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> WHAT'S NEW
> MODIFY MY NEWSFEEDS
> SEARCH NEWSFEED ARCHIVE
> RELEVANT STANDARDS
> SEARCH LEGISLATION
> ABOUT LEGISLATIVE ALERT
> MORE SERVICES
> ABOUT SAI GLOBAL

Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 US agencies issue final rules implementing the Volcker rule

On 10 December 2013, five US federal agencies issued final rules developed jointly to implement s. 619 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (the Dodd-Frank Act), known as the Volcker Rule.

The final rules prohibit insured depository institutions and companies affiliated with insured depository institutions (banking entities) from engaging in short-term proprietary trading of certain securities, derivatives, commodity futures and options on these instruments for their own account. The final rules also impose limits on banking entities' investments in, and other relationships with, hedge funds or private equity funds.

Like the Dodd-Frank Act, the final rules provide exemptions for certain activities, including market making, underwriting, hedging, trading in government obligations, insurance company activities, and organising and offering hedge funds or private equity funds. The final rules also clarify that certain activities are not prohibited, including acting as agent, broker, or custodian.

The compliance requirements under the final rules vary based on the size of the banking entity and the scope of activities conducted. Banking entities with significant trading operations will be required to establish a detailed compliance program and their CEOs will be required to attest that the program is reasonably designed to achieve compliance with the final rule. Independent testing and analysis of an institution's compliance program will also be required. The final rules reduce the burden on smaller, less-complex institutions by limiting their compliance and reporting requirements. Additionally, a banking entity that does not engage in covered trading activities will not need to establish a compliance program.

Banking organisations covered by s. 619 will be required to fully conform their activities and investments by 21 July 2015.

The final rules are available on the SEC website.

1.2 Corporate responsibility reporting survey

On 10 December 2013, the eighth edition of the *KPMG Survey of Corporate Responsibility Reporting 2013* was released. The publication surveyed 4,100 companies across 41 countries.

The report indicates that there has been a dramatic increase in corporate responsibility (CR) reporting rates in Asia Pacific over the last two years.

This survey provides a snapshot of current national, global and industry trends and insights in CR reporting.

Key insights comprise the following:

- CR reporting has evolved into a mainstream business practice over the last two decades—undertaken by 71% of companies surveyed in 2013;
- the average quality of Australian companies' reports rated highly, at 70%;
- 78% of reporting companies worldwide refer to the Global Reporting Initiative reporting guidelines;
- large companies appear to be reporting on materiality and strategy, but more transparency is needed on the materiality process.

The full report, executive summary and Australian summary are available on the KPMG website.

1.3 Bank for International Settlements quarterly review

On 8 December 2013, the Bank for International Settlements (BIS) released its quarterly review for December 2013.

The review includes information on international banking and financial market developments with a focus on trends and international statistics.

Special features include:

- the anatomy of the global FX market through the lens of the 2013 Triennial Survey;
- FX market trends before, between and beyond Triennial Surveys; and
- FX and derivatives markets in emerging economies and the internationalisation of their currencies.

The review is available on the BIS website.

1.4 Deficiencies in CRAs sovereign ratings processes: report

On 2 December 2013, the European Securities and Markets Authority (ESMA) published a Report identifying a number of deficiencies in the processes for producing and issuing sovereign ratings at the three largest credit rating agencies (CRAs), Fitch Ratings, Moody's Investors Service and Standard & Poor's.

The Report follows an investigation carried out by ESMA during February - October 2013 into the sovereign rating processes at the three CRAs. The investigation was prompted by concerns about potential conflicts of interests, the impact of sovereign ratings on other types of ratings, CRAs' capacity to cope with the number of rating actions during a period of high volatility, the use of bulk rating actions, and issues around the confidentiality and timing of rating actions.

The investigation focused on the governance and organisation of sovereign rating activities, the adequacy and expertise of allocated human resources, the disclosure of rating information to the public, and ensuring its confidentiality before disclosure.

The report is available on the ESMA website.

1.5 IOSCO launches statistics web portal on securities markets

On 28 November 2013, the Research Department of the International Organization of Securities Commissions (IOSCO) launched a statistics web portal that provides the public with a global overview of specific securities markets.

The objectives of the new portal are threefold. It seeks, first, to provide a centralised point for monitoring global trends, risks and vulnerabilities; second, to provide a mechanism for comparison of how well markets are recovering in light of the crisis; and finally, to provide IOSCO members and the broader financial community with easy access to key statistics, charts and indicators on a number of securities markets, including:

- corporate debt - including global and regional issuances of investment grade and high yield debt;
- covered bonds;
- securitised products - including issuance since the crisis;
- Islamic finance - *sukuk* bonds, with more products to be covered in the coming months;
- equity IPO volumes;
- equity market valuations - CAPE and Tobin's q measure;
- syndicated loans - including average cost of deals; and
- housing price indices - of selected countries.

The new page is available on the IOSCO website.

1.6 Product oversight and governance processes for financial products

On 28 November 2013, the Joint Committee of the three European Supervisory Authorities published eight principles applicable to the oversight and governance processes of financial products. These principles cover in particular the responsibilities of manufacturers and producers in setting up processes, functions and strategies for designing and marketing financial products.

The Authorities highlight that the design of financial products and services poses risks to consumers when the target market is not correctly identified. These risks can also arise when the objectives and characteristics of the target market are not duly taken into account in the marketing of products to consumers. These issues have previously arisen at EU level across the three sectors of banking, insurance and securities.

The Joint Position document is available on the European Banking Authority website.

1.7 Treasury discussion paper: Better regulation and governance, enhanced transparency and improved competition in superannuation

On 28 November 2013, Australian federal Assistant Treasurer Arthur Sinodinos released for public consultation a discussion paper canvassing the issues of governance, transparency and default superannuation funds in modern awards.

The purpose of the paper is to seek feedback on governance and transparency issues contained in the government's superannuation election commitments. The paper also provides an opportunity for consultation on opening up competition and increasing transparency in relation to default employee superannuation fund contributions. This feedback is sought ahead of the development of possible legislation and regulation.

The key issues raised in the paper are:

- how best to ensure an appropriate provision for independent directors on superannuation trustee boards. Issues canvassed include how "independence" could be defined and what could constitute optimal board composition;
- how best to complete the outstanding aspects of the current regulatory regime, including:
  - to what extent the choice product dashboard should reflect the MySuper product dashboard; and
  - which model of portfolio holdings disclosure would best achieve an appropriate balance between improved transparency and compliance costs; and
- the best way to improve transparency and competition in the employee default superannuation funds market.

The discussion paper is available on the Treasury website.

1.8 Swiss vote no to capping CEO pay at 12 times lowest paid

On 24 November 2013, Swiss voters rejected a proposal that would have limited CEO pay to 12 times that of the lowest paid. The referendum saw 65.3% vote against the plan with 34.7% in favour.

The country is home to a range of major businesses, including pharmaceutical companies Novartis and Roche, the insurance groups Zurich and Swiss Re and the banks UBS and Credit Suisse.

Switzerland's system of democracy means citizens can call nationwide votes on issues that concern them.

The voting results and further information are available on the Swiss Broadcasting Corporation website.

1.9 APRA releases quarterly superannuation statistics for September 2013

On 21 November 2013, the Australian Prudential Regulation Authority (APRA) released its *September 2013 Quarterly Superannuation Performance* publication. Total estimated assets, which include the assets of self-managed superannuation funds and the balance of life office statutory funds, rose to $1.75 trillion at 30 September 2013.

Contributions to funds with at least $50 million in assets over the September 2013 quarter were $21.5 billion. Total contributions for the year ending September 2013 were $90.3 billion, down 0.8% from the previous year ($91 billion).

The statistics are available on the APRA website.

1.10 European Parliament backs Commission's women on boards proposal

On 20 November 2013, the European Parliament voted by a large majority (459 for, 148 against and 81 abstentions) to back the European Commission's proposed law to improve the gender balance in Europe's company boardrooms. The strong endorsement by the Members of the European Parliament means the Commission's proposal has now been approved by one of the European Union's two co-legislators. Member states in the Council now need to reach agreement on the draft law, among themselves and with the European Parliament, in order for it to enter the EU statute book.

On 14 November 2012, the Commission adopted a proposal for a directive setting a minimum objective of having 40% of women in non-executive board-member positions in listed companies in Europe by 2020, or 2018 for listed public undertakings (see IP/12/1205 and MEMO/12/860).

Main elements of the draft law include the following:

- if a publicly listed company in Europe does not have 40% women among its non-executive board members, the new law will require it to introduce a new

selection procedure for board members which gives priority to qualified female candidates;
- the law only applies to the supervisory boards or non-executive directors of publicly listed companies, due to their economic importance and high visibility. Small and medium enterprises are excluded;
- individual EU member states will have to lay down appropriate and dissuasive sanctions for companies in breach of the Directive;
- the law is a temporary measure. It will automatically expire in 2028;
- the law also includes, as a complementary measure, a "flexi quota": an obligation for companies listed on a stock exchange to set themselves individual, self-regulatory targets regarding the representation of both sexes among executive directors to be met by 2020 (or 2018 in case of public undertakings). Companies will have to report annually on the progress made.

A database on women and men in decision making is available on the European Commission website.

1.11 UK institutional investor corporate accountability and remuneration principles

On 18 October 2013, the UK National Association of Pension Funds (NAPF) published new remuneration principles and more robust expectations for corporate accountability.

Reflecting growing concerns about the length of some auditor tenures, the NAPF policy places greater emphasis on the importance of safeguarding the independence of the external auditor. It includes for the first time a cap on non-audit fees of 100% of audit fees (or a material monetary sum of £500,000). If this cap is exceeded in successive years, investors are encouraged to vote against the chair of the audit committee or the audit fees.

Another change to the NAPF policy encourages boards to explain to shareholders how they approach oversight and management of material extra-financial risks, including risks to reputation such as their approach to tax management.

The NAPF *Corporate Governance Policy & Voting Guidelines 2014* document is available on the NAPF website.

1.12 Guidance for more effective supervision of risk appetite and risk culture at financial institutions

On 18 November 2013, the Financial Stability Board (FSB) published two papers to assist in strengthening risk management practices at financial institutions:

- *Principles for an Effective Risk Appetite Framework* - finalised document; and
- *Guidance on Supervisory Interaction with Financial Institutions on Risk Culture* - for public consultation.

These papers form part of the FSB's initiative to increase the intensity and effectiveness of supervision, which is a key component of the policy measures to address systemically important financial institutions (SIFIs) that were endorsed by the G20 in November 2010 to address the problem of firms that are "too big to fail". Supervisory expectations for firms' risk management functions and overall risk governance frameworks are increasing, as these were areas that exhibited significant weaknesses in many financial institutions during the global financial crisis.

Both Principles for an Effective Risk Appetite Framework and the consultative document Increasing the Intensity and Effectiveness of Supervision are available on the FSB website.

1.13 CFTC issues final rules for derivatives clearing organisations to align with international standards

On 17 November 2013, the US Commodity Futures Trading Commission (CFTC) finalised rules to establish additional standards for systemically important derivatives clearing organisations (SIDCOs).

These rules, together with the existing derivatives clearing organisations rules, establish Commission regulations that are consistent with the Principles for Financial Market Infrastructures (PFMIs) and would allow SIDCOs to continue to be Qualifying Central Counterparties for purposes of international bank capital standards. The final rules include substantive requirements relating to governance, financial resources, system safeguards, special default rules and procedures for uncovered losses or shortfalls, risk management, additional disclosure requirements, efficiency, and recovery and wind-down procedures.

In addition, the final rules include procedures by which derivatives clearing organisations other than SIDCOS may elect to become subject to these additional standards.

The rules are available on the CFTC website.

1.14 Research shows longer due diligence in M&A linked to significant increase in deal success for acquirers but lower takeover premiums for sellers

On 14 November 2013, Intralinks Holdings Inc. released a research report that shows the financial impact of pre-announcement M&A activity on acquirers and sellers. The research findings show that deals which have a longer due diligence period deliver significantly higher long term shareholder returns for acquirers, while also being associated with lower takeover premiums for sellers. Other results also show that the majority of M&A deal leaks are deliberate and are intended to influence the outcome of the deal to the advantage of the leaker.

The report titled "When no-one knows: pre-announcement M&A activity and its effect on M&A outcomes", is based on research on a sample of 519 publicly announced M&A transactions which used an Intralinks virtual data room (VDR) for due diligence between 2008 and 2012. In conjunction with the research, 30 M&A professionals were surveyed to comment on the findings.

The research is the first to provide real evidence to support the widely held belief that a longer due diligence process results in better deal-making by acquirers. The interviews suggested that longer due diligence processes provide acquirers with additional information on the target that can be used to negotiate a lower price. Sellers, on the other hand, appear to be at a disadvantage from deals with a longer due diligence period, and may thus be motivated to try to limit the amount of time allowed for due diligence.

The report also reveals new statistics on deal preparation and the due diligence process. According to the report, the average length of the due diligence period is 124 days, with an average of 152 users given access to the VDR and an average of over 34,000 pages of due diligence information being disclosed to potential buyers. The large number of individuals involved in a deal explains the difficulty that could arise in trying to identify the source of any intentional leak.

The report is available on the Intralinks website.

1.15 Enhancing the audit committee report

In November 2013, a group of US industry bodies published a paper titled *Enhancing the audit committee report: A call to action*. It is noted in the paper that there is a growing trend among a number of leading audit committees to voluntarily address the need for enhanced audit committee reporting.

Examples of this disclosure are given in the paper and the matters they deal with include:

- the scope of the audit committee's duties;
- the audit committee's composition;
- factors considered when selecting or reappointing an audit firm;
- selection of the lead audit engagement partner;
- factors considered when determining auditor compensation;
- how the committee oversees the external auditor; and
- the evaluation of the external auditor.

The paper is available on the Audit Committee Collaboration website.

1.16 Credit crisis litigation update

In October 2013, NERA Economic Consulting published an article that discusses the recent US trends of settlement activity and reviews some of the major settlements in credit crisis litigation. Mortgage settlements that are related to repurchase demands mainly between mortgage sellers and Fannie Mae and Freddie Mac are also discussed. Current trends in filings, including the types of claims made, the nature of defendants and plaintiffs in the litigation, and the financial products involved are examined.

Settlements of credit crisis-related litigation between 2007 and October 2013 total more than US$32 billion, about 22% of which is related to settlements of securities class action lawsuits.

The five largest securities litigation settlements to date total US$19 billion (59% of total credit crisis litigation settlements).

These are:

- the tentative US$13 billion settlement between JPMorgan and the US Department of Justice (DOJ) resolving several civil suits and investigations regarding mortgage securitisations in October 2013;
- the US$2.4 billion settlement in *In re: Bank of America Corp. Securities, Derivative and ERISA Litigation* in September 2012;
- the US$1.7 billion settlement in *MBIA v. Countrywide et al.* in May 2013;
- the US$1.1 billion settlement related to *MBIA v. Morgan Stanley et al.* and *Morgan Stanley et al. v. MBIA et al.* in December 2011; and
- the US$885 million settlement in *FHFA (as conservator for Fannie Mae and Freddie Mac) v. UBS Americas Inc. et al.* in July 2013.

The full article is available on the NERA website.

1.17 Improving Australia's regulatory system: report

The Business Council of Australia (BCA) has released a paper titled *Improving Australia's Regulatory System*, which provides a set of actions for improving the regulatory system.

The paper highlights opportunities to improve the administration of the law, noting that while key regulators must be independent, they must also operate in an environment with incentives to better understand business and minimise regulatory burdens, including those arising from delays and uncertainty.

The paper calls for four actions that should be implemented as a priority:

- legislating the mandatory preparation of regulation impact statements;
- legislating a new performance and accountability code for all major regulators, including the establishment of an Inspector-General of Regulation;
- requiring any regulation which imposes a significantly increased red tape burden to have an equivalent offsetting red tape reduction within the same portfolio; and
- productivity payments from the Commonwealth to the states for good regulation performance.

The paper also includes a number of other recommendations for governments to adopt which focus on stopping the flow of poor regulation, the performance and accountability of regulators, and reducing the stock of regulation.

The paper is available on the BCA website.

1.18 Three full-time research positions - Melbourne Law School

Melbourne Law School has available three full-time fixed term research positions. Each of these positions is funded by an Australian Research Council grant.

(a) Personal insolvency project

Associate Professor Paul Ali and Professor Ian Ramsay are undertaking an investigation into how Australians respond to financial stress within the context of Australian personal insolvency laws. Involving several industry partners, this project aims to provide a better understanding of the practical impact of the personal insolvency laws and will enable an evaluation of their effectiveness in meeting policy objectives.

(b) Fraudulent phoenix company activities project

Associate Professor Helen Anderson, Professor Ann O'Connell, Professor Ian Ramsay and Dr Michelle Welsh are conducting an investigation into fraudulent phoenix activity. Fraudulent phoenix activity is of great concern to Australian policymakers. It occurs where there is the deliberate liquidation of a company to avoid paying debts but the business continues through another company, and in corporate groups through the liquidation of undercapitalised subsidiaries and transfer of business to other companies in the group. This behaviour causes significant losses in taxation revenue and large financial losses for employees and unsecured creditors. This project aims to determine the optimal method of dealing with fraudulent phoenix activity through a thorough examination of all of its aspects in Australia and by a comparative analysis of international responses.

(c) Financial hardship project

Associate Professor Paul Ali and Professor Ian Ramsay are undertaking an investigation into financial hardship—the reduced ability to meet monetary obligations because of loss of employment, illness or disaster—which is an increasing problem for both low-income and middle-income Australians. The project is the first in-depth study of the practical operation of Australia's financial hardship laws, which are designed to protect Australians suffering financial hardship.

The position descriptions for the research positions are available on the University of Melbourne website using the search query "law".

2. Recent ASIC Developments

2.1 Further super reforms guidance

On 6 December 2013, ASIC issued further guidance to assist industry with superannuation reforms, as well as a consultation paper about keeping superannuation websites up to date.

(a) Guidance

The guidance relates to the new product dashboard requirements for MySuper products, and the new fees and costs disclosure requirements for product disclosure statements (PDSs) and periodic statements.

(b) Product dashboard

From 31 December 2013, trustees will be required to publish and keep up to date, a product dashboard for their new MySuper products. MySuper products are the new default products in superannuation, replacing over time existing default funds. The product dashboards will enable consumers to compare their super with other funds and products.

Information Sheet 170 - MySuper product dashboard requirements for superannuation trustees (INFO 170) explains what information must be provided for each of the following measures:

- the return target;
- the returns for previous financial years;
- a comparison between the return target and returns for previous financial years;
- the level of investment risk; and
- a statement of fees and other costs.

INFO 170 also contains an example of what the product dashboard may look like, which incorporates some of the feedback from the independent consumer testing conducted by Latitude Insights.

The results of the testing have been released as *ASIC Report 378 - Consumer testing of the MySuper product dashboard* (REP 378).

(c) Fees and costs disclosure

The Superannuation Legislation Amendment (MySuper Measures) Regulation 2013 (Cth) changed the existing superannuation and managed investment fee disclosure requirements under the Corporations Regulations 2001 (Cth). ASIC has issued FAQ guidance to help super trustees with respect to these changes.

Importantly, the guidance emphasises that there should not be double counting of fees.

(d) Consultation

ASIC has also released *Consultation Paper 219 - Keeping superannuation websites up to date* (CP 219), which considers what "up to date at all times" means in the context of s. 29QB of the Superannuation Industry (Supervision) Act 1993 (Cth). These requirements relate to executive officer remuneration disclosure and other systemic transparency measures.

ASIC proposes giving trustees a "safe harbour", so that they are taken to comply with the updating obligation in s. 29QB if they update the fund website within a specified time. That time is generally 14 days.

In relation to s. 29QB, ASIC has also recently amended its Class Order [CO 13/830] to extend the timeframe for compliance with the requirements of this section until 1 July 2014.

Further, ASIC has issued FAQs in relation to the s. 29QB disclosure requirements, including providing guidance on the definition of executive officers.

Further information is available on the ASIC website.

2.2 Advertising of pensioner deeming accounts

On 5 December 2013, ASIC acted to ensure people receiving an Australian Government pension are not being misled by advertising promoting the interest rates they will be paid on certain types of savings accounts.

ASIC found a number of banks and mutual authorised deposit-taking institutions (ADIs) were using the term "deeming account" to promote a basic savings account to pension recipients. These accounts have been marketed as having a connection with the government's "deeming rules", which form part of the government's social security income test.

ASIC was concerned the way advertising linked these savings accounts to the government's deeming rates could mislead consumers. In most cases, the savings accounts offer lower interest rates than the deeming rates, particularly for lower account balances.

ASIC was particularly concerned the name of the account could mislead consumers into believing the interest rates on offer would be the same as the deeming rates. ASIC was also concerned about consumers being unable to clearly identify the interest rates that apply to different account balances (known as "banded" or "tiered" interest rates).

ASIC raised concerns about certain disclosure and marketing practices and has been working collaboratively with the industry to address these concerns. Following discussions with the Australian Bankers' Association (ABA) and the Customer Owned Banking Association (COBA), industry has agreed that members offering these products will work to ensure that:

- the word "deeming" is not used in a savings account name where that might mislead consumers about the interest rates being offered;
- features of these accounts are not described as being "comparable to", "compatible with", "guided by", "reflective of" the Commonwealth Government deeming rates where this is not the case, and
- where "banded" interest rates are offered, this is clearly disclosed; and information about different bands and applicable rate made easily accessible to consumers.

ASIC will continue to work with the ABA and COBA to ensure these measures are implemented.

Further information is available on the ASIC website and the ABA website.

2.3 Advice on complex capital protected products needs to improve

On 4 December 2013, ASIC released a report on the assessment of advice provided by financial services firms to investors about capital protected products. The report found many advisers did not make adequate enquiries into their clients' personal circumstances.

Report 377 *Review of advice on retail structured products* found that in approximately half of the files, there was insufficient evidence to show that advisers had met their obligations to investigate clients' relevant circumstances, the subject matter of the advice and then to provide appropriate recommendations.

This report is part of ASIC's ongoing review of the provision of complex capital protected products to retail investors. A report in May 2013 found significant concerns around the marketing of such products.

ASIC reviewed five pieces of advice from each of ten firms providing these products to retail investors. The majority of advice reviewed was provided in 2012 and had to comply with s. 945A of the Corporations Act 2001 (Cth). This was the part of the law that required an adviser to have a "reasonable basis" for the advice. That section of the law has since been replaced by the *Future of Financial Advice* (FOFA) reforms, which include a requirement that advisers must act in the best interests of their clients.

Report 377 found:

- advisers narrowing the scope of advice to a single structured product or focusing on one product, rather than considering a range of potentially suitable products;
- a "one-size-fits-all" approach, with inadequate consideration of the client's needs and circumstances and alternative strategies/asset allocation, with a lack of diversification; and
- unsuitable gearing recommendations or a lack of evidence to support gearing recommendations—for example, to clients who may not have been able to afford the loan interest payments, or tax-driven advice where relevant risks were not highlighted.

Report 377 also details concerns with disclosure, including misrepresentation of the features of products recommended, including the degree of safety or capital protection.

Report 377 is available on the ASIC website.

2.4 Revised guidance on custody

On 21 November 2013, ASIC released revised guidance on the custody of assets and standards to be met by asset holders.

The revised guidance in Regulatory Guide 133, renamed *Managed investments and custodial or depository services: Holding assets*, and class orders, updates existing measures to:

- apply minimum standards to asset holders for managed investment schemes and holders of financial products, and affects responsible entities, licensed custodians, platform operators and managed discretionary account operators;
- ensure agreements with asset holders have certain minimum terms; and

- require primary production scheme responsible entities to safeguard the land on which the scheme operates.

ASIC also updated Regulatory Guide 166 *Licensing: Financial requirements* to accommodate industry practice of custody of certain assets like derivatives and certain bank accounts and private equity interests when these are held by a responsible entity of a managed investment scheme where existing financial resource requirements would not otherwise allow this.

The revised requirements apply from 2 January 2014 to asset holders that first hold assets or arrange for them to be held after that date. Otherwise they have until 2 January 2015 to comply with the new requirements and until 1 November 2015 to ensure agreements with asset holders comply with the changes.

Primary production schemes with interests on issue after 2 January 2014 will have to comply from 1 July 2014.

Regulatory Guide 133 and Regulatory Guide 166 are available on the ASIC website.

3. Recent ASX Developments

3.1 Mining and oil and gas - commencement of new listing rules

On 1 December 2013, the new ASX Listing Rules for mining and oil and gas reporting commenced.

The Compliance downloads page has further information about the new reporting rules, including podcasts of the mining and oil and gas roadshow presentations earlier this year and copies of the presentation slides. It also has a link to answers to frequently asked questions covering the transition to the new reporting regime, competent persons, exploration targets and production targets.

All mining and oil and gas entities should ensure that they are familiar with the new rules, including the transition process for material projects that were first publicly reported before 1 December 2013 under the old rules.

The new rules are available under the ASX Listing Rules section of the ASX website.

3.2 Proposed changes on long-term suspended entities

On 28 November 2013, ASX issued the final version of the proposed new Guidance Note 33 *Removal of entities from the official list*, which deals with when and how ASX may de-list an entity, either at the request of the listed entity or at the instigation of ASX.

The new Guidance Note gives effect to a change in policy under which ASX will automatically de-list long-term suspended entities if their securities have been suspended from trading for a continuous period of three years.

ASX also released amendments to section 4.23 of *Guidance Note 8 - Continuous Disclosure: Listing Rules 3.1 - 3.1B*, dealing with the disclosures ASX expects an entity to make if its securities are suspended from quotation.

Further information is available on the ASX website.

3.3 Reports

On 4 December 2013 ASX released:

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

for November 2013.

4. Recent Takeovers Panel Developments

4.1 Virgin Australia Holdings Ltd - Panel declines to make declaration

On 3 December 2013, the Takeovers Panel declined to make a declaration of unacceptable circumstances in response to an application dated 22 November 2013 from Mr Stephen Mayne. The application concerned the 5 for 14 entitlement offer announced by Virgin Australia Holdings Ltd on 14 November 2013 (see TP13/61).

The Panel concluded that any shortfall will be dispersed effectively between Air New Zealand, Etihad Airways and Singapore Airlines through the sub-underwriting and synthetic sub-underwriting arrangements and that the outcome of the entitlement offer will be to maintain substantially the structure of Virgin Australia's share register.

There may be circumstances in which a cap on subscriptions for additional shares or the use of cash settled derivatives would be unacceptable, but that is not the case here.

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

The reasons for the decision are available on the Takeovers Panel website.

5. Recent Research Papers

5.1 Venture's economic impact in Australia

The authors empirically compare the contributions of venture capital (VC) and private equity (PE) backed firms, including those backed by government subsidised Innovation Investment Funds (IIFs), in the Australian economy by analysing employment, R&D, patents, time to IPO, and market capitalisation from market inception to August 2012. Overall, the data highlights a central role for VC and IIF investment in facilitating R&D, innovation, and economic growth. The IIF findings highlight the success of government sponsorship of venture capital under the Australian program design, which is sharply in contrast with the lack of success of government venture programs in other countries.

The paper is available on the SSRN website.

5.2 Liquidity safety nets for banks

Liquidity shocks are a core risk of the business model of commercial banks, which is founded on a liquidity mismatch between the banks' liabilities and assets. A substantial part of the banks' funding comes from short-term retail and wholesale funding, whilst a substantial part of the assets are long-term and illiquid loans. This is the source of the banks' profits but also of their claim to fulfil an important social role. The article examines three regulatory strategies for reducing the incidence of liquidity shocks or making banks more resilient to them.

The strategies are:

- regulating the level of banks' liquidity reserves;
- insuring the value of the banks' long-term assets; and
- guaranteeing the performance of the banks' short-term liabilities.

The criteria of assessment are the least impact on the banks' social role of transforming short-term deposits into long-term loans, coupled with the least incentive for banks to take excessive risk, the least subsidy to banking and the least cost to the public purse. It is suggested that insuring the value of the banks' long-term assets emerges as the most attractive strategy.

The paper is available on the SSRN website.

5.3 Understanding the board of directors after the financial crisis

There are numerous studies on the effectiveness of boards that primarily focus on legal formalities, including gender diversity, board size, remuneration, board evaluation and the role of the chairman of the board. While attempting to design a one-size-fits-all framework, scholars approaching board independence from an agency cost perspective have been less concerned with analysing board structures that contribute to strategic decision-making and corporate performance. The authors examine the factors and board strategies that are associated with value creation and innovation by analysing the composition of high-performance and high-growth companies. The paper shows that venture capitalists, with their specific expertise and experience, continue to play an important role as independent board members in the post-IPO period. The authors specifically investigate the importance of diversity, showing that there are significant differences between the companies in terms of age, gender diversity and business expertise (which is dependent on the stage in the company life-cycle).

The paper is available on the SSRN website.

5.4 Governance of financial institutions: A cross-country evaluation of national codes following Basel (2010)

Five years after the banking crisis of 2008, the authors review progress in the area of governance reform. At the height of the crisis, broad support emerged for new governance regulations in banking that would focus more on risk management and hence the rights of depositors, debt-holders and the wider community. In 2010 the Basel Committee produced "Principles for Enhancing Corporate Governance". This document contains 14 principles and more than 120 specific recommendations; a significant revision from pre-crisis guidance and the benchmark for the analysis. Against this standard the authors examine the national codes for bank governance in Australia, Canada, China, the EU, Indonesia, Japan, Germany, Singapore, Switzerland, the UK and the US as at January 2013. They find that even in these (mainly) advanced economies, few come close to adopting the "best-practice" standards established by the Basel Committee. The authors offer some possible explanations for the apparent failure to comprehensively adopt these governance regulations developed through international negotiation.

The paper is available on the SSRN website.

5.5 The revolving door for financial regulators

In a sample of executives with employment histories including one of five US financial regulators, the authors estimate that financial firms' practice of hiring ex-regulators has grown by more than 30% from 2001 to 2012. Regulated firms, especially those that anticipate or have recently faced enforcement action, are more than twice as likely to hire ex-regulators as are other financial firms. Recent regulatory action, existing ex-regulators at the firm, and geographic proximity to the regulator also increase the likelihood of hire. Financial stocks have positive average announcement returns for ex-regulator hires into board and senior executive positions and for firms with recent enforcement actions from the same regulator. The presence of ex-regulator employees at financial firms has regulator-specific effects on the incidence of behaviour named in future enforcement actions and on the resulting monetary penalties.

The paper is available on the SSRN website.

5.6 Extraterritorial financial regulation

Systemic risk poses a classic "public goods" problem. All nations want systemic stability, but most would prefer that other nations pay for it, allowing them to "free ride". Moreover, because global financial institutions can park their higher risk operations almost anywhere, some nations can profit from regulatory arbitrage by keeping their regulatory controls laxer than in the more financially developed nations (which bear the principal share of the costs from financial contagion). As a result, the free riders do not need to internalize the full costs of systemic risk, but profit from imposing costs on others.

Under these conditions, all the preconditions for a "tragedy of the commons" are satisfied, because (i) the nations that profit from regulatory arbitrage cannot be excluded from offering under-regulated markets, and (ii) they do not need to internalize the costs they impose on others. While the "tragedy of the commons" literature has been much used in environmental law and related fields, it applies equally well to international financial markets. The solution to this problem lies in finding ways to tax the free riders or otherwise subject them to stronger controls. But here is exactly where current "soft law" approaches to international financial regulation fail. Because "soft law" is almost by definition non-binding and unenforceable, it cannot control a financial services industry that wishes to pursue highly profitable, higher risk strategies.

Aspirational theorists of international "soft law" thus misconceive the problem. To expect "soft law" to be kinder and gentler than formal law and to give every nation an equal voice is to prescribe the essential conditions for a "tragedy of the commons".

Instead, as this article argues, only the major financial nations have the right incentives to curb systemic risk, precisely because they are exposed to it. Thus, bilateral negotiations among them (particularly between the US and the EU) and the assertion of extraterritorial jurisdiction by them is necessary to create a governance structure under which highly mobile financial institutions cannot flee to less regulated venues. Ultimately, this assertion of extraterritorial authority (which both the US and the EU have now done) may be an interim stage in the longer term development of adequate international "soft law" standards. But, absent the assertion of such authority, the commons will predictably collapse again into tragedy.

This article examines recent negotiations over the international regulation of OTC derivatives markets and the uncertain status of the Volcker Rule as cases in point. With respect to the latter, it poses the question: how should a legal regime of "substituted compliance" deal with the Volcker Rule where no other nations has adopted or proposed a close financial equivalent? Finally, it asks how "extraterritorial" US law needs to be and proposes some limits.

The paper is available on the SSRN website.

6. Recent Corporate Law Decisions

6.1 High Court reviews the effect of liquidator's disclaimer on lessees

(By John Lobban, Ian Innes, Bri Bell, Ross McClymont and Chris Fenwick, Ashurst)

Willmott Growers Group Inc v Willmott Forests Limited (receivers and managers appointed) (in liquidation) [2013] HCA 51, High Court of Australia, French CJ, Hayne Kiefel, Gageler and Keane JJ, 4 December 2013

The full text of this judgment is available here.

(a) Summary

A liquidator of an insolvent lessor company has the ability to disclaim a lease agreement. Any security held by a financier in respect of the rights under the agreement will be extinguished if such a disclaimer takes effect. The lessee or financier has the ability to apply for the disclaimer to be set aside before it takes effect.

(b) Facts

The relevant factual circumstances which gave rise to this matter were that Willmott Forests Ltd (Willmott Forests) was the responsible entity of a number of managed investment schemes (both registered and unregistered) which consisted of forestry operations. Willmott Forests owned and leased a number of properties for the purposes of conducting that scheme. The properties were leased or sub-leased to the members of the Willmott Growers Group (Willmott Growers) for 25-year terms. Willmott Forests went into liquidation and the liquidators wanted to dispose of Willmott Forests' interests in the properties unencumbered.

(i) The limited effect of disclaimer on third party rights

While a liquidator is entitled to disclaim property in certain circumstances prescribed by s. 568 of the Corporations Act 2001 (Cth) (the Act), s. 568D(1) provides that such disclaimer does not affect any other person's rights or liabilities "except so far as necessary in order to release the company and its property from liability".

As a result, the liquidators sought a declaration from the Victorian Supreme Court that they were entitled to disclaim the leases with the effect of extinguishing Willmott Growers' interests in the subject properties.

(ii) The lower Court judgments

At first instance, the Victorian Supreme Court held that the disclaimer of a lease agreement by the liquidator of a lessor only operated to terminate the contractual relationship with the lessee. The disclaimer did not extinguish the associated proprietary interest of the lessee, nor was it necessary to extinguish Willmott Growers' interests in order to release Willmott Forests' property from a liability.

On appeal, the Victorian Court of Appeal held that Willmott Forests had an ongoing obligation under the lease to provide possession and quiet enjoyment to Willmott Growers, and termination of the lease agreements would relieve Willmott Forests from that liability. As the proprietary leasehold interest is governed by the contract of lease, it likewise falls away upon the disclaimer of the lease agreement.

(c) Decision

The High Court held that disclaimer by the liquidator of a lessor company brings the rights and obligations of both parties under the lease to an end. If the tenant suffers loss as a result of the disclaimer, they may prove for that loss in the winding up of the lessor company.

The majority in the High Court (French CJ and Hayne and Kiefel JJ) held that:

- while each lease created a corresponding interest in the relevant land, the question to be determined was whether that proprietary interest was brought to an end by the operation of the Act;
- the rights, interests and liabilities of Willmott Growers could not be divorced or separated from the correlative rights, interests and liabilities of Willmott Forests; and
- it was necessary to terminate both Willmott Growers' rights under the leases and their interests in the land in order to release Willmott Forests from its liabilities under the lease agreement.

In separate reasons, Gageler J held to the same effect, noting that the entirety of the arrangement is lost irrespective of whether a lease has been disclaimed by the lessor or lessee.

The majority nonetheless reiterated that a person affected by a proposed disclaimer has a right to apply for the disclaimer to be set aside where its impact upon them would be grossly out of proportion to the prejudice the company's creditors would suffer without the disclaimer.

Keane J wrote a carefully considered dissenting judgment.

In his Honour's view:

- textual, contextual, historical and policy reasons suggested that a liquidator of an insolvent lessor could not disclaim a lease without the leave of the Court; and

- if leave were to be given, it would only release the lessor company from its future obligations, but would not extinguish the lessee's previously accrued rights to exclusive possession of the land.

In the result, the High Court upheld the decision made by the Victorian Court of Appeal.

(d) Implications for financial institutions

It is uncommon for a liquidator of a lessor company to wish to disclaim a lease, as often the continuation of the lease has a commercial benefit for any proposed purchaser.

As a result, this situation is only likely to arise where:

- the term of the lease is lengthy, and would involve significant ongoing obligations on the part of the lessor company that would severely prejudice the company's creditors; and/or
- the rent payable by the lessee is under market rates, or is otherwise uncommercial or not profitable.

As a result, when considering new facilities or reviewing security profiles, it is important that financiers turn their minds to this question.

Where disclaimer of the customer's lease is a potential risk, financiers should ensure that the relevant facilities and securities:

- cover a diverse portfolio of security interests, including personal guarantees;
- require disclosure by the borrower or guarantor of an event of this nature; and
- provide for a security review and consequential facility and security adjustments if the benefit of a lease agreement is lost.

6.2 Trust assets charged following trespass and breach of contract by director

(By Kristina Popova, Ashurst)

Moore v Devanjul Pty Ltd (No 5) [2013] QSC 323, Supreme Court of Queensland, McMeekin J, 22 November 2013

The full text of this judgment is available here.

(a) Summary

The Supreme Court of Queensland has held that a director of Devanjul Pty Ltd (Devanjul) and Devanjul in its capacity as trustee of the Jadvek Berthelsen Family Trust (the JBFT) were liable in trespass and in breach of the contractual covenant of quiet enjoyment to the plaintiff.

McMeekin J ordered that the director pay damages in the amount of $297,561 plus costs and that the property of the JBFT be charged with payment to the plaintiff.

The proceeding arose following a serious of events whereby the directors of Devanjul entered the land leased by the plaintiff from Devanjul in its capacity as trustee of the JBFT.

(b) Facts

The plaintiff, Stanley Gordon William Moore in his capacity as trustee of the Moore Investment Trust, conducted a water slide business over land leased land from Devanjul under a registered lease.

In June and August 2007, without the consent of the plaintiff, the directors of Devanjul entered the land, changed the locks on the main gate and equipment shed, removed and dismantled a water slide and swimming pool and removed or damaged various other improvements on the land. These actions effectively destroyed the waterslide business of the plaintiff and made it impossible for the business to continue.

The plaintiff sued Devanjul in its capacity as trustee of the JBFT and the directors of Devanjul. The trustee of the JBFT at the time of the trial was later joined as the fifth defendant in the proceeding.

The plaintiff:

- claimed damages for the lost chance of earning an income from the demised premises in the amount of $261,672 against one of the director for trespass;
- alleged that Devanjul was vicariously liable for the director's trespass and in breach of the contractual right to have quiet enjoyment of the premises; and
- sought orders to have recourse to the assets of the JBFT.

In calculating damages, the plaintiff relied on the evidence of an accountant to establish the loss he sustained. The accountants approach took into account the profits derived from the business before the breach and applied them over the remaining term of the lease. This figure assumed an increase of 3% increase in profits per year and a discount of 25% for commercial uncertainty.

(c) Decision

(i) Liability of Devanjul and its director

McMeekin J found that the second defendant, a director of Devanjul, committed or procured the unauthorised entry onto the demised land and was therefore personally liable in damages for trespass.

His Honour did not consider it appropriate to characterise Devanjal as vicariously liable for the director's trespass, rather, that the company was directly liable. In the present circumstances, it was clear that at the time of the trespass the second defendant was a director of Devanjul and therefore one of the guiding minds of the company.

His Honour held that the acts which constituted the trespass were clearly in breach of the contractual covenant of quiet enjoyment arising under the lease and under s. 43 of the Retail Shop Leases Act 1994 (Qld).

In determining the question of damages, his Honour did not consider the discount of 25% justified in determining the probable loss of profits and instead applied a discount of 10% to the accountant's assessment and rounded the figure to $235,000. His Honour assessed interest in the amount of $62,561 pursuant s. 58 of the Civil Proceedings Act 2011 (Qld).

(ii) Remedies against the assets of the JBFT

As the trespass was effected by the directors of the corporate trustee acting as the lessor with a right of re-entry, his Honour was satisfied the actions of the trustee were "reasonably incurred" for the purpose of s. 72 of the Trust Accounts Act 1973 (Qld). Devanjul was entitled to be indemnified out of trust assets and the plaintiff was subrogated to that right.

Accordingly, McMeekin J made orders imposing a charge on the present and future property of the JBFT in favour of the plaintiff for the amount of $297,561 together with costs and authorised the current trustee of the JBFT to sell the assets of the JBFT as necessary to discharge the charge.

6.3 When will actual and apparent authority be held by a director?

(By Amy Dunphy, Minter Ellison)

LNOC Ltd v Watford Association Football Club Ltd [2013] EWHC 3615 (Comm), England and Wales High Court (Commercial Court), Judge Mackie QC, 21 November 2013

The full text of this judgment is available here.

(a) Summary

This case clarifies the factors that a Court will consider in determining whether a director has actual or apparent authority to bind the company to a transaction.

(b) Facts

LNOC Ltd (LNOC) sought payment of £900,000 from Watford Association Football Club Ltd (Defendant) said to be the amount owing on two loans. LNOC is a client of Mr Nigel Weiss whose companies Good for Sport Ltd (GFSL) and New Avenue Projects Ltd (NAP) act as intermediaries in the provision of funding to football clubs.

The loans were entered into by Mr Bassini, the then managing director and beneficial owner of Watford FL Ltd (WFCL) which took over Watford Leisure PLC (Watford Leisure) which owned 96% of the Defendant's shares. The board had delegated authority to Mr Bassini.

The salient facts are that:

- the Defendant received a bid from Swansea City Football for the transfer of striker Danny Graham (the Graham transaction);
- to forward fund the Graham transaction Mr Bassini and his associate, Mr Barrea, met with Mr Weiss. Mr Bassini provided evidence to Mr Weiss of Mr Barrea's authority to directly liaise with Mr Weiss;
- initially the transaction was structured so that LNOC would immediately pay to the Defendant £1,701,642 in exchange for an assignment to LNOC of the next nine monthly payments of £200,000 due to the Defendant from the League;
- a new Football League Regulation 19 was introduced which prevented an assignment of the kind contemplated by providing that:

> any Club that enters into an assignment of some or all of that Club's entitlement to distributions from the Pool Account (as defined in the Articles of Association) (or any other form of security or arrangement of similar effect) (Assignment) shall notify the League in writing no later than 24 hours after the date of that Assignment. Any Club that enters into an Assignment shall be subject to a registration embargo for the Effective Period of any Assignment such that it should not be permitted to register any Player with that Club without the prior written consent of the Executive;

- the loan transaction from Mr Weiss was re-structured so that instead of receiving re-payment from the League under an assignment, LNOC was to acquire from the Defendant two promissory notes, each for £900,000, payable on 1 February 2012 and 1 September 2012 respectively. The Defendant's obligations were to be supported by a personal guarantee from Mr Bassini. LNOC would also take an assignment of the Defendant's entitlement to payments from the League but the assignment would be held in escrow by Mr Weiss and only released to LNOC and completed if payment was not made;

- the money advanced by LNOC was paid to the parent company WFCL and not into the Defendant's bank account. However, WFCL had authority to receive funds for the Defendant and the management treated the two accounts as Group bank accounts; and
- the transactions were not disclosed to the board of directors. However, Mr Bassini and Mr Barrea did not conceal their actions.

Payment of the promissory notes became due and owing. The Defendant asserted that it had no knowledge of the LNOC transactions and refused to pay.

The Defendant contended that it was not bound by the transactions in accordance with s. 44(5) of the Companies Act 2006 (UK) (the Companies Act), dealing with execution of documents, on the basis of the following.

First, that both transactions were manifestly in breach of the Football League Regulations and in entering into them the Defendant was exposed to the risk of extremely serious sanctions from the Football League.

Secondly, there were not only alternative methods of funding available to the Defendant at the time but there was no pressing financial need for the Defendant to enter into the transactions at all. Furthermore, the Defendant did not, in fact, benefit financially from the transactions.

Thirdly, in the circumstances the transactions were manifestly not in the best interests of the Defendant for the purposes of s. 172 of the Companies Act, being the duty to promote the success of the company. It necessarily followed that, as a matter of law, Mr Bassini and/or Mr Barrea lacked actual authority to enter into those transactions.

Fourthly, Mr Weiss had sufficient knowledge of the nature of the transactions such that he must have known that Mr Bassini and Mr Barrea lacked actual authority to enter into them or any belief he may have had to the contrary was irrational. In the alternative, he had sufficient knowledge to trigger an obligation to make relevant enquiries of the position but he decided not to do so.

(c) Decision

His Honour Judge Mackie QC found that the Defendant was acting through its *de facto* managing director and had an obligation to pay the borrowed money back, which it had not done.

His Honour rejected the Defendant's argument that the Director had no actual or apparent authority and that the Defendants never received a financial benefit from the transaction.

In relation to actual authority, his Honour found that it was common ground that the board usually delegates authority for particular matters to individual directors or officers. The delegation of authority can be express or implied. The Defendant argued that Mr Bassini did not have actual authority on the basis that Mr Bassini was not acting in what he honestly believed to be the best interests of the Defendant.

In his Honour's opinion, mere negligence on a director's part will not vitiate a transaction. His Honour found that the Defendant had not shown that when Mr Bassini entered into these transactions he was not acting in what he honestly believed to be the best interests of the Defendant. Further, there was no evidence that Mr Bassini personally benefited from the transaction.

As to the matter of apparent authority, in his Honour's opinion it was clear that Mr Weiss genuinely believed that Mr Bassini had authority to commit the Defendant to relatively conventional transactions. Accordingly, the defence based on apparent authority failed.

6.4 "Professional investors" under the Corporations Act

(By Erica Rathbone Bales and Ian Ranson, King & Wood Mallesons)

MIS Funding No 1 Pty Ltd v Buckley [2013] VSC 607, Supreme Court of Victoria, Elliott J, 15 November 2013

The full text of this judgment is available here.

(a) Summary

In this case, Elliott J was asked to consider when an individual will be considered a "professional investor" under ss. 9 and 708(11) of the Corporations Act 2001 (Cth) (the Act).

His Honour found that in determining whether a person is a "professional investor" under the Act, which is defined, among other things, as an investor that controls at least $10 million, that person:

- should control $10 million in gross assets, rather than net assets; and

- will be considered to have "control" of company assets where it holds the majority of the voting rights attaching to the shares in the company.

(b) Facts

Willmott Forests Ltd (Willmott) was responsible for a series of registered and unregistered managed investment schemes. This case concerns an unregistered "Professional Investor Scheme" for the plantation and harvest of a pine forest (the Scheme).

Willmott promoted the Scheme under the "Willmott Forests Professional Investor - 2003 Project Information Memorandum" (the Memorandum). No prospectus was produced in relation to the Scheme. The Memorandum stated that only sophisticated or professional investors as contemplated by s. 708 of the Act were entitled to invest.

The defendant, Mr Peter Buckley, invested in the Scheme using funds loaned to him for that purpose by a subsidiary of Willmott, Willmott Finance Pty Ltd (Willmott Finance). Mr Buckley invested a total of $1,309,000 in the Scheme, of which $1,071,000 was borrowed from Willmott Finance. He signed a loan application on 21 March 2003 and it was accepted on 28 March 2003.

On 6 September 2010, Willmott was placed into voluntary administration. Shortly afterwards, Mr Buckley received a letter informing him that Willmott Finance had assigned his loan to MIS Funding No 1 Pty Ltd (MIS Funding). Around the same time, Mr Buckley defaulted on his loan repayments.

Mr Buckley's solicitor wrote to Willmott demanding that his client be given some security for his investment before making further repayments. Mr Buckley did not resume payments and ultimately MIS Funding commenced proceedings against him for the outstanding amount owing under the loan agreement.

Mr Buckley argued that:

- he was not a "professional investor" at the time he invested in the Scheme; and
- as a consequence, Willmott failed to comply with its disclosure obligations under the Act and he was not required to repay the outstanding amount of the loan.

(c) Decision

(i) Gross assets

The Act as it existed at 2003 (when the loan application was made) stated in s. 708(11) that "[a]n offer of securities does not need disclosure to investors under this Part if it is made to a professional investor (as defined in [s.] 9)".

The definitions in s. 9 of the Act (at the time) included the following:

> ... 'professional investor' means a person in relation to whom one or more of the following paragraphs apply: ...
>
> d. the person is the trustee.... within the meaning of [the Superannuation Industry (Supervision) Act 1993 (Cth)] and the fund, trust or scheme has net assets of at least $10 million;
> e. the person controls at least $10 million (including any amount held by an associated or under a trust that the person manages) ...

Mr Buckley sought to rely on amendments made to the Act after 2003, on the basis that these could influence the interpretation of the earlier legislation. In 2005, regulations altered paragraph (e) in relation to certain sections of the Act (not including s. 708(11)) to read: "the person has or controls gross assets of at least $10 million". Mr Buckley argued this suggests paragraph (e) did not refer to gross assets for the present purposes.

Elliott J considered the explanatory statement to the 2005 regulations which discussed only the addition of the word "has", but nothing was stated regarding "gross assets".

This, together with the fact that:

- paragraph (d) of the definition of "professional investor" specifically refers to net assets; and
- in ordinary language, reference to a controlling an amount is generally to a gross amount rather than a net amount,

indicated to Elliott J that the Act requires $10 million in gross assets.

On the facts of the case, his Honour noted particularly that:

- Mr Buckley chose not to present evidence himself, from which the Court was entitled to draw an adverse inference;
- a primary motivation for Mr Buckley's investment was the availability of a tax deduction which only applied to professional investors; and
- Mr Buckley had claimed in his loan application that he had net assets of $16,100,000 and gross assets of $17,050,000.

His Honour considered the evidence Mr Buckley presented to the Court about his financial position as at March 2003 (primarily from his accountant) to be unclear and incomplete. As a result, his Honour accepted the amounts stated on the original loan application.

(ii) The meaning of "control"

Elliott J went on to consider whether Mr Buckley had "control over company assets" sufficient to meet the threshold. His Honour stated that the "authorities make clear that if a person holds and controls the majority of the shares in a company, and commensurate voting rights, she or he will ordinarily be considered to be in control of the company, and the assets of the company".

Based on Mr Buckley's shareholdings and directorships, his Honour found that Mr Buckley had control over the assets held by at least 22 entities, totalling gross assets of $16,849,459. This in itself was sufficient to meet the threshold of $10 million.

Ultimately, Elliott J found that Willmott Finance had not breached its disclosure requirements as Mr Buckley was a "professional investor" for the purposes of the Act. MIS Funding was therefore entitled to recover the amount outstanding under the loan agreement. Subject to any further submissions, his Honour awarded costs against Mr Buckley "on a full indemnity basis", in accordance with the terms of the loan agreement.

6.5 Liquidators seeking Court approval of settlement deeds under the Corporations Act: Relevant factors for consideration

(By Thomas Trotman, DLA Piper Australia)

Re Bell Group Ltd (in liq); Ex Parte Antony Leslie John Woodings as Liquidator of the Bell Group Ltd (in liq) [2013] WASC 409, Supreme Court of Western Australia, Allanson J, 14 November 2013

The full text of this judgment is available here.

(a) Summary

The Western Australian Supreme Court made orders retrospectively approving the execution of a confidential settlement deed between the Bell Group of Companies (in liquidation) and a number of defendant financial institutions; pursuant to ss. 477(2A) and (2B) of the Corporations Act 2001 (Cth) (the Act).

(b) Facts

This case concerns proceedings brought by the liquidators of the Bell group of companies in 1995 against a number of banks. The matter was litigated through the Western Australian Supreme Court and Court of Appeal, with the liquidators successful in both proceedings obtaining judgment for $1.66 billion and $2.32 billion respectively. Special leave was subsequently granted to the banks to appeal to the High Court, however before the High Court heard the appeal, liquidators for the Bell group executed a settlement deed with the appellant banks. The operation of the settlement deed was conditional upon the approval of the Court pursuant to ss. 477(2A) and (2B) of the Act, and also included an obligation that the terms remain confidential.

Under ss. 477(2A) and (2B) of the Act, a liquidator must not enter into a settlement agreement to compromise a debt:

- where the claim by the company exceeds $100,000; and
- where parties can be discharged by performance more than three months after the agreement is entered into

without the approval of a Court, committee of inspection or a resolution of the creditors.

The settlement in question, whilst confidential, met these criteria and hence attracted the provisions. The issue before the Court was therefore whether such approval should be granted.

(c) Decision

(i) Approval to enter the settlement deed

In determining whether approval should be granted, Allanson J (citing *Re HIH Insurance Ltd* [2004] NSWSC 5) confirmed that the Court is not concerned with the commercial desirability of a transaction. Its function is to oversee a liquidator's actions in the interests of those concerned with the winding up, including the proper realisation of assets. Although the Court will not rubber stamp a proposal by a liquidator, it necessarily has regard to their commercial judgment. It will confine itself to interference only when a lack of good faith, error of law or error of principle is apparent; otherwise where real and substantial grounds exist to cast doubt on the prudency of a liquidator's conduct.

Due to the successful request by the plaintiffs for orders supressing the evidence on which the decision was made, Allanson J did not provide particular reasons in his judgment.

However, he noted three relevant factors for consideration:

- the compromise in this case involved both a legal and commercial assessment. In satisfying such, the liquidators had obtained advice from senior counsel appropriate to the nature and value of the claims;

- while not all creditors had seen and approved the settlement agreement, the major creditors had considered it amongst overwhelming creditor support for it generally; and
- upon review of the confidential affidavit provided by the liquidator, his Honour was satisfied that the best interests of the creditors had been considered and the settlement was going to advance the winding up of the group.

On that basis, his Honour was satisfied there was a case to grant approval under ss. 477(2A) and 477(2B) of the Act.

(ii) Grant of approval *nunc pro tunc*

Despite the Court noting that approval to enter into a settlement should be sought prior to exercising the power to do so, his Honour (citing several prior cases) found no doubt that the Court had power to backdate such approval. Given that the liquidator had provided satisfactory confidential evidence for not seeking prior approval, and that court approval was a condition precedent to the deed, Allanson J found no impediment to making orders:

- backdating the approval to the date the deed was entered into;
- extending the time to apply for court approval under s. 1322(4)(d) if and to the extent required;
- directing under s. 479(3) that the liquidators may act on the settlement as if prior approval had been granted; and
- declaring that under s. 1322(4)(a), the settlement is not invalidated by reason of not being entered into without prior approval.

(iii) Protection of liquidators

The liquidators sought a direction, under s. 479(3) of the Act, that each of them "was, is and will be acting properly and justifiably" in entering into the settlement deed and causing the companies to perform agreements under the deed.

His Honour, after considering:

- the complexity of the settlement;
- the Court's approval of the deed;
- the size and complexity of the original proceedings and judgment debt;
- the limited involvement of a liquidator who had retired since the proceedings commenced; and
- the fact that not every creditor had seen the settlement deed

was satisfied that such a direction was appropriate (albeit with different phraseology) to protect the liquidators against allegations of causing actionable loss or improper or unreasonable conduct. His Honour made orders accordingly, along with a direction that the settlement sum be held on trust and invested.

6.6 Implied representations regarding manipulation of LIBOR

(By Rachael Le Tessier, Herbert Smith Freehills)

Graiseley Properties Limited v Barclays Bank PLC and Deutsche Bank AG v Unitech Global Limited [2013] EWCA Civ 1372, England and Wales Court of Appeal (Civil Division), Longmore, Underhill and Rix LJJ, 8 November 2013

The full text of this judgment is available here.

(a) Summary

The case before the England and Wales Court of Appeal concerned two appeals relating to the manipulation of the London Inter-bank Offered Rate (LIBOR), the reference rate frequently used in the calculation of interest under finance agreements. In each appeal, the borrower/guarantor under a loan agreement had claimed that the relevant counter-party bank had sold them unsuitable interest rate swaps. Each borrower/guarantor was seeking the permission of the Court to amend their pleadings to allege, in addition, that the relevant bank had made implied, false representations as to the accuracy of LIBOR. Specifically, the borrowers/guarantors alleged that the banks had made implied representations that they were not engaged in the practice of manipulating LIBOR.

In each case, the Court of Appeal unanimously held that, although the banks would have a strong argument against the borrowers'/guarantors' claims at trial, the claims were sufficiently arguable to allow the borrowers/guarantors to make the proposed amendments to their pleadings.

(b) Facts

(i) LIBOR

LIBOR is defined by the British Bankers' Association (BBA) as "the average rate at which an individual contributor panel bank could borrow funds by asking for and accepting interbank offers in reasonable market size just prior to 11:00am on that date". It is calculated by the BBA as the average of the rates submitted by a number of panel banks, after omitting a number of the highest and lowest rates.

(i) The Graiseley action

In the first appeal, Graiseley Properties Ltd (Graiseley) was obliged to enter into swap agreements as a condition of Barclays Bank PLC (Barclays) granting it certain loan facilities. Graiseley brought an action against Barclays claiming that the swap agreements were unsuitable for them and that Barclays was aware of this at the time the agreements were entered into.

Subsequently, Graiseley sought leave to amend their pleadings to allege that:

- Barclays had impliedly represented that they were not engaged in the practice of manipulating LIBOR;
- the representations had been made through communications between Graiseley and Barclays' employees;
- the representations were false because, among other things, Barclays had committed certain wrongdoings in the process of submitting its rates to the BBA for the calculation of LIBOR;
- the representations were fraudulent because Barclays was proposing that potential customers enter into financial transactions that referenced LIBOR and because the wrongdoing by Barclays was within the knowledge of managers and others at the bank; and
- Graiseley's chief executive officer had relied on the representations when entering into the finance agreements.

The wrongdoing on the part of Barclays included taking into account requests from interest rate derivative traders, for profit, before submitting its rates to the BBA and purposefully submitting lowered rates in response to negative media comments about the bank.

At first instance, Flaux J allowed Graiseley's application to amend. Flaux J held that, if Barclays were to successfully oppose Graiseley's application, it would have to show that Graiseley's claim had no prospect of success. His honour found that Barclays had not discharged this burden.

(ii) The Deutsche actions

The second appeal related to two actions initiated by Deutsche Bank AG (Deutsche) and other lender banks. In the first action, Deutsche and the other lenders were claiming the full amount owed to them by Unitech Global Ltd (UGL) due to a failure by UGL to pay amounts due under a credit facility. The Banks claimed against both UGL and Unitech Ltd (Unitech) as UGL's parent company guarantor. In the second action, Deutsche was claiming against Unitech under the same guarantee in respect of an interest rate swap agreement.

In their defence and counterclaim, UGL and Unitech alleged that Deutsche had negligently represented that the swap agreement was a suitable hedge for UGL against interest rate fluctuations. Unitech and UGL claimed that the swap agreement was not suitable for UGL's purposes, specifically with reference to the loan agreement, and that they had relied on the representations when entering into the various agreements.

The obligations under the swap agreement referenced the US LIBOR rate, a rate to which Deutsche was a contributing panel bank. UGL and Unitech sought to amend their pleadings to allege that Deutsche had made implied, false representations that:

- LIBOR was a genuine average of estimated rates, based on good faith submissions by panel banks; and
- the banks had not acted in a way, or were not aware of any conduct, which would undermine the integrity of LIBOR.

At first instance, Cooke J dismissed the application stating that the alleged representations did not meet the test for implied representation and therefore UGL and Unitech's claim had no prospect of success.

(iii) Novation

The first Deutsche action also raised the concern that nine of the lender claimants, other than Deutsche, had acceded to the UGL credit facility agreement and that, of those nine claimants, two had acceded by way of novation. At first instance, Cooke J raised the point that the effect of a novation is to extinguish the existing agreement and to create a new contract. Consequently, any equitable right to rescind the contract for misrepresentation would be extinguished. As the only relief available to UGL and Unitech in respect of their counterclaim was rescission, this point would prove disastrous for their claim.

(c) Decision

(i) Implied representations

The Court of Appeal concluded that, in both cases, the allegations of implied representation were arguable and the borrowers/guarantors should be allowed to make the proposed changes to their pleadings.

Longmore LJ, who gave the leading judgment, stated that any case of implied representation is fact specific and it is therefore dangerous to dismiss it summarily in a factual vacuum. His Honour found that, in the current cases, as the banks had proposed the use of LIBOR, it was arguable that they were representing that their own participation in setting the rate was an honest one. His Honour considered that the banks would have a strong argument against the claims made by the borrowers/guarantors at trial, but that it was not the function of the Court of Appeal to determine the factual dispute between the parties.

(ii) Novation

In respect of the first Deutsche action, the Court of Appeal held that it was arguable that "novation" was not being used in the strict legal sense or that, if it was, there may only have been a partial novation of the contract. The partial novation would operate so that the two banks that had acceded by way of novation would be freed of the equity of rescission; however the other banks would continue to be affected by the equity. As with the question of implied representations, the Court considered that the appeal was not the appropriate forum to consider these factual questions.

6.7 Application for joinder of insurer parties

(By Stephanie De Vere, Minter Ellison)

Austcorp Project No 20 Pty Ltd v LM Investment Management Ltd, in the matter of Bellpac Pty Ltd (receivers and managers appointed) (in liq) [2013] FCA 883, Federal Court of Australia, Jacobson J, 8 November 2013.

The full text of this judgment is available here.

(a) Summary

This case highlights the principles the Court will consider when determining whether to exercise its discretion to join insurers to a proceeding.

(b) Facts

This case concerns a settlement of certain litigation in the Supreme Court of New South Wales to which LM Investment Management Ltd (LM), The Trust Co (PTAL) Ltd (PTAL), Bellpac Pty Ltd (Bellpac), Trevor Pogroski and Graham Killer in their capacities as joint and several receivers and managers of Bellpac Pty Ltd (Receivers) were parties. The settlement included a term which provided for the sale of land. The land was subject to a first mortgage to PTAL. Austcorp Project No 20 Pty Ltd (Auscorp) and Compromise Creditors Management Pty Ltd (Compromise Creditors), the plaintiffs in this proceeding, were the holders of securities of the land ranking behind the mortgage held by PTAL. The plaintiffs claimed equitable compensation, damages and other relief against LM, PTAL and the Receivers because the sale of the land was alleged to be at a gross undervalue.

It was alleged that LM was liable by reason of its knowing involvement in the breaches of duty alleged against PTAL and the Receivers.

The plaintiffs sought to amend the proceedings by, among other things, adding LM's professional indemnity insurers as defendants to the proceedings. The plaintiffs relied on r. 9.02 or r. 9.05 of the Federal Court Rules 2011 (Cth) (the Federal Court Rules) as the basis for joinder.

Rule 9.02 of the Federal Court Rules provides that an application may be made by two or more persons, or against two or more persons if:

- separate proceedings could be made by or against each person in which the same question of law or fact might arise for decision; and
- all rights to relief claimed in the proceedings (whether joint, several or alternative) arise out of the same transaction or event or series of transactions or events.

Rule 9.05 of the Federal Court Rules provides that a party may apply to the Court for an order that a person be joined as a party to the proceeding if the person sought to be joined as a party to the proceeding is a person:

- whose cooperation might be required to enforce a judgement;
- whose joinder is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined; or
- who should be joined as a party in order to enable determination of a related dispute and, as a result, avoid multiplicity of proceedings.

The plaintiff argued that leave should be granted to avoid multiplicity of proceedings by resolving any question of indemnity between LM and its insurers in the event that LM is ultimately found to be liable to the plaintiffs. There are three tranches of insurance cover, the primary layer insurer is Amlin Corporate Member Ltd (Amlin), the second layer insurer is Dual Excess Investment Managers (First Excess Insurer) and the third layer is held with Markel Capital Ltd and a syndicate of insurers (Second Excess Insurer) (collectively referred to as Insurers).

The Insurers opposed the favourable exercise of the Court's discretion to join the insurers on two bases. Firstly, the Insurers argued that joinder would be futile because the policies will not respond to a claim made by LM. The Insurers relied on the insuring clause which provided an indemnity to LM against loss, costs and expenses "arising from any Claim for any civil liability first made against You during the Period of Insurance and arising out of or in connection with a Wrongful Act". The Insurers contended that the claim was not first made in the present proceedings as the claim was made on 13 December 2011 in a pleading called the "Commercial List Response" filed in the proceedings in the Commercial List of the Supreme Court of New South Wales. Thus the Insurers submitted that the claim was first made prior to the period of cover under the policies. The second basis was that there were potential defences available to the claim.

Therefore, the question of whether leave should be granted to join the Insurers raised a question of construction of the insurance policies and the effect of the Response filed in the Commercial List.

(c) Decision

Jacobson J noted that the principles concerning an application to join an insurer are summarised by Linsday J in *The Owners-Strata Plan 62658 v Mestrez Pty Ltd* [2012] NSWSC 1259 at [54] (*The Owners-Strata Plan*). Jacobson J held that the effect of the principles, in so far as they apply to an application by a third party to join the insurer as a co-defendant with an insured defendant, is that the Court may authorise joinder where certain conditions are satisfied. His Honour highlighted the following six relevant conditions from *The Owners-Strata Plan* at [54]:

- the insurer has denied liability to indemnify the insured against the plaintiff's claim;
- there is a *bona fide* dispute as to the entitlement of the insurer to deny liability;
- there is a substantial impediment (including insolvency on the part of the insured) standing in the way of the proceedings continuing with the insured defendant itself cross-claiming against the insurer;
- the dispute as to the liability of the insurer can properly be made the subject of interlocutory relief;
- there is a true legal controversy between the plaintiff and the insurer such as to ensure that those parties serve as a contradictor of each other; and
- joinder of the insurer as co-defendant may be relied upon to avoid a multiplicity of proceedings.

His Honour noted that full Court authority supports the proposition that where there is a controversy as to the liability of a professional indemnity insurer to the insured and the debate is one in which the third party has an interest, it is a proper exercise of the discretion for the Court to permit the joinder.

Jacobson J held that it was not appropriate to determine the defendant's second ground of opposition of the possible defences to a claim as that issue could only be determined after an exploration of the facts relating to the underwriting of risk.

Consequently, the only issue was whether the Commercial List Response was a counter-claim brought against LM alleging the same wrongful act as is the subject of the present proceedings. Jacobson J held that the present proceedings differed from the Commercial List proceedings and the Response filed in it, both as to the nature of the proceedings and the parties. Ultimately, his Honour held that the Commercial List Response was not a counter claim within the meaning of the insurance policies because it was defensive in nature. Jacobson J ordered that leave be granted to join the Insurers but on the condition that there be determined as a separate question, on a final basis, the issue of construction and the underwriting issues raised by the Insurers in the present application.

6.8 First company fine for non-disclosure of reportable political donations

(By Christine Covington and Michelle Veney of Corrs Chambers Westgarth)

Director-General, Department of Planning and Infrastructure v Aston Coal 2 Pty Ltd [2013] NSWLEC 188, Land and Environment Court of New South Wales, Craig J, 8 November 2013

The full text of this judgment is available here.

(a) Summary

The defendant (Aston Coal 2) lodged a Project Application for the company's Maules Creek Coal Project on 16 August 2010. During the assessment period for this Project Application, two of its directors made reportable political donations but the company failed to disclose contrary to the requirements of s. 147 of the Environmental Planning and Assessment Act 1979 (NSW) (the EPA Act).

Prior to commencing the proceedings, the Department of Planning and Infrastructure (DoPI) investigated the matter and asked Aston Coal 2 on a number of occasions if the company needed to update its political donations disclosure information. Aston Coal 2 maintained there was no need to. However, once the proceedings were commenced, Aston Coal 2 admitted that at the time the donations were made by the two directors, its assertions were legally erroneous and it ought reasonably to have known that the donations were reportable. Accordingly, Aston Coal 2 entered a guilty plea at an early point in the proceedings.

Craig J determined that the offence was in the mid-range of objective seriousness and, after applying a 25% discount for the early entry of a guilty plea and other subjective factors, together with the principle of totality, decided each offence should incur a fine of $10,000, being a total of $20,000 in fines payable by Aston Coal 2.

This case is significant as Aston Coal 2 is the first company to be prosecuted for failure to comply with the obligation to disclose the making of reportable political donations.

(b) Facts

The object of s. 147 of the EPA Act is to require the disclosure of relevant political donations or gifts when planning applications are made, so as to minimise the perception of any undue influence on the decision-maker. The EPA Act imposes broad reporting obligations by requiring a person who makes a "relevant planning application", to disclose all "reportable political donations" (if any) made within the "relevant period" to anyone by any person with a "financial interest" in the application.

Aston Coal 2 is a wholly owned subsidiary of Aston Resources Ltd (Aston) which is listed on the ASX and has now merged and become a wholly-owned subsidiary of Whitehaven Coal Ltd. On 16 August 2010, Aston Coal 2 submitted a Major Project Application to the DoPI to carry out coal mining and associated activities at Maules Creek (known as the Maules Creek Coal Project). The Maules Creek Coal Project was considered the key asset of the company and the coal deposit to be mined was significant - on a marketable reserve basis the seventh largest coal deposit in Australia. At the time of lodging the Major Project Application, the Political Donations Disclosure Statement was marked "nil" by the company. Project Approval was granted by the Planning Assessment Commission (under delegation) on 23 October 2012.

The case centred around two directors of the company, Thomas Todd and Todd Hannigan, who each made separate political donations to the NSW National Party in their personal capacity, on 15 March 2011 for $5,000 and 22 March 2011 for $4,250, respectively. The donations were therefore in the period where the Major Project Application was still being determined. At the time that those donations were made, the two directors were entitled to benefit from Aston's Long Term Incentive Plan which granted them both the option, free of charge, to acquire 2,180,232 shares in Aston at the exercise price of $5.96 per share, should certain performance conditions be met. Two of those performance conditions were that "first coal" had been delivered from Maules Creek before 17 August 2013 and that they remained employed by Aston. Delivery of first coal was thus wholly dependent on obtaining approval of the Major Project Application.

Throughout the period of investigation into the matter by the DoPI director-general, Aston maintained that there was no need to update the information it had provided in its political donation disclosure document. However, once the proceedings were commenced, Aston admitted that at the time the donations were made by the two directors, its assertions were legally erroneous and it ought reasonably to have known that the donations were required to be disclosed. Accordingly, Aston Coal 2 entered a guilty plea at an early point in the proceedings.

(c) Decision

As Aston Coal 2 admitted guilt, the role of the Court was primarily to determine the sentence to be imposed on Aston Coal 2. Craig J addressed the relevant legislative provisions of s. 147 of the EPA Act noting that:

- reportable political donations are donations to a political party exceeding $1,000;
- the relevant period within which political donations are made that have to be disclosed is the period commencing two years before the application is made and ending when the application is determined. Where a political donation is made after a planning application is submitted, this donation must be disclosed within seven days' time after the donation is made (s. 147(6)(b) of the EPA Act);
- s. 147(8)(c) of the EPA Act states a person has a financial interest in a relevant planning application if, (c) the person "is associated with a person referred to in paragraph (a) or (b)" of s. 147(8) of the EPA Act and is "likely to obtain a financial gain if development that would be authorised by the application is authorised or carried out (other than a gain merely as a shareholder in a company listed on a stock exchange)". Craig J noted that a director is a person "associated" with a company for the purposes of s. 147(8)(c) of the EPA Act.

To determine whether it was likely that the directors would obtain a financial gain if the development application was authorised or carried out, Craig J had regard to the various market announcements and annual reports issued that showed it was likely that first coal at the Maules Creek Coal Project would be delivered before 17 August 2013.

Additionally, his Honour looked to the trading price of Aston's shares at the date the political donations were made, which were $8.47 and $8.95 per share, respectively. Each of the directors had an option to purchase 2,180,232 shares at the exercise price of $5.96 per share. Craig J noted that while other contingencies needed to be considered when identifying the prospective trading price, Aston Coal 2 accepted that at the date of each donation, the two directors were likely to have a financial gain if the Maules Creek Coal Project was authorised or carried out because it was likely that if their share options were able to be exercised, the trading price of Aston shares at the time of the exercise would exceed the option exercise price. That financial gain flowing to both directors was not merely as a shareholder in a company listed on the ASX. Whilst the quantum of the financial gain was unable to be determined by the Court, the two directors had a financial interest within the meaning of s. 147(7)(c) of the EPA Act which necessitated disclosure by Aston Coal 2 of the respective donations within seven days' time of their being made. In fact, the making of those donations was never disclosed and this constituted a breach of the EPA Act.

In determining the sentence, Craig J took into account the relevant sentencing principles including the gravity of the offence, Aston Coal 2's remorse, the early entry of the guilty plea, prior history of convictions and so forth. His Honour determined that the offence was in the mid-range of objective seriousness and, after applying a 25% discount for the early entry of a guilty plea and other subjective factors, together with the principle of totality, ordered that each offence should incur a fine of $10,000, being a total of $20,000 in fines payable by Aston Coal 2.

6.9 The rules regarding legal professional privilege in respect of documents that are relevant to an issue in proceedings or given to non-legal advisers in the context of a commercial transaction

(By Anthony Sciuto and Ebony Eades, King & Wood Mallesons)

Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 3) [2013] FCA 1160, Federal Court of Australia, Wigney J, 8 November 2013

The full text of this judgment is available here.

(a) Summary

The key issue in this case was whether implied waiver arose in respect of certain documents that were subject to claims of legal professional privilege.

Wigney J confirmed the established principle that a party entitled to privilege may impliedly waive privilege in respect of otherwise privileged documents if they put the character or contents of the document in issue in proceedings. However, in upholding the claims of privilege in respect of the relevant documents, his Honour held that otherwise privileged documents:

- will be put in issue only if the privilege holder has expressly or impliedly made an assertion about the contents of an otherwise privileged document for the purpose of mounting a case or substantiating a defence; and
- will not be put in issue merely because they may be materially relevant to an issue in proceedings.

The case also considered the circumstances in which legal professional privilege can attach to documents that do not arise in the context of a solicitor-client relationship established under a formal retainer. His Honour held that absent a retainer, a solicitor-client relationship can be inferred from the circumstances of the relationship. Furthermore, Wigney J held that documents provided to or from non-legal advisers in the context of complex legal transactions are likely to be subject to professional privilege, where they relate to legal advice.

(b) Facts

The case concerned an interlocutory application in relation to orders sought by Sage which, if granted, would require the applicants to produce certain documents for inspection by Sage.

The principal proceedings concerned claims of breach of contract, misleading and deceptive conduct and estoppel arising from a proposed transaction that did not proceed. The transaction involved a proposal from the Sage Group PLC (Sage) to acquire shares held by the applicants in MYOB Cayman Pty Ltd, which was the holding company of a group of companies that developed and sold accounting and business software.

In the present case, Sage sought an order for inspection of the following categories of documents over which the applicants claimed legal professional privilege:

- documents that related to certain allegations the applicants have made about their state of mind in the statement of claim (the State of Mind Documents);
- documents that were sent by certain applicants to Allens Arthur Robinson (Allens) or by Allens to those applicants (the Non-Archer Documents);
- documents that were sent by or to representatives of Ernst & Young (EY) (the EY Documents);
- documents sent by or to the Australian branch of UBS AG (UBS) (the UBS Documents); and
- documents sent by or to Maples FS (the Maples FS Documents).

Sage contended that the Non-Archer Documents and the EY Documents were not privileged and that privilege attaching to the State of Mind Documents and the UBS Documents had been waived by the conduct of the applicants.

(c) Decision

His Honour upheld the applicants' claims of privilege and declined to make any orders requiring the applicants to produce documents for inspection by Sage (except for two emails contained in the Maples FS Documents relating to administrative matters).

(i) State of Mind Documents

Sage contended that the applicants had impliedly waived privilege in respect of the State of Mind Documents by putting the contents of those documents in issue in the principal proceedings.

His Honour considered a number of authorities and confirmed the principle that a party entitled to privilege may impliedly waive privilege in respect of otherwise privileged documents if they put the contents of those documents in issue in proceedings.

In determining whether the State of Mind Documents had been put in issue, his Honour held that the ultimate question was whether the applicants had expressly or impliedly made an assertion about the contents of an otherwise privileged document for the purpose of mounting a case or substantiating a defence.

Making assertions about the contents of privileged documents (for example by pleading the contents of those documents) is considered to open the documents for scrutiny by the Court and any opposing party. This was found to be inconsistent with the confidentiality attached to otherwise privileged documents and would therefore amount to an implied waiver.

In contrast, the fact that a party pleads a cause of action that includes their state of mind as a material fact or as a relevant issue in the proceedings will not necessarily give rise to an implied waiver of every privileged document concerning that party's state of mind.

In the present case, the State of Mind Documents were considered likely to be materially relevant to an issue in the principal proceedings, being the applicant's belief or assumptions about the status of the transaction documents. However, it was held that mere relevance to an issue is not the proper test for implied waiver. His Honour concluded that the applicants' pleadings did not make assertions about the contents of the State of Mind Documents or specifically refer in any way to any privileged communication which may have been included in those documents. Furthermore, his Honour held that the applicants' claims were not directly based on the State of Mind Documents. Accordingly, in denying the order for inspection of the State of Mind Documents, his Honour held that the applicants had not treated the State of Mind Documents in a way that was inconsistent with the maintenance of confidentiality in those documents.

(ii) Non-Archer Documents

Sage challenged privilege in respect of the Non-Archer Documents on the basis that the relevant applicants were not clients of Allens, being the solicitors who gave the advice included in the Non-Archer Documents. It was argued that legal professional privilege cannot arise over documents that did not stem from a solicitor-client relationship.

In determining whether the Non-Archer Documents were privileged, his Honour considered that, notwithstanding the absence of a formal retainer, they were privileged because:

- a solicitor and client relationship existed between the solicitors and the relevant applicants;
- the Non-Archer Documents were a kind of communication that may be privileged in circumstances where there is no formal retainer; and
- the parties shared a common interest in the subject matter of the Non-Archer Documents.

His Honour confirmed that there does not need to be a formal or express retainer between a solicitor and a client for the requisite relationship to exist. A solicitor-client relationship can be implied or inferred based on factual circumstances.

His Honour concluded that while there was no retainer, the non-Archer applicants were clients of Allens. This was inferred from the fact that the relevant applicants had, as a result of receiving advice and communications from Allens about the proposed transaction, developed a relationship of trust and confidence with Allens.

(ii) EY Documents

Sage challenged the privilege claim in relation to documents sent to and by EY on the basis that the documents related to due diligence services, rather than legal services.

His Honour inspected the documents and upheld the applicant's privilege claim on the basis that the documents either contained legal advice from EY or Allens in relation to proposed transactions or that the documents recorded communications for the dominant purpose of providing information to EY or Allens to enable them to provide legal advice.

(iv) UBS Documents

Sage challenged the privilege claim in relation to the UBS Documents on the basis that the communications concerned their role as a financial adviser and did not relate to the provision of legal advice.

His Honour referred to the principle in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, that privilege attaches to a communication between a solicitor or client and a third party (in this case UBS) if:

- the third party is an agent of the client or solicitor for the purpose of the communication; and
- the communication was prepared by the third party and given to the client's solicitor for the dominant purpose of the client obtaining legal advice.

His Honour inspected the UBS Documents and ultimately found those documents to be privileged. In determining this issue, his Honour concluded that UBS and Allens were acting as agents of the applicants to give and receive information to and from each other for the dominant purpose of Allens giving legal advice to the applicants in respect of various aspects of the proposed transaction.

His Honour also had regard to the findings in *DSE 2 (Holdings) Pty Ltd v Intertan Inc* (2003) 135 FCR 15 which suggests that legal advice received in the context of complex, commercial transactions involving clients, solicitors and financial advisers includes "advice as to what should prudently and sensibly be done in the relevant legal framework". Accordingly, his Honour took a broad view about the nature of the documents recognising that, in complex transactions, there is often no clear distinction between communications that are provided for an advisory purpose versus a non-advisory purpose.

Sage also argued that even if privilege did attach to the UBS Documents, the applicants impliedly waived it by disclosing those documents to UBS. Sage argued that this disclosure was inconsistent with the applicants' claims of privilege in respect of those documents. His Honour rejected Sage's argument and held that UBS was part of the applicants' "deal team". Accordingly, any disclosure to UBS was made on a confidential basis, for the limited purposes of assisting and advising the applicants in relation to the proposed transaction. This type of disclosure did not give rise to an implied waiver in respect of the UBS Documents.

(v) Maples FS Documents

Sage challenged the privilege claim on the basis that Maples FS is a corporate services firm which would not have provided legal advice to the applicants.

His Honour, having inspected the relevant documents, held that there was no basis for concluding that communications in two documents which concerned administrative matters were for the dominant purpose of legal advice and made an order for inspection of those documents. Although the documents had been sent to Allens that did not amount to them being privileged. In relation to the remaining Maples FS Documents, the privilege claim was upheld as they related to the provision of legal advice.

6.10 Court grants approval for liquidator to enter funding agreement

(By Samantha Robson, Ashurst)

In the matter of Blue Mountains Helicopters Pty Ltd (in liq) [2013] NSWSC 1630, Supreme Court of New South Wales, Black J, 7 November 2013

The full text of this judgment is available here.

(a) Summary

The liquidator of Blue Mountains Helicopters Pty Ltd (in liq) (BMH) sought leave of the Court to enter into a funding agreement and retainer agreement in order to exercise the right of indemnity arising under the terms of the Trust Deed for multiple trusts, for which BMH was trustee. The application was contested by Armstrong Scalisi

Holdings Pty Ltd (ASH) which is a creditor of BMH and is associated with a former director of BMH.

Upon considering the relevant factors as identified in *Re Leigh; AP & PJ King Pty Ltd (in liq)* [2006] NSWSC 315 the Court found that the claims put forward by BMH were seriously arguable and as the funding agreement included an indemnity for adverse costs the risk that the creditors or BMH would be worse off was limited.

(b) Facts

BMH was wound up on application of the State Debt Recovery Office in respect of a debt relating to clean up orders issued by a local council in respect of two properties owned by BMH at Hume Road Smithfield and Moore Street Liverpool. Mr David Cassaniti had been a director of BMH from July 2010 to August 2011, was also a director and principal of ASH and a director of two of the companies against which proceedings were to potentially be brought.

After being appointed, the liquidator was informed by Mr Cassaniti that BMH had owned the Moore Street Property as trustee of the Moore Street Trust and had subsequently been replaced as trustee by another entity, Gold Crown Getup Pty Ltd. The liquidator found that his further inquiries indicated BMH held the Hume Road Property and the Moore Street Property as trustee for the Hume Road Trust and the Moore Street Discretionary Trust respectively.

Under the Corporations Act 2001 (Cth), a liquidator must not enter into an agreement that may end, or create obligations which continue, more than three months after entry into the agreement without the Court's approval. The application before the Court was to allow the liquidator to enter into a funding agreement and retainer agreement with a law firm to bring proceedings against the current trustees of the relevant trusts. The Court was called upon to consider whether the entry into the agreement is a proper exercise of power and not ill-advised or improper on the part of the liquidator.

The applicant intended to plead claims against Moore Street Pty Ltd and Hume Road Pty Ltd as the current trustee of the Moore Street Trust and Hume Road Trust respectively. BMH pleaded that as successor trustees to the relevant trusts these two entities are liable to cause the assets of those trusts to be applied so as to discharge BMH's right of indemnity. Further, BMH claimed an equitable charge over the assets of the Trusts as security for the right of indemnity. The claim also extended to liquidation costs.

(c) Decision

The Court granted approval for the liquidator to enter into a litigation funding agreement with Small Claims Funding Pty Ltd and a retainer agreement with Champion legal in the form provided to the Court.

The Court did not award cost orders against ASH, noting that the liquidator would in any event have had to satisfy the Court that this was a proper case for the grant of the relevant leave.

(i) Prospects of success

The Court found the claims against the current trustees of the relevant trusts and trust assets for indemnity in respect of the liabilities incurred by BMH or claims of winding up to be seriously arguable. The Court noted it is not necessary to address the strength of the liquidator's claim for indemnity in respect of costs of the winding up where the claims for indemnity for debts of the trust provide sufficient support for the merit of the proposed proceedings.

(ii) Interests of creditors and risk

The proposed funding agreement included an indemnity for adverse costs which limits the risk that BMH or its creditors could be worse off as a result of the litigation. At the time of the application there were no funds in the liquidation which could be wasted by the pursuit of litigation in any event. The Court found this did not go against the interests of creditors. ASH contended that the proceedings may only deliver a return to the litigation funder and the liquidator and not a substantive return to creditors. The Court did not accept this argument and followed the Court of Appeal in *Hall v Poolman* [2009] NSWCA 64 in holding that if a liquidator had incurred investigation costs and the relevant company had no assets from which those costs could be paid, then they could legitimately and in accordance with their duties pursue litigation with the aid of a litigation funder, even if there is little or no likelihood of the recovery going beyond those costs and expenses and the funder's fee.

ASH also contended that the liquidator should seek a negotiated settlement and pointed to the settlement offers put forward prior to the application. The Court, however, accepted the liquidator's point that a negotiated resolution can be pursued after approval of the funding agreement and that failure to approve the funding agreement would remove the threat of proceedings and be very unlikely to lead to a more favourable offer of settlement.

(iii) Costs

The Court found that the liquidator would have had to address at least the major of issues initially raised by ASH in its opposition to leave, including the scope, quantum and prospects of the proposed claim, and ASH's submission may ultimately have assisted the liquidator to more precisely articulate the proposed claims. As such the Court did not order costs against ASH.

6.11 Retrospective approval given to provisional liquidator to enter into agreements

(By Liam Hickey, Herbert Smith Freehills)

In the matter of Colorado Products Pty Limited (in prov liq) [2013] NSWSC 1613, Supreme Court of New South Wales, Black J, 6 November 2013

The full text of this judgment is available here.

(a) Summary

A provisional liquidator brought an interlocutory application seeking retrospective orders under s. 477(2B) of the Corporations Act 2001 (Cth) (the Act) approving his entry into three agreements on behalf of a company. For various reasons, the provisional liquidator had not sought Court approval prior to entering into the agreements, as required under this section of the Act. The provisional liquidator also sought directions from the Court under s. 479(3) of the Act that he was justified in entering into the three agreements.

Black J granted the orders retrospectively approving the entry into the agreements on behalf of the company. However, in part because of the provisional liquidator's significant delay in seeking the Court's approval for entry into the agreements, his Honour declined to issue directions that the provisional liquidator had been justified in entering into the three agreements.

The decision also dealt with two other interlocutory applications of a procedural nature which are not addressed in this note.

(b) Facts

A provisional liquidator was appointed to Colorado Products Pty Ltd (Company). The appointment occurred in the context of an ongoing dispute that involved a number of parties, including the Company. This dispute eventually led to the commencement of legal action (Principal Proceedings). In October 2011, the provisional liquidator was approached by legal representatives for the plaintiffs in the Principal Proceedings, seeking that the Company become a party to the Principal Proceedings.

In July 2012, the provisional liquidator entered into a Funding Agreement and a Deed of Indemnity (the Funding Agreement) with HY International (Aust) Pty Ltd (HY International), the first plaintiff in the proceedings. The Funding Agreement provided that the plaintiffs' solicitors would act for the Company in the proceedings and also provided for HY International to pay both the costs of that solicitor in the proceedings and the provisional liquidator's costs of providing instructions to the solicitor on behalf of the Company.

In August 2012, the provisional liquidator also entered into a Costs Disclosure Statement and Client Services Agreement (the Costs Agreement) with the plaintiffs' solicitors.

The provisional liquidator gave evidence that he was aware of the need to seek Court approval of agreements of this kind under s. 477(2B) of the Act. This section provides that, except with the Court's approval or the approval of a committee of inspection or a resolution of creditors, a liquidator must not enter into an agreement on a company's behalf if the term of that agreement may end, or obligations of a party to the agreement may be discharged, more than three months after entry to the agreement.

However, the provisional liquidator gave evidence that he received legal advice from the plaintiffs' solicitors in August 2012 recommending that he defer making an application for Court approval of the Funding Agreement until after an expert report was finalised for the purpose of the Principal Proceedings. That expert report had not been finalised by April 2013 (that is, eight months later), and nor had any application for approval of any agreement (either Funding Agreement of Costs Agreement) been made during that period.

After taking independent advice in February 2013, in April 2013, the provisional liquidator entered into a Deed of Assignment, under which the Company assigned to HY International the claims of the Company in the Principal Proceedings, in return for HY International paying the Company an assignment fee of $68,000 and the provisional liquidator's outstanding costs in relation to the Principal Proceedings up until that point. The provisional liquidator gave evidence that he did not consider the obligations imposed on HY International under the Deed of Assignment were such as to require approval of that agreement under s. 477(2B) of the Act.

In October 2013, the provisional liquidator of the Company brought an interlocutory application in which he sought, among other things, the following:

- a retrospective order under s. 477(2B) of the Act approving his entry into the Funding Agreement, and a direction under s. 479(3) that he was justified in doing so;
- a retrospective order under s. 477(2B) of the Act approving his entry into the Costs Agreement, and a direction under s. 479(3) that he was justified in doing so; and
- a retrospective order under s. 477(2B) of the Act approving his entry into the Deed of Assignment, and a direction under s. 479(3) that he was justified in doing so.

Section 479(3) of the Act provides that a liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

(c) Decision

(i) Statutory provisions - relevant principles

Black J summarised some of the principles relevant to the granting of approval under s. 477(2B) of the Act:

- in granting its approval, the Court is not concerned with matters of commercial judgment, but rather must be satisfied that entry into the relevant agreement was a proper exercise of power;
- factors relevant to the question whether a funding agreement relating to litigation should be approved may include the liquidator's prospects of success in the litigation;
- the interests of creditors other than the proposed defendant;
- possible oppression in bringing the proceedings;
- the nature and complexity of the cause of action; the extent to which the liquidator had canvassed other funding options; the level of the funder's premium;
- the liquidator's consultation with creditors; and the risk involved in the claim; and
- the Court can give retrospective approval.

Black J also summarised some of the principles relevant to the granting of directions under s. 479(3) of the Act:

- the function of a liquidator's application for directions under this section is for the Court to give the liquidator advice as to the proper course of action for him or her to take in the liquidation;
- the Court may give such a direction where there is a legal issue of substance or procedure such as the propriety or reasonableness of the particular course; and
- liquidator is protected against a claim for breach of duty if he or she acts in accordance with a direction given by the Court under s. 479(3) and he or she made full disclosure to the Court in the relevant application.

(ii) Application of the statutory principles to the Funding Agreement and the Costs Agreement

Black J found that the course adopted by the provisional liquidator in not seeking Court approval under s. 477(2B) to enter into the Funding Agreement and the Costs Agreement was not "wholly satisfactory".

His Honour gave the following reasons:

- first, the provisional liquidator disregarded the statutory requirement under s 477(2B) for Court approval of the Funding Agreement prior to his entry into it, although the provisional liquidator's conduct in this regard was mitigated by the fact that he did so on the basis of legal advice;
- second, the evidence suggested the provisional liquidator permitted the Company to conduct the proceedings without knowing whether the damages potentially recoverable in them would justify the Company taking that course;
- third, the evidence suggested the provisional liquidator took that course when his investigations were not sufficient to establish whether he could verify the allegations made by the Company in the Principal Proceedings, which were contested; and
- fourth, the provisional liquidator continued the proceedings on behalf of the Company for several months despite not having approval for the Funding Agreement or the Costs Agreement.

Notwithstanding this, and with some hesitation, Black J thought it appropriate retrospectively to approve entry into both the Funding Agreement and Costs Agreement.

In respect of the Funding Agreement, Black J noted the following:

- first, the Company's case was fairly arguable, in light of the evidence that had subsequently been filed by the plaintiffs;
- second, the provisional liquidator had acted reasonably in not seeking creditors' approval, given they were primarily comprised of the opposing parties in the Principal Proceeding;
- third, the proceedings could not have been conducted without entry into the Funding Agreement by the provisional liquidator; and
- fourth, the Funding Agreement contained a costs indemnity provided by HY International.

In respect of the Costs Agreement, Black J noted that an issue of importance in the application for approval of the Costs Agreement (had it been made at the appropriate time) would have been how any conflicts of interest arising from the provisional liquidator's retainer in the proceedings of the solicitors who were also retained by the plaintiffs would be addressed. However, Black J found that the provisional liquidator's retainer of the plaintiffs' solicitors was justifiable in light of the costs that would have been incurred by the Company if it had sought to retain independent solicitors.

Given the long delay in seeking approval of the Funding Agreement and Costs Agreement, Black J did not consider it appropriate to direct under s. 479(3) of the Act that the provisional liquidator was justified in entering into the Funding Agreement and Costs Agreement.

(iii) Deed of Indemnity

Black J found that there was some justification for the provisional liquidator's view that approval under s. 477(2B) of the Act was not required in respect of the Deed of Assignment. However, his Honour ultimately found that this view was incorrect.

Black J found that there was no reason to doubt the honesty or prudence of the provisional liquidator's view that the assignment of the Company's rights to HY International was prudent and in the interests of the Company's creditors.

Black J was also satisfied that, although the role of a provisional liquidator is to preserve the status quo until the determination of a winding up application, the relevant transaction was within the provisional liquidator's powers, given the Company's rights were akin to a "wasting asset" which either needed to be pursued through the Principal Proceedings or abandoned.

In these circumstances, Black J retrospectively approved entry into the Deed of Assignment under s. 477(2B) of the Corporations Act. Given the provisional liquidator had entered into the Deed already, Black J considered it unnecessary to direct under s. 479(3) of the Act that the provisional liquidator was justified in doing so.

6.12 The actual or apparent authority of a fraudulent mortgage broker

(By Peter Motti, Minter Ellison)

Landa v Perpetual Trustees Victoria [2013] NSWSC 1685, Supreme Court of New South Wales (Equity Division), Young AJ, 1 November 2013

The full text of this judgment is available here.

(a) Summary

This case examines whether a mortgage broker, who misappropriated loan monies, was acting with the actual or apparent authority of the mortgagee. This case also considers whether the contract for the loan monies was entered into in the course of "trade, business or profession", for purposes of s. 6(2) of the Contracts Review Act 1980 (NSW) (the Contracts Review Act).

(b) Facts

Barry Landa (Plaintiff) was a medical practitioner. In 2001 the Plaintiff was introduced to Dominic Cincotta (Cincotta). Cincotta was a financial advisor and the Plaintiff and Cincotta became friendly.

The Plaintiff was encouraged by Cincotta to invest with Perpetual Trustees Australia through Cincotta and the company with which he was associated, Morgan Brooks.

In August 2001, Cincotta told the Plaintiff:

> I will invest your money with Perpetual Trustees Australia, you will get 8% per annum paid monthly. Your money will be at call. For every $1,000,000 invested you will get 1000 Perpetual Trustees Shares.

The Plaintiff made an investment and received what Cincotta promised. Cincotta subsequently encouraged the Plaintiff to mortgage some of his properties, saying that:

> I can arrange mortgages through Perpetual and that money can be reinvested at the same rate as the cash already invested with Perpetual. This is easy. I do a large amount of this with Perpetual Trustees Victoria through Morgan Brooks. You would be borrowing at 6% and getting 8%.

The Plaintiff then mortgaged other properties, borrowing $650,000 from Perpetual Trustees Victoria Ltd (Defendant). Later the Plaintiff mortgaged his home for $1 million, borrowing the $1.65 million at 6%. When the monies were paid by the Defendant, the Plaintiff intended to invest them with Perpetual Trustees Australia, the Defendant's holding company, at 8%. The loan monies were paid to Mr Shacklady, a solicitor. At the Plaintiff's direction they were then paid out to Cincotta to invest.

It was at this point that Cincotta misappropriated all of the loan monies. The accounts that Cincotta rendered were completely fabricated. The Plaintiff lost all $1.65 million. The Defendant, as mortgagee, sought possession of the mortgaged properties. The Plaintiff then sued the Defendant on the basis that Cincotta was its agent when he perpetrated the frauds, and accordingly, the Defendant, as principal, was liable for the frauds of its agent.

(c) Decision

(i) Was Cincotta an agent of the Defendant?

The principal facts of the matter were not in dispute. His Honour considered the fundamental question of the case to be whether Cincotta's defrauding of the Plaintiff was done whilst he was the agent of the Defendant, acting within the scope of his actual or apparent authority. In seeking to define "agent", his Honour referenced the High Court's decision in *Peterson v Moloney* (1951) 84 CLR 91 at 94-95:

> ... an "agent" is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties. ...the mere employment of such a person under the designation of agent does not,

> apart from the general rule that the employer will be responsible for misrepresentations made by him, necessarily create any authority to do anything which will affect the legal position of his employer. ... [T]he law does not imply from the mere fact of employment to find a purchaser a general authority to do on behalf of the employer anything which may be incidental to the effecting of a sale.

His Honour emphasised the danger in the loose use of the term "agent" referring to, among others, the recent decision in *Tonto Home Loans Australia v Tavares* [2011] NSWCA 389 (*Tonto*). In *Tonto*, Allsop P discussed the concept of agency in connection with the liability of a lender for the acts of a fraudulent mortgage originator. Young AJ noted of the decision in *Tonto* that "even though the originator was a key cog in the lender's organisational or enterprise structure, this was insufficient to enable the [C]ourt to find that it was the lender's agent".

The Plaintiff argued that the documentation between the Defendant, Interstar (one of the Defendant's mortgage originators), Morgan Brooks and Cincotta established a legal framework for a system in which Morgan Brooks and its agent Cincotta were, and were held out by the Defendant to be, representatives, promoters and protectors of the interests of the Defendant. Furthermore, his Honour observed that there was evidence that Interstar's staff allowed Cincotta "special access" and gave him some "special dispensations" from its ordinary procedures. His Honour noted that this enabled Cincotta to mask some of his frauds.

Importantly however, his Honour determined that the monies were misappropriated by Cincotta as a result of the Plaintiff agreeing (at Cincotta's persistent urging) to have the monies reinvested in what the Plaintiff thought was the loan offset account, rather than anything to do with the Defendant.

His Honour considered that the Plaintiff's focus on the Defendant's organisational structure ran against the warning given in Tonto that "the lender's organisational structure is not the key factor in these cases". His Honour held that "what needs to be shown is how the originator was authorised or was held out by the lender to be a person for whose acts the lender must bear responsibility".

Ultimately, his Honour did not consider that the acts of the Defendant were sufficient to establish agency.

(ii) The meaning of "business transaction" under the Contracts Review Act

It was argued by the Defendant that the Contracts Review Act did not apply in this case because s. 6(2) made it clear that it does not apply to a business transaction. The Plaintiff responded by arguing that there was a difference between a business transaction and an investment. The relevant part of s. 6(2) of the Contracts Review Act reads:

> A person may not be granted relief under this Act in relation to a contract so far as the contract was entered into in the course of or for the purpose of a trade, business or profession ...

His Honour agreed with the Plaintiff's position, but believed that it was "a question of fact as to where the line is to be drawn" and that the question must:

> be decided in each case as one of fact, rather than by applying a formula. As the question is one of fact, this leads to the question as to whether on the facts of the present case, "the contract was entered into in the course of or for the purpose of a trade, business or profession".

Viewing this case as a "borderline one", his Honour thought that the remedial elements of the Contracts Review Act must be "construed widely" and that:

> the focus of [s.] 6 is to exclude what is the ordinary operations of a business, ... and that the section is not aimed at people's profit making on the sidelines at least where they are not actually expending effort in acquiring income or capital.

His Honour did not consider that the Plaintiff was doing more than investing and therefore, that the contracts were not in the course of or for a business, trade or profession. As a result, his Honour needed to determine whether the contract was unjust. In *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610 at 621, it was held that "a contract may be held to be unjust under [the Contracts Review Act] because of the way it was made or because of the way it operates or both". Young AJ stated that he did not believe the present case fell neatly into either category, but that was not fatal, holding that "a contract may be unjust if there is fraudulent or misleading conduct practised upon the Plaintiff even if the perpetrator is not the agent of the Defendant".

His Honour considered the Plaintiff to be a highly intelligent man and an experienced investor and that the contract he entered into with the Defendant contained no unjust provisions, nor was it oppressive in its operation. As such, his Honour concluded that the loss of the Plaintiff's investment occurred not because the contract was unjust, but because he was deceived by Cincotta. Accordingly, the Plaintiff's claim failed.

6.13 Statutory demand cannot be supported on alternative basis raised after service

(By Natasha Black and Ken Terado, Clayton Utz)

In the matter of Mark Attard and others trading under the partnership name of Colin Biggers and Paisley [2013] NSWSC 1579, Supreme Court of New South Wales, Black J, 31 October 2013

The full text of this judgment is available here.

(a) Summary

This decision of the New South Wales Supreme Court deals with the issue of whether it is open to support a statutory demand on an alternative basis raised after service. The Court held that it was not open to rely upon an agreement that had not been referenced in either the statutory demand or accompanying affidavit.

(b) Facts

On 8 December 2008, the Defendant, Colin Biggers & Paisley (CBP), entered into a costs agreement with Streetscape Projects (Australia) Pty Ltd (Streetscape) in respect of a dispute with The City of Sydney. The Plaintiff, Obeid Corporation Pty Ltd (the Company), provided a letter to CBP on 9 July 2010 (the 2010 Letter) guaranteeing "all costs pertaining to the legal action".

Streetscape entered into voluntary administration on 21 June 2012. On 22 June 2012, CBP and Mr Obeid entered into a further costs agreement for appeal proceedings. A Deed of Guarantee and Indemnity was executed by the Company in July 2012, guaranteeing payment of and indemnifying CBP in relation to fees for services provided to Mr Obeid from 22 June 2012 (the Deed).

On 9 May 2013, CBP issued a statutory demand claiming the amount of $750,227.77 (the Demand). The debt was described by reference to sums "guaranteed by Deed". The amount was verified by an affidavit of Mr Antony Riordan (the Affidavit), which referred to the Company's entry into a Deed relating to certain invoices. The stated total of those invoices contained an arithmetical error. After correcting for the error, the amount claimed in the Demand should have been $697,429.26. A copy of the Deed and a demand made for payment of the debt were annexed to the Affidavit.

The Company applied to have the Demand set aside on 30 May 2013. It argued that this should occur on two alternative bases: first, that there was a genuine dispute regarding the debt and second, that there was a "defect" in the Demand and "substantial injustice" would be caused if it were not set aside.

CBP conceded the arithmetical error contained in the Demand and sought that it be varied under s. 459H of the Corporations Act 2001 (Cth) (the Act) to correct the error.

By the time of the hearing, CBP further conceded that construction of the Deed on which the Demand relied was "problematic". The firm accordingly contended that the proceedings instead be resolved by reference to the 2010 Letter, "leaving no scope for any dispute" as to the amount claimed.

(c) Decision

(i) Demand cannot be supported on alternative basis not raised on the Demand or supporting Affidavit

Black J held that the demand could not be supported by reference to the 2010 Letter, rather than the Deed to which the Demand and accompanying Affidavit referred. His Honour noted that s. 459H(1)(a) of the Act required the Court to determine whether there was a genuine dispute as to the "debt to which the demand relates".

The debt to which the Demand related in the present matter was found to have arisen, by reason of the Deed, from invoices from CBP. Those were the documents to which reference was made in the Demand and the accompanying Affidavit. CBP did not contend that those documents were capable of establishing an undisputed debt. Black J held that this was sufficient reason for the Demand to be set aside.

(ii) Substantial injustice

This ground traversed many of the issues raised as to whether CBP could rely upon the 2010 Letter to support the Demand, despite it not being relied upon in the Demand or the Affidavit.

Section 459J(1)(a) of the Act provides that a statutory demand may be set aside where "substantial injustice" would otherwise be caused "because of a defect in the demand". Section 459J(1)(b) provides that a statutory demand may be set aside where "there is some other reason why the demand should be set aside".

Black J did not consider that there was a defect in the Demand at the time when it was served, as CBP then sought to rely upon a debt arising from the Deed and thus accurately described the debt upon which it relied. Although it was accordingly unnecessary for Black J to consider the issue of substantial injustice for the purposes of s. 459J(1)(a), his Honour nonetheless considered the issue.

Black J found that substantial injustice would have occurred if CBP had been permitted to rely on the 2010 Letter in support of the Demand. In this regard, his Honour had regard to the principle in *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452 (the Graywinter Principle). The Graywinter Principle requires the party seeking to set aside the statutory demand to ensure that all grounds of dispute are supported by affidavit filed and served within the 21-day deadline imposed by s. 459G(3) of the Act.

The Company had prepared its application to set aside on the basis that the Demand was being supported by the Deed. Were CBP permitted to rely upon the 2010 Letter, this would have prevented the Company from addressing the matter by further evidence according to the Graywinter Principle. Substantial injustice would arise in these circumstances. Black J did not accept submissions from CBP that they were able to waive this principle, finding that s. 459G(3) did not permit such waiver. His Honour accordingly would have set the Demand aside pursuant to s. 459J(1)(b), had it been open to CBP to rely upon the 2010 Letter.

(iii) Genuine dispute as to the existence of the debt

Although it was unnecessary to address the point in light of his other findings, Black J considered whether the Demand would be liable to be set aside on the basis that there was a genuine dispute, were it open to CBP to rely upon the 2010 Letter.

His Honour noted that establishing a genuine dispute is not a high test. What is required is that there be a "*prima facie* claim", that is not based on spurious, hypothetical, illusory or misconceived grounds.

The Company argued that there was a genuine dispute arising from the 2010 Letter as to whether it was intended to be immediately binding, and as to the invoices it was intended to cover. The expression "will be guaranteed" in the 2010 Letter was held to have given rise to a genuine dispute on this basis, although Black J noted that CBP might ultimately prove to have the stronger argument on the point. His Honour did not accept, however, the Company's further submission that an application for assessment of certain of its legal costs gave rise to a "genuine dispute". In this regard, Black J noted that the application had been made out of time and there was nothing to indicate that the Company may nonetheless proceed with the application.

6.14 Application to set aside a statutory demand must be supported by facts, not assertions

(By Mimosa Rizzo, Kathryn Arnett and Guy Waldron, Corrs Chambers Westgarth)

In the matter of Tesrol Holdings Pty Ltd [2013] NSWSC 1534, Supreme Court of New South Wales, Black J, 31 October 2013

The full text of this judgment is available here.

(a) Summary

This case considered whether a dispute between a creditor and a debtor as to the existence or amount to which a statutory demand related, or a deficiency in the affidavit supporting the statutory demand, was sufficient to warrant the Court setting aside the statutory demand.

The plaintiff, Tesrol Holdings Pty Ltd (Tesrol) applied under ss. 459G(1), 459H(1)(a) and 459J(1)(b) of the Corporations Act 2001 (Cth) (the Act) to set aside a statutory demand dated 14 March 2013 (the Demand) issued by the defendant, Westpac Banking Corporation (Westpac).

Section 459G(1) of the Act provides that a company may apply to the Court for an order setting aside a statutory demand served on the company. Section 459H(1)(a) provides that a statutory demand may be set aside when the Court is satisfied that there is a genuine dispute about the existence or amount to which that demand relates. Section 459J(1)(b) provides that a statutory demand may be set aside if the Court is satisfied that there is some other reason why the demand should be set aside.

Tesrol contended that a genuine dispute existed in respect of the amount of receivers and managers' fees claimed by Westpac as a component of the Demand. Tesrol claimed that Westpac had not provided sufficient particulars and supporting documentation to substantiate its claim and, as such, Tesrol was unable to determine whether the amount claimed in the Demand was due and payable. Further, Tesrol disputed the reasonableness of the quantum and necessity of the receivers' fees.

Black J found that Tesrol had failed to establish that a "genuine dispute" existed under s. 459H(1)(a) of the Act, holding that a genuine dispute requires that there be at least a plausible and genuine claim that the debt is not due on some identified basis which warrants further investigation, not merely that the plaintiff is not yet satisfied as to the basis of the creditor's claim.

Tesrol's claim under s. 459J(1)(b) was also unsuccessful. Tesrol submitted that there was an error in the affidavit in support of the Demand, which was so material that the Court should set aside the Demand for "some other reason". However, Black J held that this ground was not open to Tesrol by reason of the principle in *Graywinter Properties v Gas and Fuel Corp Superannuation Fund* (1996) 70 FCR 452 (the Graywinter Principle).

Black J dismissed Tesrol's application and ordered Tesrol to pay Westpac's costs.

(b) Facts

Epivision Pty Ltd (Epivision), a wholly owned subsidiary of Tesrol, entered into a facility agreement with St George Bank Ltd dated 24 September 2009 (Westpac later succeeded to St George Bank Ltd's assets and liabilities). Epivision's obligations under the facility agreement were secured by a guarantee and indemnity from Tesrol and a mortgage over a property in Seven Hills (the Property).

Westpac appointed receivers and managers over the secured assets of Epivision after Epivision defaulted in making repayments due under the facility agreement. The receivers and mangers sold the Property and credited the proceeds of sale to Epivision's account.

By letter dated 26 February 2013, Westpac demanded payment by Tesrol of the amount of $4,609,088.67 (the Letter of Demand). The Letter of Demand set out a reconciliation of the amount claimed against credits for deposits, including the proceeds of sale of the Property. The reconciliation also referred to receivers' fees of $393,130.87, which were debited from Epivision's account in accordance with the facility agreement. The reconciliation was incorrect in respect of the amount of receivers' fees included as a component of the amount claimed. This error arose from the misclassification of one invoice rendered by the receivers.

On 5 March 2013, Tesrol's solicitors responded to Westpac's Letter of Demand requesting particulars and supporting documentation, including an itemised copy of every tax invoice for receiver and managers fees, so that Tesrol could properly assess the amount demanded.

On 14 March 2013, Westpac issued the Demand for $4,609,088.67. The Demand was supported by an affidavit of Ms Vanessa Tran dated 14 March 2013. It stated that detailed particulars of the debt were provided to Tesrol in the Letter of Demand, and noted that the debt in respect of the receivers and managers' fees was $393,130.87 (thus repeating the error in the Letter of Demand in respect of the misclassification of the receivers' fees).

On 3 April 2013, Tesrol's solicitors again wrote to Westpac's solicitors confirming that the amount demanded was genuinely disputed on the basis that, despite requests, Westpac had not supplied adequate information to allow Tesrol to properly assess whether the amount claimed was in fact owing. Tesrol also alleged that it was an abuse of process for Westpac to invoke the statutory demand process as a debt collection tool in these circumstances.

By Originating Process dated 4 April 2013, Tesrol applied to set aside the Statutory Demand, arguing that its consistent demands for more information were sufficient to demonstrate that a genuine dispute existed.

Tesrol relied on an expert report by Mr Robert Whitton, dated 4 June 2013, which the Court held provided no support for any submission by Tesrol that the receivers' fees were incorrect or inappropriate. Tesrol also relied on three affidavits provided by its sole director, Mr Graham Young.

In his initial affidavit, dated 4 April 2013, Mr Young's evidence was that Tesrol disputed the necessity for and the quantum of the receivers' fees and, without an itemisation of the fees, Tesrol was unable to assess their reasonableness. Further, he noted that Westpac's failure to supply the information requested gave rise to the inference that the information supplied by Westpac was incapable of substantiation and, on that basis, Tesrol disputed that the amount claimed was due and payable.

Mr Young's second affidavit, dated 3 May 2013, set out Tesrol's calculation of the fees paid to the receivers as $511,680.11 based on the information in the Letter of Demand, thus recognising the error in the reconciliation and subsequently in the Demand.

Mr Young's third affidavit, dated 4 June 2013, referred to invoices issued by the receivers and claimed they contained insufficient detail to enable Tesrol to assess the adequacy of the fees referred to. Mr Young did not however identify any particular charge which Tesrol considered to be improper.

Westpac relied on an affidavit of Ms Tran, dated 15 May 2013, which acknowledged that the amount of $393,130.87 referred to in the Letter of Demand and her affidavit in support of the Demand did not include an amount of $118,500 debited to Epivision's account in respect of receivers' fees, which had been incorrectly included in the Letter of Demand under the heading "other debits". This amount did not affect the total amount claimed in the Letter of Demand or Demand, but was rather a misclassification of a component of the demand.

(c) Decision

Black J found that Tesrol had not established that a "genuine dispute" existed under s. 459H(1)(a) of the Act in respect of the amount claimed by the Demand. Black J explained that a company that is served with a statutory demand bears the onus of showing that the statutory demand should be set aside and that, although the threshold is quite low, correspondence between a creditor and a debtor, whereby the debtor merely asserts a dispute and does not accept the existence or amount of the debt, is not itself sufficient to establish a genuine dispute.

In this case, Tesrol did not contend that the amount of the debt that was the subject of the Demand was incorrect. Rather, Tesrol was resisting the claim for payment of the receivers' fees unless Westpac provided all of the information that Tesrol sought to obtain. Black J held that Tesrol had not put forward any credible material to cast real doubt on the existence of the debt or the reasonableness of the receivers' fees and that Tesrol's assertions that a dispute existed were not sufficient to establish a genuine basis for disputing the debt claimed.

In relation to s. 459J(1)(b), Tesrol submitted that there was a deficiency in Ms Tran's affidavit in support of the Demand, in that the affidavit was incorrect as to the amount of the receivers' fees. Black J held that this ground was not open to Tesrol to rely on due to the Graywinter Principle, which prevents reliance on a ground not raised in the affidavit of support to set aside the creditor's statutory demand, even if it was unknown to the applicant at the time the affidavit was filed. Black J rejected Tesrol's argument that the issue was impliedly raised by the statutory demand and supporting affidavit being attached to Mr Young's first affidavit.

Nonetheless, Black J noted his view that the error was not sufficiently fundamental to warrant the setting aside of the demand. He held that a lack of truthfulness in the affidavit was not established, as the error of classification was subsequently corrected by Ms Tran's further affidavit, and that Tesrol had ample opportunity to calculate, and eventually did calculate, the correct amount of the receivers' fees.

Black J also noted that he did not see any impropriety in a creditor relying on the statutory demand procedure, where no genuine dispute has been raised, merely because the debtor is not prepared to acknowledge that the debt is owing.

6.15 Assessing damages for trespass; aggravated damages cannot be awarded to a company

(By Andrew Burleigh, DLA Piper Australia)

Eaton Mansions (Westminster) Limited v Stinger Compania de Inversion S.A. [2013] EWCA Civ 1308, England and Wales Court of Appeal (Civil Division), Patton, Tomlinson and Clarke LJJ, 30 October 2013

The full text of this judgment is available here.

(a) Summary

The England and Wales Court of Appeal upheld the assessment of damages for trespass in relation to the placement of air conditioner units in breach of covenant. The Court denied the appellant aggravated damages due to the fact that it was a company.

(b) Facts

Eaton Mansions (Westminster) Ltd (EML) was the head lessee of a block of flats known as Eaton Mansions in London, the freehold of which was owned by Grosvenor Estate. Stinger Compania de Inversion SA (Stinger) was the lessee of two flats in the building under two separate leases granted on 23 June 1978 for a term of 751/2 years less five days' time from 24 June 1978. Neither lease included any part of the roof of the building or the chimney stack. The head lease of Eton Mansions contained a covenant by EML not to make external alterations to the building without the consent of the Grosvenor Estate, and extended to any air conditioning unit placed on the roof.

Air conditioning equipment had been in place on the roof rent-free for a number of years, presumably with the consent of the Grosvenor Estate.

In 1980, Stinger, with EML's consent, placed three air conditioning units and associated pipework on the roof. By 1998 there were six air conditioning units. The additional three units were not consented to by EML, but remained until 2006 without objection. In 2006, EML carried out repairs to the roof and informed Stinger and the tenants of the building that the units were required to be relocated.

In June 2007, the first act of trespass occurred when Stinger installed two extremely large condenser units on the roof as part of the refurbishment of the two flats. The installation occurred in breach of planning requirements. Furthermore, Grosvenor Estate expressly excluded the installation of air conditioning from their consent to the refurbishment. The units were removed in February 2008, but the piping remained. In December 2008, following an impasse in negotiations as to what could be placed on the roof, Stinger instructed contractors to install two new units, providing air conditioning to the flats (the second act of trespass).

In April 2009, EML sought an injunction and damages for trespass. On 11 March 2010, Stinger completed the sale of the two underleases, ending the trespass, and the claim continued as one for damages alone. On 9 July 2010, EML was awarded a judgment for damages to be assessed: [2010] EWCH 1725 (ch). Stinger's appeal against this judgement on liability was dismissed by the Court of Appeal on 18 May 2011: [2011] EWCA Civ 607.

With regards to the assessment of damages, EML appealed, claiming that it should be assumed that the parties had been negotiating for a consent which would have subsisted for the duration of the underleases, as opposed to a licence for the length of the trespass. They argued this as at the relevant time in 2007 it was clear that Stinger wanted to obtain a right to install permanent air conditioning in the flats which would later be sold on that basis.

(c) Decision

The Court upheld the previous award of damages against Stinger for the period of the trespass, rejecting the argument that damages should be calculated on the basis of the length of the lease. The Court declined to award aggravated damages to EML on the basis that a company is incapable of having its feelings injured.

(i) Whether on an assessment of damages on what has been called the negotiating basis the parties in the hypothetical negotiations for a licence fee are to be taken to be negotiating for a licence period equivalent to the actual duration of the trespass which has occurred or some other more extensive period (the residue of the tenant's lease)

The Court recognised the requirement that the damages awarded should be compensation for the loss suffered in the sense of the tortfeasor's gain as a result of the trespass, citing its recent decision in *Enfield LBC v Outdoor Plus Ltd* [2012] EWCA Civ 608. Consequently, the Court agreed with Stinger's submission that to treat the parties as having negotiated on a period longer than the actual trespass would disconnect the hypothetical licence fee (and hence the damages) from the legal wrong for which they constituted compensation. The Court acknowledged that Stinger would have undoubtedly been disinterested in a licence that only subsisted until 2010, but that as this was the duration of the trespass, it was the only available basis for valuing the gain that Stinger made from the trespass.

(ii) Whether the Court can (or should) make an award for aggravated damages in favour of a company

The Court outlined the criteria for an award of aggravated damages in cases of trespass, noting that the availability of aggravated damages will depend upon the defendant's conduct being high-handed, insulting or oppressive. Here, failure of the defendant to meet this threshold requirement was not a deciding factor in not awarding aggravated damages. The Court rejected the finding of Caulfield J in *Messenger Newspapers Group Ltd v National Graphical Association* (1982) [1984] IRLR 397 that aggravated damages could be awarded to a company as if it were a natural person or group of persons in the company's position. Instead, the Court held that compensatory damages for injured feelings are not recoverable by a company, as an inanimate legal entity cannot experience distress or injury to feelings.

6.16 Recognition of foreign main proceeding and summons for examination of former director

(By Flora Ho, Clayton Utz)

Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd (a company registered in the British Virgin Islands) v Global Tradewaves (in liquidation), in the matter of Global Tradewaves Ltd (in liquidation) [2013] FCA 1127, Federal Court of Australia, Logan J, 28 October 2013

The full text of this judgment is available here.

(a) Summary

This decision sets out the reasons for the Federal Court of Australia ordering that:

- pursuant to Articles 17(1) and 17(2) of Schedule 1 (the *Model Law on Cross-Border Insolvency* of the United Nations Commission on International Trade Law) (the Model Law) to the Cross-Border Insolvency Act 2008 (Cth) (the Cross-Border Insolvency Act), an insolvency proceeding originating in the British Virgin Islands (the BVI Proceeding) be recognised as a "foreign proceeding" and a "foreign main proceeding" respectively for the purpose of the Cross-Border Insolvency Act; and
- pursuant to Article 21(1)(d) of the Model Law and ss. 581 and 596B of the Corporations Act 2001 (Cth) (the Corporations Act), a former director of the company in liquidation (the subject of the BVI Proceeding) be summoned by the Registrar to attend examination in Australia in respect of the affairs of the company.

(b) Facts

Global Tradewaves Ltd (GTL) was a company registered in the British Virgin Islands, to which the plaintiffs of the proceedings, Messrs Crumpler and Lawson, were appointed liquidators (Liquidators) by the Eastern Caribbean Supreme Court's High Court of Justice, the British Virgin Islands Commercial Division (the BVI Court).

The Liquidators, as "foreign representatives" under the Cross-Border Insolvency Act, applied to the Federal Court, principally, for orders recognising the BVI Proceeding as a "foreign main proceeding" and upon securing such recognition, for the additional relief of an examination summon against Mr Riaz, a former company director of GTL who was residing in Australia at the time.

(c) Decision

(i) Recognition as "foreign proceeding" and "foreign main proceeding"

The Court first considered the question of recognition and began with Article 17(1) of the Model Law, which sets out the four criteria for recognition as "foreign proceeding".

The Court formed the view that the BVI Proceeding was a "foreign proceeding" for the purposes of Article 17(1) of the Model Law, on the basis that:

- firstly, the BVI Proceeding, in which the BVI Court was controlling and supervising the winding up of GTL, was a "collective judicial proceeding in a foreign state" for the purpose of Article 2(a) of the Model Law - as such, Article 17(1)(a) was satisfied;
- secondly, the person applying for the recognition of the BVI Proceeding, being the Liquidators (appointed as such by the BVI Court), were "foreign representatives" for the purpose of Article 2(d) - Article 17(1)(b) was therefore satisfied;

- thirdly, the formal existence of the BVI Proceedings was proved by a notarised and sealed copy of the winding up order made by the BVI Court in respect of GTL - the requirements under Article 15(2) and, accordingly, Article 17(1)(c) of the Model Law were also satisfied; and
- lastly, the Federal Court, to which the present application was submitted, was a Court competent to perform the "functions referred to in [Article 4 of the Model Law] relating to the recognition of foreign proceedings and cooperation with foreign [C]ourts" - as such, Article 17(1)(d) was satisfied.

Having established that the BVI Proceeding was a "foreign proceeding", the Court then considered whether it also constituted a "foreign main proceeding" for the purposes of Article 17(2) of the Model Law.

Given that the registered office of GTL was in the British Virgin Islands, the Court was satisfied that GTL had its centre of main interests in the British Virgin Islands. That being so, the BVI Proceeding was recognised by the Court not just as a "foreign proceeding" but also a "foreign main proceeding".

(ii) Summons for the purpose of former company director's examination

The Court then considered whether it had power to direct the issuing of summons for the examination of Mr Riaz and, if so, the sources of that power.

Upon recognition of the BVI Proceeding as a "foreign main proceeding", the various relief provided for under Article 21(1) of the Model Law became available to the Liquidators, and the Court may grant such relief "where [it is] necessary to protect the assets of the debtor or the interests of the creditors of [GTL]".

Relevantly, the available relief under Article 21(1) includes:

> d. Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; ... [and]
>
> g. Granting any additional relief that may be available to [the person or body administering a reorganisation or liquidation under the law of the enacting State] under the law of this State.

The Court was of the view that, by virtue of s. 6 of the Cross-Border Insolvency Act - which provided the Model Law (including Article 21 thereof) with the force of law in Australia - Article 21(1)(d) was therefore itself a source of authority for the Court to order the examination of a witness concerning GTL's "assets, affairs, rights, obligations or liabilities".

Further, read with s. 8 of the Cross-Border Insolvency Act - which identifies Chapter 5 of the Corporations Act as part of the "the law of the enacting State" referred to in

Article 21(1)(g) of the Model Law - Article 21(1)(g) constituted a further source of the Court's power to summon witnesses for examination purposes - a relief that is available to Australian liquidators under s. 596B in Part 5.9 of the Corporations Act.

Finally, having regard to the letter of request issued by the BVI Court to the Federal Court requesting that Mr Riaz be examined in respect of the affairs of GTL, s. 581 of the Corporations Act provides an additional source of power for the Court to summon the examination of Mr Riaz. According to s. 581 of the Corporations Act, where a letter of request from a Court of a country other than Australia (such as the British Virgin Islands), requesting aid in an external administration matter is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen in its own jurisdiction.

Having established the various sources of power under Article 21(1) of the Model Law and s. 581 of the Corporations Act to summon Mr Riaz for the purposes of examination, the Court then considered whether it should, as a matter of discretion, exercise such power.

Ultimately, the Court decided that it should do so on the basis that:

- Mr Riaz was a current director of an Australian company and had a residential address in New South Wales, Australia;
- it was apparent from the extensive exchange of email correspondence to and from Mr Riaz that he was a person likely to have an intimate understanding of the affairs of GTL; and
- for the purposes of s. 596B of the Corporations Act (which empowers the Court to summon a person for examination where a "person may be able to give information about examinable affairs of the corporation"), the Court was satisfied that Mr Riaz was such a person in respect of GTL.

6.17 Application of the Corporations Amendment (Improving Accountability on Termination Payments) Act 2009 (Cth) to agreements entered into prior to its commencement and the power of the Superior Courts to make declarations where ASIC fails to give a contradictory opinion

(By Jane Xu, DLA Piper Australia)

Re Queensland Police Credit Union Ltd [2013] QSC 273, Supreme Court of Queensland, McMurdo J, 8 October 2013

The full text of this judgment is available here.

(a) Summary

The applicant was the Queensland Police Credit Union Ltd (QPCU), an unlisted public company. It was concerned that certain payments which it had made, and also proposed to make, to former directors, may have contravened s. 200B of the Corporations Act 2001 (Cth) (the Corporations Act) and the Corporations Amendment (Improving Accountability on Termination Payments) Act 2009 (Cth) (the Termination Payments Act).

QPCU submitted that there had been no such breach, but suggested that there was an ambiguity in a relevant provision which ought to be resolved in its favour by a declaration from the Supreme Court of Queensland.

McMurdo J held that the payments made, and proposed to be made, by QPCU did not contravene s. 200B of the Corporations Act because the limitations imposed by the Termination Payments Act did not apply in this instance.

McMurdo J's consideration of whether the Supreme Court of Queensland had jurisdiction to hear the matter despite ASIC's lack of appearance and contradictory opinion is relevant for other companies seeking declarations where ASIC declines to appear or give an opinion.

(b) Facts

The declaration which was sought related to retirement payments made to three former directors of QCPU and a proposed fourth payment to another. The payments were all made according to the terms of an identical deed between QCPU and each payee-director.

Each deed was executed in September 2009, prior to the commencement of the Termination Payments Act, which reduced the amount of a termination benefit which could be paid to a departing director without the approval of members.

Each of the past or proposed payments made by QPCU to the former directors exceeded, or would exceed, the threshold prescribed by the Termination Payments Act.

The question was whether the Termination Payments Act applied, or would apply, to those payments.

QPCU commenced the proceeding by an Originating Application, which it served upon each of the directors and the Australian Securities and Investments Commission (ASIC). Unsurprisingly, none of the former directors contended that the payment which was made to him contravened the Termination Payments Act.

ASIC declined to appear and did not express a view on the subject one way or the other. The fact that ASIC declined to give a contradictory opinion raised the question whether the Supreme Court of Queensland had power to make a declaration without a dispute.

(c) Decision

(i) The Termination Payments Act only applies to directors who "hold office under agreements" entered into, renewed or varied after the commencement of the Termination Payments Act

His Honour held that the payments made to the three former directors and the proposed payment to the fourth director did not contravene s. 200B of the Corporations Act.

His Honour came to his conclusion by focusing on the requirement in s. 43 of Schedule 1 to the Termination Payments Act, which stated that the limitations on retirement benefits imposed by the Termination Payments Act would only apply where:

- the directors "hold their office under an agreement"; and
- the agreements were entered into, renewed or varied after the commencement of the Termination Payments Act.

His Honour considered the facts and was unsure of whether the former directors of QCPU "held their office under an agreement". However, he concluded that it did not matter because nonetheless the Termination Payments Act would not apply and s. 200B of the Corporations Act had not been, or would not be, breached by the past or proposed payments to the directors.

This is because, if the directors did not "hold their office under an agreement", then the Termination Payments Act would not apply as the requirements set out in s. 43 of Schedule 1 to the Termination Payments Act would not have been met.

Alternatively, if each of the directors did actually "hold office under an agreement" then the Termination Payments Act would still not apply because "the agreement[s] predated the commencement of the Termination Payments Act and there was no renewal, extension or variation after the commencement".

(ii) The Superior Courts have the discretionary power to make declarations regarding the Corporations Act 2001 even where ASIC declines to appear or express a view

His Honour also held the Supreme Court of Queensland had jurisdiction to make the declarations, despite ASIC's lack of appearance.

McMurdo J referred to the case of *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 where it was said that the broad discretionary power of superior Courts to grant declaratory relief is nevertheless "confined by the considerations which mark out the boundaries of judicial power", which means that the Supreme Court does not have jurisdiction to consider cases where:

- the Court is asked to answer abstract or hypothetical questions; or
- where the declaration sought would produce no foreseeable consequences for the parties.

McMurdo J distinguished the case before him from *Ainsworth v Criminal Justice Commission*, and stated that:

> the question is not abstract or hypothetical: it concerns the lawfulness of events which have happened. My concern about jurisdiction here came from an apprehension that there was no contradictor.

However, McMurdo J applied the accepted interpretation of a "contradictor" to find that ASIC would be a contradictor and therefore the Supreme Court had jurisdiction to make a declaration:

> ASIC has a "true interest to oppose the declaration sought", because of its statutory role or roles in connection with a potential prosecution. The fact that ASIC has chosen to express no view about the merits of the application, does not prevent it from being a proper contradictor. ASIC was served with the Originating Application as well as the affidavits in support of it.