



[\[Home\]](#) [\[Databases\]](#) [\[WorldLII\]](#) [\[Search\]](#) [\[Feedback\]](#)

Supreme Court of Victoria

You are here: [AustLII](#) >> [Databases](#) >> [Supreme Court of Victoria](#) >> [2013](#) >> [\[2013\] VSC 446](#)

[\[Database Search\]](#) [\[Name Search\]](#) [\[Recent Decisions\]](#) [\[Noteup\]](#) [\[Download\]](#) [\[Help\]](#)

Re Krypton Nominees Pty Ltd [2013] VSC 446 (27 August 2013)

Last Updated: 27 August 2013

<u>IN THE SUPREME COURT OF VICTORIA</u>	Not Restricted
---	----------------

AT MELBOURNE

COMMERCIAL AND EQUITY DIVISION

COMMERCIAL COURT

CORPORATIONS LIST

No. S CI 2012 1647

IN THE MATTER OF KRYPTON NOMINEES PTY LTD (ACN 005 329 868)

KRYPTON NOMINEES PTY LTD (ACN 005 329 868)

Plaintiff

v

JOSEPH ISAAC GUTNICK

First Defendant

and

Second Defendant

NORTHERN STAR INTERNATIONAL PTY LTD

(ACN 102 396 878)

JUDGE: ROBSON J
WHERE HELD: Melbourne
DATE OF HEARING: 17, 18, 22, 23, 29 and 30 April 2013
DATE OF JUDGMENT: 27 August 2013
CASE MAY BE CITED AS: Re Krypton Nominees Pty Ltd
MEDIUM NEUTRAL [\[2013\] VSC 446](#)
CITATION:

CORPORATIONS – Sale of shares – Misleading and deceptive conduct – Whether plaintiff relied on misrepresentations – Judgment for plaintiff – [Corporations Act 2001 ss 1041E, 1041H](#) and 1345.

CORPORATIONS – Sale of shares – Failure to provide Product Disclosure Statement – Whether plaintiff a “sophisticated investor – Sale of shares on terms – Whether total amounts payable satisfied exemption in [s 708\(8\)\(a\) – Corporations Act 2001 ss 50AA, 707](#) and [708\(8\)\(a\)](#).

CORPORATIONS – Whether the defendants conduct was unconscionable within the meaning of the unwritten law – Whether the plaintiff was at a special disadvantage – Claim rejected – *ASIC Act 2001 s 12CA*.

AGENCY – Contract for purchase of shares made by a company in a group of companies pending nomination of a member of that group by group’s accountant as the appropriate purchasing company – Contract negotiated by director who controlled group of companies – Whether company nominated by the accountant entitled to ratify contract of sale and become the purchaser – Whether nominated company entitled to rely on representations made to the director who negotiated the contract in seeking to have contract of purchase set aside for misleading and deceptive conduct and failure to provide a Product Disclosure Statement – Nominated company entitled to ratify contract and exercises remedies available to initial contracting company.

EQUITY – Whether the defendants owed a fiduciary duty to the plaintiff – Relevant applicable principles – Whether inequality of bargaining power – Claim rejected.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr P.S. Noonan	Efron & Associates

For the Defendants

Mr N.J. Clelland SC with SBA Law

Mr A.P. Young

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 In July 2010, Mr Roy Tashi found himself in financial difficulties. He had lost two lucrative appointments which provided him with a significant income. Mr Tashi had to service a large mortgage of \$6 million on his Toorak home. He wanted to make some money quickly.

2 Mr Tashi decided to seek fresh employment as a company director or a consultant to a company. Mr Tashi had considerable business and financial experience and had, in his time, been a director of numerous companies.

3 Mr Tashi and Mr Joseph Gutnick (the first defendant) are both members of the Chabad Lubavich movement. The now deceased head of the movement was Lubavicher Rebbe Mendel Schneerson (the Rebbe).

4 Mr Gutnick is well-known in Melbourne business and Jewish communities as a successful businessman and for his involvement in philanthropic activities. Mr Gutnick is also a rabbi, and a Shliach (or emissary) of the Chabad Lubavich movement, one of a small group of individuals to hold this status in Australia.^[1] Mr Tashi had previously dealt with Mr Gutnick when soliciting donations from Mr Gutnick for Chabad House Malvern.

5 Mr Tashi is also a prominent member of the Jewish community. He is currently chairman of the Community Security Group, which comes under the auspices of the Jewish Community Council of Victoria. He is an executive member of the Mount Scopus College Foundation and s past president of the Foundation. He is a life member of Jewish Care, life governor of Montefiore Homes, and director of Chabad Malvern.

6 Mr Tashi went to see Mr Gutnick to seek his help. Mr Tashi told Mr Gutnick of his financial problems and that he was seeking employment as a company director or consultant. Mr Gutnick told Mr Tashi of a US company Mr Gutnick controlled, Northern Capital Resources Corporation (Northern Capital or NCRC). NCRC held a 70% interest in Golden River Resources Corporation (Golden River), which itself held a majority interest in a Canadian gold prospecting company called Acadian Mining Corporation (Acadian or AMC). Eventually, Mr Tashi agreed to acquire from Northern

Star International Pty Ltd (NSI) (the second defendant) US\$1 million worth of shares in NCRC, being five million shares for US20 cents per share, on terms, ending on 31 December 2010.

7 Initially, Mr Tashi acquired the shares through his company Tashi Holdings Pty Ltd. Subsequently, Mr Tashi and Mr Gutnick varied the agreement for the purchase of the shares so that only AU\$1 million worth of shares were acquired (rather than US\$1 million worth of shares) and the purchaser would be Mr Tashi's company, Krypton Nominees Pty Ltd (Krypton) (the plaintiff).

8 In the statement of claim, allegations are made by Krypton as plaintiff, but for the ease of discussion at this stage I will refer to the parties as Mr Tashi and Mr Gutnick. Mr Tashi alleges that he was induced to enter into the agreement to purchase the shares by false representations made by Mr Gutnick. Mr Tashi alleges that the NCRC shares have no value, and he seeks to have the contract for their purchase rescinded and to recover the purchase price of AU\$1 million and interest.

Breaches of Corporations and ASIC Acts – misleading and deceptive conduct

9 Mr Tashi alleges that, in order to induce him to purchase the shares, Mr Gutnick expressly or impliedly represented to him that:

- (a) the proposed price of the shares was the same “bargain” price that Mr Gutnick had himself paid for shares in NCRC;
- (b) Mr Gutnick had no direct financial interest in, or control over, the “third party” person or company who was selling the shares; and accordingly
- (c) in describing the share purchase as “favourable” and “excellent for you”, Mr Gutnick was exercising independent and objective judgment in the best interests of Mr Tashi.

10 Mr Tashi alleges that each of the representations constituted a false or misleading statement within [s 1041E](#) of the [Corporations Act 2001](#).

11 Mr Tashi also alleges the making of the representations constituted misleading or deceptive conduct within the meaning of [s 1041H](#) of the [Corporations Act 2001](#), [s 12DA](#) of the ASIC Act, alternatively [s 52](#) of the [Trade Practices Act 1974](#) and/or [s 9](#) of the Fair Trading Act 1999 (Vic).

Breaches of s 12BAB and 12CA of the ASIC Act

12 Further or alternatively, by reason of the matters referred to above, Mr Tashi alleges that Mr Gutnick engaged in conduct that was unconscionable within the meaning of the unwritten law of the States and Territories contrary to ss 12BAB and 12CA of the

ASIC Act.

NSI aided and abetted misleading and deceptive conduct

13 Mr Tashi alleges that at all material times, NSI, the vendor company, aided abetted, counselled or procured, was knowingly concerned in or party to the breaches alleged above, within the meaning of [s 79](#) of the [Corporations Act 2001](#), alternatively s 75B of the [Trade Practices Act](#) and/or s 145 of the Fair Trading Act.

Failure to provide a product disclosure statement

14 Mr Tashi also alleges that Mr Gutnick controlled NCRC within the meaning of [s 707](#) of the [Corporations Act 2001](#) and that pursuant to [s 707\(2\)](#) of the [Corporations Act 2001](#) Mr Gutnick was obliged to provide a product disclosure statement to Mr Tashi in relation to the offer to sell the shares, and Mr Gutnick – in breach of [s 707\(2\)](#) and [s 727](#) – did not do so.

Breach of Fiduciary Duties

15 Mr Tashi also alleges that Mr Gutnick owed fiduciary duties to Mr Tashi and Krypton in relation to any investment in NCRC being considered or made by those parties:

- (a) to act in the interests of Mr Tashi and Krypton;
- (b) not to use his position to gain a profit for himself or for any person or a company in which he had an interest;
- (c) not to put himself in a position where his duty to Mr Tashi and Krypton may conflict with his own interests;
- (d) not to act or seek to act so as to prefer his own interests or the interests of a third party to the interests of Mr Tashi or Krypton;
- (e) to act fairly and in good faith; and
- (f) not to procure the sale of the shares to Krypton without first disclosing his interest in the NCI the vendor company to Mr Tashi.

16 Mr Tashi alleges that NCI knowingly received the AU\$1 million under the share sale agreement as proceeds of Mr Gutnick's breach of fiduciary duties and holds the AU\$1 million on constructive trust for Krypton, and also seeks damages.

Mr Gutnick's answer to the alleged representations

17 Mr Gutnick denies making the representations. Alternatively, Mr Gutnick says that if he did make any of the alleged representations, then Mr Tashi did not rely on those representations or any of them, but rather it was Mr Tashi's belief that it was divine providence or intervention (which Mr Tashi had sought from the Rebbe) that had brought the investment opportunity to him.

18 As to the "third party representation," Mr Gutnick says that on 21 July 2013, he expressly told Mr Tashi that Mr Gutnick was selling his own shares and/or that Mr Tashi was aware that in any event that Mr Gutnick was selling his own shares by the fact that Mr Gutnick signed the share sale agreement as director of NSI.

Mr Gutnick's response to the product disclosure statement

19 As to the product disclosure contention, Mr Gutnick says that, because the sale of the shares exceeded \$500,000, there was no obligation to provide a product disclosure statement to Mr Tashi.

Mr Gutnick's response to the alleged fiduciary duties and allegations of unconscionable conduct

20 Further, Mr Gutnick denies that he had a fiduciary relationship or duty towards Mr Tashi or that his conduct was unconscionable.

21 Mr Gutnick says that, in any event, Krypton does not have standing to make the complaints alleged by Mr Tashi.

Issues

22 Thus, the main issues to be resolved are as follows:

- (a) Did Mr Gutnick make to Mr Tashi the three alleged representations?
- (b) Was Mr Tashi aware that the seller of the NCRC shares was Mr Gutnick's company, as either Mr Gutnick had expressly told Mr Tashi that he was selling the shares and/or Mr Tashi was aware from the fact that Mr Gutnick signed the share sale agreement as a director of the seller or was otherwise aware?
- (c) If any of the alleged representations were made, did Mr Tashi rely on them in causing his company to acquire the NCRC shares?
- (d) If Mr Gutnick did make the alleged representations, did NCI aid and abet the alleged breaches of the [Corporations Act 2001](#)?
- (e) Was Mr Gutnick obliged to provide to Mr Tashi a product disclosure statement?

- (f) Did Mr Gutnick owe Mr Tashi fiduciary duties, and – if so – did he breach them?
- (g) Did Mr Gutnick engage in unconscionable conduct in selling the NCRC shares to Mr Tashi as he did?
- (h) Does Krypton have standing to rely on Mr Tashi’s allegations?

23 For the following reasons, I have concluded that:

- (a) Mr Gutnick did make to Mr Tashi each of the three alleged representations and that the representations were misleading or deceptive.
- (b) Mr Tashi was not aware that the seller of the NCRC shares was Mr Gutnick’s company.
- (c) Mr Tashi did rely on each of the representations in causing his company to agree to acquire the NCRC shares.
- (d) NCI did aid and abet Mr Gutnick in his conduct.
- (e) Mr Gutnick was obliged to provide to Mr Tashi a product disclosure statement.
- (f) Mr Gutnick did not owe Mr Tashi a fiduciary duty.
- (g) Mr Gutnick did not engage in unconscionable conduct.
- (h) Krypton does have standing to rely on Mr Tashi’s allegations.

24 Accordingly, I have decided to order that the share sale agreement be rescinded and that the defendants be ordered to repay the plaintiff AU\$1 million.

25 I shall hear argument on interest and costs.

The relevant facts

26 A great many of the relevant facts are not in dispute. There is a significant email trail that is not disputed, and the three main meetings between Mr Tashi and Mr Gutnick are also not in dispute. The issues basically surround what was said at those three meetings and the inferences that can be drawn from the emails and what was otherwise said.

27 On 25 May 2006, Mr Gutnick’s company, Lubavich Foundation Australia Pty Ltd (Lubavich), subscribed for and was allocated 20 million shares in NCRC for \$US0.001 per share (total purchase price of \$20,000). Mr Gutnick’s company, Lubavich, was described in the subscription agreement as the founder of NCRC. Mr Gutnick

established NCRC.

28 Subsequently, the NCRC shares were subject to a five for one split and 80 million shares were registered in the name of NSI.[\[2\]](#)

29 In July 2009, NCRC acquired an 87% interest in Golden River Resources Corporation Group (Golden River). Previously, in March 2009, Golden River acquired a 68.45% interest in Acadian.

Mr Tashi's evidence

30 In April 2010, Mr Tashi was informed by Helvetica Wealth Management Partners (Helvetica) that Helvetica was terminating its Australian operations, and gave Mr Tashi six months' notice of termination of his employment with that business.

31 In May 2010, Mr Tashi commenced efforts to find new directorships and consultancies. Also in May 2010, Mr Tashi met with Mr Gutnick in his office to discuss the Community Security Group (CSG), which comes under the auspices of the Jewish Community Council of Victoria. The CSG provides security for Jewish institutions and Jewish communal organisations.

32 Mr Tashi said that as he left Mr Gutnick's office, it occurred to him that there may be an opportunity there for him. He said he was looking for an opportunity to replace some of the loss of income that he had suffered from the cessation of Helvetica. As he said in his subsequent email to Mr Gutnick, he was looking for a position in a private company as a non-executive director or on an advisory position or as a consultant.[\[3\]](#)

33 On 8 June 2010, Mr Tashi emailed Mr Gutnick advising him that Mr Tashi was currently looking out for opportunities to take on a few more private board positions and/or advisory board positions.

34 In mid June 2010, Mr Tashi received a telephone call from the managing director of Farmoz, advising him that the Australian Board of Farmoz would cease operating and that Mr Tashi's position on the board of the business would terminate on 30 June 2010. At this stage, Mr Tashi was faced with the prospect of being unemployed.

35 On 30 June 2010, Mr Gutnick replied to Mr Tashi's 8 June email, informing Mr Tashi that he would like to meet with him to see if there were possibilities that they could work together.

36 On 6 July 2010 Mr Tashi met with Mr Gutnick in Mr Gutnick's office. Mr Tashi says that he explained to Mr Gutnick the loss of income from Helvetica and Farmoz, and that he was seeking to replace those. He says that Mr Gutnick told him that he recognised him as a successful businessman and asked Mr Tashi what brought about the situation that he found himself in, in needing additional employment. Mr Tashi says

that he informed Mr Gutnick that he had lost a substantial amount of income from the Helvetica position, some income from the Farmoz position, and also that – as a consequence of the fallout from the global financial crisis (GFC) – he found himself overstretched financially. He told Mr Gutnick that his debt service and commitments meant that in the absence of being able to replace the Helvetica and Farmoz income stream, he would probably need to sell his house.^[4] Mr Tashi says that he told Mr Gutnick that he was not interested in investing due to his financial difficulties. Mr Tashi says there was no discussion of investment at that meeting.

37 Mr Tashi said that Mr Gutnick appeared to be sympathetic to his situation and said there may be a possibility to work with him. Mr Tashi said that Mr Gutnick explained a project of his that he was giving total focus to, being NCRC and AMC, and that AMC was based in Canada, specifically in the Nova Scotia area. Mr Tashi said that Mr Gutnick went to some lengths to discuss,, and to again enforce that his business focus and his attention was on that investment, given the bullish price of gold at that time and his estimation of whether the gold price would continue to rise due to demand.

38 Mr Tashi said that some time previously, Mr Gutnick had made a speech (at which the then Federal Treasurer, Peter Costello, was present) criticising Australia’s sale of gold, depressing the price. The price of gold was then in the range of \$200 to \$300 per ounce. By the time Mr Tashi had the conversation with Mr Gutnick, the price of gold had gone to over \$1,000 an ounce, and Mr Gutnick was expressing his belief in the future increase in the value of gold.

39 Mr Tashi said that it was in this context that Mr Gutnick handed him a brochure for NCRC and for AMC.^[5] Mr Gutnick gave Mr Tashi these documents, saying that his main focus was going to be on this company and its forthcoming production of gold. Mr Tashi said that Mr Gutnick said that maybe this was an area where Mr Tashi could be involved and suggested Mr Tashi take the material away, have a read through it, and come back to him with a proposal of how Mr Tashi felt that he could be involved in NCRC in some way.

40 The material given to Mr Tashi indicated that the principal office of NCRC was at Mr Gutnick’s office in St Kilda Road, Melbourne. The presentation indicated that NCRC had a 92% interest in Golden River, whose assets included a 69% interest in Acadian. The document indicated that Acadian held five gold properties in Nova Scotia, along with some other mineral interests.

41 On 11 July 2010, in an email headed “Northern Capital Resources”, Mr Tashi informed Mr Gutnick that he had read the presentations that Mr Gutnick had given him when they last met to discuss the possibility of “working with you in some way”. In the email, Mr Tashi said that he believed that they could work well together, and – although he was no expert on gold mining – he thought that one way that he would be able to add some value was through his network of brokers on the West Coast of the

United States and potentially attract an investor. Mr Tashi asked Mr Gutnick if they could schedule another meeting in the future.

42 On 13 July 2010, Mr Tashi again met with Mr Gutnick in Mr Gutnick's office. Prior to the meeting with Mr Gutnick, Mr Tashi met with Rabbi Shimshon Yurkowitz, the director of Chabad Malvern. Mr Tashi said that he told Rabbi Yurkowitz of his predicament and that he had told Rabbi Gutnick that it was likely that his wife and he would need to sell their house in order to ensure that they could get through.^[6] Mr Tashi said that Rabbi Yurkowitz suggested that he write a letter to the late Rebbe and ask for a blessing to overcome the challenges that he was facing at that time.

43 Mr Tashi explained that these letters to the now-deceased Rebbe were faxed to the resting place of the Rebbe in Queens, New York City. Mr Tashi explained that during the Rebbe's lifetime, a grave situation occurred relating to Mr Tashi's wife's health and that Mr Tashi had received a blessing from the Rebbe which was very positive and the outcome was that his wife (who was on the operating table) avoided surgery. Mr Tashi believed that this positive outcome was as a result of the blessing of the Rebbe. Mr Tashi said it was customary for people who believe in the powers of the Rebbe to perform such miracles to continue to ask for blessings, should they be needed, by sending a facsimile message to the facsimile machine that is located at the resting place of the late Rebbe.^[7]

44 Accordingly, prior to meeting with Mr Gutnick, Mr Tashi faxed a letter to the resting place of the Rebbe in Queens, New York City. In the letter, Mr Tashi said that he was writing to ask for brocha or several brochas at the time of need for himself, his wife, his family and his community. He went on to say in the facsimile:

I have recently been challenged financially, some of which has been due to my own mismanagement for which I take full responsibility. However, some of the events were unexpected and have impacted heavily on my financial resources and ability to continue to live in the lifestyle that we have established. This has necessitated the sale of our home, which is creating a great deal of pain to both my wife and me.

I have worked hard for what we have achieved over the past 50 years and I have been generous to my family, friends and community not only financially but with my time as well. Nevertheless, I intend to continue to do so.

I have over the years become more observant and my journey has not yet achieved its full potential and I fully recognised my shortcomings in that area and I would like to continue to improve myself in this area. I know it is up to me.

My dear Rebbe, I am asking for brochas to find parnosa and if a sale of our home is the solution that is chosen please assist in making it a successful one. If you can intervene and provide a miracle that brings about a windfall financial gain in another form that will allow us to hold on to our home I will share this windfall with the community (minimum 20% Tzedeka) and take it upon myself to become more observant in additional mitzvot.^[8]

45 Mr Tashi said that at the meeting with Mr Gutnick, before they began discussing NCRC, Mr Gutnick asked him how Chabad Malvern was travelling. Mr Gutnick mentioned to Mr Tashi that he had great admiration for Mr Tashi and that Mr Tashi had a “shem tov”, which translates from Hebrew as a good name in the community.

46 Mr Tashi said that they then moved to discussing the main topic that Mr Tashi wanted to discuss with Mr Gutnick, which was a possible board or advisory position. Mr Tashi said that Mr Gutnick again inquired about the reason for his dire financial position and he told Mr Gutnick that nothing had changed, save that he and his wife had in fact appointed an agent to sell their home.

47 He said that Mr Gutnick asked what he expected to sell his house for. Mr Tashi said that they had a fantasy price of \$10 million, but the realistic value sat somewhere between \$8 million and \$9 million.^[9] Mr Tashi said that Mr Gutnick asked him whether he would have any equity after repaying the debt, and Mr Tashi told him he certainly hoped so.

48 Mr Tashi said that they discussed Mr Tashi’s visit to Chabad Mumbai and a donation that Mr Tashi had made to Chabad Mumbai (which had been the site of killings by the Mumbai terrorists).

49 Mr Tashi said that that led to a discussion about the Rebbe and he disclosed to Mr Gutnick that he had earlier in the day seen Rabbi Shimshon Yurkowitz and, at his encouragement, he had written to the Rebbe seeking a blessing for his current predicament.

50 Mr Tashi said that this led to a discussion about the incident that happened to his wife, and that he got quite emotional when discussing it with Mr Gutnick. He said that Mr Gutnick then recounted to him a number of visits that he had had with the Rebbe during the Rebbe’s lifetime, the blessings that he had received from the Rebbe and the appointment by the Rebbe of Mr Gutnick as an emissary to Israel to advise the Prime Minister of Israel. Mr Gutnick said that the Rebbe had instructed him to continue his business activities because it was important for religious people to also be engaged in worldly acts, and in business in particular.

51 Mr Gutnick told Mr Tashi that his focus was purely on NCRC. Mr Gutnick told Mr Tashi that he had bought into NCRC, and the assets of NCRC, at an opportunistic time as a result of the fallout of the GFC. Mr Gutnick said that a Canadian firm, a public company, had a need to sell its assets as a distress sale and Mr Gutnick was able to buy these assets at a bargain price. Mr Gutnick said that all the infrastructure was there and that it needed to have very little money spent in terms of building infrastructure. Mr Gutnick said that it was a mine or several mines that had been historically operational, and he said that it was not an exploration company but a production company.

52 Mr Tashi said that at that time Mr Gutnick did not mention or make any suggestion of any investment by him in NCRC.

53 Mr Tashi said that he told Mr Gutnick that the only role that he saw himself in was to assist in the introduction to brokers/investment bankers in the US who could possibly help with the necessary funds that NCRC needed to raise in order to get itself listed.

54 Mr Tashi said that Mr Gutnick told him about a Chinese company, which was partly owned by the government, named Zijin. Mr Tashi said that Mr Gutnick told him that Zijin was at an advanced stage of discussions with Mr Gutnick to be a cornerstone investor of up to \$100 million so that NCRC could get a listing. Mr Tashi said that Mr Gutnick told him that Zijin was bullish and positive about the price of gold, that the Chinese economy was booming, that Chinese people were large consumers of gold, and, for that reason, Chinese companies were looking for gold investments outside of China.

55 Mr Tashi said that Mr Gutnick also said that there was a strong possibility that Zijin would buy the whole of the company.[\[10\]](#) Mr Tashi said that Mr Gutnick said, “If the price is good enough, I’ll sell the entire lot”.

56 At the conclusion of the meeting, Mr Tashi said that he left his CV with Mr Gutnick. Mr Tashi said that Mr Gutnick told him, “Let me think about how we may be able to work together”, and the meeting concluded on that note.[\[11\]](#)

57 In cross-examination, Mr Tashi was asked about his state of mind when he visited Mr Gutnick on this occasion. Mr Tashi agreed that, in addition to obtaining a job, he wanted a windfall financial gain,[\[12\]](#) a windfall gain of such magnitude that it would permit him to hold onto his home. He agreed that that windfall gain would need to be in the nature of some millions of dollars.[\[13\]](#)

58 It was put to Mr Tashi that it was actually Mr Tashi who on 13 July raised the prospect of investing in NCRC. Mr Tashi denied that allegation.[\[14\]](#)

59 Mr Tashi said that after he left the meeting, Mr Gutnick telephoned him on his

mobile phone while Mr Tashi was driving away from Mr Gutnick's office. Mr Tashi said that he asked Mr Gutnick, "What did I leave on your desk?", and that Mr Gutnick replied, "No, no, you didn't leave anything behind, but I was thinking since you were here, I want to help you. I can't discuss it. I'm the chairman of the company. It's a public company. I'm an insider. I can't sell any of my shares, but you should buy a million dollars worth of shares and I can provide that to you from a third party at my original price."[\[15\]](#)

60 Mr Tashi said that his immediate reaction was that he was dumbfounded, he was shocked. Mr Tashi said that he thanked Mr Gutnick for the call, but said, "My tanks are empty. As I've said to you in your office, I don't have any investable funds. I don't know what to do with your offer."

61 Mr Tashi said that Mr Gutnick said to him, "I myself was in the shit once. I know what it's like and I want to help you. Have a think about how you may be able to take advantage of it." Mr Tashi said that he again thanked Mr Gutnick and that was the end of the conversation.[\[16\]](#)

62 On the next day, 14 July 2010, Mr Tashi sent an email to Mr Gutnick thanking him for his follow-up call yesterday afternoon and said that he very much appreciated the thought and the action. Mr Tashi said that he needed to clarify one point very quickly and would appreciate a 15 second call with Mr Gutnick, and asked Mr Gutnick to call him and left his mobile number.

63 Later that day, Mr Gutnick called Mr Tashi, and Mr Tashi asked Mr Gutnick what company he was referring to in the previous day's phone call. Mr Gutnick said NCRC, and Mr Tashi said that he told Mr Gutnick, "That's not a public company", and Mr Gutnick replied, "Well, it's an unlisted public company."

64 Mr Tashi said that he again reiterated the fact that his tanks were empty and that he had no investable funds at his disposal, to which Mr Gutnick replied, according to Mr Tashi, "Well, have a think about a payment plan and if you come up with a payment plan that I can put forward to the third party that might help you."

65 Under cross-examination, Mr Tashi was asked to repeat the content of the telephone conversation he had after he left Mr Gutnick's office on 13 July.

66 Mr Tashi said, "I answered the call in my car. I asked Mr Gutnick what I'd left behind, thinking that I'd left something on his desk. He said, 'No, I wanted to offer you my help and I'm suggesting that you buy a million dollars worth of shares. I can't talk about this company. I am the chairman. I [have] a controlling interest. I am an insider. It's a public company but there is a third party'." Mr Tashi said he could not recall whether it was a willing seller or a needy seller who wanted to sell a million dollars worth of shares. Mr Tashi said his response was to thank Mr Gutnick for thinking of

him and for the call. His tanks were empty, as he had said to him in his office just a short time ago. “I don’t have any investable funds, and that was roughly the extent of the call.”

67 Mr Tashi was asked whether that was the extent of the conversation. Mr Tashi said that he was perhaps a little short in his delivery. He said that Mr Gutnick emphasised that he was doing this out of wanting to help him because he himself was “in the shit once”, knew what it was like, and wanted to help him.

68 He was asked whether there was anything else he wanted to add to the statement that he attributed to Mr Gutnick, and Mr Tashi replied, “I think I’ve covered it, Your Honour.”[\[17\]](#)

69 Mr Tashi was taken to the email he sent to Mr Gutnick on the following day. He agreed that there was nothing in the email that confirmed the nature of the discussion of the phone call.[\[18\]](#)

70 Under cross-examination, it was not put to Mr Tashi that the conversation he had with Mr Gutnick at the meeting of 13 July 2010 as recounted by Mr Tashi did not take place or that Mr Gutnick would give a different version, save that it was put to Mr Tashi that he raised the prospect of investing in NCRC. Mr Tashi said to this latter point that it was untrue.[\[19\]](#)

71 Nor was it suggested to Mr Tashi that the telephone conversation between Mr Gutnick and Mr Tashi that was held after the meeting of 13 July whilst Mr Tashi was driving was not as Mr Tashi described or that Mr Gutnick would put a different version of the conversation in his evidence-in-chief.

72 Rather, it was put to Mr Tashi that he did not refer to Mr Gutnick recommending that he buy one million dollars’ worth of shares in the email that Mr Tashi sent to Mr Gutnick the following day (14 July 2010). Also it was put to Mr Tashi that the statement of claim and the amended statement of claim did not assert or claim that Mr Gutnick ever recommended or told Mr Tashi that Mr Tashi should invest in a million dollars’ worth of shares.

73 On 18 July 2010, Mr Tashi met with his friend, Mr Dug Pomeroy.[\[20\]](#) At 7.29pm on 18 July 2010, Mr Tashi sent an email to Mr Gutnick asking if the offer was still open, as he would like to accept. Mr Tashi asked in the email that once Mr Gutnick was free to articulate the terms, please let him know and he would do his best to meet those terms, and thanked him again for the opportunity.

74 Mr Tashi was asked whether there was any particular trigger for him deciding to send that email to Mr Gutnick. Mr Tashi said that he felt that after he had received the phone call that perhaps this was as a result of his request for a blessing that he had sent

to the Rebbe on 12 July (I assume Mr Tashi meant 13 July). Mr Tashi also said that he was motivated by the fact that he was being offered help by someone of good standing in the community, someone he thought he could trust and believe in, and that this was not an ordinary investment proposal.

75 On the next day, 19 July 2010, Mr Gutnick emailed Mr Tashi and asked him to let Mr Gutnick know as soon as possible Mr Tashi's best payment schedule so he could organise the purchase.

76 On the following day, 20 July 2010, Mr Tashi emailed Mr Gutnick with a schedule of payments whereby \$200,000 would be paid by the end of August 2010, \$100,000 by the end of September 2010, \$100,000 by the end of October 2010, \$100,000 by the end of November 2010 and \$500,000 by the end of December 2010. Mr Tashi undertook to make earlier settlement should his family home sell and settle early.

77 Some two hours later, Mr Gutnick replied, informing Mr Tashi that something could be worked out on the basis that Mr Tashi proposed, however Mr Gutnick said that Mr Tashi would need to pay \$100,000 upfront as a deposit to ensure the sale for both parties.

78 A few minutes later, Mr Tashi emailed Mr Gutnick, saying he was happy to execute something tomorrow, as he was going overseas. He asked Mr Gutnick whether the \$100,000 was needed by Thursday. Mr Gutnick replied a few minutes later, saying he would think so. Mr Gutnick went on to say in his email to Mr Tashi, "I then will be able to take care to ensure that the favourable terms from the third party which is excellent for you."

79 At 9.27pm on 20 July 2010, Mr Tashi responded by email to Mr Gutnick, saying:

In that case, I will do it. I truly appreciate it you doing this for me. If you want me to call into your office late tomorrow afternoon, let me know. I'll bring the cheque. Just a question that has nothing riding on it: if Northern Capital goes to IPO will my shares be subject to escrow?"

Mr Gutnick replied some few minutes later, "It will have the same status as everyone else's which will be determined at the time. Give me a call around 3.00pm and we will make a time."

80 On 21 July 2010, Mr Tashi attended at Mr Gutnick's office. Mr Gutnick produced a written document for Mr Tashi to sign. Mr Tashi told Mr Gutnick that he did not know the name of the correct entity which would be the buyer, but that it would be a corporate entity rather than himself personally. He told Mr Gutnick that he would need to get advice from his accountants (Ernst & Young) to determine the correct entity, and

to name Tashi Holdings as the buyer for now. Mr Gutnick informed Mr Tashi that that was no problem, as the share certificate would not be issued until the final payment had been made so there was time to change the entity.^[21] There was also a discussion about currency exchange rates. In Mr Tashi's presence, Mr Gutnick made an internal telephone call, which Mr Gutnick agrees occurred. Mr Tashi said that Mr Gutnick asked the person with whom he was speaking on the telephone whether he had authority to sign the document and then if the document required another signature. Mr Gutnick says he asked whether it was necessary for his wife to sign.

81 Immediately after signing the document, Mr Tashi sent another letter by fax to the resting place of the Rebbe. The letter said as follows:

I am writing as a follow-up to letter of 13 July to acknowledge and give thanks for what I truly believe are blessings that have been bestowed upon me in response to that letter.

I have received a couple of interesting business and investment opportunities since my letter and I am grateful for these opportunities, which at this stage are still at a very early stage and need further blessings and brochas.

I am prepared to work hard and do whatever is necessary to assist in driving these opportunities to a successful conclusion and I am asking for your continued guidance and attention to bring forth a successful conclusion to these investments. Furthermore, as I said in my previous letter if you can further intervene and provide a "miracle" that brings about a windfall financial gain in one form or another I will share this with the community with at least 20% going to tzedeka as well as taking it upon myself to be more observant in additional mitzvot.^[22]

82 Mr Tashi was cross-examined about the letter he sent to the Rebbe on 21 July 2010 (when the agreements were signed) and asked about his reference to the windfall financial gain. Mr Tashi said that the windfall financial gain related to purchases of Tattslotto tickets at the time.^[23] Mr Tashi said that in July 2010, he and his wife had already committed to selling their home and so by no stretch of the imagination could his investment in NCRC yield a miracle overnight to avoid the sale of the house.^[24]

83 Under cross-examination, Mr Tashi agreed that he treated any offer made to him by Mr Gutnick as being as a result of a blessing from the Rebbe.^[25]

84 Mr Tashi was asked whether he regarded the investment in NCRC as speculative. He said that he did not regard it as a normal investment. He said that this was purely a case of somebody offering to help him on the basis of a desire to help.^[26]

85 On 22 July 2010, Mr Tashi emailed Mr Pomeroy, informing him that he had made a payment of AU\$100,000 to Mr Gutnick that morning after executing a document last night committing to buy five million shares at 20 cents. He set out the terms of payment and said, “You are in no way committed for the full amount if you don’t want to be in for the full exposure. We have time to discuss and you can think about it. I don’t want to have you feel pressured.”

86 On 18 August 2010, Mr Tashi emailed Mr Gutnick, asking whether he would have time to meet with him within the next seven to ten days regarding NCRC. Mr Gutnick replied that day, asking Mr Tashi to confirm that he would be able to meet the next payment on time, saying, “Essential, I put myself out for you. Gold looking great. Will meet, no problem.”

87 On 19 August 2010, Mr Tashi met with Mr Gutnick at his office and told him that Mr Pomeroy would be paying the next instalment. Mr Gutnick provided bank details for the transfer.

88 On 27 August 2010, a further \$200,000 was paid.

89 On 2 September 2010, Mr Tashi sent a further letter to the resting place of the Rebbe. The letter provided as follows:

I am writing as a further follow-up to my letter of 21 July to further acknowledge and give thanks for what I truly believe are blessings that have been bestowed upon me in response to my two earlier letters, namely the first one of 13 July and the second letter of 21 July.

I have invested in one of Joseph Gutnick’s companies and I have committed to invest more in the same company based on what I believe is a dual blessing that has been given to him and me by you to us. I believe that immediately following my first letter to you, my meeting with Joseph resulted in him offering me the opportunity to invest in “Northern Capital Resources Corporation” one of Joseph Gutnick’s main Canadian gold ventures. This is a very significant investment for me and one to which I have committed the proceeds from the sale of our house to this investment.

I have been fortunate to have come to another opportunity ...

As I said in my previous letters, I am prepared to continue to work hard and do whatever is necessary to assist in driving these opportunities to a successful conclusion and I am asking for your

continued guidance and attention to bring forth a successful conclusion to these investments. Furthermore, as I also said in my previous letters if you can further intervene and provide a “miracle” that brings about a windfall financial gain in one form or another I will share this with the community with at least 20% going to tzedeka as well as taking upon myself to become more observant in additional mitzvot.

Notwithstanding, a “windfall miracle” I will continue to share my success with the community ...[\[27\]](#)

90 The instalments continued to be paid, and on 13 December 2010 Mr Tashi delivered a cheque for \$500,000 to Mr Gutnick’s office.

91 On 9 January 2011, Mr Tashi informed Mr Gutnick that he did not have the money for the final balance. Mr Tashi had been paying in Australian dollars, but taking into account the conversion rate, the sale price of US\$1 million left outstanding a further sum of \$184,272.86 to be paid in Australian dollars.

92 On 18 January 2011, Mr Tashi was advised by Ernst & Young that the NCRC shares should be registered in the name of Krypton Nominees Pty Ltd (one of Mr Tashi’s companies).

93 In February 2011, Mr Tashi and Mr Gutnick agreed that the number of shares purchased would be adjusted to match the purchase price of AU\$1 million, and that the agreement would be otherwise amended. Mr Gutnick was advised of the name of the purchasing company, Krypton, and on 15 March 2011, Mr Tashi received a letter from NCRC to Krypton, attaching the share certificate for 4,222,000 shares in NRC.

94 Thereafter, Mr Tashi sought to sell the shares without success, including engaging Mr Stephen Fillet, of Jesteda Partners in Los Angeles, USA.

95 In September 2011, Mr Tashi met with Mr Gutnick in Mr Gutnick’s office and asked Mr Gutnick to buy some of the shares back from Krypton. Mr Gutnick refused.

96 On 7 September 2011, Mr Tashi obtained a company search of NSI, which indicated that it was owned by Mr Gutnick and his wife. Mr Tashi said that until he had received that search, he was not aware NSI was owned by Mr Gutnick and his wife.

97 Mr Tashi also engaged an attorney in the United States to do some research on NCRC and its subsidiaries. He was informed by his American attorney, a Mr Peters, that the cost of NCRC shares to Mr Gutnick would have been no more than five cents a share, and subsequently, in 2012, Mr Tashi obtained copies of the consolidated financial statements of NCRC.

Evidence of Mr Gutnick

98 Mr Gutnick gave extensive evidence over several days and I was able to closely observe Mr Gutnick's behaviour in giving his evidence. I have also carefully read the transcript of Mr Gutnick's evidence. I do not propose to fully summarise his evidence. Rather, I have sought to summarise those parts where he disagreed with Mr Tashi or which are otherwise relevant to my decision on the issues. Mr Gutnick often referred to "we", and – where appropriate – I have taken his use of the plural as meaning the first person singular.

99 Mr Gutnick said that he was the founder of NCRC, which was incorporated in Nevada. He explained that it was his intention to have NCRC make an initial public offering (IPO) of shares in a gold business.[\[28\]](#)

100 Mr Gutnick is the Chief Executive Officer and Chairman of the board of directors. In 2006, he caused NCRC to issue 20 million shares to Lubavich Foundation Australia Pty Ltd, a company owned by Mr Gutnick and his wife (which later changed its name to Northern Star International Pty Ltd). At that stage, the company was just an empty shell.

101 In December 2007, NCRC split its shares on a five for one basis. Mr Gutnick referred to a share certificate dated 31 December 2007 recording that NSI held 80 million shares in NCRC.[\[29\]](#) In the financial year ended 30 June 2008, Legend International Holdings Inc, another company effectively controlled by Mr Gutnick and in which he had a 30 per cent interest (which was an over-the-counter company in the United States) subscribed for \$10 million of shares in NCRC.[\[30\]](#)

102 Mr Gutnick referred to the consolidated financial statements for NCRC for the years ended 30 June 2011 and 2010 (NCRC financial statements).[\[31\]](#) In the NCRC financial statements, NCRC was described as an "exploration stage company". Mr Gutnick explained that an exploration stage company may have gold resources, or be searching for gold resources, but it was not yet at a production stage or at a profit stage.

103 The NCRC financial statements include the results of NCRC's subsidiaries, Golden River and Acadian. Mr Gutnick said that Acadian was a publicly listed company on the Toronto Stock Exchange. Mr Gutnick said that Golden River was publicly listed in the sense it was an over-the-counter company in the United States, although it was not listed on the main board of NASDAQ or Wall Street. Mr Gutnick said it was just a "pink sheet" company on a secondary market to the stock exchange.[\[32\]](#)

104 The notes to NCRC financial statements reported that NCRC and its subsidiaries (which were described as "the Company") had never generated any revenues from operations and was still considered an exploration stage company.[\[33\]](#) Note 1 to the accounts further recorded that on 8 July 2009, NCRC completed an off-market

purchase of 11 million odd shares in Golden River and paid approximately CDN\$14 million, giving NCRC an 87.03% holding in Golden River.

105 Mr Gutnick produced a document that listed several purchases by NCRC in Golden River, the first purchase being the \$11 million off-market purchase on 8 July 2009, and the last purchase being on 7 December 2011, by which time NCRC interest in Golden River shares had reached 97.136%.[\[34\]](#)

106 The notes to the NCRC financial statements recorded that in the fiscal year 2009, Golden River announced it had reached an agreement with Acadian to subscribe for 33-odd million shares for a gross investment of CDN\$10 million.

107 The NCRC financial statements recorded that, as at July 2011, Golden River held a 71.96% interest in Acadian.[\[35\]](#)

108 Mr Gutnick confirmed that although he acquired his shares in NCRC in 2006, NCRC did not acquire any direct shareholding in Acadian until 2009.

109 Mr Gutnick said that Golden River published annual financial reports which were publicly available.[\[36\]](#) NCRC did not produce any publicly available accounts until about March 2011, when the NCRC financial statements were published.

110 The NCRC financial statements disclosed the history of the share issues of NCRC. The report records that during the fiscal year 2008, NCRC issued 3.5-odd million shares at an issue price of US\$0.20 and that during the financial year 2009, NCRC issued 650,000 shares at an issue price of US\$0.20 and raised CDN\$132,725 pursuant to a share subscription.

111 The NCRC financial statements record that during the fiscal year 2010, NCRC issued 48-odd million shares at an issue price of US\$0.20 and raised CDN\$10,550,420. The report says that the company also issued 55,000 shares of common stock at an issue price of US\$0.2275 and raised CDN\$14-odd million as consideration for the purchase of 11 million shares of Golden River. Finally, during the fiscal year 2011, NCRC issued 15,249,000 shares at an issue price of US\$0.20 and raised CDN\$3,097,661.[\[37\]](#)

112 Mr Gutnick gave evidence that, from time to time, Acadian issued market announcements. Mr Gutnick produced a report dated 4 March 2010 with assay results from drilling.[\[38\]](#)

113 Mr Gutnick elaborated on his intention for NCRC to have an IPO so that it became a listed public company.[\[39\]](#) Mr Gutnick said that he expected that this might happen in the future,[\[40\]](#) but that it had been difficult to do so to date, not only in Australia, but also in Canada and around the world. He referred to the difficulty getting a broker necessary to underwrite an IPO for NCRC. He said that the IPO market was at the

moment dead in Australia, and dead overseas for companies much larger than NCRC.[\[41\]](#)

114 Mr Gutnick gave evidence of sales by NSI of its shares in NCRC between June 2008 and 21 July 2010. Mr Gutnick produced a schedule which listed the sale of shares of NCRC by NSI before 21 July 2010.[\[42\]](#) The schedule contained sales to 23 parties, all by NSI, and all at US\$0.20 per share, save for the last one to one Harry Luchtenstein, which was at US\$0.225.

115 Mr Gutnick said that it had been necessary for NSI to sell NCRC shares as an IPO required a spread of shareholders. He said that there was a variety of shareholders from overseas that had showed interest in the float and that he had been successful in “IPOing” in the past. He gave evidence of several members of his own family who had acquired shares in NCRC at 20 cents per share. He said that his father-in-law invested more than \$1 million. He said that the gold price was rising and they were hoping for a successful IPO.[\[43\]](#)

116 Mr Gutnick also produced a further schedule entitled “Dealings in Shares of NCRC after 21 July 2010 and before the proceedings were commenced on 28 March 2012”.[\[44\]](#) This shows further sales by NSI and also transfers by non-NSI parties. It includes an allotment in 2010 of 8,112,000 shares by NCRC to Legend International Holdings Inc on 31 December at US\$0.20 per share. For example, on 14 June 2011, Benjamin Koppell sold five million shares to Axis Consultants Pty Ltd at US\$0.20 per share. The schedule contains 18 transactions.

117 Mr Gutnick confirmed that each of the transactions which took place after 21 July 2010, when Mr Tashi acquired his shareholding, traded at either US\$0.20 per share or above US\$0.20 per share.[\[45\]](#)

118 Mr Gutnick explained the purchase of NCRC shares by Legend International. As mentioned above, the placement took place at 20 cents per share. Mr Gutnick said that when the decision was made by the board of Legend International, he did not vote, but the rest of the independent directors did so. He said that for the purpose of the acquisition, a valuation of NCRC shares (dated 4 August 2009) was obtained.[\[46\]](#) The valuer gave a range of values for the NCRC shares, with a low of 26 cents per share to a high of 53 cents per share.[\[47\]](#)

119 Objection was taken to the production of the valuation. Leave was given to tender the report to support Mr Gutnick’s belief that the shares had that asset backing value. The valuation was not tendered as an independent objective valuation of the shares.

120 Mr Gutnick also referred to an asset valuation of Acadian (dated 25 August 2010) for Golden River.[\[48\]](#) Again, Mr Gutnick was permitted to tender the document as evidence to support his belief in the value, not as independent and objective evidence

of the true value of the Acadian shares. The valuation put upon Acadian was \$50,048,734.[\[49\]](#) Mr Gutnick said that the valuation of the assets of Acadian in the report were used in the 2010/2011 accounts to value the gold asset.[\[50\]](#)

121 Mr Gutnick confirmed that he had seen the valuation in or about August 2010.[\[51\]](#)

122 Mr Gutnick said that in May of 2010, he was in discussions with Zijin Mining Company Group Limited (a Chinese state-owned mining company), about NCRC, Golden River, and Acadian. He said that he met with representatives of Zijin to discuss with them the prospect of their investing in the mining assets of Acadian through NCRC. Mr Gutnick said the discussions continued through to June and July 2010.

123 Mr Gutnick was referred to correspondence in the Court Book between Zijin and himself.[\[52\]](#) Mr Gutnick said that he was dealing with a Mr Richard Lee,[\[53\]](#) who was the head of exploration for Zijin. Mr Gutnick said that Mr Lee was very keen about some of the properties that they had, so Mr Gutnick went with Craig Michael, his senior geologist, to visit Zijin. Mr Gutnick said that they met with Zijin's whole geological team and that they all showed a keen interest. He said that the parties discussed whether Zijin should invest through NCRC or directly into the assets. Mr Gutnick said, of course, that he wanted Zijin to directly invest in NCRC because that would help with the IPO of NCRC. He said that there was a discussion of doing both, taking a placement in NCRC and taking a placement in Acadian.

124 Mr Gutnick said that it was up to the CEO (who he did not meet) as to what form the investment would take. Mr Gutnick was asked whether the interest of Zijin focused on Acadian, rather than through NCRC, and he said no, all alternatives were kept alive.[\[54\]](#)

125 Mr Gutnick said that the negotiations with Zijin were unsuccessful and that they were put onto another Chinese company who he tried to do a deal with. Mr Gutnick said that all these Chinese companies were showing a keen interest in the properties, which was very encouraging for him.

Relationship with Mr Tashi

126 Mr Gutnick said that he first met Mr Tashi when Mr Tashi approached him for a donation for the preschool at Chabad House in Malvern, and that he made a donation of \$250,000.[\[55\]](#)

127 Mr Gutnick said that he met Mr Tashi from time to time when Mr Tashi was collecting money for charities. He said that he did not have a social relationship with Mr Tashi, and that he knew that Mr Tashi was a community leader.[\[56\]](#) Mr Gutnick said that he had not had any business dealings with Mr Tashi.

128 Mr Gutnick referred to his email of 30 June 2010 to Mr Tashi, in which he said that

he would like to meet with Mr Tashi to see “if there are possibility that we can work together”.[\[57\]](#) Mr Gutnick was asked whether he had anything in particular in mind when he had mentioned to Mr Tashi working together. Mr Gutnick said that he did not.

129 Mr Gutnick said that he could not remember the exact words used at meetings he had with Mr Tashi, but that he could remember the gist of the conversations.[\[58\]](#) Mr Gutnick confirmed he did not make any notes.[\[59\]](#)

130 As to the meeting on 6 July, Mr Gutnick said that Mr Tashi came to him and asked if there was any opportunities in Mr Gutnick’s business and that Mr Tashi said that he was having financial difficulties.[\[60\]](#)

131 Mr Gutnick said that he talked about some of the companies that he was involved in. He said that he had just come back from China so Northern Capital was on his mind and that he showed Mr Tashi two presentations that were lying on his desk and asked Mr Tashi how he thought he could assist him.[\[61\]](#)

132 Mr Gutnick said that Mr Tashi said he was looking for opportunities to be somehow involved with Mr Gutnick’s businesses.[\[62\]](#) Mr Gutnick agreed with his counsel’s proposition that Mr Tashi referred to NCRC and/or AMC as being possible companies that Mr Tashi could be involved with.[\[63\]](#)

133 Mr Gutnick said that he gave the NCRC documents to Mr Tashi as they were lying on his desk and that they had been talking about his company. Mr Gutnick said that he wanted to do an IPO, so that if Mr Tashi wanted to help, he wanted to hear what he had to offer.[\[64\]](#)

134 Mr Gutnick denied that Mr Tashi had informed him that he had lost any position or directorship of other companies.[\[65\]](#)

135 Mr Gutnick was asked as best he could recall what it was that Mr Tashi was seeking from Mr Gutnick. Mr Gutnick said “Well, he was looking for – for opportunities that I may have for him”.[\[66\]](#) Mr Gutnick said that this was whether to be a director, an adviser and added “whether it would be investments.” He said that it was just a general discussion of how you could possibly make some money.[\[67\]](#)

The meeting of 13 July 2010

136 Mr Gutnick said that he was able to recall with more precision what was said on this occasion. He said that at the meeting Mr Tashi was quite upset about his financial situation and that he was quite distressed and emotional, and went on about how he used to have a much easier life and that it was very hard for him. He said that Mr Tashi told him that he was facing difficulties and that he needed to make money.[\[68\]](#) Mr Gutnick said that he could not recall the actual words at the meeting, but that he could recall the substance of the conversation.[\[69\]](#)

137 Mr Gutnick said that there was a discussion about NCRC and that they went through in detail again: that NCRC had a holding in Golden River and Golden River had a holding in Acadian. He also said that they discussed that Northern Capital had other assets as well, in the Northwest Territories [of Canada] and also in Australia.

138 Mr Gutnick said that he informed Mr Tashi that during the GFC, he was able to take his position in Acadian at a very cheap price.^[70] Mr Gutnick said that during the GFC, the market was in disarray and, luckily, he had the funds available and that he was able to buy the gold asset on the cheap. He agreed that he told Mr Tashi that he had “bought the Acadian shares at a bargain basement price.”^[71]

139 Mr Gutnick said that he did not use the expression “bargain basement price” in relation to his acquisition of NCRC, as he had acquired his shares in NCRC a lot earlier.^[72]

140 Mr Gutnick said that after the discussion about NCRC, Mr Tashi “indicated strongly” that he wanted to buy \$1 million worth of NCRC. Mr Gutnick was asked whether he identified the company as NCRC and said, “Well that’s all we were talking about – about an IPO of Northern Capital and I’d come back from China and I was excited about that at the time.”^[73]

141 Mr Gutnick said that there was a discussion about Mr Tashi’s capacity to pay or acquire \$1 million worth of shares at that time. Mr Gutnick said that Mr Tashi told him that it would be difficult for him. Mr Gutnick said that he told Mr Tashi the price that NCRC was selling at and that they then discussed if he could pay for the shares over a period of time.^[74] Mr Gutnick said that he told Mr Tashi that the shares would sell for 20 cents per share and that was the market price that people were paying at the time.^[75]

142 Mr Gutnick was asked whether there was any discussion about where the NCRC shares, that Mr Tashi was seeking, might be sourced from. Mr Gutnick said:

We were thinking about – well, I was selling at 20 cents. I had sold to everybody else at 20 cents so the question was, could we get shares for him at a cheaper price or with some type of terms that were better than I’d sold to other people. I couldn’t really sell in better terms than I’d sold to my own father-in-law or other people that I’d sold to, so we were going to surf around and see if there was someone else that may possibly be able to sell to him at better terms than I would.^[76]

143 Mr Gutnick said that he and Mr Tashi discussed terms and that there was not any talk about getting the shares below 20 cents.^[77]

Conversation about the Rebbe

144 Mr Gutnick said that during the meeting, Mr Tashi referred to the Rebbe and that he had been corresponding with the Rebbe. Mr Gutnick said that he took it that what Mr Tashi meant was that he was consulting with the books of the Rebbe and that he was encouraged to make an investment.^[78]

145 Mr Gutnick agreed that he discussed with Mr Tashi his experience with the Rebbe and that he told Mr Tashi that the Rebbe (whilst he was still alive) had encouraged him to look for diamonds and gold.^[79]

146 Mr Gutnick was asked what else he could recall about the meeting on 13 July. He said:

Well, we discussed the Rebbe. We discussed Mr Tashi's financial situation and we discussed ways of trying to get the NCRC shares on some favourable terms, instalments or maybe someone wanted to sell cheaper, we just – maybe we could get a better deal for him.^[80]

147 Mr Gutnick was asked whether there was any discussion as to whether Mr Gutnick could sell Mr Tashi's shares in NCRC at the time. Mr Gutnick said, "Well, I said I could deal with him at 20 cents. That was about all the discussion was and we were looking to – for someone to get him better terms. I wasn't prepared at that stage to give him better terms."^[81]

Telephone call on 13 July 2010

148 Mr Gutnick recalled the telephone call with Mr Tashi after the meeting. Mr Gutnick said, "I said to him that I could possibly get for him more favourable terms. I was quite taken aback by the emotional state that he was in and that I could possibly get favourable terms from a third person, I'll certainly try, and that I would go along with trying to assist him in that way."^[82]

149 Mr Gutnick was asked whether, after 13 July, he did anything to try and source shares on what Mr Gutnick described as favourable terms for Mr Tashi. Mr Gutnick said:

Yes. I had spoken to my son who was involved, Mordechai Gutnick, who was involved a lot in the – with the IPO and some of the people that he had sold shares to on my behalf, to speak to them and see what he could get better terms for them, if someone maybe wanted to sell, someone would sell on terms.^[83]

150 Mr Gutnick said that by 21 July no other seller had been sourced for the sale of NCRC shares to Mr Tashi.[\[84\]](#)

Conversation of 14 July 2010

151 Mr Gutnick said that he could recall this conversation. He was asked whether, in that conversation, could he recall whether he was asked what the name of the company was in which it was thought that Mr Tashi might invest. Mr Gutnick said that it was quite clear at the time that he was talking about NCRC so that he did not recall such a statement.[\[85\]](#)

152 Mr Gutnick was taken to his email of 19 July 2010 to Mr Tashi, where he asked Mr Tashi to let him know as soon as possible his best payment schedules “so I can organise the purchase.”[\[86\]](#) Mr Gutnick was asked what it was that he was conveying in that email to Mr Tashi. Mr Gutnick said, “Well, I had in mind at that time that either we would find a third party or I would offer to sell the shares myself.”[\[87\]](#)

153 Mr Gutnick was taken to his email of 20 July 2010 to Mr Tashi where he said that, “You will need to pay \$100,000 upfront as deposit to ensure the sale for both parties.”[\[88\]](#) Mr Gutnick was asked what was the point of that email to Mr Tashi. Mr Gutnick said, “Well, if we were going to get an outsider or if it was going to be myself, um, needed a down payment.”[\[89\]](#)

Meeting of 21 July 2010

154 Mr Gutnick explained what was meant by consulting the Rebbe’s book. He said that there is a custom amongst certain elements of his movement (but not including him) that if you open the book and put the question in that you have written down, whatever is written on the page you open the book at, you take that as an answer to the question.[\[90\]](#)

155 Mr Gutnick said that on 21 July, Mr Tashi had told him that he had consulted the Rebbe. Mr Gutnick said that he did not mention the book to him, but he understood it to be the book that he was talking about, and that this led Mr Tashi to be motivated and optimistic.[\[91\]](#)

156 Mr Gutnick was asked whether there was, on 21 July at Mr Gutnick’s office, discussion about whether he had been successful in sourcing NCRC shares from a third party. Mr Gutnick said that he told Mr Tashi that he had not been successful.[\[92\]](#)

157 Mr Gutnick was asked whether he told Mr Tashi whether he was in a position to sell the shares. Mr Gutnick said, “I told him that I was making an exception and selling him my own shares with instalments.”[\[93\]](#)

158 Mr Gutnick agreed that he signed the sales document and that before signing, he

rang up Mr Batch, his accountant, and asked him whether his wife had to sign as a co-director or not.[\[94\]](#) Mr Gutnick said that Mr Batch advised him that he could sign as a sole director.

159 Mr Gutnick was asked whether Mr Tashi asked him anything about the identity of NSI and Mr Gutnick's relationship. Mr Gutnick said, "It was very obvious that it was my own – obvious, I told him it was my own shares."[\[95\]](#)

Cross-examination of Mr Gutnick

160 Mr Gutnick agreed that he was an ordained rabbi and a Shliach (an emissary of the Rebbe).[\[96\]](#)

161 Mr Gutnick agreed that, as far as he was aware, he had been involved in all purchases and sales of shares in NCRC.[\[97\]](#) Mr Gutnick was not able to identify any sales or purchases where he was not a controlling person on one side or another of the transaction.[\[98\]](#)

162 Mr Gutnick agreed that he understood, after the first meeting, that Mr Tashi wished to work with him so that Mr Tashi could be paid.[\[99\]](#)

163 Mr Gutnick was asked about the meeting of 13 July 2010. Mr Gutnick was asked about the discussions about the Rebbe. Mr Gutnick said that he could recall that Mr Tashi had written to the Rebbe's gravesite and that he felt optimistic.[\[100\]](#)

164 Mr Gutnick was asked whether he had told Mr Tashi that he had secured shares in NCRC at a bargain price during the global financial crisis. Mr Gutnick denied that, and said that it was the Acadian shares. He said that he was able to buy the asset very cheap and that his geological team thought it was a bargain.[\[101\]](#)

165 Mr Gutnick was asked whether he had been told that Mr Tashi proposed selling his home. Mr Gutnick agreed that Mr Tashi had told him that at some time. Mr Gutnick said that he recalled Mr Tashi telling him that once he sold his house, that he would be able to pay the instalments up and he appreciated the fact that he had got instalments.[\[102\]](#)

166 Mr Gutnick agreed that, in the telephone call that he had immediately after the meeting on 13 July, he told Mr Tashi that he wanted to help him.[\[103\]](#) Mr Gutnick denied telling Mr Tashi that he could not speak openly about it because it was a public company and that he could not personally trade in the shares. Mr Gutnick said he "wouldn't speak like that."[\[104\]](#)

167 Mr Gutnick was asked whether he could recall saying to Mr Tashi that he could arrange for him to purchase shares from a third party at his original cost price. Mr Gutnick said, "I was attempting to arrange – my son was still attempting to arrange

from a third party.”[\[105\]](#)

168 Mr Gutnick said that, “Well, I hope that by him buying the shares that he’d do well as ... we would IPO. The gold price was strong. We had 1.7 million ounces of gold in Acadian so I hoped he’d do well out of it.”[\[106\]](#)

169 Mr Gutnick was asked whether he recalled saying to Mr Tashi that he was doing this as a favour for Mr Tashi because “you yourself were in the shit once and you knew what it was like”. Mr Gutnick said that:

... I may have said that ... in my past life I had been through financial difficulties, and that I was sympathetic to his situation, and ... that’s why we’re looking to get the shares for him ... in instalments that we hadn’t done for anyone else. And that was – it would have been extremely favourable terms because, as I said beforehand, it was – would have been extremely unusual to give someone terms for a year almost.[\[107\]](#)

170 Mr Gutnick denied that Mr Tashi said that his tanks were empty and that he had no investable funds.[\[108\]](#)

171 Mr Gutnick was taken to Mr Tashi’s email of 14 July where Mr Tashi asked for a 15 second call.[\[109\]](#) Mr Gutnick did not recall calling him back. It was put to Mr Gutnick that Mr Tashi asked in that short conversation the name of the company. Mr Gutnick said that could not have been the case because all they were talking about was Northern Capital. Mr Gutnick did not claim to have any recollection of that conversation.[\[110\]](#)

172 Mr Gutnick was asked about whether there was a discussion on 14 July that NCRC was not a public company. He said he did not recall Mr Tashi asking that point, but he said it was a ridiculous point because Mr Tashi knew that it was not a public company. He said, “The whole discussion was that could IPO [sic] and because it could IPO that’s how we’d make money. Otherwise how was he going to make money? It’s unlisted.”[\[111\]](#)

173 Mr Gutnick was asked about the discussion about a payment plan. Mr Gutnick said that they were attempting to find another party. Mr Gutnick said that they tried to find somebody, but everyone they did approach thought it was a ridiculous proposition.[\[112\]](#)

174 Mr Gutnick agreed that he said to Mr Tashi that he should come up with a payment plan that Mr Gutnick might put to a third party.[\[113\]](#) Mr Gutnick said that he was not disputing that he put that proposition to Mr Tashi because he was attempting to get a third party.[\[114\]](#)

175 Mr Gutnick was taken to Mr Tashi's email of 18 July.[\[115\]](#) He said that the terms referred to there were Mr Gutnick trying to get Mr Tashi Northern Capital shares on instalment terms from a third party.[\[116\]](#) Mr Gutnick agreed that when he referred to organising the purchase in his email of 19 July, he was seeking to convey to Mr Tashi that he was acting as "a facilitator".[\[117\]](#)

176 Mr Gutnick was taken to his email of 20 July where he referred to the need to pay \$100,000 upfront as a deposit "to ensure the sale for both parties."[\[118\]](#) Mr Gutnick agreed that he was trying to convey to Mr Tashi that he would have to put some money upfront to ensure the agreement of a third party.[\[119\]](#)

177 Mr Gutnick was taken to his email of 20 July at 8.30 pm where he said that he would be able to take care to ensure "the favourable terms from the third party which is excellent for you". Mr Gutnick agreed that at that stage he did not have a third party lined up.[\[120\]](#) Mr Gutnick said that he was thinking of himself as the seller at that time.[\[121\]](#) Mr Gutnick said that the reference to a third party in the email indicated that he was looking for a third party. He said that his son was looking for a third party and that he was looking for a third party, and that he would rather have a third party be involved.[\[122\]](#) Mr Gutnick said that to entice a third party to buy the shares, he would have had to have had at least \$100,000 deposit.

178 Mr Gutnick said that it was extremely unusual to sell shares on terms and that is why it was very favourable to Mr Tashi that he was obtaining them on instalments.[\[123\]](#)

179 Mr Gutnick was cross-examined about the meeting on 21 July. He agreed that he made a telephone call while Mr Tashi was present asking whether he had authority to sign the document himself.[\[124\]](#)

180 Mr Gutnick agreed that Mr Tashi may have told him that Mr Tashi would advise him the correct entity that was buying the shares at a later date and that Mr Gutnick informed him that that would be okay because the share certificate would not be issued until after all instalments were paid. Mr Gutnick agreed that that could have happened.[\[125\]](#)

181 Mr Gutnick was asked whether he had told Mr Tashi that the price was in US cents. Mr Gutnick said that Mr Tashi knew that because it was quite obvious and that he had told Mr Tashi that in Australia, the shares were selling to everyone for US20 cents.[\[126\]](#)

182 Mr Gutnick was asked about providing Mr Tashi with the accounts of NCRC, Acadian, and Golden River. Mr Gutnick said that Mr Tashi never asked for the accounts, although Mr Tashi had told him about difficulties Mr Tashi had in obtaining them from the website.[\[127\]](#)

183 Mr Gutnick was taken to several share sale agreements for shares for sales by NSI, including one as recently as five days before 21 July and agreed that on each occasion he had signed by himself. It was put to Mr Gutnick that he knew on 21 July that he could sign as a sole signatory. He denied that.[\[128\]](#)

Cross-examination on accounts

184 Mr Gutnick agreed that the substantial assets of NCRC were in Golden River Resources.[\[129\]](#)

185 Mr Gutnick also said that the accounts for NCRC were not available until March 2012 and that none of the other investors who acquired shares in NCRC would have received the accounts before March 2012.[\[130\]](#) Mr Gutnick agreed that nobody who had invested in NCRC shares had access to the financial statements, but that he had access to management accounts.[\[131\]](#)

186 Mr Gutnick agreed that on 21 February 2011, Mr Tashi told him that he had received advice from his accountants and that correct entity to have as the purchaser was Krypton Holdings.[\[132\]](#)

187 Mr Gutnick maintained that he told Mr Tashi that he was a director of NSI and that it was his company selling the shares to Mr Tashi.

188 Counsel for Mr Tashi put it to Mr Gutnick that nowhere in the defence was it alleged that Mr Gutnick told Mr Tashi that he was selling his shares.[\[133\]](#) It was put to Mr Gutnick that it was not suggested to Mr Tashi (during cross-examination) that Mr Gutnick had told him that Mr Gutnick was selling his own shares. Mr Gutnick said that that may be the case, but that he did tell him in the meeting of 21 July.[\[134\]](#) After saying that, Mr Gutnick again referred to the fact that it was quite obvious that Mr Gutnick was selling his shares, as Mr Gutnick signed the document as a director. Mr Gutnick said, “It was quite obvious that on that meeting that it was obvious to me, obvious to him and I did state it to him. It was quite obvious when I rang ... There was never any discussion about talking to a third party.”[\[135\]](#)

189 Mr Gutnick was asked about the discussion at the meeting of 13 July as to whether Mr Tashi could get cheaper shares or shares on instalments. Mr Gutnick said, “There was a thought that there may be cheaper – may be able to get cheaper shares, but that was ruled out very quickly after speaking to a number of people that just bought the shares at 20 cents, why on earth would they sell it at a cheaper price, so it was ruled out pretty quickly.”[\[136\]](#) Mr Gutnick said his son was the main one who spoke to people, but Mr Gutnick did speak to one or two people. He did not recall who.[\[137\]](#)

190 Another issue between the parties was that Mr Gutnick maintained that, at the meeting on 13 July, he and Mr Tashi discussed acquiring the NCRC shares on

instalments. It was put to Mr Gutnick that that was not referred to in his defence, but rather his defence mentioned that, in the telephone conversation that took place on 13 July after the meeting, instalments were mentioned. Mr Gutnick responded as far as he could recall, the payment discussion was also discussed earlier at the meeting.[\[138\]](#)

191 Mr Gutnick was taken to his defence where he pleaded that on 13 July 2010 there were discussions that AMC was looking for a joint venture partner to exploit the Scotia Goldfields project and/or the zinc mine, and that there were ongoing discussions with a Chinese investor and others in this regard. The defence went on to plead that these discussions related to a potential investment in NCRC, AMC, the Nova Scotia Goldfields project and/or the zinc mine.[\[139\]](#)

192 Mr Gutnick was referred to the email from Richard Lee to Mr Gutnick on 17 June 2010 which informed Mr Gutnick that Zijin management had finally decided not to pursue the zinc and lead mine due to the small tonnage. The email went on to say that, “We might make investment on Acadian for MSS, but not Northern Capital as it is too much complicated.”[\[140\]](#)

193 Mr Gutnick said that the Chinese changed their minds, but that they were still talking about the possibility of doing a part placement in Northern Capital, and also buying Acadian shares, and also a joint venture.[\[141\]](#)

194 Mr Gutnick was taken to the email of 17 June from Richard Lee which said it was “neggive” [negative] to talk about Northern Capital any more. Mr Gutnick responded that even if the Chinese only invested in Acadian, that would still have improved the value of Northern Capital.[\[142\]](#)

195 Mr Gutnick agreed that the Chinese wished to buy AMC shares at six cents a share, which would impute a value into NCRC shares of about 15 cents per share.[\[143\]](#)

196 After being taken to the emails with the Chinese in which Mr Gutnick was informed not to press the purchasing in NCRC anymore, Mr Gutnick was asked whether, on 13 July, he told Mr Tashi there were ongoing discussions about the investment in NRC by the Chinese, and it was put to Mr Gutnick that that was not correct. Mr Gutnick said that the Chinese were still talking to him about NCRC.[\[144\]](#)

197 Mr Gutnick agreed that his company, Fast Knight, purchased 55 million NCRC shares for one cent per share. Mr Gutnick said that his original evidence – that the 22.75 cents consideration referred to in the NCRC financial statements may have been a currency issue – may not have been the case. He agreed that only US\$500,000 was paid by Fast Knight for the 55 million shares.[\[145\]](#) He agreed that shortly after Fast Knight received its shares, Legend International subscribed for shares in NCRC in order to provide funding for the investment in Golden River Resources.[\[146\]](#)

198 Mr Gutnick agreed that initially NSI bought 100 million shares for approximately two hundredths of a cent per share, and that his private company, Fast Knight, purchased 55 million shares in NCRC for one cent, and that shortly thereafter, Legend International, which is a public company in which he has a 30% shareholding, acquired its shares for some eight million dollars and acquired some 20% of the company.[\[147\]](#)

199 Mr Gutnick agreed that after 29 September 2009, he or Legend International was either a buyer or a seller for all the shares being bought and sold in NCRC.[\[148\]](#)

200 It was put to Mr Gutnick that, on his evidence, at the meeting on 13 July Mr Tashi had said he wanted to purchase one million dollars' worth of NCRC shares and that Mr Gutnick had said that he would do his best to source shares in NCRC for Mr Tashi and the purchase price would be at US\$0.20 cents per share. It was put to Mr Gutnick that that evidence was inconsistent with him telephoning Mr Tashi shortly after, telling Mr Tashi that he wanted to help him if possible by obtaining NCRC shares for him. It was put to Mr Gutnick that that evidence was inconsistent, and Mr Gutnick denied that. It was put to him that there would have been no purpose in the phone call if in fact Mr Gutnick had already told Mr Tashi in the meeting that Mr Gutnick was going to do exactly what he now said he told him in the telephone call.[\[149\]](#) Mr Gutnick explained the subsequent telephone call as one where he was trying to get favourable terms for Mr Tashi.[\[150\]](#)

201 It was then put to Mr Gutnick that his oral evidence was that he discussed getting favourable terms with Mr Tashi at the meeting of 13 July. It was put to Mr Gutnick that that was not anything new either, according to his evidence. Mr Gutnick agreed.[\[151\]](#) When it was put to Mr Gutnick that there was absolutely no reason for calling Mr Tashi after the meeting, Mr Gutnick said, "I was reassuring him. He was very emotional."[\[152\]](#)

202 It was put to Mr Gutnick that during this period of dealing with Mr Tashi, NSI was a willing seller of shares in NCRC. Mr Gutnick said:

We were selling shares, yes, to get, um, other people involved. It was a source of me having income. I'd created a company. It wasn't the first time I've done it. Made a float, started something, and sold it to make money for myself. That's one of the ways that I earn funds besides my wages.[\[153\]](#)

203 Mr Gutnick was asked about his attempts to obtain the NCRC shares for Mr Tashi from a third party. It was put to Mr Gutnick that he had not spoken to anybody, and he said, "I did speak to one or two", but he did not remember who.[\[154\]](#)

204 Mr Gutnick was asked about the instalment plan. It was put to him that no third party had said they required a payment of \$100,000. Mr Gutnick agreed.[\[155\]](#) Mr

Gutnick said it was his way of enticing another seller.[\[156\]](#) It was put to Mr Gutnick that he did not call and speak to anyone and offer them \$100,000 the next day. Mr Gutnick said that he thought he did and he said that he thought he did at the time because he called someone in the United States, one or two people in the United States who were shareholders and who were not shareholders. He said that they were based in New York and California.[\[157\]](#)

205 Mr Gutnick agreed that the prudent thing to do when investing in a company was to examine the financial statement of that company. He said that he knew that Mr Tashi could not have done that, because the financial statements were not available. Mr Gutnick agreed that Mr Tashi knew Mr Gutnick was an NCRC insider. Mr Gutnick agreed that he knew that Mr Tashi was relying on him to look after his interests in this transaction.[\[158\]](#)

206 Mr Gutnick agreed that when dealing with Mr Tashi, he knew about the existence of the Golden River Resources Annual Report for the financial year ended 30 June 2009.[\[159\]](#) Mr Gutnick was taken to page 32 of that report, which said that an investment in its common stock involved a high degree of risk and should be considered only by persons who could afford the loss of their entire investment.[\[160\]](#) Mr Gutnick was taken through information in the annual report indicating that the company had no known gold or other mineral reserves and that there was a doubt as to its ability to continue as a going concern. Mr Gutnick agreed that he knew all these factors when he was talking to Mr Tashi.[\[161\]](#)

207 Mr Gutnick agreed that the market valuation of Golden River Resource's shares in Acadian was AU\$2,286,680 million.[\[162\]](#) It was put to Mr Gutnick that Acadian shares were trading for about six cents a share, and that if one worked out the interest one acquired in Acadian shares through a shareholding in NCRC, that that would be the equivalent of ten cents per NCRC share.[\[163\]](#)

208 Mr Gutnick was cross-examined about the difference between the price paid and the value of shares acquired. He agreed that Fast Knight paid half a cent for each of the shares acquired in Golden River Resources, and swapped two shares in Golden River Resources for a share in NCRC, and thus had paid one US cent a share for each NCRC share it acquired.[\[164\]](#)

209 Under re-examination, Mr Gutnick said that in July 2010, there were 160 shareholders of NCRC and the market price was 20 cents per share.[\[165\]](#)

The financial position of NCRC

210 By July 2010, the financial position of NCRC was parlous. For the following reasons, I find that Mr Gutnick was aware of this financial position.

211 The main investment of NCRC was its holding in Golden River Resources. In September 2009, Golden River Resources had reported in its financial accounts (that Mr Gutnick had in his possession prior to July 2010) that by June 2009, Golden River Resources had not yet commenced revenue-producing operations and it had a retained deficit of US\$30,940,000. The auditor's report stated, "These conditions raise substantial doubt about the company's ability to continue as a going concern." The accounts further showed that as at 30 June 2009, Acadian (in which Golden River Resources had a significant investment) had a deficit of assets over liabilities.

212 In his evidence, Mr Gutnick referred to interest being shown by Chinese investors in investing in NCRC. By July 2010, however, the potential Chinese investors had said that they were no longer interested in investing in NCRC, although they were still looking at Acadian.

213 When the accounts for NCRC were finally published in December 2011, they disclosed that, as at 30 June 2011, NCRC had not yet commenced revenue-producing operations and had funded operations through equity and debt financing since its inception. The accounts said that these conditions raised substantial doubts about the company's ability to continue as a going concern. These were the first accounts published by NCRC. Nevertheless, Mr Gutnick admitted that he had management accounts which would have clearly shown the desperate financial straits NCRC was in.

214 Mr Gutnick (through NSI) had been selling down his shareholding in NCRC for approximately nine months prior to selling shares to Mr Tashi.

Credit of Mr Gutnick and Mr Tashi

215 For the following reasons, I did not find Mr Gutnick's evidence reliable. I am not prepared to accept his evidence unless it is corroborated.

216 Mr Gutnick did not answer questions directly and was often evasive in his answers. He often dissembled and obfuscated. He clearly sought to reconstruct conversations when it was apparent that he had no clear recollection of the conversations. Mr Gutnick often conflated the distinction between price and value in his answers in order to avoid answering direct questions on prices paid in his dealings with NCRC, Golden River and Acadian. It took a great deal of cross-examination by counsel for Mr Tashi for Mr Gutnick to concede facts which Mr Gutnick was well aware ought to be conceded.

217 Mr Gutnick said that at the meeting on 21 July 2010 he told Mr Tashi he was selling him his own shares. I find that statement was not true and that Mr Gutnick knew it was not true. Despite extensive pleading in the defence, this conversation was not mentioned. Although a critical element in the case, the conversation was not put to Mr Tashi in cross-examination. Whether Mr Tashi was aware that Mr Gutnick was selling

his shares, rather than the shares being sold by a third party, was a significant issue in the case. To meet this claim by Mr Tashi, it was pleaded by Mr Gutnick and also put to Mr Tashi in cross-examination that he knew that Mr Gutnick was selling his own shares, as the share sale agreement described Mr Gutnick as the director of the seller. There was no mention of Mr Gutnick telling Mr Tashi that Mr Gutnick was selling his own shares. I consider this evidence of Mr Gutnick to be particularly important in my assessment that his evidence was unreliable.

218 Another significant difference in the respective versions of Mr Tashi and Mr Gutnick is of the circumstances in which Mr Tashi was offered the opportunity to buy shares in NCRC.

219 Mr Gutnick denied that he offered to obtain for Mr Tashi shares in a company of which he was the Chairman in their telephone conversation after the meeting of 13 July. He denied suggesting that he buy \$1million worth of the shares. Rather, he said that he merely rang Mr Tashi to reassure Mr Tashi, who was emotional, and that he told Mr Tashi he would seek to obtain the shares on more favourable terms. I find this evidence was not true and that Mr Gutnick knew it was not true.

220 Mr Tashi said that at the meeting of 13 July there was no discussion with him of purchasing \$1 million worth of shares in NCRC; Mr Gutnick says that there was. Mr Gutnick said that a price of 20 cents per share was discussed at the meeting of 13 July. Mr Gutnick said that they discussed if Mr Tashi could pay for the shares over time and that Mr Gutnick would “surf” around and see if there was someone else that may possibly be able to sell at better terms than he would. He said that there was no discussion of getting the shares below 20 cents.^[166] Mr Tashi denied that there was any discussion of him buying shares in NCRC at the meeting of 13 July. Mr Tashi said that the purchase of shares in an unidentified company was first raised in the phone call made after the meeting.

221 Mr Tashi’s version is supported by his email of 14 July, where he thanked Mr Gutnick for the follow-up call and said he very much appreciated Mr Gutnick’s thought and action. Mr Tashi said that he wanted to clarify one point very quickly and would appreciate a 15 second call, and asked Mr Gutnick to call him and left his mobile number.

222 There was no reference in the email to Mr Tashi wishing to purchase NCRC shares as was allegedly discussed at the meeting of 13 July. Mr Tashi asked for a 15 second call. That is consistent with Mr Tashi’s evidence of asking Mr Gutnick what the name of the company was. Further, there was no need for Mr Gutnick to call Mr Tashi after the meeting on 13 July. According to Mr Gutnick’s evidence, the phone call did not take the matter any further than it was left after the meeting of 13 July.

223 I am satisfied that Mr Gutnick’s primary intention in selling NCRC shares to Mr

Tashi was for Mr Gutnick to help himself by offloading further NCRC shares, which he knew were probably close to worthless. I am not satisfied that Mr Gutnick intended to help Mr Tashi at all. Mr Gutnick's behaviour was not that of a friend assisting another in trouble. Rather, I find that it was predatory behaviour in which Mr Gutnick was primarily motivated by enriching himself at Mr Tashi's expense.

224 I find that Mr Tashi was an honest witness. On occasions, it is apparent that he sought to reconstruct his evidence. But I am satisfied that he did not seek to do so with any intention of misleading the Court. His version of events was supported by the contemporaneous documents. His frank and moving letters to the Rebbe were also entirely consistent with his version of events.

Did Mr Gutnick represent to Mr Tashi that Mr Gutnick was exercising independent and objective judgment in the best interests of Mr Tashi?

225 Mr Tashi alleges that this representation was conveyed by Mr Gutnick describing the share purchase as "favourable" and "excellent for you."

226 These two phrases come from the email that was sent by Mr Gutnick to Mr Tashi at 9.20pm on 20 July, in which he said, "I would think so. I will then be able to take care to ensure the favourable terms from the third party which is excellent for you".

227 Mr Gutnick argued that the term "favourable terms from the third party which is excellent for you" was a reference to the fact that the payment was to be on terms. I do not accept this evidence. Mr Gutnick said that at the time he sent that email, he was still considering procuring the shares from a third party. He said that he himself had made inquiries in America and, in particular, in New York and the West Coast of the United States. I do not accept this evidence. It is not conceivable that a third party would agree to such generous terms (ie, over six months) unless the third party had given prior agreement to doing so. For Mr Gutnick to be able to firmly accept the terms offered by Mr Tashi satisfies me, on the balance of probabilities, that Mr Gutnick, at that stage, had intended to sell Mr Tashi his own shares and that he had no intention of procuring shares from a third party.

228 Mr Gutnick said that he had asked his son, Mordecai Gutnick, to obtain an offer from a third party. Mr Mordecai Gutnick was in Court, was available to give evidence, and was not called by the defendants to support such evidence. I can only infer that Mr Mordecai Gutnick's evidence would not have supported his father's evidence. Further, I am more readily able to infer that there was no third party being sought to sell their shares as at the evening of 20 July 2010.

229 I do not believe Mr Gutnick when he says that he was seeking to obtain shares from a third party for sale to Mr Tashi.

230 I find that Mr Gutnick did represent to Mr Tashi that Mr Gutnick was exercising independent and objective judgment in the best interests of Mr Tashi when he described the share purchase by Mr Tashi as “favourable and excellent for you.”

Did Mr Gutnick represent that he had no direct financial interest in, or control over, the “third party” person or company who was selling the shares?

231 Mr Gutnick referred to the vendor as a third party in his email of 20 July 2010. Mr Gutnick said, however, that by the time the share purchase agreement was entered into Mr Tashi was aware that Mr Gutnick was in fact selling his own shares. As mentioned above, I do not accept Mr Gutnick’s evidence that he told Mr Tashi that he was the seller of the shares. I accept Mr Tashi’s evidence that, even though he may have noticed that Mr Gutnick signed as a director of the seller, he did not form the view that the seller was other than a third party. Mr Tashi suggested that Mr Gutnick may have been a director of a company holding the shares on behalf of the third party or acting otherwise. I accept that Mr Tashi believed that Mr Gutnick being a director did not mean that the company was not holding them as nominee for another person. I accept Mr Tashi’s evidence that he believed that the shares were beneficially owned by a third party at the time he purchased the shares.

232 I find that Mr Gutnick did represent to Mr Tashi that Mr Gutnick had no direct financial interest in, or control over, the “third party” person or company who was selling the shares.

Did Mr Gutnick represent that the price of the shares were the same “bargain” price that Mr Gutnick had himself paid for shares in NCRC?

233 Mr Gutnick denied making that representation. Mr Tashi said that he did. I accept Mr Tashi’s evidence and, for the reasons given above, I reject Mr Gutnick’s evidence. I find that Mr Gutnick did make the representation as alleged.

Were the representations false?

234 Clearly, the representation that Mr Tashi was buying shares at the same bargain price that Mr Gutnick had paid was false. Mr Gutnick paid initially a fraction of a cent for his shares and, even taking into account the later share issues, he paid nothing close to 20 cents per share.

235 I have already indicated that the representation that the shares were being sold by a third party was false. Mr Gutnick does not dispute that issue.

Did Mr Gutnick exercise independent objective judgment in the best interests of Mr Tashi?

236 For the reasons expressed above, Mr Gutnick clearly did not. As I have indicated,

Mr Gutnick considered that the sale was in his own best interests. I do not find that he believed that it was in the interests of Mr Tashi. On the contrary, Mr Gutnick was aware of the financial difficulties of NCRC. I do not accept Mr Gutnick's evidence that he genuinely believed that an IPO was possible. The Chinese had lost interest. NCRC was worth virtually nothing. The suggestion that it could be the subject of an IPO was fanciful. I find the representation was false.

Reliance

237 Mr Tashi explained why he was interested in investing in NCRC shares, even though he had told Mr Gutnick that he had no investable funds.^[167] Mr Tashi said that he was convinced that Mr Gutnick's motive was purely to help Mr Tashi get out of his predicament. Mr Tashi said that he knew Mr Gutnick as a very generous individual, a rabbi of his religious community, somebody whom he respected, somebody that he understood was committed to the Rebbe and the Rebbe's teachings, and he believed that the only motivation Mr Gutnick had was to assist him.

238 Mr Tashi said that:

[Mr Gutnick] had no commercial or financial interest in the recommendation that he made to me, that it was just as he described, that he had an opportunistic moment in purchasing the assets of NCRC and Acadian. I saw this as an opportunistic moment for me being helped by somebody that had earlier, at one of our earlier meetings expressed admiration for me by referring to me as someone with a shem tov, which translates to a good name.^[168]

239 Mr Tashi said that although he was an experienced investor, he had made no risk assessment of the investment in NCRC. Mr Tashi said that he did not see his purchase of shares in NCRC as a normal investment transaction. Mr Tashi said that ordinarily, if he were investing in shares, he would get the financial statements of the relevant company and examine them. Mr Tashi said that he tried to obtain the financial statements of NCRC from the NCRC website, but that they were not available. Mr Tashi said that, absent the financial statements, in his mind only Mr Gutnick was in a position to assess NCRC.^[169] Mr Tashi said that he totally relied on Mr Gutnick's goodwill towards him.

240 Mr Tashi was asked who he relied on in deciding to further investigate NCRC. Mr Tashi said:

I totally relied on the goodwill of Mr Gutnick, the representation that he made to me that his only interest is in helping me because he himself was in this predicament once before and he knew what it felt like. His representation to me that they were not his shares, if I consider an investment and the seller is the controlling shareholder referred to as an insider, if it's one of the directors, an insider again, to me that's a red flag and I

would not ordinarily even engage in the due diligence of such a potential investment. But this to me was not a typical investment, it was an opportunity, as Mr Gutnick put to me, to retrieve some of my financial standing in a relatively short period of time.[\[170\]](#)

241 Mr Tashi said that it was significant that NCRC was not a public company. Mr Tashi said that it was discussed in an earlier meeting with Mr Gutnick that a Chinese company called Zijin was a potential investor who would offer an IPO to NCRC. Mr Tashi was asked would he have ordinarily been interested in investing in a company that was not a public company.[\[171\]](#) Mr Tashi said that he would not have been, as he had no investor funds at the time and he was not looking for any investment.[\[172\]](#) Mr Tashi said that generally he would not have made an investment of the type he made in NCRC unless he was able to view the financial statements.[\[173\]](#)

242 In my view, the fact that Mr Tashi, as an experienced businessman, invested \$1 million in NCRC shares when he was otherwise under considerable financial strain supports the view that he relied on the business and financial acumen of Mr Gutnick and, in particular, on each of the three alleged representations.

243 Mr Tashi was asked whether there was any “particular trigger“ for deciding to send the email of 18 July 2010 informing Mr Gutnick that he would like to accept Mr Gutnick’s offer. Mr Tashi said that he thought that Mr Gutnick’s offer:

... perhaps ... was as a result of my request for a blessing from the Rebbe on – on 12 July. And so that was one thought that I had. And I was motivated by the fact that I was being offered by somebody of good standing in the community. Somebody that I thought that I could trust and believe in was offering to help me and this was not an ordinary investment proposal.[\[174\]](#)

244 Mr Tashi explained how he put his offer of the payment on terms as follows. Mr Tashi said that he expected a 10% deposit on the sale of his house and that a friend of his, Mr Pomeroy, agreed to meet the August payment.[\[175\]](#) Mr Tashi was asked what was important to him in making the decision to invest which he conveyed to Mr Gutnick by his email of 18 July 2010. Mr Tashi said:

... the importance to me is that I did not see this as a normal investment transaction. It was for me to make a commitment to invest this amount of money, even a hundred thousand dollars without having financial statements would just not happen. It’s never happened in – now I’m standing here, 49 years in business. I’ve never invested in the same manner as what this ...

So why did you do it in this instance?---Total trust in what Mr Gutnick told me. An opportunity of receiving shares that are significantly discounted to current market value. I had no way of knowing any of this as NCRC was not a listed company, the shares were not quoted, the shares could have been 20 cents, \$20, it made no

difference. It was – to me, it was just a number, but on the representations that were made to me, I assumed wholeheartedly that these shares were heavily discounted on the basis of what was transmitted to me over several meetings that Mr Gutnick had bought the assets at an opportunistic moment at significantly discounted prices due to a distress sale and he, when he made the offer to me, it was made to help me because he understood the predicament that I was in as he had experienced such a predicament himself. I trusted him and saw that this was – could have been selling me bananas for all I knew. This was an opportunity that had a built-in profit.[\[176\]](#)

245 Mr Tashi was asked about the built-in profit. He said that he told Mr Gutnick that he did not have a long tail for this investment, that he could not have the million dollars outstanding for a long period of time. He said that Mr Gutnick had previously indicated that an IPO would happen within six months. He said that he had been in business and understood that sometimes IPOs do not get launched at the predicted date. In his mind, he thought that it was somewhere between six to twelve months before NCRC may be floated on the stock exchange, but knowing that it had an inbuilt profit should the tail get longer, he would have an opportunity to extract himself out of the investment either totally or partially as he needed funds.[\[177\]](#)

246 Mr Tashi said that if he knew that he was buying the shares at market price, that he would not have bought them.[\[178\]](#)

247 Mr Tashi was asked about the significance of the representation that the shares were being made available by a third party. Mr Tashi said that he would not have bought them if he had known they belonged to Mr Gutnick. Mr Tashi said if someone who had expounded the high value of the shares was selling them, then that would be “an absolute red flag.”[\[179\]](#)

248 Mr Gutnick contends that Mr Tashi did not rely on any of the alleged representations. Mr Gutnick argues that the real, essential, substantial, direct, and effective cause of Mr Tashi causing Tashi Holdings to enter into the 21 July 2010 share sale agreement was Mr Tashi’s belief that it was divine providence or intervention that had brought the investment opportunity to him.[\[180\]](#)

249 Under cross-examination, Mr Tashi was questioned about his letter of 21 July 2010 to the Rebbe and, in particular, his request of the Rebbe for “A miracle that brings about a windfall financial gain in another form.” Mr Tashi said his reference to “a windfall financial gain” in all the letters that he wrote to the Rebbe, and not just the letter of 21 July 2010, related to the purchases of Tattsлото tickets at the time and hence the word “miracle.”[\[181\]](#)

250 Mr Tashi was pressed on the letters, and he expressed genuine distress in going through the letters as he said he had not shared them with his wife or his rabbi, Rabbi Yurkowitz.

251 Mr Tashi rejected the proposition that another way to make a windfall financial gain was to invest heavily in speculative stock, such as NCRC. Mr Tashi said that his investment in NCRC would not yield a miracle return overnight, but the investment would take at least six months, if not 12 months, to yield a profit. He accepted that he expected a “significant short-term profit” from his investment in NCRC.

252 Under cross-examination, Mr Tashi was asked how it was that he had not discovered the letters that he wrote to the Rebbe, nor referred to this correspondence to the Rebbe in his initial pleadings, but only did so after Mr Gutnick, in his defence, said that Mr Tashi had consulted the Rebbe’s books.[\[182\]](#)

253 In para 12 of Mr Gutnick’s defence, Mr Gutnick pleaded that during the meeting of 21 July 2010 and before signing the agreement, Mr Tashi had told him that in substance, after the second meeting, he had consulted the Rebbe’s books and, having consulted the Rebbe’s books, Mr Tashi had decided to buy shares in NCRC if there was any opportunity to do so.[\[183\]](#)

254 In his reply to that plea, Mr Tashi admitted that he had revealed to Mr Gutnick that he had sought guidance from the Lubavicher Rebbe, Rabbi Menachem M. Schneerson, but otherwise denied Mr Gutnick’s allegations and went on to plead that during their meeting on 13 July 2010, Mr Tashi revealed to Mr Gutnick that earlier in the day, Mr Tashi had sent a written prayer petition to the resting place of the Lubavicher Rebbe, detailing the collapse of his financial fortunes and seeking divine intervention and guidance to save him from his financial difficulties.[\[184\]](#)

255 Under cross-examination, Mr Tashi was taken to the amended statement of claim filed on 18 February 2013 (some 11 months after he had filed his reply on 21 May 2012). The amended statement of claim added, inter alia, the allegations that, as discussed above, Mr Tashi gave evidence concerning his correspondence with the Rebbe and how, on 13 July, he informed Mr Gutnick that he had sent a letter to the Rebbe’s resting place seeking a blessing from the Rebbe to help his financial situation.

256 Mr Tashi was taken to paragraph 8A of his amended statement of claim that said as follows:

By reason of the matters in paragraph 8 above, at the conclusion of his meeting with Mr Tashi on 13 July 2010, Mr Gutnick knew, as was the case, that:

- (a) Mr Tashi hoped for an event to occur by the blessing of the Rebbe, that would alleviate his financial difficulties; and
- (b) Mr Tashi understood Mr Gutnick to:
 - (i) be an emissary of the Chabad Lubavich Movement, trusted by the Rebbe;

(ii) have a personal connection with the Rebbe; and

(iii) have received the personal blessing of the Rebbe, including in particular in relation to his business and mining activities.

8B By the conclusion of his meeting with Mr Tashi on 13 July 2010, Mr Gutnick knew or ought reasonably to have known, as was the case, that Mr Tashi would:

(a) by reason of the matters in paragraphs 8A(b), above, place a high degree of trust and confidence in Mr Gutnick; and

(b) by reason of the matters in paragraphs 8 and 8A, see any offer or advice coming from Mr Gutnick as being connected with, or arising from, the blessing Mr Tashi had sought from the Rebbe.

257 Under cross-examination, Mr Tashi was asked and responded as follows:

This [referring to the pleading just referred to] was being put forward to explain why, if something came your way by way of an offer after your request for a blessing, you would, in effect, seize upon it as some form of divine intervention of providence, wasn't it?

... Will you answer my question?--- Yes.

That's what this is saying, isn't it?--- Yes.[\[185\]](#)

258 Mr Tashi said that he did assume at that time that the offer that Mr Gutnick made to help Mr Tashi was such intervention.[\[186\]](#)

259 Under cross-examination, Mr Tashi accepted that his claim alleged that any offer or advice coming from Mr Gutnick as being connected with or arising from the blessing (or divine intervention) he had sought from the Rebbe. Mr Tashi did not accept, however, it was the windfall gain he had referred to and sought in his letter.

260 Mr Tashi then gave the following evidence:

What's being pleaded is that you would see any offer, right, being made by Mr Gutnick as in effect, these are my words, divine intervention as a result of you having sought a blessing from the Rebbe?

That is correct.

Not only that, what is being suggested is that because Mr Gutnick knew that you had sought a blessing, he would know in turn that if he made an offer to you, you would seize upon it and take it up for the very reason because he knew that you would

interpret it as divine intervention?

That's correct.

That's your case, is it?

That's part of my case, Your Honour.

The way it's been pleaded is the word 'any offer', do you understand that? So that it's whatever Gutnick said in the context in which you were meeting with him and having written to the Rebbe, you would take up?

That's correct.

So that would persuade you to accept the offer would be, it's being alleged or asserted on your behalf, what would cause you – the substantial cause of you taking up Mr Gutnick's offer is that you would interpret it as being a result of the blessing from the Rebbe?

That's a part of it, yes.

No, the words are 'by reason of the matters in paragraph 8 and 8A' and you're welcome to go back to those, you would see any offer or advice coming from Mr Gutnick as being connected with or arising from the blessing that you had sought from the Rebbe?

My reading of any offer means any offer to buy shares in Northern Capital or Acadian or Legend that's in the offer.

So yes, so any offer, no matter how couched, on what terms or conditions, any offer. Is that right?

Yes.[\[187\]](#)

261 In substance, Mr Tashi rejected that he treated the offer from Mr Gutnick as a miracle that would bring a windfall financial gain, but accepted that the offer was the result of the blessing that Mr Tashi had sought from the Rebbe.

262 Mr Gutnick contends that, even if he made the representations as alleged (which he denies), Mr Tashi did not rely on any of them to induce Mr Tashi to acquire the NCRC shares. Rather, Mr Gutnick says that the effective cause of Mr Tashi entering into the 21 July share purchase agreement was Mr Tashi's belief that it was divine providence or intervention that had brought the investment opportunity to him. Mr Gutnick relies on Mr Tashi's evidence in his cross-examination, where Mr Tashi concedes that he did assume that the offer Mr Gutnick made to help him was the intervention of the Rebbe.

263 In my opinion, that concession does not lead to the conclusion that Mr Tashi did not rely on the representations of Mr Gutnick. On the contrary, I find that the representations were a fundamental element of Mr Tashi believing that the offer that Mr Gutnick made was due to the divine intervention brought about by his seeking a brocha (blessing) from the Rebbe.

264 The critical element of Mr Tashi's evidence was that Mr Tashi saw Mr Gutnick's offer as an offer to help. Not only did Mr Gutnick offer to help, but Mr Tashi says that Mr Gutnick made representations to him that demonstrated that he would in fact be helping Mr Tashi. Mr Tashi says that Mr Gutnick said he was obtaining for him the same "bargain" price that Mr Gutnick had himself paid for his shares in NCRC, and that the purchase was described to Mr Tashi by Mr Gutnick as "favourable" and "excellent for you." In my view, the fact that Mr Gutnick represented that he had no direct financial interest in or control over the "third party" selling the shares further demonstrated that the offer that Mr Gutnick made to Mr Tashi was one to help him, rather than one for the benefit of Mr Gutnick.

265 I find that the fact that Mr Tashi saw the offer of help as being connected with or arising from the blessing that Mr Tashi had sought from the Rebbe was because the offer was not merely an arm's length commercial transaction but an offer to help Mr Tashi recover financially, and that the representations made by Mr Gutnick were the basis upon which Mr Tashi characterised or saw the offer as one that was connected with or arising from the blessing that he had sought from the Rebbe.

266 In substance, the reason that Mr Tashi saw Mr Gutnick's offer as arising from the blessing was his belief that the terms were financially advantageous to him and that this belief was based in part, if not substantially, on the representations made by Mr Gutnick.

Misleading and Deceptive Conduct Claim

267 The plaintiff has alleged misleading and deceptive conduct under each of [s 1041H](#) of the [Corporations Act](#), s 12DA of the ASIC Act, alternatively under [s 52](#) of the [Trade Practices Act](#) and/or s 9 of the Fair Trading Act. The parties agree that there is no relevant difference between the causes of action under each of those Acts

268 I find that on the balance of probabilities that Mr Gutnick made each of the alleged representations, that each of the representations was false and accordingly Mr Gutnick has engaged in misleading and deceptive conduct. I also find that Mr Tashi relied on each of the representations in purchase the NCRC shares.

Position of Krypton Nominees Pty Ltd

269 The plaintiff to the proceeding is Krypton Nominees Pty Ltd. It was substituted as

the purchaser by an agreement dated 3 March 2011.

270 The defendants contend that Krypton has not made out the essential elements that representations were made to it and that Krypton relied on those representations to agree to buy the NCRC shares and pay for the shares. The defendants submit that the Court can not be satisfied that it has been proven, on the balance of probabilities, that Krypton did any of the things alleged in paras 13 and 14 of Krypton's amended statement of claim "in reliance on the alleged representations or any of them".[\[188\]](#)

271 In particular, the defendants contend that Krypton's allegation that on 21 July 2010, in reliance on the alleged representations and induced thereby, Krypton purchased the NCRC shares or that it paid any of the instalments has not been made out. On the contrary, the defendants contend that on 21 July 2010, Tashi Holdings and not Krypton agreed to purchase 5,000,000 (and not 4,222,000) shares in NCRC from NSI for US\$1,000,000 (and not AU\$1,000,000) and that the relevant payments were made by Tashi Holdings (and not Krypton) and one by Dug Pomeroy.

272 The defendants say that the first mention of Krypton was in an email memorandum from Darryn Male to Mr Tashi sent on 19 January 2011.[\[189\]](#) The defendants contend that the first time Krypton was contemplated was in 2011, on advice from Mr Tashi's accountants.[\[190\]](#)

273 The defendants make similar submissions on the issue of loss. They say that Krypton has failed to prove on the balance of probabilities that it has suffered any loss whatsoever.[\[191\]](#) They say the evidence is that Tashi Holdings (and not Krypton) paid the purchase price for the 4,222,000 relevant NCRC shares.

274 Krypton makes two answers to these submissions. First, Krypton says that Tashi Holdings entered into the agreement to purchase the shares on 21 July 2010 as agent for an undisclosed principal. Krypton says that subsequently, in March 2011, it was identified as the principal and that by the agreement of 3 March 2011 it ratified the agreement. In those circumstances, Krypton says it became the contracting party to the agreement of 21 July 2010. At the time the representations were made they were made to Mr Tashi, who was the controlling mind of the various companies in the Tashi group of companies (including Krypton). As discussed previously (and in greater detail below), at settlement on 21 July 2010, Mr Tashi was not sure which of his companies would be the actual purchaser of the shares. Mr Gutnick was agreeable to that issue being left in abeyance until Mr Tashi's accountants nominated which of Mr Tashi's companies should be the purchaser. On this analysis, each of Mr Tashi's companies had his state of knowledge as at 21 July 2010. based on his belief in Mr Gutnick's representations.

275 Krypton contends that the second approach is to view the representations as continuing. When Krypton ratified the agreement of 21 July 2010 in March 2011, it did

so relying on the representations that had been made by Mr Gutnick to Mr Tashi in 2010.

276 I turn to the facts relevant to Krypton's involvement in the purchase. At the meeting of 21 July 2010, Mr Gutnick asked Mr Tashi the name of the buyer. Mr Tashi said that he told Mr Gutnick that he had "not had an opportunity to seek advice on this so for the time being could he put down Tashi Holdings Pty Ltd".^[192] Mr Tashi said that that company was one of the options and that he told Mr Gutnick that "I would need to seek advice from my accountants Ernst & Young at that time to get the identity." It was implicit that Mr Tashi was referring to a company under his control. Mr Tashi said that Mr Gutnick replied that it would be no problem to change the identity of the purchaser as the share certificate would not be issued until Mr Tashi made the final payment.^[193]

277 Subsequently, on 21 February 2011, Mr Tashi and Mr Gutnick met. At that meeting, Mr Gutnick and Mr Tashi agreed that the purchase agreement could be amended so that Mr Tashi only purchased AU\$1 million worth of NCRC shares instead of US\$1 million. Mr Gutnick and Mr Tashi also agreed that the purchaser would be a new entity. The next day, Mr Tashi emailed Mr Gutnick and thanked him for his offer to adjust "our agreement" to the purchase of the number of shares in NCRC to the payment that he had made, namely AU\$1 million. He also asked Mr Gutnick to have the shares registered in the name of Krypton Nominees Pty Ltd.^[194] Mr Tashi said in his evidence that:

And as we agreed on 21 July to potentially re-write the agreement in another name other than Tashi Holdings this is the opportunity to do it.

Sorry, who said that? --- I said that.^[195]

278 On 3 March 2011, NSI wrote to Krypton Nominees Pty Ltd, care of Mr Tashi, enclosing the amended share purchase agreement for the acquisition by Krypton Nominees Pty Ltd of 4,222,000 shares in NCRC from NSI, which required signing.^[196] The share purchase agreement naming Krypton Nominees Pty Ltd as the purchaser was duly signed by NSI and Krypton.^[197] The agreement was returned to NSI by letter of 8 March 2011.^[198] The agreement provides that the undersigned NSI in consideration of US\$844,400 payable to NSI by Krypton has sold and assigned 4,222,000 shares of NCRC to Krypton. The document states an "effective date: 21 July 2010." The buyer is named as Krypton Nominees Pty Ltd (ATF the Tashi Family Trust).

279 By letter of 15 March 2011, NCRC sent to Krypton Nominees a share certificate for 4,222,000 NCRC common stock.^[199] The share certificate records the holding in the name of Krypton Nominees Pty Ltd ATF the Tashi Family Trust.

280 Krypton referred to *Celthene Pty Ltd v W K J Hauliers Pty Ltd*,^[200] as support for its entitlement to ratify the contract of sale as the purchaser. At issue in the case was whether the sub-contractor of a carrier was entitled to certain exemption clauses contained in a consignment note issued by the consignor to the carrier and containing clauses under which the contractor was entitled to sub-contract and providing that goods carried would be at the risk of the consignor. Justice Yeldham considered whether the sub-contractor carrier had ratified the contract and become a party to the contract. His Honour identified the elements that must be satisfied as follows:

- (a) that an agent may purport to contract on behalf of an unidentified principal.;
- (b) that the unidentified principal may ratify the contract, purportedly made on its behalf, so long as the unidentified principal could have been ascertained at the time of the making of the contract by the agent; and further
- (c) that at the time of ratification, the principal must be legally capable of fulfilling the contract.^[201]

281 In this case, Krypton says that Tashi Holdings purported to contract on behalf of an unidentified principal. Krypton was in existence as one of Mr Tashi's companies when the contract was entered into by Tashi Holdings. Krypton subsequently ratified the contract. The document signed purports to be effective as at 21 July 2010. Krypton was capable of agreeing to purchase the shares on 21 July 2010.

282 In my opinion, a new agreement was not made in March 2011. Rather, there was a variation and a ratification of the agreement that was made by Tashi Holdings as agent for an undisclosed principal, being a member of the group of companies controlled by Mr Tashi nominated by Ernest & Young. In my opinion, Krypton, as such a member, subsequently ratified the contract.

283 The defendants submit that Krypton did not act in reliance on the representations of Mr Gutnick. In my opinion, Krypton had the state of mind of Mr Tashi in July 2010 and maintained that knowledge when it ratified and became the contracting party to the agreement of 21 July 2010. At the meeting on 21 July 2010, Mr Tashi informed Mr Gutnick that one or other of his companies would be the purchaser.

284 Krypton also contends that the representations were continuing and it relied on them in ratifying and becoming the contracting party to the agreement of 21 July 2010.^[202] I accept that the representations were continuing and that Krypton did rely on them in ratifying the contract of purchase.

285 The defendants submit that Krypton has failed to prove that it has suffered any loss whatsoever. They say that the evidence is that Tashi Holdings, not Krypton, paid the whole of the purchase price for the shares in NCRC.

286 This submission is met by the ratification submission. Once it is accepted that the payment were made on Krypton's behalf to NSI, then Krypton became liable to its agent (whether Mr Tashi or Tashi Holdings) for the payments. Krypton has suffered loss and damage by becoming so liable.

Conclusion on misleading or deceptive conduct

287 For the above reasons, I find that Mr Tashi (and thus Krypton) was misled by the misleading and deceptive representations of Mr Gutnick and induced by them and each of them to cause Tashi Holdings and then Krypton to purchase the relevant shares. For the above reasons, I do not accept the submissions that Mr Tashi (and thus Krypton) was induced to purchase the relevant shares by reason of Mr Tashi's writing to the Rebbe, rather than by any representation to Mr Tashi by Mr Gutnick.

Did NSI aid, abet, counsel or procure the alleged contraventions?

288 As mentioned above, Mr Tashi alleges that the making of the representations constituted misleading or deceptive conduct within the meaning of [s 1041H](#) of the [Corporations Act](#), [s 52](#) of the [Trade Practices Act](#) and/or s 9 of the Fair Trading Act.

289 Mr Tashi alleges that NSI added, abetted, counselled or procured, was knowingly concerned in or party to the contraventions alleged within the meaning of [s 79](#) of the [Corporations Act](#), alternatively s 75B of the [Trade Practices Act](#) and or s 145 of the Fair Trading Act.

290 The defendants made no submissions in opposition to this claim. Mr Gutnick was the guiding mind of NSI and, in selling the relevant shares to Mr Tashi, Mr Gutnick knew the representations were false.[\[203\]](#) It follows that NSI did aid and abet or was knowingly concerned in or a party to the misleading and deceptive conduct of Mr Gutnick.

Was Mr Gutnick required to provide a disclosure statement?

291 Mr Tashi alleges that Mr Gutnick promoted and sold the shares to Mr Tashi without making proper disclosure as required under [Part 6D.2](#) of the [Corporations Act](#).

292 Where disclosure is needed, information that investors and their professional advisors would reasonably require to make an informed assessment of (inter alia) the assets and liabilities, financial position and performance, profits and losses and prospects of the body that issued the shares is to be disclosed.

293 Both Mr Tashi and Mr Gutnick gave evidence that assessment of an investment would include the financial statements. The financial statements would have gone some way to addressing the disclosure requirement [but not completely satisfying what must be included in a disclosure document: see, eg, [s 715](#) of the [Corporations Act 2001](#)].

However (as I have mentioned above), the accounts revealed NCRC to be in such a parlous position that it is highly unlikely that Mr Tashi would have invested the proceeds of the sale of his home in such a venture if such information had been available to him – and Mr Tashi testified to as much.

294 Mr Tashi alleges because Mr Gutnick was at all material times the President, CEO and Chairman of NCRC, he controlled NCRC within the meaning of [s 707](#) of the [Corporations Act](#), and pursuant to s 707(2) of the Act, Mr Gutnick was obliged to provide a Product Disclosure Statement to Mr Tashi in relation to the offer to sell the shares.[\[204\]](#)

295 In response to Mr Tashi’s allegations with regard to control, the defendants pleaded that they were not required to make disclosure, as the offeror of the shares was NSI, which did not control NCRC within the meaning of s 50AA of the Act because at all material times NSI owned only about 10% of NCRC’s issued shares. The defendants further plead that offers of securities were made by NSI to Mr Gutnick.[\[205\]](#)

296 Mr Tashi contends that for the purposes of Chapter 6D, “the person who offers securities is the person who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted.”[\[206\]](#) I accept Mr Tashi’s submissions that Mr Gutnick had the capacity to, and agreed to transfer shares in NCRC to Mr Tashi. The evidence established that Mr Gutnick had the capacity to determine the outcome of decisions about NCRC’s financial and operating policies within the meaning of [s 50AA](#) of the [Corporations Act](#).

297 Mr Tashi submits that the disclosure requirements apply to the offer in an ordinary sense, not in a contractual, or common law sense. As such, the contractual analysis (assignment/variation/novation, etc in March 2011) is not to the point in this case. The relevant question is to identify the offer (within the meaning of the disclosure provisions) which gave rise to the issue or transfer of the shares. Mr Tashi refers to the judgment of Justice Palmer in *ASIC v Australian Investors Forum Pty Ltd (No 2)*,[\[207\]](#) where his Honour held that:

... it could not be the case that the disclosure provisions are not attracted until the moment when the potential investor is confronted with an application form or with some other document containing all of the terms of a contract, so that mere assent is capable of bringing a binding contract into existence. Many investors would have made up their minds about whether to take up securities well before they are confronted either with the application form or with some document containing all of the terms of the contract.[\[208\]](#)

298 Justice Palmer also said that in determining at what point of time an offer has been

made, “a degree of pragmatism and common sense” must be applied and that:

[t]he information conveyed to a potential investor need not contain all of the terms of a contract of subscription or transfer but the information must be sufficient to identify the essential terms of the proposed investment and must convey that the investor may act on that information if desired.^[209]

299 Justice Palmer said that the indicia of making an offer will generally include:

- (a) identification of the company in which the securities are offered;
- (b) what is the general nature of the securities offered;
- (c) the price for which the securities may be acquired;
- (d) the suggestion that the securities are available for acquisition by the person to whom the information is conveyed;
- (e) the suggestion that the securities may be acquired now, or at some specified future time, by the requisite payment.^[210]

300 Mr Tashi submits, and I accept, that each of those indicia were met in this case in July 2010, before any document was signed. Mr Tashi correctly submits, even if there were a separate contract entered in March 2011, it would not affect Mr Gutnick’s disclosure obligations.

301 Mr Tashi contends that the offer was accepted in July 2010. He submits that whatever occurred in March 2011, there was no opportunity to withdraw from that acceptance and receive a refund of monies paid and no new offer following thereafter. The changes in February or March 2011 altered (on whatever basis) the entity to receive the shares in accordance with the offer and agreement in July 2010.^[211] Importantly, the transaction was still in the furtherance of the offer made and accepted in July 2010.

302 Mr Tashi says that as such, an analysis of the contract law effects of the events in July 2010 and February and March 2011 is not to the point of the disclosure provisions of the [Corporations Act](#). However, Mr Tashi submits that, on a proper construction of the facts:

- (a) if a person contracts as agent for a disclosed but unascertained principal, and the principal is in existence and capable of being ascertained, when the principal is later identified, the principal takes the benefit of the contract;

(b) there was an agreement in July 2010 between NSI and Tashi Holdings, acting on his own behalf or as (disclosed) agent for the entity related to Mr Tashi nominated by Ernst & Young, with agreement that the principal to be identified before the issue of the share certificate, after advice had been obtained from Ernst & Young;

(c) pursuant to the agreement, the identity of the correct entity, Krypton, was confirmed in February 2011, after advice had been obtained from Ernst & Young and before the share certificate was issued; and

(d) the signing of the document in March 2011 constitutes ratification by Krypton of the act of Tashi Holdings, in entering the contract on 21 July 2010.

303 Mr Tashi submits that an alternative construction is that the July document constitutes an agreement between NSI and Tashi Holdings formed on 21 July 2011, and the March document constitutes a variation of the agreement, which changes the buyer of the shares from Tashi Holdings to Krypton. Mr Tashi says that NSI at all times remained obliged to transfer the shares. As the contract remained on foot at all times, the date that the contract was entered remains 21 July 2010.

304 Mr Tashi submits that on the basis of either of the above possible constructions, the offer was accepted on 21 July 2010.

Was the minimum amount payable on acceptance of the offer less than \$500,000?

305 The defendants plead that the “sophisticated investor” exception to the disclosure requirements affords a complete defence to this claim of Mr Tashi.^[212] The defendants point specifically to [s 708\(8\)\(a\)](#), which reads:

(8) An offer of a body's securities does not need disclosure to investors under this Part if:

(a) the minimum amount payable for the securities on acceptance of the offer by the person to whom the offer is made is at least \$500,000 ...

306 Mr Tashi says that in the context of an offer for payment to be made by instalments, the phrase “amount payable for the securities on acceptance of the offer” refers to the initial instalment payable immediately upon acceptance of the offer. Because the first instalment required to be made on acceptance of the offer was \$100,000, Mr Tashi submits that the transaction does not meet the \$500,000 threshold and so the [s 708\(8\)\(a\)](#) exception does not apply.

307 In support of this submission that the exception refers to the initial instalment, Mr Tashi submitted that a legislative provision should be interpreted in accordance with the ordinary meaning of the words, in context and having regard to the purpose and

policy of the legislative instrument, and that counting all instalments to the relevant amount would give rise to an inconsistency with [s 708\(9\)](#), which provides that:

In calculating the amount payable, or paid, for securities for the purposes of paragraph (8)(a) or (b), disregard any amount payable, or paid, to the extent to which it is to be paid, or was paid, out of money lent by the person offering the securities or an associate.

308 Mr Tashi submits that it would be inconsistent if amounts paid by the purchaser to the person making the offer or an associate over an extended period of time were included in the calculation under [s 708\(8\)](#) if characterised as “instalments”, but were excluded under [s 708\(9\)](#) if characterised as “loan repayments”.

309 Mr Tashi says that this argument is supported by the Explanatory Memorandum to the [Corporate Law Economic Reform Program Bill 1998](#) (which inserted s 708(8) and (9)). The Explanatory Memorandum addresses this very question, stating that:

8.1 The current sophisticated investor exemption (current paragraphs 66(3)(a) and 66(3)(ba)) applies only to persons who invest over \$500,000 in the securities in question. There are a number of avoidance problems with the current exemption. The Bill will resolve these by ensuring that:

- any moneys lent to the investor by the person offering the securities, or an associate, are not included when calculating the \$500,000 (proposed subsection 708(9)); and
- the \$500,000 is ‘payable for the securities on acceptance of the offer’ rather than payable by instalments of much smaller amounts over a prolonged period of time (proposed paragraphs 708(8)(a) and (b)).

(The Explanatory Memorandum goes on to note that there are additional exemptions for those investing smaller amounts, if certain criteria are satisfied).

310 Mr Tashi submits that the apparent purpose of ss 708(8) and (9) is to limit the “automatic” exemption to those with substantial amounts of “ready money”; those who can only pay \$500,000 with the benefit of instalment terms or finance terms from the offeror or their associates must satisfy other requirements (such as certification) before the disclosure requirements can be waived.

311 Mr Gutnick asserted that the Explanatory Memorandum did not assist Mr Tashi’s submissions, and noted that Mr Tashi’s instalments included a balloon payment of \$500,000 on 13 December 2010.

312 I do not accept that argument. I find and accept the construction of sub-s (8) put forward by Mr Tashi. In my opinion, the minimum amount payable for the securities on the acceptance of the offer, refers to the amount payable on acceptance of the offer and not sums payable subsequently on the purchase. I do not consider that the balloon payment significant, as that payment was not made “on acceptance of the offer.”

313 I find that Mr Gutnick was obliged to provide a disclosure document to Mr Tashi in relation to the offer to sell the shares and that he breached the disclosure requirements of [Part 6D.2](#) of the [Corporations Act](#).

314 For reasons discussed above, I find that had Mr Tashi been provided with the appropriate disclosure document, he would not have purchased the NCIC shares.

Was Mr Gutnick’s conduct unconscionable?

315 Mr Tashi alleges that Mr Gutnick contravened s 12CA of the ASIC Act 2001 (Cth) by engaging in conduct which is “unconscionable within the meaning of the unwritten law.” Mr Gutnick denies such a contravention.

316 Section 12CA(1) reads:

A person must not, in trade or commerce, engage in conduct in relation to financial services if the conduct is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

“Financial services” are defined in s 12BAB as:

For the purposes of this Division, subject to paragraph (2)(b), a person provides a financial service if they:

- (a) provide financial product advice (see subsection (5)); or
- (b) deal in a financial product (see subsection (7)); or
- (c) make a market for a financial product (see subsection (11));
or
- (d) operate a registered scheme; or
- (e) provide a custodial or depository service (see subsection (12)); or
- (f) operate a financial market (see subsection (15)) or clearing and settlement facility (see subsection (17)); or

(g) provide a service (not being the operation of a derivative trade repository) that is otherwise supplied in relation to a financial product (other than a carbon unit, an Australian carbon credit unit or an eligible international emissions unit); or

(h) engage in conduct of a kind prescribed in regulations made for the purposes of this paragraph.

317 Mr Tashi submits that, while unconscionable dealing cannot be exhaustively defined,[\[213\]](#) the essential nature of unconscionability will apply where:

... a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation or disadvantage ... the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.[\[214\]](#)

318 Mr Tashi submits that the elements of unconscionability are expressed in more detail to be:[\[215\]](#)

- (a) special disadvantage vis-a-vis the other party;
- (b) the special disadvantage must seriously affect the weaker party's ability to judge or protect his or her own interests;
- (c) the stronger party must know of the special disadvantage, or know of facts which would raise the possibility in the mind of any reasonable person;
- (d) the party must take advantage of the opportunity presented by the special disadvantage; and
- (e) the taking of advantage must have been unconscientious.[\[216\]](#)

319 Mr Tashi says that once these elements are established, the onus is on the defendant to show that the transaction was fair, just and reasonable.[\[217\]](#) "Financial need" or "poverty or need of any kind" may also be a factor in establishing a special disadvantage.[\[218\]](#) As the learned authors of Meagher, Gummow and Lehane's Equity: Doctrines and Remedies note, "the essence of these situations is (a) parties who meet on unequal terms, (b) the stronger party takes advantage of this, (c) to obtain a beneficial bargain."[\[219\]](#)

320 Mr Tashi submits that unconscionable conduct is made out for the following

reasons:

- (a) Mr Gutnick's stated commitment that he would "help" Mr Tashi;
- (b) Mr Tashi's lack of access (to Mr Gutnick's knowledge) to the financial statements of NCRC, which prevented him from making his own assessment of the company;
- (c) Mr Tashi's resulting reliance on Mr Gutnick (to Mr Gutnick's knowledge) for advice about the merits of the investment in NCRC shares; and
- (d) Mr Gutnick's taking advantage of the circumstances to sell his own NCRC shares to Mr Tashi at a substantial profit.

321 Mr Gutnick denies that:

- (a) NSI or Mr Gutnick had any superior position or bargaining power compared with that of Krypton or Tashi Holdings Pty Ltd or Mr Tashi;
- (b) Krypton or Tashi Holdings Pty Ltd, or indeed Mr Tashi, suffered from any special disability or disadvantage;
- (c) Mr Gutnick or NSI knew that Krypton or Tashi Holdings Pty Ltd or Mr Tashi suffered from any special disability or disadvantage; or
- (d) NSI or Mr Gutnick took any unconscientious advantage of Krypton or Tashi Holdings Pty Ltd or Mr Tashi.

322 Mr Gutnick denies that any unconscionability could arise from his knowledge that Mr Tashi had written to the Rebbe seeking a blessing and that Mr Gutnick's offer was made immediately after Mr Tashi sought the blessing (ie Mr Tashi believed Mr Gutnick's offer was divine providence).

323 Mr Gutnick says that Mr Tashi was a very experienced businessman who knew exactly what he was investing in and chose not to make certain enquiries. Mr Gutnick rejects the suggestion that Mr Tashi was so vulnerable he would have accepted any offer as divine providence, pointing to the fact that Mr Tashi had been given the investor presentation, had his network of lawyers and brokers, and made enquiries like the potential of his shares going into escrow in the event of an IPO. Mr Gutnick maintains that the evidence does not bear out Mr Tashi being in a situation of such disadvantage that unconscionability can be made out.

324 Mr Gutnick further relies on the fact that neither Mr Tashi (who allegedly relied upon Mr Gutnick) nor his company Tashi Holdings (which paid for the shares) are parties to this proceeding, and so no unconscionable conduct can be made out against the plaintiff to this proceeding, Krypton.

Finding on unconscionable conduct

325 Mr Gutnick knew that Mr Tashi was in financial difficulties. I do not find, however, that Mr Tashi was at a special disadvantage vis-à-vis Mr Gutnick. Mr Tashi was a very experienced businessman. Mr Tashi was not financially impoverished. In fact, he expected to have about \$1 million after the sale of his home, as well as a flat in Caulfield.

326 He was not dependent on Mr Gutnick's "help". Mr Gutnick knew or ought to have known of Mr Tashi's lack of access to NCRC's accounts, which painted a very different picture of the investment to the one Mr Tashi took away from his discussions with Mr Gutnick. I find that Mr Gutnick took advantage of Mr Tashi's belief that Mr Gutnick was helping him. I find, however, that according to the principles laid down, Mr Gutnick's conduct falls short of being unconscionable.

327 In my opinion, this case involves Mr Gutnick misleading Mr Tashi and taking advantage of Mr Tashi. Mr Gutnick led Mr Tashi to believe that his object was to help Mr Tashi. In fact, Mr Gutnick's object was to line his own pocket at Mr Tashi's expense.

Fiduciary Duty

328 Mr Tashi alleges that Mr Gutnick owed him and Krypton a fiduciary duty, and that Mr Gutnick breached that duty.

329 Mr Tashi submits that, although the courts have not provided a comprehensive statement of the circumstances in which a fiduciary relationship may be established, there are a number of indicia, however, that may indicate that a fiduciary relationship exists.

330 One is where a person has undertaken or agreed to act in the interests of another. In *Hospital Products Ltd v United States Surgical Corporation*,^[220] Mason J said that:

The critical feature of [accepted fiduciary relationships] is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.

331 A second is where a relationship of trust and confidence exists. In *Bristol and West Building Society v Mothew*,^[221] Millett LJ said that:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.

332 A third is where a party has a disadvantage, vulnerability or unequal bargaining power giving rise to reliance on the other person. In *Hospital Products*, Dawson J said:

There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other[\[222\]](#)

333 Mr Tashi submits that:

(a) Mr Gutnick undertook to help and act in the interests of Mr Tashi and that undertaking justified Mr Tashi reposing his trust and confidence in Mr Gutnick and the imposition of fiduciary duties;

(b) Mr Gutnick knew that Mr Tashi did not have access to the financial information and accounts necessary to assess NCRC; and indeed

(c) Mr Gutnick knew that Mr Tashi was relying on him, as Mr Gutnick knew that NCRC's financial statements were not available, and so Mr Tashi could not examine them. Accordingly, he knew that Mr Tashi was relying on him as an "NCRC insider".

334 Mr Tashi submits that Mr Gutnick breached his resulting fiduciary duties by failing to disclose his interest in, and profit from, the proposed transaction, which was a transaction to his own advantage and the disadvantage of Mr Tashi.

335 Mr Gutnick denies the existence of a fiduciary relationship. Mr Gutnick agrees that there is no "general test for determining when persons or classes of persons stand in a fiduciary relationship with one another."[\[223\]](#)

336 However, Mr Gutnick submits that the courts have identified various circumstances that, if present, point towards, but do not determine, the existence of a fiduciary relationship.[\[224\]](#) Mr Gutnick says that none of those circumstances is present in the instant case.

337 Mr Gutnick relies on Finn J's observation in *Rawley Pty Ltd v Bell* (No. 2):

[O]utside of commercial agency, partnership and trust relationships, care needs to be taken in concluding that commercial parties are in a fiduciary relationship for some or all purposes ... because such a relationship, commonly, possesses characteristics (for example, known adversarial interests, the reasonable expectation of self-reliance etc) which negative a

fiduciary finding.^[225]

338 Mr Gutnick also relies upon Gibbs CJ in *Hospital Products*, where his Honour said:

In the decided cases, various circumstances have been relied on as indicating the presence of a fiduciary relationship. One such circumstance is the existence of a relation of confidence, which may be abused: *Tate v Williamson*; *Coleman v Myers*. However, an actual relation of confidence – the fact that one person subjectively trusted another – is neither necessary for nor conclusive of a fiduciary relationship ... an ordinary transaction for sale and purchase does not give rise to a fiduciary relationship simply because the purchaser trusted the vendor and the latter defrauded him.^[226]

339 Mr Gutnick also relies upon the Judicial Committee of the Privy Council’s summary in *Re Goldcorp Exchange Ltd* (in receivership): “high expectations do not necessarily lead to equitable remedies”.^[227]

340 Mr Gutnick refers to Mr Tashi’s evidence (uncontradicted by Mr Gutnick):

- (a) that he and Mr Gutnick were, and are, not friends;^[228]
- (b) that he and Mr Gutnick were not part of the same social network;^[229]
- (c) that Mr Gutnick owed him [Mr Tashi] no favour of any kind;^[230] and
- (d) that he [Mr Tashi] “had never done anything for [Mr Gutnick] which would raise any obligation whatsoever in [Mr Gutnick] towards [Mr Tashi].”^[231]

341 Mr Gutnick further submits that even if he did owe Mr Tashi a fiduciary duty, the absence of any representations and any reliance upon them by Mr Tashi (in Mr Gutnick’s case) meant that there was no breach of duty. Mr Gutnick also repeats his submissions (above) concerning Krypton’s alleged loss.

342 Although courts have previously held fiduciary relationships to exist between a priest and a penitent,^[232] Mr Tashi did not submit that a fiduciary relationship arose by virtue of Mr Gutnick’s status as a rabbi and Schliach of the Rebbe and Mr Tashi’s membership of Chabad Lubavich movement.

343 Mr Gutnick relies on the absence, on the facts, of the indicative but not conclusive circumstances in which a fiduciary relationship may arise, which were identified in *Breen v Williams* by Gaudron and McHugh JJ:

These circumstances, which are not exhaustive and may overlap, have included: the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.^[233]

344 I find that Mr Tashi took Mr Gutnick into his confidence, revealing to him the distressed state of his personal finances (having to sell his Toorak home) and the impact of this on him (including telling Mr Gutnick of his letters to the Rebbe).

345 I do not find, however that there existed an inequality of bargaining power between Mr Tashi and Mr Gutnick even though Mr Tashi was dependent on Mr Gutnick for information regarding the value of NCRC shares. The authorities indicate that care should be taken in imposing fiduciary obligations between parties to a commercial transaction.

346 Similarly to my discussion of the issue of unconscionable conduct, I find that the critical factors were Mr Gutnick's misrepresentations to Mr Tashi. It is correct that Mr Gutnick was in a better position to misrepresent the true state of affairs as Mr Tashi was not able to carry out the normal due diligence he otherwise might. Also, Mr Gutnick misled Mr Tashi into thinking that Mr Gutnick was helping him.

347 I do not consider that a fiduciary relationship is established because Mr Gutnick misrepresented the true state of affairs to Mr Tashi. Both Mr Tashi and Mr Gutnick were experienced business men. Mr Tashi was vulnerable because of his perceived financial state. Mr Gutnick took advantage of that state. He did that, however, by misrepresenting the true state of affairs. I do not, however, find there was a fiduciary relationship.

348 I, therefore, reject this cause of action.

Conclusion

349 A breach of each of Chapter 6D (Disclosure) and Part 7.10 (Misleading or deceptive conduct) of the [Corporations Act 2001](#) enlivens the powers of compensation under s 1325 of the Act. The types of orders that may be made appear in s 1325(2), including those sort by the plaintiff.

350 For the above reasons, I find that there should be judgment for the plaintiff. I will order that pursuant to [s 1325](#) of the [Corporations Act](#):

(a) the Share Sale Agreement described in paragraph 1 of the statement of claim be and is hereby rescinded;

(b) that the said Share Sale Agreement be and is hereby declared to be void ab initio;

(c) that the defendants jointly and severally forthwith pay the plaintiff \$1 million with interest thereon to be determined.

I will hear the parties on interest and costs.

[1] Mr Tashi's Statement of Claim alleged there were three such emissaries in Australia, Mr Gutnick's evidence was that there were 25 or 30; in any case, nothing turns on this difference.

[2] Such a split ought to have yielded 100 million shares; what became of the other 20 million shares was not explained, but nothing turns on this.

[3] Transcript, 80.

[4] Transcript, 81.

[5] Transcript, 82.

[6] Transcript, 85.

[7] Transcript, 86.

[8] Emphasis original.

[9] Transcript, 88.

[10] Transcript, 90.

[11] Transcript, 91.

[12] Transcript, 169.

[13] Ibid.

[14] Transcript, 181; see also 182.

[15] Transcript, 91.

[16] Transcript, 92.

[17] Transcript, 185.

[18] Transcript, 186.

[19] Transcript, 182 and 181.

[20] As discussed below, Mr Pomeroy assisted Mr Tashi with the purchase of the NCRC shares.

[21] Transcript, 106.

[22] Emphasis original.

[23] Transcript, 171.

[24] Transcript, 172.

[25] Transcript, 180.

[26] Transcript, 183.

[27] Emphasis original.

[28] Transcript, 261.

[29] Court Book, 129. (The 80 million does not reconcile with a five for one split – but nothing turns on this discrepancy.)

[30] Transcript, 263.

[31] Court Book, 533.

[32] Transcript, 267.

- [\[33\]](#) Court Book, 540.
- [\[34\]](#) Exhibit D2; Transcript, 265.
- [\[35\]](#) Court Book, 540.
- [\[36\]](#) Transcript, 268.
- [\[37\]](#) Court Book, 525.
- [\[38\]](#) Court Book, 272; Transcript, 269.
- [\[39\]](#) Transcript, 269.
- [\[40\]](#) Transcript, 270.
- [\[41\]](#) Transcript, 270.
- [\[42\]](#) Exhibit D3.
- [\[43\]](#) Transcript, 270.
- [\[44\]](#) Exhibit D4.
- [\[45\]](#) Transcript, 272.
- [\[46\]](#) Supplementary Court Book, 770ff.
- [\[47\]](#) Supplementary Court Book, 788.
- [\[48\]](#) Supplementary Court Book, 792ff.
- [\[49\]](#) Court Book, 797.
- [\[50\]](#) Transcript, 278.
- [\[51\]](#) Transcript, 279.
- [\[52\]](#) Court Book, 318, 323-9, 334, 338, and 422.

[53] I note that the email correspondence in the Court Book is signed “Richard Yu” or just “Richard”, but nothing appears to turn on this.

[54] Transcript, 280-281.

[55] Transcript, 281.

[56] Transcript, 282.

[57] Court Book, 333.

[58] Transcript, 283.

[59] Ibid.

[60] Ibid.

[61] Transcript, 284.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Transcript, 285.

[67] Ibid.

[68] Transcript, 286.

[69] Transcript, 287.

[70] Transcript, 288; Mr Gutnick habitually used “we”, but I took him to be referring to himself.

[71] Transcript, 288.

[72] Transcript, 289.

[73] Ibid.

[74] Transcript, 289-290.

[75] Transcript, 290.

[76] Ibid.

[77] Ibid.

[78] Transcript, 291.

[79] Ibid.

[80] Transcript, 292.

[81] Ibid.

[82] Ibid.

[83] Transcript, 292-293.

[84] Transcript, 293. (“Not as of yet.” “Not yet.”)

[85] Transcript, 293.

[86] Court Book, 427.

[87] Transcript, 294.

[88] Court Book, 428.

[89] Transcript, 294.

[90] Transcript, 295.

[91] Ibid.

[\[92\]](#) Ibid.

[\[93\]](#) Ibid.

[\[94\]](#) Transcript, 296.

[\[95\]](#) Ibid.

[\[96\]](#) Transcript, 300.

[\[97\]](#) Transcript, 302.

[\[98\]](#) Transcript, 303.

[\[99\]](#) Transcript, 309.

[\[100\]](#) Transcript, 310.

[\[101\]](#) Transcript, 311.

[\[102\]](#) Transcript, 313.

[\[103\]](#) Transcript, 314.

[\[104\]](#) Ibid.

[\[105\]](#) Ibid.

[\[106\]](#) Ibid.

[\[107\]](#) Transcript, 315.

[\[108\]](#) Ibid.

[\[109\]](#) Court Book, 418.

[\[110\]](#) Transcript, 316.

[\[111\]](#) Transcript, 319.

[\[112\]](#) Transcript, 321.

[\[113\]](#) Ibid.

[\[114\]](#) Ibid.

[\[115\]](#) Court Book, 427.

[\[116\]](#) Transcript, 322.

[\[117\]](#) Ibid.

[\[118\]](#) Court Book, 424.

[\[119\]](#) Transcript, 323.

[\[120\]](#) Ibid.

[\[121\]](#) Transcript, 324.

[\[122\]](#) Ibid.

[\[123\]](#) Ibid.

[\[124\]](#) Transcript, 327.

[\[125\]](#) Transcript, 330.

[\[126\]](#) Ibid.

[\[127\]](#) Transcript, 332-333.

[\[128\]](#) Transcript, 339.

[\[129\]](#) Transcript, 345.

[\[130\]](#) Transcript, 346.

[\[131\]](#) Transcript, 350.

[\[132\]](#) Transcript, 351.

[\[133\]](#) Transcript, 356.

[\[134\]](#) Transcript, 359.

[\[135\]](#) Transcript, 359-360.

[\[136\]](#) Transcript, 360.

[\[137\]](#) Ibid.

[\[138\]](#) Transcript, 361.

[\[139\]](#) Court Book, 91 ([8](G)).

[\[140\]](#) Court Book, 323.

[\[141\]](#) Transcript, 363.

[\[142\]](#) Transcript, 364.

[\[143\]](#) Transcript, 368.

[\[144\]](#) Transcript, 371.

[\[145\]](#) Transcript, 394.

[\[146\]](#) Ibid.

[\[147\]](#) Transcript, 398.

[\[148\]](#) Transcript, 399.

[\[149\]](#) Transcript, 404.

[\[150\]](#) Ibid.

[\[151\]](#) Ibid.

[152] Ibid.

[153] Transcript, 405.

[154] Transcript, 410.

[155] Ibid.

[156] Ibid.

[157] Transcript, 411.

[158] Transcript, 412.

[159] Transcript, 413 (the Report is Court Book, 591ff).

[160] Court Book, 622.

[161] Transcript, 414.

[162] Transcript, 416 (referring to Court Book, 673).

[163] Transcript, 424.

[164] Transcript, 435.

[165] Transcript, 445.

[166] Transcript, 290.

[167] Transcript, 95.

[168] Ibid.

[169] Transcript, 96-97.

[170] Transcript, 97.

[171] Transcript refers to a public company, but the clear context is a reference to a

non-public company.

[\[172\]](#) Transcript, 97.

[\[173\]](#) Transcript, 98.

[\[174\]](#) Transcript, 99.

[\[175\]](#) Transcript, 101.

[\[176\]](#) Transcript, 102-103.

[\[177\]](#) Transcript, 104.

[\[178\]](#) Ibid.

[\[179\]](#) Transcript, 106.

[\[180\]](#) Defendants' outline of closing submissions (Exhibit MFI D5), [79].

[\[181\]](#) Transcript, 171.

[\[182\]](#) Transcript, 175.

[\[183\]](#) Court Book, 23.

[\[184\]](#) Court Book, 35.

[\[185\]](#) Transcript, 177.

[\[186\]](#) Transcript, 178.

[\[187\]](#) Transcript, 179-180.

[\[188\]](#) Defendants' outline of closing submissions (Exhibit MFI D5), 15ff.

[\[189\]](#) Court Book, 485.

[\[190\]](#) Transcript, 218.

[191] Defendants' outline of closing submissions (Exhibit MFI D5), [82].

[192] Transcript, 106.

[193] *Ibid.*

[194] Court Book, 490.

[195] Transcript, 117.

[196] Court Book, 491.

[197] Court Book, 434; Transcript, 118.

[198] Court Book, 500; Transcript, 118.

[199] Court Book, 502 and 503; Transcript, 119.

[200] [\[1981\] 1 NSWLR 606](#).

[201] See *Bowstead & Reynolds on Agency*, 19th edition at Article 15. See *ibid.*, 614 (quoting *Firth v Staines* [\[1897\] 2 QB 70](#), 75 (Wright J)).

[202] See, eg, *With v O'Flanagan* [\[1936\] Ch 575](#).

[203] See *York v Lucas* [\[1985\] HCA 65](#); [\(1985\) 158 CLR 661](#) and *TPC v Australia Meat Holdings Pty Ltd* [\[1988\] FCA 244](#); [\(1988\) 83 ALR 299](#).

[204] Amended Statement of Claim, [27]-[28].

[205] Amended Defence, [27].

[206] [Corporations Act, s 700\(3\)](#), see also *ASIC v Axis International Management Pty Ltd & Ors* [\(2011\) 81 ACSR 631](#), [47].

[207] [\[2005\] NSWSC 267](#); [\(2005\) 53 ACSR 305](#) (*Australian Investors*).

[208] *Ibid.*, [97]; applied with approval by Gilmour J in *ASIC v AXIS International Management Pty Ltd (No 5)* [\(2011\) 81 ACSR 631](#).

[209] *Australian Investors*, [98].

[210] *Australian Investors*, [99].

[211] See Transcript, 330 and 351.

[212] See generally [Corporations Act, s 708\(8\)](#).

[213] Citing as authority NC Seddon and MP Ellinghaus, *Cheshire & Fifoot's Law of Contract* (9th Aust ed, 2008) (*Cheshire & Fifoot*), [15.5].

[214] *Commercial Bank of Australia Pty Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 (*Amadio*), 461 (Mason J).

[215] Citing as authority *Turner v Wendever* [2003] NSWSC 1147, [105] (approved on appeal in [2005] NSWCA 73, cited by *Cheshire & Fifoot* at [15.6]).

[216] Strictly, this is not an element required for proof by the plaintiff – once it is established that the defendant took advantage of the plaintiff, the burden falls upon the defendant to show their conduct was not unconscionable (*Amadio*, 474).

[217] *Amadio*, 474 (Deane J).

[218] *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362, 415 (Kitto J), 405 (Fullagar J), cited in Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (4th ed, 2002), [16-010].

[219] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (4th ed, 2002), [16-010].

[220] [1984] HCA 64; (1984) 156 CLR 41 (*Hospital Products*), 96-97.

[221] [1998] Ch 1, 18.

[222] *Hospital Products*, 142 (citation omitted).

[223] *Breen v Williams* (1996) 186 CLR 71 (*Breen v Williams*), 106 (Gaudron and McHugh JJ).

[224] *Ibid*, 107 (Gaudron and McHugh JJ).

[225] [\(2007\) 61 ACSR 648](#), [261].

[226] *Hospital Products*, 69 (citations omitted).

[227] [\[1994\] UKPC 3](#); [\[1995\] 1 AC, 74](#), 98 (Lord Mustill for their Lordships).

[228] Transcript, 153.

[229] *Ibid*.

[230] *Ibid*.

[231] *Ibid*.

[232] See *Brunninghausen v Galvanics* [\[1999\] NSWCA 199](#); [\(1999\) 46 NSWLR 538](#), [87]; and also *Clark v Trustee of the Roman Catholic Archdiocese of Brisbane* [\[1998\] 1 Qd R 26](#).

[233] *Breen v Williams*, 107 (citations omitted).

AustLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.austlii.edu.au/au/cases/vic/VSC/2013/446.html>