IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M203 of 2018

BETWEEN:

CONNECTIVE SERVICES PTY LTD (ACN 107 366 496)

First Appellant

CONNECTIVE OSN PTY LTD (ACN 106 761 326)

Second Appellant

and

SLEA PTY LTD (ACN 106 752 434)

First Respondent

MINERVA FINANCIAL GROUP PTY LTD (ACN 124 171 759)

Second Respondent

MILLSAVE HOLDINGS PTY LTD (ACN 115 160 097)

Third Respondent

MARK SEAMUS HARON

Fourth Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES ON THE APPEAL

2. The appeal raises one core issue: can a company contravene s 260A of the *Corporations Act 2001* (Cth) (**Act**) by prosecuting and funding a proceeding in its own name, which seeks to enforce a pre-emptive rights provision between shareholders in the company's constitution, claiming relief which has the objective of compelling one shareholder to offer its shares in the company to the other shareholders so that an acquisition of those shares may proceed?

PART III: SECTION 78B NOTICE

3. The first and second respondents (**Slea** and **Minerva**, respectively) consider that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

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PART IV: STATEMENT OF MATERIAL FACTS

4. The facts stated in the appellants' submissions are not contentious. However, the following facts, some of them additional, require emphasis.

5. *Shareholders and directors:* At all relevant times, the appellants had only three shareholders, namely Slea, the third respondent (**Millsave**) and the fourth respondent (**Mr Haron**).[1] At all relevant times, Glenn Lees has been the sole director and secretary of Millsave,[2] and Mr Lees and Mr Haron have been directors of the appellants, together with Graham Maloney (who is not a shareholder).[3]

6. Thus: (a) on the one hand, Mr Lees and Mr Haron control the boards of the appellants; and (b) on the other hand, it is the self-same Mr Lees and Mr Haron controlling or constituting the shareholders which, if the proceedings brought by the appellants are successful, will obtain the benefit of the enforcement of the pre-emptive rights provisions in issue.

7. *Wider context:* This proceeding was commenced by the appellants in the midst of ongoing litigation, including an oppression proceeding commenced by Slea in August 2011 against the appellants (which proceeding remains on foot).[4] This proceeding was also commenced approximately eight weeks after Slea filed an application for leave to commence a derivative proceeding in the name of the appellants against their directors, Mr Lees, Mr Haron and Mr Maloney, for breach of directors' duties.[5]

8. *The allegations:* The appellants' underlying claim alleging breach of pre-emptive rights by Slea is founded upon two sources: namely, the 2009 Agreement[6] entered into by Slea with Minerva in May 2009 and the Accommodation Agreement entered into by Slea with Minerva on or about 12 August 2010.[7] The 2009 Agreement was disclosed to the appellants on 21 May 2009[8] and came to an end on or about 3 June

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[1] Court of Appeal's Reasons, [4] [**AB 80-81**].

[2] Court of Appeal's Reasons, n 4 [**AB 81**].

[3] Court of Appeal's Reasons, [5] [**AB 81**].

[4] Court of Appeal's Reasons, [2] [**AB 80**] and [10] [**AB 82**].

[5] Court of Appeal's Reasons, [2] [**AB 80**]. Leave to commence the derivative proceeding was subsequently granted (*Slea Pty Ltd v Connective Services Pty Ltd* [2017] VSC 609) and the appeal by the appellants against the grant of leave was recently dismissed (*Connective Services Pty Ltd v Slea Pty Ltd* (2018) ACSR 321).

[6] Court of Appeal's Reasons, [7] [**AB 82**].

[7] Court of Appeal's Reasons, [8] [**AB 82**].

[8] Statement of Claim, [24]; Amended Defence, [24(a)].

2009 (albeit the appellants dispute this fact).[9] The Accommodation Agreement was disclosed by Slea in earlier proceedings instituted by Mr Haron, and to which Millsave was a party, on 14 December 2011.[10] It is the appellants' contention that Slea intended and intends (by those agreements) to transfer its shares to Minerva without complying with the pre-emptive rights provisions.[11]

9. *The moving parties:* Millsave and Mr Haron, despite their long knowledge of the two agreements, and for reasons unexplained, have declined to bring proceedings against Slea alleging that either or both of the 2009 Agreement or the Accommodation Agreement triggered the pre-emptive rights provisions in the constitutions of the appellants. Equally, they have chosen not to incur the costs liabilities and exposures commensurate with being plaintiffs in such a proceeding.

10. In the face of those facts, it was the appellants who chose to commence this proceeding seeking to enforce the pre-emptive rights provisions. They did so on 11 August 2016, one day less than six years after the date of the Accommodation Agreement.

11. The appellants are the only plaintiffs to the proceeding.[12] Millsave and Mr Haron have been joined as necessary defendants. They would be the beneficiaries of the orders sought by the appellants in this proceeding if the claims were successful.[13] They have no costs exposure in the proceedings.

12. *The nature of the relief sought:* The relief sought in the proceedings is variously framed. It includes, as the primary relief, an order that Slea make an offer to transfer its shares to Millsave and Mr Haron. It also includes lesser relief in the form of negative injunctions which would prevent Slea offering its shares to any other party without first offering them to Millsave and Mr Haron.[14]

13. *The financial commitment:* By bringing the proceedings, the appellants have taken on two types of financial commitment and exposure: (a) a present and continuing liability for the costs of the lawyers retained by the appellants in the proceedings; and (b) a

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[9] Appellants' Submissions, [9]; Court of Appeal's Reasons, [7] [**AB 82**].

[10] Appellants' Submissions [10]; Court of Appeal's Reasons, [9] [**AB 82**].

[11] Court of Appeal's Reasons, [13] [**AB 83**].

[12] Court of Appeal's Reasons, [12] [**AB 83**].

[13] Court of Appeal's Reasons, [77] [**AB 100-101**].

[14] Court of Appeal's Reasons, [15]-[16] [**AB 83-84**].

contingent liability for any adverse costs orders that may be made against the appellants in the proceedings.[15]

14. *No indemnity:* There is no evidence, or suggestion, that the appellants have secured an indemnity from Millsave or Mr Haron against such costs liabilities and exposures.

15. Thus: (a) even if the proceedings are successful, there is likely to remain a net out-of-pocket exposure for the appellants – for that part of their costs which are not recovered under any costs orders the Court may make in the appellants' favour; and (b) if the proceedings are unsuccessful, there will be a much larger exposure – for all the legal costs of the appellants plus all costs ordered to be paid by the appellants to Slea.

16. *The limited evidence:* At the hearing of Slea and Minerva's application to dismiss or stay the proceeding, the appellants chose to adduce no evidence in response to the contention that the commencement and prosecution of the proceeding contravened the implied prohibition in s 260A of the Act.[16] In particular, the appellants chose to adduce no evidence directed to the purpose of the appellants, or their directors, in commencing the proceeding; why it was that the appellants commenced the proceeding instead of Millsave and Mr Haron who stood to benefit from them; as to the expected financial costs of prosecuting the proceeding and the financial impact of those costs on the appellants; or as to why no indemnity was secured from Millsave and Mr Haron for the costs and exposures of the proceeding.[17]

17. On the other hand, Slea adduced unchallenged evidence of the likely costs the appellants would incur in prosecuting the proceeding, which are substantial.[18]

18. *Summary of key facts:* Millsave and Mr Haron, who control the appellants, have chosen to use company funds to prosecute this proceeding instead of bringing and funding the proceeding themselves.[19] They have done this even though the object of the proceedings is to obtain a benefit for themselves as indicated by the primary relief sought in the statement of claim, namely an order compelling Slea to offer its shares

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[15] Court of Appeal's Reasons, [77] [**AB 100-101**].

[16] Court of Appeal's Reasons, [75] [**AB 100**].

[17] Court of Appeal's Reasons, [49] [**AB 92-93**] and [51] [**AB 93**]. Those references describe the submissions on this point made by Slea and Minerva, the factual basis for which was not challenged. See also, Court of Appeal's Reasons, [75] [**AB 100**].

[18] Primary Judge's Reasons, [82] [**AB 35**].

[19] Court of Appeal's Reasons, [77] [**AB 100-101**].

in the appellants to Mr Haron and Millsave.[20]

19. While the immediate object of the proceeding is a compulsory offer from Slea to transfer its shares to Millsave and Mr Haron, that offer is intended to be one which Millsave and Mr Haron will accept, resulting in an acquisition of the shares. It is not to be inferred that Millsave and Mr Haron would cause the appellants to go to the trouble and expense of bringing the proceedings, and fighting them to this Court, to establish some idle point of principle. They know the terms of the 2009 Agreement and the Accommodation Agreement. Any offer compelled to be made to them must respect those terms. They must intend that, if they secure the benefit of a compulsory offer, they will proceed to accept it and make an acquisition of shares.

20. Thus the immediate object of the proceedings is to obtain a compulsory offer; and the ultimate object is to facilitate an acquisition of shares.

21. *Matters not before the Court*: It should go without saying that: (a) Slea denies all claims made in the proceeding; and (b) the Court on this appeal is not asked to rule on whether the pre-emptive rights provisions have been "triggered" by any action of Slea sued upon or whether, even if triggered, relief in any and if so which of the various forms sought by Millsave and Mr Haron ought to be granted.

22. Specifically, the Court is not asked to rule on the question of whether the provision, if triggered, should be enforced by a positive order to make an offer to the other shareholders or merely a negative order not to complete a threatened sale to a third party without first offering the shares to the remaining shareholders (which may depend on the construction of the particular pre-emptive rights provision in question).[21] It suffices, for the question raised in this appeal, that the appellants seek both forms of relief in the proceedings and are using the appellants' funds to do so.

PART V: STATEMENT OF ARGUMENT IN ANSWER

The origins of the prohibition – United Kingdom

23. The origin of the prohibition on financial assistance has been traced to *Trevor v*

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[20] Court of Appeal's Reasons, [15]-[16] [**AB 83-84**] (referring to paragraph A of the prayer for relief in the Statement of Claim).

[21] See the discussion of the various options in *Woolworths Ltd v About Life Pty Ltd* (2017) 18 BPR 36,983, [156] (Emmett AJA).

Whitworth.[22] In that case, responding to an argument that a company's management might legitimately exercise power to buy out "undesirable" shareholders, Lord Macnaghten said:[23]

> But I would ask, Is it possible to suggest anything more dangerous to the welfare of companies and to the security of their creditors than such a doctrine? Who are the shareholders whose continuance in a company the company or its executive consider undesirable? Why, shareholders who quarrel with the policy of the board, and wish to turn the directors out; shareholders who ask questions which it may not be convenient to answer; shareholders who want information which the directors think it prudent to withhold. Can it be contended that when the policy of directors is assailed they may spend the capital of the company in keeping themselves in power, or in purchasing the retirement of inquisitive and troublesome critics? … If shareholders think it worth while to spend money for the purpose of getting rid of a troublesome partner who is willing to sell, they may put their hands in their own pocket and buy him out, though they cannot draw on a fund in which others as well as themselves are interested. That, I think, is the law, and that is the good sense of the matter.

24. Following the publication of the Greene Report,[24] a prohibition against financial assistance was introduced into the *Companies Act 1929* (UK).[25] The report described schemes which enabled companies to effectively provide money for the purchase of their own shares, and warned such practices were open to "the gravest abuses".[26] The new provision prohibited the giving of "any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company". The prohibition applied to financial assistance given "directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise".

25. The prohibition was expanded in 1948, subsequent to the decision in *Re VGM Holdings Ltd,*[27] so it applied to subscription for (as well as purchase of) company shares.[28] The Jenkins Report, published in 1962, reiterated the important policy

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[22] (1887) 12 App Cas 409. See *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260, 290-291 (Kirby P).

[23] *Trevor v Whitworth* (1887) 12 App Cas 409, 435-436 (Lord Macnaghten).

[24] Report of the Company Law Amendment Committee, 1925-26, Cmnd 2657, [30]-[31]. The Committee was chaired by Wilfred Greene KC (later, Lord Greene MR).

[25] 19 & 20 Geo. 5 c. 23, s 45(1).

[26] Greene Report, [30].

[27] [1942] Ch 235.

[28] *Companies Act 1948* (UK) 24 & 25 Geo. 5 c. 28, s 54; see the discussion in B H McPherson, 'The Prohibition against Financial Assistance for the Purchase of Shares', (1971) 6 *The University of Queensland Law Journal* 235, 235.

reasons underlying the prohibition, noting the risks to the company, creditors and minority shareholders involved in permitting persons to gain control of a company not by using their own funds to purchase shares but on the understanding company funds would be used for that purpose.[29]

The position in Australia

26. Prior to the commencement of the Companies Codes in 1982, the position throughout Australia was generally consistent with the position in the UK (as it developed after the Greene Report).[30]

27. With the enactment of the Companies Codes, a different approach was taken to the financial assistance prohibition.[31] The new provision expressly captured direct or indirect assistance given *at any time* in respect of an actual or proposed "acquisition" of shares or units of shares.[32] The concept of an "acquisition" was intended to be broader than the concept of a "purchase".[33] New (and broad) definitions of "purpose" and "connection" were inserted. Other changes were made, including reframing the exemptions from the prohibition.

28. That expansive approach to financial assistance was also found in s 205 of the *Corporations Law*, the precursor to s 260A of the Act.

29. Section 260A was introduced as part of a suite of changes made by the *Company Law Review Act 1998* (Cth). The *Company Law Review Bill 1997* (Cth) was described as a "rewrite" of the provisions of the *Corporations Law* across seven areas.[34] The explanatory memorandum for the Bill stated that the Bill would make "the Law more

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[29] Report of the Company Law Committee 1962, Cmnd 1749, [173].

[30] Austin and Ramsay, *Ford, Austin & Ramsay's Principles of Corporation Law* (LexisNexis Butterworths), [24.670.3]. For the period prior to 1961, see, e.g.: *Companies Act 1936* (NSW), s 148; *Companies Act 1938* (Vic), s 45 and *Companies Act 1958* (Vic), s 56; *Companies Act 1931* (Qld), s 57; *Companies Act 1943* (WA), s 59; *Companies Act 1934* (SA), s 62; *Companies Act 1959* (Tas), s 55. Post-1961, see the Uniform Companies Acts 1961-1962, s 67.

[31] Austin and Ramsay, *Ford, Austin & Ramsay's Principles of Corporation Law* (LexisNexis Butterworths), [24.670.3].

[32] See, e.g., *Companies Act 1981* (Cth), s 129; Explanatory memorandum to the Companies Bill 1980-81 (Cth), [327].

[33] See, e.g., *Companies Act 1981* (Cth), s 129; Explanatory memorandum to the Companies Bill 1980-81 (Cth), [327(a)].

[34] Explanatory memorandum to the Company Law Review Bill 1997 (Cth), [1.1].

readily understandable" and would reduce "the complexity of the rules ... simplifying their expression".[35] Against that background, it is not surprising that the text of s 260A differs from its predecessor.

30. Section 260A provides as follows:

> (1) A company may financially assist a person to acquire shares (or units of shares) in the company or a holding company of the company only if:
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> (a) giving the assistance does not materially prejudice:
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> (i) the interests of the company or its shareholders; or
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> (ii) the company's ability to pay its creditors; or
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> (b) the assistance is approved by shareholders under section 260B (that section also requires advance notice to ASIC); or
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> (c) the assistance is exempted under section 260C.[36]
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> (2) Without limiting subsection (1), financial assistance may:
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> (a) be given before or after the acquisition of shares (or units of shares); and
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> (b) take the form of paying a dividend.
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> (3) Subsection (1) extends to the acquisition of shares (or units of shares) by:
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> (a) issue; or
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> (b) transfer; or
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> (c) any other means.

31. Section 260A, when compared to its predecessor provision, is greatly simplified. The changes were not only made, however, to improve the drafting. The explanatory memorandum explained that the existing provision (s 205) "performs a useful function in deterring a range of undesirable transactions having the potential to prejudice a company's financial position", but "impedes many normal commercial transactions".[37] To remedy that situation, the concept of "material prejudice" was introduced to "minimise the difficulties the rule currently causes for ordinary commercial transactions".[38] Under s 260A, according to the explanatory memorandum, a company would not need to decide if a transaction involved the giving of financial assistance unless there was material prejudice.[39]

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[35] Explanatory memorandum to the Company Law Review Bill 1997 (Cth), [1.2] and [1.11].

[36] Section 260C relates to "general exemptions based on ordinary course of commercial dealing".

[37] Explanatory memorandum to the Company Law Review Bill 1997 (Cth), [12.75].

[38] Explanatory memorandum to the Company Law Review Bill 1997 (Cth), [12.76].

[39] Explanatory memorandum to the Company Law Review Bill 1997 (Cth), [12.76].

32. Thus, s 260A maintained the broad prohibition on financial assistance but created the material prejudice exception to assist in facilitating ordinary commercial transactions.

Construction of the current statutory text

33. Section 260A is part of Chapter 2J of the Act, which concerns transactions affecting share capital. The provision itself is part of Pt 2J.3 ("financial assistance"). Section 260A(1), as set out in paragraph 30 above, commences with the words "a company may financially assist", and shortly thereafter introduces a caveat to those words that is central to the provision's operation. The authority to provide financial assistance conferred on a company by s 260A is only enlivened if one of subparagraphs (a), (b) or (c) of subsection (1) is satisfied.

34. Section 260A(1) operates in relation to financial assistance given to a person "to acquire shares (or units of shares) in the company". Section 9 of the Act defines a "unit" as follows:

> in relation to a share ... means a right or interest, whether legal or equitable, in the share ... by whatever term called, and includes an option to acquire such a right or interest in the share ...

35. Section 1324(1B) provides that where injunctive relief is sought on the basis of a contravention of s 260A(1)(a), "the Court must assume that the conduct constitutes, or would constitute, a contravention of that ... provision unless the company ... proves otherwise".

36. The following matters should be noted.

37. ***First***, s 260A is properly construed as containing an *implied prohibition*. It is not permissive.[40] That is, despite its plain English form, its substantive effect is not to add to the list of things that a corporation is otherwise permitted by law to do, but rather, as it has been expressed by the NSW Court of Appeal, it operates such that "financial assistance is not to be given unless one of some conditions is satisfied, and it begins with a prohibition which does not apply in the circumstances stated in its paras (a), (b) and (c)".[41] That it operates as an implied prohibition also follows from the concession

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[40] *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504, [409]-[413] (Giles JA with Mason P and Beazley JA agreeing) where the Court of Appeal rejected the submission that "s 260A is a permissive provision which enables the company to give financial assistance". To similar effect, see the Court of Appeal's reasons, [73] (cf Appellants' Submissions, [25], [28] and [31]-[32]).

[41] *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504, [410] (Giles JA with Mason P and Beazley JA agreeing).

now made by the appellants that the onus is on the company to establish a relevant exception.[42] In other words, a contravention of s 260A can be made out absent evidence of material prejudice.[43]

38. ***Second***, the implied prohibition is directed to the giving of financial assistance, not to the acquisition of shares or units of shares as such. The focus is on the effect of the conduct in question, not its purpose.[44] The section asks whether there is financial assistance and, if so, whether it is directed to the object of the recipient acquiring shares in the company.[45]

39. ***Third***, it is well established that the phrase "financial assistance" has no technical meaning and the court must examine the commercial realities, the frame of reference being the language of ordinary commerce.[46] Nothing has changed in this respect from the forerunner provisions. The appellants' argument[47] that the Court of Appeal incorrectly ascribed a separate meaning to "financial" and "assistance" is misconceived – even if the words are treated as a composite expression, no different result would be reached.[48]

40. ***Fourth***, the material prejudice enquiry is directed to the conduct that constitutes the assistance[49] (here, the use of company monies to fund the proceeding for the benefit of two shareholders as against the third shareholder). Material prejudice requires that company resources are diminished; the phrase invokes the criterion of the

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[42] Appellants' Submissions, [60].

[43] *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504, [409]-[413] (Giles JA with Mason P and Beazley JA agreeing).

[44] *Re HIH Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72, [344] (Santow J); *Kinarra Pty Ltd v On Q Group Ltd* (2008) 65 ACSR 438, [27] (Robson J)..

[45] Court of Appeal's Reasons, [78] [**AB 101**] and [85] [**AB 102**].

[46] Court of Appeal's Reasons, [64] to [66] [**AB 97**] and [72(1)] [**AB 99**] (referring, among other cases, to *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1, 10).

[47] Appellants' Submissions, [56].

[48] It is noted that there does not appear to be any dispute between the parties as to the meaning of "financial assistance" and "financially assist".

[49] Explanatory memorandum to the Company Law Review Bill 1997 (Cth), [12.76]-[12.77]; *Re HIH Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72, [342] (Santow J); *Kinarra Pty Ltd v On Q Group Ltd* (2008) 65 ACSR 438, [28] (Robson J).

impoverishment of the company.[50] Accordingly, whether material prejudice exists is a question of fact to be answered in light of the circumstances of each case.

41. ***Fifth***, the provision is to be interpreted in a way that counteracts "sophisticated methods" designed to get around the prohibition,[51] including indirect assistance.[52] Any other construction would ignore the statutory text, ignore the purpose of the prohibition and also enable the section to be easily circumvented.

42. ***Sixth***, s 260A ensures that a person who acquires shares in a company does so from their own resources and not with the financial assistance of the company.[53] The purpose of the prohibition lies in the preservation of a company's share capital for the benefit of shareholders (and creditors).

43. ***Finally***, the use of prior statutory provisions cannot displace the plain meaning of the text.[54] Like its predecessor, s 260A adopts an expansive approach to the concept of financial assistance, but it does so using simplified language. Nothing in the explanatory memorandum or any other material suggests s 260A was introduced with the intention of changing the meaning of financial assistance (or financially assist), or otherwise confining the prohibition to direct assistance.

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[50] Court of Appeal's Reasons, [60] [**AB 96**]; *Re HIH Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72, [344] (Santow J); *Kinarra Pty Ltd v On Q Group Ltd* (2008) 65 ACSR 438, [27] (Robson J).

[51] *Wallersteiner v Moir* [1974] 3 All ER 217, 238 (Lord Denning MR); *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260, 292 (Kirby P).

[52] Austin and Ramsay, *Ford, Austin & Ramsay's Principles of Corporation Law* (LexisNexis Butterworths), [24.700]: "Before the 1998 amendments the prohibition was on financial assistance given 'directly or indirectly'. Those words are missing from s 260A. However, it is likely that the omission of the words is of no consequence, since the question under s 260A is whether the company has as a matter of fact financially assisted a person to acquire shares, and financial assistance in fact may occur indirectly through an intermediary or directly by the company dealing with the purchaser. That being so, it is hard to think of any case of indirect financial assistance which would be caught by the old law and not caught by s 260A on the sole ground that the assistance was too indirect".

[53] *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260, 292 (Kirby P).

[54] *Walsh v Permanent Trustee Australia Ltd* (1996) 21 ACSR 213, 215 (Brownie J): "It can hardly be right to construe a statute, particular one as apparently complete as the Australian Securities Commission Act 1989 by reference to its precursors, thereby concluding that because it omits an expression from an otherwise clear provision, that clear provision means something not apparent on its face".

The appellants have contravened the implied prohibition

44. The respondents' positive case on the application of s 260A to the present facts can be stated in summary form as follows.

45. Section 260A has broad purposes protective of the company's capital. It is capable of application across a myriad of situations which cannot be confined or exhaustively catalogued. In some cases, there will be a completed acquisition and the question of financial assistance (and material prejudice) will be referrable to all the known circumstances of that acquisition. However, the implied prohibition can also apply where (as here) an acquisition is merely in prospect.[55] In such a case, one must attend to the full manner in which the proposed acquisition is intended to come about to determine whether there is assistance and whether it is financial. There can be financial assistance even if the proposed acquisition does not ultimately proceed. That is because, as noted above, the prohibition is directed to the giving of financial assistance and not to the acquisition of shares.

46. Here the position *ante* the proceedings is that the other shareholders have at most a disputed claim that Slea has done something in respect to the 2009 Agreement or Accommodation Agreement which has triggered some duty under cl 77 of the constitutions. However, those other shareholders have chosen to do nothing to resolve that dispute nor sought to compel any offer from Slea that could lead to an acquisition. Instead, they have caused the appellants, by suing and taking on the costs and associated risks of litigation, to take an action which objectively is designed to assist an identifiable acquisition occurring.

47. The character of the proceeding as "assistance" to an identifiable intended acquisition is sufficiently shown by pointing to the primary relief sought in the proceedings: positive relief which, if granted, will compel with the backing of a court order the making of an offer which does not yet exist.

48. If Slea is compelled by these proceedings to make the offer which is the immediate object of the proceedings, it may be inferred that such an offer will in fact lead to an

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[55] See s 1324(1B) of the Act, which empowers the Court to grant an injunction restraining conduct that constituted, constitutes or would constitute a contravention of s 260A(1)(a), as well as the language of s 260A(2)(a) itself ("financial assistance may be given before…the acquisition of shares…).

acquisition (see paragraphs 19 and 20 above). But even short of drawing that inference, the object of obtaining the compulsory offer is that Millsave and Mr Haron will have an ability – which does not exist – to accept an offer as made and make an acquisition.

49. Such contingencies over the proceedings as exist – namely that they may fail, or that they may succeed only in some limited fashion such that no offer is forthcoming, or that an offer is compelled out of Slea but for some unlikely reason Millsave and Mr Haron decline to accept it – do not destroy the object of the proceeding of assisting an identifiable proposed acquisition nor the financial character of such assistance.

50. With those matters in mind, it is now necessary to address the specific arguments advanced by the appellants.

Sections 140, 1072F and 1072G of the Act

51. The appellants contend that s 260A must be construed harmoniously with the Act, and in particular ss 140, 1072F and 1072G.[56] So much may be accepted at a level of generality, but what does harmony require?

52. Section 140 of the Act creates a statutory contract between a company, its members and officers.

53. The appellants contend that on the Court of Appeal's findings, "the pre-emptive provisions of a company's constitution cannot, *prima facie*, be enforced by the company"[57] and that a company would have "no practical ability to enforce rights of pre-emption in its constitution".[58] Those submissions are wrong.

54. The notion of a *prima facie* contravention is foreign to s 260A.

55. Section 260A is relevantly concerned with the *giving* of financial assistance, and not the *mode* (or act) by which the financial assistance is given (e.g. the giving of a gift, the making of a loan, the grant of security and the bringing of proceedings to enforce the statutory contract are all capable of being *modes* of the *giving*).

56. The relevance of s 140 is thus limited. That section gives a company power (standing) to bring a proceeding to enforce the constitution. But it does not follow from the fact that a company has power to take an action that doing so cannot be financial assistance. For example, a company has power to make a loan, but that does not mean making a

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[56] Appellants' Submissions, [33]-[34] and [37]-[42].

[57] Appellants' Submissions, [37].

[58] Appellants' Submissions, [38].

loan cannot be financial assistance.

57. There is thus no textual basis for the appellants' assertion that a company can never give financial assistance by enforcing the statutory contract. Further, if the appellants' submission was accepted, a company that enforced pre-emptive rights contained only in a *shareholders' agreement* could, in certain circumstances, contravene s 260A but that outcome could not arise if pre-emptive rights were contained in a *company constitution*. Such an outcome would be absurd.

58. So ss 140 and 260A sit harmoniously in that if the company is considering exercising its power under s 140 to bring a proceeding to enforce a particular type of provision in the constitution with the object of bringing about an acquisition of shares, it must subject itself to the commands of s 260A. If its actions serve to *assist* an identifiable acquisition, it must ask whether the assistance is *financial.* In some cases, it may not be financial, for example where the entire costs liabilities and exposures of the action are borne by someone other than the company, such as the shareholders designed to benefit from the action. If the *assistance* is *financial*, the company then must ask the question of *material prejudice.* Why is it, and not the shareholders who stand to benefit, bringing the action and incurring the financial liabilities? Does it harm the company for this to occur?

59. The appellants' reliance on ss 1072F and 1072G of the Act – which was not raised below – is equally misplaced. Those sections give directors power to *refuse* to register a transfer of shares.[59] If the directors refuse to register a transfer of shares, the starting point is that the directors are *preventing* an acquisition which should take the conduct outside the scope of s 260A (which is concerned with giving financial assistance to enable a person to *acquire* shares).[60]

60. It is possible that in certain circumstances, by refusing to register a transfer of shares, the directors may force a transferor to comply with rights of pre-emption which in turn may assist a shareholder to acquire the transferor's shares. Before that issue could be determined, all the circumstances of the case would need to be considered, including

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[59] Those provisions are replicated in the appellants' respective constitutions, which are in identical terms: Appellants' Further Materials, 22 and 43, cll 78.2 and 79.

[60] Cf Appellants' Submissions, [57].

for example whether there was material prejudice, whether ss 260B or 260C of the Act applied, and the terms of pre-emptive rights in issue.

61. In both of the above instances, a provision about the *existence* of power, and a constraint upon its *exercise* in certain circumstances, sit comfortably together.

62. The Court of Appeal construed s 260A harmoniously with the Act.

The potential penal consequences of a contravention of s 260A

63. Section 260D(3) provides that a person commits an offence if they are involved in a contravention of s 260A and the involvement is dishonest. There are therefore potential penal consequences if s 260A is contravened. Civil remedies are also available.[61]

64. The ordinary rules of construction are applied to penal statutes.[62] If there is ambiguity, as a rule of last resort, that ambiguity may be resolved in favour of the subject.[63] The Court of Appeal was correct in finding that there is no relevant ambiguity and therefore no warrant for taking potential penal consequences into account in assessing whether financial assistance to acquire shares was being provided.[64]

65. It should be recalled that a great deal of the Act consists in imposing commands or prohibitions on corporations, their officers or agents or persons otherwise involved in their affairs. That is a central part of the protective purpose of the Act in setting and maintaining high standards in the conduct of enterprises which have the capacity to work much good as well as much evil. The provisions are enforced by the widest range of civil and criminal mechanisms.[65] Civilly, there are variously declarations, injunctions, damages, civil penalties, disqualifications and so on. Certain provisions in certain circumstances also attract criminal sanctions. The present provision attracts

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[61] See e.g. Act, ss 1317E and 1317H.

[62] *Waugh v Kippen* (1986) 160 CLR 156, 164 (Gibbs CJ, Mason, Wilson and Dawson JJ); *The Queen v Lavender* (2005) 222 CLR 67, [94] (Kirby J).

[63] *Waugh v Kippen* (1986) 160 CLR 156, 164 (Gibbs CJ, Mason, Wilson and Dawson JJ); *The Queen v Lavender* (2005) 222 CLR 67, [93]-[94] (Kirby J).

[64] Court of Appeal's Reasons, [83] [**AB 102**]. See also the approach in *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260, 291-292 (Kirby P) where Kirby P rejected a submission that the prohibition on financial assistance should be "narrowly and strictly construed" by reason of the potential penal consequences of a contravention.

[65] See e.g. Act, Parts 9.4 and 9.4B.

both civil and criminal remedies. Its construction should be the same in both cases.[66] The purposes of the provision, even taking into account possible criminal enforcement in the case of dishonesty, require no narrow view to be taken of any of its key terms.

The absence of a transaction

66. The appellants' contentions concerning the absence of a "transaction" are unclear.[67] Section 260A does not use the word "transaction" and it is not a necessary element of the statutory prohibition. Seeking to identify a transaction directs attention away from the relevant inquiry (whether there is financial assistance)[68] and focuses on form rather than substance. The Court of Appeal was correct to conclude that the absence of a transaction is not a significant matter.[69]

The alleged absence of any "benefit"

67. The appellants' contention that Millsave and Mr Haron had existing rights under the constitution does not exclude the application of s 260A.[70]

68. The commercial position was that, absent the commencement of proceedings, Millsave and Mr Haron would not receive an offer from Slea and would not have the option of accepting an offer and acquiring the shares. The purpose of the proceeding was to bring about an offer which did not currently exist.[71] The appellants are wrong to contend that "nothing more" was being given to Millsave and Mr Haron by the proceedings.[72] The appellants' approach ignores both the commercial realities and the force of an offer compelled by court order and enforceable by court sanction which does not yet

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[66] Cf *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, [43]-[44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[67] Appellants' Submissions, [50] and [52]-[57]. The absence of a transaction presumably means the absence of a transaction directly involving Millsave and Mr Haron.

[68] The task of statutory construction must begin and end with a consideration of the text: *Commissioner of Taxation (Cth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

[69] Court of Appeal's Reasons, [84] [**AB 102**].

[70] Appellants' Submissions, [55] and [64].

[71] Court of Appeal's Reasons, [77] [**AB 100-101**].

[72] Appellants' Submissions, [55].

exist.[73] The appellants' argument also ignores the fact that Millsave and Mr Haron, by having the appellants conduct the litigation, are relieved of the burden of funding it and the other risks associated with commencing litigation. That is a benefit to the extent it is necessary or relevant to identify one.

Net transfer of value (impoverishment)

69. The appellants contend that there could be no financial assistance to Millsave and Mr Haron within the meaning of s 260A unless there was a "net transfer of value" from the appellants to Millsave and Mr Haron (seemingly in the sense of money or other valuable property transferring from the companies to those shareholders).[74]

10 70. The contention is misconceived for several reasons.

71. ***First***, if s 260A could only be contravened if a company transferred value to the acquirer of shares, the section could be easily circumvented as all forms of indirect assistance would be permitted.[75] That would be an astonishing outcome. It finds no support in the text of s 260A or the purpose of the implied prohibition.

72. ***Second***, the contention confuses the "financial assistance" and "material prejudice" limbs of the prohibition. Contrary to the appellants' contention,[76] the Court of Appeal correctly identified that any enquiry into whether there was a "net transfer of value" from the company arose at the subsequent stage of the enquiry – material prejudice – *after* the giving of financial assistance.[77]

20 73. Take the example of the company making a loan to assist an acquirer. The loan may be on perfectly normal commercial terms with good security. There would be the giving of financial assistance, but the loan may be saved from the prohibition by a

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[73] Cf *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* [1986] BCLC 1, 10 (Hoffmann J), cited by the Court of Appeal at [64] [**AB 97**].

[74] Appellants' Submissions, [58].

[75] Cf Austin, and Ramsay, *Ford, Austin & Ramsay's Principles of Corporation Law* (LexisNexis Butterworths), [24.700.3]: "As Darvall's case shows the financial assistance does not have to be constituted by a transaction between the company and a vendor or purchaser of the shares. For example, a company may contravene by entering into a transaction with another person which enables a purchaser of shares to obtain finance to acquire the company's shares."

[76] Appellants' Submissions, [58].

[77] Court of Appeal's Reasons, [60] [**AB 96**].

finding of no material prejudice, depending on all the facts.

74. Likewise, closer to the present case, the financial assistance enquiry is concluded against the appellants by observing that they are using company monies (via direct cost liabilities and incurring liability for potential adverse costs orders) to fund a proceeding whose object is to obtain an offer which two shareholders can accept to bring about an acquisition.

75. As held by the Court of Appeal, the question raised by the statute is simply whether the company has given or undertaken assistance, of a financial kind, directed to the object of the recipient acquiring shares (or units of shares) in the company.[78] In this case, the appellants' expenditure on the proceedings and incurring of a potential cost liability was (and is) directly related to facilitating the acquisition of shares or units by Millsave and Mr Haron.[79] That is enough to satisfy the giving of financial assistance.

76. The matter can be tested thus. If (contrary to the facts) the appellants had secured a full and complete enforceable indemnity from Millsave and Mr Haron, that would not deprive their actions of the character of the giving of financial assistance. It would, however, be relevant to the subsequent material prejudice stage of the enquiry. Even then all the circumstances would need to be considered. Of course, in the present case, there is no indemnity so such questions do not arise.

Material prejudice

77. The appellants contend that the Court misdirected itself as to the question of material prejudice and submit that instituting a proceeding to enforce rights in the constitution can never materially prejudice the interests of the company or its shareholders.[80] The submission is made without reference to any authority. It does not withstand scrutiny.

78. Section 260A has undoubted application in a range of analogous circumstances, including for example if a company was to provide funding to a shareholder to commence proceedings to enforce pre-emptive rights in the company's *constitution* for the benefit of that shareholder, or to provide funding to a shareholder to commence proceedings to enforce pre-emptive rights in a *shareholders' agreement* for the benefit

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[78] Court of Appeal's Reasons, [78] [**AB 101**] and [85] [**AB 102**].

[79] Court of Appeal's Reasons, [78] [**AB 101**].

[80] Appellants' Submissions, [61].

of that shareholder. No special immunity arises when a company chooses to expend company funds to itself prosecute a claim seeking to enforce pre-emptive rights in the constitution for the benefit of certain shareholders. So much is made clear when one considers the origins of the implied prohibition, as set out in paragraph 23 above: namely preventing the "disastrous" practice of allowing directors to buy out "inquisitive and troublesome" critics.

79. It is common ground that the appellants had the burden of proof to show that there was no material prejudice from their expenditure on the proceedings.[81] The appellants elected to adduce no evidence on that question. In the absence of evidence, the issue is not neutral. Section 1324(1B) of the Act provides that, in an application for an injunction based on a contravention of s 260A(1)(a), the Court must assume that the conduct constitutes a contravention unless the company proves otherwise.[82]

80. Here, there is no question that the appellants' funds are being deployed in commencing and maintaining the proceeding, diminishing their resources (as well as taking on the risk of an adverse costs order). If the appellants are unsuccessful in the litigation, they (not Millsave and Mr Haron) will bear the brunt of an adverse costs order on top of all the costs they have paid their own lawyers. Even if the appellants succeed, they will inevitably have to bear a proportion of their own costs. Thus, regardless of the outcome, company resources are being depleted in circumstances where Millsave and Mr Haron could have commenced the proceeding themselves (but elected not to).

81. Absent a complete and enforceable indemnity; absent the calling of any evidence; and noting the onus provision of s 1324(1B), the appellants were doomed to failure on the material prejudice enquiry.

Object of the financial assistance, purpose and effect

82. The appellants contend that the Court of Appeal erred in finding that the object of the institution of the proceedings was to provide financial assistance to Millsave and Mr Haron (to acquire shares).[83]

83. It is common ground that, grammatically, the use of the present infinitive "to acquire"

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[81] Appellants' Submissions, [60].

[82] Court of Appeal's Reasons, [36] [**AB 89**] and [72(3)] [**AB 99**].

[83] Appellants' Submissions, [62].

in s 260A(1) identifies the impermissible use or object to which the financial assistance is to be put. The provision asks whether there is financial assistance and, if so, whether it is directed to the object of the recipient acquiring shares.[84]

84. The appellants' contention that the object of the proceedings is to enforce the provisions of the constitution[85] is semantic, does no more than identify the *mode* through which financial assistance is being provided, and ignores both the commercial realities and the legal effect of obtaining a compelled offer under court order. The provisions being enforced are pre-emptive rights which confer rights as between the shareholders. The relief being sought is an order that Slea offer its shares to Millsave and Mr Haron. In those circumstances, the Court of Appeal correctly found that the object of the financial assistance was the acquisition of shares.

85. It is not clear whether the appellants contend that their subjective purpose was relevant.[86] In so far as they do,[87] it was within their power to call such evidence (for example, from a director), but they elected not to do so without explanation.[88]

PART VI: ESTIMATE OF TIME REQUIRED

86. Slea and Minerva will require 90 minutes for oral argument.

Dated: 1 March 2019

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[84] Court of Appeal's Reasons, [78] [**AB 101**].

[85] Appellants' Submissions, [62].

[86] Appellants' Submissions, [63].

[87] Cf *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 403 (Buckley LJ) and 407 (Goff LJ).

[88] *Jones v Dunkel* (1959) 101 CLR 298, 308 (Kitto J), 312 (Menzies J), and 321 (Windeyer J); *RPS v R* (2000) 199 CLR 620, [26] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).