SAI Global Corporate Law Bulletin No. 232>

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Bulletin No. 232

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

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 EU proposes shareholder say on pay

9 December 2016 - New rules empowering shareholders to vote on directors' pay, so as to tie it more closely to their performance, were agreed by the European Parliament, Council and Commission negotiators. The rules still require approval by the Parliament and Council.

Shareholders will have the right to vote on remuneration policy for company directors and the pay actually awarded must be transparent, the negotiators agreed. The policy should also explain how employees' pay and employment conditions are taken into account and how it contributes to the company's long-term interests.

The rules will also give companies the right to identify their shareholders, in order to better and more directly communicate with them. Companies will also have to confirm the votes cast in general meetings by, or on behalf of, shareholders.

According to the European Commission, only 13 EU member states currently give shareholders "a say on pay", either through a vote on directors' remuneration policy and/or report. Only 15 require disclosure of the remuneration policy and 11 require disclosure of individual directors' pay.

1.2 Release of the external dispute resolution in the financial system interim report

6 December 2016 - Two new ombudsman schemes, one for financial, credit and investment disputes and another for superannuation disputes, with a view to considering integration of the two new schemes in the future, is the key draft recommendation of a Review by an Independent Expert Panel into external dispute resolution bodies in the financial system.

On 8 August 2016, the Panel was provided with Terms of Reference by the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, which required it to consider whether changes to current dispute resolution and complaints bodies (the Financial Ombudsman Service (FOS), the Credit and Investments Ombudsman (CIO) and the Superannuation Complaints Tribunal (SCT)) are necessary to deliver effective outcomes for users in a rapidly changing and dynamic financial system.

On 6 December 2016 the Panel released its Interim Report, which sets out the Panel's draft recommendations for changes to the financial system dispute resolution framework.

After extensive consultation with stakeholders, the Panel found that industry ombudsman schemes have many strengths but reforms are necessary to improve outcomes for consumers, particularly by addressing gaps and overlaps between the two existing EDR schemes - FOS and CIO.

The Panel found that the monetary limits and compensation caps for consumers and small businesses - which have the effect of excluding some disputes from the dispute resolution system - are outdated and impeding access to justice, and recommends that these be increased.

The Panel also found that the rigidity of the statutory Superannuation Complaints Tribunal model hampers the flexibility and innovation that are necessary features of a dispute resolution system.

Key draft recommendations include:

- The formation of a single industry ombudsman scheme for financial, credit and investment disputes to replace FOS and CIO; and
- The replacement of the SCT with an industry ombudsman scheme for superannuation disputes, along with the development of a Superannuation Code of Practice.

Other draft recommendations include:

- Increases to the monetary limits and compensation caps for the new financial, credit and investment disputes scheme, for both consumer and small business disputes; and
- Enhanced accountability and oversight over the two new schemes, including by strengthening the Australian Securities and Investments Commission's powers and more frequent independent reviews.

Once the two new ombudsman schemes are fully operational the Panel sees merit in further integrating the schemes to create a single dispute resolution body for all financial system disputes.

The Panel does not accept that a new statutory tribunal is required on the basis that the integrated package of reforms it is recommending will address many of the problems that led to the debate about a tribunal.

The Panel does, however, see considerable merit in the introduction of an industry-funded compensation scheme of last resort.

The members of the Independent Expert Panel are Professor Ian Ramsay (Chair), Julie Abramson and Alan Kirkland.

A copy of the Interim Report is available on the Treasury website.

The Minister for Revenue and Financial Services issued a media release welcoming the interim report (view the media release) as did consumer groups (view the media release) and the Association of Superannuation Funds of Australia (view the media release).

1.3 UK government launches review of corporate governance

29 November 2016 - Measures to strengthen the UK's corporate governance framework and shareholder influence over executive pay have been outlined by Business and Energy Secretary Greg Clark in a consultation paper.

The paper sets out a range of options to address concerns around levels of executive pay, increasing representation of workers, customers, suppliers and investors in the boardroom, and whether the UK's largest private companies should be subject to more rigorous corporate governance rules.

Section 1 of the paper provides background on the current regulatory framework for executive pay, including significant reforms implemented in 2013. It also includes an analysis of trends in the Green Paper: Corporate Governance Reform levels of executive pay and shareholder voting patterns. The section asks for views on a range of options aimed at:

- strengthening shareholder voting rights;
- encouraging greater shareholder engagement with executive pay;
- strengthening the role of remuneration committees, including improved engagement with shareholders and employees; further improving transparency on executive pay; and
- improving the effectiveness of long-term pay incentives.

Section 2 explores the issue of how to strengthen the employee, customer and supplier voice at boardroom level. It outlines the current legal framework which recognises the importance of stakeholder views. It provides examples of some current approaches used by businesses to hear the voice of employees, consumers and other stakeholders and seeks further examples of existing good practice.

This section also sets out and seeks views on a number of potential options that companies could take to improve the connection between the boardroom and the workforce and other interests. These include the establishment of advisory panels and the appointment of designated non-executive directors to take formal responsibility for articulating particular stakeholder perspectives. The section suggests that there should be higher expectations for companies to engage with employees and others, but that they should be able to select the mechanisms most appropriate for their business, and explain why they have been chosen.

Section 3 considers the position of large privately-held businesses which currently face lower formal corporate governance and reporting standards than many public companies. This section therefore seeks views on whether the UK's largest privately-held companies - where they are of similar size and economic significance to public companies - should be expected to meet higher minimum standards of corporate governance and reporting. If a stronger framework is required, it suggests either extending the UK Corporate Governance Code or developing a new code tailored more specifically to the circumstances of large privately-held businesses.

1.4 Government response to the final report of the review of the small amount credit contract laws

28 November 2016 - The Australian Government has released its response to the final report of the independent review of the small amount credit contract (SACC) laws.

The Government's response supports:

- retaining the existing price caps on SACCs;
- extending the SACC protected earnings amount requirement to all consumers and lowering it to 10% of the consumer's net income (currently, for those consumers who receive 50% or more income through payments from Centrelink, total SACC repayments are capped at 20% of a consumer's gross income);
- introducing a cap on total payments on a consumer lease equal to the base price of the good plus 4% of that price per month; and
- introducing a protected earnings amount requirement for consumer lease providers of 10% of net income for all consumers, equivalent but separate to the requirement for SACCs.

It is intended that the changes will apply 12 months following the passage of the legislation through Parliament. Legislation will be developed subject to the Government's other legislative priorities, but at this stage is expected to be progressed during 2017.

The review was established to fulfil a statutory requirement under the National Consumer Credit Protection Act 2009 to examine and report on the effectiveness of the law relating to SACCs. The full report is available at the Consumer Credit website.

View Government Response.

1.5 UK policy report on executive pay reform

25 November 2016 - The Purposeful Company Taskforce, a group of leading companies, investment houses, leading business schools and business consultancy firms, established by Big Innovation Centre and supported by the Bank of England, has issued an Interim Policy Report, on executive pay reform.

This interim report finds that current pay practices can encourage short term behaviour and that action is required to rebuild trust in how executive pay is set and governed. Pay plans need to incentivise and reward sustainable long-term performance. This means removing incentives to short-term behaviour, measuring

CEOs based on truly long-term performance, and aligning targets with non-financial and strategic measures rather than short-term financial goals. The paper makes four recommendations to align CEO pay with long-term performance, company purpose and to rebuild trust:

- companies should adopt simpler pay structures, with reduced reliance on traditional performance pay and more focus on higher and longer term shareholding extending over at least five to seven years, depending on the business sector. Pay packages should result in CEOs rapidly building up shareholdings worth 2x the value of bonuses that can be awarded in any year. Cash bonuses should be limited to at most 25% of incentive pay and on non-financial and strategic goals rather than financial measures;
- companies should be required to publish a Fair Pay Charter, setting out a company's principles on pay fairness, trends in the comparison between CEO and wider workforce pay over time, and with a requirement to engage with employees on its content through an appropriate forum;
- executive pay reporting rules should be amended to provide a fuller picture of how CEO pay is linked to performance by: including disclosure of the change in CEO wealth over the year, including previously awarded shares, compared with the change in the value of the company; to show the impact of share price growth on the report value of payments made for the year; and to require a clear maximum on each element of pay; and
- shareholder voting rules should be extended, so that a company that loses its remuneration report vote or receives a vote below 75% two years in a row, is required to bring their remuneration policy back for binding approval as a special resolution requiring 75% support.

View The Purposeful Company: Interim Executive Remuneration Report 2016.

1.6 Crowd sourced equity funding draft legislation

24 November 2016 - The Australian Government has published the Corporations Amendment (Crowd-sourced Funding) Bill 2016.

The Bill enables unlisted public companies with less than $25 million in assets and annual turnover to facilitate crowd sourced equity funding. These companies will be able to raise up to $5 million in any 12 month period through crowdfunding platforms.

Small companies that become public companies to use crowdfunding will be given a transition period of up to five years during, which they will be eligible for exemptions from certain corporate governance and reporting requirements.

The Government is continuing to consult with a view to extend crowd-sourced equity funding in the new year to proprietary companies, which already have lower corporate governance and reporting requirements.

Retail investors will have an investment cap of $10,000 per company per 12 month period and a cooling off period - allowing withdrawal from their investment for up to 48 hours after making a commitment.

Licenced crowdfunding intermediaries will play a gatekeeping role by conducting checks on the companies they list on their platforms.

The Bill also increases flexibility to support development of new and specialised financial markets, including crowd-sourced equity funding platforms. In addition, the legislation extends the Treasurer's powers to exempt specialised, and emerging financial market operators from clearing and settlement licensing regimes.

Further, it allows licensing requirements to be tailored to the needs of each market.

1.7 EU banking reform

23 November 2016 - The European Commission has presented a package of reforms to further strengthen the resilience of EU banks. This proposal builds on existing EU banking rules and aims to complete the post-crisis regulatory agenda by making sure that the regulatory framework addresses any outstanding challenges to financial stability, while ensuring that banks can continue to support the real economy.

The proposals amend the following pieces of legislation:

- the *Capital Requirements Regulation* (CRR) and the *Capital Requirements Directive* (CRD) which were adopted in 2013 and which set out prudential requirements for credit institutions (i.e. banks) and investment firms and rules on governance and supervision;
- the *Bank Recovery and Resolution Directive* (BRRD) and the *Single Resolution Mechanism Regulation* (SRMR) which were adopted in 2014 and which spell out the rules on the recovery and resolution of failing institutions and establish the Single Resolution Mechanism.

The proposals include the following key elements:

1. *Measures to increase the resilience of EU institutions and enhancing financial stability*

The proposals incorporate the remaining elements of the regulatory framework agreed recently within the Basel Committee on Banking Supervision (BCBS) and the Financial Stability Board (FSB). They include:

- more risk-sensitive capital requirements, in particular in the area of market risk, counterparty credit risk, and for exposures to central counterparties (CCPs);
- implementing methodologies that are able to reflect more accurately the actual risks to which banks are exposed;
- a binding Leverage Ratio (LR) to prevent institutions from excessive leverage;A binding Net Stable Funding Ratio (NSFR) to address the excessive reliance on short-term wholesale funding and to reduce long-term funding risk; and
- a requirement for Global Systemically Important Institutions (G-SIIs) to hold minimum levels of capital and other instruments which bear losses in resolution.

2. *Measures to improve banks' lending capacity to support the EU economy*

In particular, specific measures are proposed to:

- enhance the capacity of banks to lend to SMEs and to fund infrastructure projects;
- for non-complex, small banks, reduce the administrative burden linked to some rules in the area of remuneration (namely those on deferral and remuneration using instruments, such as shares), which appear disproportionate for these banks; and
- make CRD/CRR rules more proportionate and less burdensome for smaller and less complex institutions where some of the current disclosure, reporting and complex trading book-related requirements appear not to be justified by prudential considerations.

These legislative proposals will now be submitted to the European Parliament and to the Council for their consideration and adoption.

1.8 Professional standards for financial advisors

23 November 2016 - The Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, has introduced legislation into Parliament to mandate professional standards for financial advisers.

The Corporations Amendment (Professional Standards of Financial Advisers) Bill 2016 includes:

- compulsory education requirements for both new and existing financial advisers;
- supervision requirements for new advisers;
- a code of ethics for the industry;
- an exam that will represent a common benchmark across the industry; and
- an ongoing professional development component.

Currently, ASIC guidance sets out the minimum knowledge, skills and education standards for financial advisers. Both the Financial System Inquiry and the Parliamentary Joint Committee raised concerns with the current standards, and questioned whether they were appropriate to ensure that advisers were professionally competent.

The new professional standards regime will commence on 1 January 2019. From this date, new advisers entering the industry will be required to hold a relevant degree. Existing financial advisers will have access to transitional arrangements, allowing them two years, until 1 January 2021, to pass the exam, and five years, until 1 January 2024, to meet the education requirements. The transition period recognises that existing advisers may need to complete the education requirements on a part-time basis, while continuing to service their existing clients.

The government will establish an independent standards body, as a Commonwealth company, to administer the regime. From the date of establishment until the regime commences on 1 January 2019, the body will be responsible for developing and setting the industry exam, developing the code of ethics, and setting the education requirements, including working with education providers to establish appropriate courses. The body will develop the exam, the Code, and the standards in accordance with international best practice and will consult broadly with stakeholders throughout this process. The body will be funded, both initially and on an ongoing basis, by the industry.

1.9 European Commission proposes new approach to business insolvency

22 November 2016 - The European Commission has proposed new rules dealing with business insolvency.

The proposed Directive focuses on three key elements:

- common principles on the use of early restructuring frameworks, which will help companies continue their activity and preserve jobs;
- rules to allow entrepreneurs to benefit from a second chance, as they will be fully discharged of their debt after a maximum period of 3 years. Currently, half of Europeans say they would not start a business because of fear of failure; and

- targeted measures for Member States to increase the efficiency of insolvency, restructuring and discharge procedures. This will reduce the excessive length and costs of procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates of unpaid debts.

The new rules will observe the following key principle to ensure insolvency and restructuring frameworks are consistent and efficient throughout the EU:

- companies in financial difficulties, especially SMEs, will have access to early warning tools to detect a deteriorating business situation and ensure restructuring at an early stage;
- flexible preventive restructuring frameworks will simplify lengthy, complex and costly court proceedings. Where necessary, national courts must be involved to safeguard the interests of stakeholders;
- the debtor will benefit from a time-limited "breathing space" of a maximum of four months from enforcement action in order to facilitate negotiations and successful restructuring;
- dissenting minority creditors and shareholders will not be able to block restructuring plans but their legitimate interests will be safeguarded;
- new financing will be specifically protected increasing the chances of a successful restructuring;
- throughout the preventive restructuring procedures, workers will enjoy full labour law protection in accordance with the existing EU legislation; and
- training, specialisation of practitioners and courts, and the use of technology (e.g. online filing of claims, notifications to creditors) will improve the efficiency and length of insolvency, restructuring and second chance procedures.

Further details:

- Proposal;
- Q&A;
- EU Factsheet; and
- Country-specific factsheets.

1.10 Financial Stability Board publishes 2016 G-SIB and G-SII list

21 November 2016 - The Financial Stability Board (FSB), in consultation with the Basel Committee on Banking Supervision (BCBS) and national authorities, has published the 2016 list of global systemically important banks (G-SIBs) and global systemically important insurers (G-SIIs).

Global systemically important banks (G-SIBs)

The 2016 list comprises the same 30 banks as the 2015 list. G-SIBs are subject to:

- higher capital buffer requirements;
- Total Loss-Absorbing Capacity (TLAC) requirements;
- resolvability requirements: These include group-wide resolution planning and regular resolvability assessments; and
- higher supervisory expectations: These include supervisory expectations for risk management functions, risk data aggregation capabilities, risk governance and internal controls.

Global Systemically Important Insurers (G-SIIs)

The FSB, in consultation with the International Association of Insurance Supervisors (IAIS) and national authorities, has identified in 2016 nine insurers as G-SIIs as part of its annual identification process of global systemically important financial institutions (G-SIFIs).

G-SIIs will be subject to the following internationally agreed standards:

- Higher loss absorbency (HLA), the initial development of which was published by the IAIS in October 2015;
- Enhanced group-wide supervision, including for the group-wide supervisor to have direct powers over holding companies and to oversee the development and implementation of a Systemic Risk Management Plan and a Liquidity Management Plan; and
- Group-wide recovery and resolution planning and regular resolvability assessments.

View:

- 2016 list of global systemically important banks (G-SIBs); and
- 2016 list of global systemically important insurers (G-SIIs).

1.11 Financial Conduct Authority finds weak price competition in some areas of the asset management sector

18 November 2016 - The UK Financial Conduct Authority (FCA) has published the interim findings of its asset management market study, which suggests that there is weak price competition in a number of areas of the asset management industry.

The FCA launched the market study in November 2015 to assess whether competition is working effectively. It looked at whether institutional and retail investors get good value for money when purchasing asset management services.

The UK's asset management industry is the second largest in the world, managing almost £7 trillion of assets. Over three quarters of UK households with occupation or personal pensions use the services asset managers offer.

The FCA found that:

- there is limited price competition for actively managed funds, meaning that investors often pay high charges. On average, these costs are not justified by higher returns;
- there is stronger competition on price for passively managed funds, though the FCA did find some examples of poor value for money in this segment;
- fund objectives are not always clear, and performance is not always reported against an appropriate benchmark;
- despite a large number of firms operating in the market the asset management sector as a whole has enjoyed sustained, high profits over a number of years with significant price clustering; and
- investment consultants undertake valuable due diligence for pension funds but are not effective at identifying outperforming fund managers. There are also conflicts of interest in the investment consulting business model which require further scrutiny.

The FCA has proposed a significant package of remedies that seek to make competition work better in this market, and protect those least able to engage actively with their asset manager. These include:

- a strengthened duty on asset managers to act in the best interests of investors, including reforms to hold asset managers to account for how they deliver value for money;
- introducing an all-in fee so that investors in funds can easily see what is being taken from the fund;
- a number of measures aimed at helping retail investors identify which fund is right for them, such as requiring asset managers to be clear about the objectives of the fund, clarifying and strengthening the use of benchmarks and providing tools for investors to identify persistent underperformance;
- making it easier for retail investors to move into better value share classes;
- requiring clearer communication of fund charges and their impact at the point of sale and in ongoing communication to retail investors;
- requiring increased transparency and standardisation of costs and charges information for institutional investors;
- exploring the potential benefits of greater pooling of pension scheme assets; and
- requiring greater and clearer disclosure of fiduciary management fees and performance.

1.12 Financial Stability Board's 2017 workplan

17 November 2016 - The Financial Stability Board (FSB) has met to discuss current vulnerabilities ongoing policy work and its work plan for 2017. This work includes:

- Current market developments and vulnerabilities;
- Global systemically important financial institutions (G-SIFIs);
- Central counterparties: resilience, recovery and resolvability;Structural vulnerabilities from asset management activities;
- Misconduct in the financial sector;
- Task Force on Climate-related Financial Disclosures;
- Transforming shadow banking into resilient market-based finance; and
- Issues for authorities relating to fintech.

1.13 SEC approves plan to create consolidated audit trail

15 November 2016 - The US Securities and Exchange Commission has voted to approve a national market system (NMS) plan to create a single, comprehensive database known as the consolidated audit trail (CAT) that will enable regulators to more efficiently and thoroughly track all trading activity in the US equity and options markets.

The NMS plan details the methods by which SROs and broker-dealers will record and report information, including the identity of the customer, resulting in a range of data elements that together provide the complete lifecycle of all orders and transactions in the US equity and options markets. The NMS plan also sets forth how the data in the CAT will be maintained to ensure its accuracy, integrity and security.

View SEC Fact Sheet.

1.14 RBA research paper: Why do companies fail?

November 2016 - The Reserve Bank of Australia has published Research Discussion Paper (RDP 2016-09) Why Do Companies Fail?

The paper explores the determinants of corporate failure in Australia using a large panel of public and private non-financial companies. A novel finding is that corporate failure depends on "structural" company-level characteristics. For instance, public companies are more likely to fail than comparable private companies; perhaps because the greater separation of ownership and control within public companies allows their managers to take greater risks. Consistent with overseas research, the paper finds that cyclical company-specific factors are important determinants of failure; a corporation is more likely to fail if it has low liquidity, low profitability or high leverage. Cyclical and structural company-level characteristics are the key determinants of the relative risk of a company failing, while aggregate (macroeconomic) conditions appear to be an important determinant of annual changes in the rate of corporate failure.

2. Recent ASIC Developments

2.1 Report on relief applications

12 December 2016 - ASIC has released its latest report outlining decisions on relief applications.

Report 506 - Overview of decisions on relief applications (April to September 2016) (REP 506) notes that between 1 April 2016 and 30 September 2016, ASIC granted relief from provisions of the Corporations Act 2001 (Corporations Act) or the National Consumer Credit Protection Act 2009 (the National Credit Act) in relation to 602 applications.

REP 506 discusses various publications released by ASIC during the six months that may be relevant to prospective applicants for relief. It also summarises examples of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers under the Corporations Act and the licensing and responsible lending provisions of the National Credit Act. Further, the report highlights instances where ASIC has considered adopting a no-action position regarding specified non-compliance with statutory provisions.

Finally, the report includes an appendix detailing the publicly available individual relief instruments referred to in the report.

2.2 New instrument for non-monetary consideration managed investment schemes

8 December 2016 - Following public consultation, ASIC has released a new legislative instrument on interests not for money schemes, replacing three class orders on show schemes, interests not for money schemes and film investment schemes that were due to expire (sunset).

ASIC has replaced the following class orders with a new legislative instrument:

- *Class Order [CO 02/210] Interests in film and theatrical ventures*, which was due to sunset on 1 April 2017;
- *Class Order [CO 02/211] Managed investment schemes - interest not for money*, which was due to sunset on 1 April 2017; and
- *Class Order [CO 02/236] Film investment schemes*, which was due to sunset on 1 April 2017.

The relief provided under all three class orders has been combined into a single instrument. The relief provided under the class orders has been remade without any fundamental changes so that the effect of the relief provided by the class orders will be preserved without any disruption to those who rely on them. The class orders have been repealed.

ASIC has also updated *Regulatory Guide 80 - Managed investment schemes: Interests not for money* to incorporate *Regulatory Guide 19 - Film investment schemes* (RG 19), as well as reflecting the terms of the new legislative instrument. RG 19 will be revoked.

View

- ASIC Corporations (Managed Investment Schemes: Interests not for money) Instrument 2016/1107;
- ASIC Corporations (Repeal) Instrument 2016/1108;
- Feedback Report;
- CP 266; and
- RG 80.

2.3 Updated takeovers guidance on minimum bid price rule

7 December 2016 - ASIC has reissued its regulatory guide on takeover bids to incorporate updated guidance on the minimum bid price rule in s. 621(3) of the Corporations Act. The minimum bid price rule plays a key role in takeovers regulation by ensuring that shareholders have a reasonable and equal opportunity to participate in benefits arising from a takeover bid.

Regulatory Guide 9 also includes updated references to the new legislative instruments on takeovers which were released in December 2015 and other minor updates.

View Regulatory Guide 9.

2.4 Fourth licensing activity report

7 December 2016 - ASIC has published its fourth report on its approach to and assessment of licence applications.

Report 503 - Overview of licensing and professional registration applications: Jan to Jun 2016 (REP 503) sets out recent regulatory outcomes achieved by ASIC in relation to Australian financial services (AFS) applications, Australian credit licence applications, liquidator registration applications, company auditor and approved SMSF auditor registration applications.

For 1 January to 30 June 2016:

- ASIC assessed approximately 2,850 applications (52% higher than the previous six months), with 60% relating to a new licence application, 25% relating to variations to existing licence and the remaining 15% related to professional registration (liquidators and auditors);
- Of the total number of applications assessed, 67% of these related to an Australian financial services (AFS) licence and 18% related to an Australian credit licence;
- 41% of all applications assessed during this period were approved;
- 78% of those approved were in a form other than as requested by the applicant (with 76% of these relating to an AFS licence and 68% related to a credit licence);
- Nine AFS licences were suspended, 143 AFS licences were cancelled, three credit licenses were suspended and 153 credit licences were cancelled; and
- ASIC assessed 440 applications for professional registration as liquidators and auditors.

2.5 Consultation on repealing ASIC class order on FSG exemption for market-making services on a licensed market

5 December 2016 - ASIC has released a consultation paper proposing to repeal *Class Order [CO 03/578] Financial Services Guide exemption for market-making services on a licensed market*, due to expire (sunset) in 2017.

A reconsideration of the legal basis of [CO 03/578] determined that it was no longer necessary. Regardless of the existence of [CO 03/578], ASIC does not consider that market makers on licensed markets are required to provide an FSG.

Therefore, ASIC proposes to repeal this class order as it no longer serves a regulatory purpose.

Consultation Paper 275 Repealing ASIC class order on FSG exemption for market-making services on a licensed market: [CO 03/578] (CP 275) provides further details of the class order to be repealed and the rationale for repealing it. CP 275 invites specific feedback on the proposal to repeal the class order.

2.6 Extension of the transition period for superannuation trustees and responsible entities to comply with updated fee and cost disclosure requirements

29 November 2016 - ASIC has extended the transition period for trustees of superannuation funds and responsible entities of managed funds and other managed investment schemes (issuers) to comply with updated fee and cost disclosure requirements in relation to product disclosure statements (PDS).

The transition period will now end by 30 September 2017 for issuers that notify ASIC in writing by 31 January 2017 that they intend to take advantage of this extension in relation to a PDS, and provide ASIC, before 1 March 2017, information about the fees and costs that would be required to be included in this PDS had they complied with the updated fees and costs disclosure requirements.

Issuers that do not want to take of advantage of this extension will have to comply with the updated requirements by 1 February 2017. Any issuer that has already adopted the updated requirements will not be required to provide ASIC this information.

2.7 Consultation on remaking class orders on application form requirements

25 November 2016 - ASIC has released a consultation paper proposing to remake four class orders that are due to expire (sunset) in 2017 and to incorporate two related class orders into one new instrument.

The class orders proposed to be remade are:

- *Class Order [CO 02/260] Product Disclosure Statements: Application forms created by licensee*;
- *Class Order [CO 02/262] Applications to switch managed investments products*;

- *Class Order [CO 07/10] Technical disclosure relief for reconstructions and capital reductions (paragraphs 4 and 8)*; and
- *Class Order [CO 02/437] Eligible applications: Relief from s1016A for managed investment products*.

ASIC proposes to remake these class orders because they are operating effectively and efficiently and continue to form a necessary and useful part of the legislative framework. No substantive changes are proposed.

ASIC is also seeking feedback on proposals to incorporate *ASIC Corporations (Options: Bonus Issues) Instrument 2016/77* and *Class Order [CO 14/26] Personalised or Australian financial services licensee created application forms* into the new instrument.

Consultation Paper 274 Remaking ASIC class orders on application form requirements (CP 274) outlines the class orders proposed to be remade and consolidated into one new instrument and the rationale for remaking and consolidating them.

2.8 Consultation on repealing ASIC class orders about holding client assets

23 November 2016 - ASIC has released a consultation paper proposing to repeal three class orders due to expire (sunset) in 2017. These are:

- *Class Order [CO 03/1110] Prime brokerage: Relief from holding client property on trust*;
- *Class Order [CO 03/1111] Prime brokerage: Relief from holding scheme property separately*; and
- *Class Order [CO 03/1112] Relief from obligation to hold client money on trust*.

ASIC proposes to repeal these class orders as they no longer serve any regulatory purpose.

Consultation Paper: Repealing ASIC class orders on holding client assets (CP 273) outlines the class orders to be repealed and the rationale for repealing them. In short, the relief provided by the class orders is no longer necessary and, where relief may be required, it would be more appropriate to provide relief on a case-by-case basis. However, ASIC would welcome feedback in relation to this proposal, including whether repealing these class orders would itself impose a regulatory burden on businesses.

2.9 Relief for foreign financial service providers from Luxembourg

22 November 2016 - ASIC has extended its relief for foreign financial service providers (FFSPs) from the requirement to hold an Australian financial services (AFS) licence when providing financial services to Australian wholesale clients by Luxembourg fund managers.

The relief in ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109 applies to Luxembourg fund managers who are either:

- management companies, which can manage undertakings for collective investment in transferable securities relating to the undertaking for collective investment of Luxembourg (2010 Law) that come under Chapter 15 of the 2010 Law (Chapter 15 Management Company); or
- investment companies established under Part I of the 2010 Law that have designated themselves as "self-managed" (Self -Managed UCITS).

The relief applies until 28 September 2018. This period is consistent with the extension of relief ASIC gave to FFSPs in ASIC Corporations (Repeal and Transitional) Instrument 2016/396. It will allow ASIC to consider the policy settings for all FFSPs comprehensively.

2.10 Remake of "sunsetting" class orders on financial services disclosure

17 November 2016 - ASIC has remade three class orders relating to specific financial services disclosure requirements that are due to expire (sunset) in 2017.

Class Order [CO 02/1072] Product Disclosure Statements: Top-up relief for managed investment schemes, *Class Order [CO 03/237] Updated information in Product Disclosure Statements*, and C*lass Order [CO 03/1092] Further relief for joint Product Disclosure Statements* have been remade into:

- *ASIC Corporations (Top-up Product Disclosure Statements Relief) Instrument 2016/1054*;
- *ASIC Corporations (Updated Product Disclosure Statements) Instrument 2016/1055*; and
- *ASIC Corporations (Joint Product Disclosure Statements) Instrument 2016/1056*.

The class orders have been remade following a public consultation. *Consultation Paper 255 - Remaking ASIC class orders on financial services disclosure requirements* (CP 255), issued in March 2016, sought feedback on ASIC's proposals to continue the relief in [CO 02/1072], [CO 03/237], and [CO 03/1092] without substantive changes (refer: 16-086MR).

ASIC received one formal submission and two informal submissions to CP 255 in support of the proposals to continue providing the relief.

View

- ASIC Corporations (Top-up Product Disclosure Statements Relief) Instrument 2016/1054;
- ASIC Corporations (Updated Product Disclosure Statements) Instrument 2016/1055;
- ASIC Corporations (Joint Product Disclosure Statements) Instrument 2016/1056;
- ASIC Corporations (Repeal) Instrument 2016/1053; and
- CP 255; and
- Non-confidential submission to CP 255.

3. Recent ASX Developments

3.1 Amendment to bond trading venue list for ASX bond futures expiry

In accordance with *ASX 24 Operating Rules Procedures* 2.20.1, 2.21.1 and 2.36.1, ASX has updated the Bond Trading Venue list for the purpose of determining the 3, 10 and 20 Year bond futures expiry settlement prices.

The Notice is available on the ASX website.

3.2 ASX Equity FlexClear™ - OTC options wholesale client agreement

On Wednesday 23 November 2016 amendments to *ASX Clear Operating Rules and Procedures* were made introducing an OTC Options Wholesale Client Agreement.

The purpose of introducing an OTC Options Wholesale Client Agreement is to streamline paperwork requirements for institutional customers and to provide certainty regarding the terms applicable to transactions in OTC Options.

The Notice is available on the ASX website.

3.3 Cyber health check for ASX 100 companies

ASX and ASIC have invited the 100 largest ASX-listed companies to participate in the ASX 100 Cyber Health Check, a survey to benchmark the levels of cyber security awareness, capability and preparedness within Australian business. Participation by companies is voluntary.

Companies that participate will receive a confidential report benchmarking their own cyber security practices. A public report on the themes emerging from the data is expected to be released in March 2017.

The media release is available on the ASX website.

3.4 ASX and ASX 24 cancellation policy notification timing

In 2016 ASX consulted on the timing for Participants to request cancellations of ETO transactions under the cancellation regime prescribed in the *ASX Operating Rules*. As a result of the feedback received ASX proposes to increase the time to advise ASX by telephone of the initial cancellation request in ETOs from ten minutes to 30 minutes.

ASX is now seeking feedback from Participants on ASX's proposal to increase the time to advise ASX by telephone of the initial cancellation request from ten minutes to 30 minutes for all products.

The Consultation Paper is available on the ASX website.

3.5 Reports

On 5 December ASX released on the ASX Monthly Activity Report for November 2016.

4. Recent Takeovers Panel Developments

4.1 Panel publishes re-write of Guidance Note 12 - Frustrating Action

1 December 2016 - The Takeovers Panel has published a re-write of *Guidance Note 12 Frustrating action*.

The Panel issued a consultation paper in relation to the proposed re-write of Guidance Note 12 on 14 September 2016. The Panel received six submissions in response and has taken them into account and made further changes to the Guidance Note.

The final revised Guidance Note, and the Public Consultation Response Statement detailing the material comments received and the Panel's response, are available on the Panel's website.

4.2 Merlin Diamonds Limited - Declaration of unacceptable circumstances

30 November 2016 - The Panel has made a declaration of unacceptable circumstances following an application dated 31 October 2016 by Mr Thomas Reddicliffe in relation to the affairs of Merlin Diamonds Limited (see TP16/76).

Between 23 June 2016 and 12 July 2016, Merlin entered into secured note deeds with Regals Fund LP, Chabad Properties Pty Ltd and NRMZ Pty Ltd for the issue of notes and options.

At a general meeting of Merlin held on 6 September 2016, a resolution relating to the issue of convertible notes and options to Regals was defeated. Resolutions relating to the issue of other convertible notes and options, including to Chabad Properties and NRMZ, were passed.

The Panel considered that circumstances were unacceptable because (among other things):

- Mr Mordechai Gutnick and Mr Joseph Gutnick are associated;
- Mr Mordechai Gutnick and Regals are associated. Mr Mordechai Gutnick and Regals had an understanding that Regals would convert some of its notes and Mr Mordechai Gutnick would arrange for the new shares to be issued in time to be voted and Regals would vote the new shares in favour of the resolutions at Merlin's 6 September 2016 meeting; and
- the explanatory memorandum for Merlin's 6 September 2016 meeting wrongly disclosed, in relation to the convertible notes and options, that the relevant secured note deeds required that the conversion of the convertible notes could not result in a noteholder holding more than 19.9% of the issued shares in Merlin at the time of conversion, in the absence of shareholder approval. The secured note deeds did not contain this requirement.

The Panel considered the circumstances (including the matters summarised above) led to (i) the market not being efficient, competitive and informed (ii) the shareholders of Merlin not knowing the identity of persons who have acquired a substantial interest in Merlin or being provided with enough information to enable them to assess the merits of a proposal which would result in persons acquiring a substantial interest in Merlin and (iii) contraventions of chapters 6 and 6C of the Corporations Act 2001 (Cth).

The Panel will publish its reasons for the decision in due course on the Panel's website.

5. Recent Research Papers

5.1 Is the American public corporation in trouble?

The authors examine the current state of the American public corporation and how it has evolved over the last 40 years. There are fewer public corporations now than 40 years ago, but they are much older and larger. They invest differently, as the importance of R&D investments has grown relative to capital expenditures. On average, public firms have record high cash holdings and in most recent years they have more cash than long-term debt. They are less profitable than they used to be and profits are more concentrated, as the top 100 firms now account for most of the net income of American public firms. Accounting statements are less informative about the performance and the value of firms because firms increasingly invest in intangible assets that do not appear on their balance sheets. Firms' total payouts to shareholders as a percent of net income are at record levels, suggesting that firms either lack opportunities to invest or have poor incentives to invest. The credit crisis appears to leave few traces on the course of American public corporations.

Is the American Public Corporation in Trouble?

5.2 Stakeholder theory from a management perspective: Bridging the shareholder/stakeholder divide

The law literature posits a wide chasm between the standard doctrine of shareholder primacy/shareholder wealth maximisation and stakeholder theory. In so doing, the law literature largely ignores the contribution of those in the fields of management and business ethics, many of whom conceive of stakeholder theory as an essential part of the good management necessary to maximise shareholder wealth. This article reviews major contributions from the management literature and explains how they can help lawyers understand the proper role that consideration of stakeholder interests should play in management decision making. It argues that stakeholder theory as conceived by the management theorists broadly aligns with the legal concept of enlightened shareholder value and does not conflict with the shareholder wealth maximisation objective as currently understood under dominant paradigms of Anglo-Australian corporate law.

Stakeholder Theory from a Management Perspective: Bridging the Shareholder/Stakeholder Divide

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5.3 Life after a shareholder pay "strike": Consequences for ASX-listed firms

"Say on pay" legislation has been introduced in several countries but Australia's version, namely the "two-strikes" rule, is unique in that it empowers shareholders to vote on a board spill if the compensation report of a public company receives 25% or more dissenting votes for two consecutive years. The authors test the proposition that the "two strikes" rule has increased directors' accountability beyond executive pay because it has substantially lowered the cost to activists of organising sufficient votes to threaten managers with a board spill. Consistent with this expectation, they find Australian firms respond to negative say-on-pay votes by curbing excessive CEO pay, reducing the growth rate of pay and changing the pay mix. In addition, the results suggest that the market regards negative SOP votes as a value-destroying signal since there is a negative market reaction, lower valuation and long-run underperformance. The authors also find an increase in CEO turnover but directors do not seem to bear reputational costs through the loss of outside directorships. The findings provide important insights to investors, company directors and regulators.

Life after a Shareholder Pay 'Strike': Consequences for ASX-Listed Firms

6. Recent Corporate Law Decisions

6.1 EGM to remove directors allowed despite failure to comply with time constraints

(By Thomas Cavanough, Clayton Utz)

In the matter of Jervois Mining Ltd [2016] NSWSC 1650, Supreme Court of New South Wales, Lindsay J, 23 November 2016

(a) Summary

Jervois Mining Ltd was put on notice as to a possible resolution for the removal of its directors by the shareholders. When officially put on notice, the directors strategically ensured that the resolution for their removal could not be on the agenda at the next AGM due to time constraints under s. 249O(1) of the Corporations Act 2001 (Cth) (the Corporations Act). Section 249O(1) of the Corporations Act requires a members resolution to be considered at the next AGM more than two months after the notice was given.

Once the shareholders were notified that their resolution would not be on the AGM agenda they called for an Extraordinary General Meeting (EGM) to seek to pass the resolution. Jervois Mining Ltd argued that moving the resolution at the EGM would contravene the time requirements of s. 203D(2) of the Corporations Act which requires the company to be given at least 2 months' notice of a resolution to remove the directors. The Court held that the time requirements in ss. 203D(2) and 249O(1) of the Corporations Act are not absolute.

The shareholders were forced into contravention by the directors calculated selection of the next AGM date. As a result of the directors conduct, the Court ordered relief under s. 1322(4) of the Corporations Act allowing for the Notice of Extraordinary General Meeting to be valid and dispensing with the relevant time constraints. Section 1322(4) of the Corporations Act allows the Court to validate a procedural irregularity under the Corporations Act.

(b) Facts

Jervois Mining Ltd was put on notice in April 2016 about a potential motion for the removal of its directors. The dissident shareholders officially gave notice on 29 September 2016 to Jervois Mining Ltd of their intention to move a resolution for the removal of the three directors at the next AGM. Subsequently, Jervois Mining Ltd gave notice to the ASX and the dissident shareholders that the AGM would be held on 29 November 2016.

By choosing 29 November 2016 the resolution would not be heard at the AGM as the necessary two month time requirement under s. 249O(1) of the Corporations Act would not have been satisfied. Section 249O(1) of the Corporations Act requires a company to consider a resolution proposed by the members, at the next general meeting occurring more than two months after the notice was given. If the AGM was scheduled for 30 November 2016 the resolution would have been moved.

After receiving notice that the resolution would not be tabled at the AGM, the dissident shareholders circulated a letter dated 19 October 2016 containing a Notice of Extraordinary General Meeting called originally for 25 October 2016 and subsequently extended to 24 November 2016. The dissident shareholders proposed to move the resolution to remove the directors at the EGM. If this were to occur the necessary 2 month time requirement under s. 203D(2) of the Corporations Act would not have been satisfied. Section 203D(2) of the Corporations Act requires notice of an intention to move a resolution for the removal of directors to be given at least two months before the meeting is to be held.

The issues for the Court were whether:

- The time requirement under s. 203D(2) of the Corporations Act could be dispensed with, allowing for the resolution to be considered at the EGM; and
- Who should be appointed chairman of the EGM.

(c) Decision

(i) Dispensing with time requirements

His Honour stated that the time requirement in s. 203D(2) of the Corporations Act can be construed as providing either a form of procedural fairness to directors or providing a means of facilitating company affairs in an orderly manner. Both of those interpretations were taken into consideration when ordering relief under s. 1322(4) of the Corporations Act. Section 1322(4) of the Corporations Act allows the Court to validate an irregularity despite a contravention of the Corporations Act. His Honour rejected the defendants' submission that s. 203D(2) was outside the scope of s. 1322(4) of the Corporations Act.

It was stated that the failure by the dissident shareholders to give the Notice of Meeting in compliance with the time requirements was a result of the directors calculated decision making. By strategically deciding to hold the AGM on 29 November 2016 the shareholders were forced into contravention.

The Court held that the time requirements in ss. 203D(2) and 249O(1) of the Corporations Act are not in all the circumstances absolute. When ordering relief his Honour was satisfied that the shareholders had acted honestly and that a declaration to the effect of making the Notice of Extraordinary General Meeting valid, despite non-compliance with the time requirement, was just and equitable.

(ii) Appointment of the chairman

The defendants' contention that they should elect the chairman of the EGM pursuant to a clause in their company constitution was rejected by the Court. An independent chairman was appointed. An independent chairman would promote the best interests of the members and efficiently ascertain the will of the membership by minimising any procedural risks associated with the directors appointing a chairman.

6.2 Considerations in matters of winding up

(By Dea Fairbairn, MinterEllison)

In the matter of Tanamerah Estates Pty Ltd [2016] NSWSC 1644, Supreme Court of New South Wales, Black J, 22 November 2016

(a) Summary

This case concerned an application by Tibra Capital Pty Limited (Tibra) for the winding up of Tanamerah Estates Pty Limited (Tanamerah). The Court considered that some of the issues in the present case provide an example of the way in which the underlying objective of Part 5.4 of the Corporations Act 2001 (Cth) (the Corporations Act), about disputes in relation to the existence or amount of a debt being dealt with quickly and in a way that would not impede the resolution of an application for the winding up of a company in insolvency, could be undermined by technicalities seeking to set aside creditor's statutory demands and winding up applications.

(b) Facts

Tanamerah was a former shareholder of Tibra. On 9 June 2011, pursuant to a shareholders' agreement, Tibra bought back the 231,830 shares previously held by Tanamerah. Tanamerah claimed that Tibra did not pay the market value of the shares under the shareholders' agreement or in accordance with representations made by Tibra and consequently owed Tanamerah $556,392.

On 29 August 2012, Tanamerah commenced proceedings against Tibra (First Proceedings). A director of Tanamerah, Mr Tydeman, sought to represent Tanamerah but leave to do so was declined. The First Proceedings were stayed and a costs order was made in Tibra's favour since Tanamerah had refused to engage legal representation in those proceedings. Tanamerah then made an application for leave to appeal the judgment which was dismissed by the Court of Appeal, although the orders made at first instance were varied. Tibra's costs of several proceedings were assessed as totalling $112,618.60. Tibra subsequently issued a creditor's statutory demand dated 22 May 2015 (Statutory Demand) in relation to the judgment debts.

On 15 June 2015, Tanamerah commenced proceedings seeking to set aside the Statutory Demand (Statutory Demand Proceedings). Mr Tydeman again sought to carry on the Statutory Demand Proceedings on Tanamerah's behalf. On 1 October 2015, Tibra filed a motion seeking that the proceedings be stayed for a period of time to allow a legal representative to enter an appearance on behalf of Tanamerah, and if a legal representative did not do so, an order that the proceedings be dismissed. On 12 October 2015, Black J heard the motion. Mr Tydeman was invited to seek leave to represent Tanamerah although he declined to do so, contending he had a right to represent Tanamerah. In his judgment, Black J noted that Mr Tydeman had refused the invitation to seek leave and noted the difficulties of allowing lay people to deal with applications seeking to set aside a creditor's statutory demand. Black J made orders staying the proceedings until 16 November 2016 to allow Tanamerah to seek legal representation and relisted the matter with a view to determining the status of the proceedings and whether they should be dismissed (if no legal representation had been obtained). On 9 November 2015, Tanamerah commenced proceedings seeking to set aside Black J's judgment.

On 16 November 2015, when the matter returned before Black J, Tanamerah had not obtained legal representation. Black J made orders directing Tanamerah to file and serve any Notice of Appearance by a legal representative by 4.00pm that day and provided that if no such Notice of Appearance was received, orders would be made dismissing the proceedings with costs, and staying that order for 21 days to allow Tanamerah to bring an application for leave to appeal. Tanamerah did not file and serve a Notice of Appearance by the requisite time and so on 18 November 2015, Black J made the foreshadowed orders with the Stay Order effective to 9 December 2015. On 25 November 2015, Tanamerah filed a motion in the Court of Appeal seeking leave to appeal the decision and to stay the decision pending determination of the appeal. The Court of Appeal allowed Tanamerah to amend its existing application for leave to appeal to extend it to both of Black J's decisions but declined to extend the stay which lapsed on 9 December 2015 in accordance with its terms. Tanamerah brought further applications in the Court of Appeal for special leave to appeal to the High Court, which were unsuccessful.

On 11 March 2016, Tibra made an application seeking an order for the winding up of Tanamerah. The application was filed outside the three month period in which a presumption of insolvency is available arising from noncompliance with a creditor's statutory demand.

(i) Whether a presumption of insolvency is available

Tibra sought to rely on the presumption of insolvency under s. 459C(2)(a) of the Corporations Act from Tanamerah's failure to comply with the Statutory Demand. Black J noted, however, that s. 459C(2)(a) only applies where the creditor commences winding up proceedings within 3 months of the date by which the debtor failed to comply with the creditor's statutory demand. Based on when the proceedings were brought, the presumption of insolvency is only available if it arose on or after 11 December 2015. The date in which Tanamerah failed to comply with the creditor's statutory demand and the presumption of insolvency is determined under s. 459F of the Corporations Act.

In the present case, the period for compliance with the Statutory Demand is seven days after the application was "finally determined or otherwise disposed of". If Tanamerah's application to set aside the Statutory Demand was "finally determined or otherwise disposed of" on 18 November 2015 when the orders dismissing the proceedings were made but stayed then Tanamerah did not comply with the demand on 26 November 2015, a presumption of insolvency arose on that date and that presumption of insolvency is not available to Tibra now since the present proceedings were not commenced within the 3 month period, being by 26 February 2016. However, if Tanamerah's application to set aside the Statutory Demand was not "finally determined or otherwise disposed of" until 9 December

2015, when the stay that Black J had ordered lapsed, then Tanamerah did not comply with the Statutory Demand on 17 December 2015, a presumption of insolvency arose on that date and that presumption is available to Tibra, since that presumption arose in the three months prior to the commencement of the proceedings on 11 March 2016.

Tibra argued that the stay that was ordered on 18 November 2015 deprived the order dismissing the proceedings of all legal effect and operation from that date and therefore the matter was not "finally determined or otherwise disposed of" until the stay lapsed. Tibra relied on case law that has treated the legal effect of a stay as being to suspend the operation and legal effect of a judgment and consequential orders as the basis for the argument that proceedings are not "finally determined" in circumstances where a stay has been granted. Tanamerah argued that Tibra's observation does not go that far and leaves the question open to determination.

Tanamerah submitted that the language of s. 459F of the Corporations Act supports the conclusion that the application to set aside the Statutory Demand was finally determined when the order was made dismissing the proceedings even though the order was stayed.

Black J would have preferred the view that a stay had the effect of depriving the order dismissing the proceedings of legal effect and that the matter was not finally determined until that order had legal effect but for existing legal authority on this issue, as had been presented by Tanamerah (see *Re Aquaqueen International Pty Ltd [2015] NSWSC 212 and Penson v Titan National Pty Ltd [2015] NSWCA 165*). Black J was therefore not satisfied that the stay order on 18 November 2015 had the effect of depriving the order dismissing the proceedings to set aside the Statutory Demand made on that date of legal effect. He determined that the presumption of insolvency was not available to Tibra where the application for the winding up of Tanamerah was not brought within the three month period specified in s. 459C(2)(a) of the Corporations Act.

(ii) Whether Tanamerah is insolvent in fact

The question of Tanamerah's solvency is to be determined by reference to s. 95A of the Corporations Act which provides that a company is solvent only if it is able to pay all its debts as and when they become due and payable.

Tibra made the contention that Tanamerah is insolvent in fact, relying on evidence as to Tanamerah's lack of assets and income, in order to support an inference that it cannot meet the judgment debts. In addition, Tibra relied on and submitted, that a proposed Deed of Credit Facility to be provided by a Ms Tydeman would not establish solvency, where it substitutes loan funds available for a short term or payable on demand (being a form of an immediate or near immediate obligation) for an existing immediate obligation.

Black J considered that the present case is one where Tanamerah does not have the capacity to meet the judgment debts and is therefore unable to meet its debts as and when they fall due. Furthermore, the formal requirements for a winding up had been satisfied.

(iii) Whether a winding up order should be withheld on discretionary grounds

Tanamerah contended that in the present case there is a reason for the court to exercise its discretion under s. 467(1)(a) of the Corporations Act not to make a winding up order. Black J rejected Tanamerah's submission that "it could well be solvent", in circumstances where he had determined that, as a matter of fact, Tanamerah is insolvent. Black J declined to exercise the discretion not to wind the company up.

(c) Decision

The Court ordered that Tanamerah be wound up in insolvency and a liquidator appointed. Tibra's costs of the proceedings were to be costs in the winding up.

6.3 Consideration of commercial morality and the reason for voluntary liquidation when determining whether to terminate a winding up process

(By Alex Moores and Wells Cho, DLA Piper)

In the matter of Classic Corporation Pty Ltd [2016] NSWSC 1627, Supreme Court of New South Wales, Brereton J, 18 November 2016

(a) Summary

Classic Corporation Pty Ltd (Classic) resolved that it be wound up in February 2015, at which time Mr Solomon and Mr Tayeh were appointed liquidators. The main shareholders were the fourth and fifth defendants Cinzia Hanna and her sister-in-law Lillian Hanna. Classic did not actively trade and its sole asset was industrial land at Greenacre and its alleged liabilities were to Cinzia and Lillian of $1,763,591.00 purported to be secured by mortgage on the property. Liquidators sought to have the Greenacre property auctioned off in April 2015 and have the proceeds realised and distributed to repay its secured creditors Cinzia and Lillian.

The plaintiffs, IJG Group 2 Pty Ltd (IJG) and Architectural Aluminium Systems Pty Ltd (AAS), claimed to have rights in respect to the Greenacre property through an option agreement to acquire it for a price of $1.3 million, for which they had paid a $130,000 option fee that effectively converted to a deposit. Classic disputed the liability claims and sought to have the land developed before its sale which required the winding up to be terminated. Agreement was reached in relation to settlement following mediation of the parties on 27 July 2016. The settlement permitted Classic to terminate the winding up and to develop the land whilst allowing the plaintiffs to subscribe for $100,000 in share capital to protect unsecured creditors and with intention to turn their loan accounts into equity.

The Court held that there was no longer any conditions requiring the company to go into liquidation provided that the plaintiffs' subscription for capital was in place to protect unsecured creditors. Accordingly, the Court terminated the winding up of Classic, and required a meeting of the shareholders of Classic be convened to elect a director or directors to take office upon termination of winding up.

(b) Facts

Classic resolved to be wound up on 19 February 2015 and appointed Mr Solomon and Mr Tayeh as its joint and several liquidators in the process. Cinzia Hanna and Lillian Hanna were both directors of Classic until 7 October 2014 when they were replaced by John Richard Bates. Cinzia and Lillian Hanna claimed that their interest in Classic was based on funds advanced against a secured mortgage on the Greenacre property of $1,763,591.00 and a further $841,500 debt owed to Hannas Contracting Services Pty Ltd, which was a related corporation.

The option agreement that the plaintiff alleged existed between Classic, IJG and AAS, and being the sole alleged source of the liability owing to the plaintiffs, was refuted by Classic which contended that the ability to exercise the option had lapsed.

During Classic's liquidation, the Greenacre property was listed for auction in April 2015 by the appointed liquidators, but upon threat of legal proceedings and injunction by the plaintiffs, the sale was postponed until the matter of the option agreement was addressed and disclaimed in May 2015. The plaintiffs proceeded on their cause of action seeking to have the disclaimer set aside, specific performance granted in relation to the option agreement, or in the alternative that the $130,000 fee initially paid be refunded. Furthermore, they disputed Cinzia and Lillian Hanna's assertion to having priority over the Greenacre property by questioning the validity of the mortgage and claiming that the advancement of funds to Classic had not actually occurred.

On 27 July 2016, after several interlocutory disputes, the Court referred the matter to mediation and it was ultimately settled by an agreement which included terms that Cinzia and Lillian Hanna may apply to have Classic's winding up terminated pursuant to s. 482 of the Corporations Act 2001 (Cth) (the Act) alongside having the Greenacre property developed before sale. The Court examined the application and mechanics of s. 482 which relates to the Court's power to stay or terminate a winding up. The Court determined that s. 482 "does not apply of its own force and effect to a voluntary winding up, but is made applicable pursuant to Corporations Act, s. 511(1)(b), which empowers the court to exercise, in a voluntary winding up, any power which it could exercise if the company was being wound up by a court order".

As Classic did not trade and had no capacity to commence trading in order to generate a source of income to fund the expected substantial legal costs against the plaintiff's threat of litigation, the company went into liquidation after consulting lawyers and an insolvency practitioner. The liquidation process was seen as a method of enabling Classic to sell off the Greenacre property and have the proceeds realised and distributed to pay off secured creditors first. The Greenacre property has been valued at $2.36 million which was sufficient to cover the secured liability of Cinzia and Lillian Hanna, and they agreed to forgo their debt to anything extending beyond the value of the security property.

IJG and AAS agreed that they would subscribe for $100,000.00 in share capital to allocate to a fund, which Classic could utilise to meet liabilities as they were incurred. If funds are raised for development of the Greenacre property IJG and AAS would have the option of either converting the loans to equity or postponing their security to that required by the financier. This was deemed sufficient protection by the Court for unsecured creditors whilst financiers would have adequate terms in place for their protection. There was no longer any question of the commercial morality of continuing the liquidation of Classic and the Court terminated the winding up on 25 November 2016 pursuant to ss. 482(1) and 511(1)(b) of the Act.

(c) Decision

In the substantive proceedings the matter had been referred to mediation by the Court which resulted in a settlement agreement between the parties on 27 July 2016; whereby Cinzia and Lillian Hanna were allowed to apply for the termination of Classic's winding up and permission was given to the shareholders to develop the Greenacre property before it is sold. However, an interlocutory process to stay the winding up had to be made pursuant to s. 511(1)(b) of the Act.

In determining the application for staying the winding up, the Court considered the following two factors that were explored in *Re Glass Recycling Pty Ltd [2014] NSWSC 439* that should ordinarily be required to satisfy the court that a winding up should be stayed or terminated:

- whether the court can be satisfied that the circumstances which warranted or required the company to be wound up no longer exist, and this will ultimately require satisfaction that the company can or is likely to remain solvent following a stay or termination of the winding up; and
- whether the company is confident that operation and management can be returned to responsible directors, which will commonly include analysis of the commercial morality of such an action.

The concern of commercial morality arose in this case because the original reason Classic went into liquidation was due to the threat of litigation by the plaintiffs to enforce their claim. Regardless of Classic's trading status, it did not incur debts as such, and did not contravene s. 588G of the Act relating to a director's duty to prevent insolvent trading.

A "Solvency Report" prepared by the liquidators' firm dated 28 September 2016 also confirmed that there was no obvious concern regarding Classic's solvency.

However, the Court expressed concern with a company which controlled zero assets, had a property encumbered by a mortgage by Cinzia and Lillian Hanna to its full value, and without any ability to draw on other assets if the company incurred a debt. In this eventuality it would be deemed insolvent. The directors had deliberately placed the company into liquidation to seek protection from a contentious litigation claim by the plaintiffs and the Court was not prepared to grant termination of the winding up under s. 482(1) merely because the threat had passed.

However, since the plaintiffs had subscribed for $100,000.00 in share capital as a source of funding by which Classic could meet its liabilities as they were incurred, it was considered a sufficient source of protection for unsecured creditors and financiers. Practically, if the liquidation was terminated there was the potential benefit of the company developing the property before sale and having the interests of potential unsecured creditors adequately protected.

While terminating the winding up pursuant to ss. 482(1) and 511(1)(b) of the Act, the Court gave further instruction pursuant to s. 482(3) that a meeting of company members be convened for 24 November 2016 to elect a director or directors.

6.4 Transfer of assets without consideration or at an undervalued sale price, and for the benefit of related parties, found to be breach of directors' duties

(By Alex Moores and Akshay Rao, DLA Piper)

Brentwood Village Limited (in liq) v Terrigal Grosvenor Lodge Pty Limited (No 4) [2016] FCA 1359, Federal Court of Australia, Markovic J, 18 November 2016

(a) Summary

At the centre of the dispute were two transactions effected in 2012 by Mr John Klumper, director of Brentwood Village Limited (in Liquidation) (Brentwood). First, the transfer of Veronica Nursing Home to Terrigal Grosvenor Lodge Pty Limited (TGL) without payment of any consideration to Brentwood; and second, the transfer of a parcel of land in Gosford, New South Wales (HPD Property) to ACN 153 892 436 Pty Limited (ACN) for a sale price of $2.5 million where the HPD Property's true market value was $2.75 million.

The Federal Court of Australia (the Court) held that each transfer independently contravened ss. 181(1) and 182(1) of the Corporations Act 2001 (Cth) (the Corporations Act) relating to the good faith and use of position obligations imposed on directors. The Court ordered that Mr Klumper compensate Brentwood in the amounts of $14.66 million and $250,000, in addition to paying pre-judgment interest and the plaintiffs' costs of the proceedings.

(b) Facts

(i) Veronica Nursing Home Transaction

In 2009, the Veronica Nursing Home was sold. The monies used for the acquisition were provided by TGL via a loan from the National Australia Bank, but were then applied in reduction of a prior loan from Brentwood to TGL and Brentwood claimed a GST tax credit on the transaction. The court was satisfied that the flow of funds indicated Brentwood had in fact acquired the Veronica Nursing Home. In October 2011, the ATO finalised its risk review of Mr Klumper and his associated entities, subsequently issuing amended assessments to Brentwood for the financial years ending 30 June 2000, 2001, 2002, 2003 and 2007. The tax account statement for Brentwood issued as of 30 June 2013 showed a $34,554,859.84 debt to the ATO for adjustment, penalties and interest.

Mr Klumper engaged in discussions with his accountants about the consequences of the ATO's investigation and the possibility of placing Brentwood into external administration. In June 2012, Brentwood arranged the sale of the land on which Veronica Nursing Home was located to TGL, a company controlled by Mr Klumper's children. The Court found no evidence that TGL paid any money to Brentwood for the sale despite the consideration of $3 million being contemplated by the contract of sale. The stamp duty was not paid until approximately six months later and the transfer was not lodged for a further nine months. Over this period Brentwood and TGL were engaged in conversations with accountants regarding the desirability of a restructure to create new holding entities for the property assets.

(ii) HPD Property Transaction

On 28 June 2012, Brentwood entered into a contract for the sale of the HPD Property to ACN, a company controlled by Mr Klumper's son. The sale price in the contract was $2.5 million, however a contemporaneous valuation in June 2012 valued the HPD Property at $2.75 million (including GST). Similar to the Veronica Nursing Home, the stamp duty was not paid on the sale for over six months and the lodgement of transfer did not occur for a further six months.

As noted above, the sale occurred in the midst of ongoing discussions between Mr Klumper and his accountants on the financial status of Brentwood. In October 2012, ACN transferred a sum of $2.125 million to Brentwood for the acquisition of the HPD Property, with the balance of the purchase price tendered to the liquidator in November 2014.

(c) Decision

(i) Applying legal principles

The plaintiffs, being Brentwood operating in liquidation and Brentwood's liquidator, alleged that Mr Klumper breached ss. 181(1) and 182(1) of the Act. Section 181(1) relates to the duties of directors and officers to exercise their powers in good faith in the best interests of the corporation, and for a proper purpose. Section 182(1) relates to the requirement that directors, officers and employees must not improperly use their positions to gain advantage for themselves or others, and must not cause detriment to the corporation from the improper use of their positions. These sections are civil penalty provisions under the Act.

In applying s. 181, the Court cited *Owen J in The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) [2008] WASC 239* in which his Honour outlined the general legal principle that "directors must give real and actual consideration to the interests of the company. The degree of consideration that must be given will depend on the individual circumstances. But the consideration must be more than a mere token: it must actually occur". In addition, the Court cited the following principles from *Permanent Building Society v Wheeler (1994) 14 ACSR 109* in further defining the application of duties under the Act:

- that directors' duties may be exercised "only for the purpose for which they were conferred and not for any collateral or improper purpose";
- that the issue for the court in that case was not whether a management decision was good or bad but "whether the directors acted in breach of their fiduciary duties";
- that "honest or altruistic behaviour by directors will not prevent a finding of improper conduct on their part if that conduct was carried out for an improper or collateral purpose"; and
- "whether acts were performed in good faith and in the interest of the company is to be objectively determined" but statements by directors about their subjective intentions or beliefs will be relevant to that inquiry.

In relation to s. 182, the Court cited *Doyle v Australian Securities and Investments Commission [2005] HCA 78*, where it was held that impropriety would be found where there was "a breach of the standards of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of his position as director, and the circumstances of the case, including the commercial context".

The Court also cited Santow J's analysis in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171. In that case, his Honour found that s. 182 would be breached where a director causes a "company to enter into an agreement which confers unreasonable personal benefits on a director"; that it does not matter whether the advantage for that director or someone else was actually achieved; and that impropriety is "to be determined objectively and does not depend upon the director's consciousness of impropriety".

(ii) Application to the Veronica Nursing Home Transaction

The Court found that a director cannot be said to have acted in good faith if they transfer a significant asset of the company without consideration. Further, rather than giving consideration to the interests of Brentwood, the Court found that Mr Klumper acted for a collateral purpose in light of imminent or actual recovery action by the ATO. Finally, the Court held that Mr Klumper acted improperly by effecting a transfer that was clearly for the advantage of a company controlled by Mr Klumper's family and to Brentwood's disadvantage.

(iii) Application to the HPD Property Transaction

The Court found that Mr Klumper gave no consideration to the interests of Brentwood and improperly used his position in his dealing with the HPD Property. In reaching that decision, the Court relied on the fact Mr Klumper sold the HPD Property to a party related to and owned by his son, at a time when Mr Klumper knew of Brentwood's exposure to tax liabilities. The conversations with accountants about a potential corporate restructure were evidence that there were factors beyond benefit to Brentwood that were affecting the exercise of Mr Klumper's duties. Further, the Court found that Mr Klumper had made no attempts to sell the property and therefore had received no offers which he could have otherwise used to assess whether it was reasonable to sell the property at a discount.

6.5 Statutory demand and offsetting claims

(By Manisha Pannu, MinterEllison)

Dream Money Pty Ltd v Bernhard [2016] WASCA 193, Court of Appeal, Supreme Court of Western Australia, Newnes, Murphy and Mitchell JJA J, 16 November 2016

(a) Summary

This case concerned an application to vary a statutory demand on the basis of an offsetting claim under s. 459H of the Corporations Act 2001 (Cth) (Corporations Act) and the sufficiency of the evidence from which the offsetting claim could be quantified.

(b) Facts

From late 2002 until August 2012, Lester Roy Bernhard and Pamela Kathleen Bernhard (together, the Bernhards) conducted a real estate business via a company, Dream Team Investments Pty Ltd (DTI). The business' main asset was its rent roll.

Mr Paul Ellis became a director and shareholder of DTI in 2010.

In July 2012, DTI agreed to sell the rent roll to Dream Money Pty Ltd (DM), a company controlled by Mr Ellis and interests associated with him for $650,000. Pursuant to a vendor finance agreement, DM borrowed $250,000 from the

Bernhards to finance the purchase of the rent roll. The vendor finance agreement provided for monthly repayments of $4,200 over five years and personal guarantees from Mr Ellis and Mr Graham Files.

(i) Prior proceedings

DM defaulted on the repayments and the Bernhards commenced proceedings in the District Court against Mr Ellis, Mr Files and DM, claiming the sum of $245,800 (being the principal amount outstanding under the vendor finance agreement, interest and indemnity costs).

Mr Files did not appear at trial and a default judgment was entered against him for $254,399.10 plus interest at 6% per annum from 3 February 2016.

DM and Mr Ellis did not dispute that amounts remain unpaid under the vendor finance agreement. However, they counterclaimed damages of $116,652 for misleading and deceptive conduct in relation to the value of the rent roll. In the District Court proceedings, judgment was entered in favour of the Bernhards for their claim in debt in the amount of $254,399.10 and in favour of DM for their counterclaim in the amount of $66,894. Orders were also made that:

- DM pay interest at the rate of 6% per annum on the sum of $187,505.10 from 3 February 2016 (being the judgment amount of $254,399.10 reduced by the counterclaim amount of $66,894);
- Mr Ellis and DM pay the costs of the Bernhards' claim on an indemnity basis, to be taxed if not agreed;
- the Bernhards pay 85% of Mr Ellis' and DM's costs of the counterclaim, to be taxed if not agreed; and
- the taxing officer set-off the costs allowed on taxation to each party.

On 14 May 2016, the Bernhards served a statutory demand on DM for the amount of $187,505.10 plus interest at 6% per annum. DM applied to have the statutory demand set aside or varied on the ground that DM had an offsetting claim against the Bernhards, being the costs of the counterclaim awarded to DM in the District Court proceedings. Master Sanderson found that the offsetting claim had not been quantified and varied the statutory demand by reducing it by the nominal sum of $1.00.

At issue on appeal was whether Master Sanderson erred in finding that there was no evidence from which the offsetting claim could be quantified.

(ii) Law

A company may apply for an order setting aside a statutory demand served on the company within 21 days after the demand is served (see s. 459G of the Corporations Act). The application may be made on the grounds that the company has an offsetting claim (see s. 459H(1) of the Corporations Act). An "offsetting claim" means "a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates)" (see s. 459H(5) of the Corporations Act).

(c) Decision

(i) Majority

Newnes and Murphy JJA found that Master Sanderson erred in concluding that there was no evidence from which the quantum of the offsetting claim could be determined. In coming to this conclusion, Newnes and Murphy JJA relied on a number of cases that discussed principles on offsetting claims and their quantification. These principles can be summarised as below:

- an order for costs can be an offsetting claim even though the costs have not been taxed (see *G S Technology Pty Ltd v GSA Industries (Aust) Pty Ltd [2007] FCA 1895*);
- a claim for an unliquidated sum can be an offsetting claim but it must be capable of being quantified in monetary terms (see *Diploma Construction (WA) Pty Ltd v KPA Architects Pty Ltd [2014] WASCA 91 [78]*); and
- although precise quantification of an offsetting claim is not necessary, there must be evidence from which a court can make an estimate of the amount of the claim (see for example *Royal Premier Pty Ltd v Taleski [2001] WASCA 48 [57]*).

Newnes and Murphy JJA found that the affidavit of the Bernhards' solicitor that outlined "the maximum amount that would be allowed on taxation" for DM's costs of the counterclaim which was calculated at $97,845 was sufficient evidence from which a court could estimate the amount of the offsetting claim. Applying the reduction of 85% to the amount of $97,845 in accordance with the orders made in the District Court proceedings, Newnes and Murphy JJA found that the resulting offsetting claim would be $83,168.25.

However, counsel for the Bernhards submitted that in calculating the offsetting claim, it was necessary to factor in the taxed costs of the Bernhards' claim that they were entitled to receive. This argument was advanced on the basis of the order made in the District Court proceedings that "the taxing officer is to set off the costs allowed on taxation to each party".

Newnes and Murphy JJA accepted this submission. As the order in favour of the Bernhards was made on an indemnity basis, "the party entitled to costs cannot recover more than they are legally liable to pay their solicitors". Newnes and Murphy JJA considered that without a valid cost agreement in place, the liability would be limited to costs under the relevant scale of costs. Having regard to the costs that would be payable under the relevant costs scale, the evidence as a whole and the fact that the Bernhards' claim was a simple claim in debt and the only substantive issue was DM's counterclaim; Newnes and Murphy JJA estimated that the taxed costs the Bernhards were entitled to receive, on an indemnity basis, were

$15,000. Applying this amount to DM's offsetting claim of $83,168.25, the resulting offsetting claim would be reduced to $68,168.25.

The appeal was allowed. The court set aside the order of Master Sanderson varying the statutory demand by $1.00 and varied the amount of the statutory demand to $119,336.85 (being the initial amount of $187,505.10 less the offsetting claim of $68,168,25) plus interest at the rate of 6% per annum from 3 February 2016.

(ii) Dissent

Mitchell JA dissented on the grounds that DM did not produce sufficient evidence to enable a court to make a reasonable estimate of the amount of the offsetting claim. In coming to this conclusion, Mitchell JA found that that the affidavit of Bernhards' solicitor did not contain a quantification of DM's claim but merely an analysis of "the maximum amount that might be claimable" by DM under the relevant costs scales.

6.6 Case for inspection v breach of the law: s. 247A of the Corporations Act 2001

(By Simon M Parmeter, Ashurst)

Coates v Classic Minerals Ltd [2016] WASC 371, Supreme Court of Western Australia, Acting Master Strk, 16 November 2016

(a) Summary

This case concerned an application by Sheldon Coates (the Plaintiff) - a shareholder in the defendant company, Classic Minerals Ltd (Classic Minerals) - to the Western Australia Supreme Court under s. 247A, Corporations Act 2001 (Cth) (Corporations Act), to inspect the books of Classic Minerals. Section 247A(1) stipulates that the Court has the discretion to grant an order to a member of a company to inspect the company's books if "it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose". The Court set out the principles which govern section 247A applications by applying *Mesa Minerals Ltd v Mighty River International [2016] FCAFC 16* to the facts of the case. The Court concluded that the statutory criteria had been satisfied and granted an order under s. 247A in favour of the Plaintiff to inspect the books of Classic Minerals Ltd.

(b) Facts

Classic Minerals is a minerals exploration company based in Western Australia and incorporated on 1 May 2006. The Plaintiff's relationship with Classic Minerals has two aspects. First, as a geologist with extensive experience, Mr Coates provided consulting services to Classic Minerals from November 2012 to March 2015, by which time the relationship between the two parties had deteriorated. Second, and more significantly, Mr Coates has a shareholding in Classic Minerals - in his own right he holds 2,675,000 shares, and the Sheldon Coates Superannuation Fund, of which he is co-trustee, holds 16,875,000 shares (which constitutes a 5.49% stake).

Classic Minerals was listed on the ASX on 22 May 2013. Following this, the board of Classic Minerals entered into a number of transactions which the Plaintiff took issue with. It is not necessary to detail every transaction entered into by the Defendant's board that Mr Coates is concerned with, instead the key transactions will be summarised in order to set out the facts that influenced the Plaintiff to make an application under s. 247A. These transactions can be placed into three groups as follows:

- related party transactions which Mr Coates alleged are suspicious. Transactions in this category include engaging companies where close family members of Justin Doutch (the Managing Director of Classic Minerals) serve as director (or have done so in the past) and where a director of Classic Minerals has a direct financial interest, for services when cheaper services could allegedly have been obtained from other firms;
- related party loans and deposits that the Plaintiff argued are suspicious. These include an unsecured and no interest loan by Classic Minerals to John Doutch (Justin Doutch's father); three short-term loans advanced to Classic Minerals by its shareholders valued at $857,704, on which interest accrued at 10% per month; and three loans made to Classic Minerals by Samantha Doutch (the wife of John Doutch), with two of which charging an interest rate of 20%; and
- transactions which the Plaintiff alleged appeared suspicious as being potentially uncommercial. This category consists of two rental agreements, one of which is between Classic Minerals and Rhianna Doutch (Justin Doutch's sister) which the Plaintiff argued are not at commercial rates and are not on commercial terms.

The Defendant company, in arguing that the Plaintiff's application should be denied, tendered an affidavit made by Justin Doutch which strongly denied many of these allegations, however this affidavit did not expressly address some of the allegations.

The genesis of the Plaintiff's argument was that capital raised by Classic Minerals through its ASX listing had been used by the company's board to enter into a series of transactions and loans that potentially violate statutory and fiduciary duties owed by directors as well as Chapter 2E of the Corporations Act (the related party transactions regime). Mr Coates wanted to obtain more material to scrutinise to determine if these allegations have merit, and consequently applied to the court under s. 247A of the Corporations Act for an order to inspect the books of Classic Minerals.

(c) Decision

(i) Principles to be applied

The Court outlined the principles that are to be applied in determining applications under s. 247A, as summarised in *Mesa Minerals Ltd v Mighty River International Ltd*. These principles are as follows:

- the precondition that the application be made in good faith and for a proper purpose is a single requirement rather than two separate notions. As per Brooking J in *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd (1989) 7 ACLC 536* at 541, "the reference to good faith colours and so reinforced the requirement of proper purpose. Acting in good faith and inspecting for a proper purpose means acting and inspecting for a bona fide proper purpose";
- good faith and proper purpose must be proved objectively;
- proper purpose means a purpose connected with the proper exercise of the rights of a shareholder as shareholder, not for a purpose connected only to outsider rights;
- the applicant bears the onus of proof;
- an applicant will more easily discharge the onus of proof if they have a significant shareholding which has been held for a not insignificant period of time, relative to an applicant who only recently acquired a small holding;
- the applicant does not need to show that its interests are different to the interests of other shareholders;
- the applicant is not required to have sufficient evidence to make out an action - it is sufficient that the applicant raises an issue that is "substantive and not fanciful" and "not 'artificial, specious or contrived'": *Re Style Ltd; Merim Pty Ltd [2009] 255 ALR 63 at 66-67*;
- pursuing a reasonable suspicion of breach of directors' duties is a proper purpose;
- so long as the applicant's predominant purpose is a proper purpose, it is immaterial if the inspection might benefit the applicant for another purpose;
- an applicant is not precluded from pursuing a proper purpose solely because they are hostile to other directors;
- an application under the section will not be detrimentally affected by the facts that the applicant may have had adequate information at an earlier stage nor that the applicant may have been able to access the information by other means; and
- the Court has a residual discretion as to whether or not to grant an order under the section.

(ii) Application of these principles to the facts of the case

The primary issue for the Court to decide was whether, in making this application, the Plaintiff was acting in good faith and the inspection was for a proper purpose. The Court resolved this primary issue in favour of the Plaintiff for the following reasons: first, Mr Coates held shares in Classic Minerals since 2013, and his greater than 5% shareholding cannot be characterised as "merely token" - thus such an applicant has a relatively light onus to discharge. Secondly, the Court determined that evidence of the deterioration in the previous relationship between Mr Coates and Classic Minerals (when the former provided consulting services to the latter) does not indicate a lack of good faith or an improper purpose. As per the applicable principles, an applicant is not precluded from having a proper purpose solely because they are hostile to directors. Thirdly, in accordance with the relevant principles, the Court dismissed the Defendant's arguments that the application should be rejected because the Plaintiff had sufficient opportunity to obtain the information he now seeks when he was employed as a consultant, or in his capacity as shareholder. Fourthly, the substance of Mr Coates' application exceeds simple discontent with the management of the company. Rather, the Plaintiff raises suspicions that the board of Classic Minerals breached directors' duties by entering into the aforementioned transactions. Pursuing such suspicions is a proper purpose. Due to the weight of the evidence, the Court held these concerns "are 'substantive and not fanciful', nor are they 'artificial, spurious or contrived'". This reason seems to be the most influential in the Court's determination that the Plaintiff had discharged the onus of proving that his application was "for a bona fide proper purpose": Knightswood at 541.

Additionally, in granting an order under this section, the Court did not have to determine whether there had been any impropriety, only that there is a "case for inspection". On the evidence it was so satisfied.

6.7 Client Legal Privilege: Outlining the reason for privilege with sufficient detail

(By Emma Newnham and Eliza Jackson, King & Wood Mallesons)

Hastie Group Ltd (in liq) v Moore [2016] NSWCA 305, Supreme Court of New South Wales, Court of Appeal, Beazley P, Macfarlan JA and Leeming JA, 7 November 2016.

(a) Summary

The appellants, the Hastie Group, sought to claim client legal privilege over an expert report provided to a potential litigation funder. The respondents were current and past partners of Deloitte, whose audits were the subject of litigation. At first instance, it was found on an urgent basis that the class of documents, including the report, was not privileged, although the documents may have contained "skerricks of privileged material" (*Hastie Group Ltd (in liq) v Moore [2016] NSWSC 1315* at [23]-[24]).

The Hastie Group sought leave to appeal this finding in the New South Wales Court of Appeal, arguing that the report attracted client legal privilege, that this privilege was not waived, and that leave to appeal should be granted. The partners of Deloitte asserted that the Hastie Group adduced insufficient evidence to establish a claim of privilege and as such had not discharged the onus they bore.

President Beazley and Macfarlan JA held (with Leeming JA dissenting) that the Hastie Group had discharged the onus of proof to satisfy a claim of privilege and that this privilege had not been waived. They found that a substantial injustice would be occasioned were leave refused, and granted leave to appeal.

(b) Facts

In 2014, a group of companies in liquidation (referred to as the Hastie Group) filed a statement of claim in the Supreme Court of New South Wales (Equity Division) against their former auditors, Deloitte, in relation to an audit report for the 2008 financial year. The statement of claim was not served within the time period prescribed by the rules. A second statement of claim, relating to the 2009 financial year, was filed in 2015.

Ex parte applications were made to extend the time for service of the statements of claim. The evidence relied upon addressed efforts made by the liquidators to obtain funding for the litigation against the auditors. Ultimately, the originating process was served on the partners of Deloitte, who subsequently sought to have the orders extending time for service set aside.

In advance of the hearing, the partners of Deloitte served notices to produce on the Hastie Group. The solicitors for the Hastie Group withheld production of, among other things, an expert report provided by the liquidators' solicitors to solicitors acting for a potential litigation funder (Westworth Report).

At first instance, the case related to a class of documents, including the Westworth Report, purportedly subject to "Litigation Funding Privilege". The appeal focused on the Westworth Report only.

The case on appeal turned upon the reason for the preparation of the Westworth Report, and whether it was prepared for the dominant purpose of the substantive proceedings. The Hastie Group asserted a claim for privilege pursuant to s. 119 of the Evidence Act 1995 (NSW). This section provides for client legal privilege for confidential communications or documents prepared for the dominant purpose of providing legal advice. The Hastie Group submitted that the Westworth Report was "prepared for the purpose of obtaining legal advice in connection with the public examination and proceedings" and was created "in connection with the merits of and/or the funding of the anticipated proceedings" (at [23]). The Deloitte partners argued this formulaic statement was insufficient to discharge the onus of proof. In the alternative, Deloitte argued that privilege was waived either when the

Hastie Group attempted to explain its delays in service, providing summary explanations as to the contents of the documents, or in providing the Westworth Report to the litigation funder.

(c) Decision

President Beazley and Macfarlan JA granted leave to appeal on the basis that the Westworth Report was prepared in circumstances that attracted client legal privilege and that there was no waiver. In a dissenting judgment, Leeming JA held that no leave to appeal should be granted. He held that even if the Westworth Report attracted privilege and it was not waived, no reasonably clear injustice had been established which would justify a grant of leave.

(i) Privilege

In finding for the Hastie Group, the majority restated the established principle that the party seeking to claim client legal privilege bears the onus of proof that the document was prepared for the dominant purpose of the provision of professional legal services. In determining whether this onus has been satisfied, the Court may draw inferences from proved facts. In this case, the court considered the engagement letter to which the Westworth Report was attached and the circumstances in which it was prepared. This engagement letter was agreed by the parties to be subject to client legal privilege at first instance. It could therefore be inferred, having regard to the fact that the evidence established the nature of the Westworth Report and the circumstances in which it was prepared, that the Westworth Report attracted privilege.

(ii) Waiver

The majority held there was no waiver of the relevant privilege, finding that waiver requires more than mere reference to a particular document or class of documents. In the ordinary case waiver requires reliance upon the contents of the privileged documents. Here, the disclosure of the Westworth Report to a litigation funder was also insufficient to waive privilege, as it was clear the Westworth Report was being provided on a confidential basis.

(iii) Leave to appeal

The majority held that because privilege was established in relation to the Westworth Report and this privilege was not waived, and having regard to the question of principle raised by the Hastie Group, a substantial injustice would be occasioned if leave was not granted. The majority highlighted that the matter proceeded with haste at first instance, and that in any event, it is not unusual for issues to become increasingly refined on appeal. It was also noted that the first instance judge did recognize that at least parts of the communications with the prospective funder might be privileged, notwithstanding that he did not find the documents to be privileged per se as a class. No order was made as to costs.

(iv) Dissenting judgment

In refusing to grant leave, Leeming JA was influenced by the procedural history of the case and the manner in which the case was conducted.

His Honour was of the view that to the extent the Hastie Group's concern in providing the Westworth Report was based on the intention to use the Westworth Report to formulate its case, sooner or later that case would need to be formulated and provided to Deloitte. The Hastie Group made no substantive submissions as to how prejudicial early disclosure would be to their case. Leeming JA found it difficult to see how early disclosure would have any significant bearing on the outcome of the litigation, if it proceeded.

His Honour also found that Hastie Group had two opportunities to raise the Westworth Report before the primary judge to establish privilege, and did not do so. It was open to them to supplement the materials given, especially after the primary judge criticised the insufficient factual background provided. Given that the primary judge was required to make an urgent determination on a large number of documents, the liquidators needed to have done more to put the Court and their opponents on notice that additional submissions would be made about a particular document.

In addition, Leeming JA found that even if the Westworth Report was privileged, a refusal to grant leave would not cause real prejudice to the applicants in circumstances where they had prior opportunities at first instance to establish the privilege they claimed and where they had not demonstrated that the disclosure of the Westworth Report would lead to an appreciable injustice.

6.8 Stay ordered subject to security for costs being provided

(By Sam Hall, Herbert Smith Freehills)

Treloar Constructions Pty Limited v McMillan [2016] NSWCA 302, Court of Appeal, Supreme Court of New South Wales, President Beazley, 4 November 2016

(a) Summary

This decision concerned an application to stay an appeal pending provision of security for costs. In determining that it was appropriate to order that security be provided, and that the appeal be stayed pending provision of that security, the New South Wales Court of Appeal reminded litigants of the criteria to be applied when determining whether it is appropriate to order security be provided.

(b) Facts

This application was made by the respondent (Mr McMillan) to an appeal brought by Treloar Constructions Pty Limited (Treloar). By the appeal Treloar sought to overturn a decision of the District Court of New South Wales pursuant to which the Court rejected an allegation that Mr McMillan failed to prevent a company of which he was a director from incurring debts due to Treloar when there was reason to suspect the company was insolvent or would become insolvent by incurring the debts.

Following the decision of the District Court to reject Treloar's claim, the Court ordered that it pay Mr McMillan's costs of the trial. Treloar sought to appeal both the substantive decision, as well as the costs orders.

In response, Mr McMillan sought security for his costs of the appeal.

(i) Security for costs application

A court may grant a security for costs order against a company where credible testimony shows there is reason to believe the company cannot pay the costs of the respondent, if unsuccessful in their appeal s. 1335(1) of the [Corporations Act 2001 (Cth)](#) (the Act). President Beazley identified that this does not require proof that a company cannot pay the costs. Rather, it requires "credible testimony giving rise to a belief" that a company may not be able to pay the costs (*FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd [2000] WASCA 69*). The onus of proof rests with the party seeking the order. However, the evidentiary burden may shift to the party resisting the application if the applicant meets the requirements of s. 1335 of the Act.

The issue in this case was whether McMillan had provided credible evidence identifying a reason to believe Treloar was unable to pay the costs of the appeal, if unsuccessful. Treloar had 100 ordinary shares issued with a total paid-up share capital of $100. The sole shareholder was Treloar Holdings Pty Ltd, a company with three Treloar family member directors. Treloar had no property holdings, though, each of the directors held real property.

McMillan alleged that as the directors of Treloar had real property, and where no evidence had been provided by Treloar, a security for costs order was appropriate. McMillan further identified that if Treloar loses the appeal, it remained indebted to McMillan for the costs order at first instance. Treloar contended that McMillan had proven nothing more than a risk it may be unable to pay the costs of an unsuccessful appeal. Treloar alleged that McMillan's failure to request a notice to produce meant that the standard of "reason to believe" was not met.

President Beazley found that the threshold in s. 1335 of the Act was met. The evidence established that Treloar was a company with no property, limited capital, and had failed to provide evidence that it could meet an order for costs, both for the appeal and the costs at first instance. Whilst McMillan would have had a stronger case had a notice to produce been issued, President Beazley was satisfied that there is reason to believe Treloar could not meet an order for costs if it lost the appeal.

(ii) Stay application

Treloar sought a stay of the costs awarded at first instance, asserting that McMillan is impecunious and that if costs are paid, it is likely they will not be recoverable. President Beazley identified that it is "sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion [to order a stay] in [the applicant's] favour" (*Alexander v Cambridge Credit Corporation Limited (1985) 2 NSWLR 685*).

Treloar asserted that it had arguable grounds of appeal. The question of insolvency was critical because if Treloar fails to prove insolvency, liability under s. 588M of the Act does not arise against McMillan. McMillan did accept that he was impecunious, and that the threshold for a stay was low. Despite this, McMillan argued that a failure on any one of the issues raised on appeal regarding the insolvency question, would result in a failed appeal.

President Beazley ordered a stay on the basis of McMillan's admission that he is impecunious, and that despite McMillan's insolvency argument having merit, her Honour did not believe an appeal was not arguable. As Treloar appears unable to pay the costs if it fails on appeal, and having provided no evidence that it can satisfy the costs order against it at first instance, a condition that Treloar provide security was imposed on the stay.

(c) Decision

President Beazley determined that the threshold for a security for costs order was established. There was reason to believe that Treloar could not pay the costs of an unsuccessful appeal. The requirements for a stay were also satisfied. A stay of the execution and enforcement of the costs at first instance was ordered, subject to Treloar providing $225,000 in security.

6.9 Property investment adviser provided a financial service without an AFSL

(By Tom Lawson and Rebecca Williams, King & Wood Mallesons)

Park Trent Properties Group Pty Ltd v Australian Securities and Investments Commission [2016] NSWCA 298, Court of Appeal, Supreme Court of New South Wales, Leeming JA, Gleeson JA and McColl JA, 3 November 2016.

(a) Summary

The New South Wales Court of Appeal has affirmed a decision of the Supreme Court of New South Wales, holding that Park Trent Properties Group Pty Ltd (Park Trent) had unlawfully carried on an unlicensed financial services business for approximately five years.

ASIC first commenced proceedings against Park Trent in 2014, arguing that certain property investment recommendations made by Park Trent to its customers constituted financial advice for the purposes of s. 911A of the Corporations Act 2001 (Cth) (the Act). Section 911A requires that a person carrying on a financial services business have an Australian Financial Services Licence (AFSL). During the course of the trial at first instance, Park Trent applied for leave to amend its pleaded defence, arguing that its conduct fell within an exemption to s. 911A, set out in r. 7.1.29 of the Corporations Regulations 2001 (Cth) (the Regulations), which lists circumstances in which a person is taken not to provide a financial service. That application for leave was rejected by Sackville AJA at first instance. It was on this question which Park Trent subsequently appealed.

On appeal, the Court of Appeal rejected the argument that Park Trent should have been granted leave to amend its pleaded defence. In doing so, the Court provided useful guidance on the factors that guide the exercise of the Court's discretion to grant such leave in the context of regulatory enforcement proceedings, rather than private proceedings.

Further, the Court of Appeal concluded that Park Trent's amended defence was, in any event, bad in law and that the claimed exemption did not apply to Park Trent's conduct. In so finding, the Court adopted a purposive construction of r. 7.1.29 quite different to the literal approach submitted by Park Trent.

(b) Facts

For a number of years, Park Trent and its related companies ran seminars, meetings and home visits designed to encourage potential clients to take advantage of superannuation legislation that permits the trustee of a self-managed superannuation fund (SMSF) to borrow money to purchase a single asset, including real property. Park Trent representatives at these seminars encouraged attendees to establish a new SMSF (of which the person would be a trustee and a member), and transfer their existing superannuation balances from their current general superannuation funds to that SMSF. That SMSF could then invest, in a leveraged way, in real property. Park Trent provided services to facilitate that transition. At trial, it was found that some 868 clients of Park Trent or its related companies had purchased or agreed to purchase an investment property using an SMSF.

ASIC alleged that, in making these investment recommendations, Park Trent engaged in a financial services business and was therefore required to hold an AFSL; Park Trent contended at trial that it was not so required.

On the sixth day of a nine day trial before Sackville AJA, Park Trent applied for leave to amend its pleaded defence to argue that r. 7.1.29 applied to Park Trent's conduct, with the effect that it would be exempted from the requirement to hold an AFSL.

Sackville AJA refused Park Trent's application for leave to amend mid-trial, and ultimately gave judgment against Park Trent, ordering injunctive and declaratory relief. Park Trent then appealed.

(c) Decision

The Court of Appeal first considered whether Sackville AJA had erred in refusing leave to amend Park Trent's pleaded defence. It then considered whether, had leave been granted, r. 7.1.29 would have applied to Park Trent's conduct. In each case, the Court of Appeal decided against Park Trent.

(i) Whether the trial judge erred in refusing leave to amend

In assessing whether the trial judge had erred in refusing leave to amend, the Court of Appeal noted the principle decided in *Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175* (Aon), refuting the proposition that a party can be permitted to amend its pleadings in order to raise any arguable case at any point in the proceedings, provided that party bears the burden of costs thrown away.

Park Trent argued that its error in failing to plead the matter initially could have been dealt with effectively at the costs stage and that the trial judge's failure to consider this option amounted to appellable error. However, the Court of Appeal (in the lead judgment delivered by Leeming JA) noted that the trial judge had acknowledged and applied the principle in Aon, and rejected the proposition that Park Trent's late application to amend could be adequately compensated by costs.

Park Trent also argued that the trial judge overestimated the delay which would have been caused by the amended pleadings and had failed to quantify this delay. Park Trent also submitted that the trial judge had failed to acknowledge that any delay was unlikely to be substantial. However, Leeming JA noted that if the matter had been stayed, then Park Trent would have been free to continue to unlawfully provide financial advice without a licence. His Honour conceded that Park Trent's unlicensed conduct had not yet led to any serious economic loss. Nonetheless, if a delay had been granted, Park Trent's unlicensed advice would have continued to unlawfully influence its clients to engage in their SMSF investment property plan, with "unquantifiable" costs flowing from these decisions. Further, Park Trent would have maintained an unfair advantage over competitors insofar as they were permitted to continue engaging in otherwise unlawful conduct. Leeming JA said that in these circumstances, the trial judge did not err in concluding that further delay was impermissible. In addition, his Honour concluded that quantification of delay was unnecessary and, in such circumstances, prohibitively complex; accordingly, it was permissible for the trial judge to advance on a "relatively impressionistic basis". This approach provides an interesting new dimension of the Aon principle in the context of a regulatory enforcement matter, where the consequences of delay affect not only the parties to the proceeding and the court's schedule, but also the broader public and other third parties.

Park Trent further argued that there had been no consideration of the injustice visited on the respective parties by refusing leave to amend. Park Trent noted that Park Trent was a "blameless" party as it was its legal counsel, not Park Trent itself, who had failed to plead all relevant arguments from the outset. Leeming JA noted that the trial judge had treated Park Trent's mistake as an "oversight" and had thus considered their relative culpability. His Honour additionally noted that a party is bound by the conduct of its case by its lawyers. Accordingly, the matter could not be resolved simply by means of a cost order against the lawyers personally.

Accordingly, Leeming AJA (with whom both Gleeson and McColl JA agreed) concluded that there had been no appellable error in refusing the application to amend.

(ii) Whether the exemption in Regulation 7.1.29 applied to Park Trent

For completeness, the Court also considered whether, if leave to amend had been granted, Park Trent's conduct would have fallen within the scope of r. 7.1.29 and therefore been exempted from the requirement to hold an AFSL.

The combined effect of r. 7.1.29 and s. 766A of the Act is to permit a person to provide a financial service without an AFSL if it conducts certain exempted services.

Regulation 7.1.29 relevantly states a person who provides an eligible service is taken not to provide a financial service if:

- the person provides the eligible service in the course of conducting an exempt service; and
- it is reasonably necessary to provide the eligible service in order to conduct the exempt service; and
- the eligible service is provided as an integral part of the exempt service.

Regulation 7.1.29(5) sets out four cumulative requirements for an exempt superannuation service. The second, per r. 7.1.29(5)(b), is that the person advised is, or is likely to become a trustee; a director of a trustee; or a person who controls the management of the superannuation fund.

Leeming JA agreed with Park Trent that on a literal reading, this regulation applied to Park Trent's conduct: the clients to whom Park Trent made its recommendations would, if those recommendations were followed, become trustees (or directors of trustees) of their own SMSF. However, Leeming JA adopted a contextual and purposive interpretation of the provision to conclude that this regulation would not in fact apply.

Leeming JA noted that Park Trent's advice was received by advisees in three capacities: as a member of their existing general superannuation fund; as a member of the proposed SMSF; and as a trustee, director of the corporate trustee, or controlling individual of the proposed SMSF. His Honour concluded that advisees of Park Trent were advised largely in their capacity as members of a general existing superannuation fund. This was because when the advice was given, the only currently existing capacity was the membership of the existing general superannuation fund. Additionally, entry into Park Trent's investment plan was typically preceded by a departure from an existing general superannuation fund. As the acquisition would ordinarily be dependent upon the disposition, Leeming JA considered this strengthened the conclusion that this advice was received primarily as a member of a general existing fund.

Leeming JA turned to the purpose of r. 7.1.29, noting that the regulation was designed to address advice given to a trustee, director of a corporate trustee, or other individual who controls the fund. Such entities hold analogous roles in relation to the relevant fund in that they have control without beneficial ownership. His Honour noted that exempting advice given to individuals without a beneficial interest was appropriate in the context of the regulations, citing as an example advice given to a trustee in relation to "the mechanics of complying with accounting and reporting requirements". However, Leeming JA said extending the exemption to instances where the advisee has both control and a beneficial interest would not make sense. Leeming JA then referred to the explanatory statement relating to the regulation in question. That statement relevantly provides that r. 7.1.29(5) "will not provide an exemption for advice recommending a SMSF structure in isolation or as a preferred structure to other alternative investment vehicles".

Park Trent's conduct therefore did not fall within the scope of r. 7.1.29(5)(b) and was not exempt from the requirement to hold an AFSL. Accordingly, it was unnecessary to consider whether the other limbs under r. 7.1.29(5) were established.

6.10 The ambit of s. 994(1) of the UK Companies Act 2006: can a wrongful dismissal claim be brought under an unfair prejudice petition?

(By Grant Mason and Lara Nurick, Corrs Chambers Westgarth)

Wootliff v Rushton-Turner [2016] EWHC 2802 (Ch), England and Wales High Court, Chancery Division, 3 November 2016

(a) Summary

The Respondents to a shareholder dispute sought to strike out a claim for wrongful dismissal included in a petition for relief for unfair prejudice commenced on 1 June 2015. They argued that the unfair prejudice petition provision in s. 994 of the UK *Companies Act 2006* contemplates that a member of a company applying to the Court under that provision could only claim for prejudice suffered in its capacity as a shareholder and not for any prejudice suffered in its capacity as an employee.

Section 994(1) states, relevantly, that "a member of a company may apply to the Court for an order [under the Act] on the ground. (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself); or (b) that an actual or proposed act or omission of the company. is or would be so prejudicial".

Registrar Briggs considered several cases and found that whilst generally claims under s. 994 cover a petitioner only in a shareholder capacity, in a small quasi-partnership company, it may be artificial to separate one's roles as a shareholder and as an employee. Since in such instances a petitioner's rights as shareholder and employee may be intertwined, this can, depending on the evidence, overcome the limitation in s. 994 and the claims may be heard together. Registrar Briggs also found that courts have the "greatest possible flexibility" in granting relief under s. 996 of the Companies Act 2006, including awarding compensation for breach of a service agreement. Therefore, an unfair prejudice petition involving a quasi-partnership where wrongful dismissal is also claimed, may extend beyond the petitioner's rights "qua shareholder" or as a shareholder.

(b) Facts

Smart Diner Group Limited (the Company) ran an online booking facility for restaurants. The petitioner, Mr Wootliff, was its sole director and shareholder after incorporation until the Company merged with Harden's Limited (HL), a restaurant guides publisher. The shares of the Company and HL were subject to a Share Exchange Agreement dated 24 January 2013. In addition, Mr Wootliff entered into a service agreement with the Company and acted as its Chief Executive Officer (CEO).

In September and October 2013, Mr Wootliff was first suspended and then dismissed from the Company. He was also removed from his roles as CEO and director.

In January 2014, Mr Wootliff commenced proceedings in the Employment Tribunal alleging a number of grounds relating to wrongful and unfair dismissal. These proceedings were withdrawn by Mr Wootliff in April 2015, although he reserved his right to pursue the actions in an alternate jurisdiction.

On 1 June 2015, Mr Wootliff brought an unfair prejudice petition under s. 994 of the Companies Act which is the subject of these proceedings. Mr Wootliff claimed the Company's conduct was unfairly prejudicial because: (1) it had no grounds to dismiss and remove him (as alleged in the Employment Tribunal claim) and (2) the issuance of further shares after his dismissal diluted his shareholding. Mr

Wootliff sought orders including a remedy for his loss of income for the remainder of his contract term as had been sought in the Employment Tribunal proceeding.

(c) Decision

Registrar Briggs decided that it was not appropriate to strike out the wrongful dismissal claim because the Company was a quasi-partnership, such that Mr Wootliff's roles could not be treated as separate or distinct and therefore relief under s. 994 could be available. Additionally, because the wrongful dismissal claim and the other claims made in the proceedings arose from the same facts and circumstances, separate proceedings would be "inefficient, disproportionate, a waste of court resources and could lead to different findings of fact". Registrar Briggs therefore ordered the trial of all issues to be heard together before a Registrar of the High Court.

(i) Wrongful dismissal versus unfair dismissal

Registrar Briggs rejected the Respondents' contention that Mr Wootliff could not pursue his wrongful dismissal claim as part of the unfair prejudice petition because these proceedings could not be consolidated and heard by the same Tribunal. Registrar Briggs accepted that an unfair prejudice petition could not be heard by an Employment Tribunal but distinguished between wrongful dismissal and unfair dismissal, noting that the former is a claim for breach of contract while the latter is a statutory action. Whilst a claim for unfair dismissal could only be heard by an Employment Tribunal, a claim for wrongful dismissal is not so limited and could therefore be heard in the Chancery Division together with an unfair prejudice petition.

(ii) The ambit of s. 994 of the Companies Act 2006

Registrar Briggs cited *Ebrahimi v Westborne Galleries Limited [1973] AC 360* as authority for the general view that in order to fall within the ambit of s. 994, which uses the words "interests of members", the petitioner must demonstrate that the company's conduct caused him or her prejudice or oppression as a member. However Registrar Briggs also referred to several cases including *J&S Insurance & Financial Consultants Limited [2014] EWHC 2206* to illustrate the distinctive nature of quasi-partnerships where unfairness is judged by whether the company's actions are "contrary to good faith". Since one's roles as employee and member in quasi-partnerships may be interlinked because of the organisation's size and structure, prejudice to an employee may also prejudice that employee's rights as a shareholder. Therefore removal or breach of employment rights could give rise to grounds for unfair prejudice under s. 994 provided there is evidence to substantiate this.

(iii) Relief under s. 996 of the Companies Act 2006

Registrar Briggs clarified the Court's wide discretion under s. 996 in granting relief to a successful petitioner, noting this may extend beyond the petitioner's rights as a member and include the payment of compensation. However, even where a wrongful dismissal claim is included under s. 994, relief for loss of income remains discretionary. Separately, where such claims are pursued concurrently in different forums, courts will ensure there is no double recovery.

6.11 Recovery of statute-barred debts in winding up proceedings

(By Sue Soueid and Louise Hang, Corrs Chambers Westgarth)

Re Tomker Pty Ltd (in liq) [2016] VSC 656, Supreme Court of Victoria, Randall AsJ, 2 November 2016

(a) Summary

The liquidator of Tomker Pty Ltd (In Liquidation) (Tomker), had commenced proceedings against the director of Tomker (the Defendant) for relief for insolvent trading pursuant to s. 588M of the Corporations Act 2001 (Cth) (Corporations Act). The liquidator sought to recover a debt claimed to be proven by the company's sole creditor, the Deputy Commissioner of Taxation (the Commissioner), who had given an assessment of net tax amounts payable with respect to a number of tax periods.

All but one of the assessments were challenged by the Defendant on the basis that they were provided more than four years after the relevant tax periods, and were accordingly time barred by the operation of s. 105-5 of the Taxation Administration Act 1953 (Cth) (the TAA). After failing to convince the liquidator to lodge an objection on behalf of Tomker challenging the Commissioner's assessment, the director lodged an objection under Part IVC of the TAA and sought (amongst other things) leave from the Court pursuant to s. 471A(1A)(d) of the Corporations Act permitting the lodgement of the objection in the name of Tomker.

The Court granted the orders sought by the Defendant. Randall AsJ held that the limitation period in s. 105-50 of Schedule 1 to the TAA was applicable and was not displaced by s. 588M of the Corporations Act. Further, s. 105-50 went the substance of the tax liability rather than its recoverability, such that the tax amounts subject to the limitation period in s. 105-50 were not "payable" and were not debts for the purposes of s. 588M of the Corporations Act.

(b) Facts

Tomker was wound up on 22 July 2013 pursuant to a statutory demand issued by the Commissioner in respect of debts totalling $95,482.73. On 27 June 2014, the liquidator commenced proceedings against the Defendant seeking relief for insolvent trading pursuant to s. 588M of the Corporations Act. The amount sought in the liquidator's initial claim was $99,950.80, composed entirely of a debt claimed to be proven by the Commissioner.

The Commissioner lodged five proofs of debt over time, each time amending the previous proof. The fifth proof of debt was lodged on 25 May 2016 following the Commissioner's assessments for the tax periods ending 30 September 2010, 31 December 2010, 31 March 2011, 30 June 2011, 30 September 2011, 31 December 2011, 31 March 2012 and June 2012, which was issued on 29 April 2016. The statement of claim was amended to increase the amount sought to $189,257.56 to reflect the fifth proof of debt.

The Defendant objected to the fifth proof of debt on the basis that each assessment (except the assessment for the tax period ended 30 June 2012) was time barred by s. 105-5 of Schedule 1 of the TAA. The Defendant requested that the liquidator lodge an objection on behalf of Tomker, however, the liquidator refused on the basis that the debt was one which was payable at the relevant date for the purposes of s. 588M of the Corporations Act, and was therefore provable in the liquidation. Consequently, the Defendant lodged an objection on behalf of Tomker under Part IVC of the TAA.

(c) Decision

The Court granted the orders sought by the Defendant and held that the lodgement of the objection by the Defendant in the name of Tomker should be permitted. Furthermore, the Court held that the lodgement of the objection was not invalid by reason of having occurred before approval was given by the Court.

(i) Time limit on recovery of tax amounts

The Court first considered whether the proper time limit for recovering the tax amount was four years (under s. 105-50 of Schedule 1 of the TAA) or six years (under s. 588M of the Corporations Act).

Section 105-50 of Schedule 1 to the TAA provides that any unpaid net tax amount ceases to be payable four years after it becomes payable unless the Commissioner has required payment by giving notice within that four year period. In contrast, s. 588M(4) of the Corporations Act provides that the recovery of loss and damage, as a debt due to the company, must be commenced within six years of the commencement of the winding up.

The Defendant submitted that as a consequence of the expiry of the four year time limit provided for in s. 105-50 of Schedule 1 to the TAA, the tax amounts in the final notice of assessment issued on 29 April 2016 were no longer recoverable. In response, the liquidator submitted that it is possible that a tax amount may be recovered in the winding up even if it is no longer payable under the TAA as the six year limitation in s. 588M(4) prevails over the four year limitation in s. 105-50.

Randall AsJ rejected the liquidator's submission and held that the four year period of s. 105-50 was determinative. His Honour noted that to allow the Commissioner to recover the sum by way of s. 588M would enable the Commissioner to recover greater revenue from taxpayers in liquidation than from the taxpayers trading in the ordinary course of business. His Honour considered that this would be contrary to the clear intention of s. 105-50.

(ii) Effect of four year time limitation

The Court then considered whether there was an amount owing if the four year period applies, and whether this period was affected by the liquidation of the second plaintiff. The Defendant contended that the assessment of 29 April 2016 was issued more than four years after the tax amounts were payable, with the exception of tax incurred during the period ending 30 June 2012. Accordingly, the Defendants argued that no tax amounts were payable in respect of those tax periods.

In response, the liquidator contended that the expiration of the four year period set by s. 105-50 had no impact, as the liquidation effectively "stops time" such that all debts payable at the "relevant date" (being the date that winding up begins pursuant to Division 1A of Part 5.6 of the Corporations Act) are provable in the liquidation. The liquidator relied on the decision of *Motor Terms Co Pty Ltd v Liberty Insurance Ltd (1967) 116 CLR 177*, which supported the proposition that a debt may be proved in the liquidation provided that it is recoverable (that is, not statute barred) at the commencement of the winding up, notwithstanding that it would ordinarily be irrecoverable at the time it is proved.

However, his Honour considered that the relevant question was not whether the debt was recoverable, but whether there was a debt at all. Rascall AsJ accepted the Defendant's submission that s. 105-50 goes to the substance of tax liability rather than its recoverability. His Honour held that any assessment made by the Commissioner had to be made within the four year period set by s.105-50 and that if the four year time period set by s. 105-50 has expired, the tax amount was not "payable" to the Commissioner such that there was no debt to be proved. Further, his Honour found that an assessment requiring payments of unclaimed amounts within the four year period could be plausibly disputed, and that as a result, the Defendant had reasonable prospects of success in its objection to the assessment.

Noting that the Commissioner was the only creditor, Randall AsJ found that the prejudice likely to be suffered by the Defendant if the objection remained unheard would be greater than that suffered by the Commissioner if there was a delay in the winding up. The Court allowed the lodgement of the objection and ordered that the lodgement of the objection was not invalid by reason of having occurred before approval was given by the Court.

6.12 Novel arguments in refusing to provide security for costs

(By Samuel J. Hickey, LLB Candidate, University of Queensland)

Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd [2016] WASC 353, Supreme Court of Western Australia, Kenneth Martin J, 2 November 2016.

(a) Summary

The decision of the Supreme Court of Western Australia in *Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd [2016] WASC 353* was the first ruling handed down in what is likely to be a long-running battle between two well-resourced opponents. The decision concerned the plaintiff's dispute of an application for security for costs, and contains several novel arguments which were all ultimately rejected.

The plaintiff never advanced a submission to the effect that it lacked the financial means to provide the security sought, nor did the plaintiff contend that the payment of security would hinder the other proceedings that it planned to initiate against the defendant. The thrust of the plaintiff's argument was that it was in a position of such financial strength that it would be unthinkable that it would not be able to pay an award ever made against it.

The decision is helpful as it reveals that solvency-based arguments may fail in seeking to resist an application for security for costs. The decision also serves as a useful reminder that, in providing security for costs, courts are likely to prefer money or immobile assets that cannot be unencumbered by security interests.

(b) Facts

The plaintiff and the defendant had been the parties to a services agreement which the defendant had purported to terminate. The plaintiff contended that there had been no termination event, and that the defendant's attempted termination evinced an intention to no longer be bound by the agreement. The plaintiff claimed that the agreement had thus been repudiated. In March 2016, the plaintiff informed the defendant that it elected to terminate the services agreement in light of the defendant's repudiation.

The plaintiff claimed a liquidated sum of US$7.7 million which it alleged had fallen due under the services agreement, another sum in excess of US$275,000,000 for a breach of contract and further damages for a loss of bargain. In addition to asserting that they had been entitled to terminate the contract when they had initially done so, the defendant also sought security for costs in the amount of US $577,526 under O 25 of the Rules of the Supreme Court 1971 (WA) (the Rules), or alternatively by s. 1335 of the Corporations Act 2001 (Cth) (the Corporations Act).

Order 25 r. 2 of the Rules relevantly provides that a court can order security for costs if the plaintiff is ordinarily resident out of the jurisdiction. Section 1335 similarly enshrines a power to award costs in situations where the court is satisfied that there is reason to believe a plaintiff corporation would be unable to pay the costs of the defendant in the event of the defendant's success at trial.

Pivotal to these proceedings was the fact that the plaintiff was a company incorporated in Singapore. Additionally, the plaintiff owned no assets within Australia, as its only asset was a floating production storage and offloading vessel: the Armada Claire. The Armada Claire had a market value of approximately US$100 million, and was unencumbered by any mortgage or encumbrance. At the time of these proceedings, the Armada Claire was located within Indonesian waters.

In opposing the application for security for costs under O 25 r. 2 of the Rules, the plaintiff advanced three primary arguments. First, it was submitted that there was no need to provide security for costs because the defendant could easily enforce an Australian judgment within Singapore. Second, the plaintiff alleged that its parent company, Bimi Armada Berhad, had provided a guarantee that would extend to any costs related to a judgment from an Australian court. Third, and perhaps most unusually, the plaintiff submitted that it need not provide security for costs because it was so solvent that, in the event of an adverse award, it would be inconceivable that it would not be able to pay that award. In substantiating this third point, the plaintiff pointed to both the solvency of its parent company as well as the value of the Armada Claire.

The plaintiff also made an argument in the alternative, being that, if the Court were satisfied that the plaintiff had to provide security for costs under O 25 r. 2, then the extent of that security should be US $25,000. The plaintiff contended that this amount was justified on the basis that it was the amount necessary to register for a costs judgment in Singapore.

Lastly, in response to the defendant's claim for security under s. 1335 of the Corporations Act, the plaintiff contended that s. 1335 could not possibly be engaged, as there was no evidence to give rise to a reason to believe that it would be unable to pay costs should the defendant be successful.

(c) Decision

The deciding feature in this case was the fact that the only significant asset owned by the plaintiff was a highly mobile un-attachable vessel that was moored in Indonesia. The Court commented that it was irrelevant that the plaintiff was part of a large corporate group, as it was not clear on the wording of the guarantee whether the plaintiff's parent company would actually cover the costs of an adverse award. The Court was further swayed by the fact that if the defendant did have to seek enforcement from a Singaporean court, this process could be extremely drawn out and costly. In this respect, it was simply more convenient to order that the plaintiff pay security for costs under O25 r. 2. In light of the ambiguity surrounding the guarantee provided by the plaintiff's parent, and the inherent risks in using a shipping vessel as security regardless of its value, the

Court rejected the plaintiff's argument that it was too solvent for there to be a need to provide security for costs.

The Court was also unconvinced in relation to the plaintiff's claim that security should be capped at the amount required to register for a costs judgment in Singapore. The Court determined that, because the plaintiff's only valuable asset was not permanently within Singapore, it was not possible to say that the defendant would necessarily be successful in seeking an execution process in Singapore upon a registered Australian judgment.

Having reached a decision to order security for costs under O 25 r. 2, it was not necessary for the Court to determine the plaintiff's contention in regard to s. 1335 of the Corporations Act. However, the Court went on to explain why the plaintiff's submissions in respect of this section were unfeasible. The Court deemed it highly influential that the Armada Claire was a portable asset that had, in the past, been used as security for loans. It was also noted that ships are particularly amenable to being placed under a charge and incurring liabilities under a maritime lien. It was found that all of these things contributed to there being reason to believe that a one-asset ship owning corporation could be unable to meet an adverse trial costs award.

7. Contributions

If you would like to contribute an article or news item to the Bulletin, please email it to: law-cclsr@unimelb.edu.au.
