SAI GLOBAL

29 February 2016 > Regulatory Newsfeed

SAI Global Corporate Law Bulletin No. 222>

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Bulletin No. 222

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Published by SAI Global on behalf of Centre for Corporate Law and Securities Regulation, Faculty of Law, The University of Melbourne with the support of the Australian Securities and Investments Commission, the Australian Securities Exchange and the leading law firms: Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison.

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1. Recent Corporate Law and Corporate Governance Developments

1.1 IOSCO Responses to Global Securities Market Challenges

On 22 February 2016, the Board of the International Organization of Securities Commissions (IOSCO) discussed and endorsed intensifying work on technological change - with a focus on harnessing the opportunities while mitigating the risks. The Board:

- agreed on further research on financial technology subsectors with particular relevance for securities regulators, including blockchain
- supported further work on the use and regulation of automated advice tools in securities markets and understanding the risks arising from the use of cloud technology;
- discussed a report on IOSCO's work addressing the challenges of cyber risk; and
- heard updates on the work of the Growth and Emerging Markets Committee on digitization and fintech.

On capacity building and co-operation, the Board took a number of steps to assist IOSCO members in both developed and growth and emerging markets. The Board:

- approved the framework for a Global Certificate Program and designed specifically for market regulators;
- welcomed the completion of an Online Toolkit for Regulatory Capacity Building to be launched in March;
- progressed work on the enhanced IOSCO Multilateral Memorandum of Understanding on cooperation and the exchange of information, with a view to seeking Presidents' Committee approval in May; and
- supported further work on regulator powers to compel witness statements on behalf of a foreign securities regulator and another proposal about regulators taking enforcement action based on sanctions in foreign jurisdictions.

1.2 ESMA Publishes First Supervisory Convergence Work Program

On 11 February 2016, the European Securities and Markets Authority (ESMA) published its first Supervisory Convergence Work Program 2016 (SCWP), which details the activities and tasks it will carry out to promote sound, efficient and consistent supervision across the European Union.

The priority areas for 2016 are:

- preparing for the sound, efficient and consistent implementation and supervision of MiFID 2/MiFIR;

- finalising the data and IT infrastructure needed to support the effective implementation and supervision of MiFID 2/MiFIR and MAR;
- facilitating the sound and consistent supervision of OTC derivatives markets and in particular of EU CCPs; and
- supporting the effective application of the European Commission's Capital Markets Union plan.

1.3 SEC Adopts Cross-Border Security-Based Swap Rules Regarding Activity in the US

On 10 February 2016, the US Securities and Exchange Commission voted to adopt rules that require a non-US company that uses personnel located in a US. branch or office to arrange, negotiate, or execute a security-based swap transaction in connection with its dealing activity to include that transaction in determining whether it is required to register as a security-based swap dealer. The rules, adopted under the Dodd-Frank Wall Street Reform and Consumer Protection Act, would help ensure that both US and foreign dealers are subject to Title VII of the Act when they engage in security-based swap dealing activity in the United States.

The final rules would require a non-US person using personnel located in a US branch or office to arrange, negotiate, or execute a transaction to include such transaction in its de minimis threshold calculations even if the transaction was executed anonymously and cleared. The final rules would also except those international organizations that are excluded from the definition of US person in Exchange Act rule 3a71-3(a)(4)(iii) from the requirement that non-US persons include in their dealer de minimis threshold calculations transactions that they arrange, negotiate, or execute using personnel located in a US. branch or office.

Read the Fact Sheet: Cross-Border Security-Based Swap Rules Regarding Activity in the United States

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1.4 CEO Succession Study

On 9 February 2016, the Governance Institute of Australia reported that, research by the Adelante Group shows that CEO tenure is less than five years on the ASX200, 30-40% of CEOs fail in their first three years, and it can take ten years to recover from a poor CEO selection. Its research also shows that in 2013, 68% of ASX200 CEO appointments were internal candidates, which is below the global average of 76%, yet external candidates have twice the failure rate, shorter tenures and deliver just half the shareholder returns of internal candidates.

The Governance Institute also notes that PwC has also recently made available, *15th annual CEO succession study: The value of getting CEO succession right*, looking at CEO succession trends at the 2,500 largest public companies in the world. In comparison to other companies internationally, where CEO succession is planned 86% of the time, Australian companies undertake planned CEO succession only 77% of the time. The report indicates that high-performing companies are more likely to recruit their CEO internally, and internal CEO succession is part of the culture of the company, with high-performing companies appointing one internal candidate after another 82% of the time, significantly more than low-performing companies.

The report also shows that, in Australia, there was 35% more turnover of the CEO in leading companies than in comparison with leading companies globally. Australian CEO turnovers result in a shareholder loss of approximately AU$8 billion. Not surprisingly, forced CEO turnovers lead to significantly more shareholder loss than planned CEO succession.

1.5 Revised Draft Independence Standard for Auditors

On 4 February 2016, the International Ethics Standards Board for Accountants (IESBA) made available Limited Re-exposure of Proposed Changes to the Code Addressing the Long Association of Personnel with an Audit Client (the ED) for public comment. The ED relates to the IESBA's project to develop more robust and comprehensive provisions dealing with the long association of personnel with an audit or assurance client. It contains a basis for conclusions regarding proposals that have been finalized, as well as the limited re-exposure of three remaining issues.

The proposals being re-exposed are:

- an increase from two to five years in the cooling-off period for the engagement quality control reviewer (EQCR) on the audit of a listed entity, and to three years on the audit of a public interest entity (PIE) other than a listed entity;
- an alternative approach to the cooling-off requirements for PIE audits in the *Code of Ethics for Professional Accountants* (the Code) where jurisdictions have established different but robust legislative or regulatory safeguards to address the threats to auditor independence created by long association; and
- a revised approach to determining how long an individual should cool off after having served either as an engagement partner (EP) or as an EQCR, or in a combination of roles, for only part of the seven-year period they have served as a Key Audit Partner.

Included in the ED are revised provisions addressing other long association proposals that the IESBA has now finalized, including:

- an increase in cooling-off period for EPs from two to five years on audits of all PIEs; and
- additional restrictions on activities that can be performed during the cooling-off period.

1.6 Cross Border M&A Study

In February 2016, the International Institute for the Study of Cross-Border Investment and M&A (XBMA) has published the XBMA Annual Review 2015. Key findings are:

- Global M&A reached an all-time high in 2015, with record volume of almost US$5 trillion, beating 2007's prior (inflation adjusted) record of US$4.7 trillion.
- 2015 accounted for the highest cross-border deal volume (US$1.6 trillion) since the financial crisis, with cross-border deals announced in 2015 accounting for four out of the 10 largest deals of the year (Pfizer's acquisition of Allergan, AB InBev's acquisition of SABMiller, Royal Dutch Shell's acquisition of BG Group, and Teva Pharmaceutical's acquisition of Allergan's generic drug business).
- "Megadeals" dominated the deal landscape in 2015, with six deals over US$50 billion and 152 deals over US$5 billion.
- Drivers of the robust activity included a number of financial factors, such as strong corporate earnings, large corporate cash balances in search of yield, continued availability of attractive debt financing to well-capitalised borrowers, and still relatively high stock prices, as well as business factors including industry consolidation in a number of sectors and a thirst for technology and brands in growing economies.

1.7 Review of FTSE350 companies' environmental reporting

In January 2016, the Climate Disclosure Standards Board (CDSB) made available Comply or Explain: A review of FTSE 350 companies' environmental reporting and greenhouse gas emission disclosures in annual reports.

The report reviews the disclosure of environmental information in FTSE 350 companies' annual reports following the implementation of the UK Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013. The report also

provides some sector analysis and uses examples to illustrate current practice. The aim is to inform companies, regulators and governments of current reporting practices and their implications for the implementation of the EU Non-Financial Reporting Directive, as well as for the further development of corporate reporting. CDSB is an international consortium of business and environmental NGOs.

A key finding of the report is that although environmental factors feature as principal business risks, those risks are not always reflected in the key performance indicators used by management to monitor the company's progress. By sector, environmental matters are identified as a principal risk by 38% of discretionary, 73% of energy, 54% of industrial and 37% of IT companies. However, they are represented in KPIs in 29%, 20%, 39% and 21% of companies in each of these respective sectors. Companies also struggle to communicate how environmental matters will affect the future development, performance and position of their business.

1.8 Resilience and Collateral Protection and Client Money Reforms

On 29 January 2016, the Australian Government released the Explanatory Memorandum, Explanatory Statement and exposure drafts of the Financial System Legislation Amendment (Resilience and Collateral Protection) Bill 2016 (the Bill) and the Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016 (the Regulation).

The Bill will amend the Payment Systems and Netting Act 1998 (Cth) and associated provisions in other Acts to:

- enable entities subject to Australian law to give, and enforce rights in respect of, margin provided by way of security in connection with certain financial market transactions in a manner consistent with international requirements;
- clarify domestic legislation to support globally coordinated policy efforts and provide certainty about the operation of Australian law in relation to the exercise of termination rights (also known as close-out rights) under certain financial market transactions; and
- enhance financial system stability by ensuring legal certainty for the operation of approved Real Time Gross Settlement (RTGS) systems, approved netting arrangements and netting markets (more specifically, market netting contracts) in all market conditions.

The Bill also makes consequential amendments to the Banking Act 1959 (Cth), Financial Sector (Business Transfer and Group Restructure) Act 1999 (Cth), Insurance Act 1973 (Cth); Life Insurance Act 1995 (Cth); and Private Health Insurance (Prudential Supervision) Act 2015 (Cth).

The Regulation is intended to allow trustees of regulated superannuation entities and life companies to grant security in the manner required to access certain international capital markets and liquidity.

1.9 NASDAQ Proposal Would Require Listed Companies to Disclose Certain Third-Party Payments Made to Directors and Director Nominees

On 28 January 2016, NASDAQ issued a proposed rule change that would require NASDAQ-listed companies to disclose certain payments made by third parties to their directors or director nominees. The proposal is intended to address concerns that arise when a shareholder privately offers to compensate director nominees in connection with those nominees' candidacy or service as a director. These arrangements vary, but may include compensating directors based on achieving benchmarks such as an increase in share price over a fixed term.

The proposal states NASDAQ's belief that these currently undisclosed compensation arrangements may:

- Lead to conflicts of interest among directors and call into question their ability to satisfy their fiduciary duties.
- Promote a focus on short-term results at the expense of long-term value creation.

Under the proposal, a listed company would be required to publicly disclose, on or through its website or proxy statement for its next annual meeting (or, if it does not file proxy statements, in its Form 10-K or 20-F), all agreements and arrangements between any director or director nominee and any person or entity (other than the company) that provide for compensation or other payment in connection with that person's candidacy or service as a director.

The proposed rule change requires SEC approval.

1.10 M&A in 2015 Study

On 28 January 2015, Thomson Reuters provided data which indicates that, in 2015 worldwide M&A activity rose by 42% in dollar value from comparable 2014 levels, making 2015 the strongest year for deal-making on record. Powered by 71 announced deals valued over US$10 billion, which accounted for 41% of announced M&A value, worldwide M&A totalled US$4.7 trillion during 2015, the

strongest annual period for worldwide deal-making since Thomson Reuters began record-keeping in 1980.

Overall, 42,313 worldwide deals were announced during 2015, only a 0.2% increase above the 42,220 deals announced in 2014.

The rise in total, worldwide M&A activity can be attributed in large part to a year-long parade of mega-sized, US-based M&A deals. According to Thomson Reuters, announced M&A deals for US-based target companies accrued a total of US$2.34 trillion in deal value during 2015, a 64.3% increase over 2014. US activity accounted for 49% of the US$4.7 trillion of worldwide M&A in 2015, compared to 2014 when US-based deals totalled US$1.4 trillion in dollar value, or 42.7% of the year's US$3.3 trillion in worldwide M&A.

Read the full What's Market: 2015 Year-End Public M&A Wrap-Up

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1.11 Latest Centre for Corporate Law and Securities Regulation Research Papers

The following are the latest research papers published by members of Melbourne Law School's Centre for Corporate Law and Securities Regulation:

- Regulating by Numbers: The Trend Towards Increasing Empiricism in Enforcement Reporting by Financial Regulators (By George Gilligan, Jasper Hedges, Paul Ali, Helen Bird, Andrew Godwin and Ian Ramsay)
- Directors' Conflicts: Must a Conflict Be Pursued for There to Be a Breach of Duty? (By Rosemary Teele Langford and Ian Ramsay)
- Financial Counselling and the Self-Represented Debtor in the Federal Circuit Court Bankruptcy List: An Analysis of a Recent Pilot Service (by Paul Ali, Lucinda O'Brien and Ian Ramsay)
- Corporate Law Reform in Australia: An Analysis of the Influence of Ownership Structures and Corporate Failure (by Vivien Chen, Ian Ramsay and Michelle Welsh)

2. Recent ASIC Developments

2.1 Consultation on "Sunsetting" Class Order about Share and Interest Sale Facilities

On 16 February 2016, ASIC has released a consultation paper proposing to remake its class order on share and interest sale facilities. The class order is due to expire (sunset) on 1 April 2018.

The new instrument would continue the relief currently given by Share and interest sale facilities [CO 08/10] without significant changes, so that the ongoing effect will be preserved without any disruption to the entities that rely on it. However ASIC is proposing to extend relief to a related body corporate of the product issuer.

Consultation Paper 252 Remaking ASIC class order on share and interest sale facilities (CP 252) outlines ASIC's rationale for proposing to remake the instrument.

The draft ASIC instrument, which reflects the amendments proposed in the consultation paper, is available on ASIC's website under CP 252.

2.2 Consultation on "Sunsetting" Class Order about Financial Product Advice - Exempt Documents

On 16 February 2016, ASIC has released a consultation paper proposing to remake its class order on financial product advice - exempt documents. The class order is due to expire (sunset) on 1 April 2017.

The new instrument would continue the relief currently given by Financial product advice - exempt documents [CO 03/606] without significant changes, so that the ongoing effect will be preserved without any disruption to the entities that rely on it.

Consultation Paper 251 Remaking ASIC class order on Financial product advice - exempt documents (CP 251) outlines ASIC's rationale for proposing to remake the instrument.

The draft ASIC instrument, which reflects the amendments proposed in the consultation paper, is available on ASIC's website under CP 251.

2.3 Report on Decisions on Relief Applications

On 11 February 2016, ASIC has released its latest report outlining decisions on relief applications covering the period 1 June to 30 September 2015.

Businesses frequently approach ASIC for assistance to help make the law work better for them. ASIC uses its discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit or where ASIC can facilitate business or cut red tape without harming other stakeholders.

This is a key part of ASIC's function and, between 1 June to 30 September 2015, ASIC approved 376 relief applications.
Report 467 Overview of decisions on relief applications (June to September 2015) (REP 467) aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the:

- Corporations Act 2001 (Cth) (Corporations Act), or
- National Consumer Credit Protection Act 2009 (Cth) (National Credit Act).

REP 467 also discusses the various relevant publications released by ASIC during the four months.

The report summarises examples of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act and the licensing and responsible lending provisions of the National Credit Act. The report also highlights instances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.

Finally, the report provides examples of decisions that demonstrate how ASIC has applied its policy in practice which ASIC thinks will be of particular interest for capital market participants and for participants in the financial services industry. The report includes an appendix detailing the publicly available individual relief instruments referred to in the report.

2.4 Consultation on "Sunsetting" Property and Management Class Orders

On 8 February 2016, ASIC has released a consultation paper proposing to remake eight class orders that are due to expire (sunset) between 2016 and 2018. The class orders relate to property, strata and management rights schemes. The class orders proposed to be remade are:

- *Class Order [CO 99/463] Serviced strata scheme valuations*, which sunsets on 1 April 2018;
- *Class Order [CO 02/185] Sale of strata units for $500,000 or more*, which sunsets on 1 April 2018;
- *Class Order [CO 02/245] Closed schemes*, which sunsets on 1 April 2017;
- *Class Order [CO 02/303] Management rights schemes-amendment*, which sunsets on 1 October 2017;

- *Class Orders [CO 02/304] Management rights schemes and [CO 02/305] Management rights schemes*, which sunset on 1 October 2016;
- *Class Order [CO 07/189] Management rights schemes where the strata unit cannot be used as a residence*, which sunsets on 1 October 2017; and
- *Class Order [CO 02/182] Real property rental schemes,* which sunsets 1 October 2017.

ASIC also proposes repealing *Class Order [CO 02/183] Small property syndicates* on the basis that it appears that there is no longer significant reliance on this class order. If this appears to be the case after ASIC has considered submissions, the relief provided by the class order can be dealt with on a case by case basis.

ASIC proposes remaking the eight class orders by consolidating seven of them into a single instrument to be known as A*SIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/XX* so that the substantive effect of the relief in each class order is continued beyond the expiration date in a new legislative instrument. *Class Order [02/182] Real Property Rental Schemes* which will be known as ASIC Corporations (Property Rental Schemes) will remain as a stand-alone instrument.

ASIC's preliminary position is that only minor and technical changes be made to the terms of the relief to remake the remaining class orders, as they are operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework.

Consultation Paper 250 Remaking ASIC class orders on property, strata and management rights schemes (CP 250) outlines the class orders to be remade and the rationale for remaking them.

2.5 Guidance on New Protections for Small Businesses Against Unfair Contract Terms

On 2 February 2016, ASIC has released an information sheet about new protections for small businesses from unfair contract terms in standard form contracts. These protections already apply to standard form consumer contacts and will apply to standard form small business contracts from 12 November 2016.

The information sheet provides guidance about the new provisions, including how the law defines a standard form contract and ASIC's expectations that prior to 12 November 2016, businesses will review their standard form contracts.

Read Information sheet "Unfair contract term protections for small businesses"(INFO 211)

2.6 Hochtief AG Admits to Insider Trading Contravention

On 2 February 2016, ASIC has started legal action in the Federal Court of Australia against German construction group holding company Hochtief Aktiengesellschaft (Hochtief AG), seeking a declaration of contravention and a financial penalty order against the company for insider trading.

ASIC's action centres on the early 2014 on-market acquisition of ordinary shares of Leighton Holdings Limited (now called CIMIC Group Limited) by Hochtief AG's subsidiary, Hochtief Australia Holdings Limited (HAHL).

ASIC alleges that Hochtief AG contravened the insider trading provisions of the Corporations Act by procuring HAHL to acquire LEI when, on, 29 January 2014, it varied previous instructions to acquire a large parcel of LEI (by pushing out the last day to purchase the shares from 31 January 2014 to 14 February 2014) while it was in possession of insider information, being that Leighton Holdings Limited's 2013 financial results were likely to be at the high end of previous earnings guidance.
Hochtief AG has admitted the alleged contravention.

Read the full ASIC media release

3. Recent ASX Developments

3.1 ASX Operating Rules - Schedule 10 (Warrants) Amendments

ASX is introducing a number of minor amendments to Schedule 10 (Warrants) of the ASX Operating Rules and Procedures.

The amendments relate to:

- Approval of Warrant Issuers - updating the types of entities that may be Warrant Issuers.
- Removing the application form for Admission to Trading Status from the ASX Operating Procedures. The form will now be as specified by ASX from time to time.
- A new requirement that a Warrant must be a CS Approved Product and removing provisions dealing with paper-based transfers that are only relevant where Warrants are not CS Approved Products.
- Updating the Indemnity and No Guarantee of Viability provisions of the ASX Operating Rules.

The ASX Notice is available on the ASX website.

3.2 ASX Selects Digital Asset to Develop Distributed Ledger Technology for the Australian Equity Market

On 22 January 2016 ASX announced that it has selected US-based firm Digital Asset Holdings, LLC (Digital Asset) to develop solutions for the Australian market utilising Distributed Ledger Technology. ASX has joined 12 other global financial services leaders and made a minority investment in Digital Asset. ASX will work with Digital Asset to design a new post-trade solution for the Australian equity market. The development will take place alongside CHESS, which will continue to operate as normal. This will allow all stakeholders to assess the benefits and implications before a final decision is made on Australia's post-trade technology in 2017.

The media release is available on the ASX website.

3.3 Reports

On 3 February 2016 ASX released:

- the ASX Group Monthly Activity Report; and
- ASX Compliance Monthly Activity Report

for January 2016.

4. Recent Takeovers Panel Developments

4.1 Brisbane Markets Limited - Declaration of Unacceptable Circumstances and Orders

On 10 February 2016, the Takeovers Panel has made a declaration of unacceptable circumstances and final orders in relation to an application dated 6 January 2016 by Brisbane Markets Limited in relation to its affairs.

Background

Brisbane Markets is an unlisted company with more than 50 members and its issued capital consists of 42,500,000 ordinary shares and four industry shares.

The Queensland Chamber of Fruit and Vegetable Industries Co-operative Limited (Brismark) owns 33.89% of Brisbane Markets and holds all four industry shares.

Brisbane Markets is currently the subject of an off-market takeover bid by Produce Markets Queensland Pty Ltd (PMQ), a wholly owned subsidiary of VGI Partners Pty Ltd.

The application concerned, among other things, certain disclosure issues in PMQ's bidder's statement lodged with ASIC on 12 November 2015 and supplementary bidder's statements lodged on 18 December 2015 and 23 December 2015. The bid is currently scheduled to close on 28 March 2016.

The Panel considered that the bidder's statement and supplementary bidder's statements contain information deficiencies, in that in aggregate they:

- do not adequately disclose the terms of a pre-bid deed, PMQ's ability to exercise certain rights under the pre-bid deed, the process by which rights under the industry shares may be varied, PMQ's funding arrangements for its bid and PMQ's intentions in relation to Brisbane Market's future gearing in the event that PMQ obtained less than 100% control of Brisbane Markets; and
- potentially mislead Brisbane Market's shareholders about the bid proceeds that could be distributed to Brismark members if Brismark accepts the bid.

Declaration

The Panel considered that the circumstances were unacceptable:

1. having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on:
   - the control, or potential control, of Brisbane Markets or
   - the acquisition, or proposed acquisition, by a person of a substantial interest in Brisbane Markets and
2. having regard to the purposes of Chapter 6 set out in s. 602 of the Corporations Act 2001 (Cth) (Act) or
3. because they constituted or constitute a contravention of a provision of Chapter 6 of the Act.

Orders

The Panel has made orders that:

- PMQ dispatch a supplementary bidder's statement in a form approved by the Panel so as to address the inadequacies in disclosure and to retract the potentially misleading statements, in each case referred to above

- PMQ provide Brisbane Markets shareholders who have accepted the offer with a withdrawal right
- PMQ give Brismark the supplementary bidder's statement and a cover letter (in a form approved by the Panel which explains why Brismark members are receiving a copy of the supplementary bidder's statement) and
- Brismark distribute both documents to its members.

The Panel will publish its reasons for the decision in due course.

4.2 The President's Club Limited 02 - Declaration and Orders

On 5 February 2016, the Takeovers Panel has made a declaration of unacceptable circumstances and final orders in relation to the remitted application dated 26 June 2012 of The President's Club Limited in relation to its affairs. The application had been remitted to the Panel by the Full Court of the Federal Court of Australia on 4 September 2015.

On 24 December 2015, the Federal Court extended the time for the Panel to make a declaration until the date 6 weeks from the date of the order.

Background

The President's Club is an unlisted public company with more than 50 members. It has been the subject of a previous Panel decision, which was set aside and the matter remitted for determination according to law.

At the date of the application, each President's Club shareholder held ordinary shares (which are voting shares) and a corresponding villa interest.

In July 2011, Palmer Leisure Coolum Pty Ltd (PLC, formerly Queensland North Australia Pty Ltd) acquired 98% of Coeur de Lion Holdings Pty Ltd (CDLH), which owns all the shares in Coeur de Lion Investments Pty Ltd (CDLI). CDLI owns 3,107 shares (approximately 41.4%) in The President's Club.

In March 2012, PLC acquired 221 shares (approximately 2.9%) in The President's Club, taking its total voting power to approximately 44.3%.

PLC lodged a bidder's statement, supplementary bidder's statement and replacement bidder's statement with ASIC but "withdrew" them without making any offers to shareholders.

Declaration

The Panel considers that the July 2011 acquisition of shares was made in contravention of s. 606. That the acquisition contravened s. 606 is consistent with

the findings of the Full Court of the Federal Court. The Panel considers that there are ongoing effects of the s. 606 contravention, which have not been remedied by PLC, that are unacceptable.

The Panel further considers that the March 2012 acquisitions, while not made in contravention of s. 606, were also unacceptable because reliance on item 9 of s. 611 (the "creep exception") was based on the July 2011 acquisition, which contravened s. 606.

Orders

The Panel considers that orders prohibiting the exercise of voting rights attaching to more than 20% of the shares available to be voted, taking into account the restriction on voting by its orders, are an appropriate remedy given the passing of time and the fact that the Act is concerned with control implications over 20%.

The Panel also considers that it should not restrict future "creep" in accordance with item 9 of s. 611 except in two respects. First, there can be no creep for 6 months from the date the orders come into effect and second, the exception is to operate as if only 20% were owned and the additional shares held at the date of the order (that is, those that cannot be voted) do not exist.

The Panel's reasons for its decision are available on its website.

4.3 Sedgman Limited - Panel Declines to Make Declaration

On 3 February 2016, the Takeovers Panel has declined to make a declaration of unacceptable circumstances in response to an application dated 19 January 2016 from Sedgman Limited on the basis of further disclosure provided. The application concerned the takeover offer for Sedgman by CIMIC Group Investments Pty Limited (CGI), a wholly owned subsidiary of CIMIC Group Limited.

Sedgman had sought a declaration of unacceptable circumstances in relation to the right reserved in the offer to deduct the value of franking credits from the offer consideration and disclosure in the bidder's statement.

On 28 January 2016, CGI released a second supplementary bidder's statement, amending the terms of the offer such that it will not deduct the value of franking credits from the offer consideration and providing further disclosure in relation to franking credits, dividend policy, potential board composition and whether there might be delisting of Sedgman.

The Panel considered that the second supplementary bidder's statement sufficiently dealt with the issues raised in Sedgman's application and decided not to make a declaration of unacceptable circumstances.

The Panel's reasons for its decision are available on its website.

5. Recent Research Papers

5.1 How Firms Borrow in International Bond Markets: Securities Regulation and Market Segmentation

The authors investigate how firms in emerging economies choose among the different international bond markets: global, US144A and Eurobond markets. By exploiting the connection between the market of issuance and regulatory disclosure of information, the authors show that firms with poorer credit quality, less ability to absorb flotation costs and more informational asymmetries issue debt in US144A and Eurobond markets, where regulation is lighter and information is less public. On the contrary, firms issuing global bonds - subject to full SEC requirements - are financially sounder and larger. This exercise also shows that, following the global crisis, firms are more likely to tap less regulated debt markets.

The data set comprises 3,944 debt securities, guaranteed by firms of 36 emerging economies, which amount to a total of 1.2 USD trillion in debt issued.

How Firms Borrow in International Bond Markets: Securities Regulation and Market Segmentation

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5.2 In Defence of the Dealers: Why the SEC Should Allow Substituted Compliance with the European Union for Security-Based Swap Dealers

To prevent some of the causes of the 2008-09 financial crisis, legislators around the world enacted laws that regulated the markets for over-the-counter (OTC) derivatives for the first time. These laws, though necessary, have duplicative requirements that dampen market efficiency. In the United States, the Securities and Exchange Commission (SEC) is contemplating a "substituted compliance" regime with other jurisdictions that would allow industry participants to comply with only one jurisdiction's requirements for certain transactions.

This article argues that the SEC should allow substituted compliance for OTC derivatives, but only for dealers transacting with European partners. Some advocate for substituted compliance in a broad sense. These arguments, however,

overlook nuances of the SEC's announced approach. Others argue that the SEC should avoid the concept altogether. Ultimately, if the SEC allows substituted compliance narrowly and thoughtfully, it could preserve the economic benefits of an American financial market, while preventing some causes of the most recent financial crisis.

In Defence of the Dealers: Why the SEC Should Allow Substituted Compliance with the European Union for Security-Based Swap Dealers

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5.3 When are Pre-Crisis Winners Post-Crisis Losers?

Which banks did not recover from the financial crisis, and why? The authors document that pre-crisis high performing US banks were not able to recover and to restore their performance up to eight years after the onset of the crisis. The authors demonstrate that their (risky) business models which allowed them to outperform their peers in the run up to the crisis were not viable anymore afterwards, leading to lagging post-crisis stock returns. Their risk culture and business model were based on low Tier 1 Ratios, high leverage, high market risk and other risk factors, which were not allowed or profitable anymore after the crisis, hence their low post-crisis returns. For Europe, the authors find no significant correlation between pre-and post-crisis bank returns. Risky business models and risk culture were less prominent at European banks, leading to a lower necessity for a fundamental post-crisis transformation.

When are Pre-Crisis Winners Post-Crisis Losers?

5.4 Do Institutional Investors Drive Corporate Social Responsibility? International Evidence

The authors examine whether institutional investors affect a firm's commitment to corporate social responsibility (CSR) for a large sample of firms from 41 countries over the period 2004 through 2013. The authors focus on environmental and social aspects of CSR, while controlling for firms' governance levels. They find that institutional ownership is positively associated with firm-level environmental and social commitments. Further, the "colour of money" matters. Domestic institutional investors and non-US foreign investors account for these positive associations, while US institutional investors' holdings are not related to environmental and social scores. Similarly, higher scores are associated with long-term investors such as pension funds but not with hedge funds. Evidence from a quasi-natural experiment shows that institutional ownership causes improvements in environmental scores. Overall, the results suggest that institutional investors, in

aggregate, use their ownership stakes to promote good CSR practices around the world.

Do Institutional Investors Drive Corporate Social Responsibility? International Evidence

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5.5 Offloading the Burden of Being Public: An Analysis of Multi-Voting Share Structures

Public companies with dual class and multiple voting share (MVS) structures have grown in popularity in the United States as evidenced by Google, Alibaba and Fitbit. While MVS allow founders to retain control of their firms, they undermine corporate governance standards. In particular, MVS structures undermine minority shareholders' rights and render these rights meaningless in the face of the proportionately greater economic risk that minority shareholders bear. Some argue that "caveat emptor" applies: shareholders, armed with full disclosure of a company's capital structure, invest in companies with multiple voting shares at their own risk. But this line of reasoning fails to account for two important aspects of relevant law. First, MVS structures undermine existing accountability mechanisms in corporate law. Second, a securities regime premised on investor protection that equips regulators with the discretionary power to intervene in the public interest calls for further regulation, and perhaps prohibition, of MVS.

Offloading the Burden of Being Public: An Analysis of Multi-Voting Share Structures

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5.6 New Zealand's Financial Adviser Regulation - Falling Behind in the Wake of Overseas Reforms

This article looks at New Zealand's conduct of business rules for financial advisers. It compares New Zealand's rules to conduct of business rules applicable in the United Kingdom and Australia. There are major respects in which New Zealand's conduct of business rules fall behind best practice, particularly with the rules around receipt of commissions. This article proposes that the New Zealand Government should conduct an urgent review of its conduct of business rules for financial advisers, and in particular look at introducing a ban on conflicted remuneration in relation to personal advice given to retail clients. Other areas in need of review are the rules around assessing suitability of advice, and best execution requirements.

New Zealand's Financial Adviser Regulation - Falling Behind in the Wake of Overseas Reforms

6. Recent Corporate Law Decisions

6.1 Carrying on Financial Trading in International Markets on Behalf of Australian Citizens Requires an Australian Financial Services Licence

(By Meagan Ryan, MinterEllison)

Australian Securities and Investments Commission v Munro [2016] QSC 9, Supreme Court of Queensland, Flanagan J, 3 February 2016

(a) Summary

ASIC successfully sought a declaration by the Court that the first respondent had contravened s. 911A of the Corporations Act 2001 (Cth) (Corporations Act), by carrying on a financial service business without holding an Australian Financial Services Licence (AFSL). The Court permanently restrained the first respondent from carrying on a financial services business without holding an AFSL. The Court found the second respondent did not contravene s. 911A and did not aid and abet the first respondent's contravention. However, the second respondent was permanently restrained from permitting or authorising the first respondent from using any bank or brokerage account in the second respondent's name for the purposes of carrying on a financial services business in Australia.

(b) Facts

The respondents were a married couple living in Australia. The first respondent had an extensive history of trading in international markets and solicited family members and friends to contribute predetermined sums of money to a pooled account whereby he would conduct trading. He would pay himself a management fee of 20% of any profit generated and would provide the investors with quarterly reports and pay dividends.

The first respondent used a bank account in the name of the second respondent as well as a brokerage account (Halifax account) in the name of the second respondent. The first respondent passed large sums of investor money through these accounts.

The second respondent was a teacher and remedial massage therapist. She did not have any experience in the financial services industry and did not have any involvement in the operation of the Halifax account. She would sign blank

cheques from her bank account for the first respondent to use to distribute dividends to her and the other investors.

The applicant, the Australian Securities and Investments Commission (ASIC), sought declarations and injunctions from the Court pursuant to ss. 1101B and 1324 of the Corporations Act in relation to alleged contraventions by the respondents of s. 911A of the Corporations Act. In respect of the second respondent, in addition or in the alternative to a declaration that she had contravened s. 911A, ASIC sought a declaration that she had aided or abetted the first respondent to contravene the Corporations Act.

The respondents consented to the injunctions proposed by ASIC and did not oppose the declaratory relief sought. However, as the respondents were self-represented, Flanagan J found it appropriate to deal with the application as a contested application.

Accordingly, to make the declarations sought, the Court had to be satisfied that the respondents had contravened s. 911A and had carried on a financial services business, in this jurisdiction (Australia), without an AFSL.

A further issue for consideration arose regarding the admissibility of transcripts of examinations of the respondents pursuant to s. 19 of the Australian Securities and Investments Commission Act 2001 (Cth) ('ASIC Act'). Neither of the respondents objected to the statements being admitted as evidence, however, due to the self-representation of the respondents, the Court had to be satisfied of the admissibility of the statements.

(c) Decision

Section 911A requires a person who carries on a "financial services business" in this jurisdiction to hold an AFSL. The statutory definition of "financial services business" , in s. 761A of the Corporations Act, means a business of providing financial services. Section 766A(1)(b) of the Corporations Act states that a person provides financial services if they deal in a financial product.

The Court has the power to make certain orders pursuant to s. 1101B if there has been a contravention of Chapter 7 of the Corporations Act. Section 911A is a provision of Chapter 7. The Court has a wide discretion to grant injunctive relief and s. 1324 of the Corporations Act permits the imposition of injunctions where there is a contravention or aiding and abetting of a contravention of the Corporations Act.
It was undisputed by the respondents that, during the relevant time when ASIC alleged they carried on a financial services business, the respondents did not hold an AFSL.

(i) Admissibility of ASIC transcripts

The Court found the transcripts of the respondents s. 19 examinations were admissible as evidence and not subject to privilege, despite the fact that the

transcripts were unsigned by the respondents. Further, even if the statements were not admissible the respondents had made relevant admissions in cross-examination.

In reaching these findings the Court observed that s. 68(3) of the ASIC Act operates to prevent a statement being admissible in evidence against a person in proceedings for the imposition of a penalty. The Court acknowledged that there is a divergence of judicial opinion on what constitutes a proceeding for the imposition of a penalty. However, his Honour did not delve into the divergence, finding it was unnecessary in this case due to the restricted nature of the declaratory and injunctive relief sought which was not punitive in nature. The Court determined the purpose of the relief sought was not punitive, but was to seek compliance by the respondents with the Corporations Act.

(ii) First respondent

The applicant sought a declaration by the Court that the first respondent had contravened s. 911A of the Corporations Act on the basis that he had carried on a business of financial services without an AFSL.

The applicant submitted that the financial services provided by the first respondent were financial products, as the pooling of investment funds for investment by the first respondent was intended to generate profits for the investors. The dealings in the financial services constituted a business as it was the respondent's livelihood and had the necessary "system, repetition and continuity" so as to constitute a business.

The first respondent submitted that he did not carry on a financial services business as the trading was not done in this jurisdiction (Australia), but was done by an overseas entity. However, the Court stated the place of registration of the entity where trading was taking place was irrelevant to whether or not financial investments by the investors occurred in Australia. The relevant conduct occurred in Australia, pursuant to s. 911D of the Corporations Act, as the first respondent's conduct of engaging and soliciting investors occurred in Australia.

The Court agreed with the applicant, and made a declaration that the first respondent had conducted a business of financial services without holding an AFSL in contravention of s. 911A of the Corporations Act. The Court ordered a permanent restraint on the first respondent from carrying on a financial services business without holding an AFSL.

(iii) Second respondent

ASIC sought two declarations against the second respondent: (1) that the second respondent contravened s. 911A of the Corporations Act; and (2) that the second respondent aided and abetted the first respondent's contravention of s. 911A.

The Court found that whilst the second respondent provided a financial service in the form of custodial or depository services by permitting the use of her bank and

brokerage accounts to move funds, there was insufficient evidence to prove she had conducted a financial services business. Her conduct was not a "business" as it was her husband who opened the Halifax account in her name and who operated the account.

In determining whether or not the second respondent had aided and abetted her husband's contravention of s. 911A, his Honour mentioned the operation of s. 79 of the Corporations Act and the uncertainty surrounding its application. In particular, his Honour referred to the uncertainty about whether or not it permits the making of a declaration against a party by virtue of aiding and abetting where the Corporations Act does not impose liability for involvement in a contravention.

The Court was not satisfied there was sufficient evidence to show the second respondent had aided and abetted her husband's conduct given her limited role and knowledge of the first respondent's business. The Court concluded injunctive relief would sufficiently mark the Court's disapproval of the second respondent's conduct and permanently restrained the second respondent from permitting or authorising the first respondent from using any bank or brokerage account in the second respondent's name for the purposes of carrying on a financial services business in Australia.

6.2 Amendments Removing the Rights of Specific Members Under a Company Constitution Must Be Necessary for Business Efficacy

(By Danny Ke, Herbert Smith Freehills)

Wilmar Sugar Australia Limited v Queensland Sugar Limited [2016] FCA 20, Federal Court of Australia, Yates J, 1 February 2016

(a) Summary

In this case, the Federal Court clarified when the removal of member rights in a Company Constitution is unfair and constitutes grounds for a Court Order.

In summary, Yates J held that amendments removing a specific member's rights can be unfairly prejudicial even if the member's interests conflict with the company.

The key takeaway from this case is that courts will consider a number of factors to determine objectively whether a member's rights were unfairly removed. This may include the impact of conflict on the company and whether a removal of rights was necessary for business operation. It follows that companies cannot unfairly discriminate against specific members under the Corporations Act 2001 (Cth) (Corporations Act).

(b) Facts

Queensland Sugar Limited (QSL) is a not-for-profit company that seeks to promote the development of the Queensland sugar industry by maximising net returns of sugar exports. QSL provides its members with financing, pricing, marketing and logistics services.

Wilmar Sugar Australia Limited (Wilmar) owns and operates eight sugar mills and is Australia's largest raw sugar producer.

QSL and Wilmar entered into a Raw Sugar Supply Agreement (RSSA) where Wilmar agreed to pass on 100% of their manufactured raw sugar to QSL, with the exception of any Supplier Economic Interest Sugar (SEIS). Under the RSSA, sugar mills were permitted to privately market and sell SEIS .

In November 2010, QSL amended Article 22(e) of their Company Constitution (Constitution) and removed the right of mill owner members to vote on any resolution if they had given notice of termination. Article 22 of the Constitution was expressed as 'Subject to this Constitution'.

On 21 May 2014, Wilmar gave notice of termination to QSL stating it would not extend the RSSA. Wilmar would effectively become a direct competitor in the sugar market once the agreement was terminated on 30 June 2017.
In December 2015, QSL amended Article 31 of the Constitution which restricted the power to appoint mill owner directors to continuing mill owners. Continuing mill owners were defined as members who held a RSSA and to whom Article 22(e) did not apply (2015 Amendments).

Wilmar commenced proceedings against QSL alleging the 2015 Amendments were oppressive, unfairly prejudicial or discriminatory against Wilmar in their capacity as a member.

Specifically, Wilmar alleged that:

- they had lost their right under the Constitution to participate in the management of QSL, despite being a member of the company with a current RSSA; and
- the loss of these rights was unfair.

In response, QSL alleged that:

- the 2015 Amendments did not cause any loss of rights as Article 22(e) of the Constitution had already removed the right to participate in management; and
- even if the 2015 Amendments led to a removal of rights, these changes were fair as Wilmar had become a direct competitor in the export sugar market and changes were necessary to ensure the future competitiveness of QSL.

Section 232 of the Corporations Act allows the Court to make an order under s. 233 if a resolution of the company is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, members in any capacity.

Section 233 of the Corporations Act permits the Court to make any order that it considers appropriate, including modifying or repealing the company's existing constitution.

(c) Decision

The Federal Court held that QSL had breached the Corporations Act and the 2015 Amendments were unfairly oppressive against Wilmar. In reaching his decision, Yates J considered whether there was a removal of rights, and if so, was this removal unfair and discriminatory.

(i) Any qualified provisions are generally subordinate to an unqualified provisions

The Court held that the 2015 Amendments directly caused the loss of rights to participate in management and affected Wilmar's capacity as a member.

Yates J noted that where conflicting provisions exist, qualified provisions are "subordinate or subservient to the unqualified provision".

Article 22(e) and Article 31 both sought to remove the right to appoint directors. However, as Article 22 was expressed "subject to this Constitution", his Honour found the unqualified 2015 Amendments directly caused the removal of the right to appoint mill owner directors.

(ii) An objective consideration is required to determine the fairness and validity of the loss of rights

The Court further found that reasonable members would find that the 2015 Amendments were unfair, despite the changed competitive environment in the export sugar market. His Honour stated QSL had failed to consider a number of important circumstances in ascertaining the fairness of the discrimination.

Yates J held that the following circumstances indicated the removal of rights was unfair and unnecessary:

- Wilmar remained obliged to provide 100% of their raw sugar to QSL even after giving notice of termination, and this ensured a "very real and significant continuing commercial interest" in QSL;
- a competitive environment existed prior to giving notice of termination through the private sale of SEIS;
- the competitive environment of SEIS had not previously provided difficulties for QSL's internal management;
- despite giving notice of termination, any appointed directors would remain subject to fiduciary and statutory duties owed to QSL; and

- the 2015 Amendments conferred significant discretion on the remaining mill owner members.

(iii) Court Orders

By way of declaratory relief, his Honour ordered QSL to remove the oppression and unfairness caused by the 2015 Amendments pursuant to s. 233 of the Corporations Act. Yates J stated he was willing to consider variations in the form of relief, but suggested Article 31 be removed and replaced by Article 31 in its form before the 2015 Amendments.

6.3 Court Reinstates the Registration of a Company Under Section 601AH(2) of the Corporations Act 2001

(By Jason Choi, DLA Piper)

Elsworthy v Australian Securities and Investments Commission [2016] VSC 14, Supreme Court of Victoria, Derham AsJ, 22 January 2016

(a) Summary

Sonja Ejvor Elsworthy (Plaintiff) sought an order under s. 601AH(2) of the Corporations Act 2001 (Cth) (the Act) directing the Australian Securities and Investments Commission (ASIC) to reinstate the registration of 164 Fyans Street Pty Ltd (ACN 153 001 515) (Company).

In considering the Plaintiff's application for reinstatement, Derham AsJ considered, inter alia, whether the Company's deregistration prejudiced the Plaintiff, the circumstances that led to the Company's deregistration and the financial position of the Company. His Honour was satisfied that the two limbs of s. 601AH(2) of the Act were met, and decided to exercise his discretion to order ASIC to reinstate the registration of the Company.

(b) Facts

The Plaintiff and her husband, Trevor Bruce Elsworthy, were the trustees of the T & S Superannuation Fund (the Super Fund). In 2011, the Company was established to hold the property at 164 Fyans Street, Geelong, Victoria (Trust Property) on trust for the trustees (as Custodian). The trustees agreed to indemnify the Company against all liabilities incurred by the Company in acting as Custodian.

In about July 2013, Morris Finance Ltd (Morris Finance) lodged a caveat against a property owned by the Company. In April 2014, the Company commenced proceedings in the Supreme Court of Victoria seeking removal of the caveat and

was successful. In March 2015, the Company filed a summons for taxation in the Costs Court to enforce the costs order made in consequence of the removal of the caveat against Morris Finance. In April 2015, Morris Finance's solicitors wrote to the Company's solicitors in the taxation proceeding notifying them that the Company had been deregistered in February 2015 and that all the actions that the Company had undertaken since its deregistration were of no force or effect. ASIC had in fact deregistered the Company on 2 February 2015 under s. 601AB of the Act. Section 601AB gives ASIC discretion to deregister a company on a number of grounds. For example, under s. 601AB(1) ASIC may deregister a company if the company's response to a return of particulars given to the company is at least six months late, the company has not lodged any other documents under the Act in the previous 18 months and ASIC has no reason to believe that the company is carrying on business.

A consequence of the Company's deregistration was that it prevented the Company from enforcing the order for costs arising out of the removal of the caveat. As such, the Plaintiff sought an order under s. 601AH(2) of the Act directing ASIC to reinstate the Company.

(c) Decision

Derham AsJ exercised his discretion under s. 601AH(2) to order ASIC to reinstate the registration of the Company. Under s. 601AH(2) the court is empowered to order ASIC to reinstate the registration of a company if an application for reinstatement is made to the court by a person aggrieved by the deregistration and the court is satisfied that it is just that the company's registration be reinstated.

In coming to this decision, his Honour first discussed the two requirements under s. 601AH(2) and then assessed whether the two requirements were satisfied in this case.

(i) The two limbs of section 601AH(2)

Requirement 1 - an applicant must be a "person aggrieved"

Derham AsJ stated that a person will be aggrieved by deregistration of a company if the person has a "real and direct interest in the deregistration". His Honour cited various case law (including *Arnold World Trading Pty Ltd v ACN 133 427 335 Pty Ltd* [2010] NSWSC 1369 and *Re Brockweir Pty Ltd* [2012] VSC 225) and stated that the mere fact that a person is a shareholder or a director of a deregistered company, without more, is insufficient to establish that a person is a person aggrieved within s. 601AH. Rather, his Honour stated that an applicant must show that his or her interests have been or are likely to be prejudicially affected by the deregistration of the company.

Requirement 2 - the court must be satisfied that it is "just" to reinstate a company's registration

Derham AsJ stated that the wording of s. 601AH(2) is broad and that case law confirms that courts have a wide discretion in determining whether it is "just" to reinstate a company's registration. His Honour stated that, without limiting the Court's power, the matters that the Court takes into account in addressing the issue include:

- the circumstances in which the company came to be dissolved;
- whether, if the order were made, good use could be made of it (including whether the reinstatement would be futile); and
- whether any person is likely to be prejudiced by the reinstatement.

(ii) Was the Plaintiff a "person aggrieved"?

Derham AsJ held that the Plaintiff was a "person aggrieved". His Honour agreed with the Plaintiff's contention that the Company's deregistration specially affected her interests. The Company had expended or become liable for the expenditure of funds for the costs in the Costs Court proceeding. The Plaintiff, through the indemnity given to the Company as trustee, was liable for the costs expended. Moreover, as the sole surviving trustee of the Super Fund, the Plaintiff was entitled to recover from the Super Fund the costs and expenses for which she was liable to the Company. This reduced the Plaintiff's entitlement to the benefits available under the Super Fund. Ultimately, the Company's deregistration was a cause of dissatisfaction to the Plaintiff in that she was unable to recover the costs for which she was liable to indemnify the Company.

(iii) Was it "just" for the Court to reinstate the Company's registration?

Derham AsJ held that it was just to reinstate the Company's registration. His Honour rejected Morris Finance's contention that if the Plaintiff was a person aggrieved, the Plaintiff's application for reinstatement should be refused by reason of the Plaintiff's failure to properly explain how the Company came to be deregistered, the financial position of the Company and the financial position of the Super Fund.

His Honour considered the circumstances in which the Company had become deregistered and was of the view that the Company's deregistration came down to an administrative oversight by the Company accountant in not dealing with a letter from ASIC giving notice of its intention to deregister the Company. In response to Morris Finance's contention that the Super Fund had no assets, Derham AsJ agreed with the Plantiff's submission that on the basis of the Company accountant's experience and opinion that the Super Fund was solvent and able to indemnify the Company in respect of the costs incurred in its name, it was open to the Court to find there was substance to the indemnity provided by the Super Fund via the trustee to the Company. As such, his Honour was satisfied that the Company was not insolvent and would not be insolvent if reinstated.

6.4 Court Rules on Takeovers Panel's Ability to Extend Time

(By Claire Koller-Smith, Herbert Smith Freehills)

Palmer Leisure Coolum Pty Ltd v Takeovers Panel [2015] FCA 1498, Federal Court of Australia, Greenwood J, 24 December 2015

(a) Summary

The Federal Court has upheld the Takeovers Panel's power to extend the time for applications to the Panel for a declaration of unacceptable circumstances to be made, where the effect of the unacceptable circumstances is ongoing and it would be consistent with the purposes of Chapter 6 to allow the extension.

(b) Facts

The case involved an application by The President's Club Limited (TPC) to the Takeovers Panel (Panel) for a declaration of unacceptable circumstances in relation to the acquisition by Couer de Lion Investments Pty Ltd, a company associated with Palmer Leisure Coolum Pty Ltd (formerly known as Queensland North Australia Pty Ltd) (PLC), of a relevant interest in 41.4% of the issued capital in TPC through two transactions which occurred in July 2011 and March 2012 (respectively).

The Panel had received TPC's application on 26 June 2012. Section 657C(3)(a) of the Corporations Act 2001 (Cth) (Corporations Act) requires an application to be made within two months after the relevant circumstances have occurred. While the last acquisition of TPC shares had occurred more than two months before TPC's application to the Panel, the Panel took the view that it was unnecessary to extend the time under s. 657C(3) for the making of TPC's application, as the circumstances - being the acquisition of more than a 20% interest in TPC, in breach of s. 606 of the Corporations Act - were "ongoing circumstances" and thus a period of two months had not expired "after the circumstances occurred". Since the relevant circumstances had not, in the Panel's view, come to an end, the first Panel took the view that TPC's application was within time and properly made within s. 657C(3). The Panel went on to make a declaration of unacceptable circumstances on 24 July 2012.

On 21 September 2012, PLC commenced proceedings in the Federal Court of Australia, seeking judicial review of the Panel's decision. On 5 June 2014, Collier J determined that the Panel's decision that the circumstances were "ongoing", and thus an extension of time was not necessary, was correct. On 24 June 2014, PLC appealed to the Full Court. The Full Court gave judgment on 22 May 2015, deciding to allow the appeal, setting aside both the orders of Collier J and the first Panel's declaration of unacceptable circumstances and orders. The Full Court also decided that the matter, including the decision whether to extend time, should be remitted to the Takeovers Panel to be considered by a newly constituted Panel.

In remitting the matter to the Panel, the Full Court observed that it did not know what had transpired in the market since the original acquisitions of shares by PLC (which were the subject of the Panel hearing) had occurred and, although the passage of time might have suggested that the matter should not be remitted to the Panel, it was by no means clear to the Full Court that remitting the matter to the Panel would be a futile exercise.

The Panel to which the matter was remitted, constituted by Mr Peter Day, Ms Michelle Jablko and Mr Ian Jackman SC, considered the matter and on 6 November 2015 decided to extend the period of time within which TPC's application to the Panel can be made, as the Panel is empowered to do under s. 657C(3)(b) of the Corporations Act, and to apply to the court under s. 657B for an extension of the period of time within which the Panel may make declarations of unacceptable circumstances.

In summary, the Panel took the view that it was undesirable that TPC's application be allowed to go unheard, even though it was lodged out of time, in circumstances where an earlier Panel, a first instance judge of the Federal Court and the Full Court of the Federal Court had found the underlying facts to give rise to a contravention of s. 606, and where the control implications and impact on other shareholders and TPC were ongoing.

The matter came before Greenwood J in the Federal Court, where the Court heard two applications together:

- the first, an application by PLC and its associated entities for orders under the Administrative Decisions (Judicial Review) Act 1977 (Cth) setting aside the decision made by the Panel on 6 November 2015 under s. 657C(3)(b) of the Corporations Act to extend the time for TPC to make its Panel application; and
- the second, the Panel's application under s. 657B (foreshadowed in its 6 November 2015 decision) for an order that the time within which the Panel may make a declaration under s. 657A of the Corporations Act be extended to four weeks from the date of the Court's decision on the application.

Greenwood J's decision focussed on an analysis of the Full Court's findings in *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68; (2015) FCR 150 and Q*ueensland North Australia Pty Ltd v Takeovers Panel (No 2)* [2015] FCAFC 128. In those decisions, the Full Court distinguished between finite circumstances on one hand and the effect of those circumstances, which are what can render those circumstances unacceptable, on the other. On this analysis, the acquisitions of TPC shares occurred on identifiable dates, and thus the circumstances had a beginning and an end. It was the effects of those circumstances on other shareholders of TPC which were ongoing.

(c) Decision

(i) Extension of time under section 657C(3)(b)

Greenwood J considered the Panel's reasons for granting the extension of time and found that, on an analysis of those reasons, the contention that the Panel had incorrectly applied the law could not be supported.
The Court found that the Panel's reasons clearly showed that it had correctly applied the Full Court's decisions in the Queensland North Australia Pty Ltd v the Takeovers Panel decisions, and had drawn the distinction between the circumstances, which had ended, and their ongoing effect. Greenwood J also found that the Panel had not taken into account irrelevant considerations in reaching its decision.

(ii) Extension of time under section 657B

When deciding whether to extend the time for the Panel to make a declaration under s. 657B, the Court noted that the real question to be addressed is whether the statutory purpose of Chapter 6 of the Corporations Act could be achieved if time is extended.

Greenwood J observed that there are a number of statutory purposes of Chapter 6 set out in s. 602. One is to ensure that the acquisition of control over the voting shares in a relevant company takes place in an efficient, competitive and informed market: s. 602(a). Another is that, as far as practicable, the holders of the relevant class of voting shares all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in a company: s. 602(c).

The Court observed that PLC had, on the face of the material, acquired a relevant interest in a substantial proportion of the shares of TPC and had subsequently acquired further shares in March 2012. PLC continued to assert control over those shares and there continued to be effects upon other shareholders deriving from the circumstances of the acquisition, and the effect of those circumstances amounted to, at the least, a strongly arguable contravention of s. 606 of the Corporations Act.

According to the Court, s. 657A does not operate only in the circumstances of a takeover bid. It contemplates circumstances which might be unacceptable having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on the control, or potential control, of the company or the acquisition or proposed acquisition, by a person of a substantial interest in the company.

Greenwood J noted that in all other decisions concerning applications for extensions of time under s. 657B he had reviewed, very short time periods were sought, in some cases a matter of days and in other cases some matters of weeks. However, in the present case, the long delay was attributable to the original proceedings in the Federal Court and Full Court, and that the Panel had acted promptly after orders were made by the Full Court on 4 September 2015.

On this basis, Greenwood J found that, as PLC continued to assert a position of control in TPC which derived from the acquisitions, notwithstanding the long period of time for which the extension was sought, the Panel was the appropriate

forum for considering the question on remittal and that, in light of the "very particular circumstances" (at [242]), granting the extension of time sought by the Panel was warranted and would serve the statutory purpose of Chapter 6, and the court made orders to that effect.

6.5 Substance Over Form for Prohibited Termination Benefits

(By Katrina Sleiman and Sophie Morton, Corrs Chambers Westgarth)

Discovery Africa Ltd v Nichol [2015] FCA 1497, Federal Court of Australia, Gilmour J, 23 December 2015

(a) Summary

Discovery Africa Ltd (Discovery Africa) applied for summary judgment against two former executives, who had received substantial payments from the company upon their resignation, in contravention of s. 200B of the Corporations Act 2001 (Cth) (Act). Under the Act, it is a strict liability offence to receive a benefit in connection with the retirement of a person of managerial or executive office, which has not been approved by the company members under s. 200E of the Act. Discovery Africa sought orders, under s. 200J of the Act, that the money was held on trust for it.

The judgment considered the circumstances in which a payment to executives will be a benefit given in connection with a resignation under s. 200B. In light of the policy rational for the statutory scheme, which is broadly to protect shareholders and the public from the effect of "golden handshakes", it is necessary to look to the substance of any payment, not its legal form. Gilmour J found that the sums paid to the executives were a benefit received in contravention of s. 200B and that their defences had no reasonable prospect of success. Accordingly, summary judgment was entered in favour of Discovery Africa.

(b) Facts

The applicant, Discovery Africa, brought an application for a summary judgment in respect of claims against the first respondent, Nichol and the second and third respondents, Van Den Berg and Sindise Mining CC (Sindise).

Nichol was appointed Managing Director of Discovery Africa in November 2012 and was also a director of, and employed by, Baru Singapore Pte Ltd (Baru). Van Den Bergh was a Director of Discovery Africa and also provided consultancy services to the company through Sindise, which was controlled by him. In April 2014, Nichol and Van Den Berg retired from executive roles within Discovery Africa, ahead of a boardroom spill which would likely see them removed from office. Each of them entered into Deeds of Release with Discovery Africa. On the

day Nichol and Van Den Berg retired, the company paid them $274,005.78 and $185,338.50 respectively.

Discovery Africa submitted that the payments contravened s. 200B of the Act, as they were not made with member approval under s. 200E. Under s. 200B(1A), a contravention of s. 200B(1) is a strict liability offence. Where a benefit is received in contravention of s. 200B, s. 200J provides that the money received is held on trust for the giver and is a debt due to the giver, which may be recovered by the giver in Court. The submissions of Nichol and Van Den Berg primarily argued that the payments were not a benefit under s. 200B and, due to contractual arrangements which provided for an intermediary step between payment by Discovery Africa and receipt of the funds by the executives, the payments were not made in connection with their resignation.

(c) Decision

In order for Discovery Africa to be successful it needed to show that the respondents had no reasonable prospects of defending the claim. The respondents accepted that Discovery Africa was "an entity" within the meaning of the legislation, but put the balance of the claim's elements in issue.

(i) "Benefits"

In considering whether a benefit had been paid to the executives, the economic and commercial substance of the conduct, rather than legal form, was critical. Section 200AB of the Act inclusively defines "benefit", which expressly includes a payment.

Gilmour J was not persuaded by submissions that Nichol and Van Den Bergh had not received a benefit from Discovery Africa, as the company paid Baru and Sindise respectively and not the directors themselves. In substance, the payments were found to be a benefit. In considering the payments, Gilmour J noted that it would undermine the objectives of the Act to characterise payments made through an intermediary as something other than a "benefit".

(ii) "In connection with"

In order to be in breach of the Act, s. 200A(1)(a) requires that the benefit be given by way of compensation for, or otherwise in connection with, the loss by the person of the office. There is no need for a direct link between the benefit and the executive's resignation and the circumstances are to be considered widely.

Nichol again argued that, as Baru ultimately paid him, the benefit was not connected with his resignation. Van Den Bergh similarly argued that, as Sindise received the payment, it was not connected to his resignation. In rejecting these submissions, Gilmour J found that Nichol's resignation was the "catalyst" for executing his Deed of Release, and that, absent his resignation, payment would not have been made. Gilmour J also found that, in substance, Van Den Bergh was

employed by Discovery Africa and Sindise was simply a vehicle to reduce his income tax.

(iii) "Managerial or executive office"

Only Van Den Bergh contended that he did not hold a managerial or executive office. In rejecting Van Den Bergh's submissions, Gilmour J looked to the function of Van Den Bergh's role. As he performed the duties and responsibilities of the Executive Chairman and was responsible for the day to day management of Discovery Africa, he was held to have a "managerial or executive office".

(iv) Exempt benefits

Nichol submitted that the payments made by Discovery Africa constituted part of the consideration for his agreeing to be employed by Baru, and were therefore exempt under s. 200F(2). However, the exemption only arises where the payment is made by the company, Discovery Africa, and it relates to consideration for the executive agreeing to hold an office of that company. As Nichol was not employed by Discovery Africa, but Baru, the exemption did not arise.

(v) Approved benefits

Both Nichol and Van Den Bergh submitted that the payments were approved by members in accordance with s. 200E of the Act. This contention was rejected as the notice of general meeting did not include the resolution details required by s. 200E(2), including information relating to the proposed benefit and the amount of the payment. Accordingly, the payment was not permitted by virtue of member approval.

(vi) Part of the payment was not a "benefit"

Nichol argued that he had a right to the proportion of the payment which constituted leave entitlements and payments in lieu of notice. In particular, he relied on provisions under the Fair Work Act 2009 (Cth). Again, as Nichol was not an employee of Discovery Africa, this argument was unsuccessful. However, Gilmour J found that Van Den Bergh did have a right to leave entitlements and payments in lieu of notice. As a result, Gilmour J considered whether the value of the "benefit", less the entitlements, exceeded the quantum permitted under s. 200F(2)(b). Applying the s. 200F(3) formula, the benefit exceeded the statutory threshold.

(vii) Section 200J estoppels and set-off

Nichol submitted that Discovery Africa should be estopped from claiming that he was not entitled to the payment made to him and that he should be able to rely on the defence of equitable set-off. Given that s. 200B is a strict liability offence and that, under s. 200J, the recipient is taken to hold the benefit on trust for the giver, Gilmour J held that allowing Nichol to rely on estoppel or set-off would undermine the rationale for the legislation by rendering it a "dead letter". Van Der

Bergh's argument that the Deed of Release barred Discovery Africa's claim was not accepted for similar reasons.

Gilmour J found in favour of Discovery Africa and made orders that Nichol and Van Den Bergh held the payments on trust for the company.

6.6 Court Unlikely to Approve Litigation Funding Which Gives Creditors an Opportunity to Influence Liquidator's Actions

(By James Mansfield, Ashurst)

Re Ascot Vale Self Storage Centre Pty Ltd [2015] VSC 751, Supreme Court of Victoria, Judd J, 22 December 2015

(a) Summary

A liquidator obtained creditor approval to enter into a litigation funding agreement provided by two related unsecured creditors. The liquidator foresaw a challenge to the funding agreement by the defendants in this action, and applied for the court's approval to enter into the funding agreement in order to prevent such a challenge. The funding agreement allowed one of the funding creditor's to terminate the agreement on 28 days' notice. In separate proceedings, the validity of a charge granted by the company in liquidation to the funding creditors was challenged. The court found that the proposed funding agreement would have enabled the funding creditors to influence the liquidator's decision regarding what claims to pursue. This compromised the liquidator's duty to the company and unsecured creditors, so the court refused to approve the funding agreement.

(b) Facts

The case concerned an overlap between two proceedings involving a number of the same parties.

The Ascot Vale Proceeding, which this case relates to, between:

- Ascot Vale Self Storage Centre Pty Ltd (Ascot Vale) and its liquidator as plaintiffs; and
- Nom De Plume Nominees Pty Ltd (Nom De Plume) and Mr Leggo (who controls Nom De Plume) as defendants (together the Defendants).

The Fingal Proceeding between:

- Fingal Developments Pty Ltd (Fingal) as plaintiff; and
- Nom De Plume and Ascot Vale as defendants.

(i) Ascot Vale Proceeding

Ascot Vale and its liquidator applied for an order that Nom De Plume and Mr Leggo pay a sum pursuant to a deed of settlement. An alternate claim was brought by the liquidator against Mr Leggo pursuant to s. 588M(2) of the Corporations Act 2001 (Cth) (the Act) for recovery of compensation for loss resulting from insolvent trading. Ascot Vale was ordered to provide security for the Defendants' costs of the proceeding. The proceeding was stayed pending provision of security for costs.

Subsequently, the liquidator sought a court order pursuant to s. 477(2B) of the Act for approval to enter into a litigation funding agreement with Fingal and Ryeland Nominees Pty Ltd (Ryeland). Fingal and Ryeland are controlled by Mr Neville, who was a joint venture partner of Mr Leggo in a property development undertaken by Ascot Vale. The purpose of the funding agreement is to enable the liquidator to conduct the proceeding against the Defendants and meet obligations to provide security for costs.

Section 477(2B) effectively prevents a liquidator from entering into a litigation funding agreement unless he or she obtains the approval of the court, of the committee of inspection or there is a resolution of creditors.

The liquidator had obtained creditor approval to enter the litigation funding agreement. However, he sought court approval to avoid an anticipated challenge by the Defendants under s. 477(6), which provides "[t]he exercise by the liquidator of the powers conferred by this s. is subject to the control of the Court, and any creditor or contributory, or ASIC, may apply to the Court with respect to any exercise or proposed exercise of any of those powers."

Nom De Plume is a creditor, and Mr Leggo a contributory. The liquidator was continuing to investigate whether it was in the interests of creditors to also bring a claim against Mr Leggo for breach of his duty as a director of Ascot Vale, citing a charge granted by Ascot Vale to Fingal during a period when Ascot Vale may have been insolvent (the Charge).

(ii) Fingal Proceeding

In the Fingal Proceeding, Fingal commenced an action against Nom De Plume and Ascot Vale. During the proceeding, the validity of the Charge was upheld. However, that decision is the subject of an appeal.

(iii) Overlap between the proceedings

Part of the claim made under the deed of settlement in the Ascot Vale Proceeding is for an amount secured by the Charge. Therefore both proceedings involve claims in favour of Fingal under the Charge.

Providing the Charge is upheld on appeal in the Fingal Proceeding, if the liquidator succeeds in the Ascot Vale Proceeding, Fingal will benefit as a secured

creditor ahead of unsecured creditors. If the liquidator does not succeed in the Ascot Vale Proceeding, Fingal will be an unsecured creditor.

The liquidator has applied for court approval of litigation funding provided by Fingal and Ryeland previously. In that proposed agreement, the liquidator agreed not to bring any application to challenge the validity of the Charge. While approval was granted initially, it was overturned on appeal. The agreement would have allowed Mr Neville to sue Nom De Plume in the Fingal Proceeding, and put pressure on Nom De Plume and Mr Leggo through the liquidator suing them in the Ascot Vale Proceeding, while preventing the liquidator from challenging the validity of the Charge which is the security that supports the Fingal Proceeding.

The terms of the proposed funding agreement were amended to remove this restriction. However, in the redrafted agreement now under consideration, Ryeland retained the right to terminate the agreement on 28 days' notice.

(c) Decision

(i) Standing

The liquidator contended the defendants did not have standing to oppose the application. This was rejected by the court. The liquidator's decision to apply for approval (where that approval was not required) in order to side-step a challenge by a contributory or creditor was an attempt to exclude the defendants from participation. Factors in the defendants' favour included:

- the service of the interlocutory process on the defendants and their participation in directions being made;
- their filing of affidavits without objection and the assistance they could provide as a contradictor; and
- Nom De Plume's position as defendant in the Fingal proceeding and respondent on the appeal against the Charge's validity.

(ii) Application for approval by court

Under the proposed funding agreement, Ryeland (controlled by Mr Neville) would almost certainly terminate the agreement if the liquidator were to challenge the Charge. Therefore, the holder of the Charge would be in a position to control the nature and scope of future litigation brought by the liquidator, impairing the liquidator's ability to act at arm's length from the litigation funder. This compromises the liquidator's duty to the company and its unsecured creditors. This was a sufficient reason to refuse the application.

Other relevant factors lent weight to the same conclusion. These were:

- this was not an arm's-length litigation funder, with an unusually high profit (40%) for the funder after recovery of its costs paid;
- an agreement by Fingal to forego $80,000 of a dividend to make sure other creditors receive some money was interpreted as an

acknowledgement of the possibility that otherwise, unsecured creditors may get nothing after costs and Ryeland's fee were paid out;

- there was uncertainty about the potential return to creditors, and the liquidator was reluctant to provide information to the court about his assumptions and calculations, even on a confidential basis; and
- the application should await the outcome of the appeal regarding the validity of the Charge, as the formulation of the liquidator's claims depends on this and would eliminate a highly contentious issue between Fingal and Nom De Plume.

6.7 Appointment of Provisional Liquidators Following Winding Up Applications

(By Raina Singh, Ashurst)

Australian Securities and Investments Commission v CME Capital Australia Pty Ltd [2015] FCA 1489, Federal Court of Australia, Moshinsky J, 21 December 2015

(a) Summary

Mr Petrou, the sixth defendant and sole director of the first to fourth defendants, operated a securities trading business. Mr Petrou also had influence over and lent money to the fifth defendant, IMCG Pty Ltd. The first four defendants were under administration. ASIC had made an application to wind up the first, second, third, fourth and fifth defendants (the Companies). ASIC subsequently applied for a provisional liquidator to be appointed to the Companies. That application is the subject of this case.

Pursuant to s. 472(2) of the Corporations Act 2001 (Cth) (the Act), the Federal Court appointed provisional liquidators to the Companies.

(b) Facts

ASIC made an interlocutory application for the appointment of a provisional liquidator to each of the Companies. Mr Petrou, the sole director of the first to fourth defendants, operated a securities trading business and had raised approximately $13.55 million from investors. Approximately $11 million was dispersed to the fifth, eighth and ninth defendants, yet no income from reinvestment had been made. Mr Petrou had influence over and lent approximately $7.245 million to the fifth defendant. It appeared that the defendants were not investing funds, and were instead paying investors through acquiring new investors.

Following the filing of the interlocutory application, joint and several administrators were appointed to the first four defendants. Section 472(2) of the Act gives the Court power to appoint a provisional liquidator at any time after the filing of a winding up application and before the making of a winding up order. ASIC had applied to wind up the Companies under s. 461(l)(k) of the Act and subsequently applied for the appointment of a provisional liquidator.

For a provisional liquidator to be appointed, the Court must:

- be satisfied that there is a reasonable prospect that a winding up order will be made (*Tickle v Crest Insurance Co of Australia Ltd* (1984) 2 ACLC 493 at 494; *Australian Securities and Investments Commission v Solomon* (1996) 19 ACSR 73 at 80; *Australian Securities and Investments Commission v Weerappah (No 2)* [2009] FCA 249 at [8]); and
- the applicant must show some good reason for intervention prior to the final hearing of the winding up application (*Allstate Explorations NL v Batepro Australia Pty Ltd* [2004] NSWSC 261 at [30]; *Australian Securities and Investments Commission v Weerappah (No 2)* [2009] FCA 249 at [8]).

ASIC contended:

- there was substantial evidence that the Companies were operating a "Ponzi scheme" and have contravened the Act;
- the defendants had not provided an adequate explanation to the matters put before them; and
- there was substantial evidence justifying a lack of confidence in the controllers of the Companies and the manner in which they have managed and dealt with the funds raised by investors.

(c) Decision

(i) Is there a reasonable prospect that a winding up order will be made?

ASIC applied for a winding up order on the just and equitable ground (s. 461(l)(k)). The winding up of a company on this ground is appropriate where there is evidence of serious mismanagement or repeated breaches of the Act (*Australian Securities and Investments Commission v International Unity Insurance Pty Ltd* [2004] FCA 1059 at [136]-[137]).

The evidence in this case suggested that the first to fourth defendants may have contravened ss. 113, 283AA, 601ED(5), 727, 911A and 1041H of the Act. Furthermore, the evidence suggested that the fifth defendant may have been involved in contraventions of ss. 113, 283AA, 727, 911A and 1941H of the Act.

There was also significant evidence of mismanagement, including:

- inability to meet existing and future obligations to investors;

- lack of documentary evidence to substantiate contentions of positive cash flows; and
- no net income earned from the reinvestment of investors' funds.

Given the numerous potential breaches and the evidence of mismanagement, Moshinsky J considered that there was a reasonable prospect that a winding up order would be made on the just and equitable ground.

(ii) Reasons for intervening prior to the final hearing of the winding up application

In previous cases, the appointment of a provisional liquidator had been justified on the following grounds:

- to preserve the status quo to ensure the least possible harm to all concerned;
- the need for independent examination of the state of accounts of a corporation by someone other than the directors;
- the affairs of the company have been carried on casually and without due regard to legal requirements.

Moshinsky J held that there was good reason for intervention prior to the final hearing of the winding up applications. The appointment of a provisional liquidator was supported by a justifiable lack of confidence in the management of the affairs of the Companies arising from the defendants' inability to respond to ASIC's concerns, despite being given the opportunity to do so.

(iii) Section 440A(3) of the Act

Section 440A(3) of the Act provides that a provisional liquidator should not be appointed if the company is under administration and the court believes that administration is better for the interests of creditors.

The administrators of the first to fourth defendants initially sought an adjournment to determine if a deed of company arrangement (DOCA) may be in the best interests of the creditors. In a subsequent affidavit, one of the administrators for the first to fourth defendants stated that it was not in the interests of the creditors to allow the administration to continue to consider the DOCA proposal. Additionally, Mr Turner's affidavit provided independent support for the concerns raised by ASIC and highlighted that it was critical to the interests of the creditors that the fifth defendant's assets comprise part of the return to the creditors.

Moshinsky J was not satisified that it was in the interests of creditors that the administration of the first to fourth defendants should continue. In light of this, he held that s. 440A(3) of the Act did not preclude the appointment of a provisional liquidator. Resultantly, Moshinsky J appointed two provisional liquidators to the first, second, third, fourth and fifth defendants.

6.8 UK High Court Determines Construction of Pre-emption Clause in Company's Articles of Association in Favour of Seller of Shares

(By Gary King, Minter Ellison)

Cosmetic Warriors Ltd v Gerrie [2015] EWHC 3718 (Ch), High Court of Justice, Chancery Division, Spearman QC, 18 December 2015

(a) Summary

This case considered the construction of Article 5 of the articles of association of two companies, which conferred a right of pre-emption on the remaining shareholders if a shareholder intended to sell its shares. The defendant shareholders planned to sell their shares in the claimant companies and the parties disagreed about the construction of various aspects of Article 5 including the basis for valuing the shares to be sold and the information to be provided to the accountants in order to value the shares. The High Court of Justice found in the defendants' favour on every issue, concluding that the shares should be valued as a proportion of the company's equity, that the accountants valuing the shares and third parties interested in purchasing the shares should have access to more than just publicly available information, that a third party purchaser includes a corporation as well as a natural person and that the accountants' fees should be shared between the parties.

(b) Facts

The claimants were companies associated with the Lush brand of cosmetics. The defendants were husband and wife and shareholders of both claimants. Mr Gerrie, the first defendant, owned 11.62% of the shares in each of the claimants and the defendants jointly owned an additional 10.38% of the shares in each of the claimants.

The defendants intended to sell their shares in the claimants. Article 5 of the Articles of Association of both claimants was identical and restricted the rights of shareholders to sell their shares by conferring a right of pre-emption on the other shareholders.

The parties disagreed about the proper construction of a number of aspects of Article 5 relating to the basis for valuing the shares to be sold, the information to be provided to the accountants in order to value the shares, the information to be provided to potential third party transferees, whether third party transferees are restricted to natural persons or can include corporate transferees and the liability for fees and expenses.

(c) Decision

Spearman QC, sitting as a Deputy Judge of the Chancery Division of the High Court of Justice, decided in the defendants' favour on all six issues of construction.

(i) Issues 1 and 2 - the basis for the valuation of the shares

Article 5 requires the shares to be sold at the "prescribed price", which is defined in Article 5(C) to mean:

(C) The "prescribed price" shall be such sum per share as shall be agreed between the Vendor and the Company failing which it shall be the median price of the prices as determined and certified in writing by two independent chartered accountants as being in their opinion the fair value thereof as between a willing buyer and a willing seller valuing the Company on a going concern basis such accountants to be nominated by agreement between the Vendor and the Company or in default of such agreement by the President for the time being of the institute of Chartered Accountants in England and Wales and if so nominated the said chartered accountant when determining and certifying the fair value of the Transfer Shares as aforesaid shall act as an expert and not as arbitrator but without incurring liability to the Vendor or any Member and his certificate shall be final and binding on the Vendor and other Members.

The parties appointed accountants under Article 5(C) to value the shares. The claimants contended that the shares were to be valued at the price that might be achieved for the total block of shares being transferred by considering, amongst other factors, the fact that a minority shareholding was being transferred. The defendants argued that the shares should be valued on a pro rata basis by valuing the total equity of the companies and determining the proportion of the shares being transferred.

Spearman QC considered the proper interpretation of Article 5 required the accountants to fix a price per share rather than fixing a price for the shares as a block. In reaching this conclusion, his Honour referred to other provisions in Article 5 allowing the shares to be purchased in part by an existing shareholder and in part by a third party.

His Honour held (at [72]) that it would be impossible for the accountants to fix a price for the block of shares without knowing how many shares were ultimately going to be transferred or whether the shares would be further subdivided. Consequently, his Honour found in favour of the defendants on Issue 1.

As Spearman QC decided that the shares should be valued on a pro rata basis under Issue 1 above, the question of whether the defendants' shares should be valued individually as the portion owned by Mr Gerrie and the portion owned by the defendants jointly did not arise.

(ii) Issues 3 and 4 - information to be provided to the accountants and potential third party purchasers

Spearman QC noted that Article 5 does not expressly outline the information the accountants are to be provided with when valuing the shares. The claimants contended that the accountants should base the valuation on publicly available information only and should not be provided with any more information than the defendants are entitled to receive as shareholders.

The defendants submitted that the accountants should be permitted to request further information from the parties that is not otherwise publicly available. The defendants noted that both accountants appointed by the parties considered that it was necessary for them to request information from the parties in addition to relying on publicly available information.

His Honour (at [91]) referred to case authority establishing that articles of association should be construed in a commercial sense to give them reasonable business efficacy. His Honour rejected the claimants' position, commenting (at [93]): "I am unable to see how the parties can have intended the Accountants to carry out [the valuation], or how the Accountants could be expected to carry it out, unless they are provided with the information that they need to perform it."

His Honour also relied on the procedure set out in Article 5(C) appointing the accountants as expert valuers to conclude that it would be contradictory to limit an expert valuation to publicly available information.

The parties also disagreed about what information potential third party purchasers should be provided under Article 5(L), which permitted third parties to purchase the shares if other shareholders did not exercise their pre-emption right. As above, the claimants argued that third party transferees should only receive publicly available information, while the defendants argued that further information should be made available if reasonably requested, subject to appropriate confidentiality undertakings.

Spearman QC held that the vendor is entitled to tell any prospective third party purchaser any information which bears on the value of the shares, provided the vendor is not prohibited from disclosing such information. His Honour considered the issue of confidentiality in detail, ultimately concluding that the additional information a potential transferee can be provided with includes the prices determined by the accountants' valuation of each individual share.

(iii) Issue 5 - whether third party transferees can be corporations

Article 5(L) permits a shareholder to transfer their shares to "any person" if the other shareholders do not exercise their right to pre-emption. The claimants contended that the reference to "any person" is restricted to natural persons because other provisions, such as Article 5(G), separate natural and corporate persons by referring to "any person or Company". The defendants argued that "any person" should be given its plain and natural meaning, which includes

corporations.
Spearman QC held in favour of the defendants, commenting that the claimants' interpretation could only be sustained by referring to "any natural persons" to imply a prohibition against corporate transferees.

(iv) Issue 6 - which party was liable for fees and expenses

The parties agreed that the articles of association did not state which party is liable for the accountants' fees and that it was necessary to imply a term determining how they are to be allocated. The claimants contended that the fees were the responsibility of the defendants, because Article 5 was only triggered by the defendants wishing to sell their shares. The defendants submitted the fees were to be shared between the parties because that was the established practice in the context of expert determinations.

Spearman QC dismissed the claimants' submission and held in the defendants' favour.

6.9 Payment of Dividends Applying Borrowed Funds Not Oppressive

(By Lisa Bain, King & Wood Mallesons)

KGD Investments Pty Ltd v Placard Holdings Pty Ltd [2015] VSC 712, Supreme Court of Victoria, Almond J, 11 December 2015

(a) Summary

The Supreme Court of Victoria has affirmed that a proposal by a company to pay a special dividend to its shareholders using borrowed funds may not be considered contrary to the interests of the members of the company as a whole, or oppressive to, unfairly prejudicial to or unfairly discriminatory against its members, where, when viewed objectively, the proposal is commercially justifiable and makes due allowance for risk. A special dividend of this type may be considered fair and reasonable to the company's shareholders as a whole in the context of the terms of the shareholders agreement in relation to the company (Shareholders Agreement).

(b) Facts

The plaintiff, KGD Investments Pty Ltd ("KGD") was the ultimate holding company of Placard Pty Ltd (Placard) until October 2012, when the defendant, Placard Holdings Pty Ltd (Placard Holdings) became the ultimate holding company through a share sale transaction. The 2012 restructure resulted in a change of management approach (including in respect of borrowings) under the

auspices of a new CEO (Mr Nunis) and a newly constituted board. KGD became a minority shareholder of Placard Holdings.

The classes of shares in Placard Holdings comprise A preferred shares totalling 75.59 per cent (Investors and Management's interest), B preferred shares totalling 24.41 per cent (KGD's interest) and ordinary shares. Investors and Management holding A preferred shares have a preferred right to receive dividends from Placard Holdings pro rata until such time as they have recovered the amount they paid for their shares, under the terms of the Shareholders Agreement.

In July 2015, a proposal was circulated to the board of Placard Holdings recommending an extension of a current facility comprised of increased borrowings of $29 million, with $25 million of that sum to be paid as a special dividend (Loan and Dividend Proposal). The effect of the Loan and Dividend Proposal is that the holders of A preferred shares could recover the balance of the amounts they have respectively invested.

KGD sought orders under s. 233 of the Corporations Act 2001 (Cth) (the Act) permanently restraining Placard Holdings from implementing the Loan and Dividend Proposal, based on their submissions that the Loan and Dividend Proposal is contrary to the interests of the members of Placard Holding as a whole (s. 232(d)), and oppressive to, unfairly prejudicial to or unfairly discriminatory to KGD (s. 232(e)). KGD further submitted that the payment of the dividend would not be fair and reasonable to the company's shareholders as a whole (s. 254T(1)(b)).

(c) Decision

(i) Relevant sections of the Act considered

The oppressive conduct referred to in s. 232(e) requires an objective test of whether, in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair. Conduct which is contrary to the interests of members as a whole under s. 232(d) is not confined to a consideration only of conduct that can be characterised as "commercially unfair".

The meaning of the phrase "fair and reasonable to the company's shareholders as a whole" in the context of s. 254T(1)(b) requires consideration of the same "fair and reasonable" formulation in relation to share capital reductions in s. 256B(1) of the Act. This requires assessing a wide range of matters relevant to the particular circumstances of the case.

(ii) Whether Loan and Dividend Proposal contrary to Placard Holding's interests considered

It was not disputed that increased borrowings will decrease profitability and increase interest expense (affecting liquidity), that debt will increase resulting in

higher leverage and reduced equity and that the amended bank facility terms provide for an increased bullet payment.

His Honour found that none of the evidence submitted by KGD supported the proposition that the Loan and Dividend proposal is contrary to Placard Holdings' interests. His Honour considered that:

- the financial analysis of the proposal prepared by Mr Nunis supported Placard Holdings being able to service the additional debt, with the company remaining within the target debt ratio;
- even though the company is sensitive to the non-renewal of key contracts, viewed objectively, past performance by Mr Nunis as CEO, as well as prospective opportunities, indicate that the risk of significant non-renewal of key contracts must be considered low; and
- to the extent that the view of management is correct, and the new facility would be extended or refinanced such that the bullet payment would not need to be made, his Honour accepted that the increase to the bullet payment would not form part of any disadvantage associated with the new facility.

(iii) Beneficial effects of the Loan and Dividend Proposal

In response to KGD's submissions, Placard Holdings submitted that the Loan and Dividend Proposal is in fact beneficial to Placard Holdings' interests. Broadly, his Honour agreed in relation to the submissions, which included:

- the proposed new facility offers significantly more favourable terms for Placard Holdings than the existing banking facilities;
- replacing equity with debt may be financially beneficial to Placard Holdings and is not demonstrably contrary to the interests of Placard Holdings or its members as a whole; and
- the company's cash position under the proposed new facility would be higher.

(iv) Relevant contextual matters

KGD submitted further contextual matters, including:

- that the Loan and Dividend Proposal was initiated by RMB Capital, an external investor, to advance the commercial interests of the RMB-aligned shareholders of Placard Holdings by returning all of their invested capital in the company;
- that the Loan and Dividend Proposal was not raised with the minority shareholder's representative until the banking facility was in place and with all other directors of Placard Holdings "on side", effectively oppressing the minority shareholder;
- that the RMB-aligned directors only approached two financiers and accordingly there was no competitive tension;

- that the concept of the special dividend was not discussed during the 2012 restructure or during negotiations; and
- that by entering the Loan and Dividend Proposal, Placard Holdings may restrict its ability to invest in new technology, which is an important factor within the market in which it operates.

His Honour held that none of the contextual issues raised by KGD lent weight to an inference that the Loan and Dividend Proposal impugned the relevant sections of the Act. Further, the Shareholders Agreement did not preclude the course being taken and the Constitution of the company permits directors to pay any interim or final divided that, in their judgment, the financial position of the company justifies from any available source permitted by law.

His Honour acknowledged that a different management style may present potential risks and rewards for shareholders. However, it does not follow that by adopting a higher risk strategy, with the company becoming more leveraged and more susceptible to a significant downturn of business, the Loan and Dividend Proposal will provide grounds for an order under s. 233 or contravene s. 254T of the Act. The Loan and Dividend Proposal, viewed objectively, was commercially justifiable and made due allowance for risk.

6.10 Court Grants a Further Extension of Time to Bring Voidable Transaction Proceedings

(By Jarrod Blusztein, Clayton Utz)

BKA Practice Co Pty Ltd v Viking Group Holdings Pty Ltd [2015] VSC 699, Supreme Court of Victoria, Hargrave J, 10 December 2015

(a) Summary

The Supreme Court of Victoria has held that a liquidator can rely on the application of procedural rules of a State or Territory, outside the period allowed in the Corporations Act 2001 (Cth) (Corporations Act), to extend the time within which voidable transaction proceedings can be brought under s. 588FF of the Corporations Act.

(b) Facts

The case involved an application by the liquidator of Viking Group Holdings Pty Ltd (In Liquidation) (Viking Group) for an extension of time within which to bring voidable transaction proceedings.

Generally, a voidable transaction proceeding must be brought within three years of the relation-back day. However, the Court has the power, under s. 588F(3)(b) of

the Corporations Act, to extend that time period, provided that the liquidator's application for an extension is brought within the three year period.

In these circumstances, the liquidator instructed its solicitors to prepare and commence proceedings against Belleli King & Associates to recover monies as an "unfair preference" under s. 588FE of the Corporations Act. The liquidator's solicitors had acted promptly to identify the defendant, prepare the originating process and supporting affidavit material and ensure that the proceedings were commenced before the expiry of the limitation period.

However, a mistake was made and the wrong defendant was named. While the defendant was identified as the entity "trading as Belleli King & Associates," who was the creditor of Viking Group at the time of the identified transactions, in error, the company and not the partnership was named. The mistake was discovered after the limitation period had expired.

Rule 36.01 of the Supreme Court (General Civil Procedure) Rules 2005 (Supreme Court Rules) is a procedural rule which empowers the Victorian Supreme Court to replace one party to litigation with another. It covers not just cases of misnomer, clerical error and misdescription, but also cases where the plaintiff, intending to sue a person he or she identifies by a particular description, was mistaken as to the name of the person who answers that description.

(c) Decision

(i) Issue

The issue before the Supreme Court was whether the power provided in rule 36.01 of the Supreme Court Rules could be used to effectively extend the period within which an application for relief under s. 588FF(1) could be made despite the period for making an application for extension under s. 588F(3) having expired.

(ii) First Instance and Appeal Decisions

At first instance, Efthim AsJ ordered the name of the defendant to the proceeding to be amended to substitute the partners trading as Belleli King & Associates for the company. His Honour concluded on the facts that the liquidator "intended to sue the solicitors that provided the services and received payment" and that "the correct name was not used because of a mistake". In these circumstances, Efthim AsJ considered that the application fell to be determined by reference to the provision of rule 36.01 of the Supreme Court Rules and the principles to be applied to applications under that rule as stated by the High Court in *Bridge Shipping Pty Ltd v Grand Shipping S.A.* (1991) 173 CLR 231 (Bridge Shipping). Bridge Shipping provided that a court would be able to substitute the correct description of a legal entity where there was no doubt about what entity was intended to be sued.

On appeal, the appellants acknowledged that Efthim AsJ was correct in considering that the application was governed by rule 36.01 of the Supreme Court

Rules and that the principles stated in Bridge Shipping were relevant. However, the appellants argued that the Court at first instance "fundamentally misconstrued the source and scope of the Court's power on hearing of the application".

Accordingly, the focus of the appeal was not concerned with the mistaken naming of a party, but rather if the effect of the permitted amendment would have been to commence a fresh proceeding against a newly added defendant outside the prescribed timeframe provided for under s. 588F(3)(b) of the Corporations Act.

Section 79(1) of the Judiciary Act 1903 (Cth) (Judiciary Act) provides that the laws of each State or Territory, including the laws relating to procedure, shall, "except as otherwise provided by the Constitution or laws of the Commonwealth", apply to all courts exercising federal jurisdiction in that State or Territory.

Hargraves J highlighted the findings in *Gordon v Tolcher* (2006) 231 CLR 334 that once an application for an extension of time is made under s. 588FF(3)(b) of the Corporations Act, the conduct of the litigation is left for the operation of the procedures of that court.

In dismissing the appeal, Hargraves J found that ss. 588FF does not deal with mistakes in the name of parties to applications made under that provision. There is no provision in the Corporations Act which does. Accordingly, s. 588FF(1) does not "otherwise provide" within the meaning of s. 79 of the Judiciary Act, and rule 36.01 of the Supreme Court Rules applies to any applications made. Therefore, any application made under rule 36.01 should be determined according to the principles stated in Bridge Shipping. As it was agreed by the appellants that Efthim AsJ's exercise of discretion on that basis was correct, the appeal was dismissed with costs.

6.11 Removal of Liquidator on the Basis of Reasonable Apprehension of Bias

(By Grant Mason, Corrs Chambers Westgarth)

Bank of Queensland Ltd v Ross Auto Auction Pty Ltd (in liquidation) (receivers and managers appointed) [2015] QSC 347, Supreme Court of Queensland, McMurdo JA, 7 December 2015

(a) Summary

The Court held that, in circumstances where:

- a liquidator was appointed to a company as the result of a referral;
- that referral arose from a company that regularly referred work to the liquidator's firm;

- the referring company also represented the former directors of the company; and
- the major secured creditor of the company considered there to be grounds upon which it might be necessary for the liquidator to investigate the conduct of the former directors and the referring party,

a reasonable fair minded observer might apprehend there to be bias on the part of liquidator which might prevent him from properly performing his statutory functions. Accordingly, the Court ordered his removal and the appointment of alternate liquidators.

(b) Facts

The Applicants (together BOQ) were the major creditors of the first respondent (Ross Auto). Ross Auto was in the business of selling used cars. On 17 June 2015, Ross Auto resolved that it should be voluntarily wound up, pursuant to s. 491(1) of the Corporations Act 2001 (Cth) and that the second respondent (Mr Kijurina) be appointed as liquidator.

At the date of Mr Kijurina's appointment, Ross Auto owed BOQ over $4m. BOQ held security in relation to those loans of approximately $1.8m and was unsecured in relation to the remaining liabilities.

Shortly prior to the Mr Kijurina's appointment, Ross Auto had:

- on 6 June 2015, conducted a final auction during which it sold around 60 cars, being the bulk of Ross Auto's current stock at hand;
- sold a further 20 cars, being the only remaining stock held by the company; and
- on 3, 11 and 13 June 2015, made payments of $425,000 to the Deputy Commissioner of Taxation, an unsecured creditor,

(together, the Pre-Liquidation Transactions).

BOQ was concerned that the Pre-Liquidation Transactions may have breached the terms of BOQ's security and reduced the funds available to creditors of Ross Auto.

Prior to the resolution to wind up Ross Auto, the directors of Ross Auto engaged a financial advisory firm, Insolvency Guardian Pty Ltd (IG) to obtain advice in relation to the potential insolvency of Ross Auto. IG subsequently lodged a proof of debt claiming that Ross Auto owed it debts in respect of work performed by IG prior to its appointment and also in relation to a "Liquidator Appointment Fee" of $10,000.

Mr Kijurina's Declaration of Independence Relevant Relationships and Indemnities, a document required to be provided by a liquidator to all creditors of the company to which the liquidator has been appointed prior to the first meeting of the creditors, disclosed that:

- Mr Kijurina's appointment had occurred as the result of a referral from IG, after IG was contacted by the directors of Ross Auto; and
- Mr Kijurina had a relationship with IG within the 24 months preceding his appointment by which IG referred work to him from time to time. However, Mr Kijurina asserted that that relationship did give rise to any conflict of interest.

On 27 July 2015, the solicitors for BOQ wrote to the former directors of Ross Auto in relation to allegations of further breaches of its security. The response specified that IG was acting on behalf of the directors and that all correspondence should be directed through IG.

BOQ subsequently asserted that Mr Kijurina should be removed as liquidator of Ross Auto. The primary basis on which BOQ sought this order was that a reasonable fair minded observer might reasonably apprehend that his independence as a liquidator might be compromised due to his relationship with IG. Further, BOQ proposed that, if Mr Kijurina was removed as liquidator and replaced by liquidators nominated by BOQ, it would indemnify those new liquidators for their reasonable remuneration and expenses incurred while conducting investigations, including as to the conduct of the former directors of Ross Auto.

(c) Decision

Philip McMurdo JA noted that the appropriate test to determine whether a liquidator should be removed on the basis of apprehended bias is the same test as applied for members of the judiciary or administrative decision makers. That test is summarised as "where in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality. the governing principle is that a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question..."(quoting *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ).

An apprehended bias is identified according to a two-stage process. First, one must identify what matters might lead the relevant decision maker to decide a case other than on its legal and factual merits. Secondly, there must be a logical connection between matters identified in the first step and the feared deviation from the appropriate course. A bare assertion of an interest cannot be sufficient to satisfy a Court that there is a reasonable apprehension of bias.

In this case, it was clear that Mr Kijurina's firm enjoyed a business relationship with IG that was based on a "history of frequent referrals". Philip McMurdo JA accepted:

- BOQ's assertion that Mr Kijurina would have a personal interest in the ongoing relationship between his firm and IG, thus satisfying the first stage of the test; and

- that Mr Kijurina might be disinclined to perform certain aspects of his role as a liquidator, such as conducting investigations into the conduct of IG or the conduct of IG's clients (ie the directors of Ross Auto), thus satisfying the second stage of the test.

The Court was therefore satisfied that there was a reasonable apprehension of bias and was satisfied that it should order that Mr Kijurina should be removed as liquidator. The Court noted that BOQ's offer to indemnify the new liquidators in respect of their remuneration, expenses and potential adverse costs orders placed the new liquidators at an advantage in conducting their enquiries and potential investigations. This of itself would not have been a sufficiently compelling reason to remove Mr Kijurina but having formed the view that Mr Kijurina should be removed, was a factor operating in the best interests of the creditors of Ross Auto and a reason to accept the new liquidators that had been nominated by BOQ.

6.12 An Application Under Section 447A Keeps the DOCA Away

(By Jack Quirk, DLA Piper)

Australian Securities and Investments Commission v Midland Hwy Pty Ltd (administrators appointed) [2015] FCA 1360, Federal Court of Australia, Beach J, 3 December 2015

(a) Summary

This case involved an application by ASIC pursuant to ss. 447A and 445D of the Corporations Act 2001 (Cth) (the Act) seeking orders to set aside a resolution approving a DOCA and to wind up the company. Both the subject of the DOCA and its proponent were implicated in questionable financial dealings involving a "land banking scheme" known as "Hermitage Bendigo", which involved the selling of options and off-the-plan parcels of land in a development in rural Victoria. In granting the orders applied for by ASIC, his Honour felt that it was in the public interest to set aside the resolution approving the DOCA and order that the company be wound up.

(b) Facts

In 2011, property developer Midland Highway Pty Ltd (Midland) commenced selling option deeds and off-the-plan land sale contracts for parcels of land, which were owned by Bilkurra Investments Pty Ltd (Bilkurra), The sale of the land was for a land banking scheme to promote the development of rural property in Victoria, to be known as "Hermitage Bendigo". At the time of the trial, both Midland and Bilkurra (among other associate entities) were subject to an ongoing ASIC investigation in relation to the conduct and promotion of the scheme.

Midland received $24 million from option holders (Option Holders) pursuant to such option deeds, $1.15 million from off-the-plan sales and bank guarantees of $433,000. Through a series of corporate contrivances and "shadowy" transactions involving third parties, by the time of the hearing the $24 million had been dispersed into the hands of third parties in questionable circumstances.

By operation of clause 15.3 of the options deeds, the Option Holders were creditors of Midland for at least $24 million paid under the deeds and possibly further unliquidated sums in respect of damages claims for misleading misrepresentations made by Midland to Option Holders prior to the relevant investments being made.

On 2 July 2015, Midland, on the initiative of Russell Wood (its sole director), appointed PPB advisory as joint and several administrators of Midland (Administrators).

On 21 October 2015, at the second meeting of creditors, Bilkurra proposed a Deed of Company Arrangement (DOCA), pursuant to which, among other things, Bilkurra would assume all of Midland's obligations to Option Holders. Though the Administrators recommended that the DOCA was unfairly prejudicial to creditors of Midland (including the Option Holders), there was evidence Bilkurra had communicated to Option Holders prior to the meeting for the purposes of corralling their votes and obtaining proxies. Bilkurra advised Option Holders that approval of the DOCA was necessary in order to allow the Hermitage Bendigo development to go ahead and allow them to recoup their investment.

The Option Holders overwhelmingly voted in favour of the resolution (Resolution) approving the DOCA. ASIC applied to the Court under the Act for orders setting aside the Resolution and winding up Midland.

(c) Decision

Before coming to his decision, his Honour set down the relevant case law in relation to ss. 445D and 447A of the Act.

Section 445D states that a Court may make an order terminating a deed of company arrangement in circumstances where misleading information was put to creditors regarding the approval of that deed, and the misleading information was material to the creditors' decision. The Court may set aside a DOCA pursuant to s. 445D even where creditors may be better off under the DOCA than with a liquidation. It may do so in the public interest: *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510; *ASIC v Storm Financial Ltd (admins apptd) (recs and mgrs apptd)* (2009) 761 ACSR 81; *QBI Corporation Pty Ltd v Plantation Rise Pty Ltd (admins apptd) (recs and mgrs apptd)* (2010) 77 ACSR 573. Further, the preclusion of an effective investigation by a liquidator into relevant transactions and the opportunity for greater returns may render a DOCA contrary to the creditors' interest overall: *Canadian Solar v ACN 138 535 832* [2014] FCA 783.

Section 447A gives the Court a general power to make any orders it thinks appropriate in relation to a Company under administration under Part 5.3A of the Act, such as terminating the administration and to order a winding up in the public interest: Deputy *Commissioner of Taxation v Woodings* (1995) 16 ACSR 266. The public interest includes considerations of commercial morality and the interests of the public at large: *Bidald Consulting Pty Ltd v Miles Special Builders Pty Ltd* (2005) 226 ALR 510. A winding up will be beneficial from a public interest perspective where investigations and recovery proceedings are likely to be funded and the investigations and appropriate recovery proceedings could realistically lead to the relevant persons who have engaged in the suspect transactions being brought to account: *Public Trustee (Qld) v Octaviar Ltd (subject to a deed of company arrangement)* (2009) 73 ACSR 139.

The Court has power both to terminate a DOCA already entered into, or where the DOCA has been approved by creditors but not yet signed. His Honour stated that the broad ambit of s. 447A should not be read down by the factors applicable to an order made under s. 445D.

After setting down the relevant case law pursuant to s. 447A of the Act, his Honour ordered that:

- the Resolution be set aside ab initio and that Part 5.3A of the Act have operation as though that creditors' resolution failed to pass at that meeting;
- the administration of Midland come to an end;
- Midland be wound up; and
- liquidators be appointed.

His Honour's reasons were as follows. First, Midland was insolvent. Further, it had been used and controlled by shadowy figures and entities. It had little if any assets and substantial liabilities to third parties including the Option Holders.
Second, the implementation of the proposed DOCA would not restore Midland to a position where it would be able to trade. It would not be in the public interest to allow such a corporation to continue in existence to the detriment of future creditors and other persons dealing with Midland.

Third, there were transactions involving substantial sums that required full investigation and potentially the institution of recovery proceedings which would most appropriately be undertaken by a liquidator. Further, under the DOCA, Option Holders would have lost their rights to make a claim against Midland.

Fourth, his Honour determined that the primary purpose or effect of the DOCA was to limit or hinder a full investigation of various entities and persons, including Bilkurra in relation to the shadowy transactions described earlier and ultimately to quarantine them from potential recovery proceedings by a liquidator.

Fifth, the propounder of the DOCA, Bilkurra, was of questionable financial standing and His Honour doubted whether it had the capacity to carry through the transactions contemplated by the DOCA, let alone the development of the land.
Sixth, in his Honour's view, the Option Holders would receive little if any tangible

benefit under the DOCA. Moreover, Bilkurra could separately treat with the Option Holders even if the DOCA is not entered into and Midland placed in liquidation.

6.13 UK Supreme Court: Proper Purpose Rule Applies to Restriction Notices Imposed on Shareholders

(By Calum Sargeant, King & Wood Mallesons)

Eclairs Group Ltd v JKX Oil & Gas plc [2015] UKSC 71, Supreme Court of the United Kingdom, Lord Neuberger PSC, Lord Mance, Lord Clarke, Lord Sumption and Lord Hodge, 2 December 2015

(a) Summary

The appellant shareholders sought to have set aside restriction notices issued by the board of directors of the company, on the basis that they were issued for the improper purpose of ensuring the passage of certain resolutions, by preventing the shareholders from voting at a general meeting. The UK Supreme Court found that the proper purpose rule applies to an exercise of the power to issue restriction notices, but declined to determine whether a causation test should apply to resolving questions of multiple purposes. However, the minority judgment argued that a "but for" test should apply in such cases.

(a) Facts

The board of directors of JKX Oil & Gas plc (JKX), a UK company, sought to resist what it perceived to be an attempt by a group of minority shareholders (the appellants) to acquire effective control of JKX in a "corporate raid". The appellants had called upon the company to hold an extraordinary general meeting to vote on the removal of certain directors and their replacement with persons associated with the appellants.

In reliance on the statutory power in s. 793 of the Companies Act 2006 (UK) (the Act), the board served notices on the appellants requiring the disclosure of certain information relating to the appellants' beneficial interests in JKX shares and any arrangements existing between the appellants. The board considered that the appellants failed to furnish adequate information in response to the notice, and exercised a power granted to the board under article 42 of JKX's constitution (article 42) to issue notices restricting the rights of the appellants to vote at general meetings and to transfer their shares. Article 42 largely replicates s. 794 of the Act, with the distinction that s. 794 only confers such powers on a court.

The appellants commenced proceedings in the Chancery Division challenging the restriction notices on the basis that the board, in issuing the notices, had acted with

a collateral and improper purpose and that the notices were thereby voidable. The alleged improper purpose was to prevent the appellants from voting and thereby ensure the passage of several resolutions proposed by the board at a forthcoming AGM. The appellants argued that the only proper purpose for the exercise of the power conferred by article 42 was the extraction of information specified in the earlier disclosure notices.

(i) Applicable law

The proper purpose rule in s. 171(b) of the Act provides that a "director of a company must ... only exercise powers for the purpose for which they are conferred". Under s. 170(4) of the Act, the statutory rule should be interpreted and applied in the same way as the corresponding common law rules or equitable principles.

As explained in the judgment of Lord Sumption, it is established law that directors will act with an improper purpose where they exercise a power in order to influence the outcome of a general meeting. In cases where there exist multiple purposes for the exercise of the power, the court will only find a breach of the rule where the improper purpose is the "primary" or "dominant" purpose.

(ii) Litigation history

At first instance, Mann J found that the board had reasonable cause to believe that the appellants' responses to the disclosure notices had been false. However, he went on to find that ensuring the passage of the proposed resolutions was regarded by the majority of directors to be the "primary purpose" and "positively desired effect" of the restriction notices, rather than an incidental benefit of that action. Furthermore, he found that the only proper purpose of the power under article 42 was to "provide a sanction or an incentive to remedy the default". Consequently, the board of directors acted for an improper purpose and the restriction notices were set aside.

In the course of the trial, Mann J raised the issue that it was "likely ... and virtually inevitable" that the board would have made the decision to issue the restriction notices even if it had confined its deliberations to the proper purpose of extracting the relevant information, and that where the improper purpose could not be said to have caused the action, the court may not find a breach of the purpose rule (the causation question). However, because the causation question had not been argued before the court, the matter was not further considered.

The decision of Mann J was overturned by a majority (Longmore LJ and Sir Robin Jacob, Briggs LJ dissenting) in the Court of Appeal. Their Lordships found that the purpose rule did not apply in the case of article 42 and s. 794, for three reasons:

1. the restriction notices did not constitute a unilateral exercise of power by the board, since it was within the appellants' power to avoid their application by complying with the disclosure notices;

2. there could be no further limitation on the board's powers under article 42, since restrictions on voting and share transfer were the very things article 42 was designed to permit; and
3. article 42 and s. 794 were intended to operate at times of controversy and there was no express limitation on such operation in the provisions. Consequently, no limitation as to purpose should be read in by way of implication.

The appellants then appealed to the Supreme Court.

(c) Decision

Two issues were considered by the Supreme Court:

1. whether the proper purpose rule applied in the context of article 42 and s. 794; and
2. the causation question (i.e. whether the proper purpose rule is breached where the impugned purpose cannot be said to have caused the exercise of the power).

The court agreed that the proper purpose rule should apply in the context of article 42. In respect of (ii), the minority (Lord Sumption, Lord Hodge agreeing) opined that a causation test should apply to resolving questions of multiple purposes. The majority (Lord Mance and Lord Clarke, Lord Neuberger agreeing) declined to consider the causation question on the basis that it had not been argued by the parties. The appeal was allowed.

(i) The application of the proper purpose rule

Lord Sumption delivered the primary judgment on the application of the proper purpose rule in the context of article 42, their Lordships agreeing on this issue.

His Lordship commenced by observing that the power conferred by article 42 constituted a serious interference with the financial and constitutional rights of shareholders and (in the case of a listed company) an interference with the proper operation of the market in the company's shares; such that a limitation as to purpose should be expected. Furthermore, the fact that article 42 and s. 794 are intended or likely to operate at times of controversy between competing shareholder interests should not preclude the application of the proper purpose rule. Importantly, the rule enforces the "constitutional distinction between the respective domains of the board and shareholders" and calls for care on the part of directors to distinguish between the "purpose of a decision and its incidental consequence" and not to "succumb to the temptation to use their powers to favour their allies".

In response to reason 1 of the Court of Appeal, Lord Sumption referred to the origin of the proper purpose rule as an obligation imposed on directors as fiduciaries. If the exercise of the power is an abuse of power, it is no answer that the shareholder is himself to blame. Moreover, Lord Sumption found that the case

law did not support the confinement of the proper purpose rule to instances of unilateral exercise of power. In any event, it may not always be within the shareholder's capacity to avoid the exercise of the power, because the power would exist where there is a reasonable but erroneous belief on the part of the directors that the responses are inadequate or defective.

The court found that the proper purpose of article 42 and s. 794 is to remedy a failure to comply with a disclosure notice, because the "nescapable inference is that the power to restrict the rights attaching to shares is wholly ancillary to the statutory power to call for information under [s.] 793". It followed from the findings of Mann J that the directors had acted with an improper purpose and that the restriction notices should be set aside.

(ii) The causation question

Lord Sumption (Lord Hodge agreeing) considered the way in which a court could ascertain the "primary" or "dominant" purpose in a case where there may be multiple purposes for the exercise of a power. He considered two possible tests: (a) the "weightiest" purpose (i.e. the purpose about which the directors felt most strongly); or (b) the purpose which caused the decision to be made.

His Lordship preferred a test based on causation. He reasoned that, if the law demands that a director act "only" for a proper purpose, it should be no answer to the question of multiple purposes that one purpose was more or less important in the mind of the director:

The only rational basis for such a distinction is that some improprieties may not have resulted in an injustice to the interests which equity seeks to protect. Here, we are necessarily in the realm of causation. One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it.

In support of his opinion, Lord Sumption relied heavily on Australian case law, quoting the judgment of Dixon J in *Mills v Mills* (1938) 60 CLR 150 and Mason, Deane and Dawson JJ in *Whitehouse v Carlton House Pty Ltd* (1987) 162 CLR 285, and reconciled this view with the leading Privy Council case of *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821. He regarded the "decisive factor" in resolving the question of multiple purposes in that case to be that, but for their improper purpose, the directors would not have taken the action that they did.

However, because the issue of causation was not explored with the witnesses at trial, Lord Sumption though it improper to rely on any of Mann J's hypothetical findings.
The majority decision of Lord Mance (Lord Clarke and Lord Neuberger agreeing) declined to determine whether the appropriate test is one of causation, but expressed some misgivings with the reasoning of Lord Sumption, opining that

Dixon J in Mills v Mills and Lord Wilberforce in Howard Smith v Ampol may not have been advocating a "but for" test:

In these circumstances, although I have sympathy with Lord Sumption's view that "but for" causation offers a single, simple test, which it might be possible or even preferable to substitute for references to the principal or primary purpose, I am not persuaded that we can or should safely undertake what all parties consider would be "a new development" of company law, without having heard argument.

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7. Contributions

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