



HIGH COURT OF AUSTRALIA

Public Information Officer

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SONS OF GWALIA LTD (subject to deed of company arrangement) v LUKA MARGARETIC
AND ING INVESTMENT MANAGEMENT LLC
ING INVESTMENT MANAGEMENT LLC v LUKA MARGARETIC AND SONS OF GWALIA
LTD (subject to deed of company arrangement)

A person who buys shares in a company in reliance upon misleading or deceptive information from the company, or misled as to the company's worth by its failure to make disclosures required by law, may have a claim for damages against the company which ranks equally with claims of other creditors, the High Court of Australia held today.

Sons of Gwalia Ltd was a publicly listed gold mining company. On 18 August 2004, Mr Margaretic bought 20,000 shares for \$26,200. Eleven days later, administrators were appointed pursuant to the *Corporations Act*, and the shares were then worthless. Mr Margaretic alleges that Sons of Gwalia failed to notify the Australian Stock Exchange that its gold reserves were insufficient to meet its sale contracts and that it could not continue as a going concern. He says he is a victim of misleading and deceptive conduct in contravention of the *Trade Practices Act*, the *Corporations Act* and the *Australian Securities and Investments Commission Act*. He sought compensation for the lost value of the shares. Many other shareholders have similar claims.

The proceedings have been brought to test the entitlement of shareholders in Mr Margaretic's position to make a claim, in competition with other creditors, under the deed of arrangement for distributing funds to creditors. The deed administrators applied to the Federal Court of Australia for a declaration that Mr Margaretic's claim is not provable in the deed of arrangement or alternatively that payment of the claim be postponed until all debts owed to persons other than in their capacity as Sons of Gwalia members are met. ING, a creditor, but not a shareholder, was named as the second respondent. Mr Margaretic cross-claimed for a declaration that he is a creditor entitled to all the rights of a creditor. Justice Arthur Emmett made such a declaration and further declared that his claim is not postponed until all other debts have been satisfied. The Full Court of the Federal Court dismissed appeals by Sons of Gwalia and ING, who then appealed to the High Court.

The Court, by a 6-1 majority, dismissed the appeals. Section 563A of the *Corporations Act* provides that payment of debts such as dividends owed by a company to someone in their capacity as a member of the company is to be postponed until all debts owed to persons otherwise than as members of the company are satisfied. The Court held that this did not apply to a shareholder claiming damages for the loss sustained in their acquisition of the shares when the shares were less valuable than represented, or would have been revealed to be the case had proper disclosure been made. Mr Margaretic's claim is not one owed to him in his capacity as a member of the company, therefore section 563A does not apply to it. The claim falls within section 553 of the Act, which provides that only claims arising before the relevant date – in this case, the date Sons of Gwalia went into administration – will be considered a debt against the company.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*