SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

MACKS v VISCARIELLO

[2017] SASCFC 172

Judgment of The Full Court
(The Honourable Justice Lovell, The Honourable Auxiliary Justice Corboy and The Honourable Auxiliary Justice Slattery)

22 December 2017

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT - FUNCTIONS OF APPELLATE COURT

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - SOUTH AUSTRALIA - POWERS OF COURT - OTHER MATTERS

CORPORATIONS - MANAGEMENT AND ADMINISTRATION - DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION - OFFICERS OF INSOLVENT CORPORATIONS - GENERALLY

CORPORATIONS - MANAGEMENT AND ADMINISTRATION - DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION - OFFENCES - CONTRAVENTION OF PROVISIONS OF ACT

CORPORATIONS - WINDING UP - LIQUIDATORS - SUPERVISION OF LIQUIDATORS

Mr Viscariello, the respondent and cross-appellant, was a director of Bernsteen Pty Ltd and Newmore Pty Ltd. The two companies controlled a number of stores that sold linen

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On Appeal from SUPREME COURT OF SOUTH AUSTRALIA (THE HONOURABLE CHIEF JUSTICE KOURAKIS) [2014] SASC 189

Appellant/Cross-Respondent: PETER IVAN MACKS Counsel: MR M HOFFMANN QC WITH MR B DOYLE AND MR I THOMAS - Solicitor: LIPMAN KARAS
Respondent/Cross-Appellant: JOHN VISCARIELLO (13/02/2017 - 16/02/2017) Counsel: MR D HYDE WITH MR B PETRIE - Solicitor: UJVARI LAWYERS
Respondent/Cross-Appellant: JOHN VISCARIELLO (17/02/2017) In Person
Intervener: ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA Counsel: MR M WAIT SC WITH MS F MCDONALD - Solicitor: THE CROWN SOLICITOR FOR THE STATE OF SOUTH AUSTRALIA

Hearing Date/s: 13/02/2017 to 17/02/2017

File No/s: SCCIV-06-165

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products. In late 2001 the businesses experienced financial difficulties. Mr Macks was appointed administrator on 5 December 2001.

Negotiations between Mr Viscariello and a potential purchaser of the businesses, Mr Bart, led to the production of a proposed Deed of Company Arrangement (DOCA). The DOCA was not put before the meeting of creditors as Mr Macks considered that the major creditor (ARL) had not agreed to the terms. On 21 December 2001 the companies were placed into liquidation.

Mr Viscariello sued Mr Macks, in his capacity as administrator and liquidator, alleging (inter alia) that he was in breach of various statutory duties both as administrator and liquidator. Mr Viscariello sought damages and declarations.

Mr Viscariello alleged that Mr Macks as administrator (inter alia) failed to carry out and/or adequately and properly perform his duties as Voluntary Administrator; that he made false and misleading statements to creditors, that he breached his duties by failing to administer the companies so as to maximise their prospects of continuing to trade.

The Primary Judge rejected Mr Viscariello's claims. Mr Viscariello cross-appealed against the findings of the Primary Judge.

Mr Viscariello alleged that Mr Macks, as liquidator, was motivated by personal motives, wishes and intentions that caused him not to act in the best interests of the creditors, members and contributories of the companies and to act unprofessionally. Mr Viscariello also alleged that Mr Macks acted with an improper purpose.

Mr Viscariello's claims included a declaration that (inter alia) Mr Macks:

a. Be removed as liquidator of the companies;

b. Breached the duties imposed by ss 180, 181 and 182 of the Corporations Act (CA);

c. Be not entitled to charge or retain any fees.

The Primary Judge found that in conducting the liquidation Mr Macks had breached ss 180, 181 and 182 of the CA and issued declarations to that effect. Central to the findings and resultant declarations was a finding that Mr Macks had acted with four substantive and actuating collateral purposes in pursuing litigation in breach of his duties under the CA.

Mr Macks appealed the findings of the Primary Judge submitting (inter alia) the Primary Judge: failed to adequately deal with the evidence; failed to provide adequate reasons for his findings; failed to apply the Briginshaw v Briginshaw principle when making his findings; failed to dismiss the application of Mr Viscariello to amend his pleadings after the Reasons had been delivered.

Held (the Court), allowing the appeal on grounds 2, 3, 4 & 5; grounds 1, 6, 8, & 9 dismissed:

1. The Primary Judge had the power to make declarations pursuant to s 31 of the Supreme Court Act 1935 (SA).

2. On reviewing the evidence the declaration made by the Primary Judge that Mr Macks breached s 180 of the CA from June 2005 is varied: the Court orders that the declaration of breach of s 180 of the CA be varied to commence on 28 April 2006.

a. The finding that Mr Macks acted with the four substantive and actuating collateral purposes from June 2005 is set aside.

3. The findings and therefore the declarations that Mr Macks breached ss 181 and 182 of the CA from June 2005 are set aside.

4. The findings that the Bernsteen proceedings and George proceedings were from June 2005 an abuse of process are set aside.

5. The Primary Judge did not err in allowing the amendments to the pleadings after the delivery of the Primary Judge's reasons.

6. The issues of allegations of a breach of ss 181 and 182 on the exercise of the Court's discretion should not be remitted for trial.

CORPORATIONS - VOLUNTARY ADMINISTRATION - ADMINISTRATOR - FUNCTIONS, POWERS, RIGHTS AND LIABILITIES GENERALLY

CORPORATIONS - MEMBERSHIP, RIGHTS AND REMEDIES - MEMBERS' REMEDIES AND INTERNAL DISPUTES - PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER

CORPORATIONS - MANAGEMENT AND ADMINISTRATION - DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION - FIDUCIARY AND RELATED STATUTORY DUTIES - OF CARE, SKILL AND DILIGENCE

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - INTERFERENCE WITH JUDGE'S FINDINGS OF FACT - FUNCTIONS OF APPELLATE COURT

A cross-appeal regarding the conduct of the appellant as administrator was filed and heard at the same time as the appeal outlined above.

Held (the Court), dismissing the cross-appeal:

1. An administrator does not owe a fiduciary duty to disclose all material information to creditors.

2. The conduct of Mr Macks the subject of the claims was not in "trade and commerce".

3. The Primary Judge did not err in finding that ARL would have rejected the revised DoCA had it been put to the second creditors' meeting.

4. The Primary Judge did not err in finding that the s 439A CA report was not misleading.

5. The Primary Judge did not err in failing to find that Mr Macks was under a duty to put the DoCA proposal to the meeting of creditors and that therefore Mr Viscariello suffered a "loss of chance".

6. The Primary Judge did not err in refusing to extend time for an application by Mr Viscariello under s 1321 of the CA.

Corporations Act 2001 (Cth) s 179, s 180, s 181, s 182, s 185 s 206C, s 206E, s 236, s 439A, s 447E, s 503, s 798H, s 1317E, s 1317F, s 1317G, s 1317H, s 1317J, s 1317K, s 1321, s 1323, s 1324, s 1325, s 1337A, s 1337B, pt 1.1A, pt 2D.1, pt 2F, pt 5.3A, pt 5.5, pt 9.4B, pt 9.5, pt 9.6A, Div 4; *Supreme Court Act 1935* (SA) s 31; *Judiciary Act 1903* (Cth) s

78B; *Federal Court of Australia Act 1976* (Cth) s 21; *Supreme Court Civil Rules 2006* (SA) r 57, r 286(3)(c), referred to.
Terry v Leventeris (2011) 109 SASR 358; *Fox v Percy* (2003) 214 CLR 118; *RESI Corporation v Munzer* [2016] SASCFC 15; *Holloway v McFeeters* (1956) 94 CLR 470; *Browne v Dunn* (1893) 6 R 67; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd (No 2)* [2017] FCAFC 99; *NH v Director of Public Prosecutions (SA)* (2016) 334 ALR 191; *Wellington Capital Ltd v Australian Securities & Investments Commission* (2014) 254 CLR 288; *Rizeq v Western Australia* (2017) 344 ALR 421; *Stead v State Government Insurance Commission* (1986) 161 CLR 141, applied.
Viscariello v Macks [2014] SASC 189; *Viscariello v Macks (No 2)* [2015] SASC 160; *Cropper v Smith* (1884) 26 Ch D 700; *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653; *Spies v The Queen* (2000) 201 CLR 603; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; *R v Ricciardi* (2017) 128 SASR 571; *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193; *Windoval Pty Ltd v Donnelly* (2014) 226 FCR 89; *Sullivan v Trilogy Funds Management Ltd* [2017] FCAFC 153; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Lifeplan Australia Friendly Society Ltd v Woof* [2013] FCA 613; *Hamilton-Smith v Bernsteen Pty Ltd* [2005] SASC 190; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Chahwan v Euphoric Pty Ltd (t/as Clay & Michel)* (2008) 227 FLR 43; *Mercantile Mutual Insurance (Australia) Ltd v Farrington* (1996) 44 NSWLR 634; *Genocanna Nominees Pty Ltd v Thirsty Point Pty Ltd (No 2)* [2006] FCA 1335; *FF Seeley Nominees Pty Ltd v EL AR Initiations (UK) Ltd (No 2)* (1990) 55 SASR 314; *University of Western Australia v Grey (No 24)* [2008] FCA 1400; *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* (2010) 185 FCR 237; *Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437; *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99; *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722; *The Bell Group Ltd (in liq) & Ors v Westpac Banking Corporation & Ors (No 9)* (2008) 225 FLR 1; *Hausmann v Smith* (2006) 24 ACLC 688; *Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267; *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512; *West Mercia Safetywear Ltd (in liq) v Dodd* [1988] BCLC 250; *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425; *Tabet v Gett* (2010) 240 CLR 537; *Re ION Ltd (No 2)* [2012] FCA 561; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1; *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17; *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465; *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; *ASIC v Adler* (2002) 42 ACSR 74; *Daniels v Anderson* (1995) 37 NSWLR 438; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434; *Miller & Associated Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; *Robinson Helicopter Co Inc v McDermott* (2016) 331 ALR 550; *Ashby v Slipper; Harmer v Slipper* (2014) 219 FCR 322; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362; *Ah Toy v Registrar of Companies (NT)* (1986) 10 FCR 356; *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; *Volpes v Permanent Custodians Pty Ltd* [2005] NSWSC 827; *McIntosh v Shashoua* (1931) 46 CLR 494; *Rozenbes v Kronhill* (1956) 95 CLR 407; *Mead v Watson (as Liquidator for Hypec Electronics Pty Ltd)* (2005) ACLC 718; *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547; *Hall v Poolman* (2009) 75 NSWLR 99; *Wainohu v New South Wales* (2011) 243 CLR 181; *AK v Western Australia* (2008) 232 CLR 438; *Director General of Department of Community Services; Re Sophie* [2008] NSWCA 250; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; *Henderson v Queensland* (2014) 255 CLR 1; *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432; *FAI General Insurance Co Ltd v RAIA Insurance Brokers Ltd* (1992) 108 ALR 479; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102(S); *Warramunda Village Inc v Pryde* (2001) 105 FCR 437; *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union* (2007) ATPR 42-140; *Crouch v The Commonwealth* (1948) 77 CLR 339; *Commonwealth of Australia v BIS Cleanaway Ltd* (2007) 214 FLR 271; *Parker, In the matter of Purcom No*

34 Pty Ltd (In Liq) (No 2) [2010] FCA 624; *Parker, In the matter of Purcom No 34 Pty Ltd (In Liq)* [2010] FCA 263; *Cruse v Multiplex Ltd* (2008) 172 FCR 279; *One.Tel Ltd (in liq) v Rich* (2005) 190 FLR 443; *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2013] 2 Qd R 27; *Grimaldi v Chameleon Mining NL & Anor (No 2)* (2012) 200 FCR 296; *Mesenberg v Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128; *Emlen Pty Ltd v St Barbara Mines Ltd* (1997) 24 ACSR 303; *Idylic Solutions Pty Ltd; Re Australian Securities and Investments Commission v Hobbs* (2013) 93 ACSR 421; *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 73 FCR 161; *McCausland v Surfing Hardware International Holdings Pty Ltd (No 2)* [2014] NSWSC 163; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Yates Security Services Pty Ltd v Keating* (1990) 25 FCR 1; *Gordon v Tolcher* (2006) 231 CLR 334; *R v Gee* (2003) 212 CLR 230; *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638; *Deputy Commissioner of Taxation (Cth) v Moorebank Pty Ltd* (1988) 165 CLR 55; *Australian Securities and Investments Commission v Edge* (2007) 211 FLR 137; *Re Biposo Pty Ltd; Condon v Rogers* (1995) 120 FLR 399; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Friend v Brooker* (2009) 239 CLR 129; *Liftronic Pty Ltd v Unver* (2001) 179 ALR 321; *Glennan v Commissioner of Taxation* (2003) 198 ALR 250; *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641, discussed.

MACKS v VISCARIELLO
[2017] SASCFC 172

Full Court: Lovell J, Corboy AJ and Slattery AJ

THE COURT

Summary and Overview

1 The respondent and cross-appellant, Mr Viscariello, was the sole director and effective controller of Bernsteen Pty Ltd and Newmore Pty Ltd.[1] Bernsteen and Newmore (the Companies) sold manchester through retail outlets trading under the names 'Bedroom Mazurka' and 'Faulty Sheets and Towels'. Associated Retailers Ltd (ARL) was a secured creditor of the Companies. It supplied much of the Companies' merchandise.

2 The Companies experienced financial difficulties in late 2001. Mr Viscariello sought to resolve those difficulties by entering into a heads of agreement for the sale of the Companies' businesses to Mr Bart. The agreement was made on 27 November 2001. The agreement included terms that significantly affected ARL.

3 The appellant and cross-respondent, Mr Macks, is a liquidator. He was a principal of the firm PPB. Mr Viscariello consulted Mr Macks at the time that the heads of agreement was made. Mr Macks had previously acted as the administrator of the Companies under deeds of company arrangement (DOCAs) made in 1995.

4 On 5 December 2001, Mr Viscariello determined that the Companies were insolvent or likely to become insolvent in the near future[2] and Mr Macks was appointed as their administrator. Mr Viscariello anticipated that the Companies would enter into DOCAs that gave effect to the heads of agreement following Mr Macks' appointment. However, ARL advised that it would not consent to DOCAs on the terms proposed by Mr Viscariello and Mr Bart.

5 Mr Macks then prepared a revised heads of agreement to be made by Mr Viscariello, Mr Bart and ARL (the revised Bart proposal). However, ARL refused to agree to the revised terms. Accordingly, Mr Macks advised creditors that there was no proposal to rescue the Companies and they went into liquidation on 21 December 2001. Mr Macks was appointed as the liquidator.

6 Mr Viscariello was aggrieved by that outcome. Eventually, in December 2004 he gave notice of his intention to commence proceedings against Mr Macks. The foreshadowed claims made allegations about Mr Macks' conduct as the administrator of the Companies.

7 Mr Viscariello served his first statement of claim in these proceedings in February 2006. He alleged that Mr Macks had misled creditors about the revised

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[1] It is convenient to refer to Mr Viscariello and Mr Macks by name throughout these reasons rather than as cross-appellant/respondent and appellant/cross-respondent respectively.

[2] A minute of resolutions made by Mr Viscariello as the sole director of Bernsteen was tendered as an exhibit (item 315 – P292). The minute recorded resolutions that Bernsteen was insolvent or likely to become insolvent in the near future. No minute recording a similar resolution in respect of Newmore was received as an exhibit but Mr Viscariello accepted in his evidence that he knew that the Companies were either insolvent or about to become insolvent as at 5 December 2001 (ts 295).

Bart proposal and had breached duties that he owed as the administrator of the Companies by advising that there was no alternative to liquidation. He also alleged that Mr Macks had sold the Companies' assets at an undervalue. He claimed to have lost the chance to avoid losses suffered as a consequence of the Companies being wound up.

8 Mr Macks sold some of Bernsteen's stock to Ms Hamilton-Smith. She was, at that time, Mr Viscariello's partner. Ms Hamilton-Smith defaulted under the sale agreement and in August 2002, Bernsteen commenced proceedings in the Magistrates Court to recover the sum of $28,000, being the amount payable for the stock (the Bernsteen action).

9 Ms Hamilton-Smith responded by counterclaiming against Mr Macks and embarking on a campaign of interlocutory attrition. As this court observed on the hearing of one interlocutory appeal, '[Ms Hamilton-Smith], or those advising her, are of a litigious disposition arguing every point at every stage of the process'.[3] The result was that the Bernsteen action became inordinately protracted; Bernsteen incurred substantial legal expenses that were grossly disproportionate to the debt claimed; and Mr Macks effectively lost control of the proceedings.

10 In August 2003, Ms George obtained a judgment against Ms Hamilton-Smith for an amount of approximately $5,000. The judgment was not satisfied as at June 2005. Mr Macks' legal advisors, Minter Ellison, proposed that he indemnify Ms George for the cost of presenting a petition in bankruptcy against Ms Hamilton-Smith as a way of extracting himself from the morass that had enveloped the Bernsteen action. It was suggested that the indemnity would be for an amount of $2,000 but the indemnity was not actually capped.

11 As with the Bernsteen action, the proceedings to bankrupt Ms Hamilton-Smith (the George bankruptcy proceedings) became enmeshed in interlocutory disputes. Further, Ms Hamilton-Smith commenced proceedings seeking a declaration that the judgment debt had been satisfied by an agreement that Ms George accept manchester products to a specified value and by performance of that agreement in December 2003 (the George declaration proceedings).

12 Consequently, by April 2006 Ms Hamilton-Smith had not been declared bankrupt; the Bernsteen action (including Ms Hamilton-Smith's counterclaim), the George bankruptcy proceedings and the George declaration proceedings (together, the Proceedings) remained on foot and Bernsteen continued to incur substantial legal expenses. At the end of April 2006, Mr Macks and his legal advisors discussed further strategies for concluding the litigation with Ms Hamilton-Smith but it was not until February 2007 that the Proceedings were compromised. The settlement required Ms Hamilton-Smith to pay $8,000 to Bernsteen and $6,000 to Ms George. By that time, approximately $280,000 had been paid in legal fees to Minter Ellison and counsel on account of the Bernsteen

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[3] *Hamilton-Smith v Bernsteen Pty Ltd* [2005] SASC 190 [21].

action (and approximately $151,000 in fees had been written off) and approximately $180,000 had been paid in connection with the proceedings involving Ms George.[4]

13 Mr Viscariello subsequently added claims in these proceedings alleging that Mr Macks had breached the duties that he owed as the liquidator of Bernsteen by agreeing to indemnify Ms George and by conducting and expending the company's funds on the Proceedings.

14 The trial of Mr Viscariello's claims in these proceedings occupied 49 hearing days. The Primary Judge delivered his reasons (the Reasons) approximately 21 months after the trial had been completed. There were further hearings following the publication of the Reasons. Those hearings concerned the relief to be granted and an application by Mr Viscariello to amend his statement of claim to give effect to the findings that had been made in the Reasons.

15 The Primary Judge dismissed the claims made against Mr Macks in his capacity as the administrator of the Companies. Briefly stated, his Honour found that ARL had not agreed to the revised Bart proposal; that consequently, there was no viable proposal for a DOCA to be put to the Companies' creditors; that the liquidation of the Companies was inevitable; and that Mr Macks had not misled the creditors nor was there evidence that he had breached his duties by, for example, selling the Companies' assets at an undervalue.

16 Mr Viscariello appeals, by way of cross-appeal, from those findings. We have concluded that none of the grounds of the cross-appeal should be allowed and the cross-appeal will be dismissed.

17 As to the claims made against Mr Macks in his capacity as the liquidator of Bernsteen, the Primary Judge found that Mr Macks breached the duties that he owed under ss 180 – 182 of the *Corporations Act 2001* (Cth) (CA) by continuing to prosecute the Bernsteen action after June 2005 and by initiating and maintaining the George bankruptcy proceedings. His Honour characterised Mr Macks' conduct as unreasonable and found that he had been actuated by collateral and improper purposes in pursuing the Proceedings. Mr Macks was removed as the liquidator of the Companies and declarations were made to give effect to the findings of breach. However, a claim for compensation was refused as Mr Viscariello lacked standing to seek damages or equitable compensation for a breach of the duties owed by Mr Macks to Bernsteen.

18 Mr Macks appeals from those findings. He complains about delay in the delivery of the Reasons and contends that the Reasons did not adequately explain the findings of breach (it should be noted that there was no complaint about delay or the adequacy of the Reasons in the cross-appeal). Mr Macks also complains that it was not alleged that he had acted for an improper purpose in pursing the

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4 *Viscariello v Macks* [2014] SASC 189, [704], [705].

Proceedings and accordingly, he had been denied procedural fairness. He further alleges that the Primary Judge made errors of fact and failed to engage with the whole of the evidence in making his findings and that, in any event, the court did not have power to make declarations to the effect that he had contravened ss 180 - 182 CA.

19 We have concluded that the findings that Mr Macks breached his statutory duties by prosecuting the Bernsteen action from June 2005 and by initiating and maintaining the George bankruptcy proceedings should be set aside. However, we have found that Mr Macks breached s 180 CA by failing to take steps after April 2006 to resolve the litigation with Ms Hamilton-Smith. We have also concluded that the court has power to make a declaration to that effect.

20 Finally, Mr Macks appeals from the orders made by the Primary Judge after the Reasons were delivered permitting Mr Viscariello to amend his statement of claim. Mr Macks contended that his Honour erred in exercising his discretion to permit the amendments; that the amendments did not reflect the terms on which leave had been granted; and that there were numerous defects in the pleading as amended.

21 We have concluded that the Primary Judge had power to permit Mr Viscariello to amend the statement of claim after the Reasons were delivered so as to incorporate allegations about matters that had been fairly raised and litigated in the trial. However, we have further found that his Honour made findings of improper purpose that were neither pleaded nor put to Mr Macks in the trial.[5] As it transpired, Mr Viscariello did not amend his statement of claim to plead those findings but there would have been good cause for Mr Macks to have objected to any amendment to incorporate the findings.

The procedural history of the appeal

22 The appeal was originally listed to be heard in April 2016. Sadly, Mr Viscariello's counsel (who had appeared in the trial) died shortly prior to when the appeal was to be heard. The hearing of the appeal was adjourned to enable Mr Viscariello to obtain representation. Regrettably, this took some time. The appeal was relisted and Mr Viscariello retained new counsel to represent him shortly before the hearing date. They were at a disadvantage in having limited time to prepare for the numerous issues that were raised in the appeal. We are, nevertheless, very grateful for the helpful and considered submissions made by all counsel on the appeal.

23 Mr Viscariello represented himself on the last day of the appeal. He did so, as he informed the court, not because he was dissatisfied with his representation but rather, because his knowledge of the issues meant that he was better placed to answer many of the factual issues raised by the court.

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5 *Viscariello v Macks* [2014] SASC 189 [757].

24 Mr Viscariello was also given leave to file further submissions at the conclusion of the appeal hearing. Mr Macks complained that Mr Viscariello's submissions strayed beyond the scope of the leave that had been granted and he objected to the court receiving part of the additional material. However, we have taken into account the matters raised by both parties.

The grounds of appeal and cross-appeal

25 The grounds of appeal and cross-appeal are lengthy and notices of contention were also filed by Mr Macks and Mr Viscariello. It is difficult to adequately summarise the detail of the parties' pleadings and accordingly, we have annexed the grounds of appeal and cross-appeal and points of contention to these reasons.

The structure of the reasons

26 The reasons are divided into four parts. The first deals with some preliminary matters: the relevant provisions of the CA; the allegations made by Mr Viscariello in his statement of claim and the relief granted by the Primary Judge. It is convenient in that part to also consider Mr Macks' complaints about the amendments that were made to the statement of claim following delivery of the Reasons (grounds 6, 8 and 9 of the appeal).

27 The second part considers the cross-appeal - commencing with the cross-appeal preserves the chronology of events. Part 3 considers Mr Macks' appeal from the findings that he breached his statutory duties in prosecuting the Proceedings (grounds 2 - 5). Part 4 deals with the assertion that the court lacked power to grant declaratory relief (ground 1). Mr Macks did not pursue his appeal from the order removing him as the liquidator of the Companies (ground 7).

Part 1: Preliminary matters and the amended statement of claim

The statutory framework

Interaction between the CA and State laws

28 Part 1.1A of the CA concerns the interaction between Corporations legislation and State and Territory laws. In particular, s 5E provides that:

> (1) The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
>
> (2) Without limiting subsection (1), the Corporations legislation is not intended to exclude or limit the concurrent operation of a law of a State or Territory that:
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> (a) imposes additional obligations or liabilities (whether criminal or civil) on:
>
> (i) a director or other officer of a company or other corporation;
>
> …

29 Section 5F concerns any provision of State law that declares a matter to be excluded from the whole of the Corporations legislation or any specific provision of the legislation. That section does not apply in this matter. Finally, s 5G contains provisions that are intended to avoid direct inconsistency between Corporations legislation and State and Territory laws. However, the section does not apply to a State law that 'is capable of concurrent operation with the Corporations legislation': s 5G(2). State laws that are capable of concurrent operation with the Corporations legislation are to be dealt with in accordance with s 5E.

Mr Macks' statutory duties

30 Part 2D.1 of the CA concerns the duties and powers of company officers. The expression 'officer of a corporation' is defined by s 9 CA to include an administrator and a liquidator of a corporation.

31 Section 179(1) CA provides:

> This Part sets out some of the most significant duties of directors, secretaries, other officers and employees of corporations. Other duties are imposed by other provisions of this Act and other laws (including the general law).

32 Further, s 185 states:

> Sections 180 to 184:
>
> (a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
>
> (b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

33 Section 180 CA provides:

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of the corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

(3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

34 Section 181(1) CA states:

A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

35 Section 182(1) CA states:

A director, secretary, other officer or employee of a corporation must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation.

36 Section 183 CA also imposes duties on the officers of a corporation in relation to the use of corporate information.

Disqualification

37 Section 206C(1) CA permits a court to disqualify a person from managing a corporation. The application to disqualify may only be made by the Australian Securities and Investment Commission (ASIC). A court may allow the application if:

(a) a declaration of contravention has been made under s 1317E CA; and

(b) the court is satisfied that disqualification is justified.

38 Section 206E CA also allows a court, on an application by ASIC, to disqualify a person from managing a corporation if:

(a) the person -

(i) has at least twice been an officer of a body corporate that has contravened the CA while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or

(ii) has at least twice contravened the CA while they were an officer of a body corporate; or

(iii) has been an officer of a body corporate and has done something that would have contravened s 180(1) or s 181 CA if the body corporate had been a corporation; and

(b) the court is satisfied that disqualification is justified.

Standing

39 Part 2F of the CA concerns members' rights and remedies. Section 234 permits a member to bring oppression proceedings under pt 2F.1. However, s 236 limits the circumstances in which a person may bring proceedings on behalf of a company. The section provides:

(1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:

(a) the person is:

(i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or

(ii) an officer or former officer of the company; and

(b) the person is acting with leave granted under section 237.

(2) Proceedings brought on behalf of a company must be brought in the company's name.

(3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

40 Section 237 allows a court to grant a person leave to bring proceedings on behalf of a company. The section provides:

(1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.

(2) The Court must grant the application if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

(b) the applicant is acting in good faith; and

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

(3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:

(a) the proceedings are:

(i) by the company against a third party; or

(ii) by a third party against the company; and

(b) the company has decided:

(i) not to bring the proceedings; or

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision:

(i) acted in good faith for a proper purpose; and

(ii) did not have a material personal interest in the decision; and

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) rationally believed that the decision was in the best interests of the company.

The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

41 Section 241 confers general powers on the court to make orders and give directions in respect of proceedings brought or intervened with leave under pt 2F.1A.

42 Mr Viscariello did not seek leave under s 237 prior to commencing the action against Mr Macks or at any stage until after the Reasons were delivered. The Primary Judge, not surprisingly, refused to grant leave. Mr Macks does not appeal from that decision.

Removal of a liquidator

43 Section 503 CA has been repealed by the *Insolvency Law Reform Act 2016* (Cth). However, the section applied to Mr Viscariello's action against Mr Macks in these proceedings.

44 Section 503 formed part of div 4, pt 5.5 of the CA. Division 4 concerns voluntary liquidations. Section 503 empowered the court to remove a liquidator and appoint another liquidator on cause shown.

Part 5.3A

45 Part 5.3A of the CA provides for the voluntary administration of corporations that are insolvent or likely to become insolvent. Section 435A specifies the objectives of the Part:

The object of this Part, and Schedule 2 to the extent that it relates to this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or

(b) if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

46 Section 436A provides that the directors of a corporation may appoint an administrator. The administrator must convene a first meeting of creditors; the

CA provided in 2001 that the meeting was to be convened within 5 days of the appointment. The creditors may resolve at that meeting to remove the administrator and appoint another administrator. At the times relevant to these proceedings, the creditors could also decide to appoint a committee of creditors to consult with the administrator about the course of the administration.[6]

47 As the CA stood in 2001, the administrator was required to convene a second meeting of creditors within 28 days after the date on which the administration commenced (although the meeting could be convened 5 days either side of the 28 day requirement). However, the court had (and has) a general power under s 447A(1) to make orders in relation to the administration of a corporation. Mr Mack successfully applied to abridge the time for the second creditors' meetings of the Companies pursuant to that section. The application to abridge time was referred to by the parties and the Primary Judge as the preponement application.

48 The duties of an administrator include investigating the affairs of the corporation. Section 438A provides that:

> As soon as practicable after the administration of a company begins, the administrator must:
>
> (a) investigate the company's business, property, affairs and financial circumstances; and
>
> (b) form an opinion about each of the following matters:
>
> (i) whether it would be in the interests of the company's creditors for the company to execute a deed of company arrangement;
>
> (ii) whether it would be in the creditors' interests for the administration to end;
>
> (iii) whether it would be in the creditors' interests for the company to be wound up.

49 Consistent with the duties imposed by the CA, an administrator is required by s 439A to provide the creditors with a report about the company's business, property, affairs and financial circumstances when giving notice of the creditors meeting convened under s 439A.

Part 9.4B

50 Part 9.4B of the CA is entitled 'Civil consequences of contravening civil penalty provisions'. Section 1317E provides that if a court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention. Sections 180 - 182 CA are defined as civil penalty provisions for the purpose of s 1317E.

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[6] See ss 436E and 436F of the CA. Section 436F has now been repealed.

51 Section 1317E(2) provides that a declaration of contravention must specify:

(a) the court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention;

(e) if the contravention is of a corporation/scheme civil penalty provision - the corporation or registered scheme to which the conduct related.

52 Section 1317F provides that a declaration of contravention is conclusive evidence of the matters that must be specified in the declaration.

53 Section 1317G provides that a court may order a person to pay to the Commonwealth a pecuniary penalty where a declaration of contravention has been made and:

(a) the contravention was of a corporation/scheme civil penalty provision; and

(b) the contravention:

(i) materially prejudiced the interests of the corporation or scheme, or its members; or

(ii) materially prejudiced the corporation's ability to pay its creditors; or

(iii) was serious.

54 Sections 180 - 182 CA are corporation/scheme civil penalty provisions (see ss 1317DA and 1317E(1)).

55 Section 1317H provides that a court may order a person to pay compensation to a corporation for damage suffered by the corporation if the person has contravened a corporation/scheme civil penalty provision in relation to the corporation and the damage resulted from the contravention. An order may be made under s 1317H regardless of whether a declaration of contravention has been made under s 1317E. The damage suffered by a corporation includes profits made by any person as a result of a contravention of a corporation/scheme civil penalty provision.

56 Section 1317J specifies who may apply for a declaration of contravention, a pecuniary penalty order or a compensation order. The effect of the section is that only ASIC may apply for a declaration of contravention and a pecuniary penalty order: s 1317J(1), read with s 1317J(4) (which provides that no person may apply

for a declaration of contravention, a pecuniary penalty order or a compensation order unless permitted by the section). A corporation may intervene in an application for a declaration of contravention or a pecuniary penalty order and may be heard on all matters except whether the declaration or order should be made. A corporation may also apply for a compensation order and it may do so regardless of whether a declaration of contravention has been made: s 1317J(2).

57 The balance of pt 9.4B concerns the rules of evidence that are to apply in proceedings for a declaration of contravention and a pecuniary penalty order (s 1317M) and the interplay between criminal and civil proceedings and proceedings for relief under the Part.

Part 9.5

58 Part 9.5 of the CA confers various powers on courts to make orders in respect of matters arising under the Act. Several sections found in the Part are relevant.

59 Section 1321 CA (which has also been repealed by the *Insolvency Law Reform Act* but which applied to Mr Viscariello's action against Mr Macks) provided for an appeal to a court in respect of the act, omission or decision of a liquidator or provisional liquidator of a company. The appeal could have been brought by a person aggrieved by any act, omission or decision and the court could confirm, reverse or modify the act or decision or remedy the omission, as the case may be, and make such orders and give such directions as it thought fit.

60 Mr Viscariello applied for relief under s 1321. The Primary Judge held that Mr Viscariello was a person aggrieved for the purpose of the section but that an appeal under s 1321 should not be allowed as the application was made long after the impugned decisions had been taken. Mr Viscariello has appealed against the dismissal of his application under s 1321.

61 Section 1323 CA confers wide powers on the court to prohibit payments or transfers of money or other property in circumstances where, among other things, a civil proceeding has been commenced against a person under the CA. Section 1324 empowers a court to grant an injunction to restrain a person from engaging in conduct that contravenes or would contravene the CA. An application for an injunction under s 1324 may be made by any person whose interests have been, are or would be affected by the allegedly contravening conduct. Further, s 1324(10) provides that:

> Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

62 Section 1325 CA empowers the court to make orders against a person who has contravened s 201P(1), chapters 5C, 6CA, or 6D, s 798H(1) or pt 7.10 to

compensate another person who has suffered loss or damage as a result of the contravention. Section 1325(5) contains examples of the type of order that may be made. Any person who has suffered, or is likely to suffer, loss or damage because of the contravening conduct of another person may apply for an order under s 1325. The court may make an order regardless of whether an injunction has been granted under s 1324.

63 Chapters 5C and 6CA and pt 7.10 of the CA contain provisions that are civil penalty provisions. Further, s 798H(1) is a civil penalty provision. The type of conduct proscribed by those provisions is discussed later in these reasons.

Part 9.6A

64 Part 9.6A of the CA concerns the jurisdiction and procedure of courts. Division 1 of the Part deals with, among other things, the jurisdiction of courts in respect of civil matters arising under the Corporations legislation: s 1337A(1)(a). A 'civil matter' is defined by s 9 CA to mean a matter other than a criminal matter.

65 Section 1337A(2) provides that div 1 operates to the exclusion of s 39B of the *Judiciary Act 1903* (Cth). The division does not otherwise limit the operation of that Act: s 1337A(3). Section 39B of the *Judiciary Act* defines the scope of the original jurisdiction of the Federal Court of Australia. Section 39B(1A) provides that the original jurisdiction of the Federal Court includes jurisdiction in any matter arising under any laws made by the Commonwealth Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

66 Sections 1337B(1) and 1337B(2) CA confer jurisdiction on the Federal Court and the Supreme Court of each State and Territory with respect to civil matters arising under the Corporations legislation. The jurisdiction conferred on a Supreme Court under s 1337B is not limited by any limits to which any other jurisdiction of the court may be subject: s 1337B(5).

The claims made by Mr Viscariello

The Second SOC

67 The trial was conducted on the allegations made by Mr Viscariello in the second amended statement of claim (Second SOC). In summary, Mr Viscariello alleged that:

1 Mr Macks failed to carry out and/or adequately and properly perform his duties as a voluntary administrator of the Companies (par 27) and made false and misleading statements at the first meeting of the creditors of the Companies (par 29) in connection with the preponement application (par 34), in the s 439A reports and at the second creditors' meeting (pars 40 - 57A);

2 Mr Macks owed duties pursuant to ss 180 - 182 CA and/or at common law as the liquidator of the Companies (pars 59.3 - 59.6);

3 Mr Macks breached his duties as the administrator and liquidator of the Companies by, among things, the way in which he dealt with creditors and by failing to administer the Companies so as to maximise their prospects of continuing to trade or to maximise the return to the creditors from the sale of the Companies' assets (pars 66 - 71A);

4 Mr Macks engaged in misleading and deceptive conduct in his dealings with creditors; the Companies would not have been placed in liquidation but would have entered into DOCAs if he had not engaged in that conduct (pars 71B - 71H);

5 from December 2001 until at least February 2007, Mr Macks was motivated or influenced by 'personal wishes, personal motives and/or personal intentions' that 'caused' him to act in his personal interests and not in the best interests of the creditors, members and contributories of the Companies and to act unreasonably and/or 'partially, subjectively and/or unprofessionally' in connection with the liquidation of the Companies (par 80);

6 Bernsteen paid and/or incurred a liability to pay substantial amounts in legal costs and disbursements in connection with the Proceedings - the payments were made and the liabilities were incurred as a result of Mr Macks breaching the duties imposed by ss 180 - 182 CA (pars 118 - 119);

7 Mr Macks caused Bernsteen to make payments and/or incur liabilities in connection with the Proceedings without seeking a direction from the court or taking steps to obtain the approval or sanction of the committee of inspection or the committee of creditors (pars 120 -121);

8 Mr Macks' conduct in relation to the George bankruptcy proceedings was an attempt to bankrupt Ms Hamilton-Smith for an improper purpose (par 123) or constituted an abuse of process (pars 124 - 126);

9 Mr Macks and his firm received fees and payments as a result of Mr Macks' breaches of duty (par 138);

10 Bernsteen suffered loss and damage or incurred expenses or suffered a detriment as a result of, among other things, Mr Macks' breaches of duty in connection with the Proceedings - the loss and damage included the payment of substantial legal costs and disbursements on account of the Proceedings and the payment of Mr Macks' fees (par 127);

11 in breach of his duties, Mr Macks caused Bernsteen to pay legal and professional fees, costs and disbursements that were his liability (pars 140 - 141);

12 Mr Macks sold assets of Newmore that were subject to security granted to Mr Viscariello and applied the net proceeds of sale to his own purposes or for the benefit of Bernsteen rather than accounting to Mr Viscariello - by reason of those matters, Mr Macks committed a breach of fiduciary duty and trust (pars 141A - 141E, read with par 6.10);

13 Mr Macks was liable to be removed as liquidator by reason of, among other things, the allegations made in pars 118 - 141E of the Second SOC (par 141F).

68 The relief sought by Mr Viscariello in the Second SOC included claims for:

(a) declarations that -

1 Mr Macks was disqualified from appointment as either the administrator or liquidator of the Companies and that he 'cease forthwith purporting to act' as the liquidator of the Companies;

2 (pursuant to ss 447A, 447E or 1321 CA, Mr Macks was not entitled to charge or retain any fees or disbursements paid to him as liquidator of the Companies and that he repay all fees and disbursements that had been charged;

3 Mr Macks breached the duties imposed by ss 180 - 182 CA by applying the funds of Bernsteen and/or Newmore to the Proceedings and, by reason of those matters, he caused damage to the Companies within the meaning of s 1317H CA;

4 Mr Macks expended funds of Newmore to which he was not entitled under the security granted by the company;

5 Mr Macks be removed as the liquidator of the Companies;

(b) orders that –

1 Mr Macks be removed as the liquidator of the Companies;

2 pursuant to s 1317H CA, Mr Macks compensate Bernsteen and/or Newmore in respect of fees paid in the prosecution of the Proceedings;

3 Mr Macks pay equitable compensation on account of the use of the proceeds from the sale of the assets of Newmore that were subject to the security granted to Mr Viscariello;

4 all necessary inquiries be made and accounts taken.

69 It appears that the prayer for relief was pleaded on the erroneous assumption that Mr Viscariello had standing to claim the remedies found in pt 9.4B of the CA (see s 1317J); that is, the declarations were conceived of as declarations of contravention under s 1317E that would have the effect provided for by s 1317F and which could be used as the basis for claiming relief under s 1317H. That mistaken view was reflected elsewhere in the prayer:

(a) the relief sought in respect of the fees and disbursements paid in connection with the Proceedings was confined to a claim made under s 1317H CA;

(b) no claim was expressly made for other fees and disbursements paid to Mr Macks or to PPB;

(c) the only claim that was made for equitable compensation was in respect of the net proceeds of the sale of the assets of Newmore.

The Fourth SOC

70 Mr Viscariello filed a proposed amended statement of claim (the Proposed Fourth SOC) on 5 March 2013, shortly after the trial had been completed. The Primary Judge foreshadowed in the Reasons that Mr Viscariello would be permitted to amend his statement of claim to the extent necessary to give effect to the findings that had been made [922]. The question of whether Mr Viscariello should have been permitted to amend his claim according to the Proposed Fourth SOC was argued at hearings held on 14 and 15 April, 28 October 2015 and 15 January 2016. A consolidated pleading was filed following the last of those hearings (the Fourth SOC).

71 The Fourth SOC:

1. alleged that Mr Macks prepared the revised Bart proposal and in doing so, included terms that conferred a benefit on his and/or PPB (pars 34.2.8);

2. alleged that ARL decided not to accept the proposal contained in the revised Bart proposal because it included terms that were beneficial to Mr Macks (pars 34.2. 9 and 34.2.10) and that Mr Macks had failed to disclose to the creditors matters relating to the revised Bart proposal (par 34.5.15) (it was also alleged that Mr Macks negligently or recklessly failed to negotiate a deed of company arrangement on the terms of the revised Bart proposal (par 66.6));

3. amended the allegations made in par 59 to allege that Mr Macks owed duties as an officer of the Companies pursuant to ss 180 - 182 CA

and/or under the general law (in substitution for an allegation that the duties were owed under the CA, alternatively at common law);

4. alleged that Mr Viscariello lost the chance of avoiding loss and damage as result of Mr Macks' misleading statements to the Companies' creditors about the proposals for a deed of company arrangement (pars 71HA, 71HAH and 71HAB);

5. alleged that in about early 2002, Mr Macks entered into an agreement with Minter Ellison regarding the costs of legal proceedings connected with the liquidation of the Companies without first obtaining the approval of the court or the committee of inspection, and in breach of s 42(6) of the *Legal Practitioners Act 1983* (SA) and pursuant to which Mr Macks, in breach of the duties owed under ss 180 – 182 CA or under general law, paid accounts rendered by Minter Ellison in connection with the Proceedings (pars 124A – 124D);

6. alleged that Mr Macks was motivated by improper purposes in relation to the Bernsteen action and acted dishonestly and in a position of conflict in his dealings with the committees of inspection and creditors (pars 139A – 139D);

7. re-pleaded the allegations previously made concerning -

    7.1. the payment of legal fees and disbursements by Bernsteen in connection with the Proceedings and an action between Mr Macks' father and Mr Macks (defined as the '2004 Action') (pars 140 – 141);

    7.2. the application of the net proceeds of the sale of the assets of Newmore (pars 141A – 141E);

    7.3. the removal of Mr Macks as the liquidator of the Companies (par 141F);

8. added a plea that Mr Viscariello be granted leave under s 237 CA to bring his action 'in so far as the [appellant's] breaches of duty as an officer of the Companies extend beyond the breaches of his duty to the [respondent] under the general law' (pars 141G – 141J);

9. amended the declarations sought, including to claim declarations that -

    9.1. Mr Viscariello had shown cause for the removal of Mr Macks as the liquidator of the Companies;

    9.2. Mr Macks had breached the duties imposed by ss 180 - 182 CA 'by reason of the application of the moneys recovered in the course of the voluntary administration or in the course of the

liquidations of the Companies' to the Proceedings and the 2004 Action' and that 'by reason of same, the [appellant] has caused damage to the Companies within the meaning of s 1317H' (par 142.8B);

9.3. in the alternative, a declaration that Mr Macks breached fiduciary duties owed under general law to the Companies and/or their creditors and contributories by the application of money received in the administration and winding up of the Companies and that the breaches caused damage to the Companies (par 142.8CA);

10. amended the orders sought to add orders -

10.1. that Mr Macks compensate the Companies pursuant to s 1317H CA for payments made in connection with the Proceedings;

10.2. alternatively, that Mr Macks pay equitable compensation to the Companies;

10.3. that Mr Viscariello be granted leave pursuant to s 237 CA 'to bring a proceeding constituted by this proceeding against the [appellant] in respect of the breaches of duty alleged against the [appellant] in this proceeding in so far as they extend to breaches of duty in respect of his capacity as officer of the Companies pursuant to the CA and that the grant of leave be made now for then from the commencement of the proceeding' (par 142.9A).

The relief granted by the Primary Judge

72 As has been noted, the Primary Judge declared that Mr Macks had contravened the duties imposed by ss 180 - 182 CA (the Declarations) and made an order under s 503 CA removing him as liquidator of the Companies. His Honour also made various procedural rulings and orders after the Reasons were delivered, including permitting Mr Viscariello to amend his statement of claim.

73 The Declarations were made pursuant to s 31 of the *Supreme Court Act 1935* (SA). They were in the following terms:

3. It is declared that the [appellant], as liquidator of Bernsteen Pty Ltd ("Bernsteen"), contravened section 180(1) of the Act by reason that from June 2005 he failed to exercise the degree of care and diligence required of him as an officer of Bernsteen in applying any of Bernsteen's funds:

3.1 in pursuing or, as the case may be, defending:

3.1.1 a claim for recovery of a debt from Ms Tanya Hamilton-Smith in action number 10039 of 2002 in the Magistrates Court of South Australia, Adelaide Registry (the "Bernsteen action");

3.1.2 the counterclaim brought by Ms Hamilton-Smith in the Bernsteen action;

3.1.3 an application by Ms Hamilton-Smith, in action number ADG 94 of 2005 in the Federal Magistrates Court of Australia, for an order setting aside a bankruptcy notice dated 7 April 2005 prepared on behalf of Bernsteen and served on Ms Hamilton-Smith;

3.2 pursuant to an indemnity in favour of Ms Heidi George against her liability for the costs of the following steps and proceedings:

3.2.1 the issue and pursuit by Ms George of a bankruptcy notice against Ms Hamilton-Smith;

3.2.2 the defence by Ms George of Ms Hamilton-Smith's application in the Federal Magistrates Court of Australia to set aside Ms George's bankruptcy notice (action number ADG 159/2005);

3.2.3 the issue and pursuit by Ms George of creditor's petition against Ms Hamilton-Smith in the Federal Magistrates Court of Australia (action number ADG 237/2005);

3.2.4 the defence by Ms George to an application by Ms Hamilton-Smith in the Magistrates Court of South Australia for a declaration that she had discharged judgment debt forming the subject of Ms George's bankruptcy notice and creditor's petition (action 9644/2005);

3.2.5 the pursuit of or response to any appeals associated with those proceedings.

4. It is declared that the [appellant] in the litigation referred to in Order 3, as liquidator of Bernsteen, failed to exercise his powers and discharge his duties in good faith in the best interests of Bernsteen or for a proper purpose and thereby contravened section 181(1) of the Act.

5. It is declared that the [appellant], as liquidator of Bernsteen, contravened section 182(1) of the Act by reason that, from June 2005, the [appellant] engaged in litigation referred to in Order 3 above to gain an advantage for himself to the detriment of Bernsteen.

74 The Primary Judge accepted that declarations of contravention could not be made under s 1317E CA as ASIC was not a party to the proceedings (ASIC only sought to intervene after the Primary Judge had delivered the Reasons and for the limited purpose of seeking orders that Mr Macks be removed as the liquidator of the Companies and an inquiry be conducted pursuant to s 536 CA). However, his Honour concluded that the court could declare that Mr Macks had contravened ss 180 - 182 CA pursuant to s 31 of the *Supreme Court Act*. That section provides that:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court shall have power to make binding declarations of right whether any consequential relief is or could be claimed or not.

The amendments made to the statement of claim (grounds of appeal 6, 8 and 9)

The procedural history

75 As has been noted, Mr Viscariello's claims at trial were pleaded in the Second SOC. However, he was permitted to amend his statement of claim at a hearing held on 22 November 2012. The amendments were pleaded in a proposed third statement of claim but leave had not been granted for all of the amendments made in that draft pleading.

76 Mr Viscariello's counsel proposed a further amendment to the Second SOC at a hearing held on 19 February 2013, immediately prior to closing addresses. The amendment concerned an allegation that Mr Viscariello had been subrogated to the rights of the Commonwealth Bank as a secured lender to the Companies (the Subrogation Allegation). The Primary Judge understood that the purpose of the allegation was to enable Mr Viscariello, standing in the shoes of the bank, to enforce a right against Mr Macks for the due administration of the liquidation of the Companies and to seek equitable compensation for losses suffered as a consequence of Mr Macks' alleged misconduct. Mr Viscariello's counsel confirmed that understanding.[7] His Honour allowed the amendment noting that there was an issue as to whether the security granted by the Companies to the Commonwealth Bank had the effect contended for by Mr Viscariello.

77 The application to amend the pleading to include the Subrogation Allegation was argued by reference to the proposed third statement of claim. However, Mr Viscariello filed a further draft of the statement of the claim on 5 March 2013, shortly after the trial had been completed (the Proposed Fourth SOC). He also filed submissions in February 2013 in support of the application to amend the statement of claim to include the Subrogation Allegation.

78 The Proposed Fourth SOC was not confined to pleading the Subrogation Allegation. Rather, it included numerous minor drafting amendments and also substantive amendments concerning:

1. the revised Bart proposal, including allegations that clauses 10 and 12 of the revised proposal conferred a benefit on Mr Macks and/or PPB;

2. the Subrogation Allegation;

3. Mr Macks' purposes in initiating and maintaining the Bernsteen action and in using the Companies' funds to pay the legal costs of the George proceedings;

4. Mr Macks' dealings with the committees of inspection and creditors;

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7 ts 3519 - 3520.

5. an application pursuant to s 237 CA for Mr Viscariello to be granted leave to 'bring a proceeding against the [appellant] in so far as his breaches of duty as an officer of the Companies extend beyond the breaches of his duty to the [respondent] under the general law' (the s 237 Application).

79 Mr Macks filed submissions in May 2013 (the May 2013 Submissions) opposing the proposed amendments.[8] Mr Viscariello filed submissions in response to those submissions on 28 June 2013[9] and the Mr Macks filed further submissions in reply.[10] The May 2013 Submissions were discursive. They comprised 38 closely typed pages; Mr Macks' submissions in reply to Mr Viscariello's submissions added a further closely typed 10 pages.

80 Mr Macks' submissions complained that the Proposed Fourth SOC had been filed without an application for leave and a supporting affidavit; that Mr Viscariello had failed to comply with the Supreme Court Rules and that the proposed amendments contained pleading defects. The balance of the submissions were organised around the factors identified by the High Court in *Aon Risk Services Australia Ltd v Australian National University*[11] as being generally relevant to the exercise of the court's discretion to permit a party to amend its pleadings.

81 The Primary Judge did not rule on the proposed amendments in the period between the completion of the trial and delivery of the Reasons. In the interim, Mr Viscariello filed a second proposed fourth amended statement of claim dated 1 April 2015. However, Mr Macks continued to primarily rely on the May 2013 Submissions that were directed to the Proposed Fourth SOC. The differences between the two draft pleadings were not directly relevant to the issues raised by grounds 6, 8 and 9 of the appeal. We have considered both versions of the draft pleading in determining those grounds; however, it is convenient to continue to refer to both versions collectively as the Proposed Fourth SOC.

82 As has been noted, the Primary Judge indicated in the Reasons that Mr Viscariello would be given permission to amend the statement of claim to reflect the findings that had been made.[12] His Honour considered that the issues that were decided had been fully joined in the course of the hearing and that Mr Macks had not suffered any prejudice by the 'evolving nature of the [respondent's] case'. However, the question of precisely what amendments

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8 'Defendant's written submissions in reply to the plaintiff's "reply" submissions and further "reply" submissions, proposed new fourth amended statement of claim and new proposed final orders'; in addition, Mr Macks had earlier filed a submission on the Subordination Allegation - 'Defendant's outline of argument concerning plaintiff's application for permission to amend to raise the "CBA Subrogation" allegations' dated 25 February 2013.

9 'Plaintiff's response to the defendant's submissions filed on 13 May 2013'.

10 'Defendant's submissions in reply to plaintiff's submissions of 28 June 2013' dated 4 July 2013.

11 *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175.

12 *Viscariello v Macks* [2014] SASC 189 [922].

should be permitted in light of the findings made in the Reasons became a matter of substantial disagreement.

83 That question was considered at the hearing held on 14 and 15 April 2015. Again, the parties filed extensive submissions in advance of that hearing.[13] The Primary Judge made directions on 15 April 2015 concerning the proposed amendments to the statement of claim. The parties filed further submissions as a result of those directions.[14]

84 A further hearing was held on 28 October 2015 at which his Honour published a decision on what amendments should be permitted.[15] Mr Viscariello was directed to serve a draft statement of claim incorporating the permitted amendments. The parties were granted liberty to apply if they were unable to agree on the amendments that had been allowed.

85 Subsequently, Mr Viscariello ascertained that not all of the proposed amendments were dealt with by his Honour's rulings in *Viscariello [No 2]*.[16] He applied to 're-open' the question of amending the statement of claim. Mr Macks opposed the application and yet further submissions were exchanged between the parties.[17]

86 Further orders were made in respect of the proposed amendments at a hearing held on 15 January 2016. The effect of those orders was to revoke the order that had been made at the hearing on 28 October 2015 and substitute an order identifying the amendments proposed in the Proposed Fourth SOC that would be permitted. The Fourth SOC incorporated all of the amendments that were permitted by the substituted order.

87 The Fourth SOC was the product of rulings made by the Primary Judge and consultation between the parties in light of those rulings. Mr Macks maintained his objections to the proposed amendments throughout the process of arguing and conferring over the Proposed Fourth SOC. Accordingly, concessions made by Mr Macks in the process of conferral over the Proposed Fourth SOC were without prejudice to his right of appeal.

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13 'Plaintiff's submissions for hearing 14 April 2015' dated 30 March 2015; 'Plaintiff's submissions on second proposed fourth amended statement of claim' dated 1 April 2014 (the second proposed fourth amended statement of claim was filed with these submissions); 'Defendant's response to the plaintiff's submissions on the second proposed fourth amended statement of claim' dated 10 April 2015; and 'Defendant's submissions for hearing on 14 April 2015'.

14 'Defendant's submissions on outstanding issues regarding the second proposed fourth amended statement of claim' dated 27 April 2015; 'Plaintiff's surrejoinder to submissions dated 27 April 2015 of defendant regarding second proposed amended statement of claim pursuant to leave granted 27 April 2015' dated 1 May 2015; and 'Defendant's reply to plaintiff's surrejoinder filed 1 May 2015' dated 8 May 2015.

15 *Viscariello v Macks [No 2]* [2015] SASC 160.

16 *Viscariello v Macks [No 2]* [2015] SASC 160.

17 'Outline of submissions of the plaintiff' dated 14 January 2016; 'Defendant's submissions on plaintiff's interlocutory application dated 14 December 2015' dated 14 December 2015; and 'Plaintiff's reply to defendant's submissions' dated 14 January 2016'.

88 As has been noted, Mr Macks' objections to the Proposed Fourth SOC were primarily stated in the May 2013 Submissions, supplemented by the written and oral submissions made immediately before and at the hearings on 14 and 15 April and 28 October 2015. The parties' submissions on the Proposed Fourth SOC and the Primary Judge's findings on the allegations that were made by the permitted amendments provide important context for determining grounds 6, 8 and 9 of the appeal. It is convenient to further consider those matters before turning to the parties' submissions in the appeal.

The revised Bart proposal

89 Mr Viscariello was given permission to amend the statement of claim to make allegations about the revised Bart proposal, initially by the orders made on 28 October 2015 and subsequently, by the substituted order made on 15 January 2016. The allegations were pleaded in pars 34.2.2 - 34.2.10 and par 34.5.15 of the Proposed Fourth SOC. Mr Macks did not press his objections to pars 34.2.3 - 34.2.10 at the hearing on 28 October 2015 and the Primary Judge permitted the statement of claim to be amended to include the allegations made in pars 34.2.2 and 34.5.15 over Mr Macks' objection on the ground that they concerned matters that were extensively canvassed at trial.[18]

90 The allegations made in respect of the revised Bart proposal concerned clauses 10 and 12 of the proposal. Mr Viscariello alleged that the clauses conferred a benefit on Mr Macks and/or PPB and that their inclusion caused ARL to reject the revised Bart proposal or materially contributed to its decision.

91 The evidence concerning the negotiation of the revised Bart proposal was outlined in some detail by the Primary Judge.[19] The Primary Judge found in relation to the allegations concerning the inclusion of clauses 10 and 12 in the revised Bart proposal that:

1. clause 12 advantaged Mr Macks and his evidence that he did not actively promote the insertion of the clause into the proposal should be rejected;[20]

2. contrary to his evidence, Mr Macks was largely responsible for the inclusion of several clauses in the revised Bart proposal that protected his interests but it was reasonable for him to have done so;[21]

3. it was reasonable for Mr Macks to protect his personal position as against ARL on entry into the revised Bart proposal and Mr Macks

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18 *Viscariello v Macks [No 2]* [2015] SASC 160 [13], [15].
19 *Viscariello v Macks* [2014] SASC 189 [175] and following.
20 *Viscariello v Macks* [2014] SASC 189 [224].
21 *Viscariello v Macks* [2014] SASC 189 [303].

would have been entitled to similar protections in the course of an administration and in a winding-up;[22] and

4. changes made in respect of the revised Bart proposal did not cause ARL to reject the proposal and Mr Macks' additions to, or amendments of, the clauses of the proposal did not cause ARL to reject it and accordingly, there was no 'loss of chance' to assess.[23]

92 Grounds 4 and 5 of the cross-appeal concern those findings.

93 The May 2013 Submissions contained extensive submissions in relation to the amendments proposed in respect of the revised Bart proposal. The submissions argue in some detail reasons why:

1. clauses 10 and 12 provided no additional benefit to Mr Macks beyond that provided for by the CA;

2. Mr Viscariello's submissions concerning the benefits allegedly conferred by the clauses were misconceived;

3. Mr Macks was entitled to include the clauses in the revised Bart proposal;

4. it could not be contended that ARL had rejected the revised Bart proposal because of the inclusion of the clauses;

5. the allegations raised complex factual issues that would cause the Mr Macks unfair prejudice;

6. Mr Macks may have taken a different approach in cross-examining Mr Bart and in considering whether to adduce further evidence concerning the circumstances in which the revised Bart proposal had been prepared.

94 As to the question of prejudice, Mr Macks submitted that the proposed pleading raised fresh issues as to whether Mr Bart did or did not intend to include particular terms in the revised Bart proposal and who was responsible for including the various provisions in the proposal. Further, the amendments required the court to consider what Mr Bart and ARL would have done if the revised Bart proposal had not included clauses 10 and 12. The problems raised by those matters were said to be compounded by the passage of time and Mr Bart's professed lack of memory.

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[22] *Viscariello v Macks* [2014] SASC 189 [303].
[23] *Viscariello v Macks* [2014] SASC 189 [304].

The Subrogation Allegation

95 Mr Viscariello did not seek to include in the Fourth SOC the amendments that had been proposed in the Proposed Fourth SOC concerning the Subrogation Allegation in light of the comments made by the Primary Judge in the Reasons.[24] The effect of those comments was to leave Mr Viscariello to pursue the issues raised by the Subrogation Allegation with the liquidator appointed to replace Mr Macks.

Allegations of breach of duty

96 The Second SOC contained allegations that Mr Macks had breached the duties imposed by ss 180 - 182 CA by causing Bernsteen to incur legal costs and expenses in connection with the Proceedings.[25] The allegations included that Mr Macks had commenced the George bankruptcy proceedings for an improper purpose and/or as an abuse of the court's processes, for personal purposes and for reasons unrelated to the interests of Bernsteen. Mr Viscariello was permitted to amend the statement of claim to further allege that:

1. Mr Macks was motivated by an improper purpose in initiating, maintaining and expending funds on the Proceedings;

2. Mr Macks had failed to act honestly by not informing the committee of inspection for Bernsteen of matters associated with the Proceedings, by misleading the committee and by calling meetings for purposes that were not connected with the conduct of the liquidation of the Companies; and

3. Mr Macks had acted in a position of conflict in relation to his dealings with the committee of inspection and by securing the appointment of the special purposes liquidators.

97 Those allegations were pleaded in pars 139A - 139D of the Fourth SOC. The amendments were permitted by the orders made by the Primary Judge on 28 October 2015 and 15 January 2016. His Honour held that the issues raised by the pleadings had been properly joined and exhaustively dealt with[26] and 'fully canvassed in the course of the hearing'.[27]

98 Mr Macks opposed the amendments proposed by pars 139A - 139D in the May 2013 Submissions. It was contended that the allegation in par 139A was inconsistent with how Mr Viscariello had opened his case and accordingly, the basis upon which Mr Macks had conducted his defence. The primary complaint in relation to pars 139B - 139D was that they raised matters that had not been put to Mr Macks in cross-examination. Mr Macks maintained his objection to the

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[24] *Viscariello v Macks* [2014] SASC 189 [913].
[25] Pars 118 - 119, 124A - 124B, 125 - 126.
[26] *Viscariello v Macks [No 2]* [2015] SASC 160 [33] in respect of par 139A.
[27] *Viscariello v Macks [No 2]* [2015] SASC 160 [35] in respect of pars 139B - 139D.

amendments at the hearing on 15 April 2015 on the ground that the Primary Judge had not made findings in terms of the allegations that formed the proposed amendments.

The s 237 Application

99 Mr Viscariello's application for leave to amend his statement of claim to include the allegations concerning the s 237 Application was one matter that was not dealt with in the orders made on 28 October 2015. Mr Viscariello was given leave to make the amendments at the hearing on 15 January 2016.

100 Mr Macks opposed Mr Viscariello being permitted to amend to raise the s 237 Application on grounds that included the lateness of the proposed amendment and the effect of the decision in *Chahwan v Euphoric Pty Ltd t/as Clay*.[28] As has been earlier noted, the Primary Judge refused Mr Viscariello leave under s 237 CA.

101 His Honour did not explain the reason for permitting Mr Viscariello to amend the statement of claim to plead the s 237 Application.[29] However, it appears that his Honour considered that Mr Viscariello should be permitted to amend the statement of claim to raise all of the issues that were canvassed in the Reasons regardless of the findings that were made on each issue. That approach was contrary to the view that Mr Macks took of how [922] of the Reasons was to be applied - that is, that Mr Viscariello should only have been permitted to amend the statement of claim to reflect findings that had been made in his favour and which were relevant to the relief that was to be granted. However, it is likely that his Honour was well aware by the time that the proposed amendments were argued that the parties were intending to appeal from a number of his findings.

102 Mr Macks could not be prejudiced by the amendments to the statement of claim to plead the s 237 Application given that the application was, in effect, refused and Mr Viscariello does not appeal from the Primary Judge's findings on the application.

Other allegations

103 Mr Macks stated in the May 2013 Submissions that he did not object to the amendments proposed by pars 59, 88, 118, 127.1.1 and 138 of the Proposed Fourth SOC. However, ground 8 of the appeal alleges that the Primary Judge erred in permitting those amendments to be made. We have been unable to find where, if at all, Mr Macks gave notice of a change of position in relation to those paragraphs and an explanation for withdrawing his consent to the proposed amendments. It is not apparent how his Honour could have erred in permitting the amendments unless Mr Macks' change of position had been notified and

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[28] *Chahwan v Euphoric Pty Ltd t/as Clay & Michel* [2008] NSWCA 52; (2008) 227 FLR 43.

[29] The amendments were in pars 141G - 141J of the Fourth SOC.

explained. In any event, we are unable to ascertain how Mr Macks could have been prejudiced by the amendments.

Mr Macks' contentions

104 Mr Macks contended that:

1. an application to amend after close of the trial faced 'special' difficulties, reference being made to the judgment of Bryson J in *Mercantile Mutual Insurance (Australia) Ltd v Farrington*;[30]

2. the application to amend had been made without any evidence to explain the delay;

3. Mr Macks had made extensive submissions in opposition to an application for leave to amend but those submissions, and the authorities to which reference had been made, were not seemingly considered by his Honour in the Reasons;

4. the delay in delivery of the Reasons and the reasons of 28 October 2015 had resulted in the Primary Judge misstating the circumstances that were relevant to the application to amend;

5. there were numerous defects in the pleading of the Fourth SOC;

6. Mr Macks had been prejudiced by the amendments that had been permitted.

Relevant principles

105 Rule 57 of the *Supreme Court Civil Rules 2006* (SA) provides that the court may at any stage of proceedings order the amendment of any document. The amendment may be made on the court's own initiative or on an application by a party and an amendment or an order for amendment may be made on such conditions as the court considers appropriate.

106 The observations of Bowen LJ in *Cropper v Smith* are most frequently cited in respect of the court's power to allow amendments to a party's pleadings:[31]

> [T]he objects of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party ... as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

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[30] *Mercantile Mutual Insurance (Australia) Ltd v Farrington* (1996) 44 NSWLR 634.
[31] *Cropper v Smith* (1884) 26 Ch D 700, 710 - 711.

107 Those observations were applied, for example, by Lander J in *Genocanna Nominees Pty Ltd v Thirsty Point Pty Ltd (No 2)*[32] to allow the applicants to amend their statement of claim to accord with his Honour's reasons for judgment and to claim the relief to which his Honour had found they were entitled.

108 As has been noted, Mr Macks relied on the observations of Bryson J in *Mercantile Mutual Insurance v Farrington* that an amendment following the trial faces 'special difficulties'. In that case, Bryson J had raised an issue with the parties after the trial had been completed. The plaintiff sought to amend its statement of claim to plead the issue; the defendant opposed the application claiming that he would be prejudiced by the amendment. His Honour accepted the defendant's claims of prejudice, noting in that context:[33]

> A very liberal attitude to amendments is required by the rules of court but the power is discretionary. An amendment which is brought forward for the first time after the trial of the proceedings has been concluded and when many decisions relating to presentation of the parties' cases of fact have been made, including decisions about what evidence should be put forward, what should not be tendered and what admissions should be made, faces special difficulties.

109 As can be seen, Bryson J was merely reflecting the forensic realities of adversarial proceedings in making the observation on which Mr Macks has relied. Although one function of pleadings is to identify the issues to be decided, the parties are entitled to a verdict on the issues that have been, in substance, litigated in trial. A party may obtain relief in respect of matters that were not pleaded if the relief was based on the evidence and concerned issues that were 'fairly fought out'.

110 Consequently, the result should be upheld if a case is run and decided in a particular way, despite the pleadings, unless that would cause an injustice.[34] Such an approach will often be consistent with, and necessitated by, the policy expressed in s 27 of the *Supreme Court Act*. That section provides that:

> The court in every cause or matter pending before it shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it deems just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of every legal or equitable claim properly brought forward by them respectively, in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning of any such matters avoided.

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[32] *Genocanna Nominees Pty Ltd v Thirsty Point Pty Ltd (No 2)* [2006] FCA 1335.
[33] *Mercantile Mutual Insurance (Australia) Ltd v Farrington* (1996) 44 NSWLR 634, 651.
[34] *Marshall v Flemming* [2017] NSWSC 1107 [148] (Payne JA).

111 The principles that are relevant where a party seeks relief in respect of matters that were not pleaded were summarised by Ipp J in *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd*:[35]

> The following propositions may be extracted from these authorities:
>
> (a) The rule that, in general, relief is confined to that available on the pleadings secures a party's right to a basic requirement of procedural fairness.
>
> (b) Apart from cases where the parties choose to disregard the pleadings and to fight the case on additional issues chosen at the trial, the relief that may be granted to a party must be founded on the pleadings.
>
> (c) It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground an inference that the parties have chosen a different basis to the pleaded issues for the determination of their respective rights and liabilities.
>
> (d) Acquiescence giving rise to a departure from the pleadings may arise from a failure to object to evidence that raises fresh issues - it is in this sense that 'cases are determined on the evidence, not the pleadings'.
>
> (e) While cases are to be decided upon a basis that embraces the 'real controversy' between the parties, the real controversy has to be determined in accordance with the principles stated.
>
> The next point is that a departure from the pleaded issues is a matter for the discretion of the trial judge. In *Mummery v Irvings Pty Ltd* Dixon CJ, Webb J, Fullagar J and Tayor J said (at 112): 'There is, of course, no doubt that the question of extending the issues [on the pleadings] at the trial was peculiarly within the discretion of the trial judge.'
>
> In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2001) 203 CLR 194 at 204 [19], Gleeson CJ, Gaudron J and Hayne J said:
>
> > '[19] "Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result". Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made'. (footnotes omitted)
>
> The High Court has occasionally used the language of 'duty' in speaking of circumstances under which a trial judge should allow a case to be decided on the basis of issues not revealed by the pleadings. In *Leotta v Public Transport Commission of New South Wales* (1976) 50 ALJR 666 at 668; 9 ALR 437 at 446, Stephen J, Mason J and Jacobs J spoke of 'the duty of the trial judge to leave the issue of negligence to the jury'. In *Banque Commerciale SA (In Liq) v Akhil Holdings Ltd* (at 297), Dawson J said: 'It is incumbent upon the trial judge to see that the pleadings or particulars are amended so that the record reflects the proceedings as they have been conducted, but his failure to do so will not result in the invalidity of those proceedings.'

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[35] *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653, [424] - [428] (Giles and Hodgson JJA agreeing with the summary of principles).

> These observations have to be seen in the wider context of the well-settled rule that the question whether cases are to be resolved by reference to issues beyond those pleaded is a matter for the discretion of the trial judge. The statements of the kind to which I have referred in the preceding paragraph were made in a context where, not to go beyond the pleadings, would be 'unreasonable or plainly unjust': *House v The King* (1936) 55 CLR 499 at 504 - 505. See also *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 173, per Kirby J.

112 It is necessary in determining whether a party should be permitted to amend its pleadings to consider the rules of pleading, the requirements of procedural fairness and the objective of ensuring that what is truly in dispute between the parties is fully and finally decided. Obviously, procedural fairness is the dominant consideration when an application to amend is made after the trial has been completed. However, the question of whether an amendment should be allowed is within the discretion of the Primary Judge. Accordingly, the principles relevant to an appeal from the exercise of a judicial discretion apply and an appeal court should recognise the unique advantage that the Primary Judge had in determining whether it is in the interests of justice to permit an amendment to the pleadings. That is especially where the amendment is sought after the reasons have been delivered. At that point, the Primary Judge will have completed the complex analysis involved in judicial decision-making and will be well placed to determine whether it would be unjust to allow an amendment to the pleadings. Nevertheless, there is a particular issue concerning procedural fairness and the amendments made in the Fourth SOC which is further considered below.

[922] of the Reasons

113 Grounds 6 and 8 of the appeal allege that the trial judge erred in foreshadowing in the Reasons that Mr Viscariello would be given permission to amend the statement of claim to reflect the findings that had been made in the Reasons and in the way in which his Honour subsequently allowed the statement of claim to be amended according to what had been adumbrated. The Primary Judge referred at the hearing on 14 and 15 April 2015 to the judgment of Zelling AJ in *FF Seeley Nominees Pty Ltd v EL AR Initiations (UK) Ltd (No 2)*[36] in relation to amendments made after reasons for judgment had been delivered. In that case, Zelling AJ expressed doubt as to whether the statement of claim was sufficient to ground an order for damages. Accordingly, the plaintiff sought to amend to accommodate that doubt and to give effect to the judgment. His Honour considered that it was not too late to make the amendment provided that the amendment did not raise a matter that could have been met by evidence in the trial.

114 *FF Seeley* was cited by Siopis J in *University of Western Australia v Grey (No 24)*[37] as an example of amendments to an originating process or statement of claim being permitted after reasons for judgment had been delivered. Similarly,

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[36] *FF Seeley Nominees Pty Ltd v EL AR Initiations (UK) Ltd (No 2)* (1990) 55 SASR 314.

[37] *University of Western Australia v Grey (No 24)* [2008] FCA 1400 (together with *Genocanna Nominees* and *Singh (Santosh Kumari) v Atombrook Ltd* [1989] 1 WLR 810).

in *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)*,[38] Rares J referred to *Leotta v Public Transport Commission (NSW)*[39] and *Mummery v Irvings Pty Ltd*[40] to conclude that a court can grant relief that is different to, and wider than, the relief that had been claimed by an applicant in order to give effect to findings that had been made and so as to avoid a multiplicity of proceedings. His Honour relied on the equivalent provision in the *Federal Court of Australia Act 1976* (Cth) to s 27 of the *Supreme Court Act*.

115 Rares J did not consider that it was necessary in that case for the applicant to amend its statement of claim to reflect the orders that he proposed to make. However, his Honour indicated that he would have been prepared to permit amendments to be made to the statement of claim if that had been necessary to ensure that the real issues litigated between the parties were raised on the pleadings. His Honour added:[41]

> However, the requirement to make amendments for the purpose of deciding the real issues in the proceedings does not impose some unqualified duty on the Court to permit the late addition of any new claim: *Aon* ... [31]. Deliberate tactical choices made by parties in ascertaining what was necessary to determine the real issues in the proceedings, can be a significant factor in the exercise of the discretion to allow an amendment: *Aon* ... [31], [112]. The consequence of the disputed amendment in that case had been the necessity to adjourn the trial on its first day.

Ground 2 of the appeal and the Fourth SOC

116 Ground 2 of the appeal was directed to the finding made by the Primary Judge at [757] of the Reasons that Mr Macks had four substantial and actuating purposes in 'pursuing' Ms Hamilton-Smith after 1 June 2005. The particulars to that ground asserted, among other things, that there was no evidentiary basis for the finding and that the finding was made notwithstanding that there was no pleaded allegation that Mr Macks was actuated by those purposes and the allegation was not put to him in cross-examination.[42] Grounds 3 – 5 cross-referred to ground 2 so that those complaints formed part of the particulars to those grounds.

117 As has been noted, the Second SOC alleged that:

1. Mr Macks was, from December 2001 until at least February 2007, 'motivated by and/or influenced by personal wishes, personal motives and/or personal intentions' that caused him to act, in relation to all of the matters alleged in the statement of claim, in his personal interests rather than in the interests of the Companies and in a way that was inconsistent with the 'impartial and/or professional discharge of his

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38 *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* [2010] FCA 575; (2010) 185 FCR 237.
39 *Leotta v Public Transport Commission (NSW)* (1976) 9 ALR 437.
40 *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99.
41 *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* [61].
42 Grounds of appeal 2.2 and 2.6.

duties, functions and powers as administrator and liquidator of the Companies'[43];

2. Mr Macks initiated and controlled the George bankruptcy proceedings for an improper purpose and/or as an abuse of process[44] and for 'personal purposes and/or reasons unrelated to the interests of Bernsteen, its creditors and/or its contributories'[45];

3. Mr Macks gave instructions in relation to the George bankruptcy and declaration proceedings that 'resulted from and/or were motivated by [Mr Macks'] personal interests and purposes relating to Ms Hamilton-Smith and/or [Mr Viscariello]'[46];

4. Mr Macks' conduct in entering into and/or performing the agreement to indemnify Ms George and his instructions to Minter Ellison in relation to the George bankruptcy and declaration proceedings was an abuse of process or an attempt to bankrupt Ms Hamilton-Smith for an improper purpose; alternatively, his conduct was not related to obtaining payment of judgment sum owing to Ms George or the debt owed by Ms Hamilton-Smith to Bernsteen and related solely to his personal interests.[47]

118 Particulars were provided to the first of those allegations but the particulars merely cross-referred to paragraphs of the statement of claim that made allegations about Mr Macks' conduct. The particulars did not identify what were the personal interests that allegedly motivated his conduct and no particulars were provided to the balance of the allegations of abuse and impropriety. Accordingly, the statement of claim did not plead the actual purposes that allegedly motivated Mr Macks. At most, the pleading alleged that Mr Macks had purposes that were collateral and improper.

119 The allegations of impropriety were obviously serious. They were analogous to allegations of fraud and dishonesty given that they were made against Mr Macks in his capacity as an administrator and liquidator. Fairness required that the allegations be pleaded with particularity. An allegation made at large that Mr Macks had acted for an improper purpose was not sufficient to discharge the requirement of putting him on notice of the precise case that he was required to meet. Further, the pleading did not serve to confine the issues nor was it possible to ascertain whether there was a proper basis for making the allegation. Finally, it should be noted that the allegations of impropriety concerned the George bankruptcy and declaration proceedings. No allegation of

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43 Paragraph 80.
44 Paragraph 119.6.
45 Paragraph 119.7.
46 Paragraph 119.8.3.
47 Paragraphs 124 and 125 and see also, paragraph 126.

improper purpose was pleaded in relation to Mr Macks' prosecution of the Bernsteen action.

120 Although Mr Viscariello was permitted to amend the statement of claim to give effect to the findings made in the Reasons, he not did pick and plead the findings made at [757]. That is a curious – indeed, extraordinary – omission given that the findings were critical to the Primary Judge's conclusion that Mr Macks had breached the duties imposed by ss 180 – 182 CA. Accordingly, the Fourth SOC did not strictly overcome the complaints made in ground 2 about the pleading of the allegation of improper purpose.

121 The amendments made after the Reasons were delivered could only have been justified on the ground that they dealt with issues that had been fairly raised and litigated in the trial. We have found in part 3 of the reasons that only the collateral purpose identified in the trial and put to Mr Macks in his evidence was that his conduct of the Proceedings was motivated by a desire to frustrate Mr Viscariello's claim against him. Otherwise, the purposes found by the Primary Judge were not raised in the trial and not put to Mr Macks.

122 In our view:

1. The Fourth SOC did not cure the lack of particularity with which the allegation of improper purpose had been pleaded in the Second SOC.

2. It would have been open to Mr Viscariello to amend his pleading to allege that Mr Macks was motivated in conducting the Proceedings after June 2005 by the improper purpose of 'delaying and possibly deterring' Mr Viscariello from bringing a professional indemnity claim against him – the finding made by the Primary Judge in [757] of the Reasons that reflects the assertion that Mr Macks was motivated by a desire to frustrate the claim against him that had been notified by Mr Viscariello in December 2004.

3. Although the Primary Judge permitted Mr Viscariello to amend the statement of claim to reflect the findings that had been made in the Reasons, his Honour was in error to the extent that the leave granted would have permitted Mr Viscariello to amend to plead each of the findings of collateral purpose made in [757]. The findings, apart from the allegation concerning the claim notified by Mr Viscariello, had not been put to Mr Macks and had not been 'fairly fought' in the trial.

4. Accordingly, any amendment to allege that Mr Macks was actuated by the three substantial and collateral purposes found by the Primary Judge at [757], but which had not been put to Mr Macks, would have been procedurally unfair.

Conclusion – grounds 6, 8 and 9 of the appeal

123 The principal allegation made in grounds 6, 8 and 9 is that the Primary Judge erred in permitting Mr Viscariello to amend the statement of claim to reflect the findings that had been made in the Reasons. We consider that his Honour had power to permit the statement of claim to be amended following delivery of the Reasons. The primary consideration in determining what, if any, amendments might be permitted at that late stage was procedural fairness. However, the public interest in finally disposing of all matters in dispute between the parties was also a relevant consideration.

124 As Mr Macks asserted, the amendments that were permitted in the Fourth SOC travelled beyond the findings that had been made in favour of Mr Viscariello and which were relevant to the relief that was granted. However, that complaint (which was the gist of the allegations pleaded in paragraph 6.4 of the grounds of appeal) fails to fully account for the tortuous process by which the statement of claim was amended following delivery of the Reasons. As we have observed, the Primary Judge may well have considered by the completion of that process that it was appropriate to allow more extensive amendments than had been contemplated at the time that the Reasons were delivered in order to facilitate the foreshadowed appeals.

125 Further, we do not consider that there is merit in the complaints made in paragraphs 6.2 and 6.3 of the grounds of appeal having regard to the process by which the statement of claim was amended. The comments made by the Primary Judge in [922] foreshadowed a further step to be taken by Mr Viscariello following delivery of the Reasons. The comments, and the permission granted in [922], cannot be viewed in isolation from the process that followed. The parties exchanged very lengthy submissions on the proposed amendments; his Honour ruled on their detail and further written reasons were delivered. There is, in our view, no basis for concluding that the Primary Judge did not properly consider the parties' submissions or that any delay in the delivery of the Reasons was relevant to whether Mr Viscariello ought to have been permitted to amend the statement of claim.

126 As to the allegation that Mr Macks was denied procedural fairness by the grant of leave to amend, we have concluded that it would have been unfair to Mr Macks to have permitted the statement of claim to be amended to plead three of the actuating purposes identified by the Primary Judge at [757] of the Reasons. However, Mr Viscariello did not amend his statement of claim to expressly allege those purposes. Otherwise, for the reasons given above, we do not consider that Mr Macks was unfairly prejudiced by Mr Viscariello being permitted to amend the statement of claim; alternatively, any unfairness that may have been caused by the grant of leave is no longer relevant having regard to the grounds of cross-appeal.

127 Grounds 8 and 9 of the appeal allege that the Primary Judge erred in permitting Mr Viscariello to make particular amendments to the statement of claim at the hearings held on 28 October 2015 and 15 January 2016. As to those grounds:

1. We have noted that Mr Macks did not object in the May 2013 Submissions to some of the amendments that were permitted at the hearing on 28 October 2015.

2. The remaining amendments that are referred to in ground 8 concerned the allegation that Mr Macks prosecuted the George bankruptcy proceedings for an improper purpose and/as an abuse of process and for personal purposes and the application under s 237 CA. We have dealt with the Primary Judge's decision to permit those amendments above.

3. Mr Macks could not have been prejudiced by the amendments that were permitted to allege that Mr Macks owed duties under general law rather than at common law[48] or by the minor amendment to par 119.3.

4. The remaining amendments to which ground 9 refers were amendments to the relief claimed. The amendments do not reflect the relief granted by the Primary Judge (the amendments concerned claims for compensation for the funds expended in the Proceedings and for amounts that Mr Viscariello claimed ought to have been paid to him out of the proceeds from the sale of the Companies' assets). Again, it may be that his Honour considered it appropriate to allow the amendments to facilitate an appeal. However, we do not consider that Mr Macks could have been prejudiced by those amendments. The relief claimed related to causes that had been alleged in the Second SOC and a court would not ordinarily deny a party relief to which it is entitled merely because of a defect in the pleading of the prayer for relief.

128 It follows that, for the reasons given above, grounds 6, 8 and 9 of the appeal fail (ground 6 only because Mr Viscariello did not amend the statement of claim to plead the findings made by the Primary Judge at [757] of the Reasons).

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[48] Pars 59.2 to 59.6.

Part 2: The cross-appeal

Background

129 Bernsteen had been incorporated in June 1983 and Newmore in June 1992. Until liquidation, Bernsteen had conducted a business under the registered business name "Bedroom Mazurka". A trademark registered in respect of that name was owned by Palm Hills Pty Ltd, a company associated with Mr Viscariello.

130 Newmore was the proprietor of a business name "Faulty Sheets and Towels". The trademark associated with that name was also owned by Palm Hills.

131 The whole of the issued shareholding in the Companies was legally owned by Palm Hills. It was the trustee of the John Viscariello Family Trust. Mr Viscariello was among the beneficiaries of the trust.

132 Mr Macks was appointed as administrator of the Companies in 1995. He was subsequently appointed the deed administrator for the Companies. The deed administration ended in July 1998. The Companies had losses of $3.5million carried forward from the administrations.

133 It was not in issue that Mr Viscariello was a creditor of the Companies at all relevant times. He had lent the Companies funds in 1993.[49] The loans were secured by charges. The Newmore charge in favour of Mr Viscariello was subrogated to the interests of a priority charge held by the Commonwealth Bank. In addition, Mr Viscariello claimed that he was owed money from his employment as manager of the Companies during the period of their administration.

134 As at December 2001, Bernsteen conducted its business in 18 retail outlets in South Australia, Victoria and the Northern Territory. Newmore conducted its business in 16 retail outlets. Bernsteen was a retailer of manchester and associated products. Newmore was also a retailer of lower quality manchester. The trading name of Newmore's business suggests as much.

135 As at the end of the 2000/2001 trading period, the Companies were trading at a loss. The Companies had no available working capital as a result of the earlier administrations, and no profitable trading sufficient for them to pay creditors as and when they fell due.

136 From 1995, Associated Retailers Limited (ARL) was the principal supplier of product to the Companies. It supplied product under certain credit arrangements. It was granted a first registered mortgage debenture by Bernsteen to secure credit made available to that company. It was granted a second

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[49] Mr Viscariello advanced $270,000 to Bernsteen and $60,000 to Newmore.

registered mortgage debenture by Newmore on the same basis. The Commonwealth Bank mortgage was first in priority over the assets of Newmore. Although estimates varied, the evidence suggested that ARL supplied approximately 30% of the whole of the trading stock of the Companies.

137 ARL supplied stock on a retention of title (ROT) and consignment basis. Consequently, the Companies did not become legally and beneficially entitled to the proceeds from the sale of the stock until they had accounted to ARL for the amount due under its trading terms.

The financial position of the Companies

138 In January 2001, Bernsteen's debt to ARL for trading stock was $116,494.24. By December 2001, that position had worsened - the debt due by Bernsteen to ARL was $455,393.01. Bernsteen was unable to discharge those debts from ready cash resources or available credit. The company was unable to pay its fixed and variable costs, its bank debt and its trade creditors within the usual or extended trading terms.

139 In August 2001, Mr Viscariello made an arrangement with ARL to reduce the debt. The Companies were to make two payments of $40,000 on 20 and 27 August 2001, and then three further payments on 3, 10 and 17 September 2001. However, the Companies were unable to fund those payments. Between 27 August 2001 and 5 September 2001, Mr Luigi Viscariello, the father of Mr Viscariello, made advances to the Companies.

140 At the time Mr Macks was appointed in 2001, Bernsteen employed 30 sales staff and five administrative staff. The monthly wages bill was $110,000, with an associated income tax (PAYG) liability of $20,200, and an employer's superannuation contribution of $8,000.

141 A trial balance by Bernsteen's accountants for the year ending 30 June 2001 showed a loss of $622,215. A trial balance prepared by Mr Macks' office showed a cash loss of $463,084 for the five months to the end of November 2001. Bernsteen experienced a substantial fall in sales from $7,330,907 in the year ending 30 June 2000 to $6,128,493 for the year ending 30 June 2001. Its sales in the months of September and October 2001 preceding the commencement of the administration were substantially down from the sales for September and October 2000.

142 By December 2001, Bernsteen had failed to remit to the Australian Taxation Office (ATO) an amount of $345,000 for PAYG obligations, GST and superannuation contribution guarantee charge amounts. Those obligations arose out of Bernsteen's employment arrangements and sales (GST). Bernsteen's total liability to the ATO was in the order of $370,000.

143 Bernsteen's monthly rent bill was $55,000. Bernsteen was also in default of rent equivalent to a total of three months (in total about $157,000) without

having made any separate arrangement with landlords for a postponement of payment of rent liabilities. There had been distraint on the goods of Bernsteen at two of its stores leased from the Westfield Group. The process of distraint included the closure of the relevant stores.

144 It was against that background that Mr Macks was appointed the voluntary administrator of the Companies on 5 December 2001. Investigation of the affairs of the Companies led Mr Macks to form the opinion that Bernsteen had suffered a current period trading loss, properly assessed as a cash loss, of $463,084. The loss exacerbated the already poor financial position of Bernsteen. In addition, there was unpaid rent of $32,463.17 and $41,000 respectively for the Marion and Parabanks Shopping Centre stores.

145 The financial position of Newmore was little different. Newmore's typical monthly wages bill in 2001 was $75,400, with a PAYG liability of $13,000 and superannuation contribution guarantee charge amounts of an additional $5,700. Newmore fell behind in remitting taxation deductions and superannuation payments to the ATO. At the time it entered into administration, the outstanding remittances were $103,000.

146 Newmore's monthly rent bill was $44,000. At the time of Mr Macks' appointment, arrears of rent were about $120,000. On 1 November 2001, the landlord of Newmore's store in the Westfield Shopping Centre, Arndale, distrained goods for unpaid rent of $13,784.49. On 2 November 2001, the landlord of Newmore's store at Tea Tree Plaza distrained goods on account of unpaid rent of $15,064.

147 In the year ending 30 June 2000, Newmore's total revenue was $2,170,090 (from sales of $4,861,003 after deducting costs of goods sold of $2,722,166). Total operating costs were $2,403,896, of which employment costs were $1,040,040. Costs of premises were $648,790, and depreciation was $112,834. The net loss before income tax was $223,806.

148 A trial balance for the year ending June 2001 showed total income of $1,807,275, derived largely from sales in the amount of $3,784,652 with costs of goods sold at $1,993,801. Employment costs were $1,142,024 and premises costs $670,178. Total operating costs (including a significant advertising expense) were $2,579,224, resulting in a net loss before income tax of $771,949. The loss was due in large part to a drop in sales in the order of 20 per cent.

149 A trial balance for the five months to the end of November 2001 showed sales of $890,661 with the costs of goods sold at $462,252. Together with some other income, the total revenue for that period was $430,856. Employment costs were $372,732 and premises costs $223,790. Advertising costs were much reduced from the preceding financial year. Total operating expenses were $751,855. The net loss was $320,999.

150 As at 5 December 2001, trade creditors were $1.4million of which 33% were more than 6 months overdue. Total liabilities were $1.47million which was only marginally less than inventory and receivables. In Newmore, after taking into account employee entitlements and secured creditors, there was a deficiency of assets compared with liabilities of $1.11million.

151 The Companies were suffering many of the well-known hallmarks of severe financial distress.

Appointment of Mr Macks as administrator

152 Mr Viscariello gave evidence that the Companies had experienced trading and financial difficulties from about July 2000. In August 2000 he explored with ARL the possibility of franchising the stores.

153 Due to his concern about the Companies' financial position, Mr Viscariello entered into discussions with Mr Bart, a businessman from Sydney, about whether Mr Bart would be prepared to acquire a substantial (controlling) financial interest in the Companies. Mr Viscariello had first discussed the possibility of Mr Bart buying the Companies' businesses in 1995. Although Mr Bart had expressed an interest at that time, nothing came of the discussions.

154 Mr Bart requested that Mr Viscariello provide financial information to his chief financial officer. Mr Viscariello also had discussions with Mr Yeomans from ARL about whether ARL would be interested in acquiring an interest in the Companies or their businesses.

155 In late 2001 Mr Viscariello contacted Mr Macks, to discuss the Companies' financial problems. Eventually, Mr Viscariello and Mr Bart met with Mr Macks on 27 November 2001. A heads of agreement for the sale of the Companies was made between Mr Bart and Mr Macks at that meeting (which was referred to at trial as the proposed Bart DOCA).

156 Mr Viscariello alleged that Mr Macks told him and Mr Bart at the meeting that he would recommend that the creditors accept a DOCA incorporating the terms of the heads of agreement made between Mr Viscariello and Mr Bart if Mr Macks was appointed as the voluntary administrator of the Companies. Mr Macks denied agreeing to accept the position of administrator on the basis alleged by Mr Viscariello.

157 The proposed Bart DOCA was reduced to writing and sent to Mr Macks on 28 November 2001.[50] It was in the following terms:

> **Proposal for Heads of Agreement**
>
> JV means John Viscariello the sole director and secretary of Bernsteen & Newmore Diveni means a company owned and controlled by Fred Bart
>
> 1. Diveni to payout Commonwealth Bank Facilities provided for Newmore Pty Ltd which includes a $50,000 overdraft facility and contingent liabilities in the form of Bank Guarantee for store rents.
>
>   → Diveni to acquire the Banks security over Newmore.
>
> 2. JV and his family trust to sell to FB his shares in Bernsteen & Newmore for a dollar.
>
> 3. JV's family trust Palm Hills to sell to FB the Bedroom Mazurka and Inside Home trade marks for a dollar.
>
> 4. JV to sell to FB his security over Newmore for a dollar.
>
> 5. JV to sell any loan monies he has in Bernsteen & Newmore for a dollar.
>
> 6. Diveni agrees to purchase from ARL its security over Bernsteen & Newmore for the consideration of $400,000 subject to the following:
>
>   → An assignment of ARL's entire debt and charge over Bernsteen & Newmore.
>
>   → That the net stock (net stock meaning all stock free of any retention of title, distraint of rent or any other unspecified claims or encumbrances) being not less than $1,050,000. In the event that the next stock figure is less than $1,050,000 a pro rata consideration shall be paid, provided however that the net stock figure shall not fall below $850,000.00.
>
> 7. Employee liabilities for Bernsteen & Newmore shall not exceed:
>
>   → For Bernsteen $227,000
>
>   → For Newmore $112,000 which sum excludes entitle due to the director.
>
> Signed ……. Dated 27 Nov 2001 For Bernsteen & Newmore
>
> Signed ……. Dated 27 Nov 2001 For Diveni.

158 It is to be noted that under the terms of the proposed Bart DOCA, Mr Viscariello would cause the trustee of the John Viscariello Family Trust to sell its shares in the Companies and its ownership of the trademarks to a company controlled by Mr Bart, Diveni. Diveni would purchase from ARL its security over the Companies for the sum of $400,000 and the Companies were required to maintain stock levels at a figure of $1,050,000, with a pro-rata

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[50] Ex P3 p 1312.

reduction (the amount to be paid to ARL) to a floor of $850,000. There was also to be a cap on employee liabilities.

159 On 5 December 2001 Mr Viscariello resolved, as sole director of the Companies, that the Companies were insolvent or likely to become insolvent. On 6 December 2001 Mr Viscariello appointed Mr Macks as the administrator of the Companies.

160 The first meeting of creditors was held on 11 December 2001. The Primary Judge largely relied on the minutes of the meeting to determine what had occurred in the meeting.

161 His Honour found that the proposed Bart DOCA was discussed at the meeting, with Mr Macks advising that "the proposal was dependent on the level of stock at the stores and it was crucial that the sale proceed quickly since the stock is presently at minimum levels and that every day of trading will significant [sic] reduce the expected outcome of the proposed purchase".[51] Mr Macks also informed the meeting that it would be necessary to hold the second meeting of creditors earlier than the date specified in the CA if Mr Bart's proposal was acceptable and that the proposal was dependent on the Companies not going into liquidation so that Mr Bart could take advantage of tax losses. Mr Mansueto, a partner of Minter Ellison, advised that a court order might be obtained to hold the second meeting of creditors on 21 December 2001.

162 Mr Macks also advised the creditors at the meeting of his assessment of the financial position of the Companies. He stated that he was concerned about the Companies' daily cash flow position and the accruing rental liability by maintaining the leases on the stores. He indicated that he was in negotiation with the Companies' landlords and that their support was imperative.

163 Mr Clifton, a partner of Mr Macks, told the meeting that the Companies could not afford to trade for another week. Mr Macks raised the possibility of negotiating a higher payment from Mr Bart, but also referred to the likelihood that ARL might have to "absorb some of the pain".

164 Mr Yeomans attended the meeting on behalf of ARL. He advised that ARL was not prepared to compromise its secured position nor would it accept the payment of $400,000 when compared to a debt owed by the Companies of $820,000. ARL made it clear that it would not compromise its position on its ROT terms or on its consignment stock. Mr Yeomans claimed that Mr Bart was desperate for the tax losses associated with the Companies.

165 A committee of creditors was appointed. The first meeting of the committee was held on 12 December 2001. Mr Clifton informed the committee that Mr Bart would only "sweeten" his offer by making a further $10,000 available for

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[51] *Viscariello v Macks* [2014] SASC 189, [137].

distribution amongst unsecured creditors that had generally foreclosed their credit arrangements with the Companies. Mr Clifton considered that the Companies would only be able to trade for a short period of time. No other capital had been contributed to the Companies during this period.

166 On 14 December 2001, Mr Macks gave notice to the creditors that he was likely to apply to the Court to abridge the time for holding the second meeting of creditors to 21 December 2001. He warned creditors that it was "imperative that any sale proceed as quickly as possible" because the Companies could not continue to trade through to the statutorily scheduled second meeting. The Primary Judge found that Mr Macks genuinely held that view and that Mr Viscariello knew that to be the case.

167 There were a number of reasons why Mr Macks might seek a preponement order to hold the second meeting of creditors. Christmas trading was underway, reducing stock and bringing into sharp focus the stock "floor" of $850,000 stipulated in the proposed Bart DOCA. A decision to continue to trade through the Christmas break had to be made against the background of the insolvency of the Companies, the liability of Mr Macks for the debts of the administration and the indemnity of the Mr Macks from company assets (s 443A CA).

168 The Primary Judge found that Mr Macks informed the committee of creditors on 17 December 2001 that:

(a) he was still working through the significant ROT claims of the suppliers;

(b) the Companies would most probably go into liquidation if Mr Bart's proposal was not accepted;

(c) $10,000 was insufficient for unsecured creditors but that there would be no funds available to them on a liquidation;

(d) the proposal could only be voted on at the second meeting of creditors.

169 There were some expressions of support for the proposed Bart DOCA at the committee meetings as it would have allowed for the continued employment of the Companies' workers. The committee unanimously supported the application to bring forward the second meeting of creditors.

170 Mr Macks decided that he should prepare a revised proposal for a DOCA (the revised Bart proposal) prior to the second meeting of creditors in light of the position adopted by ARL at the first meeting. The revised Bart proposal was based on the proposed Bart DOCA but with Mr Viscariello, Mr Bart and ARL as parties to the proposal. The Primary Judge found that the revised Bart proposal

was transmitted to Mr Bart and Mr Yeomans some time around midnight on 18 December 2001.[52] The terms proposed were that:

1. Mr F Bart or Diveni Pty Ltd to repay the Commonwealth Bank their liability in respect of their security over the assets of Newmore Pty Ltd, which we understand to be in the order of $86,000 in return for the assignment of their debt and the transfer of their fixed and floating security. This amount is to be paid to the Minter Ellison trust account and disbursed to the Commonwealth Bank;

2. Mr F Bart or Diveni Pty Ltd to arrange with the Commonwealth Bank to assume the existing leases that exist between the companies and the Commonwealth Bank and CBFC leasing. These are as follows:

3. Mr John Viscariello or entities under his control to sell to Mr F Bart or Diveni Pty Ltd the "Bedroom Mazurka" and "Inside Home" trademarks for $1 each;

4. Mr John Viscariello to sell to Mr F Bart or Diveni Pty Ltd his fixed and floating charge over Newmore Pty Ltd for $1;

5. Mr F Bart or Diveni Pty Ltd to pay the company the sum of $250,000 in return for the assignment by Associated Retailers Limited (ARL) of its fixed and floating charge over Bernsteen Pty Ltd and Newmore Pty Ltd, subject to the following:

    - An assignment of ARL's debt in both companies;

    - That the net stock free of any encumbrances not being less than $1,050,000. In the event that the stock is less than $1,050,000 a pro rata consideration shall be paid provided however that the net stock figure shall not fall below $850,000; and

    - The payment shall be pro-rated between Bernsteen Pty Ltd and Newmore Pty Ltd based on the value of stock purchased as determined by the records of the companies.

6. The amount determined in the above paragraph is to be calculated on the basis of the gross amount of stock available including any potential ROT claims as calculated from information extracted from records of the companies;

7. The Administrator is to use his best endeavours to assist Mr F Bart or Diveni Pty Ltd in securing the transfer of licence for the right to use the name "Faulty Towels and Sheets".

8. The amount of $20,000 is to be paid to the Administrator for the benefit of unsecured creditors. This amount is to be pro-rated between Bernsteen Pty Ltd and Newmore Pty Ltd on the basis of the value of unsecured creditors in both companies.

9. All funds payable in respect of the Commonwealth Bank payment, the ARL payment and for contribution to unsecured creditors are to be paid immediately into the Minter Ellison trust account;

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[52] *Viscariello v Macks* [2014] SASC 189, [197] and [228].

10. All amounts payable pursuant to paragraphs 5 & 8, received by the Administrator is to be disbursed in the following order:

    (a) In payment of the Voluntary Administrator's and Deed Administrator's fees and expenses;

    (b) In payment of any valid retention of title claims against the Administrator of both companies;

    (c) In payment to employees of both companies for their existing employee entitlements for unpaid wages, annual leave and long service leave; and

    (d) An amount of $20,000 is to be made available to unsecured creditors.

11. In respect of the additional stock currently in the possession of ARL, Mr F Bart or Diveni to pay ARL cost plus 5% for this stock on payment terms of 60 days from statement as the stock is ordered.

12. ARL to waive all rights in respect of the consignment stock currently held by Bernsteen Pty Ltd and Newmore Pty Ltd and the Administrator is not to account to ARL for consignment stock sold during the Administration.

13. Mr John Viscariello confirms that there is no liability of either company to Hindmarsh Financial Services who are reported as a secured creditor according to ASIC records;

14. Mr F Bart accepts as final and binding the value of stock as reflected in the company's records as ascertained by the Administrator as at the date of execution of this agreement;

15. All of the Faulty Towels and Sheets stores other than Mile End are to be closed.

16. Peter Ivan Macks is to be the Deed Administrator of both companies.

17. Settlement is to occur on 21 December 2001, immediately after the meeting of creditors, provided that the creditors accept the proposal.

171 ARL rejected the revised Bart proposal. The Primary Judge did not identify in the Reasons precisely when that occurred but it is implicit in his narrative of the relevant events that the proposal was rejected sometime shortly prior to when Mr Macks prepared a report to creditors pursuant to s 439A CA (the s 439A report).

172 The application to advance the time for the second meeting of creditors was granted on 19 December 2001. Mr Macks prepared the s 439A report later that day or that evening. The report stated that there was currently no proposal for a DOCA that could be put to the meeting. It was recommended that the Companies be placed into liquidation and that Mr Macks be appointed as liquidator.

173 Notwithstanding the statements and recommendations made in the s 439A report, Mr Macks endeavoured to persuade ARL to change its view prior to the second creditors' meeting. He spoke with Mr Yeomans and subsequently sent a

detailed letter to ARL in a further attempt to persuade the company to change its mind about the proposed DOCA. Similar attempts were made by representatives of the staff of the Companies. Those approaches failed as ARL was not prepared to give up its security.

174 Mr Macks gave evidence that Mr Bart withdrew the offer contained in the revised Bart proposal prior to the second creditors' meeting. However, the Primary Judge rejected that evidence.[53] His Honour further found that Mr Macks did not put the revised Bart proposal to the second creditors' meeting because of ARL's rejection of the proposal:

> [Macks] must have realised that it was impracticable without ARL's support. In the circumstances, and given the company's precarious financial position, he made a decision not to force ARL to an election as to what it would do by recommending the revised Bart [proposal].[54]

175 Consistent with the s 439A report, Mr Macks advised the meeting that there was no alternative but for the Companies to be placed in liquidation. Mr Macks was subsequently appointed liquidator.

176 The Primary Judge found on Mr Viscariello's claims against Mr Macks in his capacity as the administrator of the Companies that:

> Even though I have rejected Mr Macks's evidence that Mr Bart had withdrawn his offer, I find that the winding up of the companies was inevitable. The proposed and revised Bart DOCAs were doomed to failure when ARL refused to agree to them. On ARL's rejection of the proposed and then revised Bart DOCA, it is unlikely that the creditors would have voted in favour of it. Even if they had voted in favour of it, ARL was always likely to be given permission to enforce its security. The revised Bart DOCA required it to sacrifice far too much. It was entitled to rely on its security.
>
> I am also satisfied that ARL would have rejected the proposed Bart DOCA even before its revision. Even though I have found that, against Mr Macks's evidence, he was largely responsible for the inclusion of several clauses which protected his interests, in my view it was reasonable for him to do so. It was reasonable for him to protect his personal position as against ARL on entry into the proposed Bart DOCA. Mr Macks would have been entitled to similar protections in the course of the administration and in a winding up. In any event, I am satisfied, on the evidence of Mr Yeoman's statements in the meetings of creditors, that the changes made in that respect were not causative of ARL's rejection of the revised Bart DOCA. ARL rejected both the initial proposed Bart DOCA and the revised Bart DOCA simply because their terms required ARL to make too great a sacrifice of its secured debt.
>
> It has not been shown that Mr Macks's additions to, or amendments of, the clauses of the revised Bart DOCA caused ARL to oppose the proposal. There is therefore no "loss of chance" to assess.[55]

177 Those findings are challenged by Mr Viscariello in the cross-appeal.

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53 *Viscariello v Macks* [2014] SASC 189, [267].
54 *Viscariello v Macks* [2014] SASC 189, [268].
55 *Viscariello v Macks* [2014] SASC 189, [302]-[304].

The grounds of appeal

178 The notice of cross-appeal contained ten grounds of appeal. Mr Viscariello advised the court in March 2016 that he did not propose to press grounds 4, 6, 7, 9 and 10. However, he subsequently informed the court that he intended to 'revive' the previously disclaimed grounds, except for grounds 6 and 10 (although Mr Viscariello did not formally amend the notice of cross-appeal to delete grounds 6 and 10, his submissions stated that those grounds were not pursued and accordingly, we have not considered those grounds). Mr Macks did not object to the change in Mr Viscariello's position.

179 Mr Viscariello filed two sets of submissions in the cross-appeal as a result of the change. He dealt with grounds 2, 3, 5 and 8 of the cross-appeal together in his first set of submissions. The case that was put in those submissions involved the following propositions:

(1) the Primary Judge erred in holding that Mr Macks' conduct in reporting to the creditors under s 439A and in the second creditors' meeting was not in the course of trade or commerce (ground 8);

(2) Mr Macks engaged in conduct that was misleading or deceptive or likely to mislead or deceive by stating to the Companies' creditors that there was no proposal to put to the creditors when, in fact, the revised Bart proposal had not been withdrawn (grounds 2 and 3);

(3) Mr Macks was under a duty to put the revised Bart proposal to the second creditors' meeting (ground 3);

(4) There was a realistic prospect that the revised Bart proposal would have been accepted had it been put to the meeting (ground 1);

(5) Mr Viscariello lost the chance of avoiding losses that he had suffered as a consequence of the Companies going into liquidation (ground 5);

(6) The loss suffered by Mr Viscariello was caused by Mr Macks' misleading or deceptive conduct.

180 Mr Viscariello also sought to rely in his second set of submissions on the following passage in the Reasons:

> In addition to his or her common law duties, the administrator owes a fiduciary duty to the company in the management of its property and business. The administrator is also under a fiduciary duty to disclose all material information to the creditors.[56]

181 Accordingly, Mr Viscariello argued in the second set of submissions that Mr Macks was under a positive duty to inform the creditors about the revised Bart proposal and to have also informed them about matters such as the

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[56] *Viscariello v Macks* [2014] SASC 189, [99].

possibility of adjourning the second creditors' meeting to enable further negotiations with ARL.

182 The question whether Mr Viscariello possessed any right that could found a claim for damages or compensation was fundamental to the cross-appeal. The question involved determining whether the Primary Judge had erred in holding that the preparation and dissemination of the s 439A report and the provision of information to creditors in the second creditors meeting was not conduct in trade or commence. It also involved considering the nature of the duties owed by a voluntary administrator. It is convenient to consider those issues first.

183 One further preliminary matter should be noted. Mr Macks filed an extensive notice of contention in the cross-appeal. We had dealt with some of the contentions made in that notice in the course of considering Mr Viscariello's grounds of cross-appeal. However, we have not found it necessary to separately consider every contention in light of the conclusions we have reached on the cross-appeal.

The duties owed by an administrator

184 Part 5.3A of the CA contains a comprehensive regulatory regime for the 'administration of a company's affairs with a view to executing a deed of company arrangement'.[57] The Part imposes a number of requirements on an administrator, including investigating and managing the company's affairs, convening meetings of creditors and providing reports. Those requirements might be expressed as statutory duties that are imposed on an administrator - although the use of the word 'duty' may be unhelpful in this context.

185 The remedy for a failure by an administrator to comply with a statutory requirement imposed by pt 5.3A lies within the provisions of the CA. The court is given wide powers of supervision over an administration by the CA: see s 445D; div 13, pt 5.3A; and pt 9.5 (and in particular, s 1321).

186 The Primary Judge held that a voluntary administrator was a fiduciary.[58] His Honour relied on the decisions of Santow J in *Hill v David Hill Electrical Discounts Pty Ltd*[59] and Hansen J in *Wood v Laser Holdings Ltd*.[60]

187 Justice Hansen did not go so far in *Wood* as to hold that an administrator was a fiduciary. His Honour merely noted that one party had asserted that an administrator was a fiduciary and no other party in the proceedings had an interest in contesting that assertion.[61] However, Santow J had no such doubt in *Hill*. His Honour stated, "thus Butterworths Australian Corporations Law: Principles and Practice, para 5.3A.0330 conclude, correctly: 'there can be no

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57 The title to pt 5.3A CA.
58 *Viscariello v Macks* [2014] SASC 189, [67] and following.
59 *Hill v David Hill Electrical Discounts Pty Ltd* (2001) 37 ACSR 617; [2001] NSWSC 271.
60 *Wood v Laser Holdings Ltd* (1996) 19 ACSR 245.
61 *Wood v Laser Holdings Ltd* (1996) 19 ACSR 245, 267.

doubt that in combination with the statutory duties imposed on an administrator, the nature of the administrator's position is fiduciary in character'.[62]

188 It is now well-established that an administrator is a fiduciary. So, for example, Gleeson JA (with whom Barrett JA and Tobias AJA agreed) stated in *Correa v Whittingham* that, '[i]t may be readily accepted that as the company's agent, the administrator owed fiduciary duties to the company (see s 437B Corporations Act)'.[63] Similarly, Barrett J (as his Honour then was) observed in *Blundell v Macrocom Pty Ltd* that:

> Additionally, of course, an administrator occupies a fiduciary position vis-à-vis the company and is an 'officer' of it as defined by s 9, with the result that, for that reason also, a 'proper purpose' requirement with respect to the exercise of powers applies as an incident of both the general law fiduciary duty and the statutory duty under s 181.[64]

189 Neither party disputed that Mr Macks was a fiduciary when acting in his capacity as administrator of the Companies. At issue was the content of his duty as a fiduciary and whether Mr Macks owed a duty to individual creditors that could be enforced by an action for damages or compensation. It is convenient to deal first with the question whether Mr Macks owed a duty to Mr Viscariello that was capable of being enforced by an action for damages or compensation.

190 The Primary Judge held that:

> [A]s a general proposition, the administrator's duty is owed to the company in administration. The duty may extend to creditors generally because of the company's insolvency but it is doubtful that the duty is owed to individual creditors.[65]

191 Mr Viscariello did not challenge that statement of principle in his grounds of cross-appeal. However, the statement, if correct, would be fatal to his claims to the extent that they rested on a duty owed by Mr Macks under the CA or general law.

192 It is to be noted that the passages cited above from the judgments of Gleeson JA in *Correa v Whittingham* and Barrett J in *Blundell v Macrocom* identified the fiduciary relationship as subsisting between an administrator and the company in administration. We do not think that their Honours were merely defining the relationship in a general sense. Rather, we consider that the Primary Judge was right to reject, albeit tentatively, the proposition that an administrator owes a duty to individual creditors. In our view, an administrator does not owe statutory or general law duties to individual creditors. Absent a statutory entitlement, a creditor has no personal right of action against an administrator for

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62 *Hill v David Hill Electrical Discounts Pty Ltd* (2001) 37 ACSR 617; [2001] NSWSC 271, [19].

63 *Correa v Whittingham* [2013] NSWCA 263; (2013) 278 FLR 310 [148]. Section 437B CA states that 'when performing a function or exercising a power, as administrator of a company under administration, the administrator is taken to be acting as the company's agent'.

64 *Blundell v Macrocom* (2004) 50 ACSR 549; [2004] NSWSC 895, [10].

65 *Viscariello v Macks* [2014] SASC 189, [68].

damages or compensation. The directors of a company, including a company that is nearly insolvent, do not owe duties to individual creditors and we are unable to discern any basis for reaching a different conclusion for administrators.

193 There is no duty generally owed by an officer of a corporation to creditors[66] and any action for remedies for breach of ss 180, 181 or the general law duties from which those provisions are derived is ordinarily to be commenced by the company.

194 Historically, the rule in *Foss v Harbottle*[67] governed, in a restrictive way, the right to bring an action on behalf of a company. Sections 236 and 237 CA enlarge the scope of the rule and are intended to remove or reduce some of the restrictions at common law. Even so, it remains necessary under s 236(1) CA for a person to obtain leave under s 237 CA and to qualify under s 236(1)(a) (i) and (ii) and (b) CA. An applicant for leave must satisfy the court of the matters under s 237(2) CA and rebut the presumption arising under s 237(3) CA.

195 In *Spies v The Queen*[68] the High Court rejected the proposition that directors owed duties to individual creditors. In their joint judgment, Gaudron, McHugh, Gummow and Hayne JJ stated:

> [93] It is true that there are statements in the authorities, beginning with that of Mason J in *Walker v Wimborne*,[69] which would suggest that because of the insolvency of Sterling Nicholas, the appellant, as one of its directors, owed a duty to that company to consider the interests of the creditors and potential creditors of the company in entering into transactions on behalf of the company. *Walker v Wimborne* was an appeal by a liquidator against the dismissal of his misfeasance summons brought against former directors under s 367B of the *Companies Act* 1961 (NSW). Statements in this and other cases[70] came within Professor Sealy's description of:[71]
>
> > …words of censure directed at conduct which anyway comes within some well-established rule of law, such as the law imposing liability for misfeasance, the expropriation of corporate assets or fraudulent preference.
>
> Hence the view that it is "extremely doubtful" whether Mason J "intended to suggest that directors owe an independent duty directly to creditors."[72] To give some unsecured creditors remedies in an insolvency which are denied to others would undermine the basic principle of *pari passu* participation by creditors.

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66 *Spies v The Queen* (2000) 201 CLR 603.
67 *Foss v Harbottle* (1843) 67 ER 189; (1843) 2 Hare 461.
68 *Spies v The Queen* (2000) 201 CLR 603.
69 (1976) 137 CLR 1, 6-7.
70 *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 at 732-733; *Lyford v Commonwealth Bank of Australia* (1995) 130 ALR 267; *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512 at 1516; [1987] 1 All ER 114 at 118; *West Mercia Safetywear Ltd (in liq) v Dodd* [1988] BCLC 250 at 252-253; Jeffree v NCSC [1990] WAR 183, 187-189, 194.
71 Sealy, "Directors' Duties – An Unnecessary Gloss", (1988) 47 Cambridge Law Journal 175 at 175.
72 Heydon, "Directors' Duties and the Company's Interests", in Finn (ed), Equity and Commercial Relationships, (1987), 120, 126.

> [94] In *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler*,[73] Gummow J pointed out:
>
> > It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors ... the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator.
>
> [95] In so far as remarks in *Grove v Flavel*[74] suggest that the directors owe an independent duty to, and enforceable by, the creditors by reason of their position as directors, they are contrary to principle and later authority[75] and do not correctly state the law.

196 In *Geneva Finance Ltd (Receiver and Manager Appointed) v Resource & Industry Ltd* E M Heenan J summarised the position as follows:

> In such circumstances I consider that the orthodox articulation of the duty is that a director of a company, especially if the company is approaching insolvency, is obliged to consider the interests of creditors as part of the discharge of his duty to the company itself, but that he does not have any direct duty to the creditors and certainly not one enforceable by the creditors themselves, except in "special responsibility" cases or under statutory provisions now prevailing liquidation: Corporations Act 2001 (Cth), ss 588M and 588R-588U.[76]

197 That statement of the law must now be regarded as uncontroversial.

198 The Primary Judge placed some reliance upon the decision of the Full Court in *Mills v Sheahan*.[77] The plaintiffs were obliged to indemnify in respect of a bank loan. The assets of the company were sold by its liquidator. There was a shortfall and the liquidator called on the plaintiffs to indemnify the company for the amount outstanding on the bank loan. The plaintiffs claimed that the liquidator had sold the assets at an undervalue. They alleged that the liquidator owed a duty of care and that their indemnity would not have been called upon but for his breach of duty. The Full Court held that the allegation that the liquidator owed a duty of care could not be struck out on an interlocutory application as not disclosing a reasonably arguable cause of action. Debelle J held that the

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[73] (1994) 51 FCR 425 at 444-445.

[74] (1986) 43 SASR 410. See also remarks in *Nicholson v Permakraft* (NZ) Ltd [1985] 1 NZLR 242.

[75] *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187; *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 122 ALR 531. See also Farrar's Company Law, 4th ed (1998), 382-385.

[76] *Geneva Finance Ltd (Receiver and Manager Appointed) v Resource & Industry Ltd* [2002] WASC 121, [26].

[77] *Mills v Sheahan* (2007) 99 SASR 357.

liquidator owed a duty of care; Sulan J (with whom Layton J agreed) held that it was reasonably arguable that a duty was owed.

199 The decision was recently considered by Vickery J in *Perpetual Nominees Ltd v McGoldrick (No 3).*[78] As did the Full Court, Vickery J reviewed a number of the salient features for the existence of a duty of case and concluded that the defendant liquidators owed a duty of care to the plaintiff in selling real property owned by a corporate debtor that was in liquidation and over which the plaintiff had mortgages to secure loans made to the debtor. His Honour substantially endorsed the analysis of Debelle J in *Mills*.

200 A liquidator's common law duty of care in disposing of a company's assets cannot be equated with a liquidator's fiduciary duties in exercising his or her powers in winding up the affairs of an insolvent company. The source and nature of the duties are entirely different. They intersect at the point where a court is required to consider whether the imposition of a duty of care would be inconsistent with other duties owed by a liquidator. As Debelle J observed in *Mills*, there was no inconsistency in imposing a duty of care on the liquidator as the plaintiffs and the company's creditors and shareholders shared a common interest in the liquidator obtaining the best price reasonably available for the company's assets.[79]

201 The Primary Judge agreed with Debelle J on the existence of a common law duty of care. His Honour stated:

> I respectfully adopt the analysis of Debelle J on the question of the existence of a common law duty of care owed by the administrator to the company in administration and its creditors to manage its business affairs, including the sale of all or some of its assets, compromising claims for and against it, and the negotiation of a DOCA. The interests of the company, its creditors and shareholders, are at one in maximising the return to the company from its commercial dealings with unrelated parties. However, the imposition of a duty to individual creditors in making decisions as to the re-arrangement of the company's finances, the proportionate payment of debt in accordance with a DOCA, or whether the company should go into liquidation, would compromise the statutory scheme to which I have referred. In my view, this factor alone decisively tells against the imposition of a duty to individual creditors with respect to that part of an administrator's responsibilities.[80]

202 There may be some debate over the width of the common law duty of care acknowledged by the Primary Judge in that passage.[81] However, it is not necessary for us to further consider that issue. Rather, the point to be emphasised in the present context is his Honour's recognition that imposition of a duty in favour of individual creditors may be inconsistent with the statutory scheme created by pt 5.3A of the CA. The point was further developed by his Honour:

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78 *Perpetual Nominees Ltd v McGoldrick (No 3)* [2017] VSC 78.
79 *Mills v Sheahan* (2007) 99 SASR 357, [31]-[32].
80 *Viscariello v Macks* [2014] SASC 189, [94].
81 And see *Viscariello v Macks* [2014] SASC 189, [96].

> It is manifestly inconsistent with the statutory regime of the Corporations Act regulating the duties of voluntary administrators to superimpose upon it a common law duty of care owed by the administrator to individual creditors, directors or shareholders to protect them from financial loss by the exercise of reasonable care in discharging his or her statutory powers affecting the form in which the company will continue to operate or, alternatively, whether it will be wound up. That inconsistency is at its greatest when an administrator must form an opinion and frame a recommendation to the creditors, about whether to trade on, enter into a deed of company arrangement, sell the business and/or wind up the company.[82]

203 We agree with those observations. However, we would make two further points. First, Mr Viscariello did not contend in the appeal that Mr Macks owed a common law duty of care in relation to the preparation of the s 439A report and the conduct of the second creditors' meeting. He did not embark upon the analysis that would have been required on authorities such as *Mills* and *Perpetual*. More conclusively, Mr Viscariello did not challenge the Primary Judge's conclusions to which we have referred.

204 Second, the Primary Judge's discussion of *Mills* focussed on the imposition of a common law duty of care. His Honour did not consider what, if any, implications the decision had for the question whether a liquidator owed fiduciary duties to individual creditors – that is, duties that could be enforced by a creditor in an action for damages or compensation.

205 That question was also not considered in *Mills* other than in the very limited context of whether the duty alleged would be inconsistent with other duties owed by the liquidator. It is not surprising, therefore, that the Full Court did not consider the decision in *Spies* and the other authorities concerning whether an officer of a company owes fiduciary duties to individual creditors or contributories.

206 The acceptance by this court of a possible duty of care in Mills was fact specific. Relevantly, there was a coincidence of interest between the plaintiffs as indemnifiers and the company as the beneficiary of the indemnity. The identification of a common law duty of care involves different factors and policy considerations to the recognition of a fiduciary relationship. The decision in *Mills* cannot be taken as authority for the proposition that a liquidator owes a fiduciary duty to individual creditors. The imposition of such a duty would be inconsistent with the general law relating to company officers and insolvency administration.

207 As to the position of administrators, Barrett J stated in *Hausmann v Smith*:

> The second point is that the duties owed by administrators and liquidators are not duties owed to shareholders or to creditors. Reference was made to *Kinsela v Russell Kinsela Pty Ltd* [1983] 2 NSWLR 452. That case is part of a line of decisions the most recent authoritative element of which is, I think, *Spies v The Queen* (2000) 201 CLR 603 in

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[82] *Viscariello v Macks* [2014] SASC 189, [95].

> which it is recognised that directors' duties are owed to the company, even though due performance of those duties may require directors to pay attention to the interests of creditors. There is a difference between the beneficiary of a duty and the delineation of the interests to be taken account of in performing the duty. In my opinion, the same analysis holds good in relation to the duties of administrators and liquidators.[83]

208 We agree with those observations. In our view, Mr Macks did not owe a duty to Mr Viscariello in the conduct of the administration that was enforceable by Mr Viscariello under the general law. The recognition of such a duty would be inimical to the basic principles and policies on which insolvency administration rest - in particular, the principle of equality between creditors.

209 That conclusion is sufficient to dispose of any claim founded on the allegation that Mr Macks breached a fiduciary duty owed to Mr Viscariello. However, for completeness it is necessary to also comment on the Primary Judge's statement that Mr Macks, as an administrator, owed a fiduciary duty to disclose all material information to the Companies' creditors.

210 The Primary Judge based that statement on the judgment of Austin J in *Brian Rochford v Textile Clothing and Footwear Union*.[84] However, with respect, the decision of Austin J does not establish that an administrator owes a fiduciary duty to disclose information to a company's creditors. Rather, his Honour merely noted, in summarising the effect of pt 5.3A of the CA, that ss 438A and 439A(4) imposed a duty on an administrator to make investigations and form an opinion on which course of action should be taken in respect of the company's future and to report that opinion to creditors. Accordingly, Austin J did not hold that an administrator owed a fiduciary duty to disclose all material information to creditors. Rather, his Honour simply recounted the statutory requirements imposed on an administrator.

211 The question whether a fiduciary was under a duty to disclose a particular matter has been considered in a variety of contexts. In *P & V Industries v Porto*,[85] Hollingsworth J held that the plaintiffs should not permitted to plead that the defendant owed a fiduciary duty to disclose past misconduct. Although the issue arose on a pleading summons, her Honour concluded that 'there is no indication that the law in Australia is developing or likely to develop to include a positive fiduciary duty of disclosure'.[86] That was because under Australian law, fiduciary duties were limited proscriptive obligations: 'fiduciary duties are limited to imposing constraints on conduct which the fiduciary has embarked upon and not by imposing a positive obligation of disclosure of the kind assumed by a duty to disclose'.[87] As her Honour noted, the High Court had recognised the

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83 *Hausmann v Smith* [2006] NSWSC 682; (2006) 24 ACLC 688, [12].
84 *Brian Rochford Ltd v Textile Clothing & Footwear Union of New South Wales* (1998) 47 NSWLR 47.
85 *P & V Industries Pty Ltd v Porto* [2006] VSC 131; (2006) 14 VR 1.
86 *P & V Industries Pty Ltd v Porto* [2006] VSC 131; (2006) 14 VR 1, [11].
87 *P & V Industries Pty Ltd v Porto* [2006] VSC 131; (2006) 14 VR 1, [42].

distinction between proscriptive and prescriptive duties in *Breen v Williams*[88] and *Pilmer v Duke Group Ltd*.[89]

212 It was alleged in *Sliteris v Ljubic*[90] that an accountant owed a fiduciary duty to a company and its creditors to give certain advice in relation to a proposal to appoint an administrator. The accountant was a shareholder in and a creditor of the company, as well as its accountant. Black J held that the accountant did not owe a fiduciary duty to the company's creditors and added:

> A further difficulty with Mr Sliteris' claim is that it appears to contemplate a positive fiduciary duty of disclosure, or to provide advice, owed by Mr Harrow, of a kind that is plainly not accepted in Australian law, rather than disclosure in order to obtain ratification or consent to a conflict of interest which would otherwise arise.[91]

213 That observation reflects the position in Australian law. An administrator is required to perform the statutory duties (requirements) that are prescribed by pt 5.3A of the CA. Those duties or requirements are not fiduciary in nature. The CA confers various powers on administrators to enable his or her duties or requirements to be performed. The administrator's fiduciary duties, as an officer of the company under administration, operate as a constraint in exercising those powers and performing his or her statutory function. Contrary to the statement made by the Primary Judge, an administrator does not owe a fiduciary duty to disclose all material information to creditors.

214 It is convenient to deal first with ground 8 of the cross-appeal as that will complete the discussion of the possible sources of any right that Mr Viscariello might have possessed to bring a claim against Mr Macks in his capacity as the administrator of the Companies. Ground 8 alleged that the Primary Judge erred in law in finding that Mr Macks conduct in providing the s 439A report and advising creditors at the second creditors meeting was not conduct in trade or commerce.

Ground 8

215 The question determined by the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson*,[92] was whether a statement made by one employee to another in their work was a statement made in trade or commerce for the purpose of s 52 of the *Trade Practices Act 1974* (Cth) (TPA). The plurality (Mason CJ, Deane, Dawson and Gaudron JJ) stated:

> It is well established that the words 'trade' and 'commerce', when used in the context of s 51(i) of the Constitution, are not terms of art but are terms of common knowledge of the widest import. The same may be said of those words as used in s 52(1) of the Act. … The real problem involved in the construction of s 52 of the Act does not, however, spring

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88 *Breen v Williams* (1996) 186 CLR 71.
89 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.
90 *Sliteris v Ljubic* [2014] NSWSC 1632.
91 *Sliteris v Ljubic* [2014] NSWSC 1632, [46].
92 *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594.

> from the use of the words 'trade or commerce'. It arises from the requirement that the conduct to which the section refers be *in* 'trade or commerce'. Plainly enough, what is encompassed in the plenary grant of legislative power 'with respect to… Trade and commerce' in s 51(i) of the Constitution is not of assistance on the question of the effect of the word 'in' as part of the requirement that the conduct proscribed by s 52(1) of the Act be 'in trade or commerce'.
>
> The phrase "in trade or commerce" in s 52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified kind.[93]

216 The plurality further held that a narrow construction of the expression "in trade or commerce" was to be preferred and said:

> … the reference to conduct 'in trade or commerce' in s 52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. …the narrower…of the alternative constructions of the requirement 'in trade or commerce' is the preferable one.[94]

217 Toohey J expressed a similar view:

> …it should be necessary to consider closely the character of a corporation's business and in particular to determine whether or not the conduct relied upon by an applicant or plaintiff can fairly be said to be in the trade or commerce of that corporation. …
>
> In my view, s 52(1) is aimed at conduct in which a corporation engages when that conduct takes place in a situation which fairly answers the description 'in trade or commerce'. The words 'trade or commerce' are of wide import … But their focus is on commercial activity, the providing of goods and services for reward. There is no reason why they should bear a different meaning to that which they bear in s 51(i) of the Constitution …
>
> Even taking such a broad view of s 52(1), the preposition 'in' clearly operates by way of limitation. The question is not whether the conduct engaged in was *in connection with* trade or commerce or *in relation to* trade or commerce. It must have been in trade or commerce. While there are dangers in seeking for the meaning of an expression through the substitution of another, the phrase 'as part of trade or commerce' does, I think, come close to what is intended.[95]

218 After considering the ambit of the expression "in trade or commerce", the plurality turned to the question of its application and observed:

> What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public. In some areas, the dividing line between what is and what is not conduct 'in trade or commerce' may be less clear and may require the

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93 *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 602.
94 *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 603.
95 *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 613 – 614.

> identification of what imports a trading or commercial character to an activity which is not, without more, of that character.[96]

219 Similarly, Toohey J held that conduct was not in "trade or commerce" where it occurred in circumstances that were incidental to the defendant's business or commercial activities.

220 In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*,[97] Deane J said:

> The terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases of development of trade, commerce and commercial communication, the terms are clearly of the widest import … They are not restricted to dealings or communications which can properly be described as being at arm's length in the sense that they are within open markets or between strangers or have a dominant objective of profit-making.

221 As a general rule private dealings are not in trade or commerce and are not subject to the TPA and its statutory equivalents: *O'Brien v Smolonogov*.[98] However, as the Full Federal Court observed in *Taylor v Crossman (No 2)*,[99] allegedly misleading or deceptive representations may have been made in trade or commerce even if the maker of the impugned representations was not actually engaged in trade or commerce at the time when the representations were made. So, for example, representations may have been made in trade or commerce if they concerned establishing a commercial enterprise in the future. It is always necessary to consider the representation in issue in the particular context in which it was made.

222 Similarly, it was held in *Houghton v Arms*[100] and *TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd*,[101] that a misleading representation will have been made in trade or commerce even though the representation did not concern the trade of the representor if it related to the trade of the person to whom the representation was made and provided that it bore the requisite feature of trading of a commercial character.

223 Mr Viscariello contended that the representations allegedly made by Mr Macks could be characterised as being in trade or commerce irrespective of the statutory framework and obligations contained within pt 5.3A CA and the fact that Mr Macks was exercising the powers conferred, and discharging the requirements imposed, by the Part. He submitted that the focus ought to have been on the circumstances in which the representations were made and that the Primary Judge had placed undue emphasis on Mr Macks' position as a voluntary

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96 *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 604.
97 *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621, 648-649.
98 *O'Brien v Smolonogov* (1983) 53 ALR 107.
99 *Taylor v Crossman (No 2)* [2012] FCAFC 11.
100 *Houghton v Arms* (2006) 225 CLR 553.
101 *TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd* [2008] NSWCA 9; (2008) 71 NSWLR 323.

administrator. In support of that submission, Mr Viscariello relied upon the statements of the plurality in *Houghton*, accepting the comments of Toohey J in *Concrete Constructions*, that:

> …statements made by a person not himself or herself engaged in trade or commerce may answer the statutory expression if, for example, they are designed to encourage others to invest, or to continue investments, in a particular trading entity.[102]

224 The trial Judge drew a distinction between conduct by a person seeking to influence the commercial conduct of another and the commercial conduct itself. His Honour referred to, and relied upon, the decision in *New Cap Reinsurance Corp Ltd (in liq) v Daya*[103] in making that distinction. In that case, Barrett J refused to allow an amendment sought by a company and its liquidator to file a cross claim against a former director of the company alleging that misleading representations had been made at a board meeting. His Honour held that any representation made by the former director was only to facilitate the process of deciding whether the company should commit itself to a particular debt transaction. The discussions and the decision were antecedent to the making of the loan contract. It was the making of the contract that was in trade or commerce. The discussions leading to a decision to make the contract did not involve any trading or commercial activity.

225 The Primary Judge further observed that:

> …the relationship between a voluntary administrator, the company, its contributories and creditors is purely a statutory construct. There is no room for commercial exchange and compromise on the part of a voluntary administrator who is bound by his or her statutory duties and such further obligations as may be imposed by the general law.[104]

226 The general purpose of both a liquidator and an administrator is to maximise the return to creditors either under a *pari passu* distribution (liquidation) or under a DOCA. In both instances, the company is insolvent or nearly insolvent. A company is placed into liquidation by an order of the court, a resolution of creditors or a resolution of members. Under a DOCA, it is a matter for the creditors whether they accept the content of the proposed deed as being sufficient to satisfy their claims as creditors and allow the company to continue to trade. Adopting the observations of Barrett J in *New Cap Reinsurance Corporation*, we consider that the statements made by Mr Macks to Mr Viscariello and other creditors were antecedent to any decision to be made by the creditors at the second creditors meeting - statements that were provided to facilitate discussion and ultimately, to make a decision regarding the Companies' future.

227 Mr Viscariello also submitted that Mr Macks was carrying on a 'private' commercial activity by applying his skill and experience for reward in acting as

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[102] *Houghton v Arms* (2006) 225 CLR 553 [34].
[103] *New Cap Reinsurance Corp Ltd (in liq) v Daya* (2008) 216 FLR 126.
[104] *Viscariello v Macks* [2014] SASC 189, [82].

the Companies' administrator notwithstanding that he was performing a statutory function. He relied upon the decision of the Full Federal Court in *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd.*[105] That case concerned whether the owner or master of a ship navigating in the inner harbour of Port Kembla was answerable for any loss or damage caused by the ship or by the fault of the navigation of the ship in circumstances where pilotage was compulsory. At the time of the collision, an unlicensed pilot employed by Port Kembla Port Corporation was supposed to have the conduct of the ship. This was despite the fact that the applicable Act made it compulsory for ships to use a licensed pilot.

228 The Full Federal Court held that the conduct of the pilot in carrying out the pilotage was in trade or commerce. The court analysed the *Ports Corporatisation and Waterways Management Act 1995 (NSW)* and identified that one of the Corporation's principle objectives was to be a successful business, to operate efficiently as any other comparable business and to maximise the net worth of the investment by the State in the Corporation. Those were commercial objectives. The Corporation was also required to facilitate and promote trade through port facilities and it was under a statutory duty to charge for pilotage services. The Corporation's annual reports emphasized the nature of the business it carried on by providing pilotage services under the Act.

229 The Full Federal Court held that the Corporation was engaged in trade or commence in providing pilotage services having regard to the requirements of its governing legislation and the way in which it provided pilotage services and conducted its affairs.[106]

230 Mr Viscariello also relied upon *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd.*[107] That case concerned whether providing professional advice could constitute conduct in trade or commerce for the purpose of s 52 of the TPA. It was held by French J (as his Honour then was) that consulting engineers were acting in trade or commerce in giving estimates of subdivision costs and works:

> … where the conduct of a profession involves the provision of services for reward, then in my opinion, even allowing for widely differing approaches to definition, there is no conceivable attribute of that aspect of professional activity which will take it outside the class of conduct falling within the description 'trade or commerce'.[108]

231 In our view, those cases provide little assistance. *Braverus* turned on the particular statutory provisions that governed the operation of the Port Kemble

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[105] (2005) 148 FCR 68.

[106] See also *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 (which was relied on by the Full Federal Court) in which the High Court held that the *NT Power Generation Pty Ltd* carrid on a business despite its activities involving the discharge of statutory functions. That was because the Authority had the use of infrastructure as part of the means of conducting a business of generating and supplying activities.

[107] *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215.

[108] *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215, 220.

Port Corporation and the way in which the Corporation chose to discharge its statutory function. No principle of general application emerges from the decision of the Full Federal Court.

232 Similarly, the decision of French J in *Bond Corporation v Thiess Contractors* reflected the relevant factual context. The respondent provided advice pursuant to a contract between the parties for the supply of professional services in connection with a proposed subdivision.

233 We agree with the Primary Judge that there was no commercial exchange or trade between Mr Macks and Bernsteen and Newmore, their shareholders or creditors when all the relevant circumstances are considered. As the Primary Judge observed, the relationship between a voluntary administrator, the company, the contributors and the creditors is a statutory construct. Mr Macks was performing his statutory role as administrator in providing the s 439A report and in informing the creditors of the position of the Companies at the second creditors meeting. His conduct could be reviewed by a court pursuant to pt 5.3A and s 1321 of the CA.[109] The s 439A report and the statements made by him at the meetings of creditors were merely part of a process by which a decision was made to terminate the administrations and place the Companies in liquidation.

234 Accordingly, Mr Macks' conduct that was the subject of Mr Viscariello's claims under the Fair Trading Act was not in trade or commerce for the reasons that were given by the Primary Judge. We agree with his Honour's conclusion that:

> Of course the voluntary administrator may in the course of exercising his or her statutory duties dispose of the assets of the company in the course of trade or commerce. The prosecution, and compromise, of a chose in action of the company under administration may also involve conduct in trade or commerce. However, the conduct of an administrator in exercising his or her statutory functions, powers and duties relating to the creditors, contributories and directors of the company under Part 5.3A does not constitute conduct in trade or commerce.[110]

235 The conclusions we have reached concerning the nature of the duty owed by Mr Macks as administrator of the Companies and on the question of whether he was acting in trade or commence are fatal to the cross-appeal. It must be dismissed for those reasons alone. However, we are required to consider the remaining grounds of appeal.

236 We note before we do so that Mr Macks alleged in his notice of contention that any claim by Mr Viscariello under the *Fair Trading Act* was time barred. We have not dealt with that contention having regard to the conclusion reached on ground 8 of the cross-appeal and the other grounds.

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[109] And see *Baxter v Hamilton* (2005) 15 Tas R 59.
[110] *Viscariello v Macks* [2014] SASC 189, [8].

Ground 1

237 Ground 1 of the cross-appeal alleged that the Primary Judge erred in making the finding that ARL, and most likely the other creditors, would have rejected the revised Bart proposal had it been put to the second creditors' meeting. It is contended that the Primary Judge ought to have found that there were realistic prospects that the creditors would have approved the proposal had it been put.

238 Mr Viscariello submitted that the proposal contained in the revised Bart proposal was not doomed to fail as the Primary Judge had found that it had not been withdrawn by Mr Bart. It was submitted that, accordingly, his Honour had failed to give sufficient weight to the possibility that ARL might have changed its mind had the proposal been put to the meeting. There would have been pressure on ARL to accept the revised Bart proposal or to renegotiate the document in the meeting given the attitude of other creditors.

239 We reject those submissions. In our view, the evidence clearly established, as the Primary Judge found, that:

(1) the proposed Bart DOCA and the revised Bart proposal were doomed to failure when ARL refused to agree to them; and

(2) ARL rejected both proposals because their terms required ARL to 'make too great a sacrifice to its secured debt'.[111]

240 There was no basis for the allegation that there was a realistic prospect of the creditors approving the revised Bart proposal in light of those findings. The revised Bart DOCA proposal was less attractive to ARL than the first proposal. ARL had made it clear at the first creditors' meetings that it would not accept any offer that required it to compromise its position as a secured creditor. There was no evidence from which it could be concluded that there was a realistic prospect that the revised Bart proposal would have been accepted had it been put to the second meeting of creditors.

241 Mr Macks wrote to ARL late on 21 December 2001 requesting that it reconsider its attitude. The letter put various arguments as to why it would have been in ARL's best interests to join in the revised proposal but there was no change in ARL's position. ARL were represented at the meetings by Mr Yeomans. He did not indicate any change in the company's attitude. There was nothing that occurred immediately prior to or at the second creditors' meeting from which it could be inferred that there was a realistic prospect of ARL changing its position had the revised Bart proposal been put to the meetings and Mr Viscariello did not call Mr Yeomans to give evidence (it was for Mr Viscariello to call Mr Yeomans and not, as Mr Viscariello submitted in the appeal, Mr Macks, as it was Mr Viscariello who carried the onus of proving that

[111] *Viscariello v Macks* [2014] SASC 189, [303].

there were realistic prospects of the revised Bart proposal being adopted as part of his 'loss of chance' claim).

242 Moreover, the Primary Judge reproduced that part of the minutes of the second creditors meeting in which the discussion of the revised Bart proposal was recorded.[112] It is apparent from the recorded discussion that there was an opportunity for other creditors to pressure ARL and for ARL to alter its position had it been willing to do so. For example, the minutes recorded:

> Mr J Viscariello asked why the deal did not succeed and who did not accept the the terms of the proposal. The Chairman advised that Associated Retailers Limited was not in a commercial position to accept the proposal. Mr J Viscariello advised that as a consequence of the deal being rejected 80 employees will be unemployed.

243 Plainly, the revised Bart proposal was discussed even if it was not formally 'put' to the meeting and accordingly, there was an opportunity for creditors to apply pressure to ARL.

244 Mr Tony Colyer, a member of the committee of inspection and the representative of a creditor, Tony Colyer Pty Ltd, had offered a small amount to make the proposal more attractive to the creditors. It was submitted that the offer made by Mr Colyer was evidence of the possibilities that might have materialised if the creditors had been given the opportunity to consider the revised Bart proposal. However, Mr Colyer could have made his offer at any time and chose to do so only after Mr Macks had said that the revised Bart proposal would not proceed. More importantly, the amount offered by Mr Colyer was comparatively insignificant. The offer did not provide a basis for concluding that the Primary Judge had erred in finding that ARL would have agreed to the revised Bart proposal had it been put to the second creditors' meeting.

245 Mr Macks understood the significance of ARL's attitude towards a possible DOCA for the Companies. He drafted the revised Bart proposal so that it was a proposal to be made by Mr Bart, Mr Viscariello and ARL. The term used in the trial to define the proposal - 'revised Bart DOCA' - did not accurately convey the substance of what had been drawn up by Mr Macks. It was not a draft DOCA capable of being adopted as such by the creditors. It was no more than a possible agreement that might have been made between the parties who principally controlled the fate of the Companies. There was, as Mr Macks advised, nothing to put to the creditors' meetings as a viable proposal if ARL would not agree to what had been drawn up in the revised Bart proposal.

Ground 2

246 Ground 2 of the cross-appeal alleged that the Primary Judge erred in failing to find that Mr Macks had breached his duty by providing a report pursuant to s 439A CA that was misleading. The pleadings identified the source of the duty

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[112] *Viscariello v Macks* [2014] SASC 189, [257].

alleged in various ways. The Second SOC pleaded that Mr Macks, as the Companies' administrator, owed Mr Viscariello duties under ss 180, 181 and pt 5.3A of the CA. The Fourth SOC alleged that Mr Macks owed duties as a fiduciary. A claim was also made under the *Fair Trading Act* and s 447E CA.

247 We have held that Mr Macks did not owe a fiduciary duty to Mr Viscariello that could be enforced by him as a creditor of the Companies. We have further held that Mr Macks did not owe a fiduciary duty to inform the creditors that Mr Bart had not withdrawn from the revised Bart proposal; and that Mr Macks was not acting in trade or commerce in providing the s 439A report.

248 As to the allegation that Mr Macks breached any duty that he might have owed, we agree with the Primary Judge's finding that there was no proposal to put to the Companies' creditors. Mr Bart gave evidence which was accepted by the Primary Judge that he had not withdrawn from the revised Bart proposal and that he expected the proposal to be put before the second meetings of creditors. However, the s 439A report did not expressly or impliedly convey the meaning contended for by Mr Viscariello. The relevant passage in the report stated:

> Immediately prior to the completion of this report we were advised that the conditions necessary for the proposal could not be met and as a consequence the proposal is no longer available. Accordingly as far as we are presently aware there are no proposal(s) available for discussions at the meeting.

249 Similar statements were made later in the document. The statements correctly stated the position. ARL was to be a party to the revised Bart proposal. There was no proposal to be put according to the terms that had been drafted by Mr Macks and agreed to by Mr Bart and Mr Viscariello if ARL did not also agree. The stipulation that ARL should join in the revised Bart proposal merely reflected the commercial reality of ARL's position. It was a secured creditor that was owed a substantial amount; it was responsible for supplying a lot of the stock sold by the Companies' stores; and much of the stock held by the Companies was subject to ARL's ROT and consignment terms. Without ARL's agreement, there was, as the Primary Judge rightly found, no proposal to be put to the meeting of creditors regardless of the position of Mr Bart and Mr Viscariello.

250 Accordingly, Mr Viscariello has not established that the Primary Judge erred in finding that there was no proposal for a DOCA to be put to the creditors. Mr Macks did not omit any material information from the s 439A report and the report was not misleading or deceptive.

Ground 3

251 Ground 3 of the cross-appeal alleged that the Primary Judge had erred in failing to find that Mr Macks had a duty to put the revised Bart proposal to the meeting of creditors of 21 December 2001 or to adjourn the meeting to determine whether a variation to the Bart DOCA proposal to which ARL would accede could be secured. Again, the conclusions we have reached concerning the nature

of the duties owed by Mr Macks and the Primary Judge's finding that Mr Macks' conduct in the creditors' meeting was not in trade or commerce are fatal to this ground. Further, the reasons given for dismissing grounds 1 and 2 of the cross-appeal also apply in disposing of ground 3. There was no proposal to put to the creditors and there was no realistic prospect of a proposal being accepted at the meeting given the attitude of ARL.

252 Further, the evidence clearly established that the financial position of the Companies was such that they could not continue to trade beyond the second creditors' meeting if a DOCA could not be agreed. The Primary Judge's findings concerning the financial position of the Companies were not challenged by Mr Viscariello (and he would not have been in a position to have done so given that he made the resolutions of 5 December 2001). Mr Viscariello led no evidence of the capacity of the Companies to continue to trade or that there was any utility in doing so after 21 December 2001 in the absence of a DOCA. Moreover, there was no basis in the evidence from which it could be inferred that ARL and Mr Bart would have reached an agreement for a DOCA had the meeting been adjourned. As the Primary Judge effectively found, Mr Bart's proposal required ARL to give up too much and it is to be inferred that Mr Bart's interest in the Companies' businesses only made commercial sense if ARL was willing to give up too much. It is telling that the revised Bart proposal was less advantageous to ARL than the proposed Bart DOCA.

253 The Primary Judge was not in error by failing to find that Mr Macks was under a duty to put the revised Bart proposal to the second meeting of creditors or to advise the creditors that they could adjourn the meeting to enable further negotiations to occur with ARL.

Ground 4

254 Mr Viscariello alleged by ground 4 of the cross-appeal that the Primary Judge erred by failing to find that Mr Macks was motivated to place the Companies into liquidation by the prospect of personal gain. It was submitted that it could be inferred from Mr Macks' conduct that he intended that the Companies should be placed in liquidation rather than administration; that he was 'biased' towards that outcome because the fees to be generated in a liquidation would be greater than in an administration. It was said that Mr Macks' assertion in the trial that Mr Bart had withdrawn from the revised Bart proposal (an assertion that was rejected by the Primary Judge) 'speaks volumes as to [Mr Macks'] preparedness at the time to seek to justify his conduct'. With respect, we are unable to understand how Mr Macks' evidence on Mr Bart's position on the revised Bart proposal could provide any real support for an inference that Mr Macks was, in December 2001, motivated by a desire to maximise his remuneration.

255 The Fourth SOC alleged that clauses 10 and 12 of the revised Bart proposal had the intention and effect of materially benefiting Mr Macks and/or PPB at the

expense of ARL. It was pleaded that those clauses postponed any benefit to ARL from the lump sum of $250,000 to be paid by Mr Bart for an assignment of ARL's security and that this had the effect of conferring benefits on Mr Macks that he would not have been entitled to against the holder of a floating charge under the indemnity conferred by s 443D CA. Mr Viscariello further alleged that ARL rejected the revised Bart proposal because of the inclusion of clauses 10 and 12.

256 The Primary Judge rejected those allegations. His Honour found that Mr Macks had 'actively promoted' the insertion of clause 12 as it clearly conferred an advantage on him as administrator.[113] His Honour further found that clause 10 merely mirrored the priorities created by the CA and accordingly, Mr Macks had acted reasonably in including the clause in the revised Bart proposal.[114] Finally, the Primary Judge concluded that the changes made by Mr Macks to the revised Bart proposal did not cause ARL to reject the proposal. As we have already noted, his Honour found that ARL rejected the proposal (and would have rejected the proposed Bart DOCA) because it was 'required to make too great a sacrifice of its secured debt'.[115] That finding was based on the statements made by Mr Yeomans at the creditors meetings.

257 Mr Viscariello alleged that the Primary Judge ought to have inferred that Mr Macks was motivated by personal gain from the finding that Mr Macks 'actively promoted' the inclusion of clause 12. He further alleged that the Primary Judge had erred in failing to find that Mr Macks was motivated by 'impermissible considerations' in breaching his duties and that his motivation was a material cause of the revised Bart proposal not being put to the creditors. It was contended that the Primary Judge ought to have made a separate finding that Mr Macks breached his duty to the creditors and contributories of the Companies by being actuated by impermissible considerations of personal gain.

258 We have found that Mr Macks did not owe a duty to Mr Viscariello nor did he breach any duty that he might have owed to the Companies by not putting the revised Bart proposal to the second creditors meeting. The Primary Judge found that Mr Macks did not put the proposal because it had been rejected by ARL.[116] That finding was not directly challenged by Mr Viscariello but, in any event, it reflected the evidence and the findings made by the Primary Judge about the events leading up to the second creditors meeting.

259 We also note that it was not alleged in the Second SOC or the Fourth SOC that Mr Macks was motivated by a desire to make a personal gain by maximising his remuneration as a liquidator of the Companies. The Fourth SOC alleged in pars 79 and 80 that Mr Macks was motivated by what was described as the

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[113] *Viscariello v Macks* [2014] SASC 189, [224].
[114] *Viscariello v Macks* [2014] SASC 189, [227] and [303].
[115] *Viscariello v Macks* [2014] SASC 189, [304].
[116] *Viscariello v Macks* [2014] SASC 189, [268].

'Defendant's personal interests' However, the allegations of personal interest did not include any allegation of the kind pleaded in ground 4 of the cross-appeal. Accordingly, there was no duty or breach of duty alleged in the statement of claim that corresponded with the allegations pleaded in ground 4. In the circumstances, it is hardly surprising that the Primary Judge did not make any findings about the matters sought to be raised by the ground. It is also telling that his Honour made no reference to such matters in what was a detailed exposition of the allegations made against Mr Macks in his capacity as the administrator of the Companies and the evidence and circumstances relevant to those allegations.

Ground 5

260 Ground 5 of the cross-appeal alleged that the Primary Judge erred in fact in finding that Mr Macks had suffered no loss of a chance to assess. The chance that Mr Viscariello claimed that he had lost was the chance that the revised Bart proposal would have been accepted had it been put to the creditors at the second meeting so that the Companies would have avoided liquidation. Mr Viscariello was required to discharge obligations that he had incurred as a guarantor on the Companies being placed in liquidation.

261 The principles that apply to an assessment of damages for loss of a chance are not contentious. They were recently affirmed by the High Court in *Tabet v Gett*[117] and can be traced through well known decision such as *Chaplin v Hicks*,[118] *McRae v Commonwealth Disposals Commission*,[119] *Fink v Fink*,[120] *Malec v JC Hutton Pty Ltd*,[121] *The Commonwealth of Australia v Amann Aviation Pty Ltd*[122] and *Sellars v Adelaide Petroleum NL*.[123]

262 In contract, it is necessary to prove the existence of the contract and its breach on the balance of probabilities; in tort, it is necessary to prove on the balance of probabilities that, for example, a duty was owed to the plaintiff and a breach of that duty sounding in damages. Where the plaintiff has lost a chance to obtain a benefit as a consequence of a breach of contract or a tortious duty, it is not necessary for the plaintiff to also prove that that it was more likely than not that the benefit would have been obtained but for the breach. The court is required to assess the extent of the lost chance according to what might have happened.

263 Accordingly, the court may take into account future or hypothetical events in assessing damages arising from a proven breach of duty based on the probability of those future/hypothetical events occurring. Apart from events that have a negligible chance of occurring or are virtually certain, the court will

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[117] *Tabet v Gett* (2010) 240 CLR 537.
[118] [1911] 2 KB 786.
[119] (1951) 84 CLR 377.
[120] (1946) 74 CLR 127.
[121] (1990) 169 CLR 638.
[122] (1991) 174 CLR 64.
[123] [1992-4] 179 CLR 332.

assess the degree of probability that an event would have occurred or might have occurred and adjust the award of damages to reflect the degree of probability. That approach will also apply to an assessment of damages caused by a contravention of the TPA and its statutory equivalents.

264 We have concluded that the Primary Judge did not err in finding that there was no proposal for a DOCA to be put to the Companies' creditors. We have also rejected Mr Viscariello's contention that the Primary Judge ought to have found that there was a realistic prospect that the revised Bart proposal would have been accepted had it been put to the second creditors' meeting. There was no evidence from which it could be inferred that ARL would have changed its position had the revised Bart proposal been put to the Companies' creditors for the reasons that have already been given.

265 Those conclusions are sufficient to also dispose of this ground of the cross-appeal. Put simply, Mr Viscariello failed to establish, on the balance of probabilities, that he had lost a chance. However, we have also found that Mr Macks did not owe any duty to Mr Viscariello that could found a claim for damages or compensation.

Ground 7

266 Ground 7 of the cross-appeal alleged that the Primary Judge erred in refusing to grant an extension of time for the bringing of the application under s 1321 CA. The time limit within which an application is to be made is 21 days: r 14.1 of the *Corporations Rules 2001*.

267 We accept that the expression "person aggrieved" is to be construed broadly and will include a contributory, shareholder or creditor. However, the application by Mr Viscariello for an extension of time to bring a s 1321 CA appeal was made many years after the expiration of the 21 day time limit and after the termination of the Companies' administration. The Primary Judge rejected the application to extend time on the grounds that the administration of the Companies was terminated on 21 December 2001, the Bernsteen action and the Proceedings were resolved in February 2007 and there was no utility in bringing a belated appeal from decisions made by Mr Macks in the course of the administration and liquidation.[124]

268 Mr Viscariello complained that the Primary Judge erred as, in exercising his Honour's discretion to refuse the application, he failed:

(1) To have regard to the fact that a s 1321 CA (extension) application was brought in respect of Mr Macks' conduct as voluntary administrator or liquidator;

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[124] *Viscariello v Macks* [2014] SASC 189, [849].

(2) To have regard to the conduct of Mr Macks which formed the basis of an order that he be removed as liquidator and in respect of evidence that was allegedly concealed by him and that was partly revealed in 2007 and fully revealed at trial;

(3) To have regard to the failure of Mr Macks to disclose documents relevant to the conduct of the Bernsteen/George proceedings involving Ms Hamilton-Smith, the defacto partner of Mr Viscariello, and the finding of the Primary Judge of a motivation on the part of Mr Macks to maintain proceedings due to his personal antipathy to Mr Viscariello and as a foil to this proceeding; and

(4) To have regard to the complexity of the facts of the case and the overall conduct of Mr Macks.

269 Mr Viscariello did not plead a claim under s 1321 CA in the Second SOC and it was not apparent from his submissions in the appeal which of the decisions that were made by Mr Macks that did not form part of the allegations and claims made in these proceedings would have been the subject of an application under s 1321 if time had been extended. He only referred in his submissions to what he alleged were 'significant factual errors' made by Mr Macks at the second creditors' meeting. We have been unable to discern what those factual errors might have been apart from the allegations of misleading or deceptive conduct that have been made in these proceedings. If there were other alleged factual errors, they were not identified and Mr Viscariello did not explain how they may have misled him in such a way that he was unable to discern the true position from December 2001 until August 2012.

270 The matters referred to by Mr Viscariello in his notice of cross-appeal concerned the basis upon which Mr Macks had conducted the Bernsteen action and the Proceedings and, in particular, the disclosures that occurred on discovery being given during the trial of documents over which legal professional privilege had been claimed by Mr Macks. While that occurred long after the Bernsteen action and the Proceedings had been compromised, the decisions made by Mr Macks in relation to those matters have, of course, been fully reviewed in these proceedings on the basis of a complete disclosure of the arrangements made by Mr Macks with Ms George and the advice given by his legal advisors. As the Primary Judge concluded, there would have been no utility in extending time for an appeal under s 1321 CA.

271 The court has a general discretion to extend time before or after the expiration of the time limit of 21 days. Mr Viscariello relied upon the decision of

Austin J in *Derwinto v Lewis*[125] on the question of extension of time to appeal from a rejection of a proof of debt.[126] In *Derwinto* Austin J said as follows:

> Extension of time for appeal
>
> The plaintiffs submitted that the Court should use its power under Corporations Rule 14.1 to extend the time for appealing against the Notice of Rejection to 19 December 2001, the day on which the present proceeding was commenced. In *Re Estate of Knight (a bankrupt); Rocom International Pty Ltd (in liq) v Prentice* [2002] FCA 604 (17 May 2002), Tamberlin J granted an extension of time to a creditor to file an application for review of a decision by a trustee in bankruptcy to reject a proof of debt. The case was cited to me as a useful illustration of the factors relevant to applications of this kind.
>
> Tamberlin J referred to the judgment of Kirby J in *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539-543 (see also, by analogy, *Kabushi Kaisha Universal v Aristocrat Leisure Industries Pty Ltd* (1998) AIPC para 91-396 (Branson J; affirmed BC9801192)), and said that the factors relevant to an application for an extension of time include the following:
>
> - that the discretion to grant an extension is broad and flexible;
> - whether it is just in all the circumstances to grant an extension;
> - whether the time limits are of a substantive or procedural nature;
> - whether the case is arguable;
> - respective prejudice to the parties;
> - length of delay;
> - responsibility and reasons for the delay;
> - whether the delay was intentional or the result of a bona fide mistake; and
> - whether the delay was caused by the litigant or legal advisers.
>
> Counsel for the plaintiffs submitted that the principal factors might usefully be grouped under the headings:
>
> (a) delay - including the length and nature of the delay, and the responsibility and reasons for it;
>
> (b) prejudice to the respective parties; and
>
> (c) whether the claim is arguable.
>
> I am content to adopt this approach.[127]

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[125] (2002) 42 ACSR 645.

[126] In her Honour's decision in *ION Limited (subject to a Deed of Company Arrangement) (No 2)* [2012] FCA 561 Dodds-Streeton J accepted that the judgment of Austin J as correctly stating the relevant principles.

272 The language used by Austin J is associated with commonly understood considerations in the exercise of a judicial discretion. They are not in the nature of rules but are considerations to be weighed in the balance. Each will attract a particular weight according to the circumstances. The most important in this instance is that the Primary Judge has exercised his discretion in a fully informed way. Mr Viscariello has not identified any error of the kind that would justify this court setting aside the exercise of a judicial discretion.

273 The Primary Judge emphasised Mr Viscariello's delay in making the application. Mr Viscariello contended that he had taken active steps throughout the Bernsteen action and the Proceedings. However, that contention failed to address the issue of delay in making an application for an extension of time under s 1321.

274 First, it was known from at least the second creditors' meeting held on 21 December 2001 that a decision had been made by Mr Macks to inform creditors that there was no proposal for a DOCA that could be put to the second meeting. Mr Viscariello subsequently alleged in these proceedings that Mr Macks had misled creditors at the meeting as Mr Bart had not withdrawn the revised Bart proposal. Mr Viscariello knew that the revised Bart proposal had been drafted on the basis that ARL was to have been a party to the proposal. He gave evidence that he thought that the 'deal' had been done from speaking with Mr Bart prior to the second creditors' meeting. However, the Primary Judge found that Mr Viscariello had been told before the meeting that ARL had rejected Mr Bart's revised offer. Accordingly, Mr Viscariello knew, in effect, at the second creditors' meeting that Mr Bart had not withdrawn his offer but that it was unacceptable to ARL.

275 Second, Mr Viscariello amended his pleadings in these proceedings to introduce claims against Mr Macks in his capacity as the Companies' liquidator. At that point he made an election between pursing claims in the proceedings and pursing his grievances regarding the conduct of the liquidations under the appeal procedure provided for by s 1321 CA. The claims made in the Second SOC included allegations concerning Mr Macks' conduct of the Bernsteen action and the Proceedings.

276 Third, Mr Viscariello complained about Mr Macks' conduct shortly after he was appointed liquidator. Exhibit P 33 was a letter from Palm Hills (as trustee for the John Viscariello Family Trust) to Mr Macks dated 17 April 2002. The letter made allegations concerning misleading and deceptive conduct/trademark infringement/conversion by Mr Macks in his capacity as liquidator. It referred to an earlier letter of 26 December 2001 from Palm Hills to Mr Macks concerning trademarks owned by Palm Hills and stated, among other things:

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[127] *Derwinto v Lewis* (2002) 42 ACSR 645, [46]–[48].

> Whilst the above is particularly relevant and yet another example of the many irregularities in relation to you and your staff's general conduct as voluntary administrator and in turn liquidator of the company, the purpose of this letter is to request information from you in relation to the current advertising campaign being conducted by Le Cornu for the sale of "stock" purchased from you as liquidator of the company. Your general conduct as voluntary administrator and liquidator of the company, we will leave for another day.

277 Exhibit P 34 was a letter dated 2 May 2002 from Minter Ellison to Palm Hills, marked to the attention of Mr Viscariello, and written in reply to the letter of 17 April 2002. Minter Ellison stated that Mr Macks denied any improper conduct in relation to the management of the voluntary administration or the liquidation. Mr Viscariello responded to the Minter Ellison's letter by letter dated 29 May 2002.[128] The letter stated:

> We acknowledge receipt of your letter of 19 April 2002… in light of recent actions by your client we have decided to fear him no more. Your client can no longer go unchecked. He must become accountable for his conduct.
>
> We respond as follows:-
>
> 1. We reject any suggestion that your client did not improperly carry out his duties in relation to the voluntary administration and subsequent liquidation of the above companies. We say that there is no doubt as to the numerous and substantial acts of misconduct by your client. By way of only one small example it is well documented that Mr Macks refused to recommend the proposal put forward by Mr Fred Bart/Divini Pty Ltd (the Bart proposal) on the basis that there was nothing in it for the unsecured creditors…

278 Those documents speak for themselves. There was no explanation by Mr Viscariello as to why an application under s 1321 CA, together with an application seeking an extension of time, was not made at that time or why there was then a delay of over 10 years before the issue was raised (and without the proposed application having being pleaded).

279 As we have already observed, Mr Viscariello failed to identify any error of principle or fact that affected the exercise of the Primary Judge's discretion. There was no basis to set aside the decision to refuse to extend time for an application under s 1321 CA for the reasons given by the Primary Judge.

Ground 9

280 Ground 9 of the cross-appeal alleged that the Primary Judge erred in failing to find that Mr Macks' conduct in relation to the calling and conduct of the second creditors meeting caused loss to Mr Viscariello that was compensable under s 447E CA.

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[128] Exhibit P33.

281 The Primary Judge held that s 447E gave the court a power to make an order, including an order for compensation, after an administration had ended.[129] His Honour further found that there was no reason to make an order under that section so long after the administration of the Companies had ended. The liquidation of the Companies was almost complete and no prejudice had been shown and no loss had been proven by Mr Viscariello. We have already found that Mr Macks did not breach any duty that he may have had by stating in the s 439A report that there was no proposal to be put to the creditors and by not putting the revised Bart proposal to the creditors at their second meeting. Although those findings were made in the context of an allegation of breach of a fiduciary duty, they apply equally to Mr Macks' conduct as prescribed by the CA - in particular, to his conduct in discharging the requirements imposed by s 439A. As the Primary Judge found, there was no proposal to put to the creditors. We have further found that there was no realistic prospect of the creditors accepting the revised Bart proposal even if it had been put to the second creditors meeting given the attitude of ARL as a secured creditor which had supplied much of the Companies' stock on a ROT and consignment basis. Those findings are sufficient to dispose of this ground of appeal.

282 Section 447E CA allows the court to make such order as it thinks just if it is satisfied that the administrator has managed or is managing the company's business, property or affairs, in a way that is prejudicial to the interests of some or all of the company's creditors or has done an act or made an omission or proposes to do an act or make an omission that is or would be prejudicial to such interests. Mr Viscariello relied upon the width of the power conferred on the court by the section.

283 The Primary Judge accepted that the power conferred by s 447E extended to making a compensation order and that, it would seem, such an order could be made in favour of an individual creditor as a person aggrieved. Although it is not necessary for us to resolve the issue, we doubt that s 447E confers a power on the court to order compensation in favour of an individual creditor. Such an interpretation would be inconsistent with the principles underpinning the operation of Part 5.3A CA, especially the principle of equality of creditors. None of the authorities that were cited (*Honest Remark Pty Ltd v Allstate Explorations NL & Ors*,[130] *Pan Pharmaceuticals Ltd, Re; Selim v McGrath*,[131] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)*[132] and *Naumoski v Parbery*[133]) provide support for the proposition that such an order may be made in favour of a creditor.

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[129] *Viscariello v Macks* [2014] SASC 189, [309].
[130] (2006) 234 ALR 765.
[131] (2004) 48 ACSR 681; [2004] NSWSC 129.
[132] (1998) 195 CLR 1.
[133] (2002) 171 FLR 232.

Part 3: Mr Macks as liquidator

284 As discussed earlier, Mr Viscariello brought a number of claims against Mr Macks in his capacity as the liquidator of the companies. He was successful in obtaining declarations that Mr Macks breached ss 180(1), 181 and 182 of the CA. He was unsuccessful in other aspects. Mr Macks appeals the findings and the orders made.

Brief Overview

285 The genesis of many of the issues at trial was a civil action brought by Mr Macks, in his capacity as liquidator of Bernsteen, against Ms Hamilton-Smith, the then partner of Mr Viscariello. The claim resulted from dealings Mr Macks had with Ms Hamilton-Smith in his capacity as the liquidator of the companies. Mr Macks alleged that Ms Hamilton-Smith owed the company approximately $28,000. She refused to pay.

286 The claim was commenced on 6 August 2002 and began its life as a simple debt recovery action (the Bernsteen action). A defence and counter claim were filed. The counterclaim sought damages. At a mediation held on 26 February 2007 the matter finally resolved. Between those two dates a litigation war was conducted by the parties, largely instigated by Ms Hamilton-Smith. This involved numerous appeals by Ms Hamilton-Smith, including an application to the High Court for special leave. The battles, at times, spilled into the Federal Court. It could be said, at least in relation to those advising Ms Hamilton-Smith, that "no stone was left unturned" and all points, meritorious or otherwise, were taken. It is clear that Ms Hamilton-Smith embarked on a campaign of making the claim against her as uncommercial as possible for Bernsteen to pursue.

287 It is necessary, in order to deal with the grounds of appeal, to set out the background facts in some detail.

The Bernsteen Action

288 Ms Hamilton-Smith, who was in a relationship with Mr Viscariello, was employed by the Companies in 2001. A letter of appointment dated 27 August 2001 and another document entitled "Employment Agreement" dated 3 September 2001 evidenced the terms of her employment. Ms Hamilton-Smith's salary was stated to be $800 per week. Mr Macks had doubts about the authenticity of this arrangement. However, despite his reservations, Bernsteen and Ms Hamilton-Smith entered into an agreement for the sale of certain stock and shop fit outs after Mr Macks was appointed as the liquidator of Bernsteen. Ms Hamilton-Smith agreed to pay for the stock she sold on a weekly basis, in arrears, on the Monday following the end of each trading week. She undertook to pay the full amount of the stock purchased at the expiration of three months. The total price was calculated to be $21,700. Le Cornu Stores, a competitor of Bernsteen, had also purchased a large amount of the stock.

289 Ms Hamilton-Smith made a number of instalment payments pursuant to the agreement; however, she eventually defaulted in her payments. She then claimed that Le Cornu had, on a number of occasions, used the trademarks operated by Bernsteen and that this had caused her significant loss. The allegations formed the basis of the counterclaim made by Ms Hamilton-Smith in the Bernsteen action.

August 2002

290 On 6 August 2002 Bernsteen brought an action against Ms Hamilton-Smith in the Adelaide Magistrates Court claiming $28,000 plus interest and costs. Ms Hamilton-Smith filed a defence and counterclaim on 27 August 2002. On 17 September 2002 Bernsteen offered to consent to judgement in the sum of $20,000 inclusive of interest plus costs. During the latter part of 2002, Ms Hamilton-Smith obtained extensions of time in which to make discovery and amend her defence and counterclaim. Eventually on 23 April 2003 her defence and counter-claim were struck out for failure to comply with various Court orders. The defence and counter-claim were reinstated by Court order on 5 December 2003.

291 On 26 May 2002 Mr Macks requested a Lands Titles Office search for properties owned by Ms Hamilton-Smith. Thereafter, he collected documents that he thought might be helpful in any future enforcement proceedings of the judgement debt against Ms Hamilton-Smith. The collection of material was referred to during the trial as the Hamilton-Smith Dossier.[134] Mr Macks testified that he had made a note of his decision to start collecting that material and that one of the matters he noted was that Ms Hamilton-Smith received a salary of $80,000 from her employment with Bernsteen. The note was dated 26 May 2002. The note also referred to the fact that the matter was a "simple debt recovery" and that Ms Hamilton-Smith had already had the benefit of the stock sales and that she still had the stock.

292 Much evidence was given about how this note came into existence. It is not necessary to traverse all the evidence concerning this aspect. The Primary Judge found that Mr Macks fabricated the note. Mr Macks eventually admitted that he had done so but claimed that he had no intention of misleading anybody by constructing the document as he did. The document was likely to have been created in response to a request from ASIC as part of an enquiry into the conduct of Mr Macks in 2009. The enquiry arose as a result of a complaint to ASIC by Mr Viscariello. The Primary Judge, however, did not accept Mr Macks' explanation and found that he had the intention of passing it off as the original document, or at least a true copy of the original. This finding was not challenged on appeal.

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[134] Exhibit 279.

293 The Primary Judge noted that while the issue concerning the note was by and large "a collateral credit issue" it did bear on the issue concerning Mr Macks' motivation in pursuing Ms Hamilton-Smith. However, his Honour did not explain how the note constructed in 2009 was relevant to the motivation of Mr Macks in 2005. It undoubtedly could be used in the assessment of the credit of Mr Macks generally. A more specific use required an explanation. In any event, little turns on the issue.

March - December 2004

294 On 25 March 2004 a Magistrate made a costs order against Ms Hamilton-Smith. That order was appealed to a single judge of the Supreme Court. The appeal was dismissed with costs on 17 August 2004. Ms Hamilton-Smith applied for permission to appeal to the Full Court; permission to appeal was refused on 26 May 2005. Ms Hamilton-Smith brought an application for special leave to the High Court against the refusal to grant permission to appeal. Unsurprisingly the application was dismissed. Mr Macks prepared a 'Bill of Costs' which later became the subject of the claim.

295 An important event in the narrative occurred on 24 December 2004 when Mr Viscariello sent a letter of demand and notice of action to the partners at PPB (the accounting firm of which Mr Macks was a partner) in compliance with Rule 6A of the Rules of this Court. The letter contained a number of allegations relating to the conduct of Mr Macks as administrator. This was the pre-action letter before these particular proceedings were instituted.

Initial Trial Dates – January 2005

296 In January 2005 the trial of the Bernsteen action proceeded over four days in the Magistrates Court. Mr Livesey, a barrister, was briefed to appear as counsel for Bernsteen. The trial was not completed within the allotted time and it was adjourned to 6 June 2005 for further evidence. It was subsequently relisted, surprisingly, for a further 13 days of hearing.

297 The listing of a $28,000 debt claim for a hearing totalling 17 days cannot pass without comment, even allowing for the counterclaim. We are not aware of the reasons put to the Magistrate at the time when the matter was relisted but, with respect to the Magistrate, the case should not have been allowed to take that length of time. Four days of evidence had already been taken; whatever issues there were should have been clarified. No doubt counsel for Ms Hamilton-Smith urged the Magistrate to allow a further 13 days; it suited Ms Hamilton-Smith's purpose. It would have been appropriate for the Magistrate to have imposed strict time limits on examination and cross examination of the witnesses. Courts must control their own processes.

298 On 8 February 2005 Ms Riach, a partner at the law firm Minter Ellison and the person, along with the solicitor Ms Flaherty, who generally had contact with Mr Macks, informed him of the progress of the trial and questioned the

commerciality of the Bernsteen action. Importantly she also advised Mr Macks that she considered that Mr Viscariello intended to use the Bernsteen action to support his claims against PPB. She recommended that Mr Macks contact his indemnity insurer.

299 On 1 April 2005 Minter Ellison on behalf of Mr Macks responded to the notice served on them by Mr Viscariello on 24 December 2004 denying the allegations.

300 A number of costs orders had been made against Ms Hamilton-Smith as a result of her unsuccessful challenges on appeal. She failed to pay the costs. The costs became the subject of a separate claim.

301 On 5 April 2005 Mr McNamara, a solicitor acting on behalf of Ms Hamilton-Smith, offered by letter to compromise the Bernsteen Action with each party discontinuing their actions, waiving existing costs orders and bearing their own costs. That offer was rejected and a counter-offer was made on behalf of Bernsteen. This letter included an offer to settle the substantive claim and the outstanding Bill of Costs claim independently. That offer was not accepted. On 8 April 2005 the trial date of 6 June 2005 was vacated and eventually relisted for January 2006. On 12 April 2005 Bernsteen served a bankruptcy notice on Ms Hamilton-Smith on the basis of its unpaid interim allocators. On 4 May 2005 Ms Hamilton-Smith applied to set aside the bankruptcy notice.

302 On 27 May 2005 Mr McNamara wrote to Minter Ellison referring to discussions and offering to settle the Bernsteen action on the basis that Ms Hamilton-Smith pay $10,000 by way of instalments.

303 On 31 May 2005 Minter Ellison informed Mr McNamara that Bernsteen rejected the offer and that it was not interested in any settlement involving payments by Ms Hamilton-Smith in instalments. Mr Macks offered to settle the claim in the sum of $25,000 in full and final settlement of all outstanding issues. It must be remembered that Bernsteen was owed not just the $28,000 but also the costs awarded for the unsuccessful appeals instituted by Ms Hamilton-Smith.

304 On 6 June 2005 Mr McNamara on behalf of Ms Hamilton-Smith resubmitted her previous offer. On 27 June 2005 Mr McNamara re-put the offer to compromise for $10,000 but on this occasion offered payment within three months.

305 As at 1 June 2005 legal fees incurred by Mr Macks in relation to the Bernsteen action, after discounting by Minter Ellison, amounted to $104,964. The trial was still listed to resume in January 2006.

306 In June of 2005 the litigation, difficult as it was, became more complicated. Mr Macks became involved, to use a neutral term, in what became known as the George bankruptcy proceedings.

George bankruptcy proceedings: Procedural History

307 On 25 August 2003 Ms Heidi George obtained judgment for $5000 against Ms Hamilton-Smith in the Adelaide Magistrates Court. Ms George had not taken steps to enforce the judgment and the judgment debt remained unsatisfied. Minter Ellison became aware of the unsatisfied judgment debt having searched the Court Register for the purpose of seeing whether Ms Hamilton-Smith was involved in other litigation. Minter Ellison wrote to Ms George informing her they acted for a creditor also pursuing a debt against Ms Hamilton-Smith.

308 On 14 June 2005 a solicitor of Minter Ellison spoke with Mr Macks by telephone. Mr Macks was told that Minter Ellison had contacted Ms George who was a judgment debtor in the sum of $5,000 and that the judgment had not been satisfied. The solicitor proposed that Mr Macks indemnify Ms George for the costs and disbursements of bringing a bankruptcy petition against Ms Hamilton-Smith. It was suggested the indemnity be for $2,000. Mr Macks agreed with the suggestion. He told Minter Ellison that he would pay $1,000 towards Ms George's costs. This was a decision that brought many unwanted consequences. The timing of the advice from Minter Ellison is important.

309 On 24 June 2005 a bankruptcy notice with respect to the debt owed to Ms George was issued against Ms Hamilton-Smith and this was served on 1 July 2005. On 21 July 2005 Ms Hamilton-Smith filed an application to set aside the George bankruptcy notice on the grounds that the judgment debt had been satisfied. She alleged that Ms George had received manchester product to the value of $6,000 in satisfaction of the debt. Importantly Ms Hamilton-Smith asserted in her affidavit that she had reason to believe that Ms George's legal costs and expenses were being paid by Mr Macks. She alleged that the bankruptcy notice was an abuse of process, vexatious and had been issued for an ulterior purpose.

310 When Minter Ellison received the challenge to the bankruptcy notice, they spoke to both Mr Macks and Ms George about continuing the proceedings. Ms George instructed Minter Ellison to continue if Mr Macks was prepared to fund the proceedings. Mr Macks advised Minter Ellison that he was prepared to do so. The terms of this arrangement, as subsequently found by the Primary Judge, were extremely vague and left the question of the extent of the funding uncertain.[135]

311 On 11 August 2005 Ms Hamilton-Smith filed a further affidavit in the Federal Magistrates Court. On 16 August 2005 Ms George filed a responding affidavit in which she denied that the debt had been satisfied by the provision of manchester product. Ms Riach also swore an affidavit asserting that there was "no basis to suggest that the bankruptcy notice is an abuse of process" and that the events occurring in other litigation "have no relevance to the respondent". Ms

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[135] *Viscariello v Macks* [2014] SASC 189, [450].

Riach gave evidence that she had in mind unrelated litigation. The Primary Judge found that Ms Riach's affidavit was misleading but that she did not intend it to be so. This finding is inconsistent with the Primary Judge's eventual finding that Minter Ellision knew that Mr Macks acted with an improper purpose and knew that the proceedings were an abuse of process.

312 The motivation and purpose of Mr Macks in funding and continuing to fund the George bankruptcy proceedings was a contested issue at the trial of this matter.

August-14 November 2005

313 Minter Ellison kept Mr Macks informed as to the progress of matters during this period. At this time, both the Bernsteen (cost orders) and George bankruptcy notices were being contested in the Federal Court.

314 On 31 August 2005 in the Federal Court, Registrar Christie set aside the bankruptcy notice issued by Bernsteen against Ms Hamilton-Smith on the grounds that she was pursuing a counter-claim against Bernsteen.

315 On 22 September 2005 Registrar Christie dismissed Ms Hamilton-Smith's application to set aside the George bankruptcy notice. On 26 September 2005 a creditors petition was filed by Ms George.

316 On 10 October 2005 Mr Macks complained by letter to Minter Ellison about the escalating costs of pursuing Ms Hamilton-Smith. Minter Ellison responded by apologising to Mr Macks and agreeing to report more regularly about the level of fees. They drew attention to the level of "work in progress" and noted that the prospects of recovery were poor.

14 November 2005 Committee Meeting

317 Minutes of the Committee of Inspection meeting of 14 November 2005 were tendered at the trial. The previous meeting had been held on 2 March 2005.

318 Mr Macks gave evidence that at the meeting of 14 November 2005 he reported generally on the preference claims which he had instructed Minter Ellison to pursue. He also reported to the committee that he had formed the view that Mr Viscariello allowed the Companies to trade whilst they were insolvent and that he was investigating a possible action against Mr Viscariello. He thought the quantum of the claim would be considerable.

319 Mr Macks stated that he had explained to the committee that the George bankruptcy proceedings were a vehicle to endeavour to resolve the Bernsteen action. He said he thought that he had informed committee members about the

George indemnity at some earlier time.[136] Mr Macks said that he informed the Committee of the view expressed in the Minter Ellison letter that it was reasonable to continue to indemnify Ms George.

320 The Primary Judge stated that he was "very unimpressed by Mack's [sic] evidence on this topic".[137] His Honour rejected Mr Macks' evidence that there was a detailed discussion about the indemnity given to Ms George at the creditors' meeting of 14 November 2005. He noted that no member of the committee had been called to support Mr Macks' evidence. The Primary Judge made a finding that the Committee of Inspection did not approve Mr Macks entering into the George indemnity arrangement at the 14 November 2005 meeting.

February-May 2006

321 The legal manoeuvring by those acting for Ms Hamilton-Smith continued.

322 On 3 February 2006 Mr McNamara, the solicitor acting for Ms Hamilton-Smith, wrote to Minter Ellison enclosing a trust account cheque in the sum of $4079.80 in accord and satisfaction of the judgment delivered in the original action brought by Ms George against Ms Hamilton-Smith. The payment tendered was subject to a condition that reserved all other rights. It was rejected by Minter Ellison as, whilst it discharged the debt, it did not dispose of the proceedings where Ms Hamilton-Smith claimed that Ms George had already received some manchester linen. That action was left open for Ms Hamilton-Smith to recover monies from Ms George.

323 On 10 February 2006 Mr McNamara retendered the cheque.

324 On 28 February 2006 Registrar Christie adjourned Ms George's creditors petition to 5 June 2006. On 1 March 2006 Minter Ellison sent an email to Mr Livesey QC informing him of this decision. The effect of the decision was to allow the part-heard trial of the Bernsteen action in the Magistrates Court to continue. As mentioned earlier the length of the trial was estimated to be a further 13 days. The email sought a conference so that Minter Ellison and Mr Macks could discuss with Mr Livesey (now) QC the options of an appeal or a review of that decision.

325 On 7 March 2006 Minter Ellison formally reported to Mr Macks about the state of the proceedings against Ms Hamilton-Smith. Minter Ellison estimated that costs in excess of $75,000 would be incurred if the Bernsteen action proceeded to judgment.

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[136] *Viscariello v Macks* [2014] SASC 189, [509]. That cannot be right as the last meeting of the committee before 14 November was March 2005 and therefore before the arrangement with Ms George had been made.

[137] *Viscariello v Macks* [2014] SASC 189, [521].

326 Minter Ellison also reported that the outstanding fees in the proceedings in the Federal Magistrates Court in relation to the George bankruptcy proceedings were $38,835.80.

327 On 22 March 2006 PPB wrote to Minter Ellison instructing them to engage Mr Livesey QC on the review application of the George bankruptcy proceedings.

328 On 5 April 2006 Minter Ellison urged Mr Macks to concentrate on the review of Registrar Christie's decision to adjourn the George bankruptcy proceedings in the hope that a sequestration order might be made notwithstanding the trial of the Bernsteen action pending in the Magistrates Court. They further advised Mr Macks that he should attempt to extricate himself from the expensive morass of proceedings in which he found himself should that fail.

329 On 11 April 2006, a Federal Magistrate dismissed the review of Registrar Christie's decision. Following this, the partners of Minter Ellison decided to have a frank discussion with Mr Macks about settling the matters because "both firms needed to cut their losses".

330 On 27 April 2006 Minter Ellison sent a letter to Mr Macks advising him to "immediately recommence negotiations with Ms Hamilton-Smith with a view to agreeing to discontinue all litigation on the basis that all parties bear their own costs".

331 In respect to the Bernsteen action and the attempt to bankrupt Ms Hamilton-Smith on the basis of the costs *allocatur*, Mr Macks was informed that, at that time, an amount in excess of $27,000 had been expended on counsel fees and there was in excess of $150,000 in work in progress and $142,000 in outstanding invoices. Total fees of $334,000.81 had been incurred in pursuing all aspects of the Bernsteen action. In addition a further $64,249.97 had been incurred in relation to the Proceedings.

332 Minter Ellison estimated further costs of $120,000 would be incurred if the matters were to proceed. Minter Ellison advised that there would be no "benefit to creditors in continuing to pursue the litigation". However, they also noted that Mr Macks might wish to proceed due to matters of principle.

333 On 28 April 2006 a conference was held at the chambers of Mr Livesey QC. Present were Mr Macks, Mr Livesey QC, Ms Riach and Ms Flaherty (from Minter Ellison). Various strategies were considered. It was an important meeting and it is dealt with in more detail later in these reasons.

334 The Primary Judge found that by the time of the 28 April 2006 meeting it was improbable in the extreme that the creditors of the Companies stood to gain any benefit from the proceedings against Ms Hamilton-Smith or the proposed insolvent trading action against Mr Viscariello. The fees of Mr Macks and Minter

Ellison took priority over distributions to the creditors. His Honour found that there was no reasonable basis on which to expect any cost-effective recovery from Ms Hamilton-Smith or Mr Viscariello.[138]

335 On 8 May 2006 the Magistrates Court vacated the trial date in the Bernsteen action. It was re-listed to recommence on 4 December 2006. Costs thrown away were ordered against Ms Hamilton-Smith.

336 On 25 May 2006 Mr Macks wrote to Mr Mansueto of Minter Ellison referring to the meeting at Bar Chambers with Mr Livesey QC. Mr Macks complained about the suggestion that they would not continue to act in the Hamilton-Smith matters on a speculative basis.

337 Meetings of the Committees of Inspection for Bernsteen and Newmore were held on 29 May 2006. The minutes record discussion about the insolvent trading claim but contain no detail of any discussion in respect of the Bernsteen action or the George bankruptcy proceedings. The Primary Judge found that the Committees of Inspection were not told about the extent of the costs that had been incurred in pursuing Ms Hamilton-Smith.

338 Each Committee resolved that Mr Macks should apply to the Supreme Court of South Australia appointing Sheahan Lock Partners as independent special purpose liquidators for the purpose of investigating and prosecuting any insolvent trading claims against Mr Viscariello.

Denial of Mr Macks' Interest in the George Proceedings

339 On 9 June 2006 Ms Hamilton-Smith filed an affidavit of Mr Gawronski in opposition to the sequestration order sought by Ms George. Mr Gawronski alleged in his affidavit that Ms George had told him that Mr Macks was out to "get Ms Hamilton-Smith because of a dispute he had with Mr Viscariello". He also deposed to an arrangement between Mr Macks and Ms George by which Mr Macks had paid Ms George $4000 in exchange for her cooperation. He also alleged that Ms George had told him that Mr Macks had promised to pay all of the associated legal fees so he could pursue the debt against Ms Hamilton-Smith using Ms George as a front for Mr Macks' action.

340 On 19 June 2006 Ms George filed an affidavit in support of the petition against Ms Hamilton-Smith and she denied "the depositions therein contained". The affidavit was prepared by Ms Flaherty of Minter Ellison.

341 On 19 July 2006 a Federal Magistrate ruled that parts of Mr Gawronski's affidavit were inadmissible by reason of the form in which he had deposed the conversation. He confirmed the sequestration order. Ms Hamilton-Smith's counsel immediately informed the Federal Magistrate that his decision would be appealed and a stay order was granted.

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138 *Viscariello v Macks* [2014] SASC 189, [587].

342 On 1 August 2006 Mr Mansueto sent a letter to Mr Macks setting out details of fees incurred by Minter Ellison and work performed. Work that had been performed on a speculative basis in the Bernsteen action was costed at $321,913.69 exclusive of GST. He also noted that Minter Ellison had always reserved their right as to whether to continue to act on a speculative basis depending on the progress of the action.

343 In early August 2006 Ms Hamilton-Smith appealed against the Federal Magistrate's decision to confirm the sequestration order made in Ms George's bankruptcy petition.

344 On 12 September 2006 the appeal brought by Ms Hamilton-Smith against the dismissal of her declaration proceedings in the Magistrates Court came on before Gray J in the Supreme Court. During the hearing Ms Hamilton-Smith relied on Mr Gawronski's affidavit. It was in the course of the hearing that Mr Livesey QC, upon direct questioning from Gray J, denied that Mr Macks had any interest in the action at all.

345 Mr Livesey QC gave an explanation for that submission that was accepted by the Primary Judge. His Honour considered that the problem with Mr Livesey QC's submissions was the failure of Mr Macks and his legal advisors to make a timely decision about whether to disclose the funding arrangement with Ms George.[139]

Denouement

346 The hearing before Gray J was adjourned to 16 October 2006 to enable the determination of the appeal against the sequestration order to be heard by Besanko J in the Federal Court.

347 On 21 November 2006 Besanko J set aside the decision of the Federal Magistrate on the ground that he had wrongly rejected the Gawronski affidavit due to its form. He further held that the registrar's earlier finding on the question of an accord and satisfaction against Ms Hamilton-Smith did not give rise to an *issue estoppel* and that the Magistrate had not erred in failing to investigate the question again.

348 On 29 November 2006 Ms Hamilton-Smith's trustee in bankruptcy wrote to the Magistrates Court advising that he was not in a position to make an election as to whether to continue Ms Hamilton-Smith's claim. On 8 December 2006 the Magistrate found the action had vested in the Trustee and the Bernsteen trial was adjourned to 14 May 2007.

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139 *Viscariello v Macks* [2014] SASC 189, [641].

349 By letter on 12 December 2006 Minter Ellison made discovery of some documents in relation to the George proceedings. [140]

350 A mediation between the parties was conducted on 26 February 2007. It was successful. Ms Hamilton-Smith agreed to pay $8,000 to Bernsteen and $6,000 to Ms George. All other actions were discontinued save for Mr Viscariello's professional indemnity claim against Mr Macks.

351 On 5 March 2007 Bernsteen discontinued its claim and Ms Hamilton-Smith discontinued her counter-claim.

352 On 4 December 2007 Sheahan Lock Partners filed an insolvent trading claim against Mr Viscariello in the Federal Court. The matter was discontinued on 24 November 2009. Sheahan Lock Partners advised Mr Macks that the proceedings were to be discontinued. They reported that they were satisfied that Mr Viscariello had contravened the insolvent trading provisions. However, they added that Mr Viscariello had "generally abused the court process and successfully managed to frustrate the proper conduct of their investigation". They reported that in the absence of funds to investigate that claim they had determined that there was diminishing likely benefit to the Companies. They had incurred $326,000 in costs.

353 On 21 December 2009 ASIC examined Mr Macks pursuant to s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) as part of their enquiry into the complaint made by Mr Viscariello. They examined him again on 25 May 2010.

354 In 2011 and 2012 Mr Macks convened meetings of the Committee of Inspection to report on the finalisation of the liquidations.

Minter Ellison Relationship

355 Mr Macks, in his evidence and submissions at trial, placed reliance on the advice given, or in some circumstances not given, by Minter Ellison during the course of the Bernsteen and George litigation. It is necessary to set out the nature of that relationship and the findings that were made about the relationship.

356 Mr Macks was an experienced liquidator and had previously used the services of Minter Ellison. Minter Ellison and Mr Macks agreed that Minter Ellison would accept Mr Macks' instructions on preference recovery actions, and in pursuing the debt owed by Ms Hamilton-Smith, on the basis that their fees in each of the actions would be paid from the pooled proceeds of all of the actions. The agreement was not in writing. Mr Macks stated that the fees were charged at a high but not at a speculative rate. The arrangement with Minter Ellison included a term that if the proceeds of the actions were not sufficient to meet the fees of both the solicitors and the liquidators chargeable to those actions then

140 *Viscariello v Macks* [2014] SASC 189, [677].

"there would be discussions in relation to how the proceeds would be allocated between or split between PPB and Minters". As the Primary Judge found, the arrangement was, in effect, no more than an agreement to negotiate in good faith about how the funds recovered would be divided between them in the event of a shortfall.

357 As the costs escalated in the Bernsteen matter the relationship between Minter Ellison and Mr Macks eventually became strained. Minter Ellison became concerned about whether they could continue to act "on spec" in relation to the Bernsteen action.

358 The costs arrangement in relation to the Proceedings stood on a different footing. Mr Macks had agreed to indemnify Minter Ellison and, accordingly, they were entitled to charge for the work. The payment of the outstanding costs on the Proceedings was an issue which contributed to placing a strain on the relationship.

359 On 14 June 2005 Mr Macks agreed with the suggestion of Minter Ellison that he indemnify Ms George for the costs and disbursements of bringing a bankruptcy petition against Ms Hamilton-Smith. It was suggested that the indemnity be for an amount of $2,000. Mr Macks was advised that it was in both his own and Minter Ellison's interests, in terms of time and costs, to enter into an arrangement with Ms George in the hope of avoiding a trial in the Bernsteen action by having Ms Hamilton-Smith declared bankrupt. Mr Macks agreed saying that it was an "excellent suggestion". He told Minter Ellison that he was happy to pay $1,000 towards that strategy. As discussed this arrangement, by which Mr Macks indemnified Ms George, stood in contrast with the arrangement as to the litigation arising out of the liquidation.

360 The scope of the retainer was said to be "to enforce Mt Barker Magistrates Court judgment … against Ms Hamilton-Smith and in particular to prepare and attend to Federal Magistrates Court proceedings to enable a sequestration order to be made against Ms Tanya Hamilton-Smith". Ms George was informed that legal fees would be approximately $2,000. The costs became far greater than when the bankruptcy notice was challenged by Ms Hamilton-Smith. Ms George was happy to continue if Mr Macks continued to indemnify her. The obligation of Mr Macks became open ended so that there was no agreement to fix any terms, such as charge out rates, or indeed the basis on which Mr Macks was to pay. The Primary Judge found, correctly in our view, that it effectively became an agreement to indemnify Ms George for as long as she wished to continue.

361 The Primary Judge was critical of Minter Ellison and Mr Macks in the way the funding arrangements proceeded both in relation to the recovery actions and

the Proceedings. In relation to the general retainer of Minter Ellison the Judge found:[141]

> At a general level, the utility of arrangements of this kind between liquidators and solicitors to facilitate the proper winding up of companies can be accepted. However, provisions should be made to ensure that the work done and the fees charged are not disproportionate to the anticipated proceeds of the actions. In the absence of proportionality, a liquidation may generate litigation which is not in the company's interests but serves instead the financial interests of the company's professional advisers. That is contrary to the interest of the company's creditors and the public more generally.

362 Importantly, although his Honour was critical of the nature of the costs arrangement between Minter Ellison and Mr Macks he made no finding that it affected the quality of the legal advice provided by Minter Ellison to Mr Macks about the conduct of the liquidation.

Appeal Grounds

363 We have already dealt with grounds 6, 8 and 9. Ground 1 is dealt with later in these reasons. There is considerable factual and legal overlap in the remaining grounds of appeal of Mr Macks. The essence of the appeal is a challenge to the Primary Judge's findings that Mr Macks, as at the end of June 2005, acted unreasonably and with a collateral and unlawful purpose(s). This led the Judge to find that Mr Macks breached ss 180, 181 and 182 of the CA. Grounds 3, 4 and 5 of the appeal relate to the specific findings about those sections of the CA. Ground 2 relate to the finding that Mr Macks had four substantial and actuating collateral purposes. Common to the attack on all findings are contentions that the Primary Judge:

- made findings on issues that had not been pleaded by Mr Viscariello;
- made findings when the rule in *Browne v Dunn* had not been complied with;
- made findings without considering the operation of the principles in *Briginshaw v Briginshaw*;
- made mistakes of fact and reasoning which were infected by operative delay;
- failed to give adequate reasons for many of his findings;
- failed to engage with all of the evidence particularly evidence said to be contrary to his findings, and;
- applied hindsight reasoning when arriving at a number of his conclusions.

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[141] *Viscariello v Macks* [2014] SASC 189, [721].

364 We propose to deal with the question of operative delay and the structure of the judgment before turning to grounds 2, 3, 4 and 5.

Operative Delay

365 Mr Macks complained about the delay between the completion of final addresses of the parties (and completion of the evidence) and the delivery of the Reasons. He contended that the delay was inordinate and gave rise to errors on the part of the Judge in his assessment of the evidence, findings made and conclusions reached by him.

366 The trial commenced on 13 February 2012. The estimate as to the length of the trial was inadequate. After two weeks of hearing the matter was adjourned until August 2012. Further evidence was called over a three week period. This included evidence and argument, on a *voir dire*, to determine a claim Mr Macks made for legal professional privilege over certain documents. Mr Viscariello was successful on that issue. The Primary Judge ruled against the claim for privilege and Mr Viscariello obtained the documents but only well after the trial had commenced. The matter was adjourned until late November 2012 when the case proceeded, with further interruptions, until 21 December 2012. Closing addresses were heard in February 2013 and judgment reserved on 26 February 2013. Judgment was delivered on 9 December 2014 – approximately 21 months after judgment had been reserved.

367 It is always unsatisfactory when a trial judge is unable to complete the evidence in the time allocated for trial. This leads, as it did here, to fragmentation of the case.

368 We consider it necessary to make some observations about the way the trial was conducted. There were two parts to the claims made by Mr Viscariello. The first part related to the performance of Mr Macks in his capacity as administrator, the second to his conduct as liquidator. The trial was lengthy and the Primary Judge had to deal with many weeks of evidence and a substantial number of documentary exhibits. The Judge, in his reasons, dealt extensively with the evidence of the witnesses and the documentary exhibits. It was in the process of synthesising the evidence and reasoning to the ultimate conclusions on the claims against Mr Macks as the liquidator of Bernsteen, that difficulties arise.

369 We observe from a reading of the transcript that Mr Viscariello's claims against Mr Macks as Bernsteen's liquidator lacked focus. This is highlighted when compared to the focus demonstrated in the claim against Mr Macks in his capacity as administrator.

370 That is not to criticise Mr Viscariello or the choices he made about the conduct of the proceedings. Forensic decisions, which were open, were made by him. However it can be fairly said that, at times, Mr Viscariello's case was

focussed on what the Primary Judge considered to be peripheral matters. So much becomes obvious upon reading the transcript of the trial.

371 Further, there was a lack of focus in the cross-examination of Mr Macks. That may, in part, be explained by Mr Macks' misconceived claim of privilege. However, the cross-examination was wide ranging and covered almost every step that Mr Macks took as the liquidator of Bernsteen. By obscuring the real issues to be decided on Mr Viscariello's claims difficulties were created for Mr Macks' counsel and, ultimately, the Judge.

372 Approximately 21 months expired between the time when the Primary Judge reserved judgment and when he delivered his first set of reasons. The principles of operative delay become relevant.

Principles of Operative Delay

373 Delay between the taking of evidence and the delivery of judgment is not, of itself, a ground of appeal – unless the effect of the delay is that the primary judge is unable to properly assess the evidence to make findings of fact. What amounts to substantial or excessive delay depends on the circumstances of the case and the complexity of legal and practical issues arising. The longer the delay, the more clarity and specificity needed in the reasons for judgment.

374 Nor does delay of itself indicate that a trial has miscarried or the judgment is in any manner unsafe. Where, however, there is a significant delay in giving judgment, it is incumbent upon an appellate court to look with special care at any finding of fact challenged on appeal.

375 In *Terry v Leventeris*[142] Gray J helpfully analysed the relevant cases on operative delay and identified a number of general principles. He stated:[143]

- The delay weakens the advantage, as discussed above in *Fox v Percy*, that a trial judge has over an appellate court;
- appellate courts are to take the delay into account when reviewing the trial judge's factual findings[144] and when considering the adequacy of the judge's reasons;
- the trial judge's reasons should indicate that he or she has fully considered all of the evidence. It is incumbent upon the trial judge to indicate why he or she rejected the evidence of a particular witness and to indicate why he or she preferred one witness's evidence over another witness's evidence;
- assertive statements made by a trial judge which would normally be assumed to have been made after the trial judge comprehensively considered the evidence, need to be supported by a more complete statement of the relevant evidence;

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[142] [2011] SASCFC 26.
[143] [2011] SASCFC, [15] (Gray J).
[144] *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17, [69].

- the assumption that a trial judge has considered all of the evidence, albeit not referring to all of the evidence in the judgment, can no longer be made; and

- it is to be borne in mind that disquiet can result in the general public, in the losing party in that they may lose confidence in the correctness of the decision and in the winning party in that they may feel they have had to wait too long for justice. (Citations Omitted).

376 It must be remembered, however, as explained by Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*:[145]

> No judicial reasons can ever state all of the pertinent factors; nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another.

377 Mr Viscariello submitted that the principles of operative delay did not apply bearing in mind the length of time the trial took, the number of documents the Primary Judge had to consider and the legal issues involved; it was unsurprising that the Judge would take time to analyse all of the evidence and issues before delivering lengthy and detailed reasons.

378 The Primary Judge was confronted with the difficult task of deciding many complex issues of varying degrees of importance after a trial that had proceeded, intermittently, over almost 12 months. The Primary Judge had to consider an extremely large number of documentary exhibits in addition to the oral evidence. We take into account the significant challenges faced by the Primary Judge.

379 Given the delay between submissions finishing and judgment delivery, we bear in mind the principles of operative delay when considering the structure of the judgment and the grounds of appeal.

Structure of Part 2 of the Primary Judgment

380 Grounds 2, 3, 4 and 5 of the appeal raise issues about the structure of the judgment and in particular the reasoning process undertaken by the Primary Judge when reaching his ultimate conclusions.

381 The Primary Judge concluded that Mr Macks breached ss 180(1), 181 and 182 of the CA. In reaching those conclusions his Honour found that Mr Macks, as at 1 June 2005, was motivated by four substantial and actuating collateral purposes, at least one of which was improper.[146] The finding of the four collateral purposes was pivotal to his conclusions relating to the breaches of ss 181 and 182; its role in relation the conclusion of a breach of s 180(1) is unclear.

382 Mr Macks submitted that the Primary Judge's reasons leading to his conclusions that Mr Macks breached ss 180, 181 and 182, in his capacity as the liquidator, were inadequate. Mr Macks further complained that the Judge failed

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[145] *Fox v Percy* (2003) 214 CLR 118 at [41] (Gleeson CJ, Gummow and Kirby JJ)
[146] Paragraph [757].

to engage with all of the evidence; he failed to adequately explain his reasoning process; he made factual errors including conflating various time periods; on occasions he used impermissible hindsight reasoning and drew inferences that were not available on the evidence.

383 Mr Macks also submitted that the Primary Judge did not engage appropriately with the terms of the sections nor discuss any case law dealing with the sections. In relation to s 180, namely whether Mr Macks exercised the "requisite degree of skill and diligence a reasonable person would exercise", while the Judge briefly engaged with the terms of the section, he did not clearly articulate what act(s) (or failure(s) to act) by Mr Macks led to the finding of a breach of the section. To deal with those submissions it is important to examine the entirety of the Primary Judge's reasoning about this part of the claim.

384 The failure to articulate clearly the basis of the findings, particularly in relation to s 180(1) of the Act, has made the interpretation of the reasons difficult. There is uncertainty about the way in which the Primary Judge approached his task. This is particularly so when the Primary Judge made findings about the four substantial and actuating purposes operating on Mr Macks[147], and precisely what matters he had regard to before concluding that Mr Macks breached s 180(1). There were observations made by the Primary Judge that could be interpreted as having allowed the motivation of Mr Macks to intrude into his application of the objective test proposed in s 180(1).

385 After considering the judgment as a whole, we have concluded that the Primary Judge determined that it was unreasonable of Mr Macks to not accept the settlement offers made by Ms Hamilton-Smith to finalise the Bernsteen action in June 2005. His Honour saw Mr Macks' failure to accept the settlement offers as unreasonable, to such an extent that it was enough to infer a collateral and improper purpose. However, we have concluded that the Primary Judge did not allow his finding about the four collateral purposes influence his assessment of evidence related to s 180(1) of the CA. Our reasons for reaching those conclusions follow.

386 The starting point for the discussion about the structure of the judgment are the findings at paragraphs [757], [760] and [761]. They relevantly state:[148]

> [757] I find that Mr Macks had four substantial and actuating collateral purposes in pursuing Ms Hamilton-Smith after 1 June 2005. First, he was irritated by Mr Viscariello's behaviour generally and, in particular, in committee meetings after the liquidation. Secondly, he bore ill will towards Mr Viscariello for his part in assisting Ms Hamilton-Smith to defend the proceeding brought against her in a way which had caused Mr Macks to suffer financial loss because the costs of the litigation reduced the funds available to pay his fees. Thirdly, he hoped to delay and possibly deter Mr Viscariello in bringing a professional indemnity claim against him. Fourthly, he hoped that pursuing

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147 *Viscariello v Macks* [2014] SASC 189, [757].
148 *Viscariello v Macks* [2014] SASC 189, [760]-[761].

> Ms Hamilton-Smith might facilitate the prosecution and enforcement of the insolvent trading claim against Mr Viscariello.
>
> [760] I find that the maintenance of the Bernsteen action and the George bankruptcy proceedings of June 2005 were unreasonable. I am not satisfied that Mr Macks acted bona fide in the interests of the Companies in that period because his personal interests had become a substantial and actuating reason for maintaining proceedings that were so obviously not in the interests of the Companies.
>
> [761] Mr Macks breached the duty imposed on him by ss 180, 181 and 182 of the Corporations Act in prosecuting the Bernsteen action and the George bankruptcy proceeding after June 2005.

387 The Primary Judge repeated, in essence, his conclusions at paragraph [836] where he stated:[149]

> As I found earlier in these reasons, Mr Macks breached the statutory duties imposed on him by ss 180, 181 and 182 of the *Corporations Act* as a liquidator in pursuing Ms Hamilton-Smith. As to s 181 (sic)[150] of the *Corporations* Act, Mr Macks acted unreasonably for the reasons I have given. As to s 181 of the *Corporations* Act, the litigation after June 2005 was not in the best interests of the Companies and not conducted for a proper purpose because Mr Macks' predominant purpose was to protect his personal position. As to s 182 of the *Corporations* Act, Mr Macks engaged in the litigation to gain an advantage for himself to the detriment of the Companies.

388 The findings made by the Judge set out above do not particularise the conduct of Mr Macks that led to the conclusions of breach. In relation to the breach of s 180(1) the above findings fail to identify the act or acts (or failure(s) to act) of Mr Macks that Mr Macks acted "unreasonably" in the continued pursuit of the Bernsteen action and George proceedings. We accept that the Primary Judge in using that expression is adopting a shorthand expression for the elements involved in s 180.[151] However the Judge does not give the expression "unreasonably" any content.

389 The discussion and reasoning leading to the finding that the pursuit of Ms Hamilton-Smith was unreasonable and not in the interests of the Companies are generally found in paragraphs [723]–[761]. The Primary Judge stated at paragraph [725]:[152]

> Mr Macks testified that he rejected the offer of $10,000 in mid-2005 because he considered Ms Hamilton-Smith to be a person of means who should at least pay what the defendant was asking. He relied on the fact that Minter Ellison solicitors were dismissive

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149 *Viscariello v Macks* [2014] SASC 189, [836].

150 This is clearly meant to be a reference to s 180 of the Act.

151 The primary judge also used shorthand expressions to describe various elements of s 181 and s182. No point was taken on appeal about that approach and we have proceeded on the basis that the shorthand expressions are a sufficient articulation of the issue. The same can be said for the four substantial and actuating purposes. A number of different expressions have been used to encapsulate that concept. No point was taken on appeal and we have proceeded on the basis that the expressions are a shorthand method of describing the concept.

152 *Viscariello v Macks* [2014] SASC 189, [725].

> of the offer. However, it is one thing to feel aggrieved that Ms Hamilton-Smith's offer did not truly reflect the strength of Bernsteen's claim and quite another to rationally evaluate whether anything more might be gained by rejecting the offer and continuing to prosecute the proceedings. It is the latter question that a reasonable self-funded litigant, and a reasonable liquidator, alike must address. Mr Macks either did not do so at the time or was influenced to reject the offer by extraneous considerations. (Our Emphasis)

390 This finding is unclear; it expresses propositions in the alternative. The observation by the Judge suggests that Mr Macks did not rationally assess his position as at June 2005 or he was influenced to reject the offer because of "extraneous considerations". That could be interpreted as meaning that, if Mr Macks did "rationally evaluate" his position, then his failure to settle was due to other extraneous considerations. We take the reference to "extraneous considerations" to be a reference to the four collateral purposes.

391 It is arguable that the finding suggests that even if Mr Macks objectively acted "reasonably", his conduct became unreasonable due to the "extraneous considerations". It is difficult to understand how, if the objective assessment establishes that Mr Macks acted reasonably, his personal motivation could turn his actions into unreasonable ones.

392 However, we do not consider it likely that the Primary Judge intended to make a finding that the breach of s 180 was due to a collateral purpose rather than an assessment of the evidence revealing that Mr Macks objectively failed to act with the "skill and diligence" of a reasonable liquidator.

393 Support for the view that the Primary Judge intended to make a finding of "unreasonableness" separate to any finding of an extraneous purpose is to be found at paragraph [744]. His Honour stated:

> For the reasons given below, I find that Mr Macks acted unreasonably and was influenced by the extraneous consideration of his own personal interests in defending the professional indemnity claim which Mr Viscariello had foreshadowed, and later brought, against him in making his decision to pursue Ms Hamilton-Smith after June 2005. (Our Emphasis)

394 The Primary Judge found that Mr Macks acted unreasonably and was influenced by the extraneous considerations. The use of the conjunction "and" as opposed to "or" suggests the finding of acting unreasonably was separate to the finding of an extraneous personal interest.

395 There was very little discussion in the Reasons about how his Honour came to the conclusion that Mr Macks had the "four substantial and actuating collateral purposes". There were only three references in the judgment to collateral purposes or benefits.

396 The first was to be found at paragraph [428]:[153]

> I am unable to say why the matter did not settle given the apparent interest in compromise shown by the exchange of correspondence in the first half of 2005. The parties were not far apart and the proceedings were plainly uncommercial in the sense that the costs of proceedings were bound to be massively disproportionate to the difference between the offers. I conclude that both parties still saw some collateral benefits in maintaining the litigation, despite that disproportion, which held them back from further compromising their respective positions. (Our Emphasis)

397 Arguably the unstated premise in that finding was that the failure to settle was, of itself, unreasonable; in fact it was so unreasonable or irrational that the Primary Judge could infer an underlying collateral purpose. The finding of the existence of a collateral purpose would then have as its foundation the finding that Mr Macks had acted unreasonably.

398 Support for that interpretation is found at paragraph [565]. The Primary Judge stated:

> Standing back to review the position as at April 2006, the course which Mr Macks had taken in pursuit of Ms Hamilton-Smith left only one view open: it was disastrous. More had been spent on the collateral George bankruptcy proceedings than the debt he was seeking to recover. Moreover, any costs orders made in his favour were unlikely to compensate for much more than one half of the legal fees he had incurred and actual recovery even of that amount would be difficult. The fees charged by PPB in the Bernsteen action to June 2005 were $136,338 and the fees of Minter Ellison were $191,568.00. Counsel fees were in addition to those amounts. The prosecution of the actions against Ms Hamilton-Smith for the purpose of recovering a debt of just $28,000 was manifestly unreasonable, indeed irrational, unless it served a useful collateral purpose. (Our Emphasis)

399 While this paragraph commenced by reviewing the position as at April 2006, the Primary Judge makes the finding as at June 2005 that the "prosecutions of the actions…. was manifestly unreasonable, indeed irrational, unless it served a useful collateral purpose". That finding, when read in conjunction with the finding at paragraph [428], makes it clear that the finding of a collateral purpose is dependent upon a finding that Mr Macks acted unreasonably.

400 The third reference to a collateral purpose was to be found in an observation made by the Judge about the meeting between Mr Macks and Mr Livesey QC on 28 April 2006. At paragraph [574] the Judge stated:[154]

> Mr Macks is recorded as observing that "the main game is the John Viscariello" litigation. That observation too is consistent with what I find was the substantial actuating purpose behind the strategies adopted by Mr Macks.

401 The premise was that the substantial and actuating purpose exists and this evidence supports the finding. This must be a reference to the findings at [757].

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[153] *Viscariello v Macks* [2014] SASC 189, [428].
[154] *Viscariello v Macks* [2014] SASC 189, [574].

402 Returning to the findings made in [428] and [565], we consider that the findings read together separated the issue of, as the Primary Judge describes, "Macks acting unreasonably" from a finding of a collateral purpose. First, the Primary Judge found that prosecuting the Bernsteen action after June 2005 and commencing the George bankruptcy proceedings was objectively unreasonable and accordingly, a breach of s 180. Second, that prosecuting the Bernsteen action and the George bankruptcy proceedings was so unreasonable, that Mr Macks' actions can only be explained by a subjective purpose – the purposes identified at [757].

403 Reading the judgment in its entirety, we consider that the Primary Judge considered that Mr Macks, objectively, acted unreasonably in failing to settle the Bernsteen action in June 2005. Therefore his pursuit of the Bernsteen proceedings after June 2005 was a breach of s 180(1). The same reasoning applies to his entering into the George proceedings. The "extraneous considerations" referred to, while connected to the failure to settle in June of 2005, are relevant only to breaches of ss 181 and 182 as found later by the Primary Judge.

404 Mr Viscariello sought to justify the findings of the Primary Judge. He submitted that the appropriate starting point for understanding the Judge's reasons was his finding on the position as at April 2006. The Primary Judge found:[155]

> I reject Mr Macks' evidence that his comment about weakening was a reference to the position of the Companies. Their position was already hopeless. There was no prospect that they would benefit from the litigation. Their interests lay in abandoning the proceedings, even with each party bearing its own costs. I find that a settlement on those terms was always likely to find favour with Ms Hamilton-Smith.

405 This observation, it was submitted, bore out what ought to have been obvious to Mr Macks from mid-2005.

406 Mr Viscariello submitted that the earlier finding should be taken in conjunction with the Primary Judge's finding at paragraph [574], namely:[156]

> Mr Macks is recorded as observing that "the main game is the John Viscariello litigation". That observation too is consistent with what I find was a substantial actuating purpose behind the strategies adopted by Mr Macks. The notes record that Mr Macks felt that if the Bernsteen action and George bankruptcy proceedings were settled, it would give Mr Viscariello "more determination to go forward with all of his actions against Peter and PPB.

407 In addition, he submitted, regard should be had to the finding at paragraph [565]:[157]

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[155] *Viscariello v Macks* [2014] SASC 189, [584].
[156] *Viscariello v Macks* [2014] SASC 189, [574].
[157] *Viscariello v Macks* [2014] SASC 189, [565].

> Standing back to review the position as at April 2006, the course which Mr Macks had taken in pursuit of Ms Hamilton-Smith left only one view open: it was disastrous. More had been spent on the collateral George bankruptcy proceedings than the debt he was seeking to recover. Moreover, any costs orders made in his favour were unlikely to compensate for much more than one half of the legal fees he had incurred and actual recovery even of that amount would be difficult. The fees charged by PPB in the Bernsteen action to June 2005 were $136,338 and the fees of Minter Ellison were $191,568.00. Counsel fees were in addition to those amounts. The prosecution of the actions against Ms Hamilton-Smith for the purpose of recovering a debt of just $28,000 was manifestly unreasonable, indeed irrational, unless it served a useful collateral purpose. (Our Emphasis)

408 Mr Viscariello submitted that these paragraphs were related to the Primary Judge's finding that the maintenance of the Bernsteen action and the Proceedings was unreasonable. It was submitted that, as the Primary Judge found that from mid-2005 there was no "prospect of any net return to the companies… of continuing the proceedings",[158] it was open to the Judge to find that the collateral purposes were operating from mid-June 2005. Accordingly, it was contended that it was "clear from the foregoing findings and observations that the liability which the Primary Judge attached to Mr Macks was in respect of matters which ought to have been obvious to him from as early as June 2005, or mid 2005".

409 We make the following observations. The submissions of Mr Viscariello range far and wide over the Reasons to draw the above conclusions. That is not intended to be a criticism of the submissions. It does, however, confirm our observations that the reasoning of the Primary Judge was not clear.

410 Further, Mr Viscariello's submissions assert that the findings of the Primary Judge on the question of whether it was open to find breaches of the CA from after June 2005 were based on the assumption that the liability which the Primary Judge attached to Mr Macks was in respect of matters which ought to have been obvious to him from as early as June 2005, or mid-2005. As Mr Viscariello submitted, it ought to have been prospectively obvious to Mr Macks from mid-June 2005 that there was no benefit to be derived. Although not stated, that assumed that Mr Macks acted unreasonably as at June 2005. Leaving aside the question of the involvement of hindsight reasoning, if matters ought to have been obvious to Mr Macks at June 2005, then Mr Macks would have been acting in breach of s 180, or to use the Primary Judge's expression, acting unreasonably.

411 At the risk of oversimplifying the Primary Judge's reasoning our analysis of the judgment is as follows. It was reasonable for Bernsteen to pursue Ms Hamilton-Smith for the debt owed of approximately $28,000. By June 2005 the cost of pursuing her was excessive. Her strategy of defending every point and appealing any losing point had succeeded. It was as such unreasonable for Mr Macks not to settle the proceedings in June 2005 having regard to the known

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[158] *Viscariello v Macks* [2014] SASC 189 [915].

facts viewed objectively. It was in fact so unreasonable that Mr Macks must have had a collateral purpose.

412 The Primary Judge found that Mr Macks had "four actuating and collateral purposes" from 1 June 2005. One of them, at least, was improper, namely, that Mr Macks "hoped to delay and possibly deter Mr Viscariello in bringing a professional indemnity claim against him".[159] Evidence of the improper purpose could also be inferred from his continued pursuit of the Bernsteen action and the George bankruptcy proceedings after June 2005 and from statements made by Mr Macks at his meeting with Mr Livesey QC (and others) on 28 April 2006. The escalation in costs by April 2006 was highly significant and clearly not in the best interests of the company. His statements at that meeting, as found by the Primary Judge, indicated an improper purpose at that time and earlier.

413 As we have discussed, the finding that Mr Macks had a collateral purpose in implementing an offensive strategy underpinned the Primary Judge's findings as to breaches of ss 181 and 182 of the Act. Those findings, in turn, depended on the Primary Judge's finding that Mr Macks, after June 2005, acted unreasonably. The relationship between these findings means that if Mr Macks did not act unreasonably in June 2005 then no collateral purpose emerges, at least as at June 2005. His statements in April 2006, could not, taken alone, found the inference that the collateral purposes existed as at June 2005.

414 We therefore approach the judgment on the basis that the Primary Judge found that Mr Macks after June 2005:

- acted unreasonably (a breach of s 180 of the Act);
- did not conduct the litigation in the best interests of the Company and for a proper purpose (a breach of s 181 of the Act). The predominant purpose of the litigation was to protect his personal position. The purpose existed on 1 June 2005, and;
- engaged in the litigation to gain an advantage for himself to the detriment of the Companies. The advantage was to protect his personal position (a breach of s 182 of the Act).

415 We also note that there were differences in the timing of the findings relating to the breaches. In paragraph [757] there is a reference to "1 June 2005," in paragraph [760] there is a reference to "of June 2005" and in paragraph [761] there is a reference to "after June 2005." They are not necessarily inconsistent but it is not clear. Further, the expression "after June" could be interpreted as meaning from 1 July 2005.

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[159] *Viscariello v Macks* [2014] SASC 189, [757].

416 As discussed, other findings demonstrate that the Primary Judge was critical of Mr Macks entering into the arrangement with Ms George and the issue of the bankruptcy proceedings after settlement discussions had failed in late June 2005. His Honour declared that the breach of s 180 occurred from June 2005 and included entering into the George strategy. Consistent with the Primary Judge's finding that the collateral purposes influenced Mr Macks from the 1 June 2005, we will proceed on the assumption that the breach of s 180 (1) runs from the same date.

417 Importantly, as discussed earlier, the finding of actuating and collateral purposes existing as at 1 June 2005 is predicated on the finding that the failure to settle the Bernsteen proceedings was not only "unreasonable", it was so unreasonable as to lead to the inference of a collateral purpose. If it was reasonable for Mr Macks to continue with the Bernsteen action and the George strategy in and after June 2005, the finding of a collateral purpose, at June 2005, falls away.

Ground 3

The Primary Judge erred in law in finding that the appellant contravened section 180 (1) of the Corporations Act

418 It is convenient to deal with Ground 3 before Ground 2. The finding that Mr Macks "acted unreasonably" at common law and/or in breach of s 180 of the CA, as we have interpreted the Primary Judge's reasons, does not depend on the finding of an "actuating and collateral purpose". Such a finding was, of course, not necessary for the conclusion that Mr Macks had breached the duty imposed by s 180(1) CA.

419 Section 180 (1) requires a director or officer to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director of officer of a company in the company's circumstances. The subsection is a civil penalty provision. A liquidator is an "officer" of the company as defined in s 9 of the Act.

420 The standard imposed by s 180 is an objective one. The degree of care and diligence that is required by the section is fixed as an objective standard involving two elements. First, the particular circumstances of the company to which the duty is owed by the liquidator as an "officer" of the company. Second, the office and the responsibilities within the corporation as the liquidator.[160]

421 Liquidators, appointed and paid to exercise professional duties, must meet high standards of skill and competence in the performance of those duties.

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[160] *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at [18]; *Asden Developments Pty Ltd (in liq) v Dinoris* [2017] FCAFC 117.

Conduct, however, that is found to be a mere error of judgment does not contravene the statutory standard under s 180(1).[161]

422 As Austin J stated in *ASIC v Rich:*[162]

> The statutory issue under s 180(1) is not whether the defendants made mistakes in the process of financial forecasting, and a fortiori, it is not whether they formed opinions different from the opinions of ASIC or even the court. The statutory issue is whether they failed to meet the standard of care and diligence that the statute lays down. The statute requires the court to apply a standard defined in terms of the degree of care and diligence that a reasonable person would exercise, taking into account the corporation's circumstances, the offices occupied by the defendants and their responsibilities within the corporation. That requires the defendant's conduct to be assessed with close regard to the circumstances existing at the relevant time, without the benefit of hindsight, and with a distinction between negligence and mistakes or errors of judgement firmly in mind.

423 The standard imposed by the statutory duty of care and diligence are essentially the same as the standards imposed upon directors under the common law.[163] The contrary was not argued before us.

424 The Primary Judge acknowledged that the courts have shown reluctance to interfere with commercial decisions.[164] The Judge further accepted that "judgments about the liquidator's conduct must be made in the context of the circumstances as they existed at the time, without the benefit of hindsight, and with the distinction between negligence and mistakes of error of judgment firmly in mind. [sic]"[165]

425 Mr Macks submitted that the Primary Judge erred when he assessed the conduct of Mr Macks, as at June 2005, as unreasonable. In particular it was contended that the Judge:

- failed to have regard to the fact that Courts are reluctant to interfere in commercial decisions of liquidators;
- failed to have regard to, or did not engage with, all of the evidence;
- made a number of factual errors;
- impermissibly used hindsight reasoning;
- failed to explain adequately his reasoning process when making findings of fact and conclusions, and;

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[161] *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1.
[162] (2009) 236 FLR 1, [7242].
[163] *ASIC v Adler* (2002) 42 ACSR 74; *Daniels v Anderson* (1995) 37 NSWLR 438.
[164] *Viscariello v Macks* [2014] SASC 189, [816]; *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1989) 19 NSWLR 434.
[165] *Viscariello v Macks* [2014] SASC 189, [817].

– made findings on matters that were not pleaded and had not been put to witnesses.

426 Further it was submitted that the matters referred to were affected by operative delay.

427 Mr Macks submitted that the Judge made a number of errors of law and fact and that a correct assessment of the evidence was made no finding of a breach of s 180(1) could be made.

Obligation of Appellate Court

428 An appellate court, within the constraints marked out by the nature of the appellate process, is obliged to conduct a real review of the evidence given at trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons.[166] If the court of appeal concludes that the Primary Judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings.[167] An appellate court is not excused from the task of weighing conflicting evidence and drawing its own inferences and conclusions. However the court should always bear in mind that it did not hear or see the witnesses and it should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by "incontrovertible facts or uncontested testimony, or they are 'glaringly improbable' or 'contrary to compelling inferences'".[168] As the plurality stated in *Fox v Percy*: [169]

> In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.
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> (Citations Omitted)

429 Where the findings of fact are not challenged and credibility findings no longer relevant an appellate court is generally in as good a position as the trial judge.

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[166] *Fox v Percy* (2003) 214 CLR 118.
[167] *Miller & Associated Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357.
[168] *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679.
[169] *Fox v Percy* (2003) 214 CLR 118, [29] (Gleeson CJ, Gummow and Kirby JJ).

Facts Existing as at June 2005

430 The Primary Judge drew a number of factors together commencing at paragraph [723] and continuing until reaching his final conclusions at paragraphs [759]-[761]. We accept that these are the main factors the Primary Judge relied upon. However the Judge did not identify which of those factors he relied upon for his conclusion that Mr Macks breached s 180 (1) of the CA after June 2005. A number of the factors mentioned by the Primary Judge could only be relevant at a time much later than June 2005. The Judge clearly considered that April 2006 was also a pivotal period.

431 We set out below the factors that the Primary Judge identified as being relevant to the finding that Mr Macks had breached the duty imposed by s 180(1) from June 2005.

432 The Primary Judge rejected the evidence of Mr Macks that he acted on an "important matter of principle" due to the special nature of his office.

433 The Primary Judge considered that it was significant that Minter Ellison did not act "on spec' in relation to the George bankruptcy proceedings and that they repeatedly expressed the view that the litigation did not have sufficient prospects of a successful recovery.

434 The Primary Judge had regard to the settlement negotiations that took place between the parties leading up to and including June 2005 and to the fact that Mr Macks had sought advice from Minter Ellison when considering what steps to take in the Bernsteen action. While the Judge accepted that Mr Macks relied on the advice of Minter Ellison to reject the offers as at June 2005, and to enter into the George strategy, he considered that, given the arrangements between Mr Macks and Minter Ellison relating to the "spec" fees, he was not inclined to give the advice "much weight". He, therefore, discounted the weight he could give to that advice due to the nature of the retainer Mr Macks had with Minter Ellison.

435 The Primary Judge found that viewed objectively the "dossier" relating to the financial position of Ms Hamilton-Smith was not a sound basis to expect any significant recovery. Further he considered that "it must have been clear" to Mr Macks that recovery of assets would be a "protracted and expensive affair" even if she had assets.

436 The Primary Judge took into account the financial position of Bernsteen as at June 2005; that is, whether there were other extant actions from which a "return" to the creditors could reasonably be expected.

437 The Primary Judge found that Mr Macks had four substantial and actuating collateral purposes in pursuing Ms Hamilton-Smith after 1 June 2005. We have discussed this finding earlier in these reasons when considering the structure of

the judgment. However, as discussed earlier, this finding is not relevant to consideration of a breach of s 180 (1).

438 The Primary Judge found that he was not inclined to give weight to Mr Macks' commercial judgment on the question of the assessment of the cost effectiveness of the pursuit of Ms Hamilton-Smith; he considered that lawyers were better placed to make such an assessment. This finding does not sit comfortably with "discounting" the advice given by Minter Ellison.

439 Finally, the Primary Judge had regard to the costs incurred by Mr Macks and by Minter Ellison in prosecuting the Bernsteen action up to June 2005.[170] His Honour considered that the proceedings by June 2005 were uncommercial and that the reason proffered by Mr Macks for pursuing the Bernsteen debt, namely, as a matter of principle, was not objectively reasonable.[171]

440 It is convenient to deal with the issue about the advice given by Minter Ellison before dealing with other aspects of this ground of appeal.

Advice from Minter Ellison

441 Mr Macks gave evidence that he was not advised by Minter Ellison, at any stage, that he would be in breach of his duties as a liquidator in prosecuting the Bernsteen action and in entering into the indemnity arrangement with Ms George. The Primary Judge accepted that evidence and that finding was not challenged; it was clearly open. The Judge accepted the evidence of Mr Macks that Minter Ellison, in June 2005, were dismissive of the offers to settle the Bernsteen action by Ms Hamilton-Smith. The Primary Judge accepted that the advice from Minter Ellison to Mr Macks that he enter into the George strategy implied that the arrangement was both a lawful and proper one for him to make.

442 Those findings were reasonably open to the Judge. They were not challenged on appeal.

443 Mr Macks submitted that the Primary Judge erred in finding that Minter Ellison had "reasonably concluded that further expenditure of their resources on the George bankruptcy proceeding on a speculative basis was not warranted".[172] The Judge later concluded at paragraph [755]:[173]

> It is significant that Minter Ellison decided not to act "on spec" in the George bankruptcy proceedings and repeatedly expressed the view that the litigation did not have sufficient prospects of a successful recovery. It matters little that Minter Ellison sent those letters because of the concerns of the senior management of Minter Ellison that the firm was unlikely to recover fees for the work it had performed. Their concerns reflect an objective assessment of the position. Mr Macks may have hoped for a miracle but I do not accept that he believed anything different.

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[170] *Viscariello v Macks* [2014] SASC 189, [745].
[171] *Viscariello v Macks* [2014] SASC 189, [729].
[172] *Viscariello v Macks* [2014] SASC 189, [727].
[173] *Viscariello v Macks* [2014] SASC 189, [755].

444 It is likely that the Primary Judge was referring in those comments to an earlier finding in which he contrasted the position of Minter Ellison on the Bernsteen action to their position on the Proceedings. He stated: [174]

> That arrangement, by which Mr Macks indemnified Minter Ellison, stood in contrast with the arrangement as to the litigation arising out of the liquidation. In the other litigation Mr Macks and Minter Ellison had agreed to distribute equally between themselves such of the proceeds of the actions which were available to pay their fees. Moreover, the proceeds of any one action was to be available to pay the fees charged in other litigation. It is for that reason that Minter Ellison observed that the indemnity also served its interests. In short, Minter Ellison did not expect that the Bernsteen action would produce any useful return.

445 There were two relevant aspects to those findings. The first was that Minter Ellison decided that proceeding on a "speculative" basis on the George matter was not warranted. The second, that Minter Ellison "repeatedly expressed the view that the litigation did not have sufficient prospects of success."

446 A difficulty with the first finding lies in the evidence of Ms Riach, the solicitor from Minter Ellison who was in charge of the day to day running of the liquidation files. As the Judge noted: [175]

> Ms Riach was asked why a different funding arrangement, one in which Mr Macks was made liable to pay the fees irrespective of any recovery, was agreed with respect to the George proceedings. Ms Riach answered:
>
> > I am not sure why, I don't have a specific recollection as to why that was separated out. But, effectively, we were being asked to undertake further work and my understanding, although my specific recollection is that Ray would have required that if Peter was indemnifying…we would be able to charge for that work.

447 This is the only evidence from Minter Ellison about their reason for the different arrangement. It is not suggestive of a "decision" having been made that the Bernsteen action was not producing "any useful return". In our view it is an action being undertaken on a matter outside the terms of the general retainer such that Minter Ellison were entitled to charge separately. They were acting for Ms George not Mr Macks; he had agreed to indemnify them for the costs.

448 It is possible that the Primary Judge was referring to his discussion about the evidence of Mr Macks when questioned about a letter he received from Minter Ellison dated 6 July 2005.[176]

449 In that letter Mr Mansueto, a partner at Minter Ellison, had written:

> In view of the level of work which has been undertaken and for which payment has not been received, and is unlikely to be recovered, it was appropriate that we review our arrangements for the ongoing work which is required.

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[174] *Viscariello v Macks* [2014] SASC 189, [434].
[175] *Viscariello v Macks* [2014] SASC 189, [435].
[176] *Viscariello v Macks* [2014] SASC 189, [715].

450 The terms of this letter were unclear. The George strategy remained the same with regard to costs; it had only just commenced. Minter Ellison agreed to continue to act on a speculative basis in the Bernsteen matter. In essence the costs regime remained the same.

451 It is not clear that Minter Ellison made the decision referred to by the Primary Judge. It is possible that they did but it was never suggested to Ms Riach that Minter Ellison made any such decision.

452 In relation to the second aspect of the finding, Mr Macks submitted that the reference to Minter Ellison repeatedly expressing the view that the litigation "did not have sufficient prospects of a successful recovery" referred, not to the commencement of the George strategy, but to a time much later – after April 2006. While Minter Ellison had questioned the commerciality of the Bernsteen action as early as 9 June 2004, the reference by the Judge to Minter Ellison "repeatedly" expressing the view related to a number of events that occurred after June 2005. Those events could not have been a relevant factor as at June 2005. The Primary Judge conflated a number of events in making that finding.

453 Mr Macks contended that there are further problems with the Primary Judge's findings relating to the involvement of Minter Ellison. Mr Macks gave evidence at trial that Minter Ellison had not, at any stage, advised him that he was in breach of his duties as a liquidator. The Primary Judge stated:

> Mr Macks testified that Minter Ellison did not at any stage advise him that he was in breach of his duties as liquidator in prosecuting Bernsteen's claim against Hamilton-Smith and in giving Ms George an indemnity. I accept that evidence. However, the relevant question is whether Mr Macks made his decisions to pursue Ms Hamilton-Smith diligently, reasonably and in good faith. Moreover given the arrangements between Mr Macks and Minter Ellison for the pursuit of preference claims on a speculative basis, I am not inclined to give much weight to Minter Ellison's failure to so advise Mr Macks. I acknowledge that Minter Ellison's advice to adopt the George strategy impliedly accepts that the arrangement was both a lawful and proper one to make for a liquidator, but the question was never explicitly addressed by advice from Minter Ellison.[177] (Our Emphasis)

454 The Judge correctly identified the relevant question as "whether Mr Macks made his decisions to pursue Ms Hamilton-Smith diligently, reasonably and in good faith". However, the legal advice Mr Macks received from Minter Ellison was a factor to be considered in deciding the question of whether Mr Macks had acted "unreasonably".

455 Having accepted Mr Macks' evidence that Minter Ellison had not advised him that he might be in breach of his duty as a liquidator in pursuing Ms Hamilton-Smith, the Primary Judge found that he was not prepared to give the failure of Minter Ellison to give that advice "much weight" due to the nature of the retainer that existed between Mr Macks and Minter Ellison. That was, in

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[177] *Viscariello v Macks* [2014] SASC 189, [732].

effect, a finding that Minter Ellison were unable to give professional and proper advice to Mr Macks about the Bernsteen proceedings due to the nature of the retainer.

456 Not only did Minter Ellison not advise Mr Macks that he might have been in breach of his duties as a liquidator in pursuing the Bernsteen action, they devised the George strategy and positively encouraged him to fund it. The George strategy was devised to end the Bernsteen action. Implicit in the advice was the proposition that it was proper for Mr Macks to continue prosecuting the Bernsteen action. The George strategy was devised at around the time that Minter Ellison gave Mr Macks advice to reject the offers made by Ms Hamilton-Smith.

457 The Primary Judge had, as discussed earlier in these reasons, made comments about the costs arrangements between Mr Macks and Minter Ellison.[178] However, he did not make findings about whether the arrangement affected the quality of the advice given by Minter Ellison.

458 Mr Viscariello submitted in the appeal that Minter Ellison should be seen as having been in the "same camp" as Mr Macks. This was particularly so, it was submitted, as they were both earning professional fees from the continuation of the liquidation. Mr Viscariello submitted that, in any event, Mr Macks ought to have known that any advice that he had received from Minter Ellison was "questionable". However, Mr Viscariello did not suggest that those propositions were put to either Mr Macks or representatives of Minter Ellison at trial.

459 The failure by Mr Viscariello to put to the solicitors from Minter Ellison that their advice was compromised in some way raises the question as to whether the rule in *Browne v Dunn* was complied with in this case and, if not, what flows from the failure to comply with the rule.

460 Mr Viscariello submitted that no issue concerning the rule in *Browne v Dunn* arises. He contended that the manner in which the trial had been conducted meant that both parties appreciated the issues and had ample opportunity deal with all of the issues that arose at trial – in particular, the cross examination of Mr Macks left no room for doubt about the nature of the case being made against him.

The rule in Browne v Dunn

461 The rule in *Browne v Dunn* has been the subject of judicial comment in many cases. The rule is one of practice or procedure based upon general principles of fairness. As observed by Wells J in *Reid v Kerr:*[179]

> It has always seemed to me that if some kind of imputation is to be made against a witness, then, at some stage-ultimately-the precise nature of that imputation should be made clear to the witness so that he is given an opportunity to meet it and, if he can, to

[178] *Viscariello v Macks* [2014] SASC 189, [720]-[722].
[179] (1974) 9 SASR 367 at 374.

> explain it or destroy it…. I am well aware that there are more ways of taking a fort than by frontal attack, but I also hold it to be a fundamental principle that, when all arts and devices of cross examination have been exhausted for the purpose of testing whether a particular witness merits adverse criticism, then, at some stage, and in some fair manner, he should be given the opportunity of meeting the implication and answering it.

462 It was explained by Hunt J in *Allied Pastoral Holdings Pty Ltd v FCT* in the following terms: [180]

> It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examined as intention to rely upon such matters, it is necessary to put to an opponent's witness in cross examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

463 The rule has two aspects. First, it is a rule of practice designed to achieve fairness to witnesses and a fair trial between the parties. Secondly, it relates to the weight or cogency of the evidence. As a general proposition, evidence which is not inherently incredible and which is unchallenged ought to be accepted. The evidence may, of course, be rejected if it is contradicted by facts otherwise established by the evidence or the particular circumstances point to its rejection.[181]

464 There is, however, no rule of law that a court must accept unchallenged evidence.[182]

Consequences of a failure to comply with the rule in Browne v Dunn

465 The decision in *Kuhl v Zurich Financial Services Australia Ltd*[183] is instructive on the consequences that flow from a failure to comply with the rule.

466 The plaintiff sued the defendant for injuries suffered in an industrial accident. The trial judge found that the plaintiff was "less than expansive" when describing how the accident had occurred. His Honour stated that he had "formed the view that for whatever reason he [the plaintiff] was reluctant to say precisely what happened". The trial judge relied upon four questions and the answers in evidence in chief given by the plaintiff to support that view. The plaintiff was asked no further questions in his evidence about how the accident had occurred. The trial judge asked no questions. Counsel for the defendant did not make a submission on the topic in his closing address.

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[180] [1983] 1 NSWLR 1 at 16.
[181] *Ashby v Slipper; Harmer v Slipper* (2014) 219 FCR 322; *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362.
[182] *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.
[183] (2011) 243 CLR 361.

467 Heydon, Crennan and Bell JJ noted that the view taken by the trial judge was important and that to conclude that a party-witness was reluctant to say what had happened was to conclude that the party-witness had deliberately failed to comply with the duty to tell the whole truth.[184] As the majority noted, if it was not open to defence counsel to make the postulated allegation, not having cross examined on it at trial, how could it have been open to the trial judge, without warning, to incorporate into his reasons for judgment a finding to the same effect as the allegation?[185] The majority stated:[186]

> There was no point in the trial judge mentioning his conclusion that the plaintiff's evidence was not frank and complete unless it played a role in his decision adverse to the plaintiff. In the absence of any challenge from the cross-examiner to the frankness and completeness of the plaintiff's evidence, it was incumbent on the trial judge, if his conclusion that the plaintiff had not been frank and complete was to play a role in his decision adverse to the plaintiff, to make the challenge himself. Perhaps the criticism in the judgement did not occur to the trial judge until after the plaintiff had left the box, or until after the hearing had concluded and before the Judge's reserve judgement was given. It remained necessary either to recall the plaintiff or to have no regard to that aspect of the plaintiff's evidence. (Our Emphasis)

468 The error of the trial judge was that he had incorporated into his reasons a finding without providing the affected party with the opportunity to deal with the subject matter of the finding.

469 A similar situation arose in *Bale v Mills.*[187] A former client sued a firm of solicitors alleging that they had failed to advise him properly when settling his work injury claim. The solicitor handling the settlement, Mr S, gave evidence. An issue at the trial was the calculation, made by Mr S, of the "preclusion period" before the plaintiff was able to access Centrelink payments. It was alleged that he had made an error in his calculation. During the course of the trial a letter sent to Mr S from Centrelink was tendered. The error was disclosed in the letter. The letter was received by Mr S before he wrote to his client. In the subsequent letter to his client he did not advise of the error.

470 Counsel for the plaintiff at trial submitted that Mr S deliberately wrote to his client, after receipt of the letter from Centrelink, to consciously mislead him and conceal his error in calculating the preclusion period. That allegation had not been put to Mr S, but the primary judge accepted the submission.

471 On appeal it was conceded that counsel should not have made that submission. The Court (Allsop P, Giles JA and Tobias AJA) noted that the concession was properly made and added that it ought not to have been accepted by the Primary Judge.[188] The Court accepted, on the authority of *Kuhl,* that the

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[184] (2011) 243 CLR 361, [62].
[185] (2011) 243 CLR 361, [72].
[186] (2011) 243 CLR 361, [75].
[187] [2011] NSWCA 226.
[188] [2011] NSWCA 226, [41].

rule in *Browne v Dunn*, being one of fairness, applied equally to a trial judge as to counsel.

Was there a Breach of Procedural Fairness?

472 As discussed, the Primary Judge gave less weight to the advice of Minter Ellison because of the nature of the retainer. In our view, it was not open to his Honour to have made such a finding against Minter Ellison without giving them the opportunity to respond.[189] Mr Viscariello did not suggest at trial that the advice given by Minter Ellison was questionable. No challenge to the propriety of the advice given by Minter Ellison in relation to the Bernsteen action was made during the trial.[190]

473 Further, Mr Macks was not put on notice that, despite his evidence that he had accepted and acted on advice from Minter Ellison, his reliance on their advice would or might be "discounted" by the Primary Judge. No suggestion was made by Mr Viscariello that Minter Ellison were "in the same camp" as Mr Macks. Procedural fairness required that Mr Macks (and indeed Minter Ellison) be put on notice about such a potential finding.

474 Serious matters that are raised or decided in proceedings about the professional conduct and integrity of a non-party solicitor or firm of solicitors require careful consideration. The opportunity to elucidate or explain such matters is very important.

475 Apart from the failure to give Minter Ellison an opportunity to respond to such a suggestion there was no basis in the evidence to make such a finding.

476 It can be accepted that Ms Riach was challenged about the advice Minter Ellison gave in relation to the Proceedings, particularly later in those proceedings. Much time was spent at trial on events occurring after April 2006. The evidence of Mr Macks and Ms Riach about those events was contested. However, what occurred in April 2006 and thereafter is not relevant to the question of whether Mr Macks, as at June 2005, acted unreasonably. There was no challenge to the advice given by Minter Ellison to Mr Macks, about the continuation of the Bernsteen action around June 2005 nor was there any suggestion that the advice given about the George strategy was erroneous.

477 In those circumstances the Judge erred in making the finding that he would not "give much weight" to the failure of Minter Ellison to give that advice. The finding was on an extremely important aspect of the case. The objective assessment of the reasonableness of Mr Macks' conduct should have been undertaken against the background that Minter Ellison's advice was professionally and competently given and that Mr Macks was entitled to give it

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189 [2011] NSWCA 226.

190 The Outline of Submissions of Viscariello at trial criticize Macks for a failure to follow the advice of Minter Ellison. Page 12624 point 6.

proper weight when considering what action to take.[191] The legal advice could not have been a "complete" answer to the question of whether Mr Macks acted "unreasonably"; however it was a significant matter to be taken into account.

478 Further the finding of the Primary Judge that he was inclined to give less weight to the advice of Minter Ellison must be read in light of his finding about the question of "abuse of process".

479 Relevantly, the Primary Judge found:[192]

> From at least mid-2005 when Mr Macks gave instructions on the conduct of the proceedings he gave active consideration to the protection of his personal interests as he saw them. Notwithstanding Mr Macks' general intention to prosecute the proceedings through to successful judgments in his favour if he could, the lack of any prospect of obtaining any reasonable return, coupled with the personal interests he sought to protect, constituted the proceedings an abuse of process.
>
> I acknowledge that Mr Macks' position as litigation funder did not in itself constitute the proceeding an abuse of process.[193] I also acknowledge that a funder can control litigation without it being an abuse.[194] Moreover, it is not an abuse to seek the bankruptcy of an opponent in litigation, especially when the opponent is insolvent and the defence unmeritorious. Finally, I acknowledge that a debt may be purchased in order to procure a sequestration order with a view to proving debts of the purchaser in the winding up or bankruptcy[195] unless the applicant seeks to extort more than is due.[196]
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> However in this case the proceedings were, to the knowledge of Mr Macks and his advisers, prosecuted when there was no prospect of a real recovery and for the purposes, at least in part, of protecting Mr Macks from litigation, threatened and then brought, by Mr Viscariello. The disconnection between the legitimate purpose of the litigation and Mr Macks' personal purposes, and the way in which it was funded, were calculated to corrupt the proceedings. (Our Emphasis)
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> In the peculiar circumstances of this case, the proceedings were an abuse of process.

480 The Judge found that from mid-2005 the "proceedings' were an abuse of process. Further, his Honour found at [919] that Mr Macks' advisers knew that Mr Macks was acting for a collateral purpose in prosecuting the 'proceedings' and that the advisers were a 'party' to the prosecution of proceedings after June 2005 in that knowledge. That proposition was simply not put to Ms Riach, the partner from Minter Ellison, who gave evidence at the trial. Such a finding should not be made against a witness without the specific proposition being put to the witness for their comment. It was a finding made that was not part of Mr Viscariello's case.

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[191] *Ah Toy v Registrar of Companies* (1986) 10 FCR 356.
[192] *Viscariello v Macks* [2014] SASC 189, [917]-[920].
[193] *Campbell's Cash & Carry v Fostif Pty Ltd* (2006) 229 CLR 386, [84]-[89].
[194] *Volpes v Permanent Custodian Pty Ltd* [2005] NSWSC 827.
[195] *McIntosh v Shashoua* (1931) 46 CLR 494, 505.
[196] *Rozenbes v Kronhill* (1956) 95 CLR 407.

481 Mr Livesey QC was also advising Mr Macks. The Primary Judge did not specify in his finding who Mr Macks' advisers were. The Judge's expression could be read to include Mr Livesey QC. He gave evidence in the trial but it was never put to him that he had acted with knowledge that Mr Macks was actuated by a collateral purpose nor would the evidence support such a finding. It may be that the Judge intended the expression to be restricted to Minter Ellison. Even if that is so the finding was not open.

482 In any event it is not clear what the Primary Judge meant by the expression "proceedings". The Judge found that it was reasonable for Mr Macks to have brought the proceedings against Ms Hamilton-Smith. The proceedings necessarily involved defending the counter claim made by Ms Hamilton-Smith. The Primary Judge did not make any assessment of, or take into account the strength or weakness of the counter claim. Assuming the counter claim was not obviously meritorious, it is difficult to understand how defending such proceedings could amount to an abuse of process.

483 The Primary Judge stated that Mr Macks gave instructions on the 'proceedings' from the middle of 2005. However, there was no finding as to when Minter Ellison became aware of Mr Macks' collateral purpose; the inference must be that Minter Ellison were aware of the purpose from mid-2005. There was no basis in the evidence for such a finding.

484 Moreover, the finding that the proceedings were an abuse of process from mid-2005 is inconsistent with other findings made by the Primary Judge and unchallenged evidence led at trial. It is important to emphasise the sequence and timing of events leading to Macks accepting the advice of Minter Ellison to embark on the George strategy.

485 In June 2005 Macks was attempting to negotiate the settlement of the Bernsteen action. Minter Ellison, without reference to Mr Macks, devised the George strategy. This included searching the court records, locating the outstanding judgment against Ms Hamilton –Smith before speaking to Ms George. It was only after they had completed those matters that they sought instructions from Mr Macks. This evidence was unchallenged at trial. Mr Macks accepted the advice and instructed Minter Ellison to pursue the strategy; however he continued the settlement negotiations.

486 The purpose behind the George strategy, as the Primary Judge found, was to assist in bringing the Bernsteen proceedings to an end. His Honour correctly observed that the advice given implicitly accepted that "the arrangement was both a lawful and proper one to make for a liquidator".[197] Rather than colluding in proceedings that were an "abuse of process" and done to delay settlement for an improper purpose, the strategy was designed to bring the Bernsteen proceedings to a conclusion.

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[197] *Viscariello v Macks* [2014] SASC 189, [732].

487 The evidence of the George strategy is inconsistent with any of the four collateral purposes being in existence at that time. There was no suggestion that Minter Ellison, in recommending the George strategy to Macks, approached the question with improper considerations in mind. There was no suggestion at trial that, as at June 2005, the George strategy involved anything other than Macks pursuing a course that was appropriate to the circumstances. Mr Macks was entitled to assume that the arrangement was both a lawful and proper one for a liquidator to make. Given that Minter Ellison had suggested the strategy there was no reason for Mr Macks to reject the advice of Minter Ellison on the basis that it may be unlawful or improper. Nor was there any other basis for Mr Macks to reject the advice.

488 Minter Ellison's advice and Mr Macks' reliance on the advice could only be discounted if the advice and the strategy were in furtherance of Macks' collateral purpose. Such a case was not alleged nor put.

489 The Primary Judge also observed that the question of whether the arrangement was lawful was never specifically addressed. What difference that made to his assessment of the position was not discussed. However, there would have been little point to the comment unless the Judge was, in some way, discounting the advice given by Minter Ellison to enter into the George strategy.

490 The Primary Judge was obliged to give proper weight to the advice of Minter Ellison when considering the questions of whether Mr Macks acted in breach of s 180 and acted with collateral purposes in breach of ss 181 and 182 as at June 2005.

491 Mr Viscariello contended on appeal that Mr Macks ought to have known that the advice given by Minter Ellison to continue to pursue uncommercial proceedings was questionable advice.[198] This proposition was not put to Mr Macks or Minter Ellison at trial as at June 2005. Mr Macks could not rely on the advice if his solicitor has been "wrong headed or perverse"[199] such that it must have been obvious to him; that was not the situation confronting Mr Macks as at June 2005.

492 Further, as mentioned, it was Minter Ellison who advised Mr Macks to enter into the arrangement with Ms George. Leaving aside the question of the nature of the indemnity to Ms George regarding costs, the express advice from Minter Ellison was that Mr Macks should assist Ms George as, if the strategy was successful, it might resolve the Bernsteen action. As the Primary Judge observed[200] the bringing of the George bankruptcy proceedings "was the centrepiece of a strategy" to bring an end to the Bernsteen proceedings.

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[198] *Mead v Watson as Liquidator for Hypec Electronics Pty Ltd (in liq)* [2005 NSWCA] 133.
[199] *In re Beddoe; Downes v Cottam* [1893] 1 Ch 547.
[200] *Viscariello v Macks* [2014] SASC 189, [470].

Moreover, the cost effectiveness of proceedings "is a matter which lawyers are well placed to judge and assess".[201]

493 The Judge was in error in failing to give proper weight to the advice proffered by Minter Ellison to Mr Macks both in relation to the Bernsteen proceedings and the George strategy and proceedings.

494 This error is sufficient to set aside the finding of the Primary Judge that Mr Macks breached s 180 CA from June 2005. We also set aside the finding that the "proceedings" from June 2005 were an abuse of process.

495 However we consider we should deal with the other submissions made by Mr Macks.

Did the Primary Judge Consider all the Relevant Circumstances Existing as at June 2005?

496 Mr Macks also submitted that the Primary Judge failed to engage with other relevant evidence in the case and explain how he had dealt with that evidence when reaching his conclusion. We agree with those submissions for the reasons that follow.

497 The correspondence leading up to the settlement negotiations that occurred in mid-2005, that are set out by the Primary Judge, clearly indicated that Mr Macks was interested in settling the Bernsteen proceedings. Mr Macks received specific advice from Minter Ellison to reject offers made by Ms Hamilton-Smith. It must be remembered that, as at June 2005, Mr Macks had been successful in defending almost all of the applications made by Ms Hamilton-Smith. Although the Bernsteen action remained on foot, Mr Macks had obtained costs orders against Ms Hamilton-Smith involving tens of thousands of dollars. As the Primary Judge observed, Ms Hamilton-Smith was "taking every point"; however she was losing almost every point. On 12 April 2005 Bernsteen served a Bankruptcy Notice against Ms Hamilton-Smith on the basis of the unpaid allocaturs.

498 On 5 April 2005 Ms Hamilton-Smith offered to settle the Bernsteen action on the basis that both parties discontinue their actions and bear their own costs. Mr Macks rejected that offer after taking advice from Minter Ellison. Mr Macks responded by offering to settle all matters for the sum of $20,000 (inclusive of costs). He proposed a number of ways by which the matters could settle. Importantly Mr Macks offered to discontinue the substantive claim made by Bernsteen on the basis of each party bearing their own costs but leaving Ms Hamilton-Smith to contest the unpaid allocaturs.

499 The offers made by Mr Macks were rejected. On 27 May Ms Hamilton-Smith increased her offer. She offered to settle the Bernsteen action by payment

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[201] *Viscariello v Macks* [2014] SASC 189, [758].

of $10,000, that sum being paid by monthly instalments of $1000 after an initial payment of $2000. Mr Macks rejected that offer having again had advice from Minter Ellison to do so. Understandably, Mr Macks was not interested in payment by instalments given the history of the matter.

500 Mr Macks offered to settle all matters for $25,000 (inclusive of costs) the increase reflecting further costs incurred by Bernsteen successfully defending an appeal to the Full Court. On 6 June 2005 Ms Hamilton-Smith resubmitted her offer.

501 On 27 June 2005 Ms Hamilton-Smith changed the terms of her offer. She offered to settle the Bernsteen action by payment of the sum of $10,000, payment to be made within 3 months.

502 The Primary Judge considered that it was a significant factor that the matter did not settle as at June 2005 when it was uncommercial to continue. As his Honour observed, the parties were close to settling and the given the way the Bernsteen action had proceeded up to that time, there could be "no doubt in the mind of Mr Macks and his solicitors that the prosecution of the Bernsteen action would be expensive and protracted".[202] That observation can be accepted to an extent. However, it carries with it an assumption that Mr Macks had decided not to continue to attempt to settle the matter after June 2005. The Primary Judge appears to have overlooked that on 1 July 2005 Mr Macks resubmitted his offer to settle the matter for the sum of $25,000. That is, after June 2005, Mr Macks continued to pursue a settlement of the Bernsteen action.

503 Litigation is not a predictable process. It is a process which is unyielding to certainty and simplicity. It can be seen that as at 1 July 2005 settlement negotiations had not in fact finished. Ms Hamilton-Smith had recently improved the terms of her offer. Without the acuity of hindsight it is possible that she may have made a further offer. There was no evidence that as at the end of June 2005 that settlement negotiations had finished.

504 It was also reasonable to consider that as at June 2005, Ms Hamilton-Smith was tiring of the battle. She had lost a number of appeals and had significant costs awarded against her. In June 2005 she had increased her offers. She was incurring legal costs of her own. While Mr Macks no doubt considered that Mr Viscariello was providing some of the legal advice, Ms Hamilton-Smith had likely incurred costs in briefing counsel on various applications; indeed, more than one counsel had appeared on her instructions.

505 While the Primary Judge acknowledged that the Bernsteen action and the George bankruptcy proceedings were the centrepiece of the settlement strategy, he did not explain how he took that into account when assessing the question of Mr Macks acting "unreasonably". The strategy proposed by Minter Ellison was

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[202] *Viscariello v Macks* [2014] SASC 189, [423].

seen to have reasonable prospects of bringing the Bernsteen action to an end. In the event it failed to do so but that was not known at the time.

506 The Primary Judge had to deal with:

- the advice given by Minter Ellison to reject the offer by Ms Hamilton-Smith;
- the reasoning behind the George strategy (namely to force a resolution), and;
- how successful the action had been to date evidenced by the costs orders in the favour of Bernsteen and the fact that Hamilton-Smith had a counter claim extant against Bernsteen.

507 While the Judge was aware of those matters his reasoning does not disclose how they were taken into account.

508 Mr Macks submitted that the Primary Judge also erred when considering the question of whether Mr Macks acted on a "matter of principle". His Honour rejected the evidence of Mr Macks that he had pursued Ms Hamilton-Smith as a matter of principle because of the special nature of his office. Although not explicitly stated, this appears to have been a reference to the "public interest' in a liquidator pursuing recovery actions. Mr Viscariello, in compliance with the rule in *Browne v Dunn,* specifically challenged Mr Macks on his evidence on this point.

509 There is a public interest in liquidators bringing recovery actions. The public interest in the proper investigation and administration of the affairs of an insolvent company may include pursuing a matter where the amount recovered in proceedings would be absorbed by costs and expenses and would not benefit the creditors. Further a liquidator is entitled to bring proceedings where the only prospect of recovery is reimbursement of the liquidators' own fees and expenses. However a liquidator should not pursue litigation simply in order to generate fees without any view to the interests of creditors or the public interest. Each case must be determined on the applicable facts. A question may arise whether the pursuit of the litigation represents a bona fide exercise of the liquidator's powers.[203]

510 The Primary Judge quoted the evidence of Mr Macks relating to a letter he received from Minter Ellison in April 2006. Much had occurred in the Bernsteen action and the Proceedings from June 2005 to April 2006. The Judge stated that he found it "inherently improbable that Mr Macks devoted the time and resources

[203] *Hall v Poolman* (2009) 75 NSWLR 99 at paragraphs 124-157; *Pegulan Foor Coverings Pty Ltd v Carter* (1997) 24 ACSR 651.

he did to this matter because of the importance he attached to the office of liquidator alone".[204]

511 The reference to the "time and resources", and the context of the evidence of Mr Macks that was rejected, suggest that the finding relates to April 2006, or at the very least, well after June 2005. The Primary Judge was concerned at the level of costs as at June 2005. He was, however, required to consider the question of Mr Macks acting on a matter of principle as at June 2005. The fact that the action may only have proceeded to recover his costs was a matter to be looked at in the context of other relevant matters. What consideration the Primary Judge gave to these matters as at June 2005 is simply unknown.

512 Mr Macks also submitted that, although the Primary Judge had found that Ms Hamilton-Smith's defence to the Bernsteen proceedings was unmeritorious,[205] and further that she conducted the Bernsteen litigation in a manner calculated to cause maximum expense and delay, he failed to bring those matters to account when considering the conduct of Mr Macks as at June 2005. We accept the submission that to have regard only to the cost effectiveness of proceedings by liquidators would be to provide a charter to delinquent directors or others to obstruct the proper conduct of a liquidation and thereafter legitimise their conduct by pursuing complaints against a liquidator who refused to abandon claims properly made.[206] Here, the Primary Judge has placed great weight on the "cost effectiveness" of the proceedings without considering the conduct of Ms Hamilton-Smith.

513 There are, of course, limits to how far a liquidator can pursue a debtor but the right to do so is a factor to be brought to account when considering the conduct of the liquidator.

514 We consider that the submissions of Mr Macks should be accepted. These were matters that needed to be taken into account. The Primary Judge has failed to do so.

515 Mr Macks further contended that his Honour's failure to explain how he accounted for the other matters referred to meant that his reasons were inadequate.

Adequate Reasons

516 The principles to be applied when determining whether a judge has provided adequate reasons were summarised by Kirby P (as his Honour then was) in *Soulemezis v Dudley (Holdings) Pty Ltd* as follows:[207]

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[204] *Viscariello v Macks* [2014] SASC 189, [730].
[205] *Viscariello v Macks* [2014] SASC 189, [746].
[206] Appellant's Summary of Argument paragraph 110.
[207] (1987) 10 NSWLR 247 at 259.

> This decision does not require of trial judges a tedious examination of detailed evidence or a minute explanation of every step in the reasoning process that leads to the judge's conclusion. But the judicial obligation to give reasons and not to frustrate the legislative facility of appeal on questions of law, at least obliges a judge to state generally and briefly the grounds which have led him or her to the conclusion reached concerning disputed factual questions and to list the findings on the principle contested issue. Only if this is done can this court to discharge its functions, if an appeal is brought to it.

517 In *RESI Corporation v Munzer*, the Court summarised the relevant principles as follows:[208]

> Heydon J in *AK v Western Australia* stated the reasons why there is an obligation on Judges to give reasons for their decisions. First, he said, there was an obligation to give reasons as it promotes good decision making, secondly, that general acceptability of judicial decisions was promoted by the obligation to explain them and finally, that it was consistent with the idea of democratic institutional responsibility to the public that those who are trusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give an account of their reasoning by which they came to that decision.
>
> Thus the duty to give reasons is a necessary incident of the judicial process. Failure to provide sufficient or adequate reasons can promote a sense of grievance and may deny the fact and the appearance of justice having been done. Failure to give adequate reasons is an error of law.
>
> Of more recent times there have been many decisions on the question of the adequacy of judicial reasons. Many cases turn upon the facts in issue in the particular case. However, a number of general principles relating to the duty to give adequate or proper reasons may be extracted from the cases:
>
> 1. "The extent and content of reasons will depend upon the particular case under consideration and the matters in issue". While a judge is not obliged to spell out every detail of the process of reasoning to a finding it is essential to expose the reasons for resolving a point critical to the contest between the parties.
>
> 2. A court when considering the decision under appeal should not be left to speculate from collateral observations as to the basis of a particular finding.
>
> 3. A trial judge has a duty to refer to material evidence and make findings about material issues in the case. It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another and assert that having seen and heard the witnesses he or she prefers or believes the evidence of one and not the other. In other words, a bald statement of an ultimate conclusion may not be sufficient. A trial judge is required to engage with the issues canvassed and to explain why one expert is accepted over the other.
>
> 4. It will ordinarily be sufficient if by his or her reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he or her has acted.

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[208] [2016] SASCFC 15; see also *Brennan Lim v Return to Work SA* [2017] SASCFC 105.

5. Reasons for decision are to be read fairly and in the context of the manner in which the trial was conducted. Reasons may appear by necessary inference from what is stated expressly.

6. It is not the function of an appellate court to set standards as to the optimal, or even desirable, level of detail required to be revealed in reasons for judgment. The function of the appellate court is to determine whether the reasons provided have reached a minimum acceptable level to constitute a proper exercise of the judicial power.

518 The ability of the losing party to properly exercise his or her right of appeal is fundamental to the requirement to give reasons. A wider rationale, as stated by French CJ and Kiefel J in *Wainohu v New South Wales,* can be derived from the nature of the judicial function.[209]

519 A judge is required to not only state the principles of law to be applied and the facts found, but also to sufficiently disclose the reasoning process linking them and justifying the findings of fact and ultimately the verdict that is reached.[210] As Gummow and Hayne JJ observed in *AK v Western Australia*:[211]

> ... The principles of law that are relevant will be identified by reference to the issues in the case. Usually, then, a trial judge will be obliged to identify and record in the reasons what are the elements of the offence in question and which of those elements were in issue. Resolution of the issues in the case will then require not only statement in the reasons of both the principles of law that are applied and the findings of fact the judge makes, but also statement of "the reasoning process linking them and justifying the [findings of fact] and, ultimately, the verdict that is reached".

520 While *AK v Western Australia* concerned a criminal case and the reasons for a verdict given by a judge sitting without a jury, the same principles apply to a civil judgment.

521 What amounts to adequate reasons in any given case depends upon the forensic context.

522 Mr Viscariello submitted that it was not necessary for the Primary Judge to outline every step in the process of reasoning provided that he had explained how he had arrived at his conclusions. We cannot accept that statement without qualification.

523 Reasons are not necessarily adequate because they reveal a chain of reasoning leading to a conclusion. A conclusion is not to be drawn from a collection of convenient facts that lead inevitably to that particular result. What is required is a careful assessment of all of the relevant facts, and where necessary, an explanation as to how the 'inconvenient' facts can be put to one side or given

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209 *Wainohu v New South Wales* (2011) 243 CLR 181, 214 (French CJ and Kiefel J).
210 *R v Ricciardi* [2017] SASCFC 128.
211 *AK v Western Australia* (2008) 232 CLR 438 at [44].

little weight. As has often been said a fact does not cease to exist because it is ignored.

524 There was considerable overlap between this submission and the submission dealt with above relating to the failure take into account various known facts as at June 2005.

525 We consider that the Primary Judge did fail to take into account a number of relevant matters. If he did take them into account, his reasons were inadequate as they failed to explain how they had been taken into account.

526 We would also set aside the finding of a breach of s 180(1) as from June 2005 on the basis that the Primary Judge failed to take relevant matters into account or alternatively that his reasons were inadequate in that regard.

527 Mr Macks also contended that the Primary Judge, when making findings on the balance of probabilities that Mr Macks had breached s 180(1) of the Act, did not apply the principle enunciated in *Briginshaw v Briginshaw*.[212] Mr Viscariello contended otherwise.

The Briginshaw *Principle*

528 The requirement that in determining whether evidence adduced proves a fact to the civil standard, the trier of fact should take into account the significance and consequences of the finding of fact to be found in the judgments in *Briginshaw*.

529 In Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd, Mason CJ, Brennan, Deane and Gaudron JJ said:[213]

> The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commented in *Briginshaw v Briginshaw:*
>
> > "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved …"

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[212] (1938) 60 CLR 336.
[213] (1992) 67 ALJR 170, [2].

> There are, however, circumstances in which generalisations about the need for clear and cogent evidence to prove matters of the gravity of fraud or crime are, even when understood as not directed to the standard of proof, likely to be unhelpful and even misleading. In our view, it was so in the present case. (Citations Omitted)

530 As Hinton J in *Maxcon Construction Pty Ltd v Vadasz* stated: [214]

> This reflects the reality that persuasion of the existence of a fact to a particular standard requires "actual persuasion of its occurrence or existence before it can be found" and that such state of mind is not one "attained or established independently of the nature and consequences of the fact or facts to be proved".[215] The requirement that proof be clear, cogent or strict – expressions taken from the authorities applying the *Briginshaw* considerations – is an expression of the quality of the evidence necessary to move a mind to a state of actual persuasion of a fact where the finding of fact is one to which serious consequences attach.[216] Accepting this, the *Briginshaw* considerations amount, in effect, to directions to be given in a civil trial to the trier of fact as to matters relevant to the weighing of evidence adduced in support of a proposition to be proved to the civil standard. So understood the content of the directions will vary depending upon the nature of the issue in dispute. Further, the directions not amounting to a rule of law, the failure to administer them will not necessarily result in a judgment being set aside. Further again, the necessity of giving such directions evaporates where the relevant factor may be considered obvious to the trier of fact. (Our Emphasis)

531 A function of the *Briginshaw* considerations is to bring to the forefront of the judge's thinking the seriousness of the allegation and the gravity of the consequence of it being established. However it always remains incumbent on the judge to determine the issue by reference to the balance of probabilities. The requirement stated in *Briginshaw* does not change the standard of proof, but merely "reflects the perception that members of the community do not ordinarily engage in serious misconduct".[217]

532 The Primary Judge made a number of credit findings during the course of the trial. An issue of importance at trial related to two documents both within the group of documents collected by Mr Macks and related to the suggested financial position of Ms Hamilton-Smith. The documents were described as the "covering note" and the "Monksfield" memorandum. The Primary Judge was asked to make a finding that Mr Macks fabricated those documents.

533 The Judge stated:[218]

> Mr Viscariello submits that Mr Macks fabricated the covering note and the Monksfield memorandum to, in some unspecified way, protect his position in the ASIC enquiry. Mr Viscariello also submits that Mr Macks deliberately, and knowingly, withheld from the court the true provenance of the covering note and the Monksfield memorandum when he gave his evidence until he thought the better of it after the ASIC file was produced.

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[214] [2017] SASCFC 2 [251].
[215] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2 (Dixon J).
[216] *Rejfek v McElroy* (1965) 112 CLR 517 at 521 (The Court).
[217] *Director General of Department of Community Services; Re Sophie* [2008] NSWCA 250.
[218] *Viscariello v Macks* [2014] SASC 189, [387]-[388].

> The allegations are, of course, extremely serious. The innate seriousness of the allegations and the potential consequences of any adverse finding I might make have weighed heavily on me in reaching my conclusion. I have scrutinised and considered the evidence weighing its strengths and weaknesses carefully. (Citations Omitted)

534 We accept that the finding against Mr Macks relating to the documents was objectively serious. It is likely that the Primary Judge considered that in fabricating a document and supplying it to ASIC with the intention to mislead, a breach of the criminal law was a possibility.[219]

535 The fact that the Primary Judge did not specifically refer to the Briginshaw principle when making drawing his ultimate conclusions does not mean that he did not consider it. The Primary Judge, in deciding the issue of the "fabricated" document, specifically referred to the *Briginshaw* principles. It was not necessary for him to repeat the principle on every occasion he made an adverse finding against Mr Macks.

536 We accept the submissions of Mr Viscariello on this matter. No error has been demonstrated.

Hindsight Reasoning

537 Mr Macks also contended that the Primary Judge's reasons were infected by hindsight reasoning.

538 Self-evidently, judicial reasoning ought not to be founded on hindsight reasoning.[220] Hindsight bias has harmful effects on an evaluation by a decision maker. It can lead to an assessment of the quality of the decision not by whether the process was sound but by whether its outcome was good or bad. There is a limit to the ability of a person to forecast; everything makes sense in hindsight. It is a trap to think that what makes sense in hindsight was predictable. A judge should always bear in mind that actions that seemed acceptable in foresight can look irresponsibly negligent in hindsight.

539 We have taken into account the submissions of Mr Macks in this matter. The suggested examples of "hindsight" reasoning that relate to the finding of a breach of s 180 (1), are in fact allegations of factual errors where the Primary Judge has allegedly conflated various events. We do not consider the Reasons suffer from the adverse effects of hindsight reasoning.

Conclusion on Ground 3

540 For the reasons expressed we are of the opinion that the Primary Judge did err in law in his approach to the question of whether, as at the end of June 2005, Mr Macks breached s 180(1) CA. We would set aside that finding.

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[219] A potential breach of s184 of the CA was not raised before the primary Judge or on appeal.
[220] *Vairy v Wyong Shire Council* (2005) 223 CLR 422.

541 We consider that we are able to assess whether Mr Macks breached the duty imposed by s 180(1) CA as at June 2006 as the test is an objective one, and Mr Macks accepted the credit findings made by the Primary Judge on matters relevant up to June 2005.

542 We have earlier set out the factors that the Judge took into account. We have also set out the factors the Primary Judge ought to have taken into account but failed to do so. We will not repeat those matters.

543 It can be accepted that the costs incurred in pursuing Ms Hamilton-Smith were substantial as at June 2005. The amount owed by Ms Hamilton-Smith however was not simply the original debt of $28,000. As we have previously noted, Mr Macks had substantial costs orders in his favour. The counter claim remained on foot. Ms Hamilton-Smith was making attempts to settle the proceedings, as was Mr Macks. The offers made by Mr Macks were reasonable given the amount owed. His attempts to settle can be viewed as genuine attempts to resolve the matter.

544 Mr Macks appeared to be generally in control of the proceedings up to this time; points taken by Ms Hamilton-Smith had generally failed. She must have been incurring costs of her own. It was a reasonable assumption that, given she was a person involved in business, that she would avoid bankruptcy if she could.

545 Minter Ellison had advised Mr Macks to reject the offers made by Ms Hamilton-Smith and they had suggested that he enter into the "George strategy". A bankruptcy notice was issued on the 24 June 2005. It was reasonable for Mr Macks to allow the George strategy to take its course (for at least some period of time) in the hope that the Bernsteen action could be settled prior to the resumption of the adjourned trial.

546 Taking all of those matters into account and bearing in mind the *Briginshaw* principle, we find that the evidence does not establish that Mr Macks, as at the end of June 2005, failed to exercise his powers and discharge his duties as a liquidator with the degree of care and diligence that a reasonable liquidator would in the company's circumstances. We do not consider that Mr Macks, by not accepting the offer to settle made by Ms Hamilton-Smith failed to exercise the degree of skill and diligence required. The fact that the Bernsteen action and the Proceedings were not settled in the months immediately after the George strategy had been adopted does not mean that Mr Macks was negligent in not accepting any offer made by Ms Hamilton-Smith in June 2005. There was no basis for concluding that Macks ought to have 'second guessed', and rejected, the advice given by Minter Ellison. We would therefore set aside the declaration made by the Primary Judge.[221]

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[221] We note in passing that the Judge did not refer to s 180 (2) of the CA (the business judgment rule). It appears that no submissions were directed to that issue. It was not suggested on appeal that it had relevance in this matter.

547 The question remains whether such a finding is open on the evidence at a time later than June 2005.

548 As discussed earlier in these reasons the Primary Judge considered the evidence at two particular points of time. First, at the end of June 2005 and then as at April 2006.

549 When considering the conduct of Mr Macks, as at April 2006, the Judge stated: [222]

> Standing back to review the position as at April 2006, the course which Mr Macks had taken in pursuit of Ms Hamilton-Smith left only one view open: it was disastrous. More had been spent on the collateral George bankruptcy proceedings than the debt he was seeking to recover. Moreover, any costs orders made in his favour were unlikely to compensate for much more than one half of the legal fees he had incurred and actual recovery even of that amount would be difficult. The fees charged by PPB in the Bernsteen action to June 2005 were $136,338 and the fees of Minter Ellison were $191,568.00. Counsel fees were in addition to those amounts. The prosecution of the actions against Ms Hamilton-Smith for the purpose of recovering a debt of just $28,000 was manifestly unreasonable, indeed irrational, unless it served a useful collateral purpose. (Our Emphasis)

550 It is clear that the Primary Judge found that, as at April 2006 and thereafter, Mr Macks' conduct was unreasonable. In the context of his judgment this was a continuation of the earlier finding that Mr Macks had breached s 180(1) of the Act. However, the finding was based on a separate consideration of the evidence that existed as at April 2006.

551 We have reviewed the evidence of events occurring between the end of June 2005 and April 2006. The George strategy had turned out badly for Mr Macks. Ms Hamilton-Smith had contested the George bankruptcy proceedings at great cost to Mr Macks. The problems in the way the funding for the strategy by Mr Macks had been arranged had become obvious. Minter Ellison and Mr Macks had become embroiled in a dispute about the escalating costs[223] but had, nevertheless, recommended that Mr Macks continue to fund Ms George.

552 The Primary Judge found, against the evidence of Mr Macks, that the Committee of Inspection did not approve Mr Macks entering into the George indemnity at a meeting on 14 November 2005.

553 The Judge summarised the position as at March 2006: [224]

> On 7 March 2006 Minter Ellison formally reported to Mr Macks about the state of the proceedings arising out of the attempts to bankrupt Ms Hamilton-Smith. With respect to the Bernsteen action in the Adelaide Magistrates Court, Minter Ellison estimated that fees in excess of $75,000 would be incurred if that trial were to proceed. On the Hamilton-

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[222] *Viscariello v Macks* [2014] SASC 189, [565].
[223] Letter dated 10 October 2005 from Macks to Minter Ellison.
[224] *Viscariello v Macks* [2014] SASC 189, [548].

> Smith declaration proceedings in the Magistrates Court, Minter Ellison correctly anticipated that it was likely that Ms O'Connor SM would reinstate Ms Hamilton-Smith's claims which had been dismissed due to the non-attendance by Mr Viscariello. Ms O'Connor SM made that order on 23 March 2006 and the trial was listed for 13 June 2006. Ms O'Connor SM made an order for costs in favour of Ms George but declined to order that the matter was fit for counsel. The agreement between Mr Macks and Ms George did not on its terms extend to the Hamilton-Smith declaration proceedings. This lacuna in the agreement was yet another source of possible conflict between them. Minter Ellison reported that the George bankruptcy proceedings in the Federal Magistrates Court had been adjourned to 5 June 2006. Minter Ellison reported that the outstanding fees in those proceedings were $38,835.80 and that the work in progress had increased to $40,738 plus GST. Minter Ellison reported that the review of Registrar Christie's decision to adjourn the petition was listed before Federal Magistrate Raphael on 11 April 2006.

554 The Primary Judge referred to a letter written by Minter Ellison to Mr Macks of 5 April 2006. Minter Ellison wrote:[225]

> Having discussed the matter with Mr Mansueto, we are strongly of the view that your strategy in the matter should be to concentrate all efforts and resources on the review hearing. If a sequestration order is not made at that time, then we consider that you should immediately attempt to negotiate a resolution of all matters with Ms Hamilton-Smith, on the basis that the parties including Ms George, walk away with no order as to costs and both parties' entitlement to costs be forgone.
>
> Whilst we had attempted to utilise the George debt to overcome the problem of the ongoing litigation between you and Ms Hamilton-Smith, that debt has its own difficulties and is no longer an appropriate vehicle to pursue. It is most unfortunate that we have had a number of decisions turn against us in the matter. That is a risk of litigation. If our final attempt to bankrupt Ms Hamilton-Smith is not successful, then we feel it is time to withdraw and focus your efforts on other claims in the administration, such as Mr Viscariello's. Clearly there is no commercial benefit in pursuing the matter beyond the review when you are faced with two Magistrates Court trials in May and June 2006." (Emphasis in Original)

555 On 27 April 2006 Minter Ellison wrote to Mr Macks and advised him of the options available to him in the following terms:[226]

> The two options available to you are to:
>
> Q 1. Settle all matters involving Ms Hamilton-Smith, Bernsteen, and Ms George; or
>
> Q 2. continue to aggressively pursue all litigation at the likely costs set out above.
>
> Although there will be no benefit to creditors in continuing to pursue the litigation, and indeed you may be required to fund the litigation from your own funds given the lack of funds in the administration, we accept that this is a commercial decision for you to make. We understand that you may wish to proceed due to matters of principle.
>
> Should you wish to continue the litigation, our suggested approach, subject to counsel's views, is to consent to Ms Hamilton-Smith's application to vacate the Bernsteen trial date

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[225] See *Viscariello v Macks* [2014] SASC 189, [550].
[226] See *Viscariello v Macks* [2014] SASC 189, [562].

> which will not be heard by Magistrate Fahey until 8 May 2006. The George trial should be pursued as soon as possible as if the Magistrate finds the debt owed to Ms George is outstanding, you will then be in a position to move forward with the bankruptcy proceedings in the Federal Magistrates Court.
>
> If you wish to take this option, then we seek your commitment to meet the outstanding costs of the George matter (actions 4, 5 and 7) and the estimate of costs given above for the ongoing work required.
>
> The alternative is to explore settlement. To initiate discussions, we would contact Mr McNamara and raise the possibility of payment of the George monies (approximately $4,500 which were tendered to us on a conditional basis) in return for the discontinuance of all matters, with the parties to bear their own costs. Any settlement must settle all matters between Ms Hamilton-Smith, Bernsteen and Ms George.

556 On 28 April 2006 a meeting was held at the chambers of Mr Livesey QC. Ms Riach, Ms Flaherty and Mr Macks attended. It was at this meeting that Mr Macks stated that the "main game is the John Viscariello litigation".

557 The Judge noted: [227]

> By the time of the April 2006 meeting, it was improbable in the extreme that the creditors of the Companies stood to gain any benefit from the continuation of the proceedings against Ms Hamilton-Smith or the proposed insolvent trading action against Mr Viscariello. Mr Macks' fees, including possibly the excess he had paid on the insurance claims, took priority over any distribution to creditors. So too did the substantial legal fees of Minter Ellison. Despite the priority enjoyed by Minter Ellison, its objective appraisal was that there was no benefit to it in proceeding. Plainly there was no reasonable basis on which to expect any cost effective recovery from Ms Hamilton-Smith or Mr Viscariello.

558 Mr Macks still did not receive advice from Minter Ellison that to continue with the Bernsteen action and the Proceedings would lead to a breach of duty as liquidator. He also did not receive any such advice from Mr Livesey QC.

559 It can be seen from the correspondence sent by Minter Ellison to Mr Macks of 27 April 2006 that he was advised that there was no benefit to the creditors in pursuing the litigation. Despite that observation, Minter Ellison advised Mr Macks that it was a "commercial decision for him'. Mr Macks was entitled to give weight to the advice of Minter Ellison. However the advice was given in April 2006 against a background that had changed markedly since June 2005. Mr Macks had to consider the advice in the context of the other available evidence.

560 Mr Macks had effectively lost control of the George proceedings. The strategy put in place in June 2005 had not worked and, indeed, was causing significant problems by April 2006. The difficulties created by the loose terms of the indemnity were obvious by that time. Mr Macks was in dispute with Minter Ellison over fees.

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[227] *Viscariello v Macks* [2014] SASC 189, [587].

561 We consider that Mr Macks failed to rationally review his position at this time. Rather than attempt to negotiate a settlement of all matters (which may or may not have come to fruition), he decided to continue vigorously pursuing the Bernsteen action and the Proceedings. However, Mr Macks needed by this time to take steps to finalise those matters. In not taking steps to finalise the proceedings he failed to exercise his power and discharge his duty with the degree of care and diligence that a reasonable liquidator would do in the company's circumstances. His continued pursuit of the proceedings in those circumstances was unreasonable.

562 In our view, taking into account the principle in *Briginshaw*, it was open for the Primary Judge, as he found, that Mr Macks after April 2006 acted in breach of s 180 (1) of the Act. We find that after April 2006 Mr Macks, in pursuing the Bernsteen and George proceedings, acted without the degree of care and diligence that a reasonable person would exercise as liquidator in the company's circumstances. We find later in these reasons that Viscariello had standing to seek declaratory relief and that the Court can exercise its jurisdiction conferred by s 31 of the *Supreme Court Act* to declare that a company officer had breached a statutory duty imposed by the *Corporations Act*. We would make the declaration from that time.[228]

Grounds 2, 4 and 5

563 As discussed earlier in these reasons the findings of the Judge that Mr Macks breached ss 181 and 182 CA, from after June 2005, were dependent upon his finding that Mr Macks had acted unreasonably and therefore in breach of s 180(1) CA as at June 2005. We have set aside that finding. Accordingly his findings of a breach of ss 181 and 182, after June 2005 must also be set aside.

564 However, the question of whether it was open for him to find that Mr Macks acted with the four actuating and collateral purposes remains if we are wrong in our view of how the Primary Judge reasoned to his findings of breach.

565 The Judge at paragraph [757] stated: [229]

> I find that Mr Macks had four substantial and actuating collateral purposes in pursuing Ms Hamilton-Smith after 1 June 2005. First, he was irritated by Mr Viscariello's behaviour generally and, in particular, in committee meetings after the liquidation. Secondly, he bore ill will towards Mr Viscariello for his part in assisting Ms Hamilton-Smith to defend the proceeding brought against her in a way which had caused Mr Macks to suffer financial loss because the costs of the litigation reduced the funds available to pay his fees. Thirdly, he hoped to delay and possibly deter Mr Viscariello in bringing a professional indemnity claim against him. Fourthly, he hoped that pursuing Ms Hamilton-Smith might facilitate the prosecution and enforcement of the insolvent trading claim against Mr Viscariello.

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[228] The declaration is later in the reasons under the heading 'Remittal, Declaration and Orders'.
[229] *Viscariello v Macks* [2014] SASC 189, [757].

566 The Primary Judge did not explain how he arrived at his first two collateral purposes. As submitted by Mr Macks there was evidence to the contrary. That of course does not preclude the findings but in the absence of the intermediate steps in his reasoning we are left to guess. However it should be observed that the findings do not appear to have been relied upon elsewhere by the Primary Judge. The Primary Judge does not explain how he arrived at the fourth collateral purpose nor does he explain its relevance to this other conclusions.

567 Further the Primary Judge does not suggest that all four purposes are necessarily improper. For example Mr Macks may have been irritated by Mr Viscariello's behaviour generally and still acted reasonably and in the best interests of the companies.

568 The Primary Judge relied upon the third of the "substantial and actuating collateral purposes", namely that Mr Macks "hoped to delay and possibly deter Mr Viscariello in bringing a professional indemnity claim against him", to substantiate a breach of ss 181 and 182 CA.

569 Mr Macks submitted that the Primary Judge erred in making those findings in that:

- the four "purposes" were not pleaded;
- the four "purposes" were not put to the appellant in cross-examination;
- the conclusions reached do not set out the process of reasoning by which it was reached. The absence of the reasoning process was exacerbated by operative delay of 22 months;
- he did not address the *Briginshaw* standard when dealing with the question of improper purpose, and;
- the conclusions are contrary to and irreconcilable with other findings or evidence before the court, particularly that of Minter Ellison, and are affected by hindsight.

570 Mr Viscariello submitted that the four substantial and actuating purposes found by the Primary Judge were "simply a convenient distillation of the (extensive) evidence adduced at trial". He further submitted that the Judge was doing no more that "reflecting a common judicial technique of reasoning" and that the Primary Judge's findings must be seen in the light of the detailed assessment of the evidence which preceded the findings.

571 We have already dealt with the *Briginshaw* issue when considering ground 3. We have rejected Mr Macks' submissions on that matter.

The Four Purposes were not pleaded and not put to the Appellant in Cross-Examination

572 Mr Macks submitted that he had been denied procedural fairness as the Primary Judge had based his findings on matters not pleaded, not put to him in cross examination and on which he had not been given an opportunity to address.

573 Mr Viscariello accepted that the four purposes found by the Primary Judge were not specifically pleaded. Mr Viscariello submitted, however, that he had pleaded that Mr Macks was motivated by a range of personal interests inconsistent with his duties under the CA and general law. It was not necessary he submitted to plead every personal interest that Mr Macks had; it was only necessary to plead and establish that Mr Macks acted contrary to his duties. This, it was submitted, was sufficient.

574 However, it is significant that Mr Macks was not cross examined about the four collateral purposes. Moreover, they were not opened on nor did Mr Viscariello (or Mr Macks) make submissions to the Primary Judge about these specific matters. Mr Viscariello, on appeal, was unable to demonstrate by reference to the transcript, where the four actuating and collateral purposes had been specifically put to Mr Macks in cross examination.

575 Mr Viscariello submitted that the Judge discussed, in detail, the evidence leading to his conclusions and that the Primary Judge's reasoning was "clear". Mr Macks submitted that Mr Viscariello, in his submissions, had failed to identify the evidence upon which he asserted the finding was based nor the process of reasoning by which the Primary Judge's conclusions had been reached.

576 Mr Macks submitted that it was necessary for adherence to the rule in *Browne v Dunn* if it was to be suggested and/or found that he was actuated by collateral purposes, and in particular an improper purpose. This would have given him the opportunity to respond to the allegations and his advisers the opportunity to address them. It is, therefore, important to see whether the issues were raised sufficiently at trial. This is the approach urged upon us by Mr Viscariello.

577 The Primary Judge stated, during the course of the application to amend the pleadings after judgment had been delivered, that he was satisfied that the issues had been joined between the parties. The Primary Judge made no other reference as to where or how the issues had been joined. Clearly, the Primary Judge has the advantage of hearing the evidence and the manner in which it was given.

578 Mr Macks' credit was under attack during the whole of the trial – in relation to his conduct both as administrator and liquidator. Cross-examination of Mr Macks was clearly aimed at discrediting him and convincing the Primary Judge that much of his evidence should not be accepted. As discussed earlier, the

attack on the credit of Mr Macks was wide ranging but in our view lacking in focus. Mr Viscariello clearly viewed the conduct of Mr Macks both as administrator and liquidator with considerable suspicion.

579 However, it was incumbent on Mr Viscariello to put specific matters to Mr Macks for his comment. That was done in relation to some but not all matters. Mr Macks was clearly challenged about aspects of his conduct in relation to the George strategy. Mr Macks must have been aware that his conduct leading up to the meeting with Mr Livesey QC on 28 April 2006, and his conduct after that meeting, was under challenge. He must also have understood that the motivation for his conduct was in issue at that time and subsequently. However, he was not challenged as to whether he had a specific improper purpose as at the end of June 2005.

580 As we have noted, a feature of the trial was the interruption that occurred to resolve the question of the discovery of documents for which legal professional privilege had been claimed. The documents sought by Mr Visceriello related to the legal advice given by Minter Ellison about the Proceedings. Mr Viscariello and Bart had finished their evidence and Mr Macks was at that time under cross examination.

581 The Judge conducted a *voir dire*. Mr Viscariello called evidence in particular Ms Riach and Mr Manseuto from Minter Ellison. Ms George also gave evidence.

582 On 16 August 2012 the Judge delivered brief reasons for his decision. The reasons provide an insight into the conduct of the proceedings at that point.

583 After briefly setting out the history of the administration and some aspects of the liquidation, the Judge stated:

> In prosecuting the Bernsteen and George bankruptcy proceedings and associated actions in the magistrates Court and Supreme Court after 1 June 2005 legal fees in the sum of $79,809.59 and $180,162.15 respectively were incurred and paid. Having regard to the improbability that costs orders would have fully indemnified Mr Macks, the pursuit of Ms Hamilton-Smith was largely an exercise in recovering legal costs and liquidator's fees. That payment (sic) was again made by Mr Viscariello. In short, Bernsteen had incurred fees in the sum of $364,435 to recover a sum in the order of $10,000. Mr Viscariello contends that the George proceedings were an abuse of process. For the purposes of his application for production of the privileged documents, he contends that there are reasonable grounds on which to believe the communication is made between Mr Macks and his solicitors were for the purpose of furthering that abuse of process.
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> Mr Viscariello contends that the improper purposes of the George proceedings were:
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> a desire to create difficulties for Mr Viscariello through his relationship with Ms Hamilton-Smith, a desire which emanated from the animosity between Mr Macks and Mr Viscariello;

to wrongly deny Ms Hamilton-Smith an opportunity of pursuing her counterclaim against Bernsteen by placing the conduct of that proceeding, and its fate, in the hands of a trustee in bankruptcy;

to investigate the affairs of Mr Viscariello through an examination of Ms Hamilton-Smith's estate in bankruptcy;

to expose the assets of Mr Viscariello which had been assigned to associated corporations or which were held in trust for himself and Ms Hamilton-Smith;

to put undue pressure on Mr Viscariello to make a payment to discharge all or part of Ms Hamilton-Smith's liability to Bernsteen for the unpaid purchase price and the costs of recovery.

Mr Macks, on the other hand, contends that his purpose was to make Ms Hamilton-Smith's assets available to all of her creditors, including Bernsteen, and to take advantage of the independent, objective review of Ms Hamilton-Smith counterclaim by the trustee in bankruptcy. Macks contended that the latter objective was a direct statutory consequence of the sequestration order which he hoped would be made in the George bankruptcy proceedings. Macks did not testify, and his counsel does not advance, that one of his purposes in funding the George bankruptcy proceedings was to facilitate the insolvent trading claim against Mr Viscariello.

…… There were characteristics of the George bankruptcy proceedings which, on their face and in combination, were capable of being viewed as calculated to corrupt the processes of the court….

The combination of the above-mentioned matters distorted the proper prosecution of the George bankruptcy proceedings in several ways. First, the substantial capacity to control the proceeding held by Macks created a real risk that the object of the proceedings would not be the recovery of the George debt. There was a real risk that the George bankruptcy proceedings would be used to extract concessions in the Bernsteen proceedings or the contemplated insolvent trading claim against Mr Viscariello. It is not possible to say why the George bankruptcy proceedings were only resolved in February 2007 and not earlier when the check was tendered. True it is that Ms Hamilton-Smith was at that time insisting on prosecuting her claim. However, Ms Hamilton-Smith's real object was to avoid bankruptcy. Solicitors were acting for Ms George along (sic ?alone) and with her interests exclusively in mind, are likely to have more actively pursued a settlement when Ms Hamilton-Smith tendered payment in February 2006 if Macks had not given an indemnity for costs because of his interest in her bankruptcy.

……. In this case, I am satisfied that there are reasonable grounds to suspect that the proceedings were pursued recklessly, in the sense that I have described. In my view, the very fact of the adoption of the strategy of not to disclose the existence of the funding arrangement is a sufficient ground on which to form that few. (Our Emphasis)

584 His Honour went on to comment:

There is an alternative basis on which I formed the view that I should inspect the documents. There is an extraordinarily large disproportion between the costs of the litigation involving Ms Hamilton-Smith and the likely return. Close to $400,000 was spent on attempts to recover the sum of $28,000 plus interest from Ms Hamilton-Smith in circumstances where there was no reasonable basis to believe that the prospects of recovery of those costs were good. That disproportion is, in itself, a reasonable ground to

> suspect the existence of some other extraneous purpose or purposes. Macks is an experienced litigator. He was advised by a large established legal firm with an extensive commercial practice. No material has been placed before me which could explain how Macks could have come to burden the creditors of Bernsteen with the weight of legal costs approaching $400,000 in an attempt to recover $28,000.
>
> If Macks had advanced as his purpose the hope of recovery against Mr Viscariello, it would have been necessary to more closely consider whether the purpose was, in all the circumstances, a proper one. However, Macks, having disavowed that purpose, rejection of the purpose advanced by him naturally leads to a suspicion that there was another extraneous an improper purpose. (Our Emphasis)

585 There was a clear indication in the reasons that the Primary Judge was considering the question of whether Mr Macks was actuated by an extraneous purpose in prosecuting the George bankruptcy proceedings. But he also went further. He specifically raised the issue of an extraneous purpose or purposes in relation to the Bernsteen action – although the focus of his reasons was on what had occurred by the end of the proceedings not at any particular time. He also referred to the issue of an alleged abuse of process by the continuation of the George bankruptcy proceedings.

586 The Primary Judge also noted that Mr Viscariello alleged that Mr Macks was motivated by animosity towards him (among other grounds) in pursuing the George bankruptcy proceedings. The Primary Judge noted that Mr Macks specifically disavowed the suggestion that he (Mr Macks) was motivated by the hope of recovery in the insolvent trading claim.

587 Those advising Mr Macks were clearly on notice from the time of the delivery of these reasons, if not earlier, that the question of Mr Macks being influenced in his decision making by an extraneous purpose or purposes was under consideration. There was nothing, however, in the Reasons that expressly raised the third of the actuating and collateral purposes that was eventually found by the Primary Judge.

588 A puzzling aspect of the case, given the Primary Judge's reasons on this interlocutory point, is the absence of a specific pleading from Mr Viscariello about the "extraneous purposes" other than that related to the George bankruptcy proceedings. This is even more puzzling as the Primary Judge gave leave to Mr Viscariello to amend his pleadings (over strenuous objection by Mr Macks).

589 Mr Macks was questioned about the comments that he had made at the meeting with Mr Livesey QC on 28 April 2006 to the effect that Mr Viscariello was the 'main game'. He was given the opportunity to explain the comment. The Primary Judge did not accept Mr Macks' evidence on that point. There is, however, a difference between Mr Macks being given an opportunity to explain his comment, and counsel or the Judge, squarely putting to him, that not only was his evidence not correct, but that an inference was to be drawn from that comment that he was acting with a specific improper purpose.

590 An example of the problems that arise from a failure to comply with the rule in *Browne v Dunn* can be seen in the treatment of the evidence of Mr Macks about a Committee of Inspection meeting held on 14 November 2005. Mr Macks gave evidence that he had raised the question of the indemnity to Ms George at that meeting. The Primary Judge was "very unimpressed" by his evidence on this topic. His Honour rejected Macks' evidence that there had been a detailed discussion about the indemnity given to Ms George at that creditors' meeting of 14 November 2005. The Primary Judge made a finding that the Committee of Inspection did not approve Mr Macks entering into the George indemnity arrangement at the meeting.

591 The Primary Judge noted that no member of the committee had been called to support Mr Macks' evidence. The failure to call any member of the committee "reinforced" the Judge's scepticism of Mr Macks' evidence.[230] Unless the evidence of Mr Macks was properly challenged those advising him may not have considered that it was necessary to call supporting evidence.

592 We have considered the manner in which the trial was conducted and the evidence that was given. We have carefully considered Mr Macks' evidence. He was given appropriate opportunity to explain his conduct. However, he was denied the opportunity to explain to the Primary Judge why the inference that he had a collateral purpose should not be drawn and refer to other evidence which may have supported that conclusion.

593 It can also be accepted that counsel representing Mr Macks did not have an opportunity to address these issues.

594 In our view the failure to comply with the rule in *Browne v Dunn* led to a degree of unfairness to Mr Macks. What results from this finding has to be considered in the context of the findings about the collateral purposes.

Was it Open for the Primary Judge to find a Collateral Purpose as at June 2005?

595 The gravamen of the Primary Judge's finding was that Mr Macks acted with a collateral purpose that was improper: Mr Macks hoped "to delay and possibly deter Mr Viscariello in bringing a professional indemnity claim against him".[231] This finding was the foundation for the further finding that Mr Macks had breached ss 181 and 182 CA. The Judge found that Mr Macks did not act in the best interests of the companies and the liquidation was not conducted for a proper purpose because Mr Macks' predominant purpose was to protect his personal position (s 181). The Judge further found that Mr Macks engaged in the litigation to gain an advantage for himself to the detriment of the Companies

[230] *Viscariello v Macks* [2014] SASC 189, [731].
[231] *Viscariello v Macks* [2014] SASC 189, [757].

(s 182).[232] The other actuating collateral purposes do not reflect a "personal interest".[233]

596 As discussed earlier, the Primary Judge reasoned that as the Bernsteen action did not settle in June 2005 he could conclude that "both parties still saw some collateral benefits in maintaining the litigation despite that disproportion, which held them back from further compromising their respective positions."[234]

597 It was the continued pursuit of Ms Hamilton-Smith after the failure to settle the Bernsteen action in June 2005 that led to the finding that Mr Macks had acted unreasonably in breach of s 180(1) after June 2005. If Mr Macks did not act unreasonably in June 2005 (as we have found) then it was not open to the Judge to find, due to the failure to settle, a collateral purpose at that time.

598 Assuming the Primary Judge was correct in finding that as at June 2005 Mr Macks acted unreasonably, the question still arises whether it was open to the Primary Judge to find that Mr Macks was actuated by a collateral and improper purpose at that time.

Approach to Fact Finding – Drawing of Inferences

599 Plainly, the *Briginshaw* principle had to be applied in making a finding that Mr Macks was actuated by collateral purposes, including at least one purpose that was improper. Accordingly, it was necessary for the evidence to support a definite inference, not merely to conflicting inferences of equal degree of probability. In determining the inferences from primary facts, regard was to be had to the seriousness of the allegations made against Mr Macks and the gravity of the consequences of findings adverse to him.

600 As the High Court said (Williams, Webb and Taylor JJ) in *Holloway v McFeeters*:[235]

> Inferences from actual facts that are proved are just as much part of the evidence as those facts themselves. In a civil cause "you need only circumstances raising a more probable inference in favour of what is alleged….. Where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture: see per Lord Robson, Richard Evans & Co Ltd v Astley…
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> All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's

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[232] *Viscariello v Macks* [2014] SASC 189, [836]. It is correct to observe that only Bernsteen was involved in the action. However we accept that the Judge was using the expression Companies as a shorthand description of the liquidation generally.

[233] Nowhere in the judgment does the Judge assert that pursuing Ms Hamilton-Smith to help facilitate the insolvent trading claim against Viscariello amounted to a personal interest.

[234] *Viscariello v Macks* [2014] SASC 189, [428].

[235] (1956) 94 CLR 470, 480-481.

negligence. But more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood".

601 As Gageler J stated in *Henderson v State of Queensland*:[236]

> Generally speaking, and subject always to statutory modification, a party who bears the legal burden of proving the happening of an event or the existence of a state of affairs on the balance of probabilities can discharge that burden by adducing evidence of some fact the existence of which, in the absence of further evidence, is sufficient to justify the drawing of an inference that it is more likely than not that the event occurred or that the state of affairs exists. The threshold requirement for the party bearing the burden of proof to adduce evidence at least to establish some fact which provides the basis for such a further inference was explained by Kitto J in *Jones v Dunkel:*
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> > "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed."
>
> …
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> …The process of inferential reasoning involved in drawing inferences from facts proved by evidence adduced in a civil proceeding cannot be reduced to a formula. The process when undertaken judicially is nevertheless informed by principles of long standing which reflect systemic values and experience. One such principle, forming "a fundamental precept of the adversarial system of justice", is that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted". Another such principle, "reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct", is that "a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct". (Citations Omitted)

602 The existence of a fact may be inferred from other facts when those facts make it reasonably probable that it exists; if they go no further than to show that it is possible that it may exist, then its existence does not go beyond mere conjecture.[237] It is often difficult to distinguish between permissible inference and conjecture. There is no "bright line" but the distinction exists. The test is whether, on the basis of the primary facts, it is reasonable to draw the inference.[238]

603 The fact that a witness is disbelieved does not prove the opposite of that which is asserted.[239] In *Kuligowski v Metrobus* the High Court stated: [240]

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236 *Henderson v Queensland* (2014) 255 CLR 1, [89]-[91] (Gageler J).

237 *Carr v Baker* (1936) 36 SR (NSW) 301, 305 (Sir Frederick Jordan).

238 *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262, 275 (Spigelman CJ).

239 *Henderson v State of Queensland* [2014] HCA 52; *Steinberg v Federal Commissioner of Taxation* (1975) 134 CLR 640.

240 (2004) 220 CLR 363, [60] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

> In general, disbelief in a witness's evidence does not establish the contrary. Similarly, disbelief in the case presented by the moving party does not necessarily permit the court to conclude that the positive case of the opposing party is correct. In particular cases it may not be possible to reach a conclusion either way:
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> > "The judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on home the burden of proof lies in relation to any averment made by him has failed to discharge that burden."[241]
>
> A failure to find a matter alleged does not establish the truth of the contrary of that which is alleged. There are many general statements about the operation of issue estoppel, approved in this court, which require more than non-satisfaction to establish an estoppel in later proceedings.

604 The comment of Mr Macks at the meeting of 28 April 2006 with Mr Livesey QC that the "main game was the John Viscariello litigation", occurred 10 months after 1 June 2005. It could have little relevance to the motivation of Mr Macks in June 2005, particularly given what transpired between June 2005 and April 2006.

605 The Primary Judge did not clearly articulate his reasons for finding a collateral purpose, particularly an improper one, existed as at June 2005. We accept that the Primary Judge had regard to the evidence, in a general sense, as much of it is discussed in the judgment. His Honour's reasoning most likely took into account some credit findings relating to Mr Macks' evidence. However, as Mr Macks submitted, just as much of the evidence pointed away from a finding of unreasonableness; there was evidence that was inconsistent with the existence of a collateral, and in particular an improper, purpose. An obvious example was Macks' act in agreeing to the George strategy. The purpose of the strategy was to bring the Bernsteen action to a conclusion. Obviously, that is inconsistent with the collateral purposes identified by the Primary Judge as at June 2005. The Reasons do not demonstrate how he took that evidence into account when considering the question of collateral purposes. We have considered the reasons as a whole. We are unable to ascertain the basis upon which the Primary Judge made the findings at [757] other than what we have already discussed. The findings were fundamental to his further findings that Macks had breached ss 181 and 182 and accordingly, a matter on which the Primary Judge was required to fully expose his reasoning. However, his Honour failed to do so.

606 We would set aside the finding that, as at 1 June 2005, Mr Macks was actuated by the four substantial and actuating purposes identified at [757].

607 Even if Mr Macks acted unreasonably in June 2005 in failing to settle the Bernsteen action, we find that it was not open for the Primary Judge to find that Mr Macks acted with an improper collateral purpose from that date.

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[241] *Rhesa Shipping Co SA v Edmunds* [1985] 2 All ER 712 at 718 per Lord Brandon of Oakbrook.

608 We would set aside the Primary Judge's finding of breaches of ss 181 and 182 from after June 2005. This flows from our determination of grounds 2 and/or 3 of the appeal.

609 In pursuing grounds 4 and 5 Mr Macks submitted that the findings of breaches of ss 181 and 182 could not stand in any event. For the reasons that follow we agree with the submissions of Mr Macks.

610 Mr Macks complained that the Primary Judge, although setting out the terms of ss 181 and 182, did not identify the elements to be proved nor did he discuss any legal authority relating to the elements. Other than stating his conclusions, Mr Macks contended that the Primary Judge did not engage in discussion about the law on what Mr Viscariello was required to prove, the elements of the sections nor the evidence surrounding the elements.

611 In relation to s 181, the principles applicable to determine whether directors have acted for an improper purpose were discussed in *Permanent Building Society (in liq) v Wheeler*.[242]

612 In summary, the relevant principles are:

1. Fiduciary powers and duties of directors are to be exercised for the purpose for which they were given, not collateral purposes.

2. It must be shown that the substantial purpose of directors was improper or collateral to their duties as a director. The issue is not whether business decisions were good or bad; it is whether directors have acted in breach of their fiduciary duties.

3. Honest or altruistic behaviour does not prevent a finding of improper conduct if that conduct was carried out for an improper purpose although evidence as to the subjective intentions or beliefs of directors is relevant.

4. The court must determine whether but for the improper or collateral purpose the directors would have performed the act in dispute.

613 These principles are equally applicable to the company liquidator.

614 The first step is for the court to ascertain the nature of the power and the purpose for which it was conferred. The court should give credit to the bona fide opinion of the person exercising the power in determining whether a power has been exercised in the best interests of the company and for a proper purpose.

615 The reasons of the Primary Judge do not disclose that he undertook this analysis. There is no discussion about what amounts to a "proper purpose" nor is

[242] (1994) 14 ACSR 109, 137; see also Ford's Principles of Corporations Law.

there discussion about the standard applied by the courts in determining if there is a breach of duty to act in the best interests of the company. It can be accepted that the Primary Judge made a finding that Mr Macks acted with a collateral purpose and that the finding was based on a rejection of much of the evidence of Mr Macks. However, other than stating his final conclusion, the Primary Judge does not discuss in his Reasons how he dealt with the evidence that, as at June 2005, was inconsistent with his finding. To that extent, the Reasons are inadequate.

616 To establish a breach of s 182 a party must show:

1. The defendant was at the relevant time an officer of the company.

2. The defendant made improper use of his position:

3. The defendant made that improper use for the purpose of gaining an advantage or, alternatively, causing detriment to the company, and;

4. That such advantage was either for the officer or for someone else.[243]

617 In *R v Byrnes*[244] the High Court stated that the test of impropriety is objective, although a defendant's state of mind may be relevant.

618 The Primary Judge has not discussed the elements of s 182. While the Primary Judge refers to Viscariello becoming the "main game", there is no analysis as to how continuing to pursue Ms Hamilton-Smith meant he improperly used his position (a different concept to acting with a proper purpose) to gain an advantage for himself. The Primary Judge needed to identify "the advantage" and how pursuing Ms Hamilton-Smith would achieve that advantage.

619 There is no doubt that the Primary Judge made findings that Mr Macks used the Bernsteen action, and the George strategy, to assist him to gain an advantage in relation to the proceedings threatened by Mr Viscariello.

620 The Primary Judge did not discuss how he dealt with the evidence that was inconsistent with the finding of a collateral purpose. Again, the decision to adopt the George strategy provides an example. As we have previously observed, that decision by Mr Macks was inconsistent with the finding of a collateral and improper purpose. However, the Reasons did not disclose the basis upon which the finding was made.

621 We consider that we do not have to deal with all of Mr Macks' complaints relating to grounds 4 and 5. In our view the reasons leading to the conclusions of breaches of ss 181 and 182 are inadequate. We would set aside those findings on this basis as well.

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[243] *Australian Securities and Investments Commission v Somerville* (2009) 74 ACSR 89.
[244] (1995) 183 CLR 501.

622 Many of these particular complaints have been dealt with by us in considering ground 3. It was strictly not necessary for us to consider grounds 4 and 5 in relation to the time period from June 2005. However, as discussed earlier, the Primary Judge made the same findings as at April 2006. Given that we have found that Mr Macks acted in breach of s 180 (1) of the Act from April 2006 the question arise whether it is open to us to find that he breached ss 181 and 182 from April 2006.

Is it open on Appeal to find that Mr Macks acted with an Improper Collateral Purpose from April 2006?

623 We have found, that on the facts available and viewed objectively, Mr Macks breached s 180 CA after the 28 April 2006 meeting.

624 However, the findings that Mr Macks acted with a collateral and improper purpose were, to a large extent, based on the credit findings of the Primary Judge. The Primary Judge did not accept explanations given by Mr Macks in evidence on a number of matters. His Honour made adverse findings about the conduct of Mr Macks, for example in February, March and April 2006. However, he had already found that Mr Macks was motivated by the four substantial and actuating purposes from 1 June 2005 and that Mr Macks acted unreasonably from after June 2005. We have found that the Primary Judge erred in making those findings. The Primary Judge's earlier findings must percolate through his findings, particularly in relation to an assessment of Mr Macks' credit, of what occurred at a later time.

625 Mr Macks submitted that the evidence, in any event, could not support a finding that Mr Macks acted with a collateral purpose and/or not in the best interests of the company. He submitted that we should make a finding to that effect. Mr Viscariello submitted that the evidence overwhelmingly supported the Primary Judge's findings and that we could, in fact, make a finding that Mr Macks acted in breach of ss 181 and 182.

626 We do not accept the submissions made by Mr Macks. Without deciding the point, there was evidence from which the Primary Judge may have inferred that Mr Macks failed to act in good faith in the best interests of the corporation and for a proper purpose. There was evidence on which the Primary Judge may have been able to infer that Mr Macks improperly used his position to gain an advantage for himself. We are unable to conclude that there was no evidence of a potential breach of both ss 181 and 182. However, we are also unable to accept Mr Viscariello's submissions on this issue as the Primary Judge's finding of the collateral and improper purpose was based significantly on his assessment of the credit of Mr Macks which included the findings of collateral purposes from June 2005.

627 We have found that the Primary Judge erred in his assessment of the evidence as at June 2005 and that this affects his finding that Mr Macks had the

four substantial and actuating purposes from 1 June 2005. We are not in a position to separately address the question of the credibility of Mr Macks as at April 2006 once the earlier findings are set aside. The question that then remains is whether a retrial ought to be ordered to determine whether Mr Macks breached the duties imposed by ss 181 and 182 after 26 April 2006. Whether the question of a breach of ss 181 and 182 should be remittal for a retrial is discussed later in these reasons.

Part 4: Declaratory relief (ground 1 of the appeal)

628 As was noted in Part 1, the Primary Judge declared that Mr Macks had contravened the duties imposed by ss 180 - 182 CA and made an order under s 503 CA removing him as liquidator of the Companies.

629 Mr Macks subsequently elected not to pursue his appeal from the order removing him as liquidator of the Companies. He accepted that it was futile to pursue that matter given the passage of time. However, the fact that the only substantive relief granted by the Primary Judge, apart from the Declarations, was an order for Mr Macks' removal is significant for the issues considered in this Part.

630 The court was exercising federal jurisdiction in hearing and determining Mr Macks' claims under the CA. The Declarations were made pursuant to s 31 of the *Supreme Court Act*. Mr Macks' submitted that the Declarations could only have been made under s 1317E of the CA and that, by reason of s 1317J, only ASIC could have applied for a declaration that he had contravened ss 180 - 182. Sections 1317E and s 1317J are located in pt 9.4B of the CA. Mr Macks argued that pt 9.4B provides an exclusive and exhaustive source of the court's power to grant relief for a contravention of ss 180 - 182, with the result that s 31 of the *Supreme Court Act* was inconsistent to the extent that the section would have conferred jurisdiction on the court to make the Declarations (inconsistency within s 109 of the Constitution); alternatively, that pt 9.4B was a law of the Commonwealth that 'otherwise provided' for the purpose of s 79 of the *Judiciary Act*. Accordingly, the court lacked power to make the Declarations.

631 Section 78B notices were issued and the Attorney-General for the State of South Australia intervened on the question of the court's power to make the Declarations.

Summary of the findings made in Part 3

632 For the reasons that follow, we have concluded that:

1. The Declarations were not a necessary step in determining whether Mr Macks ought to have been removed as the liquidator of the Companies under s 503 CA. The Primary Judge could have made an order removing Mr Macks regardless of whether the Declarations were made and accordingly, the question of whether the court had power to grant declaratory relief under s 31 of the *Supreme Court Act* was not relevant to the exercise of the court's power under s 503 CA.

2. Mr Viscariello had standing to seek an order under s 503 CA. The question to be determined under s 503 was whether Mr Viscariello had shown cause for the removal of Mr Macks as the liquidator of the Companies. The issue that would have been considered if ground 7 of the appeal had been pressed was whether the Primary Judge had erred

in exercising his discretion under s 503 having regard to the findings that had been made about Mr Macks' conduct, the challenge to those findings and the principles that apply to an appeal against the exercise of a discretion. The question whether the Declarations had been made in excess of the court's jurisdiction would not have been relevant to that issue.

3. The Declarations declared that Mr Macks had contravened ss 180 - 182 CA. However, they also declared the acts or omissions that constituted the contravening conduct. Mr Macks' conduct, as found and declared by the Primary Judge, not only contravened his statutory duties but also constituted breaches of duties that he owed under general law. The Declarations would have been capable of being reformulated by this court if the Primary Judge's findings of breach had not been disturbed.

4. Part 9.4B does not exhaust the court's power to grant relief for breach of ss 180 - 182 CA. In particular, the court can exercise the jurisdiction conferred by s 31 of the *Supreme Court Act* to declare that a company officer has breached a statutory duty imposed by the CA.

5. Mr Viscariello had standing to seek declaratory relief in respect of Mr Macks' alleged breaches of duty (statutory and under general law).

6. On the findings that were made, it was open to the Primary Judge to exercise a discretion to make the Declarations. The Declarations recorded the basis upon which his Honour concluded that Mr Macks should be removed as the liquidator of the Companies and the marked the court's disapproval of his conduct.

The Primary Judge's reasons

633 The Primary Judge's reasons for the relief granted may be shortly stated. As to the Declarations, his Honour held that:

1. A declaration that Mr Macks had breached a duty owed to the Companies could not be made under s 1317E because of the limitations imposed by s 1317J.[245]

2. However, it did not follow that a declaration could not be made at the suit of a person who possessed a 'legal' interest in the proper management of a company against a company officer who had breached a statutory duty.[246] Mr Viscariello had a legal interest in the management of the Companies.[247]

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[245] *Viscariello v Macks* [2014] SASC 189 [821].
[246] *Viscariello v Macks* [2014] SASC 189 [823].
[247] *Viscariello v Macks* [2014] SASC 189 [835].

3. Section 31 of the *Supreme Court Act* conferred a statutory power to grant declaratory relief in the court's general jurisdiction. The power to grant relief under the section was wide – his Honour cited with approval from the judgment of King CJ in *JN Taylor Holdings Ltd (in liq) v Bond* [248] in which the Chief Justice observed that there was no jurisdictional limit to the court's power to grant declaratory relief; the power to grant such relief was only limited by the court's own discretion.[249]

4. A superior court was not to be deprived of jurisdiction except by express words or necessary implication[250] – his Honour cited the observations of the New South Wales Court of Appeal in *Law Society (NSW) v Weaver*[251] and also the decisions of Forster J in *FAI General Insurance Co Ltd v RAIA Insurance Brokers Ltd*[252] and Sheppard J in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*[253] concerning the power of the Federal Court to grant declaratory relief under s 21 of the *Federal Court of Australia Act*.

5. The CA did not expressly or by necessary implication limit the court's powers to grant declarations. In particular:[254]

> The declarations made pursuant to s 1317E have particular statutory consequences. That section and the associated provisions do not evince any intention to limit the powers of State or Federal superior courts to grant declarations.

6. Having found that Mr Macks had breached the duties imposed by ss 180 - 182 CA, it was appropriate to grant declaratory relief under s 31 of the *Supreme Court Act* as the breaches were egregious and in the circumstances of the case, the Declarations were a necessary step in determining whether to remove Mr Macks as the liquidator of the Companies.[255]

634 His Honour further found that Mr Viscariello lacked standing to bring claims for compensation or damages at common law in respect of Mr Macks' conduct as liquidator of the Companies. Mr Viscariello's claim for damages at common law was a derivative action. The right of a member to bring a derivative action had been abolished by s 236(3) CA and Mr Viscariello had not been

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[248] *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432.
[249] *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432, 436.
[250] *Viscariello v Macks* [2014] SASC 189 [829].
[251] *Law Society (NSW) v Weaver* [1974] 1 NSWLR 271, 272.
[252] *FAI General Insurance Co Ltd v RAIA Insurance Brokers Ltd* (1992) 108 ALR 479.
[253] *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1993) 41 FCR 89.
[254] *Viscariello v Macks* [2014] SASC 189 [833].
[255] *Viscariello v Macks* [2014] SASC 189 [837].

granted leave under s 237 to bring or prosecute proceedings on behalf of the Companies.

635 Further, s 237 CA did not apply to a company in liquidation (his Honour followed the decision of the New South Wales Court of Appeal in *Chahwan v Euphoric Pty Ltd t/as Clay & Michel*[256] in which it was held that pt 2F.1A of the CA had no application to a company that was in liquidation). Accordingly, Mr Viscariello could not claim damages for breach of a common law duty of care owed by Mr Macks to Bernsteen.[257] As to compensation, Mr Viscariello had no standing pursuant to s 1317J to seek a compensation order under s 1317H.[258]

636 The Primary Judge's explanation for the grant of declaratory relief was expressed in terms of the power of the court to grant relief under s 31 of the *Supreme Court Act*. However, the concept of power referred to both Mr Viscariello's standing to apply for declaratory relief and the source of the court's jurisdiction to grant the relief.

637 His Honour characterised a declaration made pursuant to s 1317E as a particular form of statutory remedy. The availability of that remedy did not necessarily imply, as a matter of the proper construction of the CA, that other sources of the court's jurisdiction to grant a remedy for breach of ss 180 - 182 were excluded - in particular, in this instance, the court's power to grant declaratory relief under s 31 of the *Supreme Court Act*.

638 Moreover, Mr Viscariello's standing to seek declaratory relief was to be determined according to whether he had a 'legal' interest in the management of the Companies. That is, Mr Viscariello's entitlement to relief under s 31 was to be assessed according to the principles that ordinarily apply to a claim for declaratory relief: whether the applicant for relief had a real interest in the subject matter of the proceedings - that is, an interest that was sufficient to justify seeking relief. The fact that Mr Viscariello sought declarations in respect of breaches of duty owed by Mr Macks to the Companies did not mean that the rules governing derivative actions applied to deny him standing.

639 His Honour held that the position was otherwise in respect of Mr Viscariello's claims under the CA and general law for loss or damage suffered as a consequence of Mr Macks' alleged breaches of duty. The duties were owed to the Companies and Mr Viscariello claimed that it was the Companies that had suffered loss and damage as a result of Mr Macks' breaches. Consequently, Mr Viscariello lacked standing to bring the claims (subject to s 237 CA).

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[256] *Chahwan v Euphoric Pty Ltd t/as Clay & Michel* [2008] NSWCA 52; (2008) 227 FLR 43.
[257] *Viscariello v Macks* [2014] SASC 189 [842].
[258] *Viscariello v Macks* [2014] SASC 189 [839] - [840].

The grounds of appeal

640 As was noted above, Mr Macks' primary contention was that pt 9.4B of the CA constituted a complete code of the remedies available for a contravention of a civil penalty provision - pt 9.4B covered the field so that there was a s 109 inconsistency between the provisions of the Part and s 31 of the *Supreme Court Act*. Alternatively, pt 9.4B contained laws that were laws of the Commonwealth that 'otherwise provided' for the purpose of s 79 of the *Judiciary Act*.

641 However, Mr Macks further contended that s 31 of the *Supreme Court Act* did not confer jurisdiction on the court to make declarations that he had contravened ss 180 -182 CA as:

1. a contravention of those sections of the CA did not create a cause of action – the sections merely prescribed norms of conduct;

2. the sections did not impose duties on Mr Macks that were owed to Mr Viscariello so that a declaration that Mr Macks had contravened the sections did not involve a declaration of any legal right of Mr Viscariello or any obligation or liability of Mr Macks.

642 Mr Macks also alleged that he had been denied procedural fairness as he had not been afforded an opportunity to submit that the court lacked power to make the Declarations. Further, and in any event, the Primary Judge had erred in exercising his discretion to make the Declaration by failing to have regard to the effect of pt 9.4B and ss 180 – 182 CA and by wrongly considering that:

1. Mr Viscariello had a legal interest in the management of Bernsteen;

2. Mr Macks' breaches of ss 180 – 182 were egregious;

3. it was necessary to make the Declaration as a step in determining whether Mr Macks ought to be removed as the liquidator of the Companies.

643 Mr Macks did not contend below that the court lacked jurisdiction to grant declaratory relief. Rather, he submitted that declarations to the effect that he had contravened ss 180 - 182 CA lacked utility or were inutile as Mr Viscariello was not entitled to seek compensation or damages in respect of the alleged breaches.[259] It was also submitted that Mr Viscariello did not have standing to seek declaratory relief.[260]

644 There were some differences between the allegations pleaded in ground 1 of the appeal and the way in which Mr Macks put his argument at the hearing. In his written summary of argument, Mr Macks identified ten reasons why he

[259] Ts 3811.
[260] See 'Defendant's written closing submissions concerning Heidi-George related allegations', par 38.

contended that the Primary Judge's decision to grant the Declarations was in error:

1. the Declarations were made on a basis that was neither pleaded nor argued in the trial so that Mr Macks had been denied procedural fairness;

2. the Primary Judge erred in holding that s 1317J CA permitted a declaration of contravention to be granted at the suit of a company;

3. pt 9.4B exhaustively provided for who has standing to seek, and the remedies that may be obtained, for a contravention of a civil penalty provision;

4. the Primary Judge did not have regard to authorities that confirmed that s 1317J limited who could seek a declaration for breach of a civil penalty provision;

5. the Primary Judge did not consider the decision of Besanko J in *Lifeplan Australia Friendly Society Ltd v Woff*;[261]

6. s 31 of the *Supreme Court Act* was inconsistent with the scheme of the CA;

7. the Primary Judge relied on cases concerning the TPA that had been subsequently overtaken by authority;

8. the Primary Judge failed to have regard to the fact that the duties imposed by ss 180 - 182 CA were not owed to Mr Viscariello and Mr Viscariello had no standing to seek the Declarations;

9. the Declarations sought were ancillary to claims for compensation but Mr Viscariello had no standing to seek compensation or damages; and

10. the court ought not to have exercised its discretion to grant the Declarations having regard to the fact that Mr Viscariello had been a director of companies that were grossly insolvent, and had traded while insolvent, and because of his conduct in the winding up of the Companies.

645 Further, Mr Macks' focus in the appeal was on whether s 31 of the *Supreme Court Act* was 'picked up' pursuant to s 79 of the *Judiciary Act* rather than whether there was a s 109 inconsistency between State and Commonwealth laws.

[261] *Lifeplan Australia Friendly Society Ltd v Woff* [2013] FCA 613.

Notice of respondent's contention

646 Mr Viscariello filed a notice of contention alleging that there were other factors relevant to the exercise of the court's discretion to make the Declarations apart from those identified by the Primary Judge.[262] It was contended that the further facts and circumstances that would justify the exercise of the discretion to make the Declarations were:

1. the breaches were serious breaches;

2. the Declarations were appropriate in order to demonstrate the court's disapproval of the conduct underlying the Declarations;

3. the breaches were centrally concerned with litigation undertaken in the courts of South Australia;

4. the breaches were by a person who was and/or described himself as an officer of the court.

647 The notice of contention further pleaded that:

1. it was open to the Primary Judge to find that he had power to make declarations of contravention under s 1317E CA as ASIC had intervened by a notice dated 24 March 2015 pursuant to s 1330 CA and had thereby become a party to the proceedings, alternatively that ASIC was a party contending in the appeal that the Declarations should be maintained;

2. the Primary Judge erred in finding that the power to make declarations of contravention under s 1317E was limited by s 1317J when he ought to have found that he was required to make the Declarations in determining that Mr Macks should be removed as the liquidator of the Companies;[263]

3. it was open for the Primary Judge to hold that he could make declarations that Mr Macks had breached the duties that he owed under general law.

The relevant provisions of the CA

648 The relevant provisions of pt 9.4B of the CA were identified in Part 1 of the Reasons. It remains necessary to briefly comment on s 503 of the CA notwithstanding that Mr Macks did not maintain his appeal from the decision of the Primary Judge to remove him as the liquidator of the Companies.

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[262] See *Viscariello v Macks* [2014] SASC 189 [837].

[263] The allegation being that the jurisdiction conferred by s 1317E was 'ambulatory'.

649 Section 503 CA was repealed by the *Insolvency Law Reform Act*. However, the section applied to Mr Viscariello's action against Mr Macks. Section 503 formed part of div 4, pt 5.5 of the CA. Division 4 concerns voluntary liquidations. Section 503 empowered the court to remove a liquidator and appoint another liquidator on cause shown.

650 Division 4 did not provide for who may show cause or the procedure to be adopted in applying for the removal of a liquidator. However, s 511 CA provided that the liquidator, any contributory or creditor could apply to the court 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 was being wound up by the court. Further, the court, if satisfied that the determination of the question or the exercise of the power would be just and beneficial, could accede wholly or partially to an application on such terms and conditions as it thought fit. The section suggested that Parliament intended that the creditors and contributories of a company in liquidation should have standing to apply for orders in respect of the conduct of the liquidation.

651 The Primary Judge held that Mr Viscariello had standing to bring an application pursuant to s 503 as he was a person who might be beneficially or adversely affected by the final winding up of the Companies[264] (his Honour cited the decision of Finkelstein J in *Re Greight Pty Ltd (in liq); Re Stafford Services Pty Ltd (in liq); Handberg v Cant*[265]). His Honour added that:[266]

> [Mr Viscariello] is a creditor of both Companies and a secured creditor of Newmore for the reasons I give below. The steps which another liquidator might take to recover fees and costs wrongfully incurred in the conduct of the liquidation by [Mr Macks] may benefit [Mr Viscariello].

652 As has been noted, Mr Macks elected not to pursue his appeal against the order made for his removal as the liquidator of the Companies on grounds of utility. However, he did not contend in his grounds of appeal that the Primary Judge had erred in holding that Mr Viscariello had standing to seek an order pursuant to s 503 CA.

653 In our view, his Honour was plainly right to hold that Mr Viscariello had standing. Mr Viscariello was both a contributory and a creditor of the Companies. As Finkelstein J observed in *Greight; Handberg v Cant*:[267]

> As a matter of principle I think that any person with a real interest in the winding up of a company … has standing under [s 503]. By a person with a real interest in the winding up, I mean one whose rights or interests will directly be affected by action taken by the

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[264] *Viscariello v Macks* [2014] SASC 189 [851].

[265] *Re Greight Pty Ltd (in liq); Re Stafford Services Pty Ltd (in liq); Handberg v Cant* [2006] FCA 17; (2006) 56 ACSR 334.

[266] *Viscariello v Macks* [2014] SASC 189 [851].

[267] *Re Greight Pty Ltd (in liq); Re Stafford Services Pty Ltd (in liq); Handberg v Cant* [2006] FCA 17; (2006) 56 ACSR 334 [3] - [4].

> liquidator in the course of performing his (the liquidator's) duties. If the company is solvent the persons with a real interest are the contributories. If it is insolvent they are the creditors …
>
> This is not to suggest that only a creditor of an insolvent company has standing to make the application.

654 Although it is not necessary to further analyse the circumstances in which a court will be justified in removing a liquidator, it will be later relevant to note the office of a liquidator and the policy behind conferring the power of removal on a court when considering the discretion exercised by the Primary Judge to make the Declarations.

The necessity for declaratory relief

655 The order made under s 503 CA for removal of Mr Macks as the liquidator of the Companies was, in effect, the ultimate relief granted by the Primary Judge. His Honour held that the Declarations were a necessary step in determining whether an order under s 503 should be made (although his Honour also considered that the Declarations should be made as Mr Macks' conduct was egregious).[268]

656 The Primary Judge did not explain why he considered that it was necessary for declarations to be made in order to determine whether Mr Macks should be removed as a liquidator of the Companies. The matter was not further explored at the hearings held on 14 and 15 April 2015 in light of Mr Macks' consent to his removal. It may be that his Honour's conclusion merely reflected the prayer for relief.

657 Mr Macks alleged that the Primary Judge erred in holding that the Declarations were a necessary step in determining the application for Mr Macks' removal under s 503 CA.[269] That allegation was effectively a particular to ground 1.6: that the Primary Judge erred in exercising his discretion to make the Declarations. However, the allegation begged a further question: having regard to the relief granted on Mr Viscariello's claims, what, if anything, turned on Mr Macks' arguments concerning the proper construction of pt 9.4B of the CA and the court's power to grant declaratory relief in respect of a contravention of ss 180 - 182? Put another way, did it matter if the Declarations were set aside for want of jurisdiction if the findings on which they were based remained intact? That question would have arisen had Mr Macks persisted with his appeal against the order that was made under s 503 CA for his removal as the liquidator of the Companies.

658 In our view, the grant of declaratory relief in the form of the Declarations was not a necessary precursor to making an order under s 503 CA – indeed, it was not necessary for the Primary Judge to have expressly found that Mr Macks

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[268] *Viscariello v Macks* [2014] SASC 189 [837].
[269] Ground 1.6.2(iii).

had contravened ss 180 - 182 to hold that cause had been shown for Mr Macks' removal as the liquidator of the Companies. It is well established that the expression 'cause shown' when used in s 503 is a broad concept that confers a wide discretion on the court.[270] However, as will be explained, that conclusion does not mean that the Declarations necessarily lacked utility. Declarations have been made in respect of breaches of the CA, including ss 180 - 182, to mark the court's disapproval of a party's conduct or to provide a formal record of the basis upon which the court has granted other relief.

The nature of declaratory relief

659 It is necessary to say something about the nature of a declaration in light of the parties' submissions on ground 1. Zamir and Woolf describe a declaratory judgment in the following terms:[271]

> A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the court. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action … A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant … In other words, the declaration simply pronounces on what is the legal position.

660 Nevertheless, declarations have legal consequences. They operate in law either as a *res judicata* or an issue estoppel. Further, declarations may take effect as a proprietary remedy – for example, a declaration that a party holds a property on a constructive trust. However, the effect of a declaration is not to create rights but to merely indicate what they have always been.

The jurisdiction to grant declaratory relief

661 It is not in doubt that the High Court of Chancery had inherent power to make declarations as an ancillary to granting principal relief. The historically significant issue has concerned the court's power to grant declarations of right: did the court possess inherent jurisdiction to make a 'bare' declaration or was the power to make such a declaration only conferred by s 31 of the *Supreme Court Act* and equivalent statutes in other jurisdictions? Section 31 and similar provisions in other jurisdictions reflected amendments made to the *Rules of the Supreme Court* following the enactment of the *Judicature Act* in 1873 – O 25 r 5 of the *Rules of the Supreme Court 1883* (UK). The English Court of Appeal held

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[270] See, for example, the observations of Austin J in *Domino Hire Pty Ltd v Pioneer Park Pty Ltd (in liq)* [2003] NSWSC 496; (2003) 21 ACLC 1330.

[271] Lord Zamir and J Woolf, *Zamir & Woolf: The Declaratory Judgment* (3rd ed, 2000) [1.02].

that O 25 r 5 permitted a party to claim, and empowered the court to make, a bare declaration.[272]

662 Despite some early opinion to the contrary,[273] the view that was generally accepted for some time was that the High Court of Chancery lacked power to make a declaration of right in the absence of a statutory enactment.[274] However, the plurality in *Ainsworth v Criminal Justice Commission* stated that:[275]

> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise'. However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The persons seeking relief must have 'a real interest' and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' or if 'the court's declaration will produce no foreseeable consequences for the parties'. (citations omitted)

663 The accuracy of the statement that superior courts may make declarations of right in their inherent jurisdiction continues to be doubted by the learned authors of Equity: Doctrines and Remedies.[276] However, the plurality (French CJ, Kiefel, Bell & Keane JJ) in *CGU Insurance Ltd v Blakeley*[277] cited *Ainsworth*[278] for the proposition that the Supreme Court of Victoria 'like all superior courts' had inherent power to grant declaratory relief.[279]

664 The Attorney-General submitted that the court lacked inherent jurisdiction to make a declaration of right (that is, without granting consequential relief). However, *Ainsworth*[280] and *CGU Insurance*[281] were both cases in which the applicant only sought and obtained declaratory relief and it is apparent that the High Court has recognised that State Supreme Courts possess inherent

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[272] *Dyson v Attorney-General* [1911] 1 KB 410.
[273] See the reference in Young PW QC, *Declaratory Orders* (2nd ed, 1984) to the arguments made in Anderson WH & Anderson GC in *Actions for Declaratory Judgments: A treatise on the Planning, Practice and Trial of an Action for a Declaratory Judgment, from its Inception to its Conclusion, with Forms* (2nd ed, 1951) and also the judgment of Bankes LJ in *Guaranty Trust Co of New York v Hannay* [1915] 2 KB 536.
[274] See Meagher RP, Heydon JD & Leeming MJ, *Meagher, Gummow & Lehane's Equity Doctrine and Remedies* (5th ed, 2014) [19-010] (Equity Doctrine and Remedies).
[275] *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey & Gaudron JJ).
[276] Meagher RP, Heydon JD & Leeming MJ, *Meagher, Gummow & Lehane's Equity Doctrine and Remedies* (5th ed, 2014) [19-110].
[277] *CGU Insurance Ltd v Blakeley* [2016] HCA 2; (2016) 259 CLR 339.
[278] *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564.
[279] *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564 [13].
[280] *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564.
[281] *CGU Insurance Ltd v Blakeley* [2016] HCA 2; (2016) 259 CLR 339.

jurisdiction to make declarations of right. The learned authors of *Judicial Review of Administrative Action and Government Liability*[282] observed that:

> The High Court said in *Ainsworth v Criminal Justice Commission* that: 'It is now accepted that superior courts have inherent power to grant declaratory relief'. That used not to be the general view. Perhaps the superior courts of general jurisdiction having been exercising their declaratory jurisdiction for so long that it might now be properly regarded as part of their powers without explicit statutory authorisation'.

665 The authors noted cases in which courts have continued to consider the relationship between their inherent and statutory jurisdiction to grant declaratory relief following *Ainsworth*.[283] However, it is not necessary to further examine the issue in light of the approach that we have taken to the determination of the issues raised by ground 1 of the appeal.

666 Mr Viscariello raised the court's inherent jurisdiction in his written submissions for the hearing of the appeal. He referred to the observations of French CJ, Kiefel and Bell JJ in *NH v Director of Public Prosecutions*[284] concerning the nature of the inherent jurisdiction of a State Supreme Court and to their Honours further statement that 'inherent jurisdiction understood not as authority to adjudicate, but as inherent power, may be deployed in the exercise of federal jurisdiction conferred on the Supreme Courts pursuant to s 39(2) of the *Judiciary Act* or some other Commonwealth law'.[285] Mr Viscariello replied to that submission by contending that it overlooked the distinction between the subject matter jurisdiction conferred by ss 75 and 76 of the *Constitution* and the powers that the High Court may possess and exercise in that jurisdiction. He further submitted that, 'while s 39(2) may have been an additional investiture of *Corporations Act* subject matter jurisdiction in the Supreme Court (by reason of s 1337A(3)), the power to grant declaratory relief under s 31 remained to be picked up, if at all, by s 79(1) of the *Judiciary Act*'.[286]

667 That latter statement may beg the question posed by Mr Viscariello's submission. However, Mr Viscariello's submission raised the possibility that the Declarations could have been made in the court's inherent jurisdiction for the first time in his written submissions. It was not the subject of a ground of contention. The point was picked up by senior counsel for the Attorney-General in oral argument but, in our view, it would be unfair to the parties to determine the issue given how it arose in the appeal. In any event, it is not necessary to determine the issue given the finding that we have made on the question that was substantially contested in the appeal - whether the court had power to make the Declarations under s 31 of the *Supreme Court Act*.

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[282] Aronson M, Groves M and Weeks G, *Judicial Review of Administrative Action and Government Liability*, (6th ed, 2017) [15.20].
[283] *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564.
[284] *NH v Director of Public Prosecutions* [2016] HCA 33; (2016) 90 ALJR 978.
[285] *NH v Director of Public Prosecutions* [2016] HCA 33; (2016) 90 ALJR 978 [68].
[286] 'Propositions to be advanced in reply to submissions of Attorney-General', par 3(c).

668 Senior counsel for Mr Macks contended that the Primary Judge had posed the wrong question in holding that the CA did not expressly or impliedly exclude the court's jurisdiction. Rather, so it was submitted, the question was whether s 31 of the *Supreme Court Act* was picked up and applied when the court exercised federal jurisdiction under the CA. Mr Macks sought to answer that question by arguing that the CA contained a set of provisions that dealt exclusively and exhaustively with a court's powers to grant remedies for contraventions of civil penalty provisions such as ss 180 - 182. In effect, that is an argument that the provisions of the CA do impliedly exclude the court's power to grant declaratory relief other than as expressly provided for by the Act. However, Mr Macks submitted in that respect:[287]

> The starting point is **not** an assumption that s 31 would, but for the potential operation of the Constitution or the Judiciary Act, applies. The proceeding invoked Federal jurisdiction and thus s 31 could only apply if it was appropriate to be picked up by s 79. We are not here concerned with a declaration pursuant to s 31 in relation to general law rights, but with a declaration **in respect of a Federal statute**. Because the proceeding under the Federal statute (the Act) squarely invoked Federal jurisdiction, it could only be by force of legislative arrangements empowering a State Court to hear such a claim that s 31 could potentially be considered. (original emphasis)

669 Mr Macks also submitted that:[288]

> It is one thing to hold that the Parliament contemplated that the general law or State law might be a source of further rights and obligations on the part of directors; it is quite another to hold that it contemplated that in addition to the clearly comprehensive suite of remedies for civil penalty provisions, different remedial powers might be 'picked up', depending on where within Australia the case is heard. Did the Parliament contemplate that the Act might operate differentially in that way or did it 'otherwise provide' by its comprehensive remedial regime? In this regard, the question of whether the Federal statute 'otherwise provides', or whether there is a s 109 inconsistency, involves asking whether the State Act would have **added to** or derogated from the provisions of or powers conferred by the law of the Commonwealth. (original emphasis)

670 We return to the first of those submissions below. However, it may be that the existence in State superior courts of an inherent power to grant declaratory relief provides a short answer to the submissions. The existence of an inherent jurisdiction might also be relevant to whether Parliament intended that the CA, by implication, excluded other sources of jurisdiction to grant declaratory relief.

Jurisdiction and power

671 There is a distinction between jurisdiction and power. The primary meaning of 'jurisdiction' is 'authority to decide'. In *Harris v Caladine* Toohey J said:[289]

> Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or

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[287] Appellant's reply submissions to respondent's and intervenor's submissions on appeal, par 18.1.
[288] Appellant's reply submissions, par 18.5.
[289] *Harris v Caladine* (1991) 172 CLR 84, 136.

> impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'.

672 However, questions of jurisdiction, power and standing may be blurred in relation to the grant of declaratory relief. As the Hon R S French AO has observed, declaration as a remedy could arguably be said to have 'one foot in jurisdiction and one foot in power'.[290]

673 Further, a distinction is to be drawn between the exercise of state jurisdiction and federal jurisdiction. As Isaacs J explained in *Baxter v Commissioners of Taxation (NSW):*[291]

> State jurisdiction is the authority which State courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws.

674 Accordingly, the subject matter of a declaration made by a State Supreme Court exercising non-federal jurisdiction generally must concern a justiciable controversy. In federal jurisdiction, the declaration must relate to a 'matter' in the sense in which that term is used in ch III of the Constitution.

675 Beyond those fundamental principles, the jurisdiction to grant declaratory relief is most often analysed in terms of power rather than jurisdiction in the strict sense of authority to decide; that is, by reference to the factors relevant to the exercise of the discretionary power to grant relief. So, for example, King CJ stated in *JN Taylor Holdings Ltd*, in a passage relied on by the Primary Judge, that:[292]

> Authoritative judicial statements make it clear that the jurisdiction to grant declaratory relief is very wide and that judicial pronouncements appearing to restrict the circumstances in which such relief will be granted relate to the sound exercise of the discretion rather than to jurisdiction … A statement by Lord Sterndale MR in *Hanson v Radcliffe Urban District Council* …, quoted by Gibbs J in *Forster v Jododex* …, appeared to confine the otherwise unlimited character of the jurisdiction to cases involving 'a question of defining the rights of two parties'. As was pointed out, however, by Street CJ in *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation*…, that statement was made 'at a time when the declaratory jurisdiction had not achieved the full development manifested in the last twenty or thirty years'. By 1970 the Privy Council could say in *Rediffusion (Hong Kong) Ltd v Attorney-General (Hong Kong)* … that to exclude the jurisdiction it must appear 'that the questions were purely abstract questions the answers to which were *incapable* of affecting any existing or *future legal rights* of the plaintiffs.
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> …
>
> I can find no warrant for the imposition by the courts of a self-denying restriction on their jurisdiction to grant declaratory relief. In my opinion there is no jurisdictional limit. The

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[290] RS French, 'Declarations - Homer Simpson's Remedy - Is There Anything They Can Not Do?' (2007) 2 *FedJSchol* 24, 39.

[291] *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142.

[292] *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432, 435 - 436.

> court's power to grant such relief is 'only limited by its own discretion' … and the boundaries of judicial power.

676 The parties did not pursue questions such as the interrelationship between a matter and standing and whether a bare declaration that produced no foreseeable consequences for the parties could not constitute a 'matter' for the purposes of ch III of the Constitution. Those issues were considered or mentioned in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd.*[293] For example, Gaudron J observed that:[294]

> There may be cases where a bare declaration that some legal requirement has been contravened will serve to redress some or all of the harm brought about by that contravention. *Ainsworth v Criminal Justice Commission* was such a case. But a declaration cannot be made if it 'will produce no foreseeable consequences for the parties'. That is not simply a matter of discretion. Rather, a declaration that produces no foreseeable consequences is so divorced from the administration of the law as to not involve a matter for the purposes of Ch III of the Constitution. And as it is not a matter for those purposes, it cannot engage the judicial power of the Commonwealth. ... This issue can, however, be put to one side, for it is not a question raised by the Case Stated.

The power/discretion to grant declaratory relief

677 In *JN Taylor Holdings Ltd,*[295] King CJ identified various circumstances that 'are so contra-indicative to the exercise of the discretion in favour of the grant of declaratory relief that the existence of those circumstances would lead almost inevitably to the exercise of the discretion against the making of a declaration'.[296] Those circumstances included that a declaration would not be made except in matters 'which have a real legal context, and to the determination of which the court's procedure is apt'.[297] Further, there must be some person who has a real interest in opposing the declaration and the applicant for relief must have a real interest in having the question determined in the sense explained above. See also *Aussie Airlines Pty Ltd v Australian Airlines Ltd*[298] and Young, *Declaratory Orders*,[299] in which it is stated that:

> Although the declaratory judgment does not involve a cause of action in the usual sense, the authorities have established that six factors must be present before there can be a declaratory order. These factors are present when the following conditions are met:
>
> 1. There must exist controversy between the parties …;
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> 2. The proceedings must involve a 'right' …;

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[293] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591.

[294] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; (2000) 200 CLR 591 [52].

[295] *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432.

[296] *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432, 436.

[297] Citing the observations of Hutley JA in *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation* [1977] 1 NSWLR 43, 61.

[298] *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406.

[299] Young PW QC, *Declaratory Orders* (2nd ed, 1984) [202].

> 3. The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or 'locus standi' …;
>
> 4. The controversy must be subject to the court's jurisdiction both within the court's own charter and also within the jurisdiction so far as private international law rules are concerned …;
>
> 5. The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claim …;
>
> 6. The issue must be ripe … It must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.

678 Those 'rules' are sourced from the judgment of Lord Dunedin[300] which was cited with approval by Gibbs J in *Forster v Jododex Australia Pty Ltd.*[301] As noted in Equity: Doctrines and Remedies,[302] there has been some controversy over whether the 'rules' embraced by Gibbs J in *Forster v Jododex*[303] go to whether a court has jurisdiction to make declaratory orders or to whether the court ought to grant or refuse relief in the exercise of a discretion. It is suggested in Equity: Doctrine and Remedies that 'recent decisions appear to settle the uncertainty by treating Gibbs J's 'rules' as going both to jurisdiction and, where jurisdiction is found, also to discretion'.[304]

679 It is not necessary that the applicant for declaratory relief possesses a cause of action and accordingly, declarations can be made concerning whether a proposed course of conduct was unlawful.[305] As the authors of *Judicial Review of Administrative Action and Government Liability* note, '[b]ecause *Dyson* said that O 25 r 5 was available when no consequential relief could be granted, it impliedly ruled that it was permissible to sue for a declaration in the absence of a cause of action'.[306] Accordingly, O 25 r 5, and the statutory provisions that are based on the rule, refer to declarations of right where the right to claim declaratory relief is the right asserted by the claimant.

680 However, a court will not provide an advisory opinion in the form of a declaration. That is because the object of the judicial process is the final determination of the rights of the parties to an action. A judicial determination involves a conclusive or final decision based on a concrete and established or

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[300] *Russian Commercial & Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438.
[301] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437 - 438.
[302] Meagher RP, Heydon JD & Leeming MJ, *Meagher, Gummow & Lehane's Equity Doctrine and Remedies* (5th ed, 2014).
[303] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437 - 438.
[304] Meagher RP, Heydon JD & Leeming MJ, *Meagher, Gummow & Lehane's Equity: Doctrine and Remedies* (5th ed, 2014) [19-125].
[305] See, for example, *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 [47] and *Guaranty Trust Co of New York v Hannay* [1915] 2 KB 536.
[306] Aronson M, Groves M and Weeks G, *Judicial Review of Administrative Action and Government Liability,* (6th ed, 2017) [15.50].

agreed situation that aims to quell controversy.[307] That principle is reflected in the observations of Edelman J:[308]

> [C]ourts only make declarations concerning the rights of parties. Legal rights include claimed rights, powers, privileges and immunities. They do not include observations about breaches of duty that have no legal consequence. Declarations are not granted where they will 'produce no foreseeable consequences for the parties'.

681 In *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd (No 2)*[309] the appellants sought declarations that the respondent had knowingly assisted other parties to breach fiduciary duties owed to the appellants by engaging in a course of conduct. The conduct was identified in the proposed declarations. The Primary Judge refused to grant the declarations and the Full Court of the Federal Court upheld that decision. The court observed:[310]

> Ordinarily, a court will decline to grant declaratory relief if the declaration does not serve any legitimate purpose, or would be of no utility … In this case, the declaration sought … is not a declaration of right; it does no more than state the findings made against the respondent in a private law claim and has no practical effect in circumstances where the contravening conduct has ceased and the parties have no ongoing relationship. Whilst the appellants succeeded on appeal in establishing an entitlement to an account of profit by reason of the respondent's contravening conduct, the remedy is in the order that the respondent account to the appellants for such profits … The declaration would have no foreseeable consequences for the parties and accordingly should not be made.

682 Similarly, in *Warramunda Village Inc v Pryde* the Full Federal Court said:[311]

> The remedy of a declaration of right is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the court in reasons for judgment. This is even more strongly the case when the conclusion is not one from which any right or liability necessarily flows.

683 However, that is not to say that the Primary Judge erred in making the Declarations on the ground that he had found that Mr Macks' conduct in contravening ss 180 - 182 CA was egregious. As R D Nicholson J observed a declaration may still have utility even if other relief, such as injunctions and pecuniary penalties, have been granted.[312] The declaration may serve a variety of purposes including by providing an appropriate vehicle to record the court's

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[307] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 [45] - [47].

[308] *Agricultural Land Management Ltd v Jackson [No 2]* [2014] WASC 102(S) [8].

[309] *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd (No 2)* [2017] FCAFC 99.

[310] *Lifeplan Australia Friendly Society Ltd v Ancient Order of Foresters in Victoria Friendly Society Ltd (No 2)* [2017] FCAFC 99 [3].

[311] *Warramunda Village Inc v Pryde* [2001] 105 FCR 437 [8].

[312] *Australian Competition and Consumer Commission v The Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; (2007) ATPR 42 - 140 [6].

disapproval of the contravening conduct or in assisting to clarify the law or deterring persons from contravening regulatory legislation.[313] It is also relevant to note in this context that a court has a discretion to determine whether a declaration as to the rights of a plaintiff should be made without giving consequential relief.[314]

684 Although R D Nicholson J's comments were made and approved in the context of proceedings prosecuted by a regulatory body, there are examples of a court making a declaration in private law proceedings to mark its disapproval of a party's conduct or to fully and publicly record the outcome of an action. For example, Gordon J made a declaration that a party had contravened ss 180 - 182 CA in *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)*[315] in order to publicly record the basis for granting relief in circumstances where the trial of the applicant's claim had proceeded without the respondent being present. Her Honour had previously held, in proceedings prosecuted by the liquidator of Purcom No 34, that a director of the company had breached ss 180 - 182 and his fiduciary duties and was liable to pay equitable compensation.[316] In *Purcom No 34 Pty Ltd (in liq) (No 2)*,[317] her Honour made orders consequent upon the findings of breach. In particular, her Honour ordered declarations that included that:[318]

> The first defendant breached his fiduciary duties and duties under ss 180(1), 181(1) and 182(1) of the *Corporations Act* … which were owed to the Second Plaintiff by embarking on a scheme designed to divert the Second Plaintiff's assets and business undertaking away from the Second Plaintiff to the Third Defendant, and the steps taken to give effect to that scheme are set out in Schedule 1.

685 Gordon J did not discuss the source of the power to make the declarations and any limitations upon the power other than whether the declarations were necessary and if so, whether they were in an appropriate form. As to necessity, her Honour observed:[319]

> In my view, it is appropriate for the Court to grant declarations of contravention by Tucker Senior, Richard Tucker and Admin. In the present case, the contravening conduct is serious. Two of the contravenors did not attend the trial. The third, Richard Tucker, attended for one day. Absent the making of the declarations, the only formal record of the disposition of the proceeding would be Orders for compensation and delivery up of equipment, without the basis for the orders being stated: cf Goldberg and Jessup JJ said

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[313] His Honour's observations were cited with approval by French J (as his Honour then was) in *Australian Competition and Consumer Commission v Kokos International Pty Ltd (No 2)* [2008] FCA 5; (2008) ATPR 42-212 and see also, *Re McDougall; Australian Investments and Securities Commission v McDougall* [2006] FCA 427; (2006) 229 ALR 158.

[314] *Crouch v The Commonwealth* (1948) 77 CLR 339 and see the discussion of utility in circumstances where consequential relief was not sought or granted in *Commonwealth of Australia v BIS Cleanaway Ltd* [2007] NSWSC 1075; (2007) 214 FLR 271.

[315] *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)* [2010] FCA 624.

[316] *Parker, In the matter of Purcom No 34 Pty Ltd (in liq)* [2010] FCA 263.

[317] *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)* [2010] FCA 624.

[318] *Parker, In the matter of Purcom No 34 Pty Ltd (in liq)* [2010] FCA 263 [1].

[319] *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)* [2010] FCA 624 [9].

> in *Cruse v Multiplex Ltd* (2008) 172 FCR 279 at [59]. It is therefore both appropriate and, in my view, necessary for the Court record to state with specificity what was the contravening conduct of each of Tucker Senior, Richard Tucker and Admin.

686 The judgment of Goldberg and Jessup JJ in *Cruse v Multiplex*,[320] to which Gordon J referred, included the following observation:[321]

> There can, therefore, be no objection in principle to the making of a declaration where the purpose and utility thereof is formally to record the basis upon which the proceeding in question has been resolved (whether by adjudication or otherwise). We agree with the way the matter was put by Lee J in *Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329, 333 at [21]:
>
> > However, on the other hand it may be said that there is some utility in declaring contraventions of the Act to have occurred in order to define and publicise the type of conduct that constitutes a contravention of the Act and to set out clearly the foundation on which the consequential orders by way of injunction and pecuniary penalty, including those based on accessorial liability, are grounded.

687 On that basis, their Honours considered that a declaration that a respondent had contravened the *Workplace Relations Act 1996* (Cth) was properly made despite no penalty having been imposed on the respondent. In their Honours' opinion, there was utility in defining and publicising the type of conduct that constituted a contravention of the Act and 'that utility is more obvious in a situation in which contraventions are admitted or have been found, in which no other relevant orders are to be made, and in which, therefore, the only *formal* record of the disposition of the proceeding, absent the making of a declaration, would be a dismissal thereof'[322] (Our Emphasis).

Standing to seek declaratory relief

688 As has been noted, factors relevant to the existence and exercise of the court's jurisdiction to grant declaratory relief may sometimes subsume questions of standing. For example, the principle that a court will not grant a declaration in respect of a hypothetical issue may be viewed as a rule going to jurisdiction or as a matter that was 'contra-indicative to the exercise of the discretion'. Similarly, the question of whether the determination of a dispute will affect the applicant's legal rights or commercial interests could be characterised as a matter of standing or a factor relevant to the exercise of the court's discretion (as a court will refuse to grant a declaration if it could not produce a foreseeable consequence for the parties). However, the rule as to who may have standing is usually expressed in terms that are no more prescriptive than that the applicant must possess a 'sufficient' or 'real' interest in the subject matter of the application for declaratory relief. As it is not necessary that an applicant for declaratory relief have an existing cause of action, possessing a cause of action is only one way in which a party can establish a sufficient or real interest in obtaining a declaration.

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[320] *Cruse v Multiplex* (2008) 172 FCR 279.
[321] *Cruse v Multiplex* (2008) 172 FCR 279 [53].
[322] *Cruse v Multiplex* (2008) 172 FCR 279 [59].

689 There was a line of authority that suggested that an applicant for declaratory relief in private law proceedings was required to show that its rights were either being infringed or threatened with infringement by the defendant.[323] However, the courts have developed a more flexible approach to the question of standing. The dispute must relate to a justiciable issue and as courts are only concerned with legal rights and obligations, there must be a real and present dispute between the parties as to the existence or extent of a legal right or obligation. If those conditions are satisfied, the fact that the parties may be affected by the determination of the dispute will be sufficient to establish standing. Relevantly, an applicant for declaratory relief will have standing if it can demonstrate that the determination of a matter that is justiciable or arises under Commonwealth law will affect or concern its commercial interests (subject to any statutory limitations on standing that may apply).

The legislative history of pt 9.4B

690 Section 124 of the *Companies Act 1961* (SA) imposed statutory duties upon directors that were said to be in addition to, and not in derogation of, any enactment or rule of law relating to the duty of directors of a company. The expression 'rule of law' included an obligation in equity. The section created an offence and imposed a liability on a defaulting director for any profit made or damage suffered by the company as a result of a breach.

691 Section 229 of the *Companies Code 1981* (SA) marginally expanded the content of the statutory duties owed by a director. However, the section was otherwise to similar effect as s 124.

692 Likewise, s 232 of the *Corporations Law*, as enacted, was similar to s 229 of the Code. However, the consequences of a contravention were altered by the introduction of pt 9.4B. The Part was inserted into the *Corporations Law* by the *Corporate Reform Act 1992* (Cth). Section 232 was one of a relatively limited number of sections of the *Corporations Law* that was defined as a civil penalty provision.

693 Section 1317EA of the *Corporations Law* enabled a court to make a declaration that a person had contravened a civil penalty provision, to prohibit the person from managing a corporation and to require the person to pay a pecuniary penalty to the Commonwealth. Section 1317EB(2) provided that a court was not required to make a declaration under s 1317EA if a declaration was already in force pursuant to div 4 of pt 9.4B. Division 4 applied to criminal proceedings for an offence constituted by a contravention of a civil penalty provision. Section 1317GF permitted a jury to make a finding that a person was not guilty of an offence by reason of the matters mentioned in s 1317FA(1) but, nevertheless, guilty of a contravention of a civil penalty provision. The court was required to make a declaration that the person had contravened the civil penalty

[323] See *Gouriet v Union of Post Office Workers* [1978] AC 435.

provision if that was the verdict of the jury.[324] Similarly, a court of summary jurisdiction or an appellate court could find a person not guilty of a criminal offence but that the person had contravened a civil penalty provision. Again, the court was required to make a declaration of contravention in those circumstances.[325]

694 Part 9.4B of the *Corporations Law* permitted ASIC to apply for a civil penalty order where a director had contravened s 232.[326] The court could also order the director to pay compensation to a corporation for loss or damage suffered as a result of the contravention in addition to any other penalty that might be imposed in civil or criminal proceedings.[327] Further, s 1317HD imposed an obligation on a person who had contravened a civil penalty provision in relation to a corporation to account for any profit made from the contravention.

695 Section 1317HE provided that s 1317HA and s 1317HD:

> (a) have effect in addition to, and not in derogation of, any rule of law about the duty or liability of a person because of the person's office or employment in relation to a corporation;
>
> (b) do not prevent proceedings being instituted in respect of a breach such a duty or in respect of such a liability.

696 That provision mirrored s 232(11) of the *Corporations Act 1989* and the *Corporations Law*. Section 232 of the *Corporations Law* contained statutory duties that were substantially the same as those imposed by ss 180 - 182 CA. The Explanatory Memorandum for the Corporate Law Reform Bill 1992 (Cth) stated in relation to s 1317HE:[328]

> This section is based on *Corporations Law* subsection 232(11). The section provides that the compensation orders made available by proposed sections 1317HA, 1317HB and 1317HD are in addition to, and not in derogation of, any rule of law which provides a remedy in circumstances which would constitute a contravention of a civil penalty provision. The section therefore preserves equitable remedies which might be available in relation to such conduct, such as an injunction in relation to a threatened breach of duty by a company director.

697 It will be apparent that pt 9.4B of the *Corporations Law* created a complex set of statutory remedies, especially in relation to the power to make declarations in respect of contraventions of civil penalty provisions. The Part distinguished between the civil and criminal consequences of a contravention of a civil penalty

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[324] s 1317GF(3).
[325] s 1317GG(3) and s 1317GH(2).
[326] s 1317EB.
[327] s 1317HA (where an application had been made for a civil penalty order) and s 1317HB (where a person had been convicted of an offence constituted by a contravention of a civil penalty provision).
[328] Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) [186].

provision but there was an unusual overlap between the two - a jury or a magistrate could deliver a special verdict that an accused person was not guilty of a criminal offence but guilty of a contravention of a civil penalty provision. It should also be noted that pt 9.4B did not exhaust the orders that could be made in respect of a contravention of s 232. Section 229 of the *Corporations Law* mandated that a person could not manage a corporation for a period of five years if the person was convicted of an offence against s 232 and s 230 permitted a court to prohibit a person from managing a corporation where the person was found to have contravened s 232(2) or s 232(4).

698 Part 9.4B of the *Corporations Law* was repealed and a substituted part enacted pursuant to the *Corporate Law Economic Reform Program Act 1999* (Cth) (CLERP Act). The Act also replaced s 232 with ss 180 - 182 of the *Corporations Law*. The Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 (Cth) explained that the proposed amendments would reinforce the distinction between civil obligations and criminal offences in respect of the duties owed by company officers. However, the memorandum also stated that pt 9.4B would be rewritten without substantial change to the existing provisions.

699 The substituted parts deleted those provisions that had previously permitted a court to make a declaration of contravention in certain circumstances in criminal proceedings. The Explanatory Memorandum described those provisions as complex and stated that the effect of their repeal would be that ASIC would be required to commence fresh proceedings to obtain a civil penalty order where a criminal prosecution had failed. The CLERP Act also amended pt 9.4B to enable a corporation to apply for a compensation order independently of ASIC.

700 The CA made only minor amendments to pt 9.4B. Further minor amendments were made to the Part by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth). Those amendments are not relevant to the issues to be determined in this appeal.

The interpretation of pt 9.4B

701 As has been mentioned, the Second SOC was apparently pleaded on a mistaken view that Mr Viscariello had standing to apply for a declaration under s 1317E. Somewhat surprisingly, the limitation imposed by s 1317J has been overlooked in several cases but the effect of s 1317E, read with s 1317J, is clear - only ASIC has standing to seek a declaration of contravention under s 1317E.

702 A declaration of contravention made under that section is a necessary precondition for making a pecuniary penalty order under s 1317G. The declaration conclusively establishes the contravention and the essential facts of the contravention for that purpose.

703 Section 1317G is the only section of pt 9.4B that expressly provides that a declaration of contravention must be made before some other statutory remedy can be granted in respect of a contravention of a civil penalty provision.[329]

704 The relationship between s 1317E and s 1317H was considered by Bergin J in *One.Tel Ltd (in liq) v Rich.*[330] Her Honour held that it was not necessary for a court to make a declaration under s 1317E as a preliminary step to making a compensation order under s 1317H. Accordingly, a corporate entity could commence proceedings for a compensation order under s 1317H without ASIC being joined as a party, and a court could order compensation without making a declaration of contravention under s 1317E. That was notwithstanding that compensation could only be ordered on proof of a contravention and s 1317E required a court to make a declaration where a contravention had been established. Her Honour considered that s 1317E was confined to cases in which ASIC was the applicant and did not operate where a corporation was the applicant under s 1317H. We agree with the interpretation of pt 9.4B adopted by Bergin J in *One.Tel*.[331]

705 Mr Macks complained that the Primary Judge had not referred to the various authorities that confirmed (if confirmation was necessary) that the effect of s 1317J was that only ASIC could obtain a declaration of contravention under s 1317E.[332] It was submitted that the making of the Declarations was inconsistent with those authorities. However, the cases to which Mr Macks referred did not consider the issue of whether a court could make a declaration that a corporate officer had contravened a civil penalty provision pursuant to some source of power other than the CA. Accordingly, the Primary Judge's conclusion, and cases that only considered the limitations imposed by s 1317J, are not necessarily inconsistent.

Other remedies for contravention of a civil penalty provision

706 The provisions of pt 9.4B do not exhaust the orders that can be made under the CA on proof of a contravention of a civil penalty provision. A court may also make orders in respect of particular civil penalty provisions pursuant to ss 206C, 206E, 588M and 961M.

707 As has already been noted, a disqualification order can only be made under s 206C on an application by ASIC. The power to make the order under that section is conditional upon a declaration having been made under s 1317E. A disqualification order made under s 206E does not require a declaration of

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[329] Refund orders (s 1317GA) and compensation orders (ss 1317H, 1317HA and 1317HB) do not expressly require a declaration of contravention to have first been made under s 1317E.

[330] *One.Tel Ltd (in liq) v Rich* [2005] NSWSC 226; (2005) 53 ACSR 623.

[331] *One.Tel Ltd (in liq) v Rich* [2005] NSWSC 226; (2005) 53 ACSR 623.

[332] For example, *One.Tel Ltd (in liq) v Rich* [2005] NSWSC 226; (2005) 53 ACSR 623 and *Fodare Pty Ltd v Shearn* [2010] NSWSC 737.

contravention to have been made under s 1317E. However, only ASIC can apply for an order under s 206E.

708 Section 588M applies where a person has contravened s 588G(2) or s 588G(3). The effect of s 588G is to impose a duty on directors to prevent a company incurring debts while insolvent. Section 588G(2) is a civil penalty provision that applies to a person who fails to prevent the company from incurring a debt in the circumstances identified in s 588G(1); s 588G(3) creates an offence of insolvent trading. Section 588M enables a liquidator or a creditor to recover the amount of any loss or damage suffered as a consequence of a person contravening s 588G(2) or s 588G(3). The liquidator or creditor is required to prove the contravention of s 588G but the court may make a compensation order regardless of whether a civil penalty order has been made against the defaulting director.

709 Section 961M enables a client to recover loss or damage caused by a contravention of the provisions of div 2, pt 7.7A of the CA. Section 961K provides that a financial services licensee contravenes the section if the licensee, or a representative of the licensee, contravenes various obligations imposed by div 2 on financial service providers. An order under s 961M can be made on an application by ASIC or the client or by the court on its own initiative. The order may be made regardless of whether a civil penalty order has been made in respect of the contravention. The applicant is required to establish the contravention by the financial services licensee but a declaration of contravention under s 1317E is not a necessary precondition.

Sections 180 - 182: A statutory cause of action?

710 The Queensland Court of Appeal held in *McCracken v Phoenix Constructions (Qld) Pty Ltd*[333] that s 1324(10) CA did not give rise to an action for damages by a creditor against a director of a company for breach of ss 180 - 183. Fraser JA (with whom White JA and Applegarth J agreed) referred to observations by Perry J in *Executor Trustee Australia Ltd v Deloitte Haskins & Sells* to the effect that the focus of the equivalent provision in the *Companies (SA) Code* was on the power to grant injunctions rather than the creation of a right to damages.[334] Fraser JA considered that it would be difficult to reconcile a construction of s 1324(10) that permitted the recovery of damages with the provisions of pt 9.4B. Such a construction would, in his Honour's opinion, have made a 'dead letter' of the provisions in pt 9.4B and, arguably, allowed a creditor to make a derivative claim for loss and to thereby prejudice the interests of other creditors and contributories.

711 The Queensland Court of Appeal in *Day v Woolworths Ltd*[335] relied on its decision in *McCracken*[336] to hold that a plaintiff who claimed to have been

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[333] *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2012] QCA 129; (2013) 2 Qd R 27.
[334] *Executor Trustee Australia Ltd v Deloitte Haskins & Sells* [1996] 22 ACSR 270.
[335] *Day v Woolworths Ltd* [2016] QCA 337.

injured when she slipped on the floor of a supermarket could not pursue a claim against the directors of the defendant company for breach of duties allegedly owed under ss 180 - 183 CA. Jackson J (with whom McMurdo P and Philippides JA agreed) concluded that:[337]

> There is no statutory cause of action conferring a right to damages or compensation upon a third party in the plaintiff's position for breach of an officer's general duties under ss 180(1) or 181(1). There are two reasons. First, loss suffered by a third party such as the plaintiff is not loss 'suffered by the corporation' within the meaning of s 1317H(1). Second, only ASIC or the corporation may apply for a compensation order under s 1317J. Properly construed, ss 180(1) and 181(1) do not create a private cause of action for damages for breach other than where an expressed provision of the CA provides for it. This view is consistent with *McCracken v Phoenix Constructions (Qld) Pty Ltd*.

Section 185

712 The statutory duties imposed on a director or other corporate officers by ss 180 - 182 CA are, in substance, the same as the duties owed by company officers under general law. However, the relief available for a breach of duty may differ. For example, different rules of attribution/causation will apply to a claim for compensation under s 1317H and a claim for compensation in equity. Further, there is no statutory equivalent to a restitutionary claim to recover property that has been misappropriated by a corporate officer. Nevertheless, the effect of s 185 CA is that a corporation may make a claim for compensation under s 1317H and a claim for relief under general law in the same proceedings.

713 Further, there may be cases in which it is appropriate to grant an equitable remedy and make an order under s 1317H because of the different principles of attribution/causation that may apply. In *Grimaldi v Chameleon Mining NL (No 2)* the Full Court of the Federal Court, after referring to s 185 CA, observed that:[338]

> It is, in consequence, open to a corporation to make a claim in equity against a director or officer for an account of profits for breach of fiduciary duty and to claim profits under s 1317H against that person if the conduct in question also contravenes a civil penalty provision. That is what was done against Mr Grimaldi and he was found liable both in equity and for contraventions of the Act.
>
> No orders were made against him either in equity or under s 1317H to compensate Chameleon for actual damage suffered which was caused by his breaches of fiduciary duty or which resulted from the contraventions. The orders made were directed at the profits he (or in the equity proceedings, he and his nominees) made. It is predictable that the profits recoverable in each such claim will to a considerable degree (if not wholly) be the same. What neither the equitable remedy nor s 1317H mandates is double recovery. In consequence to the extent that each of the orders made by his Honour have areas of independent operation (different principles of attribution/causation under the Act and in equity may account for this), the orders each had their own work to do. The orders to that extent are complementary. However, to the extent each order would sweep up profits which would also be caught by the other, they cannot be enforced so as to produce double

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336 *McCracken v Phoenix Constructions (Qld) Pty Ltd* [2012] QCA 129; (2013) 2 Qd R 27.
337 *Day v Woolworths Ltd* [2016] QCA 337 [75].
338 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 [640] - [641].

> recovery … While s 185 countenances cumulative remedies, it does not envisage double recovery.

Lifeplan

714 Mr Macks relied on the decision of Besanko J in *Lifeplan Australia Friendly Society Ltd v Woof*[339] for the proposition that pt 9.4B contained an exclusive code of remedies for a contravention of ss 180 - 182 CA. The issue in that case was whether the applicants should be permitted to file and serve a draft statement of claim that included a plea for 'a declaration within the meaning of s 1317E of the Corporations Act that [one of the respondents] was and is involved, within the meaning of s 79 of the Corporations Act in [the other respondents'] contravention of ss 180 to 183 of the Corporations Act'.

715 After noting that only ASIC could seek a declaration under s 1317E, Besanko J rejected a submission that 'the court's general power to grant declaratory relief in s 21 of the *Federal Court of Australia Act 1976* (Cth) is the source of a power to grant the declaration it seeks'.[340] His Honour stated:[341]

> The Court's power to grant declarations of right is a wide one, but it is limited by the fact that it may only be done 'in civil proceedings in relation to a matter in which it has original jurisdiction'. The relevant matter in which this Court has original jurisdiction is 'with respect to civil matters arising under the Corporations legislation: s 1337B(1) of the *Corporations Act.* A civil matter is defined to mean a matter other than a criminal matter (s 9). Section 1337B(1) is contained in pt 9.6A Division 1 of the *Corporations Act* and that Division operates to the exclusion of s 39B of the *Judiciary Act 1903* (Cth) (s 1337A(2)). Therefore, the source of the court's jurisdiction is ss 76(ii) and 77(i) of the Constitution and the *Corporations Act* itself. Parliament can confer jurisdiction subject to limitations and, in my opinion, that is what it has done. Part 9.4B creates a special regime for the type of declaration it identifies. As I have said, there is a time limit, provision for rules of evidence and procedure, the removal of any discretion in the court to refuse to make a declaration, provisions dealing with the form of a declaration of contravention and a conclusive evidence provision. Importantly, a declaration of contravention is a precondition to the imposition by order of the court of a pecuniary penalty and furthermore, it may lead to disqualification of a person from managing a corporation. It is in that context that Parliament has addressed the entities who may apply for various forms of relief specified in Part 9.4B including a provision that only ASIC may apply for a declaration of contravention. The applicants' submission that s 1317J goes no further than creating a freestanding cause of action in ASIC breaks down when the clear terms of s 1317J(1) and (4) are considered:
>
> …
>
> In my opinion, the general jurisdiction conferred by s 1337B(1) is constrained or limited by the express terms of s 1317J read in the context of Part 9.4B as a whole. The lack of jurisdiction to make a declaration of contravention on the application of a party other than ASIC is not overcome by deleting the reference in the claim for relief of the words, 'within the meaning of s 1317E of the Corporations Act'.

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339 *Lifeplan Australia Friendly Society Ltd v Woof* [2013] FCA 613.
340 *Lifeplan Australia Friendly Society Ltd v Woof* [2013] FCA 613 [36].
341 *Lifeplan Australia Friendly Society Ltd v Woof* [2013] FCA 613 [37] - [38].

716 The applicants' claims were subsequently tried before Besanko J. His Honour held that the respondents had contravened ss 180 - 183 CA and duties that they owed under general law. His Honour made declarations in respect of the respondents' breaches of their fiduciary duties (that is, under general law) pursuant to the power conferred on the Federal Court by s 21 of the *Federal Court of Australia Act*.

Other authorities

717 The question of whether pt 9.4B contains an exclusive and exhaustive code of remedies for contraventions of the civil penalty provisions of the CA was considered by Young J (as his Honour then was) in *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)*.[342] The issue in that case was whether the plaintiff had standing to seek an injunction under s 1324 of the *Corporations Law* to restrain a company officer from acting in breach of s 232(2).

718 Young J held that, subject to one qualification, the provisions of pt 9.4B formed an exclusive set of remedies for dealing with contraventions of s 232 so that s 1324 did not apply. The qualification to that conclusion was that ASIC, or another person authorised by s 1317EB of the *Corporations Law* to obtain a civil penalty order, could apply for an injunction under s 1324 in aid of the rights conferred by pt 9.4B.[343]

719 Wheeler J noted in *Emlen Pty Ltd v St Barbara Mines Ltd*[344] that the correctness of the 'narrow interpretation' of s 1324 adopted by Young J in *Mesenberg*[345] had been queried in the eighth edition of *Ford's Principles of Corporations Law*.[346] Her Honour held that the decision in *Mesenberg*[347] was 'not so plainly correct that a contrary conclusion is unarguable'.[348] However, that observation was made for the purpose of determining the plaintiff's standing to seek an interlocutory injunction, with her Honour concluding that it was sufficient for that purpose that the plaintiff had an arguable case as to standing.

720 There are other decisions that have cast doubt on the correctness of the interpretation of s 1324 adopted by Young J.[349] In *Idylic Solutions Pty Ltd; Re*

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[342] *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* [1996] 39 NSWLR 128; (1996) 19 ACSR 483.

[343] *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* [1996] 39 NSWLR 128; (1996) 19 ACSR 483, 491.

[344] *Emlen Pty Ltd v St Barbara Mines* (1997) 24 ACSR 303.

[345] *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* [1996] 39 NSWLR 128; (1996) 19 ACSR 483, 488 - 489.

[346] Ford HA, Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (8th ed, 1997) [11.365].

[347] *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* [1996] 39 NSWLR 128; (1996) 19 ACSR 483.

[348] *Emlen Pty Ltd v St Barbara Mines Ltd* (1997) 24 ACSR 303, 306.

[349] For example, Einfeld J in *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 23 ACSR 715 considered that the interpretation was inconsistent with the plain wording of s 1324.

Australian Securities and Investments Commission v Hobbs,[350] ASIC alleged that the defendants had breached various provisions of the CA and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). ASIC sought declarations of contravention, disqualification orders and pecuniary penalties. The declarations were for alleged contraventions of civil penalty provisions and other sections of the CA and the ASIC Act.

721 Ward JA held that the court had a discretion on whether to make declarations in respect of conduct that contravened sections of the CA and the ASIC Act that were not civil penalty provisions. Her Honour exercised that discretion according to the principles that ordinarily apply to a claim for declaratory relief. Declaratory relief was granted in two forms: declarations that were expressed to be pursuant to s 1317E and declarations made pursuant to the court's jurisdiction under s 75 of the *Supreme Court Act 1970* (NSW) (the equivalent of s 31 of the *Supreme Court Act*).

722 ASIC also sought orders restraining the defendants from carrying on a business in relation to financial products or services or from being involved in the carrying on of a financial services business. Section 1101B provides that the court may make certain orders in respect of a contravention of the provisions of ch 7 of the CA (that chapter contains s 1041E, s 1041G and s 1041H). Disqualification orders were made against a number of the defendants pursuant to that section on findings that they had contravened provisions in ch 7. However, ASIC sought a disqualification order under s 1324 in respect of a defendant who had not contravened ch 7. It was contended on behalf of that defendant that s 1101B operated as a code for the making of disqualification orders so that an order could not be made under s 1324 CA.

723 Ward JA referred to the decision of Young J in *Mesenberg*[351] in that context, noting that his Honour had recognised that there was a limited right of recourse to s 1324 notwithstanding pt 9.4B, and that the decision only concerned alleged contraventions of s 232 and not other provisions of the *Corporations Law*. Her Honour also referred to the decision of Perram J in *Mercedes Holdings Pty Ltd v Waters (No 2)*[352] and Einfeld J in *Airpeak*[353] and concluded that on a proper construction of s 1101B, the court retained power to make orders under s 1324 disqualifying a person from conducting a financial services business. The section did not suggest that disqualification orders in respect to financial services could not be made under other sections where the defendant had contravened provisions of the CA other than those contained in ch 7. If the interpretation

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[350] *Idylic Solutions Pty Ltd; Re Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106; (2013) 93 ACSR 421.

[351] *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* [1996] 39 NSWLR 128; (1996) 19 ACSR 483.

[352] *Mercedes Holdings Pty Ltd v Waters (No 2)* (2010) 78 ACSR 118.

[353] *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 23 ACSR 715.

adopted in *Mesenberg*[354] was correct, it was confined to a contravention of s 232 of the *Corporations Law*.

724 In *Mercedes Holdings*,[355] the unit holders of a listed property trust claimed that the officers of the responsible entity had breached duties imposed by s 601FD(3) CA. That section is not a civil penalty provision, although s 601FD(1) is such a provision. Some of the defendants contended that the contraventions alleged against them were pursuant to s 601FD(1) rather than s 601FD(3). Perram J rejected that submission but, in doing so, his Honour also considered a further submission that 'the compensation regime revealed by pt 9.4B is an exhaustive code setting out all and the only ways in which compensation may be recovered for a breach of a civil penalty provision'.[356] Although his Honour stated that he rejected the proposition that pt 9.4B provided the only means by which compensation could be obtained for a contravention of a civil penalty provision, the decision actually turned on the express wording of ss 601M and 1325 CA (which referred to ch 5 of the CA). There was no further explanation offered for the conclusion that pt 9.4B was not the only means for obtaining compensation for a contravention of a civil penalty provision.

725 It should also be noted that there have been decisions in which courts, including the Federal Court, have declared that a person has contravened ss 180 - 183.[357]

726 Declarations that a party had contravened a civil penalty provision were sought in *Edenden v Bignell*[358] and *Smith v Bone (No 2)*.[359] Barrett and Gleeson JJ respectively noted that the court could not make the declarations under s 1317E but went on to consider whether they should be granted in the court's general jurisdiction. A declaration was refused in each instance on grounds of utility but their Honours did not suggest that the court lacked power under the statutory equivalents of s 31 of the *Supreme Court Act* or in the court's inherent jurisdiction to grant such relief.

727 The Full Court of the Federal Court in *Australian Securities & Investments Commission v Wellington Capital Ltd*[360] declared that the respondent had contravened s 601FB(1) CA. The court did not expressly identify the power pursuant to which the declaration was made but s 601FB(1) is not a civil penalty

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354 *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* [1996] 39 NSWLR 128; (1996) 19 ACSR 483.

355 *Mercedes Holdings Pty Ltd v Waters (No 2)* (2010) 78 ACSR 118.

356 *Mercedes Holdings Pty Ltd v Waters (No 2)* (2010) 78 ACSR 118 [21].

357 See, for example, *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)* [2010] FCA 624; *Freedom Motors Australia Pty Ltd v Vaupotic* [2003] NSWSC 579; *Brentwood Village Limited (in liq) v Terrigal Grosvenor Lodge Pty Ltd (No 4)* [2016] FCA 1359; *Re S&D International Pty Ltd (No 4)* [2010] VSC 388; *Re S&D International Pty Ltd (No 5)* [2011] VSC 30.

358 *Edenden v Bignell* [2007] NSWSC 1122.

359 *Smith v Bone (No 2)* [2015] FCA 389; (2015) 106 ACSR 560.

360 *Australian Securities & Investments Commission v Wellington Capital Ltd* [2013] FCAFC 52; (2013) 94 ACSR 293.

provision so s 1317E could not have applied. The court considered that it was appropriate to make the declaration to mark its disapproval of the respondent's conduct and because the scheme constitution in issue was in a common form.

728 The respondent appealed to the High Court.[361] The plurality (French CJ, Crennan, Kiefel and Bell JJ) also did not identify the power by which the declaration had been made by the Full Court. However, their Honours concluded that the declaration was 'a correct statement of the legal position'; was appropriate for the reasons given by the Full Court and accordingly, should not be disturbed.[362]

729 The plurality also noted that the declaration had stated that the appellant had contravened s 602FB(1) and that the term 'contravene' was used in the CA, although not exhaustively, to designate non-compliance with a civil penalty provision. In a footnote to that observation their Honours stated:[363]

> The *Corporations Act* also refers in places to contravention of provisions which are not civil penalty provisions. For example, s 1101B(1) provides that a court may make such orders as it thinks fit on the application of ASIC if it appears to the court that a person has contravened a provision of Ch 7 or any other law relating to dealing in financial products or providing financial services. Such orders would presumably include declarations of such contraventions. However, the Corporations Act does not use the term 'contravene' in relation to s 601FB(1).

730 Although those comments referred to an application by ASIC in respect of a contravention of a section of the CA that was not a civil penalty provision, s 1101B(1) permits a court to make orders on the application of other parties and ch 7 of the CA includes provisions that are civil penalty provisions. In particular, s 1101B(1) permits a court to make such orders as it thinks fit on the application of a person aggrieved by an alleged contravention by another person of s 798H(1). Section 798(H)(1) is a civil penalty provision. There is nothing in the wording of s 1101B(1), or in the comments of the plurality in *Wellington Capital*,[364] to suggest that a court could not, if it thought fit, declare pursuant to s 1101B(1) that a person had contravened s 798(H)(1) on the application of a person who was aggrieved by the contravention. Such a declaration would not, of course, carry with it the consequences provided for by pt 9.4B in respect of a declaration of contravention made under s 1317E.

731 Gageler J, in separate reasons, merely noted that no issue had been taken in the appeal with the jurisdiction of the Full Court to make the declaration under s 21 FCAA. That observation does not appear to have been intended to cast doubt

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[361] *Wellington Capital Ltd v Australian Securities & Investments Commission* [2014] HCA 43; (2014) 254 CLR 288.

[362] *Wellington Capital Ltd v Australian Securities & Investments Commission* [2014] HCA 43; (2014) 254 CLR 288 [40].

[363] *Wellington Capital Ltd v Australian Securities & Investments Commission* [2014] HCA 43; (2014) 254 CLR 288 [10], see footnote 24.

[364] *Wellington Capital Ltd v Australian Securities & Investments Commission* [2014] HCA 43; (2014) 254 CLR 288.

on the court's power as his Honour continued, '[n]o occasion therefore arises to consider whether the same or a similar declaration might have been made under one or more provisions of the *Corporations Act'*,[365] with his Honour referring in a footnote to sections of the CA that might have applied (the examples given were ss 1101B(1)(a)(i) and 1317E(1)(f) read with ss 601FC(1)(k)(m) and 101FC(5)).

732 Finally, the decision in *McCausland v Surfing Hardware International Holdings Pty Ltd [No 2]*[366] should be noted. In that case, Slattery J found that some of the defendants had engaged in oppressive conduct within the meaning of s 232 CA and had breached a contract for the transfer of shares. The plaintiffs sought and obtained declarations in respect of each of those matters, with his Honour holding that:

- The declarations were not merely a step on the way to awarding damages. Parliament intended in s 75 of the *Supreme Court Act 1970* (NSW) that the court should be able to make declarations without consequential relief and that this was a 'large and most useful jurisdiction'.[367]

- The proposed declarations did not fall within any of the categories identified by Brereton J in *Commonwealth of Australia v BIS Cleanaway*[368] where the court will generally decline, as a matter of discretion, to exercise its 'undoubted power' to make a declaration.

- The declarations concerned matters that were not purely the theoretical and which had identifiable consequences - the award of compensation under s 233 CA and damages for breach of contract.[369]

Disposition - ground 1

The approach

733 The focus of Besanko J in *Lifeplan* was on the availability of relief under pt 9.4B, an issue that was resolved by the terms of s 1317J. Although not entirely clear, it appears that his Honour had in mind a declaration of contravention that had the consequences provided for by pt 9.4B in stating that '[t]he lack of jurisdiction to make a declaration of contravention on the application of a party other than ASIC is not overcome by deleting the reference in the claim for relief to the words within the meaning of s 1317E of the *Corporations Act'*.[370]

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365 *Wellington Capital Ltd v Australian Securities & Investments Commission* [2014] HCA 43; (2014) 254 CLR 288 [57].
366 *McCausland v Surfing Hardware International Holdings Pty Ltd [No 2]* [2014] NSWSC 163.
367 Adopting the often cited observation of Barwick CJ in *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 287, 305.
368 *Commonwealth of Australia v BIS Cleanaway Ltd* [2007] NSWSC 1075; (2007) 214 FLR 271.
369 *McCausland v Surfing Hardware International Holdings Pty Ltd [No 2]* [2014] NSWSC 163 [15] – [17].
370 *Lifeplan Australia Friendly Society Ltd v Woof* [2013] FCA 613 [38].

734 In any event, his Honour did not expressly consider whether the provisions of pt 9.4B impliedly excluded the court's power under s 21 FCAA to declare that a corporate officer had contravened a civil penalty provision (a declaration that would not entail any of the consequences provided for by pt 9.4B); or, if that issue was considered, his Honour did not explain why pt 9.4B had that effect as a matter of statutory construction.

735 The statement that the court's power to grant declaratory relief is 'only limited by its own discretion', which was adopted by King CJ in *JN Taylor Holdings Ltd*,[371] was taken from the judgment of Lord Sterndale MR in *Hanson v Radcliffe Urban District Council*.[372] Gibbs J also endorsed that statement in *Forster v Jododex*, with his Honour then noting that:[373]

> However, the jurisdiction may be ousted by statute, although the right of a subject to apply to the court for a determination of his rights will not be held to be excluded except by clear words: *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 at 268.

736 In our view, this reflects the approach to be adopted in determining whether the Primary Judge erred in holding that the court had jurisdiction to make the Declarations pursuant to s 31 of the *Supreme Court Act*. The question is whether the provisions of pt 9.4B, or more generally the CA, impliedly exclude the wide powers to grant declaratory relief conferred on the court by s 31 of the *Supreme Court Act* and the court's inherent jurisdiction – a jurisdiction that is limited only by the requirement that there be a 'matter' between the parties and the 'rules' relating to the power and discretion to grant declaratory relief to which reference has been made above.

737 As has been noted, Mr Macks argued to the contrary. He contended, in a submission that was reproduced earlier, that the 'starting point was not assumption that s 31 would, but for the potential operation of the Constitution or the *Judiciary Act* would apply. The proceeding invoked federal jurisdiction and thus s 31 could only apply if it was appropriate to be picked up by s 79'. That proposition does not appear to accord with what was said by the plurality (Bell, Gageler, Keane, Nettle & Gordon JJ) in *Rizeq v Western Australia*[374] in describing the emergence of the modern interpretation of s 79 of the *Judiciary Act*. In brief summary, their Honours stated that:

- The purpose of s 79 was to 'adopt the law of the State where federal jurisdiction is exercised as the law by which, except as the Constitution or federal law may otherwise provide, the rights of the

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[371] *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432.
[372] *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490, 507.
[373] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 435 - 436.
[374] *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421.

parties to the *lis* are to be ascertained and matters of procedure are to be regulated'.[375]

– The section operates to take the text of State law and to apply that text as Commonwealth law. Further, the section does not alter the meaning of the text of the State law other than to make that text applicable to a federal court exercising jurisdiction in the State.[376]

– By making State law 'binding' on courts exercising federal jurisdiction, s 79 of the *Judiciary Act* takes the text of State laws confirming or governing powers that State courts have when exercising State jurisdiction and applies that text as Commonwealth law to confer or govern powers that State courts and federal courts have when exercising federal jurisdiction.[377]

738 The first of those propositions suggests that the 'starting point' for s 79 is the adoption of State law unless the Constitution or Commonwealth law otherwise provides. That necessarily involves an exercise of statutory construction: does the Commonwealth law otherwise provide by excluding the State law in issue? The 'test' to be applied in determining whether a law of the Commonwealth otherwise provides is further considered below.

739 As to the third of the propositions stated above by reference to *Rizeq*,[378] the plurality gave as an example, the decision in *Forge v Australian Securities and Investment Commission.*[379] In that case, the High Court held that s 79 operated to 'pick up' and apply s 1317EA of the *Corporations Law* (NSW) (which applied as a law of New South Wales) to the Supreme Court of New South Wales when exercising federal jurisdiction under s 39(2) of the *Judiciary Act.* The plurality in *Rizeq*[380] noted that s 1317EA was described in *Forge*[381] as a provision conferring a 'power … to grant remedies'.[382] On the other, s 79 was not needed to, nor did it operate to, pick up substantive provisions of the CA, in that case ss 232 and 243ZE.

Excluding jurisdiction

740 As has been noted, Gibbs J observed in *Forster v Jododex*[383] that clear statutory wording is required to oust the court's jurisdiction to grant declaratory relief. His Honour referred to *Pyx Granite Co Ltd v Ministry of Housing and*

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375 *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421 [80] (adopting what was said in *Commissioner of Stamp Duties (NSW) v Owens (No 2)* (1953) 88 CLR 168).
376 *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421 [81].
377 *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421 [87].
378 *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421.
379 *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45.
380 *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421.
381 *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45.
382 *Rizeq v Western Australia* [2017] HCA 23; (2017) 344 ALR 421 [88].
383 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 437 - 438.

Local Government.[384] The observation of Viscount Simonds in *Anisminic Ltd v Foreign Compensation Commission* that '[i]t is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded accept by clear words'[385] is to similar effect.

741 That is not to say that a statute cannot, by implication, exclude the court's general jurisdiction to grant declaratory relief. However, the implication must be necessary to give effect to the clear intent of the Legislature.[386] As Pincus J noted in *Yates Security Services Pty Ltd v Keating*,[387] 'modern instances of the exclusion (by mere implication) of the jurisdiction to grant declaratory relief are difficult to find'.[388] His Honour also observed that '[a]bsent an express exclusion, it can hardly ever be shown that the provision of a specific mode of proceeding in a statute removes the jurisdiction of superior courts to grant declarations'.[389] Nevertheless, one way in which legislation may impliedly exclude the court's general jurisdiction to grant declaratory relief is by indicating a special procedure to be followed in order to enforce a right. Whether a statute has that effect will depend on the nature of the right, the procedure that is prescribed and the provisions of the Act read as a whole.

The scheme of the CA

742 Several aspects of the CA are relevant to the question of whether the Act, by implication, excludes the court's general jurisdiction to grant declaratory relief for a breach of a civil penalty provision:

- The civil penalty provisions of the CA include statutory duties that are, in substance, the same as duties imposed on the officers of a corporation under general law - most relevantly, the duties imposed by ss 180 - 182. However, a number of civil penalty provisions impose statutory obligations for which there is no general law analogue.

- The statutory duties imposed by ss 180 - 182 CA do not create a statutory cause of action for which a corporation could obtain a monetary or proprietary remedy other than a compensation order under s 1317H. The only claim that a corporation may make to recover loss and damage caused by a contravention of ss 180 - 182 is for a compensation order under s 1317H.

- Section 185 CA preserves the general law relating to the duties owed by corporate officers. Further, the section expressly provides that

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[384] *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260.
[385] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 286.
[386] See for example, *Oil Basins Ltd v Commonwealth of Australia* [1993] 178 CLR 643, 651 (Dawson J).
[387] *Yates Security Services Pty Ltd v Keating* (1990) 98 ALR 68.
[388] *Yates Security Services Pty Ltd v Keating* (1990) 98 ALR 68 [98].
[389] *Yates Security Services Pty Ltd v Keating* (1990) 98 ALR 68 [99].

ss 180 - 184 CA does not prevent civil proceedings for a breach of duty or in respect of the liability of a corporate officer because of their office or employment in relation to a corporation.

– A corporation may allege that it has suffered loss and damage as the result of a contravention of ss 180 - 182 and claim a compensation order under s 1317H without joining ASIC as a party. Further, the corporation may in the same proceedings allege a breach of fiduciary duty and claim general law remedies. Those remedies may be cumulative upon a compensation order under s 1317H, subject to the rule against double recovery. Different rules of causation/attribution may apply to claims for compensation under general law and s 1317H. However, as Brereton J observed in *Re Auzhair Supplies Pty Ltd (in liq)*,[390] the statutory duties imposed by ss 180 - 183 and the remedy allowed under s 1317H are 'practically indistinguishable' from the general law duties owed by corporate officers and the remedy of equitable compensation.[391]

– Only ASIC may apply for a declaration of contravention under s 1317E. An s 1317E declaration is only necessary for a disqualification order under s 206C and a pecuniary penalty order pursuant to s 1317G. Accordingly, such a declaration opens the door to statutory remedies that are only available to ASIC as the corporate regulator.

– The CA empowers the court to make a number of orders in relation to a contravention of a civil penalty provision. The orders that may be made are primarily found in pt 9.4B. However, the provisions of pt 9.4B are not an exhaustive statement of the court's powers in respect of a contravention of a civil penalty provision. Sections 206C, 206E, 558M and 961M expressly empower a court to make orders in relation to contraventions of certain civil penalty provisions. Indeed, not even the consequences of making a declaration of contravention under s 1317E are confined to the provisions of pt 9.4B where an officer has contravened ss 180 - 182 (refer s 206C).

– Further, it would seem that other sections of the CA that confer powers on the court to make orders in respect of contraventions of the Act, such as s 1101B(1), enable the court to declare that a person has contravened a requirement of the Act, including a requirement that constitutes a civil penalty provision. It may be that, where appropriate, the court could grant declaratory relief ancillary to orders made under provisions such as ss 1324, 1325 (if the declaration formed part of a set of orders to prevent or reduce loss or damage) or 1325A.

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[390] *Re Auzhair Supplies Pty Ltd (in liq)* [2013] NSWSC 1; (2013) 92 ACSR 554.
[391] *Re Auzhair Supplies Pty Ltd (in liq)* [2013] NSWSC 1; (2013) 92 ACSR 554 [76].

– Section 1317J, read with, ss 1317E, 1317G and 206C, reflects a policy that only the corporate regulator should be able to decide whether to pursue 'penal' orders for a contravention of a civil penalty provision.

743 Four points concerning the scheme of the CA are especially relevant to the resolution of the issues raised by ground 1 of the appeal.

744 First, the consequences of a contravention of a civil penalty provision are as provided for by the CA, subject to one qualification. The qualification is that, in our view, a court can declare that a civil penalty provision has been contravened pursuant to the jurisdiction conferred by s 31 of the *Supreme Court Act*. The reasons for that qualification *reflect the nature of declaratory relief*. The civil penalty provisions of the CA do not create causes of action for which common law or equitable remedies are generally available. As has been noted, a corporation may in a single proceeding claim compensation pursuant to s 1317H for a contravention of ss 180 - 183 and equitable compensation for a breach of a fiduciary duty. However, a claim for equitable compensation cannot be made for a contravention of the statutory duties. Subject to the qualification concerning declaratory relief, the statutory duties and remedies are self-contained as Mr Macks contended.

745 Second, the court can make orders of a punitive kind in respect of a contravention of a civil penalty provision – in relation to contraventions of ss 180 - 183, disqualification and pecuniary penalty orders. Plainly, those orders are intended (together with criminal proceedings) to provide statutory powers for the enforcement of the CA and for the punishment of contraventions. Not surprisingly, the power to commence and prosecute proceedings for those orders is vested exclusively in ASIC; the orders form part of the regulatory regime created by the Act.

746 Third, a declaration made under s 1317E is a peculiarly statutory creation:

– The declaration must specify the matters prescribed by s 1317E(2).

– Declarations declare the rights of the parties or a legal position or consequence. However, a declaration made under s 1317E has an evidentiary effect. The purpose of the declaration is to provide conclusive evidence of the matters specified by s 1317E(2).

– The declaration is a necessary pre-condition to ASIC, as the corporate regulator, seeking orders of a punitive kind. Accordingly, a declaration made under s 1317E forms a significant part of the regime created by the CA for regulating compliance with, and enforcement of, civil penalty provisions.

747 Fourth, s 1317E is not an exclusive source of the power conferred by the CA to make declarations, including declarations that, at least, certain civil penalty provisions have been contravened.

748 In our view, the provisions of pt 9.4B and the CA as a whole do not exclude, by necessary implication, the court's power to grant declaratory relief under s 31 of the *Supreme Court Act* when the scheme of the CA and the particular aspects of the scheme that have been highlighted above are considered. A declaration made in the court's general jurisdiction that a civil penalty provision has been contravened does not cut across or conflict with the court's power under s 1317E nor does it undermine the regulatory and enforcement objectives that are embodied in pt 9.4B. Provided that the applicant has a sufficient or real interest in obtaining declaratory relief, a power to declare that a civil penalty provision has been contravened that is wider than the particular statutory power conferred by s 1317E promotes compliance with, and the enforcement of, the duties and obligations imposed by the CA. As cases such as *Purcom No 34 (No 2)*[392] demonstrate, such a power may also facilitate the proper administration of justice. Critically, it is not necessary for an applicant for declaratory relief to possess a cause of action to demonstrate that they have a sufficient interest in the subject matter of the declaration to establish standing and the court has jurisdiction notwithstanding the lack of a cause of action.

749 Accordingly, we do not consider that the court's power to make declarations under s 31 of the *Supreme Court Act* that civil penalty provisions such as ss 180 - 182 have been contravened has been impliedly excluded by provisions of pt 9.4B or the CA considered as a whole. It is not necessary to construe pt 9.4B, or more generally the CA, as impliedly excluding the court's power under s 31 to give proper effect to the wording and objects of the Act.

750 As has been noted, the conclusion we have reached qualifies the scheme created by the CA by which remedies for a breach of its provisions are to be found within the Act. The qualification reflects the nature of declaratory relief. A contravention of a civil penalty provision does not create right of action at common law or a claim in equity; at most, it creates a statutory cause to the extent permitted by pt 9.4B or other provisions of the CA such as ss 1101B(1) and 1324. However, the right to apply for a declaration, and the court's powers on the application, are not contingent upon the existence of a cause of action and the possibility of consequential relief.

751 The conclusion we have reached also focusses on the special nature and purpose of a declaration of contravention made under s 1317E. As the Primary Judge noted, it is a particular form of statutory declaration that is intended to facilitate the enforcement of civil penalty provisions by ASIC. However, a declaration under s 1317E is only required for making a disqualification order or a pecuniary penalty order – orders that only ASIC may claim. It is not apparent

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[392] *Parker, In the matter of Purcom No 34 Pty Ltd (in liq) (No 2)* [2010] FCA 624.

why Parliament would have intended that a power to grant declaratory relief in relation to contraventions of numerous provisions of the CA would be so circumscribed.

752 Further, courts have on occasions granted declaratory relief pursuant to the statutory power conferred by provisions such as s 31 of the *Supreme Court Act* in respect of contraventions of provisions of the CA that are not civil penalty provisions and it appears that a court may make declarations pursuant to provisions of the CA such as s 1101B(1). It is not apparent why Parliament would have intended that the CA would limit the power to make declarations in respect of contraventions of a civil penalty provision but leave intact the power of a court to grant declaratory relief in relation to other matters arising under the CA either pursuant to the court's general statutory powers or under other sections of the CA. Rather, the provisions of pt 9.4B suggest that it is only the power to make a declaration that has the effect provided for by that section - in particular, s 1317F - that is quarantined.

753 Although Mr Macks at times emphasised that the question to be determined was whether the CA construed as a whole exclusively and exhaustively provided for the consequences of a contravention of a civil penalty provision, his argument necessarily drew heavily on the proposition that pt 9.4B was an exclusive code of remedies. For example, the argument commenced with the observation that pt 9.4B was headed 'Civil consequences of contravening civil penalty provisions' and there were a number of references to pt 9.4B being a code. We accept that the Part might be described as a code in that it provides a unique set of statutory consequences for a contravention of a civil penalty provision. However, that does not necessarily mean that the Part exhausts a court's power to grant remedies in respect of a contravention. Self-evidently the Part does not have that effect as other provisions of the CA provide for remedies where certain civil penalty provisions have been contravened. We do not consider that the provisions of pt 9.4B were intended to govern how those powers are to be interpreted and applied and we do not accept that the decision in *Mesenberg*[393] is correct to the extent that Young J suggested otherwise.

754 The conclusion we have reached is consistent with the approach taken in the authorities mentioned above (apart from the decision of Besanko J in *Lifeplan*) - in particular, with those cases where courts have declared in their general jurisdiction that a person has contravened a civil penalty provision such as ss 180 – 182 and with the approach that has generally been taken to granting declaratory relief in respect of matters arising under the CA.

755 As we explained, it appears that his Honour's focus in *Lifeplan* was on the question of who had standing to claim a declaration of contravention that had the effect provided for by s 1317E.

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[393] *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* [1996] 39 NSWLR 128; (1996) 19 ACSR 483.

Section 109 of the Constitution and s 79 of the Judiciary Act

756 The court was exercising federal jurisdiction in determining whether Mr Macks had contravened provisions of the CA. Accordingly, s 31 of the *Supreme Court Act* could not apply of its own force in conferring power on the court to make the Declarations. As Gummow J explained in *APLA Ltd v Legal Services Commissioner of New South Wales*:[394]

> [T]he exclusivity of the powers of the Parliament with respect to the conferring, defining and investing of federal jurisdiction (found in s 77 and supported by ss 78, 79 and 80) has the consequence, well recognised in the authorities, that the laws of a State with respect to limitation of actions and other matters of substantive and procedural law which are 'picked up' by s 79 of the Judiciary Act, could not directly and of their own force operate in the exercise of federal jurisdiction. This generally results from an absence of State legislative power rather than the operation of s 109 of the Constitution with respect to the exercise of concurrent powers.

757 The issue in *Gordon v Tolcher*[395] was whether the *District Court Rules 1973* (NSW) were picked up by s 79 of the *Judiciary Act* so as to apply to proceedings commenced by a liquidator under s 588FF CA. The court observed:[396]

> Section 5E of the *Corporations Act* states an intention not to exclude or limit the concurrent operation of any State law provided there is no direct inconsistency. However, that provision has no significance in the present case. Of their own force the Rules had no application to the exercise of federal jurisdiction by the District Court; hence the occasion for the operation of s 79.

758 Accordingly, the issue raised by ground 1 of the appeal is not whether there was s 109 inconsistency between s 31 of the *Supreme Court Act* and the CA but rather, whether s 31 of the *Supreme Court Act* was picked up and applied by s 79 of the *Judiciary Act*. That was ultimately the position adopted by Mr Macks and the Attorney-General.

759 The significance of that appears to have only been appreciated by the parties late in the exchange of their written submissions in the appeal. Consequently, considerable attention was paid to the question of whether there was s 109 inconsistency. We would have found that there was no inconsistency had it been necessary to determine that issue given the view that we take of the proper construction of the CA. Section 5E seeks to preserve the concurrent operation of State law and the CA. The effect of such a provision was explained by Mason J (with whom Gibbs, Stephen & Jacobs JJ agreed):[397]

> The Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling a

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394 *APLA Ltd v Legal Services Commissioner of New South Wales* [2005] HCA 44; (2005) 224 CLR 322 [230].

395 *Gordon v Tolcher* [2006] HCA 62; (2006) 231 CLR 334.

396 *Gordon v Tolcher* [2006] HCA 62; (2006) 231 CLR 334 [30].

397 *Re Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 545, 563 - 564.

> State's laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.
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> It is of course by now well established that a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed … but where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration would be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive.

760 There were differences between the parties regarding the principles to be applied in determining whether a law of the Commonwealth otherwise provides for the purpose of s 79 of the *Judiciary Act*. The Attorney-General contended that the test was one of 'repugnancy whereby a Commonwealth law will only "otherwise provide" in circumstances where the State law to be picked up is "irreconcilable" with the Commonwealth law'.[398] The test was said to be analogous to the test of whether a statute has impliedly repealed an earlier statute because State law that is picked up by s 79 is applied as federal law.

761 Mr Macks characterised that approach as involving a narrow test derived from observations made by Fullagar J in *Butler v Attorney-General (Vic).*[399] It was submitted that more recent authority had endorsed a wider approach: whether federal law was 'complete upon its face' so as to 'leave no room' for State law to be picked up.[400] It was submitted the CA 'otherwise provided' on that test as it was complete on its face with respect to the consequences of contraventions of civil penalty provisions such as ss 180 - 182.

762 Mr Macks referred to *R v Gee*[401] and *Bui v Director of Public Prosecutions (Cth)*[402] in support of his submissions concerning the application of s 79 of the *Judiciary Act*. In *Gee*,[403] McHugh and Gummow JJ concluded that statements that had been made about the interpretation of s 79 in *Seaegg v The King*[404] should no longer be accepted. Their Honours gave several reasons for that conclusion, including that:[405]

> Thirdly, some useful analogy is provided by the reasoning in cases such as *Deputy Commissioner of Taxation v Moorebank Pty Ltd*. Provisions such as s 64, s 68(2) and

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398 'Supplementary summary of argument of the Attorney-General', par 7.
399 *Butler v Attorney-General (Vic)* (1961) 106 CLR 268.
400 'Propositions to be advanced in reply to submissions of Attorney-General', par 6(b).
401 *R v Gee* [2003] HCA 12; (2003) 212 CLR 230.
402 *Bui v Director of Public Prosecutions (Cth)* [2012] HCA 1; (2012) 244 CLR 638.
403 *R v Gee* [2003] HCA 12; (2003) 212 CLR 230.
404 *Seaegg v The King* (1932) 48 CLR 251.
405 *R v Gee* [2003] HCA 12; (2003) 212 CLR 230 [62].

> s 79 of the *Judiciary Act* do not operate to insert a provision of State law into a Commonwealth legislative scheme which is 'complete upon its face' where, on their proper construction, those federal provisions can 'be seen to have left no room' for the picking up of State law. (footnotes omitted)

763 The language employed in that passage was then adopted by the High Court in *Bui*.[406]

764 As McHugh and Gummow JJ acknowledged in *Gee*,[407] the expressions 'complete on its face' and 'leaves no room' were taken from the reasons of the High Court in *Deputy Commissioner of Taxation v Moorebank Pty Ltd*.[408] The question in that case was whether the *Limitation Act 1969* (NSW) applied by reason of s 64 of the *Judiciary Act* to an action by the Deputy Commissioner to recover additional tax. In that context, the High Court observed:[409]

> In particular, where a Commonwealth legislative scheme is complete upon its face, s 64 will not operate to insert into it some provision of State law for whose operation the Commonwealth provisions can, when properly understood, be seen to have left no room. Accordingly, the question arises whether the relevant provisions of the Assessment Act have effectively covered the field and left no room for the direct or indirect intrusion of provisions of State Limitation Acts to limit the time in which an action can be brought on behalf of the Commissioner of Taxation for unpaid income tax or additional tax. It can be said at once that the provisions of the Assessment Act dealing with liability for and recovery of additional tax are so dependent upon and interwoven with the provisions dealing with liability for and recovery of income tax that it is plain that there will be no room for the application of State limitation provisions to limit recovery of additional tax if there is no room for the application of such provisions in relation to the recovery of income tax.

765 We doubt whether the High Court in *Butler*[410] or *Moorebank*[411] or *Gee*[412] intended to prescribe a 'test' for determining whether a law of the Commonwealth law otherwise provided for the purpose of s 79 of the *Judiciary Act*. Rather, the court appears to use different language on occasions to convey the limits imposed by the section. However, it is unnecessary for us to further consider that issue in light of the findings we have made about the proper construction of the CA.

766 It must be emphasised that the application of s 79 involves a question of construction regardless of whatever language is employed to describe its operation. Whether the CA 'covers the field' or is 'complete on its face' so as to 'leave no room' for a State law such as s 31 of the *Supreme Court Act* or whether s 31 is irreconcilable with the CA requires the court to consider, in effect, whether the CA expressly or impliedly excludes the section - whether, as

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406 *Bui v Director of Public Prosecutions (Cth)* [2012] HCA 1; (2012) 244 CLR 638 [25].
407 *R v Gee* [2003] HCA 12; (2003) 212 CLR 230.
408 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* [1988] HCA 29; (1988) 165 CLR 55.
409 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* [1988] HCA 29; (1988) 165 CLR 55, 64.
410 *Butler v Attorney-General (Vic)* (1961) 106 CLR 268.
411 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* [1988] HCA 29; (1988) 165 CLR 55.
412 *R v Gee* [2003] HCA 12; (2003) 212 CLR 230.

Mr Macks submits, the CA leaves no room for the application of s 31. The question of whether a Commonwealth statute is complete on its face is not to be determined simply by looking at the Act in isolation to ascertain whether it is apparently comprehensive in its terms.

767 We have concluded that the CA does not have the effect of leaving no room for s 31 of the *Supreme Court Act* to apply where the court has found that a person has contravened a civil penalty provision. That is not an especially surprising outcome given that Parliament was at pains to ensure, as much as legislatively possible, that the CA operated in tandem with State law.

Utility and discretion

768 In our view, it was open to the Primary Judge to conclude that the Declarations should be granted in the exercise of the court's discretion. On the findings that were made, Mr Macks had engaged in conduct that contravened ss 180 - 182 CA and which could be characterised as egregious or, at the very least, sufficiently serious as to warrant the court's disapproval.

769 The Declarations did not concern matters that were purely theoretical - they concerned Mr Macks' conduct as the liquidator of the Companies in circumstances where the relief sought by Mr Viscariello included Mr Macks' removal under s 503 CA. Although the Declarations were not an essential step in making an order under s 503, they had the consequence of identifying the conduct on which the order was based and marking the court's disapproval of that conduct. The Declarations did not fall within any of the categories of cases identified in *BIS Cleanaway*[413] where the court will generally decline to exercise the power to grant declaratory relief. On the findings made by the Primary Judge, they satisfied the requirements for declaratory relief as summarised earlier in these reasons. In particular, by making the Declarations his Honour finally determined issues that were contested and which concerned the performance of duties that were owed by Mr Macks and the exercise of powers that had been vested in Mr Macks as the liquidator of the Companies.

770 The Companies were voluntarily wound up. Accordingly, Mr Macks was not a court appointed officer. However, the fact that Mr Macks is a liquidator is, in our view, relevant to the exercise of the discretion to make the Declarations. Moreover, there would have been no formal record of the basis on which the Primary Judge had held that Mr Macks ought to be removed as the liquidator of the Companies if the Declarations had not been made.

771 The width of the court's power to remove a liquidator under s 503 CA was a reflection of the nature of the office and the functions that are performed by liquidators. Dodds-Streeton J in *Australian Securities and Investment*

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413 *Commonwealth of Australia v BIS Cleanaway Ltd* [2007] NSWSC 1075; (2007) 214 FLR 271.

Commission v Edge[414] explained the nature and functions of the liquidator's office as follows:[415]

> The liquidator's essential functions are to identify, take possession of and realise the company's assets, to investigate and determine the claims against the company and to apply the assets to the satisfaction of those claims in accordance with the statutory scheme of priority.
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> …
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> The liquidator's functions, which are performed in the fiduciary capacity of agent of the company, necessitate the conferral of wide and extensive powers currently embodied in s 477 of the Act, including the power to carry on the company's business for the purpose of beneficial disposal or winding up, pay creditors, bring and defend proceedings in the company's name, enter agreements and (subject to some restrictions) compromise claims, sell and dispose of the company's property, make purchases and execute documents on its behalf. The company's books and records must be delivered to the liquidator, who has extensive powers to obtain information and is entitled to the assistance of the company's officers.
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> In *Commissioner for Corporate Affairs v Harvey* …, Marks J recognised that 'the balance of authority favours the liquidator being treated not as a trustee *stricto sensu* but as an agent of the company'. It is clear, however, that a liquidator occupies a fiduciary position in relation to the company, its creditors and contributories. Although not a trustee in the sense, for example, that the property of the company is vested in him or her, the liquidator 'is in a position of trust'.
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> The extensive powers vested exclusively in the liquidator entail a corresponding vulnerability in the creditors, members and the public. The liquidator is a fiduciary on whom high standards of honesty, impartiality and probity are imposed both by the Act and the general law. As an officer of the company, the liquidator has a statutory duty of care, diligence and good faith.

772 Those observations were made in the context of a court appointed liquidator but are applicable to a liquidator who has been voluntarily appointed by creditors. As Young J (as his Honour then was) observed in *Re Biposo Pty Ltd*[416] 'the liquidator, even in a voluntary winding up, has very strong powers which have been given to him under the *Corporations Law*, virtually as the delegate of the court, or the delegate of the Australian Securities Commission, to see that fair play is done between the competing interests in a liquidation'.[417]

773 Accordingly, the power to remove forms an essential aspect of the court's role in supervising liquidators and the winding up of corporations; the cause for removing liquidators may relate to any of the functions that they are required to perform and the decision to remove will reflect the duties, obligations and powers that form the content of the office of liquidator. In that context, it would

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[414] *Australian Securities and Investments Commission v Edge* [2007] VSC 170; (2007) 211 FLR 137.
[415] *Australian Securities and Investments Commission v Edge* [2007] VSC 170; (2007) 211 FLR 137 [40] - [44].
[416] *Re Biposo Pty Ltd* (1995) 120 FLR 399.
[417] *Re Biposo Pty Ltd* (1995) 120 FLR 399, 403.

have been open to the Primary Judge to conclude that it was a proper exercise of discretion to make the Declarations to formally record that Mr Macks had contravened the statutory duties that he owed as a liquidator and the basis upon which he was to be removed. It also marks the court's disapproval of Mr Macks' conduct having regard to the seriousness of the findings of breach that had been made and the importance of the office of liquidator.

774 Mr Macks contended that the Primary Judge erred in exercising his discretion to grant declaratory relief having regard to Mr Viscariello's involvement in companies that were insolvent (and which had traded while they were insolvent) and his conduct in the winding-up of the Companies. Mr Macks did not plead that Mr Viscariello had engaged in disentitling conduct until the defence to the Fourth SOC.[418] That was notwithstanding that Mr Viscariello had claimed declaratory relief in the Second SOC and despite Mr Macks pleading in his defence other matters such as delay and change of position in relation to Mr Viscariello's entitlement to relief.[419] However, Mr Viscariello's conduct was not, in any event, directly relevant to the purpose for which the Declarations were made by the Primary Judge.

775 A similar sentiment was expressed at another point in Mr Macks' submissions. It was argued that the court should not exercise any power that it might possess under s 31 of the *Supreme Court Act* 'in a way that would tend to subvert the more detailed legislative scheme [the CA]'.[420] The scheme of the CA would be 'subverted' by the Declarations as they were made on the application of a 'disgruntled' creditor who was pursuing for his own interests remedies for breaches of duty owed to the company and in respect of which he possessed alternative statutory rights such as those under s 1321 CA. Again, we do not consider that the Primary Judge made an appealable error in the exercise of his discretion to make the Declarations in the face of those considerations.

776 We also consider that it was open to his Honour to conclude that there was utility in making the Declarations. That is so even though the Declarations were not a necessary step in determining Mr Viscariello's application under s 503 CA. As we have emphasised, the Declarations formally recorded the basis upon which the order was made under s 503 and marked the court's disapproval of conduct that his Honour characterised as being egregious. As such, the Declarations did not subvert the scheme of the CA. Rather, they formed a part of the court's record for the purpose of finally determining the parties' disputes and served the public interest in marking what the Primary Judge found to be significant breaches of the duties owed by Mr Macks as the liquidator of the Companies.

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418 See pars 84(c) - (g).
419 Defence to second amended statement of claim, par 33.
420 'Propositions to be advanced in reply to submissions of Attorney-General', par 8.

Mr Viscariello's standing

777 In our view, the Primary Judge was right to apply the test that is ordinarily adopted for determining standing for declaratory relief. It was not necessary for Mr Viscariello to possess a cause of action and he did not bring proceedings 'on behalf of' the Companies within the meaning of s 236 CA if he could establish, in his own right, a sufficient interest in obtaining declarations to the effect that Mr Macks had contravened ss 180 - 182 CA; that is, if he could demonstrate a sufficient interest that was separate to, and independent of, the interests of the Companies. The Primary Judge held that Mr Viscariello satisfied the sufficient or real interest test as the sole member and director of the Companies and a creditor. Clearly, it was open to his Honour to make that finding, especially in circumstances where Mr Viscariello had sought, and had standing to seek, Mr Macks' removal as the liquidator of the Companies.

778 Again, that conclusion is hardly surprising. Creditors and contributories have an obvious and immediate interest in the winding up of a company. Their interest in the liquidation of an insolvent company is recognised in the provisions of the CA. It could hardly be thought that Mr Viscariello, as the sole shareholder and director of the Companies and as a creditor, would not have had a sufficient interest in seeking declaratory relief in relation to contraventions of duties owed by Mr Macks as the liquidator of the Companies if the law granted a right to relief that was not limited to ASIC as the corporate regulator.

779 Moreover, Mr Macks' submission that the Declarations ought not to have been made as his duties as liquidator were owed to the Companies, and not to Mr Viscariello, ignored the reality of Mr Viscariello's interests in the question of whether the duties had been breached.

Procedural fairness

780 Mr Macks contended that he had been denied procedural fairness as Mr Viscariello had not claimed declaratory relief pursuant to s 31 of the *Supreme Court Act* and the parties had not been given an opportunity to address the question of whether the court had power to make the Declarations under that section. Mr Macks further contended that the alleged denial of procedural fairness was on a question of law that vitiated the exercise of the court's discretion.

781 It must be acknowledged that the finding that the court had power to grant the Declarations was made without Mr Viscariello having claimed relief under s 31 and without the parties being given an opportunity to provide submissions on the court's powers under that section. Although the hearing on 14 and 15 April 2015 was for the purpose of settling the orders to give effect to the Primary Judge's findings, it is apparent that Mr Macks considered that it was not open to argue that the court lacked power to make the Declarations under s 31 of the *Supreme Court Act*. Mr Macks' written submissions in anticipation of the hearing incorporated a draft notice of appeal in which it was alleged that the

court could not make the Declarations under s 31. Senior counsel for Mr Macks at the hearing on 14 April 2015 expressly raised the question of whether the court could make Declarations under that section having regard to the provisions of pt 9.4B of the CA.[421]

782 Mr Macks cited *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[422] *Friend v Brooker*[423] and *Liftronic Pty Ltd v Unver*[424] in support of the proposition that a denial of procedural fairness vitiated the exercise of the court's discretion to make the Declarations (assuming that the court otherwise had power under s 31 of the *Supreme Court Act*). Appellate courts had determined in each of those cases an issue that had not been raised by the parties, either at first instance or in the appeal. The issue had been significant for the disposition of the appeal but the parties had not been informed of the court's intention to determine the issue and accordingly, they had not been provided with an opportunity to make submissions. The High Court held that the decisions had to be set aside.

783 However, those cases do not establish as a principle that a decision will necessarily be set aside for a breach of procedural fairness of this kind. Rather, the injustice recognised by the High Court reflected both the process by which the appellate court had arrived at its decision and the significance of the decision for the disposition of the appeal in issue.

784 In our view, the observations of the High Court in *Stead v State Government Insurance Commission*[425] (which was also referred to by Mr Macks) provides more assistance in determining whether the Declarations should be set aside on the ground that Mr Macks had been denied procedural fairness. In that case, the Primary Judge had made a finding on evidence that he had indicated he would not accept. Consequently, counsel had not continued in his closing address with submissions on that evidence. This court dismissed an appeal, concluding that any further argument on the evidence would not have affected the result. The High Court allowed a further appeal and ordered a re-trial. The court observed:[426]

> The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker LJJ) in *Jones v National Coal Board* [1957] 2 QB 55 at 67, in these terms:
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> > 'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. … No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'

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421 See 14 April 2015, ts 49.
422 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89.
423 *Friend v Brooker* [2009] HCA 21; (2009) 239 CLR 129.
424 *Liftronic Pty Ltd v Unver* [2001] HCA 24; (2001) 75 ALJR 867.
425 *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141.
426 *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 [8] - [11].

> That general principle is, however, subject to an important qualification which Bollen J plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.
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> For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.
>
> Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference.

785 Although those observations were made in a different context, they are relevant to the issue here under consideration as Mr Macks has had a full opportunity to argue the question of law raised by ground 1: whether the court had power to make the Declarations pursuant to s 31 of the *Supreme Court Act*. We have found against Mr Macks on that issue. The conclusion that Mr Macks was denied a fair opportunity to argue the issue before the Primary Judge should not be allowed to prevent this court from determining the issue. The issue is a question of law. It is in the interests of the proper administration of justice that all controversies between the parties that can fairly be decided should be finally determined.

786 Mr Macks' position was no different to a party confronted in an appeal with a question of law that was not raised below. There was nothing in the conduct of the appeal to suggest that the questions raised by ground 1 could not be fairly determined for the first time by this court.

The alleged error in [823] of the Reasons

787 The Primary Judge stated:[427]

> It can be accepted that the Corporations Act enacts a scheme which, by and large, precludes any person other than the company or ASIC bringing or enforcing pecuniary claims against corporations. However, it does not follow that a declaration cannot be made, at the suit of a person with a legal interest in the proper management of a corporation, against a company officer, liquidator or administrator who has breached one or more of his or her statutory duties. Many circumstances can be postulated in which there may be good reason to make, and much utility in, a declaration of that kind. The declaration may inform the members' decisions in exercising their control over the corporation's officers. It may prompt ASIC to exercise its powers. It may guide the officer's management of the company.

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[427] *Viscariello v Macks* [2014] SASC 189 [823].

788 Mr Macks contended that his Honour misconstrued the effect of ss 1317E and 1317J CA in that passage by considering that a declaration under s 1317E could be made at the suit of a company.[428] However, his Honour's comments at [823] were directed to questions of standing and utility in granting relief under s 31 of the *Supreme Court Act*. It was not suggested that a company could obtain relief under s 1317E; rather, his Honour correctly observed that both ASIC and a relevant company may bring and enforce pecuniary claims (ASIC by a civil penalty order and a company by a compensation order).

Section 78B notices

789 The argument that the CA contains an exclusive code of remedies for a contravention of a civil penalty provision so that there was either a s 109 inconsistency or the Act constituted a law of the Commonwealth that 'otherwise provided' for the purposes of s 79 of the *Judiciary Act* was not raised in the trial. Accordingly, the question of whether notices ought to have been issued under s 78B of the *Judiciary Act* was not considered.

790 However, a failure to issue notices under s 78B does not render 'invalid' any proceeding even if notices ought to have been given.[429] The High Court observed that:[430]

> [T]he section does not purport to nullify the continued exercise of jurisdiction in cases where its terms apply but there is a failure in their observance. In that sense, the 'duty' which s 78B imposes is one of imperfect obligation.

791 In *Insight Vacations v Young*[431] a question arose over whether there was a constitutional inconsistency between State and Commonwealth legislation. That issue was determined at first instance without the Primary Judge issuing s 78B notices. The New South Wales Court of Appeal, applying *Glennan*,[432] held that the decision was not invalidated by that omission.[433]

Declarations of breach of duty

792 Mr Macks contended in ground 1.4 that s 31 of the *Supreme Court Act* did not confer jurisdiction on the court to make a declaration of breach of ss 180 – 182 CA as those sections 'prescribed norms of conduct' breach of which could not give rise to a cause of action. Further, a declaration that Mr Macks had contravened those statutory duties did not involve a declaration as to any legal right of Mr Viscariello or as to any obligation or liability of Mr Macks. However, an applicant's standing to seek declaratory relief, and the power of the court to grant that relief, is not contingent on the existence of a cause of action or a legal

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428 Ground 1.6.2(iii).
429 *Glennan v Commissioner of Taxation* [2003] HCA 31; (2003) 77 ALJR 1195.
430 *Glennan v Commissioner of Taxation* [2003] HCA 31; (2003) 77 ALJR 1195 [13].
431 *Insight Vacations v Young* [2010] NSWCA 137; (2010) 268 ALR 570.
432 *Glennan v Commissioner of Taxation* [2003] HCA 31; (203) 77 ALJR 1195 [13] (Gummow, Hayne and Callinan JJ).
433 *Insight Vacations v Young* [2010] NSWCA 137 [89] (Basten JA).

right. Further, the duties imposed by ss 180 - 182 cannot be properly characterised as merely norms of conduct. The sections impose duties that corporate officers are obliged to discharge. Failure to adhere to the duties imposed by the sections may result in civil and criminal sanctions. There is no reason why a contravention of ss 180 - 182 cannot be the subject matter of a declaration made in the court's general jurisdiction.

The form of the Declarations

793 Subject to the question of whether s 180(2) CA modifies the law in respect of the duty of care owed by a company officer, ss 180 - 182 contain a statutory statement of duties owed by a company officer under general law. Accordingly, Mr Viscariello contended that the Declarations were not limited to declarations that Mr Macks had contravened his statutory duties - the Declarations also declared that he had breached duties owed under general law. It was submitted that the Declarations could have been made pursuant to s 31 of the *Supreme Court Act* regardless of the effect of the CA on the court's powers.

794 In our view, the Declarations, in the form pronounced by the Primary Judge, were not, in themselves, declarations that Mr Macks had breached his duties under general law. However, the point made by Mr Viscariello is, in substance, correct. The Declarations did declare that Mr Macks had engaged in conduct that constituted a breach of duties that he owed under general law – and there can be no doubt that this was the effect of the findings made by the Primary Judge having regard to the substantial identity between Mr Macks' statutory and general law duties.

795 Accordingly, it would have been open to this court to reformulate the Declarations as breaches of general law if it had been concluded that the court lacked power to make the Declarations, as declarations of contraventions of the CA, under s 31 of the *Supreme Court Act*. Plainly, this court has power to make declarations that a company officer has breached duties owed under general law. It would not have been in the interests of justice for this court to refuse to exercise that power if there was no discretionary reason why declarations to that effect should not have been made.

Remittal for Trial

Should the matter be remitted for a trial on these issues?

796 We accept that Mr Viscariello has the standing to seek declarations to the effect that Mr Macks contravened ss 181 and 182. We have made a declaration that Mr Macks acted in breach of s 180 from the end of April 2006.

797 Mr Macks did not oppose his removal as the liquidator on 15 April 2015. Another liquidator has been acting since that date. We are aware that ASIC are investigating Mr Macks' role as liquidator.

798 There is no statutory power to remit a matter for rehearing found in the *Supreme Court Act*. The power of an appellate court to remit a matter for rehearing is found in the *Supreme Court Civil Rules 2006* (SA) at rule 286(3)(c), which states:[434]

> **286—Hearing of appeal**
>
> …
>
> (3) Subject to any limitation on its powers arising apart from these Rules, the Court may—
>
> …
>
> (c) remit the case or part of the case for rehearing or reconsideration;
>
> (Our Emphasis)

799 A similar power to that contained in SCR 286(3)(c) is found at s 28(1)(f) of the *Federal Court of Australia Act 1976* (Cth) ("FCA") That section, was discussed in *Windoval Pty Ltd v Donnelly*.[435] The Court stated:[436]

> The power contained in s 28(1)(f) is not expressed to be subject to the proviso which governs appeals against convictions by a jury in a criminal trial under state legislation. The proviso is to the effect that even if the appellate court is of the opinion that the point raised in the appeal might be decided favourably to an appellant, it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred: see *Weiss v the Queen* (2005) 224 CLR 300 at [9], [44]-[45].
>
> Nevertheless, as the High Court has observed, in construing the language of s 28(1)(f) of the Federal Court Act, what constitutes a ground appropriate for granting a new trial can only be understood by reference to the history of the law concerning the grant of new trials: *Conway v The Queen* (2002) 209 CLR 203 at [5].
>
> The plurality in *Conway* (Gaudron ACJ, McHugh, Hayne and Callinan JJ) went on to say at [6] that to construe s 28(1)(f) as authorising the dismissal of an appeal on the ground that no substantial miscarriage of justice has actually occurred gives effect to the long established common law rule that a new trial is not ordered where an error of law, fact, misdirection or other error has not resulted in any miscarriage of justice.

800 The Full Court of the Federal Court considered and applied *Windoval* in *Sullivan v Trilogy Funds Management Ltd*.[437] In *Sullivan* the conduct of directors was the subject of a judgment that awarded compensation payments for breaches of duties under s 601FD of the *Corporations Act*.

801 The appellants sought a retrial due to claimed unfairness arising out of the conduct and findings of the Primary Judge, including that they were required to

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[434] *Supreme Court Civil Rules 2006* (SA) r 286(3)(c).
[435] [2014] FCAFC 127.
[436] [2014] FCAFC 127, [82]-[84].
[437] [2017] FCAFC 153.

'meet a case which ranged well beyond the pleadings and included unpleaded allegations of "fabricated" documents made without notice in cross-examination.' Their complaint was primarily that their trial had been unfair.

802 The Court considered that *Windoval* and the authorities there examined meant that the appellants had to establish a miscarriage of justice from any errors of the Primary Judge before a retrial was granted under the FCA. The Court stated:[438]

> Section 28(1)(f) of the *Federal Court of Australia Act 1976* (Cth) provides that, subject to any other Act, the Court may, in the exercise of its appellate jurisdiction grant a new trial in any case in which there has been a trial, either with or without a jury, on any ground upon which it is appropriate to grant a new trial.
>
> In *Windoval Pty Ltd v Donnelly* at [80] to [96], the Full Court considered the principles upon which a new trial may be ordered, referring in particular to the construction of s 28(1)(f) by the plurality in *Conway v The Queen* [2002] HCA 2; 209 CLR 203at [36] as follows:
>
> > ... This power is expressed in wide terms and should be given a liberal construction. It is a power that must, of course, be exercised judicially. But there is nothing unjudicial, arbitrary or capricious in refusing to order a new trial when, although error has occurred, no miscarriage of justice has occurred. The common law courts applied such a rule in civil proceedings for more than a century. The King's Bench and the Court for Crown Cases Reserved applied it in criminal cases for a long period until 1887 when it was held in Gibson that the rule did not apply where evidence had been wrongly admitted. The Judicial Committee applied it in criminal appeals and applications for leave to appeal against criminal convictions. And this Court applied it in appeals from the Australian Capital Territory before the enactment of the Federal Court of Australia Act.
>
> Although *Conway v The Queen* was a criminal case, at [95], the Court noted that this construction of s 28(1)(f) was equally applicable to civil cases heard without a jury.

803 The Court also adopted the following statement from *Windoval*:[439]

> [T]he application of the rule in Stead turns upon similar considerations to those that informed the question of whether the ground which is relied upon is one which demonstrates that it is appropriate to grant a new trial. That is to say, the "it would have made no difference" exception is analogous to the "no miscarriage of justice" proviso which informs the exercise of the jurisdiction under s 28(1)(f).

804 The Court ultimately found that, despite some findings of the Primary Judge that went further than they should, and other findings that could not be supported, a substantial miscarriage had not occurred for the purposes of the above test:[440]

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[438] [2017] FCAFC 153, [276]-[278].
[439] *Sullivan v Trilogy Funds Management Ltd* [2017] FCAFC 153, [283].
[440] [2017] FCAFC 153, [325]-[326].

> The trial judge made some findings against Mr Sullivan concerning the extent to which he acted with Mr McCormick or authorised Mr McCormick's actions, although Mr Sullivan was not given an opportunity to respond to them in cross-examination. Those findings went further than necessary to address the case advanced by Trilogy and should not have been made.
>
> However, as explained above, those findings have no bearing on the trial judge's findings of contravention, or on his rejection of the appellants' claim for exoneration. In those circumstances, we reject the submission that the findings gave rise to a substantial miscarriage of justice. [441]

805 This Court has the power to remit the matter for hearing. It has a discretion as to whether it should do so. *Windoval* and *Sullivan* establish that a Court may refuse to remit a matter where the errors of a trial judge could have no bearing on the judge's ultimate findings.

806 That was not the case before us. We are of the view that the errors made by the Primary Judge affected his ultimate conclusions. However our discretion is not limited to that consideration.

807 Mr Macks, in the ordinary case, would be entitled to a retrial in relation to the allegations relating to breaches of ss 181 and 182. Mr Viscariello has had findings made in his favour set aside. As we have found Mr Viscariello had standing to seek the declarations. Both parties have a right to have the matter reheard and that is a right that is not to be put lightly aside. We accept that the Court should not without good reasons interfere in the parties' right to access the court processes.

808 There are however a number of matters which militate against remitting the issues of declarations for breaches of ss 181 and 182 for a further trial.

809 We have already discussed the question of the nature of declaratory relief earlier in these reasons. The statutory source of the Court's power to grant declaratory relief is found in ss 17 and 31 of the *Supreme Court Act 1935* (SA).[442] The jurisdiction to grant declaratory relief is very wide.[443] A court's power to grant such relief is "only limited by its own discretion."[444]

810 King CJ stated, in *J N Taylor Holdings Ltd v Bond*[445] the general principles of when a declaration may be granted. He said:[446]

> The proposition that there is no limit to the jurisdiction of the court to grant declaratory relief would be an incomplete and misleading statement of the true position unless there be added the further proposition that there are circumstances which are so contra-indicative to the exercise of the discretion in favour of the grant of declaratory relief that

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[441] *Viscariello v Macks* [2014] SASC 189, [325]-[326].
[442] *Tavitian v Commissioner of Highways and Anor* [2010] SASC 206.
[443] *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421.
[444] *Hanson v Radcliffe* [1922] 2 Ch 490.
[445] (1993) 59 SASR 432.
[446] (1993) 59 SASR 432, 436-437 (King CJ, Prior and Perry JJ agreeing).

> the existence of those circumstances would lead almost inevitably to the exercise of the discretion against the making of a declaration. Examples of such decisively contra-indicative circumstances can be found in the cases. A declaration will not be made except in matters "which have a real legal context, and to the determination of which the courts procedure is apt". There must be some person who has a true interest in opposing the declaration. The question raised must not be purely theoretical. There must not only be a party with a true interest in opposing the declaration, but the plaintiff must have a real interest in having the question determined. That interest may exist although the apprehended impact on the plaintiff may be no more than a future possibility. If, however, the determination of the question could not affect the plaintiff's legal rights or commercial or personal interest now or in the future, that is to say would "produce no foreseeable consequences for the parties", the declaration would almost certainly be refused. (Citations Omitted)

811 While it would, of course be a matter for another court to determine whether to grant declaratory relief to Mr Viscariello, there are reasonable grounds for a court refusing to do so. First, there is already a declaration of a breach of s 180 (1) from April 2006. The court has indicated its disapproval of Mr Macks' conduct. Secondly, as mentioned, one of the reasons relied upon by the Primary Judge when considering the question of whether to grant declaratory relief, no longer exists. While we have held that it was not a precondition to his removal as a liquidator, the fact remains that Mr Macks is no longer the liquidator of the Companies and has not been since April 2015.

812 Mr Viscariello has no other remedy he could seek. The declarations, if made, could not affect Mr Viscariello's personal or commercial interests.

813 The events in question commenced in 2002. There has already been a protracted and expensive trial about the issues. Substantial legal costs have been incurred.

814 The evidence at the trial demonstrated that ASIC is investigating the conduct of Mr Macks. It could be said that ASIC is the appropriate body to consider proceedings against Mr Macks relating to potential breaches of his duties as liquidator.

815 Pursuant to rule 286 (3) (c) the court may, on appeal, remit the case or part of the case for rehearing or reconsideration. We are of the view that given the Primary Judge's findings of improper conduct by Mr Macks from 1 June 2005 it would not be appropriate to remit the matter back to the Primary Judge for him to consider the matter further. A further trial with the remedy confined to seeking declarations of breaches of ss 181 and 182 in our view lacks utility.

816 We decline to exercise our discretion to remit the matter for retrial or reconsideration.

Orders

1. Appeal grounds 2, 4 and 5 allowed. Paragraphs 4 and 5 of the Order made by the Primary Judge on 9 April 2015 are set aside.

2. Appeal ground 3 allowed in part. Paragraph 3 of the Order made by the Primary Judge on 9 April 2015 is set aside. In its place we make the following declaration:

   It is declared that the Defendant, as liquidator of Bernsteen Pty Ltd ("Bernsteen"), contravened section 180(1) of the *Corporations Act 2001* (Cth) by reason that from 28 April 2006 he failed to exercise the degree of care and diligence required of him as an officer of Bernsteen in applying any of Bernsteen's funds:

   1.1. in pursuing or, as the case may be, defending:

      1.1.1. a claim for recovery of a debt from Ms Tanya Hamilton-Smith in action number 10039 of 2002 in the Magistrates Court of South Australia, Adelaide Registry ("the Bernsteen action");

      1.1.2. the counterclaim brought by Ms Hamilton-Smith in the Bernsteen action;

      1.1.3. an application by Ms Hamilton-Smith, in action number ADG 94 of 2005 in the Federal Magistrates Court of Australia, for an order setting aside a bankruptcy notice dated 7 April 2005 prepared on behalf of Bernsteen and served on Ms Hamilton-Smith.

   1.2. pursuant to an indemnity in favour of Ms Heidi George by which the Defendant indemnified Ms George against her liability for the costs of the following steps and proceedings:

      1.2.1. the pursuit by Ms George of a bankruptcy notice against Ms Hamilton-Smith;

      1.2.2. the defence by Ms George of Ms Hamilton-Smith's application in the Federal Magistrates Court of Australia to set aside Ms George's bankruptcy notice (action number ADG 159/2005);

      1.2.3. the pursuit by Ms George of a creditor's petition against Ms Hamilton-Smith in the Federal Magistrates Court of Australia (action number ADG 237/2005);

      1.2.4. the defence by Ms George to an application by Ms Hamilton-Smith in the Magistrates Court of South Australia for a declaration that she had discharged the judgment debt forming the subject of Ms George's bankruptcy notice and creditor's petition (action 9644/2005);

      1.2.5. the pursuit of or response to any appeals associated with those proceedings.

3. Appeal grounds 1, 6, 8, 9 dismissed.

4. Cross-appeal dismissed.

5. Parties to be heard as to costs.

Appendix

Appeal

Grounds of Appeal

The Appellant's grounds of appeal are:

1. The primary judge erred in law in granting the declarations of breach of ss 180-182 of the *Corporations Act* 2001 (Cth) (**Corporations Act**) pursuant to s 31 of the *Supreme Court Act* 1931 (SA) (**Supreme Court Act**), by reason that:

    1.1. Part 9.4 B of the Corporations Act constitutes a code of the remedies available in respect of contraventions of a civil penalty provision of the *Corporations Act* including ss 180-182;

    1.2. consequently, if and to the extent that s 31 of the Supreme Court Act would otherwise have conferred jurisdiction upon the Supreme Court to make a declaration of breach of ss 180-182, it is relevantly inoperative by virtue of the operation of s 109 of the *Constitution*;

    1.3 in the alternative, the Supreme Court Act did not confer jurisdiction upon the Supreme Court to make a declaration of breach of ss 180-182 of the Corporations Act at the suit of Mr Viscariello because:

        1.3.1. the Supreme Court was exercising federal jurisdiction;

        1.3.2. pursuant to section 79 of the *Judiciary Act 1903* (Cth), when a State Court exercises federal jurisdiction, the laws of the State apply only to the extent the laws of the Commonwealth do not otherwise provide; and

        1.3.3. the laws of the Commonwealth, in the form of the Corporations Act, otherwise provide in that they permit a declaration of breach of ss 180 - 182 to be made only at the suit of ASIC;

    1.4. further, and in any event, s 31 of the Supreme Court Act did not confer jurisdiction upon the Supreme Court to make a declaration of breach of ss 180-182 at the suit of the Plaintiff in that:

        1.4.1. sections 180-182 prescribed norms of conduct applicable to the Appellant in respect of his relationship with the Companies;

        1.4.2. a contravention by the Appellant of the duties imposed by ss 180-182 did not of itself give rise to a cause of action;

        1.4.3. sections 180-182 did not impose duties upon the Appellant in favour of the Plaintiff; and

1.4.4. to declare that the Appellant had contravened ss 180-182 did not involve a declaration as to any legal right of the Plaintiff or as to any obligation or liability of the Appellant;

1.5. further, the primary judge erred in making the declarations m circumstances where:

1.5.1. the parties had not made any submissions addressed to whether declaratory relief was available or appropriate pursuant to s 31 of the Supreme Court Act;

1.5.2. the parties had not addressed or been given an opportunity to address a matter arising under the Constitution or its interpretation, and thus in contravention of s 78B(l) of the Judiciary Act 1903 (Cth); and

1.5.3. there was accordingly a denial of procedural fairness to the Appellant; and

1.6. further, and in the alternative, if the primary judge had jurisdiction to grant declaratory relief at the suit of a person in the position of the Plaintiff, he erred in exercising his discretion to make the declarations in that:

1.6.1. the primary judge failed to have any or proper regard to:

(i) the matters set out in paragraphs 1.1 and 1.4.1-1.4.4 above; and

(ii) the Plaintiff having used the litigation referred to in order 3 of 9 April 2015 to disrupt the liquidation of the Companies for his own purposes, namely the purposes of pursuing his own private grievance against the Appellant, and of maximising the time, trouble and cost to the Appellant associated with the performance of his functions as liquidator; and

1.6.2. the primary judge had regard to irrelevant considerations in that he:

(iii) wrongly considered that a declaration under s 1317E of the Corporations Act could be made at the suit of the relevant company pursuant to s 1317J;

(iv) wrongly considered that the Plaintiff had a legal interest in the management of the company;

(v) wrongly considered that there were "egregious" breaches of ss 180-182 and that, if they were, that was a matter that militated in favour of the making of a declaration; and

(vi) wrongly considered that the declaration was a necessary step in determining whether or not to remove the Appellant as liquidator of the Companies.

2. The primary judge erred in law and/or fact in making the findings at [757] by reason that:

2.1. he impermissibly made the findings on the basis of hindsight and contrary to authority;

2.2. he did so without there being any evidentiary basis for the findings and contrary to the evidence of Ms Riach otherwise accepted by the Court;

2.3. he did so without any or any adequate regard to the fact that the Appellant received and relied upon legal advice from Minter Ellison with respect to:

2.3.1. the conduct and settlement of the Bernsteen proceedings (reasons at [441]); and

2.3.2. the indemnification of Ms George (reasons at [434]);

2.4. he did so without any or any proper regard to the fact that the costs occasioned in the Bernsteen and George proceedings were a consequence of the deliberate strategy of the defendant to those actions to frustrate, delay and render as expensive as possible the proper pursuit of assets of Bernsteen (reasons at [745]);

2.5. he failed to have any regard to the seriousness of the finding of improper purpose or to the gravity of the consequences of such a finding in determining whether the evidence was sufficient to discharge the burden of proof;

2.6. notwithstanding that they were not pleaded and were not put to the Appellant in cross-examination; and

2.7. the reasons are inadequate by reason of the matters referred to in 2.2 to 2.6 above and are affected by operative delay and thereby constitute an error of law such that a miscarriage of justice has occurred having regard to:

2.7.1. the Plaintiff's case being closed in February 2012;

2.7.2. the Appellant's case being closed in February 2013;

2.7.3. closing addresses having concluded in February 2013; and

2.7.4. reasons being published 22 months later on 9 December 2014 and subsequently on 24 December 2014.

3. Alternatively, the primary judge erred in law in finding that the Appellant contravened section 180 of the Corporations Act by reason that:

3.1. the primary judge assessed the Appellant's conduct on the basis of hindsight, and in concluding that because the costs ultimately incurred in relation to the Bernsteen and George proceedings were disproportionate to the amounts in issue, the Appellant must have acted either unreasonably, or for an improper purpose, or both;

3.2. the primary judge failed to distinguish between the proceedings to which Ms George was a party and the proceedings to which Bernsteen was a party;

3.3. the primary judge failed to distinguish between the pursuit of proceedings issued by Bernsteen and Ms George on the one hand the defence of proceedings and appeals issued by Ms Hamilton-Smith on the other;

3.4. the primary judge wrongly found that it was unreasonable for the Appellant to reject Ms Hamilton Smith's offer of 27 June 2005 to settle the Bernsteen proceedings upon payment of $10,000 by instalments, in that the learned Judge failed to give any, or any sufficient, weight to the following matters:

3.4.1. Ms Hamilton-Smith had previously dishonoured an agreement to settle a debt to Bernsteen by instalments;

3.4.2. the Appellant's assessment that Ms Hamilton-Smith was capable of making a lump sum payment;

3.4.3. the advice from the Appellant's solicitors, by letter dated 1 July 2005, to reject Ms Hamilton-Smith's offer; and

3.4.4. after the Appellant's rejection of Ms Hamilton-Smith's previous offer of settlement, Ms Hamilton-Smith had made an improved offer;

3.5. there was no evidential basis for the finding at [584] that a settlement (with Bernsteen, George, or both) on terms that each party bear their own costs was always likely to find favour with Ms Hamilton-Smith;

3.6. if, and to the extent that, the litigation against Ms Hamilton-Smith did not, after June 2005, have any prospect of generating a return to creditors, the learned Judge erred in law in finding that it was unreasonable for the Appellant:

3.6.1. not to abandon meritorious claims;

3.6.2. not to provide a release to a party, namely Ms Hamilton-Smith, who had sought to avoid her obligations by defending the claims in a manner which was calculated to obstruct the proper and orderly winding up of the Companies (being Bernsteen and Newmore); and

3.6.3. to continue the litigation for the purpose of recovering a contribution to the Appellant's fees and expenses;

3.7. the primary judge erred in finding (at [920]) that the George and Bernsteen proceedings were an abuse of process, in that:

3.7.1. he failed to distinguish between the proceedings to which Ms George was a party and the proceedings to which Bernsteen was a party;

3.7.2. he failed to distinguish between the pursuit of proceedings issued by Bernsteen and Ms George on the one hand the defence of proceedings and appeals issued by Ms Hamilton-Smith on the other;

3.7.3. he erred in finding that the Appellant had an improper purpose in pursuing or defending the proceedings to which Bernsteen was a party and in funding the proceedings to which Ms George was a party (see grounds 2 above and 4 below);

3.7.4 he erred in law to the extent he considered that the proceedings were an abuse because there was no prospect of any net return to the Companies after the payment of the legal costs of continuing the proceedings; and

3.7.5. the finding that the proceedings to which Ms George was a party were an abuse of process is inconsistent with the primary judge's acceptance (at [641] and [681]) of the evidence of Ms George to the effect that the contents of the affidavit filed by Mr Gawronski in those proceedings was untrue; and

3.8. if, and to the extent that, the primary judge concluded that the Appellant breached his duties under section 180 of the Corporations Act by reason of the matters giving rise to any breach of sections 181

and/or 182 of the Corporations Act, the Appellant will rely on the grounds referred to in paragraphs 4 and 5 below.

4. Alternatively, the primary judge erred in law in finding that the Appellant contravened section 181 of the Corporations Act by reason that:

    4.1. the primary judge assessed the Appellant's conduct on the basis of hindsight, and in concluding that because the costs ultimately incurred in relation to the Bernsteen and George proceedings were disproportionate to the amounts in issue, the Appellant must have acted for an improper purpose;

    4.2. the primary judge erred in considering (at [729] and [746]) that, on the premise that there was no prospect of any return to creditors from the litigation, the Appellant's purpose in pursuing, or failing to agree settlement terms with, Ms Hamilton-Smith after 1 June 2005 was necessarily improper;

    4.3. the primary judge erred by rejecting (at [584], [730], [734], [736], [744], [755], [757] and [760]) the Appellant's evidence as to his subjective purposes in funding the George proceedings after June 2005, being to minimise and avoid unnecessary costs in the Bernsteen proceedings. The rejection of the Appellant's evidence was inconsistent with:

        4.3.1. the acceptance (at [437]) of Ms Riach's evidence as to the reasons for the Appellant's solicitors approaching Ms George in June 2005;

        4.3.2. the terms, and the Appellant's acceptance, of his solicitors' recommendation (at [434]) that the Appellant provide an indemnity to Ms George in the hope of avoiding a trial in the Bernsteen proceedings;

        4.3.3. the finding (at [470]) that the bringing of the George bankruptcy proceeding was the centrepiece of a strategy to bring an end to the Bernsteen proceedings;

        4.3.4. the finding (at [476] and [482]) that the Appellant expressed concern in August and October 2005 at the escalating costs of the George proceedings and instructed his solicitors to minimise costs;

        4.3.5. the finding (at [531]) that in February 2006 the Appellant's strategy was to use the George proceedings to avoid the costs of the Bernsteen proceedings; and

4.3.6. the finding (at [573]) that a decision was made, on 28 April 2006, not to undertake any preparation for the trial of the Bernsteen proceedings from 16 May 2006 pending the hearing of an application by Ms Hamilton-Smith on 8 May 2006 to vacate the trial date;

4.4. the primary judge erred by rejecting (at [584], [730], [734], [736], [744], [755], [757] and [760]) the Appellant's evidence as to his subjective purposes in continuing to prosecute and defend the claims in the Bernsteen proceedings after June 2005, being to enforce the contract Ms Hamilton-Smith had made with Bernsteen (in liquidation), but also to conduct the proceedings in a way which minimised and avoided unnecessary costs;

4.5. the primary judge erred in considering that to the extent the Appellant was motivated by the following matters referred to in [757] such matters were improper purposes within the meaning of section 181 of the Corporations Act:

4.5.1. irritation with the Plaintiff's behaviour generally, and, in particular, in committee meetings after the liquidation of the Companies;

4.5.2. ill will towards the Plaintiff for his part in assisting Ms Hamilton-Smith to defend the proceedings brought against her in a way which caused the Appellant to suffer financial loss because the costs of the litigation reduced the funds available to pay his fees; and

4.5.3. hoping that pursuing Ms Hamilton-Smith might facilitate the prosecution and enforcement of the insolvent trading claim against the Plaintiff;

4.6. to the extent the primary judge rejected the Appellant's evidence on the basis of his collateral finding (at [391] and [396]) that the Appellant had fabricated a document with the intention of passing it off as the original, the primary judge erred:

4.6.1. in failing to give sufficient weight to the Appellant's explanation regarding the circumstances in which the document was created; and

4.6.2. in finding (at [389] that the circumstances in which the document was created in 2009 bore on the Appellant's motivation in pursuing the Bernsteen action and indemnifying Ms George some years previously;

4.7. to the extent that the primary judge found that the failure to give full disclosure of the terms of his funding arrangement with Ms George supported a finding that the Appellant had an improper purpose, the primary judge erred in failing to have any or any adequate regard to the following matters:

4.7.1. the Appellant's legal advisers considered that the te1ms of the arrangement were confidential and privileged ([640]);

4.7.2. the Appellant's evidence (referred to at [578]) to the effect that his belief that the documents relating to the funding arrangement were privileged was informed by communications with his legal advisers;

4.7.3. the Appellant had no role in drafting the affidavit of Ms Riach referred to in [462] of the judgment;

4.7.4. the Appellant had no role in drafting the affidavit of Ms George filed on 19 June 2006 ([605] & [606]);

4.7.5. the Appellant had no role in formulating the answers given by Mr Livesey QC to Gray J in September 2006 ([641]);

4.7.6. the Appellant had no role in drafting Minter Ellison's letter dated 12 December 2006 ([675] to [679]) except to the extent he agreed at a meeting with Minter Ellison on 11 December 2006 that they would attend to the further disclosure required in the George proceedings; and

4.7.7. the Appellant had no role in drafting the affidavit of Ms George filed on 22 December 2006 ([683]);

4.8. the primary judge failed to have any regard to the seriousness of the finding of improper purpose or to the gravity of the consequences of such a finding in determining whether the evidence was sufficient to discharge the burden of proof;

4.9. if, and to the extent that, the primary judge concluded that the Appellant breached his duties under section 181 of the Corporations Act by reason of the matters giving rise to any breach of sections 180 and/or 182 of the Corporations Act, the Appellant will rely on the grounds referred to in paragraphs 3 above and 5 below; and

4.10. the reasons are inadequate by reason of the matters referred to in paragraphs 4.2 to 4.9 above and are affected by operative delay, and thereby constitute an error of law and a miscarriage of justice as set out in paragraph 2.7 above.

5. Alternatively, the primary judge erred in law in finding that the Appellant contravened section 182 of the Corporations Act by reason that:

    5.1. the primary judge assessed the Appellant's conduct on the basis of hindsight;

    5.2. if, and to the extent that, the primary judge concluded that the Appellant breached his duties under section 182 of the Corporations Act by reason of the matters giving rise to any breach of sections 180 and/or 181 of the Corporations Act, the Appellant will rely on the grounds referred to in paragraphs 3 and 4 above;

    5.3. the primary judge failed to give any sufficient reasons for the finding that the Appellant breached his duties under section 182 of the Corporations Act, and the reasons are otherwise inadequate, in that the reasons do not identify:

        5.3.1. the advantage said to have been gained by the Appellant through the use of his position as liquidator of the Companies, or either of them; or

        5.3.2. the detriment said to have been suffered by the Companies, or either of them, through the Appellant's use of his position as liquidator of the Companies;

    5.4. the primary judge erred in concluding that the Appellant engaged in the pursuit, defence or funding of the proceedings against Ms Hamilton-Smith to gain an advantage for himself or to cause detriment to the Companies in that:

        5.4.1. the Appellant's purpose in pursuing, defending and funding the proceedings was to realise and protect the assets of Bernsteen, and no to gain an advantage for himself or to cause detriment to Bernsteen or Newmore and the Appellant repeats grounds 4.3 and 4.4 above; and

        5.4.2. the Appellant has in fact suffered a disadvantage in pursuing, defending and funding the proceedings in that neither the Appellant nor his firm received any payment for their work on the liquidation of Bernsteen after October 2004, including their work with the respect to the proceedings;

    5.5. the primary judge failed to have any regard to the seriousness of the finding that the Appellant had gained an advantage and caused detriment to the Companies, or to the gravity of the consequences of such a finding in determining whether the evidence was sufficient to discharge the burden of proof; and

5.6. the findings are inadequate by reason of the matters referred to in paragraph 5.1 to 5.4 above and are affected by operative delay, and thereby constitute an error of law and a miscarriage of justice as set out in paragraph 2.7 above.

6. The primary judge erred in law in granting, at reasons [922], permission to amend so as to file the Fourth Statement of Claim in so far as it related to his findings by reason that:

6.1. having regard to the timing of the oral application for permission, the nature of the amendments, the prejudice to the Appellant and binding appellate authority, permission should have been refused;

6.2. the primary judge failed to address any of the submissions of the Appellant in opposition to the grant of permission;

6.3. the primary judge failed to provide any or any sufficient reasons for the grant of permission at reasons [922] which reasons are affected by operative delay such as to constitute an error resulting in a miscarriage of justice;

6.4. the primary judge subsequently stated that the ruling at [922] is to the following effect, neither of which are stated in the reasons:

6.4.1. on 18 December 2014, the primary judge stated that he would "need to hear submissions on just what of the amendments in the fourth proposed amended statement of claim should be made" and that his Honour "took a shortcut by saying that it's really just those paragraphs that support the factual findings in the end that [his Honour] made"; and

6.4.2. on 15 April 2015 the primary judge stated that he had in mind a judgment of Zelling J (being *F F Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd (No 2)* (1990) 55 SASR 314) in which Zelling J "explained that amendments to the statement of claim can properly be made after the delivery of reasons and to reflect the issues that had been joined in the course of the trial and were resolved by the findings, the reasons"; and

6.5. the grant of permission has resulted in a denial of procedural fairness to the Appellant.

7. The primary judge erred in law in finding (at reasons [855]) there was cause for removal of the Appellant as liquidator of Bernsteen and Newmore by reason that:

7.1. for the reasons at grounds 2 to 6, the primary judge was wrong to find that the Appellant had breached his duties under sections 180, 181 or 182 of the Corporations Act;

7.2. the primary judge erred in finding that the Appellant failed to properly inform the Companies' committees of inspection of the way in which the litigation was conducted and its cost, in that:

7.2.1. the finding involved procedural unfairness to the Appellant, in that the primary judge wrongly considered that the Appellant had applied in the proceeding below for court approval of the arrangements to indemnify Ms George when no such application had been made;

7.2.2. the primary judge had adjourned the hearing of a separate proceeding issued by the Appellant at the direction of ASIC for a declaration under section 1322 of the Corporations Act that the committee of inspection's approval of the funding of the George proceedings in September 2011 was valid;

7.2.3. the question of what was disclosed to the committees in 2011 was not in issue in these proceedings; and

7.2.4. the primary judge was wrong to draw adverse inferences from the Appellant's failure to call members of the committees of inspection in that:

(i) the burden of proof with respect to facts and matters arising from the meetings of the committees lay with the Plaintiff; and

(ii) the Plaintiff did not call any witnesses to contradict the Plaintiff's evidence; and

7.3. the reasons are inadequate for the reasons stated in paragraph 7.1 and 7.2 above and are affected by operative delay such as to constitute an error resulting in a miscarriage of justice.

8. Further, or in the alternative to ground 6, the primary judge erred in law in granting permission on 28 October 2015 to amend the Statement of Claim with respect to the amendments contained in paragraphs 59.7. 88, 118, 127.1.1, 138, 139A, 1398, 139C (first appearing), 141G to 141J, 142.8B and 142.9A of the Second Proposed Fourth Amended Statement of Claim by reason that:

8.1. the primary judge failed to consider whether the amendments fell within the scope of the ruling at [922]. as such ruling was explained on 18 December 2014 and 15 April 2015 (see ground 6.4 above);

8.2. the primary judge failed to provide any sufficient reasons for the grant of permission in his reasons dated 28 October 2015, in that the reasons do not refer to the explanations of the ruling at [922] on 18 December 2014 and 15 April 2015, or identify whether or how the amendments fell within that ruling;

8.3. the amendments are not within the scope of the ruling in [922], as explained on 18 December 2014 and 15 April 2015;

8.4. the reasons dated 28 October 2015 are affected by operative delay such as to constitute an error resulting in a miscarriage of justice, in that:

8.4.1. the reasons were delivered more than three and half years after commencement of the trial, and more than two and a half years after conclusion of the trial;

8.4.2. the reasons mistakenly record (at [1]) that the plaintiff filed a form of Proposed Fourth Amended Statement of Claim in the course of the hearing when in fact the proposed pleading was not submitted until after conclusion of the hearing and judgment had been reserved (and which proposed pleading was further amended on 1 April 2015 and subsequently during the course of submissions); and

8.4.3. the reasons mistakenly record (at [1]) that the primary judge heard argument on the proposed amendments before the conclusion of the hearing and the delivery of reasons when in fact the only submissions on the amendments were made in writing and after judgment had been reserved.

9. Further, or in the alternative to ground 6, the primary judge erred in law in granting permission on 15 January 2016 to amend the Statement of Claim with respect to the amendments contained in paragraphs 59.2 to 59.6, 119.3, 142.8CA, 142.8CB and 142.8F of the Second Proposed Fourth Amended Statement of Claim by reason that:

9.1. the primary judge erred in re-opening the orders made on 28 October 2015 in that it was not in the interests of justice to set aside or vary the orders made on 28 October 2015 for the purpose of making further rulings on permission to amend having regard to:

9.1.1. the plaintiff's ability to appeal against the orders made on 28 October 2015;

9.1.2. the public interest in the finality of litigation;

9.1.3. case management considerations including the costs of dealing with the plaintiff's application to re-open the orders made on 28 October 2015; and

9.1.4. the lateness of the amendment to paragraph 59.2, which was first proposed by the plaintiff on 14 January 2016:

9.2. the primary judge failed to consider whether the amendments fell within the scope of the ruling at [922], as such ruling was explained on 18 December 2014 and 15 April 2015 (see ground 6.4 above);

9.3. the primary judge failed to provide any sufficient reasons for the grant of permission in his reasons dated 15 January 2016, in that the reasons do not refer to the explanations of the ruling at [922] on 18 December 2014 and 15 April 2015, or identify whether or how the amendments fell within that ruling;

9.4. the amendments are not within the scope of the ruling in [922], as explained on 18 December 2014 and 15 April 2015; and

9.5. the reasons dated 15 January 2016 are affected by operative delay such as to constitute an error resulting in a miscarriage of justice, in that the reasons were delivered more than three and half years after commencement of the trial, and more than two and a half years after conclusion of the trial.

Notice of Contention

The Respondent wishes to contend that the decision of the Court below should be affirmed but on grounds other than those relied upon by the Court below.

GROUNDS OF CONTENTION

The Respondent relies upon the following grounds:

1. Further Grounds for Removal

a. This ground is agitated if (which the Respondent contends is not the case), the grounds on which the Court removed the Appellant as liquidator of Bernsteen Pty Ltd ("Bernsteen") and Newmore Pty Ltd ("Newmore") (collectively Companies) were the declarations that the Appellant breached his duty under one or more of s 180, 181 and 182 of the *Corporations Act* 2001 (the "Declarations') rather than the findings of the conduct upon which those declarations of breach were made;

b. The Respondent contends that findings of breaches of duty can stand on their own without the making of a corresponding declaration to justify the removal of the Appellant as liquidator of the Companies;

c. Further or alternatively, it was open to the Learned Trial Judge to ascribe further grounds which justified the order removing Macks as liquidator of the Companies;

d. The Learned Trial Judge should have held that in the facts and circumstances found in paragraphs [565], [569], [587], [598], [641], [645], [655], [660], 720], [721], [726], [727], [728], [729], [730], [731], [735], [734], [739], [744], [746], [754], [757], [760], [771], [778], [787], [790], [798], [800], [804], [916], [917], [919], and [920] or one of them or some combination of them, constituted grounds justifying the removal of Macks as liquidator of the Companies regardless of their nexus to any declarations made of breach of duty under s 180, 181 or 182 of the *Corporations Act*.

2. Further or alternative bases for the exercise of discretion pursuant to s 31 of the *Supreme Court Act* 1935

a. The Respondent contends that in addition to the matters mentioned in [837] there were other bases upon which the Court could have and should have made the declarations pursuant to s 31 of the *Supreme Court Act* 1935;

b. The further facts and circumstances which would justify the exercise of the discretion to make the declarations were:

i. The breaches were serious breaches;

ii. The declarations were appropriate in order to demonstrate the Courts' disapproval of the conduct underlying the declarations;

iii. The breaches were centrally concerned with litigation undertaken in the Courts of South Australia;

iv. The breaches were by a person who was and/or described himself as officer of the Court.

3. Alternative basis for Declarations (3) – ASIC a Party

a. The Respondent contends that in the following facts and circumstances the Courts' jurisdiction under s 1317E of the *Corporations Act* had been enlivened before the declarations were made;

b. It was open to the Learned Trial Judge to find that his jurisdiction under s 1317E of the *Corporations Act* had been enlivened because:

i. ASIC intervened on 24 March 2015 by Notice pursuant to s 1330 of the *Corporations Act* and thus became a party to the proceeding by operation of s 1330(2);

ii. Upon ASIC becoming a party to the proceeding, if there was absent a jurisdictional basis for the making of the declarations of that the Appellant breached his duties under each of s 180, s 181 and s182 of the *Corporations Act* before the intervention, that ceased to be so upon the happening of the intervention;

iii. ASIC intervened before the declarations were made;

iv. ASIC agitated for the making of the declarations and for the removal of the Appellant as Liquidator of the Companies, amongst other things, on the basis of the findings upon which the declarations were made.

c. Further or alternatively, the Learned Trial Judge should have found that upon the intervention of ASIC in the proceeding he could make the declarations under s 1317E of the *Corporations Act* in addition to s 31 of the *Supreme Court Act* in circumstances where:

i. ASIC intervened on 24 March 2015 by Notice pursuant to s 1330 of the *Corporations Act* and thus became a party to the proceeding by operation of s 1330(2).

ii. Upon ASIC becoming a party to the proceeding, if there was absent a jurisdictional basis for the making of the declarations of that the Appellant breached his duties under each of s 180, s 181 and s 182 of the *Corporations Act* before the intervention that ceased to be so upon the happening of the intervention.

iii. ASIC intervened before the declarations were made.

iv. ASIC agitated for the making of the declarations and for the removal of the Appellant as liquidator of the Companies, amongst other things, on the of the findings upon which the declarations were made;

d. Alternatively, the Respondent contends that the Court on appeal is able to and should make the declarations pursuant to s 1317E of the *Corporations Act* upon the basis that ASIC is a party contending for the maintenance of the declarations.

4. Alternative basis for Declarations - Jurisdiction Under s 1317E

Ambulatory

a. The Learned Trial Judge erred in law in finding that in the exercise of the power under s1317E was limited to circumstances where an application for a declaration has been made by a person mentioned in s 1317J;

b. The Learned Trial Judge should have found that he was obliged to make declarations of breach of each of s180, s181 and s182 upon the findings in [744], [757], [761] in circumstances where the same facts and circumstances were agitated in support of the application by the Respondent for the removal of the Appellant as liquidator of the Companies.

5. Alternative basis for Declarations - The General Law

a. It was open to the Learned Trial Judge to find that he had jurisdiction to make further declarations that the Appellant breached his fiduciary duties under the general law upon the same findings or alternatively some of the findings of fact that he founded the findings that the Appellant breached his duties under s180, s181 and s182 of the *Corporations Act;*

b. The Learned Trial Judge should have held that in the facts and circumstances found in paragraphs [565], [569], [587], [598], [641], [645], [655], [660], 720], [721], [726], [727], [729], [730], [731], [735], [734], [739], [744], [746], [754], [757], [760], [771], [778], [787], [790], [798], [800], [804], [916], [917], [919], and [920] or one of them or some combination of them, the Appellant:

   i. breached his fiduciary duty under the general law in his capacity as Liquidator to the Respondent as a creditor or contributory of Bernsteen;

   ii. breached his fiduciary duty under the general law in his capacity as officer of Bernsteen;

c. Upon the findings in 5 b, the Learned Trial Judge should have made declarations that:

   i. breached his fiduciary duty under the general law in his capacity as liquidator to the Respondent as a creditor or contributory of Bernsteen;

   ii. breached his fiduciary duty under the general law in his capacity as officer of Bernsteen.

6. Alternative Contention as to the date from which the continuing conduct of the Bernsteen/George Suite of Proceedings against Hamilton-Smith was in breach of Duty

a. In the event that the Court on appeal is persuaded that the Learned Trial Judge was in error in finding that from a date no later than June 2005 the continued pursuit of Hamilton-Smith including by way of the indemnification of the proceedings involving Ms. George, the Respondent contends that it was open to the Learned Trial Judge to find that from a date no later than March 2006 to find that the continued pursuit of Hamilton-Smith including by way of the indemnification of the proceedings involving Ms. George was in breach of his duties.

Cross-Appeal

Grounds of Cross-Appeal

Grounds of Cross Appeal

The Respondent's grounds of Cross Appeal are:

1. Error in Finding that the Bart DOCA Proposal Had no Prospects of Approval

a. The Learned Trial Judge erred in fact in finding at [302] that the Bart DOCA proposal could not have been successfully been approved by the Second Meeting of Creditors.

b. The Learned Trial Judge should have found that there were realistic prospects that, if the Bart DOCA Proposal had been put to the Second Meeting of Creditors it would have been approved at the meeting.

2. Error in Failing to Find that the Appellant Breached his Duty in Issuing the Section 439 Report which Was Materially Misleading.

a. Having made the findings or accepted the evidence in [64], [68], [86], [99], [162], [172], [173], [217], [257], [265] and [230] (commencing with the words "It might) the Learned Trial Judge erred in fact in not finding that the section 439 Report to Creditors was misleading or contained a material non-disclosure in that it did not inform the creditors that the Bart DOCA Proposal remained open for consideration by the creditors in circumstances;

b. The Learned Trial Judge should have found that the section 439 Report was misleading or contained a material non-disclosure in that it failed to inform the creditors that:

i. The Bart DOCA Proposal was available for consideration by the creditors; and,

ii. That was open to the Second Meeting of Creditors to vote on whether or not the Bart DOCA Proposal should be accepted.

c. Upon the finding in 2.b. the Learned Trial Judge Should have found that if the s 439 Report had of informed the creditors of the matters in 2.b.i. and 2.b.ii. there was realistic prospect that the creditors would have voted in favour of the Bart DOCA Proposal.

3. Error in Failing to Find that the Appellant had a Duty to Put the Bart DOCA Proposal to the Meeting of Creditors on 21 December 2001 or to

Adjourn the Meeting to Determine whether a Variation to the Bart DOCA Proposal to which ARL Would Accede Could be Secured.

a. The Learned Trial Judge erred in law in failing to find that the Appellant was under duty to inform the Second Meeting of Creditors that the Bart DOCA Proposal was open for the meeting to consider and vote upon whether or not ARL had said prior to the meeting that it did not support the proposal;

b. The Learned Trial Judge should have found that the Appellant was under a such a duty and breached that duty by the conduct in 3.a.;

c. Upon the finding urged in 3.b. the Learned Trial Judge should have found that if the Appellant had not breached that duty there was realistic prospect that the a vote on the Bart DOCA Proposal would have been called the Bart DOCA Proposal adopted:

d. Further or alternatively, the Learned Trial Judge should have found that the Appellant was under a duty to put the Bart DOCA Proposal to a vote at the Second Meeting of Creditors.

e. Upon the finding urged in 3.d. the Learned Trial Judge should have found that if the Appellant had not breached that duty there was a realistic prospect that the Bart DOCA Proposal would have been adopted.

f. Further or alternatively, the Learned Trial Judge should have found that the Appellant was under a duty to inform the Second Meeting of Creditors of the existence and content of the Bart DOCA Proposal and that the position of ARL was an impediment to its acceptance and that it was open to the Second Meeting of Creditors to vote to adjourn the meeting for a period of no more than 60 days to determine whether the differing positions of Bart and ARL could be the subject of compromise.

g. Upon the finding urged in 3.f. the Learned Trial Judge should have found that if the Appellant had not breached that duty/those duties there was a realistic prospect that the Bart DOCA Proposal or a variant to the Bart DOCA Proposal would have been adopted at the adjourned meeting.

4. Error in Failing to Find that the Appellant was Motivated by Prospect of Personal Gain.

a. Having made the findings in [224], the Learned Trial Judge erred in fact in not finding that, in breaching the his duties as urged in 2.b. and 3.b., the Appellant was motivated by impermissible considerations

namely the obtaining of a greater financial benefit being in the event that the Companies were wound up rather than being made the subject of the Bart DOCA Proposal;

b. The Learned Trial Judge should have found that because of the impermissible considerations in 4.a., the Appellant breached his duty to the creditors and contributories of the Companies;

c. The Learned Trial Judge should have found that the personal motivation referred to was a material cause for the Bart DOCA Proposal not being voted on at the Second Meeting of Creditors;

d. Upon the findings urged in 4.b. and 4.c. the Learned Trial Judge should have found that if the Appellant had not breached his duty by acting on those impermissible considerations there was realistic prospect that the a vote on the Bart DOCA Proposal would have been called the Bart DOCA Proposal adopted.

5. Error in Finding No Loss of Chance to Assess

a. The Learned Trial Judge erred in fact in finding at [304] that the Respondent had suffered no loss of chance to assess.

b. The Learned Trial Judge failed to consider the matters urged in:

i. 1.b.;

ii. 2.c.;

iii. 3.c.;

iv. 43.e.;

v. 3.g.

c. On the matters referred to in 5.b. the Learned Trial Judge should have found that they caused the Respondent to suffer the loss of chance to avoid the Respondent's Liquidation losses.

d. Upon the finding urged in 5.c. the Learned Trial Judge should have assessed the Respondents loss of chance at 20%.

6. Failure to Allow the Respondent Extension of Time to File Supplementary Expert Report

a. The Learned trial Judge erred in the exercise of his discretion in refusing the Plaintiff permission to refer to and rely upon the Supplementary Expert Report of Stirling Horne filed on 7 December 2012 FDN 131 at trial.

b. In exercising his discretion, the Learned Trial Judge:

i. Failed to have any or sufficient regard to the prejudice the Respondent would suffer from being unable to rely on supplementary expert report;

ii. wrongly found that the commencement of the trial of the proceeding would be delayed if the Respondent were allowed to refer to and rely on the supplementary expert report.

7. Refusal to Grant Extension of Time for the Bringing of the Application under s 1321

a. The Learned Trial Judge erred in law in declining to exercise his discretion to grant an extension of time under *Corporations Rules* in respect of his application under s 1321 of the *Corporations Act*.

b. The Learned Trial Judge erred because:

i. He failed to have regard or sufficient regard to the fact that the application was ventilated in respect of his conduct as liquidator as well as his conduct as administrator of the Companies;

ii. He failed to have regard or sufficient regard to the fact that the conduct upon which the court found that the Appellant breached his duties as liquidator and upon which he should be removed as liquidator was concealed by the Appellant and only partly revealed in early 2007 (in the George suite of proceedings) and only fully revealed during the trial;

iii. He failed to have regard or sufficient regard to the failure to make discovery of the documents relevant to his conduct in the Bernsteen/George suite of proceedings involving Hamilton-Smith which were released to the Respondent as a result of the order of 15 August 2012 and in particular the finding that part of the Appellant's motivation in maintaining those proceedings was personal antipathy towards the Respondent and as a foil to this proceeding;

iv. He failed to have regard or sufficient regard to the complexity of the facts and circumstances of the case and the overall conduct of the Appellant in defending this action;

v. The Learned trial Judge erred in law at paragraph [849] of the Judgment in finding that there was no utility in bringing a belated appeal pursuant to s 1321 of the Act against the decisions made by Mr Macks in the course of the administration and liquidation.

c. The Learned Trial Judge should have exercised his discretion to grant an extension of time pursuant to Corporations Rules for the bringing of an application under s 1321.

8. Failure to Find that the Conduct of the Appellant was Conduct in Trade or Commerce

a. The Learned trial Judge erred in law at paragraph [83] of the Judgment in finding that the conduct of the Appellant complained of was not conduct in trade or commerce.

b. The Learned Trial Judge should have found that:

i. The issuing of the section 439 Reports which contained the misleading statement or the material non-disclosure in 2.a. constituted misleading or deceptive conduct within the meaning of s 56 of the *Fair Trading Act 1987* (SA) or s 52 of the *Trade Practices Act 1974* (C'th).

ii. The failure to inform the Second Meeting of Creditors that it was open to the meeting to consider and vote upon the Bart DOCA Proposal constituted misleading or deceptive conduct within the meaning of s 56 of the *Fair Trading Act 1987* (SA) or s 52 of the *Trade Practices Act 1974* (C'th).

c. Upon the findings urged in 8.b., the Learned Trial Judge should have found that the conduct complained of caused the Respondent to suffer a loss of chance to avoid the Respondent's Liquidation Losses.

d. Upon the finding urged in 8.c. the Learned Trial Judge should have assessed the Respondent's loss of chance at 20% and made an order for damages in the sum of 20% of the Respondent's Liquidation Losses.

9. Further to 3 - Failure to Find that the conduct of the Appellant in Relation to the Calling and Conduct of the 2nd Meeting of Creditors Caused Loss to the Respondent Compensable under s 447E of the *Corporations Act*.

a. The Learned Trial Judge found at [309] that s 447E of the *Corporations Act* empowered the Court to make an order after the administration has ended including an order for compensation.

b. The Learned Trial Judge erred in finding in the circumstances of the case that there was no reason to make a compensatory order in favour of the Respondent for the reason that the liquidation of the Companies was almost complete.

c. The Respondent repeats 3.a. to 3.g above.

d. Upon a finding of one or other of the several breaches urged in 9.c. by reference to 3.a. to 3.g., the Learned Trial Judge should have found that the conduct complained of caused the Respondent to suffer a Loss of Chance to avoid the Respondent's Liquidation Losses.

e. Upon the finding urged in 9.d. the Learned Trial Judge should have assessed the Respondent's loss of chance at 20% and made an order for compensation in the sum of 20% of the Respondent's Liquidation Losses.

10. The Interlocutory Costs Order Was in All the Circumstances Unjust

a. At paragraph [917] and [920] of the Reasons for Judgment the Court found that from at least mid 2005 the Appellant in conducting the Bernsteen/George Proceedings constituted an abuse of process.

b. From the finding in 10.a. it follows that the documents which the Court required to be disclosed by reason of the ruling on 15 August 2012, referred to in paragraph [914] of the Reasons for Judgment, were as a matter of law never the subject of privilege and should have been disclosed by the Appellant before the making of the Non-party Applications.

c. In the George Proceedings the Appellant had claimed privilege in his own right over documents concerning his relationship with George which were the subject of a subpoena to him in the George Proceedings (***Subpoena***).

d. In the proceeding the subject of Appeal, the Appellant claimed that the document or the greater part of the documents which had been the subject of the Subpoena were documents which were in his possession as litigation funder and were documents over which George had a claim for privilege.

e. To the extent of the documents produced in accordance with the ruling of referred to in paragraph [914] of the Reasons for Judgment (namely exhibits D397 and P412):

i. if they had been discovered without claim of the cloak of privilege, the Plaintiff would not have brought the applications the subject of the Interlocutory Costs Order:

ii. further or alternatively, a substantial alternatively a significant proportion of those documents were not discovered by the Appellant, and so at the time of the Non-Party Applications were

documents which would have been amenable to orders for non-party discovery sought in the applications.

Notice of Contention on Cross-Appeal

Upon the hearing of the cross-appeal the cross-respondent will contend that the judgment of the learned trial judge should be upheld for the reasons given by him and in the alternative, upon the following additional grounds:

1. As to each of the declarations sought in paragraphs 2a, 2b, 2c, 2d, 3 and 4 of the Second Notice of Cross Appeal dated 2 October 2015 ("**Notice of Cross-Appeal**"), the learned trial judge should not have made declarations in those terms on the additional ground that the cross-appellant:

    1.1. did not seek such declarations at trial, whether in any version of his statement of claim or at all; and

    1.2. did not, in the cross-appellant's draft final orders, seek any declarations at all relating to the cross-respondent's conduct as administrator.

2. As to each of the declarations sought in paragraphs 2a, 2b, 2c, 2d, 3 and 4 of the Notice of Cross-Appeal, the learned trial judge should not have made such declarations pursuant to section 1321 of the *Corporations Act 2001* (Cth) ("**Corporations Act**") on the additional ground that the cross-appellant failed to comply with, and did not purport to invoke, the required procedure for an appeal under section 1321 of the *Corporations Act* in that, (apart from failing to commence his appeal within 21 days of the act, omission or decision complained of):

    2.1. contrary to the procedure contemplated in Rules 14.1(4) and 14.1(5) of the *Corporations Rules 2003* (South Australia) ("**Corporations Rules**"), the cross-appellant did not serve any affidavit in support of his complaint as soon as practicable after filing his originating process; and

    2.2. contrary to the procedure contemplated in Rule 14.1(3) of the Corporations Rules, the cross-appellant did not apply for any extension of the time stipulated by Rule 14.1(2)(a) of the Corporations Rules within which to commence an appeal under section 1321 of the Corporations Act.

3. As to each of the declarations sought in paragraphs 2a, 2b, 2c, 2d and 3 of the Notice of Cross-Appeal, to the extent the cross-appellant seeks to rely on breaches of sections 180 to 182 of the *Corporations Act*, the learned trial judge should not have made such declarations pursuant to section 31 of the *Supreme Court Act 1935* (SA) on the additional grounds referred to in paragraphs 1.1 to 1.5 of the cross-respondent's Third Notice of Appeal dated 22 February 2016.

4. The declaration sought in paragraph 4 and the order sought in paragraph 5 of the Notice of Cross-Appeal ought to have been refused on the additional ground that the cross-respondent did not owe any duty to the cross-appellant, breach of which would give the cross-appellant a cause of action for damages or compensation.

5. The declaration sought in paragraph 2a of the Notice of Cross-Appeal ought to have been refused on the additional grounds that:

    5.1. there was no DOCA proposal on which the second meeting of creditors on 21 December 2001 could vote in that:

        5.1.1. following the failure of Mr Bart and ARL to agree terms based on the Heads of Agreement provided by the cross-appellant and Mr Bart to the cross-respondent on 27 November 2001, the cross-respondent took it upon himself to attempt to broker an agreement between Bart and ARL;

        5.1.2. following discussions and negotiations with Mr Bart, the cross respondent drafted a document on the night of 18 December 2001 in the form of a joint proposal from the cross-appellant, Mr Bart and ARL to be submitted by them to the cross-respondent (the "**Administrator's Draft DOCA Proposal**");

        5.1.3. the cross-respondent sent the Administrator's Draft DOCA Proposal by facsimile to each of Mr Bart and ARL at about midnight on the night of 18 December 2001, in which he asked them to sign the document and return it to him by 9.00 a.m. on 19 December if they consented to its terms;

        5.1.4. ARL did not consent to or sign the Administrator's Draft DOCA Proposal, and rejected its terms on 19 December 2001; and

        5.1.5. in the absence of agreement from ARL, there was no DOCA proposal to be voted on;

    5.2. alternatively, the cross-respondent acted reasonably and breached no duty in proceeding on the basis that, without ARL's consent and agreement, there was no DOCA proposal to be voted on; and 5.3. the cross-appellant conceded at trial (see T3551) that, unless the cross-respondent had breached his duties in the manner described in paragraph 2d of the Notice of Cross-Appeal, the cross-respondent was under no duty to inform the meeting on 21 December 2001 that there was a DOCA proposal on which the meeting could vote.

6. As to each of the declarations and orders sought in paragraphs 2d and 6 of the Notice of Cross-Appeal, the learned trial judge should not have made such declarations or orders because:

    6.1. the breaches of duty alleged in paragraph 2d had not been pleaded and were not the subject of the cross-appellant's claim at trial;

    6.2. the claim referred to in paragraph 6 of the Notice of Cross-Appeal for an order under section 82 of the *Trade Practices Act 1974* (Cth) had not been pleaded at trial, and permission to make an amendment to that effect was in any event refused by the learned trial judge on 28 October 2015; and

    6.3. in light of the matters set out at paragraphs 6.1 and 6.2 above, the learned trial judge was wrong to give the cross-appellant permission to plead in his Fourth Statement of Claim, either at [922] of the reasons for judgment delivered on 9 December 2014 ("**Reasons**"), or by way of permission granted on 28 October 2015 or 15 January 2016, the matters referred to in paragraph 6.1 above in that:

        6.3.1. having regard to the timing of the oral application for permission to amend on 26 February 2013, the nature of the amendments, the prejudice to the Appellant and binding appellate authority, permission should have been refused;

        6.3.2. the primary judge failed to address any of the submissions of the Appellant in opposition to the grant of permission in either the Reasons or the reasons for judgment delivered on 28 October 2015 and 15 January 2016;

        6.3.3. the primary judge failed to provide any or any sufficient reasons for the grant of permission at Reasons [922] or in the reasons delivered on 28 October 2015 or 15 January 2016, which reasons are affected by operative delay such as to constitute an error resulting in a miscarriage of justice;

        6.3.4. the primary judge stated subsequently to the Reasons that the ruling at [922] is to the following effect, neither of which are stated in the Reasons or the reasons delivered on 28 October 2015 or 15 January 2016:

            6.3.4.1. on 18 December 2014, the primary judge stated that he would "*need to hear submissions on just what of the amendments in the fourth proposed amended statement of claim should be made*" and that his Honour "*took a shortcut by saying that it's really just*

those paragraphs that support the factual findings in the end that [his Honour] made"; and

6.3.4.2. on 15 April 2015 the primary judge stated that he had in mind a judgment of Zelling J (being *F F Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd* (No 2) (1990) 55 SASR 314) in which Zelling J "*explained that amendments to the statement of claim can properly be made after the delivery of reasons and to reflect the issues that had been joined in the course of the trial and were resolved by the findings, the reasons*"; and

6.3.5. the primary judge failed to consider whether the amendments fell within the scope of the ruling at [922], as such ruling was explained on 18 December 2014 and 15 April 2015;

6.3.6. the amendments are not within the scope of the ruling in [922], as explained on 18 December 2014 and 15 April 2015;

6.3.7. the grant of permission has resulted in a denial of procedural fairness to the cross-respondent;

6.3.8. the learned trial judge failed to have regard or sufficient regard to the following matters:

6.3.8.1. the revised pleading alleged a fundamentally different case from that alleged in the Second Statement of Claim;

6.3.8.2. the cross-appellant did not mention that he intended to put his case on such a different basis until after the cross-respondent had finished his evidence;

6.3.8.3. the amendments themselves were not advanced until after evidence had closed and the parties had made their closing addresses; and

6.3.8.4. the cross-appellant gave no explanation for the lateness of the proposed amendments;

6.3.9. the cross-appellant's counsel had not put to the cross-respondent in cross examination that he had preferred his interests to those of the creditors in the manner now alleged;

6.3.10. there was a possibility that the cross-respondent would have conducted his case differently if the amendments had been pleaded before trial; and

6.3.11. the cross-respondent had no opportunity to investigate the new claims, to file an amended defence, or to re-open his case and adduce further evidence; and

6.4. having regard to the seriousness of the allegations, the evidence was not sufficient to discharge the burden of proof.

7. The declaration sought in paragraph 3 of the Notice of Cross-Appeal ought to have been refused on the additional ground that the section 439A reports gave fair disclosure of material facts and were not misleading:

7.1. the cross-appellant repeats ground 5.1 above; and

7.2. the section 439A reports set out the terms of the Administrator's Draft DOCA Proposal in full and contained words to the effect that those terms required the consent of ARL, which had not been received, all of which was true.

8. As to the claims referred to in paragraphs 4, 5, 6 and 8 of the Notice of Cross Appeal for damages or compensation for loss of a chance of avoiding the "**Respondent's Liquidation Losses**" the primary judge should have dismissed such claims on the additional grounds that:

8.1. the cross-appellant had failed to prove that he had incurred the legal costs claimed as part of the Respondent's Liquidation Losses;

8.2. the cross-appellant was required, and failed, to prove his loss on the balance of probabilities;

8.3. the breaches of duty alleged did not cause the cross-appellant to lose any relevant opportunity to avoid the Respondent's Liquidation Losses; and

8.4. the Respondent's Liquidation Losses (or the loss of any opportunity to avoid them) were in any event too remote from any breach of duty to be recoverable.

9. The order sought in paragraph 6 of the Notice of Cross-Appeal ought to have been refused on the additional ground that the cross-appellant's claim under the *Fair Trading Act 1987* (SA) was not commenced within the statutory limitation period.

10. The order sought in paragraph 7 of the Notice of Cross-Appeal ought to have been refused on the additional grounds that:

10.1. the cross-appellant did not apply for or plead any basis for any extension of time to bring an appeal under section 1321 of the Corporations Act;

10.2. the cross-appellant did not provide any explanation for his delay in failing to commence an appeal under section 1321 of the Corporations Act within 21 days of the act, omission or decision complained of; and

10.3. the proceedings below, in which the cross-appellant pursued a private law action in damages against the cross-respondent in 2006, were not in any event an appropriate vehicle for the pursuit of an appeal under section 1321 of the Corporations Act against acts, omissions or decisions of the cross respondent in 2001.

11. As to the orders sought at section 1B of the Notice of Cross-Appeal, permission to appeal against the Interlocutory Costs Order ought to be refused, or such appeal ought to be dismissed, on the additional grounds that:

11.1. the Notice of Cross-Appeal does not identify any error on the part of the learned trial judge;

11.2. the Notice of Cross-Appeal does not identify any error on the part of his Honour Judge Lunn; and

11.3. any appeal against the Interlocutory Costs Order made by his Honour Judge Lunn on 27 October 2010 would in any event be out of time and there is no basis for a grant of an extension of time.

12. As to the cross-appellant's grounds of cross-appeal:

12.1. the cross-respondent repeats paragraphs 1 - 11 above;

12.2. as to ground 4, the alleged motivation of the cross-respondent referred to in ground 4a has never been pleaded in any version of the statement of claim, and was not put to the cross-respondent at trial; and

12.3. as to ground 6, there is no appeal against, or application for permission to appeal against, the interlocutory ruling refusing an extension of time, and such an appeal is now out of time.