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## Detailed Contents

so in circumstances where it is at best uncertain that a surplus will arise for unsecured creditors

## 1. Recent Corporate Law and Corporate Governance Developments

### 1.1 Global M&A activity

On 16 May 2014, the International Institute for the Study of Cross-Border Investment and M&A published its quarterly review of M&A trends.

The key highlights are:

- global M&A volume in Q1 was US$756 billion, marking the second strongest quarter in the last three years and nearly double the volume of Q1 2013;
- Europe experienced a particularly strong resurgence in deal-making activity in Q1. If this trend persists, global M&A activity in 2014 could reach US$3 trillion, which would be the highest annual volume over the last six years;
- as one indication of companies' appetite for M&A, Q1 witnessed two mega deal bidding wars on each side of the Atlantic, for Vivendi's SFR and Time Warner Cable. At an annualised volume of US$980 billion, cross-border deal activity is on pace to reach its highest level since 2010 and will account for 32% of global M&A volume in 2014;
- media/entertainment led sector deal volume as a result of the Comcast/Time Warner Cable transaction. The real estate and energy & power sectors also turned in strong quarters; and
- private equity deal activity continued to gain momentum in Q1, accounting for 18% of global M&A volume, an increase of 21% over the corresponding period in 2013.

The full review is available on the XBMA website.

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### 1.2 European Commission review of the EU's financial regulation reform agenda

On 15 May 2014, the European Commission published a first comprehensive review of the financial regulation agenda. The review considers the wide range of financial regulation reforms adopted in the EU including revised capital requirements in banking and the reform of derivatives markets.

Further information is available on the European Commission website.

### 1.3 Corporations law - Implications of the Australian Commonwealth Budget

On 13 May 2014, the Australian Government released the Budget for 2014-15.

According to Budget Paper No 2 - Budget Measures 2014-15, the federal government intends to:

- abolish the Corporations and Markets Advisory Committee (CAMAC) and the CAMAC Legal Committee as part of its "Smaller Government Reform Agenda" by 1 July 2015;
- reduce funding to the Australian Securities and Investments Commission (ASIC) by $120.1 million over five years, which will require ASIC to "adjust its priorities to ensure it continues to meet its statutory objectives"; and
- provide funding for scoping studies into future ownership options for ASIC's registry function, which will assess the likely sale environment and the optimal method and timing of sale.

Further information about the Budget is available in the Finance Minister's media release as well as the Budget website and the Budget Paper No. 2.

### 1.4 OECD consults on revised governance guidelines for state owned enterprises

On 13 May 2014, the Organisation for Economic Co-operation and Development (OECD) published a revised draft of its "Guidelines on Corporate Governance of State-Owned Enterprises". The OECD began a review of these guidelines earlier this year. Final discussion is expected later in 2014, with the revised Guidelines to be submitted to the OECD Corporate Governance Committee for approval in November 2014.

A copy of the revised draft is available on the OECD website.

### 1.5 FSB report on reducing reliance on credit rating agency ratings

On 12 May 2014, the Financial Stability Board (FSB) published the final peer review report on national authorities' implementation of the FSB Principles for Reducing Reliance on CRA Ratings (the Principles). The report is complemented by the publication of the action plans for each FSB jurisdiction.

At the St Petersburg G20 Summit and subsequent meetings, the G20 called on national authorities to accelerate progress in implementing the Principles in accordance with the FSB roadmap agreed in October 2012. The roadmap sets out milestones for work to reduce mechanistic reliance on CRA ratings in standards, laws and regulations, and to promote and, where needed, require that financial institutions strengthen and disclose information on their own credit assessment approaches.

As follow-up, the FSB conducted a thematic peer review of national authorities' implementation of the FSB Principles in two stages. The first stage, completed in August 2013, comprised a stocktake of references to CRA ratings in national laws and regulations. The current second stage focused on the action plans developed by national authorities to implement the FSB roadmap.

The review found that progress toward the removal of references to CRA ratings from standards, laws and regulation has been uneven across jurisdictions and the financial sectors. Even so, removing references to CRA ratings from laws and regulations is only the first step; mechanistic reliance on CRA ratings can also come from market practices and contracts. The key challenge lies in developing alternative standards of creditworthiness and processes so that CRA ratings are not the sole input to credit risk assessment.

National authorities therefore need to focus on establishing stronger internal credit risk assessment practices. In some instances, this may entail a fully independent risk assessment, and in other instances this may allow using CRA ratings as one indicator, among others, of credit risk.

In the light of these findings and in support of the review conclusion that more could be done to address gaps in individual action plans, the peer review set out several recommendations to address some of the challenges hindering progress toward implementation of the roadmap.

In particular, national authorities should:

- implement their action plans and refine them as lessons of experience are gained;
- engage market participants to encourage: adoption of alternative approaches such as strengthening of internal credit assessment processes; and reviewing

reliance on CRA ratings in private contracts, such as ratings triggers, which represent mechanistic reliance on CRA ratings; and

- not replace mechanistic reliance on CRA ratings with mechanistic reliance on a very limited number of alternative measures, as this might lead to substituted procyclicality and herd behaviour.

The full report is available on the FSB website.

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**1.6 UK: Report of the inquiry into charity senior executive pay**

In April 2014, the Inquiry Panel released their report into Charity Senior Executive Pay in the UK. The Inquiry was set up following a series of media stories highlighting chief executive pay in some large charities. The Inquiry Panel was specifically appointed to represent and gather a diverse range of views and explore different perspectives on levels of senior staff remuneration in charities.

The charity sector undertakes a huge range of activities. It includes many different types of charity. The nature of what they do and the breadth of their operation inevitably determines how they are organised and the type of staff they employ. However, all charities are governed by the same legal requirement: that they exist exclusively for public benefit. In all cases, their trustees are ultimately accountable for decisions about pay. This provides the context for the Inquiry's findings and has shaped all of its recommendations.

The Inquiry has tried to balance quite divergent views, ranging from those who think that charities should be entirely led and run by volunteers to those who believe the pay of senior staff in charities needs to be consistent with their peers in other sectors in order to attract and retain professional expertise to deliver the charity's aims.

Examples of high pay have dominated some of the headlines, but the evidence shows that the vast majority of charities do not have any paid staff and, in those that do, the salaries quoted by the media are not typical. The Inquiry recognises the evidence that the charity sector pays significantly less than other sectors for comparable senior roles. Most charities' remuneration strategies are essentially designed to attract and retain people who are already motivated and committed to charities' work.

Certain charities cannot operate effectively without employing highly professional and skilled staff. In fact, the nature and complexity of many charities makes this increasingly necessary. However, the Inquiry also believes that charities that depart from paying a salary that reflects their charitable context should have good and sound reasons for doing so. They should also be able to explain their approach and rationale.

Charities with audited accounts already publish the number of staff whose remuneration is £60,000 or more, in salary bands of £10,000. The Inquiry recommends that these charities go further, and develop and publish a remuneration statement explaining their pay strategy and stating the individual remuneration of their highest-paid staff by position and name. The Inquiry believes that giving trustees the tools and confidence to agree and explain the pay of their senior staff will improve public understanding and confidence in charities.

The report is available on the National Council for Voluntary Organisations' website.

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**1.7 Point of sale disclosure in the insurance, banking and securities sectors - final report published by the Joint forum**

On 30 April 2014, the Joint Forum released its final report on point of sale disclosure in the insurance, banking and securities sectors.

The report identifies and assesses differences and gaps in regulatory approaches to point of sale (POS) disclosure for investment and savings products across the insurance, banking and securities sectors, and considers whether the approaches need to be further aligned across sectors. It sets out eight recommendations, for use mainly by policymakers and supervisors to assist them in considering, developing or modifying their POS disclosure regulations:

- jurisdictions should consider implementing a concise written or electronic POS disclosure document for the product sample identified in the report, taking into account the jurisdiction's regulatory regime;
- the POS disclosure document should be provided to consumers free of charge, before the time of purchase;
- a jurisdiction considering POS disclosure should consider requiring that a POS disclosure document disclose key characteristics including costs, risks and financial benefits or other features of a given product and any underlying or referenced assets, investments or indices, irrespective of the financial sector from which the products are derived;
- the POS disclosure document should be clear, fair, not misleading and written in a plain language designed to be understandable by the consumer;
- the POS disclosures should include the same type of information to facilitate comparison of competing products;
- the POS disclosure document should be concise, set out key information about a product and may include, as appropriate, links or refer to other information. It should make clear that it does not provide exhaustive information;
- allocation of responsibility for preparing, making available and/or delivering the POS disclosure document should be clearly established, and the POS

disclosure document should identify which entity is responsible for its content; and
- a jurisdiction considering POS disclosure should consider how to use its capabilities and powers to implement these POS recommendations, taking into account the jurisdiction's regulatory regime.

The full report is available on the BIS website.

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### 1.8 APRA proposes simplified prudential framework for securitisation

On 29 April 2014, the Australian Prudential Regulation Authority (APRA) released for consultation a discussion paper on its proposals to simplify the prudential framework for securitisation for authorised deposit-taking institutions (ADIs).

APRA's proposals take into account the lessons learned from the global financial crisis - in particular, that securitisation globally had become excessively complex and opaque - and global reform initiatives to improve transparency and incentive arrangements for this financing technique.

In APRA's view, the prudential framework for securitisation needs, as much as possible, to be clear and simple for stakeholders to understand.

APRA's proposed approach to securitisation includes the following features:

- a set of key principles that apply to securitisation, rather than an expanded set of prudential requirements;
- a simple two credit class structure, which reduces the likelihood of opaque risk transfer and enhances benefits for system stability;
- a simple "skin-in-the-game" requirement to mitigate agency risks;
- explicit recognition of funding-only securitisation, with a simple but robust prudential regime that also allows for revolving securitisations or master trusts;
- simpler requirements for capital relief, matching risk to the amount of regulatory capital held;
- better integration of securitisation with the ADI liquidity regime; and
- clarification of the treatment of warehouses and similar structures.

Following consideration of submissions received, APRA intends to release a second consultation package in 2015 that will include APRA's response to submissions as well as a draft prudential standard, prudential practice guide and associated reporting requirements.

The discussion paper is available on the APRA website.

## 1.9 Canada: Proposed national guidance for proxy advisory firms

On 24 April 2014, the Canadian Securities Administrators (CSA) published a proposed National Policy "Guidance for Proxy Advisory Firms".

The CSA notes that proxy advisory firms play an important role in the voting process by assisting institutional investors in exercising their voting rights at shareholders' meetings. Institutional investors, in making their voting decisions, may use the services of proxy advisory firms in different ways and to varying degrees. Some proxy advisory firms also provide services to issuers, including consulting services on corporate governance matters.

In recent years, certain market participants, including issuers, issuer associations and law firms, have raised concerns about the services provided by proxy advisory firms. There is general agreement among all market participants of the potential for conflicts of interest which may compromise the independence of services provided by proxy advisory firms. There are also concerns raised by issuers, issuer associations and law firms about the manner in which vote recommendations and proxy voting guidelines, which may have an influence on the voting decisions of institutional investors and the corporate governance practices of issuers, are developed. However, the extent of the actual influence of proxy advisory firms on market behaviour is subject to debate.

The CSA believes that there are several areas, in particular, those relating to conflicts of interest, transparency and accuracy, where a policy-based approach providing guidance on recommended practices and disclosure will (i) promote transparency in the processes leading to a vote recommendation and the development of proxy voting guidelines; and (ii) foster understanding among market participants about the activities of proxy advisory firms.

Although the Proposed Policy applies to all proxy advisory firms, the guidance is not intended to be prescriptive. Instead, the CSA encourages proxy advisory firms to consider this guidance in developing and implementing their own practices. The CSA also reminds proxy advisory firms that this guidance is not intended to be exhaustive and that it does not detract proxy advisory firms from their responsibility to comply with applicable securities law.

Further information is available on the CSA website.

### 1.10 Consultation on UK Corporate Governance Code published

On 24 April 2014, the UK Financial Reporting Council (FRC) announced that it is consulting on its two-yearly review of changes to the UK Corporate Governance Code following earlier consultations on directors' remuneration (October 2013) and risk management, internal control and the going concern basis of accounting (November 2013).

The UK Corporate Governance Code sets out good practice for UK listed companies on issues such as board composition and effectiveness, risk management, directors' remuneration and relations with shareholders. The Code operates on a "comply or explain" basis. It was established in 1992 and is usually reviewed by the FRC every two years with a full consultation on all proposed changes.

The proposed changes to the UK Corporate Governance Code are that:

- greater emphasis be placed on ensuring that remuneration policies are designed with the long-term success of the company in mind, and that the lead responsibility for doing so rests with the remuneration committee;
- 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;
- companies should explain when publishing AGM results how they intend to engage with shareholders when a significant percentage of them have voted against any resolution;
- companies should state in their financial statements 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 and 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.

The consultation paper is available on the FRC website.

## 1.11 Audit quality indicators

On 24 April 2014, the Centre for Audit Quality (CAQ) released the CAQ Approach to Audit Quality Indicators, which represents a two-year effort with its member firms to develop perspectives regarding which indicators of audit quality may be most relevant and how and to whom they should be communicated.

The CAQ Approach to Audit Quality Indicators (AQIs) is based on a two-fold focus:

- communications of AQIs that are directed at audit committees; and
- communications of AQIs that are focused largely on engagement-specific indicators

The CAQ Approach includes a set of potential AQIs that taken as a whole could aid audit committees in their oversight of the audit.

This set of AQIs encompasses four key elements of audit quality:

- firm leadership and tone at the top;
- engagement team knowledge, experience, and workload;
- monitoring; and
- auditor reporting.

Further information is available on the CAQ website.

## 1.12 UK: Corporate transparency and trust consultation - Government response published

In April 2014, the UK Government published a response to its consultation on corporate transparency and trusts.

The Department for Business, Innovation and Skills (BIS) published the Transparency and Trust discussion paper in July 2013. In it BIS sought views on how to improve corporate transparency and accountability in the UK. This included how best to proceed with the corporate transparency proposals in the UK G8 Action Plan, and a range of related measures to improve confidence in the UK's regime for tackling company directors who have engaged in misconduct.

The Government also published the Company Filing Requirements consultation in October 2013. This proposed deregulatory reforms based on business suggestions from the Red Tape Challenge process.

The proposals in the government response include the following:

**(a) A central registry of company beneficial ownership information**

The registry would be publicly accessible. The government response contains details of how beneficial ownership will be defined for the purpose of the registry.

**(b) Bearer shares and the opacity of company ownership**

The Government will move to prohibit the creation of new bearer shares, and a set period of time will be provided for existing bearer shareholders to surrender their shares for conversion to registered shares. After the period set for surrender, companies with bearer shares remaining will be required to apply to court for an order cancelling those shares.

**(c) Opaque corporate control through corporate directors**

The Government will move to prohibit the use of one company as the director of another company, but with specific exemptions where the use of corporate directors is of higher value and lower risk.

**(d) Opaque corporate control through irresponsible 'front' directors**

The Government will improve the information available with respect to directors' general statutory duties, to increase awareness of the potential for breaching them by acting as a front. The Government will also legislate, as soon as Parliamentary time allows, to underpin new and specific means of contacting individual directors to ensure they have understood their duties in discharging their role.

The Government will make clear that the court is required to take account of breaches of directors' duties when considering the disqualification of a director. The Government will also consider whether the accountability of individuals controlling a single director (or several directors) by bringing them into scope of legal liability should be increased, and consider the potential application of the directors' general statutory duties to those who control directors.

**(e) Updating the directors' disqualification regime**

The Government will replace the current description of the matters determining unfitness of a director (in the *Company Directors Disqualification Act* (the CDDA 1986)) with a new, broader and more generic provision. This will cover consideration of the materiality of a director's conduct, including breaches of law and the nature and extent of harm caused. In future, the court or the Insolvency Service (on behalf of the Secretary of State) will be required to take these into account in determining whether an individual should be disqualified and, if so, for how long.

Courts will also be enabled to take any overseas misconduct into account when deciding whether to disqualify a director in the UK. Further, the Secretary of State will be provided with the power to seek the disqualification of an individual from acting as a director in the UK when convicted of a relevant criminal offence overseas. Furthermore, research into international regimes has been commissioned to help determine the merits of making regulations to prevent directors restricted overseas from acting as directors in the UK.

Further information is available on the UK Government website.

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### 1.13 New disclosure obligations for Europe's largest companies

On 15 April 2014, the European Commission welcomed the adoption by the European Parliament of the Directive on disclosure of non-financial and diversity information by large companies and groups. Companies concerned will need to disclose information on policies, risks and results in regard to environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and anti-bribery issues, and diversity on boards of directors.

The new rules will only apply to large companies with more than 500 employees. In particular, large public-interest entities with more than 500 employees will be required to disclose certain non-financial information in their management reports. The scope includes approximately 6,000 large companies and groups across the EU.

As regards diversity on company boards, large listed companies will be required to provide information on their diversity policy, such as, for instance: age, gender, educational and professional background. Disclosures will set out the objectives of the policy, how it has been implemented, and the results. Companies which do not have a diversity policy will have to explain why not. This approach is in line with the general EU corporate governance framework.

Further information is available on the European Commission website.

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### 1.14 Final standard for measuring and controlling large exposures published by the Basel Committee

On 15 April 2014, the Basel Committee on Banking Supervision published a final standard that sets out a supervisory framework for measuring and controlling large exposures, which will take effect from 1 January 2019.

A large exposure framework protects banks from significant losses caused by the sudden default of an individual counterparty or a group of connected counterparties. The framework was designed so that the maximum possible loss a bank could incur if such a default were to occur would not endanger the bank's survival as a going concern. In cases where the bank's counterparty is another bank, large exposure limits will directly contribute towards the reduction of system-wide contagion risk. In addition, by extending the scope of coverage to exposures to funds, securitisation structures and collective investment undertakings, the framework is also a useful tool to contribute to strengthening the oversight and regulation of the shadow banking system.

The large exposure standard includes a general limit applied to all of a bank's exposures to a single counterparty, which is set at 25% of a bank's Tier 1 capital. This limit also applies to a bank's exposure to identified groups of connected counterparties (i.e. counterparties that are interdependent and likely to fail simultaneously). A tighter limit will apply to exposures between banks that have been designated as global systemically important banks (G-SIBs). This limit has been set at 15% of Tier 1 capital.

The Committee will by 2016 review the appropriateness of setting a large exposure limit for exposures to qualifying central counterparties (QCCPs) related to clearing activities, which are currently exempted. It will also review the impact of the large exposures framework on monetary policy implementation.

The final standard is available on the BIS website

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### 1.15 Directors' Duties and a Company's Creditors - Harold Ford Memorial Lecture - Speaker: Justice Kenneth Hayne

On 19 August 2014, the Melbourne Law School Harold Ford Memorial Lecture will be presented by Justice Kenneth Hayne of the High Court of Australia. This free public lecture is titled "Directors' Duties and a Company's Creditors".

Following the free public lecture, those attending the lecture are invited to attend the post-lecture dinner. The cost for attending the dinner is $90.

The lecture is co-hosted by Melbourne Law School and the Centre for Corporate Law & Securities Regulation and sponsored by the law firm Clayton Utz.

Further information regarding the lecture (including registration information) is available on the Melbourne Law School website.

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**1.16 History of Australian corporate law - website**

The Centre for Corporate Law and Securities Regulation at Melbourne Law School has added additional resources to the section of its website dealing with the history of Australian corporate law. This section of the Centre's website provides links to key documents in the history of Australian corporate law. It also includes relevant UK documents.

There are new sections that list:

1. articles and books about the history of Australian corporate law; and
2. books, reports and papers about Australian corporate law published up to 1980.

The objective is to provide a valuable resource for those researching Australian corporate law.

Further information is available on the Centre for Corporate Law and Securities Regulation website.

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**1.17 2015 Corporate Law Teachers Association (CLTA) Annual Conference - Call for papers and registration details**

Melbourne Law School, in conjunction with the Centre for Corporate Law and Securities Regulation, will host the *2015 Corporate Law Teachers Association Annual Conference*. The conference will be held from Sunday 1 February to Tuesday 3 February 2015. The theme of the conference is "Corporate law: local and global dimensions" to encourage broad participation from both Australian and international scholars.

The conference also includes a teaching session on Sunday 1 February 2015. The theme is "Challenges and opportunities: teaching corporate law with new technologies".

The call for papers has been issued and while papers on the conference theme are encouraged, other papers on corporate law are welcomed.

Participants at previous conferences have presented papers on the following broad topics:

- Regulators, regulation and enforcement;
- Corporate governance;
- Insolvency;
- Corporate theory;
- Directors' duties;
- Shareholder rights;
- Corporate disclosure; and
- History of corporate law.

The program will include a mix of keynote presentations, papers by participants, and panel discussions relevant to academics, regulators and practitioners alike.

You can register for the conference now. Further information on registration and the call for papers is available on the Conference website.

## 2. Recent ASIC Developments

### 2.1 ASIC reports on dark liquidity rules

On 19 May 2014, ASIC released the results of a review of rule changes affecting "dark trading" and their impact on market quality. The meaningful price improvement rule and changes to block tier thresholds were introduced in May 2013.

ASIC's review indicates the trends in dark liquidity that were of some concern have discontinued.

The report, "Review of recent rule changes affecting dark liquidity" (REP 394), shows:

- fairness issues associated with below block size dark orders stepping ahead of lit orders have been addressed;
- the bid-offer spread is more equitably distributed between parties executing below block size dark trades;

- the meaningful price improvement rule and change in block tier thresholds has not affected bid-offer spreads; and
- participants can now trade smaller blocks away from lit markets where they would have traditionally faced higher market impact costs.

To examine the impact of the rule changes, ASIC:

- reviewed concerning trends identified in Report 331 "Dark liquidity and high-frequency trading" (REP 331) to determine whether they had responded to the rule changes as anticipated; and
- provided detailed market data to Charles Lane Advisory Pty Ltd, a market microstructure expert, to conduct a robust empirical analysis of the rule changes on market efficiency.

REP 394 and REP 331 are available on the ASIC website.

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**2.2 ASIC reports on red tape reduction**

On 7 May 2014, ASIC released a report outlining ongoing and new initiatives to cut red tape and lower compliance costs for its regulated population. The report outlines ASIC's recent progress in areas such as financial services licensing and business names registration. The report also highlights the compliance cost savings that result from ASIC's ongoing work such as international engagement and waivers and guidance.

The full report is available on the ASIC website.

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**2.3 ASIC wind-up actions enable access to employee entitlements**

On 6 May 2014, ASIC announced that it had exercised its wind up powers to appoint liquidators to 13 abandoned companies. The move will assist employees of these companies to gain access to the Fair Entitlements Guarantee (FEG).

This brings to 19 the total number of abandoned companies to which ASIC has appointed liquidators this financial year.

The 13 abandoned companies owe at least 43 employees a total in excess of $800,000 in employee entitlements. These companies were domiciled in states across Australia.

The FEG is a legislative safety net scheme funded by the Australian Government. It is designed to assist employees who are owed unpaid employee entitlements because their employer company went into liquidation or the directors became bankrupt.

However, some employees who are owed entitlements have been unable to access FEG because the companies' directors have either been unable to discharge their duties or have abandoned their insolvent companies without putting them into liquidation. The appointment of liquidators by ASIC facilitates access to FEG.

Further information is available on the ASIC website.

## 3. Recent ASX Developments

### 3.1 ASX launches new managed funds settlement service

On 8 May 2014, ASX launched its new managed funds settlement service mFund. mFund is an electronic processing service that allows investors to use an ASX broker to buy and sell units in unlisted managed funds. It has been developed for investors, brokers and fund managers to improve the timeliness and efficiency associated with investing in managed funds. The service will replace the traditional paper-based processes and use the same electronic system (CHESS) familiar to investors and brokers for settling or finalising ASX share transactions.

mFund products are unlisted and not traded between investors on the market, but settled directly with fund managers via CHESS. Unit prices are set by the fund manager, usually at the end-of-the-day.

mFund will broaden fund managers' distribution networks, offer brokers a greater choice of products, reduce costs for industry, and make processes more efficient for transacting in managed funds.

Information on the launch is available on the ASX website.

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### 3.2 ASX reports earnings update for the nine months to 31 March 2014

On 7 May 2014, ASX reported its earnings update for the nine months to 31 March 2014. The update indicates that revenues increased by 6.8% and operating expenses increased by 6.9% for the nine months to March 2013.

The earnings update is available on the ASX website.

### 3.3 ASX issues the final version of its governance-related Listing Rule amendments

On 6 May 2014, ASX issued the final governance-related amendments to the ASX Listing Rules.

Most of the changes to the Listing Rules are intended to complement and give effect to the reforms proposed by the ASX Corporate Governance Council relating to the new edition of its "Corporate Governance Principles and Recommendations". However, ASX also took the opportunity to implement other governance-related changes to its Listing Rules.

The changes to the ASX Listing Rules released with the supplementary consultation response are intended to come into effect on 1 July 2014, subject to the receipt of the necessary regulatory approvals under the Corporations Act 2001 (Cth).

The final version of its governance-related Listing Rule amendments and the Supplementary Consultation Response are available on the ASX website.

### 3.4 Updated Brochures on Bonds and Hybrid Securities

ASX has updated its brochures on Bonds and Hybrid Securities, which are available on the ASX website.

### 3.5 Reports

On 5 May 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 April 2014.

## 4. Recent Research Papers

### 4.1 Assessing Hong Kong as an international financial centre

By the end of the 20th century, Hong Kong had emerged as one of the world's major international financial centres. Today, while finance remains central to Hong Kong's future, it is facing unprecedented challenges, in China, in the region and globally. In the context of China, the continuing process of economic reform and financial development raises many opportunities but at the same time brings into question Hong Kong's traditional role as the primary intermediary between China and the global financial system. At the same time, the global and European financial crises have raised fundamental questions about finance, exchange rate systems, the global position of China, and the future role of the renminbi, including Hong Kong's role therein.

The central theme of this report focuses on the need for a more strategic approach to Hong Kong's future as a financial centre, based on an analysis of academic and policy research and current expectations of best regulatory and commercial practice. The analysis seeks to answer one specific question: What policies and legislative/regulatory changes will maximise the long-run, risk-adjusted value of financial activities to Hong Kong, given that other international financial centre policymakers react strategically to such policies?

In addressing this issue, the report provides 21 recommendations focusing on five major areas: The first grouping addresses methods to help improve the way the public contributes to financial sector policymaking. The second group proposes ways that the directing minds of Hong Kong's financial and commercial organisations can participate more actively in ensuring Hong Kong's regulators adopt policies which actually improve Hong Kong's competitiveness among international financial centres (rather than just copy international "best practice"). The third grouping looks at ways to broaden cooperation with China. The fourth grouping looks at ways to diversify Hong Kong's financial sector to access opportunities beyond those presented by the Mainland. The final grouping of recommendations discusses ways of improving the way Hong Kong's regulators work to help maximise the risk-adjusted returns to the financial sector as a whole.

The paper is available on the SSRN website.

### 4.2 The regulatory responses to the global financial crisis: Some uncomfortable questions

The authors identify current challenges for creating stable, yet efficient financial systems using lessons from recent and past crises. Reforms need to start from three tenets: adopting a system-wide perspective explicitly aimed at addressing market failures; understanding and incorporating into regulations agents' incentives so as to align them better with societies' goals; and acknowledging that risks of crises will always remain, in part due to (unknown) unknowns - be they tipping points, fault lines, or spillovers. Corresponding to these three tenets, specific areas for further reforms are identified. Policy makers need to resist, however, fine-tuning regulations: a "do not harm" approach is often preferable. And as risks will remain, crisis management needs to be made an integral part of system design, not relegated to improvisation after the fact.

The paper is available on the SSRN website.

### 4.3 Getting what you paid for: Using mutual fund governance to predict the activeness of mutual funds

This paper examines the relationship between mutual fund governance and the activeness of equity mutual funds. Using a fund's corporate culture as a proxy for its governance and controlling for other variables, the authors find that funds with better governance are significantly more active than other funds. Further, they find the probability of finding a highly active fund increase significantly as the governance of the fund improves. They also find some evidence that the probability of finding a closet index fund increases as the governance of the fund declines. These results demonstrate that mutual fund governance should be considered carefully when making mutual fund investment decisions.

The paper is available on the SSRN website.

### 4.4 Institutional design for financial market supervision: The choice for national systems

Countries aspire to have a competitive financial system that is consistent with financial stability, inspires public confidence, and has the capacity to meet the needs of users and to foster growth in the real economy. This paper surveys the academic and policy debate on key issues that are relevant to the task of designing supervisory institutions to contribute to the achievement of these goals. The paper considers: the main supervisory models identified in the literature and in operation in practice in selected jurisdictions; the public character of supervision and the role of self-regulation; the role of the central bank in financial supervision; supervisory mandates and powers; supervisory accountability, governance and transparency; and supervisory costs and funding models. The paper shows that design choices can make a difference to supervisory and economic outcomes, but also that there is no single "right" or "wrong" institutional model for financial supervision, and that strong (and weak) financial supervision can come in a variety of packages.

The paper is available on the SSRN website.

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### 4.5 Say on pay laws, executive compensation, CEO pay slice, and firm value around the world

This paper examines the effects of say on pay (SoP) laws on CEO compensation, the portion of top management pay captured by CEOs, and firm valuation. Using a large cross-country sample of about 103,000 firm-year observations from 39 countries, the authors document that compared to their control group of firms, SoP laws are associated with (1) a lower level of CEO compensation, which partly results from lower CEO compensation growth rates and is related to CEO power, (2) a higher pay for performance sensitivity suggesting that SoP laws have the greatest effects on firms with poor performance, (3) a lower portion of total top management pay awarded to CEOs indicating lower pay inequality among top managers and (4) a higher firm value, which is related to whether the CEO's share of total top management pay was relatively high before the laws are passed. Further, while both mandatory and advisory SoP laws are associated with lower CEO pay levels, only advisory SoP laws tighten the sensitivity of executive pay to firm performance. Collectively, the results document significant changes in executive compensation policies and firm valuation following the passage of SoP laws around the world.

The paper is available on the SSRN website.

## 5. Recent Corporate Law Decisions

### 5.1 High Court clarifies the law on managed investment scheme equity funding

(By Wen-Ts'ai Lim, Lisa Simmons and Hayden Fox, Ashurst)

MacarthurCook Fund Management Limited v TFML Limited [2014] HCA 17, High Court of Australia, French CJ, Crennan, Kiefel, Bell and Gageler JJ, 14 May 2014

The full text of this judgment is available online.

#### (a) Summary

The judgment is significant for the funds management industry as, by clearing up the law on the operation of the withdrawal provisions for managed investment schemes in the Corporations Act 2001 (Cth) (the Corporations Act), it opens up the possibility of novel equity funding and underwriting arrangements.

#### (b) Facts

The account of the facts in this section has been simplified to the matters essential to that which is truly relevant to the decision of the Court.

Before the global financial crisis, MacarthurCook Fund Management Limited (MacarthurCook) entered into a series of identical funding agreements with RFML Limited, the responsible entity of an A-REIT. RFML was subsequently replaced as responsible entity by TFML Limited but as that change is not significant for present purposes, the responsible entity will simply be referred to as "TFML".

The funding agreements relevantly provided for an equity funding arrangement, pursuant to which MacarthurCook would subscribe for units in a special class, called "Founder Units". Under the terms of issue, the units were to be redeemed during a specified period of time, out of (and limited to) the proceeds of a public offering being undertaken by TFML. The terms of the issue also provided that TFML's obligation to redeem was subject to the constitution of the scheme and the Corporations Act.

As it turned out, the units fell to be redeemed during the global financial crisis and RFML gave notice suspending all withdrawals from the fund. At the time of suspension, the fund was not liquid within the meaning of s. 601KA(4) of the Corporations Act.

MacarthurCook sued TFML in the Supreme Court of New South Wales for damages for failing to redeem the Founder Units when required. MacarthurCook succeeded at first instance but TFML was successful in the New South Wales Court of Appeal. The High Court then granted MacarthurCook leave to appeal.

#### The key issues

TFML's primary defence to MacarthurCook's claim was that it did not breach its obligation to redeem because the redemption clause was expressly stated to be subject to the constitution of the scheme and the Corporations Act.

Part 5C.6 of the Corporations Act contains a detailed framework for withdrawals from a scheme. In particular, s. 601KA(3) provides that a responsible entity must not allow a member to withdraw from an illiquid scheme other than in accordance with the scheme's constitution and ss. 601KB to 601KE.

Sections 601KB to 601KE spell out a procedure under which a responsible entity of an illiquid scheme may offer members an opportunity to withdraw from the scheme. The responsible entity must make a "withdrawal offer" that specifies a number of things including a period (of at least 21 days) during which the offer will remain open, the assets to be realised to fund the offer, the amount of money expected to be available to fund withdrawals and how withdrawal requests will be dealt with if the requests exceed the money available. Any member wishing to withdraw must then serve a withdrawal request and if the requests do exceed the available funds then they are to be satisfied *pro rata*. The responsible entity may also cancel the withdrawal offer before it closes if it is in the best interests of members to do so.

TFML argued that its suspension of withdrawals (which it was empowered by the constitution to do), coupled with the absence of compliance with the procedure mandated by ss. 601KB to 601KE (including publication of a withdrawal offer by TFML and service of a withdrawal request by MacarthurCook) meant that there was no breach of the redemption clause in the agreements with MacarthurCook.

**(c) Decision**

The High Court held that, by failing to redeem during the redemption window specified in the funding agreements, TFML was in breach of the terms of issue of the Founder Units and liable to pay damages to MacarthurCook. MacarthurCook's appeal was therefore allowed with costs.

The Court analysed the nature and structure of the provisions of Part 5C.6 and s. 601GA(4) and ruled that a right within Part 5C.6 of a member to withdraw from a managed investment scheme involves "some act of volition on the part of the member".

The Court then went on to analyse the legislative history of Part 5C.6 and in particular the 1993 joint report by the Australian Law Reform Commission and the Companies and Securities Advisory Committee (entitled "Other People's Money"). The report was written after a loss of investor confidence because of the collapse of many property trusts in the late 1980s following a sharp decline in commercial property values. The thrust of the relevant part of the report was that the then arrangements for exiting illiquid schemes were unsatisfactory and appropriate reform was required to address the problem of, in colloquial terms, "a run for the door".

According to the Court, Part 5C.6 operates to address the problems identified in the report, namely "problems associated with investors exercising choice to exit a scheme, particularly when the scheme is not liquid; much less problems associated with the performance of duties and exercise of powers by responsible entities".

The Court concluded that the meaning which "best fits the structure and purpose of Pt 5C.6 operating in combination with s. 601GA(4)" is one which confines the operation of that part to voluntary withdrawals from a scheme, that is to say where a member "acts so as to result in the responsible entity returning the whole or some part of the member's contribution" . So, Part 5C.6 does not cover the situation where a member is being compulsorily redeemed under the constitution. Nor does it cover the situation where the responsible entity is performing an obligation to redeem under the terms of issue of the member's units, which obligation is required to be performed independently of any act of the member.

Perhaps significantly for future cases, the High Court distinguished between situations such as the one in this case, where the obligation to redeem constitutes part of the terms of issue, and situations where a separate or collateral contractual obligation to redeem has been created. In other words, the distinction is likely to be one of substance rather than form and is between what may be said to be the terms of an issue of securities (however documented) and a separate collateral arrangement entered into after the securities have been issued. Nonetheless, there remains ambiguity as to exactly how this distinction is to be drawn in practice-that will no doubt be the subject of future controversy.

In practical terms, the Court has ruled that Part 5C.6 regulates the ordinary rights of a member of a managed investment scheme to withdraw from the scheme but does not cover the situation of compulsory redemptions such as where the constitution of a scheme provides in particular circumstances for a member to be ejected from the scheme. Nor does it cover underwriting or equity funding arrangements pursuant to which the funder's interests are for a particular term, after which the funder is to be redeemed.

The key element that distinguishes the two situations is that the member wishing to withdraw does so voluntarily. By contrast a compulsory redemption is just that - the member is ejected. So too is an investor for a fixed term. At the conclusion of that term the investor has no option to choose to stay in the scheme but is ejected from the scheme by having its interests redeemed. It is only the voluntary process that is the subject of regulation by Part 5C.6.

One of the concerns addressed by the Court was the usual "floodgates" concern, that is to say whether confining Part 5C.6 in this way enables avoidance behaviour that neuters the protections in the Corporations Act. The Court's answer was twofold. First, it was said (by reference to the legislative history of Part 5C.6) that the purpose of that Part was not to regulate all withdrawals from a scheme but rather to address the shortcomings in the arrangements that had been in place at the time of the financial crisis of the early 1990s. Secondly, Part 5 of the Corporations Act contains other protective provisions that continue to apply, including the duties imposed on responsible entities by s. 601FC.

In the words of the Court [32]:

> . the responsible entity of a scheme must always exercise a reasonable degree of care and diligence, must always act in the best interests of members, must always treat members who hold interests of the same class equally and members who hold interests of different classes fairly, and must ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and the Act. The responsible entity is not placed by Pt 5C.6 under any further obligation in the performance by the responsible entity of an obligation to redeem arising under the terms of issue of a class of interests.

**Commercial impact**

The High Court has, in just 13 pages, made a ruling which is of some commercial significance. It clears up an uncertainty about the scope of the withdrawal provisions in Part 5C.6 of the Corporations Act and, by providing certainty, has opened up the prospect of new (and appropriately structured) equity funding and underwriting arrangements.

In so doing the Court has emphasised that the broader duties imposed on responsible entities by the Corporations Act will be enforced so that this ruling does not permit, for example, arrangements which discriminate between members.

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### 5.2 Claim for equitable intervention for protection of confidential information in the context of liquidation proceedings

(By Katrina Sleiman and Sheetal Balakrishnan, Corrs Chambers Westgarth)

Matthews v Clifton [2014] FCA 415, Federal Court of Australia, White J, 30 April 2014

The full text of this judgment is available online.

**(a) Summary**

This case concerned an application by a liquidator (Plaintiff) for possession of four computers, including a server (the Computers) under s. 434B of the Corporations Act 2001 (Cth) (the Act). The order for possession was opposed by interveners to the proceedings (the Cross-Claimants) on the ground that certain information contained on the Computers was confidential and privileged (the Information) and therefore the Plaintiff should be restrained from accessing and using the Information. In essence, the Cross-Claimants made a claim for equitable intervention for protection of confidential information.

White J found that although the Cross-Claimants had failed to identify the individual documents on the Computers subject to the claim of confidentiality and privilege, it was likely that the Information was confidential and privileged. In finding that it would be inconsistent with confidentiality obligations to allow the Plaintiff access to the Information, his Honour ordered the Cross-Claimants to prepare minutes of the orders they propose to give effect to a regime for the inspection and identification of the Information of the Cross-Claimants on the Computers.

**(b) Facts**

On 7 October 2012, joint and several administrators were appointed by the respective members of IWH Pty Ltd and Scarce Builders & Developers Pty Ltd (together the Companies). Following reports by the administrators, on 9 November 2012, creditors of each of the Companies resolved that each should be wound up and a liquidator appointed. Three days later the first and second defendants (the Defendants) were appointed receivers and managers of the Companies pursuant to a charge contained in separate debentures in favour of the ANZ Banking Group Ltd.

In order to pursue the respective liquidations, the Plaintiff sought possession of the Computers, which were in the possession of the Defendants. Amongst other things, the Plaintiff applied for an order pursuant to s. 434B(1) of the Act, which allows the court to order that a controller of property (including a receiver) give up possession or control of property of a corporation.

While the Defendants did not oppose the Plaintiff having possession of, or access to, the Computers, they were conscious of claims of confidentiality and privilege asserted by the Cross-Claimants as principals of the Companies and of other companies associated with them (Associated Companies).

Following a grant of leave to intervene, the Cross-Claimants sought an order restraining the Plaintiff from accessing and using the Information said to contain:

- emails concerning their own personal and business affairs;
- emails containing information concerning the Associated Companies; and
- information of the Associated Companies which was "convenient" to store on the Computers.

The Cross-Claimants claimed that the Information is not property of the Companies and should not be made available to the Plaintiff. Conversely, the Plaintiff contended that as liquidator, irrespective of confidentiality claims, he is entitled to inspect all material recorded on the property of the Companies. Alternatively, the Plaintiff contended that the Cross-Claimants had not in any event established the necessary elements for equitable intervention for protection of confidential information.

**(c) Decision**

In the context of the order sought under s. 434B(1) of the Act, the case concerned the Cross-Claimants' claim for equitable intervention for protection of the Information.

White J endorsed Gummow J's formulation in *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73 at 87 of the circumstances in which equity will intervene:

> A general formulation apt for the present case of an equitable obligation of confidence has four elements: (i) the plaintiff must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must be able to show that; (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information, without the consent of the plaintiff.

White J considered the Cross-Claimants' claim against each of these elements to determine whether equity ought to intervene in the present circumstances.

**(i) The specificity of the claim of confidentiality**

White J agreed with the Plaintiff's contention that the Cross-Claimants' evidence, comprising of affidavits, lacked the appropriate specificity of the individual documents in respect of which the confidentiality is claimed. White J further noted that any injunction restraining the Plaintiff from using the Information, as sought by the Cross-Claimants, would have to identify with proper specificity the material to which the injunction related.

However, White J found the following to be reasonable grounds to suppose that the Computers contained confidential material:

- it is possible for the court to order a regime by which the Information can be identified;
- although the evidence lacked specificity in relation to individual documents, the Cross-Claimants had identified categories of documents said to comprise the Information;

- having regard to Deane J's comments in *Baker v Campbell* (1983) 153 CLR 52 that legal professional privilege is "a fundamental and general principle of the common law" and although the Cross-Claimants had not particularised the claim by indicating who exactly is making the claim for privilege or the basis on which the claim is made, the claim is not implausible and is not lightly to be ignored; and
- given the Companies and Associated Companies are owned and controlled by the same principals in a family-business structure, it was unsurprising that the Computers were used by different companies within the structure and also for personal affairs.

**(ii) The confidentiality of the information**

Citing the judgment of the Full Court in *Smith Kline and French Laboratories (Australia) Ltd v Secretary to the Department of Community Services and Health* (1991) 28 FCR 291, White J did not have difficulty in characterising the Information as having the requisite degree of confidentiality given it is "of a kind one would expect to be confidential" and is not generally available to the public.

The Plaintiff submitted that the Information had lost its confidentiality by reason of the administrators' actions in taking an electronic image of one of the Computers and subsequently using that information in a report to creditors. White J rejected this submission on the basis that steps had been taken at relevant times to protect the confidentiality of the Cross-Claimants' information, including that the administrators would have recourse to the data only for the purpose of conducting the administration and would not otherwise access records without obtaining permission.

**(iii) An obligation of confidentiality is imported**

White J found that the Companies had either actual or imputed knowledge of the limited purpose or purposes for which the Information was being "disclosed" to them. In particular, his Honour stated that the knowledge of the Cross-Claimants (as principals of the Companies) that the Information was being recorded on the Computers for the purpose of convenient storage and that the emails were being used for personal matters, could be attributed to the Companies.

**(iv) Actual or threatened misuse**

In circumstances where the Cross-Claimants had recorded the Information on the Computers for their own personal and business use, White J found that it would be inconsistent for the Plaintiff, in his capacity as liquidator, to access and use the Information for any purpose under the Act.

Accordingly, White J ordered the Cross-Claimants to prepare minutes of the orders they propose to give effect to a regime for the inspection and identification of the Information of the Cross-Claimants on the Computers.

## 5.3 Distribution of funds by liquidator from a deficient trust account held by an insurance broker

(By Annabel Humphreys, Minter Ellison)

In the matter of All Class Insurance Brokers Pty Ltd (in liquidation) [2014] NSWSC 475, Supreme Court of New South Wales, White J, 30 April 2014

The full text of this judgment is available online.

### (a) Summary

This case considers the interpretation of regulation 7.8.03(6) of the Corporations Regulations 2001 (Cth) (the Corporations Regulations) in the context of a trust account maintained by an insurance broker that has gone into overdraft, and specifically whether general principles of tracing should be applied to determine how moneys in the trust account should be distributed to creditors.

Regulation 7.8.03(6) contains its own code as to how money in the account is to be disbursed, however principles of trust law may inform the proper construction of the regulation where the language permits. Regulation 7.8.03(6)(d) requires a deficient account to be paid in proportion to the amount of each person's entitlement and thus mandates a pro rata distribution, as opposed to a distribution founded on general tracing principles.

### (b) Facts

All Class Insurance Brokers Pty Ltd (in liquidation) (AC Insurance) carried on business as an insurance broker prior to being wound up pursuant to a creditor's voluntary winding-up. AC Insurance held an Australian Financial Services Licence and established an account pursuant to s. 981B of the Corporations Act 2001 (Cth) (the Corporations Act) into which money was paid by or on behalf of, or for the benefit of, its clients. Moneys in the account were held on trust for the benefit of the persons entitled to the moneys.

At the date of the appointment of the liquidator the account held a sum of $367,094.31, which was far less than the amount that should have been in the account. The deficit was a result of the embezzlement of funds paid to AC Insurance by an employee of AC Insurance.

Some of the payments made into the trust account were made in respect of fictitious insurance policies, that is, insurance policies that AC Insurance represented to clients had been effected or arranged but were in fact never effected or arranged, nor intended to be effected or arranged.

Twenty-seven creditors, being insurers and premium funding lenders, claimed to be beneficially entitled to a share of the moneys in the trust account. The liquidator received claims by insurers totalling $1,866,391.22 and claims by premium funding lenders totalling $168,593.30.

The liquidator applied to the Court pursuant to s. 511 of the Corporations Act for a declaration that:

- the account was operated in accordance with s. 981B of the Corporations Act; or
- if not, that the provisions of Subdivision A of Division 2 of Part 7.8 of the Corporations Act should apply to the account.

The liquidator also sought an order that:

- the funds in the trust account be distributed *pro rata* among the 27 creditors; or
- alternatively, that there be an audit to determine the source of funds held in the account and whether any of the funds in the account formed part of the property of AC Insurance.

Regulation 7.8.03(6) of the Corporations Regulations relevantly provides that:

> Money in the account of the financial services licensee maintained for section 981B of the Act is to be paid as follows:
> (a) the first payment is of money that has been paid into the account in error;
> (b) if money has been received on behalf of insureds in accordance with a contract of insurance, the second payment is payment to each insured person who is entitled to be paid money from the account, in the following order:
> (i) the amounts that the insured persons are entitled to receive from the moneys in the account in respect of claims that have been made;
> (ii) the amounts that the insured persons are entitled to receive from the moneys in the account in respect of other matters;
> (c) if:
> (i) paragraph (b) has been complied with; or
> (ii) paragraph (b) does not apply;
> the next payment is payment to each person who is entitled to be paid money from the account;
> (d) if the money in the account is not sufficient to be paid in

> accordance with paragraph (a), (b) or (c), the money in the account must be paid in proportion to the amount of each person's entitlement;
> (e) if there is money remaining in the account after payments made in accordance with paragraphs (a), (b) and (c), the remaining money is taken to be money payable to the financial services licensee.

The liquidator submitted that the court should give directions for the distribution of moneys in the account by reference to tracing principles usually applied where there has been a mixture of beneficiaries' funds in a trust account. However the liquidator also argued that, given that there was insufficient information to allow a tracing of moneys to specific creditors, a *pro rata* distribution was justified.

**(c) Decision**

White J considered a long history of case law establishing that a liquidator is entitled to be paid from the trust account in priority to other claimants, his reasonable remuneration and reimbursement for reasonable expenses incurred in administering the trust property, including handling and determining claims of creditors. His Honour noted there was no express provision in r. 7.8.03(6) that a liquidator's expenses may be paid out of the trust account, but considered the language in r. 7.8.03(6) was not strong enough for the Act to intend a different result to the abovementioned established principle.

White J considered that payments made into the account in relation to a fictitious insurance policy were paid in connection with a "proposed contract of insurance" despite the company having had no genuine intention of effecting the insurance contract, and accordingly pursuant to r. 7.8.01(4) were held by AC Insurance on trust for the person entitled thereto under s. 981A.

On the question of distribution, White J first considered whether the persons "entitled to be paid money from the account" within the meaning of r. 7.08.03(6)(c) were those who could claim a beneficial interest according to tracing principles, or those who would be entitled to be paid moneys out of the trust account in accordance with statutory obligations and without any breach of trust having occurred. His Honour held that r. 7.8.03(6) is intended to displace what would otherwise be the rules relating to the distribution of moneys from the account. As such, a person's entitlement to be paid money from the trust account depends on whether they are entitled to be paid within the meaning of the relevant regulations, and not on their ability to trace payments made into the deficient account.

His Honour considered that r. 7.8.03(6) contains its own code as to how money in the account is to be disbursed, but that principles of trust law may inform the proper construction of the regulation where the language permits. Further, his Honour considered that relief may be granted on the basis of principles of tracing if this is permitted by r. 7.8.03(6). However, White J held that r. 7.8.03(6)(d) expressly requires a deficient account to be paid in proportion to the amount of each person's entitlement and thus mandates a pro rata distribution. Accordingly, the regulation did not permit differential treatment between claimants once a relevant entitlement to the moneys is established.

His Honour ordered that, after the costs of the application were paid out of the account, the balance of the moneys in the account is to be distributed between the creditors pro rata according to their claims to be entitled to be paid money out of the said account as the liquidator might properly determine.

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### 5.4 Contractor's right to enforce determination by statutory demand

(By Lily Zhang, Ashurst Australia)

Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91, Supreme Court of Western Australia, Court of Appeal, Pullin, Newnes and Murphy JJA, 24 April 2014

The full text of this judgment is available online.

#### (a) Summary

The Court dismissed the appeal by Diploma Construction (WA) Pty Ltd (Diploma) to set aside the statutory demand served by KPA Architects Pty Ltd (KPA) on the basis that there was no genuine dispute or offsetting claim, there was no other reason for setting aside the statutory demand and the defect in the statutory demand did not cause substantial injustice to Diploma.

The Court held that a statutory demand will not be set aside on the basis of a contention that a genuine dispute exists as to the debt, where that debt is based on a determination or judgment obtained under statute, in this case the Construction Contracts Act 2004 (WA) (the CCA).

Further, an offsetting claim must arise from transactions separate from those giving rise to the determination or consequent judgment and must be capable of being quantified in monetary terms.

#### (b) Facts

On 2 November 2010, KPA entered into an agreement with Fabcot Pty Ltd to provide architectural services for carrying out redevelopment at the Kwinana Hub Shopping Centre (the Consultancy Agreement). On 23 March 2012, Diploma took over the redevelopment work by entering into a novation agreement with KPA.

On 20 October 2012, several invoices were rendered by KPA to Diploma, which were not paid, giving rise to a "payment dispute" under the CCA. On 18 January 2013, KPA issued 73 invoices to Diploma. The payment disputes were referred to two separate adjudications and the two determinations obliged Diploma to pay a total of $504,545.29. To recover the determination amounts, KPA obtained leave of the District Court to have the determinations entered as a judgment under s. 43 of the CCA. The judgment was for the amount of $504,548.29, the $3 difference between the debt demanded and the judgment debt being a typographical error. Diploma failed to pay and KPA issued a statutory demand pursuant to s. 459E(1) of the [Corporations Act 2001 (Cth)](#) (the Corporations Act) demanding payment of the judgment debt.

Diploma applied for an order pursuant to ss. 459G, 459H and 459J of the Corporations Act to set aside the demand.

The application was dismissed by a finding that:

1. there was no genuine dispute about the amount payable;
2. there was no offsetting claim;
3. there was not "some other reason" to set aside the statutory demand; and
4. although there was an error in the statutory demand (being the typographical error of $3), the defect was not so serious as to warrant it being set aside.

Diploma appealed the decision on all four grounds as found by the trial judge.

**(c) Decision**

The Court dismissed the appeal on all four grounds.

**(i) Genuine dispute**

The Court held that there was no genuine dispute about the determinations or the judgment. The determinations and the judgment did give rise to debts which are due and payable.

The Court applied the reasoning of the High Court in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 and held that there was not a genuine dispute because the source of the debt was located in the statutory consequences given to a determination under the CCA.

**(ii) Offsetting claim**

A recipient of a statutory notice may apply to set aside a statutory demand based on a determination or consequent judgment if it has offsetting claims arising from transactions separate from those giving rise to the judgment debt based upon an adjudication under the CCA.

However, only a genuine offsetting claim with sufficient evidence to establish its existence is capable of setting aside a statutory demand. Further to qualify as a genuine offsetting claim, the offsetting claim must be capable of being quantified in monetary terms. In this case, Diploma failed to quantify its claims.

**(iii) Some "other reason"**

The Court held that this ground is a catchall provision which will rarely be employed and when employed, must be for the purpose of meeting the demands of justice. In this case, the demands of justice did not require the Court to employ this ground as Diploma merely advanced and relied upon the same submission it made in relation to grounds 1 and 2.

**(iv) Defect in the demand**

The Court may set aside a statutory demand if it is satisfied that because of a defect in the demand, substantial injustice will be caused unless the demand is set aside. The typographical error in relation to the additional $3 is a defect, but did not give rise to any insubstantial injustice.

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**5.5 Court approval and justification of liquidators entering into a deed of settlement**

(By Peter Motti, Minter Ellison)

In the matter of One.Tel Limited [2014] NSWSC 457, Supreme Court of New South Wales, Brereton J, 17 April 2014

The full text of this judgment is available online.

**(a) Summary**

The special purpose liquidators (the SPL) and general purpose liquidators (the GPL) of One.Tel, (together, Liquidators), sought approval and directions under ss. 477(2A), 477(2B) and 511 of the Corporations Act 2001 (Cth) (the Corporations Act), to enter into a deed of settlement (the Deed). The Court held that, pursuant to s. 511 of the Corporations Act, the Liquidators were justified in entering into and performing the Deed, and procuring One.Tel to do so. Pursuant to ss. 477(2A) and 477(2B) of the Corporations Act, the Liquidators were also granted the approval of the Court to compromise debts in accordance with the Deed, and to enter into the Deed on behalf of One.Tel, notwithstanding that the Deed required that certain obligations be performed more than three months after the Deed was entered into.

**(b) Facts**

In or about 1999, companies associated with the Packer family and the Murdoch family made a substantial investment in One.Tel, following which the major shareholders in One.Tel were News Limited (News), Publishing and Broadcasting Limited (PBL) (now Consolidated Media Holdings Proprietary Limited (CMH)) and Consolidated Press Holdings Limited (CPH), and James Packer and Lachlan Murdoch joined the board of directors. In April 2001, it became apparent that One.Tel had cash flow difficulties and an investigation was conducted on behalf of PBL and CPH into One.Tel's cash position. On 17 May 2001, the directors of One.Tel resolved to implement a one-for-one renounceable rights issue at 5 cents per share to raise $132 million (Rights Issue). The Rights Issue was to be underwritten by CMH, CPH, News and their subsidiaries. However, no written underwriting agreement was ever finalised.

On about 29 May 2001, Ernst & Young completed a report into One.Tel's financial position (the EY Report), concluding that, *inter alia*, absent the proceeds of any asset sales, One.Tel had total cash needs of between $240 million and $320 million. At a board meeting on 29 May 2001, following the presentation of the EY Report, the board voted in favour of a resolution not to proceed with the Rights Issue, on the basis that even after raising $132 million the solvency of One.Tel was not assured (th Abandonment Resolution). Mr Packer, Mr Murdoch and two other directors associated with News and PBL participated in the board deliberations, but abstained from voting. In addition, the directors unanimously resolved to appoint voluntary administrators. On 24 July 2001, the creditors of One.Tel resolved that One.Tel be wound up and that the voluntary administrators be appointed as the GPLs. On the same day, a committee of inspection was constituted (the Committee).

On 23 December 2003, on the application of creditors of One.Tel, the Court appointed a special purpose liquidator (First SPL), for the sole purpose of investigating and if appropriate prosecuting any causes of action relating to the Abandonment Resolution. On 25 May 2007, the First SPL instituted proceedings in the Supreme Court (the Original Proceedings), against eighteen defendants, including Mr Packer, Mr Murdoch and the other directors as at 29 May 2001; PBL, CPH, News and their relevant subsidiaries; and certain professional advisers to One.Tel. The Original Proceedings were struck out as a result of extensions of time in which to serve them being set aside, and on 6 June 2012, the First SPL initiated alternative proceedings for equitable compensation for alleged breaches of fiduciary duties by Messrs Packer and Murdoch (the Equitable Proceedings). On 19 June 2012, the First SPL was replaced by the SPL, pursuant to a court order.

The SPL formed the view that there were significant risks in continuing to prosecute the Equitable Proceedings and that a settlement would likely produce a more favourable outcome for One.Tel's creditors than prosecuting the Equitable Proceedings to finality. As a result of the negotiations that ensued, on 9 April 2014 the Deed was executed, the approval of which was sought in these proceedings.

**(c) Decision**

**(i) The section 511 application**

In determining the s. 511 application, his Honour considered that the question before the Court was essentially, "whether the liquidators [were] justified in entering into and procuring One.Tel to enter into and perform the Deed."

His Honour noted that the SPL held the view that entry into the Deed was in the best interests of One.Tel and its creditors, primarily because of the uncertainty of the outcome of the Equitable Proceedings; the certain, albeit small, return for the ordinary unsecured creditors; the fact that even if One.Tel succeeded in the Equitable Proceedings, the creditors of One.Tel would not receive any distribution unless One.Tel recovered a further $40 million from the defendants to the Equitable Proceedings; the costs and time associated with a lengthy trial and any appeals; and the likelihood of an appeal by the CMH/News parties if the Equitable Proceedings were decided in One.Tel's favour, which would increase the litigation and liquidation costs, and further delay distributions to creditors.

His Honour took the view that, *inter alia*:

> given (1) the risks attendant upon the Equitable Proceedings, (2) the process of commercial negotiation between well-advised parties that has led to the settlement, (3) the advice of senior counsel, (4) the benefits to creditors of a prompt settlement and a certain if small dividend, (5) the Committee's approval of the compromise, (6) the circumstance that under the Funding Deed, there would be no additional benefit to creditors unless the outcome exceeded the settlement sum by a further $40 million, and (7) that the release of the SPL by the GPLs does not appear to involve the release of any viable claim against the SPL, the liquidators would be justified in entering into and performing the Deed, and in procuring One.Tel to do so.

However, his Honour held that the particular directions under s. 511 sought in the originating process went beyond that and ruled that "[a] direction that the liquidators are justified in entering into and implementing the Deed is all that is necessary to confer on them the requisite protection, and all that is appropriate."

**(ii) The section 477(2A) application**

Section 477(2A) provides that except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than $100,000. His Honour considered that approval under s. 477(2A) was sought by the Liquidators out of "an abundance of caution", given the broad definition of "Claims" in the Deed. If the Deed did no more than compromise the Equitable Proceedings, the approval of the court would be unnecessary. However, his Honour observed that the Deed also involved releases of "all Claims", thereby including debts.

The question for the Court under s. 477(2A), in the opinion of his Honour, was:

> whether insofar as the Deed involves the compromise of the debt, that compromise is in all the circumstances a proper and reasonable step for the liquidator to take. That is a different question from whether the compromise of the Equitable Proceedings (which do not involve a claim for debt) is proper and reasonable, though not unconnected to it. Because what is prohibited without the Court's approval is the compromise of a debt, the Court's main concern under s 477(2A) is the compromise of the debt, not the other matters covered by the Deed ...

His Honour thought that there was nothing to suggest that there was any debt, properly so called, owed by any defendant to One.Tel. Insofar as the Deed compromised all debts owed by the defendants, it appeared to compromise nothing of value. As the Committee had already approved the compromise, Court approval - which, his Honour noted, was an alternative to the approval of the Committee - for the Liquidators to compromise the debts included in it was unnecessary. However, his Honour stated that there was no reason why a liquidator could not rely on multiple sources of authority under s. 477(2A), and, noting that the Liquidators had to seek approval under s. 511 in any event and that clause 2.1 of the Deed required Court approval under s. 477(2A), held that approval should be given under s. 477(2A) to the Liquidators compromising debts in conformity with the terms of the Deed.

**(iii) The section 477(2B) application**

Section 477(2B), provides that, except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf if the term of the agreement may end, or obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance, more than three months after the agreement is entered into.

Approval under s. 477(2B) was sought by the Liquidators because some of the obligations under the Deed were continuing obligations which would have only been discharged by performance more than three months after the Deed was entered into. Those obligations were in the nature of releases, discharges, covenants not to sue and confidentiality obligations. His Honour took the view that the persistence of those obligations would not unduly protract the liquidation and were not inconsistent with its expeditious completion.

Again, his Honour observed that approval of the Court under s. 477(2B) appeared to be unnecessary, as the Committee had approved the Deed, but for the reasons explained in connection with s. 477(2A), his Honour considered that there was "likewise no harm, and there may be utility, in giving such approval." His Honour granted the approval under s. 477(2B) to the Liquidators to enter into the Deed on One.Tel's behalf.

**(iv) Orders**

The relevant Court orders were that:

- pursuant to s. 511 of the Corporations Act, the Liquidators were justified in entering into and performing, and in procuring that One.Tel enter into and perform, the Deed;
- pursuant to s. 477(2B) of the Corporations Act, the Liquidators have the approval of the Court to enter into the Deed on behalf of One.Tel, notwithstanding that obligations of a party to the Deed could, according to the terms of the Deed, be discharged by performance more than three months after the Deed was entered into; and
- pursuant to s. 477(2A) of the Corporations Act, the Liquidators have the approval of the Court to compromise all debts owing to One.Tel that are referred to in the Deed, upon the terms contained in the Deed.

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**5.6 Court finds defendant's "in substance" security interest in property vested in grantor of subsequent security interest over property pursuant to Personal Property Securities Act**

(By Jared Lynch, Ashurst)

White v Spiers Earthworks Pty Ltd [2014] WASC 139, Supreme Court of Western Australia, Le Miere J, 16 April 2014

The full text of this judgment is available online.

**(a) Summary**

The Supreme Court of Western Australia has held that under s. 267 of the Personal Property Securities Act 2009 (Cth) (the PPSA) the defendant's "in substance" security interest in property vested in the grantor of a security interest over the property immediately prior to the appointment of administrators to the grantor. The interests had not been registered, at the relevant times, under the state act or PPSA. Further, s. 267 of the PPSA does not affect an acquisition of property within the meaning of s. 51(xxxi) of the Constitution.

**(b) Facts**

The defendants sold an earthmoving business to BEM Equipment Pty Ltd (the Company) in 2010 by entering into two agreements entitled Business Purchase Agreement and Plant Hire Agreement (the Hire Agreement). Under the Hire Agreement the defendants agreed to hire to the Company vehicles and other equipment used in the business (Hire Assets). The Hire Agreement was a hire purchase agreement as defined in the Hire-Purchase Act 1959 (WA).

The Company possessed the Hire Assets in accordance with the terms of the Hire Agreement and utilised them in the course of its earthmoving business and leased items of the Hire Assets to third parties. In February 2011 the Company gave a fixed and floating charge to the National Australia Bank Ltd (NAB) as security for the payment of an amount owing to NAB.

On 24 July 2013 the Company appointed administrators pursuant to s. 436A of the Corporations Act 2001 (Cth). On 31 July 2013 NAB appointed the plaintiffs (the Receivers), as receivers and managers of the Company pursuant to the charge.

Prior to the commencement of the PPSA, the defendants did not register their interest in the Hire Assets on the register established under the Chattel Securities Act 1987 (WA). Prior to the appointment of voluntary administrators to the Company on 24 July 2013, the defendants did not register their interest on the Personal Property Security Register established under the PPSA.

The Receivers brought the action under s. 267 of the PPSA, arguing the interest of the defendants in the Hire Assets vested in the Company immediately before the appointment of the administrators and the Company was at that time entitled to possession of the Hire Assets and held them subject to the NAB charge.

**(c) Decision**

Le Miere J held that the defendant's interests in the Hire Assets vested in the Company immediately before the appointment of the administrators.

Section 267(1) of the PPSA provides for the vesting of unperfected security interests in the grantor if two conditions are met. The first condition is that one of the specified events in s. 267(1)(a) occurs. In this case a specified event occurred when voluntary administrators were appointed to the company on 24 July 2013.

The second condition, provided in s. 267(1)(b), is that a security interest granted by the Company is unperfected at the relevant time. Le Miere J separately considered whether the interest was a security interest and whether the interest had been perfected for the purposes of the PPSA.

**(i) "In substance" security interest**

The relevant issue was whether the Hire Agreement in substance secures payment or performance of an obligation. The concept of being in substance security for payment or performance of an obligation refers to the economic or commercial substance of a transaction. On the basis of the rights and obligations of the parties under the Hire Agreement, Le Miere J held that the interest of the defendants in the Hire Assets was in substance a security interest.

**(ii) Perfection of security interest**

The second condition was that the security interest granted by the Company was unperfected when the administration commenced. In this case the defendants seized or repossessed some of the Hire Assets but did not satisfy the relevant tests in s. 21(1) of the PPSA.

As a result of the defendants' failure to register their interest in the Hire Assets on the state register, the defendants' transitional security interest in the Hire Assets fell within the exception under s. 322(3) of the PPSA.

Accordingly, the defendants' transitional security interest in the Hire Assets was not perfected and the security interest in the Hire Assets held by the defendants vested in the Company immediately before the appointment of the administrators.

**(iii) Unjust acquisition of property**

The defendants argued that vesting their interest in the Hire Assets in the Company would result in an acquisition of property, because the vesting would wholly extinguish their interest in the Hire Assets and vest it in the Company.

Le Miere J considered High Court authority and found that s. 267(2) of the PPSA does not affect an acquisition of property within the meaning of "acquisition of property" in s. 51(xxxi) of the Constitution. This was because s. 267 of the PPSA is not one for the acquisition of property as such, but rather part of and incidental to a general regulatory scheme aimed at the adjustment of competing rights and liabilities.

**(iv) Failure to register under State law does not affect validity or enforceability**

Le Miere J held that where a person fails to register a security interest in compliance with a state law, then that failure does not affect the validity, priority, or enforceability of the security interest under the PPSA. In effect, the PPSA prevails over a state law.

### 5.7 Force-selling representation by bank employee held not to be misleading and deceptive

(By Jenny Altherr, Herbert Smith Freehills)

Razden v Westpac Banking Corporation [2014] NSWCA 126, Supreme Court of New South Wales, Court of Appeal, McColl JA, Macfarlan JA, Bergin CJ in Eq, 14 April 2014

The full text of this judgment is available online.

#### (a) Summary

The Court of Appeal of the Supreme Court of New South Wales has dismissed the appeal of an investor who lost money during the global financial crisis as a result of his bank force-selling his shares when his margin lending facility (the Facility) went into margin call.

The Court of Appeal's clear rejection of the investor's claims of misleading and deceptive representation, estoppel, breach of implied duty of reasonableness and good faith, and unconscionable conduct, should act as a strong warning to all investors wishing to rely on statements made by bank employees during the course of regular and lengthy telephone conversations.

#### (b) Facts

The appellant entered into a margin lending facility with St George Bank Limited (the Bank) in 2005.

The appellant managed his account over the telephone. During the course of one in-depth telephone conversation the Bank employee told the appellant: "Once you get 95% (gearing ratio), that's it, they're going to force sell" (the 95% Representation).

Subsequently, on 16 and 17 October 2008 the Bank sold the appellant's portfolio at a loss.

The appellant was unable to pay the shortfall and the Bank commenced proceedings in the District Court to recover this amount. The appellant filed a cross-claim.

The trial judge dismissed the cross-claim in the District Court and entered judgment for the Bank.

The appellant appealed to the Court of Appeal on the basis that the trial judge erred by failing to uphold his cross-claim in relation to:

- misleading and deceptive conduct;
- estoppel;
- breach of implied term of the Facility to act reasonably and in good faith; and
- unconscionable conduct.

**(c) Decision**

**(i) Misleading or deceptive representation**

McColl and Macfarlan JJA held that the 95% Representation was not a representation for the purposes of s. 51A of the Trade Practices Act 1974 (Cth), s. 41 of the Fair Trading Act 1987 (NSW) and s. 12BB of the Australian Securities and Investments Commission Act 2001 (Cth) (the ASIC Act), because the Bank's conduct, when "viewed objectively and as a whole" did not have a tendency to lead the appellant into error and a reasonable person in the position of the appellant would not have treated the statement as being made with the intention of inducing him to take a particular action.

Evidence that weighed against the 95% Representation being viewed, objectively, as misleading and deceptive included that the 95% Representation:

- was "part of a lengthy to-ing and fro-ing" between the appellant and the Bank employee made in the context of the many communications between the parties with no attempt to "persuade" or "influence" the appellant to do something; and
- did not appear to "assume any prominence or force at all" in the conversation, but instead "sounded like an aside, made quickly and in a voice trailing away".

However, Bergin CJ in Eq dissented on this point finding that the 95% Representation:

- was a representation as to a future matter, not merely an opinion, where that matter would be what would happen to the appellant's share portfolio if the gearing ratio reached the stated level; and
- in the circumstances is deemed to be misleading under the legislation as the Bank had not established reasonable grounds for the making of the 95% Representation.

However, all three judges ultimately rejected the misleading and deceptive representation claim on the basis that the appellant failed to establish reliance on the 95% Representation.

The evidence that demonstrated a lack of reliance included that:

- the appellant acknowledged in cross-examination that "he did not take seriously" anything that the Bank employee said;

- the appellant made no assertion during the course of later telephone conversations or correspondence with the Bank that he had relied on the 95% Representation; and
- the appellant originally pleaded the representation in a different form, which was altered after reviewing the transcripts of his conversations with the Bank.

**(ii) Estoppel**

The Court rejected the appellant's estoppel argument finding that even if the 95% Representation was clear and unambiguous there was no reliance upon it.

Reliance was said to be a central component of an estoppel claim, with Bergin CJ in Eq citing the case of *Austotel Pty Ltd v Franklins Selfserve Pty Limited* (1989) 16 NSWLR 582 at 610 as authority for the proposition that for an estoppel there must be the creation or encouragement of a particular assumption by the representor and reliance on that assumption to the detriment of the representee in circumstances where departure from the assumption would be unconscionable.

**(iii) Breach of implied term of reasonableness and good faith**

At first instance the trial judge found that the express terms of the Facility, which included a term that the Bank would not be held responsible for anything said even if it was said negligently, took precedence over any implied term of reasonableness and good faith.

The Court of Appeal upheld these findings, adding that even if it was assumed that a term of reasonableness and good faith was implied into the Facility, the "overwhelming evidence" was that "far from acting unreasonably or conducting itself with a lack of good faith, the Bank tried to assist the appellant to retain his portfolio of shares in the hope of the market turning around."

**(iv) Unconscionable conduct**

The Court opined that the "kind of unconscionability" picked up in s. 12CA of the ASIC Act was the equitable doctrine of unconscionability which covers a wide range of conduct including "undue pressure and taking advantage of vulnerability or lack of understanding, trickery or misleading conduct".

In determining that the conduct was not unconscionable Bergin CJ in Eq placed weight on the fact that the appellant was an educated and experienced person who was aware of his responsibility to monitor and manage his own portfolio:

The evidence clearly established that the Bank, through Mr Mesaros, did everything possible to meet the appellant's wishes of saving his portfolio from liquidation. The Bank provided him with detailed and up-to-date information and suggested he seek independent advice. Under the terms of the Facility, it was the appellant's obligation to monitor his account and manage his level of risk. It is therefore clear that, far from pressuring, tricking or misleading the appellant, the Bank made it clear that he was responsible for managing his own portfolio, encouraged him to seek advice on the best way to do that and provided him with information on the fluctuating and volatile market at the time. Furthermore it is clear that the appellant was not vulnerable. His Honour found that the appellant was educated and an experienced investor. In any event he did not rely on the statements made by the Bank.

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### 5.8 Successful application for leave to manage a company made by an applicant disqualified from doing so for insider trading

(By Louis Italiano, DLA Piper)

In re Gay [2014] TASSC 22, Supreme Court of Tasmania, Pearce J, 15 April 2014.

The full text of this judgment is available online.

#### (a) Summary

This case concerned an application for leave to manage two companies made under s. 206G of the Corporations Act 2001 (Cth) (the Act) by an applicant who had been automatically disqualified from managing corporations as a result of a conviction for insider trading.

In considering whether to grant leave under s. 206G of the Act, Pierce J considered:

- the nature and seriousness of the offence that led to the conviction;
- the applicant's general character;
- the interests of the shareholders, creditors and employees of the companies the applicant had applied for leave to manage;
- whether granting leave would undermine public confidence in the Court's upholding of corporate standards, place the public at risk or undermine the personal deterrent effect of the sentence; and
- whether granting leave would undermine the general deterrent and punitive effects of the disqualification.

#### (b) Facts

On 23 August 2013, John Gay pleaded guilty to one count of insider trading contrary to s. 1043A(1) of the Act. The offence was in relation to Mr Gay's conduct of selling shares in Gunns Limited (Gunns) between 2 - 7 December 2009 while he was in possession of insider information that he had obtained by virtue of his position as a director of Gunns. As a result of the sentence imposed for the offence, Mr Gay was automatically disqualified from managing corporations for a period of five years by operation of s. 206B of the Act.

Mr Gay applied to the Supreme Court of Tasmania for leave to manage two corporations, Specialty Veneers Pty Ltd (Specialty Veneers) and JEG Management Pty Ltd (JEG Management) (together, the Companies), pursuant to s. 206G of the Act. Section 206G confers on the Court the power to grant leave to a person who has been disqualified from managing corporations to manage and be appointed a director and/or company secretary of corporations, a particular class of corporations, or a particular corporation.

Specialty Veneers was a timber veneer and other timber products manufacturing business that operated a sawmill in Tasmania. JEG Management was a trustee company of a family trust for which Mr Gay and his immediate family were trustees (the Family Trust). JEG Management owned shares in and leased property to Specialty Veneers. Before he was disqualified from managing corporations, Mr Gay had been the sole director of and exercised managerial control over both JEG Management and Specialty Veneers. Mr Gay argued that without his managerial expertise, which he had built up over more than 50 years in the sawmill industry, sales would decrease and the Companies would be significantly less successful.

The Australian Securities and Investments Commission (ASIC) intervened in and opposed Mr Gay's application, contending that Mr Gay was unable to discharge the onus of persuading the Court to make an exception to the legislative policies behind his disqualification.

### (c) Decision

In reaching the decision that the application should be granted to allow Mr Gay to manage the Companies, his Honour had due regard to the factors set out in the subheadings below.

#### (i) The nature and seriousness of the offence leading to disqualification

Pearce J noted that the legislative provisions prohibiting insider trading were intended to protect the integrity of the securities market, and that Mr Gay's conduct in relation to his conviction was a considerable departure from an appropriate standard of corporate conduct. However, his Honour found that as Mr Gay's plea of guilty was accepted by the Crown and the Court on the basis that he did not act knowingly, but rather that he acted when he ought reasonably to have known he was in possession of insider information, his conviction for insider trading was "in a less serious category than many which come before the courts" as it did not involve dishonesty or moral wrongdoing.

#### (ii) Mr Gay's general character

Pearce J noted that prior to his conviction for insider trading, Mr Gay had been a person with an unblemished record and of good general character. His Honour considered Mr Gay's good general character, including his commercial and corporate record and the absence of dishonesty in the offence that led to his conviction, to be a factor that favoured his application under s. 206G of the Act.

**(iii) The interests of shareholders, creditors and employees of Specialty Veneers and JEG Management**

Pearce J accepted that, having regard to the important role he had played in establishing and developing the business of Specialty Veneers, Mr Gay's skill and expertise in the management of the business could not readily be replaced. His Honour found that Mr Gay's ability to continue to manage Specialty Veneers would be an important factor in its ongoing commercial performance. Noting that because of the close relationship between the two companies it would be artificial for leave to be granted to manage Specialty Veneers and not JEG Management, his Honour found that the interests of the Companies, their employees and the beneficiaries of the Family Trust would be adversely affected if leave were not granted for Mr Gay to manage them.

ASIC contended that Mr Gay's daughter and the company's Commercial Manager could adequately perform Mr Gay's role in managing Specialty Veneers. His Honour rejected this submission, noting that Mr Gay's daughter had limited experience in the timber industry and that the Commercial Manager's experience was limited to matters of financial administration.

ASIC further contended that Mr Gay's expertise would remain available to the Companies even if Mr Gay remained disqualified, as he could be engaged as a consultant or employee. His Honour also rejected this submission, noting that the prohibition against managing a company to which Mr Gay was subject under s. 206A of the Act was framed in very broad terms, and that if Mr Gay were to provide advice to company directors at the level required of him then he would be very likely to be in breach of the prohibition.

**(iv) Confidence in the Court's upholding of corporate standards, protection of the public and personal deterrence**

ASIC contended that confidence in the Court's upholding of corporate standards would be undermined if leave were granted for Mr Gay to manage the Companies. His Honour found that the exercise of the Court's discretion in relation to the Companies would not give rise to a great risk that others would perceive his conviction for insider trading to be of no real concern. Whilst noting that confidence in the Court's upholding of corporate standings was indeed a relevant consideration, his Honour held that such considerations did not point strongly to a refusal of the application before the Court.

ASIC further contended that granting leave for Mr Gay to manage the Companies would insufficiently protect the public and would undermine the personal deterrent effect of Mr Gay's sentence for insider trading. Again, whilst noting such considerations to be relevant, his Honour found that there was no appreciable risk that Mr Gay would reoffend, and that his return to management therefore presented no risk that shareholders, employees or creditors would be exposed to improper or unlawful corporate conduct.

**(v) General deterrence and punishment**

ASIC submitted that as part of his sentence for insider trading the Court had contemplated Mr Gay would be disqualified from managing the Companies, and that granting leave for him to manage the Companies would detract from the general deterrent and punitive effects of the disqualification. Pearce J rejected ASIC's arguments, noting that Mr Gay had been fined $50,000, criminally convicted, had suffered condemnation shame and loss of reputation, and was now facing a proposed prosecution under the Proceeds of Crime Act 2002 (Cth) for recovery of any benefits derived from the commission of the insider trading offence. His Honour therefore held that granting leave for Mr Gay to manage two private companies would not undermine to any significant effect the general deterrent or punitive effect of the total effect of the sanctions to which Mr Gay had been subject.

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### 5.9 Recovering unlawful termination payments to managing director

(By Shirlin Wu and Will Heath, King & Wood Mallesons)

Queensland Mining Corporation Ltd v Renshaw [2014] FCA 365, Federal Court of Australia, Perry J, 10 April 2014

The full text of this judgment is available online.

**(a) Summary**

Perry J held that a company could recover termination payments made to its managing director in contravention of s. 200B(1) of the Corporations Act 2001 (Cth) (the Act).

The payments had not been approved by shareholders and represented amounts due under a pre-existing contract between the company and its managing director.

Additionally, the company could not be estopped from bringing a claim to recover unlawful termination payments under Division 2 of Part 2D.2 of the Act. The Act protects the interests of the shareholders and the public generally against excessive termination payments. It cannot be circumvented by the terms of a contract between the company and executive.

**(b) Facts**

The first defendant, Mr Renshaw (Renshaw), was the managing director of the applicant, Queensland Mining Corporation Limited (QMCL).

The relevant service agreement (the Executive Agreement) provided for:

payment of a sum to Renshaw for personal services, including superannuation; and payment of a sum, plus GST, to the second defendant, Butmall Pty Limited (Butmall), for corporate services. Renshaw was the sole director and shareholder of Butmall.

The Executive Agreement did not provide for early termination.

At a meeting of the Board of Directors of QMCL, Renshaw was asked to resign. Renshaw said he would not retire until there was an agreement on the terms of his retirement.

Renshaw subsequently agreed to resign from the position of managing director on 23 October 2012 in accordance with an agreement executed between him, QMCL and Butmall (the Settlement Deed).

The Settlement Deed provided for payments totalling $677,333 to Renshaw, Butmall and the trust account of the third defendant, DFK Richard Hill Pty Limited (DFK Hill), to be held on trust for Mr Renshaw and Butmall (the Termination Payments).

Under the Settlement Deed, QMCL released the defendants from "any and all actions, causes of action, claims and demands" and each party was required to do all things reasonably necessary to give any other party the benefits accruing under the Settlement Deed, including obtaining shareholder approval.

The Termination Payments were not approved by QMCL shareholders.

**(c) Decision**

Section 200B(1) provides that a company must not give a person a benefit in connection with the person's retirement from a managerial or executive office in the company unless the giving of the benefit has been approved by a resolution passed at a general meeting of a company. Under the Act, a "benefit" includes any "payment or other valuable consideration".

Where a contravention of s. 200B(1) occurs, s. 200J(1) provides that the benefit is taken to be held on trust for the company by the executive, and must be immediately repaid to the company.

**(i) Did the Termination Payments constitute a "benefit"?**

Renshaw contended that the Termination Payments did not constitute a "benefit" because they represented the amounts that QMCL was liable to pay under the Executive Agreement.

Perry J held that the definition of "benefit" did not allow for the additional consideration of whether the recipient received something more than what they would otherwise have been contractually entitled to. The Termination Payments were clearly a "payment", and so were a "benefit". That is all that is required by the statutory test.

Further, Perry J did not accept that the Termination Payments represented the amounts due under pre-existing obligations in the Executive Agreement because they were paid on different terms and conditions and in advance of the time they would have been had the Executive Agreement remained on foot.

Additionally, the termination payments were not exempt benefits under the Corporations Regulations 2001 (Cth) (the Regulations). In particular, the exemption for "a genuine superannuation contribution that is paid by an employer" under the Regulations does not apply to compensation for the loss of future superannuation entitlements.

**(ii) Were the Termination Payments exempt under section 200F of the Act?**

Section 200F would exempt the Termination Payments from the application of s. 200B(1) if:

the Termination Payments were a genuine payment by way of damages for breach of contract; and
the value of the benefit did not exceed the average annual base salary Renshaw received from QMCL during the last three years he acted as Managing Director.

Renshaw contended that QMCL repudiated the Executive Agreement by requesting Renshaw's resignation, giving rise to rights to damages for anticipatory breach and to terminate the contract. It was argued that the Termination Payments were equivalent to the payment of damages that would have been made but for the Settlement Deed.

Perry J held there had been no repudiation, as the conduct of QMCL would not convey to a reasonable person in Renshaw's position any clear intention to repudiate the Executive Agreement. Rather, QMCL and Renshaw wished to reach an agreement for Renshaw to resign on terms satisfactory to both parties.

Further, her Honour held that, even if the first criteria were satisfied, the second was not.

**(iii) Was QMCL estopped from bringing its claims to recover the Termination Payments?**

Renshaw contended that QMCL was prevented from bringing its claim under the Act because of the provisions of the Settlement Deed described above.

Perry J held that the release of claims under the Settlement Deed was at best unenforceable if not void for illegality, noting that otherwise the prohibition in s. 200B would be easily circumvented.

Her Honour further observed that whether an estoppel may be raised despite a statutory prohibition on enforcement of a contract depends on whether the relevant law represents a social policy to which the court must give effect in the interests of the public generally or some section of the public.

No estoppel could be raised in relation to Division 2 of Part 2D.2 of the Act. The provisions are concerned with protecting the interests of the shareholders and the public generally against excessive termination payments. The requirement for shareholder approval of termination payments cannot be bypassed by agreement between the company and executive.

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**5.10 Application by liquidator to inspect books and records seized under section 483(1) of the Corporations Act**

(By Raghav Gupta, Herbert Smith Freehills)

Re Mischel & Co Pty Ltd (in liquidation) [2014] VSC 140, Supreme Court of Victoria, Robson J, 7 April 2014

The full text of this judgment is available online.

**(a) Summary**

The Supreme Court of Victoria did not permit the use of rl. 37.01 of the Supreme Court (General Procedure) Rules 2005 (Vic) (the Rules), or the Court's inherent jurisdiction, to inspect books and records seized in proceedings under s. 483(1) of the Corporations Act 2001 (Cth) (the Act).

The Court refused to apply its discretion under rl. 37.01 of the Rules because the purpose for which the liquidator sought to inspect the seized documents under rl.

37.01 of the Rules was for a purpose other than that for which the documents were originally seized, being under s. 483(1) of the Act.

The Court noted that s. 483(1) of the Act:

- only applies to people who derive their authority from the company or are accountable to it;
- cannot be used to determine issues of ownership;
- applies where the company is prima facie entitled to the assets subject to the application; and
- must relate to particular "money, property of the company or books" to which the company is *prima facie* entitled.

**(b) Facts**

The plaintiff, the liquidator of ACN 079 528 699 Pty Ltd (formerly Mischel & Co Pty Ltd) (Mischel & Co) (the Liquidator), issued proceedings against Mischel & Co Advisory Services Pty Ltd (Mischel Advisory) and Henry Mischel (a former director of Mischel & Co) (the Former Director) seeking orders under rl. 37.01 of the Rules that the defendants deliver the electronic books and records of Mischel & Co in their possession.

Before Mischel & Co went into liquidation, it sold its advisory business to Mischel Advisory. Mischel Advisory continued to carry on business from the premises that Mischel & Co had previously occupied (the Premises).

In late October 2011, the Liquidator became aware that work was to be done on the computers used at these Premises. The Liquidator was concerned that the books and records of Mischel & Co in electronic form were at risk of being destroyed or removed.

The Liquidator applied for and received a search order under rl. 37B.03 of the Rules for the seizure and copy of the electronic books and records of Mischel & Co at the premises. Pursuant to rl. 37 of the Rules, the search order was made for the purpose of securing or preserving evidence "which is, or may be, relevant to an issue in the proceeding or anticipated proceeding". In granting the search order, the Court was satisfied that the Liquidator had a strong prima facie case on an accrued cause of action under s. 483(1) of the Act. Section 483(1) of the Act allows a Court to require certain persons listed in the Act to deliver to a liquidator property of the company or books in the person's hands to which the company in liquidation is prima facie entitled.

The search party made copies of the books and records in electronic form. The Court established a procedure for the defendants to object to the production of any documents to the Liquidator. That procedure was followed and subsequently the defendants objected to the production of a large quantity of electronic books and records.

In this case, the Liquidator applied for an order under rl. 37.01 of the Rules to inspect the electronic books and records that the defendants objected to. The defendants argued that rl. 37.01 of the Rules did not form a proper basis for allowing inspection of the contested documents.

**(c) Decision**

Robson J dismissed the Liquidator's application for an order to inspect the seized books and records, with costs. His Honour noted that before exercising its discretion under rl. 37.01, the Court would have regard to the purpose for which inspection is sought. This would include consideration of the scope and purpose of the proceeding in which the search order was given, being proceedings under s. 483(1) of the Act.

**(i) Liquidator's purpose in seeking inspection**

In exercising his discretion under rl. 37.01 of the Rules, Robson J considered whether the purpose for which the Liquidator sought to use the inspection of the seized documents was the purpose for which the search order was obtained. The search order was obtained for the purpose of pursuing the application under s. 483(1) of the Act. This differed to the Liquidator's purpose which was twofold.

First, the Liquidator sought to use the inspection of seized documents to consider and decide whether to pursue other proceedings for the recovery of assets and, for similar reasons, to claim that the books and records of Mischel Advisory are in fact the books and records of Mischel & Co. Robson J held that he would not exercise his discretion to order inspection of the seized documents under rl. 37.01 to assist the Liquidator in pursuing or in deciding whether to pursue other proceedings. Robson J noted that other procedures were available to the Liquidator under the Rules to achieve this purpose.

Second, the Liquidator sought inspection of the seized documents to determine whether the sale of Mischel & Co to Mischel Advisory was a sham and accordingly, to seek an order for delivery up of property. For the reasons set out in item (ii) below, Robson J held that he would not exercise his discretion under rule 37.01 of the Rules to resolve this issue in favour of the Liquidator.

**(ii) Scope and purpose of the proceedings under section 483 of the Act**

Robson J made a number of key points. First, as held in *Home v Walsh* [1978] VR 688 and *Boyles Sweets (Australia) Pty Ltd (in liquidation) v Platt* (1993) 11 ACSR 76, a claim under s. 483(1) cannot be used to determine ownership of property the subject of the application. However, the Court may have the discretion to make the order without resolving the issue of ownership of that property where the company is *prima facie* entitled to that property.

In considering whether Mischel & Co was "*prima facie* entitled" to the property, Robson J cited with approval the distinction drawn in *Home v Walsh* between 'insiders' to which s. 483(1) of the Act applies and 'outsiders' over which the Court has no jurisdiction to apply s. 483(1) of the Act. Section 483(1) applies to a person who is a contributory, trustee, receiver, banker, agent, officer or employee of the company. These 'insiders' either derive their authority from the company or are accountable to it. Robson J held that Mischel & Co is an 'outsider' and does not fall within this class of persons to which s. 483(1) may be applied.

Second, Robson J cited with approval the decisions in *Home v Walsh* and *Boyles Sweets (Australia) Pty Ltd v Platt* in which the courts held that a claim under s. 483(1) of the Act is not available to a liquidator if the person in possession of the assets makes a claim to those assets that is adverse to the company in liquidation. Mischel Advisory has a claim that is adverse to Liquidator's claim for ownership of the advisory business. Consequently, the court has no jurisdiction under s. 483(1) of the Act to resolve that contest.

Third, as found by the UK Court of Appeal in *Re Palace Restaurants* [1914] 1 Ch 492 and upheld in *Home v Walsh*, a court order pursuant to s. 483(1) of the Act is only available where the company is *prima facie* entitled to the assets subject to the application as opposed to assets that the company may be prima facie entitled to. Robson J held that there was no evidence to support a contention, nor did the Liquidator contend, that Mischel & Co is *prima facie* entitled to the advisory business.

**(iii) Claim against the Former Director**

With respect to the Liquidator's claim against the Former Director, Robson J applied the decision of Hayne J in Boyles Sweets in finding that it was inappropriate to apply his discretion under s. 483(1) of the Act to resolve the issue as to what is and what is not the property of Mischel & Co. Robson J noted that the Liquidator could not specify the particular "money, property of the company or books" to which Mischel & Co is prima facie entitled as required under s. 483(1) of the Act.

The Liquidator's contention that there were other records of Mischel & Co among the books and records seized in contradiction of the Former Director's deposition is a matter of credit. Robson J applied a line of authorities including *Home v Walsh*, *Boyle Sweets*, *Evans v Bristile* (1992) 8 ACSR 344 and *Hearne v Street* (2008) 235 CLR 125 in deciding that an application under s. 483(1) of the Act is a summary procedure in which it is not possible to decide matters going to credit.

**(iv) Other reasons not to exercise the Court's discretion under rule 37.01 of the Rules**

Robson J also noted the following reasons not to exercise his discretion to order inspection of the seized books and records:

- the volume of the books and records involved, being approximately 930,000 imaged documents and file paths;
- many of the documents related to persons who were not parties to the proceedings because Mischel Advisory shared use of its computers with multiple companies occupying the Premises; and
- it would not be possible to identify any documents that might belong to Mischel & Co without invading the confidentiality of other non-parties.

**(v) Inherent jurisdiction of the Court to order inspection**

Robson J noted that if the Court had inherent jurisdiction to order inspection, he would reach the same conclusion on the basis that the matters considered in exercising discretion under rule 37.01 of the Rules would equally apply.

**(vi) Conclusion**

Robson J dismissed the Liquidator's application because none of the purposes for which the Liquidator sought to inspect the books and records satisfied rule 37.01 of the Rules.

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### 5.11 Finding the balance - Setting-off debts owed to insolvent companies under section 553C of the Corporations Act

(By James Siemon, Minter Ellison Lawyers)

MK Builders Pty Ltd v 36 Warrigal Road Pty Ltd [2014] VSC 149, Supreme Court of Victoria, Almond J, 7 April 2014

The full text of this judgment is available online.

**(a) Summary**

This case, an appeal from the Victorian Civil and Administrative Tribunal (VCAT), examines the operation of s. 553C of the Corporations Act 2001 (Cth) (the Corporations Act) which provides for debts owed reciprocally between an insolvent company being wound up and its creditors to be set-off against each other, in order to do substantial justice between the parties.

Almond J found that, in its application of s. 553C to the facts before it, VCAT had erred in relation to both questions of law the subject of the appeal.

**(b) Facts**

In the proceeding before VCAT, the appellant, MK Builders Pty Ltd (MKB), alleged that the first respondent, 36 Warrigal Road Pty Ltd (WAR), had breached both a building contract with MKB to construct four townhouses and a joint venture agreement to share the profits from the sale of the townhouses. MKB claimed $479,621 plus interest from the respondents. In turn, the respondents brought an application for orders that the claims be summarily dismissed or struck out. The respondents noted that MKB had gone into administration, that a Deed of Company Arrangement had been executed, and that WAR had subsequently lodged a formal proof of debt for $50,000. A dividend of 0.549 cents in the dollar was subsequently declared for unsecured creditors of MKB. WAR was paid a dividend of $274.29, on the basis that s. 553C of the Corporations Act had caused an automatic set-off of the debts claimed by MKB and WAR, with the net balance being a claim by WAR to the amount of the dividend paid.

Section 553C(1) of the Corporations Act provides that:

> (1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:
> (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
> (b) the sum due from the one party is to be set off against any sum due from the other party; and
> (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

VCAT found that s. 553C applied such that there was no balance owing to MKB and that the Deed of Company Arrangement had extinguished any claim by MKB against WAR. VCAT therefore made various orders dismissing and striking out the proceedings.

MKB appealed from that decision on two questions of law:

- Did the Deputy President err in law when she found that after the automatic set off and accounting required by s. 553C of the Act there was no "balance" owing to MKB?
- Did the Deputy President err in law when she found that any claim MKB might have had against WAR had been extinguished by the Deed of Company Arrangement?

**(c) Decision**

**(i) Did the Deputy President err in law when she found that after the automatic set off and accounting required by section 553C of the Act there was no 'balance' owing to MKB?**

Although there was some debate between the parties as to when the set-off occurred, the reasons for judgment of Almond J focused instead on the effect of the set-off as being the critical issue. His Honour examined the nature and purpose of set-off provisions such as s. 553C, including the observations of the High Court in *Gye v McIntyre* (1991) 171 CLR 609 at 618-9 that the object is "to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate". Almond J also considered the definition of a "sum due" under s. 553C, noting that it includes "sums that are due and presently payable, sums that have accrued but are not presently payable, and sums that are contingent."

Two debts were relevant to the set-off between the parties: a claim by WAR against MKB for reimbursement of $100,000, and a claim by MKB against WAR for payment for work in progress to the value of either $255,349 or $549,046 (as there was evidence of uncertainty as to the correct amount). The claim by WAR was subsequently reduced to $50,000 without prejudice in order to expedite settlement and WAR lodged a formal proof of debt for that amount. The dividend payment of $274.29 to WAR therefore represented a dividend of 0.549 cents in the dollar in relation to the $50,000 claimed.

His Honour noted that it was critical to the decision of VCAT that, as "the accounting required by [section] 553C" resulted in a payment to WAR, there was therefore no balance owing to MKB. Instead, his Honour rejected any submission that the Deed Administrators had performed the necessary calculation of the effect of the statutory set-off, finding that this would have resulted in the two relevant debts set out above being set-off against one another for a balance of either $155,349 or $449,046. His Honour found that no account had been taken of the payment for work in progress owed to MKB, and that the issue of set-off for that debt had not been canvassed.

His Honour therefore found that VCAT had erred in law and allowed the first ground of appeal.

**(ii) Did the Deputy President err in law when she found that any claim MKB might have had against WAR had been extinguished by the Deed of Company Arrangement?**

Given his Honour's finding that the relevant accounting required by s. 553C had not occurred, Almond J therefore proceeded to consider the effect of the dividend payment to WAR. The respondents submitted that, in accordance with the Corporations Regulations 2001 (Cth) and the Deed of Company Arrangement, the payment had the effect of extinguishing the parties' claims.

MKB submitted that if the payment had been made by mistake, given his Honour's findings on the first ground of appeal, it could not extinguish MKB's chose in action, as the object of s. 553C is "to do substantial justice between the parties". MKB further submitted that the court was entitled to calculate the proper amount of any dividend payments, giving credit for any amounts already paid.

His Honour noted various authorities in support of the proposition that the full claims by the parties could be relied upon in subsequent litigation. Despite the earlier payment of a dividend, his Honour considered that the claims would be treated as continuing to exist for the purpose of ascertaining the balance between them. His Honour therefore found that the dividend payment to WAR by the Deed Administrators did not extinguish MKB's claim against the respondents and did not prevent MKB from pursuing such a claim for any outstanding balance owed by WAR.

Consistent with the authorities examined, his Honour took the view that the mandatory nature of s. 553C meant that the automatic set-off occurred, with the result that the original claims were extinguished and only the claim for the balance remained. In respect of what that balance might be, his Honour noted that MKB would have to undertake further litigation in respect of the balance resulting from a "retrospective calculation of legitimate claims".

Almond J therefore allowed the second ground of appeal, finding that VCAT erred in law in finding that MKB's claim had been extinguished by the Deed of Company Arrangement. His Honour also noted that such a finding of extinguishment was premature until it is demonstrated that there has been a taking of account in accordance with insolvency law and the outcome of that accounting is determined. His Honour therefore ordered that the appeal be allowed and that the orders made by VCAT be set aside.

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### 5.12 When may a company rely on a source of funds for its solvency in the absence of a binding agreement?

(By Leah Cutri and Clementyne Rawlyk, Corrs Chambers Westgarth)

First Strategic Development Corporation Limited (in liq) v Chan, [2014] QSC 60, Supreme Court of Queensland, McMurdo J, 4 April 2014

The full text of this judgment is available online.

#### (a) Summary

This case considered the solvency of First Strategic Development Corporation Limited (First Strategic), a company engaged in the exploration of certain mining tenements in Western Australia. First Strategic did not have any assets, lines of credit or formal agreements for the provision of funds. Irrespective of this, from December 2009 onwards, First Strategic incurred various expenses whilst undertaking its mining exploration activities. First Strategic was wound up in November 2010. At that time it owed several debts to a variety of unsecured creditors. The liquidators claimed that First Strategic was insolvent when these debts were incurred and had therefore engaged in insolvent trading.

The three directors of First Strategic (who were each the defendants in the case) denied that First Strategic was insolvent when the debts were incurred on the basis that one of the directors (the Funding Director) was at all relevant times willing and able to fund First Strategic's exploration activities. The issue for the court was whether this availability of funds was sufficiently reliable such that, when the debts were incurred, First Strategic was able to pay its debts as and when they fell due.

The Funding Director's inclination to finance First Strategic was largely reliant on an agreement being reached between First Strategic and another company, Macarthur Minerals Limited (MMS) regarding the on-sale of mining tenements to MMS at a substantial profit. It was found that this transaction was highly contingent and uncertain, such as to render the Funding Director's preparedness to finance First Strategic's activities insufficiently reliable. As such, the court determined that First Strategic was unable to pay its debts as and when they fell due and had engaged in insolvent trading. The circumstances regarding the reliability, or otherwise, of the Funding Director as a source of funds were, or should have been, apparent to all of the directors when the debts were incurred, meaning that the directors had ample reasons to suspect insolvency. The court held that the directors were therefore in contravention of s. 588G(2) of the Corporations Act 2001 (Cth) (the Act), which provides that a director will be in breach of their duty to prevent insolvent trading if they are aware (or should be aware) that there are reasonable grounds to suspect that a company is insolvent and yet fail to prevent the company from incurring a debt. The directors of First Strategic were ordered to compensate First Strategic for the losses incurred by its insolvent trading.

**(b) Facts**

MMS held a number of mining tenements in Western Australia. Mr Dalla-Costa held, and wished to sell, further tenements adjacent to those held by MMS (the Tenements). Mr Dalla-Costa was willing to grant an option to purchase the Tenements at a price to be ascertained by reference to their mineral resources. However, as the Tenements were unexplored, these resources were unknown. As such, Mr Dalla-Costa proposed that the grantee of the option be required to expend $2.5 million exploring the Tenements as a condition of the exercise of the option, so that the price could be ascertained in accordance with that exploration.

The Tenements were attractive to MMS, however it did not have the funds to undertake the exploration itself.

As such, MMS proposed that:

- Mr Dalla-Costa would grant the option to purchase the Tenements to First Strategic;
- First Strategic would fund, and MMS would manage, the exploration of the Tenements; and
- MMS would hold a call option to purchase the Tenements from First Strategic 60 days after First Strategic exercised its option granted by Mr Dalla-Costa.

Mr Dalla-Costa granted the option to First Strategic on 3 December 2009, and work on the Tenements commenced thereafter. On 20 January 2010, MMS sent invoices to First Strategic relating to its work on the Tenements and these invoices were promptly paid. Shortly after, tensions mounted between the directors of MMS and the first and third defendants, and work on the Tenements stalled.

A management agreement between MMS and First Strategic was finally agreed and signed on 26 May 2010 and exploration on the Tenements resumed. The option agreement, whereby MMS was to be granted an option to purchase the Tenements from First Strategic, went through several drafts, though none were ever signed.

On 6 August 2010, the Funding Director emailed MMS stating that he was uncomfortable with the prospects of the exploration program and requesting that MMS immediately suspend its exploration of the Tenements. In this regard, the Funding Director stated:

> "... I have a few concerns. We have secured the buy option from the tenement owner but we cannot secure the sell option to MMS. This does not make commercial sense for me to proceed further ... I understand [First Strategic] is responsible for the exploration cost and other expenses accrued so far. Please send me the most up to date account upon suspension. [First Strategic] shall settle the account in due course ..."

Following receipt of the Funding Director's email, MMS sent the Funding Director invoices totalling $856,365.19 for its work on the Tenements, none of which were paid. On 17 November 2010, at a meeting of creditors of First Strategic, there was a resolution for First Strategic to be wound up and liquidators to be appointed. At this time, the company had assets of $269.54 and liabilities of $1,894,405.98 (all unsecured creditors).

The liquidator claimed compensation from each of the directors for losses incurred as a result of First Strategic's alleged insolvent trading. Each of the directors denied that First Strategic was insolvent at the time the debts were incurred. The directors' case was that, until 6 August 2010, the Funding Director was prepared to finance First Strategic's exploration of the Tenements. Of key concern was not whether the Funding Director was able to provide the funds, but whether he was willing to do so.

**(c) Decision**

Section 95A(1) of the Act provides that a person is solvent "if, and only if, the person is able to pay all the person's debts, as and when they become due and payable." Section 95A(2) of the Act goes on to say that "a person who is not solvent is insolvent."

His Honour determined that, in the absence of any assets, a line of credit or other financial support at arms-length, First Strategic's only prospect of paying its debts at the relevant times depended entirely on the Funding Director's preparedness to do so. The liquidator disputed that there was a sufficient likelihood that the Funding Director would meet First Strategic's debts as and when they became due, and McMurdo J agreed with this proposition.

His Honour stated that it is well established that s. 95A of the Act requires a court to have regard to the "commercial reality" in assessing whether a company is able to pay its debts when they become payable, and that this may include consideration of the likelihood that it will have funds available from sources with which it has no formalised agreement. Further, McMurdo J stated there is no objection in principle to a court considering loans from related bodies corporate or directors. As was considered in *International Cat Manufacturing Pty Ltd (in liquidation ) v Rodrick* (2013) 97 ACSR 200, "regard can be had to such financial support where the evidence establishes that the directors are likely to continue it." His Honour added to this the statement of Muir JA in *Williams v Scholz* [2008] QCA 94 that "the most important consideration is the degree of commitment of the continuation of financial support."

His Honour went on to state:

> The prospects of obtaining necessary funds from a party, which is not obliged to provide them, must be such as to give the company something more than a chance of paying its debts: the prospects must be sufficient to make the company able to do so. That does not mean that the provision of funds must be free of any uncertainty or contingency. But there must be a sufficient likelihood for the company, and those directing it, to be able to rely upon the availability of those funds when incurring the relevant debts.

The evidence indicated that the Funding Director was interested in becoming a major shareholder in MMS and stood to earn substantial profits from the on-sale of the Tenements to MMS. Accordingly, the Funding Director had a strong incentive to fund First Strategic's exploration of the Tenements. However, there were also many contingencies and uncertainties attached to the proposed transaction which ultimately resulted in a reluctance by the Funding Director to make the necessary contributions. Mc Murdo J therefore concluded that the Funding Director's degree of commitment was low, that he was not a sufficiently reliable source of funds and as such First Strategic was insolvent at all times when the relevant debts were incurred. His Honour further held that each of the directors were, or should have been, aware of the circumstances which made the Funding Director an insufficiently reliable source of funds and that they therefore had ample reasons to suspect that First Strategic was insolvent when the relevant debts were incurred.

Consequently, the directors had contravened s. 588G(2) of the Act by failing to prevent the debts from being incurred. His Honour ordered each director to compensate First Strategic for the losses it sustained as a result of its insolvent trading.

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### 5.13 Unexplained change in stance relevant to attempts to uphold a creditors' resolution

(By Rachel Loftus and David Bryant, King & Wood Mallesons)

DSG Holdings Australia Pty Ltd v Helenic Pty Ltd [2014] NSWCA 96, Supreme Court of New South Wales, Court of Appeal, Meagher JA, Leeming JA and Bergin CJ in Eq, 7 March 2014

The full text of this judgment is available online.

#### (a) Summary

This case concerned an appeal by DSG Holdings Australia (DSG) and Bicheno Investments (Bicheno) against a decision of the NSW Supreme Court to set aside a creditor's resolution that Retail Adventures Pty Ltd (RAPL), a subsidiary, execute a deed of company arrangement (DOCA). The resolution was passed due to the votes of DSG and Bicheno as related creditors, who were both parent companies of RAPL. Two unrelated creditors who voted against the resolution successfully applied to the Supreme Court of NSW to set it aside under s. 600A of the Corporations Act 2001 (Cth) (the Act). DSG and Bicheno chose not to extend the existing stay of orders made by the primary judge. As a consequence, RAPL went into liquidation on 3 February 2014, before the scheduled hearing date for the appeal, so DSG and Bicheno were required to apply for leave to bring their appeal. Leeming JA, Meagher JA and Bergin CJ in Eq concurring, refused leave to proceed with the appeal, finding that there was unreasonable prejudice to the interests of minority creditors.

#### (b) Facts

Administrators were appointed to RAPL on 26 October 2012 and to its holding company, Retail Adventures Holdings Pty Ltd (Holdings), on 7 November 2012. The Administrators transferred RAPL's business to DSG for a purchase price of $58.9 million, which was set off against $49.77 million worth of secured debt owed by RAPL.

DSG and Bicheno wrote to creditors proposing a DOCA, on 18 July 2013 and 7 August 2013 respectively, which put forward a range of liquidation options. The middle of the range of options generated by the DOCA was a return of 6 cents in the dollar to unrelated creditors. The DOCA proposed there would be a single fund against which unrelated creditors could claim, which would include a $5.5 million contribution from Bicheno, DSG, Jan Cameron, a director, and certain former directors (Contributing Related Creditors). However, if this contribution was not made by 31 January 2014, the DOCA would fail.

On 19 August 2013, the Administrators published their report pursuant to s. 439A of the Act. The Administrators' opinion was that RAPL should be wound up and that it was not in the interests of creditors to resolve that RAPL enter into a DOCA. Their decision was based on a likely return to unrelated creditors of 20-45 cents in the dollar in a winding up. This estimated return was based on the Administrators' opinion that RAPL was insolvent from 1 July 2011. The report also highlighted there was no obligation on the Contributing Related Creditors to contribute $5.5 million to the fund, given it was merely a proposal.

On 2 September 2013 in separate, but concurrent, meetings, a majority of the creditors of RAPL and Holdings resolved that each company enter into a DOCA. DSG and Bicheno voted $34,986,958 worth of parent company debt in favour of the resolution. However, if their related party votes had been disregarded, the result would have been that 122 creditors voted $39,490,655 against the resolution and 604 creditors voted $11,065,720 in its favour. Two unrelated creditors commenced proceedings to set aside the resolution.

Immediately following the judgment of the NSW Supreme Court on 23 December 2013, DSG applied for a stay of the orders setting aside the creditors' resolution so that DSG and Bicheno could bring an appeal. The primary judge granted a stay of orders until 27 December 2013, and a further stay of orders until 3 February 2014. DSG and Bicheno did not seek to extend the stay of orders beyond 3 February 2014, and RAPL therefore went into liquidation. At this time, DSG and Bicheno had also not paid the required $5.5 million contribution into a controlled monies account for the purposes of the DOCA.

On 5 March 2014, the solicitors for DSG and Bicheno advised that Ms Cameron would provide an undertaking to the court that she would ensure payment of $5.5 million was made into a controlled monies account with an irrevocable direction to the solicitors managing the account that the sum be applied to the contribution required under the DOCA. No explanation was offered for this "about-face" in relation to the contribution or the previous willingness to allow RAPL to be wound up following the expiry of the stay of orders.

**(c) Decision**

**(i) Discretionary obstacles faced in setting aside the orders made by the primary judge**

As a consequence of their decision not to extend the stay of orders, DSG and Bicheno required leave to proceed with their appeal pursuant to s. 471B of the Act and s. 101(2)(n) of the Supreme Court Act 1970 (NSW). Leeming JA refused to grant leave. His Honour concluded that while it is not necessary to demonstrate an absence of prejudice to the creditors or the orderly winding up of the company to obtain leave, the inability of DSG and Bicheno to do so went against the grant of leave. Leeming JA also refused to terminate the winding up of RAPL under s. 482, after taking into account material such as the s. 439A report prepared by the Administrators. A relevant factor was the Administrators' opinion that RAPL engaged in insolvent trading over a lengthy period of time.

Further, DSG and Bicheno required an order under s. 447A extending the time for the DOCA to be implemented and for payment of the $5.5 million.

Leeming JA identified four real differences between the proposal voted on and the actual deed that would be executed, which all went against the grant of leave:

- there would be a delay of six months in the payment of the proposed 6 cent distribution under the DOCA;
- the distribution would no longer be 6 cents, due to the additional costs incurred in the last six months;
- the vast majority of employees who voted in favour of the DOCA were no longer creditors of RAPL and so would not be bound by the deed. Without these employee votes, a majority of creditors opposed the resolution; and
- the opinions expressed by the Administrators were tested in cross-examination and found to be sound, while DSG and Bicheno's contrary opinions were discredited.

The change in RAPL's status on 3 February 2014 was brought about by a conscious decision of DSG and Bicheno, for which they offered no explanation. Leeming JA reasoned that this unexplained delay also went against the grant of leave.

**(ii) Section 600A**

s. 600A(2) confers a discretionary power on the court to set aside the resolution, or order the resolution be put to a further vote at another creditor's meeting. Under paragraph 600A(1)(c), the Court of Appeal had to determine whether the proposed resolution was contrary to the interests of the creditors as a whole or whether it had prejudiced, or was reasonably likely to prejudice, the interests of the creditors who voted against the resolution to an extent that was unreasonable having regard to certain matters.

Leeming JA noted that prejudice to the interests of creditors who voted against the resolution that falls short of unreasonable prejudice may exist, but this would not justify judicial intervention. Further, Leeming JA reasoned that an examination of prejudice to creditors is not necessarily limited to a comparison of the expected returns under the proposed DOCA and on winding up. It may be necessary to differentiate between creditors to achieve the most preferable outcome for creditors as a whole. While this may involve balancing many competing considerations, a lengthy, wide-ranging examination is not required in every case. Leeming JA found the financial disadvantage to the creditors voting against the proposal in this case was so substantial, and certain, that it amounted to prejudice that was unreasonable under subparagraph 600A(1)(c)(ii).

Leeming JA found that "the interests of creditors" in subparagraph 600A(1)(c)(i) should be construed as identical in substance to the phrase "creditors' interests" referred to in ss. 438A and 439A as part of an administrator's report. Leeming JA highlighted that the primary judge was not required to conduct an "elaborate" analysis of the various interests of creditors involved under s. 600A. The only relevant interest of creditors here was the partial recovery of their debts, as RAPL would never again trade.

**(iii) Notice of contention**

The primary judge found that the DOCA was not contrary to the interests of creditors as a whole. Leeming JA disagreed with the approach taken by the primary judge, finding that subparagraph 600A(1)(c)(i) focuses only on the interests all creditors have in recovering the money they are owed by the company. The section excludes creditors who are also potential defendants, as they have two competing interests. RAPL's many creditors had the interest as creditors to be repaid as quickly, substantially and risk free as possible. While creditors may place differing importance on speed, amount and risk, it was "plainly against the interests of creditors as whole" to resolve in favour of the DOCA (at [140]). The DOCA would pay unrelated creditors 6 cents in the dollar, even though there was a strong basis for concluding creditors would be paid triple to seven times this amount in a winding up. Meagher JA agreed with Leeming JA, but Bergin CJ in Eq did not decide this issue.

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## 5.14 Accessorial liability of company director for underpayment of employee remuneration

(By Adam Katz, DLA Piper)

Potter v Fair Work Ombudsman [2014] FCA 187, Federal Court of Australia, Cowdroy J, 7 March 2014

The full text of this judgment is available online.

**(a) Summary**

This case considered, amongst other things, whether Judith Potter (Potter), the director and secretary of Quincolli Pty Ltd (Quincolli), a company which operated a call centre in Nowra, New South Wales, was an accessory to the contravention of Quincolli in relation to the underpayment of employees, in breach of s. 182(1) of Workplace Relations Act 1996 (Cth) (the WR Act).

Cowdroy J concluded that Potter was an accessory to the contraventions which occurred from 8 July 2009 onwards, as it was not until this time that Potter had actual knowledge that the Clerical and Administrative Employees (State) Award (th Award) applied to the Employees of Quincolli.

**(b) Facts**

From 1 January 2009 to 31 December 2009 (the Relevant Period), 33 employees of Quincolli (the Employees) were paid in accordance with agreements (Agreements) that were purportedly lodged as Australian Workplace Agreements by Quincolli with the Office of the Employment Advocate (OEA). Had these Agreements being lodged in accordance with the WR Act for each of the Employees, then the Employees would have been properly paid at the rate prescribed under the Agreements. However, as the Agreements had not been lodged with (or received by) the OEA, the Employees were entitled to be remunerated under the applicable industrial award, being the Award.

The Fair Work Ombudsman (FWO) instituted proceedings against Quincolli and Mrs Potter for the alleged underpayment of the employees.

**(c) Decision**

The primary judge determined that during the Relevant Period:

- Quincolli had underpaid wages and entitlements to the Employees in breach of s. 182(1) of the WR Act;
- Quincolli had breached various subclauses of the Award;
- Quincolli breached s. 712(3) of the Fair Work Act 2009 (Cth) (the FW Act) by failing to comply with a notice to produce any and all documents in relation to whether the Award applied; and

- Mrs Potter was involved in each of the contraventions by Quincolli within the meaning of s. 728 of the WR Act and s. 550 of the FW Act.

Potter appealed the decision on five grounds, but was unsuccessful in relation to each of these grounds.

In addition to these five grounds, a further issue arose during the hearing, namely in relation to Potter's accessorial liability to the contraventions of Quincolli. The primary judge had determined that Potter was involved during the Relevant Period in the contraventions of Quincolli in relation to both the underpayments of the Employees and the failure to comply with the notice to produce. Potter sought to challenge the finding that she was involved in the underpayment contraventions.
In interpreting s. 728 of the WR Act and s. 550 of the FW Act, Cowdroy J noted that to be "knowingly concerned" in a contravention, the alleged accessory must have actual knowledge of the essential facts that constitute the contravention. At issue was whether Potter had actual knowledge of, or was wilfully blind to, the fact that the Award applied to the Employees.

His Honour emphasised that, contrary to the submission by FWO, knowledge that the Employees were not being paid in accordance with the Award was not adequate to establish actual knowledge of the essential facts that constitute the contravention. Rather, Potter must have known that the Award applied to the Employees.

In reaching this conclusion, Cowdroy J considered the situation in which directors of a company honestly but mistakenly arrange for the company's employees to be paid under an incorrect award. If the approach of the FWO applied, the directors in these circumstances would be liable as accessories simply because they knew how much the employees were being paid and because they had knowledge of the existence of the applicable award, even though they honestly believed that such award did not apply. In light of this, Cowdroy J did not believe that Potter was involved in the contraventions as there was no evidence that she knew the Award applied to the Employees.

However, Cowdroy J concluded that an inference that Potter knew the Award applied to the Employees could easily be established from July 2009 onwards, as from this time evidence existed (in the form of a series of conversations that occurred between employees of Quincolli and the Australian Industry Group) that Quincolli had received advice that the Award applied to the Employees.

In these circumstances, though Potter did not have actual knowledge that the Award applied to the Employees prior to July 2009, such knowledge existed following this time and therefore Potter was involved in contraventions from this point.

### 5.15 Leave to proceed against a company subject to a deed of company administration may not be granted if the Court considers it is futile to do so in circumstances where it is at best uncertain that a surplus will arise for unsecured creditors

(By Lucy Lyttleton and Lucienne Cassidy, Ashurst Australia)

Chief Commissioner of State Revenue v CCM Holdings Trust Pty Ltd; Chief Commissioner of State Revenue v CCT Motorway Company Nominees Pty Ltd [2014] NSWCA 42, Supreme Court of New South Wales, Court of Appeal, Gleeson JA, 7 March 2014

The full text of this judgment is available online.

#### (a) Summary

Two related companies, CCM Holdings Trust Pty Ltd (CCM Holdings) and CCT Motorway Company Nominees Pty Ltd (CCT Nominees) (together, the Companies), successfully appealed the Chief Commissioner of State Revenue's assessments of the duty applicable to a significant transaction. The Commissioner lodged notices of appeal against the decision of Bergin CJ in Eq of the Supreme Court of New South Wales, however on the same day that it lodged those notices, voluntary administrators were appointed over the Companies. The Commissioner's proceedings were stayed under s. 440D of the Corporations Act 2001 (Cth) (the Act).

Following the execution of a deed of company arrangement (DOCA) by each of the Companies' creditors, the Commissioner applied for leave to proceed with its appeals under s. 444E of the Act.  The application for leave was unsuccessful. br>
Among other things, the Court found that a key factor in exercising the discretion to refuse leave was the futility of granting leave where it was at best uncertain that there would be any surplus for unsecured creditors, and therefore any monetary return for the Commissioner if its appeals were successful. However, the Court did note that it would be open for the Commissioner to make further applications for leave if the prevailing circumstances changed.

#### (b) Facts

The Companies are companies in the CCT Motorway Group (Group), which owns and operates the Cross City Tunnel in Sydney (Tunnel).

Previously, the Cross City Motorway Property Trust (Trust) and the Cross City Motorway Pty Ltd (CCM) held the assets of the Tunnel. In 2007, ownership of the Tunnel was transferred to a new consortium of companies. The transaction was structured such that CCM Holdings paid approximately $695 million for units in the Property Trust and CCT Nominees paid approximately $3.4 million for shares in

CCM. The Commissioner determined that the transfer of the units attracted land rich duty of $36,285,490 (plus penalty tax of $5,442,823.50 and interest), and the transfer of the shares attracted approximately $20,431.20 plus interest.

Upon an application to the Supreme Court of New South Wales for a review of the Commissioner's assessments, Bergin CJ found in favour of the Companies and revoked the Commissioner's assessments.

The Commissioner lodged notices of appeal against each decision. On the same day, the directors of each of the Companies appointed joint and several voluntary administrators. The Commissioner's appeal proceedings were stayed under s. 440D of the Act (which binds all unsecured creditors of a company in administration with respect to claims they have that arose on or before the day specified in the DOCA). Receivers and managers were also subsequently appointed to the Companies.

The Commissioner lodged a proof of debt with the administrators of CCM Holdings for $68,623,963.69 (including interest and penalty tax) and CCT Nominees for $35,575.28 (including interest). The administrators of each of the Companies admitted the Commissioner's proofs for voting purposes as a contingent claim of $1.00 pending the outcome of the appeals.

In the administrators' report to creditors, they noted that the Group's most recent balance sheet recorded negative net assets (including the Commissioner's contingent claim). At the second meeting of creditors of each of the Companies, the creditors voted in favour of a resolution that each of the Companies execute a DOCA. At the meetings, the administrators stated that it was impossible to conclude whether there would be surplus assets available to unsecured creditors until after a sale of the assets of the Companies by the receivers and managers had been completed. The purpose of the DOCAs was to maintain the "status quo" of the companies in the Group until the completion of the sale process.

It was subsequently announced that an agreement had been reached for the sale of the Group's secured debt of $582 million in respect of the Tunnel for a purchase price of $475 million, with the prospective purchaser agreeing to make further progressive payments over four years totalling $27.5 million if certain performance targets were met.

Following the announcement, the Commissioner filed a notice of motion seeking leave to proceed with the appeals against each of the Companies under s. 444E of the Act.

**(c) Decision**

The primary focus of Gleeson JA was the factors to be taken into account in exercising the discretion to grant leave and the relative weight to be given to each.

Gleeson JA had regard to the decision of Lehane J in *Meehan v Stockman's Australian*

*Cafe (Holdings) Pty Ltd* (1996) 22 ACSR 123, in which his Honour stated that the approach to be taken to exercising the discretion depends on the form of the DOCA. In this case, Gleeson JA considered that, given the form of the DOCAs, it was appropriate to apply similar principles to an application for leave to proceed against a company in liquidation under s. 471B of the Act (which is in similar terms to s. 444E). The test for granting leave under that provision is that the Court must be satisfied that there is a serious question to be tried.

In respect of the factors to be taken into account in exercising the discretion, Gleeson JA referred to the summary of factors adopted by the New South Wales Court of Appeal in *Attard v James Legal Pty Ltd* [2010] NSWCA 311. While his Honour noted that the summary of factors in that case was not intended to be exhaustive (citing *Attard*; *Meehan* above; *Ogilvie-Grant v East* (1983) 7 ACLR 669), his Honour added to that list "whether it might be futile for the Court to grant leave" (referring to the decisions of Emmett and Barrett JJA in *Distinctive FX 9 Pty Ltd v Statewide Developments Pty Ltd* [2013] NSWCA 110).

Gleeson JA considered the various factors that the parties submitted should be taken into account in exercising the discretion. In the circumstances, his Honour determined that the following factors advanced by the parties were most relevant, in varying degrees, to the exercise of the Court's discretion:

- whether the dispute involved a serious claim and a significant amount;
- whether it is more convenient for the issues to be determined in the appeal proceedings sought to be continued or in an appeal of the administrators' determination of the proof of debt;
- the prospect of any surplus for distribution to unsecured creditors, including whether there was even sufficient funding to defend the appeal proceedings, and whether it would be futile or premature to grant leave in light of those facts.

Certain other factors advanced by the Commissioner were given little or no weight by Gleeson JA due to the lack of evidence in support (including that the proceedings were in an advanced stage or had precedential value, or that the Commissioner risked an adverse costs order in the proceedings below if the appeals were refused).

In refusing leave, Gleeson JA took into account a number of the above factors. However, it is clear from the judgment that the most significant factor weighing against the grant of leave to proceed with the appeals at that time was the low prospect of any surplus to unsecured creditors and the fact that "even if the appeals were successful, the prospect that they would result in any monetary return for the Commissioner is at best uncertain".

In conclusion, Gleeson JA noted that nothing would prevent the Commissioner making a further application for leave if the circumstances were to change, for example because the prospect of a return to unsecured creditors improved or the deed administrators obtained costs orders against the Commissioner in the proceedings below (citing *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196).