Commercial Law Association seminar
Practice in the Corporations List and recent case law
8 July 2022

Justice Ashley Black

Introduction

I will first make several general comments about practice in the Corporations List of the Supreme Court of New South Wales. I will then turn to several developments in corporations and insolvency law, largely between January 2021 and June 2022. I first consider a case in respect of share capital, then developments in respect of electronic execution of documents and notices of meetings, and cases relating to the business judgment rule and oppression. I then turn to several cases in insolvency law, including case law in respect of voidable transactions, insolvent trading, liquidators' examinations and claims for compensation in respect of liquidators' conduct. I then note amendments to the continuous disclosure regime and address further amendments and case law in respect of financial services, the introduction of a new form of corporate collective investment vehicle and recent case law as to statutory unconscionability.

Practice in the Corporations List

I first address several practical matters, at the risk of noting the obvious. Practice Note SC Eq 4 deals with practice in the Corporations List. The Practice Note identifies matters that are appropriate for the Corporations List as including any proceedings or applications under or in respect of matters relating to the *Corporations Act* 2001 (Cth), the *Australian Securities and Investments Commission Act* 2001 (Cth), the *Cross-Border Insolvency Act* 2008 (Cth) and the Supreme Court (Corporations) Rules 1999 (NSW) ("Corporations Rules").

A directions list takes place before the Corporations Judge (presently Hammerschlag CJ in Eq) on Monday mornings, with motions called at 9:45am and directions at 10am. The motion call-over and directions presently take place by telephone. Consent orders can be made in chambers in the previous week to avoid the cost of an appearance. Solicitors should send consent orders relating to the Monday list to my Associate, who continues to deal with the administration of that list. Solicitors can also contact my Associate to obtain fixed hearing dates for schemes of arrangement under Pt 5.1 of the *Corporations Act* where it is commercially important to obtain definite hearing dates before filing. I continue to hear applications in relation to schemes of arrangement, which are now generally taking place as live hearings.

Urgent corporations matters, including applications for short service, are listed by approaching the Associate to the Corporations Duty Judge in Court or in chambers, preferably after notice of the approach has been given to his or her Associate by telephone or email.

Proceedings in the Corporations List are governed by the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR") generally, but also by the Corporations Rules, which are uniform with the Federal Court and other State Supreme Courts and have some differences from the procedures under the UCPR, and also require particular steps in particular applications.

Where an application is not made in a proceeding already commenced in the Court, it is to take the form of an originating process (rather than a summons or statement of claim); and, in any other case, an interlocutory process is to be filed, even if the relief claimed is final relief. The originating process in corporations matters is not in the form of a pleading but the Court may make an order for the matter to continue by pleadings.[1] A judgment in default of filing a defence is only available under the UCPR after an order for pleadings has been made and a statement of claim has been filed, and a party cannot unilaterally put itself in a position to obtain default judgment by filing a statement of claim without first having obtained an order for pleadings from the Court.[2]

Rule 2.8 of the Corporations Rules requires notice of certain applications be given to the Australian Securities and Investments Commission. Rule 2.13 allows an application for leave to be heard in corporations proceedings, as an alternative to being joined as party to the proceedings under the UCPR. A person who is granted leave to be heard without becoming party under r 2.13(1) has a more limited costs exposure but can also have a lesser expectation of being awarded costs.[3]

Practice Note SC Eq 11, "Disclosure in the Equity Division" applies to proceedings in the Corporations List, as to proceedings in the Equity Division generally. The Practice Note has also been applied to extensive notices to produce, which are functionally equivalent to applications for discovery, by analogy.[4]

Parties should seek to avoid leading substantial affidavits at a very late stage. It is common practice in the Corporations List that, when fixing a matter for hearing, the Court will also make a direction that affidavits served after the date specified in the directions may not be read without leave of the Court. It cannot be assumed that such leave will be granted. First, s 61(3) of the *Civil Procedure Act* 2005 (NSW) ("*CPA*") provides that, if a party to whom a direction has been given fails to comply with it, the Court may disallow or reject any evidence that party has adduced or sought to adduce. Second, UCPR r 10.2 provides that a party intending to use an affidavit that has not been filed must serve it a reasonable time before the occasion for using it

[1] *Edenden v Bignell* [2008] NSWSC 666.
[2] *Wily v King* [2010] NSWSC 352.
[3] *Re Pan Pharmaceuticals Ltd; Selim v McGrath* [2004] NSWSC 129; (2004) ACSR 681 at [20]; *Re HIH Casualty and General Insurance Ltd* [2006] NSWSC 6; *Re Jabiru Satellite Ltd (in liq)* [2022] NSWSC 459.
[4] For example, *Owners Strata Plan SP 69567 v Baseline Constructions Pty Ltd* [2012] NSWSC 502; *Re Mempoll Pty Ltd* [2012] NSWSC 1057; *Bauen Constructions Pty Ltd v New South Wales Land & Housing Corporation* [2014] NSWSC 684; *Rhinehart v Rhinehart* [2015] NSWSC 205.

arises, and a party who fails to serve an affidavit as required by that rule must not use it except by the Court's leave. The Court's power to disallow or reject an affidavit under *CPA* s 61(3) and to grant or withhold leave to read it under UCPR r 10.2 must be exercised in accordance with the obligations imposed by *CPA* ss 56–60 and specifically the overriding purpose and the objectives of case management. The Court may well decline leave to read a later affidavit where doing so would cause prejudice to the other party, particularly if that prejudice cannot readily be accommodated by an order for costs or an adjournment; for example where allowing that affidavit to be read would require an adjournment of the final hearing.

Share capital

I now turn to developments in the case law and statutory amendments, of which there have been many. In *Aurizon Holdings Ltd v Commissioner of Taxation* [2022] FCA 368, Thawley J considered whether property transferred by the State of Queensland to a state-owned company that was to be privatised, although expressly not subscribed for shares, could be treated as "share capital" for taxation purposes. In that case, the State of Queensland had contributed a receivable of over $4 billion to a wholly owned subsidiary of Queensland Rail, Aurizon Holdings Limited, prior to the 2010 public float of Queensland Rail. Aurizon did not issue shares in exchange for that receivable and the contribution of that receivable was expressed as being for "nil consideration", although Aurizon posted that receivable to an account labelled "capital distribution" and referred to the amount being adjusted against "contributed equity". After a detailed review of the case law[5], his Honour held that, where that contribution was neither a gift or a loan, it could properly be treated as share capital, although not reflected in the issue of new shares.

Electronic execution of documents and notices of meetings

Provisions for electronic execution of company documents, the giving notice of meetings of companies and registered schemes by electronic means, and virtual meetings, including hybrid meetings, were introduced on an interim basis during the COVID-19 pandemic, and substantially similar provisions are continued by amendments made by the *Corporations Amendment (Meetings and Documents) Act* 2022 (Cth). Documents including deeds signed by or on behalf of a company under ss 126 and 127 of the *Corporations Act* may now be signed in a technology neutral manner, by signing a physical or electronic form of the document; officers of the company may now sign different copies of a document; and a single person may sign a document in more than one capacity, for example as a director of more than one company, if the document requires or permits the person to do so and states the capacity in which that person is doing so. Where a proprietary company has a sole

[5] Relevant cases included the High Court's decision in *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143, the Privy Council's decision in *Kellar v Williams* [2000] 2 BCLC 390 and the Court of Appeal's decision in *Commissioners for HM Revenue and Customs v Alan Blackburn Sports Ltd* [2008] EWCA Civ 1454.

director and no company secretary, he or she may sign a document on behalf of the company under s 127 of the *Corporations Act*.

Shareholders may still elect to receive documents relating to shareholder meetings in either physical form or by electronic means. Absent an election, meeting related documents, including notices of meetings, may be sent to shareholders in a physical form, or given to them by using electronic means, or the shareholder may be provided, in a physical or electronic form, with details sufficient to allow them to view or download the document electronically. This will often be done by sending a letter or email with a URL link which may be accessed by the shareholder, and this course is now commonly adopted in schemes of arrangement. Meetings may now be held as a physical meeting; or as a hybrid meeting comprising both a physical meeting and the use of virtual meeting technology; or as a virtual meeting, where this is required or permitted by the company's constitution and the technology permits members to exercise their right to ask questions and make comments, both orally and in writing. A substantive resolution must now be decided by a poll and not a show of hands.

The provisions in respect of the signing and execution of documents took effect from 23 February 2022 and the provisions in respect of meetings and notice of meetings took effect from 1 April 2022, after the expiry of temporary measures on 31 March 2022.

Statutory business judgment rule

In *DSHE Holdings (recs & mgrs apptd) (in liq) v Abboud (No 3); National Australia Bank Ltd v Abboud (No 4)* (2021) 155 ACSR 1; [2021] NSWSC 673, Ball J considered the operation of the statutory business judgment rule, which has rarely been considered in the case law since Austin J's judgment in *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; 75 ACSR 1; [2009] NSWSC 1229. Ball J noted that the term "business judgment" is defined in s 180(3) of the *Corporations Act* to mean "any decision to take or not take action in respect of a matter relevant to the business operations of the Corporation" and held that the payment of a dividend fell within that definition since:

> "[t]he payment of a dividend reduces the funds otherwise available to the corporation for use in its business. The decision to pay a dividend is, therefore, plainly relevant to the business operations of the corporation because it affects the funds available to conduct those operations."

His Honour there found (at [462]) that directors had discharged their obligations in relation to the declaration of dividends where they made the judgment to declare the dividend in good faith for a proper purpose, sufficiently informed themselves about the subject matter of the decision, and rationally believed that decision was in the corporation's best interests.

Derivative actions and oppression claims

Applications continue to be brought for leave to bring derivative actions, under ss 236–237 of the *Corporations Act* where a company is not in liquidation and in the Court's inherent jurisdiction where a company is in liquidation.[6] Parties should bear in mind that a derivative action may not be necessary, and leave to bring it may not be granted, where any necessary relief can be granted in an oppression action.

Turning to oppression actions, s 232 of the *Corporations Act* provides that the Court may make an order under s 233 if

> "(a) the conduct of a company's affairs; or
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> (b) an actual or proposed act or omission by or on behalf of a company;
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> or
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> (c) a resolution, or a proposed resolution, of members or a class of members of a company;
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> is either:
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> (d) contrary to the interests of the members as a whole; or
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> (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity."

That section extends to conduct involving "commercial unfairness" or where the conduct complained of involves a visible departure from the standards of fair dealing and a violation of the conditions of fair play, or a decision has been made so as to impose a disadvantage, disability or burden on the plaintiff that, according to ordinary standards of reasonableness and fair dealing, is unfair.[7] Recent oppression actions heard in the Corporations List include *Re Candy-Vend Pty Ltd* [2020] NSWSC 1735 (Black J), *Re QB Foods Pty Ltd* [2021] NSWSC 1227 (Black J) and *Re Anna Bay Resort Pty Ltd* [2022] NSWSC 331 (Rees J). The oppression remedy has also been considered in a complex decision in the Supreme Court of Victoria in *Slea v Connective Services Pty Ltd (No 9)* [2022] VSC 136. The plaintiff, Mr Slea, was a one-third shareholder in two companies, which together carried on

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[6] Recent applications for leave to bring derivative claims in the Corporations List include *Mount Gilead Pty Ltd & Hobhouse v L Macarthur-Onslow* (2021) 398 ALR 629; [2021] NSWSC 948 (Black J), *Re Ter Wisscha Holdings Pty Ltd* [2021] NSWSC 1447 (Black J) and *Wil Brown Management Pty Ltd and Wil Brown Pty Ltd - Brownlee Enterprises Pty Ltd v Wilmen Pty Ltd* [2022] NSWSC 207 (Williams J).

[7] The voluminous case law includes *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 at 704; *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459; [1985] HCA 68; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; (2009) 257 ALR 610; [2009] HCA 25 at [176]; *Tomanovic v Argyle HQ Pty Ltd* [2010] NSWSC 152 at [39], on appeal as *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* (2011) 288 ALR 310; (2011) 84 ACSR 121; [2011] NSWCA 104 at [140]; *Munstermann v Rayward* [2017] NSWSC 133 at [22].

business as mortgage aggregators. He brought oppression proceedings dealing with conduct over a lengthy period from 2001 to 2020. A significant amount of the defendants' conduct over the relevant period was held to be oppressive, including conduct that was held to be directed to acquiring Mr Slea's shares in the companies at a depressed price; a restructuring of the companies to allow a sale of an interest to a third party in 2012-2013, diluting Mr Slea's interest in the companies from a one-third to one-quarter interest and introducing a new shareholder, in a manner that avoided a pre-emptive rights regime in the shareholders agreement; and then selling the business to a third party for the alleged improper purpose of defeating the relief sought by Mr Slea in the oppression proceedings. The Court also considered whether oppression arises in circumstances where majority shareholders cause a company to actively participate in and fund the defence of oppression proceedings..[8] In dealing with relief, Robson J questioned (at [1664]ff) the view expressed by Spigelman CJ in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 that an order for a minority to purchase the majority's shares would only be made in "extraordinary" circumstances and made an order that gave the minority the option to purchase the majority's shares at current value as agreed or, in default of agreement, at a price determined by the Court.

External administration

The statutory test for solvency

Section 95A of the *Corporations Act* establishes the statutory test for insolvency. That section provides that a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable; and a person who is not solvent is insolvent.

The application of that test was considered in a complex factual setting in *Anchorage Capital Master Offshore Ltd v Sparkes (No 3); Bank of Communications Co Ltd v Sparkes (No 2)* [2021] NSWSC 1025. That case was brought by several lenders to the Arrium Group, in parallel to a claim brought by its liquidators which settled prior to judgment. The Arrium Group was a substantial listed company with mining and steel manufacturing operations. It had, since about June 2015, been undertaking a strategic review, addressing how to repay debt of $1.125 billion due that was to mature in July 2017 and had considered possibilities including asset sales, refinancing, recapitalisation or debt restructuring. It issued several drawdown and rollover notices under loan facilities in January and February 2016, while that review was continuing, and each drawdown and rollover notice represented that it was solvent at each drawdown date. It then entered into voluntary administration several months later in April 2016, shortly after its lenders had indicated a lack of confidence in its management. The question of solvency was considered at a group level in that case because of cross-guarantees given by the companies within the Arrium Group.

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[8] See also *Power v Eckstein* (2010) 77 ACSR 302; [2010] NSWSC 137 at [112] and *Re Optimisation Australia Pty Ltd* (2018) 362 ALR 374; [2018] NSWSC 31 at [318].

The Anchorage plaintiffs and the Bank of Communications ("BOC") plaintiffs brought differently structured claims against officers of companies within the Arrium Group, and one of those officers brought a cross-claim against a firm of solicitors which had provided advice to the Arrium Group in respect of issues relating to its solvency. The Anchorage plaintiffs relied on allegedly negligent or misleading representations in drawdown notices and brought claims for breach of a duty of care, misleading conduct and accessorial liability against the several officers. The BOC plaintiffs contended that representations made in drawdown notices were misleading because, inter alia, the Arrium Group was insolvent at the time those notices were given. Ball J noted that the formulation of that claim was out of the ordinary, where it sought to establish the Arrium Group's insolvency as at January 2016 by reference to debts owed under the banking facilities maturing in July 2017, rather than debts falling due at any earlier date.

Ball J summarised the legal principles on which the BOC Plaintiffs relied (at [256]ff), namely that, first the fact of insolvency must be proved on the ordinary civil standard, being the balance of probabilities; second, a debt is taken to be owing at the time stipulated for payment in the contract unless there is evidence proving to the Court's satisfaction that there has been an express or implied agreement between the company and the creditor for an extension of time, or that some estoppel applies or there is evidence of an imminent compromise between the creditor and the debtor; third, the test of insolvency is future looking such that "the question is not simply whether the company can pay debts falling due at or around the date the question arises but whether, as at that date, it can pay debts falling due in the future" and "[n]ormally, a court will not look too far into the future because there are so many unknowns and contingencies"; and, fourth:

> "the question of solvency is to be determined by reference to the circumstances as they were known or ought to be known at the date at which the question of solvency is assessed and not in hindsight, the Court can have regard to what actually happened to the extent that what actually happened sheds light on what was likely at the time when the question of solvency is to be assessed."

His Honour observed (at [263]) that those principles were not controversial, but did not accept (at [264]ff) a proposition which the BOC plaintiffs sought to derive from them, that "a company will also be insolvent if it can be said, on the balance of probabilities, that the company is not able to repay a debt falling due on some future date." In rejecting that proposition, his Honour observed (at 265]) that the question whether, from a particular date, Arrium was unable to pay its debts as they became due is one of fact not likelihood, and that the civil standard applied to proof of that fact, not to what was to be proved. His Honour also identified (at [266]) a separate question, namely:

> "The other thing the Court is concerned with is what facts are relevant to the question of solvency and, in particular, how the Court should deal with future events in assessing the question of solvency. In the present case, the assessment the Court must make is whether it can be said that as from 7 January 2016 Arrium was unable to pay a debt falling due in July 2017. That is not a question of fact in the normal sense. It involves a prediction based on

> what was known and knowable as at 7 January 2016. In order to make that prediction – that is, in order to be able to say as at 7 January 2016 Arrium could not pay a debt falling due in July 2017 – there needs to be a high degree of certainty that that state of affairs would come about on the basis of the facts known or knowable at the earlier date. Otherwise, it is not possible to say that as at 7 January 2016, Arrium was unable to pay debts falling due in July 2017. At most all that could be said is that it was unlikely that Arrium would be able to pay debts falling due in July 2017. But that is equivalent to saying that Arrium was likely to become insolvent, not that it was insolvent, from 7 January 2016 on."

His Honour also held that the plaintiffs, in seeking to establish insolvency, needed to establish that financiers would not roll over the existing facilities or make further loans to Arrium in July 2017, rather than the Arrium officers having to establish the availability of such refinancing. His Honour then found that it would be expected that, in the normal course of events, Arrium could sell assets or raise finance on the security of those assets to repay its facilities falling due in July 2017; his Honour noted, in particular, the prospect of a successful sale of the Arrium Group's mining consumables business prior to July 2017 and for cost savings within the business, and held that it was not established that, in January and February 2016, it was more likely than not that Arrium would be unable to raise sufficient funds to repay the facilities due in July 2017 or would run out of cash prior to that date so as to prevent a sale of its mining consumables business. His Honour also noted that the fact of insolvency at an earlier point in time could not be established by hindsight in that case, including by reference to the fact that Arrium was placed in voluntary administration in April 2016, after its lenders then indicated a lack of confidence in its management. His Honour also held that other aspects of the plaintiffs' claims, in respect of the alleged duty of care and misleading and deceptive representations, failed.[9]

Issues arising in a complex creditors' trust

Two recent decisions have dealt with issues arising in the Virgin administration. In *Wells Fargo Trust Company, National Association (as owner trustee) v VB Lease Co Pty Ltd (admins apptd)* [2022] HCA 8, the High Court dealt with the interaction between insolvency principles under Australian domestic law and the Protocol to the Convention on International Interests in Mobile Equipment (Cape Town Convention) and held that the latter did not require the administrators of the Virgin companies to give delivery of aircraft engines in the United States in accordance with the leases, but only that they may be made available to the aircraft lessors in Australia.

In a second decision, which may be of wider application, in *Melbourne Aircraft Leasing (UK) Ltd v Algeri & Ors in their capacity as joint and several trustees of the Project Volar Creditors' Trust* [2022] NSWSC 443, I dealt with several proceedings heard together, by which aircraft lessors claimed priority against the creditors' trust for lease payments and other liabilities under leases of

[9] For commentary, taking issue with aspects of Ball J's approach, see M Wellard, "Arrium: Is it 'commercial reality' to conclude that a company is solvent until it is 'certain that it cannot pay' its future debts?", UTS Law, 8 September 2021.

aircraft and aircraft engines. Their primary contention was that the principle in *Re Lundy Granite Co* (1871) LR 6 Ch App 462, which gives priority to amounts due under a lease where a liquidator has retained possession of the lessor's property for the purposes of the liquidation, should be applied in dealing with claims under the creditors trust. The application of that principle had been considered in the United Kingdom in *Re Toshoku Finance UK Plc (in liq)* [2000] 3 All ER 938 and recently considered in Australia in *Ford v Scentre Management Ltd* (2020) 145 ACSR 654; [2020] FCA 1023. There were some English cases which applied that principle in voluntary administration, but the voluntary administration regime in England is different from that in Australia, since it provides for the distribution of assets within the voluntary administration. I held that principle was not applicable to a distribution under the creditors' trust, by reason of the terms of the aircraft protocol agreements, under which the administrators had retained possession of the aircraft and aircraft engines, and the terms of the creditors trust. A further claim by the aircraft lessors under s 443B of the *Corporations Act* also failed, on the basis that amounts accruing, but not payable, under those arrangements did not fall within the scope of that section.

Termination of a winding up

Applications to terminate a winding up under s 482 of the *Corporations Act* are not uncommon and have mixed success. Generally, the Court will not terminate a winding up unless a company will have additional financial strength and stability to provide confidence that it can continue without an appreciable risk of returning to liquidation. The factors relevant to such an application were usefully summarised by Brereton J in *Re Glass Recycling Pty Ltd* [2014] NSWSC 439, which has been applied in several subsequent cases.[10] Many applications are brought before there is sufficient evidence to address this, and are typically then adjourned to allow the application to bring further evidence.

Priority for employee claims under s 561 of the Corporations Act

In *Re Spitfire Corporation Ltd (in liq) and Aspirio Pty Ltd (in liq)* [2022] NSWSC 340, I dealt with the question whether security taken over research and development tax refunds fell within the scope of s 561 of the *Corporations Act*, which requires payment of debts falling in specified categories to be made in priority to the claims of a secured party in relation to a circulating security interest (as defined by reference to the *Personal Property Securities Act* 2009 (Cth) ("*PPSA*")) created by the company, including from property subject to the circulating security interest, if the company's property available for payment of unsecured creditors would otherwise be insufficient to meet those debts. I held that the relevant tax refunds were "property" and "personal property" for the purposes of s 340 of the *PPSA*, and within the scope of s 561. I also held that recent decisions in the High Court of Australia, dealing with the characterisation of employment relationships as between employer

[10] For recent examples, *Re Spartan Pastoral Co Pty Ltd (in liq)* [2020] NSWSC 1218 at [30]; *Re Sails Corp Pty Ltd* [2021] NSWSC 1241; *Re Thoroughbred Consultants Pty Ltd* [2021] VSC 627 at [85].

and employee[11], did not displace, at least at first instance, the approach which had been adopted in the Supreme Court of New South Wales and the Federal Court of Australia in determining which entity was the "true employer" of employees within a group.[12] That question likely remains open at an appellate level.

Voidable transactions and insolvent trading

Section 588FF of the *Corporations Act* specifies the orders that a court may make if a transaction is voidable under s 588FE of the *Corporations Act*, including as an unfair preference (s 588FA), an uncommercial transaction of the company (s 588FB), an unfair loan to the company (s 588FD), an unreasonable director-related transaction (s 588FDA) or a creditor-defeating disposition (s 588FDB). An application under this section may be made during the period beginning on the relation-back day (as defined in s 9) and ending on the later of 3 years after the relation-back day or 12 months after the first appointment of a liquidator in relation to the winding up of the company (s 588FF(3)(a)) or within such longer period as the court orders on an application by the liquidator brought within that period (s 588FF(3)(b)).

Unfair preferences under s 588FA

A transaction is an unfair preference for the purposes of s 588FA if a creditor of the company, at the time of the transaction, is party to that transaction; and the transaction allows the creditor to receive more from the company in respect of an unsecured debt than it would have received from the company in respect of that debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company: s 588FA(1)(b). Differing views have been expressed in the case law as to whether a payment by a head contractor of debts owed by a subcontractor to secondary subcontractors is "received from the company" for the purposes of this section.[13]

In *Cant (as liquidator of Eliana Construction and Developing Group Pty Ltd (in liq) v Mad Brothers Earthmoving Pty Ltd* [2020] VSCA 198, the Court of Appeal of the Supreme Court of Victoria had held that whether a company's

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[11] *WorkPac Pty Ltd v Rossato* (2021) 392 ALR 39; (2021) 95 ALJR 681; [2021] HCA 23; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404; [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* (2022) 398 ALR 603; [2022] HCA 2.

[12] Relevant cases include *Pitcher v Langford* (1991) 23 NSWLR 142; *Shaw v Bindaree Beef Pty Ltd* [2007] NSWCA 125; *Gothard Re AFG Pty Ltd (recs and mgrs apptd) (in liq) v Davey* (2010) 80 ACSR 56; [2010] FCA 1163 and *Re Branded Media Holdings Pty Ltd (in liquidation); Re Brand New Media Pty Ltd (subject to a deed of company arrangement)* [2020] NSWSC 557.

[13] *Re Emanuel (No 14) Pty Ltd (in liq): Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281; 24 ACSR 292; 15 ACLC 1099; *Re Imobridge Pty Ltd (in liq) (No 2)* [2000] 2 Qd R 280; (2000) 18 ACLC 29; *Woodgate as liquidator of Marketing Results Pty Ltd v Network Associates International BV* [2007] NSWSC 1260; *Re Burness, Denward Lane Pty Ltd (in liq)* (2009) 259 ALR 339; 74 ACSR 1; [2009] FCA 893; contrast *Re Evolvebuilt Pty Ltd* [2017] NSWSC 901, largely affirmed on appeal in *Hosking v Extend N Build Pty Ltd* (2018) 128 ACSR 555; [2018] NSWCA 149.

assets were reduced by a payment is relevant to whether the payment was made or received from the company for the purposes of s 588FA(1)(b), and a payment made by a third party, although authorised by the company, did not satisfy that criterion,[14] approving the similar view taken by Brereton J in *Re Evolvebuilt Pty Ltd* [2017] NSWSC 901.

This line of authority was reviewed by Rees J in *Re Western Port Holdings Pty Ltd (recs & mgrs apptd)* (2021) 150 ACSR 274; [2021] NSWSC 232, where her Honour observed (at [38]-[39]) that:

> "I am left with some disquiet by the reasoning in *Cant v Mad Brothers*. The language of section 588FA(1)(b) does not readily permit a construction that it is necessary to demonstrate a diminution in the assets of a company for there to be an unfair preference. As the High Court observed in *International Air Transport Association v Ansett Australian Holdings Ltd* (2008) 234 CLR 151; [2008] HCA 3, "Insolvency law is statutory and primacy must be given to the relevant statutory text" as opposed to general principles developed from earlier case law or statutes: at [78] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ. Statutes are to be construed and applied according to their terms, not under the influence of "muffled echoes of old arguments" concerning other legislation: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers of Australia* (1959) 107 CLR 208 at 276 per Windeyer J. Further, the Court in *Cant v Mad Brothers*, in following *VR Dye [& Co v Peninsula Hotels Pty Ltd (in liq)* [1999] 3 VR 201; [1999] VSCA 60] and *McKern* [*v Minister Administering the Mining Act 1978 (WA)* (2010) 28 VR 1; [2010] VSCA 140], has applied reasoning developed in cases which did not concern third party payments to a case which did.
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> Nonetheless, the Court's conclusion in *Cant v Mad Brothers* was open in circumstances where the question had been left open in *Kassem* [*Commissioner of Taxation v Kassem* (2012) 205 FCR 156; [2012] FCAFC 124] and *Hosking* [*v Extend N Build Pty Ltd* (2018) 128 ACSR 555; [2018] NSWCA 149], there is no contrary binding appellate authority and three appellate courts have considered that *VR Dye* is not plainly wrong: *Beveridge v Whitton* [[2001] NSWCA 6]; *McKern* and *Kassem*. I am not entitled to depart from a considered judgment of an intermediate appellate court simply because I might prefer a different view: *N & M Martin Holdings Pty Ltd v Commissioner of Taxation* [2020] FCA 1186 at [43]-[45] per Steward J. Ultimately, as Nettle JA observed in McKern, "If the reasoning in *VR Dye* is to be overturned, it is for the High Court to say so": at [27]."

Preferences in respect of a running account

Turning now to running accounts, a single transaction is not a preference at general law if it forms part of a larger series of transactions, or running account, which do not confer a preference on a creditor, and the "ultimate effect" principle requires whether payment to a creditor to secure ongoing services from it is a preference to be determined by whether it results in a

[14] For commentary, see N Angelakis, "Unfair Preferences as an Instrument of Restoration" (2021) 29 *Insolvency Law Journal* 4.

decrease in the net value of the other assets available for creditors.[15] Under s 588FA(3), transactions which are an integral part of a continuing business relationship between the company and a creditor, such as a running account, are treated as a single transaction; whether an unfair preference is being given is determined by reference to that single transaction; and the amount of any unfair preference is limited to the difference between the highest amount owing during the relevant period and the amount owing on the last day of the period.

Earlier cases have permitted a liquidator bringing a preference claim to quantify the amount of a preference from the point of "peak indebtedness" during a continuing business relationship within the relation-back period. The New Zealand Court of Appeal rejected that approach in *Timberworld v Levin* [2015] 3 NZLR 365, and held that a corresponding section required all payments and transactions within a continuing business relationship to be netted off, rather than allowing a liquidator to exclude transactions prior to the point of peak indebtedness. In *Badenoch Integrated Logging Pty Ltd v Bryant, Re Gunns Ltd (in liq)* (2021) 284 FCR 590; (2021) 152 ACSR 361; [2021] FCAFC 64, the Full Court of the Federal Court took the same view and held that that section was directed to "the ultimate effect of the dealings between the parties" and to all payments and all supplies forming part of the continuing business relationship over the relevant period, and therefore excluded the "peak indebtedness" approach. The High Court of Australia has granted special leave to appeal from that decision.

Availability of set-off in response to preference claims

In an important decision in *Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufacturers Pty Ltd* [2021] FCAFC 228, the Full Court of the Federal Court considered the availability of set-off[16] in response to a preference claim, a matter which had largely been left open in previous decisions at first instance. In that case, the liquidator commenced an unfair preference claim against the creditor, seeking to recover $190,000 of payments made during the relation-back period; the creditor relied on other debts of $194,000 as a set-off against that liability; and the liquidator acknowledged that his claim would fail if the set-off was available. The question whether statutory set-off was available against a claim for recovery of unfair preferences under s 588FA of the *Corporations Act* was referred to the Full Court of the Federal Court.

The Full Court of the Federal Court (in a judgment delivered by Allsop CJ, with whom Middleton and Derrington JJ agreed) held that a creditor is not able to set off an amount owed by an insolvent company to them against the amount of a preference claim against it, because there is a lack of mutuality between the company's indebtedness to the creditor and the liability of the

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[15] *Richardson v The Commonwealth Banking Co of Sydney Ltd* (1952) 85 CLR 110 at 132; [1952] ALR 315; (1952) 25 ALJ 734; *Air Services Australia v Ferrier* (1996) 185 CLR 483; 137 ALR 609; *Kassem & Secatore v Commissioner of Taxation* [2012] FCA 152 at [32].

[16] Section 553C(1) of the *Corporations Act* relevantly provides, in the case of mutual credits, debts or dealings between a company being wound up and its creditor, for automatic set-off.

creditor to repay an unfair preference in an action brought by a liquidator, for the benefit of unsecured creditors generally. That view was reached both on construction of the relevant provisions, and on the basis of an extensive review of the history of those provisions. In summary, the Chief Justice observed (at [7]-[8]) that:

> "There is a lack of mutuality between the indebtedness of the company to the creditor and the liability of the creditor pursuant to court order to pay the company at the suit of the liquidator. The lack of mutuality arises from the different interest in which the company owes money to the creditor and in which the company receives money pursuant to the liability to repay not as a creditor of the preferred creditor, but as a payee pursuant to court order in an action brought by the liquidator in the execution of her or his duty to gather in the estate of the insolvent company for the benefit of all unsecured creditors and the administration of the estate. The lack of mutuality also arises from the absence at the relevant date of any right or equity (vested or contingent) in the company or duty or obligation (vested or contingent) in the creditor to recover or to repay the preference, respectively. Thus, the essential requirements of s 553C are absent.
>
> That this is the position derives from an understanding of the legal context before the *Corporate Law Reform Act 1992* (Cth) (the 1992 Act), the text and context of changes made by the 1992 Act, including the enactment history and secondary materials, and the lack of any evident statutory purpose to bring about significant change in underlying principle affecting mutuality and unfair preferences. The above way of expressing the matter should not be seen as a departure from the importance of the text of the relevant provision or from the principles enunciated in the High Court as to statutory construction (about which there was no debate in the argument) and as encapsulated in the reasons of Middleton J, with which I agree. (See also *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner* [2020] FCAFC 192; 282 FCR 1 at 5–6 [2]–[5]). The text of a relevant provision of the Act introduced by the 1992 Act (s 588FI) is not consistent with s 553C being engaged by a debt to a preferred creditor and the liability of the preferred creditor to disgorge the preference. This construction and conclusion best reflects and vindicates the underlying purposes of both the law of set-off in insolvency and the law of preferences: by justly protecting creditors where genuinely reciprocal or mutual debts, credits or mutual dealings exist by netting such off in working out what is owed by and to the insolvent estate, which process in no way interferes with the pari passu distribution from the estate being part of an antecedent process to establish the estate and the claims upon it; and by ensuring that past preferential transactions are unwound to put the estate in the position in which it would have been had the preferential transaction not occurred, so that thereafter all creditors (including the erstwhile preferred creditor) may share equally in an estate unaffected by earlier preferential transactions."

The High Court of Australia has granted special leave to appeal from that decision.

Unreasonable director-related transaction (s 588FDA)

Section 588FDA provides that transactions between a company on the one hand, and a director or his or her close associate on the other, may be treated as voidable on a winding up of the company if they occur in circumstances where a reasonable person in the company's circumstances would not have entered into the transaction. In *Re Bryve Resources Pty Ltd* [2022] NSWSC 647, Williams J considered the scope of that section and followed Gleeson JA's decision in *Re IW4U Pty Ltd (in liq)* (2021) 150 ACSR 146; [2021] NSWSC 40 in holding that a payment is made for the benefit of a director, for the purposes of that section, if it "financially advantages the director, regardless of whether it is paid to a director or a close associate of the director". Her Honour also noted that the section required an assessment of whether the company's conduct was reasonable, objectively assessed by reference to all the company's circumstances. Her Honour held that no reasonable person would have made the relevant payments to reduce the director's debt where, although that would reduce the amount of the company's debt, it would then have insufficient funds to pay the debts of other creditors.

"Phoenixing" transactions (s 588FDB)

A recent judgment in *Re Intellicomms Pty Ltd (in liq)* [2022] VSC 228 has considered the prohibition on creditor-defeating positions (or, colloquially, "phoenixing" transactions) in s 588FDB of the *Corporations Act*. A disposition of property of a company is a creditor defeating disposition within s 588FBD(1) if (1) the consideration payable to the company for the disposition was less than the lesser of (i) the market value of the property or (ii) the best price that was reasonably obtainable for the property, having regard to the circumstances existing at that time the relevant agreement (as defined in s 9) for the disposition was made or, if there was no such agreement, at the time of the disposition; and (2) the disposition has the effect of preventing the property from becoming available for the benefit of the company's creditors in the winding up of the company; or hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding up of the company. Section 588FDB(2) extends the concept of a creditor defeating disposition to the position where a company does something that results in another person becoming the owner of property that did not previously exist; and, under s 588FDB(3), if a company makes a disposition of property to another person and the other person gives some or all of the consideration for the disposition to a person other than the company ("third party), then the company is taken to have made a disposition of the property constituting so much of the consideration as was given to the third party.

The transaction in issue in this case was the sale of Intellicomms' business assets to another company, whose sole director and shareholder was the sister of Intellicomms' director and a former employee of Intellicomms, immediately before Intellicomms was placed in creditors' voluntary liquidation by its sole director without notice to a major creditor and its shareholders. Gardiner AsJ observed that the sale agreement had:

> "all the hallmarks of a classic phoenix transaction, ie, it involves the transfer of the assets of an insolvent enterprise to an entity controlled by persons closely associated with it, leaving behind significant liabilities with no means to satisfy them."

Gardiner AsJ found that the sale was within the scope of s 588FDB where it took place for less than the market value or best price reasonably obtainable for the business, since a major creditor had expressed interest in acquiring the business at a higher price, albeit after it became aware of the sale of the asset. His Honour found that other matters which supported a finding of breach of the prohibition included the circumstances of the sale; the lack of an explanation why it was necessary to sell the business prior to voluntary liquidation rather than leave a liquidator to do so; the fact that the director had not used the voluntary administration regime to allow an orderly sale by the administrator; the fact that the director obtained several valuations of the business, on increasingly pessimistic bases, before selling it at the lowest of those valuations; and the fact that the sale had not been exposed to the open market. This is a relatively straightforward application of this section, in circumstances that might also have allowed the transaction to be set aside as an uncommercial transaction.

Directors' liability for insolvent trading (s 588G)

Section 588G of the *Corporations Act* imposes liability on a director in respect of debts incurred by a company that is insolvent (in the sense of being unable to pay its debts as and when they fell due) if there were (objectively) reasonable grounds for suspecting the company's insolvency. Although there are several defences to such liability, it does not depend on a wrongful intention. In *Quin v Vlahos* (2021) 64 VR 319; [2021] VSCA 205, the Court of Appeal of the Supreme Court of Victoria considered whether a director's funds could be taken into account in assessing a company's solvency. The Court reviewed the principles applicable to determination of a company's solvency (at [42])ff) and had regard to the indicators of insolvency in *ASIC v Plymin* (2003) 175 FLR 124; (2003) 46 ACSR 126; (2003) 21 ACLC 700; [2003] VSC 123 at [144]ff in determining the company's solvency. The Court emphasised the question whether the company had a degree of assurance that the director's funds would be available to it to meet the company's debts, on an objective basis, which would require that it could be said that it was "likely" at a point in time that the director's financial support would continue, and would generally not be satisfied where the director's report was qualified or the company could not compel the director to pay the money. The Court held that solvency was not established where a director had funds in his personal account, but exercised the discretion as to whether those funds would be made available to the company.

Section 588GA(1), introduced by the *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act* 2017 (Cth), excludes liability for insolvent trading under s 588G if, at a particular time after a person starts to suspect a company may become or be insolvent, he or she starts "taking a course of action that is reasonably likely to lead to a better outcome for the company" and the debt is incurred in connection with that course of action and during a specified time period. In *Re Balnz Pty Ltd (in liq)* [2020] VSC 652, a defence under that section was not made out where a company had failed to pay employee entitlements and had not complied with its obligation to provide returns to the Deputy Commissioner of Taxation. A further safe harbour from directors' liability for insolvent trading, for companies under restructuring under Pt 5.3B, was introduced by the *Corporations Amendment (Corporate Insolvency Reforms) Act* 2020 (Cth). Under s 588GAAB, that safe harbour is available if the debt is incurred during the restructuring of the company under Pt 5.3B and in the ordinary course of the company's business, or with the consent of the restructuring practitioner or by order of the Court. A person who wishes to rely on that provision in a proceeding for, or relating to, a contravention of s 588G(2) bears an evidential burden (as defined in s 588GAAB(4) as the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist) in relation to that matter. However, that safe harbor does not apply in relation to a person and a debt in the circumstances prescribed by the regulations.

Vesting of a security interest under s 588FL of the Corporations Act

Section 588FL of the Corporations Act provides that an unregistered "PPSA security interest" (as defined) vests in the company that granted the security in specified circumstances. The court may extend the time limit for registration of that security interest in an appropriate case. The scope of this section was considered by Brereton J in *Re Antqip Hire Pty Ltd* [2021] NSWSC 1122, where Antqip Hire Pty Ltd and a related company were placed in voluntary administration on 3 February 2014, entered into deeds of company arrangement in May 2014 and then refinanced their debt with a lender in October 2014, on the security of a General Security Agreement. Although that lender registered a security over all the Antqip companies' present and after-acquired property ("AllPAP") on the Personal Property Securities Register, that registration was erroneously made for a fixed term and lapsed in October 2017. After the lender discovered that registration had lapsed, it registered a new AllPAP security, but the Antqip companies were wound up within six months of the registration of that new security.

The lender recognised a risk that the security would vest in the Antqip companies under s 588FL and sought an order extending the time to register that interest under s 588FM of the *Corporations Act*. Brereton JA (sitting at first instance) held (at [48]ff) that that order was not necessary, because s 588FL did not apply to security interests granted by a company *afte*r the "critical time" (as defined), but only to security interests granted *before* the critical time that did not arise (by attachment under s 19 of the PPSA) until after the critical time. His Honour did not follow the earlier decision in *KJ Renfrey Nominees Pty Ltd (atf Renfrey Family Trust) v One Steel Manufacturing Pty Ltd (subject to deed of company arrangement)* (2017) 120 ACSR 117; [2017] FCA 325 ("*One Steel*") in that regard. In the somewhat unusual facts of the case, where the companies were still subject to the deeds of company administration when they were placed in liquidation, the "critical time" was when they had been placed in voluntary administration on 3 February 2014, so the security interests granted in October 2014 arose after the “critical time” for the purposes of s 588FL, and that section did not apply to the securities granted by the Antqip companies so as to vest them in the companies.[17]

Although the sequence of events in this case was perhaps unusual, Brereton J’s reasoning would also apply where a company under an administrator’s or deed administrator’s control borrows additional funds on security while in administration or subject to a deed of company arrangement. If that approach is followed, it would no longer be necessary for an administrator or deed administrator to bring application under s 588M of the *Corporations Act* in respect of such a borrowing, of the kind made in *One Steel*, *Re Ten Network Holdings Ltd (admins apptd) (recs & mgrs apptd)* [2017] FCA 1144, *Hill (administrator), Re Flow Systems Pty Ltd (admins apptd)* [2019] FCA 35 and *Re Ralan Arncliffe Pty Ltd (admins apptd) (recs & mgrs apptd)* [2019] NSWSC 1678.

Liquidators’ examinations

In *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (in liq) (*2022) 399 ALR 1; [2022] HCA 3, the High Court considered the scope of the examination provisions under the *Corporations Act*, and particularly the circumstances in which the conduct of an examination by a third party authorised by ASIC could be set aside as an abuse of process. The third party there sought to conduct an examination to investigate potential claims against the directors and auditors of Arrium arising from a 2014 capital raising, which would be available to some but not all shareholders of Arrium. At first instance, I declined to set aside the examination, which was sought to be undertaken by a class action plaintiff that had been authorised by ASIC to do so, on the basis that the information from it would potentially be for the company’s benefit. That decision was overturned by the Court of Appeal, which held that the examination was sought for the predominant purpose of pursuing a private claim, and not for the company’s benefit and was an abuse of process. The High Court, by a majority comprising Gageler J and Edelman and Stewart JJ, allowed the appeal from the Court of Appeal’s decisions and restored the orders at first instance.

Gageler J observed at ([126]) that the applicants’ purpose was not improper where it sought to obtain evidence and information to support proceedings in connection with the company’s examinable affairs. Edelman and Stewart JJ observed in a joint judgment (at [169]) that the purpose of the examination power under s 596A of the *Corporations Act* was not confined by reference to a benefit to the company, its creditors or contributories and (at [175]) that legitimate purposes under s 596A included enforcement of the *Corporations Act*, the promotion of compliance with the *Corporations Act* and the protection of shareholders or creditors from misconduct, and an examination that was conducted to advance the public purpose of enforcement of the *Corporations Act* was not conducted for an illegitimate purpose, irrespective of the litigant’s ultimate purpose. Kiefel CJ and Keane J dissented, and held that s 596A

[17] For commentary, see ERA Legal, “Case Note: in the matter of Antquip Hire Pty Ltd (in liq), 9 September 2021”.

should be limited to examinations for the benefit of the company's external administration for the company or its creditors or contributories considered as a whole.

The decision raises the possibility of multiple examinations conducted by a liquidator and possibly by one or more potential plaintiffs in a class action, and that will raise questions whether the conduct of multiple examinations would amount to an abuse of process, which may involve similar issues to those which have arisen in respect of parallel class actions. That risk may be limited by practical matters, including the fact that the examination power only arises where a company is subject to external administration; the applicant must first be designated by ASIC as an "eligible applicant" and ASIC, in designating eligible applicants, may well have regard to the risk of multiple overlapping examinations; and the Court has the ability to supervise the conduct of an examination and will likely seek to avoid duplication. The decision has since been considered in *PIC Lindfield 19 Pty Ltd (in liq)* [2022] NSWSC 271 at [64]-[68] and [82]-[83] and in *Jewel of India Holdings Pty Ltd* [2022] NSWSC 356.

Inquiries as to liquidators' conduct and compensation orders

Section 90-5 of the Insolvency Practice Schedule (Corporations) ("IPSC") provides that the Court may, on its own initiative during proceedings before the Court, inquire into the external administration of a company. Section 90-10 of the IPSC provides that the Court may, on the application of specified persons, inquire into the external administration of a company. Section 90-15 allows the Court to make such orders as it thinks fit in relation to the external administration of a company.

in *Djordjevick v Rohrt (as liquidator of ACN 091 818 302 Pty Ltd (in liq)* [2022] VSCA 84, the Court of Appeal of the Supreme Court of Victoria considered the process to be adopted by the Court in a claim for compensation under IPSC s 90-15. The Court of Appeal there held that an order for compensation could be sought under that section without necessarily invoking the inquiry process under IPSC s 90-5 or 90-10, and without necessarily undertaking the three stage process for an inquiry into a liquidator's conduct that applied under former s 536 of the *Corporations Act*, which involved an initial question whether an inquiry is warranted; then the conduct of the inquiry; and then, if a deficiency in the liquidator's conduct was established, consideration of the order to be made. The Court of Appeal also there recognised that the Court had a discretion whether to proceed to an order under s 90-15, at a preliminary stage, and the Court could also properly adopt the three stage process were the applicant invoked that process or did not lead all the evidence necessary to establish its claim for compensation when commencing the application.

Continuous disclosure

Section 674 of the *Corporations Act* provides that, if (1) a listed entity has information that a listing rule of a listed market requires it to notify to the market operator; (2) that information is not generally available; and (3) that information is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities (as defined) of the listed entity, then the entity must notify the market operator of that information in accordance with that rule: s 674(2). That section requires continuous disclosure by entities listed on ASX, since rule 3.1 of the ASX Listing Rules imposed a continuous disclosure obligation on listed entities, subject to limited exceptions.

The statutory continuous disclosure requirements were narrowed by the *Corporations (Coronavirus Economic Response) Determination (No 2)* 2020 (Cth), initially for six months from 26 May 2020 and then extended until 23 March 2021, to apply a test whether a disclosing entity knows, or is reckless or negligent with respect to, whether the information would, if it were generally available, have a material effect on the price or value of ED securities of the entity, rather than an objective test. The Commonwealth Government then announced permanent changes to these provisions and the misleading and deceptive conduct prohibition in this context, to introduce a requirement for intent, recklessness or negligence to establish civil penalty liability for a continuous disclosure breach, which took effect from 16 August 2021 under the *Treasury Laws Amendment (2021 Measures No 1) Act* 2021 (Cth).

The amended s 674 imposes strict liability for a breach of the continuous disclosure obligation and gives rise only to criminal liability or liability to an infringement notice, and is no longer a civil penalty provision or capable of supporting a claim for damages under s 1325 of the *Corporations* Act. Section 674A now requires disclosure of information that is not generally available, where the entity *knows or is reckless or negligent* with respect to whether the information would, if it were generally available, have a material effect on price. That provision is a civil penalty provision and allows a claim for damages under s 1325 of the *Corporations A*ct where that fault requirement is satisfied. Accessorial liability is now only available in respect of a fault-based prohibition in s 674A and not for a breach of s 674 of the *Corporations Act*. Section 1041H of the *Corporations Act* and s 12DA of the *Australian Securities & Investment Commission Act* 2001 (Cth) (“*ASIC Act”)* were also amended so that a claim for misleading and deceptive conduct is not available where conduct would not breach the fault-based obligation in s 674A. However, claims under those sections will still be available in respect of a claim for misleading and deceptive conduct in respect of a positive statement, including a positive statement which is said to be misleading by omission, and claims are still available under s 1041E of the *Corporations Act* which includes a negligence standard.

A claim for breach of the continuous disclosure provisions, in the context of disputed proofs of debt lodged by shareholders in the liquidation of Babcock & Brown Ltd (in liq) was dismissed at first instance. On appeal, in *Masters v Lombe* (2021) 154 ACSR 612; [2021] FCAFC 161, the Full Court of the Federal Court held that the trial judge had erred in not finding two contraventions to have been established, but upheld his finding that the shareholders had not established causation or loss, because they had not shown that the company's share price was higher than it would have been had the relevant disclosures been made.

A continuous disclosure claim failed at first instance in *Bonham v Iluka Resources Ltd* [2022] FCA 71 ("*Iluka*"), where Jagot J held that the statements made by the company did not convey the alleged representations, and held that it was not shown that the company did not have a reasonable basis for those statements. Her Honour followed *ASIC v GetSwift Ltd* [2021] FCA 1384 at [1081]-[1085] ("*GetSwift*") in holding that, by applying the definitions of "information" and "aware" in the ASX Listing Rules, the continuous disclosure obligation can attach to an opinion that the company's officers should have formed by reference to the information available to them, even if they did not actually form that opinion. That proposition remains controversial although it has been accepted in the Full Court of the Federal Court, as we will now see.

In *Crowley v Worley Ltd* [2022] FCAFC 33, The Full Court of the Federal Court allowed an appeal in respect of a continuous disclosure claim that had failed at first instance and remitted the matter for a limited further hearing at first instance. The majority, Jagot and Murphy JJ, held (at [54]ff) that the trial judge had not sufficiently focused on the information known to the company and its executives, as distinct from its board, and had given insufficient weight to inferences which could be drawn where Worley Ltd had not called several of its executives . The Court again expressed the view, consistent with *GetSwift* and *Iluka*, that information can fall within the scope of the continuous disclosure obligation under s 674 of the *Corporations Act*, again applying the definitions of "information" and "aware" in the ASX Listing Rules, where company officers ought reasonably to have formed, but did not form, an opinion based on the facts known to them, and Perram J there qualified a different view which he had previously appeared to express as to that matter in *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2015) 322 ALR 723; [2015] FCA 149 at [157].

Obviously, class actions alleging continuous disclosure breaches and litigation funding have a practical connection, where substantially all such actions are litigation funded. In very recent decision of the Full Court of the Federal Court, *LCM Funding Pty Ltd v Stanwell Corporation Ltd* [2022] FCAFC 103, the Court departed from the position previously taken by the Full Court of the Federal Court of Australia in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 that a litigation funding scheme could be a managed investment scheme for the purposes of the *Corporations Act*.

Financial services regulation

Personal and general advice

In *Australian Securities and Investments Commission v Westpac Securities Administration Ltd* [2019] FCAFC 187, the Full Court of the Federal Court had considered the scope of the term "personal advice" as defined in s 766B(3) of the *Corporations Act*, which is relevant to the best interests obligations imposed by Pt 7.7A Div 2 of the *Corporations Act.* The Full Court there held that a marketing campaign in respect of the consolidation of superannuation accounts had involved giving “personal advice” and had failed to comply with the provider’s “best interests” duty under s 961B of the *Corporations* Act, and also upheld the finding at first instance that that marketing campaign had contravened the “efficiently, honestly and fairly” requirement in s 912A of the *Corporations Act*.

The High Court dismissed an appeal from that decision in *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118; (2021) 387 ALR 1; (2021) 150 ACSR 125; [2021] HCA 3. That appeal was directed to whether Westpac had given “personal advice” for the purposes of s 766B(3)(b) of the *Corporations Act*, and it was common ground that, if it had done so, it had breached, inter alia, the best interests duty in s 961B(1) of the *Corporations Act*, which applies to an adviser who gives personal advice to a retail client. The plurality (Kiefel CJ, Bell, Gageler and Keane JJ) held that the advice given by Westpac in that case was personal advice, because a reasonable person in the position of each of the superannuation account holders who received that advice might expect it to have considered one or more of their objectives, financial situations and needs. The plurality observed (at [20]) that s 766B(3)(b) contemplated a consideration of at least one aspect of a client’s objectives, financial situations or needs and could apply where the relevant decision was focused on one aspect of the client’s financial affairs.

Gordon J observed (at [57]) that s 766B(3)(b) establishes an objective test to determine whether advice is “personal advice”, to be applied at the time that financial product advice is given and having regard to the circumstances in which that advice is given, and (at [58]-[59]) that the paragraph “captures circumstances where a reasonable person might expect the provider to have taken into account, had regard to, or given attention to, one or more of the person's objectives, financial situation and needs.” Her Honour also observed (at [65]) that s 766B(3)(b):

> “… focuses on what a reasonable person would expect "the provider" – not the retail client – to have done. It is a consumer protection provision in which the notion of "considered" includes not only circumstances involving a certain type, level or duration of consideration (as where there is an opportunity for active, mature, intellectual reflection over time) but also where an adviser provides a prompt or immediate response. It thus ensures that advisers cannot avoid the disclosure and conduct obligations which attach to the provision of personal advice simply by failing to consider one or more of the person's objectives, financial situation and needs.”

Her Honour observed (at [67]) that s 766B(3) is engaged if an adviser (in fact or by reasonable apprehension) considers at least an aspect of one of the three categories – namely, a person's objectives, financial situation or needs – and whether that has occurred will be a fact specific inquiry. Her Honour held that Westpac gave personal advice within the meaning of s 766B(3)(b) on the relevant facts. This decision will preserve a reasonably wide operation for the concept of "personal advice" and associated obligations, including the statutory best interests duty in s 961B of the *Corporations Act*.[18]

Breach reporting

The new breach reporting regime introduced by the *Financial Sector Reform (Hayne Royal Commission Response) Act* 2020 (Cth) commenced on 1 April 2021 and expands the kinds of situations that need to be reported by licensees to ASIC. A reporting obligation is imposed on a licensee where there are reasonable grounds to believe a reportable situation (as defined) has arisen in relation to the licensee or individuals who provide personal advice to retail clients in relation to specified financial products or are mortgage brokers. The concept of "reportable situations" includes a breach or likely breach of a "core obligation" (as defined) that is significant; an investigation into a breach or likely breach of a core obligation that is significant; an "additional reportable situation" (as defined), including conduct involving gross negligence in the course of providing a financial service or serious fraud; and reportable situations about other licensees. The concept of "core obligation" includes the general obligations under s 912A of the *Corporations Act* and obligations to comply with specified financial services laws under s 912A(1)(c) of the *Corporations Act*. Breach reports are required to be lodged with ASIC in the prescribed form, within 30 calendar days after the licensee first knows that, or is reckless with respect to whether there are reasonable grounds to believe, a reportable situation (as defined) has arisen.[19]

Securities hawking

Amendments to the share hawking regime commenced on 5 October 2021, as introduced by the *Financial Sector Reform (Hayne Royal Commission Response) Act* 2020 (Cth) to give effect to recommendations from the Financial Services Royal Commission. Those amendments replace the existing provisions dealing with securities hawking in Pts 6D and 7 of the *Corporations Act* with a new prohibition in s 992A, which provides that a person must not offer a financial product for issue or sale to another person (referred to as "the consumer"), or request or invite the consumer to ask or apply for a financial product or to purchase a financial product, if (1) the consumer is a retail client (as defined in s 761G); and (2) the offer, request or invitation is made in the course of, or because of, an unsolicited contact with the consumer. The prohibition does not apply to an offer, request or invitation made by an adviser who is giving advice that is subject to the best interests obligation under Pt 7.7A Div 2 or of a kind prescribed by regulation: s 992A(2). A contravention of the section is a strict liability offence: s 992A(9). Section 992AA will allow a right of return and refund for products issued or sold in contravention of the section.

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[18] For commentary, see M Pecham, 'Westpac v ASIC: High Court addresses some important questions for Australian Financial Service Licensees' (2021) 37(3&4) *Banking Law Bulletin* 38, [31].

[19] For commentary, A Eastwood, "Breach Reporting Reforms" (2021) *AJCL* 178.

Design and distribution powers

Design and distribution obligations in respect of financial products under Pt 7.8A of the *Corporations Act* also commenced on 5 October 2021. The first product design obligation requires an issuer to make a "target market determination" for its product. The second design obligation requires an issuer to review a target market determination for a financial product during a review period (as defined) and when a review trigger (as defined) occurs, or an event or circumstance occurs that would reasonably suggest that the target market determination is no longer appropriate.

The first distribution obligation, attaching to persons who engage with a potential investor in relation to a product, prohibits retail product distribution conduct (as defined) in relation to a financial product if the issuer has failed to make a target market determination in respect of the product. Div 3 imposes further obligations as to the distribution of relevant financial products. Broadly, distributors are required to put in place reasonable controls to ensure products are distributed in accordance with the identified target markets and comply with reasonable requests for information from the issuer in relation to the review of the products. The regime also introduces requirements in s 994F for record keeping in respect of a product issuer's target market determination, review triggers, review periods and the reasons for decisions about them and requirements in s 994G as to notification to ASIC of significant dealings in a product that are not consistent with a target market determination. Under s 994H, ASIC may require (1) a person who makes or is required by to make, a target market determination; or (2) a regulated person (as defined) who engages in retail product distribution conduct (as defined) in relation to a financial product to provide ASIC with specified information, including distribution information, relating to the financial product. Section 994J allows ASIC to make a stop order if it is satisfied that a provision of Pt 7.8A Div 2 (target market determinations) or s 994E (reasonable steps to ensure consistency with the target market determination) has been contravened in relation to a financial product, generally subject to a requirement for a hearing, and also allows the making of an interim order without a hearing in circumstances of urgency. Section 994M provides for civil liability where a person contravenes specified sections and another person (defined as the "client") suffers loss or damage because of the contravention.

Product intervention power

Part 7.9A of the *Corporations Act*, introduced by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act* 2019 (Cth), confers a product intervention power on ASIC. That power applies to financial products regulated by the *Corporations Act* that are, or are likely to be, available for acquisition by retail clients by way of issue and also extends to products that may be provided by a person in the course of engaging in a credit activity or proposed credit activity for the purposes of the *National Consumer Credit Protection Act* 2009 (Cth), including credit contracts, mortgages and guarantees, and consumer leases. Broadly, the product intervention power allows ASIC to intervene in relation to a product (or class of products), where ASIC is satisfied that the product (or class of products) has resulted in, or is likely to result in, significant detriment to retail clients. ASIC may then order that a specified person must not engage in specified conduct in relation to the product or class of products, either entirely or except in accordance with conditions specified in the order. ASIC must take specified matters into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

ASIC exercised its product intervention power in respect of a form of short-term credit and, in *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479, the Federal Court of Australia upheld that product intervention order. An appeal from that decision was dismissed in *Cigno Pty Ltd v Australian Securities and Investments Commission* [2021] FCAFC 115. The Full Court there observed (at [48], [53]-[55]) that Pt 7.9A of the *Corporations Act* was "intended to provide a beneficial, remedial set of powers" and a broad construction should be favoured where the power focusses on detriment to retail clients and is preventative in nature, where such detriment may arise from the circumstances in which a financial product is supplied, utilised or distributed.

Wider law reform

The Australian Law Reform Commission is presently undertaking a review of the legislative framework for corporations and financial services legislation.

Introduction of Ch 8B of the Act - corporate collective investment vehicles

A new Ch 8B of the *Corporations Act*, introduced by the *Corporate Collective Investments Framework and Other Measures Act* 2022 which largely commences from 1 July 2022, will allow a corporate collective investment vehicle ("CCIV") to be used as an alternative to a unit trust or managed investment scheme. That Chapter is lengthy and applies, disapplies or modifies other provisions of the *Corporations Act* in their application to CCIVs. Broadly, a CCIV is a type of company limited by shares which has a public company as its sole director and does not have employees or a secretary. The corporate director of the CCIV must hold an Australian financial services licence and offers of investment in the CCIV can be made under a product disclosure statement. CCIVs must have at least one "sub-fund" and any shares issued by the CCIV must be referable to a sub-fund. The assets and liabilities of a sub-fund are segregated from those of other sub-funds and the CCIV itself. An investment in a CCIV will receive a similar tax treatment to a trust, if it passively holds assets. The ASX Listing Rules are to be amended to permit listing of a sub-fund of a CCIV, and ASIC has recently issued ASIC Consultation Paper 360 (March 2022) dealing with the CCIV regime.

Statutory unconscionability

Section 12CA of the *ASIC Act* (broadly corresponding to s 20 of the *Australian Consumer Law*) prohibits unconscionability "within the meaning of the unwritten law" and s 12CB of the *ASIC Act* (broadly corresponding to s 21 of the Australian Consumer Law) prohibits “statutory unconscionability” within a potentially wider scope.

In *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* (2021) 388 ALR 577; (2021) 151 ACSR 98; [2021] FCAFC 40, the Full Court of the Federal Court found that Quantum Housing Group Pty Ltd had engaged in unconscionable conduct in seeking to ensure that investors with rental dwellings used property managers that it had approved, although it was not established that those investors had any particular vulnerability, disability or disadvantage. The majority held that it was not necessary to establish a pre-existing disability, vulnerability or disadvantage, or that a party took advantage of such a disability, vulnerability or disadvantage, in order to establish statutory unconscionability, which could be established where the conduct was against conscience, as informed by the norms and values of acceptable commercial behaviour, including honesty, fairness with dealing with customers, and the performance of commercial bargains. On the other hand, unconscionable conduct was not established where a lessor called upon an unconditional guarantee given by a third party and had acted openly and honestly although in its own interests, in *Good Living Company Pty Ltd as trustee for the Warren Duncan Trust No 3 v Kingsmede Pty Ltd* [2021] FCAFC 33.

In *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, the High Court considered the position where the lender made a loan to a company associated with Mr Stubbings which had no assets and did not trade. The loan was described as a business loan but was to be used to purchase a property and was secured over three properties owned by Mr Stubbings. The trial judge found that the lender’s agent, a law firm, had knowledge of Mr Stubbings’ vulnerability, arising from his financial circumstances and lack of commercial understanding at the time of the transaction, although he had obtained certificates of independent advice from a solicitor and accountant, and Mr Stubbings succeeded in establishing unconscionability at first instance.

That decision was overturned in the Court of Appeal of the Supreme Court of Victoria and then reinstated by the High Court. The plurality in the High Court held that it was unconscionable for the lender to exercise its rights under guarantees given by Mr Stubbings, where the transaction was such that his default and the loss of his equity in the other secured properties was its inevitable consequence. Their Honours gave little weight to the certificates of independent advice, noting their “boiler-plate language” and that they had incorrectly stated the purpose of the loan, which the law firm acting as the lender’s agent must have known. Gordon J also found a contravention of the statutory prohibition on unconscionable conduct in connection with the supply of financial services under s 12CB of the *ASIC Act*, arising from a system of conduct or pattern of behaviour by which a lender lent money secured against a guarantor’s property, while seeking to avoid knowledge of the guarantor’s personal circumstances and of its vulnerability.