Federal Court of Australia

Ingram as trustee for the Ingram Superannuation Fund v Ardent Leisure Limited [2020] FCA 1302

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| File number(s): |  |
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| Judgment of: | **DERRINGTON J** |
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| Date of judgment: | 11 September 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – group proceedings – application to seek inspection of respondents’ insurance documents – application under s 247A of the *Corporations Act 2001* (Cth) – whether application in good faith and for a proper purpose – whether applicants seeking to enforce or vindicate rights *qua* shareholders – application dismissed  **CORPORATIONS** – shareholders’ application under s 247A of the *Corporations Act 2001* (Cth) to inspect company documents – application not in good faith and for a proper purpose – application to vindicate infringement of rights occurring prior to becoming shareholder |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 5, 12DA  *Competition and Consumer Act 2010* (Cth) Sch 2 (*Australian Consumer Law*) ss 2, 18  *Corporations Act 2001* (Cth) ss 79, 247A, 674, 1041H  *Federal Court of Australia Act 1976* (Cth) ss 23, 33V, 37M, 37N  *Insurance Contracts Act 1984* (Cth) |
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| Cases cited: | *Barrack Mines Ltd v Grants Patch Mining Ltd (No 2)* [1988] 1 Qd R 606  *Czerwinski v Syrena Royal Pty Ltd (No 1)* (2000) 34 ACSR 245  *Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473  *Hanks v Admiralty Resources NL* (2011) 85 ACSR 101  *Humes Ltd v Unity APA Ltd (No 1)* [1987] VR 467  *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 15 ACLR 151  *Leadenhall Australia Pty Ltd v Cape Lambert Resources Ltd* (2018) 125 ACSR 484  *London City Equities Ltd v Penrice Soda Holdings Ltd* (2011) 281 ALR 519  *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241  *Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236  *Re Augold NL* [1987] 2 Qd R 297  *Re Orinoco Gold Ltd* (2019) 141 ACSR 453  *Re Sirrah Pty Ltd* [2017] NSWSC 1683  *Re Style Ltd; Merim Pty Ltd v Style Ltd* (2009) 255 ALR 63  *Re Tolco Pty Ltd* [2016] NSWSC 1069  *Snelgrove v Great Southern Managers Australia Ltd (in liq) (rec and mgrs appointed)* [2010] WASC 51  *Sun Hung Kai Investment Services Limited v Metals X Limited* [2019] FCA 1673  *Tinios v French Caledonia Travel Service Pty Ltd* (1994) 13 ACSR 658  *TPT Patrol Pty Ltd (as trustee for Amies Superannuation Fund) v Myer Holdings Ltd* (2019) 140 ASCR 38  *Vinciguerra v MG Corrosion Consultants Pty Ltd* (2007) 61 ACSR 583  *Yarra Australia Pty Ltd v Burrup Holdings Ltd* (2010) 80 ACSR 641 |
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| Number of paragraphs: | 102 |
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| Date of hearing: | 28 August 2020 |
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| Counsel for the Applicant: | Mr W Edwards with Mr J Green |
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| Solicitor for the Applicant: | Piper Alderman |
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| Counsel for the Respondents: | Mr N Owens SC with Ms K Lindeman |
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| Solicitor for the Respondents: | Quinn Emanuel Urquhart & Sullivan |

ORDERS

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|  | | QUD 212 of 2020 |
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| BETWEEN: | COLIN GRAHAM INGRAM AND JUDY GAIL TULLOCH AS TRUSTEES FOR THE INGRAM SUPERANNUATION FUND  Applicant | |
| AND: | ARDENT LEISURE LIMITED (ACN 104 529 106)  First Respondent  ARDENT LEISURE MANAGEMENT LIMITED (ACN 079 630 676)  Second Respondent  ARDENT LEISURE GROUP LIMITED (ACN 628 881 603)  Third Respondent | |

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| order made by: | DERRINGTON J |
| DATE OF ORDER: | 11 September 2020 |

THE COURT ORDERS THAT:

1. The application is dismissed.
2. As to the question of costs:
   1. the parties file and serve written submissions on the question of costs within seven days of the date of these orders limited to four pages; and
   2. the parties file and serve written submissions in reply, if any, within fourteen days of these orders limited to two pages.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J

## Introduction

1. The applicants, Mr Colin Ingram and Ms Judy Tulloch, are shareholders in the third respondent, Ardent Leisure Group Limited (ALGL) and they seek orders pursuant to s 247A of the *Corporations Act 2001* (Cth) (*Corporations Act*) authorising them to inspect certain documents held by ALGL and its subsidiaries, Ardent Leisure Limited (ALL) and Ardent Leisure Management Limited (ALML). Those documents included an intercompany guarantee, insurance documents and insurance related correspondence. Mr Ingram and Ms Tulloch are also the lead applicants in a securities class action(QUD 182 of 2020) (the class action) which has been commenced against ALGL, ALL, ALML, as well as the Chief Executive Officer of ALL and ALML’s Theme Parks Division, Mr Craig Davidson. Their status as the lead applicants is important for the purposes of the present proceedings because their unabashed objective in seeking inspection of the aforementioned documents is to advance their position in the class action. In particular, they seek to ascertain its commercial viability and to enhance their prospects of settling it on favourable terms.
2. The respondents to the present matter, ALGL, ALML and ALL, oppose the making of the orders. They submit that the applicants’ purposes in seeking inspection are not “proper purposes” within the meaning of s 247A and, even if they are, the Court should exercise its discretion to refuse relief.
3. For the reasons which follow, the application to inspect documents must be dismissed. Although the applicants would have been entitled to inspect documents of ALGL (and possibly of its subsidiaries) if their purpose was to enforce or to vindicate their rights which have accrued in their capacity as shareholders, the power in s 247A does not authorise inspection to assist them to advance claims which arose from wrongs allegedly done to them in other capacities. Here, the gravamen of the applicants’ central allegation in the class action is that the respondent companies breached obligations or failed to perform duties which caused them damage when they made the investment decision to acquire stapled securities in the Ardent companies. In that sense the alleged wrongs were done to them *qua* potential investors in the companies and not *qua* shareholders. Similarly, the duties or obligations which the respondent companies allegedly breached were not owed to the applicants in their capacity as shareholders.
4. Further, even if the Court’s discretion in s 247A to authorise inspection had been enlivened, in the circumstances of this case it should not be exercised in the applicants’ favour. There is nothing in the scope or purpose of the discretion which suggests that the vitally important obligations of confidentiality of insurers and insureds *inter se* ought to be set at naught in order to facilitate a better outcome for class action litigants.

## Background facts

1. For the purposes of the present application the relevant facts include those alleged in the statement of claim in the class action filed on 18 June 2020. Whilst some are referred to below, it must be kept steadily in mind that they are mere assertions. The respondents in those proceedings have not yet filed a defence in that action, no evidence has been adduced, and no determination has been made as to which allegations might be established.
2. The group members of the class action comprise those persons who, between 17 June 2014 and 25 October 2016, acquired stapled securities in the ASX market entity called “Ardent Leisure Group”. The lead applicants purchased their stapled securities between 21 and 25 July 2016. Ardent Leisure Group was a “corporate group” consisting of ALL and ALML. Their business was conducted through the Ardent Leisure Trust and units in that trust and shares in ALL comprised the stapled securities.
3. Without doing any injustice to the carefully pleaded statement of claim filed in the class action, it is generally alleged that from around about 12 April 2013 and thereafter the Ardent Leisure Group represented to the public that it maintained very high safety standards at the amusement parks which it operated and, in particular, at the amusement park called “Dreamworld” situated at Coomera in the State of Queensland. Those representations are alleged to have been made on a website operated by the Ardent Leisure Group as well as in several annual reports. In general terms it is alleged that the representations were misleading or deceptive because the safety standards in respect of the amusement rides at Dreamworld fell below the standard represented. It is also alleged that the Ardent Leisure Group did not have reasonable grounds for making the representations which it did.
4. That statement of claim further alleges that the Ardent Leisure Group was, at all relevant times, aware of information which created a material risk or likelihood that a malfunction would occur on the amusement ride called “Thunder River Rapids Ride” and that might cause serious injury or death to one or more patrons (referred to in the pleadings as the Incident Information). If such an incident occurred, it is alleged there was a material risk or likelihood that there would be an adverse impact on the Ardent Leisure Group’s profits in current and future financial periods with a consequential decline in the value of the stapled securities (referred to in the pleadings as the Incident Impact Information). Central to the claim is the allegation that this information was not disclosed to the ASX.
5. It is well known that on 25 October 2016, a tragic incident occurred in the course of the operation of the Thunder River Rapids Ride, resulting in four people being fatally injured.
6. Following the incident the price of the traded stapled securities in the Ardent Leisure Group fell significantly. At the opening of trading on 25 October 2016 the price was $2.55. At the close of trading that day it was $2.35. At the close of trading on the following day, 26 October 2016, the price had dropped to $2.00.
7. The applicants and the members of the class action allege in their statement of claim that the representations made by the Ardent Leisure Group as to the safety standards at Dreamworld were misleading or deceptive in contravention of s 1041H of the *Corporations Act* and of s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*). In the alternative it is said that the representations were misleading within the meaning of s 18 of the *Australian Consumer Law* (*ACL*). It is alleged that, had the applicants and some of the class members known the Incident Information and/or the Incident Impact Information, they would not have acquired the stapled securities.
8. It is alternatively alleged that the failure by the Ardent Leisure Group to disclose the existence of a material risk arising from Dreamworld’s allegedly substandard safety procedures was a contravention of the continuous disclosure obligations arising pursuant to ASX Listing Rule 3.1 and s 674(2) of the *Corporations Act*. It is said that the failure of the Ardent Leisure Group to inform the market of the risk arising from the substandard safety processes amounted to a contravention of the obligations to make full disclosure because, had such disclosure been made, it would have had a material adverse effect on the price or value of the stapled securities. The consequence of this is said to be that, had the Ardent Leisure Group not contravened its obligations of continuous disclosure, the market price of the stapled securities would not have been greater than its true value or its market price. The class action members claim that as a result of this contravention they acquired stapled securities at an inflated price consequent upon the group’s failure to make proper disclosure.
9. They further claim that the damages which they have suffered can be quantified by reference to the difference between the price they paid for the stapled securities and their true value, or the price those securities would have been had the market been properly informed through Ardent Leisure Group’s compliance with its continuous disclosure obligations. In broad terms, they assert that the decline in the market value of the stapled securities following the incident on 25 October 2016, revealed their “true value”.
10. It is also alleged that Mr Davidson, in his position as CEO, was aware of the true information relating to the safety standards at Dreamworld, and that he failed to correct the published statements or to make accurate disclosures to the market. Damages are claimed as against him for being knowingly involved (within the meaning of s 79 of the *Corporations Act*, s 5 of the *ASIC Act* and s 2 of the *ACL*) in the alleged misleading or deceptive conduct and/or the alleged contraventions of the continuous disclosure obligations. It is also alleged that Mr Davidson contravened s 674(2A) of the *Corporations Act*.
11. In 2018 the Ardent Leisure Group underwent a corporate restructure. ALGL was incorporated in order to facilitate the replacement of the stapled securities issued by ALL and ALML. ALGL issued shares to the holders of the stapled securities on a one-for-one basis pursuant to a scheme of arrangement which had been approved by the holders of the stapled securities and the Supreme Court of New South Wales.
12. There is evidence that, by a deed of guarantee given as part of that restructure, ALGL guaranteed ALL in respect of its liabilities for the benefit of its creditors. That guarantee was not in evidence before the Court and it is a document which the applicants seek to inspect.
13. The class action was commenced on 18 June 2020 and the present proceedings were commenced on 10 July 2020. Ms Blacker, the solicitor for the applicants, deposed that the class action was commenced when it was for the purpose of preventing the daily expiration of the relevant limitation period. Her concern was that, if the causes of action in the class action proceedings commenced when the group members acquired their interests in the stapled securities, potential group members who purchased securities prior to 25 October 2016 would progressively lose their cause of action as the limitation period continually expired. Prior to commencing the proceedings, the solicitors for the applicants and the class members sought the agreement of the respondents to suspend the running of the limitation period such that negotiations might occur. That overture was rejected. There is no reason to doubt Ms Blacker’s evidence in this respect and the prudence of her action cannot be doubted.

### The value of the class action claims

1. In her affidavit of 10 July 2020, Ms Blacker attempted to quantify the value of the claim made in the class action and arrived at a figure of between $294m and $310m. This calculation was based on the quoted price of a stapled security at the opening of the market on 25 October 2016, being the day of the incident, at $2.55 and its closing price of $2.00 on the following day. The underlying hypothesis was that the difference of $0.55 roughly represented the degree to which the price of the stapled securities had been inflated by reason of ALL and ALML’s failure to fulfil their disclosure obligations. Ms Blacker then considered the volume of the trades of the stapled securities over the period between 30 June 2014 and 25 October 2016. Every security purchased in that period was attributed a notional loss of $0.55 on the assumption that it was still held on 25 October 2016, with the consequence that the holders suffered a loss on each security of that amount. Those assumptions produced an estimated range of total losses of between $588m and $620m (exclusive of interest and costs). From there a “preliminary discount” of 50% was applied so as to exclude circumstances where the securities may have been purchased and then sold within the identified period, such as in the case of trades by day traders. That reduced the estimated claim to $294m to $310m.
2. It cannot be doubted that the quantification by Ms Blacker was at a rudimentary level, although there is no necessary criticism in that given the embryonic stage of the class action proceedings. If the matter continues, experts will be engaged on both sides to quantify the alleged loss and their “event reports”, as they are called, may adopt an econometric analysis of the market variations which might have occurred had the identified data been released. The concept of market-based or indirect causation theory is frequently applied in cases such as this and damages are usually claimed on the “inflation-based measure”, being the difference between the price paid for a security and the market price which would have prevailed had the alleged disclosure contraventions not occurred. This is thoroughly discussed in detail in the reasons of Beach J in *TPT Patrol Pty Ltd (as trustee for Amies Superannuation Fund) v Myer Holdings Ltd* (2019) 140 ASCR 38 and, for present purposes, there is no need to consider its intricacies any further.
3. Mr Owens SC, who appeared with Ms Lindeman for the respondents, submitted that the actual fall in the value of the stapled securities on 25 and 26 October 2016, does not represent any useful proxy for the position that would have pertained had the respondents not failed to comply with their disclosure obligations as alleged by the applicants. In many securities class actions the claim is founded upon the late or delayed fulfilment of the market disclosure obligations. In those circumstances, the impact of the late disclosure might fairly be taken as a good indicator of what the position would have been had the required disclosure occurred at an earlier time. Here, however, it was the occurrence of the tragic incident which precipitated the decline in the value of the securities. That was the crystallisation of the risk which it is said the applicants ought to have disclosed. In this respect there is substance in Mr Owen SC’s submission that the occurrence of the event is qualitatively different to the risk that it might occur and it is not unfair to assume that the disclosure of the risk, as opposed to its crystallisation, is likely to have had a less detrimental impact on the price of the securities.
4. That being so, it might be said that Ms Blacker’s approach tends to overstate the extent of the loss to some degree. On the other hand, the quantum of any loss might also depend upon the nature of the causation case advanced. Here, reliance on market based causation becomes problematic for the class action applicants given the manner in which they have framed their case, and that is particularly so in relation to the misleading or deceptive conduct claim. If the general assertion is that the class members paid too much for their stapled securities such that, had the relevant information been known, they would have purchased them at a lower price – that is in the nature of a “different transaction case” – the fall in the value of the securities consequent upon the October 2016 incident may not be reflective of the loss “caused by” the alleged contraventions. Alternatively, if the claim being advanced is in the nature of a “no transaction” case, the position may be different. No conclusion can be reached in relation to these somewhat difficult issues in the present matter and, no doubt, questions of reliance and causation will consume much time at the trial of the class action. For present purposes, however, it is apparent that the evidence of Ms Blacker on this issue is expressed at a high level of abstraction and provides only slender support for any conclusion as to the quantum of the claim.
5. Mr Owens SC also submitted that it cannot be assumed that all persons who are potentially members of the class will remain in the action. It may well be that many will opt out for one reason or another. That may include institutional shareholders who remain as shareholders of the company. For such entities there is often a real concern that any benefit derived from a shareholder class action is likely to be less than the diminution in the value of their existing shareholding. Of course, whether that is true or not depends on the existence, type and quantum of insurance coverage held by the company in respect of the claims made against it. In any event, the point to be made is that the size of the class and the concomitant size of the potential damages is dependent upon a number of factors, including the rate at which members might opt out. This was not explicitly taken into account in Ms Blacker’s quantification of the potential loss and it is possible that the amount of the postulated claim is overstated for that reason.
6. A further issue raised by Mr Owens SC was that, although Ms Blacker averted to the existence of day traders who bought and sold securities over short periods, she did not refer to or take account of investors other than short term traders who sold their securities prior to the event in question. He submitted that only those who held the securities as at 25 October 2016 could be members of the class. There is substance in this submission and it is not clear that Ms Blacker’s preliminary discounting took into account these larger shareholders who may have divested their securities before the relevant date.
7. A related issue is that the methodology of assessing the number of security trades in the relevant period may be open to question. It is apparent that the approach was to identify the number of securities purchased in the period between 30 June 2014 and 25 October 2016, being the period which corresponds with that used to identify the class members. Although the notional loss of between $588m to $620m was discounted as discussed, this approach was somewhat arbitrary and did not appear to take into account the extent to which the securities were traded. If they were heavily traded, the quantum of the notional loss would be inflated and vice versa. For instance, the identified notional loss of $620m equates to a $0.55 loss in respect of 1,127m issued securities. That may overstate the number of stapled securities on issue at the time, although there is no evidence of what that number was. The FY 2020 financial statements indicated that the number of ALGL issued shares to date, including Distribution Reinvestment shares, was 479,706,016. If it were assumed that a similar number of stapled securities had been on issue as at 25 October 2016 and a loss of $0.55 was incurred in respect of each, the maximum loss would be $263,838,308. Even on that approach a discounting would need to occur in relation to securities which were acquired prior to 30 June 2014 and or prior to the date on which the relevant nondisclosure occurred. Although this exercise is based on the information available as at June 2020, its point is only to identify the fragility of Ms Blacker’s methodology and, perhaps, to underscore the absence of any confirmatory analysis in the assessment. Again, that is not a pejorative observation, but is intended to disclose the difficulty at this early stage of the class action of reliably identifying the losses which might be recovered.
8. It was suggested that an issue for the applicants was that the cost of acquiring an expert’s “event report” as to the size of the class action claim, even a preliminary one, is likely to be substantial. Necessarily it would mean the outlaying of significant expenditure at an early stage of the litigation when it is unclear whether the action will proceed. On the other hand, on their case, the amount claimed is in the hundreds of millions of dollars and, in that context, the cost of a preliminary expert’s report would be relatively slight.
9. For present purposes, the evidence of Ms Blacker does not suffice to enable the Court to identify with any great precision the likely quantum of the claim in the class action. Whilst her observations are sufficient to establish that the total amount of the claim may be considerable, it is not possible to say whether it will be $100 million, $200 million or $300 million, or something lower or higher of those numbers. The difficulty for the applicants posed by the paucity of evidence as to the value of the claim is that part of their asserted rationale for seeking to inspect the respondents’ insurance policies is to assure themselves of the commercial viability of the class action. However, as it seems that the Ardent Group has substantial nett assets from which any judgment might possibly be satisfied, the applicants’ inability to demonstrate that their claim in the class action might exceed the value of those nett assets renders their asserted rationale somewhat inutile.

### The value of the Ardent Group

1. Both parties adduced evidence at the hearing of the value of the companies in the Ardent Group. In general the applicants sought to establish that it was less than the amount claimed in the class action. Conversely, the respondents claimed the evidence established that the companies’ nett asset position was such that any judgment in the class action might be satisfied without recourse to any insurance cover. From this they submitted that the applicants’ inspection of their insurance policies was not required.
2. The applicants relied upon the publicly available information as to ALGL’s financial standing as at the dates of the affidavits sworn by Ms Blacker. On the day prior to the hearing of the application, ALGL’s financial reports for the FY 2020 were released. Whilst Mr Owens SC for the respondents relied upon these to submit that the respondents have sufficient funds with which to meet any judgment, the applicants submitted they demonstrated an ever worsening financial position, which was said to be reflected in ALGL’s share price as at 9 July 2020, being $0.32.
3. From ALGL’s financial statements for the FY 2019 and the FY 2020 it would appear that its nett asset position has diminished from $444,118m in 2018, to $385,102m in 2019, and to $289,948m in 2020. Those documents also record that the group reported a nett loss for the FY 2019 of $60.9m compared to a nett loss in the previous year of $90.7m. The nett loss for FY 2020 was $136.6m. In essence, these figures represent a not inconsiderable decline in the group’s nett asset position over the last three financial years. The financial statements for FY 2020 also reveal that the group had a substantial increase in liabilities from $320m in the preceding year to $787m. This, so the applicants submitted, demonstrated the group has suffered a number of years of trading losses and, given the present economic climate, it might be assumed that such losses will continue into the future.
4. The FY 2019 financial statements disclose that in that year some of the group’s financial arrangements were restructured with an American based subsidiary, Main Event Entertainment Inc, acquiring a US$200m term loan facility which was secured over that company’s assets albeit non-recourse to the assets of the other companies in the group. This facility was used to repay the group’s Australian bank debt facility and the remainder of the proceeds were intended to be used to support investment. This was seemingly relied upon by the applicant as evidence of the group encountering financial difficulty.
5. The applicants submitted that the financial reports also demonstrated that the group acquired Dreamworld on 3 July 1998 for $100m, completed construction of WhiteWater World on 8 December 2006 for $56m and acquired SkyPoint on 18 December 2009 for $13m, but that the combined value of Dreamworld and WhiteWater World was now only $44m and the fair value of SkyPoint is $33m. In relation to all of the group’s assets, Ms Blacker’s evidence discloses the existence of 94 priority charges on the Personal Property Security Register. Again, the point sought to be made by the applicants was that the value of the group’s assets has declined significantly, is likely to continue to do so, and that those assets are generally heavily encumbered.
6. The applicants also sought to support their submissions by reliance upon several announcements made by the group to the ASX concerning the difficulties it was facing as a result of the 2020 COVID-19 pandemic, including that its Australian theme parks were required to close, as were many of the family entertainment centres operated by it in the United States. In this respect, there is little doubt that the pandemic had a substantial impact on the group’s cashflow and impaired its relations with its investors. The evidence demonstrated that ALGL has been required to support its liquidity by securing new investors and, on 15 June 2020, it announced that a private based investment firm had invested $US80 in the subsidiary which held 100% of Main Event Entertainment Inc.
7. The applicants submitted that a major decline in the value of the groups’ property, plant and equipment could be detected by reference to what was said in note 16 to the balance sheet in the FY 2020 financial accounts. In particular, the applicants referred to statements which they said indicated that the “fair value” of Dreamworld and WhiteWater World, as assessed in an independent valuation, had dropped from $50.6m in 2019 to $28.1m in 2020. They submitted in oral submissions that this “fair value” was more indicative of the actual value of those assets than the “book value” recorded at $87.5m. This submission appears to be based on a possible misreading of the financial statement, as the figure of $87.5m appears to be the sum of the “fair value” figure and the value of all other plant and equipment, which is valued at $59.4m. On this reading, the value of the Ardent Group’s property, plant and equipment only fell from $478,641m in 2019 to $473,805m in 2020, which although a decline of about $5m, was not substantial in the overall scheme of the groups’ business.
8. Reference was also made to a decline in total income from ALGL from $492m in 2019 to $410 in 2020 which was substantially due to the closure of the group’s theme parks as a result of the pandemic. The operating loss for the FY 2020 was $136m which was said by the applicants to be an exacerbation of a trend.
9. It was submitted that the existence of other claims upon the group arising from the tragic incident in October 2016, would further lessen the value of the group’s nett assets. However, the evidence tends to suggest that any such claim will be met by third party liability insurance carried by the group and little weight can be attributed to that factor.
10. The applicants further pointed to the potential difficulties for the group involved in attempting to re-establish the level of patronage to the theme parks, and, in particular, that this required the expenditure of substantial capital. It was submitted that the evidence showed this would take about ten years with attendance rates presently being at only 48% of FY16 levels. They also pointed to the provision of a $67m loan from the Queensland State Government, although that would not alter the asset position greatly given that it was secured over the group’s assets.
11. In general terms the applicants submitted that the evidence demonstrated that the overall position of ALGL was worsening over time and that there was nothing to suggest that the slide downwards would change. Despite that, there was nothing to suggest that the group was insolvent or even approaching insolvency.
12. On the other hand, as was submitted by Mr Owens SC, the FY 2020 accounts demonstrate that, as at June 2020, the Ardent Leisure Group retained nett assets of around $290m, including cash and cash equivalents of around $160m as well as a surplus of current assets over current liabilities of $80m. In other words, despite the not inconsiderable downturn in the group’s fortunes over the past few years, its business remains substantially intact, it has a substantial nett asset position, and its liquidity remains undoubted. In that latter context, it is important to keep in mind that the group has had the benefit of the aforementioned loan from the State of Queensland.

### The position of Mr Davidson

1. In seeking disclosure of the insurance policies held by ALGL, the applicants also relied on the fact that, apart from the corporate respondents to the class action, Mr Davidson was also being pursued. In this respect, title searches identified that he held interests in some real property but that the value of those interests was unlikely to exceed $2m. So the argument went, the applicants ought to be entitled to inspect the insurance policies held by ALGL which extend cover to Mr Davidson so as to confirm the commercial or economic viability of pursuing him.
2. In order to head off this argument the respondents produced to the Court a partially redacted document entitled “Deed of Access, Insurance and Indemnity”, pursuant to which ALL agreed to indemnify Mr Davidson in relation to claims which would include those raised against him in the class action. By the end of the hearing of the application the respondents had disclosed sufficient of that document to satisfy the applicants that Mr Davidson was indemnified by ALL in relation to those claims. That being so, the question of Mr Davidson’s ability to satisfy any judgment in the class action ceased to be an issue.
3. Although the applicants sought inspection of the deed by the originating application, given that a sufficiently un-redacted version was provided to them during the course of the hearing there is no need to further consider this topic.

### Intercompany guarantee

1. As mentioned above, the incident on 25 October 2016 occurred prior to the corporate restructure and the incorporation of ALGL. As part of that restructure, the entities in the group entered into a guarantee, referred to as the “NewCo Guarantee”, pursuant to which ALGL guaranteed to meet the claims of ALL’s creditors as at the time of the restructure. The applicants’ solicitors became aware of the existence of the NewCo Guarantee after it was referred to in an affidavit of the General Counsel of the Ardent Leisure Group, Mr Todd, which had been relied upon in Supreme Court proceedings in New South Wales to approve a scheme of arrangement as part of the corporate restructure. In his affidavit Mr Todd asserted that ALL and ALML, had obtained the irrevocable guarantee from the new entity (ALGL) in respect of the group’s liabilities which may arise from the incident on 25 October 2016. Although the NewCo Guarantee was an exhibit to Mr Todd’s affidavit, the applicants’ solicitors were not able to secure a copy from the Registry of the New South Wales Supreme Court. The applicants have sought a copy of this guarantee and the respondents have declined to provide one. In the present application the applicants seek an order that they be entitled to inspect it.
2. In an affidavit of a Mr Mills, filed on behalf of the respondents, a copy of a further guarantee is produced. It was apparently entered into in 2019 and it is in the nature of an inter-company cross-guarantee to which ALGL, ALL and ALML, together with other companies in the Ardent Group, are parties. The purpose of the cross-guarantee was not identified in Mr Mills’ affidavit although the respondents’ submission was that this document should satisfy the applicants that the liabilities of ALL and ALML are guaranteed by ALGL. Mr Edwards for the applicant submitted that if there were no relevant difference between the effect of the 2019 guarantee and that of the NewCo Guarantee, the respondents ought not to be concerned about disclosing the latter.

### The existence of any insurance policies

1. In her initial affidavit, Ms Blacker deposed to her belief that the respondents carry and did carry insurance covering them as well as their directors and officers in respect of liabilities arising out of the incident on 25 October 2016 and, particularly, in respect of the directors’ liability arising from the performance of their duties. In forming that belief, Ms Blacker relied on the yearly financial reports of ALGL from FY 2016 to FY 2019 wherein it was stated that ALL had in place during the relevant reporting period “a policy of insurance covering the Directors and officers against liabilities arising as a result of work performed in their capacity as Directors and officers of ALL”. Other documents which emanated from ALGL have also indicated the existence of policies of insurance which will respond to the applicants’ claims in the class action. In particular, the financial report for FY 2020 identifies the existence of the class action and asserts that, “the Company maintains appropriate insurances to respond to the litigation and regulatory action and the majority of associated costs.”
2. In the circumstances it is reasonable to assume that ALGL and or ALL and ALML had policies of insurance for a period which included 25 October 2016 and the surrounding dates which are likely to respond to a claim of the nature which the applicants pursue in the class action. The contrary was not suggested by Mr Owens SC for the respondents.
3. Whilst the existence of such policies might be assumed, the applicants remain unaware of the policy limits and it is information in relation to that which is at the heart of this application.
4. The applicants also seek to inspect any documents amounting to the notification of any claims to relevant insurers. There was no evidence that such documents existed although, in the circumstances of this matter, it is possible to infer that they do. Their existence was not really contested by the respondents.

### Litigation funding agreement

1. The class action is supported by a litigation funder, Woodsford Litigation Funding Ltd (Woodsford), pursuant to a funding agreement entered into with the applicants on 18 May 2020. A partially redacted version of the agreement was annexed to the second affidavit of Ms Blacker filed in support of the application. Pursuant to that agreement, funding is to be provided in two phases. The first was essentially for the preparation of the statement of claim. The second is for the remainder of the proceedings, although the provision of that funding is contingent on the satisfaction of a number of conditions. By cll 1.35.5 and 1.35.6 of the agreement, two of those conditions are that the applicants obtain copies of all relevant policies of insurance covering the respondents against all liabilities arising out of the claim and that the funder confirm in writing to the applicants that the insurance position is acceptable to it.
2. Unless these conditions are waived by Woodsford, non-satisfaction will result in the termination of the funding agreement. Presently, it is not known whether Woodsford will allow the agreement to terminate, although there is an obvious risk that such may occur. It is axiomatic that if the litigation funder is uncertain about the quantum of recoverable damages, there will exist a commercial imperative not to proceed with its investment in the funding of the claim.
3. There was an absence of evidence before the Court as to what the position might be if Woodsford allowed the funding agreement to terminate. Mr Owens SC submitted that it was well known that there exists in Australia a very competitive litigation funding industry such that the Court should assume that another funder is likely to step into the breach. Whilst the existence of that industry is, perhaps, common knowledge, it does not necessarily follow that an alternative funder will agree to continue to the fund the action into the future and that is particularly so if the state of the respondents’ insurance position remains unknown.
4. For the purposes of the present application, it can be accepted that if the applicants are denied inspection of the respondents’ policies of insurance which might respond to the claims being advanced in the class action, there exists a risk that the funding arrangements presently in place will terminate and that no alternative funding will be available.

## Relevant legislation

1. The application is made pursuant to s 247A of the *Corporations Act* which relevantly provides:

**247A Order for inspection of books of company or registered scheme**

(1) On application by a member of a company or registered scheme, the Court may make an order:

(a) authorising the applicant to inspect books of the company or scheme; or

(b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant’s behalf.

The Court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.

## Principles relating to the application of s 247A

1. Self-evidently s 247A requires that the Court be satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose. That state of satisfaction to be formed by the Court is a subjective jurisdictional fact on which the discretionary power is conditioned.
2. The parties to the application agreed that the principles relevant to the application of s 247A are those which were summarised by Katzmann J (with whom Siopis and Gilmour JJ agreed) in *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241 (*Mesa Minerals*) at [22] in the following terms:

(1) The stipulation that an application be made in good faith and for a proper purpose is a composite notion rather than two distinct requirements: *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd (*1989) 15 ACLR 151 (*Knightswood Nominees*) at 155-157. That is to say, as Brooking J put it in *Knightswood* at 156:

[T]he reference to good faith colours and so reinforces the requirement of proper purpose. Acting in good faith and inspecting for a proper purpose means acting and inspecting for a bona fide proper purpose. It is as if the case was one of hendiadys.

(2) Good faith and proper purpose must be proved objectively: *Acehill, citing Barrack Mines Ltd v Grants Patch Mining Ltd* [1988] 1 Qd R 606 (Full Court) (*Barrack Mines Appeal*) and *Knightswood*. See also the discussion in Mantziaris C, “The member’s right to inspect the company books: Corporations Act, s 247A” (2009) 83 ALJ 621 at 628-629.

(3) “Proper purpose” means a purpose connected with the proper exercise of the rights of a shareholder as shareholder and not, for example, as a litigant in proceedings against the company or as a bidder under a takeover scheme: *Cescastle Pty Ltd v Renak Holdings Ltd* (1991) 6 ACSR 115 (*Cescastle*) at 117-118.

(4) The onus of proof is on the applicant: *Quinlan v Vital Technology Australia Ltd* (1987) 5 ACLC 389 (*Quinlan*) at 393.

(5) An applicant who has a significant holding and who has been a shareholder for “some considerable time” will more easily discharge the onus than one who has recently acquired a token holding: *Quinlan* at 393.

(6) It is not necessary that the applicant show that its interests are different to those of other shareholders: *Yara Australia Pty Ltd v Burrup Holdings Ltd* (2010) 80 ACSR 641 at [116].

(7) Nor is it necessary that the applicant have sufficient evidence to bring or make out an action (*Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236 (*Praetorin*) at [40]); it is enough that the issue raised by the applicant is “substantive and not fanciful”, not “artificial, specious or contrived”: *Merim Pty Ltd v Style Ltd* (2009) 255 ALR 63 (Style) at [66]-[67].

(8) Pursuing a reasonable suspicion of breach of duty is a proper purpose: *McNeill v Hearing and Balance Centre Pty Ltd* [2007] NSWSC 942 at [17] citing *Barrack Mines Ltd v Grants Patch Mining Ltd* (1987) 12 ACLR 357 and the judgment on the unsuccessful appeal: *Barrack Mines Appeal*.

(9) Provided that the applicant’s primary or dominant purpose is a proper one, it is not to the point that an inspection might benefit the applicant for some other purpose: *Unity APA Ltd v Humes Ltd (No 2)* [1987] VR 474 (*Humes*) at 480; *Barrack Mines Appeal* at 615; *Cescastle* at 117-118.

(10) Applicants do not necessarily lack a proper purpose merely because they are hostile to other directors: *Humes* at 480.

(11) Neither the fact that an applicant may have had sufficient information earlier nor the fact that an applicant may have other means of obtaining the information is detrimental to an application under the section: *McNeill* at [23]-[25].

(12) The procedure under s 247A is not intended to be as wide-ranging as discovery so that the general rule is that inspection will be limited to such documents as evidence the results of board decisions, rather than all board papers leading to decisions, but there may be occasions when it is proper to permit inspection of board papers: *Acehill* at [31].

(13) The Court has a residual discretion whether to order inspection: *Humes* at 481.

1. In *Re Tolco Pty Ltd* [2016] NSWSC 1069 (*Tolco*) at [16], Brereton J identified what he considered were the “main considerations” in the application of the section as being:

*[F]irst*, that the applicant must demonstrate that it is acting in good faith and that the inspection is to be made for a proper purpose, which is judged objectively; *secondly*, that the procedure is not intended to be in the nature of discovery; and *thirdly*, that the remedy is in any event discretionary.

## Legislative history of s 247A

1. I am relieved from any need to consider the legislative history of s 247A as that task has already been fully and completely undertaken by Colvin J in *Sun Hung Kai Investment Services Limited v Metals X Limited* [2019] FCA 1673 (*Metals X Limited*). There is no need to set out at any length his Honour’s lucid analysis but merely to observe that it demonstrates that the statutory power to permit a member to inspect the company’s books was intended to clarify uncertainties in the common law on this issue. Although as developed, the statutory power was conditioned upon the applicant showing that the application was bona fide and for a proper purpose, historically there has never been any requirement to show that access to documents will aid some claim or action that the member might be entitled to advance against the company. Importantly, for present purposes, his Honour’s historical examination revealed that the statutory provision was not intended to alter the fundamental nature of the relationship between the company and its members. In this respect his Honour observed (at [17]) that the power was “concerned with access to documents by a member; that is, access motivated by the concerns that members may properly have about the affairs of the company.” In other words, the purpose of the power is to (at [18]):

[F]acilitate scrutiny by members of the manner in which the affairs of the company are being conducted in respects in which members might properly be interested (that is, respects which go beyond seeking to challenge a managerial decision).

## The meaning of “in good faith and for a proper purpose”

1. Although originally the expression “in good faith and for a proper purpose” was thought to involve two separate elements of “good faith” and “proper purpose”: *Re Augold NL* [1987] 2 Qd R 297; it is generally now accepted that it is a composite phrase requiring the application of an objective test to ascertain its existence: *Mesa Minerals* [22]; *Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd* (1989) 15 ACLR 151, 156 – 157 (*Knightswood Nominees*).

### The purpose must relate to shareholders’ rights in their capacity as a shareholder

1. The principle articulated at (3) in the passage from *Mesa Minerals*, identifies that the scope of the power under s 247A is limited to requiring inspection for a proper purpose and that the purpose be connected to the applicant’s rights as a shareholder. Moreover, the right in question must be one which arises *qua* the person’s status as a shareholder: *Knightswood Nominees* at 157 – 158; *Vinciguerra v MG Corrosion Consultants Pty Ltd* (2007) 61 ACSR 583, 597 [63] (*Vinciguerra*); in that the purpose for which the documents are sought must be germane to the applicant’s status as a shareholder or reasonably related to it. That would include a purpose which seeks to ascertain whether the company’s directors have breached their duties: *Humes Ltd v Unity APA Ltd (No 1)* [1987] VR 467; *Yarra Australia Pty Ltd v Burrup Holdings Ltd* (2010) 80 ACSR 641; or whether the company had paid dividends otherwise than out of profits or funded the defence by directors of their board positions: *London City Equities Ltd v Penrice Soda Holdings Ltd* (2011) 281 ALR 519 (*London City Equities*). It would also accommodate circumstances where a shareholder perceives that conduct by the company will diminish the proportion or value their shareholding: *Barrack Mines Ltd v Grants Patch Mining Ltd (No 2)* [1988] 1 Qd R 606; where a shareholder seeks to ascertain the value of the company for the purposes of exercising a right of pre-emption: *Tinios v French Caledonia Travel Service Pty Ltd* (1994) 13 ACSR 658; or where a party seeks inspection for the purposes of determining whether oppression proceedings or a shareholder derivative action ought to be commenced: *Vinciguerra*.
2. As the application under s 247A is for inspection of a company’s documents, the purpose is always of an investigative nature aimed at ascertaining what or whether events have occurred. In order to establish that the purpose for seeking inspection is a “proper” one, it is necessary that the applicant adduce some evidence which will demonstrate that there is “a case for investigation” in relation to the shareholders’ concerns: *Praetorin Pty Ltd v TZ Ltd* (2009) 76 ACSR 236, 245 – 246 [38] – [39]; *Re Sirrah Pty Ltd* [2017] NSWSC 1683 [23]. The provision is not designed to assist a shareholder who is no more than an officious busy-body or engaged in an undirected fishing expedition.
3. In a number of cases, courts have refused to allow inspection of the company’s documents for purposes which are not related to the rights of a person *qua* shareholder, such as where the application is for the purposes of assisting a competitor of the company: *Knightswood Nominees*; or where the objective is to overcome legal professional privilege claimed in legal proceedings: *Czerwinski v Syrena Royal Pty Ltd (No 1)* (2000) 34 ACSR 245.
4. In the course of submissions, Mr Edwards, who appeared with Mr Green for the applicants, sought to rely upon the decision in *Re Orinoco Gold Ltd* (2019) 141 ACSR 453 (*Re Orinoco Gold*) as supporting the proposition that it was a proper purpose for a shareholder to obtain inspection to facilitate their consideration of whether to commence or continue a securities class action against the company founded upon non-compliance with the duty of continuous disclosure. It is apparent from the record of Rees J’s *ex tempore* reasons in that case that the purpose of the application under s 247A was to consider whether a class action might be brought against the company, however, the nature of the action was not clear. It may have concerned the management of the company which had caused it to be placed in administration or have been founded upon some other alleged wrongdoing. Mr Edwards for the applicant submitted that I should assume that the anticipated proceedings was a securities class action — although he identified no basis on which that assumption might be founded. It is also relevant that there was no contradictor before Rees J and no appearance by the company. Indeed, her Honour did not actually consider the question of whether a member’s purpose in seeking inspection of the company’s books for determining whether to prosecute a securities class action was a “proper purpose” within the meaning of s 247A. In such circumstances, no assistance can be derived from this decision in relation to the issues under consideration.
5. Mr Edwards also sought to rely upon the decision in *Snelgrove v Great Southern Managers Australia Ltd (in liq) (rec and mgrs appointed)* [2010] WASC 51 (*Snelgrove*), as being a case where the Court has exercised the power in s 247A to allow inspection of insurance policies for the purposes of assisting the party seeking inspection to determine whether a contemplated proceeding was economically viable. There, the plaintiffs were found to be members of a managed investment scheme and the insurance policies held by the responsible entity were found to be books of the scheme. The causes of action which the plaintiffs sought to pursue against the responsible entity arose consequent upon the alleged breach of the duties owed by the scheme operators to the members. Le Miere J allowed the application and, after analysing a number of authorities, said (at [67] – [68]):

67 It is a proper purpose to inspect the company’s books for the purpose of investigating whether there are good grounds for seeking to bring a derivative action or a personal action against the company. The purpose of the plaintiffs in seeking access to the relevant insurance policies is to assist them in considering the economic viability of pursuing their proposed action against the company. That is a proper purpose.

68 The court may refuse the application on discretionary grounds even if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose: *Vinciguerra v MG Corrosion Consultants Pty Ltd* [2007] FCA 503; (2007) 61 ACSR 583 [37]. The nature and extent of the company’s insurance cover is not in itself a matter in dispute in the action which the plaintiffs are contemplating commencing against the company. However that is not a condition for the exercise of the power under s 247A. The disclosure of the existence and extent of the relevant insurance cover is likely to assist the plaintiffs in determining whether or not to commence or proceed with the proposed action. If the company does not have insurance which covers the plaintiffs’ claims or the quantum of the cover is such that it is likely to be substantially exhausted in legal costs then the plaintiffs may well not proceed with the proposed action. That would prevent the resources of the parties and public resources being wasted. The thrust of the approach to litigation enshrined in the case management rules of this court and other superior courts in Australia is to avoid waste of time and cost and to ensure as far as possible proportionate and economical litigation. It is an appropriate exercise of the discretion of the court to make an order granting access to the plaintiffs to the company’s relevant insurance policies.

1. These passages, which were relied upon by the applicants, must be understood in the context that the proposed causes of action were against the responsible entity of the scheme in relation to its contravention of the obligation to treat all members of the scheme equally, to act in their best interests and to give priority to the interests of the scheme members over its own interests. In other words, the right or interest which the plaintiffs sought to protect or vindicate was one which arose in their capacity as a member of the scheme. Correlatively, the obligation alleged to have been breached by the responsible entity was one owed to the plaintiffs in their capacity as members. Consistently with the above authorities, a shareholder or member of a scheme acts in good faith and for a proper purpose where the information which they seek is for the purpose of enforcing or vindicating their rights and entitlements in that capacity.
2. The applicants also relied upon the decision of Goldberg J in *Re Style Ltd; Merim Pty Ltd v Style Ltd* (2009) 255 ALR 63 (*Style*). In that case, Merim Pty Ltd (Merim), sought an order allowing it to inspect the books of Style Ltd (Style) for the purposes of investigating whether Style’s directors and officers had exercised their powers reasonably, in good faith and for proper purposes consistently with their fiduciary and statutory obligations. Merim also sought to ascertain whether Style had misled shareholders and the market regarding the performance of the company. Merim was a substantial shareholder in Style and its sole shareholder was also a significant investor in Style through other means. The application was precipitated by a sudden and significant downturn in Style’s revenue for the financial year ending 30 June 2008. Goldberg J held that Merim was required to satisfy the Court that it was entitled to inspect the books because the information sought related to matters “that it as a shareholder ought to be informed of by the company”. If that was satisfied it did not matter that the shareholder obtained some other benefit from acquiring the information. In the circumstances his Honour held that the application was made in good faith and for a proper purpose, being to investigate whether the directors and officers had breached their duties which might give rise to potential derivative action claims. The scope of the documents which Merim was entitled to inspect included, “All polices of insurance and policy schedules relating to any directors and officers insurance entered into by Style for the benefit of directors and officers”. His Honour permitted such inspection primarily because it would assist Merim to determine whether it was appropriate to commence a derivative action in the name of the company against the directors and officers. In other words, to assess the commercial viability of any proposed action.
3. The applicants further relied upon the decision in *London City Equities* in which Robertson J made orders under s 247A permitting inspection of the insurance policies of the target company. The applicant, London City Equities Ltd, held a substantial shareholding in the respondent company, Penrice Soda Holdings (Penrice). It was concerned as to whether Penrice had engaged in non-disclosure or misleading disclosure of certain financial information, whether Penrice paid dividends in 2008 other than from profits, and whether Penrice had funded the defence by two of its directors of their positions on its board. Robertson J followed the decisions in *Snelgrove* and *Style* in concluding that he ought to permit inspection of, *inter alia*, any director and officer insurance policies held by Merim.
4. Similarly, in *Hanks v Admiralty Resources NL* (2011) 85 ACSR 101 (*Hanks v Admiralty Resources*), Gordon J was prepared to allow the applicant to inspect, *inter alia*, the policies of director and officer insurance held by the respondent company which were in effect in the period during which the alleged misconduct had occurred. However, in that case the applicant, Mr Hanks, was a member of Admiralty Resources NL and the foundation of his application to inspect the company’s documents was to enable him to determine whether to commence a derivative action against it under s 237 of the *Corporations Act*. In particular, his concern related to the sale by Admiralty Resources NL of one of its significant assets to a third party and the directors’ recommendation to shareholders to approve the sale without informing them of the existence of a competing offer from another bidder. In circumstances where Mr Hanks had established that he had a case for investigation, Gordon J held that the application was made for a proper purpose. At [32(3)] her Honour identified a limitation on the power in s 247A where she said:

(3) The words “proper purpose” means a purpose connected with the proper exercise of the rights of a shareholder as a shareholder, as opposed to the purpose connected with some other interest, such as an interest as a bidder under a takeover scheme, or as a litigant in proceedings against the company: *Cescastle* at 118.

1. A useful discussion of what is a proper purpose within s 247A is also found in the reasons of Brereton J in *Tolco*. There his Honour identified that the delineation of proper from improper purposes is assisted by comparing those cases in which inspection has been granted and those where it has not. After examining a number of authorities in each category his Honour said (at [19]):

From that comparison, it emerges – perhaps unsurprisingly – that authority to inspect has been refused where the purpose is unrelated to the interests of the member *qua* member, or savours of an abuse of process, but has been granted where the purpose is connected with the member’s interest *qua* member and is not vexatious.

1. His Honour’s summary of the position accords with both authority and principle and should be accepted.

## Is the present application made in good faith and for a proper purpose?

1. Mr Edwards submitted that the decisions in *Re Orinoco Gold*, *Snelgrove*, *Style* and *Hanks v Admiralty Resources* demonstrate that courts have ordered the inspection of relevant documents, including insurance policies, under s 247A for reasons which are similar to those of the applicants in the present matter and that there was no principled reason as to why the applicants, as representatives of the class action, should not have similar relief.
2. As articulated in the course of submissions, the reasons why the applicants wished to inspect the documents, being the insurance related documents, intercompany guarantees and the indemnity of Mr Davidson, were threefold. The first was to assess the commercial viability of pursuing the class action. It was submitted that access to the documents will fully inform the applicants of the worth of the respondents in the class action so that they can be satisfied of the appropriateness of pursuing complex and expensive litigation. Second, to conduct the class action litigation in a proportionate and efficient manner. This was intended to suggest that the applicants will tailor the manner in which they will conduct the class action by reference to the recovery they expect to secure. Third, to facilitate the holding of a meaningful and early mediation with the respondents in the class action so as to comply with the applicants’ obligations under ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) (*Federal Court Act*). Although the applicants did not articulate how knowledge of the respondents’ insurance position will assist in the mediation, experience suggests that with the knowledge of the respondents’ limit of insurance, the applicants will offer to accept that amount in settlement of the class action, neither more nor less. In a fashion that may shorten or facilitate the conduct of any mediation.
3. Despite the altruistic terms in which the claimed purposes of inspection were couched, the reality is that the object of the application is to substantially improve and advance the applicants’ position in the class action. Necessarily, that will involve a concomitant diminution of the respondents’ position.
4. Mr Owens SC for the respondents submitted that when it is understood that the overall objective of inspection is to advance the applicants’ class action by which they seek to enforce or to vindicate the alleged infringement of their rights as articulated in the statement of claim, it cannot be said that they have a “proper purpose” within the meaning of that terms as it is used in s 247A. The central tenet of his oral submissions was that the rights which the applicants sought to advance in the class action were not rights which they derived in their capacity as shareholders.

### Do the applicants have a “proper purpose”?

1. Whilst it is true that when an applicant has a proper purpose in seeking to inspect company documents, the courts have permitted inspection of insurance policies which might indemnify the company against any prospective claims, the first step in any application under s 247A is to ascertain whether the stated purpose is a proper one. Leaving aside for one moment the decision in *Re Orinoco Gold*, the authorities on which the applicants relied concerned applications by shareholders or scheme members seeking to enforce or vindicate their rights or entitlements in those capacities. The gravamen of their concerns and proposed actions were related to conduct by the company which infringed or damaged their rights and interests *qua* shareholder or scheme member. It is those rights and interests with which s 247A is concerned. That is consistent with the history of the provision as articulated by Colvin J in *Metals X Limited* and the principles derived from the authorities considered: esp *Mesa Minerals*.
2. When, in *Hanks v Admiralty Resources,* Gordon J referred to “proper purpose” being “a purpose connected with the proper exercise of the rights of a shareholder *as a shareholder*” (emphasis added) her Honour was identifying that the purpose is one connected with a shareholder’s rights *qua* shareholder. In contradistinction, a person who has a claim or potential claim against a company in which they are a shareholder, but which arises from events unconnected with their rights and entitlements as a shareholder, s 247A affords them no avenue to obtain a litigious advantage by inspecting the company’s private and confidential documents.
3. Here, the applicants’ claim against the respondents is not one which arises in relation to their rights and entitlements *qua* shareholders. Their complaint is that, prior to becoming shareholders, the respondents engaged in conduct which was misleading or deceptive or contravened its continuous disclosure obligations and that this has caused them loss as a result of acquiring stapled securities. The respondents’ alleged conduct is said to have affected them in their capacity as potential investors in the company. The right which they complain was infringed was their right as a potential investor or shareholder not to be misled or deceived about the operations of the respondents’ business or to be informed in accordance with the respondents’ continuous disclosure obligations. It may well be that the damage which they suffered arose after they became shareholders and because they were shareholders, however, that was not because any right or entitlement attaching to their capacity as a shareholder was infringed.
4. The decision in *Re Orinoco Gold* was one in which a member sought inspection of insurance policies for the purposes of determining whether to pursue a class action against the company. However, as mentioned above, it is far from clear that it was a securities class action. It may have been an action founded upon a breach of the duties owed to the members. Moreover, the point here in issue was not considered in that case where there was no contradictor. That being so, it does not stand as authority which would support the applicants’ position in the present case. If it can be so described, it would be plainly wrong and is inconsistent with the other authorities to which reference has been made.
5. It follows that, although the applicants have standing to bring the application given that they are presently members of ALGL, the purposes for which they seek the documents in question are not “proper purposes” within the meaning of that term as used in s 247A. That is so regardless of which of the articulated purposes is relied upon. They are all directed to advancing the applicants’ position to the detriment of the respondent in litigation in which they do not seek to enforce or vindicate their rights *qua* shareholders. The consequence is that the discretionary power to order that they be entitled to inspect the respondents’ documents is not enlivened. That conclusion applies to each of the three categories of documents which the applicants sought to inspect.
6. It ought to be observed that the respondents submitted that the applicants’ purposes could not be “proper purposes” because the application was made subsequent to the commencement of the class action. It was said that once that proceeding has commenced, any inspection would not be one seeking to identify some “case for investigation” within the meaning of the above authorities. That submission cannot be accepted. If seeking inspection of the company’s documents so as to ascertain the economic or commercial viability of an action were, in the circumstances, a proper purpose, it could not matter whether any proceedings had commenced or not. In the present case the action was commenced when it was in order to prevent the continuing daily expiration of the limitation period and it can make no difference whether the application for inspection was made before or after that prudent step was taken. Mr Owens SC submitted that, if the application for inspection is proper only if it is to “enable a shareholder who has identified an appropriate ‘case for investigation’ to determine whether the case has any substance or prospects”: *Style* at [76]: the commencement of the action against the company necessarily means that the applicant is aware of the case they wish to advance. That, however, involves a conflation of two concepts. The requirement to demonstrate a “case for investigation” relates to the quality and effect of evidence which the applicant for inspection must adduce to demonstrate that the application is substantive and not fanciful, artificial or specious. It is not a standard concerning whether the applicant actually has a cause of action against the company in relation to their rights *qua* shareholder. On the other hand, if a person demonstrates that they have a good cause of action because they have been able to articulate it in proceedings, the production of the relevant pleading may well demonstrate that there is a case requiring investigation which will be advanced by inspecting the company’s documents.
7. Here, if the purpose of the application was to inspect the company’s books so as to ascertain whether there was an available action arising out of the infringement of the applicants’ rights as shareholders or even whether such an action might be commercially viable, the veracity of that purpose would not *necessarily* be affected by whether the application was made before or after the action was commenced. It may be that if the action has been commenced a question may arise as to whether the limitations of discovery were being circumvented and inspection may be refused for that reason, but that is probably a reason to refuse inspection on the discretionary grounds rather than one which affects the veracity of the applicants’ purpose.
8. Before leaving this topic it is necessary to observe that the issue of whether the purpose of the intended inspection of documents was to advance the applicants’ rights in their capacity as shareholders was central to the respondents’ oral submissions. It was not, unfortunately, clearly articulated in the respondents’ written submissions filed prior to the hearing. Indeed, if it appears at all in those submissions, it is well camouflaged. The cases relied upon by Mr Owens SC and Ms Lindeman in support of this central submission were discussed in the written submissions but, somewhat curiously, not for this point. It is more than likely that the import of the issue only became apparent to the respondents’ legal advisers after the written submissions were filed. Nevertheless, the omission to properly ventilate it in the written submissions tends to undermine the benefit to the Court of receiving written submissions in advance of the hearing. On occasion, a failure to refer to a central argument in written submissions which are required by the Court to be filed prior to a hearing may have consequences in relation to costs.

## The discretion in s 247A

1. Mr Owens SC submitted that, even if it were determined that the applicants’ purpose in seeking inspection was within the scope of s 247A, the Court would not exercise its discretion to grant relief. That submission should be accepted in the circumstances of this case where the factors weighing against allowing inspection greatly outweigh those in favour.

### The decision in Evans v Davantage Group (No 2)

1. In accepting that submission I have been assisted by the reasons for judgment of Beach J in *Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473 (*Evans v Davantage Group (No 2)*). It must be kept in mind that his Honour was there dealing with an application made under ss 33ZF(1), 37M and 37P of the *Federal Court Act* and here the applicants eschewed reliance on those provisions. For that reason, his Honour’s erudite reasoning has less direct relevance to the issues in the present matter than might otherwise have been the case. In particular, Beach J did not have to ascertain whether the purposes for which inspection was sought were “proper purposes” within the meaning of s 247A. However, that is not to say that his Honour’s observations do not provide guidance at a more abstract level.
2. In the matter before him, Beach J had concluded that he had power to order the disclosure or inspection of documents pursuant to s 23 of the *Federal Court Act*, but found that he ought not to do so in the circumstances of the case. Firstly, his Honour was concerned to reiterate that insurance documents are generally commercially confidential as between insurer and insured and that is a significant factor where the Court is asked to exercise their production to third parties in the exercise of a discretion. Second, in the usual course it can be expected that if a policy of insurance responds to the claim advanced against a respondent, especially one of substance, it is likely that respondent is capable of enforcing its rights to coverage and to contest any declinature which it anticipates was wrongly made. Third, that in the ordinary course and save in respect of specific exceptions in respect of insolvency, a policy of insurance will be discoverable by one party only where it has a direct relevance to an issue arising on the pleadings. Fourth, an applicant usually has no right to examine a potential respondent as to their creditworthiness ahead of commencing an action in an attempt to ascertain the commercial viability of pursuing the matter. Again, insolvency provides some exceptions. Fifth, the fact that the settlement of a class action pursued under Part IVA of the *Federal Court Act* requires curial approval does not support the disclosure of insurance policies between the respondents and any insurers to the applicants. If necessary, the Court can design appropriate procedures to appraise itself of the respondent’s insurance position if the matter settles and when the occasion arises. Those procedures may fall short of complete disclosure to the applicants. Indeed, until settlement occurs it may well be premature to require a respondent to disclose their insurance position at the mediation stage. Sixth, the disclosure of an insurance policy in circumstances such as the present would confer on the applicants a not insignificant commercial advantage in the negotiations for the settlement of the action outside of any advantage acquired derivatively upon the application of the court rules. It need not be considered whether any advantage acquired if inspection is given is necessarily described as “asymmetric”. Rarely, if ever, will parties have an equal bargaining position and, depending upon the circumstances, the application of Court rules may confer an advantage for the purposes of bringing about a commercial resolution of litigation. However, it does not follow that any power the Court has to require one party to disgorge documents should be used merely to bolster the knowledge of either party to the detriment of the other.
3. The six matters identified by Beach J are relevant to the exercise of the discretionary power in s 247A and, had it been enlivened, their application to the circumstances of the present matter would have weighed heavily against permitting inspection. It should be observed that these matters were not overtly considered in the decisions of *Re Orinoco Gold*, *Snelgrove*, *Style* and *Hanks v Admiralty Resources*, nevertheless future decisions concerning s 247A might regard the decision in *Evans v Davantage Group (No 2)* as requiring that at least some weight be given to the position of the insurer.

### Other considerations

#### The respondents are solvent

1. A further matter which weighs heavily against the exercise of discretion in favour of permitting the applicants to inspect the respondents’ documents is that the respondents are all solvent and the evidence is not suggestive of impending insolvency. Whilst it may be the case that external administrators are entitled to obtain evidence of the creditworthiness of potential targets in litigation, that entitlement arises from their unique position and lack of firsthand information as to the dealings of the entities under their control. There is no principled reason for extending that type of intrusion into the private affairs of individuals to *inter parte* litigation outside of the insolvency context. Certainly none was articulated by the applicants.

#### The respondents nett assets exceed the amount of the claim in the class action

1. A perhaps weightier consideration is that, on the evidence available on this application, the applicants’ claim in the class action is unlikely to exceed the value of the respondents’ nett assets. ALGL’s most recent balance sheet discloses that its nett assets are around $290m and, although it has suffered in recent times with declining revenues and continuous annual losses, it is far from apparent that trend will continue. The impact of the incident in October 2016 and the current pandemic are likely to be temporary rather than systemic. As the FY 2020 Directors’ Report reveals, the company is reacting to the challenges which it faces. Whilst there are a variety of possible outcomes, there is no evidence which compels or suggests that the company will fail in the future. It may be implicit from the applicants’ submissions that, due to the declining value of ALGL’s assets and business, by the conclusion of the class action they will be insufficient to meet any judgment, however, any such prognostication is necessarily speculative and not one that can be made on the available evidence. Presently, the only conclusion that can be confidently drawn is that ALGL has nett assets of approximately $290m and that it faces some challenging times.
2. Conversely, the available material does not permit any sufficient assessment of the value of the applicants’ claim in the class action. As has been identified above, Ms Blacker’s estimate was rudimentary at best and there are a number of factors which diminish its reliability. In particular, the number of relevant trades is likely to be overstated, the inflationary effect of the alleged failure to comply with the duty of disclosure is quite possibly less than the value of the decline in the price of the stapled securities caused by the occurrence of the incident, the size of the class is indeterminate, and it is also likely that many will opt out of the proceedings. Added to that is the observation made that Ms Blacker’s methodology may have tended to result in an overestimation of the amount of the potential claim.
3. It follows that it is not possible to conclude that the quantum of the claim in the class action is likely to exceed the nett value of the respondents’ assets. As Mr Owens SC submitted, that conclusion substantially undermines a number of the applicants’ arguments which formed the foundation of the application. For instance, the applicants claimed that inspection of the respondents’ documents would assist their solicitors in acting to facilitate the just, quick, inexpensive and efficient resolution of the dispute by enabling them to form a view on any potential settlement of the class action by comparing the aggregate value of the claims with the likely pool of assets out of which recovery can reasonably be expected to be made. On the conclusion reached, the applicants’ solicitors do not need to inspect the documents the subject of this application to achieve that objective as they can be somewhat confident that the respondents have sufficient assets to meet any judgment they might obtain. Similarly, the applicants submitted that any application under s 33V of the *Federal Court Act* for the approval of any settlement would require production of the respondents’ insurance so as to satisfy the Court that any discount for recovery risk was fair and reasonable. However, as on the presently available material, there is no foreseeable recovery risk in respect of which a discount is likely to be made, such that any requirement for the inspection of the respondents’ documents dissipates.
4. At this point it should be added that even if I was of the opinion that the respondents’ nett assets did not exceed the amount of the claim in the class action, I would not necessarily regard that as a factor weighing in favour of permitting inspection of the respondents’ documents. On this I prefer the approach of Beach J in *Evans v Davantage Group (No 2)* at [99] – [106] as to the manner in which information is disclosed to the Court as to the value of the assets from which the applicants might recover their claim if successful, including policies of insurance. In particular reference should be made to [101] – [106], where his Honour said:

101 Now I accept that the applicant has made a reasonable point in saying that on a s 33V approval application, insurance questions *may* need to be looked at. Assume that to be so. There are a number of points that can be made.

102 First, I can design procedures to flush out the insurance question at that stage if necessary. I could require confidential material to be produced by Davantage or the insurers at that point. In circumstances where Davantage’s insurers have denied indemnity to Davantage, it would, for example, be possible for a confidential affidavit to be filed with the Court justifying why denial of indemnity was reasonable in all the circumstances, to otherwise supplement the information available to the Court as to the financial position of Davantage. I could even appoint an amicus. Indeed, I could even refer the matter to a special referee or independent expert to look at the matter and to provide an opinion to the Court. There are many possibilities. Such procedures could firm up or verify any foundational assumptions that the applicant had made in agreeing to a settlement in principle, subject to s 33V approval.

103 Second, if any foundational assumptions were not firmed up, s 33V approval would not be given and the matter would be given back to the applicant to decide the course he wanted to take. As part of this, at that stage some disclosure to the applicant might be ordered by me of the insurance position. More generally, the applicant could seek further directions from me as to how he should proceed.

104 Third, the applicant asserts that without the insurance documents he cannot even reach an in principle settlement at any mediation. Let me say a number of things as to this.

105 In a sense, any applicant in any litigation whether a class action or not might assert this. The fact is that settlements occur on imperfect information.

106 Further, the applicant can settle “in principle” on a foundational assumption or a representation made by the respondent. If that is made transparent before me I will seek to verify it in any s 33V process if the applicant cannot. Indeed, the respondent would also have an interest in verifying it. And if it was not verified, then other steps can be taken.

1. Those observations, which are applicable in this case, also demonstrate that the application, assuming that it would be for a proper purpose, would be premature at this early stage of the proceedings.
2. There is no need in this case to further consider the power of the Court to require respondents to class actions to adduce evidence of their insurance position for the purposes of any approval of the settlement of an action under s 33V of the *Federal Court Act*. The point was not addressed by the parties before the Court. However, compromises of action are contracts and, like all contracts, each party enters into them on the basis of imperfect knowledge. It is not self-evident that the obligation of the Court in s 33V is to undertake an extensive inquisition into the facts of the case and the standing or creditworthiness of the parties in order to ascertain whether a settlement is fair and reasonable. Unless the question is whether, from the perspective of the applicants and based on the information known to them, the settlement is reasonable, the task of the Court will be impossible to fulfil. It would be required to conduct a trial of the action and to examine the wider circumstances of the parties so as to answer the question asked of it on the basis of perfect knowledge.
3. Whether the Court has power under s 23 of the *Federal Court Act* to order the production of insurance policies need not be considered.
4. The conclusion that the applicants have not established that the value of their claim in the class action exceeds the quantum of the respondents’ nett assets also undermines a further purpose advanced by them for the inspection of documents, being that inspection was necessary to allow their solicitors to know how to conduct the class action and, in particular, proportionately to the amount which might be recovered. It was submitted by the applicants in their written submissions that:

There is a very obvious difference between what is proportional if one is conducting litigation which might result in a recoverable aggregate judgment of $300 million, and one where, for example, the maximum recoverable judgment is several orders of magnitude below that, such as $10 million.

1. As Mr Owens SC submitted, just exactly how the action would be conducted differently in the two scenarios was not identified and, if this was a genuine purpose underpinning the present application, that would have been articulated with some clarity. As it is, as the applicants are now aware that the respondents will have substantial assets against which execution might take place with the consequence that this asserted concern held by the applicants also dissipates.

#### No apparent risk of dissipation of insurance policy proceeds

1. The applicants submitted that a factor weighing in favour of permitting inspection was that there was a “significant risk of dissipation of insurance proceeds which may provide cover in respect of any liability of the Class Action Respondents to the Applicants and group members”. This appeared to be based upon an assumption that the policies which might respond to the securities class action claim might also respond to the personal injury and wrongful death claims arising out of the incident on 25 October 2016 and to the costs of defending regulatory proceedings. Mr Owens SC criticised the applicants’ lack of evidence on that point, although that argument is somewhat churlish given that they do not have access to the relevant policies which is why the application is made. However, it is fair to say that, ordinary commercial experience suggests that insurance cover for personal injury to third parties or for defence costs for coronial inquiries and the like are often separate and distinct from director and officer liability insurance. Further, even if “defence costs” for regulatory proceedings reduced the quantum of director and officer cover, it would be by a minor amount in the context of the alleged size of the class action. In the circumstances the applicants’ concern is not a factor which weighs in favour of the exercise of the discretion under s 247A, had that power been enlivened.

#### Inspection is also sought for the benefit of third parties

1. It is not irrelevant that the application is made by the applicants who are the lead applicants in the class action and for the purposes of prosecuting that proceeding. In this sense the application is effectively made on behalf of all members of the class and that necessarily includes persons who are no longer shareholders of ALGL. Those latter persons have no standing to make such an application: *Leadenhall Australia Pty Ltd v Cape Lambert Resources Ltd* (2018) 125 ACSR 484, 493 [44] – [45]; and, if inspection were ordered, the practical effect would be to confer on them a significant benefit which the legislation does not intend. There was no evidence as to the proportion of the class who are no longer shareholders in ALGL and, in some cases that might be significant. In this context it should be mentioned that in *Mesa Minerals* it was said that if an applicant has a proper purpose in obtaining inspection of a company’s documents, it is not to the point that inspection might benefit the applicant for some other purpose. However, two points can be made about that. First, it has been established that the application was not advanced for a proper purpose, with the result that this observation in *Mesa Minerals* is not relevant. Second, here the issue is as to the exercise of the discretion and it is a factor weighing against exercising it if the effect is to confer benefits on numerous other persons who would not have been entitled to make the application of their own motion.
2. It is also apparent that inspection of the documents was also sought to satisfy the condition in the funding agreement, being that Woodsford must confirm that the respondents’ insurance position is acceptable to it. Mr Owens SC submitted that this established that the purpose of the application was to enable Woodsford to satisfy the commercial viability of it continuing to fund the class action. Whilst that, no doubt, may have been a motivation for the application, in substance and in form the applicants brought the proceedings for the purposes of enforcing their claimed *choses in action* arising, so they say, from the respondents’ alleged misconduct. In the absence of any legislative scheme whereby redress for losses of the nature under discussion is pursued by a relevant regulator, it remains an unfortunate fact that litigants are forced to secure the assistance of litigation funders to financially support their action and protect them from the possibility of a ruinous costs order. Here, even though the consequence of the applicants succeeding in their application may have been to cause the condition to be satisfied so as to confer a benefit on Woodsford, any such benefit would be derivative upon that conferred on the applicants themselves. If the discretion had been enlivened, this factor would not have weighed against its exercise.

#### The special importance of communications with the insurer

1. Not only did the applicants seek copies of the respondents’ policies of insurance, they sought copies of correspondence with the insurers concerning the notification of the claims made against the respondents and the insurers’ responses and communications concerning that notification. Although, in the circumstances of this case, it is not strictly necessary to decide this question, there are very good reasons why such documents ought not to be inspected by shareholders pursuant to an order under s 247A. In seeking indemnity under a director and officer policy the insureds are required to act with good faith and make full disclosure of the circumstances of the claim to the insurer. The insurer must act with the utmost good faith in dealing with the claim. These obligations arise both under the *Insurance Contracts Act 1984* (Cth)and, more historically, at common law. They are obligations which are somewhat unique to the relationship between insurer and insured and necessarily they involve heightened duties of frankness and confidentiality. If it transpired that such documents were to be made available to third parties who may wish to pursue a claim in respect of which the insurance policy might respond, the insurer/insured relationship would be severely and detrimentally affected as it would necessary prevent the parties to the policy corresponding in a manner consistent with their duties *inter se*. Such an intrusion into that relationship would have consequences beyond this particular case and that gives rise to a public policy question in relation to this issue.
2. It follows that, regardless of how the discretion might be exercised in relation to other documents, it is likely that a somewhat exceptional case might have to be advanced before the discretion might be exercised to permit the inspection of correspondence between insured and insurer, even where a proper purpose is established.

### Conclusion as to the exercise of discretion

1. It follows from the above discussion that, even if the applicants had established a proper purpose for inspecting documents in the respondents’ possession, I would have exercised the discretion against granting the relief sought in relation to the insurance policies and the correspondence between the respondents and their insurer. The same would not necessarily pertain to the intercompany guarantees which are part of the corporate structure of the group and the inspection of which would not impact upon any confidentiality obligations owed to third parties. However, the parties’ submissions did not deal with the categories separately and, as the above discussion reveals, the applicants did not establish a basis for exercising the discretion in their favour in respect of any category.

## Conclusion on application

1. From the foregoing the necessary consequence is that the application under s 247A must be dismissed. Although the respondents voluntarily provided to the applicants a copy of the deed of indemnity in favour of Mr Davidson, they would not have been required to do so had they refused to do so.
2. The parties will be heard on the question of costs.

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| I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 11 September 2020