1 to the TAA does not apply because, on my conclusions, Ms Ransley did not give to Mr Mahoney all relevant taxation information.

10. CONCLUSIONS

274. The application for review and the appeal should be dismissed. I will direct the parties to file agreed or competing proposed orders within 14 days in both matters.

I certify that the preceding 274 (two hundred and seventy -four) paragraphs are a true copy of the reasons for the decision herein of Justice Jagot, Deputy President

.....[SGD].....

Associate

Dated: 21 November 2018

Date(s) of hearing:	**17 - 19 October 2018**
Counsel for the Applicant:	**M Richmond SC with B.L. Jones**
Solicitors for the Applicant:	**Mark O'Brien Legal**
Counsel for the Respondent:	**E. A. Cheeseman SC with G.O.J. O'Mahoney**
Solicitors for the Respondent:	**Minter Ellison**

SCHEDULE 1

NSD 316 of 2015

Federal Court of Australia

District Registry: New South Wales

Division: General

NERA ANNE RANSLEY

Applicant

COMMISSIONER OF TAXATION

Respondent

UPDATED STATEMENT OF AGREED FACTS

1. The Applicant was born on 30 November 1970. In 1993 she graduated with a Bachelor of Arts and a Bachelor of Laws from the University of Tasmania. In 1997 the Applicant was awarded a Masters Degree in Social Science from the University of Tasmania and admitted as a solicitor of the Supreme Court of Tasmania.

2. Between August 1997 and January 1999, the Applicant was employed as a solicitor by the Australian Securities and Investments Commission.

3. Between mid 1999 and 2005 the Applicant was employed as an in-house legal counsel by a financial planning firm in Tasmania.

4. In March 1999 the Applicant married Craig Ransley.

5. In 1995, Mr Ransley started a business, known as C&M Slashbusters, with a partner, Rodney Nash. The business involved clearing vegetation from electricity easements held by Hydro Tasmania. Mr Ransley subsequently sold his interest in the business to Mr Nash.

6. In January 2004, Mr Ransley caused the TESA Group Pty Ltd (**"TESA"**) to be incorporated. At the time of incorporation, Mr Ransley was the managing director and a founding shareholder. The Applicant was also a shareholder of TESA.

7. TESA carried on a labour hire business, providing skilled and unskilled staff to, among others, the coal mining industry in the Hunter Valley, New South Wales.

8. In or about late 2005, Mr Ransley was introduced to Andrew Poole. Mr Poole subsequently became a director of TESA.

9. During 2005, Mr Ransley moved to Newcastle to be closer to the majority of TESA's workforce. The Applicant remained in Hobart until she joined Mr Ransley in Newcastle in 2006.

10. The Applicant acquired two properties in Newcastle. The first was an apartment that they had been renting and the second was an apartment acquired off the plan.

11. In late 2006 Advent Private Capital Pty Ltd, a private equity firm, invested approximately $14 million in TESA and became the majority shareholder. Mr Ransley continued as Managing Director.

12. In August 2006, all the shares in TESA (including Mr Ransley's 2,193,863 shares and the Applicant's 182 shares) were acquired by Skilled Group Limited. The sale proceeds were banked into their joint bank account.

13. Mr Ransley and Mr Poole ceased to be directors of TESA on 31 August 2006. Mr Ransley continued to be employed by TESA until February 2007.

Establishment of Doyles Creek Mining

14. On 13 November 2006, the Applicant caused the incorporatation of ROSA Holdings Pty Ltd (**ROSA**) and its wholly owned subsidiary ResCo Services Pty Ltd. Andrew Poole was the founding shareholder of ROSA and director of both companies. Mr Ransley subsequently became a director of both companies in February 2007.

15. On or about 15 January 2007, Mr Ransley received an Information Memorandum entitled "Doyles Creek Exploration Area", which had been prepared by Dr Guy Palese. This document estimated that the site had total inferred mineable resources of 125 million tonnes of coal.

16. On 15 February 2007 the Applicant was issued 1 ordinary share in ROSA.

17. On 15 February 2007, ResCo Services Pty Ltd sent to the responsible Minister (Mr Ian McDonald) a letter which applied for consent under s 13(4) of the *Mining Act 1992* to apply for an Exploration Licence for the Doyles Creek site. The letter stated that the "target coal seams" would principally be the Whybrow and the Redbank Creek coal seams of the Whittingham coal measure to a depth of 300 metres (being the seams mentioned in Dr Palese's information memorandum).

18. Mr Ransley was a director of DCM from 15 February 2007 to 27 November 2009.

19. On 28 February 2007, the Applicant was issued a further 349,999 ordinary shares in ROSA at an issue price of $1 per share.

20. On 4 May 2007 ROSA changed its name to "ResCo Services Pty Ltd" (**"ResCo"**) and ResCo Services Pty Ltd changed its name to "Doyles Creek Mining Pty Ltd" (**"DCM"**).

21. On or about 5 June 2007, DCM issued 1599 new shares, and ResCo transferred its 1 share in DCM, to the existing shareholders in Resco in the same proportions as their shareholding in ResCo. As a consequence, the Applicant received 341 shares in DCM.

22. Following the restructure, DCM required capital from time to time to progress its business. The Applicant participated in the capital raisings.

23. Between mid 2007 and late 2009 acquired ordinary shares in DCM in the following tranches:

	Date	Shares acquired	Issue price ($) per share	Total cost
	5 June 2007	341	Nil	Nil
*	15 February 2008	53,196	1.00	$53,196
*	5 May 2008	96,421	1.00	$96,421
*	25 June 2008	88,391	1.00	$88,391
	9 September 2008	55,562	1.44	$80,009
	14 October 2009	8,069	Nil	Nil
	Total	301,980		$318,017
*	Each of these shares were acquired in the name of Craig and Nera Ransley as trustee for Rednblonde Superfund but were subsequently cancelled and reissued in the Applicant's name.			

24. The final acquisition on 14 October 2009 was by transfer from another shareholder, Pooles Australia Pty Ltd (a company associated with Mr Poole). The transfer was for nil consideration because it was designed to 'square up' and make equal the Applicant's and Mr Poole's respective interests in DCM.

25. On 18 March 2008, DCM sent to the Department of Primary Industries a letter seeking the Minister's consent under s 13(4) of the *Mining Act 1992* for DCM to apply for an Exploration Licence. The letter enclosed a

submission in support of the request for consent entitled "Training Mine Facility Submission" which contained details of the training mine proposal (**TMF Submission**).

26. On 21 August 2008, the Minister sent a letter to DCM which invited it to apply for the Exploration Licence.

27. On or about 29 September 2008, DCM lodged with the Department of Primary Industries an application for an Exploration Licence in respect of the Doyles Creek tenement, which attached, among other things, a copy of the TMF Submission.

28. In or about October 2008 ResCo engaged Sparke Helmore to draft an Operating and Maintenance contract to be entered into by ResCo Undergound Services Pty Ltd (a subsidiary of ResCo) with DCM for the training mine.

29. On 15 December 2008, DCM was granted Exploration Licence EL 7270 which gave the company a right to prospect, subject to conditions, on the Doyles Creek site for a term of 4 years. The grant was subject to special conditions.

30. On 15 October 2009, the Applicant and Pooles Australia Pty Ltd entered into an agreement with Taurus Funds Management Pty Ltd (**Taurus**) for the sale of a parcel of their DCM shares to Taurus. The Applicant sold 150,239 shares in DCM to Taurus for $5 million.

31. On 21 October 2009, ResCo undertook a share issue under which the Applicant subscribed for 5,000,000 shares at an issue price of $0.50 per share funded from the share sale to Taurus.

32. On 24 December 2009, the Applicant sold 3,005 shares in DCM to Gordon Galt, a director of DCM, for $100,006.40.

Back-door listing of DCM

33. On 23 November 2009, NuCoal Resources NL (**NuCoal**) (then called Supersorb Environmental NL) entered into an Option Agreement with each shareholder in DCM, including the Applicant, under which NuCoal:

    (a) was granted the option to acquire all the shares in DCM in return for the shareholders of DCM being issued shares in NuCoal in proportion to their shareholdings in DCM;

    (b) would raise at least $10 million in share capital; and

    (c) would be re-listed on the Australian Stock Exchange.

34. On 2 December 2009, NuCoal lodged with the Australian Securities and Investments Commission a prospectus (**"Prospectus**") offering the issue of 50 million shares at 20 cents each to raise $10 million in share capital for the purpose of funding the activities of NuCoal including exploration and drilling programs on the Doyles Creek tenement.

35. On 5 February 2010, NuCoal acquired all the issued shares in DCM following the exercise of the option and in exchange allotted new shares to the existing shareholders of DCM. The Applicant received 46,529,778 shares in NuCoal fully paid at $0.20 per share in exchange for her shareholding in DCM (which amounted to 148,736 shares).

36. Mr Ransley's mother died on 2 March 2010.

Applicant's sale of shares in NuCoal

37. Between March and September 2010, the Applicant sold the NuCoal shares in the following tranches:

Date	Shares sold	Share price $	Sale proceeds $
11 March 2010	2,974,380	0.19	565,132
11 March 2010	4,034,556	0.19	766,565

22 March 2010	1,921,572	0.201	386,130
23 March 2010	1,100,000	0.20	220,000
29 March 2010	2,000,000	0.24	479,993
16 April 2010	729,244	0.299	218,003
19 April 2010	733,014	0.298	218,694
21 April 2010	1,000,000	0.372	371,545
22 April 2010	996,500	0.362	361,207
2 August 2010	5,497,920	0.20	1,098,412
9 August 2010	23,000,000	0.209	4,814,061
21 September 2010	310,000	0.234	72,499
22 September 2010	350,000	0.234	81,797
23 September 2010	250,000	0.234	58,426
24 September 2010	1,232,593	0.238	293,698
28 September 2010	400,000	0.248	99,201
Total	46,529,779		$10,105,367.93

38. On each of the foregoing occasions the Applicant gave authority to Mr Ransley to dispose of the shares through a stockbroker.

ResCo's financial difficulties

39. On 6 April 2010, ResCo undertook a further capital raising and the Applicant subscribed for 2,284,885 shares in ResCo at an issue price of $0.50 per share ($1,142,443) using part of the proceeds from the earlier sale of her DCM shares.

40. On around 1 June 2010, the Applicant transferred her ResCo shares to RednBlonde Pty Ltd, the trustee of the Craig & Nera Family Trust.

41. On 22 November 2010, ResCo entered into an agreement to merge with Humanis Group Ltd, a company listed on the ASX under which Humanis Group Ltd agreed to acquire each share in ResCo in consideration for 2.46 shares in Humanis Group Ltd.

42. Following the merger Mr Ransley became a director of Humanis Group Ltd. In 2012 Humanis Group Ltd changed its name to Bluestone Global Ltd. RednBlonde Pty Ltd continued to be a shareholder of Bluestone (which went into Voluntary Administration in August 2014).

43. The Applicant applied part of the sale proceeds referred to at [31] above to invest in ResCo by subscribing for a further 11,521,521 shares for $1,976,133 in September 2010.

Applicant's tax returns and amended assessments

44. In her income tax returns for the 2010 and 2011 years the Applicant treated the gains from the sale of shares in DCM and NuCoal as capital gains and the 50% CGT discount was applied. In addition, the Applicant's income tax return for the 2010 year was prepared on the basis that the exchange of her shares in DCM for shares in NuCoal on 5 February 2010 satisfied the necessary conditions to allow her to choose scrip-for-scrip roll-over relief under Subdivision 124M of the *Income Tax Assessment Act 1997*.

45. In her tax return for the 2010 year the Applicant also reported a capital loss on the disposal of her shares in ResCo of $4,169,943.

46. On 14 March 2014, the Respondent issued an amended assessment to the Applicant for the 2010 year in which he increased her assessable income by $12,273,507 by:

    (a) reducing her previously declared capital gain of $1,814,438 to nil;

    (b) including the sum of $14,087,945 as ordinary income from the disposal of her DCM shares.

47. The amount of $14,087,945 treated as ordinary income was calculated as the proceeds of the disposal of her DCM shares in October and December 2009 (being $5,100,006) plus the value of the NuCoal shares received in consideration for her remaining DCM Shares on 5 February 2010, less $318,017 (being her total outlay in acquiring the DCM shares).

48. The Respondent accepted that the transfer of the ResCo shares was on capital account.

49. On 14 March 2014, the Respondent issued a notice of assessment of shortfall penalty in the amount of $2,853,590.35 being 50% of the tax shortfall amount.

50. On 23 July 2014, the Applicant objected to the amended assessment and the assessment of shortfall penalty. The objections were disallowed on 19 March 2015.

51. On 1 April 2015, the Respondent issued a revised assessment for the 2010 year in which he increased the Applicant's taxable income by $489,416 said to be the profit on the sale of the NuCoal shares. The Respondent also issued an assessment of administrative penalty in the amount of $113,789.20 on the grounds the Applicant was reckless in failing to include the profit as ordinary income.

52. On 7 April 2015, the Respondent issued a revised assessment for the 2011 year in which he increased the Applicant's assessable income by $309,991 said to be the profit on the sale of the NuCoal shares.

53. On 2 June 2015, the Applicant objected to the foregoing revised amended assessments and the assessment of administrative penalty. The Respondent disallowed the objection in full on 12 August 2015.

Independent Commission Against Corruption investigation

54. On 23 November 2011, both Houses of the NSW Parliament[1] referred the following issues to the Independent Commission Against Corruption ("**ICAC"**) under s 73 of the *Independent Commission Against Corruption Act 1988 (NSW)* ("**Act**"):

> a. That under s 73 of the Act the Commission investigate and report with respect to:
>
> (1) the circumstances surrounding the application for and allocation to DCM of Exploration Licence No 7270 under the *Mining Act 1992 (NSW)* ("**Mining Act"**).
>
> (2) the circumstances surrounding the making of profits, if any, by the shareholders of NuCoal Resources NL as proprietors of DCM.
>
> (3) any recommended action by the NSW Government with respect to licences or leases under the Mining Act over the Doyles Creek area,
>
> (4) any recommended action by the NSW Government with respect to amendment of the Mining Act, and
>
> (5) whether the NSW Government should commence legal proceedings, or take any other action, against any individual or company in relation to the circumstances surrounding the allocation of EL No 7270.
>
> b. That as deemed necessary, the Commissioner may also inquire into any related matters.

55. In the course of its investigation, the ICAC compulsorily examined Mr Ransley, first, in private and then later in May 2013, in public.

56. On 30 August 2013, the ICAC published its report "Investigation into the Conduct of Ian Macdonald, John Maitland and Others" into issues (1) and (2) referred to at [54] above. The Report included a recommendation that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Mr Ransley under s 178BB of the *Crimes Act*

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[1] Parliamentary Debates, Legislative Assembly of New South Wales, 23 November 2011, p 7733

1900 in relation to his agreeing to Mr Maitland publishing to the Department of Primary Industries (**DPI**) certain statements.

57. On 27 November 2017, Mr Ransley was found not guilty by Zahra J of the District Court of New South Wales on each of 3 counts on an indictment laid under section 178BB of the *Crimes Act 1900* in respect of certain statements made to the DPI, arising from the ICAC Report.[2]

58. On 20 March 2018, Mr Ransley was found not guilty in the Local Court of New South Wales on one count of giving false or misleading evidence to the ICAC in the respect of the investigation referred to above.[3]

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[2] *R v Craig Ransley*, District Court of New South Wales, Judge Zahra, File No. 2017/00024833, 27 November 2017, unreported.

[3] *Director of Public Prosecutions v Craig Ransley*, Local Court of New South Wales, Farnan LCM, File No 2017/22472, 20 March 2018, unreported.