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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) THE TAKEOVERS PANEL RELEASE ON VALUING LISTED SECURITIES

The Corporations and Securities Panel (the Takeovers Panel) has released a policy about the minimum price requirement of the Corporations Law (s 621(3) – introduced by the Corporate Law Economic Reform Program Act 1999) and some aspects of valuing listed securities offered as consideration under takeover bids. Under the minimum price requirement, a bidder must offer the same value, in cash or securities, as the highest price the bidder or an associate paid for bid class securities, in the four months before the bid.

The release draws attention to several matters which, taken together, should alleviate some concerns about the requirement that scrip offered as consideration must be valued when the bidder commences posting offers. There has been concern that a bidder may have to increase the number of securities it offers if the market price of its scrip falls between the time it announces its bid and when it posts its offers.

In addition, the section does not make any express allowance for changes in the market price during the time a bidder needs to finalise, print and post its offer documents. Under policy announced by ASIC on 7 March 2000, a bidder can use market prices from just before it needs to print its offer documents to value its scrip. ASIC’s initial estimate is that bidders will need two days to print their statements.

The Panel’s President , Mr Simon McKeon, said that the Panel supports ASIC’s policy of allowing bidders time needed to print bidders’ statements. However, Panel members consider that ASIC’s initial estimate of the time bidders will need to print their statements may be too short, given that bidders’ statements for scrip bids must contain prospectus-type information. A period of up to five days may be appropriate.

Mr McKeon said that the Panel’s policy supplements ASIC’s policy and is intended to assist the market to adjust to the new section and to give practical effect to the section. He said that the Panel had consulted with ASIC on its policy and that ASIC and the Panel are both consulting with the market and will use market feedback to develop policy and advise the Government on the operation of the section.

The policy also points out that, while a bidder should use market prices to value quoted scrip, the section does not require a bidder to treat an isolated price point as representing the value of its scrip. The section allows the use of more appropriate valuation techniques, such as taking the weighted average market price over a short period.

The Panel will monitor the operation of the minimum price requirement. If bidders have difficulties in complying with the section, because they do not know how much scrip they must offer until they post their offers, the Panel will consider recommending that the Government amend the section.

The Panel also invites comments whether it should make a rule to clarify the operation of subsections 621(3) and (4), particularly as regards the use and adjustment of market prices in valuing scrip.

A copy of the policy is available at the Panel’s web site "<http://www.takeovers.gov.au>".

For further information, contact:

Nigel Morris  
Director  
Level 47, Nauru House  
80 Collins Street  
Melbourne 3000  
Tel: (03) 9280 3299

(B) REPORT ON THE CORPORATIONS LAW AMENDMENT (EMPLOYEE ENTITLEMENTS) BILL 2000

On 10 April 2000 the Parliamentary Joint Statutory Committee on Corporations and Securities released its report on the Corporations Law Amendment (Employee Entitlements) Bill 2000. The Committee recommends that the Bill be enacted in its current form. The following is a summary of the Bill.

PURPOSE AND OUTLINE OF THE BILL

The second reading speech for the Corporations Law Amendment (Employee Entitlements) Bill 2000 advised that the purpose of the Bill was to amend the Corporations Law to increase protection for employee entitlements. This follows a number of high profile failures of corporate employers where employees were not paid the full amount of their accumulated entitlements. The speech advised that the Bill would send a clear message to corporate employers that deliberate avoidance of obligations to employees is not acceptable.

The speech further advised that the Bill would increase protection for employee entitlements in two ways. First, by extending the existing duty on directors not to engage in insolvent trading. Second, by introducing a new criminal offence which targets agreements and transactions entered into for the purpose of avoiding payment of employee entitlements; a breach of this provision may also lead to court-ordered payment of compensation by those involved.

(1) Extension of existing duty on directors not to engage in insolvent trading

The Corporations Law already includes a prohibition on insolvent trading by directors, but there is currently no duty on directors not to engage in a non-debt uncommercial transaction where the company is or becomes insolvent. An amendment of s 588G: Director’s duty to prevent insolvent trading by company, addresses this. Directors who breach this duty are liable to pay compensation under the civil penalty provisions of the Corporations Law. In certain circumstances offending directors may also be subject to criminal prosecution.

(2) Protection of employee entitlements from agreements and transactions entered into with the intention of defeating those entitlements

This part of the legislative scheme is effected by inserting a new Part 5.8A – Employee entitlements to Chapter 5 – External administration of the Corporations Law. The provisions of the Part are summarised below.

(a) Section 596AA : Object and coverage of Part

(i) The object of the new Part is to protect the entitlements of a company’s employees from agreements and transactions that are entered into with the intention of defeating the recovery of those entitlements.

(ii) The section defines entitlements as wages; superannuation contributions payable by the company; amounts due for injury compensation; leave entitlements; and retrenchment payments.

(iii) The new protection of entitlements does not extend to employees who are or have been directors of the company or to their spouses or relatives. Protection of entitlements extends to both past and present employees of the company.

(b) Section 596AB: Entering into agreements or transactions to avoid employee entitlements

This section prohibits a person from entering into an agreement or transaction (whether formal or informal, oral or written, or with or without legal effect) with the intention or part intention of:

- preventing the recovery of entitlements of employees of a company; or

- significantly reducing the amount of entitlements that can be recovered.

(Penalty: 1000 penalty units (at present $110,000) or 10 years, or both. Under the general principles of criminal law, persons who aid or abet a breach of this provision would also be liable to a penalty.)

(c) Section 596AC: Person who contravenes section 596AB liable to compensate for loss

This section provides that a person is liable to pay compensation if he or she contravenes the prohibition on agreements to avoid employee entitlements, the company is being wound up, and the employees suffer loss because of the contravention.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC RELEASES SUMMARY POLICY STATEMENT ON TIME-SHARING SCHEMES

On 20 April 2000 ASIC issued a Summary Policy Statement on time-sharing following an extensive consultation period with industry and stakeholders.

ASIC is publishing the summary statement to enable operators of existing and contemplated time-share schemes to plan with certainty for the transition to the managed investments provisions of the Corporations Law.

The Managed Investments Act 1998 allowed a two-year transition period for existing prescribed interest schemes to comply with the Act. This period may be extended to 30 September 2000 on a case by case basis for time-share schemes.

The summary statement aims to strike a fair balance between consumer protection and regulatory costs. It recognises, and where possible addresses, the concerns expressed by existing time-share scheme operators and puts in place a regulatory framework under which future schemes can operate.

The summary statement allows for the ongoing operation of time-sharing schemes to be undertaken by a member controlled club rather than the responsible entity. However, a number of conditions apply to protect time-share owners, including a requirement that the club be a member of an ASIC approved industry supervisory body.

ASIC is considering an application by the Australian Timeshare & Holiday Ownership Council (ATHOC) for approval as an industry supervisory body.

ASIC will in due course publish a more detailed Policy Statement including explanatory materials. That Policy Statement will reflect the policy positions set out in the Summary Statement.

Background to the summary statement can be found in the policy proposal paper dated 6 December 1999. The policy proposal paper, summary statement and the criteria by which ASIC considers applications for industry supervisory bodies, are available from the ASIC Infoline on 1300 300 630 or the ASIC web site at "<http://www.asic.gov.au>".

For further information contact:

Pauline Vamos  
National Compliance Adviser - Managed Investments  
ASIC  
Tel: (02) 9911 2178

(B) ASIC CLARIFIES OPERATING STANDARDS FOR MORTGAGE SCHEME OPERATORS

On 18 April 2000 ASIC issued an information release for mortgage operators which answers some of the questions they are asking as they make the transition to the managed investment provisions.

ASIC Managed Investments National Compliance Adviser, Pauline Vamos has conducted a number of surveillances on mortgage operators and says ASIC is concerned about the relatively low level of understanding some operators have about Policy Statement 144 and the Corporations Law.

The main topics covered by the information release include:

(1) Lack of understanding of disclosure requirements

Recent ASIC surveillance action has shown that some mortgage scheme operators do not understand their disclosure obligations when dealing the interests in the mortgage investment schemes they operate. In particular, mortgage operators need to be aware it is a breach of the law to engage in any misleading or deceptive conduct.

(2) Acting as an agent for a registered scheme

ASIC is also concerned that some practitioners are acting as agents of licensed mortgage scheme operators but are not aware of ASIC’s policy on these activities. ASIC warns that any referral that goes beyond a mere introduction may fall under the licensing and proper authority requirements of the Corporations Law.

(3) What is under the scope of the Managed Investments regulations?

ASIC urges operators to look closely at the services they are providing to determine if they are regulated as a Managed Investment scheme. The information release contains examples of some actual situations and defines what is regulated and what is not.

(4) Compliance

The information release highlights risk areas including borrower valuations, calculation of scheme property and investor disclosure.

ASIC warns it will continue to look at whether actual business procedures reflect what is in compliance plans.

The information release is available on the ASIC website at "<http://www.asic.gov.au>".

For further information contact:

Pauline Vamos  
National Compliance Adviser - Managed Investments  
ASIC  
Tel: (02) 9911 2178

(C) SURVEILLANCE ON LIFE COMPANIES AND AGENTS

On 13 April 2000 ASIC announced it will be conducting a national compliance review in the life insurance industry, with particular emphasis on the sale of disability products.

Advice and sales practices relating to income protection and trauma cover will be the primary focus, but the national surveillance activity will also look at advice and sale practices for products that include insurance against becoming totally and permanently disabled.

Disability products have been a growth area for the life insurance industry, and now account for approximately one quarter of all life insurance premiums.

ASIC’s objective with this national surveillance activity is to examine two separate aspects of disability product sales:

(1) the conduct and disclosure by agents to consumers concerning a complex product; and

(2) how the life companies ensure that agents are appropriately trained to sell those products and supervised to ensure that appropriate disclosure standards are being met."

The national surveillance activity will particularly examine the compliance by the life companies and their agents with the Life Insurance Code of Practice for Advising, Selling and Complaints Handling.

Surveillance of a number of life insurance companies and agents will be conducted in every State and Territory from April to June, with a final report to be issued early in the next financial year.

(D) RESULTS FROM THE 1999 MANAGED INVESTMENT NATIONAL SURVEILLANCE REVIEW

On 6 April 2000 ASIC announced the findings of a 1999 national surveillance review of Responsible Entities (REs) recently licensed under the Managed Investment Act.

The ASIC surveillance reviews were conducted during a four month period from July 1999 to November 1999.

The review involved 44 REs across Australia, with five operating in the financial asset industry, 13 operating in the property industry and 22 operating in the agricultural industry. The remaining four REs reviewed operated in other industry sectors, including film production.

Of the entities reviewed, 34 had less than $50 million of funds under management. Of the remaining 10 REs, five managed more than $250 million in funds while the other five had $50 to $250 million in funds under management.

The focus of the national surveillance review was on compliance with licence financial requirements, the progress of implementing working compliance structures, the process of appointing and subsequent monitoring of agents, as well as a review of the extent of the activities of compliance committees. The focus of the review differed between different entities.

Some of the key surveillance findings were:

(1) Where ASIC reviewed financial requirements, the majority of REs were found to be complying with their financial requirements, but in around 28 per cent of entities reviewed there were issues about the adequacy of their monitoring.

(2) Many participants who were reviewed were well advanced in implementing their internal compliance arrangements. However, a significant number were still to implement, or at a very early stage in implementing their compliance arrangements. In some cases there was an indication of a lack of senior management commitment and organisational ownership of compliance plan implementation.

(3) The vast majority of REs reviewed had established a compliance committee rather than using external board members. In some cases there were issues about the frequency of compliance committee meetings.

(4) The majority of REs reviewed outsource some aspect of their operations. The review found a significant number did not have formal outsourcing agreements in place.

In five cases the surveillance resulted in major remedial action, including the revoking of two REs licences. In a significant number of other cases letters were sent to the REs requiring further information, modifications to compliance arrangements, the establishment of formal agreements with external service providers or they were required to provide ASIC with a copy of audited financial statements. In all these cases the relevant REs have now satisfied ASIC’s concerns.

3. RECENT ASX DEVELOPMENTS

(A) LISTING AND BUSINESS RULE CHANGES

(1) Listing Rule changes

(a)New Quarterly Cash Flow Reporting Requirement

In January 2000 a proposal to require quarterly reporting by developing companies to apply from 31 March 2000 was made available for comment on the ASX website. The proposal applied only to those entities which were admitted under the assets test in listing rule 1.3.2(b) which came into effect on 1 September 1999. This assets test allows an entity to be admitted when it has commitments consistent with its business objectives to spend at least half of its cash and assets readily convertible to cash in the two year period following listing. This method of entry raises the issue of adequate disclosure of how these entities are spending their cash and meeting their business objectives following listing. A comparable situation occurs in relation to mining exploration entities and is dealt with by requiring these entities to provide to ASX a quarterly cash flow report.

Following the exposure period, ASX has proceeded with the proposal to require quarterly cash flow reporting effective on 31 March 2000. New listing rule 4.7B requires entities admitted under the assets test on the basis of commitments to spend money over the two year period following admission to give ASX a quarterly cash flow report. The requirement also applies to entities which must comply with Chapters 1 and 2 of the listing rules following a change of activities, if they comply with the assets test on the basis of commitments. The requirement applies to each quarter for the first eight quarters after admission.

When an entity has to provide an Appendix 4C will depend on when it was admitted to ASX and on its financial year. The following general principles apply.

(i) The quarters are based on the entity's financial year (eg. an entity with a financial year ending on 30 June has quarters ending on 30 September, 31 December, 31 March, and 30 June each year).

(ii) The reporting requirement applies only to quarters which end on or after 31 March 2000 (ie an entity with a financial year ending 30 June which was listed in September 1999 will give ASX its first Appendix 4C for the quarter ending 31 March 2000).

(iii) An Appendix 4C must be given to ASX for each of the first eight quarters (excluding those ending before 31 March 2000) which end after the date the entity was first listed (eg an entity with a financial year ending on 30 June which was admitted in September 1999 does not have to give ASX an Appendix 4C for the two quarters ending 30 September 1999 or 31 December 1999; it must give ASX an Appendix 4C for the six quarters ended 31 March 2000, 30 June 2000, 30 September 2000, 31 December 2000, 31 March 2001 and 30 June 2001).

(2) Business Rule changes

(a) CLERP related amendments

Amendments to the ASX Business Rules for the Corporate Law Economic Reform Program Act 1999 came into effect on 14 March 2000, and have been distributed to Business Rules subscribers. The amendments are minor amendments to adopt terminology consistent with the Act and do not involve policy issues.

(b) Other changes effective 14 March

Further amendments to the ASX Business Rules came into effect on 14 March 2000 which relate to:

(i) access to SEATS for Registered Independent Options Traders (RIOTs)

(ii) continuing professional education for DTRs; Securities Representatives as "Authorised Persons"; and

(iii) Adjustment to Index Options.

The amendments referred to in (i) are substantially in the form of the proposed amendments exposed for public comment in November 1999.

The amendments referred to in (ii) are consequential on proposals made in the ASX Discussion Paper in April 1999.

The amendments referred to in (iii) were made to enable ASX to adjust the options over the All Ordinaries Index when the ASX indices were changed on 3 April 2000.

An entire reprint of the ASX Business Rules incorporating all of the recent amendments will be distributed this month to subscribers.

4. RECENT CORPORATE LAW DECISIONS

(A) FORGIVENESS OF DEBT - FORMALITY AND COMMERCIALITY

(By Adam Brooks, Solicitor, Herbert Geer & Rundle)

Lewis v Cook [2000] NSWSC 191, New South Wales Supreme Court, Austin J, 21 March 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/march/2000nswsc191.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

Doran Constructions Pty Ltd ("DC") was a wholly owned subsidiary of Doran Constructions (Australia) Pty Ltd ("DCA"). The two companies had common directors. In 1994 DC loaned money to DCA. The directors of DC met on 28 November 1997 and resolved to forgive the loan account then owing by DCA (approximately $2.5 million). On 9 December 1997 the shareholders of DCA resolved that it be wound up voluntarily and that Mr Cook be appointed as liquidator. On 24 December 1997 the shareholders of DC resolved that it be wound up voluntarily and that Mr Lewis be appointed as liquidator.

In 1998 Mr Lewis signed a proof of debt in respect of the $2.5 million loan account and claimed that the purported forgiveness of the debt by the DC directors on 28 November 1997 was ineffective.

(1) Was the debt effectively forgiven on 28 November 1997?

No deed or other written instrument was executed by DC in relation to the debt forgiveness other than the minute of the 28 November 1997 directors’ meeting. Mr Lewis submitted that a debt can only be released and extinguished by an agreement for valuable consideration or an instrument of release under seal. Austin J agreed with this submission and held that the purported forgiveness of the debt was ineffective.

(2) Estoppel

Mr Cook, the defendant, submitted that the DC directors’ resolution on 28 November 1997 was a representation by DC to DCA that it had resolved to forgive the loan account, DCA had relied on that representation and given that DCA had been wound up it would be unconscionable for DC to assert that DCA owed it the debt.

Austin J held that there was no estoppel on the facts. His Honour held it would be artificial to apply the doctrine of estoppel where all relevant steps had been taken by a single group of individuals purporting to act in various capacities. His Honour held unconscionable conduct cannot be constructed artificially by employing the veil of incorporation.

(3) Waiver

Alternatively, the defendant submitted that the 28 November 1997 resolution was an intentional act with knowledge of abandoning a legal right to recover the debt from DCA which constituted a waiver of its right to recover the debt. Austin J noted the defendant’s submission relied upon a broad formulation of a general doctrine of waiver such as that expressed by Latham CJ in Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641: "Waiver involves the abandonment of a right by acting in a manner inconsistent with the continued existence of the right". Austin J noted that formulated in this broad way, a general doctrine of waiver would encroach upon the operation of other legal principles unless some limitations were recognised. Austin J preferred a narrower view of the operation of waiver which restricts it primarily to circumstances where statutory rights are conferred in such a way that they can be abandoned unilaterally by the conduct of one party.

Accordingly, Austin J held that the debt was not properly forgiven on 28 November 1997.

(4) Uncommercial transaction

His Honour proceeded to assess whether DC’s purported forgiveness of debt (if it had been effective) would have been an uncommercial transaction by DC. Section 588FE(3) states that a transaction is voidable if it is both an insolvent transaction and an uncommercial transaction and was entered into during the two years ending on the relation-back day (24 December 1997). Austin J held that DC was insolvent when the transaction was entered into as DC’s liabilities exceeded its assets by a substantial margin immediately prior to the purported forgiveness of the debt and DC was not able to pay all its debts as and when they became due and payable.

Austin J therefore had to consider whether the purported forgiveness of the debt fell within the definition of "uncommercial transaction" in section 588FB(1) which provides:

"A transaction of a company is an uncommercial transaction ... (if) it may be expected that a reasonable person in the company’s circumstances would not have entered into the transaction, having regard to:

(a) the benefits (if any) to the company of entering into the transaction; and

(b) the detriment to the company of entering into the transaction; and

(c) the respective benefits to other parties to the transaction of entering into it; and

(d) any other relevant matter."

Austin J cited with approval the following descriptions of "uncommercial transactions":

- The recipient receiving a gift or obtaining a bargain of such magnitude that it could not be explained by normal commercial practice.

- Consideration is nominal or trivial or lacks a commercial quality.

Austin J accepted that a reasonable person in the position of DC would have been influenced not to forgive the debt because of:

(a) The possibility that DCA might enjoy a windfall gain, or realise a contingent asset, allowing it to pay some of the debt.

Although the only significant assets of DCA as at 28 November 1997 were the shares it held in DC, and the only real asset of DC was a contingent litigation asset (and the possibility of the litigation’s success was no more than slight), the possibility of success would have been taken into account by a reasonable person in DC’s position in considering whether to forgive the debt. His Honour suggested a reasonable person would probably not have thought it prudent to forgive a debt without inducement to do so given the slight possibility that the debtor might be able to repay part of the debt in the future.

(b) The possibility that if DCA was wound up in insolvency, a liquidator could pursue rights under Part 5.7B of the Corporations Law against directors or other parties to recover assets.

That is, by forgiving the debt, DC would lose the opportunity to place DCA in insolvent liquidation, and would therefore lose the practical capacity to influence the administration of any subsequent winding up of DCA.

The defendant submitted that the Court should exercise its discretion against granting any relief to the Plaintiff under section 588FF(1) because DCA received no benefit from the forgiveness of the debt. Austin J held that the forgiveness of the debt conferred a benefit on the members and directors of DCA since it left the way open for its members to resolve to put DCA into a members voluntary winding up and to select the liquidator who would administer that process. Austin J held that the members and directors should not have received such a benefit.

Austin J declared that the debt of $2.5 million was not discharged by the resolution of 28 November 1997 and ordered that the agreement constituted by that resolution was void at and after the time the resolution was passed.

(5) Conclusion

This decision is a timely reminder of the requirement for valuable consideration or an instrument of release under seal to give effect to a forgiveness of debt. This decision also demonstrates the breadth of factors a court may take into consideration in determining whether a transaction is uncommercial.

(B) SECTION 999: WHETHER INDEPENDENT EXPERT’S REPORT WAS MATERIALLY MISLEADING; THE POWER OF ASIC TO INSTITUTE APPEALS: THE HIGH COURT DECISION IN BOND V THE QUEEN DISTINGUISHED; A NEW BILL TO DEAL WITH BOND V THE QUEEN

(By Jürgen Kurtz, Centre for Corporate Law and Securities Regulation, The University of Melbourne)

Australian Securities Commission v McLeod [2000] WASCA 101, Full Court of the Supreme Court of Western Australia, 13 April 2000.

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2000/april/2000wasca101.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Introduction

This case deals with two separate corporate law issues.

First, the Full Court of the West Australian Supreme Court considered the question of whether the statement of an independent expert to the ASX in this case breached the prohibition on false or misleading statements under section 999 of the Corporations Law. This aspect of the case may be of interest to practitioners as it provides some useful guidance on the ambit of the market manipulation prohibition.

Secondly, the Full Court distinguished the recent decision of the High Court in Bond v the Queen. That decision was the subject of a note in the last Corporate Law Bulletin ([No 31](http://cclsr.law.unimelb.edu.au/Bulletins/Bulletin0031.htm)). In Bond, the High Court held that the Commonwealth DPP does not, in general, have the power to institute appeals against a sentence imposed for breach of the Corporations Law. That power was found to be properly exercisable by the various State and Territory DPPs. In this case, the Full Court distinguished Bond and held that ASIC had the power to institute an appeal. The relatively technical reasons for distinguishing Bond are of interest given the broader background of recent and current constitutional challenges to the Corporations Law scheme. This part of the case note will also conclude with a brief consideration of the Jurisdiction of Courts Legislation Amendment Bill 2000 currently before the Commonwealth Parliament. That Bill, amongst other things, seeks to amend the Director of Public Prosecutions Act 1983 (Cth) to deal with the consequences of the Bond case.

Both of these aspects will be considered in this note. Before doing so, the note will set out the factual background to the case.

(2) Factual background

The respondent in this case is a geologist. In April 1993, he was engaged by Cambridge Gulf Exploration NL (Cambridge) to prepare independent reports for inclusion in a prospectus Cambridge intended to issue. Cambridge was listed on the Australian Stock Exchange (ASX) in July 1993. Its primary business was the exploration of the sea-bed in the north-west of WA with a view to finding diamonds. The following is a brief chronological summary of the other pertinent facts in this case.

October 1993: Cambridge announced to the ASX that a purpose-built marine alluvial diamond sampling ship had arrived on location. This method of diamond exploration had not previously been undertaken in Australia.

November 1993: Cambridge announced that gem quality diamonds and precious metals were being recovered. The price of shares in Cambridge began to rise.

December 1993: Between 1 December and 14 December, the share price increased from $0.88 to $2.05. On 14 December, at the insistence of the ASX, Cambridge voluntarily suspended its shares from quotation to enable it to prepare a report setting out the exploration results.

The respondent was engaged by Cambridge to prepare the report. He prepared a draft report on 15 December. On 16 December, Cambridge issued the report. The report contained two statements that are relevant to this case:

(i) that six carats of diamonds were extracted from the sample site at the rate of 0.4 carats to the tonne; and

(ii) at 0.4 carats for each tonne of ore treated (with the value of diamonds at US$135 per carat), the annual profit would be US$1,374,000,000.

The ASX requested further information which was also provided. The suspension was lifted on 22 December.

January 1998: The ASC commenced proceedings against the respondent in the Court of Petty Sessions alleging that both of the above statements were materially misleading and in breach of section 999.

November 1998: The Magistrate found a breach in relation to statement 2. The respondent appealed to the WA Supreme Court. The Commissioner of that Court upheld the appeal. ASIC then appealed to the Full Court of the WA Supreme Court.

(3) The section 999 prohibition

Section 999 reads as follows.

"A person must not make a statement or disseminate information, that is false in a material particular or materially misleading and:

(aa) is likely to induce other persons to subscribe for securities; or

(a) is likely to induce the sale or purchase of securities by other persons; or

(b) is likely to have the effect of increasing, reducing, maintaining or stabilising the market price of securities;

if, when the person makes the statement or disseminates the information:

(c) the person does not care whether the statement or information is true or false; or

(d) the person knows or ought reasonably to have known that the statement or information is false in a material particular or materially misleading."

(a) Was statement 2 materially misleading?

The first question in this case was whether statement 2 in the report was "materially misleading" under section 999. (There was no suggestion that it was false in a material particular.)

ASIC had argued that the suggestion of future profits in statement 2 was a representation as to a future matter. Under section 765, where a person does not have reasonable grounds for making such a representation, it will be taken to be misleading. ASIC argued that the formula in statement 2 was effectively a "prediction" which lacked any reasonable grounds. In the main, ASIC pointed to the small amount of sampling employed as evidence of a lack of reasonable grounds.

However, the Commissioner found that statement 2 did not constitute a prediction as to future profits. His Honour pointed primarily to the fact that no time frame had been employed within the formula so as to provide it with a predictive element. As it was not a representation about a future matter, there was no basis to require the respondent to provide reasonable grounds for justifying the prediction.

The Full Court overturned the decision of the Commissioner. Their Honours found that the primary question of whether statement 2 was materially misleading requires an analysis of the statement itself. However, their Honours explicitly stated that this analysis cannot be undertaken in abstract and must be judged against the other statements in the report and even circumstances behind the report.

Their Honours found that statement 2 amounted to a prediction as a time frame to the formula could be gleaned from the following factors:

- another part of the report indicated that Cambridge had applied for a mining licence and that commercial mining could commence by the end of 1995;

- references in the report to the purchase of mining equipment;

- other references to annual calculations for things such as tonnages treated, capital repayments, operating costs, income and profit; and

- a comparison in the report of recovery rates with Argyle, a successful diamond mining company.

Their Honours also agreed with ASIC that statement 2 (as a representation of a future matter) was misleading, in part, as the size of the sample was insufficient to assess whether diamonds were present in commercial quantities.

(b) Was statement 2 likely to induce purchases of securities in Cambridge?

Having found that the statement was "materially misleading", the Full Court went on to consider whether it was "likely to induce the sale or purchase of securities [in Cambridge] by other persons" under section 999(a).

The Full Court noted that the word "likely" will mean whether it was "probable" (rather than "possible") that members of the investing public would purchase shares due to the impugned statement. However, in this case, quotation of shares in Cambridge had been suspended at the time of the statement. As a result, there was no possibility of considering the evidence of on-market trading. There was also no suggestion of off-market trading in Cambridge shares.

The Magistrate at first instance avoided this problem by considering the opinion evidence of two witnesses who had testified that the overall report was likely to encourage the average shareholder. One of these witnesses was a research analyst specialising in Australian mining companies who had previously been the company secretary of Cambridge.

The Full Court found that this type of opinion evidence is admissible on the issue of likelihood. Their Honours found that, while each section 999 case will depend on its own circumstances, a trier of fact is not in general confined to consideration of "the four corners of the document".

Having found that statement 2 was both "materially misleading" as well as "likely to induce the...purchase of" shares in Cambridge, the Full Court overturned the decision of the Commissioner and found the respondent to be in breach of section 999.

(4) The impact of the decision of the High Court in Bond v The Queen

The appeal by ASIC to the Full Court in this case was argued on 13 December 1999. Although the appeal to the Full Court was instituted in the name of ASIC, the notice of appeal was signed by a representative of the Commonwealth DPP. On 9 March 2000, the High Court handed down the decision in Bond v The Queen. As has already been noted, that decision brought into question the competency of the Commonwealth DPP to institute appeals against sentences imposed in prosecutions for breach of the Corporations Law. The Full Court in this case invited the parties to lodge submissions on the basis of Bond. The respondent chose to challenge the competency of the appeal in this case.

The Full Court began its analysis by considering Bond as well as the earlier High Court decision in Byrnes v The Queen (1999) 73 ALJR 1292. Their Honours noted that both Byrnes and Bond concerned a similar factual scenario; prosecutions on indictment and appeals by the Commonwealth DPP against the sentence (in other words, arguing for an increase in sentence). This led the High Court in both cases to consider the so-called "double jeopardy" principle. This principle broadly states that where an appeal places in jeopardy for a second time the freedom of a respondent beyond the original sentence, there is a rule of construction that a prosecutor cannot appeal unless expressly authorised by statute.

In Bond, the High Court considered both State and Commonwealth statutes within the context of the federalised WA Corporations Law scheme. It found no express authorisation within that scheme and accordingly, held that the Commonwealth DPP did not have the power to institute appeals against sentences imposed for breach of the Corporations Law. In particular, the High Court considered section 17 of the Director of Public Prosecutions Act 1983 (Cth) which provides the Commonwealth DPP with the authority "to institute and carry on, in accordance with the terms of the appointment [that is, the appointment to prosecute offences against the laws of a state] prosecutions for such offences". In considering the scope of this section, the High Court was strongly influenced by the "double jeopardy" principle and found that section 17 did not authorise the Commonwealth DPP to institute appeals. Even if there was a State law conferring this power, it would be inconsistent with section 17 and accordingly invalid under section 109 of the Commonwealth Constitution.

The Full Court went on to note that the factual scenario in this case differs from both Byrnes and Bond. In this case, ASIC had launched a successful prosecution at first instance. That finding was overturned on appeal. ASIC was now seeking to reinstate the conviction obtained at first instance. Their Honours found that these facts will mean that the considerations of the "double jeopardy" principle which drove the High Court in Byrnes and Bond are not as applicable in this case. In support of this analysis, the Full Court referred with approval to the decision of the Full Court of the Tasmanian Supreme Court in Australian Securities Commission v Hosken [1999] TASC 120 which was delivered on 10 November 1999.

The chronology of events in Hosken is almost identical to that of the present case; it involved summary offences and an appeal seeking to reinstate a conviction obtained at first instance. The Tasmanian Full Court in Hosken rejected the argument based on Byrnes that ASIC was not competent to bring the appeal. Their Honours found that as the "double jeopardy" principle did not apply to the same extent (as the case involved a reinstatement of a conviction rather than an increase in the original sentence). This in turn meant that the strict presumption in Byrnes as to the requirement that there be express statutory authorisation to appeal has lesser relevance. The Tasmanian Full Court was content to rely on the broad formulation in section 11(4) of the Australian Securities and Investments Commission Act 1989 (Cth). That section gives ASIC the "power to do whatever is necessary for or in connection with or reasonably incidental to the performance of its functions". That broad conception of power was held to include the power to appeal in the circumstances of the case.

In this case, their Honours were influenced by the fact that the central judgments cited in Hosken had not been particularly referred to or considered in any substance in either Byrnes or Bond. That led the Full Court to again draw the distinction between the scenario in Byrnes and Bond in the one hand and Hosken and this case on the other. On this basis, the Full Court was prepared to find that the present case was distinguishable from Bond and on a similar basis to the decision in Hosken found that the appeal was competent.

(5) Jurisdiction of Courts Legislation Amendment Bill 2000

Finally, it is worth briefly considering some of the provisions of the Jurisdiction of Courts Legislation Amendment Bill 2000 currently before the Commonwealth Parliament. Most of the provisions of that Bill attempt to deal with the effect of the decision of the High Court in Re Wakim; ex parte McNally [1999] HCA 27. This note will concentrate on Schedule 5 of the Bill which seeks to amend the Director of Public Prosecutions Act 1983 (Cth) to deal with the decision in Bond. As referred to earlier, the High Court in Bond interpreted the limited wording in section 17 of that Act as not including the power of the Commonwealth DPP to institute appeals against a sentence imposed under the Corporations Law. In coming to this conclusion, the High Court was influenced by the gravity of the "double jeopardy" principle referred to earlier. The High Court went on to note in obiter that any State law which purported to grant authority to appeal on the Commonwealth DPP for breach of State law would be invalid under section 109 of the Constitution.

Schedule 5 of the Bill contains amendments to that Act to explicitly authorise the Commonwealth DPP or a member of his or her staff to exercise rights of appeal conferred under State or Territory law in relation to prosecutions for State or Territory offences. The way in which this is done under the Bill is to expressly amend section 17 by adding a new subsection 17(2).

This, however, is only the first step in ensuring that the Commonwealth DPP regains the right to exercise rights of appeal for breaches of Corporations Law. If passed into law, there will still need to be conferral of the right to appeal under State and Territory law in the context of the Corporations Law scheme. In Bond, the High Court expressly found that section 91(1) of the Corporations (Western Australia) Act 1990 (WA) which deals with "enforcement powers" in relation to the Corporations Law of Western Australia, did not authorise the Commonwealth DPP to institute an appeal against an existing sentence. To ensure that the Commonwealth DPP reverts to its pre-Bond position, it will be necessary to amend this provision (and equivalent provisions in the other States and Territory) to explicitly include the power to appeal as an "enforcement power" as well as to confer that power on the Commonwealth DPP.

(C)IS THERE A DUTY OF CARE OWED BY A DIRECTOR OF A CORPORATE LANDLORD TO TENANTS TO ENSURE THE LANDLORD DOES NOT BREACH LEASE COVENANTS?

(By Ben Bartholomaeus, [Clayton Utz](http://www.claytonutz.com.au), Perth)

Tsaprazis v Goldcrest Properties Pty Ltd [2000] NSWSC 206, Supreme Court of New South Wales, Hodgson CJ, 23 March 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/march/2000nswsc206.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".  
  
  
This case dealt with a dispute as to whether a director of a corporate landlord owed a duty of care to tenants to ensure that the landlord did not breach lease covenants. That proposition was rejected by the Supreme Court of New South Wales, which upheld the general principle that only the company is liable for company contracts, not its shareholders or directors, unless they guarantee the company's performance. The case is however, noteworthy in that it discusses the circumstances in which a director could come under a duty to ensure that the company fulfils the contract.

(1) Background

The third defendant Mr Micola, a director and shareholder of the second defendant ("Dernu"), made an application to strike out various paragraphs in the plaintiffs' Amended Statement of Claim, which alleged against him a duty of care and breach of that duty.

Putting this application in context, the proceedings concerned the plaintiffs' lease from Dernu of premises upon which the plaintiffs conducted a restaurant business. The plaintiffs claimed that there was water ingress into the premises because of defects in the roof and/or other structural defects which had not been rectified. The plaintiffs alleged they had spent substantial sums in refurbishing the premises.

Clauses 7.1.1 and 7.1.2 of the lease required the landlord to maintain the roof, ceilings, external walls and the floor of the premises in good condition and to maintain the premises in a structurally sound condition. Clause 8.2.3 of the lease provided that if the premises or the building of which they were a part were damaged, the landlord could notify the tenant that it considered the damage such as to make repair impracticable or undesirable, and then terminate the lease on seven days notice.

The first defendant ("Goldcrest") purchased the premises from Dernu on 29 May 1998 subject to the lease and became landlord. On 19 July 1998, Goldcrest purported to terminate the lease, on the ground that the premises had been damaged by water ingress and that it was impracticable or undesirable to repair that damage.

The plaintiffs sought, inter alia, damages against Dernu and Goldcrest for breaches of the covenants and a declaration that Goldcrest was not entitled to terminate the lease.

The plaintiffs alleged Mr Marcino owed them a duty of care to ensure Dernu did not breach clauses 7.1.1 and 7.1.2 of the lease because:

(a) before the purchase of the premises by Goldcrest, Mr Marcino knew that Goldcrest intended to purchase the premises for the purpose of residential unit development and would need vacant possession to effect this purpose; Mr Marcino encouraged this by approving Goldcrest's development application;

(b) Dernu and Mr Marcino knew that Goldcrest had spent substantial legal costs in regard to its proposed development;

(c) Mr Marcino knew that the plaintiffs had made substantial investment in refurbishing the premises, and had encouraged such investment;

(d) Mr Marcino knew that if Dernu did not properly maintain the premises the first defendant would have an opportunity to terminate the lease;

(e) Mr Marcino knew that if the lease was terminated under clause 8.2.3 then the plaintiffs would or might lose their investment, the benefits of the lease and be exposed to heavy litigation;

(f) by virtue of the fact that he controlled Dernu, Mr Marcino assumed responsibility to carry out all of Dernu's obligations to the plaintiffs under clauses 7.1.1 and 7.1.2 and negligently breached his duty by failing to do so; and

(g) the plaintiffs were reliant on Goldcrest maintaining the premises in accordance with clauses 7.1.1 and 7.1.2 and were further reliant on Mr Marcino ensuring Dernu complied with these clauses.

(2) The decision

Hodgson CJ in Eq determined the question of whether there was a duty of care in the context of general principles concerning contracts made by companies. His Honour further stated that, in general, only the company is liable under such a contract and that the shareholders or directors attract liability only when they guarantee the company's performance.

His Honour distinguished the claim in the action from inducing breach of contract but commented that it had some similarity to it. However, he stated that "directors are not liable for the tort of inducing breach of contract, where in exercising their functions as directors, they have caused the company to breach its contract" relying upon the decision of Said v Butt (1920) 3 KB 497. His Honour further stated that the "Court should be very hesitant to find a duty of care in this situation".

His Honour also noted that there would be a problem with a director contracting with a third party that he or she would ensure the company performed its contractual obligations to the third party. This would especially be the case if it was for consideration, with or without the informed consent of the rest of the board, as a direct promise by a director to act in a specific way would be in conflict with the director's obligation to act in the interests of the company and a breach of fiduciary duty.

Hodgson CJ in Eq held that a duty to exercise reasonable care to ensure the company fulfils its contract would not arise if all that was alleged was that the director knew of a contract by the company, knew of the circumstances in which another party would be severely damaged by breach of the contract and had the power to ensure that the company did not breach the contract. On this basis it was ordered that the allegations that Mr Marcino owed a duty of care to the plaintiffs be struck out.

However, His Honour did consider that a duty of care to ensure the company fulfils its contract may be found where a director of a company takes some positive action, knowing that it will bring about a situation where a person who has a contract with the company will suffer substantially greater loss if the company breaks its contract.

Therefore, the elements proposed by Hodgson CJ where such a duty may be owed by a director are as follows:

(a) where some positive action is taken by the director;

(b) this action substantially increases the vulnerability of the other party; and

(c) this action is taken in actual knowledge of this effect.

His Honour held that these factors were not made out in the pleading as it was not alleged that the actions by Mr Marcino substantially increased the vulnerability of the plaintiffs, nor was there actual knowledge of this effect. Further, it was held that there was no evidence to support these contentions despite the existence of clause 8.2.3 of the lease permitting the landlord to terminate the lease.

(D) APPOINTMENT OF A RECEIVER - CONSTRUCTION OF DEBENTURE CHARGE

(By Brian Loftus, Special Counsel, [Clayton Utz](http://www.claytonutz.com.au), Canberra)

Pan Foods Company Importers and Distributors v Australia and New Zealand Banking Group Limited [2000] HCA 20, High Court of Australia, 13 April 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/high/2000/april/2000hca20.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

This was an appeal from the Victorian Court of Appeal. The appellants contended that the appointment of a receiver was invalid for procedural irregularities and that the Victorian Court of Appeal was incorrect in holding that the procedures set out in the relevant security documents had been sufficiently complied with. The High Court unanimously dismissed the appeal.

The first named appellant ("Pan") carried on business as an importer of processed food. The other appellants were directors of and shareholders in Pan.

From 1988 the ANZ Banking Group Limited (the "Bank") provided finance to Pan for business purposes by way of loans at fixed and variable rates. In 1988 and 1989 and until 1994, the indebtedness was secured by a debenture in favour of the Bank over the assets and undertaking of Pan, a mortgage over land owned by Pan and personal guarantees and mortgages over lands given by the directors.

Relevantly the debenture contained provisions to the following effect:

(a) by General Condition 5.2, on the termination date the customer was required to repay to the Bank all moneys outstanding in respect of the facility;

(b) by General Condition 10.1, if an event occurred or circumstances arose which, in the opinion of the Bank, may have a material adverse effect on the business assets or financial condition of the customer, that was to be regarded as an Event of Default;

(c) by General Condition 11.1, if an Event of Default occurred the Bank may by notice to the customer terminate its obligations under the facility and declare that all moneys owing are due and payable;

(d) by General Condition 15.3, any "notice from the Bank to the Customer must be given by an Authorised Representative, in writing ... " and went on to provide appropriate methods of service.

The debenture itself contained the usual provisions and, most relevantly, at clause 18(q) provided -

"The moneys hereby secured shall at the option of the Bank (notwithstanding anything hereinbefore contained) immediately become due and payable ... without the necessity for any demand or notice ... upon the happening of any one or more of the following events:

(q) if the Mortgagor is carrying on business at a loss and in the opinion of any officer of the Bank further prosecution by the Mortgagor of its business will endanger the security ...".

When Pan's facilities came up for review in 1994 an investigating accountant was appointed to report to the Bank. It became obvious that Pan was incurring large losses. The bank officer in charge of the account told his superiors that the company was performing "disastrously". The accountant expressed the opinion that, if the Bank enforced its security, there would be a substantial shortfall.

The Court held that the evidence made it plain that circumstances had arisen which, in the opinion of the Bank, did have a material adverse effect on the business, assets and financial condition of Pan and on its ability to perform its obligations to the Bank. That entitled the Bank to declare that the moneys owing by the Customer were immediately due and payable. It did this by giving a notice demanding payment. A declaration in the formal legal sense was not necessary - it was sufficient that the Bank had clearly expressed its state of satisfaction that an Event of Default had occurred and had determined to act on it.

The notice was given under General Condition 15.3. It was personally delivered to four of Pan's directors by a bank officer who was an Authorised Representative. However the notice was not signed by him, rather it was signed by the Bank's solicitors. The Court held that in the circumstances this did not matter - there was ample demonstration that the notice (having been delivered personally by the Authorised Representative of the Bank) was adopted by him. Furthermore the provision requiring the Bank to give notice of its declaration that the moneys owing by the Customer were immediately due and payable was sufficiently satisfied by the Bank's communicating to the Customer an expression of its will, in this case the personal delivery of the notice demanding immediate repayment.

Callinan J who delivered the leading judgment, with which all of the other members of the High Court agreed, adopted the conclusions of the Victorian Court of Appeal to the effect that where financing documents contained a number of provisions, each of which allowed the Bank to appoint a receiver, the Bank is entitled to rely on all or any of them and can choose which provision or provisions upon which to found its appointment as a receiver.

Interestingly and perhaps most significantly, Kirby J, agreeing with all of the members of the Court, embarked upon an analysis of how commercial security documents should be construed. He distinguished between security documents given for personal as opposed to commercial purposes. He referred to the strict approach which had traditionally been taken in the construction of surety documents, whether they be personal or commercial in nature, and indicated his disagreement that such a strict construction should apply to commercial sureties. In the New South Wales Court of Appeal, Kirby J had previously rejected what he termed "this misapplication of legal doctrine" in Tricontinental Corporation Limited v HDFI Limited. Somewhat wryly he admits to being in the minority in that case as the majority felt that the previous High Court decision in Ankar Pty Limited v National Westminster Finance (Australia) Limited was authority for the continuance of the strict constructional approach to surety contracts.

Kirby J pointed out that the strict approach doctrine was developed originally in the United States, followed in England and Australia, and had its origin in the need to relieve volunteers in a family situation against personal obligations that they had undertaken for relatives and friends, for no benefit or reward to themselves. He questioned whether it was ever necessary, and indeed in the present commercial context whether it is now necessary, to extend it unquestioningly to commercial contracts of suretyship entered into between business enterprises for anticipated commercial gain.

In the Pan Foods Case, the remainder of the Court did not feel it necessary to advert to any rule of construction, holding on the facts of the case that what had happened sufficiently satisfied the documentation. However, Kirby J.'s approach is interesting and may point the way to a relaxation of such strict rules of construction in the case of contracts of suretyship in loan agreements between financiers and business enterprises operating for profit. Kirby J. felt that "whatever might be the approach suitable to agreements between other parties for other purposes, those of the commercial kind must be approached fairly and broadly, without being too astute or subtle in finding defects."

This may provide some relief for commercial lenders in the future whose documentation may not have been strictly complied with in the procedures leading up to enforcement of their securities.

(E) WHETHER COURT CAN ORDER SUBSIDIARY COMPANY TO PRODUCE DOCUMENTS HELD BY PARENT COMPANY

(By Jonathan Tisher, [Phillips Fox](http://www.phillipsfox.com.au))

Pegasus Gold v Kilborn Engineering [2000] NSWSC 183, New South Wales Supreme Court, Windeyer J, 21 March 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2000/march/2000nswsc183.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

(1) Summary

An application was made for a subsidiary company to produce documents that were under its parent company’s control. The NSW Supreme Court held that a company served with a subpoena to produce documents during a court proceeding must produce documents which are in its possession or custody, but is not required to take steps to bring any documents within its control or power.

(2) Background

The Administrators of Pegasus Gold Australia Pty Ltd (‘the Administrators’) sought to identify whether Kilborn Engineering Pacific Pty Ltd (‘Kilborn’) would be indemnified for liability if they obtained judgment against it. To determine whether a recovery action in the Federal Court was justified, the Administrators sought to obtain information about Kilborn’s insurance cover. Specifically, they sought to require the Canadian parent company of Kilborn (SNC-Lavalin Group Inc) to produce an insurance policy which would indemnify Kilborn for such liability.

The Administrators submitted a notice of motion before the Court which would require Kilborn to inform the Court whether any request had been made by or on behalf of Kilborn to SNC-Lavalin for the production of any relevant professional indemnity policy.

The Administrators claimed that Kilborn had a legal entitlement to be provided with a copy of the policy because it is the insured under the policy and it is entitled to enforce the policy against the insurer. Further, they argued that Kilborn had the power to require its parent company to provide it with a copy of the policy, as it is one of the beneficiaries under the policy and accordingly the policies are held on trust for it.

(3) Judgment

The NSW Supreme Court ruled that Kilborn did not have the power to require the actual policy to be produced, as Kilborn did not own the policy. The Court noted that a company served with a subpoena to produce documents is required to produce documents which are in its possession or custody, but is not required to take steps to bring any documents within its control or power. Furthermore, the Court found that there was no evidence that the policy actually existed, rather its existence had only been assumed.

It was found that the form of request sought from the Court required it to make an assumption which it could not make without further evidence as to the rights under the policy which it was sought to be produced under the notice of motion. The motion was therefore dismissed.

(F) SCOPE OF LEGAL PROFESSIONAL PRIVILEGE IN JOINT VENTURES

(By Mark Stevens, [Phillips Fox](http://www.phillipsfox.com.au))

Yunghanns v Elfic Pty Ltd (No 2) [2000] VSC 113, Supreme Court of Victoria, Warren J, 30 March 2000.

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2000/march/2000vsc113.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

The plaintiffs ("the Yunghanns Group") sought an order from the Victorian Supreme Court that they obtain leave to inspect certain documents where legal professional privilege had been claimed by the first, second and fifth defendants (the Elders Group ("Elders")) in this proceeding. The documents contained communications between Elders and their former solicitors, Corrs Chambers Westgarth, the sixth and seventh defendants ("Corrs").

(1) Background

The plaintiffs alleged a joint venture existed between the plaintiffs and the first defendant during the period of 1984 to 1991, where Elders provided finance through a service company ("Elfic") and the Yunghanns Group provided expertise in terms of selecting corporate takeover targets, and shares for strategic purposes in other companies. To facilitate this process loans were provided to the Yunghanns Group based on commercial terms and profits were to be shared equally. It was alleged that under these arrangements Elders induced the Yunghanns Group to execute a series of agreements, guarantees, and indemnities without disclosing that the real purpose of those agreements was to access the Yunghanns Group’s equity in the Knox District Shopping Centre ("Knox land").

Elders argued that under the equity finance facility, joint and several guarantees from both Mr Yunghanns and various companies within the Yunghanns Group were provided. In 1988, Elders assisted the Yunghanns Group by providing re-financing for the Knox land, on the basis that the Knox land came to form part of the security for the existing indebtedness of the Yunghanns Group.

The plaintiffs claimed that Corrs acted for both Elders and the Yunghanns Group during the period of the joint venture, and in particular, in the transaction relating to the Knox land. It was alleged that as Corrs knew the true consequences and ramifications of the guarantees and indemnities and did not inform Yunghanns of those matters they had breached their fiduciary duties.

(2) The legal professional privilege claim

Justice Warren was satisfied, at this interlocutory stage, that the plaintiffs had an arguable case that the joint venture and joint retainer existed.

The plaintiffs’ application to inspect the documents was on the following basis:

(a) the privilege claimed with respect to the documents by the defendants was also the privilege of the plaintiffs (ie a joint retainer existed) and the joint venture arrangements gave rise to an obligation that the defendants not seek to rely upon the privilege to prevent inspection;

(b) as the exception arose in fraud, the privilege could not prevent inspection as the documents related to communications of an illegal, dishonest or improper purpose.

(3) Joint retainer and joint venture

Justice Warren acknowledged that if two or more persons seek and obtain the advice of a lawyer then the privilege that attaches to the communications passing between them or one or other of them and the lawyer is jointly privileged: (Farrow Mortgage Services Pty Ltd v Webb (1996) 39 NSWLR 601, 608). In Yunghanns v Elfic Limited (unreported judgement, 3 July 1998) Justice Gillard found there was a very long relationship between Mr Yunghanns and the Yunghanns Group with Corrs, which involved contact with many partners and employees of the firm. Justice Gillard granted an injunction preventing Elders from retaining Corrs as their solicitors in this proceeding and rejected the notion that Chinese walls would overcome these difficulties. While not bound by Justice Gillard’s decision, Justice Warren found the decision to be relevant in providing background to the arrangement between the plaintiff and the defendant.

Justice Warren rejected claims by Elders that no joint privilege attached in respect of all of the advice that the Elders Group obtained, in particular the advice obtained in its capacity as lender and security holder. Her Honour found that when the same law firm provided advice to two clients on the same matter, including transactions between those two clients, then prima facie a joint interest exists, therefore, a joint privilege will attach to the communications between both or one or other of the clients and the firm. The erection of a Chinese wall would not alter this.

Her Honour rejected the arguments of Elders that separate advice was given by separate solicitors of the firm. Rather, Her Honour stated that it was apparent that Elders and the Yunghanns Group sought advice from the same firm of solicitors in relation to the same transaction but from different solicitors within the firm. It was held that it would be inappropriate to impose a Chinese wall upon the workings of a firm of solicitors, as it would give rise to potential leaks and conflicts.

Justice Warren found there was an arguable prima facie case that a joint venture existed between the Yunghanns Group and the Elders Group. As the privilege does not attach to communications against a person having a joint interest where the relationship is one of partnership or trust, then logically it cannot attach where the relationship constitutes a joint venture. Her Honour found a joint interest in the retainer and fiduciary duties obligations given the joint venture relationship (citing United Dominions Corporations Ltd v Brian Pty Ltd (1984 – 85) 157 CLR 1). A Chinese Wall was not seen as a basis by which a party to a joint venture could modify or seek to avoid the fiduciary obligations that would otherwise exist. Therefore, Elders could not rely on legal professional privilege.

(4) Purpose of documents

It is not sufficient to overcome or displace legal professional privilege to merely make allegations of illegal, dishonest or improper purpose. However, it is not necessary to fully prove the allegations. Under Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 the party resisting the claim must show reasonable grounds for believing that the communication was made for some illegal or improper purpose, that is, some purpose that is contrary to the public interest. Justice Warren was not satisfied that the plaintiffs had met this standard, commenting that an attempt to overcome or displace privilege on such basis does not require a demonstration that the legal advisers were themselves conscious participants in fulfilling the improper purpose (see R v Cox & Railton (1884) 14 QBD 153). As a result, Justice Warren found it unnecessary to determine whether the documents related to communications of an illegal, dishonest or improper purpose.

Justice Warren declined court inspection of the documents. Courts have the power to examine documents and should not be hesitant to exercise such a power (citing Esso Australia Resources Limited v Commissioner of Taxation (1999) 168 ALR 123 at 350). Whilst the defendants urged Justice Warren to review the documents, Her Honour resisted doing so, due to the sheer volume of documents, and the possible delay in the proceedings due to the time expended in reviewing these documents.

(G) VALIDITY OF CROSS-VESTING LEGISLATION AND WHEN PROCEEDINGS SHOULD BE TRANSFERRED

The Bell Group Ltd v Westpac Banking Corporation [2000] FCA 439, Federal Court of Australia, Carr J, 7 April 2000

The full text of this judgment is available at:

"<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2000/april/2000fca439.html>"

or "<http://cclsr.law.unimelb.edu.au/judgments/>".

The following is a summary of this judgment prepared by Justice Carr.

(1) Introduction

In accordance with the practice of the Federal Court in certain cases of public interest, I have prepared a brief summary to accompany the reasons for judgment that are being delivered today in relation to six motions in this matter. But the only authoritative pronouncement of my reasons is that contained in the full reasons for judgment. This summary is necessarily incomplete.

(2) Summary of judgment

The applicants comprise some 29 companies (all in liquidation) in what was formerly known as ‘The Bell Group" and two liquidators who, between them, are individual liquidators of 21 of those companies. The respondents are numerous banks ("the Banks"), many of whom lent money to various companies in the Bell Group over a period stretching back to the early 1980s.

At that time the Banks were prepared to lend money to the Bell Group on the basis of what were called "negative pledge" arrangements. That is, the borrowers agreed not to charge their assets by way of security to any other lenders.

The Bell Group also raised money during that period from other sources, principally in Europe. Those debts were evidenced by the issue of bonds. Between 1985 and 1987 the Bell Group issued bonds to the value of $400 million and £75 million. $150 million of that amount was borrowed from Heytesbury Securities Pty Ltd, a company associated with the late Mr Robert Holmes à Court. Generally speaking, the bonds were either redeemable for cash or could be converted into shares.

The extent to which the rights of the present holders of those bonds were and are subordinated, or shall remain subordinated, to all other creditors of the Bell Group, and in particular the Banks has become a major issue, not only in this case but also in certain proceedings before the Supreme Court of Western Australia.

In 1990 the applicant companies charged all of their assets to the Banks to secure repayment of various loans. Those loans then totalled about $260 million. In the judgment I have described the security documents as "the Securities". I shall do the same in this summary. When the applicants failed to repay the loans, the respondent Banks exercised their rights under the Securities and realised approximately $300 million upon the sale of the assets which were the subject of such security.

In the principal application in this matter (which has yet to be heard) the applicants seek to set aside the Securities and to obtain orders from the Court that the Banks pay to the liquidators of the applicant companies amounts equal to the total of such realisation, plus interest.

The applicants make their claims on numerous bases. I shall not try to summarise all of them. The main basis is that the applicants claim that some of their former directors and the respondent Banks wrongly caused the Bell Group of companies to execute the Securities in favour of the Banks at a time when the applicant companies were insolvent or nearly insolvent. They also rely upon those provisions of the former Companies Code and the Corporations Law which, by reference to bankruptcy principles, provide for certain transactions to be void against a liquidator.

The applicants instituted these proceedings in this Court in late 1995. It was then commonly thought that this Court had jurisdiction to hear and determine claims of this sort under the Commonwealth and State cross-vesting legislative scheme.

Numerous procedural steps were taken to prepare the matter for hearing. It was first set down for hearing (for a period of four months) in August 1998. Early that year the Banks made a major set of amendments to their defence and cross-claim. In briefest summary, the key part of those amendments raised the issue of the degree to which moneys raised by the issue of the bonds, which I have described above, and on-lent to other companies in the Bell Group were subordinated to other unsecured creditors of (and within) the Bell Group, including the Banks. As a consequence of those amendments, the applicants sought an adjournment of the hearing. I rejected that application, but postponed the start of the hearing by one month. A Full Court of this Court (on appeal from my decision not to adjourn the hearing date) vacated that hearing date. Later I fixed a new hearing to start in October 1999. However, on 17 June 1999, the High Court of Australia handed down its decision in a case known as Re Wakim. That decision held that a major relevant part of the cross-vesting legislation was constitutionally invalid. The result was that the applicants’ claims, when viewed on their own, did not raise any federal matter within the jurisdiction of this Court.

However, the respondents contended that this Court had what is known as "accrued" jurisdiction. They pointed to the fact that their amended cross-claim was, in part, based upon conduct during the 1980s by the applicants being conduct by which, on the Banks’ case, the applicants contravened s 52 of the Trade Practices Act ie that certain of the main companies in the Bell Group had engaged in misleading or deceptive conduct. The respondents argued that the factual basis for that part of their cross-claim had so much in common with the factual basis of the claims raised by the applicants that all of the disputes formed part of the one "matter".

In the meantime, in October 1996, the Banks had sued the applicants and others in the Supreme Court of Western Australia to prevent the execution of certain supplementary deeds which were intended to vary the terms of some of the convertible bonds. That action is identified as "CIV 2061 of 1996". An examination of the pleadings in that Supreme Court case and the defence and cross-claim in this case reveals, as I have found in the judgment delivered today, a very substantial degree of common factual allegations on the Banks’ part.

Immediately after the High Court’s decision in Re Wakim, procedural steps were taken in the Federal Court to decide whether this Court had jurisdiction to hear and decide the applicants’ case against the Banks and the Banks’ defence and cross-claim, and, even if this Court did have jurisdiction, whether it should transfer the proceeding to the Supreme Court of Western Australia.

The parties filed six notices of motion with a view to resolving those questions. Four of them were filed on behalf of the applicants and two on behalf of the respondents. Many affidavits were also filed. At various stages it appeared that constitutional questions had arisen. Some six notices to that effect were issued and served on the Attorneys-General for the Commonwealth, the States and the Territories. In the end, only two Attorneys intervened in the proceeding. The Attorney-General for Western Australia intervened to argue for the validity of what is known as the Western Australian "remedial" legislation which has been passed in relevantly identical terms by the various States since Re Wakim. As it turned out, it was not necessary for that issue to be decided. The Attorney-General for the Commonwealth intervened to argue for the constitutional validity of certain provisions of the Commonwealth Cross-Vesting Act, in particular the provisions which enable the transfer of a proceeding from this Court to a Supreme Court and a section which states that there shall be no appeal in relation to such a transfer decision.

The parties filed about 350 pages of written submissions in relation to the various motions. The hearing of the various motions took four days, the last such day being on 10 March 2000. I will now summarise my conclusions. They are that:

(a) the Banks have, by their cross-claim, validly invoked the jurisdiction of this Court;

(b) leave was validly granted to the respondents to begin and proceed against the applicant companies by way of the cross-claim;

(c) the question whether the relevant part of the Banks’ cross-claim is statute-barred is something which should be decided after a hearing;

(d) the applicants’ claims fall within this Court’s accrued jurisdiction, basically because they arise out of what is known as a "substratum of facts" which is common to the substratum from which the Banks’ federal cross-claim arises;

(e) the Banks’ cross-claims are not what is termed "colourable" i.e. obviously without substance, seeking only to attract this Court’s jurisdiction;

(f) those parts of the Commonwealth Cross-Vesting Act which the Banks challenge as being unconstitutional, are valid;

(g) the proceeding in this application arises out of or is related to various proceedings in the Supreme Court of Western Australia, and in particular CIV 2061 of 1996; and

(h) one Court only should decide the issues in dispute;

(i) it is more appropriate that this proceeding be heard and determined by the Supreme Court of Western Australia. I have published fairly full reasons for that conclusion. They include the following:

(i) the case raises mainly matters of "State" law;

(ii) there is a very substantial overlap between the proceeding in this Court and action No CIV 2061 of 1996 in the Supreme Court;

(iii) there is the strong possibility of substantial cost savings if this case is heard either at the same time or at about the same time as the Supreme Court proceedings;

(iv) there may still be doubts about this Court’s accrued jurisdiction which could be the subject of an appeal by the unsuccessful party at the trial of the matter; and

(v) there are no doubts about the Supreme Court’s jurisdiction to hear all of the matters; the risk of wasting millions of dollars in costs can be avoided.

5. RECENT CORPORATE LAW JOURNAL ARTICLES

J Donnan, ‘Class Actions in Securities Fraud in Australia’ (2000) 18 Company and Securities Law Journal 82

This article contends that the class action is a procedure capable of effective utilisation in securities fraud litigation in Australia. Fundamental features of securities class actions include: intraclass conflict; its deterrence and compensatory objectives; causation, defences and remedies; the antithetic effect of bringing individual claims within a group procedure; securities fraud detection and the role of institutional investors. Reference to the United States experience in securities class actions is made with a view to analysing the types of issues likely to emerge and the range of legislative and judicial responses that might be appropriate to the Australian securities context. It is argued that defects in Australia’s existing class actions laws, including settlement procedures, notice requirements, costs and remedies, threaten to undermine the effectiveness of the procedure and demand reform. Ultimately, a series of reform proposals are outlined which attempt to balance the underlying policy considerations and remedy defects of existing class action laws in redressing securities fraud in Australia.

J Edelman, ‘The Meaning of Fraud in Insolvency and Bankruptcy: A 400 Year Old Riddle’ (2000) 18 Company and Securities Law Journal 97

As national boundaries become increasingly permeable due to technological advances like the Internet and various other forms of electronic commerce, regulators are finding that the laws with which they arm themselves are inadequate. In a climate in which investment scams are on the rise, the laws in relation to prospectus advertising and securities hawking come sharply into focus. This article examines current Australian laws and the new Corporate Law Economic Reform Program Act 1999 (Cth) pertaining to prospectus advertising and securities hawking and analyses whether the law is able to deal with recent developments. The article also examines the equivalent laws in the United States of America and Hong Kong. This article concludes that while the new provisions in the CLERP Act amendments in relation to fundraising are laudable, they, in some instances, fall short of their objectives. For example, the provisions probably do not deal adequately with certain issues such as the Internet and electronic commerce.

I Ramsay, G Stapledon and K Fong, ‘Corporate Governance: The Perspective of Australian Institutional Shareholders’ (2000) 18 Company and Securities Law Journal 110

This article highlights the role played by institutional investors in corporate governance in Australia. It details the findings of an interview study conducted in late 1997 and early 1998. Representatives of twelve institutional investors were interviewed about their role in corporate governance. The article reports and analyses their views on a range of key corporate governance issues such as board structure and composition. It also details their attitudes to exercise of voting rights; involvement in behind-the-scenes activism; and barriers to institutional investor involvement in corporate governance.

Note: ‘Enforcing Second Mortgages by Executing a Power of Sale’ (2000) 18 Company and Securities Law Journal 143

Note: ‘Weather Derivatives, Hedging Volumetric Risk and Directors’ Duties’ (2000) 18 Company and Securities Law Journal 151

Note: ‘Reconceptualising the Nature of Modern Shareholding (and Making Voting Easier)’ (2000) 18 Company and Securities Law Journal 155

K Fletcher, ‘Re-baiting the Financial Assistance Trap’ (2000) 11 Australian Journal of Corporate Law 119

G A Acquaah-Gaisie, ‘Enhancing Corporate Accountability in Australia’ (2000) 11 Australian Journal of Corporate Law 139

C Symes, ‘Remuneration, Rent and "Requisite" Costs: The 3 R’s of Insolvency’s Administrative Expense Priority’ (2000) 11 Australian Journal of Corporate Law 149

D Srivastava and C Sharma, ‘Corporate Liability for Sexual Harassment in the Workplace’ (2000) 11 Australian Journal of Corporate Law 170

W Estey, ‘Pre-Incorporation Contracts: The Fog is Finally Lifting’ (1999) 33 Canadian Business Law Journal 3

J Slawotsky, ‘The Impropriety of Levying Punitive Damages on Innocent Successor Corporations’ (1999) 38 Duquesne Law Review 49

F Cassim, ‘The New Statutory Provisions on Company Share Repurchases: A Critical Analysis’ (1999) 116 South African Law Journal 760

C Taylor, ‘"A Delicate Interplay’: Resolving the Contract and Corporate Law Tension in Mergers" (1999) 74 No 2 Tulane Law Review

S Bainbridge, ‘Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud’ (1999) 52 No 4 Southern Methodist University Law Review

S Geisler, ‘Voluntary Disclosure of Corporate Violations of Federal Law’ (1999) 51 Alabama Law Review 375

C Pacini, M Martin and L Hamilton, ‘At the Interface of Law and Accounting: An Examination of a Trend Toward a Reduction in the Scope of Auditor Liability to Third Parties in the Common Law Countries’ (2000) 37 No 2 American Business Law Review

A Dignam and M Galanis, ‘Governing the World: The Development of the OECD’s Corporate Governance Principles’ (1999) 10 European Business Law Review 396

A Studler and E Orts, ‘Moral Principle in the Law of Insider Trading’ (1999) 78 Texas Law Review 375

V Di Lorenzo, ‘Equal Economic Opportunity: Corporate Social Responsibility in the New Millennium’ (2000) 71 No 1 University of Colorado Law Review

B Cheffins, ‘Teaching Corporate Governance’ (1999) Legal Studies 515

J Coffee, ‘Privatization and Corporate Governance: The Lessons from Securities Market Failure’ (1999) 25 Journal of Corporation Law 1

D Hess, ‘Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness’ (1999) 25 Journal of Corporation Law 41

R Sobol, ‘The Benefit of the Internet: The World Wide Web and the Securities Law Doctrine of Truth on the Market’ (1999) 25 Journal of Corporation Law 85

B Hollis, ‘The Unfairness of Applying Lack of Marketability Discounts to Determine Fair Value in Dissenters’ Rights Cases’ (1999) 25 Journal of Corporation Law 137

N Holladay, ‘The Limited Fiduciary Duties Owed by Corporate Managers to Preferred Shareholders: A Need for Change’ (1999-2000) 88 No 1 Kentucky Law Journal

J Sarra, ‘Corporate Governance Reform: Recognition of Workers’ Equitable Investments in the Firm’ (1999) 32 Canadian Business Law Journal 384

Case Western Reserve Law Review, Vol 50 No 2, Winter 1999. Special Symposium Issue on the Legacy of Henry Manne. Articles include:

- W Carney, ‘The Legacy of "The Market for Corporate Control" and the Origins of the Theory of the Firm’

- F McChesney, ‘Manne, Mergers, and the Market for Corporate Control’

- C Smith, ‘On the Market for Corporate Control’

- J Macey, ‘Securities Trading: A Contractual Perspective’

- R Thompson, ‘Insider Trading, Investor Harm, and Executive Compensation’

- R Painter, ‘Insider Trading and the Stock Market Thirty Years Later’

- D Haddock, ‘Academic Hostility and SEC Acquiescence: Henry Manne’s Insider Trading’

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Revisiting the Regulatory Framework - Professor Low Chee Keong, School of Accountancy, Chinese University of Hong Kong, Hong Kong

The Internet and the Malaysian Code on Corporate Governance - Mr Brent Fisse, Partner, Gilbert & Tobin, Sydney, Australia

The Complexities of Emerging Capital Instruments - Mr I G Chandran, Senior Partner, KPMG

Corporate Governance in Malaysia: The Future - YBhg Dato Megat Najmuddin Khas, President,Malaysian Institute of Corporate Governance and Federation of Public Listed Companies of Malaysia

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