SAI Global Corporate Law Bulletin No. 205>

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Bulletin No. 205

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1. Recent Corporate Law and Corporate Governance Developments

1.1 Supreme Court of Victoria Commercial Law Conference

On 9 October 2014, the Supreme Court of Victoria will hold its annual Commercial Law Conference. A program of eminent speakers will address topical and important commercial law issues.

The Conference details are as follows:

Date Thursday, 9 October 2014

Venue Banco Court, Supreme Court of Victoria
210 Williams St, Melbourne

Time 2.30pm - 5.00pm

Cost $220 (including GST)

Program:

What ever happened to pacta sunt servanda?
Speaker: Neil Young QC
Comment: The Hon Associate Justice Mark Derham

Reliance and delegation by company directors
Speaker: Jon Webster, Partner, Allens Linklaters
Comment: Professor Ian Ramsay

Estoppel in commercial law: risk, reliance and reward
Speaker: Professor Elise Bant
Comment: Phillip Crutchfield QC

Refreshments will be served following the presentations. To view the conference flyer and registration details, click here.

1.2 Justice Hayne's lecture "Directors' duties and a company's creditors" available online

On 19 August 2014, Justice Hayne of the High Court of Australia presented a lecture titled "Directors' duties and a company's creditors" at Melbourne Law School as part of the Harold Ford Memorial Lecture series.

This lecture was recorded and is available on the Centre for Corporate Law and Securities Regulation website.

1.3 SEC announces largest-ever whistleblower award

On 22 September 2014, the US Securities and Exchange Commission (SEC) announced that it expected a sum of more than US$30 million to be awarded to a whistleblower who provided key original information that led to a successful SEC enforcement action.

The award will be the largest made by the SEC's whistleblower program to date and the fourth award to a whistleblower living in a foreign country, demonstrating the program's international reach.

The SEC's whistleblower program rewards high-quality, original information that results in an SEC enforcement action with sanctions exceeding US$1 million. Whistleblower awards can range from 10-30% of the money collected in a case. The money paid to whistleblowers comes from an investor protection fund established by Congress at no cost to taxpayers or harmed investors. The fund is financed through monetary sanctions paid by securities law violators to the SEC. Money is neither taken or withheld from harmed investors to pay whistleblower awards.

By law, the SEC protects the confidentiality of whistleblowers and does not disclose information that might directly or indirectly reveal a whistleblower's identity. The previous high for an SEC award to a whistleblower was US$14 million, which was announced in October 2013.

The SEC awarded its first whistleblower under the program following its inception in fiscal year 2012. The program awarded four more whistleblowers in FY 2013, and has awarded nine whistleblowers in FY 2014.

The order determining the claim is available on the SEC website.

1.4 CEO pay research: Australian study

On 9 September 2014, the Australian Council of Superannuation Investors (ACSI) released a report on CEO pay.

Termination payments to chief executives of Australia's largest listed companies have shrunk by close to 70% in the past five years. The median termination payout to CEOs has fallen to $1.3 million in 2013, down from $3.5 million in 2008. As a result, annual costs to ASX 100 companies have fallen from 13 CEO payouts in 2008, totalling more than $83 million, to nine payments totaling just under $12 million in 2013.

The average total statutory pay for CEOs, of $4.84 million in FY 2013, is still a multiple of 63 times average earnings - but is now at its lowest level in a decade and 33% below the 2007 peak of 94 times.

Cash pay for S&P/ASX 100 CEOs, which includes all aspects of pay other than the disclosed "accounting value" of equity incentives, also fell in FY 2013, from $2.89 million to $2.53 million, the lowest level since 2006, while average cash pay has declined to pre-2006 levels.

Median and average cash bonuses for top 100 CEOs declined in FY 2013. The median bonus for those CEOs who received a bonus fell 10.4% to $950,000 and the average declined 7.2% to $1.22 million. These were the lowest levels recorded in ACSI's study for a decade. The proportion of CEOs receiving a bonus rose however, from 82% to 87%.

Bonuses accrued - the total value of bonuses awarded (including any deferred components) - also fell in FY 2013, with the median declining 5% to $1.3 million. Bonus deferral among the ASX 100 sample rose, with 44% of the CEOs having a proportion of their bonus deferred, up from 33%. This continues a trend where a greater number of companies are deferring bonuses, rather than paying all short term incentives in cash.

This has the twin benefit of improving alignment, where the deferral is into equity, and facilitating the implementation of claw back or "malus" conditions for poor performance.

The full report is available on the ASCI website.

1.5 FSB reviews work on financial reforms

On 18 September 2014, the Financial Stability Board (FSB) met in Cairns, Australia and discussed vulnerabilities affecting the global financial system and reviewed work plans for completing core financial reforms.

(a) Vulnerabilities in the financial system

The core of the financial system continues to strengthen, with overall improvements in bank capital and liquidity, including in the euro area in advance of the results of the comprehensive assessment. However, there are increasing signs of complacency about risks in financial markets, in part reflecting a search for yield amidst exceptionally accommodative monetary policies. Volatility in asset prices has become compressed and asset valuations stretched across a growing number of markets, increasing the risk of a sharp reversal.

While market forces and regulatory reforms since the crisis have reduced leverage in the banking system, leverage has picked up in other parts of the financial system, including in corporate debt markets. There are also concerns about the mispricing of liquidity risks. Pressures on market liquidity could exacerbate downward price dynamics and market dislocations during a price fall. Authorities are stepping up their monitoring of the migration of risks to less regulated parts of the financial system. A number of emerging market countries have taken policy measures to reduce risks that could arise from volatile capital flows and market dislocations.

(b) Policy work

The FSB discussed progress towards the goal of substantially completing the key post-crisis financial reforms in 2014.

(i) Ending too-big-to-fail

The FSB made further substantial progress in defining the terms and conditions of total loss absorbing capacity for global systemically important banks (G-SIBs) and in finding solutions to remaining obstacles to cross-border resolution.

(ii) Shadow banking

The FSB reviewed progress in meeting the deliverables in the shadow banking roadmap agreed at the G20 Summit in St Petersburg in 2013. The FSB also took note of the preliminary results of an initial information-sharing exercise among jurisdictions on their application of the FSB's high-level policy framework for shadow banking entities. The FSB will launch a peer review on the national implementation of the high-level policy framework in 2015.

(iii) Making derivatives markets safer

The FSB discussed progress in resolving the remaining cross-border issues that have arisen in the implementation of over-the-counter (OTC) derivatives reforms. Members emphasised the importance of authorities' moving quickly to address issues to ensure that the benefits to global financial stability of these reforms are achieved.

Members welcomed the letter from the OTC Derivatives Regulators Group to the FSB Chair on legal barriers to reporting to trade repositories, and stressed the importance of rapid action by jurisdictions to remove those barriers.

(iv) Foreign exchange benchmark reform

Members approved the finalised recommendations for reforms to foreign exchange benchmark practices, which take into account the responses to the public consultation in August.

(v) Accounting, auditing and disclosure

The FSB discussed work by the International Accounting Standards Board (IASB) and the US Financial Accounting Standards Board (FASB) on new standards for the financial sector that take account of the lessons of the crisis and introduce forward-looking expected loss provisions for loan losses.

Further information is available on the FSB website.

1.6 APRA consultation paper: Basel III disclosure requirements

On 18 September 2014, the Australian Prudential Regulation Authority (APRA) released a discussion paper and draft amendments to "Prudential Standard APS 110 Capital Adequacy" (APS 110) and "Prudential Standard APS 330 Public Disclosure" (APS 330) for public comment. These consultation documents outline APRA's proposed implementation of new disclosure requirements for authorised deposit-taking institutions (ADIs).

The proposals relate to:

- the leverage ratio;
- the liquidity coverage ratio; and
- global systemically-important banks.

These proposals form part of APRA's implementation of the post-crisis reforms that aim to promote a more resilient banking sector, and are intended to improve market discipline and transparency by equipping market participants with key information about an ADI's risk profile.

The consultation paper is available on the APRA website.

1.7 IOSCO consults on risk mitigation standards for non-centrally cleared OTC derivatives

On 17 September 2014, the International Organization of Securities Commissions (IOSCO) published the consultation report "Risk Mitigation Standards for Non-centrally Cleared OTC Derivatives", which proposes nine standards aimed at mitigating the risks in the non-centrally cleared OTC derivatives markets.

The proposed risk mitigation standards would contribute to the G20 effort to strengthen the OTC derivatives market in the wake of the global financial crisis. One of the key planks of the G20 reform programme has been to encourage the central clearing of standardised OTC derivatives. However, a substantial proportion of OTC derivatives are not standardised and hence not suitable for central clearing. The proposed standards are aimed at these non-centrally cleared OTC derivatives.

The proposed risk mitigation standards are expected to produce three main benefits:

- the promotiof legal certainty and facilitating timely dispute resolution;
- the facilitation of the management of counterparty credit and other risks; and
- an increase in overall financial stability

The proposed risk mitigation standards cover nine areas:

- Standard 1: Scope of Coverage
- Standard 2: Trading Relationship Documentation
- Standard 3: Trade Confirmation
- Standard 4: Valuation with Counterparties
- Standard 5: Reconciliation
- Standard 6: Portfolio Compression
- Standard 7: Dispute Resolution
- Standard 8: Implementation
- Standard 9: Cross-border Transactions

Comments on the proposals should be submitted on or before 17 October 2014.

Further information is available on the IOSCO website.

1.8 FRC updates UK Corporate Governance Code

On 17 September 2014, the UK Financial Reporting Council (FRC) issued an updated version of the UK Corporate Governance Code (the Code). This significantly enhances the quality of information investors receive about the long-term health and strategy of listed companies.

The FRC has confirmed proposals for boards to include a "viability statement" in the strategic report to investors. This will provide an improved and broader assessment of long-term solvency and liquidity. It is expected that this statement will look forward significantly farther than 12 months. The Code has also been changed in relation to remuneration. Boards of listed companies will now need to ensure that executive remuneration is designed to promote the long-term success of the company and demonstrate more clearly to shareholders how this is being achieved.

The key changes to the Code include:

(a) Going concern, risk management and internal control

- companies should state whether they consider it appropriate to adopt the going concern basis of accounting and identify any material uncertainties to their ability to continue to do so;
- companies should robustly assess their principal risks and explain how they are being managed or mitigated;
- companies should state whether they believe they will be able to continue in operation and meet their liabilities taking account of their current position and principal risks, and specify the period covered by this statement and why they consider it appropriate. It is expected that the period assessed will be significantly longer than 12 months; and
- companies should monitor their risk management and internal control systems and, at least annually, carry out a review of their effectiveness, and report on that review in the annual report.

Companies can choose where to put the risk and viability disclosures. If placed in the Strategic Report, directors will be covered by the "safe harbour" provisions in the *Companies Act 2006 (UK).*

(b) Remuneration

- greater emphasis being placed on ensuring that remuneration policies are designed with the long-term success of the company in mind, and the lead responsibility for doing so resting with the remuneration committee; and
- that companies should put in place arrangements that will enable them to recover or withhold variable pay when appropriate to do so, and should consider appropriate vesting and holding periods for deferred remuneration.

(c) Shareholder engagement

Companies should explain when publishing general meeting results how they intend to engage with shareholders when a significant percentage of them have voted against any resolution.

(d) Other issues

The FRC has also highlighted the importance of the board's role in establishing the "tone from the top" of the company in terms of its culture and values. The directors should lead by example in order to encourage good behaviours throughout the organisation.

In addition the FRC has emphasised that central to the effective functioning of any board is a dialogue which is both constructive and challenging. One of the ways in which such debate can be encouraged is through having sufficient diversity on the board, including in gender and race. Nevertheless, diverse board composition in these respects is not on its own a guarantee. Diversity can be just as much about difference of approach and experience. The FRC is considering this as part of a review of board succession planning and will consider the need to consult on these issues for the next update to the Code in 2016.

Further information is available on the FRC website.

1.9 NAPF 2014 AGM report

On 16 September 2014, the UK National Association of Pension Funds (NAPF) published its second Annual General Meeting (AGM) Season Report.

(a) Remuneration

The NAPF looks in particular at those companies which have received successive years of dissent on remuneration (defined as more than 20% dissent in 2013 and more than 15% dissent again this year). Last year 28 companies in the FTSE 100 and FTSE 250 were subject to significant investor concern on this issue. By mid-August eight of these companies had received further criticism from their investors with respect to either their policy or its implementation.

(b) Audit

The NAPF report comments on audit reports as this year's audit reports were the first under the new regulation introduced to require auditors to provide more specific comment on the company - including the materiality level applied in the audit, the scope of the audit, and what risk areas were particularly focused on within audit work.

The 2014 AGM Season Report is available on the NAPF website.

1.10 Basel III monitoring results published by the Basel Committee

On 11 September 2014, the Basel Committee published the results of its latest Basel III monitoring exercise. The study is based on the reporting process set up by the Committee to periodically review the implications of the Basel III standards for banks.

A total of 227 banks participated in the current study, comprising 102 large internationally active banks ("Group 1 banks", defined as internationally active banks that have Tier 1 capital of more than €3 billion) and 125 Group 2 banks (i.e. representative of all other banks).

Data as of 31 December 2013 show that most large internationally active banks now meet the Basel III risk-based capital minimum requirements, and capital shortfalls have been further reduced relative to the target levels. For example, at the Common Equity Tier 1 (CET1) target level of 7.0% (plus the surcharges on G-SIBs as applicable), the aggregate shortfall for Group 1 banks is €15.1 billion, compared to €57.5 billion on 30 June 2013. As a point of reference, the sum of after-tax profits prior to distributions across the same sample of Group 1 banks for the year ending 31 December 2013 was €419 billion.

Under the same assumptions, the capital shortfall for Group 2 banks included in the sample is estimated to be €2.0 billion for the CET1 minimum of 4.5% and €9.4 billion for a CET1 target level of 7.0%. This represents a decrease compared to the previous period's figures of €10.4 billion and €18.3 billion, respectively.

The monitoring report is available on the Bank for International Settlements (BIS) website.

1.11 IOSCO updates survey on commodity derivatives markets supervisory principles

On 9 September 2014, the International Organization of Securities Commissions (IOSCO) issued the report "Update to Survey on the Principles for the Regulation and Supervision of Commodity Derivatives Markets", which updates its 2012 review of the implementation of IOSCO's principles for commodity derivatives markets.

Consistent with the 2012 review of implementation of the IOSCO's principles for commodity derivatives markets, the majority of respondents to IOSCO's 2014 update were broadly compliant with the Principles. Where commodity derivative markets exist and market authorities were yet to be fully compliant, many of those market authorities had identified initiatives aimed at achieving full compliance over time.

The report is available on the IOSCO website.

1.12 EU: Consultation on cross-border mergers and divisions

On 8 September 2014, the European Commission released a consultation on cross-border mergers and divisions.

The European Commission launched the consultation to collect information which would allow it to assess the functioning of the existing EU legal framework for cross-border operations of companies and any potential need for changes in the current rules. It follows the 2012 Action Plan on European company law and corporate governance, which announced that the Commission would consider (i) the appropriateness of amendments to improve the existing *Directive 2005/56/EC* on cross-border mergers and (ii) a possible initiative to provide a framework for cross-border divisions of companies.

Further information is available on the European Commission website.

1.13 IOSCO seeks comment on proposed statement on non-GAAP financial measures

On 8 September 2014, the International Organization of Securities Commissions (IOSCO) issued a Proposed Statement on Non-GAAP Financial Measures, which sets out its expectations for issuers with respect to their presentation of financial measures other than those prescribed by Generally Accepted Accounting Principles (GAAP).

Non-GAAP financial measures can be useful to issuers and investors because they can provide additional insight into an issuer's financial performance, financial condition and/or cash flow. The use of non-GAAP financial measures also can provide issuers with flexibility in communicating useful, entity-specific information.

Problems can arise, however, when non-GAAP financial measures are presented inconsistently, defined inadequately, or obscure financial results determined in accordance with GAAP. Furthermore, non-GAAP financial measures typically lack a standardised meaning and thus are generally not comparable from one issuer to the next.

The Proposed Statement is intended to assist issuers in providing clear and useful disclosure for investors and other users of non-GAAP financial measures, and to help reduce the risk that such measures are presented in a way that could be misleading.

The Proposed Statement on Non-GAAP Financial Measures is available on the IOSCO website.

1.14 Report on supervisory colleges for financial conglomerates released by the Joint Forum

On 3 September 2014, the Joint Forum released its report on supervisory colleges for financial conglomerates.

The report, the result of a recent self-assessment survey of Joint Forum members, presents findings on how far cross-sectoral issues, and specific questions related to financial conglomerates, are effectively addressed within supervisory colleges.

This stocktaking exercise also provides information on the implementation of the Joint Forum Principles for the Supervision of Financial Conglomerates and, in particular, Principle 6 relating to supervisory cooperation, coordination and information-sharing.

The Joint Forum notes the general progress that has been made in this area since the previous study in 2011; however the present report identifies several gaps and issues in relation to the implementation of Principle 6, such as:

- that not all jurisdictions have in place a specific supervision framework for financial conglomerates or coordination agreements with other supervisors of financial conglomerates on a cross-sectoral level. Gaps also exist in the coordination of on-site and off-site supervision with other domestic or international supervisors, and in arrangements or processes for taking enforcement actions with other domestic or international authorities; and
- that there appear to be insufficient specific mechanisms for supervisory cooperation and coordination in periods of crisis/stress, which may possibly hinder effective intervention in times of crisis.

The report is available on the IOSCO website.

1.15 Hong Kong Exchange publishes concept paper on weighted voting rights

On 29 August 2014, the Stock Exchange of Hong Kong Limited (the Exchange), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEx), published a concept paper on weighted voting rights (the Concept Paper).

The Concept Paper seeks views on whether governance structures that give certain persons voting power or other related rights disproportionate to their shareholding (weighted voting right structures) should be permissible for companies listed or seeking to list on the Exchange's markets.

Currently, both applicants and listed companies must ensure that the voting power of their shares bears a "reasonable relationship" to the equity interest those shares represent. This means a shareholder cannot have greater voting power than another if both have the same amount of equity in a company. This is commonly known as the "one-share, one-vote" concept.

The Concept Paper is available on the HKEx website.

1.16 SEC adopts asset-backed securities reform rules

On 27 August 2014, the US Securities and Exchange Commission (SEC) adopted revisions to rules governing the disclosure, reporting, and offering process for asset-backed securities (ABS) to enhance transparency, better protect investors, and facilitate capital formation in the securitisation market.

The new rules require, among other things, loan-level disclosure for certain assets, such as residential and commercial mortgages and automobile loans. The rules also provide more time for investors to review and consider a securitisation offering, revise the eligibility criteria for using an expedited offering process known as "shelf offerings", and make important revisions to reporting requirements.

The Final Rule is available on the SEC website.

1.17 SEC adopts credit rating agency reform rules

On 27 August 2014, the US Securities and Exchange Commission (SEC) adopted new requirements for credit rating agencies to enhance governance, protect against conflicts of interest, and increase transparency to improve the quality of credit ratings and increase credit rating agency accountability. The new rules and amendments, which implement 14 rulemaking requirements under the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, apply to credit rating agencies registered with the SEC as nationally recognised statistical rating organizations (NRSROs).

The new requirements for NRSROs address internal controls, conflicts of interest, disclosure of credit rating performance statistics, procedures to protect the integrity and transparency of rating methodologies, disclosures to promote the transparency of credit ratings, and standards for training, experience, and competence of credit analysts. The requirements provide for an annual certification by the CEO as to the effectiveness of internal controls and additional certifications to accompany credit ratings attesting that the rating was not influenced by other business activities.

The SEC has also adopted requirements for issuers, underwriters, and third-party due diligence services to promote the transparency of the findings and conclusions of third-party due diligence regarding asset-backed securities.

Further information is available on the SEC website.

1.18 FTSE 100 CEO pay research

On 18 August 2014, the UK High Pay Centre released a report on how much CEOs are paid in the FTSE 100 companies. They are now paid around 130 times their average employee. In 1998, the average FTSE 100 CEO was paid 47 times their average employee. Analysis of six major UK companies in 1980 found that CEOs were being paid between 13 and 44 times their average employee.

Further information is available on the High Pay Centre website.

1.19 Latest Centre for Corporate Law and Securities Regulation research papers

The following are the most recent research papers authored by members of Melbourne Law School's Centre for Corporate Law and Securities Regulation.

(a) An analysis of companies' business objectives (by Reegan Grayson-Morison and Ian Ramsay)

The authors analyse the business objectives of the top 100 companies listed on the Australian Securities Exchange (ASX) to determine to what extent stakeholder interests are taken into account in the objectives. The objectives are classified according to whether the company prioritises the interests of shareholders, prioritises the interests of shareholders but takes into account the interests of other stakeholders, or prioritises the interests of stakeholders. For those companies that prioritise the interest of shareholders, the authors examine how this objective is described. The findings of the authors are then compared to those of other researchers who have interviewed directors to determine what interests they take into account when making decisions. The authors also compare the results to what courts have said should be the interests that directors consider to satisfy their duty to act in the interests of the company. The rationale for this research is the ongoing debate regarding in whose interests companies are managed.

The paper is available here.

(b) Shareholder protection in Australia: Institutional configurations and regulatory evolution (by Richard Mitchell, Anthony O'Donnell, Ian Ramsay and Michelle Welsh)

Various explanations have been advanced for why shareholder protection looks the way that it does. These explanations include varieties of capitalism, legal origins and various configurations of social interests. When compared with the United States and the United Kingdom, Australian corporate law appears on its face to be strongly protective of shareholders. When trying, however, to explain the relative strength of Australian corporate law, the authors find that none of the theories advanced appear to be satisfactory. Their analysis of the development of shareholder protection laws in Australia indicates that the Australian experience is not easily located within the broad theories that seek to classify countries according to matters such as types of capitalism, legal origins or political orientation.

The paper is available here.

(c) The financial literacy of young Australians: An empirical study and implications for consumer protection and ASIC's National Financial Literacy Strategy (by Paul Ali, Malcolm Anderson, Cosima McRae and Ian Ramsay)

The Australian Securities and Investments Commission (ASIC) has stewarded the Australian National Financial Literacy Strategy since 2011. Financial literacy is increasingly recognised as an essential part of consumer protection, complementing traditional consumer protection mechanisms such as disclosure. Increased financial literacy has significant benefits including the potential to reduce the need for regulatory intervention and enhance economic participation. While much attention has focused upon the financial literacy of adults, young people are active consumers and it has been suggested that their levels of financial literacy are not consistent with their extensive consumer activities. Currently a research gap exists regarding the financial literacy levels and attitudinal/behavioural aspects of young people's financial decision-making. This article discusses the results of a financial literacy survey of senior students in Australian secondary schools. The survey tested six key areas of financial literacy skills - financial decision-making; financial language comprehension; formal financial literacy (measuring the ability to conduct basic calculations and using practical skills to determine correct answers); financial knowledge comprehension (measuring awareness of matters such as investing and the classification of job types); consumer rights awareness; and financial risk awareness. The analyses tested for demographic factors and attitudes that are related to financial literacy. The study contributes important findings that can assist ASIC's ongoing work promoting consumer protection through financial literacy policies and can also assist in the development of financial literacy education programs in schools.

The paper is available here.

(d) Financial literacy and financial decision-making of Australian secondary school students (by Paul Ali, Cosima McRae and Ian Ramsay)

Young people need have the skills and knowledge to make sound financial decisions now and as adults and to support them to engage confidently and successfully in economic life. They must navigate a much more complex financial landscape and assume greater financial responsibility at a younger age than previous generations and this poses considerable challenges. A current issue for policy makers in Australia is the relative scarcity of data on young people's financial decision-making. In particular, there is little current evidence about the social and economic contexts and influences, such as peers, families and advertising that shape the financial decisions of young people around the world and in Australia. It is important to determine how financial decision-making is currently experienced by young people. A better understanding of the contexts in which young people make financial decisions, and their experiences of financial decision-making, will provide important and useful information that can shape financial education policies - the core goal of which is to ensure all Australians are able to make confident, sound financial decisions. This study, which is part of a larger study of the financial literacy of young Australians, investigates how financial decision-making at a time of transition from secondary school to adult life is conceptualised by young Australians. The data for the study is derived from focus group interviews with young Australians aged 16 and 17 years. Participants from nine Australian schools that are diverse in their geographic location and student cohort were chosen for the study. The interviews explored the context and attitudes relating to their financial decision-making.

The paper is available here.

(e) The legal structure and regulation of securities lending (by Paul Ali, Ian Ramsay and Benjamin Saunders)

This paper examines the legal structure of securities lending in Australia, and also Europe, the United Kingdom and United States. It provides an analysis of widely used industry documents the Australian Master Securities Lending Agreement (AMSLA) and the Global Master Securities Lending Agreement. It outlines the regulation of securities lending and short selling, including restrictions on short selling and the applicable disclosure requirements. It discusses the collapse of Opes Prime and the key Australian Federal Court decision that considered the legal effect of the AMSLA. It also outlines the regulatory responses to securities lending and short selling taken by IOSCO, in Europe, the United States and the United Kingdom during the global financial crisis.

The paper is available here.

(f) Securities lending, empty voting and corporate governance (by Paul Ali, Ian Ramsay and Benjamin Saunders)

This paper examines the corporate governance implications of securities loans, in particular the impact of securities loans on shareholders' voting rights and the control of listed Australian companies. The paper considers whether the current regulatory framework for securities loans in Australia adequately addresses the concerns associated with securities loans and whether reform is required in order to protect the interests of shareholders in listed Australian companies and to ensure that the governance of these companies is not undermined by securities loans.

The paper is available here.

2. Recent ASIC Developments

2.1 "Low doc" lenders tighten lending practices

On 23 September 2014, ASIC released a report on "low doc" lending. The review of low doc home loans following the introduction of responsible lending laws finds that lenders have tightened their lending practices.

Before the introduction of responsible lending laws in 2010, some lenders did not verify a borrower's financial situation for low doc loans. Instead, lenders often simply relied on a statement from the borrower that they could meet their repayments. This led, in some cases, to borrowers not being able to pay back the loan, or only being able to do so by selling their home.

ASIC's review of 12 lenders found that lenders had tightened their low doc lending practices since the introduction of the responsible lending laws.

For example:

Lenders are providing low doc loans to a narrower range of borrowers. Low doc loans are only being offered to the self-employed or those who do not have a readily verifiable income, rather than borrowers with a regular income stream that can be readily verified by documents such as payslips.

This tightening of lending standards since the introduction of the responsible lending laws is also reflected in Australian Prudential Regulation Authority (APRA) statistics indicating a significant decline in the number of low doc loans. APRA statistics indicate that since commencement of the National Consumer Credit Protection Act 2009 (Cth) in 2010, low doc loans have declined from 6.4% of new residential loans by ADIs to 0.7% of new residential loans by ADIs.

Although lending practices have improved across the industry, ASIC also identifies a number of compliance risks.

The report is available on the ASIC website.

2.2 Record-keeping obligations for AFS licensees updated

On 18 September 2014, ASIC updated its record-keeping obligations following industry consultation.

The updated obligations require Australian financial services (AFS) licensees to keep records to prove that the AFS licensee and its representatives have complied with the Future of Financial Advice (FOFA) best interests duty and related obligations when they give personal advice to retail clients.

Further information is available on the ASIC website.

2.3 Australian company data available at data.gov.au

On 18 September 2014, ASIC launched the Datasets for the companies register via the Australian Government data.gov.au website.

Each month freely available data from ASIC's companies register will be published to the website and available to download at no cost. The dataset includes company names, registration dates, Australian Company Numbers (ACNs), Australian Business Numbers (ABNs) and status, with a flag to indicate if data has been modified since the last update.

In coming months, ASIC plans to extend the datasets to include freely available information from ASIC's business name register.

Accessing some information may attract a fee. Further information is available on the data.gov.au website.

2.4 Update on financial advice stakeholder engagement

On 17 September 2014, ASIC reported on the results of two financial advice industry engagement projects conducted during the 2013-14 financial year.

(a) Future of Financial Advice (FOFA) reform implementation

ASIC has released Report 407 Review of the financial advice industry's implementation of the FOFA reforms (REP 407), which presents the findings from an ASIC review of the implementation of the FOFA reforms by 60 AFS licensees.

Key findings in REP 407 relate to the following:

1. Impact of FOFA on adviser numbers, products and services:

- a number of AFS licensees reported an increase in their provision of scaled advice and strategic advice as a result of FOFA; however, for most AFS licensees, the type of advice they provided and their adviser numbers had not changed;
- the advice industry continues to be highly concentrated, and AFS licensees are often affiliated to issuers of financial products; and
- most AFS licensees had reviewed their approved product lists in light of the FOFA reforms.

2. Conflicted remuneration:

- most AFS licensees reported changes to their revenue streams as a result of the ban on certain forms of conflicted remuneration; and
- blended fee models were common, with AFS licensees stating their advisers charged for advice through a range of methods, including advice fees and commissions.

3. Compliance challenges and risks:

- most AFS licensees stated the biggest challenges they had experienced in implementing the FOFA reforms related to the requirement to provide fee disclosure statements, and the changes they needed to make to their systems; and
- AFS licensees considered the best interests duty posed a relatively high risk of non-compliance in the future. To mitigate this risk, AFS licensees had revised their advice systems and procedures, and most were relying on the "safe harbour" steps under the Corporations Act 2001 (Cth) to demonstrate their compliance with the best interests duty and related obligations.

ASIC notes that it collected the data for this report prior to the recent amendments to the FOFA reforms.

(b) New AFS licensee visits

In a separate project, ASIC visited 35 newly licensed financial advice businesses, a sample representing just over a quarter of AFS licensees that were granted an AFS licence between July 2012 and June 2013, with an authorisation to provide personal financial advice to retail clients.

ASIC asked AFS licensees questions about their business model, advice processes, and approach to risk and compliance.

Some of the key findings from the project include that:

- in light of the FOFA obligations commencing on 1 July 2013, 97% of new AFS licensees indicated they could demonstrate compliance with the new FOFA obligations.
- just over 80% of AFS licensees providing self-managed superannuation fund (SMSF) advice require their advisers to undergo additional training before providing SMSF advice. This is significantly stronger compared to the 2012-13 project, in which only 48% of new AFS licensees required their advisers to undergo additional training before providing SMSF advice; and
- 82% of AFS licensees sought external assistance in relation to some compliance functions (compared to 86% in 2012-13).

The report is available on the ASIC website.

2.5 First report on corporate finance regulation

On 29 August 2014, ASIC published the first in a series of reports it intends to release regularly on the regulation of corporate finance issues in Australia.

The report, which covers the period January - June 2014, is intended to provide companies and their advisers with insights into ASIC's regulatory approach in the corporate finance sector and assist them with their associated legal and compliance obligations.

Report 406 "ASIC regulation of corporate finance: January to June 2014" (REP 406) provides statistical data, highlights key focus areas, and includes relevant guidance about ASIC's regulation of:

- fundraising transactions;
- mergers and acquisitions;
- corporate governance issues;
- financial reporting; and
- share buy-backs.

The report is available on the ASIC website.

2.6 Second submission to the 2014 Financial System Inquiry

On 26 August 2014, ASIC released its second submission to the 2014 Financial System Inquiry (the Murray Inquiry).

The submission includes discussion of:

- disclosure and alternative regulatory tools;
- improving the quality of financial advice;
- consumer loss and compensation;
- the role of the regulator;
- penalties;
- systemic stability ;
- market financing; and
- international regulatory integration.

The submission is available on the ASIC website.

2.7 Updated policy for externally administered companies and registered managed investment schemes being wound up

On 25 August 2014, ASIC released a consultation paper on relief for externally administered companies and registered schemes being wound up.

In Consultation Paper 223 "Relief for externally administered companies and registered schemes being wound up - RG 174 update" (CP 223) ASIC is consulting on whether it should:

- expand its policy to exempt insolvent registered schemes being wound up from financial reporting;
- expand its policy to exempt public companies from the obligation to hold an AGM if the company has a liquidator appointed; and
- update its guidance on the circumstances in which it will provide individual relief, including narrowing the circumstances in which exemptive relief is given and expanding the circumstances in which deferral relief is given.

The consultation paper is available on the ASIC website.

2.8 Consultation on red tape reduction proposals for ASIC market integrity rules

On 21 August 2014, ASIC identified obligations under the ASIC market integrity rules that could be repealed or refined to reduce the compliance burden on market participants.

Consultation Paper 222 "Reducing red tape: Proposed amendments to the market integrity rules" (CP 222) sets out ASIC's proposals to remove or refine market integrity rules that:

- require certain market participants to notify ASIC of the details of their professional indemnity insurance cover (the obligation to retain professional indemnity insurance cover will remain);
- require certain market participants to obtain ASIC's consent before sharing business connections; and
- prohibit certain transactions during takeovers, schemes of arrangement and buy-backs.

These market integrity rules apply (variously) across the ASX, Chi-X, APX, NSXA and SIM VSE markets.

The consultation paper is available on the ASIC website.

2.9 Eighth market supervision report

On 21 August 2014, ASIC published its eighth report on the supervision and surveillance of Australian financial markets and market participants.

Report 405 "ASIC supervision of markets and participants: January to June 2014" (REP 405) outlines some of the work ASIC does to ensure the integrity of Australian markets.

In the period January - June 2014, ASIC's activities included:

- 15 significant enforcement outcomes;
- eight infringement notices issued by the Markets Disciplinary Panel;
- 21 matters referred for further investigation;
- 17,091 trading alerts;
- 122 market enquiries;
- 35 risk-based assessment visits;
- 55 participant compliance reviews; and
- 17 industry presentations.

The report provides additional insight into activities underpinning ASIC enforcement action in the markets area. For example, between 1 January - 30 June 2014, the Market Integrity Enforcement team typically had over 80 matters under investigation at any one time. As part of these investigations, they conducted 66 formal interviews with persons of interest, issued 326 notices to obtain information and executed four search warrants in partnership with the Australian Federal Police.

REP 405 identifies future areas of focus for ASIC, in particular, correcting deficiencies in the treatment of confidential information by listed companies. Other aspects of market conduct to which ASIC will be paying close attention in the coming six months include suspicious activity reporting and the execution of orders by designated trade representatives.

The report is available on the ASIC website.

3. Recent ASX Developments

3.1 ASX Operating Rules Procedures amendment: Notification requirements

On 1 September 2014, the notification requirements in the Operating Rules Procedures around changes in directors (for ASX and ASX 24) and Automated Order Processing systems (for ASX only) were amended.

The change to ASX and ASX 24 Operating Rules Procedure 1400(e) increases the timeframe for notification of a change in director and aligns the requirement with the same obligations under the ASX Clear Operating Rules.

The change to ASX Operating Rules Procedures 1000(g) and 1401(a), in respect of notifications around Automated Order Processing (AOP) systems, reflect the changes ASIC made to its AOP notification requirements (under ASIC Market Integrity Rules (ASX Market) 5.6) whereby material change notifications are no longer required but an annual notification is required.

Participants should consider any changes they need to make to their compliance frameworks to reflect:

- the increased timeframe for notifying ASX and ASX 24 of a change of director;
- the fact that material AOP system change notifications are no longer required to be provided to ASX; and
- the participant is obligated to provide ASX with a copy of the annual notification regarding its AOP system at the same time it provides such notification to ASIC.

The notice announcing the amendment is available on the ASX website.

3.2 "Building stable, growing & globally competitive financial markets" - ASX submission responding to the FSI Interim Report

On 26 August 2014, ASX lodged its submission in response to the interim report of the Financial System Inquiry. ASX's submission focuses on four key areas: funding (equity and debt) economic activity; competition in the financial system; appropriate regulatory arrangements; and international integration. It proposes that the growth of a domestic corporate bond market could be enhanced by the removal of the requirement for a prospectus to accompany the issue of "vanilla" corporate bonds to retail investors. Australia's robust continuous disclosure regime (through the issue of a "cleansing notice") combined with a term sheet with key features of the bond issue would provide investors with the necessary information to make an informed investment decision.

The submission is available on the ASX website.

3.3 ASX Limited Annual Report

On 21 August 2014, ASX released its full-year result for the year ending 30 June 2014. ASX Managing Director and CEO Elmer Funke Kupper, said:

> ASX produced a positive result for the 2014 financial year (FY14), driven by revenue growth across all of ASX's major business categories. Revenues grew 6.6% to $658.3 million and net profit increased 10% to $383.2 million ...
>
> The largest contributor to revenue growth was the Listings and Issuer Services business, supported by a strong IPO market. ASX admitted 107 new listings for the year, averaging around two per week ...
>
> FY14 was an important year in which ASX delivered a number of significant infrastructure investments for Australia's financial markets. They include a service to clear OTC derivatives, a client clearing solution that provides important new protections to investors, and a collateral management service. Our investments give Australian investors access to a domestic infrastructure that is world-class, well capitalised and competitive.

On the ASX website you can find:

- media release;
- ASX Limited annual report;
- transcript of the media briefing; and
- analyst presentation

along with the Final Dividend Announcement and Appendix 4E (Preliminary Final Report).

3.4 Reports

On 3 September 2014, ASX released:

- the ASX Group Monthly Activity Report;
- the ASX 24 Monthly Volume and Open Interest Report; and
- the ASX Compliance Monthly Activity Report

for August 2014.

4. Recent Takeovers Panel Developments

4.1 Blackham Resources Limited - Panel declines to make declaration

On 20 August 2014, the Takeovers Panel announced that it had declined to make a declaration of unacceptable circumstances in response to an application dated 25 July 2014 from Blackham Resources Limited in relation to its affairs.

Blackham submitted that (among other things) Mr Joseph Gutnick, Great Central Gold Pty Ltd, Mazil Pty Ltd, Perfectus Management Limited and Polo Resources Limited were associates in relation to Blackham and, as a result, there had been contraventions of the substantial holding provisions and s. 606 (see TP14/64).

On 27 May 2014, Polo Resources acquired a 49% interest in Perfectus. At the time of Polo Resources' investment, Perfectus's only asset was 15,888,495 Blackham shares (approximately 15%).

Mr Gutnick previously owned 100% of Perfectus and retained a 49% interest following Polo Resources' subscription (a further 2% was subscribed for by an entity associated with Polo Resources' managing director).

A shareholders' agreement between the Perfectus shareholders was entered into on this date.

Also, at 27 May 2014:

- Great Central Gold, an entity that is 100% owned by Mr Gutnick, held 15,901,505 Blackham shares (approximately 15%); and
- Polo Resources held 4,761,905 Blackham shares (approximately 4.5%) through a nominee.

Shareholders' agreements such as the Perfectus shareholders' agreement can give rise to an association. In this case, however, given the general terms of the agreement, the Panel considered the surrounding circumstances and the material presented and was not, on balance, inclined to draw the necessary inferences and find that an association in relation to Blackham existed.

On the basis of the above, the Panel decided not to make a declaration of unacceptable circumstances.

The Panel has published its reasons for the decision on the Takeovers Panel website.

4.2 Ambassador Oil and Gas Limited 02 - Panel declines to conduct proceedings

On 20 August 2014, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 22 June 2014 from Drillsearch Energy Limited in relation to the affairs of Ambassador Oil and Gas Limited following Magnum Hunter Resource Corporation lodging a supplementary bidder's statement addressing the Panel's concerns.

The application concerned information deficiencies in Magnum's bidder's statement (see TP14/45). Ambassador Oil is subject to competing bids by Drillsearch and Magnum.

The Panel considered there were significant information deficiencies in Magnum's bidder's statement. After communicating these to the parties, Magnum engaged with ASIC to address additional concerns ASIC had. After several weeks, the concerns have now been addressed in a supplementary bidder's statement lodged by Magnum with ASX on 20 August 2014. The supplementary bidder's statement will also be dispatched to Ambassador Oil shareholders.

At the Panel's request, Magnum agreed to offer a 14-day withdrawal right to all Ambassador Oil shareholders who had accepted Magnum's offer.

With the lodgement and dispatch of the supplementary bidder's statement in the form required by the Panel, the Panel concluded that a declaration of unacceptable circumstances was unnecessary. Accordingly, the Panel declined to conduct proceedings.

The Panel has published its reasons for the decision on the Takeovers Panel website.

5. Recent Research Papers

5.1 Conduct of business regulation

This publication provides a survey and comparative analysis of conduct of business (COB) regulation. COB regulation governs financial intermediaries' conduct toward their clients, that is, toward the actors - whether individuals or institutions - with whom financial intermediaries transact in providing financial products and services. Modal regulatory strategies include anti-fraud rules, and duties of care, loyalty, fair-dealing and best-execution - and variants of these duties.

The publication describes the justifications for COB regulation, the modal regulatory strategies used and the complex frameworks within which COB regulation operates. It then generally assesses US COB regulation, focusing on the regulation of broker-dealers and investment advisers. It outlines important market and regulatory developments over the past several decades and draws comparisons with corresponding EU and Australian COB regulation. It concludes by discussing reforms proposed or adopted in the wake of the global financial crisis of 2007-09.

The paper is available on the SSRN website.

5.2 Executive gatekeepers: Useful and divertible governance

In his 2006 book, Coffee heavily criticises failures in corporate gatekeeping, emphasising counter-incentives created by equity compensation. The authors apply these ideas to internal gatekeeping, specifically the role of the executive general counsel in preventing fraud. They first find that fraud occurs less frequently after hiring general counsels into the executive suite. Their main tests explore how incentive pay affects an allocation of time and thus the monitoring of potentially fraudulent activities. Using data on the career paths of executive lawyers, the authors find that a one standard deviation (US$52,851) increase in the sensitivity of general counsel wealth to stock performance distorts the gatekeepers, unwinding 82% of the improved prevention of caught fraud associated with hiring a gatekeeper and 18% of the improved prevention of uncaught fraud. Gatekeepers do not get diverted from frauds associated with regulatory compliance, namely, AAERs and insider trading. Unwinding takes place in other dimensions, such as the uncaught likelihood of fraud, class action law suits, and backdating of stock options. The authors conclude with an alternative interpretation of their design that these gatekeepers-in-residence may be hired as totems of governance rather than real gatekeepers.

The paper is available on the SSRN website.

5.3 Regulation and reforms to enhance financial stability in the post-GFC era

It has been said that the intellectual origins of the global financial crisis (GFC) can be traced back to "blind spots" in traditional financial theory, which obscured complexity and financial innovation in contemporary markets. There has been growing recognition that changes to the modern market, including the effects of globalisation, extreme mobility of capital and technological advances, require corresponding changes in regulatory approach and structure. The crisis highlighted the need for specific regulation to enhance financial market stability, and the importance of ensuring that such regulation is both informed and effective. This paper discusses key regulatory issues and developments emerging from the GFC in relation to three distinct areas - financial market regulation; taxation; and banking and finance. The paper analyses the adequacy and efficacy of Australia's legal infrastructure in these three areas from a comparative perspective.

The paper is available on the SSRN website.

5.4 Independent directors and corporate litigation

In this paper, the authors examine the effects of board structure on a wide variety of corporate litigation. They use a unique hand-collected dataset of corporate law suits and the 2002 NYSE/NASDAQ exchange listing requirements, as an exogenous shock to board independence, to empirically examine the monitoring effectiveness of board independence using a difference-in-difference framework. The authors find that an increase in board independence is associated with a significant reduction in multiple types of corporate litigation, beyond shareholder class action lawsuits. While this evidence is consistent with stronger monitoring by independent directors they also find evidence that greater board independence can inhibit a board's ability to monitor internal actions. Specifically, they find evidence that mandatory increases in board independence, which reduces a board's knowledge of firm-specific information, can make a firm more susceptible to product liability, employment and labour litigation. The evidence is consistent with the greater monitoring role independent directors provide, but also their limitations when it comes to monitoring in firms where firm-specific information is more important.

The paper is available on the SSRN website.

5.5 Governance reforms and firm value: Worldwide evidence

The authors examine the impact of governance reforms on firm value in 41 countries. Using a difference-in-differences design, they find that firm value increases after enactment of the reforms and that the effect of these reforms primarily exists in countries with weak legal institutions. The effect of reforms on firm value is primarily due to provisions related to board independence and audit committee, not the separation of the roles of chief executive officer and chairman. In addition, the effect of reforms is concentrated among comply-or-explain reforms, and the role of country-level institutions is less important for these reforms than for regulation reforms. Taken together, the findings suggest exogenously imposed governance changes benefit shareholders, mainly in countries with weak institutional quality and for reforms with a comply-or-explain approach.

The paper is available on the SSRN website.

5.6 The implications of corporate social responsibility for investors: An overview and evaluation of the existing CSR literature

This paper reviews the most important academic studies on corporate social responsibility (CSR) and environmental, social and governance (ESG) to show where the current research on this topic is standing. Along these lines the authors provide their assessment of the CSR literature where appropriate. Key questions of the paper are: What are the effects of superior CSR on corporate financial performance? What are the effects that particular aspects of ESG have on the cost of equity or cost of debt for firms? Does CSR make sense from a strategic management perspective? Are financial markets aware of CSR? And if so, what can investors do with those firms that display inferior CSR and ESG standards?

The paper is available on the SSRN website.

5.7 The use of schemes of arrangement to effect takeovers: A comparative analysis

Schemes of arrangement originated in England but have since spread to a number of other common law jurisdictions. One of the most common uses of schemes is to effect a change of control transaction, as an alternative to a takeover offer. In some jurisdictions schemes have become the mechanism of choice for recommended bids. Jurisdictions differ in their response to this use of schemes. As regards English schemes, the legislative provisions, the courts and the regulatory authorities are neutral as to whether a change of control is effected by way of a scheme or a takeover offer. By contrast, some jurisdictions, such as Australia, have put in place legislative provisions that potentially constrain this use of schemes, and other jurisdictions make changes to the operation of schemes (such as increasing the approval threshold) which seem designed to respond to concerns regarding the operation of schemes in this context. This paper explores the use of schemes to effect change of control transactions, including their advantages and disadvantages compared to a takeover offer. The concerns raised regarding this use of schemes are discussed and analysed, and the approach regarding English schemes is compared with that of other jurisdictions where a different approach is taken. These include Australia, New Zealand and Hong Kong. The paper questions whether the English approach can be defended, and concludes that it can, as a result of the significant safeguards in place to prevent abuse, in particular the oversight of the court in the process and the fact that the UK Takeover Code covers change of control transactions effected via schemes as well as via takeover offers.

The paper is available on the [SSRN website].

5.8 How much is too much? Large termination fees and merger outcomes

The authors investigate the use and impact of large target termination fees in acquisitions. Large termination fees are associated with more post-bid competition and lower completion rates, suggesting bidders use high fees in expectation of bid competition. Large termination fees are more common in deals with small and distressed targets and deals with high advisory fees. Switching regression estimates predict that high-fee deals would receive lower premiums with reduced termination fees. Overall, the evidence suggests that targets use large termination fees to overcome contracting problems when bidders face high transaction costs and information risk. In contrast to prior literature, there is limited evidence that managerial self-interest motivates high fees, as target managers in these deals are not more likely to receive severance packages or employment with the bidder in high-fee deals.

The paper is available on the [SSRN website].

6. Recent Corporate Law Decisions

6.1 Representative proceedings: Must each group member have a claim against each respondent?

(By Peter Motti, Minter Ellison)

Cash Converters International Limited v Gray [2014] FCAFC 111, Full Court of the Federal Court of Australia, Jacobson, Middleton and Gordon JJ, 1 September 2014.

The full text of this judgment is available online.

(a) Summary

This was an interlocutory decision by the Court to refuse to strike out whole or part of the statement of claim made under Part IVA of the Federal Court of Australia Act 1976 (Cth) (the FCA Act). The proceedings specifically related to section 33C of the Act and whether to bring a claim under that section each group member must have a claim against each respondent. The Court granted Cash Converters leave to appeal but ultimately dismissed the appeal.

(b) Facts

Two representative proceedings were commenced under Part IVA of the Act with Gray as the lead applicant in relation to two types of "Cash Converters" loans obtained between 2010 and 2013. Loans for larger amounts were styled as "Personal Loans" and loans for smaller amounts were styled as "Cash Advances". In the first proceeding, Gray claimed that Ja-Ke Holdings Pty Ltd (Ja-Ke), a credit provider and the franchisee of the Penrith Cash Converters store, provided multiple cash advances of between $100 and $200 to her from 1 July 2010 to 12 October 2012 (the Cash Advances Proceeding). Gray's central claim was that the imposition by Ja-Ke of a deferred establishment fee in respect of those cash advances breached cl. 7 of Schedule 3 to the Credit (Commonwealth Powers) Act 2010 (NSW) (the Credit Act) or was otherwise unconscionable and in contravention of s. 12CB(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act). Gray alleged that the other respondents to the Cash Advances Proceeding - Cash Converters Pty Ltd (CCPL), the franchisor of the Cash Converters franchise in Australia, and Cash Converters International Limited (CC International), the parent entity of CCPL, were involved in the contraventions by Ja-Ke and were thereby accessories to Ja-Ke's unconscionable conduct.

In the second proceeding, Gray claimed that she had entered into personal loan contracts with two credit providers who were entities in the Cash Converters corporate group - Safrock Finance Corporation (QLD) Pty Ltd (Safrock) and Cash Converters Personal Finance Pty Ltd (CC Personal Finance) (the Personal Loans Proceeding). Again, the central claim was that the deferred establishment fee charged in respect of the personal loans breached cl. 7 of Schedule 3 to the Credit Act or was otherwise unconscionable and in contravention of s. 12CB(1) of the ASIC Act. The claim against

CC International, the parent of Safrock and CC Personal Finance, was that it was involved in their contraventions and therefore accessorily liable.

The respondents in both the Cash Advances Proceeding (other than Ja-Ke) and the Personal Loans Proceeding (collectively, Cash Converters) sought leave to appeal from interlocutory orders of the primary judge who declined to strike out the whole or part of Gray's statement of claim in each proceeding. Cash Converters contended that s. 33C(1) of the FCA Act requires that each group member whom Gray represents must have a claim against each respondent to the proceeding and that both proceedings were not properly constituted because this requirement had not been met.

Gray argued that the primary judge was correct and that the proper construction of s. 33C(1) is that it does not impose a requirement that every group member have a claim against every respondent. This construction was said to be supported by the other sections of Part IVA, as well as the overarching purpose of the civil practice and procedure provisions of the FCA Act.

(c) Decision

Their Honours noted that it was common ground between the parties that the applicant in such proceedings must have a claim against each respondent, but the parties diverged as to whether s. 33C(1) of the FCA Act required that each group member have a claim against each respondent to the proceeding. Despite finding the authorities to be inconsistent on this point, their Honours nevertheless held the answer to be "no".

In coming to their decision, their Honours considered, amongst other things, the proper construction of s. 33C of the FCA Act (and, in particular, subsection 33C(1)(a)). In examining the express words of s. 33C, their Honours noted that it contained two subsections. Their Honours observed that the first sub-section was qualified by the phrase "Subject to this Part" and that it identifies three elements that must exist before a proceeding may be commenced under Part IVA, being:

> (a) seven or more persons have claims against the same person; and
> (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
> (c) the claims of all those persons give rise to a substantial common issue of law or fact.

Their Honours placed particular emphasis on the last line in subsection 30C(1) - "a proceeding ... by one or more of those persons as representing some or all of them" and whether it meant that where an applicant's circumstances (and those of the group members) gave rise to a claim of multiple wrong doing against more than one respondent, s. 33C(1)(a) required that the applicant and each group member have a claim against each respondent. Or, in the alternative, did it require no more than that there be seven or more persons with a claim against the same respondent (subject to satisfying the requirements of sub-paragraphs (b) and (c))?

Their Honours found that Cash Converters' argument "[fell] at the first hurdle". If the condition in s. 33C(1)(a) was met by observing that seven or more persons have claims against the same respondent (and sub-paragraphs (b) and (c) are satisfied), that is the end of the enquiry. Their Honours considered that Cash Converters' submission would require the Court to treat the condition in s. 33C(1) for starting a representative proceeding where seven or more persons have a claim against one respondent as imposing an additional requirement that they cannot have a claim against anyone else, or treat it as though the condition reads that "a representative proceeding can only be begun where seven or more persons have claims against all defendants". According to their Honours, that was not what s. 33C, or any other provision in Part IVA, says or provides.

Their Honours then considered the context in which section 33C sits, finding that:

> other provisions in Part IVA do not support the construction of section 33C(1) contended for by Cash Converters. The possibility of multiple respondents and variation between claimants in a representative proceeding is expressly acknowledged in a number of provisions of Part IVA.

In particular, their Honours highlighted that s. 33Q expressly deals with the situation where the issue or issues common to all group members will not finally determine the claims of all group members. Directions may be made under s. 33Q(1) which may include establishing a subgroup consisting of those group members and appointing a person to be the subgroup representative party on behalf of the subgroup members (s. 33Q(2)). Their Honours found that this was consistent with s. 33C(2), which "expressly records that a representative proceeding may be commenced whether or not the relief sought is the same for each group member".

In the Personal Loan Proceeding, Gray made a claim against each respondent. The Court found the proceeding to be properly constituted. Their Honours held that the fact that there probably would be group members with a claim against either Safrock or CC Personal Finance did not alter that conclusion. The Cash Advances Proceeding though, was structured differently. The group members were described as including natural persons who had advanced to them $1,000 or less from a lender which was either a franchisee where CCPL was the franchisor or CC Cash Advance. There were three respondents to the proceeding. CCPL, the franchisor of the Cash Converters franchise in Australia, and CC International, the parent entity of CCPL, were joined on the basis that they were involved in the contraventions by the relevant franchisee and were thereby accessories to its unconscionable conduct. The third respondent, Ja-Ke, advanced the monies to Gray.

Their Honours noted that no other franchisee (or the other named entity, CC Cash Advance) that advanced $1,000 or less to a group member was a respondent to the proceeding. Their Honours held that the fact that the other franchisees and CC Cash

Advance (who made cash advances to some group members) were not respondents to the proceeding did not alter the conclusion that the proceeding is properly constituted under Part IVA of the FCA Act. As Gray and six other persons had claimed against each respondent, the threshold requirements of s. 33C were satisfied.

The Court dismissed the respondents' appeal from the orders made by the primary judge with costs.

6.2 Administrative Appeals Tribunal considers the term "nearly identical" for the purposes of the Business Names Registration Act 2011 (Cth) and sets aside ASIC registration of business names

(By Jared Lynch, Ashurst)

GC Swinburne and FJ McFarlane v Australian Securities and Investments Commission and Child Psychology Services Pty Ltd [2014] AATA 602, Administrative Appeals Tribunal, Deputy President F J Alpins, 26 August 2014

The full text of this decision is available online.

(a) Summary

The Administrative Appeals Tribunal (the AAT) has considered the test for determining whether a business name was "available" for the purposes of the Business Names Registration Act 2011 (Cth) (the Act). The AAT set aside two decisions by the Australian Securities and Investments Commission (ASIC) to register two business names on the grounds that the names were "nearly identical" to an existing business name registered to the applicants and, therefore, not available for the purposes of the Act.

(b) Facts

ASIC maintains a statutory register of business names, known as the Business Names Register, under the Act. The business name "Melbourne Children's Psychology Clinic" had been registered to the applicants, Dr Swinburne and Dr McFarlane, for some time. In 2012, Child Psychology Services Pty Ltd (joined to the proceedings in support of ASIC's position and referred to as the joined party) successfully applied online for registration of the business name "Melbourne Child Psychology". In 2013, the joined party successfully applied for registration of the business name "Melbourne Child Psychology Services".

The applicants applied to ASIC for review of each of the decisions to register those names to the joined party. ASIC affirmed the decision under review in respect of both decisions. The applicants contended that those two names should not have been registered, while ASIC maintained that under the Act it was required to register them.

(c) Decision

Section 24 of the Act provides that ASIC must register a business name to an entity upon application if satisfied, amongst other things, that the name is "available" to the entity. Section 25 of the Act governs the availability of business names. Relevantly, it provides that a business names is available to an entity if "the name is not identical or nearly identical to ... a business name registered to another entity".

The Act empowers ASIC to use computer programs in making most decisions under the Act, including decisions about the registration of business names, which are designated by s. 66 to be taken to be a decision made by ASIC. There is also a legislative instrument relevant to decisions made pursuant to the Act, the *Business Names Registration (Availability of Names) Determination 2012 (Cth)* (the Determination).

ASIC contended that the modificatory aspects of the Determination were exhaustively determinative of the question of whether business names are "identical or nearly identical" for the purposes of the Act. In ASIC's submission, the expression "identical or nearly identical" must be read as a single composite phrase.

The applicants contended that relevant rules in the Determination were merely part of the required analysis. In the applicant's submission, after taking the Determination into account, it remained necessary to determine whether the names are either "identical" or "nearly identical". Such a determination, in the applicant's submission, is a question of fact and necessarily involves the exercise of judgment.

The AAT extensively examined the Act and the Determination in light of the legislative and common law principles of statutory construction. The AAT also considered aspects of the Automated Assistance in the Administrative Review Council report to the Attorney-General *ARC Report No 46 - Administrative Decision Making* (November 2004) report of .

The AAT rejected ASIC's submission in relation to interpreting "identical or nearly identical" as a single composite phrase, noting that the expression "nearly identical" encapsulates the same state or quality as "identical" but to a lesser extent, and that this interpretation best served the object of the Act. In the AAT's view a determination under the Act requires, in accordance with ordinary usage, that an exercise of comparison be undertaken. Under the Act it is necessary to "ascertain the points of sameness, similarity and difference between the two names in order to determine whether the names in question are identical or nearly identical". In the AAT's view, it was clear from the Act and the Determination that some decisions about the registration of business names are not suited to being made by computer.

In the view of the AAT, the relevant confusion which is intended to be avoided in respect of identical or nearly identical business names is confusion "in the sense of a failure to distinguish between the business carried on by the entity carrying on business under a registered name and that carried on by another entity applying for registration of an identical or nearly identical name, either by mistaking one business for the other, mistakenly believing that they are both the same business or mistakenly believing that they are both carried on by the same entity".

The AAT examined previous AAT decisions and considered that the class of persons who may be confused by nearly identical business names "comprises the full range of persons who might reasonably be expected to engage or propose to engage with the businesses in question. That class would comprise people of varying 'age, linguistic ability, literacy, intelligence ... and other factors'".

In the AAT's view, the following considerations are relevant, though not exhaustive, in determining whether a business name is nearly identical to an existing business name for the purposes of the Act:

- grammatical, syntactical and typographical features of the names being compared;
- aural features of the names should also be taken into account; and
- words used in the names being compared might be of greater import than others in forming a judgment, according to the relative significance of their meaning in the context of each name, and must be considered holistically.

The AAT also provided a number of observations about the conceptual design and practical operation of the relevant rules in the Determination in relation to automated decisions made under the Act.

After applying the rules expressly provided for in the Act and the Determination and considering the above factors, the AAT determined that the names "Melbourne Child Psychology" and "Melbourne Child Psychology Services" were "nearly identical" to the business name "Melbourne Children's Psychology Clinic". Accordingly, both names were not available, for the purposes of the Act, to the joined party.

Accordingly, the AAT set aside ASIC's decisions to register the names to the joined party in respect of both of the names and, in substitution for the decisions, refused to register the names to the joined party.

6.3 After the event: Can privileges be claimed after an examination where such a claim was not made?

(By Rebecca Hahn and Adrienne Trumbull, King & Wood Mallesons)

Gemmell v Le Roi Homestyle Cookies Pty Ltd [2014] VSCA 182, Supreme Court of Victoria, Court of Appeal, Ashley and Neave JJA and Almond AJA, 22 August 2014.

The full text of this judgment is available online.

(a) Summary

The appellants wished to claim privilege with regards to pleadings and discovery despite previously being subject to examination in respect of insolvent trading claims. Under the previous examination these privileges were abrogated and no statutory protections were claimed.

The court held that the abrogation of the privileges during the examination did not extend to legal proceedings following the examination. It was also noted that failing to claim the statutory protections offered at the time did not amount to a waiver of the privileges. It was held, however, that any claims for the above privileges would not be successful to the extent they were claimed over information already provided at the examinations as the provision of the information would not increase the appellants' risk of incrimination or penalty.

(b) Facts

The respondent in this case was Le Roi Homestyle Cookies Pty Ltd (Le Roi) and its liquidators. The appellants were William Gemmell and Sean Colon, two alleged shadow directors of Le Roi during its period of insolvency. The respondent brought proceedings against the appellant alleging that (1) despite not being directors of Le Roi in form, they were directors of Le Roi in substance; and (2) that the appellants were engaged in insolvent trading pursuant to section 588 of the Corporations Act 2001 (Cth) (the Corporations Act). They sought compensation but no penalty order.

The appellants were examined pursuant to Part 1 of Division 9 of the the Corporations Act. Of importance here is the application of s. 597(12), which reads "[a] person is not excused from answering a question put to the person at an examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty". This section is subject to section 597(12A), which allows a statutory protection to be claimed by the individual being examined. This protection can be invoked if the person claims that in answering the question they may incriminate themselves or make themselves liable to a penalty order. Following the claim the question must still be answered but the answer will not be admissible as evidence in a criminal proceeding or a proceeding seeking a penalty. The appellants were informed of this statutory protection but they did not choose to invoke it at any point in the examinations.

Subsequently the appellants wished to make their pleadings and discovery requirements subject to the privileges against self-incrimination and self-exposure to penalty. They also alleged that the statutory protection under s. 597(12A) of the the Corporations Act had not been adequately explained to them at their examinations. Their summons was rejected by the Associate Judge. They appealed to a judge in the Trial Division however they were unsuccessful. They were granted leave to appeal her Honour's order.

(c) Decision

Ashley JA gave the leading judgment. The submission that s. 579(12A) had not been adequately explained was dismissed. Ashley JA clearly stated that it was sufficient that the appellants were informed of the protections s. 579(12A) offered, and it was not required that they be told the limits of these protections. He then considered if the privileges against self-incrimination and self-exposure to penalty could be claimed in the current proceedings. This issue was broken into three distinct questions.

(i) Does s. 579(12) of the Act operate to abrogate the privileges in the current proceedings?

In order to answer this, Ashley JA first had to determine if s. 579(12) acted to abrogate the privileges in the examination proceedings. He determined that s. 579(12) clearly abrogated the privileges as (1) the language of the section explicitly declared this; (2) there was no 'reasonable excuse' qualification; (3) failure to answer was an offence under the broader section; and (4) under s. 579(14) the examination records could be used against the examinee in legal proceedings, subject to s. 579(12A).

Following this, Ashley JA then had to determine the extent of the abrogation. His Honour held that the privileges were waived in respect of the answers given to the questions asked in the examination. This is further supported by s. 579(14). He also noted the importance of reading the section as narrowly as possible, as the abrogation applied to "an important common law right".

The final element of his analysis was to determine if s. 579(12) operated to abrogate the privileges in the current civil proceeding. His Honour held that the abrogation did not extend beyond the examination, as ss. 579(12), (12A) and (14) when read together indicated the legislatures full intention with regard to the extent of the abrogation, and these sections do not suggest that the privileges are waived in proceedings following the examination.

The ultimate conclusion was therefore that s. 579(12) of the Act did not abrogate the privileges in the current proceedings.

(ii) By not invoking the protections offered under s. 579(12A) of the Corporations Act did the appellants waive their right to claim privileges?

Ashley JA held that a claim under s. 579(12A) did not amount to a claim of privilege. Invoking the protections offered under s. 579(12A) was distinguished from a claim for privilege, as the protections only relate to direct use. It followed that a failure to claim under s. 579(12A) did not amount to a waiver of the privileges against self-incrimination or self-exposure to penalty. His Honour noted that this was especially so in this case due to the importance of the privileges in question.

(iii) Does the appellants claim to privileges fail due to the concept of 'no increased jeopardy'?

Despite expressing reservations Ashley JA conceded that there is a concept in Australian law of "no increased jeopardy". This means that a claim for privilege can be denied where the person has already exposed themselves to the risk of incrimination or penalty and providing the information for which they seek privilege will not increase the jeopardy they already face.

In not seeking protection under s. 579(12A) at the examination, the appellants had put themselves at risk of incrimination or incurring a penalty, as the answers provided at the examination could be used in legal proceedings against the appellants pursuant to s. 579(14). His Honour therefore held that the privileges could only be successfully claimed where the giving of the pleading or discovery would expose the appellants to increased risk, namely that the information went beyond what was in issue in the previous examination.

6.4 No derivative action for a foreign registered company

(By Alex Cook and Will Heath, King & Wood Mallesons)

In the matter of Featherston Resources Limited; Tetley v Weston [2014] NSWSC 1139, Supreme Court of New South Wales, Brereton J, 22 August 2014

The full text of this judgment is available online.

(a) Summary

Twelve shareholders of a New Zealand company (Shareholders) sought to bring a derivative action against the company's Directors in the Supreme Court of New South Wales. The company was under administration in New Zealand.

Brereton J held that the court had no jurisdiction to grant the leave sought by the Shareholders. Additionally, even if the court had jurisdiction, the High Court of New Zealand was the more appropriate court to determine the matter. The Shareholders' proceedings were accordingly dismissed with costs.

(b) Facts

Featherston Resources Limited (FRL) was incorporated in New Zealand under the *Companies Act 1993 (NZ)* (the NZ Companies Act). FRL is also a registered foreign company in Australia under Division 2 of Part 5B.2 of the Corporations Act 2001 (Cth) (the Corporations Act).

At the time of these proceedings, FRL was in voluntary administration pursuant to the NZ Companies Act and had executed a deed of company arrangement (DOCA) under the supervision of the High Court of New Zealand.

The Shareholders, holding approximately 10% of FRL's issued share capital, applied to the Supreme Court of New South Wales for leave to bring proceedings on behalf of FRL against its directors and related entities (the Defendants).

The Shareholders' proceedings concerned two principal issues:

- FRL's entry into a convertible note deed (at 20% interest per annum) with the fourth defendant, which was not approved by special resolution; and
- allegations that the Defendants drove FRL into administration by having FRL borrow funds through convertible notes at exorbitant interest rates (with an effective rate of 200% per annum).

The Defendants sought to have the proceedings stayed:

- as an abuse of process under rl. 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) or in the court's inherent jurisdiction; and/or
- pursuant to an order under s. 19 of the Trans-Tasman Proceedings Act 2010 (Cth) (the Trans-Tasman Act) on the basis that the High Court of New Zealand is the more appropriate court to determine the proceedings.

(c) Decision

(i) Were sections 236 and 237 of the Corporations Act available to the Shareholders?

The Shareholders sought leave to bring proceedings against the Defendants on behalf of FRL under ss. 236 and 237 of the Corporations Act. Brereton J held that the court had no jurisdiction to grant leave.

Brereton J noted that as a result of the definition of "company" in s. 9 of the Corporations Act, a court can only grant leave under ss. 236 and 237 where the company in question is "registered under" the Corporations Act.

Citing ss. 117 and 118 of the Corporations Act, Brereton J distinguished between a company incorporated in Australia and a foreign company registered under Division 2 of Part 5B.2, such as FRL. Brereton J held that a foreign company registered under Division 2 of Part 5B.2 is not a company "registered under" the Corporations Act for the purposes of ss. 236 and 237.

(ii) Did the Supreme Court of New South Wales have inherent jurisdiction to grant leave?

The Shareholders submitted that a court has inherent jurisdiction to allow a company's contributory or creditor to bring proceedings on behalf of the company and sought leave on that basis.

Brereton J held that, although a court has inherent jurisdiction to grant leave, such jurisdiction is an incident of its supervisory jurisdiction over liquidators. In this case, the court with supervisory jurisdiction over FRL's administration was the High Court of New Zealand. Accordingly, Brereton J concluded that the Supreme Court of New South Wales did not have jurisdiction to grant leave in the circumstances.

(iii) Did the proceedings require leave of the High Court of New Zealand?

Under s. 239ACU(1)(b) of the NZ Companies Act, a person subject to a DOCA must not, except with the permission of the High Court of New Zealand, begin or continue a proceeding against or in relation to any of the property of the company under administration.

Brereton J found that this provision did not apply to the Shareholders' application for leave. The Shareholders had applied for leave to bring proceedings on behalf of FRL, and not against it or any of its property.

(iv) Was the High Court of New Zealand the "more appropriate court"?

In obiter, Brereton J considered whether (contrary to his Honour's conclusions on issues (i) and (ii) above), even if the Supreme Court of New South Wales did have jurisdiction to grant leave, the proceedings should have been stayed pursuant to ss. 17 and 19 of the Trans-Tasman Act on the ground that the High Court of New Zealand was the "more appropriate court" to determine the matter.

Brereton J considered the criteria set out in s. 19(2) of the Trans-Tasman Act in determining whether the High Court of New Zealand was the "more appropriate court". Brereton J observed that the factors informing the more appropriate jurisdiction did not speak unanimously. On the one hand, the residence of the majority of the parties in Australia favoured the jurisdiction of the Supreme Court of New South Wales. However, the extent to which the causes of action arose in Australia was unclear.

Ultimately, Brereton J placed emphasis on the fact that the proceedings pertained to the duties of directors of a New Zealand company, the majority of whose shareholders were resident in New Zealand, and which was in administration in New Zealand pursuant to a DOCA. On the basis of these factors, Brereton J considered that the High Court of New Zealand was the "more appropriate court" to determine the proceedings.

In light of the above, even if Brereton J had found that the Supreme Court of New South Wales did have jurisdiction, Brereton J would have stayed the proceedings under s. 19 of the Trans-Tasman Act.

6.5 Administrators breach fiduciary duties and found to be liable for disposing of property not owned by company

(By Samantha Loff, Herbert Smith Freehills)

THC Holding Pty Ltd v CMA Recycling Pty Ltd [2014] NSWSC 1136, Supreme Court of New South Wales, Stevenson J, 21 August 2014

The full text of this judgment is available online.

(a) Summary

Under a Purchase Agreement, CMA Recycling Pty Ltd (CMA) agreed to sell THC Holding Pty Ltd (THC) scrap metal. Prior to shipment, CMA informed THC that it did not have the requisite quantity of steel. THC sourced the "Shortfall Amount" from another company, SIMS Group Australia Holdings Pty Ltd (SIMS).

CMA agreed to replenish the Shortfall Amount once it had obtained the relevant quantity. Administrators were appointed to CMA prior to it providing the Shortfall Amount to THC. The administrators sold all of CMA's plant equipment and stock (including, relevantly, the Shortfall Amount) to a third party.

Among other things, the court held that the administrators were liable for disposing of property not owned by CMA in contravention of s. 442C of the Corporations Act 2001 (Cth) (the Corporations Act). The administrators were found to be liable for damages, and also had an obligation in equity to account for the conduct.

(b) Facts

THC is a purchaser of scrap metal in Australia for shipment in bulk to customers throughout the Asia-Pacific region. CMA agreed to sell THC 5,800 metric tonnes of scrap metal in Western Australia, for shipment to Vietnam. Prior to the time due for shipment, CMA informed THC that it would be providing 1,367 metric tonnes less than the amount called for by the Purchase Agreement. THC made up this Shortfall Amount from SIMS.

Once CMA had accumulated the Shortfall Amount, it contacted THC to organise collection. The Shortfall Amount was accumulated in one pile, which was separate from the other scrap in the yard.

On the day administrators were appointed to CMA, someone from THC informed the administrators that the scrap in pile belonged to THC and not to CMA. This was again stated in communication from THC's solicitors. The administrators disputed that the property in the Shortfall Amount had passed to THC.

Without further notice to THC, the administrators announced to ASX that they had sold all of CMA's plant equipment and stock. This included the Shortfall Amount.

A number of issues arose in the proceedings, including:

- whether, by selling the Shortfall Amount, the administrators contravened s. 442C of the Corporations Act, and whether this created a private law claim for damages;
- whether THC was entitled to damages pursuant to s. 1324(10) of the Corporations Act in respect of any contravention of s. 442C;
- whether CMA held the Shortfall Amount for THC as a fiduciary, and if so, had acted in breach of its fiduciary obligations; and
- the proper remedy for THC.

(c) Decision

(i) Breach of s. 442C of the Corporations Act

Section 442C of the Corporations Act provides that, relevantly, an administrator must not dispose of property in the possession of the company of which someone other than the company is the owner. This section does not, however, prevent such a disposal where that disposal:

- is in the ordinary course of the company's business; or
- with the written consent of the owner; or
- with the leave of the Court.

It was common ground that the sale of CMA's entire plant equipment and stock was not a sale "in the ordinary course of business", and it was therefore found that the administrators had sold the Shortfall Amount in contravention of s. 442C of the Corporations Act.

However, it was held that a contravention of this provision did not give rise to a private right of action for damages.

(ii) Breach of fiduciary duties

After title in the Shortfall Amount passed from CMA to THC, CMA held the Shortfall Amount as a bailee for reward. Though a bailee does not usually owe a bailor a duty to act in good faith, the title provision of the Purchase Agreement provided that once the scrap metal became THC's property, CMA would hold it "in good faith in the yard until shipment [was] completed". As such, Stevenson J held that CMA held the goods for THC as fiduciary.

His Honour found that CMA had acted in breach of its fiduciary duty, and that the administrators, who chose to sell the Shortfall Amount knowing there was a dispute about CMA's title to those goods, engaged in "robust conduct" which was sufficient to attract accessorial liability and an obligation in equity to account for their conduct.

(iii) Damages under s. 1324(10) of the Corporations Act

Under s. 1324(10), where the Court has power to grant an injunction restraining a person from engaging in particular conduct, it may, in addition to or in substitution for the grant of an injunction, make an order for damages.

Though THC initially obtained an injunction to restrain the administrators from dealing with the Shortfall Amount, the administrators had, unbeknownst to THC, sold off the Shortfall Amount eight days earlier. As a result, the injunction was dissolved by consent. The administrators offered an undertaking not to dispose of the proceeds of the Shortfall Amount.

Previous jurisprudence on this subject has found that s. 1324(10) conferred the power to award damages only as a substitute or supplementary remedy to an injunction, which would not be relevant in this case, as the goods had already been sold. Stevenson J found, however, that the facts in the present case were very different from those cases, and held that the claim for damages sought by THC was to preserve the status quo insofar as that was possible, and was in substitution or supplementary to the initial claim for injunctive relief.

(iv) Remedy

The court has not yet made final orders in this matter, and it is unclear whether the administrators will be indemnified out of the CMA's property for the amounts for which they are liable.

6.6 Application of Commercial Arbitration Act to oppression proceedings under the Corporations Act

(By Katrina Sleiman and Hannah Cooper of Corrs Chambers Westgarth)

Re 700 Form Holdings Pty Ltd [2014] VSC 385, Supreme Court of Victoria, Robson J, 19 August 2014

The full text of this judgment is available online.

(a) Summary

This case involved an application by the defendants pursuant to section 8 of the Commercial Arbitration Act 2011 (Vic) (the Arbitration Act) or the general law that the plaintiffs' oppression application under s. 233 of the Corporations Act 2001 (Cth) (the Corporations Act) against them be stayed until further order as certain of the parties had agreed under an arbitration clause of a shareholders and unit holders' agreement (the Shareholders' Agreement) to refer such matters to arbitration.

The Court held that the matter was a dispute arising in connection with the Shareholders' Agreement and that the oppression proceedings must be stayed to the extent that the relevant plaintiffs or defendants were parties to the Shareholders' Agreement. The Court held that the claims relating to non-parties to the Shareholders' Agreement must be determined by the Court.

(b) Facts

(i) Establishment of Form 700

The first plaintiff and the first and third defendant established Form 700 Holdings Pty Ltd (Form 700), certain other companies and RBSC Investments Pty Ltd in its capacity as trustee of the TBSC Investments Unit Trust (collectively, the Group) to conduct a formwork business. A Shareholders' Agreement was entered into between the first and second plaintiffs, and the first, third, fourth and fifth defendants to regulate the management and operation of the Group in relation to the business. All other parties to the proceedings were not party to the Shareholders' Agreement.

(ii) Oppression proceedings

The first plaintiff alleged that the first defendant ran the Group as a dictatorship. The first defendant was alleged to have made various threats towards the first plaintiff's investment and involvement in the Group resulting in the first plaintiff's resignation as director of each Group company.

Following his resignations, the first plaintiff became concerned about the Group's management arising from the following matters:

- transactions had been undertaken by the first defendant without his consent;
- the first to third defendants were using the funds and resources of the Group to obtain benefits for themselves;
- the first defendant used the Form 700 factory to build a temporary house for himself at considerable cost and told the first plaintiff that he would be taking out a loan from Form 700 to build a new house;
  the second defendant had refurbished a car using the Form 700 yard and staff and had purchased parts and materials using Form 700 funds;
- the third defendant had stated the Group would be assisting him to build his new home; and
- the first defendant was exposing the Group to risk by tendering for contracts beyond the capability of the Group, making large up-front payments for construction materials and purchasing three new cranes.

In 2013, the first plaintiff gave a notice of offer to sell his shares and units in the Group in accordance with the Shareholders' Agreement. The offer was not accepted.

The first plaintiff's originating process comprised three substantive proceedings:

- an oppression claim under to s. 233 of the Corporations Act (the Oppression Claim);
- a claim for compensation or an account of profits (for which the plaintiffs seek leave under s. 237 of the Corporations Act to bring as a derivative proceeding); and
- a claim for a declaration in relation to the beneficial ownership of a property legally owned by the eighth defendant.

(iii) Application for a stay of the Oppression Claim

The defendants sought a stay of the Oppression Claim. In the event that the Oppression Order was stayed, they sought a further order temporarily staying the balance of the claims pursuant to the Court's power to control its own process.

(iv) The Arbitration Act

The defendants argued that the Oppression Claim was subject to the following arbitration clause in the Shareholders Agreement (the Arbitration Agreement):

> If a dispute arises in connection with this Agreement or in relation to the Business, a party to the dispute must give the other party or parties to the dispute notice specifying the dispute and requiring its resolution under Clause 12.

It was claimed that s. 8 of the Arbitration Act applied to require the Court to stay the Oppression Claim as it was a dispute capable of being determined by arbitration.

The defendants relied on the principles of construction summarised by Hargrave J in *TCL Airconditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2009] VSC 553 where it was stated, "where the words of the arbitration are sufficiently elastic and general, or capable of broad and flexible meaning, they should be given a liberal construction".

The plaintiffs opposed the stay application, arguing that the Oppression Claim did not fall within the Arbitration Agreement. The plaintiffs claimed it was not intended that the Arbitration Agreement extend to overall shareholding rights and liabilities as well and/or to oppression actions.

The plaintiffs contended that the Shareholders' Agreement had no scope in relation to the management or operations of the Group other than to prohibit interference in such management or operations. Accordingly, it could not have been the parties' intention that disputes concerning the management or operations of the Group be resolved through or under the Shareholders' Agreement; and, that it could not sensibly be submitted that disputes in respect of that embargoed area of influence are nevertheless disputes in "connection with this Agreement or in relation to the Business".

(c) Decision

The Court held that the "matter" to be determined in a proceeding is to be ascertained by reference to the subject matter of the dispute in the proceeding and the substantive, although not necessarily the ultimate, questions for determination in the proceeding: *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420. Applying that test, the subject matter of the dispute raised by the Oppression Claim is a claim for an order under the Corporations Act that the defendants purchase the shares and units held by the plaintiffs. In seeking this relief, the plaintiffs rely on acts or omissions of the first defendant, acting for himself or on behalf of the Group, that are oppressive to the plaintiffs as members of the relevant Group companies.

The Court found that the connecting words "in connection" with in the Arbitration Agreement must be given a wide compass, and on that basis, the words go beyond disputes relating to the breach, construction, formation and performance of the Shareholders' Agreement. Relevantly, the Shareholders' Agreement sets out a standard of conduct that must be observed in dealings between the shareholders and procedures for the acquisition of an offending shareholder's shares if the shareholder does not observe the Shareholders' Agreement.

The Court considered that proceedings taken to enforce one shareholder to purchase the shares of another shareholder, and therefore effectively end the relationship between the shareholders under the Shareholders Agreement, is a proceeding touching on and related to the Shareholders' Agreement as it will affect the relationship of the shareholders under the Shareholders Agreement. As the Arbitration Agreement is in a Shareholders' Agreement, the scope of "matters in connection with the Agreement or in relation to the Business" may be limited to matters between the shareholders in their capacity as shareholders, as opposed to their capacity as directors.

Accordingly, the Court found that the Oppression Claim must be stayed under s. 8 of the Arbitration Act to the extent the plaintiffs and defendants to the Oppression Claim are parties to the Shareholders' Agreement. Therefore, the plaintiffs' claims against the second and sixth to ninth defendants were not stayed.

Finally, the Court rejected the defendants' application for the Court to stay the balance of the plaintiffs' claims pending completion of the arbitration. The Court considered it premature to make such an order as there is no certainty that an arbitration will go ahead.

6.7 Accessorial liability under the "second limb" of *Barnes v Addy* revisited

(By Clementyne Rawlyk and Kathryn Arnett of Corrs Chambers Westgarth)

Hasler v Singtel Optus Pty Ltd; Curtis v Singtel Optus Pty Ltd; Singtel Optus Pty Ltd v Almad Pty Ltd [2014] NSWCA 266, Supreme Court of New South Wales, Court of Appeal, Barret, Gleeson and Leeming JJA, 15 August 2014

The full text of this judgment is available online.

(a) Summary

This case involved several appeals from the Supreme Court of New South Wales, each arising from a breach of fiduciary duty by Leon Curtis, a former employee of Singtel Optus Pty Ltd (Optus). The primary judge held that a second Optus employee, Craig Hasler, knowingly assisted Mr Curtis to breach his fiduciary duty and was therefore jointly liable for that breach under the "second limb" of *Barnes v Addy* (1874) LR 9 Ch App 244 (*Barnes v Addy*). Mr Hasler was ordered to pay equitable compensation to Optus. One of the key issues on appeal was whether the elements for establishing accessorial liability under the second limb of *Barnes v Addy* had been established, such that Mr Hasler was jointly liable for Mr Curtis' breach.

The Court dismissed all appeals and confirmed that Mr Hasler was jointly liable as a knowing accessory. In doing so, the Court considered (among other things) the meaning of a "dishonest and fraudulent" breach of fiduciary duty for the purposes of the second limb of *Barnes v Addy*, which is currently unclear in Australia following the decision of the Western Australian Court of Appeal in *Westpac Banking Corporation v Bell Group Ltd (No 3)* [2012] WASCA 157 (*Bell*). *Bell* expanded the class of breaches of fiduciary duty which could attract second limb *Barnes v Addy* liability, and as such, Mr Hasler contended that it should not be followed. Despite the Court finding that the reasoning in Bell should not be followed, it held that Mr Curtis's breach was inherently dishonest and fraudulent, such that it could attract accessorial liability.

(b) Facts

Mr Curtis held the position of General Manager - Logistics at Optus. It was accepted at trial that, given his position at Optus, Mr Curtis owed a fiduciary duty to Optus. Mr Hasler worked for Optus and reported to Mr Curtis, until his resignation in March 2005. Together they established a company called Sumo Distribution & Storage Pty Ltd (Sumo) which provided warehousing storage to Optus for various equipment. These warehousing services were provided via another entity, Almad Pty Ltd (Almad). Almad charged Optus a 20% brokerage fee on top of Sumo's warehousing fees. From March 2005, Mr Hasler resigned from Optus to manage Sumo's day to day operations on a full time basis.

(i) Fiduciary breach by Mr Curtis

The primary judge determined that Mr Curtis was a shadow director of Sumo and set the prices for Sumo's warehousing services. Further, in his capacity as an employee of Optus, Mr Curtis approved Optus's decision to use Sumo for its warehousing needs and Optus's payment of the warehousing fees (including Almad's 20% commission). Mr Curtis admitted at trial that such actions constituted a breach of his fiduciary duty to Optus. In particular, Mr Curtis had placed his personal interests, through Sumo, in conflict with the interests of Optus, without obtaining Optus's fully informed consent (i.e. he approved Optus's decision to accept Sumo's offer of warehousing services at prices that he himself had set).

At trial, Optus acknowledged that Sumo's prices were reflective of the costs it would have otherwise incurred for its warehousing arrangements, absent of Mr Curtis's breach. Accordingly, it sought equitable compensation only for the amount equal to the 20% commission that it had paid to Almad over the relevant period. Optus submitted that this amount accurately reflected its loss because it would not have paid the 20% uplift to Almad had it known that the warehousing arrangements were being procured from an Optus employee acting in breach of his fiduciary duty. The primary judge accepted this submission, and ordered Mr Curtis to pay this amount to Optus.

(ii) Accessorial liability of Mr Hasler

The primary judge held that Mr Curtis' breach was dishonest and fraudulent. Accordingly, pursuant to the High Court decision in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 (*Farah Constructions*), the breach was of a nature which could result in accessorial liability of another person under the second limb of *Barnes v Addy*. The second limb in *Barnes v Addy* provides a cause of action against third persons who knowingly assist a fiduciary to dishonestly and fraudulently breach their fiduciary duties. There are three elements that must be satisfied in order to establish accessorial liability under the second limb of *Barnes v Addy*.

These are:

- a dishonest and fraudulent breach of duty by the fiduciary;
- knowledge on the part of the defendant; and
- assistance by the defendant towards the fiduciary's dishonest and fraudulent breach.

The primary judge determined that due to Mr Hasler's knowledge of the scope of Mr Curtis's employment at Optus and his role in setting up Sumo (and the purpose for which Sumo was established), he had sufficient knowledge of the circumstances giving rise to Mr Curtis's breach of fiduciary duty and had assisted in that breach. Accordingly, Mr Curtis was held to be jointly liable for the compensation awarded to Optus.

Mr Hasler appealed to the New South Wales Court of Appeal predominantly on the basis that:

- it was not open to the primary judge to determine that Mr Curtis's breach was dishonest and fraudulent because, among other things, Optus had not specifically referenced this in its pleadings;
- Mr Curtis's conduct did not amount to a dishonest and fraudulent breach of duty under the second limb of *Barnes v Addy*; and
- even if Mr Curtis had dishonestly and fraudulently breached his duty, Mr Hasler was unaware that Optus had not fully consented to the warehousing arrangements, and as such did not have the requisite knowledge of the breach to invoke liability under *Barnes v Addy*.

Mr Curtis and Mr Hasler also jointly appealed against the primary judge's findings of causation and quantification of Optus's loss, on the basis that (among other things) Optus did not produce any evidence of what its actual costs of sourcing alternative warehousing would have been and therefore HAD failed to establish any loss. The Court rejected this submission, stating that Optus only needed to show that, had there been no breach, it could have sourced its warehousing arrangements without paying a commission to Almad. Because Mr Curtis could have supplied the warehousing arrangements directly to Optus (and thus avoid the 20% markup), it was sufficient to calculate Optus's loss by reference to that mark up.

(c) Decision

(i) Was a finding of dishonest and fraudulent breach open to be made against Mr Curtis?

Mr Hasler submitted that, because Optus had failed to specifically allege that Mr Curtis's breaches were "dishonest and fraudulent" in its pleadings and its written opening, it was not open to the primary judge to reach this finding. In this regard, Mr Hasler sought to rely on the decision in Farah Constructions which held that in order to establish liability under the second limb of *Barnes v Addy*, breaches of dishonest and fraudulent design should be pleaded.

The Court rejected this submission on the basis that, when considered as a whole, the allegations particularised by Optus in its pleadings were, by their very description, dishonest and fraudulent. The Court was also persuaded by the fact that one of the "real issues in dispute" agreed by the parties at trial was whether Mr Hasler was knowingly involved with Mr Curtis' breach of fiduciary duty. The Court concluded that this could only be read as invoking a claim under the second limb of *Barnes v Addy*. It was therefore open to the primary judge to make a finding of dishonesty and fraud by Mr Curtis.

(ii) Did the conduct of Mr Curtis amount to a dishonest and fraudulent breach of duty?

The Court recognised that, following the decision of *Bell*, the meaning of what constitutes a "dishonest and fraudulent" breach for the purposes of the second limb of *Barnes v Addy* is unclear in Australia.

In this regard, the High Court determined in *Farah Constructions* that a fiduciary's breach of duty must be dishonest and fraudulent in order to invoke the second limb of *Barnes v Addy*. The High Court also observed that breaches of fiduciary duty vary greatly in their seriousness (e.g. some breaches are well intentioned and some are trivial), and so not all breaches of fiduciary duty necessarily involve dishonesty and fraud.

In *Bell*, Drummond AJA interpreted the decision in *Farah Constructions* as expanding the class of breaches which could attract accessorial liability under the second limb of *Barnes v Addy*. In particular, his Honour held that following *Farah Constructions*, it is not necessary to show that a fiduciary has acted with a conscious awareness that what they are doing is wrong or that their actions involve an element of "moral reprehensibility". Rather, his Honour concluded that a breach of duty may be dishonest and fraudulent if it is more than trivial and otherwise too serious to be excusable on the basis that the fiduciary acted honestly, reasonably and ought fairly to be excused. In effect, Drummond AJA determined that there does not have to be an element of dishonesty on the part of the fiduciary in order to invoke the second limb of *Barnes v Addy*.

The Court considered the judgments of *Farah Constructions* and *Bell* at length and ultimately disagreed with the reasoning in *Bell*. The Court found no basis on which Drummond AJA could have interpreted *Farah Constructions* as authority for diluting the meaning of "dishonest and fraudulent design" to cover significant breaches by fiduciaries whose conduct may not be morally reprehensible.

Importantly, the Court acknowledged that Mr Hasler's appeal could ultimately be disposed of without considering this issue. This was because Mr Curtis's conduct was in and of itself so plainly a transgression of ordinary standards of honest behaviour, that no honest employee would act in the same manner without their employer's consent. Mr Curtis's breach was therefore inherently dishonest and fraudulent, and capable of attracting accessorial liability under the second limb of *Barnes v Addy*.

(iii) Did Mr Hasler have sufficient knowledge of Mr Curtis' breach?

Mr Hasler submitted that the primary judge had erred in determining that he had knowingly participated in Mr Curtis's breach, because Optus had failed to demonstrate that he had knowledge of Optus's lack of informed consent about the warehousing arrangements with Sumo. To support this submission, Mr Hasler claimed that he did not have any contact with Mr Curtis's superiors at Optus, and therefore was unable to determine what information had passed between them or whether Optus had given its informed consent.

The Court rejected this submission, determining that in order to establish liability for knowing assistance, it is not necessary to prove that the person in question had knowledge of the principal's lack of consent.

Relying on one of the four relevant categories of knowledge referred to in the judgment in *Farah Constructions*, the Court reiterated that it was only necessary for Optus to show that Mr Hasler had knowledge of the facts and circumstances which, to an honest and reasonable person, would indicate that Mr Curtis was in breach of his fiduciary duties. On this point, the Court supported the primary judge's finding that, by virtue of Mr Hasler's knowledge of the scope of Mr Curtis's employment at Optus and his role in setting up Sumo (and the purpose for which the company was established), he was taken to have objectively known the essential facts giving rise to Mr Curtis's breach.

Importantly, the Court did confirm that although proof of the existence of a principal's informed consent is not relevant to establishing a claim of knowing assistance, it can be used as a defence to such a claim.

6.8 Liquidator not required to be satisfied with the material facts or to prove debts prior to commencing insolvency proceedings

(By James Feng, Clayton Utz)

In the matter of Mustang Marine Australia Services Pty Ltd [2014] NSWSC 1074
Supreme Court of New South Wales, Brereton J, 12 August 2014

The full text of this judgment is available online.

(a) Summary

This decision considered whether proceedings are an abuse of process where the plaintiff has not conducted a preliminary assessment to satisfy itself that the material facts exist before instituting the proceedings. The court held no such requirement exists. The court also held there is no abuse of process in the liquidator instituting proceedings without first calling for and adjudicating proofs of debt.

(b) Facts

The company went into voluntary administration and the creditors resolved to accept a Deed of Company Arrangement (DOCA). The court subsequently set aside the DOCA and appointed the plaintiff as liquidator to wind up the company.

In the substantive proceedings the plaintiff liquidator sued the company's directors pursuant to section 588G of Corporations Act 2001 (Cth) (the Corporations Act) for compensation for insolvent trading, and the first defendant Standard Bank Asia Ltd (SBAL), which was alleged to have been a shadow director.

By interlocutory process filed on 3 December 2013, the applicants SBAL and Standard Bank PLC (PLC) sought orders that the proceedings be struck out or stayed pending the adjudication of proofs of debt by the liquidator. The applicants contended that the maintenance of the proceedings was an abuse of process which could only be cured by the liquidator calling for and adjudicating on proofs of debt.

(c) Decision

The applicants accepted that:

- the proceedings had been instituted *bona fide*;
- there were serious questions to be tried (in other words, the proceedings were not doomed to fail); and
- the adjudication of proofs of debt was not a legal precondition to proceedings under s. 588M of the Corporations Act (which provides that a liquidator may bring proceedings against directors to recover losses resulted from insolvent trading).

(i) Satisfaction of material facts

The applicants argued that it was an abuse of process for the liquidator to maintain proceedings involving serious allegations of insolvent trading without taking any or sufficient steps to assess and determine what debts were incurred and to what extent they remained unpaid, which in the particular circumstances could only be achieved by calling for and adjudicating proofs of debt from all putative creditors. The applicants alleged that the plaintiff liquidator simply "plagiarised" the schedule of proofs prepared by the deed administrators for a different purpose and in a different context.

Brereton J rejected the applicants' submissions. He held that there was no principle that, before instituting proceedings, a liquidator (or any other plaintiff) must be satisfied of the material facts that constitute its cause of action, and that, in the absence of such satisfaction, the proceedings constituted an abuse of process. So long as proceedings were instituted *bona fide* for the relief claimed in them, and they were not doomed to fail (in other words, there are serious questions to be tried), they were not an abuse of process.

Reference was made to the decision of the NSW Court of Appeal in *Hall v Poolman* [2009] NSWCA 64; 75 NSWLR 99 and the principle that a liquidator should exercise skill and care and give "careful thought" in commencing proceedings. Neither of those passages, however, was a statement that the liquidator must be satisfied of the material facts in a cause of action before commencing proceedings, let alone that in the absence of such satisfaction the proceedings were an abuse of process.

(ii) Proof of debt

It was held that proceedings under s. 588M of the Corporations Act necessarily involved litigation and determination of whether the alleged debts were incurred, when, and in what amount, and what loss or damage the creditor had suffered. Those were material facts in every s. 588M case. They were matters that the liquidator must prove in the proceedings. The fact that the liquidator had adjudicated proofs of debt would not relieve him of the obligation of proving those matters in the proceedings.

Liquidators are given powers not available to ordinary litigants, including to conduct examinations and to adjudicate proofs of debt. But this does not mean they are required to exercise those powers before commencing proceedings.

6.9 Data incorrectly removed from the Personal Property Securities Register by the mistake of a registering party may be restored to the Register

(By Rebecca Magee, Clayton Utz)

SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities [2014] FCA 846, Federal Court of Australia, Gleeson J, 11 August 2014 (*SFS 1*)

The full text of this judgment is available online.

SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities (No 2) [2014] FCA 987, Federal Court of Australia, Gleeson J, 11 September 2014 (*SFS 2*)

The full text of this judgment is available online.

(a) Summary

In *SFS 1*, the applicants, SFS Projects Australia Pty Ltd and Rothschild Capital Pty Ltd, sought orders to compel the respondent, the Registrar of Personal Property Securities to "restore" the original end times of three registrations to the Personal Property Securities Register (PPSR), pursuant to s. 186 of the Personal Property Securities Act 2009 (Cth) (the PPSA).

Section 186(1) provides that the Registrar may register a financing change statement to restore data to the PPSR (including an entire registration) if it appears to the Registrar that the data was incorrectly removed from the PPSR.

Gleeson J found that data may be "incorrectly removed" from the PPSR for the purposes of s. 186 if it is removed as a result of a financing change statement containing an error made by the person who submitted it.

In *SFS 1*, Gleeson J made orders to amend the existing end times of the registrations detailed in the PPSR back to the original end times.

In *SFS 2*, the applicants sought further orders under s. 186. Gleeson J made a declaration that the Registrar has the power to restore the end times to the PPSR and an order requiring the Registrar to restore the end times to the PPSR.

(b) Facts

The applicants were assigned three registered security interests by a third party assignor.

The end times of the registrations were then mistakenly brought forward by five years because of errors contained in financing change statements prepared by the assignor and registered by the Registrar. The effect of the change of the end time was that the registrations no longer appeared on PPSA searches.

The assignor's error was identified within an hour of the lodgement of the applications.

The assignor requested the Registrar to restore the registrations on the basis that a mistake had been made in the financing change statements registered with the Registrar.

The Registrar responded that the Registrar did not have the necessary power to restore the registrations.

(c) Decision

(i) Had the original end times been "removed" from the PPSR

The first substantive issue before the Court in *SFS 1* was whether the change in end times of the registrations caused by the registration of the financing change statements had resulted in data (the original end times) being "removed" from the PPSR.

Gleeson J noted that the registration of the incorrect financing change statements had not caused the registrations to be removed from the PPSR.

However, there was no evidence that the original end times still formed part of the PPSR. The fact that the original end times had been removed meant that the registrations did not appear on a PPSR search dated 8 August 2014 (as the change of the end time meant the registrations were not effective after 22 July 2014).

Gleeson J also considered that this approach was consistent with s. 148(a) of the PPSA, which does not require the PPSR to contain data that has been replaced by amended data. Logically, data that has been replaced (i.e. the original end times), and which no longer appears on the PPSR has been removed from the PPSR.

In effect, Gleeson J considered that data may be "removed" from the PPSR by replacing original data with amended data in accordance with s. 150(3).

(ii) Meaning of "incorrectly removed" from the PPSR

The second substantive issue before the Court in *SFS 1* was the meaning of "data incorrectly removed" from the PPSR for the purposes of s. 186.

Gleeson J found that the word "incorrectly" in s. 186 did not require a finding that the Registrar had made an error.

Gleeson J considered that there may be circumstances where data can be "incorrectly removed" from the PPSR even where the Registrar registers a financing change statement in accordance with an application under s. 150(3). For instance, data may be incorrectly removed where a financing change statement contained an error or did not correctly reflect the intentions of the person making the application.

In reaching this view, Gleeson J noted:

- as s. 188 provides that the Registrar may register a financing change statement to amend a registration to correct errors made by the Registrar, s. 186 may be "construed to permit the restoration of data incorrectly removed in the wider sense";
- an ordinary English interpretation of the words "incorrectly removed from the register" includes an act of removal which occurred as a result of a person making an error in their application; and
- the evident purpose of s. 186 is to ensure that data which should be included in the PPSR, but which has been incorrectly removed, may be restored to the PPSR.

Clearly, before the power under s. 186 may be exercised, the Registrar must be satisfied that data has been incorrectly removed.

Gleeson J concluded that:

- it was within the power of the Registrar to restore data comprising the original end times to the PPSR if it appeared to the Registrar that the data was incorrectly removed from the PPSR; and
- data may be "incorrectly removed" from the PPSR for the purpose of s. 186 if the Registrar registered a financing change statement containing errors made by the person submitting the application.

(iii) Orders made

On 12 August 2014, Gleeson J made orders that the end times of the registrations be amended to the original end times.

In *SFS 2*, the applicant sought declarations that the Registrar be compelled to register financing change statements to "restore the end date" of each registration to the original end dates.

Gleeson J considered that the effect of her judgment in *SFS 1* was that the applicants were entitled to have the earlier end times restored to the PPSR. Gleeson J considered that the orders made on 12 August 2014 did not achieve that result.

In *SFS 2*, Gleeson J made:

- a declaration that the Registrar has power to restore the end times to the PPSR; and
- an order requiring the Registrar to register a financing change statement to restore the end times to the PPSR before 12 December 2014.

6.10 Court sets aside statutory demands following creditor's failure to depose to its belief that there is no genuine dispute about the debt

(By Tom Ward, Minter Ellison)

Kisimul Holdings Pty Ltd v Clear Position Pty Ltd [2014] NSWCA 262 , Supreme Court of New South Wales, Court of Appeal, Beazley P, Barrett J and Gleeson J, 11 August 2014

The full text of this judgment is available online.

(a) Summary

This case is an example of the Court setting aside a statutory demand pursuant to s. 459J(1) of the Corporations Act 2001 (Cth) (the Corporations Act) where a creditor failed to strictly adhere to Part 5.4 of the Act.

(b) Facts

Kisimul Holdings Pty Ltd (Kisimul) applied under s. 459G of the Act for orders setting aside two statutory demands served on it by Clear Position Pty Ltd (Clear Position), the one dated 11 September 2013 and the other dated 2 October 2013.

The application was advanced on several alternative grounds, namely that there was a genuine dispute about the existence or amount of the debt subject to the demands (s. 459H(1)(a) of the Corporations Act), that the applicant had an offsetting claim (s. 459H(1)(b) of the Corporations Act), and that there was "some other reason" why the demands should be set aside (s. 459J(1)(b) of the Corporations Act).

The accompanying affidavits submitted by Clear Position failed to include a statement to the effect that Clear Position believed there was no genuine dispute about the existence or amount of the debts.

At first instance, Stevenson J concluded that none of the grounds relied on by Kisimul were made out and accordingly dismissed the application.

The decision was appealed on the issue of whether Clear Position's failure to depose to its belief that there was no genuine dispute in the accompanying affidavits was "some other reason" why the demands should be set aside under s. 459J(1)(b) of the Corporations Act.

(c) Decision

Barrett J (with whom Beazley P and Gleeson J agreed) ordered that the statutory demands be set aside for "some other reason".

Firstly the court pointed to s. 459E of the Corporations Act which deals with the form of a statutory demand. Specifically s. 459E(4) provides that the demand must be accompanied by an affidavit that verifies the debt is due and payable by the company and complies with the "rules".

In the Supreme Court of New South Wales, the "rules" are the Supreme Court (Corporations) Rules 1999 (NSW) (the Rules).

The Court worked through the Rules and noted that:

- rl. 5.2 provides that for the purpose of s. 459E(3) of the Corporations Act, an affidavit accompanying a statutory demand must be made in accordance with Form 7 and state the matters in that form;
- rl. 1.6 provides that a reference in the Rules to a form followed by a number is a reference to the form so numbered in Schedule 1 to the Rules; and
- Form 7 in Schedule 1 of the Rules sets out a form of affidavit containing five paragraphs, paragraph 5 of which states "I believe there is no genuine dispute about the existence or amount of the debt."

The Court therefore held that the combined effect of the Corporations Act and Rules is that a person with first-hand knowledge of circumstances concerning the debt on which the creditor relies must, as envisaged by paragraph 5 of Form 7, state on oath or affirmation his or her belief that there is no genuine dispute about the existence or amount of that debt.

Secondly, the Court found that "some other reason" within s. 459J(1)(b) of the Corporations Act extends to cases not expressly stated in the Act and should not be confined to established categories. Rather, it was said to be a remedial provision under which the Court may deal with such cases in a way that is just, having regard to the purpose of the legislation.

The Court considered that the quality of the debt as undisputed is central to the proper working of Part 5.4 of the Corporations Act and that deposing to a belief that there is no genuine dispute provides a significant measure of assurance that the objectives of Part 5.4 of the Corporations Act are being observed by the creditor. The creditor's failure to adhere to the matters in Form 7 of the Rules was therefore held to be 'some other reason' for setting aside the statutory demands.

6.11 Shareholder class action based on alleged breach of continuous disclosure requirements: Strike out application fails where claim elements are uncertain

(By Nicholas Guenther, Herbert Smith Freehills)

Camping Warehouse Australia Pty Ltd v Downer EDI Ltd [2014] VSC 357, Supreme Court of Victoria, Sifris J, 1 August 2014

The full text of this judgment is available online.

(a) Summary

An application was brought by Downer EDI Ltd (Downer) to strike out a statement of claim which had been served against it by Camping Warehouse Australia Pty Ltd (Camping) in relation to a shareholder class action.

The primary complaints raised by Downer were that Camping failed to disclose a cause of action in its statement of claim and failed to:

- properly define the group constituting the class for whom the action was brought;
  plead reliance as an element in its claim that Downer failed to comply with its continuous disclosure requirements; and
- identify any misleading representation made by Downer as to its compliance with the continuous disclosure requirements.

Sifris J refused to strike out the statement of claim. His Honour found that it was unclear from the legislation and authorities whether reliance and specific representations needed to be pleaded as matters of causation where the misleading conduct complained of is an alleged breach of the continuous disclosure requirements in s. 674(2) of the Corporations Act 2001 (Cth) (the Corporations Act). Given this uncertainty, Camping's claim was not plainly hopeless and liable to be struck out. Further, as the alleged deficiencies in the pleading regarding the definition of the members comprising the group were able to be remedied by Camping amending its statement of claim, leave was granted for Camping to file and serve an amended statement of claim.

(b) Facts

Camping filed and served a statement of claim (on behalf of an open group) against Downer alleging that Downer had breached the prohibition on misleading or deceptive conduct in s. 1041H of the Corporations Act with respect to a failure to abide by the continuous disclosure requirements in s. 674(2) of the Corporations Act (by reference to ASX Listing Rule 3.1). Camping's statement of claim described the contents of a document released to the market and accompanying investor conference call on 1 June

2010 regarding the Waratah train project (the Waratah Project) in which Downer allegedly indicated to the market that:

- its previously advised estimates for the time and cost of completing the Waratah Project were incorrect;
- it had already (and would continue) to incur additional costs in relation to the Waratah Project and that these costs would materially impact its financial performance and financial position; and
- the Waratah Project was not 80% based on the Millennium train project as had been estimated and thus the risk mitigation effects of the Waratah Project being based on a similar design to that train project could no longer be claimed.

Camping pleaded that Downer was aware of these matters at a date no later than 25 February 2010 and that these matters should have been disclosed to the ASX immediately upon Downer becoming aware of them.

Downer brought an application seeking to have the statement of claim struck out by an order made pursuant to order 23.02 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic) and/or s. 33ZF of the Supreme Court Act 1986 (Vic) for a number of alleged pleading deficiencies in Camping's statement of claim.

Camping's statement of claim sought to include as group members those investors who purchased shares in Downer on or after 25 February 2010 and who still held those shares up to the commencement of trading on 1 June 2010. Downer objected to the definition of the group members. This objection was levelled specifically at the additional proviso that it only sought to include in the group those shareholders "who have valid, lawful and enforceable claims for loss or damage". While Camping asserted that the inclusion of these words was designed to exclude shareholders who had participated in an earlier proposed funded class action, Downer objected to the definition and submitted that it, by its very words, required the Court to determine the validity of an individual member's claim before that individual could be included as a group member in Camping's claim.

Downer's application for striking out the claim relied to a large extent on the absence of Camping pleading any reliance on representations made by Downer inducing it (and group members) to purchase securities in Downer in the period from 25 February 2010 to the end of the trading session on 31 May 2010. Downer alleged that, as a result, the statement of claim failed to disclose an actionable cause of action against it and thus should be struck out as hopeless.

(c) Decision

The question considered by Sifris J was whether the deficiencies alleged by Downer with respect to Camping's statement of claim were established and sufficient to warrant the striking out of the claim.

With respect to the alleged deficiency as to the composition of the group members, his Honour was satisfied with the proposal put forth by Camping that the problem could be overcome by Camping filing and serving an amended statement of claim which removed reference to "valid, lawful and enforceable claims". This option was deemed desirable and his Honour did not consider whether it would have been possible to continue the proceeding with that definition of the group members as had been included in the statement of claim.

In relation to the second main point, his Honour noted that, in strike out applications of this kind, Camping (as the plaintiff) was entitled to the benefit of any doubt existing in relation as to whether it is necessary to plead reliance for the action brought. Upon a review of the legislation and authorities on the subject, it was concluded that there was too much uncertainty surrounding the question of whether a plaintiff is required to plead reliance and specific representations for claims grounded in an alleged contravention of s. 674(2) of the Act to strike out the statement of claim. His Honour noted that, while Camping's claim as pleaded "may well fail", the assessment for a strike out application is such that "it is only in the clearest of cases that a claim should be struck out" and that "this is not such a case".

In light of the above findings, the orders of the Court were such that the strike out application brought by Downer was dismissed and that Camping was given leave to file and serve an amended statement of claim in the proceeding.

6.12 The difficult task of striking out statutory oppression claims

(By Jack Quirk, DLA Piper)

Trafalgar West Investments Pty Ltd as Trustee for the Trafalgar West Investments Trust v Superior Lawns Australia Pty Ltd [No 6] [2014] WASC 278, Supreme Court of Western Australia, Martin J, 1 August 2014

The full text of this judgment is available online.

(a) Summary

This case was an application to strike out parts of the amended originating process and substituted statement of claim alleging statutory oppression under Part 2F.1 of the Corporations Act 2001 (Cth) (the Corporations Act). Martin J, while conceding that a number of the defendants' submissions were not without merit in relation to the defence of the oppression action, held that the high-threshold for a strike out application meant that some of these questions were ultimately best left for determination at trial. It was also significant that allowing the strike-out would effectively dismiss the oppression claim at an interlocutory stage.

(b) Facts

In June 2006, the plaintiff, Trafalgar West Investments Pty Ltd (Trafalgar), became the registered holder of 230 ordinary shares in the first defendant, Superior Lawns Australia Pty Ltd (Superior Lawns). The other five members of Superior Lawns were all part of Flugge family. All the Flugges were, or had been at various times, directors of Superior Lawns, with Craig Flugge effectively managing its day-to-day business and Margaret Flugge holding the office of company secretary. The only other director (for a time) was Patrick Jebb, also a director and shareholder of Trafalgar. The five Flugge family members were joined as the second to sixth defendants in the proceedings.

The dispute between Trafalgar and Superior Lawns primarily arose out of Superior Lawns' dealings with a property at Sydney Road, Gnangara in Western Australia (the Property). Trafalgar alleged that Superior Lawns, under control of the Flugges, engaged in conduct in relation to the Property that was contrary to the interests of Superior Lawns as a whole. Trafalgar claimed the conduct improperly benefited other Flugge family entities, namely three separate family trusts.

In particular, Trafalgar claimed, *inter alia*, that the Flugges caused Superior Lawns to:

- transfer 22 undivided 100th shares in the Property to the Flugge Property Trust, of which Craig, Margaret, Jerome and Damien were trustees and beneficiaries, for no consideration; and
- pay rent to the Flugge Property Trust at a rate without an independent assessment of what constituted either a fair or market rental for the interest in the Property, and to make capital improvements on the Property.

The thrust of the pleadings as a whole, Martin J surmised, was that those persons in a position to control and direct management decisions of Superior Lawns used that corporation as an extension of the Flugge family finances, and by doing so, acted in disregard of the interests of Trafalgar as a member of that corporation. His Honour said this created a situation where Trafalgar, as minority shareholder, found itself "locked in" to a proprietary company but also "locked out" of the decision-making and then denied any real commercial return on Trafalgar's investment capital at the hands of a dominant decision making faction of other members and appointed directors.

Trafalgar claimed that Superior Lawns' conduct constituted statutory oppression under s. 232 of Part 2F.1 of the Corporations Act in that it was oppressive to, unfairly prejudicial to, or unfairly discriminatory against Trafalgar.

The defendants applied to strike out parts of the amended originating process and substituted statement of claim.

There were three substantive issues in the application, these were:

- whether the conduct of Superior Lawns prior to June 2006 could be oppressive to Trafalgar considering they were not yet a member;
- whether the appropriate test in a close held family company is of the hypothetical shareholder or whether there has to be consideration of the fact that the shares were held by members of the family; and
- whether there was any issue estoppel/abuse of process grievances against the pleading in that a number of determinations had already been made in related proceedings, some of which potentially overlapped with the pleadings.

(c) Decision

In dismissing the application Martin J considered a number of statutory oppression authorities. However, his Honour reiterated that the oppression action is entirely a creature of statute, and any judge-made limitation to the scope of s. 232 should be approached with caution at the risk of carving out exceptions to the section that do not present from its words.

In this case, the high-threshold for striking out elements of a pleading was not met, as Martin J felt that in light of the fact that a strike out would effectively end any claim of the plaintiff whatsoever, certain questions were best left for determination at trial.

His Honour addressed three substantive issues arising from the parties' submissions in the application.

(i) Pre-membership conduct and s. 232 oppression

In disposing of this issue, Martin J felt three matters were relevant. In the first, his Honour followed the decision of Giles JA in *Campbell v Backoffice Investments* [2008] NSWCA 95, noting as significant the presence of the word "is" in s. 232 of the Corporations Act. In that case, Giles JA rejected the authority of a number of older statutory oppression cases such as *Re Spargos Mining NL* (1990) WAR 166 and the "venerable" UK decision of *Re Westbourne Galleries Ltd* [1970] on the grounds that those cases dealt with statutory predecessors of s. 232 of the Corporations Act, and were therefore of limited use to determine whether conduct fell within its ambit. For Giles JA, and cited with approval by Martin J, the use of the word "is" in s. 232 suggests that the conduct does not have to be in the "continuous present" for the section to apply. This potentially applies to conduct occurring before the person was a member as well as conduct that has ceased to be oppressive at the time the action is brought.

Second, though Martin J conceded that standing to bring an action under Part 2F.1 of the Corporations Act is basically determined by reference to the person being recorded on the company's register of members, this did not mean that the conduct had to occur while the person was a member. His Honour stated that as a matter of logic, if it was accepted that a person has standing to bring an action when they are a member, even though the conduct has wholly ceased to exist, it should follow that the person may complain over pre-membership conduct.

Third, his Honour said that it was necessary that temporal considerations should be taken into account by the court adjudicating an oppression claim. Following the decision in *De Tocqueville Private Equity Pty Ltd v Linden* [2006] FCA 1309, his Honour expressed the view that temporal considerations are best left to trial, in the "holistic context of an evaluation on the merits and correlative determination of appropriate relief if the plaintiff establishes its case".

(ii) Close held family company

His Honour saw the disposition of the above as delivering "knock-on consequences" for this issue. Trafalgar submitted that whether or not the conduct of a company's affairs is "contrary to the interests of the members as a whole" is determined not by reference to the "actual shareholders", but to the interests of an "individual hypothetical member": *Re Bagot Well Pastoral Company* (1993) 61 SASR 165; *Goozee v Graphic World Group Holdings Pty Ltd* (2002) 170 FLR 451.

By contrast, the defendants submitted, invoking *Re Lowes Park Pty Ltd* (1994) 62 FCR 535 (*Re Lowes Park*), that the Court must evaluate whether there is oppression by reference to an "individual hypothetical member [who], at the time of the alleged conduct, is necessarily a Flugge family member who is not likely to commence proceedings".

Martin J rejected the defendants' suggestion that the two above tests create a dichotomy of approach. His Honour distinguished the present case from *Re Lowes Park* suggesting that there could be no hard or fast rule as to the appropriate "hypothetical shareholder". Rather, as Trafalgar suggested, while the principles in regard to oppression do not change, how the principles operate on a particular factual matrix may change. By way of example, what may be oppressive to a shareholder of BHP, it was submitted, may not be oppressive to a shareholder of a small family company, particularly if there was unanimous consent.

His Honour rejected the argument that there is any binding and uniform statement of law that a closely held family company has laxer obligations to their shareholders than a non-family company. He also declined to treat what was pleaded as a single course of conduct by "temporally segregat[ing]" each part of the conduct and evaluating it "morsel by morsel".

(iii) Conduct of other proceedings

This issue involved the matters pleaded under the heading "Concluded Proceedings" which refer, though not mentioned in this decision, to a number of issues already determined in the ongoing litigation between the parties. It was the defendants' submission that in pleading the "Concluded Proceedings", Trafalgar was attempting to abuse the processes of the Court. This is because those events as pleaded had been determined elsewhere, albeit in a different cause of action.

His Honour felt that the issue was not made out stating, in general terms (at [107]):

> The fact that pleaded conduct has been the subject of other proceedings under other statutory provisions would not... necessarily dictate that it must be quarantined as incapable of being oppressive or as playing a relevant role in contributing to that overall conclusion. Moreover, conduct which is oppressive does not necessarily cease to be so merely because a Court has ultimately not granted relief whilst evaluating the conduct in a separate context of some distinct law.

As to the specific instances of conduct pleaded as "Concluded Proceedings", his Honour said the present interlocutory application was not the appropriate juncture to decide.

6.13 Supreme Court upholds the setting aside of statutory demand issued by subcontractor

(By Daniel Kornberg, DLA Piper)

Pravenkav Group Pty Ltd v Diploma Construction (WA) Pty Ltd [No 3] [2014] WASCA 132, Supreme Court of Western Australia, Court of Appeal, Newnes and Murphy JJA and Edelman J, 1 August 2014.

The full text of this judgment is available online.

(a) Summary

The Court of Appeal of the Supreme Court of Western Australia dismissed an appeal by Pravenkav Group Pty Ltd (PG) against a decision at first instance that the statutory demand served by them on Diploma Construction (WA) Pty Ltd (Diploma) be set aside. The Court dismissed the appeal on a number of bases, the first of which being that the affidavit supporting the application to have the demand set aside need not provide evidence by which the court must calculate the substantiated amount of the offsetting claim, it must merely "support" the application. Secondly, the court held that the evidence put forth by Diploma was sufficient to establish an offsetting claim and as such was genuine and advanced in good faith.

Additionally, the Court held that it could not necessarily be concluded that the amount of the offsetting claim equalled or exceeded the amount of the statutory demand. This had no practical effect on the setting aside of the statutory demand as on cross-appeal, the Court held that the statutory demand was to be set aside regardless of the quantum of the offsetting claim, by virtue of the amount in the demand being subject to a "genuine dispute".

(b) Facts

PG was sub-contracted by Diploma for the design, supply, delivery, installation, and completion of secondary glazing works at a site in Perth (the Site) for the sum of $128,000 plus GST. Diploma alleged that there were defects in the work done by PG or its contractors. Diploma notified PG via an email that described and attached photographs of the alleged "extensive damage".

Three days after these allegations were made against PG, it issued a progress claim to Diploma for the unpaid remainder of the contract sum, being $103,461. Diploma sent further notifications directing PG to rectify the defects. While PG gave some acknowledgement of the defects, it did not rectify them. Additionally, PG acknowledged that it was disputing some of the invoices provided to it by its contractors. PG subsequently issued Diploma with a statutory demand for $113,807.24, which consisted of the amount contained in the progress claim plus GST.

Diploma applied to have the statutory demand set aside and was successful in the Supreme Court. The demand was set aside on the basis that Diploma had an offsetting claim of at least the value of the debt alleged in the statutory demand as is required by s. 459H of the Corporations Act 2001 (Cth) (the Corporations Act).

PG appealed the decision on the basis that:

- the supporting affidavit to Diploma's application to have the statutory demand set aside did not contain the minimum content;
- there was not sufficient evidence of an offsetting claim; and
- there was not sufficient evidence concerning the quantum of the offsetting claim.

Diploma cross-appealed and filed a notice of contention on the issue of whether it was established at first instance that, in addition to the Court's finding of the "offsetting claim" under s. 459H(1)(b) of the Corporations Act, there was a "genuine dispute" between the parties about the existence or amount of the debt to which the demand relates under s. 459H(1)(a). A statutory demand can be set aside on either of those bases.

(c) Decision

(i) Grounds 1 and 2 - Minimum content of the supporting affidavit

Section 459G of the Corporations Act stipulates that an application to have a statutory demand set aside must include a supporting affidavit. PG contended that the affidavit from Mr Bishop, a contract administrator for Diploma, supporting the respondent's application was not an affidavit supporting the application as it said nothing about the quantum of Diploma's offsetting claim and did not enable the Court to determine whether the offsetting claim was equal to or exceeded the amount of the statutory demand.

The Court rejected this notion firstly on the basis that the supporting affidavit was not "silent and bereft of evidence" as put forth by PG, as despite not providing the amount of the offsetting claim, it disclosed the legal basis upon which the claim was being asserted.

Secondly, the Court rejected the idea that a supporting affidavit must be one that enables the court to determine whether the offsetting claim is equal to or exceeds the amount of the statutory demand. Three reasons for this were given. The first reason is that even if the offsetting claim is less than the amount in the statutory demand, the statutory demand must be set aside if the substantiated amount is less than the statutory minimum. The second is that even if the statutory demand is not set aside, the court may vary the demand if the substantiated amount is at least as great as the statutory minimum. Finally and perhaps most importantly, it is unnecessary for the initial supporting affidavit itself to contain all the material upon which the quantum of the offsetting claim can be determined.

The Court relied on a number of previous appellate court decisions in coming to its decision that a supporting affidavit did not need to provide evidence from which a quantification of the offsetting claim can take place, only a basis from which the magnitude of the offsetting claim can be compared with the amount of the statutory demand. The Court further stated that an offsetting claim is to be decided at the date of the hearing, not at some earlier time. Therefore, the affidavit provided by Mr Bishop clearly "supported" Diploma's offsetting claim, despite not substantiating it in precise detail.

(ii) Ground 3 - Sufficiency of evidence of an offsetting claim

PG alleged that there was insufficient evidence for the Court to conclude that the alleged offsetting claim was genuine or advanced in good faith as there was no evidence before the Court of the rectification work required or instructed to be carried out by Diploma and no evidence upon which the Court could conclude that the rectification costs claimed by Diploma were costs of rectifying defects.

The Court held that Mr Bishop's affidavit contained sufficient evidence of the rectification work required to be carried out or instructed to be undertaken as it contained the relevant communications that set this out as well as photographs of the defects. Additionally, the Court held that an affidavit provided by Mr Farrelly, the Site manager, elaborating on the evidence of Mr Bishop, contained sufficient evidence of the costs claimed for rectification of defects.

In dismissing PG's appeal on this ground, the Court held that PG's submissions fell short of establishing that the offsetting claim was not genuine or made in good faith as Diploma's evidence as a whole is not "equivocal or so lacking in precision" that it could not be said to have "sufficient [*prima facie*] plausibility as to merit further investigation as to the truth".

(iii) Ground 4 - Sufficiency of evidence concerning the quantum of the offsetting claim

PG submitted that there were no grounds under the sub-contract or at law on which the Court could come to the conclusion that the offsetting claim was equal to or exceeded the amount of the statutory demand.

The Court confirmed that the precise quantification of an offsetting claim is unnecessary and evidence need only be sufficient to enable to Court to make an estimate of the amount of the claim in monetary terms.

The affidavit provided by Mr Farrelly, made in reference to Mr Bishop's supporting affidavit, quantified the costs incurred by Diploma for rectification. The costs fell short of the amount in the statutory demand. The Court held that, at first instance, the master had erred in including the amounts that PG had not paid their contractors.

That PG had not paid its contractors was a matter concerning a "genuine dispute" as opposed to being a part of the quantification of the offsetting claim. As such, the Court held that the master had erred in concluding that the offsetting claim was equal to or exceeded the amount of the statutory demand.

(iv) Notice of contention and cross-appeal

Diploma, on cross-appeal, contended that there was a "genuine dispute" between the parties about the existence or amount of a debt to which the demand relates in accordance with s. 459H(1)(a) of the Corporations Act.

From the evidence given by Mr Bishop, there was no statutory declaration submitted with the progress claim as required and it was not itemised. For these reasons, the Court held there was a genuine dispute concerning the whole of the progress claim and therefore a genuine dispute concerning the whole of the amount of the existence of the debt asserted in the statutory demand. The consequence was that the statutory demand was required to be set aside, regardless of whether or not the offsetting claim equalled or exceeded the amount in the statutory demand.

6.14 General manager breaches fiduciary duties to employer by operating own business

(By James Siemon, Minter Ellison Lawyers)

Salary Packaging Australia Pty Limited v Andropov [2014] QSC 167, Supreme Court of Queensland, Mullins J, 31 July 2014

The full text of this judgment is available online.

(a) Summary

This case examines the fiduciary duties owed by the first defendant as the general manager and a director of the plaintiff, which the first defendant was found to have breached by owning and operating a business in competition with the plaintiff. In particular, the case examines the conflict of interests which arose from those activities, and the failure of the first defendant to act in good faith, to act in the interests of the plaintiff, and to act loyally and with fidelity towards the plaintiff.

(b) Facts

The plaintiff provided motor vehicle salary packaging services to employers, by arranging financing for the lease of the motor vehicle (for which the plaintiff was paid brokerage) and ongoing administration of the salary package arrangement (for which the plaintiff was paid a fee). The plaintiff used Macquarie Leasing Pty Ltd (Macquarie) to provide financing by way of novated leases. The salary packaging business of the plaintiff was developed by the first defendant while initially employed by Kerry's Automotive Group of companies, of which the plaintiff was a member. The first defendant was subsequently employed by the plaintiff as its general manager from around September 2003 until 13 May 2011 and was appointed as a director.

The parties agreed that the first defendant, as general manager, owed the plaintiff the following fiduciary duties:

- not placing himself in a position in which his own interests conflicted with those of the plaintiff;
- acting in good faith and in the interests of the plaintiff;
- performing his duties loyally and with fidelity towards the plaintiff;
- not receiving and/or retaining a secret profit in respect of his employment or as an officer of the plaintiff; and

- not using his position improperly to gain an advantage for himself or someone else or cause detriment to the plaintiff.

The second defendant was a company incorporated by the first and fourth defendants, who were married. Both the first and fourth defendants were shareholders of the second defendant and were appointed its directors (although the first defendant ceased to be a director between 12 August 2009 and 1 July 2011).

Mr Gregory Harris was a finance broker who provided various forms of finance for motor vehicles through Toyota Financial Services and St George Bank. In 2009, he agreed with the first and second defendants for them to provide administrative functions that would allow him to offer novated leases as a product using Macquarie (referred to as "the Harris System"). In return, the second defendant received brokerage from Macquarie and insurance commissions. The second defendant subsequently retained a consultant, who had been retained by the plaintiff, to develop and host the "Dealerpac" website towards that purpose. The concept of Dealerpac was one that had originally been developed for the plaintiff in 2006.

The plaintiff therefore alleged that the first defendant breached his fiduciary duties by assisting the second defendant to obtain brokerage and insurance commissions with respect to salary packaging services provided by the second defendant to 391 identified persons as part of the Harris System. On that basis, the plaintiff alleged that the funds received by the second defendant were obtained in breach of trust. The plaintiff therefore sought equitable compensation from the first and second defendants, as well as to recover secret commissions that the first defendant admitted receiving.

The plaintiff also brought a claim against the fourth defendant on the basis that she knowingly participated in the second defendant's activities and that she ought therefore to account for the funds she received as constructive trustee. Mullins J found that the fourth defendant had limited participation in the transactions undertaken by the second defendant and lacked knowledge of any breach of fiduciary duty owed by the first defendant to the plaintiff. Her Honour therefore dismissed the plaintiff's claim against the fourth defendant.

Other claims brought against the defendants were abandoned, and the proceeding against the third defendant was discontinued, at or prior to the commencement of the trial.

(c) Decision

In defence of the plaintiff's claims, the defendants raised three main points. First, the first defendant sought to distinguish between the plaintiff's business model and Dealerpac system, and the Harris System. The first defendant characterised the former as attracting new employers to provide salary packaging services, including finance by way of novated leases, as distinguished from the latter, which was described by the first defendant as an online system at point of sale in a dealership. Mullins J dismissed that distinction, finding that the second defendant was ultimately doing exactly the same thing in relation to the administration of the 391 transactions as was done to offer financing by way of novated leases as part of the plaintiff's business.

Secondly, the first and second defendant also submitted that, even if it was a breach of fiduciary duties owed to the plaintiff, the receipt of the commissions in relation to the 391 transactions occurred with the plaintiff's knowledge and consent. Mullins J referred to *Maguire v Makaronis* (1997) 188 CLR 449 at 466, where Brennan CJ and Gaudron, McHugh and Gummow JJ held that "informed consent" to the actions of the fiduciary was required to escape an adverse finding, the question of whether such consent had been given being "a question of fact in all the circumstances of each case" and without a precise formula. Her Honour accepted the evidence of the plaintiff's owner, Mr Kerry Ambrose-Pearce, that the first defendant had not disclosed his interest and involvement in the business of the second defendant and that Mr Ambrose-Pearce had not given the first defendant permission to operate or be involved in any other business while employed by the plaintiff. Her Honour also noted the first defendant's concession that "he did not have any specific conversations with Mr Ambrose-Pearce in relation to his activities with Greg Harris and the second defendant's business of providing novated leases". The first and second defendants therefore failed to prove that the plaintiff's informed consent had been given.

Finally, the first and second defendants argued that the 391 transactions were not business available to the plaintiff, whether because they resulted from the first defendant's relationship with Mr Greg Harris, because the plaintiff was not part of the relevant employer's closed panel of salary packaging providers, or because the deal was referred from a competitor to Kerry's Automotive Group. Mullins J doubted those submissions, but also noted that, even if the plaintiff would not have been able to obtain the business of the 391 transactions, that finding was not a defence to the plaintiff's claims. In support of that proposition, her Honour cited the statement of the court in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558 that "it is no defence that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken". Her Honour therefore dismissed the defendant's submissions raising that point as a defence.

The plaintiff sought the recovery of $41,900 in secret commissions that the first defendant admitted receiving from Australian Dealer Insurance between September 2010 and May 2011 as part of a reward program offered by Swann Insurance. The first defendant had received the commissions with authorisation while employed by Kerry's Automotive Group and submitted that this transferred with his employment when he commenced with the plaintiff. It was conceded that his receipt of the commissions was never discussed with Mr Ambrose-Pearce, however, and no approval was given for the first defendant to continue receiving them while general manager of the plaintiff. Mullins J therefore concluded that the commissions were secret profits in breach of the first defendant's fiduciary duty to the plaintiff, and ordered that the commissions be repaid with interest.

Her Honour therefore ordered the payment of equitable compensation in the sums of $978,335 and $41,900 together with interest, and made other orders regarding costs and dismissing the claim against the fourth plaintiff.

6.15 Court channels public interest considerations to terminate Deed of Company Arrangement

(By David Wright, Ashurst)

TiVo, Inc v Vivo International Corporation Pty Ltd (subject to deed of company arrangement) [2014] FCA 789, Federal Court of Australia, Gordon J, 29 July 2014

The full text of this judgment is available online.

(a) Summary

The Federal Court of Australia has exercised its discretion under s. 445D(1) of the Corporations Act 2001 (Cth) (the Corporations Act) to terminate the Deed of Company Arrangement (DOCA) that was entered into in respect of Vivo International Corporation Pty Ltd (Vivo).

The decision highlights the fact that a Court may find it in the "public interest" to terminate a DOCA even where it has been approved by a majority of creditors. In this case, the administrator's report to creditors gave rise to "legitimate concerns" in respect of which no proper disclosure was made by Vivo and others at the time. The Court held that the "public interest" therefore demanded that the DOCA be terminated and that a liquidator investigate, at the very least, those "legitimate concerns".

(b) Facts

On 22 November 2013, Vivo was placed into voluntary administration. Following the first meeting of creditors, the administrator issued a report pursuant to s. 439A of the Corporations Act (the Report). Among other matters, the Report covered related party loan accounts, a Business Sale Agreement between Vivo and its then related party Viano Corporation Pty Ltd (Viano), and possible recoverable transactions. The Report noted that a DOCA had been proposed under which the estimated return to creditors was 17 cents in the dollar.

The Report highlighted the lack of disclosure and information that had been provided by Vivo and others in respect of matters discussed in the report. The Report noted that, despite requests, the administrator failed to receive, among other things, source documentation, ledgers, journals and other primary documentation in respect of certain loan accounts, information on payments made to related parties and certain financial statements. Despite the proposed DOCA, the administrator recommended that Vivo be wound up, given the lack of information provided and the possibility of recoverable transactions. The estimated return to creditors on a winding up was between 1 and 54 cents in the dollar.

At the second meeting of creditors, however, the proposed DOCA was approved by a majority of Vivo's creditors. TiVo Inc and TiVo Brands LLC (the Plaintiffs), who were significant creditors of Vivo, voted against the proposed DOCA. The Plaintiffs sought an order from the Court to terminate the DOCA and for Vivo to be wound up. The Plaintiffs argued, *inter alia*, that the comparative likely returns in a winding up would be greater than under the DOCA, that there were circumstances calling for further investigation by a liquidator, that some of the creditors had special connections with Vivo, and that termination of the DOCA was in the interests of the creditors and the public.

(c) Decision

The Court held that the DOCA should be terminated pursuant to s. 445D(1) of the Corporations Act and that Vivo should be wound up. The Court's order was conditional on the Plaintiffs providing $100,000 of funding to be used at the direction of the liquidator for examinations and recovery actions. Given the facts of the case, the Plaintiffs were not required to pay the remaining creditors the amount they would have received under the DOCA as a condition of the termination.

(i) Legislative framework

The Plaintiffs relied upon ss. 445D(1)(f) and (g) of the Corporations Act, which provide the Court with a discretionary power to terminate a DOCA if it is satisfied that:

- the DOCA is oppressive, unfairly prejudicial or unfairly discriminatory against one or more creditors, or is contrary to the interests of the creditors as a whole; or
- the DOCA should be terminated for some other reason.

Gordon J explained that the circumstances in which a DOCA may be terminated under s. 445D(1)(g) of the Corporations Act are not closed, and will depend on the facts and combination of circumstances of each case, which must be mutually balanced.

(ii) Exercise of Court's discretion

Gordon J noted that there is some authority that the interest of creditors is the "primary consideration" for the Court in exercising its discretionary power under s. 445D(1) of the Corporations Act. Her Honour explained, however, that it is clear that the discretion must be exercised having regard not only to the interests of creditors as a whole, but also to the wider "public interest".

Her Honour considered that the Court has a duty with regard to the "commercial morality of the country", and that, relevantly, a consideration of the "public interest" includes whether the continuation of the DOCA is conducive or detrimental to "commercial morality" and to the "interests of the public at large". Gordon J emphasised that each case must, however, be considered on its own facts.

(iii) Analysis

Gordon J found that essential aspects of the Report were inaccurate or, at the least, incomplete. Gordon J concluded that anyone reading the Report would have "legitimate concerns" about certain aspects of it, particularly in respect of the numerous instances of lack of disclosure and the potentially uncommercial nature of the Business Sale Agreement between Vivo and Viano.

Gordon J held that due to the lack of proper disclosure by those in charge of Vivo in respect of matters underlying such "legitimate concerns" at the time of the Report, there was a significant risk that creditors may have been materially misled. Her Honour held that the "public interest" therefore demanded that the DOCA be terminated under s. 445D(1)(g) of the Corporations Act and that a liquidator conduct an inquiry in respect of, at the least, the "legitimate concerns" arising out of the Report.

(iv) Vivo's arguments

Vivo argued that the Court should not terminate the DOCA given that:

- all of the voting creditors (other than the Plaintiffs and one other creditor) had voted in favour of the DOCA on two separate occasions; and
- the creditors' choice was "commercially sound", and was reached on essentially the same material put before the Court.

In response to the first argument, Gordon J concluded that the Court is not bound by the consent of creditors in exercising its discretion under s. 445D(1) of the Corporations Act. The consent of creditors to a DOCA is "but an element" in the exercise of the Court's discretion, which, as noted above, must also be exercised having regard to wider "public interests" and "commercial morality" in each case. In this case, her Honour noted that the fact that a majority of creditors voted in favour of the DOCA on two separate occasions should be viewed in context, namely in the context of the non-disclosures, the identity of the creditors who voted in favour of the DOCA and the connections they had with Vivo and its related parties (in addition to creditors that were related to Vivo, there was evidence suggesting that some of the other creditors had ongoing trading relationships with Viano), and the fact that the consent was not unanimous. Given those factors, Gordon J held that the votes of the creditors carried less weight in the present case. Her Honour also rejected Vivo's submission that "questions of commercial morality" should not override the wishes of the majority of the creditors, noting that each case should be considered on its own facts and that the issues and concerns raised by the parties had otherwise been addressed.

In response to the second argument, Gordon J considered that this argument ignored or avoided the significance of the non-disclosures in this case. Her Honour found that it was difficult to understand how the DOCA could be "commercially sound" when, given the lack of information provided to the administrator, it was simply not possible to state that the creditors would be better off under the DOCA.

Separately, her Honour held that the "problem" in this case would not have arisen if the proposed DOCA had not been put to creditors. Her Honour cited Santow J's decision in *JA Pty Ltd v Jonco Holdings Pty Ltd* [2000] NSWSC 147, which noted the importance of administrators seeking directions (through the Court, if appropriate) if they are unsatisfied that a DOCA should be put to creditors when creditors cannot be properly informed due to a lack of essential corporate records and when there is a serious risk that they may be misled.