

Distributed to Panel

 **NORTON ROSE FULBRIGHT**

June 8, 2020

Via Email: Calgary.Registry@albertacourts.ca

Court of Appeal of Alberta
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Your reference

Our reference
1001040549

Dear Sir / Madam:

**Perpetual Energy Inc. and others v. PricewaterhouseCoopers Inc. (LIT)
Appeal No. 1901-0255AC and 1901-0262AC**

Please find enclosed Volume 1 of the Transcript of the cross-examination of Paul Darby held May 26, 2020, together with exhibits. I understand that Mr. Darby intends to apply to seal Volume 2.

We would be grateful if you would forward the transcript to the Panel in advance of the hearing set down for June 18, 2020.

We are concurrently providing a copy of this letter (and its attachments) to other counsel.

Yours truly,
Norton Rose Fulbright Canada LLP

Steve Leidl

Steven. H. Leidl, QC
Senior Partner

SHL/cw

c: **Rinus de Waal and Luke Rasmussen**
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Clerk's Stamp:

QUESTIONING OF PAUL JAMES DARBY

CALGARY, ALBERTA

BY MR. S. LEITL AND MR. P. G. CHISWELL

AFFIDAVITS SWORN FEBRUARY 10, 2020

HELD MAY 26, 2020

VIA REMOTE VIDEO

COURT COURT OF APPEAL OF ALBERTA

COURT FILE NUMBER 1901-0255AC

TRIAL COURT FILE NUMBER 1801-10960

REGISTRY OFFICE: Calgary

APPLICANT: Paul J. Darby

STATUS ON APPEAL: Intervener

STATUS ON APPLICATION: Applicant

RESPONDENTS: Susan Riddell Rose,
Perpetual Energy Inc.,
Perpetual Operating Trust,

1 Perpetual Operating Corp.,
 2 PricewaterhouseCoopers Inc.,
 3 LIT, in its capacity as the
 4 Trustee in Bankruptcy of
 5 Sequoia Resources Corp., not
 6 in its personal capacity

7
 8 STATUS ON APPLICATION: Respondents

9
 10 DOCUMENT QUESTIONING ON AFFIDAVIT

11
 12
 13
 14 _____
 15 Taken before L. D. Stevenson, Official Court Reporter,
 16 pursuant to Rules 5.26, 6.20, and 13.46 of the Court of
 17 Queen's Bench of Alberta.

18 _____
 19
 20 FOR THE APPLICANT PAUL J. DARBY
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27

1 FOR THE RESPONDENT PRICEWATERHOUSECOOPERS INC., LIT, IN
2 ITS CAPACITY AS THE TRUSTEE IN BANKRUPTCY OF SEQUOIA
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10 FOR THE RESPONDENTS PERPETUAL ENERGY INC., PERPETUAL
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27

1 OFFICIAL COURT REPORTER:
2 L. D. Stevenson, CSR(A)
3 Dicta Court Reporting Inc.
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6 403-531-0590

7

8 (PROCEEDINGS COMMENCED AT 1:55 PM)

9 PAUL JAMES DARBY, Affirmed, Examined by Mr. Leitl

10 THE COURT REPORTER: Please state your full name
11 for the record.

12 A Paul James Darby.

13 Q MR. LEITL: Okay. Good afternoon,
14 Mr. Darby. It's Steve Leitl here, counsel for
15 Ms. Rose.

16 We are doing this remotely, so let's both try and
17 have an extra breath between questions and answers.

18 Just for my transcript, can you restate your name
19 for the record?

20 A Paul James Darby.

21 Q And I understand you've affirmed or taken an oath.

22 A Yes.

23 Q Do you feel any restrictions this afternoon on your
24 ability to testify honestly?

25 A No.

26 Q I take you are giving evidence personally today,
27 correct, Paul Darby the individual?

1 A Yes.

2 Q You are not here to give evidence on behalf of
3 PricewaterhouseCoopers Inc. or which I might call
4 "PWC"?

5 A Correct.

6 Q Although you are vice president of PWC, the corporation
7 of which is the Trustee of Sequoia; right?

8 A Yes.

9 Q And, in fact, you have sworn an affidavit separately on
10 behalf of the trustee which is bringing its own
11 application in the Court of Appeal proceedings; right?

12 A Yes.

13 Q And to state some obvious things, PWC, the trustee,
14 they have their own separate legal counsel. You have
15 Mr. Kruger or his firm BLG and the trustee has two law
16 firms Torys and Mr. de Waal's firm; right?

17 A Correct.

18 Q Now, without revealing any privilege information, and
19 in a general way, can you tell me what you did in order
20 to prepare your affidavit? At a high level, what the
21 process was.

22 MR. KRUGER: To prepare for today's
23 proceedings?

24 MR. LEITL: For this affidavit of February
25 10th, the two affidavits of February 10th. I take it
26 you consulted legal counsel. Did you do anything else
27 in terms of process, any individual facts gathering?

1 MR. KRUGER: Mr. Leitl, just to understand,
2 are you asking what Mr. Darby did to prepare for this
3 cross-examination, or are you talking about at the time
4 when the affidavits were prepared?

5 Q MR. LEITL: The latter. I'm going to ask
6 about preparing for cross separately. Thank you for
7 that clarification.

8 What, in general terms, did you do to prepare your
9 affidavits of February 10th, 2020? And, again, I'm not
10 asking for anything you talked about with Mr. Kruger.

11 A Reviewed the materials, the decision of the judge from
12 the Court of Appeal and spoke with counsel.

13 Q Okay. I take it, when you swore your affidavit, you
14 did not have available to you the transcript from the
15 hearing before Justice Veldhuis.

16 A No, I said BL -- the trustee's counsel had ordered it
17 at that time.

18 Q So you're agreeing with me, when you swore your
19 affidavit, you had not read the transcript of the
20 hearing; correct?

21 A I believe that's correct.

22 Q You did attend the hearing though; right?

23 A Yes.

24 Q And if I recall correctly, with at least one of your
25 colleagues from PWC?

26 A Yes.

27 Q Okay. We'll come back to that.

1 Now, again, without revealing any privilege
2 information, did you do anything in addition to prepare
3 for your cross-examination? Did you read anything
4 else, for example?

5 A I read the materials which you identified would be
6 involved in the cross-examination and some general file
7 information.

8 Q When you say "materials," you're talking about
9 publically available court materials?

10 MR. KRUGER: I think we're referring,
11 Mr. Leitl, to the list that you sent me and I passed
12 that on to the witness.

13 Q MR. LEITL: Okay. Let me -- did you --
14 have you now read the hearing transcript, the hearing
15 before Justice Veldhuis?

16 A Yes.

17 Q And for the purposes of your testimony today, Mr. Darby
18 do you consider that you are under any dilemma that
19 affects your ability to answer questions truthfully?

20 A No.

21 Q If you do feel like you're under a dilemma as we
22 proceed, you'll let me know?

23 A To what degree?

24 Q If you feel --

25 A It's kind of a broad statement.

26 Q Well, we'll come to this in more detail, Mr. Darby, but
27 you've talked about a dilemma in your affidavit, so

1 with that kind of dilemma in mind, if you feel that
2 you're under any such dilemma as this questioning
3 proceeds, will you let me know?

4 A I'll consider it as you go through the questions.

5 Q Will you answer the question now, will you let me know?

6 MR. KRUGER: What are we talking about,
7 Mr. Leidl?

8 MR. LEITL: Mr. Kruger, the witness
9 deposes on two instances, two occasions in his
10 affidavit that he felt during his last
11 cross-examination that he was facing a dilemma that
12 affected his testimony, if I understand his evidence
13 correctly, and I want to make sure that he's not
14 feeling under any dilemma that impairs his ability to
15 tell the truth today.

16 MR. KRUGER: Well, you know from the
17 affidavit what dilemma he is experiencing, not just in
18 the cross-examination, but in all of the litigation of
19 the trustee and that dilemma continues to exist, so I
20 don't see the purpose of this cross-examination. The
21 dilemma continues to exist.

22 MR. LEITL: Mr. Kruger, with the greatest
23 of respect, I'd ask you not to interfere in the
24 cross-examination and particularly when you're
25 giving -- purporting to give evidence about what's in
26 your client's head.

27 So, Mr. Darby --

1 MR. KRUGER: Mr. Leitl -- Mr. Leitl, when
2 you're asking questions which are not clear or which
3 are not relevant or not material, expect objections
4 from me.

5 Q MR. LEITL: Mr. Darby, you recall deposing
6 in your affidavit about feeling a dilemma the last time
7 I cross-examined you?

8 A Yes.

9 Q Do you feel like you're under a dilemma like that right
10 now?

11 A The dilemma I described in that affidavit always
12 exists.

13 Q Always and in all proceedings you've been involved in?

14 A What all proceedings?

15 Q Well, you said "always." I'm trying to understand what
16 you mean by "always." So if I hear you correctly, if
17 it's always, then you do feel you're under dilemma
18 right now. Is that fair?

19 A The one I described in the affidavit?

20 Q Yes.

21 A That still exists.

22 Q Do you consider that that dilemma affects your ability
23 to answer questions truthfully?

24 A No.

25 Q Thank you.

26 Now, the trustee -- PWC or the Trustee of Sequoia,
27 if I can call it that, you'll agree with me that the

1 trustee is taking whatever steps it has concluded are
2 appropriate to advance the interests of the estate
3 of -- the bankrupt estate; right?

4 A Yes.

5 Q Your application, your affidavit was sworn to advance
6 your personal interests; right?

7 A Yes.

8 Q The trustee has brought an application to challenge the
9 order of Justice Veldhuis and the reasons she gave?
10 You're aware of that; right? You instructed counsel in
11 that application; right?

12 A Yes.

13 Q And you swore an affidavit on February 13th as an
14 officer of PWC in support of the trustee's application
15 in relation to the order of Justice Veldhuis; right?

16 A I don't recall the date.

17 Q You'll agree with me that you swore a separate
18 affidavit in support of the trustee's application?

19 A Yes.

20 Q And you were free to say whatever you thought was
21 appropriate on behalf of the trustee in that affidavit;
22 right?

23 A Yes.

24 Q You were free, as an officer of the trustee, to
25 introduce additional records into evidence or to seek
26 to introduce, right, additional records?

27 A What is your question?

1 Q The affidavit you swore in support of the trustee's
2 application, the trustee was free -- you were free to
3 seek to introduce additional records into evidence;
4 right? You understood that?

5 A That we did or we could have?

6 Q Could have.

7 A Yes.

8 Q The records that are attached to your confidential
9 affidavit, the second one of February 10th, and, again,
10 Mr. Kruger, I don't plan to get into the contents, but
11 the trustee could have sought to introduce those
12 through your February 13th affidavit; right?

13 A Yes.

14 Q Okay. Now, do you have your affidavit handy, sir?

15 A Which affidavit?

16 Q The February 10th non-confidential.

17 A Yes.

18 Q Paragraph 3, you swear that you -- you state that you
19 swore your affidavit in your personal capacity as a
20 licensed insolvency trustee. Do you see that?

21 A Yes.

22 Q Just to be clear again, you're swearing this in your
23 personal capacity, not as trustee; right?

24 A Yes.

25 Q Okay. Now, your February 10 non-confidential
26 affidavit, I'm going to go through parts of it.

27 As a preliminary matter, I take it you did your

1 best to give a fulsome and complete and honest
2 statement; right?

3 A Define "your best."

4 Q You can't answer that?

5 A You can't define it?

6 Q Do you have any corrections to make to your affidavit,
7 sir?

8 A I do.

9 Q And what are they?

10 A There are three dates that were incorrect.

11 Q Can you take me through those?

12 A Paragraph 24.

13 Q Okay.

14 A "November 14th" should be "November 1."

15 Q Okay.

16 A Paragraph 40.

17 Q Yes.

18 A "October 30" should be "January 30."

19 Q I'm sorry, paragraph -- okay, thank you.

20 A Paragraph 41.

21 Q Yes.

22 A "November" should be "February."

23 Q Okay.

24 A The first "November" there.

25 Q Any other corrections?

26 A No.

27 Q Paragraph 4 of your affidavit, Mr. Darby, you say that

1 you have personal knowledge. Do you see that?

2 A Yes.

3 Q You'll agree with me that the knowledge that you
4 acquired in relation to Sequoia and this lawsuit and
5 this appeal was all acquired in your capacity as a vice
6 president of PWC as trustee?

7 A Yes.

8 Q And I take it in your affidavits, we've covered this
9 before as you may recall, you did not intend to give
10 any opinion evidence, did you, sir?

11 A No.

12 Q You did not intend to make legal arguments, did you?

13 A No.

14 Q You'll agree with me you're not qualified to give
15 opinion evidence on the exercise of judicial
16 discretion?

17 A Yes.

18 Q You'll agree with me that you are not qualified to give
19 opinion evidence on the principles of fundamental
20 justice?

21 A Yes.

22 Q But in paragraph 42, you made a submission on those
23 very points, didn't you?

24 A Yes, that's what I state.

25 Q We've covered opinion. We've covered legal argument.
26 You do talk in your affidavit about belief, and I think
27 I'd asked you to confirm that where you state your

1 belief, you also state to the best of your ability the
2 basis for the belief; right?

3 A However it's worded in the normal -- I believe such
4 information to be true and accurate.

5 Q Where you give your belief in the affidavit, have you
6 done your best to explain why you believe it to be
7 true?

8 A Can you point me to an example you'd like to see?

9 Q So are you unable to answer that in general?

10 MR. KRUGER: Well, it's very much a -- a --
11 questioning the air, Mr. Leitl. We really should be
12 moving on to something more substantive here.

13 (OBJECTION)

14 Q MR. LEITL: I thank you for your help,
15 Mr. Kruger.

16 Look at paragraph 7, for example, Mr. Darby. You
17 say (AS READ):

18 I verily believe ...
19 and you go on. Do you see that?

20 A Yes.

21 Q Fair to say that you set out the basis of the belief in
22 your affidavit to the best of your ability?

23 You seem to be having a problem.

24 MR. KRUGER: No, be fair to the witness,
25 Mr. Leitl. He is taking his time to answer your
26 question. You've referred him to a paragraph. He's
27 reading it. You're not going to bully the witness.

1 Q MR. LEITL: He was looking at the screen.
2 He wasn't reading and that's why I was asking,
3 Mr. Kruger, with respect.

4 Can you answer the question, Mr. Darby, or do you
5 need more time?

6 A I still would like to understand the definition that
7 you're using for the word "best."

8 Q I see. You can't answer that either.

9 When you state your belief in your affidavit in
10 paragraph 7, did you set out any basis?

11 A Yes, sir, the basis in that paragraph 7.

12 Q Okay. Thank you.

13 Now, your affidavit addresses your concerns with
14 what you define in paragraph 6 as the reasons of
15 Justice Veldhuis; right?

16 A What was your question?

17 Q Your affidavit addresses what you define as the
18 Reasons, upper case 'R', in paragraph 6. I'm just
19 trying to give you a point of reference to begin with.

20 A Yes.

21 Q And the defined term Reasons, so just to make sure I
22 clearly understand your affidavit, refers to the
23 written reasons of Justice Veldhuis; right?

24 A Yes.

25 Q So when you go on in paragraph 7 to use terms like
26 "findings" and "comments," you're also referring to the
27 reasons; right?

1 A Sorry, when I use the word "comments" in paragraph 7?

2 Q I think this is obvious, but I want to nail this down,
3 Mr. Darby. In paragraph 6, you used a defined term
4 "Reasons," but elsewhere in the affidavit you use words
5 like "comments" and "findings," and I want to make sure
6 they all refer to the written reasons of
7 Justice Veldhuis.

8 A I might have referred to some of the comments, because
9 I said I was there and I heard her speak though, so I
10 don't know if that's -- I'd have to go review all the
11 times I used the word "reasons".

12 Q Paragraph 8, when you refer to the findings and
13 comments "in the Reasons," obviously we're talking
14 about the written reasons; correct?

15 A That's what it says.

16 Q I know that's what it says, sir, but I'm examining you
17 on your evidence given under oath, so that was your
18 intention to refer to the written reasons; right?

19 MR. KRUGER: Well, the words speak for
20 themselves, Mr. Leitl. Let's stop splitting hairs.

21 (OBJECTION)

22 Q MR. LEITL: And in paragraph 8, you talk
23 about two sets of findings and comments to which you
24 personally object; right?

25 A Yes.

26 Q And when you say "to which I object," I take it to mean
27 you're saying that you disagree with her conclusions.

1 A Yes.

2 Q I take it, based on my review of the affidavit, you'll
3 agree with me that you don't personally have any qualms
4 with the terms of the order of Justice Veldhuis that
5 granted that order that security for costs be paid;
6 right? You're focused on her reasons?

7 A I'm trying to remember what's in the order.

8 Q In layman's terms, the order says pay security for
9 costs.

10 A No, I do not have a personal problem with that.

11 Q Let's go back to paragraph 8. I just want to unpack
12 this a bit, and you, as I read this, identify two
13 categories of parts of the reasons to which you object,
14 and the first is that you say that she made a finding
15 that you allegedly breached your duties as a licensed
16 insolvency trustee to act with candor and impartiality;
17 right?

18 A I didn't hear a question. I thought you were just
19 reading.

20 Q I'm just -- so you've got your eyes on that? You know
21 where I'm talking about for a reference point?

22 A Yes.

23 Q Where is that finding in the reasons? Is it paragraph
24 24 of Justice Veldhuis' reasons?

25 MR. KRUGER: Do you want the witness to
26 look at paragraph 24?

27 Q MR. LEITL: Yes, I want him to tell me if

1 it's true that that's what he's referring to.

2 A That's one of the statements. I can't say if it's
3 stated elsewhere without re-reading the whole document.

4 Q Let's focus on paragraph 24 for a moment then.

5 MR. KRUGER: Yes, in fairness, though,
6 Mr. Leitl -- Mr. Leitl, in fairness, in paragraph 53
7 those words are expressly used.

8 MR. LEITL: Thank you for your assistance
9 to the witness, Mr. Kruger. I'm asking what the
10 witness was talking about when he swore his personal
11 affidavit.

12 MR. KRUGER: Yes, Mr. Leitl, you are
13 splitting hairs, and you are conducting not a fair
14 cross-examination if you do that. If you want to
15 identify to the witness paragraph 24 and lead him into
16 adopting that paragraph when you know and I know that
17 elsewhere in the reasons the matter is expressly
18 addressed, then I am perfectly within my rights to
19 mention the fact that it is specifically mentioned
20 elsewhere. This is not a memory test for the witness
21 whether he remembers each and every paragraph and every
22 line in the reasons and conduct your cross-examination
23 accordingly.

24 Q MR. LEITL: Mr. Darby, when you swore your
25 affidavit under oath about your personal objections to
26 the reasons of a member of our Court of Appeal, you
27 cited that you swore under oath that the court had made

1 a finding that you breached your duties as trustee to
2 act with candor and impartiality. Was the basis of
3 your evidence paragraphs 24 and 53 of the reasons?

4 A I would still need to re-read the whole reasons to see
5 if it existed elsewhere.

6 Q Okay. You'll agree with me that in paragraphs 24
7 Justice Veldhuis recited arguments made by counsel;
8 right?

9 A The quote is in the middle.

10 Q The second sentence at paragraph 24 says (AS READ):
11 During the hearing, the applicants argued ...
12 Right? Correct?

13 A Sorry, I thought you were just reading again.

14 Q Did you read that when you swore your affidavit about
15 that -- that in your view she had made a finding in
16 that regard? Did you note that she was reciting
17 arguments of counsel?

18 A I read this, yes.

19 Q Thank you.

20 Now, your counsel has referred us to paragraph 53.
21 Can you take a look at that? When you swore under oath
22 that Justice Veldhuis had made a finding about your
23 conduct, I take it you read paragraph 53 as a finding
24 in that regard.

25 A Yes, this is part of the document that I read before I
26 signed my affidavit.

27 Q Did you consider that she qualified this by saying "I

1 question"?

2 A What's your question?

3 Q It didn't concern you in giving your evidence that this
4 was a finding that she had, in fact, used the words
5 "I question"?

6 A I'm still not sure I follow your question.

7 Q Paragraph 53, Justice Veldhuis wrote that she
8 questioned something, not that she found something.
9 Had you read that when you swore your affidavit?

10 A Yes.

11 Q Thank you.

12 Now, in paragraph 8, you used the words (AS READ):
13 ... in circumstances where none of the
14 parties adverse in interest to the Trustee
15 requested the Court to make such findings ...
16 Right?

17 A Which paragraph are you?

18 MR. KRUGER: 8.

19 A 8 of the original affidavit? Yes.

20 Q MR. LEITL: I take if you look at
21 paragraph 35, is that the same thing we're talking
22 about here, you were surprised?

23 A That's my statement. What's your question?

24 Q I take it your evidence is that you were taken aback,
25 you were surprised. You had no idea that the
26 applicants, including my client, were making submission
27 to the court that you had not answered questions with

1 full candor. Is that your evidence? You were
2 surprised when you saw the reasons?

3 A That I did not answer questions, because that's a
4 different statement.

5 Q Let's look at paragraph 35; okay?

6 A I'm looking at 35.

7 Q You talked there about things you heard at the hearing;
8 right?

9 A Yes.

10 Q And that's based -- when you swore the affidavit, that
11 was based on your recollection of the hearing without
12 having read the transcript; right?

13 A I believe so.

14 Q And the same for paragraph 36? Right?

15 A Yes.

16 Q And you've since read the transcript of the hearing;
17 right?

18 A Yes.

19 Q And did that change your recollection when you read it?

20 A No.

21 Q Okay. We'll come back to that.

22 Let's go now to paragraph 16 of your affidavit.

23 Do you have that?

24 A Yes.

25 Q You say that (AS READ):

26 ... counsel for ... the Defendants made a
27 point of reminding me of a Trustee's duty to

1 "... be honest and impartial ..."

2 And you go on; right?

3 A Yes.

4 Q So it was clear to you, I suggest, tell me if you
5 disagree, at the time of your cross-examination that
6 the defendants were going to raise as an issue your
7 honesty and impartiality in answering questions. Do
8 you agree?

9 MR. KRUGER: I object to the question.

10 That is not a fair question at all.

11 (OBJECTION)

12 MR. LEITL: Fine.

13 MR. KRUGER: I object to the question. Get
14 on to the next one, Mr. Leitl.

15 Q MR. LEITL: Why did you want to make a
16 note in your affidavit here, Mr. Darby, that counsel
17 had made a point of reminding you of your trustee's
18 duties?

19 A I knew the duty. It was just the attempt by counsel in
20 the cross-examination to be difficult in reminding
21 things I already know.

22 Q Why did you or your counsel not object at the time if
23 you thought it was them being difficult?

24 MR. KRUGER: Object to the question.

25 (OBJECTION)

26 MR. LEITL: There was no objection, was
27 there? You can recall that?

1 MR. KRUGER: Well, the transcript will
2 speak for itself, Mr. Leidl. Let's get to some real
3 cross-examination here.

4 (OBJECTION)

5 MR. LEITL: You recall that, for example,
6 in November 2018, in my client's brief, we raised
7 issues about your compliance with trustee's duties;
8 right?

9 MR. KRUGER: In what document?

10 MR. LEITL: Brief of the defendants, Sue
11 Riddell Rose, filed November 1st, 2018, before
12 Justice Nixon.

13 MR. KRUGER: Yes, we don't have it here.
14 You didn't ask us to have it here.

15 Q MR. LEITL: You don't remember that,
16 Mr. Darby? I thought it might stick out in your mind.
17 You don't remember?

18 A I don't have the document here. You're talking about a
19 document I read a couple of years ago.

20 Q My question is, do you remember? It's an easy
21 question.

22 A No.

23 Q Thank you.

24 Now, getting back to the hearing transcripts, I
25 take it you have no recollection of Mr. McDonald
26 submitting that you had gone to extraordinary lengths
27 to ensure that there would be no meaningful

1 cross-examination. You don't remember that?

2 A Which paragraph is that in?

3 Q Hearing transcript page 10, line 5, to hearing page 14,
4 line 2, but my question before you go there is do you
5 remember that?

6 A Do I remember reading that or hearing that?

7 Q Hearing that.

8 A Yes.

9 Q Well, in your affidavit, paragraphs 35 and 36, you said
10 you had no recollection of anything of the sort, but
11 today you do?

12 MR. KRUGER: That's not what the -- that's
13 not what the affidavit says.

14 (OBJECTION)

15 Q MR. LEITL: Paragraph 35 of your
16 affidavit, Mr. Darby, let me read it. (AS READ):

17 Never during the Hearing did I hear counsel
18 for either Perpetual or Ms. Rose argue that I
19 did not comply with my duty of candour,
20 honesty and impartiality ...

21 And you go on. Yet at the hearing, and I'm just giving
22 you one example, Mr. McDonald submitted, and I quote,
23 that you (AS READ):

24 ... went to extraordinary lengths to ensure
25 that there would be no meaningful
26 cross-examination.

27 And gave several illustrations. Do you remember that

1 now?

2 A You're asking me the same question you just asked a
3 minute ago.

4 Q Do you remember that now?

5 A I remembered Mr. McDonald --

6 Q Did that refresh --

7 A Mr. McDonald making that statement.

8 MR. KRUGER: Just give the witness a chance
9 to answer otherwise the record is going to be
10 non-existent, Mr. Leitl.

11 MR. LEITL: Mr. Darby, you're making easy
12 things difficult.

13 You agree --

14 MR. KRUGER: Mr. Leitl -- Mr. Leitl --
15 Mr. Leitl, I object. There is no need for you to get
16 disrespectful or to make comments here -- pejorative
17 comments. The witness is treating you respectfully,
18 and I expect you to treat him respectfully.

19 (OBJECTION)

20 Q MR. LEITL: Mr. Darby, let me know if you
21 agree or disagree with this. To the extent that your
22 recollections state -- that you state in your affidavit
23 about what happened in the hearing is different from
24 what the transcript says, the transcript is more
25 reliable; right?

26 A Yes.

27 Q Thank you.

1 And at the hearing before Justice Veldhuis, your
2 counsel, Mr. de Waal, made submissions on behalf of the
3 trustee in response to those kinds of submissions;
4 right?

5 A Counsel made submissions on the matter that was being
6 heard.

7 Q Thank you.

8 Now, you are still today a licensed insolvency
9 trustee; right?

10 A Yes.

11 Q Your licence has never been challenged or revoked?

12 A No.

13 Q No one has ever filed a complaint against you alleging
14 violation of the code of conduct?

15 A No.

16 Q You agree with me?

17 A I agree with you no one has challenged me.

18 Q Yes, even after the release -- the public release of
19 Justice Veldhuis' reasons; right?

20 A No one has challenged me.

21 Q Yes, and if such a complaint is made would be made to
22 the office of the superintendent of bankruptcy; right?

23 A Yes.

24 Q And if such a complaint was made, you'd have a right to
25 respond?

26 A I've never reviewed the disciplinary process for a
27 trustee.

1 Q Okay. Fair enough.

2 Both before and after the release of the reasons
3 of Justice Veldhuis, you were a partner of
4 PricewaterhouseCoopers LLP. and a vice president of
5 PWC; correct?

6 A Of PWC Inc.

7 Q Yes. My point is your status with both of those
8 entities has not changed as a result of the reasons;
9 right?

10 A Correct.

11 Q And since the release of the reasons of
12 Justice Veldhuis, I take it PWC with you personally
13 involved has been engaged in other insolvency matters
14 such as the Delphi Energy Corp. one; right?

15 A Yes.

16 Q Now, can we look at paragraph 13 of your affidavit?
17 Correct me if I'm wrong, but you concluded that it
18 would help explain the basis of your objections to the
19 reasons if you highlighted certain provisions of the
20 Bankruptcy and Insolvency Act and certain rules; right?

21 A Sorry, what is the question?

22 Q I take it from reading this that you were drawing the
23 reader's attention to these provisions and rules to
24 help better understand the basis of your objections to
25 the reasons.

26 A Yes.

27 Q Okay. You'll also recall that none of these provisions

1 or rules had ever previously been cited by the trustee
2 in these proceedings, do you agree with that?

3 MR. KRUGER: Are you talking about the
4 appeal proceedings, Mr. Leidl? What proceedings are
5 you talking about?

6 Q MR. LEIDL: From the filing of the
7 statement of claim to this date, but for this
8 affidavit.

9 A You're asking if I can recall if we ever cited any of
10 these sections in any of the previous material we filed
11 in the nearly two and a half past years?

12 Q Is that a way of saying you don't recall?

13 A Yes.

14 Q Did you consider anything else in terms of rules or
15 statutes for the purpose of your affidavit? Did you
16 consider the Rules of Court, for example?

17 A I discussed many things with my counsel.

18 Q Well, I'm talking about now what you personally
19 considered. Obviously you've turned your mind to
20 sections of the Bankruptcy and Insolvency Act rules
21 promulgated under the regulations. Did you also
22 turn -- and you talk about them in your affidavit in a
23 non-privilege way. Did you also in the same way
24 consider the Rules of Court?

25 A I discussed various things with our counsel --

26 MR. KRUGER: Yeah --

27 A -- my counsel.

1 MR. KRUGER: -- don't go there.

2 Q MR. LEITL: Other than privileged
3 discussions for the purposes of swearing your affidavit
4 and thinking about whether your objection was tenable,
5 did you look at the Rules of Court?

6 A How am I supposed to answer that if I can't discuss
7 what I talked about with my counsel?

8 Q Well, let's do it again. You do in your affidavit talk
9 about statutes and rules, and you say (AS READ):

10 I wish to draw particular attention to them.

11 Right?

12 A Yes --

13 Q Correct?

14 A -- that's what it says.

15 Q Did you, in parallel with this preparation of this
16 affidavit, did you look at the Rules of Court?

17 A I had counsel --

18 Q Aside --

19 A -- that can --

20 Q Sorry, I interrupted you. I apologize.

21 A I had counsel look at rules.

22 Q Did you turn your mind to the duties that were upon you
23 when you were under cross-examination in swearing your
24 affidavit of February 10th?

25 A Did I turn my mind to my duties, that's your question?

26 Q Let's break this down.

27 You knew that when you were cross-examined on your

1 prior affidavit filed in response to the application
2 for security for costs that you were under oath; right?

3 A Yes.

4 Q And you knew that you were obligated to answer all
5 relevant questions save for those to which you
6 objected; right?

7 A Or that we deemed confidential.

8 Q That might be a basis of objection, but you agree with
9 me in principle that you were obliged to answer all
10 questions honestly but for those to which you objected;
11 right?

12 A Yes.

13 Q Thank you.

14 In terms of this dilemma that you talk about in
15 your affidavit, and we'll come back to, I take it that
16 you'll agree with me that you're not suggesting in your
17 affidavit in paragraph 13 or otherwise that the duties
18 upon you as a trustee somehow limited your duties to
19 answer questions truthfully, are you?

20 A No.

21 Q Thank you.

22 You saw, for example, in paragraph 50 of her
23 reasons that Justice Veldhuis turned her mind to at
24 least one of the rules; right?

25 MR. KRUGER: That's the bankruptcy rule
26 you're referring to?

27 Q MR. LEITL: Giving you a point of

1 reference, you saw that Her Ladyship did address one of
2 the bankruptcy rules; right?

3 A Yes.

4 Q Thank you.

5 The first thing that you cite in paragraph 13 is
6 Section 23 of the BIA; right?

7 A Correct.

8 Q And you wanted to cite this to help us understand why
9 you object to the reasons; right?

10 A It's part of the story.

11 Q Section 23 provides that (AS READ):

12 The trustee shall, at all reasonable times,
13 permit any authorized person to inspect the
14 books and papers of the bankrupt in order to
15 prepare or verify returns that the bankrupt
16 is by statute required to file.

17 Right?

18 A I don't have it in front of me.

19 Q Did you have it in front of you when you swore your
20 affidavit?

21 A No.

22 Q "Authorized person" is not defined. Did you consider
23 that?

24 A I'm aware of it.

25 Q The trustee at the time though took the position that
26 Ms. Rose was not an authorized person; right?

27 A Correct.

1 Q The next thing you recite in Section 26 of BIA, and
2 this is the books and records that are supposed to be
3 kept -- sorry, this provides that (AS READ):

4 The trustee shall permit the books and
5 records to be inspected by a bankrupt
6 creditor or representative of the creditor.

7 Do you remember that?

8 A Again, I don't have the BIA in front of me, so I'm not
9 gonna say whether you're reading it correctly or
10 incorrectly to me.

11 Q Does that accord with your recollection the Act that
12 you're administering as a trustee?

13 A Yes.

14 Q And the trustee took the position that Ms. Rose was not
15 an authorized representative of Perpetual. Do you
16 remember that?

17 A The position was Ms. Rose, in her personal capacity as
18 a litigant, was not a creditor.

19 Q And you recall that when we asked the trustee's
20 counsel, well, how are we going to separate that when
21 Ms. Rose is also the president, and his answer was, I
22 don't know, and that's quoted in the reasons. Does
23 that refresh your memory?

24 A Yes, it was your issue to deal with.

25 Q The next thing you cite is BIA Section 27, and as you
26 probably recall, that provides for the obligation of
27 the trustee to report from time to time on the estate;

1 right?

2 A Yes.

3 Q And the trustee reports are supposed to be accurate;
4 right?

5 A They're completed with the information available.

6 Q They're supposed to be as accurate as the trustee can
7 make them; right?

8 A With the information available.

9 Q Right, and then filed -- they're made publically
10 available, aren't they?

11 A Yes.

12 Q And PWC, as trustee, filed a report in relation to the
13 affairs of Sequoia; right?

14 A We filed several reports on Sequoia.

15 Q Do recall that Ms. Rose's affidavit filed in support of
16 the application for security for costs referenced one
17 report and certain information in that report; right?

18 A I believe she was referring to the first report of the
19 trustee.

20 Q Yes, and the first report of the trustee contained
21 factual information, didn't it?

22 A It would. It would include our summary of the position
23 at that time.

24 Q I don't know if there's a distinction, but it did
25 contain factual information; right?

26 A There would be factual information in it, yes.

27 Q Would there have been any non-factual information in

1 it, Mr. Darby?

2 A I need to review it to see what it said.

3 Q And what is the date of the last report of the trustee
4 on the affairs of Sequoia?

5 A I don't recall.

6 Q And why did you think it was important to explain your
7 objection to the reasons to draw the reader's attention
8 to the obligation of the trustee to prepare and file
9 reports?

10 A It tells part of this whole story.

11 Q How does it explain your objection, sir, to the
12 reasons?

13 MR. KRUGER: Well, Mr. Leitl, if you look
14 at the introductory portion of paragraph 13, then the
15 witness says for what purpose he's referring to the
16 sections.

17 Q MR. LEITL: I've seen that, and we've
18 covered that. Thank you, Mr. Kruger.

19 So how does the obligation of the trustee under
20 Section 27 fit into your story, Mr. Darby?

21 A It's part of the story explaining the background of how
22 we got here, the requests by Perpetual and Rose to
23 review records, the preparation of the Section 27
24 report, the attempt by Perpetual and Rose to put
25 confidential records in the public's domain. It all is
26 part of the story.

27 Q Thank you for that. Let's unpack that a bit.

1 So you recall that, when Ms. Rose swore her
2 affidavit in support of the application for security
3 for costs, the latest information published by the
4 trustee regarding the financial affairs of Sequoia was
5 the report that she cited, the preliminary report of
6 the trustee; right?

7 A I would need to check, because we have other matters
8 going on. I'd want to check the dates of the other
9 reports we filed in court.

10 Q When you saw Ms. Rose's affidavit, you carefully
11 considered it and took legal advice on it; right?

12 A Yes.

13 Q I'm going to come back to that.

14 The next section you flag in support of your story
15 is Section 30 of the BIA. You don't explain that at
16 all, but I take it this is simply you referring to the
17 fact that the trustee has certain statutory powers;
18 correct?

19 A Part of the story explaining how we got here.

20 Q That the trustee has a statutory right to bring a
21 lawsuit; correct?

22 A What's the question?

23 Q Is that what you're referring to? How does Section 30
24 of the BIA help us understand your objection to the
25 reasons?

26 A Again, I would say it's part of the whole story of how
27 we got here, how we are authorized to do this. There

1 is not a short line between each section and the
2 objection, if that's what you're looking for.

3 Q No, I'm looking to understand your evidence when you
4 said that you wished to draw the reader's attention to
5 these provisions to understand the objections, and
6 you've now given me your best answer on Section 30.

7 Section 37 of the BIA talks about -- do you
8 recall?

9 MR. KRUGER: What's the question,
10 Mr. Leitl?

11 A Is it a memory test?

12 Q MR. LEITL: Yes, it is in part a memory
13 test, sir. It's called a cross-examination.

14 When you swore your affidavit and you wanted to
15 cite Section 135 of the BIA, how did you think that
16 helps tell the story of your objection to the reasons?

17 A Section 135 of the BIA dealing with claims.

18 Q Yes.

19 A Last time --

20 MR. KRUGER: You have to give the witness a
21 chance to answer.

22 A Last time you went through a few conversation about
23 claims that you wanted to put on the record and had
24 questions about how the trustee dealt with them. This
25 is the section that governs on how the trustee deals
26 with claims.

27 Q MR LEITL: Section 135 contains mandatory

1 language in relation to the duties of the trustee to
2 examine every proof of claim and the grounds therefore.
3 You're aware of that?

4 A Before accepting them, yes.

5 Q Section 135(1.1) has mandatory language that (AS READ):

6 The trustee shall determine whether any
7 provision claimed or unliquidated claim is a
8 provable claim and to value it.

9 Right.

10 A I don't have the Act in front of me. You're quoting it
11 again. If you'd like me to read it, I would need a
12 copy of it.

13 Q You recall from your cross-examination and submissions
14 made that Justice Veldhuis said the applicants, my
15 client included, were making complaints that the
16 trustee had not done any of this yet. Do you remember
17 that?

18 A Where is that paragraph?

19 Q So you don't remember that?

20 A That we had not reviewed the claims?

21 Q You don't remember being cross-examined on the fact
22 that the proof the claims made by creditors and not --
23 the secured claims had not been sorted out, that you
24 hadn't looked at the unsecured claims, you didn't know
25 what the total of the secured claims were, you didn't
26 know whether the AER's claim was zero dollars or 225
27 million. Do you remember that?

1 A Their question started with reference to the judge and
2 its decision. Now you've morphed into your examination
3 from last time. Appreciate if you could separate your
4 questions and ask them one at a time.

5 Q You don't remember?

6 A I remember the cross-examination very well.

7 Q Good.

8 Section 136 you cite of the BIA which is the
9 scheme of distribution. Do you see that?

10 A Yes.

11 Q I take it you now understand that a cost claim of my
12 client would be an unsecured claim against the estate;
13 right?

14 A I'm not accepting or rejecting any claim made by your
15 client right now.

16 Q You understand, as an experienced trustee, that a cost
17 claim made against the trustee in this litigation would
18 be an unsecured claim in the priority scheme; right?

19 A Preferred claim I believe, isn't it?

20 Q Allow me to start here. It would rank behind the
21 secured creditors; right?

22 A A theoretical claim, yes.

23 Q It would rank behind the trustee's fees; right?

24 A Correct.

25 Q Why did you think reference to the priority of the
26 claims, Section 136, helped tell your story about your
27 objection to the reasons?

1 A I believe it falls under the topic, as we've mentioned
2 all these sections that one-by-one with you that this
3 tells part of the story of how we got here, and you
4 need to read the whole affidavit as one to understand
5 it.

6 Q Another part of that story of how we got here was you
7 admitting on cross-examination last time that there is
8 a high probability that the unsecured creditors get
9 nothing; right? Do you remember that?

10 A I don't know how that gets us here today.

11 Q Do you remember that?

12 A Do I remember the statement that there's a high
13 probability unsecured creditors would receive nothing?

14 Q Yes.

15 A Yes, I do. I don't see how that gets us here today
16 though.

17 Q We may have different versions of what's important in
18 this story. That's why I list it early.

19 You also referred to several sections of the BIA
20 rules; right?

21 A Yes.

22 Q First one you cite is 34. (AS READ):

23 Every trustee shall maintain the high
24 standards of ethics that are central to the
25 maintenance of public trust and confidence of
26 the administration of the Act.

27 Do you remember that?

1 A Again, you're asking me to verify something you're
2 reading which you have not provided copy to me to allow
3 me to read to see if you're reading it accurately, so I
4 cannot confirm you can read.

5 Q Mr. Darby, you swore the affidavit. The affidavit
6 refers to things that the affidavit suggests are
7 important, and I'm trying to get you to explain why,
8 and you're telling me here that you're not able to do
9 it.

10 MR. KRUGER: That is not what the witness
11 said.

12 A I said I cannot confirm what you just read. How can I
13 do that --

14 Q MR. LEITL: Rule --

15 A -- without a copy in front of me.

16 Q Rule 36 (AS READ):

17 Trustee shall perform their duties in a
18 timely manner and carry out their functions
19 with competence, honesty, integrity and due
20 care.

21 You're aware of that rule, aren't you?

22 A Yes.

23 Q Rule 39 (AS READ):

24 Trustee shall be honest and impartial and
25 shall provide to interested parties full and
26 accurate information as required by the Act.

27 And it goes on. You're aware of that, aren't you?

1 A Yes.

2 Q And yet the trustee took the position that Ms. Rose was
3 not an interested party, didn't it?

4 A Took the position that Ms. Rose is not a creditor.

5 Q And was not otherwise permitted to see anything, right,
6 in her personal capacity?

7 A In accordance with the Act.

8 Q Paragraph 14 of your affidavit. Is it your belief that
9 the trustee did not proceed aggressively against my
10 client in the lawsuit?

11 A We filed a statement of claim.

12 Q Is it your view that the -- I'm going to suggest to you
13 that the trustee did aggressively pursue my client in
14 the litigation. Do you agree with that?

15 MR. KRUGER: Well, Mr. Leidl,
16 "aggressively," I mean, in the context of litigation,
17 that can mean a hundred things.

18 (OBJECTION)

19 Q MR. LEITL: Well, it just turns out to be
20 a term that your client used in his own affidavit.

21 So in the sense that you used it in your own
22 affidavit, Mr. Darby, you agree with me that the
23 trustee proceeded aggressively against Ms. Rose?

24 A No, I would disagree.

25 Q So the trustee filed a statement of claim on the Friday
26 before a long weekend, had not told Ms. Rose that it
27 was coming, sought with interest and costs almost a

1 quarter of a billion dollars, filed an application for
2 judgment returnable three weeks later, and you're
3 saying that's not aggressive?

4 MR. KRUGER: Objection. You can argue all
5 this to the court.

6 (OBJECTION)

7 MR. LEITL: Okay. Well, why --

8 (INDISCERNIBLE - BACKGROUND NOISE) Mr. Kruger, to his
9 arguments about aggression in paragraph 15 of his
10 affidavit, if I can't ask him about the other side of
11 the coin?

12 MR. KRUGER: You've heard my objection.

13 MR. LEITL: At no time in this proceeding
14 today have you personally or the trustee ever expressed
15 any concern about the impact of litigation on my
16 client, Ms. Rose, right, on her reputation, for
17 example?

18 MR. KRUGER: Again, Mr. Leitl, what has
19 that to do with this application?

20 (OBJECTION)

21 MR. LEITL: Mr. Darby, you have sworn an
22 affidavit in which you attempt to set out your personal
23 objections to the considered and reserved reasons of a
24 respected member of our Court of Appeal --

25 MR. KRUGER: Well, that's your opinion.

26 MR. LEITL: -- and the reason you state in
27 your affidavit, if I can finish my question, is the

1 impact on your reputation, and I'm simply asking you,
2 as a matter of fact, which we all know and you can
3 simply agree now and I can move on, is that neither you
4 or the trustee have ever uttered a word of concern
5 about the impact of the lawsuit on my client's
6 reputation. That's true, isn't it?

7 MR. KRUGER: Objection. That is inherent
8 in every lawsuit that somebody is going to be
9 prejudiced in litigation. Every defendant is in that
10 situation --

11 MR. LEITL: Thank you.

12 MR. KRUGER: -- and there's no duty to --
13 don't apologize to a defendant that you're suing the
14 defendant even if it is Ms. Rose.

15 (OBJECTION)

16 Q MR. LEITL: Thank you, Mr. Kruger.

17 So let's look at paragraph 15 where you do talk
18 about your conception of aggression. Do you want to
19 take your time and remind yourself of what you said
20 there, or do you need that time?

21 A I've read it.

22 Q You say that it was clear to you from the outset that
23 the litigation would be hard fought by the defendants;
24 right?

25 A Yes.

26 Q You're not suggesting that there was anything
27 inappropriate about that?

1 A No.

2 Q And then you say (AS READ):

3 The Defendants have been very aggressive in
4 their conduct of the litigation ...

5 Right?

6 A Yes.

7 Q And then you do the best to illustrate how; right?

8 A Someone needs to turn off their e-mail.

9 Q I can't. That's mine. I'm sorry.

10 A I don't -- I don't agree with the term "best." Again,
11 I -- that is not a defined term. I use examples.

12 Q We'll come to that.

13 And you say that some of that aggression was
14 directed at you personally; right?

15 A Yes.

16 Q You've never been personally involved in this lawsuit,
17 have you? It's always been you as the vice president
18 of PWC, the trustee?

19 A The aggression has been towards me as the vice
20 president of PWC.

21 Q Thank you.

22 And PWC had legal counsel who never made any
23 complaints about aggression in the course of the
24 proceedings; right?

25 A No, I would disagree with that.

26 Q So what do you recall?

27 A We can use the example of the attempt to question the

1 inspectors.

2 Q Okay. Anything else?

3 A The accusations of me intentionally causing delay.

4 Q Yes, we're coming to that.

5 Anything else?

6 A Those are just a couple of the examples.

7 Q Can you recall any other examples?

8 A I'd have to flip through all of the Schedule C to see
9 what I attached and look around, but ...

10 Q Let's talk about Exhibit C then, in general, what it
11 comprises. I don't want to go through a page flip, but
12 you'll see pages 19 to 43 relate to a notice of
13 appointment sent by Perpetual counsel to question two
14 inspectors; right?

15 A Yes.

16 Q And I take it you saw that that was unduly aggressive
17 to you personally.

18 A Unduly aggressive.

19 Q Because of why, the inspectors would be inconvenienced?

20 A Because it was an inappropriate (INDISCERNIBLE) the
21 inspectors.

22 MR. KRUGER: Sorry, Mr. Leitl, I caused a
23 bit of a mess here trying to pour water. Just give us
24 a second here. Just give us a second.

25 (DISCUSSION OFF THE RECORD)

26 Q MR. LEITL: Where we were, Mr. Darby, was

27 I take it you concluded that it was inappropriate for

1 the Perpetual defendants to try and seek to examine the
2 inspectors; right?

3 A Under Rule -- whatever it was you were using, yes.

4 Q And trustee counsel, Mr. de Waal, wrote back to
5 Mr. McDonald on October 7th, 2019, and said that they
6 weren't going to attend; right?

7 A I'd need to see the letter for the date, but I
8 understand that's what happened.

9 Q With no complaint about anybody feeling -- being
10 aggressive? You recall that much; right?

11 A I need to see the letter.

12 Q Pages 44 to 55 of your Exhibit C are transcripts in the
13 hearing that was Justice Horner in the bankruptcy;
14 right?

15 A Yes.

16 Q My client was not a party. Ms. Rose was not a party to
17 that proceeding and is not a party; right?

18 A In her personal capacity, no.

19 Q And Mr. de Waal's colleague, Mr. Rassmussen, made
20 submissions and someone from Burnet Duckworth made
21 submissions, and in the end, Justice Horner -- Horner
22 made an order of costs; right?

23 A Dismissed in costs, yes.

24 Q Did you see that as undue aggression towards you?

25 A I saw that as being difficult, unprofessional.

26 Q And then in paragraph 16 of your affidavit, at the end
27 of that paragraph, you say that you were (AS READ):

1 ... on occasion treated in a disrespectful,
2 unprofessional and sarcastic manner.

3 Right?

4 A Yes.

5 Q And you were referencing my cross-examination of you on
6 your affidavit sworn in response to the application for
7 security for costs; right?

8 A Yes.

9 Q And you attached some selected transcripts -- excerpts
10 from the transcripts, the same transcripts that were
11 before Justice Veldhuis; right?

12 A I would assume they were before her, yes.

13 Q You don't recall from the hearing or from your recent
14 review of the transcripts that Justice Veldhuis made it
15 clear then and in her reasons that she read the entire
16 transcript of your cross-examination?

17 A Does she state that in the --

18 Q Do you recall that --

19 A -- reasons --

20 Q -- sitting here today?

21 A I don't recall that she stated she read the entire
22 transcript, but if it's in the reasons or the wording.

23 Q Paragraph 16, you talk about what you call "a difficult
24 position." Do you see that?

25 A Yes.

26 Q And then you go on to describe what you -- the term you
27 use is "dilemma." Do you see that?

1 A Yes.

2 Q And you explained the dilemma on this basis (AS READ):

3 ... on the one hand I was regularly reminded

4 that I was an "Officer obliged to be

5 impartial" ...

6 Right?

7 A Yes.

8 Q You knew that, from the outset, that you were an

9 officer obligated to be impartial; correct?

10 A Yes.

11 Q So opposing counsel reminding you of that wouldn't have
12 caused you any problems, would it?

13 A If known.

14 Q Sorry? Can you repeat --

15 A Your e-mail recovers you. Your e-mail keeps
16 interrupting you.

17 Q Yes, I apologize. I don't know how to turn that little
18 dingy off. It's been very infrequent, but I take it it
19 should have been no problem to you that counsel is
20 reminding you of duties that you knew you were bound
21 by.

22 A The manner in which you conduct your examinations and
23 the tone you put towards the witness.

24 Q But that's not what you say in your affidavit,

25 Mr. Darby. You say (AS READ):

26 ... on the one hand I was regularly reminded

27 that I was an "Officer obliged to be

1 impartial" ...

2 Right? How did that contribute to you feeling under
3 any kind of dilemma of any sort?

4 MR. KRUGER: Now, you're putting only half
5 the dilemma to the witness. He explains that was the
6 one part of it, and then there's another part to it, so
7 be fair, Mr. Leitl.

8 (OBJECTION)

9 Q MR. LEITL: And I'm asking how that first
10 part possibly contributed to any dilemma. Do you have
11 an answer, Mr. Darby?

12 A You'd like me to comment on half of the dilemma without
13 considering the other half?

14 Q I would like you to answer the question as to how the
15 first part contributed to the dilemma. If you say it's
16 not possible, I'll consider that.

17 A The two pieces are tied together. It's a dilemma of
18 two issues.

19 Q Okay. (AS READ):

20 ... on the other hand I was on occasion
21 treated in a disrespectful, unprofessional
22 and sarcastic manner.

23 Right?

24 A Yes.

25 Q Do you see that? And you only cite my
26 cross-examination, so it's fair to say that when
27 Mr. McDonald was cross-examining you, you did not feel

1 under any dilemma, because you cite no instance or no
2 suggestion of him being disrespectful or sarcastic, do
3 you?

4 A As I said, I attached examples. I'm not saying it's a
5 complete record.

6 Q So on one hand, you're reminded of duties that patently
7 exist and apply to you. On the other hand, you think
8 Steve Leitl is being a jerk. How does that leave you
9 in a dilemma in terms of the evidence you give on
10 cross-examination?

11 A Because I'm also a litigant to the piece of litigation
12 for which I have responsibility to act in the best
13 interests of creditors for.

14 Q But that's not what you say in paragraph 16. You say
15 and have now --

16 MR. KRUGER: No, paragraph 16, Mr. Leitl,
17 objection, and paragraph 16 expressly speaks to what he
18 says is the difficulty which he found himself in, and
19 it's all part and parcel of that discussion here. Be
20 fair.

21 (OBJECTION)

22 Q MR. LEITL: Mr. Darby, you describe a
23 dilemma in paragraph 16. You've complained when I only
24 put one half to you. I've now put to you both halves.
25 Now that we have both halves on the table, one is you
26 were reminded of a duty that patently applied to you.
27 The other one was you didn't like the cut of my jib on

1 the cross-examination. Why were you under the feeling
2 of any kind of dilemma as a result of those two things?

3 MR. KRUGER: Mr. Leitl, you ignore the
4 words "as such" which follows immediately after he
5 explains this difficulty every -- a few litigants find
6 itself in. It's not a freestanding --

7 (OBJECTION)

8 Q MR. LEITL: We've got a third half, and I
9 take it the third half, Mr. Darby, and I'm not being
10 cute, but the third component is that the trustee was a
11 plaintiff in a lawsuit; right?

12 A Yes.

13 Q But when the trustee and the plaintiff in a lawsuit is
14 questioned under oath, you've agreed with me the
15 trustee has to give full and honest answers; right?

16 A I can't disclose confidential information.

17 Q But for objections, full and honest answers; right?

18 A Subject to -- subject to objectionable questions, yes.

19 Q So the dilemma you talk about in your affidavit had no
20 impact on your evidence, did it?

21 A The dilemma of sharing everything versus not sharing
22 everything because of litigation, I -- I think there is
23 a balancing act all through the middle of this whole
24 thing.

25 Q Fair enough. It may be a dilemma in terms of what the
26 Rules of Court require a witness can answer and there
27 may be some confidentiality issues under the Bankruptcy

1 Insolvency Act that has to be reconciled; right? Is
2 that what you mean?

3 A Yeah, the duty to act for the benefit of the estate.

4 Q Okay, but when you were asked the question, for
5 example, what were the fees of the trustee to date and
6 you refused, that wasn't based on the basis of any such
7 dilemma, was it?

8 A We chose not to disclose the fees of our legal counsel
9 to the other side of the litigation.

10 Q And why?

11 MR. KRUGER: Mr. Leidl, on what basis would
12 your clients be entitled to that information? These
13 are litigating parties. If you and I are in litigation
14 against each other for different clients, what possible
15 right would my client have to know what Norton Rose's
16 modest fees are?

17 (OBJECTION)

18 MR. LEIDL: I was following up on a
19 question given by the person who is under oath today,
20 Mr. Kruger. Is that a refusal?

21 MR. KRUGER: It's an objection.

22 Q MR. LEIDL: You recall from the hearing
23 that, when Mr. de Waal made submissions to
24 Justice Veldhuis, there was no argument of any such
25 dilemma; right? He argued that the -- that my client
26 had simply failed to meet an onus. Do you remember
27 that?

1 A I remember part of his submissions, yes, and
2 Mr. de Waal focused more on the issue of how
3 requirements for costs be posted. There's a lot of
4 issues in this matter and he dealt with that one.

5 Q Paragraph 17 of your affidavit, you talk about what you
6 see as a strained relationship; right?

7 A Yes.

8 Q You're not suggesting that that relationship somehow
9 impaired your ability to give honest evidence under
10 cross-examination, are you?

11 A No.

12 Q Thank you.

13 Now, paragraph 20 you talk about -- or, you begin
14 to talk about the trustee's response to the application
15 for security for costs; right?

16 A Yes.

17 Q And you understood that the trustee did not have to
18 oppose that application; right?

19 A The trustee did not have to oppose which application?

20 Q The application for security for costs.

21 A The trustee could have consented to posting is what
22 you're asking?

23 Q Yes.

24 A Yes.

25 Q And the reason that the trustee concluded that it
26 should oppose was that you concluded that my clients
27 and the other applicants -- applications were, to use

1 your word, wrong. Do you remember that?

2 A I don't recall our conversation on that. I'd have to
3 go read the transcript.

4 Q And you set out in your affidavit why you felt the
5 applications were wrong. Do you remember that?

6 A I'm sure I did. I don't have that affidavit in front
7 of me though.

8 Q You knew that you did not have to swear an affidavit;
9 right?

10 A To bring an application, you --

11 Q To respond --

12 A -- have to file an affidavit.

13 Q To respond to the application, you knew that you were
14 not obliged to swear an affidavit; right? You chose to
15 swear one?

16 A Yes.

17 Q And you chose not to cross-examine Ms. Rose?

18 A Yes.

19 Q And when you chose to swear the affidavit, you knew
20 that I would have -- my client would have a right to
21 cross-examine you?

22 A Yes.

23 Q And when you swore your affidavit, you did your best to
24 explain why you saw Ms. Rose's affidavit as wrong;
25 right?

26 A I recall us having this debate over the word "best"
27 last time. I don't remember --

1 Q On my side --

2 THE COURT REPORTER: I'm sorry?

3 Q MR. LEITL: You seem to be unable to agree
4 that you have done anything to the best of your
5 ability. Did you swear your responding affidavit in
6 the security of costs application to the best of your
7 ability?

8 A I don't know that the term "best" is required in that
9 statement, but I did swear it to fulfill the purpose.

10 Q And you can say whatever you want in the affidavit;
11 right? You took counsel on that and your affidavit
12 says what it says?

13 MR. KRUGER: Is there a question?

14 Q MR. LEITL: You're free to say what you
15 wanted in the affidavit? You didn't feel constrained;
16 right?

17 A Correct.

18 Q Beginning at paragraph 21, you talk about some
19 accusations made against you. That was not made by my
20 client, was it?

21 A I think I state that it was counsel for Perpetual.

22 Q Right.

23 A Your client is the CEO of Perpetual.

24 Q Paragraphs 22 through 28, you talk about all kinds of
25 background correspondence. All of that could have been
26 put before Justice Veldhuis had the trustee so decided;
27 right?

1 MR. KRUGER: Mr. Leitl, the way I read the
2 chronology here with the corrected dates, this all
3 occurred after Mr. Darby swore his affidavit on October
4 the 18th.

5 Q MR. LEITL: Did you ever seek to swear a
6 supplemental affidavit to put this information before
7 Justice Veldhuis?

8 A We did not do a supplemental.

9 Q And the records attached to your confidential affidavit
10 could have been put before Justice Veldhuis by the
11 trustee; right? There was no reason you were not
12 available?

13 A Could have been put forward by Perpetual, too. They
14 had them.

15 Q It could have been put forward by the trustee; right?

16 A And Perpetual.

17 Q Now, beginning at paragraph 29 of your affidavit, you
18 talk about your cross-examination by Mr. McDonald and
19 I; right?

20 A I actually think that was mostly Mr. Chiswell that
21 time, wasn't it?

22 Q Fair enough. It's all from Mr. Chiswell. Thank you.

23 And I take it here you were trying to give some
24 context for the evidence you gave under
25 cross-examination previously.

26 A Again, part of the story here.

27 Q The story and what your evidence was under

1 cross-examination, you'll agree, is your
2 cross-examination transcript; right? Right?

3 A This is my current affidavit for which I'm providing
4 this information.

5 Q And your current affidavit is talking about your prior
6 cross-examination; right?

7 A Yes.

8 Q So if you look at paragraph 32, for example, we've got
9 another dilemma. Now, are the factors that contributed
10 to this dilemma, are they explained in paragraphs 32(a)
11 through (e)?

12 A Yes.

13 Q And I want to be clear here, are you saying that this
14 dilemma was at the top of your mind during the
15 cross-examination or this is something that occurred to
16 you on reflection afterwards?

17 A Before.

18 Q So while you're under cross-examination, you considered
19 that you were under this dilemma and you went through
20 this thought process; is that right?

21 A The issue of providing the confidential records was
22 discussed prior to the cross-examination. Counsel for
23 Perpetual agreed to keep them confidential, and we
24 provided them to them on those grounds.

25 Q Mr. Darby, the opening phrase of paragraph 32 is
26 (AS READ):

27 During the Darby Questioning I faced the

1 following dilemma ...

2 Do you see that?

3 A Yes.

4 Q When you were being cross-examined by Mr. Chiswell and
5 myself, were you thinking that you were facing this
6 dilemma? Was it in your mind at the time?

7 A At times, yes.

8 Q You never said anything about this dilemma at the time,
9 did you?

10 A I don't recall everything I said during that
11 examination.

12 Q Prepared to say you don't recall ever saying anything
13 about a dilemma; right?

14 A To you?

15 Q Yes, or to Mr. Chiswell.

16 A I don't recall what I said during that examination.

17 Q Well, about --

18 MR. KRUGER: Mr. Leitl --

19 MR. LEITL: -- 15 minutes ago --

20 MR. KRUGER: -- Mr. Leitl, to be fair to
21 the witness, it was made very clear both by him and by
22 Mr. de Waal on more than one occasion that they would
23 not allow confidential records to go into a public
24 record, so be fair. That was made very clear all
25 along.

26 (OBJECTION)

27 Q MR. LEITL: I take issue with the

1 suggestion I'm not being fair, because I don't see how
2 that orange has anything to do with my apples.

3 Let's look at paragraph 32(a), Mr. Kruger. The
4 first contributing factor to this dilemma, you
5 understood that the applicants had a legal onus of
6 proof; right?

7 A Yes.

8 Q So this was your understanding of a legal issue; right?

9 A Yes.

10 Q You did not think that, when you were under
11 cross-examination, that the legal onus would have
12 affected in any way your duty to answer questions
13 honestly, did you?

14 A The onus of proof that you had to come across did not
15 impact my question -- my answers, no.

16 Q You agree with me. Thank you.

17 You say (AS READ):

18 ... the only evidence they had placed before
19 the Court was the Rose Affidavit containing
20 statements about Ms. Rose's belief but no
21 actual financial information.

22 Right?

23 A Yes.

24 Q Ms. Rose gave factual information about the defendant's
25 costs to date; right?

26 A She gave factual information about the costs to date?

27 Q The costs --

1 A To what date?

2 Q -- the legal costs and disbursements incurred by the
3 defendants to date.

4 A To what date? I don't understand what timeframe you're
5 talking about.

6 Q You don't need to understand that to answer my
7 question. You saw, when you looked at Ms. Rose's
8 affidavit, that she gave evidence about the legal fees
9 and disbursements incurred by the parties in the
10 Queen's Bench proceeding; right?

11 A She stated the amount that --

12 Q And the trustee did not challenge that information, did
13 it?

14 A No.

15 Q So you're telling me today you still believe that was
16 not factual information?

17 A Are you suggesting that my statement was a blanket
18 against every word in Sue Rose's affidavit that it was
19 not factual with all make believe?

20 Q You say in paragraph 32(a) that Ms. Rose's affidavit
21 contained no actual financial information. Do you see
22 that?

23 A Yes.

24 Q Do you still stand by that?

25 A In the context which I've stated it, yes.

26 Q The context which you stated was no actual financial
27 information. You do agree with me that she put forward

1 financial information about what the defendants had
2 incurred, right, and expected to incur?

3 A What they had incurred, I -- she included it. We
4 didn't question what they're going to incur would not
5 be a fact. That would be a belief.

6 Q And another thing that she did was attach a report
7 authored by PricewaterhouseCoopers; right?

8 A I don't have her document to confirm it was attached,
9 but I believe it was attached.

10 Q Mr. Darby, you swore unequivocally in your affidavit
11 that her affidavit contained no actual financial
12 information. When you made that statement under oath,
13 had you considered that she had, in fact, referred to
14 the trustee's report and information contained in it?

15 A No, I was referring to her position of the trustee's
16 current position.

17 Q And how would have Ms. Rose been able to find out the
18 current position of the estate?

19 A Isn't that something for Ms. Rose to seek advice on?

20 Q So you're not going to answer the question?

21 MR. KRUGER: It's a matter, Mr. Leitl, for
22 you to advise your client on it, and it appears that it
23 wasn't done.

24 (OBJECTION)

25 Q MR. LEITL: That's verging on hilarious,
26 with respect, Mr. Kruger. I'm looking at paragraph
27 32(a) of your client's statement under oath in which he

1 is explaining the thought process he was undergoing
2 during the cross-examination, and the first thing he
3 points to is his understanding of an onus on the part
4 of my client and his apparently ill-considered
5 statement that it contained in her affidavit no
6 financial information.

7 Did -- did --

8 MR. KRUGER: Mr. Leitl -- Mr. Leitl, if
9 somebody applies for security for costs and they don't
10 have the facts and the evidence to get over the onus,
11 then it is their problem, then you don't apply. You
12 don't apply if you don't have the evidence.

13 Q MR. LEITL: Thank you, Mr. Kruger, for
14 that explanation of one subset of the law of security
15 of costs.

16 Mr. Darby, I'm looking at paragraphs -- paragraph
17 32(a) which explains your thinking at the time. Let me
18 ask you from this perspective.

19 Is it fair to say that, despite your concerns
20 about the onus on my client and your review of the
21 quality of the evidence tendered by my client, you
22 understood that you were still obligated to truthfully
23 answer all relevant questions on cross-examination? Do
24 you agree?

25 A I answered questions truthfully in cross-examination.

26 Q And you agree with me then that despite the factors
27 that you enumerate in paragraph 32(a), you agree with

1 me that they did not change your view about your
2 obligation to give honest answers; right?

3 A I gave honest answers.

4 Q I'm taking you to agree with me and you'll let me know
5 otherwise.

6 You'll also agree with me that you understood at
7 the time that, regardless of whether you saw Ms. Rose's
8 affidavit to be defective in any way, because you swore
9 an affidavit, you were obligated to answer truthfully
10 all relevant questions; right?

11 A I answered truthfully all questions.

12 Q So I hear you to agree with me.

13 Now, you in paragraph 32(c) say that you were
14 concerned that your questioning was intended to rectify
15 defects in the applications; right?

16 A Yes.

17 Q What defects?

18 A The onus -- she provided no evidence about the security
19 of costs issue.

20 THE COURT REPORTER: I'm sorry?

21 MR. LEITL: What was the defects if she
22 gave -- I'm sorry?

23 THE COURT REPORTER: I'm sorry, you'll have to
24 repeat that answer.

25 A She gave no evidence that would -- that would be
26 required in the security for costs application.

27 THE COURT REPORTER: Thank you.

1 Q MR. LEITL: That's a conclusion of law
2 you're making; right?

3 A I was answering your question.

4 Q So what do you mean by "defect"? What evidence was
5 missing when you say defect from her affidavit that was
6 required?

7 A The ability of the trustee to pay.

8 Q Anything else?

9 A That's the one that currently comes to mind.

10 Q And despite you seeing that defect, we've covered this,
11 you chose to swear a responding affidavit; right?

12 A Yes.

13 Q And because you swore a responding affidavit, you knew
14 you could be cross-examined; right?

15 A Yes.

16 Q And because you could be cross-examined, you knew that
17 the applicants might try and fill or correct any
18 defects, right, through the trustee's evidence?

19 A Yes.

20 Q So I take it then that your view of this defect in the
21 applications or my client's affidavit didn't impair
22 your ability to tell the truth on cross-examination,
23 did it?

24 A I told the truth on cross-examination.

25 Q So I hear you to agree with me.

26 And at the end of the day, you saw that
27 Justice Veldhuis, in fact, found that your affidavit

1 was defective. You saw that, didn't you?

2 MR. KRUGER: Would you refer us to the
3 paragraph in the judgment or the reasons?

4 Q MR. LEITL: They speak for themselves.
5 You don't recall that, Mr. Darby?

6 A You're asking if I recall she stated our affidavit was
7 defective?

8 Q I'm asking you -- I'm suggesting to you, rather, that
9 someone who applies to the Court of Appeal to object to
10 the considered and reserved reasons of a respected
11 member of the Court of Appeal would have those reasons
12 memorized backwards and upside down, but I'll move on.

13 MR. KRUGER: Don't answer the question.
14 (OBJECTION)

15 Q MR. LEITL: Paragraph 32(d), you then say
16 that you had to negotiate something. So if you
17 considered yourself still, despite this dilemma, under
18 a duty to fully answer all relevant questions, what
19 negotiation was going on inside your head?

20 A The very one we've been talking about.

21 Q What do you mean by that?

22 A The duty to disclose information versus fighting the
23 litigation.

24 Q Duties are not negotiable, are they?

25 A Depends which context you're in.

26 Q Wow, that's amazing, with the greatest of respect.

27 The duty of a trustee that -- some of them we've

1 illustrated, to act with candor and honesty and
2 impartiality, those are not negotiable, are they?

3 A I cannot provide confidential information just because
4 you ask me.

5 Q But you're not answering my question.

6 When you use the word "negotiate" in your
7 affidavit, surely you weren't thinking about
8 negotiating the duties of the trustee, were you?

9 A There is a balancing act between disclosing information
10 that may be confidential and not. It is not a black
11 and white line.

12 Q You aren't talking about in paragraph 32 anything about
13 confidentiality, Mr. Darby. You're talking about
14 preventing or trying to prevent the applicants from
15 filling what you saw was a hole in their evidence,
16 nothing to do with confidentiality, all on the basis of
17 your perception of a legal onus. So when you --

18 MR. KRUGER: Mr. Leitl, that -- that's a
19 statement which you make and probably believe. The
20 witness has answered your question. It's very clear in
21 the context what he's talking about.

22 Q MR. LEITL: Respectfully disagree.

23 What were you negotiating, Mr. Darby?

24 A Didn't we just answer this question?

25 Q Can you explain it any better words? I'll move on if
26 you can't.

27 MR. KRUGER: He told you it's a gray area

1 which he was very express about in his evidence and in
2 the affidavit. Let's move on to something else.

3 (OBJECTION)

4 Q MR. LEITL: So the gray area, Mr. Darby,
5 the gray area between the duty of a trustee to be
6 impartial and the duty of a trustee not to prejudice
7 estate's claims, why did you see any gray area at all?

8 A To be a litigant, you need to take the position and not
9 be impartial on everything. You have to take a side.
10 The trustee is supposed to be impartial in all things.
11 The very fact that a trustee can perform litigation
12 means it has to balance that act.

13 Q So you had concluded at the time that, by suing, the
14 trustee could not be impartial in the lawsuit; is that
15 right?

16 A I don't think a blanket statement is fair.

17 Q I just heard what you said, and I'm trying to
18 understand it.

19 What is the gray area --

20 MR. KRUGER: (INDISCERNIBLE) your question.

21 MR. LEITL: What is the gray area --

22 MR. KRUGER: The witness -- the witness has
23 answered the question, Mr. Leitl.

24 (OBJECTION)

25 Q MR. LEITL: Well, he answered in your --
26 your view. I don't agree.

27 What were you concerned about prejudicing the

1 estate's claims against the defendants in this regard?

2 A We're involved in litigation, the three of us, plus we
3 had another piece which we've already discussed that
4 has been dismissed. There's issues -- litigation
5 between us. I don't think I want to discuss with you
6 everything I've thought about from your position.

7 Q You are required to discuss what you say in your
8 affidavit, and in your affidavit you say that at the
9 time of your cross-examination, you were concerned
10 about possible prejudice to the estate's claims against
11 Perpetual and Ms. Rose. What prejudice were you
12 concerned about?

13 A That's what I -- if you want to get into that level of
14 depth, that's something I need to think about and get
15 back to you.

16 Q Did you read your affidavit before coming here to be
17 cross-examined?

18 A I did.

19 Q And you are unable to answer --

20 A I didn't --

21 Q -- that question today? You're unable to tell me what
22 kind of prejudice you referred to in paragraph 32(d) of
23 your affidavit?

24 MR. KRUGER: That's not what the witness
25 said. He said that if you want to get into the details
26 of that, he'll get back to you.

27 Q MR. LEITL: Well, that's not, as you know,

1 Mr. Kruger, how a cross-examination works. It's kind
2 of a here-and-now event.

3 So just to confirm for the record, Mr. Darby, you
4 are unable, without further reflection, to tell me
5 today, this moment, what you mean by prejudice to the
6 estate's claims in paragraph 32(d) of your affidavit?

7 A The trustee has to be impartial by statute, but the
8 trustee, when authorized to perform litigation, must
9 take a stand on issues. I still say this is the main
10 issue is the trustee has to balance being impartial
11 while pursuing litigation. You cannot be impartial in
12 litigation.

13 Q Thank you for that. Although many will disagree I
14 suggest to you, but my question to you is what you
15 meant by "prejudice the estate's claims," and I'll ask
16 that for the last time. If you can't answer it, we'll
17 just have it on the record that you can't answer it.

18 A If we don't pursue the estate's claims, that's a
19 prejudice against the claims of the estate. If we are
20 not able to ask in the best interests of the creditors,
21 which may make us take impartial positions, then we are
22 in fact, prejudicing the estate claims. We could never
23 pursue a claim in litigation if we had to be impartial
24 in all things at all times.

25 Q The applications were applications for security for
26 costs; right?

27 A Some of the applications are applications for security

1 for costs. There are many applications out there.
2 Ours has never been heard.

3 Q The applications that were heard and determined by
4 Madam Justice Veldhuis were applications for security
5 for costs?

6 A Yes.

7 Q And the payment of security for costs by the trustee
8 would not have prejudiced its claims against the
9 defendants; right?

10 MR. KRUGER: Well, that's your view,
11 Mr. Leitl. To put up \$400,000, I would certainly think
12 is prejudice. Would you not?

13 (OBJECTION)

14 Q MR. LEITL: The trustee has paid -- posted
15 a security for costs; right?

16 A We posted \$240,000.

17 Q As ordered. You've posted the security ordered by the
18 court; right?

19 A It has.

20 Q And the trustee is pursuing its appeals; right?

21 A Yes.

22 Q You're filing your factum this Friday; right?

23 A I would have to speak to counsel to see when they're
24 filing their factum.

25 Q You know the filing of the factum is coming up and your
26 instructions are to proceed with it; right?

27 A Yes.

1 Q So the order for security for costs did not prejudice
2 the trustee's ability to proceed with the appeals, did
3 it?

4 MR. KRUGER: Mr. Leitl, you're -- we're not
5 going to be arguing any further about this. Get back
6 to something which is relevant here.

7 (OBJECTION)

8 MR. KRUGER: Mr. Leitl, any idea how long
9 you're still going to be? Maybe it's time to take a
10 break.

11 MR. LEITL: Yeah, I've got -- I'm moving
12 to the confidential affidavit and on that I'll be
13 probably ten minutes. Again, I'm not going to get into
14 the nature of the -- the substance of the records and
15 then over to Mr. Chiswell.

16 MR. KRUGER: Okay. Well, then we can move
17 on, if it's okay with, Madam Reporter.

18 THE COURT REPORTER: It's fine.

19 Q MR. LEITL: Can you then get to your
20 confidential affidavit, Mr. Darby?

21 A Yes.

22 Q You swore that under oath and you had no changes to
23 make; right?

24 A I swore it under oath, and there are no changes to be
25 made.

26 Q And you swore it in your personal capacity; correct?

27 A Yes.

1 Q In support of your personal application?

2 A Yes.

3 Q Regarding your personal interests?

4 A Yes.

5 Q And you, with your trustee hat on, had previously
6 expressed concerns about releasing confidential
7 information in relation to the estate; right?

8 A Publically releasing confidential information, yes.

9 Q Yes, so you here personally are tendering records of
10 the estate that are confidential; right?

11 A In a confidential affidavit.

12 Q Yes, and these are records that the trustee has not
13 sought to tender in support of its applications; right?

14 A I tendered them. They're on the record.

15 Q Through your personal affidavit; right?

16 A Yes.

17 Q Large portions of the documents attached to your
18 personal affidavit are redacted; right?

19 A Portions are redacted --

20 Q And no explanations are given -- I'm sorry, I
21 interrupted. You may have to restate that.

22 A I said portions are redacted. I wouldn't use the word
23 "large."

24 Q And no explanations have been offered for the
25 individual redactions; correct?

26 A These were the records which were provided to Perpetual
27 being provided to the court on a confidential basis.

1 Q Do you consider that to be an answer to my question?

2 A So the court could understand what Perpetual had and
3 Rose, 'cause it was shared with her.

4 Q And these are records that were available to the
5 trustee that you could have deposed to in your prior
6 affidavit, right, in response to Ms. Rose's affidavit?

7 A The trustee could have put them in a confidential
8 affidavit. Perpetual could have put them in a
9 confidential affidavit, and given that Rose took a
10 copy, she could've put them in a confidential
11 affidavit.

12 Q Okay. I just need two minutes to confer with
13 Mr. Benediktsson, then I think I'm handing it off to
14 Mr. Chiswell.

15 (ADJOURNMENT)

16 MR. CHISWELL: Mr. Kruger, we're just going
17 to continue this as a -- one cross-examination, so
18 everybody agrees that the witness is still under oath?

19 MR. KRUGER: Yes, certainly, and I've given
20 him copies of your two letters.

21 MR. CHISWELL CROSS-EXAMINES THE WITNESS:

22 Q Thank you.

23 Mr. Darby, you've read the statement of claim the
24 trustee filed against the Perpetual companies as well
25 as Ms. Rose?

26 A I have, but it has been some time since I've read it.

27 Q On an overall basis, you're familiar that the trustee's

1 statement of claim makes at least three claims against
2 the Perpetual defendants. The first one being -- the
3 claim dealing with the Bankruptcy Insolvency Act,
4 Section 96. The second one being the oppression claim,
5 and the third one being public policy or statutory
6 legality and equitable rescission or equitable grounds,
7 if we just call it. The third ground, the public
8 policy claim, you'll know what I'm talking about?

9 A Yes.

10 Q And, I'm sorry, because I asked you two questions. You
11 also -- you'll agree with me that those are the three
12 claims that the trustee made against the Perpetual
13 companies?

14 A I haven't reviewed that document. I was not aware that
15 was on the table for today, so -- and I don't have it
16 in front of me, so I can't comment if that's the
17 extension of them.

18 Q Okay, but you remember it's at least those three? I'm
19 not trying --

20 A Yes.

21 Q I just want to make sure that you agree that it's at
22 least three of those three.

23 A Yes.

24 Q And, sir, you were in attendance when Justice Nixon
25 read his reasons on August 15th, 2019?

26 A Yes.

27 Q And, sir, I'm assuming you've read Justice Nixon's

1 written reasons for decision that followed in January
2 of 2020.

3 A Yes.

4 Q You agree with me that he struck the oppression claim
5 against the Perpetual defendants?

6 A I have not reviewed the Nixon decision recently,
7 because I understood this was on my February 10th
8 affidavit, so I don't want to get into the details of
9 what Nixon did and did not say without reviewing that.

10 Q Sir, you'll agree with me that Justice Nixon struck the
11 public policy claim against Perpetual defendants?

12 A I would just simply restate I would like -- if we're
13 going to be cross-examined on this, I'd like to go
14 through it again.

15 Q Okay.

16 A The record stands for whatever it says, if you have it.

17 Q So, sir, is that not something that you would have
18 reviewed as part of swearing your affidavit on February
19 10th, 2010?

20 A No, I do not believe I've read in detail the decision
21 of Justice Nixon at the time I swore my February 10th
22 affidavit.

23 Q Paragraph 18 of your February 10th affidavit that you
24 filed on February 26th, 2020, it refers to the
25 defendant's application for summary dismissal, and then
26 you'll see that on August 15th, 2019, you say that
27 Justice Nixon granted Ms. Rose's application but not

1 Perpetual's application. And, sir, all I'm asking you
2 is whether you agree that that's not fully accurate,
3 that that statement is not fully accurate and that, in
4 fact, Justice Nixon granted Perpetual's application to
5 the extent of the oppression claim and the public
6 policy claim.

7 A I believe you're correct, Paul, but I -- like I say,
8 the general concept in here I'm comfortable with.
9 That's why it's in my affidavit, but the specifics of
10 each of the claims that Nixon went through in his 60,
11 70-page document over a year ago, if we want to go over
12 those in detail, I -- I need to be given an opportunity
13 to review that in detail. I don't think there's a copy
14 in front of us, is there?

15 MR. KRUGER: No.

16 A There's not even a copy in front of us here, so I
17 assume you're at an advantage here.

18 MR. KRUGER: Don't comment.

19 Q MR. CHISWELL: Okay. Well, if you'd like, we
20 can get a court order -- or, get the court order that
21 shows those things but -- or, we can go through the
22 reasons together, but I think you agree with me, and
23 you can just confirm that the Perpetual defendants
24 applied to strike the oppression claim and the public
25 policy claim and those were, in fact, struck by
26 Justice Nixon.

27 A Yeah, we can agree to that.

1 Q And then, sir, on the same paragraph of your affidavit,
2 you reference the appeal that was filed by Perpetual,
3 and you say (AS READ):

4 It's against the refusal by Nixon, J. to
5 dismiss the claims (pleural) against
6 Perpetual.

7 And while that describes at least what Perpetual filed
8 for the BIA claim, you'll agree with me that
9 Perpetual's not appealing the -- Justice Nixon's
10 striking of the oppression claim for his striking of
11 the public policy claim?

12 A That Perpetual is not appealing those matters.

13 Q And it's -- in fact, it's the trustee that is appealing
14 Justice Nixon's striking of the oppression claim
15 against Perpetual and the trustee's policy claim
16 against Perpetual?

17 A Yes.

18 Q Sir, paragraph 24 of your affidavit, February 10th
19 affidavit that you filed on the 26th, you state, and I
20 appreciate you corrected it's no longer November 14th,
21 2019. It's November 1st. You say Perpetual's counsel,
22 Mr. McDonald and me attended the trustee's offices for
23 the inspection of the records. You're familiar with
24 that, of course, that Ms. Rose, Perpetual's CEO, as
25 well as Mr. Schweitzer, Perpetual's CFO, also attended
26 on that date to conduct the inspection?

27 A I believe I recall that, but I didn't coordinate that

1 inspection. I just knew that you two set it up.

2 Q And so at paragraph 30 of your affidavit, the affidavit
3 has been filed, it says in the last paragraph that
4 (AS READ):

5 Perpetual justified sharing this ...

6 Or, pardon me, the last sentence of paragraph 30
7 (AS READ):

8 Perpetual justified sharing the information
9 on the basis that Ms. Rose is the (CEO) of
10 one of the Perpetual defendants.

11 You appreciate that if she inspected the records on
12 November 1st, like we just discussed, that she would
13 have -- already had known the contents of the trustee's
14 books and records?

15 A You're asking if I can confirm she understood what is
16 in the books and records?

17 Q Well, no, if she -- listen, if she attended the
18 inspection, she would already know the contents of the
19 books and records.

20 A Well, I can't say what she did in the inspection
21 though.

22 Q She would have seen them?

23 A I would assume, but I can't confirm.

24 Q When you say that Perpetual justified sharing the
25 information with Ms. Rose, do you have any objections
26 to that happening, given that she was the CEO of
27 Perpetual and Perpetual was a creditor of Sequoia?

1 A Our position on this matter, as we've previously
2 discussed, is quite clear. We -- we are of the view
3 that Perpetual, as a creditor, had the right.
4 Ms. Rose, as individual capacity, is not a creditor,
5 and, therefore, not -- did not have the right. You
6 acted in accordance with the way you wanted to act and
7 it's done.

8 Q So I'm just wondering if you have -- because you have
9 an objection to Perpetual having shared the information
10 with Ms. Rose?

11 MR. KRUGER: Counsel, we're not going to
12 have a rehash of the prior cross-examination. You have
13 got an affidavit here on which you are to cross-examine
14 and I won't interfere with that, but we're not going to
15 have a rehash about matters which were discussed for
16 pages with the previous cross-examination.

17 (OBJECTION)

18 Q MR. CHISWELL: Well, I'm just asking the
19 witness about the paragraph -- or, the sentence in his
20 affidavit today. It seems to me that there is a
21 negative connotation to Perpetual having shared the
22 information with its CEO, and I'm wondering if the --
23 Mr. Darby objects to that as having been improper.

24 A As we explained, we believe Ms. Rose in her personal
25 capacity was not entitled to view the records.
26 Perpetual as a creditor was entitled to view the
27 records and that was our position.

1 Q And I'm asking you today, sir, as a person who swore an
2 affidavit, whether you viewed it as improper for the
3 information to have been shared with Ms. Rose.

4 A Yes.

5 Q On what basis, sir?

6 A I believe I just explained that to you.

7 Q No other reason?

8 A I think we've been through this.

9 Q I'm just asking if that's the only reason.

10 MR. KRUGER: I think the witness has
11 answered your question, Mr. Chiswell. Move on to the
12 next one.

13 (OBJECTION)

14 MR. CHISWELL: Mr. Darby, earlier I believe
15 you told Mr. Leidl that the matters -- or, the
16 Exhibit A to your confidential affidavit that you swore
17 within the file are -- is the contents that were
18 provided to Perpetual on its inspection November 1st,
19 2019; is that correct?

20 MR. KRUGER: Just a second. You've got the
21 confidential affidavit there.

22 A Exhibit A.

23 MR. KRUGER: Just a moment. Just making
24 sure he has got it.

25 A Exhibit A is a letter -- starts with a letter and then
26 an index. Yeah, I guess the tabs fall under A, so,
27 yes, that's correct. Sorry, I just followed the tabs

1 and I thought you were splitting it up.

2 Q MR. CHISWELL: No, so on November 1st, PWC
3 provided Perpetual with a binder of information, and
4 then it provided an electronic copy to BDP as counsel
5 for Perpetual, and I just want to confirm that that's
6 the same stuff that's altogether in Exhibit A to your
7 affidavit, your confidential affidavit.

8 A That is my understanding, yes.

9 Q Now, at your cross-examination on November 6th, 2020, I
10 had put the estate binder or the contents effectively
11 of Exhibit A to your confidential affidavit to you and
12 I tried to make it an exhibit. We're agreed that those
13 are all the same records; correct?

14 A I believe so.

15 Q And that binder that I put to you on your
16 cross-examination transcript November 6th, 2019, we
17 made that Exhibit A to that questioning, A for
18 Identification?

19 A The binder wasn't admitted as evidence though.

20 Q No, but you agree it was the same binder that we made
21 as an Exhibit A for Identification?

22 A I believe so, yes.

23 Q And that's the same binder that your counsel objected
24 to me asking you questions about; correct?

25 A Yes.

26 Q So even though Perpetual had the information that was
27 in that binder, it wasn't allowed to use them to

1 cross-examine you; correct?

2 A The contents were confidential. I would not -- we
3 would not permit them to be put on the public record as
4 you had been advised when you took possession of the
5 records.

6 Q Sir, we'll get to what we were advised when we
7 inspected the records, but Perpetual was prevented from
8 asking you questions in a boardroom at BDP that was not
9 public; correct?

10 MR. KRUGER: That's not fair. You know, as
11 well as I do, Mr. Chiswell, that if you introduce
12 exhibits into a public cross-examination transcript
13 that gets filed at the court and it is part of a public
14 record.

15 (OBJECTION)

16 MR. CHISWELL: Well, Mr. Kruger, I didn't ask
17 you the question and --

18 MR. KRUGER: Well, don't --

19 MR. CHISWELL: -- and, Mr. Kruger, you're
20 making assumptions about what might happen after the
21 questioning, but during the questioning, it was a
22 private boardroom at BDP's offices; correct, Mr. Darby?

23 MR. KRUGER: How does that make any
24 difference? I object to the question.

25 (OBJECTION)

26 Q MR. CHISWELL: Mr. Darby, when you were
27 questioned on November 6th, 2019, you'll agree with me

1 there were no members of the public in attendance.

2 There was counsel and the parties to the appeal?

3 A Like, it was more than just lawyers in attendance.

4 There was a public court reporter. There was staff
5 from my office, employees of Perpetual.

6 Q Okay. So the court reporter, the parties and the
7 lawyers; correct?

8 A Correct.

9 Q Sir, in your public affidavit that you filed on
10 February 26th at Exhibit L, those are your undertaking
11 responses from your questioning?

12 A Yes.

13 Q And in Undertaking Number 1, you were asked to produce
14 the accounts and records of the estate of Sequoia
15 Resources Corp., and I appreciate that you declined to
16 answer the question. I appreciate there was an
17 explanation that ends with I decline to -- or, the
18 trustee declined to answer the question.

19 MR. KRUGER: No, Mr. -- Mr. Chiswell, what
20 it says is taken under advisement.

21 MR. CHISWELL: Well, except for at the bottom
22 of the answer, it says (AS READ):

23 The trustee declines to produce the accounts
24 and records of the estate publically.

25 MR. KRUGER: Yes, correct.

26 Q MR. CHISWELL: And if you had provided the
27 answers to that undertaking, sir, your answer would

1 have been the binder that we've been talking about, the
2 one that was produced to Perpetual and that was given
3 to you at your cross-examination as Exhibit A for
4 Identification?

5 MR. KRUGER: There are two documents which
6 are referred to there. It's the binder and also the
7 Section 27 report, but why are we dealing with a
8 hypothetical situation? It didn't happen.

9 (OBJECTION)

10 MR. CHISWELL: Well, I just want to know if
11 the full answer for Undertaking Number 1 is effectively
12 that Mr. Darby attached as Exhibit A to his
13 confidential affidavit.

14 MR. KRUGER: Isn't it A and B? The Section
15 27 report was also attached to the confidential
16 affidavit.

17 MR. CHISWELL: Mr. Kruger, Tab 15 of
18 Exhibit A to your client's affidavit, which I assume
19 your office prepared, is the Section 27 report, so when
20 I reference Exhibit A to the confidential affidavit --

21 MR. KRUGER: My mistake. My mistake.
22 Yeah, my mistake.

23 A A and B. We're looking at A and B.

24 MR. KRUGER: I am corrected. Under
25 Exhibit B is the Section 27 report.

26 MR. CHISWELL: Okay. Why don't we go to page
27 133 to 1 -- pardon me, 132 to 134 of your confidential

1 affidavit, which is ultimately Exhibit A.

2 MR. KRUGER: Yes, Mr. Chiswell, let's just
3 be careful. As you know, we claim that those exhibits
4 are confidential, and we're not going to allow you to
5 put confidential matters onto the record unless we
6 agree that that part of the transcript will remain
7 confidential pending the court's decision on our
8 application to seal these exhibits.

9 MR. CHISWELL: Okay. Well, we'll cross that
10 bridge when we get there.

11 MR. KRUGER: Okay.

12 Q MR. CHISWELL: In the meantime, Mr. Darby, do
13 you agree with me that the report to creditor per
14 Section 27 of the BIA dated October 31st, 2019, is part
15 of your Exhibit A to your affidavit?

16 A The one that you find at Tab 15, yes. That, again, is
17 Tab B.

18 Q Back to my earlier question, before your counsel was
19 trying to point out that it was also replicated in
20 Exhibit B to your affidavit, Exhibit A to your
21 confidential affidavit would have been the fulsome
22 answer to Undertaking Number 1?

23 A So Undertaking Number 1 was to produce the accounts and
24 records of the estate of Sequoia Resources. That's a
25 very broad term. We have far more records than exist
26 in these exhibits.

27 Q So if I understand your answer is that Exhibit A is

1 only part of the accounts and records of the estate of
2 Sequoia Resources Corp.?

3 A Yes.

4 Q Sir, you understood when Perpetual inspected the -- or,
5 attended your offices on November 1st, 2019, to inspect
6 the accounts and records of the estate, Exhibit A is
7 what you provided though and that was all you provided?

8 A Yes.

9 Q Sir, you agree with me that providing Exhibit A to your
10 confidential affidavit to Justice Veldhuis when she was
11 deciding the security for costs application would have
12 provided her with relevant information to the financial
13 information of the estate; correct?

14 MR. KRUGER: I object. There's no need for
15 the witness to speculate about that. You can argue
16 that, Mr. Chiswell.

17 (OBJECTION)

18 Q MR. CHISWELL: Well, Mr. Darby, do you agree
19 with me that Exhibit A to your confidential affidavit
20 contains relevant financial information regarding the
21 estate?

22 A Yes.

23 Q And I think you might have already told Mr. Leitl this,
24 but it was not provided to Justice Veldhuis; correct?

25 A Correct.

26 Q Sir, at paragraph 32(e) of your affidavit that you
27 filed, you say at your questioning on November 4th,

1 2019 -- pardon me, November 6th, 2019, Perpetual
2 attempted (AS READ):

3 ... to introduce the confidential records of
4 the Estate as exhibits into a public record,
5 despite knowing about the Trustee's prior
6 objections to such disclosure ...

7 Now, do you know what you're referring to when you say
8 "the Trustee's prior objections to such disclosure"?

9 And before you answer that question, your
10 confidential affidavit, Exhibit A, the first document
11 in there, the first page, is a letter from Mr. de Waal,
12 and at the last paragraph, it refers to a condition for
13 the inspection. That's the only possible objection
14 that I'm familiar with before your questioning. Are
15 you aware of any others, or are you referencing any
16 others in your affidavit at paragraph 33(e)?

17 A That one I'm familiar with. I can't recall if there
18 was further correspondence between yourself and our
19 counsel on this topic when you actually made your
20 request.

21 Q So in your affidavit when you said "prior objections,"
22 it could be that it was just this one?

23 A I would need to speak with my counsel about their
24 record of correspondence with you.

25 Q Well, sir, I'm not going to be able to question your
26 counsel, and you swore this affidavit and you
27 referenced plural, so unless you can sit here today

1 and tell me that there is some other sort of objection
2 somewhere, you'll agree with me that it could just be
3 that one; correct?

4 A As I stated, I would want to speak to my counsel about
5 the e-mail correspondence that may have occurred or
6 voicemail, telephone conversations with you prior to
7 that letter, so ...

8 Q Okay. Do you want to take that break now and you can
9 ask your counsel, or how do you want to do that?

10 MR. KRUGER: No, Mr. de Waal is not here.
11 I wasn't involved in any of that. If you want an
12 undertaking from the witness, we'll give the
13 undertaking that he will make inquiries.

14 MR. CHISWELL: Well, Mr. de Waal is on the
15 screen, but I take your point. I'll ask you for the
16 undertaking, and it's very clear that I'm referencing
17 before the questioning of Mr. Darby on November 6th,
18 2019, what other objections were made other than the
19 letter dated October 3rd, 2019.

20 MR. KRUGER: Yes, we understand that, and
21 we give the undertaking, Mr. Chiswell.

22 UNDERTAKING 1 - To make inquiries to
23 determine and advise, before the questioning
24 of Mr. Darby on November 6th, 2019, what
25 other objections were made other than the
26 letter dated October 3rd, 2019

27 Q MR. CHISWELL: Sir, at Exhibit E to your

1 public affidavit, the second last piece of
2 correspondence at page 103 of your affidavit, is a
3 letter from Mr. de Waal to Perpetual's counsel, and the
4 first circled bullet suggests that Ms. Rose, either in
5 her own capacity or CEO of Perpetual, could have
6 requested to inspect the books and records of the
7 trustee, and then it says (AS READ):

8 For some reason, she chose not to do so.

9 Do you see that, sir?

10 A Yes.

11 Q And I assume you approved Mr. de Waal sending this
12 letter before he sent it.

13 A I would have to go back and look.

14 Q And this statement here is consistent with a statement
15 in your affidavit before Justice Veldhuis specifically
16 regarding if -- how the defendants hadn't inspected the
17 books and records; correct?

18 A I believe that chronology is correct, yes.

19 THE COURT REPORTER: I'm sorry, you'll have to
20 repeat that.

21 A I believe that chronology is correct.

22 Q MR. CHISWELL: Sir, if you'll go a couple of
23 pages earlier in that same exhibit, Exhibit E of your
24 public affidavit, page 99, there's an e-mail from
25 Mr. McDonald, on behalf of Perpetual, to the trustee's
26 counsel, among others, and you'll see in the first line
27 it's referencing having received your affidavit that

1 would -- that was before Justice Veldhuis; correct?

2 A It refers to an affidavit, yes.

3 Q Well, it refers to your affidavit that was received on
4 October 21st, 2019; correct?

5 A I can't tell you when you received it.

6 Q Okay, but your affidavit that was before
7 Justice Veldhuis would have been received either on the
8 date that it was sworn, which was October 18th or the
9 date that it was filed which was October 21st; correct?

10 A I would assume it's around that time, but I can't tell
11 you when you received it.

12 Q Okay. The fifth paragraph in that begins with
13 (AS READ):

14 Mr. Darby states in paragraph 4 of his
15 affidavit that the funds currently in the
16 estate easily exceed the estimated cost of
17 Ms. Rose and the Perpetual defendants.
18 Please provide all documentation that
19 supports that assertion before the
20 cross-examination.

21 Sir, was that information provided either by you or the
22 trustee's counsel in response to that request?

23 A That request by Mr. McDonald to Mr. de Waal was on the
24 21st of October. You reviewed the records on November
25 the 1st, and I was crossed on November the 6th, so you
26 had access to our records prior to your
27 cross-examination.

1 Q I want to make sure I understood you. So you're
2 suggesting that the response to the question or the
3 request was Perpetual inspected the books and records
4 and then had that information before the questioning on
5 November 6th, 2019?

6 A Well, I'm suggesting that's the chronology of what
7 happened. Whether or not Mr. de Waal responded to this
8 specific e-mail is something I would have to ask
9 Mr. de Waal.

10 Q Okay. Please undertake to ask Mr. de Waal or PWC
11 whether the trustee responded to the specific request
12 to provide documentation that supports the assertion at
13 paragraph 4 of your affidavit.

14 MR. KRUGER: I'm not sure I follow. I
15 understood, Mr. Chiswell, that you were asking whether
16 this request, in this e-mail of October the 21st,
17 whether that was responded to. You're not -- and you
18 weren't asking about paragraph 4.1 of the affidavit,
19 because it seems to me 4.1 dealt with an inspection of
20 the records by your clients so -- just to make sure
21 that we respond to the right request for undertaking
22 over here, maybe if you just formulate the undertaking
23 again.

24 MR. CHISWELL: I have only been referencing
25 the first two sentences of --

26 MR. KRUGER: Okay.

27 MR. CHISWELL: -- paragraph -- it's the fifth

1 paragraph to the e-mail that's at page 99 of
2 Mr. Darby's affidavit and that's in regards to the
3 statement that Mr. Darby makes in his affidavit that
4 the funds currently in the estate easily exceed the
5 estimated cost of Ms. Rose and the Perpetual
6 defendants.

7 MR. KRUGER: Okay, my -- my
8 misunderstanding. Yes, we'll give the undertaking.

9 UNDERTAKING 2 - To make inquiries of
10 Mr. de Waal or PWC to determine and advise
11 whether the trustee responded to the specific
12 request to provide documentation that
13 supports the assertion at paragraph 4 of
14 Mr. Darby's affidavit

15 Q MR. CHISWELL: And then, sir, at the bottom
16 of that same paragraph, you'll see that Perpetual is
17 taking up your invitation to conduct the inspection
18 that you made in your affidavit and that Mr. de Waal
19 made in his letter that we talked about earlier on
20 October 23rd, 2019; correct?

21 A Yes.

22 Q Sir, the previous page, I think it's page 98 of your
23 affidavit, so still in Exhibit E, it says (AS READ):

24 I repeat that request here, and ask that the
25 report be prepared before the questioning of
26 Mr. Darby.

27 And you'll appreciate that's the report that was

1 prepared and provided to Perpetual's part of its
2 inspection of the books and records, the one that's at
3 paragraph -- or, page 132 to 134 of your confidential
4 affidavit; correct?

5 A So to be clear, this is an e-mail by Mr. McDonald that
6 you're asking me to comment on what he meant by the
7 word "report"?

8 Q Well, no, I'm asking you about an e-mail that you
9 appended to your affidavit that requests a report
10 before your questioning.

11 A And the question is?

12 Q You'll agree with me that the report that was requested
13 before your questioning was the report that I just
14 referenced, that's the report to creditor per Section
15 27 of the BIA that's at pages 120 -- pardon me, 132 to
16 134 of your confidential affidavit.

17 A That's my understanding that we provided in response to
18 what Mr. McDonald is asking for.

19 Q And you appreciate he was asking for it before your
20 questioning; correct?

21 A Yes.

22 Q Similarly, you understood that Mr. McDonald or
23 Perpetual were seeking to inspect the books and records
24 of the estate also before your questioning?

25 A Yes.

26 Q Can you turn to Exhibit I of your affidavit, your
27 public affidavit?

1 A Yes.

2 Q It's a letter from me to your -- to the trustee's
3 counsel November 4th, so after the inspection, and two
4 days before your questioning on November 6th, and
5 you'll see in the last paragraph, it says (AS READ):

6 We look forward to receiving this material as
7 soon as it is available, and in any event in
8 advance of the scheduled questioning of
9 Mr. Darby on Wednesday, November 6th, 2019.

10 Do you see that, sir?

11 A Yes.

12 Q And you see that Perpetual's attempting to obtain the
13 information before your questioning?

14 A The historical information, yes.

15 Q And, sir, I don't have the records before you, but I'm
16 going to tell you that you gave me the -- at least some
17 of the information as part of that request from PWC
18 directly either that day or the following day. Agreed?

19 A I can't recall when that was sent to you.

20 Q If we can turn to Exhibit J to your affidavit, your
21 public affidavit? You'll see this is a letter from the
22 trustee's counsel dated November 5th, 2019, responding
23 to my letter that we just looked at at Exhibit I, and
24 you'll see it agrees that the trustee will provide
25 certain information to me? Agreed, sir?

26 A Yes.

27 Q And you'll agree with me, sir, that there's no

1 objection from the trustee or the trustee's counsel
2 that the information wouldn't be permitted to be used
3 at your questioning; correct?

4 A This all falls underneath of our position regarding the
5 trustee's books and records. These are just follow-up
6 questions you were asking.

7 Q Right, but I don't see any objection in November -- in
8 the November 5th, 2019, e-mail, which is a response to
9 my letter asking for information because it's needed
10 for the questioning.

11 THE COURT REPORTER: I'm sorry, because ...

12 Q MR. CHISWELL: Because it's needed for the
13 questioning.

14 A We're of the opinion that this concept of the sharing
15 of the books and records of the trustee is a single
16 issue, not a per document issue.

17 Q Sir, I understand your position, but you agree with me
18 factually there's no notice of an objection in this
19 letter dated November 5th, 2019, or even any notice to
20 Perpetual that it wouldn't be entitled to ask questions
21 that you're going to learn from the information
22 gathered through the inspection process or this letter
23 process?

24 MR. KRUGER: I object, Mr. Chiswell. There
25 is an inspection where you had given a letter which
26 makes it very clear what that trustee claims
27 confidentiality. You write the letter on November the

1 4th and your introductory portion is very clear this is
2 pursuant to the inspection that you now want certain
3 additional information having had access to the binder
4 of documents and that documentation is then provided to
5 you under cover from Mr. -- or, correction, Mr. de Waal
6 writes back November 1st to that request of yours, so
7 it's not -- it's not a fair question.

8 (OBJECTION)

9 MR. CHISWELL: Mr. Kruger, with respect, I'm
10 asking Mr. Darby if the letter dated November 5th,
11 2019, has an objection in it. It seems to me a pretty
12 simple question.

13 MR. KRUGER: Well, then he's answered you.
14 He's said to you this was all part of that process, so
15 he has answered the question. The letter -- the
16 letter -- the letter we can all read and see what it
17 says and what it doesn't say. You asked the question
18 -- asked --

19 MR. CHISWELL: Mr. Kruger or Mr. Darby,
20 whoever would like to answer this question, please
21 point me to the provision or the statement in the
22 November 5th, 2019, letter that warns Perpetual or its
23 counsel that it would not be entitled to use that
24 information at the questioning of Mr. Darby.

25 MR. KRUGER: The matter has been canvassed
26 and you can move on to your next question.

27 (OBJECTION)

1 MR. CHISWELL: Is that an objection to the
2 witness answering the question?

3 MR. KRUGER: It is an objection. Get onto
4 your next question.

5 Q MR. CHISWELL: Sir, if you could look at the
6 letter I provided to you this afternoon through your
7 counsel, specifically this is the letter dated February
8 20th, 2020, from me to Mr. de Waal. Do you recognize
9 this letter, sir, as the letter that was sent on that
10 day to your -- to trustee's counsel?

11 A I recall this letter.

12 Q Do you recall it was in the context of Perpetual
13 seeking to inspect the records of the estate another
14 time in February of 2020 after Justice Veldhuis'
15 decision came out; correct?

16 A Yes.

17 Q We'll mark that as the next exhibit which I believe is
18 Exhibit A or 1.

19 MR. KRUGER: It will be 1.

20 EXHIBIT 1 - Letter dated February 20, 2020,
21 from Mr. Chiswell to Mr. de Waal

22 Q MR. CHISWELL: And, Mr. Darby, if you can
23 look at the next other letter I've provided you, the
24 one dated February 21st, 2020, from the trustee's
25 counsel, Mr. de Waal, to me in response to what is now
26 Exhibit 1. Do you recognize that letter, sir?

27 A Yes.

1 Q Mark that as Exhibit 2.

2 EXHIBIT 2 - Letter dated February 21, 2020,
3 from the trustee's counsel, Mr. de Waal, to
4 Mr. Chiswell in response to Exhibit 1

5 Q MR. CHISWELL: Sir, you'll see the second
6 bullet point in Mr. de Waal's letter. It says
7 (AS READ):

8 The Trustee shall not use any confidential
9 information that is gathered in a
10 professional capacity for the benefit of a
11 third party.

12 Do you know which specific bankruptcy and insolvency
13 general rule that's referencing?

14 A I would need to open that and look, which I do not have
15 a copy of.

16 Q Did you approve sending this letter as the senior vice
17 president responsible for the trustee in this matter?

18 A I would assume so.

19 Q Sir, I'm reading from the bankruptcy and insolvency
20 general rules, Rule 41, which says (AS READ):

21 The trustee shall not use any confidential
22 information that is gathered in a
23 professional capacity for the personal
24 benefit or for the benefit of a third party.

25 Is that consistent with your understanding of Rule 41,
26 sir?

27 A If you read it correctly, then I would say yes.

1 Q Sir, did the -- did you seek or obtain permission from
2 the inspectors permitting you to file your confidential
3 affidavit in your personal capacity?

4 A No.

5 Q Sir, you'll agree with me that the trustee has gained
6 Exhibit A to your confidential information as -- or,
7 pardon me, confidential affidavit as confidential
8 information?

9 A Yes.

10 Q And you'll agree with me that that confidential
11 information belongs to the estate?

12 A Yes.

13 Q Section 26(3) of the Bankruptcy and Insolvency Act says
14 (AS READ):

15 The Trustee shall permit the books, records,
16 and documents referred to in subsection (ii)
17 to be inspected and copies of them made by
18 the superintendent, the bankrupt, or any
19 (other) creditor ...

20 Pardon me (AS READ):

21 ... or any creditor or their representative
22 at a reasonable time.

23 Sir, do you agree with me that you're not the
24 superintendent, the bankrupt or a creditor in this
25 matter?

26 A I'm not.

27 Q Sir, in your affidavit sworn on February 13th and filed

1 February 14th, you reference your attempts to
2 personally file an application in this matter and that
3 that was unsuccessful as of February 5th, 2020.

4 You then state that (AS READ):

5 On February 10th, 2020, the Trustee filed an
6 application regarding Justice Veldhuis'
7 decision.

8 Did the trustee file that application as a result of
9 your unsuccessful attempts to file your own application
10 in your personal capacity?

11 MR. KRUGER: We're not busy with the
12 trustee. This is irrelevant to the present
13 application. We're not busy with the trustee.

14 (OBJECTION)

15 MR. CHISWELL: I'm just asking Mr. Darby who
16 is personally involved with the matters and he swore an
17 affidavit whether that's the case.

18 MR. KRUGER: Yeah, it's objected to.

19 (OBJECTION)

20 Q MR. CHISWELL: Sir, did you participate in
21 the trustee's decision to file an application to set
22 aside or vary Justice Veldhuis' order?

23 A Yes.

24 Q Sir, you testified earlier to Mr. Leitl that Ms. Rose
25 was entitled to see the books and records as the
26 president/CEO of Perpetual was not entitled to see
27 those same book and records in her personal capacity;

1 correct?

2 MR. KRUGER: I don't think you've stated
3 correctly what the witness said.

4 (OBJECTION)

5 Q MR. CHISWELL: Mr. Darby, do you disagree
6 with what I just said? Did I misquote you?

7 A I can't even recall what -- the wording you just used
8 'cause you're talking -- I didn't catch it.

9 Q Perhaps madam court reporter could read the question
10 back.

11 THE COURT REPORTER: (By Reading)

12 "Q Sir, you testified earlier to Mr. Leidl
13 that Ms. Rose was entitled to see the books
14 and records as the president/CEO of Perpetual
15 was not entitled to see those same book and
16 records in her personal capacity;
17 correct?"

18 A I did not say that.

19 Q MR. CHISWELL: Is that -- is that not your
20 position then, sir?

21 A What I stated was Perpetual, as a creditor, has a right
22 to review the books and records. Ms. Rose, in her
23 personal capacity, is not a creditor and did not have
24 the right to review the books and records.

25 Q Understood. How do you reconcile that, sir, you using
26 the books and records in your personal capacity?

27 MR. KRUGER: Objection. It's

1 argumentative. You can argue this to the court,
2 Mr. Chiswell.

3 (OBJECTION)

4 MR. CHISWELL: Well, except for I think the
5 court would benefit from receiving Mr. Darby's
6 understanding of the matter given that he has made his
7 position very clear about Ms. Rose --

8 (INDISCERNIBLE - OVERLAPPING SPEAKERS)

9 MR. KRUGER: -- from you.

10 MR. CHISWELL: -- style it, and if he
11 doesn't, I don't want to see another affidavit later
12 about it.

13 MR. KRUGER: The court must get assistance
14 from you. The objection stands.

15 MR. CHISWELL: Okay, but I'm not asking the
16 -- an opportunity for me to give my understanding. I'm
17 asking for Mr. Darby to give his understanding and so
18 I'm giving, you know, an open-ended question to a
19 witness in a cross-examination, and I want to make sure
20 he has got the opportunity to reconcile those two
21 positions that the witness has taken.

22 MR. KRUGER: It's a matter for argument. I
23 object, and he's not going to answer.

24 MR. CHISWELL: At Exhibit I of your public
25 affidavit -- pardon me, I misread my notes. It's
26 Exhibit 1 of the affidavit that you swore as -- on
27 February 13th, 2020, and it's the reasons of

1 Justice Veldhuis. Do you have that in front of you,
2 sir?

3 MR. KRUGER: We don't have that affidavit
4 here, but we have the reasons.

5 MR. CHISWELL: That'll do.

6 MR. KRUGER: Paragraph?

7 MR. CHISWELL: Sir, paragraph 24, it said
8 that (AS READ):

9 PD was aware of his duty of candor as an
10 officer of the court.

11 THE COURT REPORTER: I'm sorry, I didn't hear that.

12 Q MR. CHISWELL: Paragraph 24, it says that
13 (AS READ):

14 PD was aware of his duty of candor as an
15 officer of the court.

16 You'll agree with me, sir, that you were, in fact,
17 aware of your duty of candor as an officer of the court
18 when you were questioned?

19 A Yes.

20 Q At paragraph 25, it refers to non-responses and
21 refusals to provide relevant and material financial
22 information about the estate, and you'll agree with me
23 that there was refusals to provide certain financial
24 information of the estate at your questioning or your
25 response to your undertaking answers?

26 A We refused to provide the confidential information in a
27 public forum.

1 Q Sir, also at paragraph 25, it refers to a refusal to
2 refer to financial documents put before you at your
3 questioning. You'll agree with me that that's
4 accurate?

5 A Refusal to look at and comment on confidential
6 information in a public forum is correct.

7 Q At paragraph 27, says that you refused to review recent
8 financial statements of the estate. You'll agree with
9 me that that's a correct statement?

10 A That I refused to review confidential information in a
11 public forum, correct.

12 Q No, sir, I asked you a question. That it's a correct
13 statement to say that at your questioning you refused
14 to review recent financial statements of the estate.
15 Yes or no?

16 A That was confidential and could not be disclosed.

17 Q So that's an agreement, sir?

18 A With my additions to your question but not without
19 them.

20 Q Subject to your proviso, you agree with me that you
21 refused to review recent financial statements of the
22 estate at your questioning?

23 A That were confidential and could not be made public and
24 we were in a public forum.

25 Q And paragraph 28, it refers to your undertakings.

26 Paragraph 28 ends with the words (AS READ):

27 The respondent refused these requests.

1 You'll agree with me that your undertakings to produce
2 the books and records of the estate were refused?

3 A The undertaking is quite clear in that it states that
4 the information being requested was confidential and
5 would not be shared on the public record, and,
6 therefore, we declined to produce it.

7 Q Sir, you agree with me that you refused to provide the
8 books and records in response to the undertaking?

9 MR. KRUGER: The witness has answered the
10 question.

11 (OBJECTION)

12 Q MR. CHISWELL: At paragraph 28 of the
13 reasons, it also references the request for an
14 undertaking for you to produce the most recent cost
15 estimates for Sequoia's estate. You'll agree with me,
16 sir, that that undertaking was refused; correct?

17 A Which undertaking number was that?

18 Q Undertaking Number 2.

19 A It was refused, because that information, too, was
20 considered confidential and would not be disclosed in a
21 public forum as you requested.

22 Q Sir, paragraph 28 also says that you refused a
23 requested undertaking to produce cash flow projections
24 for the estate, and, sir, if it helps you, that's
25 Undertaking Number 4. You'll agree with me, sir, that
26 you refused that undertaking?

27 A That undertaking again requested that we provide

1 confidential information in a public forum.

2 Q Sir, you refused the undertaking?

3 A Because you requested us to provide confidential
4 information in a public forum, yes.

5 Q And, sir, you'll see also at paragraph 28 of
6 Justice Veldhuis' reasons we were requesting an
7 undertaking to produce the trustee's position on the
8 secured creditor claims in the estate and their dollar
9 amounts, and that's Undertaking Number 8. You'll see
10 that that information wasn't provided; correct?

11 MR. KRUGER: No, it flows back to
12 Undertaking Number 7. It says see the response on
13 Undertaking Number 7.

14 Q MR. CHISWELL: Right, which was that the
15 trustee had no position, so when the undertaking asked
16 for a position and the answer is we have no position,
17 you'll agree with me the undertaking -- that the
18 information wasn't provided.

19 A No, I believe the undertaking states that the trustee
20 had paid out the claim of one secured creditor, but had
21 not considered and formulated a final position on the
22 remaining secured creditor -- creditor's claims in the
23 estate, and as I offered in my November 6th
24 cross-examination, we would be happy to sit with you
25 and go through all those claims and explain to you why
26 we had not taken a position on it, but you have not
27 taken us up on that offer yet.

1 Q Sir, you say that, but Undertaking Number 6 to produce
2 the claim files was refused. Do you agree with me?

3 A Again, the records are considered confidential, and
4 we're not prepared to produce all the records of a
5 confidential basis on a public forum.

6 Q So you agree with me, sir, that Undertaking Number 6
7 was refused?

8 MR. KRUGER: The witness has answered the
9 question.

10 (OBJECTION)

11 MR. CHISWELL: I don't believe he has. I --

12 MR. KRUGER: He has answered --

13 (INDISCERNIBLE - OVERLAPPING SPEAKERS)

14 MR. CHISWELL: -- he didn't and it's a
15 question, a straight question that requires a straight
16 answer.

17 MR. KRUGER: He gave you a straight answer
18 and that is the way bankruptcies and insolvencies work.
19 He has given you the answer.

20 MR. CHISWELL: Is that an objection, sir?

21 MR. KRUGER: It's an objection. It's an
22 objection.

23 Q MR. CHISWELL: Paragraph 32 of
24 Justice Veldhuis' reasons, it says in the middle of the
25 paragraph that you were unaware of the value of the
26 claims of the secured creditors at your questioning.
27 Do you agree with that statement?

1 A That I did not know the exact quantum of the claims? I
2 did not know the exact quantum of all the claims. You
3 had that information.

4 Q And, sir, I asked you specifically if it was
5 approximately 10 million and you told me you didn't
6 know. You'd have to check. That's consistent with
7 your recollection?

8 A Yes.

9 Q Paragraph 32, it says that you were unaware or did not
10 know the balance of funds in the estate. Now, I
11 appreciate you told me it would be approximately 2.3
12 million, but you would agree with me that that was a
13 guess; correct?

14 A I believe I told you it was approximately 2 -- 2.3 or
15 2.5 million, and it was an estimate based on what I
16 knew. The fact that we have two bank accounts,
17 outstanding cheques and investments that roll, we -- it
18 takes -- we only do our cash calculation at month end.

19 Q Sir, you'll agree with me that you told me it was a
20 guess?

21 A I believe an estimate is better than a guess.

22 Q I didn't ask that question. My question was, you told
23 me the 2.3 million was a guess.

24 MR. KRUGER: Refer us to the passage in the
25 transcript, please.

26 MR. CHISWELL: Page 23, lines 14 to 16. I
27 asked you the question --

1 MR. KRUGER: Yeah, just a moment. Yeah,
2 sorry, Mr. Chiswell, I'm going to get the witness to
3 read from line 24 on page 20, because there's a whole
4 discussion before we get to that yet.

5 Q MR. CHISWELL: No, you're not going to
6 read --

7 A Mr. Chiswell, so you --

8 Q I'm asking the question --

9 A -- said the estate is approximately 2.5 million --

10 Q I'm asking the question --

11 A -- in the bank account -- trust account --

12 (INDISCERNIBLE - OVERLAPPING SPEAKERS)

13 THE COURT REPORTER: Sorry, you can't talk at the
14 same time.

15 MR. CHISWELL: You're going to have to object
16 to my question.

17 MR. KRUGER: Are you objecting to the
18 witness reading --

19 MR. CHISWELL: Mr. Kruger -- Mr. Kruger, you
20 will have an opportunity --

21 MR. KRUGER: No, I'm speaking.

22 MR. CHISWELL: -- in re-direct --

23 MR. KRUGER: I'm speaking.

24 MR. CHISWELL: You will have an
25 opportunity --

26 MR. KRUGER: I'm speaking.

27 MR. CHISWELL: -- in re-direct --

1 MR. KRUGER: I'm speaking.

2 MR. CHISWELL: You will not interfere with my
3 questioning by putting words in the witness's mouth.

4 MR. KRUGER: Mr. Chadwick --

5 A Chiswell.

6 MR. KRUGER: -- Chiswell, your response is
7 totally inappropriate. You wanting to ask the witness
8 to look at two lines in a transcript when what was
9 being discussed started a couple of pages before that,
10 and all I'm saying is the witness is entitled to read
11 what he said in the context, and so you're objecting
12 and then you accuse me of laying words in the mouth of
13 the witness. I object to that.

14 (OBJECTION)

15 MR. CHISWELL: Sir, if you want to ask the
16 witness questions in re-direct, you're entitled to do
17 so, but asking the witness to read on the record
18 portions of a transcript that have nothing to do with
19 the question is inappropriate.

20 MR. KRUGER: I'm not asking to --

21 MR. CHISWELL: That was --

22 MR. KRUGER: I'm not asking to read it into
23 the record.

24 MR. CHISWELL: You asked --

25 MR. KRUGER: I'm not asking him to read it
26 into the record. I want him to read it so that he can
27 understand in what context he gave you that answer, and

1 there is nothing wrong with that, Mr. Chiswell.

2 Q MR. CHISWELL: Sir, at paragraph -- or, page
3 23, line 14, I asked you (AS READ):

4 So it could be that the operating account is
5 approximately 2.3 million?

6 And you answered (AS READ):

7 I'm guessing on numbers.

8 Correct?

9 A At that point you were referring to the deduction of
10 funds which could be held up in a trust account. The
11 actual number, if you refer to a couple of pages
12 earlier, in which you actually respond on page 20
13 (AS READ):

14 So you said the estate has approximately \$2.5
15 million in its bank accounts between the
16 trust account and its operating account.

17 There's pages of commentary on that. We knew it was
18 approximately 2.5 million. We told you that, and we
19 offered to provide you the exact number. We'd have to
20 go back and do a reconciliation of our bank account.

21 Q So, sir, you're denying that you said 2.3 million was a
22 guess?

23 MR. KRUGER: I object. The witness has
24 answered the question. Start asking the questions in a
25 fair manner.

26 (OBJECTION)

27 Q MR. CHISWELL: Sir, in paragraph 32 of

1 Justice Veldhuis' reasons, the third last sentence says
2 (AS READ):

3 It was open to PD to apprise himself of this
4 information before swearing his affidavit.

5 Do you agree with that statement, sir?

6 A That's what the statement says.

7 Q Do you agree with me that it was open for you to
8 apprise yourself of the information of the estate
9 before you swore your affidavit?

10 A Are we talking about the confidential information that
11 you keep trying to put on the record or something else
12 here?

13 Q I'm asking about the estate's information that is
14 referenced at paragraph 32 of Justice Veldhuis'
15 reasons. She makes the statement (AS READ):

16 It was open to PD to apprise himself of this
17 information before swearing his affidavit.

18 You agree with me that that statement is correct, sir?

19 A I agree that I shared -- we have the information which
20 a lot of you requested, but it was confidential and we
21 disagree that that needs to go on the public record.
22 To the fact that I did not know the bank account --
23 bank account balance to the penny is not possible to
24 know without doing a bank reconciliation for a specific
25 date and time.

26 Q Sir, it was open for you to apprise yourself of the
27 information before you attended questioning on November

1 6th, 2019?

2 MR. KRUGER: The witness answered the
3 question.

4 (OBJECTION)

5 MR. CHISWELL: Sir, with respect they're
6 different questions. One was before he swore his
7 affidavit and the one I just asked was before
8 questioning.

9 MR. KRUGER: Yes, you're correct.

10 A The information that is not shared in the
11 cross-examination, the majority of it was being
12 confidential and would not be shared in the
13 cross-examination. It wasn't a matter of apprising
14 oneself's of it. It was a matter of not sharing it
15 with you because of the confidentiality.

16 The matter of the bank balance, as I've stated, is
17 something that has to pick a specific date and
18 determine the exact balance due to outstanding cheques,
19 investments, multiple bank accounts which we do once a
20 month. To approximate the bank balance at any time is
21 a completely acceptable estimate of the bank balance.

22 Q MR. CHISWELL: Sir, you were asked a direct
23 question whether it was open for you to apprise
24 yourself of the information. Is that --

25 MR. KRUGER: The witness --

26 MR. CHISWELL: -- true or not?

27 MR. KRUGER: The witness answered the

1 question.

2 (OBJECTION)

3 MR. CHISWELL: Is it true or not?

4 MR. KRUGER: The witness answered the
5 question. Get on to your next question.

6 (OBJECTION)

7 MR. CHISWELL: Well, what was his answer,
8 Mr. Kruger? Was it true or was it not?

9 MR. KRUGER: You've heard -- you've heard
10 the answer. You -- you have no right to insist on true
11 or not. Some questions require an explanation. He
12 gave you the explanation. Get on to the next question.

13 MR. CHISWELL: He didn't answer the question
14 in his explanation.

15 MR. KRUGER: I'm not going to argue.

16 Q MR. CHISWELL: Mr. Darby, Justice Veldhuis
17 says that it was open for you to apprise yourself of
18 the financial information during your questioning and
19 you recall I tried putting the books and records to you
20 during your questioning. So do you agree with me that
21 that was a correct statement that it was available or
22 open to you to apprise yourself of the information of
23 the estate during your questioning?

24 A The information that was available during the
25 questioning was confidential, and we had stated that we
26 would not allow the confidential information to be
27 placed on the public record.

1 Q Sir, at paragraph 32(c) of your affidavit sworn
2 February 10th, 2020, filed on the 18th --

3 THE COURT REPORTER: Sorry, your question was
4 blanked out by them turning the pages.

5 Q MR. CHISWELL: Sir, paragraph 32(c) of your
6 affidavit sworn February 10th and filed February 18th,
7 2020. You said (AS READ):

8 I was accordingly concerned that my
9 questioning was intended to rectify the
10 defects in the security application.

11 Do you see that, sir?

12 A Yes.

13 Q Did you view that as improper use of the
14 cross-examination?

15 A I view you trying to put confidential records on to the
16 public record as an inappropriate use of a
17 cross-examination.

18 Q Sir, that wasn't my question, with respect. I asked
19 you if you saw the use of the questioning to rectify
20 what you saw as defects in the application as improper.

21 A I believe you can use cross-examination to test the
22 evidence of the witness as put forward. That is
23 proper.

24 Q That doesn't answer my question.

25 A Theoretically are we talking or practically here?

26 Q Sir, you wrote something in your affidavit. I'm
27 wondering if you wrote that because you thought it was

1 improper or not.

2 A Your attempt to bring confidential records onto the
3 public record was improper.

4 Q Sir, is it fair to say that at your questioning an
5 explanation for the way you answered your questions the
6 way you did was because you were concerned that
7 Perpetual or Ms. Rose would obtain information about
8 the financial position of the estate that would, in
9 your words, rectify the defects in the security
10 application at the expense of the estate?

11 A Perpetual and Ms. Rose had the financial information of
12 the estate at the time of questioning. Your attempts
13 to bring that information into the public record was to
14 what we objected to.

15 Q That's not my question.

16 Madam court reporter, can you, please, repeat the
17 question to the witness?

18 THE COURT REPORTER: (By Reading)

19 "Q Sir, is it fair to say that at your
20 questioning an explanation for the way you
21 answered your questions the way you did was
22 because you were concerned that Perpetual or
23 Ms. Rose would obtain information about the
24 financial position of the estate that would,
25 in your words, rectify the defects in the
26 security application at the expense of the
27 estate?"

1 A I believe my answer was Perpetual and Ms. Rose had that
2 information at the time of the questioning.

3 MR. KRUGER: Are you still there, Paul?

4 MR. CHISWELL: Sorry, I wasn't sure if
5 Mr. Darby finished answering, because I didn't hear an
6 answer that was responsive to the question.

7 MR. KRUGER: Well, I think you've beaten
8 this horse to death. Let's move on to the next one.

9 MR. CHISWELL: Sorry, are you objection --
10 are you objecting to the question, Mr. Kruger?

11 MR. KRUGER: No, the question has been
12 answered.

13 Q MR. CHISWELL: Okay. Well, why don't we try
14 a third time then, because I don't -- I didn't get an
15 answer to my question.

16 Sir, was that the reason that you were answering
17 the way you did, because you were concerned that
18 Perpetual or Ms. Rose would be able to rectify their
19 evidence?

20 A Ms. Rose and Perpetual had the information. We did not
21 want the information on the public record.

22 Q In your confidential affidavit, Exhibit A, page 138 in
23 the top-right corner, you'll agree with me, Mr. Darby,
24 we're looking at a claims register for Sequoia as of
25 October 22nd, 2019?

26 A Yes, it is.

27 Q And you'll agree with me we're looking specifically on

1 page 138 is where it begins a list of secured
2 creditors' claims against Sequoia's estate?

3 A Yes.

4 Q You'll agree with me that the sixth secured creditor
5 claim is from Canadian Natural Resources Limited?

6 MR. KRUGER: Just -- just a minute,
7 Mr. Chiswell. We can discuss this. We're not going to
8 go on public record here with confidential information
9 in the books and records of the trustee. We're not
10 going to go on the public record telling people who has
11 made what claims in what amounts.

12 (OBJECTION)

13 MR. CHISWELL: Mr. Kruger, is it your
14 position that I'm not able to cross-examine Mr. Darby
15 on his confidential affidavit?

16 MR. KRUGER: No, no, I thought I made
17 myself very clear to you and Mr. Leitl. If you want to
18 cross-examine on the contents of the confidential
19 affidavit, then let's do so separate from the public
20 transcript, and we will then -- if the court refuses
21 our application to seal, then the confidentiality of
22 this record will suffer the same fate, but for now, I'm
23 not stopping you for one moment to cross-examine on
24 that affidavit, but it must be done on the basis that
25 everybody here agrees that the transcript be kept
26 confidential pending the outcome of this application.

27 MR. CHISWELL: Well, you leave me no choice

1 but to agree, I guess.

2 Mr. Leitl, do have any objections to that?

3 MR. LEITL: Sorry, you'll have to restate
4 exactly what I'm being asked to do.

5 MR. CHISWELL: So specifically, if I
6 understand Mr. Kruger, is this specific portion of the
7 transcript will not be filed, and you'll have the
8 opportunity to apply to the Court of Appeal to have it
9 sealed, and if that's denied, then it will be made
10 public, but if it is -- in either event, the Court of
11 Appeal will get to see the transcript.

12 MR. KRUGER: What I seek is agreement from
13 counsel that cross-examination on the confidential
14 affidavit will be kept confidential until the court has
15 ruled on whether or not the transcript should be kept
16 confidential.

17 MR. CHISWELL: So what --

18 MR. LEITL: I don't think we can -- we
19 have no jurisdiction or authority to declare anything
20 to be confidential. That is the sole jurisdiction of
21 the court. I can agree that it's up to the court. We
22 can mark this transcript in a way and give you an
23 opportunity to ask the court, but I'm not agreeing that
24 it's confidential. It's not my jurisdiction or
25 authority.

26 MR. KRUGER: No, I'm not asking you,
27 Mr. Leitl, to make that decision. All I'm saying is I

1 want an agreement from counsel that the contents of
2 this transcript will be kept confidential until the
3 court has ruled on the matter.

4 MR. LEITL: This portion of the transcript
5 going forward, if the reporter can mark it, yeah.

6 MR. KRUGER: Yeah, that's all I'm asking.

7 MR. LEITL: To give you an opportunity to
8 make the application. If you don't, then it will go
9 public.

10 MR. KRUGER: Yes.

11 MR. LEITL: Okay.

12 MR. KRUGER: So, Madam Reporter, if we
13 could -- if we could make sure that we start on a fresh
14 page and that you make a note that -- of the agreement
15 between counsel that all counsel and their clients will
16 treat this transcript as confidential until the court
17 has ruled on the matter.

18 MR. CHISWELL: Mr. Kruger, why don't we try
19 to make it easier and just have a separate document,
20 if --

21 MR. KRUGER: Sure.

22 MR. CHISWELL: -- madam court reporter can
23 accommodate.

24 MR. KRUGER: Sure.

25 (WHICH WAS ALL THE EVIDENCE TAKEN AT 5:37 PM)

26

27

1 CERTIFICATE OF TRANSCRIPT:

2

3

I, L. D. Stevenson, certify that the foregoing
4 pages are a complete and accurate transcript of the
5 Proceedings conducted in accordance with the Alberta
6 Protocol for Remote Questioning, taken down by me in
7 shorthand and transcribed from my shorthand notes to
8 the best of my skill and ability.

9

Dated at the City of Calgary, Province of Alberta,
10 this 29th day of May, 2020.

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L. D. Stevenson, CSR(A)

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Official Court Reporter

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EXHIBITS ENTERED IN THE QUESTIONING OF
PAUL JAMES DARBY
MAY 26, 2020

PAGE NUMBER:

EXHIBIT 1 - Letter dated February 20, 97
2020, from Mr. Chiswell to Mr. de Waal

EXHIBIT 2 - Letter dated February 21, 98
2020, from the trustee's counsel,
Mr. de Waal, to Mr. Chiswell in response
to Exhibit 1

1 OBJECTIONS ENTERED IN THE QUESTIONING OF
2 PAUL JAMES DARBY
3 MAY 26, 2020

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UNDERTAKINGS GIVEN IN THE QUESTIONING OF
PAUL JAMES DARBY
MAY 26, 2020

(Undertakings are inserted and indexed as a courtesy service to be utilized at the discretion of counsel. They are interpretations by the court reporter and it is requested counsel refer to the appropriate page to ensure accuracy)

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UNDERTAKING 1 - To make inquiries to 88
determine and advise, before the
questioning of Mr. Darby on November 6th,
2019, what other objections were made
other than the letter dated October 3rd,
2019

UNDERTAKING 2 - To make inquiries of 92
Mr. de Waal or PWC to determine and advise
whether the trustee responded to the
specific request to provide documentation
that supports the assertion at paragraph 4
of Mr. Darby's affidavit

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