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info.regulatory@saiglobal.com

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Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation

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Detailed Contents

1. Recent Corporate Law and Corporate Governance Developments

1.1 EU code of conduct for proxy advisors recommended

On 19 February 2013, the European Securities and Markets Authority (ESMA) released its final report on the proxy advisory industry.

The Report has found that there is no current market failure related to proxy advisors' interaction with investors and issuers in the European Union (EU), which would require regulatory intervention. However, ESMA has identified a number of concerns regarding the independence of proxy advisors, and the accuracy and reliability of the advice provided. ESMA is recommending that the proxy advising industry should develop an EU Code of Conduct that focuses on:

- identifying, disclosing and managing conflicts of interest; and
- fostering transparency to ensure the accuracy and reliability of the advice.

The report sets out a proposed framework for a code, including the roles of the different stakeholder groups, the relationship with other corporate governance codes for issuers and the key principles concerning proxy advisors which ESMA would expect such a Code to cover.

ESMA has identified the following principles that are intended to offer guidance to the industry committee developing an industry-wide Code:

1. Identifying, disclosing and managing conflicts of interest

Proxy advisors should seek to avoid conflicts of interest with their clients. Where a conflict effectively or potentially arises the proxy advisor should adequately disclose this conflict and the steps which it has taken to mitigate the conflict, in order that the client can make a properly informed assessment of the proxy advisor's advice.

2. Fostering transparency to ensure the accuracy and reliability of the advice

Proxy advisors should provide investors with information on the process they have used in making their general and specific recommendations and any limitations or conditions to be taken into account on the advice provided so that investors can make appropriate use of the proxy advice.

(i) Disclosing general voting policies and methodologies

Proxy advisors should, where appropriate in each context, disclose both publicly and to client investors the methodology and the nature of the specific information sources they use in making their voting recommendations, and how their voting policies and guidelines are applied to produce voting recommendations.

(ii) Considering local market conditions

Proxy advisors should be aware of the local market, legal and regulatory conditions to which issuers are subject, and disclose whether/how these conditions are taken into account in the proxy advisor's advice.

(iii) Providing information on engagement with issuers

Proxy advisors should inform investors about their dialogue with issuers, and of the nature of that dialogue.

The report is available on the ESMA website.

1.2 Financial Stability Board reports to G20 on progress of financial regulatory reforms

On 16 February 2013, the Chairman of the Financial Stability Board (FSB) reported to the G20 Finance Ministers and Central Bank Governors on progress in the financial regulatory reform program.

In connection with this, the FSB has released:

- a letter by the FSB Chair to the G20, sent ahead of their meeting, reporting on the progress being made in financial reforms, including in the following priority areas:

- creating continuous core markets by completing OTC derivatives and related reforms;
- strengthening the oversight and regulation of shadow banking;
- building resilient financial institutions; and
- ending 'too big to fail'.

The letter also summarises the FSB's recent work and plans to monitor the implementation of reforms.

- an assessment of the effect of the G20 financial reform program on the availability of long-term finance. This assessment has been contributed by the FSB as part of a broader diagnostic report prepared by international organisations to assess factors affecting long-term financing. The FSB assessment concludes that, while there may be short-term adjustment effects, the most important contribution of the financial reform program to long-term investment finance is to rebuild confidence and resilience in the global financial system.
- a joint update by the International Accounting Standards Board (IASB) and the Financial Accounting Standards Board on the status and timeline of their remaining projects on converging their standards.

At the meeting on 16 February 2013, the G20 Finance Ministers and Central Bank Governors reaffirmed their commitment to the full, timely and consistent implementation of internationally agreed financial sector reforms.

1.3 IAASB consultation paper on audit quality

On 15 February 2013, the Auditing and Assurance Standards Board (AUASB) released the IAASB consultation paper, 'A Framework for Audit Quality'.

Through the proposed framework, the IAASB aims to raise awareness of the key elements of audit quality, encourage stakeholders to explore ways to improve audit quality, and facilitate greater dialogue between key stakeholders on the topic.

The IAASB is seeking responses to several questions listed in the consultation paper; in particular, whether the framework is clear, comprehensive, and useful. In developing the framework, the IAASB has also identified, with the input of stakeholders, a number of areas for consideration by both auditors and other participants in the financial reporting supply chain that may benefit audit quality on a global basis.

The consultation paper is available on the IAASB website.

1.4 Basel Committee and IOSCO issue near-final proposal on margin requirements for non-centrally cleared derivatives

On 15 February 2013, the Basel Committee on Banking Supervision and the International Organization of Securities Commissions (IOSCO) published a second consultative paper which represents a near-final proposal on margin requirements for non-centrally cleared derivatives.

Several features of the near-final proposal are intended to manage the liquidity impact of the margin requirements on financial market participants. The proposed requirements would allow for the introduction of a universal initial margin threshold of ?50 million. The results of a quantitative impact study (QIS) conducted in 2012 indicate that application of the threshold could reduce the total liquidity costs by 56% relative to a margining framework with a zero initial margin threshold, which was initially proposed in the July 2012 consultative paper on margin requirements for non-centrally cleared derivatives.

The proposal also envisages a gradual phase-in to provide market participants with sufficient time to adjust to the requirements. The requirement to collect and post initial margin on non-centrally cleared trades is proposed to be phased in over a four year period beginning 2015 and begin with the largest, most active and most systemically risky derivative market participants.

These policy proposals are articulated through a set of key principles that primarily seek to ensure that appropriate margining practices will be established for all non-centrally cleared over-the-counter (OTC) derivative transactions. These principles will apply to all transactions that involve either financial firms or systemically important non-financial entities.

The paper is available on the BIS website.

1.5 Risk report on EU securities markets

On 14 February 2013, the European Securities and Markets Authority (ESMA) published its first report on trends, risks and vulnerabilities in European Union (EU) securities markets. The report looks at the performance of securities markets in 2012, assessing both trends and risks in order to develop a comprehensive picture of systemic and macro-prudential risks in the EU that can serve both national and EU bodies in their risk assessments.

The report finds that EU securities markets and investment conditions in the EU improved in 2012, especially in the second half of the year; while systemic risk in EU securities markets decreased in the fourth quarter. The recovery can be linked to the ECB's announcement of Outright Monetary Transactions (OMT) in early August 2012, which alleviated pressure on euro area sovereign bond markets and reduced uncertainty among market participants. However, risk indicators remained at high levels: amongst other factors, this was due to the on-going sovereign debt and banking crisis, the realignment of risk assessments by investors, funding risk, potential long-term implications of low interest rates and obstacles to orderly market functioning.

The report identifies the following key trends in EU securities markets:

- **Securities markets:** after a volatile first semester, financial market conditions in 2012 improved due to the ECB's OMT announcement. However, sovereign bond markets continue to struggle;
- **Collective investments:** asset managers benefited from easing markets (with total net asset values up to ?8tn, compared to ?7.4tn in 2011). Main beneficiaries were bond, hedge, real estate and exchange-traded funds. Overall however, fund inflows remained volatile; and
- **Market infrastructures:** trading on EU venues significantly decreased in 2012. The use of Central Counterparties (CCPs) however, increased: 60% of worldwide interest rate swaps are now centrally cleared, and 10% of CDSs.

The report is available on the ESMA website.

1.6 FSB publishes peer review on risk governance

On12 February 2013, the Financial Stability Board (FSB) published a thematic peer review on risk governance. The report takes stock of risk governance practices at both national authorities and firms, notes progress made since the financial crisis, identifies sound practices and offers recommendations to support further improvements.

The recent global financial crisis exposed a number of risk governance weaknesses in major financial institutions, relating to the roles and responsibilities of corporate boards of directors (the board), the firm-wide risk management function, and the independent assessment of risk governance. Without the appropriate checks and balances provided by the board and these functions, a culture of excessive risk-taking and leverage was allowed to permeate in many of these firms.

The peer review found that, since the crisis, national authorities have taken several measures to improve regulatory and supervisory oversight of risk governance at financial institutions. These measures include developing or strengthening existing regulation or guidance, raising supervisory expectations for the risk management function, engaging more frequently with the board and management, and assessing the accuracy and usefulness of the information provided to the board to enable effective discharge of their responsibilities. Nonetheless, more work is necessary. In particular, national authorities need to better assess the effectiveness of a firm's risk governance framework, and more specifically its risk culture, to help ensure the sound management of risk through the economic cycle. Supervisors will need to strengthen their assessment of risk governance frameworks to encompass an integrated view across all aspects of the framework.

Despite improvements, significant gaps remain in a number of areas, particularly in the risk management function. At the core of strong risk management is an effective risk appetite framework, and firms' progress to date is uneven in its development, comprehensiveness and implementation. Very few firms were able to identify clear examples of how they used their risk appetite framework in strategic decision-making processes.

Drawing from the findings of the review, the report identifies a list of sound risk governance practices that would help firms continue to improve their risk governance and national authorities to assess its effectiveness.

The peer review is available on the FSB website.

1.7 Remuneration guidelines for hedge funds and private equity managers

On 11 February 2013, the European Securities and Markets Authority (ESMA) published final Guidelines on remuneration of alternative investment fund managers (AIFMs). The rules will apply to managers of alternative investment funds (AIFs) including hedge funds, private equity funds and real estate funds. Non-EU AIFMs who market funds (using passport agreements) to EU investors will also be subject in full to the guidelines after a transitional period.

AIFMs will be asked to introduce sound and prudent remuneration policies and organisational structures which avoid conflicts of interest that may lead to excessive risk taking.

The key elements of the guidelines include:

AIFs' internal governance

- the governing body of each AIFM has to ensure sound and prudent remuneration policies/ structures exist and are not circumvented; and
- AIFMs should select the type of staff for which a remuneration policy is put in place and be able to demonstrate according to which criteria this selection occurred.

Categories of staff covered

ESMA's remuneration guidelines apply to identified staff whose professional activities might have a material impact on the AIF's risk profile. This includes:

- senior management, risk takers, control functions; and

- any employee receiving a total remuneration that takes them into the same remuneration bracket as the aforementioned categories of staff.

Types of remuneration covered

- for the purposes of the guidelines, remuneration consists of all forms of payments or benefits paid by the AIFM, of any amount paid by the AIF itself, including carried interest, and of any transfer of units or shares of the AIF, in exchange for professional services rendered by the identified staff; and
- all remuneration should be divided into either fixed remuneration (payments or benefits without consideration of any performance criteria) or variable remuneration (additional payments or benefits depending on performance or, in certain cases, other contractual criteria).

The final guidelines are available on the ESMA website.

1.8 Clearing and settlement in the cash equity market

On 11 February 2013, the Australian Treasury announced that it had accepted in full the recommendations of the Council of Financial Regulators in relation to competition in the clearing and settlement of the Australian cash equity market.

The Council's advice is built on the work carried out by the Reserve Bank of Australia, the Australian Securities and Investments Commission, and the Australian Treasury in collaboration with the Australian Competition and Consumer Commission, and follows consultations on the Council discussion paper 'Competition in the Clearing and Settlement of the Australian Cash Equity Market', which was released on 15 June 2012. The key recommendation is that a decision on any licence application from a clearing and settlement infrastructure provider seeking to compete in the Australian cash equity market be deferred for two years.

The Council advice draws out key matters for consideration in understanding the implications of competition and assessing licence applications from competing providers of central counterparty services and provides recommendations to Government on how to approach competition in clearing and settlement of the Australian cash equity market.

The advice is available on the Treasury website.

1.9 Report on global high pay talent market

On 11 February 2013, the UK's High Pay Centre released a report titled 'Global CEO Appointments - A Very Domestic Issue', a study of international moves in the world's top companies.

According to the report, '[l]ess than one per cent of top chief executives are poached from overseas, and 80% are promoted from within the company, proving that justifications for high pay in the UK due to a highly-paid global talent pool are a 'self-serving myth''.

The report disputes the notion that huge financial incentives are a must to keep talent in the UK. Drawn from The Fortune Global 500 of CEO appointments from the largest companies in the world, the report shows that:

- only 4 chief executives out of 489 were poached while CEOs of another company in a foreign country - just 0.8% of total appointments;

- only one CEO was poached while CEO of another company in another continent;
- in North America, Japan, Latin America and Eastern Europe not one CEO was appointed from outside the country where the company is based;
- 80% of CEO appointments in the world's largest companies are internal promotions; and
- just 6.5% (32) of current CEOs were poached from another company while serving as a CEO.

The report argues that the supposed scarcity of talent, and what is claimed to be the highly competitive market for that talent, is principally responsible for pushing up pay to the current levels. Yet the vast majority recruit from within, and only a tiny number of companies look outside their country to find a successor who is in another CEO role.

The report is available on the High Pay Centre website.

1.10 Institutional investors increasing share ownership: study

On 10 February 2013, the Australasian Investor Relations Association (AIRA) released a study indicating that large institutions including local superannuation funds and sizeable offshore investors have strengthened their hold on Australian listed entities at the same time that small shareholders have dramatically slashed their portfolios.

The analysis of trends in share ownership during the 10 years from 2002 to 2011 found that even before the Global Financial Crisis (GFC) hit in 2008, small shareholders were reducing their equity holdings.

Among the study's findings was that the decline in the percentage of issued capital held by investors owning fewer than 10,000 shares (considered in the analysis to be small shareholders) in the average ASX 300 company was from 15.1% in 2002 to 9.9% in 2011. By comparison, the percentage held by institutional shareholders (with 10,001 shares or more) increased from 84.9% to 90.1%.

Some 97.1% of shareholders in the average ASX 20 stock are small shareholders, yet they owned only 25.2% of the shares outstanding during the survey period. The flip side of this was that institutions held 74.8% of the issued capital even though they represented just 2.9% of the total number of shareholders.

Further information is available from the AIRA website.

1.11 IOSCO publishes recommendations on the protection of client assets

On 8 February 2013, the International Organization of Securities Commissions (IOSCO) released a consultation report on 'Recommendations Regarding the Protection of Client Assets', which seeks to help regulators improve the supervision of intermediaries holding client assets.

Regulators are seeking to address risks to client assets and determine how to transfer or return client assets in default, resolution or insolvency scenarios.

The eight principles published provide guidance to regulators on how to enhance their supervision of intermediaries holding client assets by clarifying the roles of the intermediary and the regulator in protecting those assets.

Many jurisdictions have rules and regulations governing client assets, although their protection regimes may vary across these jurisdictions. The report outlines the intermediary's responsibility to ensure compliance with these rules, including through the development of internal systems and controls to monitor compliance. Where the intermediary places client assets with third parties, the intermediary should reconcile the client's accounts and records with those of the third party. While the intermediary must comply with the client asset protection regimes, the regulator has a role in supervising the intermediary's compliance with the applicable domestic rules and maintaining a regime that promotes effective safeguarding of client assets, according to the report.

The consultation report is available on the IOSCO website.

1.12 Guidance for boards on remuneration principles for long-term business success

On 7 February 2013, Hermes EOS, the UK National Association of Pension Funds (NAPF), BT Pension Scheme, RPMI Railpen Investments and USS Investment Management published guidance for boards titled 'Remuneration Principles for Building and Reinforcing Long-Term Business Success'. The principles are intended to provide guidance to companies on their remuneration structures and practices.

The guidance contains four high-level principles:

- management should make a material long-term investment in shares of the businesses they manage;
- pay should be aligned to long-term success and the desired corporate culture throughout the organisation;
- pay schemes should be simple, understandable for both investors and executives, and ensure that rewards reflect long-term returns to shareholders; and
- remuneration committees should fully explain and justify how their decisions operate to deliver long-term business success.

The guidance is available on the NAPF website.

1.13 International director network releases paper on board diversity

On 6 February 2013, the Global Network of Director Institutes (GNDI) released their joint policy perspective setting out the significant and positive impact a diverse board can have on business outcomes, and arguing that mandatory quotas is not the most effective way to improve board diversity.

The paper emphasises that diversity encompasses, but is not limited to, gender, ethnicity/race, nationality, religious beliefs, cultural or socio-economic background, and age. It reflects a view from the director institutes of the GNDI that because systems of organisational governance vary significantly around the world, the approach that each organisation takes to diversity will vary; all organisations are different and there is no 'one size fits all' formula. Rather, the paper argues that each organisation must examine its individual circumstances, existing board composition and should ideally conduct a skills gap analysis to determine its specific needs. For this reason, the GNDI does not support mandatory, externally imposed quotas and argues there are many other effective mechanisms to improve board diversity.

Initiatives and practices which may be employed by organisations to increase the diversity of their boards could include establishing diversity policies and objectives, improving transparency in board selection and appointment processes, and implementing board evaluation processes that assess the board's performance and the potential contribution of diversity to board effectiveness.

The GNDI policy perspective paper on board diversity is available on the GNDI website.

1.14 Australia one of the world's largest five pension markets

On 4 February 2013, Towers Watson released its Global Pension Assets Study. According to the study, Australian superannuation assets relative to GDP rose from 96% in 2011 to 101% in 2012, joining the Netherlands, Switzerland, the UK and the US as countries where this ratio is higher than 100%. Australia now has the world's fourth largest pension pool, with assets totalling US$1.6 trillion.

Australia remains the country with the highest proportion of defined contribution (DC) assets relative to defined benefit (DB) assets at 81%, followed by the US with 58%. There is, however, an increasing shift in the direction of DC globally, with it starting to appear on the radar in the previously DB-dominated markets of the Netherlands and Canada.

Asset allocation shifts continue to show movement towards alternative assets, with Switzerland (30%), Australia (23%) and Canada (23%) now having the highest allocations. Australia continues to have the highest allocation to equities in the world (54%) and the lowest allocation to bonds (15%).

In equities, of the largest seven pension fund markets, only the US has a higher home country bias than Australia, but in bonds Australia has the lowest home country bias (in bonds many countries have higher home country biases as a result of asset liability matching for many of their DB schemes).

Global institutional pension fund assets in the 13 major markets grew by 9% during 2012 to reach a new high of US$30 trillion. The growth continues the trend which started in 2009 when assets grew 17%, and in sharp contrast to a 21% fall during 2008 which took assets back to 2006 levels. Global pension fund assets have now grown at over 7% on average per annum (in USD) since 2002, when they were under half their current level.

The study reveals that the growth in assets helped to strengthen pension fund balance sheets globally during 2012 (measured by asset values over liability values using sovereign bond yields to discount liabilities). Furthermore, the ratio of global assets to GDP is just below the level reached in 2007. According to the study, pension assets now amount to 78% of global GDP, which is significantly higher than the 72% recorded in 2011 and substantially higher than the 61% recorded in 2008.

Further information, including the study, is available on the Towers Watson website.

1.15 Guidance on good governance for not-for-profit boards

In February 2013, the Australian Institute of Company Directors (AICD) released its draft Good Governance Principles and Guidance For Not-for-profit boards for consultation.

The draft guide 'sets out [ten] key principles and guidance that can provide a useful framework when considering what constitutes good governance practice' for not-for-profit (NFP) organisations, including commentary to assist in applying the principles in practice. The AICD states that the proposed guide is a 'practical industry driven, non-prescriptive framework', and is not intended as a substitute for the relevant legislation and standards, such as the minimum governance standards charities must comply with to be registered with the Australian Charities and Not-for-profits Commission.

The 10 principles (which are elaborated upon in the draft guide) are:

- there should be clarity regarding individual director responsibilities, organisational expectations of directors and the role of board;

- a board needs to have the right group of people, having particular regard to each individual's background, skills and experience, and how the addition of an individual adds to the collective capability and effective functioning of the board;
- the board sets the vision, mission and strategies of the organisation, helping the organisation understand these, and adapting the direction or plans as appropriate;
- through putting in place an appropriate system of risk oversight and internal controls, boards can help increase the likelihood that their organisation will deliver on its mission;
- the degree to which an organisation is delivering on its mission can be difficult to assess, but this can be aided by the board determining appropriate performance categories and indicators for the organisation;
- a board's effectiveness may be greatly enhanced through: careful forward planning of board-related activities; board meetings being run in an efficient manner; regular assessments of board performance; having a board succession plan; and the effective use of sub-committees, where appropriate;
- it is important that the board have in place a system whereby: there is a flow of information to the board that aids decision-making; there is transparency and accountability to external stakeholders; and the integrity of financial statements and other key information is safeguarded;
- the board has a role to play in enhancing the capabilities of the organisations they serve;
- the board sets the tone for ethical and responsible decision-making throughout a NFP; and
- the board helps a NFP to engage effectively with key stakeholders.

1.16 Consultation on implementation of Sharman Panel recommendations issued by FRC

On 30 January 2013, the UK Financial Reporting Council (FRC) released for consultation the 'Sharman Implementation Consultation Paper', which implements the recommendations of the Sharman Panel of Inquiry into Going Concern and Liquidity Risks.

The Sharman Panel was commissioned in March 2011 to identify lessons from the financial crisis and recessionary environment for companies and auditors, addressing going concern and liquidity risks; and to recommend measures, if any, which are necessary to improve the existing reporting regime and related guidance in relation to these matters.

The inquiry highlighted the importance of the identification, analysis and management of risk. It raised questions about the quality of information provided on companies' financial health and their ability to withstand economic and financial stresses in the short, medium and longer term.

The inquiry recommended, and the FRC has concluded, that to improve the robustness and reporting of the going concern assessment, the boards of companies complying with the FRC's Corporate Governance Code should:

- consider the threats to the company's business model and capital adequacy, over a period longer than twelve months, looking through the economic cycle and the company's own business cycle;
- develop a high level of confidence that solvency and liquidity risks can be managed effectively during the period of at least twelve months from approval of the financial statements;
- always disclose the significant risks to the company's solvency and liquidity and how they are being managed, as part of its discussion of principal risks in the business review; and
- confirm that it has undertaken a robust going concern assessment.

In addition, auditors should consider the board's report on the robustness of its assessment and the resulting disclosures in the annual report and confirm in their report that they have nothing to add or to draw attention to.

The Consultation Paper is available on the FRC website.

1.17 Cross-border cooperation between regulators

On 24 January 2013, the Australian Treasury announced changes to the corporations law to strengthen cross-border cooperation and information sharing.

The Mutual Assistance in Business Regulation Act 1992 (Cth) (MABRA) and associated regulations allow Australian business regulators (the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, and the Australian Prudential Regulatory Authority) to respond to requests from foreign counterparts to gather information to assist with their supervisory functions.

Recent amendments to the MABRA framework through regulations aim to improve the speed and scope of cross-border cooperation and information sharing, in accordance with recent developments in international regulatory cooperation.

The regulation is available on the ComLaw website.

1.18 Board practices report

In January 2013, Deloitte released its '2012 Board Practices Report: Providing insight into the shape of things to come'. The report contains insights and trends across sixteen areas of governance practices, including political contributions; diversity; CEO succession planning; shareholder engagement; and sustainability initiatives.

The report's findings are based on a survey of corporate secretaries at nearly 200 US companies. Key findings of the 2012 survey include:

- **Room for improvement in board diversity:** More than 80% of respondents say that the percentage of women and minorities on their boards is at most 25%, and less than 15% say that the percentage has increased since last year.
- **Industry knowledge tops list of desired director experience:** The type of skill and experience most desired for board success in the next two years is industry knowledge, followed by C-level experience, international business exposure, technology/IT, and operations.
- **Separate CEO and chairman roles:** a split outcome: Just over half of respondents, 51%, currently separate the role of the chairman and CEO, about the same as last year.
- **Directors are receiving meeting information earlier:** Compared to last year's study, there is a 10% decline in directors receiving board meeting information five or fewer days in advance of the meeting. Instead, more directors report getting information six or more days in advance of meetings. This could be attributed to an increase in board usage of technology, such as tablet devices and board portals.
- **Variation in risk oversight practices:** How boards are assigning risk oversight for the organization's risk management program varies. Only 7% say they have a board risk committee, and the remaining responses display little variation in those saying the responsibility is spread across all board committees; to the audit committee; and to the full board.
- **Greater use of technology by boards:** Eighty-three percent (83%) of boards say that their use of technology for board matters has increased year-over-year; this is in line with trends from the 2011 report. Compared to last year, more boards are using tablets and board portals, and fewer are distributing materials in hard-copy format.
- **More company involvement in ethical matters:** Compared to last year's results, 5% more companies report taking steps to create or enhance a culture of candid and open communication, and 4% more say they conduct cultural surveys on an annual basis.

Further, there has been a significant increase in companies that have management review cultural survey findings with the board.

The report is available on the Deloitte website.

1.19 New book - employee share ownership

Members of the Centre for Corporate Law and Securities Regulation at Melbourne Law School have published a new book titled 'The theory, policy and practice of employee share ownership plans in Australia'. The authors are Ingrid Landau, Ann O'Connell and Ian Ramsay.

Employee share ownership has the potential to generate a culture of enterprise and innovation, and build national wealth and savings. This book is the culmination of a multi-year research project and represents the first detailed discussion of the theory, policy and practice of employee share ownership plans (ESOPs) in Australia. The topics examined in the book are key legal and policy issues relevant to ESOPs, the current incidence and forms of ESOPs in Australia, the corporate law and taxation law frameworks, why employers implement ESOPs and why employees participate in them, international comparisons, and recommendations for reform.

The book can be purchased from Melbourne University Publishing as:

- a paper back (available here); or
- an e-book (available here).

2. Recent ASIC Developments

2.1 Consultation on reforms to regulation of the debenture sector

On 13 February 2013, ASIC announced a number of proposals to strengthen the regulation of the debenture sector, including introducing minimum capital and liquidity requirements.

The move follows a number of high-profile collapses in the sector, including Banksia Securities Ltd, the subsequent ASIC debenture taskforce and the Government's December 2012 announcement about law reform for this $4 billion sector.

ASIC is consulting on:

- mandatory minimum capital and liquidity requirements for debenture issuers;
- proposals to strengthen disclosure to investors about debenture issuers; and
- clarifying the powers and duties of debenture trustees, and the role of auditors.

APRA will separately consult on proposed reforms to more clearly differentiate debenture issuers from banks, building societies and credit unions that are prudentially regulated. This includes a proposal to prohibit debenture issuers from using terms like 'deposit' and a proposal to restrict 'at-call' accounts by imposing a minimum maturity period.

Consultation Paper 199, 'Debentures: Reform to strengthen regulation', is available on the ASIC website.

2.2 SMSF auditor register

On 31 January 2013, ASIC announced the commencement of its registration of self-managed super fund (SMSF) auditors. Auditors doing SMSF audits can apply for registration online.

The new register is part of the Australian Government's 'Stronger Super' reforms.

Auditors can apply to register as an SMSF auditor through ASIC's online portal, ASIC Connect, via www.asic.gov.au. Registration requires an ASIC Connect account.

Registration will be mandatory for anyone conducting an SMSF audit from 1 July 2013 and sanctions may apply if an auditor accepts an SMSF audit engagement without being registered after this date.

In order to be registered, SMSF auditors must meet minimum education, experience and competency requirements. SMSF auditors must also maintain professional indemnity insurance.

Regulatory Guide 243 'Registration of self-managed superannuation fund auditors' (RG 243) and Class Order [CO 12/1687] 'Competency standards for approved SMSF auditors' provide further information on the requirements SMSF auditors must meet and the transitional arrangements for the registration of existing approved auditors of SMSFs.

More information is available on ASIC's dedicated super webpage, for auditors on the SMSF auditor webpage, for consumers on ASIC's MoneySmart website and at the Government's website.

2.3 Report on relief decisions - June to September 2012

On 31 January 2013, ASIC released its latest report outlining decisions on relief applications covering the period 1 June to 30 September 2012.

Report 325 'Overview of decisions on relief applications (June to September 2012)' aims to improve the level of transparency and the quality of publicly available information about decisions ASIC makes when asked to exercise its discretionary powers to grant relief from provisions of the:

- Corporations Act 2001 (Cth) (the Corporations Act);
- National Consumer Credit Protection Act 2009 (Cth) (the National Credit Act); or
- National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 (Cth) (the Transitional Act).

The report also discusses the various relevant publications released by ASIC during the three months.

ASIC uses its discretion to vary or set aside certain requirements of the law where there is a net regulatory benefit or where ASIC can facilitate business without harming other stakeholders.

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

The report provides examples of decisions that demonstrate how ASIC has applied its policy in practice which ASIC thinks will be of particular interest for capital market participants and for participants in the consumer credit and financial services industries.

The report includes an appendix detailing the relief instruments referred to in the report.

Report 325 is available on the ASIC website.

3. Recent ASX Developments

3.1 Reports

On 5 February 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 January 2013.

3.2 Corporate Action and Listed Entity Data Straight Through Processing

ASX is proposing to improve the process of capturing and delivering information from listed entities about corporate actions to the market. This will be achieved by introducing straight-through processing (STP) for corporate actions.

Each year ASX-listed entities make more than 110,000 announcements via the company announcements platform to the market. Currently, the data is manually transcribed from these unstructured company announcements, processed in ASX internal systems and disseminated in ASX Market Information reference products.

The initiative aims to significantly improve the current process by:

- removing the risks associated with accuracy, timing and interpretation;
- improving compliance with listing rules;
- developing new data sets compliant with international standards; and
- providing new product formats and delivery mechanisms.

It is currently proposed to trial the system around mid-calendar 2013 and to implement the new system, including listing rule changes, shortly after that. ASX proposes to allow entities six months to transition to the new system after implementation. ASX will also run education seminars in the lead-up to implementation.

Information on the project is available on ASX.com.au.

4. Recent Research Papers

4.1 Is director industry experience valuable?

The authors investigate whether investor reactions to the announcement of a new outside director appointment significantly depend on the director's experience in the appointing firm's industry. The authors use a sample of 385 outside directors appointed to the board of S&P 500 companies from 2008 to 2010. Their results indicate that companies announcing the appointment of a new director with industry experience exhibit economically and statistically significantly higher announcement returns than companies announcing the appointment of a director without such experience.

The results further show that industry experience gained as an inside director drives this result. Experience as an employee without board membership or as an outside director is not associated with significantly higher announcement returns. These results hold when the authors control for various other director characteristics and financial and corporate governance variables at the firm level. To alleviate endogeneity concerns, the authors use the deaths of 166 directors holding 229 outside directorships in listed US firms as an identification strategy. Consistent with the results on appointments, they find significantly more negative announcement returns associated with the deaths of experienced vs. inexperienced directors.

The paper is available on the SSRN website.

4.2 Should shareholders have a say on executive compensation? Evidence from say-on-pay in the United States

This paper examines the SEC 2011 regulation requiring an advisory (non-binding) shareholder vote on the compensation of the top five highest paid executives - 'say-on-pay' (SOP). Using a unique dataset of the first two years of SOP votes from the Russell 3000, the authors find approval (reject) votes are associated with firms that have: better (lower) financial performance, higher (lower) market returns, lower (higher) returns volatility, lower (higher) total compensation, lower (higher) abnormal CEO compensation and lower (higher) abnormal accruals.

The authors also find evidence to suggest that firms that receive a high level of SOP rejection votes subsequently reduce the growth of executive compensation levels. This study contributes to the literature in two ways. First, it is the first to empirically examine the first two years of SOP votes in the United States. Second, the analysis provides evidence of shareholder efficiency in identifying excessive CEO compensation and poor financial performance, thus suggesting that shareholder voting rights are an effective mechanism of corporate governance that addresses the problem of incomplete contracts and management rent extraction.

The first two years of SOP votes in the US votes show a great degree of shareholder sophistication in recognizing the monitoring and reward tools that need to coexist between the owners and firm managers.

The paper is available on the SSRN website.

4.3 The agency costs of agency capitalism: Activist investors and the revaluation of governance rights

Equity ownership in the United States no longer reflects the dispersed share ownership of the canonical Berle-Means firm. Instead, there is the reconcentration of ownership in the hands of institutional investment intermediaries, which gives rise to what the authors call "the agency costs of agency capitalism."

This ownership change has occurred because of:

- political decisions to privatise the provision of retirement savings and to require funding of such provision; and
- capital market developments that favour investment intermediaries offering low cost diversified investment vehicles.

A new set of agency costs arise because in addition to divergence between the interests of record owners and the firm's managers, there is divergence between the interests of record owners - the institutional investors - and the beneficial owners of those institutional stakes.

The business model of key investment intermediaries like mutual funds, which focus on increasing assets under management through superior relative performance, undermines their incentive and competence to engage in active monitoring of portfolio company performance. Such investors will be "rationally reticent" - willing to respond to governance proposals but not to propose them. The authors posit that shareholder activists should be seen as playing a specialised capital market role of setting up intervention proposals for resolution by institutional investors. The effect is to potentiate institutional investor voice, to increase the value of the vote, and thereby to reduce the agency costs the authors have identified.

The authors therefore argue against recent proposed regulatory changes that would undercut shareholder activists' economic incentives by making it harder to assemble a meaningful toe-hold position in a potential target.

The paper is available on the SSRN website.

4.4 The future of shareholder democracy in the shadow of the financial crisis

This author argues that the UK regulatory response to the financial crisis in the form of 'stewardship' and shareholder engagement is an error built on a mistaken understanding of the key active role shareholders played in the enormous corporate governance failure that the banking crisis represented. Shareholders' passivity rather than activity has characterized the reform perception of their role. This leads to the conclusion that if only they were more active they would be more responsible 'stewards' of the corporation.

Unfortunately, if activity was part of the problem in the banks as the author would argue, then encouraging increased shareholder action and exporting it outside the banks, as has subsequently been done in the United Kingdom, risks a wider systemic corporate governance failure. In short, we have learned the wrong lesson about shareholders from the banking crisis.

The paper is available on the SSRN website.

4.5 The problem of, and with, financial crime

Financial crime is a term that is widely used, but it is a label or category that is bedevilled by definitional uncertainty and this uncertainty impacts upon how it is perceived and acted upon by law enforcement and other regulatory actors. This is perhaps not surprising and echoes many of the difficulties that have plagued efforts to counter white-collar crime.

This article considers the definitional and other ambiguities that have permeated debates about both white-collar and financial crime. The analysis draws on a short survey which asked law enforcement and other regulatory actors in Australia and the UK whose responsibilities included countering behaviours that could be viewed as financial crime, what operational definitions of financial crime they employed in the course of their work.

Results indicate that definitional uncertainty ensures that there are numerous understandings of what constitutes financial crime and no immediate prospect of a universal legal definition. However, there are some interesting classification developments for financial crime emerging from the business sciences literature and inter-disciplinary approaches would seem to offer the most promise for categorizing the suite of evolving behaviours that comprise financial crime.

The paper is available on the SSRN website.

5. Recent Corporate Law Decisions

5.1 Refusal to register shares: consideration of 'just cause' under section 1071F of the Corporations Act

(By Katrina Sleiman and Ben Williams, Corrs Chambers Westgarth)

Trafalgar West Investments Pty Ltd v Superior Lawns Australia Pty Ltd [2012] WASC 460, Supreme Court of Western Australia, Kenneth Martin J, 1 February 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/wa/WASC/2012/460.html

a) Summary

The plaintiff, Trafalgar West Investments Pty Ltd (Trafalgar), as trustee for the Trafalgar West Investments Trust (the Trust) sought a vesting order under section 78 of the Trustees Act 1962 (WA) (the Trustees Act) or, alternatively, an order under section 1071F of the Corporations Act 2001 (Cth) (the Corporations Act) that certain share transfers lodged by Trafalgar be registered by the defendant, Superior Lawns Australia Pty Ltd (Superior Lawns).

On 30 May 2012, Mr Patrick Jebb, as appointer under the Trust, appointed Trafalgar as a trustee and purported to transfer the legal ownership of two classes of shares in Superior Lawns to Trafalgar. By notice dated 5 June 2012, Mr Jebb, who was also a trustee of the Trust, resigned as trustee, effective from the date the share transfers were registered by Superior Lawns. Superior Lawns refused to register the share transfers, and therefore Mr Jebb remained a trustee.

Kenneth Martin J declined to make an order under section 78 of the Trustees Act vesting the shares in Trafalgar, because Mr Jebb was still a trustee. However, his Honour made an order under section 1071F of the Corporations Act that Superior Lawns register the share transfers.

(b) Facts

Trafalgar, as trustee of the Trust, brought three separate proceedings against Superior Lawns in the Supreme Court of Western Australia under the Corporations Act. In each case, it did so as a member (sections 232, 233 and 274A) or shareholder (sections 293(1) and 293(3)(c)) of Superior Lawns.

On 26 October 2011, Mr Jebb, the sole director and 50% shareholder of Trafalgar, appointed himself as the new trustee of the Trust, replacing Trafalgar. Trafalgar (by Mr Jebb) also transferred the legal ownership of 345 ordinary shares and one 'D' class share in Superior Lawns (the Shares) to Mr Jebb. Mr Jebb's reason for the appointment and transfer was that Trafalgar could not afford legal representation but, as a corporate litigant, was required by the Rules of the Supreme Court to have representation in order to continue the proceedings.

On that basis, Mr Jebb applied to the Court to have himself substituted as the plaintiff in those three proceedings, or joined as the second plaintiff. On 29 May 2012, his substitution and joinder applications were refused because he was not the relevant member or shareholder of Superior Lawns at the time proceedings were commenced. Kenneth Martin J also temporarily stayed one of the proceedings (a statutory oppression proceeding) until the shares in Superior Lawns were returned to Trafalgar.

On 30 May 2012, by deed of appointment of a new trustee, Mr Jebb reappointed Trafalgar as trustee of the Trust 'to join with the Existing Trustee'. On 5 June 2012, by notice of trustee resignation, Mr Jebb resigned as a trustee of the Trust 'effective from the date the share transfers dated 5 June 2012 lodged with [Superior Lawns] are registered in the name of [Trafalgar]'. Also on 5 June 2012, Mr Jebb wrote to the directors of Superior Lawns enclosing signed share transfer forms by which he purported to transfer the Shares to Trafalgar.

Superior Lawns refused to register the share transfers for a number of reasons, citing clause 30 of its constitution which provided that the directors may decline to register any transfer of shares, without giving any reason.

(c) Decision

Trafalgar's primary submission was that the share transfers were, properly understood, a transmission by law (rather than transfer) of shares, that the directors therefore had no discretion to refuse registration and that the Court should accordingly make a vesting order under section 78 of the Trustees Act. In the alternative, Trafalgar sought an order under section 1071F of the Corporations Act that the transfers be registered on the basis that Superior Lawns could not demonstrate 'just cause' for its refusal to register the share transfers.

(i) Section 78 of the Trustees Act

Kenneth Martin J accepted that if Trafalgar was able to identify a relevant transmission of the Shares, Superior Lawns had no discretion (under its constitution) to refuse to register the share transfers. However, his Honour held that no such transmission had taken place and declined to make a vesting order which would have effected a transmission.

Section 78 of the Trustees Act provides that, relevantly, the Court may make a vesting order where the Court appoints a new trustee, where a new trustee has been appointed out of Court under any statutory or express power or where a trustee has retired.

Trafalgar submitted that it was entitled to a vesting order because the executed transfers of shares 'simply evidenced the prior transmission on the appointment of a new trustee and resignation of a former trustee'. His Honour rejected that submission, stating that the executed transfers were not a transmission, but merely a basis upon which Trafalgar could seek a vesting order. A vesting order, if made, would effect the transmission: *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 126 FLR 404.

Kenneth Martin J declined to make a vesting order because Mr Jebb's resignation as trustee, which was conditional upon the registration of the share transfers, had not yet become effective. His Honour held that the Court retains an overriding discretion under section 78 and that since Mr Jebb's connection with the Trust had not ended, there was no basis for making an order under section 78.

(ii) Section 1071F of the Corporations Act

Section 1071F(1) provides that, relevantly, if an authority in relation to a company refuses or fails to register a transfer of securities, the transferee may apply to the Court for an order under section 1071F. Section 1071F(2) provides that, relevantly, if a Court is satisfied that the refusal or failure was without just cause, it may order that the transfer be registered.

In discussing the burden of proving an absence of just cause, Kenneth Martin J noted with approval the comments of Brereton J in *Beck v Tuckey* [2007] NSWSC 1065:

'The prevailing view is that the onus of showing an absence of just cause for the purposes of s. 1071F remains with the applicant for registration ... However, that is not to say that, once it appears objectively that there is no such cause, an evidentiary onus may not easily shift to the directors to raise some cause ... and while failure to give reasons does not of itself ... prove there is no just cause, at least where reasons are not required to be given, nonetheless, the failure to provide reasons may ... assist in the drawing of an inference that there is no good reason.'

With respect to Superior Lawns' refusal to process requested share transfers, his Honour found that 'just cause' had not been demonstrated, such that an order under section 1071F requiring Superior Lawns to register the share transfers was warranted.

His Honour made the following observations

- the bare invocation of a discretion under clause 30 of the constitution to refuse the transfers did not constitute just cause;
- the clause of the Superior Lawns constitution dealing with transfers of shares seemed to imply that a situation of a new trustee followed by a transfer request should normally receive favourable consideration;

- Superior Lawns' argument that Trafalgar's purpose was only to shore up its position in relation to the statutory oppression proceeding did not give it just cause to refuse the transfer request;
- the question of the futility of the statutory oppression proceeding was not an appropriate question for determination on this application;
- Trafalgar's strained financial situation did not constitute just cause; and
- from the time that it received Mr Jebb's notice of trustee resignation, Superior Lawns knew that his resignation would become effective upon the registration of the share transfers.

5.2 Limitation periods and equitable breach of directors' fiduciary duties

(By Alison Hill, Herbert Smith Freehills)

In the Matter of Auzhair Supplies Pty Ltd (in Liq) [2013] NSWSC 1, New South Wales Supreme Court, Brereton J, 25 January 2013

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2013/1.html

(a) Summary

This case centred on the question of which, if any, limitation period applies to an action in equity for breaches of fiduciary duties by directors of a company. The question was argued both in relation to statutory limitation periods, and limitation periods applied by equity. Ultimately neither statutory nor equitable limitations were held to be applicable.

It is a highly methodical and carefully judgment, with extensive analysis of authorities for almost every conclusion. The result of this is a two-step test formulated by Brereton J for cases such as this involving equitable causes of action. The case demonstrates that for directors breaching fiduciary duties to their company, the determinative question will be whether it would be inequitable in all the circumstances to time-bar the action. This means that each such case will turn on its facts, and that mere passage of time will not necessarily prevent a director from being held accountable for a breach of duty.

(b) Facts

Warren and Elizabeth Greenaway advanced $200,000 to Auzhair Supplies Pty Limited (Auzhair Supplies), followed by a further $400,000. Around the same time, a new company called Auzhair 1 Pty (Auzhair 1) was incorporated and Auzhair Supplies transferred all its assets and undertaking to it, without consideration. Auzhair Supplies was later deregistered, with one of the directors making a declaration that the company had no liabilities.

For some time after the transfer, the Greenaways continued to be paid interest on their loan. However, this ceased and the Greenaways then sought orders reinstating Auzhair Supplies and winding it up in insolvency. These orders were granted (see Auzhair Supplies Pty Ltd (a deregistered company) and Auzhair 1 Pty Ltd, Re: Greenaway v Auzhair 1 Pty Ltd (2010) 80 ACSR 538), and the reinstated Auzhair Supplies brought proceedings against Auzhair 1 and its former directors for breach of the general law equitable duties owed by directors to their company. Auzhair Supplies sought to have the defendants account to it for the assets and undertaking that were transferred.

(c) Decision

Several key issues of the claim were not disputed. Brereton J found that by authorising the transfer of assets for no consideration, the directors had clearly breached their duties to act in good faith and the best interests of Auzhair Supplies, and with proper care and diligence. Auzhair 1 also admitted that they held the relevant assets and undertaking on trust for Auzhair Supplies.

The main issue in the case was instead whether Auzhair Supplies' claim was barred by an applicable limitation period - the proceedings were not instituted until six and a half years after the claim arose.

(i) Statutory limitation periods

The statutory limitation period in section 1317K applies to breaches of director duties under the Corporations Act 2001 (Cth) (the Corporations Act). The section states that proceedings for compensation cannot be started more than 6 years after a contravention. However, the proceedings were deliberately brought for breach of the equivalent equitable breaches instead, so that this limitation would not apply.

Sections 47 and 48 of the Limitation Act 1969 (NSW) also contain limitation periods, relating to trusts. Brereton J ultimately held that neither was applicable, as the cause of action related to breaches of fiduciary duty and not breaches of trust and though directors have fiduciary duties, they are not trustees. However, consideration was still given to the following issues raised by the parties.

The plaintiff argued that the appropriate limitation period was that in section 47(1)(a), a 12 year limitation period for fraudulent breaches of trust. Brereton J disagreed, finding that there was no fraudulent conduct as the incorrect declaration given about Auzhair Supplies' liabilities was not given dishonestly but rather in the mistaken belief that liabilities had also been transferred. Also, the transfer was not an attempt to defeat the claims of creditors, being made with the agreement and involvement of the Greenaways with interest continuing to be paid for some time afterwards. There were also problems with the pleadings, which referred to words such as 'wilfully' and 'recklessly' but did not distinctly allege fraud.

Section 48 of the Limitation Act provides that a cause of action in respect of a breach of trust must be brought within 6 years, but the plaintiff argued that the period could be suspended during the time the company was deregistered using section 601AH(3) of the Corporations Act. That section states that other appropriate orders can be made if a reinstatement order is made. Brereton J rejected this, at least in relation to causes of actions brought by the company, as it would have very broad consequences in exposing people to seemingly time-barred suits. However, Brereton J assumed that this could be different for causes of action against the company (see *Del Borrello v Australian Securities and Investments Commission* [2008] WASC 48).

(ii) Limitation in equity by analogy

Regardless of the fact that the statutes did not apply directly, the defendants argued that the 6 year limitation period applied by analogy.

An extensive analysis of authorities was undertaken by Brereton J, who made the following conclusions:

- if the court is exercising equity's auxiliary jurisdiction, ie where a superior remedy is asked for a legal right, then equity will apply the legal limitation period; but
- if the court is exercising equity's exclusive jurisdiction in relation to an equitable cause of action, then a two-step test should be used. Under this test, a limitation period that applies to a statutory or legal right will usually also be applied to an equitable action, as an aspect of the doctrine of laches, where:
  1. the equitable action is analogous to the statutory or legal right, with applicable analogies determined by a consideration of the similarities between the actions and their respective remedies; and
  2. it would not inequitable in all the circumstances of the case to apply the limitation period.

On applying the test to the facts, Brereton J held that despite a very strong analogy between the plaintiff's action and remedies and the equivalent directors' duties and remedies in the Corporations Act, the limitation period did not apply because it would be inequitable.

Brereton J held that it would be inequitable because the plaintiff had not been able to enforce its rights earlier than it did so, because the company was at first under the control of the defendants and then was wrongly deregistered. Once deregistered, the action could not be brought until the process of reinstatement and winding up had occurred. Brereton J considered the level of knowledge of the Greenaways and whether they should have instituted the reinstatement proceedings earlier, but found that they had acted appropriately. They could not have been expected to act before their interest payments ceased, as the arrangements between the companies may not have been clear before then. Once reinstated, the plaintiff brought the action promptly. Also relevant was that the defendants would suffer no prejudice from the delay.

Brereton J therefore found that Auzhair Supplies' action was not barred by statutory limitation or laches, and that the plaintiff's claim was made out.

The appropriate relief was held to be that Auzhair 1 would account to Auzhair Supplies for the assets and undertaking, and the directors would be liable in equity to compensate Auzhair Supplies for any further amounts Auzhair 1 was unable to repay.

5.3 Binding dissenting creditors to a scheme, and the proper constitution of scheme classes

(By Andrew Kim and Angela Su, Ashurst Australia)

Nine Entertainment Group Limited, in the matter of Nine Entertainment Group Limited (No 1) [2012] FCA 1464, Federal Court of Australia, Jacobson J, 20 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2012/1464.html

(a) Summary

In this case, the Court ordered the convening of meetings of two classes of secured creditors of Nine Entertainment Group Limited (Nine), to consider and vote on a creditors' scheme of arrangement proposed by Nine under section 411(1) of the Corporations Act 2001 (Cth) (the Act). Under the scheme, it was proposed that Nine's creditors will assign their debt to Nine Entertainment Co Holdings Pty Ltd (Nine Holdings), in return for cash and shares in Nine Holdings.

A number of creditors opposed the scheme, on two main grounds. However, the Court ordered that the scheme meeting be convened and rejected the arguments advanced by the opposing creditors.

In making the orders, the Court noted that:

- section 231 of the Act, which provides that a person is a member of a company if they agree to becoming so, must be read subject to section 411, which empowers the Court to order a scheme meeting; and
- the scheme classes were properly constituted, even though certain senior lenders would obtain once-only rights to appoint the directors of Nine Holdings following the scheme.

The Court also noted that a loan facility component of the proposed transaction, which was to be used to (in part) fund the cash payments under the scheme, did not contravene section 260A of the Act (the financial assistance provisions) as it would not materially prejudice the interests of Nine, per section 260A(1)(a).

(b) Facts

Nine had two classes of secured creditors: the 'senior beneficiaries' (consisting of senior lenders and hedge counterparties) and 'subordinated beneficiaries' (consisting of mezzanine lenders).

The senior beneficiaries were owed approximately $2.5 billion in total (the senior debt), which fell due for payment on 7 February 2013. Nine's failure to pay the senior debt would have constituted an event of default under the mezzanine loan facilities, and was likely to result in Nine's parent company, Nine Holdings, entering insolvency administration.

In view of the above, Nine sought Court approval under section 411 of the Act to propose a scheme of arrangement between Nine and its creditors which would give effect to a debt for equity swap.

However, the scheme was opposed by two groups within the senior beneficiaries, being the 'par lenders', or the original senior lenders (rather than lenders who acquired the senior debt on the secondary market) and the hedge counterparties (the Opponents).

The opposition to the scheme was based on two main grounds:

- that section 231 of the Act prohibited the allocation of shares to a person without their express or implied consent; and
- that the scheme classes were improperly constituted by reason of director appointment rights attaching to certain senior lenders.

The Opponents also argued that a new loan facility that was to be used to fund the cash payments under the scheme involved the provision of financial assistance that contravened section 260A of the Act.

(c) Decision

Jacobson J rejected all of the arguments put forward by the Opponents.

(i) Does section 231 of the Act prohibit a scheme which involves the issue of shares to a person without their consent?

The starting point of the Opponents' submission, which the Court accepted, was that section 411 of the Act does not authorise the Court to approve a scheme that contains a provision which is inconsistent with another provision of the Act, based on the decision in *Australian Securities Commission v Marlborough Gold Mines Limited* (1993) 177 CLR 485.

On the basis of this principle, the Opponents argued that the scheme, if implemented, would be contrary to section 231 of the Act, which provides that a person is a member of a company if they agree to become a member of the company, as the scheme would compel any dissenting creditor to become a member of Nine Holdings without their consent.

This argument was based on the decision in *Re Hunter Resources Limited* (1992) 34 FCR 418, where Lockhart J held that a reduction of capital which effectively compelled shareholders in the company to become shareholders in a different company was contrary to section 231 of the Act. However, Jacobson J rejected this argument, noting comments by Lockhart J in the same case that if the company wished to achieve that objective (of compelling shareholders to become shareholders in a different company), it should invoke the provisions of the law concerning schemes of arrangement or takeovers.

From these comments, Jacobson J deduced an underlying assumption that section 411 can be invoked notwithstanding the assenting provisions in section 231, and commented that such an assumption is supported by authority, and concluded that section 231 must be read subject to section 411, recognising the broad scope of the latter. It was also observed that 'there is nothing in [section 231] to suggest that it is an exhaustive definition of the circumstances in which a person is a member.'

(ii) Were the scheme classes improperly constituted?

One of the steps in the proposed scheme involved the adoption of a new constitution for Nine Holdings, under which two of the major senior lenders, Apollo Management LP (Apollo) and Oaktree Capital Management LP (Oaktree), would obtain once-only rights to appoint the directors of Nine Holdings. The Opponents argued these rights would give Apollo and Oaktree control of the board and confer dissimilar legal rights upon them compared with the other senior beneficiaries, and hence the senior beneficiaries would not constitute a single class under the proposed scheme.

Jacobson J rejected this argument, noting the comments of Bowen J in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 that 'the test for composition of different classes of creditors is whether their rights are so dissimilar as to make it impossible for them to consult together with a view to their common interest' and those of Barret J in *Re Hills Motorways Ltd* (2002) 43 ACSR 101 that the test of classes is 'not one of identical treatment, but community of interest' and 'not on differentiation of interest, but on its effects'.

Applying this test to the facts of the case, Jacobson J noted that the interests of Apollo and Oaktree were not so different to the other creditors that it would render it impossible for them to consult with the other senior beneficiaries in a class meeting as there was nothing which 'destroys their ability to consult on the terms of corporate governance provided for in the draft constitution', and that the relevant director appointment rights were once-only rights which would endure only to the next annual general meeting.

(iii) Would the implementation of the scheme contravene section 260A of the Act?

The proposed transaction under the scheme involved a new loan facility, secured against the assets of Nine Holdings, which would be used in part to fund the cash payments under the scheme. The Opponents argued this would amount to the provision of financial assistance in contravention of section 260A of the Act.

Jacobson J rejected this argument by observing that even if the grant of security pursuant to the new loan facility did constitute financial assistance, it does not materially prejudice Nine Holdings' interests within the meaning of section 260A(1)(a), as the scheme provided the opportunity for all secured creditors to consent with full disclosure of the details of the proposed transaction, citing Lindgren J's judgment in Anzon Australia Limited, in the matter of *Anzon Australia Limited* [2007] FCA 2079.

5.4 Leave pursuant to section 471B of the Corporations Act: a liquidator's attempt to obtain a security interest as a condition on granting an application for leave

(By Thomas Avery, DLA Piper Australia)

Cassegrain v Gerard Cassegrain & Co Pty Ltd (in liq) [2012] NSWCA 435, New South Wales Court of Appeal, Ward JA, 18 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWCA/2012/435.html

(a) Summary

Before the court were applications for a stay of judgment and leave to proceed with an appeal against a company in liquidation. The merits of the applications were not seriously disputed, however the liquidator argued conditions should be placed on the grant of leave. The liquidator feared the appellant would dispose of his most valuable assets (shares in two other companies), because in two other proceedings the appellant was found to have been involved in dishonest and reprehensible conduct, including disposing of assets to evade creditors. The court granted the stay and the leave, but did not impose the conditions the liquidator sought. Instead, the court held that the appellant could not deal with any of his shares without providing the liquidators seven days' advance notice in writing.

(b) Facts

On 20 December 2011, Barrett J found the appellant, Claude Cassegrain liable for equitable compensation for breach of fiduciary duty owed by him as a director to the respondent company, Gerard Cassegrain & Co Pty Ltd (the company). Ultimately, Mr Cassegrain was ordered to pay the company the sum of $3,743,422.06. This judgment is the subject of the appeal, for which he filed for a stay of execution and leave to proceed against the company in the present case.

In parallel litigation stemming from Mr Cassegrain's conduct as director in 2005, Mr Cassegrain was found to have transferred significant assets belonging to the company at prices well under their true value in order to put them out of reach of potential liquidators. Furthermore, he was found to have been carrying on a business with his siblings, and accessed the profits of the business to the exclusion of his siblings in a less than honest manner.

On 24 July 2012, the company was placed into liquidation by order of the court. Because the company was in liquidation, any action against, or in relation to, that company requires leave of the court, as per section 471B of the Corporations Act 2001 (Cth). It was undisputed that Mr Cassegrain required leave of the court under section 471B for his appeal to proceed.

Before the court was Mr Cassegrain's application for leave to proceed with his appeal in respect of the 20 December 2011 judgment, and his application to stay the execution of that judgment. The liquidator did not oppose the merits of the application for leave, but had concerns that based on Mr Cassegrain's prior conduct there was a risk he would transfer his most valuable assets; rendering any judgment against him of little to no value. To ameliorate that risk, the liquidator requested the court impose conditions on Mr Cassegrain's application for leave.

(c) Decision

The court granted the application for both stay and leave, and rejected the liquidators request that a security interest be granted over Mr Cassegrain's shares. However, the court determined that the liquidators' concerns were valid, and imposed as a term on both the stay and the leave that Mr Cassegrain must provide written notice seven days prior to any 'dealing with' of his shares. The court warned Mr Cassegrain that 'dealing with' was to be given a broad construction.

(i) Application for leave

The applicable test for leave was not in dispute, the court endorsed the view of Wilcox, Burchett and Beazley JJ in *Vagrand Pty Ltd (in liq) v Fielding* (1993) 41 FCR 550 that an appellant must 'affirmatively satisfy [the court] that the claim has a solid foundation and gives rise to a serious dispute'.

The liquidator did not challenge the application for leave on the merits, and the court was satisfied that the appellant could make a reasonable argument in appeal proceedings if leave were granted. The pertinent issue was whether the court would accept the imposition of conditions requested by the liquidator.

(ii) Application for stay

In addition to applying for a grant of leave, Mr Cassegrain also sought a stay of execution on the $3.7 million judgment made against him. Mr Cassegrain feared that if the appeal were successful, the company in liquidation would be unlikely to be able to repay him.

The court reviewed the conditions where a stay is typically granted, and noted the proposition from *TCN Channel 9 Pty Ltd v Antoniadis* (No 2) [1999] NSWCA 104 that courts regularly stay execution of judgments where there is a risk of difficulty or delay in the judgment creditor repaying the money.

The court believed Mr Cassegrain had met the requisite standard for leave, being: 'Prima facie a successful party is entitled to the benefit of a judgment but it is recognised that a stay may be granted where an applicant demonstrates an appropriate case to warrant the exercise of discretion in its favour': *Adeels Palace Pty Ltd v Moubarak* [2009] NSWCA 130 applying the test from *Alexander v Cambridge Credit Corporation Limited* (1985) 2 NSWLR 685 at 694. The court also opined that if Mr Cassegrain was near bankruptcy as his counsel suggested, that would weigh in favour of granting a stay.

(iii) Conditions sought by the liquidator

The court noted that the liquidator's request for conditions was a reasonable action to take to preserve the company's assets - in this case, the right to recover a judgment debt. However, in finding against the liquidator, the court found dispositive that there was no evidence to suggest that Mr Cassegrain was presently acting to dispose of assets to thwart creditors. The court did not view past findings of serious dishonesty and misconduct sufficient grounds to impose the strict conditions which the liquidator sought.

The court determined that conditions placed on a grant of leave under section 471B normally relate to protecting the company from unnecessary risk or expense stemming from the litigation itself. The liquidator in this case was seeking to minimise a different type of risk, namely a risk based on Mr Cassegrain's past conduct that he might dispose of assets and be unable to pay a judgment against him if the appeal is unsuccessful.

The court concluded that best way to proceed was to address the liquidator's concerns by placing a condition on both the stay and the leave, requiring Mr Cassegrain to provide written notice to the liquidator seven days prior to 'dealing with' his shares.

(iv) Conclusion

Though the liquidator did not obtain the desired security interest, the court did not foreclose that possibility in the future. If a situation arose where a liquidator had evidence that an appellant was actively engaging or planning to engage in a disposition of assets which would render a judgment valueless, a court might be open to grant more significant conditions than were applied in this case. A past history of dishonesty and misconduct alone, however serious, will not be enough for the court to make a security interest a condition on granting leave under section 471B.

5.5 Is a broken commercial relationship sufficient for a court to wind up a company?

(By Steven Grant, Minter Ellison)

In the matter of Amazon Pest Control Pty Ltd [2012] NSWSC 1568, Supreme Court of New South Wales, Black J, 14 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1568.html

(a) Summary

This case demonstrates the analysis that a Court may undertake when considering whether to make a winding up order on the basis that it is just and equitable to do so, particularly where a commercial relationship has broken down between individuals who are directors and shareholders of the company in question.

(b) Facts

By application filed on 17 July 2012, the plaintiff, Mr Edward Lakis sought an order pursuant to section 461(1)(k) of the Corporations Act 2001 (Cth) (the Act) that the first defendant, Amazon Pest Control Pty Limited (Company) be wound up. That section permits the Court to make a winding up order where it is of the opinion that it is just and equitable that a company be wound up.

Mr Lakis and the second defendant, Mr Michael Lardis, were both directors, secretaries and 50% shareholders of the Company which conducted a pest control business. There were numerous disputes between Mr Lakis and Mr Lardis as to various matters, most of which were not relevant to these proceedings but evidenced the falling out between the two.

The claims made by Mr Lakis included that:

- the company paid various personal expenses incurred by Mr Lardis and these expenses were not properly reconciled;
- Mr Lardis had established another pest control business and taken steps which enabled work directed to the Company to be redirected to the new business;
- Mr Lardis had transferred the Company's mobile phone number to his personal name; and
- Mr Lardis had ceased booking pest control jobs into the Company's computer system and instead only recorded the jobs in his personal diary.

(c) Decision

Black J noted that although the circumstances in which a winding up order can be made under section 461(1)(k) are not closed or rigid, they include:

- where a company is in the nature of a quasi-partnership and there has been a loss of trust and confidence;
- circumstances where a company was formed on the basis of a personal relationship involving mutual confidence and that confidence has broken down so that continuation of

that association would be futile; and
- a breakdown of relations or loss of confidence between a company's members.

In this respect, Black J observed that:

- there were various indications of the fact that the Company was in the nature of a 'quasi-partnership', including that each of Mr Lakis and Mr Lardis became directors and secretaries, each of them acquired 50% of the shares in the Company, and each became a signatory to the Company's bank account;
- there was evidence of a breakdown of cooperation between the parties and exclusion of Mr Lakis from the business, although Mr Lardis sought to give explanations of the various occasions on which that has occurred; and
- the extent of payment of personal expenses from the Company and the misdescription of those expenses in the Company's financial records were matters that frustrate the commercially sensible operations of the Company and would also warrant a lack of confidence in the conduct and management of its affairs.

Black J also had regard to section 467(4) of the Act, which provides that where an application of this kind is made, the Court, if it is of the opinion that:

- the applicants are entitled to relief either by winding up the company or by some other means; and
- in the absence of any other remedy it would be just and equitable that the company should be wound up;

must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

On balance, Black J concluded that it was not unreasonable for Mr Lakis to proceed to seek an order for winding up, given the likely complexity of an oppression action, and the significant difficulties which would have been involved in any valuation of his shares in the Company, had he sought an order that Mr Lardis buy out those shares, given the extent to which the Company's financial records had been compromised.

Finally, Black J recognised the fact that an order to wind up a solvent company was an extreme step but also noted that there is no principle or assumption that a winding up order of a solvent company is inappropriate, as distinct from a question whether a winding up order is appropriate to address the grounds of relief that have been established.

On this basis, Black J was satisfied that an order for winding up should be made but stayed the making of the order for a further period, to allow the parties a final opportunity to resolve their differences in a manner which would avoid the liquidation of the Company such as the sale of Mr Lakis' shares to Mr Lardis. A liquidator has since been appointed.

5.6 Period for compliance with statutory demand expired, court unable to extend period following expiry

(By Karen O'Flynn and Natasha Blake, Clayton Utz)

Commercial & General Law (SA) Pty Ltd v Permanent Custodians Ltd (No 2) [2012] SASC 216, Supreme Court of South Australia, Nicholson J, 14 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/sa/SASC/2012/216.html

(a) Summary

This decision deals with an appeal by Commercial & General Law (SA) Pty Ltd (the Appellant) against a Master's refusal of its application to set aside a statutory demand. While refusing the application, the Master granted an extension of the period for compliance with the statutory demand. The Appellant filed an appeal within the requisite period for filing an appeal, but not within the extended period for compliance with the demand.

The key issues that the Court was asked to determine were whether:

- the period for compliance with the statutory demand had ended; and
- a Court has the power to extend the period for compliance after its expiry.

On the facts, the Court found that the period for compliance had ended.

The Court held that it had no power to extend the period for compliance following its expiry. In reaching this conclusion, the Court considered itself bound by the High Court decision in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited* [2008] HCA 9.

In any event, the Court did not consider the Appellant had demonstrated sufficient grounds for setting aside the statutory demand.

(b) Facts

The statutory demand was served on the Appellant by Permanent Custodians Ltd (the Respondent).

The Appellant's submissions focussed on an offsetting claim being available, pursuant to section 459H of the Corporations Act 2001 (Cth) (the Act), and, in the alternative, on there being 'some other reason' the demand should be set aside pursuant to section 459J.

The offsetting claim was submitted to have arisen from the Respondent's poor management of its powers as mortgagee of land over which it held a registered first mortgage. The Respondent's conduct was alleged to have compromised the Appellant's unregistered third mortgage security interest over the land. As the alleged value of this security interest was greater than the amount claimed in the statutory demand, the Appellant submitted that the demand should be set aside.

(c) Decision

(i) Period for compliance had ended

The Court held that the period for compliance with the statutory demand had ended on the facts of the case.

The period for compliance is set out in section 459F of the Act. Section 459F(2) provides that the period for compliance, on hearing an application to set aside the demand, ends:

- if a Court makes an order extending the period for compliance, following the time specified in that order: section 459F(2)(a)(i); or
- 'otherwise', following the period between service of the statutory demand and 7 days after the application to set it aside 'is finally determined or otherwise disposed of': section 459F(2)(a)(ii).

The Master's order extending the period for compliance was held to be an order which attracted the application of section 459F(2)(a)(i). The period determined by that section had ended.

The Court rejected the Appellant's contention that section 459F(2)(a)(ii) applied to extend the period to 7 days after its application to set aside the demand was 'finally determined or otherwise dealt with'.

Even if that contention were accepted, the Court considered that the period prescribed in section

459F(2)(a)(ii) had expired in any event. In this regard, the Court rejected as a matter of construction the Appellant's argument that the application to set aside a statutory demand, as an interlocutory proceeding, is not 'finally determined or otherwise dealt with' on refusal of the application while the order may be appealed.

The case was distinguished from cases in which orders from a setting aside application hearing are successfully appealed on the ground of procedural unfairness.

The Court held that the fact an order may be appealed did not prevent a matter being 'finally determined or disposed of' for the purposes of section 459F(2)(a)(ii).

(ii) Court unable to extend period for compliance once ended

The Court held that it was beyond its powers to grant an extension of the period for compliance following its expiry.

In this regard, the Court considered itself bound by the High Court authority of *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Limited* [2008] HCA 9.

In that case, the High Court held that no extension of time can be granted by the Court once the period for compliance with a statutory demand has expired. Section 459F specifies the time for compliance with a statutory demand. Once this time expires, the recipient is taken to have failed to comply with the demand. If a company wishes to appeal a refusal to set the demand aside, either an extension of the period must be obtained, or the appeal must be determined, before expiry of the period.

(iii) No grounds to set aside statutory demand

In any event, the Court did not consider that the Appellant had demonstrated sufficient grounds for the statutory demand to be set aside.

The Court did not consider the Appellant had provided sufficient particulars to substantiate any alleged right of set off. Evidence of the claim was considered to amount to mere assertion and did not provide the Court with a means of assessing its value. The claim was also considered misconceived as a matter of law. The Court found that the Appellant had failed to establish any other reason for setting aside the statutory demand.

5.7 Insider trading: the classification of Division 3 financial products for the purpose of section 1043A of the Corporations Act

(By Vanessa Petsinis and Kate Johnson, King & Wood Mallesons)

Joffe v R; Stromer v R [2012] NSWCCA 277, New South Wales Court of Criminal Appeal, Bathurst CJ, Allsop P and Barrett JA, 14 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2012/277.html

(a) Summary

This decision examines the proper construction of the definition of Division 3 Financial Products in the insider trading provisions, and in particular section 1043A of the Corporations Act 2001 (Cth) (the Act).

The decision confirms that to be a 'Division 3 Financial Product' for the purpose of the prohibition in section 1043A, the instrument must first be a 'financial product' as defined in section 761A of the

Act. Accordingly, any specific exemptions from the definition of 'financial product' (such as those contained in section 765A of the Act) are also relevant.

In this case, the instruments on issue were Contracts for Difference (CFDs) and these were found to be Division 3 Financial Products given:

- they are derivatives and, relevantly, do not attract the exemption to the definition of derivative in section 761D(3)(b) as they are not contracts for the future provision of services; and
- as derivatives, they fall within the definition of 'financial products'. They are not excluded from the definition of 'financial product' by the operation of section 765A(1) of the Act because, relevantly, they are not 'credit facilities'.

(b) Facts

The appellants were each charged with ten counts of insider trading contrary to the Act. In the case of Mr Joffe, it was alleged that he contravened section 1043A(1)(d) of the Act (the procuring offence). Mr Stromer was charged with contravening section 1043A(1)(c) of the Act (the dealing offence). The offences arose as a result of Mr Joffe procuring Mr Stromer to acquire relevant Division 3 Financial Products, being CFDs in various companies, whilst in possession of 'inside information' concerning those companies. It was not disputed that the CFDs fell within the definition of 'derivative' in section 761D(1) of the Act and that an acquisition of such derivatives within the meaning of section 761E(3) of the Act had taken place.

The appellants sought orders to have six of the ten counts quashed on the basis that the CFDs were not Division 3 Financial Products within the meaning of section 1042A of the Act, and therefore did not fall within the ambit of the insider trading provisions. They argued this on two grounds. First, that the CFDs were contracts for the future provision of services and fell within the exemption to the definition of 'derivative' outlined in section 761D(3)(b) of the Act. Secondly, that even if the CFDs fell within the definition of derivative (which is a type of financial product), the CFDs were credit facilities and so excluded from the definition of financial products by the operation of section 765A(1) of the Act.

(c) Decision

The trial judge held that section 765A (which lists specific things that are not 'financial products') had no application in the consideration of whether a derivative was a Division 3 Financial Product for the purposes of section 1042A. In addition, the trial judge considered whether, if relevant, the exemptions would have been available and concluded that the CFDs did not fall within the exemption to the definition of derivatives in section 761D(3)(b) as they were not contracts for the future provision of services. His Honour also concluded that the CFDs were not credit facilities for the purposes of section 765A(1) of the Act.

On appeal, three issues were considered to determine whether the appellants had contravened the relevant insider trading provisions. The three issues were:

- whether the exemptions in section 765A of the Act apply in considering whether an instrument is a Division 3 Financial Product;
- whether the CFDs were credit facilities and therefore excluded from the definition of financial products under section 765A; and
- whether the CFDs were contracts for the future provision of services and therefore excluded from the definition of derivatives under section 761D.

Bathurst CJ, Allsop P and Barrett JA delivered separate judgments but were unanimous in dismissing the appeal.

(i) Division 3 Financial Products

The appellants contended that the CFDs were not Division 3 Financial Products as defined in section 1042A of the Act. It was submitted that the CFDs were therefore not subject to the prohibition in section 1043A because, among other things, they fell within the exemptions set out in section 765A of the Act.

The primary consideration for the court was ascertaining the relationship between the defined phrase 'Division 3 Financial Products' in the insider trading provisions and Chapter 7 of the Act as a whole. There were various stages in the court's analysis of this issue.

First, provisions within section 1043A prohibit certain forms of conduct in relation to 'relevant Division 3 Financial Products'. Section 1042A defines both 'Division 3 Financial Products' and 'relevant Division 3 Financial Products'. Only if something is first found to be within the former, can it be within the latter.

Second, the court reasoned that items are within the section 1042A definition of Division 3 Financial Products only if they fall within the ambit of the section 761A definition of 'financial product'. Importantly, therefore, it is appropriate that 'matters which lead to the exclusion of arrangements from being 'financial products' will likewise do so from their being 'Division 3 financial products' (per Allsop P) - that is, exclusions from the definition of financial product also apply to the definition of Division 3 financial products.

(ii) Credit facility

The appellants submitted that transactions underlying the CFDs were not financial products as they amounted to a credit facility. It was submitted that the taking of an open position under the CFDs gave rise to the liability of a customer (that is, the price for the subject of the contract). Under the terms of the CFDs, the obligation to pay this price was deferred by payment of a deposit until a margin was called for or until it was closed by the acquisition of a contra position. Therefore, the balance of the purchase price was a debt. It was argued by analogy that buying and selling the performance of a security or index using a CFD was similar to buying the actual underlying instrument using a loan.

The court rejected this view on the basis that it was too simplistic. As there was no deferral of payment of the debt and no money was lent, the transactions did not fall within the definition of 'credit facility'. As Barrett JA noted, clause 11.6 of the Product Disclosure Statement for the CFDs expressly stated that the issuer's policy is 'not to provide credit facilities on any Accounts'. The CFDs were therefore held not to be credit facilities.

(iii) Contracts for the future provision of services

Section 761D(3)(b) excludes from the definition of derivatives a contract for the future provision of services.

It was submitted by the appellants that the CFDs necessarily entailed the provision of certain services by the CFD issuer to the customer, for example, the issuer making payments, and the issuer providing and deploying certain electronic systems, software and facilities. The appellants therefore argued that the CFDs were contracts for the future provision of services for the purpose of section 761D(3)(b) and were not derivatives. The appellants argued that the individual CFD was dependent on essential and ongoing services being provided pursuant to the CFD by the issuer in the future for as long as the position remained open. This argument was rejected by the Court.
The court acknowledged that the viability of the CFDs was dependant on the issuer performing certain obligations outlined in the agreement. However, the court held that the particular acts of the issuer were no more than ancillary or incidental to the primary purpose and effect of the contractual relationship.

The CFDs were therefore not contracts for the future provision of services and section 761D(3)(b) did not exclude them from the definition of 'derivatives'.

(d) Orders

The court dismissed the appeal and held that the appellants had contravened section 1043A of the Act. The CFDs were financial products and, relevantly, Division 3 Financial Products within the meaning of section 1042A of the Act. They could not be classified as either credit facilities or contracts for the future provision of services and the CFDs were therefore subject to the prohibition in section 1043A.

5.8 Application of proceeds of contracts of reinsurance

(By Stephanie De Vere, Minter Ellison)

Amaca Pty Limited (under NSW administered winding up) v Messrs A G McGrath & C J Honey (as liquidators of the HIH Group of Companies) [2012] NSWSC 1523, Supreme Court of New South Wales, Black J, 11 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1523.html

(a) Summary

This case provides some useful guidance on when the Court will exercise its discretion to make an order under section 562A(4) of the Corporations Act 2001 (Cth) (the Act); that the proceeds of reinsurance should be paid contrary to the general principles set out in the Act on the basis that it is just and equitable to do so.

(b) Facts

Amaca Pty Limited (under NSW administered winding up), Amaba Pty Limited (under NSW administered winding up) and ABN 60 Pty Ltd (under NSW administered winding up) (collectively referred to as the Plaintiffs) held policies of insurance with HIH Casualty & General Insurance Limited (HIH) and the policies were covered by contracts of reinsurance. HIH went into liquidation. The Plaintiffs and HIH had reached a settlement of their claims in respect of the relevant policy years and HIH had claimed on its reinsurers and had received monies from several reinsurers.

Sections 562A(2)-(3) of the Act set out the general position for the payment of reinsurance proceeds. That is, a liquidator must distribute the reinsurance proceeds among the insured creditors in the manner specified in sections 562A(2)-(3) of the Act. Section 562A(4) of the Act provides the Court with discretion to make an order providing a different allocation of reinsurance proceeds where it is just and equitable to do so.

The Plaintiffs sought orders under section 562A(4) of the Act that the general rules should not apply to the receipt of specified insurance monies and that those monies should be paid by Messrs A G McGrath and C J Honey (the Liquidators) as liquidators of HIH (in liquidation and subject to scheme of arrangement) (the Defendants) to the Plaintiffs.

A further issue arose as to the treatment of a particular receipt in respect of a claim in relation to Universal Insurance Co (in liquidation) (UIC). UIC reinsured 6.6% of the second excess layer of cover provided by HIH to the Plaintiffs. Evidence was led that payments were made to HIH in connection with UIC under a scheme of arrangement. By way of background provisional liquidators were appointed to UIC, a settlement agreement was reached between the provisional liquidators and a major shareholder in UIC in providing for it to make a payment to UIC, calculated in a specified manner, which was intended to allow scheme creditors' Net Established Claims (as defined) to be paid in full.

The scheme provided that if surplus funds were available after Net Established Claims were paid in full, they would be distributed to scheme creditors. A claim was lodged by HIH in the UIC scheme of arrangement in respect of the contract of reinsurance between HIH and UIC in reinsurance of the Plaintiff's policy with HIH. The amount of the claim by HIH was reduced by applying a formula under that scheme to $100,129. That amount was received by HIH and subsequent amounts of $23,030 and $11,014 (further receipts) were received.

Section 562A(1) of the Act provides that the section applies where:

- a company is insured, under a contract of reinsurance entered into before the relevant date, against liability to pay amounts in respect of a relevant contract of insurance; and

- an amount in respect of that liability has been or is received by the company or the liquidator under the contract of reinsurance.

The liquidators contended that the further receipts were not within section 562A(1) of the Act because they were not received in respect of the liability of HIH under its contract of insurance with the Plaintiffs.

The Plaintiffs contended that the monies paid under the scheme were received by HIH or the liquidators under the contract of insurance or at least under the compromise of their rights under that agreement, where there was no other reason for the relevant payment. The liquidators did, however, concede that the amount of $100,129 was received under a contract of reinsurance.

(c) Decision

Justice Black determined that it was just and equitable to make the orders sought by the Plaintiffs. In making his determination, Justice Black referred to section 562A(5) of the Act which sets out certain matters the Court may take into account when considering whether to make an order. In particular, Justice Black considered subsections 562A(5)(a) and (d) which provide, respectively, that the Court may take into account:

- whether it is possible to identify any particular contracts of insurance as being the contracts in respect of which the contract of reinsurance was entered into; and
- whether a person to whom an amount is payable under a relevant contract of insurance would be severely prejudiced if subsections (2) and (3) applied to the amount received under the contract of reinsurance.

In accordance with section 562A(5)(a), Justice Black held that it was possible to identify particular relevant contracts of insurance as those in respect of which the contracts of reinsurance were entered into. It was accepted that there was evidence that the relevant reinsurance contracts were obtained by HIH in respect of the cover sought by the Plaintiffs.

In accordance with section 562A(5)(d) of the Act, Justice Black held that the Plaintiffs would have been prejudiced if they did not receive the direct benefit of the reinsurance monies for which they had bargained, where they would not have contracted for cover from HIH without that reinsurance. His Honour held that the prejudice which section 562A(5)(d) of the Act is directed at, is the prejudice following from the operation of sections 562A(2)-(3) of the Act, if left unaltered by the Court, rather than any prejudice flowing from an alteration of that section. Further, his Honour held that the words 'severely prejudiced' mean that a person will suffer disadvantage that is severe in the sense of harsh or unpleasantly extreme. However, Justice Black confirmed that a finding of 'severe prejudice' is not essential to the exercise of the discretion, and the real and significant prejudice which the Plaintiffs would suffer by being deprived of the reinsurance proceeds was a matter which also supported the making of an order in the Plaintiff's favour.

Justice Black held that it was also relevant that the adverse impact of the orders sought on the other insurance creditors of HIH would be widely diversified and the detriment suffered by any particular creditor would be limited.

In respect of the further receipts, Justice Black held that the fact that the payments were made under a scheme of arrangement relating to UIC did not mean that the further receipts were not received under the contract of insurance for the purposes of section 562A(1)(b) of the Act. Further, Justice Black held that no distinction would be drawn between the initial payment under the UIC scheme and the further receipts as it was not a case where the parties terminated one contract and entered another. Justice Black also noted that his conclusion was not altered because the amount of the initial claim lodged was discounted by a mechanism internal to the UIC scheme and then supplementary payments were made under the terms of the UIC scheme. Consequently, Justice Black held that the discounting arrangements under the UIC scheme did not undermine the factors which made it just and equitable to make an order under section 562A(4) of the Act in respect of the monies received from the UIC scheme.

5.9 Application to extend convening period for administrators: the interests of affected parties will be prioritised above the administrators' time constraints

(By Ella Pope, DLA Piper Australia)

Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed); In the matter of Autodom Ltd (Administrators Appointed) (Receivers and Managers Appointed) [2012] FCA 1393, Federal Court of Australia, McKerracher J, 7 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/cth/FCA/2012/1393.html

(a) Summary

The Court declined to grant an extension to the convening period sought by the Administrators, finding that an extension would be prejudicial to the employees and the creditors of the entities under administration. Further, there was no evidence that, in the event of the convening period being extended, the Administrators would have any more certainty on how to instruct the creditors.

(b) Facts

The administration in question was being carried out for seven companies who were part of a corporate group. Autodom was the parent group, and it had three trading entity subsidiaries - AiDair Dandenong, AiDair New Gisborne, and AiAutomotive (together, the Group). There were also three subsidiaries of AiAutomotive which were inactive, but still potentially affected by the administration.

The Administrators consented to act in the administration on 3 November 2012. At that stage the major financier was the National Australia Bank (NAB), a secured creditor of the Group that had entered into various banking facilities with Autodom and AiAutomotive. NAB cancelled all facilities on 5 November 2012 and made demands in respect of a debt a little over $6 million. On 6 November 2012, NAB advised that it had assigned its rights, pursuant to an agreement with the Group, to Ford Motor Company of Australia (Ford) and GM Holden Ltd, such that those entities became the secured creditors (the Secured Creditors). The Secured Creditors, however, on the same day, appointed McGrathNicol as Receivers and Managers of the company (the Receivers).

The first meeting convened by the Administrators of creditors of each company of the Group was held on 14 November 2012, in accordance with section 436E of the Corporations Act 2001 (Cth) (the Act), where the possibility of seeking an extension of the convening period was raised. The report as to the affairs of each of the Group entities (the RATA) was not received until 23 November 2012. There is a requirement under section 438B(2) of the Act that, within five business days after the administration of the company begins, or such longer period as the Administrator allows, the directors are to give the Administrator a statement about the company's business, property affairs and financial circumstances.

The Administrators had requested that the directors of the Group provide the RATA on 7 November 2012. On 9 November 2012, a director of each of the Group entities requested an extension of ten business days due to the unavailability of the CFO and Secretary of the Group, as well as another director. This left the Administrators with limited time to review the RATA for the purpose of preparing their report required for section 439A(4) of the Act.

At meetings for each of the committees of creditors held on 28 November 2012, the Administrators foreshadowed their intention to bring the extension; this was met with divergent views. The unions who represented the employees employed by subsidiary companies all opposed, as did the creditors. There was a variety of responses from the other committee members, leaving the Administrators in a difficult position.

The Administrators applied under section 439A(6) of the Act for orders that the convening period be extended by four months (from 30 November 2012 until 28 March 2013). The Administrators had sustained difficulties in collating the necessary information about the Group to prepare the report required under section 439A(4) of the Act and therefore, needed an extension.

(c) Decision

The Court declined to grant the Administrators the extension they applied for. In the alternative, they permitted an extension for only seven days to permit the Administrators to convene a meeting and to complete the discharge of their statutory function. The judge noted that this was an unusual case and that there appeared to be no precedent for granting relief of the nature sought; that is, a substantial extension of time in the face of strenuous and apparently well founded opposition.

(i) Jurisdiction

The Court has jurisdiction to make an extension order by reason of section 439A(6) of the Act, and in exercising that jurisdiction, it must have regard to, and balance, the interests of creditors in a relatively speedy administration, and the need to allow sufficient time to administrators to carry out their function properly (*Mentha, in the matter of the Griffin Coal Mining Company Pty Ltd (administrators appointed)* [2010] FCA 30).

(ii) Justifying an extension

The Court considered issues that may provide reasons for justifying an extension:

- the size and scope of the business;
- a large number of employees with complex entitlements;
- a complex corporate group structure and intercompany loans;
- a lack of access to corporate financial records;
- the need for time to assess thoroughly any proposal for a Deed of Company Arrangement (DoCA);
- where an extension would allow the sale of a business as a going concern; and
- where additional time is likely to enhance the return for unsecured creditors.

A relevant matter for the exercise of the court's discretion is the attitude of the creditors and others who would be affected by the extension sought, a principle the Court relied on substantially in this case.

(iii) The difficulty in conducting the administration

The Administrators were confronted with substantial complexity in the affairs of the Group and received limited information only about those affairs. Specifically, the Administrators found it difficult to obtain access to key employees, information and documents used in the continuation of the trading by the Group; they had difficulty obtaining information directly from the Receivers; and because of the appointment of a Receiver, the Administrators had no control over the assets of the Group and had limited access to funding.

The relevant businesses are of considerable size and the Administrators informed the Court that the RATA was relatively incomplete. Evidence as to the value of Autodom was also inadequate. The RATA suggested that the floating charge assets of the Group were valued in excess of $20 million. This would then be available to pay employee entitlements in priority to amounts owed to the Secured Creditor. However, the Receiver indicated that the net value of the floating charge assets would likely be considerably less than that suggested in the RATA.

The position of the Administrators was that they could not say, at the time of the hearing, that there was no option but to place the companies into liquidation. That might have been the position, but they were not yet able to conclude determinatively. On the other hand, if the Administrators were required to make a recommendation within seven days, liquidation would be their recommendation albeit based on limited information.

There was also the possibility of a DoCA. The Administrators said they would require three weeks to consider any DoCA proposal, but the information on which such a proposal would be based was not available to the Administrators.

(iv) The interests of those affected

In considering the interests of those affected, the Court was most concerned by the position the employees would be placed in if an extension was granted. The Court considered that the employees were low-paid factory workers, many of whom were of non-English speaking backgrounds. These employees had mortgages, rent, and families to support. Further, because this application was being heard during the Christmas period, the Court noted that this was a particularly difficult period during which to be unemployed. All of this was compounded by the decline in customer demand for some Australian cars and Australian automotive parts. The employees opposed extending the convening period because they would be unable to access any benefits until the Group was placed into liquidation.

(v) No extension of convening period granted

The Court refused to grant an extension to the convening period because there was a real prejudice to the employees in prolonging the administration. There would also be prejudice to at least one major creditor, although this was not discussed in detail. The degree of certainty of a better outcome being achieved by extending the convening period was so low that an extension would be unwarranted. Therefore, the Administrators were given seven days in which to enable the creditors' meeting to be convened and conducted in accordance with the statutory obligations imposed on the Administrators.

5.10 Agreement purporting to deprive MIS unitholders of their Ch 5C statutory rights deemed contrary to the Corporations Act's protective purpose

(By Melinda Shiell, Centre for Corporate Law and Securities Regulation, Melbourne Law School)

Westfield Management Limited v AMP Capital Property Nominees Limited [2012] HCA 54, High Court of Australia, French CJ, Heydon, Crennan, Kiefel and Bell JJ, 5 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/cth/HCA/2012/54.html

(a) Summary

The High Court considered whether a managed investment scheme unitholder's statutory right to vote under section 601NB of the Corporations Act 2001 (Cth) (the Act) can be fettered by contractual agreement. The central question was whether the prohibition on the sale of trust property without consent fettered a unitholder's right to vote for an extraordinary resolution to wind up a managed investment scheme under section 601NB of the Act.

Most of the judgment turns on the correct construction of Clauses 10.1(a) and 16.2 of the contractual agreement between the parties (the Agreement), and their operation in the situation of a proposed resolution under section 601NB of the Act. At issue was whether the Agreement, properly construed, had the effect that a unitholder could not vote to wind up the managed investment scheme without the prior written consent of all other unitholders and, if so, whether the Agreement was unenforceable as being contrary to the public interest.

The High Court unanimously dismissed the appeal from the judgment of the Court of Appeal of the Supreme Court of New South Wales. The High Court held that the terms of the unitholders' Agreement did not fetter a party's statutory right to vote for the winding up of a managed investment scheme under the Act, which would lead to the sale of the sole property of the trust, a shopping centre. The Court held that, on its proper construction, the prohibition on selling trust property without consent was directed to a sale during the continuance of the scheme. It did not apply where a resolution is passed by unitholders to wind up the scheme, even if that would result in the trust property being sold.

Furthermore, the Court held that an agreement between the members of a scheme and the responsible entity which purports to deprive members of the rights given by Chapter 5C of the Act would be prejudicial to their interests and contrary to the protective purposes which inform the regulatory scheme of Chapter 5C.

(b) Facts

The Karrinyup Regional Shopping Centre (the Property) is the principal asset of the KSC Trust. The KSC Trust is a unit trust. It is a managed investment scheme (the scheme) registered under

Chapter 5C of the Act. AMP Capital Investors Ltd (AMPCI) is the trustee of the KSC Trust, and the responsible entity of the scheme. One-third of the units in the KSC Trust are held by the appellant, Westfield Management Limited (Westfield). Two-thirds are held by the first respondent, AMP Capital Property Nominees Limited (AMPCN), in its capacity as nominee of the second respondent, UniSuper Limited. On 29 March 1994, the initial unitholders and the responsible entity entered into a Unitholders' and Joint Venture Agreement (the Agreement), the terms of which both Westfield and AMPCN, as later unitholders, acceded to by deeds dated 30 January 2008.

AMPCN wanted the unitholders to pass an extraordinary resolution under section 601NB of the Act directing AMPCI, as the responsible entity, to wind up the scheme. If the scheme were wound up, the Property would be sold and the proceeds distributed among the unitholders. AMPCN was in a position to carry the resolution alone because it held the majority of the units in the trust. Westfield opposed the resolution, and sought to restrain AMPCN from voting for it without the prior written consent of Westfield. Two key provisions of the Agreement were relied upon by Westfield:

- Cl 10.1(a): '[AMPCI], in its capacity as responsible entity of the KSC Trust, shall not sell the Property or any substantial part thereof, without the written consent of the Unitholders'; and
- Cl 16.2: 'Each and all of the Unitholders mutually agree that they will so exercise their respective voting rights as unitholders under the Trust Deed so as to most fully and completely give effect to the intent and effect of the provisions of this deed.'

Westfield argued that the Agreement, properly construed, precludes a unilateral winding up of the Trust because this would result in a sale of the Property without the consent of all unitholders, contrary to clause 10.1(a). It argued that clause 16.2, read in conjunction with clause 10.1(a), operated to preclude a unitholder from voting for a winding up if it would cause a sale lacking that consent.

The primary judge, Ward J, held that an exercise by AMPCN of its voting rights in favour of the proposed extraordinary resolution would be a breach of clause 16.2. On appeal, the Court of Appeal held that the 'intent and effect' of the prohibition on selling trust property without consent did not include preventing a sale following a determination of the trust. Therefore, the restriction on how voting rights could be exercised did not preclude AMPCN from voting in favour of the resolution to wind up the scheme. The injunction was set aside.

Westfield appealed by special leave to the High Court. The focus of the appeal to the High Court was upon the terms of the Agreement. Westfield argued that the Court of Appeal fell into error in focusing upon clause 10.1(a), because to construe the 'intent and effect of the provisions of [the Agreement]', to which unitholders are required to give effect under clause 16.2, requires consideration of the Agreement as a whole. The Agreement was said to reveal purposes which were opposed to the sale of the Property and to the exercise by members of the scheme of their voting rights under section 601NB of the Act where it has that result. The respondents, AMPCN, contended that if that be the correct construction of the Agreement, then clause 16.2 is unenforceable as being inconsistent with Chapter 5C of the Act, in particular section 601NB.

Chapter 5C regulates managed investment schemes, including granting rights to scheme members which may be exercised in protection of their own interests. One such right is that given under section 601NB, which allows a scheme member to call a members' meeting and vote on an extraordinary resolution to wind up the scheme. An extraordinary resolution requires 50% of votes to pass. It does not require that a ground for winding up be shown.

(c) Decision

The High Court unanimously dismissed the appeal. The Court held that clause 10.1(a) of the Agreement, on its proper construction, prohibits only the responsible entity's power to sell the trust property during the continuance of the scheme; it does not apply where a resolution is passed by members to wind up the scheme, even if that would result in the trust property being sold. It did not restrict AMPCN from voting on a resolution to the responsible entity to wind up the scheme pursuant to section 601NB.

The High Court also provided commentary on whether rights under section 601NB could be 'bargained away' by unitholders. The Court stated that '[i]t is the policy of the law that contractual arrangements will not be enforced where they operate to defeat or circumvent a statutory purpose or policy according to which statutory rights are conferred in the public interest'. In such cases, the courts will treat these arrangements as 'ineffective or void' (at [46]).

The Court considered the history and policy of Chapter 5C and the intent of the legislature. It held that, when parties choose to adopt a managed investment scheme as the vehicle through which to pursue their commercial interests, the scheme is subject to the legal framework provided by Chapter 5C 'with all that it entails.' Parties may not contract out of those protections:

'An agreement between the members of a scheme and the responsible entity which purports to deprive members of the rights given by Ch 5C would be prejudicial to their interests and contrary to the protective purposes which inform the regulatory scheme of Ch 5C.' (French CJ, Crennan, Kiefel and Bell JJ at [52])

Accordingly, any agreement to limit investors' rights under Chapter 5C would therefore be invalid.

5.11 Application for stay or relief from filing defence in civil action when defending contemporaneous penalty action in relation to same conduct

(By Rhys Ryan and Marissa Bendyk, King & Wood Mallesons)

Re Australian Property Holdings Limited (in liq) (recs & mgrs apptd) (No 2) [2012] VSC 576, Supreme Court of Victoria, Robson J, 4 December 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/vic/VSC/2012/576.html

(a) Summary

This case considered an application by defendants facing two contemporaneous court proceedings (one civil penalty action and one non-penalty action) for the same alleged breaches of directors' duties under the Corporations Act 2001 (Cth) (the Corporations Act). The application sought a stay of non-penalty proceedings until the civil penalty proceeding had been determined, or alternatively, that the common defendants be excused from filing a defence which provides evidence against them (or be permitted to file a limited defence) in the non-penalty action.

The Court held:

- that the stay application be refused on the grounds that it was not 'in the interests of justice' or convenient to interfere with the plaintiff's right to a civil proceeding, nor was there evidence of a real possibility that ASIC would institute criminal proceedings; and
- that the common defendants be allowed to deliver a limited defence which departed from the rules of pleading only insofar as to protect their privilege against exposure to penalty.

(b) Facts

The plaintiff (APCH), in liquidation at the time of hearing, was the responsible entity of a managed investment scheme constituted as a unit trust (the Trust) and subject to regulation under the Corporations Act. In 2006, the constitution of the Trust was amended by the board of APCH to provide for the payment of a listing fee to APCH, in its personal capacity, if the units of the Trust were listed on ASX. In August 2007, the units in the Trust were listed on ASX, and APCH in its own right became entitled to (and was subsequently paid) a listing fee of approximately $33 million out of the assets of the trust under the terms of the constitutional amendment. These events - the amendment and subsequent transaction - formed the factual basis of two litigation proceedings, as follows.

On 3 August 2012, the liquidator of APCH filed a statement of claim in the Supreme Court of Victoria seeking, inter alia, an order against all 15 defendants (who included seven former directors of APCH and a group of related companies effectively owned by one such director, Mr Lewski - the Lewski Companies) in addition to damages or equitable compensation (the Supreme Court proceeding). The order sought compensation pursuant to sections 1317H and 1317HA and/or 1325 of the Act for the directors' breach of section 610FC in relation to the constitutional amendment, and section 601FD in relation to the payment of the listing fee to APCH.

On 21 August 2012, ASIC commenced civil penalty proceedings in the Federal Court of Australia against APCH (the plaintiff in the Supreme Court proceeding) and five of its directors (the first five defendants in the Supreme Court proceeding, referred to as the Common Directors) (the Federal Court proceeding). The Federal Court proceeding complained about the same conduct and transaction as the Supreme Court proceeding, except the former alleged that the directors breached section 601FD of the Act (as opposed to section 610FC) in relation to the constitutional amendment.

As a result of the Federal Court proceeding being instituted, several applications were made in the Supreme Court proceeding. The application which forms the subject of this case was by the Common Directors who sought a stay of the Supreme Court proceeding until the hearing and determination of the Federal Court proceeding, or alternatively, if a stay was not granted, that the Common Directors be excused from filing a defence which raises positive allegations (or be permitted to file a limited defence). The submissions by Mr Lewski - a defendant director in both proceedings - were largely relied on by all Common Directors.

(c) Decision

The Supreme Court phrased the two key issues for determination as follows:

- Should a stay of the Supreme Court proceeding be granted, and if so, on what grounds?
- If a stay is not granted, should the Common Directors (and other defendants) be excused in limine from filing a defence to the extent that compliance with the Supreme Court (General Civil Procedure) Rules 2005 (Vic) may have the tendency to expose them to civil penalty or criminal proceedings?

(i) Application for stay of proceedings

The Supreme Court acknowledged that it has inherent power to stay proceedings in the interests of justice, and that it may make such a decision as a matter of judicial discretion. The Court went on to approve the principles set out by Wooton J in *McMahon v Gould* (1982) 7 ACLR 202 which provide guidance on when a stay ought to be granted. The key principles include: the plaintiff's entitlement to have his or her action tried in the ordinary course of the procedure and business of the court; the seriousness of interfering with this entitlement by a stay of proceedings, which requires justification on proper grounds; and the defendant's burden in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with.

In the present case, APCH argued that there was a real potential for prejudice if a stay was granted. It based this submission on the grounds that: the proceeds of an insurance policy covering APCH's directors' misconduct may be exhausted before judgment; the proceeds of the $33 million paid out of the assets by APCH was not accounted for in its entirety and that a delay may make it harder to trace; and the liquidators of APCH would not have sufficient funds to conduct the Federal Court proceeding. The Supreme Court accepted that APCH would be prejudiced by a delay, noting the distinct possibility that the proceeds may be dissipated. The Court did not accept Mr Lewski's submissions that defending two proceedings simultaneously would be financially burdensome.

On the point of self-incrimination, the McMahon principles recognise that where there are pending or possible criminal proceedings, an accused person's privilege against exposure to penalty and self-incrimination may be taken into account when considering a stay application in a civil action. However, the Supreme Court noted that this so-called 'right to silence' does not extend to give such a defendant the same protection as a matter of right in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant having to disclose what his defence is likely to be in the criminal proceeding. In any case, here, the Supreme Court found there was insufficient evidence to suggest ASIC was considering instituting criminal proceedings against the Common Directors. Accordingly, a failure to stay the civil proceeding until the determination of any potential criminal proceeding would not result in real injustice to the common defendants.

On balance, the Supreme Court was not satisfied it was just and convenient to interfere with APCH's right to a civil proceeding. The defendants had not satisfied the Court that the overriding consideration of the interests of justice required a stay, and therefore the application to stay the Supreme Court proceeding was dismissed.

(ii) Application by Common Directors to be relieved of obligation to file and serve defences

The Supreme Court considered several authorities - notably *Refrigerated Express Lines (A'asia) Pty Ltd v Australian Meat and Livestock Corp* (1979) 42 FLR 204 which was later confirmed by the High Court in *Pyneboard Pty Ltd v Trade Practice Commissioner* (1983) 152 CLR 328 - before summarising the principles relating to penalty privilege as follows:

- in civil penalty proceedings, as a general rule, the defendant is entitled to be excused in limine (that is, at the outset) from giving discovery or answering questions in those proceedings;
- in non-penalty civil proceedings, the privilege may not be invoked in limine but requires the defendant to exercise the privilege - where it is available - on a particular interrogatory question or production of a particular document;
- in civil penalty proceedings, the defendant is not excused from filing a defence. He is, however, excused, in limine from complying with the rules relating to the content of the defence, but only to the extent that the rules would override the privilege;
- in non-penalty civil proceedings, as a general rule, where the defendant believes he has good grounds to rely on the privilege in pleading his defence, then he should plead according to the rules, but taking the privilege where appropriate. If the pleadings in that form are challenged by the plaintiff, the Court should rule on the defence and its justification in taking the privilege, with the defendant bearing the onus of establishing a bona fide and reasonable basis for taking the privilege.

Where, as in the present case, the common defendants will be pleading to accusations which effectively mirror those made in the concurrent civil penalty proceedings, the circumstances are exceptional and the existence of the civil penalty proceedings establishes that taking the privilege would be bona fide and reasonable.

Here, the Court was satisfied that filing a defence in the Supreme Court proceeding would subject each of the Common Directors to a penalty because that proceeding relied on the same alleged conduct as the Federal Court proceeding. Accordingly, the Supreme Court ordered that the requirements of *Supreme Court Rules* 13.07, 13.10 and 13.12 did not apply to the Common Directors in filing their defence to the extent that compliance with these Rules would have a tendency to expose the Common Directors directly or indirectly to civil penalty or criminal proceedings in respect of the subject matter of the Supreme Court proceeding.

(iii) Application by Lewski Companies to be relieved of obligation to file and serve defences

As a final point, the Court held that the Common Directors' ruling also applied to the Lewski Companies on the ground that Mr Lewski's sole directorship of the Companies meant the knowledge alleged against the Companies was the knowledge of Mr Lewski. Requiring the Companies to file defences compliant with the ordinary rules of pleading would necessarily undermine Mr Lewski's claim for privilege.

5.12 Liquidators successfully justify an extension of time for voidable transactions

(By Nicholas Guenther, Herbert Smith Freehills)

In the matter of Octaviar Ltd (receivers and managers appointed) (in liquidation) and In the matter of Octaviar Administration Pty Limited (in liquidation) [2012] NSWSC 1460, Supreme Court of New South Wales, Black J, 30 November 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1460.html

(a) Summary

The Court jointly heard two applications brought in relation to litigation surrounding the fall of the Octaviar Group. On 3 October 2008, Octaviar Administration Pty Ltd (OA) went into voluntary administration. Under section 588FF(3)(a)(i) of the Corporations Act 2001 (Cth) (the Act), its liquidators had until 3 October 2011 to commence recovery proceedings for voidable transactions. This limitation period was extended generally by a subsequent order of the Court to run until 3 April 2012 (the Extension Order).

Fortress Credit Corporation (Australia) II Pty Ltd and Fortress Investment Group Australia Pty Ltd (together, Fortress) applied for an order to prevent them from being subject to the Extension Order so as to avoid claims being commenced against them post-3 October 2011. In a separate application, the liquidators of both Octaviar Ltd (OL) and OA (Liquidators) sought the application for the Extension Order to be reheard as against Fortress and that the Extension Order be varied to expressly set out its applicability to claims regarding Fortress.

Fortress was unsuccessful in its application and the Court refused to set aside the Extension Order. In deciding that the Extension Order was appropriately made, the Court highlighted that:

- under section 588FF of the Act, the Court has the power to make a broad order extending the limitation period for liquidators to commence an action for any claims made pursuant to that section;
- while the Court's discretion must be exercised judicially when determining whether to make an order granting an extension of time under section 588FF(3)(b) of the Act, there is no requirement for 'exceptional circumstances' to exist before the order can be made;
- when determining whether to exercise discretion to grant an extension of time for claims under section 588FF(3)(b) of the Act, all of the surrounding circumstances must be considered including the basis of the need for an extension, the reason as to why a claim cannot be brought within the limitation period, the prejudice suffered by the affected parties and a preliminary assessment of the merits of any identified claims likely to be commenced if an extension is granted; and
- a liquidator has a duty to notify each person it believes is likely to be adversely affected by an order sought in an application under section 588FF of the Act, however, the Court must exercise a large degree of caution when determining what a liquidator believed, knew, or should have known at a particular time, and this is especially so in complicated liquidations.

(b) Facts

OL and OA were members of the Octaviar Group which was in the business of managing investment schemes and the ownership, management and operation of a number of hotels, resorts, aged care facilities and child care facilities. OL and OA were placed into voluntary administration in September and October 2008 respectively.

Following an order made on 30 May 2011 to extend the time for which voidable transaction claims could be made under the Act with respect to OL to 3 October 2011, the Liquidators obtained an order for a further extension to the limitation period for both OL and OA to 3 April 2012. Notifications were given to parties which were identified as interested parties and those who were identified at the time as having been potentially involved in transactions the subject of proposed recovery proceedings. No such notification was provided to Fortress which had received a number of payments from various members of the Octaviar Group throughout 2007-2008.

The Liquidators presented evidence that it was not until almost two months after the application for the Extension Order that they came to believe that a substantial claim was available to OA against Fortress. This belief arose following the Liquidators examination of material which led them to conclude that various payments made to Fortress consisted of funds to which OA rather than OL had a better entitlement.

Fortress applied for an order that the Extension Order be varied so as to exclude any application against Fortress or alternatively be set aside in so far as it applies to Fortress. By separate application (but heard at the same time), the Liquidators applied for their original application for the Extension Order to be reheard with Fortress as a respondent to provide adequate notification and for the order to be varied so as to include express reference to the limitation period for claims in relation to Fortress to run until 3 April 2012.

(c) Decision

The Court refused to set aside the Extension Order, ordered that Fortress be added as a respondent to the Extension Order application and indicated that it would hear from the parties to determine whether the Extension Order requires variation to expressly include claims against Fortress to give effect to the judgment.

(i) Can a general extension order be made under section 588FF(3)(b) of the Act?

Fortress submitted that, while there is appellant authority to the effect that the Court has the power to make a general order for a time extension under section 588FF(3)(b) of the Act, such authority is inconsistent with the wording in section 588FF of the Act which refers to orders being made by reference to 'a transaction'. It was contended that the use of the phrase 'a transaction' under section 588FF of the Act suggests that any order made under section 588FF(3)(b) is limited to particular transactions involving particular identified parties. The Court disagreed and applied *BP Australia Ltd v Brown* [2003] NSWCA 216 where it was found that a general order made granting an extension of time under section 588FF(3)(b) of Act was valid as against any creditor subjected to a claim made by a liquidator under section 588FE.

(ii) Was the Extension Order too broad to be appropriate in the circumstances?

Fortress submitted that any order made under section 588FF(3)(b) should be drafted to create a minimum amount of uncertainty for creditors and that there were no 'exceptional circumstances' which justified permitting a broad time extension that covered transactions reaching beyond those transactions and parties identified by the Liquidators at the time of the application. The Court rejected this submission by finding that, while discretion must be exercised judicially by reference to all of the surrounding circumstances, there exists no requirement for 'exceptional circumstances' to exist before a Court is able to grant an order providing an extension of time under section 588FF(3)(b) of the Act.

(iii) Was making the Extension Order a judicial exercise of discretion?

After finding a power to make the Extension Order in the terms it was made, the Court was asked to consider whether doing so was an appropriate exercise of judicial discretion. The Court found that the Liquidators had discharged their burden of establishing that the time limit prescribed in section 588FF(3)(a) of the Act should not apply in all of the surrounding circumstances so as to justify the Extension Order being made. The fact that the Liquidators had not been appointed until 11 months after OA went into administration, the number and complexity of the transactions involved in the liquidation, the difficulties encountered by the Liquidators in identifying potential defendants to claims and the fact that Fortress had suffered little demonstrable prejudice were all factors which were considered to weigh in favour of granting the Extension Order.

(iv) Should the Extension Order be set aside as against Fortress due to the failure of an opportunity to be heard on the application?

The Court was asked to consider the applicability of the general rule that a person who is likely to be adversely affected by orders has a right to be heard on the application for those orders. Fortress submitted that, at the time the order was made, it was a party likely to be affected and thus possessed a right to have the order set aside in so far as it applied to it according to the law set down in *Williams (as liquidator of Willahra Pty Ltd (in liq)) v Kim Management Pty Ltd* [2012] QSC 143 (Williams). The Court distinguished Williams on the basis that evidence presented to the Court outlined that the Liquidators, through no fault of their own, had not come to realise that a substantial claim may be available against Fortress until almost two months after the application. In its ruling, the Court also noted that caution against hind-sight belief must be had when determining what a liquidator knew or should have known at any given point in time. This is particularly so during a complicated liquidation where an assessment of parties likely to be affected must be determined by reference to the liquidator's beliefs at the time of making the application.

5.13 Review of a registrar's decision ordering the substitution of applicants in relation to a winding-up application

(By John O'Grady and Coral Alden, Corrs Chambers Westgarth)

In the matter of C2C Investments Pty Ltd [2012] NSWSC 1443, Supreme Court of New South

Wales, Black J, 28 November 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/nsw/NSWSC/2012/1443.html

(a) Summary

The applicant C2C Investments Pty Ltd (C2C) was provided with a consumer credit facility on 22 October 2004 by the Commonwealth Bank of Australia (CBA), which C2C defaulted under on 24 November 2009.

On 24 February 2012, Community Association DP No 270158 (Community Association) applied for C2C to be wound up in accordance with section 459P of the Corporations Act 2001 (Cth) (the Corporations Act), in reliance on a failure of C2C to comply with a creditor's statutory demand. CBA sought to be substituted for Community Association in relation to the application for C2C to be wound up when the debt to Community Association was settled out of court. The application was granted by Senior Deputy Registrar Howard.

C2C applied to the New South Wales Supreme Court to set aside Senior Deputy Registrar Howard's decision.

Black J, hearing the application, determined that the Court, under rule 49.19 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) and upon application of any party, had the authority to review a registrar's decision and make an order, by way of confirmation, variation, discharge or otherwise as it thinks fit. Black J noted that the Court's power of review is, however, limited to decisions that determine a party's rights or to decisions where an error in the decision can be demonstrated. Further, Black J detailed how the Court has the power to dismiss proceedings where no reasonable cause of action is disclosed.

Black J held that C2C's application should be dismissed with costs, making the following findings:

- despite C2C satisfying Community Association's debt, this should not preclude CBA from being substituted;
- it was not necessary for CBA to issue a statutory demand to C2C or for CBA to establish one of the grounds under section 461 of the Act in order for CBA to be granted standing;
- CBA was a creditor and had standing by virtue of the outstanding debt owed to it; and
- CBA was not required to account to C2C Developments Pty Limited (C2C Developments) for the sale of the properties based on the finding that the evidence provided by C2C was insufficient to establish a breach of CBA's obligations in respect of the sale of the properties under section 420A of the Corporations Act.

Senior Deputy Registrar Howard's decision, to substitute CBA for Community Association in the winding up application of C2C, was therefore upheld.

(b) Facts

On 22 October 2004, CBA provided a consumer credit facility to C2C. Following C2C's default under the facility on 24 November 2009, CBA commenced proceedings against C2C. Judgment, obtained by consent, was entered on 28 September 2010 in favour of CBA against C2C for the amount of $419,386.46 and an order was made granting CBA possession of a property in New South Wales.

On 24 February 2012, Community Association applied for C2C to be wound up in accordance with section 459P of the Act, in reliance on a failure by C2C to comply with their statutory demand. The debt then appears to have been settled out of court. On 26 June 2012, the Court granted leave to Community Association to withdraw from the winding up proceedings and granted CBA leave to file an application to be substituted for Community Association.

CBA sought by interlocutory process filed on 11 July 2012 to be granted leave to be substituted as the plaintiff for Community Association in accordance with sections 459P and 465B of the Act. The application was supported by affidavit relying upon the consent judgment and orders dated 28 September 2010. CBA's application, contested by C2C, was heard by Senior Deputy Registrar Howard on 24 July 2012.

Senior Deputy Registrar Howard made an order under section 465B of the Act substituting CBA in the place of Community Association in relation to the winding up application. This decision was reached on the basis that, first, a failure to comply with the statutory demand served by Community Association on C2C raised the presumption of insolvency; second, that CBA had established there was a debt owing to it and therefore CBA was a creditor of C2C; and third, that there was no genuine dispute as to the debt that was the subject of the application, particularly given that the parties had not sought to have the debt set aside. A dispute had arisen, however, in relation to the valuation of the properties sold pursuant to the judgment obtained by consent on 28 September 2010, the amounts for which they were sold and the accounting of the proceeds of those sales.

The key issue for the Court's determination was whether, upon the application of C2C for the Court to review and set aside the decision of Senior Deputy Registrar Howard, the Court should decline to order substitution of CBA for Community Association as the applicant in the winding up application in respect of C2C.

(c) Decision

The first issue for the Court's consideration was whether CBA could be classified as a creditor of C2C, in that CBA was a person who might otherwise have applied for C2C to be wound up in accordance with section 465B of the Corporations Act. Black J held that it was not necessary for CBA to have served a statutory demand or to establish one of the other grounds specified in section 461 of the Act in order to assert that it might otherwise have applied for C2C to be wound up. CBA could be classified as a creditor of C2C by reason of the consent judgment obtained on 28 September 2010 in its favour and the evidence of the unpaid balance due to it.

CBA therefore had standing to apply for a winding up order and could be classified as a person who might otherwise have applied for C2C to be wound up. Black J discussed the underlying policy rationale guiding this decision, stating that where one creditor has issued a statutory demand and if the debt of the first creditor is paid out after a presumption of insolvency has arisen, the other creditors may rely on that presumption of insolvency in a subsequent winding up application in order to avoid the company and the Court having to deal with parallel applications to wind up the company concerned.

The second issue for the Court's consideration was whether the CBA's debt was genuinely disputed by C2C upon substantial grounds, given that if this is the case the Court is obliged to decline the substitution. Black J, after reviewing the authorities, stated that it was necessary for C2C to demonstrate that the dispute which it contends exists raises a plausible contention requiring further investigation or that is not spurious, illusory or misconceived. The Court considered whether the entire debt owed by C2C to CBA was settled. Black J held that there was no evidence that the properties owned by C2C and C2C Developments were sold at an undervalue.

Further, Black J found in favour of CBA that the correspondence between the parties indicated that C2C remained liable for any shortfall on the sale of the properties to satisfy the debt owed to CBA. Black J held that despite Mr Shannon's expectation that the proceeds from the sale would be sufficient to discharge the debt owed to CBA, this realisation or disappointment of this expectation is not sufficient to give rise to a genuine dispute as to the balance of the debt remaining following the sale of the properties. A sufficient basis for a dispute as to the debt was therefore unable to be established. Black J went on to state in obiter that even if a sufficient basis were established, this would be insufficient to prevent an order for substitution.

The final issue for the Court's determination related to the fact that CBA's claim was being disputed in a separate proceeding, with C2C arguing that Senior Deputy Registrar Howard should have adjourned or dismissed the application. Black J held that, given the claim was being brought by C2C Developments rather than C2C and that the claim was dismissed on the basis that it did not disclose a reasonable cause of action, a genuine dispute as to the debt owed by C2C to CBA could not be established.

Black J ordered that the interlocutory process filed by C2C be dismissed with costs. The previous order of Senior Deputy Registrar Howard that Community Association be substituted for CBA was therefore upheld.

5.14 Derivative actions: good faith and best interests

(By Huw Watkins, Ashurst Australia)

Re The President's Club Ltd; Coeur De Lion Investments Pty Ltd v Kelly [2012] QSC 364, Supreme Court of Queensland, Mullins J, 22 November 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/qld/QSC/2012/364.html

(a) Summary

This case concerns an application by Coeur De Lion Investments Pty Ltd (the Applicant), a member of The President's Club Limited (the Company), for leave to bring a derivative action on behalf of the Company to recover consultancy fees paid to three of its directors between 2004 and 2011.

In dismissing the application, Mullins J found that the Applicant had failed to show that it was acting in good faith and in the best interests of the Company as required by section 237(2)(b) and (c) of the Corporations Act 2001 (Cth) (the Act). In reaching his decision, Mullins J found that while the mere existence of other proceedings between the parties did not show a lack of good faith, the failure to explain the extended delay in bringing the action, particularly considering the receipt of benefits from the services provided by the directors, meant that he was not satisfied that the application had been made in good faith. In addition, he found that the potential defences available to the directors had to be considered in determining the prospects of recovering the relevant amount and the potential benefit to the company.

(b) Facts

The Applicant was a property developer and the largest shareholder of the Company (approximately 41%). The Company leased villas in the Coolum Resort from the Applicant, which were then available to its shareholders on a 'timeshare' basis. The primary role of the Company was to provide property administration services in respect of the villas and to act as a vehicle for distributing income and expenses relating to the villas to members.

Between 2004 and 2011, the Company paid consultancy fees totalling $437,870.00 to three of its directors; the first, second and third respondents, for additional work performed by them in relation to changes in the regulation of managed investment schemes, litigation in respect of the refurbishment of the resort by the Applicant and the refurbishment of the villas. These payments were authorised by resolution of the board of the Company on 12 February 2001 and all payments were recorded in the annual reports for each of the relevant years.

On 13 February 2012, the Applicant gave notice to the Company of its intention to apply for leave to bring an action on behalf of the Company and subsequently brought the application on 18 May 2012. This was not the only proceeding between the Company and the Applicant (or entities related to the Applicant) and it was acknowledged at the hearing that there were also ongoing proceedings relating to an application for specific performance by the Company against the Applicant and a takeover bid by an entity associated with the ultimate controller of the Applicant, Professor Clive Palmer.

The principal issue in this case was whether the applicant had satisfied the test outlined in section 237(2) of the Act. As items (a) and (e) were not disputed, Mullins J was only required to determine:

- whether there was a serious question to be tried;
- whether the Applicant was acting in good faith, and
- whether it was in the best interests of the company that the Applicant be granted leave.

(c) Decision

(i) Serious question to be tried (section 237(2)(d))

With regard to the requirement that there must be a serious question to be tried, Mullins J reiterated that the determination of whether there was a 'serious question to be tried' was a low threshold test that does not require a detailed consideration of the merits. He found that this requirement was satisfied due to the apparent failure to obtain member approval as required by section 208(1) of the Act and the potential breach of duty by the directors. In reaching this determination, Mullins J noted that a consideration of the prospects of success or potential recovery was not required to determine whether there was a serious question to be tried (although these considerations were relevant to the determination of whether the actions were in the best interests of the company).

(ii) Good faith (section 237(2)(b))

Mullins J found that the Applicant had failed to show that the application was made in good faith. In doing so he found that while the mere fact of other dealings or proceedings showing a desire to control the company does not show a lack of good faith where there is a serious question to be tried, the lack of explanation for the large delay in bringing the application and failure to challenge the payments in the annual meetings of the Company, especially considering that the Applicant would have been aware of the payments and would have received the benefit of the additional work that the payments paid for, resulted in him not being satisfied that the application was brought in good faith.

In addition, Mullins J noted that it was not necessary for an officer of the Applicant to swear as to the good faith of the Applicant in order to prove that the application had been brought in good faith.

(iii) Best interests of the Company (section 237(2)(c))

In his decision, Mullins J noted that while the effect of potential exceptions under section 211 or exemptions under section 1318 of the Act should not be assessed at the application phase, their existence needed to be considered in determining what is in the best interests of the company, as it would not be in the best interests of the company to institute proceedings where an amount sufficient to make the proceedings worthwhile is unlikely to be recovered. Based upon the Applicant's failure to make submissions relating to the potentially recoverable amount (the Applicant had focused on the gross amount of the payments), Mullins J did not consider that the Applicant had shown that the granting of leave was in the best interests of the company.

(iv) Order

Mullins J dismissed the application with costs to be determined following submissions from both parties.

5.15 Considerations for liquidators when applying for a compromise of debt

(Amy Hill and Alistair Fleming, Clayton Utz)

In the matter of S & D International Pty Ltd (in liquidation) (No 7) [2012] VSC 551, Supreme Court of Victoria, Robson J, 15 November 2012

The full text of this judgment is available at:

http://www.austlii.edu.au/au/cases/vic/VSC/2012/551.html

(a) Summary

Section 477(a) of the Corporations Act 2001 (Cth) (the Act) requires a liquidator to seek the approval of the Court, a committee of inspection or a resolution of creditors to compromise a debt of $100,000 or more. Section 477(2B) of the Act also requires similar approval for a liquidator to enter into an agreement on the company's behalf, if the term of agreement may end, or obligations of a party be discharged by performance, more than 3 months after the agreement has been entered into.

The Supreme Court of Victoria has, in this case, provided some useful guidance as to the types of considerations a Court will look at in applications to compromise debt, which includes:

- Is the compromise of debt proposed by the liquidator in the best interests of creditors?
- Has the liquidator made a proper assessment of prospects and recovery of the debt?
- Are there any concerns about future claims by creditors against the liquidators in relation to the debt?
- Is the proposed compromise in good faith and for a proper purpose?
- Has there been full and frank disclosure to the Court/creditors of all matters relevant to the debt and the proposed compromise?

(b) Facts

The liquidator, MIG Property Services Pty Ltd (MIG) and S&D (the company) agreed at mediation to settle certain proceedings between them (principal proceeding, an appeal proceeding and a winding up proceeding) subject to the liquidator obtaining orders pursuant to section 511 of the Act on the terms set out in the deed of settlement. A liquidator may apply to the Court in accordance with section 511 to determine any question arising in the winding up of a company; or to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.

The liquidator believed the deed of settlement was in the best interests of creditors, on the basis that:

- there were inherent risks regarding the defence of the appeal proceedings affecting the company;
- the costs associated with completing the appeal proceedings would be substantial; and
- even if successful in the appeal proceedings, there was a real risk that no funds would be recoverable by the company.

The settlement included a compromise of a judgment debt payable by MIG to the company of $200,000 ($20,000 payable 7 days after execution and $180,000 payable 120 days after execution).

As required by sections 477(2A), and (2B) of the Act, the liquidator sought the Court's approval of the compromise of the debt and the entry into an agreement whereby obligations under the agreement may not be performed within three months of it being entered into.

The liquidator insisted on approval in accordance with section 511 due to the deed of settlement being likely to be the subject of future claims by other parties and creditors. His concern was based on the litigious nature of the parties involved with the principal proceeding and throughout the protracted liquidation of the company generally, as well as a string of litigation which had resulted from previous transactions with the company.

(c) Decision

The Court found that the directions sought by the liquidator were in the best interests of the creditors of the company. The liquidator was successful in obtaining directions under sections 511 and 477 (2A), (2B). The Court:

- found that the liquidator was justified in compromising the unresolved matters in the principal proceedings, the appeal proceedings and the winding up proceedings, on the terms and conditions set out in the deed of settlement, pursuant to section 511;
- approved the compromise of the debt owed by MIG to the company pursuant to section 477(2A); and
- approved the liquidator entering into the settlement agreement on the company's behalf where obligations of MIG may not be performed for more than 3 months after the agreement was entered into pursuant to section 477(2B).

Notwithstanding that the liquidator does not have power to enter into the agreement without the Court's approval under section 477(2A) and (2B), his Honour believed the history of the litigation between the parties put the liquidator at a material risk of suit by compromising the debt owed by MIG and as such the liquidator was justified in making the application.

This decision would tend to suggest that the Court's focus will be on the process undertaken by the liquidator to assess the relative benefits and detriments to the company in any proposed compromise of debt rather than the actual outcome of the compromise. This would typically involve an analysis by the liquidator of the time, costs, risks and benefits of attempting to recover a debt in full compared with a commercial compromise of that debt which may see a lesser amount of funds recovered in the short term for the benefit of creditors.