Federal Court of Australia

Binqld Finances Pty Ltd (in liq) v Binetter [2024] FCA 361

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| File number: | NSD 377 of 2023 |
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| Judgment of: | **KENNETT J** |
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| Date of judgment: | 12 April 2024 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for summary dismissal and strike-out of cause of action – where application turns solely on a question of law – where question of law has previously been answered in a single-judge interlocutory decision of a superior court – where applicants contend that decision is plainly wrong – whether question of law should be decided at the final hearing  **STATUTORY INTERPRETATION –** whether limitation period in s 1317K of *Corporations Act 2001* (Cth) (**Act**) may be extended by s 1322(4)(d) – whether limitation period has jurisdictional character with respect to the cause of action conferred by s 1317H  **STATUTORY INTERPRETATION** – relevance of extrinsic materials to discerning legislative intention of amending legislation |
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| Legislation: | *Corporate Law Economic Reform Program Act 1999* (Cth)  *Corporate Law Reform Act 1992* (Cth)  *Corporations Act 2001* (Cth) ss 180, 181, 182, 588FF, 962P, 1317E, 1317F, 1317G, 1317H, 1317HA, 1317HB, 1317J, 1317K, 1655, 1657  *Corporations Act 1989* (Cth) (repealed) ss 232, 459G, 1317DA, 1317EA, 1317EB, 1317EC, 1317GF, 1317HA, 1317HD, 1317HE, 1322  *Federal Court of Australia Act 1976* (Cth) s 31A  *Trade Practices Act 1974* (Cth) (repealed) s 82  *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) sch 1  *Federal Court Rules 2011* (Cth) rr 26.01, 30.01  Corporate Law Economic Reform Program Bill Explanatory Memorandum 1998 (Cth)  Corporate Law Reform Bill (No 2) Explanatory Memorandum 1992 (Cth)  *Corporations Law* (Vic) ss 459C, 459F, 459G, 1322 |
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| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27  *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1  *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684  *Austructures Pty Ltd v Makin* [2014] VSC 544; 290 FLR 153  *Barnes v Addy* (1874) LR 9 Ch App 244  *BP Australia Ltd v Brown* [2003] NSWCA 216; 58 NSWLR 322  *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541  *British American Tobacco v Western Australia* [2003] HCA 47; 217 CLR 30  *Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378  *Chung-Yi Pty Ltd v Chih-Yang Chang (No 2)* [2018] NSWSC 1112; 128 ACSR 585  *CSR Ltd v Eddy* [2005] HCA 64; 226 CLR 1  *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265  *Emanuele v Australian Securities Commission* (1997) 188 CLR 114  *General Steel Industries* *Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125  *Gerace v Auzhair Supplies Pty Ltd (in liq)* [2014] NSWCA 181; 87 NSWLR 435  *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* [2023] NSWCA 134; 111 NSWLR 550  *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; 167 FCR 372  *Jobbins v Capel Court Corp Ltd* (1989) 25 FCR 226  *Karam v Palmone Shoes Pty Ltd* [2012] VSCA 97  *Lewis Securities Ltd (in liq) v Carter* [2018] NSWCA 118; 355 ALR 703  *Maxwell v Murphy* (1957) 96 CLR 261  *McKain v RW Millar & Company (South Australia) Pty Ltd* (1991) 174 CLR 1  *Minister for Immigration and Border Protection v BHA17* [2018] FCAFC 68; 260 FCR 523  *Minister for Immigration v FAK19* [2021] FCAFC 153; 287 FCR 181  *Newtronics Pty Ltd v Gjergja* [2007] VSC 195; 212 FLR 190  *Newtronics Pty Ltd v Gjergja* [2008] VSCA 117  *Nichol v Discovery Africa Ltd* [2016] FCAFC 182; 343 ALR 594  *Port Ballidu Pty Ltd v Frews Lawyers* [2017] QSC 19  *Port Ballidu Pty Ltd v Frews Lawyers* [2018] QCA 110; 1 Qd R 276  *R v JS* [2007] NSWCCA 272; 230 FLR 276  *R v Wallis; Ex parte Employers’ Association of Wool-Selling Brokers & H V McKay Massey Harris Pty Ltd* (1949) 78 CLR 529  *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96  *Re Auzhair Supplies Pty Ltd (in liq)* [2013] NSWSC 1; 272 FLR 304  *Re Bolton; Ex parte Beane* (1987) 162 CLR 514  *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252  *Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118  *The Crown v McNeil* (1922) 31 CLR 76 |
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| Number of paragraphs: | 84 |
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| Date of hearing: | 26 March 2024 |
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| Counsel for the applicants: | J Arnott SC with B Mostafa |
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| Solicitor for the applicants: | Clayton Utz |
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| Counsel for the respondent: | F Roughley SC with R Jameson |
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| Solicitor for the respondent: | White & Case |

ORDERS

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|  | | NSD 377 of 2023 |
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| BETWEEN: | BINQLD FINANCES PTY LTD (IN LIQ) (ACN 119 243 220)  First Applicant  LIGON 268 PTY LTD (IN LIQ) (ACN 051 824 081)  Second Applicant  ERBIN FINANCES PTY LTD (IN LIQ) (ACN 138 259 800) (and others named in the Schedule)  Third Applicant | |
| AND: | STEVEN BINETTER  Respondent | |

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| order made by: | KENNETT J |
| DATE OF ORDER: | 12 APRIL 2024 |

THE COURT ORDERS THAT:

1. Pursuant to r 26.01 of the *Federal Court Rules 2011* (Cth), the originating application is dismissed in so far as it seeks compensation under s 1317H of the *Corporations Act 2001* (Cth).
2. The applicants’ interlocutory application filed on 24 November 2023 for leave to amend their Statement of Claim and Reply is dismissed.
3. The costs of the respondent’s interlocutory application filed on 7 November 2023 and the applicants’ interlocutory application filed on 24 November 2023 are reserved.

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

REASONS FOR JUDGMENT

KENNETT J:

# Introduction

1. Each of the six applicants in this proceeding seeks the same relief against the respondent, namely equitable compensation and, further or alternatively, an order for compensation under s 1317H of the *Corporations Act 2001* (Cth) (**the Corporations Act**). The claims arise out of the respondent having been a director of each of the applicants and having, it is alleged, been involved in causing them to become involved in schemes for the evasion of tax by members of his family. All of the conduct alleged against the respondent took place more than six years before the proceeding was commenced on 3 May 2023.
2. By his defence, filed on 28 July 2023, the respondent pleads that the claim under s 1317H is time barred by operation of s 1317K of the Corporations Act. By their reply, filed on 14 August 2023, the applicants say that time should be extended in relation to that claim pursuant to s 1322(4)(d) of the Corporations Act.
3. The respondent filed an interlocutory application on 7 November 2023 seeking an order that the claim for statutory compensation under s 1317H be summarily dismissed or, alternatively, that the paragraphs of the Statement of Claim advancing that claim be struck out. These paragraphs of the Statement of Claim are not said to be deficient except to the extent that they advance a claim that cannot succeed. Attention can therefore focus on the prayer seeking summary dismissal of the claim for statutory compensation. This prayer invoked r 26.01 of the *Federal Court Rules 2011* (Cth) (**the Rules**); however, reliance was also placed orally (with no objection by the applicants) on s 31A of the *Federal Court of Australia Act 1976* (Cth).
4. The substance of the respondent’s argument is that the limitation period in s 1317K is not capable of being extended under s 1322(4)(d) and the claim for statutory compensation must therefore fail.
5. The respondent’s interlocutory application also seeks an order under r 30.01 of the Rules that the Court hear and determine, as a separate question, whether power exists under s 1322(4)(d) to extend the limitation period in s 1317K. However, this order is sought only “to the extent necessary to determine Orders 1 and 2”; that is, in aid of the application for summary dismissal and/or strike-out. It is apparently not sought to separate the question thus identified from the other issues in the trial and obtain a final judgment on that question. Framed in this way, the application appears to misunderstand the role and effect of the procedure provided by r 30.01. It is, in any event, unnecessary. No procedural prelude is required to a decision on the prayers for relief seeking summary judgment or strike-out. These reasons therefore focus, as indicated in the previous paragraph, on the application for summary judgment.
6. Also in play is an interlocutory application, filed by the applicants on 24 November 2023, for leave to amend their Statement of Claim and Reply. The proposed amendments relate to issues other than those raised by the respondent’s interlocutory application. The respondent says that leave should not be granted to file an amended pleading containing the claim for statutory compensation because that claim is bad in law, for the reason advanced in his application for summary dismissal. He makes no further objection to the application to amend.

# the positions of the parties

1. The question whether the limitation period in s 1317K is subject to the power of extension in s 1322(4)(d) has been considered in one case: *Austructures Pty Ltd v Makin* [2014] VSC 544; 290 FLR 153 (***Austructures***). There, Almond J held that the power in s 1322(4)(d) was not available.
2. The respondent relies on *Austructures*, as the only authority directly on point, to argue that there is no viable answer to his reliance on s 1317K and the claim for statutory compensation therefore cannot succeed. The applicants submit that it is at least arguable that *Austructures* is wrongly decided. The applicants do not contend that any of the conduct which they claim breached ss 181 or 182 occurred within the period of six years before the proceeding was commenced. The parties therefore agree that the question whether s 1317K applies or not will not be affected by evidence which might be led at the final hearing. Of course, the question whether time should be extended under s 1322(4)(d), if it arises, is likely to be highly fact dependent and might well be affected by findings made about the respondent’s conduct. However, the question whether s 1322(4)(d) is applicable or not is one of pure statutory construction. It thus stands outside the usual rule that issues in relation to the application of limitation periods should be left to trial. The applicants did not suggest that any evidence led at the final hearing was capable of affecting the resolution of the issue.
3. Another point that is not in dispute is that there is almost complete, if not complete, overlap between the evidence relevant to the statutory compensation claim and that relevant to the claim for equitable compensation. The latter, of course, is not the subject of the respondent’s interlocutory application and is not directly affected by it. There is an indirect effect, in that the respondent also pleads that the limitation period in s 1317K applies by analogy to defeat the claim in equity. However, the question whether the circumstances of the case make it unconscionable for the respondent to rely on the limitation period for this purpose is clearly likely to depend on evidence led at the final hearing. The respondent therefore does not seek to abbreviate the hearing on the equitable compensation claim by taking any preliminary point, and correspondingly does not suggest that summary dismissal of the statutory compensation claim would result in any significant contraction of the factual issues at trial. It would obviate the need to determine a set of confined questions of statutory construction.
4. The respondent referred to *Jobbins v Capel Court Corp Ltd* (1989) 25 FCR 226 at 231 where Davies, Burchett and Hill JJ observed that, where “it is clear that an applicant cannot succeed upon the case pleaded” because a statutory limitations provision is “a complete answer to the claim”, the court “should not merely defer the inevitable”. This observation was made in a case where the application of the limitation provision was regarded as clearly established and as defeating the entirety of the applicant’s claim. The second of those features is not present here. However, because summary dismissal is discretionary, distinguishing earlier cases on the exercise of the power does not necessarily take matters far.
5. There are statements in the cases, upon which the applicants relied, suggesting that a party resisting a summary dismissal application need only demonstrate an arguable position on a question of law (eg *Nichol v Discovery Africa Ltd* [2016] FCAFC 182; 343 ALR 594 at [134]). However, while there are many cases where the preferable decision in the exercise of the Court’s discretion (which must be exercised “sparingly” (*Karam v Palmone Shoes Pty Ltd* [2012] VSCA 97 at [28]) and “with caution” (*Spencer v Commonwealth* [2010] HCA 28; 241 CLR 118 at [24] (French CJ and Gummow J) (***Spencer***))) is to defer the resolution of the issue to final hearing, a pure question of law can often be decided just as conveniently and authoritatively on a summary dismissal application as on any other occasion; and an assessment of whether it is “clear that the applicant cannot succeed” is therefore, often if not usually, best undertaken after any such question of law has been resolved. The fact that the arguments on the point are complex and require detailed review of the case law does not prevent a firm view as to the correct answer being reached and given effect. This approach is supported by statements of Kirby J in *British American Tobacco v Western Australia* [2003] HCA 47; 217 CLR 30 at [103] and Gordon J in *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* [2008] FCAFC 60; 167 FCR 372 at [131] (citing *General Steel Industries* *Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130). At least in a case of the present kind, it is not apparent that a decision on a contested issue of statutory construction at an interlocutory stage is apt to “stultify the development of the law” (cf *Spencer* at [25] (French CJ and Gummow J)).
6. It was submitted for the applicants that a decision on the issue of statutory construction at this stage would be likely to lead to an application for leave to appeal, with potential for fracturing of the proceeding and consequent delay. This is a significant discretionary consideration. However, it is one that properly arises if and when an application for leave to appeal is filed.
7. Because the construction issue does not depend on any evidence that may be adduced at a final hearing, and I have heard able and detailed argument (which it would be inefficient to hear again at the trial), I consider it appropriate to decide the issue at this stage. The view to which I have come leads me to conclude that the statutory compensation claim should be dismissed.

# the construction issue

1. The applicants allege contraventions by the respondent of ss 181 and 182 of the Corporations Act, which impose duties on directors and other officers.
2. Part 9.4B of the Corporations Act deals with “Civil consequences of contravening civil penalty provisions”. The relevant version of Part 9.4B for present purposes is that which was in force prior to the commencement of amendments made by Schedule 1 to the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth): see ss 1655 and 1657 of the Corporations Act. (The important provisions remain in the same form, but other provisions have been added and Division headings have been inserted.)
3. Under s 1317E(1), if a Court was satisfied that a person had contravened one of the provisions referred to therein (defined as the “**civil penalty provisions**”), it was required to make a declaration to that effect (a “**declaration of contravention**”). Sections 181 and 182 were in s 1317E(1).
4. Section 1317G empowered the Court to make an order that a person pay a pecuniary penalty to the Commonwealth, in relation to the contravention of a civil penalty provision (a “**pecuniary penalty order**”), if a declaration of contravention of that provision had been made. A declaration of contravention could also provide a basis for the Court to order a person to refund fees that were charged in breach of s 962P of the Corporations Act (s 1317GA).
5. Section 1317H provided for “**compensation orders**”. It provided (relevantly for present purposes) as follows.

**1317H Compensation orders—corporation/scheme civil penalty provisions**

*Compensation for damage suffered*

(1) A Court may order a person to compensate a corporation, registered scheme or notified foreign passport fund for damage suffered by the corporation, scheme or fund if:

(a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation, scheme or fund; and

(b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

…

(5) A compensation order may be enforced as if it were a judgment of the Court.

1. Sections 1317HA and 1317HB provided for compensation orders in favour of specific classes of person, in circumstances not relevant here.
2. Section 1317J specified who might apply for a declaration of contravention or an order of a kind provided for in the sections mentioned above. Relevantly:
3. a declaration of contravention might be applied for by the Australian Securities and Investments Commission (**ASIC**) (s 1317J(1));
4. a pecuniary penalty order might be applied for by ASIC (s 1317J(1))
5. a compensation order in favour of a corporation (ie, under s 1317H) might be applied for by ASIC (s 1317J(1)) or by “the corporation” (s 1317J(2)); and
6. no other person may apply for an order of one of these kinds (s 1317J(4)).
7. Section 1317K imposed a limitation period in respect of all such applications. It was as follows.

**1317K Time limit for application for a declaration or order**

Proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than 6 years after the contravention.

1. There was no provision in Part 9.4B for the period specified in s 1317K to be extended.
2. Section 1322 is in Part 9.5 of the Corporations Act. It is headed “Irregularities” and contains a range of provisions confirming that procedural irregularities in relation to (for example) the commencement of proceedings and the convening of meetings do not invalidate those things. Of present relevance is s 1322(4)(d), which provides (and provided at all relevant times) as follows.

(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

…

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

# analysis

## Earlier cases

1. In *Austructures*, Almond J was taken to a line of cases on the interaction between s 1322(4)(d) and limitation provisions in the Corporations Act. It is useful to approach the issue by reference to those cases and the provisions that they considered.
2. *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 (***David Grant***) concerned s 1322(4)(d) of the *Corporations Law* (Vic) (**the Corporations Law**), which was not materially different to the current s 1322(4)(d). The provision had been part of the uniform companies legislation in Australia since 1990. The issue was whether s 1322(4)(d) authorised an extension of the time provided in s 459G of the Corporations Law for a company to apply for an order setting aside a statutory demand that had been served on it. Section 459G(2) provided that an application “*may only be made* within 21 days after the demand is so served” (emphasis added). Section 459G(3) reinforced the stringency of the time limit by providing that an application was made in accordance with the section “only if” an affidavit was also filed and served “within those 21 days”.
3. Gummow J, with whom the other Justices agreed, held that s 1322(4) did not allow the extension of the 21 day period. The following points were important in his Honour’s reasoning.
4. Section 459G was a later and more specific provision. His Honour thus drew support (at 276) from the principle stated in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J) (***Anthony Hordern***), as follows:

When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

1. The temporal requirements in s 459G(2) and (3) operated as part of the definition of the court’s jurisdiction in respect of an application to set aside a statutory demand. That is, s 459G conferred a “new right” and the requirement as to time was an “essential condition” of that right. Adapting a dictum of Isaacs J in *The Crown v McNeil* (1922) 31 CLR 76 at 100-101, “it is a condition of the gift in sub-s (I) of s 459G that sub-s (2) be observed and, unless this is so, the gift can never take effect” (at 277).
2. This added force to the point that it was hard to identify the function or utility of the word “only” in s 459G(2) if it did not mean what it said (at 277).
3. Part 5.4 of the Corporations Law, within which s 459G was located, contained specific provisions conferring power on the court to extend time in various ways (albeit, it would appear, not to extend the time for filing an application stipulated by s 459G(2)) (at 277). The force of this point appears to have been that the legislature in enacting Part 5.4 had given express consideration to whether and how the times for which it provided should be able to be extended.
4. Read in the context of the provisions defining non-compliance with a statutory demand (s 459F), and the presumption of insolvency following from non-compliance (s 459C), s 459G was an integral part of the scheme established by Part 5.4G (at 277-278).
5. *BP Australia Ltd v Brown* [2003] NSWCA 216; 58 NSWLR 322 (***BP Australia***) concerned the relationship between s 1322(4)(d) and s 588FF of the Corporations Act, which pertained to applications by liquidators in respect of voidable transactions. Section 588FF(3) provided:

**588FF Courts may make orders about voidable transactions**

…

(3) An application under subsection (1) may only be made:

(a) within 3 years after the relation-back day; or

(b) within such longer period as the Court orders on an application under this paragraph by the liquidator within those 3 years.

1. Spigelman CJ, with whom Mason P and Handley JA agreed, held that s 588FF(3) was intended to cover the relevant field to the exclusion of s 1322 (at [85]). His Honour observed that, in a sense, the provision that fell to be construed was s 1322(4)(d) (at [77]). He noted the role performed by s 1322 in mitigating the strict application of various provisions in the Corporations Act (at [78]) and then observed that the requirements of certainty or deterrence, or other objectives pursued by particular “sub-regimes” within the Act, might be such that the flexibility introduced by s 1322 was “not appropriate” (at [79]). Such a conclusion was “particularly likely” where the particular sub-regime included its own particular provision for flexibility, as s 588FF did (at [79]). The general words of s 1322(4)(d) might need to be “read down” with respect to such a provision.
2. Spigelman CJ then addressed the text of s 588FF(3), observing the role played by the word “only” was to ensure that a particular procedure was observed (at [83]-[84]), and observed (at [85]):

The time period identified in par (a) is itself subject to a specific power of extension under par (b). That is a comprehensive provision for extension of time which, in my opinion, is intended to cover the relevant field to the exclusion of s 1322. This conclusion turns on the text of s 588FF(3) and the scope and purpose of Pt 5.7B.

1. The relevant provision of construction was drawn from *Anthony Hordern* (quoted above at [26(a)]) and *R v Wallis; Ex parte Employers’ Association of Wool-Selling Brokers & H V McKay Massey Harris Pty Ltd* (1949) 78 CLR 529 at 550 (Dixon J), which is to similar effect (at [86]). Spigelman CJ continued (at [88]-[89]):

The word “only” in a time limitation statutory provision can characterise the provision as a “time so emphatically prescribed”. However, the use of the word “only” is not of itself determinative. Its force is affected by the relevant statutory scheme considered as a whole, as the analysis in *David Grant v Westpac* shows.

Of particular significance in this respect is the scope and purpose of Pt 5.7B of the legislative scheme and its legislative history.

(Citations omitted.)

1. At [90], Spigelman CJ observed that the position in *BP Australia* was “not as clear” as that considered in *David Grant*, noting the range of statutory indicators in play in that case. Nevertheless, in my view, *BP Australia* was a clear case of exclusion of a general provision by the *Anthony Hordern* principle. The specific provision, s 588FF, contained its own express provision as to when and how its time limit could be extended.
2. The third of the cases leading up to *Austructures* is *Newtronics Pty Ltd v Gjergja* [2008] VSCA 117 (***Newtronics***). *Newtronics* concerned a predecessor of s 1317H. It is necessary to describe the relevant regime in a little detail.
3. The proceeding at first instance in *Newtronics* was commenced in 2005, by which time the company was in liquidation, and concerned alleged breaches of duty by directors in the mid 1990s. The relevant provisions were thus understood to include Part 9.4B in the form introduced by the *Corporate Law Reform Act 1992* (Cth) (**the 1992 Reform Act**).
4. Prior to the 1992 Reform Act, s 232(8) provided that a company could recover compensation from a director for damage caused by a contravention of their duty. It did not fix any time limit.
5. Following commencement of the 1992 Reform Act, the relevant subsection of s 232 was identified as a civil penalty provision by s 1317DA. There were three sets of provisions in the Corporations Law bearing upon recovery of statutory compensation for loss resulting from a contravention of a civil penalty provision.
   1. Section 1317HD, which was relied on in *Newtronics*, was the predecessor of the current s 1317H. It conferred on a company the right to recover compensation from a person who contravened a civil penalty provision if the person made a profit because of the relevant act or if the corporation suffered loss or damage. Unlike the current s 1317H, s 1317HD had a limitation period contained within it. Subsection (2) provided that proceedings under the section “*may only be begun* within 6 years after the contravention” (emphasis added).
   2. Division 2 of Part 9.4B provided for civil penalty orders. Under s 1317EA, the Court could impose various sanctions on a person who contravened a civil penalty provision. Section 1317EB provided that an application for a civil penalty order could be made by the Australian Securities Commission (now ASIC), its delegate or a person authorised by the Minister. Section 1317EC provided that an application “*may be made* within 6 years after the contravention” (emphasis added). Upon the hearing of an application for a civil penalty order, s 1317HA empowered the Court to make a compensation order in favour of the relevant corporation if satisfied that the contravention was made out and loss had occurred as a result. The corporation was allowed, under s 1317HA(2), to intervene in the proceeding to seek such an order.
   3. Criminal proceedings in respect of a contravention could be commenced under Part 9.4. Section 1316 required such proceedings to be instituted within five years after the relevant act or omission, but allowed that to be done later with the Minister’s consent. A civil penalty order application could be made in respect of the same contravention but, under s 1317GB, would be stayed until the criminal proceeding was finally determined. Sections 1317GC to 1317GK provided for various contingencies arising from the interaction of the civil penalty application and criminal proceedings. The short point for present purposes is that a corporation could in some circumstances intervene in a civil penalty application, after the lifting of a stay, more than six years after the relevant contravention.
6. In the Court of Appeal, Maxwell ACJ and Osborn AJA agreed with the reasons of Dodds-Streeton JA. Her Honour identified the issue as whether the six year limitation period in s 1317HD(1) could be extended pursuant to s 1322(4)(d). After describing the legislation, reviewing the authorities and summarising the reasoning below, her Honour expressed the view at [81] that the authorities supported the position of the respondents (ie, that s 1317HD(2) was on all fours with the provision considered in *David Grant* and s 1322(4)(d) was therefore excluded). She made the following points in support of this conclusion at [82]-[89].
7. *David Grant* indicates that the “emphatic prescription of a limitation period in the very provision which confers a right of action” ordinarily establishes the “jurisdictional character of the unmodified time limit”, compliance with which is thus a condition for the exercise of the Court’s power. That reasoning was consistent with *R v Wallis*, and with the distinction drawn between jurisdictional and procedural conditions in *Emanuele v Australian Securities Commission* (1997) 188 CLR 114.
8. In *David Grant*, Gummow J considered a number of significant factors, all of which pointed the same way. It was unnecessary to say whether any particular factor was decisive. However, it appeared that neither the use of “may only” nor the general principle that a later, more specific provision overrides an earlier, general one was decisive in itself. Gummow J also gave weight to other factors including the “character, goals and intended operation of the statutory scheme, as reflected in the Explanatory Memorandum”. His Honour’s jurisdictional analysis appeared to depend on its consistency with the effective operation of the provision in question. On that basis, a capricious or irrational outcome could displace the view that compliance with the time limit in s 1317HD was an “integer of [the] cause of action it confers”.
9. Only one feature of s 1317HD distinguished it from the provisions considered in *David Grant* and *BP Australia*. This was the absence of any internal provision for an extension of time.
10. Otherwise, the provisions were similar. They were specific provisions post-dating the general remedial provision in s 1322. They used peremptory language, apparently deliberately, while an analogous provision in the same Part as s 1317HD (s 1317EC) omitted the word “only”. The Explanatory Memorandum to the 1992 Reform Act confirmed that the “distinctively mandatory operation of ‘only’ in s 1317HD(2) was intended”. There was no basis for distinguishing the cause of action created by s 1317HD from the right created by s 459G.
11. Dodds-Streeton JA then considered at [90] whether the exclusion of s 1317HD(2) from s 1322(4)(d), in making the time limit in the former provision a rigid one, would result in its “capricious or unjust operation”. The asserted caprice appears to have been that compensation could be obtained through the other avenues contemplated in Part 9.4B (that is, by the corporation intervening at a late stage in an application for pecuniary penalties) after the six year period had passed, whereas an action under s 1317HD would be bound to fail if commenced after that time. This analysis appears to have proceeded on an understanding that the limitation period for an application by the Australian Securities Commission under s 1317EC was capable of being extended under s 1322(4)(d) (see *Newtronics* at [27]), which, as the respondent submitted before me, is not self-evidently correct. However, be that as it may, it clearly was the case that a corporation might take advantage of a pecuniary penalty application having been made (either *simpliciter* or in conjunction with criminal proceedings) and intervene in that application, to seek compensation, after the expiry of the s 1317HD limitation period. In any case, as her Honour accepted at [90], there was an obvious explanation for different treatment between proceedings commenced in the public interest (where the relevant corporation had no control over whether they were commenced) and proceedings commenced by the corporation solely in its own interest. It was also to be borne in mind that the right to recover compensation under s 1317HD operated in addition to any other rule of law about the duties or liabilities of office holders (at [96]).

## *Austructures*

1. The issues in *Austructures* arose in connection with alleged contraventions occurring in 2007. The relevant provisions of Part 9.4B were in the same form as is applicable here.
2. Almond J rejected a submission by the plaintiffs that the phrase “no later than” in s 1317K was analogous to the word “within” used in s 82(2) of what was then the *Trade Practices Act 1974* (Cth) (at [29]) and only barred the relevant remedy without extinguishing the underlying right. His Honour gave three reasons for this.
3. First, the language of s 1317K (“no later than”) was emphatic. It was sufficiently peremptory to suggest that the same operative effect as s 1317HD (“may only”) was intended: ie, to bar the right and not only the remedy (at [30]).
4. Second, Part 9.4B dealt with the civil consequences of contraventions. It provided for declarations of contravention, pecuniary penalty orders and compensation orders. It provided a single time limit for applications for these orders (at [31]).
5. The relevant form of Part 9.4B was inserted, and the version that applied in *Newtronics* repealed, by the *Corporate Law Economic Reform Program Act 1999* (Cth) (**the 1999 CLERP Act**). The Explanatory Memorandum (**EM**) to the Bill for that Act contained the following passage at p 31 [6.10]:

6.10 The draft provisions will rewrite without substantial change the existing provisions of the Law about Officers (Part 3.2), Related Party Transactions (Part 3.2A), Oppression (Part 3.4) and Civil Penalties (Part 9.4B). The following paragraphs outline the more significant changes proposed to be made to these provisions in the course of rewriting them.

1. The “more significant changes”, discussed in the succeeding paragraphs of the EM, did not include any reference to s 1317K. Almond J observed that, had it been intended to convert the absolute bar in former s 1317HD(2) into one capable of extension, it would most likely have been referred to in the extrinsic materials (at [32]-[36]).
2. Third, there was the principle of construction that a later specific provision which confers and regulates the exercise of a power excludes the operation of a prior, general power (at [37]). Reference was made in this connection to *David Grant* and *Newtronics*.
3. From [38], his Honour considered the significance of the fact that the limitation period is no longer contained in a subsection of the provision conferring the relevant right of action. He concluded at [42]:

… I accept the general proposition that in order to show that a time limitation establishes the jurisdictional character of the specified time limit, it is not essential to demonstrate that the prescribed limitation period is found in the same section as the section which creates the right of action. In my view, this is not inconsistent with the observations of Gummow J in *David Grant*. Here, the statute confers and regulates the exercise of the power not within one specific provision, but in separate sections in the same part: Pt 9.4B. Part 9.4B is a sub-regime devoted to the civil consequences of contravening civil penalty provisions and post-dates the prior general remedial provision in s 1322(4)(d) in Part 9.5 of the *Corporations Law*, which was enacted in 1990 and remained in substantially identical terms when the Act was enacted.

(Footnotes omitted.)

1. His Honour referred to *Anthony Hordern* and *R v Wallis*, which were regarded as indicating that s 1317K, by its affirmative words appointing the course to be followed, may be understood as importing a negative (namely that proceedings may not be started otherwise than in accordance with its terms) (at [43]-[45]).
2. The final consideration referred to by Almond J was that Part 9.4B contained “punitive provisions”. His Honour referred at [47] to the well known statement of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552-553 concerning the justification for limitation provisions and continued (at [48]):

In my view, these observations are all the more potent where punitive provisions such as those found in Pt 9.4B are concerned.

## The construction of s 1317K

1. I describe the task here as the construction of s 1317K because the relevant question is: what is the legislative intention that that provision embodied? Was it intended to be an exhaustive code governing the time within which applications must be made; or was it intended to operate subject to provisions elsewhere in the Corporations Act that permit time limits to be extended?
2. The legislative intention for these purposes resides in the text, with which the task of statutory interpretation must begin and end (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ)). It is not a function of the subjective intentions of people involved in the legislative process and is not to be inferred from other sources. The consequences of competing interpretations may provide significant guidance as to what the legislative intention is taken to be, to the extent that such consequences are obviously unlikely to have been intended. However, that form of reasoning should generally be confined to cases where a particular construction renders the statute incoherent or runs against one of the accepted presumptions of legislative intention found in the cases. There is a danger in the Court identifying its own view of what constitutes a sensible policy and assuming this to have been the legislative intention (*Certain Lloyd’s Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [25]-[26] (French CJ and Hayne J)).
3. The text, of course, is always to be read in its context. That context includes the statutory scheme as a whole, the mischief at which the provision was directed (if it can be identified), the pre-existing law and the extrinsic materials. The text is also to be read with the aid of established principles of statutory construction (which, it is assumed, Parliament knows and expects to be applied). Thus, the “legal meaning” ultimately given to the statutory words does not always accord with its “literal” or “ordinary” meaning: *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* [2023] NSWCA 134; 111 NSWLR 550 at [14] (Bell CJ (Meagher and Kirk JJA agreeing)). However, the text is not to be given a meaning which its words cannot reasonably bear.
4. These basic principles make some aspects of the reasoning in *Austructures* questionable. First, it is doubtful whether anything can really be drawn from the EM to the Bill for the 1999 CLERP Act for reasons I will explain below. Secondly, the observation at [48] concerning the “potency” of the factors identified by McHugh J appears to reflect Almond J’s own conception of good policy rather than to draw from the statutory text, structure or context. However, that does not resolve the question whether the decision in *Austructures* is correct.
5. In seeking to give effect to the principles referred to above, a single judge necessarily starts (as Almond J did) from the position that the decisions in *David Grant*, *BP Australia* and *Newtronics* state the correct constructions of the provisions with which those cases were concerned. The actual decisions in those cases do not govern the present case, because the provisions are different; however, the reasoning supporting those decisions is to be applied to the extent that it is relevant here. The following points emerge with reasonable clarity from these cases.
6. Where the provision in question confers a new right or creates a cause of action, rather than regulating the commencement of proceedings more generally, that points strongly to the conclusion that the time specified for exercising the right or moving on the cause of action is integral to its definition: that is, “[when] the time expired the right of action was terminated or defeated” (*Maxwell v Murphy* (1957) 96 CLR 261, 268 (Dixon CJ); see also *McKain v RW Millar & Company (South Australia) Pty Ltd* (1991) 174 CLR 1 at 43 (Brennan, Dawson, Toohey and McHugh JJ)). This, in turn, makes it likely that the time limit is intended to operate to the exclusion of general provisions for the relaxation of statutory requirements; particularly if the terms of the general provision suggest that it is concerned with procedural irregularities.
7. The point is reinforced if the provision in question uses emphatic or peremptory language in stating its time limit (eg “may only be made”). Such language tends to confirm that the time limit defines the limits of the right being conferred.
8. If the provision in question contains (or is accompanied by) a provision dealing expressly with how and when its limitation period can be extended, that brings the principle of construction in *Anthony Hordern* into play in a direct way. It is a powerful indication that the limitation period is not intended to be extended otherwise than pursuant to the specific provision therefor. This point, in my view, was arguably sufficient in itself to justify the decision in *BP Australia*.
9. The reasoning in *David Grant* and *Newtronics* appears to derive a somewhat broader principle from *Anthony Hordern*: that the stipulation of a time limit in respect of a specific kind of application is taken to be intended to displace a provision in the same Act allowing discretionary relaxation of rules in relation to (among other things) applications. This goes somewhat beyond the words of the statement in *Anthony Hordern* extracted above. I do not understand this principle to have been decisive in either case. Properly understood, it does not appear to take matters very far beyond the presumption that more specific provisions (especially if enacted later) prevail over more general ones. That presumption must give way to any clear indications that the specific provision was intended to accommodate or operate subject to the general one. For this reason, in my view, the observation in *Austructures* at [45] that the positive specification in s 1317K “may be understood as importing the negative”, although correct, really only states the position before the interaction of s 1317K with other provisions of the Corporations Act is considered.
10. Here again, however, peremptory or emphatic language in the enactment of the limitation period tends to support the view that it is intended to operate to the exclusion of more general and pre-existing provisions in the Act. A stipulation that an application “may *only*” be made within a certain time can be taken as conveying that the legislature is consciously overriding any general rules or principles that might otherwise allow the time limit to be relaxed.
11. The context is relevant. The context includes the nature of the right being conferred and the statutory scheme within which it sits—particularly if that scheme envisages steps occurring in a particular sequence or time frame. The context also includes the extrinsic materials, to the extent that they shed real light on the issue.
12. I turn to consider how these points apply in the present case.

### Textual matters

1. ***First***, s 1317H created a right of action. The express time limit within which an application must be made was, *prima facie*, inherent to that right of action. Unlike the regime considered in *Newtronics*,the time limit was provided by a separate section (s 1317K) rather than within the section that created the right; however, that is not particularly significant in itself. What may be more significant is that s 1317K applied to applications for declarations of contravention and pecuniary penalty orders as well as applications for compensation orders. I return to this issue later.
2. ***Secondly***, I do not think there is any real difference in meaning or tone between “may only be made” (the language considered in *Newtronics*) and “may be made not later than” (in s 1317K). Replacement of statutory language that has an established meaning is often unhelpful, unless some change of effect is intended. However, there do not seem to have been any cases considering s 1317HD(2), in the form inserted by the 1992 Reform Act, decided before it was repealed and replaced by s 1317K as part of the amendments made by the 1999 CLERP Act. As a matter of ordinary language, “not later than” conveys that there is a point in time after which an application cannot be made. It reinforces the impression that the limitation period was inherent in the right created by s 1317H.
3. ***Thirdly***, Part 9.4B in its presently relevant form did not contain any express provision for extension of the limitation period in s 1317K. In *Newtronics*, some attention was given to the potential that existed in Part 9.4B, prior to the 1999 CLERP Act, for a corporation to seek and obtain a compensation order by intervening in proceedings on an application for a pecuniary penalty order (proceedings which could conceivably be stayed for some time if there were also criminal proceedings arising from the same conduct). This feature of the legislation at that time meant that circumstances could readily be imagined in which a corporation that took no action before the expiry of the limitation period in s 1317HD(2) could nevertheless obtain the benefit of a compensation order. However, this consideration was clearly not determinative. It was different in character from an express provision (of the kind seen in *BP Australia*) allowing a limitation period to be extended, in defined circumstances, by an exercise of judicial discretion on the application of a person who seeks to file an application for relief.
4. ***Fourthly***, s 1317K was clearly later in time and more specific than s 1322(4)(d). For reasons outlined above, that does not in itself take matters very far. However, ***fifthly***, the emphatic language of s 1317K adds some force to this consideration.
5. These considerations point to the conclusion that s 1317K meant what it said—that an application for a compensation order could be brought up to six years after the relevant contravention and not later—and was intended to operate to the exclusion of s 1322(4)(d).

### Context

1. Four points should be made about context.
2. ***First***, because the pre-existing law (s 1317HD as enacted by the 1992 Reform Act) had not been interpreted by the courts before the insertion of the presently relevant provisions (by the CLERP Act in 1999), no presumption arises from the fact that Parliament used the same, or similar, or different language in the latter provisions (cf eg *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106–107 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)).
3. ***Secondly***, for the same reason, care is needed in attributing weight to statements in the EM to the Bill for the 1999 CLERP Act concerning what were or were not understood to be significant changes being made to the legislative regime by that Act (cf *Austructures* at [32]-[36]). As noted earlier, *Newtronics* was not decided until some years later; so that the construction of s 1317HD(2) in that case cannot have been a reference point for any view as to whether the form of s 1317K in the Bill involved a significant change to the pre-existing law. However, the fact that no mention was made of s 1317K in the EM does provide some limited support for the view, expressed above, that the change in expression from “only” to “no later than” does not reflect a change in intended operation.
4. It is of course not unknown for explanatory memoranda and second reading speeches to contain statements concerning the intended effect of proposed provisions contained in a Bill that are not borne out by the construction given to those provisions by the courts. Examples are *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 517-518 (Mason CJ, Wilson and Dawson JJ) and *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at [31]-[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). It is not impossible that the authors of the EM, in coming to the view that the provisions of the Bill for the 1999 CLERP Act would “rewrite without substantial change” Part 9.4B, were simply wrong in their understanding of either the pre-existing law or the proper construction of the text that was being enacted (cf *R v JS* [2007] NSWCCA 272; 230 FLR 276 at [141]-[144] (Spigelman CJ)). Statements of this kind “may reinforce the understanding to be gained from a reading of the [provision] itself”, but would not be a sound basis for resolving any real doubt about its legal meaning: *Minister for Immigration and Border Protection v BHA17* [2018] FCAFC 68; 260 FCR 523 at [47] (Robertson, Moshinsky and Bromwich JJ).
5. ***Thirdly***, in one respect, the enactment of s 1317K arguably did involve significant change. As Part 9.4B stood before the enactment of the 1999 CLERP Act, civil penalty orders and compensation orders were dealt with in separate divisions. Division 1 contained provisions dealing with the making of civil penalty orders (s 1317EA), the persons entitled to apply for those orders (s 1317EB) and the limitation period for such applications (s 1317EC). The last of these sections provided:

An application for a civil penalty order may be made within 6 years after the contravention.

1. Division 5, which was the focus of attention in *Newtronics*, dealt with compensation orders. Section 1317HD(2), which has been set out above, provided a limitation period (also six years) specifically applicable to applications for such orders.
2. The presently relevant iteration of Part 9.4B was organised differently. It was not divided into Divisions. Sections 1317E, 1317G, 1317GA, 1317H, 1317HA and 1317HB empowered the Court to make specific kinds of orders. The classes of persons entitled to apply for orders of these various kinds were all identified by s 1317J. A single limitation period, applicable to all applications for declarations, pecuniary penalty orders and compensation orders, was imposed by s 1317K.
3. The judgments at first instance and on appeal in *Newtronics* noted the difference in language between s 1317EC (“may be made within 6 years”) and s 1317HD(2) (“may *only* be begun within 6 years”): see (at first instance) *Newtronics Pty Ltd v Gjergja* [2007] VSC 195; 212 FLR 190 at [29], [31] (Byrne J), and (on appeal) *Newtronics* at [65], [68], [89]. While the point was not expressly decided (and did not need to be), it is apparent that both Byrne J and Dodds-Streeton JA considered it at least possible that the limitation period in s 1317EC was capable of extension. They explained why, in their view, this would not be anomalous or capricious. If the limitation period for an application for a pecuniary penalty order prior to the 1999 CLERP Act was capable of extension, the effect of the reasoning in *Austructures* is that the 1999 CLERP Act replaced it with a rigid time limit. That is hard to reconcile with the observation in the EM that Part 9.4B was being rewritten without substantial change. However, if *Austructures* is wrong and the applicant’s argument is correct (ie, if the limitation period in s 1317K can be extended), an equally substantial change has been effected in relation to applications for compensation orders. The answer to that conundrum is probably that the authors of the EM did not understand the limitation periods in ss 1317EC and 1317HD(2) to be different. Whether they were correct in that understanding does not need to be decided. The lack of clarity tends to confirm the limitations of the EM as a guide to the meaning of the statutory text.
4. I was referred during oral argument to pp 33-34 of the EM, which form part of the discussion of “more significant changes” that is introduced by the paragraph set out above. The passage is found under the heading “Civil penalty provisions” and confusingly begins with paragraph [6.5]. (There are many oddities in the paragraph numbering of the pdf version available online.) Changes are outlined which involve repealing some of the complex provisions in the earlier iteration of Part 9.4B that dealt with the interaction between civil and criminal proceedings. The passage ends with the following.

6.9 It is proposed to remove the power of a criminal court to make a compensation order against a defendant who has not been found guilty. This will make it necessary for ASIC to begin fresh civil proceedings if it wishes to pursue civil remedies following an unsuccessful prosecution.

1. It was suggested that, given the time that a criminal prosecution is likely to take to reach its conclusion, this paragraph envisages the limitation period in s 1317K being extended. If that is so, it is at best an assumption on the part of the authors of the EM. It finds no reflection in the text of s 1317K or elsewhere in Part 9.4B.
2. Stepping back from the EM, the imposition of an inflexible deadline for an application by ASIC for a declaration of contravention or a pecuniary penalty order clearly raises real issues of public policy. It can be persuasively argued that an application brought by a regulator in the public interest, with the aim of identifying and condemning breaches of the law, should not be subject to an inflexible limitation period, especially in a field where contraventions may not be discoverable until some years after they have been committed. However, as noted above, the Court should not form its own view as to what constitutes good policy and assume that that was Parliament’s intention. The text of s 1317K must be given effect, read in context and consistently with established rules of statutory construction.
3. The ***fourth*** point concerning context was raised by the applicants’ submissions and to some extent differentiates the present case from *David Grant* and *BP Australia*. Both of those cases arose in the context of corporate insolvency. *David Grant* involved an application to set aside an order served on a corporation. Obviously in such a case the corporation knows or ought to know about the notice, and subjecting it to a rigid deadline to apply for the notice to be set aside subjects it to no hardship. This was in a context where, as explained by Gummow J, the relevant sub-regime in the Corporations Law provided for steps to follow in a particular sequence and time frame. *BP Australia* also arose in the insolvency context. The provision in issue there provided a three year period in which a liquidator could apply for orders in relation to a voidable transaction. It could be assumed that a liquidator, with access to the corporation’s records, would be in a position to identify relevant transactions and make applications for orders within that period. In contrast, the operation of ss 1317H and 1317K in a case such as the present concerns contraventions of civil penalty provisions which may be actively concealed and, even if not concealed, may not become known to the company (or, as in the present case, its liquidators) until years have passed.
4. Again, it is important that the Court not take its own view of what would be a sensible policy and impute it to the legislature, in the absence of indications in the statutory text that that is indeed the policy being pursued.
5. The sequence of statutory events and their timing was set out in the relevant provisions in *David Grant*, and was thus an aspect of context properly brought to bear in coming to the conclusion that the limitation period in that case was not intended to be flexible. The issue did not attract attention in *BP Australia*, probably because the limitation period there was subject to express provisions allowing some flexibility. The features of sequence and timing in the provisions considered in *David Grant* are not present here. However, the textual aspects of the reasoning in that case, which were influential in *BP Australia* and *Newtronics*, remain clearly relevant.
6. The direct predecessor of s 1317K in its present operation, namely s 1317HD(2), was held not to be amenable to extension in *Newtronics*. In other words, whatever may be the policy merits of allowing extensions of the limitation period in appropriate cases, *Newtronics* stands as binding authority for the view that the Parliament chose not to allow for such extensions when enacting s 1317HD(2). The Parliament having taken that position makes it all the more difficult for the Court to conclude that the merit of flexibility is so obvious as to affect the construction of the spare language of s 1317K.

## Cases in Equity

1. A further reason for adhering to the construction of s 1317K adopted in *Austructures* is that decisions (including at appellate level) on claims for equitable remedies have proceeded consistently with it. Because Equity follows the law, and therefore has regard to the limitation period applicable to any analogous claim for remedies at law, the operation of s 1317K has sometimes arisen for consideration in connection with claims for equitable relief.
2. *Gerace v Auzhair Supplies Pty Ltd (in liq)* [2014] NSWCA 181; 87 NSWLR 435 (***Auzhair***) was decided before *Austructures*. A company in liquidation commenced proceedings seeking equitable compensation against its former directors for breach of their equitable duties. More than six years had passed since the alleged breaches and the former directors relied on the application by analogy of s 1317K. The primary judge (Brereton J) held that the equitable claim and the corresponding legal right were practically indistinguishable and the time limit applicable to the latter should therefore apply, but also held that it would nevertheless be inequitable to apply the limitation period (see *Re Auzhair Supplies Pty Ltd (in liq)* [2013] NSWSC 1; 272 FLR 304). His Honour in substance granted the final relief that was sought. The former directors’ appeal to the Court of Appeal was confined to whether it was inequitable for them to rely on the limitation period (there being no dispute that the analogy between the equitable and statutory claims and remedies was “as close an analogy as one can conceive” (*Auzhair* at [4] (Meagher JA, Beazley P agreeing), [103] (Emmett JA)) and also, it would seem, no contest concerning the breaches of duty (at [91] (Emmett JA))). They succeeded on this issue.
3. The starting point, for Meagher JA, was (at [3]):

[Section 1317K] provides that proceedings under s 1317H for compensation for contraventions of the statutory duties in ss 180–183, which are essentially the same as the equitable duties the appellant directors were found to have breached, must be commenced no later than six years after the contravention. There are no provisions in the Act that postpone the time from which that period commences to run in the face of fraudulent concealment or mistake. Nor are there provisions that suspend the operation of the statute in the event of disability because of age or incapacity: cf *Limitation Act 1969*, s 52, s 55 and s 56.

1. The question whether the limitation period in s 1317K could be extended by the exercise of any general discretion does not seem to have been agitated. *Auzhair* is therefore not strictly authority on the point: [*CSR Ltd v Eddy* [2005] HCA 64; 226 CLR 1 at [13]](https://anzlaw.thomsonreuters.com/Link/Document/FullText?refType=U2&serNum=2007540841&pubNum=0003586&originationContext=document&transitionType=DocumentItem&ppcid=556d2802f170405d898a99753a09462a&contextData=(sc.Search)#co_pp_13) (Gleeson CJ, Gummow and Heydon JJ). However, in considering whether an existing authority should be departed from, the extent to which it reflects a position relied upon in other cases is potentially of some relevance: see *Minister for Immigration v FAK19* [2021] FCAFC 153; 287 FCR 181 at [2]-[13] (Allsop CJ).
2. *Austructures* was referred to in *Port Ballidu Pty Ltd v Frews Lawyers* [2018] QCA 110; 1 Qd R 276 (***Port Ballidu***). In that case a company commenced proceedings in 2015 against the solicitors who had acted on a transaction in 2006, by which one of its directors had procured a mortgage of land owned by the company to secure a loan to him. One of the claims against the lawyers was for equitable compensation for knowing participation in a dishonest breach of fiduciary duty by the director (the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244 (***Barnes v Addy***)). The primary judge held that s 1317K should be applied by analogy unless it was unconscionable for the lawyers to rely on a six year limitation period, and dismissed the claim: *Port Ballidu Pty Ltd v Frews Lawyers* [2017] QSC 19.
3. In the Court of Appeal, Fraser JA (with whom McMurdo JA and Boddice J agreed) referred to *Austructures* and *Newtronics* for the following proposition (at [14]):

It has been held that s 1317K extinguishes the right to compensation for the contravention after expiry of the six year time limit.

1. The unsuccessful argument of the company on appeal (dealt with at [15]–[19]) was that s 185 of the Corporations Act, which provides that ss 180–184 do not derogate from other rules of law relating to the duties of officers of a corporation, thereby excluded s 1317K. Whether the limitation period in s 1317K was a rigid one was therefore not explored. However, the respondent’s argument in the present case gains some support from Fraser JA’s apparent acceptance that s 1317K operates to extinguish the right to statutory compensation (see also at [18]) and that *Newtronics* supports this proposition.
2. In *Chung-Yi Pty Ltd v Chih-Yang Chang (No 2)* [2018] NSWSC 1112; 128 ACSR 585 (***Chang***), which was heard before the judgment in *Port Ballidu* and decided shortly afterwards and involved both statutory and equitable claims, Ball J observed (at [90]):

The limitation period in respect of claims for breaches of ss 180–182 of the Corporations Act is six years commencing from the time of the contravention: s 1317K of the Corporations Act. There is no provision for extending that period in the case of fraud. Consequently, the statutory claim in respect of the first payment of $709,142 is time barred ...

1. No authority was cited and the potential availability of s 1322(4)(d) does not appear to have been the subject of argument. At [91]-[95], referring to *Auzhair*, Barr J held that the defendant was guilty of fraudulent concealment and could not rely on the statutory time bar in answer to the claims in Equity.
2. In oral argument, senior counsel for the applicants submitted that *Port Ballidu* was not good law because it was inconsistent with the approach of the New South Wales Court of Appeal in *Lewis Securities Ltd (in liq) v Carter* [2018] NSWCA 118; 355 ALR 703 (***Lewis Securities***). *Lewis Securities* was also heard before judgment in the appeal in *Port Ballidu* and decided soon afterwards. Leeming JA referred at [46] to the first instance judgment in *Port Ballidu* and noted that the appeal had been dismissed “without addressing the issues presently relevant”.
3. The issue in *Lewis Securities* that is of potential relevance to the present case was whether a limitation period of six years applied to a claim under the second limb of *Barnes v Addy* by analogy with s 1317K. As to that issue, Leeming JA held at [60]-[71] that s 1317K was an inapt analogy for an equitable claim that had a fraudulent and dishonest design as a necessary element. Sackville AJA agreed at [98]. Emmett AJA concluded as a broad proposition that a claim for breach of a director’s fiduciary duties was analogous to a claim for breach of ss 180-182 of the Corporations Act (at [203]-[215]), but that s 1317K could not apply by analogy to a claim for accessorial liability that depended on a fraudulent and dishonest breach of duty (at [216]-[218]).
4. This issue (including whether there is tension between *Port Ballidu* and *Lewis Securities*) is clearly likely to require close attention at the final hearing of the present case. It does not require determination at present. *Lewis Securities*, like *Auzhair* and *Chang*, appears to have taken as its starting point the unquestioned assumption that s 1317K in its direct application (as distinct from its application by analogy) imposed a rigid time limit. None of the decisions on claims in Equity constitutes binding authority as to the correctness of *Austructures*. *Port Ballidu* provides a modicum of support to the respondent’s position in so far as it appears, in an observation that is strictly *obiter*, to regard *Newtronics* as applicable to the construction of s 1317K.

## Conclusion on the construction issue

1. On the present state of the authorities, the claim for statutory compensation cannot succeed at a final hearing unless I am persuaded that the decision in *Austructures* is plainly wrong (see eg [*Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684 at [106] (Halley J)](https://anzlaw.thomsonreuters.com/Link/Document/FullText?refType=U2&serNum=2053870013&pubNum=0006270&originationContext=document&transitionType=DocumentItem&ppcid=b1131bdc88584fe8a941c8b926b008e2&contextData=(sc.Search))). For the reasons set out above, I consider that the conclusion reached in *Austructures* as to the availability of the power in s 1322(4)(d) is the preferable view. It is clear that *Austructures* is at least not plainly wrong and would therefore be followed.

# conclusion on summary dismissal

1. The conclusion in the previous paragraph means, inevitably, that the claim for statutory compensation will fail on the present state of the authorities. It is preferable that that conclusion be stated now and the issues in the final hearing be correspondingly narrowed.
2. The originating application will therefore be dismissed in so far as it seeks compensation under s 1317H of the Corporations Act.
3. The applicants’ application for leave to amend their pleadings will be dismissed, on the basis that those pleadings require further amendment in the light of the dismissal of part of the applicants’ claims in order for their filing to be appropriate. I note the respondent’s indication, through his counsel, that he otherwise does not oppose the proposed amendments.

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| I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett. |

Associate:

Dated: 12 April 2024

SCHEDULE OF PARTIES

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|  | NSD 377 of 2023 |
| Applicants |  |
| Fourth Applicant: | RAWBIN FINANCES PTY LTD (IN LIQ) (ACN 140 576 549) |
| Fifth Applicant: | MARBIN FINANCES PTY LTD (IN LIQ) (ACN 140 572 970) |
| Sixth Applicant: | GEROBIN FINANCES PTY LTD (IN LIQ) (ACN 140 586 410) |